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Summary record of the 3159th meeting

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INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE FIRST PART OF THE SIXTY-FIFTH SESSION

Held at Geneva from 6 May to 7 June 2013

3159th MEETING

Monday, 6 May 2013, at 3.05 p.m.

Outgoing Chairperson: Mr. Lucius CAFLISCH

Chairperson: Mr. Bernd H. NIEHAUS

Present: Mr. Al-Marri, Mr. Candiotti, Mr. Comissário Afonso, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wisnumurti, Sir Michael Wood.

Opening of the session

1. The OUTGOING CHAIRPERSON declared open the sixty-fifth session of the International Law Commission.

Tribute to the memory of Chusei Yamada, former member of the Commission

2. The OUTGOING CHAIRPERSON said that the session was beginning on a sad note owing to the death of Mr. Chusei Yamada on 21 March 2013. For 16 years, the Commission had benefited from Mr. Yamada's wealth of experience in the areas of international law and diplomacy. His achievements, in particular through his work as Special Rapporteur on the topic of shared natural resources, had included the adoption on second reading of the draft articles on the law of transboundary aquifers.¹

At the invitation of the Outgoing Chairperson, the members of the Commission observed a minute of silence.

¹ The final version of the draft articles on the law of transboundary aquifers, with commentaries thereto, was adopted by the Commission at its sixtieth session (2008), *Yearbook ... 2008*, vol. II (Part Two), paras. 53–54. The draft articles on the law of transboundary aquifers adopted by the Commission are reproduced in an annex to General Assembly resolution 63/124 of 11 December 2008.

Statement by the Outgoing Chairperson

3. The OUTGOING CHAIRPERSON said that he would provide a brief overview of the discussion in the Sixth Committee of the report of the Commission on the work of its sixty-fourth session.² A topical summary of that discussion, prepared by the Secretariat was contained in document A/CN.4/657.

4. The consideration of the Commission's report had been the main focus of the Sixth Committee's work, even if it had been necessary to postpone the discussion on chapter IV of the report of the Commission on the work of its sixty-third session on the topic "Reservations to treaties"³ until the sixty-eighth session of the General Assembly, in 2013, owing to the fact that the United Nations Headquarters had been closed for several days in a row due to Hurricane Sandy. Based on the Sixth Committee's consideration of the Commission's report, the General Assembly had adopted resolution 67/92 of 14 December 2012, in which it expressed its appreciation to the International Law Commission for the work accomplished at its sixty-fourth session, in particular the completion of the first reading of the draft articles on the expulsion of aliens,⁴ and recommended that the Commission continue its work on the topics in its current programme, taking into account the comments and observations of Governments, whether submitted in writing or expressed orally in debates in the Sixth Committee. In paragraph 5 of the same resolution, the General Assembly noted its decision to continue, at its sixty-eighth session, the consideration of chapter IV of the Commission's report on the work of its sixty-third session. In paragraph 6, it drew the attention of Governments to the importance for the Commission of receiving by 1 January 2014 their comments and observations on the draft articles on the topic "Expulsion of aliens", which had been adopted on first reading by the Commission at its sixty-fourth session. In paragraph 7, it noted with appreciation the decision of the Commission to include the topics "Provisional application of treaties" and "Formation and evidence of customary international

² *Yearbook ... 2012*, vol. II (Part Two).

³ *Yearbook ... 2011*, vol. II (Part Two), chap. IV, and *ibid.*, vol. II (Part Three).

⁴ *Yearbook ... 2012*, vol. II (Part Two), paras. 45–46.

law⁵ in its programme of work, and encouraged the Commission to continue the examination of the topics that were in its long-term programme of work.⁶ Lastly, in paragraph 8, it invited the Commission to continue to give priority to the topics “Immunity of State officials from foreign criminal jurisdiction” and “The obligation to extradite or prosecute (*aut dedere aut judicare*)”.

Election of officers

Mr. Niehaus was elected Chairperson by acclamation.

Mr. Niehaus took the Chair.

5. The CHAIRPERSON thanked the members of the Commission for the honour they had conferred upon him and paid tribute to Mr. Caflich, Chairperson of the sixty-fourth session, and to the other officers of the sixty-fourth session for their outstanding work.

Mr. Šturma was elected First Vice-Chairperson by acclamation.

Mr. Singh was elected Second Vice-Chairperson by acclamation.

Mr. Tladi was elected Chairperson of the Drafting Committee by acclamation.

Mr. Forteau was elected Rapporteur by acclamation.

Adoption of the agenda (A/CN.4/656)

The provisional agenda was adopted.

*The meeting was suspended at 3.40 p.m.
and resumed at 4.40 p.m.*

Organization of the work of the session

[Agenda item 1]

6. The CHAIRPERSON drew the members’ attention to the programme of work for the following two weeks. During the current meeting, after the election to fill the vacancy in the Commission, Mr. Nolte, Special Rapporteur for the topic “Subsequent agreements and subsequent practice in relation to the interpretation of treaties” would introduce his first report, which would be considered during the following three plenary meetings. The Planning Group and the Working Group on the long-term programme of work would meet on Tuesday afternoon, and the Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*) would meet on Wednesday afternoon. In addition, the Bureau proposed that the plenary meeting on Wednesday morning should be dedicated to the memory of Mr. Chusei Yamada. In the second week, the Working Group on the long-term programme of work would meet on Monday afternoon. At the plenary meeting on Tuesday morning, the Special Rapporteur for the topic “Subsequent agreements and subsequent practice in relation to the interpretation of treaties” would summarize the debate

⁵ *Ibid.*, paras. 267–268.

⁶ *Yearbook ... 2011*, vol. II (Part Two), paras. 365–369.

on his first report. Subsequent plenary meetings would be devoted to consideration of the second report of Ms. Escobar Hernández, Special Rapporteur for the topic “Immunity of State officials from foreign criminal jurisdiction”. The Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*) would meet after the close of the plenary meeting on Tuesday and Thursday, and the Drafting Committee on the topic “Subsequent agreements and subsequent practice in relation to the interpretation of treaties” would meet on Tuesday, Wednesday and Thursday afternoon.

The programme of work for the first two weeks of the session was adopted.

Filling of a casual vacancy

[Agenda item 2]

7. The CHAIRPERSON said that, in accordance with article 11 of its statute, the Commission would proceed to fill the seat that had become vacant owing to the resignation of Mr. Stephen C. Vasciannie. The curricula vitae of the three candidates were contained in documents A/CN.4/655/Add.1–2,⁷ and a related communication was contained in document ILC/LXV/Misc.1. As was customary, the election would be held in a closed meeting.

*The meeting was suspended at 4.45 p.m.
and resumed at 5 p.m.*

8. The CHAIRPERSON announced that Mr. Vázquez-Bermúdez had been elected to fill the casual vacancy resulting from the resignation of Mr. Vasciannie. On behalf of the Commission, he would inform the newly elected member and invite him to take his place in the Commission.

Subsequent agreements and subsequent practice in relation to the interpretation of treaties (A/CN.4/660,⁸A/CN.4/L.813⁹)

[Agenda item 6]

FIRST REPORT OF THE SPECIAL RAPPORTEUR

9. The CHAIRPERSON invited Mr. Nolte, Special Rapporteur for the topic “Subsequent agreements and subsequent practice in relation to the interpretation of treaties” to introduce his first report (A/CN.4/660).

10. Mr. NOLTE (Special Rapporteur) recalled that the Commission had already addressed important aspects of the topic in the Study Group on treaties over time. The objective of the present report, which was based on and continued the previous work, was to provide guidance to all those responsible for interpreting or applying treaties. The materials and analyses contained in the present report and those to be contained in future reports, together with the Commission’s conclusions, should serve as a point of

⁷ Mimeographed; available from the Commission’s website, documents of the sixty-fourth session (2012).

⁸ Reproduced in *Yearbook ... 2013*, vol. II (Part One).

⁹ Mimeographed; available from the Commission’s website.

reference and thereby contribute, as far as possible, to the development of a common approach to the interpretation and application of any treaty.

11. The report contained four draft conclusions that were based not only on the informal reports previously submitted to the Study Group on treaties over time, but also on the preliminary conclusions reached following their consideration.

12. Draft conclusion 1 concerned the general rule of interpretation and the various means of interpretation set out in the Vienna Convention on the law of treaties (1969 Vienna Convention) and applied by the major international courts and tribunals. As mentioned in the report, the latter recognized articles 31 and 32 of the 1969 Vienna Convention as formulating the general rule and the supplementary rules on treaty interpretation, and as having the status of rules of customary international law. In their interpretative practice, those courts and tribunals took into account the various means of interpretation, in accordance with article 31 of the Convention, without considering any one of those means as being determinative or higher in rank than the others. However, they could place more or less emphasis on one or the other means of interpretation without that resulting in derogation from the rule embodied in the Convention. The Convention thus provided for a rather broad framework of interpretation within which the various means of interpretation had to be carefully identified and taken into account in their “interaction”. That interaction required giving the appropriate weight to the respective means of interpretation, meaning that the weight given might differ depending on the treaty in question. Thus, the first paragraph of draft conclusion 1 essentially confirmed that article 31 of the Convention, as treaty obligation and as reflection of customary international law, set forth the general rule on the interpretation of treaties. It seemed worthwhile to enunciate that common point of departure for all those called upon to apply treaties. The second paragraph of draft conclusion 1 stated that the interpretation of a treaty in a specific case might result in a different emphasis on the various means of interpretation contained in articles 31 and 32 of the Convention, in particular on the text of the treaty or on its object and purpose, depending on the treaty or on the treaty provisions concerned. It seemed important to highlight that point in order to illustrate that placing more or less emphasis on one or the other of those elements was part and parcel of the process of interpretation that was provided for in the Convention.

13. The first paragraph of draft conclusion 2 reaffirmed the rule set out in article 31, paragraph 3 (a) and (b), of the 1969 Vienna Convention, according to which subsequent agreements and subsequent practice between the parties to a treaty were means of interpretation that were to be taken into account in the interpretation of treaties, as had been recognized in the case law of major international courts and tribunals. It stated that those means of interpretation were “authentic” in order to indicate why they were to be taken into account. The second paragraph of draft conclusion 2 stated that subsequent agreements and subsequent practice could guide an evolutive interpretation of a treaty. In order to

illustrate the importance of those means of interpretation, the report cited several examples of how subsequent agreements and subsequent practice could affect the selection and weighing of other means of interpretation, such as the “ordinary meaning” of the terms of a treaty in their context and the object and purpose of the treaty.

14. Draft conclusion 3 was concerned with the definition of the terms “subsequent agreement” and “subsequent practice” as means of treaty interpretation, which gave rise to two main issues: what distinction should be drawn between subsequent agreement and subsequent practice, and whether subsequent practice had to be agreed between all the parties. It seemed that the main difference between the two categories was that subsequent agreements were more formal in nature; however, since such agreements were not always in writing, it was proposed to include only “manifested” agreements. As to a subsequent practice that might be followed by one or more parties without necessarily establishing the agreement of all the parties regarding the interpretation of the treaty, it was recognized that such practice could be used as a supplementary means of interpretation, though not an authentic one, within the meaning of the Convention, so long as it did not constitute a breach of the treaty, as could also be the case. The proposed text therefore also took that into account.

15. Draft conclusion 4 defined the possible authors of subsequent practice. It followed from the case law of international courts and tribunals that the rules for the attribution of a practice to a State for the purpose of treaty interpretation were not the same as those for the attribution of conduct to a State for the purpose of establishing its responsibility for wrongful acts; they must therefore be derived from the specific character of the interpretation and application of each treaty by the parties thereto. Subsequent practice could emanate from all government officials who were considered by the international community to be responsible for the application of the treaty, as well as from lower government officials. On the other hand, the courts remained reluctant to take into account the practice of non-State actors or conduct related to social developments, thence the need to specify that point in the second paragraph of the draft conclusion.

16. The first report on subsequent agreements and subsequent practice in relation to the interpretation of treaties covered general aspects of the topic. He would submit a second report in 2014 that synthesized the other issues dealt with in the three reports of the Study Group on treaties over time,¹⁰ followed by a third report, in 2015, that would address the practice of international organizations and the case law of national courts, and would contain new draft conclusions. He envisaged submitting his final report in 2016, with the conclusions and commentaries thereto revised in the light of the debate in the Commission and the discussions in the Sixth Committee.

17. The CHAIRPERSON thanked the Special Rapporteur for his introduction and invited the members of the Commission to comment.

¹⁰ See *Yearbook ... 2010*, vol. II (Part Two), pp. 194–195, paras. 347–354; *Yearbook ... 2011*, vol. II (Part Two), paras. 336–344; and *Yearbook ... 2012*, vol. II (Part Two), paras. 232–233.

18. Mr. TLADI said that it should be borne in mind that subsequent agreements and subsequent practice were merely tools that facilitated the application of the general rule of interpretation of treaties, as set forth in article 31, paragraph 1, of the 1969 Vienna Convention. While it was true that the Commission had sought to emphasize that the process of treaty interpretation was “a single combined operation” and that the elements of that operation should be placed “on the same footing” as the other means of interpretation provided for in the paragraphs of article 31 that followed, which included subsequent practice and subsequent agreements, its intention had been to underscore the unity, rather than the equality, of the various elements, and to avoid a situation in which they were presented as a hierarchy. It had thus specified that all elements were obligatory.

19. Yet, a methodological analysis of the weight accorded by judicial and quasi-judicial bodies to subsequent agreements and subsequent practice in relation to the other means of interpretation, such as that performed by the Special Rapporteur, risked de-emphasizing the idea of unity that was so essential. It would have been preferable to assess in which cases those two elements contributed, or failed to contribute, to determining the ordinary meaning of the terms of the treaty in their context and in the light of its object and purpose. That was the purpose that they should serve, rather than offering a competing vision or idea of the ordinary meaning of a treaty provision. For that reason, he disagreed with the Special Rapporteur when he stated, in paragraph 49 of his report, that subsequent agreements and subsequent practice could also render a more evolutive interpretation of an apparently clear treaty provision, citing as an example the advisory opinion of the International Court of Justice in the case concerning the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. Far from indicating that subsequent practice had allowed for elucidating a new meaning from an already clear provision, the Court limited itself to noting that that practice was “consistent with” the provision in question.

20. Subsequent agreements and subsequent practice could just as easily support an evolutive interpretation as they could a contemporaneous interpretation, owing to the fact that they were merely tools for identifying, in good faith, the ordinary meaning of the terms of the treaty in their context and in the light of its object and purpose. For that reason, he also wished to express his disagreement with the second paragraph of draft conclusion 2, which, by stating that those two elements could “guide an evolutive interpretation of a treaty”, might suggest that subsequent practice and subsequent agreements did not guide a contemporary interpretation. One might also question the usefulness of the first paragraph of draft conclusion 2, which did not say anything beyond what was stated in the 1969 Vienna Convention to the effect that subsequent practice and subsequent agreements were “authentic” means of interpretation.

21. Lastly, if one took into account the fact that subsequent agreements and subsequent practice were, in effect, merely tools that were neither binding nor determinative, it was perhaps unnecessary to require that

they be concluded among all the parties of a given treaty, as was advocated by the Special Rapporteur.

The meeting rose at 5.50 p.m.

3160th MEETING

Tuesday, 7 May 2013, at 10.05 a.m.

Chairperson: Mr. Bernd H. NIEHAUS

Present: Mr. Al-Marri, Mr. Cafilisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wisnumurti, Sir Michael Wood.

Subsequent agreements and subsequent practice in relation to the interpretation of treaties (*continued*) (A/CN.4/660, A/CN.4/L.813)

[Agenda item 6]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to pursue its consideration of the first report of the Special Rapporteur on subsequent agreements and subsequent practice in relation to treaty interpretation (A/CN.4/660).

2. Sir Michael WOOD said that the elements of interpretation provided for in article 31, paragraph 3 (*a*) and (*b*), of the 1969 Vienna Convention were sometimes overlooked by those who assumed, wrongly, that paragraph 1 of that article alone constituted the essence of the general rule on interpretation. Yet a subsequent agreement between parties regarding the interpretation of the treaty carried great, probably the greatest, weight as an interpretative factor. That said, care needed to be taken in the practical application of the principles set out in paragraph 3 (*a*) and (*b*).

3. It was somewhat misleading to refer to subsequent agreements and subsequent practice within the meaning of article 31, paragraph 3 (*a*), and paragraph 3 (*b*), respectively, as “means” of interpretation, since their role as part of an integrated system was better captured by the word “elements”. In paragraph (14) of its 1966 commentary to the draft articles on the law of treaties,¹¹ the Commission stated that an agreement as to the interpretation of a provision reached after the conclusion of the treaty represented an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation. The reiteration of that statement in the commentaries to the conclusions would draw attention to an important aspect of treaty

¹¹ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1 (Part II), p. 221, commentary to article 27.