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The General Rule: (2) Agreements as Context, Subsequent Agreements, and Subsequent Practice

Agreements at conclusion and subsequently—concordant practice showing agreement

The Commission considered that subsequent practice establishing the understanding of the parties regarding the interpretation of a treaty should be included . . . as an authentic means of interpretation alongside interpretative agreements.¹

Article 31

General rule of interpretation

...

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

...

1. Introduction

1.1 The linking notion of agreement

The core of this chapter is the notion of agreement between the parties on interpretation of a treaty. This is considered in two forms: first, a recorded agreement,

¹ [1966] *Yearbook of the ILC*, vol II, p 222, para 15.

and second, concordant practice of parties where this reveals their agreement on a point of interpretation. The first part overlaps with the subject of the preceding chapter in that 'context' is a feature of both chapters. Agreements on interpretation adopted in connection with the conclusion of a treaty, as well as interpretative initiatives in connection with conclusion of a treaty that are of a unilateral character but are accepted by the other parties as related to the treaty, are defined in the Vienna rules as part of the context. These are, however, listed as categories of relevant matter separate from the treaty text itself (the preamble and any annexes being part of the text).

While agreement is the theme linking the present treatment of article 31(2)(a) and (b) and 31(3)(a) and (b) of the Vienna Convention, article 31(2)(b) is to a somewhat different effect from the other three subparagraphs. Those three address the possibility of a complete interpretative agreement. This is *potential* in the case of article 31(2)(a), being dependent on whether the agreement made in connection with the conclusion of the treaty addresses the particular issue of interpretation under investigation. It is *explicit* in the case of paragraph (3)(a), the stipulation there defining an agreement as being one regarding the interpretation of the treaty or the application of its provisions. A complete interpretative agreement is *resultant* in the case of paragraph (3)(b), the requirement there being sufficient practice to establish such an agreement. In contrast, in article 31(2)(b), the agreement of the parties lies only in their acceptance of an instrument of unilateral or group origin as being related to the treaty. Whether such acceptance of an instrument provides an authoritative interpretation or merely records an interpretative understanding which may contribute evidence pointing towards an interpretation, is a further stage in the process, not spelt out in the Vienna rules but considered below.

It is to be noted, however, that the ILC saw the agreements and instruments in paragraph (2) of article 31 as so closely related to the text as to be equivalent to context, while the elements in paragraph (3) are extrinsic to the text. However, the ILC Commentary on its draft articles stated of paragraph (3): 'But these three elements are all of an obligatory character and by their very nature could not be considered to be norms of interpretation in any way inferior to those which precede them.'²

If taking account of subsequent agreement between the parties constitutes a norm of interpretation not in any way *inferior* to the preceding elements of the general rule of treaty interpretation, to what extent may the converse be true? Does a particular or superior value attach to the interpretation which the parties place on their agreement? The short answer is that a clear agreement of the parties as to what their treaty means will *usually* be the strongest element in the crucible of interpretation.³

² [1966] *Yearbook of the ILC*, vol II, p 220, para 9; the third element to which the comment refers is the provision on relevant rules of international law, the main subject of Chapter 7 below.

³ Cf *Azpetrol v Azerbaijan*, ICSID Case No. ARB/06/15, Award of 8 September 2009, at para 64: 'English law does not normally admit reference to the subsequent conduct of the parties as an aid to

1. Introduction

As Professor Crawford has put it: ‘it is too often forgotten that the parties to a treaty, that is, the states which are bound by it at the relevant time, own the treaty. It is their treaty. ... International law says that the parties to a treaty own the treaty and can interpret it. ...’⁴ However, he also asks in relation to subsequent agreements: ‘But if “agreement” means “agreement”, why then do you only “have regard” to it? Why is the agreement not dispositive?’⁵ The two reasons which he gives are to the effect that agreements may range from formal to almost ephemeral, and may themselves be open to difficulties of interpretation: ‘Not every coming together of states is equal to every other coming together of states. Not every press release is equal to every other press release.’⁶

This is very much in line with the approach taken by Waldock as the ILC’s Special Rapporteur that the cogency of indications of meaning in preparatory works ‘depends on the extent to which they furnish proof of the *common* understanding of the parties as to the meaning attached to the terms of the treaty’.⁷ Further, the ILC in its Guide to Practice on Reservations to Treaties has commented that ‘when an interpretative declaration made in respect of a bilateral treaty is accepted by the other party, it constitutes *the authentic interpretation thereof*’.⁸ Noting the PCIJ’s statement that: ‘the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it’, the ILC commentary continues with the observation that:

in the case of a bilateral treaty this power belongs to both parties. Accordingly, if they agree on an interpretation, that interpretation prevails and itself takes on the nature of a treaty, regardless of its form. ...⁹

Thus in the particular circumstances of bilateral interpretative agreements, the ILC equates an ‘authentic’ interpretation by the parties with an ‘authoritative’ one and asserts its supremacy over other meanings. Obviously such an interpretation only holds good in relation to the particular treaty. A state which has made a ‘shared’ interpretative declaration of a bilateral provision will not necessarily be

the interpretation of a contract. Again, this is in marked contrast to the approach taken by international law, in which the subsequent practice of the parties can be of the utmost importance in the interpretation of a treaty’ (footnotes omitted).

⁴ J Crawford, ‘Subsequent Agreements and Practice from a Consensualist Perspective’, Chapter 3 in G Nolte (ed), *Treaties and Subsequent Practice* (Oxford: OUP, 2013), at 31.

⁵ Crawford, at 31.

⁶ Crawford, at 31–32.

⁷ Waldock, ‘Third Report on the Law of Treaties’ [1964] *Yearbook of the ILC*, vol II, p 58, para 21 (footnotes omitted, emphasis in original) and see Chapter 8, section 2.2 below.

⁸ Guideline 1.6.3, commentary para (2) (footnote omitted, emphasis added) in Addendum to Report of the International Law Commission, Sixty-third session (2011), UN General Assembly Official Records, Sixty-sixth Session, Supplement No. 10, A/66/10/Add.1, <<http://legal.un.org/ilc/reports/2011/english/addendum.pdf>>.

⁹ Guideline 1.6.3, commentary para (2); the statement of the PCIJ is reproduced at the head of Chapter 4 above and cited there.

held to have given an identical interpretation to the same words in another of treaty of the same kind.¹⁰

However, the principle of the supremacy of the parties' interpretation may not apply across the board, as the ILC has noted in its later and continuing work on subsequent agreements and subsequent practice that:

The character of subsequent agreements and subsequent practice of the parties...as 'authentic means of interpretation' does not, however, imply that these means necessarily possess a conclusive, or legally binding, effect. According to the chapeau of article 31(3), subsequent agreements and subsequent practice shall, after all, only 'be taken into account' in the interpretation of a treaty, which consists of a 'single combined operation' with no hierarchy among the means of interpretation which are referred to in article 31.¹¹

It is difficult, however, to find any practical examples where a clear indication of the parties' agreement on interpretation has been outweighed by other interpretative considerations. As the Commission has noted, its comment quoted above 'does not exclude that the parties to a treaty, if they wish, may reach a binding agreement regarding the interpretation of a treaty'.¹² The problematic case is therefore likely to be at the opposite end of the scale and involve a questionable interpretative agreement or incomplete evidence of one, particularly in the latter case where this evidence is sought from practice.¹³ The need for caution is demonstrated by the emerging difficulties where interpretative competence is allocated both to future agreement of the parties and to third party adjudication, particularly where the treaty is one which has direct implications for the acquired rights of individuals and corporations.¹⁴ Caution is also particularly warranted if reaching an interpretation which places weight on a subsequent agreement or on subsequent practice but appears to change the meaning of a treaty without following any amendment procedure which the treaty lays down.¹⁵

¹⁰ Cf, however, *Daimler v Argentina*, ICSID Case No. ARB/05/1, Award of 22 August 2012, at para 272, where an arbitral tribunal guardedly considered an exchange of diplomatic notes between Argentina and Panama with an 'interpretive declaration' of a most favoured nation clause in their investment treaty noting that, although an interpretive declaration issued by a state after a dispute had already arisen could not be considered as a definitive guide to the state's original intentions—particularly when the declaration related to a different treaty—nevertheless the fact that Argentina and Panama had distanced themselves from the understanding endorsed by an earlier tribunal was indicative of their mutual disapproval of that holding. This appears to have been among the many factors which the tribunal found helped its decision.

¹¹ ILC Report on the work of its Sixty-fifth session (2013) General Assembly Official Records Sixty-eighth Session, Supplement No. 10 (A/68/10), Chapter 4, p 21 para (4).

¹² ILC Report on the work of its Sixty-fifth session para (5).

¹³ Cf the difficult position where a different interpretation was agreed by the parties after an arbitral tribunal had delivered its decision but not yet awarded damages in the *Pope & Talbot v Canada* case considered in section 4.7 below.

¹⁴ See, for example, A Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States' (2010) 104 AJIL 179.

¹⁵ See the detailed consideration of this in the development of Draft Conclusion 11 in Nolte (ILC Special Rapporteur), 'Second Report on Subsequent agreements and subsequent practice

In as much as the agreements on interpretation considered here can arise at different stages in the life of a treaty—principally at the time of conclusion of the treaty or subsequently, these interpretative elements may have a particularly prominent role when time factors are an issue. Time factors are present in various guises, notably in the questions whether a treaty is to be interpreted as it would have been at the moment of its conclusion or at the time when it is actually being interpreted; more narrowly, whether interpretation takes account of the law as at the former or latter of these instances; and, usually with a focus on a particular term or provision of a treaty, whether the interpretation is to be ‘evolutionary’ (or ‘evolutive’), that is taking account of other changes than just those of law, such as changes in meaning of words, changes in the relevant practices, technology, social and political changes, and so on.

This chapter only considers evolutive or evolutionary interpretation to the extent relevant to interpretative agreements. Time factors relevant to changes in rules of international law are considered in the next chapter.¹⁶ Evolutive or evolutionary interpretation is considered more generally in the concluding chapter.¹⁷

Study of the role of subsequent agreement and subsequent practice has benefitted greatly from recent work in the ILC, initially under the description of ‘Treaties over Time’, then ‘Subsequent Agreements and Subsequent Practice in Relation to Interpretation of Treaties’.¹⁸ The formulation by the ILC of draft ‘Conclusions’, with commentaries, represents development toward a clarificatory code on this aspect of treaty interpretation.¹⁹ Further, the ILC work highlights the importance of this set of elements of treaty interpretation, a necessary antidote to the occasional misunderstanding which suggests that the first part of the general rule is the main rule to which the rest is somehow subsidiary. Another misunderstanding which is sometimes met is that the general rule is only concerned with the treaty’s text. Although the text is the obvious starting point, the provisions considered in this chapter, particularly those on agreements evidenced by practice, show that the interpretative exercise is not exclusively textual.²⁰

in relation to interpretation of treaties’, A/CN.4/671 (26 March 2014), pp 50–71 and see section 4.7 below.

¹⁶ See Chapter 7, section 1 below. ¹⁷ See Chapter 10, section 4 below.

¹⁸ See First and Second Reports of the Special Rapporteur (Nolte), A/CN.4/660 (2013) and A/CN.4/671 (2014), and Report of the International Law Commission (2013), (Sixty-eighth Session, Supplement No. 10 A/68/1), Chapter 4, and the extensive and invaluable research and analysis in Nolte, *Treaties and Subsequent Practice*.

¹⁹ ILC 2013 Report above; see also Report of the International Law Commission (2014), (Sixty-eighth Session, Supplement No. 10 A/69/1), Chapter VII which includes draft conclusions (inter alia) on what constitutes subsequent agreements and subsequent practice, on their possible effects, and on the weight to be attached to them.

²⁰ See helpful analysis and examples in R Moloo, ‘When Actions Speak Louder Than Words: The Relevance of Subsequent Party Conduct to Treaty Interpretation’ (2013) 31 *Berkeley JIL* 39, at 43–4.

1.2 Substantial identity of effect of subsequent agreements on interpretation as of those at time of conclusion

Although their link to the conclusion of a treaty firmly separates in time agreements within article 31(2)(a) from subsequent agreements within article 31(3)(a), it would be difficult to distinguish their legal effects. In principle, agreements and instruments accepted at the time of the conclusion of the treaty are part of the context to be used in ascertaining the ordinary meaning of the terms used. In contrast, subsequent agreements are 'to be taken into account, together with the context'. Since all relevant parts of the general rule, that is the whole of article 31 of the Vienna Convention, are to be applied in any interpretation (as well, of course, as articles 32 and 33, if appropriate), it is difficult to discern any difference in practical consequence between an agreement on interpretation which is to be treated as part of the context and one which is made later. If their content is clear, both types of agreements, being specifically directed to interpretation, will have an equally decisive effect on meaning.

In the commentary on the draft articles in its Report that formed the basis for the text adopted at the Vienna Conference in 1968–69, the ILC explained that the fact that the two classes of document now defined in article 31(2) were to be regarded as part of the context did not mean that they were necessarily to be regarded as integral parts of the treaty (which depended on the intention of the parties in the particular case). However, they were not to be treated as mere evidence to be used only to resolve any ambiguity or obscurity but rather 'as part of the context for the purpose of arriving at the ordinary meaning of the terms of the treaty'.²¹ Referring to paragraph 3(a) of the same draft article (subsequent agreements), the ILC pointed out that questions of fact might arise as to whether an understanding reached during the negotiations on the meaning of a provision constituted an agreed basis for its interpretation:

But it is well settled that when an agreement as to the interpretation of a provision is established as having been reached before or at the time of the conclusion of the treaty it is to be regarded as forming part of the treaty... Similarly, an agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation.²²

The idea that subsequent agreements on interpretation must be 'read into' the treaty places such agreements pretty much on a par with those reached at the time the treaty is made.

In one national case an attempt was made to draw a distinction between agreements on interpretation coming under article 31(2)(a) and those under article 31(3)(a). In *Coblentz v Canada*²³ the Canadian Court of Appeal considered whether a lump

²¹ [1966] *Yearbook of the ILC*, vol II, p 221, para 13.

²² [1966] *Yearbook of the ILC*, vol II, para 14.

²³ [1997] 1 FC 368, (1996) Can LII 4091 (Federal Court of Appeal).

sum pension payment was exempt from taxation in Canada under a 1980 treaty between the USA and Canada of the type colloquially described as a 'double taxation' treaty (meaning for avoidance of double taxation).²⁴ A few months after the treaty was signed the US Treasury Department published a 'Technical Explanation' explaining the treaty's provisions and giving examples of its application. The treaty did not enter into force until protocols were concluded in 1983 and 1984 to deal with certain 'technical problems' in the original text and taking account of US legislation on pensions. In transmitting the Convention and first Protocol to the US Senate for advice and consent to ratification, the US President asserted that 'the Protocol resolves these technical problems by clarifying the language of the Convention to assure that its original intent is fulfilled'.²⁵ Four months after the Convention entered into force in 1984, the Canadian Department of Finance confirmed that a revised Technical Explanation of 1984, superseding one issued in 1981, accurately reflected understandings reached in the course of negotiations with respect to the interpretation and application of the various provisions in the 1980 Tax Convention as amended.²⁶ The Technical Explanation, in one of its examples, effectively resolved the question whether the lump sum was taxable in Canada. The Court, in deciding that the Technical Explanation was admissible to provide an interpretation, considered which provision of the Vienna Convention made it so, and explored possible consequences of deciding one way or the other:

... it may be asked whether the Technical Explanation falls within Article 31(2) or 31(3) ... Correlatively, it may be asked whether the words 'shall be taken into account' found in Article 31(3) lessen the interpretative weight to be given to documents which fall within its boundaries, at least when compared to those documents that come within the ambit of Article 31(2)... As I understand the taxpayer's argument here, the Technical Explanation falls within Article 31(3) and, therefore, the Explanation cannot be used to contradict the ordinary meaning of Article XVIII of the Convention. The argument, of course, is premised on the understanding that the Explanation is not a document made 'in connection with the conclusion of the treaty' as required under Article 31(2). It is also premised on the understanding that there is a substantive difference between Article 31(2) which speaks of the interpretative 'context' and Article 31(3) which speaks in terms of taking into 'account'. In short, it is argued that a document which falls within the latter article must be given less weight than one which comes within the former. Above all, the taxpayer maintains that the Explanation cannot be used to contradict an article of the Convention. Counsel for the Minister sidesteps this line of attack by insisting that his argument rests on the ordinary meaning of the terms found within paragraph 1 of Article XVIII... I am of the view that the Technical Explanation facilitates our understanding of paragraph 1 of Article XVIII and does not contradict it.²⁷

²⁴ Convention Between the United States of America and Canada with Respect to Taxes on Income and on Capital, Washington, September 26, 1980, as amended: at <<http://www.irs.gov/pub/irs-trty/canada.pdf>>.

²⁵ Convention Between the United States of America and Canada as amended, at p 40.

²⁶ *Coblentz v Canada* [1997] 1 FC 368, (1996) CanLII 4091 (Federal Court of Appeal), paras 10–18.

²⁷ *Coblentz v Canada* paras 12–16.

This example is of more help for the issues which it raises than any conclusion it may imply. Whether an elucidation of treaty provisions is provided at the time of conclusion of a treaty or later seems of little importance if the parties concerned have clearly indicated that they view the elucidation as a correct interpretation. Their agreement on this is the essence of the matter. The suggestion that there should be a difference between something that is part of the context, to be used in establishing the ordinary meaning of a term, and something which is drawn up later and therefore only to be 'taken into account', seems at first reading to fit the wording and scheme of the Vienna Convention. Similarly, the idea that the former circumstance allows an instrument accompanying the text to 'contradict' a provision of the treaty, while the latter would not be admissible for this purpose, seems a plausible distinction. On closer examination, however, there are cogent reasons for concluding that this is not a distinction which the Vienna rules mandate or permit.

First, a separate instrument adopted at the same time as the treaty, such as a Protocol of Signature (see below), giving an apparently different meaning to a term of the treaty than its 'obvious' one, is not inherently more cogent by reason of the circumstances of its adoption than a later agreement doing exactly the same thing. In fact the latter may be said to be more cogent if it is an agreement on interpretation drawn up to meet a point that has actually arisen in practice: it represents the agreement of the parties on a point which has crystallized.

Second, while it is correct that the difference in wording governing the role of the agreement or instrument made in connection with conclusion and a subsequent one could initially suggest different roles, the whole of article 31 of the Vienna Convention is the 'general rule'. Using the consequence attached by the ILC to this characterization, if all relevant matter is to go into the crucible of interpretation, once an element has gone in, any difference in weight must result from its inherent characteristics, not its position in the crucible.

Third, although the ILC was responsible for the formulation of the provisions which make the apparent distinction, the ILC commentary treats both classes of interpretative agreement as on a par.²⁸ This is explained by the history of the provisions. In his first draft, the Special Rapporteur (Waldock) had included subsequent practice as 'other evidence or indications of the intentions of the parties' which was treated as on a par with the preparatory work of the treaty and only to be used in the circumstances, and to the same ends, as such work.²⁹ However, the Commission developed the division between the general rule and supplementary means. In response to an observation by the USA, that in the draft text of what became the general rule there might be a certain appearance of conflict between the primacy given to the ordinary meaning and the rule concerning a subsequent agreement between the parties regarding the interpretation of the treaty, the Special Rapporteur (Waldock) noted:

This observation does not perhaps give full weight to the opening phrase of paragraph 3: 'There shall also be taken into account, together with the context: (a) any agreement

²⁸ See section 1.1 *ad fin* above.

²⁹ [1964] *Yearbook of the ILC*, vol II, p 52, draft article 71(2).

between the parties etc.’ These words were intended by the Commission to put such interpretative agreements on the same level as the ‘context’ and to indicate that an interpretative agreement is to be taken into account as if it were part of the treaty.³⁰

It is to be noted that this is reinforced by the whole of article 31 constituting the general rule. Realistically, if an accompanying document does appear to contradict the ordinary meaning of the terms of a treaty, the problem is no different whether that document was adopted at the same time as the treaty or is a later one directly addressed to it. The key issue is whether the interpretative instrument is one to which the parties have given their concordant blessing.

Thus agreements and instruments of the kind described that are made in connection with the conclusion of the treaty and which bear on its interpretation are likely to deal with some point of doubt, difficulty, or specific application which it was not thought appropriate to cover in the treaty itself but which could be foreseen or which might possibly arise. Subsequent agreements on interpretation are likely to be concluded to cover specific issues which have actually arisen between the parties. Agreement resolving such difficulties may be recorded in a formal instrument of the same legal standing as the original treaty or in a less formal record of agreement or understanding on interpretation. Hence it can be seen that all these agreements and instruments have a similar function of clarifying the meaning of provisions of treaties, albeit in slightly different circumstances.³¹

1.3 Interpretative agreement in subsequent practice

Subsequent practice in relation to a matter covered by a treaty which establishes the agreement of the parties on its interpretation is clearly a category distinct from the matters covered in article 31(2) and (3)(a). However, for the purpose of treaty interpretation, such practice is examined for evidence of agreement and it can therefore be viewed as fulfilling a similar function to formally recorded agreements. The difference is essentially evidentiary: the coincidence of subsequent practice may show agreement as to meaning without the expressed meeting of minds which

³⁰ [1966] *Yearbook of the ILC*, vol II, p 95, para 6.

³¹ An example of how an agreement at the time of conclusion and a subsequent one may have the same effect on interpretation is in connection with the Air Transport Agreement between the USA and Peru, Lima, 27 December 1946 (UNTS No 390). In the first Exchange of Notes accompanying this Agreement, the parties recorded understandings that as Peru was not able to designate under the agreement an airline that met the then normal requirements that it be ‘substantially owned and effectively controlled’ by Peru or its nationals, Peru could (for the first ten years of the Agreement’s operation) designate an airline with at least 30 per cent Peruvian capital and the remainder would be American or Canadian, with a difference of no more than 20 per cent between the latter interests. Six months later it was realized that this formula did not achieve the intended aim of not permitting either US or Canadian interests to exceed 42 per cent. Hence a further Exchange of Notes took place recording this and other interpretative corrections. Both these (and other) Exchanges of Notes were registered (together with the treaty itself) with the UN at the same time. The interpretative effect of the Notes six months after conclusion appears to be no different from that of the Notes at conclusion of the treaty.

the term 'subsequent agreement' indicates. However, the potential difficulties in establishing whether there has been clear and sufficient practice to show agreement of the parties are obviously much greater than in the case of a specifically recorded agreement. There is one point at which the categories intersect. This is where there is a recorded agreement on interpretation which is informal but which has been put into practice. In this situation an informal record of understanding as to interpretation may, through the confirming practice, acquire a force of the same standing as a formal agreement.

In consequence of the roles described above for agreements and practice in interpretation of treaties, this chapter examines first agreements and instruments made in connection with conclusion of a treaty, second, subsequent agreements, and, third, subsequent practice.

2. Agreements and Instruments Made in Connection with Conclusion of a Treaty

A general description of the procedures which may produce the range of instruments within article 31(2)(a) and (b) has been given in Chapter 3 above. The general role of context in the Vienna rules has been considered above and in Chapter 5. This section considers in more detail the elements of paragraphs (2) (a) and (b), the function in treaty interpretation of such agreements and instruments, and how they fulfil that function.

2.1 Meaning of 'Conclusion' of a treaty

To identify what is connected with conclusion of a treaty it is necessary first to pinpoint what is 'conclusion' of a treaty and when it occurs. Unfortunately, this is not a term having a clear meaning.³² It is the common practice for purposes of identification to regard a treaty as concluded when it is signed. Hence the accepted manner of reference is to couple the treaty's name with the place and date of signature. This may suggest that 'conclusion' matches the words often put in capital letters in the testimonium, as in the Vienna Convention: 'DONE at Vienna, this twenty-third day of May, One thousand nine hundred and sixty-nine.'³³

It seems clear, however, that in some provisions of the Vienna Convention, 'conclusion' has a broader meaning. Most prominently, in Part II ('Conclusion and Entry into Force of Treaties'), Section 1 ('Conclusion of Treaties') contains provisions relating not only to drawing up a treaty, its authentication, and signature, but also on how states consent to be bound by signature (in those cases where signature conveys such consent), ratification, accession, etc.

³² A thorough study of the issues is in E W Vierdag, 'The Time of the "Conclusion" of a Multilateral Treaty: Article 30 of the Vienna Convention and Related Provisions' (1988) LIX BYBIL 75.

³³ United Nations Conference on the Law of Treaties, Official Records, Documents, p 301.

2. *Agreements etc Linked to Conclusion*

The titles (above) read together imply that conclusion is a distinct step in a process. However, it is clear from the text, context (that is the whole treaty), and the history of the provisions that the titles do not provide any indicator of the precise moment or stage in the process that can be viewed as conclusion, since the section's title and content are open to being read as covering the processes leading to conclusion as much as some point at completion of the process. The first three articles of this Section identify the capacity of states to conclude treaties and the means by which representatives of a state can be identified as authorized for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound. Articles 9 and 10 concern 'adoption' and 'authentication' of the text of a treaty. The later provisions of the Section (articles 11–17) refer to different means of 'consent to be bound by a treaty', thus presupposing existence of a treaty.

'Treaty' is defined as an 'international agreement concluded etc.' (article 2(1)). This suggests that by the time of the procedures in articles 11–17 conclusion has already taken place, assuming a concluded agreement is a synonym for a concluded treaty. The switch from reference to 'text of a treaty', the phrase used in articles covering development of the treaty text, to reference to 'treaty' (*tout court*) comes between article 10 (authentication of the text) and article 11 (means of expressing consent), but this is hardly sufficient to pinpoint a moment of conclusion.

Among the many provisions referring to conclusion, article 4 of the Vienna Convention provides for the Convention's application to treaties 'concluded' by states after its entry into force. This suggests that conclusion of a treaty occurs on an identifiable date, different from entry into force (the context within the article being use of two distinct terms), and necessarily preceding the treaty's entry into force (that being the very last moment of the 'process' possibility considered below), but without indicating at what point in the Part II procedures the date of conclusion falls. Paragraphs (2) and (3) of article 40 seem based on a distinction between entitlement to negotiate and conclude a treaty and entitlement to become a party; but, again, while these provisions make quite clear that negotiation and conclusion are distinct, no clear pointer is given as to the moment of conclusion, the use here appearing to indicate participation in the drawing up of a treaty as distinct from becoming a participant in the result of that effort.³⁴

In these circumstances it is appropriate to look at the preparatory work. The draft articles presented by the Special Rapporteur (Brierly) after the ILC's first discussion of the law of treaties started with a provision on conclusion of treaties.³⁵ This identified conclusion as occurring when the agreed text had been established in final written form and, in the typical case of a treaty produced by an international

³⁴ For an analysis and comparison of the Vienna Convention's articles mentioning conclusion, see Vierdag, 'The Time of the "Conclusion" of a Multilateral Treaty: Article 30 of the Vienna Convention and Related Provisions' above.

³⁵ In the draft article in his First Report on the Law of Treaties, Brierly had referred simply to states 'making' treaties: see [1950] *Yearbook of the ILC*, vol II, p 223, draft article 3 and at 233 ff, draft chapter III headed 'The Making of Treaties'.

conference, 'either such text or the Final Act of the conference has been duly signed or initialled *ne varietur* on behalf of two or more States represented at the conference'.³⁶ Brierly supported this approach by referring to examples of words frequently used in the formal parts of treaties, identifying 'agreed' and 'concluded' as most commonly used.³⁷

When Fitzmaurice took over from Hersch Lauterpacht as Special Rapporteur on the law of treaties, he made a more detailed analysis of the framing and conclusion of treaties as part of proposed provisions on the validity of treaties. He saw conclusion as the second of four stages: authentication, conclusion, participation, and entry into force.³⁸ He acknowledged, however, that 'conclusion' was an ambiguous term and had always given rise to difficulties, but stated that 'there is no doubt that a treaty is always given the date of its signature (i.e., conclusion), never that of its entry into force unless that coincides with signature'.³⁹ His solution was to treat conclusion as the stage beyond acknowledging the text as finally established and as the point at which states indicate that that text is also the one by which they are willing to be bound if they become bound at all.⁴⁰

When Waldock took over as fourth Special Rapporteur on the law of treaties, the nature of the exercise had changed. He was preparing draft provisions on conclusion, entry into force, and registration of treaties either as a stand-alone convention or as part of a larger one. He noted that Fitzmaurice had pointed out that conclusion of treaties could be regarded either as a *process* or as a *substantive matter* relating to the validity of treaties.⁴¹ Homing in on the former (the process approach), now that validity of treaties was no longer included in the part of the exercise which addressed conclusion of treaties, efforts at finding a definition of 'conclusion' were discarded. Conclusion became the description of the process preceding entry into force. As indicated above, however, some provisions in the Vienna Convention point to an act or moment rather than a process. Most obvious are those involving time factors, such as the ones on successive treaties.

In the light of these difficulties both in the text of the Convention and the preparatory work, the most appropriate meaning of 'conclusion' for present purposes seems the contextual and pragmatic one. In article 31(2)(a) an 'agreement...in connection with the conclusion' is to be contrasted with 'subsequent agreement' in article 31(3)(a). Hence, 'conclusion' in this context would generally be the date of adoption and opening for signature (the first Fitzmaurice sense). This is the moment of collective action (though signature can be a moveable feast, with a treaty open for signature over an extended period rather than on a single occasion). However, this would not exclude from consideration as part of the context a later agreement (such as an amendment required to bring the treaty into force)

³⁶ Second Report on the Law of Treaties [1951] *Yearbook of the ILC*, vol II, p 70.

³⁷ [1951] *Yearbook of the ILC*, vol II, at p 71.

³⁸ Fitzmaurice, First Report [1956] *Yearbook of the ILC*, vol II, p 121, paras 48 and 52.

³⁹ [1956] *Yearbook of the ILC*, vol II, at para 50.

⁴⁰ [1956] *Yearbook of the ILC*, vol II, at para 51.

⁴¹ Waldock, First Report [1962] *Yearbook of the ILC*, vol II, p 30, para 9.

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which does not specifically provide an interpretation, provided it is one to which all those who participated in the treaty's conclusion agree.⁴² Practice on this is considered below.

The immediate context is slightly different in the case of instruments made by one or more parties unilaterally (article 31(2)(b)). There is no contrasting provision in article 31(3). Nor is there the same sense of collective action involving all parties reaching agreement as to an interpretation (as distinct from agreement that an instrument is related to the treaty concerned). Yet an occasion such as deposit of an instrument of ratification may be just the moment for making a unilateral interpretative declaration. Hence 'conclusion' in article 31(2)(b) may more appropriately attract the 'process' meaning since such instruments may accompany ratification, accession, etc as much as signature.

2.1.1 Issues arising as to 'in connection with conclusion' of a treaty

The uncertainty over the moment of conclusion of a treaty, or of the completion of the process of conclusion, has resulted in doubts as to whether a document associated with a treaty but prepared before the treaty was adopted or opened for signature forms part of the preparatory work or is connected with conclusion of the treaty. This was illustrated in *R v Secretary of State for the Home Department, Ex parte Read*.⁴³ There the House of Lords found confirmation of its interpretation of a treaty in an Explanatory Report, but hedged its bets as to the basis of the Report's admissibility for interpretative purposes:

Although it does not purport to be an authoritative interpretation of the Convention, it is available as an aid to construction as part of the 'travaux préparatoires' and under article 31 of the Vienna Convention on the Law of Treaties 1969 (Cmd. 4818).⁴⁴

As an instrument published at the behest of the Committee of Ministers of the Council of Europe when opening the Convention for signature, the Explanatory Report can be viewed as an 'agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty' (article 31(2)(a)), and hence part of the context;⁴⁵ but as a document drawn up by the Committee of Experts preparing the text for conclusion by the Committee of Ministers, it also appears to form part of the preparatory work. That such a report can be characterized as within the meaning of context is significant in that it is to be taken into account as part of the general rule of interpretation, rather than admitted as a supplementary means of interpretation admitted on the conditions prescribed for use of preparatory work.

⁴² Cf Vierdag, 'The Time of the "Conclusion" of a Multilateral Treaty: Article 30 of the Vienna Convention and Related Provisions', at 83–4.

⁴³ [1989] AC 1014; the facts and other issues are considered in Chapter 5, section 4.2.3 above.

⁴⁴ [1989] AC 1014, at 1052; see further Chapter 8, section 4.5.3 below.

⁴⁵ See I Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press, 2nd edn, 1984), 129–30.

From the discussion above about the meaning of ‘conclusion’ of a treaty, it can be seen that there may also be uncertainty whether a particular agreement falls within the category of those made ‘in connection with the conclusion of the treaty’ or constitutes a ‘subsequent agreement’ regarding interpretation or application of the treaty (which is a category considered later in this chapter). It is likely to be most commonly correct that the existence of agreement on interpretation or application of a treaty is more important than the form or timing of the agreement. If all the parties to a treaty agree on its meaning, this will usually be the correct meaning. There may be difficulties if the parties make an interpretative agreement while an interpretative process that affects third parties is underway (such as where investors are relying on bilateral investment treaties) or if, for example, there is a body within an organization endowed with competence to determine the interpretation.

Examples of such situations are hard to find.⁴⁶ However, the potential for uncertainty as to whether an agreement is in connection with conclusion or is a subsequent one can be illustrated by the sequence of the UN Convention on the Law of the Sea 1982 and the Agreement relating to the Implementation of Part XI of the Convention adopted in July 1994 before the Convention itself entered into force later that year. Although problems of categorization of the kind considered here in relation to interpretation do not appear to have arisen, (probably because of skilful construction of provisions establishing the relationship between the Agreement and the Convention), it can be seen that an implementing agreement making adjustments necessary to enable further states to participate in a convention could affect the potential for the convention to enter into force. If such an implementation agreement adjusted the terms on which states which had already signed the convention become parties to it, could it be viewed as made in connection with the convention’s conclusion? It seems more probable that in such a case the convention would be regarded as having been concluded when the text was adopted or signed. An implementing agreement would thus be viewed as having been made subsequent to the conclusion of the convention and therefore one potentially relating to its interpretation or application within paragraph (3)(a) rather than (2)(a) of article 31 of the Vienna Convention.⁴⁷

In the case of both subparagraphs (a) and (b) of article 31(2) there is a problem in the use of the term ‘parties’, at least of a theoretical kind. ‘Party’ is a term defined in article 2(1)(g) of the Vienna Convention as ‘a State which has consented to be bound by the treaty and for which the treaty is in force’. This combination of consent and entry into force means that there will not be parties to a treaty until after conclusion of a treaty, except in the case where conclusion and entry into force are simultaneous (such as those treaties which enter into force upon signature). The

⁴⁶ Cf *Arbitration under Chapter Eleven of NAFTA, Pope & Talbot v Canada (Award in respect of Damages)* (2002) 41 ILM 1347 considered in section 4.7 below.

⁴⁷ For an example of factors which may bear on determining in which category interpretative understandings may need to be considered, see K Heller, ‘The Uncertain Legal Status of the Aggression Understandings’ (2012) 10 *Journal of International Criminal Justice* 229 and section 2.3 below.

use of ‘parties’ in these two subparagraphs is therefore either proleptic or, more probably, intended to be read as looking at the position when the treaty is being interpreted after entry into force and is being applied in treaty relations between the parties. The point does not appear to have raised problems in connection with these two subparagraphs, in contrast with the use of ‘parties’ in article 31(3)(c) of the Vienna Convention but further possible issues in relation to article 31(2)(b) are considered below.⁴⁸

It would obviously be more convenient if ‘conclusion’ could be fixed in a way which would simplify the interpretation of article 31(2) of the Convention. This may be possible for some purposes. In its current work on subsequent agreements and subsequent practice in relation to the interpretation of treaties the ILC has identified, in its commentary on the proposed definition of such agreements and practice, a specific stage in the treaty making process. Noting that various provisions of the Vienna Convention show that a treaty may be ‘concluded’ before its actual entry into force, for the purposes of the Commission’s present work, “‘conclusion’ is whenever the text of the treaty has been established as definite’.⁴⁹

2.2 Interpretative role of agreements connected with conclusion of a treaty

Some formal agreements concluded in connection with a treaty specifically indicate that they address interpretation. For example, the ‘Protocol on the Interpretation of Article 69 of the European Patent Convention’⁵⁰ gives guidance on how to interpret and apply the Convention’s direction that the extent of the protection conferred by a European patent (in the sense of what is the area monopolized by the invention) is to be determined by the terms of the claims, using also the description and any drawings in the specification. The Protocol sought to establish a balance between an unduly narrow and literal construction of the claims on the one hand and, on the other, an excessively general approach resulting from viewing the claims as merely an aid to finding the essence of the invention and protecting that.⁵¹

⁴⁸ See section 2.3.1 below, and Chapter 7, section 3.3 where the various subparagraphs are compared, together with the use of ‘parties’ in article 31(3)(a) on subsequent agreements on interpretation.

⁴⁹ ILC Report on the work of its Sixty-fifth session (2013) General Assembly Official Records Sixty-eighth Session, Supplement No. 10 (A/68/10), Chapter 4, p 31 commentary para (2).

⁵⁰ See Convention on the Grant of European Patents (European Patent Convention), Munich 1973 and Protocol on the Interpretation of article 69 of the Convention, adopted at the Munich Diplomatic Conference for the setting up of a European System for the Grant of Patents on 5 October 1973 at <<http://www.european-patent-office.org/legal/epc/e/ar69.html>>; a revised text of the Protocol has been adopted: Act Revising the Convention on the Grant of European Patents, Munich, 29 November 2000; cf the First Protocol on the Interpretation by the Court of Justice of the European Communities of the Convention on the Law Applicable to Contractual Obligations (UKTS 33 (2004)), which concerns acceptance of jurisdiction of the Court of Justice to interpret the treaty, rather than specific matters of interpretation.

⁵¹ For a more detailed history and analysis of the Protocol, see *Kirin-Amgen Inc v Hoechst Marion Roussel Limited* [2005] RPC 9, judgment of Lord Hoffmann at paras 23–30.

While this Protocol shows well the role of a fairly typical interpretative instrument, setting out guidance on how to exercise interpretative discretion in relation to the plain rule in the text of the treaty, the Protocol is not a typical example of the way in which such an interpretative Protocol is related to the treaty. This is because the Protocol is specifically mentioned in a list of associated instruments in article 164 of the European Patent Convention, which are to be regarded as integral parts of the Convention; it could therefore probably be viewed as admissible within article 31(1) of the Vienna rules rather than article 31(2)(a).

The substance, however, is clearly more important than the form or classification; and this example provides an opportunity to recall that the whole of article 31 of the Vienna Convention is to be applied as the 'general rule'. Hence, pedantic distinctions need not be drawn between interpretative elements that form part of the context and those derived from other relevant matter.

A similar role to a protocol on interpretation, though not so explicit in the title, is performed by a Protocol of Signature. This refers to an instrument concluded at the time of signature of a treaty; but as a description it is somewhat misleading as it is not directly concerned with the process of signature of a treaty.⁵² Such a Protocol is described in a UN guide:

A Protocol of Signature is an instrument subsidiary to a treaty, and drawn up by the same parties. Such a Protocol deals with ancillary matters such as the interpretation of particular clauses of the treaty, those formal clauses not inserted in the treaty, or the regulation of technical matters...⁵³

Other such protocols concern matters at the blurred line between interpretation and application. For example, article 3 of the Customs Convention on Containers, Geneva, 1972,⁵⁴ requires parties to grant temporary admission to containers, subject to conditions prescribed in the treaty, whether loaded with goods or not. The second declaration in the Protocol of Signature attached to the treaty states: 'The terms of the present Convention shall not preclude the application of national provisions or of international agreements, not of a Customs nature, regulating the use of containers.' This can be read as interpreting the extent of the general obligation in article 3 or simply as an understanding for avoidance of doubt as to the reach of the treaty. The latter seems a better analysis as the same treaty provides in its article 13 for a compilation of interpretations to be made. This is in the set of 'Explanatory Notes' in Annex 6 to the treaty. These notes provide an interpretation

⁵² The unfamiliar and perhaps confusing description of such an instrument may have been the reason why the Court of Appeal in one case described a protocol of signature as 'a protocol of the United Kingdom signature of the Convention' (when in fact the UK had acceded to the treaty, a process that does not involve signature) and to assume that there must have been 'a further protocol of the United Kingdom's accession to the Convention' allowing for territorial extension (when in fact article 46 of the relevant treaty provided for such extension by notification to the Secretary General of the UN): *Chloride Industrial Batteries Ltd. v F & W Freight Ltd* [1989] 1 WLR 823, at 827–28; see also Chapter 3, section 2.4.1.

⁵³ UN Treaty Collection, Treaty Reference Guide, Definition of key terms, at <https://treaties.un.org/Pages/Overview.aspx?path=overview/definition/page1_en.xml>.

⁵⁴ [1967] ATS 3 where a Protocol of Signature is also reproduced.

of some of the provisions of the Convention, not modifying them but making their contents, meaning, and scope more precise. Those ‘notes’ include details such as: ‘The term “insulated container” is to be taken to include refrigerated and isothermic containers’ (para 4.2.1.(c)), the type of definition or specification which clearly falls within the notion of interpretation showing an intention of the parties to give the term a special meaning (Vienna Convention, article 31(4)).

2.3 Interpretative role of instruments made by one or more parties

That the context for the purposes of interpretation of a treaty is to include any instrument made by one or more parties in connection with conclusion of the treaty and accepted by the other parties as an instrument related to it, raises two main issues. The first is what these instruments are. The second is how they can assist interpretation.

2.3.1 *Instruments covered by article 31(2)(b) of the Vienna Convention*

As to what the ‘instruments’ are, it seems clear that this term is not specifically linked to unilateral statements or interpretative declarations. It is the instrument that is identified in article 31(2)(b), not the content. The term is apt to cover a document.⁵⁵ The Vienna Convention uses ‘instrument’ in this sense in the definition of a treaty (‘an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments’: article 2(1)(a)). It also uses the term in many other articles, but none appears to refer to a particular item in the content of a document rather than the document itself. Self-evidently, however, instruments containing statements relevant to interpretation and, in particular, those claiming to state interpretative understandings are the prime candidates for consideration. In contrast, when unilateral statements or interpretative declarations are recorded in preparatory work these are admissible in the interpretative process to the extent stated in article 32.

Among the most obvious instruments produced by a state unilaterally in connection with a treaty are ‘instruments of ratification, acceptance, approval or accession’ (a phrase used in article 16 and elsewhere in the Convention). Are these instruments ‘in connection with conclusion of a treaty’? As has been indicated above, the moment of ‘conclusion’ of a treaty is not clearly identified in the Vienna Convention and the term may signify a process rather than a single act.⁵⁶ If signature is taken as the moment of conclusion, and the treaty is the instrument

⁵⁵ The *Oxford English Dictionary* (1989) offers as its fifth definition of ‘instrument’, in usage relating to law: ‘A formal legal document whereby a right is created or confirmed, or a fact recorded; a formal writing of any kind, as an agreement, deed, charter, or record, drawn up and executed in technical form, so as to be of legal validity.’

⁵⁶ See section 2.1 above.

being signed, there could be scope for doubting whether an appended interpretative statement is properly described as ‘an instrument...made...in connection with the conclusion of the treaty’. The instrument is the document being signed. A statement could be written under the signature or may be in a separate document, the latter being more probable and clearly being capable of description as an instrument. Yet the interpretative value can hardly be dependent on the precise process used to record it if the circumstances of its making are essentially of the same kind. There seems little doubt that an interpretative statement made at the moment of signature will be admissible in the interpretative process, the niceties of the wording of article 31(2)(b) notwithstanding.

Likewise, such a statement made (or repeated) on ratification, accession, etc ought clearly to be admissible under this provision. It is to be noted, however, that this was not so certain in the work of the ILC. There was some doubt initially whether instruments of ratification should be taken into account in interpretation and, logically anterior to that issue, whether ‘instrument’ was an appropriate term since (it was suggested) it could be read as excluding declarations.⁵⁷ Nevertheless, it was pointed out that not only ratifications accompanied by reservations but other instruments containing declarations might affect interpretation.⁵⁸ A suggestion by Rosenne included the words ‘instrument related to the treaty and accepted by the parties in connection with its conclusion’;⁵⁹ and this thought seems later to have shaped the eventual wording, without there being significant discussion of precisely what instruments might be covered.

In its Guide to Practice on Reservations to Treaties, the ILC has noted doubts about the admissibility of interpretative declarations under articles 31 and 32, although it has indicated their interpretative relevance, particularly where confirmatory of meaning.⁶⁰ Any doubt seems based on earlier work of the ILC preceding the adoption of its draft provisions for the Vienna rules, and on the lack of authority as to the common understanding of the parties that the unilateral character of an interpretative declaration can sustain. It seems clear, however, that the ILC ultimately opted for identifying the conditions on which an instrument could have interpretative potential rather than offering criteria on which the interpretative weight of the instrument’s contents should be assessed.

Thus there can be little doubt that the ordinary meaning of the phrase in article 31(2)(b) can include documentation associated with an instrument of ratification so that an interpretative declaration lodged with such an instrument is to be taken into account. Indeed, this is the material most likely to emerge within the ambit of this subparagraph. If it were excluded, this would leave little effect for the Vienna

⁵⁷ [1964] *Yearbook of the ILC*, vol. I, pp 310–13.

⁵⁸ [1964] *Yearbook of the ILC*, vol. I, pp 311 and 313.

⁵⁹ [1964] *Yearbook of the ILC*, vol. I, p 313, para 54.

⁶⁰ Addendum to Report of the International Law Commission, Sixty-third session (2011), UN General Assembly Official Records, Sixty-sixth Session, Supplement No. 10, A/66/10/Add.1, <<http://legal.un.org/ilc/reports/2011/english/addendum.pdf>>, Guideline 4.7.1, commentary para (24) ff; and see Chapter 3, section 3 above.

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provision; and if acceptance of the substance of a declaration by all other relevant states were a precondition for consideration of the interpretative declaration, the resultant agreement on meaning would make the Vienna provision unnecessary as the agreement would be included either under article 31(2)(a) or 31(3)(a).

One particular treaty-related instrument which warrants attention is the 'Final Act' of a diplomatic conference. Closer in time to conclusion of a treaty, if conclusion is taken as the adoption of the text or its signature, a final act comes well within the description of an instrument made in connection with the treaty's conclusion and is likely to be readily seen as one accepted by the parties as an instrument related to the treaty. However, this again casts some doubt over which parties are meant and how their agreement is signified.⁶¹

The term 'party' in the Vienna Convention refers to a state which has become bound by a treaty and for whom it is in force. In as much as such states have accepted that the treaty's adoption or opening for signature has been properly agreed as recorded in the final act or equivalent instrument, so too it seems likely that their acceptance of that instrument as being related to the treaty has been agreed by them. If specific acceptance that the instrument is related to the treaty had to be shown for each state participating in a conference, as well as those which eventually become parties but did not participate in the negotiations, many final acts would lose interpretative significance, there being in several cases no formal record of which states were actually present and participating in the session of the conference which approved or adopted the final act by consensus.⁶² It should be emphasized that acceptance that an instrument as related to a treaty is quite different from agreement to propositions within the instrument. A final act may record matters of differing kinds and states may need to take a position on these and, if appropriate, give effect to their position by, for example, reservation or interpretative declaration when they become a party.

2.3.2 *Role of unilateral instruments covered by article 31(2)(b)*

The role of such instruments was equally little discussed in the ILC debates. The assumption seems to have been that the opportunities for unilateral declarations were sufficiently varied to leave them as a flexible element whose possible role in shaping an interpretation was dependent on the circumstances of each particular case.⁶³ In its work preparing the draft articles on the law of treaties, the ILC

⁶¹ See section 2.1 above.

⁶² Cf a different view in K Heller, 'The Uncertain Legal Status of the Aggression Understandings' (2012) 10 *Journal of International Criminal Justice* 229 concerning amendments to the Rome Statute of the International Criminal Court adopted at a review conference where understandings were recorded relating to the definition of 'aggression'; analysis of that situation is made more difficult by the nature of the amending instrument, the differing procedures by which states become parties to the amended Statute, and the possibility of a further review conference before the amendments come into force.

⁶³ See F Horn, *Reservations and Interpretative Declarations to Multilateral Treaties* (Amsterdam: North-Holland, 1988), at 231–3, and Chapter 3, section 3 above.

therefore focused on the source (the instrument) rather than the substance of the interpretative material. That omission has thus far only been partly remedied in the recent work of the ILC on guidelines on reservations.⁶⁴

There has been little published practice on the effect of interpretative declarations. There is no express reference to them in the Vienna rules. The most substantial consideration of the processes surrounding them (formulation, approval, disapproval, recharacterization, etc) is in the Guide to Practice on Reservations to Treaties which is the product of the ILC's work on reservations. Because the ILC linked interpretative declarations with reservations and integrated the procedural aspects of the two types of statement with their effects, the whole topic of interpretative declarations has been covered in the consideration of interpretative material in Chapter 3 above.⁶⁵ Article 31(2)(b) also covers instruments made by two or more parties, if accepted by the other parties to the treaty. For example, in the *East German expropriation* case the German Federal Constitutional Court had to consider whether the Treaty on the Final Settlement of 12 September 1990, which finally ended the occupation of Germany, dealt with the issue of expropriations made by the occupying power of the German Democratic Republic.⁶⁶ Although that treaty contained no provision on the question of restitution of expropriated properties, there had been a joint letter of the Federal Foreign Minister and the Minister President of the German Democratic Republic to the foreign ministers of the victorious powers in the talks which preceded the treaty. The Court concluded:

This correspondence, therefore, under Article 31.2 letter b of the Vienna Convention on the Law of Treaties of 23 May 1969 (Federal Law Gazette 1985 II p. 926), was to be consulted in interpreting the Treaty on the Final Settlement and to be understood to the effect that the Federal Republic of Germany had committed itself vis-à-vis the victorious powers to leave the expropriations on the basis of sovereign acts by occupying powers untouched.⁶⁷

3. Subsequent Agreements

Two aspects of article 31(3)(a) are quite clear: the provision refers to interpretative agreements made after conclusion of a treaty (that is, not made 'in connection' with its conclusion), and it clearly covers treaties which embody agreements on interpretation or application of a treaty. In place of 'made in connection with the conclusion of the treaty' (the linkage envisaged for agreements and instruments in article 31(2)), subsequent agreements (not being ones with that link) are specified in article 31(3)(a) as agreements 'regarding the interpretation of the treaty or the application of its provisions'. Whether an agreement falls within this description will be uncontroversial if it is explicitly directed to interpretation or application

⁶⁴ See Chapter 3, section 3.1 above.

⁶⁵ See Chapter 3, section 3 above.

⁶⁶ BVerfG, 2 BvR 955/00 of 10/26/2004, at <http://www.bverfg.de/entscheidungen/rs20041026_2bvr095500en.html>.

⁶⁷ BVerfG, 2 BvR 955/00 of 10/26/2004, at para 63 (translation by the Court).

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of the treaty whose interpretation is in question, but may be less clear where, for example, there is a later treaty between the same parties which can be viewed as on the same subject, or related ones, but which reveals no specific reference to, or relationship with, the earlier treaty.

In the *Jan Mayen* case (*Denmark v Norway*), the ICJ touched on this latter issue, although it confusingly opened its consideration of the matter by referring to taking account of subsequent practice rather than agreement (perhaps indirectly reinforcing the point that it is agreement of the parties as to interpretation that is significant rather than the form that agreement takes).⁶⁸ The Court had to decide whether reference to use of a median line in a 1965 agreement between Denmark and Norway on delimitation of their continental shelves could be shown to be of general application between them because, among other factors, their 1979 Agreement on delimitation of the continental shelf in the area between the Faroe Islands and Norway used the median line. The Court considered that if the 1965 Agreement had been designed to commit the parties to the median line in all ensuing shelf delimitations, a reference would have been made to it in the 1979 Agreement (which there was not). The absence of a relationship between the two agreements was explicitly confirmed by a communication by the Norwegian government to the Norwegian parliament ruling out application of the 1965 agreement to the area between the Faroe Islands and Norway.⁶⁹ Clearly, there must be a relationship between the putative subsequent agreement and the treaty which is being interpreted sufficient to warrant the subsequent agreement being seen as providing evidence of meaning by way of interpretation or application.⁷⁰

Further issues that arise are: (1) whether there is any difference in legal effect between subsequent agreements and those reached at the time of conclusion; (2) whether subsequent agreements or understandings recorded by a less formal means than a treaty are envisaged; and (3) (linked to the previous issue) whether in the case of less formal understandings over interpretation, additional support needs to be found for any understanding by showing that it has been implemented in practice, thus making an overlap with the topic of article 31(3)(b). The lack of significant difference in effect between subsequent agreements and those made at the time of conclusion of a treaty has been considered above.⁷¹

3.1 Fact of agreement, not form, is the key factor

In considering whether the Vienna rules envisage a subsequent agreement as having any particular form, the starting point is the meaning of 'agreement' in article 31(3)(a). In the title of an international instrument 'agreement' usually denotes

⁶⁸ *Case concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway)*, [1993] ICJ Reports 38, at 51 para 28; see further Chapter 5, section 5.3.4 above.

⁶⁹ [1993] ICJ Reports 38, at 51, paras 28–9.

⁷⁰ See further L Crema, 'Subsequent Agreements and Subsequent Practice within and outside the Vienna Convention', Chapter 2 in Nolte, *Treaties and Subsequent Practice*, section 3.

⁷¹ See section 1.2.

binding commitment and is synonymous with a treaty. Similarly, in the most common form of a treaty, the opening recital of the states involved and any pre-ambular paragraphs are followed by words of 'agreement', viz '...have agreed as follows:...''. So too in the substantive provisions of a treaty, the word 'agree' in any form provides strong evidence that the intention was to create binding legal relations. However, while all these indicators (particularly when present together) will usually show conclusively that the intention is to set out the terms of a treaty, that is not the issue over article 31(3)(a). It is not a question of whether that provision adds to the assessment that any given instrument was intended to be a binding treaty, but whether the parties to a treaty have, subsequent to its conclusion, reached a firm agreement on what one of its provisions means. Thus it does not necessarily follow that such an agreement will be recorded in one of the forms commonly used for a treaty. Conversely, however, if a firm agreement has been reached between two states with the intention of creating a legal relationship, this will amount to a treaty (subject to the further requirements, if one is following the definition in article 2(1)(a) of the Vienna Convention, that the agreement must be in writing, etc).

3.1.1 History and analysis

The ILC linked subsequent agreements to understandings reached during negotiation of a treaty:

A question of fact may sometimes arise as to whether an understanding reached during the negotiations concerning the meaning of a provision was or was not intended to constitute an agreed basis for its interpretation. But it is well settled that when an agreement as to the interpretation of a provision is established as having been reached before or at the time of the conclusion of the treaty, it is to be regarded as forming part of the treaty... Similarly, an agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation.⁷²

The first of these quoted sentences suggests that the underlying issue is what constitutes 'an agreed basis' for a treaty's interpretation. The implication is that 'an understanding' could constitute such a basis where reached during the negotiations, albeit that this would depend on whether a clear intention was manifested. The commentary then notes that if an agreement on interpretation is established as having been reached before or at conclusion of a treaty, this is clearly to be read as forming part of the treaty. Hence it seems that the test for use of a subsequent agreement in treaty interpretation ought to be whether there was a manifest intention that the understanding would constitute an agreed basis for interpretation. Regrettably, however, the ILC's recorded comment is not framed in such a way as to make this entirely clear because the explanation, in the case of an agreement

⁷² [1966] *Yearbook of the ILC*, vol II, p 221, para 14.

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before or at the time of conclusion of a treaty, switches from the term ‘understanding’ to the term ‘agreement’ without clearly indicating whether a distinction is intended. However, it seems reasonable to conclude from all the circumstances that ‘agreement’ does not have to be in treaty form but must be such as to show that the parties intended their understanding to be the basis for an agreed interpretation.

These rather obvious points in analysis of article 31(3)(a) of the Vienna Convention assume greater significance when seen in the context of the all too common situation where some issue of everyday interpretation of a practical treaty is the subject of discussion between officials of two or more parties. They reach an understanding or compromise over some minor interpretative controversy but record this in a ‘minute’, ‘memorandum of understanding’, or simply a letter, perhaps not considering that the matter warrants the hassle of domestic legislative procedures and of international requirements such as registration of a treaty with the UN. Can such a process, or rather its outcome, be regarded as a subsequent agreement on interpretation? The answer (which is still only lightly evidenced, but is considered further below) seems twofold. First, there is the issue of whether the official is sufficiently senior to have the authority to make an agreement binding the state. Second, if an understanding is actually put into effect in applying a treaty, that less formal agreement (whether recorded in a letter, agreed record of discussions or whatever), merges with the next element of treaty interpretation in the Vienna rules (subsequent practice).

That practical resolution of difficulties of interpretation is often achieved in the course of implementation of a treaty may be one reason why article 31(3)(a) refers to subsequent agreements regarding the interpretation of the treaty ‘or the application of its provisions’. The addition of the words ‘or the application of its provisions’ was one of the few changes made at the Vienna conference to the ILC draft articles on interpretation. The conference took up the addition proposed by Pakistan to cover cases ‘where the parties entered into subsequent agreements concerning the implementation of the treaty, which might shed light on their intentions’.⁷³ There is no explanation why the drafting committee preferred ‘application’ to ‘implementation’, but the former is in the heading of the part of the Vienna Convention in which the Vienna rules appear and is the term used several times elsewhere in the Convention. It also sensibly reflects an ordinary usage by which parties are as likely to agree that the treaty ‘applies’, ‘is to apply’, or ‘that they will apply it’, to some new situation or object, as they are to specify that they interpret it in that way. Whether such formulations of application point to interpretation or extension is a matter for assessment in each particular case but is considered further below.⁷⁴

⁷³ United Nations Conference on the Law of Treaties, First Session (26 March–24 May 1968), Official Records: Summary Records of Committee of the Whole, p 168, para 53.

⁷⁴ Cf Nolte (ILC Special Rapporteur), Second Report on Subsequent Agreements etc, A/CN.4/671 (26 March 2014) pp 4–5, paras 4–6 suggesting a slightly different analysis of the relationship between interpretation and application in the Vienna rules, and at pp 49–69 bearing on the relationship between interpretation and change in meaning of a treaty.

3.1.2 ICJ looks for fact of agreement, not form

In its judgment in the *Botswana/Namibia* case in 1999 (concerning the location of part of the river boundary between those states), the ICJ affirmed the role of subsequent agreements in treaty interpretation, quoting the last sentence of the extract from the ILC's commentary in the section above.⁷⁵ The ICJ noted that both parties in the case accepted that interpretative agreements and subsequent practice constitute elements of treaty interpretation, though disagreeing over the consequences to be drawn from the facts for purposes of interpretation of the treaty in issue.⁷⁶ The Court examined relevant events and dealings between the predecessors to the disputing states and concluded that these events demonstrated the absence of agreement. Hence, the Court found, those events could not constitute subsequent practice in the application of the treaty which established the agreement of the parties regarding its interpretation (quoting article 31(3)(b)):⁷⁷ 'A fortiori, they cannot have given rise to an "agreement between the parties regarding the interpretation of the treaty or the application of its provisions" (ibid., Art 31, para 3 (a)).'⁷⁸

In looking at the history of dealings between the relevant authorities to see whether they had reached any agreement subsequent to the historic treaties establishing where the river boundary lay, the ICJ rather worked backwards to the conclusion that there can have been no subsequent agreement from the starting point of an assessment that the various moves to resolve the difficulties between the states' predecessors did not amount to subsequent practice showing agreement on an interpretation. This approach seems to suggest that the concepts of a subsequent agreement and subsequent practice establishing agreement over interpretation have some potential overlap at the point of less formal agreements or understandings. More significant in the present context, the ICJ seems to have reached its conclusion on the premise that 'any subsequent agreement' refers to the fact of agreement, rather than presupposing a formal instrument.

In relation to subsequent agreements, Sinclair writes:

It follows naturally from the proposition that the parties to a treaty are legally entitled to modify the treaty or indeed to terminate it that they are empowered to interpret it... This having been said, it is rarely that one comes across subsequent agreements between the parties bearing upon the interpretation of a treaty which they have concluded.⁷⁹

⁷⁵ *Kasikili/Sedudu Island (Botswana/Namibia)* [1999] ICJ Reports 1045, at 1076, para 49.

⁷⁶ [1999] ICJ Reports 1045, at para 51.

⁷⁷ [1999] ICJ Reports 1045, at para 63.

⁷⁸ [1999] ICJ Reports 1045, at para 63.

⁷⁹ Sinclair, *The Vienna Convention on the Law of Treaties* at 136. Sinclair cites an advisory opinion of the PCIJ showing this proposition to be uncontroversial. He also reports there Yasseen's explanation for the paucity of examples of interpretative agreements, namely that there has to be a high level of desire to reach an understanding (ambiguity is often in the interest of one of the parties) and that it requires a delicate touch to reach agreement on interpretation, which becomes even more difficult where a multilateral treaty is in issue. For an example of a formal agreement on interpretation, see Exchange of Notes constituting an Agreement between Governments of Australia and others and the Government of Italy, concerning the Interpretation of Article 7 of the Agreement respecting Graves of British Soldiers in Italy of 11 May 1922 (Rome, 6 August 1936) [1936] ATS 5 (electronic); cf so-called agreements on interpretation which are actually agreements on application: Agreement on

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It is difficult to determine why agreements on interpretation or application are not too commonly encountered.⁸⁰ It could be that in instances where differences are resolved by agreement in the course of practical application of a treaty the matter is not reported at all, or not with the prominence of a dispute that goes to international adjudication. Another possibility is that, particularly where there is more than one difficulty in the application of treaty, the parties to the treaty may be more likely to enter a further agreement which does not specifically identify itself as directed to interpretation. This perhaps carries the implication that in addition to considering the role of subsequent agreements (such as there are) specifically on interpretation or application of a treaty, one should also consider whether an amending agreement may have implications for interpretation. For the latter may in fact be designed to clarify the meaning and, in the case of a multilateral treaty which is being amended among some parties only, may have implications for the interpretation of the unamended treaty. It is also appropriate to consider whether an informal subsequent agreement on the meaning of a treaty provision takes effect as an instrument within the Vienna Convention's article 31(3)(a) (subsequent agreement) or whether, if implemented in practice, it lays the groundwork for applying article 31(3)(b) (subsequent practice).

The judgment of the ICJ in the *Botswana/Namibia* case (considered above) was cited by the Arbitral Tribunal in *Methanex v USA*, in conjunction with other material, as showing that article 31(3)(a) does not envisage that a subsequent agreement need be concluded with the same formal requirements as a treaty for such an agreement to play a role in treaty interpretation.⁸¹

3.2 Less formal or informal agreement

In its reference to 'any subsequent agreement' in article 31(3)(a), the Vienna Convention does not specify that such an agreement must constitute a treaty or have the same formal status as the instrument which is interpreted. Hence any good evidence that parties to a treaty have reached agreement on its interpretation seems admissible. The approach of the ICJ in the *Botswana/Namibia* case has been noted above. That case was decided in the light of the Vienna rules. Before those rules received widespread application, whether agreement had been achieved on

Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade of 30 October 1947 (Subsidies and Countervailing Duties Code) (Geneva, 12 April 1979) [1981] ATS 28; see also understandings on the interpretation of the various GATT articles annexed to the Marrakesh Agreement establishing the World Trade Organization (WTO Agreement), Marrakesh, 1994 [1995] ATS 8.

⁸⁰ For consideration of the paucity of interpretative agreements in the case of investment treaties, see A Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States' (2010) 104 AJIL 179, at 215–17.

⁸¹ *International Arbitration under Chapter 11 of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules, Methanex v USA (Merits)*, Award of 3 August 2005 (2005) 44 ILM 1345, at 1354, paras 18–21; and see Contemporary Practice of the United States, 'Statements by Parties as "Subsequent Agreement" in Treaty Interpretation' (2001) 95 AJIL 887.

interpretation was sometimes viewed in terms of estoppel: had one of the treaty partners adopted a position which precluded it from arguing any further for a different interpretation from that propounded by another party? Informal records and evidence of statements might make the case.

By their nature, however, informal agreements and records are less likely to surface than formal ones. They tend to be buried in the files of government departments. Sometimes, however, such instruments emerge and have a clear role in interpretation. Even those that appear to have a less formal character than a commonly identifiable treaty have been held to constitute a binding agreement. For example, in the *European Molecular Biology Laboratory Arbitration*⁸² the laboratory (EMBL) was an international organization with a permanent staff under a Director-General and having its headquarters in the Federal Republic of Germany pursuant to a treaty ('Headquarters Agreement'). Differences arose between EMBL and Germany over the extent of exemptions from tax and duties accorded by the Headquarters Agreement to both EMBL and the Director-General. Did the exemptions in relation to official activities cover income generated from the operation of a canteen and guest house used by staff and scientists visiting EMBL, and was the Director-General exempt from import duties and value added tax on goods purchased and imported for his or her personal benefit? In the case of the Director-General, article 10 of the Headquarters Agreement stated that the exemptions were inapplicable to goods purchased or imported for the personal benefit of the Director-General and staff of EMBL, but article 19 accorded the Director-General the immunities and privileges of a diplomatic agent as in the multilateral convention on diplomatic relations, which generally exempts diplomatic agents from tax and duties.⁸³

In 1977 the Federal Ministry for Research and Technology (BMFT) sent a letter to EMBL confirming that the Director-General's status under article 19 was not restricted by article 10, thus apparently recognizing the broad entitlement to tax exemption of a diplomatic agent. Nevertheless, the Federal Foreign Ministry stated in 1982, in a communication purporting to revoke the BMFT's 1977 letter, that goods purchased or imported for the Director-General's benefit were not exempt. In 1987 negotiations led to a 'Settlement'; but in relevant respects this only set out guidelines for interpreting the Headquarters Agreement and, in relation to the official activities of the organization, merely repeated the statement of purposes and responsibilities in the EMBL's constitutive instrument. Thus the differences over interpretation continued.

In the ensuing international arbitration the tribunal considered that both the Ministry's letter of 1977 and the Settlement of 1987 constituted subsequent agreements within the meaning of article 31(3)(a) of the Vienna Convention(s).⁸⁴ As

⁸² *European Molecular Biology Laboratory Arbitration (EMBL v Germany)*, Award of 29 June 1990, 105 ILR 1.

⁸³ Vienna Convention on Diplomatic Relations, Vienna, 1961 [1968] ATS 3, article 34 (with listed exceptions).

⁸⁴ The Arbitral Tribunal noted that both the 1969 Vienna Convention and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between

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regards the BMFT's letter of 1977, the Federal Government had disputed its binding effect, but not on the basis that it did not follow 'the usual and well tested form of communication in public international law'.⁸⁵ Rather it had relied on an assessment of the contents of the letter, asserting that it was just an intermediate link in the controversy. The Tribunal, however, saw the letter as more than a unilateral statement, being a reply to a question put by the other side in a dispute, a reply which constituted an agreement on interpretation.⁸⁶ It is evident from this Award that, in assessing whether there was a subsequent agreement for the purposes of the Vienna rules, the Tribunal attached value to identifying a binding agreement on interpretation, binding through being conclusive of a dispute rather than through compliance with forms for international agreements.

A further example of an informal record of agreement on interpretation is in the UK case *Seaboard World Airlines Inc v Department of Trade*.⁸⁷ There the judgment recorded that difficulties had arisen between the UK and the USA as to the meaning of the route descriptions in a bilateral agreement on air services, and that representatives of the two governments had discussed the matter. The problem had been over the interpretation of the route schedule which set out possible points in four columns, listing successively departure points, intermediate points, destination points, and 'points beyond'. Each of these columns had a note under the heading 'Any one or more of the following if desired'. One of the issues was whether this note permitted omission of all destination points and if so whether 'points beyond' could still be served. The result of the discussions between representatives of the two governments was recorded in an attachment to a 'Memorandum Summarising a Portion of the Discussions':

The two delegations discussed the meanings to be attributed to the headings of the columns...

The delegations were in agreement (a) that these headings should remain unchanged and (b) that the headings as they stand permit the designated carriers of either party to serve as desired any, several or no points listed in any of those columns. Even if no point listed in the 'Destination' column is served, such designated carriers may serve any point or points listed as 'Intermediate points' or 'Points beyond', including terminating flights at any of these points, unless there is a precise provision in the route description to the contrary.⁸⁸

In the light of this record of discussions, which the judge described as 'the interpretation agreements reached between the two governments', it would be difficult to maintain that a destination point had to be served on an outward journey, even

International Organizations contain the same provision on this point which applied in the present case as a matter of general customary international law: *European Molecular Biology Laboratory Arbitration (EMBL v Germany)*, Award of 29 June 1990, 105 ILR 1, at 25 and 53.

⁸⁵ *European Molecular Biology Laboratory Arbitration (EMBL v Germany)*, Award of 29 June 1990, 105 ILR 1, at 54; presumably the Tribunal was making the contrast with communications such as a diplomatic note, aide-memoire or formal Exchange of Notes constituting an agreement.

⁸⁶ *European Molecular Biology Laboratory Arbitration (EMBL v Germany)*, Award of 29 June 1990, 105 ILR 1, at 54–56, where the Tribunal cited the well-known conclusion of the PCIJ on the binding effect of a declaration in the *Legal Status of Eastern Greenland (Denmark v Norway)* PCIJ Series A/B53.

⁸⁷ [1976] 1 Lloyd's Rep 42.

⁸⁸ [1976] 1 Lloyd's Rep 42, at 45.

though absence of such a point made nonsense of the notion of a 'beyond' point (there being nothing appropriate for it to be beyond) and meant that an outward journey included no point in the state granting the right to operate the route and thus established no connection between the air service and that route outbound.⁸⁹

Although these two cases do not provide a great weight of authority, they do support the suggestion that the *fact* of subsequent agreement is likely to be taken as what is required rather than agreement evidenced by conclusion through the usual treaty formalities. There is, however, more than a hint of a relationship between subsequent agreements and subsequent practice. The less formal the agreement, the greater the significance of subsequent practice confirming the less formal agreement or understanding.

3.3 Formal amendment and changed wording

3.3.1 *Effect of amending agreements*

If a treaty amends an earlier one, the function of 'amending' is not always carefully distinguished in its title from the function of clarifying, amplifying, or supplementing an earlier treaty. A protocol may, for example, state in its title that it is 'amending' or 'supplementing' a particular treaty; but this does not exhaust the possibilities or indicate the effect of every provision. For present purposes the question is whether a later agreement, including any described as an 'amending' one, has an amending or an interpretative effect on an earlier one.⁹⁰ In some situations the answer may not matter. In others it does.

An example of the former was in *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*.⁹¹ In investigating the boundary between Libya and Chad, the ICJ had to consider a Convention of 8 September 1919 signed at Paris between Great Britain and France. The Convention itself stated that it was 'Supplementary to the Declaration signed at London on March 21, 1899, as an addition to the Convention of June 14, 1898, which regulated the Boundaries between the British and French Colonial Possessions'. The Court was dismissive of whether the 1919 Convention was an interpretation or modification of the earlier treaty:

There is thus little point in considering what was the pre-1919 situation, in view of the fact that the Anglo-French Convention of 8 September 1919 determined the precise endpoint

⁸⁹ The judgment in this case at first instance was followed a few days later by a decision in another case in the Court of Appeal relating to the same treaty on air services in which that Court said that because such agreements were not incorporated into English law, the courts had no business to be interpreting them: see *Pan-American World Airways Inc v Department of Trade* [1976] 1 Lloyd's Rep 257. Thus, as a formal precedent the judgment was trumped. Nevertheless, the example given in the text here remains a good factual one to show the potential effects of an informal agreement on interpretation of a treaty.

⁹⁰ Cf issues over whether subsequent practice which appears to diverge from the meaning of a treaty provision constitutes an interpretation or tacit amendment which are considered in section 4.7 below.

⁹¹ [1994] ICJ Reports 6.

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of the line in question... The text of the 1919 Convention presents this line as an interpretation of the Declaration of 1899; in the view of the Court, for the purposes of the present Judgment, there is no reason to categorize it either as a confirmation or as a modification of the Declaration. Inasmuch as the two States parties to the Convention are those that concluded the Declaration of 1899, there can be no doubt that the 'interpretation' in question constituted, from 1919 onwards, and as between them, the correct and binding interpretation of the Declaration of 1899.⁹²

Thus the last of the instruments was dispositive, whatever its true characterization. This does not, however, mean that there is never a significance in whether a later treaty is truly an amendment to an earlier one. Treaties which amend earlier ones sometimes contain provisions aimed at resolving problems that have arisen over interpretation of the original treaty. These amending treaties are not necessarily designated or described as agreements on interpretation. Their construction may present difficulties where a different wording in relation to the same matter may be viewed as a clearer wording to reflect a meaning which is thereby confirmed, as a change to cope with a situation which the earlier wording did not cover or for which it produced unexpected results, or with no very clear indication either way. This may be an important matter not just for states which do not become party to the amending treaty. It can also be significant for those that do become bound by the 'amendments' if they continue to be parties to the original treaty; for this will continue to apply in their relations with states parties only to that original instrument. If provisions in the later treaty are truly amendments, and produce obligations incompatible with those of the earlier instrument, states may not be able to reconcile these and be party to both.⁹³

An example of a circumstance in which an amending instrument was considered as interpreting the unamended version was in *El Al v Tseng* (US Supreme Court).⁹⁴ An intrusive body search at an airport led to a claim based on assault and false imprisonment (among other claims), but alleging no bodily injury. Article 17 of the Warsaw Convention provides that a carrier by air 'is liable for damage sustained in the event of the death or *wounding* of a passenger or any other *bodily injury* suffered by a passenger, if the *accident* which caused the damage so sustained

⁹² [1994] ICJ Reports 6, at 29, para 60; see also paras 31, 30–33, and 59.

⁹³ This raises complex issues over successive treaties on the same subject matter and amendment and modification of treaties. See, for example, the Convention for the Unification of Certain Rules relating to International Carriage by Air, Warsaw, 1929 (see fn 95 below), which through its uniform regime, definition of 'international carriage', prescription of jurisdictions, and prohibition of substantive reservations made it quite clear that a group of parties could not modify the treaty *inter se*, but left it less clear whether and how the parties collectively could implement amending protocols if only some of them became bound by these later instruments; see *R v Secretary of State for the Environment, Transport and the Regions, ex parte IATA* [1999] 2 CMLR 1385, R K Gardiner, 'Revising the Law of Carriage by Air: Mechanisms in Treaties and Contract' (1998) 47 ICLQ 278, Gardiner, 'Treaty Relations in the Law of Carriage by Air: Article 55(1) of the Montreal Convention' [2000] *The Aviation Quarterly* 24–61, and see generally A Aust, *Modern Treaty Law and Practice* (Cambridge: CUP, 3rd edn, 2012), Chapters 12 and 15.

⁹⁴ 525 US 155, 119 S Ct 662.

took place on board the aircraft or in the course of any of the operations of embarking or disembarking'.⁹⁵ Although the claimant's cause of action could be loosely described as being for 'personal injury', there had been no accident and the claim did not come within the ordinary meaning of 'wounding' or 'other bodily injury' (unless the latter could cover purely mental or psychological harm, a controversial matter in application of the Convention). The claimant therefore sought to claim outside the Convention (ie under local law) but encountered difficulty because of article 24 of the Convention:

- (1) In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.
- (2) In the cases covered by Article 17 the provisions of the preceding paragraph also apply...

In issue was whether the words 'In the cases covered by Article 17' meant that where circumstances matched all the conditions in article 17 a claim could only be brought on the basis of that provision, or whether article 24 meant that article 17 provided the sole and exclusive source or remedy for all personal injury claims relating to the carriage by air. The Supreme Court held that the Convention remedy was exclusive so that claims based on local laws were not available if a claim could not succeed under the Convention. In reaching this conclusion, one element which the Court considered was a provision in a 1975 Protocol 'to amend' the Warsaw Convention, even though it had not been in force for the USA at the relevant time. This replaced article 24 so that it would read:

- (1) In the carriage of passengers and baggage, any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention. ...⁹⁶

The Court considered that this made the Convention's 'pre-emptive' effect quite clear. It can be seen, however, that, framed as an amendment, in a collection of amendments, in an amending Protocol, there could be a question whether this amounted to a clarificatory interpretation or was an amendment changing the meaning. The Supreme Court held that the revised article 24 merely clarified the meaning and did not alter the unamended Convention's rule of exclusivity. It reached this conclusion on the basis of the text, drafting history, and underlying purpose of the Convention, together with the concordant views of courts in other countries applying the original Convention.⁹⁷

⁹⁵ Convention for the Unification of Certain Rules relating to International Carriage by Air, Warsaw, 1929 [1963] ATS 18 (emphasis added).

⁹⁶ Article 24 as amended by Montreal Protocol No 4 to amend the Convention for the Unification of Certain Rules relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as amended by the Protocol done at The Hague on 28 September 1955 (Montreal, 25 September 1975) [1998] ATS 10.

⁹⁷ *El Al v Tseng* 525 US 155, at 174–79.

4. *Subsequent Practice*3.3.2 *Changed wording in related or comparable agreements*

An illustration of an issue to which such a changed wording can give rise is provided by the attempt to address the persistent uncertainty whether most favoured nation (MFN) provisions in bilateral investment treaties apply only to provisions protecting investors within a state party's legal system or also allow claimants to invoke from other such treaties provisions that establish procedures for dispute settlement, such as arbitral jurisdiction.

Thus, for example, some bilateral agreements in the last couple of decades have included of a provision on the lines: 'For the avoidance of doubt it is confirmed that the treatment provided above' (viz MFN treatment) shall apply to listed provisions which include those on dispute settlement.⁹⁸ However, this wording is really recognition that there could be doubt as to the proper interpretation of the earlier agreements that did not include it. Hence such a statement could only become something of an interpretative indicator for treaties which did not include it if both parties had adopted the changed wording systematically and if there were indications that this was to apply to their existing agreements.⁹⁹

4. **Subsequent Practice**

The prominent role accorded to the practice of parties to a treaty in its interpretation is one of the features of the Vienna rules which marks out a difference from the approach taken in some legal systems to interpretation of legal texts of purely domestic origin. Words are given meaning by action. This is, at least in part, because treaties differ in character from national legal instruments, bearing an exact analogy neither to contract nor to legislation. Closer to the former than the latter, being compacts or recorded agreements, treaties embody the common understanding of the parties to them. Hence concordant practice of the parties is best evidence of their correct interpretation. In a judgment in 1999, the ICJ affirmed the role of subsequent practice in treaty interpretation, endorsing the ILC:

As regards the 'subsequent practice'... the Commission... indicated its particular importance in the following terms:

'The importance of such subsequent practice in the application of the treaty, as an element of interpretation, is obvious; for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty. Recourse to it as a means of interpretation is well-established in the jurisprudence of international tribunals.'¹⁰⁰

⁹⁸ See examples in *National Grid plc v The Argentine Republic*, UNCITRAL arbitration, Decision on Jurisdiction, 20 June 2006, paras 66 ff and 85; for later cases on MFN clauses, see Chapter 10, section 6.2.3 below.

⁹⁹ Cf the different interpretative technique adopted by Argentina and Panama which exchanged diplomatic notes containing an 'interpretative declaration' of the MFN clause in their bilateral investment treaty to the effect that the MFN clause did not extend to dispute resolution clauses, and that this had always been their intention: as described in *National Grid* at para 85.

¹⁰⁰ *Kasikili/Sedudu Island (Botswana/Namibia)* [1999] ICJ Reports 1045, at 1076, para 49, quoting from [1966] *Yearbook of the ILC*, vol II, p 221, para 15. In that case the Court also noted that it

4.1 Elements of subsequent practice

4.1.1 History and development of the provision

In his original proposals to the ILC on treaty interpretation, the Special Rapporteur (Waldock) included subsequent practice in a draft article permitting reference to ‘other evidence or indications of the intentions of the parties’ in specified circumstances similar to those in the present article 32 of the Vienna Convention for affording recourse to supplementary means of interpretation.¹⁰¹ However, the Commission decided to make subsequent practice a distinct element in the general rule which had the effect, in the Commission’s view, of making subsequent practice an authentic interpretation comparable to an interpretative agreement.¹⁰² The Special Rapporteur noted that: ‘Clearly, to amount to an “authentic interpretation”, the practice must be such as to indicate that the interpretation has received the tacit assent of the parties generally.’¹⁰³

The text of article 31(3)(b) of the Vienna Convention offers four elements for consideration or notice: (1) the meaning of ‘subsequent practice’; (2) that it be in the application of the treaty; (3) which parties need to participate in the practice; (4) what it is that establishes interpretative agreement.

4.1.2 Meaning of ‘subsequent practice’

The dictionary definition of ‘practice’ emphasizes ‘action’ or ‘doing something’, meanings which it develops to include the ‘habitual doing or carrying on of something’ and ‘customary or constant action’.¹⁰⁴ In relation to interpretation of treaties the two important qualifying characteristics of practice are that the practice is ‘in the application of the treaty’ and is practice ‘which establishes the agreement of the parties regarding its interpretation’. These characteristics do not, however, give an indication of what factually comprises such practice or what evidence is admissible to demonstrate that it has occurred.

What subsequent practice comprises will vary according to the subject matter of the treaty in issue. The essence of it is what can be shown to have been done systematically or repeatedly in implementation and application of a treaty, whether

had itself frequently examined the subsequent practice of the parties in the application of that treaty, giving as examples: *Corfu Channel, Merits, Judgment* [1949] ICJ Reports 25; *Arbitral Award Made by the King of Spain on 23 December 1906, Judgment* [1960] ICJ Reports 206–7; *Temple of Preah Vihear, Merits, Judgment* [1962] ICJ Reports 33–35; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion* [1962] ICJ Reports 157, 160–61, and 172–75; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Jurisdiction and Admissibility, Judgment* [1984] ICJ Reports 408–13, paras 36–47; *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment* [1994] ICJ Reports 34–37, paras 66–71; *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion* [1996–I] ICJ Reports 75, para 19.

¹⁰¹ Third Report, draft article 71(2) [1964] *Yearbook of the ILC*, vol II, p 52.

¹⁰² See Waldock, Sixth Report [1966] *Yearbook of the ILC*, vol II, pp 98–9, para 18 and Commentary on draft article 27(3)(b), at 221–22, para 15.

¹⁰³ Waldock, [1966] *Yearbook of the ILC*, vol II, at p 99, para 18.

¹⁰⁴ *Shorter Oxford English Dictionary* (Oxford: Clarendon Press, 1973).

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it be the levying of tax in a matter governed by a double taxation convention or, in the classic case of the 'veto' in the United Nations Security, regularly treating the absence of any negative vote as satisfying the requirement for 'concurring' votes even if there is an abstention or absence of a permanent member.¹⁰⁵

It would be difficult to offer a list of what may constitute 'practice'. The notion is well known in general international law in the widespread use of the description of a source of international law as 'international custom, as evidence of a *general practice* accepted as law'.¹⁰⁶ Obviously, with a focus on treaty interpretation any such description transforms 'general' into 'specific' practice revealing what the parties accept as the meaning of a particular provision. However, this cognate description of practice in general international law suggests something of the range of evidence that can be used to show practice. Crawford lists as material sources of international custom:

...diplomatic correspondence, policy statements, press releases, the opinions of government legal advisers, official manuals on legal questions (e.g. manuals of military law), executive decisions and practices, orders to military forces (e.g. rules of engagement), comments by governments on drafts and accompanying commentary, state legislation, international and national judicial decisions, recitals in treaties and other international instruments (especially when in 'all states' form), a pattern of treaties in the same terms, the practice of international organs, and resolutions relating to legal questions in UN organs, notably the General Assembly.¹⁰⁷

This list requires some qualifying in application to treaty interpretation. Statements and records of a position taken with regard to a treaty provision need to be linked to something actually done unless they are in a form which itself amounts to an official act or committed policy that is being, or will be, implemented. However, while recalling that the essence of the definition of practice is repeated action, the typical evidence as demonstrated by the general list set out above is the written record or account of any practice. It can be seen that, in the context of customary international law, several of the items in the list relating to general practice may record unilateral approaches to a legal matter which need replication more widely to show practice sufficient to found a customary rule (in conjunction there with evidence that the practice is carried out under a sense of obligation). When searching for practice relating to interpretation of a particular treaty provision, the defining test is that the practice must establish the agreement of the parties. This dictates that relevant evidence is that which shows the 'concordant' conduct of the parties, that is that they have done essentially the same thing expressly in pursuance of the treaty or, if the conduct is unilateral, that it reveals the agreement of the other party or parties.

¹⁰⁵ See below for elaboration of both these examples.

¹⁰⁶ Statute of the International Court of Justice, article 38 (emphasis added).

¹⁰⁷ J Crawford, *Brownlie's Principles of Public International Law* (Oxford: OUP, 8th edn, 2012), 24 (footnotes omitted).

4.1.3 Frequency and uniformity of practice

It is inherent in the combination of the term 'practice' and establishment thereby of agreement of the parties as to meaning that the relevant conduct of parties to the treaty be concordant. However, although the term 'concordant' was used in ILC debate and in its draft commentary to characterize practice which could amount to authentic interpretation of a given agreement or treaty, in its final version of the commentaries on the draft articles as taken up at the Vienna conference, the ILC stated: 'The value of subsequent practice varies according as it shows the common understanding of the parties as to the meaning of the terms.'¹⁰⁸ Thus, rather than suggesting a threshold of concordant practice must be crossed before this element of interpretation is engaged, the ILC looked to the result, that is whether practice is sufficiently extensive to demonstrate 'a common understanding'. Somewhat in contrast, the Appellate Body of the World Trade Organization in *Japan—Alcoholic Beverages* tried to identify features of practice with specific reference to article 31(3)(b):

Generally, in international law, the essence of 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.¹⁰⁹

It is to be noted that Sinclair, as the source cited by the WTO Appellate Body, considered that the '*value and significance* of subsequent practice will naturally depend on the extent to which it is concordant, common and consistent'.¹¹⁰ It thus seems best to consider the criteria 'concordant, common and consistent' as indicators of the cogency with which practice evidences agreement of the parties as to the proper meaning of a term or treaty which is being interpreted. These criteria are not aids to interpretation independent of such agreement. In its current work on subsequent agreements and subsequent practice Nolte, the ILC's Special Rapporteur, has noted that the ICJ, and most other international courts and tribunals, have not taken up the formula 'concordant, common and consistent', while tribunals established through the Centre for the Settlement of Investment Disputes have adopted divergent positions on it.¹¹¹

¹⁰⁸ [1966] *Yearbook of the ILC*, vol II, p 222, para 15; and for earlier consideration see [1964] *Yearbook of the ILC*, vol I, p 282, paras 3 and 5, p 296, para 39, p 298, paras 56–7, p 299, para 64, etc; and [1964] *Yearbook of the ILC*, vol II, Report of the Commission to the General Assembly, p 204, para 13.

¹⁰⁹ *Japan—Taxes on Alcoholic Beverages*, AB-1996–2, Report of 4 October 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, pp 12–13; and see *Chile—Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, AB-2002–2, (2002) WT/DS207/AB/R, at paras 213–14, where the Appellate Body took the view that the assertion that no country that had had a price band system in place before the Uruguay Round had actually converted it into ordinary customs duties did not reveal a discernible pattern of acts or pronouncements, since this only showed the alleged practice of some members of the WTO.

¹¹⁰ Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, 1984), 137 (emphasis added); see also Yasseen, 'L'interprétation des traités d'après la Convention de Vienne sur le Droit des Traités' (1976-III) 151 *Recueil des Cours* 1 at 48.

¹¹¹ 'Second Report on Subsequent agreements and subsequent practice in relation to interpretation of treaties', A/CN.4/671 (26 March 2014), pp 21–4 where extensive supporting material is cited.

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In its draft conclusions, the ILC has therefore avoided use of the formula ‘concordant, common and consistent’ and has suggested:

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...¹¹²

If this is necessary to avoid the impression that the formula ‘concordant, common and consistent’ is to be taken as a statement of established entry criteria for practice to be assessed, it does the job. However, if it can be recognized that there is something of a sliding scale, the extent to which the practice can be shown to be concordant, common, and consistent may strike more of a chord with interpreters making the assessment as to whether agreement on meaning can be shown.

4.1.4 *Practice may consist of executive, legislative, and judicial acts*

A simpler classification of conduct that may amount to practice of states is in terms of executive, legislative, and judicial acts. Of these, ‘executive’ is not limited to the conduct of a central government nor, where it is acts of a central government that are being considered, only those acts that have an obvious international connection. Any body charged with the authority of the state may carry out relevant acts if these demonstrate a position in relation to the state’s treaty commitments or entitlements.

Legislative acts may take a position on interpretation at a time when effect is given to a treaty’s provisions in the course of meeting constitutional requirements to enable the state to become party to a treaty. Legislation may also, however, specifically address points of interpretation that arise at a later stage. Examples of the latter in the UK are: section 2(1) of the Carriage by Air and Road Act 1979, which provided in relation to the 1929 Warsaw Convention on carriage by air as amended at The Hague in 1955 that references to ‘damage’ were to be construed as including loss of contents of a passenger’s baggage,¹¹³ and section 100 of the Arbitration Act 1996, which provides that for the purposes of the 1958 New York Convention on recognition and enforcement of foreign arbitral awards an award

¹¹² Report of the International Law Commission (2014), (Sixty-eighth Session, Supplement No. 10 A/69/1), Chapter VII, draft conclusion 8, and see commentary on that draft conclusion, paras (7)–(11); for an example of assessing the practice by reference to the number of parties adopting it, see *Yugraneft Corporation v Rexx Management Corporation* [2010] 1 SCR 649, para [21] (Canadian Supreme Court).

¹¹³ See *Fothergill v Monarch Airlines* [1981] AC 251 where, after reporting damage to a suitcase at the airport, the passenger discovered loss of some of its contents after arrival home. The House of Lords applied the same interpretation as the legislation (not then in force) and found that such loss was included in the term ‘damage’ (which had to be reported within a specified number of days). For an example of French legislation being specifically identified as subsequent practice for the purposes of the Vienna rules, see *R v Secretary of State for the Home Department ex parte Mullen* [2004] UKHL 18, at para 47.

is to be treated as made at the seat of the arbitration, regardless of where it was signed, despatched, or delivered to any of the parties.¹¹⁴

Judicial decisions, as conduct which may contribute towards subsequent practice, can be separated into national and international ones. Decisions of a state's courts are commonly taken as capable of constituting practice, though it is really necessary to see where ultimate authority to interpret treaties lies within the state to be sure that a court's judgment does truly represent the interpretative position of the state. In the UK, the principle, put very generally, is that where a matter concerning the foreign relations of the UK is before the courts, the courts try to speak 'with the same voice' as that of the government or Parliament if the matter is also within the foreign affairs competence of these bodies.¹¹⁵ This principle applies implicitly whenever legislation in the UK implements a treaty and the courts follow and apply that legislation. It has also been explicitly stated to apply to treaty interpretation. Where Parliament legislated in 1999 to give effect to a ruling by the European Court of Human Rights (ECtHR) that admission in evidence of answers given by defendants under compulsion was contrary to the European Convention right to fair trial,¹¹⁶ Lord Hoffmann observed:

Given that Parliament had accepted the ECtHR interpretation when it passed the 1999 Act, it seems to me very likely that the courts would also have done so. If Parliament considered that the law should be changed to comply with an international obligation, it would be strange for the courts to say that it had been unnecessary. Parliament and the courts should speak with one voice on such issues.¹¹⁷

Thus in identifying the practice of the UK in interpreting treaties, one can generally expect the pronouncements of the courts, the government, and Parliament to be in alignment but in exceptional cases care may need to be taken to consider later legislation designed to adjust an interpretation made by a court.¹¹⁸

A note of caution also needs to be sounded over the characterization of some decisions of international courts and tribunals as subsequent practice for the purposes of article 31(3)(b) of the Vienna Convention. International judicial proceedings take place by consent of the parties. Commonly the parties agree that the decisions of international courts and tribunals shall be final and binding (though some arbitral agreements provide for an 'advisory' award or qualify in some other

¹¹⁴ This effectively reversed the interpretation adopted by the House of Lords in *Hiscox v Outhwaite* [1992] 1 AC 562, on which see Chapter 1, section 5.4 above; see also section 53 of the same Act.

¹¹⁵ *Rio Tinto Zinc Corporation v Westinghouse* [1978] AC 547, at 617.

¹¹⁶ See Youth Justice and Criminal Evidence Act 1999, Sch 3, para 5, and *Saunders v UK* (1996) 23 EHRR 313 and *JJL, GMR and AKP v U K* 19 September 2000, ECtHR, Series A no 285-C.

¹¹⁷ *R v Lyons* [2003] 1 AC 976, at 997, para 46.

¹¹⁸ In one instance the British government disavowed an interpretation by the House of Lords of a treaty. In *Philippson v Imperial Airways* [1939] AC 332, the House interpreted a contractual reference to 'High Contracting Parties to the Warsaw Convention' as applying to Belgium. Belgium had signed the Convention but had not deposited an instrument of ratification. The British government told the US government that in its view the interpretation by the House of Lords was a misinterpretation; see Cheng, 'The Law of "International" and "Non-International Carriage"' (1963) 60 *Law Society Gazette* 444, at 445–46; and see *Hiscox v Outhwaite* (fn 114 above).

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way the obligation to implement an award). Although each judgment or award is only binding on the parties to it, successive judgments or awards in the same sense but between different parties can show a consistent practice effective to establish the interpretation as that agreed by the parties in the case. The reason for care, however, is that in some instances the decision of a court or tribunal established within an international organization is linked with some other body within the organization which has power to make a further decision.¹¹⁹

4.1.5 *'Subsequent practice' and 'subsequent conduct' distinguished*

The most obvious distinction is that practice requires an element of constancy, a feature which is reinforced by the context in that subsequent practice must be sufficient to reveal the agreement of the parties on interpretation. Conduct merely denotes the behaviour of the parties, which may constitute an instance of relevant practice or may not. Thus Sinclair emphasizes the requirement for a plurality of acts: 'A practice is a sequence of facts or acts and cannot in general be established by one isolated fact or act, or even by several individual applications.'¹²⁰ Nevertheless, in the context of 'subsequent practice' courts and tribunals do refer to 'conduct' and to the 'attitude' of a party.

In *Kasikili/Sedudu Island (Botswana/Namibia)*,¹²¹ the ICJ considered the history of dealings between relevant states concerning a disputed island, assessed facts and incidents relating to it, including the use made of the island by people from the neighbouring territories since a treaty of 1890, the principal one in issue. The Court noted that for any such conduct to constitute relevant practice, the various elements in the history traced by the Court would need to meet at least two criteria: first, that they were linked to a belief on the part of those responsible for the conduct that it reflected a position taken on the interpretation of the treaty; and, second, that the other state concerned was fully aware of and accepted the conduct as a confirmation of the Treaty boundary.¹²² The Court concluded that, in the particular case, none of the facts or incidents in the history presented to it amounted to the necessary elements to constitute subsequent practice in the application of the 1890 treaty within the meaning of article 31(3)(b) of the Vienna Convention.¹²³ The Court's approach was criticized by Judge Oda in his separate opinion:

The Judgment refers to various acts or conduct... I accept that these facts and the survey reports are extremely important for the Court's consideration of the matter. However, I am unable to accept the Court's position that such facts and reports could be considered only as possible evidence of... [a subsequent agreement or subsequent practice] within the

¹¹⁹ See, eg, the WTO Dispute Settlement Understanding, under which the Member States acting as the DSB have powers to reject by consensus Reports of the Panels and Appellate Body.

¹²⁰ Sinclair, *The Vienna Convention on the Law of Treaties*, at 137.

¹²¹ *Kasikili/Sedudu Island (Botswana/Namibia)* [1999] ICJ Reports 1045; see Chapter 5, section 3.3.4 above.

¹²² [1999] ICJ Reports 1045, at para 74.

¹²³ [1999] ICJ Reports 1045, at paras 63, 75, and 78–79.

meaning of Article 31, paragraph 3, of the Vienna Convention on the Law of Treaties, to be taken into account when interpreting the 1890 Anglo-German Treaty. The Court, after a lengthy analysis (paras. 47 to 70), comes to the conclusion that the facts and documents in question cannot be regarded as constituting ‘any subsequent agreement’ or ‘any subsequent practice’ to be used for the interpretation of the 1890 Treaty, although the Court ultimately found that these facts ‘nevertheless support the conclusions which it has reached by interpreting Article III, paragraph 2, of the 1890 Treaty in accordance with the ordinary meaning to be given to its terms’ (para. 80). I would rather suggest that these facts and documents should be considered at their face value, as historical background to the present case but without having any bearing on the provisions of the Vienna Convention, in order to assist the Court in determining the boundary.¹²⁴

It is respectfully suggested that Judge Oda was here swimming against the tide. With the increasing acceptance that the Vienna rules are the rules generally applicable to treaty interpretation, approaches which link analysis to components of those rules are appropriate. To do this it is necessary to examine conduct to see whether it does meet the tests in article 31(3)(b). It would be strange if such conduct were *inconsistent* with the ordinary meaning of a term for no remark to be made by a court or tribunal. Hence it seems reasonable for the Court to have noted its consistency in this case.

The analysis of ‘conduct’ of one party as ‘practice’ is not actually inconsistent with the requirement of the Vienna rule if the conduct is sufficiently constant and repeated as to amount to practice, always recalling that the rest of the rule must also be observed so as to show that the ‘practice’ establishes the agreement of the parties. This is illustrated by a case before the Iran–US Claims Tribunal in which it was argued that a judgment in a domestic court created a debt or obligation distinct from the claim that had led to the judgment. In deciding that a judgment in a domestic US court did *not* amount to a claim within the meaning of the Algiers Accords (the treaties setting up and applied by the Tribunal), the Tribunal noted that in suspending execution of judgments against Iran as well as suspending claims in US courts unresolved at the time the Accords took effect, the US had recognized that a judgment had no distinct status under the Accords independent of the claim on which it was based.¹²⁵ This was in a case brought by US nationals against Iran. Hence the conduct of the US courts in implementation of a treaty of the USA could be seen as practice of the USA under the treaty when it accorded with the interpretation of the treaty advanced by Iran.

Somewhat similar was the view taken in a case before the same Tribunal but where the claimant was Iran. In holding that where export of Iranian property had been banned under US export control laws before the Algiers Accords, such a ban could be continued after their entry into force, the Tribunal found that:

... this interpretation is consistent with the subsequent practice of the Parties in the application of the Algiers Accords and, particularly, with the conduct of the United States... a

¹²⁴ Separate Opinion at para 7.

¹²⁵ *Burton Marks and Harry Umann v Iran* 8 Iran–US Claims Trib Rep 290, at 295–96.

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practice, according to Article 31(3)(b) of the Vienna Convention... to be taken into account in the interpretation of a treaty.¹²⁶

In relying on this conduct, the Tribunal appears also to have taken into account that in its communication informing Iran of its refusal of export approval, the USA acknowledged Iran's right to compensation for the value of the property. This may have encouraged the Tribunal to place unilateral conduct under a somewhat more generous characterization of the idea of practice than would usually be the case.

4.1.6 *Practice 'in the application of the treaty'*

That relevant practice is that 'in application of the treaty' plainly indicates that this is not limited to conduct specifically referable to a particular provision or provisions in issue. A good illustration of this is the ICJ's Advisory Opinion in the *IMCO Maritime Safety Committee* case.¹²⁷ This concerned the composition of a committee of an international organization whose constitutive treaty provided that in the membership of the committee 'not less than eight shall be the largest ship-owning nations'. Did 'largest ship-owning nations' mean those having the greatest registered tonnage flying their flag (which would have led to inclusion of 'flags of convenience' states) or did this mean states having the greatest tonnage of ships beneficially owned by their nationals? The Court noted that the practice of the Assembly of the organization (and thus implicitly of states party to the treaty setting up the organization) in implementing other provisions of the treaty used registered tonnage of a flag state, and therefore considered it unlikely that any criterion other than registered tonnage was contemplated.¹²⁸

A further issue which could arise over the phrase 'in the application of the treaty' is when relevant practice begins. At first sight it would seem probable that the practice must be that after the treaty has entered into force and be the practice of parties to the treaty. Only such practice seems strictly in application of the treaty.¹²⁹ However, the position may not be quite so clear cut. Signatory states and other potential parties may also have an interest in development of practice in relation to matters to be governed by the treaty when it enters into force and may

¹²⁶ *The Islamic Republic of Iran v The USA* 19 Iran-US Claims Trib Rep 273, at 294-95, para 68. See also C N Brower and J D Brueschke, *The Iran-United States Claims Tribunal* (The Hague: Martinus Nijhoff, 1998), at 283-85 and G H Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (Oxford: Clarendon Press, 1996), at 372.

¹²⁷ Advisory Opinion on *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization* [1960] ICJ Reports 150; see also H Thirlway, 'The Law and Procedure of the International Court of Justice 1960-1989' (1991) LXII BYBIL, Part Three, at 49-50.

¹²⁸ Advisory Opinion on *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization* [1960] ICJ Reports 150, at 168-69 (practice under the IMCO Convention) and 169-70 (international practice under various other conventions).

¹²⁹ See G Hafner, 'Subsequent Agreements and Practice: Between Interpretation, Informal Modification, and Formal Amendment' in Nolte *Treaties and Subsequent Practice*, Chapter 10, 118.

establish their practice through implementing legislation given effect before entry into force.¹³⁰

Taking conclusion as the moment when the text of a treaty 'has been established as definite', the ILC has stated in its commentary on one of its draft conclusions on subsequent agreements and subsequent practice that:

It is after conclusion, not just after entry into force, of a treaty when... subsequent practice can occur. Indeed, it is difficult to identify a reason why an agreement or practice which take[s] place between the moment when the text of a treaty has been established as definite and the entry into force of that treaty should not be relevant for the purpose of interpretation.¹³¹

4.2 Deduction from absence of subsequent practice

4.2.1 *Absence of action*

The flip side of the requirement of subsequent practice being open to characterization as 'in the application of the treaty' is consideration of practice where a treaty provision might be thought to be applicable but in practice has not been applied. Taking subsequent practice as an element of treaty interpretation involves drawing conclusions from what has been constantly done. Examining what interpretation has been demonstrated through conduct makes an association with, or adaptation of, what has been stated in writing. Hence, although it does not apply literally, the maxim *expressio unius exclusio alterius* may be applied in a somewhat analogous manner. This seems to be the effect of the ICJ's approach in its advisory opinion to the UN General Assembly on *Legality of the Threat or Use of Nuclear Weapons*.¹³² On the question whether treaty provisions prohibiting use of poisonous and asphyxiating weapons (the Second Hague Declaration 1899, the Hague Regulations 1907, and the Geneva Protocol 1925) should be interpreted as barring nuclear weapons, the ICJ stated:

The Court will observe that the Regulations annexed to the Hague Convention IV do not define what is to be understood by 'poison or poisoned weapons' and that different interpretations exist on the issue. Nor does the 1925 Protocol specify the meaning to be given to the term 'analogous materials or devices'. The terms have been understood, in the practice of States, in their ordinary sense as covering weapons whose prime, or even exclusive, effect

¹³⁰ See, for example, D H Anderson, 'British Accession to the UN Convention on the Law of the Sea' (1997) 46 ICLQ 761, at 762, indicating that British practice, through modernisation of maritime legislation in the period after completion of the UN Convention on the Law of the Sea in 1982, came to be based in many respects on the content of the Convention, apart from its Part XI, even though the United Kingdom only became a party following its accession to the Convention and ratification of the Implementing Agreement in July 1997, some years after the Convention's entry into force in November 1994.

¹³¹ International Law Commission Report 2013 (Sixty-eighth Session Supplement No. 10 A/68/1), p31, Commentary on draft Conclusion 4, para (2) (footnote omitted).

¹³² [1996-I] ICJ Reports 226.

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is to poison or asphyxiate. This practice is clear, and the parties to those instruments have not treated them as referring to nuclear weapons.

In view of this, it does not seem to the Court that the use of nuclear weapons can be regarded as specifically prohibited on the basis of the above-mentioned provisions of the Second Hague Declaration of 1899, the Regulations annexed to the Hague Convention IV of 1907 or the 1925 Protocol (see paragraph 54 above).¹³³

In terms of acts and conduct, the proscription of ‘asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices’ affirmed by the 1925 Geneva Protocol has been recognized as having secured the non-repetition of the use made in the First World War of gas (with some notorious exceptions), but there was no evidence that a self-denying ordinance had been understood to apply to nuclear weapons. However, it would have been more difficult to pin the absence of a bar on nuclear weapons on practice in this sense had the ban on poisoned weapons, etc not been accompanied by practice in the sense of further treaty practice. The latter included the negotiation, conclusion, and ratification of the 1977 Additional Protocol I to the 1949 Geneva Conventions, in the course of which it was made clear that the new rules did not regulate or prohibit nuclear weapons. Express statements to this effect were not challenged or contradicted.¹³⁴

The ECtHR has viewed consistent absence of action, where measures might have been expected, as practice indicative of interpretative agreement. In *Bankovic & Others v Belgium & Others*, a central issue was whether NATO action in Serbia provided a basis for claims against NATO participating states of violation of the European Convention on the basis that military action in Serbia came within their jurisdiction.¹³⁵ The Court found state practice in the application of the Human Rights Convention to be indicative of a lack of any apprehension on the part of the parties that they might attract responsibility under the Convention in respect of military operations in which they had participated outside of their territories.¹³⁶

¹³³ [1996–I] ICJ Reports 226, at 248, paras 55–56.

¹³⁴ It is difficult to pinpoint the evidence leading to the Court’s conclusion on practice in relation to these particular treaty provisions. Written submissions of the USA and the Russian Federation provide supporting assertions, references, and citations of relevant material, while the USA addressed arguments raised on the meaning of poison and gas weapons at the oral proceedings (ICJ, *Compte Rendu* 15 November 1995, *CR 95/34*). There was, of course, much broader evidence of treaty practice acknowledging the possession of nuclear weapons in, for example, the Treaty on the Non-Proliferation of Nuclear Weapons, Washington, London, and Moscow, 1968; but it is difficult to describe that as practice in relation to the three treaty provisions discussed here. See also: *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Reports 16, at 36, para 69, where the ICJ concluded that the fact that the General Assembly decided not to set up a temporary subsidiary body to assist it in the exercise of its supervisory functions over the former League of Nations mandates could not be interpreted as implying that the General Assembly lacked competence or could not itself exercise its functions in that field; and *Oil Platforms (Iran v USA) (Preliminary Objections)* [1996] ICJ Reports 803, at 815, para 30, where the ICJ viewed as relevant practice the fact that neither party had, in previous cases between them before the ICJ, referred to the treaty provision under consideration.

¹³⁵ Application no 52207/99, Decision on Admissibility, 12 December 2001.

¹³⁶ Application no 52207/99, Decision on Admissibility, 12 December 2001, at para 62. See also Lord Bingham in *R (on the application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, at para 38, referring to absence of a practice of making derogations under article 15 of the European

Practice evidencing their agreement on this was found in the lack of derogations under article 15 of the Convention.

While subsequent practice in the form of another treaty or treaties may confirm a possible reading of the text, subsequent practice evidenced by conduct in relation to a different agreement is not admissible to establish an interpretation which does not lie in the words used in the text being interpreted. This is shown by the analysis by a Chamber of the ICJ in *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*.¹³⁷ One aspect of the dispute was whether the special agreement which referred the dispute to a Chamber of the ICJ empowered the court to 'delimit' the maritime boundary. The special agreement asked the court to 'determine the legal situation of the island and the maritime spaces', in contrast with conferring jurisdiction on the court 'to delimit the boundary line' regarding the land frontier. The significance of this distinction lay in the position of the disputing parties as to the legal status of the waters in question. El Salvador claimed that they were subject to a condominium in favour of the three coastal states and that delimitation would therefore be inappropriate, whereas Honduras argued that there was a community of interests among the coastal states which necessitated a judicial delimitation of the maritime space.

Having considered the ordinary meaning of the terms of the special agreement and the context, and finding that these excluded its jurisdiction to delimit, the Chamber considered the argument of Honduras that pursuant to identical wording in a General Treaty of Peace between the same parties in 1980, a Joint Frontier Commission acting under that treaty had entertained proposals in relation to maritime delimitation. The Chamber held, with specific reference to article 31(3)(b) of the Vienna Convention, that practice under a different treaty could not prevail over the absence of a specific reference to delimitation in the text on which Honduras sought to base jurisdiction. Further, the practice in other special agreements conferring jurisdiction on the Court to make a delimitation had been to spell out very clearly what was asked of the court.¹³⁸ Evidently, practice under agreements of the same type as that in issue could be taken into account to support the ordinary meaning of terms used in their context, particularly where the established practice had not been followed.

4.2.2 Combining action with absence of reaction

To find agreement on meaning from practice may require examining a combination of action by one or more states with subsequent responsive action or inaction by others. The principle that there may be circumstances in which an act by one state calls for a reaction by another has been recognized by the ICJ. In the *Temple* case, a dispute between Cambodia and Thailand as to sovereignty over

Convention on Human Rights when conducting peacekeeping operations under UN auspices as an element of interpretation admissible under article 31(3)(b) of the Vienna Convention.

¹³⁷ [1992] ICJ Reports 351.

¹³⁸ [1992] ICJ Reports 351, at 585–86, paras 379–80.

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the region of the Temple of Preah Vihear, relevant maps had been handed over. Even if there had had been no acknowledgement by conduct that these maps had been delivered, the Court found that ‘it is clear that the circumstances were such as called for some reaction, within a reasonable period, on the part of the Siamese authorities’.¹³⁹

Fifteen years later, a Court of Arbitration, in the *Beagle Channel* case between Argentina and Chile, noted that the Vienna Convention provision on subsequent practice did not specify the ways in which agreement could be manifested. In the context of acts of jurisdiction by Chile, which were public and well-known to Argentina and which could only derive from the treaty in issue, the Court held that ‘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’.¹⁴⁰

The significance of absence of responsive conduct can also be illustrated by the *Assange* case before the UK Supreme Court (although the application of the Vienna Convention to the Council of the European Union’s Framework Decision on the European Arrest Warrant was not expected by the parties).¹⁴¹ A European Arrest Warrant issued by the Swedish Prosecuting Authority requested the arrest and surrender of Julian Assange then in England. The issue was whether a state prosecutor constituted a ‘judicial authority’, the entity competent to issue such a warrant under the Framework Decision.

That several states had public prosecutors issuing warrants at the time at which the Framework Decision was drawn up is more a pertinent circumstance of conclusion than a matter of interpretative practice. However, that prosecutors in several different states functioned as judicial authorities in implementing the Decision without a murmur of dissent from states which had appointed judges for this function, and as the reports to the bodies reviewing operation of the system did not voice any objection, in the view of the majority of the judges there was sufficient practice to amount to agreement on the meaning of the term. Hence the practice consisted of action on the part of those states which appointed prosecutors as judicial authorities, while there was absence of action by those who might have objected. The judges approved the helpful account by Villiger of what the Vienna provision requires:

...it requires active practice of some parties to the treaty. The active practice should be consistent rather than haphazard and it should have occurred with a certain frequency.

¹³⁹ *Case Concerning the Temple of Preah Vihear (Cambodia v Thailand)* [1962] ICJ Reports 6, at 23; and on silence as a possible element of an agreement under article 31 (3), see further Nolte, (ILC Special Rapporteur), ‘Second Report on subsequent agreements and subsequent practice in relation to interpretation of treaties’, A/CN.4/671 (26 March 2014), pp 29–33, paras 58–70, and Nolte, *Treaties and Subsequent Practice*, 192–5.

¹⁴⁰ *Dispute between Argentina and Chile concerning the Beagle Channel* XXI (Pt II) UNRIAA 53, Award of 18 February 1977, at 187, para 169(a).

¹⁴¹ *Assange v The Swedish Prosecution Authority* [2012] UKSC 22; on the approach of the UK Supreme Court to the Vienna rules in this case, see Chapter 4, section 4.2.2 above.

However, the subsequent practice must *establish the agreement of the parties regarding its interpretation*. Thus, it will have been acquiesced in by the other parties; and no other party will have raised an objection.¹⁴²

4.3 Parties participating in the practice

4.3.1 Practice must be attributable to parties

The Vienna rule refers to ‘any subsequent practice’ which establishes ‘the agreement of the parties’. To be relevant, practice must be attributable to the parties to the treaty.¹⁴³ Hence the first issue is what acts or pronouncements are attributable to parties (generally states, but also potentially international organizations). The principle is that practice must be under the authority of the state, meaning here any manifestation of its executive, legislative, or judicial branches. Thus, in considering its jurisdiction over claims involving standby letters of credit in a dispute between the USA and Iran, an arbitral tribunal rejected an assertion that settlements between American and Iranian banks could be viewed as subsequent practice in interpretation of a treaty because, although the Iranian Bank Markazi, as the central bank of Iran, was an entity of the Iranian state, the US banks were not entities of the USA.¹⁴⁴ The fact that the respective banks had alluded to standby letters of credit in their own settlement negotiations did not amount to practice showing that such letters of credit were included within the deposits and assets covered by the agreement between the two states so as to bring the matter within the tribunal’s jurisdiction.

4.3.2 Agreement, not practice, of all parties is required

A second issue is the relationship and effect of the words ‘any’ subsequent practice and agreement of ‘the parties’. The wording of article 31(3)(b) does not require that the practice be performed by all the parties; but does the agreement have to be that of *all* parties? Ordinarily, the definite article before parties would suggest ‘all’ rather than ‘some’ parties. That this was meant to be the case is confirmed by the development of the provision as recorded in the work of the ILC:

The text provisionally adopted in 1964 spoke of a practice which ‘establishes the understanding of all the parties.’ By omitting the word ‘all’ the Commission did not intend to

¹⁴² *Assange v The Swedish Prosecution Authority* [2012] UKSC 22, at para 130, quoting M E Villger *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden: Nijhoff, 2009), 431, at para 22 (footnotes omitted; original emphasis); but cf *Ministry of Justice, Lithuania v Bucnys* [2013] UKSC 71, at paras 38–9, considered in Chapter 4, section 4.2.2 above.

¹⁴³ In its work on subsequent agreements and subsequent practice in relation to interpretation of treaties, the ILC has proposed in draft conclusion 5 that subsequent practice ‘may consist of any conduct in the application of a treaty which is attributable to a party to the treaty under international law’, borrowing phraseology from it articles on the responsibility of States for internationally wrongful acts: Report on the work of its sixty-fifth session (2013) General Assembly Official Records Sixty-eighth Session, Supplement No. 10 (A/68/10), Chapter 4, p 41 and commentary at pp 42–7.

¹⁴⁴ Case A16 *USA v Iran*, 5 Iran–US Claims Trib Rep 57, at 62–64 and 70–71.

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change the rule. 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.¹⁴⁵

Noting that the wording ultimately adopted in the Convention up-rated the concept of ‘understanding’ to ‘agreement’, it nevertheless seems clear that participation of all the parties in the practice is not required. What is required is their manifested or imputable agreement. Participation in the practice is obviously the clearest evidence of this. Thus the principle appears to be that there must be a sufficient nexus between the parties to the treaty and the practice, as distinct from actual participation of all parties in the practice concerned.

An oblique illustration of this was the dispute between Indonesia and Malaysia over certain islands.¹⁴⁶ This involved historical investigation of conduct of predecessor states. Dealings between the Dutch government and the local Sultan may well have taken account of a 1891 Convention between the Dutch government and Great Britain; and amendments in 1893 to the earlier Dutch ‘Contracts of Vassalage’ with the Sultan of Bulungan may have provided a further indication of the interpretation given by the Netherlands government to the 1891 Convention (as was asserted by Indonesia). Nevertheless, Great Britain (one of the links in the chain of Malaysia’s asserted title) had had no part in this and the ICJ concluded that these transactions were *res inter alios acta* for Great Britain.¹⁴⁷ Great Britain had therefore not concurred in the practice.

4.3.3 *Practice of some parties only does not interpret a treaty ‘inter se’ unless so agreed*

Quite a different question is whether some states parties to a multilateral treaty can through their practice establish an interpretation which becomes binding on them alone even though it differs from that of the majority of the parties. There are two clear grounds for rejecting this possibility, but one argument appears, at least initially, to go in its favour. First, the principle underlying the rule on use of subsequent practice in treaty interpretation is that a correct interpretation can only emerge from concordant practice coupled with unalloyed agreement—that latter being at a very minimum evidenced by the absence of any disagreement. This requirement for the agreement of all parties is underlined in the ILC Report quoted above. Second, the principle of autonomous interpretation precludes the possibility of legitimate differences of interpretation among states (always bearing

¹⁴⁵ [1966] *Yearbook of the ILC*, vol II, 222, para 15.

¹⁴⁶ *Sovereignty over Pulau Litigan and Pulau Sipadan (Indonesia/Malaysia)* [2002] ICJ Reports 625; see further section 4.4 below.

¹⁴⁷ *Sovereignty over Pulau Litigan and Pulau Sipadan (Indonesia/Malaysia)* at para 64.

in mind the distinction between this proposition and the case of the treaty provision whose single, correct interpretation allows for a range of possible acts or applications).¹⁴⁸

The only wrinkle in this clear position might be thought to lie in the provisions of the Vienna Convention which allow 'modification' of treaties in certain circumstances, 'modification' meaning in this context a change effective for some parties only (article 41). If this can be achieved by explicit agreement, why not by convergent practice of just some parties? First, it is to be noted that article 41 includes procedural requirements as well as specific conditions for modification. Article 41(2) requires that the states making the modification notify the other parties of their intention to conclude an agreement doing this, and of the modification to the treaty which the agreement is to make. Such notifications do not fit within the notion of convergent practice. If there is a preliminary agreement sufficient to enable states to announce an intention to modify, then the next step envisaged by the Vienna Convention is the agreement doing that, not convergent practice. More generally, in the absence of clear guidance in case law (or elsewhere), modification by practice of some parties only would be inconsistent with the two principles stated immediately above. The interpretative value of subsequent practice, which by definition is not a formal, textual agreement, is wholly dependent on the practice being concordant, the agreement being that of all parties and the resultant interpretation being a single autonomous one.

4.3.4 Practice of some parties in absence of that of others

More difficult is the position in the case of a multilateral treaty where some parties have established a practice which other parties have not had occasion to emulate or on which to act differently. This may be a matter of how to view the evidence of agreement (considered in the next section) or it may be the result of the way a particular provision is framed and is intended to work. Where the language in issue is of a kind that the meaning can really only be elucidated by practice, such practice as there is may indicate considerations to be taken into account and factors which are to be balanced in applying the treaty without revealing an all-purpose meaning.

An example of this is the provisions of the Vienna Convention on Diplomatic Relations which requires parties to take all appropriate steps to protect the premises of another state's diplomatic mission 'against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity' (article 22) and in relation to a diplomatic agent to 'take all appropriate steps to prevent any attack on his person, freedom or dignity' (article 29). The term 'dignity', and what constitutes its impairment or an attack on it, leaves open quite a range of possibilities.

¹⁴⁸ See Chapter 1, section 4.1 above and *R v Secretary of State for the Home Department, ex parte Adan* [2001] 2 AC 477.

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In *Minister for Foreign Affairs and Trade v Magno*¹⁴⁹ the Australian High Court considered these treaty provisions in the context of a protest against the conduct of the Indonesian authorities in East Timor. The protestors placed a number of white crosses on public land within 50 metres of the Indonesian embassy in Australia. The Australian Minister certified that the presence of these objects on that land could lead to the impairment of the dignity, or to disturbance of the peace, of the mission or the head, or other diplomatic agent, of the mission. In interpreting the term ‘dignity’, the court found little help in dictionary definitions, identified the purposes of the treaty regime, and (in the leading judgment) examined state practice. The judgment found that in the context of the defined functions of a diplomatic mission (article 3 of the Vienna Convention on Diplomatic Relations), the purpose of articles 22 and 29 was to permit diplomatic representatives to operate with maximum efficiency, quality, and freedom of action and that the extent of any interference with the functions of a diplomatic mission must be highly relevant in considering the obligation to protect impairment of dignity. However, the judgment noted that international application of the Convention by democratic countries showed that another consideration, particularly significant when dealing with political demonstrations outside embassies, was taking account of the legal principle of freedom of speech. Giving close attention to the position in the USA and the UK, where there was substantial evidence of practice, the judgment found:

...both of these major countries have taken a restrictive view of ‘impairment of dignity’, linking it to breaches of the peace, and the disruption of the mission’s essential functions. In both countries only actual interferences are proscribed. Both nations have interpreted the Convention obligations in a way which takes into account and gives considerable weight to freedom of expression. The United States, in particular, has narrowly interpreted its obligation with respect to preventing the impairment of dignity...

The importance of this State practice is that it suggests that a narrow interpretation is consistent with compliance with the Convention obligations. If the practices of the United States and the United Kingdom are insufficient to make a conclusive finding as to what ought to be the Australian interpretation of the Convention, they certainly provide influential examples of how two important democratic countries with experience in the field have interpreted it.¹⁵⁰

It should be noted, however, that this was a case where application and interpretation ran very closely together. The notion of ‘dignity’ is somewhat elastic when it has to be fitted to novel facts.¹⁵¹

4.4 ‘Establishing’ agreement

To be admissible under the rule, the practice must be such as to establish the agreement of the parties. This is widely taken as requiring that the practice be ‘concordant’, that is identical or sufficiently close to identical as to show that the parties

¹⁴⁹ 112 ALR 529, 37 FCR 298.

¹⁵⁰ 37 FCR 298, at 337–38.

¹⁵¹ See *Aziz v Aziz and Others* [2007] EWCA Civ 712.

have demonstrated their agreement.¹⁵² It does not, however, necessarily mean that there has been abundant practice by all parties to the treaty. It is sufficient if there is practice of one or more parties and good evidence that the other parties have endorsed the practice. Hence the matter may be largely one of how a court or other interpreter views the evidence. The example given above in the Australian decision in *Magno* indicates how practice may help in showing the boundaries of a range of acceptable meanings.

The difficulty of locating, collating, and assessing evidence of practice of states makes short-cuts particularly attractive. This is, of course, quite admissible where reputable studies have been carried out by international organizations, research institutes, and others. For example, in the case of the UN Refugee Convention:

The Preamble to the Convention notes that the United Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the protection of Refugees... The UNHCR Handbook [on Procedures and Criteria for Determining Refugee Status] was published in 1979 upon the request (as its Preface shows) of the Executive Committee of the High Commissioners Programme to consider the possibility of issuing—for the guidance of Governments—a handbook relating to procedures and criteria for determining refugee status...

... the issue we must decide is whether or not, as a matter of law, the scope of Art.1A(2) extends to persons who fear persecution by non-State agents in circumstances where the State is not complicit in the persecution, whether because it is unwilling or unable (including instances where no effective State authority exists) to afford protection. We entertain no doubt but that such persons, whose case is established on the facts, are entitled to the Conventions protection... This interpretation is supported by the approach taken in paragraph 65 of the UNHCR Handbook. We have described the Handbook's genesis, to which we attach some importance. While the Handbook is not by any means itself a source of law, many signatory States have accepted the guidance which on their behalf the UNHCR was asked to provide, and in those circumstances it constitutes, in our judgment, good evidence of what has come to be international practice within Art.31(3)(b) of the Vienna Convention.¹⁵³

Obviously the extent and evidence of state practice required to establish an interpretation may be affected by the context of the treaty provision in issue and the scheme of the particular Convention. For example, the Vienna Convention on Diplomatic Relations, 1961 provides in its article 47 that parties are not to discriminate between states in application of the convention, but that it will not be regarded as discrimination where the receiving state applies any of the provisions restrictively because of a restrictive application of that provision to its mission in the sending state, or where by custom or agreement states extend to each other more favourable treatment than is required by the Convention. This implicitly acknowledges scope for establishing the precise level of treatment by practice, with

¹⁵² See, eg, *Japan—Alcoholic Beverages*, section 4.1.3 above; and Sinclair, *The Vienna Convention*, at 137.

¹⁵³ *R v Secretary of State for the Home Department, ex parte Adan* [2001] 2 AC 477, at 490 and 500.

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an assurance of bilateral reciprocity. Thus practice may establish an interpretation where generally accepted by the diplomatic corps in a particular capital.

An instance illustrating this in the UK is *Jimenez v Inland Revenue Commissioners*¹⁵⁴ where one issue was whether the appellant, although a member of the service staff of a diplomatic mission, was disqualified from exemption from taxation by reason of being permanently resident in the UK within the meaning of article 37(3) of the Vienna Convention on Diplomatic Relations. In holding that she was permanently resident in this sense, the judge considered a longstanding circular that had been issued by the Foreign and Commonwealth Office to the Heads of Diplomatic Missions in London giving guidance on the determination of whether or not particular persons employed in diplomatic missions should be regarded as persons permanently resident in the UK. Although the context of the circular was the administration of diplomatic relations between the government and foreign missions, and included a consultation procedure to resolve any 'difference of opinion' which might arise between a Mission and Her Majesty's Government as to whether an individual was permanently resident in the UK, the judge held that it constituted practice for the purposes of interpretation:

In accordance with article 31(3) of the Vienna Convention on the Law of Treaties... I ought to take into account 'any subsequent practice...'.... [T]he provisions of the 1969 FCO Circular... have never been challenged by the Heads of Mission in the United Kingdom... Therefore I consider I should have regard to it in accordance with article 31(3) of the Vienna Convention on the Law of Treaties, and I further consider that it is reflective of customary international law which, by the fifth indent of the Preamble to the 1961 Convention 'should continue to govern questions not expressly regulated by the provisions of the [1961] Convention'.¹⁵⁵

Most commonly, it will be a question of assessing each instance of practice to take account of all the evidence. In the Indonesia/Malaysia islands dispute, the ICJ examined a number of elements that were put forward as subsequent practice.¹⁵⁶ The central issue was whether what was essentially a land frontier, which had been developed through a series of transactions involving treaties made by predecessors of the disputing states from the nineteenth century onwards, extended out to sea to identify sovereignty over two islands. Indonesia sought to characterize as subsequent practice a map in an Explanatory Memorandum drawn up by the Dutch government to accompany its draft law ratifying a Convention of 1891 with the Great Britain. Although this Memorandum and map had been reported to the British government by their diplomatic agent at The Hague, it was not in any way a document recording any dealings between the parties to the Convention or endorsed by the British government and thus the Court found that this particular item was not subsequent practice for the purposes of the Vienna rule.¹⁵⁷

¹⁵⁴ [2004] STC (SCD) 371; [2004] STI 1939.

¹⁵⁵ [2004] STC (SCD) 371, at para 69.

¹⁵⁶ *Sovereignty over Pulau Litigan and Pulau Sipadan (Indonesia/Malaysia)* [2002] ICJ Reports 625, at 656–65, paras 59–80.

¹⁵⁷ [2002] ICJ Reports 625, at 656, paras 59–61.

The Court also excluded from consideration as subsequent practice transactions between the Netherlands and the local Sultan following the 1981 Convention. These transactions could not reveal any agreement of Great Britain as it was not a party to them. The Court did, however, find that the work of a mixed Commission and Agreements of 1915 and 1928 were relevant to the interpretation of the 1891 Convention (showing that there had been scope for a more exact delimitation of the boundary, not its extension out to sea). The Court's attention was also directed to internal consideration by the Dutch authorities over where maritime boundaries should be drawn, one possibility being an extension of the land boundary. This was not taken up with the British government but was seen by the Court as further evidence that the Dutch had not understood the 1891 Convention to extend boundaries seawards generally. Later limitations in grants of oil concessions by Indonesia and Malaysia themselves could not be seen as referable to an interpretation of the 1891 Convention. 'In view of all the foregoing', the Court stated that it 'considers that an examination of the subsequent practice of the parties to the 1891 Convention confirms the conclusions at which the Court has arrived...'.¹⁵⁸ One can see, therefore, that the Court viewed the various acts and transactions put to it as potentially within the ambit of 'subsequent practice', though in relation to particular elements it applied the requirements underlying the Vienna rule to ensure that they reflected agreement.

What is clear is that a mere headcount does not satisfy the requirement to show sufficient practice to evidence agreement (unless the result clearly shows unanimity). How to evaluate the number of participants in a practice can be illustrated by the contrasting situations in the UK cases of *Hoxha* and *Assange*.¹⁵⁹ In *Hoxha* the evidence that a substantial number of states gave refugee status to a range of people extending beyond that required by the text did not indicate an agreed interpretation that such treatment was a requirement of the treaty. In *Assange* a number of states had designated a prosecutor as a judicial authority for the purposes of issue of European Arrest Warrants. That this was not a uniform practice of all Member States did not prevent this type of designation being viewed as showing a subsequent practice having interpretative effect when such designations had been the subject of reports to the European Parliament and the Council of Ministers in several rounds of mutual evaluations and no objection had been raised to the practice.¹⁶⁰

However, any assessment is dependent on evaluating all the circumstances as is shown by the ICJ's view in the *Whaling* case that the claimant and intervening states had overstated the legal significance of the recommendatory resolutions and the Guidelines of the International Whaling Commission in as much as:

many IWC resolutions were adopted without the support of all States parties to the Convention and, in particular, without the concurrence of Japan [the Respondent state].

¹⁵⁸ [2002] ICJ Reports 625, at 665, para 80.

¹⁵⁹ *R (on the application of Hoxha) v Special Adjudicator* [2005] 4 All ER 580 and *Assange v The Swedish Prosecution Authority* [2012] UKSC 22; for a fuller account of *Hoxha* see Chapter 1, section 5.5 above; and cf *Yugraneft Corporation v Rexx Management Corporation* [2010] 1 SCR 649, para [21] (Canadian Supreme Court).

¹⁶⁰ *Assange*, at paras 68–71; but cf *Ministry of Justice, Lithuania v Bucnys* [2013] UKSC 71.

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Thus, such instruments cannot be regarded as subsequent agreement to an interpretation of Article VIII [of the Whaling Convention], nor as subsequent practice establishing an agreement of the parties regarding the interpretation of the treaty within the meaning of subparagraphs (a) and (b), respectively, of paragraph (3) of Article 31 of the Vienna Convention on the Law of Treaties.¹⁶¹

4.5 Subsequent practice linked with informal agreement, understandings, or other instruments

Subsequent practice is sometimes confirmatory of an interpretation recorded or intimated in an instrument related to a treaty but not falling precisely within one or other of the categories in the Vienna rules. If the practice yields a clear interpretation, it does not matter too much what the precise status is of the instrument that fostered it. Thus, for example, the Explanatory Reports that accompany Council of Europe conventions have been viewed as preparatory work (ie within article 32, since they are prepared before the treaties are concluded) or as falling within article 31 (as agreements or instruments within paragraph (2)).¹⁶² As preparatory work, these reports would strictly be only supplementary means of interpretation for use in the circumstances indicated in article 32 of the Vienna Convention. If within article 31(2), they form part of the context. However, once implemented in practice, their interpretative effect is confirmed, whatever their correct designation.¹⁶³

Subsequent practice may also have a significant role in interpretation of instruments to which the Vienna rules are applied by analogy, or which are derived from a treaty or made under powers in one. For example, the rules may apply to the UN Security Council's resolutions where later resolutions may constitute subsequent interpretative practice, as might the work of Sanctions Committees overseeing implementation of mandatory resolutions of the Security Council.¹⁶⁴

¹⁶¹ *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)*, Judgment of 31 March 2014, para 83.

¹⁶² See *R v Secretary of State for the Home Department, Ex parte Read* [1989] AC 1014, at 1052.

¹⁶³ Cf *Pulp Mills on the River Uruguay (Argentina v Uruguay)* [2010] ICJ Reports 14, at 63, para 131, where the ICJ concluded that an understanding recorded in minutes of a meeting of foreign ministers of Argentina and Uruguay would only have had the effect of relieving Uruguay of its obligations under a treaty establishing procedures relating to the river Uruguay only if Uruguay had complied with the terms of the understanding; see also *R v Secretary of State for the Home Department, ex parte Mullen* [2004] UKHL 18, at para 48, where prospective state practice, which would be based on an Explanatory Report, was expressly recognized as directly relevant to interpretation of a treaty provision by virtue of article 31(3)(b) of the Vienna Convention.

¹⁶⁴ See M Wood, 'The Interpretation of Security Council resolutions' (1998) 2 *Max Planck Yearbook of United Nations Law* 73, at 92, where the possibility of application of the Vienna rules is advanced with caution; see also at 94–95, suggesting that subsequent practice of states, in implementing such resolutions, or for example in their legislation to comply with orders of the International Criminal Tribunal for the Former Yugoslavia, even if not sufficient to establish agreement might nevertheless have an interpretative role as supplementary means.

4.6 Subsequent practice and 'evolutive' interpretation distinguished

Where a provision in a treaty is open to different possible interpretations, practice of the parties may coalesce to provide a clear common approach. However, such a firming-up process does not occur in every case. Obviously the establishment of practice is dependent on states having occasion to take some action in application of the treaty. The process also depends to some extent on how the provisions come to be open to different possible interpretations. Practice may resolve deliberate or unrealized ambiguity, or may be part of the development of the application of a treaty; but some treaties in their nature are designed to allow for a more progressive development or elaboration of the treaty.

The latter has given rise to the idea of 'evolutive' interpretation. In a joint dissenting opinion, seven judges of the European Court indicated the difference between subsequent practice and evolutive interpretation.¹⁶⁵ The issue was whether entitlement to health benefits under statutory social security schemes gave rise to 'civil rights and obligations' and thus required the 'fair and public hearing within a reasonable time by an independent and impartial tribunal established by law' guaranteed in article 6(1) of the European Convention on Human Rights. After finding that state practice had not developed to the point where the parties could be said to be agreed on the 'civil' or other character of an entitlement to such health benefits, the dissenting judges found that an evolutive interpretation of article 6(1) led to no different conclusion. The judges explained:

An evolutive interpretation allows variable and changing concepts already contained in the Convention to be construed in the light of modern-day conditions... but it does not allow entirely new concepts or spheres of application to be introduced into the Convention: that is a legislative function that belongs to the Member States of the Council of Europe. The desirability of affording proper safeguards for the adjudication of claims in the ever-increasing field of social security is evident. There are, however, limits to evolutive interpretation and the facts of the present case go beyond those limits as far as Article 6 (1) para. 1 (art. 6–1) is concerned.¹⁶⁶

¹⁶⁵ *Feldbrugge v Netherlands*, ECtHR case no 8/1984/80/127 (Judgment of 23 April 1986); for further consideration of evolutionary (evolutive) interpretation, see Chapter 10, section 4 below.

¹⁶⁶ Joint dissenting opinion at paras 23–24; cf the position where practice allows a margin of appreciation to parties as in *Ireland v United Kingdom* (1978) 2 EHRR 25 at 96, para 220 where, in relation to derogations from the European Convention on Human Rights in circumstances of a public emergency threatening the life of the nation, the ECtHR concluded that 'the interpretation of article 15 must leave a place for progressive adaptations'. Somewhat similar is the view taken in the UN Human Rights Committee as explained by G Nolte (ILC Special Rapporteur) in his First Report on Subsequent Agreements etc, A/CN.4/660 (13 March 2013), at para 21: 'One important aspect of the Human Rights Committee's interpretative approach is its evolutive understanding of the rights of the Covenant. For example, in the case of *Yoon and Choi v The Republic of Korea*, the Committee stressed that any right contained in the Covenant evolved over time, and by this reasoning justified a certain departure from its own prior jurisprudence. However, in the case of *Atasoy and Sarkut v Turkey*, the Committee has emphasised that evolutive interpretation "cannot go beyond the letter and spirit of the treaty or what the States parties initially and explicitly so intended"' (footnotes giving case citations omitted).

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The indication that evolutive interpretation must be based on concepts already in the treaty suggests that this has more limited potential for extending meanings than does concordant practice of the parties. Since the parties are, acting collectively through their concordant practice, sovereign to make further treaty provisions, they can take interpretation further than can a person or body charged with the role of independent interpretation. Saying this, however, takes the matter into investigation of whether the parties really are interpreting the treaty or reach a point at which they amend it through their practice, which is the topic of the next section.¹⁶⁷

4.7 Subsequent practice and amendment differentiated

Whether subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation is in fact interpretation or amendment is not always easy to discern. Does this distinction matter? Even if the outcome is properly construed as an amendment, for the purposes of application of a provision, the effect should be no different whether what is being applied is an interpretation reflecting the agreement of the parties or an amendment reflecting the agreement of the parties. Further, if one accepts that every application of a treaty is preceded, no matter for how fleeting a moment, by an act of interpretation, any subsequent practice or subsequent agreement to an amendment constituted by practice would each form a valid component of an interpretation.

To accept this, however, would be to ignore the importance of treaty relations, procedural difficulties, and the fact that decisions of courts and tribunals, though in principle only binding on the parties to the proceedings, do have an effect comparable to precedent (albeit their authority will depend more on the cogency of the reasoning than the status of the adjudicator). Thus treaty relations may suppose that a procedure has been followed for amendment giving not only parties but potential parties an opportunity to participate (for example, in a revision conference for a multilateral treaty). Procedural difficulties may occur where one body is empowered to interpret a treaty while another has authority to determine disputes. In such circumstances a tribunal determining a dispute may have to decide whether an act described as an interpretation really is one.¹⁶⁸

The potential importance of practice constituting agreement of the parties on interpretation, and the relatively lesser importance of whether the meaning constitutes an interpretation of the terms of the treaty or an agreed departure from them,

¹⁶⁷ On evolutionary interpretation, see further Chapter 10, section 4 below.

¹⁶⁸ See, eg, *Arbitration under Chapter Eleven of NAFTA, Pope & Talbot v Canada (Award in respect of Damages)* (2002) 41 ILM 1347, where the Free Trade Commission, a body empowered to give interpretations of the North American Free Trade Agreement issued an 'interpretation' relating to a point on which an arbitral tribunal had made a decision but had not yet awarded damages. The Tribunal found that had it been required to adjudicate on the nature of the Commission's act, it would have found it not to be an interpretation but an amendment: Award of 31 May 2002, *Arbitration under Chapter Eleven of NAFTA, Pope & Talbot v Canada (Award in respect of Damages)* (2002) 41 ILM 1347, at para 47.

was presciently described by Waldock in his introduction of proposed articles on interpretation:

Subsequent practice when it is consistent and embraces all the parties would appear to be decisive of the meaning to be attached to the treaty, at any rate when it indicates that the parties consider the interpretation to be binding upon them. In these cases, subsequent practice as an element of treaty interpretation and as an element in the formation of a tacit agreement overlap and the meaning derived from the practice becomes an authentic interpretation established by agreement. Furthermore, if the interpretation adopted by the parties diverges, as sometimes happens, from the natural and ordinary meaning of the terms, there may be a blurring of the line between the *interpretation* and the *amendment* of a treaty by subsequent practice.¹⁶⁹

There are, however, only some isolated suggestions that practice may be taken into account in the course of interpreting and applying a treaty in such a way that a result can be found which acknowledges the practice without the distinction between interpretation and amendment proving an obstacle.¹⁷⁰ This can be illustrated by two judgments of the ECtHR. In its judgment in *Soering v the United Kingdom*¹⁷¹ the Court accepted that an established practice among parties to the European Convention on Human Rights could give rise to an amendment of the Convention, and held that a general abolition of capital punishment in states' penal policy could amount to subsequent practice establishing the agreement of the parties to abrogate the exception in article 2(1) of the Convention (right to life except in execution of a sentence of a court in accordance with the law).¹⁷² The Court found, however, that by adopting a specific protocol (no 6) committing parties to the protocol to abolish capital punishment in time of peace, the parties to the Convention showed an intention to use the normal method for its

¹⁶⁹ Waldock, Third Report, [1964] *Yearbook of the ILC*, vol II, p 60, para 25, footnote omitted, emphasis in original; but care is needed in considering the question of amendment through practice because of the history of rejection of explicit provision for this at the Vienna Conference: see Nolte (ILC Special Rapporteur), 'Second Report on subsequent agreements and subsequent practice in relation to interpretation of treaties', A/CN.4/671 (26 March 2014), pp 51–53, paras 117–123. Note, however, the issue here is one of whether there is a distinction to be drawn between 'interpretation' and 'amendment', not between 'interpretation' and 'modification'. In the Vienna Convention 'modification' is carefully distinguished from 'amendment' (though this had not been finally established when the ILC drafts were first considered at the Vienna Conference). This distinction is significant in the case of interpretation of a treaty in that 'modification' in the Convention's sense could never be achieved purely by practice as envisaged in article 31(3)(b) because that provision is predication on agreement of *all* the parties, while modification is by the Vienna Convention's usage (article 41 in particular) operative for only *some* of the parties. 'Modification' is, however, commonly used in discussion of the present issue to refer to change effective for all parties, even though this blurs the Convention's clear usage.

¹⁷⁰ See, eg, *Air Transport Arbitration (USA v France)*, Award of 22 December 1963, 38 ILR 182, where an arbitral tribunal found that a schedule to a bilateral treaty specifying points which could be served on an air route had been extended by repeated permission to serve a point not listed and consequent operation of services including that point, but this case was before the conclusion of the Vienna Convention and the tribunal seems to have been describing something more akin to estoppel than interpretation or amendment; see also Nolte (ILC Special Rapporteur), 'Second Report' (26 March 2014), p 56, paras 130–31.

¹⁷¹ Judgment of 7 July 1989, Series A no 161, p 40.

¹⁷² Judgment of 7 July 1989, at para 103.

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amendment. Accordingly, the practice of the parties did not at that time lead to article 3 of the same Convention (prohibition of inhuman or degrading treatment) being interpreted to encompass prohibition of the death penalty.¹⁷³

In contrast, when the same Court came to consider the same point more recently in *Öcalan v Turkey* its view was that it could not now exclude the possibility that the parties to the European Convention on Human Rights had agreed through their practice to change the effect of article 2 as regards capital punishment in peacetime, so that the implementation of the death penalty could now be regarded as inhuman and degrading treatment contrary to article 3.¹⁷⁴ This took account of the fact that 43 of 44 parties had abolished the death penalty in peacetime and the forty-fourth had imposed a moratorium on executions. That practice was to be assessed along with the fact that all parties had signed the Protocol requiring abolition of the death penalty in peacetime and all but three had ratified it. This was combined with the policy of the Council of Europe requiring all new members to abolish the death penalty, also taking account of the adoption of a further Protocol proscribing the death penalty even in time of war (which supported the assessment of the policy).¹⁷⁵ The Court did not have to reach a firm decision on this point as it found that to implement a death sentence following what in the particular case had been an unfair trial would run counter to the Convention in any event. Nevertheless, the reasoning illustrates how interpretation of a treaty provision could be affected by practice of the parties revealing, in combination with other elements, an agreement which substantially changes the original meaning of a text albeit there was the rather particular circumstance in the situation posited by the ECtHR that the practice was in proleptic application of a properly adopted amendment.¹⁷⁶

An example of interpretation by reference to practice which is often cited is in an advisory opinion of the ICJ. This concerned the well-known matter of the voting practice in the UN Security Council under article 27(3) of the UN Charter and that treaty's prescription relating to votes of the five permanent members in relation to the rest of the total of 15 members. The provision requires that decisions of the Security Council in all matters other than procedural ones are made 'by an *affirmative* vote of nine members including the *concurring* votes of the permanent members' (emphasis added). The combination of 'affirmative' and 'concurring' very strongly suggests that on these matters all the permanent members must vote in favour of a resolution for a decision to be duly made. Yet from virtually its earliest days, the requirement of 'concurring' in relation to the votes of permanent members was interpreted as fulfilled by abstention or absence as much as by a vote

¹⁷³ Judgment of 7 July 1989, at paras 103–4.

¹⁷⁴ Application no 46221/99 (Judgment of 12 March 2003).

¹⁷⁵ Application no 46221/99 (Judgment of 12 March 2003), paras 192–98.

¹⁷⁶ See also *Al-Saadoon and Mufdhi v UK*, Application no 61498/08 (Judgment of 2 March 2010) which follows the reasoning in *Öcalan v Turkey*; but on the particular circumstances, see further Nolte (ILC Special Rapporteur), 'Second Report on Subsequent agreements and subsequent practice in relation to interpretation of treaties', A/CN.4/671 (26 March 2014), pp 56–7, paras 133–35.

in favour. This converted the apparently ordinary meaning of ‘concurring votes’ in the case of permanent members to (in effect) not casting a negative vote (leading to such a negative vote being generally labelled a ‘veto’). The ICJ has acknowledged this interpretation.¹⁷⁷

While there may be scope for questioning whether practice by an organ of limited membership within an organization may itself constitute practice which establishes the agreement of the parties to the constitution of the organization (on which see next section), assuming that the absence of objection over a long period amounts to practice complying with the Vienna rule’s requirements, this seems an example of an interpretation close to accepting amendment by practice, particularly given that the preparatory work of the Charter suggests an intent contrary to the adopted practice on the part of the eventual permanent members of the Security Council.¹⁷⁸

The ICJ has given further apparent support to the possibility that subsequent practice may produce a departure from what might have been the interpretation contemporaneous with conclusion of the treaty, a departure based on tacit agreement between the parties. In its judgment in the *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)*, the ICJ prefaced its analysis of the case with some general propositions on taking account of a change in the meaning of a treaty provision where a term’s meaning is no longer the same as it was at the date of conclusion.¹⁷⁹

The case concerned the extent of Costa Rica’s rights on the section of the San Juan river where the right bank, ie the Costa Rican side, marks the border between Costa Rica and Nicaragua pursuant to an 1858 ‘Treaty of Limits’. In considering whether the right of vessels of Costa Rica to navigate the river included the right to conduct activities such as tourism and navigation of government vessels, the Court first determined that the Spanish phrase *con objetos de comercio* meant ‘for the purposes of commerce’ rather than ‘with articles of trade’. Thus a key question which the Court had to determine was whether ‘commerce’ was limited to what that term embraced at the time of the 1858 treaty or whether it should take account of subsequent changes in the term’s meaning.

The Court accepted that a treaty was to be interpreted in the light of the determination of the parties’ common intention as reflected in the treaty, that is necessarily contemporaneous with the treaty’s conclusion but as identified through the text.¹⁸⁰ The Court followed this by stating: ‘This does not however signify that,

¹⁷⁷ See *Legal Consequence for States of the Continued Presence of South Africa in Namibia (South West Africa)* [1971] ICJ Reports 16, at 22, para 22; and see Aust, *Modern Treaty Law and Practice* (Cambridge: CUP, 3rd edn, 2012), 215–16.

¹⁷⁸ Aust, *Modern Treaty Law and Practice*, at 216.

¹⁷⁹ [2009] ICJ Reports 214, at 237, para 47.

¹⁸⁰ [2009] ICJ Reports 214, at 242, para 63; it should be noted parenthetically that the Court was avowedly applying the Vienna rules, was not embarking on a search for the ‘intention’ of the parties by any means other than the rules, but indicated that the relevant provision was to be interpreted ‘like any other provision of a treaty, i.e. in accordance with the intentions of its authors as reflected by the text of the treaty and the other relevant factors in terms of interpretation’ (Judgment, para 48).

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where a term's meaning is no longer the same as it was at the date of conclusion, no account should ever be taken of its meaning at the time when the treaty is to be interpreted for purposes of applying it.¹⁸¹ The Court noted the latter occurrence includes situations where 'the subsequent practice of the parties, within the meaning of Article 31 (3) (b) of the Vienna Convention, can result in a departure from the original intent on the basis of a tacit agreement between the parties'.¹⁸²

While this appears to provide explicit recognition of tacit amendment by subsequent practice as constituting authentic interpretation, it has been noted in the work of the ILC that the Court may have been merely making a point relating to the interpretation of treaties, rather than referring to their amendment, 'since the "original" intent of the parties is not necessarily conclusive for the interpretation of a treaty'.¹⁸³ This observation is consistent with the proper use of the Vienna rules and seems more probable than endorsement of tacit amendment.

In terms of dynamics between treaty parties, however, how could a supposed amendment by practice come to be challenged? For practice to meet the requirements of article 31(3)(b) there must be no treaty party dissenting from the practice. Yet for any challenge to arise on the ground that the resultant meaning given to the treaty is inadmissible because it amounts to a procedurally defective amendment, at least one party must express opposition. To support a practice, or to acquiesce in it sufficiently to be shown to have agreed to it, and then challenge it seems an improbable posture to assume.¹⁸⁴

Thus one difficulty in investigating issues of interpretations encroaching on, or circumventing, amendment provisions in treaties is how it can be shown that there is a properly established interpretation which may have been changed by practice such as to constitute an amendment. The case of the UN Security Council voting practice, for example, was not one where an established interpretation was overturned. Only where an incontrovertible meaning is now changed by practice to a meaning which the term in issue could not bear as its ordinary meaning would a clear conflict between interpretation and amendment truly arise, but this would be a conflict engineered by all the parties collectively. There is little in the case law of international courts and tribunals that really fits this specification, the nearest cases having been presented in the work of the ILC on subsequent agreements and practice and shown to be distinguishable from the clear-cut case.¹⁸⁵

¹⁸¹ [2009] ICJ Reports 214. at 242, para 64.

¹⁸² [2009] ICJ Reports 214. at 242, para 64.

¹⁸³ Nolte (ILC Special Rapporteur), 'Second Report on Subsequent agreements and subsequent practice in relation to interpretation of treaties', A/CN.4/671 (26 March 2014), p 50, para 115.

¹⁸⁴ The position of those with interests under a treaty may, however, be different if the treaty is of a kind which affords individuals reliance on the treaty; but see, for example, *Hassan v UK*, Application no 29750/09, Judgment of 16 September 2014, para 101, where the ECtHR considered that 'a consistent practice on the part of the High Contracting Parties, subsequent to their ratification of the Convention, could be taken as establishing their agreement not only as regards interpretation but even to modify the text of the Convention'; see also L Hill-Cawthorne 'The Grand Chamber Judgment in *Hassan v UK*', 16 September 2014 <<http://www.ejiltalk.org>>; as to the practice in issue on derogations from the Convention, see also *Smith v Ministry of Defence* [2013] UKSC 41, at para 60.

¹⁸⁵ Nolte, 'Second Report', A/CN.4/671 (26 March 2014), at pp 52–60.

The proposed draft conclusion in the continuing work of the ILC seems, therefore, the best that can be suggested in advising a presumption that the parties through their practice intend to interpret the treaty rather than change it and noting the lack of general recognition of changed meaning being established by the subsequent practice of the parties.¹⁸⁶ Even were some form of tacit amendment by subsequent practice to be recognized as an interpretative possibility it would be less likely to be readily achieved in the case of multilateral treaties than bilateral ones because of the required degree of participation in the practice, the extent of uniformity which would be necessary, and the unanimity of agreement which would have to be demonstrated.

4.8 Subsequent practice in international organizations

The role of international organizations in treaty interpretation has been considered generally in Chapter 4 above. There is little in the output of international organizations that specifically bears on the role of subsequent practice in the Vienna rules, other than the work of the ILC and the judgments, opinions, and decisions of international courts and tribunals.¹⁸⁷ The current work of the ILC includes consideration of subsequent agreements and subsequent practice in relation to treaty interpretation, but the Commission has not yet considered in any detail treaties establishing international organizations.¹⁸⁸ Subsequent practice under such treaties raises particular issues because the principle underlying this element of the Vienna rules is that practice demonstrating the agreement of the parties as to the meaning of a treaty is a strong indicator of that meaning; but the practice of, or within, an organization is in principle attributable to the organization itself and does not necessarily demonstrate the specific concurrence of the individual parties to the treaty setting it up. Nevertheless, practice within international organizations is taken into account, allying the Vienna rules to a further provision of the Vienna Convention considered below

4.8.1 Whose practice in the organization?

The first point to note is that both the 1969 Vienna Convention and that of 1986 (the latter specifically relating to treaties to which international organizations are parties, but not yet in force) refer to subsequent practice in the application of the treaty which ‘establishes the agreement of the parties’ regarding its interpretation. This does not say whose practice is to be taken into account. There is no specific

¹⁸⁶ Nolte, ‘Second Report’ on Subsequent agreements and subsequent practice in relation to interpretation of treaties’, A/CN.4/671 (26 March 2014), at p 69, para 166, draft conclusion 11.

¹⁸⁷ See C F Amerasinghe, *Principles of Institutional Law of International Organizations* (Cambridge: CUP, 2nd edn, 2005), at 49–55.

¹⁸⁸ See Nolte (ILC Special Rapporteur), ‘Second Report’, p 33, fn 158, flagging up treaties establishing international organizations as a matter to be addressed more specifically at a later stage of the work on the topic.

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requirement here that the practice be that of state parties individually, though it has been noted that in relation to the provision in the 1969 Convention the practice contemplated is that of states, not organizations.¹⁸⁹ A reasonable expectation is that relevant practice will usually be that of those on whom the obligation of performance falls, but obviously this depends on the nature of the obligation and treaty provision in issue.¹⁹⁰ Hence where states by treaty entrust performance of activities to an organization, how those activities are conducted can constitute practice under the treaty; but whether such practice establishes agreement of the parties regarding the treaty's interpretation may require account to be taken of further factors. These may include assessment of the powers of the organ acting in the matter, the potential for any other body in the organization to control the organ, the manner in which states parties to the treaty participate in the activities of the organization, etc.

It is appropriate, therefore, to distinguish between consideration of subsequent practice in connection with interpretation of the powers and functions in a treaty establishing an international organization—its constitution, and any contribution of international organizations to the interpretative function of subsequent practice more generally.

4.8.2 *Practice in relation to a treaty establishing an organization*

Article 5 of the 1969 Vienna Convention provides that the Convention 'applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization'. Article 5 of the 1986 Vienna Convention is to like effect; but there the reference to 'rules of the organization' is amplified by a definition of that phrase as 'the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization' (article 2(1)(j)). Thus established practice of the organization is specifically envisaged in the latter case as falling within the rules of the organization.¹⁹¹

¹⁸⁹ H G Schermers and N M Blokker, *International Institutional Law: Unity within Diversity* (Boston: Martinus Nijhoff, 2003), at 841, § 1347.

¹⁹⁰ Cf Amerasinghe, *Principles of Institutional Law of International Organizations*, at 51, pointing out that practice in international organizations would generally not be based on a sense of obligation so much as exercise of a discretion, the interpretative value following from conduct of the organ being pursued in the belief it was acting lawfully under the organization's constitutive instrument.

¹⁹¹ On practice in international organizations, see E Lauterpacht, 'The Development of the Law of International Organisation by the Decisions of International Tribunals' (1976-IV) 152 *Recueil des Cours* 379, at 448-65, and on whose acts are relevant, see 458-59; C Peters, in a detailed and useful study adducing further material, suggests that, although article (2)(1)(j) of the 1986 Convention may not be strictly germane to interpretation of the 1969 Convention, '[a]ll things considered, the language, history and purpose of Art. 5 [1969 Vienna Convention] lead to the conclusion that established practice is part of the rules of the organization regardless of the difficulties of contextual interpretation': C Peters, 'Subsequent Practice and Established Practice of International Organizations: Two Sides of the Same Coin?' (2011) 3 *Goettingen Journal of International Law* 617, at 629.

These provisions leave no doubt over the applicability of the Vienna rules to a treaty which is the constitution of an international organization, but the modalities of taking into account subsequent practice are less clear. The ICJ has expressly confirmed applicability of the Vienna rules in its advisory opinion in *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*.¹⁹² The central issue was whether asking a question about the legality of use of nuclear weapons came within the scope of the activities of the World Health Organization (WHO). Having referred to its own previous consistent practice of following the principles and rules generally applicable to the interpretation of treaties when interpreting the UN Charter, the Court noted:

But the constituent instruments of international organizations are also treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals. Such treaties can raise specific problems of interpretation owing, *inter alia*, to their character which is conventional and at the same time institutional; the very nature of the organization created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, as well as its own practice, are all elements which may deserve special attention when the time comes to interpret these constituent treaties.¹⁹³

The Court's reference to the relevance of an organization's 'own practice' as an interpretative element deserving special attention is to be noted. The Court followed this by singling out the 1969 Vienna Convention's provision on subsequent practice for complete quotation in its brief reference to some elements of the general rule. It listed the occasions on which it had previously applied the rule on subsequent practice and stated that it would apply it in the present case 'for the purpose of determining whether, according to the WHO Constitution, the question to which it has been asked to reply arises "within the scope of [the] activities" of that Organization.'¹⁹⁴

The Court thus appears to have equated the organization's own practice with subsequent practice in the Vienna rules.¹⁹⁵ When it came to examine the practice of the WHO, the Court used the practice in an essentially confirmatory role, having determined the meaning using a textual approach first, combined with assessment of the legitimate functions of the organization in the light of the treaty's

¹⁹² [1996] ICJ Reports 66, Opinion of 8 July 1996. The Court held that the request for an opinion submitted by the WHO did not relate to a question arising within the scope of WHO's activities and that a condition essential to founding its jurisdiction was absent.

¹⁹³ [1996] ICJ Reports 66, at 75, para 19.

¹⁹⁴ [1996] ICJ Reports 66, at para 19.

¹⁹⁵ See, however, C M Brölmann, 'Specialized Rules of Treaty Interpretation: International Organizations', Chapter 20 in D B Hollis (ed), *The Oxford Guide to Treaties* (Oxford: OUP, 2012), at 515–16 identifying application of a constitutive treaty as attributable to the organization itself and therefore as practice which 'cannot be put on the same footing as the interpretive tool envisaged by Article 31(3)(b) of the [Vienna Convention]' (at p 515, footnote omitted); see also Schermers and Blokker, *International Institutional Law: Unity within Diversity*, at 841, to the effect that as the 1969 Vienna Convention refers to the practice of states and not of organizations: 'Article 31(3)(b) of the Vienna Convention seems to be incorrect as a foundation on which "practice of the organization" may rest.'

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object and purpose, refined by application of the specialty principle (confining a specialized agency to its prescribed area of activity).

Of further interest is what the Court treated as practice. In the preamble to its resolution asking for the Court's opinion on the legality of use of nuclear weapons, the Assembly of the WHO referred to reports and resolutions within the organization prior to the request for the Court's opinion. The Court found that none of these constituted a practice of the WHO such as to show that it treated the legality of use of nuclear weapons as a matter for that organization's attention.¹⁹⁶ The Court reached this conclusion not because it did not view resolutions of an organization as practice, nor because they and secretariat reports were not to be regarded as authoritative expressions of the position of the organization, but because they addressed the *effects* of use of nuclear weapons and therefore did not, in their substance, sustain an argument that the issue sent to the Court was treated by the organization as within the scope of its activities. That the Court engaged with the content of the instruments makes it clear that such output of an international organization has the potential to constitute subsequent practice for the purposes of the Vienna rules.

The only WHO resolution which did raise the issue of legality of use of nuclear weapons was the one seeking the Court's opinion. As the Court observed, however, this resolution was adopted almost immediately the matter had been raised and was itself adopted in the face of opposition. The Court therefore concluded:

... [the resolution] could not be taken to express or to amount on its own to a practice establishing an agreement between the members of the Organization to interpret its Constitution as empowering it to address the question of the legality of the use of nuclear weapons.¹⁹⁷

Hence the Court's opinion in this case indicates a rationale for treating resolutions of an organization as relevant practice if they establish agreement of the members of an organization, which is in line with the provision on subsequent practice in the Vienna rules. In contrast, however, it has been pointed out that in its Advisory Opinion on the *Wall in Occupied Palestinian Territory*, the Court took account of the evolution of practice of the General Assembly and Security Council of the United Nations without investigating whether the extent of support for the practice showed agreement of all Member States.¹⁹⁸

In the *Wall* case the Court had to decide whether article 12 of the UN Charter precluded the General Assembly adopting a resolution requesting an advisory opinion because the Security Council was engaged in consideration of matters of international peace and security in the Middle East.¹⁹⁹ The Court noted that,

¹⁹⁶ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* [1996] ICJ Reports 66, at 81, para 27.

¹⁹⁷ [1996] ICJ Reports 66, at 81, para 27.

¹⁹⁸ Peters, 'Subsequent Practice and Established Practice of International Organizations: Two Sides of the Same Coin?' (2011) 3 *Goettingen Journal of International Law* 617, at 623–4.

¹⁹⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Reports 136.

as regards the practice of the United Nations, both the General Assembly and the Security Council initially interpreted and applied article 12 to the effect that the Assembly could not make a recommendation on a question concerning the maintenance of international peace and security while the matter remained on the Council's agenda, but that this interpretation of article 12 had evolved subsequently. The Court further noted that there has been an increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security.²⁰⁰ Both as regards the original interpretation by the UN organs and as evidence of the evolving practice, the Court gave numerous specific examples of the practice; but without investigating the extent of support for each resolution, recommendation or decision, the Court concluded that 'the *accepted practice* of the General Assembly, as it has evolved, is consistent with Article 12, paragraph 1, of the Charter'.²⁰¹

The Court did not mention the Vienna rules until a much later stage and in connection with a different point; but if it was following the line it had taken in the *Use of Nuclear Weapons* case, Peters notes that something must have influenced the way the provision on subsequent practice in the Vienna rules applied:

This could be the rule of customary law as codified in Art. 5 [of the Vienna Convention]. Further, the established practice of the United Nations could have created a rule of the organization with the content that its subsequent practice does not strictly require the agreement of *all* the Member States.²⁰²

It has also been argued elsewhere that the practice of international organizations in fulfilment of their constitutional remit may in some sense have an independent basis rather than being purely interpretative of their constitutive treaty as drawn up by the founding states, particularly when membership and functions have grown.²⁰³ This seems implicit in the Court's recognition that interpretation may evolve through the political organs of the UN.²⁰⁴ However, as noted above, the

²⁰⁰ [2004] ICJ Reports 136, at 149, para 27.

²⁰¹ [2004] ICJ Reports 136, at 150, para 28 (emphasis added).

²⁰² Peters, 'Subsequent Practice and Established Practice of International Organizations: Two Sides of the Same Coin?', at 624.

²⁰³ See Amerasinghe, *Principles of Institutional Law of International Organizations*, at 53 and Lachs [1964] *Yearbook of the ILC*, vol 1, Part 1, p 286, para 46; Brölmann, 'Specialized Rules of Treaty Interpretation: International Organizations', Chapter 20 in Hollis (ed), *The Oxford Guide to Treaties* (Oxford: OUP, 2012); and L B de Chazournes, 'Subsequent Practice, Practices and 'Family Resemblance': Towards Embedding Subsequent Practice in its Operative Milieu', Chapter 6 in Nolte, *Treaties and Subsequent Practice*, at 57–9.

²⁰⁴ See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Reports 136, at 149–50, paras 27–28, where the Court noted that the General Assembly had originally refused to recommend measures when a question concerning maintenance of international peace and security remained on the agenda of the Security Council, but had later interpreted article 12 of the Charter as precluding recommendations by the Assembly only when the Council was actually exercising its functions; see also the ICJ's consideration of the procedure followed by the Security Council constituting the 'veto' which the Court found in the *Namibia* case had been generally accepted by members of the United Nations and evidenced a general practice of the UN: see section 4.7, above.

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ICJ took account of the opposition to the WHO resolution in assessing whether the resolution reflected practice of the organization, so that clarification of the Court's view of the precise modalities of use of practice in interpretation of constitutive treaties is yet to emerge.²⁰⁵ The ILC may have the opportunity to suggest approaches to this issue in its work on subsequent agreements and practice.

Interpretative practice in relation to constitutional instruments of international organizations may also link with general rules of international law. For example, work within the United Nations is constrained by article 2(7) preserving a realm of 'domestic jurisdiction' of states. The volumes of practice of the organs of the UN interpreting this term has had a more general effect ascribing meaning to the term in international law and deriving support from international law in ascertaining its meaning.²⁰⁶

4.8.3 *Practice in relation to treaty provisions other than in constitutions of international organizations*

This category is concerned with international organizations, including courts and tribunals forming part of international organizations, which have powers to interpret treaties that are not the constitution of the institution of which they form part. Their work is considered throughout this book and is merely noted here as a source of systematic practice in interpretation of the Vienna rules.

Where international organizations have a role in developing rules on matters within their sphere of activity, furthering interpretation of treaties in a manner that assists their useful application in accordance with the policies which the organization seeks to promote may be seen more as a substantive function in developing the law than one which develops practice of the organization in relation to interpretation. For example, the UN High Commissioner for Refugees acts as a catalyst for interpretation of the UN Convention on Refugees, particularly through the publication of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status.²⁰⁷

4.8.4 *Does practice of courts and tribunals constitute precedent?*

Many international courts and tribunals are established within the framework of an international organization, although ad hoc arbitrations between states are still a feature of the international scene, often using the facilities of the Permanent Court of Arbitration. It is perhaps inevitable that where judgments, awards, and decisions are made within single systems, and often relating to matters forming

²⁰⁵ See also Amerasinghe, *Principles of Institutional Law of International Organizations*, at 53–4.

²⁰⁶ See *Repertory of Practice of United Nations Organs*, at <<http://www.un.org/law/repertory>>.

²⁰⁷ See introduction to 1992 edition of the Handbook; while the Handbook records the practice of states parties to the Convention, by also taking into account exchanges of views between the UNHCR Office and the authorities of the parties, the Handbook provides coordinated evidence of practice and an institutional input; see also section 4.4 above on the role of the Handbook.

a distinct community of interests, attempts will be made to shape reasoning in a coherent form, drawing inspiration from the efforts of predecessors.

Decisions of international courts and tribunals only bind the parties to a particular dispute unless otherwise established. This is inherent in a system of multifarious treaties each with potentially differing sets of parties to them. However, the governing instruments establishing some of these courts and tribunals may make this explicit. Thus article 59 of the Statute of the ICJ provides: 'The decision of the Court has no binding force except between the parties and in respect of that particular case.'²⁰⁸ Yet the judgments and opinions of the ICJ are full of references to its previous case law and occasionally to decisions of others. Similarly courts and tribunals having jurisdiction in the growing number of specialist fields, such as human rights, world trade, investments between private parties and states, tax, international criminal law etc, all are building up great bodies of case law which often furnishes reasoning and guidance somewhat akin to precedent used ad hoc to sustain reasoning in later judgments, awards, and decisions.

The approach of the ICJ to propositions of law established in its previous cases (and those heard at the Permanent Court of International Justice) is that of the civil law's '*jurisprudence constante*' rather than the common law's notion of binding precedent. *Jurisprudence constante* (now commonly just 'jurisprudence' when used in the context of the case law of an international court or tribunal) respects propositions of law more on the basis of weight of repetition than authority of source: 'a precedent becomes a source of law when it has become "settled jurisprudence" (*jurisprudence constante*) through an uninterrupted line of judicial decisions'.²⁰⁹ An excellent illustration of this is the way in which the ICJ built up its use of the Vienna rules, listing its earlier applications of the rules to demonstrate progressively its established position on their applicability.²¹⁰ The ICJ leans towards this approach. It does refer to precedents and, in application of article 38 of its Statute, may refer to 'other judicial decisions... as subsidiary means for the determination of rules of law'.²¹¹

²⁰⁸ It may be that treaty provisions on dispute settlement tend to be more concerned with issues of compliance and finality than precedent: see eg the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington, 1965, article 53 (1) 'The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.'

²⁰⁹ See B Luppi and F Parisi, 'Judicial Creativity and Judicial Errors: an Organizational Perspective' (2010) 6 *Journal of Institutional Economics* 91, at 93; see also: R L Henry, 'Jurisprudence Constante and Stare Decisis Contrasted' (1929) 15 *American Bar Assoc Journal* 11; M Shahabuddeen, *Precedent in the World Court* (Cambridge: Grotius, 1996); J Gill, 'Is There a Special Role for Precedent in Investment Arbitration?' (2010) 25 *ICSID Review* 87; I M Ten Cate, 'The Costs of Consistency: Precedent in Investment Treaty Arbitration' (2012–2013) 51 *Colum J Transnat'l L* 418.

²¹⁰ See Chapter 1 section 2.2 above; for further examples of the ICJ explicitly referring to its own jurisprudence, see *Ambatielos case (Greece v United Kingdom)* [1953] ICJ Reports 10, at 19: 'The Court is not departing from the principle, which is well-established in international law and accepted by its own jurisprudence as well as that of the Permanent Court of International Justice, to the effect that...'; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* [2010] ICJ Reports 404 at 417, para 31: 'Accordingly, the consistent jurisprudence of the Court has determined that...'

²¹¹ See, eg, *Nottebohm case (Liechtenstein v Guatemala)* [1953] ICJ Reports 111 at 119: 'Since the Alabama case, it has been generally recognized, following the earlier precedents, that, in the absence

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While, however, it is clear that the ICJ does follow its jurisprudence and precedents in the senses described above, the cases of the Court are generally too varied and distinct (except where grouped together to produce effectively the same judgments) for there to be many examples of cases where it has to interpret a second or further time the same treaty terms. In contrast, some of the courts and tribunals concerned with specialist fields are often interpreting a single treaty or treaties of closely similar type and are therefore more likely to encounter the same treaty provisions for interpretation anew. Here, the idea of both precedent and jurisprudence take on a rather different appearance depending on whether there is a strong element of continuity of the court or tribunal or whether it is constituted for each occasion. For example, the ECtHR is a body with some degree of continuity, while arbitral tribunals under the treaty setting up the International Centre for Settlement of Investment Disputes (ICSID) are composed of arbitrators selected for each case. In the latter cases, the ideas of *jurisprudence constante* or precedent sit ill with the absence of any collegial affiliation beyond the community of specialism which the ICSID may foster. While there are studies showing how in these specialisms judges and arbitrators may treat decisions relating to the same or similar treaties and situations, there is little to suggest that there is any coherent approach to case law or jurisprudence in regard to interpretation of treaties.²¹² Unfortunately, although increasing reference has been made to the Vienna rules, which might be expected to encourage coherence in their application, actual familiarity with the rules and full and proper use of them have not been uniformly apparent in investment arbitration.²¹³

4.9 Possible overlap with relevant rules of international law

The next chapter shows how potentially wide is the requirement in article 31(3)(c) to take into account in treaty interpretation ‘any relevant rules of international

of any agreement to the contrary, an international tribunal has the right to decide as to its own jurisdiction...’, and see *Case concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* [1984] ICJ Reports 246, at paras 143 and 147, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)* [2001] ICJ Reports 40, at 110, para 227, and *Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea Intervening)* [2002] ICJ Reports 303, at 415, paras 222–3.

²¹² For a useful review of the role of prior awards or decisions in interpretation of bilateral investment treaties, with helpful comparisons with similar issues in other areas, see J R Weeramantry, *Treaty Interpretation in Investment Arbitration* (Oxford: OUP, 2012), 116–27; on ‘legal certainty and *jurisprudence constante*’ in WTO bodies, see I Van Damme, *Treaty Interpretation by the WTO Appellate Body* (Oxford: OUP, 2009), 195–203; see also M Paparinskis ‘Sources of Law and Arbitral Interpretations of *Pari Materia* Investment Protection Rules’, Chapter 5 in O K Fauchald, and A Nollkaemper (eds), *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (Oxford: Hart Publishing, 2012).

²¹³ See Chapter 10, section 6 below; and cf *Canadian Cattlemen for Fair Trade v United States*, UNCITRAL (NAFTA), Award on Jurisdiction, 28 January 2008, paras 49–51, asserting the relevance of other arbitral awards as supplementary means of interpretation; and see A Orakhelashvili, ‘Principles of Treaty Interpretation in the NAFTA Arbitral Award on *Canadian Cattlemen*’ (2009) 26 *Journal of International Arbitration* 159, 167–69.

law applicable in the relations between the parties'. Subsequent practice of states parties to a treaty may take the form of their entering into further agreements in relation to the same or related subject matter or such further agreements may establish obligations which apply in their relations.²¹⁴ In the *Abyei Arbitration* the tribunal hedged its bets as to the basis on which it should take into account some agreements of 2008 when interpreting the Comprehensive Peace Agreement of 2005 (CPA):

In the Tribunal's view, the 2008 Agreements serve to clarify the meaning of provisions of the CPA as "subsequent practice" pursuant to Article 31(3)(b). The phrase "subsequent practice" has been widely interpreted and is not restricted to specific, interpretative treaties. The 2008 Agreements constitute relevant subsequent practice, since the Agreements make specific reference to sections of the CPA: ... As such, these 2008 Agreements reaffirm the relevant provisions of these elements of the CPA and must be taken into account in interpreting the CPA. The 2008 Agreements are thus admissible and relevant for purposes of assessing the reasonableness of the ABC [Abyei Boundaries Commission] Experts' interpretation of the Formula [the phrase defining the Abyei Area in dispute] as expressed in the Abyei Protocol. ... Even if one were to consider that the 2008 Agreements do not constitute relevant "subsequent practice," the 2008 Agreements would still inform the interpretation of the CPA as "relevant rules ... applicable in the relations between the parties" pursuant to Article 31(3)(c) of the Vienna Convention.²¹⁵

5. Conclusions

A proven agreement of all parties on interpretation of their treaty is usually the best evidence of its meaning. This is so even though the Vienna rules separate consideration of agreements made at the time of conclusion of a treaty from subsequent agreements (the latter evidenced by being recorded or shown through sufficient practice). Because the general rule is a single rule composed of several elements, and because of the particular significance of the agreement of the parties on a treaty's interpretation, such agreements are not subordinate to the elements in the first paragraph of the general rule. A somewhat different element to be taken into account is any unilateral instrument connected to the conclusion of the treaty and accepted by the other parties as related to it. Instruments of this kind may contain interpretative declarations, the effects of which vary according to the particular circumstances.

²¹⁴ See Chapter 7, section 3.2.2.

²¹⁵ *The Abyei Arbitration (The Government of Sudan/The Sudan People's Liberation Movement/Army)*, Final Award of 22 July 2009, paras 654–5 (footnote omitted), <<http://www.pca-cpa.org>>; and see R Moloo, 'When Actions Speak Louder Than Words: The Relevance of Subsequent Party Conduct to Treaty Interpretation' (2013) 31 *Berkeley JIL* 39, at 45–46.