Document:-
A/CN.4/3119

Summary record of the 3119th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
2011, **vol. I**

3119th MEETING

Monday, 8 August 2011, at 10 a.m.

Chairperson: Mr. Maurice KAMTO

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Treaties over time (A/CN.4/638, sect. G)

[Agenda item 9]

Report by the Study Group

1. Mr. NOLTE (Chairperson of the Study Group on treaties over time) recalled that the Study Group on treaties over time had been established by the Commission at its sixty-first session[434] and had been reconstituted at its sixty-second[435] and sixty-third sessions.[436] At the current session, it had held five meetings, on 25 May, 13, 21 and 27 July and 2 August 2011.

2. As had been agreed the previous year, the Study Group had pursued its work on its Chairperson's introductory report on the relevant case law of the ICJ and arbitral tribunals of *ad hoc* jurisdiction.[437] Members had accordingly discussed the section on possible modification of a treaty by subsequent agreements and practice, and the relationship of subsequent agreements and practice, on the one hand, and formal amendment procedures, on the other. The Study Group, acting on a proposal from its Chairperson, had considered that no conclusion should be drawn, at that stage, on the matters covered in the introductory report.

3. The Study Group had also had before it a second report by its Chairperson and two informal papers presented by Mr. Murase and Mr. Petrič. The Chairperson's second report was concerned with case law under certain international economic regimes (the WTO dispute settlement system, the Iran–United States Claims Tribunal, the tribunals set up by ICSID and the tribunals set up under the North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States, and the Government of the United States of America), international human rights regimes (the European Court of Human Rights, the Inter-American Court of Human Rights and the Human Rights Committee) and other regimes (the International Tribunal for the Law of the Sea, the International Criminal Court, the International Tribunal for the Former Yugoslavia, the International Tribunal for Rwanda and the Court of Justice of the European Union). The report explained why it had covered those regimes in preference to others.

4. The Study Group had considered the 20 general conclusions contained in the second report. Discussions had focused on reliance by adjudicatory bodies under special regimes on the general rules of treaty interpretation; the extent to which the special nature of certain treaties, notably human rights treaties and treaties in the field of international criminal law, might affect the approach of the relevant adjudicatory bodies to treaty interpretation; the different emphasis which adjudicatory bodies placed on various means of treaty interpretation (taking, for example, more text-oriented or more purpose-oriented approaches to treaty interpretation rather than more conventional approaches); general recognition of subsequent agreements and practice as a means of treaty interpretation; the significance of the role attached by various adjudicatory bodies to subsequent practice as one of the means of treaty interpretation; the concept of subsequent practice for the purpose of treaty interpretation, including the point in time at which a practice might be regarded as subsequent; possible authors of relevant subsequent practice; and evolutionary interpretation as a form of purposive interpretation in the light of subsequent practice. The Study Group had had time to discuss only 11 of the above-mentioned conclusions. In the light of those discussions, the Chairperson had formulated the following nine preliminary conclusions:

"*1. General rule of treaty interpretation*

"The provisions contained in article 31 of the 1969 Vienna Convention on the Law of Treaties, regarded either as an applicable treaty provision or as a reflection of customary international law, were recognized by the adjudicatory bodies which had been reviewed as the general rule on the interpretation of the treaties that they applied.

"*2. Approaches to interpretation*

"Regardless of their recognition of the general rule set forth in article 31 of the 1969 Vienna Convention as the basis for the interpretation of treaties, different adjudicatory bodies had put varying amounts of emphasis on different means of interpretation depending on the context. Three broad approaches could be distinguished:

"The conventional approach: Like the International Court of Justice, most adjudicatory bodies (the Iran–United States Claims Tribunal, the tribunals set up by the International Centre for the Settlement of Investment Disputes, the International Tribunal for the Law of the Sea and international criminal courts and tribunals) typically took into account all the means of interpretation mentioned in article 31 of the 1969 Vienna Convention without making more or less use of certain means of interpretation.

"The text-oriented approach: Panel reports within the framework of the General Agreement on Tariffs and Trade and reports of the Appellate Body of the World Trade Organization (WTO) had in many cases put a certain emphasis on the text of the treaty (the ordinary or special meaning of the terms of the agreement) and had been reluctant to emphasize purposive interpretation.

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[434] *Yearbook … 2009*, vol. II (Part Two), p. 148, para. 217.

[435] *Yearbook … 2010*, vol. II (Part Two), p. 194, para. 345.

[436] *Ibid*., p. 195, para. 353, and *Yearbook … 2011*, vol. II (Part Two), para. 334.

[437] *Yearbook … 2010*, vol. II (Part Two), p. 194, paras. 348–351.

That approach seemed to be dictated, *inter alia*, by a need for certainty and the technical nature of many provisions in WTO-related agreements.

"The purpose-oriented approach: The regional human rights courts and the Human Rights Committee established under the International Covenant on Civil and Political Rights had frequently emphasized the object and purpose of the text. That approach seemed to stem from the character of substantive provisions of human rights treaties, which dealt with the personal rights of individuals in an evolving society.

"The reason some adjudicatory bodies often put a certain emphasis on the text of a treaty while others looked more at its object and purpose lay not only in the subject matter of the treaty obligations concerned, but also in their drafting and other factors, including possibly the age of the treaty regime and the procedure followed by the adjudicatory body. While it was unnecessary to determine the exact degree to which such factors influenced the interpretative approach of the adjudicatory body in question, it was useful to bear in mind those different broad approaches when assessing the role which subsequent agreements and subsequent practice played for different adjudicatory bodies.

"*3. Interpretation of treaties concerning human rights and international criminal law*

"The European Court of Human Rights and the Inter-American Court of Human Rights emphasized the special nature of the human rights treaties which they applied and affirmed that that special nature affected their approach to interpretation. The International Criminal Court, the International Tribunal for the former Yugoslavia and the International Tribunal for Rwanda applied special rules of interpretation derived from general principles of criminal law and human rights law. However, neither the regional human rights courts nor the international criminal courts and tribunals called into question the applicability of the general rule contained in article 31 of the 1969 Vienna Convention as a basis for their treaty interpretation. The other adjudicatory bodies reviewed did not claim that the particular treaty they applied justified a special approach to its interpretation.

"*4. Recognition in principle of subsequent agreements and practice as a means of interpretation*

"All the adjudicatory bodies reviewed recognized that subsequent agreements and subsequent practice in the sense of article 31, paragraphs 3 (*a*) and 3 (*b*), of the 1969 Vienna Convention were a means of interpretation they should take into account when they interpreted and applied treaties.

"*5. Concept of subsequent practice as a means of interpretation*

"Most adjudicatory bodies reviewed had not defined the concept of subsequent practice. The definition given by the WTO Appellate Body ('"a concordant, common and consistent" sequence of acts or pronouncements which is sufficient to establish a discernable pattern implying the agreements of the parties [to the treaty] regarding its interpretation'[438]) combined the element of practice ('sequence of acts or pronouncements') with the requirement of agreement (reflected by the words 'concordant, common') as laid down in article 31, paragraph 3 (*a*) and 3 (*b*), of the 1969 Vienna Convention (subsequent practice in a narrow sense). Other adjudicatory bodies reviewed had, however, also used the concept of practice as a means of interpretation without referring to and requiring a discernable agreement between the parties (subsequent practice in a broad sense).

"*6. Identification of the role of a subsequent agreement or practice as a means of interpretation*

"Like other means of interpretation, subsequent agreements and subsequent practice were usually just one among several means of interpretation used by adjudicatory bodies in reaching a particular decision. It was therefore rare for adjudicatory bodies to state that a particular subsequent practice or subsequent agreement had decisively influenced the final decision. It was, however, often possible to ascertain whether a particular subsequent agreement or subsequent practice had played a major or a minor role in the reasoning underlying a particular decision.

"Most adjudicatory bodies made use of subsequent practice as a means of interpretation. Subsequent practice was less important for adjudicatory bodies that were either more text-oriented (such as the WTO Appellate Body) or more purpose-oriented (such as the Inter-American Court of Human Rights). The European Court of Human Rights placed more emphasis on subsequent practice in that it referred to the common legal standards of Council of Europe member States.

"*7. Evolutionary interpretation and subsequent practice*

"Evolutionary interpretation was a form of purpose-oriented interpretation. Evolutionary interpretation could be guided by subsequent practice in both a narrow and a broad sense. The text-oriented WTO Appellate Body had only occasionally expressly engaged in evolutionary interpretation. Among the human rights treaty bodies, the European Court of Human Rights had frequently employed an evolutionary interpretation that had been explicitly guided by subsequent practice, whereas the Inter-American Court of Human Rights and the Human Rights Committee had hardly ever relied on subsequent practice. The reason for that might be that the European Court of Human Rights could rely on a fairly similar level of restrictions on human rights among Council of Europe member States. The International Tribunal for the Law of the Sea seemed to engage in evolutionary interpretation along the lines of some of the jurisprudence of the International Court of Justice.

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[438] See *Japan–Taxes on Alcoholic Beverages, AB-1996-2, Report of the WTO Appellate Body* (WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R), 1 November 1996, p. 13, referring to, *inter alia*, I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed., Manchester University Press, 1984, p. 137.

"*8. Rare invocation of subsequent agreements*

"The adjudicatory bodies reviewed had rarely relied on subsequent agreements in the narrow sense of article 31, paragraph 3 (*a*), of the 1969 Vienna Convention. That might be due, in part, to the character of certain treaty obligations, especially those under human rights treaties, substantial parts of which might not lend themselves to subsequent agreements among Governments.

"Some decisions which plenary organs or States parties might take in accordance with a treaty, such as the adoption of the Elements of Crimes pursuant to article 9 of the Rome Statute of the International Criminal Court, or the 2001 'Notes of interpretation of certain Chapter 11 provisions' in the context of the North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States, and the Government of the United States of America,[439] if adopted unanimously might have an effect similar to that of subsequent agreements in the sense of article 31, paragraph 3 (*a*), of the 1969 Vienna Convention.

"*9. Possible authors of relevant subsequent practice*

"Relevant subsequent practice could consist of acts of all State organs (executive, legislative or judicial) that could be attributed to a State for the purpose of treaty interpretation. Such practice might, under certain circumstances, even include 'social practice' insofar as it was reflected in State practice."

5. The Study Group recommended that the text of those preliminary conclusions be reproduced in the chapter of the Commission's report that related to treaties over time. The Study Group regarded those conclusions as being of a preliminary nature, as they would have to be revisited and expanded in the light of other reports on additional aspects of the topic and the discussions thereon.

6. The Study Group had also discussed future work on the topic. It expected to complete its discussion of the Chairperson's second report during the Commission's sixty-fourth session (2012). Thereafter it would analyse the practice of States that was unrelated to judicial and quasi-judicial proceedings on the basis of a report on that subject. The Study Group expected that its work on the topic would be concluded in the next quinquennium, as envisaged, and that it would result in conclusions based on a repertory of practice. The possibility of modifying its working method by having a Special Rapporteur on the topic appointed by the Commission could be considered at the next session by the newly elected members.

7. At its meeting on 2 August 2011, the Study Group had also examined the possibility of reiterating the request for information from States that had been included in chapter III of the Commission's report on the work of its sixty-second session.[440] It had generally been felt that it would be useful to have more information on instances of subsequent practice and agreement that had not been the subject of judicial or quasi-judicial rulings by an international body. The Study Group therefore recommended that the Commission include a section requesting information on that subject in chapter III of its report on the work of its sixty-third session.

8. He hoped that the Commission would be in a position to take note of the report and to approve the two above-mentioned recommendations.

9. The CHAIRPERSON said that he took it that the Commission wished to take note of the progress report of the Study Group on treaties over time.

It was so decided.

The most-favoured-nation clause (A/CN.4/638, sect. H)

[Agenda item 10]

Report by the Study Group

10. Mr. PERERA (Co-Chairperson of the Study Group on the most-favoured-nation clause) said that the Study Group, chaired by Mr. McRae and himself, had been reconstituted at the current session and had held four meetings on 1 June, 20 July and 4 August 2011.

11. In an effort to pinpoint the normative content of most-favoured-nation clauses in the field of investment and to analyse case law, including the role of arbitrators, factors explaining different approaches to interpreting most-favoured-nation provisions, divergences and the steps taken by States in response to the case law, the Study Group had examined an informal document that had identified the arbitrators and counsel in investment cases involving most-favoured-nation clauses and the type of most-favoured-nation provisions that had been interpreted. It had also had before it an informal working paper prepared by Mr. McRae, in which he had attempted to ascertain the factors which tribunals had taken into account when reaching their decisions, in order to determine whether they shed any light on divergences in case law. The objective had been to discover which categories of factors had been invoked and to assess their relative significance for the interpretation and application of most-favoured-nation clauses. The various uses for which these clauses had been invoked in investment disputes had been investigated, especially the use of such clauses to obtain a substantive benefit provided for in a bilateral investment treaty between the respondent State and a third State, as well as the use of these clauses to obtain more favourable dispute settlement provisions than those set forth in the bilateral investment agreement under which the claim had been brought.

12. The working paper had also examined the considerations that had played a part in investment tribunals' decisions and had focused on the source of the right to most-favoured-nation treatment, as well as its scope. It had been noted, with regard to scope, that investment tribunals had framed the application of the

[439] North American Free Trade Agreement, Free Trade Commission, "Notes of interpretation of certain Chapter 11 provisions", 31 July 2001 (available from www.sice.oas.org/TPD/NAFTA/Commission/CH11understanding_e.asp).

[440] *Yearbook … 2010*, vol. II (Part Two), p. 16, paras. 26–28.

ejusdem generis principle in many ways and that in some cases different approaches had been taken even within the same decision.

13. Those approaches had included: (*a*) drawing a distinction between substance and procedure (jurisdiction); (*b*) adopting a treaty interpretation approach, either interpreting most-favoured-nation provisions as a general matter of treaty interpretation or treating the matter as one of interpreting the jurisdiction of the tribunal; (*c*) adopting a conflict-of-treaty-provisions approach, in which tribunals took into account the fact that the matter whose incorporation in the treaty was being sought had already been covered in a different way by the basic treaty itself; and (*d*) examining the practice of the parties in order to ascertain their intention with regard to the scope of the most-favoured-nation clause.

14. The working paper had further considered whether the type of claim being made had had any influence on the willingness of tribunals to incorporate other provisions by means of a most-favoured-nation clause, and it had discussed limits to the application of the clause, including the public policy exceptions set out in the *Maffezini* case.

15. In the main, the working paper had concluded that an examination of the decisions of investment tribunals had not revealed a consistent approach in the reasoning of the tribunals which had either permitted or rejected the use of the most-favoured-nation clause as a means of incorporating dispute settlement provisions in a basic treaty. The first step in deciding whether such a clause could be used to that end was to decide, explicitly or implicitly, whether in principle these clauses covered dispute settlement provisions. The second step was to interpret the most-favoured-nation clause in question to see whether in fact it applied to dispute settlement provisions. Those approaches were not always explicit. In some cases, tribunals, apparently ignoring the first step, had said that their approach was one of treaty interpretation.

16. The Study Group had held a wide-ranging discussion on the basis of the working paper and a set of questions which had been prepared in order to provide an overview of the issues that might require consideration by the Study Group. Those questions had ranged from strictly legal considerations to wider aspects of policy and had included the issue of whether a liberal interpretation of the scope of most-favoured-nation clauses could potentially upset the overall equilibrium of an investment agreement that sought to strike a balance between the protection of the investor and its investment and a host State's discretion to formulate policy.

17. It was the Study Group's general understanding that the source of the right to most-favoured-nation treatment was the basic treaty, not a third-party treaty. Such clauses were no exception to the privity rule in treaty interpretation. It had also been recognized that the key question in decisions in investment cases was how to determine the scope of the right to most-favoured-nation treatment, in other words whether it expressly or implicitly fell within the limits of the subject matter of the clause.

18. In that connection, the Study Group had examined the ways in which the *ejusdem generis* question had been framed, especially when that had been done through the invocation of the distinction between substantive and procedural (jurisdictional) provisions. When a most-favoured-nation clause expressly included or excluded dispute settlement procedures, there was obviously no need for further interpretation. It was needed, however, when the parties' intention with regard to the applicability of the most-favoured-nation clause to a dispute settlement mechanism was not expressly stated, or could not be clearly ascertained. That was often the case with bilateral investment treaties that had open-textured provisions.

19. The Study Group had taken note of other recent developments, including the issuance of the UNCTAD publication *Most-Favoured-Nation Treatment*[441] in the Series on Issues in International Investment Agreements II, which had shown that, after the *Maffezini* case, when States entered into investment agreements they tended to state expressly whether the most-favoured-nation clause applied to dispute settlement procedures.

20. The Study Group had considered the recent decision in the case concerning *Impregilo S.p.A. v. Argentine Republic*, in particular the concurring and dissenting opinion of arbitrator Brigitte Stern, who had argued, *inter alia*, that a most-favoured-nation clause could not apply to dispute settlement for a core reason intimately linked with the essence of international law: there was no automatic assimilation of substantive rights and the jurisdictional means to enforce them, since there was a difference between the qualifying conditions for access to the substantive rights and the qualifying conditions for access to the jurisdictional means (para. 56). It had also been noted that legal writers' opinions differed as to the correct approach. Some commentators contended that there was no convincing reason to distinguish between substantive provisions and dispute settlement provisions, while others viewed the interpretation of most-favoured-nation provisions as a jurisdictional matter, where the intention to incorporate dispute settlement provisions must be clearly and unambiguously expressed.

21. It had been recognized that the various decisions implied a philosophical position on whether most-favoured-nation clauses in principle covered dispute settlement provisions. One scenario proceeded on the assumption that such clauses could include procedural rights, while the other assumed that they could not. It had been noted that, on the whole, the conundrum arose from the fact that tribunals had no uniform and systematic approach to interpretation. For that reason, it was hard to draw any general conclusions about interpretative approaches in decisions on investment cases. One of the challenges facing the Study Group was to arrive at an assessment that might flesh out an underlying theoretical framework to explicate the reasoning in those decisions.

22. In that connection, it had also been noted that the concurring and dissenting opinion in *Impregilo S.p.A. v.*

[441] UNCTAD, *Most-Favoured-Nation Treatment*, UNCTAD/DIAE/IA/2010/1, United Nations publication (Sales No. 10.II.D.19), Geneva, 2010.

Argentine Republic offered a possible framework for finding ways of approaching the *ejusdem generis* question, for example by first examining whether the fundamental preconditions for invocation of access to the rights granted in the bilateral investment treaty (namely the conditions *ratione personae*, *ratione materiae* and *ratione temporis*) had been satisfied. In that regard, it had been recalled that article 14 of the 1978 draft articles on most-favoured-nation clauses had provided that the exercise of rights arising under such a clause for the beneficiary State, or for persons or things in a determined relationship with that State, was subject to compliance with the relevant terms and conditions laid down in the treaty containing the clause, or otherwise agreed between the granting State and the beneficiary State.[442] In other words, in addition to a two-step process consisting in first deciding whether in principle these clauses covered dispute settlement provisions and then embarking on the interpretation of the most-favoured-nation provision in question to see whether it applied in fact to dispute settlement provisions, there was a prior step, which had possibly been overlooked in the case law and the purpose of which was to determine who was entitled to benefit and whether the preconditions for access had been fulfilled.

23. The Study Group had deemed it advisable to review the various approaches taken and to draw attention to the strengths and weaknesses of each approach. It had been noted that the treaty interpretation approach might be a misnomer, since the whole process involved treaty interpretation. The general point of departure would be the 1969 Vienna Convention, supplemented by any principles which might be deduced from practice in the investment area. It had been noted, however, that the 1969 Vienna Convention did not appear to support reference to the other treaty-making practice of the parties to the bilateral investment treaty, in respect of which a most-favoured-nation claim had been made, as a means of ascertaining the parties' intention with regard to the scope of the most-favoured-nation clause.

24. As far as its future programme of work was concerned, the Study Group had again reaffirmed the need to study further the question of most-favoured-nation treatment in relation to trade in services and to investment agreements, as well as the relationship between such treatment, fair and equitable treatment and national treatment standards. It had also been suggested that there was a need to investigate other areas of international law in order to discover whether the application of most-favoured-nation treatment there might afford some useful insights.

25. The Study Group's work could possibly be completed in 2013. The aim should be to ensure greater coherence in the approaches taken in arbitral decisions in order to prevent the fragmentation of international law. The Study Group could thus contribute to greater certainty and stability in the field of investment law. The outcome of its work should be of practical utility to those involved in the investment field and to policymakers. The Study Group did not intend to prepare any draft articles, or to revise the 1978 draft articles. Instead, under the guidance of its Co-Chairpersons, it would draw up a draft report describing the general background, analysing case law in various contexts, drawing attention to any issues that had arisen and to trends in practice and, where appropriate, making recommendations and suggesting model clauses.

26. He hoped that the Commission would be in a position to take note of the Study Group's progress report.

27. The CHAIRPERSON said that he took it that the Commission wished to take note of the progress report of the Study Group on the most-favoured-nation clause.

It was so decided.

Draft report of the International Law Commission on the work of its sixty-third session (*continued*)

Chapter V. *Responsibility of international organizations* (concluded) (A/CN.4/L.784 and Add.1–2)

C. Recommendation of the Commission (*concluded*)

28. The CHAIRPERSON recalled that, at its 3118th meeting, paragraph 9 of section C of this chapter, contained in document A/CN.4/L.784, concerning the Commission's recommendation to the General Assembly, had been left in abeyance. He invited the Special Rapporteur to inform the Commission of his proposal with regard to that paragraph.

29. Mr. GAJA (Special Rapporteur) said that it would be wise for the Commission to adopt a paragraph similar to that which it had adopted with respect to chapter VI on the effects of armed conflicts on treaties (A/CN.4/L.785) and which in turn had been modelled on its recommendation to the General Assembly concerning the draft articles on responsibility of States for internationally wrongful acts.[443]

30. He therefore proposed that the single paragraph of section C read:

> "The Commission recommends to the General Assembly (*a*) that it take note of the draft articles on responsibility of international organizations in a resolution and that it annex them to the resolution, and (*b*) that it consider at a later stage the elaboration of a convention on the basis of the draft articles."

31. The CHAIRPERSON said that he took it that the Commission wished to adopt paragraph 9 of document A/CN.4/L.784 as proposed by the Special Rapporteur.

It was so decided.

Section C was adopted.

Chapter V of the report of the Commission, as a whole, as amended, was adopted.

The meeting rose at 10.50 a.m.

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[442] *Yearbook ... 1978*, vol. II (Part Two), p. 39.

[443] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 25, para. 73.