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Peaceful settlement of disputes

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Contents

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I. Introduction

1. In accordance with a decision taken at its sixty-first session (A/64/10, para. 238), the Commission, on 29 July 2010, held a debate in a plenary session on the peaceful settlement of disputes, under "Other matters" (A/65/10, para. 388). The debate[1] took as its starting point a note by the Secretariat, entitled "Settlement of dispute clauses" (A/CN.4/623). Widespread support was expressed for continuing consideration of the matter at the sixty-third session of the Commission, and suggestions were made regarding possible areas of future work (see sect. II below). The Commission decided to resume discussion of the matter at its sixty-third session with a view to identifying specific matters that it might consider in the future.

2. The present working paper responds to a suggestion made during the above-mentioned debate (see A/CN.4/SR.3070, pp. 11, 12 and 15) and is intended to assist the Commission's consideration of the matter at its sixty-third session.

3. Section II of the paper summarizes the discussions of the Commission at its sixty-second session and lists the specific suggestions made. Section III recalls the work done by the United Nations and other bodies, including regional organizations. Section IV contains tentative suggestions for the way forward. In the light of the plenary debate at the sixty-third session, one or more proposals could, if considered appropriate, be referred to in the Working Group on the Long-term Programme of Work.

II. Note by the Secretariat and debate held by the Commission at its sixty-second session

4. Consideration by the Commission of dispute settlement issues may be viewed as part of its contribution to the consideration by the General Assembly of the rule of law at the national and international levels (see A/65/10, paras. 389-393). For the debate at its sixty-second session, the Commission took as a starting point the note by the Secretariat (A/CN.4/623), prepared in response to its request for a note on the history and past practice of the Commission in relation to dispute settlement clauses. The note, which was widely welcomed, contained three substantive sections. Section II provided an overview of the study by the Commission of topics related to the settlement of disputes. It first described the work undertaken by the Commission in the 1950s, which led to the adoption of the Model Rules on Arbitral Procedure (see A/CN.4/623, paras. 4-8).[2] It then recalled that the Commission had considered taking up aspects of dispute settlement on the occasion of its three reviews of international law: in 1949 (see A/CN.4/623, para. 9), from 1971 to 1973 (see A/CN.4/623, paras. 10-12) and in 1996 (see A/CN.4/623, para. 13). On each occasion, the Commission had decided not to take up the topic of dispute settlement. As mentioned in paragraph 11 of the note, the Commission's approach at that time was described in 1971 as follows:

> "The Commission has not in general been concerned, when elaborating texts setting out substantive rules and principles, with determining the method of

[1] Fifteen members of the Commission took part in the debate (see A/CN.4/SR.3070).

[2] For the text of the Rules, see *Yearbook of the International Law Commission, 1958*, vol. II (United Nations publication, Sales No. E.58.V.I), p. 83, para. 22.

> 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."

5. Section III of the note described the Commission's practice in relation to the inclusion of dispute settlement clauses in its drafts. It examined relevant clauses in draft articles adopted by the Commission, such as those on the law of the sea, diplomatic law, the law of treaties, internationally protected persons and non-navigational uses of international watercourses (A/CN.4/623, paras. 15-44), and considered other draft articles in which the inclusion of such clauses, while substantially discussed, did not eventuate (paras. 45-66). Section III provided, for each set of draft articles mentioned, a brief description of the factors considered by the Commission in deciding whether or not to include settlement of dispute clauses. The note concluded with a short section which provided information on the recent practice of the General Assembly in relation to settlement of dispute clauses inserted in conventions which were not concluded on the basis of draft articles adopted by the Commission (paras. 67-69).

6. During the debate held by the Commission, the growing importance of the peaceful settlement of disputes was noted. Together with the prohibition on the use of force set out in Article 2, paragraph 4, of the Charter of the United Nations, the principle of the peaceful settlement of disputes, as set forth in Article 2, paragraph 3, and Article 33, paragraph 1, lay at the heart of the system established under the Charter for the maintenance of international peace and security. It was a principle set forth in the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV), annex) and was further elaborated in the Manila Declaration on the Peaceful Settlement of International Disputes, approved in 1982 (General Assembly resolution 37/10, annex).

7. The view was expressed that the Commission did and should have a role in promoting the practical implementation of one of the basic principles of the Charter in the field of international law, the peaceful settlement of disputes. It was noted that the reasons which had led the Commission to hesitate to take up dispute settlement issues might no longer apply. In recent years, the political organs of the United Nations have stressed the importance of dispute settlement, including through courts and tribunals. The General Assembly, including in recent practice

(see A/CN.4/623, paras. 67-69), the Secretary-General[3] and now the Security Council have been quite clear in this regard. In particular, it was recalled that a statement by the President of the Security Council dated 29 June 2010 (S/PRST/2010/11) contained the following passages:

> "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.
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> "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."

8. Regarding the inclusion of dispute settlement clauses in international instruments, it was suggested that encouraging States to accept dispute settlement procedures would be broadly welcomed as a contribution to rule of law at the international level. Since the specific terms of the dispute settlement provision may need to be tailored to the substantive content of the instrument, it might often make sense for those who draft the substantive provisions to also indicate what they consider to be the appropriate modalities for dispute settlement. While recourse to the International Court of Justice may often be appropriate, specialized fields might sometimes require other methods.

9. It was apparent that the Commission had a rich practice in considering and sometimes including dispute settlement clauses in its drafts. It seemed, however, on the surface at least, to have approached dispute settlement in a somewhat haphazard manner. Also, it had not previously discussed the issue in general terms.

10. It emerged clearly from the note by the Secretariat that States, when adopting an instrument on the basis of the drafts prepared by the Commission, frequently departed from its recommendations on dispute settlement. That did not mean, however, that the Commission's decision on the matter (i.e., to include or not to include a particular provision) was without purpose. The Commission's recommendation may well have been influential in prompting States to consider the matter and pointing towards the eventual solution.

11. Consideration of the topic could also be relevant in relation to existing instruments. Many States continued not to accept dispute settlement clauses, such as

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[3] The Secretary-General, in a letter dated 12 April 2010 informing States of the 2010 United Nations Treaty Event, encouraged States which had not yet done so to withdraw reservations made to jurisdictional clauses contained in the multilateral treaties to which they were already party, providing for the submission to the International Court of Justice of disputes in relation to the interpretation or application of those treaties. States becoming party to such instruments were also encouraged to accede to the jurisdictional clauses contained therein. The Secretary-General was of the view that the event would also encourage States which had not yet done so to deposit with him during the 2010 event declarations recognizing as compulsory the jurisdiction of the Court under Article 36, paragraph 2, of its Statute.

those contained in the respective optional protocols to the Vienna Convention on Diplomatic Relations of 1961[4] and the Vienna Convention on Consular Relations of 1963.[5] They maintained reservations to other clauses, which were often expressly permitted. There is, however, a trend in recent years not to make such reservations or to withdraw them, a move that could be encouraged.

12. It was suggested that, with the current emphasis on the rule of law in international affairs, there might even be a presumption in favour of including effective dispute settlement clauses in international instruments. Such a trend could be seen with the inclusion by the General Assembly of article 27 in the United Nations Convention on the Jurisdictional Immunities of States and Their Property, adopted on 2 December 2004 (General Assembly resolution 59/38, annex)[6] and of elaborate dispute settlement provisions in the 2006 International Convention for the Protection of All Persons from Enforced Disappearance, adopted on 20 December 2006 (General Assembly resolution 61/177, annex).[7]

13. In specific cases, inclusion of a dispute settlement clause may be an essential part of a package deal on some delicate issue. A classic example was the inclusion of such provisions in the 1969 Vienna Convention on the Law of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations in relation to *jus cogens*.[8] One could also cite part XV of the United Nations Convention on the Law of the Sea, adopted on 10 December 1982.[9]

14. Various suggestions were made for specific outcomes from the Commission's study of the issues.

15. One member suggested that such outcomes might include the following:

(a) There was already useful output: the note by the Secretariat. The note itself might serve as a point of reference for consideration by the Commission, and indeed by States, of the inclusion of dispute settlement clauses in future drafts and instruments;

(b) The very fact of having the debate was recognition of the importance of the inclusion or not of dispute settlement clauses in drafts prepared by the Commission, and in instruments, multilateral and bilateral, adopted by States;

(c) The Commission could recall that, in paragraph 9 of the 1982 Manila Declaration (General Assembly resolution 37/10, annex), the General Assembly had encouraged States to include in bilateral agreements and multilateral conventions to

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[4] United Nations, *Treaty Series*, vol. 500, No. 7310. The Convention entered into force on 24 April 1964.

[5] Ibid., vol. 596, No. 8638. The Convention entered into force on 19 March 1967.

[6] The Convention is not yet in force.

[7] The Convention entered into force on 23 December 2010.

[8] For the text of the 1969 Convention, see United Nations, *Treaty Series*, vol. 1155, p. 331. For the 1986 Convention (not yet in force), see *United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, Vienna, 18 February-21 March 1986, Official Records*, vol. II, *Documents of the Conference* (United Nations publication, Sales No. E.94.V.5).

[9] United Nations, *Treaty Series*, vol. 1833, No. 31363. The Convention entered into force on 16 November 1994.

be concluded, as appropriate, effective provisions for the peaceful settlement of disputes arising from the interpretation and application thereof;

(d) In recognition of the practical importance of dispute settlement, the Commission could decide, at least in principle, to discuss dispute settlement at an appropriate stage of the consideration of each item or sub-item of its agenda;

(e) The Commission should acknowledge the important work done by other United Nations bodies in regard to the peaceful settlement of disputes. For example, the *Handbook on the Peaceful Settlement of Disputes between States*,[10] published in 1992, remained a valuable introduction to the subject. The Secretariat could perhaps be encouraged to find a way of bringing the Handbook up to date;

(f) The Commission might invite the regional bodies with which it had a relationship to provide information on any work they had done in the field of dispute settlement. They could do so on the occasion of their visit to the Commission and/or in writing. The Commission had been informed by the Council of Europe of the two recommendations adopted in 2007 by the Committee of Ministers on the basis of work done by the Committee of Legal Advisers on Public International Law. Dispute settlement could be a good subject for cooperation between the Commission and regional bodies.

16. Other suggestions made in the debate included:

(a) Fact-finding and inquiry, in particular the procedures and principles for fact-finding missions;[11]

(b) The need for States and international organizations to reinforce procedures for the settlement of disputes, the position of international organizations being particularly problematic. In the case of international organizations to which the International Court of Justice was not open, arbitration needed to be made more effective;[12]

(c) The elaboration of one or more standard model dispute settlement articles for inclusion, as appropriate, in conventions adopted under the auspices of the United Nations or elsewhere, together with commentaries on the draft articles. Such clauses would be relevant where the Commission's work culminated in a convention but possibly also where the output comprised guidelines, principles or a study. Whether a model clause would be suitable for all circumstances was something the Commission should examine; it was suggested that there could be a single model clause which could be adapted to individual circumstances but others expressed doubt in that regard;

(d) The need to consider methods of dispute settlement other than judicial and arbitral methods, including negotiation, conciliation and mediation;

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[10] United Nations publication, Sales No. E.92.V.7.

[11] A. Jacheć-Neale, "Fact-finding", in *Max Planck Encyclopedia of Public International Law* (by subscription).

[12] See, for example, L. Boisson de Chazournes, C. Romano, and R. Mackenzie, eds., *International Organizations and International Dispute Settlement: Trends and Prospects* (Transnational Publications, 2002). On the involvement of the European Union in international dispute settlement, see F. Hoffmeister, "Litigating against the European Union and its member States — Who responds under the ILC's draft articles on international responsibility of international organizations", *European Journal of International Law*, vol. 21, No. 3 (2010), pp. 723-747.

(e) The elaboration of model rules for conciliation, good offices, mediation, fact-finding and inquiry;

(f) Consideration to be given to preparing model clauses for declarations under the Optional Clause (Article 36, paragraph 2, of the Statute of the International Court of Justice), as had been done by the Council of Europe;

(g) Stressing the importance of prevention of disputes and of provisions on cooperation, as in the aquifers draft;

(h) Recommending that all new conventions include dispute settlement clauses and consider whether existing conventions could be amended to include such provisions;

(i) Examination of the question of the fragmentation of dispute settlement procedures;

(j) Consideration of why States accept dispute settlement in certain fields (e.g., trade) but not in others;

(k) Enforcement of decisions of dispute settlement bodies.

III. Work done by the United Nations and other bodies, including regional organizations

17. The Commission will need to take account of the work already done by the United Nations in regard to the peaceful settlement of disputes, in particular by the General Assembly. The present section may provide a basis for determining, among other things, where the Commission may add value.

18. Examples of such work include:

(a) Model Rules on Arbitral Procedure;[13]

(b) Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV), annex);

(c) The Manila Declaration on the Peaceful Settlement of International Disputes (General Assembly resolution 37/10, annex);

(d) United Nations Model Rules for the Conciliation of Disputes between States (General Assembly resolution 50/50, annex).

IV. Tentative suggestions

19. It is suggested that, during the debate at the present session of the Commission, members discuss which, if any, specific issues within the broad field of dispute settlement might be appropriate for further consideration. These could

[13] *Yearbook of the International Law Commission*, 1958, vol. II (United Nations publication, Sales No. E.58.V.I), p. 81, para. 15 and pp. 83-88, paras. 22-43; General Assembly resolution 1262 (XIII) of 14 November 1958; and A. Watts, ed., *The International Law Commission 1949-1998*, vol. III (Clarendon Press, Oxford, 1999), pp. 1773-1792.

either be topics mentioned above or additional topics suggested during the debate. Every effort should be made to specify as precisely as possible the scope and aim of any such issue.

20. Examples of possible topics are:

(a) Model dispute settlement clauses for possible inclusion in drafts prepared by the Commission;

(b) Improving procedures for dispute settlement involving international organizations;

(c) More broadly, the conduct by the Commission of a study of access to and standing before different dispute settling mechanisms of various actors (States, international organizations, individuals, corporations etc.);

(d) Competing jurisdictions between international courts and tribunals. This could address issues such as forum shopping and the procedural fragmentation of international law;

(e) Declarations under the optional clause, including the elaboration of model clauses for inclusion therein.

21. In the light of the discussion, one or more members may wish to propose a syllabus (or syllabuses) for consideration, perhaps during the present session, by the Working Group on the Long-term Programme of Work. The question of appointing a special rapporteur, as suggested during the debate (A/CN.4/SR.3070, p. 12), could await a later stage.