United Nations A/CN.4/712/Add.1

General Assembly

Distr.: General
1 June 2018

Original: English

International Law Commission
Seventieth session
New York, 30 April–1 June 2018; and Geneva,
2 July–10 August 2018

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

Comments and observations received from Governments

Addendum

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I. Introduction

1. One additional written reply, containing comments and observations on the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, adopted on first reading by the International Law Commission at its sixty-eighth session (2016), was received from the Netherlands (19 April 2018). The comments and observations are reproduced below. General comments are reproduced first, followed by specific comments on the draft conclusions.

II. Comments and observations received from Governments

A. General comments

Netherlands

[Original: English]

As we have pointed out previously with respect to the draft conclusions and commentaries thereto provisionally adopted by the Commission at its sixty-sixth session, in distilling and identifying the different elements and criteria making up "subsequent agreements" and "subsequent practice", and placing them under different draft conclusions, the dividing line between the cross-cutting issues of the different draft conclusions is sometimes difficult to discern.[1] For example, in respect of the term "other conduct" in paragraph 2 of draft conclusion 5, the commentary states, inter alia, that such conduct may be "statements by a State that is not party to a treaty about the latter's interpretation" and that "[a]ctivities of actors that are not State parties, as such, may only contribute to assessing subsequent practice of the parties to a treaty". We believe that these phrases raise further questions in relation to the current reading of the term "conclusion" in draft conclusion 4 and underline the need for further clarification, including by adding appropriate cross-references. The same is true for the reference in the commentary to draft conclusion 5 to "a pronouncement by a treaty monitoring body" and how this relates to draft conclusion 13 [12].

In a similar vein, we note that paragraph 2 of draft conclusion 12 [11] is formulated in a slightly different manner than the first sentence of paragraph 3 of draft conclusion 13 [12], although the contents refer to the same process. Thus, according to the Commission, "arise from" is intended to encompass the generation and development of subsequent agreements and subsequent practice, while "expressed in" is used in the sense of reflecting and articulating such agreements and practice. This is in essence the same as proposed in draft conclusion 13 [12], in which it is said that a pronouncements of an expert treaty body "may give rise to, or refer to, a subsequent agreement or subsequent practice". A similar reference is included in the commentary to draft conclusion 5, stating that: "Statements or conduct of other actors, such as international organizations or non-State actors, can reflect, or initiate, relevant subsequent practice of the parties to a treaty." Unless some specific reasons call for divergent formulations, we suggest that, for reasons of conceptual clarity, the same language be used as much as possible.

Finally, we refer to the fourth report of the Special Rapporteur, which, in addition to draft conclusions in respect of expert (treaty) bodies, contained a draft conclusion on "decisions of domestic courts". We note, however, that the Commission itself has not yet provided a draft conclusion on this topic. We would welcome it if the Commission in its final version could give consideration to "decisions of domestic

[1] See http://legal.un.org/docs/?path=../ilc/sessions/67/pdfs/english/sasp_netherlands.pdf&lang=E.

courts", particularly in respect of their potential relevance as subsequent practice in the application of a treaty and for the purpose of a proper assessment of subsequent agreements and subsequent practice when domestic courts are called on to interpret and apply a treaty. In our opinion, the decisions of domestic courts can only constitute relevant State practice when such decisions are not rejected by the State's executive. Such rejection can be said to exist when the executive considers and externally presents such decisions as not representing the State's position on an issue. This qualification follows from the proposition that subsequent practice requires the consistency of the different branches of Government.

B. Specific comments on the draft conclusions

Part Two
Basic rules and definitions

1. Draft conclusion 2 [1] — General rule and means of treaty interpretation

Netherlands

[Original: English]

Draft conclusion 2 [1] reaffirms that the process of treaty interpretation is a "single combined operation". We support this reaffirmation, but would like to emphasize that article 32 does not provide for an alternative, autonomous means of interpretation, but only for a means to aid an interpretation governed by the principles of article 31, as explained by the Commission's commentary to the 1966 draft articles on the law of treaties.[2]

2. Draft conclusion 4 — Definition of subsequent agreement and subsequent practice

Netherlands

[Original: English]

Draft conclusion 4 refers to a subsequent agreement regarding the interpretation of the treaty, and the application of its provisions and subsequent practice in the application of a treaty, "after its conclusion". The commentary explains that the term "conclusion" should be understood as the moment at which the text of the treaty has been established as definite and not only after entry into force of the treaty. According to the commentary, it would be difficult to identify a reason why an agreement or a practice prior to the treaty's entry into force should not be relevant for the purpose of interpretation. We believe it would be helpful if the commentary specifies the circumstances and particular situations in which agreement or practice prior to a treaty's entry into force might be relevant for the interpretation of a treaty. Examples would include the situations envisaged under articles 18 and 25 of the Vienna Convention on the Law of Treaties (Vienna Convention). In our opinion, if practice is to be relevant it must in any event be that of States that have signed the treaty in question or have expressed their consent to be bound by the treaty pending its entry into force. However, we cannot but note that the approach involves some conceptual inconsistencies, particularly regarding the requirement under article 31, paragraph 3 (a) and (b), that there must be an "agreement between the parties" or "practice … which establishes the agreement of the parties", in which the term "parties" under the Vienna Convention has been defined as States that have consented

[2] *Yearbook … 1966*, vol. II, p. 223.

to be bound by the treaty and for which the treaty is in force (article 2, paragraph 1 (g)).

[See also the comments above under general comments]

3. Draft conclusion 5 — Attribution of subsequent practice

Netherlands

[Original: English]

With respect to draft conclusion 5, paragraph 1, we note that the Commission did not consider it necessary to limit the scope of the relevant conduct by adding the phrase "for the purpose of treaty interpretation" as originally proposed by the Special Rapporteur. The Commission considers that the requirement that any conduct must be "in the application of the treaty" would sufficiently limit the scope of possibly relevant conduct. According to the Commission, since the concept of "'in the application of the treaty' requires conduct in good faith, a manifest misapplication of the treaty falls outside this scope". Although we agree with the Commission that good faith is also an element to be taken into account when applying article 31, paragraph 3, we would add a word of caution with respect to the term "manifest misapplication of the treaty". This term suggests that an incorrect application of the treaty in a specific case could be established in a (relatively) straightforward manner. In many cases, however, this would require an in-depth analysis of the treaty (provision) concerned in accordance with the terms of article 31.

[See also the comments above under general comments.]

Part Three
General aspects

4. Draft conclusion 7 — Possible effects of subsequent agreements and subsequent practice in interpretation

Netherlands

[Original: English]

Draft conclusion 7 deals with the possible effects of subsequent agreements and subsequent practice in interpretation, and the delineation between treaty interpretation and treaty amendment or modification through the operation of subsequent agreements or subsequent practice. We agree with the Commission that the starting point must be the "clarification of the meaning of a treaty". We therefore welcome that this draft conclusion establishes a link with other means of interpretation and reaffirms that the interactive process of treaty interpretation consists of placing appropriate emphasis in any particular case on the various means of interpretation in a "single combined operation", without laying down a hierarchical order for the application of the various elements of article 31.

The draft conclusion provides that subsequent agreements and subsequent practice "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". In the commentary, the Commission seems to take a more narrow perspective and explains that the effects may be to narrow down (specifying) possible meanings of a particular term or provision, or the scope of the treaty as a whole, or to confirm a wider interpretation. The phrase "widening … the range of possible interpretations" would seem to open up the possibility of widening the range of possible interpretations beyond possible interpretations based on the

ordinary meaning of the terms of the treaty. We therefore suggest to replace the phrase "narrowing, widening" in paragraph 1 with "specifying a more narrow interpretation or confirming a wider interpretation".

5. Draft conclusion 10 [9] — Agreement of the parties regarding the interpretation of a treaty

Netherlands

[Original: English]

The second sentence of paragraph 2 of draft conclusion 10 [9] refers to the circumstances in which failure to react to a practice may constitute acceptance of that practice as subsequent practice. The commentary mentions that the relevance of silence or inaction depends to a large extent on the circumstances of the specific case. In our opinion, it would be important to add that the relevance of silence or inaction is not to be presumed since the rule is not that silence implies acquiescence, but rather that in a particular situation in which it was clear that reaction was called for, no such reaction came. We note in this respect that a presumption against silence has been specifically included in paragraph 3 of draft conclusion 13 [12]. We consider, however, that there are no circumstances that would justify a different approach with respect to draft conclusion 10 [9]. Therefore, we suggest that the presumption be added to draft conclusion 10 [9] as well and that the issue be addressed in the commentary thereto, including any differences in applying the presumption, if any, in situations under draft conclusion 10 [9] and draft conclusion 13 [12]. We also suggest that the commentary take into account the role of reactions or explanations that States may at a later stage give for certain positions and their possible silence. We also suggest that the commentary pay attention to the possibility that a State protests in a confidential, or at least not public, manner. In the latter case, we are of the view that the fact that there is no public reaction to certain conduct cannot be taken as evidence of acceptance of the subsequent practice.

Part Four
Specific aspects

6. Draft conclusion 11 [10] — Decisions adopted within the framework of a Conference of States Parties

Netherlands

[Original: English]

Conferences of States Parties are open to all parties to a treaty and we recognize that decisions adopted at such conferences may embody a subsequent agreement or give rise to subsequent practice. Given the wide diversity of Conferences of States Parties and their practice, as the examples mentioned in the commentary show, we also concur with the Commission that the starting point for determining the legal effect of a decision adopted by a Conference of States Parties must always be the treaty concerned and any applicable rules of procedure.

For a decision of a Conference of States Parties to embody subsequent agreement or subsequent practice, the decision must express agreement in substance between the parties regarding the interpretation of the treaty. We would like to stress the importance of this requirement as well as the observation that a decision adopted by consensus may not necessarily reflect an agreement in substance, i.e. that consensus in itself is not a sufficient condition for such an agreement. We doubt, however, whether the current language of the last part of paragraph 3 of draft

conclusion 11 [10] effectively addresses this concern. In our view, the phrase may create confusion since it could be read as suggesting that decisions taken at Conferences of States Parties that are not adopted by consensus could still embody agreement in substance. We would therefore favour deletion of the phrase "regardless of the form and the procedure by which the decision was adopted, including by consensus" in the draft conclusion, and addressing this issue in the commentary.

We note that draft conclusion 11 [10] and the commentary thereto do not address the situation in which a Conference of States Parties adopts a decision by consensus or unanimous vote without all parties to the treaty being present and participating in decision-making in the meeting at which that decision is adopted. In our view, provided the decision has been taken in accordance with the provisions of the treaty and any applicable rules of procedure, particularly any applicable requirements regarding a quorum, such a decision could also embody a subsequent agreement or give rise to a subsequent practice under article 31, paragraph 3, if it can be established that it constitutes agreement in substance between the parties regarding the interpretation of the treaty.

Finally, with respect to the last sentence of paragraph 2 of draft conclusion 11 [10], we suggest to move it to the commentary. We believe this sentence is less suited to be included as a draft conclusion, since it is presumably based on present practice, which is susceptible to change over time. Its prominence in the present draft conclusion would distract from focusing on decisions that go beyond mere practical options for implementing a treaty.

7. Draft conclusion 12 [11] — Constituent instruments of international organizations

Netherlands

[Original: English]

Paragraph 3 of draft conclusion 12 [11] states that the practice of an international organization in the application of its constituent instrument may be considered relevant for clarifying the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. At the same time, the Commission admits that certain differences exist among writers on how to explain the relevance of the practice of an international organization in its own right under the Vienna Convention. In the absence of further evidence supporting paragraph 3, we wonder whether the relevance of the practice of an international organization is appropriately considered by the operation of article 31, paragraph 1; or whether its relevance for the application and interpretation of its constituent instrument stems from the institutional character of such treaties (falling under any relevant rules of the organization, including the notion of "established practice of the organization" as a "means of interpretation"), rather than its treaty character. We would appreciate a further analysis, including with respect to the proposition that "specific relevant rules of interpretation" may be contained in the constituent instrument or implied therein, or derive form the established practice of the organization.

[See also the comment above under general comments.]

8. Draft conclusion 13 [12] — Pronouncements of expert treaty bodies

Netherlands

[See the comments above under general comments and those on draft conclusion 10 [9].]