

Contribution of the European Union on the topic of subsequent agreements and subsequent practice in relation to treaty interpretation

The European Union (hereinafter the "Union" or "EU") refers to the request of the International Law Commission extended to States and international organisations

"(a) to provide it with any examples where the practice of an international organization has contributed to the interpretation of a treaty; and

*(b) to provide it with any examples where pronouncements or other action by a treaty body consisting of independent experts have been considered as giving rise to, subsequent agreements or subsequent practice relevant for the interpretation of a treaty"*¹

and has the pleasure to submit the following.

The Union recalls from the outset that it is a well-settled case law of the European Court of Justice (ECJ) that *"even though the Vienna Convention on the Law of Treaties of 23 May 1969 does not bind either the European Union or all its Member States, that convention reflects the rules of customary international law which, as such, are binding upon the EU institutions and form part of the legal order of the European Union"*², as well as that *"international treaty law was codified, in essence, by the Vienna Convention and. . the rules contained in that convention apply to an agreement concluded between a State and an international organisation"*³.

The EU will consider the request of the International Law Commission from two points of view: first, the application of Article 31 (3) (a) and (b) of the Vienna Convention on the Law of Treaties (VCLT) with regard to the interpretation of the founding Treaties of the Union, *i.e.* Treaty of the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU); second, the application of Article 31 (3) (a) and (b) of the VCLT with regard to the interpretation of international agreements to which the Union is a Party.

I. Application of Article 31 (3) (a) and (b) of the VCLT with regard to the interpretation of the founding Treaties of the Union

The Special Rapporteur has pointed out in his First report that *"[t]he European Court of Justice treats the rules of the founding treaties ("primary Union law") as constituting an "autonomous legal order" and accordingly does not refer to the Vienna Convention when*

¹ Report of the International Law Commission, A/69/10, paragraph 26.

² Case C-410/11, request for preliminary ruling in the proceedings *Pedro Espada Sánchez, Alejandra Oviedo Gonzáles, Lucía Espada Oviedo, Pedro Espada Oviedo v. Iberia Líneas Aéreas de España SA*, paragraph 21. See also case C-386/08, request for preliminary ruling in the proceedings of *Brita GmbH v. Hauptzollamt Hamburg-Hafen*, paragraph 42 and case law cited therein.

³ Case C-613/12, request for preliminary ruling in the proceedings *Helm Dungenmittel GmbH v Hauptzollamt Krefeld*, paragraph 37. See also case C-386/08 cited above, paragraphs 40-41.

*interpreting those treaties*⁴, as well as that "[t]he European Court of Justice, in contrast to other adjudicatory bodies, has refrained from taking subsequent practice of the member States into account when interpreting the founding treaties of the Union (primary Union law). This is in keeping with the general approach to treat the founding treaties as constituting an "autonomous legal order" and thus not to refer to and apply the Vienna Convention when interpreting those treaties "⁵

The Union can confirm that the above statements correctly reflect the current state of the case-law of the ECJ. That the Union law represents an autonomous legal order and that the founding Treaties of the Union are not like ordinary international treaties is a long standing and well-settled case-law, the origins of which could be traced back to judgements delivered already in the early years of the existence of the then European Communities. It was reconfirmed as recently as in Opinion 2/13 of 18 December 2014 on the compatibility with the Treaties of the draft agreement on the accession of the Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, where the ECJ stated the following:

*" ..the founding treaties of the EU, unlike ordinary international treaties, established a new legal order, possessing its own institutions, for the benefit of which the Member States thereof have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only those States but also their nationals "*⁶ (internal citations omitted).

However, it should also be pointed out that, despite its autonomous character, the Union law is not an absolutely closed or impermeable legal order; quite the contrary, it is open to other legal orders, to which it refers in order to fill its own lacunae, one of those legal orders being International law. The case-law of the ECJ provides some examples where the Court turns to International law, in particular, to the law of treaties, as codified by the VCLT, looking for an answer.

For instance, it has applied the international customary rules on treaty interpretation to the interpretation of the founding Treaties of the Union.⁷ Also, it has applied the international rules on successive treaties relating to the same subject-matter and concluded by the same parties to solve contradictions existing between those Treaties, on the one hand, and treaties concluded before their entry into force by the Member States among themselves, on the other.⁸

⁴ First report on subsequent agreements and subsequent practice in relation to treaty interpretation, A/CN.4/660, paragraph 26

⁵ *Id.*, paragraph 41.

⁶ Opinion 2/13 of 18.12.2014, paragraph 157 and case law cited therein.

⁷ See Opinion 1/91 of 14.12.1991 on the compatibility with the Treaties of the draft agreement relating to the creation of the European Economic Area, paragraph 14, Case C-321/91, *Metalsa*, paragraph 12; and Case C-268/99, *Aldona Malgorzata Jany and others*, paragraph 35

⁸ See Case C-10/61, *Commission of the European Economic Community v. Italian Republic*, rep. p.22.

The Special Rapporteur has already pointed that the Court refrains from taking into account of Member States subsequent practice when interpreting the founding Treaties. The Court has also declined to accept a subsequent agreement between all Member States having as an effect extension of a deadline for fulfilment of an obligation fixed by the Treaties. In case C-43/75⁹ the Court considered, *inter alia*, a Resolution of the Conference of the Member States of 30 December 1961 introducing a timetable for equalizing the pay of men and women which envisaged the obligation to be fulfilled by 31 December 1964 while Article 119 EEC Treaty has set a deadline of 31 December 1961. The Court held that "[w]ithout prejudice to its possible effects as regards encouraging and accelerating the full implementation of Article 119, the Resolution of the Member States of 30 December 1961 was ineffective to make any valid modification of the time-limit fixed by the Treaty"¹⁰

In light of the specific characteristic of the Union and its autonomous legal order, it might be interesting for the International Law Commission to note that according to case-law of the ECJ, subsequent practice of institutions of the Union in implementation of the founding Treaties is not capable of creating a precedent binding upon the Union's institutions with regard to the proper interpretation and implementation of the relevant provisions of the Treaties. In this respect, it could be pointed to the judgement of 23 February 1988 in the Case C-68/86 where the Court held that "...in the context of the organization of the powers of the Community the choice of the legal basis for a measure must be based on objective factors which are amenable to judicial review. A mere practice on the part of the Council cannot derogate from the rules laid down in the Treaty. Such a practice cannot therefore create a precedent binding on Community institutions with regard to the correct legal basis"¹¹ (emphasis added)

Also, in its judgment of 9 August 1994 in Case C-327/91, and against an argument advanced by the European Commission that the use of the term "*reconnus*" in the French version of the EEC Treaty shows that it may derive its powers from sources other than the Treaty, such as practices followed by the institutions, the Court held that "...in any event, a mere practice cannot override the provisions of the Treaty."¹²

Further, according to a consistent case-law, the fact that the European Commission, in her general task of guardian of the Treaties, has not reacted against an infringement of European law on the part of a Member State does not imply on her side neither an approval of the State behaviour or a refusal to initiate in the future enforcement proceedings ex Article 258 TFEU against that State.

⁹ Case C-43/73, reference for a preliminary ruling in the proceedings between *Gabrielle Defienne v Societe Anonyme Belge de Navigation Aeriennne Sabena*

¹⁰ *Id.*, paragraph 57.

¹¹ Case C-68/86, *United Kingdom of Great Britain and Northern Ireland v. Council of the European Communities*, paragraph 24 and case-law cited therein

¹² Case C-327/91, *French Republic v Commission of the European Communities*, paragraphs 31 and 36.

The above position is considered to be a settled case-law¹³ and is constantly applied by the ECJ. For example, in a recent judgment in case C-81/13, the Court reiterated that "[t]he legal basis that has been used for the adoption of other European Union measures which might, in certain cases, display similar characteristics is *irrelevant* in that regard"¹⁴ (emphasis added)

The ECJ case-law relating to the principle of State liability for breach of Union law introduces a qualification to this general idea. In order to be held responsible for harm caused to individuals by breaches of Union law the infringement must constitute a "sufficiently serious infringement". One of the factors that national courts may take into consideration for characterising as such the breaches of Union law brought before them is *"the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law"*¹⁵. So, the conduct of the institutions does not avoid the existence of a breach, but it could avoid characterizing the breach as "sufficiently serious".

Finally, it could be mentioned that the conduct of either Member States and the institutions of the Union contrary to an unambiguous provision of the Treaties cannot raise, on the part of the individuals, a legitimate expectation deserving protection.

The Union would point here to a couple of judgements, the first regarding the Member States, the second regarding the institutions of the Union:

- Case 153/10: *"The Court has held that the principle of the protection of legitimate expectations cannot be relied upon against an unambiguous provision of European Union law, nor can the conduct of a national authority responsible for applying European Union law, which acts in breach of that law, give rise to a legitimate expectation on the part of a trader of beneficial treatment contrary to European Union law"*¹⁶ (internal citations omitted)
- Case T-475/07: *"[A]ccording to settled case-law, the right to rely on the principle of the protection of legitimate expectations extends to any individual who is in a situation in which it is clear that the Community authorities have, by giving him precise assurances, led him to entertain legitimate expectations (...). However, a person may not plead infringement of that principle unless he has been given precise assurances by the authorities. Moreover, only assurances which comply with the*

¹³ See to that effect judgement in Case T-240/10, *French Republic v the Commission of the European Communities*, stating inter alia that "[a]ccording to settled case-law, a mere practice cannot override the provisions of the Treaty and cannot alter the division of powers between the institutions" (internal citations omitted), paragraph 45.

¹⁴ Case C-81/13, *United Kingdom of Great Britain and Northern Ireland v Council of the European Union*, paragraph 36 and case law cited therein.

¹⁵ Cases C-46/93 and C-48/93, *Brasserie du Pecheur SA and Federal Republic of Germany and The Queen and Secretary of State for Transport, ex parte. Factorame Ltd and Others*, paragraph 56

¹⁶ Case C-153/10, reference to a preliminary ruling in the proceedings between *Staatssecretaris van Financiën v Sony Supply Chain Solutions (Europe) BV, formerly Sony Logistics Europe BV*, paragraph 47.

applicable rules may give rise to legitimate expectations ¹⁷ (internal citations omitted)

II. Application of Article 31 (3) (a) and (b) of the VCLT with regard to the interpretation of international agreements to which the Union is a Party

1. Case-law of the European Court of Justice

The Special Rapporteur has pointed out that *"when the European Court of Justice interprets agreements of the Union with third States it considers itself bound by the rules of customary international law as they are reflected in the rules of interpretation of the Vienna Convention."*¹⁸, as well as that *"the Court does take subsequent practice into account when it interprets agreements which the Union has concluded with third States, and it has recognised the relevance of "settled practice of the parties to the Agreement" for the purpose of their interpretation."*¹⁹

The above statements also correctly reflect the current state of the case-law of the ECJ. There is a lot of case-law confirming the above but the Union would point to just a few judgments, which specifically refer to practice of the parties to an international agreement. For example:

- Case C-52/77, relating, *inter alia*, to the interpretation of the Agreement between European Economic Community and Spain, the Court specifically referred to the practice of the parties to the Agreement to confirm a particular interpretation, stating the following: *"Moreover, that interpretation is confirmed by the settled practice of the parties to the Agreement, as it emerges from the documents produced by the Commission"*²⁰.
- Case C-432/92, relating to the interpretation of the Agreement establishing Association between the European Economic Community and the Republic of Cyprus, the Court specifically referred to the relevance of subsequent practice for the interpretation of the Agreement (*"43. Although, in accordance with the rules on interpretation of international treaties (see Article 31 of the Vienna Convention on the law of the Treaties of 23 May 1969, hereinafter 'the Vienna Convention') substantial importance properly attaches to the object and the purpose of a treaty and to any subsequent practice in its application..) and held that "...the practice followed in applying the Agreement after the material events took place does not suffice to establish unequivocally, within the meaning of Article 21 of the Vienna Convention, the existence of an agreement between the parties regarding the interpretation of the relevant provisions of the 1977 Protocol."*, and further held that *"Moreover, as is clear from the file, the practice followed after the material events reflects the absence of a uniform approach on the part of the Member States."*

¹⁷ Case T-475/07, *Dow AgroSciences Ltd and Others v. European Commission*, paragraph 265.

¹⁸ First report on subsequent agreements and subsequent practice in relation to treaty interpretation, A/CN.4/660, paragraph 26.

¹⁹ *Id.*, paragraph 41.

²⁰ Case C-52/77, reference for a preliminary ruling in the proceedings between *Leone Cayrol v Giovanni Rivoira & Fighi*, paragraph 18, p 2277.

Although some Member States have accepted certificates issued by authorities other than those of the Republic of Cyprus, others have not."²¹

2. World Trade Organisation dispute settlement

In his reports the Special Rapporteur has studied, among others, reports of World Trade Organisation (WTO) panels and the WTO Appellate Body. As a Member of the WTO, the Union is an active participant in WTO dispute settlement and finds it appropriate to briefly set out the relevant reports below.

WTO panels and the Appellate Body have pronounced themselves on the criteria that must be fulfilled to establish "subsequent practice". WTO panels and the Appellate Body have also considered whether practice by (a) the WTO bodies and (b) the European Union could be relevant as "subsequent practice" when interpreting the WTO covered agreements. In light of the request of the ILC for examples where the practice of an international organisation has contributed to the interpretation of a treaty, the Union is pleased to provide some examples of such cases.

2.1 General criteria for establishing "subsequent practice"

The Appellate Body clarified that there are two elements to be established. First, there must be a common, consistent and discernable pattern of acts or pronouncements. Second, those acts or pronouncements must imply agreement on the interpretation of the relevant provision.

- In *Japan – Alcoholic Beverages II*, the Appellate Body found that "[g]enerally, in international law, the essence of 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. An isolated act is generally not sufficient to establish subsequent practice; it is a sequence of acts establishing the agreement of the parties that is relevant".²²
- The Appellate Body repeated in *US – Gambling* that establishing subsequent practice within the meaning of Article 31(3)(b) of the VCLT involves two elements: "(i) there must be a common, consistent, discernible pattern of acts or pronouncements; and (ii) those acts or pronouncements must imply agreement on the interpretation of the relevant provision".²³
- Also in *China – Raw Materials*, the WTO Panel stated that under Article 31(3)b of the VCLT, a treaty interpreter may take into account the subsequent practice in the

²¹ Case C-432/92, reference for a preliminary ruling, *The Queen and the Minister of Agriculture, Fisheries and Food*, paragraphs 43 and 52

²² Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 97

²³ Appellate Body Report, *US – Measures Affecting the Cross-border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, para 192 (emphasis original)

application of the treaty whenever such practice establishes the agreement of the parties regarding its interpretation.²⁴

WTO panels and the Appellate Body have also stressed the need for sufficient evidence on the existence of a "subsequent practice".

- For instance, in *Chile – Price Band System*, the Appellate Body rejected Chile's argument that it was highly relevant that no country that had a price band system in place before the conclusion of the Uruguay Round actually converted it into ordinary customs duties. The Appellate Body found that there was no discernible pattern of acts or pronouncements implying an agreement among WTO Members on the interpretation of the relevant WTO provision (i.e. Article 4.2 of the *Agreement on Agriculture*).²⁵
- Further, in *EC – IT Products*, the Panel found that "*it is incumbent on a party asserting the existence of a 'common' and 'concordant' practice among WTO Members to provide sufficient evidence – which clearly is something beyond a handful of classification exercises in one Member – to establish such a 'consistent, common and concordant' classification practice*".²⁶
- In *China – Intellectual Property Rights*, the Panel disagreed that certain enforcement policies of two authorities of two Members, a draft Directive of another Member and various free trade agreements entered into by the United States constituted subsequent practice for the purpose of interpreting the *TRIPS Agreement*. The Panel found that this material "*lacks the breadth to constitute a common, consistent, discernible pattern of acts or pronouncements*" and its content "*does not imply agreement on the interpretation of Article 61 of the TRIPS Agreement*".²⁷

2.2 Practice of WTO Bodies and the Secretariat

The Appellate Body and an Arbitrator have refused to consider GATT/WTO reports as "subsequent practice".

²⁴ Panel Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R, WT/DS395/R, WT/DS397/R, as modified by the Appellate Body, adopted 22 February 2012, para. 7.247 (footnote 423).

²⁵ Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002, DSR 2002 VIII, p. 3045 (Corr 1, DSR 2006 XII, p. 5473), paras 213 – 214.

²⁶ Panel Report, *EC – Tariff Classification of Certain Information Technology Products*, WT/DS375/R, WT/DS376/R, WT/DS377/R, adopted 21 September 2010, para. 7.565.

²⁷ Panel Report, *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R, adopted 20 March 2009, para. 7.581.

- In *Japan – Alcoholic Beverages II* the Appellate Body did not agree with the Panel's conclusion that adopted GATT/WTO panel reports constitute subsequent practice in a specific case for the purposes of Article 31 of the VCLT.²⁸
- In *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body repeated that panel reports adopted by the GATT Members and the WTO Dispute Settlement Body do not constitute subsequent practice in a specific case in the sense of Article 31 of the VCLT.²⁹
- Finally, the Arbitrator in *US – Offset Act (Byrd Amendment) (Brazil) (Article 22.6 – US)* found that, "[a]s a matter of fact, we do not consider previous arbitrations to be constitutive of 'subsequent practice', within the meaning of that concept under public international law (see Vienna Convention on the Law of Treaties, Article 31.3(b))".³⁰

Also outside the context of WTO entities involved in WTO dispute settlement, the Appellate Body did not consider the practice of WTO bodies, or the Secretariat, to constitute "subsequent practice" for the purpose of interpreting the WTO covered agreements.

- In *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, the Appellate Body did not "consider that GATT and WTO practice of granting waivers from Article I:1 and Article XIII [of the General Agreement on Tariffs and Trade 1994 ('GATT 1994')] provided conclusive guidance on whether duty-free tariff quotas are subject to Article XIII [of the GATT 1994]".³¹
- In *US – Gambling*, the Appellate Body examined the meaning of certain market access commitments in the US schedules of specific GATS commitments. The Appellate Body examined three WTO documents that were invoked as "subsequent practice": the 1993 *Scheduling Guidelines*, document W/120 (the *Services Sectoral Classification List*) and the 2001 *Scheduling Guidelines*. The Appellate Body considered that the 2001 *Scheduling Guidelines* could not constitute subsequent practice for the US commitments made in 1994. Further, it also disagreed that document W/120 and the 1993 *Scheduling Guidelines* constituted subsequent practice. Because these documents were prepared by the WTO Secretariat, they did not constitute a "common, consistent, discernible pattern of acts or pronouncements by Members as a whole". Moreover, they did not demonstrate a common understanding

²⁸ Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 97.

²⁹ Appellate Body Report, *US – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011, para. 325 (footnote 238).

³⁰ Decision by the Arbitrator, *United States – Continued Dumping and Subsidy Offset Act of 2000, Original Complaint by Brazil – Recourse to Arbitration by the United States under Article 22.6 of the DSU*, WT/DS217/ARB/BRA, 31 August 2004, DSR 2004:IX, p. 4341, para. 3.42, footnote 57.

³¹ Appellate Body Reports, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador*, WT/DS27/AB/RW2/ECU, adopted 11 December 2008, and Corr 1 / *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States*, WT/DS27/AB/RW/USA and Corr.1, adopted 22 December 2008, DSR 2008:XVIII, p. 7165, para. 349.

among Members that specific commitments are to be interpreted by reference to these documents.³²

2.3 Practice of the EU in the context of the WTO

WTO panels and the Appellate Body have considered whether the practice of the EU – possibly on its own – would be relevant as "subsequent practice". This question arose principally in the context of the interpretation of tariff schedules.

- In *EC – Computer Equipment*, the Appellate Body found that the Panel in those proceedings would have been required, as part of a "proper interpretation", to include an examination of the existence and relevance of subsequent practice relating to classification in tariff schedules.³³
- In *EC – Chicken Cuts*, concerning the interpretation of the EU schedules of tariff concessions, the Appellate Body examined whether it is required that *all* WTO Members must have engaged in a particular practice, or whether there may be situations where the practice of a sub-set of the WTO Membership, or even of one Member only (the EU) may be sufficient.

The Appellate Body found that "*.. not each and every party must have engaged in a particular practice for it to qualify as a 'common' and 'concordant' practice.*" The Appellate Body considered it nevertheless "*difficult to establish a 'concordant, common and discernible pattern' on the basis of acts or pronouncements of one, or very few parties to a multilateral treaty, such as the WTO Agreement*" The Appellate Body stated that, given that tariff commitments "*were negotiated on the basis of the Harmonized System*", the "*relevant tariff headings are common to all WTO Members*" and, therefore, the classification practice of other WTO Members with regard to those headings is also relevant.³⁴ It also disagreed that "*'lack of protest' against one Member's classification practice by other WTO Members may be understood, on its own, as establishing agreement with that practice by those other Members*".³⁵ According to the Appellate Body, it should not be determined that "subsequent practice" under Article 31(3)(b) of the VCLT "*has been established by virtue of the fact that the Panel [h]ad not been provided any evidence to indicate that WTO Members protested against the EC classification practice in question*".³⁶ Finally, the Appellate Body recalled that relying on "subsequent practice" for purposes of interpretation must not lead to interference with the "exclusive authority" of the Ministerial Conference and the General Council (as provided for in Article IX:2 of the

³² Appellate Body Report, *US – Measures Affecting the Cross-border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, paras. 193-194

³³ Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, p. 1851

³⁴ Appellate Body Report, *EC – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, paras. 259-266

³⁵ *Ibid.*, para. 272.

³⁶ *Ibid.*

WTO Agreement) to adopt interpretations of WTO agreements that are binding on all Members.³⁷

³⁷ *Ibid*, para 273