Chapter VIII

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

A. Introduction

118. 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.[277] 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.[278]

119. From the sixty-second to the sixty-fourth session (2010–2012), the Study Group was reconstituted under the chairmanship of Mr. Georg Nolte. The Study Group examined three reports presented informally by the Chairperson, which addressed, respectively, the relevant jurisprudence of the International Court of Justice and arbitral tribunals of *ad hoc* jurisdiction;[279] jurisprudence under special regimes relating to subsequent agreements and subsequent practice;[280] and subsequent agreements and subsequent practice of States outside judicial and quasi-judicial proceedings.[281]

120. At its sixty-fourth session (2012), the Commission, on the basis of a recommendation from the Study Group,[282] 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".[283]

121. At its sixty-fifth session (2013), the Commission considered the first report of the Special Rapporteur[284] and provisionally adopted five draft conclusions.[285]

122. At its sixty-sixth session (2014), the Commission considered the second report of the Special Rapporteur[286] and provisionally adopted five draft conclusions.[287]

B. Consideration of the topic at the present session

123. At the present session, the Commission had before it the third report of the Special Rapporteur (A/CN.4/683), which offered an analysis of the role of subsequent agreements and subsequent practice in relation to treaties that are the constituent instruments of international organizations and which proposed draft conclusion 11 on the issue. In particular, after addressing article 5 of the 1969 Vienna Convention (Treaties constituting international organizations and treaties adopted within an international organization), the third report turned to questions related to the application of the Vienna Convention rules on treaty interpretation to constituent instruments of international organizations. It also dealt with several issues relating to subsequent agreements under article 31, paragraph 3 (*a*) and (*b*), as well as article 32, of the Vienna Convention, as a means of interpretation of constituent instruments of international organizations.

124. The Commission considered the report at its 3259th to 3262nd meetings, on 29 May and 2, 3 and 4 June 2015.

125. Following its debate on the third report, the Commission decided, at its 3262nd meeting, on 4 June 2015, to refer draft conclusion 11, on constituent instruments

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[277] 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.

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

[279] See *Yearbook … 2010*, vol. II (Part Two), pp. 194–195, paras. 344–354, and *Yearbook … 2011*, vol. II (Part Two), p. 168, para. 337.

[280] 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.

[281] 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 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 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).

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

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

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

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

[286] *Yearbook … 2014*, vol. II (Part One), document A/CN.4/671.

[287] *Ibid*., vol. II (Part Two), pp. 106–134, paras. 70–76. The Commission provisionally adopted draft conclusion 6 (Identification of subsequent agreements and subsequent practice); draft conclusion 7 (Possible effects of subsequent agreements and subsequent practice in interpretation); draft conclusion 8 (Weight of subsequent agreements and subsequent practice as a means of interpretation); draft conclusion 9 (Agreement of the parties regarding the interpretation of a treaty); and draft conclusion 10 (Decisions adopted within the framework of a Conference of States Parties).

of international organizations, as presented by the Special Rapporteur, to the Drafting Committee.

126. At its 3266th meeting, on 8 July 2015, the Commission received the report of the Drafting Committee and provisionally adopted draft conclusion 11 (see section C.1 below).

127. At its 3284th, 3285th and 3288th meetings, on 4 and 6 August 2015, the Commission adopted the commentary to the draft conclusion provisionally adopted at the present 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 provisionally adopted so far by the Commission

1. Text of the draft conclusions

128. The text of the draft conclusions provisionally adopted so far by the Commission is reproduced below.[288]

Conclusion 1. General rule and means of treaty interpretation

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

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

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

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

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

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

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

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

Subsequent agreements and subsequent practice under articles 31 and 32 may assist in determining whether or not the presumed intention of the parties upon the conclusion of the treaty was to give a term used a meaning which is capable of evolving over time.

Conclusion 4. Definition of subsequent agreement and subsequent practice

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

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

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

Conclusion 5. Attribution of subsequent practice

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

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

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.

[288] For the commentaries to draft conclusions 1–5, see *Yearbook … 2013*, vol. II (Part Two), pp. 17–37. For the commentaries to draft conclusions 6–10, see *Yearbook … 2014*, vol. II (Part Two), pp. 108–134.

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

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

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

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

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

Conclusion 11. Constituent instruments of international organizations

1. Articles 31 and 32 apply to a treaty which is the constituent instrument of an international organization. Accordingly, subsequent agreements and subsequent practice under article 31, paragraph 3, are, and other subsequent practice under article 32 may be, means of interpretation for such treaties.

2. Subsequent agreements and subsequent practice under article 31, paragraph 3, or other subsequent practice under article 32, may arise from, or be expressed in, the practice of an international organization in the application of its constituent instrument.

3. Practice of an international organization in the application of its constituent instrument may contribute to the interpretation of that instrument when applying articles 31, paragraph 1, and 32.

4. Paragraphs 1 to 3 apply to the interpretation of any treaty which is the constituent instrument of an international organization without prejudice to any relevant rules of the organization.

2. Text of the draft conclusion and commentary thereto provisionally adopted by the Commission at its sixty-seventh session

129. The text of the draft conclusion, together with commentary thereto, provisionally adopted by the Commission at the sixty-seventh session, is reproduced below.

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Commentary

(1) Draft conclusion 11 refers to a particular type of treaty, namely constituent instruments of international organizations, and the way in which subsequent agreements or subsequent practice shall or may be taken into account in their interpretation under articles 31 and 32 of the 1969 Vienna Convention.

(2) Constituent instruments of international organizations are specifically addressed in article 5 of the 1969 Vienna Convention, which provides:

> The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization.[289]

(3) A constituent instrument of an international organization under article 5, like any treaty, is an international agreement "whether embodied in a single instrument or in two or more related instruments" (art. 2, para. 1 (*a*)). The provisions that are contained in such a treaty are part of the constituent instrument.[290]

(4) As a general matter, article 5, by stating that the Vienna Convention applies to constituent instruments of international organizations without prejudice to any relevant rules of the organization,[291] follows the general approach of the Convention according to which treaties between States are subject to the rules set forth in the Convention "unless the treaty otherwise provides".[292]

(5) Draft conclusion 11 only refers to the interpretation of constituent instruments of international organizations. It therefore does not address every aspect of the role of subsequent agreements and subsequent practice in relation to the interpretation of treaties involving international organizations. In particular, it does not apply to the interpretation of treaties adopted within an international organization or to treaties concluded by international

[289] See also the parallel provision of article 5 of the 1986 Vienna Convention.

[290] Article 20, para 3, of the 1969 Vienna Convention requires the acceptance, by the competent organ of the organization, of reservations relating to its constituent instrument. See the twelfth report on reservations to treaties, *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/584, p. 47, paras. 75–77; see also S. Rosenne, *Developments in the Law of Treaties 1945–1986* (Cambridge, Cambridge University Press, 1989), p. 204.

[291] See *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 191; K. Schmalenbach, "Article 5. Treaties constituting international organizations and treaties adopted within an international organization", in O. Dörr and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties—A Commentary* (Heidelberg, Springer, 2012), p. 89, para. 1.

[292] See, for example, articles 16; 19 (*a*) and (*b*); 20, paras. 1, 3, 4 and 5; 22; 24, para. 3; 25, para. 2; 44, para. 1; 55; 58, para. 2; 70, para. 1; 72, para. 1; and 77, para. 1, of the 1969 Vienna Convention.

organizations which are not themselves constituent instruments of international organizations.[293] In addition, draft conclusion 11 does not apply to the interpretation of decisions by organs of international organizations as such,[294] including to the interpretation of decisions by international courts,[295] or to the effect of a "clear and constant jurisprudence"[296] (*jurisprudence constante*) of courts or tribunals.[297] Finally, the conclusion does not specifically address questions relating to pronouncements by a treaty monitoring body consisting of independent experts, or to the weight of particular forms of practice more generally, matters which may be dealt with at a later stage.

(6) The *first sentence of paragraph 1 of draft conclusion 11* recognizes the applicability of articles 31 and 32 of the Vienna Convention to treaties that are constituent instruments of international organizations.[298] The International Court of Justice has confirmed this point in its advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*:

> From a formal standpoint, the constituent instruments of international organizations are multilateral treaties, to which the well-established rules of treaty interpretation apply.[299]

(7) The Court has held with respect to the Charter of the United Nations:

> On the previous occasions when the Court has had to interpret the Charter of the United Nations, it has followed the principles and rules applicable in general to the interpretation of treaties, since it has recognized that the Charter is a multilateral treaty, albeit a treaty having certain special characteristics.[300]

(8) At the same time, article 5 suggests, and decisions by international courts confirm, that constituent instruments of international organizations are also treaties of a particular type which may need to be interpreted in a specific way. Accordingly, the International Court of Justice has stated:

> But the constituent instruments of international organizations are also treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals. Such treaties can raise specific problems of interpretation owing, *inter alia*, to their character which is conventional and at the same time institutional; the very nature of the organization created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, as well as its own practice, are all elements which may deserve special attention when the time comes to interpret these constituent treaties.[301]

(9) The *second sentence of paragraph 1 of draft conclusion 11* more specifically refers to elements of articles 31 and 32 which deal with subsequent agreements and subsequent practice as a means of interpretation and confirms that subsequent agreements and subsequent practice under article 31 paragraph 3, are, and other subsequent practice under article 32 may be, means of interpretation for constituent instruments of international organizations.

(10) The International Court of Justice has recognized that article 31, paragraph 3 (*b*), is applicable to constituent instruments of international organizations. In its advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, after describing constituent instruments of international organizations as being treaties of a particular type, the Court introduced its interpretation of the Constitution of the World Health Organization (WHO) by stating:

> According to the customary rule of interpretation as expressed in Article 31 of the 1969 Vienna Convention on the Law of Treaties, the terms of a treaty must be interpreted "in their context and in the light of its object and purpose" and there shall be
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> "taken into account, together with the context:
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> […] (*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation".[302]

Referring to different precedents from its own case law in which it had, *inter alia*, employed subsequent practice under article 31, paragraph 3 (*b*), as a means of interpretation, the Court announced that it would apply article 31, paragraph 3 (*b*):

> in this case for the purpose of determining whether, according to the WHO Constitution, the question to which it has been asked to reply arises "within the scope of [the] activities" of that Organization.[303]

(11) The *Land and Maritime Boundary between Cameroon and Nigeria* case is another decision in which the Court has emphasized, in a case involving the interpretation of a constituent instrument of an international organization,[304] the subsequent practice of the parties.

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[293] The latter category is addressed by the 1986 Vienna Convention.

[294] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, *I.C.J. Reports 2010*, p. 403, at p. 442, para. 94 ("While the rules on treaty interpretation embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties may provide guidance, differences between Security Council resolutions and treaties mean that the interpretation of Security Council resolutions also require that other factors be taken into account"); see also H. Thirlway, "The law and procedure of the International Court of Justice 1960–1989 (Part Eight)", *British Year Book of International Law*, vol. 67 (1996), p. 1, at p. 29; M. C. Wood, "The interpretation of Security Council resolutions", *Max Planck Yearbook of United Nations Law*, vol. 2 (1998), p. 73, at p. 85; R.K. Gardiner, *Treaty Interpretation*, 2nd ed. (Oxford, Oxford University Press, 2015), p. 127.

[295] *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the* Temple of Preah Vihear (Cambodia v. Thailand) *(Cambodia v. Thailand)*, Judgment, *I.C.J. Reports 2013*, p. 281, at p. 307, para. 75 ("A judgment of the Court cannot be equated to a treaty, an instrument which derives its binding force and content from the consent of the contracting States and the interpretation of which may be affected by the subsequent conduct of those States, as provided by the principle stated in Article 31, paragraph 3 (*b*), of the 1969 Vienna Convention on the Law of Treaties").

[296] See *Regina v. Secretary of State for the Environment, Transport and the Regions ex parte Alconbury (Developments Limited and others)* [2001] UKHL 23; *Regina v. Special Adjudicator ex parte Ullah; Do (FC) v. Secretary of State for the Home Department* [2004] UKHL 26 [20] (Lord Bingham); *R (on the application of Animal Defenders International) v. Secretary of State for Culture, Media and Sport* [2008] UKHL 15.

[297] Such jurisprudence may be a means for the determination of rules of law as indicated, in particular, by Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice of 26 June 1945.

[298] See Gardiner (footnote 294 above), pp. 281–82.

[299] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, *I.C.J. Reports 1996*, p. 66, at p. 74, para. 19.

[300] *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 p. 157.

[301] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (see footnote 299 above), p. 75, para. 19.

[302] *Ibid.*

[303] *Ibid.*

[304] See article 17 of the Convention and Statutes relating to the Development of the Chad Basin (1964); generally: P. H. Sand, "Development of international water law in the Lake Chad Basin", *Heidelberg Journal of International Law*, vol. 34 (1974), pp. 52–76.

Proceeding from the observation that "member States have also entrusted to the Commission certain tasks that had not originally been provided for in the treaty texts",[305] the Court concluded that:

> From the treaty texts and the practice [of the parties] analysed at paragraphs 64 and 65 … 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.[306]

(12) Article 31, paragraph 3 (*a*), is also applicable to constituent treaties of international organizations.[307] Self-standing subsequent agreements between the member States regarding the interpretation of constituent instruments of international organizations, however, are not common. When questions of interpretation arise with respect to such an instrument, the parties mostly act as members within the framework of the plenary organ of the organization. If there is a need to modify, amend or supplement the treaty, the member States either use the amendment procedure provided for in the treaty, or they conclude a further treaty, usually a protocol.[308] It is, however, also possible for the parties to act as such when they meet within a plenary organ of the respective organization. In 1995,

> [t]he Governments of the 15 member States have achieved the common agreement that this decision is the agreed and definitive interpretation of the relevant [European Union] Treaty provisions.[309]

That is to say that

> the name given to the European currency shall be Euro … The specific name Euro will be used instead of the generic term 'ecu' used by the Treaty to refer to the European currency unit.[310]

This decision of the "member States meeting within" the European Union has been regarded, in the literature, as a subsequent agreement under article 31, paragraph 3 (*a*).[311]

(13) It is sometimes difficult to determine whether "member States meeting within" a plenary organ of an international organization intend to act in their capacity as members of that organ, as they usually do, or whether they intend to act in their independent capacity as States parties to the constituent instrument of the organization.[312] The Court of Justice of the European Union, when confronted with this question, initially proceeded from the wording of the act in question:

> It is clear from the wording of that provision that acts adopted by representatives of the member States acting, not in their capacity as members of the Council, but as representatives of their governments, and thus collectively exercising the powers of the member States, are not subject to judicial review by the Court.[313]

Later, however, the Court accorded decisive importance to the "content and all the circumstances in which [the decision] was adopted" in order to determine whether the decision was that of the organ or of the member States themselves as parties to the treaty:

> Consequently, it is not enough that an act should be described as a "decision of the member States" for it to be excluded from review under Article 173 of the Treaty [establishing the European Economic Community]. In order for such an act to be excluded from review, it must still be determined whether, having regard to its content and all the circumstances in which it was adopted, the act in question is not in reality a decision of the Council.[314]

(14) Apart from subsequent agreements or subsequent practice which establish the agreement of all the parties under article 31, paragraph 3 (*a*) and (*b*), other subsequent practice by one or more parties in the application of the constituent instrument of an international organization may also be relevant for the interpretation of that treaty.[315] Constituent instruments of international organizations, like other multilateral treaties, are, for example, sometimes implemented by subsequent bilateral or regional agreements or practice.[316] Such bilateral treaties are not, as such, subsequent agreements under article 31, paragraph 3 (*a*), if only because they are concluded between a limited number of the parties to the multilateral constituent instrument. They may, however, imply assertions concerning the interpretation of the constituent instrument itself and may serve as supplementary means of interpretation under article 32.

(15) *Paragraph 2 of draft conclusion 11* highlights a particular way in which subsequent agreements and subsequent practice under article 31, paragraph 3, and article 32 may arise or be expressed. Subsequent agreements and subsequent practice of States parties may "arise from" their reactions to the practice of an international organization in the application of a constituent instrument. Alternatively, subsequent agreements and subsequent practice of States parties to a constituent agreement

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[305] *Land and Maritime Boundary between Cameroon and Nigeria*, Preliminary Objections, Judgment, *I.C.J. Reports 1998*, p. 275, at p. 305, para. 65.

[306] *Ibid*., pp. 306–307, para. 67.

[307] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Judgment, *I.C.J. Reports 2014*, p. 226, at p. 248, para. 46; see also footnote 335 below and accompanying text.

[308] See articles 39 to 41 of the 1969 Vienna Convention.

[309] See "Madrid European Council, Conclusions of the Presidency", *European Union Bulletin*, No. 12 (1995), p. 10, I.A.I.

[310] *Ibid*.

[311] See A. Aust, *Treaty Law and Modern Practice*, 3rd ed. (Cambridge, Cambridge University Press, 2013), p. 215; G. Hafner, "Subsequent agreements and practice: between interpretation, informal modification and formal amendment", *in* G. Nolte (ed.), *Treaties and Subsequent Practice* (Oxford, Oxford University Press, 2013), p. 105, at pp. 109–110.

[312] See P. J. G. Kapteyn and P. VerLoren van Themaat, *Introduction to the Law of the European Communities*, 3rd ed. (London, Kluwer Law International, 1998), pp. 340–343.

[313] Joined Cases C-181/91 and C-248/91, *European Parliament v. Council of the European Communities and Commission of the European Communities* [1993], *European Court Reports 1993 I-3713*, para. 12.

[314] *Ibid*., para. 14.

[315] See draft conclusions 1, paragraph 4, and 4, paragraph 3, provisionally adopted by the Commission in 2013, *Yearbook … 2013*, vol. II (Part Two), p. 17; see, in particular, para. (10) of the commentary to draft conclusion 1, *ibid*., p. 20, and paras. (22)–(36) of the commentary to draft conclusion 4, *ibid*., pp. 31–34.

[316] This is true, for example, of the 1944 Convention on International Civil Aviation; see P. P. C. Haanappel, "Bilateral air transport agreements—1913–1980", *The International Trade Law Journal*, vol. 5, No. 2 (1980), p. 241; L. Tomas, "Air transport agreements, regulation of liability", *in* R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, vol. I (Oxford, Oxford University Press, 2012), p. 242 (online edition: http://opil.ouplaw.com/home/mpil); B.F. Havel, *Beyond Open Skies: A New Regime for International Aviation* (Alphen aan den Rijn, Kluwer Law International, 2009), p. 10.

may be "expressed in" the practice of an international organization in the application of a constituent instrument. "Arise from" is intended to encompass the generation and development of subsequent agreements and subsequent practice, while "expressed in" is used in the sense of reflecting and articulating such agreements and practice. Either variant of the practice in an international organization may reflect subsequent agreements or subsequent practice by the States parties to the constituent instrument of the organization (see draft conclusion 4).[317]

(16) In its advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, the International Court of Justice recognized the possibility that the practice of an organization may reflect an agreement or the practice of the Member States as parties to the treaty themselves, but found that the practice in that case did not "express or amount to" a subsequent practice under article 31, paragraph 3 (*b*):

> Resolution WHA46.40 itself, adopted, not without opposition, as soon as the question of the legality of the use of nuclear weapons was raised at the WHO, could not be taken to express or to amount on its own to a practice establishing an agreement between the members of the Organization to interpret its Constitution as empowering it to address the question of the legality of the use of nuclear weapons.[318]

(17) In this case, when considering the relevance of a resolution of an international organization for the interpretation of its constituent instrument, the Court considered, in the first place, whether the resolution expressed or amounted to "a practice establishing agreement between the members of the Organization" under article 31, paragraph 3 (*b*).[319]

(18) In a similar way, the WTO Appellate Body has stated in general terms:

> Based on the text of Article 31 (3) (*a*) of the *Vienna Convention*, we consider that a decision adopted by Members may qualify as a "subsequent agreement between the parties" regarding the interpretation of a covered agreement or the application of its provisions if: (i) the decision is, in a temporal sense, adopted subsequent to the relevant covered agreement; and (ii) the terms and content of the decision express an *agreement* between Members on the *interpretation* or *application* of a provision of WTO law.[320]

(19) Regarding the conditions under which a decision of a plenary organ may be considered to be a subsequent agreement under article 31, paragraph 3 (*a*), the WTO Appellate Body held:

> 263. With regard to the first element, we note that the Doha Ministerial Decision was adopted by consensus on 14 November 2001 on the occasion of the Fourth Ministerial Conference of the WTO … With regard to the second element, the key question to be answered is whether paragraph 5.2 of the Doha Ministerial Decision expresses an *agreement* between Members on the *interpretation or application* of the term "reasonable interval" in Article 2.12 of the *TBT Agreement*.
>
> 264. We recall that paragraph 5.2 of the Doha Ministerial Decision provides:
>
> "Subject to the conditions specified in paragraph 12 of Article 2 of the Agreement on Technical Barriers to Trade, the phrase "reasonable interval" shall be understood to mean normally a period of not less than 6 months, except when this would be ineffective in fulfilling the legitimate objectives pursued."
>
> 265. In addressing the question of whether paragraph 5.2 of the Doha Ministerial Decision expresses an agreement between Members on the interpretation or application of the term "reasonable interval" in Article 2.12 of the *TBT Agreement*, we find useful guidance in the Appellate Body reports in *EC—Bananas III (Article 21.5—Ecuador II) / EC—Bananas III (Article 21.5—US)*. The Appellate Body observed that the International Law Commission (the "ILC") describes a subsequent agreement within the meaning of Article 31 (3) (*a*) of the *Vienna Convention* as "a further *authentic element of interpretation* to be taken into account together with the context". According to the Appellate Body, "by referring to 'authentic interpretation', the ILC reads Article 31 (3) (*a*) as referring to *agreements bearing specifically upon the interpretation of the treaty*." Thus, we will consider whether paragraph 5.2 bears specifically upon the interpretation of Article 2.12 of the *TBT Agreement*.
>
> …
>
> 268. For the foregoing reasons, we *uphold* the Panel's finding … that paragraph 5.2 of the Doha Ministerial Decision constitutes a subsequent agreement between the parties, within the meaning of Article 31(3)(*a*) of the *Vienna Convention*, on the interpretation of the term "reasonable interval" in Article 2.12 of the *TBT Agreement*.[321]

(20) The International Court of Justice, although it did not expressly mention article 31, paragraph 3 (*a*), when relying on the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations[322] for the interpretation of Article 2, paragraph 4, of the Charter, emphasized the "attitude of the Parties and the attitude of States towards certain General Assembly resolutions" and their consent thereto.[323] In this context, a number of

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[317] R. Higgins, "The development of international law by the political organs of the United Nations", *Proceedings of the American Society of International Law*, fifty-ninth annual meeting, p. 116, at p. 119; the practice of an international organization, in addition to arising from, or being expressed in, an agreement or the practice of the parties themselves under paragraph 2, may also be a means of interpretation in itself under paragraph 3 (see below at paras. (25)–(35) of the present commentary).

[318] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion (see footnote 299 above), p. 81, para. 27.

[319] The Permanent Court of International Justice had adopted this approach in its *Competence of the International Labour Organization to Regulate, Incidentally, the Personal Work of the Employer*, Advisory Opinion, 1926, *P.C.I.J., Series B—No. 13*, pp. 19–20; see S. Engel, "'Living' International Constitutions and the World Court (The Subsequent Practice of International Organs under their Constituent Instruments)", *International and Comparative Law Quarterly*, vol. 16 (1967), p. 865, at p. 871.

[320] WTO Appellate Body Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012, para. 262.

[321] *Ibid*., paras. 263–265 and 268 (footnotes omitted); although the Doha Ministerial Decision does not concern a provision of the WTO Agreement itself, it concerns an annex to that Agreement (the "TBT Agreement") which is an "integral part" of the Marrakesh Agreement establishing the World Trade Organization (art. 2, para. 2 of the WTO Agreement). For the *EC—Bananas III* case, see Appellate Body Reports, *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*, WT/DS27/AB/RW2/ECU and Corr.1, adopted 11 December 2008, *European Communities—Regime for the Importation, Sale and Distribution of Bananas—Recourse to Article 21.5 of the DSU by the United States*, WT/DS27/AB/RW/USA and Corr.1, adopted 22 December 2008, para. 390. For the Commission's text included in the quotation, see *Yearbook … 1966*, vol. II, document A/6309/Rev.1, p. 221, para. (14).

[322] General Assembly resolution 2625 (XXV), 24 October 1970, annex.

[323] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, *I.C.J. Reports 1986*, p. 14, at p. 100, para. 188: "The effect of consent to the text of such resolutions cannot be understood as merely that of a 'reiteration or elucidation' of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves." This statement, whose primary purpose is to explain the possible role of General Assembly resolutions for the formation of customary law, also recognizes the treaty-related point that such resolutions may serve to express the agreement, or the positions, of the parties regarding a certain interpretation of the Charter of the United Nations as a treaty ("elucidation"); similarly, *Accordance with International Law of the Unilateral*

writers have concluded that subsequent agreements within the meaning of article 31, paragraph 3 (*a*), may, under certain circumstances, arise from or be expressed in acts of plenary organs of international organizations,[324] such as the General Assembly of the United Nations.[325] Indeed, as the WTO Appellate Body has indicated with reference to the Commission,[326] the characterization of a collective decision as an "authentic element of interpretation" under article 31, paragraph 3 (*a*), is only justified if the parties to the constituent instrument of an international organization acted as such, and not, as they usually do, institutionally as members of the respective plenary organ.[327]

(21) Paragraph 2 refers to the practice of an international organization, rather than to the practice of an organ of an international organization. The practice of an international organization can arise from the conduct of an organ but can also be generated by the conduct of two or more organs.

(22) Subsequent agreements and subsequent practice of the parties, which may "arise from, or be expressed in" the practice of an international organization, may sometimes be very closely interrelated with the practice of the organization as such. For example, in its *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* advisory opinion, the International Court of Justice arrived at its interpretation of the term "concurring votes" in Article 27, paragraph 3, of the Charter of the United Nations as including abstentions primarily by relying on the practice of the competent organ of the Organization in combination with the fact that this practice was then "generally accepted" by Member States:

> … the proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions … This procedure followed by the Security Council, which has continued unchanged after the amendment in 1965 of Article 27 of the Charter, has been generally accepted by Members of the United Nations and evidences a general practice of that Organization.[328]

In this case, the Court emphasized both the practice of one or more organs of the international organization and the "general acceptance" of that practice by the Member States, and characterized the combination of those two elements as being a "general practice of the Organization".[329] The Court followed this approach in its advisory opinion regarding *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* by stating that:

> The Court considers that the *accepted** practice of the General Assembly, as it has evolved, is consistent with Article 12, paragraph 1, of the Charter.[330]

By speaking of the "accepted practice of the General Assembly", the Court implicitly affirmed that acquiescence on behalf of the Member States regarding the practice followed by the Organization in the application of the treaty permits agreement regarding the interpretation of the relevant treaty provision to be established.[331]

Declaration of Independence in Respect of Kosovo, Advisory Opinion (see footnote 294 above), p. 437, para. 80; in this sense, for example, L. B. Sohn, "The UN System as authoritative interpreter of its law", *in* O. Schachter and C .C. Joyner (eds.), *United Nations Legal Order*, vol. 1 (Cambridge, American Society of International Law/Cambridge University Press, 1995), p. 169, at pp. 176–177 (noting in regard to the *Nicaragua* case that "[t]he Court accepted the Friendly Relations Declaration as an authentic interpretation of the Charter").

[324] H. G. Schermers and N. M. Blokker, *International Institutional Law*, 5th ed. (Leiden/Boston, Martinus Nijhoff, 2011), p. 854 (referring to interpretations by the Assembly of the Oil Pollution Compensation Fund regarding the constituent instruments of the Fund); M. Cogen, "Membership, associate membership and pre-accession arrangements of CERN, ESO, ESA, and EUMETSAT", *International Organizations Law Review*, vol. 9 (2012), p. 145, at pp. 157–158 (referring to a unanimously adopted decision of the European Organization for Nuclear Research (CERN) Council of 17 June 2010 interpreting the admission criteria established in the Convention for the Establishment of a European Organization for Nuclear Research as a subsequent agreement under article 31, paragraph 3 (*a*)).

[325] See E. Jiménez de Aréchaga, "International law in the past third of a century", *Collected Courses of the Hague Academy of International Law 1978-I*, vol. 159, p. 32 (stating in relation to the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations that "[t]his Resolution … constitutes an authoritative expression of the views held by the totality of the parties to the Charter as to these basic principles and certain corollaries resulting from them. In the light of these circumstances it seems difficult to deny the legal weight and authority of the Declaration both as a resolution recognizing what the Members themselves believe constitute existing rules of customary law and as an interpretation of the Charter by the subsequent agreement and the subsequent practice of all its Members"); O. Schachter, "International law in theory and practice. general course in public international law", *Collected Courses of the Hague Academy of International Law 1982-V,* vol. 178, p. 113 ("the law-declaring resolutions that construed and 'concretized' the principles of the Charter—whether as general rules or in regard to particular cases—may be regarded as authentic interpretation by the parties of their existing treaty obligations. To that extent they were interpretation, and agreed by all the Member States, they fitted comfortably into an established source of law" (footnotes omitted)); P. Kunig, "United Nations Charter, interpretation of", *in* R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, vol. X (Oxford, Oxford University Press, 2012), p. 272, at p. 275 (stating that, "[i]f passed by consensus, [General Assembly resolutions] are able to play a major role in the … interpretation of the UN Charter") (online edition available from: http://opil.ouplaw.com/home/MPIL); Aust (see footnote 311 above), p. 213 (mentioning that General Assembly resolution 51/210 ("Measures to eliminate international terrorism") of 17 December 1996 can be seen as a subsequent agreement about the interpretation of the Charter of the United Nations). All resolutions to which the writers are referring were adopted by consensus.

[326] WTO Appellate Body Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes* (see footnote 320 above), para. 265.

[327] Y. Bonzon, *Public Participation and Legitimacy in the WTO* (Cambridge, Cambridge University Press, 2014), pp. 114–115.

[328] *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. 22.

[329] H. Thirlway, "The law and procedure of the International Court of Justice 1960–1989 (Part Two)", *British Year Book of International Law*, vol. 61 (1990), p. 1, at p. 76 (mentioning that "[t]he Court's reference to the practice as being 'of' the Organization is presumably intended to refer, not to a practice followed by the Organization as an entity in its relations with other subjects of international law, but rather a practice followed, approved or respected throughout the Organization. Seen in this light, the practice is … rather a recognition by the other members of the Security Council at the relevant moment, and indeed by all Member States by tacit acceptance, of the validity of such resolutions").

[330] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *I.C.J. Reports 2004*, p. 136, at p. 150.

[331] See draft conclusion 9, paragraph 2, provisionally adopted by the Commission in 2014, and, in particular, paras. (13)–(24) of the commentary, *Yearbook … 2014*, vol. II (Part Two), pp. 125–127; see also M. E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden, Martinus Nijhoff, 2009), pp. 431–432, para. 22; J. Arato, "Treaty interpretation and constitutional transformation: informal change in international organizations", *Yale Journal of International Law*, vol. 38, No. 2 (2013), p. 289, at p. 322.

(23) On this basis it is reasonable to consider "that relevant practice will usually be that of those on whom the obligation of performance falls",[332] in the sense that "where States by treaty entrust performance of activities to an organization, how those activities are conducted can constitute practice under the treaty; but whether such practice establishes agreement of the parties regarding the treaty's interpretation may require account to be taken of further factors."[333]

(24) Accordingly, in the *Whaling in the Antarctic* case, the International Court of Justice referred to (non-binding) recommendations of the International Whaling Commission (which is both the name of an international organization established by the International Convention for the Regulation of Whaling[334] and that of an organ thereof) and clarified that, when such recommendations are "adopted by consensus or by a unanimous vote, they may be relevant for the interpretation of the Convention or its Schedule."[335] At the same time, however, the Court also expressed a cautionary note, according to which

> … Australia and New Zealand overstate the legal significance of the recommendatory resolutions and Guidelines on which they rely. First, many IWC resolutions were adopted without the support of all States parties to the Convention and, in particular, without the concurrence of Japan. Thus, such instruments cannot be regarded as subsequent agreement to an interpretation of Article VIII, nor as subsequent practice establishing an agreement of the parties regarding the interpretation of the treaty within the meaning of subparagraphs (*a*) and (*b*), respectively, of paragraph (3) of Article 31 of the Vienna Convention on the Law of Treaties.[336]

(25) This cautionary note does not, however, exclude the possibility that a resolution which has been adopted without the support of all member States may give rise to, or express, the position or the practice of individual member States in the application of the treaty, which may be taken into account under article 32.[337]

(26) *Paragraph 3 of draft conclusion 11* refers to another form of practice which may be relevant for the interpretation of a constituent instrument of an international organization: the practice of the organization *as such*, meaning its "own practice", as distinguished from the practice of the member States. The International Court of Justice has in some cases taken the practice of an international organization into account in its interpretation of constituent instruments without referring to the practice or acceptance of the member States of the organization. In particular, the Court has stated that the international organization's "own practice … may deserve special attention" in the process of interpretation.[338]

(27) For example, in its advisory opinion on the *Competence of the General Assembly for the Admission of a State to the United Nations*, the Court stated that:

> [t]he organs to which Article 4 entrusts the judgment of the Organization in matters of admission have consistently interpreted the text in the sense that the General Assembly can decide to admit only on the basis of the recommendation of the Security Council.[339]

(28) Similarly, in *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, the Court referred to acts of organs of the organization when it referred to the practice of "the United Nations":

> In practice, according to the information supplied by the Secretary-General, the United Nations has had occasion to entrust missions—increasingly varied in nature—to persons not having the status of United Nations officials … In all these cases, the practice of the United Nations shows that the persons so appointed, and in particular the members of these committees and commissions, have been regarded as experts on missions within the meaning of Section 22.[340]

(29) In its advisory opinion concerning the *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization* [later the International Maritime Organization], the International Court of Justice referred to "the practice followed by the Organization itself in carrying out the Convention [establishing the Inter-Governmental Maritime Consultative Organization]" as a means of interpretation.[341]

(30) In its advisory opinion on *Certain expenses of the United Nations*, the Court explained why the practice of an international organization, as such, including that of a particular organ, may be relevant for the interpretation of its constituent instrument:

> Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted; the opinion which the Court is in course of rendering is an *advisory* opinion. As anticipated in 1945, therefore, each organ must, in the first place at least, determine its own jurisdiction. If the Security Council, for example, adopts a resolution purportedly for the maintenance of international peace and security and if, in accordance with a mandate or authorization in such resolution, the Secretary-General incurs financial obligations, these amounts must be presumed to constitute "expenses of the Organization".[342]

(31) Many international organizations share the same characteristic of not providing for an "ultimate authority to interpret" their constituent instrument. The conclusion which the Court has drawn from this circumstance is

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[332] Gardiner (see footnote 294 above), p. 281.

[333] *Ibid.*

[334] S. Schiele, *Evolution of International Environmental Regimes: The Case of Climate Change* (Cambridge, Cambridge University Press, 2014), pp. 37–38; A. Gillespie, *Whaling Diplomacy: Defining Issues in International Environmental Law* (Cheltenham, Edward Elgar, 2005), p. 411.

[335] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)* (see footnote 307 above), para. 46.

[336] *Ibid*., para. 83.

[337] See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (see footnote 330 above), p. 149 (referring to General Assembly resolutions 1600 (XV) of 15 April 1961 (adopted with 60 votes in favour, 23 abstentions and 16 votes against, including the USSR and other States of the "Eastern bloc") and 1913 (XVIII) of 3 December 1963 (adopted by 91 affirmative votes over the two negative votes of Spain and Portugal).

[338] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (see footnote 299 above), p. 75. See also D. Simon, *L'interprétation judiciaire des traités d'organisations internationales* (Paris, Pedone, 1981), pp. 379–384.

[339] *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, *I.C.J. Reports 1950*, p. 4, at p. 9.

[340] *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, Advisory Opinion, *I.C.J. Reports 1989*, p. 177, at p. 194, para. 48.

[341] *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.

[342] *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (see footnote 300 above), p. 168.

therefore now generally accepted as being applicable to international organizations.[343] The identification of a presumption, in the *Certain expenses of the United Nations* advisory opinion, which arises from the practice of an international organization, including by one or more of its organs, is a way of recognizing such practice as a means of interpretation.[344]

(32) Whereas it is generally agreed that the interpretation of the constituent instruments of international organizations by the practice of their organs constitutes a relevant means of interpretation,[345] certain differences exist among writers about how to explain the relevance, for the purpose of interpretation, of an international organization's "own practice" in terms of the Vienna rules of interpretation.[346] Such practice can, at a minimum, be conceived as a supplementary means of interpretation under article 32.[347] The Court, by referring to acts of international organizations which were adopted against the opposition of certain member States,[348] has recognized that such acts may constitute practice for the purposes of interpretation, but generally not a (more weighty) practice that establishes agreement between the parties regarding the interpretation and which would fall under article 31, paragraph 3. Writers largely agree, however, that the practice of an international organization, as such, will often also be relevant for clarifying the ordinary meaning to be given to the terms of a treaty in their context and in the light of its object and purpose.[349]

(33) The Commission has confirmed, in its commentary to draft conclusion 1, that "given instances of subsequent practice and subsequent agreements contributed, or not, to the determination of the ordinary meaning of the terms in their context and in the light of the object and purpose of the treaty".[350] These considerations are also relevant with regard to the practice of an international organization itself.

(34) The possible relevance of an international organization's "own practice" can thus be derived from article 31, paragraph 1, and article 32 of the 1969 Vienna Convention. Those rules permit, in particular, taking into account the practice of an organization itself, including by one or more of its organs, as being relevant for the determination of the object and purpose of a treaty, including the function of the international organization concerned, under article 31, paragraph 1.[351]

(35) Thus, article 5 of the Vienna Convention allows for the application of the rules of interpretation in articles 31 and 32 in a way which takes account of the practice of an international organization, in the interpretation of its constituent instrument, including taking into account its institutional character.[352] Such elements may thereby also contribute to identifying whether, and if so how, the meaning of a provision of a constituent instrument of an international organization is capable of evolving over time.[353]

(36) Paragraph 3, like paragraph 2, refers to the practice of an international organization as a whole, rather than to the practice of an organ of an international organization. The practice of a particular international organization can

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[343] J. Klabbers, *An Introduction to International Institutional Law*, 2nd ed. (Cambridge, Cambridge University Press, 2009), p. 90; C. F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2nd ed. (Cambridge, Cambridge University Press, 2005), p. 25; J. E. Alvarez, *International Organizations as Law-makers* (Oxford, Oxford University Press, 2005), p. 80; Rosenne (footnote 290 above), pp. 224–225.

[344] 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, p. 377, at p. 460; N. Blokker, "Beyond 'Dili': on the powers and practice of international organizations", *in* G. Kreijen (ed.), *State, Sovereignty, and International Governance* (Oxford, Oxford University Press, 2002), p. 299, at pp. 312–318.

[345] C. Brölmann, "Specialized rules of treaty interpretation: international organizations", *in* D.B. Hollis (ed.), *The Oxford Guide to Treaties* (Oxford, Oxford University Press, 2012), p. 507, at pp. 520–521; S. Kadelbach, "Interpretation of the Charter", *in* B. Simma and others (eds.), *The Charter of the United Nations: A Commentary*, 3rd ed., vol. I (Oxford, Oxford University Press, 2012), p. 71, at p. 80; Gardiner (footnote 294 above), pp. 127 and 281.

[346] Gardiner (footnote 294 above), p. 282; Schermers and Blokker (footnote 324 above), p. 844; J. Crawford, *Brownlie's Principles of Public International Law*, 8th ed. (Oxford, Oxford University Press, 2012), p. 187; Klabbers (footnote 343 above), pp. 89–90; see also *Partial Award on the lawfulness of the recall of the privately held shares on 8 January 2001 and the applicable standards for valuation of those shares*, 22 November 2002, United Nations, *Reports of International Arbitral Awards*, vol. XXIII (Sales No. E/F.04.V.15), p. 183, at p. 224, para. 145.

[347] The Commission may revisit the definition of "other subsequent practice" in draft conclusions 1, para. 4, and 4, para. 3, provisionally adopted by the Commission at its sixty-fifth session, in order to clarify whether the practice of an international organization as such should be classified within this category which, so far, is limited to the practice of Parties; see *Yearbook … 2013*, vol. II (Part Two), paras. 38–39.

[348] See footnote 337 above.

[349] The International Court of Justice used the expression "purposes and functions as specified or implied in its constituent documents and developed in practice", *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion, *I.C.J. Reports 1949*, p. 174, at p. 180.

[350] *Yearbook … 2013*, vol. II (Part Two), p. 21 (para. (15) of the commentary, footnote 58); see, in particular, *Land and Maritime Boundary between Cameroon and Nigeria* (footnote 305 above), pp. 306–307, para. 67.

[351] See *South-West Africa—Voting Procedure*, Advisory Opinion of June 7th, 1955, *I.C.J. Reports 1955*, p. 67, at p. 106 (Separate Opinion of Judge Lauterpacht: "A proper interpretation of a constitutional instrument must take into account not only the formal letter of the original instrument, but also its operation in actual practice and in the light of the revealed tendencies in the life of the Organization").

[352] There is debate among commentators as to whether the specific institutional character of certain international organizations, in combination with the principles and values which are enshrined in their constituent instruments, could also yield a "constitutional" interpretation of such instruments that draws inspiration from national constitutional law; see, for example, J. E. Alvarez, "Constitutional interpretation in international organizations", *in* J.-M. Coicaud and V. Heiskanen (eds.), *The Legitimacy of International Organizations* (Tokyo, United Nations University Press, 2001), pp. 104–154;. A. Peters, "L'acte constitutif de l'organisation internationale", in E. Lagrange and J.-M. Sorel (eds.), *Droit des organisations internationales* (Paris, Librairie générale de droit et de jurisprudence, 2013), p. 201, at pp. 216–218; M. Wood, "'Constitutionalization' of international law: a sceptical voice", *in* K.H. Kaikobad, M Bohlander (eds.), *International Law and Power: Perspectives on Legal Order and Justice—Essays in Honour of Colin Warbrick* (Leiden, Martinus Nijhoff, 2009), pp. 85–97.

[353] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (*see footnote 328 above), pp. 31–32, para. 53. See also draft conclusion 3, provisionally adopted by the Commission at its sixty-fifth session, and commentary thereto, *Yearbook … 2013*, vol. II (Part Two), pp. 24–28; see also O. Dörr, "Article 31—General rule of interpretation", *in* Dörr and Schmalenbach (eds.), *Vienna Convention on the Law of Treaties—A Commentary* (footnote 291 above), p. 537, para. 31; Schmalenbach, "*Article 5…*" (footnote 291 above), p. 92, para. 7.

arise from the conduct of an organ, but can also be generated by the conduct of two or more organs.[354] It is understood that the practice of an international organization can only be relevant for the interpretation of its constituent instrument if that organization is competent, since it is a general requirement that international organizations do not act *ultra vires*.[355]

(37) Paragraph 3 of draft conclusion 11 builds on the previous work of the Commission. Draft conclusion 5 addresses "subsequent practice" as defined in draft conclusion 4, which concerns conduct by *parties* to a treaty in the application of that treaty. Draft conclusion 5 does not imply that the practice of an international organization, as such, in the application of its constituent instrument cannot be relevant practice under articles 31 and 32. In its commentary to draft conclusion 5, the Commission has explained that:

> Decisions, resolutions and other practice by international organizations can be relevant for the interpretation of treaties in their own right. This is recognized, for example, in article 2, paragraph 1 (*j*), of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations … which mentions the "established practice of the organization" as one form of the "rules of the organization".[356]

(38) *Paragraph 4 of draft conclusion 11* reflects article 5 of the 1969 Vienna Convention and its formulation borrows from that article. The paragraph applies to the situations covered under paragraphs 1 to 3 and ensures that the rules referred to therein are applicable, interpreted and applied "without prejudice to any relevant rules of the organization". The term "rules of the organization" is to be understood in the same way as in article 2, paragraph 1 (*j*), of the 1986 Vienna Convention, as well as in article 2 (*b*) of the 2011 articles on responsibility of international organizations.[357]

(39) The Commission has stated, in its general commentary to the 2011 articles on the responsibility of international organizations:

> There are very significant differences among international organizations with regard to their powers and functions, size of membership, relations between the organization and its members, procedures for deliberation, structure and facilities, as well as the primary rules including treaty obligations by which they are bound.[358]

(40) Paragraph 4 implies, *inter alia*, that more specific "relevant rules" of interpretation which may be contained in a constituent instrument of an international organization may take precedence over the general rules of interpretation under the Vienna Convention.[359] If, for example, the constituent instrument contains a clause according to which the interpretation of the instrument is subject to a special procedure, it is to be presumed that the parties, by reaching an agreement after the conclusion of the treaty, do not wish to circumvent such a procedure by reaching a subsequent agreement under article 31, paragraph 3 (*a*). The special procedure under the treaty and a subsequent agreement under article 31, paragraph 3 (*a*), may, however, be compatible if they "serve different functions and have different legal effects".[360] Few constituent instruments contain explicit procedural or substantive rules regarding their interpretation.[361] Specific "relevant rules" of interpretation need not be formulated explicitly in the constituent instrument; they may also be implied therein, or derive from the "established practice of the organization".[362] The "established practice of the organization" is a term which is narrower in scope than the term "practice of the organization" as such.

(41) The Commission noted, in its commentary to article 2 (*j*) of the draft articles on the law of treaties between States and international organizations or between international organizations, which it adopted at its thirty-third and thirty-fourth sessions, that the significance of a particular practice of an organization may depend on the specific rules and characteristics of the respective organization, as expressed in its constituent instrument:

> It is true that most international organizations have, after a number of years, a body of practice which forms an integral part of their rules. However, the reference in question is in no way intended to suggest that practice has the same standing in all organizations; on the contrary, each organization has its own characteristics in that respect.[363]

(42) In this sense, the "established practice of the organization" may also be a means of interpreting the constituent instruments of international organizations. Article 2, paragraph 1 (*j*), of the 1986 Vienna Convention and article 2 (*b*) of the articles on the responsibility of international organizations[364] recognize the "established practice of the organization" as a "rule of the organization". Such practice may produce different legal effects in different organizations and it is not always clear whether those

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[354] See paragraph (21) of the present commentary above.

[355] *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (see footnote 300 above), p. 168 ("But when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization").

[356] *Yearbook … 2013*, vol. II (Part Two), p. 36 (para. (14) of the commentary). The Commission may, however, eventually revisit the formulation of draft conclusion 5 in the light of draft conclusion 11 in order to clarify their relationship. See also footnote 347 above.

[357] Draft articles on the responsibility of international organizations adopted by the Commission at its sixty-third session, *Yearbook … 2011*, vol. II (Part Two), para. 87. The articles on the responsibility of international organizations are contained in the annex to General Assembly resolution 66/100 of 9 December 2011.

[358] *Yearbook … 2011*, vol. II (Part Two), p. 47 (general commentary, para. (7)).

[359] See, for example, Klabbers (footnote 343 above), p. 88; Schmalenbach, "Article 5 …" (footnote 291 above), p. 89, para. 1 and p. 96, para. 15; Brölmann (footnote 345 above), p. 522; Dörr, "Article 31 …" (footnote 353 above), pp. 537–538, para. 32.

[360] WTO Appellate Body Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes* (see footnote 320 above), paras. 252–257, in particular para. 257.

[361] Most so-called interpretation clauses determine which organ is competent authoritatively to interpret the treaty, or certain of its provisions, but do not formulate specific rules "on" interpretation itself; see C. Fernández de Casadevante y Romani, *Sovereignty and Interpretation of International Norms* (Berlin, Springer, 2007), pp. 26–27; Dörr, "Article 31 …" (footnote 353 above), pp. 537–538, para. 32.

[362] See 1986 Vienna Convention, art. 2, para. 1 (*j*), and the Commission's draft articles on the responsibility of international organizations, art. 2 (*b*) (*Yearbook … 2011*, vol. II (Part Two), para. 87); see also C. Peters, "Subsequent practice and established practice of international organizations: two sides of the same coin?", *Göttingen Journal of International Law*, vol. 3, No. 2 (2011), pp. 617–642.

[363] *Yearbook ... 1982*, vol. II (Part Two), p. 21 (para. (25) of the commentary to article 2 (footnotes omitted)).

[364] *Yearbook … 2011*, vol. II (Part Two), para. 87.

effects should be explained primarily in terms of traditional sources of international law (treaty or custom) or of institutional law.[365] But even if it is difficult to make general statements, the "established practice of the organization" usually encompasses a specific form of practice,[366] one which has generally been accepted by the members of the organization, albeit sometimes tacitly.[367]

[365] Higgins (see footnote 317 above), p. 121 ("The aspects of treaty interpretation and customary practice in this field merge very closely"); Peters, "Subsequent practice …" (see footnote 362 above), pp. 630–631 ("It should be considered a kind of customary international law of the organization"); it is not persuasive to limit the "established practice of the organization" to so-called internal rules since, according to the Commission, "[t]here would have been problems in referring to the 'internal law' of an organization, for while it has an internal aspect, this law also has in other respects an international aspect" (*Yearbook … 1982*, vol. II (Part Two), p. 21 (para. (25) of the commentary to article 2 of the draft articles on the law of treaties between States and international organizations or between international organizations adopted by the Commission at its thirty-third and thirty-fourth sessions)); Schermers and Blokker (see footnote 324 above), p. 766; but see C. Ahlborn, "The rules of international organizations and the law of international responsibility", *International Organizations Law Review*, vol. 8 (2011), p. 397, at. pp. 424–428.

[366] Blokker, "Beyond 'Dili' …" (see footnote 344 above), p. 312.

[367] Lauterpacht (see footnote 344 above), p. 464 ("consent of the general body of membership"); Higgins (see footnote 317 above), p. 121 ("The degree and length of acquiescence need here perhaps to be less marked than elsewhere, because the U.N. organs undoubtedly have initial authority to make such decisions [regarding their own jurisdiction and competence]"); Peters, "Subsequent practice …" (see footnote 362 above), pp. 633–641.