

International Law Commission's draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties - Czech Republic's comments

With reference to paragraph 73 of the Report on the work of the sixty-eighth session of the International Law Commission (doc. A/71/10), the Czech Republic welcomes the opportunity to present written comments on the set of 13 draft conclusions, together with commentaries thereto, on subsequent agreements and subsequent practice in relation to the interpretation of treaties, adopted on first reading by the International Law Commission. In this connection, the Czech Republic would like to express its appreciation to the Commission and the Special Rapporteur, Mr. Georg Nolte, for their work on this topic and commend the Special Rapporteur for his scholarly guidance in this undertaking.

The Czech Republic would like to make the following comments concerning the draft conclusions:

General comments

The outcome of the work of the Commission on this topic should provide *practical* guidance to treaty parties in the application of the relevant provisions of the 1969 Vienna Convention on the Law of Treaties.

The role of subsequent agreements and subsequent practice in the interpretation of treaties should not be overestimated. These means of interpretation can only be properly understood in the context of the entire set of rules of treaties' interpretation, confined by the framework of articles 31 and 32 of the Vienna Convention. Draft conclusions should properly reflect the complementarity and flexibility characterizing the use of subsequent agreements and subsequent practice as a means of treaty interpretation.

In order to be of practical use, draft conclusions have to be sufficiently specific. They should focus on issues, where the need for guidance emerged in practice and not to be a

theoretical exercise. Mere repetitions of the provisions of the Vienna Convention, as well as very abstract conclusions should be avoided. To this end, several elements contained in the commentaries to individual draft conclusions should be further considered with the view to elevating them directly in the text of draft conclusions.

During the second reading the Commission should also consider whether, and if so, in which cases, a more pronounced distinction should be made in the formulation of conclusions concerning bilateral and multilateral treaties. In the latter case it should proceed with a more in-depth analysis of the question of different weight of the subsequent practice of all parties to a multilateral treaty compared to practice of only some of the parties, including in cases when there is a substantive difference in parties' role in treaty's implementation.

Comments on individual draft conclusions

Part One Introduction

Conclusion 1 [1a] Introduction

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

Draft conclusion 1 would benefit from an explicit clarification of the scope as far as treaties are concerned. The commentary to this draft conclusion suggests that the draft conclusions are based on the Vienna Convention of the Law of Treaties of 1969, i.e. treaties between States. It would therefore be appropriate to clarify this aspect directly in the text of the draft conclusion.

Should it be considered that draft conclusions could provide some guidance also for the use of subsequent agreements and subsequent practice as a means of interpretation of treaties between States and international organizations or between international organizations, then it would require more than including explicit text to this end directly in the draft conclusions: while

several conclusions may equally be valid for treaties between States and international organizations or between international organizations, it can't be assumed that all conclusions could be automatically transposable to these treaties. Moreover, several aspects of subsequent agreements and subsequent practice concerning international organizations would have to be considerably developed in the draft conclusions.

Part Two Basic rules and definitions

Conclusion 2 [1] 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 rule on 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.

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.

The main difficulties with draft conclusion 2 arise from its overall structure: selective presentation of certain elements of article 31 of the Vienna Convention of the Law of Treaties of 1969 in combination with one selected element of article 32. It also seems to us that some

aspects of this draft conclusion could be better addressed separately. In particular, paragraphs 3 and 4 interrupt otherwise logical flow between paragraphs 1, 2 and 5 which is of particular importance in the context of current undertaking. Paragraphs 3 and 4 could form a separate draft conclusion.

Concerning paras 3 and 4: the difference between article 31, para 3 a) and b) and article 32 as regards conditionality of their use should be highlighted in a more pronounced manner. Contrary to article 31, para 3 (a) and (b), the element of “subsequent practice” can’t be found in the text of article 32 itself. It is only one of possible components of “supplementary means of interpretation” under this article.

But mainly, article 32 contains also very important conditions, which are not adequately highlighted in para 3 of draft conclusion 2. Article 32 provides that: “Recourse may be had to supplementary means of interpretation, including [...] in order to confirm the meaning resulting from the application of article 31, or to determine the meaning *when the interpretation according to article 31 (a) leaves the meaning ambiguous or obscure; or (b) leaves to a result which is manifestly absurd or unreasonable.*

Unless the conditions under (a) or (b) are met, there is no recourse to the “supplementary means under 32, including “other subsequent practice”. Presenting, in draft conclusion 4, the difference in use of subsequent practice under article 31, para 3 (a) and (b) and article 32 with the only accent on “shall” and “may” could be very misleading. The missing elements from article 32 can’t be imported in the text of the draft conclusion by means of mere reference to article 32. This is not adequate – the text of the guideline becomes cryptographic and can’t provide good guidance.

Finally, the reference to customary international law in the second sentence of paragraph 1 may be confusing: not only provisions of articles 31 and 32, but most of the provisions of the Vienna Convention of the Law of Treaties of 1969 are considered as reflecting customary international law. It would be preferable to address this issue only in the commentary, where it could be explained in a more elaborated manner.

Conclusion 3 [2] 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.

We do not see practical utility of this conclusion. It seems that its main purpose is to justify the introduction of a rather detailed recitation of parts of the Commission's commentary to respective provisions of the Vienna Convention, without going beyond what is already in the books. As currently drafted, the conclusion also does not reveal properly that subsequent agreements and subsequent practice are not the only authentic means of interpretation. This clarification has to be found only in the commentary.

The place for this conclusion, if retained, should be after conclusion 4 (where the element of "authenticity" has no place - see comments below).

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. Other "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.

The definition of terms should be of technical nature. It is of outmost importance that the terms defined in this draft conclusion do not deviate from the text of respective provisions of the Vienna Convention of 1969. In this respect we do not consider it appropriate to include in the definitions contained in para 1 and 2 the phrase “*an authentic means of interpretation*” which can’t be found in article 31, para 3 (a) and (b). Moreover, we note that no practical implications are linked to this qualification neither in draft conclusion 3, where the element of “authenticity” is introduced, nor in any other conclusion.

The term to be defined in para 3 of this guideline is “other subsequent practice” (not “subsequent practice”), the quote marks should therefore be placed accordingly. Additionally, “other subsequent practice” should be defined as *one of supplementary means of interpretation under article 32*, in order to make it clear, that it is not an equivalent of the term *supplementary means of interpretation*.

Conclusion 5 Attribution of subsequent practice

1. Subsequent practice under articles 31 and 32 may consist of any conduct in the application of a treaty which is attributable to a party to the treaty under international law.
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.

To clarify what constitutes the “practice” for the purpose of articles 31 and 32 there is no need to deal with “attribution” of the conduct in the application of a treaty to a party. Any analogy with the topic of state responsibility is out of place here. Unlike in the case of responsibility where the focus is on a wrongful act of one party of legal obligation causing an injury to the other party, the practice in application of a treaty primarily concerns the question of performance of specific activities or functions and that of *competence* of various state’s organs involved in the application of the treaty, not around the question of attribution.

Moreover, it can't be said that "practice" consists of "any conduct". The element of time (duration) as well as elements of "reciprocity" or "concordance" in treaty's application by the parties (not just one of them) have also to be taken into consideration.

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. This is not normally the case 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, can 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.

Commission's analysis should go beyond basic statements contained in draft conclusion 6.

Paragraph 1 - dealing together with subsequent agreements and subsequent practice at the same place limits the scope of this provision to the lowest denominator common to "agreements" and "practice", namely the determination whether the parties, by an agreement or a practice, have taken a *position regarding the interpretation* of the treaty. However, as far as the subsequent practice is concerned, the need to ascertain whether the conduct by the parties is also *in the application of the treaty*, is not less important than in the situation covered by paragraph 3.

Moreover, in order to determine "whether the parties, by an agreement or a practice, have taken a position regarding the interpretation of the treaty" the states would benefit from some guidance on *how to arrive to such a determination*. Otherwise this paragraph does not add

anything to what is already obvious from the mere reading of the provisions of the Vienna Convention.

As far as various aspects of “subsequent practice” are concerned, the conclusion could address such questions as when the conduct amounts to a “practice“, if there are variations or inconsistencies either in the conduct of one party or both parties; how and when it could be ascertained that a practice is establishing the agreement of the parties regarding the interpretation of the treaty; how the practice of parties to multilateral treaties is to be ascertained, etc.

Para 2 contains a statement of obvious, which is of no practical use. Moreover, subsequent practice under article 32 can also take a variety of forms.

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 can also contribute to the clarification of the meaning of a treaty.

3. It is presumed that the parties to a treaty, by an agreement subsequently arrived at 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.

Paragraphs 1 and 2 contain the statements of obvious and are superfluous also in view of draft conclusions 2, 3 and 4 to which they do not add anything substantive.

Paragraph 3 - There is no basis for the presumption formulated in the first sentence. The question whether a subsequent agreement is an agreement under article 31, paragraph 3 (a) and / or whether the subsequent practice meets the criteria of article 31, paragraph 3 (b), must be decided on a case by case basis and in the light of all relevant circumstances. There may be also other reasons for the parties to arrive at a subsequent agreement than those listed in the first sentence. Some subsequent agreement also may be of mixed nature. First sentence ignores realities and introduces an undesirable element of rigidity. Second sentence may be reflecting prevailing academic point of view, however it has no place here and should be deleted together with third sentence; the issue of modification of treaties is out of the scope of the present topic.

Conclusion 8 [3] 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.

The term “intention” should be used instead of “presumed intention”.

Conclusion 9 [8] 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. The weight of subsequent practice under article 31, paragraph 3 (b), depends, in addition, 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.

See our comments on draft conclusion 6.

In addition, we have serious doubts, whether the question of “weight” of these means of interpretation can be considered in isolation from other means of treaty interpretation and whether it could be based solely on the consideration of aspects relevant for the *identification* of these means.

Conclusion 10 [9] 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. Though it shall be taken into account, such an agreement need not be legally binding.

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 can constitute acceptance of the subsequent practice when the circumstances call for some reaction.

Para 2 - It is not clear, what is the meaning of “silence” in the context of “*subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.*” The non-participation of a party (or some parties) in the practice of application of the treaty precludes a possibility of its (their) participation in the establishment, through such practice, of any agreement regarding the interpretation of the treaty. In fact, the question is whether any such agreement could be established at all. We object to the entire para 2 of draft conclusion 10.

Conclusion 11 [10] 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 States parties pursuant to a treaty for the purpose of reviewing or implementing the treaty, except if 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 by consensus.

Last sentence of para 2 should be deleted. It does not relate to this topic.

Conclusion 12 [11] Constituent instruments of international organizations

1. Articles 31 and 32 apply to a treaty which is the constituent instrument of an international organization. Accordingly, subsequent agreements and subsequent practice under article 31, paragraph 3, are, and other subsequent practice under article 32 may be, means of interpretation for such treaties.

2. Subsequent agreements and subsequent practice under article 31, paragraph 3, or other subsequent practice under article 32, may arise from, or be expressed in, the practice of an international organization in the application of its constituent instrument.

3. Practice of an international organization in the application of its constituent instrument may contribute to the interpretation of that instrument when applying articles 31, paragraph 1, and 32.

4. Paragraphs 1 to 3 apply to the interpretation of any treaty which is the constituent instrument of an international organization without prejudice to any relevant rules of the organization.

We agree with the main premise of this conclusion namely, that provisions of article 31, para 3 (a) and (b) as well as article 32 of the Vienna Convention apply also to interpretation of any treaty which is constituent instrument of an international organization, and *a fortiori* to a particular aspect of such interpretation concerning the subsequent agreements and practice in the application of these constituent instruments.

Paragraph 2, while making distinction between the practice of parties on one hand and the practice of an international organization on the other hand, does not provide any guidance how to draw the line between them. The commentary provides some examples containing elements which should still be explored and eventually included in additional paragraphs of this conclusion, in order to make it useful for practice.

Conclusion 13 [12] 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 other 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 a pronouncement of an expert treaty body may otherwise make to the interpretation of a treaty.

Paragraph 3 addresses several aspects of the pronouncement of an expert treaty body for the interpretation of a treaty

We agree that the pronouncement of an expert treaty body, subject to relevant treaty provisions, may in itself constitute “other subsequent practice” under article 32 of the Vienna Convention but not a subsequent agreement or subsequent practice by parties under article 31, paragraph 3.

We also agree that “the pronouncement of an expert treaty body may give rise to subsequent agreement or subsequent practice by parties under article 31, paragraph 3”, but that mere “silence by a party” in reaction to such pronouncement does not constitute acceptance of the interpretation of the treaty by the expert treaty body, and “shall not be presumed to constitute subsequent practice under article 31 paragraph 3 (b)”. These elements should appear together in a streamlined text easy to read.

Paragraph 4 should be deleted.