Document:-
**A/CN.4/3160**

# Summary record of the 3160th meeting

Topic:
**<multiple topics>**

Extract from the Yearbook of the International Law Commission:-
**2013**, **vol. I**

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. Caflisch, 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.

interpretation that supplemented the provisions of the 1969 Vienna Convention, without modifying or contradicting them. Yet, no matter how important or authentic the elements of interpretation listed in article 31, paragraph 3 (*a*) and (*b*), might be, they should not be treated as separate or distinct from the other elements in the general rule of interpretation.

4. His comments regarding the four draft conclusions suggested by the Special Rapporteur were largely editorial. With regard to draft conclusion 1, which described article 31 as a reflection of customary international law, the Commission should avoid making an *a contrario* implication concerning the status of the rule set forth in article 32, since there was now ample authority for regarding it, too, as a rule of customary international law. Concerning the second paragraph, it might be going too far to contrast the text of a treaty with its object and purpose, since article 31 referred to a single operation. Moreover, the words "a different emphasis" were potentially misleading in that a difference in emphasis was inherent in the structure of articles 31 and 32, in that the latter addressed supplementary means of interpretation, as distinct from the text of the treaty in the light of its object and purpose. In fact, the presence or absence of particular elements of interpretation was not really a question of emphasis.

5. In draft conclusion 2, it was inaccurate to suggest that subsequent agreements and subsequent practice should "guide an evolutive interpretation" of a treaty in all cases, since they might equally guide a contemporaneous interpretation.

6. As to draft conclusion 3, given that agreement could be manifested through practice, the Commission should consider replacing the phrase "a manifested agreement" with "an agreement made" between the parties, and what was meant by the word "agreement" in that context should be explained, either in the draft conclusion or elsewhere.

7. With regard to draft conclusion 4, he proposed redrafting the first paragraph so as to indicate when conduct was attributable to the State for the purpose of treaty interpretation. In paragraph 2, the attribution of two different meanings to the term "subsequent State practice" was confusing. Ultimately, he wondered whether the paragraph was necessary at all.

8. With those comments, he would be in favour of referring the draft conclusions to the Drafting Committee.

9. Mr. AL-MARRI said that treaties constituted one of the most important primary sources of international law. The ultimate goal of their interpretation was to ascertain the intentions of the various parties in the event of a dispute over a treaty provision. Any exploration of the parties' intentions should start with the text of the treaty.

10. Mr. HUANG said that with regard to the study of the topic, the Commission's main challenge was to establish rules while preserving the flexibility inherent in the provisions on subsequent agreements and subsequent practice. However, it should refrain from allowing so much flexibility that the treaty regime and States parties' obligations were undermined. The Commission should also emphasize the clarifying role of subsequent agreements and subsequent practice in relation to treaty interpretation, bearing in mind that they were part of an integrated process. Care should be taken not to interpret treaties too broadly.

11. Turning to methodology, he said that disregarding the original intention of the parties and the content of the treaty or deeming them subject to evolutive interpretation was not in conformity with article 31 of the 1969 Vienna Convention. It was necessary to balance the contemporaneous and evolutive interpretations and weigh the consequences in order to define guidelines for subsequent agreements and subsequent practice. Since treaties and agreements were the result of negotiations by consensus, subsequent agreements and subsequent practice should reflect such consensus and be based on comprehensive State practice.

12. Mr. HMOUD sought clarification regarding the essential issue—the role of intent in the interpretation of treaties. Twenty years after the conclusion of a treaty, would an interpretation that did not reflect the intention of the drafters be permissible under article 31, paragraph 3 (*a*) and (*b*), of the 1969 Vienna Convention?

13. Mr. NOLTE (Special Rapporteur) said that to discover the intention of the parties was the ultimate goal of treaty interpretation; while article 31, paragraphs 1 to 3, of the Convention did not refer to the intention of the parties as a means of interpretation, the Convention presupposed that the goal of interpretation was furthered by the different means of interpretation spelled out in article 31. When drafting the Convention, the Commission had followed the approach first adopted by Sir Humphrey Waldock in his third report,[12] and it should continue to do so. As Mr. Tladi had said, the means of interpretation as set out in article 31 were means to facilitate the identification of the interpretation of the parties.

14. Mr. FORTEAU said that the Special Rapporteur had neglected to mention article 31, paragraph 4, of the 1969 Vienna Convention, according to which a special meaning should be given to a term if it was established that the parties so intended. In its judgment in *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, the International Court of Justice had held that the subsequent practice of the parties could result in a departure from the original intent on the basis of a tacit agreement between the parties. In that sense, subsequent agreement or subsequent practice could be seen as an intention modifying the original intention of the parties.

15. Mr. NOLTE (Special Rapporteur) said that he had failed to mention paragraph 4 because it suggested that "the parties so intended" meant the original intentions, which was restrictive.

16. Mr. FORTEAU, commending the Special Rapporteur on the research and analysis done for the first report, said that by and large he endorsed its four draft conclusions. Before addressing them, he wished to

[12] *Yearbook ... 1964*, vol. II, document A/CN.4/167 and Add.1–3.

emphasize that he fully endorsed the goal outlined by the Special Rapporteur in paragraph 6 of his report, namely that the Commission's work on the topic should contribute, as far as possible, to a common and uniform approach to the interpretation of a particular treaty in the light of subsequent agreements and subsequent practice. That was all the more important in that the rule of interpretation spelled out in article 31 applied to all treaties, irrespective of whether they had been concluded before or after the entry into force of the 1969 Vienna Convention.

17. Concerning the methodology behind draft conclusion 1, he thought that an analysis of case law by theme, instead of by court or other adjudicative body, would have been perhaps more conducive to the identification of common principles of interpretation. The Special Rapporteur's method was apparently based on the premise that each body developed its own characteristic approach to interpretation. Yet other factors such as the nature of the instrument—bilateral trade accord or human rights treaty, for example—could result in different approaches to interpretation being used by the same body. If that was the case, then that should have been more clearly spelled out in the draft conclusion and in the report.

18. He had some reservations regarding the second paragraph of the draft conclusion, which implied that an interpreter of a treaty could decide how much weight was to be given to the different means of interpretation. That was not in line with the Commission's conclusion, in its 1966 commentary, that all of the elements of interpretation cited in article 31 were on an equal footing. Moreover, the draft conclusion suggested that the means of interpretation in article 32 could be given preference over those in article 31, although the former were clearly subsidiary to the latter. He himself would prefer to adhere more closely to the 1966 commentary, perhaps in a slightly more nuanced way, by stating that depending on the specific case, the evidentiary weight of each element of interpretation could differ. In short, he thought it would be wrong to fuse two very different issues, namely the nature of the available means of interpretation and the probative value of those means in specific cases.

19. He welcomed the analysis that led up to draft conclusion 2, particularly on the difficult question of evolutive interpretation which, as the Special Rapporteur pointed out, was not a separate method of interpretation, but rather the result of the interpretation process. The text of the draft conclusion should be fleshed out, however, in view of the important legal issues it was intended to cover. The first paragraph should be more closely aligned on article 31 of the 1969 Vienna Convention: it was not all subsequent practice, but only subsequent practice that established the agreement of the parties, that constituted authentic means of interpretation. The second paragraph needed to be strengthened: article 31 did not simply evoke a possibility, it laid down an obligation to take into account any subsequent agreement or subsequent practice. Substantive provisions should be introduced, to cover evolutive interpretation, and specifically to resolve the issues raised by the Special Rapporteur in paragraphs 62 and 63 of his report. In his own view, the fact that evolutive interpretation was not a separate method of interpretation accounted for the absence of a presumption of contemporaneous interpretation. If the Commission agreed that that statement reflected current practice, then a separate conclusion should be drafted to indicate, on the one hand, that international law made no presumptions with regard to evolutive interpretation and, on the other, that any subsequent agreement or subsequent practice constituted one of the elements to be taken into account in determining whether the meaning to be given to a treaty provision was evolutive or not.

20. Draft conclusion 3 was based on the Special Rapporteur's assumption that two separate types of agreement were addressed in article 31, paragraph 3 (*a*) and (*b*), whereas in his own view, the agreements envisaged in paragraph 3 (*b*) were subsumed in paragraph 3 (*a*). That view was supported by the decisions of international courts, which made no clear distinction between the two types of agreements. Moreover, the use of the term "manifested" would restrict the scope of paragraph 3 (*a*). Ultimately, the draft conclusion should include a more detailed description of what could be considered as practice establishing the agreement of parties; a clear distinction between subsequent practice in the restrictive sense of article 31 and in the broader sense of article 32; and a reference to the fact that a subsequent agreement in the sense of article 31 was an agreement between all the parties to the treaty.

21. Draft conclusion 4 was a useful starting point but needed further detail. It should cover subsequent agreements, which also raised attribution issues. The first paragraph seemed somewhat redundant: the Commission should define the cases in which there was attribution for the purpose of treaty interpretation, based on its consideration of State practice. The second paragraph seemed to relate to the definition of practice and was more relevant to draft conclusion 3.

22. Mr. PARK said that the draft conclusions were all formulated in rather general terms and were lacking in legal clarity. More specific conclusions were required in order to determine the role of subsequent agreements and subsequent practice, to resolve ambiguity in the principles of interpretation and to offer guidance to those who interpreted or applied treaties. The conclusions should have sufficient normative content while retaining the flexibility inherent in the concept of subsequent practice and subsequent agreements. He asked the Special Rapporteur whether such agreements and practice covered by article 32, rather than article 31, paragraph 3 (*a*) and (*b*), might be included in the Commission's work.

23. He had no substantive reservations on draft conclusion 1, because it was similar to the Study Group's conclusions and because it was plain that there was no absolute hierarchy in the general principles or rules of treaty interpretation. With reference to draft conclusion 2, he drew attention to a lack of coherence between paragraphs 30, 70 and 95 of the report. He asked whether the example mentioned in paragraphs 49 and 50 did not pertain more to a *de facto* amendment of Article 12 of the Charter of the United Nations than to a question of interpretation. While it was true that the evolutive interpretation of treaties had been examined in the past in the context of the fragmentation of international law, he was unsure whether it was necessary to mention it

in the second paragraph of draft conclusion 2, given the view expressed by the Special Rapporteur in the second sentence of paragraph 62. Furthermore, he wished to know what was meant by the term "authentic means" in the first subparagraph of that draft conclusion.

24. Moving on to draft conclusion 3, he wondered if the relevant rules of international law applicable in relations between the parties had any bearing on subsequent agreements and subsequent practice of a relational character. He pointed out that the words "after the conclusion of" had been omitted in the French version of the first paragraph of the draft conclusion. In the Drafting Committee, it would be advisable to clarify the meaning of the phrase "the conclusion of a treaty".

25. Lastly, with regard to draft conclusion 4, he was uncertain whether the collections and other reports by international organizations on State practice could be said to possess evidentiary weight, since they did not constitute the practice of the international organization itself. He concurred with Mr. Forteau's comments in respect of the second paragraph of that draft conclusion.

**Organization of the work of the session (*continued*)**

[Agenda item 1]

26. Mr. ŠTURMA (Chairperson of the Planning Group) read out the names of the 24 members of the Planning Group.

*The meeting rose at 11.45 a.m.*

---

## 3161st MEETING

*Wednesday, 8 May 2013, at 10 a.m.*

*Chairperson*: Mr. Bernd H. NIEHAUS

*Present*: Mr. Adoke, Mr. Al-Marri, Mr. Caflisch, 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.

---

**Tribute to the memory of Chusei Yamada, former member of the Commission (*concluded*)**[*]

1. The CHAIRPERSON announced that the current meeting was dedicated to the memory of Mr. Chusei Yamada, who had been a member of the Commission from 1992 to 2008. With his vast experience of diplomacy and his outstanding skills as a jurist, Mr. Yamada had made a significant contribution to the development and codification of international law in areas as varied as the law of the sea, the use of natural resources, disarmament and international trade. He had also made an exceptional contribution to the work of the Commission, as evidenced in his tireless efforts as Special Rapporteur on the topic of shared natural resources, which had reached a successful conclusion with the Commission's adoption of the set of draft articles on the law of transboundary aquifers in 2008.[13]

2. Mr. WISNUMURTI, Mr. MURASE, Mr. COMISSÁRIO AFONSO, Mr. CANDIOTI, Mr. SABOIA, Mr. NOLTE and Mr. PARK also paid a tribute to Mr. Yamada, whose passing was a great loss for the Commission and the international legal community, and expressed their appreciation for his important contribution to the development and codification of international law. At the age of 14, after witnessing first-hand the bombing of Hiroshima on 6 August 1945 and having understood that diplomacy was the only way to put an end to the use of atomic weapons, Mr. Yamada had decided to become a diplomat. As a student at the Faculty of Law at the University of Tokyo, he had studied international law under Professor Kisaburo Yokota, the first Japanese member of the International Law Commission. Finding his approach to be too theoretical to be useful, Mr. Yamada had quickly arrived at a more pragmatic approach, the antithesis of the prevailing trend in academia at the time. He had constantly striven to strengthen the practical utility of international law, which he considered an instrument of peace, and to promote international understanding and harmony through diplomacy and the law. He had been the incarnation of postwar Japanese diplomacy, embodying its strengths and, perhaps, its imperfections.

3. He had been an exemplary member of the Commission, and his legal and diplomatic skills, his modesty, his spirit of compromise and his tireless commitment had been the keys to his success. Mr. Yamada had always tried to be friendly with all his colleagues, carefully avoiding overly assertive or offensive remarks. He had always been ready to offer compromise solutions, had contributed a great deal to the creation of a friendly and collaborative atmosphere in the Commission and had always respected his colleagues' points of view, even when he disagreed with them. He had been a competent lawyer, a man of integrity and generosity, hard-working and meticulous. In 1997, while serving as Chairperson of the Working Group on international liability for injurious consequences arising out of acts not prohibited by international law, his insightful proposals had enabled the Commission to move forward when the project had reached an impasse.

4. However, his greatest contribution had been in the development of principles and standards for the protection of natural resources and the environment, and he had proven to be a determined researcher, valuable legal adviser and careful and skilled negotiator, always working to reach

[*] Resumed from the 3159th meeting.

[13] 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.