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COMMENT ON THE ILC DRAFT CONCLUSIONS ON SUBSEQUENT AGREEMENTS AND SUBSEQUENT PRACTICE IN RELATION TO THE INTERPRETATION OF TREATIES

Abstract: In 2018, the ILC completed its work on the Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties. There is still the dilemma of whether interpretation in its essence reflects more the assumptions of art or science. From this perspective, the ILC's undertaking is the next step in the field of treaty interpretation that should provoke a moment of reflection and intellectual curiosity. Especially when the presented approach is the result of thorough research, is of a multilayered nature and consciously constitutes an element of a broader whole, and demonstrates the undeniable theoretical and practical value. The International Law Commission, in its final outcome on subsequent agreements and practice in relation to the interpretation of treaties, has obtained such a harmonized picture. This is the product of several factors. First, the proposals are of rich normative value. Their shape facilitates the potential defense of this normativity in the event of a dispute. Secondly, the draft skillfully combines the themes of *lex generalis* and *lex specialis*, situating deliberations in the correct systemic context, thus making the final result of the effort realistic. The notion of acquiescence, the unformalized nature of international law or the objectification of particular institutions of international law can be cited here as an example.

As a consequence, thirdly, the ILC's view of subsequent agreements and practice as essential elements of the treaty interpretation process is flexible and multidimensional.

Keywords: subsequent agreements, subsequent practice, interpretation of treaties

In 2018, the International Law Commission (ILC) completed its work initiated in 2012 on a project concerning the impact of subsequent agreements and subsequent practice of the parties on the interpretation of a treaty.[1] From perspective of the rules of interpretation set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (Vienna Convention, VCLT), this is a very important step towards enhancing the value of the interpretative directives expressed in these provisions through elaboration of aspects of systemic interpretation. Thus, the general rule of interpretation expressed in Article 31 Vienna Convention attained greater functionality by incorporating into the process of interpretation further components of the broadly understood 'context of the treaty,'[2] which are one of the key preconditions, alongside the text of the treaty, its object and purpose, for obtaining an outcome of the interpretation of the provisions at issue that is consistent with the legal order as a whole. A detailed analysis of these conditions is one of the key guarantees of ensuring a faithful interpretation of the treaty and of their harmonious incorporation into the picture of interrelated rights and obligations in accordance with the essence of the given normative order.

The International Law Commission took examined subsequent international agreements ('subsequent agreement') and subsequent practice as a component of both the general rule of interpretation (Article 31 Vienna Convention) and the rule referring to supplementary means of interpretation (Article 32 Vienna Convention). Article 31(3) Vienna Convention provides that:

> 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;

[1] The text posted on the site: https://legal.un.org/docs/?path=../ilc/texts/instruments/english/draft_articles/1_11_2018.pdf&lang=EF (accessed 10.5.2020).

[2] Its strict form is defined in Article 31(2) of the Vienna Convention.

(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.

Attention should be drawn here to the structure of the general rule of interpretation and the resulting conclusions with regard to any subsequent agreement between the parties concerning the interpretation of the treaty or the application of its provisions and any subsequent practice of application of the treaty establishing the parties' agreement on its interpretation. It affects the reading of the actual weight of the constituent elements analyzed in the complex process of interpretation. Obviously, Article 31 Vienna Convention has an internal structure with ordered content, which could suggest a kind of gradation of interpretation directives emerging from the individual components of this provision. However, in decoding the essence of the operational character of this provision the most important role is played by its superior attribute, i.e. the title of the article, which reduces all the components to one, combined general rule of interpretation.[3] The content of Article 31 Vienna Convention allows us to distinguish several material planes in which to search for the proper meaning of interpreted treaty provisions. These include the text of the treaty, the context of the treaty ('closer' and 'further')[4] and the elements taken into account together with the context of the treaty, i.e. the previously mentioned subsequent agreement between the parties concerning the interpretation of the treaty or the application of its provisions and every subsequent practice of the treaty's application, establishing the agreement of the parties concerning its interpretation. Article 31(3) Vienna Convention concludes its reference to the broadest systemic context in the form of the need to take into account when interpreting any relevant

[3] Attention is drawn in this case to the conscious use of the singular. See also, A. Pellet, *Canons of Interpretation under the Vienna Convention*, [in:] J. Klingler, Y. Parkhomenko, C. Salonidis (eds), 'Between the Lines of the Vienna Convention? Canons and Other Principles of Interpretation in Public International Law', Wolters Kluwer, Alphen aan den Rijn 2018, pp. 4-8.

[4] See A. Kozłowski, *Interpretacja traktatu w świetle jego kontekstu* [Interpretatation of a treaty in the light of its context], Wydawnictwo Sejmowe, Warszawa 2002, pp. 83--128; on the concept of context and its elements see also U. Linderfalk, *On the Interpretation of Treaties. The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties*, Springer, Dordrecht 2007, pp. 101-201.

rules of international law applicable to the relations between the parties.[5] The application of the general rule of interpretation as a starting point for determining the meaning of conflicting treaty expressions entails that all these distinguished components must be placed initially on the same plane. This means that subsequent interpretative agreements or subsequent practice demonstrating agreement between the parties on interpretation have the same weight within the meaning of the general rule of interpretation as the original treaty text. Thus, the result of a concrete interpretation is a consequence of a skillfully interpretive combination of all these components, taking into account good faith and the subject matter and purpose of the treaty, but without assuming *a priori* primacy of any of the elements distinguished in Article 31 Vienna Convention.[6]

The work on the project has led the ILC to prepare a number of proposals, conclusions in the form of a legal provision, but excluding the form of a treaty, which has been the standard solution for some time. It therefore remains to be established whether, and if so, how the final proposals proposed by the ILC develop or complement in a normative manner the provisions of Vienna Convention on the interpretation of the treaties. These proposals cannot be considered on the plane of a binding agreement. Therefore, it remains to determine their possible legal force through the form of international custom, general principles of law or the determination that, as of now, the conclusions in question constitute only a sort of recommendation, which, only after a time, enriched with the

[5] On the principle of systemic interpretation in the broadest sense see C. McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 'International and Comparative Law Quarterly' 2005, vol. 54, pp. 279-320. It seems that that part of the Article 31(3) should be read together with the ILC document on fragmentation (The Report of the Study Group of the International Law Commission on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, 2006).

[6] Unless the parties agree on some legal interpretative directives for a particular treaty. This could be, for example, the deliberate introduction into the text of the treaty of expressions susceptible to an evolutionary change in meaning (referred to in the draft). On the margins of the above considerations, it should be noted that the Vienna Convention in a certain way gives primacy, after certain conditions, to the object and purpose of the treaty (Article 33(4) Vienna Convention: 'Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.')

practice and *opinion juris,* has a chance to be transformed into customary norms. The analysis of the ILC's commentary to the draft[7] allows us to assume the presumption of normative value of particular conclusions as the inferential consequences of Article 31(2)(a) and (b), or a separate normativity resulting from existing international custom or recognized general principles of international law.[8] However, as a presumption *iuris tantum,* it is effective in court proceedings insofar as it is not effectively rebutted by any of the parties in the dispute or negated by the court. It is then necessary to present separate evidence, and to demonstrate the individual constituent elements of the customary rule together with the general rule of juxtaposition, starting with the universal character of the rule sought, through its regional form, and ending with the bilateral rule. If a general principle of international law is developed, the parties to the proceedings or the court will be required to apply certain interference rules properly.

In case of rejection of the idea of normative character of the ILC's conclusions, it always remains possible in court proceedings to accept *ad casum* certain rules without evoking legal effect for the future.[9]

The ILC has proposed thirteen conclusions divided into four main parts (Introduction, Basic rules and definitions, General aspects, Detailed aspects). The structure of most of the proposals is complex and multilayered.

The first conclusion (Conclusion 1) as formulated clarifies the subject matter of the project as a whole. The ILC clearly emphasizes the link between the proposal and the sphere of treaty interpretation. This motive also appears later, with invocation of the need to distinguish e.g. modification or amendment of the treaty from the consequences of taking into account

[7] See https://legal.un.org/docs/?path=../ilc/texts/instruments/english/commentaries/1_11_2018.pdf&lang=EF (accessed 10.5.2020).

[8] E.g. the binding force of both oral and written agreements draws on the general principle of the unformalized very nature of international law. The conclusion may be treated as a sort of systemic presumption. In this way the principle which is an emanation of the nature of international law forms part of the international legal order.

[9] By analogy to acceptance in court proceedings before the ICJ of the provisions of the Vienna Convention as a customary law by states which are not parties to the codification. Strictly speaking, such acceptance may be meaningless if the court is certain that the relevant rules of customary international law are binding regardless of the consent being raised. Cf. *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20.4.2010, I.C.J. Reports 2010, p. 46, para. 64 and *Kasikili/Sedudu Island (Botswana v. Namibia)*, Judgment of 13.12.1999, I.C.J. Reports 1999, p. 1059, para. 18.

all subsequent agreements and interpretation practices in the course of interpretation arising from the need to apply the treaty.[10] Therefore, the directive linking the ILC project with the process of treaty interpretation is clear and obvious.

The second part (Basic rules and definitions) is a summary recollection of the rules of interpretation contained in the Vienna Convention and elucidates the understanding of key terms for the project. It does so in the form of a kind of legal definitions. It should be noted that Conclusion 2 of the draft (General rule and means of treaty interpretation) directly invokes the customary nature of the rules contained in Articles 31 and 32 Vienna Convention and emphasizes the combined nature of the entire interpretation process (a single combined operations). Furthermore, it makes a literal reference to Article 31(1) and (3) of the Vienna Convention. The ILC points out that a type of practice can also be distinguished which, within the framework of article 32 Vienna Convention, comprises an element of subsidiary means of interpretation. This is an important element of the distinction as the interpretation practice provided for in Article 31(3)(b) is taken into account in the framework of the general rule of interpretation in the first place, whereas the interpretation practice provided for in Article 32 Vienna Convention will only be taken into account

[10] This is one of the more controversial issues raised in the project: the decision on the effect of subsequent practice from the perspective of interpretation and possible amendment of the treaty. Cf. H. Fox, *Article 31(3) (a) and (b) of the Vienna Convention and the Kasikili/Sedudu Island Case*, [in:] M. Fitzmaurice, O. Elias, P. Merkouris (eds), 'Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on', Martinus Nijhoff Publishers, Leiden-Boston 2010, p. 61: 'In assessing its relevance to the determination of the boundary concerning Kasiliki/Sedudu Island VCLT Article 31(3) is to be distinguished from other distinct operations which may be resorted to where a query as to a meaning of words in a treaty arises. The amendment or revision of the treaty is the most far-reaching of such operations since it may change the legal effect of the treaty provisions, it may result in the replacement of the original treaty by a new treaty satisfying all the procedural requirements of part IV of the Vienna Convention relating to the amendment of treaties. Closely allied to such amendment but more in conformity with the parties' original imperfectly expressed intent, will be an authoritative interpretation of the meaning of the disputed words […]'. It follows that the concept of interpretation should be associated with the original will of the parties decoded at a later time, while a change or amendment should accompany actions aimed at a real transformation of parties' intention. See also G. Hafner, *Subsequent Agreements and Practice: Between Interpretation, Informal Modification, and Formal Amendment*, [in:] G. Nolte (ed.), 'Treaties and Subsequent Practice', OUP, Oxford 2013, pp. 105-122.

to confirm the meaning resulting from the application of Article 31 Vienna Convention, or when the use of the general rule of interpretation has led to an ambiguous, vague, absurd or unreasonable result.

Conclusion 3 refers to the divisions in theory and practice that have emerged in the interpretation of treaties. The Commission refers to the key concept of subsequent agreements and subsequent practice as authentic means of interpretation.[11] It thus clearly articulates the value of subsequent agreements and subsequent practice as means of interpretation directly linked to the parties to the treaty, i.e. means which clearly demonstrate their will or intention. It should be stressed that the subsequent agreements or practice of interpretation provided for in Article 31(3)(a) and (b) Vienna Convention constitute objective evidence[12] for the existence of an agreement on the understanding of the treaty, which indicates the way this evidence should be carried out.

The subsequent conclusions of Part II, in which the ILC expands on the meaning of the terms 'subsequent agreement' and 'subsequent practice' in the framework of Articles 31 and 32 Vienna Convention, are important for the functional value of the project. In its Conclusion 4, the ILC states that a subsequent agreement as a means of authentic interpretation within the meaning of Article 31(3)(a) shall mean an international agreement between all the parties which has been concluded after the conclusion of the treaty and which concerns the subject matter of its interpretation or application. In turn, a subsequent practice read as an element of authentic interpretation is understood as a post-treaty application procedure ('conduct') which thereby

[11] In a general way on the subject of authentic interpretation speaks K. Berner, *Authentic Interpretation in Public International Law*, 'Zeitschrift für ausländisches öffentliches Recht und Völkerrecht' 2016, vol. 76, pp. 845-878.

[12] The use of the criterion of objectivity allows the context of the *Bahrain v. Qatar* case to be cited here and the conditions referred to there by the ICJ for objectifying the process of concluding an international agreement. The objectivised treaty understanding emerging from subsequent interpretative agreements or interpretative practice should therefore be presumed to conform to those standards. Cf. *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Jurisdiction und Admissibility, Judgment of 1.7.1994, I.C.J. Reports 7 1994. p. 121, para. 25: 'Accordingly, and contrary to the contentions of Bahrain, the Minutes are not a simple record of a meeting, similar to those drawn up within the framework of the Tripartite Committee; they do not merely give an account of discussions and summarize points of agreement and disagreement. They enumerate the commitments to which the Parties have consented. They thus create rights and obligations in international law for the Parties. They constitute an international agreement.'

establishes an agreement as to its interpretation. Attention should be drawn here to the distinction made by the ILC. The subsequent practice provided for in article 31 Vienna Convention refers to the concerted attitude of all the parties to the treaty, since it is only under this condition that it will have the merit of an authentic interpretation. By contrast, a practice forming part of complementary measures of interpretation (Article 32 Vienna Convention) may take the form of a practice of applying the treaty after it has been concluded in a unilateral or group manner, but not unanimously by all parties. This is consistent with the division of interpretation into the general rule, with a distinguished primacy, and complementary means of interpretation. Unilateral practice of treaty application has no genuine interpretational value. On the other hand, however, it can illustrate the intentions of a party to the treaty and open the way for it to be compared with those of the other parties.

The ILC states (Conclusion 5) that the practice of application of a treaty, to which both articles 31 and 32 Vienna Convention refer, covers all attitudes of the State party, including actions in the executive, legislative and judicial planes. On the other hand, this practice does not cover attitudes or behavior that cannot be characterized as those of a State party to the treaty. At this point, the Commission points, among other things, to the practice of non-State actors, while suggesting that although the practice in question does not exhaust the premises provided for in articles 31 and 32 Vienna Convention, it may be taken into account when examining and formulating assessments of subsequent practice of treaty application directly by the party itself, as long as the practice of the non-State actor exhibits the trait of appropriateness (be relevant).[13]

[13] ILC's commentary to the Draft, p. 40, point 12: 'The phrase 'assessing the subsequent practice' in the second sentence of paragraph 2 should be understood in a broad sense as covering both the identification of the existence of a subsequent practice and the determination of its legal significance.' *Ibidem* p. 42, point 16: 'The examples of ICRC and the Monitor [the Landmine and Cluster Munition Monitor, an initiative of the International Campaign to Ban Landmines-Cluster Munitions Coalition – added by AK] show that non-State actors can provide valuable information about subsequent practice of parties, contribute to assessing this information and even solicit its coming into being. However, non-State actors can also pursue their own goals, which may be different from those of States parties. Their documentation and their assessments must thus be critically reviewed' (https://legal.un.org/docs/?path=../ilc/texts/instruments/english/commentaries/1_11_2018.pdf&lang=EF).

On the other hand, Part III of the project consists of five conclusions, whose subject matter includes the process of identifying subsequent agreements and practice (Conclusion 6), the possible effects of taking into account subsequent agreements and practice in the process of treaty interpretation (Conclusion 7), interpretation of treaty terms whose meaning may evolve over time by their very nature (Conclusion 8), the importance of subsequent agreements and practice as a means of interpretation (Conclusion 9) and the agreement of the parties on treaty interpretation that prevails from subsequent agreements and practice (Conclusion 10).

When identifying subsequent agreements and practice as components of Article 31(3) Vienna Convention, the Commission emphasizes, it seems that in line with the unformalized nature of international law,[14] that they may assume a multiplicity of forms. What links them in particular is the need to demonstrate via them that the parties explicitly refer through them to the issue of treaty interpretation and do not intend, for example, to agree on a temporary suspension of its application or to establish a practical consensus between them (*modus vivendi*). Referring to the need to identify the relevant practice for the application of Article 32 Vienna Convention, the Commission concludes that it is necessary to demonstrate the connection between the practice and the sphere of application of the treaty. This is the correct approach to the relevant connection, since the practice that can be referred to in Article 32 Vienna Convention is only an individual or group practice. Therefore, it cannot be a reflection of the interpretation of the treaty agreed upon by all parties.

In Conclusion 7, the ILC invokes in a way the very essence of interpretation. Considering the effects that may be attached to taking

[14] The principle of the unformalized nature (character) of international law is an inferential consequence of the principle of consent and the principle of good faith. See I. Brownlie, *Principles of Public International Law*, 6th ed., Oxford 2002, p. 18: 'logical propositions resulting from judicial reasoning on the basis of existing international law and municipal analogies'. It has the effect of a presumption that can be waived. Hence, an international agreement may be concluded in any form, while a treaty, in accordance with the Vienna Convention, only in writing (Article 2). Similarly, in accordance with Article 11 of the Vienna Convention, the conclusion of a treaty may take any form as long as it is agreed upon by the states concerned. In this sense, the general principle of the unformalized nature (character) of international law creates a framework for both formal and informal agreements to occur within its boundaries and to produce a legal effect appropriate to their nature. See A. Aust, *The Theory and Practice of Informal International Instruments*, 'ICLQ' 1986, vol. 35, p. 787: […] '>>informal instruments<< means an instrument which is not a treaty because the parties to it do not intend it to be legally binding.'

subsequent agreements and practice into account in the course of interpretation, it confirms that this constitutes a supplementary approach, in conjunctions with other means of interpretation, to clarification of the meaning of the treaty. This may ultimately lead to a result that both compresses and broadens the meaning of the disputed expressions, as the case may be. It may also facilitate resolution of the degree of discretion the treaty confers on the parties to it. In this sense, subsequent agreements and interpretation practice (including the practice covered by article 32 Vienna Convention and under the conditions set out therein) are one of many necessary means of interpretation which determine the correctness of the final result of interpretation.

A very important presumption closes Conclusion 7. The Commission stresses that the agreement of the parties that emerges from subsequent agreements and interpretative practice must first be equated with the notion of interpretation rather than with formal amendment or modification of the treaty. This is one of the more controversial points of the project.[15] The ILC here invokes the lack of universal recognition for a solution combining later agreements and interpretation practice with the effect appropriate for a change or modification of the treaty. On the other hand, however, the institution of the presumption does not rule out demonstrating in a specific case the intention of the parties to change or modify the treaty by means of subsequent interpretative agreements or, even more so, the practice of its application. Obviously, the ILC states that the present conclusion in no way diminishes either the relevant provisions of the Vienna Convention or the customary law norms reproduced therein concerning the amendment and modification of the treaty.

Another scope of application of subsequent agreements and interpretation practice has been linked to the concept of functional

[15] This is the presumption of *iuris tantum* character. Thus, the ILC correctly concluded that 'an agreement to modify a treaty is thus not excluded, but also not to be presumed' (ILC's commentary to the Draft, p. 59, point 24). An amendment to the treaty through a subsequent agreement resulting from the consistent practice of applying the treaty is one possible solution. However, it requires a relevant proof of intention. It is worth noting here that the possibility of changing the treaty through the subsequent practice of its application has already been pointed out by the ILC during codification work on the VCLT. It was then found that treaties can 'indeed be modified by subsequent practice that establishes the agreement of the parties to that effect' as a consequence of 'a general rule under customary international law' (ILC's commentary to the Draft, p. 59, points 25 and 26). This view seems to still have a strong systemic justification notwithstanding some reluctance in this regard on the part of international courts.

interpretation. Thus, in Conclusion 8, the ILC indicates the possibility of using the agreements and practice in question to decide whether it is necessary to engage in dynamic interpretation in a given case, taking into account the evolution of the meaning of the disputed treaty expressions. This needs to be examined on a case-by-case basis, since subsequent agreements and practice do not determine *per se* the evolutionary nature of interpretation. In its commentary the ILC gives examples of expressions which by their very nature can be open to dynamic interpretation, e.g. 'right of self-determination,' 'trade' and 'investment.'[16]

In Conclusion 9, the ILC referred to an important aspect of the importance of invoking subsequent agreements and interpretation practice. In view of the need to take jointly a number of equivalent factors into account in the course of interpretation, the Commission points out that the criteria of clarity, detail and frequency (especially with regard to subsequent practice) are helpful for later agreements and practice in determining their weighting within the rules set out in Articles 31 and 32 Vienna Convention.

It appears that Conclusion 10 is crucial for the recognition of subsequent agreements and interpretation practice as an effective means of influencing the process of interpreting and modelling the meaning of disputed treaty terms. It states that, with respect to subsequent interpretative agreements, the consensus reached in such an agreement on its material relationship with the sphere of interpretation of the treaty is decisive for taking them into account in the interpretation process. The project also stresses that this relationship must be made known and accepted by the parties. It should be added that, on the basis of previous conclusions, the rule of objectification of the totality of the situation applies here too. Interestingly, the ILC states that the relevant agreements and practice attesting to the agreement may be taken into account in the course of interpretation, whether or not they are binding. The sense of this construction should understood as saying that the agreement reached may play an important role in the course of interpretation, without directly creating further, independent obligations.[17] It seems, however, that it is one

[16] ILC's commentary to the Draft, p. 64 et seq. See on the evolutionary interpretation E. Bjorge, *The Evolutionary Interpretation of Treaties*, OUP, Oxford 2014. For restrictions on the use of evolutionary (dynamic) interpretation and sources of possible confusion regarding the notions of intertemporality, vagueness and ambiguity, see also S.T. Helmersen, *Evolutive Treaty Interpretation: Legality, Semantics and Distinctions*, 'European Journal of Legal Studies' 2013, vol. 6, no. 1, p. 127-148.

[17] ILC's commentary to the Draft, p. 24 point: 'The characterization of subsequent agreements and subsequent practice of the parties under article 31, paragraph 3 (a)

thing to create separate rights and obligations, and another to create a binding standard for the reading of a disputed treaty expression, conditioning the proper identification of rights and obligations. The solution proposed in the draft may be a source of some controversy. In the case of a later practice (Article 31(3)(b) Vienna Convention), an agreement is also necessary. However, the ILC states that the number of parties involved in reaching this agreement may vary from case to case. A solution to ensure that the agreement referred to by the ILC can be concluded is the principle of qualified silence (*acquiescence*). The draft stipulates that silence, as a response to the practice of the other parties to the treaty, may be read as consent if the circumstances surrounding the practice of some of the parties to the treaty and the passive attitude of the other parties would indicate the need for some response.

The last part of the project, which addresses several specific issues, situates subsequent agreements and practice in the context of decisions taken in the course of a conference of States parties to a treaty (Conclusion 11), the specific nature of the treaties that constitute international organizations (Conclusion 12) and the activities of specialized bodies sometimes established by treaties and bringing together experts (Conclusion 13).

Conclusion 11 elaborates the understanding of the term 'conference of States parties'. In the framework of the draft, this term is understood as a meeting of the parties to a treaty to review the agreement or issues related to its implementation. A session of an international body of an

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and (b), as 'authentic means of interpretation' does not, however, imply that these means necessarily possess a conclusive effect. According to the chapeau of article 31, paragraph 3, subsequent agreements and subsequent practice shall, after all, only 'be taken into account' in the interpretation of a treaty, which consists of a 'single combined operation' with no hierarchy among the means of interpretation that are referred to in article 31 (see draft conclusion 2, paragraph 5). For this reason, and notwithstanding the suggestions of some commentators, subsequent agreements and subsequent practice that establish the agreement of the parties regarding the interpretation of a treaty are not necessarily legally binding' [footnotes omitted – AK]. This line of reasoning is quite important because the ILC considers the effect of agreements and interpretative practice as a function of the expression 'be taken into account'. In the Commission's view, this would imply both non-binding and binding agreements. It may cause also some controversies as regards the structure of the Article 31 VCLT. Cf. Ch.J. Tams, S.W. Schill, R. Hofmann, *International Investment Law and the Global Financial Architecture*, Edward Elgar Publishing, Cheltenham, Northampton 2017, pp. 71-72; G. Nolte, *Subsequent Agreements and Subsequent Practice of States Outside of Judicial or Quasi-judicial Proceedings*, [in:] G. Nolte (ed.), *op.cit.*, p. 375 ('non-binding' but with 'a certain legally relevant effect').

organization does not constitute such a conference. The ILC proposal rightly emphasizes that the nature of the decisions taken at a conference of the States parties to the treaty depends primarily on the provisions of the agreement itself and the relevant procedural rules. Such decisions may, expressly or implicitly, cover subsequent agreements within the meaning of Article 31(3)(a) Vienna Convention or initiate a subsequent practice within the meaning of Article 31(3)(b) or Article 32 Vienna Convention. The ILC reiterates that such agreements and practice shall be considered part of the general rule of interpretation (Article 31(3) Vienna Convention) provided that they express the relevant agreement between the parties to the treaty on its interpretation. The project clearly states that the form of the decision containing an interpretation agreement or practice is not fixed (unformalized), and may come in the form of consensus. Of course, the treaty can clearly define the way in which the conference of States parties will take decisions. The draft only states that from the point of view of Article 31(3) Vienna Convention this form is irrelevant.

The importance of Conclusion 12 cannot be overestimated. It concerns the interpretation of the treaties that constitute international organizations. Given the role played by some international organizations in contemporary international relations, the practical dimension of this conclusion is significant. The background to the considerations on the role of subsequent agreements and practice in the interpretation of treaties constituting international organizations is the rule provided for in Article 5 Vienna Convention. The project repeats the conditions referred to therein. Thus, when assessing the impact of subsequent agreements and practice on the interpretation of the treaty establishing a given international organization, the relevant rules of the international organization shall apply first. Of course, to the extent such rules have emerged in the practice of an international organization, either at the treaty level or in the sphere of international custom. In the absence of such rules, the rules of interpretation provided for in the Vienna Convention should be applied. The project confirms that in such circumstances subsequent agreements and practice within the meaning of Article 31(3) Vienna Convention constitute the means of interpretation of treaties forming international organizations. In the case of a practice falling within the scope of Article 32 Vienna Convention, the Commission, in accordance with the previous characteristics of such practice, states that it can perform the role of a means of interpretation on a conditional basis. In the judgement of the ILC, the subjective source of subsequent agreements and practices within the meaning of Articles 31 and 32 Vienna Convention is the practice of

organizing the application of its founding treaties. It seems that with consideration to the primary character of States as parties to the treaty establishing an international organization, agreements and practice developed outside the formal representation of States parties in the bodies of a given organization are also capable of influencing the process of interpretation of its founding treaty. Thus, a session of the plenary body of a given organization bringing together all the States parties and the decisions made there may influence the interpretation of the founding treaty as an act of the organization (its body), but also as a forum for direct activity of the States parties to the founding treaty.

Of course, the project considers not only the subsequent agreements and practice that can be linked to the founding States parties as relevant to the interpretation of the founding treaty of an international organization, but also the practice of the organization as such in applying the founding treaty. However, this is assuming that such practice can be accounted for within the framework of Articles 31 or 32 Vienna Convention. This may involve actions taken by bodies that are not composed of representatives of the member states. The ILC states that the practice of the organization itself does not constitute a subsequent practice of the parties as stipulated in Article 31(3)(b) Vienna Convention.[18]

The project closes with Conclusion 13. It concerns expert bodies created on the basis of international agreements and the impact of their activities on the process of interpretation. Again, the ILC logically emphasizes the primacy

[18] ILC's position on the organization's practice is not entirely clear. On the one hand, this is not the practice of the Member States, but on the other hand, again under certain conditions, it may be an element taken into account when interpreting the constituent treaty using articles 31 and 32 VCLT. ILC's commentary to the Draft, p. 103, point 34: 'It is clear, however, that the practice of an international organization is not a subsequent practice of the parties themselves under article 31, paragraph 3 (b).' *Ibidem*, 102-103, point 32: 'It is largely agreed, however, that the practice of an international organization, as such, will often also be relevant and thus may contribute to the interpretation of that instrument when applying articles 31 and 32' [footnotes omitted – A.K.]. *Ibidem*, point 34: The possible relevance of an international organization's 'own practice' can thus be derived from articles 31 and 32 of the 1969 Vienna Convention. Those rules permit, in particular, taking into account practice of an organization itself, including by one or more of its organs, as being relevant for the determination of the function of the international organization concerned' [footnotes omitted – A.K.]. *Ibidem*, pp. 103-104, point 35: 'Such elements may thereby also contribute to identifying whether, and if so how, the meaning of a provision of a constituent instrument of an international organization is capable of evolving over time' [footnotes omitted – A.K.].

of the principles established in the treaties themselves. In their absence, the draft declares that statements made by such bodies, consisting of experts acting on their own behalf and not constituting bodies of an international organization, may initiate or refer to a subsequent agreement or practice of the parties within the meaning of Articles 31 or 32 Vienna Convention. However, unlike Conclusion 10, the presumption of consent of a State party to evoke the effect of a party's subsequent practice within the meaning of Article 31(3)(b) Vienna Convention by acquiescence to the position of the body in question shall not apply to statements made by an expert body.

According to Lord McNair, there is no issue that causes greater trepidation for an internationalist researcher than that of treaty interpretation.[19] There is also the dilemma of whether interpretation in its essence reflects more the assumptions of art or science.[20] From this perspective, any undertaking of the problem of treaty interpretation should provoke a moment of reflection and intellectual curiosity. The theoretical and practical value of such proposals and the considerations they contain is difficult to question. Especially when the presented approach is the result of thorough research, is of a multilayered nature and consciously constitutes an element of a broader whole. The International Law Commission, in its final outcome on subsequent agreements and practice in relation to the interpretation of treaties, has obtained such a harmonized picture. This is the product of several factors. First, the proposals are of rich normative value. Their shape facilitates the potential defense of this normativity in the event of a dispute. Secondly, the draft skillfully combines the themes of *lex generalis* and *lex specialis*, situating deliberations in the correct systemic context, thus making the final result of the effort realistic. The notion of acquiescence, the unformalized nature of international law or the objectification of particular institutions of international law can be cited here as an example. As a consequence, thirdly, the ILC's view of subsequent agreements and practice as essential elements of the treaty interpretation process is flexible and multidimensional.

Therefore, when combining the presented strands of thought, it is important to stress the importance of the conclusions and accompanying comments

[19] Lord McNair, *The Law of Treaties*, OUP, Oxford 1961, p. 364.

[20] Cf. U. Linderfalk, *Is Treaty Interpretation an Art or a Science? International Law and Rational Decision Making*, 'European Journal of International Law' 2015, vol. 26, pp. 188-189.

formulated in the project from the perspective of both the law of treaties as a whole and its significant part comprising the issue of treaty interpretation.

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