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Report of the International Law Commission on the work of its sixty-ninth sessions
Cluster I

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

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

Mr. Chairman,

Let me first of all express our deep appreciation to the International Law Commission for the completion of its work on the topic of "Subsequent agreements and subsequent practice in relation to the interpretation of treaties".

The adoption, on second reading, of a full set of 13 draft conclusions, together with commentaries thereto, marks the conclusion of the study undertaken by the Commission on this topic over the last ten years.

We therefore take this opportunity to congratulate and express its gratitude to the Special Rapporteur, Mr. Georg Nolte, for his tireless efforts throughout these years as well as for the high qualify of his reports, including his fifth report which was presented at the current session of the Commission and which ably addressed the comments and observations received from States.

In our view the final outcome of the Commission's work on this topic significantly contributes to the codification and progressive development of international law, as it is based on the existing rules on treaty interpretation, as codified in the 1969 Vienna Convention on the Law of Treaties, while duly taking into account recent developments in this field in the case-law and State practice.

In particular, we consider that the Commission rightfully situates subsequent agreements and subsequent practice within the framework of articles 31 and 32 of the 1969 Vienna Convention on the law of treaties and builds upon its previous work in this field, including the 1966 Commentary on the draft articles on the law of treaties. The unity and continuity of the work of the Commission is, in our view, important in light of the mandate entrusted to it and we happy to see that the draft conclusions precisely aim at complementing and clarifying the meaning of the existing provisions of the 1969 Vienna Convention.

At the same time, the Commission, when borrowing language from its previous work in other fields, such as, in particular, the law on responsibility of States for international wrongful acts, should be cautious with respect to the use of concepts which have been developed for the purpose of that body of law and might be limited in scope.

We further share the Commission's understanding of the process of treaty interpretation as a single combined operation which should place, in good faith, appropriate emphasis on the various means of interpretation indicated in articles 31 and 32 of the 1969 Vienna Convention. As emphasized in the commentary, depending on the treaty or the treaty provisions concerned, the interpreter needs to identify the relevance of the different means of interpretation and give them appropriate weight in relation to each other in order to arrive at a proper interpretation.

Turning now to the possible effects of subsequent agreements and subsequent practice on the interpretation of treaties, we welcome the establishment of a presumption in favor of the interpretation, as well as the reaffirmation by the Commission that the possibility of amending or modifying a treaty by means of the subsequent practice of the parties has not been generally recognized. This conclusion, while being firmly based on the jurisprudence of international courts and tribunals, especially since the adoption of the 1969 Vienna Convention, is also important for the overall purpose of preserving the stability of the treaty relations, in particular with respect to certain categories of treaties, such as the boundary treaties, to which special rules may apply (cf. article 62 of the 1969 Vienna Convention which provides that a fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from such treaties).

In the same vein, we consider that caution should also be taken, when addressing the legal significance of the silence or inaction in the face of a subsequent practice of a party to a treaty. It is recognised in the commentary that, in cases involving treaties delimiting a boundary, there appears to be a strong presumption that silence or inaction does not constitute acceptance of a practice. Therefore, concluding that silence on the part of one or more parties may constitute acceptance of the subsequent practice, when the circumstances call for some action, might be more ambitious than what the relevant case-law seems to support. We would

therefore have preferred a different formulation of the relevant conclusion, i.e. providing that the mere silence or inaction does not constitute acceptance unless it is clear that the circumstances of the case call for some action.

With these concluding remarks, we would like to underline the high quality of the commentaries which are, in our view, a valuable source of additional information that will significantly contribute to the clarification and better understanding of the current state of law in relation to treaty interpretation, as they rely on a thorough research and analysis of relevant case-law and State practice.

We, therefore, welcome the final outcome of the Commission's work on the topic of "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" and hope that it will be duly relied on by all States, international courts and tribunals, as well as other appropriate actors, when seeking guidance and assistance in relation to the interpretation of international treaties.

Chapter V: Identification of customary international law

Mr. Chairman,

Greece welcomes the adoption by the International Law Commission on second reading of a set of 16 conclusions with commentaries thereto on this topic and I take this opportunity to congratulate the Special Rapporteur, Sir Michael Wood, for the high quality of his five reports which allowed the successful completion of the work of the ILC on this very important and complex matter.

I wish today to make a few comments on some of the above conclusions and commentaries as adopted by the Commission.

First, we particularly welcome, in paragraph 3 of the commentary to conclusion 3, the ILC's clarification that in some cases certain forms of practice or evidence of acceptance as law may be of particular significance. This in our view adds the necessary flexibility to the application of the two elements approach.

Paragraph 3 of conclusion 4 strikes the right balance on the delicate issue of the contribution of non-state actors to the identification of customary international law. In fact, in cases of international law rules whose addressees are also non-State actors, one cannot easily argue that the behavior of the addressees of those norms is irrelevant for the formation of customary international law. In such cases, the non-State actor's abidance by some rules and principles, if accepted by the community of Sates as reflecting the law, may constitute a practice which may be taken into account for the formation of a customary international law rule, even if it cannot be equated with State practice.

Regarding conclusion 15 on the persistent objector, as was stated by our delegation on previous occasions, the rule's applicability is in our view questionable not only in relation to the rules *of jus cogens*, a matter already reserved in paragraph 3 of conclusion 15, but also in relation to the broader category of the general principles of international law which seem to apply to all members of the community of States irrespective of their consent to be bound by them. We believe that the specific character of the general principles of international law justifies their exclusion from the scope of application of the persistent objector rule. It would be rather strange to support that a State would not be bound by rules having a fundamental character for the international community and it seems that even the decisions of international courts provide no evidence of such an extended application of the persistent objector rule.

In view of the above, the ILC's commentary to conclusion 15 should have addressed this matter, as one can hardly imagine how a State could qualify as a persistent objector to uncontested general principles of international law such as the right of innocent passage, the objective legal personality of international organizations or the principle of sustainable development, even if those rules do not qualify as *jus cogens* rules.

In addition, paragraph 3 (fn. 777) of the commentary to conclusion 15, while recognizing that the "ability to effectively preserve a persistent objector status overtime may sometimes prove difficult", does not put into question the applicability of the persistent objector rule over time. In our view, the ILC should have elaborated more on this temporal aspect of the

rule as there seem to be no eternal or decades lasting precedents of persistent objector to an established customary international law rule dating far back in time.

Turning to conclusion 16 on particular customary international law, as indicated in previous interventions, we welcome the clarification in paragraph 7 of the commentary to conclusion 16 that "the application of the two-element approach is stricter in the case of rules of particular customary law", in the sense that a concurring practice and acceptance as law by *all* the States involved is required. However, the ILC could also have distinguished between novel particular customs, whose scope of application refers to State behavior not already regulated by specific rules of international law and derogatory particular customs, the latter derogating from a general rule of customary international law, by requiring a stricter standard of proof in the latter case.

In conclusion, we once again express our appreciation for the work of the ILC and the Special Rapporteur on this topic and for the high quality of the conclusions and commentaries thereto, which shall provide valuable guidance to courts, governments, intergovernmental organizations, practitioners and academia in one of the most theoretical matters ever put in the Commission's agenda.

Chapter XIII: Other Decisions

Mr. Chairman,

Let me know turn to the question of the future work of the ILC and in particular the decision of the Commission to consider the topic "Sea level rise in relation to International law".

Greece wishes to express some concerns as regards the selection of this topic by the Commission.

Although some parts of international law relating to climate change have developed to the point of approaching the stage of codification, we do not think that this topic is one of them.

Despite the seriousness and the adverse effects of sea level rise, it is questionable whether this phenomenon could usefully offer itself, at the present time, to codification. In particular, we wish to express our concern on the way the ILC applies at the present case the sound

criterion of "emerging State practice", which is considered by it critical for the selection of new topics.

Although the concerns of many states about the rise of sea level are very real and legitimate we wonder what is this State practice with regard to the legal implications of the above phenomenon which is still in the process of developing and evolving continuously . A few sparse examples would not by any means constitute a conclusive body of established practices. For the ILC to include a topic in its agenda, the need for the provision of relevant regulatory guidance should go hand in hand with a minimum threshold of available state practice which would allow the Commission, to associate, according to its mandate, progressive development with codification. Failing this, the Commission risks to embark upon an exercise of a prevailing *lege ferenda* character. The above as well as the fact that ILA deals with this topic should advocate for a period of waiting before a body such as the ILC would eventually take it up.

For the above reasons we have some doubts about the feasibility of the topic at the present time, while not putting into doubt the factual consequences and legal implications of sea level rise. Should however States decide, during this session, to entrust to the ILC the study of this topic the Commission should preserve the integrity of the UNCLOS which sets out the legal framework within which all activities in the oceans and seas should be carried out. Moreover, in such a case the outcome of the ILC's work should safeguard the entitlements to maritime zones, the stability of maritime boundaries as well as of relevant treaties.

Notwithstanding the above it should be noted that in the syllabus there are references to speculative scenarios such as "possible transfers of sovereignty", "mergers", etc. We are afraid that if the ILC were to initiate a discussion on the above scenarios would go beyond its fundamental role and mandate.

In conclusion, we feel that this topic is not yet ripe to be taken by the Commission. It could be taken up however sometime in the future when further developments and in particular the accumulation of some State practice might allow for its meaningful regulation as well as the elaboration of useful norms.

Mr. Chairman,

At this point allow me to pay tribute on behalf of my country to the ILC for its outstanding role and achievements from its very beginning, in the promotion of the "progressive development of international law and its codification". The Commission's work had had a considerable impact not only on the development of international law, but also on peaceful international relations among states by providing legal certainty. We are aware of the new challenges facing the Commission today and we commend it for having adapted so far its work to these challenges. The Commission should however be more cautious in identifying its future priorities by focussing on existing topics of its agenda rather than expanding its work to new areas and new items which may not fit in its mandate. We stand ready to support the ILC in its future endeavours.

I thank you Mr. Chairman