Chapter VII
Subsequent agreements and subsequent practice in relation to the interpretation of treaties

A. Introduction

66. 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.527 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.528

67. From the sixty-second to the sixty-fourth session (2010–2012), the Study Group was reconstituted under the chairmanship of Mr. Georg Nolte. The Study Group examined three reports presented informally by the Chairman, which addressed, respectively, the relevant jurisprudence of the International Court of Justice and arbitral tribunals of ad hoc jurisdiction;529 the jurisprudence under special regimes relating to subsequent agreements and subsequent practice;530 and subsequent agreements and subsequent practice of States outside judicial and quasi-judicial proceedings.531

68. At the sixty-fourth session (2012), the Commission, on the basis of a recommendation of the Study Group,532 also decided (a) to change, with effect from its sixty-fifth session (2013), the format of the work on this topic as suggested by the Study Group; and (b) to appoint Mr. Georg Nolte as Special Rapporteur for the topic “Subsequent agreements and subsequent practice in relation to the interpretation of treaties”.533


531 Ibid., Sixty-seventh Session, Supplement No. 10 (A/67/10), paras. 232–234. At the sixty-third session (2011), the Chairman of the Study Group presented nine preliminary conclusions, reformulated in the light of the discussions in the Study Group (ibid., Sixty-sixth Session, Supplement No. 10 (A/66/10), para. 344). At the sixty-fourth session (2012), the Chairman presented the text of six additional preliminary conclusions, also reformulated in the light of the discussions in the Study Group (ibid., Sixty-seventh Session, Supplement No. 10 (A/67/10), para. 240). The Study Group also discussed the format in which the further work on the topic should proceed and the possible outcome of the work. A number of suggestions were formulated by the Chairman and agreed upon by the Study Group (ibid., paras. 235–239).


533 Ibid., paras. 227.
69. At the sixty-fifth session (2013), the Commission considered the first report of the Special Rapporteur (A/CN.4/660) and provisionally adopted five draft conclusions.534

B. Consideration of the topic at the present session

70. At the present session, the Commission had before it the second report of the Special Rapporteur (A/CN.4/671), which it considered at its 3205th to 3209th meetings, from 15 to 22 May 2014.

71. In his second report, the Special Rapporteur considered the following aspects of the topic: the identification of subsequent agreements and subsequent practice (section II); possible effects of subsequent agreements and subsequent practice in the interpretation of treaties (section III); the form and value of subsequent practice under article 31, paragraph 3 (b) (section IV); the conditions for an “agreement” of the parties regarding the interpretation of a treaty under article 31, paragraph 3 (section V); decisions adopted within the framework of Conferences of States Parties (section VI); and the possible scope for interpretation by subsequent agreements and subsequent practice (section VII). The report also included some information on the future programme of work (section VIII). The Special Rapporteur proposed a draft conclusion corresponding with each of the issues addressed in sections II to VII.535

534 Ibid., Sixty-eighth Session, Supplement No. 10 (A/68/10), paras. 33 to 39. The Commission provisionally adopted draft conclusions 1 (General rule and means of treaty interpretation); 2 (Subsequent agreements and subsequent practice as authentic means of interpretation); 3 (Interpretation of treaty terms as capable of evolving over time); 4 (Definition of subsequent agreement and subsequent practice); and 5 (Attribution of subsequent practice).

535 The six draft conclusions proposed by the Special Rapporteur read as follows:

Draft conclusion 6
Identification of subsequent agreements and subsequent practice
The identification of subsequent agreements and subsequent practice under article 31 (3) and article 32 requires careful consideration, in particular of whether the parties, by an agreement or a practice, assume a position regarding the interpretation of a treaty, or whether they are motivated by other considerations.

Draft conclusion 7
Possible effects of subsequent agreements and subsequent practice in interpretation
(1) Subsequent agreements and subsequent practice under articles 31 (3) and 32 can contribute to the clarification of the meaning of a treaty, in particular by narrowing or widening the range of possible interpretations, or by indicating a certain scope for the exercise of discretion which the treaty accords to the parties.
(2) The value of a subsequent agreement or subsequent practice as a means of interpretation may, inter alia, depend on their specificity.

Draft conclusion 8
Forms and value of subsequent practice under article 31 (3) (b)
Subsequent practice under article 31 (3) (b) can take a variety of forms and must reflect a common understanding of the parties regarding the interpretation of a treaty. Its value as a means of interpretation depends on the extent to which it is concordant, common and consistent.

Draft conclusion 9
Agreement of the parties regarding the interpretation of a treaty
(1) An agreement under article 31 (3) (a) and (b) need not be arrived at in any particular form nor be binding as such.
72. At its 3209th meeting, on 22 May 2014, the Commission referred draft conclusions 6 to 11, as contained in the second report of the Special Rapporteur, to the Drafting Committee.

73. At its 3215th meeting, on 5 June 2014, the Commission considered the report of the Drafting Committee and provisionally adopted five draft conclusions (see section C.1 below).

74. At its 3239th to 3240th meetings, on 6 August 2014, the Commission adopted the commentaries to the draft conclusions provisionally adopted at the current session (see section C.2 below).

C. Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, as provisionally adopted by the Commission at its sixty-sixth session

1. Text of the draft conclusions

75. The text of the draft conclusions provisionally adopted by the Commission at its sixty-sixth session is reproduced below.

(2) An agreement under article 31 (3) (b) requires a common understanding regarding the interpretation of a treaty of which the parties are aware. The number of parties that must actively engage in subsequent practice in order to establish an agreement under article 31 (3) (b) may vary. Silence on the part of one or more parties can, when the circumstances call for some reaction, constitute acceptance of the subsequent practice.

(3) A common subsequent agreement or practice does not necessarily indicate an agreement between the parties regarding the interpretation of a treaty, but may instead signify their agreement temporarily not to apply the treaty or to establish a practical arrangement (modus vivendi).

Draft conclusion 10
Decisions adopted within the framework of a Conference of States Parties

(1) A Conference of States Parties, under these draft conclusions, is a meeting of States parties pursuant to a treaty for the purpose of reviewing or implementing the treaty, except if they act as members of an organ of an international organization.

(2) The legal effect of a decision adopted within the framework of a Conference of States Parties depends primarily on the treaty and the applicable rules of procedure. Depending on the circumstances, such a decision may embody a subsequent agreement under article 31 (3) (a), or give rise to subsequent practice under article 31 (3) (b) or article 32.

(3) A decision adopted within the framework of a Conference of States Parties embodies a subsequent agreement or subsequent practice under article 31 (3) in so far as it expresses agreement in substance between the parties regarding the interpretation of a treaty, regardless of the form and the procedure by which the decision was adopted.

Draft conclusion 11
Scope for interpretation by subsequent agreements and subsequent practice

(1) The scope for interpretation by subsequent agreements or subsequent practice as authentic means of interpretation under article 31 (3) may be wide.

(2) It is presumed that the parties to a treaty, by a subsequent agreement or subsequent practice, intend to interpret the treaty, not to modify it. The possibility of modifying a treaty by subsequent practice of the parties has not been generally recognized.
Conclusion 6
Identification of subsequent agreements and subsequent practice

1. The identification of subsequent agreements and subsequent practice under article 31, paragraph 3, requires, in particular, a determination whether the parties, by an agreement or a practice, have taken a position regarding the interpretation of the treaty. This is not normally the case if the parties have merely agreed not to apply the treaty temporarily or agreed to establish a practical arrangement (modus vivendi).

2. Subsequent agreements and subsequent practice under article 31, paragraph 3, can take a variety of forms.

3. The identification of subsequent practice under article 32 requires, in particular, a determination whether conduct by one or more parties is in the application of the treaty.

Conclusion 7
Possible effects of subsequent agreements and subsequent practice in interpretation

1. Subsequent agreements and subsequent practice under article 31, paragraph 3, contribute, in their interaction with other means of interpretation, to the clarification of the meaning of a treaty. This may result in narrowing, widening, or otherwise determining the range of possible interpretations, including any scope for the exercise of discretion which the treaty accords to the parties.

2. Subsequent practice under article 32 can also contribute to the clarification of the meaning of a treaty.

3. It is presumed that the parties to a treaty, by an agreement subsequently arrived at or a practice in the application of the treaty, intend to interpret the treaty, not to amend or to modify it. The possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized. The present draft conclusion is without prejudice to the rules on the amendment or modification of treaties under the Vienna Convention on the Law of Treaties and under customary international law.

Conclusion 8
Weight of subsequent agreements and subsequent practice as a means of interpretation

1. The weight of a subsequent agreement or subsequent practice as a means of interpretation under article 31, paragraph 3, depends, inter alia, on its clarity and specificity.

2. The weight of subsequent practice under article 31, paragraph 3 (b), depends, in addition, on whether and how it is repeated.

3. The weight of subsequent practice as a supplementary means of interpretation under article 32 may depend on the criteria referred to in paragraphs 1 and 2.

Conclusion 9
Agreement of the parties regarding the interpretation of a treaty

1. An agreement under article 31, paragraph 3 (a) and (b), requires a common understanding regarding the interpretation of a treaty which the parties are aware of and accept. Though it shall be taken into account, such an agreement need not be legally binding.
2. The number of parties that must actively engage in subsequent practice in order to establish an agreement under article 31, paragraph 3 (b), may vary. Silence on the part of one or more parties can constitute acceptance of the subsequent practice when the circumstances call for some reaction.

**Conclusion 10**

**Decisions adopted within the framework of a Conference of States Parties**

1. A Conference of States Parties, under these draft conclusions, is a meeting of States parties pursuant to a treaty for the purpose of reviewing or implementing the treaty, except if they act as members of an organ of an international organization.

2. The legal effect of a decision adopted within the framework of a Conference of States Parties depends primarily on the treaty and any applicable rules of procedure. Depending on the circumstances, such a decision may embody, explicitly or implicitly, a subsequent agreement under article 31, paragraph 3 (a), or give rise to subsequent practice under article 31, paragraph 3 (b), or to subsequent practice under article 32. Decisions adopted within the framework of a Conference of States Parties often provide a non-exclusive range of practical options for implementing the treaty.

3. A decision adopted within the framework of a Conference of States Parties embodies a subsequent agreement or subsequent practice under article 31, paragraph 3, in so far as it expresses agreement in substance between the parties regarding the interpretation of a treaty, regardless of the form and the procedure by which the decision was adopted, including by consensus.

2. **Text of the draft conclusions with commentaries thereto provisionally adopted by the Commission at its sixty-sixth session**

76. The text of the draft conclusions, together with commentaries, provisionally adopted by the Commission at the sixty-sixth session, is reproduced below.

**Conclusion 6**

**Identification of subsequent agreements and subsequent practice**

1. The identification of subsequent agreements and subsequent practice under article 31, paragraph 3, requires, in particular, a determination whether the parties, by an agreement or a practice, have taken a position regarding the interpretation of the treaty. This is not normally the case if the parties have merely agreed not to apply the treaty temporarily or agreed to establish a practical arrangement (*modus vivendi*).

2. Subsequent agreements and subsequent practice under article 31, paragraph 3, can take a variety of forms.

3. The identification of subsequent practice under article 32 requires, in particular, a determination whether conduct by one or more parties is in the application of the treaty.

**Commentary**

(1) The purpose of draft conclusion 6 is to indicate that subsequent agreements and subsequent practice, as means of interpretation, must be identified.

(2) The first sentence of paragraph 1 recalls that the identification of subsequent agreements and subsequent practice for the purposes of article 31, paragraph 3, (a) and (b), requires particular consideration of the question whether the parties, by an agreement or a
practice have taken a position regarding the interpretation of a treaty, or whether they were motivated by other considerations.

(3) Subsequent agreements under article 31, paragraph 3 (a), must be “regarding the interpretation of the treaty or the application of its provisions”, and subsequent practice under article 31, paragraph 3 (b), must be “in the application of the treaty” and thereby establish an agreement “regarding its interpretation”. The relationship between the terms “interpretation” and “application” in article 31, paragraph 3, is not clear-cut. “Interpretation” is the process by which the meaning of a treaty, including of one or more of its provisions, is clarified. “Application” encompasses conduct by which the rights under a treaty are exercised or its obligations are complied with, in full or in part. “Interpretation” refers to a mental process, whereas “application” focuses on actual conduct (acts and omissions). In this sense, the two concepts are distinguishable, and may serve different purposes under article 31, paragraph 3 (see below paragraphs (4)–(6)), but they are also closely interrelated and build upon each other.

(4) Whereas there may be aspects of “interpretation” which remain unrelated to the “application” of a treaty, application of a treaty almost inevitably involves some element of interpretation – even in cases in which the rule in question appears to be clear on its face. Therefore, an agreement or conduct “regarding the interpretation” of the treaty and an agreement or conduct “in the application” of the treaty both imply that the parties assume, or are attributed, a position regarding the interpretation of the treaty. Whereas in the case of a “subsequent agreement between the parties regarding the interpretation of the treaty” under article 31, paragraph 3 (a) (first alternative), the position regarding the interpretation of a treaty is specifically and purposefully assumed by the parties, this may be less clearly identifiable in the case of a “subsequent agreement ... regarding ... the


537 According to G. Haraszti, interpretation has “the elucidation of the text as to its meaning as its objective” whereas application “implies the specifying the consequences devolving on the contracting parties” (see G. Haraszti, Some Fundamental Problems in the Law of Treaties (Akadémiai Kiadó, 1973), p. 18); he recognizes, however, that “a legal rule manifesting itself in whatever form cannot be applied unless its content has been elucidated” (ibid.).

application of its provisions” under article 31, paragraph 3 (a) (second alternative).\footnote{540} Assuming a position regarding interpretation “by application” is also implied in simple acts of application of the treaty under articles 31, paragraph 3 (b), that is, in “every measure taken on the basis of the interpreted treaty”.\footnote{541} The word “or” in article 31, paragraph 3 (a), thus does not describe a mutually exclusive relationship between “interpretation” and “application”.

(5) The significance of an “application” of a treaty, for the purpose of its interpretation, is, however, not limited to the identification of the position which the State party concerned thereby assumes regarding its interpretation. Indeed, the way in which a treaty is applied not only contributes to determining the meaning of the treaty, but also to the identification of the degree to which the interpretation which the States parties have assumed is “grounded” and thus more or less firmly established.

(6) It should be noted that an “application” of the treaty does not necessarily reflect the position of a State party that such application is the only legally possible one under the treaty and under the circumstances.\footnote{542} Further, the concept of “application” does not exclude certain conduct by non-State actors which the treaty recognizes as forms of its application which is attributable to its parties,\footnote{543} and hence can constitute practice establishing the agreement of the parties. Finally, the legal significance of a particular conduct in the application of a treaty is not necessarily limited to its possible contribution to interpretation under article 31, but may also contribute to meeting the burden of proof\footnote{544} or to fulfilling the conditions of other rules.\footnote{545}

(7) Subsequent conduct which is not motivated by a treaty obligation is not “in the application of the treaty” or “regarding” its interpretation, within the meaning of article 31, paragraph 3. In the Certain Expenses case, for example, some judges doubted whether the continued payment by the Member States of the United Nations of their membership contributions signified acceptance of a certain practice of the organization.\footnote{546} Judge Fitzmaurice formulated a well-known warning in this context, according to which “the

\footnote{540} This second alternative was introduced at the proposal of Pakistan, but its scope and purpose was never addressed or clarified, see \textit{Official Records of the United Nations Conference on the Law of Treaties}, \textit{Official Records}, A/CONF.39/11, at p. 168, para. 53.

\footnote{541} Linderfalk, \textit{supra} note 539, pp. 164–165 and 167; see draft conclusions 1 (4) and 4 (3), \textit{supra} note 536, p. 12.

\footnote{542} See below draft conclusion 7 (1).


\footnote{544} In the case concerning \textit{Application of the International Convention on the Elimination of All Forms of Racial Discrimination} (Georgia v. Russian Federation), \textit{Preliminary Objections, Judgment}, \textit{I.C.J. Reports} 2011, p. 70, at p. 117, para. 105, the International Court of Justice denied that certain conduct (statements) satisfied the burden of proof with respect to the Russian Federation’s compliance with its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination between 1999 and July 2008, in particular because the conduct was not found to specifically relate to the Convention. According to Judge Simma, the burden of proof had been met to some degree, see \textit{ibid.}, \textit{Separate Opinion of Judge Simma}, pp. 199–223, paras. 23–57.

\footnote{545} In the case concerning the Kasikili/Sedudu Island (Botswana/Namibia), \textit{Judgment}, \textit{I.C.J. Reports} 1999, p. 1045, the International Court of Justice analysed subsequent practice not only in the context of treaty interpretation but also in the context of acquisitive prescription, see p. 1092, para. 71, p. 1096, para. 79, and p. 1105, para. 97.

argument drawn from practice, if taken too far, can be question-begging”. According to Fitzmaurice, it would be “hardly possible to infer from the mere fact that Member States pay, that they necessarily admit in all cases a positive legal obligation to do so”.

(8) Similarly, in the Maritime Delimitation and Territorial Questions between Qatar and Bahrain case, the International Court of Justice held that an effort by the parties to the Agreement of 1987 (on the submission of a dispute to the jurisdiction of the Court) to conclude an additional Special Agreement (which would have specified the subject-matter of the dispute) did not mean that the conclusion of such an additional agreement was actually considered by the parties to be required for the establishment of the jurisdiction of the Court.

(9) Another example of a voluntary practice which is not meant to be “in application of” or “regarding the interpretation” of a treaty concerns “complementary protection” in the refugee law context. Persons who are denied refugee status under the Convention relating to the Status of Refugees are nonetheless often granted “complementary protection”, which is equivalent to that under the Convention. States which grant complementary protection, however, do not consider themselves as acting “in the application of” the Convention or “regarding its interpretation”.

(10) It is sometimes difficult to distinguish relevant subsequent agreements or practice regarding the interpretation or in the application of a treaty under article 31, paragraph 3 (a) and (b), from other conduct or developments in the wider context of the treaty, including from “contemporaneous developments” in the subject area of the treaty. Such a distinction is, however, important since only conduct regarding interpretation by the parties introduces their specific authority into the process of interpretation. The general rule would seem to be that the more specifically an agreement or a practice is related to a treaty the more interpretative weight it can acquire under article 31, paragraph 3 (a) and (b).

(11) The characterization of a subsequent agreement or subsequent practice under article 31, paragraph 3 (a) and (b); as assuming a position regarding the interpretation of a treaty often requires a careful factual and legal analysis. This point can be illustrated by examples from judicial and State practice.

(12) The jurisprudence of the International Court of Justice provides a number of examples. On the one hand, the Court did not consider a “Joint Ministerial Communiqué” of two States to “be included in the conventional basis of the right of free navigation” since the “modalities for cooperation which they put in place are likely to be revised in order to suit the parties.” The Court has also held, however, that the lack of certain assertions

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547 Ibid., p. 201.
548 Ibid.
549 Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995, p. 6, at p. 76, para. 28.
551 On the “weight” of an agreement or practice as a means of interpretation, see draft conclusion 8, paras. 1–3 below; an example for the need, but also for the occasional difficulty of distinguishing specific conduct by the parties regarding the interpretation of a treaty and more general development see Maritime Dispute (Peru v. Chile), I.C.J., Judgment of 27 January 2014, http://www.icj-cij.org/docket/files/137/17931.pdf; paras. 103, 104–117 and 118–151 (see supra note 538).
552 Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009, p. 213, at p. 234, para. 40; see also Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999, p. 1045, at p. 1091, para. 68 where the Court implied that one of the
regarding the interpretation of a treaty, or the absence of certain forms of its application, constituted a practice which indicated the legal position of the parties according to which nuclear weapons were not prohibited under various treaties regarding poisonous weapons.\footnote{Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226, at p. 248, paras. 55–56; see also Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996, p. 803, at p. 815, para. 30; Gardiner, supra note 538, pp. 232–235.} In any case, the exact significance of a collective expression of views of the parties can only be identified by a careful consideration as to whether and to what extent such expression is meant to be “regarding the interpretation” of the treaty. Accordingly, the Court held in the Whaling in the Antarctic case that “relevant resolutions and Guidelines [of the International Whaling Commission] that have been approved by consensus call upon States parties to take into account whether research objectives can practically and scientifically be achieved by using non-lethal research methods, but they do not establish a requirement that lethal methods be used only when other methods are not available”\footnote{Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), I.C.J, Judgment of 31 March 2014, www.icj-cij.org/docket/files/148/18136.pdf, para. 83.}.\footnote{Iran-United States Claims Tribunal, Partial Award No. 382-B1-FT, The Islamic Republic of Iran and the United States of America, Iran-USCTR, vol. 19 (1989), pp. 294–295.}

(13) When the Iran-United States Claims Tribunal was confronted with the question whether the Claims Settlement Declaration obliged the United States to return military property to Iran, the Tribunal found, referring to the subsequent practice of the parties, that this treaty contained an implicit obligation of compensation in case of non-return:\footnote{Iran-United States Claims Tribunal, Partial Award No. 382-B1-FT, The Islamic Republic of Iran and the United States of America, Iran-USCTR, vol. 19 (1989), p. 304.}

“66. [...] Although Paragraph 9 of the General Declaration does not expressly state any obligation to compensate Iran in the event that certain articles are not returned because of the provisions of U.S. law applicable prior to 14 November 1979, the Tribunal holds that such an obligation is implicit in that Paragraph. (...) 68. Moreover, the Tribunal notes that the interpretation set forth in paragraph 66 above is consistent with the subsequent practice of the Parties in the application of the Algiers Accords and, particularly, with the conduct of the United States. Such a practice, according to article 31 (3) (b) of the Vienna Convention, is also to be taken into account in the interpretation of a treaty. In its communication informing Iran, on 26 March 1981, that the export of defence articles would not be approved, the United States expressly stated that “Iran will be reimbursed for the cost of equipment in so far as possible.”

This position was criticized by Judge Holtzmann in his dissenting opinion:

“Subsequent conduct by a State party is a proper basis for interpreting a treaty only if it appears that the conduct was motivated by the treaty. Here there is no evidence, or even any argument, that the United States’ willingness to pay Iran for its properties was in response to a perceived obligation imposed by Paragraph 9. Such conduct would be equally consistent with a recognition of a contractual obligation to make payment. In the absence of any indication that conduct was motivated by the treaty, it is incorrect to use that conduct in interpreting the treaty.”\footnote{Separate Opinion of Judge Holtzmann, Concurring in Part, Dissenting in Part in Iran-United States Claims Tribunal, Partial Award No. 382-B1-FT, The Islamic Republic of Iran and the United States of America, Iran-USCTR, vol. 19 (1989), p. 304.}
Together, the majority opinion and the dissent clearly identify the need to analyse carefully whether the parties, by an agreement, or a practice assume a position “regarding the interpretation” of a treaty.

(14) The fact that States parties assume a position regarding the interpretation of a treaty sometimes also may be inferred from the character of the treaty or of a specific provision. Whereas subsequent practice in the application of a treaty often consists of conduct by different organs of the State (executive, legislative, judicial or other) in the conscious application of a treaty at different levels (domestic and international), the European Court of Human Rights, for example, mostly does not explicitly address the question whether a particular practice was undertaken “regarding the interpretation” of the Convention. Thus, when describing the domestic legal situation in the Member States, the Court rarely asks whether a particular legal situation results from a legislative process during which the possible requirements of the Convention were discussed. The Court rather presumes that the Member States, when legislating or otherwise acting in a particular way, are conscious of their obligations under the Convention, and that they act in a way which reflects their understanding of their obligations. The Inter-American Court of Human Rights has also on occasion used legislative practice as a means of interpretation. Like the International Court of Justice, the European Court of Human Rights has occasionally even considered that the “lack of any apprehension” of the parties regarding a certain interpretation of the Convention may be indicative of their assuming a position regarding the interpretation of the treaty.

(15) Article 118 of Geneva Convention III of 1949 provides that “prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.” The will of a prisoner of war not to be repatriated was intentionally not declared to be relevant by the States parties in order to prevent States from abusively invoking the will of prisoners of war in order to delay repatriation. The International Committee of the Red Cross (ICRC) has, however, always insisted as a condition for its participation that the will of a prisoner of

560 See, for example, Hilaire, Constantine and Benjamin and others v. Trinidad and Tobago, Judgments (Merits, Reparations and Costs, Judgment), 21 June 2002, Inter-Am. Ct. H.R. Series C No. 94, para. 12.
561 Bankovic et al. v. Belgium and 16 Other Contracting States (dec.) [GC], Application No. 52207/99, ECHR 2001-XII, para. 62.
war not to be repatriated be respected. This approach, as far as it has been reflected in the practice of States parties, does not necessarily mean, however, that article 118 should be interpreted as demanding that the repatriation of a prisoner of war must not happen against his or her will. The ICRC Study on customary international humanitarian law carefully notes in its commentary on rule 128 A:

“According to the Fourth Geneva Convention, no protected person may be transferred to a country ‘where he or she may have reason to fear persecution for his or her political opinions or religious beliefs’ (Art. 45 para. 4 Geneva Convention IV). While the Third Geneva Convention does not contain a similar clause, practice since 1949 has developed to the effect that in every repatriation in which ICRC has played the role of neutral intermediary, the parties to the conflict, whether international or non-international, have accepted the ICRC conditions for participation, including ICRC being able to check prior to repatriation (or release in case of a non-international armed conflict), through an interview in private with the persons involved, whether they wish to be repatriated (or released).”

(16) This formulation suggests that the State practice of respecting the will of the prisoner of war is limited to cases in which ICRC is involved and in which the organization has formulated such a condition. States have drawn different conclusions from this practice. The 2004 United Kingdom Manual provides that:

“A more contentious issue is whether prisoners of war must be repatriated even against their will. Recent practice of States indicates that they should not. It is United Kingdom policy that prisoners of war should not be repatriated against their will.”

(17) This particular combination of the words “must” and “should” indicates that the United Kingdom, like other States, is not viewing the subsequent practice as demonstrating an interpretation of the treaty according to which the declared will of the prisoner of war must always be respected.

(18) The preceding examples from the case-law and State practice substantiate the need to identify and interpret carefully subsequent agreements and subsequent practice, in particular to ask whether the parties, by an agreement or a practice, assume a position...
regarding the interpretation of a treaty, or whether they are motivated by other considerations. 568

(19) The second sentence of paragraph 1 is merely illustrative. It refers to two types of cases which need to be distinguished from practice regarding the interpretation of a treaty.

(20) A common subsequent practice does not necessarily indicate an agreement between the parties regarding the interpretation of a treaty, but may instead signify their agreement temporarily not to apply the treaty, 569 or an agreement on a practical arrangement (*modus vivendi*). 570 The following examples are illustrative.

(21) Article 7 of the 1864 Geneva Convention provides that “[a] distinctive and uniform flag shall be adopted for hospitals, ambulances and evacuation parties. … [The] … flag … shall bear a red cross on a white ground”. 571 During the Russo-Turkish War of 1876–1878 the Ottoman Empire declared that it would in the future use the red crescent on a white ground to mark its own ambulances, while respecting the red cross sign protecting enemy ambulances and stated that the distinctive sign of the Convention “has so far prevented [Turkey] from exercising its rights under the Convention because it gave offence to the Muslim soldiers”. 572 This declaration led to a correspondence between the Ottoman Empire, Switzerland (as depositary) and the other parties which resulted in the acceptance of the red crescent only for the duration of the conflict. 573 At The Hague Peace Conferences of 1899 and 1907 and during the Geneva Revision Conference 1906, the Ottoman Empire, Persia and Siam unsuccessfully requested the inclusion of the red crescent, the red lion and sun, and the red flame in the Convention. 574 The Ottoman Empire and Persia, however, at least gained the acceptance of “reservations” which they formulated to that effect in 1906. 575 This acceptance of the reservations of the Ottoman Empire and Persia in 1906 did not mean, however, that the Parties had accepted that the 1864 Geneva Convention had been interpreted in a particular way prior to 1906 by subsequent unopposed practice. The practice by the Ottoman Empire and Persia was rather seen, at least until 1906, as not being

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571 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (adopted 22 August 1864, entered into force 22 June 1865).


575 Joined by Egypt upon accession in 1923, see Bugnion, *ibid.*, pp. 23–26; It was only on the occasion of the revision of the Geneva Conventions in 1929, when Turkey, Persia and Egypt claimed that the use of other emblems had become a *fait accompli* and that those emblems had been used in practice without giving rise to any objections, that the red crescent and the red lion and sun were finally recognized as a distinctive sign by article 19 (2) of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (1929, League of Nations, *Treaty Series*, vol. 118, No. 2733, p. 303).
covered by the 1864 Convention, but it was accepted as a temporary and exceptional measure which left the general treaty obligation unchanged.

(22) The purpose of paragraph 2 of draft conclusion 6 is to acknowledge the variety of forms that subsequent agreements and subsequent practice can take under article 31, paragraph 3 (a) and (b). The Commission has recognized that subsequent practice under article 31, paragraph 3 (b) consists of any “conduct” in the application of a treaty, including under certain circumstances, inaction, which may contribute to establishing an agreement regarding the interpretation of the treaty. Depending on the treaty concerned, this includes not only externally oriented conduct, such as official acts, statements and voting at the international level, but also internal legislative, executive and judicial acts, and may even include conduct by non-state actors which is attributable to one or more States parties and which fall within the scope of what the treaty conceives as forms of its application. Thus, the individual conduct which may contribute to a subsequent practice under article 31, paragraph 3 (b), need not meet any particular formal criteria.

(23) Subsequent practice at the international level need not necessarily be joint conduct. A merely parallel conduct may suffice. It is a separate question whether parallel activity actually articulates a sufficient common understanding (agreement) regarding the interpretation of a treaty in a particular case (see below draft conclusion 9 paragraph (1)). Subsequent agreements can be found in legally binding treaties as well as in non-binding instruments like memoranda of understanding. Subsequent agreements can also be found in certain decisions of a Conference of States Parties (see below draft conclusion 10, paragraphs 1, 2 and 3).

(24) Paragraph 3 of this draft conclusion provides that in identifying subsequent practice under article 32, the interpreter is required to determine whether, in particular, conduct by one or more parties is in the application of the treaty. The Commission decided to treat such “other subsequent practice” (see draft conclusion 4, paragraph 3) under article 32 in a separate paragraph for the sake of analytical clarity (see below draft conclusion 7 paragraph 2 and draft conclusion 8 paragraph 3), but it does not thereby call into question the unity of the process of interpretation. The considerations which are pertinent for the identification of subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), also apply, mutatis mutandis, to the identification of “other subsequent agreements” and subsequent practice under article 32.

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580 Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007, p. 659, at p. 737, para. 258; but see Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982, p. 18, at p. 84, para. 117 where the Court recognized concessions granted by the parties to the dispute as evidence of their tacit agreement; see also Maritime Dispute (Peru v. Chile), I.C.J., Judgment of 27 January 2014.
581 Gardiner, supra note 538, pp. 475, 483.
582 See above, paras. 1–4; Second Report, supra note 557, pp. 4–5, paras. 3–5.
practice” under article 32. Thus, agreements between less than all parties to a treaty regarding the interpretation of a treaty or its application are a form of subsequent practice under article 32.

(25) An example of a practical arrangement is the memorandum of understanding between the Department of Transportation of the United States of America and the Secretaría de Comunicaciones y Transportes of the United Mexican States on International Freight Cross-Border Trucking Services of 6 July 2011.584 The memorandum of understanding does not refer to Canada, the third party of the North American Free Trade Agreement (NAFTA), and specifies that it “is without prejudice to the rights and obligations of the United States and Mexico under NAFTA.” These circumstances suggest that the memorandum of understanding does not claim to constitute an agreement regarding the interpretation of NAFTA under article 31, paragraph 3 (a) or (b), but that it rather remains limited to being a practical arrangement between a limited number of parties which is subject to challenge by other parties or by a judicial or quasijudicial institution.

Conclusion 7
Possible effects of subsequent agreements and subsequent practice in interpretation

1. Subsequent agreements and subsequent practice under article 31, paragraph 3, contribute, in their interaction with other means of interpretation, to the clarification of the meaning of a treaty. This may result in narrowing, widening, or otherwise determining the range of possible interpretations, including any scope for the exercise of discretion which the treaty accords to the parties.

2. Subsequent practice under article 32 can also contribute to the clarification of the meaning of a treaty.

3. It is presumed that the parties to a treaty, by an agreement subsequently arrived at or a practice in the application of the treaty, intend to interpret the treaty, not to amend or to modify it. The possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized. The present draft conclusion is without prejudice to the rules on the amendment or modification of treaties under the Vienna Convention on the Law of Treaties and under customary international law.

Commentary

(1) Draft conclusion 7 deals with the possible effects of subsequent agreements and subsequent practice on the interpretation of a treaty. The purpose is to indicate how subsequent agreements and subsequent practice may contribute to the clarification of the meaning of a treaty. Paragraph 1 emphasizes that subsequent agreements and subsequent practice must be seen in their interaction with other means of interpretation (see draft conclusion 1, paragraph 5).585 They are therefore not necessarily in themselves conclusive.

(2) Subsequent agreements and subsequent practice, like all means of interpretation, may have different effects on the interactive process of interpretation of a treaty, which

584 J.R. Crook, supra note 570, pp. 809–812; see also: Mexico, Diario Oficial de la Federación (7 July 2011), Decreto por el que se modifica el artículo 1 del diverso por el que se establece la Tasa Aplicable durante 2003, del Impuesto General de Importación, para las mercancías originarias de América del Norte, publicado el 31 de diciembre de 2002, por lo que respecta a las mercancías originarias de los Estados Unidos de América.

consists of placing appropriate emphasis in any particular case on the various means of interpretation in a “single combined operation”. The taking into account of subsequent agreements and subsequent practice under articles 31, paragraph 3, and 32 may thus contribute to a clarification of the meaning of a treaty in the sense of a narrowing down (specifying) of possible meanings of a particular term or provision, or of the scope of the treaty as a whole (see paras. 4, 6–7, 10 and 11 below). Alternatively, such taking into account may contribute to a clarification in the sense of confirming a wider interpretation. Finally, it may contribute to understanding the range of possible interpretations available to the parties, including the scope for the exercise of discretion by the parties under the treaty (see paras. 12–15 below).

(3) International courts and tribunals usually begin their reasoning in a given case by determining the “ordinary meaning” of the terms of the treaty. Subsequent agreements and subsequent practice mostly enter into their reasoning at a later stage when courts ask whether such conduct confirms or modifies the result arrived at by the initial interpretation of the ordinary meaning (or by other means of interpretation). If the parties do not wish to convey the ordinary meaning of a term, but rather a special meaning in the sense of article 31 paragraph 4, subsequent agreements and subsequent practice may shed light on this special meaning. The following examples illustrate how subsequent agreements and subsequent practice as means of interpretation can contribute, in their interaction with other means in the process of interpretation, to the clarification of the meaning of a treaty.

(4) Subsequent agreements and subsequent practice can help identify the “ordinary meaning” of a particular term by confirming a narrow interpretation of different possible shades of meaning of the term. This was the case, for example, in the Nuclear Weapons Advisory Opinion where the International Court of Justice determined that the expressions “poison or poisonous weapons”:

have been understood, in the practice of States, in their ordinary sense as covering weapons whose prime, or even exclusive, effect is to poison or asphyxiate. This

586 Commentary to draft conclusion 1, paragraph 5, paras. 12–15 (Ibid., para. 39).
587 The terminology follows guideline 1.2 (Definition of interpretative declarations) of the Commission’s Guide to Practice on Reservations to Treaties: “Interpretative declaration” means a unilateral statement, whereby … [a State or an international organization] purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions) (see Ibid., Sixty-sixth Session, Supplement No. 10 (A/66/10/Add.1, chap. IV. F.2, guideline 1.2); see also ibid., commentary to guideline 1.2, para. 18.
practice is clear, and the parties to those instruments have not treated them as referring to nuclear weapons.592

(5) On the other hand, subsequent practice may prevent specifying the meaning of a general term to just one of different possible meanings.593 For example, in the case of U.S. Nationals in Morocco, the Court stated:

The general impression created by an examination of the relevant materials is that those responsible for the administration of the customs ... have made use of all the various elements of valuation available to them, though perhaps not always in a consistent manner. In these circumstances, the Court is of the opinion that Article 95 lays down no strict rule on the point in dispute. It requires an interpretation which is more flexible than either of those which are respectively contended for by the parties in this case.594

(6) Different forms of practice may contribute to both a narrow and a broad interpretation of different terms in the same treaty.595

(7) A treaty shall be interpreted in accordance with the ordinary meaning of its terms “in their context” (art. 31, para. 1). Subsequent agreements and subsequent practice, in interaction with this particular means of interpretation, may also contribute to identifying a narrower or broader interpretation of a term of a treaty.596 In the Intergovernmental Maritime Consultative Organization (IMCO) Advisory Opinion, for example, the International Court of Justice had to determine the meaning of the expression “eight ... largest ship-owning nations” under article 28 (a) of the Convention on the International Maritime Organization (IMCO Convention). Since this concept of “largest ship-owning nations” permitted different interpretations (such as determination by “registered tonnage” or by “property of nationals”), and since there was no pertinent practice of the organization or its members under article 28 (a) itself, the Court turned to practice under other provisions in the Convention and held:

This reliance upon registered tonnage in giving effect to different provisions of the Convention ... persuade[s] the Court to view that it is unlikely that when the latter article [article 28 (a)] was drafted and incorporated into the Convention it was contemplated that any criterion other than registered tonnage should determine which were the largest shipping owning nations.597

(8) Together with the text and the context, article 31, paragraph 1, accords importance to the “object and purpose” for its interpretation.598 Subsequent agreements and subsequent

596 See, for example, Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988, p. 69, at p. 87, para. 40.
598 Gardiner, supra note 538, pp. 190 and 198.
practice may also contribute to a clarification of the object and purpose of a treaty, or reconcile invocations of the “object and purpose” of a treaty with other means of interpretation.

(9) In the *Maritime Delimitation in the Area between Greenland and Jan Mayen* and *Oil Platforms* cases, for example, the International Court of Justice clarified the object and purpose of bilateral treaties by referring to subsequent practice of the parties. And in the *Land and Maritime Boundary between Cameroon and Nigeria* case, the Court held:

From the treaty texts and the practice analysed at paragraphs 64 and 65 above, it emerges that the Lake Chad Basin Commission is an international organization exercising its powers within a specific geographical area; that it does not, however, have as its purpose the settlement at a regional level of matters relating to the maintenance of international peace and security and thus does not fall under Chapter VIII of the Charter.

(10) State practice other than in judicial or quasi-judicial contexts confirms that subsequent agreements and subsequent practice only contribute to specifying the meaning of a term in the sense of narrowing the possible meanings of the rights and obligations under a treaty, but may also indicate a wider range of acceptable interpretations or a certain scope for the exercise of discretion which a treaty grants to States.

(11) For example, whereas the ordinary meaning of the terms of article 5 of the 1944 Chicago Convention do not appear to require a charter flight to obtain permission to land while *en route*, long-standing State practice requiring such permission has led to general acceptance that this provision is to be interpreted as requiring permission. Another case is

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603 This is not to suggest that there may ultimately be different interpretations of a treaty, but rather that the treaty may accord the parties the possibility to choose from a spectrum of different permitted acts, see Gardiner, *supra* note 538, pp. 30–31 and p. 111, quoting the House of Lords in *R v. Secretary of State for the Home Department, ex parte Adam* [2001] AC 477: “It is necessary to determine the autonomous meaning of the relevant treaty provision … It follows that, as in the case of other multilateral treaties, the Refugee Convention must be given an independent meaning derivable from the sources mentioned in articles 31 and 32 [of the Vienna Convention] and without taking colour from distinctive features of the legal system of any individual contracting State. In principle there can only be one true interpretation of a treaty … In practice it is left to national courts, faced with a material disagreement on an issue of interpretation, to resolve it. But in doing so it must search, untrammelled by notions of its national legal culture, for the true autonomous international meaning of the treaty. And there can only be one true meaning”, at pp. 515–517 (Lord Steyn).

604 S.D. Murphy, “The relevance of subsequent agreement and subsequent practice for the interpretation of treaties”, in *Treaties and Subsequent Practice*, G. Nolte, ed. (Oxford, Oxford University Press,
article 22 (3) of the Vienna Convention on Diplomatic Relations which provides that the means of transport used by a mission shall be immune from search, requisition, attachment or execution. While police enforcement against diplomatic properties will usually be met with protests of States,\(^{605}\) the towing of diplomatic cars that have violated local traffic and parking laws generally has been regarded as permissible in practice.\(^{606}\) This practice suggests that, while punitive measures against diplomatic vehicles are forbidden, cars can be stopped or removed if they prove to be an immediate danger or obstacle for traffic and/or public safety.\(^{607}\) In that sense, the meaning of the term “execution”, and thus, the scope of protection accorded to means of transportation, is specified by the subsequent practice of parties.

(12) Another possible example concerns Article 12 of the Additional Protocol to the Geneva Conventions of 1949 (Protocol II) of 1977 which provides:

Under the direction of the competent authority concerned, the distinctive emblem of the Red Cross, Red Crescent or Red Lion and Sun on a white ground shall be displayed by medical and religious personnel and medical units, and on medical transports. It shall be respected in all circumstances. It shall not be used improperly.

Although the term “shall” suggests that it is obligatory for States to use the distinctive emblem for marking medical personnel and transports under all circumstances, subsequent practice suggests that States may possess some discretion with regard to its application.\(^{608}\) As armed groups have in recent years specifically attacked medical convoys which were well recognizable due to the protective emblem, States have in certain situations refrained from marking such convoys with a distinctive emblem. Responding to a parliamentary question on its practice in Afghanistan, the Government of Germany has stated that:

As other contributors of ISAF contingents, the Federal Armed Forces have experienced that marked medical vehicles have been targeted. Occasionally, these medical units and vehicles, clearly distinguished as such by their protective emblem, have even been preferred as targets. The Federal Armed Forces have


thus, alongside with Belgium, France, the UK, Canada and the US, decided within ISAF to cover-up the protective emblem on medical vehicles.609

(13) Such practice by States may confirm an interpretation of article 12 according to which the obligation to use the protective emblem610 under exceptional circumstances allows a margin of discretion for the parties.

(14) A treaty provision which grants States an apparently unconditional right may raise the question of whether this discretion is limited by the purpose of the rule. For example, according to article 9 of the Vienna Convention on Diplomatic Relations, the receiving State may notify the sending State, without having to give reasons, that a member of the mission is persona non grata. States mostly issue such notifications in cases in which members of the mission were found or suspected of having engaged in espionage activities, or having committed other serious violations of the law of the receiving State, or caused significant political irritation.611 However, States have also made such declarations in other circumstances, such as when envoys caused serious injury to a third party612 or committed repeated infringement of the law,613 or even to enforce their drunk-driving laws.614 It is even conceivable that declarations are made without clear reasons or for purely political motives. Other States do not seem to have asserted that such practice constitutes an abuse of the power to declare members of a mission as personae non gratae. Thus, such practice confirms that article 9 provides an unconditional right.615

(15) Paragraph 2 of draft conclusion 7 concerns possible effects of “other subsequent practice” under article 32 (see draft conclusion 4, paragraph 3), which does not reflect an agreement of all parties regarding the interpretation of a treaty. Such practice, as a supplementary means of interpretation, can confirm the interpretation which the interpreter has reached in the application of article 31, or determine the meaning when the interpretation according to article 31 leaves the meaning ambiguous or obscure or leads to a

610 Spieker, supra note 608, para. 12.
611 See Denza, supra note 605, pp. 77–88 with further references to declarations in relation to espionage; see also Salmon, supra note 605, p. 484 para. 630; and Richtsteig, supra note 607, p. 30.
result which is manifestly absurd or unreasonable. Article 32 thereby makes a distinction between a use of preparatory work or of “other subsequent practice” to confirm a meaning arrived at under article 31, and its use to “determine” the meaning. Hence, recourse may be had to “other subsequent practice” under article 32 not only to determine the meaning of the treaty in certain circumstances, but also — and always — to confirm the meaning resulting from the application of article 31.616

(16) Subsequent practice under article 32, can contribute, for example, to reducing possible conflicts when the “object and purpose” of a treaty appears to be in tension with specific purposes of certain of its rules.617 In the Kasikili/Sedudu Island case, for example, the International Court of Justice emphasized that the parties to the 1890 Treaty “sought both to secure for themselves freedom of navigation on the river and to delimit as precisely as possible their respective spheres of influence.”618 The parties thereby reconciled a possible tension by taking into account a certain subsequent practice by only one of the parties as a supplementary means of interpretation (under article 32).619

(17) Another example of “other subsequent practice” under article 32 concerns the term “feasible precautions” in article 57, paragraph (2) (ii), of the Additional Protocol to the Geneva Conventions of 1949 (Protocol I) of 1977. This term has been used in effect by article 3 (4) of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II) of 10 October 1980, which provides that “[f]easible precautions are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.” This language has come to be accepted by way of subsequent practice in many military manuals as a general definition of “feasible precautions” for the purpose of article 57, paragraph (2) (ii), of Protocol I of 1977.620

616 WTO Appellate Body China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, WT/DS363/AB/R para. 403 (2009); “Although the Panel’s application of Article 31 of the Vienna Convention to ‘Sound recording distribution services’ led it to a ‘preliminary conclusion’ as to the meaning of that entry, the Panel nonetheless decided to have recourse to supplementary means of interpretation to confirm that meaning. We note, in this regard, that China’s argument on appeal appears to assume that the Panel’s analysis under Article 32 of the Vienna Convention would necessarily have been different if the Panel had found that the application of Article 31 left the meaning of ‘Sound recording distribution services’ ambiguous or obscure, and if the Panel had, therefore, resorted to Article 32 to determine, rather than to confirm, the meaning of that term. We do not share this view. The elements to be examined under Article 32 are distinct from those to be analyzed under Article 31, but it is the same elements that are examined under Article 32 irrespective of the outcome of the Article 31 analysis. Instead, what may differ, depending on the results of the application of Article 31, is the weight that will be attributed to the elements analyzed under Article 32”, see also M.E. Villiger, Commentary on the 1969 Vienna Convention on the Law of Treaties (Martinus Nijhoff Publishers, 2009), p. 447, para 11.


619 Ibid., at p. 1078, para. 55 and p. 1096, para. 80.

(18) Paragraph 3 of draft conclusion 7 addresses the question of how far the interpretation of a treaty can be influenced by subsequent agreements and subsequent practice in order to remain within the realm of what is considered interpretation under article 31, paragraph 3 (a) and (b). The paragraph reminds the interpreter that agreements subsequently arrived at may serve to amend or modify a treaty, but that such subsequent agreements are subject to article 39 of the Vienna Convention and should be distinguished from subsequent agreements under article 31, paragraph 3 (a). The second sentence, while acknowledging that there are examples to the contrary in case-law and diverging opinions in the literature, stipulates that the possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized.

(19) According to article 39 of the Vienna Convention on the Law of Treaties "[a] treaty may be amended by agreement between the parties". Article 31, paragraph 3 (a), on the other hand, refers to subsequent agreements “between the parties regarding the interpretation of the treaty and the application of its provisions”, and does not seem to address the question of amendment or modification. As the WTO Appellate Body has held: [...] the term “application” in article 31 (3) (a) relates to the situation where an agreement specifies how existing rules or obligations in force are to be “applied”; the term does not connote the creation of new or the extension of existing obligations that are subject to a temporal limitation...

(20) Articles 31, paragraph 3 (a), and 39, if read together, demonstrate that agreements which the parties reach subsequently to the conclusion of a treaty can interpret and amend or modify the treaty. An agreement under article 39 need not display the same form as the treaty which it amends. As the International Court of Justice has held in the Pulp Mills on the River Uruguay (Argentina v. Uruguay) case:

Whatever its specific designation and in whatever instrument it may have been recorded (the [River Uruguay Executive Commission] CARU minutes), this “understanding” is binding on the Parties, to the extent that they have consented to it and must be observed by them in good faith. They are entitled to depart from the procedures laid down by the 1975 Statute, in respect of a given project pursuant to an appropriate bilateral agreement.

(21) It is often difficult to draw a distinction between agreements of the parties under a specific treaty provision which attributes binding force to subsequent agreements, simple subsequent agreements under article 31, paragraph 3 (a), which are not binding as such, and, finally, agreements on the amendment or modification of a treaty under articles 39–41.625 International case-law and State practice suggest626 that informal agreements which

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622 Murphy, supra note 604, p. 88.
624 Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010, p. 14, at pp. 62–63, paras. 128 and 131; the Court then concluded that, in the case under review, that these conditions had not been fulfilled, at pp. 62–66, paras. 128–142.
625 In judicial practice it is sometimes not necessary to determine whether an agreement has the effect of interpreting or modifying a treaty, see Territorial Dispute (Libyan Arab Jamahiriya/Chad),
are alleged to derogate from treaty obligations should be narrowly interpreted. There do not seem to be any formal criteria other than those set forth in article 39, if applicable, apart from the ones which may be provided for in the applicable treaty itself, which are recognized as distinguishing these different forms of subsequent agreements. It is clear, however, that States and international courts are generally prepared to accord States parties a rather wide scope for the interpretation of a treaty by way of a subsequent agreement. This scope may even go beyond the ordinary meaning of the terms of the treaty. The recognition of this scope for the interpretation of a treaty goes hand in hand with the reluctance by States and courts to recognize that an agreement actually has the effect of amending or modifying a treaty. An agreement to modify a treaty is thus not excluded, but also not to be presumed.

(22) Turning to the question whether the parties can amend or modify a treaty by a common subsequent practice, the Commission originally proposed, in its Draft Articles on the Law of Treaties, to include the following provision in the Vienna Convention which would have explicitly recognized the possibility of a modification of treaties by subsequent practice:

Draft Article 38: Modification of treaties by subsequent practice

A treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions.

(23) This draft article gave rise to an intense debate at the Vienna Conference. An amendment to delete draft article 38 was put to a vote and was adopted by 53 votes to 15, with 26 abstentions. After the Vienna Conference, the question was discussed whether the rejection of draft article 38 at the Vienna Conference meant that the possibility of a modification of a treaty by subsequent practice of the parties had thereby been excluded. Many writers came to the conclusion that the negotiating States simply did not wish to address this question in the Convention and that treaties can, as a general rule under the customary law of treaties, indeed be modified by subsequent practice which establishes the agreement of the parties to that effect. International courts and tribunals, on the other hand, have been more open to recognizing this possibility, albeit with some qualifications.

Judgment, I.C.J. Reports 1994, p. 6, at p. 29, para. 60 (“in the view of the Court, for the purposes of the present Judgment, there is no reason to categorize it either as confirmation or as a modification of the Declaration”); it is sometimes considered that an agreement under article 31 (3) (a) can also have the effect of modifying a treaty, see Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010, p. 14, at p. 63, paras. 131 and 140; Crawford, supra note 570, p. 32; Iran-United States Claims Tribunal, Interlocutory Award No. ITL 83-B1-FT (Counterclaim), The Islamic Republic of Iran v. the United States of America, Iran-USCTR vol. 38 (2004-2009), p. 77, at pp. 125–126, para. 132; ADF Group Inc. v. United States of America (Case No. ARB(AF)/00/1), ICSID Arbitration Under NAFTA Chapter Eleven, 9 January 2003, pp. 84–85, para. 177 (www.state.gov/documents/organization/16586.pdf); Ibid., Part IV, Chapter C, paras. 20–21; Second Report, supra note 557, p. 61–68, paras. 146–165. It may be that States, in diplomatic contexts outside court proceedings, tend to acknowledge more openly a certain agreement or common practice amounts to a modification of a treaty, see Murphy, supra note 604, p. 83.

Ibid., p. 66, para. 140; Crawford, supra note 570, p. 32.


hand, have since the adoption of the Vienna Convention mostly refrained from recognizing this possibility.

(24) In the case concerning the Dispute regarding Navigational and Related Rights, the International Court of Justice has held that “subsequent practice of the parties, within the meaning of Article 31, paragraph 3 (b), of the Vienna Convention, can result in a departure from the original intent on the basis of a tacit agreement”. It is not entirely clear whether the Court thereby wanted to recognize that subsequent practice under article 31, paragraph 3 (b), may also have the effect of amending or modifying a treaty, or whether it was merely making a point relating to the interpretation of treaties as the “original” intent of the parties is not necessarily conclusive for the interpretation of a treaty. Indeed, the Commission recognized in provisionally adopted draft conclusion 3 that subsequent agreements and subsequent practice, like other means of interpretation, “may assist in determining whether or not the presumed intention of the parties upon the conclusion of the treaty was to give a term used a meaning which is capable of evolving over time”. The scope for “interpretation” is therefore not necessarily determined by a fixed “original intent”, but must rather be determined by taking into account a broader range of considerations, including certain later developments. This somewhat ambiguous dictum of the International Court raises the question of how far subsequent practice under article 31, paragraph 3 (b), can contribute to “interpretation”, and whether subsequent practice may have the effect of amending or modifying a treaty. Indeed, the dividing line between the interpretation and the amendment or modification of a treaty is in practice sometimes “difficult, if not impossible, to fix”.


(25) Apart from the dictum in *Dispute regarding Navigational and Related Rights*, the International Court of Justice has not explicitly recognized that a particular subsequent practice has had the effect of modifying a treaty. This is true, in particular, for the *Namibia Advisory Opinion* as well as for the *Wall Advisory Opinion* in which the Court recognized that subsequent practice had an important effect on the determination of the meaning of the treaty, but stopped short of explicitly recognizing that such practice had led to an amendment or modification of the treaty. Since these opinions concerned treaties establishing an international organization it seems difficult to derive a general rule of the law of treaties from them. The questions of subsequent agreements and subsequent practice relating to international organizations will be the subject of a later report.

(26) Other important cases in which the International Court of Justice has raised the issue of possible modification by the subsequent practice of the parties concern boundary treaties. As the Court said in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*:

“Here the conduct of Cameroon in that territory has pertinence only for the question of whether it acquiesced in the establishment of a change in treaty title, which cannot be wholly precluded as a possibility in law.”

(27) The Court found such acquiescence in the case concerning the *Temple of Preah Vihear*, where it placed decisive emphasis on the fact that there had been clear assertions of sovereignty by one side (France) which, according to the Court, required a reaction on the part of the other side (Thailand). This judgment, however, was rendered before the adoption of the Vienna Convention and thus, at least implicitly, was taken into account by States in their debate at the Vienna Conference. The judgment also stops short of explicitly recognizing the modification of a treaty by subsequent practice as the Court left open whether the line on the French map was compatible with the watershed line that had been agreed upon in the original boundary treaty between the two States – although it is often assumed that this was not the case.

(28) Thus, while leaving open the possibility that a treaty might be modified by the subsequent practice of the parties, the International Court of Justice has so far not explicitly

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636 Thirlway, supra note 631, p. 64.
639 *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, *Merits*, Judgment, *I.C.J. Reports* 1962, p. 6, at p. 30: “an acknowledgement by conduct was undoubtedly made in a very definite way ... it is clear that the circumstances were such as called for some reaction”; “a clearer affirmation of title on the French Indo-Chinese side can scarcely be imagined” and therefore “demanded a reaction”.
641 *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, *Merits*, Judgment of 15 June 1962, *I.C.J. Reports* 1962, p. 6, at p. 26: “a fact, which if true, must have been no less evident in 1908”. Judge Parra-Aranguren has opined that the *Temple* case demonstrated “that the effect of subsequent practice on that occasion was to amend the treaty”; *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, *I.C.J. Reports* 1999, p. 1045, at pp. 1212–1213, para. 16 (Dissenting Opinion of Judge Parra-Aranguren); Buga, supra note 631, at note 113.
recognized that such an effect has actually been produced in a specific case. Rather the Court has reached interpretations which were difficult to reconcile with the ordinary meaning of the text of the treaty, but which coincided with the identified practice of the parties.\(^{642}\) Contrary holdings by arbitral tribunals have been characterized either as an “isolated exception”\(^ {643}\) or rendered before the Vienna Conference and critically referred to there.\(^ {644}\)

(29) The WTO Appellate Body has made clear that it would not accept an interpretation which would result in a modification of a treaty obligation, as this would not be an “application” of an existing treaty provision.\(^ {645}\) The Appellate Body’s position may be influenced by article 3.2. of the Dispute Settlement Understanding, according to which “[r]ecommendations and rulings of the [Dispute Settlement Body] cannot add to or diminish the rights and obligations provided in the covered agreements”.\(^ {646}\)

(30) The European Court of Human Rights occasionally has recognized the subsequent practice of the parties as a possible source for a modification of the Convention. In an obiter dictum in the 1989 case of *Soering v. the United Kingdom*, the Court held

> that an established practice within the member States could give rise to an amendment of the Convention. In that case the Court accepted that subsequent practice in national penal policy, in the form of a generalised abolition of capital punishment, could be taken as establishing the agreement of the Contracting States to abrogate the exception provided for under article 2 § 1 and hence remove a textual limit on the scope for evolutive interpretation of article 3 ([ibid.], pp. 40–41, § 103).\(^ {647}\)

(31) Applying this reasoning, the Court came to the following conclusion in *Al-Saadoon and Mufdhi v. the United Kingdom*:

\(^{642}\) In particular the Namibia opinion has been read as implying that subsequent practice has modified article 27 paragraph 3 of the Charter of the United Nations, Alain Pellet, Article 38, in The Statute of the International Court of Justice A Commentary, A. Zimmermann \textit{et al.}, ed. 2nd ed. (Oxford, Oxford University Press), 2012), p. 844, para. 279; cf. Second Report, \textit{supra} note 557, pp. 53–54, paras. 124–126.


“All but two of the Member States have now signed Protocol No. 13 and all but three of the States which have signed have ratified it. These figures, together with consistent State practice in observing the moratorium on capital punishment, are strongly indicative that Article 2 has been amended so as to prohibit the death penalty in all circumstances. Against this background, the Court does not consider that the wording of the second sentence of Article 2 § 1 continues to act as a bar to its interpreting the words ‘inhuman or degrading treatment or punishment’ in Article 3 as including the death penalty (cf. Soering, cited above, §§ 102–104).”

(32) The case-law of international courts and tribunals allows the following conclusions: The WTO situation suggests that a treaty may preclude the subsequent practice of the parties from having a modifying effect. Thus, the treaty itself governs the question in the first place. Conversely, the European Court of Human Rights cases suggest that a treaty may permit the subsequent practice of the parties to have a modifying effect. Thus, ultimately much depends on the treaty or of the treaty provisions concerned.

(33) The situation is more complicated in the case of treaties for which such indications do not exist. No clear residual rule for such cases can be discerned from the jurisprudence of the International Court of Justice. The conclusion can be drawn, however, that the Court, while finding that the possibility of a modification of a treaty by subsequent practice of the parties “cannot be wholly precluded as a possibility in law”, considered that finding such a modification should be avoided, if at all possible. Instead the Court prefers to accept broad interpretations which may stretch the ordinary meaning of the terms of the treaty.

(34) This conclusion from the jurisprudence of the International Court of Justice is in line with certain considerations that were articulated during the debates among States on draft article 38 of the Vienna Convention. Today, the consideration that amendment procedures which are provided for in a treaty are not to be circumvented by informal means seems to have gained more weight in relation to the equally true general observation that international law is often not as formalist as national law. The concern which was expressed by a number of States at the Vienna Conference, according to which the possibility of modifying a treaty by subsequent practice could create difficulties for domestic constitutional law, has also since gained in relevance. And, while the principle *pacta sunt servanda* is not formally called into question by an amendment or modification of a treaty by subsequent practice that establishes the agreement of all the parties, it is

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equally true that the stability of treaty relations may be called into question if an informal means of identifying agreement as subsequent practice could easily modify a treaty.\textsuperscript{654}

(35) In conclusion, while there exists some support in international case-law that, absent indications in the treaty to the contrary, the agreed subsequent practice of the parties theoretically may lead to modifications of a treaty, the actual occurrence of that effect is not to be presumed. Instead, States and courts prefer to make every effort to conceive of an agreed subsequent practice of the parties as an effort to interpret the treaty in a particular way. Such efforts to interpret a treaty broadly are possible since article 31 of the Vienna Convention does not accord primacy to one particular means of interpretation contained therein, but rather requires the interpreter to take into account all means of interpretation as appropriate.\textsuperscript{655} In this context an important consideration is how far an evolutive interpretation of the treaty provision concerned is possible.\textsuperscript{656}

### Conclusion 8

**Weight of subsequent agreements and subsequent practice as a means of interpretation**

1. The weight of a subsequent agreement or subsequent practice as a means of interpretation under article 31, paragraph 3, depends, \textit{inter alia}, on its clarity and specificity.
2. The weight of subsequent practice under article 31, paragraph 3 (b), depends, in addition, on whether and how it is repeated.
3. The weight of subsequent practice as a supplementary means of interpretation under article 32 may depend on the criteria referred to in paragraphs 1 and 2.

### Commentary

(1) Draft conclusion 8 identifies some criteria that may be helpful for determining the interpretative weight to be accorded to a specific subsequent agreement or subsequent practice in the process of interpretation in a particular case. Naturally, the weight accorded to subsequent agreements or subsequent practice must also be determined in relation to other means of interpretation (see draft conclusion 1, paragraph 5).

(2) Paragraph 1 addresses the weight of a subsequent agreement or subsequent practice under article 31, paragraph 3, thus dealing with both subparagraphs (a) and (b) from a general point of view. Paragraph 1 specifies that the weight to be accorded to a subsequent agreement or subsequent practice as a means of interpretation depends, \textit{inter alia}, on its clarity and specificity. The use of the term “\textit{inter alia}” indicates that these criteria should not be seen as exhaustive. Other criteria may relate to the time when the agreement or

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\textsuperscript{654} See, for example, Kohen, \textit{supra} note 640, p. 274 (in particular with respect to boundary treaties).

\textsuperscript{655} Draft conclusion 1, para. 5, and accompanying commentary (\textit{Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10 A/68/10}, chap. IV, sect. C.1 and sect. C.2); Hafner, \textit{supra} note 615, p. 117; some authors support the view that the range of what is conceivable as an “interpretation” is wider in case of a subsequent agreement or subsequent practice under article 31, paragraph 3, than in the case of interpretations by other means of interpretation, including the range for evolutive interpretations by courts or tribunals, for example, Gardiner, \textit{supra} note 538, p. 243; Dörr, \textit{supra} note 539, p. 555, para. 76.

\textsuperscript{656} In the case concerning the \textit{Dispute regarding Navigational and Related Rights}, for example, the International Court of Justice could leave the question open whether the term “comercio” had been modified by the subsequent practice of the parties since it decided that it was possible to give this term an evolutive interpretation. \textit{Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)}, Judgment, \textit{I.C.J. Reports} 2009, p. 213, at pp. 242–243, paras. 64–66.
practice occurred,657 the emphasis given by the parties to a particular agreement or practice, or the applicable burden of proof.

(3) The interpretative weight of subsequent agreements or practice in relation to other means of interpretation often depends on their specificity in relation to the treaty concerned.658 This is confirmed, for example, by decisions of the International Court of Justice, arbitral awards and reports of the World Trade Organization (WTO) Panels and Appellate Body.659 The award of the International Centre for Settlement of Investment Disputes (ICSID) tribunal in Plama v. Bulgaria is instructive:

“It is true that treaties between one of the Contracting Parties and third States may be taken into account for the purpose of clarifying the meaning of a treaty’s text at the time it was entered into. The Claimant has provided a very clear and insightful presentation of Bulgaria’s practice in relation to the conclusion of investment treaties subsequent to the conclusion of the Bulgaria-Cyprus BIT in 1987. In the 1990s, after Bulgaria’s communist regime changed, it began concluding BITs with much more liberal dispute resolution provisions, including resort to ICSID arbitration. However, that practice is not particularly relevant in the present case since subsequent negotiations between Bulgaria and Cyprus indicate that these Contracting Parties did not intend the MFN provision to have the meaning that otherwise might be inferred from Bulgaria’s subsequent treaty practice. Bulgaria and Cyprus negotiated a revision of their BIT in 1998. The negotiations failed but specifically contemplated a revision of the dispute settlement provisions (...). It can be inferred from these negotiations that the Contracting Parties to the BIT themselves did not consider that the MFN provision extends to dispute settlement provisions in other BITs.”660

(4) Whereas the International Court of Justice and arbitral tribunals tend to accord more interpretative weight to rather specific subsequent practice by States, the European Court of Human Rights often relies on broad comparative assessments of the domestic legislation or international positions adopted by States.661 In this latter context, it should be borne in mind that the rights and obligations under human rights treaties must be correctly transformed, within the given margin of appreciation, into the law, the executive practice and international arrangements of the respective State party. For this purpose, sufficiently strong commonalities in the national legislation of States parties can be relevant for the determination of the scope of a human right or the necessity of its restriction. In addition, the character of certain rights or obligations sometimes speaks in favour of taking less

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657 In the case concerning the Maritime Dispute (Peru v. Chile), the Court privileged the practice that was closer to the date of entry into force, Maritime Dispute (Peru v. Chile), I.C.J., Judgment of 27 January 2014. Available from www.icj-cij.org/docket/files/137/17930.pdf, p. 47, para. 126.
658 Murphy, supra note 604, p. 91.
specific practice into account. For example, in the case of *Rantsev v. Cyprus* the Court held that:

“it is clear from the provisions of these two [international] instruments that the Contracting States ... have formed the view that only a combination of measures addressing all three aspects can be effective in the fight against trafficking (...). Accordingly, the duty to penalise and prosecute trafficking is only one aspect of member States’ general undertaking to combat trafficking. The extent of the positive obligations arising under Article 4 [prohibition of forced labour] must be considered within this broader context.”662

(5) On the other hand, in the case of *Chapman v. the United Kingdom*, the Court observed “that there may be said to be an emerging international consensus amongst the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle (...),”663 but ultimately said that it was “not persuaded that the consensus is sufficiently concrete for it to derive any guidance as to the conduct or standards which Contracting States consider desirable in any particular situation.”664

(6) Paragraph 2 of draft conclusion 8 deals only with subsequent practice under article 31, paragraph 3 (b), and specifies that the weight of subsequent practice also depends on whether and how it is repeated. This formula “whether and how it is repeated” brings in the elements of time and the character of a repetition. It indicates, for example, that, depending on the treaty concerned, something more than just a technical or unmindful repetition of a practice may contribute to its interpretative value in the context of article 31, paragraph 3 (b). The element of time and the character of the repetition also serves to indicate the “grounding” of a particular position of the parties regarding the interpretation of a treaty. Moreover, the non-implementation of a subsequent agreement may also suggest a lack of its weight as a means of interpretation under article 31, paragraph 3 (a).665

(7) The question of whether “subsequent practice” under article 31, paragraph 3 (b),666 requires more than a one-off application of the treaty was addressed by the WTO Appellate Body in *Japan – Alcoholic Beverages II*:

“Subsequent practice in interpreting a treaty has been recognized as a ‘concordant, common and consistent’ sequence of acts or pronouncements which is sufficient to establish a discernable pattern implying the agreement of the parties regarding its interpretation.”667

(8) This definition suggests that subsequent practice under article 31, paragraph 3 (b), requires more than one “act or pronouncement” regarding the interpretation of a treaty, but rather action of such frequency and uniformity that it warrants a conclusion that the parties have reached a settled agreement regarding the interpretation of the treaty. Such a threshold would imply that subsequent practice under article 31, paragraph 3 (b), requires a broad-

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664 Ibid., para. 94.


based, settled, and qualified form of collective practice in order to establish agreement among the parties regarding interpretation.

(9) The International Court of Justice, on the other hand, has applied article 31, paragraph 3 (b), more flexibly, without adding further conditions. This is true, in particular, for its judgment in the case of Kasikili/Sedudu Island. Other international courts have mostly followed the approach of the International Court of Justice. This is true for the Iran–United States Claims Tribunal and the European Court of Human Rights.

(10) The difference between the standard formulated by the WTO Appellate Body, on the one hand, and the approach of the International Court of Justice, on the other, is, however, more apparent than real. The WTO Appellate Body seems to have taken the “concordant, common and consistent” formula from a publication which stated that “the value of subsequent practice will naturally depend on the extent to which it is concordant, common and consistent.” The formula “concordant, common and consistent” thus provides an indication as to the circumstances under which subsequent practice under article 31, paragraph 3 (b) has more or less weight as a means of interpretation in a process of interpretation, rather than require any particular frequency in the practice. The WTO Appellate Body itself on occasion has relied on this nuanced view.

(11) The Commission, while finding that the formula “concordant, common and consistent” may be useful for determining the weight of subsequent practice in a particular case, also considers it as not being sufficiently well-established to articulate a minimum threshold for the applicability of article 31, paragraph 3 (b), and as carrying the risk of


671 I. Sinclair, supra note 538, p. 137; see also Yasseen, supra note 538, pp. 48–49; whilst “commune” is taken from the work of the International Law Commission, “d’une certaine constance” and “concordante” are conditions which Yasseen derives through further reasoning; see Yearbook of the International Law Commission, 1966, vol. II (United Nations publication, Sales No. E.67.V.2), pp. 98–99, paras. 17–18 and p. 221, para. 15.


being misconceived as overly prescriptive. Ultimately, the Commission continues to find that “the value of subsequent practice varies according as it shows the common understanding of the parties as to the meaning of the terms.”\(^{675}\) This implies that a one-off practice of the parties which establishes their agreement regarding the interpretation needs to be taken into account under article 31, paragraph 3 (b).\(^{676}\)

(12) Paragraph 3 of draft conclusion 8 addresses the weight that should be accorded to “other subsequent practice” under article 32 (see draft conclusion 4, paragraph 3). It does not address when and under which circumstances such practice can be considered. The WTO Appellate Body has emphasized, in a comparable situation, that those two issues must be distinguished from each other:

“We consider that the European Communities conflates the preliminary question of what may qualify as a ‘circumstance’ of a treaty’s conclusion with the separate question of ascertaining the degree of relevance that may be ascribed to a given circumstance, for purposes of interpretation under Article 32.”\(^{677}\)

The Appellate Body also held that:

“first, the Panel did not examine the classification practice in the European Communities during the Uruguay Round negotiations as a supplementary means of interpretation within the meaning of Article 32 of the Vienna Convention; and, second, the value of the classification practice as a supplementary means of interpretation ...”\(^{678}\)

In order to determine the “relevance” of such subsequent practice, the Appellate Body referred to “objective factors”:

“These include the type of event, document, or instrument and its legal nature; temporal relation of the circumstance to the conclusion of the treaty; actual knowledge or mere access to a published act or instrument; subject matter of the document, instrument, or event in relation to the treaty provision to be interpreted; and whether or how it was used or influenced the negotiations of the treaty (...)”\(^{679}\)

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\(^{676}\) In practice, a one-off practice will often not be sufficient to establish an agreement of the parties regarding a treaty’s interpretation, as a general rule, however, subsequent practice under article 31, paragraph 3 (b), does not require any repetition but only an agreement regarding the interpretation. The likelihood of an agreement established by an one-off practice thus depends on the act and the treaty in question, see E. Lauterpacht, “The Development of the Law of International Organization by the Decisions of International Tribunals”, Recueil des cours de l’Académie de droit international de La Haye, vol. 152, 1976, p. 381, at p. 457; Linderfalk, supra note 539, p. 166; C.F. Amerasinghe, “Interpretation of Texts in Open International Organizations”, British Yearbook of International Law vol. 65, No. 1 (1994), p. 175, at p. 199; Villiger argues in favour of a certain frequency, but emphasizes that the important point is the establishment of an agreement, Villiger, supra note 616, p. 431, para. 22. Yasseen and Sinclair write that practice cannot “in general” be established by one single act, M.K. Yasseen, supra note 538, p. 47; I. Sinclair, supra note 538, p. 137; cf. Third Report for the ILC Study Group on Treaties over Time, in G. Nolte (ed.), Treaties and Subsequent Practice (Oxford University Press, 2013), p. 307, at p. 310.


(13) Whereas the Appellate Body did not use the term “specificity”, it referred to the criteria mentioned above. Instead of clarity, the Appellate Body spoke of “consistency”, and stated, that consistency should not set a benchmark but rather determine the degree of relevance. “Consistent prior classification practice may often be significant. Inconsistent classification practice, however, cannot be relevant (in interpreting the meaning of a tariff concession).” 680

(14) A further factor that helps determine the relevance under article 32 may be the number of affected states that engage in that practice. The Appellate Body has stated:

“To establish this intention, the prior practice of only one of the parties may be relevant, but it is clearly of more limited value than the practice of all parties. In the specific case of the interpretation of a tariff concession in a Schedule, the classification practice of the importing Member, in fact, may be of great importance.” 681

Conclusion 9
Agreement of the parties regarding the interpretation of a treaty

1. An agreement under article 31, paragraph 3 (a) and (b), requires a common understanding regarding the interpretation of a treaty which the parties are aware of and accept. Though it shall be taken into account, such an agreement need not be legally binding.

2. The number of parties that must actively engage in subsequent practice in order to establish an agreement under article 31, paragraph 3 (b), may vary. Silence on the part of one or more parties can constitute acceptance of the subsequent practice when the circumstances call for some reaction.

Commentary

(1) The first sentence of paragraph 1 sets forth the principle that an “agreement” under article 31, paragraph 3 (a) and (b), requires a common understanding by the parties regarding the interpretation of a treaty. In order for that common understanding to have the effect provided for under article 31, paragraph 3, the parties must be aware of it and accept the interpretation contained therein. While the difference regarding the form of an “agreement” under subparagraph (a) and subparagraph (b) has already been set out in draft conclusion 4 and its accompanying commentary, 682 paragraph 1 of draft conclusion 9 intends to capture what is common in the two subparagraphs, which is the agreement between the parties, in substance, regarding the interpretation of the treaty.

(2) The element which distinguishes subsequent agreements and subsequent practice as authentic means of interpretation under article 31, paragraph 3 (a) and (b), on the one hand, and other subsequent practice as a supplementary means of interpretation under article 32, 683 on the other, is the “agreement” of the parties regarding the interpretation of the treaty. It is this agreement of the parties which provides the means of interpretation under

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683 See draft conclusion 2 and draft conclusion 4, para. 3 (Ibid., A/68/10, chap. IV.C.1).
article 31, paragraph 3 their specific function and weight for the interactive process of interpretation under the general rule of interpretation of article 31.

(3) Conflicting positions expressed by different parties to a treaty preclude the existence of an agreement. This has been confirmed, *inter alia*, by the Arbitral Tribunal in the case of *German External Debts* which held that a “tacit subsequent understanding” could not be derived from a number of communications by administering agencies since one of those agencies, the Bank of England, had expressed a divergent position.

(4) However, agreement is only absent to the extent that the positions of the parties conflict and for as long as their positions conflict. The fact that Parties apply a treaty differently does not, as such, permit a conclusion that there are conflicting positions regarding the interpretation of the treaty. Such a difference may indicate a disagreement over the one correct interpretation, but it may also simply reflect a common understanding that the treaty permits a certain scope for the exercise of discretion in its application.

Treaties which are characterized by considerations of humanity or other general community interests, such as treaties relating to human rights or refugees, tend to aim at a uniform interpretation but also to leave a margin of appreciation for the exercise of discretion by States.

(5) Whereas equivocal conduct by one or more parties will normally prevent the identification of an agreement, not every element of the conduct of a State which does not fully fit into a general picture necessarily renders the conduct of that State so equivocal that it precludes the identification of an agreement. The Court of Arbitration in the *Beagle Channel* case, for example, found that although at one point the parties had a difference of opinion regarding the interpretation of a treaty, that fact did not necessarily establish that the lack of agreement was permanent:

"... In the same way, negotiations for a settlement that did not result in one [viz. a settlement], could hardly have any permanent effect. At the most they might temporarily have deprived the acts of the Parties of probative value in support of..."

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684 See Crawford, *supra* note 570, p. 30: “There is no reason to think that the word ‘agreement’ in para. (b) has any different meaning as compared to the meaning it has in para. (a)”.

685 See commentary to draft conclusion 1, paras. 12–15 (*Official Records of the General Assembly, Sixty-eighth session, Supplement No. 10, A/68/10, chap. IV.C.2*); article 31 must be “read as a whole” and conceives of the process of interpretation as “a single combined operation”, and is “not laying down a legal hierarchy of norms for the interpretation of treaties”; *Yearbook ... 1966*, vol. II, p. 219, para. 8, and p. 220, para. 9.


687 See commentary to draft conclusion 7, paras. 12–15.

their respective interpretations of the treaty, insofar as these acts were performed during the process of the negotiations. The matter cannot be put higher than that”.

(6) Similarly, in *Loizidou v. Turkey*, the European Court of Human Rights held that the scope of the restrictions which the parties could place on their acceptance of the competence of the Commission and the Court was “confirmed by the subsequent practice of the Contracting parties”, that is, “the evidence of a practice denoting practically universal agreement amongst Contracting Parties that articles 25 and 46 ... of the Convention do not permit territorial or substantive restrictions”. The Court, applying article 31, paragraph 3 (b), described “such a State practice” as being “uniform and consistent”, despite the fact that it simultaneously recognized that two States possibly constituted exceptions. The decision suggests that interpreters, at least under the European Convention, possess some margin when assessing whether an agreement of the parties regarding a certain interpretation is established.

(7) The term “agreement” in the Vienna Convention does not imply any particular requirements of form, including for an “agreement” under article 31, paragraph 3 (a) and (b). The Commission, however, has noted that, in order to distinguish a subsequent agreement under article 31, paragraph 3 (a), and a subsequent practice which “establishes the agreement” of the parties under article 31, paragraph 3 (b), the former presupposes a “single common act”. There is no requirement that an agreement under article 31,

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689 *Case concerning a dispute between Argentina and Chile concerning the Beagle Channel*, 18 February 1977, *Reports of International Arbitral Awards*, vol. XXI, part II, p. 57, at p. 188, para. 171.

690 *Loizidou*, supra note 670, paras. 79 and 81.

691 *Ibid.*, paras. 80 and 82; The case did not concern the interpretation of a particular human right, but rather the question of whether a State was bound to the Convention at all.

692 The more restrictive jurisprudence of the WTO Dispute Settlement Body suggests that different interpreters may evaluate matters differently, see *United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)*, WT/DS294/R, 31 October 2005, para. 7.218: “[…] even if it were established conclusively that all the 76 Members referred to by the European Communities have adopted a certain practice […], this would only mean that a considerable number of WTO Members have adopted an approach different from that of the United States. […] We note that one third party in this proceeding submitted arguments contesting the view of the European Communities.”

693 See articles 2 (1) (a), 3, 24 (2), 39–41, 58 and 60.


paragraph 3 (a), be published or registered under Article 102 of the Charter of the United Nations.697

(8) For an agreement under article 31, paragraph 3, it is not sufficient that the positions of the parties regarding the interpretation of the treaty happen to overlap, but the parties must also be aware of and accept that these positions are common. Thus, in the Kasikili/Sedudu Island case, the International Court of Justice required that, for practice to fall under article 31, paragraph 3 (b), the “authorities were fully aware of and accepted this as a confirmation of the Treaty boundary”.698 Indeed, only the awareness and acceptance of the position of the other parties regarding the interpretation of a treaty justifies the characterization of an agreement under article 31, paragraph 3 (a) or (b), as an “authentic” means of interpretation.699 In certain circumstances, the awareness and acceptance of the position of the other party or parties may be assumed, particularly in the case of treaties which are implemented at the national level.

(9) The aim of the second sentence of paragraph 1 is to reaffirm that “agreement”, for the purpose of article 31, paragraph 3, need not, as such, be legally binding.700 In contrast to other provisions of the Vienna Convention in which the term “agreement is used in the sense of a legally binding instrument”.701

(10) This is confirmed by the fact that the Commission, in its final draft articles on the law of treaties, used the expression “any subsequent practice which establishes the understanding [emphasis added] of the parties”.702 The expression “understanding” indicates that the term “agreement” in article 31, paragraph 3, does not require that the parties thereby undertake or create any legal obligation existing in addition to, or independently of, the treaty.703 The Vienna Conference replaced the expression “understanding” by the word “agreement” not for any substantive reason but “related to drafting only” in order to emphasize that the understanding of the parties was to be their “common” understanding.704 An “agreement” under article 31, paragraph 3 (a), being

698 Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999, p. 1045, at p. 1094, para. 74 (“occupation of the island by the Masubia tribe”) and pp. 1077, para. 55 (“Eason Report” which “appears never to have been made known to Germany”); Dörr, supra note 539, p. 560, para. 88.
699 In this respect the ascertainment of subsequent practice under article 31 (3) (b) may be more demanding than what the formation of customary international law requires, but see Boisson de Chazournes, supra note 543, p. 53–55.
701 See articles 2 (1) (a), 3, 24 (2), 39–41, 58 and 60.
distinguished from an agreement under article 31, paragraph 3 (b), only in form and not in substance, equally need not be legally binding.\textsuperscript{705}

(11) It is thus sufficient that the parties, by a subsequent agreement or a subsequent practice under article 31, paragraph 3, attribute a certain meaning to the treaty,\textsuperscript{706} or in other words, adopt a certain “understanding” of the treaty.\textsuperscript{707} Subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), even if they are not in themselves legally binding, can thus nevertheless, as means of interpretation, give rise to legal consequences as part of the process of interpretation according to article 31.\textsuperscript{708} Accordingly, international courts and tribunals have not required that an “agreement” under article 31, paragraph 3, reflect the intention of the parties to create new, or separate, legally binding undertakings.\textsuperscript{709} Similarly, memoranda of understanding have been recognized, on occasion, as “a potentially important aid to interpretation” – but “not a source of independent legal rights and duties”.\textsuperscript{710}

(12) Some members considered on the other hand that the term ‘agreement’ has the same meaning in all provisions of the Vienna Convention. According to those members, this term designates any understanding which has legal effect between the States concerned and the case-law referred to in the present commentary does not contradict this definition. Such a definition would not prevent taking into account, for the purpose of interpretation, a legally non-binding understanding under Article 32.

(13) The first sentence of paragraph 2 confirms the principle that not all the parties must engage in a particular practice to constitute agreement under article 31, paragraph 3 (b). The second sentence clarifies that acceptance of such practice by those parties not engaged in the practice can under certain circumstances be brought about by silence or inaction.

\textsuperscript{705} Ph. Gautier, supra note 700, para. 14; Aust, supra note 604, pp. 211, 213.

\textsuperscript{706} This terminology follows the commentary of guideline 1.2. (Definition of interpretative declarations) of the Commission’s Guide to Practice on Reservations to Treaties (see Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10, A/66/10/Add.1, p. 69, paras. 18 and 19).

\textsuperscript{707} Yearbook … 1966, vol. II, pp. 221–222, paras. 15 and 16 (uses the term “understanding” both in the context of what became article 31 (3) (a) as well as what became article 31 (3) (b)).


From the outset, the Commission has recognized that an “agreement” deriving from subsequent practice under article 31, paragraph 3 (b), can result, in part, from silence or inaction by one or more parties. Explaining why it used the expression “the understanding of the parties” in draft article 27, paragraph 3 (b) (which later became “the agreement” in article 31, paragraph 3 (b) (see paragraph 10 above)), and not the expression “the understanding of all the parties”, the Commission stated that:

“It considered that the phrase ‘the understanding of the parties’ necessarily means ‘the parties as a whole’. It omitted the word ‘all’ merely to avoid any possible misconception that every party must individually have engaged in the practice where it suffices that it should have accepted the practice.”

The International Court of Justice also has recognized the possibility of expressing agreement regarding interpretation by silence or inaction by stating, in the case concerning the Temple of Preah Vihear, that “where it is clear that the circumstances were such as called for some reaction, within a reasonable period”, the State confronted with a certain subsequent conduct by another party “must be held to have acquiesced”. This general proposition of the Court regarding the role of silence for the purpose of establishing agreement regarding the interpretation of a treaty by subsequent practice has been confirmed by later decisions, and supported generally by writers. The “circumstances” which will “call for some reaction” include the particular setting in which the States parties interact with each other in respect of the treaty.

The Court of Arbitration in the Beagle Channel case dealt with the contention by Argentina that acts of jurisdiction by Chile over certain islands could not be counted as relevant subsequent conduct, since Argentina had not reacted to these acts. The Court, however, held:

“The terms of the Vienna Convention do not specify the ways in which agreement may be manifested. In the context of the present case the acts of jurisdiction were not intended to establish a source of title independent of the terms of the treaty; nor

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712 Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment, I.C.J. Reports 1962, p. 6, at p. 23.
714 M. Kamto, supra note 631, pp. 134–141; Yasseen, supra note 538, p. 49; Gardiner, supra note 538, p. 236; Villiger, supra note 616, p. 431, para. 22; Dörr, supra note 539, pp. 557 and 559, paras. 83 and 86.
716 Case concerning a dispute between Argentina and Chile concerning the Beagle Channel, 18 February 1977, Reports of International Arbitral Awards, vol. XXI, part II, p. 53.
could they be considered as being in contradiction of those terms as understood by Chile. The evidence supports the view that they were public and well-known to Argentina, and that they could only derive from the Treaty. Under these circumstances the silence of Argentina permits the inference that the acts tended to confirm an interpretation of the meaning of the Treaty independent of the acts of jurisdiction themselves.”

In the same case, the Court of Arbitration considered that:

“The mere publication of a number of maps of (as the Court has already shown) extremely dubious standing and value could not — even if they nevertheless represented the official Argentine view — preclude or foreclose Chile from engaging in acts that would, correspondingly, demonstrate her own view of what were her rights under the 1881 Treaty – nor could such publication of itself absolve Argentina from all further necessity for reaction in respect of those acts, if she considered them contrary to the treaty.”

(17) The significance of silence also depends on the legal situation to which the subsequent practice by the other party relates and on the claim thereby expressed. Thus, in the case concerning the Land and Maritime Boundary between Cameroon and Nigeria, the International Court of Justice held that:

“Some of these activities — organization of public health and education, policing, administration of justice — could normally be considered to be acts à titre de souverain. The Court notes, however, that, as there was a pre-existing title held by Cameroon in this area, the pertinent legal test is whether there was thus evidenced acquiescence by Cameroon in the passing of the title from itself to Nigeria.”

(18) This judgment suggests that in cases which concern treaties delimiting a boundary the circumstances will only very exceptionally call for a reaction with respect to conduct which runs counter to the delimitation. In such situations, there appears to be a strong presumption that silence or inaction does not constitute acceptance of a practice.

(19) The relevance of silence or inaction for the establishment of an agreement regarding interpretation depends to a large extent on the circumstances of the specific case. Decisions of international courts and tribunals demonstrate that acceptance of a practice by one or more parties by way of silence or inaction is not easily established.

(20) International courts and tribunals, for example, have been reluctant to accept that parliamentary proceedings or domestic court judgments are considered as subsequent practice under article 31, paragraph 3 (b), to which other parties to the treaty would be expected to react, even if such proceedings or judgments had come to their attention through other channels, including by their own diplomatic service.

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717 Ibid., at p. 187, para. 169 (a).
718 Ibid.
720 Ibid., at p. 351, para. 64: “The Court notes, however, that now that it has made its findings that the frontier in Lake Chad was delimited ..., it follows that any Nigerian effectivités are indeed to be evaluated for their legal consequences as acts contra legem”; Frontier Dispute, Judgment, I.C.J. Reports 1986, p. 554, at p. 586, para. 63; Case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal, Decision of 31 July 1989, Reports of International Arbitral Awards, vol. XX, part II (Dissenting Opinion of Judge Bedjaoui), p. 119, at p. 181, para. 70.
Further, even where a party, by its conduct, expresses a certain position towards another party (or parties) regarding the interpretation of a treaty, this does not necessarily call for a reaction by the other party or parties. In the Kasikili/Sedudu Island case, the International Court of Justice held that a State which did not react to the findings of a joint commission of experts, which had been entrusted by the parties to determine a particular factual situation with respect to a disputed matter, did not thereby provide a ground for the conclusion that an agreement had been reached with respect to the dispute. The Court found that the parties had considered the work of the experts as being merely a preparatory step for a separate decision subsequently to be taken on the political level. On a more general level, the WTO Appellate Body has held that:

“in specific situations, the ‘lack of reaction’ or silence by a particular treaty party may, in the light of attendant circumstances, be understood as acceptance of the practice of other treaty parties. Such situations may occur when a party that has not engaged in a practice has become or has been made aware of the practice of other parties (for example, by means of notification or by virtue of participation in a forum where it is discussed), but does not react to it.”

The International Tribunal for the Law of the Sea has confirmed this approach. Taking into account the practice of states in interpreting articles 56, 58 and 73 of UNCLOS, the Tribunal stated:

“The Tribunal acknowledges that the national legislation of several States, not only in the West African region, but also in some other regions of the world, regulates bunkering of foreign vessels fishing in their exclusive economic zones in a way comparable to that of Guinea-Bissau. The Tribunal further notes that there is no manifest objection to such legislation and that it is, in general, complied with.”

The possible legal significance of silence or inaction in the face of a subsequent practice of a party to a treaty is not limited to contributing to a possible underlying common agreement, but may also play a role for the operation of non-consent based rules, such as estoppel, preclusion or prescription.

Once established, an agreement between the parties under article 31, paragraph 3 (a) and (b), can eventually be terminated. The parties may replace it by another agreement with a different scope or content under article 31, paragraph 3. In this case, the new agreement replaces the previous one as an authentic means of interpretation from the date of its existence, at least with effect for the future. Such situations, however, should not be lightly assumed as States usually do not change their interpretation of a treaty according to short-term considerations.

It is also possible for a disagreement to arise between the parties regarding the interpretation of the treaty after they had reached a subsequent agreement regarding such
interpretation. Such a disagreement, however, normally will not replace the prior subsequent agreement, since the principle of good faith prevents a party from simply disavowing the legitimate expectations which have been created by a common interpretation.\(^727\) On the other hand, clear expressions of disavowal by one party of a previous understanding arising from common practice “do reduce in a major way the significance of the practice after that date”, without however diminishing the significance of the previous common practice.\(^728\)

**Conclusion 10**

**Decisions adopted within the framework of a Conference of States Parties**

1. A Conference of States Parties, under these draft conclusions, is a meeting of States parties pursuant to a treaty for the purpose of reviewing or implementing the treaty, except if they act as members of an organ of an international organization.

2. The legal effect of a decision adopted within the framework of a Conference of States Parties depends primarily on the treaty and any applicable rules of procedure. Depending on the circumstances, such a decision may embody, explicitly or implicitly, a subsequent agreement under article 31, paragraph 3 (a), or give rise to subsequent practice under article 31, paragraph 3 (b), or to subsequent practice under article 32. Decisions adopted within the framework of a Conference of States Parties often provide a non-exclusive range of practical options for implementing the treaty.

3. A decision adopted within the framework of a Conference of States Parties embodies a subsequent agreement or subsequent practice under article 31, paragraph 3, in so far as it expresses agreement in substance between the parties regarding the interpretation of a treaty, regardless of the form and the procedure by which the decision was adopted, including by consensus.

**Commentary**

(1) Draft conclusion 10 addresses a particular form of action by States which may result in a subsequent agreement or subsequent practice under article 31, paragraph 3, or subsequent practice under article 32, namely, decisions adopted within the framework of Conferences of States Parties.\(^729\)

(2) States typically use Conferences of States Parties as a form of action for the continuous process of multilateral treaty review and implementation.\(^730\) Such Conferences can be roughly divided into two basic categories. First, some Conferences are actually an organ of an international organization within which States parties act in their capacity as members of that organ (e.g. meetings of the States parties of the World Trade Organization, \(^\text{Maritime Dispute (Peru v. Chile), I.C.J., Judgment of 27 January 2014, p. 52, para. 142. Available from www.icj-cij.org/docket/files/137/17930.pdf.}\)

\(^{727}\) Karl, supra note 539, p. 151.

\(^{728}\) Other designations include: Meetings of the Parties or Assemblies of the States Parties.

the Organization for the Prohibition of Chemical Weapons, or the International Civil Aviation Organization). Such Conferences of States Parties do not fall within the scope of draft conclusion 10, which does not address the subsequent practice of and within international organizations. Second, other Conferences of States Parties are convened pursuant to treaties that do not establish an international organization; rather, the treaty simply provides for more or less periodic meetings of the States parties for their review and implementation. Such review conferences are frameworks for States parties’ cooperation and subsequent conduct with respect to the treaty. Either type of Conference of States Parties may also have specific powers concerning amendments and/or the adaptation of treaties. Examples include the review conference process of the 1972 Biological Weapons Convention (BWC), the Review Conference under article VIII (3) of the 1968 Non-Proliferation Treaty (NPT), and Conferences of States Parties established by international environmental treaties. The International Whaling Commission (IWC) under the International Convention for the Regulation of Whaling is a borderline case between the two basic categories of Conferences of States Parties and its subsequent practice was considered in the judgment of the International Court of Justice in the Whaling in the Antarctic case.

(3) Since Conferences of States Parties are usually established by treaties they are, in a sense, ‘treaty bodies’. However, they should not be confused with bodies which are

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732 Subsequent agreements and subsequent practice under treaties which establish international organizations will be the subject of another report.

733 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (Biological Weapons Convention), 1972 (United Nations, Treaty Series, vol. 1015, No. 14860), article XI. According to this mechanism, States parties meeting in a review conference shall “review the operation of the Convention, with a view to assuring that the purposes of the preamble and the provisions of the Convention (...) are being realized. Such review shall take into account any new scientific and technological developments relevant to the Convention” (art. XII).

734 Treaty on the Non-Proliferation of Nuclear Weapons 1968, (United Nations, Treaty Series, vol. 729, No. 10483); article VIII, paragraph 3, establishes that a review conference shall be held five years after its entry into force, and, if so decided, at intervals of five years thereafter “in order to review the operation of this Treaty with a view to assuring that the purposes of the preamble and the provisions of the Treaty are being realized”. By way of such decisions, States parties review the operation of the Treaty on the Non-Proliferation of Nuclear Weapons, article by article, and formulate conclusions and recommendations on follow-on actions.


736 The Convention is often described as establishing an international organization, but it does not do so clearly, and it provides IWC with features which fit the present definition of a Conference of States Parties.

comprised of independent experts or bodies with a limited membership. Conferences of States Parties are more or less periodical meetings which are open to all of the parties of a treaty.

(4) In order to acknowledge the wide diversity of Conferences of States Parties and the rules under which they operate, paragraph 1 provides a broad definition of the term “Conference of States Parties” for the purpose of these draft conclusions, which only excludes action of States as members of an organ of an international organization (which will be the subject of a later draft conclusion).

(5) The first sentence of paragraph 2 recognizes that the legal significance of any acts undertaken by Conferences of States Parties depends, in the first instance, on the rules that govern the Conferences of States Parties, notably the constituent treaty and any applicable rules of procedure. Conferences of States Parties perform a variety of acts, including reviewing the implementation of the treaty, reviewing the treaty itself, and decisions under amendment procedures.738

(6) The powers of a Conference of States Parties can be contained in general clauses or in specific provisions, or both. For example, Article 7 (2) of the United Nations Framework Convention on Climate Change begins with the following general language, before enumerating thirteen specific tasks for the Conference, one of which concerns examining the obligations of the Parties under the treaty:

“The Conference of the Parties, as the supreme body of this Convention, shall keep under regular review the implementation of the Convention and any related legal instruments that the Conference of the Parties may adopt, and shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention.”

(7) Specific provisions contained in various treaties refer to the Conference of the Parties proposing “guidelines” for the implementation of particular treaty provisions,739 or defining “the relevant principles, modalities, rules and guidelines” for a treaty scheme.740

(8) Amendment procedures (in a broad sense of the term) include procedures by which the primary text of the treaty may be amended (the result of which mostly requires ratification by States parties according to their constitutional procedures), as well as tacit

738 Convention on Wetlands of International Importance especially as Waterfowl Habitat: article 6, paragraph 1, on review functions and article 10 bis, on amendments; United Nations Framework Convention on Climate Change: article 7, paragraph 2, on review powers, and article 15, on amendments; Kyoto Protocol, article 13, paragraph 4, on review powers of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol, article 20 on amendment procedures; Convention on International Trade in Endangered Species of Wild Fauna and Flora (United Nations, Treaty Series, vol. 993, No. 14537), art. XI on review Conference of the Parties, and XVII on amendment procedures Treaty on the Non-Proliferation of Nuclear Weapons; World Health Organization Framework Convention on Tobacco Control (United Nations, Treaty Series, vol. 2302, No. 41032), article 23, paragraph 5 (review powers), article 28 (amendments) and article 33 (protocols).

739 Articles 7 and 9, of the World Health Organization Framework Convention on Tobacco Control.

acceptance and opt-out procedures that commonly apply to annexes, containing lists of substances, species or other elements that need to be updated regularly.

(9) As a point of departure, paragraph 2 provides that the legal effect of a decision adopted within the framework of a Conference of States Parties depends primarily on the treaty in question and any applicable rules of procedure. The word “primarily” leaves room for subsidiary rules “unless the treaty otherwise provides” (see e.g. articles 16, 20, 22, paragraph 1, 24, 70, paragraph 1, and 72, paragraph 1, of the Vienna Convention on the Law of Treaties). The word “any” clarifies that rules of procedure of Conferences of States Parties, if they exist, will apply, given that there may be situations where such conferences operate with no specifically adopted rules of procedure.

(10) The second sentence of paragraph 2 recognizes that decisions of Conferences of States Parties may constitute subsequent agreement or subsequent practice for treaty interpretation under articles 31 and 32 of the Vienna Convention. Decisions adopted within the framework of Conferences of States Parties can perform an important function for determining the Parties’ common understanding of the meaning of the treaty.

(11) Decisions of Conferences of States Parties, inter alia, may constitute or reflect subsequent agreements under article 31, paragraph 3 (a), by which the parties interpret the underlying treaty. For example, the Biological Weapons Convention Review Conference has regularly adopted “understandings and additional agreements” regarding the interpretation of the Convention’s provisions. These agreements have been adopted by States Parties within the framework of the review conferences, by consensus, and they “have evolved across all articles of the treaty to address specific issues as and when they arose”. Through these understandings, States Parties interpret the provisions of the Convention by defining, specifying or otherwise elaborating on the meaning and scope of the provisions, as well as through the adoption of guidelines on their implementation. The Biological Weapons Convention Implementation and Support Unit defines an “additional agreement” as one which:

(i) Interprets, defines or elaborates the meaning or scope of a provision of the Convention; or
(ii) Provides instructions, guidelines or recommendations on how a provision should be implemented.

(12) Similarly, the Conference of States Parties under the London (Dumping) Convention has adopted resolutions interpreting that convention. The Sub-Division for Legal Affairs of

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742 Ibid.
743 This is the case, for example, for the UN Framework Convention on Climate Change.
745 The “Implementation Support Unit” was created by the Conference of States Parties, in order to provide administrative support to the Conference, and to enhance confidence building measures among States parties (see Final Document of the Sixth Review Conference of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (BWC/CONF.VI/6), pp. 19–20).
746 See background information document submitted by the Implementation and Support Unit, prepared for the Seventh Review Conference of the States Parties to the Convention, entitled “Additional agreements reached by previous Review Conferences relating to each article of the Convention” (BWC/CONF.VII/INF.5) (updated to include the understandings and agreements reached by that Conference, Geneva 2012).
the International Maritime Organization, upon a request of the governing bodies, opined as follows in relation to an “interpretative resolution” of the Conference of States Parties under the London Convention:

According to article 31, paragraph (3) (a), of the Vienna Convention on the Law of Treaties, 1969 (the Vienna Convention), subsequent agreements between the Parties shall be taken into account in the interpretation of a treaty. The article does not provide for a specific form of the subsequent agreement containing such interpretation. This seems to indicate that, provided its intention is clear, the interpretation could take various forms, including a resolution adopted at a meeting of the parties, or even a decision recorded in the summary records of a meeting of the parties.747

(13) In as similar vein, the World Health Organization (WHO) Legal Counsel has stated in general terms that:

“Decisions of the Conference of the Parties, as the supreme body comprising all Parties to the FCTC, undoubtedly represent a ‘subsequent agreement between the Parties regarding the interpretation of the treaty’, as stated in Article 31 of the Vienna Convention”.748

(14) Commentators have also viewed decisions of Conferences of States Parties as being capable of embodying subsequent agreements749 and have observed that:

“Such declarations are not legally binding in and of themselves, but they may have juridical significance, especially as a source of authoritative interpretations of the treaty.”750

(15) The International Court of Justice has held with respect to the role of the IWC under the International Convention for the Regulation of Whaling:

“Article VI of the Convention states that ‘[t]he Commission may from time to time make recommendations to any or all Contracting Governments on any matters which relate to whales or whaling and to the objectives and purposes of this Convention’. These recommendations, which take the form of resolutions, are not binding. However, when they are adopted by consensus or by a unanimous vote, they may be relevant for the interpretation of the Convention or its Schedule.”751

747 Agenda item 4 (Ocean fertilization), submitted by the Secretariat on procedural requirements in relation to a decision on an interpretive resolution: views of the IMO Sub-Division of Legal Affairs (International Maritime Organization, document LC 33/J/6, para. 3).


(16) The following examples from the practice of Conferences of States Parties support the proposition that decisions by such Conferences may embody subsequent agreements under article 31, paragraph 3 (a):

(17) “Article I, paragraph 1, of the Biological Weapons Convention provides that States parties undertake never in any circumstances to develop, produce, stockpile or otherwise acquire or retain:

Microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes”;

(18) At the third Review Conference (1991), States parties specified that:

“the prohibitions established in this provision relate to microbial or other biological agents, or toxins, which are “harmful to plants and animals, as well as humans (…)”; 

(19) Article 4, paragraph 9, of the Montreal Protocol has given rise to a debate about the definition of its term “State not party to this Protocol”. According to Article 4, paragraph 9

“For the purposes of this Article, the term ‘State not party to this Protocol’ shall include, with respect to a particular controlled substance, a State or regional economic integration organization that has not agreed to be bound by the control measures in effect for that substance.”

(20) In the case of hydrochlorofluorocarbons (or HCFCs), two relevant amendments, the Beijing amendment and the Copenhagen amendment, impose obligations which raised the question as to whether a State, in order to be “not party to this Protocol”, has to be a non-party with respect to both amendments. The COP decided that

“The term ‘State not party to this Protocol’ includes all other States and regional economic integration organizations that have not agreed to be bound by the Copenhagen and Beijing Amendments.”

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752 Final Declaration of the Third Review Conference of the Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (BWC/CONF.III/23, part II).

753 For details, see decision XV/3 on obligations of parties to the Beijing Amendment under article 4 of the Montreal Protocol with respect to hydrochlorofluorocarbons, Montreal Protocol on Substances that Deplete the Ozone Layer (United Nations, Treaty Series, vol. 1522, No. 26369); the definition itself is formulated as follows: 1. (...) (a) The term “State not party to this Protocol” in article 4, paragraph 9 does not apply to those States operating under article 5, paragraph 1, of the Protocol until January 1, 2016 when, in accordance with the Copenhagen and Beijing Amendments, hydrochlorofluorocarbon production and consumption control measures will be in effect for States that operate under article 5, paragraph 1, of the Protocol; (b) The term “State not party to this Protocol” includes all other States and regional economic integration organizations that have not agreed to be bound by the Copenhagen and Beijing Amendments; (c) Recognizing, however, the practical difficulties imposed by the timing associated with the adoption of the foregoing interpretation of the term “State not party to this Protocol,” paragraph 1 (b) shall apply unless such a State has by 31 March 2004: (i) Notified the Secretariat that it intends to ratify, accede or accept the Beijing Amendment as soon as possible; (ii) Certified that it is in full compliance with articles 2, 2A to 2G and article 4 of the Protocol, as amended by the Copenhagen Amendment; (iii) Submitted data on (i) and (ii) above to the Secretariat, to be updated on 31 March 2005, in which case that State shall fall outside the definition of “State not party to this Protocol” until the conclusion of the Seventeenth Meeting of the Parties (UNEP/OzL.Pro.15/9, chap. XVIII.A).
(21) Whereas the acts which are the result of a tacit acceptance procedure\textsuperscript{754} are not, as such, subsequent agreements by the parties under article 31, paragraph 3 (a), they can, in addition to their primary effect under the treaty, under certain circumstances imply such a subsequent agreement. One example concerns certain decisions of the Conference of the Parties to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Convention).\textsuperscript{755} At its sixteenth meeting, held in 1993, the Consultative Meeting of Contracting Parties adopted three amendments to annex I by way of the tacit acceptance procedure provided for in the Convention.\textsuperscript{756} As such, these amendments were not subsequent agreements. They did, however, also imply a wide-ranging interpretation of the underlying treaty itself.\textsuperscript{757} The amendment refers to and builds on a resolution that was adopted by the Consultative Meeting held three years earlier and which had established the agreement of the parties that “[t]he London Dumping Convention is the appropriate body to address the issue of low-level radioactive waste disposal into sub-seabed repositories accessed from the sea”.\textsuperscript{758} The resolution has been described as “effectively expand[ing] the definition of ‘dumping’ under the Convention by deciding that this term covers the disposal of waste into or under the seabed from the sea but not from land by tunnelling”.\textsuperscript{759} Thus, the amendment confirmed that the interpretative resolution contained a subsequent agreement regarding the interpretation of the treaty.

(22) The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal provides in Article 17, paragraph 5, that “Amendments (…) shall enter into force between Parties having accepted them on the ninetieth day after the receipt by the Depositary of their instrument of ratification, approval, formal confirmation or acceptance by at least three-fourths of the Parties who accepted them (…)”. Led by an Indonesian-Swiss initiative, the Conference of the Parties decided to clarify the requirement of the acceptance by three-fourths of the Parties, by agreeing,

“without prejudice to any other multilateral environmental agreement, that the meaning of paragraph 5 of Article 17 of the Basel Convention should be interpreted to mean that the acceptance of three-fourths of those parties that were parties at the time of the adoption of the amendment is required for the entry into force of such amendment, noting that such an interpretation of paragraph 5 of Article 17 does not compel any party to ratify the Ban Amendment.”\textsuperscript{760}

\textsuperscript{754} See paragraph (8) above.


\textsuperscript{756} See London sixteenth Consultative Meeting of the Contracting Parties, resolution LC.51 (16), and resolution LC.50 (16); First, the decided to amend the phase-out-dumping of industrial waste by 31 December 1995. Second, it banned the incineration at sea of industrial waste and sewage sludge. And finally, it decided to replace para. 6 of annex I, banning the dumping of radioactive waste or other radioactive matter (see “Dumping at sea: the evolution of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (LC), 1972”, Focus on IMO (London, International Maritime Organization, July 1997).

\textsuperscript{757} It has even been asserted that these amendments to annex I of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter “constitute major changes in the Convention” (see Churchill and Ulfstein, supra note 730, p. 638).

\textsuperscript{758} International Maritime Organization, resolution LDC.41 (13), para. 1.

\textsuperscript{759} Churchill and Ulfstein, supra note 730, p. 641.

The parties adopted this decision on the interpretation of article 17, paragraph 5, by consensus, with many States Parties underlining that the Conferences of the States Parties to any convention are “the ultimate authority as to its interpretation”. While this suggests that the decision embodies a subsequent agreement of the parties under article 31, paragraph 3 (a), the decision was taken after a debate about whether a formal amendment of the Convention was necessary to achieve this result. It should also be noted that Japan, requesting that this position be reflected in the Conference’s Report, stated that his delegation “supported the current-time approach to the interpretation of the provision of the Convention regarding entry into force of amendments, as described in a legal advice provided by the United Nations Office of Legal Affairs as the Depositary, and had accepted the fixed-time approach enunciated in the decision on the Indonesian-Swiss country-led initiative only in this particular instance.”

(23) The preceding examples demonstrate that decisions of Conferences of States Parties may embody under certain circumstances subsequent agreements under article 31, paragraph 3 (a), and give rise to subsequent practice under articles 31, paragraph 3 (b), or to other subsequent practice under article 32 if they do not reflect agreement of the parties. The respective character of a decision of a Conference of States Parties, however, must always be carefully identified. For this purpose, the specificity and the clarity of the terms chosen in the light of the text of the Conference of the States Parties decision as a whole, its object and purpose, and the way in which it is applied, need to be taken into account. The parties often do not intend that such a decision has any particular legal significance.

(24) The last sentence of paragraph 2 of draft conclusion 10 reminds the interpreter that decisions of Conferences of States Parties often provide a range of practical options for implementing the treaty, which may not necessarily embody a subsequent agreement and subsequent practice for the purpose of treaty interpretation. Indeed, Conferences of States Parties often do not explicitly seek to resolve or address questions of interpretation of a treaty.

(25) A decision by the Conference of the States Parties to the WHO Framework Convention on Tobacco Control provides an example. Articles 9 and 10 of the Convention deal, respectively, with the regulation of the contents of tobacco products, and with the regulation of the disclosure of information regarding the contents of such products. Acknowledging that such measures require the allocation of significant financial resources, the States Parties agreed, under the title of “practical considerations” for the implementation of articles 9 and 10, on “some options that Parties could consider using”, such as

“(a) designated tobacco taxes;

761 Ibid., para. 65.
763 The “current-time approach” favoured by the UN Legal Adviser stipulates that “[w]here the treaty is silent or ambiguous on the matter, the practice of the Secretary-General is to calculate the number of acceptances on the basis of the number of parties to the treaty at the time of deposit of each instrument of acceptance of an amendment.” See extracts from OLA’s Memorandum of 8 March 2004, available at http://www.basel.int/TheConvention/Overview/Amendments/Background/tabid/2760/Default.aspx.
(b) tobacco manufacturing and/or importing licensing fees;
(c) tobacco product registration fees;
(d) licensing of tobacco distributors and/or retailers;
(e) non-compliance fees levied on the tobacco industry and retailers; and
(f) annual tobacco surveillance fees (tobacco industry and retailers)."\textsuperscript{766}

This decision provides a non-exhaustive range of practical options for implementing articles 9 and 10 of the Convention. The parties have thereby, however, implicitly agreed that the stated “options” would, as such, be compatible with the Convention.

(26) It follows that decisions of Conferences of States Parties may have different legal effects. Such decisions are often not intended to embody a subsequent agreement under article 31, paragraph 3 (a), by themselves because they are not meant to be a statement regarding the interpretation of the treaty. In other cases the parties have made it sufficiently clear that the Conference of State Parties decision embodies their agreement regarding the interpretation of the treaty. In still other cases they may produce a legal effect in combination with a general duty to cooperate under the treaty, which then puts the parties “under an obligation to give due regard” to such a decision.\textsuperscript{767} In any case, it cannot simply be said that because the treaty does not accord the Conference of the States Parties a competence to take legally binding decisions, their decisions are necessarily legally irrelevant and constitute only political commitments.\textsuperscript{768}

(27) Ultimately, the effect of a decision of a Conference of States Parties depends on the circumstances of each particular case and such decisions need to be properly interpreted. A relevant consideration may be whether States parties uniformly or without challenge apply the treaty as interpreted by the Conference of States Parties decision. Discordant practice following a Conference of States Parties decision may be an indication that States did not assume that the decision would be a subsequent agreement under article 31, paragraph 3 (a).\textsuperscript{769} Conference of States Parties’ decisions which do not qualify as subsequent agreements under article 31, paragraph 3 (a), or as subsequent practice under article 31, paragraph 3 (b), nevertheless may be a subsidiary means of interpretation under article 32.\textsuperscript{770}

(28) Paragraph 3 sets forth the principle that agreements regarding the interpretation of a treaty under article 31, paragraph 3, must relate to the content of the treaty. Thus, what is important is the substance of the agreement embodied in the decision of the Conference of States Parties and not the form or procedure by which that decision is reached. Acts which originate from Conferences of States Parties may have different forms and designations, and they may be the result of different procedures. Conferences of States Parties may even

\textsuperscript{766} FCTC/COP4(10): Partial guidelines for implementation of Articles 9 and 10 of the WHO Framework Convention on Tobacco Control (Regulation of the contents of tobacco products and Regulation of tobacco product disclosures), Annex, adopted at the 4th Conference of the States Parties to the WHO Framework Convention on Tobacco Control (Punta del Este, Uruguay, 15–20 November 2010).
\textsuperscript{768} Ibid., para. 46.
\textsuperscript{769} See commentary on draft conclusion 9, paragraphs (22)–(23) above.
operate without formally adopted rules of procedure.771 If the decision of the Conference of States Parties is based on a unanimous vote in which all parties participate, it may clearly embody a “subsequent agreement” under article 31, paragraph 3 (a), provided that it is “regarding the interpretation of the treaty”.

(29) Conference of States Parties decisions regarding review and implementation functions, however, normally are adopted by consensus. This practice derives from rules of procedure which usually require States parties to make every effort to achieve consensus on substantive matters. An early example can be found in the Provisional Rules of Procedure for the Review Conference of the Parties to the Biological Weapons Convention. According to rule 28, paragraph 2:

“The task of the Review Conference being to review the operation of the Convention with a view to assuring that the purposes of the preamble and the provisions of the Convention are being realized, and thus to strengthen its effectiveness, every effort should be made to reach agreement on substantive matters by means of consensus. There should be no voting on such matters until all efforts to achieve consensus have been exhausted.”772

This formula, with only minor variations, has become the standard with regard to substantive decision-making procedures at Conferences of States Parties.

(30) In order to address concerns relating to decisions adopted by consensus, the phrase “including by consensus” was introduced at the end of paragraph 3 in order to dispel the notion that a decision by consensus would necessarily be equated with agreement in substance. Indeed, consensus is not a concept which necessarily indicates any particular degree of agreement on substance. According to the Comments on some Procedural Questions issued by the Office of Legal Affairs of the United Nations Secretariat in accordance with United Nations General Assembly resolution 60/286 (2006):773

“Consensus is generally understood as a decision-taking process consisting in arriving at a decision without formal objections and vote. It may however not necessarily reflect ‘unanimity’ of opinion on the substantive matter. It is used to

771 The Conference of States Parties to the UNFCCC provisionally applies the draft rules of procedure, contained in FCCC/CP/1996/2, with the exception of draft rule 42 “Voting”, since no agreement has been reached so far on one of the two voting alternatives contained therein, cf. Report of the Conference of the Parties on its first session (28 March to 7 April 1995) (FCCC/CP/1995/7), p. 8, para. 10; Report of the Conference of the Parties on its nineteenth session (11 to 23 November 2013) (FCCC/CP/2013/10), p. 6, para. 4; similarly, the Conference of States Parties to the Convention on Biological Diversity did not adopt Rule 40 paragraph 1 (Voting) of the Rules of Procedure “because of the lack of consensus among the Parties concerning the majority required for decision-making on matters of substance”, Report of the Eleventh Meeting of the Conference of the Parties to the Convention on Biological Diversity (8–19 October 2012) (UNEP/CBD/COP/11/35), at p. 21, para. 65.

772 See rule 28, paragraph 2, of the provisional rules of procedure for the Review Conference of the Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, held in Geneva, from 3 to 21 March 1980 (BWC/CONF.I/2).

773 See General Assembly resolution 60/286 of 8 September 2006, on revitalization of the General Assembly, requiring the United Nations Secretariat “to make precedents and past practice available in the public domain with respect to rules and practices of the intergovernmental bodies of the Organization” (para. 24).
describe the practice under which every effort is made to achieve general agreement and no delegation objects explicitly to a consensus being recorded.”

(31) It follows that adoption by consensus is not a sufficient condition for an agreement under article 31, paragraph 3 (b). The rules of procedure of Conferences of States Parties usually do not give an indication as to the possible legal effect of a resolution as a subsequent agreement under article 31, paragraph 3 (a) or a subsequent practice under article 31, paragraph 3 (b). Such rules of procedure only determine how the Conference of States Parties shall adopt its decisions, not their possible legal effect as a subsequent agreement under article 31, paragraph 3. Although subsequent agreements under article 31, paragraph 3 (a) need not be binding as such, the Vienna Convention attributes them a legal effect under article 31 only if there exists agreement in substance among the parties concerning the interpretation of a treaty. The International Court of Justice has confirmed that the distinction between the form of a collective decision and the agreement in substance is pertinent in such a context.

(32) That certain decisions, despite having been declared as being adopted by consensus, cannot represent a subsequent agreement under article 31, paragraph 3 (a), is especially true when there exists an objection by one or more States Parties to that consensus.

(33) For example, at its Sixth Meeting in 2002, the Conference of the States Parties to the Convention on Biological Diversity worked on formulating guiding principles for the prevention, introduction and mitigation of impacts of alien species that threaten ecosystems, habitats or species. After several efforts to reach an agreement had failed, the President of the Conference of the States Parties proposed that the decision be adopted, and the reservations which Australia had raised be recorded in the final report of the meeting. Australia’s representative, however, reiterated that the guiding principles could not be accepted and that “his formal objection therefore stood”. The President declared the debate closed and, “following established practice”, declared the decision adopted without a vote, clarifying that the objections of the dissenting States would be reflected in the final report of the meeting. Following the adoption, Australia reiterated its view that consensus is adoption without formal objection, and expressed concerns about the legality of the adoption of the draft decision. As a result, a footnote to decision VI/23 indicates that “one representative entered a formal objection during the process leading to the adoption of this decision and underlined that he did not believe that the Conference of the Parties could legitimately adopt a motion or a text with a formal objection in place”.

(34) In this situation, the Executive Secretary of the Convention on Biological Diversity requested a legal opinion from the United Nations Legal Counsel. The opinion by the UN Legal Counsel expressed the view that a party could “disassociate from the substance or text of the document, indicate that joining consensus does not constitute acceptance of the

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776 See decision VI/23 (UNEP/CBD/COP/6/20, annex I).
778 Ibid., para. 318; for the discussion see paras. 294–324.
780 Ibid.
substance or text or parts of the document and/or present any other restrictions on its
Government’s position on the substance or text of the document (…)”. 781 Thus, it is clear
that a decision by consensus can occur in the face of rejection of the substance of the
decision by one or more of the States Parties.

(35) The decision under the Convention on Biological Diversity, as well as a similar
decision reached in Cancún in 2010 by the Meeting of the Parties to the Kyoto Protocol to
the Climate Change Convention (Bolivia’s objection notwithstanding), 782 raise the
important question of what “consensus” means. 783 However, this question, which does not
fall within the scope of the present topic, must be distinguished from the question of
whether all the parties to a treaty have arrived at an agreement in substance on matters of
interpretation of that treaty under article 31, paragraphs 3 (a) and (b). Decisions by
Conferences of States Parties, which do not reflect agreement in substance among all the
parties, do not qualify as agreements under article 31, paragraph 3, but maybe a form of
“other subsequent practice” under article 32 (see draft conclusion 4, paragraph 3).

(36) A different issue concerns the legal effect of a decision of a Conference of the
Parties once it qualifies as an agreement under article 31, paragraph (3). In 2011, the IMO
Sub-Division for Legal Affairs was asked to “advise the governing bodies […] about the
procedural requirements in relation to a decision on an interpretative resolution and, in
particular, whether or not consensus would be needed for such a decision”.784 In its
response, while confirming that a resolution by the Conference of States Parties can
constitute, in principle, a subsequent agreement under article 31, paragraph 3 (a), the IMO
Sub-Division for Legal Affairs advised the governing bodies that even if the Conference
were to adopt a decision based on consensus, that would not mean that the decision would
be binding on all the parties.785

(37) Although the opinion of the IMO Sub-Division for Legal Affairs proceeded from the
erroneous assumption that a “subsequent agreement” under article 31, paragraph 3 (a),
would only be binding “as a treaty, or an amendment thereto”,786 it came to the correct
conclusion that even if the consensus decision by a Conference of the Parties embodies an
agreement regarding interpretation in substance it is not (necessarily) binding upon the
parties.787 Rather, as the Commission has indicated, a subsequent agreement under article
31, paragraph 3 (a), is only one of different means of interpretation to be taken into account
in the process of interpretation.788

(38) Thus, interpretative resolutions by Conferences of States Parties which are adopted
by consensus, even if they are not binding as such, can nevertheless be subsequent
agreements under article 31, paragraph 3 (a), or subsequent practice under article 31,
paragraph 3 (b), if there are sufficient indications that that was the intention of the parties at

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782 See decision 1/CMP.6 on the Cancun Agreements: outcome of the work of the Ad Hoc Working
Group on Further Commitments for Annex I Parties under the Kyoto Protocol at its fifteenth session;
and decision 2/CMP.6 the Cancun Agreements: land use, land-use change and forestry, adopted by
Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol
(FCCC/KP/CMP/2010/12/Add.1); and proceedings of the Conference of the Parties serving as the
Meeting of the Parties to the Kyoto Protocol (FCCC/KP/CMP/2010/12), para. 29.
784 International Maritime Organization, document LC 33/4, para. 4.15.2.
785 International Maritime Organization, document LC 33/J/6, para. 3.
786 Ibid., para. 8.
787 See commentary on draft conclusion 9, paragraphs (9)–(11) above.
788 Commentary to draft conclusion 2, para. 4 (Official Records of the General Assembly, Sixty-eighth
Session, Supplement No. 10 (A/68/10), chap. IV.C.2).
the time of the adoption of the decision, or if the subsequent practice of the parties establishes an agreement on the interpretation of the treaty. The interpreter must give appropriate weight to such an interpretative resolution under article 31, paragraph 3 (a), but not necessarily treat it as legally binding.790
