B E L A R U S

Seventy-third session of the United Nations General Assembly

Agenda item 82 "Report of the International Law Commission on the work of its seventieth session

Cluster I

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

Distinguished Chairperson!

Allow me first to congratulate the Commission, Professor Nolte and all of us on conclusion of the work on the topic of Subsequent agreements and subsequent practice in relation to the interpretation of treaties. We are particularly satisfied with clear boundaries between existing rules, codified by the draft conclusions, and elements of progressive development of international law, reflected in the commentaries.

We would like to share certain observations which we intend to be guided by in the application of the conclusions.

Regarding paragraph 19 of the commentary to the conclusion 2 we assume that one State's behavior cannot create an agreement: this requires acceptance of such behavior by at least one other State. We consider this to be a key distinction between subsequent agreement and subsequent practice. Agreement, unlike practice, position, attitude or approach, is premised on acceptance of one State's practice by other States. Unilateral acts become agreements only following acceptance by other States. Otherwise unilateral acts should be viewed as subsequent practice. As comment 33 to conclusion 4 aptly notes, one State's position does not create international law.

As far as commentaries 18, 19, 27, 28, 29, 30 to conclusion 4 are concerned, we proceed from the presumption that national legislation and its implementation are neither agreement, nor subsequent practice in application of a treaty. The later fall within the ambit of international relations, while the former relate to internal affairs. Only actions or omissions of State as a subject of international relations, and not actions of government agencies in internal affairs, are relevant for interpretation or application of a treaty. In this regard we are supportive of NAFTA Arbitral Panel conclusions, referred to in paragraph 19 of the comment to conclusion 4.

Relating to commentary 2 to conclusion 5 our understanding is that manifest misuse of a treaty by one State, and reaction to such misapplication by other States should not be confused with interpretation of a treaty by subsequent practice of a State, met with tacit consent of another State.

With regard to commentaries 5, 6 and 7 to conclusion 5 we stress that the practice of competent State bodies is relevant for interpretation purposes only as long as such body is acting on behalf of a State. If a higher organ establishes that the competent body was not authorized to act on State's behalf, its practice loses significance for interpretation purposes.

As far as commentaries 13-16 to conclusion 5 are concerned, we note the secondary nature of decisions, reports and other documentation of international organizations. Their value for identification of subsequent practice and agreements of States depend on accuracy of information, measure to exclude unsubstantiated, selective or hasty generalizations.

Our reading of commentaries 18 through 20 to this conclusion is based on the understanding that State practice comprises actions or inaction, attributed to a State in international relations. For "social changes" to be regarded as State practice, they must be articulated as State position in international relations. In case where "social changes" lead to changes in national legislation or its application, we should be referring to implementation measures taken by a State under a treaty.

Regarding commentaries 14, 15, 16, 17, 18, 22 to conclusion 6 we recall that a treaty can only be applied in international relations; it can't be directly applicable to internal relations. States take measure to implement their obligations under a treaty, by *inter alia* transformation of international norms into acts of national legislation.

The same observations relate to commentaries 33 and 34 to conclusion 7, commentaries 13-17, 19 and 20 to conclusion 8, and commentaries 3-5 to conclusion 9, which elaborate not on subsequent agreements and subsequent practice of States, but rather on internationalized private relations under scrutiny by ICTY, ECHR, Human Rights Committee, investment arbitrations or national courts.

On conclusion 7 our delegation supports the presumption against intent of Parties to modify a treaty by subsequent practice, put forth by the Commission. In our understanding such practice can lead to "parallel" formation of the rule of customary international law, which in certain conditions (acceptance by all Parties) would *de facto* replace certain parts of a treaty. Such acceptance, though, should be ascertained in every specific case.

Concerning commentary 14 to conclusion 7, we are of opinion that the question whether the purpose of the rule limits the discretion of State in its application should be answered in positive. We support this approach and assume that the purpose of a rule is one of key elements of its interpretation and, therefore, of establishing its precise content.

Commentaries 32-34 to conclusion 11 bring an example of a decision which in our opinion can be hardly seen as consensual, given manifest objection of one State.

Concerning paragraph 1 of conclusion 1 it should be noted, that nowadays it's not an easy task to clearly distinguish between the conference of Parties and an organ of an organization. The most vivid example here is the General Assembly of the United Nations, which under Article 7 of the UN Charter is one of the main bodies of the UN, while under Article 10 is competent to discuss any matter under the Charter. In our view, it would be more expedient to focus on criteria of "conference of Parties" for interpretation purposes. Most pertinent criteria are, in our understanding, the plenary nature of the meeting and clear reference to relevant mandate in a treaty concerned.

In paragraph 3 of conclusion 11 we deem it useful to distinguish between two categories of decisions of international organization. The first should encompass decisions, the procedure of adoption of which is irrelevant for interpretation purposes. The second category should include decisions, whose form and procedure of adoption should be considered for interpretation purposes. Thus, we have difficulties agreeing with the statement that the positions of States voting against a decision adopted by majority vote are not relevant. The only exception could be a scenario whereby the treaty itself explicitly provides for its interpretation by non-consensual decisions. In such scenario the "objector" has explicitly agreed to majority interpretation in advance. This conclusion is supported by commentary 38 to this conclusion which, for legal certainty, would be better placed in conclusion itself, and by commentary 25 to conclusion 12.

We understand that paragraph 2 of conclusion 12 relates to application of a constituent instrument of an international organization by the Member States and – within established mandates and procedures – by the organs of the organization. Comments 12, 32 and especially 36 to conclusion 12 support such understanding.

Regarding conclusion 13 and commentaries thereto we proceed from the presumption that neither resolutions and other documents, nor oral pronouncements of the bodies, comprised of experts acting in their personal capacities, represent subsequent agreements or subsequent practice by States for interpretation purposes. Only the positions taken by States regarding such

documents/pronouncements are relevant for interpretation. The only exception would be the direct explicit reference in a treaty to the right of expert treaty bodies to interpret such a treaty.

Furthermore, as far as conclusion 13 is concerned, we remain to be convinced of "added value" of its paragraph 4, the gist of which is adequately reflected in paragraphs 1 to 3. We assume that decisions of treaty bodies are auxiliary means for identification and systematization of State practice, while, as confirmed by commentary 25, only decisions taken within treaty bodies' mandates have any significance.

Identification of customary international law

Distinguished Chairperson!

Our delegation congratulates the Commission and Special Rapporteur, Sir Michael Wood, on concluding the work on identification of customary international law. We also highly commend the tremendous work of our colleagues from the UN Secretariat, which resulted in a memorandum on ways and means for making the evidence of customary international law more readily available.

In our practical application of the document prepared by the Commission we intend to be guided by the following.

At the outset I would like to note that our delegation highly values and supports the research by the Commission of fundamental elements of normative system of modern international law. Unlike work on specific branches of international law, this activity contributes to codification and progressive development of international law as a holistic system.

Having said that, we proceed from the presumption that "healthy conservatism" is the only valid method of work in this area. This work should be based on analysis of "representative sample" of State practice and *bona fide* approach towards discerning existing trends. Both scholarly writings and jurisprudence of international tribunals can play useful auxiliary role, yet "auxiliary" the accent here is on the word "auxiliary". Against this background we share the cautious approach of the Commission regarding "theories, not accepted by States or in jurisprudence" as rightly noted in commentary to conclusion 2.

Commentary 5 to conclusion 3 correctly notes the general principle, according to which actions or inactions of State bodies should be assessed on a case-by-case basis. Decisions of courts or ministries subsequently quashed by supreme courts or governments should not be seen as illustrative of State actions. This is the question of attribution of acts and omissions to a State. We support the conclusion that State practice in accordance with the rule, which contradicts State's interests or entails costs for that State, can prove that the rule is regarded not as a right of that State, but as a legal obligation.

Commentary 8 to conclusion 4 correctly notes that actions by persons, who are not subjects of international law, can neither create nor apply international customary (as well as conventional) law. These actions fall within the ambit of internal affairs. Nevertheless, the reaction of States towards actions by private persons can create international law, including customary.

Our reading of commentary 3 to conclusion 5 is based on understanding that international law does not govern relations between a State and a private person.

Concerning commentary 6 to conclusion 6 and commentaries 6 and 7 to conclusion 13 our assumption is that national courts do not apply international law as such. Norms of international law can be transformed into national legislation; hence they become norms of internal, not international law. This barely relates to expertise of judges, who can be well qualified in international law, but rather to the nature of disputes adjudicated by national courts. Such disputes are internal within a State, not interstate.

The same approach should be taken towards international criminal tribunals, international human rights courts, and international investment arbitrations. These institutions adjudicate private, not intergovernmental cases, even if one of the parties to the dispute is a State. Thus, as far as commentary 4 to conclusion 13 is concerned, we note that decisions of such institutions concern internal affairs. Therefore, they are irrelevant for identification of customary international law.

We share the Commission's opinion in commentary 9 to conclusion 8 (regarding "specially affected States") that from strictly legal perspective there is no such thing as "instant custom". Widely cited examples of launches of space objects by the USSR and the USA at the dawn of "space age" do not take into account the fact that both during launch and re-entry the objects were moving in the atmosphere either above the launching State (USSR) or above the high seas (USA).

Subparagraph c) of paragraph 1 of conclusion 11 should be read together with conclusion 6 on subsequent agreements and subsequent practice in relation to the interpretation of treaties. It would seem prudent to ensure compatibility with previous conclusions by making it clear that this subparagraph is concerned with practice of States, which are not parties to a treaty.

Regarding paragraph 2 of conclusion 15 we remain of the opinion that the language proposed ("The objection must be … maintained persistently") places a disproportionate burden on persistent objector and is at odds with consensual nature of international law. It is unclear what should be the form, periodicity and means of bringing the continuing objection to the attention of international community. Once the objection is made known to the interested parties in a clear and unequivocal way, it should only be reiterated if the circumstances so reasonably require (e.g. reference to alleged formation of customary rule in bilateral diplomatic correspondence or in the draft resolution of international organizations). In this context we draw attention to paragraph 9 of the

commentary to conclusion 15. Like the Commission, we assume that once an objection is made, it remains valid until manifestly and openly withdrawn.

Conclusion 16 could benefit from an indicative list of criteria of “relevant” (interested) States. Certain effort to that effect has been made in paragraph 5 of the commentary.