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*Check against delivery*

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

**Statement of the Chairman of the Drafting Committee,  
Mr. Mathias Forteau**

**8 July 2015**

Mr. Chairman,

It gives me great pleasure today to introduce the third report of the Drafting Committee for the sixty-seventh 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.854, which reproduces the text of the draft conclusion provisionally adopted by the Drafting Committee at the present session.

The Drafting Committee devoted two meetings, on 4 June, to its consideration of the draft conclusion regarding this topic. It examined the draft conclusion that was presented by the Special Rapporteur in his third report (A/CN.4/683), together with a reformulation that was presented by the Special Rapporteur to the Drafting Committee in order to respond to suggestions made, or concerns raised, during the Plenary with respect to that draft conclusion.

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.

Mr. Chairman,

The report of the Drafting Committee comprises a single draft conclusion that I shall now introduce.

## **Draft conclusion 11 – Constituent instruments of international organizations**

Draft conclusion 11 is entitled “Constituent instruments of international organizations”, as originally proposed. The purpose of this draft conclusion is to address the role of subsequent agreements and subsequent practice in relation to the interpretation of treaties which are the constituent instruments of international organizations. The content and structure of this draft conclusion were revised by the Drafting Committee, following Special Rapporteur’s suggestions, in light of comments made during the debate in the Plenary and consists of four paragraphs.

### *Paragraph 1*

Paragraph 1 contains the general principle regarding the role of subsequent agreements and subsequent practice in relation to the interpretation of treaties which are the constituent instruments of international organizations. It was adopted without changes at two exceptions, which are not substantive in nature. The reference to “any relevant rules of the organization” has been moved to a new paragraph 4, to which I will come back in a moment. In addition, the reference to sub-paragraphs (a) and (b) of Article 31, paragraph 3, has been deleted for the sake of consistency within the draft conclusions provisionally adopted in 2013 and 2014.

The first sentence of paragraph 1 is a reminder to the interpreter stating that “[a]rticles 31 and 32 [of the Vienna Convention on the Law of Treaties] apply to a treaty which is the constituent instrument of an international organization”. The applicability, as a general rule, of the rules of the Vienna Convention, including articles 31 and 32 on treaty interpretation, to treaties which are constituent instruments of international organizations is confirmed by its Article 5. According to this article, the Vienna Convention “applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rule of the organization.” As was made clear by the Special Rapporteur in his third report, this draft conclusion does not concern the role of international organizations in the interpretation of treaties adopted within such organizations and those concluded by international organizations which are not constituent instruments of international organisations. The conclusion finally does not specifically address the questions relating to pronouncements by a treaty monitoring body consisting of independent experts (a matter which may be dealt with at a later stage), nor to the questions of the interpretation of decisions by organs of international organizations as such.

The second sentence of paragraph 1 describes the implication of the general principle stated in the first sentence. It is stated therein that “[a]ccordingly, subsequent agreements and subsequent practice under article 31, paragraph 3, are, and other subsequent practice under article 32 may be, means of interpretation for such treaties.” This sentence clarifies the purpose of the draft conclusion and tracks the language of previous draft conclusions. It has been adopted without any change, with the exception of the stylistic change already mentioned.

Let me now turn to paragraph 2.

*Paragraph 2*

Mr. Chairman,

According to paragraph 2, “[s]ubsequent agreements and subsequent practice under article 31, paragraph 3, or other subsequent practice under article 32, may arise from, or be expressed in, the practice of an international organization in the application of its constituent instrument.” This paragraph concerns the practice of parties to the constituent instrument of an international organization. The parties are not directly mentioned since this follows from the definition provided for in draft conclusion 4, which sets out the definitions of a subsequent agreement and of a subsequent practice under Article 31, paragraph 3, and Article 32 by referring to the agreement or the practice of the parties. This reference to draft conclusion 4 will be inserted in the commentary.

The purpose of this paragraph is to indicate that a subsequent agreement or a subsequent practice that is attributable to the parties to a constituent instrument of an international organization and which shall to be taken into account by virtue of Article 31, paragraph 3, may arise from, or be expressed in, the practice of an international organization in the application of its constituent instrument. In other words, in this case, the practice of the international organization does not play a interpretative role by itself, but only insofar as it gives rise to, or expresses, an agreement or a subsequent practice attributable to the parties to the constituent instrument (or to some of them, in the case of a subsequent practice under Article 32).

The term “arise from or be expressed in” has been retained instead of the term “give rise to or articulate” in order to better express the two different hypotheses which are encompassed within this paragraph. Firstly, the practice of an international organization may generate a subsequent agreement or subsequent practice, while, secondly, such practice may reflect a

subsequent agreement or subsequent practice. The verb “may” is meant to flag that some caution is required when assessing the role of the practice of an international organization for the purpose of assessing whether it gives rise to or reflects a subsequent agreement or subsequent practice of the parties.

Finally, the Drafting Committee considered it more appropriate to refer to the practice of an international organization as a whole, rather than to the practice of an organ of an international organization, since the practice of an international organization in question can also be generated by the joint conduct of two or more organs.

Mr. Chairman,

Let me now turn to paragraph 3.

*Paragraph 3*

Paragraph 3 indicates that “[p]ractice of an international organization in the application of its constituent instrument may contribute to the interpretation of that instrument when applying articles 31, paragraph 1, and 32.” Its purpose is to address the role of the practice of international organizations as such in interpreting its constituent instrument. Paragraph 3 encapsulates the different elements originally formulated under paragraphs 3 and 4 of draft conclusion 11 as proposed in the Special Rapporteur third report.

The terms “practice of an international organization” are used rather than the terms “conduct of an organ of an international organizations” for the reasons enunciated under paragraph 2. The Drafting Committee discussed the possibility to add the qualification “competent” before “international organizations” and concluded that this question should be left for the commentary since this requirement was implicit for any action of an international organization. The decision was also taken not to qualify the practice of an international organization, in the text of paragraph 3, as either a general practice or as an established practice, because the effect of these forms of practice is not always entirely clear, or sufficiently well-established, in contemporary general international law. Hence, paragraph 3 refers solely to “practice of an international organization”, stating that it “may”, but does not necessarily, contribute to the interpretation. It was mentioned that the Commission might revisit the definition of “other subsequent practice” in Draft Conclusions 1(4) and 4(3) 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 States parties.

The Drafting Committee excluded the possibility that the interpretative role of the practice of international organizations be based on Article 31, paragraph 3, because this paragraph only refers to the practice of the parties. It was also agreed that it was not possible to limit the role of the practice of international organizations to Article 32. Hence the decision to anchor it on Article 31, paragraph 1, as well as Article 32. This means in particular that the practice of the international organization does not modify the general rule of interpretation under Article 31. It only contributes to applying this general rule – without prejudice to any relevant rules of the organization (para. 4). It also makes clearer the distinction with paragraph 2 of the conclusion, which concerns the indirect role which the practice of an international organization may play under Article 31, paragraph 3.

Let me now turn to paragraph 4.

#### *Paragraph 4*

Paragraph 4 states that “[p]aragraphs 1 to 3 apply to the interpretation of any treaty which is the constituent instrument of an international organization without prejudice to any relevant rules of the organization.” This provision reflects Article 5 of the Vienna Convention and its formulation borrows from that article. It was decided to insert this provision in a separate paragraph, since it applies to the situations covered under paragraphs 1 to 3. The Drafting Committee also considered it preferable to mention this rule in the last paragraph of the draft conclusion, rather than its chapeau, in order not to put too much emphasis on it. It was also understood that the term “rules of the organization” were to be defined in the same way as in the Vienna Convention on the Law of Treaties, as well as in the articles on *Responsibility of international organizations* of 2011.

Mr. Chairman

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

I thank you for your kind attention.

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## **Draft conclusion 11**

### **Constituent instruments of international organizations**

1. Articles 31 and 32 apply to a treaty which is the constituent instrument of an international organization. Accordingly, subsequent agreements and subsequent practice under article 31, paragraph 3, are, and other subsequent practice under article 32 may be, means of interpretation for such treaties.
2. Subsequent agreements and subsequent practice under article 31, paragraph 3, or other subsequent practice under article 32, may arise from, or be expressed in, the practice of an international organization in the application of its constituent instrument.
3. Practice of an international organization in the application of its constituent instrument may contribute to the interpretation of that instrument when applying articles 31, paragraph 1, and 32.
4. Paragraphs 1 to 3 apply to the interpretation of any treaty which is the constituent instrument of an international organization without prejudice to any relevant rules of the organization.