Document:-
A/CN.4/3215

Summary record of the 3215th meeting

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

Extract from the Yearbook of the International Law Commission:-
2014, **vol. I**

"common concern" was that it created substantive obligations of environmental protection, in addition to those already recognized by customary international law. He rejected the alternative interpretations whereby the "common concern" concept gave all States a legal interest, or standing, in the enforcement of rules concerning protection of the global atmosphere or created rights for individuals and future generations. Contrary to Mr. Murphy's fears, his intention in employing the concept was not to create a legal duty for industrialized States to provide financial assistance to developing nations, or to create a liability mechanism in environmental law, but rather to provide a framework for international cooperation towards atmospheric protection.

20. Mr. Park's criticism of the use of the concept in draft guideline 3 reflected a view of the atmosphere as being divided into one part that was subject to a State's sovereignty or control and another that was not. That view was problematic, however. It was based on an approach to the protection of the marine environment, enshrined in the United Nations Convention on the Law of the Sea, that was ill adapted to the current topic, as two speakers had observed. It would be impractical, if not impossible, for a State to exercise jurisdiction and control over a portion of the air that happened to be in its territorial airspace at a particular moment but later moved to another State's airspace. The concept of jurisdiction and control was premised on an assumption that the object of control was clearly identifiable. However, the atmosphere, unlike the sea, could not be visibly divided or delineated; it was for that reason that the first report treated it as a comprehensive single unit, not subject to division along State lines.

21. He endorsed Mr. Candioti's suggestion that the title of draft guideline 3 be changed to "Protection of the atmosphere as a common concern of humankind" and that the concept of common concern form the basis of both a stand-alone guideline and a guideline articulating the basic principles relevant to atmospheric protection. In addition, he intended to move the savings clause on airspace from draft guideline 2 to draft guideline 3.

22. Two speakers considered that the concept of "common heritage of humankind" was preferable to "common concern", since the latter notion might be too weak to provide an effective legal regime for the protection of the atmosphere. However, while the instruments adopted in 1954 and 1967 on celestial bodies and cultural property used the language of common heritage, the notion had acquired a new meaning over time: it was now understood as requiring a far-reaching institutional apparatus for the implementation of protective mechanisms. It was in part for that reason that the General Assembly had designated climate change as a "common concern of [hu]mankind",[149] instead of its common heritage. However, he would have no objection if the Commission chose to use the concept of "common heritage" in relation to atmospheric pollution.

23. In sum, 10 members had expressed support for sending all three draft guidelines to the Drafting Committee, while 4 members had been in favour of sending some and deferring consideration of others until the next session. Two members had indicated that they would not oppose sending the draft guidelines to the Drafting Committee, although they would prefer to postpone doing so until the next session. Four members had opposed referral to the Drafting Committee, preferring to leave the draft guidelines in abeyance until the next session. Three members had not expressed their views on referral. Thus, the majority of the members had supported continuing the discussion of at least some of the draft guidelines in the Drafting Committee. Nonetheless, he would like to reformulate some parts of the draft guidelines, in light of the comments, suggestions and criticisms raised, before referring them to the Drafting Committee.

24. In response to a question by Mr. NOLTE, he said that the revised draft guidelines would appear in his second report and that their referral to the Drafting Committee could be decided by the plenary following the debate on the topic.

25. The CHAIRPERSON said that she took it that the Commission wished to follow the recommendation of the Special Rapporteur and defer the referral of the draft guidelines to the Drafting Committee until the following year.

It was so decided.

The meeting rose at 11.15 a.m.

3215th MEETING

Thursday, 5 June 2014, at 10.05 a.m.

Chairperson: Ms. Concepción ESCOBAR HERNÁNDEZ (Vice-Chairperson)

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wako, Mr. Wisnumurti.

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

[Agenda item 6]

REPORT OF THE DRAFTING COMMITTEE

1. Mr. SABOIA (Chairperson of the Drafting Committee) presented the text and titles of draft conclusions 6 to 10, which had been provisionally adopted by the Drafting

[149] General Assembly resolution 43/53 on protection of global climate for present and future generations of mankind of 6 December 1988, para. 1.

* Resumed from the 3209th meeting.

Committee at the current session. The draft conclusions, as contained in A/CN.4/L.833, read:

Conclusion 6. Identification of subsequent agreements and subsequent practice

1. The identification of subsequent agreements and subsequent practice under article 31, paragraph 3, requires, in particular, a determination whether the parties, by an agreement or a practice, have taken a position regarding the interpretation of the treaty. This is not normally the case if the parties have merely agreed not to apply the treaty temporarily or agreed to establish a practical arrangement (*modus vivendi*).

2. Subsequent agreements and subsequent practice under article 31, paragraph 3, can take a variety of forms.

3. The identification of subsequent practice under article 32 requires, in particular, a determination whether conduct by one or more parties is in the application of the treaty.

Conclusion 7. Possible effects of subsequent agreements and subsequent practice in interpretation

1. Subsequent agreements and subsequent practice under article 31, paragraph 3, contribute, in their interaction with other means of interpretation, to the clarification of the meaning of a treaty. This may result in narrowing, widening or otherwise determining the range of possible interpretations, including any scope for the exercise of discretion which the treaty accords to the parties.

2. Subsequent practice in the sense of article 32 can also contribute to the clarification of the meaning of a treaty.

3. It is presumed that the parties to a treaty, by an agreement subsequently arrived at or a practice in the application of the treaty, intend to interpret the treaty, not to amend or to modify it. The possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized. The present draft conclusion is without prejudice to the rules on the amendment or modification of treaties under the Vienna Convention on the Law of Treaties and under customary international law.

Conclusion 8. Weight of subsequent agreements and subsequent practice as a means of interpretation

1. The weight of a subsequent agreement or subsequent practice as a means of interpretation under article 31, paragraph 3, depends, *inter alia*, on its clarity and specificity.

2. The weight of subsequent practice under article 31, paragraph 3 (*b*), depends, in addition, on whether and how it is repeated.

3. The weight of subsequent practice as a supplementary means of interpretation under article 32 may depend on the criteria referred to in paragraphs 1 and 2.

Conclusion 9. Agreement of the parties regarding the interpretation of a treaty

1. An agreement under article 31, paragraph 3 (*a*) and (*b*), requires a common understanding regarding the interpretation of a treaty which the parties are aware of and accept. Though it shall be taken into account, such an agreement need not be legally binding.

2. The number of parties that must actively engage in subsequent practice in order to establish an agreement under article 31, paragraph 3 (*b*), may vary. Silence on the part of one or more parties can constitute acceptance of the subsequent practice when the circumstances call for some reaction.

Conclusion 10. Decisions adopted within the framework of a conference of States parties

1. A conference of States parties, under these draft conclusions, is a meeting of States parties pursuant to a treaty for the purpose of reviewing or implementing the treaty, except if they act as members of an organ of an international organization.

2. The legal effect of a decision adopted within the framework of a conference of States parties depends primarily on the treaty and any applicable rules of procedure. Depending on the circumstances, such a decision may embody, explicitly or implicitly, a subsequent agreement under article 31, paragraph 3 (*a*), or give rise to subsequent practice under article 31, paragraph 3 (*b*), or to subsequent practice under article 32. Decisions adopted within the framework of a conference of States parties often provide a non-exclusive range of practical options for implementing the treaty.

3. A decision adopted within the framework of a conference of States parties embodies a subsequent agreement or subsequent practice under article 31, paragraph 3, insofar as it expresses agreement in substance between the parties regarding the interpretation of a treaty, regardless of the form and the procedure by which the decision was adopted, including by consensus.

2. Only five draft conclusions had been presented, since draft conclusion 11, as proposed by the Special Rapporteur, had been partially incorporated into draft conclusion 7. Draft conclusion 6 was not overly prescriptive and should be regarded as a practice pointer to assist the interpreter. Paragraph 1 was a reminder that, for identification purposes, particular attention should be paid to determining whether the parties, by an agreement or a practice, had assumed a position regarding the interpretation of a treaty; if their conduct had been motivated by other considerations, the subsequent agreement or subsequent practice was irrelevant. Subsequent agreements and subsequent practice therefore had the effects attributed to them under article 31, paragraph 3, of the 1969 Vienna Convention only if they concerned the interpretation of a treaty. The commentary would specify that the term "agreement" denoted agreements between the parties regarding the interpretation of a treaty or the application of its provisions and that the term "practice" meant any subsequent practice in the application of the treaty. It would also state that the application of a treaty or its provisions could serve not only to reflect its interpretation, but also to illustrate whether and to what extent the interpretation of the parties was based on practice. The second sentence of paragraph 1, which was a slightly modified version of paragraph 3 of the original draft conclusion 9,[150] had been added in order to clarify the principle set forth in the first sentence by distinguishing between subsequent conduct that was relevant to article 31, paragraph 3, and that which was not. The commentary would explain that the sentence was intended to be illustrative, not exhaustive. Paragraph 2 referred to the "form" of subsequent agreements and subsequent practice, an issue which had been covered by the original draft conclusions 8 and 9,[151] but it did not deal with that of their "value" or "weight". The purpose of that paragraph was to make it clear that the interpretation of treaties under the 1969 Vienna Convention must encompass various forms of subsequent agreements and subsequent practice. The Drafting Committee had added paragraph 3 in response to the concerns of members who wished to address the identification of subsequent practice under articles 31 and 32 separately in order to avoid blurring the distinction between the two articles. The Committee had deemed it important not to give the impression that the subsequent practice of only one or some of the parties was comparable, for the purposes of treaty interpretation, to subsequent agreements or subsequent practice under article 31, paragraph 3.

[150] See A/CN.4/671, annex.

[151] *Idem*.

3. With regard to draft conclusion 7, in light of the debates in plenary meetings, the Drafting Committee had been in favour of the Special Rapporteur's proposal to examine the issue of value in a separate draft conclusion. Paragraph 1 emphasized that subsequent agreements and subsequent practice were just some of the means contributing to treaty interpretation, which constituted a single, complex operation, and that consideration should therefore be given to their interaction with other means of interpretation. It followed that subsequent conduct could help to clarify not only the terms of a treaty but also the other means of interpretation mentioned in article 31. Paragraph 3 was based on paragraph 2 of the original draft conclusion 11,[152] which had related to the scope for interpretation by subsequent agreements and subsequent practice. The fact that paragraph 1 of the original draft conclusion 11 had been rendered redundant by draft conclusion 7 had raised the question as to whether paragraph 2 should be moved within the same provision or should constitute a new provision. The former option had been chosen, and a third paragraph had been added in order to remind the interpreter that the intention of the parties, as reflected in their subsequent conduct under article 31, was presumed to be solely the interpretation of the treaty and that if subsequent agreements served to amend or modify a treaty they fell under article 39 and should be distinguished from subsequent agreements under article 31, paragraph 3. The second sentence, which reinforced that presumption, adopted the wording used by the Study Group on treaties over time. Although its deletion had been proposed on the grounds that it either went too far, or not far enough, the Drafting Committee had considered that the last sentence, which contained a "without prejudice" clause, sufficiently clarified paragraph 3 as a whole.

4. The original draft conclusion 8[153] had been recast in light of the views expressed in plenary meetings, above all in order to distinguish between the possible *effects* of subsequent agreements and subsequent practice in the interpretation of the treaty, referred to in draft conclusion 7, and the *weight* that should be given to them in that process, on the understanding that such weight should be assessed in relation to other means of interpretation. The new wording, which combined the original draft conclusion 8 and paragraph 2 of the original draft conclusion 7, sought to enlighten the interpreter as to the circumstances in which subsequent agreements and subsequent practice carried more or less weight as means of interpretation. The criterion of "concordant, common and consistent" practice initially proposed by the Special Rapporteur had not been retained, since some members had thought that it was insufficiently established or overly prescriptive. In paragraph 1, the words *inter alia* showed that the provision was not exhaustive; the term "specificity" should be understood as describing the extent to which subsequent agreements and subsequent practice related to a treaty. Paragraph 2 introduced the criteria of repetition and frequency, to demonstrate that the mere repetition of a practice was not necessarily sufficient to endow it with interpretative value under article 31, paragraph 3 (*b*). The Drafting Committee had decided to deal with article 32 in a separate paragraph to distinguish it from article 31. The phrase "as a supplementary means of interpretation" was used to emphasize the subsidiary nature of subsequent practice under article 32, and the verb "may" indicated that the criteria mentioned in paragraphs 1 and 2 were not necessarily as relevant in that context as they were for assessing the weight of subsequent practice under article 31, paragraph 3 (*b*), since other factors could be taken into account. The distinction between subsequent practice under article 31 and that under article 32, as well as the weight to be given to it in each case for the purposes of interpretation, would be clarified in the commentary.

5. Draft conclusion 9 had been reworked in order to remove any reference to the form of the agreement, or to cases in which subsequent practice or subsequent agreement between parties did not signify a common understanding regarding the interpretation of a treaty. As stated earlier, both points were currently addressed in draft conclusion 6. The first paragraph of the new text highlighted the common feature of article 31, paragraph 3 (*a*) and (*b*), namely the requirement in both cases of a common understanding between parties regarding the interpretation of a treaty. Furthermore, not only must the parties be aware of that common understanding, but the latter must reflect their acceptance of the resulting interpretation. The aim of the second sentence of the same paragraph was to make it clear that the term "agreement" under article 31, paragraph 3, must not be seen as a requirement that the parties should assume or establish legal obligations beyond, or independent of, the treaty in question. In other words, the conduct of the parties for the purposes of interpreting the treaty would be taken into account, insofar as that conduct attributed a certain meaning to the treaty and therefore established an agreement regarding its interpretation, but that agreement did not have to be legally binding. That wording disregarded the issue of the politically binding nature which some agreements might have. The conditions for taking silence into consideration, referred to in paragraph 2, would be specified in the commentary.

6. Draft conclusion 10 recognized the fact that, depending on the circumstances, decisions at a conference of States parties might not automatically give rise to subsequent agreements or subsequent practice under article 31, paragraph 3, and article 32. It also recognized the importance, in assessing the subsequent agreement and subsequent practice, of any rules of procedure that might govern conferences. The word "any" had been added to emphasize the fact that a conference of parties might not necessarily have rules of procedure. The aim of the final additional sentence in paragraph 2 was to remind the interpreter that the decisions of conferences of States parties often offered practical solutions for the purposes of applying a treaty, which did not necessarily give rise to a subsequent agreement or subsequent practice for the purposes of interpreting that treaty. Lastly, the intention behind the last phrase, "including by consensus", was to dispel the notion that the adoption of a decision by consensus necessarily presupposed the existence of an agreement in substance. The commentary would specify the implications of a consensus and the problems it could generate in the interpretation of treaties.

[152] *Idem*.

[153] *Idem*.

7. The CHAIRPERSON invited the members of the Commission to adopt, one by one, the draft conclusions provisionally adopted by the Drafting Committee, as contained in document A/CN.4/L.833.

Draft conclusion 6. Identification of subsequent agreements and subsequent practice

Draft conclusion 6 was adopted.

Draft conclusion 7. Possible effects of subsequent agreements and subsequent practice in interpretation

Draft conclusion 7 was adopted.

Draft conclusion 8. Weight of subsequent agreements and subsequent practice as a means of interpretation

Draft conclusion 8 was adopted.

Draft conclusion 9. Agreement of the parties regarding the interpretation of a treaty

8. Mr. KAMTO said that, in his view, the rule whereby an agreement under article 31, paragraph 3 (*a*) and (*b*), was not necessarily legally binding was insufficiently substantiated. In addition, several provisions of the 1969 Vienna Convention were devoted to consent and could be applied to all agreements concluded thereunder. Moreover, if certain agreements specified that they were binding, should it be inferred *a contrario* that agreements which were silent on that matter were not binding? Lastly, since interpretation gave rise to a certain degree of modification of a treaty in one way or another, it was difficult to accept that a State which had been party to a non-binding agreement could then oppose that agreement.

9. Mr. FORTEAU also reiterated his reservations relating to the scope of that rule and said that an agreement under article 31, paragraph 3, was inevitably binding. Moreover, paragraphs 1 and 2 of draft conclusion 9 related to acceptance by the parties, which seemed to reflect the requirement that any agreement had to be based on consent. The commentary to draft conclusion 4 (Definition of subsequent agreement and subsequent practice)[154] did not truly substantiate the said rule. The commentary to draft conclusion 9 should also be more convincing in that regard.

10. Mr. NOLTE (Special Rapporteur) said that, in the Drafting Committee, he had been willing to adopt the proposal made by Mr. Hmoud, which would have enabled the Commission to transcend the debate by stating that an agreement under article 31, paragraph 3, "produced legal effects" and that "to that extent it was binding". Furthermore, he had cited various sources in support of the possibility that such agreements might not be binding. Following a lengthy discussion, the Drafting Committee had eventually adopted the current wording, which Mr. Kamto and Mr. Forteau might accept until the commentary had convinced them of its pertinence.

11. Mr. KAMTO was not sure that such a substantive issue could be settled in the commentary. Furthermore, the examples that could be found of non-binding decisions or "gentlemen's agreements" which did have a legally binding effect had to do with their frequency or the sameness of their content, which did not render them "agreements" in the strict sense of the word. The problem likely stemmed from the use of the term "agreement" when referring to arrangements that did not fall under that category. However, he would await the clarifications provided by the Special Rapporteur in the commentary.

Draft conclusion 9 was adopted, subject to an editorial amendment in the French text of paragraph 1.

Draft conclusion 10. Decisions adopted within the framework of a conference of States parties

12. The CHAIRPERSON, speaking as a member, said that she approved of the replacement of *sustancial* by *sustantivo* in the Spanish text of paragraph 3, which rendered moot the debate surrounding that term at a previous meeting.

Draft conclusion 10 was adopted.

The report of the Drafting Committee on subsequent agreements and subsequent practice in relation to the interpretation of treaties, as a whole, as it appeared in document A/CN.4/L.833, was adopted.

The meeting rose at 11.05 a.m.

3216th MEETING

Friday, 6 June 2014, at 10 a.m.

Chairperson: Mr. Shinya MURASE (Vice-Chairperson)

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murphy, Mr. Niehaus, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wako, Mr. Wisnumurti.

Expulsion of aliens (*concluded*)* (A/CN.4/669 and Add.1, A/CN.4/670, A/CN.4/L.832)

[Agenda item 2]

REPORT OF THE DRAFTING COMMITTEE

1. Mr. SABOIA (Chairperson of the Drafting Committee) introduced the titles and texts of the draft articles on the expulsion of aliens, as adopted by the Drafting Committee, and as contained in document A/CN.4/L.832, which read:

[154] *Yearbook … 2013*, vol. II (Part Two), pp. 28–34.

* Resumed from the 3204th meeting.