Enclosure 2

Response of the Republic of Singapore to the International Law Commission's Request for Comments and Observations on the Draft Conclusions on Identification of Customary International Law

Singapore is pleased to respond to the International Law Commission's request for comments and observations on the draft conclusions on identification of customary international law as adopted on first reading.

2. Singapore commends the Commission and the Special Rapporteur Sir Michael Wood for taking up this important task of clarifying the methodology for determining the existence and content of customary international law. Singapore is of the view that the Commission's final output will be of valuable practical guidance for States, international courts and tribunals and practitioners. Singapore has previously provided our views on this topic at the 69th, 70th and 71st sessions of the Sixth Committee from 2014 to 2016.

3. We have comments and views on the following draft conclusions and/or commentaries as presently drafted:

(a) Draft conclusion 4, paragraph 2, which states that "[i]n certain cases, the practice of international organisations also contributes to the formation, or expression, of rules of customary international law";

(b) Draft conclusion 6, paragraph 1, which states that practice "may, under certain circumstances, include inaction";

(c) The accompanying commentary to draft conclusion 8, which affirms that there is no such thing as "instant custom";

(d) Draft conclusion 11, paragraph 1, which does not provide for any distinction between the three means in sub-paragraphs (a) to (c) by which a treaty rule may reflect a rule of customary international law;

(e) Draft conclusion 12, paragraph 2, which states that "[a] resolution adopted by an international organization or at an intergovernmental conference may provide evidence for establishing the existence and content of a rule of customary international law, or contribute to its development";

(f) The accompanying commentary to draft conclusion 13, which elaborates on the courts and tribunals whose decisions would be a subsidiary means for the determination of rules of customary international law; and

(g) Draft conclusion 15 on the persistent objector principle and its accompanying commentaries.

These are elaborated in the following paragraphs, to assist the Commission in finalising the text at its seventieth session.

4. As a preliminary remark on the draft conclusions, we note the Commission's decision not to include a separate draft conclusion on its own output.[1] However, we read with interest the Commission's commentary concerning the circumstances when the Commission's output can have value in identifying the existence of a rule of customary international law, or the lack thereof. Singapore views the Commission's treatment of its own output as timely in the light of increasing attention to its so-called "non-legislative codifications"[2]. With the seventieth anniversary of the Commission approaching in 2018, Singapore looks forward to further discussions on this important issue, whether in the context of the Commission's work on the present topic or otherwise.

Draft conclusion 4 (Requirement of practice)

5. Singapore agrees with the overarching principle that "it is primarily the practice of States that contributes to the formation, or expression, of rules of customary international law"[3]. Consequently, Singapore also agrees that the conduct of non-State actors, such as non-governmental organisations, transnational corporations and private individuals, is not practice that contributes to the formation, or expression of rules of customary international law[4].

6. However, the reference to "[i]n certain cases" in draft conclusion 4, paragraph 2 should be revised to state "[i]n limited cases". The expression "limited cases" would more accurately reflect the Commission's description of the circumstances in which the practice of international organisations (IOs) can contribute to the formation or expression of rules of customary international law[5].

7. The commentaries should also emphasise that the reason the practice of an IO can contribute to customary international law in such limited cases is that, in these cases, the practice of international organisations *reflects the practice of States*. This emphasis would be consistent with the statement in draft conclusion 4, paragraph 1.

8. As regards paragraph (10) of the commentary, Singapore does not disagree with the general position stated therein. However, given the intended generality of application of the draft conclusions, the Commission may wish to consider referring to

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1 See paragraph (2) of the accompanying commentary to Part Five of the draft conclusions.

2 See Fernando Lusa Bordin, "Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law" (2014) 63 ICLQ 535; see also Natalie Y. Morris-Sharma, "The ILC's Draft Articles Before the 69th Session of the UNGA: A Reawakening?" (2017) Asian J. Int. Law 1.

3 See draft conclusion 4, paragraph 1.

4 See draft conclusion 4, paragraph 3.

5 See paragraphs (5) to (8) of the accompanying commentary to draft conclusion 4.

the statements and publications of the International Committee of the Red Cross in the context of paragraph (9) of the commentaries.

Draft conclusion 6 (Forms of practice)

9. Draft conclusion 6, paragraph 1 states that practice "may, under certain circumstances, include inaction". Paragraph (3) of the accompanying commentary explains that "the words 'under certain circumstances' seek to caution... that only deliberate abstention from acting may serve such a role[, and that] the State in question needs to be conscious about refraining from acting in a given situation."

10. For clarity, Singapore proposes that the concept of a deliberate abstention from acting be incorporated into the text of draft conclusion 6, paragraph 1 itself. Specifically, the Commission may wish to consider replacing the expression "inaction" with "deliberate abstention from acting".

11. Singapore wishes to add that determining what constitutes a "deliberate" abstention will ultimately be a factual exercise dependent on all the circumstances of the case. In this regard, Singapore notes the Special Rapporteur's finding that "[e]ven more than other forms of practice, inaction may at times be difficult to identify and qualify"[6].

12. For the avoidance of doubt, we emphasise that any inaction, or deliberate abstention from acting, relied upon in identifying a rule of customary international law must be accompanied by *opinio juris*. This is in line with the general requirement in draft conclusion 9 that a constituent element of customary international law is for the practice of States to be accepted as law. This could take the form of a State's acceptance that its inaction is required by international law. In other cases, this could take the form of a State's belief that it need not act or react because the other State's practice is consistent with international law.

Draft conclusion 8 (The practice must be general)

13. In paragraph (9) of the accompanying commentary, the Commission makes clear that there is no such thing as "instant custom", and that some time must elapse for a general practice to emerge.

14. Singapore agrees and considers this view to reflect *lex lata*. For the commentary to be of further guidance to States, international courts and tribunals, and practitioners, the Commission may wish to incorporate in the commentary a reference to, or an explanation on, the origins of the concept of "instant custom"[7]. This would be helpful especially since the four reports of the Special Rapporteur have also not extensively addressed the concept.

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[6] Third Report of the Special Rapporteur (A/CN.4/682) at paragraph 20.

[7] See Bin Cheng, "United Nations Resolutions on Outer Space: "Instant" Customary International Law?" (1965) 5 IJIL 23-48.

Draft conclusion 11 (Treaties)

15. Draft conclusion 11, paragraph 1 currently provides three means by which a rule set forth in a treaty may reflect a rule of customary international law. The accompanying commentary clarifies that, for sub-paragraph (c), the process of a treaty rule generating a new rule of customary law is one that is not lightly to be regarded as having occurred.

16. This distinction in treatment between the ways in which a treaty rule can reflect customary international law is not apparent from the text of draft conclusion 11, paragraph 1. Singapore therefore proposes that draft conclusion 11, paragraph 1, be revised so that this distinction is clearly reflected in the text of the draft conclusion itself.

17. Singapore also wishes to emphasise that, in determining whether there exists a treaty rule that reflects a rule of customary international law, the content, scope and ambit of that particular treaty rule should first be determined by applying the law on treaty interpretation to interpret that treaty text[8]. A rule of customary international law should not be assumed to be reflected in a treaty rule only because another similarly-worded treaty rule in a separate other treaty has been found to be reflective of customary international law.

Draft conclusion 12 (Resolutions of international organisations and intergovernmental conferences)

18. Singapore agrees with draft conclusion 12, paragraphs 1 and 3. Singapore also endorses the position in paragraph (4) of the accompanying commentary that "[t]here is no "instant custom" arising out of [the resolutions adopted by international organisations or intergovernmental conferences] on their own account".

19. However, we propose revising draft conclusion 12, paragraph 2 to state that it is only "in certain circumstances" that a resolution adopted by an IO or at an intergovernmental conference may provide evidence for establishing the existence and content of a rule of customary international law, or contribute to its development. The expression "certain circumstances" mirrors the language of the International Court of Justice in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*[9]. The expression would also clarify, in the text of the draft conclusion itself, that it is not *all* such resolutions that can provide evidence of or contribute to the development of customary international law.

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[8] See Articles 31 to 33 of the *Vienna Convention on the Law of Treaties 1969*.

[9] See *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, at pp. 254-255, para. 70: "The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, *in certain circumstances*, provide evidence important for establishing the existence of a rule or the emergence of an opinio juris..." (emphasis added).

20. Paragraph (6) of the accompanying commentary cautions that "a careful assessment of various factors is required in order to verify whether indeed the States concerned intended to acknowledge the existence of a rule of customary international law" by the adoption of a resolution by an IO or at an intergovernmental conference. Singapore's view is that a consideration of the particular powers, membership and functions of the IO or intergovernmental conference would also be relevant to this assessment[10]. The accompanying commentary to draft conclusion 12 should therefore incorporate these factors.

Draft conclusion 13 (Decisions of courts and tribunals)

21. Singapore notes that draft conclusion 13 closely follows the wording of Article 38, paragraph 1(d) of the Statute of the International Court of Justice, which provides that judicial decisions are a "subsidiary means" for the determination of rules of international law. Singapore therefore affirms draft conclusion 13 to the extent that it reflects existing law under Article 38, paragraph 1(d) of the Court's Statute.

22. With respect to the Commission's definition of "national courts" in paragraph (6) of the accompanying commentary, Singapore considers that this would include the Singapore International Commercial Court, which provides for international commercial dispute resolution, adjudicated by a panel of both Singapore and international judges.

Draft conclusion 15 (Persistent objector)

23. Singapore affirms the existence of the "persistent objector" principle as stated in draft conclusion 15, paragraph (1) and considers its existence to be *lex lata*.

24. Concerning draft conclusion 15, paragraph 2, Singapore welcomes in particular the Commission's acknowledgment that, in maintaining its persistent objection, a State is not expected to object on every single occasion, especially where the position is already well known, and the determination of whether the requirement that a State's objection be maintained persistently should be done in a "pragmatic manner, bearing in mind the circumstances of each case".

25. Finally, Singapore notes that the Commission's inclusion of draft conclusion 15 is without prejudice to issues of *jus cogens*, and further notes that the Commission is undertaking separate work on the topic of peremptory norms of general international law (*jus cogens*). We agree that, given the different stages of work on the two topics, it may be premature for the Commission to settle on a position regarding the relation between *jus cogens* and the persistent objector principle.

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[10] The Commission referred to the varying powers, membership and functions of international organizations in the context of the practice of international organisations in paragraph (8) of the accompanying commentary to draft conclusion 4.