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Summary record of the 3208th meeting

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

Extract from the Yearbook of the International Law Commission:-
2014, **vol. I**

3208th MEETING

Wednesday, 21 May 2014, at 10 a.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Subsequent agreements and subsequent practice in relation to the interpretation of treaties (*continued*) (A/CN.4/666, Part II, sect. A, A/CN.4/671, A/CN.4/L.833)

[Agenda item 6]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the second report of the Special Rapporteur on the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties (A/CN.4/671).

2. Mr. GÓMEZ ROBLEDO, referring to draft conclusion 6, said that an unduly sharp distinction must not be made between subsequent agreements and subsequent practice, since the two concepts were not completely distinct. In fact, it was clear from article 31, paragraph 3 (*b*), of the 1969 Vienna Convention, which identified relevant practice as "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation", that those concepts were closely linked. Placing them in genuinely distinct categories might actually make it more difficult to determine the relevance of practice in the interpretation of a treaty. Rather, such a determination should focus on whether practice reflected a pre-existing agreement on the manner in which a treaty should be interpreted, or clarified other reasons which accounted for a particular interpretation. Analytical efforts should centre on determining the forms that practice must take for it to be considered relevant for the purposes of the interpretation of a treaty.

3. With regard to draft conclusion 9, he agreed that subsequent agreements need not take a particular form nor be binding under international law, since the 1969 Vienna Convention contained no requirement to that effect. Whether there was tacit agreement in certain cases was often difficult to determine, and the appropriate criterion should be that used by the International Court of Justice in the *Kasikili/Sedudu Island (Botswana/Namibia)* case, namely evidence of awareness and acceptance of the agreement by the parties.

4. Chapter V of the second report, on decisions adopted by conferences of States parties, offered truly promising material for analysis. Like the Special Rapporteur, he thought that the legal effect of such decisions depended on both their content and their form. Consensus was a necessary but not a sufficient element in determining whether such decisions were subsequent agreements for the purposes of interpreting a treaty. However, reaching consensus on the exact meaning of the term "consensus" was no easy matter, since it had been variously understood to mean unanimity, an overwhelming majority and the adoption of a decision without a vote. Fortunately, in its judgment in the case concerning *Whaling in the Antarctic*, the International Court of Justice had at least delineated the way in which consensus differed from unanimity.

5. It would also be pertinent to consider the value of resolutions issued by bodies established under the constituent instruments of international organizations. In particular, the agreements reached on a dynamic and ongoing basis within the United Nations system could shed light on the evolution of a number of provisions of the Charter of the United Nations. Although the International Court of Justice had ruled on the value of those resolutions in various advisory opinions, there was still scope for assessing their usefulness in interpreting the obligations of Member States. The same applied to other international organizations of a universal character.

6. Turning to chapter VI of the second report, on the scope of subsequent agreements and subsequent practice as a means of interpretation, he said he did not agree with all of the reasoning therein. The reasoning began with the decision in the *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua)*, in which the International Court of Justice had held that the subsequent practice of the parties could result in a departure from the original intent of the treaty on the basis of a tacit agreement. But the Court's logic was taken to extreme lengths with the suggestion, in paragraph 117 of the report, that under certain circumstances, a treaty might be modified by the subsequent practice of the parties.

7. In paragraph 165 of his second report, the Special Rapporteur referred to a comment made by the Commission, many years earlier, that the line between interpretation and amendment of a treaty by subsequent practice might be blurred.[101] On the contrary, the line was by no means so tenuous, since the subsequent practice of the parties was merely one of the elements in the general rule of interpretation set out in article 31 of the 1969 Vienna Convention. Moreover, the second report showed that it was only in decisions of arbitral tribunals that a treaty was seen to be susceptible to modification by the practice of parties. The majority of the international courts considered subsequent practice as providing an evolutive interpretation of a treaty.

8. Thus, in contrast to the notion that a treaty could be modified by subsequent practice, a more reasonable approach would be an evolutive interpretation of the obligations of the parties, using the combined application

[101] *Yearbook … 1964*, vol. II, document A/CN.4/167 and Add.1–3, p. 60 (para. (25) of the commentary to article 71 of the draft articles on the law of treaties).

of all the elements of the general rule of interpretation. The operation would involve, not modifying a treaty, but rather clarifying the scope of its application and the substantive scope of its provisions.

9. He recommended that all the draft conclusions be referred to the Drafting Committee.

10. Mr. NIEHAUS said that he supported the proposal made by Mr. Murase at a previous meeting to replace the term "conclusion" with "guideline". The former term referred only to an outcome, while the latter reflected more clearly the nature of the text being prepared by the Special Rapporteur.

11. With regard to draft conclusions 6 and 7, he agreed with the Special Rapporteur and other speakers that they were descriptive rather than prescriptive in nature. As such, they served to clarify and enhance the understanding of the topic.

12. In his opinion, the ambiguity in draft conclusion 6 noted by Mr. Park stemmed from the overly broad term "other considerations", but that ambiguity could be removed by specifying clearly the types of considerations concerned. Although the phrase "concordant, common and consistent" used in draft conclusion 8 was perfectly clear, it would nonetheless be desirable to use a single term encompassing all three characteristics and indicating that subsequent practice must not deviate from the central purpose of the treaty.

13. With regard to draft conclusion 9, which addressed the core requirements for the agreement of the parties on the interpretation of the treaty, he said that in order for silence to be understood as constituting acceptance of subsequent practice, the requisite circumstances, described in paragraph 2 of the draft conclusion, must be present.

14. It was true that a conference of States parties, as defined in the first paragraph of draft conclusion 10, did not include those States attending a conference as members of an organ of an international organization, but the text should be reworded for ease of comprehension. Similarly, in the second paragraph, it should be made explicit that the phrase "applicable rules of procedure" referred to the rules of procedure of the conference.

15. As to draft conclusion 11, he proposed deleting the first paragraph, since it reiterated what was stated in other draft conclusions. The second paragraph should be expanded to give fuller treatment to a complex and contentious subject.

16. He wished to join with other members who had emphasized the importance of referring to the temporal element. The question of the time needed for subsequent agreements or subsequent practice to be consolidated was a fundamental one requiring careful consideration.

17. Lastly, he recommended that all six draft conclusions be referred to the Drafting Committee.

18. Mr. HMOUD said that the Commission should take care not to reinterpret or amend the rules set out in the 1969 Vienna Convention, including the general rule on interpretation. It must remain within the confines of the topic and not deviate from the understanding reached in 2012, when the format of the topic had been changed.[102] Despite the obvious difficulty in distinguishing between the interpretation of treaties and their modification through subsequent practice, it would be counterproductive to address the topic solely from the standpoint of its relationship to the rules on interpretation.

19. He agreed with the premise that a careful factual and legal analysis of the positions of the parties regarding the interpretation of a treaty was necessary. Through their subsequent agreement or subsequent practice, the parties had to create a common position regarding a certain interpretation in order for it to produce legal effects. However, the parties must be aware that the position was held in common in order to fulfil the requirements of article 31, paragraph 3, of the 1969 Vienna Convention.

20. Although draft conclusion 7, paragraph 1, reflected the fact that subsequent agreements and subsequent practice could widen or narrow the interpretation of a term, the text should emphasize that they were means or tools of interpretation that did not override the ordinary meaning of the term.

21. With regard to draft conclusion 8, it should be stressed that subsequent practice under article 31, paragraph 3 (*b*), must establish an agreement between the parties regarding its interpretation, not merely reflect a common understanding. The practice in question had to reach a certain intensity or frequency in order to determine its weight or value. He agreed with the standard set by the WTO Appellate Body for the value of subsequent practice, namely that it should be concordant, common and consistent,[103] so long as it purported to determine the intention of the parties regarding agreement on the interpretation.

22. In draft conclusion 9, the statement that an agreement under article 31, paragraph 3 (*a*) and (*b*), did not need to be binding as such, was worrying. The fact that the United Nations Conference on the Law of Treaties had replaced the expression "understanding" with the word "agreement"[104] meant that such an agreement had to produce legal effects in order to be taken into account as an authentic element of interpretation. He did not see the value of underlining the nature of an agreement under article 31, paragraph 3 (*a*) and (*b*), of the 1969 Vienna Convention, as binding or otherwise: it was likely simply to create confusion for interpreters of treaties. Despite the argument in paragraph 74 of the second report that a disagreement between the parties regarding the interpretation of the treaty would not normally replace the original subsequent agreement, what mattered most was that, in order to constitute an agreement under article 31, paragraph 3, of the 1969 Vienna Convention, the parties to a treaty had

[102] See *Yearbook … 2012*, vol. II (Part Two), p. 77, paras. 226–227.

[103] *Japan—Taxes on Alcoholic Beverages II*, pp. 12 *et seq.*, sect. E.

[104] *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March–24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11, United Nations publication, Sales No.: E.68.V.7), 74th meeting, 16 May 1968, p. 442, para. 29.

not only to have a common understanding of a position regarding the interpretation of the treaty, but also to accept that position. It was that interrelationship between awareness of a position and its acceptance by all the parties that should be emphasized in draft conclusion 9.

23. While acceptance, or more precisely acquiescence, could be deduced from silence in some circumstances, the Commission had to be careful about highlighting that point. A State party might, for political reasons, choose not to object or react to a certain practice by another State party or parties, but that must not be seen as acquiescence to the practice. In order for such silence or lack of reaction to constitute an authentic means of interpretation, it must have been preceded by an awareness of such a practice, an awareness that could not be derived from the mere availability of the relevant information in the public domain. Account also had to be taken of awareness gained by notification through the appropriate official and diplomatic channels.

24. As to draft conclusion 10, he agreed with the proposition in paragraph 94 of the second report that only decisions of conferences of States parties that were intended to produce legal effects were pertinent as subsequent agreements under article 31, paragraph 3 (*a*), of the 1969 Vienna Convention. He likewise agreed that consensus reached in a conference of States parties did not imply unanimity or agreement on substance but was merely a procedural arrangement. In order for such consensus to be considered subsequent agreement under article 31, paragraph 3 (*a*), all the elements of a duly and specifically established agreement needed to be present, including acceptance by the parties of the substance of the interpretation.

25. Lastly, he said that although the line between the modification and evolutive interpretation of a treaty might be blurred, the issue of amendments to treaties fell outside the scope of the present topic and required a separate and thorough study. Despite the inference to the contrary in paragraph 144 and subsequent paragraphs of the second report, an amendment to a treaty by agreement between the parties under article 39 of the 1969 Vienna Convention was a process that required the application of the substantive and formal rules contained in Part II of that Convention. The many examples contained in the Special Rapporteur's second report showed that the issue of the amendment or modification of a treaty by means of subsequent agreements or subsequent practice had not been settled (see paragraphs 117 *et seq.*). The proposal made at the United Nations Conference on the Law of Treaties to allow for the modification of a treaty through subsequent practice had been defeated by an overwhelming majority of votes;[105] it could therefore not be inferred that the Convention was merely silent on the matter. Although draft conclusion 11, paragraph 2, had been referred to as descriptive, it might nevertheless lead to a normative proposition, opening up the prospects of misuse and misinterpretation.

26. He recommended referring the draft conclusions to the Drafting Committee.

27. Responding to a comment by Mr. TLADI about the understanding of the nature of agreement, binding or otherwise, suggested in draft conclusion 9, paragraph 1, he said his point had been that the Commission should not refer explicitly to the binding or otherwise nature of subsequent agreements, because doing so risked creating confusion in terms of the application of the rules of interpretation.

28. Mr. FORTEAU said that the term "agreement" in article 31, paragraph 3 (*a*) and (*b*), of the 1969 Vienna Convention denoted a specific concept under international law that should be distinguished from the non-binding instruments which could be used as means of interpretation under article 32. The Commission was currently divided on the question of how to define the term "interpretative agreement", and a more detailed and in-depth study of that concept was needed.

29. Mr. KAMTO said he agreed with those who felt that the term "agreement", within the meaning of article 31 of the 1969 Vienna Convention, could not be understood in any way other than as binding. Whether it was an interpretative agreement or *a fortiori*, an agreement to modify a treaty, it was inconceivable that it could be considered non-binding. Indeed, nothing could qualify as an agreement unless it was binding, and all the case law cited by the Special Rapporteur in his second report confirmed that point.

30. Mr. SABOIA said that a subsequent agreement regarding the interpretation of a treaty that had the effect of modifying that treaty, and essentially amending it, had to follow the formal rules for amendment laid down in the 1969 Vienna Convention.

31. Mr. HMOUD said that, to the extent that a subsequent agreement regarding the interpretation of a treaty had to produce legal effects in order to be considered an authentic means of interpretation, it constituted a binding agreement.

32. Sir Michael WOOD said that, in a recent work edited by the Special Rapporteur and cited in the second footnote to paragraph 49 of the second report, James Crawford stated that "[i]nternational law says that the parties to a treaty own the treaty and can interpret it".[106] That statement illustrated the importance of the role played by subsequent agreements and subsequent practice as part of the general rule of interpretation. The Commission's work might help to correct the misconception that article 31, paragraph 1, of the 1969 Vienna Convention alone provided the general rule of interpretation.

33. One of the themes emerging from the Commission's work was a focus on the interpretative value of a "common understanding" of the parties in the process of treaty interpretation—a formulation that appeared to reflect a return to earlier language. On the subject of language, he himself still held out hope that he could convince the Special Rapporteur and others that "elements of interpretation" was preferable to "means of interpretation".

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[105] *Yearbook … 1966*, vol. II, draft article 38, p. 236, and *Official Records of the United Nations Conference on the Law of Treaties, First Session …* (A/CONF.39/11) (see previous footnote), 38th meeting, 25 April 1968, p. 215, para. 60.

[106] J. Crawford, "A consensusalist interpretation of article 31(3) of the Vienna Convention on the Law of Treaties", *in* G. Nolte (ed.), *Treaties and Subsequent Practice*, Oxford University Press, 2013, pp. 29–33, at p. 31.

34. As to the discussion on whether the work on the topic should be descriptive or normative, in his view, it should be both. Mr. Tladi had suggested that the Special Rapporteur might be criticized for being too descriptive. However, an essentially descriptive set of draft conclusions would be of interest. The Special Rapporteur had referred to the draft conclusions as "practice pointers"; if they gave direction to interpreters of treaties, then that fact alone made them helpful. The present form of the Commission's outcome—that of draft conclusions—remained an appropriate description of the aim of its work.

35. Another theme emerging from the Commission's work was the need to retain the distinction between the general rule of interpretation in article 31 of the 1969 Vienna Convention and the supplementary means of interpretation in article 32. The two should not simply be dealt with together, as they were in some of the draft conclusions, since the role of practice in article 32 was quite distinct. Sir Michael hoped that the Commission would review and revise paragraph (3) of the commentary to draft conclusion 1, which appeared to suggest that any recourse to preparatory work was limited by preconditions. That seemed to ignore the important distinction made in the Convention between the unqualified use of preparatory work to confirm meaning and its conditional use to determine meaning. It was only the use of supplementary means to determine the meaning of a treaty that was subject to preconditions.

36. On draft conclusion 6, he shared the view of other speakers that an appropriate reference to the application of the provisions of a treaty should be included and that the Commission should not depart from the 1969 Vienna Convention in that respect. Although it had been formulated as guidance for the interpreter, draft conclusion 6 actually seemed to be directed more towards identifying an interpretative nexus between the subsequent agreement or subsequent practice and the treaty. He did not find the expression "assume a position regarding the interpretation" to be particularly clear. Nor did the phrase "or whether they are motivated by other considerations" add much. Instead, it invited a difficult investigation into the motivation of treaty parties; he therefore proposed to delete it. There appeared to be an overlap between draft conclusion 6 and draft conclusion 9, paragraph 3, and it might be preferable to put all the guidance on the identification of relevant subsequent agreements and practice in one place.

37. Draft conclusion 7 might appear to state the obvious, but it was useful and could be improved. Draft conclusion 8 helped to clarify subsequent practice. Sir Michael agreed that a good test for the value of subsequent practice as a means of interpretation was whether it was "concordant, common and consistent", but he would suggest adding the word "clear" to the end of that list.

38. Regarding draft conclusion 9, which provided helpful interpretations of article 31, paragraph 3 (*a*) and (*b*), of the 1969 Vienna Convention, he shared Mr. Hmoud's concern about the phrase "need not … be binding". It seemed to give the wrong emphasis, particularly since the term "binding" was not used in the Convention.

39. Draft conclusion 10 concerned the relevance of the acts of the parties to a treaty, which were distinct from yet similar to the acts of States within international organizations. It might be preferable to move the contents of draft conclusion 10 closer to the draft conclusions on international organizations; Mr. Gómez Robledo had made some interesting remarks in that respect. He endorsed Mr. Murase's comments on draft conclusion 10, comments which could be considered in the Drafting Committee.

40. Regarding draft conclusion 11, he endorsed Mr. Hmoud's words of caution about entering into the field of treaty amendment, but thought that the Special Rapporteur had actually adopted a fairly cautious approach. Nevertheless, the end of paragraph 2 could be refined by the Drafting Committee, and there was an important point of terminology: the second report tended to refer to "modification" of a treaty, yet in the 1969 Vienna Convention, "modification" was carefully distinguished from "amendment". Thus, in the first sentence of paragraph 2, the word "modify" should be replaced with "amend". In conclusion, he agreed that all the draft conclusions should be referred to the Drafting Committee.

41. Mr. VÁZQUEZ-BERMÚDEZ said that, as Mr. Murase had rightly observed, the temporal factor was important for the interpretation of treaties. Efforts to establish the intention of the parties formed part of the initial stage, covering the period from the negotiations on the treaty until its adoption. At that stage, the important elements for interpretation were the preparatory work and the circumstances in which the treaty was concluded. At the subsequent stage, following the adoption and entry into force of the treaty, the important elements for interpretation were subsequent agreements on its interpretation and application and subsequent practice on its application, establishing the agreement of the parties regarding the interpretation. He shared the concerns of Mr. Murphy and Ms. Escobar Hernández, among others, as to how the Special Rapporteur had dealt with the two distinct concepts of interpretation and application of the treaty. In the draft conclusions and corresponding analyses, those two concepts should be kept separate, as they were in article 31, paragraph 3 (*a*) and (*b*), of the 1969 Vienna Convention.

42. As far as multilateral treaties were concerned, in some cases, conferences of States parties had adopted guidelines explicitly described as to be used for the implementation of the treaty, while in other cases, it had been stipulated that the guidelines must not be understood as interpreting a treaty, their aim being to facilitate its implementation by giving practical guidance. The case mentioned by the Special Rapporteur in paragraphs 157 and 158 of his second report had, in his own view, been an agreement regarding the implementation of the Convention: its purpose had not been to determine or clarify the meaning of the instrument's provisions.

43. Referring to the statement in paragraph 78 of the second report that a conference of States parties was a meeting of States parties pursuant to a treaty for the purpose of reviewing or implementing the treaty, he observed that the establishment of a conference of States parties, or any other intergovernmental body, did not have to be expressly provided for in a treaty; States parties

themselves could decide on such matters. For example, many years after the adoption of the 1970 Convention on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property, the States parties had decided, in 2002, to establish the Meeting of States Parties[107] and had then adopted, in 2012, its Rules of Procedure.[108]

44. He agreed with the Special Rapporteur that as the owners of the treaty, States parties could reach agreement regarding its interpretation and that the agreement need not necessarily be reached on the basis of consensus.

45. Mr. Hmoud had mentioned the Commission's proposal, rejected by the United Nations Conference on the Law of Treaties, to include a provision in the 1969 Vienna Convention allowing for the modification of treaties by subsequent practice. However, practice and case law gave very little justification for asserting that such a procedure now formed part of customary law. He himself was of the opinion that the matter did not fall within the scope of the topic under consideration and required separate and thorough analysis.

46. He shared the Special Rapporteur's view that the weight that subsequent agreement should be given within the interpretative process, which was a single combined operation, depended on all the elements in the process and on the specific case at hand.

47. The CHAIRPERSON, speaking as a member of the Commission, said that the steady growth in the number of treaties in a wide variety of spheres accounted for a renewed interest in the interpretation of treaties. He endorsed the comments made about the rather general nature of the draft conclusions, which gave rise to concern about the implications for their implementation in practice. The outcome of work on the topic should be a set of clear guidelines for the professionals who were constantly dealing with the interpretation and application of international treaties.

48. Regarding the text of the draft conclusions and the reasoning behind them, he endorsed the approach proposed by the Special Rapporteur in draft conclusion 6, but was not entirely convinced of the "value added" of a separate draft conclusion. After all, article 31, paragraph 3 (*a*) and (*b*), of the 1969 Vienna Convention could be applied only to those subsequent agreements and subsequent practice that reflected the parties' common understanding of the treaty.

49. The advisability of referring to both article 31, paragraph 3, and article 32, of the 1969 Vienna Convention in draft conclusions 6 and 7 was doubtful. A clearer distinction should be drawn between the primary and supplementary means of treaty interpretation set out in those two articles.

50. He had difficulty with the statement in paragraph 5 of the second report that conduct in the application of the treaty was only an example, albeit the most important one, of all acts regarding the interpretation of a treaty. True, the application of international treaties was inextricably linked to their interpretation. Yet the two should remain separate, because the purpose of interpretation was to clarify the meaning of the text, whereas application entailed determining the consequences arising for the parties, or for third parties in certain circumstances.

51. He had no objection to draft conclusion 7, paragraph 1, as long as the original intention of the parties was preserved even after the range of possible interpretations of the treaty was narrowed or widened by subsequent agreements and subsequent practice. If that was not the case, the draft conclusion would give too much leeway for the interpretation of the treaty, which could lead to infringements.

52. Concerning paragraph 2 of the draft conclusion, he queried the choice of specificity as the criterion for determining the value of subsequent agreements and subsequent practice. Was that really the most important element in treaty interpretation? According to draft conclusion 8, on the other hand, the value of subsequent practice as a means of interpretation depended on the extent to which it was concordant, common and consistent. In support of that formulation, the Special Rapporteur referred to a decision of the WTO Appellate Body.[109] However, one example was hardly sufficient to corroborate the proposed approach. It was true that subsequent practice should be concordant, common and consistent, otherwise it could not demonstrate common agreement among the parties. Nevertheless, the Commission might wish to think again about whether the approach proposed by the Special Rapporteur was advisable.

53. Concerning draft conclusion 9, he said that all the parties should be involved, in so far as possible, in subsequent practice. Invoking the tacit consent of the parties to existing practice was acceptable, as long as they were aware of such practice and did not have their own practice supporting a different understanding of the treaty. The question just raised by some members as to whether an agreement was binding should be dealt with separately.

54. Regarding draft conclusion 10, he said that a conference of States parties was the most appropriate mechanism for coordinating the positions of the parties to a treaty with regard to their understanding and application of its provisions.

55. He expressed doubts about the proposition put forward in draft conclusion 11. Although he endorsed the statement in paragraph 116 of the second report that the dividing line between the interpretation and the modification of a treaty was in practice often difficult to determine, the two processes must be kept separate, since they

[107] United Nations Educational, Scientific and Cultural Organization (UNESCO), "Decisions adopted by the Executive Board at its 165th session (Paris, 7–17 October 2002)", document 165 EX/Decisions, point 6.2, decision 9 (*b*), p. 26. Available from: http://unesdoc.unesco.org/images/0012/001280/128093e.pdf.

[108] UNESCO, "Meeting of States Parties to the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO, Paris, 1970), Rules of Procedure", adopted on 22 June 2012. Available from: www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/1970_MSP_Rules_Procedure_2012_en.pdf.

[109] *Japan—Taxes on Alcoholic Beverages II.*

had completely different legal consequences. The 1969 Vienna Convention was based on the notion that the original intentions of the authors of treaties were expressed primarily in the texts of treaties, and it was up to those who interpreted treaties to elucidate those intentions. The International Court of Justice had repeatedly emphasized that the interpreter's task was not to review treaties or to bring up things they did not contain.

56. The Special Rapporteur's conclusion that the possibility of modifying a treaty by subsequent practice was not generally recognized was, in many respects, justified. Nevertheless, if it was recognized in a specific case that a treaty had been modified by subsequent agreements and subsequent practice, such agreements should be considered, not as a means of interpretation under article 31, paragraph 3, of the 1969 Vienna Convention, but as agreements on amendments under article 39 of that Convention. If, when applying the treaty, the need arose for an evolutive interpretation through subsequent agreements and subsequent practice, it was an indication that the treaty needed to be reviewed. Updating a treaty through the formal process of amendment would then clarify the text and reflect the changes in the parties' understanding of their obligations since the time of signature.

57. In conclusion, he agreed that the draft conclusions should be referred to the Drafting Committee.

The meeting rose at 11.40 a.m.

3209th MEETING

Thursday, 22 May 2014, at 10 a.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Subsequent agreements and subsequent practice in relation to the interpretation of treaties (*continued*) (A/CN.4/666, Part II, sect. A, A/CN.4/671, A/CN.4/L.833)

[Agenda item 6]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. The CHAIRPERSON invited the Special Rapporteur on subsequent agreements and subsequent practice in relation to the interpretation of treaties to summarize the debate on his second report (A/CN.4/671).

2. Mr. NOLTE (Special Rapporteur) said that he had endeavoured to formulate the draft conclusions as normatively as possible, but that the diversity of international jurisprudence and State practice made it difficult to identify very clear rules. However, there were some patterns from which general conclusions could be derived that would help interpreters. Such help might consist of describing the approach adopted by the international courts and tribunals when confronted with subsequent agreements and practice. For example, the way in which the International Court of Justice dealt with the issue provided important guidance for the interpreter. The proposed draft conclusions were thus not purely descriptive. In order to avoid any misunderstandings, the Commission might prefer to call the draft text "guidelines", as proposed by Mr. Niehaus and Mr. Murase.

3. The proposal to distinguish more clearly the role played by articles 31 and 32 of the 1969 Vienna Convention was acceptable, provided that the principle of the unity of the process of interpretation was preserved and that reference was made to article 32 where necessary. It could also be pointed out, as proposed by Sir Michael Wood, that article 32 was applicable not only in a subsidiary fashion but also systematically in order to confirm the meaning resulting from the application of article 31.

4. With reference to draft conclusion 6, Mr. Murphy had expressed the view, based on considerable research, that application and interpretation were two entirely separate and distinguishable operations. However, many examples could be cited to show that, on the contrary, the two operations overlapped to some extent, and therefore the interpreter's attention was simply drawn to the fact that application of a treaty always involved some degree of interpretation. He supported Mr. Murphy's proposal to emphasize more clearly the content of article 31, paragraph 3 (*a*), which pushed the interpreter more towards agreements that were happening on the ground, as well as Mr. Forteau's proposal to specify that a subsequent agreement or subsequent practice might serve not only to clarify the terms of the treaty but also other means of interpretation, such as the object and purpose of the treaty. It might also be possible to find a better expression than "other considerations" at the end of the draft conclusion, as suggested by Mr. Niehaus.

5. Draft conclusion 7 repeated the content of article 31 of the 1969 Vienna Convention for the very purpose of explaining it in more detail. The other criteria cited by Mr. Forteau could be mentioned, but it would be difficult to take the further step of concluding, as Mr. Forteau had proposed, that the specificity of a particular practice always had significant value for the purpose of interpretation. Mr. Hmoud's proposal to indicate that practice should be specific to the treaty seemed to go in the right direction, however. The references to specificity, value and form could also be merged in one draft conclusion. The Drafting Committee should also consider the proposal by Mr. Murphy and Ms. Escobar-Hernández to replace the word "value" with "weight".

6. As far as draft conclusion 8 was concerned, he agreed that the formulation "concordant, common and consistent" was perhaps excessively prescriptive. He would propose new wording that would also take account of Mr. Hmoud's proposal that practice should be sufficiently