

Document:-  
**A/CN.4/3209**

**Summary record of the 3209th meeting**

Topic:  
**<multiple topics>**

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had completely different legal consequences. The 1969 Vienna Convention was based on the notion that the original intentions of the authors of treaties were expressed primarily in the texts of treaties, and it was up to those who interpreted treaties to elucidate those intentions. The International Court of Justice had repeatedly emphasized that the interpreter's task was not to review treaties or to bring up things they did not contain.

56. The Special Rapporteur's conclusion that the possibility of modifying a treaty by subsequent practice was not generally recognized was, in many respects, justified. Nevertheless, if it was recognized in a specific case that a treaty had been modified by subsequent agreements and subsequent practice, such agreements should be considered, not as a means of interpretation under article 31, paragraph 3, of the 1969 Vienna Convention, but as agreements on amendments under article 39 of that Convention. If, when applying the treaty, the need arose for an evolutive interpretation through subsequent agreements and subsequent practice, it was an indication that the treaty needed to be reviewed. Updating a treaty through the formal process of amendment would then clarify the text and reflect the changes in the parties' understanding of their obligations since the time of signature.

57. In conclusion, he agreed that the draft conclusions should be referred to the Drafting Committee.

*The meeting rose at 11.40 a.m.*

## 3209th MEETING

*Thursday, 22 May 2014, at 10 a.m.*

*Chairperson:* Mr. Kirill GEVORGIAN

*Present:* Mr. Cafilisch, Mr. Candiotti, Mr. Comisário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, 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. Tladi, Mr. Vázquez-Bermúdez, Mr. Wako, 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 (*concluded*)

1. The CHAIRPERSON invited the Special Rapporteur on subsequent agreements and subsequent practice in relation to the interpretation of treaties to summarize the debate on his second report (A/CN.4/671).

2. Mr. NOLTE (Special Rapporteur) said that he had endeavoured to formulate the draft conclusions as normatively as possible, but that the diversity of international jurisprudence and State practice made it difficult to identify very clear rules. However, there were some patterns from which general conclusions could be derived that would help interpreters. Such help might consist of describing the approach adopted by the international courts and tribunals when confronted with subsequent agreements and practice. For example, the way in which the International Court of Justice dealt with the issue provided important guidance for the interpreter. The proposed draft conclusions were thus not purely descriptive. In order to avoid any misunderstandings, the Commission might prefer to call the draft text "guidelines", as proposed by Mr. Niehaus and Mr. Murase.

3. The proposal to distinguish more clearly the role played by articles 31 and 32 of the 1969 Vienna Convention was acceptable, provided that the principle of the unity of the process of interpretation was preserved and that reference was made to article 32 where necessary. It could also be pointed out, as proposed by Sir Michael Wood, that article 32 was applicable not only in a subsidiary fashion but also systematically in order to confirm the meaning resulting from the application of article 31.

4. With reference to draft conclusion 6, Mr. Murphy had expressed the view, based on considerable research, that application and interpretation were two entirely separate and distinguishable operations. However, many examples could be cited to show that, on the contrary, the two operations overlapped to some extent, and therefore the interpreter's attention was simply drawn to the fact that application of a treaty always involved some degree of interpretation. He supported Mr. Murphy's proposal to emphasize more clearly the content of article 31, paragraph 3 (*a*), which pushed the interpreter more towards agreements that were happening on the ground, as well as Mr. Forteau's proposal to specify that a subsequent agreement or subsequent practice might serve not only to clarify the terms of the treaty but also other means of interpretation, such as the object and purpose of the treaty. It might also be possible to find a better expression than "other considerations" at the end of the draft conclusion, as suggested by Mr. Niehaus.

5. Draft conclusion 7 repeated the content of article 31 of the 1969 Vienna Convention for the very purpose of explaining it in more detail. The other criteria cited by Mr. Forteau could be mentioned, but it would be difficult to take the further step of concluding, as Mr. Forteau had proposed, that the specificity of a particular practice always had significant value for the purpose of interpretation. Mr. Hmoud's proposal to indicate that practice should be specific to the treaty seemed to go in the right direction, however. The references to specificity, value and form could also be merged in one draft conclusion. The Drafting Committee should also consider the proposal by Mr. Murphy and Ms. Escobar-Hernández to replace the word "value" with "weight".

6. As far as draft conclusion 8 was concerned, he agreed that the formulation "concordant, common and consistent" was perhaps excessively prescriptive. He would propose new wording that would also take account of Mr. Hmoud's proposal that practice should be sufficiently

frequent. The rules on the burden of proof could also be addressed, given that it was closely linked to the value of a subsequent agreement or subsequent practice, as had been noted by Mr. Forteau.

7. Several members had taken issue with the proposition made in draft conclusion 9—although it was based on the commentary to draft conclusion 4 that had already been adopted by the Commission—to the effect that a subsequent agreement under article 31, paragraph 3 (a), of the 1969 Vienna Convention need not be binding. If subsequent agreements had necessarily to be binding, the Convention would have attributed them stronger legal force. The report of the WTO Appellate Body on the *United States—Measures Affecting the Production and Sale of Clove Cigarettes* case, also mentioned by Mr. Forteau, had not stated that in order to be qualified as a subsequent agreement the Doha Ministerial Declaration needed to be binding, but that it clearly expressed a common understanding and was not merely hortatory.<sup>110</sup> Furthermore, there was no indication that the Commission or the States assembled at the United Nations Conference on the Law of Treaties had considered a subsequent agreement under article 31, paragraph 3 (a), of the 1969 Vienna Convention to have a different legal effect than an agreement established by virtue of subsequent practice. Of course, the interpreter was bound to “take into account” subsequent agreements or subsequent practice; however, that obligation did not derive from the necessarily binding nature of subsequent conduct, but from the Convention itself. Mr. Kamto had rightly noted that, in the *Kasikili/Sedudu Island (Botswana/Namibia)* case, cited in the second report to highlight the need for parties to reach an agreement on the interpretation of a treaty, the International Court of Justice had not confirmed that a subsequent agreement must not be binding. Conversely, it had not expressed the position, in that case or any other, that agreements must be binding. In order to conclude what appeared to be a false debate, perhaps the formulation proposed by Mr. Hmoud could be used, namely that an agreement under article 31, paragraph 3, of the 1969 Vienna Convention produced legal effects and, to that extent, it was binding.

8. Mr. Park and Mr. Murphy had quite rightly raised the question of whether a distinction should be made between agreements under article 31, paragraph 3 (a), and under article 31, paragraph 3 (b), of the 1969 Vienna Convention, but that distinction had already been made in draft conclusion 4 and its accompanying commentary. The purpose of draft conclusion 9 was to identify what the two paragraphs had in common, namely the agreement between the parties regarding the interpretation of the treaty. With regard to silence, it did not seem appropriate to explore the concepts of estoppel, preclusion and prescription, as proposed by Mr. Kamto. The proposal by Mr. Murphy and Sir Michael Wood to move paragraph 3 of draft conclusion 9 to draft conclusion 6 should be examined.

9. As the general thrust of draft conclusion 10 had been supported, he proposed that the Commission consider the issue of parties to treaties establishing international organizations, raised by Sir Michael, at a later date. Mr. Murase and Mr. Park had made the point that, as conferences of

States parties operated under different rules, they could not be treated as a single category. In order to take account of that very diversity, the primacy of the applicable rules of procedure was recognized in subparagraph 2 and a broad definition of the term “conference of States parties” was used in subparagraph 1. As proposed by Mr. Murase, it could perhaps be explained that the interpreter had ample room to take into account specific provisions governing the operation of a conference of States parties when assessing the effect of a decision it had taken. He questioned the appropriateness of making a distinction, as proposed by Mr. Murphy, between conferences specially charged with assessing implementation of a treaty and those undertaking a review of the treaty itself. A treaty was not necessarily interpreted expressly, but could be interpreted implicitly during its implementation. The doubts expressed by Ms. Escobar Hernández with regard to the expression “agreement in substance” in subparagraph 3 did not seem justified, as the importance of the distinction between the form and the substance was grounded in international case law. The Commission might wish to consider the possible effects of decisions of conferences of States parties beyond their contribution to the interpretation of a treaty, as proposed by Mr. Gómez Robledo, provided that it did not stray from the topic. The fact that some conferences of States parties, such as the Conference of the Parties to the United Nations Framework Convention on Climate Change, did not operate under rules of procedure should be highlighted more clearly.

10. Some members had expressed doubts as to whether draft conclusion 11 fell within the scope of the project, while others believed, on the contrary, that it was necessary to address the question of a possible modification of a treaty by a subsequent agreement or by subsequent practice. He had taken care to formulate the draft conclusion so that it fell within the scope of the topic, namely the interpretation of treaties; however, the distinction between interpretation and modification arose frequently in practice and should thus be brought to the interpreter’s attention. The possible effect of the intention to modify or amend the treaty on the scope and range of possible interpretations should be examined, referring if necessary to the possibility of an evolutive interpretation, as proposed by Mr. Gómez Robledo. As draft conclusions 7, 8 and 11 were closely connected, the Drafting Committee might consider merging some of their provisions.

**Protection of the atmosphere<sup>111</sup>**  
(A/CN.4/666, Part II, sect. I, A/CN.4/667<sup>112</sup>)

[Agenda item 11]

FIRST REPORT OF THE SPECIAL RAPPORTEUR

11. The CHAIRPERSON invited Mr. Murase, Special Rapporteur on the protection of the atmosphere, to introduce his first report (A/CN.4/667).

<sup>111</sup> At its sixty-third session (2011), the Commission included the topic in its long-term programme of work (*Yearbook ... 2011*, vol. II (Part Two), p. 175, para. 365, and annex II). At its sixty-fifth session (2013), the Commission included the topic in its programme of work and appointed Mr. Shinya Murase Special Rapporteur for the topic (*Yearbook ... 2013*, vol. II (Part Two), p. 78, para. 168).

<sup>112</sup> Reproduced in *Yearbook ... 2014*, vol. II (Part One).

<sup>110</sup> *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, para. 267.

12. Mr. MURASE (Special Rapporteur) recalled that, while the inclusion of the topic in the Commission's programme of work had been strongly supported by a number of States in the Sixth Committee, other delegations had expressed doubts as to its feasibility owing to the highly technical and politically sensitive nature of the topic in light of ongoing negotiations in that area. In order to address those concerns, the Commission had agreed to include the topic subject to an "understanding";<sup>113</sup> however, there was nothing to prevent it from discussing issues that were not being dealt with in any political negotiations or from examining existing treaty practice from the perspective of customary international law, particularly as it would not seek to fill the gaps in specialized treaties by proposing a set of draft articles. Furthermore, since the effectiveness of the mechanisms established by those treaties was relative and varied depending on the region, the difficulties faced in applying those treaties should be identified. Consequently, the Commission's objective should be to elaborate non-binding draft guidelines. Some States, however, had expressed the view that a redefinition of the 2013 "understanding" would be unavoidable at a later stage of the project. In any case, the choice of topic was appropriate because the protection of the atmosphere was a pressing concern for the international community and there was abundant evidence of State practice; moreover, it was essentially a legal issue, which meant that the Commission would not be at risk of interfering in the political domain. Far from being ill suited to deal with issues of special regimes, the Commission was in fact best placed in the United Nations to address those issues from the perspective of general international law and thus to avoid the fragmentation of international law. In addition, on the basis of article 16 (e) of its statute, the Commission could consult with scientific organizations and individual experts, which it had already done.

13. As to the background provided in chapter I of his first report, the Special Rapporteur recalled that the arbitral award made in 1941 in the *Trail Smelter* case had laid the foundations of the law in relation to transboundary air pollution. Since the 1980s, the legal framework in relation to the protection of the atmosphere had been supplemented by the Convention on long-range transboundary air pollution, as well as other multilateral instruments dealing with different aspects of the deterioration of the atmosphere, particularly tropospheric transboundary air pollution, stratospheric ozone depletion and climate change. However, no convention covering the protection of the atmosphere as a whole had been concluded to date, despite efforts to that end by the intergovernmental conference held in Ottawa in February 1989<sup>114</sup> and the growing recognition of the law of the atmosphere by the international community over the past 30 years.

14. The law relating to the protection of the atmosphere was based both on specialized conventions and on a variety of international case law, ranging from the *Trail Smelter* case to the *Whaling in the Antarctic* case and the *Nuclear Tests (Australia v. France)* and *Nuclear Tests*

(*New Zealand v. France*) cases, which had given rise to the possibility of recognizing an *actio popularis* in that area. Other sources included non-binding instruments and domestic legislation and case law. Those sources were important in determining whether the rules and principles relating to the protection of the atmosphere were established customary law and thus ripe for codification or emergent customary law, in which case the Commission would work on its progressive development.

15. The draft guidelines proposed in the first report were general in nature and contained definitions. They were thus preceded by a description of the physical characteristics of the atmosphere, together with diagrams, which highlighted the fragility of the atmosphere and its importance for human survival as a limited, scarce natural resource. The movement of the atmosphere around the Earth—atmospheric circulation—inevitably resulted in the dispersion of airborne substances, particularly pollutants and greenhouse gases, and made the atmosphere a fluctuating and dynamic mass, which meant that it could not be treated in same way as airspace.

16. Draft guideline 1 (Use of terms) provided a legal definition of the atmosphere for the purposes of the guidelines, taking account of both its physical characteristics and its functional aspect.

17. Draft guideline 2 (Scope of the guidelines) defined the scope of the draft guidelines, limiting it to atmospheric degradation caused by human activities—whose effects on the atmosphere were often indirect, as had been demonstrated by the nuclear accidents at Chernobyl and Fukushima—and specifying that it covered both the natural and human environment, as well as the two causes of atmospheric degradation, namely the introduction into the atmosphere of deleterious substances and the alteration of the atmosphere. The question of specific substances that could cause atmospheric degradation would not be addressed; however, the interlinkages between the topic at hand and other relevant fields of international law, such as the law of the sea, commercial law and human rights law, would be taken into account.

18. Draft guideline 3 (Legal status of the atmosphere) contained a "without prejudice" clause to expressly protect the sovereignty of States over their airspace, as provided for under applicable international law, which was justified on the basis of the different nature of airspace and the atmosphere. He considered that the atmosphere was an essential natural resource, as set forth in draft guideline 3, but that it could be depleted, even if it was not exploitable in the ordinary sense of the word, and that it should thus be preserved. He suggested that the concept of "shared natural resources" could be applied to the problem of bilateral or regional transboundary pollution, and that of "common natural resources" to global environment issues relating to the atmosphere. However, for the legal characterization of the atmosphere and its protection, he would not apply the concepts of "common property" or *res communis*, which was too spatial, or "common heritage of humankind", which implied the collective management of problems related to the atmosphere and would thus be premature. Instead, the more moderate but more comprehensive concept of

<sup>113</sup> *Yearbook ... 2013*, vol. II (Part Two), p. 78, para. 168.

<sup>114</sup> See "Protection of the atmosphere: statement of the Meeting of Legal and Policy Experts, Ottawa, Ontario, Canada, February 22, 1989", *American University Journal of International Law and Policy*, vol. 5, No. 2 (Winter 1990), pp. 529–542.

“common concern of humankind” seemed more likely to promote mechanisms for cooperation among States to solve a problem of common concern, on the basis of the draft guidelines.

*The meeting rose at 11.45 a.m.*

### 3210th MEETING

*Friday, 23 May 2014, at 10 a.m.*

*Chairperson:* Mr. Kirill GEVORGIAN

*Present:* Mr. Cafilisch, Mr. Candiotti, Mr. Comisário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, 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. Tladi, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

#### **Protection of the atmosphere (*continued*)** **(A/CN.4/666, Part II, sect. I, A/CN.4/667)**

[Agenda item 11]

#### FIRST REPORT OF THE SPECIAL RAPporteur (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the first report of the Special Rapporteur on the protection of the atmosphere (A/CN.4/667).

2. Mr. KITTICHAISAREE said that the first report by the Special Rapporteur was a strong step forward as the Commission began its work on a pressing contemporary issue.

3. To supplement the detailed overview of relevant case law provided in paragraphs 42 to 50 of the report, the Special Rapporteur might also consider looking at the award rendered in 2013, by the Permanent Court of Arbitration, in the *Indus Waters Kishenganga Arbitration (Pakistan v. India)*, which had concerned a dispute over the construction of a hydroelectric project by India on a river shared by India and Pakistan. The case was significant because the Court had recognized that the *Trail Smelter* arbitration had enunciated a foundational principle of customary international environmental law: that of *sic utere tuo ut alienum non laedas* (use your own property so as not to injure that of another). That finding supported the Special Rapporteur’s conclusion in paragraph 51 of his report that the *sic utere* principle was generally recognized as customary international law concerning transboundary air pollution between adjacent States. The Permanent Court of Arbitration had also strongly affirmed the status of the principle of sustainable development as part of contemporary customary international law.

4. With regard to draft guideline 1 and the proposed definition of the term “atmosphere”, he agreed with the Special Rapporteur on the need for a legal definition that corresponded reasonably well to the scientific definition. For the purposes of the guidelines, the Special Rapporteur had excluded the upper atmosphere, of which the mesosphere and the thermosphere formed part, from the definition of “atmosphere”. He wished to caution against that exclusion for three reasons.

5. First, changes in the mesosphere might serve as the first indicators of greenhouse effects. An increase in the concentration of greenhouse gases was generally understood to result in the warming of the troposphere; however, it could also produce a cooling of the stratosphere and the mesosphere, as had been observed in recent studies on climate change, including the Antarctic Program implemented by the Government of Australia.<sup>115</sup>

6. Second, although figure I of the first report showed that there were low orbital satellites in the upper atmosphere, the environmental consequences of the launch and presence of low orbital satellites was beyond the present scope of the guidelines.

7. Third, the limited attention currently being paid to the upper atmosphere for the purpose of the protection of the atmosphere was likely due to a lack of scientific knowledge, as had initially been the case with the ozone layer.

8. With regard to draft guideline 2, he noted that the draft guidelines were limited in scope to those adverse effects on the environment that were “significant” enough to warrant international regulation, yet no definition of the term “significant” appeared in the first report. Since, according to the report, the atmosphere was “a fluid, single and non-partitionable unit” (para. 81), it was worth considering whether the effect of the introduction of substances and energy into the atmosphere or the alteration of its composition would be considered “significant” if it had potentially widespread or long-term consequences. Given that the cumulative effect was the most ruinous one, even minor damage might, by accumulating, lead to significant damage for which no particular State was responsible, thereby undermining the “common concern” approach to the protection of the atmosphere.

9. With regard to draft guideline 3 (*a*), he said that, in reaching the conclusion that the protection of the atmosphere was a “common concern of humankind”, the Special Rapporteur had helpfully analysed various concepts that could be applied to the legal status of the atmosphere. Two aspects of his analysis raised difficult questions that merited further discussion.

10. First, he fully agreed with the Special Rapporteur that the notion of “airspace” differed significantly from that of the “atmosphere”: the former was an area-based concept, whereas the latter was a functional concept. The existing regime for the protection of the marine

<sup>115</sup> See the information on climate change in the mesosphere on the website of the Antarctic Program of the Government of Australia: [www.antarctica.gov.au/about-antarctica/environment/atmosphere/studying-the-atmosphere/hydroxyl-airglow-temperature-observations/climate-change-in-the-mesosphere](http://www.antarctica.gov.au/about-antarctica/environment/atmosphere/studying-the-atmosphere/hydroxyl-airglow-temperature-observations/climate-change-in-the-mesosphere).