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For participants only

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Sixty-eighth session (second part)

Provisional summary record of the 3336th meeting

Held at the Palais des Nations, Geneva, on Thursday, 4 August 2016, at 3 p.m.

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Present:

Chair: Mr. Saboia

Members: Mr. Caflisch
Mr. Candiotti
Mr. El-Murtadi
Ms. Escobar Hernández
Mr. Forteau
Mr. Hassouna
Mr. Hmoud
Mr. Huang
Mr. Kamto
Mr. Kittichaisaree
Mr. Laraba
Mr. McRae
Mr. Murase
Mr. Murphy
Mr. Niehaus
Mr. Nolte
Mr. Park
Mr. Peter
Mr. Petrič
Mr. Singh
Mr. Šturma
Mr. Tladi
Mr. Valencia-Ospina
Mr. Vázquez-Bermúdez
Mr. Wako
Mr. Wisnumurti
Sir Michael Wood

Secretariat:

Mr. Llewellyn Secretary to the Commission

The meeting was called to order at 3 p.m.

Draft report of the Commission on the work of its sixty-eighth session *(continued)*

Chapter VI.

Subsequent agreements and subsequent practice in relation to the interpretation of treaties (continued) (A/CN.4/L.884/Add.1 and Add.2)

The Chairman invited the Commission to resume its consideration of the portion of chapter VI contained in document A/CN.4/L.884/Add.1.

C. *Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties adopted by the Commission on first reading*

2. *Text of the draft conclusions with commentaries thereto*

Paragraph 1

Paragraph 1 was adopted.

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

Introduction

Paragraph (1)

Mr. Murphy asked whether the introductory paragraph would be inserted before the text of draft conclusion 2 [1] or whether it was rather a general introduction to the draft conclusions that would appear before draft conclusion 1, which was currently in document A/CN.4/L.886/Add.2. He also wondered whether it was really necessary.

Mr. Nolte (Special Rapporteur) said that paragraph (1) would in principle precede draft conclusion 1. The second sentence was an important one, but the idea expressed in it could be found elsewhere in the draft commentaries. He would not insist on retaining the paragraph if there were compelling reasons for its deletion.

Mr. Murphy said that one compelling reason might be that it would be difficult to justify having an introductory paragraph, most of which was reproduced in the commentary to draft conclusion 1, appear before a draft conclusion that itself was introductory in nature.

Mr. Tladi said that the idea expressed in the second sentence of the paragraph could be found in paragraph (4) of the commentary to draft conclusion 2 as well as to some extent in paragraph (1) of that conclusion. He therefore agreed that paragraph (1) should be deleted.

Paragraph (1) was deleted.

Commentary to draft conclusion 2 [1] (General rule and means of treaty interpretation)

Paragraph (1)

Paragraph (1) was adopted.

Mr. Murphy noted that the Special Rapporteur had inserted subheadings among the paragraphs of the commentary that subdivided it based on the sentences, paragraphs or subparagraphs of the commented conclusions. Those subheadings, beginning with the first one, seemed questionable and should be reviewed.

Sir Michael Wood, supported by **Mr. Kamto** and **Mr. Park**, said that it might be sufficient simply to indicate the number of the sentence, paragraph or subparagraph to which the commentary referred and to delete the subheadings.

Mr. Nolte (Special Rapporteur) said that, while he would not be opposed to the deletion of the letters preceding the subheadings, he would prefer the Commission to review the text of the subheadings themselves, which he believed made the text more readable.

Mr. Šturma said that, given the complexity of the topic, the subheadings seemed useful.

The Chairman suggested that the Commission should consider each subheading before considering the paragraphs themselves.

It was so decided.

Paragraph 1, first sentence — general rule of interpretation and interrelationship between articles 31 and 32

Mr. Murphy said that the first part of the subheading should be deleted; the second part should be retained, however, because the topic was indeed both the general rule and the complementary rule of interpretation.

The subheading, as amended, was adopted.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

Mr. Nolte (Special Rapporteur) said that Sir Michael Wood had suggested that, in the second sentence of the paragraph, the quotation from article 32 of the Vienna Convention should reproduce the entire relevant text in order to avoid any ambiguity. The second part of the sentence would therefore read: “to which recourse may be had in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 leaves the meaning of the treaty or its terms ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable.”

Paragraph (3), as amended, was adopted.

Paragraph 1, second sentence — the Vienna Convention rules on interpretation as customary international law

Mr. Murphy said that the word “as” should be replaced with “and” in order to avoid giving the impression that the Commission was of the opinion that the relevant provisions of the Vienna Convention on the Law of Treaties were all part of customary international law.

The subheading, as amended, was adopted.

Paragraphs (4) to (6)

Paragraphs (4) to (6) were adopted.

Paragraph 2 — article 31, paragraph 1, as part of a single integrated rule

Mr. Murphy wondered whether the subheading reflected the content of the draft conclusion or the commentary. It should reflect the draft conclusion; he therefore suggested that the subheading should read: “Paragraph 2 — rule contained in article 31, paragraph 1”.

Sir Michael Wood said that article 31 as a whole was generally considered to constitute the general rule for the interpretation of treaties. Paragraph 1 of that article alone could not therefore be described as constituting a rule.

Mr. Nolte (Special Rapporteur) said that, in order to not delay the Commission’s work, the subheading could simply refer to the paragraph in question.

Mr. Kamto said that, while he appreciated the Special Rapporteur’s efforts to provide subheadings, he was afraid that that approach simply led to problems, especially since it seemed to be neither systematic nor coherent, as demonstrated by the Special Rapporteur’s willingness to drop the wording of the current subheading.

The Chairman said that, while he had taken note of Mr. Kamto’s comments, he took it that the Commission wished to adopt the current subheading.

The subheading, as amended, was adopted.

Paragraph (7)

Paragraph (7) was adopted.

Paragraph 3 — article 31, paragraph 3, as an integral part of the general rule of interpretation

Mr. Murphy said that only the reference to the paragraph should be retained, so that the subheading would read: “Paragraph 3 — article 31, paragraph 3”.

Mr. McRae said that members should consult with the Special Rapporteur to agree on a standard for subheadings that the Commission could adopt easily.

The Chairman said that, in view of the objections being raised to the subheadings, it would indeed be preferable, with the agreement of the Special Rapporteur, to suspend consideration of them so as not to unduly delay the discussion.

Mr. Tladi said that, while he agreed with the Chairman, he was concerned that the subheadings might influence the content of the adopted paragraphs and therefore could not be considered separately.

Consideration of the subheadings was suspended.

Paragraphs (8) to (16)

Paragraphs (8) to (16) were adopted.

The commentary to draft conclusion 2 [1], as a whole, as amended, was adopted.

*Commentary to draft conclusion 3 [2] (Subsequent agreements and subsequent practice as authentic means of interpretation)**Paragraph (1)*

Paragraph (1) was adopted.

Paragraph (2)

Mr. Tladi said that the word “ordinary” should be deleted from the second sentence because the meaning of the text of a treaty should simultaneously capture the ordinary meaning of the terms used in the treaty, the context of the treaty, its objects and purposes, in particular if, as the Special Rapporteur had said, the Commission wished to remain true to the meaning of article 31 of the Vienna Convention, which referred to all those aspects.

Mr. Murase said that the sentence would be meaningless without the word “ordinary”.

Mr. Forteau said that he agreed with Mr. Tladi’s proposal: while the “ordinary meaning” was indeed a means of interpretation, as underlined by the Special Rapporteur, article 31 referred to the ordinary meaning of “the terms” and not “the text”. The meaning of the latter was the end result of the interpretation process as a whole described in article 31.

Mr. Šturma, echoing Mr. Murase’s remark, suggested that the words “the text” should be replaced with “the terms” in order to make the sentence’s meaning clear.

Mr. Nolte (Special Rapporteur) said that he agreed with that proposal because the end of the sentence indicated that it was one of a number of means of interpretation.

Mr. Forteau said that proposal would not be consistent with the quotation that followed, which stated that the text of the treaty included the ordinary meaning of the terms, the context of the treaty, its objects and purposes. It would be simpler to delete the phrase “the ordinary meaning of” so that the sentence would read: “Analysing the text of a treaty, in particular, is also such a means.”

Mr. Nolte (Special Rapporteur) said that it would be more expedient to delete the second sentence, which would not affect the meaning of the paragraph.

Paragraph (2), as amended, was adopted.

Paragraphs (3) to (13)

Paragraphs (3) to (13) were adopted.

The commentary to draft conclusion 3 [2], as a whole, as amended, was adopted.

*Commentary to draft conclusion 4 (Definition of subsequent agreement and subsequent practice)**Paragraphs (1) to (11)*

Paragraphs (1) to (11) were adopted.

Paragraph (12)

Mr. Nolte (Special Rapporteur) said that Sir Michael Wood had drawn his attention to an important judicial decision that it would be worth mentioning; he therefore proposed amending footnote 93, the last sentence of which was in any case not relevant. The current text of footnote 93 should be deleted and replaced with: “A common act may consist of an exchange of letters between the parties on a particular matter. See High Court of the Republic of Singapore: *Government of the Lao People’s Republic v. Sanum Investments Ltd.*, [2015] SGHC 15, available at: <http://www.italaw.com/sites/default/files/case-documents/italaw4107.pdf>, pp. 25 to 27, paras. 70 to 78.”

Paragraph (12), as amended, was adopted.

Paragraphs (13) and (14)

Paragraphs (13) and (14) were adopted.

Paragraph (15)

Mr. Murphy said that, in order to make the paragraph more readable, the second sentence should be split into two separate sentences. The first new sentence would end with the words “the interpretation of the Joint Declaration”; the second would begin with the words “As evidence, the party pointed to a booklet that stated that it was compiled ...”. The beginning of the last sentence should likewise be amended to read “The Court did not find that it established the purpose of the booklet ...”.

Paragraph (15), as amended, was adopted.

Paragraphs (16) to (34)

Paragraphs (16) to (34) were adopted.

Paragraph (35)

Mr. Murphy said that one of the two occurrences of the word “clearly” should be deleted from the last sentence.

Paragraph (35), as amended, was adopted.

Paragraphs (36) and (37)

Paragraphs (36) and (37) were adopted.

The commentary to draft conclusion 4, as a whole, as amended, was adopted.

Commentary to draft conclusion 5 (Attribution of subsequent practice)

Paragraphs (1) to (22)

Mr. Kamto pointed out that the draft contained a subheading marked (a) but there was no subheading (b) later in the text. The text needed editing.

Mr. Nolte (Special Rapporteur) thanked Mr. Kamto and said that he would make the necessary correction.

Paragraphs (1) to (22) were adopted.

The commentary to draft conclusion 5, as a whole, as amended, was adopted.

Commentary to draft conclusion 6 (Identification of subsequent agreements and subsequent practice)

Paragraphs (1) to (22)

Paragraphs (1) to (22) were adopted.

Paragraph (23)

Mr. Tladi said that the second sentence should read: “A parallel conduct by parties may suffice.”

Paragraph (23), as amended, was adopted.

Paragraphs (24) and (25)

Paragraphs (24) and (25) were adopted.

The commentary to draft conclusion 6, as a whole, as amended, was adopted.

Commentary to draft conclusion 7 (Possible effects of subsequent agreements and subsequent practice in interpretation)

Paragraphs (1) to (17)

Paragraphs (1) to (17) were adopted.

Paragraph (18)

Mr. Murphy said that, in the first sentence of the English text, the word “both” should be deleted. Furthermore, at the end of the third sentence, the phrase “but exclusively by the passenger’s state of health” should be deleted, because that circumstance had been upheld in only one case, *Air France v. Saks*.

Paragraph (18), as amended, was adopted.

Paragraph (19)

Paragraph (19) was adopted.

Paragraph (20)

Mr. Murphy said that, in the second sentence of the English text, the words “selectively to invoke” should be replaced with “selective invocation of”.

Paragraph (20), as amended, was adopted.

Paragraphs (21) to (38)

Paragraphs (21) to (38) were adopted.

The commentary to draft conclusion 7, as a whole, as amended, was adopted.

Commentary to draft conclusion 8 [3] (Interpretation of treaty terms as capable of evolving over time)

Paragraphs (1) to (20)

Paragraphs (1) to (20) were adopted.

The commentary to draft conclusion 8 [3], as a whole, was adopted.

Commentary draft conclusion 9 [8] (Weight of subsequent agreements and subsequent practice as a means of interpretation)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

Mr. Murphy expressed surprise that paragraph (3) dealt only with specificity, while paragraph 1 of draft conclusion 9 dealt with both clarity and specificity. He therefore proposed the insertion of a new paragraph (3) following the current paragraph (2) to deal

with the concept of clarity and which would use much the same language as the current paragraph (3): “The interpretative weight of subsequent agreements or practice in relation to other means of interpretation often depends on the clarity of the agreement, in particular practice clearly establishing a consistent view among the parties as to interpretation of the treaty concerned”.

Mr. Nolte (Special Rapporteur) said that he was not sure that it was necessary to address the notion of clarity in a new paragraph with language modelled on the first sentence of paragraph (3). He proposed, in response to Mr. Murphy’s concern, that the phrase “their clarity and” should be inserted before “their specificity” in the first sentence of paragraph (3).

Paragraph (3), as amended, was adopted.

Paragraphs (4) to (14)

Paragraphs (4) to (14) were adopted.

The commentary to draft conclusion 9 [8], as a whole, as amended, was adopted.

Commentary to draft conclusion 10 [9] (Agreement of the parties regarding the interpretation of a treaty)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Mr. Murphy said that, in the first sentence, the words “of the parties” should be replaced with “of all the parties”.

Paragraph (2), as amended, was adopted.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

Paragraph (5)

Mr. Tladi said that, in the first sentence, the statement “equivocal conduct by one or more parties will normally prevent the identification of an agreement” was not really supported by the quoted excerpt from the *Beagle Channel* case, which did not deal with equivocal conduct as such but rather the possible permanent effect that such conduct might have on the identification of an agreement. The paragraph should therefore be amended accordingly.

Mr. Nolte (Special Rapporteur) said that the Court of Arbitration decision was not limited to the temporal dimension described by Mr. Tladi. It also dealt with the issue of ambiguity and the latter’s effects on determination of whether an agreement existed. That aspect might be made clearer, but there was no need to amend the first sentence.

Mr. Murphy said that, at the end of the first sentence, the words “so” and “that it precludes the identification of an agreement” should be deleted.

Mr. Nolte (Special Rapporteur) said that he did not entirely agree with that proposal but would not oppose it if it was acceptable to Mr. Tladi.

Paragraph (5), as amended, was adopted.

Paragraphs (6) to (21)

Paragraphs (6) to (21) were adopted.

Paragraph (22)

Mr. Murphy said that, in the second sentence, the word “provided” should be replaced with “provides”. The end of the last sentence should be rewritten to read: “whose rules preclude using the practice of the parties, and their silence, from being used for the purpose of interpretation”.

Paragraph (22), as amended, was adopted.

Paragraphs (23) to (25)

Paragraphs (23) to (25) were adopted.

The commentary to draft conclusion 10 [9], as a whole, as amended, was adopted.

The Chairman suggested that the meeting should be suspended to allow the Special Rapporteur and interested members to continue the discussion on the subheadings, which had been suspended.

The meeting was suspended at 4.40 p.m. and resumed at 5.05 p.m.

The Chairman said that no definitive decision relating to the subheadings had been reached during the suspension. The Committee would revisit that issue at a later meeting.

Commentary to draft conclusion 11 [10] (Decisions adopted within the framework of a Conference of States Parties)

Paragraphs (1) to (23)

Paragraphs (1) to (23) were adopted.

Paragraph (24)

Mr. Murphy said that the phrase “even if the decision is by consensus” should be inserted at the end of the first sentence.

Mr. Nolte (Special Rapporteur) said that he did not think the amendment necessary; the issue of consensus was analysed in detail later in the commentary. The amendment might affect the even-handed tone of the sentence and add a negative connotation.

The Chairman, speaking as a member of the Commission, said that he was likewise reluctant to accept Mr. Murphy’s amendment, which might be construed as implying that decisions taken by consensus did not have the same weight as others.

Mr. Tladi said that he had no strong opinion about whether or not to include the amendment proposed by Mr. Murphy, but it was true that, as confirmed by the Commission’s own experience, decisions taken by consensus did not reflect the agreement of all the parties.

Mr. Murphy said that his amendment added nothing that could not already be found in the draft conclusion. There was for example very similar wording at the end of paragraph 3; he simply wished to specify that aspect in paragraph (24). Since the first sentence was rather long, he suggested dividing it into two sentences: a full stop should be inserted following the words “implementing the treaty”. In the new following sentence the word “which” should be replaced with “Those decisions” and the phrase “even if the

decision is by consensus”, preceded by a comma, would be inserted following “treaty interpretation”.

Mr. Nolte (Special Rapporteur) said that he was still not convinced that the amendments were necessary but he would not oppose them.

The Chairman said that, if he heard no objection, he would take it that the Commission wished to adopt the paragraph as amended by Mr. Murphy.

Paragraph (24), as amended, was adopted.

Paragraph (25)

Paragraph (25) was adopted.

Paragraph (26)

Mr. Murphy said that the fourth sentence, which referred to the International Court of Justice decision in the case concerning *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, did not accurately reflect the language of the decision. He said that, in that sentence the words “In still other cases” should be replaced with “In such cases”; the words “ a legal” should be replaced with “an”; and the quotation “under an obligation to give due regard” should be replaced with “should give due regard”.

Mr. Nolte (Special Rapporteur) proposed that adoption of the paragraph should be suspended to allow him time to review the actual wording of the decision.

It was so decided.

Paragraphs (27) to (38)

Paragraphs (27) to (38) were adopted.

Commentary to draft conclusion 12 [11] (Constituent instruments of international organizations)

Paragraphs (1) to (31)

Paragraphs (1) to (31) were adopted.

Paragraph (32)

Mr. Murphy said that footnote 571 should be deleted. There were a number of issues that the Commission would revisit on second reading and there was no reason to specifically mention the current one.

Mr. Nolte (Special Rapporteur) said that it was not his intention to note all the issues the Commission might revisit on second reading but he had considered it helpful to include footnote 571 because it dealt with a topic on which members had diverging views, which he believed should be noted.

Sir Michael Wood said that in principle all topics dealt with during first reading could be taken up again during second reading. The footnote was therefore superfluous and should be deleted.

Mr. Cafilich said that it was worthwhile for the Commission to indicate from time to time that it was undecided about certain topics. The footnote should be retained.

The Chairman suggested that members should accept the opinion of the Special Rapporteur and adopt the paragraph as drafted.

Paragraph (32) was adopted.

Paragraphs (33) to (42)

Paragraphs (33) to (42) were adopted.

The commentary to draft conclusion 12 [11], as a whole, as amended, was adopted.

The Chairman said that, since the Commission had yet to take a decision on the subheadings, the draft as a whole would be adopted at a later meeting. He invited members to consider the portion of chapter VI contained in document A/CN.4/L.884/Add.2.

Mr. Nolte (Special Rapporteur) said that he had done his best to accurately reflect the discussions and decisions of the drafting committee, in particular with regard to the commentary to paragraph 4 of draft conclusion 13, which described the differing views that had led the Commission to include a “without prejudice” clause in the paragraph.

Commentary to draft conclusion 1 [1a] (Introduction)

Paragraph (1)

Sir Michael Wood said that, in the first sentence, the word “clarifying” should be replaced with “explaining”.

Mr. Nolte (Special Rapporteur) agreed.

Mr. Park said that, in the third sentence, the word “ordering” was ambiguous and should be deleted.

Mr. Vázquez-Bermúdez said that he agreed with that proposal. The meaning of “elucidating relevant authorities” in the same sentence was not clear to him.

Mr. Nolte (Special Rapporteur) said that the sentence reflected the process for preparing the draft conclusions, which entailed collecting relevant sources considered to be authorities, which were then categorized and organized in a coherent manner so that they were mutually explanatory. He had no objection to the deletion of the word “ordering” but wished to retain the rest of the sentence.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Sir Michael Wood said that the words “as a whole” were superfluous and should be deleted.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Sir Michael Wood said that, in the second sentence, the words “but also” should be replaced with “as well as”. He did not understand why, in the third sentence, the interpretation of domestic law of States was included as an issue not addressed in the draft conclusions. The reader might think that the interpretation by domestic courts of international instruments incorporated into their domestic legal framework was outside the scope of the draft conclusions, which was not the Commission’s intention. Lastly, he suggested that the fourth sentence, which bore no relation to the rest of the paragraph, could be deleted.

Mr. Forteau said that he agreed with the proposal to delete the fourth sentence. In addition, the third sentence should be amended by replacing the phrase “the interpretation

of secondary rules of an international organization” with “the interpretation of the rules adopted by international organizations (secondary rules)”.

Mr. Tladi, Mr. Murphy and Mr. Park agreed that the last sentence should be deleted.

Mr. Nolte (Special Rapporteur) said that he accepted the first amendment suggested by Sir Michael Wood and also agreed that the reference to the interpretation of domestic law of States should be deleted from the third sentence. He did not agree, however, that the fourth sentence should be deleted; it was linked to the third and opened new avenues for reflection by drawing the reader’s attention to other sources of international law applicable to the parties to a treaty.

Mr. Cafilisch, Mr. Šturma and Mr. McRae agreed that the fourth sentence should be retained.

Mr. Forteau said that, if the fourth sentence were retained, then article 31 (2) (c) of the Vienna Convention should also be cited.

At the request of **Mr. Nolte** (Special Rapporteur), **the Chairman** said that the adoption of the paragraph should be suspended to allow the Special Rapporteur to consult the Commission members.

Commentary to conclusion 13 [12] (Pronouncements of expert treaty bodies)

Paragraph (1)

Sir Michael Wood said that, at the beginning of the second sentence, the word “Important” should be deleted; he would also like to add the Committee on the Rights of Persons with Disabilities to the list of treaty bodies in that sentence. He suggested that the phrase “Other significant expert treaty bodies include” should be deleted from the beginning of the third sentence and replaced with “One can also note”.

Mr. Forteau said that there was an error in the first sentence of paragraph 3 of draft conclusion 13: the word “and” should be replaced with “or”.

The Chairman said that paragraph 3 of draft conclusion 13 had already been adopted; the latter amendment was an editing change.

Ms. Escobar Hernández said that it was a question of the substance of the sentence, not an editing change.

Mr. Kamto agreed that it did affect the meaning and Mr. Forteau had been right to raise the matter. From a procedural point of view, however, he wondered whether the Commission could reopen consideration of a text adopted in plenary. With regard to the first sentence of paragraph (1) of the commentary, in the French text, he wondered whether “surveiller” was the appropriate word; he suggested that “chargés de surveiller ou de favoriser ... la bonne application” should be replaced with “chargés de veiller ... à la bonne application”. He added that “veiller à” implied both “surveiller” and “favoriser”.

Mr. Nolte (Special Rapporteur) said that he did not see a problem with the English text, which referred to “monitoring” and “contributing”. In response to Mr. Forteau, he requested that adoption of the paragraph should be suspended so that he could consult the members. He accepted the amendments proposed by Sir Michael Wood.

The Chairman said that the Commission had taken note of the proposals and comments made and would continue its consideration of the draft report at its next meeting.

The meeting rose at 6.10 p.m.