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Chapter XI Treaties over time

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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 At the sixty-second session (2010), the Study Group was reconstituted under the chairmanship of Mr. Georg Nolte and began its work on the aspects of the topic relating to subsequent agreements and practice, on the basis of an introductory report prepared by its Chairman on the relevant jurisprudence of the International Court of Justice and arbitral tribunals of *ad hoc* jurisdiction.³

B. Consideration of the topic at the present session

2. At the present session, the Study Group on Treaties over time was reconstituted again under the chairmanship of Mr. Georg Nolte.

3. At its ... meeting, on 8 August 2011, the Commission took note of the oral report of the Chairman of the Study Group on Treaties over time and approved the recommendation of the Study Group that the request for information included in Chapter III of the report of the Commission on the work of its sixty-second session (2010) be reiterated in Chapter III of the Commission’s report on its work at the current session.⁴

1. Discussions of the Study Group

4. The Study Group held five meetings, on 25 May, on 13, 21 and 27 July, and on 2 August 2011.

5. The Study Group first took up the remainder of the work on the introductory report prepared by its Chairman on the relevant jurisprudence of the International Court of Justice and arbitral tribunals of *ad hoc* jurisdiction. Accordingly, members discussed the section of the introductory report relating to a possible modification of a treaty by subsequent agreements and practice and the relation of subsequent agreements and practice to formal amendment procedures. As with respect to the other parts of the introductory report and following a proposal by the Chairman, the Study Group considered that no conclusions should be drawn, at this stage, on the matters covered in the introductory report.

6. The Chairman noted that the following additional documents had been submitted for consideration by the Study Group: the second report by the Chairman on the “Jurisprudence under special regimes relating to subsequent agreements and subsequent practice”, a paper by Mr. Murase entitled “The Pathology of “Evolutionary” Interpretations: GATT Article XX’s Application to Trade and the Environment” and a paper prepared by Mr. Petrič on subsequent agreements and practice concerning a particular boundary treaty. The Study

¹ At its 2997th meeting, on 8 August 2008. (*Official Records of the General Assembly, Sixty third Session, Supplement 10 (A/63/10)*, para. 353). For the syllabus of the topic, see *ibid.*, Annex A. The General Assembly, in para. 6 of its resolution 63/123 of 11 December 2008, took note of the decision.

² See *Official Records of the General Assembly, Sixty-fourth Session, Supplement 10 (A/64/10)*, paras. 220–226.

³ *Ibid.*, *Sixty-Fifth Session, Supplement 10 (A/65/10)*, paras. 344–354.

⁴ See below, para. 11.

Group discussed the paper by Mr. Murase in connection with the pertinent point addressed in the Chairman's second report, and decided to postpone the consideration of the paper prepared by Mr. Petrič until it would discuss issues of subsequent agreement and subsequent practice that are unrelated to judicial or quasi-judicial proceedings.

7. The Chairman's second report covers the jurisprudence under certain international economic regimes (World Trade Organization, Iran-US Claims Tribunal, International Centre for the Settlement of Investment Disputes tribunals and North American Free Trade Area tribunals), international human rights regimes (European Court of Human Rights, Inter-American Court of Human Rights, and Human Rights Committee under the International Covenant on Civil and Political Rights), and other regimes (International Tribunal for the Law of the Sea, International Criminal Court, International Criminal Tribunals for the former Yugoslavia and Rwanda, and Court of Justice of the European Union). The report explains why those regimes are covered and not others.

8. The Study Group considered the second report on the basis of the twenty "General conclusions" contained therein. Discussions focused on the following aspects: reliance by adjudicatory bodies under special regimes on the general rule of treaty interpretation; the extent to which the special nature of certain treaties — notably human rights treaties and treaties in the field of international criminal law — might affect the approach of the relevant adjudicatory bodies to treaty interpretation; different emphasis placed by adjudicatory bodies on the various means of treaty interpretation (e.g. more text-oriented or more purpose-oriented approaches to treaty interpretation in comparison with more conventional approaches); general recognition of subsequent agreements and practice as a means of treaty interpretation; the significance of the role assigned by various adjudicatory bodies to subsequent practice among the various means of treaty interpretation; the concept of subsequent practice for the purpose of treaty interpretation, including the point in time from which a practice may be regarded as "subsequent"; possible authors of relevant subsequent practice; as well as evolutionary interpretation as a form of purposive interpretation in the light of subsequent practice. Due to lack of time, the members of Study Group could only discuss eleven of the conclusions contained in the second report. In the light of these discussions in the Study Group, the Chairman reformulated the text of what have now become nine preliminary conclusions, as follows:

...

9. The Study Group agreed that the above conclusions by its Chairman were of a preliminary nature, as they would have to be revisited and expanded in the light of other reports on additional aspects of the topic and of the discussions thereon.

2. Future work and request for information

10. The Study Group also discussed the future work with regard to this topic. It was expected that, during the sixty-fourth session (2012), the discussion of the second report prepared by the Chairman would be completed, to be followed by a third phase, namely the analysis of the practice of States that is unrelated to judicial and quasi-judicial proceedings. This should be done on the basis of a further report on this topic. The Study Group expected that the work on the topic would, as originally envisaged, be concluded during the next quinquennium and result in conclusions on the basis of a repertory of practice. The Study Group also discussed the possibility of modifying the working method with respect to the topic so as to follow the procedure involving the appointment by the Commission of a Special Rapporteur. It came to the conclusion that this possibility should be considered during the next session by the newly elected membership.

11. At its meeting on 2 August 2011, the Study Group examined the possibility that the request for information from Governments which was included in Chapter III of the

Commission's report on the work of its sixty-second session (2010) be reiterated. It was generally felt in the Study Group that more information provided by Governments in relation to this topic would be very useful, in particular with respect to the consideration of instances of subsequent practice and agreements that have not been the subject of a judicial or quasi-judicial pronouncement by an international body. Therefore, the Study Group recommended to the Commission that Chapter III of this year's report include a section reiterating the request for information on the topic "Treaties over time".
