Chapter VII

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

A. Introduction

66. The Commission, at its sixtieth session (2008), decided to include the topic "Treaties over time" in its programme of work and to establish a Study Group on the topic at its sixty-first session.[521] At its sixty-first session (2009), the Commission established the Study Group on treaties over time, chaired by Mr. Georg Nolte. At that session, the Study Group focused its discussions on the identification of the issues to be covered, the working methods of the Study Group and the possible outcome of the Commission's work on the topic.[522]

67. From the sixty-second to the sixty-fourth session (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 arbitral tribunals of *ad hoc* jurisdiction;[523] the jurisprudence under special regimes relating to subsequent agreements and subsequent practice;[524] and subsequent agreements and subsequent practice of States outside judicial and quasi-judicial proceedings.[525]

68. At the sixty-fourth session (2012), the Commission, on the basis of a recommendation of the Study Group,[526] also decided: (*a*) to change, with effect from its sixty-fifth session (2013), the format of the work on this topic as suggested by the Study Group; and (*b*) to appoint Mr. Georg Nolte as Special Rapporteur for the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties".[527]

69. At the sixty-fifth session (2013), the Commission considered the first report of the Special Rapporteur[528] and provisionally adopted five draft conclusions.[529]

B. Consideration of the topic at the present session

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

71. In his second report, the Special Rapporteur considered the following aspects of the topic: the identification of subsequent agreements and subsequent practice (paras. 3–19); the possible effects of subsequent agreements and subsequent practice in the interpretation of treaties (paras. 20–41); the form and value of subsequent practice under article 31, paragraph 3 (*b*) (paras. 42–48); the conditions for an "agreement" of the parties regarding the interpretation of a treaty under article 31, paragraph 3 (paras. 49–75); the decisions adopted within the framework of Conferences of States Parties (paras. 76–111); and the possible scope for interpretation by subsequent agreements and subsequent practice (paras. 112–166). The report also included some information on the future programme of work (para. 167). The Special Rapporteur proposed a draft conclusion corresponding with each of the issues addressed.[530]

---

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

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

[523] See *Yearbook … 2010*, vol. II (Part Two), pp. 194–195, paras. 345–354; and *Yearbook … 2011*, vol. II (Part Two), p. 168, para. 337.

[524] See *Yearbook … 2011*, vol. II (Part Two), pp. 168–169, paras. 338–341; and *Yearbook … 2012*, vol. II (Part Two), pp. 77–78, paras. 230–231.

[525] See *Yearbook … 2012*, vol. II (Part Two), p. 78, paras. 232–234. At the sixty-third session (2011), the Chairperson of the Study Group presented nine preliminary conclusions, reformulated in the light of the discussions in the Study Group (*Yearbook … 2011*, vol. II (Part Two), pp. 169–171, para. 344). At the sixty-fourth session (2012), the Chairperson presented the text of six additional preliminary conclusions, also reformulated in the light of the discussions in the Study Group (*Yearbook … 2012*, vol. II (Part Two), pp. 79–80, para. 240). 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 (*ibid*., pp. 78–79, paras. 235–239).

[526] *Yearbook … 2012*, vol. II (Part Two), pp. 77–79, paras. 226–239.

[527] *Ibid*., p. 77, para. 227.

[528] *Yearbook … 2013*, vol. II (Part One), document A/CN.4/660.

[529] *Ibid.*, vol. II (Part Two), pp. 16–37, paras. 33–39. The Commission provisionally adopted draft conclusions 1 (General rule and means of treaty interpretation); 2 (Subsequent agreements and subsequent practice as authentic means of interpretation); 3 (Interpretation of treaty terms as capable of evolving over time); 4 (Definition of subsequent agreement and subsequent practice); and 5 (Attribution of subsequent practice).

[530] The six draft conclusions proposed by the Special Rapporteur read as follows:

"*Draft conclusion 6. Identification of subsequent agreements and subsequent practice*

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

"*Draft conclusion 7. Possible effects of subsequent agreements and subsequent practice in interpretation*

"(1) Subsequent agreements and subsequent practice under articles 31, paragraph 3, and 32 can contribute to the clarification of the meaning of a treaty, in particular by narrowing or widening the range of possible interpretations, or by indicating a certain scope for the exercise of discretion which the treaty accords to the parties.

"(2) The value of a subsequent agreement or subsequent practice as a means of interpretation may, *inter alia*, depend on their specificity.

"*Draft conclusion 8. Forms and value of subsequent practice under article 31, paragraph 3 (b)*

"Subsequent practice under article 31, paragraph 3 (*b*), can take a variety of forms and must reflect a common understanding of the

72. At its 3209th meeting, on 22 May 2014, the Commission referred draft conclusions 6 to 11, as contained in the second report of the Special Rapporteur, to the Drafting Committee.

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

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

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

1. Text of the draft conclusions

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

Conclusion 6. Identification of subsequent agreements and subsequent practice

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion 10. Decisions adopted within the framework of a Conference of States Parties

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

2. The legal effect of a decision adopted within the framework of a Conference of States Parties depends primarily on the treaty

---

parties regarding the interpretation of a treaty. Its value as a means of interpretation depends on the extent to which it is concordant, common and consistent.

"*Draft conclusion 9. Agreement of the parties regarding the interpretation of a treaty*

"(1) An agreement under article 31, paragraph 3 (*a*) and (*b*), need not be arrived at in any particular form nor be binding as such.

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

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

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

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

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

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

"*Draft conclusion 11. Scope for interpretation by subsequent agreements and subsequent practice*

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

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

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

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

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

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

Conclusion 6. Identification of subsequent agreements and subsequent practice

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

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

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

Commentary

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

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

(3) Subsequent agreements under article 31, paragraph 3 (*a*), must be "regarding the interpretation of the treaty or the application of its provisions", and subsequent practice under article 31, paragraph 3 (*b*), must be "in the application of the treaty" and thereby establish an agreement "regarding its interpretation".[531] The relationship between the terms "interpretation" and "application" in article 31, paragraph 3, is not clear-cut. "Interpretation" is the process by which the meaning of a treaty, including of one or more of its provisions, is clarified. "Application" encompasses conduct by which the rights under a treaty are exercised or its obligations are complied with, in full or in part. "Interpretation" refers to a mental process, whereas "application" focuses on actual conduct (acts and omissions). In this sense, the two concepts are distinguishable, and may serve different purposes under article 31, paragraph 3 (see paragraphs (4)–(6) below), but they are also closely interrelated and build upon each other.

(4) Whereas there may be aspects of "interpretation" which remain unrelated to the "application" of a treaty,[532] application of a treaty almost inevitably involves some element of interpretation—even in cases in which the rule in question appears to be clear on its face.[533] Therefore, an agreement or conduct "regarding the interpretation" of the treaty and an agreement or conduct "in the application" of the treaty both imply that the parties assume, or are attributed, a position regarding the interpretation of the treaty.[534] Whereas in the case of a "subsequent agreement between the parties regarding the interpretation of the treaty" under article 31, paragraph 3 (*a*) (first alternative), the position regarding the interpretation of a treaty is specifically and purposefully assumed by the parties, this may be less clearly identifiable in the case of a "subsequent agreement … regarding … the application of its provisions" under article 31, paragraph 3 (*a*) (second alternative).[535]

---

[531] See draft conclusion 4 and commentary thereto, paras. (16)–(19) (*Yearbook … 2013*, vol. II (Part Two), chap. IV, sect. C.2, pp. 17 *et seq.*).

[532] According to Haraszti, interpretation has "the elucidation of the meaning of the text as its objective" whereas application "implies the specifying of the consequences devolving on the contracting parties" (G. Haraszti, *Some Fundamental Problems of the Law of Treaties*, Budapest, Akadémiai Kiadó, 1973, p. 18); he recognizes, however, that "[a] legal rule manifesting itself in whatever form cannot be applied unless its content has been elucidated" (*ibid*., p. 15).

[533] "[Harvard] Draft Convention on the Law of Treaties", *Supplement to the* AJIL, vol. 29 (1935), pp. 657 *et seq.*, at pp. 938–939; A. McNair, *The Law of Treaties*, Oxford, Clarendon Press, 1961, p. 372; I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed., Manchester University Press, 1984, p. 116; Fragmentation of international law: difficulties arising from the diversification and expansion of international law, report of the Study Group finalized by Martti Koskenniemi (A/CN.4/L.682 and Corr.1 [and Add.1]), para. 423 (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)); R. K. Gardiner, *Treaty Interpretation*, Oxford University Press, 2008, pp. 27–29 and 213; M. K. Yasseen, "L'interprétation des traités d'après la Convention de Vienne sur le droit des traités", *Collected Courses of the Hague Academy of International Law, 1976-III*, vol. 151 p. 47; U. Linderfalk, "Is the hierarchical structure of articles 31 and 32 of the Vienna Convention real or not? Interpreting the rules of interpretation", *Netherlands International Law Review*, vol. 54, No. 1 (May 2007), pp. 141–144 and 147; G. Distefano, "La pratique subséquente des États parties à un traité", *Annuaire français de droit international*, vol. 40 (1994), p. 44; and 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 University Press, 2011, p. 111.

[534] Gardiner, *Treaty Interpretation* (see preceding footnote), p. 235; U. Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties*, Dordrecht, Springer, 2007, p. 162; W. Karl, *Vertrag und spätere Praxis im Völkerrecht*, vol. 84, *Beiträge zum ausländischen öffentlichen Recht und Völkerrecht*, Berlin, Springer, 1983, pp. 114 and 118; and O. Dörr, "Article 31. General rule of interpretation", in O. Dörr and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A Commentary*, Berlin, Springer, 2012, pp. 556–557, paras. 80 and 82.

[535] This second alternative was introduced at the proposal of Pakistan, but its scope and purpose was never addressed or clarified, see *Official Records of the United Nations Conference on the Law of Treaties,*

Assuming a position regarding interpretation "by application" is also implied in simple acts of application of the treaty under articles 31, paragraph 3 (*b*), that is, in "every measure taken on the basis of the interpreted treaty".[536] The word "or" in article 31, paragraph 3 (*a*), thus does not describe a mutually exclusive relationship between "interpretation" and "application".

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

(6) It should be noted that an "application" of the treaty does not necessarily reflect the position of a State party that such application is the only legally possible one under the treaty and under the circumstances (see draft conclusion 7, paragraph 1, below). Further, the concept of "application" does not exclude certain conduct by non-State actors which the treaty recognizes as forms of its application which is attributable to its parties,[537] and hence can constitute practice establishing the agreement of the parties. Finally, the legal significance of a particular conduct in the application of a treaty is not necessarily limited to its possible contribution to interpretation under article 31, but may also contribute to meeting the burden of proof[538] or to fulfilling the conditions of other rules.[539]

(7) Subsequent conduct which is not motivated by a treaty obligation is not "in the application of the treaty" or "regarding" its interpretation, within the meaning of article 31, paragraph 3. In the advisory opinion on *Certain expenses of the United Nations*, for example, some judges doubted whether the continued payment by the Member States of the United Nations of their membership contributions signified acceptance of a certain practice of the organization.[540] Judge Fitzmaurice formulated a well-known warning in this context, according to which "[t]he argument drawn from practice, if taken too far, can be question-begging".[541] According to Fitzmaurice, it would be "hardly possible to infer from the mere fact that Member States *pay*, that they necessarily admit in all cases a positive legal obligation to do so".[542]

(8) Similarly, in the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* case, the International Court of Justice held that an effort by the parties to the Agreement of 1987 (on the submission of a dispute to the jurisdiction of the Court) to conclude an additional Special Agreement (which would have specified the subject matter of the dispute) did not mean that the conclusion of such an additional agreement was actually considered by the parties to be required for the establishment of the jurisdiction of the Court.[543]

(9) Another example of a voluntary practice which is not meant to be "in application of" or "regarding the interpretation" of a treaty concerns "complementary protection" in the refugee law context. Persons who are denied refugee status under the Convention relating to the Status of Refugees are nonetheless often granted "complementary protection", which is equivalent to that under the Convention. States which grant complementary protection, however, do not consider themselves as acting "in the application of" the Convention or "regarding its interpretation".[544]

(10) It is sometimes difficult to distinguish relevant subsequent agreements or practice regarding the interpretation or in the application of a treaty under article 31, paragraph 3 (*a*) and (*b*), from other conduct or developments in the wider context of the treaty, including from "contemporaneous developments" in the subject area of the treaty. Such a distinction is important, however, since only conduct regarding interpretation by the parties introduces their specific authority into the process of interpretation. The general rule would seem to be that the more specifically an agreement or a practice is related to a treaty the more interpretative weight it can acquire under article 31, paragraph 3 (*a*) and (*b*).[545]

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), 31st meeting of the Committee of the Whole, 19 April 1968, p. 168, para. 53.

[536] Linderfalk, *On the Interpretation of Treaties* … (see footnote 534 above), pp. 164–165 and 167; see also draft conclusions 1, paragraph 4, and 4, paragraph 3 (*Yearbook … 2013*, vol. II (Part Two), pp. 18 and 28).

[537] See L. Boisson de Chazournes, "Subsequent practice, practices, and 'family-resemblance': towards embedding subsequent practice in its operative milieu", in G. Nolte (ed.), *Treaties and Subsequent Practice*, Oxford University Press, 2013, pp. 53 *et seq.*, at pp. 54, 56 and 59–60.

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

[539] In the case concerning the *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, p. 1045, the International Court of Justice analysed subsequent practice not only in the context of treaty interpretation but also in the context of acquisitive prescription, (see pp. 1092–1093, para. 71, p. 1096, para. 79, and p. 1105, para. 97).

[540] *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962, I.C.J. Reports 1962*, p. 151, at pp. 201–202 (separate opinion of Judge Fitzmaurice) and pp. 189–195 (separate opinion of Judge Spender).

[541] *Ibid*., p. 201.

[542] *Ibid*.

[543] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995*, p. 6, at p. 76, para. 28.

[544] See A. Skordas, "General provisions: article 5", in A. Zimmermann (ed.), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary*, Oxford University Press, 2011, p. 682, para. 30; and J. McAdam, *Complementary Protection in International Refugee Law*, Oxford University Press, 2007), p. 21.

[545] On the "weight" of an agreement or practice as a means of interpretation, see draft conclusion 8; an example for the need, but also for the occasional difficulty of distinguishing specific conduct by the parties regarding the interpretation of a treaty and more general development can be seen in *Maritime Dispute (Peru v. Chile), Judgment, I.C.J. Reports 2014*, pp. 3 *et seq*., at pp. 41–58, paras. 103, 104–117 and 118–151; see also footnote 533 above.

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

(12) The jurisprudence of the International Court of Justice provides a number of examples. On the one hand, the Court did not consider a "joint ministerial communiqué" of two States to "be included in the conventional basis of the right of free navigation" since the "modalities for cooperation which they put in place are likely to be revised in order to suit the parties".[546] The Court has also held, however, that the lack of certain assertions regarding the interpretation of a treaty, or the absence of certain forms of its application, constituted a practice which indicated the legal position of the parties according to which nuclear weapons were not prohibited under various treaties regarding poisonous weapons.[547] In any case, the exact significance of a collective expression of views of the parties can only be identified by a careful consideration as to whether and to what extent such expression is meant to be "regarding the interpretation" of the treaty. Accordingly, the Court held in the *Whaling in the Antarctic* case that "relevant resolutions and Guidelines [of the International Whaling Commission] that have been approved by consensus call upon States parties to take into account whether research objectives can practically and scientifically be achieved by using non-lethal research methods, but they do not establish a requirement that lethal methods be used only when other methods are not available".[548]

(13) When the Iran–United States Claims Tribunal was confronted with the question whether the Claims Settlement Declaration obliged the United States to return military property to Iran, the Tribunal found, referring to the subsequent practice of the parties, that this treaty contained an implicit obligation of compensation in case of non-return:

> 66. … Although paragraph 9 of the General Declaration does not expressly state any obligation to compensate Iran in the event that certain articles are not returned because of the provisions of [United States] law applicable prior to 14 November 1979, the Tribunal holds that such an obligation is implicit in that Paragraph.
>
> …
>
> 68. Moreover, the Tribunal notes that the interpretation set forth in paragraph 66 above is consistent with the subsequent practice of the Parties in the application of the Algiers Accords and, particularly, with the conduct of the United States. Such a practice, according to article 31 (3) (*b*) of the Vienna Convention, is also to be taken into account in the interpretation of a treaty. In its communication informing Iran, on 26 March 1981, that the export of defence articles would not be approved, the United States expressly stated that "Iran will be reimbursed for the cost of equipment in so far as possible".[549]

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

> Subsequent conduct by a State party is a proper basis for interpreting a treaty only if it appears that the conduct was motivated by the treaty. Here there is no evidence, or even any argument, that the United States' willingness to pay Iran for its properties was in response to a perceived obligation imposed by Paragraph 9. Such conduct would be equally consistent with a recognition of a contractual obligation to make payment. In the absence of any indication that conduct was motivated by the treaty, it is incorrect to use that conduct in interpreting the treaty.[550]

Together, the majority opinion and the dissent clearly identify the need to analyse carefully whether the parties, by an agreement, or a practice assume a position "regarding the interpretation" of a treaty.

(14) The fact that States parties assume a position regarding the interpretation of a treaty sometimes also may be inferred from the character of the treaty or of a specific provision.[551] Whereas subsequent practice in the application of a treaty often consists of conduct by different organs of the State (executive, legislative, judicial or other) in the conscious application of a treaty at different levels (domestic and international), the European Court of Human Rights, for example, mostly does not explicitly address the question whether a particular practice was undertaken "regarding the interpretation" of the European Convention on Human Rights.[552] Thus, when describing the domestic legal situation in the member States, the Court rarely asks whether a particular legal situation results from a legislative process during which the possible requirements of the Convention were discussed. The Court rather presumes that the member States, when legislating or otherwise acting in a particular way, are conscious of their obligations under the

---

[546] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213, at pp. 234–235, para. 40; see also *Kasikili/Sedudu Island* (footnote 539 above), at p. 1091, para. 68, where the Court implied that one of the parties did not consider that certain forms of practical cooperation were legally relevant for the purpose of the question of boundary at issue and thus did not agree with a contrary position of the other party.

[547] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 248, paras. 55–56; see also *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment of 12 December 1996, I.C.J. Reports 1996*, p. 803, at p. 815, para. 30; and Gardiner, *Treaty Interpretation* (footnote 533 above), pp. 232–235.

[548] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, pp. 226 *et seq*., at p. 257, para. 83.

[549] *The Islamic Republic of Iran v. the United States of America*, Partial Award No. 382-B1-FT of 31 August 1988, Iran–United States Claims Tribunal, *Iran–United States Claims Tribunal Reports*, vol. 19 (1988-II), pp. 273 *et seq*., at pp. 294–295. Regarding the Algiers Accords, and in particular the Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, of 19 January 1981, see ILM, vol. 20, No. 1 (1981), pp. 230 *et seq*.

[550] Separate opinion of Judge Holtzmann, concurring in part, dissenting in part, *The Islamic Republic of Iran and the United States of America*, Partial Award No. 382-B1-FT (see footnote 549 above), p. 304.

[551] See the second report of the Special Rapporteur (A/CN.4/671), para. 15.

[552] See, for example, *Soering v. the United Kingdom, Application no. 14038/88, Judgment of 7 July 1989, European Court of Human Rights Series A*, No. 161, para. 103; *Dudgeon v. the United Kingdom*, Application no. 7275/76, Judgment of 22 October 1981, European Court of Human Rights *Series A*, No. 45, para. 60; *Demir and Baykara v. Turkey*, Application no. 34503/97, Judgment of 12 November 2008 (on the merits and on just satisfaction), Grand Chamber, European Court of Human Rights, *Reports of Judgments and Decisions* 2008, para. 48; however, by way of contrast, compare with *Mamatkulov and Askarov v. Turkey*, Application nos. 46827/99 and 46951/99, Judgment of 4 February 2005, Grand Chamber, European Court of Human Rights, *Reports of Judgments and Decisions* 2005-I, para. 146; and *Cruz Varas and Others v. Sweden* (see footnote 106 above), para. 100.

Convention, and that they act in a way which reflects their understanding of their obligations.[553] The Inter-American Court of Human Rights has also on occasion used legislative practice as a means of interpretation.[554] Like the International Court of Justice, the European Court of Human Rights has occasionally even considered that the "lack of any apprehension" of the parties regarding a certain interpretation of the Convention may be indicative of their assuming a position regarding the interpretation of the treaty.[555]

(15) Article 118 of the Geneva Convention relative to the Treatment of Prisoners of War (Convention III) of 1949 provides that "[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities". The will of a prisoner of war not to be repatriated was intentionally not declared to be relevant by the States parties in order to prevent States from abusively invoking the will of prisoners of war in order to delay repatriation.[556] However, the ICRC has always insisted as a condition for its participation that States respect the will of a prisoner of war not to be repatriated.[557] This approach, as far as it has been reflected in the practice of States parties, does not necessarily mean, however, that article 118 should be interpreted as demanding that the repatriation of a prisoner of war must not happen against his or her will. The ICRC Study on customary international humanitarian law carefully notes in its commentary on rule 128 A that:

> According to the Fourth Geneva Convention, no protected person may be transferred to a country "where he or she may have reason to fear persecution for his or her political opinions or religious beliefs" [art. 45, para. 4, of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV)]. While the Third Geneva Convention does not contain a similar clause, practice since 1949 has developed to the effect that in every repatriation in which ICRC has played the role of neutral intermediary, the parties to the conflict, whether international or non-international, have accepted the ICRC's conditions for participation, including that the ICRC be able to check prior to repatriation (or release in case of a non-international armed conflict), through an interview in private with the persons involved, whether they wish to be repatriated (or released).[558]

(16) This formulation suggests that the State practice of respecting the will of the prisoner of war is limited to cases in which ICRC is involved and in which the organization has formulated such a condition. States have drawn different conclusions from this practice.[559] The 2004 United Kingdom *Manual of the Law of Armed Conflict* provides that:

> A more contentious issue is whether prisoners of war *must* be repatriated even against their will. Recent practice of States indicates that they should not. It is United Kingdom policy that prisoners of war should not be repatriated against their will.[560]

(17) This particular combination of the words "must" and "should" indicates that the United Kingdom, like other States, is not viewing the subsequent practice as demonstrating an interpretation of the treaty according to which the declared will of the prisoner of war must always be respected.[561]

(18) The preceding examples from the case law and State practice substantiate the need to identify and interpret carefully subsequent agreements and subsequent practice, in particular to ask whether the parties, by an agreement or a practice, assume a position regarding the interpretation of a treaty, or whether they are motivated by other considerations.[562]

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

(20) A common subsequent practice does not necessarily indicate an agreement between the parties regarding the interpretation of a treaty, but may instead signify their agreement temporarily not to apply the treaty,[563] or an agreement on a practical arrangement (*modus vivendi*).[564] The following examples are illustrative.

---

[553] See footnote 552 above; see further *Marckx v. Belgium*, Application no. 6833/74, Judgment of 13 June 1979, European Court of Human Rights, *Series A*, No. 31, para. 41; *Jorgic v. Germany*, Application no. 74613/01, Judgment of 12 July 2007, European Court of Human Rights, *Reports of Judgments and Decisions* 2007-III, para. 69; and *Mazurek v. France*, Application no. 34406/97, Judgment of 1 February 2000, European Court of Human Rights, *Reports of Judgments and Decisions* 2000-II, para. 52.

[554] See, for example, *Hilaire, Constantine and Benjamin* et al. *v. Trinidad and Tobago*, Judgment of 21 June 2002 (Merits, Reparations and Costs, Judgment) , Inter-Amercian Court of Human Rights, Series C, No. 94, para. 12.

[555] *Banković and Others v. Belgium and Others*, Application no. 52207/99, Decision on Admissiblity, Grand Chamber, European Court of Human Rights, *Reports of Judgments and Decisions* 2001-XII, para. 62.

[556] See C. Shields Delessert, *Release and Repatriation of Prisoners of War at the End of Active Hostilities*, Zurich, Schulthess, 1977, pp. 145–156 and pp. 171–175; see, in general, on the duty to repatriate, S. Krähenmann, "Protection of prisoners in armed conflict", in D. Fleck (ed.), *The Handbook of International Humanitarian Law*, 3rd ed., Oxford University Press, 2013, pp. 409–410.

[557] Thus, by its involvement, the ICRC tries to reconcile the interests in speedy repatriation and the respect of the will of prisoners of war (see Krähenmann (footnote 556 above), pp. 409–410).

[558] J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, vol. I, *Rules*, Cambridge, ICRC and Cambridge University Press, 2005, p. 455.

[559] J.-M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law*, vol. II, *Practice*, Cambridge, ICRC and Cambridge University Press, 2005, pp. 2893–2894, paras. 844–855, and online update for Australia, Israel, the Netherlands and Spain, available from www.icrc.org/customary-ihl/eng/docs/v2_rul_rule128_section D.

[560] United Kingdom of Great Britain and Northern Ireland, Ministry of Defence, *The Manual of the Law of Armed Conflict*, Oxford University Press, 2004, p. 205, para. 8.170.

[561] The United States manual mentions only the will of prisoners of war who are sick or wounded, see Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol. II, *Practice* (footnote 559 above), pp. 2893–2894, paras. 844–855; but United States practice after the Second Gulf War was to have the ICRC establish the prisoner's will and to act accordingly (United States of America, Department of Defense, *Conduct of the Persian Gulf War: Final Report to Congress*, United States Government Printing Office, 1992, pp. 707–708).

[562] See the second report of the Special Rapporteur (A/CN.4/671), paras. 11–18. See also L. Crema, "Subsequent agreements and subsequent practice within and outside the Vienna Convention", in Nolte (ed.), *Treaties and Subsequent Practice* (footnote 537 above), pp. 25–26.

[563] See the second report of the Special Rapporteur (A/CN.4/671), para. 71.

[564] See *Dispute regarding Navigational and Related Rights* (footnote 546 above), at pp. 234–235, para. 40; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, *Judgment of 20 April 2010*, *I.C.J. Reports 2010*, p. 14, at pp. 65–66, paras. 138–140; J. Crawford, "A consensualist interpretation of article 31 (3) of the Vienna Convention on the Law of Treaties", in Nolte (ed.), *Treaties and Subsequent Practice* (footnote 537 above), p. 32; for another example, see the second report of the Special Rapporteur (A/CN.4/671), para. 72; and J. R. Crook (ed.), "Contemporary practice of the United States relating to international law", AJIL, vol. 105, No. 4 (2011), pp. 809–812.

(21) Article 7 of the Geneva Convention of 22 August 1864, for the Amelioration of the Condition of the Wounded in Armies in the Field provides that "[a] distinctive and uniform flag shall be adopted for hospitals, ambulances and evacuation parties. … [The] … flag … shall bear a red cross on a white ground".[565] During the Russo-Turkish War of 1876–1878, the Ottoman Empire declared that in the future it would use the red crescent on a white ground to mark its own ambulances, while respecting the red cross sign protecting enemy ambulances, and stated that the distinctive sign of the Convention "has so far prevented [Turkey] from exercising its rights under the Convention because it gave offence to the Muslim soldiers".[566] This declaration led to a correspondence between the Ottoman Empire, Switzerland (as depositary) and the other parties which resulted in the acceptance of the red crescent only for the duration of the conflict.[567] At The Hague Peace Conferences of 1899 and 1907 and during the Geneva Revision Conference 1906, the Ottoman Empire, Persia and Siam unsuccessfully requested the inclusion of the red crescent, the red lion and sun, and the red flame in the Convention.[568] The Ottoman Empire and Persia, however, at least gained the acceptance of "reservations" which they formulated to that effect in 1906.[569] This acceptance of the reservations of the Ottoman Empire and Persia in 1906 did not mean, however, that the Parties had accepted that the Geneva Convention, of 22 August 1864, for the Amelioration of the Condition of the Wounded in Armies in the Field had been interpreted in a particular way prior to 1906 by subsequent unopposed practice. The practice by the Ottoman Empire and Persia was rather seen, at least until 1906, as not being covered by the 1864 Convention, but it was accepted as a temporary and exceptional measure which left the general treaty obligation unchanged.

(22) The purpose of paragraph 2 of draft conclusion 6 is to acknowledge the variety of forms that subsequent agreements and subsequent practice can take under article 31, paragraph 3 (*a*) and (*b*). The Commission has recognized that subsequent practice under article 31, paragraph 3 (*b*), consists of any "conduct" in the application of a treaty, including under certain circumstances, inaction, which may contribute to establishing an agreement regarding the interpretation of the treaty.[570] Depending on the treaty concerned, this includes not only externally oriented conduct, such as official acts, statements and voting at the international level, but also internal legislative, executive and judicial acts, and may even include conduct by non-State actors which is attributable to one or more States parties and which fall within the scope of what the treaty conceives as forms of its application.[571] Thus, the individual conduct which may contribute to a subsequent practice under article 31, paragraph 3 (*b*), need not meet any particular formal criteria.[572]

(23) Subsequent practice at the international level need not necessarily be joint conduct.[573] A merely parallel conduct may suffice. It is a separate question whether parallel activity actually articulates a sufficient common understanding (agreement) regarding the interpretation of a treaty in a particular case (see draft conclusion 9, paragraph 1, below).[574] Subsequent agreements can be found in legally binding treaties as well as in non-binding instruments like memorandums of understanding.[575] Subsequent agreements can also be found in certain decisions of a Conference of States Parties (see draft conclusion 10, paragraphs 1, 2 and 3, below).

(24) Paragraph 3 of this draft conclusion provides that in identifying subsequent practice under article 32, the interpreter is required to determine whether, in particular, conduct by one or more parties is in the application of the treaty.[576] The Commission decided to treat such "other subsequent practice" (see draft conclusion 4, paragraph 3)[577] under article 32 in a separate paragraph for the sake of analytical clarity (see draft conclusion 7, paragraph 2 and draft conclusion 8, paragraph 3, below), but it does not thereby call into question the unity of the process of interpretation. The considerations which are pertinent for the identification of subsequent agreements and subsequent practice under article 31, paragraph 3 (*a*) and (*b*), also apply, *mutatis mutandis*, to the identification of "other subsequent practice" under article 32. Thus, agreements between less than all parties to a treaty regarding the interpretation of a treaty or its application are a form of subsequent practice under article 32.

---

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

[566] *Bulletin international des Sociétés de secours aux militaires blessés*, No. 29, January 1877, pp. 35–37, quoted in F. Bugnion, *The Emblem of the Red Cross: a Brief History*, Geneva, ICRC, 1977, pp. 15–16.

[567] *Bulletin international des Sociétés de secours aux militaires blessés*, No. 31, July 1877, p. 89, quoted in Bugnion (see preceding footnote), p. 18.

[568] Bugnion, *ibid*., pp. 19–31.

[569] Joined by Egypt upon accession in 1923, see Bugnion, *ibid*., pp. 23–26. It was only on the occasion of the revision of the Geneva Conventions in 1929, when Turkey, Persia and Egypt claimed that the use of other emblems had become a *fait accompli* and that those emblems had been used in practice without giving rise to any objections, that the red crescent and the red lion and sun were finally recognized as a distinctive sign by article 19 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (1929).

[570] Commentary to draft conclusion 4, paras. (16)–(19) (*Yearbook … 2013*, vol. II (Part Two), chap. IV, pp. 30–31).

[571] See, for example, the commentary to draft conclusion 5, *ibid*., pp. 34–37; Boisson de Chazournes, "Subsequent practice …" (footnote 537 above), pp. 54, 56 and 59–60; Gardiner, *Treaty Interpretation* (footnote 533 above), pp. 228–230; see also *Maritime Dispute (Peru v. Chile)* (footnote 545 above), pp. 41–45, paras. 103–111, and pp. 48–49, paras. 119–122, and p. 50, para. 126; and Dörr, "Article 31. General rule of interpretation" (footnote 534 above), pp. 555–556, para. 78.

[572] Gardiner, *Treaty Interpretation* (see footnote 533 above), pp. 226–227.

[573] *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962*, *I.C.J. Reports 1962*, p. 6, at p. 32; and *Kasikili/Sedudu Island* (see footnote 539 above), p. 1213, para. 17 (dissenting opinion of Judge Parra-Aranguren).

[574] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment*, *I.C.J. Reports 2007*, p. 659, at p. 737, para. 258; but see *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment*, *I.C.J. Reports 1982*, p. 18, at p. 84, para. 117, where the Court recognized concessions granted by the parties to the dispute as evidence of their tacit agreement; see also *Maritime Dispute (Peru v. Chile)* (footnote 545 above).

[575] Gardiner, *Treaty Interpretation* (see footnote 533 above), pp. 244 and 250.

[576] See paragraphs (1)–(4) of this commentary, above; see also the second report of the Special Rapporteur (A/CN.4/671), paras. 3–5.

[577] *Yearbook … 2013*, vol. II (Part Two), pp. 17 *et seq*.

(25) An example of a practical arrangement is the memorandum of understanding between the Department of Transportation of the United States of America and the Secretaría de Comunicaciones y Transportes of the United Mexican States on International Freight Cross-Border Trucking Services of 6 July 2011.[578] The memorandum of understanding does not refer to Canada, the third party of the North American Free Trade Agreement (NAFTA), and specifies that it "is without prejudice to the rights and obligations of the United States and Mexico under NAFTA". These circumstances suggest that the memorandum of understanding does not claim to constitute an agreement regarding the interpretation of NAFTA under article 31, paragraph 3 (*a*) or (*b*), but that it rather remains limited to being a practical arrangement between a limited number of parties which is subject to challenge by other parties or by a judicial or quasijudicial institution.

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

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

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

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

Commentary

(1) Draft conclusion 7 deals with the possible effects of subsequent agreements and subsequent practice on the interpretation of a treaty. The purpose is to indicate how subsequent agreements and subsequent practice may contribute to the clarification of the meaning of a treaty. Paragraph 1 emphasizes that subsequent agreements and subsequent practice must be seen in their interaction with other means of interpretation (see draft conclusion 1, paragraph 5).[579] They are therefore not necessarily in themselves conclusive.

(2) Subsequent agreements and subsequent practice, like all means of interpretation, may have different effects on the interactive process of interpretation of a treaty, which consists of placing appropriate emphasis in any particular case on the various means of interpretation in a "single combined operation".[580] The taking into account of subsequent agreements and subsequent practice under article 31, paragraph 3, and article 32 may thus contribute to a clarification of the meaning of a treaty[581] in the sense of a narrowing down (specifying) of possible meanings of a particular term or provision, or of the scope of the treaty as a whole (see paragraphs (4), (6)–(7), (10) and (11), below). Alternatively, such taking into account may contribute to a clarification in the sense of confirming a wider interpretation. Finally, it may contribute to understanding the range of possible interpretations available to the parties, including the scope for the exercise of discretion by the parties under the treaty (see paragraphs (12)–(15), below).

(3) International courts and tribunals usually begin their reasoning in a given case by determining the "ordinary meaning" of the terms of the treaty.[582] Subsequent agreements and subsequent practice mostly enter into their reasoning at a later stage when courts ask whether such conduct confirms or modifies the result arrived at by the initial interpretation of the ordinary meaning (or by other means of interpretation).[583] If the parties do not wish to convey the ordinary meaning of a term, but rather a special meaning in the sense of article 31, paragraph 4, subsequent agreements and subsequent practice may shed light on this special meaning. The following examples[584] illustrate how subsequent agreements and subsequent practice as means of interpretation can contribute, in their interaction with other means in the process of interpretation, to the clarification of the meaning of a treaty.

(4) Subsequent agreements and subsequent practice can help identify the "ordinary meaning" of a particular term by confirming a narrow interpretation of different possible shades of meaning of the term. This was the case,

---

[578] Crook (ed.), "Contemporary practice of the United States …" (see footnote 564 above), pp. 809–812; see also Mexico, *Diario Oficial de la Federación* (7 July 2011), *Decreto por el que se modifica el artículo 1 del diverso por el que se establece la Tasa Aplicable durante 2003, del Impuesto General de Importación, para las mercancías originarias de América del Norte, publicado el 31 de diciembre de 2002, por lo que respecta a las mercancías originarias de los Estados Unidos de América*.

[579] Commentary to draft conclusion 1, paragraph 5, paras. (12)–(15) (*Yearbook … 2013*, vol. II (Part Two), pp. 20–21).

[580] *Ibid.*

[581] The terminology follows guideline 1.2 (Definition of interpretative declarations) of the Commission's Guide to Practice on Reservations to Treaties adopted by the Commission at its sixty-third session: "'Interpretative declaration' means a unilateral statement … whereby [a State or an international organization] purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions") (*Yearbook … 2011*, vol. II (Part Three), p. 51); see also *ibid*., commentary to guideline 1.2, p. 54, para. (18).

[582] Commentary to draft conclusion 1, para. (14) (*Yearbook … 2013*, vol. II (Part Two), pp. 20–21); *Competence of Assembly regarding admission to the United Nations*, *Advisory Opinion*, *I.C.J. Reports 1950*, p. 4, at p. 8.

[583] See, for example, *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, *Judgment*, *I.C.J. Reports 2002*, p. 625, at p. 656, paras. 59–61, and p. 665, para. 80; *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, *Judgment*, *I.C.J. Reports 1994*, p. 6, at pp. 34–37, paras. 66–71; and *Dispute regarding Navigational and Related Rights* (footnote 546 above), p. 290 (declaration of Judge *ad hoc* Guillaume).

[584] For more examples, see G. Nolte, "Jurisprudence under special regimes relating to subsequent agreements and subsequent practice: second report for the ILC Study Group on treaties over time", in Nolte (ed.), *Treaties and Subsequent Practice* (footnote 537 above), pp. 210–306.

for example,[585] in the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, where the International Court of Justice determined that the expressions "poison or poisonous weapons"

> have been understood, in the practice of States, in their ordinary sense as covering weapons whose prime, or even exclusive, effect is to poison or asphyxiate. This practice is clear, and the parties to those instruments have not treated them as referring to nuclear weapons.[586]

(5) On the other hand, subsequent practice may prevent specifying the meaning of a general term to just one of different possible meanings.[587] For example, in the *Case concerning rights of nationals of the United States of America in Morocco*, the Court stated:

> The general impression created by an examination of the relevant materials is that those responsible for the administration of the customs … have made use of all the various elements of valuation available to them, though perhaps not always in a consistent manner.
>
> In these circumstances, the Court is of the opinion that Article 95 [of the General Act of the International Conference of Algeciras] lays down no strict rule on the point in dispute. It requires an interpretation which is more flexible than either of those which are respectively contended for by the Parties in this case.[588]

(6) Different forms of practice may contribute to both a narrow and a broad interpretation of different terms in the same treaty.[589]

(7) A treaty shall be interpreted in accordance with the ordinary meaning of its terms "in their context" (art. 31, para. 1). Subsequent agreements and subsequent practice, in interaction with this particular means of interpretation, may also contribute to identifying a narrower or broader interpretation of a term of a treaty.[590] In the *Intergovernmental Maritime Consultative Organization (IMCO) Advisory Opinion*, for example, the International Court of Justice had to determine the meaning of the expression "eight … largest ship-owning nations" under article 28 (*a*) of the Convention on the International Maritime Organization. Since this concept of "largest ship-owning nations" permitted different interpretations (such as determination by "registered tonnage" or by "property of nationals"), and since there was no pertinent practice of the organization or its members under article 28 (*a*) itself, the Court turned to practice under other provisions in the Convention and held that

> [t]his reliance upon registered tonnage in giving effect to different provisions of the Convention … persuade[s] the Court to view that it is unlikely that when [article 28 (*a*)] was drafted and incorporated into the Convention it was contemplated that any criterion other than registered tonnage should determine which were the largest ship-owning nations.[591]

(8) Together with the text and the context, article 31, paragraph 1, accords importance to the "object and purpose" for its interpretation.[592] Subsequent agreements and subsequent practice may also contribute to a clarification of the object and purpose of a treaty,[593] or reconcile invocations of the "object and purpose" of a treaty with other means of interpretation.

(9) In the *Maritime Delimitation in the Area between Greenland and Jan Mayen*[594] and *Oil Platforms* cases,[595] for example, the International Court of Justice clarified the object and purpose of bilateral treaties by referring to subsequent practice of the parties. And in the *Land and Maritime Boundary between Cameroon and Nigeria* case, the Court held that

> From the treaty texts and the practice analysed at paragraphs 64 and 65 above, it emerges that the Lake Chad Basin Commission is an international organization exercising its powers within a specific geographical area; that it does not, however, have as its purpose the settlement at a regional level of matters relating to the maintenance of international peace and security and thus does not fall under Chapter VIII of the Charter [of the United Nations].[596]

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

---

[585] See also *Oil Platforms, Preliminary Objection, Judgment of 12 December 1996* (footnote 547 above), p. 815, para. 30; *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 275, at pp. 306–307, para. 67; and *Competence of Assembly regarding Admission to the United Nations* (footnote 582 above), p. 9.

[586] *Legality of the Threat or Use of Nuclear Weapons* (footnote 547 above), p. 248, para. 55.

[587] *Reservations to the Convention on Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 15, at p. 25.

[588] *Case concerning rights of nationals of the United States of America in Morocco, Judgment of 27 August 1952, I.C.J. Reports 1952*, p. 176, at p. 211.

[589] See, *mutatis mutandis*, *Certain expenses of the United Nations* (footnote 540 above), p. 151, where the International Court of Justice interpreted the term "expenses" broadly and "action" narrowly in the light of the respective subsequent practice of the United Nations, at pp. 158–161 ("expenses") and pp. 164–165 ("action").

[590] See, for example, *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 69, at p. 87, para. 40.

[591] *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion of 8 June 1960, I.C.J. Reports 1960*, p. 150, at p. 169; see also pp. 167–169; also *Proceedings pursuant to the OSPAR Convention (Ireland–United Kingdom), Dispute Concerning Access to Information Under Article 8 of the OSPAR Convention between Ireland and the United Kingdom of Great Britain and Northern Ireland*, Final Award, Decision of 2 July 2003, UNRIAA, vol. XXIII (Sales No. E/F.04.V.15), p. 59, at p. 99, para. 141.

[592] Gardiner, *Treaty Intepretation* (see footnote 533 above), pp. 190 and 198.

[593] *Ibid*., pp. 191–194; see also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, at p. 31, para. 53; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 179, para. 109; 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: Essays in Honour of Krzysztof Skubiszewski*, The Hague, Kluwer, 1996, p. 180; Distefano (footnote 533 above), pp. 52–54; and Crema (footnote 562 above), p. 21.

[594] *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, pp. 38 *et seq.*, at pp. 50–51, para. 27.

[595] *Oil Platforms, Preliminary Objection, Judgment of 12 December 1996* (footnote 547 above), p. 813, para. 27, and p. 815, para. 30.

[596] See also *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment* (footnote 585 above), p. 306, para. 67.

certain scope for the exercise of discretion which a treaty grants to States.[597]

(11) For example, whereas the ordinary meaning of the terms of article 5 of the 1944 Convention on International Civil Aviation do not appear to require a charter flight to obtain permission to land while *en route*, long-standing State practice requiring such permission has led to general acceptance that this provision is to be interpreted as requiring permission.[598] Another case is article 22, paragraph 3, of the Vienna Convention on Diplomatic Relations, which provides that the means of transport used by a mission shall be immune from search, requisition, attachment or execution. While police enforcement against diplomatic properties will usually be met with protests of States,[599] the towing of diplomatic cars that have violated local traffic and parking laws generally has been regarded as permissible in practice.[600] This practice suggests that, while punitive measures against diplomatic vehicles are forbidden, cars can be stopped or removed if they prove to be an immediate danger or obstacle for traffic and/or public safety.[601] In that sense, the meaning of the term "execution", and thus, the scope of protection accorded to means of transportation, is specified by the subsequent practice of parties.

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

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

Although the term "shall" suggests that it is obligatory for States to use the distinctive emblem for marking medical personnel and transports under all circumstances, subsequent practice suggests that States may possess some discretion with regard to its application.[602] As armed groups have in recent years specifically attacked medical convoys which were well recognizable due to the protective emblem, States have in certain situations refrained from marking such convoys with a distinctive emblem. Responding to a parliamentary question on its practice in Afghanistan, the Government of Germany has stated that:

> As other contributors of ISAF contingents, the Federal Armed Forces have experienced that marked medical vehicles have been targeted. Occasionally, these medical units and vehicles, clearly distinguished as such by their protective emblem, have even been preferred as targets. The Federal Armed Forces have thus, alongside with Belgium, France, the UK, Canada and the US, decided within ISAF to cover up the protective emblem on medical vehicles.[603]

(13) Such practice by States may confirm an interpretation of article 12 according to which the obligation to use the protective emblem[604] under exceptional circumstances allows a margin of discretion for the parties.

(14) A treaty provision which grants States an apparently unconditional right may raise the question of whether this discretion is limited by the purpose of the rule. For example, according to article 9 of the Vienna Convention on Diplomatic Relations, the receiving State may notify the sending State, without having to give reasons, that a member of the mission is *persona non grata*. States mostly issue such notifications in cases in which members of the mission were found or suspected of having engaged in espionage activities, or having committed other serious violations of the law of the receiving State, or caused significant political irritation.[605] However, States have also made such declarations in other circumstances, such as when envoys caused serious injury to a third party[606] or committed repeated infringement of the

---

[597] This is not to suggest that there may ultimately be different interpretations of a treaty, but rather that the treaty may accord the parties the possibility to choose from a spectrum of different permitted acts, see Gardiner, *Treaty Interpretation* (footnote 533 above), pp. 30–31 and p. 111, quoting the House of Lords in *R v. Secretary of State for the Home Department, ex parte Adan* [2001] 2 AC 477: "It is necessary to determine the autonomous meaning of the relevant treaty provision. … It follows that, as in the case of other multilateral treaties, the Convention relating to the Status of Refugees must be given an independent meaning derivable from the sources mentioned in articles 31 and 32 [of the Vienna Convention] and without taking colour from distinctive features of the legal system of any individual contracting State. In principle therefore there can only be one true interpretation of a treaty … In practice it is left to national courts, faced with a material disagreement on an issue of interpretation, to resolve it. But in doing so it must search, untrammelled by notions of its national legal culture, for the true autonomous international meaning of the treaty. And there can only be one true meaning", at pp. 515–517 (Lord Steyn).

[598] S. D. Murphy, "The relevance of subsequent agreement and subsequent practice for the interpretation of treaties", in Nolte (ed.), *Treaties and Subsequent Practice* (see footnote 537 above), p. 85; and A. Aust, *Modern Treaty Law and Practice*, 3rd ed., Cambridge University Press, 2013, p. 215.

[599] E. Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, 3rd ed., Oxford University Press, 2008, pp. 160–161; J. Salmon, *Manuel de droit diplomatique*, Brussels, Bruylant, 1994, pp. 207–208, para. 315.

[600] See, for example, Australia, Department of Foreign Affairs and Trade, *Privileges and Immunities of Foreign Representatives* (http://dfat.gov.au/about-us/publications/corporate/protocol-guidelines/Documents/A21.pdf); Iceland, Protocol Department Ministry of Foreign Affairs, *Diplomatic Handbook*, p. 14 (https://www.government.is/media/utanrikisraduneyti-media/media/PDF/Diplomatic_Handbook_March2010.pdf); United Kingdom, see the statement of the Parliamentary Under-Secretary of State, Home Office (Lord Elton) in the House of Lords, HL Deb, 12 December 1983, vol. 446 cc3-8; United States, see M. Nash, "Contemporary practice of the United States relating to international law", AJIL, vol. 88, No. 2 (April 1994), pp. 312–313.

[601] Denza (see footnote 599 above), p. 160; and M. Richtsteig, *Wiener Übereinkommen über diplomatische und konsularische Beziehungen: Entstehungsgeschichte, Kommentierung, Praxis*, 2nd ed., Baden-Baden, Nomos, 2010, p. 70.

[602] S.-S. Junod, *et al.* (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Protocol II)*, Geneva, ICRC, 1987, p. 1440, paras. 4742–4744; and H. Spieker, "Medical transportation", in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, vol. VII, Oxford University Press, 2012, pp. 54–55, paras. 7–12 (available from http://opil.ouplaw.com/home/MPIL). See also the less stringent future tense in the French version "*sera arboré*".

[603] Deutscher Bundestag (Federal Parliament of Germany), "Antwort der Bundesregierung: Rechtlicher Status des Sanitätspersonals der Bundeswehr in Afghanistan", 9 April 2010, *Bundestagsdrucksache 17/1338*, p. 2.

[604] Spieker (see footnote 602 above), p. 55, para. 12.

[605] See Denza (footnote 599 above), pp. 77–88, with further references to declarations in relation to espionage; see also Salmon (footnote 599 above), pp. 483–484, para. 630; and Richtsteig (footnote 601 above), p. 30.

[606] The Netherlands, Protocol Department, Ministry of Foreign Affairs, *Protocol Guide for Diplomatic Missions and Consular Posts*, available from www.government.nl/documents.

law,[607] or even to enforce their drunk-driving laws.[608] It is even conceivable that declarations are made without clear reasons or for purely political motives. Other States do not seem to have asserted that such practice constitutes an abuse of the power to declare members of a mission as *personae non gratae*. Thus, such practice confirms that article 9 provides an unconditional right.[609]

(15) Paragraph 2 of draft conclusion 7 concerns possible effects of "other subsequent practice" under article 32 (see draft conclusion 4, paragraph 3),[610] which does not reflect an agreement of all parties regarding the interpretation of a treaty. Such practice, as a supplementary means of interpretation, can confirm the interpretation which the interpreter has reached in the application of article 31, or determine the meaning when the interpretation according to article 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable. Article 32 thereby makes a distinction between a use of preparatory work or of "other subsequent practice" to confirm a meaning arrived at under article 31, and its use to "determine" the meaning. Hence, recourse may be had to "other subsequent practice" under article 32 not only to determine the meaning of the treaty in certain circumstances, but also—and always—to confirm the meaning resulting from the application of article 31.[611]

(16) Subsequent practice under article 32, can contribute, for example, to reducing possible conflicts when the "object and purpose" of a treaty appears to be in tension with specific purposes of certain of its rules.[612] In the *Kasikili/Sedudu Island* case, for example, the International Court of Justice emphasized that the parties to the 1890 Agreement "sought both to secure for themselves freedom of navigation on the river and to delimit as precisely as possible their respective spheres of influence".[613] The parties thereby reconciled a possible tension by taking into account a certain subsequent practice by only one of the parties as a supplementary means of interpretation (under article 32).[614]

(17) Another example of "other subsequent practice" under article 32 concerns the term "feasible precautions" in article 57, paragraph 2 (*a*) (ii), of the Protocol additional to the Geneva Conventions of 12 August 1949 (Protocol I) of 1977. This term has been used in effect by article 3, paragraph 4, of the Protocol on prohibitions or restrictions on the use of mines, booby-traps and other devices (Protocol II) of 10 October 1980, which provides that "[f]easible precautions are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations." This language has come to be accepted by way of subsequent practice in many military manuals as a general definition of "feasible precautions" for the purpose of article 57, paragraph 2 (*a*) (ii), of Protocol I of 1977.[615]

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

---

[607] France, Ministère des affaires étrangères et du développement, *Guide for Foreign Diplomats Serving in France: Immunities—Respect for Local Laws and Regulations* (www.diplomatie.gouv.fr/en/the-ministry-and-its-network/protocol/immunities/article/respect-for-local-laws-and); Turkey, Ministry of Foreign Affairs, *Principal Circular Note, 63552 Traffic Regulations 2005/PDGY/63552* (6 April 2005) (www.mfa.gov.tr/06_04_2005--63552-traffic-regulations.en.mfa); and United Kingdom, Foreign and Commonwealth Office, Circular dated 19 April 1985 to the Heads of Diplomatic Missions in London, reprinted in G. Marston (ed.), "United Kingdom materials on international law 1985", BYBIL *1985*, vol. 56, p. 437.

[608] See Canada, Foreign Affairs, Trade and Development, Revised Impaired Driving Policy (www.international.gc.ca/protocol-protocole/vienna_convention_idp-convention_vienne_vfa.aspx?lang=eng); and United States, Department of State, *Diplomatic Note 10-181 of the Department of State* (24 September 2010) (www.state.gov/wp-content/uploads/2019/05/149985.pdf), pp. 8–9.

[609] See G. Hafner, "Subsequent agreements and practice: between interpretation, informal modification, and formal amendment", in Nolte (ed.), *Treaties and Subsequent Practice* (footnote 537 above), p. 112, for an even more far-reaching case under article 9 of the Vienna Convention on Diplomatic Relations.

[610] *Yearbook … 2013*, vol. II (Part Two), p. 28.

[611] WTO, Report of the WTO Appellate Body, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, AB-2009-3* (WT/DS363/AB/R), 19 January 2010, para. 403: "Although the Panel's application of Article 31 of the *Vienna Convention* to 'Sound recording distribution services' led it to a 'preliminary conclusion' as to the meaning of that entry, the Panel nonetheless decided to have recourse to supplementary means of interpretation to *confirm* that meaning. We note, in this regard, that China's argument on appeal appears to assume that the Panel's analysis under Article 32 of the Vienna Convention would *necessarily* have been different if the Panel had found that the application of Article 31 left the meaning of 'Sound recording distribution services' ambiguous or obscure, and if the Panel had, therefore, resorted to Article 32 to *determine*, rather than to *confirm*, the meaning of that term. We do not share this view. The elements to be examined under Article 32 are distinct from those to be analyzed under Article 31, but it is the same elements that are examined under Article 32 irrespective of the outcome of the Article 31 analysis. Instead, what may differ, depending on the results of the application of Article 31, is the weight that will be attributed to the elements analyzed under Article 32". See also M. E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Leiden, Martinus Nijhoff, 2009, p. 447, para. 11.

[612] See WTO, Report of the WTO Appellate Body, *United States—Import Prohibition of Certain Shrimp and Shrimp Products, AB-1998-4* (WT/DS58/AB/R), 6 November 1998, para. 17 ("most treaties have no single, undiluted object and purpose but rather a variety of different, and possibly conflicting, objects and purposes"); and Gardiner, *Treaty Interpretation* (footnote 533 above), p. 195.

[613] *Kasikili/Sedudu Island* (see footnote 539 above), p. 1074, para. 45. For the Agreement between Great Britain and Germany, respecting Zanzibar, Heligoland, and the Spheres of Influence of the two Countries in Africa, signed at Berlin on 1 July 1890, see *British and Foreign State Papers, 1889–1890*, vol. 82, p. 35.

[614] *Kasikili/Sedudu Island* (see footnote 539 above), pp. 1077–1078, para. 55, and p. 1096, para. 80.

[615] For the military manuals of Argentina (1989), Canada (2001) and the United Kingdom (2004), see Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol. II, *Practice* (footnote 559 above), pp. 359–360, paras. 160–164, and the online update for the military manual of Australia (2006) (www.icrc.org/customary-ihl/eng/docs/v2_rul_rule15_sectionc); see also Pilloud, *et al.* (eds.), *Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)* (footnote 291 above), p. 683, para. 2202.

(19) According to article 39 of the 1969 Vienna Convention, "[a] treaty may be amended by agreement between the parties". Article 31, paragraph 3 (*a*), on the other hand, refers to subsequent agreements "between the parties regarding the interpretation of the treaty and the application of its provisions", and does not seem to address the question of amendment or modification. As the WTO Appellate Body has held that

> […] the term "application" in article 31 (3) (*a*) relates to the situation where an agreement specifies how existing rules or obligations in force are to be "applied"; the term does not connote the creation of new or the extension of existing obligations that are subject to a temporal limitation …[616]

(20) Articles 31, paragraph 3 (*a*), and 39, if read together, demonstrate that agreements which the parties reach subsequently to the conclusion of a treaty can interpret and amend or modify the treaty.[617] An agreement under article 39 need not display the same form as the treaty which it amends.[618] As the International Court of Justice has held in the *Pulp Mills on the River Uruguay* case:

> Whatever its specific designation and in whatever instrument it may have been recorded (the [River Uruguay Executive Commission] CARU minutes), this "understanding" is binding on the Parties, to the extent that they have consented to it and must be observed by them in good faith. They are entitled to depart from the procedures laid down by the 1975 Statute, in respect of a given project pursuant to an appropriate bilateral agreement.[619]

(21) It is often difficult to draw a distinction between agreements of the parties under a specific treaty provision which attributes binding force to subsequent agreements, simple subsequent agreements under article 31, paragraph 3 (*a*), which are not binding as such, and, finally, agreements on the amendment or modification of a treaty under articles 39–41.[620] International case law and State practice suggest[621] that informal agreements which are alleged to derogate from treaty obligations should be narrowly interpreted. There do not seem to be any formal criteria other than those set forth in article 39, if applicable, apart from the ones which may be provided for in the applicable treaty itself, which are recognized as distinguishing these different forms of subsequent agreements. It is clear, however, that States and international courts are generally prepared to accord States parties a rather wide scope for the interpretation of a treaty by way of a subsequent agreement. This scope may even go beyond the ordinary meaning of the terms of the treaty. The recognition of this scope for the interpretation of a treaty goes hand in hand with the reluctance by States and courts to recognize that an agreement actually has the effect of amending or modifying a treaty.[622] An agreement to modify a treaty is thus not excluded, but also not to be presumed.[623]

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

Draft Article 38. Modification of treaties by subsequent practice

> A treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions.[624]

---

[616] *European Communities—Regime for the Importation, Sale and Distribution of Bananas, Second Recourse to Article 21.5 of the DSU [Dispute Settlement Understanding] by Ecuador, AB-2008-8,* WTO, Report of the WTO Appellate Body (WT/DS27/AB/RW2/ECU and Corr.1), adopted on 11 December 2008; and *European Communities—Regime for the Importation, Sale and Distribution of Bananas, Second Recourse to Article 21.5 of the DSU [Dispute Settlement Understanding] by the United States, AB-2008-9* (WT/DS27/AB/RW/USA and Corr.1), adopted on 22 December 2008, paras. 391–393.

[617] Murphy, "The relevance of subsequent agreement and subsequent practice … " (see footnote 598 above), p. 88.

[618] Sinclair (see footnote 533 above), p. 107, referring to Waldock, *Official Records of the United Nations Conference on the Law of Treaties, First Session …* (A/CONF.39/11) (footnote 535 above), 37th meeting of the Committee of the Whole, 24 April 1968, p. 204, para. 15; Villiger, *Commentary on the 1969 Vienna Convention* … (footnote 611 above), pp. 513–515, paras. 7, 9 and 11; and K. Odendahl, "Article 39. General rule regarding the amendment of treaties", in Dörr and Schmalenbach (eds.) (footnote 534 above), p. 706, at para. 16.

[619] *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment* (see footnote 564 above), p. 62, para. 128; see also p. 63, para. 131; the Court then concluded that, in the case under review, that these conditions had not been fulfilled, at pp. 62–66, paras. 128–142. For the Statute of the River Uruguay, signed at Salto (Uruguay) on 26 February 1975, see United Nations, *Treaty Series*, vol. 1295, No. I-21425, p. 331.

[620] In judicial practice, it is sometimes not necessary to determine whether an agreement has the effect of interpreting or modifying a treaty, see *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* (footnote 583 above), p. 31, para. 60 ("in the view of the Court, for the purposes of the present Judgment, there is no reason to categorize it either as confirmation or as a modification of the Declaration [of 21 March 1899, completing the Convention between Great Britain and France of 14 June 1898]"); it is sometimes considered that an agreement under article 31 (3) (*a*) can also have the effect of modifying a treaty, Aust, *Modern Treaty Law and Practice* (see footnote 598 above), pp. 212–214, with examples. For the Convention between Great Britain and France, for the Delimitation of their respective Possessions to the West of the Niger, and of their respective Posessions and Spheres of Influence to the East of that River, signed at Paris on 14 June 1898, and the Declaration completing the foregoing Conventon of June 14, 1898, signed at London on 21 March 1899, see *British and Foreign State Papers, 1898–1899*, vol. 91, pp. 38 and 55 respectively.

[621] *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment* (see footnote 564 above), p. 63, para. 131, and p. 66, para. 140; Crawford, "A consensualist interpretation of article 31 (3) … " (footnote 564 above), p. 32; *The Islamic Republic of Iran v. the United States of America*, Interlocutory Award No. ITL 83-B1-FT (Counterclaim), Iran–United States Claims Tribunal, *Iran–United States Claims Tribunal Reports*, vol. 38 (2004–2009), pp. 77 *et seq.*, at pp. 125–126, para. 132; *ADF Group Inc. v. United States of America*, Case No. ARB(AF)/00/1, *In the matter of an arbitration under chapter eleven of the North American Free Trade Agreement*, 9 January 2003, *ICSID Reports*, vol. 6 (2004), pp. 470 *et seq.*; see, in particular, pp. 526–527, para. 177 (available from https://2009-2017.state.gov/documents/organization/16586.pdf); *Methanex Corporation v. United States of America, Arbitration of the United Nations Commission on International Trade Law (UNCITRAL) in the matter of an arbitration under chapter eleven of the North American Free Trade Agreement*, Final award of the Tribunal on juridication and merits, 3 August 2005 (https://2009-2017.state.gov/documents/organization/51052.pdf), Part IV, chapter C, paras. 20–21; and the second report of the Special Rapporteur (A/CN.4/671), paras. 146–165.

[622] It may be that States, in diplomatic contexts outside court proceedings, tend to acknowledge more openly that a certain agreement or common practice amounts to a modification of a treaty, see Murphy, "The relevance of subsequent agreement and subsequent practice …" (footnote 598 above), p. 83.

[623] *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment* (see footnote 564 above), p. 66, para. 140; and Crawford, "A consensualist interpretation of article 31 (3) …" (footnote 564 above), p. 32.

[624] *Yearbook … 1966,* vol. II, document A/6309/Rev.1, Part II, p. 236.

(23) This draft article gave rise to an intense debate at the United Nations Conference on the Law of Treaties.[625] An amendment to delete draft article 38 was put to a vote and was adopted by 53 votes to 15, with 26 abstentions. After the Conference, the question was discussed whether the rejection of draft article 38 at the Conference meant that the possibility of a modification of a treaty by subsequent practice of the parties had thereby been excluded. Many writers came to the conclusion that the negotiating States simply did not wish to address this question in the Convention and that treaties can, as a general rule under the customary law of treaties, indeed be modified by subsequent practice which establishes the agreement of the parties to that effect.[626] International courts and tribunals, on the other hand, have since the adoption of the 1969 Vienna Convention mostly refrained from recognizing this possibility.

(24) In the case concerning the *Dispute regarding Navigational and Related Rights*, the International Court of Justice has held that "subsequent practice of the parties, within the meaning of Article 31, paragraph 3 (*b*), of the Vienna Convention, can result in a departure from the original intent on the basis of a tacit agreement".[627] It is not entirely clear whether the Court thereby wanted to recognize that subsequent practice under article 31, paragraph 3 (*b*), may also have the effect of amending or modifying a treaty, or whether it was merely making a point relating to the interpretation of treaties, as the "original" intent of the parties is not necessarily conclusive for the interpretation of a treaty. Indeed, the Commission recognized in provisionally adopted draft conclusion 3 that subsequent agreements and subsequent practice, like other means of interpretation, "may assist in determining whether or not the presumed intention of the parties upon the conclusion of the treaty was to give a term used a meaning which is capable of evolving over time".[628] The scope for "interpretation" is therefore not necessarily determined by a fixed "original intent", but must rather be determined by taking into account a broader range of considerations, including certain later developments. This somewhat ambiguous dictum of the Court raises the question of how far subsequent practice under article 31, paragraph 3 (*b*), can contribute to "interpretation", and whether subsequent practice may have the effect of amending or modifying a treaty. Indeed, the dividing line between the interpretation and the amendment or modification of a treaty is in practice sometimes "difficult, if not impossible, to fix".[629]

(25) Apart from the dictum in *Dispute regarding Navigational and Related Rights*,[630] the International Court of Justice has not explicitly recognized that a particular subsequent practice has had the effect of modifying a treaty. This is true, in particular, for the advisory opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*,[631] as well as for the advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,[632] in which the Court recognized that subsequent practice had an important effect on the determination of the meaning of the treaty, but stopped short of explicitly recognizing that such practice had led to an amendment or modification of the treaty.[633] Since these opinions concerned treaties establishing an international organization, it seems difficult to derive a general rule of the law of treaties from them. The questions of subsequent agreements and subsequent practice relating to international organizations will be the subject of a later report.[634]

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

---

[625] *Official Records of the United Nations Conference on the Law of Treaties, First Session …* (A/CONF.39/11) (footnote 535 above), 37th meeting of the Committee of the Whole, 24 April 1968, pp. 207–215; the second report of the Special Rapporteur (A/CN.4/671), paras. 119–121; and Distefano (footnote 533 above), pp. 55–61.

[626] Sinclair (see footnote 533 above), p. 138; Gardiner, *Treaty Interpretation* (footnote 533 above), pp. 243–245; Yasseen (footnote 533 above), pp. 51–52; M. Kamto, "La volonté de l'État en droit international", *Collected Courses of the Hague Academy of International Law 2004*, vol. 310, pp. 134–141, at p. 134; Aust, *Modern Treaty Law and Practice* (footnote 598 above), p. 213; Villiger, *Commentary on the 1969 Vienna Convention …* (footnote 611 above), p. 432, para. 23; Dörr, "Article 31. General rule of interpretation" (footnote 534 above), pp. 554–555, para. 76 (in accord Odendahl (footnote 618 above), pp. 702–704, paras. 10–11); Distefano (footnote 533 above), pp. 62–67; H. Thirlway, "The law and procedure of the International Court of Justice 1960–1989: supplement, 2006—part three", BYBIL *2006*, vol. 77, p. 65; M. N. Shaw, *International Law*, 6th ed., Cambridge University Press, 2008, p. 934; I. Buga, "Subsequent practice and treaty modification", in M. J. Bowman and D. Kritsiotis (eds.), *Conceptual and Contextual Perspectives on the Modern Law of Treaties*, Cambridge University Press (forthcoming), at note 65 with further references; disagreeing with this view, in particular, and stressing the solemnity of the conclusion of a treaty in contrast to the informality of practice, Murphy, "The relevance of subsequent agreement and subsequent practice …" (footnote 598 above), pp. 89–90; see also Hafner (footnote 609 above), pp. 115–117 (differentiating between the perspectives of courts and States, as well as emphasizing the importance of amendment provisions in this context).

[627] *Dispute regarding Navigational and Related Rights* (see footnote 546 above), p. 242, para. 64; see also *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.V5), p. 231, at p. 256, para. 62; Yasseen (footnote 533 above), p. 51; Kamto, "La volonté de l'État …" (footnote 626 above), pp. 134–141; and R. Bernhardt, *Die Auslegung völkerrechtlicher Verträge*, Cologne/Berlin, Heymanns, 1963, p. 132.

[628] *Yearbook … 2013*, vol. II (Part Two), pp. 24–28, draft conclusion 3 and commentary thereto.

[629] Sinclair (see footnote 533 above), p. 138; see also Gardiner, *Treaty Interpretation* (footnote 533 above), p. 243; Murphy, "The relevance of subsequent agreement and subsequent practice …" (footnote 598 above), p. 90; B. Simma, "Miscellaneous thoughts on subsequent agreements and practice", in Nolte (ed.), *Treaties and Subsequent Practice* (footnote 537 above), p. 46; Karl (footnote 534 above), pp. 42–43; J.-M. Sorel and V. Boré Eveno, "Article 31: Convention of 1969", in O. Corten and P. Klein (eds.), *The Vienna Conventions on the Law of Treaties: A Commentary*, vol. I, Oxford University Press, 2011, pp. 825–826, para. 42; Dörr, "Article 31. General rule of intepretation" (footnote 534 above), pp. 554–555, para. 76; this is true even if the two processes can theoretically be seen as being "legally quite distinct", see the dissenting opinion of Judge Parra-Aranguren in *Kasikili/Sedudu Island* (footnote 539 above), at pp. 1212–1213, para. 16; similarly Hafner (footnote 609 above), p. 114; and Linderfalk, *On the Interpretation of Treaties …* (footnote 534 above), p. 168.

[630] *Dispute regarding Navigational and Related Rights* (see footnote 546 above), p. 242, para. 64.

[631] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (see footnote 593 above).

[632] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (see footnote 593 above).

[633] Thirlway (see footnote 626 above), p. 64.

[634] See *Yearbook … 2012*, vol. II (Part Two), p. 79, para. 238, and *Yearbook … 2008*, vol. II (Part Two), annex I, p. 159, para. 42.

[T]he conduct of Cameroon in that territory has pertinence only for the question of whether it acquiesced in the establishment of a change in treaty title, which cannot be wholly precluded as a possibility in law.[635]

(27) The Court found such acquiescence in the *Case concerning the Temple of Preah Vihear,* where it placed decisive emphasis on the fact that there had been clear assertions of sovereignty by one side (France) which, according to the Court, required a reaction on the part of the other side (Thailand).[636] This judgment, however, was rendered before the adoption of the Vienna Convention and thus, at least implicitly, was taken into account by States in their debate at the United Nations Conference on the Law of Treaties.[637] The judgment also stops short of explicitly recognizing the modification of a treaty by subsequent practice, as the Court left open whether the line on the French map was compatible with the watershed line that had been agreed upon in the original boundary treaty between the two States—although it is often assumed that this was not the case.[638]

(28) Thus, while leaving open the possibility that a treaty might be modified by the subsequent practice of the parties, the International Court of Justice has so far not explicitly recognized that such an effect has actually been produced in a specific case. Rather, the Court has reached interpretations which were difficult to reconcile with the ordinary meaning of the text of the treaty, but which coincided with the identified practice of the parties.[639] Contrary holdings by arbitral tribunals have been characterized either as an "isolated exception"[640] or rendered before the Vienna Conference and critically referred to there.[641]

(29) The WTO Appellate Body has made clear that it would not accept an interpretation which would result in a modification of a treaty obligation, as this would not be an "application" of an existing treaty provision.[642] The Appellate Body's position may be influenced by article 3, paragraph 2, of the Understanding on Rules and Procedures Governing the Settlement of Disputes, according to which "[r]ecommendations and rulings of the [Dispute Settlement Body] cannot add to or diminish the rights and obligations provided in the covered agreements".

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

that an established practice within the member States could give rise to an amendment of the Convention. In that case the Court accepted that subsequent practice in national penal policy, in the form of a generalised abolition of capital punishment, could be taken as establishing the agreement of the Contracting States to abrogate the exception provided for under Article 2 § 1 and hence remove a textual limit on the scope for evolutive interpretation of Article 3 [see *Soering v. the United Kingdom*, Application no. 14038/88, 7 July 1989, Series A, No. 161, para. 103].[643]

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

All but two of the member States have now signed Protocol No. 13 [to the European Convention on Human Rights] and all but three of the States which have signed have ratified it. These figures, together with consistent State practice in observing the moratorium on capital punishment, are strongly indicative that Article 2 [of the Convention] has been amended so as to prohibit the death penalty in all circumstances. Against this background, the Court does not consider that the wording of the second sentence of Article 2, paragraph 1, continues to act as a bar to its interpreting the words "inhuman or degrading treatment or punishment" in Article 3 as including the death penalty [compare *Soering v. the United Kingdom*, paras. 102–104].[644]

---

[635] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, *Judgment*, *I.C.J. Reports 2002*, p. 303, at p. 353, para. 68.

[636] *Case concerning the Temple of Preah Vihear* (see footnote 573 above), p. 23: "an acknowledgement by conduct was undoubtedly made in a very definite way … it is clear that the circumstances were such as called for some reaction"; "[a] clearer affirmation of title on the French Indo-Chinese side can scarcely be imagined" and therefore "demanded a reaction" (*ibid*., p. 30).

[637] M. G. Kohen, "*Uti possidetis*, prescription et pratique subséquente à un traité dans l'affaire de l'*Île de Kasikili/Sedudu* devant la Cour internationale de Justice", *German Yearbook of International Law*, vol. 43 (2000), p. 272.

[638] *Case concerning the Temple of Preah Vihear* (see footnote 573 above), p. 26: "a fact, which if true, must have been no less evident in 1908". Judge Parra-Aranguren has opined that the *Case concerning the Temple of Preah Vihear* demonstrated "that the effect of subsequent practice on that occasion was to amend the treaty", *Kasikili/Sedudu Island* (see footnote 539 above), at pp. 1212–1213, para. 16 (dissenting opinion of Judge Parra-Aranguren); and Buga (see footnote 626 above), at note 113.

[639] In particular, the Namibia opinion (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (see footnote 593 above)) has been read as implying that subsequent practice has modified Article 27, paragraph 3, of the Charter of the United Nations (see A. Pellet, "Article 38", in A. Zimmermann *et al*. (eds.), *The Statute of the International Court of Justice—a Commentary*, 2nd ed., Oxford University Press, 2012, p. 844, para. 279); see the second report of the Special Rapporteur (A/CN.4/671), paras. 124–126.

[640] M. G. Kohen, "Keeping subsequent agreements and practice in their right limits", in Nolte (ed.), *Treaties and Subsequent Practice* (see footnote 537 above), p. 42, regarding *Decision regarding delimitation of the border between Eritrea and Ethiopia*, Decision of 13 April 2002, UNRIAA, vol. XXV (Sales No. E/F.05.V.5), p. 83, at pp. 110–111, paras. 3.6–3.10; see also *Case concerning the location of boundary markers in Taba between Egypt and Israel*, Decision of 29 September 1988, UNRIAA, vol. XX (Sales No. E/F.93.V.3), p. 1, at pp. 56–57, paras. 209–210, in which the Arbitral Tribunal held, in an *obiter dictum*, "that the demarcated boundary line would prevail over the Agreement [of 1 October 1906] if a contradiction could be detected" (p. 57); but see R. Kolb, "La modification d'un traité par la pratique subséquente des parties", *Revue suisse de droit international et de droit européen*, vol. 14 (2004), p. 20. The Agreement signed at Rafah on 1 October 1906 is reproduced in UNRIAA, vol. XX, *Case concerning the location of boundary markers in Taba between Egypt and Israel*, appendix B, pp. 114–116.

[641] *Interpretation of the air transport services agreement between the United States of America and France*, Decision of 22 December 1963, UNRIAA, vol. XVI (Sales No. 69.V.1), p. 5, at pp. 62–63; *Official Records of the United Nations Conference on the Law of Treaties, First Session …* (A/CONF.39/11) (footnote 535 above), 37th meeting of the Committee of the Whole, 24 April 1968, p. 208, para. 58 (Japan); and Murphy, "The relevance of subsequent agreement and subsequent practice …" (see footnote 598 above), p. 89.

[642] *European Communities—Regime for the Importation, Sale and Distribution of Bananas, Second Recourse to Article 21.5 of the DSU by Ecuador …* , Reports of the WTO Appellate Body (WT/DS27/AB/RW2/ECU and Corr.1) */ Second Recourse to Article 21.5 of the DSU by the United States …* (WT/DS27/AB/RW/USA and Corr.1) (see footnote 616 above), paras. 391–393.

[643] *Öcalan v. Turkey, Application no. 46221/99*, Judgment of 12 March 2003, First Section, European Court of Human Rights, para. 191; see also *Al-Saadoon and Mufdhi v. the United Kingdom*, Application no. 61498/08, Judgment of 2 March 2010, European Court of Human Rights, *Reports of Judgments and Decisions* 2010-II, para. 119, referring to *Öcalan v. Turkey*, Application no. 46221/99, Judgment of 12 May 2005, Grand Chamber, European Court of Human Rights, *Reports of Judgments and Decisions* 2005-IV, para. 163.

[644] *Al-Saadoon and Mufdhi v. the United Kingdom* (see footnote above), para. 120; see also B. Malkani, "The obligation to refrain from assisting the use of the death penalty", *International and Comparative Law Quarterly*, vol. 62, No. 3 (July 2013), p. 523.

(32) The case law of international courts and tribunals allows the following conclusions: The WTO situation suggests that a treaty may preclude the subsequent practice of the parties from having a modifying effect. Thus, the treaty itself governs the question in the first place. Conversely, the European Court of Human Rights cases suggest that a treaty may permit the subsequent practice of the parties to have a modifying effect. Thus, ultimately much depends on the treaty or the treaty provisions concerned.[645]

(33) The situation is more complicated in the case of treaties for which such indications do not exist. No clear residual rule for such cases can be discerned from the jurisprudence of the International Court of Justice. The conclusion can be drawn, however, that the Court, while finding that the possibility of a modification of a treaty by subsequent practice of the parties "cannot be wholly precluded as a possibility in law",[646] considered that finding such a modification should be avoided, if at all possible. Instead the Court prefers to accept broad interpretations which may stretch the ordinary meaning of the terms of the treaty.

(34) This conclusion from the jurisprudence of the International Court of Justice is in line with certain considerations that were articulated during the debates among States on draft article 38 of the Vienna Convention.[647] Today, the consideration that amendment procedures which are provided for in a treaty are not to be circumvented by informal means seems to have gained more weight in relation to the equally true general observation that international law is often not as formalist as national law.[648] The concern which was expressed by a number of States at the Vienna Conference, according to which the possibility of modifying a treaty by subsequent practice could create difficulties for domestic constitutional law, has also since gained in relevance.[649] And, while the principle *pacta sunt servanda* is not formally called into question by an amendment or modification of a treaty by subsequent practice that establishes the agreement of all the parties, it is equally true that the stability of treaty relations may be called into question if an informal means of identifying agreement as subsequent practice could easily modify a treaty.[650]

(35) In conclusion, while there exists some support in international case law that, absent indications in the treaty to the contrary, the agreed subsequent practice of the parties theoretically may lead to modifications of a treaty, the actual occurrence of that effect is not to be presumed. Instead, States and courts prefer to make every effort to conceive of an agreed subsequent practice of the parties as an effort to interpret the treaty in a particular way. Such efforts to interpret a treaty broadly are possible since article 31 of the Vienna Convention does not accord primacy to one particular means of interpretation contained therein, but rather requires the interpreter to take into account all means of interpretation as appropriate.[651] In this context an important consideration is how far an evolutive interpretation of the treaty provision concerned is possible.[652]

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

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

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

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

Commentary

(1) Draft conclusion 8 identifies some criteria that may be helpful for determining the interpretative weight to be accorded to a specific subsequent agreement or subsequent practice in the process of interpretation in a particular case. Naturally, the weight accorded to subsequent agreements or subsequent practice must also be determined in relation to other means of interpretation (see draft conclusion 1, paragraph 5).[653]

---

[645] Buga (see footnote 626 above), at notes 126–132.

[646] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment* (see footnote 635 above), p. 353, para. 68.

[647] Second report of the Special Rapporteur (A/CN.4/671), paras. 119–121.

[648] Murphy, "The relevance of subsequent agreement and subsequent practice …" (see footnote 598 above), p. 89; Simma, "Miscellaneous thoughts on subsequent agreements and practice" (footnote 629 above), p. 47; Hafner (footnote 609 above), pp. 115–117; and J. E. Alvarez, "Limits of change by way of subsequent agreements and practice", in Nolte (ed.) *Treaties and Subsequent Practice* (footnote 537 above), p. 130.

[649] See *NATO Strategic Concept Case, Application 2 BvE 6/99*, Judgment of 22 November 2001, German Federal Constitutional Court (English translation available from www.bundesverfassungsgericht.de/entscheidungen/es20011122_2bve000699en.html), paras. 19–21; S. Kadelbach, "Domestic constitutional concerns with respect to the use of subsequent agreements and practice at the international level", pp. 145–148; Alvarez (preceding footnote), p. 130; I. Wuerth, "Treaty interpretation, subsequent agreements and practice, and domestic constitutions", pp. 154–159; and H. Ruiz Fabri, "Subsequent practice, domestic separation of powers, and concerns of legitimacy", pp. 165–166, all in Nolte (ed.), *Treaties and Subsequent Practice* (footnote 537 above).

[650] See, for example, Kohen, "*Uti possidetis*, prescription et pratique …" (footnote 637 above), p. 274 (in particular with respect to boundary treaties).

[651] Draft conclusion 1, para. 5, and commentary thereto (*Yearbook … 2013*, vol. II (Part Two), pp. 20--22); Hafner (footnote 609 above), p. 117; some authors support the view that the range of what is conceivable as an "interpretation" is wider in case of a subsequent agreement or subsequent practice under article 31, paragraph 3, than in the case of interpretations by other means of interpretation, including the range for evolutive interpretations by courts or tribunals, for example, Gardiner, *Treaty Interpretation* (see footnote 533 above), p. 243; and Dörr, "Article 31. General rule of interpretation" (footnote 534 above), pp. 554–555, para. 76.

[652] In the case concerning the *Dispute regarding Navigational and Related Rights*, for example, the International Court of Justice could leave the question open whether the term "*comercio*" had been modified by the subsequent practice of the parties since it decided that it was possible to give this term an evolutive interpretation (*Dispute regarding Navigational and Related Rights* (see footnote 546 above), pp. 242–243, paras. 64–66).

[653] *Yearbook … 2013*, vol. II (Part Two), p. 18.

(2) Paragraph 1 addresses the weight of a subsequent agreement or subsequent practice under article 31, paragraph 3, thus dealing with both subparagraphs (*a*) and (*b*) from a general point of view. Paragraph 1 specifies that the weight to be accorded to a subsequent agreement or subsequent practice as a means of interpretation depends, *inter alia*, on its clarity and specificity. The use of the term "*inter alia*" indicates that these criteria should not be seen as exhaustive. Other criteria may relate to the time when the agreement or practice occurred,[654] the emphasis given by the parties to a particular agreement or practice, or the applicable burden of proof.

(3) The interpretative weight of subsequent agreements or practice in relation to other means of interpretation often depends on their specificity in relation to the treaty concerned.[655] This is confirmed, for example, by decisions of the International Court of Justice, arbitral awards and reports of the World Trade Organization (WTO) Panels and Appellate Body.[656] The award of the International Centre for Settlement of Investment Disputes (ICSID) tribunal in *Plama v. Bulgaria* is instructive:

> It is true that treaties between one of the Contracting Parties and third States may be taken into account for the purpose of clarifying the meaning of a treaty's text at the time it was entered into. The Claimant has provided a very clear and insightful presentation of Bulgaria's practice in relation to the conclusion of investment treaties subsequent to the conclusion of the Bulgaria–Cyprus [bilateral investment treaty] in 1987. In the 1990s, after Bulgaria's communist regime changed, it began concluding [bilateral investment treaties] with much more liberal dispute resolution provisions, including resort to ICSID arbitration. However, that practice is not particularly relevant in the present case since subsequent negotiations between Bulgaria and Cyprus indicate that these Contracting Parties did not intend the [most-favoured-nation] provision to have the meaning that otherwise might be inferred from Bulgaria's subsequent treaty practice. Bulgaria and Cyprus negotiated a revision of their [bilateral investment treaty] in 1998. The negotiations failed but specifically contemplated a revision of the dispute settlement provisions … . It can be inferred from these negotiations that the Contracting Parties to the [bilateral investment treaty] themselves did not consider that the [most-favoured-nation] provision extends to dispute settlement provisions in other [bilateral investment treaties].[657]

(4) Whereas the International Court of Justice and arbitral tribunals tend to accord more interpretative weight to rather specific subsequent practice by States, the European Court of Human Rights often relies on broad comparative assessments of the domestic legislation or international positions adopted by States.[658] In this latter context, it should be borne in mind that the rights and obligations under human rights treaties must be correctly transformed, within the given margin of appreciation, into the law, the executive practice and international arrangements of the respective State party. For this purpose, sufficiently strong commonalities in the national legislation of States parties can be relevant for the determination of the scope of a human right or the necessity of its restriction. In addition, the character of certain rights or obligations sometimes speaks in favour of taking less specific practice into account. For example, in the case of *Rantsev v. Cyprus and Russia*, the Court held that

> [i]t is clear from the provisions of these two [international] instruments that the Contracting States … have formed the view that only a combination of measures addressing all three aspects can be effective in the fight against trafficking … Accordingly, the duty to penalise and prosecute trafficking is only one aspect of member States' general undertaking to combat trafficking. The extent of the positive obligations arising under Article 4 [prohibition of forced labour] must be considered within this broader context.[659]

(5) On the other hand, in the case of *Chapman v. the United Kingdom*, the Court observed "that there may be said to be an emerging international consensus amongst the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle",[660] but ultimately said that it was "not persuaded that the consensus is sufficiently concrete for it to derive any guidance as to the conduct or standards which Contracting States consider desirable in any particular situation".[661]

(6) Paragraph 2 of draft conclusion 8 deals only with subsequent practice under article 31, paragraph 3 (*b*), and specifies that the weight of subsequent practice also depends on whether and how it is repeated. This formula "whether and how it is repeated" brings in the elements of time and the character of a repetition. It indicates, for example, that, depending on the treaty concerned, something more than just a technical or unmindful repetition of a practice may contribute to its interpretative value in the context of article 31, paragraph 3 (*b*). The element of time and the character of the repetition also serves to indicate the "grounding" of a particular position of the parties regarding the interpretation of a treaty. Moreover, the non-implementation of a subsequent agreement may also suggest a lack of its weight as a means of interpretation under article 31, paragraph 3 (*a*).[662]

---

[654] In the case concerning the *Maritime Dispute (Peru v. Chile)*, the Court privileged the practice that was closer to the date of entry into force (*Maritime Dispute (Peru v. Chile)* (see footnote 545 above), p. 50, para. 126).

[655] Murphy, "The relevance of subsequent agreement and subsequent practice …" (see footnote 598 above), p. 91.

[656] See, for example, *Maritime Delimitation in the Area between Greenland and Jan Mayen* (see footnote 594 above), pp. 55–56, para. 38; *Question of the tax regime governing pensions paid to retired UNESCO officials residing in France* (footnote 627 above), at p. 259, para. 74; *United States—Continued Existence and Application of Zeroing Methodology, Report of the WTO Panel* (WT/DS350/R), adopted on 19 February 2009, modified by *AB-2008-11, Report of the WTO Appellate Body* (WT/DS350/AB/R); and *United States—Subsidies on Upland Cotton, Report of the WTO Panel* (WT/DS267/R and Add.1–3 and Corr.1), adopted on 21 March 2005, modified by *AB-2004-5, Report of the WTO Appellate Body* (WT/DS267/AB/R), para. 625.

[657] *Plama Consortium Limited v. Republic of Bulgaria*, Case No. ARB/03/24, Decisions on Jurisdiction of 8 February 2005, ICSID, *ICSID Review—Foreign Investment Law Journal*, vol. 20, No. 1 (Spring 2005), p. 262, at pp. 323–324, para. 195. For the bilateral treaty between Bulgaria and Cyprus on the promotion and reciprocal protection of investments, signed at Nicosia on 12 November 1987, see *Republic of Cyprus Official Gazette* S.VII 2314, 31 March 1988, p. 19, also available from http://investmentpolicyhub.unctad.org, *Investment Dispute Settlement Navigator*.

[658] See, for example, *Cossey v. the United Kingdom*, Application no. 10843/84, Judgment of 27 September 1990, European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 184, para. 40; *Tyrer v. the United Kingdom*, Application no. 5856/72, Judgment of 25 April 1978, European Court of Human Rights, *Series A: Judgments and Decisions*, No. 26, para. 31; and *Norris v. Ireland*, Application no. 10581/83, Judgment of 26 October 1988, European Court of Human Rights, *Series A: Judgments and Decisions*, No. 142, para. 46.

[659] *Rantsev v. Cyprus and Russia*, Application no. 25965/04, Judgment of 7 January 2010, First Section, European Court of Human Rights, *Reports of Judgments and Decisions* 2010-I, para. 285; see also paragraphs 273–274.

[660] *Chapman v. the United Kingdom*, Application no. 27238/95, Judgment of 18 January 2001, Grand Chamber, European Court of Human Rights, *Reports of Judgments and Decisions* 2001-I, para. 93.

[661] *Ibid.*, para. 94.

[662] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, *Judgment* (see footnote 564 above), p. 63, para. 131.

(7) The question of whether "subsequent practice" under article 31, paragraph 3 (*b*),[663] requires more than a one-off application of the treaty was addressed by the WTO Appellate Body in *Japan—Alcoholic Beverages II*: "subsequent practice in interpreting a treaty has been recognized as a 'concordant, common and consistent' sequence of acts or pronouncements which is sufficient to establish a discernable pattern implying the agreement of the parties regarding its interpretation".[664]

(8) This definition suggests that subsequent practice under article 31, paragraph 3 (*b*), requires more than one "act or pronouncement" regarding the interpretation of a treaty, but rather action of such frequency and uniformity that it warrants a conclusion that the parties have reached a settled agreement regarding the interpretation of the treaty. Such a threshold would imply that subsequent practice under article 31, paragraph 3 (*b*), requires a broad-based, settled, and qualified form of collective practice in order to establish agreement among the parties regarding interpretation.

(9) The International Court of Justice, on the other hand, has applied article 31, paragraph 3 (*b*), more flexibly, without adding further conditions. This is true, in particular, for its judgment in the case of *Kasikili/Sedudu Island*.[665] Other international courts have mostly followed the approach of the International Court of Justice. This is true for the Iran–United States Claims Tribunal[666] and the European Court of Human Rights.[667]

(10) The difference between the standard formulated by the WTO Appellate Body, on the one hand, and the approach of the International Court of Justice, on the other, is, however, more apparent than real. The WTO Appellate Body seems to have taken the "concordant, common and consistent" formula from a publication[668] which stated that "the value of subsequent practice will naturally depend on the extent to which it is concordant, common and consistent."[669] The formula "concordant, common and consistent" thus provides an indication as to the circumstances under which subsequent practice under article 31, paragraph 3 (*b*) has more or less weight as a means of interpretation in a process of interpretation, rather than require any particular frequency in the practice.[670] The WTO Appellate Body itself on occasion has relied on this nuanced view.[671]

(11) The Commission, while finding that the formula "concordant, common and consistent" may be useful for determining the weight of subsequent practice in a particular case, also considers it as not being sufficiently well-established to articulate a minimum threshold for the applicability of article 31, paragraph 3 (*b*), and as carrying the risk of being misconceived as overly prescriptive. Ultimately, the Commission continues to find that "[t]he value of subsequent practice varies according as it shows the common understanding of the parties as to the meaning of the terms."[672] This implies that a one-off practice of the parties which establishes their agreement regarding the interpretation needs to be taken into account under article 31, paragraph 3 (*b*).[673]

(12) Paragraph 3 of draft conclusion 8 addresses the weight that should be accorded to "other subsequent practice" under article 32 (see draft conclusion 4, paragraph 3[674]). It does not address when and under which circumstances such practice can be considered. The WTO

---

[663] Draft conclusion 4, para. 2 (*Yearbook … 2013*, vol. II (Part Two), p. 28).

[664] *Japan—Alcoholic Beverages II*, *AB-1996-2, Report of the WTO Appellate Body* (WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R), adopted on 1 November 1996, sect. E, pp. 12–13.

[665] *Kasikili/Sedudu Island* (see footnote 539 above), pp. 1075–1076, paras. 47–50, and p. 1087, para. 63; *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* (see footnote 583 above), pp. 34–37, paras. 66–71.

[666] *The Islamic Republic of Iran v. the United States of America*, Interlocutory Award No. ITL 83-B1-FT (Counterclaim) (see footnote 621 above), pp. 116–126, paras. 109–133.

[667] *Soering v. the United Kingdom* (see footnote 552 above), para. 103; *Loizidou v. Turkey*, Application no. 15318/89, Judgment on Preliminary Objections of 23 March 1995, European Court of Human Rights, *Series A: Judgments and Decisions*, No. 310, paras. 73 and 79–82; *Banković and Others v. Belgium and Others* (see footnote 555 above), paras. 56 and 62; and concerning the jurisprudence of ICSID tribunals, see O. K. Fauchald, "The legal reasoning of ICSID tribunals—an empirical analysis", *The European Journal of International Law*, vol. 19, No. 2 (2008), p. 345; see also A. Roberts, "Power and persuasion in investment treaty interpretation: the dual role of States", AJIL, vol. 104, No. 2 (2010), pp. 207–215.

[668] Sinclair (footnote 533 above), p. 137; see also Yasseen (footnote 533 above), pp. 48–49; whilst "commune" is taken from the work of the International Law Commission, "*d'une certaine constance*" and "*concordante*" are conditions which Yasseen derives through further reasoning; see *Yearbook ... 1966*, vol. II, document A/CN.4/486 and Add.1–7, pp. 98–99, paras. 17–18, and document A/6309/Rev.1, Part II, pp. 221–222, para. (15).

[669] Sinclair (footnote 533 above), p. 137; see also *The Islamic Republic of Iran v. the United States of America*, Interlocutory Award No. ITL 83-B1-FT (Counterclaim) (footnote 621 above), p. 118, para. 114.

[670] *Dispute between Argentina and Chile concerning the Beagle Channel*, Award of 18 February 1977, UNRIAA, vol. XXI (Sales No. E/F.95.V.2), pp. 53 *et seq.*, at p. 187, para. 169; J.-P Cot, "La conduite subséquente des parties à un traité", *Revue générale de droit international public*, vol. 70, No. 3 (1966), pp. 644–647 (*valeur probatoire*); Distefano (footnote 533 above), p. 46; Dörr, "Article 31. General rule of interpretation" (footnote 534 above), p. 556, para. 79; see also the oral argument before the International Court of Justice in *Maritime Dispute (Peru v. Chile)*, CR 2012/33, pp. 32–36, paras. 7–19 (Wood), available from www.icj-cij.org/files/case-related/137/137-20121211-ORA-01-00-BI.pdf, and CR 2012/36, pp. 13–18, paras. 6–21 (Wordsworth), available from www.icj-cij.org/en/case/137.

[671] *European Communities—Customs Classification of Certain Computer Equipment, AB-1998-2, Report of the WTO Appellate Body* (WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R), adopted on 22 June 1998, para. 93.

[672] *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, Part II, pp. 221–222, para. (15); Cot (see footnote 670 above), p. 652.

[673] In practice, a one-off practice will often not be sufficient to establish an agreement of the parties regarding a treaty's interpretation. As a general rule, however, subsequent practice under article 31, paragraph 3 (*b*), does not require any repetition but only an agreement regarding the interpretation. The likelihood of an agreement established by an one-off practice thus depends on the act and the treaty in question, see E. Lauterpacht, "The development of the law of international organization by the decisions of international tribunals", *Collected Courses of the Hague Academy of International Law, 1976*, vol. 152, pp. 377 *et seq.*, at p. 457; Linderfalk, *On the Interpretation of Treaties* … (footnote 534 above), p. 166; C. F. Amerasinghe, "Interpretation of texts in open international organizations", BYBIL *1994*, vol. 65, pp. 175 *et seq.*, at p. 199. Villiger argues in favour of a certain frequency, but emphasizes that the important point is the establishment of an agreement, Villiger, *Commentary on the 1969 Vienna Convention* … (footnote 611 above), pp. 431–432, para. 22. Yasseen and Sinclair write that practice cannot "in general" be established by one single act, Yasseen (footnote 533 above), p. 47; Sinclair (footnote 533 above), p. 137; see, likewise, G. Nolte, "Third report for the ILC Study Group on treaties over time", in Nolte (ed.), *Treaties and Subsequent Practice* (footnote 537 above), pp. 307 *et seq.*, at p. 310.

[674] *Yearbook … 2013*, vol. II (Part Two), p. 28.

Appellate Body has emphasized, in a comparable situation, that those two issues must be distinguished from each other:

> … we consider that the European Communities conflates the preliminary question of what may qualify as a 'circumstance' of a treaty's conclusion with the separate question of ascertaining the degree of relevance that may be ascribed to a given circumstance, for purposes of interpretation under Article 32.[675]

The Appellate Body also held that

> first, the Panel did *not* examine the classification practice in the European Communities during the Uruguay Round negotiations *as a supplementary means of interpretation* within the meaning of Article 32 of the *Vienna Convention*; and, second, the value of the classification practice as a supplementary means of interpretation is subject to certain qualifications.[676]

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

> These include the type of event, document, or instrument and its legal nature; temporal relation of the circumstance to the conclusion of the treaty; actual knowledge or mere access to a published act or instrument; subject matter of the document, instrument, or event in relation to the treaty provision to be interpreted; and whether or how it was used or influenced the negotiations of the treaty.[677]

(13) Whereas the Appellate Body did not use the term "specificity", it referred to the criteria mentioned above. Instead of clarity, the Appellate Body spoke of "consistency", and stated that consistency should not set a benchmark but rather determine the degree of relevance. "Consistent prior classification practice may often be significant. Inconsistent classification practice, however, cannot be relevant (in interpreting the meaning of a tariff concession)".[678]

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

> [t]o establish this intention, the prior practice of only *one* of the parties may be relevant, but it is clearly of more limited value than the practice of all parties. In the specific case of the interpretation of a tariff concession in a Schedule, the classification practice of the importing Member, in fact, may be of great importance.[679]

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

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

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

Commentary

(1) The first sentence of paragraph 1 sets forth the principle that an "agreement" under article 31, paragraph 3 (*a*) and (*b*), requires a common understanding by the parties regarding the interpretation of a treaty. In order for that common understanding to have the effect provided for under article 31, paragraph 3, the parties must be aware of it and accept the interpretation contained therein. While the difference regarding the form of an "agreement" under subparagraph (*a*) and subparagraph (*b*) has already been set out in draft conclusion 4 and its accompanying commentary,[680] paragraph 1 of draft conclusion 9 intends to capture what is common in the two subparagraphs, which is the agreement between the parties, in substance, regarding the interpretation of the treaty.

(2) The element which distinguishes subsequent agreements and subsequent practice as authentic means of interpretation under article 31, paragraph 3 (*a*) and (*b*), on the one hand, and other subsequent practice as a supplementary means of interpretation under article 32,[681] on the other, is the "agreement" of the parties regarding the interpretation of the treaty. It is this agreement of the parties which provides the means of interpretation under article 31, paragraph 3,[682] their specific function and weight for the interactive process of interpretation under the general rule of interpretation of article 31.[683]

(3) Conflicting positions expressed by different parties to a treaty preclude the existence of an agreement. This has been confirmed, *inter alia*, by the Arbitral Tribunal in the case of *German External Debts* which held that a "tacit subsequent understanding" could not be derived from a number of communications by administering agencies since one of those agencies, the Bank of England, had expressed a divergent position.[684]

---

[675] *European Communities—Customs Classification of Frozen Boneless Chicken Cuts, AB-2005-5, Report of the WTO Appellate Body* (WT/DS269/AB/R and Corr.1, WT/DS286/AB/R and Corr.1), adopted on 27 September 2005, para. 297.

[676] *European Communities—Customs Classification of Certain Computer Equipment* (see footnote 671 above), para. 92 (footnote omitted).

[677] *European Communities—Customs Classification of Frozen Boneless Chicken Cuts* (see footnote 675 above), para. 291 (footnote omitted).

[678] *Ibid.*, para. 307 (the text cited is from paragraph 95 of *European Communities—Customs Classification of Certain Computer Equipment* (see footnote 671 above)).

[679] *European Communities—Customs Classification of Certain Computer Equipment* (see footnote 671 above), para. 93.

[680] See paragraph (10) of the commentary to draft conclusion 4 (*Yearbook … 2013*, vol. II (Part Two), p. 29).

[681] See draft conclusion 2 and draft conclusion 4, para. 3 (*ibid*., pp. 22 and 28).

[682] See Crawford, "A consensualist interpretation of article 31 (3) … " (footnote 564 above), p. 30: "There is no reason to think that the word 'agreement' in para. (*b*) has any different meaning as compared to the meaning it has in para. (*a*)."

[683] See paragraphs (12) to (15) of the commentary to draft conclusion 1 (*Yearbook … 2013*, vol. II (Part Two), pp. 20–21); article 31 must be "read as a whole" and conceives of the process of interpretation as "a single combined operation", and is not "laying down a legal hierarchy of norms for the interpretation of treaties", *Yearbook … 1966*, vol. II, document A/6309/Rev.1, Part II, pp. 219–220, paras. (8)–(9).

[684] *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 of 16 May 1980, UNRIAA, vol. XIX (Sales No. E/F.90.V.7), pp. 67 *et seq.*, pp. 103–104, para. 31 (see also ILR,

(*Continued on next page.*)

(4) However, agreement is only absent to the extent that the positions of the parties conflict and for as long as their positions conflict. The fact that Parties apply a treaty differently does not, as such, permit a conclusion that there are conflicting positions regarding the interpretation of the treaty. Such a difference may indicate a disagreement over the one correct interpretation, but it may also simply reflect a common understanding that the treaty permits a certain scope for the exercise of discretion in its application (see the commentary to draft conclusion 7, paragraphs (12) to (15), above). Treaties which are characterized by considerations of humanity or other general community interests, such as treaties relating to human rights or refugees, tend to aim at a uniform interpretation but also to leave a margin of appreciation for the exercise of discretion by States.

(5) Whereas equivocal conduct by one or more parties will normally prevent the identification of an agreement,[685] not every element of the conduct of a State which does not fully fit into a general picture necessarily renders the conduct of that State so equivocal that it precludes the identification of an agreement. The Court of Arbitration in the *Beagle Channel* case, for example, found that although at one point the parties had a difference of opinion regarding the interpretation of a treaty, that fact did not necessarily establish that the lack of agreement was permanent:

> In the same way, negotiations for a settlement, that did not result in [a settlement], could hardly have any permanent effect. At the most they might temporarily have deprived the acts of the Parties of probative value in support of their respective interpretations of the [1881 Boundary Treaty], insofar as these acts were performed during the process of the negotiations. The matter cannot be put higher than that.[686]

(6) Similarly, in *Loizidou v. Turkey*, the European Court of Human Rights held that the scope of the restrictions which the parties could place on their acceptance of the competence of the Commission and the Court was "confirmed by the subsequent practice of the Contracting parties", that is, "the evidence of a practice denoting practically universal agreement amongst Contracting Parties that Articles 25 and 46 … of the Convention do not permit territorial or substantive restrictions".[687] The Court, applying article 31, paragraph 3 (*b*), described "such a … State practice" as being "uniform and consistent", despite the fact that it simultaneously recognized that two States possibly constituted exceptions.[688] The decision suggests that interpreters, at least under the European Convention, possess some margin when assessing whether an agreement of the parties regarding a certain interpretation is established.[689]

(7) The term "agreement" in the Vienna Convention[690] does not imply any particular requirements of form,[691] including for an "agreement" under article 31, paragraph 3 (*a*) and (*b*).[692] The Commission, however, has noted that, in order to distinguish a subsequent agreement under article 31, paragraph 3 (*a*), and a subsequent practice which "establishes the agreement" of the parties under article 31, paragraph 3 (*b*), the former presupposes a "single common act".[693] There is no requirement that an agreement under article 31, paragraph 3 (*a*), be published or registered under Article 102 of the Charter of the United Nations.[694]

(8) For an agreement under article 31, paragraph 3, it is not sufficient that the positions of the parties regarding the interpretation of the treaty happen to overlap, but the parties must also be aware of and accept that these positions are common. Thus, in the *Kasikili/Sedudu Island* case, the International Court of Justice required that, for practice to fall under article 31, paragraph 3 (*b*), the "authorities were fully aware of and accepted this as a confirmation of the Treaty boundary".[695] Indeed, only the awareness and acceptance of the position of the other parties regarding the

(*Footnote 684 continued.*)

vol. 59 (1980), p. 494, at p. 540); see also *European Communities—Customs Classification of Certain Computer Equipment* (footnote 671 above), para. 95; and *Case concerning the delimitation of the maritime boundary between Guinea and Guinea-Bissau*, Decision of 14 February 1985, UNRIAA, vol. XIX, p. 149, at p. 175, para. 66.

[685] *Question of the tax regime governing pensions paid to retired UNESCO officials residing in France* (footnote 627 above), at p. 258, para. 70; and Kolb, "La modification d'un traité …" (footnote 640 above), p. 16.

[686] *Dispute between Argentina and Chile concerning the Beagle Channel* (see footnote 670 above), p. 188, para. 171. For the Boundary Treaty between the Argentine Republic and the Republic of Chile, signed at Buenos Aires on 23 July 1881, see United Nations, *Treaty Series*, vol. 2384, No. 1295, p. 205.

[687] *Loizidou v. Turkey* (see footnote 667 above), paras. 79–80.

[688] *Ibid*., paras. 80 and 82; the case did not concern the interpretation of a particular human right, but rather the question of whether a State was bound to the European Convention on Human Rights at all.

[689] The more restrictive jurisprudence of the WTO Dispute Settlement Body suggests that different interpreters may evaluate matters differently, see *United States—Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"), Report of the WTO Panel* (WT/DS294/R), modified by AB-2006-2, Report of the WTO Appellate Body (WT/DS294/AB/R), adopted on 9 May 2006, para. 7.218: "even if it were established conclusively that all the 76 Members referred to by the European Communities have adopted a [certain] practice …, this would only mean that a considerable number of WTO Members have adopted an approach different from that of the United States. … We note that one third party in this proceeding submitted arguments contesting the view of the European Communities".

[690] See article 2, paragraph 1 (*a*), article 3, article 24, paragraph 2, and articles 39–41, 58 and 60.

[691] Commentary to draft conclusion 4, para. (5) (*Yearbook … 2013*, vol. II (Part Two), p. 28); confirmed by the Permanent Court of Arbitration in the *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Award of 7 July 2014, available from www.pca-cpa.org/en/cases/18, p. 47, para. 165; Yasseen (footnote 533 above), p. 45; and Distefano (footnote 533 above), p. 47.

[692] Commentary to draft conclusion 4, para. (5) (*Yearbook … 2013*, vol. II (Part Two), p. 28); Gardiner, *Treaty Interpretation* (footnote 533 above), pp. 208–209 and 216–220; Aust, *Modern Treaty Law and Practice* (see footnote 598 above), p. 213; Dörr, "Article 31. General rule of interpretation" (footnote 534 above), p. 554, para. 75; and R. Gardiner, "The Vienna Convention rules on treaty interpretation", in D. B. Hollis (ed.), *The Oxford Guide to Treaties*, Oxford University Press, 2012), pp. 475 and 483.

[693] Commentary to draft conclusion 4, para. (10) (*Yearbook … 2013*, vol. II (Part Two), p. 29); a "single common act" may also consist of an exchange of letters, see *European Molecular Biology Laboratory Arbitration (EMBL v. Germany)*, Decision of 29 June 1990, ILR, vol. 105 (1997), p. 1, at pp. 54–56; 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/Boston, Martinus Nijhoff, 2010, p. 59, at p. 63; and Gardiner, *Treaty Interpretation* (footnote 533 above), pp. 220–221.

[694] A. Aust, "The theory and practice of informal international instruments", *The International and Comparative Law Quarterly*, vol. 35, No. 4 (October 1986), pp. 789–790.

[695] *Kasikili/Sedudu Island* (see footnote 539 above), p. 1094, para. 74 ("occupation of the Island by the Masubia"), and pp. 1077–1078, para. 55 ("Eason Report [which] appears never to have been made known to Germany"); and Dörr, "Article 31. General rule of interpretation" (footnote 534 above), p. 560, para. 88.

interpretation of a treaty justifies the characterization of an agreement under article 31, paragraph 3 (*a*) or (*b*), as an "authentic" means of interpretation.[696] In certain circumstances, the awareness and acceptance of the position of the other party or parties may be assumed, particularly in the case of treaties which are implemented at the national level.

(9) The aim of the second sentence of paragraph 1 is to reaffirm that "agreement", for the purpose of article 31, paragraph 3, need not, as such, be legally binding,[697] in contrast to other provisions of the Vienna Convention in which the term "agreement is used in the sense of a legally binding instrument".[698]

(10) This is confirmed by the fact that the Commission, in its final draft articles on the law of treaties, used the expression "any subsequent practice … which establishes the *understanding** of the parties".[699] The expression "understanding" indicates that the term "agreement" in article 31, paragraph 3, does not require that the parties thereby undertake or create any legal obligation existing in addition to, or independently of, the treaty.[700] The Vienna Conference replaced the expression "understanding" by the word "agreement" not for any substantive reason but "related to drafting only" in order to emphasize that the understanding of the parties was to be their "common" understanding.[701] An "agreement" under article 31, paragraph 3 (*a*), being distinguished from an agreement under article 31, paragraph 3 (*b*), only in form and not in substance, equally need not be legally binding.[702]

(11) It is thus sufficient that the parties, by a subsequent agreement or a subsequent practice under article 31, paragraph 3, attribute a certain meaning to the treaty,[703] or in other words, adopt a certain "understanding" of the treaty.[704] Subsequent agreements and subsequent practice under article 31, paragraph 3 (*a*) and (*b*), even if they are not in themselves legally binding, can thus nevertheless, as means of interpretation, give rise to legal consequences as part of the process of interpretation according to article 31.[705] Accordingly, international courts and tribunals have not required that an "agreement" under article 31, paragraph 3, reflect the intention of the parties to create new, or separate, legally binding undertakings.[706] Similarly, memorandums of understanding have been recognized, on occasion, as "a potentially important aid to interpretation"—but "not a source of independent legal rights and duties".[707]

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

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

---

[696] In this respect, the ascertainment of subsequent practice under article 31 (3) (*b*) may be more demanding than what the formation of customary international law requires, but see Boisson de Chazournes, "Subsequent practice …" (footnote 537 above), p. 53–55.

[697] Commentary to draft conclusion 4, para. (6) (*Yearbook … 2013*, vol. II (Part Two), p. 29); P. Gautier, "Non-binding agreements", *Max Planck Encyclopedia of Public International Law*, online version available from https://opil.ouplaw.com/home/MPIL, para. 14; M. Benatar, "From probative value to authentic interpretation: the legal effect of interpretative declarations", *Revue belge de droit international*, vol. 44 (2011), p. 170, at pp. 194–195; and Aust, *Modern Treaty Law and Practice* (see footnote 598 above), p. 213; and Gardiner, *Treaty Interpretation* (footnote 533 above), p. 217; see also Nolte, "Third report for the ILC Study Group on treaties over time" (footnote 673 above), p. 307, at p. 375.

[698] See article 2, paragraph 1 (*a*); article 3; article 24, paragraph 2; and articles 39–41, 58 and 60.

[699] *Yearbook … 1966*, vol. II, document A/6309/Rev.1, Part II, pp. 221–222, para. (15).

[700] *Dispute between Argentina and Chile concerning the Beagle Channel* (see footnote 670 above), p. 187, para. 169; *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 …* (see footnote 684 above), para. 31; Karl (footnote 534 above), pp. 190–195; Kolb, "La modification d'un traité …" (footnote 640 above), pp. 25–26; and Linderfalk, *On the Interpretation of Treaties* … (footnote 534 above), pp. 169–171.

[701] *Official Records of the United Nations Conference on the Law of Treaties, First Session …* (A/CONF.39/11) (footnote 535 above), p. 169, at paras. 59–60; P. Gautier, "Les accords informels et la Convention de Vienne sur le droit des traités entre États", in N. Angelet *et al.* (eds)., *Droit du pouvoir, pouvoir du droit: mélanges offerts à Jean Salmon*, Brussels, Bruylant, 2007, p. 425, at p. 431: *La lettre a) du paragraphe 3 fait référence à un accord interprétatif et l'on peut supposer que le terme "accord" est ici utilisé dans un sens 'générique, qui ne correspond pas nécessairement au "traité" défini à l'article 2 de la [C]onvention de Vienne. Ainsi, l'accord interprétatif ultérieur pourrait être un accord verbal, voire un accord politique* (footnote omitted).

[702] Gautier, "Non-binding agreements" (see footnote 697 above), para. 14; and Aust, *Modern Treaty Law and Practice* (see footnote 598 above), pp. 211 and 213.

[703] This terminology follows the commentary of guideline 1.2. (Definition of interpretative declarations) of the Guide to Practice on Reservations to Treaties adopted by the Commission at its sixty-third sesson (*Yearbook … 2011*, vol. II (Part Three), p. 54, paras. (18)–(19)).

[704] *Yearbook … 1966*, vol. II, document A/6309/Rev.1, Part II, pp. 221–222, paras. (15)–(16) (uses the term "understanding" both in the context of what became article 31, paragraph 3 (*a*), as well as what became article 31, paragraph 3 (*b*)).

[705] *United States–United Kingdom Arbitration concerning Heathrow Airport User Charges*, Award on the First Question, Decision of 30 November 1992, UNRIAA, vol. XXIV (Sales No. E/F.04.V.18), p. 3, at p. 131, para. 6.8; Aust, "The theory and practice of informal international instruments" (see footnote 694 above), pp. 787 and 807; Linderfalk, *On the Interpretation of Treaties* … (footnote 534 above), p. 173; Hafner (footnote 609 above), pp. 110–113; and Gautier, "Les accords informels et la Convention de Vienne … " (footnote 701 above), p. 434.

[706] For example, "pattern implying the agreement of the parties regarding its interpretation" (*Japan—Alcoholic Beverages II* (see footnote 664 above), p. 16); or "pattern … must imply *agreement* on the interpretation of the relevant provision" (*European Communities and its Members States—Tariff Treatment of Certain Information Technology Products, Reports of the WTO Panel* (WT/DS375/R, WT/DS376/R, WT/DS377/R), adopted on 21 September 2010, para. 7.558); or "practice [which] reflects an agreement as to the interpretation" (*The Islamic Republic of Iran v. the United States of America*, Interlocutory Award No. ITL 83-B1-FT (Counterclaim) (footnote 621 above), p. 119, para. 116); or that "State practice" was "indicative of a lack of any apprehension on the part of the Contracting States" (*Banković and Others v. Belgium and Others* (see footnote 555 above), para. 62).

[707] *United States–United Kingdom Arbitration concerning Heathrow Airport User Charges* (see footnote 705 above), at p. 131, para. 6.8; see also *Award in the Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, Decision of 24 May 2005, UNRIAA, vol. XXVII (Sales No. 06.V.8), p. 35, at p. 98, para. 157.

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

> It considered that the phrase "the understanding of the parties" necessarily means "the parties as a whole". It omitted the word "all" merely to avoid any possible misconception that every party must individually have engaged in the practice where it suffices that it should have accepted the practice.[708]

(15) The International Court of Justice also has recognized the possibility of expressing agreement regarding interpretation by silence or inaction by stating, in the *Case concerning the Temple of Preah Vihear*, that where "it is clear that the circumstances were such as called for some reaction, within a reasonable period", the State confronted with a certain subsequent conduct by another party "must be held to have acquiesced".[709] This general proposition of the Court regarding the role of silence for the purpose of establishing agreement regarding the interpretation of a treaty by subsequent practice has been confirmed by later decisions,[710] and supported generally by writers.[711] The "circumstances" which will "call for some reaction" include the particular setting in which the States parties interact with each other in respect of the treaty.[712]

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

> The terms of the Vienna Convention do not specify the ways in which "agreement" may be manifested. In the context of the present case the acts of jurisdiction were not intended to establish a source of title independent of the terms of the Treaty; nor could they be considered as being in contradiction of those terms as understood by Chile. The evidence supports the view that they were public and well-known to Argentina, and that they could only derive from the Treaty. Under these circumstances the silence of Argentina permits the inference that the acts tended to confirm an interpretation of the meaning of the Treaty independent of the acts of jurisdiction themselves.[713]

In the same case, the Court of Arbitration considered that

> The mere publication of a number of maps of (as the Court has already shown) extremely dubious standing and value could not—even if they nevertheless represented the official Argentine view—preclude or foreclose Chile from engaging in acts that would, correspondingly, demonstrate her own view of what were her rights under the [1881 Boundary Treaty]—nor could such publication of itself absolve Argentina from all further necessity for reaction in respect of those acts, if she considered them contrary to the Treaty.[714]

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

> Some of these activities—the organization of public health and education, policing, administration of justice—could normally be considered to be acts *à titre de souverain*. The Court notes, however, that, as there was a pre-existing title held by Cameroon in this area, the pertinent legal test is whether there was thus evidenced acquiescence by Cameroon in the passing of the title from itself to Nigeria.[715]

(18) This judgment suggests that, in cases which concern treaties delimiting a boundary, the circumstances will only very exceptionally call for a reaction with respect to conduct which runs counter to the delimitation. In such situations, there appears to be a strong presumption that silence or inaction does not constitute acceptance of a practice.[716]

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

---

[708] *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, Part II, pp. 221–222, para. (15).

[709] *Case concerning the Temple of Preah Vihear* (see footnote 573 above), p. 23.

[710] *Oil Platforms, Preliminary Objection, Judgment of 12 December 1996* (footnote 547 above), p. 815, para. 30; *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; *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgment of 10 December 1998, Trial Chamber, International Tribunal for the Former Yugoslavia, *Judicial Reports 1998*, vol. 1, p. 466, at p. 591, para. 179; *Rantsev v. Cyprus and Russia* (see footnote 659 above), para. 285; cautiously: *European Communities—Customs Classification of Frozen Boneless Chicken Cuts* (see footnote 675 above), para. 272; see also, for a limited holding, *RayGo Wagner Equipment Company v. Iran Express Terminal Corporation*, Case No. 16, Award No. 30-16-3 of 18 March 1983, Iran–United States Claims Tribunal, *Iran–United States Claims Tribunal Reports*, vol. 2 (1983-I), p. 141, at p. 144; and *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 ...* (see footnote 684 above), para. 31.

[711] Kamto, "La volonté de l'État …" (see footnote 626 above), pp. 134–141; Yasseen (footnote 533 above), p. 49; Gardiner, *Treaty Interpretation* (see footnote 533 above), p. 236; Villiger, *Commentary on the 1969 Vienna Convention …* (footnote 611 above), pp. 431–432, para. 22; and Dörr, "Article 31. General rule of interpretation" (footnote 534 above), pp. 557–559, paras. 83 and 86.

[712] For example, when acting within the framework of an international organization, see *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece), Judgment of 5 December 2011, I.C.J. Reports 2011*, p. 644, at pp. 675–676, paras. 99–101; and Kamto, "La volonté de l'État …" (footnote 626 above), p. 136.

[713] *Dispute between Argentina and Chile concerning the Beagle Channel* (see footnote 670 above), p. 187, para. 169 (*a*).

[714] *Ibid.*, p. 188, para. 171.

[715] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment* (see footnote 635 above), pp. 352–353, para. 67.

[716] *Ibid.*, at p. 351, para. 64: "The Court notes, however, that now that it has made its findings that the frontier in Lake Chad was delimited … , necessarily it follows that any Nigerian *effectivités* are indeed to be evaluated for their legal consequences as acts *contra legem*"; see also *Frontier Dispute, Judgment, I.C.J. Reports 1986*, p. 554, at p. 586, para. 63; *Case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal*, Decision of 31 July 1989, UNRIAA, vol. XX (Sales No. E/F.93.V.3), p. 119, at p. 181, para. 70 (dissenting opinion of Judge Bedjaoui) (in French; the English translation is reproduced in *ibid.*, Annex to the Application Instituting Proceedings of the Government of the Republic of Guinea-Bissau).

(20) International courts and tribunals, for example, have been reluctant to accept that parliamentary proceedings or domestic court judgments are considered as subsequent practice under article 31, paragraph 3 (*b*), to which other parties to the treaty would be expected to react, even if such proceedings or judgments had come to their attention through other channels, including by their own diplomatic service.[717]

(21) Further, even where a party, by its conduct, expresses a certain position towards another party (or parties) regarding the interpretation of a treaty, this does not necessarily call for a reaction by the other party or parties. In the *Kasikili/Sedudu Island* case, the International Court of Justice held that a State which did not react to the findings of a joint commission of experts, which had been entrusted by the parties to determine a particular factual situation with respect to a disputed matter, did not thereby provide a ground for the conclusion that an agreement had been reached with respect to the dispute.[718] The Court found that the parties had considered the work of the experts as being merely a preparatory step for a separate decision subsequently to be taken on the political level. On a more general level, the WTO Appellate Body has held that

> in specific situations, the "lack of reaction" or silence by a particular treaty party may, in the light of attendant circumstances, be understood as acceptance of the practice of other treaty parties. Such situations may occur when a party that has not engaged in a practice has become or has been made aware of the practice of other parties (for example, by means of notification or by virtue of participation in a forum where it is discussed), but does not react to it.[719]

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

> The Tribunal acknowledges that the national legislation of several States, not only in the West African region, but also in some other regions of the world, regulates bunkering of foreign vessels fishing in their exclusive economic zones in a way comparable to that of Guinea-Bissau. The Tribunal further notes that there is no manifest objection to such legislation and that it is, in general, complied with.[720]

(22) The possible legal significance of silence or inaction in the face of a subsequent practice of a party to a treaty is not limited to contributing to a possible underlying common agreement, but may also play a role for the operation of non-consent based rules, such as estoppel, preclusion or prescription.[721]

(23) Once established, an agreement between the parties under article 31, paragraph 3 (*a*) and (*b*), can eventually be terminated. The parties may replace it by another agreement with a different scope or content under article 31, paragraph 3. In this case, the new agreement replaces the previous one as an authentic means of interpretation from the date of its existence, at least with effect for the future.[722] Such situations, however, should not be lightly assumed as States usually do not change their interpretation of a treaty according to short-term considerations.

(24) It is also possible for a disagreement to arise between the parties regarding the interpretation of the treaty after they had reached a subsequent agreement regarding such interpretation. Such a disagreement, however, normally will not replace the prior subsequent agreement, since the principle of good faith prevents a party from simply disavowing the legitimate expectations which have been created by a common interpretation.[723] On the other hand, clear expressions of disavowal by one party of a previous understanding arising from common practice "do reduce in a major way the significance of the practice … after that date", without however diminishing the significance of the previous common practice.[724]

Conclusion 10. Decisions adopted within the framework of a Conference of States Parties

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

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

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

---

[717] *Sovereignty over Pulau Ligitan and Pulau Sipadan* (see footnote 583 above), pp. 650–651, para. 48; and *European Communities—Customs Classification of Frozen Boneless Chicken Cuts* (see footnote 675 above), para. 334 ("mere access to a published judgment cannot be equated with acceptance").

[718] *Kasikili/Sedudu Island* (see footnote 539 above), pp. 1089–1091, paras. 65–68.

[719] *European Communities—Customs Classification of Frozen Boneless Chicken Cuts* (see footnote 675 above), para. 272 (footnote omitted).

[720] *The M/V "Virginia G" Case (Panama/Guinea-Bissau)*, Case No. 19, Judgment of 14 April 2014, International Tribunal for the Law of the Sea, *Reports of Judgments, Advisory Opinions and Orders 2014*, pp. 4 *et seq.*, at p. 64, para. 218.

[721] *Certain expenses of the United Nations* (see footnote 540 above), pp. 182 *et seq.* (dissenting opinion of Judge Spender).

[722] Hafner (see footnote 609 above), p. 118; this means that the interpretative effect of an agreement under article 31, paragraph 3, does not necessarily go back to the date of the entry into force of the treaty, as Yasseen ((footnote 533 above), p. 47) maintains.

[723] Karl (see footnote 534 above), p. 151.

[724] *Maritime Dispute (Peru v. Chile)* (see footnote 545 above), p. 56, para. 142. Available from www.icj-cij.org/en/case/137.

Commentary

(1) Draft conclusion 10 addresses a particular form of action by States which may result in a subsequent agreement or subsequent practice under article 31, paragraph 3, or subsequent practice under article 32, namely, decisions adopted within the framework of Conferences of States Parties.[725]

(2) States typically use Conferences of States Parties as a form of action for the continuous process of multilateral treaty review and implementation.[726] Such Conferences can be roughly divided into two basic categories. First, some Conferences are actually an organ of an international organization within which States parties act in their capacity as members of that organ (for example, meetings of the States parties of the World Trade Organization, the Organization for the Prohibition of Chemical Weapons, or the International Civil Aviation Organization).[727] Such Conferences of States Parties do not fall within the scope of draft conclusion 10, which does not address the subsequent practice of and within international organizations.[728] Second, other Conferences of States Parties are convened pursuant to treaties that do not establish an international organization; rather, the treaty simply provides for more or less periodic meetings of the States parties for their review and implementation. Such review conferences are frameworks for States parties' cooperation and subsequent conduct with respect to the treaty. Either type of Conference of States Parties may also have specific powers concerning amendments and/or the adaptation of treaties. Examples include the review conference process of the 1972 Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction,[729] the Review Conference under article VIII, paragraph 3, of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons,[730] and Conferences of States Parties established by international environmental treaties.[731] The International Whaling Commission (IWC), established under the 1946 International Convention for the Regulation of Whaling,[732] is a borderline case between the two basic categories of Conferences of States Parties and its subsequent practice was considered in the judgment of the International Court of Justice in the *Whaling in the Antarctic* case.[733]

(3) Since Conferences of States Parties are usually established by treaties they are, in a sense, "treaty bodies". However, they should not be confused with bodies which are comprised of independent experts or bodies with a limited membership. Conferences of States Parties are more or less periodical meetings which are open to all of the parties of a treaty.

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

(5) The first sentence of paragraph 2 recognizes that the legal significance of any acts undertaken by Conferences of States Parties depends, in the first instance, on the rules that govern the Conferences of States Parties, notably the constituent treaty and any applicable rules of procedure. Conferences of States Parties perform a variety of acts, including reviewing the implementation of the treaty, reviewing the treaty itself, and decisions under amendment procedures.[734]

---

[725] Other designations include: Meetings of the Parties or Assemblies of the States Parties.

[726] See V. Röben, "Conference (Meeting) of States Parties", in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, vol. II, Oxford University Press, 2012, p. 605 (available from http://opil.ouplaw.com/home/epil); R. R. Churchill and G. Ulfstein, "Autonomous institutional arrangements in multilateral environmental agreements: a little-noticed phenomenon in international law", AJIL, vol. 94, No. 4 (October 2000), p. 623; J. Brunnée, "COPing with consent: law-making under multilateral environmental agreements", *Leiden Journal of International Law*, vol. 15, No. 1 (2002), p. 1; A. Wiersema, "The new international law-makers? Conferences of the Parties to multilateral environmental agreements", *Michigan Journal of International Law*, vol. 31, No. 1 (Fall 2009), p. 231; and L. Boisson de Chazournes, "Environmental treaties in time", *Environmental Policy and Law*, vol. 39, No. 6 (2009), p. 293.

[727] The 1994 Marrakesh Agreement Establishing the World Trade Organization; the 1993 Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction; and the 1944 Convention on International Civil Aviation.

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

[729] Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction, art. XI. According to this mechanism, States parties meeting in a review conference shall "review the operation of the Convention, with a view to assuring that the purposes of the preamble and the provisions of the Convention … are being realised. Such review shall take into account any new scientific and technological developments relevant to the Convention" (art. XII).

[730] Article VIII, paragraph 3, establishes that a review conference shall be held five years after its entry into force, and, if so decided, at intervals of five years thereafter "in order to review the operation of this Treaty with a view to assuring that the purposes of the preamble and the provisions of the Treaty are being realised". By way of such decisions, States parties review the operation of the Treaty on the Non-Proliferation of Nuclear Weapons, article by article, and formulate conclusions and recommendations on follow-on actions.

[731] Examples include the Conference of the Parties of the 1992 United Nations Framework Convention on Climate Change; the Conference of the Parties serving as the meeting of the Parties to the [1997] Kyoto Protocol to the United Nations Framework Convention on Climate Change; and the Conference of the Contracting Parties of the 1971 Convention on wetlands of international importance especially as waterfowl habitat.

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

[733] *Whaling in the Antarctic* (see footnote 548 above).

[734] Convention on wetlands of international importance especially as waterfowl habitat: article 6, paragraph 1, on review functions, and article 10 *bis* (1982 Protocol to amend the above-mentioned Convention, art. 1), on amendments; United Nations Framework Convention on Climate Change: article 7, paragraph 2, on review powers, and article 15, on amendments; Kyoto Protocol to the United Nations Framework Convention on Climate Change, article 13, paragraph 4, on review powers of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol, and article 20, on amendment procedures; Convention on international trade in endangered species of wild fauna and flora, article XI, on review Conference of the Parties, and article XVII, on amendment procedures; Treaty on the Non-Proliferation of Nuclear Weapons; WHO Framework Convention on Tobacco Control, article 23, paragraph 5 (review powers), article 28 (amendments) and article 33 (protocols).

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

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

(7) Specific provisions contained in various treaties refer to the Conference of the Parties proposing "guidelines" for the implementation of particular treaty provisions,[735] or defining "the relevant principles, modalities, rules and guidelines" for a treaty scheme.[736]

(8) Amendment procedures (in a broad sense of the term) include procedures by which the primary text of the treaty may be amended (the result of which mostly requires ratification by States parties according to their constitutional procedures), as well as tacit acceptance and opt-out procedures[737] that commonly apply to annexes, containing lists of substances, species or other elements that need to be updated regularly.[738]

(9) As a point of departure, paragraph 2 provides that the legal effect of a decision adopted within the framework of a Conference of States Parties depends primarily on the treaty in question and any applicable rules of procedure. The word "primarily" leaves room for subsidiary rules "unless the treaty otherwise provides" (see, for example, articles 16, 20, 22, paragraph 1, 24, 70, paragraph 1, and 72, paragraph 1, of the Vienna Convention on the Law of Treaties). The word "any" clarifies that rules of procedure of Conferences of States Parties, if they exist, will apply, given that there may be situations where such conferences operate with no specifically adopted rules of procedure.[739]

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

(11) Decisions of Conferences of States Parties, *inter alia*, may constitute or reflect subsequent agreements under article 31, paragraph 3 (*a*), by which the parties interpret the underlying treaty. For example, the Biological Weapons Convention Review Conference has regularly adopted "understandings and additional agreements" regarding the interpretation of the Convention's provisions. These agreements have been adopted by States Parties within the framework of the review conferences, by consensus, and they "have evolved across all articles of the treaty to address specific issues as and when they arose".[740] Through these understandings, States Parties interpret the provisions of the Convention by defining, specifying or otherwise elaborating on the meaning and scope of the provisions, as well as through the adoption of guidelines on their implementation. The Biological Weapons Convention Implementation and Support Unit[741] defines an "additional agreement" as one which:

> (*a*) Interprets, defines or elaborates the meaning or scope of a provision of the Convention; or
>
> (*b*) Provides instructions, guidelines or recommendations on how a provision should be implemented.[742]

(12) Similarly, the Conference of States Parties under the Convention on the prevention of marine pollution by dumping of wastes and other matter has adopted resolutions interpreting that convention. The Sub-Division for Legal Affairs of the International Maritime Organization (IMO), upon a request of the governing bodies, opined as follows in relation to an "interpretative resolution" of the Conference of States Parties under the London Convention:

> According to article 31, paragraph (3) (*a*), of the Vienna Convention on the Law of Treaties, 1969 (the Vienna Convention), subsequent agreements between the Parties shall be taken into account in the interpretation of a treaty. The article does not provide for a specific form of the subsequent agreement containing such interpretation. This seems to indicate that, provided its intention is clear, the interpretation could take various forms, including a resolution adopted at a meeting of the Parties, or even a decision recorded in the summary records of a meeting of the Parties.[743]

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

> [d]ecisions of the Conference of the Parties, as the supreme body comprising all Parties to the [Framework Convention on Tobacco Control],

---

[735] Articles 7 and 9 of the WHO Framework Convention on Tobacco Control.

[736] Article 17 of the Kyoto Protocol to the United Nations Framework Convention on Climate Change regarding emissions-trading provides an example, see Churchill and Ulfstein (footnote 726 above), p. 639; and J. Brunnée, "Reweaving the fabric of international law? Patterns of consent in environmental framework agreements", in R. Wolfrum and V. Röben (eds.), *Developments of International Law in Treaty Making*, Berlin, Springer, 2005, pp. 110–115.

[737] See J. Brunnée, "Treaty amendments", in D. B. Hollis (ed.), *The Oxford Guide to Treaties*, Oxford University Press, 2012, pp. 354–360.

[738] *Ibid*.

[739] This is the case, for example, for the United Nations Framework Convention on Climate Change.

[740] See P. Millett, "The Biological Weapons Convention: securing biology in the twenty-first century", *Journal of Conflict and Security Law*, vol. 15, No. 1 (2010), p. 33.

[741] The Implementation Support Unit was created by the Conference of States Parties, in order to provide administrative support to the Conference, and to enhance confidence-building measures among States parties (see the Final Document of the Sixth Review Conference of the States Parties to the Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction (BWC/CONF.VI/6), pp. 19–20).

[742] Background information document submitted by the Implementation and Support Unit, prepared for the Seventh Review Conference of the States Parties to the Convention, entitled "Additional agreements reached by previous Review Conferences relating to each article of the Convention" (BWC/CONF.VII/INF.5), para. 1.

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

undoubtedly represent a 'subsequent agreement between the Parties regarding the interpretation of the treaty', as stated in Article 31 of the Vienna Convention.[744]

(14) Commentators have also viewed decisions of Conferences of States Parties as being capable of embodying subsequent agreements[745] and have observed that

> [s]uch declarations are not legally binding in and of themselves, but they may have juridical significance, especially as a source of authoritative interpretations of the treaty.[746]

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

> Article VI of the Convention states that "[t]he Commission may from time to time make recommendations to any or all Contracting Governments on any matters which relate to whales or whaling and to the objectives and purposes of this Convention". These recommendations, which take the form of resolutions, are not binding. However, when they are adopted by consensus or by a unanimous vote, they may be relevant for the interpretation of the Convention or its Schedule.[747]

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

(17) Article I, paragraph (1), of the Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction provides that States parties undertake

> never in any circumstances to develop, produce, stockpile or otherwise acquire or retain … microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes.

(18) At the Third Review Conference (1991), States parties specified that the prohibitions established in this provision relate to "microbial or other biological agents or toxins harmful to plants and animals, as well as humans".[748]

(19) Article 4, paragraph 9, of the Montreal Protocol on Substances that Deplete the Ozone Layer has given rise to a debate about the definition of its term "State not party to this Protocol". According to Article 4, paragraph 9:

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

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

> The term "State not party to this Protocol" includes all other States and regional economic integration organizations that have not agreed to be bound by the Copenhagen and Beijing Amendments.[749]

(21) Whereas the acts which are the result of a tacit acceptance procedure (see paragraph (8) above) are not, as such, subsequent agreements by the parties under article 31, paragraph 3 (*a*), they can, in addition to their primary effect under the treaty, under certain circumstances imply such a subsequent agreement. One example concerns certain decisions of the Conference of the Parties to the 1972 Convention on the prevention of marine pollution by dumping of wastes and other matter. At its sixteenth meeting, held in 1993, the Consultative Meeting of Contracting Parties adopted three amendments to annex I by way of the tacit acceptance procedure provided for in the Convention.[750] As such, these amendments were not subsequent agreements. They did, however, also imply a wide-ranging interpretation of the underlying treaty itself.[751] The amendment refers to and builds on a reso-

---

[744] Conference of the Parties to the WHO Framework Convention on Tobacco Control, Intergovernmental Negotiating Body on a Protocol on Illicit Trade in Tobacco Products, "Revised Chairperson's text on a protocol on illicit trade in tobacco products, and general debate: legal advice on the scope of the protocol", note by the WHO Legal Counsel on scope of the protocol on illicit trade in tobacco products (WHO, document FCTC/COP/INB-IT/3/INF.DOC./6, annex, para. 8); and see S. F. Halabi, "The World Health Organization's Framework Convention on Tobacco Control: an analysis of guidelines adopted by the Conference of the Parties", *Georgia Journal of International and Comparative Law*, vol. 39, No. 1 (2010), pp. 135–136.

[745] D. H. Joyner, *Interpreting the Nuclear Non-Proliferation Treaty*, Oxford University Press, 2011, p. 83 (with respect to the Treaty on the Non-Proliferation of Nuclear Weapons); and Aust, *Modern Treaty Law and Practice* (see footnote 598 above), pp. 213–214.

[746] B. M. Carnahan, "Treaty review conferences", AJIL, vol. 81, No. 1 (January 1987), p. 229.

[747] *Whaling in the Antarctic* (see footnote 548 above), p. 248, para. 46.

[748] Final Document of the Third Review Conference of the Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (BWC/CONF.III/23), Final Declaration, part II, p. 11.

[749] Decision XV/3 on obligations of parties to the Beijing Amendment under article 4 of the Montreal Protocol with respect to hydrochlorofluorocarbons; the definition itself is formulated as follows: "1. … (*a*) The term 'State not party to this Protocol' in article 4, paragraph 9 does not apply to those States operating under Article 5, paragraph 1, of the Protocol until January 1, 2016 when, in accordance with the Copenhagen and Beijing Amendments, hydrochlorofluorocarbon production and consumption control measures will be in effect for States that operate under Article 5, paragraph 1, of the Protocol; (*b*) The term 'State not party to this Protocol' includes all other States and regional economic integration organizations that have not agreed to be bound by the Copenhagen and Beijing Amendments; (*c*) Recognizing, however, the practical difficulties imposed by the timing associated with the adoption of the foregoing interpretation of the term 'State not party to this Protocol', paragraph 1 (*b*) shall apply unless such a State has by 31 March 2004: (i) Notified the Secretariat that it intends to ratify, accede or accept the Beijing Amendment as soon as possible; (ii) Certified that it is in full compliance with Articles 2, 2A to 2G and Article 4 of the Protocol, as amended by the Copenhagen Amendment; (iii) Submitted data on (i) and (ii) above to the Secretariat, to be updated on 31 March 2005, in which case that State shall fall outside the definition of 'State not party to this Protocol' until the conclusion of the Seventeenth Meeting of the Parties" (UNEP/OzL.Pro.15/9, chap. XVIII.A).

[750] See resolutions LC.49 (16), LC.50 (16), and resolution LC.51 (16), of 12 November 1993, adopted at the Sixteenth Consultative Meeting of the Contracting Parties, United Nations, *Treaty Series*, vol. 1775, p. 395. First, the Meeting decided to amend the phase-out dumping of industrial waste by 31 December 1995. Second, it banned the incineration at sea of industrial waste and sewage sludge. Finally, it decided to replace paragraph 6 of annex I, banning the dumping of radioactive waste or other radioactive matter; see also "Dumping at sea: the evolution of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (LC), 1972", *Focus on IMO* (IMO, July 1997).

[751] It has even been asserted that these amendments to annex I of the Convention on the prevention of marine pollution by dumping of wastes and other matter "constitute major changes in the Convention" (Churchill and Ulfstein, footnote 726 above, p. 638).

lution that was adopted by the Consultative Meeting held three years earlier and which had established the agreement of the parties that "[t]he London Dumping Convention is the appropriate body to address the issue of low-level radioactive waste disposal into sub-seabed repositories accessed from the sea".[752] The resolution has been described as "effectively expand[ing] the definition of 'dumping' under the Convention by deciding that this term covers the disposal of waste into or under the seabed from the sea but not from land by tunneling".[753] Thus, the amendment confirmed that the interpretative resolution contained a subsequent agreement regarding the interpretation of the treaty.

(22) The Basel Convention on the control of transboundary movements of hazardous wastes and their disposal provides in its article 17, paragraph 5, that "Amendments (…) shall enter into force between Parties having accepted them on the ninetieth day after the receipt by the Depositary of their instrument of ratification, approval, formal confirmation or acceptance by at least three-fourths of the Parties who accepted them (…)". Led by an Indonesian-Swiss initiative, the Conference of the Parties decided to clarify the requirement of the acceptance by three-fourths of the Parties, by agreeing,

> without prejudice to any other multilateral environmental agreement, that the meaning of paragraph 5 of Article 17 of the Basel Convention should be interpreted to mean that the acceptance of three-fourths of those parties that were parties at the time of the adoption of the amendment is required for the entry into force of such amendment, noting that such an interpretation of paragraph 5 of Article 17 does not compel any party to ratify the Ban Amendment.[754]

The parties adopted this decision on the interpretation of article 17, paragraph 5, by consensus, with many States Parties underlining that the Conferences of the States Parties to any convention are "the ultimate authority as to its interpretation".[755] While this suggests that the decision embodies a subsequent agreement of the parties under article 31, paragraph 3 (*a*), the decision was taken after a debate about whether a formal amendment of the Convention was necessary to achieve this result.[756] It should also be noted that Japan, requesting that this position be reflected in the Conference's Report, stated that his delegation "supported the current-time approach to the interpretation of the provision of the Convention regarding entry into force of amendments, as described in the legal advice provided by the United Nations Office of Legal Affairs as the Depositary,[757] and had accepted the fixed-time approach enunciated in the decision on the Indonesian–Swiss country-led initiative *only in this particular instance**".[758]

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

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

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

> (*a*) designated tobacco taxes;
>
> (*b*) tobacco manufacturing and/or importing licensing fees;
>
> (*c*) tobacco product registration fees;
>
> (*d*) licensing of tobacco distributors and/or retailers;
>
> (*e*) non-compliance fees levied on the tobacco industry and retailers; and
>
> (*f*) annual tobacco surveillance fees (tobacco industry and retailers).[759]

---

[752] IMO, resolution LDC.41 (13), para. 1 (IMO, document LDC 13/15 (1990), annex 7).

[753] Churchill and Ulfstein, footnote 726 above, p. 641.

[754] BC-10/3: Indonesian–Swiss country-led initiative to improve the effectiveness of the Basel Convention, Report of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal on its tenth meeting (Cartagena (Colombia), 17–21 October 2011), UNEP/CHW.10/28, p. 31.

[755] *Ibid*., p. 9, para. 65.

[756] G. Handl, "International 'lawmaking' by Conferences of the Parties and other politically mandated bodies", in Wolfrum and Röben (eds.), *Developments of International Law in Treaty Making* (footnote 736 above), p. 127, at p. 132.

[757] The "current-time approach" favoured by the United Nations Legal Adviser stipulates that "[w]here the treaty is silent or ambiguous on the matter, the practice of the Secretary-General is to calculate the number of acceptances on the basis of the number of parties to the treaty at the time of deposit of each instrument of acceptance of an amendment". See extracts from the Memorandum of 8 March 2004 from the Office of Legal Affairs of the United Nations, available from www.basel.int/TheConvention/Overview/Amendments/Background/tabid/2760/Default.aspx.

[758] Report of the Conference of the Parties to the Basel Convention, UNEP/CHW.10/28 (see footnote 754 above), p. 10, para. 68.

[759] FCTC/COP4(10): Partial guidelines for implementation of Articles 9 and 10 of the WHO Framework Convention on Tobacco Control (Regulation of the contents of tobacco products and Regulation of tobacco product disclosures), annex, adopted at the 4th Conference of the States Parties to the WHO Framework Convention on Tobacco Control (Punta del Este (Uruguay), 15–20 November 2010), FCTC/COP/4/DIV/6, p. 54, guideline 2.3.

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

(26) It follows that decisions of Conferences of States Parties may have different legal effects. Such decisions are often not intended to embody a subsequent agreement under article 31, paragraph 3 (*a*), by themselves because they are not meant to be a statement regarding the interpretation of the treaty. In other cases, the parties have made it sufficiently clear that the Conference of State Parties decision embodies their agreement regarding the interpretation of the treaty. In still other cases, they may produce a legal effect in combination with a general duty to cooperate under the treaty, which then puts the parties "under an obligation to give due regard" to such a decision.[760] In any case, it cannot simply be said that because the treaty does not accord the Conference of the States Parties a competence to take legally binding decisions, their decisions are necessarily legally irrelevant and constitute only political commitments.[761]

(27) Ultimately, the effect of a decision of a Conference of States Parties depends on the circumstances of each particular case and such decisions need to be properly interpreted. A relevant consideration may be whether States parties uniformly or without challenge apply the treaty as interpreted by the Conference of States Parties decision. Discordant practice following a Conference of States Parties decision may be an indication that States did not assume that the decision would be a subsequent agreement under article 31, paragraph 3 (*a*) (see the commentary to draft conclusion 9, paragraphs 22–23, above). Conference of States Parties' decisions which do not qualify as subsequent agreements under article 31, paragraph 3 (*a*), or as subsequent practice under article 31, paragraph 3 (*b*), nevertheless may be a subsidiary means of interpretation under article 32.[762]

(28) Paragraph 3 sets forth the principle that agreements regarding the interpretation of a treaty under article 31, paragraph 3, must relate to the content of the treaty. Thus, what is important is the substance of the agreement embodied in the decision of the Conference of States Parties and not the form or procedure by which that decision is reached. Acts which originate from Conferences of States Parties may have different forms and designations, and they may be the result of different procedures. Conferences of States Parties may even operate without formally adopted rules of procedure.[763] If the decision of the Conference of States Parties is based on a unanimous vote in which all parties participate, it may clearly embody a "subsequent agreement" under article 31, paragraph 3 (*a*), provided that it is "regarding the interpretation of the treaty".

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

> The task of the Review Conference being to review the operation of the Convention with a view to assuring that the purposes of the preamble and the provisions of the Convention are being realized, and thus to strengthen its effectiveness, every effort should be made to reach agreement on substantive matters by means of consensus. There should be no voting on such matters until all efforts to achieve consensus have been exhausted.[764]

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

(30) In order to address concerns relating to decisions adopted by consensus, the phrase "including by consensus" was introduced at the end of paragraph 3 in order to dispel the notion that a decision by consensus would necessarily be equated with agreement in substance. Indeed, consensus is not a concept which necessarily indicates any particular degree of agreement on substance. According to the *Comments on some Procedural Questions* issued by the Office of Legal Affairs of the United Nations Secretariat in accordance with United Nations General Assembly resolution 60/286:[765]

> Consensus is generally understood as a decision-taking process consisting in arriving at a decision without formal objections and vote. It may however not necessarily reflect "unanimity" of opinion on the substantive matter. It is used to describe the practice under which every effort is made to achieve general agreement and no delegation objects explicitly to a consensus being recorded.[766]

---

[760] *Whaling in the Antarctic* (see footnote 548 above), pp. 257 and 269–270, paras. 83 and 137.

[761] *Ibid*., p. 248, para. 46.

[762] *Ibid.* (separate opinion of Judge *ad hoc* Charlesworth, pp. 453–454, para. 4: "I note that resolutions adopted by a vote of the IWC have some consequence although they do not come within the terms of Article 31, paragraph 3, of the Vienna Convention").

[763] The Conference of States Parties to the United Nations Framework Convention on Climate Change provisionally applies the draft rules of procedure, contained in FCCC/CP/1996/2, with the exception of draft rule 42 (Voting), since no agreement has been reached so far on one of the two voting alternatives contained therein, see Report of the Conference of the Parties on its first session, held in Berlin from 28 March to 7 April 1995 (FCCC/CP/1995/7), pp. 8–9, para. 10; and Report of the Conference of the Parties on its nineteenth session, held in Warsaw from 11 to 23 November 2013 (FCCC/CP/2013/10), p. 6, para. 4; similarly, the Conference of States Parties to the Convention on biological diversity did not adopt Rule 40, paragraph 1, of the Rules of Procedure (on voting) "because of the lack of consensus among the Parties concerning the majority required for decision-making on matters of substance", Report of the Eleventh Meeting of the Conference of the Parties to the Convention on biological diversity (8–19 October 2012) (UNEP/CBD/COP/11/35), p. 21, para. 65.

[764] See rule 28, paragraph 2, of the provisional rules of procedure for the Review Conference of the Parties to the Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction, held in Geneva, from 3 to 21 March 1980 (BWC/CONF.I/2), p. 8.

[765] See General Assembly resolution 60/286 of 8 September 2006, on revitalization of the General Assembly, requiring the United Nations Secretariat "to make precedents and past practice available in the public domain with respect to rules and practices of the intergovernmental bodies of the Organization" (annex, para. 24).

[766] Comments on some procedural questions: "Consensus in UN practice: general", paper prepared by the Secretariat, available from www.un.org/en/ga/about/ropga (http://legal.un.org/ola/media/GA_RoP/GA_RoP_EN.pdf); see also R. Wolfrum and J. Pichon, "Consensus", *Max Planck Encyclopedia of Public International Law* (available from http://opil.ouplaw.com/home/epil), paras. 3–4 and 24.

(31) It follows that adoption by consensus is not a sufficient condition for an agreement under article 31, paragraph 3 (*b*). The rules of procedure of Conferences of States Parties usually do not give an indication as to the possible legal effect of a resolution as a subsequent agreement under article 31, paragraph 3 (*a*), or a subsequent practice under article 31, paragraph 3 (*b*). Such rules of procedure only determine how the Conference of States Parties shall adopt its decisions, not their possible legal effect as a subsequent agreement under article 31, paragraph 3. Although subsequent agreements under article 31, paragraph 3 (*a*), need not be binding as such, the Vienna Convention attributes them a legal effect under article 31 only if there exists agreement in substance among the parties concerning the interpretation of a treaty. The International Court of Justice has confirmed that the distinction between the form of a collective decision and the agreement in substance is pertinent in such a context.[767]

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

(33) For example, at its Sixth Meeting in 2002, the Conference of the States Parties to the Convention on biological diversity worked on formulating guiding principles for the prevention, introduction and mitigation of impacts of alien species that threaten ecosystems, habitats or species.[768] After several efforts to reach an agreement had failed, the President of the Conference of the States Parties proposed that the decision be adopted, and the reservations which Australia had raised be recorded in the final report of the meeting. Australia's representative, however, reiterated that the guiding principles could not be accepted and that "[h]is formal objection therefore stood".[769] The President declared the debate closed and, "following established practice", declared the decision adopted without a vote, clarifying that the objections of the dissenting States would be reflected in the final report of the meeting. Following the adoption, Australia reiterated its view that "consensus was adoption without formal objection", and expressed concerns about the legality of the adoption of the draft decision. As a result, a footnote to decision VI/23 indicates that "one representative entered a formal objection during the process leading to the adoption of this decision and underlined that he did not believe that the Conference of the Parties could legitimately adopt a motion or a text with a formal objection in place".[770]

(34) In this situation, the Executive Secretary of the Convention on biological diversity requested a legal opinion from the Legal Counsel of the United Nations.[771] The Legal Counsel[772] expressed the view that a party could "disassociate itself from the substance or text of the document; indicate that its joining in the consensus does not constitute acceptance of the substance or text or parts of the document; and/or present any other restrictions on its Government's position on the substance or text of the document".[773] Thus, it is clear that a decision by consensus can occur in the face of rejection of the substance of the decision by one or more of the States Parties.

(35) The decision under the Convention on biological diversity, as well as a similar decision reached in Cancún in 2010 by the Meeting of the Parties to the Kyoto Protocol to the United Nations Framework Convention on Climate Change (the objection by Bolivia notwithstanding),[774] raise the important question of what "consensus" means.[775] However, this question, which does not fall within the scope of the present topic, must be distinguished from the question of whether all the parties to a treaty have arrived at an agreement in substance on matters of interpretation of that treaty under article 31, paragraphs 3 (*a*) and (*b*). Decisions by Conferences of States Parties, which do not reflect agreement in substance among all the parties, do not qualify as agreements under article 31, paragraph 3, but maybe a form of "other subsequent practice" under article 32 (see draft conclusion 4, paragraph 3).[776]

(36) A different issue concerns the legal effect of a decision of a Conference of the Parties once it qualifies as an agreement under article 31, paragraph 3. In 2011, the IMO Sub-Division for Legal Affairs was asked to "advise the governing bodies […] about the procedural requirements in relation to a decision on an interpretative resolution and, in particular, whether or not consensus would be needed for such a decision".[777] In its response, while confirming that a resolution by the Conference of States Parties can constitute, in principle, a subsequent agreement under article 31, paragraph 3 (*a*), the IMO Sub-Division for Legal Affairs advised the governing bodies that even if the Conference were to adopt a decision based on consensus, that would not mean that the decision would be binding on all the parties.[778]

(37) Although the opinion of the IMO Sub-Division for Legal Affairs proceeded from the erroneous assumption that a "subsequent agreement" under article 31, paragraph 3 (*a*), would only be binding "as a treaty, or an amendment thereto"[779] , it came to the correct conclusion that even if the consensus decision by a Conference of the

[767] *Whaling in the Antarctic* (see footnote 548 above), p. 257, para. 83.

[768] Report of the sixth meeting of the Conference of the Parties to the Convention on biological diversity (UNEP/CBD/COP/6/20), annex I, decision VI/23.

[769] *Ibid.*, para. 313.

[770] *Ibid*., paras. 316, 318 and 321; for the discussion see paragraphs 294–324. All the decisions of the Conference of the Parties are available from www.cbd.int/decisions/.

[771] The request is available from the secretariat of the Convention on Biological Diversity, document SCBD/SEL/DBO/30219 (6 June 2002).

[772] Letter dated 17 June 2002, sent by fax.

[773] *Ibid.*

[774] See decision 1/CMP.6 on the Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol at its fifteenth session; and decision 2/CMP.6: the Cancun Agreements: land use, land-use change and forestry, adopted by Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol (FCCC/KP/CMP/2010/12/Add.1); and proceedings of the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol (FCCC/KP/CMP/2010/12), para. 29.

[775] See Nolte, "Third report for the ILC Study Group on treaties over time" (footnote 673 above), pp. 307 *et seq.*, at pp. 372–377.

[776] *Yearbook … 2013*, vol. II (Part Two), p. 28.

[777] IMO, document LC 33/4, para. 4.15.2.

[778] IMO, document LC 33/J/6 (see footnote 743 above), para. 3.

[779] *Ibid.*, para. 8.

Parties embodies an agreement regarding interpretation in substance, it is not (necessarily) binding upon the parties (see commentary on draft conclusion 9 above, paras. (9)–(11)). Rather, as the Commission has indicated, a subsequent agreement under article 31, paragraph 3 (*a*), is only one of different means of interpretation to be taken into account in the process of interpretation.[780]

(38) Thus, interpretative resolutions by Conferences of States Parties which are adopted by consensus, even if they are not binding as such, can nevertheless be subsequent agreements under article 31, paragraph 3 (*a*), or subsequent practice under article 31, paragraph 3 (*b*), if there are sufficient indications that this was the intention of the parties at the time of the adoption of the decision, or if the subsequent practice of the parties establishes an agreement on the interpretation of the treaty.[781] The interpreter must give appropriate weight to such an interpretative resolution under article 31, paragraph 3 (*a*), but not necessarily treat it as legally binding.[782]

[780] Commentary to draft conclusion 2, para. (4) (*Yearbook … 2013*, vol. II (Part Two), p. 22).

[781] *Whaling in the Antarctic* (see footnote 548 above) (separate opinion of Judge Greenwood, para. 6, and separate opinion of Judge *ad hoc* Charlesworth, pp. 453–454, para. 4).

[782] Commentary to draft conclusion 2, para. (4) (*Yearbook … 2013*, vol. II (Part Two), p. 22).