

## Chapter IV

### SUBSEQUENT AGREEMENTS AND SUBSEQUENT PRACTICE IN RELATION TO THE INTERPRETATION OF TREATIES

#### A. Introduction

29. 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.<sup>9</sup> 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 identifying the issues to be covered, the working methods of the Study Group and the possible outcome of the Commission’s work on the topic.<sup>10</sup>

30. From the sixty-second to the sixty-fourth sessions (2010–2012), the Study Group was reconstituted under the chairpersonship of Mr. Georg Nolte. The Study Group examined three reports presented informally by the Chairperson, which addressed, respectively, the relevant jurisprudence of the International Court of Justice and of the arbitral tribunals of *ad hoc* jurisdiction;<sup>11</sup> the jurisprudence under special regimes relating to subsequent agreements and subsequent practice;<sup>12</sup> and the subsequent agreements and subsequent practice of States outside judicial and quasi-judicial proceedings.<sup>13</sup>

31. At the sixty-third session (2011), the Chairperson of the Study Group presented nine preliminary conclusions, reformulated in the light of discussions in the Study Group.<sup>14</sup> At the sixty-fourth session (2012), the Chairperson presented the text of six additional preliminary conclusions, also reformulated in the light of discussions in the Study Group.<sup>15</sup> The Study Group also discussed the format in which further work on the topic should proceed and the possible outcome of the work. A number of suggestions were formulated by the Chairperson and agreed upon by the Study Group.<sup>16</sup>

32. At the sixty-fourth session, the Commission, on the basis of a recommendation from the Study Group,<sup>17</sup> also

decided (a) to change, with effect from its sixty-fifth session (2013), the format of 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”.<sup>18</sup>

#### B. Consideration of the topic at the present session

33. At the present session, the Commission had before it the first report of the Special Rapporteur (A/CN.4/660), which it considered at its 3159th to 3163rd meetings, from 6 to 8 and on 10 and 14 May 2013.

34. In his first report, the Special Rapporteur, after addressing the scope, aim and possible outcome of work on this topic (paras. 4–7), considered the general rule and means of treaty interpretation (paras. 8–28); subsequent agreements and subsequent practice as means of interpretation (paras. 29–64); the definition of subsequent agreement and subsequent practice as means of treaty interpretation (paras. 65–118); and the attribution of a treaty-related practice to a State (paras. 119–144). The report also contained some indications as to the future programme of work (para. 145). The Special Rapporteur proposed a draft conclusion corresponding to each of the four issues addressed in paragraphs 8 to 144.<sup>19</sup>

<sup>18</sup> *Ibid.*, para. 227.

<sup>19</sup> The four draft conclusions proposed by the Special Rapporteur read as follows:

“Draft conclusion 1. *General rule and means of treaty interpretation*

“Article 31 of the Vienna Convention on the Law of Treaties, as treaty obligation and as reflection of customary international law, sets forth the general rule on the interpretation of treaties.

“The interpretation of a treaty in a specific case may result in a different emphasis on the various means of interpretation contained in articles 31 and 32 of the Vienna Convention, in particular on the text of the treaty or on its object and purpose, depending on the treaty or on the treaty provisions concerned.

...

“Draft conclusion 2. *Subsequent agreements and subsequent practice as authentic means of interpretation*

“Subsequent agreements and subsequent practice between the parties to a treaty are authentic means of interpretation which shall be taken into account in the interpretation of treaties.

“Subsequent agreements and subsequent practice by the parties may guide an evolutive interpretation of a treaty.

...

“Draft conclusion 3. *Definition of subsequent agreement and subsequent practice as means of treaty interpretation*

“For the purpose of treaty interpretation a ‘subsequent agreement’ is a manifested agreement between the parties after the conclusion of a treaty regarding its interpretation or the application of its provisions.

“For the purpose of treaty interpretation ‘subsequent practice’ consists of conduct, including pronouncements, by one or more parties to the treaty after its conclusion regarding its interpretation or application.

<sup>9</sup> At its 2997th meeting, on 8 August 2008 (see *Yearbook ... 2008*, vol. II (Part Two), para. 353). For the syllabus of the topic, see *ibid.*, annex I. The General Assembly, in paragraph 6 of its resolution 63/123 of 11 December 2008, took note of the decision.

<sup>10</sup> See *Yearbook ... 2009*, vol. II (Part Two), paras. 220–226.

<sup>11</sup> See *Yearbook ... 2010*, vol. II (Part Two), paras. 345–354; and *Yearbook ... 2011*, vol. II (Part Two), para. 337.

<sup>12</sup> See *Yearbook ... 2011*, vol. II (Part Two), paras. 338–341; and *Yearbook ... 2012*, vol. II (Part Two), paras. 230–231.

<sup>13</sup> See *Yearbook ... 2012*, vol. II (Part Two), paras. 232–234.

<sup>14</sup> For the text of the preliminary conclusions by the Chairperson of the Study Group, see *Yearbook ... 2011*, vol. II (Part Two), para. 344.

<sup>15</sup> For the text of the preliminary conclusions by the Chairperson of the Study Group, see *Yearbook ... 2012*, vol. II (Part Two), para. 240.

<sup>16</sup> *Ibid.*, paras. 235–239.

<sup>17</sup> *Ibid.*, paras. 226 and 239.

35. At its 3163rd meeting, on 14 May 2013, the Commission referred draft conclusions 1 to 4, as contained in the Special Rapporteur's first report, to the Drafting Committee.

36. At its 3172nd meeting, on 31 May 2013, the Commission considered the report of the Drafting Committee and provisionally adopted five draft conclusions (see section C.1 below).

37. At its 3191st to 3193rd meetings, on 5 and 6 August 2013, 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-fifth session

### 1. TEXT OF THE DRAFT CONCLUSIONS

38. The text of the draft conclusions provisionally adopted so far by the Commission is reproduced below.

#### *Conclusion 1. General rule and means of treaty interpretation*

1. Articles 31 and 32 of the Vienna Convention on the Law of Treaties set forth, respectively, the general rule of interpretation and the rule on supplementary means of interpretation. These rules also apply as customary international law.

2. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.

3. Article 31, paragraph 3, provides, *inter alia*, that there shall be taken into account, together with the context, (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; and (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

4. Recourse may be had to other subsequent practice in the application of the treaty as a supplementary means of interpretation under article 32.

5. The interpretation of a treaty consists of a single combined operation, which places appropriate emphasis on the various means of interpretation indicated, respectively, in articles 31 and 32.

#### *Conclusion 2. Subsequent agreements and subsequent practice as authentic means of interpretation*

Subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), being objective evidence of the

understanding of the parties as to the meaning of the treaty, are authentic means of interpretation, in the application of the general rule of treaty interpretation reflected in article 31.

#### *Conclusion 3. Interpretation of treaty terms as capable of evolving over time*

Subsequent agreements and subsequent practice under articles 31 and 32 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.

#### *Conclusion 4. Definition of subsequent agreement and subsequent practice*

1. A "subsequent agreement" as an authentic means of interpretation under article 31, paragraph 3 (a), is an agreement between the parties, reached after the conclusion of a treaty, regarding the interpretation of the treaty or the application of its provisions.

2. A "subsequent practice" as an authentic means of interpretation under article 31, paragraph 3 (b), consists of conduct in the application of a treaty, after its conclusion, which establishes the agreement of the parties regarding the interpretation of the treaty.

3. Other "subsequent practice" as a supplementary means of interpretation under article 32 consists of conduct by one or more parties in the application of the treaty, after its conclusion.

#### *Conclusion 5. Attribution of subsequent practice*

1. Subsequent practice under articles 31 and 32 may consist of any conduct in the application of a treaty which is attributable to a party to the treaty under international law.

2. Other conduct, including by non-State actors, does not constitute subsequent practice under articles 31 and 32. Such conduct may, however, be relevant when assessing the subsequent practice of parties to a treaty.

### 2. TEXT OF THE DRAFT CONCLUSIONS AND COMMENTARIES THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS SIXTY-FIFTH SESSION

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

## Introduction

(1) The following draft conclusions are based on the Vienna Convention on the law of treaties (1969 Vienna Convention), which constitutes the framework for work on the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties". The Commission considers that the relevant rules of the 1969 Vienna Convention today enjoy general acceptance.<sup>20</sup>

(2) The first five draft conclusions are general in nature. Other aspects of the topic, in particular more specific points, will be addressed at a later stage of the work.

#### *Conclusion 1. General rule and means of treaty interpretation*

1. Articles 31 and 32 of the Vienna Convention on the Law of Treaties set forth, respectively, the general rule of interpretation and the rule on supplementary

"Subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation is a means of interpretation according to article 31 (3) (b) of the Vienna Convention. Other subsequent practice may under certain circumstances be used as a supplementary means of interpretation according to article 32 of the Vienna Convention.

...  
"Draft conclusion 4. Possible authors and attribution of subsequent practice

"Subsequent practice can consist of conduct of all State organs which can be attributed to a State for the purpose of treaty interpretation.

"Subsequent practice by non-State actors, including social practice, may be taken into account for the purpose of treaty interpretation as far as it is reflected in or adopted by subsequent State practice, or as evidence of such State practice."

<sup>20</sup> See draft conclusion 1, para. 1, and accompanying commentary.

means of interpretation. These rules also apply as customary international law.

2. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.

3. Article 31, paragraph 3, provides, *inter alia*, that there shall be taken into account, together with the context, (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; and (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

4. Recourse may be had to other subsequent practice in the application of the treaty as a supplementary means of interpretation under article 32.

5. The interpretation of a treaty consists of a single combined operation, which places appropriate emphasis on the various means of interpretation indicated, respectively, in articles 31 and 32.

#### Commentary

(1) Draft conclusion 1 situates subsequent agreements and subsequent practice as a means of treaty interpretation within the framework of the rules on the interpretation of treaties set forth in articles 31 and 32 of the 1969 Vienna Convention. The title “General rule and means of treaty interpretation” signals two points. First, article 31 of the Vienna Convention, as a whole, is the “general rule” of treaty interpretation.<sup>21</sup> Second, articles 31 and 32 of the Vienna Convention together list a number of “means of interpretation” which must (art. 31) or may (art. 32) be taken into account in the interpretation of treaties.<sup>22</sup>

(2) Paragraph 1 of draft conclusion 1 emphasizes the interrelationship between articles 31 and 32 of the 1969 Vienna Convention, as well as the fact that these provisions, together, reflect customary international law. The reference to both articles 31 and 32 clarifies from the start the general context in which subsequent agreements and subsequent practice are addressed in the draft conclusions.

(3) Whereas article 31 sets forth the general rule and article 32 deals with supplementary means of interpretation, both rules<sup>23</sup> must be read together as they constitute an integrated framework for the interpretation of treaties. Article 32 includes a threshold between the primary means

of interpretation according to article 31,<sup>24</sup> all of which are to be taken into account in the process of interpretation, and the “supplementary means of interpretation” to which recourse may be had when the interpretation according to article 31 leaves the meaning of the treaty or its terms ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable.

(4) The second sentence of paragraph 1 of draft conclusion 1 confirms that the rules enshrined in articles 31 and 32 of the Vienna Convention reflect customary international law.<sup>25</sup> International courts and tribunals have acknowledged the customary character of these rules. This is true, in particular, for the International Court of Justice,<sup>26</sup> the International Tribunal for the Law of the Sea (ITLOS),<sup>27</sup> inter-State arbitrations,<sup>28</sup> the Appellate Body of the World Trade Organization (WTO),<sup>29</sup> the European Court of

<sup>24</sup> *Yearbook ... 1966*, vol. II, document A/6309/Rev.1 (Part II), p. 223, para. (19); third report on the law of treaties, by Sir Humphrey Waldock, Special Rapporteur, *Yearbook ... 1964*, vol. II, document A/CN.4/167 and Add.1–3, pp. 58–59, para. (21); M. K. Yasseen, “L’interprétation des traités d’après la Convention de Vienne sur le droit des traités”, *Recueil des cours de l’Académie de droit international de La Haye*, 1976-III, vol. 151, p. 1, at p. 78; I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed. (Manchester, Manchester University Press, 1984), pp. 141–142; Villiger, “The 1969 Vienna Convention ...” (see footnote 22 above), pp. 127–128.

<sup>25</sup> Y. le Bouthillier, “Commentary on Article 32 of the Vienna Convention”, in O. Corten and P. Klein (eds.), *The Vienna Conventions on the Law of Treaties: A Commentary* (Oxford, Oxford University Press, 2011), p. 841, at pp. 843–846, paras. 4–8; P. Daillier, M. Forteau and A. Pellet, *Droit international public*, 8th ed. (Paris, Librairie générale de droit et de jurisprudence, 2009), pp. 285–286; Gardiner (see footnote 23 above), pp. 12–19; Villiger, “The 1969 Vienna Convention ...” (see footnote 22 above), pp. 132–133.

<sup>26</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 14, at p. 46, para. 65 (Vienna Convention, art. 31); *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Reports 2009, p. 213, at p. 237, para. 47; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, at pp. 109–110, para. 160; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136, at p. 174, para. 94; *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, I.C.J. Reports 2004, p. 12, at p. 48, para. 83; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, I.C.J. Reports 2002, p. 625, at pp. 645–646, para. 37; *LaGrand (Germany v. United States of America)*, Judgment, I.C.J. Reports 2001, p. 466, at p. 501, para. 99 (Vienna Convention, art. 31); *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, I.C.J. Reports 1999, p. 1045, at p. 1059, para. 18 (Vienna Convention, art. 31); *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, I.C.J. Reports 1994, p. 6, at pp. 21–22, para. 41 (Vienna Convention, art. 31; art. 32 of the Vienna Convention is not expressly mentioned but reference is made to supplementary means of interpretation).

<sup>27</sup> *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10, at p. 28, para. 57.

<sup>28</sup> *Arbitration regarding the Iron Rhine (“Ijzeren Rijn”) Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, Decision, 24 May 2005, UNRIAA, vol. XXVII (Sales No. E/F.06.V.8), p. 35, at p. 62, para. 45 (Vienna Convention, arts. 31–32).

<sup>29</sup> Article 3, paragraph 2, of the Understanding on Rules and Procedures Governing the Settlement of Disputes provides that “it serves ... to clarify the existing provisions of [the] agreements [covered by WTO] in accordance with customary rules of interpretation of public international law”, but does not specifically refer to articles 31 and 32 of the Vienna Convention. However, the Appellate Body has consistently recognized that articles 31 and 32 reflect rules of customary international law, and has resorted to them by reference to article 3, paragraph 2, of the Understanding. See, for example, WTO, Appellate Body

<sup>21</sup> Title of article 31 of the 1969 Vienna Convention.

<sup>22</sup> See first report on subsequent agreements and subsequent practice in relation to treaty interpretation (A/CN.4/660), para. 8; see also M. E. Villiger, “The 1969 Vienna Convention on the Law of Treaties—40 years after”, *Recueil des cours de l’Académie de droit international de La Haye*, 2009, vol. 344, p. 9, at pp. 118–119 and 126–128.

<sup>23</sup> On the meaning of the term “rules” in this context, see *Yearbook ... 1966*, vol. II, document A/6309/Rev.1 (Part II), pp. 218–220; and R. K. Gardiner, *Treaty Interpretation* (Oxford, Oxford University Press, 2008), pp. 36–38.

Human Rights,<sup>30</sup> the Inter-American Court of Human Rights,<sup>31</sup> the Court of Justice of the European Union,<sup>32</sup> and tribunals established by the International Centre for Settlement of Investment Disputes under the Convention on the settlement of investment disputes between States and nationals of other States.<sup>33</sup> Hence, the rules contained in articles 31 and 32 apply as treaty law in relation to those States which are parties to the Vienna Convention for treaties which fall within the scope of the Convention, and as customary international law between all States.

(5) The Commission also considered referring to article 33 of the Vienna Convention in draft conclusion 1 and whether this provision also reflected customary international law. Article 33 may be relevant for draft conclusions on the topic of subsequent agreements and subsequent practice in relation to treaty interpretation. A “subsequent agreement” under article 31, paragraph 3 (a), for example, could be formulated in two or more languages, and there could be questions regarding the relationship of any subsequent agreement to different language versions of the treaty itself. The Commission nevertheless decided not to address such questions for the time being, but left open the possibility to do so should this issue come up in future work on the topic.

(6) The Commission, in particular, considered whether the rules set forth in article 33 reflected customary international law. Some members thought that all the rules in article 33 reflected customary international law, while others wanted to leave open the possibility that only some, but not all, rules set forth in this provision qualified as such. The jurisprudence of international courts and tribunals has not yet fully addressed the question. The International Court of Justice and the WTO Appellate Body have considered parts of article 33 to reflect rules of customary international law: in *LaGrand*, the Court recognized that paragraph 4 of

article 33 reflects customary international law.<sup>34</sup> It is less clear whether the Court in the *Kasikili/Sedudu Island* case considered that paragraph 3 of article 33 reflected a customary rule.<sup>35</sup> The WTO Appellate Body has held that the rules in paragraphs 3 and 4 reflect customary law.<sup>36</sup> The Arbitral Tribunal in the *German External Debts* case found that paragraph 1 “incorporated” a “principle”.<sup>37</sup> ITLOS and the European Court of Human Rights have gone one step further and stated that article 33 as a whole reflects customary law.<sup>38</sup> Thus, there are significant indications in the case law that article 33, in its entirety, indeed reflects customary international law.

(7) Paragraph 2 of draft conclusion 1 reproduces the text of article 31, paragraph 1, given its importance for the topic. Article 31, paragraph 1, is the point of departure for any treaty interpretation according to the general rule contained in article 31 as a whole. This is intended to contribute to ensuring balance in the process of interpretation between an assessment of the terms of the treaty in their context and in the light of its object and purpose, on the one hand, and the considerations regarding subsequent agreements and subsequent practice, on the other hand, in the following draft conclusions. The reiteration of article 31, paragraph 1, as a separate paragraph is not, however, meant to suggest that this paragraph and the means of interpretation mentioned therein possess a primacy in substance within the context of article 31 itself. All means of interpretation in article 31 are part of a single integrated rule.<sup>39</sup>

(8) Paragraph 3 reproduces the language of article 31, paragraph 3 (a) and (b), of the Vienna Convention, in order to situate subsequent agreements and subsequent practice, as the main focus of the topic, within the general legal framework of treaty interpretation. Accordingly, the

Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, sect. III.B (Vienna Convention, art. 31, para. 1); and WTO, Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, sect. D (Vienna Convention, arts. 31–32). See also “Second report for the ILC Study Group on treaties over time”, in G. Nolte (ed.), *Treaties and Subsequent Practice* (Oxford, Oxford University Press, 2013), p. 210, at p. 215.

<sup>30</sup> *Golder v. the United Kingdom*, 21 February 1975, Series A no. 18, para. 29; *Witold Litwa v. Poland*, no. 26629/95, ECHR 2000-III, para. 58 (Vienna Convention, art. 31); *Demir and Baykara v. Turkey* [GC], no. 34503/97, ECHR 2008, para. 65 (by implication, Vienna Convention, arts. 31–33).

<sup>31</sup> *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights* (Arts. 74 and 75), Advisory Opinion OC-2/82, 24 September 1982, Inter-American Court of Human Rights, Series A, No. 2, para. 19 (by implication, Vienna Convention, arts. 31–32); *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, Judgments (Merits, Reparations and Costs), 21 June 2002, Inter-American Court of Human Rights, Series C, No. 94, para. 19 (Vienna Convention, art. 31, para. 1).

<sup>32</sup> *Firma Brita GmbH v. Hauptzollamt Hamburg-Hafen*, Judgment, 25 February 2010, Case C-386/08, *European Court Reports* 2010, p. I-01289, paras. 41–43 (Vienna Convention, art. 31).

<sup>33</sup> United Nations Commission on International Trade Law (UNCITRAL) arbitration, *National Grid plc v. The Argentine Republic*, Decision on Jurisdiction, 20 June 2006, para. 51 (Vienna Convention, arts. 31–32) (available from [www.italaw.com/](http://www.italaw.com/)); *Canfor Corporation v. United States of America, Tembec Inc., Tembec Investments Inc. and Tembec Industries Inc. v. United States of America and Terminal Forest Products Ltd. v. United States of America*, Order of the Consolidation Tribunal, 7 September 2005, para. 59 (Vienna Convention, arts. 31–32).

<sup>34</sup> *LaGrand* (see footnote 26 above), p. 502, para. 101.

<sup>35</sup> *Kasikili/Sedudu Island* (see footnote 26 above), p. 1062, para. 25; the Court may have applied this provision only because the parties had not disagreed about its application.

<sup>36</sup> WTO, Appellate Body Report, *United States—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, para. 59 (Vienna Convention, art. 33, para. 3); Appellate Body Report, *United States—Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, para. 424, where the Appellate Body applied and expressly referred to art. 33, para. 3, of the Vienna Convention without suggesting its customary status; Appellate Body Report, *Chile—Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002, para. 271 (Vienna Convention, art. 33, para. 4).

<sup>37</sup> *Case concerning the question whether the re-evaluation of the German Mark in 1961 and 1969 constitutes a case for application of the clause in article 2 (e) of Annex I A of the 1953 Agreement on German External Debts between Belgium, France, Switzerland, the United Kingdom of Great Britain and Northern Ireland and the United States of America on the one hand and the Federal Republic of Germany on the other*, Decision, 16 May 1980, UNRIIA, vol. XIX (Sales No. E/F.90.V.7), p. 67, at p. 92, para. 17; see also ILR, vol. 59 (1980), p. 494, at p. 528, para. 17.

<sup>38</sup> *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area* (see footnote 27 above), para. 57; *Golder v. the United Kingdom* (see footnote 30 above), para. 29; *Witold Litwa v. Poland* (see footnote 30 above), para. 59; *Demir and Baykara v. Turkey* [GC] (see footnote 30 above), para. 65 (Vienna Convention, arts. 31–33).

<sup>39</sup> *Yearbook ... 1966*, vol. II, document A/6309/Rev.1 (Part II), pp. 219–220, para. (8). See, in detail, paragraph (12) of the commentary to paragraph 5 of draft conclusion 1, below.

*chapeau* of article 31, paragraph 3—“there shall be taken into account, together with the context”—is maintained in order to emphasize that the assessment of the means of interpretation mentioned in paragraph 3 (a) and (b) of article 31 is an integral part of the general rule of interpretation set forth in article 31.<sup>40</sup>

(9) Paragraph 4 clarifies that subsequent practice in the application of a treaty that does not meet all criteria of article 31, paragraph 3 (b), nevertheless falls within the scope of article 32. Article 32 includes a non-exhaustive list of supplementary means of interpretation.<sup>41</sup> Paragraph 4 borrows the language “recourse may be had” from article 32 to maintain the distinction between the mandatory character of the *taking into account* of the means of interpretation that are referred to in article 31, and the discretionary nature of the use of the supplementary means of interpretation under article 32.

(10) In particular, subsequent practice in the application of a treaty that does not establish the agreement of all parties to the treaty, but only of one or more parties, may be used as a supplementary means of interpretation. This was stated by the Commission<sup>42</sup> and has since been recognized by international courts and tribunals<sup>43</sup> and in the literature<sup>44</sup> (see in more detail paras. (22)–(36) of the commentary to draft conclusion 4).

(11) The Commission did not, however, consider that subsequent practice that is not “in the application

of the treaty” should be dealt with, in the present draft conclusions, as a supplementary means of interpretation. Such practice may, however, under certain circumstances, be a relevant supplementary means of interpretation as well.<sup>45</sup> But such practice is beyond what the Commission now addresses under the present topic, except insofar as it may contribute to “assessing” relevant subsequent practice in the application of a treaty (see draft conclusion 5 and accompanying commentary). Thus, paragraph 4 of draft conclusion 1 requires that any subsequent practice be “in the application of the treaty”, as does paragraph 3 of draft conclusion 4, which defines “other ‘subsequent practice’”.

(12) The Commission considered it important to complete draft conclusion 1 by emphasizing in paragraph 5<sup>46</sup> that, notwithstanding the structure of draft conclusion 1, moving from the general to the more specific, the process of interpretation is a “single combined operation”, which requires that “appropriate emphasis” is placed on various means of interpretation.<sup>47</sup> The expression “single combined operation” is drawn from the Commission’s commentary to the 1966 draft articles on the law of treaties.<sup>48</sup> There, the Commission also stated that it intended “to emphasize that the process of interpretation is a unity”.<sup>49</sup>

(13) Paragraph 5 of draft conclusion 1 also explains that appropriate emphasis must be placed, in the course of the process of interpretation as a “single combined operation”, on the various means of interpretation that are referred to in articles 31 and 32. The Commission did not, however, consider it necessary to include a reference, by way of example, to one or more specific means of interpretation in the text of paragraph 5 of draft conclusion 1.<sup>50</sup> This avoids a possible misunderstanding that any one of the different means of interpretation has priority over others, regardless of the specific treaty provision or the case concerned.

(14) Paragraph 5 uses the term “means of interpretation”. This term captures not only the “supplementary means of interpretation”, which are referred to in article 32, but also

<sup>40</sup> *Yearbook ... 1966*, vol. II, document A/6309/Rev.1 (Part II), p. 220, para. (8); “Introductory report for the ILC Study Group on treaties over time”, in Nolte (ed.) (see footnote 29 above), p. 169, at p. 177.

<sup>41</sup> Yasseen (see footnote 24 above), p. 79.

<sup>42</sup> *Yearbook ... 1964*, vol. II, document A/5809, pp. 203–204, para. (13).

<sup>43</sup> *Kasikili/Sedudu Island* (see footnote 26 above), p. 1096, paras. 79–80; *Loizidou v. Turkey* (preliminary objections), 23 March 1995, Series A no. 310, paras. 79–81; *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, Judgments (Merits, Reparations and Costs) (see footnote 31 above), para. 92; *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, Provisional Measures, Order of 27 August 1999, *ITLOS Reports 1999*, p. 280, at p. 294, para. 50; WTO, 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, para. 90; see also WTO, Appellate Body Report, *United States—Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R, WT/DS386/AB/R, adopted 23 July 2012, para. 452.

<sup>44</sup> Yasseen (see footnote 24 above), p. 52: “... la Convention de Vienne ne retient pas comme élément de la règle générale d’interprétation la pratique ultérieure en général, mais une pratique ultérieure spécifique, à savoir une pratique ultérieure non seulement concordante, mais également commune à toutes les parties ... Ce qui reste de la pratique ultérieure peut être un moyen complémentaire d’interprétation, selon l’article 32 de la Convention de Vienne”\*; Sinclair (see footnote 24 above), p. 138: “... paragraph 3(b) of Article 31 of the Convention [covers] only a specific form of subsequent practice—that is to say, *concordant subsequent practice common to all the parties*. Subsequent practice which does not fall within this narrow definition may nonetheless constitute a supplementary means of interpretation within the meaning of Article 32 of the Convention”\*; S. Torres Bernárdez, “Interpretation of treaties by the International Court of Justice following the adoption of the 1969 Vienna Convention on the Law of Treaties”, in G. Hafner, G. Loibl, A. Rest, L. Sucharipa-Behrmann and K. Zemanek (eds.), *Liber Amicorum: Professor Ignaz Seidl-Hohenveldern, in Honour of His 80th Birthday* (The Hague, Kluwer Law International, 1998), p. 721, at p. 726; M. E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden, Martinus Nijhoff, 2009), pp. 431–432.

<sup>45</sup> L. Boisson de Chazournes, “Subsequent practice, practices, and ‘family resemblance’: Towards embedding subsequent practice in its operative milieu”, in Nolte (ed.) (see footnote 29 above), p. 53, at pp. 59–62.

<sup>46</sup> First report on subsequent agreements and subsequent practice in relation to treaty interpretation (A/CN.4/660); “Introductory report for the ILC Study Group on treaties over time”, in Nolte (ed.) (see footnote 29 above), pp. 171 and 177.

<sup>47</sup> On the different function of subsequent agreements and subsequent practice in relation to other means of interpretation, see first report on subsequent agreements and subsequent practice in relation to treaty interpretation (A/CN.4/660), paras. 42–57; see also “Introductory report for the ILC Study Group on treaties over time”, in Nolte (ed.) (see footnote 29 above), p. 183.

<sup>48</sup> *Yearbook ... 1966*, vol. II, document A/6309/Rev.1 (Part II), pp. 219–220, para. (8).

<sup>49</sup> *Ibid.*

<sup>50</sup> This had been proposed by the Special Rapporteur: see first report on subsequent agreements and subsequent practice in relation to treaty interpretation (A/CN.4/660), para. 28 (“General rule and means of treaty interpretation ... The interpretation of a treaty in a specific case may result in a different emphasis on the various means of interpretation contained in Articles 31 and 32 [of the Vienna Convention on the law of treaties], in particular on the text of the treaty or on its object and purpose, depending on the treaty or on the treaty provisions concerned”). See also the analysis in *ibid.*, paras. 8–27.

the elements mentioned in article 31.<sup>51</sup> Whereas the Commission, in its commentary on the draft articles on the law of treaties, sometimes used the terms “means of interpretation” and “elements of interpretation” interchangeably, for the purpose of the present topic the Commission retained the term “means of interpretation” because it also describes their function in the process of interpretation as a tool or an instrument.<sup>52</sup> The term “means” does not set apart from each other the different elements mentioned in articles 31 and 32. Rather, it indicates that these means each have a function in the process of interpretation, which is a “single” and at the same time a “combined” operation.<sup>53</sup> Just as courts typically begin their reasoning by looking at the terms of a treaty, and then continue, in an interactive process,<sup>54</sup> to analyse those terms in their context and in the light of the object and purpose of the treaty,<sup>55</sup> the precise relevance of different means of interpretation must first be identified in any case of treaty interpretation before they can be “thrown into the crucible”<sup>56</sup> in order to arrive at a proper interpretation, by giving them appropriate weight in relation to each other.

(15) The obligation to place “appropriate emphasis on the various means of interpretation” may, in the course of the interpretation of a treaty in specific cases, result in a different emphasis on the various means of interpretation depending on the treaty or on the treaty provisions concerned.<sup>57</sup> This is not to suggest that a court or any other interpreter is more or less free to choose how to use and apply the different means of interpretation. What guides the interpretation is the evaluation by the interpreter, which consists in identifying the relevance of different means of interpretation in a specific case and in determining their interaction with the other means of interpretation in the case by placing a proper emphasis on them in good faith, as required by the rule to be applied. This evaluation should include, if possible and practicable, consideration of relevant prior assessments and decisions in the same and possibly also in other relevant areas.<sup>58</sup>

<sup>51</sup> See also the commentary to draft conclusion 1, para. 1; Villiger, “The 1969 Vienna Convention ...” (see footnote 22 above), p. 129; Daillier, Forteau and Pellet (see footnote 25 above), pp. 284–289.

<sup>52</sup> See the summary record of the 3172nd meeting, held on 31 May 2013.

<sup>53</sup> *Yearbook ... 1966*, vol. II, document A/6309/Rev.1 (Part II), pp. 219–220, para. (8).

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*, p. 219, para. (6); Yasseen (see footnote 24 above), p. 58; Sinclair (see footnote 24 above), p. 130; J. Klabbbers, “Treaties, object and purpose”, *Max Planck Encyclopedia of Public International Law* (<http://opil.ouplaw.com/home/EPIL/>), para. 7; Villiger, *Commentary on the 1969 Vienna Convention ...* (see footnote 44 above), p. 427, para. 11; *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, *Jurisdiction and Admissibility, Judgment*, *I.C.J. Reports 1988*, p. 69, at p. 89, paras. 45–46; *English Channel (Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic)*, Decision of 30 June 1977, UNRIIAA, vol. XVIII (Sales No. E/F.80.V.7), p. 3, at pp. 32–33, para. 39.

<sup>56</sup> *Yearbook ... 1966*, vol. II, document A/6309/Rev.1 (Part II), pp. 219–220, para. (8).

<sup>57</sup> First report on subsequent agreements and subsequent practice in relation to treaty interpretation (A/CN.4/660), para. 28 (draft conclusion 1, para. 2), and, generally, paras. 10–27.

<sup>58</sup> The first report (see previous footnote) refers to the jurisprudence of different international courts and tribunals as examples of how the weight of a means in an interpretation exercise is to be determined in specific cases, and demonstrates how given instances of

(16) The Commission debated whether it would be appropriate to refer, in draft conclusion 1, to the “nature” of the treaty as a factor which would typically be relevant to determining whether more or less weight should be given to certain means of interpretation.<sup>59</sup> Some members considered that the subject matter of a treaty (e.g. whether provisions concern purely economic matters or rather address the human rights of individuals; and whether the rules of a treaty are more technical or more value-oriented), as well as its basic structure and function (e.g. whether provisions are more reciprocal in nature or more intended to protect a common good), may affect its interpretation. They indicated that the jurisprudence of different international courts and tribunals suggests that this is the case.<sup>60</sup> It was also mentioned that the concept of the “nature” of a treaty is not alien to the 1969 Vienna Convention (see e.g. art. 56, para. (1) (b))<sup>61</sup> and that the concept of the “nature” of the treaty and/or of treaty provisions had been included in other work of the Commission, in particular on the topic of the effects of armed conflicts on treaties.<sup>62</sup> Other members, however, considered that the draft conclusion should not refer to the “nature” of the treaty in order to preserve the unity of the interpretation process and to avoid any categorization of treaties. The point was also made that the notion of the “nature of the treaty” was unclear and that it would be difficult to distinguish it from the object and purpose of the treaty.<sup>63</sup>

subsequent practice and subsequent agreements contributed, or not, to the determination of the ordinary meaning of the terms in their context and in the light of the object and purpose of the treaty.

<sup>59</sup> See first report (footnote 57 above), draft conclusion 1, para. 2, and analysis at paras. 8–28.

<sup>60</sup> The WTO Panels and the Appellate Body, for example, seem to emphasize more the terms of the respective agreement covered by WTO (e.g. Appellate Body Report, *Brazil—Export Financing Programme for Aircraft—Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/AB/RW, adopted 4 August 2000, para. 45), whereas the European Court of Human Rights and the Inter-American Court of Human Rights highlight the character of the European Convention on Human Rights and the American Convention on Human Rights, respectively, as human rights treaties (e.g. *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, ECHR 2005-I, para. 111; and *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, 1 October 1999, Inter-American Court of Human Rights, Series A, No. 16, para. 58); see also *Yearbook ... 2011*, vol. II (Part Two), chapter XI, sect. B.3, and “Second report for the ILC Study Group on treaties over time”, in Nolte (ed.) (see footnote 29 above), p. 210, at pp. 216, 244–246, 249–262 and 270–275.

<sup>61</sup> M. Forteau, “Les techniques interprétatives de la Cour Internationale de Justice”, *Revue générale de droit international public*, vol. 115 (2011), p. 399, at pp. 406–407 and 416; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion (Separate opinion of Judge Dillard), *I.C.J. Reports 1971*, p. 16, at pp. 150 and 154, footnote 1.

<sup>62</sup> Articles on the effects of armed conflicts on treaties (art. 6 (a)), General Assembly resolution 66/99 of 9 December 2011, annex. See the draft articles adopted by the Commission and the commentaries thereto reproduced in *Yearbook ... 2011*, vol. II (Part Two), paras. 100–101; see also the Guide to Practice on Reservations to Treaties, *ibid.*, vol. II (Part Three) (guideline 4.2.5 refers to the nature of obligations under a treaty, rather than the nature of the treaty as such).

<sup>63</sup> According to the commentary to guideline 4.2.5 of the Guide to Practice on Reservations to Treaties, it is difficult to distinguish between the nature of treaty obligations and the object and purpose of the treaty (*Yearbook ... 2011*, vol. II (Part Three), paragraph (3) of the commentary to guideline 4.2.5). On the other hand, article 6 of the articles on the effects of armed conflicts on treaties suggests “a series of factors pertaining to the nature of the treaty, particularly its subject matter, its object and purpose, its content and the number of parties to the treaty” (*ibid.*, vol. II (Part Two), para. 101, at paragraph (3) of the commentary to article 6).

The Commission ultimately decided to leave the question open and to make no reference in draft conclusion 1 to the nature of the treaty for the time being.

**Conclusion 2. Subsequent agreements and subsequent practice as authentic means of interpretation**

**Subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), being objective evidence of the understanding of the parties as to the meaning of the treaty, are authentic means of interpretation, in the application of the general rule of treaty interpretation reflected in article 31.**

*Commentary*

(1) By characterizing subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), of the Vienna Convention as “authentic means of interpretation” the Commission indicates the reason why those means are significant for the interpretation of treaties.<sup>64</sup> The Commission thereby follows its 1966 commentary on the draft articles on the law of treaties, which described subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), as “authentic means of interpretation” and which underlined that

[t]he importance of such subsequent practice in the application of a treaty, as an element of interpretation, is obvious; for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty.<sup>65</sup>

(2) Subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), are, however, not the only “authentic means of interpretation”. Analysing the ordinary meaning of the text of a treaty, in particular, is also such a means. As the Commission has explained,

... the Commission’s approach to treaty interpretation was on the basis that the text of the treaty must be presumed to be the authentic expression of the intentions of the parties ... making the ordinary meaning of the terms, the context of the treaty, its object and purpose, and the general rules of international law, together with authentic interpretations by the parties, the primary criteria for interpreting a treaty.<sup>66</sup>

The term “authentic” thus refers to different forms of “objective evidence”, or “proof” of conduct of the parties which reflects the “common understanding of the parties” as to the meaning of the treaty.

<sup>64</sup> See R. Jennings and A. Watts (eds.), *Oppenheim’s International Law*, 9th ed. (Harlow, Longman, 1992), vol. I, p. 1268, para. 630; G. Fitzmaurice, “The law and procedure of the International Court of Justice 1951-4: Treaty interpretation and certain other treaty points”, *The British Year Book of International Law* 1957, vol. 33, p. 203, at pp. 223–225; WTO, Panel Report, *United States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/R, adopted 23 March 2012, para. 7.953.

<sup>65</sup> *Yearbook ... 1966*, vol. II, document A/6309/Rev.1 (Part II), pp. 221–222, para. (15).

<sup>66</sup> *Yearbook ... 1964*, vol. II, document A/5809, pp. 204–205, para. (15); see also *ibid.*, pp. 203–204, para. (13): “Paragraph 3 specifies as further authentic elements of interpretation: (a) agreements between the parties regarding the interpretation of the treaty, and (b) any subsequent practice in the application of the treaty which clearly established the understanding of all the parties regarding its interpretation”\*; on the other hand, Waldock, in his third report on the law of treaties, explained that *travaux préparatoires* are not, as such, an authentic means of interpretation (see *ibid.*, document A/CN.4/167 and Add.1–3, pp. 58–59, para. (21)).

(3) By describing subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), as “authentic” means of interpretation, the Commission recognizes that the common will of the parties, from which any treaty results, possesses a specific authority regarding the identification of the meaning of the treaty, even after the conclusion of the treaty. The 1969 Vienna Convention thereby accords the parties to a treaty a role which may be uncommon for the interpretation of legal instruments in some domestic legal systems.

(4) The character of subsequent agreements and subsequent practice of the parties under article 31, paragraph 3 (a) and (b), as “authentic means of interpretation” does not, however, imply that these means necessarily possess a conclusive, or legally binding, effect. According to the *chapeau* of article 31, paragraph 3, subsequent agreements and subsequent practice shall, after all, only “be taken into account” in the interpretation of a treaty, which consists of a “single combined operation” with no hierarchy among the means of interpretation that are referred to in article 31.<sup>67</sup> For this reason, and contrary to the view of some commentators,<sup>68</sup> subsequent agreements and subsequent practice that establish the agreement of the parties regarding the interpretation of a treaty are not necessarily conclusive, or legally binding.<sup>69</sup> Thus, when the Commission characterized a “subsequent agreement” as representing “an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation”,<sup>70</sup> it did not go quite as far as to say that such an interpretation is necessarily conclusive in the sense that it overrides all other means of interpretation.

(5) This does not exclude that the parties to a treaty, if they wish, may reach a binding agreement regarding the interpretation of a treaty. The Special Rapporteur on the law of treaties, Sir Humphrey Waldock, stated in his third report on the law of treaties that it may be difficult to distinguish subsequent practice of the parties under what became article 31, paragraph 3 (a) and (b)—which is only

<sup>67</sup> *Yearbook ... 1966*, vol. II, document A/6309/Rev.1 (Part II), pp. 219–220, paras. (8)–(9).

<sup>68</sup> M. E. Villiger, “The rules on interpretation: Misgivings, misunderstandings, miscarriage? The ‘crucible’ intended by the International Law Commission”, in E. Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (Oxford, Oxford University Press, 2011), p. 105, at p. 111; Gardiner (see footnote 23 above), p. 32; O. Dörr, “Commentary on Article 31 of the Vienna Convention”, in O. Dörr and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties* (Berlin, Springer, 2012), p. 521, at pp. 553–554, paras. 72–75; K. Skubiszewski, “Remarks on the interpretation of the United Nations Charter”, in R. Bernhardt et al. (eds.), *Völkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit, Menschenrechte—Festschrift für Hermann Mosler* (Berlin, Springer, 1983), p. 891, at p. 898.

<sup>69</sup> H. Fox, “Article 31 (3) (a) and (b) of the Vienna Convention and the *Kasikili Sedudu Island* case”, in M. Fitzmaurice, O. Elias and P. Merkouris (eds.), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Leiden, Martinus Nijhoff, 2010), p. 59, at pp. 61–63; A. Chanaki, *L’adaptation des traités dans le temps* (Brussels, Bruylant, 2013), pp. 313–315; M. Benatar, “From probative value to authentic interpretation: The legal effects of interpretative declarations”, *Revue belge de droit international*, vol. 44 (2011), p. 170, at pp. 194–195; cautiously: J. M. Sorel and B. Eveno, “Commentary on Article 31 of the Vienna Convention”, in Corten and Klein (eds.) (see footnote 25 above), p. 804, at p. 825, paras. 42–43; see also “Third report for the ILC Study Group on treaties over time”, in Nolte (ed.) (see footnote 29 above), p. 307, at p. 375, para. 16.4.3.

<sup>70</sup> *Yearbook ... 1966*, vol. II, document A/6309/Rev.1 (Part II), p. 221, para. (14).



to be taken into account, among other means, in the process of interpretation—and a later agreement which the parties consider to be binding:

Subsequent practice when it is consistent and embraces all the parties would appear to be decisive of the meaning to be attached to the treaty, *at any rate* when it indicates that the parties consider the interpretation to be binding upon them. In these cases, subsequent practice as an element of treaty interpretation and as an element in the formation of a tacit agreement overlap and the meaning derived from the practice becomes an authentic interpretation established by agreement.<sup>\*71</sup>

Whereas Waldock's original view that (simple) agreed subsequent practice "would appear to be decisive of the meaning" was ultimately not adopted in the 1969 Vienna Convention, subsequent agreements and subsequent practice establishing the agreement of the parties regarding the interpretation of a treaty must be conclusive regarding such interpretation when "the parties consider the interpretation to be binding upon them". It is, however, always possible that provisions of domestic law prohibit the government of a State from arriving at a binding agreement in such cases without satisfying certain—mostly procedural—requirements under its constitution.<sup>72</sup>

(6) The possibility of arriving at a binding subsequent interpretative agreement by the parties is particularly clear in cases in which the treaty itself so provides. Article 1131, paragraph 2, of the North American Free Trade Agreement (NAFTA), for example, provides that "[a]n interpretation by the [inter-governmental] Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section". The existence of such a special procedure or an agreement regarding the authoritative interpretation of a treaty which the parties consider binding may or may not preclude additional recourse to subsequent agreements or subsequent practice under article 31, paragraph 3 (a) and (b).<sup>73</sup>

(7) The Commission has continued to use the term "authentic means of interpretation" in order to describe the not necessarily conclusive, but more or less authoritative, character of subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b). The Commission has not employed the terms "authentic interpretation" or "authoritative interpretation" in draft conclusion 2 since these concepts are often understood to mean a necessarily conclusive, or binding, agreement between the parties regarding the interpretation of a treaty.<sup>74</sup>

(8) The term "authentic means of interpretation" encompasses a factual and a legal element. The factual element is indicated by the expression "objective evidence", whereas the legal element is contained in the concept of "understanding of the parties". Accordingly, the Commission characterized a "subsequent agreement" as representing "an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation",<sup>75</sup> and subsequently stated that subsequent practice "similarly ... constitutes objective evidence of the understanding of the parties as to the meaning of the treaty".<sup>76</sup> Given the character of treaties as embodiments of the common will of their parties, "objective evidence" of the "understanding of the parties" possesses considerable authority as a means of interpretation.<sup>77</sup>

(9) The distinction between any "subsequent agreement" (art. 31, para. 3 (a)) and "subsequent practice ... which establishes the agreement of the parties" (art. 31, para. 3 (b)) does not denote a difference concerning their authentic character.<sup>78</sup> The Commission considers rather that a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" *ipso facto* has the effect of constituting an authentic interpretation of the treaty, whereas a "subsequent practice" only has this effect if it "shows the common understanding of the parties as to the meaning of the terms".<sup>79</sup> Thus, the difference between a "subsequent agreement between the parties" and a "subsequent practice ... which establishes the agreement of the parties" lies in the manner of establishing the agreement of the parties regarding the interpretation of a treaty, with the difference being in the greater ease with which an agreement is established.<sup>80</sup>

(10) Subsequent agreements and subsequent practice as authentic means of treaty interpretation are not to be confused with interpretations of treaties by international courts, tribunals or treaty bodies in specific cases. Subsequent agreements or subsequent practice under article 31, paragraph 3 (a) and (b), are "authentic" means of interpretation because they are expressions of the understanding of the treaty by the States parties themselves. The authority of international courts, tribunals and treaty bodies derives rather from other sources, most often from the treaty which is to be interpreted. Judgments and other

<sup>71</sup> *Yearbook ... 1964*, vol. II, document A/CN.4/167 and Add.1–3, p. 60, para. (25).

<sup>72</sup> This issue will be addressed at a later stage of work on the topic.

<sup>73</sup> This question will be explored in more detail at a later stage of work on the topic; see also the Marrakesh Agreement establishing the World Trade Organization (1994), art. IX, para. 2; and WTO, Appellate Body Report, *European Communities—Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, para. 273; WTO, 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, paras. 383 and 390.

<sup>74</sup> See, for example, *Methanex Corporation v. United States of America*, International Arbitration under Chapter 11 of NAFTA and the UNCITRAL Arbitration Rules, Final Award on Jurisdiction and Merits,

3 August 2005, Part II, chapter H, para. 23 (with reference to Jennings and Watts (eds.) (footnote 64 above), p. 1268, para. 630); Gardiner (footnote 23 above), p. 32; U. Linderfalk, *On the Interpretation of Treaties* (Berlin, Springer, 2007), p. 153; Skubiszewski (footnote 68 above), p. 898; G. Haraszti, *Some Fundamental Problems of the Law of Treaties* (Budapest, Akadémiai Kiadó, 1973), p. 43; see also "Second report for the ILC Study Group on treaties over time", in Nolte (ed.) (footnote 29 above), p. 242, para. 4.5.

<sup>75</sup> *Yearbook ... 1966*, vol. II, document A/6309/Rev.1 (Part II), p. 221, para. (14).

<sup>76</sup> *Ibid.*, para. (15).

<sup>77</sup> Gardiner (see footnote 23 above), pp. 32 and 354–355; Linderfalk, *On the Interpretation of Treaties* (see footnote 74 above), pp. 152–153.

<sup>78</sup> First report on subsequent agreements and subsequent practice in relation to treaty interpretation (A/CN.4/660), para. 69.

<sup>79</sup> *Yearbook ... 1966*, vol. II, document A/6309/Rev.1 (Part II), pp. 221–222, para. (15); W. Karl, *Vertrag und spätere Praxis im Völkerrecht* (Berlin, Springer, 1983), p. 294.

<sup>80</sup> *Kasikili/Sedudu Island* (see footnote 26 above), p. 1087, para. 63; see also draft conclusion 4 and the accompanying commentary.



pronouncements of international courts, tribunals and treaty bodies, however, may be indirectly relevant for the identification of subsequent agreements and subsequent practice as authentic means of interpretation if they reflect or trigger such subsequent agreements and practice of the parties themselves.<sup>81</sup>

(11) Draft conclusions 1 and 4 distinguish between “subsequent practice” establishing the agreement of the parties under article 31, paragraph 3 (b), of the 1969 Vienna Convention, on the one hand, and other subsequent practice (in a broad sense) by one or more, but not all, parties to the treaty, which may be relevant as a supplementary means of interpretation under article 32.<sup>82</sup> Such “other” subsequent interpretative practice which does not establish the agreement of all the parties cannot constitute an “authentic” interpretation of a treaty by all its parties and thus will not possess the same weight for the purpose of interpretation.<sup>83</sup>

(12) The last part of draft conclusion 2 makes it clear that any reliance on subsequent agreements and subsequent practice as authentic means of interpretation should occur as part of the application of the general rule of treaty interpretation reflected in article 31 of the 1969 Vienna Convention.

### **Conclusion 3. Interpretation of treaty terms as capable of evolving over time**

**Subsequent agreements and subsequent practice under articles 31 and 32 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.**

#### *Commentary*

(1) Draft conclusion 3 addresses the role which subsequent agreements and subsequent practice may play in the context of the more general question of whether the meaning of a term of a treaty is capable of evolving over time.

(2) In the case of treaties, the question of the so-called intertemporal law<sup>84</sup> has traditionally been put in terms of

<sup>81</sup> This aspect will be addressed in more detail at a later stage of work on the topic; see, for example, “Third report for the ILC Study Group on treaties over time”, in Nolte (ed.) (see footnote 29 above), p. 307, at pp. 381 *et seq.*, para. 17.3.1.

<sup>82</sup> See in particular paragraphs (22)–(36) of the commentary to draft conclusion 4.

<sup>83</sup> See in more detail paragraph (34) of the commentary to draft conclusion 4.

<sup>84</sup> T. O. Elias, “The doctrine of intertemporal law”, *American Journal of International Law*, vol. 74 (1980), p. 285; D. W. Greig, *Intertemporality and the Law of Treaties* (London, British Institute of International and Comparative Law, 2001); M. Fitzmaurice, “Dynamic (evolutive) interpretation of treaties, Part I”, *Hague Yearbook of International Law*, vol. 21 (2008), p. 101; M. Kotzur, “Intertemporal law”, *Max Planck Encyclopedia of Public International Law* (<http://opil.ouplaw.com/home/EPIL/>); U. Linderfalk, “Doing the right thing for the right reason: Why dynamic or static approaches should be taken in the interpretation of treaties”, *International Community Law Review*, vol. 10(2) (2008), p. 109; A. Verdross and B. Simma, *Universelles Völkerrecht*, 3rd ed. (Berlin, Duncker & Humblot, 1984), pp. 496 *et seq.*, paras. 782 *et seq.*

whether a treaty should be interpreted in the light of the circumstances and the law at the time of its conclusion (“contemporaneous” or “static” interpretation), or in the light of the circumstances and the law at the time of its application (“evolutive”, “evolutionary” or “dynamic” interpretation).<sup>85</sup> Arbitrator Max Huber’s *dictum* in the *Island of Palmas* case, according to which “a judicial fact must be appreciated in the light of the law contemporary with it”,<sup>86</sup> led many international courts and tribunals, as well as many writers, to generally favour contemporaneous interpretation.<sup>87</sup> At the same time, the Tribunal in the *Iron Rhine* case asserted that there was “general support among the leading writers today for evolutive interpretation of treaties”.<sup>88</sup>

(3) The Commission, in its commentary to the draft articles on the law of treaties, considered in 1966 that “to attempt to formulate a rule covering comprehensively the temporal element would present difficulties”, and it therefore “concluded that it should omit the temporal element”.<sup>89</sup> Similarly, the debates within the Commission’s Study Group on the fragmentation of international law led to the conclusion in 2006 that it is difficult to formulate and to agree on a general rule which would give preference either to a principle of contemporaneous interpretation or to one which generally recognizes the need to take account of an “evolving meaning” of treaties.<sup>90</sup>

(4) Draft conclusion 3 should not be read as taking any position regarding the appropriateness of a more contemporaneous or a more evolutive approach to treaty interpretation in general. Draft conclusion 3 emphasizes rather that subsequent agreements and subsequent practice, like any other means of treaty interpretation, can support both a contemporaneous and an evolutive interpretation (or, as it is often called, evolutionary interpretation), where appropriate. The Commission, therefore, concluded that these means of treaty interpretation “may assist in determining

<sup>85</sup> Fitzmaurice, “Dynamic (evolutive) interpretation of treaties ...” (see previous footnote).

<sup>86</sup> *Island of Palmas case (Netherlands v. USA)*, Award, 4 April 1928, UNRIIAA, vol. II (Sales No. 1949.V.1), p. 829, at p. 845.

<sup>87</sup> *Yearbook ... 1966*, vol. II, document A/6309/Rev.1 (Part II), pp. 220–221, para. (11).

<sup>88</sup> *Arbitration regarding the Iron Rhine (“Ijzeren Rijn”) Railway between the Kingdom of Belgium and the Kingdom of the Netherlands* (see footnote 28 above), para. 81; see, for example, A. Aust, *Modern Treaty Law and Practice*, 2nd ed. (Cambridge, United Kingdom, Cambridge University Press, 2007), pp. 243–244; Fitzmaurice, “Dynamic (evolutive) interpretation of treaties ...” (see footnote 84 above); G. Distefano, “L’interprétation évolutive de la norme internationale”, *Revue générale de droit international public*, vol. 115(2) (2011), p. 373, at pp. 384 and 389 *et seq.*; R. Higgins, “Some observations on the intertemporal rule in international law”, in J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century* (Kluwer Law International, 1996), p. 173, at pp. 174 *et seq.*; Sorel and Eveno (see footnote 69 above), p. 807, para. 8; P.-M. Dupuy, “Evolutionary interpretation of treaties: Between memory and prophecy”, in Cannizzaro (ed.) (see footnote 68 above), p. 123, at pp. 125 *et seq.*; Kotzur (see footnote 84 above), para. 14.

<sup>89</sup> *Yearbook ... 1966*, vol. II, document A/6309/Rev.1 (Part II), p. 222, para. (16); Higgins (see previous footnote).

<sup>90</sup> Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, report of the Study Group of the International Law Commission—Finalized by Martti Koskenniemi (A/CN.4/L.682 and Corr.1 and Add.1), para. 478; available from the Commission’s website, documents of the fifty-eighth session (the final text will be published as an addendum to *Yearbook ... 2006*, vol. II (Part One)).

whether or not” an evolutive interpretation is appropriate with regard to a particular treaty term.

(5) This approach is confirmed by the jurisprudence of international courts and tribunals. The various international courts and tribunals which have engaged in evolutive interpretation—albeit to varying degrees—appear to have followed a case-by-case approach in determining, through recourse to the various means of treaty interpretation which are referred to in articles 31 and 32, whether a treaty term should be given a meaning capable of evolving over time.

(6) The International Court of Justice, in particular, is seen as having developed two strands of jurisprudence, one tending towards a more “contemporaneous” and the other towards a more “evolutionary” interpretation, as Judge *ad hoc* Guillaume has pointed out in his Declaration in *Dispute regarding Navigational and Related Rights*.<sup>91</sup> The decisions that favour a more contemporaneous approach mostly concern specific treaty terms (“water-parting”;<sup>92</sup> “main channel/*Thalweg*”;<sup>93</sup> names of places;<sup>94</sup> “mouth” of a river<sup>95</sup>). On the other hand, the cases that support an evolutive interpretation seem to relate to more general terms. This is true, in particular, for terms which are “by definition evolutionary”, such as “the strenuous conditions of the modern world” or “the well-being and development of such peoples” in article 22 of the Covenant of the League of Nations. The International Court of Justice, in *Namibia*, has given those terms an evolving meaning by referring to the evolution of the right of peoples to self-determination after the Second World War.<sup>96</sup> The “generic” nature of a particular term in a treaty<sup>97</sup> and the fact that the treaty is designed to be “of continuing duration”<sup>98</sup> may also give rise to an evolving meaning.

(7) Other international judicial bodies sometimes also employ an evolutive approach to interpretation, though displaying different degrees of openness towards such interpretation. The WTO Appellate Body has only occasionally resorted to evolutive interpretation. In a well-known case it has, however, held that “the generic term ‘natural resources’ in article XX (g) is not ‘static’ in its content or reference but is rather ‘by definition, evolutionary’”.<sup>99</sup> The ITLOS Seabed Disputes Chamber has held that the meaning of certain “obligations to ensure”<sup>100</sup> “may change over time”,<sup>101</sup> and has emphasized that the rules of State liability in the United Nations Convention on the Law of the Sea are apt to follow developments in the law and are “not considered to be static”.<sup>102</sup> The European Court of Human Rights has held more generally “that the Convention is a living instrument which ... must be interpreted in the light of present-day conditions”.<sup>103</sup> The Inter-American Court of Human Rights also more generally follows an evolutive approach to interpretation, in particular in connection with its so called *pro homine* approach.<sup>104</sup> In the *Iron Rhine* case, the continued viability and effectiveness of a multi-dimensional, cross-border railway arrangement was an important reason for the Tribunal to accept that even rather technical rules may have to be given an evolutive interpretation.<sup>105</sup>

(8) In the final analysis, most international courts and tribunals have not recognized evolutive interpretation as a separate form of interpretation, but instead have arrived at such an evolutive interpretation in the application of the various means of interpretation which are mentioned in articles 31 and 32 of the 1969 Vienna Convention, by considering certain criteria (in particular those mentioned in paragraph (6) above) on a case-by-case basis. Any evolutive interpretation of the meaning of a term over

<sup>91</sup> *Dispute regarding Navigational and Related Rights* (see footnote 26 above), Declaration of Judge *ad hoc* Guillaume, p. 290, at pp. 294 *et seq.*, paras. 9 *et seq.*; see also *Yearbook ... 2005*, vol. II (Part Two), para. 479; report of the Study Group on the fragmentation of international law, 2006 (A/CN.4/L.682 and Corr.1 and Add.1) (see previous footnote), para. 478; Institute of International Law, resolution on “The intertemporal problem in public international law”, *Yearbook*, vol. 56, Session of Wiesbaden (1975), pp. 536 *et seq.* (available from the website of the Institute: [www.idi-iil.org/](http://www.idi-iil.org/)).

<sup>92</sup> *Case concerning a boundary dispute between Argentina and Chile concerning the delimitation of the frontier line between boundary post 62 and Mount Fitzroy*, Decision of 21 October 1994, UNRIAA, vol. XXII (Sales No. E/F.00.V.7), p. 3, at p. 43, para. 130; see also, with respect to the term “watershed”, *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment of 15 June 1962, I.C.J. Reports 1962, p. 6, at pp. 16–22.

<sup>93</sup> *Kasikili/Sedudu Island* (see footnote 26 above), pp. 1060–1062, paras. 21 and 25.

<sup>94</sup> *Decision regarding delimitation of the border between Eritrea and Ethiopia (Eritrea v. Ethiopia)*, Decision of 13 April 2002, UNRIAA, vol. XXV (Sales No. E/F.05.V.5), p. 83, at p. 110, para. 3.5.

<sup>95</sup> *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I.C.J. Reports 2002, p. 303, at p. 338, para. 48, and p. 346, para. 59.

<sup>96</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (see footnote 61 above), p. 31, para. 53.

<sup>97</sup> *Aegean Sea Continental Shelf, Judgment*, I.C.J. Reports 1978, p. 3, at p. 32, para. 77; report of the Study Group on the fragmentation of international law, 2006 (A/CN.4/L.682 and Corr.1 and Add.1) (see footnote 90 above), para. 478.

<sup>98</sup> *Dispute regarding Navigational and Related Rights* (see footnote 26 above), p. 243, para. 66.

<sup>99</sup> WTO, Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, para. 130.

<sup>100</sup> United Nations Convention on the Law of the Sea, art. 153, para. 4, and art. 4, para. 4, in annex III.

<sup>101</sup> *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area* (see footnote 27 above), para. 117.

<sup>102</sup> *Ibid.*, para. 211.

<sup>103</sup> *Tyrer v. the United Kingdom*, 25 April 1978, Series A no. 26, para. 31.

<sup>104</sup> *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (see footnote 60 above), para. 114 (“This guidance is particularly relevant in the case of international human rights law, which has made great headway thanks to an evolutive interpretation of international instruments of protection. That evolutive interpretation is consistent with the general rules of treaty interpretation established in the 1969 Vienna Convention. Both this Court, in the Advisory Opinion on the Interpretation of the American Declaration of the Rights and Duties of Man (1989), and the European Court of Human Rights, in *Tyrer v. United Kingdom* (1978), *Marckx v. Belgium* (1979), *Loizidou v. Turkey* (1995), among others, have held that human rights treaties are living instruments whose interpretation must consider the changes over time and present-day conditions.” (footnotes omitted)).

<sup>105</sup> *Arbitration regarding the Iron Rhine (“Ijzeren Rijn”) Railway between the Kingdom of Belgium and the Kingdom of the Netherlands* (see footnote 28 above), para. 80: “In the present case it is not a conceptual or generic term that is in issue, but rather new technical developments relating to the operation and capacity of the railway”; see *Aegean Sea Continental Shelf* (footnote 97 above), p. 32, para. 77; see also *Case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal (Guinea-Bissau v. Senegal)*, Award, 31 July 1989, UNRIAA, vol. XX (Sales No. E/F.93.V.3), p. 119, at pp. 151–152, para. 85.

time must therefore result from the ordinary process of treaty interpretation.<sup>106</sup>

(9) The Commission considers that this state of affairs confirms its original approach to treaty interpretation:

... the Commission's approach to treaty interpretation was on the basis that the text of the treaty must be presumed to be the authentic expression of the intentions of the parties, and that the elucidation of the meaning of the text rather than an investigation *ab initio* of the supposed intentions of the parties constitutes the object of interpretation ... making the ordinary meaning of the terms, the context of the treaty, its object and purpose, and the general rules of international law, together with authentic interpretations by the parties, the primary criteria for interpreting a treaty.<sup>107</sup>

Accordingly, draft conclusion 3, by using the phrase "presumed intention", refers to the intention of the parties as determined through the application of the various means of interpretation which are recognized in articles 31 and 32. The "presumed intention" is thus not a separately identifiable original will, and the *travaux préparatoires* are not the primary basis for determining the presumed intention of the parties but are only, as article 32 indicates, a supplementary means of interpretation. And although interpretation must seek to identify the intention of the parties, this must be done by the interpreter on the basis of the means of interpretation which are available at the time of the act of interpretation, and which include subsequent agreements and subsequent practice of parties to the treaty. The interpreter thus has to answer the question of whether parties can be presumed to have intended, upon the conclusion of the treaty, to give a term used a meaning that is capable of evolving over time.

(10) Draft conclusion 3 does not take a position regarding the question of the appropriateness of a more contemporaneous or a more evolutive approach to treaty interpretation in general (see commentary above, at paragraph (4)). This draft conclusion should, however, be understood as indicating the need for some caution with regard to arriving at a conclusion in a specific case as to whether to adopt an evolutive approach. For this purpose, draft conclusion 3 points to subsequent agreements and subsequent practice as means of interpretation which may provide useful indications to the interpreter for assessing, as part of the ordinary process of treaty interpretation, whether the meaning of a term is capable of evolving over time.<sup>108</sup>

<sup>106</sup> As the 2006 report of the Study Group on the fragmentation of international law puts it, "the starting-point must be ... the fact that deciding [the] issue [of evolutive interpretation] is a matter of interpreting the treaty itself" (A/CN.4/L.682 and Corr.1 and Add.1 (see footnote 90 above), para. 478).

<sup>107</sup> *Yearbook ... 1964*, vol. II, document A/5809, pp. 204–205, para. (15); see also *ibid.*, pp. 203–204, para. (13) ("Paragraph 3 specifies as further authentic elements of interpretation: (a) agreements between the parties regarding the interpretation of the treaty, and (b) any subsequent practice in the application of the treaty which clearly established the understanding of all the parties regarding its interpretation"); on the other hand, Waldock, in his third report on the law of treaties, explained that *travaux préparatoires* are not, as such, an authentic means of interpretation (*ibid.*, document A/CN.4/167 and Add.1–3, pp. 58–59, para. (21)).

<sup>108</sup> See also Gardiner (footnote 23 above), pp. 253–254; R. Kolb, *Interprétation et création du droit international* (Brussels, Bruylant, 2006), pp. 488–501; J. Arato, "Subsequent practice and evolutive interpretation: Techniques of treaty interpretation over time and their diverse consequences", *The Law & Practice of International Courts and Tribunals*, vol. 9-3 (2010), p. 443, at pp. 444–445 and 465 *et seq.*

(11) This approach is based on and confirmed by the jurisprudence of the International Court of Justice and other international courts and tribunals. In *Namibia*, the Court referred to the practice of United Nations organs and of States in order to specify the conclusions which it derived from the inherently evolutive nature of the right to self-determination.<sup>109</sup> In the *Aegean Sea* case, the Court found it "significant" that what it had identified as the "ordinary, generic sense" of the term "territorial status" was confirmed by the administrative practice of the United Nations and by the behaviour of the party which had invoked the restrictive interpretation in a different context.<sup>110</sup> In any case, the decisions in which the Court has undertaken an evolutive interpretation have not strayed from the possible meaning of the text and from the presumed intention of the parties to the treaty, as they had also been expressed in their subsequent agreements and subsequent practice.<sup>111</sup>

(12) The judgment of the International Court of Justice in *Dispute regarding Navigational and Related Rights* also illustrates how subsequent agreements and subsequent practice of the parties can assist in determining whether a term has to be given a meaning that is capable of evolving over time. Interpreting the term "*comercio*" in a treaty of 1858, the Court observed as follows:

On the one hand, the subsequent practice of the parties, within the meaning of article 31 (3) (b) of the Vienna Convention, can result in a departure from the original intent on the basis of a tacit agreement between the parties. On the other hand, there are situations in which the parties' intent upon conclusion of the treaty was ... to give the terms used ... a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law.<sup>112</sup>

The Court then found that the term "*comercio*" was a "generic term" of which "the parties necessarily" had "been aware that the meaning ... was likely to evolve over time" and that "the treaty has been entered into for a very long period", and concluded that "the parties must be presumed ... to have intended" this term to "have an evolving meaning".<sup>113</sup> Judge Skotnikov, in a separate opinion, while disagreeing with this reasoning, ultimately arrived at the same result by accepting that a more recent subsequent practice of Costa Rica related to tourism on the San Juan river "for at least a decade", against which Nicaragua "never protested" but rather "engaged in consistent practice of allowing tourist navigation", and concluded that this "suggests that the Parties have established an agreement regarding its interpretation".<sup>114</sup>

<sup>109</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (see footnote 61 above), pp. 30–31, paras. 49–51.

<sup>110</sup> *Aegean Sea Continental Shelf* (see footnote 97 above), p. 31, para. 74.

<sup>111</sup> See also *Case concerning the delimitation of the maritime boundary between Guinea-Bissau and Senegal* (footnote 105 above), pp. 151–152, para. 85.

<sup>112</sup> *Dispute regarding Navigational and Related Rights* (see footnote 26 above), p. 242, para. 64. See also Treaty of Territorial Limits between Costa Rica and Nicaragua ("Cañas-Jerez Treaty"), San José de Costa Rica, 15 April 1858, *Treaty Collection*, San José, Ministry of Foreign Relations, 1907, p. 159.

<sup>113</sup> *Dispute regarding Navigational and Related Rights* (see footnote 26 above), paras. 66–68.

<sup>114</sup> *Ibid.*, separate opinion of Judge Skotnikov, p. 283, at p. 285, paras. 9–10.

(13) The International Tribunal for the Former Yugoslavia has sometimes taken more general forms of State practice into account, including trends in the legislation of States which, in turn, can give rise to a changed interpretation of the scope of crimes or their elements. In *Furundžija*, for example, the Chamber of the Tribunal, in search of a definition for the crime of rape as prohibited by article 27 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV), article 76, paragraph 1, of the first additional Protocol (Protocol I) and article 4, paragraph 2 (e), of the second additional Protocol (Protocol II),<sup>115</sup> examined the principles of criminal law common to the major legal systems of the world and held that

a trend can be discerned in the national legislation of a number of States of broadening the definition of rape so that it now embraces acts that were previously classified as comparatively less serious offences, that is sexual or indecent assault. This trend shows that at the national level States tend to take a stricter attitude towards serious forms of sexual assault.<sup>116</sup>

(14) The “living instrument” approach of the European Court of Human Rights is also based, *inter alia*, on different forms of subsequent practice.<sup>117</sup> While the Court does not generally require “the agreement of the parties regarding its interpretation” in the sense of article 31, paragraph 3 (b), the decisions in which it adopts an evolutive approach are regularly supported by an elaborate account of subsequent (state, social and international legal) practice.<sup>118</sup>

(15) The Inter-American Court of Human Rights, despite its relatively rare mentioning of subsequent practice, frequently refers to broader international developments, an approach which falls somewhere between subsequent practice and other “relevant rules” under article 31, paragraph 3 (c).<sup>119</sup> In the case of *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, for example, the Court pointed out that

human rights treaties are live instruments [“*instrumentos vivos*”] whose interpretation must adapt to the evolution of the times and, specifically, to current living conditions.<sup>120</sup>

<sup>115</sup> International Tribunal for the Former Yugoslavia, *Prosecutor v. Furundžija*, Trial Chamber, Case No. IT-95-17/1-T, Judgment of 10 December 1998, *Judicial Reports 1998*, vol. I, p. 466, at paras. 165 *et seq.*

<sup>116</sup> *Ibid.*, para. 179; similarly *The Prosecutor v. Alfred Musema*, International Tribunal for Rwanda, Trial Chamber I, Case No. ICTR-96-13-T, Judgment, 27 January 2000, paras. 220 *et seq.*, in particular para. 228.

<sup>117</sup> “Second report for the ILC Study Group on treaties over time”, in Nolte (ed.) (see footnote 29 above), pp. 246 *et seq.*

<sup>118</sup> *Öcalan v. Turkey* [GC], no. 46221/99, ECHR 2005-IV, para. 163; *Vo v. France* [GC], no. 53924/00, ECHR 2004-VIII, paras. 4 and 70; *Johnston and Others v. Ireland*, 18 December 1986, Series A no. 112, para. 53; *Bayatyan v. Armenia* [GC], no. 23459/03, ECHR 2011, para. 63; *Soering v. the United Kingdom*, 7 July 1989, Series A no. 161, para. 103; *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, ECHR 2010, paras. 119–120; *Demir and Baykara v. Turkey* [GC] (see footnote 30 above), para. 76.

<sup>119</sup> See, for example, *Velásquez Rodríguez v. Honduras*, Judgment (merits), 29 July 1988, Inter-American Court of Human Rights, Series C, No. 4, para. 151, and *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (footnote 60 above), paras. 130–133 and 137.

<sup>120</sup> *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment (Merits, Reparations and Costs), 31 August 2001, Inter-American Court of Human Rights, Series C, No. 79, para. 146; see also *Interpretation of the American Declaration of the Rights and Duties of*

(16) The Human Rights Committee also on occasion adopts an evolutive approach, which is based on developments in State practice. Thus, in *Judge v. Canada*, the Committee abandoned its *Kindler v. Canada*<sup>121</sup> jurisprudence, elaborating:

The Committee is mindful of the fact that the above-mentioned jurisprudence was established some 10 years ago, and that since that time there has been a broadening international consensus in favour of abolition of the death penalty, and in States which have retained the death penalty, a broadening consensus not to carry it out.<sup>122</sup>

In *Yoon and Choi*, the Committee stressed that the meaning of any right contained in the International Covenant on Civil and Political Rights evolved over time and concluded that article 18, paragraph 3, now provided at least some protection against being forced to act against genuinely held religious beliefs. The Committee reached this conclusion since “an increasing number of those States parties to the Covenant which have retained compulsory military service have introduced alternatives to compulsory military service”.<sup>123</sup>

(17) Finally, tribunals of the International Centre for Settlement of Investment Disputes have emphasized that subsequent practice can be a particularly important means of interpretation for such provisions as the parties to a treaty intended to evolve in the light of their subsequent treaty practice. In the case of *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, for example, the Tribunal stated as follows:

Neither party asserted that the [Convention on the settlement of investment disputes between States and nationals of other States] contains any precise *a priori* definition of “investment”. Rather, the definition was left to be worked out in the subsequent practice of States, thereby preserving its integrity and flexibility and allowing for future progressive development of international law on the topic of investment.<sup>124</sup>

(18) The jurisprudence of international courts, tribunals, and other treaty bodies thus confirms that subsequent agreements and subsequent practice under articles 31 and 32 “may assist in determining” whether a “term” shall be given a meaning which is capable of evolving over time. The expression “term” is not limited to specific words (like “commerce”, “territorial status”, “rape” or

*Man within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10/89, 14 July 1989, Inter-American Court of Human Rights, Series A, No. 10, para. 38.

<sup>121</sup> *Kindler v. Canada*, Views, 30 July 1993, communication No. 470/1991, Report of the Human Rights Committee, *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 40 (A/48/40)*, vol. II, annex XII.

<sup>122</sup> *Judge v. Canada*, Views, 5 August 2003, communication No. 829/1998, *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 40 (A/58/40)*, vol. II, annex VI, para. 10.3.

<sup>123</sup> *Yoon and Choi v. the Republic of Korea*, Views, 3 November 2006, communications Nos. 1321/2004 and 1322/2004, *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40 (A/62/40)*, vol. II, annex VII, para. 8.4.

<sup>124</sup> *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka* (United States–Sri Lanka Bilateral Investment Treaty), ICSID Case No. ARB/00/2, Award and Concurring Opinion, 15 March 2002, *ICSID Reports*, vol. 6 (2004), p. 308, at p. 317, para. 33 (see also *ICSID Review*, vol. 17(1) (2002), pp. 151 and 161); similarly *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction, 27 September 2001, *ICSID Reports*, vol. 6 (2004), p. 417, at p. 419, para. 97.

“investment”), but may also encompass more interrelated or cross-cutting concepts (such as “by law” (art. 9 of the International Covenant on Civil and Political Rights) or “necessary” (art. 18 of the Covenant), as they exist, for example, in human rights treaties). Since the “terms” of a treaty are elements of the rules which are contained therein, the rules concerned are covered accordingly.

#### **Conclusion 4. Definition of subsequent agreement and subsequent practice**

1. A “subsequent agreement” as an authentic means of interpretation under article 31, paragraph 3 (a), is an agreement between the parties, reached after the conclusion of a treaty, regarding the interpretation of the treaty or the application of its provisions.

2. A “subsequent practice” as an authentic means of interpretation under article 31, paragraph 3 (b), consists of conduct in the application of a treaty, after its conclusion, which establishes the agreement of the parties regarding the interpretation of the treaty.

3. Other “subsequent practice” as a supplementary means of interpretation under article 32 consists of conduct by one or more parties in the application of the treaty, after its conclusion.

#### *Commentary*

(1) Draft conclusion 4 defines the three different “subsequent” means of treaty interpretation which are mentioned in draft conclusion 1, paragraphs 3 and 4, namely “subsequent agreement” under article 31, paragraph 3 (a), “subsequent practice” under article 31, paragraph 3 (b), and other “subsequent practice” under article 32.

(2) In all three cases the term “subsequent” refers to acts occurring “after the conclusion of a treaty”.<sup>125</sup> This point in time is often earlier than the moment when the treaty enters into force (art. 24). Various provisions of the 1969 Vienna Convention (e.g. art. 18) show that a treaty may be “concluded” before its actual entry into force.<sup>126</sup> For the purposes of the present topic, “conclusion” is whenever the text of the treaty has been established as definite. It is after conclusion, not just after entry into force, of a treaty when subsequent agreements and subsequent practice can occur. Indeed, it is difficult to identify a reason why an agreement or practice which takes place between the moment when the text of a treaty has been established as definite and the entry into force of that treaty should not be relevant for the purpose of interpretation.<sup>127</sup>

<sup>125</sup> *Yearbook ... 1966*, vol. II, document A/6309/Rev.1 (Part II), p. 221, para. (14).

<sup>126</sup> Second report on the law of treaties, by J. L. Briery, Special Rapporteur, *Yearbook ... 1951*, vol. II, document A/CN.4/43, pp. 70 *et seq.*; *Yearbook ... 1956*, vol. II, document A/CN.4/101, p. 112; S. Rosenne, “Treaties, conclusion and entry into force”, in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 7 (Amsterdam, North Holland Publishing, 2000), p. 464, at p. 465 (“Strictly speaking it is the negotiation that is concluded through a treaty”); Villiger, *Commentary on the 1969 Vienna Convention ...* (see footnote 44 above), pp. 78–80, paras. 9–14.

<sup>127</sup> See, for example, Declaration on the European Stability Mechanism, agreed on by the Contracting Parties to the Treaty establishing the European Stability Mechanism, 27 September 2012.

(3) Article 31, paragraph 2, of the 1969 Vienna Convention provides that the “context” of the treaty includes certain “agreements” and “instruments”<sup>128</sup> that are “made in connection with the conclusion of the treaty”. The phrase “in connection with the conclusion of the treaty” should be understood as including agreements and instruments which are made in a close temporal and contextual relation with the conclusion of the treaty.<sup>129</sup> If they are made after this period, then such “agreements” and agreed upon “instruments” constitute “subsequent agreements” or subsequent practice under article 31, paragraph 3.<sup>130</sup>

(4) Paragraph 1 of draft conclusion 4 provides the definition of “subsequent agreement” under article 31, paragraph 3 (a).

(5) Article 31, paragraph 3 (a), uses the term “subsequent agreement” and not the term “subsequent treaty”. A “subsequent agreement” is, however, not necessarily less formal than a “treaty”. Whereas a treaty within the meaning of the 1969 Vienna Convention must be in written form (art. 2, para. 1 (a)), the customary international law on treaties knows no such requirement.<sup>131</sup> The term “agreement” in the Vienna Convention<sup>132</sup> and in customary international law does not imply any particular degree of formality. Article 39 of the Vienna Convention, which lays down the general rule according to which “[a] treaty may be amended by agreement between the parties”, has been explained by the Commission to mean that “[a]n amending agreement may take whatever form the parties to the original treaty may choose”.<sup>133</sup> In the same way, the Vienna Convention does not envisage any particular formal requirements for agreements and practice under article 31, paragraph 3 (a) and (b).<sup>134</sup>

<sup>128</sup> See *Yearbook ... 1966*, vol. II, document A/6309/Rev.1 (Part II), p. 221, para. (13). The German Federal Constitutional Court has held that this term may include unilateral declarations if the other party did not object to them: see German Federal Constitutional Court, *BVerfGE*, vol. 40, p. 141, at p. 176. See generally Gardiner (footnote 23 above), pp. 215–216.

<sup>129</sup> Yasseen (see footnote 24 above), p. 38; Jennings and Watts (eds.) (see footnote 64 above), p. 1274, para. 632 (“but, on the other hand, too long a lapse of time between the treaty and the additional agreement might prevent it being regarded as made in connection with ‘the conclusion of’ the treaty”).

<sup>130</sup> See *Yearbook ... 1966*, vol. II, document A/6309/Rev.1 (Part II), p. 221, para. (14); see also Villiger, *Commentary on the 1969 Vienna Convention ...* (footnote 44 above), p. 431, paras. 20–21; see also K. J. Heller, “The uncertain legal status of the aggression understandings”, *Journal of International Criminal Justice*, vol. 10 (2012), p. 229, at p. 237.

<sup>131</sup> Villiger, *Commentary on the 1969 Vienna Convention ...* (footnote 44 above), p. 80, para. 15; P. Gautier, “Commentary on article 2 of the Vienna Convention”, in Corten and Klein (eds.) (see footnote 25 above), p. 33, at pp. 38–40, paras. 14–18; J. Klabbbers, *The Concept of Treaty in International Law* (The Hague, Kluwer Law International, 1996), pp. 49–50; see also A. Aust, “The theory and practice of informal international instruments”, *International and Comparative Law Quarterly*, vol. 35(4) (1986), p. 787, at pp. 794 *et seq.*

<sup>132</sup> See arts. 2, para. 1 (a), 3, 24, para. 2, 39–41, 58 and 60.

<sup>133</sup> *Yearbook ... 1966*, vol. II, document A/6309/Rev.1 (Part II), pp. 232–233 (paragraph (4) of the commentary to article 35); see also Villiger, *Commentary on the 1969 Vienna Convention ...* (footnote 44 above), p. 513, para. 7; P. Sands, “Commentary on article 39 of the Vienna Convention”, in Corten and Klein (eds.) (see footnote 25 above), p. 963, at pp. 971–972, paras. 31–34.

<sup>134</sup> Draft article 27, paragraph 3 (b), which later became article 31, paragraph 3 (b), of the 1969 Vienna Convention, contained the word “understanding”, which was changed to “agreement” at the Vienna

(6) While every treaty is an agreement, not every agreement is a treaty. Indeed, a “subsequent agreement” under article 31, paragraph 3 (a), “shall” only “be taken into account” in the interpretation of a treaty. Therefore, it is not necessarily binding. The question of under which circumstances a subsequent agreement between the parties is binding, and under which circumstances it is merely a means of interpretation among several others, will be addressed at a later stage of work on the topic.

(7) The 1969 Vienna Convention distinguishes a “subsequent agreement” under article 31, paragraph 3 (a), from “any subsequent practice ... which establishes the agreement of the parties regarding its interpretation” under article 31, paragraph 3 (b). This distinction is not always clear, and the jurisprudence of international courts and other adjudicative bodies shows a certain reluctance to assert it. In *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, the International Court of Justice used the expression “subsequent attitudes” to denote both what it later described as “subsequent agreements” and as subsequent unilateral “attitudes”.<sup>135</sup> In the case of *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, the International Court of Justice left open the question of whether the use of a particular map could constitute a subsequent agreement or subsequent practice.<sup>136</sup> WTO Panels and the Appellate Body have also not always distinguished between a subsequent agreement and subsequent practice under article 31, paragraph 3 (a) and (b).<sup>137</sup>

(8) The NAFTA Tribunal in *Canadian Cattlemen for Fair Trade v. United States*,<sup>138</sup> however, has squarely

addressed this distinction. In that case, the United States asserted that a number of unilateral actions by the three NAFTA parties could, if considered together, constitute a subsequent agreement.<sup>139</sup> In a first step, the Panel did not find that the evidence was sufficient to establish such a subsequent agreement under article 31, paragraph 3 (a).<sup>140</sup> In a second step, however, the Tribunal concluded that the very same evidence constituted a relevant subsequent practice, which established an agreement between the parties regarding the interpretation:

The question remains: is there “subsequent practice” that establishes the agreement of the NAFTA Parties on this issue within the meaning of Article 31 (3) (b)? The Tribunal concludes that there is. Although there is, to the Tribunal, insufficient evidence on the record to demonstrate a “subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions,” the available evidence cited by the Respondent demonstrates to us that there is nevertheless a “subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its applications ...”.<sup>141</sup>

(9) This reasoning suggests that one difference between a “subsequent agreement” and “subsequent practice” under article 31, paragraph 3, lies in different forms that embody the “authentic” expression of the will of the parties. Indeed, by distinguishing between “any subsequent agreement” under article 31, paragraph 3 (a), and “subsequent practice ... which establishes the agreement of the parties” under article 31, paragraph 3 (b), of the 1969 Vienna Convention, the Commission did not intend to denote a difference concerning their possible legal effect.<sup>142</sup> The difference between the two concepts, rather, lies in the fact that a “subsequent agreement between the parties” *ipso facto* has the effect of constituting an authentic means of interpretation of the treaty, whereas a “subsequent practice” only has this effect if its different elements, taken together, show “the common understanding of the parties as to the meaning of the terms”.<sup>143</sup>

(10) Subsequent agreements and subsequent practice under article 31, paragraph 3, are hence distinguished based on whether an agreement of the parties can be identified *as such*, in a common act, or whether it is necessary to identify an agreement through individual acts which in their combination demonstrate a common position. A “subsequent agreement” under article 31, paragraph 3 (a), must therefore be “reached” and presupposes a single common act by the parties by which they manifest their common understanding regarding the interpretation of the treaty or the application of its provisions.

Conference. This change was “merely a drafting matter”; see *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March–24 May 1968, Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole (A/CONF.39/11)*, United Nations publication, Sales No. E.68.V.7), p. 169; Fox (see footnote 69 above), p. 63.

<sup>135</sup> *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* (see footnote 26 above), pp. 34 *et seq.*, paras. 66 *et seq.*

<sup>136</sup> *Sovereignty over Pulau Ligitan and Pulau Sipadan* (see footnote 26 above), p. 656, para. 61; in the *Gabčíkovo-Nagymaros* case, the Court spoke of “subsequent positions” in order to establish that “the explicit terms of the treaty itself were, therefore, in practice acknowledged by the parties to be negotiable” (*Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 7, at p. 77, para. 138); see also *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility*, Judgment, I.C.J. Reports 1995, p. 6, at p. 16, para. 28 (“subsequent conduct”).

<sup>137</sup> See “Scheduling guidelines” in WTO, Panel Report, *Mexico—Measures Affecting Telecommunications Services*, WT/DS204/R, adopted 1 June 2004, and in Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R and Corr.1, adopted 20 April 2005; “1981 Understanding” in Panel Report, *United States—Tax Treatment for “Foreign Sales Corporations”*, WT/DS108/R, adopted 20 March 2000; “Tokyo Round SCM Code” in Panel Report, *Brazil—Measures Affecting Desiccated Coconut*, WT/DS22/R, adopted 20 March 1997; and a “waiver” in Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas* (see footnote 73 above).

<sup>138</sup> *Canadian Cattlemen for Fair Trade v. United States*, UNCITRAL Arbitration under NAFTA Chapter 11, Award on Jurisdiction, 28 January 2008; see also *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on the Challenge to the President of the Committee, 3 October 2001, ICSID Reports, vol. 6 (2004), p. 327, at p. 334, or see ICSID Review, vol. 17(1) (2002), p. 168, at pp. 173–174,

para. 12; P. Merkouris and M. Fitzmaurice, “Canons of treaty interpretation: Selected case studies from the World Trade Organization and the North American Free Trade Agreement”, in Fitzmaurice, Elias and Merkouris (eds.) (see footnote 69 above), p. 153, at pp. 217–233.

<sup>139</sup> *Canadian Cattlemen for Fair Trade v. United States* (see previous footnote), paras. 174–177.

<sup>140</sup> *Ibid.*, paras. 184–187.

<sup>141</sup> *Ibid.*, para. 188; see also para. 189. In a similar sense: *Aguaes del Tunari S.A. v. Republic of Bolivia* (Netherlands/Bolivia Bilateral Investment Treaty), ICSID Case No. ARB/02/3, Decision on Respondent’s Objections to Jurisdiction, 21 October 2005, ICSID Review—Foreign Investment Law Journal, vol. 20 (2005), p. 450, at pp. 528 *et seq.*, paras. 251 *et seq.*

<sup>142</sup> *Yearbook ... 1966*, vol. II, document A/6309/Rev.1 (Part II), pp. 221–222, para. (15).

<sup>143</sup> *Ibid.*; and Karl (see footnote 79 above), p. 294.

(11) “Subsequent practice” under article 31, paragraph 3 (b), on the other hand, encompasses all (other) relevant forms of subsequent conduct by the parties to a treaty which contribute to the identification of an agreement, or “understanding”,<sup>144</sup> of the parties regarding the interpretation of the treaty. It is, however, possible that “practice” and “agreement” coincide in specific cases and cannot be distinguished. This explains why the term “subsequent practice” is sometimes used in a more general sense which encompasses both means of interpretation that are referred to in article 31, paragraph 3 (a) and (b).<sup>145</sup>

(12) A group of separate subsequent agreements, each between a limited number of parties, but which, taken together, establish an agreement between all the parties to a treaty regarding its interpretation, is not normally “a” subsequent agreement under article 31, paragraph 3 (a). The term “subsequent agreement” under article 31, paragraph 3 (a), should, for the sake of clarity, be limited to a single agreement between all the parties. Different later agreements between a limited number of parties which, taken together, establish an agreement between all the parties regarding the interpretation of a treaty constitute subsequent practice under article 31, paragraph 3 (b). Different such agreements between a limited number of parties, which, even taken together, do *not* establish an agreement between all the parties regarding the interpretation of a treaty, may have interpretative value as a supplementary means of interpretation under article 32 (see below, paras. (22)–(23)). Thus, the use of the term “subsequent agreement” is limited to agreements between all the parties to a treaty which are manifested in one single agreement—or in a common act in whatever form—that reflects the agreement of all parties.<sup>146</sup>

(13) A subsequent agreement under article 31, paragraph 3 (a), must be an agreement “regarding” the interpretation of the treaty or the application of its provisions. The parties must therefore purport, possibly among other aims, to clarify the meaning of a treaty or how it is to be applied.<sup>147</sup>

(14) Whether an agreement is one “regarding” the interpretation or application of a treaty can sometimes be determined by some reference which links the “subsequent agreement” to the treaty concerned. Such reference may also be comprised in a later treaty. In the *Jan Mayen* case between Denmark and Norway, for example, the International Court of Justice appears to have accepted that a “subsequent treaty” between the parties “in the same field” could be used for the purpose of the interpretation of the previous treaty. In that case, however, the

Court ultimately declined to use the subsequent treaty for that purpose because it did not in any way “refer” to the previous treaty.<sup>148</sup> In *Dispute regarding Navigational and Related Rights* between Costa Rica and Nicaragua, Judge Guillaume referred to the actual practice of tourism on the San Juan River in conformity with a Memorandum of Understanding between the two States.<sup>149</sup> It was not clear, however, whether this particular Memorandum was meant by the parties to serve as an interpretation of the boundary treaty under examination.

(15) *Paragraph 2 of draft conclusion 4* does not intend to provide a general definition for any form of subsequent practice that may be relevant for the purpose of the interpretation of treaties. Paragraph 2 is limited to subsequent practice as a means of authentic interpretation, which establishes the agreement of all the parties to the treaty, as formulated in article 31, paragraph 3 (b). Such subsequent practice (in a narrow sense) is distinguishable from other “subsequent practice” (in a broad sense) by one or more parties which does not establish the agreement of the parties, but which may nevertheless be relevant as a subsidiary means of interpretation according to article 32 of the 1969 Vienna Convention.<sup>150</sup>

(16) Subsequent practice under article 31, paragraph 3 (b), may consist of any “conduct”. The word “conduct” is used in the sense of article 2 of the articles, adopted by the Commission, on responsibility of States for internationally wrongful acts.<sup>151</sup> It may thus include not only acts but also omissions, including relevant silence, which contribute to establishing agreement.<sup>152</sup> The question of under which circumstances omissions, or silence, can contribute to an agreement of all the parties regarding the interpretation of a treaty will be addressed at a later stage of the work.

(17) Subsequent practice under article 31, paragraph 3 (b), must be conduct “in the application of the treaty”. This includes not only official acts at the international or at the internal level which serve to apply the treaty, including to respect or to ensure the fulfilment of treaty obligations, but also, *inter alia*, official statements regarding its interpretation, such as statements at a diplomatic conference, statements in the course of a legal dispute or judgments of domestic courts; official communications to which the treaty gives rise; or the

<sup>144</sup> The word “understanding” had been used by the Commission in the corresponding draft article 27, paragraph 3 (b), on the law of treaties (see footnote 134 above).

<sup>145</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006, p. 113, at pp. 127–128, para. 53: in this case, even an explicit subsequent verbal agreement was characterized by one of the parties as “subsequent practice”.

<sup>146</sup> See WTO, Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012, para. 371. This aspect will be addressed further at a later stage of work on this topic.

<sup>147</sup> *Ibid.*, paras. 366–378, in particular para. 372; Linderfalk, *On the Interpretation of Treaties* (see footnote 74 above), pp. 164 *et seq.*

<sup>148</sup> *Maritime Delimitation in the Area between Greenland and Jan Mayen*, Judgment, I.C.J. Reports 1993, p. 38, at p. 51, para. 28.

<sup>149</sup> *Dispute regarding Navigational and Related Rights* (see footnote 26 above), Declaration of Judge *ad hoc* Guillaume, p. 290, at pp. 298–299, para. 16.

<sup>150</sup> On the distinction between the two forms of subsequent practice, see below, paras. (22)–(23) of the commentary.

<sup>151</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 34–35, paragraphs (2)–(4) of the commentary. The articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session appear in the annex to General Assembly resolution 56/83 of 12 December 2001.

<sup>152</sup> Third report on the law of treaties by Waldock, *Yearbook ... 1964*, vol. II, document A/CN.4/167 and Add.1–3, pp. 61–62, paras. (32)–(33); *Case concerning the Temple of Preah Vihear* (see footnote 92 above), p. 23; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 392, at p. 410, para. 39; *Case concerning a dispute between Argentina and Chile concerning the Beagle Channel*, UNRIAA, vol. XXI (Sales No. E/F.95.V.2), p. 53, at pp. 185–187, paras. 168–169.



enactment of domestic legislation or the conclusion of international agreements for the purpose of implementing a treaty even before any specific act of application takes place at the internal or at the international level.

(18) It may be recalled that, in one case, a NAFTA Panel denied that internal legislation can be used as an interpretative aid:

Finally, in light of the fact that both Parties have made references to their national legislation on land transportation, the Panel deems it appropriate to refer to Article 27 of the Vienna Convention, which states that “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”. This provision directs the Panel not to examine national laws but the applicable international law. Thus, neither the internal law of the United States nor the Mexican law should be utilized for the interpretation of NAFTA. To do so would be to apply an inappropriate legal framework.<sup>153</sup>

Whereas article 27 of the 1969 Vienna Convention is certainly valid and important, this rule does not signify that national legislation may not be taken into account as an element of subsequent State practice in the application of the treaty. There is a difference between invoking internal law as a justification for a failure to perform a treaty and referring to internal law for the purpose of interpreting a provision of a treaty law. Accordingly, international adjudicatory bodies, in particular the WTO Appellate Body and the European Court of Human Rights, have recognized and regularly distinguish between internal legislation (and other implementing measures at the internal level) which violates treaty obligations, and national legislation and other measures which can serve as a means to interpret the treaty.<sup>154</sup> It should be noted, however, that an element of *bona fides* is implied in any “subsequent practice in the application of the treaty”. A manifest misapplication of a treaty, as opposed to a *bona fide* application (even if erroneous), is therefore not an “application of the treaty” in the sense of articles 31 and 32.

(19) The requirement that subsequent practice in the application of a treaty under article 31, paragraph 3 (b), must be “regarding its interpretation” has the same meaning as the parallel requirement under article 31, paragraph 3 (a) (see above, paras. (13)–(14)). It may often be difficult to distinguish between subsequent practice which specifically and purposefully relates to a treaty, i.e. is “regarding its interpretation”, and other practice “in the application of the treaty”. The distinction, however, is important because only conduct that the parties undertake “regarding the interpretation of the treaty” is able to contribute to an “authentic”

interpretation, whereas this requirement does not exist for other subsequent practice under article 32.

(20) The question of under which circumstances an “agreement of the parties regarding the interpretation of a treaty” is actually “established” will be addressed at a later stage of work on the topic.

(21) Article 31, paragraph 3 (b), does not explicitly require that the practice must be conduct of the parties to the treaty themselves. It is, however, the parties themselves, acting through their organs,<sup>155</sup> or by way of conduct which is attributable to them, who engage in practice in the application of the treaty which may establish their agreement. The question whether other actors can generate relevant subsequent practice is addressed in draft conclusion 5.<sup>156</sup>

(22) Paragraph 3 of draft conclusion 4 addresses “other” subsequent practice, i.e. practice other than that referred to in article 31, paragraph 3 (b). This paragraph concerns “subsequent practice in the application of the treaty as a supplementary means of interpretation under article 32”, as mentioned in paragraph 4 of draft conclusion 1. This form of subsequent practice, which does not require the agreement of all the parties, was originally referred to in the commentary of the Commission as follows:

But, in general, the practice of an individual party or of only some parties as an element of interpretation is on a quite different plane from a concordant practice embracing all the parties and showing their common understanding of the meaning of the treaty. Subsequent practice of the latter kind evidences the agreement of the parties as to the interpretation of the treaty and is analogous to an interpretative agreement. For this reason the Commission considered that subsequent practice establishing the common understanding of all the parties regarding the interpretation of a treaty should be included in paragraph 3 [of what became article 31, paragraph 3, of the Vienna Convention] as an authentic means of interpretation alongside interpretative agreements. The practice of individual States in the application of a treaty, on the other hand, may be taken into account only as one of the “further” means of interpretation mentioned in article 70.<sup>157</sup>

(23) Paragraph 3 of draft conclusion 4 does not enunciate a requirement, as contained in article 31, paragraph 3 (b), that the relevant practice be “regarding the interpretation” of the treaty. Thus, for the purposes of the third paragraph, any practice in the application of the treaty that may provide indications as to how the treaty should be interpreted may be a relevant supplementary means of interpretation under article 32.

(24) This “other” subsequent practice, since the adoption of the Vienna Convention, has been recognized and applied by international courts and other adjudicatory bodies as a means of interpretation (see below, paras. (25)–(33)). It should be noted, however, that the WTO Appellate Body, in *Japan—Alcoholic Beverages II*,<sup>158</sup> has formulated a definition of subsequent

<sup>153</sup> NAFTA Arbitral Panel Final Report, *Cross-Border Trucking Services (Mexico v. United States of America)*, No. USA-MEX-98-2008-01, adopted 6 February 2001, para. 224.

<sup>154</sup> For example, WTO, Panel Report, *United States—Section 110(5) of the US Copyright Act*, WT/DS160/R, adopted 27 July 2000, para. 6.55; Panel Report, *United States—Continued Existence and Application of Zeroing Methodology*, WT/DS350/R, adopted 19 February 2009, para. 7.173; Appellate Body Report, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011, paras. 335–336; International Centre for Settlement of Investment Disputes, *CMS Gas Transmission Company v. Argentine Republic* (United States/Argentina Bilateral Investment Treaty), ICSID Case No. ARB/01/8, Decision on Objections to Jurisdiction, 17 July 2003, *ICSID Reports*, vol. 7 (2003), p. 492, para. 47; European Court of Human Rights, *V. v. the United Kingdom* [GC], no. 24888/94, ECHR 1999-IX, para. 73; *Kart v. Turkey* [GC], no. 8917/05, ECHR 2009 (extracts), para. 54; *Sigurður A. Sigurjónsson v. Iceland*, 30 June 1993, Series A no. 264, para. 35.

<sup>155</sup> Karl (see footnote 79 above), pp. 115 *et seq.*

<sup>156</sup> See draft conclusion 5, para. 2.

<sup>157</sup> *Yearbook ... 1964*, vol. II, document A/5809, p. 204, para. (13); see also *Yearbook ... 1966*, vol. II, document A/6309/Rev.1 (Part II), pp. 221–222, para. (15).

<sup>158</sup> WTO, Appellate Body Report, *Japan—Taxes on Alcoholic Beverages* (see footnote 29 above), and Panel Report, WT/DS8/R, WT/DS10/R, WT/DS11/R, adopted 1 November 1996.

practice for the purpose of treaty interpretation which seems to suggest that only such “subsequent practice in the application of the treaty” “which establishes the agreement of the parties regarding its interpretation” can at all be relevant for the purpose of treaty interpretation, and not any other form of subsequent practice by one or more parties:

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.<sup>159</sup>

However, the jurisprudence of the International Court of Justice and of other international courts and tribunals, and ultimately even that of the WTO Dispute Settlement Body itself (see below, paras. (32)–(33)), demonstrate that subsequent practice which fulfils all the conditions of article 31, paragraph 3 (b), of the 1969 Vienna Convention is not the only form of subsequent practice by parties in the application of a treaty which may be relevant for the purpose of treaty interpretation.

(25) In the *Kasikili/Sedudu Island* case, for example, the International Court of Justice held that a report by a technical expert which had been commissioned by one of the parties and which had “remained at all times an internal document”,<sup>160</sup> while not representing subsequent practice which establishes the agreement of the parties under article 31, paragraph 3 (b), could “nevertheless support the conclusions” which the Court had reached by other means of interpretation.<sup>161</sup>

(26) Tribunals of the International Centre for Settlement of Investment Disputes have also used subsequent State practice as a means of interpretation in a broad sense.<sup>162</sup> For example, when addressing the question whether minority shareholders can acquire rights from investment protection treaties and have standing in the International Centre for Settlement of Investment Disputes procedures, the tribunal in *CMS Gas v. Argentina* noted as follows:

State practice further supports the meaning of this changing scenario ... Minority and non-controlling participations have thus been included in the protection granted or have been admitted to claim in their own right. Contemporary practice relating to lump-sum agreements, ... among other examples, evidence increasing flexibility in the handling of international claims.<sup>163</sup>

(27) The European Court of Human Rights held in *Loizidou v. Turkey* that its interpretation was “confirmed by the subsequent practice of the Contracting Parties”,<sup>164</sup> i.e. “the evidence of a practice denoting practically universal agreement amongst Contracting Parties that Articles 25 and 46 ... of the [European] Convention [on Human Rights] do not permit territorial or substantive

restrictions”.<sup>165</sup> More often the European Court of Human Rights has relied on—not necessarily uniform—subsequent State practice by referring to national legislation and domestic administrative practice, as a means of interpretation. In the case of *Demir and Baykara v. Turkey*, for example, the Court held that “as to the practice of European States, it can be observed that, in the vast majority of them, the right for public servants to bargain collectively with the authorities has been recognised”<sup>166</sup> and that “the remaining exceptions can be justified only by particular circumstances”.<sup>167</sup>

(28) The Inter-American Court of Human Rights, when taking subsequent practice of the parties into account, has also not limited its use to cases in which the practice established the agreement of the parties. Thus, in the case of *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, the Court held that the mandatory imposition of the death penalty for every form of conduct which resulted in the death of another person was incompatible with article 4, paragraph 2, of the American Convention on Human Rights (imposition of the death penalty only for the most serious crimes). In order to support this interpretation, the Court held that it was “useful to consider some examples in this respect, taken from the legislation of those American countries that maintain the death penalty”.<sup>168</sup>

(29) The Human Rights Committee under the International Covenant on Civil and Political Rights is open to arguments based on subsequent practice in a broad sense when it comes to the justification of interferences with the rights set forth in the Covenant.<sup>169</sup> Interpreting the rather general terms contained in article 19, paragraph 3, of the Covenant (permissible restrictions on the freedom of expression), the Committee observed that “similar restrictions can be found in many jurisdictions”,<sup>170</sup> and concluded that the aim pursued by the contested law did not, as such, fall outside the legitimate aims of article 19, paragraph 3, of the Covenant.<sup>171</sup>

(30) ITLOS has on some occasions referred to the subsequent practice of the parties without verifying whether such practice actually established an agreement between the parties regarding the interpretation of the treaty. In *M/V “SAIGA” (No. 2)*,<sup>172</sup> for example, the Tribunal reviewed

<sup>165</sup> *Ibid.*, para. 80; it is noteworthy that the Court described “such a State practice” as being “uniform and consistent”, despite the fact that it had recognized that two States possibly constituted exceptions (Cyprus and the United Kingdom; “whatever their meaning”), paras. 80 and 82.

<sup>166</sup> *Demir and Baykara v. Turkey* [GC] (see footnote 30 above), para. 52.

<sup>167</sup> *Ibid.*, para. 151; similarly *Jorgic v. Germany*, no. 74613/01, ECHR 2007-III, para. 69.

<sup>168</sup> *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago* (see footnote 31 above), reasoned concurring opinion of Judge Sergio García Ramírez, para. 12.

<sup>169</sup> *Jong-Cheol v. the Republic of Korea*, Views, 27 July 2005, communication No. 968/2001, Report of the Human Rights Committee, *Official Records of the General Assembly, Sixtieth Session, Supplement No. 40 (A/60/40)*, p. 63.

<sup>170</sup> *Ibid.*, para. 8.3.

<sup>171</sup> *Ibid.*; see also *Yoon and Choi v. the Republic of Korea* (footnote 123 above), para. 8.4.

<sup>172</sup> *M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p. 10, at paras. 155–156.

<sup>159</sup> *Ibid.* (Appellate Body Report), sect. E, p. 16.

<sup>160</sup> *Kasikili/Sedudu Island* (see footnote 26 above), p. 1078, para. 55.

<sup>161</sup> *Ibid.*, p. 1096, para. 80.

<sup>162</sup> O. K. Fauchald, “The legal reasoning of ICSID tribunals—An empirical analysis”, *European Journal of International Law*, vol. 19 (2008), p. 301, at p. 345.

<sup>163</sup> *CMS Gas Transmission Company v. Argentine Republic* (see footnote 154 above), para. 47.

<sup>164</sup> *Loizidou v. Turkey* (see footnote 43 above), para. 79.

State practice with regard to the use of force to stop a ship according to the United Nations Convention on the Law of the Sea.<sup>173</sup> Relying on the “normal practice used to stop a ship”, the Tribunal did not specify the respective State practice but rather assumed that a certain general standard existed.<sup>174</sup>

(31) The International Tribunal for the Former Yugoslavia, referring to the Convention on the Prevention and Punishment of the Crime of Genocide, noted in the *Jelisić* judgment that

the Trial Chamber ... interprets the Convention's terms in accordance with the general rules of interpretation of treaties set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties ... The Trial Chamber also took account of subsequent practice grounded upon the Convention. Special significance was attached to the Judgments rendered by the Tribunal for Rwanda ... The practice of States, notably through their national courts, and the work of international authorities in this field have also been taken into account.<sup>175</sup>

(32) The WTO dispute settlement bodies also occasionally distinguish between “subsequent practice” that satisfies the conditions of article 31, paragraph 3 (b), and other forms of subsequent practice in the application of a treaty which they also recognize as being relevant for the purpose of treaty interpretation. In *United States—Section 110(5) of the US Copyright Act*<sup>176</sup> (not appealed), for example, the Panel had to determine whether a “minor exceptions doctrine” concerning royalty payments applied.<sup>177</sup> The Panel found evidence in support of the existence of such a doctrine in several member States' national legislation and noted as follows:

We recall that Article 31 (3) of the Vienna Convention provides that together with the context (a) any subsequent agreement, (b) subsequent practice, or (c) any relevant rules of international law applicable between the parties, shall be taken into account for the purposes of interpretation. We note that the parties and third parties have brought to our attention several examples from various countries of limitations in national laws based on the minor exceptions doctrine. In our view, State practice as reflected in the national copyright laws of Berne Union members before and after 1948, 1967 and 1971, as well as of WTO Members before and after the date that the TRIPS Agreement became applicable to them, confirms our conclusion about the minor exceptions doctrine.<sup>178</sup>

And the Panel added the following cautionary footnote:

By enunciating these examples of State practice we do not wish to express a view on whether these are sufficient to constitute “subsequent practice” within the meaning of Article 31 (3) (b) of the Vienna Convention.<sup>179</sup>

<sup>173</sup> United Nations Convention on the Law of the Sea, art. 293.

<sup>174</sup> *M/V “SAIGA” (No. 2)* (see footnote 172 above), at paras. 155–156; see also “*Tomimaru*” (*Japan v. Russian Federation*), *Prompt Release, Judgment, ITLOS Reports 2005–2007*, p. 74, at para. 72; *Southern Bluefin Tuna* (see footnote 43 above), paras. 45 and 50.

<sup>175</sup> *The Prosecutor v. Goran Jelisić*, Trial Chamber, Judgment, 14 December 1999, IT-95-10-T, para. 61; similarly *Prosecutor v. Radislav Krstić*, Trial Chamber, Judgment, 2 August 2001, IT-98-33-T, para. 541.

<sup>176</sup> WTO, Panel Report, *United States—Section 110(5) of the US Copyright Act* (see footnote 154 above).

<sup>177</sup> See Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), art. 9.1.

<sup>178</sup> WTO, Panel Report, *United States—Section 110(5) of the US Copyright Act* (see footnote 154 above), para. 6.55.

<sup>179</sup> *Ibid.*, footnote 68.

(33) In *EC—Computer Equipment*, the Appellate Body criticized the Panel for not having considered decisions by the Harmonized System Committee of the World Customs Organization (WCO) as relevant subsequent practice:

A proper interpretation also would have included an examination of the existence and relevance of subsequent practice. We note that the United States referred, before the Panel, to the decisions taken by the Harmonized System Committee of the WCO in April 1997 on the classification of certain LAN equipment as ADP machines. Singapore, a third party in the panel proceedings, also referred to these decisions. The European Communities observed that it had introduced reservations with regard to these decisions ... However, we consider that in interpreting the tariff concessions in Schedule LXXX, decisions of the WCO may be relevant.<sup>180</sup>

Thus, on closer inspection, the WTO dispute settlement bodies also recognize the distinction between “subsequent practice” under article 31, paragraph 3 (b), and a broader concept of subsequent practice which does not presuppose an agreement between all the parties to a treaty.<sup>181</sup>

(34) In using subsequent practice by one or more, but not all, parties to a treaty as a supplementary means of interpretation under article 32, one must, however, always remain conscious of the fact that “the view of one State does not make international law”.<sup>182</sup> In any case, the distinction between agreed subsequent practice under article 31, paragraph 3 (b), as an authentic means of interpretation and other subsequent practice (in a broad sense) under article 32 implies that a greater interpretative value should be attributed to the former.

(35) The distinction between subsequent practice under article 31, paragraph 3 (b), and subsequent practice under article 32 also contributes to answering the question whether subsequent practice requires repeated action with some frequency<sup>183</sup> or whether a one-time application of the treaty may be enough.<sup>184</sup> In the WTO framework, the Appellate Body has found that

[a]n 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.<sup>185</sup>

If, however, the concept of subsequent practice as a means of treaty interpretation is distinguished from a possible agreement between the parties, frequency is not

<sup>180</sup> WTO, Appellate Body Report, *European Communities—Customs Classification of Certain Computer Equipment* (see footnote 43 above), para. 90; see also I. van Damme, *Treaty Interpretation by the WTO Appellate Body* (Oxford, Oxford University Press, 2009), p. 342.

<sup>181</sup> See also WTO, Appellate Body Report, *United States—Certain Country of Origin Labelling (COOL) Requirements* (see footnote 43 above), para. 452.

<sup>182</sup> *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, para. 385; see also *Enron Corporation and Ponderosa Assets, L.P., v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, para. 337; WTO, Panel Report, *United States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint)* (see footnote 64 above), footnote 2420 in para. 7.953.

<sup>183</sup> Villiger, *Commentary on the 1969 Vienna Convention ...* (footnote 44 above), p. 431, para. 22.

<sup>184</sup> Linderfalk, *On the Interpretation of Treaties* (footnote 74 above), p. 166.

<sup>185</sup> WTO, Appellate Body Report, *Japan—Taxes on Alcoholic Beverages* (see footnote 29 above), sect. E, p. 16.

a necessary element of the definition of the concept of “subsequent practice” in the broad sense (under art. 32).<sup>186</sup>

(36) Thus, “subsequent practice” in the broad sense (under art. 32) covers any application of the treaty by one or more parties. It can take various forms.<sup>187</sup> Such “conduct by one or more parties in the application of the treaty” may, in particular, consist of a direct application of the treaty in question, conduct which is attributable to a State party as an application of the treaty, or a statement or judicial pronouncement regarding its interpretation or application. Such conduct may include official statements concerning the treaty’s meaning, protests against non-performance, or tacit acceptance of statements or acts by other parties.<sup>188</sup>

### **Conclusion 5. Attribution of subsequent practice**

**1. Subsequent practice under articles 31 and 32 may consist of any conduct in the application of a treaty which is attributable to a party to the treaty under international law.**

**2. Other conduct, including by non-State actors, does not constitute subsequent practice under articles 31 and 32. Such conduct may, however, be relevant when assessing the subsequent practice of parties to a treaty.**

#### *Commentary*

(1) Draft conclusion 5 addresses the question of possible authors of subsequent practice under articles 31 and 32. The phrase “under articles 31 and 32” makes it clear that this draft conclusion applies both to subsequent practice as an authentic means of interpretation under article 31, paragraph 3 (b), and to subsequent practice as a supplementary means of interpretation under article 32 of the 1969 Vienna Convention. Paragraph 1 of draft conclusion 5 defines positively whose conduct in the application of the treaty may constitute subsequent practice under articles 31 and 32, whereas paragraph 2 states negatively which conduct does not, but which may nevertheless be relevant when assessing the subsequent practice of parties to a treaty.

(2) *Paragraph 1 of draft conclusion 5*, by using the phrase “any conduct ... which is attributable to a party to the treaty under international law”, borrows language from article 2 (a) of the articles on responsibility of States for internationally wrongful acts.<sup>189</sup> Accordingly, the term “any conduct” encompasses actions and omissions and is not limited to the conduct of State organs, but also covers conduct which is otherwise attributable, under international law, to a party to a treaty. The reference to the articles on responsibility of States for internationally wrongful acts does not, however, extend to the requirement that the

conduct in question be “internationally wrongful” (see below, para. (8)).

(3) An example of relevant conduct which does not directly arise from the conduct of the parties, but nevertheless constitutes an example of State practice, has been identified by the International Court of Justice in the *Kasikili/Sedudu Island* case. There the Court considered that the regular use of an island on the border between Namibia (former South-West Africa) and Botswana (former Bechuanaland) by members of a local tribe, the Masubia, could be regarded as subsequent practice in the sense of article 31, paragraph 3 (b), of the 1969 Vienna Convention if it

was linked to a belief on the part of the Caprivi authorities that the boundary laid down by the 1890 Treaty followed the Southern Channel of the Chobe; and, second, that the Bechuanaland authorities were fully aware and accepted this as a confirmation of the treaty boundary.<sup>190</sup>

(4) By referring to *any* conduct in the application of a treaty which is attributable to a party to the treaty, however, paragraph 1 does not imply that any such conduct necessarily constitutes, in a given case, subsequent practice for the purpose of treaty interpretation. The use of the phrase “may consist” is intended to reflect this point. This clarification is particularly important in relation to conduct of State organs which might contradict an officially expressed position of the State with respect to a particular matter, and thus contribute to an equivocal conduct by the State.

(5) The Commission debated whether draft conclusion 5 should specifically address the question of under which conditions the conduct of lower State organs would be relevant subsequent practice for purposes of treaty interpretation. In this regard, several members of the Commission pointed to the difficulty of distinguishing between lower and higher State organs, particularly given the significant differences in the internal organization of State governance. The point was also made that the relevant criterion was not so much the position of the organ in the hierarchy of the State as its actual role in interpreting and applying any particular treaty. Given the complexity and variety of scenarios that could be envisaged, the Commission concluded that this matter should not be addressed in the text of draft conclusion 5 itself, but rather in the commentary.

(6) Subsequent practice of States in the application of a treaty may certainly be performed by the high-ranking government officials mentioned in article 7 of the 1969 Vienna Convention. Yet, since most treaties typically are not applied by such high officials, international courts and tribunals have recognized that the conduct of lower authorities may also, under certain conditions, constitute relevant subsequent practice in the application of a treaty. Accordingly, the International Court of Justice recognized, in the *Case concerning rights of nationals of the United States of America in Morocco*, that article 95 of the Act of Algeciras had to be interpreted flexibly in the light of the inconsistent practice of local customs authorities.<sup>191</sup> The jurisprudence of arbitral tribunals confirms that relevant subsequent practice may emanate from lower

<sup>186</sup> Kolb (see footnote 108 above), pp. 506–507.

<sup>187</sup> Aust, *Modern Treaty Law and Practice* (see footnote 88 above), p. 239.

<sup>188</sup> Karl (see footnote 79 above), pp. 114 *et seq.*

<sup>189</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 35, paragraph (4) of the commentary; the question of the attribution of relevant subsequent conduct to international organizations for the purpose of treaty interpretation will be addressed at a later stage of work on the topic.

<sup>190</sup> *Kasikili/Sedudu Island* (see footnote 26 above), p. 1094, para. 74.

<sup>191</sup> *Case concerning rights of nationals of the United States of America in Morocco, Judgment*, I.C.J. Reports 1952, p. 176, at p. 211.

officials. In the *German External Debts Decision*, the Arbitral Tribunal considered a letter from the Bank of England to the German Federal Debt Administration as relevant subsequent practice.<sup>192</sup> And in the case of *Tax regime governing pensions paid to retired UNESCO officials residing in France*, the Arbitral Tribunal accepted, in principle, the practice of the French tax administration of not collecting taxes on the pensions of retired United Nations Educational, Scientific and Cultural Organization (UNESCO) employees as being relevant subsequent practice. Ultimately, however, the Arbitral Tribunal considered some contrary official pronouncements by a higher authority, the French Government, to be decisive.<sup>193</sup>

(7) It thus appears that the practice of lower and local officials may be subsequent practice “in the application of a treaty” if this practice is sufficiently unequivocal and if the government can be expected to be aware of this practice and has not contradicted it within a reasonable time.<sup>194</sup>

(8) The Commission did not consider it necessary to limit the scope of the relevant conduct by adding the phrase “for the purpose of treaty interpretation”.<sup>195</sup> This had been proposed by the Special Rapporteur in order to exclude from the scope of the term “subsequent practice” such conduct as may be attributable to a State but which does not serve the purpose of expressing a relevant position of the State regarding the interpretation of a treaty.<sup>196</sup> The Commission, however, considered that the requirement that any relevant conduct must be “in the application of the treaty” would sufficiently limit the scope of possibly relevant conduct. Since the concept of “application of the treaty” requires conduct in good faith, a manifest misapplication of a treaty falls outside this scope.<sup>197</sup>

(9) Paragraph 2 of draft conclusion 5 comprises two sentences. The first sentence indicates that conduct other than that envisaged in paragraph 1, including by non-State actors, does not constitute subsequent practice under articles 31 and 32. The phrase “other conduct” was introduced in order to clearly establish the distinction between the conduct contemplated in paragraph 2 and that contemplated in paragraph 1. At the same time, the Commission considered that conduct not covered by paragraph 1 may be relevant when “assessing” the subsequent practice of parties to a treaty.

<sup>192</sup> *Case concerning the question whether the re-evaluation of the German Mark in 1961 and 1969 constitutes a case for application of the clause in article 2 (e) of Annex I A of the 1953 Agreement on German External Debts between Belgium, France, Switzerland, the United Kingdom of Great Britain and Northern Ireland and the United States of America on the one hand and the Federal Republic of Germany on the other* (see footnote 37 above), pp. 103–104, para. 31.

<sup>193</sup> *Question of the tax regime governing pensions paid to retired UNESCO officials residing in France*, Decision of 14 January 2003, UNRIAA, vol. XXV (Sales No. E/F.05.V.5), p. 231, at p. 257, para. 66, and p. 259, para. 74.

<sup>194</sup> See Chanaki (footnote 69 above), pp. 323–328; Gardiner (footnote 23 above), p. 239; M. Kamto, “La volonté de l’État en droit international”, *Recueil des cours de l’Académie de droit international de La Haye*, 2004, vol. 310, p. 9, at pp. 142–144; Dörr (footnote 68 above), pp. 555–556, para. 78.

<sup>195</sup> See first report on subsequent agreements and subsequent practice in relation to treaty interpretation (A/CN.4/660), para. 144 (draft conclusion 4, para. 1).

<sup>196</sup> *Ibid.*, para. 120.

<sup>197</sup> See above, paragraph (18) of the commentary to draft conclusion 4.

(10) “Subsequent practice in the application of a treaty” will be brought about by those who are called to apply the treaty, which are normally the States parties themselves. The general rule has been formulated by the Iran–United States Claims Tribunal as follows:

It is a recognized principle of treaty interpretation to take into account, together with the context, any subsequent practice in the application of an international treaty. This practice must, however, be a practice of the parties to the treaty and one which establishes the agreement of the parties regarding the interpretation of that treaty. Whereas one of the participants in the settlement negotiations, namely Bank Markazi, is an entity of Iran and thus its practice can be attributed to Iran as one of the parties to the Algiers Declarations, the other participants in the settlement negotiations and in actual settlements, namely the United States banks, are not entities of the Government of the United States, and their practice cannot be attributed as such to the United States as the other party to the Algiers Declarations.<sup>198</sup>

(11) The first sentence of the second paragraph of draft conclusion 5 is intended to reflect this general rule. It emphasizes the primary role of the States parties to a treaty who are the masters of the treaty and are ultimately responsible for its application. This does not exclude the possibility that conduct by non-State actors may also constitute a form of application of the treaty if it can be attributed to a State party.<sup>199</sup>

(12) “Other conduct” in the sense of paragraph 2 of draft conclusion 5 may be that of different actors. Such conduct may, in particular, be practice of parties which is not “in the application of the treaty”, or statements by a State, which is not party to a treaty, about the latter’s interpretation,<sup>200</sup> or a pronouncement by a treaty monitoring body or a dispute settlement body in relation to the interpretation of the treaty concerned,<sup>201</sup> or acts of

<sup>198</sup> Iran–United States Claims Tribunal, *The United States of America, and others and The Islamic Republic of Iran, and others*, Award No. 108-A-16/582/591-FT, *Iran–United States Claims Tribunal Reports*, vol. 5 (1984), p. 57, at p. 71; similarly Iran–United States Claims Tribunal, *The Islamic Republic of Iran v. The United States of America*, Interlocutory Award No. ITL 83-B1-FT (Counterclaim), *ibid.*, vol. 38 (2004–2009), p. 77, at pp. 124–125, paras. 127–128; see also Iran–United States Claims Tribunal, *International Schools Services, Inc. (ISS) v. National Iranian Copper Industries Company (NICICO)*, Interlocutory Award No. ITL 37-111-FT, *ibid.*, vol. 5 (1984), p. 338, dissenting opinion of President Lagergren, p. 348, at p. 353: “... the provision in the Vienna Convention on subsequent agreements refers to agreements between States parties to a treaty, and a settlement agreement between two arbitrating parties can hardly be regarded as equal to an agreement between the two States that are parties to the treaty, even though the Islamic Republic of Iran was one of the arbitrating parties in the case.” With regard to the Algiers Declarations of 19 January 1981, see ILM, vol. 20(1) (1981), p. 223.

<sup>199</sup> See, for example, Iran–United States Claims Tribunal, *The United States of America, and others and The Islamic Republic of Iran, and others*, Award No. 108-A-16/582/591-FT, dissenting opinion of Parviz Ansari, *Iran–United States Claims Tribunal Reports*, vol. 9 (1985), p. 97, at p. 99.

<sup>200</sup> See, for example, Observations of the United States of America on the Human Rights Committee’s General Comment 33: the Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, 22 December 2008, p. 1, para. 3 (available from [www.state.gov/documents/organization/138852.pdf](http://www.state.gov/documents/organization/138852.pdf)). To the extent that the statement by the United States relates to the interpretation of the Optional Protocol to the International Covenant on Civil and Political Rights, to which the United States is neither party nor a contracting State, its statement constitutes “other conduct” under draft conclusion 5, para. 2.

<sup>201</sup> See, for example, International Law Association, Committee on International Human Rights Law and Practice, “Final report on the impact of findings of the United Nations human rights treaty bodies”, *Report of the Seventy-first Conference Held in Berlin, 16–21 August 2004* (London, 2004), p. 621, paras. 21 *et seq.*

technical bodies which are tasked by conferences of the States parties to advise on the implementation of treaty provisions, or different forms of conduct or statements by non-State actors.

(13) The phrase “assessing the subsequent practice” in the second sentence of paragraph 2 should be understood in a broad sense as covering both the identification of the existence of a subsequent practice and the determination of its legal significance. Statements or conduct of other actors, such as international organizations or non-State actors, can reflect, or initiate, relevant subsequent practice of the parties to a treaty.<sup>202</sup> Such reflection or initiation of subsequent practice of the parties by the conduct of other actors should not, however, be conflated with the practice by the parties to the treaty themselves, including practice which is attributable to them. Activities of actors that are not States parties, as such, may only contribute to assessing subsequent practice of the parties to a treaty.

(14) Decisions, resolutions and other practice by international organizations can be relevant for the interpretation of treaties in their own right. This is recognized, for example, in article 2, paragraph 1 (j), of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986 Vienna Convention), which mentions the “established practice of the organization” as one form of the “rules of the organization”.<sup>203</sup> Draft conclusion 5 only concerns the question whether the practice of international organizations may be indicative of relevant practice by States parties to a treaty.

(15) Reports by international organizations at the universal level, which are prepared on the basis of a mandate to provide accounts on State practice in a particular field, may enjoy considerable authority in the assessment of such practice. For example, the *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* is an important work that reflects and thus provides guidance for State practice.<sup>204</sup> The same is true for the so-called 1540 Matrix, which is a systematic compilation, by the Security Council Committee established pursuant to resolution 1540 (2004), of implementation measures taken by Member States.<sup>205</sup> As far as the Matrix relates to

the implementation of the 1972 Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction, as well as of the 1993 Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction, it constitutes evidence for and an assessment of State practice subsequent to those treaties.<sup>206</sup>

(16) Other non-State actors may also play an important role in assessing subsequent practice of the parties in the application of a treaty. A pertinent example is the International Committee of the Red Cross (ICRC).<sup>207</sup> Apart from fulfilling a general mandate conferred on it by the 1949 Geneva Conventions and by the Statutes of the International Red Cross and Red Crescent Movement,<sup>208</sup> the ICRC occasionally provides interpretative guidance on the Geneva Conventions and their additional Protocols on the basis of a mandate from the Statutes of the Movement.<sup>209</sup> Article 5, paragraph 2 (g), of the Statutes provides as follows:

The role of the International Committee, in accordance with its Statutes, is in particular: ... (g) to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof.

On the basis of this mandate, the ICRC, for example, published the *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* in 2009.<sup>210</sup> The *Guidance* is the outcome of an “expert process” based on an analysis of State treaty and customary practice and it “reflect[s] the ICRC’s institutional position as to how existing [international humanitarian law] should be interpreted”.<sup>211</sup> In this context it is, however, important to note that States have reaffirmed their primary role in the development of international humanitarian law. Resolution 1 of the 31st International Conference of the Red Cross and Red Crescent, 2011, while recalling “the important roles” of the ICRC, “emphasiz[es] the primary role of States in the development of international humanitarian law”.<sup>212</sup>

(17) Another example for conduct of non-State actors which may be relevant for assessing the subsequent practice of States parties is the Landmine and Cluster Munition Monitor, a joint initiative of the International Campaign to Ban Landmines and the Cluster Munition Coalition. The Monitor acts as a “*de facto* monitoring regime”<sup>213</sup> for the

<sup>202</sup> See Gardiner (footnote 23 above), p. 239.

<sup>203</sup> This aspect of subsequent practice to a treaty will be addressed at a later stage of work on the topic.

<sup>204</sup> See Office of the United Nations High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (re-edited December 2011), HCR/1P/4/ENG/REV.3, foreword; the view that the *Handbook* itself expresses State practice has correctly been rejected by the Federal Court of Australia in *Seminig v. The Minister for Immigration & Multicultural Affairs* [1999] FCA 422 (1999), Judgment, 14 April 1999, paras. 5–13; the *Handbook* nevertheless possesses considerable evidentiary weight as a correct statement of subsequent State practice. Its authority is based on art. 35, para. 1, of the Convention relating to the Status of Refugees, 1951, according to which “the Contracting States undertake to cooperate with [UNHCR] ... in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention”.

<sup>205</sup> Security Council resolution 1540 (2004) of 28 April 2004, operative para. 8 (c); according to the 1540 Committee’s website, “the 1540

Matrix has functioned as the primary method used by the 1540 Committee to organize information about implementation of UN Security Council resolution 1540 by Member States” ([www.un.org/en/sc/1540/national-implementation/1540-matrices.shtml](http://www.un.org/en/sc/1540/national-implementation/1540-matrices.shtml)).

<sup>206</sup> See generally Gardiner (footnote 23 above), p. 239.

<sup>207</sup> H.-P. Gasser, “International Committee of the Red Cross (ICRC)”, *Max Planck Encyclopedia of Public International Law* (<http://opil.ouplaw.com/home/EPIL/>), para. 20.

<sup>208</sup> *Ibid.*, para. 25.

<sup>209</sup> Adopted by the 25th International Conference of the Red Cross and Red Crescent at Geneva in October 1986 and amended in 1995 and 2006.

<sup>210</sup> ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009), p. 10.

<sup>211</sup> *Ibid.*, p. 9.

<sup>212</sup> ICRC, 31st International Conference 2011: Resolution 1—Strengthening legal protection for victims of armed conflicts, 1 December 2011.

<sup>213</sup> See [www.the-monitor.org/](http://www.the-monitor.org/).

1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Ottawa Convention), and the 2008 Convention on Cluster Munitions (Dublin Convention). The Cluster Munition Monitor lists pertinent statements and practice by States parties and signatories and identifies, *inter alia*, interpretative questions concerning the Dublin Convention.<sup>214</sup>

(18) The examples of the ICRC and of the Monitor show that non-State actors can provide valuable evidence of subsequent practice by parties, contribute to assessing this evidence, and even solicit its coming into being. However, non-State actors can also pursue their own goals, which may be different from those of States parties. Their assessments must therefore be critically reviewed.

(19) The Commission considered whether it should also refer, in the text of draft conclusion 5, to “social practice” as an example of “other conduct ... [which] may ... be relevant when assessing the subsequent practice of parties to a treaty”.<sup>215</sup> Taking into account the concerns expressed by several members regarding the meaning and relevance of that notion, the Commission considered it preferable to address the question of the possible relevance of “social practice” in the commentary.

(20) The European Court of Human Rights has occasionally considered “increased social acceptance”<sup>216</sup> and “major social changes”<sup>217</sup> to be relevant for the purpose of treaty interpretation. The invocation of “social changes” or “social acceptance” by the Court, however, ultimately remains linked to State practice.<sup>218</sup> This is true, in particular, for the important cases of *Dudgeon v. the United Kingdom*<sup>219</sup> and *Christine Goodwin v. the United Kingdom*.<sup>220</sup> In *Dudgeon v. the United Kingdom*,

the Court found that there was an “increased tolerance of homosexual behaviour” by pointing to the fact “that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied”, and that it could therefore not “overlook the marked changes which have occurred in this regard in the domestic law of the member States”.<sup>221</sup> The Court further pointed to the fact that “in Northern Ireland itself, the authorities have refrained in recent years from enforcing the law”.<sup>222</sup> And in *Christine Goodwin v. the United Kingdom*, the Court attached importance “to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals”.<sup>223</sup>

(21) The European Court of Human Rights thus verifies whether social developments are actually reflected in State practice. This was true, for example, in cases concerning the status of children born outside marriage<sup>224</sup> and in cases that concerned the alleged right of certain Roma (“Gypsy”) people to have a temporary place of residence assigned by municipalities in order to be able to pursue their itinerant lifestyle.<sup>225</sup>

(22) It can be concluded that mere (subsequent) social practice, as such, is not sufficient to constitute relevant subsequent practice in the application of a treaty. Social practice has, however, occasionally been recognized by the European Court of Human Rights as contributing to the assessment of State practice.

<sup>214</sup> See, for example, *Cluster Munition Monitor 2011* (Mines Action Canada, 2011), pp. 24–31.

<sup>215</sup> See first report on subsequent agreements and subsequent practice in relation to treaty interpretation (A/CN.4/660), paras. 129 *et seq.*

<sup>216</sup> *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, ECHR 2002-VI, para. 85.

<sup>217</sup> *Ibid.*, para. 100.

<sup>218</sup> See also *I. v. the United Kingdom* [GC], no. 25680/94, 11 July 2002, para. 65; *Burden and Burden v. the United Kingdom*, no. 13378/05, 12 December 2006, para. 57; *Shackell v. the United Kingdom* (dec.), no. 45851/99, 27 April 2000, para. 1; *Schalk and Kopf v. Austria*, no. 30141/04, ECHR 2010, para. 58.

<sup>219</sup> *Dudgeon v. the United Kingdom*, 22 October 1981, Series A no. 45, in particular para. 60.

<sup>220</sup> *Christine Goodwin v. the United Kingdom* [GC] (see footnote 216 above), in particular para. 85.

<sup>221</sup> *Dudgeon v. the United Kingdom* (see footnote 219 above), para. 60.

<sup>222</sup> *Ibid.*

<sup>223</sup> *Christine Goodwin v. the United Kingdom* [GC] (see footnote 216 above), para. 85; see also para. 90.

<sup>224</sup> *Mazurek v. France*, no. 34406/97, ECHR 2000-II, para. 52; see also *Marckx v. Belgium*, 13 June 1979, Series A no. 31, para. 41; *Inze v. Austria*, 28 October 1987, Series A no. 126, para. 44; *Brauer v. Germany*, no. 3545/04, 28 May 2009, para. 40.

<sup>225</sup> *Chapman v. the United Kingdom* [GC], no. 27238/95, ECHR 2001-I, paras. 70 and 93; see also *Lee v. the United Kingdom* [GC], no. 25289/94, 18 January 2001, paras. 95–96; *Beard v. the United Kingdom* [GC], no. 24882/94, 18 January 2001, paras. 104–105; *Coster v. the United Kingdom* [GC], no. 24876/94, 18 January 2001, paras. 107–108; *Jane Smith v. the United Kingdom* [GC], no. 25154/94, 18 January 2001, paras. 100–101.