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# The Significance of Subsequent Agreements and Practice of the 1969 Vienna Convention on the Law of Treaties in the Development of International Law: The Analysis of the Notable Navigational and Related Rights and Whaling Decisions

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**Abstract**
The Vienna Convention on the Law of Treaties has been applied by international legal scholars, international courts and tribunals, and states since 1969, especially an application of treaty interpretation under Article 31 to 33 of the Convention. The current trend aims at applying subsequent agreements and subsequent practice in interpretation proceedings. However, this might lead to a broad interpretation, resulting in the inconsistency of parties' intention. Thus, there should be a scope or guideline for international courts and tribunals to apply and limit the treaty interpretation. This essay focuses on a better understanding of how international courts and tribunals use subsequent agreements and practice in their cases, studying and comparing the notable Navigational and Related Rights and Whaling decisions from the International Court of Justice to analyse the legal status of judicial views applied in subsequent agreements and in subsequent practice. The essay also explores how far the interpretation of courts and tribunals can be extended by focusing on the intentions of the parties and the object and purpose, the principle of restrictiveness and intertemporal law.
**Keywords:** treaty interpretation, subsequent agreements, subsequent practice, 1969 Vienna Convention on the Law of Treaties

## 1. Introduction

One key feature of international law is its flexibility in covering all past, current and even future circumstances that are consistent with parties' intentions.[1] This feature refers to subsequent agreements and practice under Article 31, paragraph 3 (a) and (b) of the 1969 Vienna Convention on the Law of Treaties ('VCLT'). Regarding treaty interpretation, subsequent agreements and practice have contributed to the development of international law for almost 50 years and have been highlighted in a number of decisions from international courts and tribunals.

## 2. Subsequent Agreements and Practice as Elements to Interpret Treaties under the Vienna Convention

Before analysing how subsequent agreements and practice are applied to international cases, it is necessary to present an overview of treaty interpretation, and particularly elements of these two concepts under the VCLT. This section finally introduces gaps in the application of these elements in practice by focusing on the historical development of the work of the International Law Commission ('ILC').

### *2.1 Treaty Interpretation: A Brief Overview*

On 23 May 1969, the Parties to the United Nations ('UN') agreed to set standards for the most significant rules regulating international treaties called 'the VCLT'.[2] This Convention highlights the significance of treaties that are a source of international law and serve as instruments in international negotiations. Regarding the concept of treaty interpretation, this is clearly stated under three specific rules: the general rule of interpretation (Article 31), supplementary means of interpretation (Article 32) and the interpretation of treaties authenticated in two or more languages (Article 33).

The basic concept of interpretation can be found in paragraph 1 of Article 31: good faith, the ordinary meaning of terms, context and object and purpose. These simple rules were vaguely drafted and resulted in different conclusions.[3] Judgments from the International Court of Justice ('ICJ') may illustrate how the Court interprets this rule. For example, in the *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)*, the ICJ referred to 'the natural and ordinary meaning' of the text of Article 31 and reaffirmed the *South West Africa* judgment that this provision is not a complete rule. When a meaning is unsuitable for its character, object and

[1] ILC, 'Report of the International Law Commission on the Work of its 60th session' (5 May-6 June and 7 July-8 August 2008) UN Doc A/63/10, Annex I.
[2] Vienna Convention on the law of treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.
[3] Jean-Marc Sorel, 'Article 31 Convention of 1969' in Corten and Klein (ed) *The Vienna Conventions on the Law of Treaties: A Commentary* (Oxford University Press 2011) 818.

 

purpose or context, such meaning cannot be relied upon.[1] The *Territorial Dispute* case restated the text from paragraph 1 and ruled that: 'Interpretation must be based above all upon the text of the treaty. As a supplementary measure recourse may be had to means of interpretation …'[2] It can be implied from these two cases that measures for applying the Vienna rules differ; while in the first case the Court relies on the natural meaning, which complies with the treaty's spirit, in the second case, the Court focuses on the textual approach. The second and third paragraphs illustrate the internal (such as the treaty's preamble and annexes) and external (such as subsequent agreements and practices and relevant rules of international law) contexts, respectively. These paragraphs will be discussed later in the following section. The last paragraph relates to a special meaning to which the parties agreed.

Secondly, Article 32 is applied within a limited scope: validating the meaning and considering the ambiguous or obscure meaning or an absurd result derived from Article 31, the supplementary means, namely preparatory work, circumstances of the treaty's conclusion or other means and then applying to clarify the true meaning. Finally, Article 33 is only exercised in a situation where two or more authenticated languages are conducted employed in one treaty.

### *2.2 The Concept of Subsequent Agreements and Practice*

Regarding the third paragraph of Article 31, these elements 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 provision;
(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; …

Regarding the definition of the subsequent agreement, the term used is an 'agreement' rather than a 'treaty'. This leads to a broader interpretation, but this does not mean that this term is less formal than the term 'treaty'. The Commission affirms this point by stating that the following: 'While every treaty is an agreement, not every agreement is a treaty.'[3] This means that there is no requirement regardless of whether the subsequent agreement is considered a binding instrument. The ICJ in the *Kasikili/Sedudu Island* case directly described the character of the subsequent agreement by referring to the ILC's commentary on Article 27 of the draft Convention, stating: '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.'[4] This definition shares the same concept found in the working draft conclusion context provided by the ILC report chaired by Nolte in the sixty-eighth session.[5] One important point derived from this definition is its character as an authentic means of interpretation, which the Commission refers to as different forms of factual (objective evidence) and legal (common understanding of the parties) elements.[6]

Unlike the subsequent agreement, Sinclair first defined subsequent practice as 'a sequence of facts or acts and cannot in general be established by one isolated fact or act or even by several individual applications.'[7] It can be seen that this concept is broader than the subsequent agreement, because there is no requirement regarding written form or even a legally binding obligation. In *Namibia's Advisory Opinion*, the Court denied an argument from South Africa that Security Council Resolution 284 was null because its permanent members abstained in the vote.[8] Another difference between subsequent agreement and practice is that the former constitutes an authentic means of interpretation, while the latter will be taken into effect if its diverse factors illustrate the common understanding of the parties of the terms.[9] This implies that the value of subsequent practice is different depending upon the consistency and concordance of all parties to a treaty. From this point of view, the supportive reasoning might be derived from the difficulty in applying this rule properly and effectively. In other words, if every single practice leads to interpretation, there may be complexity in defining terms that are either too broad or too narrow.

### *2.3 The Work of the International Law Commission*

The work on subsequent agreements and practice was reintroduced several times under the Commission.[10] In

[1] *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)* (Judgment) [1991] ICJ Rep 53, para 48.
[2] *Case concerning the Territorial Dispute (Libyan Arab Jamahiriya v Chad)* (Judgment) [1994] ICJ Rep 6, para 41.
[3] ILC, 'Report of the ILC on the Work of its 68th session' (2 May-10 June and 4 July-12 August 2016) UN Doc A/71/10 [139].
[4] *Case concerning Kasikili/Sedudu Island (Botswana v Namibia)* (Judgment) [1999] ICJ Rep 1045, para 48.
[5] ILC (n 6) 121.
[6] ibid 136.
[7] Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester University Press 1984) 137.
[8] *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] ICJ Rep 16 [22].
[9] ILC, 'Report of the ILC on the Work of its 17th and 18th session' (15 November-20 December 1965 and 3-18 January 1966) UN Doc A/CN4/SER A/1966/Add 1 [222].
[10] In sixty-fourth session (2012), the Commission decided that: 'The Commission decided to change, in 2013, the format of

 

2008, the Commission at its sixtieth session included 'Treaties over time' as one of its work and also formed a Study Group on this topic, which was chaired by Nolte in the following session. During operations between 2010-2012, three reports addressed the relevant ICJ and tribunal cases and subsequent agreements and practice under special regimes and outside judicial and quasi-judicial proceedings.[1]

However, at the 3136th meeting, the Commission agreed to modify the format of the work proposed by the Study Group, changing it to the topic: 'Subsequent agreements and subsequent practice in relation to the interpretation of treaties'. As chairman, Nolte provided three major reasons for this modification: (1) the Commission would be better able to concentrate on the conclusion of the work, which was accomplished in three reports produced by the Study Group and synthesised into one specific report to be developed through the debate of States; (2) the Commission would be able to focus on the specific scope of the topic and (3) the synthesised report would include specific conclusions and guidelines contributing to the concept of subsequent agreements and practice.[2] This implies that there might be some ongoing gaps that the Commission intends to narrow down.

Such gaps are illustrated in preliminary conclusions by Nolte posed as the following six questions: (1) What is the position of subsequent practice (as a position regarding treaty interpretation or only an implicit position in practice)? (2) Should subsequent practice be specific as an interpretative instrument for judicial bodies? (3) Can silence by a State be constructed to qualify as subsequent practice? (4) In some adjudicatory bodies, such as the World Trade Organization or the European Court of Human Rights, non-uniform practice is referred to as the majority; what is the effect of subsequent contradictory practice? (5) Some tribunals still apply the subsequent agreements and practice as a means of treaty interpretation even if there are formal amendments or interpretative procedures in place, under what circumstances can tribunals apply these elements? (6) Can subsequent agreements and practice modify their own treaty?[3]

Following the establishment of the modification of the topic and the Study Group, four reports were issued by the Special Rapporteur. In the latest report of the Drafting Committee at the sixty-eighth session (2016), the Commission adopted 13 conclusions and commentaries in its first reading. Its texts include basic rules and definitions, general aspects (e.g., identification, possible effects, terms as capable of evolving over time, weight and agreement of the parties) and specific aspects (e.g., decisions adopted within the framework of a Conference of States Parties, constituent instruments of international organisations and pronouncements of expert treaty bodies).[4] This topic, however, is not on the schedule for consideration at the sixty-ninth session (2017).

## 3. Subsequent Agreements and Practice in International Courts and Tribunals: Current Trends

This section describes how international courts and tribunals apply subsequent agreements and practice as elements employed to interpret and modify treaties. The primary cases to be analysed include the *Navigational and Related Rights* and the *Whaling in the Antarctic* cases by the ICJ. Both cases have substantial impact on the concept of subsequent agreements and practice, which can be derived from their judgments, their dissenting and separate opinions, as well as legal opinions from international legal scholars.

### *3.1 Lessons Learned from the Navigational and Related Rights Case*

As previously stated, subsequent agreements and practice are normally used as elements for treaty interpretation. Likewise, the ICJ often applies these elements in its judgments. In the *Navigational and Related Rights* case, Costa Rica initiated an Application instituting proceedings against Nicaragua in 2005, claiming that Nicaragua had violated several provisions under the 1858 Treaty of Limits regarding Costa Rican navigation and the country's passengers on the San Juan River. In its judgment, the ICJ found that Costa Rica had the right of free navigation on the River for commercial activities including tourism and that Nicaragua had violated obligations.

With regard to this judgment, all judges agreed that the definition of '*comercio*' had changed, but there are some residual concerns, which can be seen in the analysis below.

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the work on this topic and its title from "Treaties over time" to "Subsequent agreements and subsequent practice in relation to interpretation of treaties" '. (ILC, 'Report of the ILC on the Work of its 64th session' (7 May-1 June and 2 July-3 August 2012) UN Doc A/67/10, paras 226, 239). See also, ILC, 'Report of the ILC on the Work of its 60th session' (5 May-6 June and 7 July-8 August 2008) UN Doc A/63/10, chap XII; ILC, 'Report of the ILC on the Work of its 61st session' (4 May-5 June and 6 July-7 August 2009) UN Doc A/64/10, chap XII; ILC, 'Report of the ILC on the Work of its 62nd session' (3 May-4 June and 5 July-6 August 2010) UN Doc A/65/10, chap X; ILC, 'Report of the ILC on the Work of its 63rd session' (26 April-3 June and 4 July-12 August 2011) UN Doc A/66/10, chap XI; ILC, 'Report of the ILC on the Work of its 65th session' (6 May-7 June and 8 July-9 August 2013) UN Doc A/68/10, chap IV; ILC, 'Report of the ILC on the Work of its 66th session' (5 May-6 June and 7 July-8 August 2014) UN Doc A/69/10, chap VII; ILC, 'Report of the ILC on the Work of its 67th session' (4 May-5 June and 7 July-7 August 2015) UN Doc A/70/10, chap VIII; ILC, 'Report of the ILC on the Work of its 68th session' (2 May-10 June and 4 July-12 August 2016) UN Doc A/71/10, chap VI; ILC, 'Report of the ILC on the Work of its 70st session' (30 April-1 June and 2 July-10 August 2018) UN Doc A/CN.4/712.

[1] ILC (n 6) 118.

[2] ILC, 'Report of the ILC on the Work of its 64th session' (7 May-1 June and 2 July-3 August 2012) UN Doc A/67/10, paras 236-8.

[3] ibid, para 240.

[4] ILC (n 6) 120-420.

 

(a) *Developing rule of interpretation through time*

The Court accepted that the subsequent practice of the parties could lead to a departure from the original intent as an implicit agreement and it was also possible that the parties, following the conclusion of the treaty, intended to define terms or content capable of evolving for the development of international law.[1] This is the same conclusion proposed by the ICJ in the *Aegean Sea Continental Shelf* case.[2]

In this regard, the ICJ referred to the subsequent practice rule to support its finding that generic terms in a treaty should be carefully used. As the Court stated:

> It is founded on the idea that, where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is 'of continuing duration', the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning.[3]

It then referred to the subsequent practice rule under Article 31, paragraph 3 (*b*) of the VCLT to support its finding that '*comercio*' included the right to use the river for tourism without visas. Seemingly, the parties to the Treaty of Limits may not have intended to incorporate tourism into the scope of '*comercio*'. This implies that the Court prioritised the importance of subsequent practice over the ordinary text to conform with the meaning in the current situation.

(b) *Intention of the parties derived from the object of the treaty*

Paragraph 48 of the judgment stated that the following:

> …A treaty provision which has the purpose of limiting the sovereign powers of a State must be interpreted like any other provision of a treaty, i.e. in accordance with the intentions of its authors as reflected by the text of the treaty and the other relevant factors in terms of interpretation.[4]

Regarding sovereignty, Judge Skotinov expressed his belief that the Treaty of Limits should not be restrictively interpreted and the Court should consider the intention of the parties at the time of the treaty's conclusion as well as the State's sovereignty, which should be strictly interpreted.[5] He believed that both parties had no intention at the time of the conclusion of the Treaty to cover tourism because there was no supporting documentation from any of the parties to construe the term '*comercio*' as having an evolving meaning.[6] Thus, it is the responsibility of the Court to limit the scope of the definition of the term relating to the sovereignty of a State.

In this regard, the Court in its judgment referred to the *Territorial and Maritime Dispute* case,[7] indicating that the object of the treaty was to achieve a permanent settlement between the parties regarding their territorial disputes and this is stated in the treaty itself.[8] That is to say, the Court acknowledged that the current definition of the term did not share the same meaning as the definition dating back to 1958 (at the time of conclusion). However, to achieve a permanent settlement of the living instrument and conform to the object of the Treaty of Limits, the Court believed that the evolving term should be accepted in order to maintain the object of the treaty.

(c) *Silence as the subsequent practice*

Considering silence as part of a State's acceptance, it is possible for the Court to include silence as an element for treaty interpretation under the category of subsequent practice. In this case, Judge Skotnikov put forth an important argument regarding Nicaragua's silence. The Treaty was concluded for more than 100 years, and Costa Rica had been operating a tourism business for more than 10 years, while Nicaragua allowed tourism navigation on the River during this time without protest.[9] Additionally, Judge Sepúlveda-Amor supported Judge Skotnikov's claim that: 'No need for State practice; no need for *opinio juris*, only the lack of protest of Nicaragua to a practice not previously claimed as a right …'[10] It is clear that the abstention of a disputing party can create the subsequent practice which leads to the interpretation of a treaty.

The ILC also reached the same conclusion in the fourth report: 'Silence on the part of one or more parties can constitute acceptance of the subsequent practice when the circumstances call for some reaction.'[11] As the Commission interpreted, the subsequent practice represents conduct by a State that includes acts, omissions and

[1] *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (Judgment) [2009] ICJ Rep 213, para 64.
[2] *Aegean Sea Continental Shelf (Greece v Turkey)* (judgment) [1978] ICJ Rep 3, para 77. In this case, the Court affirmed that: '… the presumption necessarily arises that its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time …'
[3] *Navigational and Related Rights* (n 18), para 66.
[4] ibid, para 48.
[5] *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (Separate Opinion of Judge Skotnikov) [2009] ICJ Rep 213 [283]-[5].
[6] ibid.
[7] *Territorial and Maritime Dispute (Nicaragua v Colombia)* (Preliminary Objections) [2007] ICJ Rep 832, para 89.
[8] *Navigational and Related Rights* (n 18), para 68.
[9] *Navigational and Related Rights* (n 22).
[10] *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (Separate Opinion of Judge Sepúlveda-Amor) [2009] ICJ Rep 213 [278].
[11] ILC (n 6) 123.

 

silence.[1] This is not the first time the Court has accepted the concept of silence. It can also be seen in the *Temple of Preah Vihear* case that the Court believed if Thailand had disagreed with the document (map) provided by Cambodia, Thailand should have protested. This non-action, which spanned many years, led to the effect of the principle *qui tacet consentire videtur si loqui debuisset ac potuisset*, which means that one who keeps silent is held to consent if one can speak.[2] Silence, thus, is a subset of subsequent practice.

(d) *Consistency of practice versus a written agreement*

Judge Skotnikov indicated that following the conclusion of the Treaty of Limits, Nicaragua employed a consistent practice of tourist navigation by Costa Rica. For example, the Ministers of Tourism for both parties concluded the Agreement of Understanding on Tourist Activity in the Border Zone of the San Juan River in 1994.[3] This document aims for cooperation in joint sustainable tourism operations on the River and creates a zone of free transit between these two countries.[4] Even though this Agreement had never been implemented, it could be seen from the attempt that both parties sought to cooperate in their use of the River for tourism activities. This leads to the question of whether concluding an agreement on tourist activities qualifies as a written agreement or a State practice. Gardiner argues that the Court might determine 'the consistent and concordant practice of the parties' as evidence of agreement.[5] In other words, whether the conduct of the disputing parties qualifies as subsequent agreement or practice has never been clarified. This represents a gap in treaty interpretation, because no clarification is provided in the rule. However, deriving clarification from the ILC's fourth report, the subsequent agreement as an element to treaty interpretation requires no legally binding language,[6] so this might be a guideline for the Agreement in this case to qualify as a subsequent agreement.

(e) *Subsequent (interpretative or modifying) agreement*

This point is raised by Gardiner in arguing about the characteristic of subsequent practice. He points out that it is still unclear as to whether the purpose of the subsequent agreement should be considered as an 'interpretative' or 'amending' instrument.[7] This is also true because the subsequent agreement is specified under the section of the interpretation of treaties in the VCLT. In this judgment, however, the Court itself seemed to interpret the treaty in order to modify the term '*comercio*' to cover tourism activities.

To address this specific point, there are at least three possibilities to support the idea that the characteristic of the subsequent agreement should be applied as interpretative instruments. First, such a legal term is specified under the interpretation section, indicating that the drafters might have intended to qualify it as the interpretative instrument. The term related to the subsequent agreement was first introduced by the 1935 Harvard Draft Convention on the Law of Treaties as the 'subsequent conduct of the parties in applying the provisions of the treaty'.[8] This term is also found in the section covering the treaty's interpretation. Second, given that the Court believed the term can evolve following the conclusion of a treaty,[9] this could mean that at the conclusion of the Treaty of Limits between the two countries, they decided to use the term '*comercio*' and Nicaragua did not protest the use of the River for tourism navigation purposes, which may indicate that both parties believed in the concept of flexibly in adapting the term according to future activities related to commerce. If so, this also means that the interpretation of such a term by the Court is, in fact, an interpretation and not a modification. Third, modification is a strong word and is used in a different sense than interpretation. If the Court believes that clarifying the term results in an alteration of its meaning, the Court might not use the subsequent agreement as an instrument. This can be seen in cases that have come before several international tribunals. The Appellate Body of the WTO in the *EC—Bananas III* case argued that the fact that the Panel interpreted the Waiver to modify the European Communities' original Schedule failed to qualify as the characteristic of the subsequent agreement under the VCLT.[10] From this it can be implied that the ICJ has qualified the subsequent agreement as the interpretative instrument.

To conclude, these five points represent a portion of the primary concerns contributing to the development of subsequent agreements and practice derived from the *Navigational and Related Rights* case. First, the Court ruled that to conform with the current situation, the subsequent practice can be used to support the evolving term of the treaty. Second, the intention of the parties can be derived from the object of a treaty, which aims to achieve a permanent settlement. Third, silence is also counted as a practice of a State. Fourth, an unimplemented document can qualify as the subsequent agreement. And fifth, the purpose of the subsequent agreement is to

[1] ibid 142.
[2] *Case concerning the Temple of Preah Vihear (Cambodia v Thailand)* (Merit) [1962] ICJ Rep 3 [23].
[3] *Navigational and Related Rights* (n 22).
[4] *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (Memorial of Costa Rica, Vol 1) [2006], para 3.20.
[5] Richard Gardiner, *Treaty Interpretation* (Oxford University Press 2008) xxix.
[6] ILC (n 6) 139.
[7] Gardiner (n 33) xxx.
[8] *The 1935 Harvard Draft Convention on the Law of Treaties*, art 19.
[9] *Navigational and Related Rights* (n 18), para 63.
[10] WTO, *European Communities—Regime for the Importation, Sale and Distribution of Bananas* (Second Recourse to Article 21.5 of the DSU by Ecuador and First Recourse by USA) (26 November 2008) WT/DS27/AB/RW2/ECU and WT/DS27/AB/RW/USA, para 392.

 

interpret, not to modify, terms in a treaty.

*3.2 Lessons Learned from the Whaling in the Antarctic Case*

Another important case is the *Whaling in the Antarctic* case. In 2010, Australia initiated an Application instituting proceedings against Japan, claiming that the Second Phase of Japan's Research Program under the Special Permit in the Antarctic ('JARPA II') breached obligations under the International Convention for the Regulation of Whaling ('ICRW'). The ICJ also accepted the intervention proposed by New Zealand in the case. In the judgment, the Court found that Japan's activities violated the ICRW because the conduct of Japan was not related to scientific research purposes.

Regarding relevant judicial documents in the case, there are several concerns regarding the view of subsequent agreements and practice, which are delineated by the Court as follows.

(a) *Restrictive interpretation of subsequent agreements and practice*

One main issue in this case is the interpretation of Article VIII, paragraph 1 of the ICRW, which states the following:

> Notwithstanding anything contained in this Convention any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions …

Regarding this point, the Court clearly ruled that Article VIII is a part of the ICRW. Thus, it should be interpreted in the light of its object and purpose, including the Schedule. However, the Court contended that such a provision is an exception from the Schedule relating to the moratorium on whaling for commercial purposes, the prohibition of commercial whaling in the Southern Ocean Sanctuary and the moratorium relating to factory ships.[1] As it is mentioned in the ICRW's Preamble that its object is conservation and sustainable exploitation, Australia and New Zealand believed that Article VIII should be restrictively interpreted, but Japan rejected this argument by claiming freedom of scientific research of whaling under customary international law.[2] However, the Court applied neither the restrictive nor general (as customary international law) approach. The Court then raised the Guidelines of the International Whaling Commission ('IWC'), which are compatible with the contribution of conservation and management of whales and other living marine resources under Annex Y and P of JARPA II.[3] Noticing that both Australia and Japan are parties to the ICRW, even if the Court refused to directly apply the restrictive interpretation, the Court interpreted the IWC Guidelines as one of the elements of interpretation. The IWC Guidelines might then be implied to be subsequent agreements by parties to the ICRW.

Judge Xue, on the other hand, pointed out that interpreting Article VIII of the ICRW should be done using a restrictive approach.[4] She believed that the quality of whales for purposes of scientific research cannot be considered exclusively by sizes that are dictated by fundraising considerations.[5] However, Judge Xue did not clearly specify the characteristics or qualities of whales that can be caught for scientific research purposes. Another point brought forth by Judge Trindade is the status of ICRW as a living instrument. He raised the necessity of the future of the IWC and the survival of ICRW in order to secure whales.[6] This implies that marine life should be protected without concerns regarding the time factor because it can be seen from new developing challenges based upon current and future facts that there are inherent complexities in the protection of the environment and sea life. From this point of view, Article VIII of the ICRW should consequently be restrictively but completely interpreted to cover all current and future facts, leading to gaps in whaling activities.

(b) *Interpretative value of non-binding instrument as the non-subsequent agreements and practice*

The Court admitted in its judgment that IWC recommendations are not legally binding instruments, but they might be applied as elements for interpretation of the ICRW or its Schedule if they are adopted by consensus or by unanimous vote.[7] Regarding the interpretation of Article VIII of the ICRW, Australia argued that the use of lethal methods 'should only be permitted in exceptional circumstances where the questions address critically important issues which cannot be answered by the analysis of existing data and/or use of non-lethal research technique'[8] in accordance with resolution 1995-9. This non-adopted document from the IWC was believed by Australia to represent the subsequent agreement and practice between parties under the scope of Article 31, paragraph 3 (*a*) and (*b*) of the VCLT.[9]

With regard to the interpretative value of IWC resolutions, the Court ruled that: (1) IWC resolutions that were adopted without consensus of all parties cannot be regarded as subsequent agreements or practice and (2)

[1] *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* (Judgment) [2014] ICJ Rep 226, para 55.
[2] ibid, para 57.
[3] ibid, para 58.
[4] *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* (Separate Opinion of Judge Xue) [2014] ICJ Rep 226, para 27.
[5] ibid.
[6] *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* (Separate Opinion of Judge Trindade) [2014] ICJ Rep 226, para 28.
[7] *Whaling* (n 39), para 46.
[8] ibid, para 78.
[9] ibid, para 79.

 

relevant resolutions and guidelines (which were adopted with consensus) relating to scientific research objectives that can be accomplished without killing whales did not allow for the application of lethal methods in cases in which other methods were unavailable.[1] It is clearly seen from the Court's reasoning that not every resolution represents the subsequent agreement or practice. Only a resolution adopted with the consensus of the parties can be classified as the subsequent agreement or practice.

It is difficult to claim IWC resolutions as subsequent agreements or practice before the Court because they must be adopted with consensus. Judge Charlesworth believed that even though several IWC resolutions on special permits on whaling had negative votes, which prevented them from being regarded as subsequent agreements or practice, he insisted that they had the effect of treaty interpretation, which is not in the scope of paragraph 3 of Article 31 of the VCLT.[2] This opinion did not identify the clear status of the effect of IWC resolutions adopted without consensus in the VCLT, but this point was solved by Judge Greenwood in his separate opinion. He realised that Australia referred to 40 IWC resolutions but only 10 resolutions had been adopted by consensus.[3] He also pointed out that the remaining resolutions were adopted by majority, but they did not qualify as elements for treaty interpretation.[4] This is almost the same argument made by Judge Charlesworth. However, he proposed a solution to apply the ICRW as a living instrument, resulting in an evolutionary approach to interpretation.[5] This solution might not change the status of IWC resolutions to be subsequent agreements or practice, but it does increase the power of the Court to evolutionarily interpret the ICRW directly, without considering whether subsequent resolutions are adopted with or without consensus.

(c) *Consistent practice as the subsequent practice*

As explained earlier in the section on the judgment of *Navigational and Related Rights*, consistency can serve as evidence of the use and the interpretation of a treaty, but consistent practice without the participation of a disputing party to the treaty cannot be applied as subsequent practice. For instance, in the *Whaling* case, generally Japan neither adopted IWC resolutions nor engaged in relevant practice conforming to IWC resolutions. This truly means that there might be no subsequent practice derived from IWC resolutions. However, Arato argues that the ICJ in the *Certain Expenses* and the *Construction of a Wall* cases accepts UNGA resolutions as 'a proxy for the interpretation of the subsequent practice of the membership'.[6] However, the trend in the *Whaling* case has changed in light of the rule from the ICJ that only resolutions adopted with consensus can be subsequent agreements or practice.

From this perspective, the characteristic of the subsequent practice is different from that of the agreement. The agreement may be a document adopted by international organisations, such as IWC resolutions, while the practice should be broadly interpreted, including the practice of the entire community regarding specific points. For example, the lethal method of whaling should be allowed in the light of the consistency of State practice regarding marine conservation. This practice can be found, for instance, in IWC resolutions accepted by most States parties. These documents thus might qualify as subsequent practice from this viewpoint.

(d) *Transparent and sovereigntist approach to treaty interpretation*

The following term 'transparent and sovereigntist approach' was introduced by Arato in an article in which he attempts to prove that the ICJ rejected its case line by declining to identify the applicability of the practice of international organisations as the intention of member States.[7] This might be simultaneously true and false. It is true that the Court refuses to accept practice from international organisations as the subsequent practice, but this does not mean that the Court did not recognise the IWC resolutions as the practice of the international organisation at all. The Court might not directly specify the use of IWC resolutions adopted without consensus as subsequent agreements or practice, but it can be seen from separate opinions of several judges, such as Judge Charlesworth, Judge Trindade and Judge Greenwood, that they accept the effect of IWC resolutions in the interpretation of Article VIII of the ICRW.[8] In particular, Judge Greenwood recognised the ICRW as a living instrument, which leads to the conclusion that the Court might evolutionarily interpret the Convention easily. This point makes more sense because environmental protection, especially as it relates to marine environments, is a dynamic issue that should be interpreted in the interest of the entire community.

To conclude, the four major issues of the *Whaling* case concerning subsequent agreements and practice have

[1] ibid, para 83; see also Malgosia Fitzmaurice, 'The Whaling Convention and Thorny Issues of Interpretation' in Fitzmaurice and Tamada (ed), *Whaling in the Antarctic: Significance and Implications of the ICJ Judgment* (Brill Nijhoff 2016) 114.
[2] *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* (Separate Opinion of Judge Charlesworth) [2014] ICJ Rep 226, para 4.
[3] *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* (Separate Opinion of Judge Greenwood) [2014] ICJ Rep 226, para 6.
[4] ibid.
[5] ibid, para 7.
[6] Julian Arato, 'Subsequent Practice in the Whaling Case, and What the ICJ Implies about Treaty Interpretation in International Organizations' (EJIL: Talk!, 31 March 2014) <www.ejiltalk.org/subsequent-practice-in-the-whaling-case-and-what-the-icj-implies-about-treaty-interpretation-in-international-organizations> accessed 17 December 2017.
[7] ibid.
[8] *Whaling* (n 44, 49 and 50).

 

been clearly analysed. First, Article VIII of the ICRW should be restrictively but completely interpreted by applying subsequent agreements to fill gaps in whaling activities. Moreover, IWC resolutions, regardless of whether adopted with consensus, have contributed to the interpretation of Article VIII of the ICRW. Furthermore, even though the Court rejected the subsequent practice status of resolutions adopted without consensus, subsequent practice should be broadly interpreted in the light of the consistency of State practice to maintain marine environments. Finally, the Court broke its case line by refusing to accept IWC resolutions as the practice of international organisations, but some judges made a point of qualifying the ICRW as a living instrument, resulting in interpretation in the interest of international communities.

## 4. Subsequent Agreements and Practice as Elements to Push the Limits in Treaty Interpretation

The following is a brief analysis of the limitation of treaty interpretation derived from the *Navigational and Related Rights* and the *Whaling in the Antarctic* cases. The limits of treaty interpretation can be exemplified by considering the intentions of the parties and the object and purpose of the treaty, applying principle of restrictiveness and intertemporal law.

### *4.1 The Intention of the Parties and the Object and Purpose*

Treaty interpretation should be conducted using elements of the general rule of interpretation and supplementary means of interpretation as stated in Article 31 and 32 of the VCLT, which is based on the ordinary meaning. However, a new trend in treaty interpretation has been developed and there are new approaches to interpret a treaty more effectively and properly. One of them is the evolutionary interpretation of treaties.

The ICJ in the *Navigational and Related Rights* case adopted the intention of the parties to evolutionarily interpret the Treaty of Limits between Costa Rica and Nicaragua.[1] As mentioned earlier, the Court referred to the joint ministerial communiqués of 1995 and 1998, the special agreement between Costa Rica and Nicaragua leading to US President Cleveland's arbitration and the subsequent practice of Costa Ricans' right to navigation as the subsequent practice.[2] Crema believes that the subsequent practice of both parties illustrates the original meaning of the treaty and demonstrates how the intentions of the parties played a role in the evolving meaning of terms in the treaty.[3] This implies that applying the intentions of the parties as the subsequent practice in the process of interpretation creates room to exceed the limits of treaty interpretation. In addition to this case, this can also be seen from the *Construction of a Wall of Palestine* case, in which the Court referred to the UNGA and UNSC practices in determining how these Charters can evolve.[4]

Even though the ICJ in the *Whaling* case came to a different conclusion by applying the object and purpose, it still reached the same result, which is the evolutionary interpretation.[5] The Court interpreted Article VIII of the ICRW by considering the Preamble of the ICRW, which referred to conservation and sustainable exploitation as the object and purpose.[6] Fitzmaurice raised two significant objects and purposes, which are the conservation of whales and development of the whaling industry.[7] There is no clear concept regarding the priority to interpret treaties on the object and purpose approach, because this should be analysed on a case-by-case basis.[8] Thus, it is clear that the subsequent practice derived from the object and purpose could also push the limits of treaty interpretation.

### *4.2 Principle of Restrictiveness*

The Court in the *Navigational and Related Rights* case admitted the existence of the principle of restrictiveness, which is related to State sovereignty. In the rejoinder of Nicaragua, it stated that: '… In a treaty concerning territorial sovereignty, the jurisprudence affirms that limitations to the State's sovereignty, in case of doubt, shall be interpreted narrowly …'[9] The Court then replied in its judgment in 2009 as follows:

> … the Court is not convinced by Nicaragua's argument that Costa Rica's right to free navigation should be interpreted narrowly because it represents a limitation of the sovereignty over the river conferred by the Treaty on Nicaragua, that being the most important principle set forth by Article VI.[10]

[1] Luigi Crema, 'Subsequent Agreements and Subsequent Practice within and outside the Vienna Convention' in Nolte (ed), *Treaties and Subsequent Practice* (Oxford University Press 2013) 23.
[2] Marcelo G Kohen, 'Keeping Subsequent Agreements and Practice in Their Right Limits' in Nolte (ed), *Treaties and Subsequent Practice* (Oxford University Press 2013) 40.
[3] Crema (n 56) 23.
[4] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, paras 94-5.
[5] Fitzmaurice (n 48) 84.
[6] *Whaling* (n 39), paras 56-8.
[7] Fitzmaurice (n 48) 85.
[8] Julian Arato, 'Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences' [2010] 9 The Law and Practice of International Courts and Tribunals 443, 475.
[9] *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (Rejoinder of Nicaragua, Vol 1) [2008], para 3.97.
[10] *Navigational and Related Rights* (n 17), para 48.

 

It is clear from this viewpoint that the Court refused the principle of restrictiveness in interpreting the Treaty of Limits. Even though such a treaty has a provision to limit State sovereignty, this does not mean that it must apply the restrictive approach for the purpose of interpretation. Gardiner points out that the principle of restrictiveness has no *a priori* application in cases in which the general approach leads to the appropriate result, but this principle might still have a role in weighing State sovereignty against a right of other States.[1] Its provision is thus interpreted with the general approach of treaty interpretation[2], resulting in an evolving meaning for the term '*comercio*,' as discussed in a previous section.

In the *Whaling* case, both Australia and New Zealand claimed the same argument to apply the principle of restrictiveness in interpreting Article VIII of the ICRW because this provision is an exception to whaling for a specific purpose. Japan, on the other hand, introduced the principle of effectiveness to interpret this provision as a freedom to engage in whaling under customary international law.[3] However, the ICJ refused to take any approach proposed by any States because the Court believed that the interpretation should be reliant upon the Preamble of the ICRW and IWC Guidelines.[4] It is clear that the Court attached itself to the VCLT, which may lead to either the principle of restrictiveness or the principle of effectiveness rather than directly stating principles. However, Judge Trindade in his separate opinion stated manifestly that he believed Article VIII of the ICRW should be interpreted restrictively, because this provision represents an exception in the granting special permits to allow scientific research, resulting in lethal methods of whaling.[5] Both the judgment and the separate opinion of Judge Trindade are reasonable even though they examine different viewpoints; the Court focused primarily on the general approach toward interpretation under Article 31 of the VCLT, but this leads to the Preamble, which strives for the proper conservation of whale stocks and the orderly development of the whaling industry, while Judge Trindade directly specified the result of overwhaling by applying the principle of restrictiveness.

*4.2 Intertemporal Law*

The relationship between intertemporal law and the subsequent practice of the parties is obviously seen from the *Navigational and Related Right* case, when the ICJ explained two relevant situations where the meaning can be changed. Regarding the first situation, the Court ruled that: '… the subsequent practice of the parties … can result in a departure from the original intent on the basis of a tacit agreement between the parties …'[6] This statement made by the ICJ, however, is unclear because the Court only mentioned that the meaning is not the same, without delineating whether the new meaning is narrower or broader. It comes down to one simple question: whether it is possible to modify the term absent a formal amendment. Gardiner believes that it is more difficult to apply the tacit agreement in multilateral treaties when compared with bilateral treaties because of the issue of harmoniousness.[7]

Another situation is the presumption of the intention of the parties. On this, the Court stipulated the following:

> … the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used – or some of them – a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments of international law. In such instances it is indeed in order to respect the parties' common intention at the time the treaty was concluded, not to depart from it, that account should be taken of the meaning acquired by the terms in question upon each occasion on which the treaty is to be applied.[8]

That is to say, the Court in this case believed that the Treaty of Limits was concluded in 1858 and has been applied since then, which means that the parties might have an intention to apply it over time to achieve permanent settlement between Costa Rica and Nicaragua.[9]

In the dissenting opinion of Judge Yusuf in the *Whaling* case, he argued that Article VIII should be evolutionarily interpreted. He raised an interesting point regarding the evolution of the regulatory framework of the ICRW.[10] He based his idea upon the nature of international environmental law regulations, arguing that they are dynamic instruments for conservation and sustainable exploitation.[11] The same idea is supported by Judge Trindade in his separate opinion, in which he argued that the ICRW is a living instrument, enabling it to conform

[1] Gardiner (n 33) xviii.
[2] ibid.
[3] *Whaling* (n 39), para 57.
[4] ibid, para 58.
[5] *Whaling* (n 44), para 21.
[6] *Navigational and Related Rights* (n 18), para 64.
[7] Gardiner (n 33) xix.
[8] *Navigational and Related Rights* (n 18), para 64.
[9] ibid, para 68.
[10] *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* (Dissenting Opinion of Judge Yusuf) [2014] ICJ Rep 226, para 26.
[11] ibid.

 

to the needs of the international community.[1] In support of his opinion, he further stated:

> …In sum, international treaties and conventions are a product of their time, being also *living instruments*. They evolve with time; otherwise, they fall into *desuetude*. The ICRW is no exception to that. Those treaties endowed with supervisory organs of their own (like the ICRW) disclosure more aptitude to face challenging circumstances.[2]

This demonstrates that subsequent practices of States parties developed over time may contribute to the developing principle of the living instrument. Thus, even though the ICRW in 1946 might not have been concerned about the existence of living marine resources, practice stemming from resolutions adopted after the conclusion of the ICRW illustrates the attempt to address the conservation of whaling in the Antarctic Ocean. Thus, time is a factor in these matters.

## 5. Conclusion

Subsequent agreements and practice under Article 31, paragraph 3 (*a*) and (*b*) of the VCLT, as discussed and analysed above, play an important role in the development of international law. This can be seen in two recent examples, which are the *Navigational and Related Rights* and the *Whaling in the Antarctic* cases from the ICJ. The Court, for instance, accepts the role of subsequent agreements and practice as a developing rule, as well as the interpretative value of non-binding instruments and the consistency of subsequent practice, which has in turn resulted in the development of an interpretative approach to treaties.

However, this essay suggests that there is a possibility that the Court will apply this rule broadly in the future disputes depending on the dynamic of issues on case-by-case basis. This essay analyses the development of only two cases. In other words, there are more rooms to be explored in applying subsequent agreements and practice in the light of the development of international law, especially when dealing with environmental or human rights issues that are dynamic in their nature.

## References

*Books*

Crema L, 'Subsequent Agreements and Subsequent Practice within and outside the Vienna Convention' in Nolte (ed), Treaties and Subsequent Practice (Oxford University Press 2013)

Davidson S, *The Law of Treaties* (Ashgate Dartmouth 2004)

Fitzmaurice M, 'The Whaling Convention and Thorny Issues of Interpretation' in Fitzmaurice and Tamada (ed), Whaling in the Antarctic: Significance and Implications of the ICJ Judgment (Brill Nijhoff 2016)

Gardiner R, Treaty Interpretation (Oxford University Press 2008)

Kohen MG, 'Keeping Subsequent Agreements and Practice in Their Right Limits' in Nolte (ed), Treaties and Subsequent Practice (Oxford University Press 2013)

Murphy SD, 'The Relevance of Subsequent Agreement and Subsequent Practice for the Interpretation of Treaties' in Nolte (ed), Treaties and Subsequent Practice (Oxford University Press 2013)

Sinclair I, The Vienna Convention on the Law of Treaties (2nd edn, Manchester University Press 1984)

Sorel JM, 'Article 31 Convention of 1969' in Corten and Klein (ed) The Vienna Conventions on the Law of Treaties: A Commentary (Oxford University Press 2011)

*Articles*

Arato J, 'Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences' [2010] 9 The Law and Practice of International Courts and Tribunals 443-494

Young MA and Sullivan AR, 'Evolution through the Duty to Cooperate: Implications of the *Whaling* case at the International Court of Justice' [2015] 16 *Melbourne Journal of International Law* 1-33

*UN Reports*

ILC, 'Report of the ILC on the Work of its 17th and 18th session' (15 November-20 December 1965 and 3-18 January 1966) UN Doc A/CN4/SER A/1966/Add 1

_____, 'Report of the ILC on the Work of its 60th session' (5 May-6 June and 7 July-8 August 2008) UN Doc A/63/10, Annex I

_____, 'Report of the ILC on the Work of its 64th session' (7 May-1 June and 2 July-3 August 2012) UN Doc A/67/10

_____, 'Report of the ILC on the Work of its 68th session' (2 May-10 June and 4 July-12 August 2016) UN Doc A/71/10

[1] *Whaling* (n 44), para 28.
[2] ibid, para 33.

 

*Cases*

(a) ICJ

Aegean Sea Continental Shelf (Greece v Turkey) (judgment) [1978] ICJ Rep 3

Case concerning Kasikili/Sedudu Island (Botswana v Namibia) (Judgment) [1999] ICJ Rep 1045

Case concerning the Temple of Preah Vihear (Cambodia v Thailand) (Merit) [1962] ICJ Rep 3

Case concerning the Territorial Dispute (Libyan Arab Jamahiriya v Chad) (Judgment) [1994] ICJ Rep 6

Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua) (Judgment) [2009] ICJ Rep 213

_____ (Memorial of Costa Rica, Vol 1) [2006]

_____ (Rejoinder of Nicaragua, Vol 1) [2008]

_____ (Separate Opinion of Judge Sepúlveda-Amor) [2009] ICJ Rep 213

_____ (Separate Opinion of Judge Skotnikov) [2009] ICJ Rep 213

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] ICJ Rep 16

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 136

Territorial and Maritime Dispute (Nicaragua v Colombia) (Preliminary Objections) [2007] ICJ Rep 832

Whaling in the Antarctic (Australia v Japan: New Zealand intervening) (Dissenting Opinion of Judge Yusuf) [2014] ICJ Rep 226

_____ (Judgment) [2014] ICJ Rep 226

_____ (Separate Opinion of Judge Charlesworth) [2014] ICJ Rep 226

_____ (Separate Opinion of Judge Greenwood) [2014] ICJ Rep 226

_____ (Separate Opinion of Judge Trindade) [2014] ICJ Rep 226

_____ (Separate Opinion of Judge Xue) [2014] ICJ Rep 226

(b) WTO

WTO, European Communities—Regime for the Importation, Sale and Distribution of Bananas (Second Recourse to Article 21.5 of the DSU by Ecuador and First Recourse by USA) (26 November 2008) WT/DS27/AB/RW2/ECU and WT/DS27/AB/RW/USA

(c) International Tribunal

Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal) (Judgment) [1991] ICJ Rep 53

*Online Resources*

Julian Arato, 'Subsequent Practice in the Whaling Case, and What the ICJ Implies about Treaty Interpretation in International Organizations' (EJIL: Talk!, 31 March 2014) <www.ejiltalk.org/subsequent-practice-in-the-whaling-case-and-what-the-icj-implies-about-treaty-interpretation-in-international-organizations> accessed 17 December 2017.