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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. Gilberto Vergne Saboia**

**5 June 2014**

Madam Chairperson,

It gives me great pleasure today to introduce the second report of the Drafting Committee for the sixty-sixth 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.833, which reproduces the text of the draft conclusions provisionally adopted by the Drafting Committee at the present session.

The Drafting Committee devoted five meetings, from 26 to 28 May and on 2 and 3 June, to its consideration of the draft conclusions regarding this topic. It examined the six draft conclusions that were presented by the Special Rapporteur in his second report (A/CN.4/671), together with a number of reformulations that were presented by the Special Rapporteur to the Drafting Committee in order to respond to concerns raised, or suggestions made, during the Plenary with respect to certain draft conclusions.

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 valuable assistance.

Madam Chairperson,

The report of the Drafting Committee comprises five draft conclusions. As will be shown later, some elements of what was contained in draft conclusion 11 as proposed by the Special Rapporteur in his second report have been incorporated into paragraph 3 of draft conclusion 7. I shall now introduce the draft conclusions in turn.

**Draft conclusion 6 - Identification of subsequent agreements and subsequent practice**

Draft conclusion 6 is entitled “Identification of subsequent agreements and subsequent practice”, as originally proposed. It is the first draft conclusion which addresses the ways in which subsequent agreements and subsequent practice should be approached by interpreters more specifically than through the first five draft conclusions already provisionally adopted by the Commission. Like other draft conclusions, it is not overly prescriptive and should be seen more as a practice pointer to assist the interpreter in his or hers endeavours. The purpose of draft conclusion 6 is to indicate that subsequent agreements and subsequent practice, as means of interpretation, must be identified as such. The content and structure of this draft conclusion were revisited by the Drafting Committee in light of comments made during the debate in the Plenary and consists of three paragraphs.

*Paragraph 1*

Paragraph 1 reminds the interpreter that the identification of subsequent agreements or subsequent practice, for the purpose of article 31, paragraph 3, of the Vienna Convention on the Law of Treaties requires particular consideration concerning the question whether the parties, by an agreement or practice, have taken a position regarding the interpretation of a treaty or whether their conduct has been motivated by other considerations. In the latter case, the subsequent agreement or subsequent

practice would not be relevant for the purpose of article 31, paragraph 3. Only if a subsequent agreement or subsequent practice is regarding the interpretation of a treaty can it have the effects attributed to it under article 31, paragraph 3. This is the core element of paragraph 1 and it is addressed in the first sentence. Following suggestions by some members during the debate in Plenary, the language was refined to introduce a more normative formulation. It is understood that the commentary will explain that “agreement” relates to agreements between the parties regarding the interpretation of the treaty or the application of its provisions and that “practice” relates to subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation. It is also understood that the commentary will reflect the understanding that the application of a treaty or of its provisions may not only imply an interpretation of a treaty, but that it can also indicate the fact and the degree to which any interpretation by the parties is grounded in the practice of the parties.

The range of subsequent agreements and subsequent practice under article 31, paragraph 3, is wide and it would be difficult to encapsulate this diversity in the text of the draft conclusion. Therefore, the second sentence of paragraph 1, which is a slightly reformulated version of paragraph 3 of original draft conclusion 9, has been introduced here to clarify the principle set forth in the first sentence by distinguishing relevant subsequent agreements and practice in the context of article 31, paragraph 3, and irrelevant forms of subsequent conduct by States parties. This sentence provides two examples of conduct that would normally not be relevant for the purpose of article 31, paragraph 3. The commentary will clarify that the second sentence is merely illustrative and is not intended to be exhaustive.

### *Paragraph 2*

The purpose of paragraph 2 is to acknowledge the variety of forms that subsequent agreements and subsequent practice can take under article 31, paragraph 3. It intends to reflect the fact that the Vienna Convention has recognized that the treaties within its scope shall also be interpreted by taking into account less formal agreements and practice. This notion has been taken from original draft conclusions 8 and 9 and

was merged into a single paragraph, which in this case addresses only the form, and not the value, or weight, of subsequent agreements and subsequent practice.

### *Paragraph 3*

Madam Chairperson,

Paragraph 3 addresses the identification of subsequent practice under article 32. This paragraph was added in response to the concerns expressed during the Plenary debate that dealing with subsequent practice under articles 31 and 32 of the Vienna Convention in the same provision, as originally proposed, would blur the distinction between the two articles. It was deemed important not to give the impression that subsequent practice of just one or some of the parties were comparable for purposes of treaty interpretation to subsequent agreement or subsequent practice that falls within the scope of article 31, paragraph 3. Paragraph 3 of this draft conclusion provides that in identifying subsequent practice under article 32, the interpreter is required to determine whether, in particular, conduct by one or more parties is in the application of the treaty.

### **Draft conclusion 7 – Possible effects of subsequent agreements and subsequent practice in interpretation**

Madam Chairperson,

Draft conclusion 7 is entitled “Possible effects of subsequent agreements and subsequent practice in interpretation”, as originally proposed by the Special Rapporteur. The text provisionally adopted by the Drafting Committee is based on paragraph 1 of draft conclusion 7 as proposed by the Special Rapporteur in his second report. In light of the debate in Plenary, the Special Rapporteur proposed to deal with

the content of paragraph 2 of the text initially presented by him, which addressed the value of subsequent agreements and subsequent practice, in a separate draft conclusion. The text of draft conclusion 7 also contains elements of what was originally contained in draft conclusion 11.

#### *Paragraph 1*

Paragraph 1 of draft conclusion 7 describes the possible effects of subsequent agreements and subsequent practice in interpretation. The purpose is to indicate that subsequent agreements and subsequent practice may contribute to a clarification of the meaning of a treaty. The original text of the first sentence was refined to emphasize that the consideration of subsequent agreements and subsequent practice is only one element of the single combined operation of interpretation and that they must therefore be seen in their interaction with other means of interpretation. This would include the understanding that such conduct may serve not only to clarify the terms of the treaty but also other means of interpretation which are mentioned in article 31. The second sentence in paragraph 1 serves to illustrate the effects subsequent agreements and subsequent practice may have in the interpretation of a treaty, which may result in narrowing, widening or otherwise determining the range of possible interpretations. This notion is further clarified by way of example in referring to the element of discretion which the treaty may accord to the parties.

#### *Paragraph 2*

Paragraph 2 of draft conclusion 7 concerns possible effects of subsequent practice in interpretation in the context of article 32. While paragraph 2 sets out the same main idea that is contained in paragraph 1, the Drafting Committee decided to treat article 31, paragraph 3, and article 32 in two separate provisions in order to maintain the distinction between these two articles.

### *Paragraph 3*

Paragraph 3 is based on paragraph 2 of draft conclusion 11 as originally proposed by the Special Rapporteur. It will be recalled that original draft conclusion 11 dealt with the scope for interpretation by subsequent agreements and subsequent practice. Paragraph 1 of that draft conclusion dealt with scope in such a manner that it is already covered in paragraph 1 of draft conclusion 7, as provisionally adopted by the Drafting Committee. The question therefore arose whether paragraph 2 of draft conclusion 11 should be a stand alone conclusion or be part of draft conclusion 7 since it also deals with possible effects. The Drafting Committee decided to move it as paragraph 3.

This paragraph primarily addresses the question of how far the interpretation of a treaty can be influenced by subsequent agreements and subsequent practice in order to remain within the realm of what is considered interpretation. It is intended as a practice pointer and formulates a presumption that the parties to a treaty, by subsequent agreements or subsequent practice, do not intend to modify the treaty but to interpret it. It aims to remind the interpreter that subsequent agreements may serve to amend or modify a treaty but that such subsequent agreements fall under article 39 of the Vienna Convention and should be distinguished from subsequent agreements under article 31, paragraph 3. The use of the phrase “agreement subsequently arrived at or a practice in the application of a treaty” seeks to clarify this distinction and points to a wider notion of those terms. The commentary will provide further clarification on this point.

The draft presumption contained in the first sentence is further strengthened by the second sentence, which states that the possibility of modifying a treaty by subsequent practice of the parties has not generally been recognised. This formulation was originally used by the Study Group on treaties over time. It serves to reflect the fact that there are strong indications in the practice of States and in the case-law of international courts that such practice would not lead to an amendment or a modification of a treaty, but that there are also indications that this possibility is not definitively excluded. The proposition in the second sentence of paragraph 3 is

descriptive and not normative in character. The view was however expressed that the second sentence be deleted since it could conceivably be considered as going too far or not far enough. On the other hand, it was generally understood that the last sentence of paragraph 3, which contains a without prejudice clause, provided a sufficient clarification for the understanding of the paragraph as whole.

**Draft conclusion 8 – Weight of subsequent agreements and subsequent practice as a means of interpretation**

Madam Chairperson,

Draft conclusion 8 is entitled “Weight of subsequent agreements and subsequent practice as a means of interpretation”. The content and structure of this draft conclusion were revisited by the Drafting Committee in light of comments made during the debate in the Plenary, which also necessitated changing the title to its current wording. In particular, the text was reformulated in order to distinguish between possible *effects* of subsequent agreements and subsequent practice on treaty interpretation, a matter dealt with in draft conclusion 7, and the *weight* accorded to such agreements and practice in the process of interpretation. Draft conclusion 8 is thus a combination of original draft conclusion 8 and paragraph 2 of original draft conclusion 7. It should also be noted that the new version of draft conclusion 8 deals with the question of weight in relation to both subsequent agreements and subsequent practice.

Draft conclusion 8 addresses the question how far subsequent agreements and subsequent practice demonstrate the common understanding of the parties as to the meaning of the terms of a treaty. The purpose is to provide the interpreter with an indication as to the circumstances under which subsequent agreements and subsequent practice would have more or less value as means of interpretation. Draft conclusion 8

identifies some criteria that may be useful to take into consideration in order to identify the interpretative value, or weight, which a particular subsequent agreement or subsequent practice should play in the process of interpretation in a particular case. Naturally, the weight accorded to subsequent agreements and subsequent practice must be viewed in relation to other means of interpretation. The formula “common, concordant and consistent”, which was employed in the text of draft conclusion 8 as originally proposed, gave rise to concern during the plenary debate as not being sufficiently well-established or having the risk of being misconceived as overly prescriptive. This formula has therefore not been retained in the draft conclusion.

Draft conclusion 8 now consists of three paragraphs.

#### *Paragraph 1*

Paragraph 1 addresses the weight of a subsequent agreement or subsequent practice under article 31, paragraph 3, thus dealing with both subparagraphs (a) and (b) of the said article from a more general point of view. Paragraph 1 specifies that the weight to be accorded to a subsequent agreement or subsequent practice as a means of interpretation depends, *inter alia*, on its clarity and specificity. The use of the term “*inter alia*” indicates to the interpreter that the provision should not be seen as exhaustive. The term “specificity” should, in this context be understood to include the degree to which the subsequent agreement or subsequent practice relates to the treaty concerned.

#### *Paragraph 2*

Paragraph 2 deals only with subsequent practice under article 31, paragraph 3 (b), and specifies that the weight of subsequent practice depends on whether and how it is repeated. This formula brings in the elements of time and frequency intended to indicate to the interpreter that something more than just mere repetition of a practice may be necessary for such practice to be of interpretative value in the context of article 31, paragraph 3 (b). The element of time and frequency, or repetition, of the subsequent practice is supposed to provide some grounding that is required for the purpose of



interpretation.

### *Paragraph 3*

Paragraph 3 sets out the same main idea that is contained in paragraphs 1 and 2 and addresses the weight of subsequent practice under article 32 in treaty interpretation. The Drafting Committee decided to treat article 31, paragraph 3, and article 32 in separate provisions in order to maintain the distinction between these two articles. This distinction is reinforced by the phrase “as a supplementary means”, which emphasizes the subsidiary character of subsequent practice under article 32 in the process of treaty interpretation. Moreover, the word “may” indicates an element of permissiveness that presupposes the interpreter being in a situation that article 32 applies. For purposes of article 32, the criteria referred to in paragraphs 1 and 2 may not necessarily be equally relevant when assessing the weight of subsequent practice as for article 31, paragraph 3 (b), and other factors may need to be taken into account. The distinction between subsequent practice under article 31, paragraph 3 (b), and article 32, and the meaning of their weight in treaty interpretation will be further clarified in the commentary to this draft conclusion.

### **Draft conclusion 9 – Agreement of the parties regarding the interpretation of a treaty**

Madam Chairperson,

Let me now turn to draft conclusion 9, which is entitled “Agreement of the parties regarding the interpretation of a treaty”, as originally proposed. The text provisionally adopted by the Drafting Committee is based on paragraphs 1 and 2 of draft conclusion 9 as proposed by the Special Rapporteur in his second report. However, as I mentioned earlier, the part of paragraph 1 of original draft conclusion 9 that addressed the question of form of subsequent agreement is now dealt with in paragraph 2 of draft conclusion 6. Similarly, paragraph 3 of original draft conclusion 9 was also incorporated in draft conclusion 6 to clarify, by way of example, that only if a subsequent agreement or subsequent practice is regarding the interpretation of a treaty

can it have the effects attributed to it under article 31, paragraph 3.

Draft conclusion 9 as provisionally adopted by the Drafting Committee consists of two paragraphs. Whereas paragraph 1 refers to what is general for article 31, paragraph 3 (a) and (b), paragraph 2 addresses only subsequent practice under article 31, paragraph 3 (b). While the different meaning attributed to the term “agreement” in subparagraph (a) and subparagraph (b) has already been set out in draft conclusion 4 and its accompanying commentary, paragraph 1 of draft conclusion 9 intends to capture what is common in the two subparagraphs, which is the agreement between the parties, in substance, regarding the interpretation of the treaty.

#### *Paragraph 1*

Paragraph 1 sets forth the principle that an “agreement” under article 31, paragraph 3 (a) and (b), requires a common understanding by the parties regarding the interpretation of a treaty; in order for that common understanding to have the effect provided for under article 31, paragraph 3, the parties must be aware of it and accept it. The term “accept” in this context was added to the text originally proposed by the Special Rapporteur to clarify that, for the purpose of article 31, paragraph 3, it would not be sufficient to only be aware of the common understanding but that it must reflect an acceptance of the interpretation contained therein.

The aim of the second sentence of paragraph 1 is to avoid any misconception that “agreement” for the purpose of article 31, paragraph 3, need to be binding. This notion has already been accepted by the Commission in its commentary to paragraph 1 of draft conclusion 4, which was provisionally adopted last year. It was nevertheless deemed important to clarify this point in the draft conclusion since the term is used in other provisions of the Vienna Convention in the sense of a legally binding instrument. In other words, the term agreement under paragraph 3 of article 31 does not require that the parties would undertake or create any legal obligation existing in addition to, or independently of, the treaty in question. As long as the parties by their conduct attribute a certain meaning to the treaty or, in other words, establish agreement regarding the interpretation, such conduct shall be taken into account when interpreting the treaty in

question. The second sentence therefore provides that although an agreement under article 31 paragraph 3, shall be taken into account, such an agreement need not be legally binding. The word “legally” is used to distinguish from this draft conclusion agreements which may be binding politically.

Paragraph 2 of draft conclusion 9 is based on the second sentence of paragraph 2 of the original draft conclusion 9 and has only been slightly refined. This paragraph addresses the question of whether all the parties to a treaty must have actively engaged in a practice to give effect to article 31, paragraph 3 (b), or whether it may be sufficient if some parties have remained silent in the face of a common practice by other parties.

The first sentence of paragraph 2 confirms the principle that not all the parties must engage in a particular practice to constitute agreement under article 31, paragraph 3 (b). The second sentence clarifies that acceptance of such practice by those parties not engaged in the practice, can indeed be brought about by silence. Nevertheless, the draft conclusion takes into consideration that agreement by silence is not easily established and depends to a large extent on the circumstances of the specific case. The sentence therefore specifies that silence can constitute acceptance when the circumstances call for some reaction. The conditions for when silence could be relevant for the establishment of an agreement regarding the interpretation of a treaty would be further elaborated in the commentary.

#### **Draft conclusion 10 – Decisions adopted within the framework of a Conference of States Parties**

Draft conclusion 10 is entitled “Decisions adopted within the framework of a Conference of States Parties”, as originally proposed by the Special Rapporteur.

Draft conclusion 10 addresses a particular form of action by States which may result in a subsequent agreement or subsequent practice under article 31, paragraph 3, or subsequent practice under article 32, namely, decisions adopted within the framework of Conferences of States Parties. While such decisions may under certain

circumstances embody subsequent agreements or subsequent practice for the purpose of interpretation, they do not automatically do so. As in other situations, this depends on the circumstances and must be specifically established.

In order to acknowledge the wide diversity of Conferences of States Parties and the rules under which they operate, paragraph 1 provides a broad definition of the term Conference of States Parties for the purpose of the draft conclusions and paragraph 2 recognizes the primacy of the respective rules that govern them. Organs of international organizations are excluded from the definition. The Special Rapporteur has suggested that he will deal with the question whether decisions from such organs may also constitute subsequent agreements or subsequent practice for the purpose of article 31, paragraph 3, at a later stage.

As a point of departure, paragraph 2 provides that the legal effect of a decision adopted within the framework of a Conference of States Parties depends primarily on the treaty in question and the rules of procedure. The word “any” was inserted by the Drafting Committee in this sentence to better clarify that rules of procedure of Conferences of States Parties will apply, if any, given that there might be situations where there are no specifically adopted rules of procedure. The aim of the second sentence of paragraph 2 is to lay down the principle that decisions of Conferences of States Parties may indeed constitute subsequent agreement or subsequent practice for treaty interpretation under articles 31 and 32 of the Vienna Convention. It is nevertheless also clarified that whether they do so depends on the circumstances. The last sentence of paragraph 2 was added by the Drafting Committee in order to remind the interpreter that decisions of Conferences of States Parties often provide a range of practical options for implementing the treaty, which may not necessarily embody a subsequent agreement and subsequent practice for the purpose of treaty interpretation.

Paragraph 3 sets forth the principle that agreements regarding the interpretation of a treaty under article 31, paragraph 3, must relate to the content of the treaty. It is thus the substance of the decision and not the form or procedure by which it was adopted that is of importance. The purpose of paragraph 3 is therefore to call on the

interpreter to make the necessary distinction between the substance of a decision, which may or may not be regarding the interpretation of a treaty, and its form, which may or may not reflect agreement in substance. In order to address concerns relating to decisions adopted by consensus at Conferences of States Parties, the phrase “including by consensus” was introduced in order to dispel the notion that consensus would necessarily be equated with agreement in substance. While the question of consensus would be further elaborated in the commentary, the intention was not to provide a definition thereof but to describe what it entails, in principle, and the problems it can generate in the context of treaty interpretation under the Vienna Convention.

Madam Chairperson,

This concludes my introduction of the second report of the Drafting Committee for the sixty-sixth session. It is in my sincere hope that the Commission will be in a position to provisionally adopt the draft conclusions as presented.

I thank you for your kind attention.

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