

Comments of the Law Commission on the paragraphs 25, 26, 27 and 28 of the Chapter III of the Report of the International Law Commission (ILC) on the work of its sixty-second session entitled “Specific issues on which comments would be of particular interest to the Commission”

Please find below the comments of the Law Commission on the paragraphs 25, 26, 27 and 28 of the Chapter III of the Report of the International Law Commission (ILC) on the work of its sixty-second session entitled “Specific issues on which comments would be of particular interest to the Commission”. However, we think the United Nations Wing (Treaty Section) of Bangladesh Ministry of Foreign Affairs is in a better position to provide examples of “subsequent agreements” or “subsequent practice”, as requested by the ILC in paragraph 27 of the above Chapter, which Bangladesh considers relevant in the interpretation and application of its treaties.

International Law Commission since its inception in 1948 has been making great contributions towards the codification and progressive development of international law. Its works in drafting several international conventions including the Geneva Convention on the Law of the Sea, Vienna Conventions on diplomatic and consular relations, Vienna Conventions on the Law of Treaties, are its commendable achievements. The Commission’s endeavours are continuing not only in further codification of international law, but also in its study, observation, appreciation, understanding and evaluation of the emerging norms of international law and practices, as are so manifest in the proceedings of its annual sessions and reports presented before the international community.

Reservation is one of the thorny issues of the Law of Treaties. Although the conditions and consequences of reservation have been fairly well laid down in the Conventions of 1969 and 1986, many things have remained ambiguous, as subsequent developments have so demonstrated. This especially relates to reactions and objections of the other parties to the impermissible and invalid reservations. The ILC has rightly taken up the issue to shed light on these and other problems primarily based on the state intention and practices.

The draft guidelines presented in the 62nd Session of the ILC are hugely useful to better understand the provisions of the Conventions on reservation. Guidelines on the effects of an established reservation (Section 4.2) are logical and based on the actual state practices and understanding. It should not be difficult for any party to follow these guidelines to apply the relevant provisions of the Conventions.

The effects of an invalid reservation are more problematic. The Convention provisions are not very clear on this. Therefore, ILC draft guidelines are more useful for understanding the impact and consequences of the invalid reservations. The guidelines have been drafted on serious research and analysis of numerous state practices and views of authoritative individuals and institutions. It is quite understandable and acceptable that the main thrust of the guidelines is not towards excluding the reservation making parties from treaty relations but to limit the

relations. This position is closer to the views and approaches of the overwhelming majority of the states.

The provision for reservation promotes the goal of maximum participation of the states in the multi-lateral treaties. However, this must not undermine the very object and essence of any treaty. While the decision to make reservation rests with the reservation making state, other states' reactions and responses are immensely significant for establishment of treaty relations with the reserving states, this being especially important in the cases of impermissible and invalid reservation and any special mention about reservation in the text of the treaty. The draft guidelines of the ILC are based on the rational understanding of the spirit and idea of the provisions on reservations in the Conventions. To follow these guidelines would mean to promote better realisation of the objectives of the treaties and healthy treaty relations.

Another area on which the ILC is working is the interpretation of treaties. The Study Group formed for the purpose has particularly focused on the significance of the subsequent agreements and the subsequent practices of the parties as a means of the interpretation and application of treaties which have long term perspective to continue to operate i.e. Treaties over time. This relates to Article 31(3) (a) & (b) of the 1969 Vienna Convention.

Three Articles on the interpretation of treaties in the Convention contain all the necessary ingredients and guidelines for the interpretation. To make out the intention of the parties is the central point of the provisions on interpretation in the Convention. However, this intention is presumed to be reflected in the text of the treaty. This is also ought to be conditioned by the objective of the treaty as well as by the context and the circumstances under which the treaty was signed.

It has been rightly noted that treaties are not dry parchments, but living instruments. So, to realise the spirit, essence, contents and goals of a treaty, it would need to be so interpreted as to respond to acts, events, developments, both legal and factual, that may take place over time. While treaty interpretation must satisfy the requirements of the stability of the treaty and the treaty relations amongst the parties, actual situations during the application of the treaty provisions must be taken into consideration, if the primary intention and objective of the treaty is to be more appropriately fulfilled.

Appreciation of the new developments is not mere subjective evaluation of any individual state but objective realities borne by the subsequent agreements and the subsequent practices of the states. Only the subsequent practices of the states would indicate the nature and the genuineness of the new legal or factual developments which would need to be taken into consideration for true interpretation of the treaty to achieve the expected results of its application.

However, it is not easy for any institution or individual to measure the outcome of the totality of the state practices over any period of time. ILC can legitimately claim to be one such institution which has the potentials, resources, experiences and urge to do the work objectively. Works of the Study Group already indicate that it is in the right track. Conclusions of the ILC, in whatever form, suggestions or recommendations or guidelines, would be of immense value to the state parties to use subsequent

agreements and subsequent practices for true interpretation of the treaties for their effective and fruitful application.

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