

## 3205th MEETING

Thursday, 15 May 2014, at 10.05 a.m.

Chairperson: Mr. Kirill GEVORGIAN

*Present:* Mr. Caflisch, Mr. Candioti, 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. 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<sup>82</sup> (A/CN.4/666, Part II, sect. A, A/CN.4/671,<sup>83</sup> A/CN.4/L.833<sup>84</sup>)

[Agenda item 6]

#### SECOND REPORT OF THE SPECIAL RAPPORTEUR

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

2. Mr. NOLTE (Special Rapporteur) said that the descriptive method used in relation to the current topic was conditioned by one of the core objectives, namely, to provide a repertory of interpretative practice. That objective was based on the nature of the process of interpretation described in articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties (“1969 Vienna Convention”), which did not prescribe hard and fast rules but instead required the interpreter to take different means of interpretation into account. The draft conclusions were indicative rather than prescriptive, and sought to clarify the role of subsequent agreements and subsequent practice as means of interpretation. His second report contained six draft conclusions that followed on from the first five. They ranged from the general to the particular, situated subsequent agreements and subsequent practice within the general framework of the rules on interpretation contained in the 1969 Vienna Convention and, in general, had been favourably received by States.

3. Draft conclusion 6 (Identification of subsequent agreements and subsequent practice) reminded interpreters that the identification of subsequent agreements and subsequent practice relevant for the purposes of interpretation under articles 31 and 32—a phrase not to be understood in the normative sense—required careful consideration, since it presented a number of difficulties. The subsequent agreements and subsequent practice that

were taken into account must represent the assumption by a State of a position “regarding the interpretation of the treaty”. Subsequent practice followed “in the application of the treaty” (art. 31, para. 3 (b)) or subsequent agreements regarding “the application of its provisions” (art. 31, para. 3 (a)), were specific forms of conduct relating to the interpretation of a treaty. Interpreters thus had to ensure the proper identification of those forms of interpretative conduct by determining, for example, whether a particular practice indeed related to the application of the treaty in question.

4. Draft conclusion 7 (Possible effects of subsequent agreements and subsequent practice in interpretation) concerned the possible effects of subsequent agreements and subsequent practice. Given that subsequent agreements and subsequent practice were two means of interpretation among others, and that international courts and tribunals assessed, on a case-by-case basis, the relevance of the various means of interpretation, subsequent agreements and subsequent practice might be used to narrow or widen the range of possible interpretations of a treaty compared to the results of the preliminary interpretation provided for in article 31, paragraph 1, of the 1969 Vienna Convention. Draft conclusion 7, paragraph 2, drew attention to the fact that the more specific the subsequent practice, the greater the interpretative value that seemed to be accorded to it under international case law. The paragraph was not, however, formulated in mandatory terms.

5. Draft conclusion 8 (Forms and value of subsequent practice under article 31, paragraph (3) (b)), which could perhaps be placed after draft conclusion 9 since it dealt with a more specific aspect of the topic, referred to the forms and the value of subsequent practice under article 31, paragraph 3 (b), of the 1969 Vienna Convention. The criteria it set forth could be used to identify the interpretative value of subsequent practice, but not all subsequent practice had to meet those criteria in order to qualify as such.

6. Draft conclusion 9 (Agreement of the parties regarding the interpretation of a treaty) set forth, in paragraph 1, the requirements for the agreement of the parties under article 31, paragraph 3 (a) and (b), of the 1969 Vienna Convention, without prejudice to the definition of the term “treaty” as a written agreement contained in article 2 of the Convention. In order to clarify the meaning of the term “agreement”, which was used in other provisions of the Convention in the sense of a legally binding instrument, paragraph 1 of draft conclusion 9 stated that the agreement of the parties need not be binding as such. Draft conclusion 9, paragraph 2, reiterated the position expressed previously by the Commission, and which he had endeavoured to reflect in his second report, concerning the value to be attributed to silence on the part of one or more parties in certain circumstances. If necessary, the second sentence of paragraph 2 could become a new paragraph. Lastly, paragraph 3, which was aimed primarily at practitioners at the national level who were unfamiliar with certain usages at the international level, was intended to serve as a reminder that the objective of common subsequent agreements or common subsequent practice was not necessarily the interpretation of a treaty.

<sup>82</sup> At its sixty-fifth session (2013), the Commission provisionally adopted draft conclusions 1 to 5 and the commentaries thereto (*Yearbook ... 2013*, vol. II (Part Two), pp. 17 *et seq.*, paras. 38–39).

<sup>83</sup> Reproduced in *Yearbook ... 2014*, vol. II (Part One).

<sup>84</sup> Mimeographed, available from the Commission’s website.

7. Draft conclusion 10 (Decisions adopted within the framework of a conference of States parties) concerned the adoption of decisions that could result in a subsequent agreement or give rise to a subsequent practice within the framework of a conference of States parties to a treaty. The expression “conference of States parties”, which did not appear in the 1969 Vienna Convention or in any other treaty of general application, described a meeting of States parties to a treaty for the purpose of reviewing or implementing that treaty. Its definition was provided in paragraph 1 for the purposes of the draft conclusions. Excluded from that definition were the organs of international organizations; the significance of their decisions under article 31, paragraph 3 (a) and (b), of the 1969 Vienna Convention would be considered in his next report. Since there was no requirement that an agreement between the parties under the aforementioned provisions take a particular form, there was nothing to prevent reaching such an agreement within the framework of a conference of States parties, unless the treaty provided otherwise. Paragraph 2 therefore stated that, under articles 31 and 32 of the 1969 Vienna Convention, the legal effect of a decision adopted within the framework of a conference of States parties depended on the terms of the treaty and the applicable rules of procedure. Paragraph 3 drew a necessary distinction between the substance (interpretative intention) and the form (unanimity or consensus) of a decision resulting from a conference of the States parties. An agreement under article 31 of the 1969 Vienna Convention could result only from a unanimous decision of a conference taken with the intention of interpreting the treaty, since the mere achievement of consensus could conceal disagreement on the part of some States as to its intended interpretation. On the other hand, the fact that the rules of procedure of a conference of States parties did not provide for its decisions to have binding effect did not, in itself, exclude the possibility for such decisions to constitute an agreement under article 31, paragraph 3, of the 1969 Vienna Convention since such agreements did not necessarily have to be legally binding.

8. Lastly, draft conclusion 11 (Scope for interpretation by subsequent agreements and subsequent practice) was intended to clarify the interpretative scope of subsequent agreements and subsequent practice. International courts and tribunals tended to arrive at rather broad interpretations of treaties, based on subsequent agreements or subsequent practice, while simultaneously considering whether the latter might have modified the treaty, thus inextricably creating a link between the two—interpretation and modification by means of subsequent agreements and subsequent practice. Nevertheless, they were entirely separate things, and the Commission’s work remained focused on interpretation. A subsequent agreement between the parties to a treaty could modify the treaty if that agreement met the conditions set forth in article 39 of the 1969 Vienna Convention. However, whether an agreed subsequent practice could have the effect of modifying a treaty—something which States at the 1968–1969 United Nations Conference on the Law of Treaties had rejected, despite the Commission’s proposal to that effect—had not yet been expressly and widely recognized in State practice or by international courts and tribunals. Consequently, draft conclusion 11 merely stated, in paragraph 1, that the scope for interpretation by subsequent

agreements or subsequent practice might be wide. In paragraph 2, it said that, through a subsequent agreement or subsequent practice, the parties to a treaty were presumed to be intending to interpret the treaty, not to modify it. That solution made it possible to reconcile the reluctance to recognize that the informal practice of the parties could modify a treaty with the reality that the common practice of the parties was a preferred form of treaty application.

9. The CHAIRPERSON invited the members of the Commission to comment on the second report of the Special Rapporteur.

10. Mr. MURPHY noted that, in draft conclusion 6, the Special Rapporteur had omitted any reference to the position of the parties regarding the application of a treaty, and had referred only to the position they assumed regarding its interpretation, since he considered that every application of a treaty presupposed its interpretation. If that was the case, then the question arose why article 31 of the 1969 Vienna Convention referred explicitly to both. Moreover, it was a point that States at the United Nations Conference on the Law of Treaties had wished to include in paragraph 3 (a) of that article,<sup>85</sup> even though it had not featured in the initial set of draft articles prepared by the Commission in 1966.<sup>86</sup> The distinction between “interpretation” and “application” had originated in the work of Lord McNair, who had asserted that, if the meaning of a treaty was clear, the latter was applied and not interpreted: interpretation was a secondary process that came into play only when it was impossible to make sense of the treaty.<sup>87</sup> In other words, when the parties agreed on joint action in application of a treaty without any particular attention to refining the meaning of a treaty provision, it was their agreement on the application of the treaty that mattered, and not their agreement on its interpretation. It was in order to point that out that he proposed to include the phrase “or the application of its provisions”. In fact, hundreds of treaty provisions accorded jurisdiction to a court for settling disputes relating to the interpretation *and* the application of a treaty, and the distinction between the two concepts had proved to be relevant for many decisions in that context. Admittedly, other scholarly writings took a position similar to that of the Special Rapporteur, but, in any case, it was not advisable to reject a distinction that was enshrined in the provisions of the 1969 Vienna Convention and confirmed by long-standing treaty practice.

11. As was the case in relation to other draft conclusions proposed by the Special Rapporteur, draft conclusion 6 referred to article 32 of the 1969 Vienna Convention. It was, of course, important to clarify that subsequent agreements and subsequent practice that did not fall within the scope of article 31 could fall within that of article 32; however, by referring to the two

<sup>85</sup> *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March–24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11, United Nations publication, Sales No.: E.68.V.7), 74th meeting, 16 May 1968, p. 442, para. 29.

<sup>86</sup> See the text of draft article 69 (which became article 31 of the 1969 Vienna Convention) in *Yearbook ... 1966*, vol. II, document A/CN.4/L.117 and Add.1, p. 101 (paragraph 3 of article 69).

<sup>87</sup> A. McNair, *The Law of Treaties*, Oxford, Clarendon Press, 1961, p. 365, note 1.

articles too frequently, the Commission risked blurring the important distinction between them. It would be better simply to indicate in the commentary that the standards set in the draft conclusions, if they were not covered by article 31, might be relevant for the purposes of article 32—although it was uncertain that all of them were, in fact, relevant to an article 32 analysis.

12. Finally, rather than recommending “careful consideration” of the subsequent conduct of the parties in order to determine whether such conduct in fact concerned the interpretation of the treaty, it would be better to state directly that such conduct could not be established when the parties were motivated by other considerations. Accordingly, he proposed that draft conclusion 6 be reformulated to read:

“Subsequent agreements and subsequent practice under article 31, paragraph 3, may not be established when the parties are motivated by considerations other than agreement regarding the interpretation of a treaty or the application of its provisions.”

13. In connection with draft conclusion 7, the Special Rapporteur suggested that subsequent practice could show that there was some scope for the exercise of discretion in the application of a treaty provision. Nonetheless, it was important to explain in the commentary what was meant by the expression “scope for the exercise of discretion”. The idea was that the exceptional and temporary non-implementation of a provision did not alter the general obligation arising therefrom and did not allow significant “scope for the exercise of discretion”. Draft conclusion 7, paragraph 1, appeared to duplicate draft conclusion 11, paragraph 1, since both indicated that subsequent conduct could help to clarify the meaning of a treaty by narrowing or widening the range of possible interpretations. Paragraph 2 of draft conclusion 7 should be harmonized with draft conclusion 8, given that, as they currently stood, the two formulations made the value of subsequent practice as a means of interpretation conditional upon differing criteria. If nothing else, it would be preferable, in the case of paragraph 2, to replace the word “value” with “weight”, which better reflected the idea of the assessment to be made as a function of the quality of the conduct.

14. With regard to draft conclusion 8, the Special Rapporteur explained in paragraph 42 of his second report that relevant subsequent practice included not only the externally-oriented conduct of a State but also its internal acts. It would be useful if such practice was understood to include written and oral pleadings before international courts, since those materials also reflected the views of the State with regard to the interpretation of a treaty. The title of the draft conclusion suggested that its text enumerated the forms of subsequent practice, but it actually stated only that such practice could take a “variety” of forms, mirroring the statement in draft conclusion 9 that subsequent agreements did not need to be arrived at in “any particular form”. It was unnecessary to repeat that point. With regard to the criteria used to determine the value of subsequent practice, the Special Rapporteur had chosen to adopt the formula “concordant, common and consistent”, whose origin was described in paragraph 47

of the second report. While consistency over time might carry greater or lesser weight for the purposes of interpretation, the fact that a practice was “concordant” and “common” could not vary by degrees. In that case, there could be no question of “extent”: if the practice followed in interpreting a treaty was not common to the parties and concordant among them, it fell outside the scope of article 31, paragraph 3, of the 1969 Vienna Convention. That probably explained why most international courts and tribunals had not adopted the formula, and perhaps the Commission should not do so either.

15. The title of draft conclusion 9 appeared to collapse, under the term “agreement of the parties”, the two distinct but interrelated concepts of a subsequent agreement regarding the interpretation of a treaty and the subsequent practice in the application of the treaty which established that agreement. Yet, it was advisable to continue to keep the two concepts separate, as the Commission had chosen to do in the title of the present topic. Paragraph 2 raised the question of the silence of a State in response to the unilateral interpretative declaration of another State. It would be useful to recall in that regard that such silence did not imply any general presumption of acceptance by the first State and could therefore not be construed as either assent or dissent, as the Commission had repeatedly emphasized in the Guide to Practice on Reservations to Treaties.<sup>88</sup> Reference should at least be made to the fact that, generally speaking, silence alone did not establish an agreement, even if, in a particular instance, it might be possible to find proof to the contrary. With regard to paragraph 3, it seemed more appropriate to move it to draft conclusion 6, which referred to the fact that the parties might be motivated by considerations other than interpretation of the treaty.

16. Concerning draft conclusion 10, it was important to maintain the distinction between conferences of States parties that reviewed the treaty’s implementation and those that undertook a review of the treaty itself. Contrary to what was indicated in paragraph 83 of the second report, tacit acceptance and non-objection procedures were not generally described as “amendment” procedures; rather, they were often as “formal” as those according to which a State ratified an amendment. Among the examples of decisions of conferences of States parties that could be considered subsequent agreements within the meaning of article 31, paragraph 3 (a), of the 1969 Vienna Convention, the example of the guidelines for the implementation of article 14 of the WHO [World Health Organization] Framework Convention on Tobacco Control was not relevant, since the aim of the guidelines was not to clarify the interpretation to be given to article 14 but rather “to assist States parties in fulfilling their obligations” under article 14. The guidelines indicated that the definitions of terms were provided for the purposes of the guidelines.<sup>89</sup>

<sup>88</sup> General Assembly resolution 68/111 of 16 December 2013, annex. The guidelines constituting the Guide to Practice on Reservations to Treaties adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2011*, vol. II (Part Three), chap. IV, sects. F.1 and F.2, pp. 37 *et seq.*

<sup>89</sup> WHO, “Guidelines for implementation of Article 14 of the WHO Framework Convention on Tobacco Control”, in *WHO Framework Convention on Tobacco Control: Guidelines for Implementation: Article 5.3; Article 8; Articles 9 and 10; Article 11; Article 12; Article 13; Article 14*, 2013 edition. Available from [www.who.int](http://www.who.int).

A better example would be decision No. BC-10/3, adopted in 2011 by the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal.<sup>90</sup> Lastly, paragraph 1 of draft conclusion 11 could be merged with draft conclusion 7, as he had indicated previously.

17. Mr. FORTEAU welcomed the fact that the Special Rapporteur had cited the recent judgments handed down by the International Court of Justice in the *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)* and the *Maritime Dispute (Peru v. Chile)* cases, even if the latter, which dealt with the interpretation of a tacit agreement and not a treaty, was not entirely relevant to the current topic. One could also cite the *M/V "Virginia G" Case (Panama/Guinea-Bissau)*, in which the International Tribunal for the Law of the Sea interpreted a treaty on the basis of subsequent practice, even if it did not refer to the customary rules of interpretation embodied in articles 31 and 32 of the 1969 Vienna Convention, which was regrettable.

18. With regard to the scope of the draft conclusions, it was doubtful whether it was appropriate to address issues related to the implementation of a treaty or its amendment when the topic under consideration related to the interpretation of treaties. He had strong reservations about draft conclusion 9, paragraph 3, and even stronger ones about draft conclusion 11, paragraph 2, in that it could not be presumed that subsequent agreements or subsequent practice had an interpretative rather than a modifying effect: that depended on the circumstances. The statement in the same paragraph that "[t]he possibility of modifying a treaty by subsequent practice of the parties has not been generally recognized" was not very convincing. In its advisory opinions issued in the case concerning *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970)* and in the case concerning the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice appeared to have recognized that subsequent practice could indeed result in amending a treaty.

19. With regard to the nature of the Commission's work, it was unclear whether the Special Rapporteur's objective was to draft a detailed guide to practice or conclusions that were somewhat normative in scope, even if one might question the latter of those hypotheses after reading certain draft conclusions that were of a purely descriptive, rather than prescriptive, nature. Thus, to say in draft conclusion 6 that the identification of subsequent agreements and subsequent practice required careful consideration was of little usefulness. As to the wording of paragraph 2 of draft conclusion 7, it left the reader at somewhat of a disadvantage, to say the least. To state that the value of a subsequent agreement or subsequent practice as a means of interpretation could depend, *inter alia*, on their specificity, was not very enlightening. The

question was not whether the specificity of a subsequent agreement or subsequent practice *could* have an effect, but whether it *had* a legal effect, and whether that effect should be taken into account. One could, in fact, say the same about draft conclusion 10, paragraph 2. Useful additions, such as those mentioned in paragraph 22 of the second report, should therefore be made to those draft conclusions in order to give them greater normative force.

20. It was true that, from a legal standpoint, other draft conclusions were more robust, but, in such instances, it was their very normative nature that was problematic. Thus, one could question the validity of the three criteria proposed in the second sentence of draft conclusion 8, in view of the fact that international courts and tribunals had not limited themselves to those criteria. Rather, the criteria they had invoked included those of clarity and the uncontested or the long-standing nature of practice. In the *Peru v. Chile* case, for example, the International Court of Justice had given greater weight to practice that took place closer to the time of the conclusion of an agreement. One could argue, on a more fundamental level, that every case should be considered individually, that such an assessment related more to the system of evidence used than to the rules of interpretation, and that it would consequently be difficult to establish criteria in that area. In the case concerning *Kasikili/Sedudu Island (Botswana/Namibia)*, the International Court of Justice had merely verified whether the practice established an agreement, without establishing the general criteria that had to be met in order to reach that conclusion. In addition, as the Special Rapporteur recalled, with the exception of the Dispute Settlement Body of the World Trade Organization (WTO), that was the usual approach adopted by international courts and tribunals—a trend that must be taken into account.

21. With regard to more specific questions of law, he continued to believe that treaty interpreters should consider subsequent agreements, within the meaning of article 31 of the 1969 Vienna Convention, to be binding. He did not think, after having carefully reread it, that the case law cited by the Special Rapporteur in his second report served to substantiate draft conclusion 9, paragraph 1. The commentary to draft conclusion 4, which had been adopted at the previous session, did not provide further clarification of the considerations underlying the Special Rapporteur's reasoning. In fact, it was difficult to understand how a court could not consider itself bound by an agreement between all the parties to a treaty on a particular interpretation of the treaty, including in situations in which such a subsequent agreement operated outside of the institutional procedures expressly established for the interpretation of the treaty. Thus, in its decision of 4 April 2012 in the case concerning *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, the WTO Appellate Body had first of all considered that the Doha Ministerial Decision<sup>91</sup> did not constitute a multilateral interpretation within the meaning of article IX, paragraph 2,

<sup>90</sup> See Report of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal on its tenth meeting (UNEP/CHW.10/28), p. 31 *et seq.*

<sup>91</sup> WTO, "Ministerial decision on implementation-related issues and concerns", adopted on 14 November 2001, document WT/MIN(01)/17, in *The Doha Round Texts and Related Documents*, available from: [www.wto.org/english/res\\_e/booksp\\_e/doha\\_round\\_texts\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/doha_round_texts_e.pdf).

of the Marrakesh Agreement Establishing the World Trade Organization.<sup>92</sup> It further considered that this Decision could indeed constitute a subsequent agreement within the meaning of article 31, paragraph 3, of the 1969 Vienna Convention,<sup>93</sup> basing its reasoning on the draft articles on the law of treaties and the commentaries thereto adopted by the International Law Commission in 1966.<sup>94</sup> According to the Appellate Body, any agreement “bearing specifically” on the interpretation of the treaty “should” be taken into account in its interpretation, given that, according to the aforementioned draft articles, such a subsequent agreement “must be read into the treaty for purposes of its interpretation”.<sup>95</sup> It therefore seemed that the Special Rapporteur had relied on an overly broad view of the notion of “agreement”, which blurred the distinction between the means of interpretation of article 31 and those of article 32, given that a non-binding obligation arose from article 32 but could not arise from article 31.

22. While he fully endorsed the Special Rapporteur’s conclusion concerning the role of silence as a constitutive element of an agreement within the meaning of article 31, paragraph 3, of the 1969 Vienna Convention, he drew attention to the fact that, in the *M/V “Virginia G” Case (Panama/Guinea-Bissau)*, the International Tribunal for the Law of the Sea had found that the fact that there was “no manifest objection” to the legislation of several States concerning the bunkering of foreign vessels was evidence that such legislation was “in general, complied with” (para. 218 of the judgment). With regard to draft conclusion 6, it was doubtful whether one could address articles 31 and 32 of the 1969 Vienna Convention in the same way in that draft conclusion. It was far from being an established fact that what was asserted in the draft conclusion with regard to subsequent practice within the meaning of article 31 of the 1969 Vienna Convention also held for subsequent practice within the meaning of article 32. Lastly, contrary to what was indicated in its title, chapter VI of the second report was not devoted to the fundamental question of the interpretative scope of subsequent agreements and subsequent practice, which was dealt with in draft conclusions 7 and 8. In that respect, it was unclear what the difference was between the interpretative effect, value or scope—terms used in draft conclusions 7, 8 and 11—of subsequent practice, and he was of the view that those terms, which for the most part were equivalent, should be brought together in a single draft conclusion.

23. Mr. MURASE said that, since the merit of subparagraphs (a) and (b) of article 31 of the 1969 Vienna Convention lay largely in their ambiguity, which allowed States and international courts and tribunals a certain margin of flexibility, the Commission should endeavour to strike a proper balance between flexibility and clarity in formulating its draft conclusions. That was not an easy task, as evidenced by draft conclusions 6, 9 and 11, whose

usefulness was far from self-evident. He even wondered whether it might not be better to adopt draft guidelines rather than draft conclusions, since the term “conclusion” was, in his view, too simplistic.

24. It was worrying that there was no reference in the draft conclusions to the element of time, which was essential. The Commission should therefore address the question of what the required length of time was for a treaty provision to qualify as subsequent practice. That could be done in draft conclusion 8. It was also important to have a clearer idea of when the interpretation of a treaty provision ended and when its implementation began.

25. It was doubtful whether conferences of States parties could be treated as if they were all the same. Since their powers and functions varied according to the multilateral treaty to which they corresponded, their relevance in terms of subsequent agreements and subsequent practice was far from uniform. It should be borne in mind that, owing to their nature, some treaty provisions could not be interpreted by means of subsequent agreements or subsequent practice. For that reason, it was important to insert in draft conclusion 10, paragraph 2, the phrase “depending also on the nature of the provision at issue” after “Depending on the circumstances” and the words “or may not” after the verb “may”. Moreover, contrary to what was implied by draft conclusion 10, paragraph 3, a consensus could not always be equated with an “agreement”—a point that should be made in the commentary.

26. He also wished to address what appeared to be a contradiction in the judgment handed down by the International Court of Justice in the *Whaling in the Antarctic* case: for the purposes of the interpretation of article VIII of the International Convention for the Regulation of Whaling, the Court initially found that the resolutions and guiding principles of the International Whaling Commission concerning the use of non-lethal methods<sup>96</sup> were instruments that “cannot be regarded as subsequent agreement ..., nor as subsequent practice” because they had been adopted without the support of all States parties to the Convention, in particular without the approval of Japan (paras. 83 and 137 of the judgment). However, the Court subsequently referred to “significant advances in a wide range of non-lethal research over the past 20 years” (para. 137 of the judgment). Lastly, he proposed that draft conclusions 7 (para. 2), 8 and 11, which partially overlapped, be reformulated. As to draft conclusion 4, which concerned the definition of subsequent agreements and subsequent practice, it should be placed before draft conclusion 3, which was a substantive conclusion.

*The meeting rose at 12.40 p.m.*

<sup>92</sup> *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, para. 255.

<sup>93</sup> *Ibid.*, para. 268.

<sup>94</sup> *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, Part II, p. 221 (para. (14) of the commentary to draft article 27).

<sup>95</sup> *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, paras. 265 and 269.

<sup>96</sup> G. Donovan (ed.), Annex Y to the Report of the Scientific Committee: “Guidelines for the review of scientific permit proposals”, *The Journal of Cetacean Research and Management*, vol. 3, Suppl. (June 2001), pp. 371–372; and G. Donovan (ed.), Annex P to the Report of the Scientific Committee: “Process for the review of special permit proposals and research results from existing and completed permits”, *ibid.*, vol. 16, Suppl. (forthcoming April 2015), pp. 349–353. Available online from the website of the International Whaling Commission, <https://iwc.int/documents>.