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Summary record of the 3192nd meeting

Topic:
Draft report of the International Law Commission on the work of its sixty-fifth session

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

3192nd MEETING

Monday, 5 August 2013, at 3 p.m.

Chairperson: Mr. Bernd H. NIEHAUS

Present: Mr. Caflisch, Mr. Candioti, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, 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. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Draft report of the International Law Commission on the work of its sixty-fifth session (*continued*)

Chapter IV. *Subsequent agreements and subsequent practice in relation to the interpretation of treaties* (*continued*) (A/CN.4/L.819 and Add.1–3)

C. Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, as provisionally adopted by the Commission at its sixty-fifth session (*continued*)

2. Text of the draft conclusions and commentaries thereto provisionally adopted by the Commission at its sixty-fifth session (*continued*)

1. The CHAIRPERSON invited the Commission to continue its consideration of the portion of chapter IV of the report contained in document A/CN.4/L.819/Add.1.

Commentary to draft conclusion 1 (General rule and means of treaty interpretation) (*continued*)

Paragraph (16)

Paragraph (16) was adopted.

Commentary to draft conclusion 2 (Subsequent agreements and subsequent practice as authentic means of interpretation)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

2. Sir Michael WOOD proposed that, in the first sentence, the phrase "'authentic means of interpretation'" should be replaced with "'authentic elements for the interpretation of the treaty'". In the second sentence, he proposed replacing the words "also such a means" with "the authentic expression of the intentions of the parties". The text of a treaty could not be a means of interpretation: it was what was being interpreted.

3. Mr. MURPHY proposed that the second sentence should instead be reformulated to read: "Analysing the ordinary meaning of the text of a treaty, in particular, is such a means."

4. Mr. NOLTE (Special Rapporteur) endorsed that amendment.

5. Sir Michael WOOD, referring to the final sentence in the paragraph, queried the phrase "'proof' of conduct of the parties". Did it refer to proof of the intention of the parties?

6. Mr. NOLTE (Special Rapporteur) said that the word "conduct" encompassed everything the parties did to express their intentions, including formulating the text of a treaty, formulating a subsequent agreement and engaging in a subsequent practice.

Paragraph (2), as amended by Mr. Murphy, was adopted.

Paragraph (3)

7. Mr. FORTEAU said that the second sentence was confusing because the first part referred to the parties to "a treaty", while the second part referred to "legal texts". That term in French, "*textes de lois*", was used to denote legislation, not treaties. He proposed deleting the sentence.

8. Ms. ESCOBAR HERNÁNDEZ said that there was a similar problem with the Spanish version, for which an alternative to the expression "*textos jurídicos*" would have to be found.

9. Mr. NOLTE (Special Rapporteur) said that the aim of the second sentence was to draw attention to the fact that the use of subsequent agreements and subsequent practice as means of interpreting a legal document, such as a contract, was uncommon in national law but was well established, with respect to treaties, in international law.

10. Mr. FORTEAU said that one could not confidently reach such a conclusion without conducting a thorough analysis of comparative law. There were operations in certain domestic legal systems that were quite comparable to what was practised under the law of treaties.

11. Mr. NOLTE (Special Rapporteur) said that, for the sake of compromise, the word "some" might be inserted before "domestic legal systems" in the second sentence. In the same sentence, the expression "legal texts" should be replaced with "legal instruments".

Paragraph (3), as thus amended, was adopted.

Paragraph (4)

12. Sir Michael WOOD proposed that, in the second sentence, the word "all", after "among", should be deleted, as it was superfluous.

Paragraph (4), as amended, was adopted.

Paragraph (5)

13. Sir Michael WOOD said that in the first sentence, the word "necessarily" should be inserted before "conclusive", to emphasize the point that subsequent agreements were not automatically binding but could be made so by agreement among the parties.

14. Mr. NOLTE (Special Rapporteur) said that the point was that the subsequent agreements and subsequent

practice referred to in article 31, paragraph 3 (*a*) and (*b*), of the 1969 Vienna Convention, were not conclusive or binding as such. However, it was possible to reach a binding agreement regarding the interpretation of a treaty on the basis of subsequent agreements and subsequent practice, if there were specific indications that the parties so intended, and such agreements and practice would then be conclusive.

15. Responding to a comment by Sir Michael, he said that the reference to domestic law in the final sentence served as an important reminder to all those called upon to interpret the law that there were other rules that might need to be taken into account when establishing the agreement of the parties regarding the interpretation of a treaty. When discussing the scope of the topic, a number of Commission members had expressed concern that the Commission might inadvertently enunciate rules that would make it easy for States to agree to terms that would have the effect of overriding the original treaty. He suggested including a footnote to indicate that this issue would be addressed in greater detail at a later stage of work on the topic.

16. Mr. TLADI said that he was opposed to Sir Michael's amendment to the first sentence and would prefer to delete the words "conclusive or". The idea that subsequent agreements could be conclusive went against the notion that the process of interpretation was a single, combined operation in which all the means of interpretation were equal.

17. Mr. MURPHY proposed, in an effort to bridge the diverging views on the first sentence, that the words "are not" should be replaced with "need not be".

18. Sir Michael WOOD said that he could go along with that amendment and agreed with the Special Rapporteur that it would be helpful to include a footnote to the effect that the issue would be dealt with at a later stage in the work on the topic. In the final sentence, the word "prevent" should be replaced with "prohibit", because the provisions of domestic law could prohibit but not prevent a State from entering into a binding agreement regarding the interpretation of a treaty.

19. Mr. NOLTE (Special Rapporteur) endorsed that proposal.

The proposal was adopted.

20. Mr. NOLTE (Special Rapporteur), referring again to the first sentence, said that the Commission had come very close to saying that subsequent agreements could be conclusive, in the sense of overriding all other means of interpretation, when it had characterized a subsequent agreement as representing an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation. Thus, it was not helpful simply to ignore that question by deleting the word "conclusive"; rather, it had to be dealt with in the commentary. He could not accept Mr. Murphy's proposal, because if the Commission stated that subsequent agreements and subsequent practice under article 31, paragraph 3 (*a*) or (*b*), need not be conclusive or binding, it was implying that they could be.

21. Mr. FORTEAU said that, since the final two sentences of paragraph (4) explained that subsequent agreements and subsequent practice that established the agreement of the parties regarding the interpretation of a treaty were not necessarily conclusive or legally binding, the beginning of paragraph (5) should simply refer back to paragraph (4) and be reformulated to read: "This does not exclude that the parties to a treaty, if they wish …" ["*Ce qui précède n'exclut pas que les parties à un traité puissent, si elles le souhaitent …*"].

22. Mr. NOLTE (Special Rapporteur) endorsed Mr. Forteau's proposal.

The proposal was adopted.

Paragraph (5), as thus amended, was adopted.

Paragraph (6)

Paragraph (6) was adopted.

Paragraph (7)

23. Sir Michael WOOD proposed that, in the first sentence, the words "to a certain degree" should be replaced with "more or less".

Paragraph (7), as amended, was adopted.

Paragraph (8)

Paragraph (8) was adopted.

Paragraph (9)

24. Mr. FORTEAU proposed that in the final sentence, the words "and thus in its evidentiary character" should be replaced by "the greater ease with which the agreement of the parties may be established" ["*la facilité plus grande avec laquelle on peut établir l'accord entre les parties*"].

25. Mr. NOLTE (Special Rapporteur) endorsed that proposal.

Paragraph (9), as amended, was adopted.

Paragraphs (10) to (12)

Paragraphs (10) to (12) were adopted.

The commentary to draft conclusion 2 as a whole, as amended, was adopted.

Commentary to draft conclusion 3 (Interpretation of treaty terms as capable of evolving over time)

Paragraph (1)

26. Mr. HMOUD proposed replacing the words "terms of" with "a term used in", which was closer to the wording of the draft conclusion.

Paragraph (1), as amended, was adopted.

Paragraph (2)

27. Sir Michael WOOD proposed inserting the phrase "In the case of treaties," at the beginning of the first sentence, so as to avoid implying that intertemporal law applied only to treaties.

That amendment was adopted.

28. Mr. PARK said that the final sentence conveyed the erroneous impression that many leading academics favoured the evolutive approach to the interpretation of treaties. Yet paragraphs (4) to (6) of the commentary to draft conclusion 3 made it plain that the Commission itself had not yet taken a position regarding the appropriateness of a more contemporaneous or a more evolutive approach to treaty interpretation. He therefore proposed deleting the sentence.

29. Mr. NOLTE (Special Rapporteur) said that the sentence was an effort to frame the discussion that followed, which did not take as a given that there was a general tendency to support the evolutive approach to interpretation. In fact, the discussion put the phrase into the appropriate context, which was that evolutive interpretation, as far as it was practised and had been recognized—not only by academic commentators but also by courts and tribunals—was the result of the proper application of the means of interpretation referred to in articles 31 and 32 of the Vienna Convention. It was undeniable that many academic commentators favoured evolutive interpretation, and international courts and tribunals had taken note of that fact. The quotation of the arbitral tribunal used as an example in the final sentence[184] made that position particularly clear. Framing the elaboration of draft conclusion 3 in the light of the academic perspective added to the persuasiveness of the Commission's arguments.

30. Mr. MURPHY said that, in order to meet the Special Rapporteur's objective and to address Mr. Park's concern that the Commission itself should not appear to be advocating the evolutive approach to the interpretation of treaties, the sentence could be reworded along the following lines: "At the same time, the Tribunal in the *Iron Rhine* case asserted that there was 'general support among the leading writers today for evolutive interpretation of treaties'".

31. Mr. FORTEAU supported Mr. Murphy's proposal. In the second sentence, he proposed deleting the word "Originally" ["*Initialement*"] in order to make the sentence more neutral.

32. Mr. NOLTE (Special Rapporteur) endorsed the amendments proposed by Mr. Murphy and Mr. Forteau.

Those amendments were adopted.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

33. Mr. HMOUD proposed the deletion of the words "(or rule)" at the end of the paragraph.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

34. Mr. HMOUD suggested that in the third sentence, the words "recognize that the meaning of a treaty rule has evolved over time" should be replaced with "support an evolutive interpretation".

That amendment was adopted.

35. Mr. KITTICHAISAREE said that the Special Rapporteur should make it clear whether he was quoting the judgments in the cases cited[185] or the declaration of Judge *ad hoc* Guillaume. The first footnote to the second sentence should refer to the arbitral award of 21 October 1994 in *Boundary dispute between Argentina and Chile concerning the frontier line between boundary post 62 and Mount Fitzroy*. He queried the accuracy of the pages and paragraphs mentioned in the second and fourth footnotes to the same sentence.

36. Mr. NOLTE (Special Rapporteur) explained that the quotations came from the judgments of the International Court of Justice and not from Judge Guillaume's declaration. It was true that in the first footnote to the second sentence, the reference should be to page 16, not page 14. He agreed with Mr. Hmoud's proposal.

Paragraph (6), as amended, was adopted.

Paragraph (7)

Paragraph (7) was adopted.

Paragraph (8)

37. Mr. FORTEAU said that at the end of the paragraph, the words "must … be justifiable" should be replaced with "must … be justified" ["*doit ... être justifiée*"].

38. Sir Michael WOOD suggested that the text should be amended to read "must therefore result from the ordinary process of treaty interpretation".

39. Mr. NOLTE (Special Rapporteur) said that he had used the word "justifiable" since there were courts which did not provide a detailed explanation of how they had arrived at a particular interpretation, although it could be assumed that they had done so in the manner prescribed by articles 31 and 32 of the Vienna Convention. However, he had no objection to Sir Michael's proposal.

Paragraph (8), as amended, was adopted.

[184] *Award in the Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands.*

[185] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua).*

Paragraph (9)

40. Mr. HMOUD said that he could accept the paragraph only if a new sentence was added at the end, to read: "Ultimately, the interpreter has to answer the following question: Can it be presumed that the parties have intended, when they concluded the treaty, to give the term under consideration an evolving character?" The presumption of intention was an objective test that took into account how the drafters of a treaty would have interpreted, in contemporary circumstances, a term whose meaning had subsequently evolved.

41. Mr. MURPHY and Ms. JACOBSSON supported Mr. Hmoud's proposal.

42. Mr. SABOIA said that the addition proposed by Mr. Hmoud would disturb the delicate balance of the text, and the objective test that he proposed was overly strict. In paragraph (6) of the commentary, the Commission had explicitly referred to the International Court of Justice's two strands of jurisprudence, whereby some treaties could be interpreted by an evolutive approach, while others called for a contemporaneous interpretation.

43. Mr. NOLTE (Special Rapporteur) said that Mr. Hmoud's proposal oversimplified a complex issue and elevated the *travaux préparatoires* to a higher status than they were given in the Vienna Convention. He proposed that the sentence to be added to the end of the paragraph should read: "The interpreter thus has to answer the question whether the parties can be presumed to have intended, upon the conclusion of the treaty, to give a term used a meaning which is capable of evolving over time."

Paragraph (9), as thus amended, was adopted.

Paragraph (10)

44. Mr. HMOUD, supported by Sir Michael WOOD, Mr. FORTEAU and Mr. MURPHY, proposed that, in the last sentence, the word "rule" should be replaced with "term", which was the expression used in the draft conclusion.

45. Mr. NOLTE (Special Rapporteur) said that when the meaning of a term changed as a result of an evolutive interpretation given to that term, then the meaning of the rule in which the term occurred also changed. However, he acknowledged that paragraph (10) was not the best place to address the issue of whether the meaning of a "rule" could evolve over time and therefore agreed to the replacement of that word with "term".

Paragraph (10), as amended, was adopted.

Paragraph (11)

Paragraph (11) was adopted.

Paragraph (12)

46. Mr. FORTEAU said that the first sentence was rather complicated and should be streamlined by replacing the words "contribute to understanding under which circumstances the interpretation of a treaty results in" with "assist in determining whether a term should be given" ["*aider à déterminer s'il convient de donner à un terme*"].

Paragraph (12), as amended, was adopted.

Paragraph (13)

47. Ms. ESCOBAR HERNÁNDEZ said that in the first sentence, the word "member", before "States", was superfluous and should be deleted.

Paragraph (13), as amended, was adopted.

Paragraphs (14) to (17)

Paragraphs (14) to (17) were adopted.

Paragraph (18)

48. Mr. NOLTE (Special Rapporteur) pointed out that the second sentence should be amended to avoid repetition of the word "phrase".

49. Sir Michael WOOD suggested that the sentence should read "The expression 'term' is not limited to specific words …".

50. Mr. FORTEAU said that the final phrase should be worded more explicitly. He proposed that the words "the respective rules are covered accordingly" should be replaced with "the evolving meaning of a term affects the rule in which it is contained" ["*le sens évolutif du terme a un effet sur le sens de la règle qui le contient*"].

51. Mr. MURPHY agreed with Mr. Forteau that the last sentence could be worded more clearly, but he suggested simply replacing the word "covered" with "affected".

52. Sir Michael WOOD said that the words "respective rules" might be replaced with "rules concerned".

53. Mr. NOLTE (Special Rapporteur) said that the very artificial distinction between terms and rules would merely be emphasized by using the word "affected". He did not see any reason not to use the word "covered".

54. Mr. PETRIČ, supported by Mr. SABOIA, noted that the Special Rapporteur had a *primus inter pares* position and other members should respect his wish to maintain a particular word.

Paragraph 18, with the two amendments by Sir Michael, was adopted.

The commentary to draft conclusion 3 as a whole, as amended, was adopted.

55. The CHAIRPERSON invited the Commission to resume its consideration of paragraphs (8) and (14) of the commentary to draft conclusion 1 that had been left in abeyance at the previous meeting.

Commentary to draft conclusion 1 (General rule and means of treaty interpretation) (*continued*)

Paragraph (8) (*concluded*)

56. Mr. NOLTE (Special Rapporteur) said that, although he still maintained that the final sentence was substantive, he would be willing to delete it, since some members considered it obscure.

57. With respect to the second sentence, there had been some debate about whether the phrase "the reasoning set out in paragraph 1" was a reference to paragraph 1 in article 31 of the Vienna Convention or to paragraph 1 of the draft conclusion. It was a reference to the process of interpretation described in draft conclusion 1, and he therefore proposed amending the phrase to read "the application of the rules of interpretation set out in paragraph 1".

58. Mr. TLADI said that the amendment introduced an element of circuitous reasoning: the means of interpretation were to be integrated into the application of a general rule of interpretation, of which they were already a part.

59. Sir Michael WOOD said that in his view, the final phrase should read "set out in paragraph 1 of article 31".

60. Mr. FORTEAU suggested that the end of the sentence should be reworded to read "are an integral part of the general rule of interpretation reflected in article 31" ["*sont une partie intégrante de la règle générale d'interprétation reflétée à l'article 31*"].

61. Mr. TLADI said that the proposal by Mr. Forteau met his concern, but to track the language of the draft conclusion, he suggested that the words "set forth" should be used rather than "reflected".

Paragraph (8), as thus amended, was adopted.

Paragraph (14) (*continued*)

62. Mr. NOLTE (Special Rapporteur) said that three points remained open. On the question of whether to use the word "factors" or "elements", he agreed with Sir Michael that "elements" was preferable in that context.

63. On the interactive process, he pointed out that paragraph (8) of the Commission's 1966 commentary on interpretation of treaties said that the various elements present in any given case would be thrown into a crucible, and their "interaction" would give the legally relevant interpretation.[186] The term "interactive process" was not such a leap from "interaction".

64. On whether to use the word "rule" in the phrase "analyze those terms in their context and in the light of the object and purpose of a rule", he proposed a compromise formula, using the word "treaty", thus reproducing the language of the Vienna Convention, but adding a footnote with references to case law and the literature, including the writings of former Commission member Yasseen, that indicated that a treaty did not necessarily have a single object and purpose.[187]

65. Mr. MURPHY said he feared that the Commission might be bringing in aspects of the Vienna Convention other than those covered in articles 31 and 32.

66. Mr. FORTEAU said that the object of draft conclusion 1 was not to give guidelines on interpreting the provisions of article 31 but to provide a reminder of the general rule of interpretation. Emphasizing the difference between the object and purpose of the treaty and the object and purpose of a rule was not relevant to the draft conclusion and might create legal difficulties in the future. Simply referring to the object and purpose of the treaty would be perfectly clear, and a footnote would then not be needed.

67. Sir Michael WOOD said that the compromise of referring in the text to the object and purpose of "the treaty" and, in a footnote, to at least some of the sources cited by the Special Rapporteur might be acceptable.

68. The CHAIRPERSON suggested that the Commission leave the paragraph in abeyance until a later meeting.

Chapter X. *The obligation to extradite or prosecute (*aut dedere aut judicare*) (A/CN.4/L.825)*

69. The CHAIRPERSON invited the Commission to begin its consideration, paragraph by paragraph, of chapter X of the draft report as contained in document A/CN.4/L.825.

A. Introduction

Paragraphs 1 to 3

Paragraphs 1 to 3 were adopted.

B. Consideration of the topic at the present session

Paragraph 4

Paragraph 4 was adopted.

Paragraph 5

70. Mr. KITTICHAISAREE (Chairperson of the Working Group on the obligation to extradite or prosecute) said he would prefer the report of the Working Group (A/CN.4/L.829) to be included in the body of chapter X rather than annexed to the report. He noted that the report of the Study Group on fragmentation of international law had been incorporated in the report of the Commission to the General Assembly on the work of its fifty-fourth session.[188]

71. The CHAIRPERSON said that it was standard practice for the reports of working groups that had not yet completed their work to be annexed to the Commission's report. Only when groups had concluded their work were their reports included in the report itself.

72. Mr. CANDIOTI supported Mr. Kittichaisaree's position that the Working Group's report should be included in chapter X.

[186] *Yearbook … 1966*, vol. II, document A/6309/Rev.1 (Part II), pp. 219–220, paragraph (8) of the commentary to articles 27 and 28.

[187] M. K. Yasseen, "L'interprétation des traités d'après la Convention de Vienne sur le droit des traités", *Collected Courses of The Hague Academy of International Law, 1976-III*, vol. 151, pp. 1 *et seq.*, at p. 58.

[188] *Yearbook … 2002*, vol. II (Part Two), chap. IX, pp. 97–99, paras. 495–513.

73. Mr. MURPHY opposed that position, since the incorporation of the Working Group's report would create the impression that it reflected the views of the Commission as a whole. Moreover, placing the Working Group's report in an annex would give it greater visibility.

74. Mr. CANDIOTI pointed out that the composition of the Working Group, which was a working group of the whole, was the same as that of the plenary. Given the extensive delays in the work on the topic and the expectations in the Sixth Committee, the Working Group's report must not be relegated to an annex.

75. Sir Michael WOOD said that as he understood it, it had already been agreed in the Working Group and in the plenary that the report would be annexed. It would be more prominent as a separate annex, facilitating its consideration by the members of the Sixth Committee.

76. Mr. SABOIA said that he supported the views expressed by Mr. Candioti. The Commission had made substantial progress on the topic, and that progress should be well publicized.

77. Mr. PETRIČ suggested that, as in similar situations in the past, the Commission should take an indicative vote.

Following an indicative vote, paragraph 5 was adopted.

Chapter X of the report of the Commission, as a whole, was adopted.

The meeting rose at 6.05 p.m.

3193rd MEETING

Tuesday, 6 August 2013, at 10 a.m.

Chairperson: Mr. Bernd H. NIEHAUS

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, 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. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Draft report of the International Law Commission on the work of its sixty-fifth session (*continued*)

1. Mr. CANDIOTI said that, at the previous meeting, the Commission had decided that the report of the Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*), contained in document A/CN.4/L.829, should be annexed to the report of the Commission on the work of its sixty-fifth session, which was not its usual practice and should not set a precedent.

Chapter XI. *The most-favoured-nation clause* (A/CN.4/L.826)

2. The CHAIRPERSON invited the members of the Commission to consider, paragraph by paragraph, chapter XI of the draft report, as contained in document A/CN.4/L.826.

A. Introduction

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

B. Consideration of the topic at the present session

Paragraph 3

3. Mr. FORTEAU (Rapporteur) said that the last sentence should be aligned with the English text.

Paragraph 3 was adopted subject to the necessary amendments to the French text.

Paragraphs 4 and 5

Paragraphs 4 and 5 were adopted.

Chapter XI of the report of the Commission as a whole, as amended, was adopted.

Chapter IV. *Subsequent agreements and subsequent practice in relation to the interpretation of treaties* (*continued*) (A/CN.4/L.819 and Add.1–3)

C. Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, as provisionally adopted by the Commission at its sixty-fifth session (*continued*)

2. Text of the draft conclusions and commentaries thereto provisionally adopted by the Commission at its sixty-fifth session (*continued*)

Document A/CN.4/L.819/Add.2

Commentary to draft conclusion 4 (Definition of subsequent agreement and subsequent practice)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

4. Following a debate in which Sir Michael WOOD and Mr. FORTEAU, speaking both as Rapporteur and in his capacity as an expert, took part, Mr. NOLTE (Special Rapporteur) proposed, in response to Sir Michael's concern about the inaccuracy of the term "conclusion", that the third sentence should be reworded: "Various provisions in the Vienna Convention (for example, article 18) show that a treaty may be 'concluded' before its actual entry into force." The next sentence should read: "For the purpose of the present topic, 'conclusion' is whenever the text of the treaty has been established as definite"; and the reference to the existing footnote should be retained. Lastly, the problem raised by Sir Michael could be resolved by adding the following sentence at the end of the paragraph: "The possibility that subsequent agreements and subsequent practice can occur before the entry into force of a treaty implies that the word 'parties' is used in a wider sense than the definition in article 2 (*g*) of the Vienna Convention."

Paragraph (2), as amended, was adopted.