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Summary record of the 3161st meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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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.

a compromise. As Special Rapporteur on the topic of shared natural resources, he had overcome both technical and legal challenges to bring his diplomatic skills, his initiative and his determination to bear in promoting the adoption of the draft articles on the law of transboundary aquifers by the Commission and the General Assembly.

5. Mr. Yamada had also been one of the few members of the Commission to have succeeded in forging constructive links with the representatives of the Sixth Committee. The relationship between the two bodies had continued to be a major concern for him and, at a recent meeting of the Japanese Society of International Law, he had suggested setting up a joint committee to serve as liaison between the two. His passing was a great loss, and it was the duty of the Commission to perpetuate his legacy.

6. Mr. PETRIČ, Mr. HMOUD, Mr. AL-MARRI, Mr. VALENCIA-OSPINA, Mr. KITTICHAISAREE, Mr. HUANG, Mr. SINGH and Mr. KAMTO then each also paid a warm tribute to Mr. Yamada, highlighting his human qualities and his exceptional professional skills. They all recalled that their eminent colleague had been not only an outstanding lawyer and diplomat, but also a man of great wisdom who was a good listener and sought to foster collaboration. Throughout his life, he had been committed to the development of international law, convinced that it was essential to international peace. A forward-looking man, he had also been concerned about the preservation of natural resources and had dared to guide the Commission's deliberations into the field of science. His contribution to the Commission's work on the subject of shared natural resources, in particular, had been invaluable. The Commission had been an important part of his life, and even after leaving it, he had continued to have its best interests at heart.

7. Members of the Commission would also recall the role Mr. Yamada had played as Chairperson of the Drafting Committee, where his remarkable diplomatic skills had been a valuable asset. In that role, he had launched an unprecedented initiative, namely the submission to the plenary Commission and to the Sixth Committee of two conflicting proposals on a single draft article whose consideration had stalled in inconclusive discussions. The initiative had resulted in the adoption of a consensus version of the contentious article on second reading.

8. Outside the Commission, Mr. Yamada had been heavily involved in the work of the Asian–African Legal Consultative Organization (AALCO), advising and encouraging several francophone African countries to become members, and had worked tirelessly to promote international law and training in that subject in Asia. He had also undertaken to promote ratification of the United Nations Convention on Jurisdictional Immunities of States and Their Property. His legacy was invaluable and would remain a source of inspiration for all.

9. The CHAIRPERSON in turn paid a tribute to Chusei Yamada. Quoting two haikus by the Japanese poet Issa, he said that though the world was ephemeral and life, all too brief, one's loved ones stayed on, even after their passing.

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*)

10. The CHAIRPERSON invited the members of the Commission to pursue their examination of the Special Rapporteur's first report on subsequent agreements and subsequent practice in relation to treaty interpretation (A/CN.4/660).

11. Mr. SABOIA said that, even though it was understood that the different means of interpretation established in the 1969 Vienna Convention were to be applied by way of a single combined operation, with no hierarchical order, article 31, paragraphs 1 and 2, of the Convention nevertheless established a general framework for their application.

12. Subsequent agreements and subsequent practice were important means of interpretation as they embodied actions taken by the parties to allow a treaty to adapt to changing circumstances and remain a useful instrument. That element of flexibility must be balanced with the element of stability represented by the terms of the treaty, its context and its object and purpose.

13. As the Special Rapporteur pointed out in paragraph 83 of the report, the concept "subsequent agreements" should be limited to individual agreements between all the parties. Similarly, subsequent practice should reflect a common position. Concerning the contrast between evolutionary and contemporaneous interpretation, it was only natural that a given court should emphasize one approach or the other depending on the treaty under consideration. Thus, in the case of a human rights treaty, greater importance would be attached to elements such as its context or the object and purpose. Environmental treaties, meanwhile, must be adapted dynamically to constant technological change. An interesting, but audacious, example was the interpretation given by the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, which had argued that "measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge".[14]

14. In conclusion, he said that he was in favour of sending the four draft conclusions to the Drafting Committee, taking into account remarks made during the debate.

15. Mr. PETRIČ said that, since the report was the first on the topic, he would limit himself to making some general comments that, in his view, should be kept in mind throughout the project. Firstly, it was important not to deviate from the commentary to articles 31 and 32 of the 1969 Vienna Convention without good reason. As indicated by the title of article 31, which referred to a single general rule of interpretation, the Commission and States had wanted to stress that the interpretation of a

[14] *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011*, para. 117.

treaty was a single operation which involved combining various means of interpretation, without hierarchy or distinction. It should be borne in mind that the international jurisprudence cited in the report, as extensive as it was, was not a source of law but simply an aid for identifying the existing international law. The decisions of the various adjudicatory bodies were binding only *inter partes* and did not create rules with *erga omnes* effect.

16. The Commission was going to produce conclusions that, while not being binding, would be imbued with its authority. The conclusions must therefore be well thought out and very cautious, particularly with respect to sensitive issues such as evolutive interpretation, the impact of social developments and practice in the broad sense, in other words, practice which did not reflect the agreement of all parties on the interpretation of the treaty. In addition, it should be recalled that the conclusions would be addressed not only to adjudicatory bodies but also to States, which also had to interpret treaties. Furthermore, the contradiction between stability and evolution caused a real dilemma, and the Commission must remain mindful of that in its deliberations. The issue of legal security, which was particularly important for small States, should also be kept in mind.

17. While he agreed with the substance of draft conclusion 1, he wondered whether the conclusion itself was actually necessary, except to introduce the subsequent draft conclusions. In his view, the "evolutive interpretation" of the European Court of Human Rights cited in paragraph 38 of the Special Rapporteur's report was very complex and specific to the Court and should therefore have only a limited impact on the general conclusions drafted by the Commission. He took issue with the view expressed in paragraph 49 of the report, as well as with draft conclusion 2, which would have to be discussed by the Drafting Committee. In the English version, the verb "shall" was too restrictive, as was the link established between subsequent agreements and subsequent practice on the one hand and evolutive interpretation on the other. He also disagreed with the idea in paragraphs 107 and 108 of defining the concept of "subsequent practice" broadly and taking it into consideration for the purposes of treaty interpretation. In addition, the conclusion drawn went too far and was questionable from the point of view of legal certainty. He also had grave doubts with respect to draft conclusion 3, paragraph 3, in particular the last sentence, and serious reservations with regard to draft conclusion 4. It was not true that all State organs could be considered the authors of subsequent practice for the purpose of treaty interpretation, as such practice could only come from organs whose conduct had an international dimension. Lastly, draft conclusion 4, paragraph 2, could be misleading and should be modified or deleted. In conclusion, he proposed that the draft conclusions should be sent to the Drafting Committee.

18. Mr. MURPHY said that draft conclusion 1 should be a broad statement about the central importance of the rules on interpretation expressed in the 1969 Vienna Convention. He would prefer the first paragraph to also include a reference to articles 32 and 33 of the Convention, as articles 31 to 33 all reflected customary international law. The Commission should specify whether those articles were binding on parties as treaty law or as customary international law. He therefore proposed that the first paragraph of the draft conclusion should read:

> "Articles 31 to 33 of the Vienna Convention on the Law of Treaties address the interpretation of treaties. These rules bind as a matter of treaty law in circumstances where the Convention itself applies and otherwise bind as a matter of customary international law."

19. As to the second paragraph, it must not suggest that the various tools available were autonomous units, any one of which might be used to the exclusion of others. He therefore proposed that the paragraph should read:

> "Articles 31 and 32 identify various elements that may be used when interpreting a treaty in good faith in accordance with the ordinary meaning to be given to its terms in their context and in light of its object and purpose."

20. With respect to draft conclusion 2, it was not necessary to describe subsequent agreements and subsequent practice as "authentic" means of interpretation, as all other means were also authentic. He also had doubts, for a variety of reasons, about the use of the expression "evolutive interpretation", which could be confusing, and his preference would be to repeat the terms used in the 1969 Vienna Convention. He therefore proposed that the paragraph should be reworded:

> "One of the elements that may be used in treaty interpretation, as identified in article 31, paragraph 3, concerns taking into account (*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; and (*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."

21. Draft conclusion 3 could be strengthened by explaining what was not included in the concepts of "subsequent agreement" and "subsequent practice" and indicating that agreements to amend or modify a treaty were not considered the types of "subsequent agreement" and "subsequent practice" at issue in the draft conclusion, but were instead governed by articles 39 and 40 and by article 41 of the 1969 Vienna Convention, respectively. It could also be helpful to indicate that the Commission's idea of modification of a treaty by subsequent practice had been expressly rejected by the Diplomatic Conference that had finalized the Vienna Convention. He did not understand what was meant by the term "manifest", which appeared in three places in the Convention, but not as a modifier to "agreement", and did not appear to be anchored in any of the prior work of the Commission or the jurisprudence of international courts or tribunals.

22. With regard to the title of draft conclusion 4, it was important also to mention the authors of subsequent agreements. In addition, the first sentence should provide readers with guidance in identifying the State organs in question, perhaps by pointing, as in paragraph 121 of the report, to the practice of "those organs of a State party which are internationally regarded as being responsible

for the application of the treaty" or, as in the articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session, by indicating that an "organ" was a body that exercised "legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State".[15] Failing such a modification, the sentence should be deleted.

23. The second sentence of draft conclusion 4 read as though the practice of non-State actors was a form of "subsequent practice" envisaged by article 31 of the 1969 Vienna Convention, an assertion for which there was no support—not surprisingly, given that the Convention dealt exclusively with the practice of parties to the treaty. The reference to "social practice" was driven exclusively by the jurisprudence of the European Court of Human Rights, which did not seem appropriate in a general guideline intended to assist all international courts and tribunals. If the intention of the sentence was to say "Subsequent practice by relevant State organs may be influenced by the conduct of other actors, including international organizations, non-governmental organizations and other non-State actors", then it should be put in those terms. In conclusion, he said that he was in favour of sending the draft conclusions to the Drafting Committee.

The meeting rose at 1.05 p.m.

3162nd MEETING

Friday, 10 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.

Protection of persons in the event of disasters (A/CN.4/657,[16] sect. B, A/CN.4/662,[17] A/CN.4/L.815[18])

[Agenda item 4]

Report of the Drafting Committee

1. The CHAIRPERSON introduced the text and titles of draft articles 5 *bis*, and 12 to 15, adopted by the Drafting Committee at the sixty-fourth session, as contained in document A/CN.4/L.812.[19]

2. Following comments by Mr. FORTEAU and Mr. CANDIOTI, the CHAIRPERSON said he took it that the Commission wished to adopt the titles and texts of the draft articles, subject to editorial corrections to the French and Spanish versions.

It was so decided.

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*)

3. Mr. ŠTURMA commended the Special Rapporteur on his first report and his careful analysis of the case law of various international adjudicative bodies. Concerning methodology, there was one basic issue to be resolved: whether the draft conclusions should be considered as descriptive or prescriptive in nature. He shared the concerns expressed by other members about the risk of the latter approach.

4. He endorsed draft conclusion 1 and the first paragraph of draft conclusion 2, but thought that the insertion of the words "establishing agreement" after "subsequent practice" might be useful. As to the second paragraph of draft conclusion 2, the question of whether the term "evolutive" was more appropriate than "evolutionary" should be discussed by the Drafting Committee. On a matter of principle, however, he considered that evolutive interpretation was not another method of interpretation, but a result of the application of certain means of interpretation pursuant to the 1969 Vienna Convention. The case law of the human rights bodies mostly led to the evolutive interpretation of treaties, although it could in some cases lead to a contemporaneous interpretation.

5. With the exception of the reference to "social practice" in draft conclusion 4, he found the draft conclusions to be generally acceptable and recommended their referral to the Drafting Committee.

6. Mr. KAMTO commended the Special Rapporteur on a detailed and in some respects bold first report, which raised some serious problems.

7. Concerning methodology, he questioned the structure of the report. It would have made more sense for the chapter on the definition of subsequent agreement and subsequent practice as means of interpretation of a treaty to have preceded the chapter on the general rule and the means of interpreting a treaty, in other words, for the concepts to have been defined before the legal regime was examined. Another methodological problem was the failure to draw a distinction between subsequent agreements and subsequent practice in relation to multilateral and bilateral treaties. While for the former

[15] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 40, art. 4, para. 1. The articles on responsibility of States for internationally wrongful acts adopted by the Commission are reproduced in the annex to General Assembly resolution 56/83 of 12 December 2001.

[16] Mimeographed; available from the Commission's website.

[17] Reproduced in *Yearbook … 2013*, vol. II (Part One).

[18] Mimeographed; available from the Commission's website.

[19] *Ibid.*, documents of the sixty-fourth session (2012).