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

Statement of the Chair of the Drafting Committee

Mr. Charles Chernor Jalloh

18 May 2018

Mr. Chair,

It is my pleasure, today, to introduce the second report of the Drafting Committee for the seventieth session of the Commission. This report, which addresses the topic “Subsequent agreements and subsequent practice in relation to the interpretation of treaties”, is contained in document A/CN.4/L.907.

The Committee had before it the entire set of draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, as adopted on first reading, together with the recommendations of the Special Rapporteur contained in his fifth report, the suggestions made during the plenary debate and the comments and observations received from Governments.

The Drafting Committee held 4 meetings from 7 to 10 May on this topic. I am pleased to report that the Committee was able to complete the second reading of a set of 13 draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, and decided to submit its report to the Plenary with the recommendation that the draft conclusions be adopted by the Commission on second reading.

Mr. Chair,

Before addressing the details of the report, let me pay tribute to the Special Rapporteur, Mr. Georg Nolte, whose constructive approach, flexibility and mastery of the topic once again greatly facilitated the work of the Drafting Committee. I also thank the members of the Committee for their active participation and significant contributions. Furthermore, I wish to thank the Secretariat

for its invaluable assistance. As always, and on behalf of the Drafting Committee, I would also like to extend my appreciation to the interpreters.

Mr. Chair,

Let me begin with two general observations. First, the Drafting Committee agreed with the Special Rapporteur that “conclusions” is the appropriate designation of the outcome of the Commission’s work on this particular topic. The term, as used in this context, emphasizes the fact that the work of the Commission rests on “conclusions” from the observation of practice and various other sources and is also appropriate considering that the aim of the project is to facilitate the work of those who are called on to interpret treaties. It is also consistent with the work of the Commission on related topics, in particular “Identification of customary international law”.

Second, the Drafting Committee adopted the draft conclusions in English only. However, some suggestions with regard to the French and Spanish versions were made by the Special Rapporteur as well as by several members of the Commission. The language groups will meet at a later stage to verify the accuracy of the various linguistic versions.

Mr. Chair,

I will now turn to the text of the draft conclusions as adopted by the Drafting Committee. They are structured in four parts.

Part One - Introduction

The Drafting Committee retained the title for Part One as “Introduction”. Part One comprises one draft conclusion.

Draft conclusion 1 - Scope

The title of draft conclusion 1 is “Scope”. It is a stylistic change from the first reading text, in order to avoid repetition of the word “introduction” in the title of Part One, and to align the title with other recent projects of the Commission.

Draft conclusion 1 reads:

“The present draft conclusions concern the role of subsequent agreements and subsequent practice in the interpretation of treaties.”

The Drafting Committee maintained the text adopted on first reading with the understanding that the draft conclusions are grounded, in particular, in the 1969 Vienna Convention on the Law of Treaties. The Committee decided against an explicit reference to the 1969 Vienna Convention in the text of draft conclusion 1, to allow for the “collateral” application of the draft conclusions to situations beyond the 1969 Vienna Convention, for example in certain situations falling under the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. This will be explained in the commentary.

Part Two – Basic rules and definitions

Mr Chair,

I will now turn to Part Two. Part Two is entitled “Basic rules and definitions”. Let me begin with draft conclusion 2.

Draft conclusion 2 – General rule and means of treaty interpretation

The purpose of draft conclusion 2 is to situate subsequent agreements and subsequent practice as a means of treaty interpretation within the framework of the rules on the interpretation of treaties set forth in articles 31 and 32 of the 1969 Vienna Convention.

The title of draft conclusion 2 is “General rule and means of treaty interpretation”. The general rule, contained in article 31, is emphasized by mentioning it separately in the title of the draft conclusion. The term “means” refers to all means of interpretation referred to in draft conclusion 2, each of which serves a function within the single combined operation that is treaty interpretation.

Draft conclusion 2 consists of five paragraphs.

The first paragraph reads:

“1. Articles 31 and 32 of the Vienna Convention on the Law of Treaties set forth, respectively, the general rule of interpretation and the recourse to supplementary means of interpretation. These rules also apply as customary international law.”

The only change to this paragraph from the text adopted on first reading is the replacement of the words “rule on”, before “supplementary means of interpretation”, by the term “recourse to”. This language reflects more closely the text of article 32 of the Vienna Convention. The use of the plural “rules”, in the second sentence, emphasizes that articles 31 and 32 contain different, though closely interrelated rules, which apply alongside the Vienna Convention as customary international law.

In paragraph 2, the Drafting Committee decided to add to the end of the paragraph the term “, as provided in article 31, paragraph 1.” The full text of the paragraph now reads:

“2. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose, as provided in article 31, paragraph 1.”

The reference to article 31, paragraph 1, aligns the text with that of the other paragraphs in draft conclusions 2, which refer to specific provisions in the Vienna Convention.

The reference has been included at the end of the paragraph, rather than at the beginning, to indicate that the Vienna Convention is not the only source of the general rule: it also applies as customary international law, as stated in the second sentence of paragraph 1 of draft conclusion 2. The explicit reference to article 31, paragraph 1, is not meant to disturb the close connection between paragraphs 1 and 2 of article 31.

The Drafting Committee adopted paragraphs 3 and 4 of draft conclusion 2 without changes. The text of these paragraphs reads as follows:

“3. Article 31, paragraph 3, provides, *inter alia*, that there shall be taken into account, together with the context, (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; and (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

4. Recourse may be had to other subsequent practice in the application of the treaty as a supplementary means of interpretation under article 32.”

Paragraph 5 reads as follows:

“5. The interpretation of a treaty consists of a single combined operation, which places appropriate emphasis on the various means of interpretation indicated, respectively, in articles 31 and 32.”

Suggestions were made to move this paragraph up to paragraph 2 of draft conclusion 2, or to include it as a separate draft conclusion. The Drafting Committee found, however, that paragraph 5 plays an important role in the structure of draft conclusion 2, as it ties together the various rules of treaty interpretation set out in paragraphs 2 to 4.

Draft conclusion 3 – Subsequent agreements and subsequent practice as authentic means of interpretation

I will now turn to draft conclusion 3, which is entitled “Subsequent agreements and subsequent practice as authentic means of interpretation”. The title immediately reveals the purpose of the draft conclusion, which is to indicate that subsequent agreements and subsequent practice under article 31, paragraph 3, are significant for the interpretation of treaties since they constitute authentic means of interpretation.

This draft conclusion was adopted without changes to the first reading text. It reads as follows:

“Subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), being objective evidence of the understanding of the parties as to the meaning of the treaty, are authentic means of interpretation, in the application of the general rule of treaty interpretation reflected in article 31.”

Draft conclusion 4 – Definition of subsequent agreement and subsequent practice

The title of draft conclusion 4 is “Definition of subsequent agreement and subsequent practice”. Draft conclusion 4 consists of three paragraphs. As a general matter, the Drafting Committee decided to remove the quotation marks around the terms “subsequent agreement” and “subsequent practice” in all three paragraphs, as these were seen as unnecessary.

Paragraph 1 reads:

“1. A subsequent agreement as an authentic means of interpretation under article 31, paragraph 3 (a), is an agreement between the parties, reached after the conclusion of a treaty, regarding the interpretation of the treaty or the application of its provisions.”

The Committee discussed whether to add the word “all” before “the parties”, to highlight that agreement of all parties is required under article 31, paragraph 3 (a). It eventually found that the

term “the parties” was sufficiently clear, particularly as contrasted with the phrase “one or more parties” in paragraph 3. This is also in line with the text of the Vienna Convention, which omits the word “all”. The commentary will emphasize that “the parties” refers to all the parties.

Paragraphs 2 of draft conclusion 4 was adopted without any changes. The text reads:

“2. A subsequent practice as an authentic means of interpretation under article 31, paragraph 3 (b), consists of conduct in the application of a treaty, after its conclusion, which establishes the agreement of the parties regarding the interpretation of the treaty.”

With regard to paragraph 3, the Drafting Committee decided to remove the word “other” and to replace it with the indefinite article “a”. This change has been consistently implemented for stylistic purposes where the first reading text referred to “other subsequent practice under article 32”. The paragraph reads as follows:

3. A subsequent practice as a supplementary means of interpretation under article 32 consists of conduct by one or more parties in the application of the treaty, after its conclusion.

Conclusion 5 - Conduct as subsequent practice

Let me now turn to draft conclusion 5, which addresses the question of the possible authors of subsequent practice under articles 31 and 32 of the 1969 Vienna Convention.

The title was modified to read “Conduct as subsequent practice”. This change was made to avoid reference to the concept of attribution. The commentary will note that the term “conduct” refers to the relevant conduct of the party, in order not to confuse it with the “other conduct” referred to in paragraph 2 of draft conclusion 5.

It consists of two paragraphs.

Paragraph 1 reads:

1. Subsequent practice under articles 31 and 32 may consist of any conduct of a party in the application of a treaty, whether in the exercise of its executive, legislative, judicial or other functions.

The text of paragraph 1 as adopted on first reading made reference to the concept of attribution. The Drafting Committee considered that it would be preferable not to use this term which is closely associated with the law on responsibility of States for internationally wrongful acts. In particular, it could be misunderstood as extending this draft conclusion to *ultra vires* acts by state officials,

attributable to States under the rules of State responsibility, but which should not be understood as subsequent practice in the application of the treaty. At the same time, the Drafting Committee sought a formulation that covers the conduct of private actors acting under delegated public authority. The adopted text therefore focuses on the functions of a State, rather than on its organs. A similar approach was adopted in the Commission's work on the identification of customary international law and the revised formulation is consistent with the text adopted by the Commission in that topic.

Paragraph 2 of draft conclusion 5 was retained from first reading. The text is:

2. Other conduct, including by non-State actors, does not constitute subsequent practice under articles 31 and 32. Such conduct may, however, be relevant when assessing the subsequent practice of parties to a treaty.

Part Three – General aspects

Mr. Chair,

Let me now turn to Part Three of the draft conclusions.

Part Three is entitled “General aspects”. Let me begin with draft conclusion 6.

Conclusion 6 - Identification of subsequent agreements and subsequent practice

The title of draft conclusion 6 is “Identification of subsequent agreements and subsequent practice”. Its purpose is to indicate that subsequent agreements and subsequent practice, as means of interpretation, must be identified. The draft conclusion consists of three paragraphs.

Paragraph 1 reads as follows:

1. The identification of subsequent agreements and subsequent practice under article 31, paragraph 3, requires, in particular, a determination whether the parties, by an agreement

or a practice, have taken a position regarding the interpretation of the treaty. Such a position is not taken if the parties have merely agreed not to apply the treaty temporarily or agreed to establish a practical arrangement (*modus vivendi*).

The discussion in the Drafting Committee focused on the second sentence, which aims to illustrate situations in which a State has *not* taken a position regarding the interpretation of a treaty. The Committee revised the second sentence for stylistic reasons. The commentary will clarify the illustrative nature of the phrase, which is not meant to exclude other ways in which States may refrain from taking a position.

The only change to paragraph 2 of draft conclusion 6 is stylistic with the replacement of the word “can” by the word “may”. The second paragraph reads:

2. Subsequent agreements and subsequent practice under article 31, paragraph 3, may take a variety of forms.

The text of paragraph 3 was retained as adopted on first reading. It reads:

3. The identification of subsequent practice under article 32 requires, in particular, a determination whether conduct by one or more parties is in the application of the treaty.

Conclusion 7 - Possible effects of subsequent agreements and subsequent practice in interpretation

I will now turn to draft conclusion 7, which is entitled “Possible effects of subsequent agreements and subsequent practice in interpretation”.

Its purpose is to indicate how subsequent agreements and subsequent practice may contribute to the clarification of the meaning of a treaty. The draft conclusion comprises three paragraphs.

Paragraph 1 was adopted without any changes to the first reading text. The text of paragraph 1 reads as follows:

1. Subsequent agreements and subsequent practice under article 31, paragraph 3, contribute, in their interaction with other means of interpretation, to the clarification of the meaning of a treaty. This 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.

The Drafting Committee considered proposals to replace the word “clarification” in the first sentence with “identification”, “confirmation” or even “interpretation”. It eventually agreed to retain the original language, because the first sentence refers to the process of interpretation, rather than its end result, which the word “clarification” appropriately captures. The results of the clarification are then spelled out in the second sentence of paragraph 1.

No changes were made to the text of paragraph 2, apart from replacing the term “can” with “may” for stylistic reasons. It now reads:

2. Subsequent practice under article 32 may also contribute to the clarification of the meaning of a treaty.

The Drafting Committee discussed various aspects of paragraph 3, which reads as follows:

3. It is presumed that the parties to a treaty, by an agreement or a practice in the application of the treaty, intend to interpret the treaty, not to amend or to modify it. The possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized. The present draft conclusion is without prejudice to the rules on the amendment or modification of treaties under the Vienna Convention on the Law of Treaties and under customary international law.

The Drafting Committee decided first to retain the reference to the interpretative presumption. Second, it removed the words “subsequently arrived at”, which appeared after “by an agreement”. This was done to avoid the suggestion that “agreement” refers to any agreement. Rather, the agreement must relate to the application of the respective treaty. A suggestion to use the term “subsequent agreement” here was not acted upon by the Drafting Committee, as that term is defined in draft conclusion 4 as concerning interpretation, which would have effectively prejudged the presumption in paragraph 3 of draft conclusion 7. Third, the Committee decided not to split off the last sentence of paragraph 3 and turn it into a separate paragraph, in order to keep the emphasis of the draft conclusion on the effects of subsequent agreements and subsequent practice.

Let me now turn to draft conclusion 8.

Conclusion 8 - Interpretation of treaty terms as capable of evolving over time

Draft conclusion 8 is entitled “Interpretation of treaty terms as capable of evolving over time”. This draft conclusion addresses the role that subsequent agreements and subsequent practice may play in the context of a more general question of whether the meaning of a term of a treaty is capable of evolving over time.

Draft conclusion 8 was adopted without changes from the first reading text. It reads as follows:

“Subsequent agreements and subsequent practice under articles 31 and 32 may assist in determining whether or not the presumed intention of the parties upon the conclusion of the treaty was to give a term used a meaning which is capable of evolving over time.”

This draft conclusion again elicited a discussion over the word “presumed”, which was ultimately retained. The word serves to contextualize the term “intention”, to avoid that it is taken as “original intention”, which could be pointing to the *travaux préparatoires*. Rather, the word “presumed” indicates that the “intention” of the parties must be ascertained at the time of the act of interpretation, and in light of all the interpretive means available in accordance with articles 31 and 32 – including subsequent agreements and subsequent practice.

Let me now turn to draft conclusion 9.

Conclusion 9 - Weight of subsequent agreements and subsequent practice as a means of interpretation

Draft conclusion 9 is entitled “Weight of subsequent agreements and subsequent practice as a means of interpretation”. This draft conclusion identifies criteria that may be helpful in determining the interpretative weight to be accorded to a specific subsequent agreement or subsequent practice in the process of interpretation in a particular case. It comprises three paragraphs.

Paragraph 1 was adopted without any changes. It reads:

1. The weight of a subsequent agreement or subsequent practice as a means of interpretation under article 31, paragraph 3, depends, *inter alia*, on its clarity and specificity.

Paragraph 2 reads as follows:

2. In addition, the weight of subsequent practice under article 31, paragraph 3 (b), depends, *inter alia*, on whether and how it is repeated.

The Drafting Committee discussed whether to include the words “consistency” and “breadth”, as suggested by the Special Rapporteur in his fifth report. The Committee eventually found that these criteria need not necessarily be explicitly included in the text of the draft conclusion itself. That being said, the Drafting Committee acknowledged that, in certain cases, consistency and breadth may play a role in the determination of the weight of a subsequent practice. The text adopted points to this possibility through the use of the term “*inter alia*”, which allows the commentary to

elaborate on the possible role of consistency and breadth in the determination of the weight of a subsequent practice.

The Drafting Committee also added the words “In addition” to the beginning of the paragraph, to indicate that the criteria in paragraph 2 are cumulative to, rather than independent from, those set out in paragraph 1.

No changes were made to paragraph 3 of draft conclusion 9 as adopted on first reading. It reads:

3. The weight of subsequent practice as a supplementary means of interpretation under article 32 may depend on the criteria referred to in paragraphs 1 and 2.

Let me now turn to draft conclusion 10.

Conclusion 10 - Agreement of the parties regarding the interpretation of a treaty

The title of draft conclusion 10 is “Agreement of the parties regarding the interpretation of a treaty”. Its purpose is to clarify the element of agreement, which distinguishes subsequent agreement and subsequent practice as authentic means of interpretation under article 31, paragraph 3 (a) and (b), from subsequent practice as a supplementary means of interpretation under article 32. The draft conclusion consists of two paragraphs.

Paragraph 1 reads as follows:

1. An agreement under article 31, paragraph 3 (a) and (b), requires a common understanding regarding the interpretation of a treaty which the parties are aware of and accept. Such an agreement may, but need not, be legally binding for it to be taken into account.

The discussion in the Drafting Committee on paragraph 1 focussed on two issues. First, a suggestion was made to replace the words “a common understanding” in the first sentence with “the same understanding”. The Drafting Committee decided to retain the term “common”, with the understanding that it can cover situations in which the parties reach the same understanding individually, as well as cases where parties have a mutual awareness of a shared understanding. These two aspects of the word “common” will be explained in the commentary. Second, the Drafting Committee acted upon a suggestion by the Special Rapporteur made in his fifth report, to clarify the language of the second sentence without changing its content.

The only stylistic change to paragraph 2 was to replace the word “can” with “may”. The text is as follows:

2. The number of parties that must actively engage in subsequent practice in order to establish an agreement under article 31, paragraph 3 (b), may vary. Silence on the part of one or more parties may constitute acceptance of the subsequent practice when the circumstances call for some reaction.

Part Four – Specific aspects

Mr Chair,

Let me now turn to Part Four of the draft conclusions.

Part Four is entitled “Specific aspects”. Let me begin with draft conclusion 11.

Conclusion 11 - Decisions adopted within the framework of a Conference of States Parties

Draft conclusion 11 is entitled “Decisions adopted within the framework of a Conference of States Parties”. This draft conclusion addresses a particular form of action that 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 a Conference of States Parties. Draft conclusion 11 comprises 3 paragraphs.

Paragraph 1 reads as follows:

1. A Conference of States Parties, under these draft conclusions, is a meeting of parties to a treaty for the purpose of reviewing or implementing the treaty, except where they act as members of an organ of an international organization.

The Drafting Committee made three changes to this paragraph. First, it deleted the word “States” in the phrase “a meeting of States parties”, in recognition of the fact that international organizations sometimes participate in these meetings as parties. Second, it deleted the word “pursuant” in the phrase “pursuant to a treaty”, because treaties do not always make explicit reference to meetings of states parties for these meetings to take place. Third, the word “if” after “except” was replaced with “where”, for stylistic reasons.

Paragraph 2 was adopted without any changes. It reads:

2. The legal effect of a decision adopted within the framework of a Conference of States Parties depends primarily on the treaty and any applicable rules of procedure. Depending on the circumstances, such a decision may embody, explicitly or implicitly, a subsequent agreement under article 31, paragraph 3 (a), or give rise to subsequent practice under article 31, paragraph 3 (b), or to subsequent practice under article 32. Decisions adopted within the framework of a Conference of States Parties often provide a non-exclusive range of practical options for implementing the treaty.

The text of the paragraph 3 reads:

3. A decision adopted within the framework of a Conference of States Parties embodies a subsequent agreement or subsequent practice under article 31, paragraph 3, in so far as it expresses agreement in substance between the parties regarding the interpretation of a treaty, regardless of the form and the procedure by which the decision was adopted, including adoption by consensus.

The discussion focussed on the word “consensus”. On the one hand, it was felt that reference to consensus was warranted, as it is the prevailing method of adopting decisions in the context of a Conference of States parties. On the other hand, it was considered important to emphasize that the meaning of the term consensus has changed over time and remains to be defined in all its aspects.

The Drafting Committee decided to insert the term “adoption” after “including” to emphasize the procedural sense in which the word “consensus” is used in this paragraph.

Conclusion 12 - Constituent instruments of international organizations

Let me now turn to draft conclusion 12, which is entitled “Constituent instruments of international organizations”. This draft conclusion refers to a particular type of treaty, namely constituent instruments of international organizations, and the way in which subsequent agreements or subsequent practice shall or may be taken into account in their interpretation. It consists of four paragraphs.

Paragraph 1 reads as follows:

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 subsequent practice under article 32 may be, means of interpretation for such treaties.

The only change to paragraph 1 involves the removal of the word “other” in front of “subsequent practice under article 32”, to be consistent with the language of the definition adopted under draft conclusion 4, paragraph 3.

The text of paragraph 2 as adopted reads:

2. Subsequent agreements and subsequent practice of the parties under article 31, paragraph 3, or 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.

The word “other” was removed for the same reasons as in paragraph 1. The Drafting Committee agreed with a proposal by the Special Rapporteur to insert “of the parties” after “subsequent agreement and subsequent practice” in the first line of the paragraph, to emphasize the distinction from the practice of the international organization. However, it was decided not to insert “of the parties” when referring to subsequent practice under article 32, as such practice does not require the participation of all the parties.

The text of paragraph 3 reads:

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 and 32.

A discussion took place in the Drafting Committee on whether to include a reference to paragraph 1 of article 31 at the end of the paragraph. On the one hand, the reference to paragraph 1 was considered useful in order to avoid the implication that practice of an international organization can constitute “subsequent practice” under article 31, paragraph 3(b). On the other hand, the Drafting Committee was mindful that explicit reference to paragraph 1 would exclude the application of articles 31, paragraphs 3 (c), and (4), when taking into account the practice of international organizations. It eventually decided to remove the reference to paragraph 1 in the text of the draft conclusion, and to specify in the commentary that the practice of an international organization is not a subsequent practice of the parties under article 31, paragraph 3(b).

The Drafting Committee retained the text of paragraph 4 as adopted on first reading, which tracks article 5 of the Vienna Convention on the Law of Treaties. The text reads as follows:

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.

Conclusion 13 - Pronouncements of expert treaty bodies

Finally, let me turn to draft conclusion 13, which is entitled “Pronouncements of expert treaty bodies”. This draft article addresses the role of pronouncements of expert treaty bodies.

The Drafting Committee considered the term “pronouncements” used throughout the draft conclusion. The Committee considered various alternatives such as the terms determination, works and views, which were either found to be too broad – covering any act of an expert treaty body – or too narrow. There were also concerns about the implications of their equivalents once translated into other languages. The Committee thus decided to retain the term “pronouncements”, as it was considered sufficiently neutral and able to cover all relevant factual and normative assessments by expert treaty bodies.

The text of draft conclusion 13 as adopted by the Committee comprises four paragraphs. I will discuss each in turn.

Paragraph 1 defines the term “expert treaty body” for the purposes of these draft conclusions. It explicitly distinguishes these bodies from organs of international organizations, which are not addressed in this context. The text has not been changed from first reading and reads:

1. For the purposes of these draft conclusions, an expert treaty body is a body consisting of experts serving in their personal capacity, which is established under a treaty and is not an organ of an international organization.

The Committee also retained the first reading text of paragraph 2, which reads:

2. The relevance of a pronouncement of an expert treaty body for the interpretation of a treaty is subject to the applicable rules of the treaty.

The Drafting Committee noted that the words “the treaty” at the end of the paragraph could refer to the treaty establishing the expert treaty body, as well as to the treaty being interpreted. The commentary will indicate that these can be two different instruments, and that expert treaty bodies may sometimes be authorized to interpret treaties other than those under which they are established.

In paragraph 3, the Committee again decided to preserve the text as adopted on first reading. The text as adopted reads as follows:

3. A 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 subsequent practice under article 32. Silence by a party shall not be presumed to constitute subsequent practice under article 31, paragraph 3 (b), accepting an interpretation of a treaty as expressed in a pronouncement of an expert treaty body.

The only change, for reasons of consistency, was the deletion of the word “other” before “subsequent practice under article 32” in the first sentence. The Committee considered a proposal to align the text of the second sentence with that of draft conclusion 10 paragraph 2, since both deal with the role of silence. In the end, the Committee felt that the proposed changes would have focused on the reaction of other parties to such pronouncements, while the first reading text rightly focussed on a party’s reaction to the pronouncements of expert treaty bodies themselves.

The Drafting Committee also considered a suggestion by the Special Rapporteur to insert a new paragraph 4 on the practice of expert treaty bodies. The proposal attracted significant support, both in the plenary and in the Drafting Committee, but also opposition. Following a suggestion by the Special Rapporteur, the Committee considered it appropriate to base its deliberation on the text adopted on first reading.

The Committee decided to revise the text of the original fourth paragraph of the first reading text, containing a “without prejudice” clause. This paragraph now reads:

4. This draft conclusion is without prejudice to the contribution that pronouncements of expert treaty bodies make to the interpretation of the treaties under their mandates.

The new text recognizes more clearly that pronouncements of expert treaty bodies contribute to the interpretation of treaties. The phrase “under their mandates” reaffirms paragraph 2 of draft conclusion 13, which specifies that the relevance of a pronouncement of an expert treaty body for the interpretation of a treaty is subject to the applicable treaty rules under which such bodies were created or operate.

Mr. Chair,

This concludes my introduction of the second report of the Drafting Committee for this session. As I stated at the beginning of my statement, the Drafting Committee recommends that the Commission adopt the draft conclusions on the topic “Subsequent agreements and subsequent practice in relation to the interpretation of treaties” that are before you, on second reading.

Thank you for your attention.

ANNEX

SUBSEQUENT AGREEMENTS AND SUBSEQUENT PRACTICE

IN RELATION TO THE INTERPRETATION OF TREATIES

Text of the draft conclusions adopted by the Drafting Committee

on second reading

Part One

Introduction

Conclusion 1

Scope

The present draft conclusions concern the role of subsequent agreements and subsequent practice in the interpretation of treaties.

Part Two

Basic rules and definitions

Conclusion 2

General rule and means of treaty interpretation

1. Articles 31 and 32 of the Vienna Convention on the Law of Treaties set forth, respectively, the general rule of interpretation and the recourse to supplementary means of interpretation. These rules also apply as customary international law.
2. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose, as provided in article 31, paragraph 1.
3. Article 31, paragraph 3, provides, *inter alia*, that there shall be taken into account, together with the context, (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; and (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

4. Recourse may be had to other subsequent practice in the application of the treaty as a supplementary means of interpretation under article 32.
5. The interpretation of a treaty consists of a single combined operation, which places appropriate emphasis on the various means of interpretation indicated, respectively, in articles 31 and 32.

Conclusion 3

Subsequent agreements and subsequent practice as authentic means of interpretation

Subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), being objective evidence of the understanding of the parties as to the meaning of the treaty, are authentic means of interpretation, in the application of the general rule of treaty interpretation reflected in article 31.

Conclusion 4

Definition of subsequent agreement and subsequent practice

1. A subsequent agreement as an authentic means of interpretation under article 31, paragraph 3 (a), is an agreement between the parties, reached after the conclusion of a treaty, regarding the interpretation of the treaty or the application of its provisions.
2. A subsequent practice as an authentic means of interpretation under article 31, paragraph 3 (b), consists of conduct in the application of a treaty, after its conclusion, which establishes the agreement of the parties regarding the interpretation of the treaty.
3. A subsequent practice as a supplementary means of interpretation under article 32 consists of conduct by one or more parties in the application of the treaty, after its conclusion.

Conclusion 5

Conduct as subsequent practice

1. Subsequent practice under articles 31 and 32 may consist of any conduct of a party in the application of a treaty, whether in the exercise of its executive, legislative, judicial or other functions.
2. Other conduct, including by non-State actors, does not constitute subsequent practice under articles 31 and 32. Such conduct may, however, be relevant when assessing the subsequent practice of parties to a treaty.

Part Three

General aspects

Conclusion 6

Identification of subsequent agreements and subsequent practice

1. The identification of subsequent agreements and subsequent practice under article 31, paragraph 3, requires, in particular, a determination whether the parties, by an agreement or a practice, have taken a position regarding the interpretation of the treaty. Such a position is not taken if the parties have merely agreed not to apply the treaty temporarily or agreed to establish a practical arrangement (*modus vivendi*).
2. Subsequent agreements and subsequent practice under article 31, paragraph 3, may take a variety of forms.
3. The identification of subsequent practice under article 32 requires, in particular, a determination whether conduct by one or more parties is in the application of the treaty.

Conclusion 7

Possible effects of subsequent agreements and subsequent practice in interpretation

1. Subsequent agreements and subsequent practice under article 31, paragraph 3, contribute, in their interaction with other means of interpretation, to the clarification of the meaning of a treaty. This 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.
2. Subsequent practice under article 32 may also contribute to the clarification of the meaning of a treaty.
3. It is presumed that the parties to a treaty, by an agreement or a practice in the application of the treaty, intend to interpret the treaty, not to amend or to modify it. The possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized. The present draft conclusion is without prejudice to the rules on the amendment or modification of treaties under the Vienna Convention on the Law of Treaties and under customary international law.

Conclusion 8

Interpretation of treaty terms as capable of evolving over time

Subsequent agreements and subsequent practice under articles 31 and 32 may assist in determining whether or not the presumed intention of the parties upon the conclusion of the treaty was to give a term used a meaning which is capable of evolving over time.

Conclusion 9

Weight of subsequent agreements and subsequent practice as a means of interpretation

1. The weight of a subsequent agreement or subsequent practice as a means of interpretation under article 31, paragraph 3, depends, *inter alia*, on its clarity and specificity.
2. In addition, the weight of subsequent practice under article 31, paragraph 3 (b), depends, *inter alia*, on whether and how it is repeated.
3. The weight of subsequent practice as a supplementary means of interpretation under article 32 may depend on the criteria referred to in paragraphs 1 and 2.

Conclusion 10

Agreement of the parties regarding the interpretation of a treaty

1. An agreement under article 31, paragraph 3 (a) and (b), requires a common understanding regarding the interpretation of a treaty which the parties are aware of and accept. Such an agreement may, but need not, be legally binding for it to be taken into account.
2. The number of parties that must actively engage in subsequent practice in order to establish an agreement under article 31, paragraph 3 (b), may vary. Silence on the part of one or more parties may constitute acceptance of the subsequent practice when the circumstances call for some reaction.

Part Four

Specific aspects

Conclusion 11

Decisions adopted within the framework of a Conference of States Parties

1. A Conference of States Parties, under these draft conclusions, is a meeting of parties to a treaty for the purpose of reviewing or implementing the treaty, except where they act as members of an organ of an international organization.
2. The legal effect of a decision adopted within the framework of a Conference of States Parties depends primarily on the treaty and any applicable rules of procedure. Depending on the circumstances, such a decision may embody, explicitly or implicitly, a subsequent agreement under article 31, paragraph 3 (a), or give rise to subsequent practice under article 31, paragraph 3 (b), or to subsequent practice under article 32. Decisions adopted within the framework of a Conference of States Parties often provide a non-exclusive range of practical options for implementing the treaty.
3. A decision adopted within the framework of a Conference of States Parties embodies a subsequent agreement or subsequent practice under article 31, paragraph 3, in so far as it

expresses agreement in substance between the parties regarding the interpretation of a treaty, regardless of the form and the procedure by which the decision was adopted, including adoption by consensus.

Conclusion 12

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 subsequent practice under article 32 may be, means of interpretation for such treaties.
2. Subsequent agreements and subsequent practice of the parties under article 31, paragraph 3, or 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 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.

Conclusion 13

Pronouncements of expert treaty bodies

1. For the purposes of these draft conclusions, an expert treaty body is a body consisting of experts serving in their personal capacity, which is established under a treaty and is not an organ of an international organization.
2. The relevance of a pronouncement of an expert treaty body for the interpretation of a treaty is subject to the applicable rules of the treaty.
3. A 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 subsequent practice under article 32. Silence by a party shall not be presumed to constitute subsequent practice under article 31, paragraph 3 (b), accepting an interpretation of a treaty as expressed in a pronouncement of an expert treaty body.
4. This draft conclusion is without prejudice to the contribution that pronouncements of expert treaty bodies make to the interpretation of the treaties under their mandates.
