CHAPTER 29

Subsequent Practice and Tax Treaties

Michael Lang[*]

§29.1 THE REPORT OF THE ILC

Peter Essers is one of the most outstanding tax law scholars, known and active far beyond the Netherlands. For many years, I have had a professional collaboration with him, which over time has also become a very good friendship. We share not only a passion for European tax law but also an interest in international tax law and in particular double taxation treaties. Peter Essers is also very concerned about the rule of law and – related to this – the separation of powers. Especially in the area of international tax law, the executive branch often has a predominant position. In contrast, the importance of legislation and jurisdiction often recedes into the background.

This is particularly evident in the case of subsequent practice, which is decisive for the interpretation of international treaties according to Article 31(3) lit b Vienna Convention on the Law of Treaties (VCLT): Subsequent practice is mostly shaped by the administrative authorities. In this way, the administrative authorities influence the content of the norms of international treaties and thereby compete with the competence of the legislature, which, at least in the area of double taxation agreements, is reserved in most states for the approval of these international treaties.[1] However, they also encroach on the jurisdiction of the courts, insofar as the 'subsequent practice'

* I completed this manuscript on 31 August 2023. I wish to express my sincere thanks to Dominik Hemmelmeyer for the critical review and his support in literature research, in drafting the annotations, and proofreading.

1. *See* in general Stefan Kadelbach, *The International Law Commission and Role of Subsequent Practice as a Means of Interpretation under Articles 31 and 32 VCLT*, QIL, Zoom-in 46 (2018), 5 (15); *see also* Stefan Kadelbach, *Domestic Constitutional Concerns with Respect to the Use of Subsequent Agreements and Practice at the International Level*, in: Georg Nolte (ed.) Treaties and Subsequent Practice (2013), 145 (153).

shaped by the administrative authorities is to be taken into account as part of the context of the international treaty when interpreting it. In the final analysis, this could lead to the courts adopting views of the administration instead of performing their very own task, namely reviewing administrative decisions.[2] Especially tax law scholars and tax courts, who are committed to the principle of separation of powers, are therefore often sceptical about the 'subsequent practice' according to Article 31(3) lit b VCLT.

The International Law Commission (ILC) has given new impetus to this topic: After long preparatory work – in particular by its Special Rapporteur *Georg Nolte* – the ILC adopted a report in its 70th session in 2018, which in its Chapter IV deals in detail with the topic 'Subsequent agreements and subsequent practice in relation to the interpretation of treaties'.[3] The ILC has reproduced, summarized and attempted to reconcile the views that have emerged on the interpretation of Article 31(3) lit b VCLT, and has naturally also set its own accents. Chapter IV of the report, including the 'Draft Conclusions' contained therein, became the subject of a separate resolution, which was adopted by the UN General Assembly on 20 December 2018.[4] I will not go into the significance of this resolution and the report of the ILC in terms of international law here, but there is no question that the work of the ILC will have a considerable influence on the further practice of international law and the jurisprudence on Article 31(3) lit b VCLT.[5] For this reason, I would like to pick out some of the considerations put forward by the ILC and examine what significance they might have, in particular, for the interpretation of tax treaties.

§29.2 IMPORTANCE OF 'SUBSEQUENT PRACTICE' IN THE CONTEXT OF DTA INTERPRETATION

In its 'Conclusion 2', the ILC emphasizes right at the beginning of its report that Articles 31 and 32 VCLT are also applicable as customary international law. In the Commentary, the ILC states:[6] '... the rules contained in articles 31 and 32 apply as treaty law in relation to those States that are parties to the 1969 Vienna Convention, and as customary international law between all States, including to treaties which were concluded before the entry into force of the Vienna Convention for the States parties concerned'. However, this does not necessarily apply to all rules of interpretation of the VCLT:[7] 'The Commission nevertheless decided not to address ... the question of how far article 33 reflects customary international law.'

2. *See* in that respect the Letter of the German Ministry of Finance of 19 April 2023 (BStBl I 2023, 630) in which the Ministry took the view that the most recent OECD Commentaries should be regarded as 'subsequent practice' for the interpretation of German tax treaties; in more detail Michael Lang, *Die Auffassung des BMF zur Bedeutung des OECD-Kommentars für die Auslegung von DBA*, IStR 2023, 549 et seq.
3. Report of the International Law Commission, Seventieth session 2018, UN Doc. A/73/10, 11 et seq.
4. Resolution of the UN General Assembly, 20 December 2018, UN Doc. A/RES/73/202.
5. *See, e.g.*, Danae Azaria, *'Codification by Interpretation': The International Law Commission as an Interpreter of International Law*, EJIL (2020), Vol. 31 No. 1, 171 (188 et seq.).
6. Report of the International Law Commission, Seventieth session 2018, 19 (para. 4 Conclusion 2).
7. Report of the International Law Commission, Seventieth session 2018, 19 (para. 5 Conclusion 2).

The significance of Articles 31 and 32 VCLT for the interpretation of a specific international treaty is not yet clear: As an international treaty, the VCLT is not superior to other international treaties – such as the tax treaties – but is on the same level. This also applies to customary international law. Articles 31 and 32 VCLT are therefore also a component of customary international law on the same level with the tax treaties. Therefore, each international treaty can also regulate its own interpretation, which in the field of tax treaties is evidenced by the provision modelled on Article 3(2) OECD Model Convention (OECD MC). Even if there is no explicit provision, international treaties could regulate their own interpretation if this results from the subject matter of the treaty.[8] Therefore, it is not excluded that for individual treaties the provisions of Articles 31 and 32 VCLT are applied in a modified form, which may also be relevant with regard to Article 31(3) lit b VCLT. Particularly in the area of tax treaties, where the provisions modelled on Article 3(2) OECD MC explicitly provide a separate interpretation provision, the question arises as to what extent this provision leaves room for Article 31(3) lit b VCLT. This is a question not only of the relationship between Articles 31 and 32 VCLT and Article 3(2) OECD MC but also of the interpretation of Article 3(2) OECD MC itself: If one assumes that this provision requires the primacy of the interpretation from the context of the tax treaty, and only in the second place the consideration of mutual agreements and in the third place that of the domestic law of the application state,[9] the question arises whether under the 'context' Articles 31 and 32 VCLT as a whole is to be understood, or, for instance, Article 31(3) VCLT is to be excluded.[10] Since the ILC does not address these questions, they will not be dealt with in depth here but only briefly addressed in this way.

The ILC emphasizes the primacy of Article 31 VCLT resulting from Article 32 VCLT:[11] 'Whereas article 31 sets forth the general rule and article 32 the recourse to supplementary means of interpretation, these rules must be read together as they constitute an integrated framework for the interpretation of treaties. Article 32 includes thresholds between the application of the primary means of interpretation according to article 31, all of which are to be taken into account in the process of interpretation, and "supplementary means of interpretation" set forth in article 32. Recourse may be had

8. For more details, *see* Michael Lang, *Can Law Regulate Its Own Interpretation? Relevance and Meaning of Articles 31-33 of the Vienna Convention on the Law of Treaties (VCLT) and Article 3 Para. 2 of the Model Convention of the Organisation for Economic Co-operation and Development (OECD MC) for the Interpretation of Double-Taxation Conventions*, in: Yariv Brauner, Research Handbook on International Taxation, 174 et seq.
9. On this subject in detail Michael Lang, *Tax Treaty Interpretation: A Response to John Avery Jones*, Bulletin for International Taxation 2020 (Vol. 74, no. 11), 660 et seq.; *see also* Michael Lang, *Die Bedeutung von Verständigungsvereinbarungen nach Art 3 Abs 2 OECD-Musterabkommen 2017*, in *FS Moris Lehner* 209 et seq. (Roland Ismer et al. (eds), 2019).
10. *See, e.g.*, Jasper Bossuyt, *The Legal Status of Extrinsic Instruments for the Interpretation of Tax Treaties* (2021), 1328: 'The "context" should not be interpreted as broadly as generally advocated in doctrine but refers to (i) the position that a term has in a phrase; (ii) the position that a phrase has in a paragraph; or (iii) the position that a paragraph has in an article, i.e. the mutual consistency of sentences and parts of sentences in a treaty, including the preamble and annexes. It additionally includes agreements concluded by both contracting states at the moment of treaty conclusion.'
11. Report of the International Law Commission, Seventieth session 2018, 17 et seq. (para. 3 Conclusion 2).

to the supplementary means of interpretation, either in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 leaves the meaning of the treaty or its terms ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable.' This distinction is particularly important with regard to 'subsequent practice': According to Article 31(3) lit b VCLT, 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' may be relevant. In certain cases, however, Article 32 VCLT may also come into consideration:[12] '... subsequent practice in the application of the treaty, which does not establish the agreement of all parties to the treaty, but only of one or more parties, may be used as a supplementary means of interpretation. This was stated by the Commission, and has since been recognized by international courts and tribunals, and in the literature'. The ILC attaches great importance to considering 'subsequent practice' as relevant under certain conditions, at least according to Article 32 VCLT.

Regarding the relationship of the individual means of interpretation mentioned in Article 31 VCLT, the ILC states the following in its Commentary:[13] 'The characterization of subsequent agreements and subsequent practice of the parties under article 31, paragraph 3 (a) and (b), as "authentic means of interpretation" does not, however, imply that these means necessarily possess a conclusive effect. According to the chapeau of article 31, paragraph 3, subsequent agreements and subsequent practice shall, after all, only "be taken into account" in the interpretation of a treaty, which consists of a "single combined operation" with no hierarchy among the means of interpretation that are referred to in article 31 ... .'

In addition, the ILC has stated:[14] 'Domestic courts have sometimes explicitly recognized that subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), are "authentic" means of interpretation. They have, however, not always been consistent regarding the legal consequences that this characterization entails. Whereas some courts have assumed that subsequent agreements and practice by the parties under the treaty may produce certain binding effects, others have rightly emphasized that article 31, paragraph 3, only requires that subsequent agreements and subsequent practice "be taken into account".'

Thus, the ILC makes it clear that the importance of 'subsequent practice' must not be overestimated: it is *one* of the 'means of interpretation'. It is by no means more important than other means of interpretation.[15] Therefore, the interpretation can also lead to a completely different result than subsequent practice suggests at first glance.[16]

12. Report of the International Law Commission, Seventieth session 2018, 20 et seq. (para. 9 Conclusion 2).
13. Report of the International Law Commission, Seventieth session 2018, 24 (para. 4 Conclusion 3).
14. Report of the International Law Commission, Seventieth session 2018, 26 (para. 8 Conclusion 3).
15. *See also* Artur Kozlowski, *Comment on the ILC Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties*, Polish Review on International and European Law 2021, Vol. 10, Issue 1, 121 (124).
16. *See* Rahim Moloo, *When Actions Speak Louder than Words: The Relevance of Subsequent Party Conduct to Treaty Interpretation*, Berkeley Journal of International Law 2013, 39 (76).

§29.3 CONDUCT OF TAX AUTHORITIES MAY CONSTITUTE SUBSEQUENT PRACTICE

The ILC also addresses an issue that is particularly relevant in the area of tax treaties:[17] 'Subsequent practice of States in the application of a treaty may certainly be performed by the high-ranking government officials mentioned in article 7 of the 1969 Vienna Convention. Yet, since most treaties typically are not applied by such high officials, international courts and tribunals have recognized that the conduct of lower authorities may also, under certain conditions, constitute relevant subsequent practice in the application of a treaty.'

In fact, tax treaties are generally applied by local tax authorities all over the world. In addition, there are courts that are called upon to review the decisions of the local tax authorities. But none of the officials mentioned in Article 7 VCLT – Heads of State, Heads of Government and Ministers for Foreign Affairs as well as heads of diplomatic mission – apply the provisions of the DTAs. This is also true for the representatives accredited by states to an international conference or to an international organization or one of its organs mentioned in Article 7(2) lit c because this applies only 'for the purpose of adopting the text of a treaty in that conference, organization or organ'. The Ministers of Finance and their authorities, which are not explicitly mentioned in Article 7 VCLT, apply the DTAs only in special situations, as in the case of Article 26 or Article 27 OECD MC or Article 29(8) lit c OECD MC. The application of Article 25 OECD MC is also reserved for the 'competent authorities' but only serves the conclusion of mutual agreements, which in turn may have significance for the interpretation as 'subsequent agreements'.[18]

The ILC even mentions, by way of illustration, an example from international tax law concerning the tax treatment of pensions by local tax authorities:[19] 'And in the case of *Tax regime governing pensions paid to retired UNESCO officials residing in France*, the Arbitral Tribunal accepted, in principle, the practice of the French tax administration of not collecting taxes on the pensions of retired UNESCO employees as being relevant subsequent practice. Ultimately, however, the Arbitral Tribunal considered some contrary official pronouncements by a higher authority, the French Government, to be decisive.' The ILC Report then summarizes as follows:[20] 'The practice of lower

17. Report of the International Law Commission, Seventieth session 2018, 38 (para. 6 Conclusion 5); *see also* Irina Buga, *Subsequent Practice and Treaty Modification*, in: Michael J. Bowman & Dino Kritsiotis (eds) *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (2018), 363 (368).
18. *See also* Rahim Moloo, *When Actions Speak Louder than Words: The Relevance of Subsequent Party Conduct to Treaty Interpretation*, Berkeley Journal of International Law 2013, 39 (69 et seq.): '[...] with respect to customs exemptions in a treaty, the actions of border customs agents may be relevant [under Article 31 (3) lit b VCLT], though that same customs agent would not be able to represent the state in entering an agreement on the interpretation of the same treaty for the purposes of Article 31(3)(a)'.
19. Report of the International Law Commission, Seventieth session 2018, 38 (para. 6 Conclusion 5).
20. Report of the International Law Commission, Seventieth session 2018, 38 (para. 7 Conclusion 5); *see also* Irina Buga, *Subsequent Practice and Treaty Modification*, in: Michael J. Bowman & Dino Kritsiotis (eds) *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (2018), 363 (368).

and local officials may thus be subsequent practice "of a party in the application of a treaty" if this practice is sufficiently unequivocal and if the Government can be expected to be aware of this practice and has not contradicted it within a reasonable time.'

Therefore, according to the ILC Report, the practice of the competent local authorities, i.e., as a rule, the tax offices, is decisive for the determination of a 'subsequent practice'. In such cases, statements by the government or another 'higher authority' cannot themselves establish a 'subsequent practice'. They can – if the government takes a view contrary to the practice of the competent local authorities – only *prevent* this practice from becoming a 'subsequent practice' according to Article 31(3) lit b VCLT.[21]

A judgment of the Austrian Supreme Constitutional Court (Verfassungsgerichtshof) goes in a similar direction:[22] 'A later practice within the meaning of Article 31 (3) of the Vienna Convention on the Law of Treaties that is to be taken into account in the context of treaty interpretation can only be spoken of if the authorities entrusted with the application of the law hold a uniform opinion that has remained undisputed, i.e. has not been challenged before the courts or confirmed by the appellate court (cf. also *Lang*, ÖStZ 2006, 208 f.).' The authorities entrusted with the application of the law, whose conduct may constitute a 'subsequent practice', are also in Austria primarily the local tax authorities.[23] Decisions of the local tax authorities can only be considered a 'subsequent practice' if they have remained uncontested, i.e., have not been challenged before the courts or have even been confirmed by them. However, if a court disagrees, no 'subsequent practice' can arise.[24]

Recently, the Swiss Federal Supreme Court (Bundesgericht) referred to the above-mentioned ruling of the Austrian Supreme Constitutional Court, among others, and also made statements along the same lines.[25] In particular, the Swiss Federal Supreme Court also rejected the argument that the OECD Commentaries could be an expression of a 'subsequent practice':[26] 'In the literature, it was rightly pointed out that the OECD MC itself does not yet embody a consistent application practice and that the tax offices and tax judicial authorities – and not, for example, the representatives of the Member States in the Fiscal Committee of the OECD or the supreme tax authority of the Member States – are typically entrusted with the application of the DTAs (cf. MICHAEL

21. In this regard also already Michael Lang, *Die Auffassung des BMF zur Bedeutung des OECD-Kommentars für die Auslegung von DBA*, IStR 2023, 549 (554).
22. VfSlg. 20005/2015; on this also Michael Lang in Georg Kofler et al., *Steuerpolitik und Verfassungsrecht*, 2023, 135 (160 et seq.).
23. More closely Michael Lang, *Wer hat das Sagen im Steuerrecht? Die Bedeutung des OECD-Steuerausschusses und seiner Working Parties*, ÖStZ 2006, 203 (207); *see also* Rahim Moloo, *When Actions Speak Louder than Words: The Relevance of Subsequent Party Conduct to Treaty Interpretation*, Berkeley Journal of International Law 2013, 39 (69), who points out that in interpreting customs exemptions in international treaties, the 'practice' is shaped by the customs authorities.
24. In this regard also Michael Lang, *Die Auffassung des BMF zur Bedeutung des OECD-Kommentars für die Auslegung von DBA*, IStR 2023, 549 (551).
25. In addition also Michael Lang, *Schweizer Bundesgericht zur Bedeutung des OECD-Kommentars*, SWI 2023, 418 et seq.
26. Swiss Federal Supreme Court, 23 June 2023, 9C_682/2022 (para. 9.4.4.).

LANG, Die Bedeutung des OECD-Kommentars und der Reservations, Observations und Positions für die DBA-Auslegung, in FS Dietmar Gosch, 235 (239); cf. also judgment of the Austrian Supreme Constitutional Court V 41/2015 of September 25, 2015, para. 2.2.3; contrary view judgment of the Supreme Court of Canada of November 26, 2021 Canada v Alta Energy Luxembourg S.A.R.L., 2021 SCC 49 para. 41; LINDERFALK/HILLING, op. cit, p. 45 f.; cf. for the identification of the application practice of a State Party UN International Law Commission, Yearbook of the International Law Commission 2018, Vol. II, Part Two, Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, commentary on Conclusion 5 paras. 6 f. and 9 and on Conclusion 6 paras. 7 and 22).'

According to the standard set by the Austrian Supreme Constitutional Court and now also by the Swiss Federal Supreme Court, it is difficult at all to prove a practice that is significant under Article 31(3) lit b VCLT: For such a practice arises 'when the authorities entrusted with the application of the law' take 'a uniform view' in their decisions. As a rule, taxpayers have no knowledge of how the authority responsible for them and the other authorities in their country have proceeded in cases of other taxpayers involving the same legal issue. However, the authorities are also prevented from granting taxpayers insight into other tax files for reasons of tax secrecy. The proof of an undisputed practice is therefore practically hardly possible.[27] More realistic, however, is the proof of a practice – at least considered relevant by the Austrian Supreme Constitutional Court –[28] confirmed by the appellate courts. Therefore, if courts unanimously confirm the opinion of the local tax authorities on a certain question of interpretation of tax treaties, this can rather establish a 'practice'.[29]

In the case of the tax regime governing pensions paid to retired UNESCO officials residing in France referred to by the ILC in its report, the group of taxpayers concerned was manageable from the outset. This made it easier to provide evidence. In addition, the proof of a uniform practice was not decisive in this case because the assumption of a 'subsequent practice' within the meaning of Article 31(3) lit b VCLT was ruled out in any case due to the government's contradiction to this legal interpretation.

In this context, the requirements explicitly mentioned by the ILC in Conclusion 9 are interesting:[30] 'The weight of a subsequent agreement or subsequent practice as a means of interpretation under article 31, paragraph 3, depends, *inter alia*, on its clarity and specificity. ... In addition, the weight of subsequent practice under article 31, paragraph 3 (b), depends, *inter alia*, on whether and how it is repeated.' According to the Commentary of the ILC, this does not exclude that there are constellations in which even a single act can be considered as 'subsequent practice'.[31] In the context of tax treaties, one might think of constellations in which only in one single case a court was

27. In this regard also Michael Lang, *Die Auffassung des BMF zur Bedeutung des OECD-Kommentars für die Auslegung von DBA*, IStR 2023, 549 (551).
28. VfSlg. 20005/2015.
29. Michael Lang, *Die Auffassung des BMF zur Bedeutung des OECD-Kommentars für die Auslegung von DBA*, IStR 2023, 549 (551).
30. Report of the International Law Commission, Seventieth session 2018, 70.
31. Report of the International Law Commission, Seventieth session 2018, 73 et seq. (para. 11 Conclusion 9).

involved in the review of the legal issue, and the court confirmed the opinion of the local tax authorities. However, the ILC also points out that the WTO Appellate Body, for example, regularly sets higher standards:[32] 'subsequent practice in interpreting a treaty has been recognized as a "concordant, common and consistent" sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties regarding its interpretation'.

For the purposes of Article 31(3) lit b VCLT, a concurrent practice in both states is required. According to the ILC, a 'parallel practice' is sufficient.[33] It would therefore have to be proven in both states that the local tax authorities or, if applicable, the courts have taken the same legal view. If the proof can only be provided in one of the two states, this unilateral subsequent practice is not completely irrelevant in the opinion of the ILC: It can still be taken into account according to Article 32 VCLT.[34] However, this is only possible under the conditions stated there, either to confirm the interpretation obtained under Article 31 VCLT or if the interpretation under Article 31 VCLT leaves the meaning of the treaty or its terms ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable.

§29.4 SUBSEQUENT PRACTICE AND INTERPRETATION OF TREATY TERMS AS CAPABLE OF EVOLVING OVER TIME?

According to the ILC, subsequent practice – just like subsequent agreements – is also relevant to the question of whether and to what extent a provision of an international treaty carries with it the possibility of its further development. Conclusion 8 reads as follows:[35] 'Subsequent agreements and subsequent practice under articles 31 and 32 may assist in determining whether or not the presumed intention of the parties upon the conclusion of the treaty was to give a term used a meaning which is capable of evolving over time.'

The ILC clearly differentiates here: The ILC does not say that when it comes to expressions that have a 'meaning which is capable of evolving over time', there is more room for subsequent practice in the interpretation of these expressions. Subsequent practice can merely help to determine whether an expression is to be given a more dynamic or more static understanding. 'Subsequent practice' can therefore also show that a more contemporaneous approach is appropriate for the interpretation of an

32. Report of the International Law Commission, Seventieth session 2018, 33 (para. 25 Conclusion 4); *see also* Georg Nolte, *Subsequent Practice as a Means of Interpretation in the Jurisprudence of the WTO Appellate Body*, in: Enzo Cannizzaro (ed.) The Law of Treaties Beyond the Vienna Convention (2011), 138 (143 et seq.).
33. Report of the International Law Commission, Seventieth session 2018, 50 (para. 23 Conclusion 6).
34. Report of the International Law Commission, Seventieth session 2018, 75 (para. 15 Conclusion 9).
35. Report of the International Law Commission, Seventieth session 2018, 64.

expression. According to the Commentary of the ILC, this is also not at all unlikely:[36] 'The conclusion should, however, be understood as indicating the need for some caution with regard to arriving at a conclusion in a specific case whether to adopt an evolutive approach.' The ILC therefore urges caution in adopting an 'evolutionary approach' in a particular case.

On the question of which understanding is appropriate in which cases, the ILC then refers to the case law of the International Court of Justice (ICJ):[37] 'The International Court of Justice, in particular, is seen as having developed two strands of jurisprudence, one tending towards a more "contemporaneous" and the other towards a more "evolutionary" interpretation, as Judge *ad hoc* Guillaume pointed out in his Declaration in *Dispute regarding Navigational and Related Rights*. The decisions that favour a more contemporaneous approach mostly concern specific treaty terms ("water-parting"; "main channel or Thalweg"; names of places; and "mouth" of a river). On the other hand, the cases that support an evolutive interpretation seem to relate to more general terms. This is true, in particular, for terms that are by definition evolutionary, such as "the strenuous conditions of the modern world", "the well-being and development of such peoples", and "sacred trust" in article 22 of the Covenant of the League of Nations. The International Court of Justice, in its *Namibia* Advisory Opinion gave "sacred trust" an evolving meaning so as to conclude "that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned."'

A decision in which the ICJ arrived at an evolving meaning is quoted in detail in the Commentary of the ILC to Conclusion 8:[38] 'The judgment of the International Court of Justice in *Dispute regarding Navigational and Related Rights* illustrates how subsequent agreements and subsequent practice of the parties can assist in determining whether a term has to be given a meaning that is capable of evolving over time. Interpreting the term "comercio" in a treaty of 1858, the Court held:

> On the one hand, the subsequent practice of the parties, within the meaning of article 31 (3) (b) of the Vienna Convention, can result in a departure from the original intent on the basis of a tacit agreement between the parties. On the other hand, there are situations in which the parties' intent upon conclusion of the treaty was ... to give the terms used ... a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law.

The Court then found that the term "comercio" was a "generic term" of which "the parties necessarily" had "been aware that the meaning ... was likely to evolve over

36. Report of the International Law Commission, Seventieth session 2018, 67 (para. 10 Conclusion 8); *see also* Sean D. Murphy, *The Relevance of Subsequent Agreement and Subsequent Practice for the Interpretation of Treaties*, in: Georg Nolte (ed.) Treaties and Subsequent Practice (2013), 82 (87).
37. Report of the International Law Commission, Seventieth session 2018, 65 (para. 6 Conclusion 8); *see also* Bruno Simma, *Miscellaneous Thoughts on Subsequent Agreements and Practice*, in: Georg Nolte (ed.) Treaties and Subsequent Practice (2013), 46 (48).
38. Report of the International Law Commission, Seventieth session 2018, 67 et seq. (para. 12 Conclusion 8); *see also* Marcelo G. Kohen, *Keeping Subsequent Agreements and Practice in Their Right Limits*, in: Georg Nolte (ed.) Treaties and Subsequent Practice (2013), 34 (41).

time" and that "the treaty has been entered into for a very long period", and concluded that "the parties must be presumed ... to have intended" this term to "have an evolving meaning". Judge Skotnikov, in a Separate Opinion, while disagreeing with this reasoning, ultimately arrived at the same result by accepting a more recent subsequent practice of Costa Rica related to tourism on the San Juan River "for at least a decade" against which Nicaragua "never protested" but rather "engaged in consistent practice of allowing tourist navigation" and concluded that this "suggests that the parties have established an agreement regarding its interpretation."'

The latter example in particular gives rise to the question of whether we are really dealing with two different 'strands of jurisprudence'. For apparently there was no tourism on the San Juan River in 1858. From the perspective of the year 1858, this is a new phenomenon. However, it is part of the daily routine of any legal interpretation to clarify which facts that have only newly arisen since the entry into force of the law or the conclusion of the contract are covered by the provision and which are not. In the present case, it has been shown that tourism is still covered by 'comercio'. However, if the decision had been on a completely different service and the ICJ had ruled that this service was not covered by 'comercio', this would probably not have led to the term 'comercio' no longer having an evolving meaning.[39] The boundaries are fluid in interpretation. It is a matter of continuum: some provisions are more, others less, likely to cover new phenomena as well.

The Swiss Federal Supreme Court recently had to rule on how to proceed in this tension in the interpretation of terms contained in tax treaties:[40] 'The terms "salaries", "wages" and above all "similar remuneration" would be open in themselves and a dynamic interpretation autonomous of the treaty would therefore not be excluded from the outset. However, according to practically unanimous doctrine, they are to be interpreted in accordance with Art. 3 para. 2 OECD MC and Art. 3 para. 2 of the tax treaty Switzerland – United Arab Emirates, respectively, with recourse to the law of the applicable state, in order to enable a complete coverage of taxable employment income ... . In any case, the new explanations in the OECD commentaries are not intended to define "salaries, wages and similar remuneration". Rather, they are intended to help identify the specific consideration of a remuneration so that it can be determined whether or, if so, to what extent it was received for the performance of work in the State in which the work was performed ... . Consequently, this addition concerns the interpretation of Art. 15, para. 1, sentence 2 of the tax treaty Switzerland – United Arab Emirates and of the OECD MC, respectively, where the connection between remuneration and work performed is presupposed (...; in the original French and English versions: "Si l'emploi y [i.e.: dans l'autre État contractant] est exercé, les rémunérations reçues à ce titre sont imposables dans cet autre État."; "If the employment is so [i.e.: in the other Contracting State] exercised, such remuneration as is derived therefrom may be taxed in that other State."). In this respect, however, no open terms are apparent, the meaning of which would foreseeably change in the course of time and

39. Critical also Malgosia Fitzmaurice, *Subsequent Agreement and Subsequent Practice*, ICLR 20 (2020), 14 (31).
40. Swiss Federal Supreme Court, 23 June 2023, 9C_682/2022 (para. 10.1.).

the dynamic interpretation of which the Contracting States of the tax treaty Switzerland – United Arab Emirates could have intended.'

The Swiss Federal Supreme Court agrees that in the context of Article 15 OECD MC – and presumably also in the context of the other distribution norms of the tax treaties – there is no indication that these are open terms which would support a dynamic interpretation. In the case of the terms 'salaries, wages and similar remuneration' in Article 15 OECD MC, the situation is indeed different. These words serve the same purpose as the words 'profits', 'payments' or 'income' in the other distribution standards: They ensure that each distributive rule of a tax treaty is linked to the tax base of the domestic tax law of the Contracting States so that then the distributive rule – either alone or in combination with the method article – restricts accordingly, if necessary. Tax treaties distribute taxation rights between the Contracting States and must therefore be based on domestic tax law not only from the perspective of its personal scope – by the 'resident person' – but also from the perspective of its substantial scope. From this point of view, the tax treaty provision modelled on Article 3(2) OECD MC can only be relevant to the extent that the context of the treaty requires the use of the tax base under domestic law, i.e., by way of an autonomous interpretation.[41] It is absolutely correct that with all these mentioned expressions ('salaries, wages and similar remuneration'), the respective domestic tax base at the time when the facts occur is decisive.

§29.5 SUMMARY

In my opinion, the work of the ILC, whose conclusions were even the subject of a resolution of the UN General Assembly, contributes significantly to eliminating concerns about the meaning of 'subsequent practice' in Article 31(3) lit b VCLT from the perspective of the rule of law. At first sight, the possibilities granted by Article 31(3) lit b VCLT to the executive branch to change the content of the tax treaties by means of subsequent practice for which it is responsible and thus to interfere with the prerogative of the legislative branch and, in addition, to eliminate the control of the judicial branch by assuming a binding effect of subsequent practice are oppressive. However, the Conclusions and the Commentaries of the ILC make it clear that 'subsequent practice' according to Article 31(3) lit b VCLT is only relevant if it is consistent in both states. Unilateral subsequent practice could only be relevant under Article 32 VCLT and therefore only under very limited conditions. But also, in the context of Article 31 VCLT, subsequent practice is only a means of interpretation, which stands on an equal footing with the other means of interpretation. Therefore, there is no question of a 'binding effect' of subsequent practice. If the other means of interpretation suggest a different direction, subsequent practice recedes into the background. However, it is hardly verifiable because it is usually the practice of the local tax authorities that is at issue. It will be difficult to prove that a consistent practice exists throughout the entire

41. *See also* Michael Lang, *Schweizer Bundesgericht zur Bedeutung des OECD-Kommentars*, SWI 2023, 418 (425).

country if only because of tax secrecy. It is only considered subsequent practice if it has remained undisputed. If courts or even the Ministry of Finance itself then take a completely different view, it is no longer possible to speak of a 'subsequent practice'. Conversely, the opinion of the Ministry of Finance alone cannot justify a subsequent practice.

The ILC Report has also made clear that a 'subsequent practice' to a provision of a tax treaty is not an indication that this provision is to be understood in an evolutionary way. Rather, only 'subsequent practice' can even help to determine whether a more 'contemporaneous' or a more 'evolutionary' interpretation should be applied. Subsequent practice may also indicate that a more 'contemporaneous interpretation' is appropriate. The ILC also advocates a cautious approach in this regard. There is much to be said for requiring a more 'contemporaneous interpretation', especially in the area of tax treaties.