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Summary record of the 3071st meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
2010, **vol. I**

settlement mechanisms or for optional mechanisms, or it could remain silent. In his view, the Commission should deal with the question case by case.

58. Mr. CANDIOTI said that it was important to focus on the prevention of disputes. The Commission's special rapporteurs on topics relating to natural resources, the environment or human rights, for example, should take that into account when they elaborate draft articles and should make provision from the outset for adequate consultation and cooperation mechanisms, which could play an essential prevention role.

59. Mr. MELESCANU, referring to the two approaches identified by Ms. Escarameia, namely the immediate approach and the long-term approach, said the Commission could decide for the time being that all draft articles elaborated by it would contain dispute settlement clauses. As suggested by Mr. Caflisch, the Commission should even review the international conventions which it had drafted and which did not contain such clauses, and propose the necessary amendments to them. The longer-term approach could be limited to the elaboration of model clauses relating to the peaceful settlement of disputes, but even so, it must be borne in mind that this work would keep the Commission busy for many years. If the Commission adopted a general approach, it should not confine itself to judicial or arbitral procedures but should also include negotiations, good offices, mediation and so on. If it decided to embark on work of that magnitude, it should also address the question of the application of decisions emerging from the implementation of dispute settlement mechanisms.

60. Mr. HMOUD pointed out that the purpose of dispute settlement mechanisms was not only to defend the rule of law, but also to preserve and restore peace, and thus the international community as a whole had an interest in having more such mechanisms. Apart from the universal problem of expenses, some States were reluctant to accept dispute settlement mechanisms, and formulated reservations to dispute settlement clauses because of the political context, the specific instrument concerned or for other reasons. The Commission should take that into account, as well as the problem of the fragmentation of international law, to which a number of speakers had referred and which resulted in overlap between the procedures and mechanisms provided for under different instruments. He supported Ms. Escarameia's suggestion to propose model dispute settlement clauses. If that suggestion were adopted, the commentaries would be more useful than the clauses themselves, because they would clarify the various situations likely to arise. As Mr. Melescanu had noted, given the magnitude of the task, perhaps the Commission should limit the number of areas which it considered, whether it be investment, trade or law enforcement.

61. Mr. FOMBA said that in view of the importance of the legal nature of the obligation of the peaceful settlement of disputes, which was an obligation of results and not of means, it was clear that the subject was of particular interest to the Commission, given its mandate. The question was whether and to what extent the Commission could or should make a contribution in that area. An assessment of its role was necessary, and the Secretariat's note had provided a good overview of the subject. The Commission's approach should essentially be guided by the criterion of the final legal form of its work and the resulting logic from the point of view of the method to be adopted, including the question of whether to draw up model dispute settlement clauses.

62. Sir Michael WOOD thanked all those who had spoken on the subject and had made many interesting proposals. It had been suggested that he might prepare a short working paper for the 2011 session, and he was prepared to do so with, he hoped, the assistance of the Secretariat. On the basis of the paper, the Commission might consider whether to include some of the points raised during the current debate in the report and, more specifically, whether there were any particular aspects of the very broad field of dispute settlement on which the Commission might decide to focus its attention.

63. The CHAIRPERSON said that, if he heard no objection, he would take it that at its next session, the Commission wished to give further consideration, under the agenda item "Other business", to the question of settlement of disputes clauses and that Sir Michael would be entrusted with preparing a document for that purpose, taking into account the proposals made at the current meeting.

It was so decided.

The meeting rose at 11.40 a.m.

3071st MEETING

Friday, 30 July 2010, at 10.05 a.m.

Chairperson: Mr. Nugroho WISNUMURTI

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Perera, Mr. Petrič, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Treaties over time[358] (A/CN.4/620 and Add.1, sect. I)

[Agenda item 10]

REPORT OF THE STUDY GROUP

1. Mr. NOLTE (Chairperson of the Study Group on treaties over time) said that the Study Group had held

[358] The Commission decided to include the topic in its programme of work and to establish a study group at its sixtieth session (*Yearbook ... 2008*, vol. II (Part Two), p. 148, para. 353; see *ibid.*, annex I, p. 156, for the framework proposed for the study of the topic). At its sixty-first session, the Commission created a Study Group on treaties over time, chaired by Mr. Nolte, which identified the issues to be covered and the working methods of the Study Group (*Yearbook ... 2009*, vol. II (Part Two), chap. XII, p. 148, paras. 220–226).

four meetings, on 5 and 26 May and 28 July 2010. It had begun its work on the aspects of the topic relating to subsequent agreement and practice, on the basis of an introductory report prepared by its Chairperson on the pertinent jurisprudence of the ICJ and of arbitral tribunals of *ad hoc* jurisdiction.[359] The report addressed a number of questions, including certain terminological issues; the general significance of subsequent agreement and practice in treaty interpretation; the question of inter-temporal law; the relationship between evolutionary interpretation and subsequent agreement and practice; the beginning and the end of the period within which subsequent agreement and practice could take place; common understanding or agreement by the parties, including the potential role of silence and omissions; attribution of conduct to the State; and subsequent agreement and practice as a possible means of treaty modification. Except for the last item, deferred for lack of time until the next session, all those questions had been the subject of preliminary discussions within the Study Group.

2. Aspects touched upon included whether, in the interpretation of treaties, different judicial or quasi-judicial bodies had a different understanding of, or had a tendency to give different weight to, subsequent agreement and practice; and whether the relevance and significance of subsequent agreement and practice could vary, depending on factors relating to the treaty such as its age, its subject matter or its past- or future-oriented nature. It had generally been felt that no definitive conclusions could be drawn on those issues at that stage.

3. During the second meeting, some members of the Study Group had asked for additional information to be provided on relevant aspects of the preparatory work for the 1969 Vienna Convention. At the third meeting, the Chairperson had accordingly submitted an addendum to his introductory report, dealing with the preparatory work relating to the rules on interpretation and modification of treaties and on inter-temporal law.[360] The addendum described the Commission's drafting work during the first and second readings of those draft articles relating to the interpretation and modification of treaties and the changes made to those texts in the 1969 Vienna Convention. It concluded that the Convention's article 31, paragraphs 3 (*a*) and (*b*), on "subsequent agreements" and "subsequent practice", were the remnants of a more ambitious plan to deal with inter-temporal law and the modification of treaties. The plan could not be realized for a number of reasons, in particular the difficulties of formulating in an appropriate way a general rule on inter-temporal law and the reluctance by States at the United Nations Conference on the Law of Treaties to accept an explicit rule on the informal modification of treaties by way of subsequent practice. However, no differences in substance appeared to have caused the initial, more ambitious plan to have been abandoned.

4. The Study Group had also discussed its future work. During the Commission's next session, it intended first to complete its discussion of the introductory report prepared by its Chairperson and then move to the analysis of pronouncements of courts and other independent bodies under special regimes. That would be done on the basis of a report to be prepared by the Chairperson. In parallel, contributions were to be made by some members on specific issues, such as subsequent agreement and practice in the field of environmental law and treaties pertaining to specific regions.

5. At its final meeting, the Study Group had examined the idea that a request for information from Governments might be included in chapter III of the Commission's report on its current session and be brought to the attention of Governments by the Secretariat. It was generally felt that any information provided by Governments would be extremely useful, in particular with respect to the consideration of instances of subsequent practice and agreement that had not been the subject of a judicial or quasi-judicial pronouncement by an international body. The Study Group therefore recommended that chapter III of the Commission's report on its current session should include a request for information on the topic "Treaties over time". The Study Group had been able to agree on a provisional text for the request, subject to any modifications the Commission might introduce when adopting chapter III of its report. The text of the request had been circulated to all members of the Commission.[361]

6. The CHAIRPERSON said he took it that the Commission wished to take note of the report of the Study Group on treaties over time, and to approve the recommendation regarding the request to Governments for information.

It was so decided.

The most-favoured-nation clause[362] (A/CN.4/620 and Add.1, sect. I)

[Agenda item 11]

Report of the Study Group

7. Mr. PERERA (Co-Chairperson of the Study Group on the most-favoured-nation clause) said that the Study Group had been reconstituted at the current session and had held three meetings, on 6 May and 23 and 29 July 2010. It had reviewed various papers prepared on the basis of the road map for future work decided on in 2009[363] and had agreed on a programme of work for 2011. It had had before it several papers prepared by its members, including: (*a*) a catalogue of

[359] ILC(LXII)SG/TOT/INFORMAL.1 (session document, distribution limited to the members of the Commission); see *Yearbook … 2010*, vol. II (Part Two), chap. X, para. 349.

[360] ILC(LXII)SG/TOT/INFORMAL.1/Add.1 (*idem.*); *Yearbook … 2010*, vol. II (Part Two), chap. X, para. 352.

[361] See the text adopted by the Commission in *Yearbook … 2010*, vol. II (Part Two), chap. III, paras. 26–28.

[362] At its sixtieth session (2008), the Commission decided to include the topic in its programme of work and to establish a study group at its sixty-first session (*Yearbook ... 2008*, vol. II (Part Two), p. 138, para. 354; see *ibid.*, annex II, p. 168, for the framework proposed for the study of the topic). In 2009, the Commission established a Study Group on the topic, co-chaired by Mr. McRae and Mr. Perera, and took note of the oral report of the Study Group (*Yearbook ... 2009*, vol. II (Part Two), p. 146–147, paras. 211–216).

[363] *Ibid.*, paras. 215–216.

most-favoured-nation provisions[364]—Mr. McRae and Mr. Perera; (*b*) the 1978 draft articles of the International Law Commission[365]—Mr. Murase;[366] (*c*) Most-favoured nation in the General Agreement on Tariffs and Trade (GATT) and the WTO[367]—Mr. McRae; (*d*) the work of the OECD on most-favoured nation[368]—Mr. Hmoud; (*e*) the work of the United Nations Conference on Trade and Development (UNCTAD) on most-favoured nation[369]—Mr. Vasciannie; and (*f*) the *Maffezini* problem under investment treaties[370]—Mr. Perera. The papers shed light on the challenges of the most-favoured-nation clause in contemporary times by looking at the typology of existing most-favoured-nation provisions; the relevance of the 1978 draft articles; how most-favoured nation had developed and was developing in the context of GATT and the WTO; what other activities had been carried out, particularly in the context of OECD and UNCTAD; where substantial work had been accomplished on the subject; and contemporary issues concerning the clause's scope of application, such as those arising in *Maffezini*.

8. The central focus remained on how most-favoured-nation clauses were being interpreted, particularly in the context of investment, and whether some common underlying guidelines could be formulated to serve as interpretative tools or assure some certainty and stability in the field of investment law.

9. The Study Group had held wide-ranging discussions on the basis of the papers before it as well as developments elsewhere, including within the context of the Southern Common Market (MERCOSUR), on which Mr. Saboia had submitted a paper. The Group had also had before it other material on recent work done on the subject.

10. The general sense of the Study Group had been that it was premature to consider preparing draft articles or revising the 1978 draft articles. It had also been felt that the Group could study further the relationship between trade and investment in services and in intellectual property in the context of GATT and the WTO. There was a need to better identify the normative content of most-favoured-nation clauses in investment, to undertake a further analysis of case law, including the role of arbitrators and to consider other factors that explained the divergences, assumptions and interpretative approaches taken in case law and the steps taken by States in response to case law. A systematic attempt should be made to determine whether general patterns could be distilled from the way case law had proceeded in making determinations on questions of jurisdiction based on the most-favoured nation principle. It was necessary to consider the types of most-favoured-nation clauses that had been implicated when making such determinations and to examine the outcomes of arbitral awards in the light of the interpretative tools under the 1969 Vienna Convention.

11. The Co-Chairpersons would endeavour to address the issues just highlighted and to put together an overall report, including a framework of questions, for the Study Group's consideration in 2011.

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

It was so decided.

The obligation to extradite or prosecute (*aut dedere aut judicare*)[371] (A/CN.4/620 and Add.1, sect. F, A/CN.4/630,[372] A/CN.4/L.774[373])

[Agenda item 7]

Report of the Working Group

13. Mr. CANDIOTI (Interim Chairperson of the Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*)) said that the Working Group had been reconstituted at the current session and had held two meetings, on 27 and 28 July 2010. It had continued its discussions with the aim of identifying the issues to be addressed to further facilitate the work of the Special Rapporteur on the topic. He himself had acted as interim Chairperson in the absence of Mr. Pellet.

14. The Working Group had had before it a survey of multilateral conventions that might be of relevance, prepared by the Secretariat (A/CN.4/630), together with the general framework prepared by the Working Group in 2009.[374] The survey identified 61 multilateral instruments that contained provisions combining extradition and prosecution as alternative courses of action for the punishment of offenders. It proposed a description and a typology of such instruments and examined the preparatory work for certain key conventions that had served as models in the field, as well as the reservations made to the relevant provisions. It pointed out the differences and similarities between the provisions reviewed. Lastly, the Secretariat's survey offered conclusions on: (*a*) the relationship between extradition and prosecution in the relevant provisions; (*b*) the conditions applicable to extradition under the various conventions; and (*c*) the conditions applicable to prosecution under the various conventions.

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[364] *Yearbook … 2010*, vol. II (Part Two), chap. XI, para. 360.

[365] *Yearbook … 1978*, vol. II (Part Two), p. 16, para. 74.

[366] *Yearbook … 2010*, vol. II (Part Two), chap. XI, para. 361.

[367] *Ibid.*, paras. 362–363.

[368] *Ibid.*, para. 364.

[369] *Ibid.*, para. 365.

[370] *Ibid.*, paras. 366–368.

[371] At its sixtieth session, the Commission established, under the chairpersonship of Mr. Pellet, a working group on the topic (*Yearbook ... 2008*, vol. II (Part Two), p. 142, para. 315). At its sixty-first session, the Working Group proposed a general framework for the Commission's consideration of the topic, to facilitate the work of the Special Rapporteur (*Yearbook ... 2009*, vol. II (Part Two), pp. 143–144, para. 204). From 2006 to 2008, the Commission received and discussed three reports from the Special Rapporteur, Mr. Galicki: *Yearbook … 2006*, vol. II (Part One), document A/CN.4/571; *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/585; and *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/603. The Commission also received comments and information from Governments at its fifty-ninth, sixtieth and sixty-first sessions, respectively: *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/579 and Add.1–4; *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/599; and *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/612.

[372] Reproduced in *Yearbook … 2010*, vol. II (Part One).

[373] *Idem*.

[374] *Yearbook ... 2009*, vol. II (Part Two), para. 204.

15. The Working Group had also had before it a paper prepared by the Special Rapporteur, entitled "Bases for discussion in the Working Group on the topic 'The obligation to extradition or prosecute (*aut dedere aut judicare*)'" (A/CN.4/L.774), containing observations and suggestions based on the general framework proposed in 2009 and further drawing upon the survey by the Secretariat. In particular, the Special Rapporteur drew attention to questions concerning: (*a*) the legal bases of the obligation to extradite or prosecute (paras. 5–8); (*b*) the material scope of the obligation (paras. 9–10); (*c*) the content of the obligation to extradite or prosecute (paras. 11–13); and (*d*) the conditions for triggering the obligation to extradite or prosecute (paras. 18–19).

16. In its discussions, the Working Group had affirmed the continuing relevance of the general framework agreed upon in 2009. It had recognized that the Secretariat survey had helped to elucidate aspects of the typology of treaty provisions, differences and similarities in the formulation of the obligation to extradite or prosecute in those provisions and their evolution. However, the treaty practice on which the Secretariat study focused needed to be complemented by a detailed consideration of State practice, including but not limited to national legislation, case law and official statements of government representatives. In particular, since the duty to cooperate in combating impunity seemed to underpin the obligation to extradite or prosecute, a systematic assessment needed to be made of the extent to which that duty could, as a general rule or in relation to specific crimes, help to elucidate work on the topic, including on the material scope, the content and the conditions for triggering the obligation to extradite or prosecute.

17. Taking into account the Commission's practice in the progressive development of international law and its codification, the Working Group considered that the general orientation of future reports should be towards presenting draft articles for consideration by the Commission.

18. The CHAIRPERSON said he took it that the Commission wished to take note of the report.

It was so decided.

The meeting rose at 10.30 a.m.

3072nd MEETING

Monday, 2 August 2010, at 3.05 p.m.

Chairperson: Mr. Nugroho WISNUMURTI

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. McRae, Mr. Murase, Mr. Nolte, Mr. Perera, Mr. Petrič, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Draft report of the International Law Commission on the work of its sixty-second session

Chapter VI. *Effects of armed conflicts on treaties* (A/CN.4/L.766 and Add.1)

1. The CHAIRPERSON invited the members of the Commission to adopt chapter VI of its report (A/CN.4/L.766 and Add.1), paragraph by paragraph.

A. Introduction (A/CN.4/L.766)

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

Paragraph 3

Paragraph 3 was adopted with a minor editorial amendment to the English version.

Paragraph 4

2. Mr. GAJA said that the paragraph suggested that Sir Ian Brownlie had resigned from his position as Special Rapporteur, which was not the case. In order to avoid confusion, he proposed that the words "from the Commission" should be inserted after "Sir Ian Brownlie".

Paragraph 4, as amended, was adopted.

Section A as a whole, as amended, was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.766 and Add.1)

Paragraphs 5 to 9

Paragraphs 5 to 9 were adopted.

Paragraph 10

3. Mr. NOLTE proposed the deletion of the last sentence, because its wording suggested that the topic raised essentially formal questions which, however, formed the subject of only a few draft articles, whereas, generally speaking, it concerned substantive issues.

Paragraph 10, as amended, was adopted.

Paragraphs 11 to 24

Paragraphs 11 to 24 were adopted.

Paragraph 25

4. Mr. NOLTE said that, contrary to the statement made at the beginning of the last sentence, the definition of "armed conflict" in the *Tadić* case did not contain "a certain degree of circularity". He therefore proposed the deletion of the phrase "While admitting a certain degree of circularity in that definition."

5. Mr. CAFLISCH (Special Rapporteur) approved of that proposal. When he had spoken of circularity, he had been referring to the Geneva Conventions for the protection of war victims and article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and