

Document:-
A/CN.4/3163

Summary record of the 3163rd meeting

Topic:
<multiple topics>

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

*Downloaded from the web site of the International Law Commission
(<http://legal.un.org/ilc/>)*

referred to in article 31, paragraph 3 (b), and in article 32—in the same draft conclusion, since doing so could mislead the reader about the nature of such practice and its validity as a means of authentic interpretation. If the reference to “Other subsequent practice” was maintained, the paragraph should clearly specify the conditions in which recourse could be had to such practice. To have that phrase relate exclusively to article 32 was too restrictive, since it could just as easily refer to article 31, paragraph 1.

38. Draft conclusion 4 left open a number of gaps. It did not provide helpful elements for identifying the State organs whose subsequent practice could be taken into account for the purpose of treaty interpretation. It failed to address the authorship or attribution to the State of subsequent agreements, which was necessary since the notion of agreement expressed in article 31, paragraph 3 (a), was not limited to formal agreements such as treaties. The point made in paragraph 2 should be made more explicit, and the use of the expression “social practice” merited further consideration.

39. With those comments, she was in favour of referring the draft conclusions to the Drafting Committee.

40. Ms. JACOBSSON said that, owing to the nature of the topic, it was of the utmost importance to focus on State practice and to see how States interpreted the consequences of their action. Much State practice in the interpretation of treaties worked smoothly, causing no major conflicts, and it should be regarded as equally important as was the interpretation of treaties that sparked controversy. This was particularly relevant in situations where bilateral and regional treaties were applicable.

41. With regard to draft conclusion 1, she shared the view of other Commission members that it should state that article 32 of the 1969 Vienna Convention, like article 31, was to be considered as a rule of customary law: the risk of an *a contrario* interpretation should be averted. Equally important was the fact that international tribunals such as the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea had taken the position that articles 31 to 33 of the Convention were to be considered as reflecting customary law. Paragraph 1 should be moved to a separate draft conclusion and a distinction made between article 31, as a general rule of interpretation, and article 32, as a supplementary means of interpretation.

42. As to draft conclusion 2, paragraph 1, it should specify that it was only “together with the context” that subsequent agreements and subsequent practice were to be regarded as authentic means of interpretation. Although paragraph 2 was the most controversial part of the draft, it was far too early to dismiss it at the current stage, since there were convincing examples of case law, particularly in the field of human rights, which could not be disregarded. She endorsed the proposal to include a reference to contemporaneous interpretation. Paragraph 2 should also reflect the notion that a distinction had to be made between treaties of various types—bilateral and multilateral, for example. The interpretation of treaties that established rights for other States or actors, to which reference was made in the penultimate footnote to paragraph 30 of the report, required further discussion.

43. With regard to draft conclusion 3, paragraph 1, she was not convinced of the need for the word “manifested”. Concerning paragraph 2, she endorsed Mr. Kamto’s proposal to reword it in line with the narrower definition of subsequent practice given by the WTO Appellate Body and concurred with Ms. Escobar Hernández about the need for the references to articles 31 and 32 to be in separate paragraphs.

44. In draft conclusion 4, paragraph 1, the current wording did not seem adequate to address the complicated issue of the conduct of State organs that could be attributed to the State. It was important to elaborate on what was meant by attribution in that context, as distinct from in the articles on responsibility of States for internationally wrongful acts.²⁴

45. She was in favour of referring all four draft conclusions to the Drafting Committee.

The meeting rose at 1.05 p.m.

3163rd MEETING

Tuesday, 14 May 2013, at 10.05 a.m.

Chairperson: Mr. Bernd H. NIEHAUS

Present: Mr. Caffisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Gómez Robledo, 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. 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 (*concluded*)

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

2. Mr. HASSOUNA said that it was vital not to amend or contradict the fundamental rules governing treaty interpretation set forth in the 1969 Vienna Convention. The prime purpose of subsequent agreements and subsequent practice was to contextualize the terms of a treaty, since they had to be interpreted in the light of their context, provided that the resultant interpretation did not

²⁴ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 76–77. 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.

stray too far from their ordinary meaning, or lend them an absurd or unreasonable meaning. A straightforward reading of the Convention suggested that a subsequent agreement concerning the interpretation or application of a treaty presupposed express modification of the treaty language; subsequent practice would matter only if, through statements or other means, it clearly established the parties' agreement as to the meaning to be given to those terms. That restrictive approach excluded action by a party which contradicted its statements. Practice establishing a tacit or an express agreement on the application or interpretation of the treaty formed an integral part of the treaty and might serve as estoppel.

3. Since international case law was relatively heterogeneous, it would be preferable to rely more on regional case law and on the practice of the United Nations. The case law of the ICSID tribunals was also far from uniform but, contrary to the view expressed in the report, those tribunals had sometimes attached great weight to the presumed intentions of the parties to the 1969 Vienna Convention, as reflected in the *travaux préparatoires*.

4. He supported the draft conclusions proposed by the Special Rapporteur and was in favour of referring them to the Drafting Committee, provided that they were recast in clearer, more detailed language. For example, in the first paragraph of draft conclusion 2, it should be made plain that it was only subsequent practice within the meaning of article 31, paragraph 3 (b), of the 1969 Vienna Convention that constituted "authentic means of interpretation". Practice in the broader sense served simply as supplementary means of interpretation and, moreover, had to be the practice of all parties. In the second paragraph, it would be wise to define the term "evolutive interpretation", or to use a more readily understandable term. Lastly, it was questionable whether the practice of non-State actors should be taken into consideration, as suggested in draft conclusion 4, that being particularly true of social practice, which was not universally recognized.

5. Mr. GEVORGIAN endorsed the scope and aim of the work as defined by the Special Rapporteur. The topic was sensitive and not without political implications. It was therefore vital to devise a uniform approach which would be of service to all those who were called upon to interpret treaties. The Special Rapporteur's exhaustive analysis of international case law was valuable, but the *travaux préparatoires* to the 1969 Vienna Convention and the principles established by the Convention, especially those flowing from article 31, ought also to be borne in mind.

6. In draft conclusion 1, mention should be made of article 32, which was as much a reflection of customary international law as was article 31. It might be inadvisable to refer to evolutive interpretation in draft conclusion 2 as, in the absence of any definition of that notion, its meaning could be deduced only by applying a variety of means of interpretation. In draft conclusion 3, it was essential to avoid any ambiguity in the definitions of "subsequent agreement" and "subsequent practice". Lastly, he was unconvinced that it would be helpful to include a reference to social practice in draft conclusion 4. However, he considered that the four draft conclusions could be referred to the Drafting Committee.

7. The CHAIRPERSON invited the Special Rapporteur to sum up the discussion on his first report on subsequent agreements and subsequent practice in relation to the interpretation of treaties.

8. Mr. NOLTE (Special Rapporteur) thanked the members of the Commission for their constructive comments. Mr. Šturma had made the very general point that the draft conclusions could be perceived either as more descriptive, or as more prescriptive. While that was true, that feature was not necessarily unique to the report and draft conclusions, for international law was often predicated on a description of practice that produced a more or less prescriptive effect. That comment had therefore been a helpful reminder that the draft conclusions could be formulated either way.

9. All the speakers in the debate had agreed that the Commission's work on the topic should cleave as faithfully as possible to the 1969 Vienna Convention, although it had to be remembered that the rules of interpretation defined therein had been a compromise between varying schools of thought. Those rules reflected a consensus which had lasted for half a century and there should be no departing from it unless there were good reasons for doing so. As had been suggested, in forthcoming reports and in the commentaries to the draft conclusions, he would give greater prominence to the Commission's *travaux préparatoires* leading up to the Convention.

10. Most members had insisted on the need to visualize the process of treaty interpretation as a "single combined operation" without distinguishing between, or unduly emphasizing, any of the means listed in article 31 of the 1969 Vienna Convention. The process of interpretation and its outcome were, however, two quite separate matters. Determining the relevance, in a specific case, of a given means of interpretation alone and then in relation to other means of interpretation, was not the same thing as singling out that means. In fact, subsequent agreements and subsequent practice were only two of several means of interpretation. That did not, however, signify that it was possible to choose freely how to use each means. The reasoning underpinning sound judgments often took as its point of departure the ordinary meaning of the terms of a treaty read in their context and in the light of the object and purpose, while at the same time taking into account the other means listed in article 31 of the Convention, supplemented by those mentioned in article 32. Draft conclusion 1 was certainly not meant to facilitate manipulation in that respect, as Mr. Kamto had feared. That balance between the various means of interpretation was fundamental to all the Commission's work on the law of treaties and must therefore be preserved. Some members had criticized the draft conclusions as being too general. He thought that a general approach was necessary at the introductory stage of the work and helped to recall that the interpretative process must remain open. The general nature of the draft conclusions should not, however, endanger legal certainty.

11. With regard to draft conclusion 1, several members had suggested that article 32, and even article 33, should be placed on the same footing as article 31 of the 1969 Vienna Convention. He had no objections to that. He had

drawn a distinction, because the Study Group on treaties over time had insisted on the need to make the “general rule” set forth in article 31 the unquestionable starting point of the interpretative process. On the other hand, members’ views had diverged somewhat on the question of whether the means of interpretation mentioned in article 31 should all be “thrown into the crucible”. Some members had stressed the importance of the means listed in paragraph 1 of that article, while others had considered that they alone did not comprise the whole essence of the general rule. At all events, nothing in the wording of the article or in the *travaux préparatoires* suggested that “the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose” should be given a privileged position. Nor was there any reason to infer that, conversely, the means referred to in paragraph 3 were less important; in fact, in his third report on the law of treaties (1964), the Special Rapporteur, Sir Humphrey Waldock, had gone so far as to say “[s]ubsequent practice when it is consistent and embraces all the parties would appear to be decisive of the meaning to be attached to the treaty”.²⁵ The only means which were supplementary in nature were those mentioned in article 32.

12. All the same, the “ordinary meaning” remained the point of departure for interpretation, as one member had rightly contended. That being so, a provision could be interpreted by giving more weight to some means than to others. As one member had commented, the interaction of the means thrown into the crucible was guided by the evaluation of those means by the interpreter; that evaluation entailed ascertaining the relevance of the various means of interpretation in the particular case and determining their interaction, by placing proper emphasis on them.

13. That was the reason the report referred to the case law of a variety of international courts and tribunals. Contrary to the understanding of some members, that case law did not show that, in the abstract, courts and tribunals diverged in the emphasis which they placed on various means of interpretation—which would mean that they disagreed about how to interpret the 1969 Vienna Convention. In reality, it seemed that the particular provisions applied by those courts and tribunals usually required the placing of varying degrees of emphasis on certain means of interpretation. The cases cited in the report therefore illustrated how given instances of subsequent practice and subsequent agreements contributed, or not, to the determination of the ordinary meaning of the terms in their context and in the light of the object and purpose of the treaty, as Mr. Tladi had put it. Perhaps, as Mr. Forteau had proposed, it would be better to link the emphasis to be placed on certain means of interpretation to the “nature” of the treaty or treaty provisions which were to be applied, to decide whether, when human rights treaties were interpreted, greater emphasis was to be placed on their object and purpose, whereas the ordinary meaning of terms would be stressed more when interpreting treaties containing specific, reciprocal obligations, such as bilateral commercial agreements. In

any event, draft conclusion 1 did not imply that different international courts and tribunals had developed a style of interpretation regardless of the nature or content of the treaties which they applied. Perhaps it was also necessary to make clear that the purpose of the second paragraph of that draft conclusion was not to change the logical order of reasoning suggested by article 31, but to refer to the practice of courts and tribunals in order to adjust the emphasis placed on the various means of interpretation mentioned in articles 31 and 32 according to the circumstances of the case.

14. Although Sir Michael had suggested that the expression “means of interpretation”, which might be misleading, should be replaced with “elements of interpretation”, he personally thought that, for various reasons, there should be no deviating from the terminology employed by the 1969 Vienna Convention and the Commission. The term “means” did not single out the different factors mentioned in articles 31 and 32 of the Convention, but indicated that, on the contrary, each had a particular function in the overall process of interpretation which was a single, combined operation. Just as a court usually began to construct its reasoning by examining the terms of a treaty, then by analysing them in their context and in the light of the object and purpose of a rule, it was necessary first to ascertain the relevance of the different means of interpretation in a given case before “throwing them into the crucible” in order to arrive at a correct interpretation where each was given its appropriate weight.

15. He concurred with Mr. Murase that some of the case law of the *ad hoc* tribunals set up under the Convention on the settlement of investment disputes between States and nationals of other States might be of limited significance in comparison with that of permanent courts and tribunals. On the other hand, unlike Sir Michael, he considered that paragraph 19 of the report was correct in stating that the Inter-American Court of Human Rights did not generally rely on a primarily textual approach, but tended to resort to other means of interpretation, in particular the object and purpose of the treaty.

16. With regard to draft conclusion 2, he was not convinced that it was necessary to depart from the wording of the 1969 Vienna Convention, as Sir Michael had proposed. Unlike Mr. Murphy, he deemed it essential to make it clear that subsequent agreements and subsequent practice were “authentic” means of interpretation for, although they did not express the original agreement between parties, they were equally relevant as means of interpretation. In order to dispel the doubts expressed by Ms. Escobar Hernández as to the authenticity of all subsequent agreements and all subsequent practice as means of interpretation, he drew attention to the fact that the first paragraph of draft conclusion 2 referred only to subsequent agreements and subsequent practice “between the parties to a treaty”. As far as the second paragraph of the draft conclusion was concerned, he endorsed the view expressed by several members that subsequent agreements and subsequent practice might guide evolutive interpretation and might also support a contemporaneous interpretation, a point which the Commission should make more explicitly. In that connection, courts and other authorities responsible for applying the

²⁵ *Yearbook ... 1964*, vol. II, document A/CN.4/167 and Add.1–3, p. 60, commentary to article 71, para. (25).

law should be reminded that what was sometimes called “evolutive” interpretation was generally intrinsically related to the parties’ practice and should not therefore be taken lightly. That, to reply to Mr. Park, was why evolutive interpretation had to be taken into consideration. The fact that, as Mr. Murase had said, different authors had given different shades of meaning to that term should perhaps, as Mr. Wisnumurti had suggested, lead the Commission to define it more precisely. A closer look should be taken both at Mr. Forteau’s suggestion that it was necessary to spell out the fact that there was no presumption of contemporaneous interpretation and at the proposal put forward by Mr. Forteau and Mr. Kamto that one conclusion should explicitly state that evolutive interpretation was not a special form of interpretation but resulted from the application of the usual means of interpretation. Lastly, Mr. Murphy was mistaken in believing that the report said that evolutive interpretation necessarily took account of subsequent agreements and subsequent practice; it made the more modest claim that it might be guided by them.

17. Turning to draft conclusion 3, he said that, unlike Mr. Forteau, he did not think that subsequent agreements within the meaning of article 31, paragraph 3 (a), and the subsequent practice which established the agreement of the parties within the meaning of article 31, paragraph 3 (b), were necessarily binding by virtue of the principle of *pacta sunt servanda*. As for the second paragraph of that draft conclusion, in order to take account of the diverging views of Ms. Escobar Hernández, Mr. Huang, Mr. Kamto, Mr. Petrič and Mr. Wisnumurti, on the one hand, and of Mr. Forteau, Mr. Hassouna, Mr. Hmoud and Sir Michael, on the other, regarding the practice of one or some, but not all, parties to a treaty, it might be wise to study the proposal put forward by Ms. Escobar Hernández to devote a separate draft conclusion to subsequent practice in the broader sense which did not reflect the agreement of all parties, but which might constitute a means of interpretation within the meaning of article 32 of the 1969 Vienna Convention. As for the comments made by Mr. Forteau and Sir Michael about the distinction between a subsequent agreement within the meaning of article 31, paragraph 3 (a), and subsequent practice within the meaning of paragraph 3 (b) of that article, the drafting history of the Convention clearly showed that that distinction turned on whether the parties’ agreement was express or tacit, something which could be of considerable importance when determining where the burden of proof lay. Contrary to what those terms seemed to suggest, the difference between the two kinds of agreement was not always clear in practice. For that reason, as proposed by Mr. Wisnumurti, it might be advisable, in the English version, to replace the adjective “manifested” with “express”.

18. He readily agreed with Mr. Forteau and Mr. Murphy that it would be desirable to have more precise and detailed wording in draft conclusion 4. One possibility would be to use the formulation contained in paragraph 124 of the report and to specify, as suggested by Mr. Murphy, that the practice in question was that of legislative or judicial organs at a level below that of the central government. The draft conclusion did make the important point that for the purposes of treaty interpretation, practice

must be specifically attributed to a State. Nevertheless, as Mr. Murphy had pointed out, the draft conclusion should probably also refer to subsequent agreements. He endorsed the concerns expressed by some members that in the second paragraph of that draft conclusion, the expression “Subsequent practice by non-State actors” might mislead the reader into thinking that that practice was deemed to be at the same, or a similar, level to that of States parties to a treaty. That phrase could be replaced, for example, with “the pronouncements or activities of non-State actors”, which would also meet Mr. Forteau’s concern, since he considered that that paragraph dealt with the question of evidence. However, the issue of non-State actors’ activities should not be ignored; the fact that they were mentioned did not interfere with the discretion of the treaty interpreter. Lastly, he took note of the fact that many members were reluctant to recognize “social practice” as a form of subsequent State practice. He had not, however, intended to assert that social practice constituted subsequent State practice but, on the contrary, to emphasize that, in order to be taken into account, any social practice had to acquire the form of State practice.

19. Finally, with regard to some points which were unrelated to any particular conclusion, he said that a number of aspects of the topic which had not been dealt with in his first report would be broached in later reports. With reference to the limits of interpretation based on subsequent practice, including what Mr. Kittichaisaree and Mr. Park had termed “*de facto* amendments”, several members had been reluctant to recognize any possibility of treaty modification through a subsequent agreement which was not a formal amendment. He considered that it was necessary to examine that matter in order to cover the whole of the topic. He assured members that he would display the appropriate sensitivity when doing so.

20. The CHAIRPERSON said that he took it that the Commission wished to refer draft conclusions 1 to 4 to the Drafting Committee.

It was so decided.

Organization of the work of the session (continued)*

[Agenda item 1]

21. The CHAIRPERSON, speaking in the absence of the Chairperson of the Drafting Committee, said that the Drafting Committee on subsequent agreements and subsequent practice in relation to treaty interpretation was composed of Ms. Escobar Hernández, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Murase, Mr. Murphy, Mr. Park, Mr. Petrič, Mr. Saboia, Mr. Šturma, Mr. Valencia-Ospina, Mr. Wisnumurti, Sir Michael Wood, Mr. Tladi (Chairperson of the Drafting Committee) and Mr. Forteau (Rapporteur, *ex officio*).

The meeting rose at 11.10 a.m.

* Resumed from the 3160th meeting.