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The Thirteen Practical Steps: Legal or Political?

The 13 Practical Steps for the implementation of Article VI adopted by the 2000 NPT Review Conference have been referred to by some countries as "political commitments," which robs them of their legal significance. This paper will demonstrate that in light of the rules of treaty interpretation set forth in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, *the Practical Steps lay down criteria, principles, and measures for compliance with Article VI. They constitute subsequent agreement and practice authoritatively applying and interpreting Article VI. Accordingly, to implement the Practical Steps is to move towards complete fulfillment of the legal obligations set forth in Article VI.¹ To fail to do so in essential respects is to demonstrate a lack of good faith and to breach the Article VI obligations.*

Article 31

The Vienna Convention is generally acknowledged to state customary international law, binding on non-party states.² Regarding Article 31, headed "General rule of interpretation," the International Court of Justice has held in several cases that "customary international law found expression in Article 31."³ Article 31 provides in its entirety:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

¹ Full compliance will require meeting the standard set by the International Court of Justice, to "bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control."

² Of the NPT nuclear weapon states, Britain, Russia, and China are parties to the Vienna Convention; the United States is a signatory; and France has neither signed nor ratified. A recent U.S. case states: "The United States recognizes the Vienna Convention as a codification of customary international law. The United States Department of State considers the Vienna Convention 'in dealing with day-to-day treaty problems' and recognizes the Vienna Convention as in large part 'the authoritative guide to current treaty law and practice.' [Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 Va. J. Int'l L. 281, 286 (1988)] at 298 (quoting Assistant Legal Advisor for Treaty Affairs at the Department of State and Secretary of State Roger's Report to the President, Oct. 18, 1971, 65 Dep't St. Bull. 684, 685 (1971))." *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 308 (2nd Cir. 2000).

³ International Court of Justice, *Botswana v. Namibia*, I.C.J. Reports 1999, para. 18, citing *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, I.C.J. Reports 1994, p. 21, para. 41; *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, I.C.J. Reports 1996 (II), p. 812, para. 23).

- (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
- (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;**
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;**
- (c) any relevant rules of international law applicable in the relations between the parties. (Emphasis supplied.)**

4. A special meaning shall be given to a term if it is established that the parties so intended.

Under Article 31(3), subsequent agreement and practice - to be considered "together" with the context of agreements and instruments made in connection with the treaty's adoption - have a crucial role in interpretation. As the International Law Commission, which drafted the Vienna Convention, stated prior to adoption of the treaty regarding what became Article 31:

The Commission, by heading the article 'General Rule of Interpretation' in the singular and by underlining the connexion between paragraphs 1 and 2 and again between paragraph 3 and the two previous paragraphs, intended to indicate that the application of the means of interpretation in the article would be a single combined operation. All the various elements, as they were present in any given case, would be thrown into the crucible and their interaction would give the legally relevant interpretation.⁴

The Practical Steps Constitute A Subsequent Agreement

The Practical Steps are a "subsequent agreement" under Article 31(3)(a) applying and interpreting Article VI. Indeed, the 2000 Review Conference described the Practical Steps as an *agreement*. The Final Document provides that:

The Conference *agrees* on the following practical steps for the systematic and progressive efforts to implement Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons and paragraphs 3 and 4(c) of the 1995 Decision on "Principles and Objectives for Nuclear Non-Proliferation and Disarmament" ... [Emphasis supplied.]

⁴ International Law Commission, Yearbook of the ILC, 1966, Vol. II, pp. 219-220. The Commission went on: "Thus [Article 31] is entitled 'General rule of interpretation' in the singular, not 'General rules' in the plural, because the Commission desired to emphasize that the process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule." *Id.*

In all other parts of the 2000 Final Document, the Conference "reiterated" or "reaffirmed" preambular and operative provisions of the NPT. *Only in the case of the Practical Steps did the Conference use the term "agrees."* Because the Final Document was adopted with the approval of all participating states, the Practical Steps constitute a *consensus agreement*.

The agreement was reached in the context of a proceeding authorized by Article VIII of the NPT "to review the operation of this Treaty with a view to assuring that the purposes of the Preamble and the provisions of the Treaty are being realized." This is the most natural setting for states to make authoritative applications and interpretations of the NPT. Further, the phrase "systematic and progressive efforts" is drawn from the Principles and Objectives adopted in connection with the decision to extend the treaty indefinitely, as authorized by Article X(2), and the Practical Steps concern implementation of the Principles and Objectives.⁵ Consequently, the Practical Steps have added weight because they are inextricably bound up with a decision pursuant to Article X(2) that is both legally binding and of supreme practical importance.

In a 2004 opinion, Rabinder Singh, QC, and Professor Christine Chinkin of Matrix Chambers, London, state that a "Declaration of a Review Conference such as that adopted by consensus would fall within the wording of article 31 (3) (a) [of the Vienna Convention] and *is thus an appropriate source of interpretation of the obligations of the NPT.*"⁶ They give considerable weight to the 2000 Final Document and the Practical Steps in analyzing the relationship of the U.S.-U.K. Mutual Defence Agreement and the NPT.⁷ They cite a 1987 article by Burrus Carnahan in the American Journal of International Law regarding review conferences for the NPT and other arms control treaties. Carnahan holds that the "final declaration of a review conference, especially if adopted by consensus, would probably fit within either or both these categories," referring to subsequent agreement and practice identified in Article 31(3)(a) and (b).⁸

When the parties to a treaty reach a subsequent agreement on its interpretation, that will ordinarily be dispositive. Thus the International Court of Justice quoted with approval a statement by the International Law Commission that "an agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation."⁹

⁵ The decision to extend the NPT indefinitely is comparable to the adoption of a treaty, because the NPT could have been allowed to expire after a short further period pursuant to Article X(2). In that light, the Principles and Objectives can be compared to "any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty" referred to in Article 31(2)(a), forming part of the context of interpretation.

⁶ Joint Advice, July 20, 2004, para. 20. Online at www.acronym.org.uk/dd/dd78/78news02.htm#01.

⁷ Joint Advice at paras. 34-36, 42.

⁸ Burrus M. Carnahan, "Current Development: Treaty Review Conferences," 81 American Journal of International Law (January 1987) 226. The author is a lieutenant colonel in the U.S. Air Force; a note says that the views expressed are solely his.

⁹ International Law Commission, Yearbook of the International Law Commission, 1966, Vol. II, p. 221, para. 14, cited in International Court of Justice, Judgment: Case Concerning Kasikili/Sedudu Island, 13 December 1999. In that case, the ICJ found that the states had not agreed to be legally bound by the results of a joint boundary survey.

In the case between Nicaragua and the United States, the ICJ noted in regard to General Assembly resolutions addressing UN Charter provisions on use of force that

the effect of consent to the text of such resolutions cannot be understood as merely that of a "reiteration or elucidation" of the treaty commitment undertaken... On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves.¹⁰

Similarly, a consensus Review Conference adoption of measures and criteria for implementation of Article VI constitutes states' acceptance of the validity of those measures and criteria.

The Practical Steps Also Constitute Subsequent Practice

The Practical Steps also constitute subsequent practice under Article 31(a)(3). Subsequent practice can encompass a variety of acts *and pronouncements* of states. The International Court of Justice has generally examined materials regarding subsequent practice "in order to determine what conclusions may be drawn from them in the light of the rules set out in Article 31, paragraph 3, of the Vienna Convention."¹¹ For example, the ICJ has considered "the attitudes of the Parties ... on occasions when matters pertinent to the [dispute] came up before international fora" evidenced by state reports and complaints to intergovernmental bodies.¹² The International Law Commission has stated: "The importance of such subsequent practice in the application of the treaty, as an element of interpretation, is obvious; for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty. Recourse to it as a means of interpretation is well-established in the jurisprudence of international tribunals."¹³

The WTO Appellate Body gave this description of the role of subsequent practice in treaty interpretation:

Generally, in international law, the essence of 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 discernable pattern implying the agreement of the parties regarding its interpretation. An isolated act is

¹⁰ International Court of Justice, Judgment: Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua/United States of America), I.C.J. Reports 1986, para. 188.

¹¹ International Court of Justice, Judgment: Case concerning Kasikili/Sedudu Island (Botswana/Namibia), December 1999. Additional examples of the Court examining subsequent practice in the application of a treaty: Corfu Channel, Merits, Judgment, I.C.J. Reports 1949, p. 25; Arbitral Award Made by the King of Spain on 23 December 1906, Judgment, I.C.J. Reports 1960, pp. 206-207; Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962, pp. 33-35; Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962, pp. 157, 160-161 and 172-175; Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, pp. 408-413, paras. 36-47; Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994, pp. 34-37, paras. 66-71; Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996 (I), p. 75, para. 19).

¹² International Court of Justice, Judgment: Territorial Dispute (Libyan Arab Jamahiriya/Chad), I.C.J. Reports 1994, para. 68.

¹³ International Law Commission, 1966.

generally not sufficient to establish subsequent practice; it is a sequence of acts establishing the agreement of the parties that is relevant.¹⁴

A consistent sequence of acts or pronouncements certainly exists in the NPT setting, dating back to the inception of the treaty. After it was opened for signature on July 1, 1968, the Soviet Union and the United States placed specific measures before the predecessor to today's Conference on Disarmament, the Eighteen Nation Disarmament Committee, where the NPT had been negotiated. Under a heading taken from Article VI, they proposed an agenda including "the cessation of testing, the non-use of nuclear weapons, the cessation of production of fissionable materials for weapons use, the cessation of manufacture of weapons and reduction and subsequent elimination of nuclear stockpiles...."¹⁵ Disarmament measures have been the subject of discussion at every Review Conference since then. Notably, in addition to committing to "systematic and progressive efforts to reduce nuclear weapons globally," the 1995 Principles and Objectives echoed the 1968 agenda in identifying the Comprehensive Test Ban Treaty and a convention banning the production of fissile materials for nuclear weapons as important measures for the "full realization and effective implementation of Article VI."

The Practical Steps thus built upon an existing and solid foundation. Moreover, they were adopted through the strengthened review process, which, the 1995 Review Conference specified, "should look forward as well as back [and] identify the areas in which, and the means through which, further progress should be sought in the future." It is fundamental that both the 1995 and 2000 commitments were made in the collective, deliberative context of review conferences conducted "with a view to assuring that the purposes of the Preamble and the provisions of the Treaty are being realized." They are to be distinguished from individual states' acts, omissions, and statements not consonant with the intent of Article VI.

As previously noted, Review Conferences provide an ideal setting for reaching agreement on the treaty's application and interpretation. Consequently, the categories of subsequent agreement and subsequent practice – which includes pronouncements as well as acts- identified by Article 31(3) of the Vienna Convention blend together.

Article 32

This article provides that:

Recourse may be had to supplementary means of interpretation ... 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:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

¹⁴ World Trade Organization, Appellate Body Report on Japan – Alcoholic Beverages II, pp. 12-13. [Emphasis supplied.]

¹⁵ ENDC/PV. 390, 15 August 1968, para. 93.

Suppose, then, that Article 31 were applied so as to reduce the Practical Steps to mere political desiderata, without legal significance, as some countries would have it. This would lead to the manifestly unreasonable, if not absurd, result of reducing the Article VI requirement to negotiate in good faith for nuclear disarmament to “a tale told by an idiot, full of sound and fury, signifying nothing”.¹⁶ Article 32 therefore informs the application of article 31 to the Practical Steps, in the sense described above.

Conclusion

Regardless of whether each of the measures identified in the Practical Steps is considered a necessary means of implementing Article VI, or a reasonable but not unique means of doing so, it remains the case that *the 2000 Review Conference authoritatively determined that the Practical Steps constitute a practical and reasonable implementation of Article VI*. Accordingly, unless no longer feasible, as in the case of the ABM Treaty or (at least as a matter of labeling) the START process, the measures should be reaffirmed by the 2005 Review Conference, and strengthened. They must certainly not be repudiated or undermined in any way.

The Practical Steps, as an *application* of Article VI, are an essential guide to its *interpretation*. *They identify criteria and principles that are so tightly connected to the core meaning of Article VI as to constitute requirements for compliance with the NPT*. The key criteria and principles include:

- 1) The Article VI obligation is to achieve the complete elimination of nuclear weapons, as the "unequivocal undertaking" in step 6 specifies, without any precondition of comprehensive demilitarization.
- 2) The reduction and elimination of nuclear arsenals are to be accomplished pursuant to principles of verification (employed in the START process, and referred to in step 13), transparency, and irreversibility.
- 3) Cessation of the nuclear arms race at an early date and nuclear disarmament pursuant to Article VI require a diminishing role of nuclear weapons in security policies and a reduction of their operational status.
- 4) The process of nuclear disarmament must involve all NPT nuclear weapon states (which are to be engaged as soon as appropriate) and multilateral negotiations involving non-nuclear weapon states (as in Conference on Disarmament negotiations on a fissile materials treaty and a CD body to deal with nuclear disarmament).

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¹⁶ Shakespeare, *Macbeth*, V, v, 17