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**Subsequent Practice, Practices,  
and “Family-Resemblance”:  
Towards Embedding Subsequent Practice in its  
Operative Milieu – A Multi-Actor Perspective**

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# **Subsequent Practice, Practices, and “Family-Resemblance”: Towards Embedding Subsequent Practice in its Operative Milieu – A Multi-Actor Perspective**

*Laurence Boisson de Chazournes*<sup>\*</sup>

## **Abstract**

Being as it is volatile, multifaceted, amorphous, omnipresent, flexible, and dynamic, “practice” defies precise definition. Plural in its characteristics, practice is also plural in the roles it plays. Hence, the question arises as to how “practice” operates as a tool of treaty interpretation and application. To answer this question, it is necessary to explore the genesis and features of the “practice family” as well as the way in which *species* of practice operate under a treaty regime. That is crucial to ascertain a better understanding of today’s role of subsequent practice in the legal regime applicable to treaties. It also allows for reflection on how the legal category of “subsequent practice” may itself evolve in the future to meet the needs of any given treaty. At present, subsequent practice is centred on the conduct of states. However, the presence of other legally relevant practice under current treaties involving various actors may require a more in-depth consideration as to how all of these different categories coexist and interact with one another.

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### 1. Introduction: Subsequent Practice and Practices

Being as it is volatile, multifaceted, amorphous, omnipresent, flexible, and dynamic, “practice” defies precise definition. Plural in its characteristics, practice is also plural in the *roles* it plays within our discipline. To most if not all of us, practice instinctively springs to mind in the context of custom, as well as treaties.<sup>1</sup> Its functions range, in fact, from the production to the application of legal rules. Yet, the semantic singularity of “practice” might suggest a unitary production process for *all* legally relevant practices. It is commonplace to discuss the criteria of practice’s normativity in connection with the theory of custom development. In particular, the genesis of “practice” is often conflated into the process of rule production through practice. Both the circumstances relevant to practice formation and the prerequisites for the former to count as practice are determined on the basis of the paradigm of customary rules formation. Other than according to custom logic, little or no room, therefore, remains for a legally relevant practice to arise. However, one may doubt whether this assumption accurately reflects the international legal order we live in today.

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<sup>1</sup> For an overview, see M. Kohen, “La Pratique et la Théorie des Sources du Droit International” in Société Française pour le Droit International - S.F.D.I., *La Pratique et le Droit International* (Pedone, Paris, 2004) pp. 81–111.

In attempting to address the aforementioned proposition, subsequent practice can be seen as a good starting point, revealing the narrowness of the former. Formally baptized by the Vienna Convention on the Law of Treaties (henceforth, VCLT) as a source of treaty interpretation, subsequent practice represents something of an exception regarding the VCLT's cautious treatment of facts for interpretative purposes.<sup>2</sup> As such, it comes straight-jacketed into a consensual framework based on the behaviour of the Parties to the Convention. In requiring the repetition of a certain conduct, coupled with some form of recognition by the Parties, art. 31(3)(b) repeats the normative criteria regarding the development of customary rules. A similar approach also recurs in the judicial and doctrinal debate about subsequent practice. Cases dealing with subsequent practice follow a similar reasoning to that laid down in cases where customary rules are analysed. Accordingly, any given conduct needs some degree of consistency to be considered a subsequent practice,<sup>3</sup> as *usus* classically does, whereas the degree of endorsement by the Parties is measured against the spectrum of *opinio iuris*. Scholars reinforce this tendency by discussing subsequent practice as something of a sub-category of custom.<sup>4</sup> Differences arise concerning the respective threshold of generality and endorsement for a subsequent practice to be established, but its founding normative elements are fairly undisputed. Therefore, while operating in areas as diverse as those of agreements related to human rights, environment, investment, or trade, subsequent practice is, at its core, fairly uniform. To consider it as a blend of repetition over time with acknowledgement appears to be a firmly rooted assumption for international lawyers.

Such a conceptual homogeneity, however, is blurred by the fact that some conventional regimes have *practices* that do not match the logic of custom. The hiatus can have to do with process of practice production, *e.g.*

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<sup>2</sup> It is important to note that art. 31(3)(b) entails an important characteristic relative to the overall architecture of the VCLT. Facts are formally relegated to a supplementary function, but for the exception of subsequent practice. At the time of codification, this move was quite innovative relative to the debate on interpretation. In this sense, *see* F.G. Jacobs, "Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties before the Vienna Diplomatic Conference", 18:2 *International and Comparative Law Quarterly* (1969) p. 318, pp. 327-332.

<sup>3</sup> The degree of consistency of a conduct has been formulated in different ways by judicial courts and tribunals. The WTO Appellate Body held that a conduct must be "concordant, common and consistent", *see* WTO, *Japan: Taxes on Alcoholic Beverages—Report of the Appellate Body*, 4 October 1996, WT/DS8/AB/R, WT/DS10/AB/R, and WT/DS11AB/R 13, paras. 11-15. A similar formulation can be found in *US-France Air Services (USA v France)*, 1963, Arbitration Tribunal, 38 ILR 182.

<sup>4</sup> For instance, R. Kolb argues that "[s]ubsequent practice often presents itself as a sub-category of custom [our translation]", *see* R. Kolb, *Interprétation et Création du Droit International* (Bruylant, Bruxelles, 2006) p. 507.

“environmental best practices”, or the actors involved, *e.g.* “commercial uses”, or even both, *e.g.* “technical standards”. Common to all these practices is the lack of consistency and endorsement necessary in tandem for custom development and, in turn, usually ascribed to subsequent practice. Nonetheless, these practices impact upon states’ behaviour under the treaty and, what is more, they play a role in the judicial or quasi-judicial application of treaties. It suffices to note, for the time being, that a number of international judicial instances – ranging from the World Trade Organization (henceforth, WTO) Panels and Appellate Body to the International Tribunal for the Law of the Sea (ITLOS) or to arbitral tribunals – have referred to technical standards, best practices and so forth.<sup>5</sup>

Overall, one could describe such practices in terms of “family resemblance”, recalling a concept developed by the late Wittgenstein.<sup>6</sup> According to Wittgenstein, there are certain categories of concepts or elements which seem to share one essential feature, but are, in fact, connected by a series of overlapping similarities, with no one feature common to all. In our case, different practices are recognized as an expression of conduct that is legally relevant under a treaty. As such, these kinds of practices are suited to supporting claims about the application of a treaty in a certain way made by its interpreters. Yet, there is no one normative feature that is common to all practices. With criss-crossing similarities, they rather interplay, intersect, and overlap with one another throughout the life of any given treaty. Hence, the question arises as to how “practice” operates as a tool of treaty interpretation and application. To attempt an answer, it is necessary to explore the genesis and features of the “practice family” (*see* Part 2 of the contribution) as well as the way in which *species* of practice operate under a treaty regime (*see* Part 3). On the one hand, this implies less of a focus on some “classical” issues related to subsequent practice, such as art 31(3)(b)’s consensual approach or the permissibility of treaty modification through subsequent practice. On the other hand, it broaches the horizontal role of subsequent practice as a problem of “operative mode” rather than that of “essence”. In other words, we do not mean to question if the features of subsequent practice vary according to the

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<sup>5</sup> See Part 3 of the present contribution.

<sup>6</sup> To illustrate the concept of family resemblance, Wittgenstein argues that “[C]onsider for example the proceedings that we call ‘games’. I mean board-games, card-games, ball-games, Olympic games, and so on. What is common to them all? Don’t say: ‘There must be something common, or they would not be called “games”’ – but look and see whether there is anything common to all. For if you look at them you will not see something that is common to all, but similarities, relationships, and a whole series of them at that [. . .]. I can think of no better expression to characterize these similarities than ‘family resemblances’; for the various resemblances between members of a family: build, features, colour of eyes, gait, temperament, etc., etc. overlap and criss-cross in the same way. And I shall say: ‘games form a family’” in L. Wittgenstein, *Philosophical Investigations*, translated by G.E.M. Anscombe, 3rd ed. (Blackwell, Oxford, 2001) pp. 27-28.

characteristics inherent to a certain treaty. Rather, our question concerns the judicial and non-judicial uses of the network of “practices” surrounding treaties. The value of such a broad focus is to insert subsequent practice into its operative milieu. That, in turn, is not only crucial to ascertain a better understanding of today’s role of subsequent practice, but also allows for reflection on how the legal category of “subsequent practice” may itself evolve in the future to meet the needs of any given treaty. At present, subsequent practice is centred on the conduct of states. However, the presence of other legally relevant practice under current treaties may require a more in-depth consideration as to how all of these different categories coexist and interact with one another. Indeed, subsequent practice is a useful tool for treaty Parties to rely upon when they make certain claims. If such claims came to reflect or be influenced by other “practices”, our understanding of “subsequent practice” would shift accordingly. Giving some indication as to the possible direction of this shift is also part of our objective.

## **2. The “Practice Family”: Mapping the *Species* of Practice under Current Conventional Regimes**

What types of conduct have legal relevance under today’s treaties? This is our key question. To address it, one has to be mindful that treaties are porous to their legal environment. The normative character of a practice may therefore either be anchored in a conventional regime or derive from the international legal order. Two layers of analysis thus overlap. One requires us to identify practice internal to today’s treaties, *i.e.* practice which emanates from a treaty as well as practice nominally recognized by it. The other involves analysing how certain instruments, which find their normative character primarily in the international legal order, induce conduct, in some respects akin to practice, once incorporated into a treaty. Such a broad focus allows for, on the one hand, an extension of the circle of actors beyond the Parties to a treaty and, on the other hand, touching on development processes that are different from those usually considered in conjunction with subsequent practice.

### *a. The Practice of the States Parties to a Treaty*

The Parties to a treaty are the first link in the chain of development that leads to practice. The category of subsequent practice confers legal meaning to their conduct under a treaty. Reference to practice amongst Treaty parties is well established in the jurisprudence of international courts and tribunals. Scholars have also accorded extensive attention to this topic. We will limit ourselves to a few remarks on this *species* of practice.

Although scholars agree in general on the existence of some degree of consistency as well as endorsement by the Parties, various formulations have

been put forward to pinpoint these aspects. It has been stressed that conduct “must be consistent rather than haphazard”<sup>7</sup> or, more stringently, that conduct should be “concordant, common and consistent”.<sup>8</sup> It has also been noted that a practice can stem from a “sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties regarding its interpretation”.<sup>9</sup> Implicitly, it is suggested that the significance of subsequent practice will depend on the extent to which it is concordant, common, and consistent. Yet this account of subsequent practice may overlook a further layer of complexity insofar as the existence of agreements involving non-state actors is concerned.

Subsequent practice may sometimes be the practice of one party only, *i.e.* a unilateral practice. A good example is Bilateral Investment Treaty (henceforth, BIT). Arguments concerning a unilateral practice are to be found, for instance, in the *CEMEX Caracas Investments BV and CEMEX Caracas Investments II BV v Bolivarian Republic of Venezuela* case. The investors involved in that case maintained that Venezuela’s “[a]doption of the Netherlands Model BIT indicates an intention to follow the pro-investment policies expressed therein”<sup>10</sup> or that “Venezuela’s treaty practice has consistently favored a broad interpretation of ‘investment’”.<sup>11</sup> While having made no definitive finding on that issue, the arbitral tribunal took due notice of the position of the investors. The legal relevance of such a unilateral practice is grounded in the very architecture of BITs.<sup>12</sup> These, in fact, involve a state and a private actor. As such, the interpretation of a BIT, particularly in the context of an investment dispute, can hardly amount to “concordant” state behaviour, required under subsequent practice. Conceptually, similar considerations apply to other types of agreements concluded with non-state actors, for instance in the field of international humanitarian law. Together, these considerations suggest that the very category of subsequent practice, centred on the conduct of states, is one of variable geometry. State conduct

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<sup>7</sup> M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers, Netherlands, 2009) p. 431.

<sup>8</sup> I. McTaggart Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed., (Manchester University Press, Manchester, 1984) pp. 137-138. This formulation has been endorsed also by the WTO Appellate Body, see *Japan: Taxes on Alcoholic Beverages*—Report of the Appellate Body, 4 October 1996, WTO Appellate Body, WT/DS8/AB/R, WT/DS10/AB/R, and WT/DS11AB/R.

<sup>9</sup> See the *US-France Air Services Arbitration (USA v France)*, Arbitration Tribunal, (1963) 38 ILR 182.

<sup>10</sup> *CEMEX Caracas Investments BV and CEMEX Caracas Investments II BV v Bolivarian Republic of Venezuela*, Decision on Jurisdiction, 30 December 2010, ICSID Case No ARB/08/15, para. 32.

<sup>11</sup> *CEMEX Caracas Investments BV*, para. 32.

<sup>12</sup> A. Roberts, “Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States”, 104 *American Journal of International Law* (2010) pp. 179-222.



that can amount to subsequent practice depends on the conventional context and, more precisely, on the allocation of rights and obligations established under it.<sup>13</sup>

*b. Practice Stemming from Treaties' Institutional Machinery*

A rich “practice” stems from the institutional machinery created under many post-Second World War treaties. The jargon of both academics and practitioners is interspersed today with expressions such as “the practice of the organization” or “the practice of an organ”. Practice is also formally recognized as part of the “rules of the organizations” by art 1(2)(j) VCLT between states and International Organizations or between International Organizations.<sup>14</sup> Yet, its place in the “practice family” largely owes to the International Court of Justice (henceforth, ICJ), which has asserted its normative nature and spelt out its features. The Court has generally treated the “practice of an International Organization” as an individual category, in line with its institutional approach to International Organizations’ constitutive instruments. However, this has not prevented considering, at times, the practice of an International Organization as a “subsequent practice” in the application of an International Organization’s constitutive instrument. Evidence of this swinging from one to another of these categories can be found by comparing, on the one hand, the express reference to VCLT art. 31(3)(b) in the Advisory Opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*<sup>15</sup> and, on the other hand, the neglect of this provision in case law on the practice of the Organization.<sup>16</sup> If this double

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<sup>13</sup> A. Roberts, “Power and Persuasion in Investment Treaty Interpretation”, 104 *American Journal of International Law* (2010) pp. 207-215.

<sup>14</sup> Article 2(1)(j) VCLT between States and International Organizations or between International Organizations reads as follows: “[r]ules of the organization’ means, in particular, the constitutive instruments, decision and resolutions adopted in accordance with them, and established practice of the organization”. In this respect, see also International Law Commission, *Yearbook of the International Law Commission* (1982), Vol. 2, Part 2, 21, para. 25. The “established practice” is also identified as part of the “rules of the organization” by art. 2 (b) of the Draft Articles on the Responsibility of International Organizations, as adopted upon second reading by the Drafting Committee on 30 May 2011, see UNGA *Responsibility of International Organizations: Texts and Titles of Draft Articles 1 to 67 Adopted by the Drafting Committee on Second Reading in 2011* (2011), UN Doc A/CN.4/L.778, 1. As the Special Rapporteur on the topic refers “even if this [to ‘the established practice’] reference may appear vague, it is hardly dispensable when considering functions and instruments of international organizations”, see UNGA *Seventh Report on Responsibility of International Organizations* (2009), UN Doc A/CN.4/610, 6, para. 16.

<sup>15</sup> *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, 8 July 1996, Advisory Opinion, [1996] ICJ Reports, 66, see in particular paras. 19 and 27.

<sup>16</sup> See *Competence of the General Assembly Regarding Admission to the United Nations*, 3 March 1950, Advisory Opinion, [1950] ICJ Reports, 4, para. 9; *Certain Expenses*

qualification supports the “family resemblance” argument, the Court’s way of identifying the pre-requisites of practice points in that direction also.

In reading the practice of an International Organization from an institutional perspective, the Court has allowed itself space to loosen the criteria of subsequent practice;<sup>17</sup> a move which came under fire from certain members of the Court’s bench.<sup>18</sup> In truth, the element of consistency and endorsement by the member states of an organ is of particular importance in certain *dicta* of the *Namibia* and the *Maritime Committee* Advisory Opinions.<sup>19</sup> Any resemblance with subsequent practice would therefore seem to reside in the overall process of establishing a practice, although the *intensity* of the aforementioned elements would seem less than that indicated under art 31(3)(b) and states’ reactions would be appraised more in their capacity *qua* members of an International Organization’s organ, than *qua* Parties to a treaty. In this light, some have come to speak of practice as an “internal custom” of the organization;<sup>20</sup> a move which, incidentally, allows the obstacles standing in the way of treaty modification through practice to be brushed away. Yet, the affinity with custom is to be qualified. To begin with,

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*of the United Nations (Article 17, paragraph 2, of the Charter)*, 20 July 1962, Advisory Opinion, [1962] ICJ Reports 151, 160; *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, 15 December 1989, Advisory Opinion, [1989] ICJ Reports, 177, 194.

<sup>17</sup> In this sense, see P.M. Dupuy, “Le Droit des Nations Unies et sa Pratique dans la Jurisprudence de la Cour Internationale de Justice” in *Société Française pour le Droit International - S.F.D.I., La Pratique et le Droit International* (Pedone, Paris, 2004) p. 139, pp. 144-145.

<sup>18</sup> See in particular the dissenting opinions of Judge Spender and Judge Fitzmaurice, respectively, in the *Certain Expenses* and in the *Namibia* cases: *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, 20 July 1962, Separate Opinion of Judge Sir Percy Spender, [1962] ICJ Reports 182, 189-190; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, 21 June 1971, Advisory Opinion, [1971] ICJ Reports 16; Dissenting Opinion of Judge Sir Gerald Fitzmaurice, [1971] ICJ Reports 208, 282.

<sup>19</sup> In particular *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, 8 June 1960, Advisory Opinion, [1960] ICJ Reports 150, 168; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, 21 June 1971, Advisory Opinion, [1971] ICJ Reports 22.

<sup>20</sup> For instance, C. Peters, “Subsequent Practice and Established Practice of International Organizations: Two Sides of the Same Coin?”, 3 *Göttingen Journal of International Law* (2011), p. 617 and pp. 629-634. The concept of the “customary law of the organization” is to be found also in International Law Commission (1963) Yearbook of the International Law Commission, Vol. 2, 213, in R. Higgins, “The Development of International Law by the Political Organs of the United Nations”, 59 *ASIL Proceedings* (1965) p. 116 and 121, also published in R Higgins, *Themes and Theories*, Vol. 1 (Oxford University Press, Oxford, 2009) pp. 154-160; P. Reuter, “Quelques Reflexions sur la Notion de ‘Pratique Internationale’ Spécialement en Matière d’Organisations Internationales” in *Studi in Onore di Giuseppe Sperduti* (Giuffrè, Milano, 1984) p. 187.

the Court has, at times, omitted any reference to state endorsement, being content to discuss a certain regularity of pattern over loosely-defined periods of time.<sup>21</sup> The generality of *usus*, on its part, seems to stretch according to the framework of the organization.<sup>22</sup> In addition, the resemblance with custom formation dwindles when shifting the focus from the main political organs of classic International Organizations. Let us take the non-binding, technical documents and regulations issued by International Organizations' integrated organs. While routinely treated as an element of practice,<sup>23</sup> these acts are adopted through administrative procedures and emanate from organs composed of technicians or independent individuals, thereby involving little state participation.<sup>24</sup> Rather than a direct consanguinity, we can trace criss-crossing similarities between the aforementioned *species* of practice. We may ask whether both subsequent practice and the practice of an organization are sisters to international custom, insofar as they are twins raised in two different contexts to one another.

Outside the framework of classic International Organizations, the entities created under certain treaties give rise to conduct which has certain traits in common with the *species* of institutional practice discussed above. By way of example, the working methods and instruments developed by treaty-monitoring bodies under human rights treaties evoke those of integrated organs of classic International Organizations. It has been evidenced that General Comments of the Human Rights Committee were not initially provided in the International Covenant on Civil and Political Rights.<sup>25</sup>

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<sup>21</sup> For instance, in *Certain Expenses* the ICJ speaks of “the practice of the Organization throughout its history”, *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, 20 July 1962, Advisory Opinion, [1962] ICJ Reports 165; similarly “the Court notes that there has been an increasing tendency over time for the General Assembly and the Security Council” in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, Advisory Opinion, [2004] ICJ Reports 136, 149-150.

<sup>22</sup> An example from a practitioner is provided by L. Picard, “La pratique comme fondement de l’action du Bureau international du Travail” in S.F.D.I., *La pratique et le droit international* in *Colloque de Genève* (Pedone, Paris, 2004) p. 209 and pp. 224-227.

<sup>23</sup> Particularly telling is the approach of the Special Rapporteur on the Responsibility of International Organizations for Wrongful International Acts, who abundantly refers to the practice of integrated organs, for instance, International Law Commission, *Report on the work of its sixty-third session* (26 April to 3 June and 4 July to 12 August 2011) UN Doc A/66/10 and Add.1, 88, 105, 125, note 235, 129.

<sup>24</sup> Take, for instance, the recent reference to the practice of the Secretary General of the United Nations in the *Kosovo* Advisory Opinion, it is important to stress that the Court speaks in this respect of “subsequent practice” concerning the interpretation of Security Council resolution 1244, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, 22 July 2010, Advisory Opinion, [2010] ICJ Reports 403, *see particularly* paras. 94 and 108.

<sup>25</sup> P. Alston, “The Historical Origin of the Concept of General Comments in Human Rights Law” in L. Boisson de Chazournes and V. Gowlland-Debbas (eds.), *The International Legal System in Quest of Equity and Universality/L’Ordre Juridique International*, un

Progressively, General Comments arose as a sort of teaching tool, intended to provide guidance under the Covenant. In this sense, they are similar to administrative acts issued by a secretariat.<sup>26</sup> Incidentally, General Comments have developed through a sort of bargaining process of the balancing of interests, in which member states react by expressing their views on a proposed draft text. Overall, while lacking the qualities of subsequent practice, the conduct of non-classical institutional circles falls under the category of “family practice”.<sup>27</sup> In the same vein, one could also mention the institutional machinery of environmental agreements. Conditioned by the evolution of scientific knowledge and the introduction of new technologies, environmental treaties attempt to accommodate change through a number of built-in techniques, ranging from the adoption of protocols and amendments<sup>28</sup> to the decisions of Conferences of the Parties and of other organs under environmental treaties.<sup>29</sup> These decisive circles, periodical and involving the Parties, resemble in many respects the functioning of classical institutional bodies. As such, they activate the process of practice-development.

*c. External or Extraneous Practices Recognized by Current Treaties*

Treaties can bestow legal recognition upon uses developed by non-state communities. Formally qualified as “practices”, such uses belong *de iure* or *de facto* to the “practice family”. Examples span over diverse areas of international regulation. The reference to “uses” is particularly widespread in the commercial field. For instance, the 1980 United Nations Convention on Contracts for the International Sale of Goods holds several references to

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*Système en Quête d'Équité et d'Universalité: Liber Amicorum Georges Abi-Saab* (The Hague: Martinus Nijhoff Publishers, Boston, 2001) pp. 764-776. See also D. McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Clarendon Press, Oxford, 1991) pp. 89-96.

<sup>26</sup> For instance, it has been noticed that the Secretary-General's Bulletin on the Observance by United Nations Forces of International Humanitarian Law, functions as a “teaching tool” for UN contingents. See M. Zwanenburg, *Accountability of Peace Support Operations* (Martinus Nijhoff Publishers, Netherlands, 2005) p. 174.

<sup>27</sup> In a similar vein, the ICJ referred to the practice of the Human Rights Committee in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, Advisory Opinion, [2004] ICJ Reports, pp. 179-180.

<sup>28</sup> Interestingly, the 1987 *Montreal Protocol on Substances That Deplete the Ozone Layer* provides for an innovative alternative mechanism to formal amendments with the adoption of so-called adjustments by the Parties, art. 2, para. 9 of the *Montreal Protocol*, available at <[ozone.unep.org/pdfs/Montreal-Protocol2000.pdf](http://ozone.unep.org/pdfs/Montreal-Protocol2000.pdf)>, visited on 21 November 2012.

<sup>29</sup> L. Boisson de Chazournes, “Environmental Treaties in Time”, 39 *Environmental Policy and Law* (2009) p. 293.

commercial usages.<sup>30</sup> One can also cite art. 13.2 of the 1995 United Nations Convention on Independent Guarantees and Stand-by Letters of Credit.<sup>31</sup> These mention “rules and usages of independent guarantee or stand-by letter of credit practice”. Additionally, the International Convention on the Simplification and Harmonisation of Customs Procedures (Kyoto Convention) envisages the category of “recommended practice” meant as a “[p]rovision [. . .] recognized as constituting progress towards the harmonization and the simplification of Customs procedures and practices, the widest possible application of which is considered to be desirable”.<sup>32</sup> These uses, by their very nature, evolve and change over time through the action of private actors.

Another branch of externally driven practice is rooted in environmental agreements. The latter’s many references to “best environmental practices”<sup>33</sup> open the treaty-gates to the epistemic communities of technicians responsible for the elaboration and filtering of such practices. While states contribute little to the production of “best environmental practices”, they are nevertheless involved in the adoption phase. Yet, even at this stage, one would look in vain for the features of endorsement and consistency, characteristic of custom-related practice. On the one hand, best practices are not adopted out of a sense of legal obligation, but for their appropriateness in meeting certain goals pursued by environmental treaties. On the other hand, the adoption of best practices is lacking in its consistency. This is because states parties to an environmental treaty most probably differ in their capacities to keep abreast with the technological developments embodied in best practices. This also

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<sup>30</sup> Article 9 of the Convention provides as follows: “[. . .] The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned (para. 2)”. In this convention, reference could also be made to arts. 4 and 18 para. 3, art. 32 para. 2 or 55. See *UN Convention on Contracts for the International Sale of Goods*, adopted on 11 April 1980, 19 I.L.M. 668 (1980); 1489 U.N.T.S. 3, 59; S .Treaty Doc. 98-99 (1983).

<sup>31</sup> See also art. 14 para. 1 and art. 16 para. 1 of the same Convention; *UN Convention on Independent Guarantees and Stand-by Letters of Credit*, adopted on 11 December 1995, entered into force on 1 January 2000, 2169 U.N.T.S. 190.

<sup>32</sup> Article 1(c) of the *International Convention on the Simplification and Harmonisation of Customs Procedures (Revised Kyoto Convention)*, adopted on 26 June 1999, entered into force on 3 February 2006, available at <[http://www.wcoomd.org/Kyoto\\_New/Content/Body\\_Gen\\_Annex\\_and\\_Specific\\_Annexes.pdf](http://www.wcoomd.org/Kyoto_New/Content/Body_Gen_Annex_and_Specific_Annexes.pdf)>, visited on 21 November 2012.

<sup>33</sup> For instance, art. 4 of the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, adopted on 22 March 1989, entered into force on 5 May 1992, 1673 U.N.T.S. 125; art. 9(2)(2)(i) of the *Convention on the Protection and Use of Transboundary Watercourses and International Lakes Alternative*, adopted on 17 March 1992, entered into force on 6 October 1996, 1936 U.N.T.S. 269.

suggests that, since best practices are bound to change with technological developments, they can hardly amount to a persistent *usus*. Environmental best practices nonetheless belong to the “practice family”. Not only do they receive normative value from being formally recognized as “practice” in environmental agreements, but they also tend to catalyse states’ conduct. A similar feature is to be found in a further type of practice, namely technical norms which are incorporated into current treaties. These derive their normative character from the international legal order.

*d. Incorporation of Instruments with a Normative Value as Practice Outside of the Conventional Regime*

The environment of current treaties is in many ways permeated by the dynamics affecting the international legal order. In particular, the quest for harmonization, integration, and cooperation at an international level is impacting on international law’s normative scope as well as treaty-making.<sup>34</sup> On the one hand, numerous instruments have been flourishing in the interstices between the classical means of regulation—treaties and custom—which have proven insufficient or inapt for meeting the above-mentioned objectives.<sup>35</sup> Technical standards, guidelines, recommendations, and codes of conduct are among them. These instruments influence the conduct of international law actors depending on their capacity to provide effective guidance in a given area. The binding character of prescriptive statements thus ceases to be the only determinant of their legal effect.<sup>36</sup> As the normative boundaries shift, the prism of legally relevant processes extends beyond those of rule formation to those of standardization and harmonization. Borne out of a need for assimilation, the latter processes tend to produce discernible patterns of behaviour. Such regularities are alien to the process of rule-formation, but nevertheless possess a normative character for they are engaged in response to legally relevant demands. Together, the activity of standard-setting actors and the behavioural patterns catalysed henceforth, come to form an autonomous branch of international practice.

Treaties, on the other hand, are not merely surrounded by such a growing complexity. Standards and other instruments produced by external

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<sup>34</sup> V. Gowlland, “Law Making in a Globalized World”, *Bancaja Euromediterranean Courses of International Law*, Vol. 8-9, (2004/2005) p. 499.

<sup>35</sup> L. Boisson de Chazournes, “Treaty Law-Making and Non-Treaty Law Making: The Evolving Structure of the International Legal Order” in R. Wolfrum and V. Röben (eds.), *Developments of International Law in Treaty Making* (Springer, Berlin, 2005) pp. 463-479.

<sup>36</sup> L. Boisson de Chazournes, “Standards et normes techniques dans l’ordre juridique contemporain: quelques réflexions” in L. Boisson de Chazournes and M. Kohen (eds.), *International Law and the Quest for its Implementation. Le Droit International et la Quête de sa Mise en Oeuvre* (Martinus Nijhoff Publishers, Netherlands, 2010) pp. 351-355.

actors have in fact been integrated into certain conventional systems. For instance, in the WTO framework, the Agreement on Sanitary and Phytosanitary Measures (SPS) and the Agreement on Technical Barriers to Trade (TBT) refer to standards such as those enacted by the Codex Alimentarius, the World Organization for Animal Health (formerly the Office International des Epizooties (OIE)) and the Secretariat of the International Plant Protection Convention (IPPC).<sup>37</sup> Equally worth mentioning is *Annex III* to the Cartagena Protocol on Risk Assessment, which refers to the “guidelines developed by relevant international organizations” in order to conduct risk assessment.<sup>38</sup> Incorporation can also occur through acts of international organizations, the 2005 International Health Regulations adopted under the auspices of the World Health Organization being an example in this respect.<sup>39</sup> Overall, these references open up a heterogeneous “international normative community”,<sup>40</sup> centred on technical epistemic communities and operating through decision-making procedures of its own. Consequently, technical standards lack the features of endorsement and consistent use by states which are deemed relevant for subsequent practice *stricto sensu*. In addition, while consenting to their inclusion, states have not formally envisaged them as “practice”. On the face of it, the resemblance with practice might seem dubious. Yet, the point is that these instruments are, themselves, normative because of their aptitude to prompt harmonization and assimilation of conduct at international level. Upon inclusion, technical standards bring into a conventional system the normative properties they enjoy as part of an autonomous branch of “practice” rooted in the international legal order.<sup>41</sup> This shows the potential of practice to act as a gateway for change across different normative layers of the international legal order.

Overall, these are among the major trends characterizing today’s treaties, without drawing a “genealogical map of the practice family”. In truth,

<sup>37</sup> On this aspect, see WTO, *Relationship with Codex, ICCP, OIE. Note by the Secretariat*, 15 May 2007, G/SPS/GEN/775.

<sup>38</sup> *Annex III “Risk Assessment”* to the *Cartagena Protocol on Biosafety to the Convention on Biological Diversity*, adopted on 29 January 2000, entered into force on 11 September 2003, 2226 U.N.T.S. 208, art. 3.

<sup>39</sup> *International Health Regulations* (2005), adopted by the World Health Assembly in accordance with art. 21 of the Constitution of the WHO. The latter refers to “relevant international standards” at art. 17 and to “safety guidelines and standards” at art. 23. On this topic, see L. Boisson de Chazournes, “Le Pouvoir Réglementaire de l’Organisation Mondiale de la Santé à l’Aune de la Santé Mondiale: Réflexions sur la Portée et la Nature du Règlement Sanitaire International de 2005” in N. Angelet (ed.), *Droit du Pouvoir, Pouvoir du Droit, Mélanges Offerts à Jean Salmon* (Bruylant, Bruxelles, 2007) pp. 1157-1181.

<sup>40</sup> See WTO, *European Community: Trade Description of Sardines—Report of the Appellate Body*, 26 September 2002, WT/DS231/AB/R para. 222. The same expression is used in the Explanatory Note in Annex 1.2 of the *Agreement on Technical Barriers to Trade*.

<sup>41</sup> See L. Boisson de Chazournes, “Qu’est-ce que la Pratique en Droit International?” in S.F.D.I., *La Pratique et le Droit International* (Pedone, Paris, 2004) p. 20.

we doubt whether an exhaustive catalogue of practice could ever be produced. Indeed, the way we conceive this legal category is bound to be affected not only by the specific context we look at, but also by the very conception of normativity that we have at a certain stage of evolution of the international legal order. Paraphrasing De Visscher on custom formation,<sup>42</sup> the crux of the practice issue is in the mental process whereby we link normativeness with certain social regularities. If the former was exposed to a number of new challenges,<sup>43</sup> it would not only be arduous but even counterproductive as it would constrain practice development into too rigid a conceptual framework. This may risk overlooking the stakes of such challenges and to foreclose the possibility of addressing them, *inter alia*, through the tool of practice. For the same reason, practice could hardly be compartmentalized into regime-specific boxes. It is true that some *species* of practice are often, if not exclusively, present under treaties with subject-matter affinities. But this reflects the suitability of certain practices to meet similar objectives. Were the latter to change, the features of practice(s) under those regimes would also change. It suffices to consider the inclusion of technical standards into the WTO regime with the extension of the goals pursued hereunder. The concurrent existence of different *species* of practice under the same treaty regime, coupled with the cross-fertilization of practices amongst different regimes, opposes broaching a discourse on the “essence” of practice. Rather, what seems crucial is the way these practices interact with one another during the life of any given treaty.

### **3. Practices in Motion: Walking the Path of Practice under Current Conventional Regimes**

Adopting the “practice family” approach has various practical implications. On the one hand, it embeds subsequent practice in its proximate operative milieu. It is, therefore, recognized that practice impacts on treaties along multiple trajectories. In this light, the function of harmonization and standardization proper for certain practices adds another dimension to the objective of subsequent practice, usually spanning the spectrum between treaty interpretation and modification. Taking an overall look at practice also entails assessing how it functions in contexts that are peripheral to those associated with subsequent practice. For instance, technical standards or best practices will more likely be relied upon in non-adversarial settings. The same applies to institutional practice, which impacts on the life of treaties in the day-to-day activities of the institution’s organs and bureaucratic apparatus. Arguments made on the basis of practice will therefore be articulated by

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<sup>42</sup> C. de Visscher, *Théories et Réalités en Droit International Public* (Pedone, Paris, 1953) pp. 190-191.

<sup>43</sup> A. Bianchi, “Looking Ahead: International Law’s Main Challenges” in D. Armstrong (ed.), *Routledge Handbook of International Law* (Routledge, 2010) pp. 398-399.



different actors in these contexts, ranging from state as well as International Organization bureaucracies to treaty monitoring bodies or other compliance entities.

On the other hand, for a legal operator under a certain regime, the features of practice as a whole will depend on the *species* of practice he or she will face. Owing to their criss-crossing similarities, though, the *species* of the practice family are unlikely to operate in isolation from one another. This affects how and what claims are formed regarding subsequent practice as well as the spectrum of practice-based arguments to be found in the reasoning of judicial organs. As to the first aspect, assuming that a certain conduct by the Parties is influenced by one or more of the treaty-embedded practices, claims seeking to establish a subsequent practice thereupon will absorb those practices as well. To maintain such claims, Parties or any another actor under the treaty will need to take into account the normative parameters proper with the incorporated practices. Concerning the features of practice in the reasoning of international courts and tribunals, one has to consider that subsequent practice is the only type of practice formally recognized as influencing the life of a treaty. Aiming at accounting for the actual impact of a broader range of practices under today's treaties, international courts and tribunals have offered argumentative techniques additional to art 31(3)(b).

The case law of International Courts and Tribunals pervades international lawyers' studies on subsequent practice.<sup>44</sup> The functions and features of subsequent practice are largely extrapolated from this source. Yet, neither the letter of art. 31(3)(b) nor the category of subsequent practice is the only gateway for practice to enter judicial reasoning. A state's conduct falling short of the classical criteria of subsequent practice has at times been singled out for interpretative purposes.<sup>45</sup> This is not surprising, considering that the qualification of certain facts as practice can determine the external boundaries of interpretation, *i.e.* to exclude a given interpretation.<sup>46</sup> In such a case, other elements would still be necessary to give meaning to the text object of interpretation. Besides that, we have already mentioned the ICJ jurisprudence which has given life to the "practice of the organization". Rather than adding to these aspects, our focus will be on the judicial use of practices channelling technological developments and harmonization under current treaties.

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<sup>44</sup> See G. Distefano, "L'interprétation évolutive de la norme internationale" 115 *Revue générale du droit international public* (2011) p. 373 and pp. 375-383.

<sup>45</sup> R. Kolb, *Interprétation et Création du Droit International* (Bruylant, Bruxelles, 2006), pp. 482-485.

<sup>46</sup> *Kasikili/Sedudu Island (Botswana/Namibia)*, 13 December 1999, Judgment, 1999 ICJ Reports p. 1045, para. 80. In this respect, see H Fox, "Article 31(3)(a) and (b) of the Vienna Convention in the Kasikili/Sedudu Island Case" in M. Fitzmaurice, O. Elias, and Panos Merkouris (eds.), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Martinus Nijhoff Publishers, Netherlands, 2010) p. 59 and pp. 70-73.

Although still in its early stages, such a trend of cases deserves consideration with the aim of assessing the argumentation on practice today as well as the hurdles raised by the interplay between these and more classical *species* of practice.

A fairly articulated manifestation of the above trend concerns technical standards, which first made their way into the WTO adjudicative context in the *European Communities—Trade Description of Sardines* case.<sup>47</sup> The EC, as the respondent, argued that a standard could be only covered by the TBT Agreement if it had first been adopted by consensus. The Panel and the Appellate Body rejected this interpretation, maintaining that, in the silence of *Annex 1.2* of the TBT, a standard could apply within the WTO framework even though it was not adopted by consensus.<sup>48</sup> These positions raise various considerations. On the one hand, the EC's stress on consensus represents an attempt to bring technical standards closer to subsequent practice, by inserting some degree of consent in its functioning under the treaty. On the other hand, the WTO examples bring to light the hurdles that the dual role played—to the international legal order as well as to their incorporating treaties—by technical standards. The question arises as to how the production processes of technical standards should be reconciled with the functioning of their incorporating treaties. This seems particularly crucial in the case of standards that allow opting-out or are based on voluntary membership.<sup>49</sup> The approach of the *European Communities—Trade Description of Sardines* does not seem to have affected the matter. In the *European Communities—Measures Affecting the Approval and Marketing of Biotech Products* (commonly referred to as *EC—Biotech Products*), the Panel engaged in a direct consultation with certain organizations working in the field of biotechnology<sup>50</sup> in order to obtain documents, standards, and guidelines relevant to interpreting certain terms contained in *Appendix A* of the SPS Agreement.<sup>51</sup>

Both cases highlight the impact of standardization upon the application of treaties as well as the resemblance with the interpretative role of

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<sup>47</sup> WTO, *European Communities: Trade Description of Sardines—Report of the Appellate Body*, 26 September 2002, WT/DS231/AB/R.

<sup>48</sup> WTO, *European Communities: Trade Description of Sardines—Report of the Appellate Body*, 26 September 2002, WT/DS231/AB/R, paras. 219-227.

<sup>49</sup> See M. Mbengue, “Technique de l’ ‘Opting Out’: Acceptation par les Etats des Normes Techniques Internationales” in E. Brosset and E. Truilhé-Marengo, *Les Enjeux de la Normalisation Technique Internationale: Entre Environnement, Santé et Commerce International* (La Documentation française, Paris, 2006) pp. 121-152.

<sup>50</sup> In particular, the *Codex Alimentarius*, the *Secretariat of the International Plant Protection Convention* (IPPC), the *World Organisation for Animal Health* (OIE) and the *Secretariat of the Convention on Biological Diversity* (CBD).

<sup>51</sup> WTO, *European Communities: Measures Affecting the Approval and Marketing of Biotech Products—Panel Report*, 29 September 2006, BWT/DS291/R, WT/DS292/R, and WT/DS293/R para. 7.96.

subsequent practice. The ways in which these issues may be framed remain different. In the *Sardines* case, the approach is vertical in nature, insofar as the Appellate Body accepted the normative value and applicability of the *Codex* standard without consulting the *Codex Alimentarius Commission* on the merits and demerits of the procedure of adoption for *Codex* norms. On the contrary, the *EC—Biotech* case reveals a horizontal perspective. This is evident by the way in which the Panel identified the “relevant international standards” *in casu*. This approach seems to enable states to exercise some control and to have a say in important international standards that may occupy the dispute settlement bodies of the WTO in the interpretation and implementation of the WTO agreements.<sup>52</sup> The Panel in *United States—Continued Suspension of Obligations in the EC—Hormones Dispute*<sup>53</sup> and *Canada—Continued Suspension of Obligations in the EC—Hormones Dispute*,<sup>54</sup> adopted an approach similar to that of the Panel in *EC—Biotech Products*.<sup>55</sup>

Cooperation between the Dispute Settlement Body of the WTO and International Standards Organizations thus seems to allow for a more harmonious and coherent assimilation of multiple international standards, formulated by various institutions in a given field. The functioning of the WTO regime is, however, not the only part of that picture. Indeed, the very capacity of technical standards to meet the needs of standardization at international level is subject to challenge. States may be discouraged from relying on standards where the latter is used too prominently in treaty-related

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<sup>52</sup> Indeed, in the Panel’s own words: “Regarding the Panel’s decision to seek information from international organizations, *it should be noted that the Parties were consulted both on the international organizations from which information would be sought and on the list of terms on which information would be sought*. Taking into account the Parties’ view, the Panel decided that it would seek information from the secretariats of the CBD, Codex, FAO, IPPC, OIE, UNEP and WHO. In December 2004, the Panel contacted these organizations and invited them to identify appropriate standard references (scientific or technical dictionaries, documents adopted or circulated by the relevant international organization, etc) that would assist the Panel in ascertaining the meaning of certain terms and concepts. *The Parties were given an opportunity to comment in writing on the materials provided to the Panel by the international organizations*”, see WTO, *European Communities: Measures Affecting the Approval and Marketing of Biotech Products—Panel Report*, 29 September 2006, BWT/DS291/R, WT/DS292/R, and WT/DS293/R para. 7.31 (emphasis added).

<sup>53</sup> WTO, *United States: Continued Suspension of Obligations in the EC (Hormones Dispute)—Panel Report*, 31 March 2008, WT/DS320/R para. 1.8.

<sup>54</sup> WTO, *Canada: Continued Suspension of Obligations in the EC (Hormones Dispute)—Panel Report*, 31 March 2008, WT/DS321/R para. 1.8.

<sup>55</sup> After consulting the parties in the dispute, the Panel sought an opinion from the *Codex Alimentarius Commission* (Codex), the *Joint FAO/WHO Expert Committee on Food Additives* (JECFA) and the *International Agency for Research on Cancer* (IARC) on scientific and technical issues. The Panel also met with four representatives of Codex, JECFA, and IARC in the presence of the parties to the dispute.

adjudicative contexts. A dialogic approach can stave off this risk by allowing institutional actors who oversee standard setting to have a say in the process of legally qualifying facts for interpretative purposes. This offers some clues as to the possible interfacing with institutional standardization circles. On the contrary, and yet largely unexplored, remain the implications of private actors' involvement in standardization.

The role of private actors is also gaining importance in the judicial use of “best practices”, developed within scientific epistemic communities. Reliance on these practices has ushered in a mix of intentional and purposive interpretation. We are by now accustomed to reading into certain expressions, *e.g.* “best environmental practices”, “best technology”, “customary and accepted practice of design”,<sup>56</sup> the intent of the Parties to adapt to technological developments and change. Science-related practices have, in fact, proved a gateway for “evolutive” or “dynamic” interpretation.<sup>57</sup> The link between practice-based and purpose-oriented interpretation lies in the technical appropriateness attributed to best practices. Given that the latter, while being produced outside the conventional regime, are considered apt for meeting the object of a treaty, reliance thereon for interpretative purposes features within the intentions of the Parties at the time of drafting the treaty.

Interestingly, this line of reasoning has proven strong enough to be endorsed in support of rather unconventional interpretative approaches. A good example is provided by the first Advisory Opinion of the Sea Bed Disputes Chamber of the International Tribunal for the Law of the Sea. In that context, the reference to “best environmental practices” contained in the *Sulphides Regulation* has been used to interpret another Regulation, namely the *Nodules Regulation*. The move was bold insofar as the criterion of “best environmental practices” is more stringent than that of “best technology” mentioned in the *Nodules Regulation*. Crucially, the Chamber held that the adoption of higher standards in a more recent text “[w]ould seem to indicate that, in light of the advancement in scientific knowledge, member States of the Authority have become convinced of the need for sponsoring States to apply ‘best environmental practices’ in general terms so that they may be seen

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<sup>56</sup> These expressions are to be found in Part 3 of Annexure D to the *Indus Waters Treaty*, adopted on 19 September 1960, 1962 UNTS 126. Full text is available at <[siteresources.worldbank.org/INTSOUTHASIA/Resources/223497-1105737253588/AnnexureD.pdf](http://siteresources.worldbank.org/INTSOUTHASIA/Resources/223497-1105737253588/AnnexureD.pdf)>, visited on 13 December 2011.

<sup>57</sup> For a broad account of the notion, see M. Fitzmaurice, “Dynamic (Evolutive) Interpretation of Treaties (Part I)” 21 *Hague Yearbook of International Law* 101 (2009); “Dynamic (Evolutive) Interpretation of Treaties (Part II)” 22 *Hague Yearbook of International Law* 1 (2009).

to have become enshrined in the sponsoring States' obligation of due diligence".<sup>58</sup>

In reading these passages, certain *dicta* of regional Courts, and in particular of the European Court of Human Rights (ECtHR),<sup>59</sup> spring to mind. The latter's use of social practice to pinpoint broad teleological interpretations is well known to international lawyers and has fuelled the discourse on evolutive interpretation.<sup>60</sup> Faced with the scenario of blurring practice with purposive interpretation, some commentators have argued that the ECtHR's approach has to be read against the specific character of human rights treaties in general, and the "constitutional dimension" of the European Convention on Human Rights specifically.<sup>61</sup> Yet, attempts at containment are thwarted by the emergence of similar trends under thematically different regimes. The latter trend rather supports the view that the *species* of practice less resembling subsequent practice tends to absorb and give legal shape to both pragmatic and value-oriented societal demands. Admittedly, the risk of diminishing practice into mere factuality is a looming danger. This suggests that international lawyers should adopt a more holistic approach regarding the tendency for practice to span over different areas.

#### **4. Concluding Remarks: The Challenges of Subsequent Practice in Light of the New Trends Pervading the International Legal Order**

Many elements suggest that, under current conventional regimes, the umbrella heading of practice is a web of distinct practices with criss-crossing similarities. Yet, we still have an insufficient grasp of what such a structure implies. This is particularly so with the role of states in the production and functioning of the different *species* of practice. International lawyers have so far addressed this issue from the angle of subsequent practice. But this approach is in need of recalibration for two reasons. On the one hand, owing to the web-like structure of practice, subsequent practice itself cannot fully be appraised if not in light of the broader phenomenon of practice under today's treaties. On the other hand, assuming that states are equally involved and central to all *species* of practice seems risky. Such an approach may in fact

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<sup>58</sup> *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Request for Advisory Opinion Submitted to the Seabed Disputes Chamber)*, 1 February 2011, Advisory Opinion, ITLOS Case No 17, paras. 136-137.

<sup>59</sup> See particularly *Dudgeon v United Kingdom*, 22 October 1981, ECHR, Series A, No 45, 18-19, paras. 60, 64, 92; *Christine Goodwin v United Kingdom* [GC], 11 July 2002, ECHR 2002-VI paras. 88, 90, 100.

<sup>60</sup> See also G. Distefano, "L'interprétation évolutive de la norme internationale" 115 *Revue générale du droit international public* (2011) pp. 383-96.

<sup>61</sup> For instance, see G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press, Oxford, 2007).

hide the challenges raised by the contribution of other actors to the formation and use of practice.

The question arises as to how to apprehend these multiple types of conduct as part of the practice relevant to a certain treaty regime. Being different in nature, these practices also pose different challenges. For instance, in the case of private actors, issues of publicity and accountability may prove more difficult to tackle than for other actors, such as organs that are part of the “institutional machinery” of a treaty. To engage in this endeavour can also lead to extending the set of legal categories relevant to practice beyond art 31(3)(b).

Several further issues arise when it comes to assessing the use of practice in an adjudicatory context. Whereas subsequent practice allows a range of interpretative arguments that are anchored in the behaviour of the Parties, the use of other *species* of practice mires this homogeneity. Arguments based on “best practices” or “societal practices” have in fact served as a gateway to evolutive interpretations. Hence, the need arises to reframe the boundaries of the acceptability of arguments based on practice. This is crucial in understanding not only to what extent “practice” can channel demands coming from the societal body at large, but also how it can interface these demands with the more proximate intentions of the Parties under a given treaty. This could also be phrased as a matter of how the “object and purpose” of a treaty is deemed to evolve over time. Subsequent practice, it has been said, allows for evidencing of the Parties’ intentions through the life of a treaty. However, the construction of such a purpose is inevitably affected by the existence of a bundle of legally relevant practices under a treaty. Therefore, the purpose(s) emerging through practice entails a balancing act amongst the different *species* of practice clustered under a given treaty.

Furthermore, if a certain degree of consent is required for state practice, how is this to be practically addressed when it comes to other actors? As we have noticed, the *Biotech* case offers an example of collaboration with institutional actors external to the WTO system.<sup>62</sup> Yet its replication may prove difficult in other cases, especially involving private actors. Hence, the question arises as to which collaborative patterns or, more generally, which alternative means can be devised to take the perspective of actors other than the Parties into account.

These are just some of the questions posed by the growing complexity of today’s treaty regimes. In a cascade-like effect, the establishment of forms of co-regulation as well as the further institutionalization of certain fields of governance impact upon the life of treaties. The issue of “time” has always

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<sup>62</sup> WTO, *European Communities: Measures Affecting the Approval and Marketing of Biotech Products—Panel Report*, 29 September 2006, WT/DS291/R, WT/DS292/R, and WT/DS293/R

been a thorn in the side of international lawyers. Add the further complexities related to the architecture of most current treaties, and the task to apprehend the role of subsequent practice can become truly daunting. If anything, this suggests that the attempts at subject-matter compartmentalization are doomed to yield meagre results. Practice, unitary and yet pervaded by a varied and dynamic internal diversity, resists strict conceptual compartments.