

**Comments from the United States
On the International Law Commission's Draft Conclusions on
Subsequent Agreements and Subsequent Practice in relation
To the Interpretation of Treaties
As Adopted by the Commission in 2016 on First Reading**

General Observations

The United States appreciates the opportunity to provide written comments on the International Law Commission's Draft Conclusions on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties, and accompanying commentaries, which were adopted on first reading in 2016. The United States recognizes and greatly appreciates the efforts of the Commission, and in particular its Special Rapporteur, Georg Nolte, on this important topic.

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 ILC 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 U.S. 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.

Approach

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 ILC topic 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" or "VCLT"), i.e., what do Articles 31(3)(a) and (b) and 32 mean? Secondly, 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.

Draft Conclusion 3 (Subsequent agreements and subsequent practice as authentic means of interpretation), commentary paragraphs 4–7, and paragraph 24 of the commentary to Draft Conclusion 7

The United States appreciates the Commission’s effort in paragraphs 4-7 of the commentary to Draft Conclusion 3 to distinguish between (1) 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 (2) 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 VCLT. 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 the 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.

Draft Conclusion 4 (Definition of subsequent agreement and subsequent practice), commentary paragraphs 8-11

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, paragraphs 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 *CCFT 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 parties can be identified as such, in a common act...” (emphasis added). Yet the *CCFT* tribunal neither uses the terms “form” and “common act” nor suggests that they are what distinguishes

subsequent agreements and subsequent practice.¹ 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 U.S. pleadings) might have been sufficient for it to conclude that a subsequent agreement had been reached.²

Further, even if the *CCFT* 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, 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.

Draft Conclusion 4 (Definition of subsequent agreement and subsequent practice), commentary paragraph 20

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

¹ *C.C.F.T. v. United States*, UNCITRAL Arbitration under NAFTA Chapter Eleven, Award on Jurisdiction, January 28, 2008 (CCFT Award), paras. 184-189.

² CCFT Award, para. 187.

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) ...;
- (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.

Draft Conclusion 5 (Attribution of subsequent practice)

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 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).³ 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.⁴

Further, language similar to the attribution language in Draft Conclusion 5 was removed -- properly in the U.S. view -- from the Draft Conclusions on the Identification of Customary International Law.⁵ We believe that the two sets of Draft Conclusions should be consistent.

The United States, therefore, believes that Draft Conclusion 5 should be edited as follows:

Conclusion 5

Attribution of subsequent practice

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 ICRC's proposed interpretation 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 practice of non-party States, their conduct may be relevant to the interpretation of the treaty.

³ *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, p. 1045, at p. 1095, para. 75.

⁴ *Id.*, para. 74.

⁵ Compare the text of draft Conclusion 5 as adopted by the Commission on first reading, Report of the International Law Commission, 68th Session (2016), 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 in the Identification of Customary International Law, International Law Commission, Sixty-sixth session (2014)(A/CN.4/672).

However, we believe that paragraphs 12 to 18 of the commentary need to be reworked to avoid suggesting that non-parties and their practice has 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, the 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 the 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 of the Movement does not have the legal effect of authorizing the 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.⁶ Thus, we recommend the commentary be revised to reflect that this example prompted criticism by States, including descriptions of contrary State practice.

Conclusion 6 (Identification of subsequent agreements and subsequent practice), Paragraphs 15-18 of the commentary

We appreciate the discussion of Article 118 of the Third Geneva Convention 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 POW 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’s study on Customary International Humanitarian Law. The actual manual being cited is a U.S. Department of the Army Field Manual last issued in 1976, and the effect of that manual must be considered in light of changes to U.S. law and Department of Defense procedures since that time. Moreover, the provision of that manual being cited is based

⁶ See, e.g., Stephen Pomper, *Toward a Limited Consensus on the Loss of Civilian Immunity in Non-International Armed Conflict: Making Progress through Practice*, 88 *International Law Studies* 181, 186 (2012).

on Article 109 of the Third Geneva Convention, not Article 118. The misinterpretation of U.S. 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 the ICRC regards as U.S. practice. The United States has indicated significant concerns with the methodology used in the ICRC's study, including its use of military manuals.⁷

We recommend citing the U.S. 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 intermediary other than the ICRC could be used and supports the interpretation offered by the United Kingdom.

Draft Conclusion 8 (Interpretation of treaty terms as capable of evolving over time)

The United States believes that Draft Conclusion 8 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 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 VCLT, its negotiating history, State practice, or tribunals’ interpretations of the VCLT.

Therefore, we believe that the Draft Conclusion should be revised as follows:

Conclusion 8

Interpretation of treaty terms as capable of evolving over time

Subsequent agreements and subsequent practice under articles 31 and 32 may assist in determining whether ~~or not the presumed intention of the parties upon the conclusion of the treaty was to give 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.⁸

⁷ 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*, Volume 89, number 866, June 2007, pp. 444-46.

⁸ See, e.g., paragraph 27 of the commentary to Draft Conclusion 7.

Draft Conclusion 10 (Agreement of the parties regarding the interpretation of a treaty), paragraphs 4 and 10 of the commentary

The United States believes that the text of paragraph 1 of Draft Conclusion 10 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 indicates 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.⁹

For the foregoing reasons, the United States believes that paragraph 1 of Draft Conclusion 10 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~~

⁹ 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.

~~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 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.¹⁰ (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 and believes it should be deleted if it cannot be better supported.

Draft Conclusion 11 (Decisions adopted within the framework of a Conference of States Parties)

With respect to Draft Conclusion 11, we are concerned that the Draft Conclusion and commentary may be understood to mean that the work of Conferences of States Parties (COPs) 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 COP 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 COP), or that the parties may engage in actions within the COP 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 COPs. Therefore, the general language of Draft Conclusion 11 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

¹⁰ We believe that the last sentence should be deleted as unclear and not likely to arise in the context of a subsequent agreement under VCLT Article 31(3)(a).

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,~~ dDecisions 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 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 VCLT Article 31(3). We agree with that view. However, the placement of the phrase “including by consensus” does not make that point. The commentary on Draft Conclusion 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 VCLT 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 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~~ 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.

Draft Conclusion 12 (Constituent instruments of international organizations)

The United States agrees with paragraph 1 of Draft Conclusion 12, which states:

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

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, which reads:

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

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, which states that the “[p]ractice 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.”

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(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(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(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(1). Indeed, there may even be a risk that such "practice," if located along with "text" in Article 31(1), might be viewed as superior to "subsequent practice" identified in Article 31(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 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 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.

Draft Conclusion 13 (Pronouncements of expert treaty bodies)

The United States also recognizes that the work of expert treaty bodies, like that of the international organizations addressed in Draft Conclusion 12, "may give rise to, or refer to" a subsequent agreement or subsequent practice by parties to the treaty within the scope of Article 31(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, 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. First, Draft Conclusion 13 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 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 *2bis* to the Draft Conclusion.

With these changes, Draft Conclusion 13 would read:

Conclusion 13 [12]

~~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.
2bis. 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 catalyzing 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.

Conclusion

The United States appreciates the opportunity to have our views considered, and we hope that these written comments are helpful to the Commission and its Special Rapporteur as these Draft Conclusions continue to be developed and refined. We look forward to continued engagement with the Commission to help address remaining issues before the Draft Conclusions and commentary are finally adopted.