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Chapter VII

Subsequent agreements and subsequent practice in relation to the interpretation of treaties

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A. Introduction

1. The Commission, at its sixtieth session (2008), decided to include the topic “Treaties over time” in its programme of work and to establish a Study Group on the topic at its sixty-first session.¹ At its sixty-first session (2009), the Commission established the Study Group on Treaties over time, chaired by Mr. Georg Nolte. At that session, the Study Group focused its discussions on the identification of the issues to be covered, the working methods of the Study Group and the possible outcome of the Commission’s work on the topic.²

2. From the sixty-second to the sixty-fourth session (2010–2012), the Study Group was reconstituted under the chairmanship of Mr. Georg Nolte. The Study Group examined three reports presented informally by the Chairman, which addressed, respectively, the relevant jurisprudence of the International Court of Justice and arbitral tribunals of *ad hoc* jurisdiction;³ the jurisprudence under special regimes relating to subsequent agreements and subsequent practice;⁴ and subsequent agreements and subsequent practice of States outside judicial and quasi-judicial proceedings.⁵

3. At the sixty-fourth session (2012), the Commission, on the basis of a recommendation of the Study Group,⁶ also decided (a) to change, with effect from its sixty-fifth session (2013), the format of the work on this topic as suggested by the Study Group; and (b) to appoint Mr. Georg Nolte as Special Rapporteur for the topic “Subsequent agreements and subsequent practice in relation to the interpretation of treaties”.⁷

4. At the sixty-fifth session (2013), the Commission considered the first report of the Special Rapporteur (A/CN.4/660) and provisionally adopted five draft conclusions.⁸

¹ At its 2997th meeting, on 8 August 2008. See *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 353. For the syllabus of the topic, see *ibid.*, annex A. The General Assembly, in paragraph 6 of resolution 63/123 of 11 December 2008, took note of the decision.

² See *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), paras. 220–226.

³ *Ibid.*, Sixty-fifth Session, Supplement No. 10 (A/65/10), paras. 344–354; and *ibid.*, Sixty-sixth Session, Supplement No. 10 (A/66/10), para. 337.

⁴ *Ibid.*, Sixty-sixth Session, Supplement No. 10 (A/66/10), paras. 338–341; and Sixty-seventh Session, Supplement No. 10 (A/67/10), paras. 230–231.

⁵ *Ibid.*, Sixty-seventh Session, Supplement No. 10 (A/67/10), paras. 232–234. At the sixty-third session (2011), the Chairman of the Study Group presented nine preliminary conclusions, reformulated in the light of the discussions in the Study Group (*ibid.*, Sixty-sixth Session, Supplement No. 10 (A/66/10), para. 344). At the sixty-fourth session (2012), the Chairman presented the text of six additional preliminary conclusions, also reformulated in the light of the discussions in the Study Group (*ibid.*, Sixty-seventh Session, Supplement No. 10 (A/67/10), para. 240). The Study Group also discussed the format in which the further work on the topic should proceed and the possible outcome of the work. A number of suggestions were formulated by the Chairman and agreed upon by the Study Group (*ibid.*, paras. 235–239).

⁶ *Ibid.*, Sixty-seventh Session, Supplement No. 10 (A/67/10), paras. 226 and 239.

⁷ *Ibid.*, paras. 227.

⁸ *Ibid.*, Sixty-eighth Session, Supplement No. 10 (A/68/10), paras. 33 to 39. The Commission provisionally adopted draft conclusions 1 (General rule and means of treaty interpretation); 2 (Subsequent agreements and subsequent practice as authentic means of interpretation); 3 (Interpretation of treaty terms as capable of evolving over time); 4 (Definition of subsequent agreement and subsequent practice); and 5 (Attribution of subsequent practice).

B. Consideration of the topic at the present session

5. At the present session, the Commission had before it the second report of the Special Rapporteur (A/CN.4/671), which it considered at its 3205th to 3209th meetings, from 15 to 22 May 2014.

6. In his second report, the Special Rapporteur considered the following aspects of the topic: the identification of subsequent agreements and subsequent practice (section II); possible effects of subsequent agreements and subsequent practice in the interpretation of treaties (section III); the form and value of subsequent practice under article 31, paragraph 3 (b) (section IV); the conditions for an “agreement” of the parties regarding the interpretation of a treaty under article 31, paragraph 3 (section V); decisions adopted within the framework of Conferences of States Parties (section VI); and the possible scope for interpretation by subsequent agreements and subsequent practice (section VII). The report also included some information on the future programme of work (section VIII). The Special Rapporteur proposed a draft conclusion corresponding with each of the issues addressed in sections II to VII.⁹

⁹ The six draft conclusions proposed by the Special Rapporteur read as follows:

Draft conclusion 6

Identification of subsequent agreements and subsequent practice

The identification of subsequent agreements and subsequent practice under article 31 (3) and article 32 requires careful consideration, in particular of whether the parties, by an agreement or a practice, assume a position regarding the interpretation of a treaty, or whether they are motivated by other considerations.

Draft conclusion 7

Possible effects of subsequent agreements and subsequent practice in interpretation

(1) Subsequent agreements and subsequent practice under articles 31 (3) and 32 can contribute to the clarification of the meaning of a treaty, in particular by narrowing or widening the range of possible interpretations, or by indicating a certain scope for the exercise of discretion which the treaty accords to the parties.

(2) The value of a subsequent agreement or subsequent practice as a means of interpretation may, *inter alia*, depend on their specificity.

Draft conclusion 8

Forms and value of subsequent practice under article 31 (3) (b)

Subsequent practice under article 31 (3) (b) can take a variety of forms and must reflect a common understanding of the parties regarding the interpretation of a treaty. Its value as a means of interpretation depends on the extent to which it is concordant, common and consistent.

Draft conclusion 9

Agreement of the parties regarding the interpretation of a treaty

(1) An agreement under article 31 (3) (a) and (b) need not be arrived at in any particular form nor be binding as such.

(2) An agreement under article 31 (3) (b) requires a common understanding regarding the interpretation of a treaty of which the parties are aware. The number of parties that must actively engage in subsequent practice in order to establish an agreement under article 31 (3) (b) may vary. Silence on the part of one or more parties can, when the circumstances call for some reaction, constitute acceptance of the subsequent practice.

(3) A common subsequent agreement or practice does not necessarily indicate an agreement between the parties regarding the interpretation of a treaty, but may instead signify their agreement temporarily not to apply the treaty or to establish a practical arrangement (*modus vivendi*).

7. At its 3209th meeting, on 22 May 2014, the Commission referred draft conclusions 6 to 11, as contained in the second report of the Special Rapporteur, to the Drafting Committee.

8. At its 3215th meeting, on 5 June 2014, the Commission considered the report of the Drafting Committee and provisionally adopted five draft conclusions (see section C.1 below).

9. At its ... to ... meetings, on ... 2014, the Commission adopted the commentaries to the draft conclusions provisionally adopted at the current session (see section C.2 below).

C. Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, as provisionally adopted by the Commission at its sixty-sixth session

1. Text of the draft conclusions

10. The text of the draft conclusions provisionally adopted by the Commission at its sixty-sixth session is reproduced below.

Conclusion 6

Identification of subsequent agreements and subsequent practice

1. The identification of subsequent agreements and subsequent practice under article 31, paragraph 3, requires, in particular, a determination whether the parties, by an agreement or a practice, have taken a position regarding the interpretation of the treaty. This is not normally the case if the parties have merely agreed not to apply the treaty temporarily or agreed to establish a practical arrangement (*modus vivendi*).

2. Subsequent agreements and subsequent practice under article 31, paragraph 3, can take a variety of forms.

Draft conclusion 10

Decisions adopted within the framework of a Conference of States Parties

(1) A Conference of States Parties, under these draft conclusions, is a meeting of States parties pursuant to a treaty for the purpose of reviewing or implementing the treaty, except if they act as members of an organ of an international organization.

(2) The legal effect of a decision adopted within the framework of a Conference of States Parties depends primarily on the treaty and the applicable rules of procedure. Depending on the circumstances, such a decision may embody a subsequent agreement under article 31 (3) (a), or give rise to subsequent practice under article 31 (3) (b) or article 32.

(3) A decision adopted within the framework of a Conference of States Parties embodies a subsequent agreement or subsequent practice under article 31 (3) in so far as it expresses agreement in substance between the parties regarding the interpretation of a treaty, regardless of the form and the procedure by which the decision was adopted.

Draft conclusion 11

Scope for interpretation by subsequent agreements and subsequent practice

(1) The scope for interpretation by subsequent agreements or subsequent practice as authentic means of interpretation under article 31 (3) may be wide.

(2) 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.

3. The identification of subsequent practice under article 32 requires, in particular, a determination whether conduct by one or more parties is in the application of the treaty.

Conclusion 7

Possible effects of subsequent agreements and subsequent practice in interpretation

1. Subsequent agreements and subsequent practice under article 31, paragraph 3, contribute, in their interaction with other means of interpretation, to the clarification of the meaning of a treaty. This may result in narrowing, widening, or otherwise determining the range of possible interpretations, including any scope for the exercise of discretion which the treaty accords to the parties.

2. Subsequent practice under article 32 can also contribute to the clarification of the meaning of a treaty.

3. It is presumed that the parties to a treaty, by an agreement subsequently arrived at or a practice in the application of the treaty, intend to interpret the treaty, not to amend or to modify it. The possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized. The present draft conclusion is without prejudice to the rules on the amendment or modification of treaties under the Vienna Convention on the Law of Treaties and under customary international law.

Conclusion 8

Weight of subsequent agreements and subsequent practice as a means of interpretation

1. 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.

2. The weight of subsequent practice under article 31, paragraph 3 (b), depends, in addition, on whether and how it is repeated.

3. The weight of subsequent practice as a supplementary means of interpretation under article 32 may depend on the criteria referred to in paragraphs 1 and 2.

Conclusion 9

Agreement of the parties regarding the interpretation of a treaty

1. An agreement under article 31, paragraph 3 (a) and (b), requires a common understanding regarding the interpretation of a treaty which the parties are aware of and accept. Though it shall be taken into account, such an agreement need not be legally binding.

2. The number of parties that must actively engage in subsequent practice in order to establish an agreement under article 31, paragraph 3 (b), may vary. Silence on the part of one or more parties can constitute acceptance of the subsequent practice when the circumstances call for some reaction.

Conclusion 10

Decisions adopted within the framework of a Conference of States Parties

1. A Conference of States Parties, under these draft conclusions, is a meeting of States parties pursuant to a treaty for the purpose of reviewing or implementing the treaty, except if they act as members of an organ of an international organization.

2. The legal effect of a decision adopted within the framework of a Conference of States Parties depends primarily on the treaty and any applicable rules of procedure. Depending on the circumstances, such a decision may embody, explicitly or implicitly, a subsequent agreement under article 31, paragraph 3 (a), or give rise to subsequent practice under article 31, paragraph 3 (b), or to subsequent practice under article 32. Decisions adopted within the framework of a Conference of States Parties often provide a non-exclusive range of practical options for implementing the treaty.

3. A decision adopted within the framework of a Conference of States Parties embodies a subsequent agreement or subsequent practice under article 31, paragraph 3, in so far as it expresses agreement in substance between the parties regarding the interpretation of a treaty, regardless of the form and the procedure by which the decision was adopted, including by consensus.

2. Text of the draft conclusions and commentaries thereto provisionally adopted by the Commission at its sixty-sixth session

11. The text of the draft conclusions, together with commentaries, provisionally adopted by the Commission at the sixty-sixth session, is reproduced below.

[....]
