

# **The international law gaze: subsequent agreements and subsequent practice in the interpretation of international treaties**

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The International Law Commission (ILC) recently examined in great detail the use of subsequent agreements and subsequent practice in the interpretation of international treaties. (*70th Session – Subsequent agreements and subsequent practice in relation to the interpretation of treaties* [2018]). Such use is often carried out by parties to treaties and by international courts and tribunals when settling disputes. Private actors and government officials should be aware of the ILC's conclusions on this important topic. The report constitutes a valuable tool.

The ILC's work is related to the rules of interpretation provided for in arts 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT). Article 31, titled "General rule of interpretation", provides:

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. ...
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. ...

Article 32 establishes under the heading, "Supplementary means of interpretation", that:

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.

The use of art 31 is mandatory for international courts when interpreting treaties, while the use of art 32 is discretionary.

Readers should bear in mind that international agreements often, not always, lack the precision that domestic legislation or regulation may have. What is called "strategic ambiguity" is a common feature in the negotiations of the text of treaties. Overcoming such ambiguity is one of the reasons why the interpretative process of treaties is of particular importance.

The ILC offered a set of conclusions with commentaries. They are based on the jurisprudence of the International Court of Justice (ICJ) and other international tribunals, such as the Appellate Body of the World Trade Organization (WTO), the European Court of Human Rights (ECHR), the Inter-American Court of Human Rights, the International Tribunal for the Law of the Sea, and awards of investor/State arbitration tribunals. The ILC also performed a detailed review of the scholarly literature in several languages and assessed subsequent agreements and practices of States outside judicial or quasi/judicial organs. Finally, governments had the opportunity to make comments on previous drafts circulated by the ILC. The work is therefore comprehensive and will likely be quite influential and useful. It presents with intellectual rigour all of the nuances of the use of subsequent agreements and subsequent practices within the interpretation process. As usual with the ILC's reports, the commentaries are meant to clarify the scope and extent of the conclusions.

Before starting it is important to mention that the ILC is a body created by the United Nations General Assembly. Its role is to assist the Assembly in its task of initiating "studies and make recommendations for the purpose of ... encouraging the progressive development of international law and its codification", as mandated by art 13(1)(a) of the Charter of the United Nations. The ILC has thirty-four members, who represent all regions of the world and are elected by the General Assembly. (A more detailed discussion of the work of the ILC in recent decades, its challenges and limitations, and its changing relation with the General Assembly has already been made: Don McRae "The Work of the International Law Commission, 2007 – 2011: Progress and Prospects" (2012) 106 *American Journal of International Law* 322).

## **CONCLUSION 2: CUSTOMARY LAW AND INTERPRETATION AS A SINGLE COMBINED OPERATION.**

Articles 31 and 32 have repeatedly been regarded as customary international rules by international courts and tribunals. The ILC confirms this nature, which means that the two provisions can be used to interpret treaties which entered into force before the VCLT did it in 1980.

The ILC carefully distinguishes between subsequent agreements that are made regarding the interpretation or application of treaties from those which do not have such purposes. Art 31 refers to the former not to the latter.

The ILC also makes it clear that there might be some subsequent practice in the application of a treaty that does not meet the requirements of art 31. This is the case when the practice is carried out by one or several parties only, and there is no evidence of acquiescence by the others, as will be seen in due course. Such practice still can be used but as a supplementary means of interpretation under art 32.

The ILC observes in this conclusion that interpreting a treaty "consists of a single combined operation, which places appropriate emphasis on the various means of interpretation indicated, respectively, in articles 31 and 32" (at 17). Consequently, in principle the interpretation of a treaty provision cannot be based only on a subsequent agreement or practice. Nor do subsequent agreements and subsequent practice have primacy in the interpretative process.

### **CONCLUSION 3: AUTHENTIC MEANS OF INTERPRETATION**

Subsequent agreements and subsequent practice under art 31(3)(a) and (b) of the VCLT, says the ILC, “being objective evidence of the understanding of the parties as to the meaning of the treaty, are authentic means of interpretation in the application of (art 31)” (at 23). In its commentary, the ILC expresses the extent of this conclusion.

The fact that these subsequent agreements and subsequent practice are authentic means of interpretation does not imply that they are necessarily conclusive regarding the content of the provision being interpreted. This is to say that they are not necessarily binding. Interpreters will, as art 31 indicates, take into account these subsequent agreements and practice along with the other means of interpretation. The words “take into account” are central. They express that subsequent agreements and subsequent practice are two elements among other means of interpretation, such as text, context, object and purpose, and other general rules that must be used as part of the single combined operation already mentioned.

However, the ILC illustrates that an exception may exist and parties might decide that a subsequent agreement on the interpretation of a provision is binding and conclusive. An example, highlighted by the ILC, is art 1131(2) of the North American Free Trade Agreement (NAFTA): “[a]n interpretation of the (intergovernmental) Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section” (at 25).

### **CONCLUSION 4: DEFINITIONS AND DISTINCTIONS**

The ILC defines the notions of subsequent agreements and subsequent practice under art 31 and identifies the distinctions between them. Art 31 includes three types: (i) subsequent agreements regarding interpretation of treaties (art 31(3)(a)); (ii) subsequent agreements regarding application of the treaty (art 31(3)(a)); and (iii) subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation (art 31(3)(b)).

There are several elements to consider. First, art 31 refers to subsequent agreements, not subsequent treaties. While the VCLT mandates that the latter be in written form (art 2.1(a)), there is not special formality for an agreement or practice to exist under art 31. Second, the subsequent agreements under any of the two forms provided for in art 31(3)(a) must be between all the parties to the treaty. As to subsequent practice in the application of the treaty under art 31(3)(b), it has to reflect the understanding of all of the parties even if one or more of them do not perform the practice, but have acquiesced to it. Third, although sometimes the ICJ and the Appellate Body of the World Trade Organization have not made a clear distinction between subsequent agreements and subsequent practice, the ILC has. According to it:

The difference between the two concepts ... lies in the fact that a ‘subsequent agreement between the parties’ *ipso facto* has the effect of constituting an authentic means of interpretation of the treaty, whereas a ‘subsequent’ practice only has this effect if its different elements, taken together, show ‘the common understanding of the parties as to the meaning of the terms’” (at 30).

Fourth, subsequent agreements under art 31 are those “regarding the interpretation of the treaty or the application of its provisions”. Thus, a party relying on a subsequent agreement must provide evidence of such intention, which does not need to be the only one of the agreement. One way is by proving a reference in the subsequent agreement to the treaty in question. Absence of such reference may lead to the conclusion that the subsequent agreement is not related to the interpretation of the given treaty, as the ICJ decided in the *Jan Mayen* case between Denmark and Norway. (*Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway) (Merits)* [1993] ICJ Rep at 28)

The ILC also deals with subsequent practice that does not meet the requirements of art 31. The ILC states that the practice can still be used under art 32 as a supplementary means of interpretation. This subsequent practice is larger in scope than that under art 31. In the ILC’s words: “any practice in the application of the treaty that may provide indications as to how the treaty is to be interpreted may be a relevant supplementary means of interpretation under article 32” (at 33). The ILC’s comment is important since at least the WTO Appellate Body has sometimes embraced a narrow criterion and disregarded the possibility of relying on subsequent practice if it does not meet the requirements of art 31. The ILC’s expansive approach draws on decisions of some tribunals and international bodies that have not followed the Appellate Body’s position, such as the ECHR, the Inter-American Court of Human Rights and the Human Rights Committee. The ILC, though, emphasises that subsequent agreements under art 31 have a greater interpretative value than the general subsequent agreements under art 32. Basically, an inference that can be made is that a conclusion on the content of a provision based on subsequent agreements under art 32 cannot override one rooted in subsequent agreements under art 31.

## **CONCLUSION 5: CONDUCT AS SUBSEQUENT PRACTICE**

Subsequent practice under art 31, as authentic means of interpretation, and under art 32, as a supplementary means, is the object of the fifth conclusion. According to the ILC, subsequent practice includes any conduct by a party in the application of the given treaty “whether in exercise of its executive, legislative, judicial or other functions” (at 37). Conduct can be expressed in actions or omissions. The exercise of public functions is what defines State practice. Thus, conduct by private actors with delegated public authority may also constitute conduct in the application of a treaty.

The ILC reaffirms that high-ranking government officials may perform conduct that qualifies as subsequent practice of their State in the application of a treaty. But they are not the only ones. Conduct carried out by lower authorities can also be so categorised, as has been recognised by the ICJ and by international arbitration tribunals. However, the ILC qualifies the role of lower authorities as subsequent practice in the application of a treaty: (i) their practice has to be unequivocal; and (ii) the Government can be expected to be aware of the practice and not have contradicted it within a reasonable time. As a result, in the event of conflict between the practices of higher and lower authorities the former will be, in principle, the one receiving a higher degree of attention as subsequent practice within the interpretation process.

The fifth conclusion has a second paragraph titled “conduct not constituting subsequent practice”. It reads: “[o]ther conduct, including by non-State actors, does not constitute subsequent practice under articles 31 and 32. Such conduct may, however, be relevant when assessing the subsequent practice of parties to a treaty” (at 37). This paragraph deals, among others, with non-State actors and reports of

international organisations that provide accounts of State practice. Highly influential examples of the first is, among others, the International Committee of the Red Cross, which provides interpretative guidance on the 1949 Geneva Conventions, and the Landmine and Cluster Munition Monitor, which is a de facto monitoring body for the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction. Although the ILC recognises the contribution these actors usually make, it also calls for a critical review of their reports since such actors may also have their own goals, which may be different from those of State parties to the treaty being interpreted.

Examples of reports of international organisations related to State practice that the ILC highlights in support of its conclusion are the *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* of the Office of the United Nations High Commissioner for Refugees and the so-called 1540 Matrix, which deals with the implementation of the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological and Toxin Weapons and on their Destruction.

The ILC finally states that its fifth conclusion does not refer to States' social practice as "other conduct" for the purpose of arts 31 and 32. The ILC mentions the position taken by the ECHR on "increased social acceptance" and "major social changes" in States party to the European Convention on Human Rights. New social realities regarding for instance homosexuality and transsexuality are part of the assessment of subsequent practice when the European Court interprets the applicable provisions. The ILC mentions that the European Court accepts social practice when it is linked to the practice of State parties. The ILC embraces this approach: mere social practice is not enough to constitute subsequent practice in the application of a treaty under arts 31 and 32. Some voices have criticised the ILC for not granting social practice, on its own, a more prominent role in the development of international rules. They will likely extend such criticism to this conclusion.

## **CONCLUSION 6: IDENTIFICATION OF SUBSEQUENT AGREEMENTS AND SUBSEQUENT PRACTICE**

There might be subsequent agreements and subsequent practice of many kinds. Only those that meet the requirements of art 31 will be of mandatory use as a means of interpretation of the applicable treaty. Identifying them, and proving them, is therefore fundamental for the party invoking a given subsequent agreement or subsequent practice in support of its interpretation.

Subsequent agreements and subsequent practice in art 31 must be regarding the interpretation of the treaty or the application of its provisions. The ILC carefully explores further the distinction between "interpretation" and "application". The former "is the process by which the meaning of a treaty, including of one or more of its provisions, is clarified" (at 43). The latter "encompasses conduct by which the rights under a treaty are exercised or its obligations are complied with, in full or in part" (at 43). Thus, "interpretation" is a mental process, while "application" focuses on conduct, acts or omissions. Moreover, the ILC highlights the interaction between the two concepts: (i) not every interpretation implies an application of a treaty; (ii) but an application almost always includes an element of interpretation of the given treaty.

A subsequent agreement on the interpretation of a treaty is easier to identify than subsequent agreement regarding the application of its provisions. One can expect the parties to make their intention to interpret in the former more or less explicit. Proving that there is a subsequent agreement regarding the application of treaty provisions demands more. The ILC offers some insight.

Interpretation by application can be implied in “every measure taken on the basis of the interpreted treaty” (at 44). The ILC recognises some limits of subsequent agreements by application based on the case law of the ICJ and the Iran-United States Claims Tribunal. First, the application of the treaty does not necessarily mean that it is the only one legally possible. Second, subsequent conduct must be motivated by a treaty obligation to qualify under art 31. Thus, voluntary practice under a treaty falls outside the scope of the said provision.

The ILC makes an abstract proposition to identify subsequent agreements and subsequent practice: “[t]he general rule seems to be that the more specifically an agreement or a practice is related to a treaty the more interpretative weight it can acquire under article 31, paragraph 3 (a) and (b) (at 45)”. In addition, such identification requires a careful factual and legal assessment.

The ILC also recognises that subsequent agreements and subsequent practice can take a variety of forms: actions and omissions; public acts or internal legislative, executive and judicial acts. Moreover, subsequent practice does not need to be joint conduct. Parallel conduct by the parties may be enough, although it has to constitute a sufficient common understanding as to the interpretation of the treaty.

## **CONCLUSION 7: POSSIBLE EFFECTS OF SUBSEQUENT AGREEMENTS AND SUBSEQUENT PRACTICE IN INTERPRETATION**

The ILC notes in this conclusion that the use of subsequent agreements and practice is one means of interpretation. With the exception of binding subsequent agreements, the interpretation will usually start with the text, and move on with an assessment of the applicable provision in light of its context and the object and purpose of the treaty. Then subsequent agreements and practice might enter into play. The ILC highlights the effects that they might have at this stage of the process.

The first effect subsequent agreements and subsequent practice under art 31 can produce is to help interpreters identify the ordinary meaning of a particular term. The term might have different possible meanings with broader or narrow implications. An international court or tribunal might have chosen one, broad or narrow, and the use of subsequent agreements and subsequent practice under art 31 may confirm the choice made. Second, art 31 sets forth that the object and purpose of the treaty constitutes one of the means of interpretation of treaties. It is not unusual to find in treaties a variety of objects and purposes. Also there might be general object and purposes of a treaty but certain provisions may have also specific object and purposes, an issue the WTO Appellate Body has dealt with several times. The

use of subsequent agreements and subsequent practice can help courts and tribunals clarify the object and purpose that is more relevant to the precept being interpreted.

Another effect assessed by the ILC is the possibility of modification or amendment to treaties through subsequent agreements or subsequent practice under art 31. The amendment of treaties is addressed in art 39 of the VCLT: “[a] treaty may be amended by agreement between the parties” and the ICJ states in *Pulp Mills on the River Uruguay* that an agreement under art 39 does not need to have the same formalities as the amended treaty. The ILC then distinguishes between subsequent agreements that amend treaties and subsequent agreement that interpret treaties, and recognises that it might be sometimes difficult to draw a difference between an interpretation and an amendment. However, the ILC admits that international courts have, rightly, granted States wide power to interpret treaties. The ILC, though, does not delve into the issue of subsequent agreements clothed as interpretation but introducing amendments without following the procedures contemplated in the given treaty. Sometimes a debate of this nature might be just academic, sometimes it might not, as the NAFTA award in respect of damages in *Pope & Talbot Inc v Government of Canada* illustrates. There the tribunal was highly critical of the first interpretation made by the NAFTA Free Trade Commission under the already mentioned art 1131(2). The tribunal regarded the declaration as an amendment and not just an interpretation.

The ILC’s analysis regarding the possibility of amendment of treaties through subsequent practice is much more detailed. Given the fragmentation of international law today, it is very difficult to arrive at a general application. The ILC, though, finds that there is a certain reluctance by States and courts to accept this possibility. But the ILC also highlights that the ICJ and the ECHR have virtually accepted that treaties can be amended through subsequent practice, although the Appellate Body has explicitly rejected this possibility. In light of these realities, the ILC indicates that the possibility depends on whether or not the treaty in question provides or prohibits the possibility. If nothing is said, then the possibility should not be presumed.

## **CONCLUSION 8: INTERPRETATION OF TREATY TERMS AS CAPABLE OF EVOLVING OVER TIME**

A challenging issue sometimes in the interpretation of treaties is whether their terms should be interpreted according to the meaning of the words at the time of the conclusion of the treaty in question (static interpretation), or whether the meaning should be the one the text has at the time of its application (dynamic interpretation).

The ICJ uses both methods depending on the treaty in question; the WTO Appellate Body is more inclined to the static approach although sometimes it uses dynamic interpretations; and the ECHR is definitely more inclined to the dynamic interpretation of the European Convention.

The ILC concludes that it is not possible to answer this question in favour of either option once and for all. Instead, it suggests that subsequent agreements and subsequent practice can be useful to determine whether the term at issue should be interpreted in one way or the other.

## **CONCLUSION 9: WEIGHT OF SUBSEQUENT AGREEMENTS AND SUBSEQUENT PRACTICE AS A MEANS OF INTERPRETATION**

The ILC indicates the elements that give greater weight to subsequent agreements and subsequent practice within the interpretation process under arts 31 and 32. These elements determine the weight within the interpretation process not the existence of the subsequent agreement and practice in question under arts 31 or 32. This is a distinction that the ILC highlights.

Although they are not the only ones, clarity and specificity in relation to the treaty at issue are two fundamental factors of subsequent agreements under art 31. The more they are present in the subsequent agreement being used the more influence the agreement has within the interpretation process of the applicable treaty provision.

These two criteria come in different degrees and the facts of each case will determine the weight to be attached to the subsequent agreement at issue. The ILC could have expanded much more on these criteria in its commentary. Nonetheless the conceptualisation of these criteria is still a valuable contribution to the interpretation process.

Turning to any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation, under art 31.3(b), the ILC states that repetition is an important criterion. The ILC uses the expression “whether and how” the practice is repeated. Thus, much more than a mechanical or unmindful repetition is required. The ILC finds two standards as to repetition. One supported by the WTO Appellate Body, which is strict and demands a concordant, common and consistent subsequent practice. A second, more flexible, is applied by the ICJ. The ILC prefers the latter for there is no evidence that the Appellate Body’s approach is a well-established minimum threshold for a subsequent practice to be used under art 31.3(b).

Also important is the fact that non-implementation of a subsequent agreement is an indication of low weight as a means of interpretation under art 31(3)(a).

Another criteria identified by the ILC is consistency: “whether and how far conduct exceptionally deviates from the otherwise established pattern of practice” (at 74). Thus, the subsequent practice does not need to be uniform all the time for receiving significant weight: exceptional deviations are tolerated.

Repetition, clarity and specificity are criteria equally applicable to determine the weight to be given to subsequent practice as a means of interpretation under art 32.

## **CONCLUSION 10: AGREEMENT OF THE PARTIES REGARDING THE INTERPRETATION OF A TREATY**

The ILC states: “1. An agreement under article 31, paragraph 3 (a) and (b), requires a common understanding regarding the interpretation of a treaty which the parties are aware of and accept”. The content of the concept of a “common understanding” is then critical. In this sense, common understanding means the agreement of all of the parties concerning the interpretation of the treaty in question, and a mutual awareness of such understanding. The ILC explores the concept “common understanding” further.

Conflicting interpretations between several parties prevent the existence of an agreement, but only to the extent of the conflict. Moreover, the existence of equivocal conduct will sometimes preclude the existence of an agreement, but interpreters should go deeper in the analysis and see if the treaty provision accords discretion to the parties. If this is the case, what appears as equivocal conduct is not a conflict of perspectives on the content of the given provision but different exercises of the discretion the precept under interpretation grants to parties. An important comment that expands the availability of subsequent agreement is that temporary differences of opinion do not mean that the difference is permanent and that no agreement exists. Basically, what the ILC suggests interpreters to do is to take a dynamic perspective when assessing the evidence regarding the parties’ conduct and see if it evolves in time.

Conclusion 10 has a second, quite important paragraph, dealing with the role of silence or inaction. The ILC states:

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

According to this second paragraph, subsequent practice under art 31(3)(b) can exist even if not all the parties have carried out the conduct. The topic poses risks for treaties involving parties with significant asymmetry of power. The ILC rests its conclusion in the case law of the ICJ, the WTO Appellate Body, the International Tribunal for the Law of the Sea, and arbitral awards. From the case law of these courts the ILC also infers some of the limits of silence. First, acceptance of practice through silence or inaction by other parties is not to be easily established, an important comment for small States. Second, failure to react to parliamentary proceedings or court decisions does not mean acquiescence for the purpose of a subsequent practice under art 31(2)(b).

The ILC ends its comment on this conclusion with a reflection on the issue of disagreements after a subsequent agreement on interpretation under art 31. The ILC states that the legitimate expectations of the parties created by the subsequent agreement should be protected, so the new disagreement will not replace the first subsequent agreement. In the event of a common understanding based on practice, the ILC is of the view that the rejection by one party undermines the weight to be given to the subsequent practice, but only after the beginning of the disagreement.

## **IN A NUTSHELL**

The ILC has issued a very important report on subsequent agreements and subsequent practice under arts 31 and 32 of the VCLT. It should receive significant attention by government officials, practitioners, and domestic and international courts and tribunals. The ILC has distilled the several dimensions that constitute the substance of subsequent agreement and subsequent practice, and it has done so avoiding hard rules that could create controversy and resistance to the conclusions of the ILC.

The topic itself is highly technical, with some exceptions such as the role of silence and social practice. It does not have the same political implications as the ILC's work, for instance, on the identification of customary international law. In this domain, the ILC has recently been criticised for not fully taking into consideration the state practice and interests of several regions of the world and their contribution to the formation of customary norms. (BS Chimini "Customary International Law: A Third World Perspective" (2018) 112 *American Journal of International Law* 1 at 23).

The interpretation of treaties is more an art than a science no matter how deep and refined the work of the ILC is on the topic. The quality of interpretations depends to a significant extent on the intellectual skills of the interpreter and the words of a character in Murakami's *Colorless Tsukuru Tazaki* entirely apply:

“The most important part, of course, is all in here’. Aka tapped his temple.

‘Like with a chef. The most important critical ingredient isn’t in the recipe.’”

