PERMANENT MISSION OF GREECE TO THE UNITED NATIONS
866 SECOND AVENUE · NEW YORK, NY 10017-2905
Tel: 212-888-6900 Fax: 212-888-4440
e-mail: grdel.un@mfa.gr

www.mfa.gr/un

68TH SESSION OF THE UNITED NATIONS GENERAL ASSEMBLY

Sixth Committee

Agenda Item 81

Report of the International Law Commission on the work of its sixty-third and sixty-fifth sessions

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

Chapter V: Immunity of State officials from foreign criminal jurisdiction

---

Statement by
Maria Telalian
Legal Adviser, Head of the Legal Department,
Ministry of Foreign Affairs

NEW YORK
Monday, October 29, 2013

Check against delivery

At the outset I wish to thank the chairman of the International Law Commission for his concise introduction yesterday to the work of the ILC during its sixty-fifth Session. We also express our appreciation to the Commission for the high quality of its work in addressing and developing important legal issues.

I will now address the following two topics at the ILC agenda: a) Subsequent agreements and subsequent practice in relation to the interpretation of treaties and b) Immunity of State officials from foreign criminal jurisdiction.

Chapter IV: Subsequent agreements and subsequent practice in relation to the interpretation of treaties.

Greece welcomes the change to the format of the work on this topic and the appointment of Mr. Nolte as Special Rapporteur and wishes to express its gratitude to the Special Rapporteur for his first Report on the basis of which the Commission prepared the first set of five draft conclusions, with commentaries thereto, that are currently under consideration.

As a general remark, Greece would like to underline that it fully supports the decision of the ILC to take as a point of departure and a basis for its examination of this topic the 1969 Vienna Convention on the Law of Treaties and, in particular, its Articles 31 and 32, which are generally considered to reflect customary international law, as well as the previous work undertaken by the Commission on the law of treaties, including relevant excerpts of its Reports to the General Assembly and of the Reports submitted by the Special Rapporteurs regarding the rules on treaty interpretation. Those texts constitute, in our view, an important source not only for understanding how the rules on treaty interpretation were drafted but also for identifying possible lacunae in the existing rules embodied in the Convention that were deliberately left open and could require further analysis and clarification. The role of subsequent agreements and subsequent practice in relation to the interpretation of treaties is indeed one of those issues that need to be explored in this context.

In view of the above, Greece considers that the text of draft conclusion 1 is a valuable reaffirmation of existing rules on treaty interpretation which should underpin and guide the overall work of the Commission on this topic. As stated in the commentary, "Article 31 of the Vienna Convention, as a whole, is *the* general rule of treaty interpretation", which, taken together with Article 32, provides "an integrated framework for the interpretation of treaties".

Within this framework, subsequent agreements and subsequent practice meeting the criteria of Article 31, paragraph 3, of the Vienna Convention form an "integral part of the general rule of treaty interpretation", i.e. they are put on the same footing as other primary means of treaty interpretation which, unlike the supplementary means referred to in Article 32, not only may, but must be taken into account in the process of interpretation.

Therefore, as has been stated by the Commission in its 1966 Report to the General Assembly[1], it was only logic which suggested that the elements in paragraph 3 of

[1] *Yearbook of the ILC*, 1966, vol. II, p. 220, paragraph (9).

Article 31 "should follow and not precede the elements in the [two] previous paragraphs. The logical consideration which suggested this was that these elements were extrinsic to the text. All of these elements however are of an obligatory character and by their very nature could not be considered to be norms of interpretation in any way inferior to those which precede them".

Accordingly, it is not clear why the Commission, in its current Report, seems to draw a distinction between the term "authentic means of interpretation" which it uses in draft conclusion 2, "in order to describe the not necessarily conclusive, but to a more or less authoritative character of subsequent agreements and subsequent practice, under Article 31 (3) (a) and (b)", and the term "authentic interpretation" which is "often understood to mean a necessarily conclusive, or binding, agreement between the parties regarding the interpretation of a treaty" (see in particular paragraphs 4 to 7 of the commentary to draft conclusion 2).

In our view, the proposed criterion for the above distinction is not an operative one. If the parties to a treaty may collectively agree to modify or terminate it, they may, *a fortiori*, interpret it by means of a subsequent agreement regarding its interpretation or the application of its provisions and such interpretative agreement between them should necessarily have a binding effect. From that point of view, interpretative agreements that meet all the criteria of Article 31 (3) (a) should represent an authentic interpretation binding upon the parties. The same applies with regard to subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation. Therefore, the binding effect of such means of authentic interpretation derives from the legal nature of the agreement itself, whereas the subsequent practice, under Article 31 (3) (b), seems to be nothing more than the factual proof of the interpretative agreement of the parties.

For the same reason, with regard to the definition of subsequent agreement as an authentic means of interpretation, in paragraph 1 of draft conclusion 4, we share the view expressed by the Commission that the use of the term "agreement" instead of "treaty", in Article 31 (3) (a) of the Vienna Convention, is intended to signify that, for the purposes of treaty interpretation, there are no requirements with regard to the form of the agreement to be taken into account, provided however that it is a legally binding agreement governed by international law[2]. In other words, there is not, in our view, sufficient ground for suggesting that a subsequent agreement under Article 31 (3) (a) "is not necessarily binding" (see paragraph 6 of the commentary to draft conclusion 4). Moreover, the assumption contained therein may give rise to misleading conclusions with regard to other provisions of the Vienna Convention. In Article 39, for instance, which contains the general rule regarding the amendment of treaties, the term "agreement" is similarly used to indicate that there are no requirements with regard to the form of the agreement, whether written or not. There is, however, no doubt that for an instrument to be qualified as an "agreement" under this provision, it must be, not only politically or morally, but legally binding. To this regard it should be pointed out that the difficulties in the application of such informal agreements, in particular the verbal ones, should not however affect their validity. The same applies in respect of constitutional requirements regarding the entry into force of

[2] U. Linderfalk, *On the Interpretation of Treaties*, Springer, 2007, p. 162.

international agreements that may in some instances function as a barrier in the modification of a treaty by an informal agreement.

Furthermore, with regard to the two remaining paragraphs of draft conclusion 4, which define subsequent practice, on the one hand, as an authentic means of interpretation and, on the other hand, as a supplementary means of interpretation, we would like to underline that we strongly support the distinction proposed by the Commission since, as stated above, only subsequent practice which meets all the criteria contained in Article 31 (3) (a) qualifies as means of authentic interpretation which must be taken into account in the process of interpretation. This distinction is particularly useful not only for reasons of terminology but also for practical reasons since it follows from jurisprudence that international courts and tribunals do not always sufficiently explore the elements of subsequent practice in treaty interpretation and, thus, tend to give it a more or less subsidiary role of a confirmative nature.

On the other hand, regarding draft conclusion 3, which addresses the "role that subsequent agreement and subsequent practice may play in the context of the more general question of whether the meaning of a term of a treaty is capable of evolving over time", we would like to express some doubts as to the appropriateness to include this conclusion in the text of this very first set of draft conclusions which are general in nature. Trying to identify the "presumed intention" of the parties upon the conclusion of the treaty by applying the various means of interpretation recognized in Articles 31 and 32 may result to misleading conclusions. In our view it would be artificial to say that it was the initial intention of the parties to give a term used in the treaty, even a generic one, an evolving meaning whereas such an evolution is usually linked to further developments in international law in general which the parties had not envisaged at the time of the conclusion of the treaty.

Moreover, the text of draft conclusion 3 only partially addresses the question at hand because one should also explore the possibility that it is not the meaning of a given term but rather the intention of the parties itself that may evolve over time. We therefore suggest that the Commission should, at a later stage of its work on this topic, be encouraged to examine whether subsequent agreements or subsequent practice, under Article 31 (3) (a) and (b), may result in a departure from the original intent of the parties, as stated by the ICJ in its Judgment on *Dispute regarding Navigational and Related Rights* (Costa Rica v. Nicaragua, 2009, see paragraph 12 of the commentary to draft conclusion 3). In the same vein, the Commission should also be encouraged to examine the little explored question of whether and under which circumstances such a departure from the original intent of the parties, on the basis of a subsequent interpretative agreement or of subsequent practice establishing the agreement of the parties to a treaty regarding its interpretation could amount to an informal modification of the treaty. In this respect, it should be recalled that the Commission, within its previous work on the law of treaties, had suggested draft Article 38 on the modification of treaties by subsequent practice which was however set aside by the majority of States represented at the Diplomatic Conference convened in Vienna.

Finally, on draft conclusion 5, which addresses the question of the attribution of subsequent practice, we consider that paragraph 1 thereof as well as the clarifications contained in the commentary, are particularly useful, because as stated therein, it is

also subsequent practice attributable to the parties to a treaty that can be taken into account for the purpose of interpretation. Therefore, we consider that reference to other conduct, including by non-State actors, which is made in the text of the draft conclusion itself does not fit therein and would be better placed in the commentary which deals with other relevant forms of conduct, such as social conduct which is not attributable to the parties.

Chapter V: Immunity of State officials from foreign criminal jurisdiction.

Greece would like to warmly thank the Special Rapporteur Mrs. Concepcion Escobar Hernandez for her second Report on immunity for State officials, which further analyses and develops the scope of the topic, the concepts of immunity and jurisdiction and all the various aspects of immunity ratione personae. We are pleased to see that the report takes into account the discussions both within the Commission and the Sixth Committee in 2012 as well as new developments over the past year and, in particular, international and national jurisprudence. We also thank the International Law Commission for the provisional adoption of three articles which basically reflect the substance of the six draft articles proposed by the Rapporteur.

Mr. Chairman,

Greece attaches great importance to the topic of immunity for State officials and we had the opportunity in the past to comment extensively on previous reports. At this point I would like to make some comments on the draft articles provisionally adopted by the Commission:

Draft article one, indicates in a concise and clear manner that scope of application of the Draft Articles which relate only to immunity from foreign criminal jurisdiction. In this respect my delegation concurs with the Commission in its remarks regarding the strictly procedural nature of this immunity, which does not however relieve a foreign official who enjoys such immunity from his or her individual criminal responsibility under the substantive rules of criminal law. The same conclusion was drawn by the International Court of Justice in the *Arrest Warrant* case.

Paragraph one of draft article one also makes it clear that immunities enjoyed by an official before international criminal tribunals, which are subject to their own legal regime, are not covered, and rightly so, by the scope of the draft articles. The text is further improved by the drafting amendment made by the Commission and, in particular, by the deletion of the phrase «without prejudice to the provisions of Article 2».

Paragraph 2 of draft article one makes clear, through a ''without prejudice clause'', that the articles do not affect the immunity from criminal jurisdiction enjoyed under special rules of international law, in particular by persons connected with diplomatic missions, consular posts, special missions, international organizations and military forces of a State. It is important however to further clarify that this list of special immunity regimes is not exclusive and in that regard we wonder if the clarifications made in the commentary regarding the use of ''in particular'' would suffice.

On draft article three, which deals with ''Persons enjoying immunity ratione personae'': My delegations had the opportunity to express its views on this important issue last year when we supported the idea that immunity ratione personae should be accorded, at maximum, to Head of State, Head of Government and the Minister of Foreign Affairs. We concur with the Commission that the enjoyment of immunity by the above three categories of State officials is justified on representational and functional considerations and that there are sufficient grounds in State practice and in international law to support this. As to whether other high ranking officials should also enjoy immunity ratione personae from foreign criminal jurisdiction we fully agree with those delegations that are against the expansion of such immunity to such other high officials. Besides, as the Raporteur and the Commission rightly emphasize, state practice in this regard is neither widespread nor consistent or conclusive so as to justify extending the immunity ratione personae to include senior State officials other than the troika. We agree however with the Commission that this is without prejudice to the rules pertaining to immunity ratione materiae.

Lastly, we support the use of the words ''*from the exercise of*'' in draft article three as this formulation better illustrates the procedural nature of the immunity and the relationship between immunity and foreign criminal jurisdiction.

Mr. Chairman, in relation to the issue of possible exceptions to immunity which as the Rapporteur has indicated will be explored by her in her subsequent reports my delegation would like once again to express its position in respect of immunity for the most serious crimes of international concern such as genocide, crimes against humanity and serious war crimes. We firmly believe that in the face of such crimes immunity should be set aside and the draft articles should properly reflect current trends in international law. The ILC should not miss this opportunity to further explore this issue in its future deliberations taking into account important international treaties and jurisprudence in this field to identify the precise contours of an exception to immunity in respect of international crimes.

Thank you Mr. Chairman