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

Comments and observations received from Governments

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I. Introduction

1. At its sixty-eighth session (2016), the International Law Commission adopted, on first reading, the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties.[1] Moreover, the Commission decided, in accordance with articles 16 to 21 of its Statute, to transmit the draft conclusions, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2018. The Secretary-General circulated a note dated 17 January 2017 transmitting the draft conclusions with commentaries thereto to Governments and inviting them to submit comments and observations in accordance with the request of the Commission. By its resolutions 71/140 of 13 December 2016 and 72/116 of 7 December 2017, the General Assembly drew the attention of Governments to the importance for the Commission of having their comments and observations on the draft conclusions and commentaries thereto.

2. As at 14 February 2018, written replies had been received from Belarus (12 January 2018), the Czech Republic (3 January 2018), El Salvador (18 December 2017), Germany (17 January 2018), Spain (19 January 2018), Sweden (on behalf of the Nordic countries) (2 January 2018), the United Kingdom of Great Britain and Northern Ireland (5 January 2018) and the United States of America (5 January 2018). The comments and observations previously submitted, by Austria (11 March 2015) and the Netherlands (6 July 2015), are also included, since they remain relevant to the consideration, on second reading, of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties.

3. The comments and observations received from Governments are reproduced below. They are organized thematically as follows: general comments are reproduced first, followed by specific comments on each draft conclusion.[2]

II. Comments and observations received from Governments

A. General comments

Belarus

[Original: Russian]

We start with the premise that the progressive development of the relevant provisions of the 1969 Vienna Convention on the Law of Treaties is desirable for establishing the principles and other rules of international treaty interpretation.

Czech Republic

[Original: English]

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

[1] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10), para. 75.

[2] In each of the sections below, the comments and observations received are arranged by States, which are listed in English alphabetical order.

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.

Germany

[Original: English]

Germany expresses great appreciation for the Commission's impressive achievements in the complex matter of subsequent agreements and subsequent practice in relation to the interpretation of treaties. The Commission's draft conclusions and reports on the subject will form a comprehensive manual for State practice and academic literature for years to come. The in-depth analysis contained in the intellectually rigorous commentary adopted will above all aid international jurisprudence and assist domestic courts in the application of articles 31 and 32 of the Vienna Convention on the Law of Treaties (hereafter: Vienna Convention) and the identification of subsequent agreements and subsequent practice.

While it is clear from article 31, paragraph 3 (a) and (b), of the Vienna Convention that, when interpreting an international treaty, subsequent agreements and subsequent practice of the State parties should be taken into account, actors other than States may also contribute to the interpretation of an international treaty. In the following comments, Germany would like to underline the importance of further exploring in the Commission's work the role that such other actors may play with regard to subsequent practice.

Germany would like to reiterate its interest in further observations by the Commission regarding the role of domestic courts. Germany understands that a draft conclusion on this issue was proposed by the Special Rapporteur but that this does not form part of the draft conclusions adopted by the Commission. The advantages and disadvantages of the different possible roles of decisions of domestic courts, however, must be weighed carefully. It would, therefore, be helpful to have the Commission's guidance on this topic after the second reading of the draft conclusions.

Netherlands

[Original: English]

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. The Netherlands reiterates its 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" and draft conclusion 10 [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. Obviously, the existence of a common understanding would also be relevant for identification purposes.

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 or the relevance of the application of a treaty to the identification of the degree to which the interpretation of the parties is grounded under the same draft conclusion and the relevance of these elements under draft conclusion 9 [8] dealing with the weight of subsequent agreement and subsequent practice.

Spain

[Original: Spanish]

Spain wishes to start by commending the Commission for successfully completing the first reading of the draft conclusions. In general, we approve of the text, although we find it too descriptive and vague on various points.

Our comments will focus on various aspects of the draft conclusions that have been adopted. Some of the comments had already been made in recent years at meetings of the Sixth Committee where the annual reports of the Commission were considered.

Sweden (on behalf of the Nordic countries)

[Original: English]

The Nordic countries have underlined the importance of uniform and coherent interpretation of treaties in several statements before the General Assembly. We believe that the draft conclusions will contribute greatly to this end.

United Kingdom

[Original: English]

The United Kingdom is particularly grateful to the Special Rapporteur for his excellent work on the Commentary. The Commentary is detailed and rigorous. It is a helpful and constructive contribution to the development of treaty interpretation.

In view of the usefulness of the Commentary, the United Kingdom welcomes any step to ensure that further details from the Commentary are brought out in the draft conclusions.

United States

[Original: English]

As will be apparent from the discussion that follows, the United States agrees with most of the black letter rules set forth in the draft conclusions themselves. We have had greater difficulty in evaluating the commentaries, given their length and

breadth. The Special Rapporteur has gathered an impressive amount of very interesting material. As a general matter, however, we believe the International Law Commission product would be more useful to readers if the commentaries were limited to material that explains and supports the draft conclusions. Material deleted to produce a more focused final commentary would remain available to researchers and others who desire to explore the issue more deeply in the Commission's report from 2016.

Further, given their extensiveness, our failure to comment on any particular aspect of the commentaries should not be taken as United States agreement with it.

We take this opportunity to address the most significant of our concerns regarding the draft conclusions and commentaries that we have been able to identify.

Before addressing specific draft conclusions and commentaries, the United States would like to make a general comment about the interpretative approach that has been adopted. The United States notes that this topic of the Commission primarily addresses a question of how best to interpret certain provisions of a particular treaty, the Vienna Convention on the Law of Treaties ("the Vienna Convention"), i.e., what do articles 31 (3) (a) and (b) and 32 mean?

Secondarily, this topic concerns how to understand the customary international law rules reflected in those provisions. Therefore, we believe that the draft conclusions and commentaries would be strengthened by explicit analyses of the meaning of articles 31 (3) (a) and (b) and 32 that apply the whole of article 31 (and article 32, where appropriate), as well as greater evidence of State practice and *opinio juris* establishing that the principles set forth in the draft conclusions are consistent with customary international law.

B. Specific comments on the draft conclusions

Part One
Introduction

1. Draft conclusion 1 [1a] — Introduction

Czech Republic

[Original: English]

Draft conclusion 1 [1a] 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 on 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 cannot 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

2. Draft conclusion 2 [1] — General rule and means of treaty interpretation

Belarus

[Original: Russian]

With regard to draft conclusion 2 [1], paragraph 2, it would seem that reproducing the corresponding wording of the Vienna Convention is unnecessary. A greater emphasis should be placed in this and other draft conclusions (or in the commentaries thereto) on examining the meaning of the terms, such as "good faith" and "ordinary meaning", used in the Convention and in the draft conclusions.

The Commission's conclusions on whether the interpretation of international treaties should be dependent on their type or "nature" would be very interesting from an academic and a practical standpoint.

Czech Republic

[Original: English]

The main difficulties with draft conclusion 2 [1] arise from its overall structure: selective presentation of certain elements of article 31 of the Vienna Convention on 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 the otherwise logical flow between paragraphs 1, 2 and 5 which is of particular importance in the context of the current undertaking. Paragraphs 3 and 4 could form a separate draft conclusion.

Concerning paragraphs 3 and 4: the difference between article 31, paragraph 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, paragraph 3 (a) and (b), the element of "subsequent practice" cannot 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 paragraph 3 of draft conclusion 2 [1]. 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) leads to a result which is manifestly absurd or unreasonable*" (emphasis added).

Unless the conditions under (a) or (b) are met, there is no recourse to the "supplementary means of interpretation under article 32", including "other subsequent practice". Presenting, in paragraph 4, the difference in use of subsequent practice under article 31, paragraph 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 cannot 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 cannot 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 on 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.

Germany

[See comment below on draft conclusion 13 [12]]

United Kingdom

[Original: English]

Subparagraph 2 repeats the text of article 31 (1) of the Vienna Convention on the Law of Treaties.

The United Kingdom questions whether it might be sensible to delete the reference to article 31 (1). This is because the inclusion of a reference to article 31 (1) may lead readers that are unfamiliar with the law to an incorrect understanding that treaty interpretation starts with an analysis as to the object and purpose of a treaty, as opposed to being one single exercise, in accordance with the whole of article 31.

Subparagraph 5 discusses the emphasis to be placed on the various means of interpretation in articles 31 and 32 of the Vienna Convention.

The United Kingdom agrees with the content of subparagraph 5 as a statement of principle. However, the United Kingdom questions whether it would be of assistance for the Special Rapporteur to elaborate further on the meaning of the word "appropriate" used in subparagraph 5, perhaps by reference to the factors set out in draft conclusion 9 [8].

3. Draft conclusion 3 [2] — Subsequent agreements and subsequent practice as authentic means of interpretation

Belarus

[Original: Russian]

Although the situations indicated in draft conclusion 3 [2] (subsequent practice, tacit agreement and violation) are not exhaustive, their study and definition will be a valuable contribution to the development of this topic and to the interpretation of international agreements generally.

Czech Republic

[Original: English]

We do not see the 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 can 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 on draft conclusion 4).

Netherlands

[See comment above under general comments]

Spain

[Original: Spanish]

Spain agrees with the content of this draft conclusion, but hardly sees any value in characterizing subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), as "authentic means of interpretation", since such characterization does not confer upon them any additional value beyond that resulting from the application of article 31.

United States

[Original: English]

The United States appreciates the Commission's effort in paragraphs (4)–(7) of the commentary to draft conclusion 3 [2] to distinguish between (a) subsequent agreements and subsequent practice under article 31, paragraphs 3 (a) and (b), that do not necessarily have a conclusive legal effect on the interpretation of the treaty, and (b) cases in which a subsequent interpretive agreement is itself a legally binding instrument or a conclusive interpretation of the treaty. In particular, the United States agrees with the reference to and description of article 1131 (2) of the North American Free Trade Agreement (NAFTA) as an example of the latter. It is an explicit treaty mechanism for arriving at binding subsequent interpretive agreements.

Paragraph (24) of the commentary to draft conclusion 7, however, referencing, e.g., *ADF Group Inc. v. United States* in footnote 678, states that "informal agreements that are alleged to derogate from treaty obligations should be narrowly interpreted". The United States disagrees with this statement and believes it should be deleted from the commentary as lacking in adequate support. The terms of a treaty should be interpreted pursuant to the interpretive rules described in articles 31 and 32 of the Vienna Convention. Moreover, the *ADF* tribunal was discussing a binding (i.e., "formal") interpretation under NAFTA article 1131 (2), not an informal one. Second, the *ADF* tribunal was clear that it would not entertain the claimant's allegation that the interpretation was an "amendment" of NAFTA. Third, merely because an "alleg[ation]" of derogation has been put forward does not mean a narrow interpretation should follow. The remaining citations in footnote 678 similarly fail to support the proposition quoted above.

4. Draft conclusion 4 — Definition of subsequent agreement and subsequent practice

Austria

[Original: English]

In the view of Austria, draft conclusion 4, paragraph 1, deserves clarification. It should be mentioned already in the text of the draft conclusion that the "agreement" that may constitute a "subsequent agreement" in the sense of that draft conclusion does not need to be a treaty in the sense of the Vienna Convention on the Law of Treaties. Also, informal agreements and non-binding arrangements may amount to relevant "subsequent agreements".

Equally, interpretative declarations by treaty bodies can be regarded as such "subsequent agreements". In this sense, the NAFTA Arbitral Tribunal, in the case of *Methanex Corporation v. United States of America*, qualified the NAFTA Free Trade Commission's interpretation of NAFTA provisions as "subsequent agreement".[3] It stated: "[i]t follows from the wording of article 31 (3) (a) that it is not envisaged that the subsequent agreement need be concluded with the same formal requirements as a

[3] Final Award on Jurisdiction and Merits, 3 August 2005, part II, chap. B, paras. 20–21.

treaty, … the Tribunal has no difficulty in deciding that the [Free Trade Commission's] Interpretation is properly characterized as a 'subsequent agreement' on interpretation falling within the scope of article 31 (3) (a) of the Vienna Convention".

In this respect the delegation of Austria would like to draw attention to the fact that the guidelines of the Commission on reservations to treaties also deal with "interpretative declarations", and that there may be a need to bring the results of the work of the Commission on these two topics into line.

As regards the role of subsequent practice in the interpretation of a treaty as referred to in draft conclusion 4, paragraph 3, Austria wishes to emphasize that the subsequent practice of only one or of less than all parties to a treaty can only serve as supplementary means of interpretation under the restrictive conditions of article 32 of the Vienna Convention.

Belarus

[Original: Russian]

The definitions of "subsequent agreement" and "subsequent practice" in draft conclusion 4 need further study. Specifically, practice that does not flow from an existing agreement is not relevant for the interpretation of an international agreement in determining the agreed intentions of the States parties thereto. Subsequent conduct by a State party to a treaty is a proper basis for interpreting the treaty only when it occurs in the implementation of the treaty and is taken into account by the other parties. For an agreement to be considered a "subsequent agreement", it is not necessary for it to expressly concern the interpretation of a treaty. In our view, any agreement relating to the core provisions of a treaty (the preamble, conditions for its entry into force, and so on) could be considered a "subsequent agreement".

Czech Republic

[Original: English]

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

The term to be defined in paragraph 3 of this guideline is "other subsequent practice" (not "subsequent practice"), the quotation marks should therefore be placed accordingly. Additionally, "other subsequent practice" should be defined as one of the "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".

[See also comment above on draft conclusion 3 [2]]

Germany

[See comment below on draft conclusion 13 [12]]

Sweden (on behalf of the Nordic countries)

[Original: English]

The Nordic countries welcome the fact that the draft conclusions include a definition of subsequent agreements and of subsequent practice. In this regard, we would like to underline that any agreement under article 31, paragraph 3 (a) and (b), of the Vienna Convention on the Law of Treaties requires the awareness and acceptance of the parties.

United Kingdom

[Original: English]

Subparagraph 1 defines "subsequent agreement". The United Kingdom respectfully suggests that the definition of subsequent agreement in subparagraph 1 be expanded to include a statement that a subsequent agreement does not need to be legally binding.

The United Kingdom recognizes that draft conclusion 10 [9], paragraph 1, provides that a subsequent agreement does not need to be legally binding. However, the United Kingdom questions whether it might be useful to make this point at the beginning of the draft conclusions, at the definition stage. The United Kingdom considers that this approach might assist users of the draft conclusions that are unfamiliar with the details regarding subsequent agreements.

Subparagraph 2 defines "subsequent practice". The United Kingdom respectfully suggests that it might assist if the indefinite article, "a", at the beginning of the subparagraph 2 is deleted. This is because the wording "a subsequent practice" implies that practice is a single event, as opposed to a course of practice.

The United Kingdom further proposes that the word "all" be added to subparagraph 2, to make clear that the agreement of "all" of the parties is required for there to be subsequent practice under article 31 (3) (b). The fact that the agreement of all of the parties is required is made in the commentary. The United Kingdom would welcome the repetition of this point in subparagraph 2.

United States

[Original: English]

The United States also appreciates the effort reflected in draft conclusion 4 and its commentary to define and clarify the terms "subsequent agreement" and "subsequent practice" in article 31, paragraph 3 (a) and (b), respectively. However, the United States does not believe that the conclusion drawn in paragraphs (8)–(11) of the commentary is supported by the material cited. Paragraph 9 of the commentary states that the reasoning of the NAFTA tribunal in *Canadian Cattlemen for Fair Trade v. United States* "suggests that one difference between a 'subsequent agreement' and 'subsequent practice' ... lies in the different *forms* that embody the 'authentic' expression of the will of the parties'' (emphasis added). Paragraph 10 states further that "[s]ubsequent agreements and subsequent practice ... are *hence* distinguished based on whether an agreement of the patties can be identified as such, in *a common act* ..." (emphasis added). Yet the tribunal neither uses the terms ''form" and "common act" nor suggests that they are what distinguishes subsequent agreements and subsequent practice.[4] Indeed, the tribunal suggests that an additional, unilateral statement from Canada (albeit in the same form as the Mexican submission already before the tribunal, but different in form from the pleadings of the United States)

[4] Award on Jurisdiction, 28 January 2008, paras. 184–189.

might have been sufficient for it to conclude that a subsequent agreement had been reached.[5]

Further, even if the tribunal had addressed the issues of form and a common act, a ruling of a single arbitral tribunal is not sufficient to support the conclusions reached in the commentary. (As noted in the discussion below concerning draft conclusion 10 [9], a significant difference between a subsequent agreement and subsequent practice is rather that a subsequent agreement requires a common understanding regarding the interpretation of a treaty that the parties are aware of and accept, whereas subsequent practice does not.)

For the foregoing reasons, we believe that paragraphs (8) and (10) of the commentary should be deleted and paragraph (9) reworded to read:

> (9) ~~This reasoning suggests that one difference between a "subsequent agreement" and "subsequent practice" under article 31, paragraph 3, lies in different forms that embody the "authentic" expression of the will of the parties. Indeed. b~~ By distinguishing between "any subsequent agreement" under article 31, paragraph 3 (a), and "subsequent practice ... which establishes the understanding of the parties" under article 31, paragraph 3 (b), of the 1969 Vienna Convention, the Commission did not intend to denote a difference concerning their possible legal effect. The difference between the two concepts, rather, lies in the fact that a "subsequent agreement between the parties" *ipso facto* has the effect of constituting an authentic means of interpretation of the treaty, whereas a "subsequent practice" only has this effect if its different elements, taken together. show "the common understanding of the parties as to the meaning of the terms" (footnote omitted).

The last sentence of paragraph 12 should likewise be deleted and similar edits are required elsewhere in the commentaries. See e.g. paragraphs (1) and (7) to the commentary to draft conclusion 10 [9].

Paragraph (20) of the commentary to draft conclusion 4 contains a misreading of article 31 of the Vienna Convention. Paragraph (20) states:

> "The requirement that subsequent practice in the application of a treaty under article 31, paragraph 3 (b), must be 'regarding its interpretation' has the same meaning as the parallel requirement under article 31, paragraph 3 (a) (see paragraphs (13) and (14) above). It may often be difficult to distinguish between subsequent practice that specifically and purposefully relates to a treaty, that is 'regarding its interpretation', and other practice 'in the application of the treaty'. The distinction, however, is important because only conduct that the parties undertake 'regarding the interpretation of the treaty' is able to contribute to an 'authentic' interpretation, whereas this requirement does not exist for other subsequent practice under article 32."

However, article 31 (3) (b) does not require that the parties' practice be regarding its interpretation. Rather, article 31 (3) (b) requires that the practice be in the application of the treaty and that it establish an agreement of the parties regarding the treaty's interpretation. This is clear from the language of article 31 (3), which states in pertinent part:

> "3. There shall be taken into account, together with the context:
>
> (a) ...;

[5] Ibid., para. 187.

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) ...".

A State's application of a treaty may reflect a view as to the State's interpretation of a treaty provision, even where that practice does not involve a specific articulation of the interpretation in question (or, in the words of the commentary, involve practice specifically "regarding the interpretation of the treaty"). Such practice in the application of the treaty, together with similar practice by other States, could serve to establish the agreement of the parties regarding the interpretation of a treaty within the meaning of article 31 (3) (b).

The United States believes that the necessary corrections should be made throughout the commentaries.

5. Draft conclusion 5 — Attribution of subsequent practice

Czech Republic

[Original: English]

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 organs involved in the application of the treaty, not around the question of attribution.

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

Germany

[Original: English]

Germany would like to refer to draft conclusion 5, which acknowledges that international treaties are not always and not solely applied by States parties themselves. While emphasizing the role of the States parties as the "masters of the treaty", the draft conclusion states that "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". Accordingly, the conduct of non-State actors, if attributable, can also establish "subsequent practice" within the meaning of articles 31 and 32 of the Vienna Convention. Notably, this finding is not called into question by draft conclusion 5, paragraph 2, which rather only excludes such conduct which does not happen as part of the application of the treaty. Germany recognizes that where States have commissioned non-State actors to carry out international treaty obligations the conduct of such actors may in some form be taken into account. We therefore generally welcome this broader approach presented by the Commission. Germany would, however, deem it beneficial if the Commission could, during the second reading, offer further guidance on this issue. Considerable case law and practice is already provided with regard to attributable conduct of State organs pursuant to draft conclusion 5, paragraph 1, as well as the possible role of non-State actors pursuant to draft conclusion 5, paragraph 2. Comparable case law and practice with regard to attributable conduct of non-State actors within the meaning of draft conclusion 5, paragraph 1, would be helpful as well.

This is even more desirable since the wording of draft conclusion 5, paragraph 1, raises the complex question of attribution.

United Kingdom

[Original: English]

Subparagraph 2 discusses the relevance of non-State actor conduct as regards subsequent practice. As to the second sentence of subparagraph 2, the United Kingdom respectfully suggests the language is amended slightly to reflect the fact that non-State actor practice can provide evidence of subsequent practice.

Revised language could, for instance, read "such conduct may, however, provide ancillary evidence to demonstrate subsequent practice by a party or itself generate or give rise to subsequent practice by a treaty party".

United States

[Original: English]

The United States also disagrees with the text of the first paragraph of draft conclusion 5, which states that subsequent practice "may consist of any conduct in the application of a treaty which is attributable to a party to the treaty under international law". Paragraph (2) of the commentary explains that this language borrows from article 2 (a) of the draft articles on responsibility of States for internationally wrongful acts, and covers not only the conduct of a State, but also conduct by others that is attributable to a State under international law. In our view, it is not appropriate to apply rules designed to address situations of State responsibility to questions of treaty interpretation as there are many acts that are attributed to a State for purposes of holding a State responsible that would not evidence a State's views regarding the meaning of a treaty to which it is party. An example would be the actions of a State agent contrary to instructions. Therefore, paragraph 1 of the draft conclusion should be revised to remove the reference to attribution.

The *Kasikili/Sedudu Island* case cited in the commentary is not to the contrary. In that case, the International Court of Justice found that the use of the disputed island by a local tribe did not constitute subsequent practice within the meaning of article 31 (3) (b).[6] In doing so, it focused on the conduct and legal views of the parties in that case with respect to the actions of the tribe. It stated:

> "To establish such practice, at least two criteria would have to be satisfied: first, that the occupation of the Island by the Masubia was linked to a belief on the part of the Caprivi authorities that the boundary laid down by the 1890 Treaty followed the southern channel of the Chobe; and, second, that the Bechuanaland authorities were fully aware of and accepted this as a confirmation of the Treaty boundary."[7]

Further, language similar to the attribution language in draft conclusion 5 was removed — properly in the United States' view — from the draft conclusions on the identification of customary international law.[8] We believe that the two sets of draft conclusions should be consistent.

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[6] *Kasikili/Sedudu Island (Bostwana/Namibia), Judgment, I.C.J. Reports 1999*, p. 1045, at p. 1095, para. 75.

[7] Ibid., para. 74.

[8] Compare the text of draft conclusion 5 as adopted by the Commission on first reading (*Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10)), with the text of draft conclusion 6 in the Special Rapporteur's second report on identification of customary international law (A/CN.4/672, p. 19).

The United States, therefore, believes that draft conclusion 5 should be edited as follows:

> 1. Subsequent practice under articles 31 and 32 may consist of any conduct of a party 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.

Conforming edits will be required in the commentary. See, e.g., the last sentence of paragraph (11) to the commentary to draft conclusion 5.

The United States is also concerned about the commentary to paragraph 2 of draft conclusion 5. We agree that the conduct of entities other than parties to a treaty may be relevant to assessing the practice of the parties in the application of a treaty. For example, if the International Committee of the Red Cross (ICRC) proposes an interpretation of a treaty and the parties to the treaty respond, the interpretation proposed by ICRC contributes to the generation of, or may help in the assessment of, the practice of those parties. Similarly, where a treaty provides a role for non-party States with their consent, or otherwise intends to incorporate the practice of non-party States, their conduct may be relevant to the interpretation of the treaty.

However, we believe that paragraphs (12) to (18) of the commentary need to be reworked to avoid suggesting that non-parties and their practice have a role in the interpretation of a treaty that is inconsistent with article 31 of the Vienna Convention. In particular, it should be made clear that non-party international organizations, ICRC, and other non-parties may collect evidence of practice that may be a useful starting point in identifying the practice of the parties in the application of the treaty, or those non-parties may inspire the parties to engage in practice that constitutes subsequent practice, as in the ICRC example above. However, it is what the parties do in the application of the treaty that is relevant subsequent practice in interpreting the treaty. The views or conduct of a non-party as such have no such direct role in the interpretation of a treaty under either articles 31 or 32. Nor should it be suggested that the views of certain international organizations "may enjoy considerable authority in the assessment of such practice" as stated in paragraph (15) of the commentary, as there is no support for that proposition.

Regarding paragraph (16) of the commentary's discussion of the role of ICRC, we are concerned that it may be misunderstood by readers as endorsing the view that the ICRC has a mandate to interpret authoritatively the 1949 Geneva Conventions and their Additional Protocols. The mandate from the Statutes and the Rules of Procedure of the International Red Cross and Red Crescent Movement does not have the legal effect of authorizing ICRC to issue binding interpretations of the 1949 Geneva Conventions, which the term "interpretative guidance" may suggest. Moreover, the specific example of interpretive guidance provided in paragraph 16 was widely criticized.[9] Thus, we recommend the commentary be revised to reflect that this example prompted criticism by States, including descriptions of contrary State practice.

[9] See, e.g., Stephen Pomper, "Toward a limited consensus on the loss of civilian immunity in non-international armed conflict: making progress through practice", *International Law Studies*, vol. 88 (2012), pp. 181–193, at p. 186.

Part Three
General aspects

6. Draft conclusion 6 — Identification of subsequent agreements and subsequent practice

Belarus

[Original: Russian]

We propose that a definition of the concept of *modus vivendi* as "a temporary and exceptional measure that leaves the general treaty obligations unchanged" be added in draft conclusion 6, paragraph 1.

Czech Republic

[Original: English]

The 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 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 at 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.

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

Netherlands

[Original: English]

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 of 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".

[See also the comment above under general comments]

United Kingdom

[Original: English]

Subparagraph 1 effectively provides that it is necessary to assess whether parties to a treaty have taken a position regarding its interpretation.

The United Kingdom considers that it might be sensible to include an explanation as to the distinction between agreements that establish practical arrangements and agreements that provide for substantive interpretation in subparagraph 1. This is because the distinction between the two forms of agreement is often unclear in practice.

Subparagraph 2 provides a general statement of principle as to the form that subsequent agreements and subsequent practice can take.

The United Kingdom questions whether it would assist if subparagraph 2 became a new subparagraph 1. By adopting this approach, the United Kingdom considers that those unfamiliar with the law might first understand the basic principle, and that they can then move on to understand further details.

United States

[Original: English]

We appreciate the discussion of article 118 of the Third Geneva Convention (Geneva Convention relative to the Treatment of Prisoners of War) as a useful example that demonstrates, as noted in draft commentary paragraph (18), "the need to identify and interpret carefully subsequent agreements and subsequent practice, in particular to ask whether the parties, by an agreement or a practice, assume a position regarding the interpretation of a treaty or whether they are motivated by other considerations'.' However, we recommend refining the discussion of this example.

First, the discussion seems to focus on the issue of whether "the declared will of the prisoner of war must always be respected". However, the more significant issue of treaty interpretation presented by article 118 is whether the wish of the prisoner of war not to be repatriated may be considered at all, consistent with the terms of the treaty provision.

Second, footnote 603 of the commentary cites "the United States manual" by reference to a quote found in the ICRC study on customary international humanitarian law. The actual manual being cited is a United States Department of the Army Field Manual last issued in 1976, and the effect of that manual must be considered in the light of changes to United States law and Department of Defense procedures since that time. Moreover, the provision of that manual being cited is based on article 109 of the Third Geneva Convention, not article 118. The misinterpretation of United States practice in the draft commentary is understandable given that the ICRC study on customary international humanitarian law does not provide this background when it presents what ICRC regards as United States practice. The United States has indicated significant concerns with the methodology used in the ICRC study, including its use of military manuals.[10]

We recommend citing the United States Department of Defense Law of War Manual, June 2015, updated December 2016, section 9.37.4.2., rather than what is currently provided in footnote 603. That discussion makes clear that a neutral

[10] John B. Bellinger, III and William J. Haynes II, "A US government response to the International Committee of the Red Cross study *Customary International Humanitarian Law*", *International Review of the Red Cross*, vol. 89, No. 866 (June 2007), pp. 443–471, at pp. 444–446.

intermediary other than ICRC could be used and supports the interpretation offered by the United Kingdom.

7. Draft conclusion 7 — Possible effects of subsequent agreements and subsequent practice in interpretation

Austria

[Original: English]

My delegation shares the view expressed in the first sentence of draft conclusion 7, paragraph 3, that the parties to a treaty are presumed not to amend or modify a treaty by subsequent agreement or practice. Rather, the presumed intention of the parties is the interpretation of treaty provisions. This presumption aptly describes faithfulness to treaty obligations and the principle of *pacta sunt servanda*.

The statement contained in the second sentence of draft conclusion 7, paragraph 3, that "the possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized" raises some questions. One may strictly adhere to this statement on the basis of the proposed definition of "subsequent practice" in draft conclusion 4, paragraph 2, which is only regarded as "an authentic means of interpretation". In so far as "subsequent practice" is defined as an act of interpretation, it will not extend to amendment or modification.

However, as indicated by the discussions within the Commission, this conclusion leads to the more general issue of whether a subsequent practice of treaty parties may modify a treaty. In the view of the Austrian delegation, this effect may not be generally excluded. Notwithstanding the fact that during the 1969 Vienna Conference on the Law of Treaties former draft article 38 on the modification of treaties by subsequent practice was not adopted, it seems clear that a "subsequent practice" establishing an agreement to modify a treaty should be regarded as a treaty modification and not merely as an interpretation exercise

Also where no such intention of the parties can be established, general international law does not exclude that states parties to a treaty may create customary international law through their subsequent practice, if accompanied by *opinio juris*, and thereby modify the rights and obligations contained in the treaty. This consequence is even reinforced by the fact that international law does not know any hierarchy between the sources of international law. Thus, the change of international law based on custom by treaty rules and vice versa is a generally accepted phenomenon, which the formulation of the second sentence of draft conclusion 7, paragraph 3, should not be understood to exclude.

Belarus

[Original: Russian]

We support draft conclusion 7, paragraph 3, and have consistently advocated that interpretation in good faith in any form should not replace the existing procedure for amending a treaty.

Czech Republic

[Original: English]

Paragraphs 1 and 2 contain statements of the obvious and are superfluous, also in view of draft conclusions 2 [1], 3 [2] 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 of 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 the relevant circumstances. There may also be 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. The first sentence ignores realities and introduces an undesirable element of rigidity. The second sentence may be reflecting the prevailing academic point of view, however, it has no place here and should be deleted together with the third sentence; the issue of modification of treaties is out of the scope of the present topic.

Netherlands

[Original: English]

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.

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 *problématique* 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 of whether such an approach on the 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.

Spain

[Original: Spanish]

Spain considers that paragraph 2 of this draft conclusion refers only to one of the possible effects of supplementary means of interpretation under article 32 of the 1969 Vienna Convention on the Law of Treaties. As indicated in the draft conclusion, such means may contribute to the clarification of the meaning of a treaty, although they may also help to "confirm" the meaning of a treaty resulting from the general rule of interpretation of article 31 of the Vienna Convention.

United Kingdom

[Original: English]

Subparagraph 2 explains the role of subsequent practice with regard to article 32 of the Vienna Convention.

The United Kingdom considers that it might assist if the following text was added to end of the sentence in subparagraph 2: "by confirming the interpretation that has been reached under conclusion 7 (1)". The aim of this proposed amendment is to reflect the scheme of articles 31 and 32 of the Vienna Convention.

United States

[See comment above on draft conclusion 3 [2]]

8. Draft conclusion 8 [3] — Interpretation of treaty terms as capable of evolving over time

Belarus

[Original: Russian]

With regard to the issue of "evolutionary" interpretation in draft conclusion 8 [3], it seems unlikely that any wording or categorization of an international treaty could in and of itself signal, a priori, that the treaty is "evolutive" in nature. It may be helpful to follow some guideline according to which an interpretation that leads to a patently absurd outcome is deemed inadmissible. The most pragmatic and correct approach would be to determine whether the provisions of a treaty can evolve based on the following criteria: first, the broadness of the wording and, second, the duration of the treaty. A treaty with broad wording and an unspecified period of validity is more likely to have been intended to be subject to "evolutive" interpretation than one with narrow wording and a limited period of validity. Furthermore, a clearer distinction should be made between situations in which the practice of the parties serves to clarify the content of the rules of the treaty (i.e. the possibility for such clarification already exists), and situations in which practice merely points to this possibility.

Czech Republic

[Original: English]

The term "intention" should be used instead of "presumed intention".

United States

[Original: English]

The United States believes that draft conclusion 8 [3] should be revised to eliminate the reference to the "presumed intention" of the parties. Although discerning the intent of the parties is the broad purpose of treaty interpretation, that purpose is served through the specific means of treaty interpretation set forth in articles 31 and 32 of the Vienna Convention. In other words, intent is discerned by applying the approach set out in those articles, not through an independent inquiry into intent or "presumed intent". We believe that draft conclusion 8 [3] is confusing in appearing to distinguish between the "intent'' of the parties and their "presumed intent'' and that it may be misinterpreted to suggest that a separate inquiry as to the "presumed intent" is appropriate, undercutting the interpretative rules of the Vienna Convention.

Although the United States appreciates the clarifying language in paragraph (9) of the commentary, we do not believe that it is sufficient to remove the potential for confusion from the term "presumed intent", which we note does not appear to be supported by the text of the Vienna Convention, its negotiating history, State practice, or tribunals' interpretations of the Convention.

Therefore, we believe that the draft conclusion should be revised 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~~ the meaning of a term used in a treaty was intended to be ~~a meaning which is~~ capable of evolving over time.

Parallel edits would need to be made throughout the commentaries.[11]

9. Draft conclusion 9 [8] — Weight of subsequent agreements and subsequent practice as a means of interpretation

Belarus

[Original: Russian]

In the commentary to draft conclusion 9 [8], a clear distinction should be made between repeated practice as a means of interpreting an international treaty and practice that leads to the formation of a rule of customary international law and, accordingly, to a de facto change in the international treaty regime.

Czech Republic

[Original: English]

In addition, we have serious doubts about 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.

[See also comment above on draft conclusion 6]

El Salvador

[Original: Spanish]

We believe that it is appropriate to state that the weight given to subsequent agreements and subsequent practice depends on their clarity and specificity. However, we suggest that other criteria identified by the Special Rapporteur should be expressly added, such as the time when the agreement or practice occurred and the emphasis given to it by the parties.

With regard to the time when the agreement occurred, it should be clarified that this criterion generally refers to the historical moment interpreters must consider when making their interpretation. Notions and concepts evolve over time, and the meaning and scope of a term at the time of conclusion of a treaty or agreement can be very different from the meaning and scope of the same term some years later; bearing in mind that interpretation in conformity with the historical moment when a treaty is concluded is a mechanism that helps to indicate the most correct and useful form for interpreting a provision and ensuring its implementation.

One example of this was the signing of the General Peace Treaty between the Governments of the Republic of El Salvador and Honduras on 30 October 1980. Article 1 of this treaty provides that both Governments declare their firm intention of maintaining, preserving and consolidating peace between them and in their relations renounce the use of force, the threat of, and any type of pressure or aggression, and any act or omission which is incompatible with the principles of international law.

In Title IV, the Treaty defines frontier questions, which were subsequently revised in the decision rendered by the International Court of Justice in its judgment of 11 September 1992 concerning the frontier dispute between El Salvador and Honduras.

The issuance of this judgment and the subsequent presidential statements made by the Governments in question in the years 1986, 1991, 1994, 1995 and 1996 endorsed the necessary framework for the subsequent signing of the Convention on

[11] See, e.g., paragraph (27) of the commentary to draft conclusion 7.

Nationality and Acquired Rights in the Areas Delimited by the Judgment of the International Court of Justice of 11 September 1992, ratified by El Salvador through Legislative Decree No. 454, published in the Official Gazette of 18 November 1998; article 5 thereof is an example of how this Convention interprets the provisions contained in Title VII of the aforementioned General Peace Treaty of 1980, particularly in terms of respect for human rights and the family. The article provides that in terms of respect for human rights, both parties reaffirm that they shall adjust their conduct in conformity with the principles enshrined in Chapter VI, Title VII of the General Peace Treaty of 30 October 1980 and in other international and regional conventions on this subject to which both States are party.

As a result, the States parties to that Convention have developed a subsequent practice that reflects the application of these normative instruments in line with the interpretation that both countries have decided to base on provisions concerning human rights and the family. Thus, El Salvador has adopted domestic legislation in the areas of (1) the legalization of land ownership, possession and tenure rights in the areas delimited by the judgment of the International Court of Justice of 11 September 1992 and (2) the establishment of the special regime applicable to persons affected by the aforementioned judgment.

Ultimately, the development of subsequent agreements and practices followed subsequent to the General Peace Treaty signed between the Governments of El Salvador and Honduras in 1980 show how the historical circumstances of its signature are important factors for the interpretation of its provisions, especially where they regulate the nationality and acquired rights of the population described in the content of the above-mentioned Treaty.

Netherlands

[Original: English]

With respect to draft conclusion 9 [8], we concur with the Commission that the formula adopted by the World Trade Organization 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.

[See also comment above under general comments]

Sweden (on behalf of the Nordic countries)

[Original: English]

Regarding draft conclusion 9 [8], the Nordic countries agree that the weight of a subsequent agreement or subsequent practice as a means of interpretation depends on its clarity and specificity.

United Kingdom

[Original: English]

Subparagraph 2 discusses the weight of subsequent practice.

The United Kingdom questions whether subparagraph 2 could be expanded so that “how” is replaced with “how often and with what precision”. The aim of this proposed amendment is to introduce greater specificity.

10. Draft conclusion 10 [9] — Agreement of the parties regarding the interpretation of a treaty

Austria

[Original: English]

The Austrian delegation appreciates the formulation in draft conclusion 10 [9], paragraph 1, that an agreement under article 31, paragraph 3, subparagraph (a) and (b), of the Vienna Convention on the Law of Treaties "need not be legally binding". We note that apparently the question was not uncontroversial in the deliberations of the International Law Commission. As already stated in our previous comments and in particular last year's statement in the Sixth Committee, we are convinced that such an "agreement" only has to be an "understanding" indeed and need not be a treaty in the sense of the Vienna Convention. Also, informal agreements and non-binding arrangements may amount to relevant "subsequent agreements".

With regard to the first sentence of draft conclusion 10 [9], paragraph 2, Austria wishes to emphasize that the subsequent practice of fewer than all parties to a treaty can only serve as a means of interpretation under very restrictive conditions. This applies in particular to the silence on the part of one or more parties referred to in the second sentence of this draft conclusion.

Belarus

[Original: Russian]

Clarification is needed with respect to the view set out in draft conclusion 10 [9], paragraph 2, that "[s]ilence on the part of one or more parties can constitute acceptance of the subsequent practice when the circumstances call for some reaction". Specifically, it should be made abundantly clear that a party that has accepted a practice by way of silence should have been made aware of such practice and its implications for interpretation and should have had the opportunity to contest it.

Czech Republic

[Original: English]

Paragraph 2: it is not clear what the meaning is 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 paragraph 2 of draft conclusion 10 [9].

El Salvador

[Original: Spanish]

The text adopted by the Commission indicates that such an agreement requires a common understanding but adds that such an agreement need not be legally binding.

Admittedly, in this case the Vienna Convention on the Law of Treaties has been interpreted to mean that a binding agreement is not required; however, the wording could be improved by referring both to binding agreements and to those which, although not binding, may be taken into account.

One example that could be addressed in this context is the Association Agreement between Central America and the European Union, ratified by El Salvador

through Legislative Decree No. 410 of 4 July 2013. Specifically, in accordance with article 4 of this Agreement, an institutional framework is established that consists principally of "An Association Council ... which shall oversee the fulfilment of the objectives of this Agreement and supervise its implementation. The Association Council shall meet at ministerial level at regular intervals, not exceeding a period of two years, and extraordinarily whenever circumstances so require, if the Parties so agree."

In this regard, according to article 6 of the same Agreement, the Association Council shall have the power to take decisions binding on the Parties, which shall take all measures necessary to implement them in accordance with each Party's internal rules and legal procedures. However, it may also make appropriate recommendations. In both cases, such decisions and recommendations shall be adopted by mutual agreement between the Parties.

In view of the foregoing, the content of this Association Agreement is an example of how the body established in its provisions has, inter alia, the power to take decisions that could entail subsequent agreements in relation to the interpretation and implementation of the treaty, in respect of which those that are not binding — recommendations — must always be taken into account for the purpose of its implementation.

Finally, with regard to this draft conclusion, it is also recommended that the Spanish translation of the phrase "such an agreement need not be legally binding" should be improved in order to clarify the meaning of the text. To that end, it is recommended that the expression "dicho acuerdo *no tiene que* ser legalmente vinculante" be replaced by "dicho acuerdo *no requiere* ser legalmente vinculante".

Netherlands

[Original: English]

On the other hand, concerning the second paragraph of draft conclusion 10 [9], we are not sure whether the statement that an "agreement" for the purpose 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.

[See also comment above under general comments]

United Kingdom

[Original: English]

Subparagraph 1 articulates a key element of the Special Rapporteur's findings: that subsequent agreements need not be legally binding.

The United Kingdom respectfully suggests that this central principle might be brought out earlier in the conclusions. One option is to introduce the general principle in conclusion 4, paragraph 1, as set out above.

Subparagraph 2 discusses the number of parties that must engage in practice, and the significance of silence.

The United Kingdom respectfully suggests that the word "manifestly" be included before the phrase "call for some reaction". The aim of this proposed amendment is to avoid subsequent practice from arising by inadvertence. The risk of

subsequent practice arising by inadvertence without the addition of the word "manifestly" is a concern of the United Kingdom.

[See also comment above on draft conclusion 4]

United States

[Original: English]

The United States believes that the text of paragraph 1 of draft conclusion 10 [9] and at least two paragraphs of the commentary are incorrect and should be revised.

First, paragraph 1 of the draft conclusion and paragraph (8) of the commentary erroneously indicate that an agreement under article 31, paragraph 3 (a) and (b), requires a common understanding regarding the interpretation of a treaty that the parties are aware of and accept. Paragraph (8) of the commentary offers the explanation that "it is not sufficient that the positions of the parties regarding the interpretation of the treaty happen to overlap, the parties must also be aware of and accept that these positions are common". Although these statements are correct with regard to subsequent agreements under Vienna Convention article 31 (3) (a), they are not correct with respect to subsequent practice under subparagraph (b). Rather, the parties' parallel practice in implementing a treaty, even if not known to each other, may evidence a common understanding or agreement of the parties regarding the treaty's meaning and fall within the scope of Vienna Convention article 31 (3) (b). Indeed, we believe that that is one of the primary differences between a subsequent agreement and subsequent practice, i.e., subsequent practice "establishes" (to use the term in Vienna Convention article 31 (3) (b)) the agreement of the parties; the Vienna Convention does not require that the agreement exist independently.

Further, the International Court of Justice's judgment in the *Kasikili/Sedudu Island* case does not support the language of paragraph 8. Rather than indicating that — for the purposes of Vienna Convention article 31 (3) (b) — the two parties had to be aware of their common interpretation, as suggested in the commentary, the passages cited simply require that both parties have engaged in subsequent practice evidencing their interpretation of the treaty.[12]

For the foregoing reasons, the United States believes that paragraph l of draft conclusion 10 [9] should be revised to read:

> 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.

Similarly, paragraph (8) of the commentary should either be deleted or edited to read:

> (8) For an agreement under article 31, paragraph 3, subparagraph (a), it is not sufficient that the positions of the parties regarding the interpretation of the treaty happen to overlap, the parties must also be aware of and accept that these positions are common. ~~Thus, in the *Kasikili/Sedudu Island* case, the International Court of Justice required that, for practice to fall under article 31, paragraph 3 (b), the "authorities were fully aware of and accepted this as a confirmation of the Treaty boundary".~~ Indeed, only the awareness and acceptance of the position of the other parties regarding the interpretation of a

[12] The commentary's quotation from paragraph 74 of the judgment is incomplete. It should read: "*the Bechuanaland* authorities were fully aware of and accepted this as a confirmation of the Treaty boundary" (emphasis added). It is not a reference to both parties' authorities.

treaty justifies the characterization of an agreement under article 31, paragraph 3 (a) ~~or (b)~~, as an "authentic" means of interpretation. ~~In certain circumstances, the awareness and acceptance of the position of the other party or parties may be assumed, particularly in the case of treaties that are implemented at the national level.~~[13] (footnote omitted)

Second, the last sentence of paragraph (4) of the commentary, regarding treaties "characterized by considerations of humanity or other general community interests", should be deleted because there is no basis in the rules of treaty interpretation described in the Vienna Convention (whether applied as conventional or customary international law) for interpreting such treaties differently from any other treaty; nor would it be clear in all instances which treaties would fall within such a category. The draft commentary does not provide any legal support for the proposition set forth in that sentence.

In addition, the United States questions whether there is sufficient practice and authority to support the conclusions in paragraph (25) of the commentary to draft conclusion 10 [9] and believes it should be deleted if it cannot be better supported.

Part Four
Specific aspects

11. Draft conclusion 11 [10] — Decisions adopted within the framework of a Conference of States Parties

Belarus

[Original: Russian]

As a general comment with respect to part four of the draft conclusions, we would emphasize the exclusive role that States and their practice play in the interpretation of international treaties. In this regard, the practice of international courts and tribunals is significant only to the extent that they are acting within the powers granted to them by States. As for academic, quasi-judicial and expert treaty bodies and non-governmental organizations, their work could provide useful information to facilitate the identification and analysis of the practice of States.

Czech Republic

[Original: English]

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

Netherlands

[Original: English]

In its draft conclusion 11 [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

[13] We believe that the last sentence should be deleted as it is unclear and not likely to arise in the context of a subsequent agreement under article 31 (3) (a) of the Vienna Convention.

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.

Furthermore, draft conclusion 11 [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 10 [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 11 [10].

Spain

[See comment below on draft conclusion 12 [11]]

United States

[Original: English]

With respect to draft conclusion 11 [10], we are concerned that the draft conclusion and commentary may be understood to mean that the work of Conferences of States Parties commonly involves acts that may constitute subsequent agreements or subsequent practice in the interpretation of a treaty. Subject to the terms of the treaty at issue, it is possible that a Conference of States Parties may produce a decision that constitutes a subsequent agreement of the parties regarding the interpretation of a treaty provision, if such a decision clearly reflects the agreement of all the treaty's parties (and not just those present at the Conference), or that the parties may engage in actions within the Conference of States Parties that constitute subsequent practice within the meaning of article 31 (3) (b). However, those results are by far the rare exception, not the rule, with regard to the activities of Conferences of States Parties. Therefore, the general language of draft conclusion 11 [10] should be modified to indicate that these results are neither widespread nor easily demonstrated.

This potential for misunderstanding may be addressed by clarifying the second sentence and inserting a new third sentence in paragraph 2 of the draft conclusion, so that the paragraph 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~~ In certain, limited 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 usually do not have such effects. However, d~~D~~ecisions adopted within the framework of a Conference of States Parties often provide a non-exclusive range of practical options for implementing the treaty.

In addition, paragraph 3 of draft conclusion 11 [10] may be particularly difficult for a reader to understand due to the placement of "including by consensus" at the end of the sentence. We understand from paragraphs (30) and (31) of the commentary that the phrase was added to make clear that a decision by consensus is not necessarily sufficient for a decision to constitute an agreement under article 31 (3) of the Vienna Convention. We agree with that view. However, the placement of the phrase

"including by consensus" does not make that point. The commentary on draft conclusion 11 [10] may also be confusing in that it cites a number of examples of consensus decisions before clarifying in paragraphs (30) and (31) that consensus is not necessarily sufficient. As such, either those examples should be deleted or an explanation should be added regarding how the examples are consistent with the recognition that consensus is not necessarily sufficient for a decision to constitute an agreement under article 31 (3).

In addition, the words "in substance" should be rephrased in paragraph 3 of the draft conclusion to avoid suggesting that something less than the full agreement of the parties is required. Such an implication would be inconsistent with other draft conclusions (see, e.g., draft conclusion 4) and article 31 of the Vienna Convention, which do not use the phrase "in substance" or otherwise suggest that a relaxed notion of agreement is sufficient. The United States understands that what is intended by the phrase, based on paragraph (30) of the commentary, is "on the substantive matter". Therefore, that language might be used instead.

For the foregoing reasons, we believe that paragraph 3 of draft conclusion 11 [10] should be reworded to read:

> 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~~ only if it expresses agreement ~~in substance~~ between the parties on the substantive matter regarding the interpretation of a treaty.~~, regardless of t~~The form and the procedure by which the decision was adopted, including where adoption is by consensus, must result in the agreement of all of the parties.

Parallel edits would need to be made to the commentary.

12. Draft conclusion 12 [11] — Constituent instruments of international organizations

Belarus

[Original: Russian]

All rules that apply generally to international treaties also fully apply to treaties that are the constituent instruments of international organizations (draft conclusion 12 [11]). It is our understanding, however, that such instruments and their interpretation are unique, owing to the relatively more regularized and formalized way that the States parties thereto interact. Other entities, such as the secretariat and other permanent bodies within the international organization, also have some effect on this practice.

We share the view that, while the practice of an international organization (draft conclusion 12 [11], paragraphs 2 and 3) may contribute to the interpretation of its constituent instrument, for purposes of interpretation, such practice cannot replace the practice of States, which should not be pitted against an international organization they had established and oversee. Consequently, the practice of an international organization should be taken into account for purposes of interpretation only when it is carried out by States in the representative organs of the international organization, including in bodies with limited membership, and when it has the support of the overwhelming majority of members. Here, it is worth making clear that unlawful practice (first and foremost, in the case in which the organization's bodies overstep their mandates), naturally, does not create law, including for purposes of interpretation (*ex injuria jus non oritur*).

It would be helpful to set out what distinguishes the practice of international organizations more clearly in draft conclusion 12 [11], rather than in the commentary thereto.

[See also comment above on draft conclusion 11 [10]]

Czech Republic

[Original: English]

We agree with the main premise of this conclusion, namely that the provisions of article 31, paragraph 3 (a) and (b), as well as article 32 of the Vienna Convention apply also to interpretation of any treaty that is the 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 a distinction between the practice of parties, on the one hand, and the practice of an international organization, on the other hand, does not provide any guidance on how to draw the line between them. The commentary provides some examples containing elements that should still be explored and eventually included in additional paragraphs of this conclusion, in order to make it useful for practice.

Germany

[See comment below on draft conclusion 13 [12]]

Spain

[Original: Spanish]

For Spain, this draft conclusion would be clearer if it specified that the subsequent agreements, subsequent practice and other subsequent practice referred to in paragraphs 1 and 2 concern, more specifically, the agreements and practice of States parties to the constituent treaty of the international organization, either that of all of them (they would then come under article 31, paragraph 3, of the 1969 Vienna Convention), or that of one or more of them (they would fall within the ambit of article 32 of the Convention). It is true that draft conclusion 4 already defined the expressions "subsequent agreement", "subsequent practice" and "other subsequent practice", indicating the parties concerned, but given that in the case of constituent treaties of international organizations the States parties are considered States members of the organization, a reference to the subsequent agreement and subsequent practice "of the member States" or one or more of them could be included. This would help highlight how these paragraphs differ from paragraph 3, whose object is not the subsequent practice of States, but the subsequent practice of the international organization as such.

Secondly, as article 32 of the Vienna Convention does not refer to practice of any kind, it does not seem appropriate, at least in the Spanish version, to use the phrase "*en el sentido del artículo 32*" (in the sense of article 32). Instead, it could be referred to as having interpretative value "*en virtud del artículo 32*" (under article 32), or as being a supplementary means of interpretation "*en el sentido del artículo*" (in the sense of article 32). This comment also applies to both paragraph 2 of draft conclusion 11 [10] and paragraph 2 of draft conclusion 13 [12], which both use the impugned phrase.

We believe that the intent of paragraph 2 should be better worded to, inter alia, distinguish it more clearly from that of paragraph 3. In our view, the phrase "may

arise from, or be expressed in, the practice of an international organization in the application of its constituent instrument", in reference to subsequent agreements and subsequent practice, is not sufficiently clear. Once again, it may well be that the problem is only in the Spanish version. Moreover, the commentary to this provision points in two different directions: on the one hand, the examples given allude to the subsequent agreements and subsequent practice of member States or States parties which are reflected in the practice of an international organization; on the other hand, in paragraph (15) of the commentary, the Commission explains the reference to the fact that the agreements and practice may "arise from" or "be expressed in" the practice of an organization by stating that "subsequent agreements and subsequent practice of States parties may 'arise from' their reactions to the practice of an international organization in the application of a constituent instrument. Alternatively, subsequent agreements and subsequent practice of States parties […] may be 'expressed in' the practice of an international organization in the application of a constituent instrument". Seen in that light, the practice of an organization might trigger an agreement or a practice of States, either to react to it or to acknowledge it. However, the rest of the commentary does not point in this direction; as we indicated above; it refers instead to the fact that the agreement or practice of States may be articulated, contained or reflected, as the case may be, in the practice of an international organization. It would be important to clarify to what the paragraph refers to, to ensure that the wording of the paragraph and its accompanying commentary fully achieve their purpose.

United States

[Original: English]

The United States agrees with paragraph 1 of draft conclusion 12 [11]. However, the United States has a number of concerns regarding other aspects of the draft conclusion. Our first concern is with regard to paragraph 2.

The United States agrees that the practice of an international organization may trigger practice by the parties to a treaty that constitutes subsequent practice for the purposes of article 31 (3) or that the parties to the treaty may potentially act within an international organization in a way that constitutes subsequent practice. International organizations may also report on the subsequent practice of the parties. However, we believe it is important to recognize that it is only the practice of the parties to a treaty that constitutes subsequent practice within the meaning of article 31 (3) (b) and that paragraph 2 (including its reference to the "practice" of an international organization) should not be understood to suggest a broader role for the practice of an international organization.

Second, the United States remains very concerned regarding paragraph 3 of draft conclusion 12 [11]. The draft commentary explains that the purpose of this provision is to address the role of the practice of an international organization "as such" in the interpretation of the instrument by which it was created. In other words, it refers, not to the practice of the parties to the treaty creating the international organization, but to the conduct of the international organization itself (see paragraph (26) of the commentary). In citing articles 31, paragraph 1, and 32 of the Vienna Convention, the Commission recognized that the practice of that international organization is not "subsequent practice" for the purposes of the rule reflected in article 31 (3) (b). We believe that that conclusion is correct because the international organization itself is not a party to the constituent instrument and its practice as such, therefore, cannot contribute to establishing the agreement of the parties.

However, in light of the inapplicability of article 31 (3) (b), the draft conclusion states instead that consideration of the international organization's practice is

appropriate under paragraph 1 of article 31 as well as article 32 of the Vienna Convention.

Paragraph 1 of article 31 is not relevant in this context and, therefore, reference to it should be deleted. Paragraph 1 reads: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given the terms of the treaty in their context and in light of its object and purpose." The factors to be considered pursuant to article 31, paragraph 1 — "ordinary meaning," "context," and "object and purpose" — do not encompass consideration of subsequent practice regardless of whether the actor is a party or the international organization. The draft commentary fails to explain how article 31, paragraph 1, can properly be interpreted in this way, consistent with the Vienna Convention itself. Indeed, it provides no support for this proposition; the decisions cited do not even appear to mention article 31, paragraph 1. Indeed, there may even be a risk that such "practice", if located along with "text" in article 31, paragraph 1, might be viewed as superior to "subsequent practice" identified in article 31, paragraph 3, an outcome that is clearly not intended.

The United States accepts that article 32 of the Vienna Convention, in certain circumstances, may provide a basis for considering the practice of an international organization with respect to the treaty by which it was created, particularly where the parties to the treaty are aware of and have endorsed the practice. As such, we can support the retention of this reference. Of course, under article 32, recourse may only be had to supplementary means of interpretation 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 leaves the meaning ambiguous or obscure, or leads to a result that is manifestly absurd or unreasonable. The practice of the international organization would be on par with the *travaux* of the treaty in this regard. We believe that the circumstances in which the practice of the international organization may fall within article 32, however, would need to be better explained in the commentary.

Paragraph 3 of draft conclusion 12 [11] should, therefore, be amended to read:

> 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.

13. Draft conclusion 13 [12] — Pronouncements of expert treaty bodies

Belarus

[Original: Russian]

With regard to draft conclusion 13 [12], we are of the view that the collective position of the parties to a treaty and, in some cases, their individual positions, are crucial for its interpretation. In that connection, we greatly appreciate the precision of the wording used in the draft conclusion. The fact that documents issued by treaty bodies are referenced in resolutions, including those adopted by consensus, does not mean that States agree with the contents of those documents. In general, such references are for informational purposes and do not pass judgment on the documents referenced. Silence by States cannot be interpreted as constituting agreement with the conclusions of the treaty bodies. A clear distinction should be made, in the context of this draft conclusion, between the practice of States (including with respect to treaty bodies) and documents issued by treaty bodies, which are generally prepared for a specific situation and are not appropriate for purposes of interpretation of an international treaty. Only States parties apply and therefore interpret international treaties.

[See also the comment above on draft conclusion 11 [10]]

Czech Republic

[Original: English]

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.

Germany

[Original: English]

Germany would like to emphasize the importance of further exploring the role of treaty bodies with regard to the interpretation of international treaties. As can be seen by the extensive work on this topic and the draft conclusion adopted, the Commission is duly aware of the importance and the complexity of the issue. Draft conclusion 13 [12], paragraph 3, states that the "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". While thereby acknowledging that the pronouncements of treaty bodies may initiate or make reference to subsequent agreements or practice by the parties, the Commission refrains from giving further guidance on the question of how the pronouncements themselves can contribute to interpretation, possibly as subsequent practice under article 32 of the Vienna Convention. Rather, it states in draft conclusion 13 [12], paragraph 4, that draft conclusion 13 [12], paragraph 3, shall be "without prejudice to the contribution that a pronouncement of an expert treaty body may otherwise make to the interpretation of a treaty". The need for addressing this issue arises, however, from the following consideration:

The fact that interpretative weight should be given to pronouncements of expert treaty bodies has not only been recognized by international jurisprudence, but these pronouncements already assist international jurisprudence as well as domestic courts, which are less likely to be confronted with the interpretation of an international treaty on a regular basis, in the application of international treaties. So, while the pronouncements of expert treaty bodies already play a role in the interpretation of their respective treaties exceeding the scope of draft conclusion 13 [12], paragraph 3, it remains unclear how these pronouncements fit into the "single combined operation" of treaty interpretation in accordance with articles 31 and 32 of the Vienna Convention. As these pronouncements can, however, neither be subsumed under article 31, paragraph 2, nor article 31, paragraph 3, of the Vienna Convention, the question arises whether they can — as Germany would support — constitute practice as a supplementary means of interpretation under article 32 of the Vienna Convention and thereby contribute to the clarification of the meaning of a treaty as envisaged in draft conclusion 7, paragraph 2. Moreover, the topic of subsequent practice is not limited to States parties' practice, as draft conclusion 12 [11] illustrates, which in

paragraph 3 positively states that the practice of an international organization itself "may contribute" to the interpretation of its constituent instrument.

Germany therefore not only welcomes the possibility, described by the Commission, that the definition of "other subsequent practice" in draft conclusions 2 [1] and 4 could be revisited in order to "clarify whether the practice of an international organization as such should be classified within this category which, so far, is limited to the practice of parties" (A/71/10, footnote 957 to paragraph (32) of the commentary to draft conclusion 12 [11]), but also encourages the Commission to actively address the role of expert treaty bodies in its reconsideration.

Spain

[Original: Spanish]

Spain considers that the use of the word "pronouncements" is correct. It is a generic term that covers instruments in which these expert bodies express their views, regardless of their specific characterization.

Conversely, the phrase "experts serving in their personal capacity" used in the definition in paragraph 1 may not be that appropriate. It would be preferable to refer to "independent experts".

As for paragraph 3, we understand that the draft conclusion refers to situations in which a pronouncement of these experts gives rise to a subsequent agreement or subsequent practice by parties to a treaty. However, we do not understand why it contemplates situations in which a pronouncement of the experts refers to a subsequent agreement or subsequent practice by said parties. What contribution would the expert body make in such case? What matters is the subsequent agreement already concluded by the parties or the subsequent practice which they follow. Moreover, the commentary to the draft conclusion does not provide any example of such situation.

[See also comment above on draft conclusion 12 [11]]

Sweden (on behalf of the Nordic countries)

[Original: English]

The Nordic countries have commented on several occasions on the issue of pronouncements by expert treaty bodies, which has been included in draft conclusion 13 [12].

It is the view of the Nordic countries that general comments and views expressed in individual cases by treaty bodies consisting of independent experts are of importance for States' implementation and interpretation of international conventions at a national level. However, such comments and views are not legally binding and should not have as a purpose the amendment of a treaty. They can only be regarded as means of interpretation and their legal weight will depend on their content, quality and legally persuasive character.

The Nordic countries have expressed that the work of the United Nations human rights treaty bodies contributes to the understanding, implementation and development of international human rights law — not only through their jurisprudence, following consideration of many individual complaints and communications, but also through adopting general comments and recommendations interpreting treaty provisions.

It is the view of the Nordic countries that a pronouncement of an expert treaty body cannot, in and of itself, constitute subsequent practice that establishes the

agreement of the parties regarding the interpretation of the treaty. We do not exclude that in certain cases a pronouncement of a treaty body regarding the interpretation of a treaty may give rise to, or refer to, a subsequent agreement or subsequent practice by the parties themselves. This, however, requires that it is established that all parties have accepted a particular pronouncement of an expert treaty body as a proper interpretation of the treaty. Such agreement cannot be inferred from silence.

United Kingdom

[Original: English]

Subparagraph 3 discusses the effect of pronouncements of expert treaty bodies as regards subsequent agreements and subsequent practice.

The United Kingdom considers that it might be helpful to expand on subparagraph 3 to make clear that the effect of a pronouncement of an expert treaty body depends on the interpretative impact that is permitted or provided for by a particular treaty.

The United Kingdom further considers that it might assist if:

(a) Appropriate wording were added to the first sentence of subparagraph 3, to reflect the fact that States may reach subsequent agreements on the effect of the pronouncement of an expert treaty body;

(b) The second sentence of subparagraph 3 were slightly amended so that the word "accepting" is replaced with "neither shall it indicate acceptance of". The United Kingdom considers that this amendment will assist in making the effect of silence totally clear.

United States

[Original: English]

The United States also recognizes that the work of expert treaty bodies, like that of the international organizations addressed in draft conclusion 12 [11], "may give rise to, or refer to" a subsequent agreement or subsequent practice by parties to the treaty within the scope of article 31, paragraph 3 (see paragraph 3 of the draft conclusion). However, we believe that this is not a frequent occurrence or easily demonstrated. Moreover, as with draft conclusion 12 [11], it is important that it be understood that it is only the practice of the parties in the application of a treaty that constitutes subsequent practice within the meaning of article 31 (3) (b). Paragraph (9) of the commentary appropriately emphasizes this important point, stating "[a] pronouncement of an expert treaty body cannot as such constitute subsequent practice under article 31, paragraph 3 (b), since this provision requires a subsequent practice of the parties that establishes their agreement regarding the interpretation of the treaty". The reference in paragraph 3 to the possibility that a statement of an expert treaty body may "give rise to, or refer to" subsequent practice by the parties should not be understood to suggest a broader role for expert treaty bodies, and it is on that understanding that we support that aspect of paragraph 3 to the draft conclusion.

However, three clarifying edits are required to the text of draft conclusion 13 [12]. First, draft conclusion 13 [12] is titled and refers throughout to "pronouncements" of expert treaty bodies. The United States believes that the term "pronouncements" carries with it an inappropriate implication of authority. We believe that a more neutral term, like "views" or "statements," should be used instead.

Second, we believe that the reference to the "rules" of a treaty in paragraph 2 is likely to be confusing and believe "terms" should be used instead.

Third, the important, clarifying language from paragraph (9) of the commentary, quoted above, should be broadened and included as a new paragraph 2*bis* to the draft conclusion.

With these changes, draft conclusion 13 [12] would read:

~~Pronouncements~~ Views 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~~ the views of an expert treaty body for the interpretation of a treaty is subject to the applicable ~~rules~~ terms of the treaty.

2*bis*. The views of an expert treaty body cannot as such constitute a subsequent agreement or subsequent practice under article 31, paragraph 3, because that provision requires that the parties agree or engage in practice that establishes their agreement regarding the interpretation of their treaty.

3. ~~A pronouncement~~ The views 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~~ the views of an expert treaty body.

4. This draft conclusion is without prejudice to the contribution that ~~a pronouncement~~ the views of an expert treaty body may otherwise make to the interpretation of a treaty.

With respect to the commentary on this draft conclusion, the United States believes that the examples in paragraphs (13)–(15) should be deleted. In none of the examples has it been demonstrated either that the views of the expert treaty bodies refer to a subsequent agreement of or subsequent practice by the parties to the treaty at issue or that those parties adopted the views of the expert treaty body as their interpretation of their treaty obligations. Therefore, the examples are misleading. The same is true of the examples in footnote 1022. It is not surprising that the Commission has not identified stronger examples of views of expert treaty bodies catalysing or referring to subsequent agreements or subsequent practice of the parties to a treaty, as we do not believe it is a common occurrence, as recognized in part in footnote 1026.