Chapter X

TREATIES OVER TIME

A. Introduction

222. The Commission, at its sixtieth session (2008), decided to include the topic "Treaties over time" in its programme of work and to establish a study group on the topic at its sixty-first session.[344] At its sixty-first session (2009), the Commission established the Study Group on treaties over time, chaired by Mr. Georg Nolte. At that session, the Study Group focused its discussions on the identification of the issues to be covered, the working methods of the Study Group and the possible outcome of the Commission's work on the topic.[345]

223. At the sixty-second session (2010), the Study Group was reconstituted under the chairpersonship of Mr. Georg Nolte and began its work on the aspects of the topic relating to subsequent agreements and practice, on the basis of an introductory report prepared by its Chairperson on the relevant jurisprudence of the International Court of Justice and of the arbitral tribunals of *ad hoc* jurisdiction.[346]

224. At the sixty-third session (2011), the Study Group, under the same chairpersonship, first took up the remainder of the work on the introductory report prepared by its Chairperson. The Study Group then began its consideration of the second report by the Chairperson on the jurisprudence under special regimes relating to subsequent agreements and subsequent practice, focusing on some of the general conclusions proposed therein. Owing to a lack of time, the Study Group could only discuss 11 of those conclusions.[347] In the light of the discussions, the Chairperson reformulated the text of what had become his first nine preliminary conclusions.[348]

B. Consideration of the topic at the present session

225. At the present session, the Study Group on treaties over time was reconstituted again under the chairpersonship of Mr. Georg Nolte. The Study Group held eight meetings, on 9, 10, 15, 16 and 24 May, and on 19, 25 and 26 July 2012.

226. At the 3135th meeting of the Commission, on 29 May 2012, the Chairperson of the Study Group presented a first oral report to the Commission on those aspects of the work undertaken by the Study Group at its five meetings from 9 to 24 May that were related to the format and the modalities of the Commission's future work on the topic. In his report, the Chairperson indicated, *inter alia*, that the Study Group recommended that the Commission change the format of the work on the topic and appoint a special rapporteur.

227. At its 3136th meeting, on 31 May 2012, the Commission decided (*a*) to change, with effect from its sixty-fifth session (2013), the format of the work on this topic as suggested by the Study Group; and (*b*) to appoint Mr. Georg Nolte as Special Rapporteur for the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties".

228. On 30 July 2012, the Chairperson of the Study Group presented to the Commission a second oral report on the work done by the Study Group. The Commission took note of that oral report at its 3152nd meeting on 30 July 2012.

1. Discussions of the Study Group

229. At the present session, the Study Group (*a*) completed its consideration of the second report by its Chairperson, which it had begun at the sixty-third session (2011); (*b*) considered the third report by its Chairperson; and (*c*) engaged in a discussion of the format and the modalities of the work of the Commission on the topic.

(a) *Completion of the consideration of the second report by the Chairperson of the Study Group*

230. The Study Group completed its consideration of the second report by its Chairperson on the jurisprudence under special regimes relating to subsequent agreements and subsequent practice. In so doing, the Study Group examined six additional general conclusions proposed in the second report. The discussions focused on the following aspects: the question whether a subsequent practice, in order to serve as a means of interpretation, must reflect a position regarding the interpretation of the treaty; the extent to which subsequent practice would need to be specific; the necessary degree of active participation in a practice and the significance of silence by one or more parties to the treaty with respect to the practice of one or more other parties; the possible effects of contradictory subsequent practice; the question of possible treaty modification through subsequent practice; and the relationship between subsequent practice and formal amendment or interpretation procedures.

231. In the light of those discussions in the Study Group, the Chairperson reformulated the text of what had

[344] At its 2997th meeting, on 8 August 2008 (see *Yearbook ... 2008*, vol. II (Part Two), para. 353). For the syllabus of the topic, see *ibid.*, annex I. The General Assembly, in paragraph 6 of its resolution 63/123 of 11 December 2008, took note of the decision.

[345] See *Yearbook ... 2009*, vol. II (Part Two), paras. 220–226.

[346] *Yearbook … 2010*, vol. II (Part Two), paras. 344–354.

[347] *Yearbook … 2011*, vol. II (Part Two), paras. 334–341.

[348] For the text of these preliminary conclusions by the Chairperson of the Study Group, see *ibid*., para. 344.

now become six additional preliminary conclusions by the Chairperson of the Study Group (see sect. 2 below). As it had done for the first nine preliminary conclusions reproduced in the Commission's 2011 report,[349] the Study Group agreed that those six preliminary conclusions by its Chairperson would be revisited and expanded in the light of future reports of the newly appointed Special Rapporteur, including on additional aspects of the topic, and of the future discussions within the Commission.

(b) *Consideration of the third report by the Chairperson of the Study Group*

232. The Study Group considered the third report by its Chairperson on "Subsequent agreements and subsequent practice of States outside judicial and quasi-judicial proceedings". That report covers a variety of issues. They include the forms, evidence and interpretation of subsequent agreements and subsequent practice, as well as a number of general aspects concerning, *inter alia*, the possible effects of subsequent agreements and subsequent practice (e.g. in terms of specifying the meaning of a treaty provision or confirming the degree of discretion left to the parties by a treaty provision); the extent to which an agreement in the sense of article 31, paragraph 3 (*a*) and (*b*), of the 1969 Vienna Convention must express the legal opinion of States parties regarding the interpretation or application of the treaty; subsequent practice as possibly indicating agreement on a temporary non-application or on a temporary extension of the scope of the treaty, or as expressing a *modus vivendi*; bilateral and regional practice under treaties with a broader membership; the relationship between subsequent practice and agreements, on the one hand, and technical and scientific developments, on the other hand; the relationship between the subsequent practice by the parties under a treaty and the parallel formation of rules of customary international law; the possible role of subsequent agreements and subsequent practice in respect of treaty modification; and the role that may be exceptionally played by subsequent practice and subsequent agreements in terminating a treaty. Furthermore, the third report addresses other aspects such as the influence of specific cooperative contexts on the interpretation of some treaties by way of subsequent practice, and the potential role played by conferences of the States parties and treaty monitoring bodies in relation to the emergence or consolidation of subsequent agreements or practice. In analysing those various issues, the third report provides examples of subsequent agreements and subsequent practice, assesses those examples and attempts to draw some preliminary conclusions.

233. The debate in the Study Group on the third report was very rich. Many members commended the Chairperson for the thorough character of his report and for the extensive research undertaken for its preparation. One general issue that was touched upon by several members during the discussions was the level of determinacy of the draft conclusions contained in the third report. While some members were of the view that many of them were formulated in rather general terms, other members considered that certain conclusions were too determinate in the light of the examples identified in the report. In that regard, it was observed by some members that the main challenge in the Commission's future work on the topic was to attempt to elaborate propositions with sufficient normative content, while preserving the flexibility inherent in the concept of subsequent practice and agreements. In relation to the section of the report dealing with conferences of the parties, a number of points were raised, including the question to what extent such forums deserved special treatment in the consideration of the present topic; whether there was a single notion of "conference of the parties" or whether that term covered a variety of different bodies whose common character would be the fact that they are not organs of international organizations; to what extent the conferral or not, on conferences of the parties, of decision-making powers or review powers had an impact on their possible contribution to the formation of subsequent agreements or subsequent practice in relation to a treaty; and the significance and relevance, in the present context, of consensus and other decision-making procedures that might be followed by conferences of the parties.

234. In view of the decision of the Commission to change the future format of the work, the Chairperson did not propose to the Study Group, in contrast to what he had done with respect to the second report, that he reformulate the draft conclusions that were contained in his third report in the light of the discussions of the Study Group. He indicated that he preferred to take these discussions into account when preparing his first report as Special Rapporteur. That first report would synthesize the three reports that he had submitted to the Study Group.

(c) *Modalities of the Commission's work on the topic*

235. The Study Group discussed the format in which the further work on the topic should proceed and the possible outcome of that work. Several members expressed the view that, in view of the preparatory work that had been accomplished and considering the need to focus the work on the envisaged outcome, the time had come for the Commission to change the format of the work on the topic and to appoint a special rapporteur. It was felt that this would be the most efficient way of making use of the work already done.

236. The Chairperson indicated that he would welcome a change in the format of the work on the topic at this stage. This would enable the Commission to focus on the ultimate outcome of the work. In his view, it had been necessary to first identify, collect, arrange and discuss the most important sources of the topic. That had been done in the first three reports for the Study Group and by the discussions within the Study Group. The three available reports could now be synthesized into one report, which could be made available for all States and debated in the plenary.

237. The Chairperson also expressed the view that a change of the format of the work would give the Commission the opportunity to define the scope of the topic more sharply. He reminded the members that an important reason for the Commission to pursue the work on the topic "Treaties over time" within the format of a study group had been to give the members the opportunity to consider whether this topic should be approached with a broad focus—which would have also involved, *inter alia*,

[349] See previous footnote.

an in-depth treatment of the termination and the formal amendment of treaties—or whether the topic should be limited to a narrower focus on the aspect of subsequent agreements and subsequent practice. Since the discussions within the Study Group had led to the result that it would be preferable to limit the topic to the narrower aspect of the legal significance of subsequent agreements and practice, an important reason why the Commission had originally chosen to deal with the topic in the framework of a study group was no longer pertinent. He welcomed that development, having previously expressed his preference for a narrower approach to the topic.

238. The Chairperson suggested that, if the format of the work on the topic were to be changed in the way contemplated, a report that would synthesize the three reports that have been submitted to the Study Group so far should be prepared for the sixty-fifth session. That report should take into account the discussions that had been held so far within the Study Group and should contain specific conclusions or guidelines, which would be derived in particular from materials contained in the existing three reports for the Study Group. After the debates on that report within the Commission during the next session and the discussions in the Sixth Committee in 2013, one or two further reports should be submitted, as it had been envisaged in the original proposal of the topic, on the practice of international organizations and the jurisprudence of national courts (see the report of the Commission on the work of its sixtieth session (2008)).[350] Those reports would contain additional conclusions or guidelines that would complement or modify, as appropriate, the work based on the first report. Those conclusions or guidelines would be explained by commentaries. The work on the topic could then be finalized within the current quinquennium. It would be understood that the topic would remain within the scope of the law of treaties. The main focus would be on the legal significance of subsequent agreements and subsequent practice for interpretation (art. 31 of the 1969 Vienna Convention), as explained in the original proposal for the topic.[351]

239. The members of the Study Group agreed with the suggestions of the Chairperson on how to proceed further with the work on the topic. On that basis, the Study Group recommended that the Commission decide to change the format of the work on the topic and appoint a special rapporteur. As indicated (para. 227 above), the Commission, at its 3136th meeting, on 31 May 2012, decided to follow that recommendation of the Study Group.

2. Preliminary conclusions by the Chairperson of the Study Group, reformulated in the light of the discussions in the Study Group

240. The six additional preliminary conclusions by the Chairperson of the Study Group, reformulated in the light of the discussions in the Study Group,[352] are as follows:

(1) *Subsequent practice as reflecting a position regarding the interpretation of a treaty*

In order to serve as a means of interpretation, subsequent practice must reflect a position of one or more parties regarding the interpretation of a treaty.[353] The adjudicatory bodies reviewed, however, do not necessarily require that subsequent practice must expressly reflect a position regarding the interpretation of a treaty, but may view such a position to be implicit in the practice.[354]

(2) *Specificity of subsequent practice*

Depending on the regime and the rule in question, the specificity of subsequent practice is a factor that can influence the extent to which it is taken into account by adjudicatory bodies.[355] Subsequent practice thus need not always be specific.

(3) *The degree of active participation in a practice and silence*

Depending on the regime and the rule in question, the number of parties that must actively contribute to relevant subsequent practice may vary.[356] Most adjudicatory bodies that rely on subsequent practice have recognized that silence on the part of one or more parties can, under certain circumstances, contribute to relevant subsequent practice.[357]

(4) *Effects of contradictory subsequent practice*

Contradictory subsequent practice can have different effects depending on the multilateral treaty regime in

[350] *Yearbook ... 2008*, vol. II (Part Two), annex I, paras. 17, 18, 39 and 42.

[351] *Ibid.*, paras. 11 *et seq*.

[352] These preliminary conclusions supplement those reproduced in the report of the Commission on the work of its sixty-third session (2011); see footnote 348 above.

[353] See, for example, European Court of Human Rights, *Cruz Varas and Others v. Sweden*, 20 March 1991, para. 100 (see footnote 158 above).

[354] European Court of Human Rights, *Marckx v. Belgium*, 13 June 1979, para. 41, Series A no. 31; *Kart v. Turkey* [GC], no. 8917/05, para. 54, ECHR 2009 (extracts); see also Iran–United States Claims Tribunal, *The Islamic Republic of Iran and the United States of America*, Partial Award No. 382-B1-FT (31 August 1988), reprinted in *Iran–United States Claims Tribunal Reports*, vol. 19 (1988-II), p. 273, at pp. 294–295.

[355] See World Trade Organization (WTO), report of the Appellate Body, *United States—Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted on 21 March 2005; Iran–United States Claims Tribunal, Case No. A17, decision No. DEC 37-A17-FT (18 June 1985), reprinted in *Iran–United States Claims Tribunal Reports*, vol. 8 (1985-I), p. 189, at p. 201; European Court of Human Rights, *Rantsev v. Cyprus and Russia*, no. 25965/04, para. 285, 7 January 2010, ECHR 2010 (extracts); *Chapman v. the United Kingdom* [GC], no. 27238/95, paras. 93–94, ECHR 2001-I; International Tribunal for the Law of the Sea (ITLOS), *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)*, ITLOS Case No. 17, *Advisory Opinion*, *1 February 2011*, *ITLOS Reports 2011*, pp. 10 *et seq*, para. 136; International Tribunal for the Former Yugoslavia, *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment of 10 December 1998, *Judicial Reports 1998*, vol. I, p. 466, at para. 179.

[356] WTO, report of the Appellate Body, *European Communities—Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R and WT/DS286/AB/R, adopted on 27 September 2005, and Corr.1, p. 101, para. 259.

[357] International Tribunal for the Former Yugoslavia, *Prosecutor v. Furundžija* (see footnote 355 above); European Court of Human Rights, *Rantsev v. Cyprus and Russia*, no. 25965/04 (see footnote 355 above); cautiously: WTO, *European Communities—Customs Classification of Frozen Boneless Chicken Cuts* (see footnote 356 above), para. 272; see also, for a limited holding, *RayGo Wagner Equipment Company v. Iran Express Terminal Corporation*, Award No. 30-16-3 (18 March 1983), reprinted in *Iran–United States Claims Tribunal Reports*, vol. 2 (1983-I), p. 144.

question. Whereas the WTO Appellate Body discounts practice that is contradicted by the practice of any other party to the treaty,[358] the European Court of Human Rights, faced with non-uniform practice, has sometimes regarded the practice of a "vast majority" or a "near consensus" of the parties to the European Convention on Human Rights to be determinative.[359]

(5) *Subsequent agreement or practice and formal amendment or interpretation procedures*

There have been instances in which adjudicatory bodies have recognized that the existence of formal amendment or interpretation procedures in a treaty regime does not preclude the use of subsequent agreements and subsequent practice as a means of interpretation.[360]

(6) *Subsequent practice and possible modification of a treaty*

In the context of using subsequent practice to interpret a treaty, the WTO Appellate Body has excluded the possibility that the application of a subsequent agreement could have the effect of modifying existing treaty obligations.[361] The European Court of Human Rights and the Iran–United States Claims Tribunal seem to have recognized the possibility that subsequent practice or agreement can lead to modification of the respective treaties.[362]

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[358] WTO, report of the Appellate Body, *European Communities—Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted on 22 June 1998, paras. 92−93; report of the Panel, *United States—Continued Existence and Application of Zeroing Methodology*, WT/DS294/R (modified by the report of the Appellate Body adopted on 9 May 2006, WT/DS294/AB/R and Corr.1), para. 7.218.

[359] See, for example, *Demir and Baykara v. Turkey* [GC], no. 34503/97, para. 52, ECHR 2008; and *Sigurður A. Sigurjónsson v. Iceland*, 30 June 1993, para. 35, Series A no. 264.

[360] WTO, report of the Appellate Body, *European Communities—Customs Classification of Frozen Boneless Chicken Cuts* (see footnote 356 above), para. 273; see also European Court of Human Rights, *Öcalan v. Turkey* [GC], no. 46221/99, para. 163, ECHR 2005-IV.

[361] WTO, reports of the Appellate Body, *European Communities—Regime for the Importation, Sale and Distribution of Bananas, Second Recourse to Article 21.5 of the DSU by Ecuador* (26 November 2008), WT/DS27/AB/RW2/ECU and Corr.1, adopted on 11 December 2008, paras. 391−393; in this connection, see also article 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 to the Marrakesh Agreement establishing the World Trade Organization. See also European Court of Justice, *French Republic v. Commission of the European Communities*, Case C-327/91, 9 August 1994, *European Court of Justice Reports 1994–8*, p. I-3641, at p. I-3674.

[362] European Court of Human Rights, *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, paras. 119–120, ECHR 2010; *Öcalan v. Turkey* [GC], no. 46221/99 (see footnote 360 above), para. 163; Iran–United States Claims Tribunal, *The Islamic Republic of Iran v. The United States of America*, Case No. B1 (Counterclaim), Interlocutory Award No. ITL 83-B1-FT, 9 September 2004, 2004 WL 2210709, *Iran–United States Claims Tribunal Reports*, vol. 38 (1983-I), p. 77, at pp. 125–126, para. 132.