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**THE RELEVANCE OF
SUBSEQUENT AGREEMENT AND SUBSEQUENT PRACTICE
FOR THE INTERPRETATION OF TREATIES**

in TREATIES AND SUBSEQUENT PRACTICE 82 (Georg Nolte, ed.) (Oxford University Press) (2013)

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In May 2012, the International Law Commission (ILC) appointed a special rapporteur, Georg Nolte, to complete a project on “subsequent agreements and subsequent practice in relation to the interpretation of treaties.” Previously referred to by the name “treaties over time,” the project is expected to result by 2016 in a series of “observations” or “conclusions” about how the meaning of a treaty might be determined based, at least in part, on the conduct of the States Parties *after* the treaty is concluded.

The project raises a large number of interesting issues, some of which concern terminology and line drawing, others that concern theory and history, and still others that concern when and how States and tribunals rely upon this phenomenon. This essay discusses the extent to which subsequent agreements and practice – which for simplicity I will refer to collectively as “subsequent conduct” – have actually been a relevant or important component of treaty law in the past and present, and what level of importance they might enjoy in the future. In other words, while there are certainly examples of the use of subsequent conduct in different fields of international law, how pervasive is this phenomenon, and do we think it is increasing or decreasing in its relevance?

I will not attempt to answer that question with any degree of finality. But I will identify the three key areas where subsequent conduct is more or less relevant to treaty law, and then suggest several factors that seem to influence the degree of that relevance. These areas and factors are inspired in part by the excellent initial reports generated by Professor Nolte for ILC’s initial Study Group on this topic,¹ as well as outstanding academic writings that speak to this topic.²

¹ Georg Nolte, *Introductory Report for the Study Group on Treaties over Time, Jurisprudence of the International Court of Justice and Arbitral Tribunals of Ad Hoc Jurisdiction Relating to Subsequent Agreements and Subsequent Practice* (2010) [hereinafter “Nolte Introductory Report”]; Georg Nolte, *Second Report for the ILC Study Group on Treaties over Time, Jurisprudence Under Special Regimes Relating to Subsequent Agreements and Subsequent Practice* (2011) [hereinafter “Nolte Second Report”]; Georg Nolte, *Third Report for the ILC Study Group on Treaties Over Time: Subsequent Agreements and Subsequent Practice of States Outside of Judicial or Quasi-Judicial Proceedings* (2012).

² See, e.g., Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AM. J. INT’L L. 179 (2010).

I. Some Cautionary Observations When Assessing “Relevance”

Before identifying the three key areas and the factors that influence those areas, allow me to offer some cautionary observations concerning any effort to reach definitive conclusions about the importance of subsequent conduct in treaty law, as well as past and future trends.

First, when considering this area of the law, it is easiest to focus on the use of subsequent conduct by *international courts and tribunals*, as was done in the first two reports of the Study Group. That focus, however, provides a very limited window on the overall relevance of subsequent conduct for treaty law. As is the case for contracts and statutes in national law, the vast majority of interpretations and applications occur away from courts and tribunals, and the approach there taken may well differ from what is expected from third-party dispute settlers. It is entirely reasonable to postulate, for example, that States are very reluctant to permit dispute settlers to use subsequent conduct to modify a treaty relationship, but that States are quite happy to view a treaty as modified based on mutual understandings reached among themselves over the life of the treaty about what it means and how it should operate. In other words, States may resist the unpredictability of a dispute settler “evolving the law”, but may embrace their own ability consensually to re-shape or refine over time treaties concluded amongst themselves. If that is true, then trying to ascertain the importance of subsequent conduct solely by reference to its use by courts and tribunals is misguided; the broader array of state practice must be surveyed prior to drawing any firm conclusions, and the possibility of differential treatment depending on the setting should be taken into account. Fortunately, the Study Group’s Third Report seeks to canvas this broader array of practice.

Second, while there are many examples of the use of subsequent conduct by international courts and tribunals, as identified in the reports prepared for the Study Group, there are also many treaty cases that have been decided *without* any use of subsequent conduct. To truly ascertain the relative importance of this issue for treaty law, it is necessary to take account of not just situations where subsequent conduct has been used, but also situations where it could have been used but was not.

Third, trying to identify *trends* based on limited data amidst myriad points of reference is a very tricky thing to do, as they should consider multiple causal explanations. For instance, perhaps one can show that few PCIJ cases used subsequent conduct as a part of its treaty decisions, whereas many more ICJ cases did so. This might suggest a greater trend in the use of subsequent conduct. But perhaps there are other explanations, such as the longer life of the ICJ as an institution or the greater size of the ICJ docket on average than that of the PCIJ, or a greater number of treaty cases arising before the ICJ than before the PCIJ.

II. The Three Key Areas Where Relevance Should Be Assessed

That said, I now turn to the three key areas where relevance of subsequent conduct should be assessed: using subsequent conduct to interpret a treaty; using subsequent conduct to modify a treaty; or using subsequent conduct to establish the existence or non-existence of a treaty. I’ll

briefly address each in turn.

Using Subsequent Conduct to Interpret a Treaty

Discussions relating to subsequent conduct are often focused on the *interpretation* of a treaty. When using subsequent conduct to interpret a treaty, the idea is that a particular treaty provision is ambiguous and requires interpretation; to that end, resort might be had to any subsequent conduct of the parties, as indicated by Article 31(3) of the Vienna Convention on the Law of Treaties (VCLT).³

How often does this really happen? While there are some examples of tribunals using subsequent *agreements* by parties to interpret an ambiguous provision of a treaty⁴ – such as the Elements of Crimes adopted by the ICC Assembly of States Parties⁵ or the joint interpretive statement issued by the NAFTA parties under the auspices of the Free Trade Commission⁶ – as a general matter such interpretive statements seem relatively rare.⁷ Indeed, Professor Nolte’s survey of the different adjudicatory bodies in specialized regimes led him to conclude that “adjudicatory bodies have rarely relied on subsequent agreements in the sense of Article 31(3)(a) [of the] VCLT.”⁸ Even the European Court of Human Rights, which in other respects has been receptive to subsequent conduct, “has never actually examined whether an agreement between states parties could be a relevant ‘subsequent agreement’ in the sense of” VCLT Article 31(3)(a).⁹

Why the lack of numerous precedents for the use of subsequent agreements? Certainly for major multilateral treaties, developing consensus among the parties for an interpretive agreement may be difficult. In some situations, it may be unclear whether the parties have actually developed such an agreement or have simply issued a political declaration that is intended to guide their future action.¹⁰ When the parties to a multilateral or bilateral treaty have the political will to conclude an agreement, it may be politically desirable to do through an agreement that expressly modifies the existing treaty commitment rather than one that “interprets” the treaty, since concluding an “interpretive” agreement may domestically

³ Article 31(3) of the Vienna Convention states that treaty interpretation *shall* take into account, together with the treaty’s context, “(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; [and] (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.” Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 [hereinafter VCLT].

⁴ GYORGY HARASZTI, *SOME FUNDAMENTAL PROBLEMS OF THE LAW OF TREATIES* 139 (1973).

⁵ See *Nolte Second Report*, at 111.

⁶ See SEAN MURPHY, *UNITED STATES PRACTICE IN INTERNATIONAL LAW, VOL. I, 1999-2000*, at 239-41 (2002).

⁷ IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 136 (2d ed. 1984); ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 191-93 (2000).

⁸ See *Nolte Second Report*, at 132.

⁹ See *Nolte Second Report*, at 51.

¹⁰ See, e.g., Steve Charnovitz, *The Legal Status of the Doha Declarations*, 5 J. INT’L ECON. L. 207 (discussing how the Doha Declarations could be considered decisions taken by the WTO that would affect obligations or alternatively considered simply political declarations).

antagonize those actors normally involved in the treaty-making process if they are excluded from the interpretive process. As for dispute settlers, there may be few precedents showing the use of subsequent agreements for interpretation of a treaty because of the vague dividing line between “agreement” and “practice,”¹¹ and the consequent “evasive terminology” used by tribunals in analyzing the exact subsequent conduct at issue.¹²

By contrast, there seems to be a fair amount of evidence regarding the use of subsequent *practice* of treaty parties for the interpretation of an ambiguous treaty provision. In my own experience as a government attorney, it was quite common when analyzing a commitment under a treaty to take account of not just the ordinary meaning of the text but the manner in which governments had applied the treaty since its inception. Indeed, I would regularly read a provision in an investment treaty or environmental agreement or military protocol, and see multiple possible interpretations or shades of meaning, which could only be resolved by going into the files to figure out how the provision had been applied over time.¹³

The use of subsequent practice to interpret treaties has certainly been a feature of international case law, as demonstrated in several cases before the I.C.J., some cases before the P.C.I.J.,¹⁴ the case law of the European Court of Human Rights,¹⁵ and the case law of the permanent and *ad hoc* international criminal tribunals. Once there is a settled practice for interpreting a provision in a particular way, it becomes difficult for one party to the treaty to attempt to press for an alternative interpretation and, if the matter were placed before a tribunal, that party may find itself estopped from doing so based on its conduct.¹⁶ Yet it is interesting that the use of subsequent practice by dispute settlers is far from common or systematic; indeed, it seems quite modest given the number of international cases that have been decided over the past 100 years.

Consider the various conclusions reached in Professor Nolte’s report on specialized regimes. He notes that the WTO “Appellate Body has adopted a rather restrictive approach to subsequent agreements and subsequent practice as means of interpretation within the WTO system.”¹⁷ The Iran-U.S. Claims Tribunal, which has issued several hundred arbitral awards,

¹¹ See Roberts, *supra* note 2 (“A subsequent agreement turns on the fact of an agreement between the treaty parties, not its form. The agreement need not be in binding or treaty form but must demonstrate that the parties intended their understanding to constitute an agreed basis for interpretation. Such agreements may be more or less formal, ranging from a jointly signed document to a series of acts or communications from which an agreement can be inferred. The more informal the basis, the greater the overlap with subsequent practice.”)

¹² See Nolte *Introductory Report*, at 7.

¹³ An example used by Aust is the interpretation of Article 5 of the Chicago Convention; though Article 5 does not expressly require charter aircraft to seek permission to land, the practice of the parties has been to interpret Article 5 as containing such a requirement. AUST, *supra* note 5, at 194.

¹⁴ See Nolte *Introductory Report*, at 10-12; see also A. Mark Weisburd, *The International Court of Justice and the Concept of State Practice*, 31 U. PA. J. INT’L L. 295 (2009) (discussing the ICJ’s mixed record in giving weight to parties’ subsequent practice when interpreting treaties).

¹⁵ See Nolte *Second Report*, at 52-53, 63-75.

¹⁶ See, e.g., Nolte *Second Report*, at 31.

¹⁷ Nolte *Second Report*, at 20; see also Alexander M. Feldman, *Evolving Treaty Obligations: A Proposal for*

only “occasionally used subsequent practice as a means of interpretation” and on only one occasion used subsequent practice as the decisive criterion.¹⁸ Similarly, ICSID Tribunals have engaged in “comparatively limited use of subsequent agreements and subsequent practice,”¹⁹ while NAFTA panels “have been rather restrictive in recognizing certain forms of subsequent practice as a decisive consideration in specific cases,” though they have “taken the argument based on subsequent practice seriously...”²⁰ The Inter-American Court of Human Rights “hardly ever mentions subsequent practice” in its decisions, though it does refer to “international developments in a broader sense.”²¹ ITLOS “has abstained from reviewing state practice systematically,” even though the “law of the sea is an area of law in which state practice traditionally plays a particularly important role.”²² The European Court of Justice generally “refrains from taking subsequent practice of the Member States into account when interpreting primary law,” though it “is less reluctant to take account of subsequent practice when it interprets agreements which the Union has concluded with third states.”²³ In short, the evidence of international courts and tribunals finding subsequent practice to be an extremely important component of treaty interpretation is rather thin.

When it is used, the importance of subsequent conduct for interpreting a treaty might be further analyzed by considering the different interpretive uses to which the conduct is being put. Subsequent conduct might be used to clarify the ordinary meaning of a treaty provision *at the time it was adopted* (“contemporaneous interpretation”), on a theory that the subsequent conduct sheds light on what the parties originally intended when they adopted the treaty.²⁴ My sense of state practice, and of the case law and literature, is that this use of subsequent conduct is the most important way in which subsequent conduct features in treaty interpretation when it is used. I fully anticipate that in the future this use of subsequent conduct will continue, though I see no reason why it would proportionally increase in importance as a factor in treaty interpretation.

Alternatively, the interpretive approach might seek to use the subsequent conduct to establish a *contemporary* meaning of a treaty provision, i.e., a meaning that has developed since the inception of the treaty (“evolutive interpretation”). (Closely allied with this is the use of subsequent conduct as a means for understanding the object and purpose of the treaty, or the treaty’s so-called “emergent purpose”). Here, the idea is that a treaty provision, when adopted, might be open-textured, with the parties intending that it would cover certain future

Analyzing Subsequent Practice Derived From WTO Dispute Settlement, 41 N.Y.U. J. INT’L L. & POL. 655, 676-95 (2009); Michael Lennard, *Navigating by the Stars: Interpreting the WTO Agreements*, 5 J. Int’l Econ. L. 17, 29-35 (2002).

¹⁸ See *Nolte Second Report*, at 32.

¹⁹ See *Nolte Second Report*, at 39.

²⁰ See *Nolte Second Report*, at 48; see also Roberts, *supra* note 2, at 179 (finding that “investor-state tribunals have tended to shun” use of subsequent agreements and practice as part of their interpretive approach).

²¹ See *Nolte Second Report*, at 92.

²² See *Nolte Second Report*, at 106.

²³ See *Nolte Second Report*, at 123, 127.

²⁴ See *Nolte Introductory Report*, at 18-21.

developments that might not be known at the time.²⁵ A treaty provision might use the term “transport,” which at the time specifically covered trains, horses and bicycles, but is interpreted at a later time to include automobiles and airplanes once they are invented. Evolutive interpretation does not seek to modify the treaty provision, but does seek to interpret the language of the provision in light of subsequent developments, and the manner in which the parties to the treaty view those developments in relation to the treaty provision.

In my view, States resort infrequently to “evolutive interpretation” in their own interpretation of their treaty commitments. States tend to be fairly careful and precise in the language used in their treaty commitments: they want to know what they are getting into when they join a treaty; they need to explain it to their domestic constituencies; they worry about unforeseen future applications of a treaty provision; and they prefer to undertake formal changes to a treaty as necessary to address new developments.

Likewise, “evolutive interpretation” undertaken by a dispute settlement body is a more controversial and a much less common use of subsequent conduct than “contemporaneous interpretation.” The European Court of Human Rights²⁶ and, to a certain extent, the I.C.J. engage in evolutive interpretation, but the WTO dispute settlement body, the Inter-American Court of Human Rights, the Human Rights Committee, and the ITLOS do not.²⁷ The reason is that, when a tribunal does this, it is consciously departing from an inquiry solely into the meaning of the treaty at the time of its adoption and is engaging in a subjective assessment of the meaning of the practice of States over time, which invariably shifts power away from States to the dispute settler. Nevertheless, this phenomenon of “evolutive interpretation” does exist in dispute settlement, usually in circumstances where States have crafted an open-textured treaty provision and, by subjecting it to interpretation by a dispute-settler, have invited the possibility of interpretation and reinterpretation in reaction to future developments. Sometimes this is referred to as the parties agreeing to let the dispute settler “complete the contract” because the States find doing so themselves *ab initio* to be too difficult. My sense, however, is that this phenomenon is not widely embraced in treaty relations, that States are not especially comfortable in leaving their fate in the hands of third-parties except in narrowly-defined areas, and that tribunals are cautious in exercising such power, for fear that doing so may disrupt stable treaty relationships and may provoke criticisms that the tribunal is improperly “making” the law.

As for what the future may bring, there may well be pressures in favor of more “evolutive interpretation” or interpretation by “emergent purpose.” Treaties are cumbersome devices that

²⁵ See Julian Arato, *Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences*, in *THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS* 443, 465 (2010) (“The basis of evolutive interpretation is the idea that parties may conclude a treaty with the intention that it, or some of its provisions, be capable of evolving in meaning over time, in light of certain changes in factual or legal circumstances – ranging from scientific or technical developments to the emergence of new legal regimes.”)

²⁶ The European Court views the European Convention as a “living instrument” that must be interpreted in the light of present-day conditions. See *Nolte Second Report*, at 50.

²⁷ See *Nolte Second Report*, at 132.

cannot change quickly, and thus may become increasingly less responsive to complex realities. Further, major multilateral treaties and institutions set up during the mid-twentieth century are in many respects showing their age, and hence we may be entering a period when greater flexibility in treaty interpretation is needed.

At the same time, those pressures can be met in other ways. States have demonstrated remarkable creativity in establishing treaty relationships and institutions that can change over time within formalized mechanisms of change. By way of example, the Chicago Convention has been changed thousands of times through express alterations to its annexes by decision of the ICAO Council; there has not been a need to constantly “reinterpret” the meaning of the original 1944 treaty in order to adopt it to modern developments. Further, for all the talk of a more complex and fast-changing world, those arguments also can be invoked in favor of maintaining stable treaty relationships, ones that do not change based on episodic and disparate findings regarding the contemporary conduct of States.

In sum, subsequent conduct – especially in the form of subsequent practice – is a highly relevant feature of treaty interpretation, though it seems most important and least controversial when used as just one factor in ascertaining the ordinary meaning of a treaty provision at the time it was adopted.

Using Subsequent Conduct to Modify a Treaty

A second area where subsequent practice might be highly relevant is for the *modification* of the treaty. In other words, even if an unambiguous provision of a treaty means one thing at the treaty’s inception, it may be possible to regard that meaning as having changed by reference to a subsequent conduct by the parties.

One form of subsequent conduct modifying an earlier treaty is uncontroversial and quite common: the parties to a treaty can formally modify the treaty by means of a subsequent agreement.²⁸ Such a subsequent agreement could take the form of an amendment to a treaty as contemplated in VCLT Articles 39-41, a new annex or protocol to a treaty, or a subsequent agreement that expressly or implicitly terminates or supercedes the earlier-in-time treaty. This type of subsequent agreement is extremely important for treaty law and has been around for quite some time. Grotius himself recognized that “[i]n case the contradiction is real, a later agreement between the contracting parties will annul earlier agreements, since no one could at the same time have had contradictory desires”²⁹ – a concept later incorporated into the VCLT.³⁰ Since Grotius’ time, governments have formally modified their treaty relationships through subsequent instruments on numerous occasions, such that there should be little doubt that this type of subsequent agreement is a highly relevant for treaty law.

²⁸ See *Nolte Introductory Report*, at 2.

²⁹ HUGO GROTIUS, *THE LAW OF WAR AND PEACE* 411 (Francis W. Kelsey trans., 1925).

³⁰ VCLT, art. 30.

There is every reason to believe that formal modification of treaties by subsequent agreement will continue to be an important component of treaty law in the future. Although the process of ratifying formal amendments has become cumbersome and perhaps unwieldy, the creative mechanisms developed for modifying treaty regimes through decisions by the organs of an international organization or a conference of the parties, including tacit content/opt out procedures, in many circumstances has obviated the need for amendment processes.³¹ The somewhat bewildering array of protocols, annexes, amendments, and other formal modifications to the 1985 Vienna Convention for the Protection of the Ozone Layer³² is just one example. The one caveat is that, in the future, we may see increasing backlashes from national decision-makers about being excluded from a treaty-modification process, or unwillingness domestically to accept the modification if done outside normal processes for treaty-making.³³

By contrast, the importance of modifying a treaty by more *informal* subsequent conduct is more difficult to gauge, precisely because it is less open and transparent. Modifying a treaty by some kind of informal subsequent agreement (meaning an agreement that is not in accordance with normal ratification or accession procedures) seems quite rare, no doubt partly due to the fact that agreements, by their nature, are usually not informal, and because doing so is at tension with the process for concluding formal agreements. (If national treaty-makers are resistant to subsequent agreements *interpreting* a treaty, they are even more so by informal agreements that *modify* a treaty).

What about modification of a treaty by the subsequent practice of the parties, meaning conduct in the form of something other than an agreement? Arguably such practice could be a very helpful means for States to adapt treaties to new circumstances without having to resort to formal procedures, yet it is precisely the abandonment of formal procedures that causes alarm among States. As is well-known, the International Law Commission proposed an article for the VCLT which would have provided that a “treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions.”³⁴ Although this proposal had some grounding in the 1963 arbitral decision relating to a U.S.-France aviation dispute (which found that by practice the landing rights of both States had been extended beyond what was envisaged in their original agreement),³⁵ States vehemently objected to this proposal as an unacceptable affront to *pacta sunt servanda*. Indeed, I believe it is the only draft article proposed by the ILC that was completely deleted by the inter-governmental negotiators.³⁶

³¹ See, e.g., Annecoos Wiersema, *The New International Law-Makers? Conferences of the Parties to Multilateral Environmental Agreements*, 31 MICH. J. INT’L L. 231 (2009).

³² Mar. 22, 1985, 1513 U.N.T.S. 293.

³³ For an example in the United States, see NRDC v. EPA, 464 F.3d 1 (D.C. Cir. 2006); see also Andrew D. Finkelman, Note, *The Post-Ratification Consensus Agreements of the Parties to the Montreal Protocol: Law or Politics? An Analysis of Natural Resources Defense Council v. EPA*, 93 IOWA L. REV. 665 (2008).

³⁴ See 2 Y.B. Int’l L. Comm’n 245 (1966).

³⁵ Decision of the Arbitration Tribunal Established Pursuant to the Arbitration Agreement Signed at Paris, France on Jan. 22, 1963, Between the United States of American and France (Dec. 22, 1963), reprinted in 3 I.L.M. 668, 713 (1964).

³⁶ See Feldman, *supra* note 9, at 661-75.

Even so, precedents do exist for what appear to be modifications of a treaty provision based on state practice, such as the interpretation of what is meant by a “concurring” vote in Article 27(3) of the U.N. Charter.³⁷ The European Court of Human Rights apparently has used subsequent practice for the purpose of modifying the European Convention in at least one line of cases (the *Al-Saadoon and Mufdhi* case and its predecessors).³⁸ Precedents exist in national courts as well. For example, U.S. courts now regard the liability coverage of the Warsaw Convention as modified by subsequent practice.³⁹

Yet the precedents seem quite limited, especially in case law. **A study of State practice might reveal a greater proclivity toward modifying treaties through subsequent practice, but I doubt it.** Of course, in the absence of VCLT support for modification of a treaty based on such practice, States and tribunals may be inclined to shoe-horn a situation of “modification” into one of “interpretation” instead, making it difficult to identify precedents in this area.⁴⁰ Yet, my sense is that States and tribunals generally resist modification of treaties through subsequent practice and will continue to do so in the years to come, absent exceptional circumstances. Even more than “evolutive interpretation” and interpretation by “emergent purpose,” modification of treaties through subsequent practice can disrupt the settled expectation of a State as to its treaty obligations, might serve to disempower some States as against others, and can call into question the legitimacy of decisions of courts and tribunals.

Using Subsequent Conduct to Establish the Existence or Non-Existence of a Treaty

The third key area where subsequent conduct is potentially relevant concerns proving the existence or non-existence of a treaty. Thus, subsequent conduct was considered when assessing the existence of a treaty in *Maritime Delimitation and Territorial Questions (Qatar v. Bahrain)*,⁴¹ while subsequent conduct was considered for determining whether a treaty had been terminated in the *Serbian Loans* case.⁴² The later possibility might be discussed in the context of a treaty falling into desuetude.

³⁷ Of course, that modification ultimately was acknowledged by the I.C.J. See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*, 1971 I.C.J. 16 (June 21).

³⁸ See *Nolte Second Report*, at 75-78.

³⁹ See *Husserl v. Swiss Air Transport*, 351 F. Supp. 702 (S.D.N.Y. 1972); *Day v. Trans World Airlines*, 528 F.2d 31 (2d Cir. 1975). These courts appear to view the term “accident” within the Warsaw Convention as originally not covering a hijacking or sabotage of aircraft, but as having been altered by virtue of subsequent practice. It should be noted, however, that both courts invoked Article 31(3)(b) of the VCLT, a provision that deals with interpretation and not modification of a treaty. Moreover, the “practice” at issue was the development by governments of a non-treaty scheme, commonly referred to as the Montreal Agreement, which was actually signed by the airline industry and not by States. For more detailed discussion, see Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 Va. J. Int’l L. 281, 341-52 (1988).

⁴⁰ Even in the best of circumstances, it may be difficult to distinguish between situations of “modification” and “interpretation” of a treaty through use of subsequent practice. See SINCLAIR, *supra* note 5, at 138; AUST, *supra* note 5, at 191.

⁴¹ 1994 I.C.J. 112, paras. 28-30.

⁴² *Serbian Loans (France v. Serbia/Croatia/Slovenia)*, 1929 P.C.I.J., ser. A, no. 20, at 38.

Only a handful of examples can be found for such use of subsequent conduct. States and tribunals seem reluctant to regard the very existence or non-existence of treaty relationships as turning on subsequent conduct, preferring instead that the issue turn upon the formal steps envisaged for bringing a treaty into force or terminating it. In this regard, it may be worth considering the approach to treaty relationships in the aftermath of the break-up of the former Soviet Union or the former Yugoslavia. As a general matter, States were not willing to leave to their subsequent practice the resolution of uncertainties about the continuance of treaty relationships with the new republics that emerged from those break-ups. Rather, most States undertook processes by which they specifically identified and agreed to the continuance or non-continuance of treaties.

As such, the importance of subsequent conduct for this area of treaty law seems low, and I expect the same to be true in the future.

III. Four Potential Factors Influencing the Relevance of Subsequent Conduct

For those situations where subsequent conduct is relevant to treaty law, there are four factors that seem to influence the degree of that relevance. These factors are not mutually exclusive, and probably not collectively exhaustive, but they seem to be ones worth considering for any study of this topic.

The Type of Treaty Provision at Issue

One factor for whether subsequent conduct will prove relevant concerns the specific type of treaty provision at issue. Treaty provisions can be seen as falling along a spectrum of specificity, with provisions at one end of the spectrum being quite clear, unambiguous and specific, while those at the other end of the spectrum are vague, ambiguous or “open-textured”. The former do not as readily invite a use of subsequent conduct to interpret or modify the provision, whereas the latter likely are more susceptible to clarification through subsequent agreement or practice. Thus, as the ILC’s study on fragmentation indicated, a key question is: “When might the treaty language itself, in its context, provide for the taking into account of future developments?”⁴³

The Subject Matter of the Treaty, Including Whether It Embodies Reciprocal Governmental Obligations as Opposed to Addressing Rights or Obligations of Individuals

The broad subject matter of the treaty may be a second factor for whether subsequent conduct plays a significant role in the treaty regime. Professor Nolte’s first report cast doubt on this proposition, stating that differentiations based on the “nature of the subject matter” could not be clearly identified in the jurisprudence of the ICJ and arbitral tribunals.⁴⁴ Yet in his second

⁴³ *Report of the ILC Study Group on Fragmentation*, at 240, para. 478.

⁴⁴ *See Nolte Introductory Report*, at 19-20.

report on specialized tribunals, he suggests that there may be certain areas of international law, such as international economic law, that are more static than other areas of international law, such as human rights and international criminal law.⁴⁵

To me, a generalization of that sort seems counter-intuitive. Perhaps States would be comfortable with the use of subsequent conduct for purposes of refining or modifying their obligations with respect to their own nationals, as in the area of human rights. Yet one might predict that tribunals would be wary of relying on subsequent practice of States that, by often deviating from human rights norms, might actually diminish those norms.⁴⁶ Further, one might predict that in the area of international criminal law, there would be a greater fidelity to a purely textual analysis of the obligations owned by individuals, since changing those obligations based on subsequent conduct provides less notice and certainty to the individual as to the standards for determining action as criminal. Finally, if it is true that tribunals in some settings, such as investor-state disputes, are reluctant to give much weight to subsequent conduct, because they wish to maintain a “level playing field” between the investor and the State,⁴⁷ then one might have predicted a similar approach in the fields of human rights and international criminal law.

Further, such generalizations are not entirely consistent with the evidence. For example, regarding the field of human rights as more likely to take into account subsequent practice than other fields is consistent with the fact that the European Court of Human Rights has employed various forms of “evolutive interpretation,” but not consistent with the fact that the Human Rights Committee has not done so, or the fact that the Inter-American Court of Human Rights “hardly ever mentions subsequent practice” in its decisions.

I am more persuaded that particular regimes, involving particular State parties and perhaps a particular dispute settler with a particular mandate, is a better causal explanation for the use of subsequent conduct, than is generalizations about broad subject matter areas.

Number of Parties to the Underlying Treaty Regime

Intuitively, it would seem that the number of parties to the underlying treaty regime should be a significant factor for the relevance of subsequent practice to that treaty regime. Normally, it is easier to conclude bilateral treaties than it is to conclude multilateral treaties, and therefore it seems plausible that a bilateral treaty is more susceptible to use of subsequent agreement for interpretation (or even modification), which might easily be done through a simple exchange of diplomatic notes or standing consultative commission.⁴⁸ Similarly, makes sense that two States would more readily view subsequent practice as providing an interpretive gloss on a bilateral

⁴⁵ See *Nolte Second Report*, at 120.

⁴⁶ See, e.g., John Tobin, *Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation*, 23 HARV. HUM. RTS. J. 1 (2010) (“[A] consideration of any subsequent agreements or practice between parties—as is permitted under Article 31(3) of the VCLT—will rarely prove helpful with respect to an international human rights treaty because all too often states fail to treat their obligations under such treaties with the respect that international law demands.”).

⁴⁷ See Roberts, *supra* note 2.

treaty, where the practice is more easily identified, where concordant practice is more likely, and where the impact of the change is limited. Use of subsequent conduct in the context of interpreting a boundary agreement reflects this phenomenon. Indeed, there appear to be many cases where subsequent practice by two parties to a boundary agreement results in an informal modification of that agreement, perhaps most famously the case involving the Temple of Preah Vihear.⁴⁹

By contrast, normally it is much more difficult to conclude treaties with large numbers of parties either to interpret or modify an agreement. As such, it would seem comparably difficult to reach agreement on interpretation or modification of the treaty. The same is true for using subsequent practice to interpret or modify the treaty, especially given the difficulty in assessing the practice of numerous States, deciding how to view any inconsistencies in that practice, how to construe silence or inaction, and how to determine which types of practice are relevant. For example, consider the following assessment in the context of the WTO:

Because of the large number of WTO Parties, there in fact appears to be only limited scope for evidence of ‘subsequent practice’, since in this context the practice is intended to be the practice of (or acceptance of that practice by) the Parties to the Agreement *as a whole*. A complete unanimity is not required for an explicit General Council decision on interpretation but it would probably have to be shown for ‘subsequent practice’ to have a similar effect. Although that unanimity would not necessarily have to occur at a particular meeting, it would have to coalesce into a uniform practice or acceptance of it, and then persist until at least the time legally relevant to the dispute. Meeting these requirements is an almost impossible order within such a large international organization, especially with only a short history for many of the agreements during which practice could develop, and with an ever-expanding membership.⁵⁰

The Introductory Report by Professor Nolte maintains that the character of the agreement as bilateral or multilateral does not seem to matter in the context of the jurisprudence of the I.C.J. or *ad hoc* tribunals.⁵¹ That is a very interesting observation and suggests that careful attention should be given to whether basic intuitions on this factor are correct. **At the same time, it is important to keep in mind that the use of subsequent conduct by global dispute resolution fora may not be reflective of the use of subsequent conduct by States generally in their practice.**

The Structure or Legal Context of the Treaty

A fourth factor that will drive the relevance of subsequent conduct for a treaty regime is the structure or legal context of the treaty. A treaty establishing an international organization, for

⁴⁸ See Angela M. Bradley, *Opposing Interpretations of an International Treaty: The Anti-Ballistic Missile Treaty Controversy*, 2 CHI. J. INT’L L. 295 (2001) (discussing the interpretive role of the now-defunct ABM Treaty’s standing consultative commission).

⁴⁹ See *Nolte Introductory Report*, at 48.

⁵⁰ Lennard, *supra* note 17, at 34.

⁵¹ See *Nolte Introductory Report*, at 19-20.

example, is often thought to be particularly susceptible to the use of subsequent practice by its parties (as well as its organs) for interpreting the powers and constraints upon that organization over time. Other treaties can be structured so as to make subsequent agreements interpreting or modifying the treaty much easier, through decisions by organs or conferences of the parties. A further important element of structure is whether the regime includes an authoritative dispute settler and what mandate it has been given. To the extent that the regime as a whole was crafted with the intention that open-textured terms would be refined and perhaps modified over time by a dispute settler, then it would be expected subsequent practice would feature more as a part of that regime. Even the PCIJ, which to a large extent eschewed the use of subsequent conduct, was more receptive to its use for the interpretation of a treaty in the context of an institutionalized international regime to which the PCIJ was inextricably linked, the League of Nations, as may be seen in the *Free City of Danzig and ILO* case.⁵²

In order for subsequent practice to be relevant for a treaty regime, it is likely necessary that the regime has existed for some extended period of time, so as to allow the practice to develop. Having said that, I doubt that the age of the treaty regime or its institutions strongly correlates with an increased use of subsequent conduct. There are some regimes, such as ICAO, where the use of subsequent conduct is important to the regime right from its inception, whereas for others, such as the Inter-American Court of Human Rights, use of subsequent conduct has been minimal throughout its thirty-year life. No doubt for some regimes there is a shift over time to an increased use of subsequent conduct, but I suspect that the shift is due to factors beyond just the age of those regimes.

⁵² Advisory Opinion on the Free City of Danzig and ILO, P.C.I.J. Ser. B, No. 18, at 12-13 (1930).