Chapter X

TREATIES OVER TIME

A. Introduction

344. 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.[1367] 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.[1368]

B. Consideration of the topic at the present session

345. At the present session, the Study Group on treaties over time was reconstituted under the chairpersonship of Mr. Georg Nolte.

346. At its 3071st meeting, on 30 July 2010, the Commission took note of the oral report of the Chairperson of the Study Group on treaties over time and approved the recommendation of the Study Group that a request for information be included in chapter III of the Commission's report and also brought to the attention of States by the Secretariat.[1369]

1. Discussions of the Study Group

347. The Study Group held four meetings, on 5 and 26 May, and on 28 July 2010.

348. The Study Group 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 Chairperson on the relevant jurisprudence of the ICJ and arbitral tribunals of *ad hoc* jurisdiction.

349. The introductory report addressed a number of questions including: terminological issues; the general significance of subsequent agreements and practice in treaty interpretation; the question of inter-temporal law; the relationship between evolutionary interpretation and subsequent agreements and practice; the various elements of subsequent agreements and practice such as the beginning and the end of the relevant period within which this phenomenon may take place, the identification of a common understanding or agreement by the parties, including the potential role of silence, and questions of attribution of conduct to the State; and subsequent agreements and practice as a possible means of treaty modification.

350. These various questions were the subject of preliminary discussions within the Study Group. However, due to lack of time, the consideration of the section relating to a possible modification of a treaty by subsequent agreements and practice had to be deferred until the following year.

351. Aspects that were touched upon during the discussions in the Study Group included whether different judicial or quasi-judicial bodies have a different understanding of, or have a tendency to give a different weight to, subsequent agreements and practice in the interpretation of treaties, and whether the relevance and significance of subsequent agreements and practice may vary depending on factors relating to the treaty concerned, such as its age, its subject-matter or its past—or future-oriented nature. It was generally felt, however, that no definitive conclusions could be drawn on these issues at this stage.

352. During the first meeting of the Study Group in May 2010, some members expressed the wish that additional information be provided on relevant aspects of the preparatory work of the 1969 Vienna Convention. The Chairperson therefore presented to the Study Group, at its third meeting, an addendum to his introductory report, dealing with the preparatory work of the 1969 Vienna Convention relating to the rules on the interpretation and modification of treaties, and on inter-temporal law. The addendum addressed the work of the Commission concerning the elaboration, on first and on second reading, of the draft articles relating to the interpretation and modification of treaties, as well as the modifications introduced to those draft articles by the 1969 Vienna Convention. The addendum concluded that paragraphs (3) (*a*) and (*b*) of article 31 of the 1969 Vienna Convention on "subsequent agreements" and "subsequent practice" were the remnants of a more ambitious plan by the Commission to deal also with inter-temporal law and the modification of treaties. This more ambitious plan could not be realized for various reasons, in particular the difficulties of formulating in an appropriate way a general rule on inter-temporal law and the resistance by States during the United Nations Conference on the Law of Treaties to accept an explicit rule on the informal modification of treaties by way of subsequent practice. It does not seem, however, that clear differences in substance led to the abandoning of the initial, more ambitious plan.

[1367] At its 2997th meeting, on 8 August 2008 (see *Yearbook ... 2008*, vol. II (Part Two), p. 148, para. 353). For the syllabus of the topic, see *ibid.*, Annex I. The General Assembly, in paragraph 6 of its resolution 63/123 of 11 December 2008, took note of the decision.

[1368] See *Yearbook ... 2009*, vol. II (Part Two), pp. 148–149, paras. 220–226.

[1369] See paragraph 354 below.

2. Future work and request for information

353. The Study Group also discussed its future work. It is expected that, during the sixty-third session of the Commission (2011), the Study Group will first complete its discussion of the introductory report prepared by its Chairperson, and will then move to a second phase of its work on subsequent agreements and practice, namely the analysis of the jurisprudence of courts or other independent bodies under special regimes. This will be done on the basis of a report to be prepared by the Chairperson of the Study Group. In parallel, other contributions are expected to be made by some members on specific issues.

354. At its meeting on 28 July 2010, the Study Group also examined the possibility that a request for information from Governments be included in chapter III of the Commission's report on the current session, and that this request be brought to the attention of Governments by the Secretariat. It was generally felt in the Study Group that 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 the current year's report include a section containing a request for information on the topic "Treaties over time", and that this request be brought to the attention of States by the Secretariat.