



**General Assembly**

Distr.  
LIMITED

A/CN.4/L.741  
5 August 2008

Original: ENGLISH

INTERNATIONAL LAW COMMISSION  
Sixtieth session  
Geneva, 5 May-6 June and 7 July-8 August 2008

**DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION  
ON THE WORK OF ITS SIXTIETH SESSION**

**Rapporteur: Ms. Paula ESCARAMEIA**

**CHAPTER XII**

**OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION**

**CONTENTS**

	<i>Paragraphs</i>	<i>Page</i>
A. Programme, procedures and working methods of the Commission and its documentation .....	1 - 30	
1. Commemoration of the sixtieth anniversary of the Commission and meeting with Legal Advisers .....	4 - 8	
2. Consideration of General Assembly resolution 62/70 of 6 December 2007 on the rule of law at the national and international levels .....	9 - 14	
3. Relations between the Commission and the Sixth Committee .....	15 - 18	
4. Working Group on Long-term Programme of Work .....	19 - 20	
5. Inclusion of new topics on the programme of work of the Commission and establishment of study groups .....	21 - 22	
6. Meeting with Legal Advisers of specialized agencies .....	23	

## CONTENTS *(continued)*

	<i>Paragraphs</i>	<i>Page</i>
7. Meeting with members of the Appellate Body of the WTO .....	24	
8. Financial matters .....	25 - 26	
(a) Attendance of Special Rapporteurs in the General Assembly during the consideration of the Commission's report .....	25	
(b) Honoria .....	26	
9. Documentation and publications .....	27 - 30	
(a) Processing and issuance of reports of Special Rapporteurs .....	27	
(b) Establishment of a trust fund on the backlog relating to the <i>Yearbook</i> of the International Law Commission .....	28	
(c) Other publications and the assistance of the Codification Division .....	29 - 30	
B. Date and place of the sixty-first session of the Commission .....	31	
C. Cooperation with other bodies .....	32 - 39	
D. Representation at the sixty-third session of the General Assembly .....	40	
E. International Law Seminar .....	41 - 54	

## Annexes

**A. Programme, procedures and working methods of the  
Commission and its documentation**

1. At its 2971st meeting, on 4 June 2008, the Commission established a Planning Group for the current session.
2. At its ... meeting, on ... 2008, the Commission took note of the proposed strategic framework for the period 2010-2011, concerning Programme 6 - Legal Affairs, Sub-programme 3, Progressive development and codification of international law.
3. The Planning Group held five meetings. It had before it Section G of the Topical Summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-second session entitled "Other decisions and conclusions of the Commission"; and General Assembly resolution 62/66 of 6 December 2007 on the Report of the International Law Commission on the work of its fifty-ninth session, in particular paragraphs 8, 9 and 14 to 25, as well as General Assembly resolution 62/70 of 6 December 2007 on the rule of law at the national and international levels.

**1. Commemoration of the sixtieth anniversary of the Commission  
and meeting with Legal Advisers**

4. The Commission notes that, as part of events to commemorate its sixtieth anniversary, the Commission convened on 19 May 2008 a solemn meeting, during which statements were made by Mr. Sergei Ordzhonikidze, Director-General of the United Nations Office at Geneva; Ms. Micheline Calmy-Rey, Federal Counsellor of the Swiss Confederation; Mr. Nicolas Michel, Under-Secretary-General, the Legal Counsel of the United Nations; and the Chairman of the Commission, Mr. Edmundo Vargas Carreño. Mr. Srgian Kerim, President of the General Assembly of the United Nations delivered a video message, while Judge Rosalyn Higgins, President of the International Court of Justice delivered a keynote address.<sup>1</sup>
5. The solemn meeting was followed by a one-and-a-half-day meeting with legal advisers on 19 and 20 May. The meeting was dedicated to the work of the Commission under the overall

---

<sup>1</sup> The keynote address of the President of the International Court of Justice and the statements of the Director General, the Legal Counsel and the Chairman of the Commission are available at the website on the Commission's work: [www.un.org/law/ilc/](http://www.un.org/law/ilc/).

theme: “*The International Law Commission: Sixty Years ... And Now?*” It comprised a series of panel discussions involving Legal Advisers of member States, other international law experts and the Commission members, present and former, focusing on practical matters concerning the Commission and its cooperation with member States in the progressive development of international law and its codification.<sup>2</sup> The discussions proceeded on the basis of the Chatham House rule and no record was kept of the meeting.

6. The Commission deeply appreciates that many legal advisers, judges of the International Court of Judges, former members of the Commission and other international law experts joined the Commission in the celebrations. The Commission commends the Secretariat, together with the group of members of the Commission entrusted with the preparatory arrangements,<sup>3</sup> for the organization of the successful commemorative event.

---

<sup>2</sup> The general introduction entitled “*What Role for the International Law Commission in the 21st Century?*” was given by Mr. Georges Abi-Saab. (a) Mr. Michael Wood, gave an introduction and chaired the first cluster of issues under the sub-theme “*A Subsidiary Organ Composed of Independent Experts: Is the Commission Adapted to its Purposes?*”. The first panel on “*The Membership of the Commission: Profiles of a Codifier*” was led by Mr. A. Pellet and Mr. R.E. Fife (Norway). The second panel on “*The Commission and Governments: Mutual Indifference or Ongoing Interaction?*” was led by Mr. Z. Galicki and Mr. J.B. Bellinger (United States of America). (b) Mr. James Crawford gave an introduction and chaired the second cluster of issues under the sub-theme “*The Commission and its Methods of Work: How to Achieve the Mandate?*” Mr. D. Momtaz also chaired part of the session. The third panel on “*Within the Commission: Is There a Need to Renew the Methods of Work?*” was led by Mr. C. Yamada and A.E. Villalta (El Salvador). The fourth panel on “*Opening up the Commission: Sharing Experiences with Other Bodies?*” was led by Ms. P. Escameia and Mr. A. Havas Oegroseno (Indonesia). Mr. Ahmed Mahiou gave an introduction and chaired the third cluster of issues under the sub-theme “*Prospects for the Commission: Which Outcomes for Future Topics?*”. The fifth panel on “*Future topics for the Commission: The End of the Golden Age?*” led by Mr. E. Candioti and Ms. L. Lijnzaad (The Netherlands). The sixth panel addressed “*The Outcomes of the Commission’s Work: Should Codification and Progressive Development Still Be Achieved Through Treaties?*” was led by Mr. J. Dugard and Ms. P. O’Brien (Ireland). Ms. Brigitte Stern offered general conclusions for the meeting.

<sup>3</sup> The members of the Group were as follows: Mr. E. Candioti, Mr. P. Comissário Afonso, Mr. Z. Galicki, Mr. A. Pellet and Mr. C. Yamada. The Chairman of the Commission at the fifty-ninth session, Mr. I. Brownlie; and the Chairman of the Planning Group at the fifty-ninth session Mr. E. Vargas Carreño, served *ex officio*.

7. The Commission also notes that the meeting with legal advisers provided a useful forum for interaction and considers it useful to have such meetings at least once during a quinquennium, preferably before the midpoint of the quinquennium.

8. The Commission also notes with appreciation that Member States, in association with existing regional organizations, professional associations, academic institutions and members of the Commission concerned, convened national or regional meetings, which were dedicated to the work of the Commission.<sup>4</sup> The Commission notes that such meetings, particularly at national and regional levels assist in the better understanding and appreciation of the role of the Commission in the progressive development and codification of international law and encourages Member States, in association with regional organizations, professional associations, academic institutions and members of the Commission concerned, to continue convening such events as appropriate.

## **2. Consideration of General Assembly resolution 62/70 of 6 December 2007 on the rule of law at the national and international levels**

9. The General Assembly, by the terms of its resolution 62/70 on the rule of law at the national and international levels, *inter alia*, invited the Commission to comment, in its report to the General Assembly, on its current role in promoting the rule of law. The Commission is aware that the agenda item of the General Assembly on the rule of law at the national and the international levels covers a wider range of topics than those which are currently on its own agenda. The Commission is mindful of such other aspects of the General Assembly's agenda item.

---

<sup>4</sup> Some of the activities made known to the Commission included: a Seminar organized by the Argentine Council of Foreign Relations and the Argentine Institute of Water Resources concerning the Integrated management of transboundary aquifers in Buenos Aires on 5 October 2007 and a publication entitled "*Temas recientes de la Comisión de Derecho Internacional*" was issued; a round table organized by the Latin American Society of International Law on "The 60th Anniversary of the International Law Commission: Contributions and Perspectives from Latin America" in Geneva on 21 May 2008; an event organized by the Graduate Institute of International and Development Studies on "The International Law Commission's Sixtieth anniversary: Results and perspectives" in Geneva on 28 May 2008; Peace through law: The Role of the United Nations International Law

10. In keeping with the mandate set out in Article 13 (1) (a) of the Charter of the United Nations, the Commission continues to promote the progressive development and codification of international law. In its current work, the Commission has sought to comply with requests from the General Assembly and is preparing draft treaty texts, guidelines and other instruments on a significant range of legal issues. For each of the topics on the current work programme<sup>5</sup>, the Commission has adopted a systematic approach to the identification of the sources of the law, paying particular attention to treaties, State practice, *opinio juris*, general principles, and judicial decisions of both national and international tribunals. Thus, in its current work, the Commission promotes the rule of law in international relations by applying generally accepted methods for the identification of the law: these methods give prominence to State actions and perceptions, while taking into account the practice of international organizations and, in appropriate instances, the increasing role of non-governmental organizations and individuals in world affairs.

11. In promoting the rule of law in international relations, the Commission is committed to the premise that States, regardless of considerations such as size, power and prominence, are all subject to binding rules of law. Generally, the Commission formulates draft rules that are designed to be universally applicable, and promotes the principle that where disputes arise as to the interpretation or application of rules these should be resolved by means of peaceful settlement. But although the Commission gives primacy to law in the conduct of international affairs, and seeks to formulate rules that give effect to this core principle of the rule of law, this approach does not always preclude a scope for reference to policy considerations on the part of international actors and the international community. In some instances, rules of law may themselves suggest or require the application of discrete policies, and in others the relative paucity of practice and other indicia of existing law encourage the Commission to make proposals *de lege ferenda*. In all instances, however, the Commission presupposes that the rule of law requires States, international organizations and other international entities to conduct their affairs with full deference to the law. This point is exemplified by the work of the Commission

---

Commission, A colloquy on the Occasion of the Sixtieth Anniversary in Munich on 11 July 2008.

<sup>5</sup> For the topics of the current programme of work of the Commission see Chapter I, para. ....

on the Effects of Armed Conflict on Treaties: implicit in the approach taken by the Commission here is the idea that even in the case of armed conflict there are binding rules of law applicable to the behaviour of States.

12. At the international level, the rule of law also requires sensitivity to the content of particular rules. For matters on its current agenda, the Commission has been especially careful to ensure that the proposed rules reflect a balanced reconciliation of divergent State and non-State interests, having regard to established precedents. So, for example, with respect to rules being developed on transboundary aquifers, different perspectives are carefully weighed against each other in light of relevant technical and scientific information and broadly accepted principles of law. The importance of balancing different interests is also clearly reflected in the current programme of work in topics pertaining to the Responsibility of International Organizations, the Obligation to Extradite or Prosecute, and Reservations to Treaties, among others. In essence, draft rules that balance different interests promote the rule of law by encouraging order, clarity and consistency in international relations. For some matters on its agenda, sensitivity to the content of rules may also provide the Commission with the opportunity to take directly into account human rights considerations, such as the dignity and security of the individual and fairness to individuals, in its formulation of draft rules. In this regard, topics such as the Expulsion of Aliens, the Immunity of State Officials from Foreign Criminal Jurisdiction and the Protection of Persons in the Event of Disasters require the careful assessment of generally accepted human rights standards in light of well-established principles of State sovereignty and non-intervention. Where the Commission promotes rules that uphold concepts such as fairness, security and justice for individuals without limiting the proper authority of the State, it assists in the development of the rule of law.

13. As one of a number of United Nations bodies working directly on legal issues, the Commission continues to cooperate with other international agencies in promoting the rule of law. The Commission's main role lies in the formulation of rules, an undertaking which it carries out in close collaboration with States in the General Assembly. However, the nature of the functions performed by the Commission does not lend itself to the kind of coordination at the Secretariat level described in the Report of the Secretary-General "Uniting Our Strengths:

Enhancing United Nations Support for the Rule of Law”.<sup>6</sup> The Commission is also part of what has been characterized as a symbiotic relationship with the International Court of Justice, the highest judicial organ of the United Nations. Time and again, the Court has relied on treaties and other documents prepared by the Commission either as binding instruments in themselves or as evidence of customary international law. Conversely, the Commission attaches the highest authority to the jurisprudence of the Court; for instance, in its current work on issues such as Reservations to Treaties and the Responsibility of International Organizations, the Commission has in many cases formulated proposed rules with direct reference to Court decisions or on the basis of arguments by analogy from pronouncements of the Court. The relationship between the Court and the Commission helps to promote the rule of law not only through the consistent and transparent application of clear rules, but also by demonstrating that different law-determining agencies adopt the same approach to the identification of rules of international law. Regional and national courts, too, have sometimes been prepared to apply draft rules of the Commission as evidence of international law; thus, for example, various courts in recent years have expressly referred to propositions set out in the Commission’s draft rules on the Responsibility of International Organizations. Such reference gives enhanced status to the relevant draft rules, and underlines the practical nature of the current contribution made by the Commission to the rule of law.

14. Overall, therefore, the Commission remains committed to the rule of law in all of its activities. Indeed, it may be said that the rule of law constitutes the essence of the Commission, for its basic mission is to guide the development and formulation of the law. The Commission adopts a systematic approach to its work, and proposes practical solutions to international issues. In this way, it continues to build on a strong tradition that is now commemorating its sixtieth anniversary, a tradition that includes the preparation for major treaties such as the Vienna Convention on Diplomatic Relations and the Vienna Convention on the Law of Treaties. In drafting general rules based on State practice and relevant activities of other international persons, the Commission takes advantage of the fact that its composition requires membership from the main legal systems of the world and from all regional groupings recognized within the United Nations system. It remains committed to the idea that all States, regardless of their

---

<sup>6</sup> A/61/636-S/2006/980, paras. 48-50.



circumstances, are subject to the primacy of law. It is sensitive to the fact that proposed rules which disregard divergent State and non-State interests will be of limited value. And, finally, by cooperating with other bodies that help to determine and apply the law, the Commission assists in ensuring that, at a time when tendencies towards fragmentation in the law are quite pronounced, some rules of law are applied uniformly by a cross-section of States and entities.

### **3. Relations between the Commission and the Sixth Committee**

15. The Commission continued its consideration of ways in which the dialogue between the Commission and the Sixth Committee could be further enhanced in the light of calls contained in annual resolutions of the General Assembly. The Commission wishes to reiterate that its plenary meetings are open to interested delegations and that its draft reports, issued in the A/CN.4/L... series as documents for limited distribution (L-documents) and usually adopted during the last week of the Commission's session, are available for advance perusal, subject to changes that may be made during the adoption stage. The draft reports are available on the Official Documents System of the United Nations (ODS).<sup>7</sup>

16. The Commission welcomes the continued practice of informal consultations in the form of focused discussions between the members of the Sixth Committee and the members of the Commission attending sessions of the General Assembly as a useful means to enhance dialogue on the various topics on the Commission's agenda.

17. The Commission is also aware that the informal meeting of Legal Advisers which is convened during the Sixth Committee's consideration of Commission's report has, on its agenda, a variety of international law issues to discuss. In order to further enhance the discussion on the report of the Commission, it may be worthwhile to explore possibilities that the informal meeting of Legal Advisers identifies in advance of its meetings one or two topics on the agenda of the Commission which could be a subject of detailed discussion in such a forum, and where possible with the presence of the Special Rapporteur for the topic concerned.

---

<sup>7</sup> <http://documents.un.org>.

18. The Planning Group agreed to keep under review the possibility of the Commission convening a part of its session in New York.

#### **4. Working Group on Long-term Programme of Work**

19. At its 1st meeting, on 4 June 2008, the Planning Group decided to reconstitute the Working Group on the Long-term Programme of Work, under the chairmanship of Mr. Enrique Candioti. At the same meeting, the Planning Group decided to refer to the Working Group for its consideration of the report of the Working Group on the most-favoured-nation clause.<sup>8</sup> The Chairperson of the Working Group on the Long-term Programme of Work submitted an oral progress report to the Planning Group on 28 July 2008. The Working Group recommended the inclusion in the long-term programme of work of two topics, namely “Treaties over time” on the basis of a revised and updated proposal by Mr. G. Nolte and “The Most-Favoured-Nation clause” on the basis of the report of the 2007 Working Group chaired by Mr. D.M. McRae on the subject (A/CN.4/L.719). Both topics met the relevant criteria outlined by the Commission most recently in its 2000 report, namely, *inter alia*, they were concrete and feasible and presented theoretical and practical utility in terms of codification and progressive development of international law.<sup>9</sup> The syllabuses on the two topics are annexed to the present report.

20. The Planning Group endorsed the recommendation for the inclusion of the two topics on the long-term programme of work of the Commission. It also proposed the inclusion of the two topics in the current programme of work of the Commission and recommended the establishment, at the sixty-first session of the Commission, of study groups on the two topics.

---

<sup>8</sup> The Planning Group recalled that at the 2944th meeting, on 27 July 2007, the Commission had considered the report of that Working Group and had decided to refer it to the Planning Group.

<sup>9</sup> *Yearbook ... 2000*, vol. II, (Part 2), para. 728. See also *Yearbook ... 1997*, vol. II (Part 2), para. 238.

## **5. Inclusion of new topics on the programme of work of the Commission and establishment of study groups**

21. At its ... meeting, on ... August 2008, the Commission decided to include in its programme of work the topic “Treaties over time” and to establish a Study Group therefor at its sixty-first session.

22. At the same meeting, the Commission decided to include in its programme of work the topic “The Most-Favoured-Nation clause” and to establish a Study Group therefor at its sixty-first session.

## **6. Meeting with Legal Advisers of specialized agencies**

23. The Commission took note that the 2009 meeting of Legal Advisers of international organizations within the United Nations system will take place in Geneva at a time that coincides with the session of the Commission. In accordance with article 26 (1) of its Statute, the Commission recommends that a joint meeting be organized with the Legal Advisers during the sixty-first session of the Commission in order to hold discussions on matters of mutual interest and requested the Secretariat to make appropriate arrangements to this effect.

## **7. Meeting with members of the Appellate Body of the WTO**

24. In accordance with article 26 (1) of its Statute, the Commission on 27 May 2008 held a joint meeting with present and former members of the Appellate Body of the World Trade Organization.<sup>10</sup> During the meeting, members of the Commission and the present and former members of the Appellate Body held a useful exchange of views on matters of mutual interest, in particular discussions were held on alternative approaches to treaty interpretation: Application of articles 31-32 of the Vienna Convention on the Law of Treaties to ordinary treaties and

---

<sup>10</sup> The present and former members were: Luiz Baptista (Brazil, current AB chair), Georges Abi-Saab (outgoing ABM, Egypt), A.V. Ganesan (outgoing ABM, India), Julio Lacarte (former ABM, Uruguay), Florentino Feliciano (former ABM, Philippines), Claus-Dieter Ehlermann (former ABM, Germany), Mitsuo Matsushita (former ABM, Japan), Yasuhei Taniguchi (outgoing ABM, Japan), Giorgio Sacerdoti (ABM, Italy), David Unterhalter (ABM, South Africa), Lilia Bautista (ABM, Philippines), Jennifer Hillman (ABM, United States), Yuejiao Zhang (incoming ABM, China) and Shotaro Oshima (incoming ABM, Japan).

constitutive instruments; procedures and guidelines for application of MFN clauses; and the relationship between international and municipal law: Standard of review applied by international bodies reviewing domestic acts.

## **8. Financial matters**

### **(a) Attendance of Special Rapporteurs in the General Assembly during the consideration of the Commission's report**

25. The Commission notes that, with a view to strengthening its relationship with the General Assembly, it has on previous occasions drawn attention to the possibility of enabling Special Rapporteurs to attend the Sixth Committee's debate on the report of the Commission so as to give them the opportunity to acquire a more comprehensive view of existing positions, to take note of observations made and to begin preparing their reports at an earlier stage.<sup>11</sup> It has also considered that presence of Special Rapporteurs facilitates exchanges of views and consultations between them and representatives of Governments.<sup>12</sup> In accordance with paragraph 5 of General Assembly resolution 44/35, the General Assembly invited the Commission, whenever circumstances so warrant, to request a Special Rapporteur to attend the session of the General Assembly during the discussion of the topic which the Special Rapporteur is responsible and requested the Secretary-General to make the necessary arrangements within the existing resources. The Commission notes that due to financial constraints it has not been possible to make the necessary arrangements for more than one Special Rapporteur to attend meetings of the Sixth Committee. It wishes to emphasize that the post of Special Rapporteur is central to the work of the Commission and wishes to reiterate the usefulness of Special Rapporteurs being afforded the opportunity to interact with representatives of Governments during the consideration of their topics in the Sixth Committee.

### **(b) Honoraria**

26. The Commission also reiterates its views concerning the question of honoraria, resulting from the adoption by the General Assembly of its resolution 56/272 of 27 March 2002, which

---

<sup>11</sup> *Yearbook ... 1988*, vol. II (Part 2), para. 582.

<sup>12</sup> *Yearbook ... 1989*, vol. II (Part 2), para. 742.

were expressed in its previous reports.<sup>13</sup> The Commission emphasized again that the above resolution especially affects the Special Rapporteurs, in particular those from developing countries, as it compromises support for their research work. The Commission urges the General Assembly to reconsider this matter, with a view to restoring, at this stage, the honoraria for Special Rapporteurs.

## **9. Documentation and publications**

### **(a) Processing and issuance of reports of Special Rapporteurs**

27. The Commission reiterates the importance of providing and making available all evidence of State practice and other sources of international law relevant to the performance of the Commission's function of progressive development and codification of international law. The Commission also wishes to stress that it and its Special Rapporteurs are fully conscious of the need for achieving economies whenever possible in the overall volume of documentation and will continue to bear such considerations in mind.<sup>14</sup>

### **(b) Establishment of a trust fund on the backlog relating to the *Yearbook* of the International Law Commission**

28. The Commission notes with appreciation that, pursuant to paragraph 21 of General Assembly resolution 62/66, the Secretary-General had established a trust fund to receive voluntary contributions to address the backlog relating to the *Yearbook* of the International Law Commission.<sup>15</sup> While reiterating the importance of ensuring that the necessary budgetary

---

<sup>13</sup> See *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), paras. 525-531. *Ibid.*, *Fifty-eighth Session, Supplement No. 10* (A/58/10), para. 447; *ibid.*, *Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 369; *ibid.*, *Sixtieth Session, Supplement No. 10* (A/60/10), para. 501; *ibid.*, *Sixty-first Session, Supplement No. 10* (A/61/10), para. 269; and *Sixty-second Session, Supplement No. 10* (A/62/10), para. 379.

<sup>14</sup> For considerations relating to page limits on the reports of Special Rapporteurs, see for example, *Yearbook ... 1977*, vol. II, Part Two, p. 132 and *Yearbook ... 1982*, vol. II, Part Two, pp. 123-4. See also resolution 32/151, para. 10 and resolution 37/111, para. 5, as well as subsequent resolutions on the annual reports of the Commission to the General Assembly.

<sup>15</sup> As at 31 July 2008, the backlog for the period 1994-2001 was as follows: vol. II (Part One) in Arabic has not been issued since 1996. No volume has been issued in Chinese since 1994. Except for 1997, vol. II (Part One) in English has not been issued since 1996. Vol. II (Part One) in French has not been issued since 1998. Vol. II (Part One) has not been issued in Russian

resources are allocated for addressing the backlog under the relevant programme in the regular budget, the Commission appeals, in accordance with the terms of the trust fund, to Member States, non-governmental organizations, private entities and individuals to contribute to the trust fund. It reiterated that the *Yearbooks* were critical to the understanding of the Commission's work in the progressive development and codification of international law, as well as in the strengthening of the rule of law in international relations.

**(c) Other publications and the assistance of the Codification Division**

29. The Commission expressed its appreciation for the valuable assistance of the Codification Division of the Secretariat in its substantive servicing of the Commission and in preparation of research projects, by providing legal materials and their analysis. In particular, the Commission expressed its appreciation to the Secretariat for its preparation of two excellent memoranda on the topic "Protection of persons in the event of disasters" (A/CN.4/590 and Add.1-3) and on the topic "Immunity of State officials from foreign criminal jurisdiction" (A/CN.4/596).

30. The Commission also expressed its appreciation for the results of activity of the Secretariat in its continuous updating and management of its website on the International Law Commission.<sup>16</sup> It acknowledged in particular the establishment of a new website on the *United Nations Juridical Yearbook*, including a full-text research option on all published volumes of the collection (currently in English). The Commission reiterated that the websites constitute an invaluable resource for the Commission in undertaking its work and for researchers of work of the Commission in the wider community, thereby contributing to the overall strengthening of the teaching, study, dissemination and wider appreciation of international law. The Commission would welcome the further development of the website on the work of the Commission with the inclusion of information on the current status of the topics on the agenda of the Commission.

---

since 1998, except 2001. Vol. II (Part One) has not been issued in Spanish since 1996; vol. II (Part Two) in Spanish for 2001 has also not been issued. From 2002 to the present, no volume has been issued in all the six official languages.

<sup>16</sup> Located at <http://www.un.org/law/ilc/>.

### **B. Date and place of the sixty-first session of the Commission**

31. The Commission decided that the sixty-first session of the Commission be held in Geneva from 4 May to 5 June and 6 July to 7 August 2009.

### **C. Cooperation with other bodies**

32. The Commission was represented at the Forty-seventh session of the Asian-African Legal Consultative Organization, held in New Delhi from 30 June to 4 July 2008 by Mr. A. Rohan Perera.

33. At its 2982nd meeting, on 22 July 2008, Judge Rosalyn Higgins, President of the International Court of Justice, addressed the Commission and informed it of the Court's recent activities and of the cases currently before it.<sup>17</sup> An exchange of views followed.

34. The Inter-American Juridical Committee was represented at the present session of the Commission by, Mr. Antonio Fidel Perez, addressed the Commission, who addressed the Commission at its 2978th meeting, on 15 July 2008.<sup>18</sup> An exchange of views followed.

35. The European Committee on Legal Cooperation and the Committee of Legal Advisers on Public International Law were represented at the present session of the Commission by the Chairman of the Committee, Mr. Michael Wood and the Director of Legal Advice and Public International Law, Mr. Manuel Lezertua, who addressed the Commission at its 2985th meeting, on 25 July 2008.<sup>19</sup> An exchange of views followed.

36. The Asian-African Legal Consultative Organization was represented by Mr. Narinder Singh, President of AALCO at its Forty-seventh session, who addressed the Commission at its 2988th meeting, on 31 August 2008.<sup>20</sup>

---

<sup>17</sup> This statement is recorded in the summary record of that meeting and is also placed on the website on the work of the Commission.

<sup>18</sup> This statement is recorded in the summary record of that meeting.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

37. The International Tribunal for the Law of the Sea was represented at the present session of the Commission by the President of the Court, Judge Rüdiger Wolfrum, who addressed the Commission at its 2988th meeting, on 31 August 2008.<sup>21</sup> An exchange of views followed.

38. On 24 July 2008 an informal exchange of views was held between members of the Commission and the International Committee of the Red Cross on topics of mutual interest.

39. In order to optimize on a better appreciation of each other's activities, the Commission would explore possibilities of enhancing the cooperation of the Commission with other bodies by making the meetings more focused and issues oriented, paying particular attention to aspects that may have particular relevance to the work of the Commission or the body concerned.

#### **D. Representation at the sixty-third session of the General Assembly**

40. The Commission decided that it should be represented at the sixty-third session of the General Assembly by its Chairman, Mr. Edmundo Vargas Carreño.

#### **E. International Law Seminar**

41. Pursuant to General Assembly resolution 62/66 of 6 December 2007, the forty-fourth session of the International Law Seminar was held at the Palais des Nations from 7 to 25 July 2008, during the present session of the Commission. The Seminar is intended for advanced students specializing in international law and for young professors or government officials pursuing an academic or diplomatic career or in posts in the civil service in their country.

42. Twenty-seven participants of different nationalities, from all the regions of the world, were able to take part in the session.<sup>22</sup> The participants in the Seminar observed plenary meetings of

---

<sup>21</sup> *Ibid.*

<sup>22</sup> The following persons participated in the forty-fourth session of the International Law Seminar: Ms. Adineh Abghari (Iran), Ms. Dace Apine (Latvia), Ms. Stacie-Anne Marie Brown (Jamaica), Ms. Lalii Chin (Palau), Ms. Iryna Chyzheuskaya (Belarus), Mr. Juan Andrés Fuentes Véliz (Peru), Mr. Charlie Garnjana-Goonchorn (Thailand), Ms. Ruwanthika Gunaratne (Sri Lanka), Ms. Izevbuwa Ikhimiukor (Nigeria), Ms. Ivana Jelić (Montenegro), Mr. Klaus Keller (Germany), Mr. Blaise Koïvogui (Guinea), Mr. Paavo Kotiaho (Finland), Mr. Toufik Koudri (Algeria), Ms. Siami Leabo (Ivory Coast), Ms. Helyati Mahmud Saedon



the Commission, attended specially arranged lectures, and participated in working groups on specific topics.

43. The Seminar was opened by Mr. Edmundo Vargas Careño, Chairman of the Commission. Mr. Ulrich von Blumenthal, Senior Legal Adviser of the United Nations Office at Geneva (UNOG), was responsible for the administration, organization and conduct of the Seminar, assisted by Mr. Vittorio Mainetti, Legal Consultant at UNOG.

44. The following lectures were given by members of the Commission: Mr. Giorgio Gaja: “*Responsibility of International Organizations*”; Mr. Chusei Yamada: “*Codification of the Law of Shared Natural Resources*”; Mr. Enrique Candioti: “*Future Topics for the International Law Commission*”; Mr. John Dugard: “*The Outcomes of the Commission’s Work*”; Mr. Zdzislaw Galicki: “*The Obligation to Extradite or Prosecute (Aut dedere aut judicare)*”; Mr. Lucius Caflisch: “*The Legal Regime of Wrecks*”; Ms. Marie Jacobsson: “*The Protection of Historic Wrecks*”; Mr. A. Rohan Perera: “*Towards a Comprehensive Convention on Terrorism*”; Mr. Donald McRae: “*The MFN Clause*”; Mr. Georg Nolte: “*Cultural Diversity in International Law*”; Judge Bruno Simma of the International Court of Justice and former member of the Commission, addressed the participants of the Seminar on: “*ILC and ICJ: A Symbiotic Relationship*”.

45. Lectures were also given by Mr. Vittorio Mainetti, Assistant to the Director of the International Law Seminar: “*Introduction to the Work of the International Law Commission*”; Mr. Daniel Müller, Assistant to the Special Rapporteur Mr. Alain Pellet: “*Reservations to Treaties*”; and Ms. Jelena Pejic, Legal Adviser of International Committee of the Red Cross: “*Current Challenges to International Humanitarian Law*”.

---

(Brunei Darussalam), Ms. Rudo Makunike (Zimbabwe), Mr. Cláudio Mate (Mozambique), Mr. Thang Nguyen Dang (Viet Nam), Ms. Jeanette Sautner (Canada), Ms. Sabrina Urbinati (Italy), Mr. Gustavo Velasquez (Equator), Mr. Leandro Vieira Silva (Brazil), Mr. Andres Villegas Jaramillo (Colombia), Ms. Marise Warner (Trinidad and Tobago), Ms. Tahmina Yolchiyeva (Azerbaijan), Mr. Ahmed Zaki (Egypt), Mr. Gentian Zyberi (Albania). The Selection Committee, chaired by Ms. Vera Gowlland-Debbas (Professor at the Graduate Institute of International and Development Studies - Geneva), met on 29 April 2008 and selected 28 candidates out of 107 applications for participation in the Seminar. At the last minute, the twenty-eighth candidate selected failed to attend.

46. Seminar participants were invited to visit the World Trade Organization (WTO) and attended briefing sessions by Ms. Gabrielle Marceau, Counsellor of the Director General, and Mr. Werner Zdouc, Director of the WTO Appellate Body Secretariat. The discussion focused on the current legal issues at the WTO and on the WTO Disputes Settlement System.

47. A special session dedicated to the “Peaceful Settlement of International Disputes” was organized in the premises of the Graduate Institute of International and Development Studies of Geneva (HEID). Seminar participants attended lectures given by Mr. Marcelo Kohen: “*The Notion of Peaceful Settlement of International Disputes*”; Ms. Vera Gowlland-Debbas: “*The International Court of Justice As Principal Judicial Body of the United Nations*”; and Mr. Georges Abi-Saab (Member and former Chairman of the WTO Appellate Body): “*The Transformation of the Judicial Function*”.

48. Two Seminar working groups on “*The Obligation to Extradite or Prosecute*”, and “*Reservations to Treaties*” were organized. Each Seminar participant was assigned to one of them. Mr. Zdzislaw Galicki, a member of the Commission; and Mr. Daniel Müller provided guidance to the working groups. Each group wrote a report and presented their findings to the Seminar in a special session organized for this purpose. A collection of the reports was compiled and distributed to all participants.

49. The Republic and Canton of Geneva offered its traditional hospitality to the participants with a guided visit of the Alabama Room at the City Hall followed by a reception.

50. Mr. Chairman of the Commission, Mr. Ulrich von Blumenthal, Director of the Seminar, and Ms. Adineh Abghari (Iran), on behalf of the participants, addressed the Commission and the participants at the close of the Seminar. Each participant was presented with a certificate attesting to his or her participation in the forty-fourth session of the Seminar.

51. The Commission noted with particular appreciation that during the last three years the Governments of Austria, China, Cyprus, Finland, Germany, Hungary, Ireland, Mexico, Sweden, Switzerland, and the United Kingdom of Great Britain and Northern Ireland had made voluntary contributions to the United Nations Trust Fund for the International Law Seminar. The financial situation of the Fund allowed awarding a sufficient number of fellowships to deserving

candidates from developing countries in order to achieve adequate geographical distribution of participants. This year, full fellowships (travel and subsistence allowance) were awarded to 16 candidates and partial fellowships (subsistence only) were awarded to 4 candidates.

52. Since 1965, 1,006 participants, representing 162 nationalities, have taken part in the Seminar. Of them, 618 have received a fellowship.

53. The Commission stresses the importance it attaches to the Seminar, which enables young lawyers, especially from developing countries, to familiarize themselves with the work of the Commission and the activities of the many international organizations, which have their headquarters in Geneva. The Commission recommends that the General Assembly should again appeal to States to make voluntary contributions in order to secure the holding of the Seminar in 2009 with as broad participation as possible.

54. The Commission noted with satisfaction that in 2008 comprehensive interpretation services were made available to the Seminar. It expresses the hope that the same services would be provided at the next session, within existing resources.

## **Annex A**

### **Treaties over time**

#### **in particular:**

### **Subsequent Agreement and Practice**

**(Mr. Georg Nolte)**

#### **A. Introduction**

1. Treaties are not just dry parchments. They are instruments for providing stability to their parties and to fulfil the purposes which they embody. They can therefore change over time, must adapt to new situations, evolve according to the social needs of the international community and can, sometimes, fall into obsolescence.
2. The general question of “treaties in time” reflects the tension between the requirements of stability and change in the law of treaties. On the one hand, it is generally the purpose of a treaty and of the law of treaties to provide stability in the face of evolving circumstances. On the other hand, legal systems must also leave room for the consideration of subsequent developments in order to ensure meaningful respect for the agreement of the parties and the identification of its limits.
3. It is important in any legal system to determine how subsequent acts, events and developments affect existing law. In national law, the most important subsequent developments after the enactment of a law, or the conclusion of a contract, are amendments by the legislature or by the parties to the contract, and evolutive interpretations by courts. In international law, the situation is more complicated. Different sources, in particular treaty and customary law, are subject to different rules and mechanisms; moreover, they interact with each other.
4. In the case of customary law, a given rule is the result of a process combining certain acts, accompanying expressions of legal evaluation and reactions thereto (State practice and *opinio iuris*). This process is, in principle, continuing in time and makes the given rule an object of constant reaffirmation or pressure to change. Thus, in the case of customary law, subsequent acts, events and developments are, in principle, part of and not different from the process of formation of customary law itself.

5. In treaty law, on the other hand, the treaty and the process of its conclusion must be clearly distinguished from subsequent acts, events and developments which may affect the existence, content or meaning of the said treaty. A treaty is a formalized agreement between States and/or other subjects of international law which is designed to preserve the agreement in a legally binding form over time. Therefore, subsequent acts, events or developments can affect the existence, content or meaning of a treaty only under certain conditions. It is in the interest of the security of treaty relations that such conditions should be well-defined. The judgment of the International Court of Justice in the *Gabcikovo-Nagymaros* case<sup>1</sup> provides a good example of how the law of treaties operates in relation to subsequent acts, events and developments which may affect the existence, content or meaning of a treaty.

6. It is suggested that the Commission revisit the law of treaties as far as the evolution of treaties over time is concerned. Problems arise frequently in this context. As certain important multilateral treaties reach a certain age, they are even more likely to arise in the future.

7. One aspect of the topic “treaties over time” should be the role which subsequent agreement and subsequent practice of States parties play in treaty interpretation, in particular in relation to a more or less dynamic treaty interpretation on the basis of the purpose of a treaty rule (see more specifically below sub B.-E.). The evolution of the legal context or the emergence in international society of new needs can be taken into account if the pertinent treaty is considered as a “living instrument”.

8. Another dimension of the topic “treaties over time” would be the effect which certain acts, events or developments have on the continued existence, in full or in part, of a treaty. The most obvious questions in this context concern the termination or withdrawal (arts. 54, 59 and 60 VCLT), denunciation (art. 56 VCLT) and suspension (arts. 57, 58 and 60 VCLT) of treaties, and the related question of their inter-temporal effects. The Vienna Convention considers a number of causes for termination or suspension of the effects of a treaty: some clearly relate to the passage of time, such as the question of termination of treaties which contains no provision regarding their termination and which do not provide for denunciation or withdrawal (art. 56) or

---

<sup>1</sup> ICJ, *Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment of 25 September 1997, *ICJ Reports*, 1997, 7.

the supervening change of circumstances (art. 62). The formation of a customary rule derogating from the treaty, which may imply the desuetude of a treaty in whole or in part, is not addressed in the Vienna Convention as a ground for the termination of the treaty, although it is arguably one of such causes.

9. Still another dimension of the topic would be the effect which supervening treaties or customary law have on a particular treaty. This concerns the modification of a treaty by way of the conclusion of one or more later treaties (art. 41 VCLT), but also the modification of a treaty by way of a supervening rule of customary international law. A specific issue in this context would be the emergence of a new peremptory norm of general international law (art. 64 VCLT) and its inter-temporal effects.

10. A fourth aspect of the effects of time on a treaty is the possible obsolescence of some of its provisions. This is particularly significant with regard to law-making treaties. The need to revise certain treaties has been met with clauses providing for review mechanisms, but in the case of most treaties the issue of their possible future obsolescence has not been considered.

**B. In particular: the topic of subsequent agreement and subsequent practice with respect to treaties**

11. International law has a specific feature which is designed to ensure that evolving circumstances are taken into account in a way which is compatible with the agreement of the parties. This feature is referred to in articles 31 (3) (a) and (b) VCLT. It consists of the recognition of the role that subsequent agreement and subsequent practice play in the interpretation of a treaty. Both means of interpretation are of considerable practical importance. International tribunals and other dispute settlement organs have referred to and applied articles 31 (3) (a) and (b) VCLT in a large number of cases. This is true for the International Court of Justice (ICJ)<sup>2</sup> as well as its predecessor, the Permanent Court of International Justice

---

<sup>2</sup> See only *Temple of Preah Vihear*, pp. 33-34; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, *I.C.J. Reports*, 1962, p. 160; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, *I.C.J. Reports*, 1971, p. 22, para. 22; the Court makes further references to its case law in the *Case Concerning Kasikili/Sedudu Island (Botswana v. Namibia)*, Judgment of 13 December 1999, *I.C.J. Reports*, 1999, p. 1045, para. 50.

(PCIJ).<sup>3</sup> Subsequent practice has also played an important role in arbitral awards,<sup>4</sup> the jurisprudence of the Iran-United States Claims Tribunal,<sup>5</sup> the International Tribunal for the Law of the Sea,<sup>6</sup> the European Court of Human Rights,<sup>7</sup> the International Tribunal for the Former

---

<sup>3</sup> See only *Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture*, Advisory Opinion of 12 August 1922, Series B No. 2, pp. 38-40; *Interpretation of Article 3, Paragraph 2 of the Treaty of Lausanne*, Advisory Opinion of 21 November 1925, Series B No. 12, p. 24; *Jurisdiction of the European Commission of the Danube*, Advisory Opinion of 26 December 1926, Series B No. 14, p. 27, pp. 62-63; *Jurisdiction of the Courts of Danzig*, Advisory Opinion of 24 September 1927, Series B, No. 15, p. 18.

<sup>4</sup> See only *The Chamizal Case (Mexico v. United States)*, Award of 15 June 1911, UNRIAA, vol. XI, pp. 323-235; *Affaire de l'indemnité russe (Russia v. Turkey)*, Award of 11 November 1912, UNRIAA, vol. XI, p. 433; *Interpretation of the air transport services agreement between the United States of America and France (USA v. France)*, Award of 22 December 1963, UNRIAA, vol. XVI, pp. 5-74; *Interpretation of the air transport services agreement between the United States of America and Italy (USA v. Italy)*, Award of 17 July 1965, UNRIAA, vol. XVI, pp. 75-108, 100; *Beagle Channel Arbitration (Argentina v. Chile)*, Award of 18 February 1977, UNRIAA, vol. XXI, p. 53; *Delimitation of the Continental Shelf (UK v. France)*, Award of 30 June 1977, UNRIAA vol. XVIII, p. 3; *Taba Arbitration (Egypt v. Israel)*, Award of 29 September 1988, UNRIAA XX, pp. 56-7, paras. 209-211; *Affaire de la Délimitation de la frontière maritime (Guinée/Guinée-Bissau)*, 14 February 1985, UNRIAA vol. XIX, p. 175, para. 66; *Southern Bluefin Tuna Case (Australia and New Zealand/Japan)* Award of 4 August 2000 (Jurisdiction and admissibility) UNRIAA, vol. XXII, pp. 1-57, 45-6; *Affaire relative au régime fiscal des pensions versées aux fonctionnaires retraités de l'UNESCO résidant en France* (2003), RGDIP 107 (2003), 221 et seq., para. 70.

<sup>5</sup> *The United States of America, et al. v. The Islamic Republic of Iran, et al.*, Award of 25 January 1984, *Iran-US C.T.R.*, vol. 5, p. 71; *Houston Contracting Company v. National Iranian Oil Company, et al.*, Award of 22 July 1988, *Iran-US C.T.R.*, vol. 20, pp. 56-57.

<sup>6</sup> *M/V 'Saiga' Case (No. 2) (Saint Vincent and the Grenadines v. Guinea)* Judgment, ITLOS Reports, 1 July 1999.

<sup>7</sup> *Case of Soering v. United Kingdom*, Judgment (Merits and Just Satisfaction), 7 July 1989, Application No. 14038/88; *Loizidou v. Turkey*, Judgment (Merits and Just Satisfaction), 18 December 1996, Application No. 15318/89, ECHR, 1996-VI, p. 2236; *Banković and Others v. Belgium and 16 Other Contracting States* (dec.) [GC], Application No. 52207/99, ECHR 2001-XII; *Öcalan v. Turkey*, Judgment, 12 May 2005, Application No. 46221/99, ECHR 2005-IV.

Yugoslavia<sup>8</sup> and in reports of the WTO Panels and of its Appellate Body.<sup>9</sup> In addition, domestic courts repeatedly refer to subsequent practice as a means of determining the impact of a given treaty on the domestic legal order.<sup>10</sup>

12. The Commission addressed this topic between 1957 and 1966 as part of its work on the Law of Treaties.<sup>11</sup> Later, the Commission considered the topic briefly in connection with the

---

<sup>8</sup> *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-A, A. Ch, Judgment of 15 July 1999.

<sup>9</sup> See only Appellate Body Report, *Japan-Taxes on Alcoholic Beverages* (1 November 1996) WT/DS8/R, WT/DS10/R, WT/DS11/R; Appellate Body Report, *European Communities-Customs Classification of Certain Computer Equipment* (22 June 1998) WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, DSR 1998:V, 1851; Panel Report, *United States-Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")* (9 May 2006) WT/DS294/R, paras. 7.214-7.218; Panel Report, *Chile-Price Band System and Safeguard Measures Relating to Certain Agricultural Products* (23 October 2002) WT/DS207/R, paras. 7.78-7.101; *European Communities - Customs Classification of Frozen Boneless Chicken Cuts* (12 September 2005) WT/DS269/AB/R, paras. 253-60, 271-3; Appellate Body Report, *United States Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, pp. 64-66, paras. 190-95.

<sup>10</sup> See e.g. *Medellin v. Texas*, Judgment of 25 March 2008, 552 U.S. (2008) (Slip opinion at pp. 20-21); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243 (1984); *R. v. Sec. of State, on Application of Channel Tunnel Group*, 23 July 2001, ILR vol. 125 (2004), 125, pp. 580, 597, para. 48; *Morris v. KLM Royal Dutch Airlines* [2002] UKHL7, 2 AC 628, ILDC 242 (UK 2002); *Attorney-General v. Zaoui*, [2005] NZSC 38, ILDC 81 (NZ 2005); *A. v. B., Swiss Federal Supreme Court*, 1st Civil Law Chamber, 8 April 2004, BGE 130 III 430, ILDC 343 (SW 2004); *Bouzari v. Iran (Islamic Republic of)* (2004), 243 D.L.R. (4th) 406, ILDC 175 (CA 2004).

<sup>11</sup> *Sir Gerald Fitzmaurice*, Second Report on the Law of Treaties, A/CN.4/107, YBILC 1957, vol. II, pp. 22, 25, 39, 44, 68; *Sir Humphrey Waldock*, First Report on the Law of Treaties, A/CN.4/144 and Add.1, YBILC 1962, vol. II, p. 69; Second Report, A/CN.4/156 and Add.1-3, YBILC 1963, vol. II, pp. 60, 64, 66, 69-71, 80; Third Report, UN doc. A/CN.4/167 and Add.1-3, YBILC 1964, vol. II, pp. 39, 40, 52, 53, 55, 59, 60, 62; Fourth Report, A/CN.4/177 and Add.1 and 2, p. 49; Fifth Report, A/CN.4/183 and Add.1-4, p. 28; Sixth Report, A/CN.4/186 and Add.1, 2/Rev.1, 3-7, YBILC 1966, vol. II, draft article 68 at pp. 87-91, draft article 69 at pp. 91-99, 101; *15th Session of the Commission, Plenary Discussions*, A/CN.4/SER.A/1963, YBILC 1963, vol. I, 687th meeting, p. 89; 689th meeting, p. 100; 690th meeting, p. 109; 691st meeting, pp. 116, 121; 694th meeting, pp. 136, 139; 706th meeting, p. 224; 707th meeting, p. 226; 712th meeting, p. 269; 720th meeting, p. 316; *16th Session of the Commission, Plenary Discussions*, A/CN.4/SER.A/1964, YBILC 1964, vol. I, 729th meeting, pp. 39, 40; 752nd meeting, p. 190; 753rd meeting, pp. 192, 193; 758th meeting, p. 230; 765th meeting, p. 276, pp. 278, 279; 766th meeting, p. 282, pp. 284-286, 288; 767th meeting, pp. 296-298; 769th meeting, pp. 308-311,



draft articles on treaties concluded between States and international organizations or between two or more international organizations.<sup>12</sup> Finally, the Study Group on the “Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law”, briefly touched on the topic of subsequent agreement and subsequent practice with respect to treaties.<sup>13</sup>

**C. Should the International Law Commission examine the topic of subsequent agreement and subsequent practice with respect to treaties?**

13. Despite their great practical importance the means of interpretation contained in articles 31 (3) (a) and (b) VCLT have hardly been analysed by international tribunals beyond what the cases at hand required. In addition, these means of interpretation have rarely been the subject of extensive empirical, comparative or theoretical research. In fact, relevant subsequent agreement and subsequent practice of States is not always well-documented and often only comes to light in legal proceedings.

---

313; 770th meeting, pp. 316, 318; 773rd meeting, p. 332; 774th meeting, p. 340; *17th Session of the Commission, Plenary Discussions*, A/CN.4/SER.A/1965, YBILC 1965, vol. I, 790th meeting, p. 105; 799th meeting, p. 165; 802nd meeting, p. 191; A/CN.4/SER.A/1966, YBILC 1966, vol. I, Part I, 830th meeting, pp. 55, 57; *18th Session of the Commission, Plenary Discussions*, A/CN.4/SER.A/1966, YBILC 1966, vol. I, Part II, 857th meeting, p. 96; 859th meeting, pp. 113, 114; 866th meeting, p. 166; 870th meeting, p. 126; 871st meeting, p. 197; 883rd meeting: draft article 68 was adopted as article 38, pp. 266, 267; 893rd meeting, draft article 69 was adopted as article 27, pp. 328f.

<sup>12</sup> Paul Reuter, *Third report on treaties concluded between States and International Organizations or between two or more International Organizations*, A/CN.4/279 and Corr.1, YBILC 1974, vol. II, Part I, p. 148; Fourth report, A/CN.4/285 and Corr.1, YBILC 1975, vol. II, p. 44; *29th Session of the Commission*, A/CN.4/SER.A/1977, YBILC 1977, vol. I, 1438th meeting, pp. 123f.; 1458th meeting, pp. 234, 235; *31st Session of the Commission*, A/CN.4/SER.A/1979, YBILC 1979, vol. I, 1548th meeting, p. 77; *33rd Session of the Commission*, A/CN.4/SER.A/1981, YBILC 1981, vol. I, 1675th meeting, p. 169; *34th Session of the Commission*, A/CN.4/SER.A/1982, YBILC 1982, vol. I, 1702nd meeting, p. 22, 1740th meeting, adopted article 31, pp. 251, 252, 260.

<sup>13</sup> Report, UN doc. A/CN.4/L.663/Rev.1 of 28 July 2004, p. 19: “relations between article 30 (subsequent agreements), 41 (inter se modification) and Article 103 of the United Nations Charter (priority of the Charter obligations)”; report finalized by Martti Koskenniemi, UN doc. A/CN.4/L.682 of 13 April 2006, pp. 13, 60, 214, 233, 241, 251, 252.

14. As important treaties reach a certain age, in particular law-making treaties of the post-1945 era, the context in which they operate becomes different from the one in which they were conceived. As a result, it becomes more likely that some of these treaties' provisions will be subject to efforts of reinterpretation, and possibly even of informal modification. This may concern technical rules as well as more general substantive rules. As their context evolves, treaties face the danger of either being "frozen" into a state in which they are less capable of fulfilling their object and purpose, or of losing their foundation in the agreement of the parties. The parties to a treaty normally wish to preserve their agreement, albeit in a manner which conforms to present-day exigencies. Subsequent agreement and subsequent practice aim at finding a flexible approach to treaty application and interpretation, one that is at the same time rational and predictable.<sup>14</sup>

15. The interest in clarifying the legal significance and effect of subsequent agreement and subsequent practice is enhanced by the increasing tendency of international courts to interpret treaties in a purpose-oriented and objective manner. Before the adoption of the VCLT it was an open question whether a more objective or more subjective method of treaty interpretation should prevail.<sup>15</sup> While the VCLT already puts a stronger emphasis on objective factors, the trend towards objective treaty interpretation is continuing. The arbitral tribunal in the 2005 *Iron Rhine* case has, for example, maintained that an evolutive interpretation would ensure an application of the treaty that would be effective in terms of its object and purpose. The tribunal emphasized that this would "be preferred to a strict application of the intertemporal rule".<sup>16</sup> At a

---

<sup>14</sup> On the relation of change and the *clausula rebus sic stantibus* see *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgement of 25 September 1997, *I.C.J. Reports*, 1997, 7, para. 104.

<sup>15</sup> On the historical development see Rudolf, Bernhardt, "Interpretation in International Law", in (ed.), *Encyclopedia of Public International Law*, vol. II (1995), pp. 1416-1426, 1419 et seq.

<sup>16</sup> *In the Arbitration Regarding the Iron Rhine ("Ijzeren Rijn") Railway (Belgium v. The Netherlands)*, Permanent Court of Arbitration, Award of the Arbitral Tribunal, 24 May 2005, para. 80.

time when international law is faced with a “proliferation of international courts and tribunals”,<sup>17</sup> an evolutive interpretation of treaties is, on the one hand, a method to ensure a treaty’s effectiveness. On the other hand, an evolutive interpretation can lead to a reinterpretation of the treaty beyond the actual consent of the parties. This makes reference to subsequent practice less predictable and more important at the same time: if the invocation of subsequent practice is not limited to elucidating the actual and continuing agreement of parties<sup>18</sup> treaty interpretation can become less predictable but subsequent practice can become more important when it is used as evidence of a dynamic understanding of treaty instruments (e.g. when the European Court of Human Rights speaks about the Convention as a “living instrument, which must be interpreted in the light of present day conditions”<sup>19</sup>).

16. Subsequent agreement and subsequent practice also affect the so-called fragmentation and diversification of international law. The Report of the ILC Study Group,<sup>20</sup> however, merely took note of the issue of subsequent practice.<sup>21</sup> This may be the reason why it was suggested in the Sixth Committee in 2006 that the Commission consider the subject of adaptation of international

---

<sup>17</sup> See Jonathan I. Charney, “The Impact on the International Legal System of the Growth of International Courts and Tribunals”, *New York University Journal of International Law and Politics*, vol. 31 (1999), pp. 697 et seq.; Benedict Kingsbury, “Is the Proliferation of International Courts and Tribunals a Systemic Problem?”, *New York University Journal of International Law and Politics*, vol. 31 (1999), pp. 679 et seq.

<sup>18</sup> *Interpretation of Article 3, Paragraph 2 of the Treaty of Lausanne*, Advisory Opinion of 21 November 1925, Series B, No. 12, p. 24.

<sup>19</sup> *Tyrer v. the United Kingdom*, Judgment, 25 April 1978, Application No. 26, para. 31; *Marckx v. Belgium*, Judgment, 13 June 1979, Application No. 31, para. 41; *Airey v. Ireland*, Judgment, 9 October 1979, Application No. 32, para. 26; ECHR, *Loizidou v. Turkey*, Preliminary Objections, 23 March 1995, Application No. 310, para. 71.

<sup>20</sup> Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi, A/CN.4/L.682, 13 April 2006.

<sup>21</sup> See *ibid.*, p. 13, para. 12; p. 60, para. 109; p. 116, footnote 288; p. 179, para. 354; p. 208, para. 412; p. 233, para. 464; p. 241, para. 476.

treaties to changing circumstances, with a special emphasis on the field of subsequent agreements and subsequent practice.<sup>22</sup>

17. A final reason why subsequent agreement and subsequent practice as a means of interpretation of treaties should be studied results from their implications on the domestic level. In the United Kingdom, Lord Nicholls has noted in a recent decision of the House of Lords that subsequent practice would not be the right way to modify a treaty, an end which should only be achieved through an amendment procedure.<sup>23</sup> In the United States, the Supreme Court has recently interpreted a treaty by relying on the “postratification understanding” of the parties”.<sup>24</sup> The question of the significance of subsequent practice as a means of treaty interpretation is regarded in the United States as being part of the larger question which effects different sources of international law have in domestic law, and which source of international law favours a larger role of the United States Senate.<sup>25</sup> While the United States Supreme Court has been reluctant to consider recently developed customary law when interpreting international agreements,<sup>26</sup> it has more openly referred to subsequent practice in some cases.<sup>27</sup> This aspect of the question is

---

<sup>22</sup> Topical Summary of the discussion held in the Sixth Committee, UN doc. A/CN.4/577/Add.1, 27 January 2007, para. 31.

<sup>23</sup> *King v. Bristow Helicopters Ltd*, UK House of Lords, [2002] UKHL 7, [2002] 2 AC 628, ILDC 242 (UK 2002), para. 98.

<sup>24</sup> *Medellin v. Texas*, Judgement of 25 March 2008, 552 United States (2008) (Slip opinion at pp. 20-21) with further references.

<sup>25</sup> For an overview see John Norton Moore, “Treaty Interpretation, the Constitution, and the Rule of Law”, *Virginia Journal of International Law*, vol. 42 (2001), pp. 163-263; Phillip R. Trimble & Alexander W. Koff, All Fall Down: The Treaty Power in the Clinton Administration, *Berkeley Law Review*, vol. 16 (1998), p. 55 et seq.

<sup>26</sup> In *United States v. Alvarez-Machain*, 504 U.S. 655 (1992), note 15, Justice Rehnquist wrote: “(t)he practice of nations under customary international law” is “of little aid in construing the terms of an extradition treaty or the authority of a court to later try an individual who has been so abducted”.

<sup>27</sup> See, in addition to *Medellin v. Texas* (*supra* note 24), e.g., *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243 (1984).

important for other countries as well.<sup>28</sup> In Germany, for example, the Federal Constitutional Court has recently reviewed the question of whether certain informal agreements and certain practical steps taken by NATO member States are evidence of a legitimate reinterpretation of the NATO treaty, or whether such agreements and practical steps should be seen as modifications of the NATO Treaty which would require renewed parliamentary approval. While the German Court has held that all steps taken so far have remained within the confines of legitimate treaty interpretation by way of subsequent agreement and subsequent practice,<sup>29</sup> such cases reflect a widespread concern on the side of political actors that domestic control mechanisms concerning the conclusion and application of treaties may be bypassed. A former judge of the European Court of Human Rights has described treaties as being “set on wheels” by the processes of subsequent agreement and subsequent practice.<sup>30</sup>

18. Subsequent agreement and subsequent practice are not only pertinent for ordinary inter-State treaties, but also for those treaties that are constituent instruments of an international organization (art. 5 VCLT). By virtue of operating in and engaging with international organizations, member States display forms of subsequent agreement and subsequent practice that are relevant to the evolving interpretation of the constituent treaties of such organizations. However, the Commission has in the past sometimes kept projects on international organizations apart (in particular the projects on the law of treaties and on international responsibility). The question of the relevance of organizational practice, and the reactions of member States to this organizational practice, will indeed not always be judged according to the same standards as

---

<sup>28</sup> See Anthony Aust, “Domestic Consequences of Non-Treaty (Non-Conventional) Law-Making”, in Rüdiger Wolfrum/Volker Röben (eds.), *Developments of International Law in Treaty Making*, Berlin, 2005, pp. 487-496; and Francisco Orrego Vicuña, “In Memory of Triepel and Anzilotti: The Use and Abuse of Non-Conventional Lawmaking”, *ibid.*, pp. 497-506; for a view on United States jurisprudence see David J. Bederman, “Revivalist Canons and Treaty Interpretation”, *UCLA Law Review*, vol. 41 (1994), p. 953 et seq., pp. 972 et seq.

<sup>29</sup> *Parliamentary Group of the Partei des Demokratischen Sozialismus v. Bundesregierung*, 22 November 2001, BVerfGE 104, 151; *Parliamentary Group of the Partei des Demokratischen Sozialismus/Linkspartei v. Bundesregierung*, 3 July 2007, case No. 2 BvE 2/07.

<sup>30</sup> Georg Ress, “Verfassungsrechtliche Auswirkungen der Fortentwicklung völkerrechtlicher Verträge”, in Walther Fürst *et al.* (eds.), *Festschrift für Wolfgang Zeidler*, vol. 2, Berlin 1987, pp. 1775 et seq., 1779.

those which are applicable to ordinary inter-State treaties.<sup>31</sup> However, since these two areas are so closely interrelated it would be artificial to distinguish between them. One caveat may, however, be in order: while some the best-known examples of relevant organizational practice concern the United Nations,<sup>32</sup> it could be considered to exclude the practice of the main bodies of the United Nations from the inquiry, should there be concerns about possible limitations to the development of the United Nations system as a whole. Other United Nations organs, organizations and treaty bodies, however, do not raise similar concerns and should be reviewed. In addition, generally recognized rules and principles that were developed with the practice of the United Nations organs in mind should be reviewed as to their applicability to other treaties and actors.

#### **D. The goal and the possible scope of consideration of the proposed topic**

19. The goal of considering the topic of subsequent agreement and subsequent practice with respect to treaties would be twofold.

20. The first goal would be to establish a sufficiently representative repertory of practice. Such a repertory would serve an important practical purpose. So far, the actual practice of subsequent agreement and subsequent practice with respect to treaties has never been collected in more than a random fashion. Although the importance of these means of treaty interpretation is generally acknowledged, their actual significance has not been identified in a systematic fashion, but only in judicial proceedings or when the case arose. Collecting examples of relevant subsequent

---

<sup>31</sup> C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, Cambridge, 2nd ed. 2005, at pp. 49 seq., 290 seq. and 460 seq.

<sup>32</sup> *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion of 3 March 1950, *I.C.J. Reports*, 1950, pp. 8 seq.; *Certain Expenses of the United Nations*, Advisory Opinion of 20 July 1962, *I.C.J. Reports*, 1962, pp. 160, 162, 165, 168 seq., 177-179; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, *I.C.J. Reports*, 1971, p. 16, paras. 21-22; Bruno Simma/Stefan Brunner/Hans-Peter Kaul, "Article 27", in Bruno Simma (ed.), *The Charter of the United Nations: A Commentary*, vol. I, Oxford, 2002, pp. 493 seq., para. 46 seq.; Michael Bothe, "Peace-keeping", in Bruno Simma (ed.), *The Charter of the United Nations: A Commentary*, vol. I, Oxford, 2002, p. 685, paras. 86 and 91 seq.; *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion of 11 April 1949, *I.C.J. Reports*, 1949, p. 180.

agreement and subsequent practice and systematically ordering them is not merely a value in itself, as this could form the basis for orientation in analogous cases. Although such a collection certainly could not aspire to completeness, it would nevertheless provide an exemplary overview. This would be helpful for practitioners who would then more easily be able to reason from analogy. A repertory should also provide courts and tribunals with illustrative guidance on the relevance of subsequent agreement and practice. Without such guidance, judicial bodies might too easily identify what they consider to be the object and purpose of a treaty, thereby possibly overlooking the continuing role of States in treaty interpretation.

21. The task of compiling a repertory is not simply a matter that can be done equally well by an academic research institute. Although States do not consider it to be a secret, some instances of subsequent agreement and practice are simply not available in the public realm. The Commission is the best possible forum to determine whether certain activities can indeed be classified as relevant practice. With the help of its members, it is also the best and most legitimate source for obtaining relevant instances of subsequent agreement and subsequent practice. Of course, the process of collecting material cannot be conducted in the style of a fishing expedition, but must rather be based on a carefully formulated questionnaire.

22. The second and more important goal of the consideration of the topic should be to derive some general conclusions or guidelines from the repertory of practice. Such conclusions or guidelines should not result in a Draft Convention, if only for the reason that guidelines to interpretation are hardly ever codified even in domestic legal systems. Such general conclusions or guidelines could, however, give those who interpret and apply treaties an orientation for the possibilities and limits of an increasingly important means of interpretation that is specific to international law. These conclusions, or guidelines, would neither provide a straightjacket for the interpreters, nor would they leave them in a void. They would provide a reference point for all those who interpret and apply treaties, and thereby contribute to a common background understanding, minimizing possible conflicts and making the interpretive process more efficient.

23. The following specific issues could be addressed within this general framework:

- (a) Delimitation of subsequent agreement and subsequent practice;
- (b) Types of subsequent agreements and subsequent practice;

- (c) Relevant actors or activities;
- (d) Constituent elements;
- (e) Substantive limits;
- (f) Treaty modification and informal means of cooperation;
- (g) Special types of treaties;
- (h) Customary international law and systemic integration.

**(a) Delimitation of subsequent agreement and subsequent practice**

24. The delimitation between the various means of interpretation provided for in article 31 (3) VCLT is not clear. While the Commission has shed some light on the principle of systemic integration (art. 31 (3) (c) VCLT),<sup>33</sup> the boundary between subsequent agreement and subsequent practice is rather fluid. It is accepted that subsequent agreement can take various forms. Subsequent agreement therefore may be present when there is simply a decision adopted by a meeting of the parties to a treaty, as was the case when EU member States changed the denomination of the ECU to the Euro.<sup>34</sup> Since subsequent agreement presupposes the consent of all the parties, it seems to imply a higher degree of formality than subsequent practice.

25. Subsequent practice relies on the establishment of a subsequent agreement of the parties to a treaty. It is generally required to be concordant, common and consistent.<sup>35</sup> As Special Rapporteur *Sir Humphrey Waldock* put it, “(t)o amount to an authentic interpretation, the practice must be such as to indicate that the interpretation has received the tacit assent of the

---

<sup>33</sup> Fragmentation Report, *supra* note 20, paras. 410-480.

<sup>34</sup> See Anthony Aust, *Modern Treaty Law and Practice*, Cambridge University Press, New York, 2000, p. 192.

<sup>35</sup> See *Kasikili/Sedudu Island*, 49-50; *Air Services Arbitration (US v. France)*: Award of Appellate Body Report on *Japan-Alcoholic Beverages* (1 November 1996) WT/DS8; WT/DS10; WT/DS11, p. 13; Giovanni, Distefano, “La pratique subséquente des États parties à un traité”, *Annuaire français de droit international*, vol. XL (1994), p. 41 et seq., 46 et seq.



parties generally”.<sup>36</sup> However, the problem lies in how to establish this tacit assent. In this context, the notions of acquiescence and *estoppel* are used to determine whether a party has given its implied consent to a practice by another party. The exact meaning of those principles is subject to considerable debate.<sup>37</sup> While it may not be possible to arrive at definite conclusions in this respect, an analysis of State and organizational practice would probably give some general orientation.

**(b) Types of subsequent agreements and subsequent practice**

26. A study would try to identify different types of subsequent agreements and subsequent practice, or certain distinctions which could aid to identify relevant analogous cases:

- The distinction between specific and general subsequent developments;
- The distinction between technical treaties and more general treaties, such as treaties concerning the ensuring of security and/or human rights;
- The distinction between treaties with or without a special judicial dispute resolution mechanism;

---

<sup>36</sup> Sir Humphrey Waldock, Sixth Report on the Law of Treaties, *Yearbook of the International Law Commission*, 1966, vol. II, A/CN.4/186. p. 99, para. 18; see also Giovanni Distefano, *supra* note 30, p. 55.

<sup>37</sup> See *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)*, Judgment of 12 October 1984, *I.C.J. Reports*, 1984, 246, para. 130; *Temple of Preah Vihear*; *ibid.*, (separate opinion of Judge Alfaro) pp. 39, 40; *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands)*, Judgment of 20 February 1969, *I.C.J. Reports*, 1969, 4, para. 30; Ian Brownlie, *Principles of Public International Law*, 6th ed., Oxford University Press, 2003, p. 616; see also Phil C.W. Chan, “Acquiescence/Estoppel in International Boundaries: *Temple of Preah Vihear* Revisited”, *Chinese Journal of International Law*, vol. 3 (2004), pp. 421-439, 439; Hans Das, “L’Estoppel et l’Acquiescement: Assimilations Pragmatiques et Divergences Conceptuelles”, *Revue Belge de Droit International*, vol. 30 (1997), pp. 607-634, at p. 608; Malcom N. Shaw, *International Law*, 5th ed., Cambridge University Press, Cambridge 2003, p. 439; Martti Koskeniemi, *From Apology to Utopia - The Structure of International Legal Argument*, Reissue, Cambridge 2005. pp. 356 et seq.

- The distinction between old and new treaties;
- The distinction between bilateral and multilateral treaties.

**(c) Relevant actors or activities**

27. The question as to which of its organs is entitled to represent the State on the international level is known from a variety of settings. Article 7 VCLT is obviously too narrow when it comes to determining the range of state organs or other actors that are capable of contributing to relevant subsequent agreement or practice. On the other hand, the all-inclusive approach of the rules on State responsibility<sup>38</sup> is probably too broad for this purpose. The arbitral award in the case of the *Tax regime governing pensions paid to retired UNESCO officials residing in France* was reluctant to consider the conduct of low-ranking state organs as evidence of subsequent practice to a treaty.<sup>39</sup> Other awards have, however, relied on such practice, albeit only when it occurred with the tacit consent of higher authorities.<sup>40</sup> A study could provide a systematic analysis of whose action can count for subsequent agreement or practice.

**(d) Constituent elements**

28. The view is still widely held that all parties to a treaty should contribute to the subsequent practice in question. However, subsequent practice is also sometimes compared to being structurally similar to the development of new customary rules. There, the principle according to which all States need to consent to customary rules has been subject to certain modifications.<sup>41</sup>

---

<sup>38</sup> See Article 4, Draft Articles on State Responsibility, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10)*.

<sup>39</sup> *Question of the tax regime governing pensions paid to retired UNESCO officials residing in France (France v. UNESCO)*, Award of 14 January 2003, UNRIAA, vol. XXV, pp. 231-266, 258, para. 70; on this award see Robert Kolb, “La modification d’un traité par la pratique subséquente des parties”, *Schweizerische Zeitschrift für Internationales und Europäisches Recht*, vol. 14 (1) (2004), pp. 9-32.

<sup>40</sup> *Air Services Arbitration (US-France)*.

<sup>41</sup> See Christian Tomuschat, “Obligations Arising for States Without or Against their Will”, *Recueil des Cours*, vol. 241 (1993-IV), pp. 195-374, 290.

However, one important difference between customary law and treaty law lies in the fact that treaty law more clearly rests on the consent of all parties.

29. It is, however, a matter of considerable debate how such consent should be established. Examples from international practice include a WTO Panel Report which determined that the practice of only one party could shed light on the meaning of a provision as long as it was the practice of the sole State concerned with the question at issue.<sup>42</sup> Although the panel was later overruled in this regard by the Appellate Body,<sup>43</sup> the panel report merits attention and has merely reiterated a problem that has arisen in other contexts as well.<sup>44</sup> The ICJ has recognized that the practice of one individual State may have special cogency when it is related to the performance of an obligation incumbent on that State.<sup>45</sup>

**(e) Substantive limits**

30. The study would also need to look into possible limits for the consideration of subsequent agreement and subsequent practice. Some treaties contain specific rules concerning their interpretation and which can affect the operation of general methods of interpretation (see below sub g) = “Special types of treaties”). However, substantive limits could also flow from rules of *jus cogens*. Such rules could pose a limit to certain forms of evolutive treaty interpretation by the parties, but they may also themselves be specifically affected by subsequent developments (see article 64 VCLT).

---

<sup>42</sup> *European Communities - Customs Classification of Frozen Boneless Chicken Cuts*, para. 7.255.

<sup>43</sup> Panel Report, *European Communities - Customs Classification of Frozen Boneless Chicken Cuts* (30 May 2005) WT/DS269/R, para. 259.

<sup>44</sup> C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, Cambridge, 2nd ed. 2005, at pp. 50 seq.

<sup>45</sup> *Legal Status of South-West Africa*, Advisory Opinion of 11 July 1950, I.C.J. Reports 1950, p. 128, 135 et seq.; Lord McNair, *The Law of Treaties*, 2nd rev., Stevens and Sons, London, 1961, p. 427.

**(f) Treaty modification and informal cooperation**

31. While it may be exaggerated to pretend, as Georges Scelle has done, that “l’application elle-même des traités n’est (...) qu’une révision continue”,<sup>46</sup> a study on subsequent agreement and subsequent practice must consider informal treaty application as forms of interpretation and possibly even of treaty modification.<sup>47</sup> A classical example for the case in which supposed interpretation may have turned into a modification of a treaty is the understanding of the ICJ of Article 27 (3) of the United Nations Charter with respect to the non-consideration of abstentions of permanent members of the Security Council.<sup>48</sup> Although the possibility of treaty modification was also acknowledged by arbitral awards,<sup>49</sup> the ICJ has recently adopted a more sceptical position in this regard and did not find a modification through subsequent practice in the *Kasikili/Sedudu Island Case*.<sup>50</sup>

32. The issue of modification is connected with a tendency of States to resort to informal means of international cooperation. One question concerns the value of “memorandums of understanding” in the context of subsequent practice.<sup>51</sup> Their legal force is contested. However,

---

<sup>46</sup> Georges Scelle, *Théorie juridique de la révision des traités*, Paris (Librairie du Recueil Sirey) 1936, p. 11.

<sup>47</sup> Karol Wolfke, “Treaties and Custom”, in: Jan Klabbbers (ed.), *Essays on the Law of Treaties - A Collection of Essays in Honour of Bert Vierdag*, (1998), pp. 31-39, 34.

<sup>48</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, I.C.J. Reports 1971, p. 16, 21-22.

<sup>49</sup> See *Taba Arbitration (Egypt v. Israel)*, Award of 29 September 1988, UNRIAA XX, pp. 1-118, at 56-7, paras. 209-211; *Temple of Preah Vihear; Air Services Arbitration (US-France)*; *Delimitation of the Border (Eritrea v. Ethiopia)*, *supra* note 34, pp. 110 et seq.; Anthony Aust, *Modern Treaty Law and Practice*, p. 213.

<sup>50</sup> *Kasikili/Sedudu Island (Botswana v. Namibia)*.

<sup>51</sup> Aust, *Modern Treaty Law and Practice*, pp. 26-45.

uncertainty surrounding their status has not prevented arbitral tribunals from considering them as subsequent practice.<sup>52</sup>

**(g) Special types of treaties**

33. The study should also consider subsequent agreement and subsequent practice within special treaty regimes. While the Study Group Report on Fragmentation has rejected the notion of “self-contained regimes”,<sup>53</sup> it is nevertheless necessary to study how the general rules are applied in special contexts. One example is provided by WTO law. The interpreter of WTO law is faced with a complex array of provisions that simultaneously provide for and limit recourse to the interpretation of WTO law through subsequent practice. It follows that the considerable amount of reports both by Panels and the Appellate Body, which explicitly deal with subsequent practice, must be read in light of this framework of rules.<sup>54</sup>

34. Certain other treaty regimes that establish judicial organs or provide for some form of institutionalized dispute settlement display a tendency to develop their own rules of interpretation which differ from the classical canons of general international law. One example is the European Community/European Union Legal System, in which subsequent practice is regularly not included in the list of means of interpretation of the (European) Court of Justice.<sup>55</sup> On the other hand, in the context of the Common Foreign and Security Policy under the Treaty Establishing the European Union (TEU), subsequent practice of the organization as a means to interpret the relevant provisions of the TEU, such as Article 24,<sup>56</sup> is still plausible.

35. The European Convention on Human Rights is another special case. Although references to subsequent developments are numerous in the jurisprudence of the European Court of

---

<sup>52</sup> *Arbitration Concerning Heathrow Airport User Charges (United States v. United Kingdom)*, Award of 30 November 1992, UNRIAA, vol. XXIV, pp. 1-359, 76 et seq., 130 et seq.

<sup>53</sup> Fragmentation Report, *supra* note 20, paras. 191 et seq.

<sup>54</sup> See the references in *supra* note 9.

<sup>55</sup> See Case 68/86 *United Kingdom v. Council* [1988] ECR 855, para. 24.

<sup>56</sup> See Daniel Thym, “Die völkerrechtlichen Verträge der Europäischen Union”, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 66 (2006), pp. 863 et seq., at p. 870.

Human Rights,<sup>57</sup> it merits attention how the Court actually makes use of it. Apart from the classical practice of the member States themselves, the concept of the Convention as a “living instrument” could be considered as subsequent practice of the civil society more than as subsequent practice of the States party to the Convention.<sup>58</sup>

**(h) Customary international law and systemic integration**

36. The means of interpretation provided for in article 31 (3) VCLT invite closer inspection as to their relation to the development of new customary rules.<sup>59</sup> Subsequent practice may reflect the wish of States to see a treaty modified in order to adapt it to the changing normative environment. From this perspective, subsequent practice in the sense of article 31 (3) (b) VCLT is intimately connected to the principle of systemic integration as embodied in lit. c of the same paragraph.

**E. How to approach the topic of subsequent agreement and practice**

37. The object of the proposal is to develop guidelines for the interpretation of treaties in time on the basis of a repertory of practice. The goal is to deal with the topic within one quinquennium.

38. The nature of the topic as a cross-cutting issue requires an approach that is different from the one to be adopted if the goal would be to codify a specific area of international law. It would not make sense, for example, to start with general principles and then move to more specific guidelines or exceptions. This is because the material from which the guidelines would be extracted is substantially less pre-formed as are subject-areas which lend themselves to codification. It is therefore necessary to develop the repertory and the ensuing guidelines inductively from certain manageable categories of material. These categories should fulfil two requirements: first, it should be possible to rather clearly delineate them from each other and,

---

<sup>57</sup> See the references in *supra* note 7.

<sup>58</sup> Rudolf, Bernhardt, “Interpretation in International Law, in (ed.), *Encyclopedia of Public International Law*, vol. II (1995), pp. 1416-1426, 1421.

<sup>59</sup> See Maurice Kamto, “La volonté de l’État en droit international”, *Recueil des Cours* vol. 310 (2004), pp. 133 et seq.

second, it should be possible deal with them in a sequence which avoids duplication of work as far as possible.

39. The following categories of material should fulfil these requirements if analysed one after the other:

- (a) Jurisprudence of international courts and tribunals of general and *ad hoc* jurisdiction (e.g. ICJ, Arbitral Tribunals);
- (b) Pronouncements of courts or other independent bodies under special regimes (e.g. WTO, DSU, ECHR);
- (c) Subsequent agreement and practice of States outside of judicial or quasi-judicial proceedings;
- (d) Subsequent agreement and practice with respect to and by international organizations (United Nations, Specialized and Regional Organisations);
- (e) Jurisprudence of national courts;
- (f) Conclusions.

40. From a purely theoretical point of view the point of departure should, in principle, be the practice of States outside of judicial or quasi-judicial proceedings. Practical considerations, however, militate in favour of the suggested sequence. The collection of the practice of States outside of judicial or quasi-judicial proceedings is the most difficult part of the project and it requires, more than any other category of material, help from States and other sources. There should be time for the preparation of this aspect of the topic by the Commission, and in particular for States to respond to a questionnaire. Since the legal significance of subsequent agreement and practice is usually described by way of examples from the jurisprudence of international courts it is probably better to start the analysis of the topic by reviewing the jurisprudence of international courts of general jurisdiction (in particular the ICJ) and of *ad hoc* jurisdiction (various arbitral tribunals). These judicial bodies have developed the main reference points from which an analysis can proceed. The analysis of the pronouncements of courts or of other independent bodies under special regimes would follow and supplement the previous

analysis by either confirming the approach of the international courts or tribunals of general or ad hoc jurisdiction, or by suggesting that certain exceptions exist in special regimes.

41. After reviewing the international judicial or quasi-judicial bodies' reflection of subsequent agreement and practice of States pertinent examples of such agreement and practice of States outside of judicial or quasi-judicial proceedings should be addressed. In this context, the question must again be asked whether such practice of States generally confirms the jurisprudence of international judicial or quasi-judicial bodies, and whether it adds any considerations.

42. The analysis of the international pronouncements on the topic would be completed by looking at subsequent agreement and practice with respect to and by international organizations. It is expected that certain specific understandings and practices will emerge in this context which could then become the basis for corresponding guidelines. A review of the available jurisprudence of national courts will help confirm or call into question previous insights.

43. Ultimately, a final report should synthesize the different layers of analysis and conclude with the envisaged guidelines to interpretation.

44. The suggested way of how to proceed with this cross-cutting issue inevitably raises questions of delimitation which must be resolved as the work on the topic proceeds. Another question is how to integrate the views of authors. It is suggested that they be considered depending of how specifically they relate to the subcategory of material under consideration. This means that general views of authors on the issue of treaty interpretation in time would be considered mainly at the beginning and near the end of the work on the topic.

## **F. Conclusion**

45. There are many examples of subsequent agreement and subsequent practice to international treaties. In a statement to the Sixth Committee in October 2007, one State has confirmed and substantiated the practical interest of States to improve their knowledge how subsequent agreements and subsequent agreement and practice may influence interpretation of their treaty obligations.<sup>60</sup> It is true that the topic implicates many subject areas, as another State

---

<sup>60</sup> Statement by Germany on 30 October 2007, p. 5.



has remarked in its statement to the Sixth Committee,<sup>61</sup> but this does not mean that the topic is not sufficiently concrete and suitable for progressive development. As a cross-cutting issue, the topic proceeds from a firm basis in practical cases to which it gives added value by way of comparative analysis. The “real world issues”<sup>62</sup> which suggest that the Commission take on this topic at this time are coming up more and more frequently, as is demonstrated by the recent *Medellin v. Texas* decision of the United States Supreme Court and its analysis of the “post-ratification understanding” of the Vienna Convention on Consular Relations.<sup>63</sup>

46. It is therefore suggested that the Commission shed light on the necessary balance between stability and change in the law of treaties through the codification and progressive development of international law on the matter. The topic lends itself both to the traditional method of being elaborated on the basis of reports by a Special Rapporteur, as well as to the method of being treated by a Study Group.

---

<sup>61</sup> Statement by the United States on 31 October 2007, p. 4.

<sup>62</sup> Statement by the United States on 31 October 2007, p. 5.

<sup>63</sup> *Medellin v. Texas*, Judgment of 25 March 2008, 552 U.S. ... (2008) (Slip opinion at pp. 20-21).

## APPENDIX

### Table of Authorities

#### A. International jurisprudence

##### 1. Judicial Organs

###### (a) Permanent Court of International Justice

*Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture*, Advisory Opinion of 12 August 1922, Series B No. 2.

*Interpretation of Article 3, Paragraph 2 of the Treaty of Lausanne*, Advisory Opinion of 21 November 1925, Series B No. 12.

*Jurisdiction of the European Commission of the Danube*, Advisory Opinion of 26 December 1926, Series B No. 14.

*Jurisdiction of the Courts of Danzig*, Advisory Opinion of 24 September 1927, Series B, No. 15.

###### (b) International Court of Justice

*Status of South-West Africa*, Advisory Opinion of 11 July 1950, I.C.J. Reports 1950, p. 128.

*Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment of 15 June 1962, I.C.J. Reports 1961, p. 6.

*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, I.C.J. Reports 1962, p. 151.

*North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands)*, Judgment of 20 February 1969, I.C.J. Reports 1969, p. 3.

*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, I.C.J. Reports 1971, p. 16.

*Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)*, Judgment of 12 October 1984, I.C.J. Reports 1984, p. 246.

*Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment of 12 December 1996, I.C.J. Reports 1996, p. 803.

*Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment of 25 September 1997, I.C.J. Reports 1997, p. 7.

*Case Concerning Kasikili/Sedudu Island (Botswana v. Namibia)*, Judgment of 13 December 1999, I.C.J. Reports 1999, p. 1045.

**(c) European Court of Justice**

Case 68/86 *United Kingdom v. Council* [1988] ECR 855.

**(d) European Court of Human Rights**

*Tyrer v. the United Kingdom*, Judgment, 25 April 1978, Application No. 26.

*Marckx v. Belgium*, Judgment, 13 June 1979, Application No. 31.

*Airey v. Ireland*, Judgment, 9 October 1979, Application No. 32.

*Case of Soering v. United Kingdom*, Judgment (Merits and Just Satisfaction), 7 July 1989, Application No. 14038/88.

*Loizidou v. Turkey*, Preliminary Objections, 23 March 1995, Application No. 310.

*Loizidou v. Turkey*, Judgment (Merits and Just Satisfaction), 18 December 1996, Application No. 15318/89, ECHR, 1996-VI, p. 2236.

*Banković and Others v. Belgium and 16 Other Contracting States* (dec.) [GC], Application No. 52207/99, ECHR 2001-XII.

*Öcalan v. Turkey*, Judgment, 12 May 2005, Application No. 46221/99, ECHR 2005-IV.

**(e) International Court of the Law of the Sea**

M/V 'Saiga' Case (No. 2) (*Saint Vincent and the Grenadines v. Guinea*) Judgment, ITLOS Reports, 1 July 1999.

**(f) International Criminal Tribunal for The former Yugoslavia**

*Prosecutor v. Dusko Tadic*, Case No. IT-94-1-A, A.Ch, Judgment of 15 July 1999.

**(e) World Trade Organization**

Appellate Body Report, *Japan - Taxes on Alcoholic Beverages* (1 November 1996) WT/DS8/R, WT/DS10/R, WT/DS11/R, modified by Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, DSR 1996:I, 125.

Appellate Body Report, *European Communities - Customs Classification of Certain Computer Equipment* (22 June 1998) WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, DSR 1998:V, 1851.

Panel Report, *Chile - Price Band System and Safeguard Measures Relating to Certain Agricultural Products* (23 October 2002) WT/DS207/R, modified by Appellate Body Report, WT/DS207AB/R, DSR 2002:VIII, 3127.

Panel Report, *United States - Laws, Regulations and Methodology for Calculating Dumping Margins* ("Zeroing") (9 May 2006) WT/DS294/R, modified by Appellate Body Report, WT/DS294/AB/R.

Appellate Body Report, *European Communities - Customs Classification of Frozen Boneless Chicken Cuts* (27 September 2005) WT/DS269/AB/R, WT/DS286/AB/R, and Corr.1.

Panel Report, *European Communities - Customs Classification of Frozen Boneless Chicken Cuts* (30 May 2005) WT/DS269/R.

## 2. Arbitral Awards

*Affaire de l'indemnité russe, (Russia v. Turkey)*, Award of 11 November 1912, UNRIAA, vol. XI, pp. 421-447.

*Interpretation of the air transport services agreement between the United States of America and France (USA v. France)*, Award of 22 December 1963, UNRIAA, vol. XVI, pp. 5-74.

*Interpretation of the air transport services agreement between the United States of America and Italy (USA v. Italy)*, Award of 17 July 1965, UNRIAA, vol. XVI, pp. 75-108.

*Beagle Channel Arbitration (Argentina v. Chile)*, Award of 18 February 1977, UNRIAA, vol. XXI, pp. 53-264.

*The Chamizal Case (Mexico v. United States)*, Award of 15 June 1911, UNRIAA, vol. XI, pp. 309-347.

*Delimitation of the Continental Shelf (UK v. France)*, Award of 30 June 1977, UNRIAA, vol. XVIII, pp. 3-413.

*The United States of America, et al. v. The Islamic Republic of Iran, et al.*, Award of 25 January 1984, *Iran-US C.T.R.*, vol. 5, p. 57.

*Affaire de la Délimitation de la frontière maritime (Guinée/Guinée-Bissau)*, 14 February 1985, UNRIAA, vol. XIX, pp. 119-213.

*Houston Contracting Company v. National Iranian Oil Company, et al.*, Award of 22 July 1988, *Iran-US C.T.R.*, vol. 20, p. 3.

*Taba Arbitration (Egypt v. Israel)*, Award of 29 September 1988, UNRIAA, XX, pp. 1-118.

*Arbitration Concerning Heathrow Airport User Charges (United States v. United Kingdom)*, Award of 30 November 1992, UNRIAA, vol. XXIV, pp. 1-359.

*Decision Regarding Delimitation of the Border between the State of Eritrea and the Federal Democratic Republic of Ethiopia*, 13 April 2002, UNRIAA, vol. XXV, pp. 83-195.

*Question of the tax regime governing pensions paid to retired UNESCO officials residing in France (France v. UNESCO)*, Award of 14 January 2003, UNRIAA, vol. XXV, pp. 231-266.

*Southern Bluefin Tuna case (Australia and New Zealand/Japan)* Award of 4 August 2000 (Jurisdiction and admissibility) UNRIAA, vol. XXII, pp. 1-57.

*In the Arbitration Regarding the Iron Rhine ("Ijzeren Rijn") Railway (Belgium v. The Netherlands)*, Permanent Court of Arbitration, Award of the Arbitral Tribunal, 24 May 2005.

## **B. National Jurisprudence**

*Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243 (1984).

*United States v. Alvarez-Machain*, 504 U.S. 655 (1992), 31 ILM 902 (1992).

*Medellin v. Texas*, Judgment of 25 March 2008, 552 U.S. ... (2008).

*R. v. Sec. of State, on Application of Channel Tunnel Group*, 23 July 2001, ILR vol. 125, (2004), p. 580.

*Parliamentary Group of the Partei des Demokratischen Sozialismus v. Bundesregierung*, German Federal Constitutional Court, 22 November 2001, BVerfGE 104, 151, ILDC 134 (DE 2001).

*King v. Bristow Helicopters Ltd.* [2002] UKHL 7, [2002] 2 AC 628, ILDC 242 (UK 2002).

*Morris v. KLM Royal Dutch Airlines* [2002] UKHL 7, 2 AC 628, ILDC 242 (UK 2002).

*A v. B*, Swiss Federal Supreme Court, 1st Civil Law Chamber, 8 April 2004, BGE 130 III 430, ILDC 343 (SW 2004).

*Attorney-General v. Zaoui*, New Zealand Supreme Court, 21 June 2005, [2005] NZSC 38, SC CIV 19/2004, ILDC 81 (NZ 2005).

*Parliamentary Group of the Partei des Demokratischen Sozialismus/Linkspartei v. Bundesregierung*, German Federal Constitutional Court, 3 July 2007, 2 BvE 2/07; available at <http://www.bverfg.de>.

*Bouzari v. Iran (Islamic Republic of)* (2004), 243 D.L.R. (4th) 406, ILDC 175 (CA 2004).

## **C. International organizations**

### **1. United Nations**

Sir Humphrey Waldock, Third report on the Law of Treaties, *Yearbook of the International Law Commission*, 1964, vol. II, A/CN.4/167/Add.1-3.

Sir Humphrey Waldock, Sixth report on the Law of Treaties, *Yearbook of the International Law Commission*, 1966, vol. II, A/CN.4/186.

Sir Humphrey Waldock, Commentary on Draft Articles on the Law of Treaties, *Yearbook of the International Law Commission*, 1966, vol. II, A/CN.4/SER.A/1966/Add.1, p.236.

Sixth Commission consideration of Article 38 on Modification of treaties by subsequent practice, *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 24 April 1968, Summary records of the plenary meetings of the Sixth Committee* (A/CONF.39/11), pp. 207-215.

Draft Articles on State Responsibility, Article 4, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10).

Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi, A/CN.4/L.682, 13 April 2006.

Topical Summary of the discussion held in the Sixth Committee, prepared by the Secretariat, A/CN.4/577/Add.1, 27 January 2007.

#### **D. Treaties and similar documents**

Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, *Treaty Series*, vol. 1155, p. 331.

Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 21 March 1986, 25 ILM 543.

Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 14 October 2005, London, LEG/CONF.15/21.

#### **E. Literature**

Michael Akehurst, "The Hierarchy of the Sources of International Law", *British Yearbook of International Law*, vol. 47 (1974-1975), pp. 273-285.

José E. Alvarez, *International Organisations as Law-Makers*, Oxford University Press, USA, 2005.

Anthony Aust, *Modern treaty law and practice*, Cambridge University Press, New York, 2000.

Anthony Aust, "Domestic Consequences of Non-Treaty (Non-Conventional) Law-Making", in Rüdiger Wolfrum/Volker Röben (eds.), *Developments of International Law in Treaty Making*, Berlin, 2005, pp. 487-496.

David J. Bederman, "Revivalist Canons and Treaty Interpretation", *UCLA Law Review* vol. 41 (1994), p. 953.

Rudolf, Bernhardt, "Interpretation in International Law, in (ed.), *Encyclopedia of Public International Law*, vol. II (1995), pp. 1416-1426.

Rudolf, Bernhardt, “Völkerrechtliche und verfassungsrechtliche Aspekte konkludenter Vertragsänderungen”, in Hans-Wolfgang Arndt et al. (eds.), *Völkerrecht und deutsches Recht - Festschrift für Walter Rudolf* (2001), pp. 15-22.

Yves le Bouthillier, “Article 32” in Olivier Corten/Pierre Klein (eds.), “Les Conventions de Vienne sur le droits des traités. Commentaire article par article”, Bruxelles, Bruylant, 2006.

Ian Brownlie, *Principles of Public International Law*, 6th ed., Oxford University Press, USA, 2003.

Michael Byers, *Custom, Power, and the Power of Rules*, Cambridge University Press, Cambridge, 1999.

Michael Byers, “Policing the High Seas: The Proliferation Security Initiative”, *American Journal of International Law*, vol. 98 (2004), pp. 526-545.

Phil C.W. Chan, “Acquiescence/Estoppel in International Boundaries: *Temple of Preah Vihear* Revisited”, *Chinese Journal of International Law*, vol. 3 (2004), pp. 421-439.

Jonathan I. Charney, “The Impact on the International Legal System of the Growth of International Courts and Tribunals”, *New York University Journal of International Law and Politics*, vol. 31 (1999), p. 697.

Hans Das, “L’Estoppel et l’Acquiescement: Assimilations Pragmatiques et Divergences Conceptuelles”, *Revue Belge de Droit International*, vol. 30 (1997), pp. 607-634.

Giovanni, Distefano, “La pratique subséquente des États parties à un traité”, *Annuaire français de droit international*, vol. XL (1994), p. 63.

Maurice Kamto, “La volonté de l’État en droit international”, *Recueil des Cours*, vol. 310 (2004), p. 133.

Wolfram Karl, *Vertrag und spätere Praxis im Völkerrecht: zum Einfluss der Praxis auf Inhalt und Bestand völkerrechtlicher Verträge*, Springer, Berlin; New York, 1983.

Benedict Kingsbury, “Is the Proliferation of International Courts and Tribunals a Systemic Problem?”, *New York University Journal of International Law and Politics*, vol. 31 (1999), pp. 679-696.

Robert Kolb, “La modification d’un traité par la pratique subséquente des parties”, *Schweizerische Zeitschrift für Internationales und Europäisches Recht*, vol. 14 (1) (2004), pp. 9-32.

Robert Kolb, “Interprétation et création du droit international”, Bruxelles, 2006.

Nancy Kontou, *The Termination and Revision in the Light of New Customary International Law*, Clarendon Press, Oxford, 1994.

Martti Koskeniemi, *From Apology to Utopia - The Structure of International Legal Argument*, Reissue, Cambridge 2005.

Maximilian Malirsch and Florian Prill, "The Proliferation Security Initiative and the 2005 Protocol to the SUA Convention", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 67 (2007), pp. 229-240.

Matshushita, Schoenbaum, Mavroidis, *The World Trade Organization - Law, Practice, and Policy*, 2nd ed., Oxford University Press, USA, 2006.

John Norton Moore, "Treaty Interpretation, the Constitution, and the Rule of Law", *Virginia Journal of International Law*, vol. 42 (2001), pp. 163-263.

Lord McNair, *The Law of Treaties*, 2nd rev., Stevens and Sons, London, 1961.

Lord McNair, "Severance of Treaty Provisions", in *Hommage d'une generation des Juristes au President Basdevant* (1961), p. 352.

Alexander Orakhelashvili, *Peremptory Norms in International Law*, Oxford University Press, New York, 2006.

Joost Pauwelyn, *Conflict of Norms in Public International Law*, Cambridge University Press, New York, 2003.

Georg Ress, "Verfassungsrechtliche Auswirkungen der Fortentwicklung völkerrechtlicher Verträge", in Walther Fürst et al. (eds.), *Festschrift für Wolfgang Zeidler*, vol. 2, Berlin 1987.

Georges Scelle, *Théorie juridique de la révision des traités*, Paris, Librairie du Recueil Sirey, s. a., 1936.

Malcom N. Shaw, *International Law*, 5th ed., Cambridge University Press, Cambridge 2003.

Sir Ian Sinclair, *The Vienna Convention of the Law of Treaties*, Manchester University Press, Manchester, 1984.

Bruno Simma, (ed.) *The Charter of the United Nations: A Commentary*, New York: Oxford University Press, 2003.

Daniel Thym, "Die völkerrechtlichen Verträge der Europäischen Union", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 66 (2006), pp. 863-925.

Christian Tomuschat, "Obligations Arising for States Without or Against their Will", *Recueil des Cours*, vol. 241 (1993-IV), pp. 195-374.



Francisco Orrego Vicuña, “In Memory of Triepel and Anzilotti: The Use and Abuse of Non-Conventional Lawmaking”, in Rüdiger Wolfrum/Volker Röben (eds.), *Developments of International Law in Treaty Making*, Berlin, 2005, p. 497.

Mark E. Villiger, *Customary International Law and Treaties: a study of their interactions and interrelations with special consideration of the 1969 Vienna Convention on the Law of Treaties* (Dordrecht: Nijhoff, 1985).

Karol Wolfke, “Treaties and Custom, in: Jan Klabbbers (ed.), *Essays on the Law of Treaties - A Collection of Essays in Honour of Bert Vierdag*”, (1998), pp. 31-39.

M., Yasseen, “L’interprétation des traits d’après la Convention de Vienne sur le Droit de Traités”, *Recueil des Cours de l’Académie de Droit International*, vol. 151 (1976-III).

## **Annex B**

### **The Most-Favoured-Nation clause**

#### **(Working Group of the Commission)**

1. In 1978, the Commission adopted draft articles on the topic of the Most-Favoured-Nation (MFN) clause. No action was taken on them by the General Assembly. In 2006, at the fifty-eighth session of the ILC, the long-term Working Group discussed whether the MFN clause should be considered again and to include the topic in its long-term programme of work but the Commission did not make any decision on the matter. The Commission then invited the views of governments. At the sixty-first session of the Sixth Committee, one State supported the idea but two States expressed doubts about the wisdom of taking on the topic. The Commission has now established a working group to consider whether or not the topic of the MFN clause should be included in its long-term programme of work.

2. This discussion paper reviews the MFN clause issue; what was decided in 1978, why it was not taken any further, what has changed since 1978, and whether there is something that the Commission could usefully do on this subject.

#### **1. The nature, origins and development of MFN clauses**

3. An MFN clause is a provision in a treaty under which a State agrees to accord to the other contracting partner treatment that is no less favourable than that which it accords to other or third States. It was an early and particular form of a non-discrimination clause and its origins date back to early treaties of friendship, commerce and navigation ("FCN treaties"). For example, a 1654 treaty between Great Britain and Sweden<sup>1</sup> provided:

The people, subjects and inhabitants of both confederates shall have, and enjoy in each other's kingdoms, countries, lands, and dominions, as large and ample privileges, relations, liberties and immunities, as any other foreigner at present doth and hereafter shall enjoy.

---

<sup>1</sup> *Treaty of Peace and Commerce between Great Britain and Sweden*, 11 April 1654, BSP 1/691.

Such a clause guaranteed only treatment that was as good as other foreigners were to receive. It was not a guarantee of national treatment. Nationals might receive better or worse treatment than foreigners. Thus, an MFN clause was not a comprehensive non-discrimination provision.

4. As the Great Britain/Sweden agreement shows, the grant of MFN treatment was for the benefit of the “people, subjects and inhabitants” of both States. This was typical of FCN treaties. They were primarily, although not exclusively, about economic activities. The benefits being granted under these agreements were designed to facilitate the economic activities of the subjects of each State within the territory of the other State. Indeed, the rationale for granting MFN treatment was economic - the desire by the recipient of MFN treatment to avoid its own subjects from being economically disadvantaged by comparison with the subjects of third States. It was not based on any notion of the equality of States.

5. However, MFN treatment was not solely limited to the economic sphere. Bilateral treaties relating to diplomatic and consular relations also included MFN guarantees, both in respect of the ability to maintain diplomatic and consular premises and in respect of the privileges granted to diplomatic and consular personnel.<sup>2</sup> Once diplomatic and consular relations were regulated by multilateral conventions establishing rights across the board, there was no need for bilateral agreements preventing discrimination through the inclusion of an MFN clause.

6. Outside the economic sphere, MFN was a principle of non-discrimination suited to circumstances where relations between States were regulated through bilateral arrangements. Such clauses had less utility where relations were regulated under multilateral agreements and MFN could be covered by a general non-discrimination provision. However, MFN has retained its pre-eminence in the economic sphere, where multilateral agreements have included MFN provisions. This reflects the economic objective of MFN in this area, something that is not captured by a general non-discrimination provision.

---

<sup>2</sup> See for example the Italo-Turkish Consular Convention of 9 September 1929, 129 L.N.T.S. 195, cited in “First report on the most-favoured-nation clause, by Mr. Endre Ustor, Special Rapporteur” (UN doc. A/CN.4/213), in *Yearbook ... 1969*, vol. 2, 166 at para. 57 (A/CN.4/SER.A/1969/Add.1).

7. In the economic field in the nineteenth and early twentieth centuries, MFN was often granted conditionally. Instead of granting MFN treatment automatically, a State would grant MFN treatment in exchange for a benefit provided by the other State. In other words, the grant of MFN treatment had to be paid for. This was known as “conditional MFN”. The granting of conditional MFN declined with greater realization that there were economic benefits to the granting State from granting MFN unconditionally and conditional MFN has little significance today.

8. Unconditional MFN became the cornerstone of the GATT regime. Under article I of GATT, MFN was to be granted at the border to the goods of other GATT Contracting Parties “immediately and unconditionally”. Together with the requirement of GATT article III to provide “national treatment” to those goods once they had entered the domestic market of a GATT Contracting Party, the MFN principle became the core of the principle of non-discrimination under GATT, and this has continued under the WTO. Indeed, under the WTO agreements MFN has been extended beyond its specific application to goods and applied to the area of services and the protection of intellectual property rights. Article II of the General Agreement on Trade in Services (GATS) provides for a very broad application of MFN in respect of “any measure covered by this Agreement”.

9. Notwithstanding the centrality of MFN treatment under GATT article I, the GATT and the WTO also provide important exceptions to MFN treatment. The principal exception is in respect of regional arrangements - customs unions and free trade areas - which grant preferences to the members of those agreements and hence are not providing MFN treatment to all GATT contracting parties. In accordance with GATT article XXIV, these benefits do not have to be extended to other GATT Contracting Parties or WTO Members.

10. The continuation of MFN under the regime of the WTO with its own dispute settlement process has meant that within the WTO trading regime there is an opportunity for the requirement of MFN treatment to be interpreted in a consistent way. However, MFN has been given a new lease of life with the inclusion of regional trade agreements and the explosion in the conclusion of bilateral investment agreements, all usually including some form of MFN requirement.

## 2. The prior work of the ILC on the MFN clause

11. The ILC's treatment of MFN clauses arose out of its work on the law of treaties. It had been proposed that a provision be included in the draft articles on the law of treaties excluding their application in the case of MFN clauses. The Commission decided not to do that but to look at MFN clauses as a separate topic.<sup>3</sup> The Special Rapporteur, Mr. Endre Ustor, and his successor Mr. Nikolai Ushakov, conducted exhaustive analyses of MFN clauses as they existed up until the mid-1970s. Their reports were based on considerable State practice in the conclusion of treaties that included MFN clauses in a variety of areas, decisions of the ICJ that touched on MFN clauses (*Anglo-Iranian case*,<sup>4</sup> *Case concerning right of nationals of the United States of America in Morocco*,<sup>5</sup> *Ambatielos case*<sup>6</sup>) the *Ambatielos Arbitration*<sup>7</sup> and a considerable body of decisions of national courts.

12. The approach of the Commission was to study the MFN clause and MFN treatment "as a legal institution"<sup>8</sup> and not simply as a matter of the law of treaties, and to look at the operation of the clause broadly and not be limited to the field of international trade. It sought to avoid trying to resolve matters of a "technical economic nature".<sup>9</sup>

13. The 30 draft articles produced by the Commission covered such matters as the definition of the MFN clause and MFN treatment (draft articles 4 and 5), its scope, the conventional rather than customary international law basis of MFN treatment (draft article 7), the scope of MFN

---

<sup>3</sup> Report of the Commission to the General Assembly on the work of its thirtieth Session (UN doc. A/33/10), in *Yearbook ... 1978*, vol. 2 (Part 2), 8 at para. 15 (A/CN.4/SER.A/1978/Add.1 (Part 2)).

<sup>4</sup> *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, *I.C.J. Reports*, 1952, p. 93.

<sup>5</sup> *Case concerning rights of nationals of the United States of America in Morocco (France v. United States of America)*, *I.C.J. Reports*, 1952, p. 176.

<sup>6</sup> *Ambatielos Case (Greece v. United Kingdom)* [1952], *I.C.J. Reports*, 1952, p.28.

<sup>7</sup> *Ambatielos Arbitration* (United Kingdom-Greece), U.N.R.I.A.A., vol. XII (1956), at p. 83.

<sup>8</sup> *Yearbook ... op. cit.*, at para. 61.

<sup>9</sup> *Ibid.*, at para. 62.

treatment (draft articles 8, 9 and 10), the effect of conditional and unconditional MFN (draft articles 11, 12 and 13), the source of the treatment to be provided under an MFN clause (draft articles 14-19), the time that rights arise under an MFN clause (draft article 20), termination or suspension of an MFN clause (draft article 21), and the relationship of the MFN clause to a generalized system of preferences (draft articles 23 and 24), and the special cases of frontier traffic and transit rights of land-locked States.

### **3. The reaction of the Sixth Committee to the draft articles**

14. The draft articles on MFN were never taken any further by the General Assembly. The debate in the Sixth Committee<sup>10</sup> indicates several concerns about the draft articles but two matters were prominent. First, there were concerns that the draft articles did not exclude customs unions and free trade areas. This was a particular issue for EEC members, which did not want to see the benefits under the Treaty of Rome being extended through MFN to States that were not EEC members. They would have preferred excluding customs unions and free trade areas from the draft articles. Developing countries that were entering into regional free trade agreements voiced similar concerns.

15. Second, there were concerns over the treatment of the issue of development in the draft articles, including the treatment of generalized systems of preferences. For some, the draft articles did not treat the issue of preferences for developing countries adequately; for others the draft articles were straying into the debate over the New International Economic Order. The combination of these and other concerns meant that there was no constituency in the General Assembly for turning the draft articles into a convention. For some States, the draft articles should simply be seen as guidelines.

### **4. Developments since 1978**

16. The circumstances that existed when the Commission dealt with the MFN clause in its reports and final draft articles of 1978 have changed significantly.

---

<sup>10</sup> C6, 33rd Session, UN doc. A/C.6/33/SR.27-45 (1978). The topic was raised in the Sixth Committee from 1980 until 1983, in 1988 and 1989 and again in 1991.

First, several of the bilateral arrangements on which the Special Rapporteurs relied to demonstrate State practice in relation to MFN provisions have been superseded by multilateral arrangements. The consequence is that MFN today is more focused in the economic area.

Second, the GATT, which was a principal source for considering MFN, has now been subsumed within the WTO. This has had the result of broadening the ambit of MFN to areas beyond goods, to services and to intellectual property. In addition, the WTO dispute settlement system with its appellate process has provided an opportunity for the MFN provisions in the WTO agreements to be subject to authoritative interpretation.

Third, there has been a vast increase in the negotiation of free trade agreements on a bilateral and regional basis and of bilateral investment agreements that include MFN provisions.

Fourth, resort to dispute settlement under investment agreements through the procedures of the International Centre for the Settlement of Investment Disputes (ICSID) or the UNCITRAL Arbitration Rules has resulted in the interpretation of MFN provisions in the investment context.

17. These developments all have implications for the way MFN clauses are to be viewed today and for the contemporary relevance of the draft articles produced by the Commission in 1978. There is now a substantial new body of practice to be taken into account in assessing how MFN clauses are being used and how they operate in practice. The relationship between the general MFN obligation in GATT article I and the power of States to grant preferential treatment to developing countries has been discussed specifically by the WTO Appellate Body.<sup>11</sup>

18. Practice relating to MFN clauses is also taking place in a context that is different from that which existed when the Commission last considered the MFN clause. The 1978 draft articles relied heavily on the Charter of Economic Rights and Duties of States when considering the relationship of the MFN clause to the question of preferential treatment for developing States.

---

<sup>11</sup> *EC-Conditions for the Granting of Tariff Preferences to Developing Countries* (2004), WTO doc. WT/DS246/AB/R (Appellate Body Report).

The debate on preferential treatment for developing countries in the field of trade takes place now within the framework of the WTO whose membership is increasingly becoming universal, and in particular within the context of the Doha Development Round of multilateral trade negotiations.

19. In the field of investment agreements the nature and scope of MFN provisions has particularly come to the fore. The scope accorded to certain MFN provisions and the differing approaches taken by various investment tribunals has created what is perhaps the greatest challenge in respect of MFN provisions. This, too, is a body of jurisprudence that was not available to the Commission at the time of its earlier work.

20. In a global environment of economic liberalization and deeper economic integration, the MFN clause continues to be a critical factor in international economic relations among member States. The continuing relevance of the MFN clause could perhaps be viewed in the context of two phases. In the first phase, the growth of Bilateral Investment Promotion and Protection Agreements (BITs) in the 1990s underlined the continuing importance of the MFN clause which along with other provisions ensured international minimum standards of treatment for foreign investors and their investments. In the second phase, the emergence of Free Trade and Comprehensive Economic Partnership Agreements which provide for the liberalization of trade in goods and services and the treatment of investment in an integrated manner, with close cross-linkages between services and investment sectors has brought to surface new issues with regard to the application of the MFN Clause.

21. The according of MFN treatment for investment even at the pre-establishment stage, is a feature in the Free Trade Agreements, which was not common in Investment Promotion and Protection Agreements in the past, where MFN treatment was limited to the post-establishment phase. The conclusion of these Free Trade Agreements and Comprehensive Economic Partnership Agreements, with substantive chapters on foreign investment, marks a new phase in the importance of the MFN clause in the contemporary economic relations among States. A review of the role of the MFN clause in the context of these new economic integration agreements merits closer study from a legal perspective.



## 5. The challenges of the MFN clause today

22. An exhaustive study of the practice of including MFN provisions in treaties would no doubt shed new light on the way that clause is operating and being applied by States. This may yield new insights about MFN. However, in the field of investment specific problems have arisen with the application of MFN clauses that may have implications for the application of MFN in other contexts as well.

23. The issue arose in *Maffezini v. Kingdom of Spain*.<sup>12</sup> The claimant, Maffezini, an Argentine national, had brought a claim under the bilateral investment agreement between Argentina and Spain. Spain argued that in accordance with article X (3) of that agreement Maffezini had to submit the case to the domestic courts in Spain for a period of 18 months before bringing a claim under the provisions of the agreement. However, the claimant pointed to the MFN provision in the Argentine-Spain investment agreement (art. 4), which provided:

In all matters subject to this Agreement, this treatment shall be not less favourable than that extended by each Party to the investments made in its territory by investors of a third country.

The claimant was then able to show that under the Spain-Chile bilateral investment agreement, investors bringing a claim under that agreement did not have to first submit their claims to domestic Spanish courts. By comparison, then, the Argentine investor was being treated less favourably than Chilean investors in Spain. Thus, by virtue of the MFN clause in the Argentine-Spain agreement the claimant said, it was entitled to the more favourable treatment that Chilean investors receive under the Spain-Chile bilateral investment agreement. As a result, it argued, its failure to commence a claim on the Spanish courts was not a barrier to bringing a claim under the Argentine-Spain investment agreement.

24. The tribunal rejected Spain's argument that the MFN clause in the Argentine-Spain bilateral investment agreement applied only to substantive and not procedural provisions, pointing out that by its very terms the MFN clause applied to "all matters subject to this

---

<sup>12</sup> *Maffezini v. Kingdom of Spain*, 25 January 2000, ICSID Case No. ARB97/7.

Agreement”. After a review of prior international jurisprudence and Spanish treaty practice, the tribunal concluded that the claimant could use the MFN clause in the Argentine-Spain bilateral investment treaty to claim the better treatment provided in the Spain-Chile investment agreement and thereby avoid the obligation of having to submit its claim to the domestic courts of Spain.

25. Subsequent ICSID tribunals have both followed<sup>13</sup> and distinguished<sup>14</sup> the *Maffezini* decision, although it is not clear that any consistent interpretation of MFN provisions has emerged. The *Maffezini* decision opens the possibility that MFN clauses could have an extremely broad scope. An MFN clause has the potential for becoming a “super-treaty” provision, which would allow beneficiary States simply to pick and choose from amongst the benefits that third States receive from the other contracting party - what has been referred to as “treaty-shopping”. The members of the tribunal in *Maffezini* saw potential problems with their decision and sought to limit its scope with a number of exceptions. But the principle on which those exceptions are based is not made clear in the decision nor is it clear whether such exceptions are exclusive.

26. The problem for States arising out of the *Maffezini* decision is whether they can determine in advance with any certainty what obligation they have in fact undertaken when they include an MFN clause in an investment agreement. Are they granting broad rights, or are the rights they are granting more circumscribed. The 1978 draft articles provide limited guidance on the question. Under draft article 9, a beneficiary State acquires under an MFN clause “only those rights which fall within the subject matter of the clause”. But, determining the subject matter of the clause is the very question with which the *Maffezini* and other tribunals have been grappling.

---

<sup>13</sup> *Siemens A.G. v. Argentine Republic*, 3 August 2004, ICSID Case No. ARB/02/8.

<sup>14</sup> See for example, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. the Hashemite Kingdom of Jordan*, 9 November 2004, ICSID Case No. ARB/02/13.

27. There are further dimensions to the question of the scope of an MFN provision, in particular its relationship to other provisions in investment agreements, such as those relating to national treatment and “fair and equitable treatment”. Some investment tribunals have taken the view that an MFN clause justifies reference to other investment agreements to establish what constitutes “fair and equitable treatment”.<sup>15</sup> This, too, has led to uncertainty in the scope of an MFN clause.

28. *Maffezini* has resulted in States trying to craft MFN clauses that will not have broad-ranging consequences. Distinctions between substantive and procedural provisions, the exclusion of dispute settlement from MFN, and the limitation of MFN to specified benefits have found their way into various agreements. The problem is that States cannot be certain how these new clauses will be interpreted in fact.

29. At one level the problem is simply a matter of treaty interpretation. MFN clauses are worded differently in different agreements. Some are broad in scope and others are narrow. Some limit MFN treatment to those in “like circumstances”. The function of the interpreter therefore is to define the precise scope of the clause in question. Under this approach the problem can be resolved through interpretation. But, at another level the question is more fundamental. Treaty interpretation does not take place in a vacuum. How an interpreter approaches an MFN clause will depend in part on how the interpreter views the nature of MFN clauses.

30. If MFN clauses are seen as having the objective of promoting non-discrimination and harmonization, then a treaty interpreter may consider that the very purpose of the clause is to permit and indeed encourage treaty shopping. An interpreter who sees an MFN clause as having the economic purpose of allowing competition to proceed on the basis of equality of opportunity,

---

<sup>15</sup> *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile*, 25 May 2004, ICSID Case No. ARB/01/7; *Pope & Talbot, Inc. v. Canada*, Award of the NAFTA Tribunal, 10 April 2001, I.L.R. vol. 122, (200), p. 352.

might be more inclined to favour a substantive/procedural distinction in the interpretation of an MFN provision. In this regard, the experience of the interpretation of the MFN clause in the WTO context and in other areas may provide guidance for the interpretation of MFN in the context of investment agreements.

## **6. What could the ILC usefully do?**

31. It is clear that circumstances have changed significantly since the 1978 draft articles on MFN clauses. There is now a body of practice and jurisprudence that was not available at that time. There is also a problem that has emerged with the application of MFN clauses in investment agreements resulting in a need by States for clarification and perhaps progressive development of the law in this area.

32. The argument that the underlying problems that led the General Assembly not to proceed to a convention with the 1978 draft articles remain today would only be compelling if it was proposed that the Commission undertake to update and revise the 1978 draft articles. There are existing forums for dealing with the issues that caused concern with those draft articles. As far as the issue of generalized systems of preferences and the broader question of development are concerned, they are matters being dealt with in the context of the WTO and the Doha Development Round. As far as the issue of customs unions and free trade areas are concerned, they, too, are being dealt with within the framework of the WTO agreements. There is no reason for the Commission to seek to consider undertaking a codification or progressive development exercise in respect of a regime that is developing under the framework of GATT article XXIV and the decisions of WTO panels and the Appellate Body.

33. The issue today with respect to MFN clauses is different from the issues that created concerns with the 1978 draft articles. It has arisen specifically in the context of investment agreements, but it may be of broader application. The real question, given the nature of the problem that currently exists, is whether there is anything that the ILC as the United Nations organ concerned with the progressive development of international law and its codification can usefully do.

34. This is not to suggest that the issue is one that is narrow and technical properly falling within the purview of some other body. It is not. The fundamental questions about MFN clauses are matters of public international law. The central issue is how should MFN clauses be interpreted. And while this may appear to be a narrow question, in reality it is a broad question involving both treaty interpretation and the nature and extent of obligations undertaken by States under the ambit of an MFN clause. It engages our understanding of the role and function of MFN clauses and of their relationship to the principle of non-discrimination in international law.

35. Other bodies have also been focusing on this topic. OECD has produced a study on MFN clauses,<sup>16</sup> as has UNCTAD.<sup>17</sup> Equally, the subject is being explored in the academic literature. This does not mean that the field is already fully occupied.

36. The contrary view, taken by some Governments, is that MFN clauses are varied and do not easily fit into general categories. Governments are able to craft clauses that suit their needs and thus there is no need for any general consideration of the subject. The problems that have arisen can be dealt with on a case-by-case basis and thus it is appropriate to let the jurisprudence on the interpretation of MFN clauses develop as it has been doing. On this analysis there would be no role for the Commission on this topic.

37. Those who support work by the Commission in this area consider that what it could usefully do in this area is provide authoritative guidance on the interpretation of MFN clauses. This would require an exhaustive analysis of the development of the nature, scope and underlying rationale for MFN clauses, the existing MFN jurisprudence in the various

---

<sup>16</sup> OECD, Directorate for Financial and Enterprise Affairs, *Most-Favoured-Nation Treatment in International Investment Law*, Working Papers on International Investment, Working Paper No. 2004/2 (2004). Online: <<http://www.oecd.org/dataoecd/21/37/33773085.pdf>>.

<sup>17</sup> United Nations Conference on Trade and Development (UNCTAD). “Most-Favoured-Nation Treatment” (1999), UNCTAD Series on issues in international investment agreements. UN doc. UNCTAD/ITE/IIT/10 (vol. III).

contemporary areas in which the MFN clause operates today, the variety and uses of MFN clauses in contemporary practice, and how MFN clauses have been interpreted and how they should be interpreted.

38. The result of the Commission's work could be draft articles or draft guidelines relating to the interpretation of MFN clauses or it could be a series of developing model MFN clauses or categories of clauses with commentaries on their interpretation. Either outcome could provide guidance to States in their negotiation of agreements with MFN clauses and to arbitrators interpreting investment agreements.

39. The interpretation of MFN clauses is a topic that responds to the needs of States and practice is sufficiently developed to permit some progressive development and possibly codification in this area. The topic has a defined scope and could be completed within the current quinquennium.

### Select Bibliography

Dolzer, Rudolf and Myers, Terry. "After Tecmed: Most-Favored-Nation Clauses in Investment Protection Agreements" 19 ICSID Review - FILJ 49 (2004).

Ehring, Lothar. "*De Facto* Discrimination in World Trade Law" (2002) 36 (5) Journal of World Trade 921 (Kluwer Law International).

Freyer, Dana H. and Herlihy, David. "Most-Favored Nation Treatment and Dispute Settlement in Investment Arbitration: Just How 'Favored' is 'Most-Favored'?" 20 ICSID Review - FIJL 58 (2005).

Organisation for Economic Co-operation and Development (OECD). "Most-Favoured-Nation Treatment in International Investment Law" (2004). Working Papers on International Investment Number 2004/2.

United Nations Conference on Trade and Development (UNCTAD). "Most-Favoured-Nation Treatment" (1999) UNCTAD Series on issues in international investment agreements. UN doc. UNCTAD/ITE/IIT/10 (vol. III).

Yanai, Akiko. "The Function of the MFN clause in the Global Trading System" (2002). Working Paper Series 01/02 - No. 3, APEC Study Center Institute of Developing Economies, online: <[http://www.heisummer.ch/pdf/introduction/003\\_yanai\\_mfn\\_clause.pdf](http://www.heisummer.ch/pdf/introduction/003_yanai_mfn_clause.pdf)>.

-----