Document:-
A/CN.4/3095

Summary record of the 3095th meeting

Topic:
<multiple topics>

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

85. The question of whether the Commission was engaging in codification had continually been coming up ever since the item had been placed on the agenda—a rather surprising state of affairs. What should be done? Were the Special Rapporteur on the expulsion of aliens and all the Commission's other special rapporteurs to be told how to recognize a customary rule for the purposes of codification? Should the topic proposed by Sir Michael, the formation of customary rules of international law, be taken up and the issue resolved before anything else was done? Except for the responsibility of States and to some degree diplomatic protection, no topic brought together as large a body of legal instruments, practice and international and domestic case law as did the expulsion of aliens. Under those circumstances, it was surprising to hear that the topic could not be codified, still more, that the Commission wished to develop guidelines. In any case, it would be for the Commission to decide on the form to be taken by the text that would be submitted to the General Assembly. He had no personal stake in the matter. However, it should be recalled that the topic had contributed material to the codification of State responsibility: most of the cases cited in the articles on State responsibility for internationally wrongful acts[219] related to the expulsion of aliens, from the conclusions of the arbitral proceedings of the late nineteenth century to those of the present day, not to mention the decisions of treaty bodies and regional human rights courts.

86. He welcomed the fact that the Commission had decided to refer all the draft articles to the Drafting Committee. He had taken note of all the drafting proposals, which would be considered in due course by the Committee that had been set up for that very purpose. Regarding the proposal to draw up a draft article on the suspensive effect of appeals against an expulsion decision, he continued to maintain that he had not found sufficient material, and still less, sufficiently convergent State practice, to enable him to put forward a draft article. However, the Commission might choose—as a matter of policy rather than of progressive development, as practice varied so widely—to propose a draft article on the subject. There was no reason not to do so, but it should be borne in mind that the foundation was not sufficiently solid.

87. Regarding the proposal to draft an article on international cooperation, he wished to recall that such cooperation was a general principle underlying all the relations between States in peacetime, according to General Assembly resolution 2625 (XXV) of 24 October 1970, entitled "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations". If the Commission decided to include such a provision in the draft articles, something that did not seem particularly useful, it would have to do the same for all the other texts it had produced.

88. A member of the Commission had questioned the usefulness of draft article 8 (Expulsion in connection with extradition). All the topics were interrelated, however, and it was not because one was not specifically on extradition that a provision on that subject could not be developed. Draft article 8 was all the more useful precisely because it did not go into the subject matter of extradition. As to the retention of article J1 on diplomatic protection, he would have liked to have had more time to demonstrate its advantages. In the *Ahmadou Sadio Diallo* case, the ICJ had held that the application of the Republic of Guinea was admissible on grounds of the protection of Mr. Diallo's human rights, although diplomatic protection had previously been deemed to cover only certain personal rights. It would be regrettable not to reflect in a draft article the latest developments in the law. In conclusion, he thanked the members of the Commission for their support for referring all the draft articles on the expulsion of aliens to the Drafting Committee.

89. The CHAIRPERSON said that he took it that the Commission wished to refer to the Drafting Committee draft articles D1, E1, F1, as revised, H1, I1 and J1, as contained in the second addendum to the sixth report on expulsion of aliens, and revised draft article 8, as reproduced in a footnote to the report of the Commission on the work of the previous session.[220]

It was so decided.

Organization of the work of the session (*continued*)[*]

[Agenda item 1]

90. Mr. HASSOUNA (Chairperson of the Working Group on methods of work) said that the Working Group on methods of work was composed of the following members: Mr. Caflisch, Mr. Candioti, Mr. Fomba, Mr. Galicki, Ms. Jacobsson, Mr. Melescanu, Mr. Murase, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood and Mr. Perera (*ex officio*).

The meeting rose at 1.05 p.m.

3095th MEETING

Tuesday, 31 May 2011, at 10 a.m.

Chairperson: Ms. Marie G. JACOBSSON
(Vice-Chairperson)

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

---

[219] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 30 *et seq.*, para. 77.

[220] See footnote 217 above.

[*] Resumed from the 3092nd meeting.

Other business (A/CN.4/638, sect. J)

[Agenda item 15]

PEACEFUL SETTLEMENT OF DISPUTES (A/CN.4/641[221])

1. The CHAIRPERSON invited the members of the Commission to consider the working paper on peaceful settlement of disputes (A/CN.4/641) prepared by Sir Michael Wood.

2. Sir Michael WOOD, introducing the working paper, drew attention to a very useful note by the Secretariat entitled "Settlement of dispute clauses", published at the sixty-second session.[222]

3. At its sixty-second session, the Commission had decided that its aim at the current session would be to identify specific issues relating to dispute settlement that might be taken up in the Working Group on the long-term programme of work.[223]

4. According to paragraph 140 of the topical summary, prepared by the Secretariat, of the discussion held in the Sixth Committee of the General Assembly during its sixty-fifth session (A/CN.4/638), some delegations had welcomed the indication that the Commission would continue its discussion on settlement of dispute clauses, and particular attention had been drawn to the idea of exploring options for the settlement of disputes involving international organizations.

5. Paragraphs 4 to 16 of the working paper contained a summary of the Commission's debate on dispute settlement during the sixty-second session, and paragraphs 15 and 16 listed suggestions made for specific outcomes to be sought from the Commission's study of the issue. Paragraphs 17 and 18 recalled the work already done on the peaceful settlement of disputes by the United Nations and other bodies, including regional organizations. A more detailed account of that work was contained in the note by the Secretariat on settlement of dispute clauses. Paragraphs 19 to 21 of the working paper contained tentative suggestions for specific issues that might be appropriate for further consideration.

6. The Commission's consideration of dispute settlement issues could be viewed as part of its contribution to the debate within the General Assembly on the rule of law at the national and international levels. As was clear from the note by the Secretariat, the Commission had periodically addressed the subject of dispute settlement clauses, even if, for a variety of reasons, the results had been quite meagre.

7. During the debate at its sixty-second session,[224] the Commission had noted the growing importance of procedures for the peaceful settlement of disputes. The view had been expressed that the Commission should continue to have a role in promoting the practical implementation of the peaceful settlement of disputes, a basic principle of the Charter of the United Nations. It had been noted that the reasons that had led the Commission to hesitate to take up dispute settlement issues might no longer apply. The change was due to recent activity by the political organs of the United Nations stressing the importance of dispute settlement.

8. For all the respect paid to the rule of law in international affairs, many States continued not to accept dispute settlement clauses such as those contained in the Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes and the Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes. Many States maintained reservations to the dispute settlement clauses of multilateral conventions, including those drawn up on the basis of the Commission's work. There had been an encouraging trend in the late 1980s and 1990s, with the end of the cold war, to withdraw such reservations or not to formulate them in the first place. Recent case law of the ICJ had the potential to promote that trend and thus to encourage States to accept such clauses.

9. It had also been suggested at the sixty-second session that, given the current emphasis on the rule of law in international affairs, there should be "a presumption in favour of including effective dispute settlement clauses in international instruments".[225] Such a trend could be seen in the inclusion of article 27 in the United Nations Convention on Jurisdictional Immunities of States and Their Property, adopted in 2004, and of elaborate dispute settlement provisions in the International Convention for the Protection of All Persons from Enforced Disappearance, adopted in 2006.

10. In specific cases, the inclusion of a dispute settlement clause might be an essential part of a package deal on some delicate issue. A classic example was the 1969 and the 1986 Vienna Conventions, which contained a dispute settlement clause relating to *jus cogens* provisions. Part XV of the United Nations Convention on the Law of the Sea provided another such example.

11. Paragraph 20 of the working paper listed five tentative suggestions for issues that might be appropriate for future consideration. One issue that had been highlighted by the Sixth Committee in 2010 was procedures for dispute settlement involving international organizations (A/CN.4/638, para. 140). Consideration of that issue followed naturally from the Commission's work on the topic of the responsibility of international organizations, which it expected to conclude at the current session. One feature of that topic was the relative lack of corresponding case law, in contrast to the extensive amount of case law on State responsibility. That was, at least in part, a reflection of the lack of opportunities for cases to be brought by or against international organizations.

12. The Commission could decide in due course on the precise scope of a topic or subtopic relating to dispute

[221] Reproduced in *Yearbook … 2011*, vol. II (Part One).

[222] Reproduced in *Yearbook … 2010*, vol. II (Part One), document A/CN.4/623.

[223] See *Yearbook … 2010*, vol. II (Part Two), p. 15, para. 24 and p. 202, para. 388.

[224] See *Yearbook … 2010*, vol. I, 3070th meeting, pp. 261–268.

[225] *Ibid*., p. 263, para. 16.

settlement, focusing on the settlement of disputes to which international intergovernmental organizations were parties, and excluding the settlement of inter-State disputes by such organizations under Chapter VI of the Charter of the United Nations, *inter alia*.

13. Should the new topic be limited to universal organizations, or should it also include the regional organizations that were becoming increasingly important international actors? He thought that it should include all international organizations, both universal and regional. The Commission would also have to decide whether the topic should be confined to disputes arising under international law or also cover private-law disputes of a contractual or non-contractual nature. He thought that it should not include the latter, as such disputes differed significantly. As to whether the topic should include staff-related matters, he thought not, as such matters were already well catered for in the law. Other questions were whether the topic should include all forms of dispute settlement or only those involving third-party mechanisms, and within the latter, whether it should be limited to arbitral, judicial or other mechanisms leading to a binding decision. Lastly, the Commission would have to decide whether the new topic should cover the enforcement of decisions.

14. Arrangements for the settlement of disputes to which international organizations were parties had long been a source of fascination for international lawyers, and a field of innovation. There was already some practice and several mechanisms for dispute settlement. Some were to be found in instruments drawn up on the basis of the Commission's work, such as the annex to the 1986 Vienna Convention. Other examples were the binding and compulsory advisory opinion mechanism provided for in section 30 of the Convention on the privileges and immunities of the United Nations and in section 32 of the Convention on the privileges and immunities of the specialized agencies. Recourse had already been had to those mechanisms, as evidenced by the ICJ advisory opinion of 15 December 1989 on the *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations* and its advisory opinion of 29 April 1999 on the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*. The 1982 United Nations Convention on the Law of the Sea provided that certain organizations could be parties to dispute settlement proceedings under the new mechanisms it established in article 287, including the International Tribunal for the Law of the Sea. The Permanent Court of Arbitration had also drawn up optional rules for dispute settlement.[226] However, those examples reflected a rather piecemeal approach. In most cases, there was no international court or tribunal that had any possibility whatsoever of jurisdiction over disputes to which international organizations were parties.

15. A new topic could either be self-contained or constitute part of a broader topic on the peaceful settlement of disputes. Depending on the choices made about its scope, a possible title for a new topic or subtopic might be "Procedures for the settlement of international disputes to which international organizations are parties". A first step towards the development of the topic might be to examine existing arrangements for the settlement of disputes involving one or more international organizations and arising under international law. Substantial material already existed, both at the universal level and regionally.

16. Certain suggestions made in the debate at the sixty-second session[227] related more generally to the way the Commission set about its work. One was that the note by the Secretariat could serve as a point of reference for consideration by the Commission and by States of the inclusion of dispute settlement clauses in future drafts and instruments. Another was that, when drafting proposals, the Commission should recall that, in paragraph 9 of the Manila Declaration on the Peaceful Settlement of International Disputes (General Assembly resolution 37/10 of 15 November 1982, annex), the General Assembly had encouraged States to include in bilateral agreements and multilateral conventions effective provisions for the peaceful settlement of disputes arising from their interpretation or application. A third suggestion was that, in recognition of the practical importance of dispute settlement, the Commission should decide, at least in principle, to discuss it at an appropriate stage of the consideration of each topic or subtopic. Fourthly, the Commission should acknowledge the important work done by other United Nations bodies. The *Handbook on the Peaceful Settlement of Disputes between States*,[228] published in 1992, remained a valuable introduction to the subject, and the Secretariat might be encouraged to find a way of updating it. Lastly, the Commission should invite regional bodies to provide information on any work they were doing in relation to dispute settlement.

17. He looked forward to hearing the reactions of Commission members, particularly to the proposal for a new topic and a first subtopic to be entitled, respectively, "Settlement of disputes" and "Procedures for the settlement of international disputes to which international organizations are parties". The appropriate place to develop the work was now in the Working Group on the long-term programme of work.

18. Mr. VARGAS CARREÑO said that he agreed with most of the comments and preliminary suggestions made by Sir Michael in his working paper. The peaceful settlement of disputes was a fundamental issue of international law, not only because in key provisions of the Charter of the United Nations it was accorded the status of a basic principle underlying a primary purpose of the United Nations—the maintenance of international peace and security—but also because in a globalized and increasingly interdependent world, it was essential to have dispute settlement mechanisms that allowed States to resolve their differences in a quick, effective and appropriate manner.

[226] Optional Rules for: (*a*) Arbitrating Disputes between Two States (1992); (*b*) Arbitrating Disputes between Two Parties of Which Only One is a State (1993); (*c*) Arbitration Involving International Organizations and States (1996); and (*d*) Arbitration between International Organizations and Private Parties (1996); as well as (*e*) Arbitration of Disputes relating to Natural Resources and/or the Environment (2001); and (*f*) Arbitration of Disputes relating to Outer Space Activities (2011). These Optional Rules are available from the website of the Permanent Court of Arbitration at www.pca-cpa.org.

[227] *Yearbook … 2010*, vol. I, 3070th meeting, p. 263, paras. 19–24.

[228] Office of Legal Affairs, Codification Division, *Handbook on the Peaceful Settlement of Disputes between States* (OLA/COD/2394) (United Nations publication, Sales No. E.92.V.7), New York, 1992.

19. As the Secretariat had pointed out in its excellent note, over the past 15 years the General Assembly had adopted six conventions and three protocols, all of which provided for the same mechanism for the settlement of disputes: negotiation. A dispute that could not be settled by negotiation within a reasonable time must, at the request of either party, be submitted to arbitration. If the parties were unable to agree on the organization of the arbitration, any party could refer the dispute to the ICJ. The current trend thus was to attach increasing importance to negotiation, arbitration and recourse to the ICJ as the most suitable methods of resolving a dispute.

20. The Commission should perhaps recommend that, in any dispute in which the parties expressed a wish to have recourse to a peaceful method of settlement, they should start by seeking a solution through negotiation. Some members of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, when drafting the Declaration subsequently adopted as General Assembly resolution 2625 (XXV) of 24 October 1970, had proposed to include a requirement that States which were party to a dispute must try first to settle it by negotiation.[229] That proposal had not been accepted because some considered initial efforts to settle a dispute by negotiation to be the standard practice and therefore viewed a legal provision as unnecessary. Today, however, when so many States were bound by agreements stipulating a means of dispute settlement, it might be useful to recommend that they should initially endeavour to resolve the dispute through negotiation.

21. Arbitration, so prevalent in the twentieth century, seemed now to have partially given way to recourse to the ICJ. Arbitration nevertheless continued to be a frequent dispute settlement method, particularly in respect of foreign investment, under the system established by the International Centre for Settlement of Investment Disputes (ICSID).

22. It was the States that were parties to the dispute which determined the applicable substantive and procedural rules for arbitration. Since those rules could not provide for every situation that might arise in an arbitration case, the subsidiary rules established by international customary law came into play, hence the importance of the Model Rules on Arbitral Procedure, which the Commission had adopted in 1958.[230] Should the Commission decide to take up the topic of the peaceful settlement of disputes, it might usefully update those rules so that States could take them into account when opting for arbitration as a means of dispute settlement.

23. There was no doubt that the ICJ was the preferred dispute resolution forum in the Latin American region. The Court had recently adjudicated or was adjudicating an unprecedented number of disputes in the region. If the Commission decided to formulate recommendations on dispute settlement, one of them ought to be that States should recognize as compulsory the jurisdiction of the ICJ. That would be in line with similar recommendations made by the Security Council and the Secretary-General of the United Nations.

24. In his working paper, Sir Michael recalled a statement by the President of the Security Council calling upon States that had not yet done so to consider accepting the jurisdiction of the Court.[231] Sir Michael also referred to a letter from the Secretary-General encouraging States to withdraw reservations made to jurisdictional clauses contained in multilateral treaties to which they were a party providing for the submission to the ICJ of disputes relating to the interpretation or application of those treaties.[232] The difference between those two texts was that the statement of the President of the Security Council was broader. It allowed States which, for substantiated reasons, were not able to make a general declaration under the optional clause recognizing as compulsory the jurisdiction of the ICJ, to recognize—by means of the withdrawal of reservations to the relevant clauses—the jurisdiction of the Court in treaties that predated a dispute or were concluded after its emergence.

25. Negotiation, arbitration and recourse to the ICJ were thus the most common means of dispute settlement. In contrast, the instruments prepared by the Commission a few decades earlier and adopted subsequently by plenipotentiary conferences usually emphasized conciliation as a dispute resolution mechanism. It was provided for, *inter alia*, in the 1969 and 1986 Vienna Conventions and in the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character. Conciliation had been mentioned in those instruments not because of its intrinsic merits but as a compromise between States that had advocated acceptance of the compulsory jurisdiction of the ICJ and those that had been in favour of including only a general reference to the methods of dispute settlement set out in Article 33 of the Charter of the United Nations.

26. The fact was that conciliation had never been used to settle a dispute, and it was not normally used in inter-State disputes. While it was true that many bilateral treaties provided for conciliation, there had been very few cases in practice where States had chosen to settle disputes in that way. When States wished to use the diplomatic channel, they opted for mediation, which had proved successful in cases such as the dispute between Argentina and Chile in the *Beagle Channel* case, mediated by the Holy See. Otherwise, if they wished to resolve a dispute definitively, States generally chose compulsory means, such as arbitration or the jurisdiction of the ICJ.

27. What was most important was that the Commission's analysis of dispute settlement be realistic and in line with current practice. That was one of the merits of the work done by Sir Michael. For instance, in his report he invited the

[229] See *Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 18* (A/8018).

[230] *Yearbook ... 1958*, vol. II, document A/3859, Report of the Commission on the work of its tenth session, p. 83, para. 22.

[231] Statement by the President of the Security Council of 29 June 2010, on the item entitled "The promotion and strengthening of the rule of law in the maintenance of international peace and security" (S/PRST/2010/11), para. 2.

[232] *Treaty Event 2010: Towards Universal Participation and Implementation*, "The Secretary-General's Letter to Heads of State and Government", of 12 April 2010 (available from https://treaties.un.org, under the "Treaty Events" tab).

Commission to consider why States accepted the settlement of disputes in trade matters, yet not in other areas. The truth was that the system for settling disputes in the WTO was probably one of the simplest and most efficient that existed and, more importantly, the costs involved were borne by that Organization. Of course, it was difficult to transpose such a system to other types of disputes, but the experience of WTO should be taken into account.

28. Accordingly, the study of international dispute settlement should not focus solely on inter-State disputes: other disputes under international law involving enterprises and private individuals should also be considered. Most cases of international arbitration were currently handled by ICSID, but its manner of doing so had been questioned. It might therefore be useful for the Commission to consider, not substantive matters relating to foreign investments—other bodies were more competent to do so—but procedures governing the settlement of disputes by ICSID.

29. Other useful recent practice in the settlement of disputes could be found in the decisions of regional human rights bodies. The judgments of the European Court of Human Rights and the Inter-American Court of Human Rights had greatly facilitated the protection of human rights at the national level and the progressive development of international law. The regional bodies had more experience than the United Nations in settling human rights disputes, although that was not true for other types of disputes, at least in Latin America.

30. The basic instruments of the inter-American system for the protection of human rights all stipulated, in almost identical terms, that American States would endeavour to settle any dispute through the procedures established under the inter-American system before referring the matter to the United Nations. Those provisions had been applied for many years, until the invasion of Guatemala in 1954. The appeal for assistance of the Government of Guatemala to the Security Council,[233] whose members had included Brazil, Colombia and the United States of America, had been rejected on the grounds that the inter-American system did not allow States to appeal directly to the Security Council.[234] The situation had since changed with the amendment of the relevant regional instruments so that nothing in their provisions could be interpreted as depriving a State of the right to refer a dispute directly to the Security Council in accordance with Article 35 of the Charter of the United Nations.

31. In conclusion, he said that the excellent documents prepared by the Secretariat and Sir Michael had enabled the Commission to get off to a good start in the work on dispute settlement. At its next session, the first in the new quinquennium, it should take up the topic of peaceful settlement of disputes. He was accordingly in favour of referring the matter at the current session to the Working Group on the long-term programme of work so that it could take appropriate action.

32. Mr. MURASE, referring to the topics for consideration listed in paragraph 20 of Sir Michael's useful working paper, said that consideration of the inclusion of model dispute settlement clauses in drafts prepared by the Commission (para. 20 (*a*)) might not be a fruitful exercise. Each set of draft articles had a distinctive character that might warrant a specific dispute settlement clause. If he were proposing a topic on international environmental law, for instance, he would certainly incorporate a dispute clause that addressed proof of scientific evidence, an important characteristic of environmental disputes. However, it might not be equally relevant in other branches of the law. Thus, the "one-size-fits-all" approach might not be appropriate.

33. The question of the access to and standing before different dispute settlement mechanisms of various actors (para. 20 (*c*)) would be an interesting topic for study, but it would be naive to expect that the Commission's ideas would be accepted by States. Declarations under the optional clause of the Statute of the International Court of Justice (para. 20 (*e*)) depended more on the political will of States than on technical questions of drafting.

34. In view of the increasing number of disputes arising between international organizations and States, he endorsed Sir Michael's proposal to consider strategies for improving procedures for dispute settlement involving international organizations (para. 20 (*b*)). Advisory proceedings were the only way that international organizations could bring their claims before the ICJ. The subject matter of the advisory cases varied, falling largely into four categories: the status of members of the organizations and their obligations; the status of members and observer missions in host countries; the status and treatment of officials and experts of international organizations in the territory of member States and non-member States; and treaty interpretation.

35. While it might be desirable from the point of view of international organizations to amend the Statute of the International Court of Justice so that they could bring their claims as contentious proceedings, such a proposal must come from States and not from the International Law Commission. Perhaps a proposal worth considering would be to invest the Secretary-General of the United Nations with the competence to request an advisory opinion, since the Secretary-General often mediated or arbitrated disputes between States, for example the *"Rainbow Warrior"* arbitration, and an advisory opinion from the ICJ would help significantly in settling such disputes. Yet even such a modest proposal might encounter opposition from some States. Therefore, there did not seem much that the Commission could do to enhance the role of the Court in handling disputes involving international organizations.

36. By contrast, disputes between international organizations and States were normally considered best settled by arbitration. The Commission could contribute a great deal by drafting a set of model rules on arbitral procedures involving international organizations, based on the 1958 Model Rules on Arbitral Procedure.[235]

---

[233] Cablegram, dated 19 June 1954, from the Minister for External Relations of Guatemala, addressed to the President of the Security Council (S/3232). See also Security Council resolution 104 (1954) of 20 June 1954.

[234] See *Official Records of the Security Council, Ninth Year*, 675th meeting, 20 June 1954 (S/PV.675).

[235] See footnote 230 above.

37. The IMF generally responded to disagreements with its member States by withholding funding, which created fierce disputes on a number of issues such as the best accounting methods of a member State's central bank and the austerity measures that a defaulting country should take. Those were the types of contract disputes that would seem to lend themselves well to litigation or arbitration, but thus far no appropriate forum for them existed. It might make sense for organizations responsible for economic activities like the IMF and the World Bank to resolve disputes as if they were private parties. That would allow them, theoretically at least, to have recourse to ICSID or to a forum of commercial arbitration.

38. However, since international organizations were intrinsically different from private individuals on the one hand and from States on the other, it might be advisable to envisage a set of model rules specifically for disputes between international organizations and States. When drafting such rules, the Commission should focus on the cases that international organizations would be most likely to face. One typical area of dispute was the dissolution or bankruptcy of an international organization resulting in debt owed to third parties, such as in the case of the International Tin Council or, more recently, the Korean Peninsula Energy Development Organization. The model rules should also facilitate access to arbitration by private corporations—a point where his views seemed to differ from those of Sir Michael.

39. As to the second topic that the Commission might wish to explore, that of competing jurisdictions between international courts and tribunals (para. 20 (*d*)), he said that the proliferation of international courts and tribunals was a fact of life, but it posed problems of how to overcome the possible fragmentation of international case law and coordinate competing jurisdictions. The primary concern was the lack of *stare decisis* among the different courts and tribunals. For example, the ICJ and the International Tribunal for the Former Yugoslavia employed different tests ("effective control test" and "overall control test", respectively) to determine the attribution of certain conduct to the State concerned, as illustrated by the former's case concerning *Military and Paramilitary Activities in and against Nicaragua* and the latter's *Tadić* case.

40. The second problem was parallel jurisdiction, which occurred both between universal and regional courts (the ICJ and the European Court of Justice) and between courts of general jurisdiction and specialized tribunals (the European Court of Justice and the WTO). In the era of the General Agreement on Tariffs and Trade (GATT), the European Court of Justice had on several occasions found that the GATT Panel Reports had no effect on the domestic law of European Community member States; he was not certain that the establishment of the WTO had eliminated that particular problem. The *MOX Plant* case had been before three tribunals: the European Court of Justice, the International Tribunal for the Law of the Sea and the dispute settlement procedure under the Convention for the protection of the marine environment of the North-East Atlantic (OSPAR Convention). The case concerning the *Conservation and Sustainable Exploitation of Swordfish Stocks* had been before the WTO and the International Tribunal for the Law of the Sea concurrently.

41. One way in which States had tried to overcome the problem of competing jurisdictions was through treaty provisions. In *Southern Bluefin Tuna Cases*, in 2000, the Arbitral Tribunal constituted under annex VII of the United Nations Convention on the Law of the Sea had found, in favour of Japan, that it did not have jurisdiction under the general rules of the Convention because the parties had signed a more specific dispute resolution procedure that governed the dispute resolution mechanism. On the other hand, in the *MOX Plant* case it had been found that a similar regional treaty (the Convention for the protection of the marine environment of the North-East Atlantic) did not prevent the International Tribunal for the Law of the Sea from exercising parallel jurisdiction because the treaties did not cover exactly the same set of rights (order of 3 December 2001, para. 50).

42. The applicability of *lis pendens* and *res judicata* would also have to be considered. With regard to the former, in the case concerning the *Chorzów Factory*, the Permanent Court of International Justice had decided that it could exercise jurisdiction over the State-to-State dispute concerning the confiscation by Poland of German-owned factories, despite concurrent jurisdiction by the private German companies involved.

43. With regard to the principle of *res judicata* and its applicability between different international institutions, he noted that the American Convention on Human Rights: "Pact of San José, Costa Rica" had an explicit *res judicata* clause (art. 47 (*d*)), but such a clause was rare in treaties. The article prohibited the exercise of jurisdiction by the Inter-American Commission on Human Rights if the petition was substantially the same as one previously studied by that Commission or by another international organization. Like many other countries, Japan had made a reservation to the Statute of the International Court of Justice when accepting the compulsory jurisdiction of the ICJ to the effect that the Court would have jurisdiction only over issues that were not already decided by other forums.[236] In its 1960 judgment in the case concerning the *Arbitral Award made by the King of Spain on 23 December 1906*, the ICJ had held that it could not decide the merits of a previously binding arbitration between the two States, although it maintained competence to declare the arbitral award null and void. The Court had upheld that judgment in its 1991 judgment in the case concerning the *Arbitral Award of 31 July 1989*.

44. In conclusion, he said that while he was not certain which of the suggestions made by Sir Michael in paragraph 20 (*b*) and (*d*) was better, he was ready to cooperate on whatever topic the Commission might wish to take up.

45. Mr. CAFLISCH said that while the Commission should consider all aspects of the peaceful settlement of disputes, it should pay particular attention to those that related to the multilateral conventions that were often the product of its work. It was true that, thus far, it had proved impossible to set up a universal jurisdiction or a general mechanism for the peaceful settlement of disputes, but success had been achieved in specific areas, for example,

[236] *Multilateral Treaties Deposited with the Secretary-General* (available from https://treaties.un.org), chap. I.4.

the law of the sea, and the law of the WTO. It was therefore necessary to move forward cautiously when establishing rules on the peaceful settlement of disputes.

46. He was not in favour of preparing a single set of model dispute settlement clauses because the areas requiring peaceful settlement rules differed greatly. As Mr. Murase had pointed out, one size did not fit all. However, he could go along with the idea of drafting several sets of model clauses.

47. He was very much in favour of improving procedures for dispute settlement involving international organizations, more or less along the lines indicated in Sir Michael's introductory statement. That could constitute a first step and would not necessarily rule out work on the other topics suggested in paragraph 20 of the working paper.

48. As he had suggested at the previous session, the Commission should acquire the reflex, whenever it drafted an instrument, of considering whether it should include articles on a mechanism for the peaceful settlement of disputes and, if so, what that mechanism should be. That reflex could also take the form of always inviting special rapporteurs, when they began to study a topic, to consider the matter of dispute settlement and to submit proposals on how to deal with it.

49. He would like to see the Commission get down to serious work on dispute settlement at the current session so that when it was reconstituted at the next session, the new Commission could take up the subject with the least possible delay. He would not like the Commission to embark on an unfocused, general discussion that was unlikely to produce results, however.

50. Mr. DUGARD said that the peaceful settlement of disputes certainly was an important aspect of the rule of law. For that reason, it was encouraging that there was more international litigation than ever before and that the ICJ was the busiest it had been in the whole of its history. The time was therefore ripe for a study of measures conducive to the peaceful settlement of disputes.

51. It would be unwise to focus on procedures for dispute settlement involving international organizations, because the legal advisers to international organizations appeared to object to international organizations being singled out for special attention. The Commission should therefore broaden its scope of enquiry.

52. Conversely, it would be wise to examine the possibility of drafting model dispute settlement clauses for inclusion in the texts prepared by the Commission. Sir Michael had made the interesting comment that the recent case law of the ICJ might lead States to reconsider their reservations to dispute settlement clauses. Mr. Dugard wondered if Sir Michael was referring to the very powerful joint separate opinion in the case concerning *Armed Activities on the Territory of the Congo,* which had sent out the message to States that the Court might rule on the validity of reservations to dispute settlement clauses, or to the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*. Sir Michael was quite right when he said that this aspect of the topic required careful attention.

53. Dispute settlement clauses had not been included in the most recent sets of draft articles drawn up by the Commission (on responsibility of States for internationally wrongful acts, responsibility of international organizations, diplomatic protection and the effects of armed conflicts on treaties). When the articles on State responsibility for internationally wrongful acts[237] were being prepared, Mr. Kateka had launched a very interesting and controversial debate by suggesting that model dispute settlement clauses be included.[238] At that juncture, the Commission had been fairly evenly divided on the matter, but since then it seemed to have taken it for granted that the issue should be left to the Sixth Committee or to other international forums charged with the task of converting the Commission's draft texts into international instruments.

54. There was a real need to address the subject of dispute settlement involving international organizations. The Commission should examine the suggestion that the Statute of the International Court of Justice be amended to allow it to hear disputes between States and international organizations. It could take that opportunity to consider the settlement of disputes between States and international organizations on the one hand and NGOs on the other. In the past, the only subjects of international law had been States and international organizations, but in the twenty-first century, international disputes frequently involved NGOs.

55. Concerns about forum shopping had arisen because the United Nations Convention on the Law of the Sea had provided for a choice of bodies to hear disputes involving the law of the sea: the International Tribunal for the Law of the Sea, the ICJ or an arbitral tribunal. It would therefore be helpful if the Commission were to ascertain whether offering such a choice had been an effective way of dealing with dispute settlement or whether it had led to the fragmentation of dispute mechanisms.

56. With regard to declarations under the optional clause in Article 36, paragraph 2, of the Statute of the International Court of Justice, he said that it was widely recognized that most States did not have the political will to accept that clause. However, very little pressure was brought to bear on them to do so. The Rome Statute of the International Criminal Court had been ratified by 115 States as a result of the pressure of public opinion and NGOs. Surely it would be possible to engage in such a process with respect to the optional clause. If the Commission did draft a model declaration, it might be easier for other bodies to press States to accept the optional clause.

57. The Commission should not be afraid of considering the idea of investing the Secretary-General with the power to request advisory opinions from the ICJ. Times had changed, and States might be more receptive than they had been in the past to that idea.

---

[237] General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and the commentary thereto are reproduced in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

[238] *Yearbook … 2001*, vol. I, 2668th meeting, p. 14, para. 38; see also, *inter alia,* the statements by Mr. Pellet (*ibid*., pp. 14–15, paras. 39–40); Mr. Dugard (*ibid*., p. 16, para. 47); Mr. Sepúlveda (*ibid*., 2671st meeting, p. 29, paras. 24–28); and Mr. Tomka (*ibid*., p. 30, para. 36).

58. The Commission should also turn its attention to the establishment of procedures and principles for fact-finding missions. International organizations often set up a fact-finding mission in order to settle very serious disputes, but the very nature of the mission had sometimes been challenged on the grounds that it was not, by definition, a judicial body. During her visit to the Commission, the United Nations Legal Counsel had explained that the Secretary-General requested advice from panels, but in reality, such advisory panels engaged in a fact-finding exercise. The Commission had to recognize the need for a code of conduct for fact-finding missions, especially as the broad guidelines in the Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security, contained in the annex to General Assembly resolution 46/59 of 9 December 1991, were seldom followed in practice.

59. Mr. MELESCANU said that the Secretariat's excellent note on the peaceful settlement of disputes[239] examined 17 peaceful settlement clauses, of which 9 had been embodied in texts and 8 had not. While the note offered the basis for imaginative solutions when drafting model dispute settlement clauses, he agreed that the main problem was the lack of States' acceptance of such clauses.

60. There had never been a better time to focus on improving dispute settlement procedures involving international organizations, since the Commission was about to adopt the draft articles on the responsibility of international organizations.[240] It should therefore examine the manner in which disputes that might arise from their application could be solved.

61. The subject fitted in well with the campaign of the United Nations to strengthen the rule of law. The Commission could initially focus on procedures for improving dispute settlement involving international organizations, and it could then expand the list contained in paragraph 20 of the working paper. He strongly supported referral of the topic to the Working Group on the long-term programme of work with the recommendation that it be included as an item on the agenda of the following year's session. He agreed with Sir Michael that there was not enough time at the current session to appoint a Special Rapporteur on the topic.

62. Sir Michael WOOD, responding to some of the points raised during the debate, said that the case law to which he had referred in the context of reservations to dispute settlement clauses had been the judgment of the ICJ in the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*. The Court's approach indicated that the risk that States thought they were assuming if they accepted clauses under specific conventions, particularly those in the field of human rights, was not as great as it seemed, since the Court would interpret and apply such clauses in a reasonable manner.

63. Although Mr. Dugard had been right in saying that political will was the main problem in respect of declarations under the optional clause, it had to be acknowledged that the actual drafting of those declarations was very difficult, because it was necessary to have a deep knowledge of case law in order to understand the effect of various provisions. In his experience, States often made such declarations in haste without carefully considering them. On a technical level, it would be helpful if the Commission were to look at possible elements for inclusion in those declarations. Some elements, for example a cut-off date, might be a means of encouraging States to accept the optional clause, as they would no longer fear being held responsible for events that had occurred many years earlier. When the Council of Europe had engaged in such an exercise, at least one State had accepted the optional clauses under articles 25 and 46 of the European Convention on Human Rights and other States had started to consider such action.

64. It would be advisable to investigate the principles underpinning fact-finding missions. It would also be interesting to explore the idea of giving the Secretary-General the power to request an advisory opinion from the ICJ.

Organization of the work of the session (*continued*)

[Agenda item 1]

65. Mr. CANDIOTI (Chairperson of the Working Group on the long-term programme of work) said that the Working Group had the following members: Mr. Caflisch, Mr. Comissário Afonso, Ms. Escobar Hernández, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Nolte, Mr. Pellet, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood and Mr. Perera (*ex officio*).

66. Mr. PERERA (Co-Chairperson of the Study Group on the most-favoured-nation clause) said that in addition to Mr. McRae, who was the other Co-Chairperson, the Study Group comprised: Mr. Caflisch, Mr. Candioti, Ms. Escobar Hernández, Mr. Gaja, Mr. Hmoud, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Saboia, Mr. Singh, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti and Sir Michael Wood.

The meeting rose at 11.35 a.m.

3096th MEETING

Wednesday, 1 June 2011, at 10 a.m.

Chairperson: Ms. Marie G. JACOBSSON (Vice-Chairperson)

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

---

[239] *Yearbook … 2010*, vol. II (Part One), document A/CN.4/623.

[240] *Yearbook … 2011*, vol. II (Part Two), chap. V, sect. E.