

ILC Draft Conclusions on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties

– Comments and Observations by the Kingdom of the Netherlands –

1. In accordance with paragraph 73 of the Report of the International Law Commission (ILC) at its 68th Session (A/71/10), the Kingdom of the Netherlands appreciates the opportunity to submit its comments and observations on the ILC Draft Conclusions on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties. The Kingdom of the Netherlands would like to express its profound gratitude to the Special Rapporteur, Professor Georg Nolte, as well as the ILC as a whole, and commend them for their work on the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties. The Kingdom of the Netherlands considers this an important topic, given that it is of important practical relevance in the process of treaty interpretation. The work of the ILC could contribute in significant ways to the development and understanding of relevant practice.

General comments

2. As we have pointed out previously with respect to the draft conclusions and commentaries thereto provisionally adopted by the Commission at its 66th session, in distilling and identifying the different elements and criteria making up 'subsequent agreement' and 'subsequent practice', and placing them under different draft conclusions, the dividing line between cross-cutting issues of the different draft conclusions is sometimes difficult to discern.¹ For example, in respect of the term 'other conduct' in paragraph 2 of draft conclusion 5, the draft commentary states, amongst others, that such conduct may be 'statements by a State that is not party to a treaty about the latter's interpretation' and that 'activities of actors that are not State parties, as such, may only contribute to assessing subsequent practice of the parties to a treaty'. We believe that these phrases raise further questions in relation to the current reading of the term 'conclusion' in draft conclusion 4 and underline the need for further clarification, including by adding appropriate cross-references. The same is true for the reference in the commentary to draft conclusion 5 to 'a pronouncement by a treaty monitoring body' and how this relates to draft conclusion 13.
3. In a similar vein, we note that paragraph 2 of draft conclusion 12 is formulated in a slightly different manner than the first sentence of paragraph 3 of draft conclusion 13, although the contents refers to the same process. Thus, according to the ILC, 'arise from' is intended to encompass the generation and development of subsequent agreements and subsequent practice, while 'expressed in' is used in the sense of reflecting and articulating such agreements and practice. This is in essence the same as proposed in draft conclusion 13 where it is said that pronouncements of expert treaty bodies 'may give rise to or refer to a subsequent agreement or subsequent practice'. A similar reference is included in the draft commentary to draft conclusion 5 stating that statements or conduct of other actors, such as international organization or non-State actors, can reflect or initiate relevant subsequent practice of the parties to a treaty. Unless some specific reasons call for divergent formulations, we suggest that for reasons of conceptual clarity the same language be used as much as possible.
4. Finally, we refer to the fourth report of the Special Rapporteur, which in addition to draft conclusions in respect of expert (treaty) bodies, contained draft conclusions on 'decisions of national courts'. We note, however, that the Commission itself has not yet provided draft

¹ http://legal.un.org/docs/?path=../ilc/sessions/67/pdfs/english/sasp_netherlands.pdf&lang=E

conclusions on this topic. We would welcome it if the Commission in its final version could give consideration to “decisions of domestic courts”, particularly in respect of its potential relevance as subsequent practice in the application of a treaty and for the purpose of a proper assessment of subsequent agreements and subsequent practice when domestic courts are called to interpret and apply a treaty. In our opinion decisions of domestic courts can only constitute relevant state practice when such decisions are not rejected by the State’s executive. Such rejection can be said to exist when the executive considers and externally presents such decisions as not representing the State’s position on the issue. This qualification follows from the proposition that subsequent practice requires consistency of the different branches of government.

Comments and observations on specific draft conclusions

Draft conclusion 2

5. Draft conclusion 2 reaffirms that the process of treaty interpretation is a ‘single combined operation’. We support this reaffirmation, but would like to emphasize that article 32 does not provide for an alternative, autonomous means of interpretation, but only for a means to aid an interpretation governed by the principles of article 31 as explained by the Commission’s commentary to the 1966 draft articles on the law of treaties.²

Draft conclusion 4

6. Draft conclusion 4 refers to a subsequent agreement regarding the interpretation of the treaty, and the application of its provisions and subsequent practice in the application of a treaty, ‘after its conclusion’. The draft commentary explains that the term ‘conclusion’ should be understood as the moment at which the text of the treaty has been established as definite and not only after entry into force of the treaty. According to the draft commentary, it would be difficult to identify a reason why an agreement or a practice prior to the treaty’s entry into force should not be relevant for the purpose of interpretation. We believe it would be helpful if the commentary specifies the circumstances and particular situations in which agreement or practice prior to a treaty’s entry into force might be relevant for the interpretation of a treaty. Examples would include the situations envisaged under the articles 18 and 25 of the Vienna Convention on the Law of Treaties (Vienna Convention). In our opinion if practice is to be relevant it must in any event be that of States which have signed the treaty in question or have expressed their consent to be bound by the treaty pending its entry into force. However, we cannot but note that the approach involves some conceptual inconsistencies, particularly regarding the requirement under article 31 (3) (a) and (b) that it must be ‘an agreement between the parties’ or ‘establishing agreement of the parties’, where the term ‘party’ under the Vienna Convention has been defined as ‘a State which has consented to be bound by the treaty and for which the treaty is in force’ (article 2 (1) (g)).

Draft conclusion 5

7. With respect to draft conclusion 5, paragraph 1, we note that the ILC did not consider it necessary to limit the scope of the relevant conduct by adding the phrase ‘for the purpose of treaty interpretation’ as originally proposed by the Special Rapporteur. The ILC considers that the requirement that any conduct must be ‘in the application of the treaty’ would sufficiently limit the scope of possibly relevant conduct. According to the ILC, since the concept of ‘in the

² Yearbook of the International Law Commission, 1966, Vol. II, pp. 223.

application of the treaty requires conduct in good faith, a manifest misapplication of the treaty falls outside this scope'. Although we agree with the ILC that good faith is also an element to be taken into account when applying article 31 (3), we would add a word of caution with respect to the term 'manifest misapplication of the treaty'. This term suggests that an incorrect application of the treaty in a specific case could be established in a (relatively) straightforward manner. In many cases, however, this would require an in-depth analysis of the treaty (provision) concerned in accordance with the terms of article 31.

Draft conclusion 7

8. Draft conclusion 7 deals with the possible effects of subsequent agreements and subsequent practice in interpretation, and the delineation between treaty interpretation and treaty amendment or modification through the operation of subsequent agreement or subsequent practice. We agree with the Commission that the starting point must be the 'clarification of the meaning of a treaty'. We therefore welcome that this draft conclusion establishes a link with other means of interpretation and reaffirms that the interactive process of treaty interpretation consists of placing appropriate emphasis in any particular case on the various means of interpretation in a 'single combined operation', without laying down a hierarchical order for the application of the various elements of article 31.
9. The draft conclusion provides that subsequent agreements and subsequent practice 'may result in narrowing, widening, or otherwise determining the range of possible interpretations, including any scope for the exercise of discretion which the treaty accords to the parties'. In the draft commentary, the ILC seems to take a more narrow perspective and explains that the effects may be to narrow down (specifying) possible meanings of a particular term or provision, or the scope of the treaty as a whole, or to *confirm* a wider interpretation. The phrase 'widening [...] the range of possible interpretations' would seem to open up the possibility of widening the range of possible interpretations beyond possible interpretations based on the ordinary meaning of the terms of the treaty. We therefore suggest to replace the phrase 'narrowing, widening' in paragraph 1 with 'specifying a more narrow interpretation or confirming a wider interpretation'.

Draft conclusion 10 [9]

10. The second sentence of paragraph 2 of draft conclusion 10 refers to the circumstances where failure to react to a practice may constitute acceptance of that practice as subsequent practice. The draft commentary mentions that the relevance of silence or inaction depends to a large extent on the circumstances of the specific case. In our opinion, it would be important to add that the relevance of silence or inaction is not to be presumed since the rule is not that silence implies acquiescence, but rather that in a particular situation in which it was clear that reaction was called for, no such reaction came. We note in this respect that a presumption against silence has been specifically included in paragraph 3 of draft conclusion 13. We consider, however, that there are no circumstances that would justify a different approach with respect to draft conclusion 10. Therefore, we suggest that the presumption be added to draft conclusion 10 as well and that the issue be addressed in the commentary thereto, including any differences in applying the presumption, if any, in situations under draft conclusion 10 and draft conclusion 13. We further suggest that the commentary take into account the role of reactions or explanations that States may at a later stage give for certain positions and their possible silence. We also suggest that the commentary pay attention to the possibility that a State protests in a confidential, or at least not public, manner. In the latter case, we are of the view that the fact that there is no public reaction to certain conduct cannot be taken as evidence of acceptance of the subsequent practice.

Draft conclusion 11 [10]

11. Conferences of States Parties (CSP) are open to all parties to a treaty and we recognize that decisions adopted at CSPs may embody a subsequent agreement or give rise to subsequent practice. Given the wide diversity of CSPs and their practice, as the examples mentioned in the draft commentary show, we also concur with the ILC that the starting point for determining the legal effect of a decision adopted by a CSP must always be the treaty concerned and any applicable rules of procedure.
12. For a decision of a CSP to embody subsequent agreement or subsequent practice, the decision must express agreement in substance between the parties regarding the interpretation of the treaty. We would like to stress the importance of this requirement as well as the observation that a decision adopted by consensus may not necessarily reflect an agreement in substance, i.e. that consensus in itself is not a sufficient condition for such an agreement. We doubt, however, whether the current language of the last part of paragraph 3 of draft conclusion 11 effectively addresses this concern. In our view, the phrase may create confusion since it could be read as suggesting that CSP decisions that are not adopted by consensus could still embody agreement in substance. We would therefore favor deletion of the phrase 'regardless of the form and the procedure by which the decision was adopted, including by consensus' in the draft conclusion, and addressing this issue in the commentary.
13. We note that draft conclusion 11 and the draft commentary thereto do not address the situation in which a CSP adopts a decision by consensus or unanimous vote without all parties to the treaty being present and participating in decision-making in the meeting at which that decision is adopted. In our view, provided the decision has been taken in accordance with the provisions of the treaty and any applicable rules of procedure, particularly any applicable quorum requirements, such a decision could also embody a subsequent agreement or give rise to a subsequent practice under article 31 (3), if it can be established that it constitutes agreement in substance between the parties regarding the interpretation of the treaty.
14. Finally, with respect to the last sentence of paragraph 2 of draft conclusion 11, we suggest to move it to the draft commentary. We believe this sentence is less suited to be included as a draft conclusion, since it is presumably based on present practice susceptible to changing over time. Its prominence in the present draft conclusion would distract from focusing on decisions that go beyond mere practical options for implementing a treaty.

Draft conclusion 12 [11]

15. Paragraph 3 of draft conclusion 12 states that the practice of an international organization in the application of its constituent instrument may be considered relevant for clarifying the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose. At the same time, the ILC admits that certain differences exist among writers on how to explain the relevance of the practice of an international organization in its own right under the Vienna Convention. In the absence of further evidence supporting paragraph 3, we wonder whether the relevance of the practice of an international organization is appropriately considered by the operation of article 31 (1); or whether its relevance for the application and interpretation of its constituent instrument stems from the institutional character of such treaties (falling under any relevant rules of the organization, including the notion of 'established practice of the organization' as a means of interpretation'), rather than its treaty character. We would appreciate a further analysis, including with respect to the proposition that 'specific relevant rules of interpretation' may be contained in the constituent instrument or implied therein, or derive from the established practice of the organization.