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

Statement of the Chairman of the Drafting Committee,

Mr. Dire Tladi

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Mr. Chairman,

It gives me great pleasure today to introduce the first report of the Drafting Committee for the sixty-fifth 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.813, which reproduces the text of the draft conclusions provisionally adopted by the Drafting Committee at the present session.

The Drafting Committee devoted 9 meetings, from 14 to 17 and from 21 to 23 May, to its consideration of the draft conclusions relating to this topic. It examined the four draft conclusions initially proposed by the Special Rapporteur in his first report (A/CN.4/660), together with a number of suggested reformulations that were presented by the Special Rapporteur to the Drafting Committee in order to respond to concerns raised, or suggestions made, during the debate in Plenary with respect to certain draft conclusions. As a result of the
splitting of the original draft conclusion 2, which comprised two paragraphs, into two separate draft conclusions, the Drafting Committee provisionally adopted, at the present session, a total of five draft conclusions on this topic.

Before addressing the details of the report, let me pay tribute to the Special Rapporteur, Mr. Georg Nolte, whose mastery of the subject, guidance and cooperation greatly facilitated the work of the Drafting Committee. I also thank the members of the Drafting Committee for their active participation and valuable contributions to the successful outcome. Furthermore, I wish to thank the Secretariat for its valuable assistance.

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Mr. Chairman,

The report of the Drafting Committee comprises five draft conclusions, which I shall introduce in turn.

**Draft conclusion 1 – General rule and means of treaty interpretation**

Draft conclusion 1 is entitled “General rule and means of treaty interpretation”, as originally proposed. The content and structure of this draft conclusion were revisited by the Drafting Committee in the light of comments made during the debate in Plenary.

An extensive discussion took place in the Drafting Committee regarding the best way to recall, in this first draft conclusion, the general legal framework of treaty interpretation, while contextualizing the subject matter of the draft conclusions (i.e. subsequent agreements and subsequent practice) within that framework. Having considered various proposals to that end, the Drafting
Committee eventually opted for a formulation that exposes, first, general aspects of the legal framework (paragraphs 1 and 2), then addresses the issue of subsequent agreements and subsequent practice (paragraphs 3 and 4), and finally recalls the nature of interpretation as a single combined operation that places appropriate emphasis on various means (paragraph 5).

Before introducing the five paragraphs of draft conclusion 1, I wish to draw the Commission’s attention to a terminological point. There was some discussion in the Drafting Committee concerning the usage of the words “elements” or “means” of interpretation, which were both employed by the Commission in its previous work on the law of treaties, particularly in its commentaries to the 1966 draft articles. Upon reflection, the Drafting Committee ultimately opted for the word “means”, which was viewed by various members as more directly linked to the notion of a “tool” or “instrument” and, therefore, as a more precise descriptor of their function in the process of interpretation. Also, it was noted that the word “means” appears in the text and title of article 32 of the Vienna Convention on the Law of treaties, dealing with “Supplementary means of interpretation”.

Mr. Chairman,

I will now turn to the five paragraphs of draft conclusion 1.

The purpose of paragraph 1 is to introduce the rules on treaty interpretation contained in the 1969 Vienna Convention on the Law of Treaties as well as the legal status of those rules. The formulation of paragraph 1 as retained by the Drafting Committee builds upon the text originally proposed by the Special Rapporteur in his first report. However, following a suggestion made by some members during the debate in Plenary, the Drafting Committee decided to reformulate the paragraph so as to refer, in the first sentence, both to the general
rule of interpretation set forth in article 31 of the Vienna Convention and to the rule on supplementary means of interpretation set forth in article 32. It was felt that this double reference was helpful in order to clarify from the start the general context in which subsequent agreements and subsequent practice are addressed in the draft conclusions. The second sentence of paragraph 1 is a reminder, which was already contained in the original proposal by the Special Rapporteur, of the fact that the rules contained in articles 31 and 32 of the Vienna Convention also apply as a matter of customary international law. The appropriateness of also including, in paragraph 1, a reference to the rules contained in article 33 of the Vienna Convention was discussed in the Drafting Committee. The Committee eventually found that such a reference was unnecessary as article 33 would not appear to be as immediately relevant to the issue of subsequent agreements and subsequent practice as the other two provisions of the Vienna Convention. This point would be explained in the commentary, which would provide the necessary explanations regarding the customary status of the provisions on treaty interpretation contained in the Vienna Convention.

Paragraph 2 of draft conclusion 1, which is new, reproduces verbatim the text of article 31, paragraph 1, of the Vienna Convention. The Drafting Committee considered that it was important to reproduce this provision in extenso, given its fundamental importance for the topic.

Paragraphs 3, dealing with subsequent agreements and subsequent practice within the meaning of article 31(3)(a) and (b) of the Vienna Convention, is also new. The Drafting Committee deemed it appropriate to refer, already in draft conclusion 1, to subsequent agreements and subsequent practice in order to establish the integration of subsequent agreements and subsequent practice, as the subject matter of the draft conclusions, within the general legal framework of treaty interpretation. In so doing, the Committee considered it useful to reproduce
the text of article 31(3)(a) and (b) of the Vienna Convention, as those provisions constitute the main focus of the whole project.

Paragraph 4 of draft conclusion 1 has also been added by the Drafting Committee. It contains a reference to subsequent practice in a broader sense – *i.e.* subsequent practice which does not establish the agreement of the parties concerning the interpretation of a treaty – as a supplementary means of interpretation under article 32 of the Vienna Convention. As is indicated in the text of the paragraph, this broader notion of subsequent practice remains circumscribed to practice followed *in the application of the treaty*; the commentary would provide the necessary clarifications on this point.

Finally, paragraph 5 of draft conclusion 1 emphasizes a point that was made by several members during the debate in Plenary, namely that the interpretation of a treaty constitutes a single combined operation in which the various means that are contemplated in the Vienna Convention are taken into account by the interpreter. After careful consideration, the Drafting Committee decided that it was most appropriate to include this clarification, as a reminder, in the last paragraph of draft conclusion 1 in order to indicate that the single combined operation involves all means of treaty interpretation referred to in the preceding paragraphs. Furthermore, the formulation of paragraph 5 incorporates the Special Rapporteur’s original proposal to refer, in this context, to the idea of appropriate emphasis being placed by the interpreter in a specific case on the different means of treaty interpretation. The Drafting Committee decided, however, to streamline the formulation by avoiding any reference to specific means of treaty interpretation, which could have been perceived as unduly suggesting a general predominance of certain means of interpretation over others.
Also with regard to paragraph 5, a discussion took place in the Drafting Committee as to whether a reference to the nature of the treaty should be included. According to some members, the respective weight to be given to the different means of interpretation may indeed vary depending on the nature of the treaty. In contrast, other members were opposed to any reference to the nature of the treaty. It was stated, in particular, that it was essential to preserve the unity of the interpretation process by avoiding any categorization of treaties. The point was also made that the notion of the “nature of the treaty” was unclear and that it would be difficult to distinguish it from the object and purpose of the treaty. Bearing these concerns in mind, the Drafting Committee decided that no reference to the nature of the treaty would be made in this context. The terms of the discussion on this particular point would be reflected in the commentary.

**Draft conclusion 2 – Subsequent agreements and subsequent practice as authentic means of interpretation**

Draft conclusion 2 is entitled “Subsequent agreements and subsequent practice as authentic means of interpretation”, as originally proposed. The text adopted by the Drafting Committee is based on paragraph 1 of draft conclusion 2 as proposed by the Special Rapporteur in his first report. The Drafting Committee considered that the content of paragraph 2 of the text initially presented by the Special Rapporteur, which addressed the question of evolutive interpretation, would be better dealt with in a separate draft conclusion.

The discussions in the Drafting Committee regarding draft conclusion 2 focused on the meaning of the phrase “authentic means of interpretation”. The point was made that this phrase might not appropriately express the reason why subsequent agreements and subsequent practice should be considered by the interpreter together with the other means of interpretation contemplated in article
31 of the Vienna Convention. Some members of the Drafting Committee were concerned that the word “authentic” did not convey the intended meaning in this context and could thus lead to possible misunderstandings. As a result, the Drafting Committee decided to reformulate the draft conclusion by including a reference to article 31 of the Vienna Convention and by clarifying the meaning of the term “authentic” through the insertion of a clause referring to subsequent agreements and subsequent practice under article 31(3)(a) and (b) as “being objective evidence of the understanding of the parties as to the meaning of the treaty”. This phrase was taken from paragraph 15 of the 1966 commentary to draft article 27 on the law of treaties (Yearbook of the International Law Commission, 1966, vol. II, p. 221).

Furthermore, the last part of draft conclusion 2 was reformulated in order to make it clear that any reliance on subsequent agreements and subsequent practice as authentic means of interpretation should occur as part of the application of the general rule of treaty interpretation reflected in article 31 of the Vienna Convention.

**Draft conclusion 3 – Interpretation of treaty terms as capable of evolving over time**

Draft conclusion 3 is now entitled “Interpretation of treaty terms as capable of evolving over time”. As I have already mentioned, the text of this draft conclusion builds upon paragraph 2 of draft conclusion 2 contained in the Special Rapporteur’s first report.

You will recall that the formulation initially proposed by the Special Rapporteur referred to the possibility that subsequent agreements and subsequent practice may guide an evolutive interpretation of a treaty. You will also recall that,
during the debate in Plenary, there was substantial discussion on the notion of “evolutive interpretation”, or “evolutionary interpretation”, which was considered by some members as unclear or as problematic. More specifically, the relationship between evolutive interpretation and subsequent agreements and subsequent practice was questioned by certain members. In particular, the point was made that, depending on the circumstances, subsequent agreements and subsequent practice may as well support a contemporaneous (static) interpretation of the terms of a treaty.

Following a lengthy discussion, the Drafting Committee decided to reformulate draft conclusion 3 so as to focus on the role that subsequent agreements and subsequent practice may play in guiding an interpreter who is called upon to determine whether the meaning of a treaty is static, or whether it may evolve over time. In this regard, the Drafting Committee considered it important to indicate in this draft conclusion that reliance on subsequent agreements and subsequent practice may assist in determining whether or not the presumed intention of the parties to the treaty was to give a particular term a meaning that is capable of evolving over time. The commentary would explain that the phrase “presumed intention” refers to the intention of the parties as determined through the application of the various means of interpretation recognized in the relevant rules of the Vienna Convention on the Law of Treaties, and not simply on the basis of the travaux préparatoires.

The commentary would also emphasize that draft conclusion 3 should not be read as promoting evolutive interpretation nor as taking any position regarding the appropriateness of a more contemporaneous or a more evolutive approach to treaty interpretation in general. This draft conclusion should be rather understood as instilling a sense of caution by pointing to subsequent agreements and subsequent practice as considerations which may provide useful indications to the
interpreter in assessing whether the meaning of a treaty term, or rule, is capable of evolving over time, depending on the circumstances. Reference would also be made in the commentary to the relevant case-law of various international courts and tribunals, which have engaged in evolutive interpretation – albeit at varying degrees – and which appear to have followed a case-by-case approach in determining, through recourse to various means of treaty interpretation, whether or not a particular treaty term should be given a meaning capable of evolving over time. Furthermore, the commentary would indicate that this potential function of subsequent agreements and subsequent practice in guiding the interpretation of a term over time is to be regarded as part of the ordinary process of treaty interpretation, and not as separate or distinct method of interpretation.

**Draft conclusion 4 – Definition of subsequent agreement and subsequent practice**

Mr. Chairman,

I shall now turn to draft conclusion 4, which is now entitled “Definition of subsequent agreement and subsequent practice”. The Drafting Committee considered that the title could be simplified by omitting the phrase “as means of treaty interpretation” contained in the text originally proposed by the Special Rapporteur.

The formulation of draft conclusion 4 builds upon the text of draft conclusion 3 as contained in the Special Rapporteur’s first report. However, the Drafting Committee has opted for a restructuring of this draft conclusion so as to enunciate, in turn, three definitions that correspond, respectively, to the provisions of articles 31(3)(a), 31(3)(b) and 32 of the Vienna Convention.
Before presenting the three paragraphs of draft conclusion 4, I should refer to a general element in the definitions of subsequent agreement and subsequent practice for the purposes of the present topic, namely the fact that these definitions cover only subsequent agreements and subsequent practice which take place after the conclusion of the treaty. You will recall that, during the debate in Plenary, mention was made of the potential ambiguity of the notion of “conclusion” of a treaty. This point also gave rise to some discussions in the Drafting Committee. The Committee considered that it would be appropriate to explain in the commentary that the phrase “conclusion of the treaty” is intended to refer to the moment at which the text of a treaty is established as definitive. The commentary would also address the relevance of subsequent agreements and subsequent practice occurring between the conclusion of the treaty and its entry into force, including practice which may arise from a provisional application of the treaty.

I shall now turn to paragraph 1 of draft conclusion 4, which provides a definition of “subsequent agreement” under article 31(3)(a) of the Vienna Convention. The text of this paragraph is largely based on the formulation originally proposed by the Special Rapporteur. The beginning of the paragraph was reformulated by the Drafting Committee in order to establish a clear link with article 31(3)(a) of the Vienna Convention and to also link the paragraph with draft conclusion 2, which refers to subsequent agreement “as an authentic means of interpretation”. You will recall that, in the definition of “subsequent agreement” originally proposed by the Special Rapporteur, the qualifier “manifested” accompanied the term “agreement” in order to distinguish a subsequent agreement between the parties under article 31(3)(a) from a less formalized agreement that could be established through a subsequent practice by the parties in the application of the treaty under article 31(3)(b) of the Vienna Convention. Taking into account, however, the concerns expressed in Plenary by some members who were of the view that the notion of “manifested agreement” was unclear or unduly restrictive,
the Drafting Committee decided to omit this qualifier in the text of draft conclusion 4. At the same time, the additional word “reached” was inserted in order to signal that, although a “subsequent agreement” under article 31(3)(a) of the Vienna Convention need not necessarily be formal, such an agreement presupposes a common act by the parties in agreeing on the interpretation of the treaty. The commentary would address this point and also provide examples to illustrate the distinction between, on the one hand, a subsequent agreement by the parties and, on the other hand, an agreement which is established through a subsequent practice by the parties.

Paragraph 2 of draft conclusion 4 provides a definition of “subsequent practice” under article 31(3)(b) of the Vienna Convention. The opening words of this paragraph were reformulated in the same way as in paragraph 1, thereby also making the clear distinction between subsequent practice as an authentic means of treaty interpretation and “other” subsequent practice that is referred to in paragraph 3. As regards terminology, the Drafting Committee considered that the word “conduct”, which the Commission used in article 2 of its Articles on State responsibility, adequately conveyed the universe of possible subsequent practice, including tacit conduct. There was some discussion on whether it was necessary to retain a specific reference to “pronouncements” as possible forms of subsequent practice. In this regard, the point was made that it could be useful to indicate that declarations and other official statements may constitute subsequent practice. The Drafting Committee considered, however, that since pronouncements constitute a form of conduct, it was not necessary to specify this type of conduct in the draft conclusion; an appropriate explanation to that effect could be included in the commentary. Regarding paragraph 2, there was also some discussion in the Drafting Committee on whether the term “understanding” would be preferable in order to distinguish this form of agreement arising from subsequent practice, from the “subsequent agreements” within the meaning of article 31(3)(a) of the Vienna
Convention. Although this expression had been used by the Commission in the corresponding draft article 27(3)(b) on the Law of Treaties, the Committee ultimately decided to retain the term “agreement” in order to remain faithful to the wording of article 31(3)(b) of the Vienna Convention. As noted previously, the commentary would provide some indications regarding the possible modalities of an agreement established through subsequent practice and the distinction between such an agreement and a subsequent agreement under article 31(3)(a). In addition, I wish to draw attention to the fact that the phrase “by one or more parties”, contained in paragraph 2 of the original draft conclusion 3 proposed by the Special Rapporteur, was omitted by the Drafting Committee in paragraph 2 of draft conclusion 4. The reason for this omission is that paragraph 2 as reformulated by the Drafting Committee does not anymore intend to provide an abstract definition of subsequent practice; it is limited, instead, to subsequent practice as a means of authentic interpretation, which needs to establish the agreement of all the parties to the treaty. The Commentary would clarify this point. Another issue that was raised in the Drafting Committee is that the reference to “the parties” in the draft conclusion would not cover the possibility of subsequent practice by organs of international organizations, in particular in relation to constituent instruments of international organizations. The Committee considered that, for the time being, it was sufficient to mention this point in the commentary, with the understanding that the Commission would examine, at a later stage, the possible role of organs of international organizations in the establishment of a subsequent practice for the purposes of treaty interpretation.

Paragraph 3 of draft conclusion 4 refers to other subsequent practice as a supplementary means of interpretation under article 32. The word “other”, which already appeared in the initial proposal by the Special Rapporteur, was deemed particularly useful in order to indicate that the subsequent practice referred to in paragraph 3 is distinct from the subsequent practice as a means of treaty
interpretation within the meaning of article 31(3)(b). The phrase “in the application of the treaty” was inserted to harmonize paragraph 3 of draft conclusion 4 with paragraph 4 of draft conclusion 1, and thus qualify the type of conduct which may constitute “subsequent practice” for purposes of treaty interpretation; the commentary would address this point. Finally, given that paragraph 3 addresses the broader notion of subsequent practice as a supplementary means of interpretation, the Drafting Committee considered it appropriate to retain, in this paragraph, the phrase “by one or more parties”. In the context of paragraph 3, this phrase indicates that, in order to serve as a subsidiary means of interpretation, a subsequent practice need not involve all parties to the treaty nor establish an agreement between all parties regarding its interpretation. Furthermore, paragraph 3 does not enunciate a specific requirement that the relevant practice be “regarding the interpretation” of the treaty. For the purposes of this paragraph, any practice in the application of the treaty that may provide some indications as to the manner in which the parties involved in that practice interpret the treaty may be relevant as a supplementary means of interpretation. The commentary would clarify this point as well.

**Draft conclusion 5 – Attribution of subsequent practice**

Mr. Chairman,

I shall finally address draft conclusion 5, which is now entitled “Attribution of subsequent practice”. You will recall that the original draft conclusion 4 on “Possible authors and attribution of subsequent practice”, contained in the Special Rapporteur’s first report, gave rise to a number of comments during the debate in Plenary. In particular, concerns were raised regarding the contemplated inclusion of a reference to “social practice”, as well as the manner in which the role of
certain conduct by non-State actors ought to be understood in relation to the emergence or identification of a subsequent practice.

Paragraph 1 of draft conclusion 5 is based on paragraph 1 of the original draft conclusion 4. A few changes were introduced, however, by the Drafting Committee to the text of this paragraph. The phrase “under articles 31 and 32” was inserted to qualify “subsequent practice” at the beginning of the paragraph, thus making it clear that this draft conclusion on attribution applies both to subsequent practice as an authentic means of interpretation under article 31(3)(b) and to subsequent practice as a supplementary means of interpretation under article 32 of the Vienna Convention. The phrase “in the application of the treaty” was introduced for the sake of consistency with the definitions of “subsequent practice” provided in paragraphs 2 and 3 of draft conclusion 4. In addition, the phrase “for the purpose of treaty interpretation”, which qualified the words “attributed to a State” in the text originally proposed by the Special Rapporteur, was deleted by the Drafting Committee, mainly in response to concerns raised in Plenary that the phrase may introduce an element of circularity into the provision. In this regard, doubts were also expressed in the Drafting Committee as to whether there was a need to establish, in relation to subsequent practice for the purpose of treaty interpretation, rules of attribution that would differ from those relating to State responsibility; the point was made that the real question was not one of attribution, but of relevance of certain conduct to the process of treaty interpretation. Furthermore, paragraph 1 of draft conclusion 5 as adopted by the Drafting Committee refers to “any conduct … which is attributable to a party to a treaty under international law”, without limiting such conduct to that of the organs of the State. In other words, the draft conclusion is intended to cover cases in which conduct that is not performed by a State organ within the meaning of article 4 of the Commission’s Articles on State responsibility is nevertheless attributable, under international law, to a party to the treaty. However, by referring to any
conduct in the application of the treaty which is attributable to a party to the treaty, paragraph 1 does not intend to suggest that any such conduct necessarily constitutes, in a given case, subsequent practice for the purposes of treaty interpretation. The use of the phrase “may consist” is intended to reflect this point, which would be also addressed in the commentary. This clarification is particularly important in relation to conduct of lower State organs which might not reflect – or might even contradict – the position of the organs of the State that are competent under internal law to express the position of the State in international relations with respect to a particular matter. Indeed, an extensive discussion took place in the Drafting Committee as to whether this provision should specifically refer to the question of whether, or under which circumstances or conditions, the conduct of a lower organ of the State could be attributed to the State for purposes of treaty interpretation. In this regard, several members of the Committee pointed to the difficulty of distinguishing between lower and higher State organs, particularly given the significant differences in the internal organization of State governance. The point was also made that the relevant criterion was less the position of the organ in the hierarchy of the State than its actual role in interpreting and applying any particular treaty. Given the complexity and variety of scenarios that could be envisaged, the Drafting Committee eventually decided that these various issues would be better addressed in the commentary, where concrete examples and appropriate references to relevant case-law could be included, or at a later stage of the work.

Paragraph 2 of draft conclusion 5 as adopted by the Drafting Committee comprises two sentences. The first sentence indicates that conduct other than that envisaged in paragraph 1, including by non-State actors, does not constitute subsequent practice under articles 31 and 32 of the Vienna Convention. This sentence was added by the Drafting Committee, following a proposal by the Special Rapporteur, in order to respond to the point, made by some members
during the plenary debate, that practice by non-State actors does not in itself constitute subsequent practice within the meaning of the Vienna Convention. The phrase “other conduct” was introduced to more clearly establish the distinction between the conduct contemplated in paragraph 2 and that contemplated in paragraph 1. At the same time, the Drafting Committee considered it appropriate to recognize, in the second sentence of paragraph 2, the relevance that conduct not covered under paragraph 1 may have when assessing the subsequent practice of parties to a treaty. The formulation of the second sentence of paragraph 2, as adopted by the Drafting Committee, is more general than that initially proposed by the Special Rapporteur. The phrase “assessing the subsequent practice” should be understood in a broad sense as covering both the identification of the existence of a subsequent practice and the determination of its legal significance. Appropriate explanations regarding the manner in which conduct that is not attributable to a party to the treaty may be relevant in assessing subsequent practice of the parties, as well as the possible interactions between such conduct and subsequent practice, would be provided in the commentary, together with references to examples and relevant case-law.

Finally, it will be recalled that paragraph 2 of the text originally proposed by the Special Rapporteur also contained a reference to “social practice”. Taking into account the concerns expressed by several members of the Commission in Plenary, and reiterated in the Drafting Committee, regarding the meaning and relevance of that notion in relation to the present topic, the Drafting Committee considered it preferable to delete the reference to “social practice” from the text of the draft conclusion. The commentary would provide some indications as to the manner in which “social practice” has been relied upon, particularly in the case-law of the European Court of Human Rights, in connection with treaty interpretation.
Mr. Chairman,

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

I thank you for your kind attention.