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Draft report of the International Law Commission on the work of its sixty-sixth session

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

Addendum

Contents

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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 9
Agreement of the parties regarding the interpretation of a treaty

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

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

Commentary

(1) The first sentence of paragraph 1 sets forth the principle that an "agreement" under article 31, paragraph 3 (a) and (b) requires a common understanding by the parties regarding the interpretation of a treaty. In order for that common understanding to have the effect provided for under article 31, paragraph 3, the parties must be aware of it and accept the interpretation contained therein. While the difference regarding the form of an "agreement" under subparagraph (a) and subparagraph (b) has already been set out in draft conclusion 4 and its accompanying commentary,[147] paragraph 1 of draft conclusion 9 intends to capture what is common in the two subparagraphs, which is the agreement between the parties, in substance, regarding the interpretation of the treaty.

(2) The element which distinguishes subsequent agreements and subsequent practice as authentic means of interpretation under article 31, paragraph 3 (a) and (b), on the one hand, and other subsequent practice as a supplementary means of interpretation under article 32,[148] on the other, is the "agreement" of the parties regarding the interpretation of the treaty. It is this agreement of the parties which provides the means of interpretation under article 31, paragraph 3[149] their specific function and weight for the interactive process of interpretation under the general rule of interpretation of article 31.[150]

(3) Conflicting positions expressed by different parties to a treaty preclude the existence of an agreement. This has been confirmed, inter alia, by the Arbitral Tribunal in the case of *German External Debts* which held that a "tacit subsequent understanding" could not be derived from a number of communications by administering agencies since one of those agencies, the Bank of England, had expressed a divergent position.[151]

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147 See commentary to draft conclusion 4, para. 10 (A/68/10, chap. IV.C.2).

148 See draft conclusion 2 and draft conclusion 4, para. 3 (A/68/10, chap. IV.C.1).

149 See Crawford, *supra* note 35, p. 30: "There is no reason to think that the word 'agreement' in para. (b) has any different meaning as compared to the meaning it has in para. (a)".

150 See commentary to draft conclusion 1, paras. 12–15 (A/68/10, chap. IV.C.2); article 31 must be "read as a whole" and conceives of the process of interpretation as "a single combined operation", and is "not laying down a legal hierarchy of norms for the interpretation of treaties", *Yearbook of the International Law Commission, 1966*, vol. II (United Nations publication, Sales No. E.67.V.2), p. 219, para. 8, and p. 220, para. 9.

151 *Case concerning the question whether the re-evaluation of the German Mark in 1961 and 1969 constitutes a case for application of the clause in article 2 (e) of Annex I A of the 1953 Agreement on German External Debts between Belgium, France, Switzerland, the United Kingdom of Great Britain*

(4) However, agreement is only absent to the extent that the positions of the parties conflict and for as long as their positions conflict. The fact that Parties apply a treaty differently does not, as such, permit a conclusion that there are conflicting positions regarding the interpretation of the treaty. Such a difference may indicate a disagreement over the one correct interpretation, but it may also simply reflect a common understanding that the treaty permits a certain scope for the exercise of discretion in its application.[152] Treaties which are characterized by considerations of humanity or other general community interests, such as treaties relating to human rights or refugees, tend to aim at a uniform interpretation but also to leave a margin of appreciation for the exercise of discretion by States.

(5) Whereas equivocal conduct by one or more parties will normally prevent the identification of an agreement,[153] not every element of the conduct of a State which does not fully fit into a general picture necessarily renders the conduct of that State so equivocal that it precludes the identification of an agreement. The Court of Arbitration in the *Beagle Channel* case, for example, found that although at one point the parties had a difference of opinion regarding the interpretation of a treaty, that fact did not necessarily establish that the lack of agreement was permanent:

> ... In the same way, negotiations for a settlement that did not result in one [*viz.* a settlement], could hardly have any permanent effect. At the most they might temporarily have deprived the acts of the Parties of probative value in support of their respective interpretations of the treaty, insofar as these acts were performed during the process of the negotiations. The matter cannot be put higher than that.[154]

(6) Similarly, in *Loizidou v. Turkey*, the European Court of Human Rights held that the scope of the restrictions which the parties could place on their acceptance of the competence of the Commission and the Court was "confirmed by the subsequent practice of the Contracting parties," that is, "the evidence of a practice denoting practically universal agreement amongst Contracting Parties that articles 25 and 46 ... of the Convention do not permit territorial or substantive restrictions."[155] The Court, applying article 31, paragraph 3 (b), described "such a State practice" as being "uniform and consistent", despite the fact that it simultaneously recognized that two States possibly constituted exceptions.[156] The decision suggests that interpreters possess some margin when assessing whether an agreement of the parties regarding a certain interpretation is established.[157]

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and Northern Ireland and the United States of America on the one hand and the Federal Republic of Germany on the other, Award of 16 May 1980, *Reports of International Arbitral Awards*, vol. XIX, part III, p. 67, pp. 103–104, para. 31; see 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; *Case concerning the delimitation of the maritime boundary between Guinea and Guinea-Bissau*, Decision of 14 February 1985, *Reports of International Arbitral Awards*, vol. XIX, part IV, p. 149, at p. 175, para. 66.

[152] See commentary on draft conclusion 7, paras. 12–15.

[153] *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 para. 258, para. 70; R. Kolb, *supra* note 109, p. 16.

[154] *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. 57, at p. 188, para. 171.

[155] *Loizidou*, *supra* note 135, paras. 79 and 81.

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

[157] The more restrictive jurisprudence of the WTO Dispute Settlement Body suggests that different interpreters may evaluate matters differently, see United States – Laws, Regulations and Methodology

(7) The term "agreement" in the Vienna Convention[158] does not imply any particular requirements of form,[159] including for an "agreement" under article 31, paragraph 3 (a) and (b).[160] The Commission, however, has noted that, in order to distinguish a subsequent agreement under article 31, paragraph 3 (a), and a subsequent practice which "establishes the agreement" of the parties under article 31, paragraph 3 (b), the former presupposes a "single common act".[161] There is no requirement that an agreement under article 31, paragraph 3 (a), be published or registered under Article 102 of the Charter of the United Nations.[162]

(8) For an agreement under article 31, paragraph 3, it is not sufficient that the positions of the parties regarding the interpretation of the treaty happen to overlap, but the parties must also be aware of and accept that these positions are common. Thus, in the *Kasikili/Sedudu Island* case, the International Court of Justice required that, for practice to fall under article 31, paragraph 3 (b), the "authorities were fully aware of and accepted this as a confirmation of the Treaty boundary."[163] Indeed, only the awareness and acceptance of the position of the other parties regarding the interpretation of a treaty justifies the characterization of an agreement under article 31, paragraph 3 (a) or (b), as an "authentic" means of interpretation.[164] In certain circumstances, the awareness and acceptance of the position of the other party or parties may be assumed, particularly in the case of treaties which are implemented at the national level.

(9) The aim of the second sentence of paragraph 1 is to reaffirm that "agreement", for the purpose of article 31, paragraph 3, need not, as such, be legally binding,[165] In contrast to

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for Calculating Dumping Margins (Zeroing), WT/DS294/R, 31 October 2005, para. 7.218: "[…] even if it were established conclusively that all the 76 Members referred to by the European Communities have adopted a [certain] practice [...], this would only mean that a considerable number of WTO Members have adopted an approach different from that of the United States. [...] We note that one third party in this proceeding submitted arguments contesting the view of the European Communities."

158 See articles 2 (1) (a), 3, 24 (2), 39–41, 58 and 60.

159 Commentary to draft conclusion 4, para. 5 (A/68/10, chap. IV.C.2); confirmed by the Permanent Court of Arbitration in the Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India), Award of 7 July 2014, available at http://www.pca-cpa.org/showfile.asp?fil_id=2705, p. 47, para. 165; Yasseen, *supra* note 3, p. 45; Distefano, *supra* note 3, p. 47.

160 Commentary to draft conclusion 4, para. 5 (A/68/10, chap. IV.C.2); Gardiner, *supra* note 4, pp. 208–209 and 216–220; Aust, *supra* note 68, p. 213; Dörr, *supra* note 4, p. 554, para. 75; R. Gardiner, "The Vienna Convention Rules on Treaty Interpretation", in D. B. Hollis (ed.), The Oxford Guide to Treaties (Oxford, Oxford University Press, 2012), 475, 483.

161 Commentary to draft conclusion 4, para. 10 (A/68/10, chap. IV.C.2); a "single common act" may also consist of an exchange of letters, see *European Molecular Biology Laboratory Arbitration (EMBL v. Germany)*, 29 June 1990, *ILR*, vol. 105, p. 1, at pp. 54–56; H. Fox, "Article 31 (3) (a) and (a) of the Vienna Convention and the *Kasikili/Sedudu Island Case*", in *Treaty Interpretation and the Vienna Convention on the Law of Treaties – 30 Years On*, M. Fitzmaurice, O. Elias and P. Merkouris, eds. (Martinus Nijhoff, 2010), p. 63; Gardiner, *supra* note 3, pp. 220–221.

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

163 *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, p. 1045, at p. 1094, para. 74 ("occupation of the island by the Masubia tribe") and pp. 1077, para. 55 ("Eason Report" which "appears never to have been made known to Germany"); Dörr, *supra* note 4, p. 560, para. 88.

164 In this respect the ascertainment of subsequent practice under article 31 (3) (b) may be more demanding than what the formation of customary international law requires, but see Boisson de Chazournes, *supra* note 8, p. 53–55.

165 Commentary to draft conclusion 4, para. 6 (A/68/10, chap. IV.C.2); H. Fox, "Article 31 (3) (a) and (b) of the Vienna Convention and the Kasikili Sedudu Island Case" in M. Fitzmaurice, O. Elias, P.

other provisions of the Vienna Convention in which the term "agreement is used in the sense of a legally binding instrument."[166]

(10) This is confirmed by the fact that the Commission, in its final draft articles on the law of treaties, used the expression "any subsequent practice which establishes the *understanding* [emphasis added] of the parties".[167] The expression "understanding" indicates that the term "agreement" in article 31, paragraph 3, does not require that the parties thereby undertake or create any legal obligation existing in addition to, or independently of, the treaty.[168] The Vienna Conference replaced the expression "understanding" by the word "agreement" not for any substantive reason but "related to drafting only" in order to emphasize that the understanding of the parties was to be their "common" understanding.[169] An "agreement" under article 31, paragraph 3 (a), being distinguished from an agreement under article 31, paragraph 3 (b), only in form and not in substance, equally need not be legally binding.[170]

(11) It is thus sufficient that the parties, by a subsequent agreement or a subsequent practice under article 31, paragraph 3, attribute a certain meaning to the treaty,[171] or in other words, adopt a certain "understanding" of the treaty.[172] Subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), even if they are not in themselves legally binding, can thus nevertheless, as means of interpretation, give rise to legal consequences as part of the process of interpretation according to article 31.[173]

Merkouris (eds.), Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on (Martinus Nijhoff Publishers, 2010), p. 59, at pp. 61–62; A. Chanaki, L'adaptation des traités dans le temps (Bruylant, 2013), pp. 313–315; M. Benatar, "From Probative Value to Authentic Interpretation: The Legal Effect of Interpretative Declarations", Revue belge de droit international, vol. 44 (2011), p. 170, at pp. 194–195; see also Third Report for the ILC Study Group on Treaties over Time, *supra* note 92, p. 307, at p. 375.

166 See articles 2 (1) (a), 3, 24 (2), 39–41, 58 and 60.

167 *Yearbook of the International Law Commission, 1966*, vol. II (United Nations publication, Sales No. E.67.V.2), p. 222, para. 15.

168 *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; *Young Loan Arbitration on German External Debts* (*Belgium, France, Switzerland, United Kingdom and United States v. Germany*), ILR vol. 59 (1980), pp. 541–542, para. 31; Karl, *supra* note 4, pp. 190–195; Kolb, *supra* note 109, pp. 25–26; Linderfalk, *supra* note 4, pp. 169–171.

169 *Official Records of the United Nations Conference on the Law of Treaties*, p. 169, at para. 60 (see footnote 12 above); P. Gautier, "Les accords informels et la Convention de Vienne sur le droit des traités entre États", in *Droit du pouvoir, pouvoir du droit: mélanges offerts à Jean Salmon*, N. Angelet, ed. (Bruylant, 2007), p. 425, at p. 431 ("La lettre a) du paragraphe 3 fait référence à un accord interprétatif et l'on peut que le terme <<accord>> est ici utilisé dans un sens 'générique, qui ne correspond pas nécessairement au << traité >> défini à l'article 2 de la convention de Vienne. Ainsi, l'accord interprétatif ultérieur pourrait être un accord verbal, voire un accord politique.")

170 Ph. Gautier, Non-Binding Agreements, *Max Planck Encyclopedia of Public International Law*, available at mpepil.com, para. 14; Aust, *supra* note 68, ppx. 211, 213.

171 This terminology follows the commentary of guideline 1.2. (Definition of interpretative declarations) of the Commission's Guide to Practice on Reservations to Treaties (see A/66/10/Add.1, p. 69, paras. 18 and 19).

172 *Yearbook of the International Law Commission, 1966*, vol. II (United Nations publication, Sales No. E.67.V.2), pp. 221–222, paras. 15 and 16 (uses the term "understanding" both in the context of what became article 31 (3) (a) as well as what became article 31 (3) (b)).

173 *United States-United Kingdom Arbitration concerning Heathrow Airport User Charges, Award on the First Question*, 30 November 1992, *Reports of International Arbitral Awards*, vol. XXIV, p. 3, at p. 131, para. 6.7; Aust, "The theory and practice of informal international instruments", *supra* note 162, pp. 787 and 807; Linderfalk, *supra* note 4, p. 173; Hafner, *supra* note 80, pp. 110–113; Gautier, *supra* note 170, p. 434.

Accordingly, international courts and tribunals have not required that an "agreement" under article 31, paragraph 3, reflect the intention of the parties to create new, or separate, legally binding undertakings.[174] Similarly, memoranda of understanding have been recognized, on occasion, as "a potentially important aid to interpretation" – but "not a source of independent legal rights and duties".[175]

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

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

> It considered that the phrase 'the understanding of the parties' necessarily means 'the parties as a whole'. It omitted the word 'all' merely to avoid any possible misconception that every party must individually have engaged in the practice where it suffices that it should have accepted the practice.[176]

(14) The International Court of Justice also has recognized the possibility of expressing agreement regarding interpretation by silence or inaction by stating, in the case concerning the *Temple of Preah Vihear*, that "where it is clear that the circumstances were such as called for some reaction, within a reasonable period", the State confronted with a certain subsequent conduct by another party "must be held to have acquiesced".[177] This general proposition of the Court regarding the role of silence for the purpose of establishing agreement regarding the interpretation of a treaty by subsequent practice has been confirmed by later decisions,[178] and supported generally by writers.[179] The "circumstances"

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[174] E.g. "pattern implying the agreement of the parties regarding its interpretation", WTO, Appellate Body Report, Japan – Alcoholic Beverages II, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 4 October 1996, section E, p. 13; or "pattern ... must imply agreement on the interpretation of the relevant provision", WTO, Panel Report, EC – IT Products, WT/DS375/R, WT/DS376/R, WT/DS377/R, 16 August 2010, para. 7.558; or "practice [which] reflects an agreement as to the interpretation", 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. 119, para. 116; or that "State practice" was "indicative of a lack of any apprehension on the part of the Contracting States"; Bankovic, *supra* note 26 para. 62.

[175] *United States-United Kingdom Arbitration concerning Heathrow Airport User Charges, Award on the First Question,* 30 November 1992, *Reports of International Arbitral Awards,* vol. XXIV, p. 2, at p. 131, para. 6.7; see also *Award in the Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands,* Decision of 24 May 2005, *Reports of International Arbitral Awards*, vol. XXVII, part II, p. 35, at p. 98, para. 157.

[176] *Yearbook of the International Law Commission, 1966*, vol. II (United Nations publication, Sales No. E.67.V.2), p. 222, para. 15.

[177] *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June, I.C.J. Reports 1962*, p. 6, at p. 23.

[178] See also *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803, p. 815, para. 30; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 392, at p. 410, para. 39; *Prosecutor v. Furundžija*, Trial Chamber, Judgment, 10 December 1998, ICTY-95-17/1, para. 179; *Rantsev*, *supra* note 127, para. 285; cautiously: WTO, Appellate Body Report, *EC – Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R,

which will "call for some reaction" include the particular setting in which the States parties interact with each other in respect of the treaty.[180]

(15) The Court of Arbitration in the *Beagle Channel* case[181] dealt with the contention by Argentina that acts of jurisdiction by Chile over certain islands could not be counted as relevant subsequent conduct, since Argentina had not reacted to these acts. The Court, however, held:

> The terms of the Vienna Convention do not specify the ways in which agreement may be manifested. In the context of the present case the acts of jurisdiction were not intended to establish a source of title independent of the terms of the treaty; nor could they be considered as being in contradiction of those terms as understood by Chile. The evidence supports the view that they were public and well-known to Argentina, and that they could only derive from the Treaty. Under these circumstances the silence of Argentina permits the inference that the acts tended to confirm an interpretation of the meaning of the Treaty independent of the acts of jurisdiction themselves.[182]

In the same case, the Court of Arbitration considered that:

> The mere publication of a number of maps of (as the Court has already shown) extremely dubious standing and value could not — even if they nevertheless represented the official Argentine view — preclude or foreclose Chile from engaging in acts that would, correspondingly, demonstrate her own view of what were her rights under the 1881 Treaty – nor could such publication of itself absolve Argentina from all further necessity for reaction in respect of those acts, if she considered them contrary to the treaty.[183]

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

> Some of these activities — organization of public health and education, policing, administration of justice — could normally be considered to be acts *à titre de souverain*. The Court notes, however, that, as there was a pre-existing title held by

12 September 2005, para. 272; see also, for a limited holding, Iran-United States Claims Tribunal, Award No. 30-16-3, *RayGo Wagner Equipment Company v. Iran Express Terminal Corporation*, Iran-USCTR, vol. 2 (1983), p. 141, at p. 144; *Young Loan Arbitration on German External Debts (Belgium, France, Switzerland, United Kingdom and United States v. Germany)*, 16 May 1980, *Reports of International Arbitral Awards*, vol. XIX, part III, p. 67; ILR, vol. 59 (1980), p. 541, para. 31.

[179] M. Kamto, *supra* note 97, pp. 134–141; Yasseen, *supra* note 3, p. 49; Gardiner, *supra* note 3, p. 236; Villiger, *supra* note 81, p. 431, para. 22; Dörr, *supra* note 4, pp. 557 and 559, paras. 83 and 86.

[180] For example, when acting within the framework of an international organization, see *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece), Judgment of 5 December 2011, I.C.J. Reports 2011*, p. 644, at pp. 675–676, paras. 99–101; Kamto, *supra* note 97, p. 136.

[181] *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.

[182] *Ibid*., at p. 187, para. 169 (a).

[183] *Ibid*.

> Cameroon in this area, the pertinent legal test is whether there was thus evidenced acquiescence by Cameroon in the passing of the title from itself to Nigeria.[184]

(17) This judgment suggests that in cases which concern boundary treaties establishing a delimited boundary the circumstances will only very exceptionally call for a reaction with respect to conduct which runs counter to the delimitation. In such situations, there appears to be a strong presumption that silence or inaction does not constitute acceptance of a practice.[185]

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

(19) International courts and tribunals, for example, have been reluctant to accept that parliamentary proceedings or domestic court judgments are considered as subsequent practice under article 31, paragraph 3 (b), to which other parties to the treaty would be expected to react, even if such proceedings or judgments had come to their attention through other channels, including by their own diplomatic service.[186]

(20) Further, even where a party, by its conduct, expresses a certain position towards another party (or parties) regarding the interpretation of a treaty, this does not necessarily call for a reaction by the other party or parties. In the *Kasikili/Sedudu Island* case, the International Court of Justice held that a State which did not react to the findings of a joint commission of experts, which had been entrusted by the parties to determine a particular factual situation with respect to a disputed matter, did not thereby provide a ground for the conclusion that an agreement had been reached with respect to the dispute.[187] The Court found that the parties had considered the work of the experts as being merely a preparatory step for a separate decision subsequently to be taken on the political level. On a more general level, the WTO Appellate Body has held that:

> in specific situations, the 'lack of reaction' or silence by a particular treaty party may, in the light of attendant circumstances, be understood as acceptance of the practice of other treaty parties. Such situations may occur when a party that has not engaged in a practice has become or has been made aware of the practice of other parties (for example, by means of notification or by virtue of participation in a forum where it is discussed), but does not react to it.[188]

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[184] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 303, at p. 352, para. 67.

[185] *Ibid*., at p. 351, para. 64: "The Court notes, however, that now that it has made its findings that the frontier in Lake Chad was delimited ..., it follows that any Nigerian effectivités are indeed to be evaluated for their legal consequences as acts contra legem"; *Frontier Dispute, Judgment, I.C.J. Reports 1986*, p. 554, at p. 586, para. 63; *Case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal*, Decision of 31 July 1989, *Reports of International Arbitral Awards*, vol. XX, part II (Dissenting Opinion of Judge Bedjaoui), p. 119, at p. 181, para. 70.

[186] *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 625, at p. 650, para. 48; WTO, Appellate Body Report, *EC – Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, 12 September 2005, para. 334 ("... mere access to a published judgment cannot be equated with acceptance …").

[187] *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, p. 1045, at pp. 1089–1091, paras. 65–68.

[188] WTO, Appellate Body Report, *EC – Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, 12 September 2005, para. 272 (footnote omitted).

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

> The Tribunal acknowledges that the national legislation of several States, not only in the West African region, but also in some other regions of the world, regulates bunkering of foreign vessels fishing in their exclusive economic zones in a way comparable to that of Guinea-Bissau. The Tribunal further notes that there is no manifest objection to such legislation and that it is, in general, complied with.[189]

(21) The possible legal significance of silence or inaction in the face of a subsequent practice of a party to a treaty is not limited to contributing to a possible underlying common agreement, but may also play a role for the operation of non-consent based rules, such as estoppel, preclusion or prescription.[190]

(22) Once established, an agreement between the parties under article 31, paragraph 3 (a) and (b), can eventually be terminated. The parties may replace it by another agreement with a different scope or content under article 31, paragraph 3. In this case, the new agreement replaces the previous one as an authentic means of interpretation from the date of its existence, at least with effect for the future.[191] Such situations, however, should not be lightly assumed as States usually do not change their interpretation of a treaty according to short-term considerations.

(23) It is also possible for a disagreement to arise between the parties regarding the interpretation of the treaty after they had reached a subsequent agreement regarding such interpretation. Such a disagreement, however, normally will not replace the prior subsequent agreement, since the principle of good faith prevents a party from simply disavowing the legitimate expectations which have been created by a common interpretation.[192] On the other hand, clear expressions of disavowal by one party of a previous understanding arising from common practice "do reduce in a major way the significance of the practice after that date", without however diminishing the significance of the previous common practice.[193]

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

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

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

[189] The M/V "Virginia G" Case (Panama/Guinea-Bissau), Judgment of 14 April 2014, para. 218.
[190] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962, I.C.J. Reports 1962*, pp. 130–131 (Dissenting Opinion of Judge Spender).
[191] Hafner, *supra* note 80, p. 118; this means that the interpretative effect of an agreement under article 31 (3) does not necessarily go back to the date of the entry into force of the treaty, as Yasseen, *supra* note 3, p. 47, maintains.
[192] Karl, *supra* note 4, p. 151.
[193] *Maritime Dispute (Peru v. Chile), I.C.J., Judgment of 27 January 2014*, p. 52, para. 142. Available from www.icj-cij.org/docket/files/137/17930.pdf.

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.

Commentary

(1) Draft conclusion 10 addresses a particular form of action by States which may result in a subsequent agreement or subsequent practice under article 31, paragraph 3, or subsequent practice under article 32, namely, decisions adopted within the framework of Conferences of States Parties.[194]

(2) States typically use Conferences of States Parties as a form of action for the continuous process of multilateral treaty review and implementation.[195] Such Conferences can be roughly divided into two basic categories. First, some Conferences are actually an organ of an international organization within which States parties act in their capacity as members of that organ (e.g. meetings of the States parties of the World Trade Organization, the Organization for the Prohibition of Chemical Weapons, or the International Civil Aviation Organization).[196] Such Conferences of States Parties do not fall within the scope of draft conclusion 10, which does not address the subsequent practice of and within international organizations.[197] Second, other Conferences of States Parties are convened pursuant to treaties that do not establish an international organization; rather, the treaty simply provides for more or less periodic meetings of the States parties for their review and implementation. Such review conferences are frameworks for States parties' cooperation and subsequent conduct with respect to the treaty. Either type of Conference of States Parties may also have specific powers concerning amendments and/or the adaptation of treaties. Examples include the review conference process of the 1972 Biological Weapons Convention (BWC),[198] the Review Conference under article VIII (3) of the 1968 Non-

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

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

[196] Agreement establishing the World Trade Organization (WTO Agreement) (United Nations, *Treaty Series*, vol. 1867, No. 31874), concluded at Marrakesh in 1994; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Chemical Weapons Convention) (United Nations, *Treaty Series*, vol. 1974, No. 33757), opened for signature in 1993; Convention on International Civil Aviation (Chicago Convention) (United Nations, *Treaty Series*, vol. 15, No. 102), signed at Chicago in 1994.

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

[198] Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (Biological Weapons Convention), 1972 (United Nations, *Treaty Series*, vol. 1015, No. 14860), article XI. According to this mechanism, States parties meeting in a review conference shall "review the operation of the Convention, with a

Proliferation Treaty (NPT),[199] and Conferences of States Parties established by international environmental treaties.[200] The International Whaling Commission (IWC) under the International Convention for the Regulation of Whaling[201] is a borderline case between the two basic categories of Conferences of States Parties and its subsequent practice was considered in the judgment of the International Court of Justice in the *Whaling in the Antarctic* case.[202]

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

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

(5) The first sentence of paragraph 2 recognizes that the legal significance of any acts undertaken by Conferences of States Parties depends, in the first instance, on the rules that govern the Conferences of States Parties, notably the constituent treaty and any applicable rules of procedure. Conferences of States Parties perform a variety of acts, including reviewing the implementation of the treaty, reviewing the treaty itself, and decisions under amendment procedures.[203]

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view to assuring that the purposes of the preamble and the provisions of the Convention (...) are being realized. Such review shall take into account any new scientific and technological developments relevant to the Convention" (art. XII).

199 Treaty on the Non-Proliferation of Nuclear Weapons 1968, (United Nations, *Treaty Series*, vol. 729, No. 10485); article VIII, paragraph 3, establishes that a review conference shall be held five years after its entry into force, and, if so decided, at intervals of five years thereafter "in order to review the operation of this Treaty with a view to assuring that the purposes of the preamble and the provisions of the Treaty are being realized". By way of such decisions, States parties review the operation of the Treaty on the Non-Proliferation of Nuclear Weapons, article by article, and formulate conclusions and recommendations on follow-on actions.

200 Examples include the Conference of the Parties of the United Nations Framework Convention on Climate Change, 1992 (United Nations, *Treaty Series*, vol. 1771, No. 30822), the CMP Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto Protocol), 1997 (United Nations, *Treaty Series*, vol. 2303, No. 30822), and the Conference of the Contracting Parties of the Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention), 1971 (United Nations, *Treaty Series*, vol. 996, No. 14583).

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

202 *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), I.C.J., Judgment of 31 March 2014*, http://www.icj-cij.org/docket/files/148/18136.pdf.

203 Convention on Wetlands of International Importance especially as Waterfowl Habitat: article 6, paragraph 1, on review functions and article 10 *bis*, on amendments; United Nations Framework Convention on Climate Change: article 7, paragraph 2, on review powers, and article 15, on amendments; Kyoto Protocol, article 13, paragraph 4, on review powers of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol, article 20 on amendment procedures; Convention on International Trade in Endangered Species of Wild Fauna and Flora (United Nations, *Treaty Series*, vol. 993, No. 14537), art. XI on review Conference of the Parties, and

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

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

(7) Specific provisions contained in various treaties refer to the Conference of the Parties proposing "guidelines" for the implementation of particular treaty provisions,[204] or defining "the relevant principles, modalities, rules and guidelines" for a treaty scheme.[205]

(8) Amendment procedures (in a broad sense of the term) include procedures by which the primary text of the treaty may be amended (the result of which mostly requires ratification by States parties according to their constitutional procedures), as well as tacit acceptance and opt-out procedures[206] that commonly apply to annexes, containing lists of substances, species or other elements that need to be updated regularly.[207]

(9) As a point of departure, paragraph 2 provides that the legal effect of a decision adopted within the framework of a Conference of States Parties depends primarily on the treaty in question and any applicable rules of procedure. The word "primarily" leaves room for subsidiary rules "unless the treaty otherwise provides" (see e.g. articles 16, 20, 22, paragraph 1, 24, 70, paragraph 1, and 72, paragraph 1, of the Vienna Convention on the Law of Treaties). The word "any" clarifies that rules of procedure of Conferences of States Parties, if they exist, will apply, given that there may be situations where such conferences operate with no specifically adopted rules of procedure.[208]

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

(11) Decisions of Conferences of States Parties, inter alia, may constitute or reflect subsequent agreements under article 31, paragraph 3 (a), by which the parties interpret the underlying treaty. For example, the Biological Weapons Convention Review Conference has adopted "additional agreements" regarding the interpretation of the Convention's

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XVII on amendment procedures Treaty on the Non-Proliferation of Nuclear Weapons; World Health Organization Framework Convention on Tobacco Control (United Nations, Treaty Series, vol. 2302, No. 41032), article 23, paragraph 5 (review powers), article 28 (amendments) and article 33 (protocols).

[204] Articles 7 and 9, of the World Health Organization Framework Convention on Tobacco Control.

[205] Article 17 of the Kyoto Protocol to the United Nations Framework Convention on Climate Change regarding emissions-trading provides an example, see Churchill and Ulfstein, *supra* note 195, p. 639; J. Brunnée, "Reweaving the fabric of international law? Patterns of consent in environmental framework agreements", in R. Wolfrum and V. Röben (eds.), *Developments of International Law in Treaty Making*, (Berlin, Springer, 2005), pp. 110–115.

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

[207] *Ibid*.

[208] This is the case, for example, for the UN Framework Convention on Climate Change.

provisions. These agreements have been adopted by States Parties within the framework of the review conferences, by consensus, and they "have evolved across all articles of the treaty to address specific issues as and when they arose".[209] Through these understandings, States Parties interpret the provisions of the Convention by defining, specifying or otherwise elaborating on the meaning and scope of the provisions, as well as through the adoption of guidelines on their implementation. The Biological Weapons Convention Implementation and Support Unit[210] defines an "additional agreement" as one which:

> (i) interprets, defines or elaborates the meaning or scope of a provision of the Convention; or
>
> (ii) provides instructions, guidelines or recommendations on how a provision should be implemented.[211]

(12) Similarly, the Conference of States Parties under the London (Dumping) Convention has adopted resolutions interpreting that convention. The Sub-Division for Legal Affairs of the International Maritime Organization, upon a request of the governing bodies, opined as follows in relation to an "interpretative resolution" of the Conference of States Parties under the London Convention:

> According to article 31, paragraph (3) (a), of the Vienna Convention on the Law of Treaties, 1969 (the Vienna Convention), subsequent agreements between the Parties shall be taken into account in the interpretation of a treaty. The article does not provide for a specific form of the subsequent agreement containing such interpretation. This seems to indicate that, provided its intention is clear, the interpretation could take various forms, including a resolution adopted at a meeting of the parties, or even a decision recorded in the summary records of a meeting of the parties.[212]

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

> Decisions of the Conference of the Parties, as the supreme body comprising all Parties to the FCTC, undoubtedly represent a "subsequent agreement between the Parties regarding the interpretation of the treaty", as stated in Article 31 of the Vienna Convention.[213]

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

[210] The "Implementation Support Unit" was created by the Conference of States Parties, in order to provide administrative support to the Conference, and to enhance confidence building measures among States parties (see Final Document of the Sixth Review Conference of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (BWC/CONF.VI/6), pp. 19–20).

[211] See background information document submitted by the Implementation and Support Unit, prepared for the Seventh Review Conference of the States Parties to the Convention, entitled "Additional agreements reached by previous Review Conferences relating to each article of the Convention" (BWC/CONF.VII/INF.5) (updated to include the understandings and agreements reached by that Conference, Geneva 2012).

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

[213] See Conference of the Parties to the World Health Organization Framework Convention on Tobacco Control, Intergovernmental Negotiating Body on a Protocol on Illicit Trade in Tobacco Products, "Revised Chairperson's text on a protocol on illicit trade in tobacco products, and general debate: legal advice on the scope of the protocol", note by the WHO Legal Counsel on scope of the protocol

(14) Commentators have also viewed decisions of Conferences of States Parties as being capable of embodying subsequent agreements[214] and have observed that:

> Such declarations are not legally binding in and of themselves, but they may have juridical significance, especially as a source of authoritative interpretations of the treaty.[215]

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

> Article VI of the Convention states that "[t]he Commission may from time to time make recommendations to any or all Contracting Governments on any matters which relate to whales or whaling and to the objectives and purposes of this Convention". These recommendations, which take the form of resolutions, are not binding. However, when they are adopted by consensus or by a unanimous vote, they may be relevant for the interpretation of the Convention or its Schedule.[216]

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

(17) The Review Conference of the Biological Weapons Convention, acting under its general review functions, regularly reaches "additional understandings and agreements" relating to the provisions of the Convention. For example, Article I, paragraph 1, of the Biological Weapons Convention provides that States parties undertake never in any circumstances to develop, produce, stockpile or otherwise acquire or retain:

> Microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes;

(18) At the third Review Conference (1991), States parties specified that[217]

> the prohibitions established in this provision relate to microbial or other biological agents, or toxins, which are "harmful to plants and animals, as well as humans (…)"

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

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

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on illicit trade in tobacco products (World Health Organization, document FCTC/COP/INB-IT/3/INF.DOC./6, annex); S. F. Halabi, "The World Health Organization's Framework Convention on Tobacco Control: an analysis of guidelines adopted by the Conference of the Parties", *Georgia Journal of International and Comparative Law*, vol. 39, 2010, pp. 14–16.

214 D. H. Joyner, *Interpreting the Nuclear Non-Proliferation Treaty* (Oxford, Oxford University Press, 2011), p. 83 (with respect to the Non-Proliferation Treaty); Aust, *supra* note 68, pp. 213–214.

215 B. M. Carnahan, "Treaty review conferences", *American Journal of International Law*, vol. 81, No. 1 (1987), p. 229.

216 *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), I.C.J., Judgment of 31 March 2014*, http://www.icj-cij.org/docket/files/148/18136.pdf, para. 46.

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

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

> The term "State not party to this Protocol" includes all other States and regional economic integration organizations that have not agreed to be bound by the Copenhagen and Beijing Amendments.[218]

(21) Whereas the acts which are the result of a tacit acceptance procedure[219] are not, as such, subsequent agreements by the parties under article 31, paragraph 3 (a), they can, in addition to their primary effect under the treaty, under certain circumstances imply such a subsequent agreement. One example concerns certain decisions of the Conference of the Parties to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Convention).[220] At its sixteenth meeting, held in 1993, the Consultative Meeting of Contracting Parties adopted three amendments to annex I by way of the tacit acceptance procedure provided for in the Convention.[221] As such, these amendments were not subsequent agreements. They did, however, also imply a wide-ranging interpretation of the underlying treaty itself.[222] The amendment refers to and builds on a resolution that was adopted by the Consultative Meeting held three years earlier and which had established the agreement of the parties that "[t]he London Dumping Convention is the appropriate body to address the issue of low-level radioactive waste disposal into sub-

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[218] For details, see decision XV/3 on obligations of parties to the Beijing Amendment under article 4 of the Montreal Protocol with respect to hydrochlorofluorocarbons, Montreal Protocol on Substances that Deplete the Ozone Layer (United Nations, Treaty Series, vol. 1522, No. 26369); the definition itself is formulated as follows: 1. (...) (a) The term "State not party to this Protocol" in article 4, paragraph 9 does not apply to those States operating under article 5, paragraph 1, of the Protocol until January 1, 2016 when, in accordance with the Copenhagen and Beijing Amendments, hydrochlorofluorocarbon production and consumption control measures will be in effect for States that operate under article 5, paragraph 1, of the Protocol; (b) The term "State not party to this Protocol" includes all other States and regional economic integration organizations that have not agreed to be bound by the Copenhagen and Beijing Amendments; (c) Recognizing, however, the practical difficulties imposed by the timing associated with the adoption of the foregoing interpretation of the term "State not party to this Protocol," paragraph 1 (b) shall apply unless such a State has by 31 March 2004: (i) Notified the Secretariat that it intends to ratify, accede or accept the Beijing Amendment as soon as possible; (ii) Certified that it is in full compliance with articles 2, 2A to 2G and article 4 of the Protocol, as amended by the Copenhagen Amendment; (iii) Submitted data on (i) and (ii) above to the Secretariat, to be updated on 31 March 2005, in which case that State shall fall outside the definition of "State not party to this Protocol" until the conclusion of the Seventeenth Meeting of the Parties (UNEP/OzL.Pro.15/9, chap. XVIII.A).

[219] See paragraph 8 above.

[220] Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Dumping Convention), (United Nations, *Treaty Series*, vol. 1046, No. 15749).

[221] See London sixteenth Consultative Meeting of the Contracting Parties, resolution LC.51 (16), and resolution LC.50 (16); First, the decided to amend the phase-out-dumping of industrial waste by 31 December 1995. Second, it banned the incineration at sea of industrial waste and sewage sludge. And finally, it decided to replace para. 6 of annex I, banning the dumping of radioactive waste or other radioactive matter (see "Dumping at sea: the evolution of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (LC), 1972", *Focus on IMO* (London, International Maritime Organization, July 1997).

[222] It has even been asserted that these amendments to annex I of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter "constitute major changes in the Convention" (see Churchill and Ulfstein, *supra* note 195, p. 638).

seabed repositories accessed from the sea".[223] The resolution has been described as "effectively expand[ing] the definition of 'dumping' under the Convention by deciding that this term covers the disposal of waste into or under the seabed from the sea but not from land by tunnelling".[224] Thus, the amendment confirmed that the interpretative resolution contained a subsequent agreement regarding the interpretation of the treaty.

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

> without prejudice to any other multilateral environmental agreement, that the meaning of paragraph 5 of Article 17 of the Basel Convention should be interpreted to mean that the acceptance of three-fourths of those parties that were parties at the time of the adoption of the amendment is required for the entry into force of such amendment, noting that such an interpretation of paragraph 5 of Article 17 does not compel any party to ratify the Ban Amendment.[225]

The parties adopted this decision on the interpretation of article 17, paragraph 5, by consensus, with many States Parties underlining that the Conferences of the States Parties to any convention are "the ultimate authority as to its interpretation".[226] While this suggests that the decision embodies a subsequent agreement of the parties under article 31, paragraph 3 (a), the decision was taken after a debate about whether a formal amendment of the Convention was necessary to achieve this result.[227] It should also be noted that Japan, requesting that this position be reflected in the Conference's Report, stated that his delegation "supported the current-time approach to the interpretation of the provision of the Convention regarding entry into force of amendments, as described in a legal advice provided by the United Nations Office of Legal Affairs as the Depositary,[228] and had accepted the fixed-time approach enunciated in the decision on the Indonesian-Swiss country-led initiative *only in this particular instance*."[229]

(23) The preceding examples demonstrate that decisions of Conferences of States Parties may embody under certain circumstances subsequent agreements under article 31,

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[223] International Maritime Organization, resolution LDC.41 (13), para. 1.

[224] Churchill and Ulfstein, *supra* note 195, p. 641.

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

[226] *Ibid*., para. 65.

[227] See Günther Handl, "International "Lawmaking" by Conferences of the Parties and other Politically Mandated Bodies", in *Developments of International Law in Treaty Making*, Rüdiger Wolfrum and Volker Röben, eds. (Springer 2005) p. 127, at p. 132.

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

[229] Report of the Conference of the Parties to the Basel Convention, *supra* note 225, para. 68. Emphasis added.

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

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

(25) A decision by the Conference of the States Parties to the WHO Framework Convention on Tobacco Control provides an example.[230] Articles 9 and 10 of the Convention deal, respectively, with the regulation of the contents of tobacco products, and with the regulation of the disclosure of information regarding the contents of such products. Acknowledging that such measures require the allocation of significant financial resources, the States Parties agreed, under the title of "practical considerations" for the implementation of articles 9 and 10, on "some options that Parties could consider using", such as

> "(a) designated tobacco taxes;
>
> (b) tobacco manufacturing and/or importing licensing fees;
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> (c) tobacco product registration fees;
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> (d) licensing of tobacco distributors and/or retailers;
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> (e) non-compliance fees levied on the tobacco industry and retailers; and
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> (f) annual tobacco surveillance fees (tobacco industry and retailers)."[231]

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

(26) It follows that decisions of Conferences of States Parties may have different legal effects. Such decisions are often not intended to embody a subsequent agreement under article 31, paragraph 3 (a), by themselves because they are not meant to be a statement regarding the interpretation of the treaty. In other cases the parties have made it sufficiently clear that the Conference of State Parties decision embodies their agreement regarding the interpretation of the treaty. In still other cases they may produce a legal effect in combination with a general duty to cooperate under the treaty, which then puts the parties "under an obligation to give due regard" to such a decision.[232] In any case, it cannot simply be said that because the treaty does not accord the Conference of the States Parties a

[230] 2003 WHO Framework Convention on Tobacco Control, 2302 U.N.T.S. 166.

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

[232] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), I.C.J., Judgment of 31 March 2014*, http://www.icj-cij.org/docket/files/148/18136.pdf, para. 83.

competence to take legally binding decisions, their decisions are necessarily legally irrelevant and constitute only political commitments.[233]

(27) Ultimately, the effect of a decision of a Conference of States Parties depends on the circumstances of each particular case and such decisions need to be properly interpreted. A relevant consideration may be whether States parties uniformly or without challenge apply the treaty as interpreted by the Conference of States Parties decision. Discordant practice following a Conference of States Parties decision may be an indication that States did not assume that the decision would be a subsequent agreement under article 31, paragraph 3 (a).[234] Conference of States Parties' decisions which do not qualify as subsequent agreements under article 31, paragraph 3 (a), or as subsequent practice under article 31, paragraph 3 (b), nevertheless may be a subsidiary means of interpretation under article 32.[235]

(28) Paragraph 3 sets forth the principle that agreements regarding the interpretation of a treaty under article 31, paragraph 3, must relate to the content of the treaty. Thus, what is important is the substance of the agreement embodied in the decision of the Conference of States Parties and not the form or procedure by which that decision is reached. Acts which originate from Conferences of States Parties may have different forms and designations, and they may be the result of different procedures. Conferences of States Parties may even operate without formally adopted rules of procedure.[236] If the decision of the Conference of States Parties is based on a unanimous vote in which all parties participate, it may clearly embody a "subsequent agreement" under article 31, paragraph 3 (a), provided that it is "regarding the interpretation of the treaty".

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

> The task of the Review Conference being to review the operation of the Convention with a view to assuring that the purposes of the preamble and the provisions of the Convention are being realized, and thus to strengthen its effectiveness, every effort should be made to reach agreement on substantive matters by means of consensus.

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[233] *Ibid*., para. 46.

[234] See commentary on draft conclusion 9, paragraphs 22–23 above.

[235] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), I.C.J., Judgment of 31 March 2014*, http://www.icj-cij.org/docket/files/148/18136.pdf (Separate opinion of Judge *ad hoc* Charlesworth, para. 4: "I note that resolutions adopted by a vote of the IWC have some consequence although they do not come within the terms of Article 31.3 of the Vienna Convention").

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

> There should be no voting on such matters until all efforts to achieve consensus have been exhausted.[237]

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

(30) In order to address concerns relating to decisions adopted by consensus, the phrase "including by consensus" was introduced at the end of paragraph 3 in order to dispel the notion that a decision by consensus would necessarily be equated with agreement in substance. Indeed, consensus is not a concept which necessarily indicates any particular degree of agreement on substance. According to the *Comments on some Procedural Questions* issued by the Office of Legal Affairs of the United Nations Secretariat in accordance with United Nations General Assembly resolution 60/286 (2006):[238]

> Consensus is generally understood as a decision-taking process consisting in arriving at a decision without formal objections and vote. It may however not necessarily reflect "unanimity" of opinion on the substantive matter. It is used to describe the practice under which every effort is made to achieve general agreement and no delegation objects explicitly to a consensus being recorded.[239]

(31) It follows that adoption by consensus is not a sufficient condition for an agreement under article 31, paragraph 3 (b). The rules of procedure of Conferences of States Parties usually do not give an indication as to the possible legal effect of a resolution as a subsequent agreement under article 31, paragraph 3 (a) or a subsequent practice under article 31, paragraph 3 (b). Such rules of procedure only determine how the Conference of States Parties shall adopt its decisions, not their possible legal effect as a subsequent agreement under article 31, paragraph 3. Although subsequent agreements under article 31, paragraph 3 (a) need not be binding as such, the Vienna Convention attributes them a legal effect under article 31 only if there exists agreement in substance among the parties concerning the interpretation of a treaty. The International Court of Justice has confirmed that the distinction between the form of a collective decision and the agreement in substance is pertinent in such a context.[240]

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

(33) For example, at its Sixth Meeting in 2002, the Conference of the States Parties to the Convention on Biological Diversity worked on formulating guiding principles for the prevention, introduction and mitigation of impacts of alien species that threaten ecosystems,

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[237] See rule 28, paragraph 2, of the provisional rules of procedure for the Review Conference of the Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, held in Geneva, from 3 to 21 March 1980 (BWC/CONF.I/2).

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

[239] See "Consensus in UN practice: general", paper prepared by the Secretariat. Available from http://legal.un.org/ola/media/GA_RoP/GA_RoP_EN.pdf; see also R. Wolfrum and J. Pichon, "Consensus", in Max Planck Encyclopedia of Public International Law (www.mpepil.com), paras. 3–4, 24.

[240] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), I.C.J., Judgment of 31 March 2014*, http://www.icj-cij.org/docket/files/148/18136.pdf, para. 83.

habitats or species.[241] After several efforts to reach an agreement had failed, the President of the Conference of the States Parties proposed that the decision be adopted, and the reservations which Australia had raised be recorded in the final report of the meeting. Australia's representative, however, reiterated that the guiding principles could not be accepted and that "his formal objection therefore stood".[242] The President declared the debate closed and, "following established practice", declared the decision adopted without a vote, clarifying that the objections of the dissenting States would be reflected in the final report of the meeting. Following the adoption, Australia reiterated its view that consensus is adoption without formal objection, and expressed concerns about the legality of the adoption of the draft decision. As a result, a footnote to decision VI/23 indicates that "one representative entered a formal objection during the process leading to the adoption of this decision and underlined that he did not believe that the Conference of the Parties could legitimately adopt a motion or a text with a formal objection in place".[243]

(34) In this situation, the Executive Secretary of the Convention on Biological Diversity requested a legal opinion from the United Nations Legal Counsel.[244] The opinion by the UN Legal Counsel[245] expressed the view that a party could "disassociate from the substance or text of the document, indicate that joining consensus does not constitute acceptance of the substance or text or parts of the document and/or present any other restrictions on its Government's position on the substance or text of the document (…)."[246] Thus, it is clear that a decision by consensus can occur in the face of rejection of the substance of the decision by one or more of the States Parties.

(35) The decision under the Convention on Biological Diversity, as well as a similar decision reached in Cancún in 2010 by the Meeting of the Parties to the Kyoto Protocol to the Climate Change Convention (Bolivia's objection notwithstanding),[247] raise the important question of what "consensus" means.[248] However, this question, which does not fall within the scope of the present topic, must be distinguished from the question of whether all the parties to a treaty have arrived at an agreement in substance on matters of interpretation of that treaty under article 31, paragraphs 3 (a) and (b). Decisions by Conferences of States Parties, which do not reflect agreement in substance among all the parties, do not qualify as agreements under article 31, paragraph 3, but maybe a form of "other subsequent practice" under article 32 (see draft conclusion 4, paragraph 3).

(36) A different issue concerns the legal effect of a decision of a Conference of the Parties once it qualifies as an agreement under article 31, paragraph (3). In 2011, the IMO Sub-Division for Legal Affairs was asked to "advise the governing bodies […] about the procedural requirements in relation to a decision on an interpretative resolution and, in

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241 See decision VI/23 (UNEP/CBD/COP/6/20, annex I).

242 Report of the sixth meeting of the Conference of the Parties to the Convention on Biological Diversity, (UNEP/CBD/COP/6/20), para. 313.

243 *Ibid*., para. 318; for the discussion see paras. 294–324.

244 Available from the secretariat of the Convention on Biological Diversity, document SCBD/SEL/DBO/30219 (6 June 2002).

245 *Ibid*.

246 *Ibid*., document UNEP/SCBD/30219R (17 June 2002).

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

248 See "Third report for the ILC Study Group on Treaties over Time", *supra* note 92, pp. 372–377.

particular, whether or not consensus would be needed for such a decision."[249] In its response, while confirming that a resolution by the Conference of States Parties can constitute, in principle, a subsequent agreement under article 31, paragraph 3 (a), the IMO Sub-Division for Legal Affairs advised the governing bodies that even if the Conference were to adopt a decision based on consensus, that would not mean that the decision would be binding on all the parties.[250]

(37) Although the opinion of the IMO Sub-Division for Legal Affairs proceeded from the erroneous assumption that a "subsequent agreement" under article 31, paragraph 3 (a), would only be binding "as a treaty, or an amendment thereto",[251] it came to the correct conclusion that even if the consensus decision by a Conference of the Parties embodies an agreement regarding interpretation in substance it is not (necessarily) binding upon the parties.[252] Rather, as the Commission has indicated, a subsequent agreement under article 31, paragraph 3 (a), is only one of different means of interpretation to be taken into account in the process of interpretation.[253]

(38) Thus, interpretative resolutions by Conferences of States Parties which are adopted by consensus, even if they are not binding as such, can nevertheless be subsequent agreements under article 31, paragraph 3 (a), or subsequent practice under article 31, paragraph 3 (b), if there are sufficient indications that that was the intention of the parties at the time of the adoption of the decision, or if the subsequent practice of the parties establishes an agreement on the interpretation of the treaty.[254] The interpreter must give appropriate weight to such an interpretative resolution under article 31, paragraph 3 (a), but not necessarily treat it as legally binding.[255]

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[249] International Maritime Organization, document LC 33/4, para. 4.15.2.

[250] International Maritime Organization, document LC 33/J/6, para. 3.

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

[252] See commentary on draft conclusion 9, paragraphs 9–11 above.

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

[254] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), I.C.J., Judgment of 31 March 2014*, http://www.icj-cij.org/docket/files/148/18136.pdf, (Separate opinion of Judge Greenwood, para. 6, and Separate opinion of Judge *ad hoc* Charlesworth, para. 4).

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