

Comments and observations

provided by the

Federal Republic of Germany

with reference to the request of the International Law Commission
regarding its Draft Conclusions

on the topic

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

The general outcome of the project:

Germany expresses great appreciation for the Commission's impressive achievements in the complex matter of subsequent agreements and subsequent practice in relation to the interpretation of treaties. The Commission's draft conclusions and reports on the subject will form a comprehensive manual for State practice and academic literature for years to come. The in-depth analysis contained in the intellectually rigorous commentary adopted will above all aid international jurisprudence and assist domestic courts in the application of articles 31 and 32 of the Vienna Convention on the Law of Treaties (hereafter: Vienna Convention) and the identification of subsequent agreements and subsequent practice.

On the content of the Draft Conclusions in detail:

1. While it is clear from article 31, paragraph 3 (a) and (b), of the Vienna Convention that, when interpreting an international treaty, subsequent agreements and subsequent practice of the State parties should be taken into account, actors other than States may also contribute to the interpretation of an international treaty. In the following comments, Germany would like to underline the importance of further exploring in the Commission's work the role that such other actors may play with regard to subsequent practice.

In this regard, Germany would like to refer to draft conclusion 5, which acknowledges that international treaties are not always and not solely applied by States parties themselves. While emphasizing the role of the States parties as the "masters of the treaty", the draft conclusion states that "subsequent practice under articles 31 and 32 may consist of any conduct in the application of a treaty which is attributable to a party to the treaty under international law". Accordingly, the conduct of non-State actors, if attributable, can also establish "subsequent practice" within the meaning of articles 31 and 32 of the Vienna Convention. Notably, this finding is not called into question by draft conclusion 5, paragraph 2, which rather only excludes such conduct which does not happen as part of the application of the treaty. Germany recognizes that where States have commissioned non-State actors to carry out international

treaty obligations the conduct of such actors may in some form be taken into account. We therefore generally welcome this broader approach presented by the Commission. Germany would, however, deem it beneficial if the Commission could, during the second reading, offer further guidance on this issue. Considerable case-law and practice is already provided with regard to attributable conduct of State organs pursuant to draft conclusion 5, paragraph 1, as well as the possible role of non-State actors pursuant to draft conclusion 5, paragraph 2. Comparable case-law and practice with regard to attributable conduct of non-State actors within the meaning of draft conclusion 5, paragraph 1, would be helpful as well. This is even more desirable since the wording of draft conclusion 5, paragraph 1, raises the complex question of attribution.

2. Furthermore, Germany would like to emphasize the importance of further exploring the role of treaty bodies with regard to the interpretation of international treaties. As can be seen by the extensive work on this topic and the draft conclusion adopted, the Commission is duly aware of the importance and the complexity of the issue. Draft conclusion 13, paragraph 3, states that the “pronouncement of an expert treaty body may give rise to, or refer to, a subsequent agreement or subsequent practice by parties under article 31, paragraph 3, or other subsequent practice under article 32”. While thereby acknowledging that the pronouncements of treaty bodies may initiate or make reference to subsequent agreements or practice by the parties, the Commission refrains from giving further guidance on the question of how the pronouncements themselves can contribute to interpretation, possibly as subsequent practice under article 32 of the Vienna Convention. Rather, it states in draft conclusion 13, paragraph 4, that draft conclusion 13, paragraph 3, shall be “without prejudice to the contribution that a pronouncement of an expert treaty body may otherwise make to the interpretation of a treaty”. The need for addressing this issue arises, however, from the following consideration:

The fact that interpretative weight should be given to pronouncements of expert treaty bodies has not only been recognized by international jurisprudence, but these pronouncements already assist international jurisprudence as well as domestic courts, which are less likely to be confronted with the interpretation of an international treaty on a regular basis, in the application of international treaties. So while the

pronouncements of expert treaty bodies already play a role in the interpretation of their respective treaties exceeding the scope of draft conclusion 13, paragraph 3, it remains unclear how these pronouncements fit into the “single combined operation” of treaty interpretation in accordance with articles 31 and 32 of the Vienna Convention. As these pronouncements can, however, neither be subsumed under article 31, paragraph 2, nor article 31, paragraph 3, of the Vienna Convention the question arises whether they can – as Germany would support – constitute practice as a supplementary means of interpretation under article 32 of the Vienna Convention and thereby contribute to the clarification of the meaning of a treaty as envisaged in draft conclusion 7, paragraph 2. Moreover, the topic of subsequent practice is not limited to States parties’ practice, as draft conclusion 12 illustrates, which in paragraph 3 positively states that the practice of an international organization itself “may contribute” to the interpretation of its constituent instrument.

Germany therefore not only welcomes the possibility, described by the Commission, that the definition of “other subsequent practice” in draft conclusions 2 and 4 could be revisited in order to “clarify whether the practice of an international organization as such should be classified within this category which, so far, is limited to the practice of parties” (*cf.* ILC Report, A/71/10, commentary to draft conclusion 12 [11], paragraph 3), but also encourages the Commission to actively address the role of expert treaty bodies in its reconsideration.

3. Lastly, Germany would like to reiterate its interest in further observations by the Commission regarding the role of domestic courts. Germany understands that a draft conclusion on this issue was proposed by the Special Rapporteur but that this does not form part of the draft conclusions adopted by the Commission. The advantages and disadvantages of the different possible roles of decisions of domestic courts, however, must be weighed carefully. It would, therefore, be helpful to have the Commission’s guidance on this topic after the second reading of the draft conclusions.

Finally, Germany would again like to thank the Commission for its work and the excellent orientation offered by the adopted draft conclusions and commentaries. We will continue to follow this project with great interest.