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# When Actions Speak Louder Than Words: The Relevance of Subsequent Party Conduct to Treaty Interpretation

Rahim Moloo\*

## INTRODUCTION

One of the oldest recorded treaties, the Kadesh Peace Treaty, was signed in the late-thirteenth century B.C.E. between Pharaoh Ramesses II of Egypt and King Hattusili III of the Hittites.<sup>1</sup> The treaty proclaimed that “hostility shall not occur between [Egypt and the land of Hattites] forever.”<sup>2</sup> The everlasting commitment expressed, inscribed in silver, prophesized a future where treaties would express long-term commitments that would be difficult to amend.

Treaties may be difficult to amend, but times change, often requiring a reassessment of obligations in changed circumstances. This apparent paradox is not easily solved. In contemporary international law we see that despite longstanding calls for reform of the United Nations, its Charter has been all but impossible to amend.<sup>3</sup> We also witness stalemates such as the Doha Round of

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1. ANCIENT NEAR EASTERN TEXTS RELATING TO THE OLD TESTAMENT 199-201 (James B. Pritchard ed., 3rd ed. 1969).

2. *Id.* at 200.

3. For example, the composition of the Security Council and the role of NGOs in the U.N. have long been debated. *See, e.g.*, Rahim Moloo, *The Quest for Legitimacy in the United Nations: A*

trade negotiations, where disagreements between developed and developing countries have prevented amendments to World Trade Organization (WTO) obligations that would further reduce trade barriers.<sup>4</sup> In this context, the International Law Commission (ILC) has undertaken a study of treaty interpretation over time.<sup>5</sup>

Subsequent party conduct,<sup>6</sup> after the conclusion of a treaty, may shed some light on that treaty's meaning, especially with respect to how the treaty ought to be interpreted in changed circumstances.<sup>7</sup> To be clear, however, it is not necessarily the case that long periods of time should lapse before parties' conduct becomes relevant to interpreting treaties. It may in fact be the case that the application of a treaty in its first few years is particularly important to the parties' understanding of their obligations. Where treaty terms pose multiple possible meanings, party conduct in implementing the treaty may elucidate the party intentions, indicating the correct interpretation. Indeed, certain terms may be left undefined, to be sorted out as the treaty is implemented over time, in order for parties to finalize their agreement.<sup>8</sup> Alternatively, an ambiguity may be unintentional, and parties only discover it when putting the treaty into practice, deciding to articulate a subsequent understanding as to its interpretation.<sup>9</sup>

This article focuses primarily on two provisions in the Vienna Convention that comprise part of the general rule on the interpretation of treaties. Articles 31(3)(a) and (b) of the Vienna Convention require that treaty interpretation take into account "any subsequent agreement between the parties regarding the

*Role for NGOs?*, 16 UCLA J. INT'L L. & FOREIGN AFF. (forthcoming).

4. *The Doha round...and round...and round*, THE ECONOMIST (July 31, 2008), <http://www.economist.com/node/11848592>; *The Doha round: Dead man talking*, THE ECONOMIST (Apr. 28, 2011), <http://www.economist.com/node/18620814>; *Trade: Goodbye Doha, hello Bali*, THE ECONOMIST (Sept. 6, 2012), <http://www.economist.com/node/21562196>.

5. Georg Nolte, *Treaties Over Time In Particular: Subsequent Agreement And Practice*, Rep. of the Int'l Law Comm'n, 60th Sess., May 5–June 6, July 7–Aug. 8, 2008, U.N. Doc. A/63/10; GAOR, 63d Sess., Supp. No. 10, Annex A, 365 (2008).

6. Subsequent conduct is used in this article to refer, cumulatively, to subsequent practice and agreement. The International Court of Justice (ICJ) has previously used this phrase in a similar context. See *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahr.), Jurisdiction and Admissibility, 1995 I.C.J. 112, ¶ 28 (July 1); *Legal Consequences for States of the Continued Presence of South Africa in Namibia Notwithstanding Security Council Resolution 276* (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 22 (June 21). I note, however, that the ILC Working Group on Treaties Over Time has not adopted such language in its commission reports.

7. *Husserl v. Swiss Air Transport*, 351 F. Supp. 702, 707 (S.D.N.Y. 1972) (“[A] prime canon of treaty construction is to look to the subsequent action of the parties for the interpretation of the treaty in areas clearly unanticipated at the time.”).

8. Gidon Gottlieb, *The Interpretation of Treaties by Tribunals*, 63 AM. SOC'Y INT'L L. PROC. 122, 130 (1969) (“Often, parties to a treaty who are unable to agree on a specific provision adopt vague language, thus in effect postponing agreement and delegating to the interpreters the responsibility for reaching an acceptable solution.”).

9. For example, and as discussed in further detail below, the parties to the North American Free Trade Agreement (NAFTA) have adopted clarifications on the interpretation of certain NAFTA provisions to avoid undesirable consequences of alternate interpretations.

interpretation of the treaty or the application of its provisions” and “any subsequent practice in the application of the treaty which establishes the agreement of the treaty parties regarding its interpretation.”<sup>10</sup> In so doing, the article stresses the need for party conduct to demonstrate the agreement of the parties on treaty interpretation in order for it to be relevant to the interpretation exercise. Methodologically, this article reviews cases in a variety of fora, extracting general principles that are relevant across international institutional arrangements.<sup>11</sup>

Following this introduction, the second part of the article discusses how subsequent party conduct fits within the broader approach to treaty interpretation. The third part discusses how subsequent party conduct can impact treaty interpretation under Articles 31(3)(a) and (b), or as a subsidiary means of interpretation under Article 32. The fourth part attempts to distinguish analysis of subsequent conduct relevant to treaty interpretation from the consequences that subsequent party conduct may otherwise have on the rights of parties to a treaty, such as estoppel. Finally, the article offers some preliminary conclusions.

## I. GENERAL APPROACH TO TREATY INTERPRETATION

In interpreting treaties, subsequent party conduct is one of many factors that should be taken into account. This first section briefly sets out how Articles 31(3)(a) and (b) fit within the broader framework of the rules applicable to treaty interpretation.

### *A. General Principles of Treaty Interpretation: The Vienna Convention on the Law of Treaties*

It is generally accepted that Articles 31-33 of the Vienna Convention reflect customary principles of treaty interpretation.<sup>12</sup> While this may not have

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10. Vienna Convention on the Law of Treaties arts. 31(a), (b), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention] (entered into force Jan. 27, 1980).

11. To an extent, there is a bias in the article towards the cases of institutional regimes that make their case law publicly accessible. Given the prominence of the ICJ as the principal judicial organ of the United Nations in resolving disputes between states and offering Advisory Opinions on matters of international law, its jurisprudence is given special attention.

12. On the reference to the provisions contained in Articles 31-33 as principles as opposed to rules, *see* RICHARD GARDINER, *TREATY INTERPRETATION* 38 (2008) (noting that “the use of ‘rules’ when referring to the provisions of Articles 31-33 should not be taken as defining their character” but rather, while Articles 31-33 “are of mandatory application when interpreting treaties . . . their manner of application is to be in the enlightened sense described by Waldock, treating them as regulations, principles, or guidelines as appropriate.”). Generally, principles require the weighing of different interests, as opposed to rules, which requires the application of “norms which are always either fulfilled or not.” ROBERT ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS* 48 (Julian Rivers trans.) (1986).

been the case prior to the adoption of the Vienna Convention in 1969<sup>13</sup>—indeed there was much debate over the appropriate principles applicable to interpretation—the codification of certain principles in the Vienna Convention have brought normative force and primacy to those rules such that today they have achieved the status of customary international law.<sup>14</sup> Article 31 provides the general rule of interpretation, Article 32 covers supplementary rules of interpretation, and Article 33 addresses the interpretation of plurilingual treaties. For the purposes of this article, it is helpful to set out in full Articles 31 and 32:

*Article 31*

*General rule of interpretation*

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
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;
  - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

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13. Jan Klabbers, *Virtuous Interpretation*, in TREATY INTERPRETATION AND THE VIENNA CONVENTION ON THE LAW OF TREATIES: 30 YEARS ON 17, 27 (Malgosia Fitzmaurice et al. eds., 2010) (“All in all, it seems doubtful whether, prior to the Vienna Convention, there was indeed a general rule, let alone one of customary status.”).

14. Oil Platforms (Iran v. U.S.), Preliminary Objections, 1996 I.C.J. 803, ¶ 23 (Dec. 12); LaGrand Case (Ger. v. U.S.), 2001 I.C.J. 466, ¶ 99 (June 27); Case Concerning Kasikili/Sedudu Island (Bots. v. Namib.), 1059 I.C.J. 1045 ¶ 18 (Dec. 13); The Legality of Use of Force (Serb. and Montenegro v. Belg.), Preliminary Objections, 2004 I.C.J. 279, ¶ 100 (Dec. 15); Beagle Channel Arbitration (Arg. v. Chile), 21 R. INT’L ARB. AWARDS [RIAA] 53, ¶ 15 (1977); IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 153 (2d ed. 1984) (“There is no doubt that Articles 31 to 33 of the Convention constitute a general expression of the principles of customary international law relating to treaty interpretation. The phrase ‘a general expression’ has been used deliberately, since few would seek to argue that the rules embodied in Articles 31 to 33 of the Convention are exhaustive of the techniques which may be properly adopted by the interpreter in giving effect to the broad guidelines laid down in those rules.”). With respect to Article 31(3)(a) and (b) specifically, see *Treaties over Time*, in Rep. of the Int’l Law Comm’n, 63d Sess., U.N. Doc. A/66/10; GAOR, 66th Sess., Supp. No. 10, at 282, ¶ 344, preliminary conclusion 4 (2011) (“All adjudicatory bodies reviewed recognize that subsequent agreements and subsequent practice in the sense of article 31 (3) (a) and (b) [Vienna Convention] are a means of interpretation which they should take into account when they interpret and apply treaties.”).

*Article 32*

*Supplementary means of interpretation*

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

Articles 31 and 32 outline a clear hierarchy among the principles to be applied in interpreting treaties, giving primacy to the principles contained in Article 31. Within Article 31, however, there is no hierarchy. Nevertheless, certain tribunals have confused the relevance of the subsequent party conduct in asserting that it is always subordinate to a review of the text of the treaty. For instance, in *RSM v. Grenada*, a tribunal under the aegis of the International Center for the Settlement of Investment Disputes (ICSID) suggested that “the Vienna Convention reveals an interpretive structure in which subsequent practice and the other two methods of treaty interpretation, subjective and teleological, are supplementary in nature. They are to be used to assist in the interpretation when the textual method is insufficient.”<sup>15</sup> Similarly, the dissenting opinion in an arbitration between the United States and Italy, with respect to the interpretation of an Air Transport Services Agreement, suggested that “since it is a subsidiary element in interpretation, recourse to the behavior of the Parties can only be justified if literal interpretation does not lead to clear unequivocal results.”<sup>16</sup>

As the ILC noted in its commentary to what later became Article 31 of the Vienna Convention, “the application of the means of interpretation in the article would be a single combined operation. All the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation.”<sup>17</sup> Indeed, “it was

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15. *RSM Prod. Co. v. Grenada*, ICSID Case No. ARB/05/14, Award, ¶ 383 (Mar. 13, 2009). However, the tribunal was simply applying the Vienna Convention principles by analogy, as the relevant claims concerned contract interpretation, not a treaty.

16. Interpretation of the Air Transport Services Agreement of 6 February 1948 (It. v. U.S.), 16 RIAA 75, 107-08 (1965) (Monaco, J., dissenting). See also *Beagle Channel Arbitration* (Arg. v. Chile), 21 R. INT’L ARB. AWARDS [RIAA] 53, ¶ 169 (1977) (emphasis added) (noting that the tribunal “cannot accept the contention that no subsequent conduct, including acts of jurisdiction, can have probative value as a subsidiary means of interpretation unless representing a formally stated or acknowledged ‘agreement’ between the Parties. The terms of the Vienna Convention do not specify the ways in which ‘agreement’ must be manifested.”).

17. Draft Articles on the Law of Treaties with Commentaries, [1966] 2 Y.B. INT’L L. COMM’N 187, 219-20, art. 27, comment 8, U.N. Doc. A/CN.4/SER.A/1966/Add.1; *Golder v. United Kingdom*, 18 Eur. Ct. H.R. (ser. A), ¶ 30 (1975) (“In the way in which it is presented in the ‘general rule’ in Article 31 of the Vienna Convention, the process of interpretation of a treaty is a unity, a single combined operation; this rule, closely integrated, places on the same footing the various elements enumerated in the four paragraphs of the Article.”). See also *Hrvatska Elektroprivreda d.d.*

considerations of logic, not any legal obligatory hierarchy, which guided the Commission in arriving at the arrangement in [Article 31].”<sup>18</sup> As such, it is logical to begin the process of interpretation by considering the ordinary meaning of the terms in their context and in light of their object and purpose (Article 31(1)). This would be followed by a consideration of the specific elements of the context surrounding the text (Article 31(2)). Finally, the elements contemplated in Article 31(3)—subsequent agreement as to the interpretation, subsequent practice establishing the agreement of the parties as to the interpretation, and relevant and applicable rules of international law—should be considered as “elements intrinsic to the text.”<sup>19</sup> All of these elements, however, are “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.”<sup>20</sup>

Within Article 31(3) there is potential for overlap between Articles 31(3)(a) or (b) and Article 31(3)(c). The use of Article 31(3)(c) as a means to promote systemic integration through treaty interpretation has been extensively discussed, given the work of the ILC on the fragmentation of international law.<sup>21</sup> Article 31(3)(c) requires that the process of interpretation take into account “any relevant rules of international law applicable in relations between the parties.” It “deals with the case where material sources external to the treaty are relevant in its interpretation” including “treaties, customary rules or general principles of law.”<sup>22</sup> As noted in the Conclusions of the ILC Fragmentation

v. Republic of Slovenia, ICSID Case No. ARB/05/24, Decision on Treaty Interpretation Issue, ¶ 164 (June 12, 2009) (“there is no legal hierarchy between the various aids to interpretation outlined in article [31].”); “White Van” (Paniagua-Morales et al.) v. Guatemala, Preliminary Objections, 23 Inter-America Ct. H.R., (ser. C), ¶ 40 (Jan. 25, 1996) (“the process of interpretation should be taken as a whole.”); GARDINER, *supra* note 12, at 36 (“a distinct significance does attach to the use here of the singular ‘rule’ . . . emphasizing the unity of its several paragraphs and its intended application as a single operation.”).

18. Draft Articles on the Law of Treaties with Commentaries, *supra* note 17, at 220, art. 27, comment 9.

19. *Id.*

20. *Id.* See also *id.* at 219, art. 27, comment 8 (“the opening phrase of paragraph 3 [of Article 31] ‘There shall be taken into account *together with the context*’ is designed to incorporate in paragraph 1 the elements of interpretation set out in paragraph 3.”); Legal Consequences for States of the Continued Presence of South Africa in Namibia Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 22 (June 21) (noting that “a finding of ‘ambiguity’” is not “a precondition for recourse to subsequent conduct as a legitimate mode of enquiry into meaning.”).

21. Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Rep. of the Int’l Law Comm’n, 58th Sess., 1 May—9 June, 3 July—11 Aug., 2006, U.N. Doc. A/CN.4/L.682 (2006) [hereinafter Report of the ILC Fragmentation Study Group]; Martti Koskenniemi, *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, [2006] 2 Y.B. INT’L L. COMM’N [hereinafter Conclusions of the ILC Fragmentation Study Group].

22. Koskenniemi, Conclusions of the ILC Fragmentation Study Group, *supra* note 21, at

Study Group, other treaty-based rules “are of particular relevance . . . where they provide evidence of the common understanding of the parties as to the object and purpose of the treaty under interpretation or as to the meaning of a particular term.”<sup>23</sup> As such, other treaties may be applicable both as relevant rules of international law applicable between the parties, and/or as subsequent party conduct that demonstrates the agreement of the parties with respect to the interpretation of the treaty in question.

The potential for overlap in this regard was recently demonstrated in the Abyei arbitration, where the tribunal considered whether the experts of the Abyei Boundary Commission exceeded their mandate in delimiting the Abyei area in Sudan.<sup>24</sup> As one of its tasks, the tribunal was required to interpret the Comprehensive Peace Agreement (CPA) signed by Government of Sudan and the Sudan People’s Liberation Movement/Army on January 9, 2005.<sup>25</sup> In interpreting this agreement, the tribunal had recourse to certain 2008 agreements which were “designed to bring a final settlement to the Parties’ dispute over the Abyei Area” and “ma[d]e specific reference to sections of the CPA.”<sup>26</sup> The 2008 agreements—“reaffirm[ing] the relevant provisions of these elements of the CPA”—were found to be relevant subsequent practice pursuant to Article 31(3)(b).<sup>27</sup> The tribunal went on to find that “[e]ven 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.”<sup>28</sup> As such, any subsequent international legal commitments entered into by parties to a treaty may be relevant under both Articles 31(3)(a) or (b) and Article 31(3)(c) insofar as they concern the interpretation or application of the treaty in question.

Despite resistance from the United States’ delegation, led by Myers McDougal,<sup>29</sup> it was decided that the elements in Article 31 should take priority

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conclusion 18.

23. *Id.* at conclusion 21.

24. In the Matter of an Arbitration before a Tribunal Constituted in Accordance with Article 5 of the Arbitration agreement between the Government of Sudan and the Sudan People’s Liberation Movement/Army on Delimiting Abyei Area (The Government of Sudan v. the Sudan People’s Liberation Movement/Army), Final Award (PCA Arb. Trib. July 22, 2009), <http://www.pca-cpa.org/upload/files/Abyei%20Final%20Award.pdf>.

25. Although the agreements in question were not between two state parties, the rules found in the Vienna Convention were agreed to by the parties as applicable to matters of interpretation. *Id.* ¶ 572.

26. *Id.* ¶¶ 651, 654.

27. *Id.* ¶ 654.

28. *Id.* ¶ 655.

29. See, e.g., Myers S. McDougal, Harold D. Laswell & James C. Miller, *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER: PRINCIPLES OF CONTENT AND PROCEDURE* xvi-xvii (1967). The authors stated:

The primary aim of a process of interpretation by an authorized and controlling



over *travaux préparatoires* and other forms of evidence that do not explicitly reflect the agreement of the parties.<sup>30</sup> Unlike Article 31, which is a closed list of principles to be taken into account when interpreting treaties in the first instance, Article 32 is open-ended and can include principles such as *contra proferentum*, *a contrario*, *eiusdem generis*,<sup>31</sup> and, in some instances, party conduct. For example, in the case concerning Kasikili/Sedudu Island, the court took into account the subsequent practice of the parties as to the boundary between

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community decision-maker can be formulated in the following proposition: discover the shared expectations that the parties to the relevant communication succeeded in creating in each other. It would be an act of distortion on behalf of one party against another to ascertain and to give effect to his version of a supposed agreement if investigation shows that the expectations of this party were not matched by the expectations of the other. And it would be an obvious travesty on interpretation for a community decision-maker to disregard the shared subjectivities of the parties and to substitute arbitrary assumptions of his own. It is the grossest, least defensible exercise of arbitrary formalism to arrogate to one particular set of signs—the text of the document—the role of serving as the exclusive index of parties’ shared expectations.

*Id.* at xvi-xvii.

Thoroughly understood, interpretation is a two-pronged and inter-connected process. One approach arranges the manifest content of the statements that appear in relevant texts—including more than a putatively final text—according to harmony or contradictions, and abstractness. The further approach examines each pertinent expression in the order in which it was made and also in relation to any information that helps to establish the perspectives of the communicator and his audience. The interpreter is thereby exposing himself to an agenda of experiences that aid in modifying the initial procedure of the subjectivities of the parties.

*Id.* at xviii.

See also Myers S. McDougal, *The International Law Commission’s Draft Articles Upon Interpretation: Textuality Redivivus*, 61 AM. J. INT’L L. 992 (1967) (“The great defect, and tragedy, in the International Law Commission’s final recommendations about the interpretation of treaties is in their insistent emphasis upon an impossible, conformity-imposing textuality.”).

30. Draft Articles on the Law of Treaties with Commentaries, *supra* note 17, at 220, art. 27, comment 10. The commentary states:

The elements of interpretation in article 27 all relate to the agreement between the parties at the time when or after it received authentic expression in the text. *Ex hypothesi* this is not the case with preparatory work which does not, in consequence, have the same authentic character as an element of interpretation, however valuable it may sometimes be in throwing light on the expression of the agreement in the text.

*Id.*

31. GARDINER, *supra* note 12, at 349. This does not mean that all principles of interpretation not specifically articulated in Article 31 are subsumed under “supplementary” means of interpretation. For instance, the principle of effective interpretation—requiring that all words be given meaning—may be relevant to interpreting treaty terms in good faith, as required by Article 31(1). SINCLAIR, *supra* note 14, at 120 (noting that the principle of good faith “underlies the concept that interpretation should not lead to a result which is manifestly absurd or unreasonable.”). For use of the principle of effectiveness in the WTO context, see Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, 23, WT/DS2/AB/R (Adopted May 20, 1996) (applying the principle of effectiveness to avoid “reducing whole clauses or paragraphs of a treaty to redundancy or inutility.”); Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body*, 21 EUR. J. INT’L L. 605 (2010).

Botswana and Namibia, even though that practice did not establish the agreement of the parties as required by Article 31(3)(b).<sup>32</sup>

*B. Interpretation Principles Contained in the Treaty Being Interpreted*

In some instances, a treaty will contain special principles of interpretation to be applied to the text of that treaty.<sup>33</sup> To the extent that there is any conflict, these specific principles should be given primacy over the general principles articulated in the Vienna Convention.<sup>34</sup> For instance, Article 17.6(ii) of the World Trade Organization (WTO) Anti-Dumping Agreement provides that:

[T]he panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.<sup>35</sup>

Arguably, this provision sets out a special interpretive regime to be applied. Recently, this provision has been interpreted as requiring the application of the principles contained in the Vienna Convention in the first instance, and “[o]nly after engaging this exercise will a panel be able to determine whether the second

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32. Case Concerning Kasikili/Sedudu Island (Bots. v. Namib.), 1059 I.C.J. 1045, ¶¶ 79-80 (Dec. 13). See Hazel Fox, *Article 31(a) and (b) of the Vienna Convention and the Kasikili/Sedudu Island Case*, in *TREATY INTERPRETATION AND THE VIENNA CONVENTION ON THE LAW OF TREATIES: 30 YEARS ON* 59, 71 (Malgosia Fitzmaurice et al. eds., 2010) (suggesting that the court in *Kasikili/Sedudu Island* “evolved a new method of treaty interpretation by employing ‘factual findings’ of parties on separate occasions over time as to the meaning of the contested words, factual findings which were not disputed, to support the court’s conclusions as to the ordinary meaning of the words . . .”). See *infra*, Part II.B on the reference to subsequent party conduct as a supplementary means of interpretation under Article 32.

33. MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 441 (2009) (“States remain free to agree to employ other means of interpretation.”).

34. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 I.C.J. 14, 137, ¶ 274 (June 27) (“In general, treaty rules being *lex specialis*, it would not be appropriate that a State should bring a claim based on a customary-law rule if it has by treaty already provided means for settlement of a such a claim.”); HUGO GROTIUS, ON THE LAW OF WAR AND PEACE, Book II Ch. 16, § XXIX (1625). (“Among agreements which are equal . . . that should be given preference which is most specific and approaches most nearly to the subject in hand, for special provisions are ordinarily more effective than those that are general.”); Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points*, 33 BRIT. Y.B. INT’L L. 237 (1957) (noting that the special law applies “where both the specific and general provisions concerned deal with the same substantive matter.”); ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 249 (2d ed. 2007) (“*Lex specialis derogat legi generali*. A specific rule prevails over a general rule.”). For difficulties with applying the *lex specialis* principle, see Koskenniemi, Report of the ILC Fragmentation Study Group, *supra* note 21, ¶¶ 46-222.

35. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade art. 17.6(ii), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 154.

sentence of Article 17.6(ii) applies.”<sup>36</sup> According to the Appellate Body, the second sentence of Article 17.6(ii) of the WTO Anti-Dumping Agreement then suggests that:

[T]he application of the rules of the Vienna Convention may give rise to an interpretative range and, if it does, an interpretation falling within that range is permissible and must be given effect by holding the measure to be in conformity with the covered agreement. The function of the second sentence is thus to give effect to the interpretative range rather than to require the interpreter to pursue further the interpretative exercise to the point where only one interpretation within that range may prevail.<sup>37</sup>

Neither WTO Panels nor Appellate Bodies have been faced with “more than one permissible interpretation” that would call for applying this Article.<sup>38</sup> However, this type of provision governs the process of interpretation in the first instance.

A treaty provision addressing matters of interpretation does not, of course, exclude the application of the general principles of interpretation contained in the Vienna Convention.<sup>39</sup> This is especially the case where there is no conflict between the specific and the general rules.<sup>40</sup> An apt example is where treaties

36. Appellate Body Report, *United States—Continued Existence and Application of Zeroing Methodology*, ¶ 271, WT/DS350/AB/R (Adopted Feb. 19, 2009).

37. *Id.* ¶ 272.

38. *See, e.g., id.* ¶ 317; Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, *supra* note 35; Panel Report, *European Communities—Anti-dumping Duties on Imports of Cotton-Type Bed Linen from India*, ¶ 6.46, WT/DS141/R (Oct. 30, 2000); Appellate Body Report, *European Communities—Anti-dumping Duties on Imports of Cotton-Type Bed Linen from India*, ¶ 65, WT/DS141/AB/R (Adopted Mar. 12, 2001); Appellate Body Report, *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico*, ¶ 136, WT/DS344/AB/R (Adopted May 20, 2008). *See also* Donald McRae, *Treaty Interpretation by the WTO Appellate Body: The Conundrum of Article 17(6) of the WTO Antidumping Agreement*, in *THE LAW OF TREATIES: BEYOND THE VIENNA CONVENTION* 164, 183 (Enzo Cannizzaro ed. 2011) (arguing that “the Appellate Body has articulated a process of interpretation whose application leads to the denial of the very object of Article 17(6)(ii)—the search to determine whether there are two permissible interpretations of a provision of the Antidumping Act.”). *But see* ISABELLE VAN DAMME, *TREATY INTERPRETATION BY THE WTO APPELLATE BODY* 70 (2009):

The scepticism of the Appellate Body towards Article 17.6(ii) is understandable in the light of the principle of *jura novit curia*, as judges are presumed to know the law and its meaning. . . . The Appellate Body seeks the ‘proper’ or ‘correct’ interpretation, not any ‘permissible’ interpretation. . . . However, it seems implausible to say that there is *always* a right answer, given the complexities of language and context and changing circumstances, often unforeseen.

39. *Amoco International Finance Corp. v. Iran*, 15 Iran-U.S. CTR 189, 222, ¶ 112 (1987):

As a *lex specialis* in the relations between the two countries, the Treaty supersedes the *lex generalis*, namely customary international law. This does not mean, however, that the latter is irrelevant in the instant Case. On the contrary, the rules of customary law may be useful in order to fill in possible *lacunae* of the Treaty, to ascertain the meaning of undefined terms in its text or, more generally, to aid interpretation and implementation of its provisions.

*See also* Koskenniemi, Report of the ILC Fragmentation Study Group, *supra* note 21, ¶¶ 98-107.

40. *Neumeister v. Austria*, 17 Eur. Ct. H.R. (ser. A), ¶¶ 28-31 (1974) (where the European

provide for a means of determining an authentic interpretation. The WTO Agreement contains such a provision:

The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements . . . . The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members. This paragraph shall not be used in a manner that would undermine the amendment provisions in Article X.<sup>41</sup>

It has been suggested that “Article IX of the WTO Agreement has contracted out of Article 31(3)(a) on subsequent agreements ‘between the parties’ regarding interpretation” because it only requires that “three quarters of WTO members agree to an interpretation for the WTO treaty for that interpretation to be authoritative.”<sup>42</sup> To the extent that this process is followed, it is true that such an interpretation would be authoritative and “bind[] all Members.”<sup>43</sup> This should not, however, exclude the possibility of other forms of subsequent party conduct demonstrating agreement as to the treaty’s interpretation from being taken into account. As such, one may question the statement made in *Japan—Alcoholic Beverages II*, where the Appellate Body, in referring to Article IX:2, suggested that “the fact that such an ‘exclusive authority’ in interpreting the treaty has been established so specifically in the WTO Agreement is reason enough to conclude that such authority does not exist by implication or by inadvertence elsewhere.”<sup>44</sup> If no authentic interpretation is given under Article IX:2 of the WTO Agreement, a WTO panel is still required to interpret the provision in question. If subsequent party conduct demonstrates the parties’ agreement as to the interpretation of a provision, it would be illogical to discount such evidence in attempting to derive the correct interpretation. In this regard, the Appellate Body’s later decision in *EC—Chicken Cuts* correctly concluded that there was no *lex specialis* relationship between Article 31(3) of the Vienna Convention and Article IX:2 of the WTO Agreement.<sup>45</sup>

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Court of Human Rights found that a specific obligation did not prevail over the more general one where there was no inconsistency between the two); JAMES CRAWFORD, DRAFT ARTICLES ON RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS, WITH COMMENTARIES Art. 55 and associated commentary (2001).

41. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 159, Art. IX:2 [hereinafter WTO Agreement].

42. Joost Pauwelyn, *The Role of Public International Law in the WTO: How far can we go?*, 95 AM. J. INT’L L. 535, 574 (2001).

43. Claus Dieter Ehlermann & Lothar Ehring, *The Authoritative Interpretation Under Article IX:2 of the Agreement Establishing the World Trade Organization: Current Law, Practice and Possible Improvements*, 8(4) J. INT’L ECON. L. 803, 807 (2005).

44. Appellate Body Report, *Japan—Taxes on Alcoholic Beverages II*, ¶ 13, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Adopted Nov. 1, 1996).

45. Appellate Body Report, *European Communities—Customs Classification of Frozen Boneless Chicken Cuts*, ¶ 273, WT/DS269/AB/R (Adopted Sept. 27, 2005):

We fail to see how the express authorization in the WTO Agreement for Members to adopt interpretations of WTO provisions—which requires a three-quarter majority

A similar issue arises in the context of the North American Free Trade Agreement (NAFTA), where Article 1131(2) provides that “[a]n interpretation by the [Free Trade] Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.”<sup>46</sup> The tribunal in *Methanex v. United States* found that the Free Trade Commission (FTC) interpretation of Article 1105 of NAFTA (on the minimum standard of treatment owed to an investor) falls under Article 31(3)(a) of the Vienna Convention as a subsequent agreement with respect to its interpretation, independent of the effect under 1131(2) of NAFTA.<sup>47</sup> As such, Article 1131(2) of NAFTA and specific treaty interpretation provisions found in other treaties do not displace the general law on interpretation if there is no contradiction in terms. Even where the provision in question contemplates a mechanism for authoritative interpretations, this should not mean that an interpreter should ignore subsequent conduct of the parties evidencing their agreement as to the terms of the treaty unless the procedure contemplated by the treaty has been followed. Rather, such evidence should be considered along with the other elements of Article 31.

Some examples show that certain international legal regimes have adopted methods of interpretation not explicitly stated in the treaty, that nonetheless frame the approach to interpretation. The best example of this is the European Court of Human Rights, which takes the approach that the European Convention on Human Rights “is a living instrument which . . . must be interpreted in the light of present-day conditions.”<sup>48</sup> This approach to treaty interpretation has, in some cases, supplanted the relatively more conservative approach in the Vienna Convention.<sup>49</sup> With respect to subsequent party conduct, the European Court of Human Rights has taken into account, among other things, “continuing international trend[s]” in favor of “increased social acceptance” and “legal recognition” of particular rights.<sup>50</sup> As such, while the court has acknowledged

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vote and not a unanimous decision—would impinge upon recourse to subsequent practice as a tool of treaty interpretation under Article 31(3)(b) of the Vienna Convention.

46. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289, 605, 702 (1993) [hereinafter NAFTA].

47. *Methanex v. United States of America*, Final Award, Part II, Ch. B, ¶ 19, Ch. H, ¶ 23 (NAFTA Ch. 11/UNCITRAL Arb. Trib. Aug. 3, 2005).

48. *Tyrer v. the United Kingdom*, 26 Eur. Ct. H.R. (ser. A) ¶ 31 (1978); *Selmouni v. France*, App. No. 25803/94, 29 Eur. H.R. Rep. 403, ¶ 101 (1999); *Rantsev v. Cyprus and Russia*, App. No. 25965/04, 51 E.H.R.R. 1, ¶¶ 272-81 (2010); See generally THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A LIVING INSTRUMENT: ESSAYS IN HONOUR OF CHRISTOS L. ROZAKIS (Dean Spielmann, et al. eds., 2011).

49. George Letsas, *Strasbourg’s Interpretive Ethic: Lessons for the International Lawyer*, 21 EUR. J. INT’L L. 509, 513 (2010) (“It is fair to say that the [Vienna Convention] has played a minor role in the interpretation of the ECHR. The European Court of Human Rights created its own labels for the interpretative techniques which it uses, such as ‘living instrument, practical and effective rights’, ‘autonomous concepts’, etc.”).

50. *Goodwin v. United Kingdom*, 2002-VI Eur. Ct. H.R., 1, ¶ 84 (2002). See also *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A), ¶ 60 (1981).

that the Vienna Convention applies to treaty interpretation,<sup>51</sup> it plays a less important role, especially in the context of subsequent party conduct.

*C. Evolutive Approach to Treaty Interpretation*

Sir Hersch Lauterpact aptly commented that “in the relations of States there arises . . . the question of the continuing validity and the interpretation at any given time of legal rights arising or created in what may be the distant past.”<sup>52</sup> This begs the question: Is treaty interpretation an evolutive process where the meaning of a given provision may change with time? This is, in essence, the query that the ILC set out to answer in its investigation of treaties over time. In his proposal to include the matter in the ILC’s long-term programme of work, Professor Georg Nolte opened with the following remarks:

Treaties are not just dry parchments. They are instruments for providing stability to their parties and to fulfill the purposes which they embody. They can therefore change over time, must adapt to new situations, evolve according to the social needs of the international community and can, sometimes, fall into obsolescence. The general question of ‘treaties in time’ reflects the tension between the requirements of stability and change in the law of treaties.<sup>53</sup>

The answer to this question will dictate the limits of the impact subsequent party conduct can have on the interpretation of a treaty, and as such, it is an important preliminary inquiry.

For one who has gone through the process of negotiating and then applying treaties, the answer to this question may seem relatively obvious. A treaty is the manifestation of an agreement between parties reached through negotiations and often detailed discussion over the text in question. That agreement is only reached in a specific context, and in light of the circumstances known to the parties at that time. Given the “fundamental rule of interpretation that the intention of the parties must prevail,”<sup>54</sup> it seems logical that there be a temporal limitation on the question of interpretation.<sup>55</sup> As such, Sir Humphrey Waldock proposed to include a provision in the Vienna Convention on inter-temporal law. The proposed language reflected the principle of contemporaneity providing

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51. *Golder v. United Kingdom*, 18 Eur. Ct. H.R. (ser. A) 1 (1975).

52. HERSCH LAUTERPACT, *INTERNATIONAL LAW, VOLUME 1: THE GENERAL WORKS* 129 (Elihu Lauterpact ed. 1970).

53. Nolte, *supra* note 5, ¶¶ 1-2. *See also* Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1988] 1 S.C.R. 982, ¶ 129 (Can.) (Dissenting opinion of Justices Cory and Major) (“The interpretation of international legal instruments is a dynamic process which must take into account the contemporary conditions. To put it another way, the interpretation must respond to the contemporary context.”).

54. Summary Record of the 729th meeting of the ILC, [1964] 1 Y.B. INT’L L. COMM’N, 34, ¶ 13, comment by Mr. Shabatai Rosenne.

55. *Id.* ¶ 45, comment by Mr. Gilberto Amado (“It seemed difficult to imagine that when two States jointly drew up a legal instrument expressing the agreement of their wills to the reciprocal granting of benefits, they would not take account of the legal order prevailing at the time.”).

that, in the first instance, “[a] treaty is to be interpreted in the light of the law in force at the time when the treaty was drawn up.”<sup>56</sup> This provision was qualified through a distinction between the interpretation and application of a treaty: “the application of a treaty shall be governed by the rules of international law in force at the time when the treaty is applied.”<sup>57</sup> This language (and the interpretation/application distinction) was not ultimately adopted in the Vienna Convention. The ILC felt it inappropriate to address matters of temporality and interpretation, as the “correct application of the temporal element would normally be indicated by interpretation of the term in good faith.”<sup>58</sup>

Indeed, parties to a treaty may not themselves expect the terms of the treaty to remain frozen in time.<sup>59</sup> An example is the term “investment” in the

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56. Sir Humphrey Waldock, *Third Report on the Law of Treaties*, [1964] 2 Y.B. INT’L L. COMM’N at 8. *See also* Interpretation of Article 3, Paragraph 63, of the Treaty of Lausanne (Frontier Between Turkey and Iraq), Advisory Opinion, 12 PCIJ (ser. B), 24 (Nov. 21, 1925) (“facts subsequent to the conclusion of the Treaty of Lausanne can only concern the Court in so far as they are calculated to throw light on the intention of the Parties at the time of the conclusion of that Treaty.”); Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law*, 30 BRIT. Y.B. INT’L L. 1, 5 (1953) (“It can now be regarded as an established principle of international law that in such cases the situation in question must be appraised, and the treaty interpreted, in the light of the rules of international law as they existed at the time, and not as they exist today.”); GEORG SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 532 (3d ed. 1957):

The attitudes adopted by the parties to a treaty subsequent to its conclusion are evidence which an international judicial institution may take into account in its interpretative work, but only for the purpose of strengthening its conclusions on the common intention of the parties or the meaning of the treaty at the time of its conclusion.

Even today, tribunals are cautious to rely on subsequent practice to find that the meaning of the treaty text has “changed.” *See, e.g.*, *King v. Bristow Helicopters Ltd.*, In Re M, [2002] UKHL 7, ILDC 242, ¶ 98 (Opinion of Lord Hope of Craighead) (“I think that we should be cautious in the use of subsequent practice. It would not be right to use subsequent practice to show that the meaning of these words has been changed.”).

57. Waldock, *supra* note 56, at 9, Article 56(2). *See also* *Island of Palmas (Neth. v. U.S.)*, Award, 2 RIAA 829, 845 (1928):

[A] juridical fact must be appreciated in the light of the law contemporary with it, and not the law in force at the time when a dispute in regard to it arises or fails to be settled . . . The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words, its continued manifestations, shall follow the conditions required by the evolution of law.

*See also* Summary Record of the 729th meeting of the ILC, *supra* note 54, ¶ 47, comment by Mr. Gilberto Armado (“States could not conclude a treaty in disregard of the law contemporary with it; but neither could they ignore the development of law.”).

58. Draft Articles on the Law of Treaties with Commentaries, *supra* note 17, at 222, art. 27, comment 16.

59. Summary Record of the 728th meeting of the ILC, [1964] 1 Y.B. INT’L L. COMM’N 33, ¶ 10, comment by Mr. Jiménez de Aréchaga:

The intention of the parties should be controlling, and there seemed to be two possibilities so far as that intention was concerned: either they had meant to

Convention on the Settlement of Investment Disputes between States and Nationals of Other States.<sup>60</sup> In *Mihaly v. Sri Lanka*, the tribunal noted, “the definition [of investment in the ICSID Convention] was left to be worked out in the subsequent practice of the States, thereby preserving its integrity and flexibility and allowing for future progressive development of international law on the topic of investment.”<sup>61</sup> The choice of words, with due regard to context and the object and purpose of the treaty, will often demonstrate whether a particular term was meant to have a technical and/or specific interpretation, or whether an evolutive approach would be more appropriate to realize the parties’ intentions.<sup>62</sup>

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incorporate in the treaty some legal concept that would remain unchanged, or, if they had no such intention, the legal concepts might be subject to change and would then have to be interpreted not only in the context of the instrument, but also within the framework of the entire legal order to which they belong. The free operation of the will of the parties should not be prevented by crystallizing every concept as it had been at the time when the treaty was drawn up.

*See also* Summary Record of the 729th meeting of the ILC, *supra* note 54, ¶ 24, comment by Mr. Senjin Tsuruoka (“If the interpretation showed that the parties had wished to follow the evolution of international law, it was international law at the time when the treaty was interpreted which prevailed.”).

60. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Art. 25, Mar. 18, 1965, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

61. *See, e.g.*, *Mihaly International Corp. v. Sri Lanka*, ICSID Case No. ARB/00/2, Award (Mar. 15, 2002). *See also* *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction (Sept. 27, 2001) (“[T]he drafters of the Convention deliberately chose not to define the terms ‘legal dispute’, ‘investment’, ‘nationality’ and ‘foreign control’. In reliance on the consensual nature of the Convention, they preferred giving the parties the greatest latitude to define these terms themselves.”); Laurence Boisson de Chazournes, *Environmental Treaties in Time*, 39 ENV. POL. & L. 293, 296 (2009) (noting that “Environmental treaties sometimes contain words or notions for which States could not reach an agreed definition or for which no definition was considered necessary at the time of their negotiation.”).

62. LORD MCNAIR, *THE LAW OF TREATIES* 467 (1961):

There is authority for the rule that when there is a doubt as to the sense in which the parties to a treaty used words, those words should receive the meaning which they bore at the time of the conclusion of the treaty; unless that intention is negatived by the use of terms indicating the contrary, as is illustrated in the paragraph that follows . . . Expressions such as ‘suitable, appropriate, convenient’, occurring in a treaty are not stereotyped as at the date of the treaty but must be understood in the light of the progress of events and changes of habits of life.

*See also* *Aegean Continental Shelf (Greece v. Turk.)*, Jurisdiction of the Court, 1978 I.C.J. 3, 32 (Dec. 19) (finding that “territorial status” was used as a “generic term” and as such “the presumption necessarily arises that its meaning is intended to follow the evolution by the law and to correspond with the meaning attached to the expression by the law and to correspond with the meaning attached to the expression by the law in force at any given time.”); Rosalyn Higgins, *Time and the Law: International Perspectives on an Old Problem*, 46 INT’L & COMP. L.Q. 501, 519 (1997) (discussing several cases, including the *Aegean Continental Shelf* case). Higgins concludes:

In the law of treaties—notwithstanding judicial indication that the Huber rule [reflecting the principle of contemporaneity] is applicable thereto—the intention of the parties is really the key. Attention to that point allows one to see that ‘generic clauses’



A strong indication that a treaty was meant to have an evolving interpretation is when the words chosen reflect party “inten[tion] to key into that evolving meaning without adopting their own idiosyncratic definition (for example, use of terms such as “expropriation” or “continental shelf” in the relevant treaty).<sup>63</sup> An evolved approach to interpretation may also be appropriate where the object and purpose of the treaty reflects a commitment “to a program of progressive development.”<sup>64</sup> Likewise, “[t]he description of obligations in very general terms” can operate as “a kind of renvoi to the state of the law *at the time of its application*.”<sup>65</sup> The ILC Fragmentation Study Group highlights the exceptions contained in Article XX of the General Agreement on Tariffs and Trade (GATT) as exemplifying an evolutive approach:

GATT article XX, discussed in *Shrimp-Turtle*, in permitting measures ‘necessary to protect human, animal or plant life or health’ or ‘relating to the conservation of exhaustible natural resources’, are intended to adjust to the situation as it develops over time. For example, the measures necessary to protect shrimp evolve depending upon the extent to which the survival of the shrimp population is threatened. Although the broad meaning of Article XX may remain the same, its actual content will change over time. In that context, reference to ‘other rules of international law’, such as multilateral environment treaties, becomes a form of secondary evidence supporting the enquiry into science and community values and expectations, which the ordinary meaning of the words, and their object and purpose, invites.<sup>66</sup>

Similarly, in *Costa Rica v. Nicaragua* the ICJ adopted an evolved interpretation of the term *comercio* (commerce).<sup>67</sup> In that case, Costa Rica and Nicaragua had entered into a treaty granting Costa Rica freedom to navigate the San Juan River (under the sovereignty of Nicaragua) for *objetos de comercio* (for the purposes of commerce).<sup>68</sup> Nicaragua contended that this purpose was limited to the transport of goods and did not cover services, such as tourism on

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and human rights provisions are not really random exceptions to a general rule. They are an application of a wider principle—intention of the parties, reflected by reference to the objects and purpose—that guide the law of treaties.

*See also* Legal Consequences for States of the Continued Presence of South Africa in Namibia Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 53 (June 21) (ascribing “primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion.”); Martin Dawidowicz, *The Effect of the Passage of Time on the Interpretation of Treaties: Some Reflections on Costa Rica v. Nicaragua*, 24 LEIDEN J. INT’L L. 201 (2011) (arguing that whether an evolved interpretation of a treaty is to be adopted is based on the intentions of the parties at the time of a treaty’s conclusion).

63. Koskenniemi, Report of the ILC Fragmentation Study Group, *supra* note 21, ¶ 478.

64. *Id.*

65. *Id.* (emphasis added).

66. *Id.* *See also* Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 130, WT/DS58/AB/R (Nov. 6, 1998).

67. Dispute Regarding Navigational and Related Rights (*Costa Rica v. Nicar.*), 2009 I.C.J. 213, ¶ 19 (July 13). Author translation: “commerce.”

68. The translation of this phrase adopted by the Court was “for the purposes of commerce.” *Id.* ¶ 56.

the San Juan River. The court found that *comercio* is a generic term that “was likely to evolve over time,” and at the time of judgment “commerce” (reinforced by the practice of the parties) covered both goods and services.<sup>69</sup>

The question then is whether the parties’ subsequent conduct can also indicate whether a particular term in a treaty is meant to be evolutive, or whether it is simply indicative of what the evolved interpretation is. The answer to this question would determine the line between interpretation and modification or amendment.<sup>70</sup> In the former scenario, the parties have more flexibility in agreeing to an interpretation. In the latter scenario, however, the agreement is only relevant insofar as it reflects the parties’ intention at the time the treaty was signed. The answer likely depends on the circumstances. As already discussed, the ordinary meaning of the terms, the context in which the terms appear, and the object and purpose of the treaty are no more important to interpretation than the parties’ subsequent conduct. As such, why can subsequent party conduct not also indicate that an evolved meaning was intended by particular terms of a treaty? There may be limitations in this regard, such as where the ordinary meaning, context, or object and purpose suggest that an evolved meaning was *not* intended. However, in ambiguous cases, the principle of contemporaneity, while acceptable as a default position,<sup>71</sup> should not otherwise be applied as a presumption against the effect of subsequent party conduct on interpretation.<sup>72</sup>

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69. *Id.* ¶¶ 66-68, 71. *See also* Award in the Arbitration Regarding the Iron Rhine Railway (Belg. v. Neth.), 27 R.I.A.A. 35, 72-74 ¶¶ 79-81 (Perm. Ct. Arb. 2005) (finding that even certain technical rules may have to be interpreted in an evolutive manner where this reflects the object and purpose of the treaty, for instance, to create long-lasting relations between the parties.); Case concerning the Gabčíkovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 76-80, ¶¶ 132-47 (Sept. 25).

70. According to the Vienna Convention, there is a distinction made between modification and amendment. Amendment of a treaty is an agreement between all of the parties to change the terms of a treaty. Vienna Convention, *supra* note 10, art. 40. Modification, on the other hand, is an agreement to change the terms of the treaty only as between some of the parties. *Id.* at art. 41. This distinction is only applicable for multilateral treaties, as for bilateral treaties, any agreement to alter the terms of the treaty would necessarily involve all of the parties. The distinction adopted by the Vienna Convention is not consistently applied in the literature and case law, and the terms “modification” and “amendment” are often used interchangeably. This article attempts to adhere to the distinction adopted by the Vienna Convention wherever possible.

71. Decision Regarding Delimitation of the Border between The State of Eritrea and The Federal Democratic Republic of Ethiopia, Eritrea-Ethiopia Boundary Commission, 25 R.I.A.A. 83, ¶ 3.5 (April 13 2002):

It has been argued before the Commission that in interpreting the Treaties it should apply the doctrine of ‘contemporaneity.’ By this the Commission understands that a treaty should be interpreted by reference to the circumstances prevailing when the treaty was concluded. This involves giving expressions (including names) used in the treaty the meaning that they would have possessed at that time. The Commission agrees with this approach and has borne it in mind in construing the Treaties.

72. Nolte, *supra* note 5, at 17 (noting that subsequent conduct may itself “indicate[] openness for different shades of meaning.”); *Dispute Regarding Navigational and Related Rights*, *supra* note 67, at ¶ 64. (suggesting that “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

As noted above, this does not mean that subsequent party conduct is only relevant to identifying evolved interpretations of treaties. Certain party conduct taking place shortly after the entry into force of a treaty may be particularly relevant to elucidate party intentions in the first instance. For instance, once a treaty is put into practice it is not unusual for parties to further clarify their mutual understanding as to the interpretation and approach of certain provisions.<sup>73</sup> In such circumstances, subsequent party conduct may have the opposite effect of rejecting an evolved interpretation. If the parties engage in consistent conduct over a long period, demonstrating agreement on interpretation, it may entrench the interpretation and make it difficult to demonstrate that an evolved interpretation is permissible.<sup>74</sup>

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tacit agreement between the parties.”); MCDUGAL, LASWELL & MILLER, *supra* note 29, at 143-44:

In a given case any factor, including the subsequent actions of the parties, may be of paramount importance in determining the relevant expectations. False [E]vidence of the parties’ expectations at the time of commitment should of course be given an initial presumption which would hold in the absence of persuasive indices that such expectations had been altered by subsequent explicit communications or implicit acts of collaboration. If such evidence is produced, however, the parties’ contemporary expectations should be respected. It seems of little value to say as a matter of policy that such a choice by a decision-maker marks an ‘avoidance of the act of interpretation’ where in fact it constitutes an effort to determine the parties’ genuine shared expectations.

LAUTERPACHT, *supra* note 52, at 132-33:

The provisions of a treaty ought to be interpreted in the light of the law and usage existing at the time of the conclusion of the treaty. . . . At the same time it must be borne in mind . . . that the true intention of the parties may on occasions be frustrated if exclusive importance is attached to the meaning of words divorced from the social and legal changes which have intervened in the long period following upon the conclusion of those treaties. Moreover, the parties to a treaty may by their subsequent conduct put upon the treaty an interpretation which, having regard to changed conditions, may depart from the meaning of the words obtaining at the time of its signature.

73. See, e.g., NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions* (July 31, 2001), <http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/NAFTA-Interpr.aspx?lang=en&view=d> (last visited Nov. 13, 2012) (clarifying that Article 1105(1) of NAFTA, relating to the minimum standard of treatment to be accorded to foreign investors “prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another party” and that “[t]he concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.”); Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AM. J. INT’L L. 210, 225 (2010) (arguing for the use of subsequent party conduct to foster “a constructive dialogue between investment tribunals and treaty parties about interpretation”).

74. For a discussion on both the overlap and diverse consequences of subsequent practice and evolutive interpretation as treaty interpretation techniques see Julian Arato, *Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences*, 9 L. & PRACTICE OF INT’L CTS. & TRIBUNALS 443 (2010).

II.  
INTERPRETING THE RULES OF INTERPRETATION: THE RELEVANCE OF  
SUBSEQUENT PARTY CONDUCT IN INTERPRETING TREATIES

Having given the general context in which parties' subsequent conduct should be taken into account in treaty interpretation, the article now details the type of subsequent conduct that is relevant to treaty interpretation. Both Article 31(3)(a) and (b) focus on agreement of the parties with respect to interpretation of treaty terms, the former requiring "agreement between the parties" and the latter requiring "practice . . . which establishes the agreement of the parties." Therefore, while substance is generally preferred over form in international law,<sup>75</sup> the distinction between Articles 31(3)(a) and (b) concerns form rather than substance. The following analysis takes a comparative approach, first defining the type of conduct that satisfies Articles 31(3)(a) and (b) and the relative weight to be accorded to each. This section demonstrates that subsequent party conduct establishing agreement on the interpretation of treaty terms falls on a continuum, with more formal agreement falling under Article 31(3)(a) and less formal agreement falling under Article 31(3)(b). Second, this section considers whether subsequent party conduct that does not result in party agreement can be taken into account for the purpose of treaty interpretation under Article 32 of the Vienna Convention.

*A. The Continuum Between Subsequent Agreement and Practice Under Article 31(3)*

This section considers the nature of subsequent party conduct that is relevant to treaty interpretation under Article 31(3)(a)-(b). It first considers subsequent party agreement, and secondly, subsequent practice to the extent that it establishes party agreement. In comparing the two, this article theorizes that these two sections of Article 31(3) rest on an evidentiary continuum. While all subsequent conduct demonstrating party agreement as to the interpretation of a treaty is highly probative, more weight should be given to subsequent agreement than to subsequent practice establishing agreement.

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75. Nuclear Tests Case (Austl. v. Fr.), 1974 I.C.J. 253, ¶ 45 (Dec. 20):

With regard to the question of form, it should be observed that this is not a domain in which international law imposes any special or strict requirements. Whether a statement is made orally or in writing makes no essential difference, for such statements made in particular circumstances may create commitments in international law, which does not require that they should be couched in written form. Thus the question of form is not decisive.

### 1. Subsequent Agreement

While it has been suggested that “no particular formality is required for there to be an agreement under Article 31(3)(a)”<sup>76</sup> it is clear that some degree of formality is, in fact, required. Applying the principle of effectiveness,<sup>77</sup> Article 31(3)(a) must not cover agreements on treaty interpretation that are established through party practice, as Article 31(3)(b) otherwise covers this.<sup>78</sup> Read in conjunction with Article 31(3)(b), it seems clear that Article 31(3)(a) contemplates a more formal agreement, though not the formal requirements of a treaty itself.<sup>79</sup> What, then, is the requirement to satisfy Article 31(3)(a) versus Article 31(3)(b)? To answer this question it is helpful to consider some illustrative cases across a spectrum of international institutional frameworks that have resorted to subsequent party conduct in interpreting treaties.

When parties document their agreement on interpretation in writing, this clearly comes within the ambit of Article 31(3)(a). For instance, in the NAFTA context, as noted above, the FTC interpretation on the minimum standard of treatment “is properly characterized as a ‘subsequent agreement’ on interpretation falling within the scope of the Vienna Convention.”<sup>80</sup> Here, the three NAFTA parties, through the FTC, explicitly articulated their joint understanding of the meaning of Article 1105 of NAFTA. Of note, the FTC is specifically designated with the authority to interpret the treaty and is comprised of the ministers for trade from each state party.<sup>81</sup>

76. *Methanex v. United States*, Final Award, Part II, Ch. B, ¶ 20 (NAFTA Ch. 11/UNCITRAL Arb. Trib. Aug. 3, 2005).

77. The principle of effectiveness is a well-established principle of interpretation that treaty terms should be interpreted so as not to render any clause meaningless. *See supra* text at note 31; *Fisheries Jurisdiction Case (Spain v. Can.)*, 1998 I.C.J. 432, ¶ 52 (Dec. 4); *Legal Consequences for States of the Continued Presence of South Africa in Namibia Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16, ¶ 66 (June 21); *Case Concerning Border and Transborder Armed Actions (Nicar. v. Hond.)*, Jurisdiction of the Court and Admissibility of the Application, 1998 I.C.J. 69, ¶ 46 (Dec. 20); *Eureko B.V. v. Poland*, Partial Award, ¶ 248 (ad hoc Arb. Trib. 2005); *Draft Articles on the Law of Treaties with Commentaries*, *supra* note 17, at 219, art. 28 comment 6 (“When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted.”).

78. *See, e.g., McNair supra* note 62, at 427 (“The subsequent practice of the parties to a treaty, regarded as evidence of their common intention, must not be confused with the conclusion of a subsequent interpretative agreement.”).

79. GARDINER, *supra* note 12, at 208 (noting that subsequent agreements under article 31(3)(a) “may be recorded . . . in a less formal record of agreement or understanding on interpretation”).

80. *Methanex v. United States*, Final Award, Part II, Ch. B, ¶ 21 (NAFTA Ch. 11/UNCITRAL Arb. Trib. Aug. 3, 2005). For now, we put aside the issue of whether the agreement in this regard was actually an amendment. *See Charles H. Brower, II, Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105*, 46 VA. J. INT’L L. 347 (2006). The distinction between agreement with respect to the interpretation of treaty terms and modification or amendment of the treaty is considered further below. *See infra* Part III.

81. NAFTA, *supra* note 46, arts. 1131, 2001(2)(b).

Another example from the investment treaty context is the case of *CME v. Czech Republic*.<sup>82</sup> In that case, after the issuance of a partial award, the parties to the bilateral investment treaty under which the claims were brought consulted with one another on the interpretation of certain provisions of the treaty. As a result, the parties reached a “common position” on the interpretation and the application of the treaty.<sup>83</sup> In its final award the tribunal applied the common position, as recorded in the agreed minutes, but without referring to the Vienna Convention.<sup>84</sup> Nonetheless, it would be difficult to discount the Respondent’s position (which was uncontested) that “[t]he common positions, representing the interpretation and application of the Treaty agreed between its contracting parties, are conclusive and binding on the Tribunal.”<sup>85</sup>

In the international tax law context, parties to a tax treaty may come together to jointly agree to a technical explanation of the treaty. For instance, the United States Treasury Department and the Canadian Ministry of Finance, the two government agencies responsible for tax matters, have agreed to a technical explanation of the 2007 Protocol to the United States-Canada tax treaty.<sup>86</sup> Given that this agreement was prepared after the treaty had been signed, it would likely be seen as coming within Article 31(3)(a) to the extent that it interprets the treaty.<sup>87</sup> Though not referring to the Vienna Convention, the United States Tax Court held the joint technical explanation to be “particularly persuasive in light of the fact that the Canadian Department of Finance has generally accepted the Technical Explanation as an accurate portrayal of the understandings and in which the Canadian Convention was negotiated.”<sup>88</sup>

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82. *CME Czech Republic B.V. (Neth. vs. Czech)*, Final Award (UNCITRAL Arb. Trib. Mar. 14, 2003).

83. *Id.* ¶¶ 87-93.

84. *Id.* ¶¶ 437, 504.

85. *Id.* ¶ 217. For another example in the investment treaty context, see *National Grid plc v. Argentina*, Decision on Jurisdiction, ¶ 85 (UNCITRAL Arb. Trib. June 20, 2006) (noting that “after the decision on jurisdiction in *Siemens*, the Argentine Republic and Panama exchanged diplomatic notes with an ‘interpretative declaration’ of the MFN clause in their 1996 investment treaty to the effect that the MFN clause does not extend to dispute resolution clauses, and that this has always been their intention.”).

86. U.S. DEP’T OF THE TREASURY, TECHNICAL EXPLANATION OF THE PROTOCOL AMENDING THE CONVENTION BETWEEN THE UNITED STATES OF AMERICA AND CANADA WITH RESPECT TO TAXES ON INCOME AND ON CAPITAL 1 (2008), available at <http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/tecanada08.pdf>.

87. See Michael S. Kirsch, *The Limits of Administrative Guidance in the Interpretation of Tax Treaties*, 87 TEX. L. REV. 1097, 1097-98 (2009).

88. *N.W. Life Assurance Co. of Can. v. Comm’r*, 107 T.C. 363, 385 (USTC 1996). However, there was some debate as to whether the joint technical explanation was consistent with the terms of the treaty itself. See *Canada v. Kubicek Estate*, [1998] 1 F.C. 0 (Can. F.C.A., 1997) (the court refusing to defer to the United States technical explanation regarding the taxation of capital gains, despite acknowledging that the Canadian Minister of Finance had endorsed the explanation contained therein, because the technical explanation was inconsistent with the intent of the parties as reflected in the treaty). To the extent that the technical explanation is inconsistent with the original treaty, it would be considered an impermissible modification or amendment, discussed further

Parties may also agree to interpretation of particular terms through the exchange of notes. This can be made difficult, however, where different interpretations are offered at different times by different government bodies. An illustrative case involves an arbitration concerning the privileges accorded to the European Molecular Biology Laboratory (EMBL), an international organization with its headquarters in Germany.<sup>89</sup> A dispute arose with respect to EMBL's tax exemptions under its Headquarters Agreement with Germany. The tribunal found that the interpretation of the decisive provisions turned on a 1977 response of Germany's Federal Ministry for Research and Technology (BMFT) to EMBL's earlier request for clarification on the tax issue, and on a 1987 Settlement Agreement with EMBL. Both of those documents reflected Germany's agreement with EMBL's interpretation of its rights.<sup>90</sup> Of interest, a 1982 letter from the Federal Foreign Ministry—allegedly revoking the 1977 letter of the BMFT—did not prevent the tribunal from finding that an agreement had been reached on the interpretation.<sup>91</sup>

A question that arises in this context is whether states' actions at international organizations are relevant conduct for the purposes of treaty interpretation. For instance, in the WTO context, can agreements of the Ministerial Conference come under Article 31(3)(a) when they interpret obligations under existing WTO Agreements? As an example, in 2001 the WTO members negotiated a Declaration on the TRIPS Agreement and Public Health (the Doha Declaration),<sup>92</sup> which served in part to clarify the interpretation of certain provisions of the WTO intellectual property treaty.<sup>93</sup> Paragraph 4 of the Doha Declaration states: "We affirm that [TRIPS] can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all."<sup>94</sup> All of the WTO members agreed to the Doha Declaration through the TRIPS Council, then the General Council,<sup>95</sup> and finally the Ministerial Conference, which issued

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below. *But see* Ian J. Gamble, *Canada's Failure to Apply the U.S. Technical Explanation to a New Treaty Article*, WORLDWIDE TAX DAILY, Feb. 19, 2009 (criticizing the Canada Revenue Agency for failing to apply an interpretation contained in the joint technical explanation to the United States-Canada Tax Treaty Protocol).

89. *Germany v. European Molecular Biology Laboratory*, 105 I.L.R. 1 (1990).

90. *Id.* at 53-56. In this case, the tribunal was applying the analogous provision to Article 31(3)(a) in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

91. *Id.*

92. World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/2, 41 I.L.M. 746 (2002) [hereinafter Doha Declaration].

93. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299; 33 I.L.M. 1197(1994).

94. Doha Declaration, *supra* note 92, ¶ 4.

95. Barry Mawhinney, *Canadian Practice in International Law at the Department of External Affairs in 1990-91*, 29 CAN. Y.B. INT'L L. 454, 462 (1991):

the Declaration. In this regard, the primary context in which the WTO membership would be able to come together to agree on an interpretation of a WTO Agreement is a Ministerial Conference.<sup>96</sup> It is logical, therefore, that the actions of state representatives to international organizations be considered party conduct for the purposes of Article 31(3).<sup>97</sup> Especially in the context of multilateral treaties with several parties, it would be difficult to expect all parties to come to an agreement on the interpretation of a treaty provision outside of a formal council or conference established to oversee and implement the treaty. The question here is not about the actions of the international organization *per se* but rather the actions of the state parties in their activities at the international organization, which may be represented by a decision of the international organization. In this regard, states are still responsible for their own activities when participating within an international organization.<sup>98</sup> As such, when interpreting TRIPS, it would be appropriate to accept the interpretative guidance provided by the Doha Declaration.<sup>99</sup>

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The success of an argument that a GATT Council decision of the [Contracting Parties] interprets . . . the GATT in a manner that is legally binding will depend on factors such as the manner in which the decision was adopted and the scope of the decision. If a decision is reached by a vote rather than by consensus, it is more difficult to argue credibly that a subsequent agreement has been reached or that subsequent practice is common and consistent. Interpretive notes are more likely to find quick acceptance as binding than a decision that alters substantive obligations in a major fashion.

96. Indeed, the Ministerial Conference has the necessary authority to interpret the treaty, given its mandate to “take on decisions on all matters under any of the Multilateral trade Agreements.” WTO Agreement, *supra* note 41, art. IV(a). *See also id.*, art. IX:2 (granting the Ministerial Conference exclusive authority to adopt interpretations of the WTO Agreements). The interpretation contained in the Doha Declaration, however, was not taken pursuant to Art. IX:2 as the Declaration’s contents went beyond simply interpreting TRIPS.

97. The Assembly of the International Oil Pollution Compensation Fund 1992 has specifically issued a resolution, referencing Article 31(3) of the Vienna Convention, and providing that “the courts of the States Parties to the 1992 Conventions should take into account the decisions by the governing bodies of the 1992 Fund and the 1971 Fund relating to the interpretation and application of these Conventions.” 1992 Fund Resolution No. 8 on the Interpretation and Application of the 1992 Civil Liability Convention and the 1992 Fund Convention (May 2003), at <http://www.iopecfund.org/mpdf/RES'92E.pdf>.

98. *See* JAMES CRAWFORD, *supra* note 40, art. 57, comment 5. Article 57, providing that the Articles of State Responsibility are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization,

Does not exclude from the scope of the articles any question of the responsibility of a State for its own conduct, i.e. for conduct attributable to it under chapter II of Part One, not being conduct performed by an organ of an international organization. In this respect the scope of article 57 is narrow. It covers only what is sometimes referred to as the derivative or secondary liability of member States for the acts or debts of an international organization.

99. Supporting this view, *see* James Thuo Gathii, *The Legal Status of the Doha Declaration on TRIPS and Public Health Under the Vienna Convention on the Law of Treaties*, 15 HARV. J. L. & TECH. 291, 299-301 (2001-2002); Susy Frankel, *The WTO’s Application of “the Customary Rules of Interpretation of Public International Law” to Intellectual Property*, 46 VA J. INT’L L. 365, 400-01



Similarly, the parties to the Rome Statute of the International Criminal Court (ICC) entered into a subsequent agreement, for the purposes of Article 31(3)(a), to define the “Elements of Crimes” under Articles 6-8 of the Rome Statute.<sup>100</sup> The Assembly of State Parties agreed to the Elements of Crimes in a non-treaty document interpreting Articles 6-8.<sup>101</sup> That document details “Elements of Crimes” that are to be used to assist the court in the “interpretation and application” of the Rome Statute.<sup>102</sup> The ICC has already demonstrated its reliance on the Elements of Crime as decisive to matters of interpretation.<sup>103</sup>

Despite a dearth of contentious cases where a subsequent agreement under Article 31(3)(a) is decisive,<sup>104</sup> there are some common principles that can be taken from the examples discussed above. Specifically there are four important characteristics that allow subsequent party conduct to come within Article 31(3)(a): (1) the agreement is reflected in writing by the parties; (2) the parties’ agreement is related directly to the interpretation and application of the treaty terms; (3) the agreement of all of the parties is demonstrated; and (4) the agreement is entered into by government representatives authorized to interpret the treaty, including those that may represent governments before international organizations with respect to certain treaties that fall within the remit of that organization.

With respect to the requirement that all parties must be in agreement, the cases demonstrate that *inter se* agreements between some of the parties are not sufficient under Article 31(3)(a).<sup>105</sup> This is the case even if a dispute arises as

(2005-2006); Matthew Turk, *Bargaining and Intellectual Property Treaties: The Case for a Pro-Development Interpretation of TRIPS but no TRIPS Plus*, 42 N.Y.U. J. INT’L L. & POL. 981, 1013-14 (2009-2010).

100. Georg Nolte, Second Report for the ILC Study Group on Treaties over Time: Subsequent agreements and subsequent practice in relation to interpretation of treaties, 111 (on file with author).

101. The Elements of Crimes, ICC-ASP/1/3, Part II-B, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, New York, (Sept. 3-10, 2002).

102. *Id.* at Introduction (1).

103. *See, e.g.*, Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09-1, Decision on the Prosecution’s Application for a Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ¶ 128 (Mar. 4, 2009); Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on Confirmation of Charges, ¶¶ 359-60 (Jan. 29, 2007).

104. Indeed, it is unlikely that a matter would make it before a tribunal where the parties have agreed to the interpretation of the treaty terms.

105. *See, e.g.*, The Question whether the re-evaluation of the German Mark in 1961 and 1969 constitutes a case for application of the clause in article 2 (e) of Annex I A of the 1953 Agreement on German External Debts, Award, 19 R.I.A.A. 67, 103, ¶ 31 (May 16, 1980) (finding that neither Articles 31(a) or (b) were satisfied where all of the parties could not be said to have agreed); Mark E. Villiger, *The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? The ‘Crucible’ Intended by the International Law Commission*, in THE LAW OF TREATIES: BEYOND THE VIENNA CONVENTION 105, 110 (Enzo Cannizzaro ed., 2011):

The means [Article 31(3)] can only be invoked if all the parties to the treaty have been involved in the interpretation of a particular meaning of a treaty term by means of an agreement, or if one of the parties have been involved by means of an instrument or

between only those parties that have agreed. It may be that principles of estoppel apply in such cases,<sup>106</sup> but the treaty cannot be interpreted in different ways as between different parties.<sup>107</sup> There is an assumption that the treaty reflects a common understanding among all the parties and to interpret it differently among some parties would amount to the formulation of several bilateral commitments as opposed to the multilateral regime contemplated by the parties. The same applies *a fortiori* to Article 31(3)(b).

## 2. *Subsequent Practice Establishing Agreement*

Compared to Article 31(3)(a), there is more lenience on the type of conduct that would be categorized as practice under Article 31(3)(b), making 31(3)(b) a catch-all for all other forms of subsequent party conduct that establish party agreement on the meaning of certain treaty terms. As such, while certain general principles can be extracted from the relevant case law, each case has to be determined based on the context of the particular treaty at issue and the specific facts available. Each case asks whether the evidence presented demonstrates an agreement of the parties,<sup>108</sup> even if it does not meet the more formal requirements of Article 31(3)(a).

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subsequent practice to which the other parties have agreed.

Alan Boyle, *Further Development of the Law of the Sea Convention: Mechanisms for Change*, 54 INT'L & COMP. L.Q. 563, 571-72 (2005) (suggesting that the 1995 U.N. Fish Stocks Agreement, which seeks to implement the U.N. Convention on the Law of the Sea, cannot be considered a "subsequent agreement between the parties regarding the interpretation of [UNCLOS] or the application of its provisions" because it had, at that point, only been concluded between 50 States, and a number of important fishing States had no intention of participating. Further suggesting, however, that to come within Art. 31(3)(a) not all UNCLOS parties would have to become party to the other treaty in order to achieve the requisite "consensus support" or "no objection."). *But see* Fitzmaurice, *supra* note 34, at 223 (in referring to subsequent conduct as informing the interpretation of treaty, adopting a slightly less stringent standard: "[i]t is, of course, axiomatic that the conduct in question must have been that of both or all—or, in the case of general multilateral conventions, of the great majority of the parties, and not merely of one.").

106. See Part III.

107. Christine M. Chinkin, *Suspension of Treaty Relationship: The ANZUS Alliance*, 7 UCLA PAC. BASIN L.J. 114, 135 (1990) (with respect to the ANZUS Treaty, which is now suspended between the U.S. and New Zealand, noting that *inter se* subsequent agreements may not be authoritative to the interpretation of the treaty but, such agreements "suggest[] that the two parties in question [a]re prepared to undertake additional mutual obligations, albeit within the framework of the alliance treaty").

108. *R v. Sec'y of State for the Env't, Transp. & the Regions, ex parte Int'l Air Transp. Ass'n*, 3 EUR. L. REP. 811, 818 (UKQB Apr. 16, 1999) (noting with respect to article 31(3)(b) "it is important to observe that practice alone is not sufficient; it has to be such as to establish the agreement with the parties."); *Bouzari & Others v. Iran*, 71 OR (3d) 675 ¶ 77-79 (Can. Ont. June 30, 2004), ILDC 175 (CA 2004) (the Ontario Court of Appeal affirming that there was sufficient evidence of state practice to establish party agreement as to the meaning of Article 14 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, relying on expert evidence demonstrating "a broad state practice reflecting a shared understanding that Article 14 limits the obligation of a ratifying state to providing the right to a civil remedy only for acts of torture committed within its territory."); *King v. Bristow Helicopters Ltd. Re M* (on the

Relevant practice does not necessarily have to relate to the provision in question in order to establish agreement of the parties with respect to the interpretation of the treaty more broadly. For instance, in the case concerning the Constitution of the Maritime Safety Committee, the ICJ considered how to interpret Article 28(a) of the Convention for the Establishment of the Inter-Governmental Maritime Consultative Organization, to determine the eight largest ship-owning nations.<sup>109</sup> The court found that the parties had relied on registered tonnage to give effect to other provisions of the Convention, which demonstrated the relevance of that criterion for the purposes of Article 28(a).<sup>110</sup> In this case, the relevance of subsequent practice across different treaty provisions depended on context. It would have been illogical for parties to use one metric for one provision and a different metric for another. Under these circumstances it is reasonable to conclude that agreement was reached on the interpretation of the treaty in more general terms; the parties' application of the treaty generally suggests that, whenever applicable, registered tonnage ought to be the relevant measure.

A key consideration is the type of conduct that constitutes subsequent practice. While it is clear that subsequent practice is relevant to the interpretation exercise only when all parties have agreed to an interpretation,<sup>111</sup> a recurrent query is whether inaction by a party can be considered subsequent practice, demonstrating agreement through silence. The ILC specifically considered this in drafting Article 31(3)(b):

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 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*

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application of CM), *supra* note 57, ¶ 80 ("It is . . . legitimate to have regard to subsequent practice in the application of the Convention, if this shows that the contracting parties were in agreement as to its interpretation when it was entered into."); *R. v. Sec'y of State for the Env't, Transp. & the Regions, ex parte Int'l Air Transp. Ass'n*, 3 EUR. L. REP. 811, 818 (UKQB Apr. 16, 1999), (with respect to Article 31(3)(b) of the Vienna Convention, noting that "practice alone is insufficient; it has to be such as to establish the agreement with the parties.").

109. Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion, 1960 I.C.J. 150 (June 8).

110. *Id.* at 169:

This reliance upon registered tonnage in giving effect to different provisions of the Convention and the comparison which has been made of the texts of Articles 60 and 28(a), persuade the Court to the view that it is unlikely that when the latter article was drafted and incorporated into the Convention it was contemplated that any criterion other than registered tonnage should determine which were the largest ship-owning nations.

111. *See Schalk and Kopf v. Austria*, 28 Eur. Ct. H.R., (Malinverni, J., concurring) ¶ 1 (2010), (answering whether homosexual couples have the right to marry and finding Article 31(3)(b) was not satisfied when only some states provided for such a possibility).

*practice*.<sup>112</sup>

A relevant case to consider in this regard is *Costa Rica v. Nicaragua*, discussed above, where the ICJ considered whether the permission of commercial activity in the applicable treaty extended to services or was limited to goods.<sup>113</sup> As already discussed, the court alluded to the practice of the parties but based its decision on the treaty's generic, evolutive language. In a separate opinion, Judge Skotnikov more fully addressed the relevance of subsequent practice, finding that although Nicaragua submitted evidence that it alone controlled the commercial transport of passengers on the San Juan for 100 years after the conclusion of the treaty, Nicaraguan and Costa Rican practice established an agreement allowing Costa Rica to use the river for tourism.

Costa Rican-operated tourism on the San Juan river has been present for at least a decade, and to a substantial degree. Nicaragua has never protested. This is in contrast to Nicaragua's treatment of police vessels, which it has repeatedly asserted have no right whatsoever to travel on the San Juan. Nicaragua has not only engaged in a consistent practice of allowing tourist navigation by Costa Rican operators, but has also subjected it to its regulations. This can be seen as recognition by Nicaragua that Costa Rica acted as of right.<sup>114</sup>

Judge Skotnikov therefore concluded that "the subsequent practice in the application of the Treaty suggests that the Parties have established an agreement regarding its interpretation: Costa Rica has a right under the 1958 Treaty to transport tourists . . . ."<sup>115</sup>

Silence can suggest agreement in certain contexts, as suggested by Judge Skotnikov in *Costa Rica v. Nicaragua*, where Nicaragua would have been expected to act given the context and its actions with respect to some types of vessels and not others. As suggested by the tribunal in the *Beagle Channel* arbitration, a party's "continued failure to react to acts openly performed, ostensibly by virtue of the Treaty, tend[s] to give some support to that interpretation of it which alone could justify such acts."<sup>116</sup>

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112. Draft Articles on the Law of Treaties with commentaries, *supra* note 17, at 221-22, Art. 27 (emphasis added).

113. Case Concerning the Dispute Regarding Navigational and Related Rights (*Costa Rica v. Nicaragua*), 2009 I.C.J. 213, 229 (July 13).

114. Case concerning the Dispute Regarding Navigational and Related Rights (*Costa Rica v. Nicaragua*), 2009 I.C.J. 283, 285, ¶ 9 (July 13) (separate Opinion of Judge Skotnikov).

115. *Id.* ¶ 10.

116. *Beagle Channel Arbitration (Argentina v. Chile)*, 21 R. INT'L ARB. AWARDS, ¶¶ 169, 172 (1977):

[T]he silence of Argentina [relating to Chile's acts of jurisdiction] permits the inference that the acts tended to confirm an interpretation of the meaning of the Treaty independent of the acts of jurisdiction themselves . . . . [T]he important point throughout is not whether Argentina was under a duty to protest against Chilean acts in order to avoid the loss of the islands because of unilateral acts performed outside the terms of the Treaty . . . : the important point is that her continued failure to react to acts openly performed, ostensibly by virtue of the Treaty, tended to give some support to that interpretation of it which alone could justify such acts.

Another helpful case to consider is *Vimar Suguros y Reasegueros v. M/V Sky Reefer et al.*, decided by the Supreme Court of the United States.<sup>117</sup> In that case, the Court interpreted the Carriage of Goods by Sea Act (COGSA) with reference to conduct of the parties to the Brussels Convention for the Unification of Certain Rules Relating to Bills of Lading (Hague Rules), on which COGSA was based. Although the Court did not directly refer to the Vienna Convention, it found that “Sixty six countries, including the United States and Japan, are now parties to the Convention, and it appears that none has interpreted its enactment of §3(8) of the Hague Rules to prohibit foreign forum selection clauses.”<sup>118</sup> Furthermore, the Court found that “other countries that do not recognize foreign forum selection clauses rely on specific provisions to that effect in their domestic versions of the Hague Rules.”<sup>119</sup> The Court found that “[i]n light of the fact that COGSA is the culmination of a multilateral effort ‘to establish uniform ocean bills of lading to govern the rights and liabilities of carriers and shippers *inter se* in international trade,’ we decline to interpret our version of the Hague Rules in a manner contrary to every other nation to have addressed this issue.”<sup>120</sup> In this case, the Court was willing to consider the consistent interpretation of treaty parties that had addressed the provision being considered, even though evidence of explicit agreement as to the interpretation was not necessarily available for *all* treaty parties. Indeed, agreement resulting from the express practice of all of the parties to a multilateral treaty would be difficult to demonstrate.

In other cases, however, where overt acts of protest would not necessarily be expected if a party disagreed with the interpretation adopted by another party, it would be inappropriate to rely on the silence of a party, even over an extended period of time, as evidence of agreement.<sup>121</sup> In the case concerning

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*See also* MCNAIR, *supra* note 62, at 427 (“evidence that both parties adopted the same meaning of a treaty provision before a dispute arises is of higher probative value than evidence as to the view of one party only. But when one party in some public document such as a statute adopts a particular meaning, circumstances can arise, particularly after the lapse of time without any protest from the other party, in which that evidence will influence a tribunal.”).

*See also* John H. Knox, *The Judicial Resolution of Conflicts between Trade and the Environment*, 28 HARV. ENVTL. L. REV. 1, 68 (2004) (noting that to come within Article 31(3)(b), “the practice need only be accepted by all, and the acceptance can be tacit.”). *But see* Bin Cheng, *Properly Speaking, Only Celestial Bodies Have Been Reserved for Use Exclusively for Peaceful (Non-Military) Purposes, but Not Outer Void Space*, 75 INT’L L. STUD. SER. U.S. NAVAL WAR COL. 81, 99 (2000) (cautioning “if every time some foreign State official commits a legal malapropism, one were required to protest, whether or not one’s rights are affected, government offices would hardly have time to do anything else!”). It would be unreasonable, for instance, to establish an agreement of the parties on the basis of the internal action of one party without any protest from the other.

117. *Vimar Seguros y Reasegueros, SA v. M/V Sky Reefer et. al.*, 515 U.S. 528 (1995).

118. *Id.* at 536-37.

119. *Id.*

120. *Id.*

121. In the WTO context, some Panels have even required “overt acts, not mere toleration” in order for party conduct to be considered as subsequent practice for the purposes of Article 31(3)(b).

Kasikili/Sedudu Island, the ICJ found that Namibia's silence did not constitute practice establishing agreement as to the boundary with Botswana, where "the documents . . . to which Botswana refers are internal documents, which, moreover, contain no express reference to Kasikili/Sedudu Island."<sup>122</sup> Therefore, in order for silence to be considered relevant for the purposes of Article 31(3)(b), it must be: (1) in response to the consistent conduct of the other party or parties reaffirming a particular interpretation; and (2) conduct that the silent party ought reasonably to be aware of and object to in light of the extent of the party conduct. Where those criteria are not fulfilled, silence cannot be seen as practice that establishes agreement. Assessing these criteria is a fact-specific inquiry, considering the number of parties to the treaty, how many parties have expressly interpreted the treaty provision in question, and how long the treaty has been in effect.<sup>123</sup>

In contrast to the cases discussed above, certain institutions routinely adopt a much stricter approach to the type of subsequent practice that is relevant for treaty interpretation. The WTO and certain municipal courts, for instance, require that party practice be "concordant, common, and consistent" in order to

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*See, e.g.*, Panel Report, Chile—Price Band System and Safeguard Measures Relating to Certain Agricultural Products, ¶¶ 7.79, 7.100, WT/DS207/R (Adopted Oct. 23, 2002). *But see*, Appellate Body Report, European Communities—Customs Classification of Frozen Boneless Chicken Cuts, ¶ 272, WT/DS269/AB/R (Sept. 27, 2005):

[A]greement may be deduced from the affirmative reaction of a treaty party. However, we have misgivings about deducing, *without further inquiry*, agreement with a practice from a party's 'lack of reaction'. We do not exclude that, in specific situations, the 'lack of reaction' or silence by a particular treaty party may, in the light of attendant circumstances, be understood as acceptance of the practice of other treaty parties. Such situations may occur when a party that has not engaged in a practice has become or has been made aware of the practice of other parties (for example, by means of notification or by virtue of participation in a forum where it is discussed), but does not react to it. However, we disagree with the Panel that 'lack of protest' against one Member's classification practice by other WTO Members may be understood, on its own, as establishing agreement with that practice by those other Members.

122. Case Concerning Kasikili/Sedudu Island (Bots. v. Namib.), 1998 I.C.J. ¶ 78.

123. *But see* R. v. Sec'y of State for the Home Dept., ex parte Mullen, [2004] UKHL 18 ¶¶ 47-48, [2004], (Appeal taken from Eng.) (relying on the conduct of European parties to the International Covenant on Civil and Political Rights in interpreting Article 14(6) as "establish[ing] state practice, which is relevant to treaty construction" for the purposes of Article 31(3)(b) of the Vienna Convention). It is unlikely that a consideration of the conduct of only a sub-group of the parties to an international treaty would be sufficient to establish the agreement necessary under Article 31(3)(b) of the Vienna Convention.

be considered under Article 31(3)(b).<sup>124</sup> Specifically, the Appellate Body in *Japan—Alcoholic Beverages II*, following Ian Sinclair,<sup>125</sup> noted the following:

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 discernible pattern implying the agreement of the parties regarding its interpretation. An isolated act is generally not sufficient to establish subsequent practice, it is a sequence of acts establishing the agreement of the parties that is relevant.<sup>126</sup>

Subsequent cases have further elaborated on this concept. In *EC—Chicken Cuts*, that Appellate Body noted that consistent party practice does not always require the participation of all parties in a large multilateral treaty regime:

[N]ot each and every party must have engaged in a particular practice for it to qualify as a ‘common’ and ‘concordant’ practice. Nevertheless, practice by some, but not all parties is obviously not of the same order as practice by only one, or very few parties. To our mind, it would be difficult to establish a ‘concordant, common and discernible pattern’ on the basis of acts or pronouncements of one, or very few parties to a multilateral treaty, such as the WTO Agreement.<sup>127</sup>

In overturning the Panel’s decision, the Appellate Body found that although the *EC* court’s classification with respect to certain types of frozen boneless chicken cuts had not been opposed in six years, this was not sufficient to establish subsequent practice.<sup>128</sup>

Likewise, investment treaty tribunals have also found that “[t]he value and significance of subsequent practice will naturally depend on the extent to which it is concordant, common, and consistent. 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.”<sup>129</sup> On this basis, the tribunal in *Canadian Cattlemen v. United States* found that “in interpreting the treaty, ‘reference may be made to ‘subsequent practice’ that clearly establishes the understanding of all the parties regarding its interpretation.”<sup>130</sup>

Another important consideration is the scope of actors whose conduct is relevant for the purposes of treaty interpretation. Whereas subsequent

124. For a discussion on the role of subsequent practice in WTO treaty interpretation, see George Nolte, *Subsequent Practice as a Means of Interpretation in the Jurisprudence of the WTO Appellate Body*, in *THE LAW OF TREATIES: BEYOND THE VIENNA CONVENTION* 138 (Enzo Cannizzaro ed., 2011); Alexander Feldman, *Evolving Treaty Obligations: A Proposal for Analyzing Subsequent Practice Derived from WTO Dispute Settlement*, 41 N.Y.U. J. INT’L L. POL. 655 (2009).

125. SINCLAIR, *supra* note 14, at 137.

126. Appellate Body Report, *Japan—Taxes on Alcoholic Beverages II*, 12, 13, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Adopted Nov. 1, 1996).

127. Appellate Body Report, *European Communities—Customs Classification of Frozen Boneless Chicken Cuts*, ¶ 259, WT/DS269/AB/R (Sept. 27, 2005).

128. *Id.* ¶¶ 272-76.

129. *Canadian Cattlemen v. United States of America*, Award on Jurisdiction, ¶ 182 (NAFTA Ch. 11/UNCITRAL Arb. Trib. Jan. 28, 2008), quoting SINCLAIR, *supra* note 126, at 137.

130. *Id.* ¶ 183, quoting IAN BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 635 (5th ed. 1998).

agreements under Article 31(3)(a) generally must be demonstrated by government officials authorized to interpret treaties,<sup>131</sup> the conduct of any official tasked to implement the subject matter of a treaty may be taken into account under Article 31(3)(b).<sup>132</sup> For instance, with respect to customs exemptions in a treaty, the actions of border customs agents may be relevant, though that same customs agent would not be able to represent the state in entering an agreement on the interpretation of the same treaty for the purposes of Article 31(3)(a). Therefore, the distinction between Articles 31(3)(a) and (b) is about *whose* conduct as much as it is about the *type* of conduct.

A helpful case in this regard is the case concerning the tax regime governing pensions paid to retired UNESCO officials residing in France, where the arbitral tribunal considered the privileges and immunities afforded to retired UNESCO officials under the UNESCO Headquarters Agreement.<sup>133</sup> Specifically, the tribunal considered whether, on retirement, the pensions of UNESCO officials continued to be tax exempt. UNESCO argued that the longstanding practice of French tax authorities to not tax such pensions was determinative.<sup>134</sup> France argued that on at least two occasions, in 1956 and 1994, its State Budget Secretary had officially communicated that the pensions of former UNESCO officials were subject to taxation, and that these communications were decisive.<sup>135</sup> The tribunal considered whether the actor mattered, finding that it did not so long as the actions reflected the “unequivocal expression” of the state.

[T]he determining factor is the unequivocal expression of the position of the State. This position may result from statements or conduct of authorities vested

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131. See, e.g., Helmut Philipp Aust and Mindia Vashakmadze, *Parliamentary Consent to Use of German Armed Forces Abroad: The 2008 Decision of the Federal Constitutional Court in the AWACS/Turkey Case*, 9 GERMAN L. J. 2223, 2230 (2008) (citing the *Tornado Case* of the German Federal Constitutional Court, suggesting that pursuant to Article 31(3)(a) “it is for the executive branch to contribute to processes by which an international treaty undergoes evolutionary development.”).

132. Abram Chayes and Antonia Handler Chayes, *Testing and Development of “Exotic” Systems Under the ABM Treaty: The Great Reinterpretation Caper*, 99 HARV. L. REV. 1956, 1968 (1986) (referring to Article 31(3)(b), noting that “under international canons of construction, consistent interpretation of the meaning of an enactment by the administrative bodies charged with its implementation is entitled to very great weight.”); David A. Koplow, *When is an Amendment Not an Amendment?: Modification of Arms Control Agreements Without the Senate*, 59 U. CHI. L. REV. 981, 1036 (1992) (“It is the executive branch that operates the treaty for the United States, interprets its terms, and engages in the ‘subsequent practice’ that gives the treaty meaning and supplies many of the needed functional details.”).

133. Sur la question du régime fiscal des pensions versées aux fonctionnaires retraités de l’UNESCO résident en France (France v. UNESCO), Award, 25 RIAA 231 (Jan. 14, 2003). The tribunal here applied the general principles of interpretation, including with respect to subsequent practice, as reflected in both the Vienna Convention and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. *Id.* ¶ 41.

134. *Id.* ¶ 65.

135. *Id.* ¶ 66.



with treaty-making power as well as administrative bodies responsible for the implementation of the treaty. But in both cases, it is necessary that the position of the Contracting State is unequivocal, especially when the treaty creates obligations.<sup>136</sup>

As such, the actions of both those administrators charged with applying the treaty on a day-to-day basis, as well as those authorities with treaty making power, are relevant for the purposes of subsequent practice. Because multiple authorities could be inconsistent, the ultimate requirement is that the government have an unequivocal position, indicating an agreement on the treaty's interpretation. In this case, given that France's position was unclear, subsequent party practice did not result in the requisite agreement as to the interpretation or application of the treaty.<sup>137</sup>

As discussed above, state conduct at an international organization can be relevant for purposes of interpretation under Articles 31(3)(a) and (b). In its advisory opinion on the *Legality of the Use by a State of Nuclear Arms in Armed Conflict*, the court explicitly referenced Article 31(3)(b) in assessing whether the question of the legality of the use of nuclear weapons (in view of their health and environmental effects) comes within the scope of the World Health Organization's (WHO) remit pursuant to its Constitution and the United Nations Charter.<sup>138</sup> The court found that the practice of the WHO indicates that it does not fall within the scope of its activities to address the question of the legality of nuclear weapons.<sup>139</sup> In interpreting the relevant treaties, the court relied on the practice of the WHO as representative of the practice of the parties to the WHO Constitution.<sup>140</sup>

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136. *Id.* ¶ 74 (“le facteur déterminant, c’est l’expression non équivoque de la position de l’Etat. Cette position peut résulter tout aussi bien de déclarations ou de conduite des autorités investies du treaty-making power tout comme des organes administratifs chargés de l’application de l’accord. Mais dans l’un et l’autre cas, il est nécessaire que la position de l’Etat contractant soit sans équivoque, surtout quand il s’agit d’un traité entraînant une obligation”) (author translation).

137. *Id.* ¶ 77.

138. *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, 1996 I.C.J. 66, ¶ 2 (July 8).

139. *Id.* ¶¶ 27, 55-56. The same day, the ICJ issued its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, where the Court considered the subsequent practice of the parties in interpreting the Hague Convention IV (though not referring explicitly to the Vienna Convention). In deciding on the interpretation of “poison or poisoned weapons,” the court found that “[t]he terms have been understood, in the practice of States, in their ordinary sense as covering weapons whose prime, or even exclusive, effect is to poison or asphyxiate. This practice is clear, and the parties to those instruments have not treated them as referring to nuclear weapons.” As such, the court found that the use of nuclear weapons cannot be regarded as specifically prohibited by the provision in question. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶55.

140. *See Case regarding Certain Expenses of the United Nations*, Advisory Opinion, 1962 I.C.J. 151, 160 (July 20) (Considering the type of expenses covered through member contributions pursuant to Article 17 of the United Nations Charter, and finding that “the practice of the Organization is entirely consistent with the plain meaning of the text. The budget of the Organization has from the outset included items which would not fall within any of the definitions of

However, care must be taken when attributing the practice of an international organization to its members. For instance, the South African Constitutional Court relied on an OECD report to interpret certain corruption conventions. Relying on Article 31(3)(b) of the Vienna Convention, the court found that “[t]he OECD Report is not in itself binding in international law, but can be used to interpret and give content to the obligations in the Conventions we have described.”<sup>141</sup> The report relied on, however, specifically provides “[t]his work is published on the responsibility of the Secretary-General of the OECD. The opinions expressed and arguments employed herein do not necessarily reflect the official views of the Organization or of the governments of its member countries.”<sup>142</sup> Certainly such a report should not qualify as state practice (let alone state practice establishing party agreement) for the purposes of treaty interpretation.

Similarly, several domestic courts have relied on the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status in interpreting the 1951 Convention and the 1967 Protocol relating to the Status of Refugees.<sup>143</sup> For instance, in *Pushpanathan v. Canada*, the Supreme Court of Canada noted that the UNHCR Handbook “was accepted as a valid source under Article 31(3)(b) of the Vienna Convention.”<sup>144</sup> The UNHCR Handbook, relied on by the lower courts in *Pushpanathan*, is produced by the High Commissioner’s office but has not been approved by all state parties to the 1951 Convention and the 1967 Protocol. As such, to rely on the Handbook as reflective of state practice establishing party agreement seems unreasonable.

The above reveals that the type of conduct constituting practice varies significantly from case to case. The determinative factor, however, is whether party agreement has been reached as to the interpretation of the terms in question. In this regard, it is best to identify what conduct falls within the scope of subsequent practice for the purpose of Article 31(3)(b) by how it differs from conduct falling within Article 31(3)(a). The above indicates that under Article 31(3)(b), (1) the agreement need not be recorded; (2) generally, the agreement of

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‘administrative budget’ which have been advanced in this connection.”).

141. *Hugh Glenister v. President of the Republic of South Africa and others* 2011 (CC), Case no. CCT 48/10, ILDC 1712 (ZA 2011), (SACR) ¶ 187 (S. Afr.).

142. OECD, *SPECIALISED ANTI-CORRUPTION INSTITUTIONS: REVIEW OF MODELS 2* (2008), <http://www.oecd.org/dataoecd/7/4/39971975.pdf>.

143. UNHCR, *HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES* (1992), Doc. No. HCR/IP/4/Eng/REV.1, <http://www.unhcr.org/3d58e13b4.html>.

144. *Pushpanathan v. Canada* (Minister of Citizenship and Immigration), 1988 SCR 982, ¶ 54 (S.Ct. Can. June 4). *See also* *Regina v. Secretary of State for the Home Department, ex parte Adan*; *R. v. Sec’y of State for the Home Dept., ex parte Aitsegeu*, [1999] 3 WLR 1274 (H.L.) 1296 (U.K.) (“It also may be argued that the UNHCR Guidelines constitute subsequent practice that is to be taken into account in the interpretation of treaties (Article 31(3)(b) of the [Vienna Convention]).”) *aff’d at* *R. v. Sec’y of State for the Home Dept., ex parte Adan*, [2001] UKHL 40 ILM 727 [2000].

all of the parties must be demonstrated;<sup>145</sup> (3) inaction can reflect agreement in circumstances where action would otherwise be expected in response to the conduct of the other party or parties; and (4) the actions of officials tasked with applying, making or interpreting the treaty is relevant.<sup>146</sup>

### 3. *The Continuum of Party Conduct Demonstrating Party Agreement*

The above analysis of relevant case law shows a continuum between Article 31(3)(a) and (b), where sub-article (a) has more stringent requirements, both in terms of form and, to a lesser extent, substance.<sup>147</sup> As such, tribunals will often assess whether party conduct meets the criteria for Article 31(3)(a) before then considering whether, in the alternative, Article 31(3)(b) is satisfied.

In the “re-evaluation of the German mark” case, the tribunal first found that “it is undisputed that the parties to the [Treaty] were unable to agree on a particular interpretation of the clause in question after the [Treaty] had been concluded.”<sup>148</sup> It was only after this finding that the tribunal noted that “[a]n indication of at least a tacit subsequent understanding between the contracting parties on a particular rendering of the term ‘depreciated’ in the clause in dispute might, therefore, at best be found in the relevant practice of the parties concerned.”<sup>149</sup>

Similarly, the award in the NAFTA case *Canadian Cattlemen v. United States* demonstrates the continuum between Articles 31(3)(a) and (b).<sup>150</sup> That case related to the U.S. import ban on Canadian cattle after the discovery of bovine spongiform encephalopathy (BSE, or “Mad Cow Disease”) in Alberta. At issue was the scope of NAFTA’s coverage under Article 1101. The claimant submitted that there was no relevant subsequent agreement with respect to the interpretation of Article 1101, as the parties had not sought an FTC interpretation pursuant to Article 1131 (as had been the case for the minimum standard of treatment discussed above). The tribunal, however, found that the FTC interpretation “is not the only means available to the NAFTA Parties of reaching subsequent agreement.”<sup>151</sup> The United States relied on Mexico’s

145. VILLIGER, *supra* note 33, at 110.

146. It is worth noting that the interpretation of courts of a state party can be considered as “subsequent practice.” See, e.g., *King v. Bristow Helicopters Ltd. Re M*, (on the application of CM), Appeal Judgment, ILDC UKHL 242, ¶ 98 [2002] (Opinion of Lord Hope of Craighead).

147. HICEE B.V. v. Slovak Republic, Partial Award, ¶ 134 (PCA/UNCITRAL Arb. Trib. May 23, 2011) (“In sub-paragraph (a) the agreement is *ex hypothesi* conscious and express, in sub-paragraph (b) it arises by implication from the parties’ actions.”).

148. The Question whether the re-evaluation of the German Mark in 1961 and 1969 constitutes a case for application of the clause in article 2(e) of Annex I A of the 1953 Agreement on German External Debts, Award, 19 RIAA 67, 103, ¶ 31 (May 16, 1980).

149. *Id.*

150. *Canadian Cattlemen v. United States of America*, Award on Jurisdiction, ¶ 182 (NAFTA Ch. 11/UNCITRAL Arb. Trib. Jan. 28, 2008), quoting SINCLAIR, *supra* note 13, at 137.

151. *Id.* ¶ 185.

Article 1128 submission in the arbitration (allowing third-party states to intervene in the proceedings) and Canada's statements in implementing NAFTA and its counter-memorial in another NAFTA case to demonstrate that a subsequent agreement had been reached as to the interpretation of Article 1101. The tribunal found that "[a]lthough there is . . . insufficient evidence on the record to demonstrate [subsequent agreement], the available evidence cited by the Respondent demonstrates to us that there is nevertheless a 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its applications . . .'"<sup>152</sup> The tribunal therefore effectively acknowledged that subsequent agreement pursuant to Article 31(3)(a) requires a higher evidentiary threshold than demonstrating that subsequent practice establishes party agreement.

Another investment treaty case, *Vivendi v. Argentina*, involved a challenge to the President of the Annulment Committee.<sup>153</sup> The Annulment Committee considered whether the ICSID rules applicable to arbitrator dismissal also applied to the dismissal of Annulment Committee members. The Committee found that party adoption of an arbitration rule applying all of the rules *mutas mutandis* to annulment proceedings "can be seen, if not as an actual agreement by the States parties to the [ICSID] Convention as to its interpretation, at least as amounting to subsequent practice relevant to its interpretation."<sup>154</sup> Again, this approach supports the theory that subsequent practice and agreement are on a continuum where establishing relevant practice to be considered for purposes of treaty interpretation requires a lower threshold.

#### *4. Relative Weight to be Accorded to Subsequent Conduct in Interpreting Treaties*

As discussed above, there is a higher evidentiary threshold to establish party agreement under Article 31(3)(a) versus Article 31(3)(b). As such, party agreement coming under Article 31(3)(a) should be given more weight in interpreting a treaty. Just as there is a sliding scale between subsequent agreement and subsequent practice establishing agreement, so should there be a sliding scale on the weight accorded to that agreement, based on where it falls along the subsequent conduct continuum. As noted by the ILC when drafting the Vienna Convention, "[t]he value of subsequent practice varies according[ly] as it shows the common understanding of the parties as to the meaning of the terms."<sup>155</sup>

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152. *Id.* ¶ 188.

153. *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on the Challenge to President of the Committee (Oct. 3, 2001).

154. *Id.* ¶ 12.

155. Draft Articles on the Law of Treaties with commentaries, *supra* note 17, at 221, comment 15.

In any event, an agreement of the parties as to the interpretation of terms of the treaty is often decisive in ascribing meaning to those terms. As the ILC noted, “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.”<sup>156</sup> The same is true for subsequent practice that establishes the agreement of the parties.<sup>157</sup> The ILC noted with respect to subsequent practice that “[t]he 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.”<sup>158</sup> Indeed, it would be difficult for a tribunal to refuse to adopt a meaning that the parties mutually agree to, especially in state-to-state cases.

A question arising in this context is whether the same weight should be given to subsequent party conduct when third party (non-state) rights are the subject of the treaty being interpreted. For instance, with respect to human rights or investment treaties, which give standing to private individuals or entities, Articles 31(3)(a) and (b) could give the parties significant control over the outcome of the dispute. This concern arose in the NAFTA case *Pope & Talbot v. Canada*, where, after the tribunal’s final award finding Canada liable but prior to its Damages Award, the tribunal was presented with an agreement by the FTC (*i.e.*, between the NAFTA parties) as to the interpretation of the requirement to provide foreign investors with the minimum standard of treatment in accordance with international law, pursuant to Article 1105.<sup>159</sup> The interpretation was provided pursuant to Article 1131(2) of NAFTA, as discussed above, and was narrower in scope than the interpretation adopted by the tribunal in its final award on the merits. One of the questions the tribunal posed to the parties was the following:

In respect that the Tribunal is required by Article 1131 to decide the issue in

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156. *Id.* at comment 14.

157. *Id.* at 221, comment 15 (“The Commission considered that subsequent practice establishing the understanding of the parties regarding the interpretation of a treaty should be included in paragraph 3 as an authentic means of interpretation alongside interpretative agreements.”); *Mexico v. Cargill, Inc.*, 2011 ONCA 622 (Oct. 4, 2011), ¶ 84 (“if th[e] position of the three Parties was a clear, well-understood, agreed common position, in accordance with Article 31(3)(b) of the Vienna Convention, that prohibited the award of any losses suffered by the investor in its home business operation, even caused by the breach, *it would be an error of jurisdiction for the tribunal to fail to give effect to that interpretation of the relevant provisions of Chapter 11.*”) (emphasis added); Fitzmaurice, *supra* note 34, at 211 (“In interpreting a text, recourse to the subsequent conduct and practice of the parties in relation to the treaty is permissible, and may be desirable, as affording the best and most reliable evidence, derived from how the treaty has been interpreted in practice, as to what its correct interpretation is.”). *See also* Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points*, 28 BRIT. Y.B. INT’L L. 1, 9 (1951).

158. Draft Articles on the Law of Treaties, at 221, comment 15.

159. *Pope & Talbot Inc. v. Canada, Damages* (NAFTA Ch. 11 Arb. Trib. May 31, 2002), ¶ 10, 70-73.

dispute in accordance with the NAFTA Agreement and applicable rules of international law, and it may be taken as a rule of international law that no-one shall be judge in his own cause, and that the purpose of this arbitral mechanism is under Article 1115 to assure due process before an impartial tribunal, is it correct for the Tribunal to apply an interpretation by the Commission so as to affect an award previously made by the Tribunal whereby it has determined an issue in dispute (namely Canada's liability for a breach of Article 1105) adversely to Canada?<sup>160</sup>

The tribunal's framing of the question demonstrates the tension between the objective decision-making process and the role of states in interpreting treaties granting third party rights. Where a dispute concerns state parties and those parties agree to an interpretation of an applicable treaty, a tribunal would certainly welcome such guidance. In a sense, this would be one step towards settling the dispute between the parties. However, where the agreement on interpretation affects the rights of a third party, a tribunal would be more concerned that the states (in this case all potential defendants to similar claims) were acting to determine the outcome of a dispute in their favor. In the *Pope & Talbot* case, the tribunal begrudgingly applied the FTC interpretation but nonetheless found that Canada was still in breach of Article 1105. There, the tribunal's decision turned on the wording of Article 1131(2), requiring that the interpretation "shall be binding."<sup>161</sup> The tribunal suggested that this phrase was "mandatory" in nature.<sup>162</sup>

States should still be permitted to agree, through their subsequent conduct, to an interpretation of treaty terms where third party rights are at issue; however, they should be precluded from doing so once a third party has relied on an interpretation that had been accepted previously. This is analogous to contract law in many jurisdictions, where parties to a contract generally cannot act to adversely impact third party rights once the "beneficiary has accepted them or reasonably acted in reliance on them."<sup>163</sup>

With respect to both forms of subsequent conduct, one cannot ignore the other principles of interpretation contained in Article 31 of the Vienna Convention. Although subsequent conduct establishing party agreement carries significant weight, it is still thrown in the same crucible with the other interpretation criteria. Therefore, where subsequent conduct leads to an interpretation that deviates from the ordinary meaning, discerned in context and in light of its object and purpose, such an interpretation would be

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160. *Id.* ¶ 13.

161. *Id.* ¶ 51.

162. *Id.*

163. *See, e.g.*, International Institute for the Unification of Private Law, UNIDROIT Principles on International Commercial Contracts, Art. 5.2.5 (2010), <http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf> ("The parties may modify or revoke the rights conferred by the contract on the beneficiary until the beneficiary has accepted them or reasonably acted in reliance on them.").

impermissible.<sup>164</sup> However, where more than one interpretation is possible, subsequent party conduct demonstrating party agreement will almost certainly be decisive to disputes arising after the agreement has been established.<sup>165</sup>

*B. Subsequent Party Conduct as a Supplementary Means of Interpretation*

Party conduct can be relevant to treaty interpretation even where no agreement has been achieved. However, reliance on subsequent party conduct in this regard should not be considered as a primary means of interpretation, but rather as supplementary under Article 32 of the Vienna Convention. Article 32 sets out an open-ended list of evidence that can be relied on in interpreting a treaty, in order to confirm the meaning indicated under Article 31, or to be used where the application of Article 31 renders the meaning “ambiguous or obscure, or leads to a result that is manifestly absurd or unreasonable.”<sup>166</sup> While most courts and tribunals will limit their analysis under Article 32 to *travaux préparatoires*, reference to subsequent practice should not be discounted.

For instance, in the case concerning Kasikili/Sedudu Island, while the court found that certain subsequent practice did not fall under Article 31, it was still relevant to confirming the court’s interpretation of the applicable treaty. Though the court did not explicitly refer to Article 32, the court noted that:

[O]n at least three occasions . . . surveys carried out on the ground identified the channel of the Chobe to the north and west as the main channel of the river around Kasikili/Sedudu Island. . . . The factual findings made on these occasions were not, as such, disputed at the time. The Court finds that these facts, while not consisting subsequent practice by the parties in the interpretation of the 1890 Treaty, nevertheless support the conclusions which it has reached by interpreting Article III, para. 2, of the 1890 Treaty in accordance with the ordinary meaning to be given its terms.<sup>167</sup>

Here, the parties’ silence with respect to the factual findings were taken into account by the court to support its interpretation, derived under Article 31.

Similarly, WTO panels have referred to subsequent party conduct to confirm their interpretation of WTO Agreements, even where party agreement could not be demonstrated. In *U.S.—Section 110(5) Copyright Act*, a WTO

164. The distinction between interpretation and an impermissible modification or amendment is discussed in further detail below. See *infra* Part III.

165. VILLIGER, *supra* note 33, at 111 (referring to Articles 31(3)(a) and (b), noting “[t]his means of interpretation is not only particularly reliable, it is also endowed with binding force. It provides *ex hypothesi* the ‘correct’ interpretation among the parties in that it determines which of the various ordinary meanings shall apply.”).

166. Vienna Convention, *supra* note 10, art. 32.

167. Case Concerning Kasikili/Sedudu Island (Bots. v. Namib.) 1059 I.C.J. ¶ 80 (Dec. 13); See also D. W. GEIG, INTERTEMPORALITY AND THE LAW OF TREATIES 122 (2001). But see Fox, *supra* note 32, at 71 (suggesting that “the International Court has evolved a new method of treaty interpretation by employing ‘factual findings’ of parties on separate occasions over time as to the meaning of the contested words, factual findings which were not disputed, to support the court’s conclusions as to ordinary meaning of words in article III of 1890 Treaty. [sic]”).

panel referred to “several examples from various countries of limitations in national laws” that confirmed its interpretation of the Berne Convention (1971).<sup>168</sup> The panel referred to this practice as “confirm[ing their] conclusion” as to the interpretation of the treaty, without expressing a view on “whether these are sufficient to constitute ‘subsequent practice’ within the meaning of Article 31(3)(b) of the Vienna Convention.”<sup>169</sup>

Though some authors have expressed concern over the reliance on subsequent party conduct that does not demonstrate party agreement on interpretation,<sup>170</sup> it is important to note that this reliance simply confirms the interpretation already arrived at through application of the general principles contained in Article 31. One cannot show concern where an interpreter thoroughly considered all facts, finding a degree of consistency among the presented evidence. As suggested by McNair, while party inaction towards interpretation expressed by another party is “not [necessarily] conclusive upon a court which is called upon later to interpret the treaty,” it may nonetheless be “relevant evidence” where it fails to demonstrate party agreement.<sup>171</sup>

The European Court of Human Rights, among other tribunals, has been much more liberal in its consideration of subsequent party conduct for purposes of treaty interpretation. If it were not for the unique “living instrument” approach to interpretation adopted by the court, one might query, for instance, the consideration of “social acceptance” as a primary tool of interpretation.<sup>172</sup> In other contexts, such practice would be more appropriate to consider under Article 32 as suggested above (if at all).<sup>173</sup>

### III.

#### RELEVANCE OF SUBSEQUENT PARTY CONDUCT FOR PURPOSES OTHER THAN TREATY INTERPRETATION

The conduct of parties after the conclusion of a treaty may be relevant to party rights in ways other than simply elucidating the meaning of the treaty. This section seeks to identify some of the areas in which subsequent party conduct may impact the rights of parties under treaties, with a focus on the legal distinction between the interpretation of treaties and the manifestation of other

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168. WTO Panel Report, United States—Section 110(5) of the U.S. Copyright Act, ¶ 6.55, WT/DS/160/R (June 15, 2000).

169. *Id.* at 68.

170. Malcolm Shaw, *Case Concerning Kasikili/Sedudu Island (Botswana/Namibia)*, 49 INT’L & COMP. L.Q. 964, 975 (2000) (with respect to the *Kasikili/Sedudu Island* case, suggesting that “[i]t is perhaps problematic for the Court to accept ‘facts,’ the legal consequences of which were not accepted by the relevant parties, as supportive of legal conclusions reached by the Court.”).

171. MCNAIR *supra* note 62, at 431.

172. *See supra* note 50.

173. *But see* Letsas *supra* note 49, at 541 (suggesting that “International lawyers have much to learn from a close study of Strasbourg’s interpretive ethic.”).



legal obligations. Specifically, this section articulates the distinction to be drawn between treaty interpretation and modification/amendment, while theorizing that reliance on the principle of estoppel is a preferred means of justifying a deviation from treaty rights, where subsequent party conduct justifies such deviation.

Lauterpacht has asked “which of the opposing views interprets the treaty and which revises it?”<sup>174</sup> Sinclair has similarly noted that “[i]t is inevitably difficult, if not impossible, to fix the dividing line between interpretation properly so called and modification effects under the pretext of interpretation.”<sup>175</sup>

It is no surprise, then, that international institutions, cases, and several commentators arguably modified treaty obligations while purporting only to interpret them.<sup>176</sup> For instance, the court in *Temple of Preah Vihear* confused interpretation and amendment.<sup>177</sup> The case concerned a boundary dispute between Cambodia and Thailand in the area where the Temple of Preah Vihear was located. A 1904 treaty had been signed between the two countries, creating a joint commission to demarcate the border according to the watershed. Cambodia submitted as evidence a map that had been drawn by French authorities subsequent to the work of the commission. The court found that the map, which placed the Temple on the Cambodian side of the border, “was accepted by the Parties in 1908 and thereafter as constituting the result of the interpretation given by the two governments to the delimitation which the Treaty itself required.”<sup>178</sup> The court found that “the Parties at that time adopted an interpretation of the treaty settlement which caused the map line, *in so far as it may have departed from the line of the watershed, to prevail over the relevant*

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174. HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW* 287 (1982).

175. SINCLAIR, *supra* note 14, at 138.

176. *See, e.g.*, AUST, *supra* note 34, at 239 (suggesting: “Given that the parties can agree later to modify the treaty, they can subsequently also agree on an authoritative interpretation of its terms, and this can amount in effect to an amendment.”); Ibrahim Shihata, *The Dynamic Evolution of International Organizations: The Case of the World Bank*, 2 J. HIST. INT’L L. 217 (2000) (discussing examples where subsequent practice has resulted in “informal modification” of the World Bank’s Charter); VILLIGER, *supra* note 105, at 111 (“[T]he parties to the treaty are their own masters; they may be means of the instruments, agreements, or practice mentioned in paragraph 2 and subparagraphs 3(a) and (b) not only give a special meaning to the term at issue but also amend, extend, or delete a text.”); Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VA. J. INT’L L. 431, 439 (2003-2004) (“courts may deviate from ‘ordinary meaning’ when treaty parties conclude a subsequent agreement that otherwise elucidates or reconfigures ‘the interpretation of the treaty or the application of its provision’ . . . . Like subsequent agreements, parties’ post-ratification practice may reflect an implicit agreement to revise the original treaty document.”); Koplow, *supra* note 132, at 1023-24 (“parties are free to alter their treaty obligations through the device of unwritten ‘subsequent practice,’ utilizing the opaque process of evolving customary international law to supersede the textual obligations.”).

177. Case Concerning the Temple of Preah Vihear (Cambodia v. Thai.), Merits Judgment, 1962 I.C.J. 6 (June 15).

178. *Id.* at 34.

*clause of the treaty.*"<sup>179</sup> Effectively, the court held that subsequent party conduct in applying the treaty can have the effect of deviating from the terms of that treaty.<sup>180</sup> This finding blurs the line between interpretation and amendment.

Similarly, in the *Namibia Advisory Opinion* of 1971, the ICJ considered the meaning of Article 27(3) of the United Nations Charter, requiring that a resolution be adopted by the affirmative vote of nine members including the concurring votes of the permanent members. It was argued that the requirement in Article 27(3) had not been met because two permanent members had abstained. The court found that abstention did not invalidate the resolution.

[T]he proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions . . . . This procedure followed by the Security Council, which has continued unchanged after the amendment in 1965 of Article 27 of the Charter, has been generally accepted by Members of the United Nations . . . .<sup>181</sup>

The problem here is how to reconcile the ordinary meaning of the requirement for a "concurring vote" with the practice of abstentions. It may be that the rules of the organization deviate from the United Nations Charter, but to interpret the Charter in a manner that rejects its ordinary meaning is concerning, even if politically expedient.

The process of treaty interpretation and the process of modification or amendment are "legally quite distinct."<sup>182</sup> This is best explained by Georg Schwarzenberg, who wrote the following while the Vienna Convention was being finalized:

As distinct from the verification and clarification of consensus by interpretation, the object of revision is a change in the rights and duties of the parties to the

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179. *Id.* (emphasis added).

180. *See* Case Concerning Kasikili/Sedudu Island (Bots. v. Namib.), Dissenting Opinion of Judge Parra-Aranguren, I.C.J. 1208, 1213, ¶ 16 (Dec. 13) (noting that in the *Temple of Preah Vihear* case "the effect of subsequent practice . . . was to amend the treaty.").

181. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, 22, ¶ 22 (June 21).

182. Case Concerning Kasikili/Sedudu Island (Bots. v. Namib.) I.C.J. 1208, 1213, ¶ 16 (Dec. 13) (dissenting opinion of Judge Parra-Aranguren); *See also* Case Concerning Gabčíkovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 120, 123, ¶ 12 (Sept. 25) (separate opinion of Judge Bedjaoui) ("An interpretation of a treaty which would amount to substituting a completely different law to the one governing it at the time of its conclusion would be a distorted revision. The 'interpretation' is not the same as the 'substitution' for a negotiated and approved text, of a completely different text, which has neither been negotiated nor agreed."); Mamatkulov and Askarov v. Turkey, 2005-I Eur. Ct. H.R., ¶ 5 (Feb. 4, 2005) (joint partly dissenting opinion of Judges Caffisch, Turmen and Kovler), *referring to* Cruz Vars and Others v. Sweden, 201 Eur. Ct. H.R. (ser. A) (1991) ("This 'subsequent practice' could be taken as establishing the agreement of Contracting States regarding the interpretation of a Convention provision . . . but not to create new rights and obligations which were not included in the Convention at the outset.").

treaty. Thus, both tasks start from different major assumptions. That underlying the interpretation of treaties is that once the legal meaning and effects of a consensual engagement have been established, they must have been willed by the parties from the moment when the treaty entered into force. To make such an assumption in the case of the revision of a treaty would be atypical. In other words, whereas interpretation works retrospectively (*ex tunc*), revision operates as from the present (*ex nunc*).<sup>183</sup>

Therefore, where tribunals look back and suggest that party conduct had, at some point in time, modified or amended treaty obligations, the very purpose of entering into formal commitments in the first place is called into question. Indeed, the concept of *pacta sunt servanda* requires that legal commitments in treaties be kept.<sup>184</sup> As Judge Bedjoi stated in his separate opinion in *Gabčikovo-Nagymaros*, “[a] State cannot incur unknown obligations whether for the future or even for the present.”<sup>185</sup> The concern with subsequent party conduct that purports to apply or interpret a treaty but results in a modification or amendment is most pronounced in the international criminal context. If crimes could be amended through practice, this would violate the most fundamental of rights: *nullum crimen sine lege*.<sup>186</sup> It would be particularly concerning if in a parliamentary democracy, for instance, the legislature was required to approve the text of a treaty only to have the terms informally changed shortly thereafter.<sup>187</sup> This would undermine the treaty making process altogether.

183. Georg Schwarzenberger, *Myths and Realities of Treaty Interpretation: Article 27-29 of the Vienna Draft Convention on the Law of Treaties*, 9 VA. J. INT'L L. 3, 8 (1968).

184. Vienna Convention, *supra* note 10, pmb1. (“Noting that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized”); *id.* art. 26 (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”); BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 113 (1953) (“*Pacta sunt servanda*, now an indisputable rule of international law, is but an expression of the principle of good faith which above all signifies the keeping of faith, the pledged faith of nations as well as that of individuals. Without this rule, International law as well as civil law would be a mere mockery. . . . As long as a Treaty remains in force, it must be observed as it stands. It is not for a Treaty to adapt itself to conditions. But if the latter are of a compelling nature, compliance with them would necessitate another legal instrument.”).

185. *Gabčikovo-Nagymaros Project (Hungary v. Slovakia)*, 1997 I.C.J. 76-80, para. ¶ 14 (Sept. 25).

186. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), Art. 11(2) (“No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence under national or international law at the time when it was committed.”).

187. For a critique of informal amendments to treaty obligations, including through subsequent practice, *see generally* Koplow, *supra* note 132. *See also* CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE: A STUDY PREPARED FOR THE COMMITTEE ON FOREIGN RELATIONS, UNITED STATES SENATE 176-84 (2001), <http://www.gpo.gov/fdsys/pkg/CPRT-106SPRT66922/pdf/CPRT-106SPRT66922.pdf> (suggesting that the Senate has the same role in amending or modifying treaty obligations, as in adopting treaties in the first instance). *But see* 1 U.N. CONFERENCE ON THE LAW OF TREATIES, OFFICIAL RECORDS 214, ¶ 55, U.N. Doc. A/CONF.39/11 (1968) (Waldock stating that “such modified applications of treaties had never raised any constitutional problem. The variations normally did not touch the main basis of the treaty and did not

With respect to amendments, which are changes to a treaty as between all of the parties,<sup>188</sup> many treaties will provide a specific procedure to be followed.<sup>189</sup> Such procedures should be followed in order to provide commitments that cannot otherwise come within the meaning of the treaty as written. Where no amendment provision is present in the treaty in question, the Vienna Convention provides an amendment procedure in Article 39: “[a] treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except insofar as the treaty may otherwise provide.”<sup>190</sup> Part II, which outlines the process for the conclusion and entry into force of treaties, applies *mutas mutandis* to the amendment of treaties. The ILC explained in its commentary to what became Article 39 that “The amendment of a treaty is normally effected through the conclusion of another treaty in written form and this is reflected in the provision that the rules of Part II are to apply to the amending agreement.”<sup>191</sup> Among other things, and for similar reasons, there are also limitations on the persons permitted to enter into amendments. Whereas the practice of a diversity of actors can be taken into account for the purposes of treaty interpretation under Article 31(3)(b), amendment agreements can only be entered into by those with “full powers” under Article 7.<sup>192</sup> Article 40 of the

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give rise to any objections from parliaments.”). That informal modification “normally” did not impact the “main basis” of a treaty does not mean that it never will, or that the “main basis” is the only important provision.

188. Vienna Convention, *supra* note 10, art. 40.

189. See, e.g., United Nations Convention on the Law of the Sea, arts. 312-314, Dec. 10, 1982, 1833 U.N.T.S. 397, <http://www.un.org/Depts/los/> [hereinafter UNCLoS]; Energy Charter Treaty, art. 42, Dec. 17, 1994, 2080 UNTS 95, [http://www.encharter.org/fileadmin/user\\_upload/document/EN.pdf](http://www.encharter.org/fileadmin/user_upload/document/EN.pdf) (providing for specific amendment procedures). See also Boisson de Chazournes, *supra* note 61, at 294 (discussing amendment provisions found in several environmental treaties).

190. Vienna Convention, *supra* note 10, art. 39.

191. Draft Articles on the Law of Treaties with commentaries, *supra* note 17, art. 35, comment 4. *But see* Methanex v. United States, *supra* note 47, Part IV, Ch. C, para. 21. (“Article 39 of the Vienna Convention on the Law of Treaties says simply that ‘[a] treaty may be amended by agreement between the parties’. No particular mode of amendment is required and many treaties provide for their amendment by agreement without requiring a re-ratification.”). The *Methanex* case appears to dismiss the reference to the application of the rules in part II in the relevant provision.

192. Vienna Convention, *supra* note 10, art. 7:

1. A person is considered as representing a State 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 by a treaty if: (a) he produces appropriate full powers; or (b) it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers.
2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State: (a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty; (b) heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited; (c) representatives accredited by States to an international conference or to an international organization

Vienna Convention provides further procedural rules for amending multilateral treaties.

With respect to modification, which addresses changes to treaty terms as between some of the treaty parties, the parties must adhere to the terms of the treaty governing modification.<sup>193</sup> Alternatively, Article 41 of the Vienna Convention governs.<sup>194</sup> Under Article 41, modification is permitted where the treaty permits such a modification<sup>195</sup> or where the modification “(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations,” and “(ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.”<sup>196</sup>

In either instance, the parties must “notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.”<sup>197</sup> At first blush, the modification process appears to be more lenient than the process for amendments, given that Part II of the Vienna Convention is said not to apply.<sup>198</sup> However, there are clear obligations, especially regarding notification to the other parties, which prevent less formal means of agreement, such as agreement resulting from practice. What is more, in drafting the Vienna Convention the ILC contemplated the inclusion of a provision enabling subsequent practice to modify the terms of a treaty. The provision under consideration stated: “A treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties

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or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ.

193. For instance, UNCLOS contains provisions that limit the ability of parties to modify treaty obligations. *See, e.g.*, UNCLOS, *supra* note 189, art. 310 (“Article 309 [limiting the ability of parties to make reservations or exceptions to the Convention] does not preclude a State, when signing, ratifying or acceding to this Convention, from making declarations or statements, however phrased or named, with a view, *inter alia*, to the harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that State.”); *Id.* art. 311 (adopting the modification rules of Article 41 of the Vienna Convention with certain express limitations).

194. Vienna Convention, *supra* note 10, art. 41.

195. *Id.* art. 41(1)(a).

196. *Id.* art. 41(1)(b).

197. *Id.* art. 42.

198. *But see* Treaties and Other International Agreements, *supra* note 187, at 178 (“As previously indicated, amendments or modifications to a treaty or international agreement generally have entailed the same procedure as the original agreement unless otherwise specified in the original agreement.”); *id.* at 184 (“the general rule is that the amendment or modification of an international agreement to which the United States is a party is subject to the same rules as apply to the making of an agreement.”). MARJORIE WHITEMAN, DIGEST OF INTERNATIONAL LAW, vol. 14, 441 (1970) (“it is a general rule that a treaty cannot be modified except by an instrument brought into force through the treaty processes.”).

to modify its provisions.”<sup>199</sup> This provision was rejected, given the uncertainty around the validity of the rule.<sup>200</sup>

The test to differentiate an interpretation from a modification or amendment is whether the subsequent party conduct leads to an agreement as to the interpretation that comes within the ordinary meaning of the words, read in good faith and in accordance with their context and in light of their object and purpose (*i.e.*, whether the outcome of the agreement resulting from the subsequent conduct comes within the four corners of the treaty text).<sup>201</sup> Given that there are often several possible “ordinary” meanings of a word and that there can be multiple objects and purposes to a treaty, subsequent conduct can often be decisive in choosing between several different meanings.<sup>202</sup>

Although subsequent party conduct may not necessarily result in a modification or amendment of a treaty, this does not mean that it cannot affect the rights of parties in other ways, such as through the operation of estoppel. Estoppel is viewed generally as a principle of international law.<sup>203</sup> After the

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199. Draft Articles on the Law of Treaties with Commentaries, *supra* note 17, at 236, art. 38. As noted by the Head of Canada’s Treaty and Economic Section of the Department of External Affairs at the time of the Vienna Convention’s adoption, “Whereas practice, to be considered as interpretative under article 31, would have to be consistent with the provisions of the treaty, ILC draft article 38 dealt with the case in which the subsequent practice was inconsistent with the provisions of the treaty.” J. S. Stanford, *The Vienna Convention on the Law of Treaties*, 20 U. TORONTO L.J. 18, 32 (1970). For a detailed discussion on Draft Article 38 and the implication of not including it in the Vienna Convention, see generally Giovanni Distefano, *La Pratique Subséquente des États Parties à un Traité*, 40 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 41 (1994).

200. See Elizabeth Zoller, *The “Corporate Will” of the United Nations and the Rights of the Minority*, 81 AM. J. INT’L. L., 610, 616 (1987) (noting that given the rejection of Article 38, “a treaty may not be modified by subsequent practice in applying the treaty, even if that practice should establish the agreement of the parties to modify the provisions of the treaty.”). As Reisman and Arsanjani have noted, the *travaux* can be especially useful “when a particular draft was discussed and clearly rejected.” Mahnoush H. Arsanjani & W. Michael Reisman, *Interpreting Treaties for the Benefit of Third Parties: The “Salvors’ Doctrine” and the Use of Legislative History in Investment Treaties*, 104 AM. J. INT’L. L., 597, 604 (2010).

201. LAUTERPACHT, *supra* note 174, at 76 (“An international court which yields conspicuously to the urge to modify the existing law—even if such action can be brought within the four corners of a major legal principle—may bring about a drastic curtailment of its activity.”).

202. Gottlieb, *supra* note 8, at 130 (“The problem of interpretation involves finding guidance for the choice between the rival applications of a text.”); Beagle Channel Arbitration (Arg. v. Chile), 21 R. INT’L ARB. AWARDS [RIAA] ¶ 74 (1977) (“It is clear that the Treaty is controlling, but the critical issue is, what does the Treaty mean? . . . [T]he question in the present case is not one of attempting to change the boundary, but of determining what the boundary is.”).

203. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 153, 643-44 (7th ed. 2008) (noting that estoppel is based on principles of good faith and consistency and is regularly part of the judicial reasoning of tribunals); CHENG, *supra* note 184, at 141-42 (“[A] man shall not be allowed to blow hot and cold—to affirm at one time and deny at another . . . . Such a principle has its basis in common sense and common justice, and whether it is called ‘estoppel,’ or by any other name, it is one which courts of law have in modern times most usefully adopted.”) (quoting England, Court of Exchequer: *Cave v. Mills* (1862) 7 Hurlstone & Norman, 913, 927); I. C. MacGibbon, *Estoppel in International Law*, 7 INT’L & COMP. L.Q. 468, 512 (1958) (“[A] State ought to maintain towards a given factual or legal situation an attitude consistent with that which it was known to have

conclusion of a treaty, if a party acts in a way that surrenders its rights and the other party relies on that action to its detriment, then the first party is not permitted to withdraw those statements or actions.<sup>204</sup> As noted by McNair, “It is reasonable to expect that any legal system should possess a rule designed to prevent a person who makes or concurs in a statement, upon which another person in privity with him relies to the extent of changing his position, from later asserting a different state of affairs.”<sup>205</sup> Where such criteria are met, the subsequent conduct of one party should preclude it from asserting certain rights under a treaty. This does not impact the meaning of the treaty, but does impact the rights of a party under that treaty.

Therefore, if some but not all parties to a treaty agree to a particular interpretation of a treaty provision, that agreement may not objectively determine the meaning of the treaty, but it may impact the rights of any party to that agreement which then seeks to adopt a different meaning. Indeed, prior to the Vienna Convention, estoppel often applied to treaty interpretation disputes, raising the issue of whether “one of the treaty partners [had] adopted a position which precluded it from arguing any further for a different interpretation from that propounded by another party.”<sup>206</sup>

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adopted with regard to the same circumstances on previous occasions. At its simplest, estoppel in international law reflects the possible variations, in circumstances and effects, of the underlying principle of consistency which may be summed up in the maxim *allegans contraria non audiendus est.*”).

204. See Legal Status of Eastern Greenland, Judgment (Denmark v. Norway), 1933, 53 PCIJ (ser. A/B), para. 186 (Sept. 5) (holding that because Norway had previously “reaffirmed that she recognized the whole of Greenland as Danish,” “she has debarred herself from contesting Danish sovereignty over the whole of Greenland.”); D. W. Bowett, *Estoppel Before International Tribunals and its Relation to Acquiescence*, 33 BRIT. Y.B. INT’L L. 176 (1957) (“The rule of estoppels, whether treated as a rule of evidence or a rule of substantive law, operates so as to preclude a party from denying before a tribunal the truth of a statement of fact made previously by that party to another whereby that other has acted to his detriment or the party making the statement has secured some benefit.”); see also Pan Am. Energy LLC v. Argentine Republic, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, para. 159 (July 27, 2006) (“Of the essence to the principle of estoppel is detrimental reliance by one party on statements of another party, so that reversal of the position previously taken by the second party would cause serious injustice to the first party.”); AUST, *supra* note 34, at 55 (citing *El-Salvador-Honduras Land, Island and Maritime Frontier*, 1990 I.C.J. 92, ¶ 63 (Sept. 13)) (“where a clear statement or representation is made by one state to another, which then in good faith relies upon it to its detriment, the first state is estopped (precluded) from going back on its statement or representation.”).

205. MCNAIR, *supra* note 62, at 487.

206. GARDINER, *supra* note 12, at 220. See also Case Concerning the Payment of Various Serbian Loans Issued in France (Fr. v. Kingdom of Serbs, Croats and Slovenes), 1929, 20 P.C.I.J. (ser. A), para. 80 (July 12) (contemplating, though not finding, the possibility of subsequent party conduct leading to the termination of a treaty obligation by way of estoppel); Fitzmaurice, *supra* note 34, at 223 (in discussing the requirement that all parties must have engaged in the relevant conduct to be taken into consideration for purposes of treaty interpretation, noting that “the conduct of one party may be evidence *against* that party”). Estoppel, however, is broader than the principle now contained in Articles 31(3)(a) and (b) of the Vienna Convention, as it depends solely on the action of the party who later seeks to adopt a contrary position, and does not depend on the establishment of agreement between all treaty parties. *But see* Philippe Kirsch, *Canadian Practice in*

Estoppel should not be confused with modification or amendment of the treaty itself. The Eritrea-Ethiopia Boundary Commission appear to have conflated amendment and estoppel, as the tribunal suggested that the *Temple of Preah Vihear* case was based on principles of estoppel:

[In the *Temple* case], after identifying conduct by one party which it was reasonable to expect that the other party would expressly have rejected if it had disagreed with it, the Court concluded that the latter was estopped or precluded from challenging the validity and effect of the conduct of the first. This process has been variously described by such terms, amongst others, as estoppel, preclusion, acquiescence or implied or tacit agreement. But in each case the ingredients are the same: an act, course of conduct or omission by or under the authority of one party indicative of its view of the content of the applicable legal rule—whether of treaty or customary origin; the knowledge, actual or reasonably to be inferred, of the other party, of such conduct or omission; and a failure by the latter party within a reasonable time to reject, or dissociate itself from, the position taken by the first. Likewise, these concepts apply to the attitude of a party to its own conduct: it cannot subsequently act in a manner inconsistent with the legal position reflected in such conduct.<sup>207</sup>

The Eritrea-Ethiopia Boundary Commission then found that subsequent party conduct delimiting the relevant boundary had the effect of changing that boundary, albeit a “relatively small” change.<sup>208</sup> It is unclear whether the tribunal found that the terms of the treaty had changed or that there was some other overriding legal principle calling for deviation from the treaty text. The tribunal could have been more explicit about its reliance, for instance, on the principle of estoppel. In the boundary delimitation context, the legal distinction may be less relevant but it is important to maintain in other contexts.

The following hypothetical example best explains the concern with confusing estoppel with treaty amendment. Assume states A and B enter into a bilateral investment treaty that precludes investments that are not made in accordance with the law.<sup>209</sup> An investor from State A invests in State B, but

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*International Law*, 35 CAN. Y.B. INT'L L. 349, 372 (1997)

It is possible that an estoppel can be created through a course of conduct by treaty parties that constitute either a subsequent agreement regarding the interpretation of the treaty or the application of its provisions [Article 31(3)(a)] or any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation [31(3)(b)].

207. *Eritrea-Ethiopia Boundary case*, *supra* note 71, ¶ 3.9.

208. *See, e.g., id.* ¶ 6.32

“In the view of the Commission, with the exception of the boundary checkpoints at Bure reflecting a common agreement that the boundary passes between them at that town, none of the other effectivities adduced by the Parties was of such weight as to cause the Commission to vary the geometric boundary determined by the Commission in application of Article I of the 1908 Treaty. In relation to Bure, the adjustment is relatively small, requiring only a slight variation of the border reflected in the insertion of Point 40 between Points 39 and 41.”

209. Such a requirement can be found in several investment treaties, often in the definition of the term “investment.” *See generally*, Rahim Moloo and Alex Khachaturian, *The Compliance with the Law Requirement in International Investment Law*, 34 *FORDHAM J. INT'L L.* 1473 (2011).



procures its investment illegally. State B becomes aware of the illegal conduct but decides nonetheless to endorse the foreign investor and its investment due to the various benefits that come with it, making this clear to the foreign investor and its home state, which also supports its investor's activities in State B. Several years pass and the relations between the foreign investor and State B deteriorate. The foreign investor sues State B under the bilateral investment treaty for what it feels is unfair and inequitable treatment. In its defense, State B argues that the tribunal does not have jurisdiction because the foreign investor's investment was procured illegally, and as such is not covered by the investment treaty. In this scenario, the foreign investor may argue that State B is estopped or precluded from raising the illegality before the tribunal.<sup>210</sup> Irrespective of the fact that both States may have wilfully ignored the legality requirement with respect to this particular investment, this does not mean that the treaty has been amended to now permit all illegal investments. Rather, the subsequent actions of the parties to the treaty only have a direct impact on the rights of State B *vis-à-vis* this particular investment. The terms of the treaty, however, remain unchanged. The same would apply *a fortiori* to multilateral treaties.

#### CONCLUSION

Those tasked with interpreting treaties should take account of subsequent party conduct insofar as it demonstrates the agreement of the parties as to the meaning of the treaty terms in question. In this regard, the distinction between Articles 31(3)(a) and (b) is somewhat more formalistic than substantive. In both cases, what is relevant is that the parties agree as to the meaning of the treaty. A formal written agreement between the parties agreeing to the meaning of an otherwise ambiguous term would likely fall within Article 31(3)(a). On the other hand, independent actions of both parties, temporally separated, that appear to demonstrate agreement between them on the meaning of the treaty is more likely to come within Article 31(3)(b). There is a spectrum of conduct between these two, and in this regard, Articles 31(3)(a) and (b) sit on a continuum. That continuum also represents the weight to be accorded to the party agreement for purposes of treaty interpretation. The stronger the case for the conduct to come within Article 31(3)(a), the more weight that conduct should receive as expressing an authentic interpretation of the text. The parties' agreement as to the meaning of the treaty text, however, must still be consistent with the ordinary meaning, read in good faith, in context, and in line with its object and purpose. Otherwise, the parties may be inadvertently (or advertently) modifying or amending the treaty in an impermissible manner. Parties may still act to modify or amend a treaty but must follow the agreed upon procedure for doing so.

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210. *Id.* at 1497-99 (discussing the applicability of estoppel in this context).

Interpreting treaties is a task that international lawyers do on a regular basis. While this article has primarily focused on disputes to draw out general principles as they apply to subsequent party conduct in the context of interpreting and applying treaties, treaty interpretation is more often the task of a lawyer in the office of a foreign ministry or in an international organization than that of a judge or arbitrator. Those lawyers, however, can also have an important impact on the meaning of treaties that they are tasked to interpret. Further, those tasked with implementing treaties also have such an impact. As this article has demonstrated, subsequent party conduct matters when interpreting and applying that treaty. Therefore, when those interpreting a treaty also represent one of the parties to that treaty, they ought to consider if their actions suggesting one particular interpretation over another might bind themselves in the future. Parties should embrace this tool rather than worry about it, because it allows parties to clarify, confirm, and converse with others interpreting the treaty, to their benefit. Perhaps most importantly, it allows for a degree of dynamism in treaty law, with the potential to prevent what are often long-term commitments from going stale.