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

Addendum

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

Draft 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).[50] 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".[51] The taking into account of subsequent agreements and subsequent practice under articles 31, paragraph 3, and 32 may thus contribute to a clarification of the meaning of a treaty[52] in the sense of a narrowing down (specifying) of possible meanings of a particular term or provision, or of the scope of the treaty as a whole (see paras. 4, 6–7, 10 and 11 below). Alternatively, such taking into account may contribute to a clarification in the sense of confirming a wider interpretation. Finally, it may contribute to understanding the range of possible interpretations available to

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[50] Commentary to draft conclusion 1, paragraph 5, paras. 12–15 (*Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10, chap IV.C.2), para. 39).

[51] Commentary to draft conclusion 1, paragraph 5, paras. 12–15 (*Ibid.*, para. 39).

[52] The terminology follows guideline 1.2 (Definition of interpretative declarations) of the Commission's Guide to Practice on Reservations to Treaties: "Interpretative declaration" means a unilateral statement, whereby … [a State or an international organization] purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions) (see *Ibid., Sixty-sixth Session, Supplement No. 10* (A/66/10/Add.1, chap. IV. F.2, guideline 1.2); see also *ibid*., commentary to guideline 1.2, para. 18.

the parties, including the scope for the exercise of discretion by the parties under the treaty (see paras. 12–15 below).

(3) International courts and tribunals usually begin their reasoning in a given case by determining the “ordinary meaning” of the terms of the treaty.[53] 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).[54] 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 contribute to shed light on this special meaning. The following examples[55] illustrate how subsequent agreements and subsequent practice as means of interpretation can contribute, in their interaction with other means in the process of interpretation, to the clarification of the meaning of a treaty.

(4) Subsequent agreements and subsequent practice can help identify the “ordinary meaning” of a particular term by confirming a narrow interpretation of different possible shades of meaning of the term. This was the case, for example,[56] in the *Nuclear Weapons Advisory Opinion* where the International Court of Justice determined that the expressions “poison or poisonous weapons” have been understood, in the practice of States, in their ordinary sense as covering weapons whose prime, or even exclusive, effect is to poison or asphyxiate. This practice is clear, and the parties to those instruments have not treated them as referring to nuclear weapons.[57]

(5) On the other hand, subsequent practice may prevent specifying the meaning of a general term to just one of different possible meanings.[58] For example, in the case of *U.S. Nationals in Morocco*, the Court stated:

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

[53] Commentary to draft conclusion 1, paragraph 5, p. 18, para. 14 (*Ibid., Sixty-eighth Session* A/68/10, chap. IV.2, , para. 39); *Competence of Assembly regarding admission to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, p. 4, at p. 8.

[54] 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 p. 34, paras. 66–71; *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213, at p. 290 (Declaration of Judge *ad hoc* Guillaume).

[55] For more examples see “Second report of the ILC Study Group on Treaties over Time: jurisprudence under special regimes relating to subsequent agreements and subsequent practice”, in *Treaties and Subsequent Practice*, G. Nolte, ed. (Oxford, Oxford University Press, 2013), pp. 210–306.

[56] See also *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803, at p. 815, para. 30; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 275, at p. 306, para. 67; *Competence of Assembly regarding Admission to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, p. 4, at p. 9.

[57] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 248, para. 55.

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

> more flexible than either of those which are respectively contended for by the parties in this case.[59]

(6) Different forms of practice may contribute to both a narrow and a broad interpretation of different terms in the same treaty. [60]

(7) A treaty shall be interpreted in accordance with the ordinary meaning of its terms "in their context" (article 31, paragraph 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.[61] In the *Intergovernmental Maritime Consultative Organization (IMCO) Advisory Opinion*, for example, the International Court of Justice had to determine the meaning of the expression "eight ... largest ship-owning nations" under article 28 (a) of the Convention on the International Maritime Organization (IMCO Convention). Since this concept of "largest ship-owning nations" permitted different interpretations (such as determination by "registered tonnage" or by "property of nationals"), and since there was no pertinent practice of the organization or its members under article 28 (a) itself, the Court turned to practice under other provisions in the Convention and held:

> This reliance upon registered tonnage in giving effect to different provisions of the Convention ... persuade[s] the Court to view that it is unlikely that when the latter article [Article 28 (a)] was drafted and incorporated into the Convention it was contemplated that any criterion other than registered tonnage should determine which were the largest shipping owning nations.[62]

(8) Together with the text and the context, article 31, paragraph1, accords importance to the "object and purpose" of a treaty for its interpretation.[63] Subsequent agreements and subsequent practice may also contribute to a clarification of the object and purpose of a treaty,[64] or reconcile invocations of the "object and purpose" of a treaty with other means of interpretation:

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[59] *Case concerning Rights of Nationals of the United States of America in Morocco, Judgment of August 27th, 1952, I.C.J. Reports 1952*, p. 176, at p. 211.

[60] See, *mutatis mutandis*, *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, 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 UN, at pp. 158–161 ("expenses") and pp. 164–165 ("action").

[61] 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.

[62] *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion, I.C.J. Reports 1960*, p. 150, at p. 169; see also pp. 167–169; obiter: *Proceedings pursuant to the OSPAR Convention (Ireland-United Kingdom), Reports of International Arbitral Awards*, vol. XXIII, p. 59, at p. 99, para. 141.

[63] Gardiner, *supra* note 3, pp. 190 and 198.

[64] *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 inter-temporal rule in international law", in *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski*, J. Makarczyk, ed. (The Hague, Kluwer, 1996), p. 180; Distefano, *supra* note 3, pp. 52–54; Crema, *supra* note 33, p. 21.

(9) In the *Maritime Delimitation in the Area between Greenland and Jan Mayen*[65] and *Oil Platforms* cases,[66] for example, the International Court of Justice clarified the object and purpose of bilateral treaties by referring to subsequent practice of the parties. And in the *Land and Maritime Boundary between Cameroon and Nigeria* case, the Court held:

> From the treaty texts and the practice analysed at paragraphs 64 and 65 above, it emerges that the Lake Chad Basin Commission is an international organization exercising its powers within a specific geographical area; that it does not, however, have as its purpose the settlement at a regional level of matters relating to the maintenance of international peace and security and thus does not fall under Chapter VIII of the Charter.[67]

(10) State practice other than in judicial or quasi-judicial contexts confirms that subsequent agreements and subsequent practice can contribute to clarifying the meaning of a treaty by either narrowing the range of conceivable interpretations or by indicating a certain margin of discretion which a treaty grants to States.

(11) For example, whereas the terms of article 5 of the 1944 Chicago Convention do not appear to require a charter flight to obtain permission to land while *en route*, long-standing State practice requiring such permission has led to general acceptance that this provision is to be interpreted as requiring permission.[68] Another case is Article 22 (3) of the Vienna Convention on Diplomatic Relations which provides that the means of transport used by a mission shall be immune from search, requisition, attachment or execution. While police enforcement against diplomatic properties will usually be met with protests of States,[69] the towing of diplomatic cars that have violated local traffic and parking laws generally has been regarded as permissible in practice.[70] 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.[71] 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.

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[65] *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, p. 38, at p. 51, para. 27.

[66] *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803, at p. 815, paras. 27 and 30.

[67] See also *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 275, at p. 306, para. 67.

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

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

[70] See, for example, Australia, Department of Foreign Affairs and Trade, *Privileges and Immunities of Foreign Representatives* (www.dfat.gov.au/protocol/Protocol_Guidelines/A21.pdf); Iceland, Protocol Department Ministry of Foreign Affairs, *Diplomatic Handbook*, p. 14 (www.mfa.is/media/PDF/Diplomatic_Handbook.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 cc3-4; United States, see *American Journal of International Law*, vol. ii, 1994, pp. 312–313.

[71] Denza, *supra* note 69, p. 160; M. Richtsteig, *Wiener Übereinkommen über diplomatische und konsularische Beziehungen: Entstehungsgeschichte, Kommentierung, Praxis*, 2nd ed. (Nomos, 2010), p. 70.

(12) Subsequent agreements or practice may not 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 they may also indicate a wider range of acceptable interpretations or a certain scope for the exercise of discretion which a treaty grants to States (see above para. 10).[72]

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

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

Although the term "shall" suggests that it is obligatory for States to use the distinctive emblem for marking medical personnel and transports under any circumstances, subsequent practice suggests that States possess some discretion with regard to its application.[73] 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.[74]

(14) Such apparently uncontested practice by States confirms an interpretation of article 12 according to which the general obligation to use the protective emblem[75] does not contain an obligation to use the protective emblem under any circumstances, and thereby indicates a margin of discretion for the parties.

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[72] This is not to suggest that there may exist different possible interpretations of a treaty, but rather that the treaty may accord the parties the possibility to choose from a spectrum of different permitted acts, see Gardiner, *supra* note 3, 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] AC 477: "It is necessary to determine the autonomous meaning of the relevant treaty provision … It follows that, as in the case of other multilateral treaties, the Refugee Convention must be given an independent meaning derivable from the sources mentioned in articles 31 and 32 [of the Vienna Convention] and without taking colour from distinctive features of the legal system of any individual contracting State. In principle there can only be one true interpretation of a treaty … In practice it is left to national courts, faced with a material disagreement on an issue of interpretation, to resolve it. But in doing so it must search, untrammelled by notions of its national legal culture, for the true autonomous international meaning of the treaty. And there can only be one true meaning", at pp. 515–517 (Lord Steyn).

[73] Y. Sandoz, C. Swinarski and B. Zimmermann, eds., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Dordrecht, International Committee of the Red Cross and Martinus Nijhoff, 1987), p. 1440, paras. 4742–4744; H. Spieker, "Medical transportation", in *Max Planck Encyclopedia of Public International Law* (www.mpepil.com), paras. 7–12; see also the less stringent future tense in the French version "sera arboré".

[74] Deutscher Bundestag, "Antwort der Bundesregierung: Rechtlicher Status des Sanitätspersonals der Bundeswehr in Afghanistan", 9 April 2010, Bundestagsdrucksache 17/1338, p. 2 (translation by the Special Rapporteur).

[75] Spieker, *supra* note 73, para. 12.

(15) A treaty provision which grants States discretion 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.[76] However, States have also made such declarations in more mundane circumstances, such as when envoys caused serious injury to a third party[77] or committed repeated infringement of the law,[78] or even to enforce their drink-drive laws.[79] 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* for purposes unrelated to political or similarly serious concerns. Thus, such practice suggests that article 9 provides a very broad right with a corresponding scope for the exercise of discretion.[80]

(16) Paragraph 2 of draft conclusion 7 concerns possible effects of "other subsequent practice" under article 32 (see draft conclusion 4, paragraph 3), which does not reflect an agreement of all parties regarding the interpretation of a treaty. Such practice, as a supplementary means of interpretation, can confirm the interpretation which the interpreter has reached in the application of article 31, or determine the meaning when the interpretation according to article 31 leaves the meaning ambiguous or obscure or leads to a 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, article 32 is applicable not only in a subsidiary way when the meaning of a treaty remains obscure, but also — and always — to confirm the meaning which has resulted from the application of article 31.[81]

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[76] See Denza, *supra* note 69, pp. 77–88 with further references to declarations in relation to espionage; see also Salmon, *supra* note 69, p. 484 para. 630; and Richtsteig, *supra* note 71, p. 30.

[77] The Netherlands, Protocol Department, Ministry of Foreign Affairs, Protocol Guide for Diplomatic Missions and Consular Posts. Available from www.government.nl/issues/staff-of-foreign-missions-and-international-organisations/documents-and-publications/leaflets/2013/01/21/protocol-guide-for-diplomatic-missions-en-consular-posts-january-2013.html.

[78] 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/ministry/guide-for-foreign-diplomats/immunities/article/respect-for-local-laws-and); Turkey, Ministry of Foreign Affairs, Traffic regulations to be followed by foreign missions in Turkey, Principal Circular Note, 63552 Traffic Regulations 2005/PDGY/63552 (6 April 2005) (http://www.mfa.gov.tr/06_04_2005--63552-traffic-regulations.en.mfa); United Kingdom, Foreign and Commonwealth Office, Circular dated 19 April 1985 to the Heads of Diplomatic Missions in London, reprinted in G. Marston, "United Kingdom materials on international law 1985", *British Yearbook of International Law*, vol. 56, No. 1 (1985), p. 437.

[79] See Canada, Foreign Affairs, Trade and Development, Revised Impaired Driving Policy (www.international.gc.ca/protocol-protocole/vienna-vienne/idp/index.aspx?view=d); United States, Department of State, *Diplomatic Note 10-181 of the Department of State* (24 September 2010), www.state.gov/documents/organization/149985.pdf, pp. 8–9.

[80] See G. Hafner, "Subsequent agreements and practice: between interpretation, informal modification, and formal amendment", in *Treaties and Subsequent Practice*, G. Nolte, ed. (Oxford, Oxford University Press, 2013), p. 112, for an even more far-reaching case under article 9 of the Vienna Convention on Diplomatic Relations.

[81] WTO Appellate Body China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, WT/DS363/AB/R para 403 (2009);

(17) 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.[82] In the *Kasikili/Sedudu Island* case, for example, the International Court of Justice emphasized that the parties to the 1890 Treaty "sought both to secure for themselves freedom of navigation on the river and to delimit as precisely as possible their respective spheres of influence."[83] 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).[84]

(18) Another example of "other subsequent practice" under article 32 concerns the term "feasible precautions" in article 57 of the Additional Protocol to the Geneva Conventions of 1949 (Protocol I) of 1977. This term has been clarified in effect by article 3 (4) of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II) of 10 October 1980, which provides that "[f]easible precautions are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations." This language has come to be accepted by way of subsequent practice in many military manuals as a general definition of "feasibility" for the purpose of article 57 of Protocol I of 1977.[85]

(19) 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

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"Although the Panel's application of Article 31 of the Vienna Convention to 'Sound recording distribution services' led it to a 'preliminary conclusion' as to the meaning of that entry, the Panel nonetheless decided to have recourse to supplementary means of interpretation to confirm that meaning. We note, in this regard, that China's argument on appeal appears to assume that the Panel's analysis under Article 32 of the Vienna Convention would necessarily have been different if the Panel had found that the application of Article 31 left the meaning of 'Sound recording distribution services' ambiguous or obscure, and if the Panel had, therefore, resorted to Article 32 to determine, rather than to confirm, the meaning of that term. We do not share this view. The elements to be examined under Article 32 are distinct from those to be analyzed under Article 31, but it is the same elements that are examined under Article 32 irrespective of the outcome of the Article 31 analysis. Instead, what may differ, depending on the results of the application of Article 31, is the weight that will be attributed to the elements analyzed under Article 32", see also M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers, 2009), 447, para 11.

[82] See World Trade Organization, *United States — Import Prohibition of Certain Shrimp and Shrimp Products — AB-1998-4*, report of the Appellate Body of 12 October 1998 (World Trade Organization, document WT/DS58/AB/R), para. 17 ("most treaties have no single, undiluted object and purpose but rather a variety of different, and possibly conflicting, objects and purposes"); Gardiner, *supra* note 3, p. 195.

[83] *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, p. 1045, at p. 1074, para. 45.

[84] *Ibid*., at p. 1078, para. 55 and p. 1096, para. 80.

[85] For the military manuals of Argentina (1989), Canada (2001) and the United Kingdom (2004), see Henckaerts and Doswald-Beck, *Practice*, *supra* note 30 pp. 359–360, paras. 160–164 and the online update for the military manual of Australia (2006) (http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule15_sectionc); see also Y. Sandoz, C. Swinarski and B. Zimmermann, *supra* note 73, p. 683, para. 2202.

in the literature, stipulates that the possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized.

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

> […] the term "application" in Article 31(3)(a) relates to the situation where an agreement specifies how existing rules or obligations in force are to be "applied"; the term does not connote the creation of new or the extension of existing obligations that are subject to a temporal limitation ...[86]

(21) 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.[87] An agreement under article 39 need not display the same form as the treaty which it amends (unless the latter provides otherwise[88]). Like an agreement under article 31, paragraph 3 (a), an agreement under article 39 may be reached by informal means, as well as be limited to modifying or suspending the obligations under the treaty for only one or a certain number of cases of its application.[89] As the International Court of Justice has held in the *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* case:

> Whatever its specific designation and in whatever instrument it may have been recorded (the [River Uruguay Executive Commission] CARU minutes), this "understanding" is binding on the Parties, to the extent that they have consented to it and must be observed by them in good faith. They are entitled to depart from the procedures laid down by the 1975 Statute, in respect of a given project pursuant to an appropriate bilateral agreement.[90]

(22) 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.[91] International case-law and State practice suggest[92] that informal agreements which are

[86] WTO, Appellate Body Report, EC — *Bananas* III, Second Recourse to Article 21.5, WT/DS27/AB/RW2/ECU, WT/DS27/AB/RW/USA, 26 November 2008, paras. 391–393.

[87] Murphy, *supra* note 68, p. 88.

[88] According to article 39, second sentence.

[89] Sinclair, *supra* note 3, p. 107 with reference to Waldock, *Official Records of the United Nations Conference on the Law of Treaties*, *supra* note 5, p. 207, paras. 49–52; Villiger, *supra* note 81, p. 513, paras. 7, 9 and 11; Odendahl, "Article 39. General rule regarding the amendment of treaties", in *Vienna Convention on the Law of Treaties — A Commentary*, O. Dörr and K. Schmalenbach, eds. (Springer, 2012), p. 706, at para. 16.

[90] *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, at pp. 62–63, paras. 128 and 131; the Court then concluded that, in the case under review, that these conditions had not been fulfilled, at pp. 62–66, paras. 128–142.

[91] 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), Judgment, I.C.J. Reports 1994*, p. 6, at p. 29, para. 60 ("in the view of the Court, for the purposes of the present Judgment, there is no reason to categorize it either as confirmation or as a modification of the Declaration"); it is sometimes considered that an agreement under article 31 (3) (a) can also have the effect of modifying a treaty, Aust, *supra* note 68, pp. 212–214 with examples.

[92] *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, at p. 63, paras. 131 and 140; Crawford, *supra* note 35, p. 32; Iran-United States Claims Tribunal,

alleged to derogate from treaty obligations should be narrowly interpreted. There do not seem to be any formal criteria, 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.[93] An agreement to modify a treaty is thus not excluded, but also not to be presumed.[94]

(23) 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.[95]

(24) This draft article gave rise to an intense debate at the Vienna Conference.[96] An amendment to delete draft article 38 was put to a vote and was adopted by 53 votes to 15, with 26 abstentions. After the Vienna Conference, the question was discussed whether the rejection of draft article 38 at the Vienna Conference meant that the possibility of a modification of a treaty by subsequent practice of the parties had thereby been excluded. Most 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.[97] International courts and tribunals, on the other

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Interlocutory Award No. ITL 83-B1-FT (Counterclaim), *The Islamic Republic of Iran v. the United States of America*, Iran-USCTR vol. 38 (2004–2009), p. 77, at pp. 125–126, para. 132; *ADF Group Inc. v. United States of America* (Case No. ARB(AF)/00/1), ICSID Arbitration Under NAFTA Chapter Eleven, 9 January 2003, pp. 84–85, para. 177 (www.state.gov/documents/organization/16586.pdf); *Ibid*., Part IV, Chapter C, paras. 20–21; Second Report, *supra* note 22, p. 61–68, paras. 146–165.

[93] 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, *supra* note 68, p. 83.

[94] *Ibid*., p. 66, para. 140; Crawford, *supra* note 35, p. 32.

[95] *Yearbook of the International Law Commission, 1966*, vol. II, p. 236.

[96] *Official Records of the United Nations Conference on the Law of Treaties*, *supra* note 5, pp. 208–214; Second Report, *supra* note 22, p. 52–53, paras. 119–121; Distefano, *supra* note 3, pp. 56–61.

[97] Sinclair, *supra* note 3, p. 138; Gardiner, *supra* note 3, pp. 243–245; Yasseen, *supra* note 3, pp. 51–52; M. Kamto, "La volonté de l'État en droit international", *Recueil des cours de l'Académie de droit international de La Haye*, vol. 310 (2004), pp. 134–141, at p. 134; Aust, *supra* note 68, p. 213; Villiger, *supra* note 81, p. 432, para. 23; Dörr, *supra* note 4, p. 555, para. 76 (in accord Odendahl, *supra* note 89, p. 702, paras. 10–11); Distefano, *supra* note 3, pp. 62–67; H. Thirlway, "The law and procedure of the International Court of Justice 1960–1989: supplement, 2006 – part three", *British Yearbook of International Law*, vol. 77, No. 1 (2006), p. 65; M.N. Shaw, *International Law*, 6th ed. (Cambridge, Cambridge University Press, 2003), p. 934; I. Buga, "Subsequent practice and treaty modification", in *Conceptual and Contextual Perspectives on the Modern Law of Treaties*, M.J. Bowman and D. Kritsiotis, eds. (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

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

(25) 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".[98] 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".[99] The scope for "interpretation" is therefore not necessarily determined by a fixed "original intent", but must rather be determined by taking into account a broader range of considerations, including certain later developments. This somewhat ambiguous dictum of the International Court raises the question of how far subsequent practice under article 31, paragraph 3 (b), can contribute to "interpretation", and whether subsequent practice may have the effect of amending or modifying a treaty. Indeed, the dividing line between the interpretation and the amendment or modification of a treaty is in practice often "difficult, if not impossible, to fix".[100]

(26) Apart from the dictum in *Dispute regarding Navigational and Related Rights*,[101] the International Court of Justice has not explicitly recognized that a particular subsequent practice has had the effect of modifying a treaty. This is true, in particular, for the *Namibia Advisory Opinion* as well as for the *Wall Advisory Opinion* in which the Court recognized that subsequent practice had an important effect on the determination of the meaning of the treaty, but stopped short of explicitly recognizing that such practice had led to an amendment or modification of the treaty.[102] Since these opinions concerned treaties

informality of practice Murphy, *supra* note 68, pp. 89–90; see also Hafner, *supra* note 80, pp. 115–117 (differentiating between the perspectives of courts and States, as well as emphasizing the importance of amendment provisions in this context).

[98] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213, at 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, *Reports of International Arbitral Awards*, vol. XXV, part IV, p. 231, at p. 256, para. 62; Yasseen, *supra* note 3, p. 51; Kamto, *supra* note 97, pp. 134–141; R. Bernhardt, *Die Auslegung völkerrechtlicher Verträge*, (Heymann, 1963), p. 132.

[99] Draft conclusion 3, (*Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* A/68/10, chap. IV.C.1) and commentary to draft conclusion 3, paras. 1–18 (*ibid.*, chap. IV.C.2).

[100] Sinclair, *supra* note 3, p. 138; Gardiner, *supra* note 3, p. 243; Murphy, *supra* note 68, p. 90; B. Simma, "Miscellaneous thoughts on subsequent agreements and practice", in Treaties and Subsequent Practice, G. Nolte, ed. (Oxford, Oxford University Press, 2013), p. 46; Karl, *supra* note 4, pp. 42–43; J.-M. Sorel and V. Boré Eveno, "Article 31: Convention of 1969", *The Vienna Conventions on the Law of Treaties — A Commentary*, in O. Corten and P. Klein, eds. (Oxford, Oxford University Press, 2011), p. 825, para. 42; Dörr, *supra* note 4, p. 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 (Botswana/Nambia), Judgment, I.C.J. Reports 1999*, p. 1045, at pp. 1212–1213, para. 16; similarly Hafner, *supra* note 80, p. 114; Linderfalk, *supra* note 4, p. 168.

[101] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213, at p. 242, para. 64.

[102] Thirlway, *supra* note 97, p. 64.

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.[103]

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

> Here the conduct of Cameroon in that territory has pertinence only for the question of whether it acquiesced in the establishment of a change in treaty title, which cannot be wholly precluded as a possibility in law.[104]

(28) 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).[105] This judgment, however, was rendered before the adoption of the Vienna Convention and thus, at least implicitly, was taken into account by States in their debate at the Vienna Conference.[106] 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.[107]

(29) Thus, while raising 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.[108] Contrary

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[103] See already *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 10* A/67/10, p. 124, para. 238, and, *Ibid., Sixty-third Session, Supplement No. 10,* A/63/10, annex A, p. 383, para. 42.

[104] *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.

[105] *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment, I.C.J. Reports 1962*, p. 6, at p. 30: "an acknowledgement by conduct was undoubtedly made in a very definite way ... it is clear that the circumstances were such as called for some reaction"; "a clearer affirmation of title on the French Indo-Chinese side can scarcely be imagined" and therefore "demanded a reaction".

[106] M. 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.

[107] *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 6, at p. 26: "a fact, which if true, must have been no less evident in 1908". Judge Parra-Aranguren has opined that the *Temple* case demonstrated "that the effect of subsequent practice on that occasion was to amend the treaty", *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, p. 1045, at pp. 1212–1213, para. 16 (Dissenting Opinion of Judge Parra-Aranguren); Buga, *supra* note 97, at note 113.

[108] In particular the Namibia opinion has been read as implying that subsequent practice has modified article 27 paragraph 3 of the Charter of the United Nations, Alain Pellet, Article 38, in The Statute of the International Court of Justice A Commentary, A. Zimmermann *et al.*, ed. 2nd ed. (Oxford, Oxford University Press), 2012), p. 844, para. 279; cf. Second Report, *supra* note 22, pp. 53–54, paras. 124–126.

holdings by arbitral tribunals have been characterized either as an "isolated exception"[109] or rendered before the Vienna Conference and critically referred to there.[110]

(30) 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.[111] The Appellate Body's position may be influenced by article 3.2. of the Dispute Settlement Understanding, according to which "[r]ecom-mendations and rulings of the [Dispute Settlement Body] cannot add to or diminish the rights and obligations provided in the covered agreements".

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

> that an established practice within the member States could give rise to an amendment of the Convention. In that case the Court accepted that subsequent practice in national penal policy, in the form of a generalised abolition of capital punishment, could be taken as establishing the agreement of the Contracting States to abrogate the exception provided for under Article 2 § 1 and hence remove a textual limit on the scope for evolutive interpretation of Article 3 (*ibid.*, pp. 40–41, § 103).[112]

(32) 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 and all but three of the States which have signed have ratified it. These figures, together with consistent State practice in observing the moratorium on capital punishment, are strongly indicative that Article 2 has been amended so as to prohibit the death penalty in all circumstances. Against this background, the Court does not consider that the wording of the second sentence of Article 2 § 1 continues to act as a bar to its interpreting the words "inhuman or degrading treatment or punishment" in Article 3 as including the death penalty (cf. Soering, cited above, §§ 102–104).[113]

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[109] M. Kohen, "Keeping subsequent agreements and practice in their right limits", in *Treaties and Subsequent Practice*, G. Nolte, ed. (Oxford, Oxford University Press, 2013), p. 43 regarding *Decision regarding delimitation of the border between Eritrea and Ethiopia*, 13 April 2002, *Reports of International Arbitral Awards*, vol. XXV, 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*, 29 September 1988, *Reports of International Arbitral Awards*, vol. XX, p.1, at p. 56, paras. 209 and 210 in which the Arbitral Tribunal held, in an obiter dictum, "that the demarcated boundary line would prevail over the Agreement if a contradiction could be detected"; but see R. Kolb, "La modification d'un traité par la pratique subséquente des parties", *Revue suisse de droit international et européen*, vol. 14, 2004, p. 20.

[110] *Interpretation of the Air Transport Services Agreement between the United States of America and France*, 22 December 1963, *Reports of International Arbitral Awards*, vol. XVI, p. 5, at pp. 62–63; *Official Records of the United Nations Conference on the Law of Treaties*, *supra* note 5, p. 208, para. 58 (Japan); Murphy, *supra* note 68, p. 89.

[111] WTO, Appellate Body Report, *EC — Bananas III*, Second Recourse to Article 21.5, WT/DS27/AB/RW2/ECU, WT/DS27/AB/RW/USA, 26 November 2008, paras. 391–393.

[112] *Al-Saadoon and Mufdhi v. the United Kingdom*, 2 March 2010, Application No. 61498/08, ECHR 2010, para. 119, referring to *Öcalan v. Turkey* [GC], 12 May 2005, Application No. 46221/99, ECHR 2005-IV.

[113] *Ibid*., para. 120; B. Malkani, "The obligation to refrain from assisting the use of the death penalty", *International and Comparative Law Quarterly*, vol. 62, No. 3 (2013), p. 523.

(33) The case-law of international courts and tribunals allows the following conclusions: The WTO case suggests that a treaty may preclude the subsequent practice of the parties from having a modifying effect. Thus, the treaty itself governs the question in the first place. Conversely, the European Court of Human Rights cases suggest that a treaty may permit the subsequent practice of the parties to have a modifying effect. Thus, ultimately much depends on the treaty or of the treaty provisions concerned.[114]

(34) 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",[115] 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.

(35) 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.[116] 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.[117] 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.[118] And, while the principle *pacta sunt servanda* is not formally called into question by an amendment or modification of a treaty by subsequent practice 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.[119]

(36) 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

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[114] Buga, *supra* note 97, at notes 126–132.

[115] *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.

[116] Second Report, *supra* note 22, p. 52–53, paras. 119–121.

[117] Murphy, *supra* note 68, p. 89; Simma, *supra* note 100, p. 47; Hafner, *supra* note 80, pp. 115–117; J.E. Alvarez, "Limits of change by way of subsequent agreements and practice", in *Treaties and Subsequent Practice*, G. Nolte, ed. (Oxford, Oxford University Press, 2013), p. 130.

[118] See *NATO Strategic Concept Case*, German Federal Constitutional Court, Judgment of 19 June 2001, Application 2 BvE 6/99 (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, *supra* note 117, 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 *Treaties and Subsequent Practice*, G. Nolte, ed. (Oxford, Oxford University Press, 2013).

[119] See, for example, Kohen, *supra* note 106, p. 274 (in particular with respect to boundary treaties).

appropriate.[120] In this context an important consideration is how far an evolutive interpretation of the treaty provision concerned is possible.[121]

Draft 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).

(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,[122] 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.[123] 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

[120] Draft conclusion 1, para. 5, and accompanying commentary (A/68/10, chap. IV, sect. C.1 and sect. C.2); Hafner, *supra* note 80, 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, *supra* note 3, p. 243; Dörr, *supra* note 4, p. 555, para. 76.

[121] 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 (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213, at pp. 242–243, paras. 64–66.

[122] In the case concerning the *Maritime Dispute (Peru v. Chile*), the Court privileged the practice that was closer to the date of entry into force, *Maritime Dispute (Peru v. Chile), I.C.J.,* Judgment of 27 January 2014. Available from www.icj-cij.org/docket/files/137/17930.pdf, p. 47, para. 126.

[123] Murphy, *supra* note 68, p. 91.

Appellate Body.[124] The award of the International Centre for Settlement of Investment Disputes (ICSID) tribunal in *Plama v. Bulgaria* is instructive:

> It is true that treaties between one of the Contracting Parties and third States may be taken into account for the purpose of clarifying the meaning of a treaty's text at the time it was entered into. The Claimant has provided a very clear and insightful presentation of Bulgaria's practice in relation to the conclusion of investment treaties subsequent to the conclusion of the Bulgaria-Cyprus BIT in 1987. In the 1990s, after Bulgaria's communist regime changed, it began concluding BITs with much more liberal dispute resolution provisions, including resort to ICSID arbitration. However, that practice is not particularly relevant in the present case since subsequent negotiations between Bulgaria and Cyprus indicate that these Contracting Parties did not intend the MFN provision to have the meaning that otherwise might be inferred from Bulgaria's subsequent treaty practice. Bulgaria and Cyprus negotiated a revision of their BIT in 1998. The negotiations failed but specifically contemplated a revision of the dispute settlement provisions (...). It can be inferred from these negotiations that the Contracting Parties to the BIT themselves did not consider that the MFN provision extends to dispute settlement provisions in other BITs.[125]

(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 and sometimes rough comparative assessments of the domestic legislation or international positions adopted by States.[126] 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* the Court held that:

> it is clear from the provisions of these two <international> instruments that the Contracting States ... have formed the view that only a combination of measures addressing all three aspects can be effective in the fight against trafficking (...). Accordingly, the duty to penalise and prosecute trafficking is only one aspect of member States' general undertaking to combat trafficking. The extent of the positive

[124] See, for example, *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment, I.C.J. Reports 1993*, p. 38, at p. 55, para. 38; *Question of the tax regime governing pensions paid to retired UNESCO officials residing in France*, Decision of 14 January 2003, *Reports of International Arbitral Awards*, vol. XXV, part IV, p. 231, at p. 259, para. 74; WTO, Panel Report, *US — Continued Zeroing*, WT/DS350/R, 1 October 2008 WTO, Appellate Body Report, *US — Upland Cotton*, WT/DS267/AB/R, 3 March 2005, para. 625.

[125] *Plama Consortium Limited v. Republic of Bulgaria* (Cyprus/Bulgaria BIT), Decision on Jurisdiction, ICSID Case No. ARB/03/24 (ECT) (8 February 2005), *ICSID Review — Foreign Investment Law Journal*, vol. 20 (2005), p. 262, at pp. 323–324, para. 195.

[126] See, for example, *Cossey v. the United Kingdom*, 27 September 1990, Application No. 10843/84, ECHR Series A, No. 184, para. 40; *Tyrer v. the United Kingdom*, 25 April 1978, Application No. 5856/72, ECHR Series A, No. 26, para. 31; *Norris v. Ireland*, 26 October 1988, Application No. 10581/83, ECHR Series A, No. 142, para. 46.

> obligations arising under Article 4 <prohibition of forced labour> must be considered within this broader context.[127]

(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 (...),"[128] 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."[129]

(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).[130]

(7) The question of whether "subsequent practice" under article 31, paragraph 3 (b),[131] 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.[132]

(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,

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[127] *Rantsev v. Cyprus and Russia*, 7 January 2010, Application No. 25965/04, ECHR 2010, paras. 273–274 and 285.

[128] *Chapman v. the United Kingdom* [GC], 18 January 2001, Application No. 27238/95, ECHR 2001-I, para. 93.

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

[130] *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, at pp. 63, para. 131.

[131] Draft conclusion 4, para. 2 (*Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10*, A/68/10, chap. IV.C.1).

[132] WTO, Appellate Body Report, *Japan — Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 4 October 1996, sect. E, pp. 12–13.

for its judgment in the case of *Kasikili/Sedudu Island*.[133] Other international courts have mostly followed the approach of the International Court of Justice. This is true for the Iran-United States Claims Tribunal[134] and the European Court of Human Rights.[135]

(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[136] which stated that "the value of subsequent practice will naturally depend on the extent to which it is concordant, common and consistent."[137] 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.[138] The WTO Appellate Body itself on occasion has relied on this nuanced view.[139]

(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 "the value of subsequent practice varies according as it shows the common understanding of the parties as to the meaning of the terms."[140] This implies that a one-off

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[133] *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, p. 1045, at pp. 1075–1076, paras. 47–50 and p. 1087, para. 63; *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 6, at pp. 34–37, paras. 66–71.

[134] Iran-United States Claims Tribunal, Interlocutory Award No. ITL 83-B1-FT (Counterclaim), *The Islamic Republic of Iran v. the United States of America*, Iran-USCTR vol. 38 (2004–2009), p. 77, at pp. 116–126, paras. 109–133.

[135] *Soering*, *supra* note 23 para. 103; *Loizidou v. Turkey (Preliminary Objections)*, 23 March 1995, Application No. 15318/89, ECHR, Series A, No. 310, paras. 73 and 79–82; *Bankovic*, *supra* note 26, paras. 56 and 62; concerning the jurisprudence of ICSID tribunals see O.K. Fauchald, "The legal reasoning of ICSID tribunals: an empirical analysis", *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", *American Journal of International Law*, vol. 104, 2010, pp. 207–215.

[136] I. Sinclair, *supra* note 3, p. 137; see also Yasseen, *supra* note 3, pp. 48–49; whilst "commune" is taken from the work of the International Law Commission, "d'une certaine constance" and "concordante" are conditions which Yasseen derives through further reasoning; see *Yearbook of the International Law Commission, 1966*, vol. II (United Nations publication, Sales No. E.67.V.2), pp. 98–99, paras. 17–18 and p. 221, para. 15.

[137] I. Sinclair, *supra* note 3, p. 137; Iran-United States Claims Tribunal, Interlocutory Award No. ITL 83-B1-FT (Counterclaim), *The Islamic Republic of Iran v. the United States of America*, Iran-USCTR, vol. 38 (2004–2009), p. 77, at p. 118, para. 114.

[138] *Case concerning a dispute between Argentina and Chile concerning the Beagle Channel*, 18 February 1977, *Reports of International Arbitral Awards*, vol. XXI, part II, p. 53, at p. 187, para. 169; J.-P Cot, "La conduite subséquente des parties a un traité", *Revue générale de droit international public*, vol. 70, 1966, pp. 644–647 ("valeur probatoire"); Distefano, *supra* note 3, p. 46; Dörr, *supra* note 4, 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/docket/files/137/17218.pdf and CR 2012/36, pp. 13–18, paras. 6–21 (Wordsworth), available from www.icj-cij.org/docket/files/137/17234.pdf.

[139] WTO, Appellate Body Report, *EC — Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, 5 June 1998, para. 93.

[140] *Yearbook of the International Law Commission, 1966*, vol. II, p. 222, para. 15; Cot, *supra* note 138, p. 652.

practice of the parties which establishes their agreement regarding the interpretation needs to be taken into account under article 31, paragraph 3 (b).[141]

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

> We consider that the European Communities conflates the preliminary question of what may qualify as a "circumstance" of a treaty's conclusion with the separate question of ascertaining the degree of relevance that may be ascribed to a given circumstance, for purposes of interpretation under Article 32.[142]

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 ...[143]

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 (…)[144]

(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

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[141] In practice, a one-off practice will often not be sufficient to establish an agreement of the parties regarding a treaty's interpretation, as a general rule, however, subsequent practice under article 31, paragraph 3 (b), does not require any repetition but only an agreement regarding the interpretation. The likelihood of an agreement established by an one-off practice thus depends on the act and the treaty in question, see E. Lauterpacht, "The Development of the Law of International Organization by the Decisions of International Tribunals", *Recueil des cours de l'Académie de droit international de La Haye*, vol. 152, 1976, p. 381, at p. 457; Linderfalk, *supra* note 4, p. 166; C.F. Amerasinghe, "Interpretation of Texts in Open International Organizations", *British Yearbook of International Law* vol. 65, No. 1 (1994), p. 175, at p. 199;. Villiger argues in favour of a certain frequency, but emphasizes that the important point is the establishment of an agreement, Villiger, *supra* note 81, p. 431, para. 22. Yasseen and Sinclair write that practice cannot "in general" be established by one single act, M.K. Yasseen, *supra* note 3, p. 47; I. Sinclair, *supra* note 3, p. 137; cf. Third Report for the ILC Study Group on Treaties over Time, in G. Nolte (ed.), *Treaties and Subsequent Practice* (Oxford University Press, 2013), p. 307, at p. 310.

[142] WTO, Appellate Body Report, *EC — Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, 12 September 2005, para. 297.

[143] WTO, Appellate Body Report, *EC — Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, 5. June 1998, para 92.

[144] WTO, Appellate Body Report, *EC — Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, 12 September 2005, para. 290.

classification practice, however, cannot be relevant (in interpreting the meaning of a tariff concession)".[145]

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

> "To establish this intention, the prior practice of only one of the parties may be relevant, but it is clearly of more limited value than the practice of all parties. In the specific case of the interpretation of a tariff concession in a Schedule, the classification practice of the importing Member, in fact, may be of great importance."[146]

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[145] WTO, Appellate Body Report, *EC — Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, 12 September 2005, para 307; cf. also WTO, Appellate Body Report, *EC — Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, 5. June 1998, para. 95.

[146] WTO, Appellate Body Report, *EC — Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, 5. June 1998, para. 93.