The question:

Subsequent practice in treaty interpretation between Article 31 and Article 32 of the Vienna Convention

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In 2012 the International Law Commission started to work on ‘Subsequent agreements and subsequent practice in relation to interpretation of treaties’. From 2013 to 2016 the Special Rapporteur, Georg Nolte, has handed down four reports where he distinguishes between ‘agreed subsequent practice’ and ‘other subsequent practice’ and draws some consequences from such a distinction. The former should include subsequent practice that establishes the agreement between the parties regarding its interpretation and would fall under the purview of Article 31(3)(b) of the Vienna Convention on the Law of Treaties. The latter should include other subsequent practice, in a broad sense, of the parties to a treaty. This distinction, that was already present in the First Report (see paras 65, 81, 93), was clarified in the Fourth Report where draft conclusion 4 has been revised and now reads: ‘Other “subsequent practice” as a supplementary means of interpretation under Article 32 consists of official conduct in the application of the treaty, after its conclusion’ (additional para 3).

In that regard, QIL identified the following four main questions and invited two prominent scholars to provide their views on some or all of them.

1. Is this distinction appropriate? Is the adoption of a restrictive interpretation of ‘agreed subsequent practice’ consistent with international and national judicial practice? Can the taking into account of ‘subsequent practice’ for interpretative purposes fall under the purview of Article 32? Under which conditions? What is the rationale justifying such an inclu-
sion? Among the elements in the open list of Article 32, some international law scholars quickly include ‘subsequent practice’,1 ‘subsequent practice which either was not that of parties (but, for example, of international organs), or which does not relate to the application of the treaty or does not establish an agreement of the parties, and therefore does not fall under Article 31 para 3 lit c’,2 or ‘agreements and practice among a subgroup of parties to a treaty not falling within the ambit of authentic interpretation in Article 31, para 2 and subparas 3(a) and (b)’.3 On the other hand, other scholars seem to question the very fact that subsequent practice is able to shed light on the original intentions of the drafters of the treaty.4

2. The main consequence that the Special Rapporteur draws from the distinction between ‘agreed subsequent practice’ and ‘subsequent practice (in the broad sense)’ is that the former has greater interpretative value than ‘subsequent practice’ in a broad sense (First Report, para 107). Accordingly, the distinction reduces significantly the value of ‘subsequent practice’ (confined to Article 32). Is this consistent with the spirit of the VCLT and international practice (see eg Hassan v United Kingdom App no 29750/09 (ECtHR, 16 September 2014) para 101)?

3. The distinction adopted by the Special Rapporteur seems problematic when compared to its approach to the issue of the possibility of a treaty modification by way of subsequent practice. While Article 31(3)(b) is limited to (tacit) agreements between contracting states, modification by way of subsequent practice is in principle rejected (Second Report, draft conclusion 11: ‘It is presumed that the parties to a treaty, by a subsequent agreement or subsequent practice, intend to interpret the treaty, not to modify it. The possibility of modifying a treaty by subsequent practice of the parties has not been generally recognized’). Is this consistent with the view that Article 31(3)(b) only covers ‘agreed subsequent practice’?

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4. Another relevant consequence of the distinction between ‘agreed subsequent practice’ and ‘subsequent practice (in the broad sense)’ is that the practice of international organizations would possibly be considered as falling under the purview of Article 32 (Third Report, para 33). This does not seem to be an isolated view. However, is it correct? Other international law scholars have expressed opposite views according to which ‘the practice of, or within, an organization is in principle attributable to the organization itself and does not necessarily demonstrate the specific concurrence of the individual parties to the treaty setting it up’.\textsuperscript{5} Under which conditions can the practice of the organs of an international organization be a means of interpretation revealing the intentions of the contracting states at the time of the conclusion of the treaty? More generally, is a special approach with respect to the interpretation of treaties establishing international organizations justified? For instance, ICJ advisory opinions seem to justify a broader reliance on institutional subsequent practice in relation to the interpretation of treaties establishing international organizations.

\textsuperscript{5} R Gardiner, \textit{Treaty interpretation} (2nd edn, OUP 2015) 280.