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

**Statement of the Chairman of the Drafting Committee,
Mr. Pavel Šturma**

10 June 2016

Mr. Chairman,

It gives me great pleasure today to introduce the fourth report of the Drafting Committee for the sixty-eighth session of the Commission. This report concerns the topic “Subsequent agreements and subsequent practice in relation to the interpretation of treaties” and is contained in document A/CN.4/L.874, which reproduces the text of all the draft conclusions provisionally adopted by the Drafting Committee.

The Drafting Committee devoted 4 meetings, on 1, 3 and 6 June 2016, to its consideration of the draft conclusions regarding this topic. It will be recalled that following the debate on the Special Rapporteur’s fourth report (A/CN.4/694), the Plenary, at its 3307th meeting on 31 May, referred to the Drafting Committee for its consideration draft conclusions 1a and 12, as contained in that report, bearing in mind the views expressed in the Plenary debate and the summary thereof by the Special Rapporteur. The Drafting Committee examined these draft conclusions, together with reformulations that were presented by the Special Rapporteur to the Drafting Committee in order to respond to suggestions made, or concerns raised, during the Plenary. The Drafting Committee also considered the structure of the entire set of draft conclusions, in light of proposals made by the Special Rapporteur.

Before addressing the details of the report, let me pay tribute to the Special Rapporteur, Mr. Georg Nolte, whose constructive approach, flexibility and patience once again greatly facilitated the work of the Drafting Committee. I also thank the other members of the Committee for their active participation and significant contributions. Furthermore, I wish to thank the Secretariat for its invaluable assistance.

Mr. Chairman,

You have before you in document A/CN.4/L.874 a complete set of the 13 draft conclusions adopted by the Drafting Committee on first reading. It will be recalled that during its sixty-fifth session (2013), the Commission provisionally adopted five draft conclusions with commentaries on the topic. Five additional draft conclusions, with commentaries, were adopted at the sixty-sixth session (2014). At the sixty-seventh session last year, the Commission provisionally adopted one additional draft conclusion, with commentary, making a total of eleven draft conclusions provisionally adopted by the Commission. These draft conclusions have been subject of previous statements of the Chairman of the Drafting Committee in the years that they were provisionally adopted. This year, based on the draft conclusions referred to it, the Drafting Committee has adopted two additional draft conclusions, thus completing a set of 13 draft conclusions.

In this statement I will first address the question of the structure, and then deal with the two draft conclusions adopted provisionally by the Drafting Committee at this session.

Structure of the draft conclusions

Turning now to the structure, on the basis of the proposal made by the Special Rapporteur in his fourth report, the draft conclusions provisionally adopted by the Drafting Committee have been divided into four parts, namely Part One, entitled “Introduction”, which contains one draft conclusion; Part Two, entitled “Basic rules and definitions”, consisting of draft conclusions 2 [1] to 5; Part Three, entitled “General aspects”, containing draft conclusions 6 to 10 [9]; and finally Part Four, entitled “Specific aspects”, comprising draft conclusions 11 [10] to 13 [12].

Moreover, the draft conclusions have been renumbered due to a re-organization of the draft conclusions. In addition to renumbering draft conclusion 1a, entitled, “Introduction”, adopted at this session as draft conclusion 1, draft conclusion 3, on “Interpretation of treaty terms as capable of evolving over time”, is now placed in Part Three, appearing as draft conclusion 8. The original numbering appears in square brackets.

Mr. Chairman,

I shall now address the two draft conclusions adopted at the present session by the Drafting Committee.

Draft conclusion -1[1a] - Introduction

I draw your attention first to draft conclusion 1[1a], which was proposed by the Special Rapporteur to reorient the structure and place into focus the overall scope of the conclusions.

Draft conclusion 1 [1a] is composed of a single paragraph, which reads: “The present draft conclusions concern the role of subsequent agreements and subsequent practice in the interpretation of treaties.” This introductory draft conclusion aims at explaining the purpose of the entire set of draft conclusions. The commentary will make it clear that the draft conclusions as a whole do not address all conceivable circumstances in which subsequent agreements and subsequent practice may be taken into account in the interpretation of treaties. For instance, one aspect not specifically dealt with is the relevance of subsequent agreements and subsequent practice in relation to treaties between States and international organizations or between international organizations.

The Drafting Committee has considered appropriate to use the term “role” rather than “significance” as proposed in the fourth report, since it carried the idea that the present draft conclusions were aiming at clarifying the function of subsequent agreements and subsequent

practice in the interpretation of treaties. Consequently, the Drafting Committee has slightly amended the sentence with purely editorial changes.

The title of the draft conclusion is, “Introduction”, as originally proposed by the Special Rapporteur.

I now turn to draft conclusion 13 [12].

Draft conclusion 13 [12] – Pronouncements of expert treaty bodies

As indicated by the Special Rapporteur during the debate in Plenary, the objective of draft conclusion 13 [12] is to recognize, for the purpose of the present project, that pronouncements of expert bodies, as a form of practice under the treaty or otherwise, may be relevant for its interpretation, either in connection with the practice of States parties, or as such.

It comprises 4 paragraphs that I will introduce in turn.

Paragraph 1 reads: “For the purposes of these draft conclusions, an expert treaty body is a body consisting of experts serving in their personal capacity, which is established under a treaty and is not an organ of an international organization.” This is a definitional provision of the term “expert treaty body” for the purpose of the present draft conclusions.

Further to the suggestions made during the debate in Plenary, the Special Rapporteur proposed to replace the term “expert body” by the term “expert treaty body” and to replace the expression “individual capacity” by “personal capacity”. The Drafting Committee has considered that the expression “expert treaty body” was appropriate since it excludes bodies established by organs of international organizations, which are not the object of draft conclusion 13 [12].

Paragraph 1 designates an “expert treaty body” “which is established under a treaty and is not an organ of an international organization.” The exclusion of expert treaty bodies that are organs of international organizations from the scope of this draft conclusion has been made for formal reasons. This does not imply a substantive conclusion that the pronouncements of expert treaty bodies which are organs of international organizations may, or may not, bear similar effects in the context of the interpretation of treaties. The purpose of this part of the sentence is

to make clear that draft conclusion 13 [12] does not purport to make any determination of the effects of the pronouncements of such bodies. The commentary will provide examples of “expert treaty bodies”, including those cases that may appear *sui generis* “established *under* a treaty”.

Moreover, the Drafting Committee found appropriate the proposal to use the term “personal” rather than “individual” capacity since this is the terminology used in most of the treaties themselves. The Drafting Committee, on the suggestion of the Special Rapporteur, has also decided to delete the terms “for the purpose of contributing to its proper application” since it is conceivable that such bodies may also be created for other purposes depending on the applicable rules of the treaty.

Paragraph 2 indicates that “The relevance of a pronouncement of an expert treaty body for the interpretation of a treaty is subject to the applicable rules of the treaty.” This provision seeks to import the idea contained in the proposal made by the Special Rapporteur in his fourth report under draft conclusion 12, paragraph 5. The purpose of this provision is to signal to the interpreter that, when assessing pronouncements of expert treaty bodies, in the context of the interpretation of a treaty, the necessary first step is to look into the treaty establishing the said body. A treaty may contain indications regarding the role of the expert treaty body thereby established. Paragraph 2 directs the interpreter to the text of the constituent treaty that cannot be overlooked. These important indications are to be found in “the applicable rules of the treaty”. These rules need to be taken into consideration when assessing the relevance of a pronouncement of an expert treaty body. Pronouncements of such bodies are no more binding or authoritative than what the respective treaty establishing such bodies provides.

According to paragraph 3:

“A pronouncement of an expert treaty body may give rise to, or refer to, a subsequent agreement and subsequent practice by parties under article 31, paragraph 3, or other subsequent practice under article 32. Silence by a party shall not be presumed to constitute subsequent practice under article 31 (3) (b) accepting an interpretation of a treaty as expressed in a pronouncement of an expert treaty body.”

The purpose of this paragraph is to indicate the role that a pronouncement of an expert treaty body may perform with respect to a subsequent agreement or subsequent practice by the

parties to a treaty. The first sentence of this paragraph corresponds to the proposal made in the fourth report under draft conclusion 12, paragraph 3. As indicated in the fourth report, a pronouncement of an expert treaty body cannot, as such, constitute subsequent practice under article 31 (3) (b), since that provision requires that a subsequent practice in the application of the treaty establishes the agreement of the parties. This self-evident point will be reflected in the commentary. However, such pronouncements may have indirect effects when applying articles 31 (3) or 32. First, a pronouncement can refer to a subsequent agreement and subsequent practice by parties under article 31, paragraph 3, or other subsequent practice under article 32. Following some debate, the Drafting Committee has considered appropriate to use the verb “refer” rather than “reflect” to clarify that any subsequent agreement of the parties is not comprised in the pronouncement itself. Second, a pronouncement of an expert treaty body can play a role of catalyst and give rise to a subsequent agreement or a subsequent practice by the parties.

The second sentence of paragraph 3 was proposed in the fourth report under draft conclusion 12, paragraph 4. It indicates to the interpreter that caution should be exercised when interpreting silence by a party on a pronouncement of an expert treaty body, which is a circumstance with respect to which silence of a party does not typically indicate acceptance. The formulation proposed in the fourth report has been simplified to highlight that a subsequent practice which establishes the agreement of the parties under article 31 (3) (b) was not to be presumed in such instance.

Whereas paragraph 3 addresses the possible “indirect” effect of a pronouncement, paragraph 4 of the draft conclusion seeks to address the situation dealt with by the Special Rapporteur in his report of the possible “independent” effect of a pronouncement of an expert treaty body. Paragraph 4 is formulated as a without prejudice clause. The paragraph provides that this draft conclusion is without prejudice to the contribution that a pronouncement of an expert treaty body may otherwise make to the interpretation of a treaty. The use of “otherwise” seeks to draw a link between paragraph 3, which acknowledges the possible “indirect” effect of a pronouncement of an expert treaty body, and paragraph 4, which leaves unprejudiced the possible “independent” effect such a pronouncement.

The title of draft conclusion 12 is, “Pronouncements of expert treaty bodies”, based on the proposal by the Special Rapporteur in his report. The word “expert” had been added to reflect the current orientation of the draft conclusion.

This concludes my introduction of the fourth report of the Drafting Committee for the sixty-eighth session. It is my sincere hope that the Plenary will be in a position to adopt the draft conclusions on Subsequent agreements and subsequent practice in relation to the interpretation of treaties, on first reading, as set out in document A/CN.4/L.874.

Thank you very much.