

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

1. As announced in my statement before the Sixth Committee last year my Government would provide you with a more detailed reaction concerning the topic of "*Subsequent agreements and subsequent practice in relation to the interpretation of treaties*", in particular with respect to the five draft conclusions and commentaries thereto provisionally adopted by the Commission at its sixty-sixth session on the basis of the second report of the Special Rapporteur, Professor Georg Nolte.
2. The stated purpose of the draft conclusions and the commentaries thereto has been to serve as a practice pointer assisting the interpreter of a treaty in his or her endeavours. Let me reiterate our general appreciation for this approach. At the same time, we note that in distilling and identifying the different elements and criteria making up "subsequent agreement" and "subsequent practice" and grouping them under different draft conclusions, the dividing line between the different draft conclusions is sometimes difficult to discern. This concerns for example the relationship between draft conclusion 6 dealing with "the identification of subsequent agreement and subsequent practice" stating that "the position regarding the interpretation of a treaty is specifically and purposefully assumed by the parties" [p. 171] and draft conclusion 9 concerning "agreement of the parties regarding the interpretation of a treaty" stating that there must be a common understanding regarding the interpretation of a treaty that the parties are aware of and accept [p. 197]. Obviously, the existence of a common understanding would also be relevant for identification purposes.
3. Similarly, there appears to be some overlap between elements such as the specificity of an agreement or a practice for identification purposes under draft conclusion 6 [p. 173] or the relevance of the application of a treaty to the identification of the degree to which the interpretation of the parties is grounded [p. 172] under the same draft conclusion

and the relevance of these elements under draft conclusion 8 dealing with the weight of subsequent agreement and subsequent practice.

4. As regards the substance of draft conclusion 6, we agree with the general thrust of it and we are happy to see that the Commission has left out ambiguous terminology or phrases such as “requires careful consideration” or “whether they are motivated by other considerations”, which would not help the interpreter of a treaty very much. We would also express our preference for the formulation stating that the identification of subsequent agreement or subsequent practice requires a determination whether the parties have “taken” a position rather than “assumed” a position, which we believe lacks the clarity required for the articulation of the general criterion identifying whether agreement or practice is “regarding the interpretation of the treaty”.
5. Draft conclusion 7 deals with the effects of subsequent agreement and subsequent practice. We appreciate that the link with other means of interpretation is re-established in the first paragraph and the examples taken from the case-law of international courts provide a useful illustration of the interaction of subsequent agreement and subsequent practice in relation to other elements of interpretation.
6. The other pertinent issue dealt with under draft conclusion 7 concerns the delineation of treaty interpretation and treaty amendment or modification through the operation of subsequent agreement or subsequent practice. We understand that a general reference to this problematique cannot be wholly ignored in the present study and that some attention must be given to the question of evolutive interpretation. At the same time, as the examples taken from the case-law of international courts and tribunals show, the question whether such an approach on basis of subsequent agreement or subsequent practice would seem possible at all, will depend to a large extent on the provisions of the treaty concerned.

7. With respect to draft conclusion 8 we concur with the Commission that the formula adopted by the WTO Appellate Body, which is apparently taken from a publication, while useful for determining the weight of subsequent practice in a particular case at hand, has so far not been sufficiently well-established to justify its articulation as a general criterion.
8. On the other hand, concerning the second paragraph of draft conclusion 9, we are not sure whether the statement that an “agreement” for the purpose of article of article 31, paragraph 3, need not, as such be legally binding, is particularly helpful and we agree therefore with the concerns expressed by some members of the Commission that it would seem to give the wrong emphasis and create confusion. Instead we believe emphasis should rather be placed on the legal consequences that any subsequent agreements or subsequent practice could give rise to.
9. In its draft conclusion 10, the Commission has given special attention to decisions of Conferences of States Parties as a particular form of action by States that could result in subsequent agreement or subsequent practice within the meaning of article 31, paragraph 3 (and to subsequent practice under article 32). We fully share the relevance of Conferences of States Parties as a framework within which States seek to discuss and review the implementation of a treaty and acknowledge that decisions adopted at such conferences could embody subsequent agreement or subsequent practice. At the same time, we also note , as the Commission did, the wide diversity of Conferences of States Parties. As a consequence thereof, general conclusions may be difficult to draw from practice. As the analysis provided in the commentary to the conclusion would suggest, in order to establish whether a decision adopted by a Conference of States Parties embodies subsequent agreement or subsequent practice in a concrete case at hand, it would still be necessary to “carefully” identify the relevance of the decision for that purpose.
10. Furthermore, draft conclusion 10 establishes that a decision of the Conference of States parties must “express agreement in substance between the parties regarding the interpretation of the treaty”. This

would seem to incorporate both elements of "identification" under draft conclusion 6 and elements of "agreement" under draft conclusion 9. We wonder how the conceptual distinction made in the latter draft conclusions, i.e. the requirement that parties "have taken a position" and the requirement that there must be a common understanding between the parties that they "are aware of and accept" relate to the equation formulated in draft conclusion 10?