Document:-
A/CN.4/3070

Summary record of the 3070th meeting

Topic:
Other business

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

certain relevant cases might well hamper any attempt at a sufficiently comprehensive and useful analysis of the issues involved.

46. He recalled that, when selecting a topic, the Commission was generally guided by established criteria, namely that the topic should reflect the needs of States in respect of the progressive development and codification of international law; it should be sufficiently advanced in stage in terms of State practice to permit progressive development and codification; and it should be concrete and feasible for the purposes of progressive development and codification.

47. Having considered all aspects of the matter in the light of its previous discussions, and taking into account the views of Governments including those reflected in the working paper, the Working Group recommended that the Commission not consider the transboundary oil and gas aspects of the topic "Shared natural resources".

48. In conclusion, he expressed the hope that the Commission would take note of the report of the Working Group and endorse its recommendation. He expressed his appreciation to Mr. Murase and all the members of the Working Group for their useful contributions, and to the Secretariat for its valuable assistance.

49. The CHAIRPERSON said he took it that the Commission wished to take note of the report of the Working Group on shared natural resources and endorse its recommendation.

It was so decided.

The meeting rose at 1 p.m.

3070th MEETING

Thursday, 29 July 2010, at 10 a.m.

Chairperson: Mr. Nugroho WISNUMURTI

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

Other business

[Agenda item 15]

SETTLEMENT OF DISPUTES CLAUSES (A/CN.4/623[341])

1. The CHAIRPERSON recalled that at its sixty-first session, the Commission had decided to devote at least one meeting to a discussion on settlement of disputes clauses.[342] In that connection, the Secretariat, taking into account the recent practice of the General Assembly, had been requested to prepare a note on the history and practice of the Commission with respect to such clauses, which was contained in document A/CN.4/623.

2. Sir Michael WOOD said that the examination of the topic could be viewed as the Commission's contribution to the consideration by the General Assembly of the agenda item entitled "The rule of law at the national and international levels".[343] In its 2009 report, the Commission had reiterated its commitment to the rule of law in all its activities and had stressed that the rule of law constituted its essence, since its basic mission was to guide the development and formulation of the law.[344] He would welcome the Commission to provide a fuller response to the General Assembly at the current session and perhaps to mention the current debate in that regard.

3. He welcomed the fact that the debate was taking place. It was good that the Commission took the opportunity from time to time to discuss such cross-cutting issues as the peaceful settlement of disputes, which was of growing importance. Together with the prohibition on the use of force enunciated in Article 2, paragraph 4, of the Charter of the United Nations, the principle of the peaceful settlement of disputes in Article 2, paragraph 3, and Article 33 lay at the heart of the system for the maintenance of international peace and security defined in the Charter of the United Nations. It was one of the principles of international law set forth 40 years previously in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted by the General Assembly in its resolution 2625 (XXV) of 24 October 1970, and further elaborated in the 1982 Manila Declaration on the Peaceful Settlement of International Disputes, approved by the General Assembly in its resolution 37/10 of 15 November 1983, in which it appears as an annex.

4. Reference should also be made to the statement by the President of the Security Council of 29 June 2010, which contained the following passage:

> The Security Council is committed to and actively supports the peaceful settlement of disputes and reiterates its call upon Member States to settle their disputes by peaceful means as set forth in Chapter VI of the Charter of the United Nations. The Council emphasizes the key role of the International Court of Justice, the principal judicial organ of the United Nations, in adjudicating disputes among States and the value of its work and calls upon States that have not yet done so to consider accepting the jurisdiction of the Court in accordance with its Statute.
>
> The Security Council calls upon States to resort also to other dispute settlement mechanisms, including international and regional courts and tribunals which offer States the possibility of settling their disputes peacefully, contributing thus to the prevention or settlement of conflict.[345]

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

[342] *Yearbook … 2009*, vol. II (Part Two), p. 151, para. 238.

[343] Item 83 of the agenda of the sixty-fourth session of the General Assembly (A/64/251). See also General Assembly resolution 63/128 of 11 December 2008.

[344] *Yearbook … 2009*, vol. II (Part Two), p. 150, para. 231.

[345] S/PRST/2010/11, paras. 2– 3.

5. It was only natural that the Commission continue to make a contribution in the field of the peaceful settlement of disputes. The 2009 decision had referred specifically to settlement of disputes clauses. That was an important part of a wider topic, where the Commission had played a role in the past. In his view, the Commission should have a role in promoting the practical implementation of one of the basic principles of the Charter of the United Nations in the field of international law. The question was how best it could make a contribution.

6. On the specific issue of the inclusion of dispute settlement clauses in international instruments, it could be said that this was essentially a political matter, one to be left to the appreciation of States. In the past, that might have been an accurate perception, to some degree at least. Things were different today, however, and encouragement to States to accept dispute settlement procedures would be broadly welcomed as a contribution to the rule of law at international level. The above-mentioned statement by the President of the Security Council was witness to that.

7. The specific terms of the dispute settlement provision in an instrument might need to be tailored to the substantive content, and it might often make sense for those who drafted the substantive provisions also to indicate what they considered to be the best modalities for dispute settlement. While the ICJ might often be appropriate, in specialized fields it might sometimes be necessary to think of other methods.

8. He thanked the Secretariat for its note on settlement of disputes clauses (A/CN.4/623), which contained three substantive chapters. The first (paras. 3–13) provided an overview of the history of the study by the Commission of topics related to the settlement of disputes. In a sense, that was the most interesting sections of the report. It first described the Commission's work in the 1950s leading to the Model Rules on Arbitral Procedure.[346] That could not perhaps be described as a total success, but the process itself of consideration by the Commission had undoubtedly shed light on important aspects of inter-State arbitral procedure. As indicated in the Secretariat's note, the Commission had considered taking up aspects of dispute settlement on the occasion of its three great reviews of international law, in 1949,[347] 1971[348] and 1996,[349] but each time it had ultimately decided not to do so. The description of the Commission's approach set out in its 1971 report, cited in paragraph 11 of the Secretariat's note, was interesting and worth quoting, the issue being whether the reasons that had led to that approach were still valid in the very different world of today:

> [T]he Commission has not in general been concerned, when elaborating texts setting out substantive rules and principles, with determining the method of implementation of those rules and principles, or with the procedure to be followed for resolving differences arising from the interpretation and application of the substantive provisions—with one exception. That exception arises when the procedure is seen as inextricably entwined with, or as logically arising from, the substantive rules and principles, or, in the Commission's words "as an integral part" of the codified law. Otherwise the question of the settlement of disputes and, indeed, of implementation as a whole, have been regarded as issues to be decided by the General Assembly or by the codification conference of plenipotentiaries which acts on the draft.[350]

9. There had been at least one other more recent occasion when the Commission had consciously decided not to take up a dispute settlement issue. That was in connection with the topic on fragmentation of international law,[351] when it had been decided that the Commission would focus on the fragmentation of substantive law. The question of the competing and overlapping jurisdiction of the many international courts and tribunals had been deliberately not addressed, yet it was still a live issue, and the great expansion in the number and role of international courts and tribunals was well known.

10. The reasons which had led the Commission to hesitate to consider dispute settlement clauses might not apply today. In recent years, the political organs of the United Nations had stressed the importance of dispute settlement, including through courts and tribunals.

11. The following chapter of the Secretariat's note detailed the practice followed by the Commission in relation to dispute settlement clauses (paras. 14–66). It was divided into two sections. First, in paragraphs 15 to 44, it examined the relevant clauses as they had been included in draft articles adopted by the Commission and covered such varied matters as the law of the sea, diplomatic law, the law of treaties, the security of persons entitled to international protection and the non-navigational uses of international watercourses.

12. The second section of this chapter (paras. 45–66) considered draft articles in which the inclusion of such clauses, although discussed, had not been retained. For each set of draft articles, the Secretariat had provided a brief description of the factors considered by the Commission in deciding whether to include settlement of disputes clauses.

13. Finally, the Secretariat's note had a short chapter with information on the recent practice of the General Assembly in relation to settlement of disputes clauses inserted in conventions which had not been concluded on the basis of draft articles adopted by the Commission. The note was not limited to the inclusion of settlement of disputes clauses in international instruments, but also covered the Commission's contribution to the peaceful settlement of disputes. In his view, the current discussion could usefully range more widely.

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

[347] "Survey of international law in relation to the work of codification of the International Law Commission: preparatory work within the purview of article 18, paragraph 1, of the International Law Commission", memorandum submitted by the Secretary-General (A/CN.4/1/Rev.1), para. 105.

[348] *Yearbook ... 1971*, vol. II (Part Two), document A/CN.4/245, pp. 29–34, paras. 120–149.

[349] *Yearbook ... 1996*, vol. II (Part Two), annex II, sect. XIII, p. 136.

[350] *Yearbook ... 1971*, vol. II (Part Two), document A/CN.4/245, p. 33–34, para. 144.

[351] *Yearbook … 2003*, vol. II (Part Two), pp. 96–97, paras. 416–419, and "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 and Add.1 and Corr.1) (see footnote 291 above).

14. The Secretariat's note prompted several reflections. It was apparent that the Commission had a rich practice in considering and sometimes including dispute settlement clauses in its drafts, but it seemed, superficially at least, to have approached dispute settlement in a rather haphazard manner. The Secretariat stated in its note that the Commission had not discussed the issue in general terms before. It also emerged clearly from the Secretariat's note that when they adopted an instrument on the basis of the Commission's draft, States frequently departed from the Commission's recommendations with regard to dispute settlement. That did not mean that the Commission's decision on the matter—to include or not to include a particular provision—was without purpose. One would think that its recommendation had been influential in prompting States to consider the question and pointing towards the eventual solution. Ultimately, the inclusion or not, and the form, of dispute settlement clauses was a policy matter for States. In that respect, dispute settlement clauses were no different from any other provisions of an international instrument.

15. While consideration of the matter was primarily of importance for current and future topics, it was also relevant in relation to existing instruments. It was, unfortunately, the case that many States still did not accept optional dispute settlement clauses, such as the optional protocols to the Vienna Convention on Consular Relations and the Vienna Convention on Diplomatic Relations, and they maintained reservations to other clauses, which were often expressly permitted. However, there was a trend in recent years not to make such reservations or to withdraw them. That was to be encouraged.

16. As a general matter, it might be thought that a presumption in favour of including effective dispute settlement clauses in international instruments should follow from the current emphasis on the rule of law in international affairs. One could see a trend in that direction with the General Assembly's inclusion of article 27 in the 2004 United Nations Convention on Jurisdictional Immunities of States and their Property. Only where there was some special reason not to include a clause should it be omitted.

17. In specific cases, inclusion of a dispute settlement clause might be an essential part of a package deal on some particularly delicate issue. Classic examples were the provisions of the Vienna Conventions on the Law of Treaties concerning *jus cogens* and Part XV of the United Nations Convention on the Law of the Sea.

18. What, in concrete terms, might come out of the Commission's discussion of the issue? The Commission had initially planned to devote one or more meetings to the question, but owing to its workload, it had only been able to allocate the current meeting. Given the preliminary nature of the current debate, the Commission should perhaps agree to continue with it in 2011 with a view to possibly including the following suggestions in the 2011 report.

19. First, the Secretariat's note already constituted a useful contribution, and it could serve as a point of reference for consideration by the Commission, and indeed by States, of whether to include dispute settlement clauses in future drafts and instruments.

20. Second, the very fact that the debate was taking place was recognition of the importance of the question of whether to include dispute settlement clauses in drafts prepared by the Commission and in instruments, multilateral and also bilateral, adopted by States.

21. Third, the Commission could recall that in the 1982 Manila Declaration on the Peaceful Settlement of International Disputes, the General Assembly had encouraged States to include "in bilateral agreements and multilateral conventions to be concluded, as appropriate, effective provisions for the peaceful settlement of disputes arising from the interpretation or application thereof" (General Assembly resolution 37/10, annex, para. 9).

22. Fourth, in recognition of the practical importance of dispute settlement, the Commission could decide, in principle at least, to discuss the question at an appropriate stage of the consideration of each topic on its agenda.

23. Fifth, the Commission could acknowledge and encourage the important work done by other United Nations bodies in the field of the peaceful settlement of disputes. For example, the *Handbook on the Peaceful Settlement of Disputes between States*[352] prepared in the early 1990s by the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization remained a valuable introduction to the subject, although it would be good if the Secretariat could find a way of bringing it up to date.

24. Sixth, the Commission might invite regional bodies with which it interacted to inform it of any work they had done in the field of dispute settlement. They could do so when their representatives visited the Commission. The Council of Europe had already drawn attention to two interesting recommendations adopted a few years previously by the Committee of Ministers on the basis of the work of CAHDI. The first had been to suggest model clauses for possible inclusion in declarations under the optional clause accepting the compulsory jurisdiction of the ICJ,[353] and the second dealt with the important practical matter of nominating qualified persons for the lists of arbitrators and conciliators provided for under a range of treaties.[354] The Commission had heard the previous week that this was an ongoing exercise within CAHDI. It would be interesting to hear from other regional bodies. Dispute settlement could be a good subject for cooperation between those bodies and the Commission.

25. Ms. JACOBSSON said that in 2009, in the first annual report on strengthening and coordinating the United Nations rule of law activities, the Secretary-General had stated that "[f]or any conception of the rule of law at the international level, peaceful means to address alleged violations of international law are essential" and

[352] Office of Legal Affairs, Codification Division, *Handbook on the Peaceful Settlement of Disputes between States* (OLA/COD/2612) (United Nations publication, Sales No. E.92.V.7), New York, 1992.

[353] Recommendation CM/Rec(2008)8 of the Committee of Ministers of the Council of Europe to member States on the acceptance of the jurisdiction of the International Court of Justice of 2 July 2008.

[354] Recommendation CM/Rec(2008)9 of the Committee of Ministers of the Council of Europe to member States on the nomination of international arbitrators and conciliators of 2 July 2008.

that "Member States have repeatedly recognized the need to strengthen international dispute settlement mechanisms (see General Assembly resolution 55/2 [of 8 September 2000])".[355] The report referred to Article 33 of the Charter of the United Nations, and the importance of settling disputes by peaceful means was also stressed in the statement by the President of the Security Council of 29 June 2010 cited by Sir Michael.

26. Given the time constraints, she would limit her comments. She agreed with most of the views expressed by Sir Michael. International law allowed for disputes to be settled in numerous ways, but although States resorted more frequently to dispute settlement mechanisms, they had always been reluctant to include compulsory mechanisms in the treaties which they concluded. Today, there was an interesting trend towards a more frequent use of dispute settlement procedures at both multilateral and regional levels. That was a welcome development, although in some instances the procedures were not used at all when they ought to be, or the reservations which States made to treaties were such that the dispute settlement clauses therein became meaningless. States were perfectly entitled to make such reservations, but that clearly weakened dispute settlement mechanisms. Some mechanisms, such as the Court of Conciliation and Arbitration of the Organization for Security and Cooperation in Europe, had never even been used.

27. The question, as Sir Michael had said, was how the Commission could make a contribution in that area. In her view, it was important to broaden the discussion and to include not only dispute settlement clauses as such but also other instruments and mechanisms, for example fact-finding mechanisms. Fact-finding could be of a legal nature; it was not necessarily political.

28. She supported the idea of continuing the discussion at the 2011 session. Sir Michael had made six suggestions, which all deserved further examination, although the one concerning cooperation with other bodies should be given special attention, because it was within the regional context that there had been the greatest developments in terms of dispute settlement.

29. Mr. GAJA welcomed the initiative which had led the Commission to have a debate on peaceful dispute settlement clauses and expressed appreciation to the Secretariat for its comprehensive note on the subject and to Sir Michael for his very useful introduction, including his six suggestions.

30. As a possible result of its consideration of dispute settlement clauses, the Commission could first stress the importance for States and international organizations of strengthening the accepted methods of settling disputes in many areas; the position of international organizations was particularly problematic in that regard and needed to be addressed. The Commission could then add that, because of the greater certainty of the applicable rules that an international convention offered, its adoption provided a clear incentive for accepting a method capable of eventually leading to a settlement of the dispute. That applied, regardless of whether the convention was based on draft articles prepared by the Commission. Those two general recommendations should be in a preliminary part and should not necessarily be tied to the Commission's contribution as such.

31. As the recent practice of the General Assembly showed, the choice of the method of settlement did not necessarily depend on the subject of the convention. With regard to disputes between States, the clauses to which the Secretariat's note referred in paragraphs 67 to 69 and article 27 of the United Nations Convention on Jurisdictional Immunities of States and their Property provided an adequate model for future conventions. The model would need to be enlarged in order to cover disputes between States and international organizations or between international organizations; in this regard, it was important to make arbitration effective, access to the Court being barred for the time being.

32. It did not seem necessary for the Commission to elaborate a specific clause each time it adopted draft articles. When adopting a text which was designed to eventually become binding, it could simply remind States and international organizations of the need to envisage an appropriate method for settling disputes and call attention to the pattern prevailing in the recent practice of the General Assembly, which on the whole was satisfactory. He did accept, however, as Sir Michael had said, that there might be cases in which a tailor-made clause would be more appropriate; in that case, the Commission would recommend a special clause.

33. Mr. CAFLISCH warmly commended the author or authors of the Secretariat's note, an excellent piece of work that presented a real overview of the question and was a useful text, not only for the Commission, but for anyone interested in the peaceful settlement of disputes as well as the codification and progressive development of international law. The note showed first of all that, as indicated in paragraph 20, there had always been members of the Commission who thought that the task of the Commission was to codify or develop the law but not to safeguard its application. However, it also made clear that, in general, that view had not prevailed either in the Commission or in the recent practice of the General Assembly, as set out in paragraphs 67 to 69 of the note, a practice which supported the possibility of a unilateral referral to the ICJ.

34. From the Commission's point of view, the subject under consideration had at least two aspects: firstly, the rules relating to the peaceful settlement of disputes as a subject of progressive development and codification, of which the 1958 Model Rules on Arbitral Procedure[356] was a classic example; and secondly, the elaboration of settlement clauses to build on the drafts prepared by the Commission, the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations being examples in that regard. The point was not to codify a specific area (the peaceful settlement of disputes), but to add settlement clauses to the draft conventions which the Commission elaborated.

[355] A/64/298, para. 13.

[356] See footnote 346 above.

35. The subject addressed in the Secretariat's note raised a number of difficulties when considered in the perspective of the work of the Commission. The first difficulty was the reluctance of some States to accept settlement mechanisms, especially if they had to do so in advance. Such reluctance could result in a refusal to accept a particular text, the draft codification and the progressive development of international law. However, as recent practice suggested, that disapproving attitude was less pronounced *vis-à-vis* treaties of a specific, limited and precise nature, as was the case with the Commission's drafts.

36. The second difficulty was that the Commission practised a sectoral approach to international law. Its work covered a given question on a particular dimension of substantive law. The rules relating to the peaceful settlement of disputes were applicable, as the phrase indicated, to disputes. In reality, disputes did not, or did not exclusively, concern the interpretation or application of an instrument emanating from the Commission, but rather a variety of problems of relevance to the law of nations. As a consequence, settlement clauses in an instrument of progressive development or codification might not be effective, because they only covered a particular dimension of a given dispute. With regard to the development or codification of procedural rules, for example in the areas of arbitration, conciliation or fact-finding, the content of the rules could depend on the institutional environment within which the rules were to be applied.

37. Another difficulty was that the activities of the Commission produced different categories of texts, which might later become draft conventions, model rules, guides to practice or something else. Only if the results of the Commission's work were meant to take the form of conventions in the short or longer term should it be asked whether the substantive rules in question should also have dispute settlement clauses concerning what was usually called the interpretation or application of those rules.

38. A final difficulty was that draft treaties emanating from the Commission covered very varied subjects. That meant that, for the peaceful settlement of disputes, every body of substantive rules could give rise to different requirements for the methods used to settle the disputes to which they might give rise. The idea of elaborating model clauses for every draft convention produced by the Commission would thus have to be addressed with caution.

39. The document under consideration showed that, notwithstanding the standpoint of those in favour of work being confined to a study of the substantive rules of international law, the Commission had in fact addressed the application of rules which it had formulated by making provision for a great variety of solutions: compulsory or optional referral to the courts, such as the ICJ or a special tribunal; arbitration or conciliation with optional or compulsory participation (which could be combined with a fact-finding procedure); or a simple reference to Article 33 of the Charter of the United Nations. Sometimes, however, nothing had been contemplated.

40. He drew a number of conclusions on the basis of those considerations. First, the Commission should give greater attention to the question of the peaceful settlement of disputes. Secondly, following the precedent established in 1958, the Commission could also envisage formulating draft rules of procedure with regard to conciliation and, perhaps, fact-finding, where essentially the idea would be to review the rules in the Hague Conventions I of 1899 and 1907 for the Pacific Settlement of International Disputes. Any results could take the shape of model rules, from which States could derogate, however. To that could be added, as suggested by Sir Michael, the question of the fragmentation of international law from the point of view of the peaceful settlement of disputes. Thirdly, all Special Rapporteurs, and with them the Commission, should consider, during the elaboration of draft conventions or drafts which might lead to negotiations, whether dispute settlement clauses were needed and, if so, what kind. The clauses should be tailored to the content of the draft. It was to be hoped that the debate under way was the first of many and that it would lead either to the elaboration of procedural rules for certain types of dispute settlement or to greater attention being given to that aspect of the preparation of treaties or, even better, to both of the above. The consideration of the subject should be continued, and he endorsed the idea of greater cooperation with regional organizations.

41. Ms. ESCARAMEIA congratulated the newly elected Chairperson and members of the Bureau; thanked all those who, in her absence, had shown her support; and expressed appreciation to the Secretariat for its excellent note on the question of settlement of disputes clauses. She fully agreed with the statement by Sir Michael and had just a few comments. The Commission must give close attention to the implementation of the basic principles on the peaceful settlement of disputes enunciated in Article 2, paragraph 3, and Article 33 of the Charter of the United Nations. Those Articles recognized the primacy of law and were the very essence of international law.

42. The Commission could make a contribution to the subject at three levels, which she would take up by order of difficulty of accomplishment. First, it could simply cooperate with AALCO and CAHDI, with which it already interacted, as well as any other relevant regional legal body to exchange information on the issue of dispute settlement. It would also be useful to bring up the question during the meeting of the legal advisers in the framework of informal exchanges between the members of the Commission and the representatives of the Sixth Committee and, more generally, on any suitable occasion.

43. Secondly, the Commission should always try to insert dispute settlement clauses in all its drafts. Some members were opposed to that; they usually argued that an insertion of such clauses would prejudge the final form of the draft articles, which would then have to be a convention. That was why a number of recently adopted drafts, such as the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities or the draft articles on the law of transboundary aquifers, did not include such clauses. It would be useful for the Sixth Committee to know how the Commission envisaged the settlement of disputes even if the draft articles concerned did not become a convention. The Secretariat's note on settlement of disputes clauses showed that the conventions recently adopted by the General Assembly contained such provisions. That was the case

in any rate for the three conventions on terrorism and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance, which contained very sophisticated dispute settlement mechanisms ranging from negotiation to arbitration and referral to the ICJ. It would thus be surprising for a body such as the Commission, which was firmly committed to the rule of law, not to insert dispute settlement clauses in its draft articles.

44. Thirdly, the Commission could be more ambitious, as Mr. Caflisch had suggested, and make a more substantial contribution by working to propose possible forms of dispute settlement, as had been done in 1958 in its Model Rules on Arbitral Procedure. For its part, CAHDI had formulated a recommendation on acceptance of the compulsory jurisdiction of the ICJ. Thus, the Commission should always consider the possibility of drafting model rules on international fact-finding, mediation and conciliation. She hoped that the current debate would continue at the 2011 session, and she agreed with the suggestions made by the previous speakers.

45. Mr. McRAE thanked the Secretariat for its excellent note on the subject of dispute settlement. It was appropriate for the Commission to consider the question, given its contemporary importance and increasing use of third party mechanisms by States to settle their disputes. It might be asked why, in certain areas, some States were prepared to accept third party dispute settlement—for example, the compulsory third party dispute settlement under the WTO—but refused it in others, or why there had been increased resort to the ICJ and arbitral bodies.

46. As pointed out by Mr. Caflisch, the Commission should not limit itself to the area of judicial settlement of disputes, and there was a greater need for considering issues of conciliation, mediation and fact-finding mechanisms. It was surprising that, just as the international community seemed to be engaging more and more in litigation-types of dispute settlement, domestically many systems were looking at alternatives to litigation. Thus, the development in international law with regard to dispute settlement seemed to be somewhat behind in relation to practice. As noted by Sir Michael, the Commission's approach to the question of dispute settlement in individual topics had been somewhat haphazard, and that was a good argument for considering it in greater depth in the context of the Working Group on the long-term programme of work. It would not be useful to update the rules on arbitral procedures; instead, the Commission should examine the feasibility of devising a model article for all draft articles that it adopted. Although Mr. Caflisch had opposed that idea, arguing that each situation was different, he personally thought that the Commission should discuss the question to see whether there was some value in elaborating a model article on conciliation and mediation, indicating, for example, in which circumstances it was preferable to go before an arbitral tribunal rather than the ICJ and in which circumstances one mechanism should be favoured over another.

47. The question of whether each dispute was unique deserved further discussion in the Commission. Did different subject areas necessarily mean that there had to be a different type of dispute settlement, or could the Commission identify core principles that could then be adapted to specific needs? In any event, the Commission should consider whether different areas required different dispute settlement models. Mr. Gaja had suggested that the solution adopted by the General Assembly was the best way of proceeding. He was personally of the view that the Commission should continue its discussion on the topic, focusing on particular questions. To that end, perhaps Sir Michael could produce a working paper for consideration at the 2011 session.

48. Mr. VARGAS CARREÑO thanked the Secretariat for its excellent study and endorsed the proposals made by Sir Michael, which were timely, realistic and useful. Settlement of disputes clauses should be a priority topic in the future work of the Commission, given their importance and the effective and fruitful contribution which the Commission could make in that area. As indicated in the Secretariat's note, the question was not new. It had been the subject of debate during the United Nations Conference on the Law of Treaties, at which States initially had taken two seemingly irreconcilable positions. For some, the wish of the parties should take precedence with regard to dispute settlement, and it was up to them to choose how to proceed; others had stressed the compulsory nature of the jurisdiction of the ICJ and were reluctant to ratify a treaty that did not provide for compulsory dispute settlement. After nearly ending in failure, the Conference had agreed on a compromise: conciliation had been retained as the compulsory dispute settlement mechanism, and in the event of a dispute concerning treaty provisions, notably those relating to *jus cogens*, the ICJ would have jurisdiction. It would be interesting to see how that system, which had prevented the emergence of other dispute settlement mechanisms, had functioned in practice.

49. The conciliation mechanism was probably the most widespread, judging by the number of treaties that made provision for it, but it was the means of dispute settlement least used in international practice. Although it emerged from international practice that referral to the ICJ was the best way of settling disputes, it should be recalled that when the Court rendered a decision unfavourable for a State, it seemed very dangerous that this State should be able to revoke its acceptance of the obligatory jurisdiction of the Court in the framework of the dispute or the interpretation or application of the relevant treaty. Precedents existed and gave cause for concern.

50. He agreed with the proposals by Sir Michael and Mr. Caflisch; the question of settlement of disputes clauses should be given priority attention. He also endorsed Ms. Escarameia's proposal that the subject be addressed during the meeting of the legal advisers. The question, which was linked to the fragmentation of international law, would probably come up again in the work of the Commission. He was not at all certain, given the complexity of the subject, that there could be a sole model clause for the settlement of disputes. Whereas some types of disputes called for a pre-established type of settlement, others did not: all the more reason to give priority attention to the issue at the 2011 session.

51. Mr. PETRIČ supported the proposal by Sir Michael to consider the question of dispute settlement clauses in the Commission and thanked the Secretariat for its excellent

report on the subject. The peaceful settlement of disputes was the cornerstone of the rule of law; the two were closely linked, and promoting the rule of law presupposed the peaceful settlement of disputes. Thus, there was no question of the crucial importance of the question, which should be placed on the agenda of the Commission, although with the end of the quinquennium approaching, it was perhaps not the right time to appoint a special rapporteur.

52. The various suggestions made by the previous speakers were interesting, and he agreed that the issue should perhaps be addressed during the meeting of the legal advisers or with regional legal bodies, but the main question was how the Commission was to pursue its work on the subject. It would be useful for the Secretariat and Sir Michael to prepare a document clearly indicating how to continue with the topic, which in his view was suitable for codification and progressive development. After the fall of the Berlin Wall in 1989 and the end of the bipolar world, it had been expected that the peaceful settlement of disputes would become the general rule. Yet despite some progress, that had not been the case. The ICJ was increasingly busy, as was the International Tribunal for the Law of the Sea in Hamburg, whereas the Court of Conciliation and Arbitration of the Organization for Security and Cooperation in Europe had never been used, as noted by Ms. Jacobsson. The peaceful settlement of disputes was a crucial topic that was closely linked to the rule of law, and for that reason, the Commission should not merely discuss whether to start work on the question, but should make a decision, appoint a special rapporteur in due course and take steps to codify or develop international law in the area.

53. Mr. PERERA stressed the need to widen the scope of the discussion beyond draft articles already elaborated by the Commission. Sir Michael had referred to the 1982 United Nations Convention on the Law of the Sea, which had been a watershed in the area of dispute settlement. Taking into account the great sensitivity of States with regard to jurisdiction over natural resources, the drafters of the Convention had placed emphasis on a combination of formal and informal settlement methods, such as conciliation, compulsory conciliation, mediation and so on. As indicated by Mr. Caflisch, that example should be followed, and the Commission should go beyond formal, judicial methods of dispute settlement and explore informal alternatives. He also agreed with the elements of the road map outlined by Sir Michael in his statement.

54. Mr. NOLTE said that the study of the topic fit well in the Commission's work, in particular at a time when the General Assembly was addressing the question of the rule of law at national and international levels. Sir Michael had evoked the current trend towards a wider acceptance of dispute settlement procedures and had come to the conclusion that a presumption should be considered to exist in favour of including dispute settlement clauses in international instruments. He personally would generalize that suggestion by recommending that the Commission include the question of dispute settlement in all its work, not as a separate matter, but in all topics in which it was relevant. He agreed with Mr. McRae that the Commission should examine more closely why States were at times reluctant to use dispute settlement procedures and what incentives might encourage them to resort more readily to them.

55. Mr. DUGARD said that Sir Michael had drawn attention to the fact that CAHDI had embarked on the task of preparing model clauses for possible inclusion in declarations by States under the optional clause on recognition of the compulsory jurisdiction of the ICJ. It would be very helpful for the Commission to examine those declarations; that was a very sensitive area, and such declarations were often inconsistent or unacceptable.

56. Mr. VASCIANNIE said that the subject required further discussion and cooperation, especially with regional bodies. He agreed with the point made by Ms. Escarameia that supporting dispute settlement was tantamount to reaffirming the primacy of law over power. However, it was important first to assess the magnitude of the problem, namely the number of unresolved disputes, if that was possible, so as to avoid an exchange of platitudes. The question of the settlement of disputes was often a political matter, as other members had noted. Some States were opposed to dispute settlement through legal procedures because they were confused about the material rules to be considered or were sceptical about the dispute settlement body. In the field of international law relating to investments, for example, for many years the countries of Latin America had maintained the Calvo doctrine,[357] arguing that disputes pertaining to investment matters should be settled in their national courts. Over time, those same countries had gradually become more accepting of international dispute settlement, not because they had been given a set of draft articles on the subject, but because they had come to believe that they might get a more just hearing. Sometimes States were reluctant to accept international dispute settlement mechanisms because they believed that disputes which might arise were their personal matters.

57. International dispute settlement should not be limited to judicial or arbitral forms, but should also cover negotiations and conciliation procedures. Several years previously, two Caribbean States, Barbados and Trinidad and Tobago, had had a dispute over their maritime boundary. One of those States had sought international arbitration under the United Nations Convention on the Law of the Sea, but the other State had publicly announced that it would be preferable, for reasons of cost, to arrive at a friendly settlement of the dispute through negotiations. In the area of human rights, States were frequently encouraged to accede to optional protocols to a given instrument. That was a good idea on the face of it, but sometimes a State might find that the settlement mechanism concerned interpreted the rules enunciated in the instrument very differently from the way it did. It was interesting to note in that regard that the WTO dispute settlement mechanism, which had sought to confine itself to the most literal interpretation possible of the rules, benefited from the confidence of WTO member States. The Commission should also address questions concerning separation of powers: in some countries, the executive power could not hand over the jurisdiction of the courts from a national to an international body. Finally, the Commission should also choose the form it wanted to give the draft articles: it could provide for compulsory dispute

[357] C. Calvo, *Le droit international théorique et pratique: précédé d'un exposé historique des progrès de la science du droit des gens*, 6 vols., 4th rev. ed., Paris, Guillaumin, 1887–1888, available from http://gallica.bnf.fr.

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

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

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

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

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

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

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

It was so decided.

The meeting rose at 11.40 a.m.

3071st MEETING

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

Chairperson: Mr. Nugroho WISNUMURTI

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

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

[Agenda item 10]

REPORT OF THE STUDY GROUP

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

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