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Summary record of the 3206th meeting

Topic:
Subsequent agreements and subsequent practice in relation to the interpretation of treaties

Extract from the Yearbook of the International Law Commission:-
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3206th MEETING

Friday, 16 May 2014, at 10.05 a.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Subsequent agreements and subsequent practice in relation to the interpretation of treaties (*continued*) (A/CN.4/666, Part II, sect. A, A/CN.4/671, A/CN.4/L.833)

[Agenda item 6]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. PARK said that the six new draft conclusions seemed to be of a fairly general and descriptive character. Since the Commission had to supply precise guidance to States, which were the first to interpret a treaty, some of the terminology employed in the draft conclusions should be amended or improved.

2. In draft conclusion 6, the phrases "requires careful consideration" and "whether they are motivated by other considerations" were rather ambiguous, as were the phrases "in particular by narrowing or widening" and "may, *inter alia*, depend on their specificity" in draft conclusion 7. In fact, he queried the contents of draft conclusion 7, given that the European Court of Human Rights was the only international court to limit itself to broad, comparative assessments of subsequent practice. Despite the inclusion of the words "may" and "*inter alia*", the second paragraph of that draft conclusion did not seem to reflect the diversity of international case law. It was doubtful whether specificity should be made a criterion for determining the value of subsequent practice.

3. With regard to draft conclusion 8, he said that if a given conduct was consented to by all States parties to a treaty, in line with article 31, paragraph 3, of the 1969 Vienna Convention, then it should be viewed as subsequent agreement, as opposed to subsequent practice. Subsequent practice within the meaning of article 31, paragraph 3, required a "concordant, common and consistent sequence of acts", as the WTO Appellate Body had stated (see paragraph 44 of the second report of the Special Rapporteur (A/CN.4/671)). However, the expression "concordant, common and consistent" required further scrutiny, since it was used only by the WTO Appellate Body.

4. With reference to draft conclusion 9, he was unsure whether the term "agreement", as used in article 31, paragraph 3 (*a*), of the 1969 Vienna Convention was identical in meaning to the sense in which it was used in paragraph 3 (*b*). The agreement referred to in article 31, paragraph 3 (*a*), required the existence of a "single common act" demonstrating the parties' agreement, whereas no single, common line of conduct was necessary for the agreement mentioned in article 31, paragraph 3 (*b*), where that term signified that subsequent practice had to be indicative of a "common understanding" among the parties. Draft conclusion 9 should therefore be amended and its title changed to "Agreement of the parties as referred to in article 31, paragraph 3 (*b*)". Another draft conclusion could be added, to state that the agreement referred to in article 31, paragraph 3 (*a*), meant a "single common act". The question then arose whether tacit agreement or acquiescence could be deemed agreement within the meaning of article 31, paragraph 3.

5. For draft conclusion 10, it might be wise to give further consideration to the roles of the different conferences of States parties and the legal effect of a decision adopted at such a conference, as mentioned in paragraph 2. The phrase "in the context of the interpretation of treaties" should be inserted in paragraph 2.

6. Chapter VI of the second report, especially paragraph 116 thereof, pinpointed the key issues: to what extent could subsequent agreements and subsequent practice under article 31, paragraph 3, of the 1969 Vienna Convention contribute to interpretation, and could subsequent agreements and subsequent practice have the effect of modifying a treaty? Many academic writers admitted that it was not always easy to draw a distinction between application and modification of a treaty. Article 39 of the 1969 Vienna Convention laid down a general rule on modification of a treaty, namely that it could be amended by agreement between the parties concerning its interpretation or application. Thus, a treaty could be modified by subsequent agreement among the parties concerning its interpretation or application.

7. While that line of research being pursued by the Special Rapporteur was promising, draft conclusion 11, as currently worded, lacked clarity. It should be reworded to deal separately with the role of subsequent agreements, on the one hand, and with the role of subsequent practice, on the other. The contents of paragraph 1 added no additional guidance or information and were therefore superfluous. In paragraph 2, a distinction was made between modification of a treaty and conduct by which the parties "intended to interpret" a treaty, the distinction being whether or not the conduct was consistent with the treaty provisions governing modification. It was the substance, not the form of conduct, that was important. Subsequent practice resulting in a fundamental change in a treaty was a *de facto* modification and not an interpretation of that treaty. The Drafting Committee would have to discuss whether paragraph 2 should reflect the fact that subsequent practice, as a *de facto* modification, brought about an essential change in a treaty.

The meeting rose at 10.30 a.m.
