BERICHTE UND URKUNDEN

Judicial Settlement of International Disputes

International Symposium, Heidelberg, July 10—12, 1972

Survey of Subjects Covered under this Report

From 10 to 12 July 1972 the Max Planck Institute for Comparative Public Law and International Law in Heidelberg held an international symposium on the present situation and possibilities for development of the settlement of international disputes by international courts and arbitral tribunals. The object was to depict contemporary international law and the current situation of judicial settlement of international disputes, as well as to work out appropriate proposals and suggestions for improvements in these areas. The symposium was organized by the Institute on its own initiative and responsibility. Financial support was received from the Max Planck Society for the Advancement of Sciences and from the German Fritz Thyssen Foundation.

Experts on international law and international adjudication from many countries were invited to the symposium. Among those invited were judges of the International Court of Justice and of other permanent international courts, members of the International Law Commission of the United Nations, leading officials of international organizations and professors of international law. About sixty persons accepted the invitation and during the three days of the symposium discussed the most important problems and aspects of the judicial and arbitral resolution and settlement of international disputes.

The International Court of Justice which, when considered together with its predecessor — the Permanent Court of International Justice —, marks 50 years of existence in 1972, is still the only permanent judicial body with world-wide jurisdiction and is at the same time the principal judicial organ of the United Nations. For this reason it is necessary to start any discussion of international adjudication with the World Court in The Hague. In contradistinction to various other panels and meetings which have recently considered the present situation and the future of the International Court of Justice, the symposium pursued a more extensive goal. In addition to the International Court of Justice there are a number of regional and specialized courts. Moreover, there is also the important field of arbitration, which often is employed to consider and decide inter-State disputes. In order to obtain the most comprehensive view of the present condition and possibilities for development of the judicial settlement of disputes, international courts other than the I.C.J. and arbitral tribunals were included in the discussion. The program of the international symposium therefore embraced general problems and possibilities for the future development of international adjudication (see below I) as well as the following three concrete questions:

> "1. Does the International Court of Justice as it is presently shaped correspond to the requirements which follow from its functions as the central judicial body of the international community?
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> 2. To which extent and for which subject matters is it advisable to create and develop special judicial bodies with a jurisdiction limited to certain regions or to certain subject matters?
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> 3. To which extent and for which questions is it advisable to provide for the settlement of international legal disputes by other organs than permanent courts"?

A comprehensive written report on each of these three questions was worked out by research associates of the Institute and sent out in advance

to all participants. During the symposium experts delivered oral reports on each topic. Extensive discussions based on a systematically arranged questionnaire followed. The symposium concluded with an extensive general debate.

The symposium was directed by Professor Hermann Mosler and Professor Rudolf Bernhardt. Oral reports on question number one were presented by Dr. T. O. Elias, Chief Justice, Supreme Court of Nigeria, Member of the International Law Commission, Lagos, and Professor R. Y. Jennings, University of Cambridge, while the preparatory report on this topic was written by Professor Helmut Steinberger. Reports on question number two were given by Professor F. V. García-Amador, Director of the Legal Division of the Organization of American States, Washington, D. C., and Dr. Dr. h. c. Heribert Golsong, Director of the Legal Division of the Council of Europe, Strasbourg. The preparatory report on topic number two was composed by Professor Christian Tomuschat. On question number three an oral report was heard from Ambassador and Professor Rudolf L. Bindschedler, Bern, while the preparatory report was done by Dr. Hans v. Mangoldt.

The written and oral reports, together with a summary of the discussions, will be published in English in the series »Beiträge zum ausländischen öffentlichen Recht und Völkerrecht« ("Contributions to Comparative Public Law and International Law") edited by the Max Planck Institute. This report is intended to supply some information concerning the main issues and proposals which were discussed. It does not pretend to be complete. Individual contributions and dissenting opinions, which are only summarized here, will be included in the later publication. This report was composed by the Max Planck Institute.

I. General Questions of the Judicial Settlement of International Disputes

There are certain basic problems associated with all types of judicial dispute settlement. In addition to these general problems, specific issues are posed by the individual types of international adjudication and arbitration. The course of the discussions concerning these specific issues related to the three topics of the symposium and the proposals which were advanced therein for the improvement of judicial settlement of disputes will be presented in the following sections (II—IV). At the outset the most important general points of view will be reported. These points of view were expressed

partly in the general debate at the end of the colloquium, and partly in connection with the special topics.

1. The question of whether binding judicial decisions in international disputes are at all appropriate for the contemporary international order and whether therefore steps beyond the present state of affairs appear desirable was answered affirmatively by most but not all of the participants in the colloquium. The reservation of many States toward judicial dispute settlement is obvious, however. It has been recently increasing rather than decreasing and is illustrative of a certain preference for the use of political means to resolve disputes. In the opinion of several participants in the colloquium, a change in the attitude of countries is now taking place or at least seems to be possible. Those critical of States which are reluctant to submit disputes to international adjudication pointed out that, in contradistinction to judicial dispute settlement, the pure political regulation of differences can favour the politically and economically stronger States at the expense of the weaker members of the international community, since the relative strength of a State is an important factor in negotiating a compromise. The relatively weak position of international adjudication prompted many participants to remark that the "rule of law" was not playing the role which it should in international relations and that to this extent changes in the attitudes of States and of international organizations are desirable. The political settlement of disputes, through inter-State negotiations and within the framework of international organizations, cannot generally replace judicial decision making in legal questions. It is mentioned in Article 33 of the U. N. Charter only along and together with judicial dispute settlement. Moreover, the rule of international law prohibiting the use of force needs, if violations of law are not to remain without sanctions, to be supplemented by the binding judicial settlement of legal differences which cannot be resolved in any other way. On the other hand it would not be right to expect judicial dispute settlement to play a decisive role in sensitive political disputes. It was the opinion of most of the participants in the colloquium that only a gradual expansion of international adjudication together with a strengthening of the confidence of States in judicial decision and in the present order of international law would itself be appropriate and attainable.

2. It may safely be stated that there is no clear line of demarcation between legal and political disputes, nor between justiciable and non-justiciable matters. A serious political dispute can, even where it embodies the danger of armed conflict, be completely or partially resolved by courts or tribunals on the basis of international law. In many cases the differentia-

tion between justiciable and non-justiciable disputes is not a question of objective judgment. Rather, the States reach determinations in accordance with their own interests and convictions as to whether they desire to submit a matter to a court for a decision. It is only after this affirmative step has been taken that the court in question can decide whether the applicable international law can contribute to the solution of the matter in dispute. It would appear to be desirable, however, to restrict the area of the non-justiciable and to expand the activities of judicial institutions.

3. One reason for the reluctance of many States to resort to international judicial and arbitral procedures is uncertainty concerning the existence and content of the norms of international law. The traditional customary law seems to several States, among them many developing countries, to be problematical. In other respects as well, for instance in the evaluation of the significance in international law of resolutions adopted by international organizations, the sources of international law are unclear. This question concerning the law applicable in deciding disputes was discussed during the colloquium, especially with reference to Article 38 of the Statute of the International Court of Justice. With regard to the resolutions of international organizations, various solutions were suggested, *e. g.*, their significance in international law should depend on the content of the resolution and the extent of support which it received from the States voting on it.

Uncertainty concerning the norms of international law is presently being reduced by the codification of important parts of international law. Old and new countries are participating on an equal basis in this codification. To date this development has had little impact on the readiness of States to accept judicial dispute settlement, and progress along these lines would seem to be desirable. Many provisions in recent multilateral treaties are compromises, some States seem to be deterred thereby from recognizing compulsory judicial settlement. The dangers of uncertainty concerning the norms are obviously reduced where regional and specialized jurisdiction is present, since the community of States concerned is usually more homogenous. Moreover, such communities are applying a predominantly specialized treaty law and usually enjoy closer and more frequent legal contracts among their member States.

4. The possibility of combining legal and political dispute settlement was discussed often and from various points of view. The decision of the International Court of Justice concerning the *Continental Shelf* under the *North Sea* can serve as an example. The Court in that case outlined the legal criteria for a subsequent political settlement. Colloquium participants repeatedly suggested that a similar procedure could be employed in other cases as well,

e. g., submit only a part of the subject of the dispute to the Court, reserving the remaining part for a political solution to be agreed upon by the States concerned. This should be achieved by appropriate treaty provisions or special *compromis* establishing the jurisdiction of the court.

Another matter which was discussed was the delivering of advisory opinions by international courts. As a rule, advisory opinions are not legally binding and leave open the possibility of a subsequent political settlement. Doubts which were raised concerning the propriety of delivering advisory opinions by courts were mainly resolved in favour of such activity, at least with relation to the International Court of Justice. The practice of the I.C.J. could be expanded and, with the interposition of international organs, could be made into a more effective instrumentality for the resolution of inter-State and other disputes.

5. An organizational expansion of international judicial institutions and procedures in several directions is conceivable, but the political chances for any new re-ordering are uncertain. In attempting any expansion, consideration must be given to the relationship between the various courts. In particular, the following possibilities for a further development of international adjudication present themselves:

a) Permanent specialized courts, *e. g.*, for the protection of human rights, for the regulation of the exploitation of the ocean bed and subsoil, possessed of world-wide jurisdiction, but independent of the I.C.J., represent a possibility of controversial value for the development of the international legal order.

b) The establishment of permanent chambers of the I.C.J. for separate regions and for disputes originating therein was mainly regarded as not feasible within the framework of the present Statute of the Court. Appropriate amendments to the Statute would presently meet political obstacles, and in addition the dangers of a regional splintering of international law must not be overlooked.

c) Regional courts with extensive jurisdiction over all international law disputes arising in the region were not advocated during the symposium.

d) The special regional adjudication in matters involving human rights and within the framework of an economic community is predominately viewed in Europe in a positive light; its prospects in other regions were more critically evaluated. (Cf. *infra* III. 3).

e) The question of how specialized courts, regional courts and arbitral tribunals might be related to the I.C.J. — by the submission of particular questions to the Hague Court or in some other fashion — needs further study. Should regional and arbitral adjudication be expanded, it will be necessary

to determine how the danger of a fragmentation of international law can be avoided. As has been the case in the past, all courts should continue to take the case law of the I.C.J. into consideration. The I.C.J., for its part, should strive to reach decisions in accord with the case law of other international judicial bodies.

f) The example of the European Communities, in which national courts submit questions of community law arising before them to an inter-State court, is interesting as a model, but it is uncertain whether it may be transferred to other areas.

6. The question of access to international judicial and arbitral courts needs study and revision. According to the probably prevailing but by no means unanimous view, international organizations should be granted not only the right to request advisory opinions from international courts but also the possibility to be a party in contentious proceedings. The individual already has limited access to some regional and specialized courts. In this regard several colloquium participants indicated that further progress along these lines would be desirable. Among the questions which were discussed was whether the I.C.J. should adopt procedural rules similar to those employed by the European Court of Human Rights when it decides cases involving the rights of individuals.

7. A basic prerequisite for progress in the area of international judicial and arbitral dispute settlement is the growing confidence of States in the ability of courts to act both objectively as well as with due regard for State interests and a correspondingly composed judicial bench. For this reason it was not proposed that the *ad hoc* judge on the I.C.J. should be abolished. The present distribution of membership in the I.C.J. according to the various regions and groups of States took into consideration, at least to some extent, earlier expressed criticism.

In the area of arbitration it does not presently appear advisable to restrict the influence of States on the composition of the tribunals.

8. States will gain confidence in international adjudication when judges demonstrate that they are able and willing to apply the law in force and, at the same time, convincingly to develop this law. In the determination of applicable law, especially in the process of interpretation, declaring and developing the law play an integral role. The readiness of a court not only to apply but also to develop the law can influence the confidence and the readiness of States to recognize the jurisdiction of the court in different ways. The more homogenous a community of States is and the more certain the existing norms are, the lesser the danger is of unpredictable judicial law-making.

9. In order to concentrate on the subject matter in the topics, discussion in the colloquium was restricted to the settlement of disputes by judicial, international law-oriented and normally binding decisions. Although the settlement of disputes by political means, *e.g.*, by negotiation between the disputants or by invoking the assistance of a third party such as an international organization or a third State is doubtless an especially important factor in international affairs, it had to remain largely untouched. The same held true for the problems involved in "peaceful change". Peripherally, only those institutions other than courts and tribunals which deal at least to some extent with judicial dispute settlement, such as Human Rights Commissions and conciliation commissions, received attention during the colloquium. The political and other possibilities of dispute resolution which are mentioned in Article 33 of the U. N. Charter are, along with the genuine judicial decisions and institutions which constituted the main subject of the colloquium, absolutely essential; however, they cannot take the place of the judicial decision and its guarantees.

II. The International Court of Justice

1. The place of the I.C.J. in the contemporary legal order is, as was stated by many of the participants, characterized by the following factors:

The I.C.J. is the only judicial institution which is accessible to all States of the world. It is also the principal judicial organ of the United Nations and in this capacity can take up legal questions of specialized world-wide organizations. As the general court of the community of nations, it applies a universally binding international law, the sources of which are mentioned in Article 38 of its Statute. As the judicial organ of the United Nations and under circumstances also of other international organizations, it applies the Charter and the special law of these organizations. It can therefore promote the reciprocal connection and influence of general international law and the basic rules and principles of the Charter. Since the States are free to take advantage of its services or to opt for other possibilities peaceably to settle their disputes, the significance which the Court can have in international life depends upon the extent to which States can be convinced that judicial settlement best serves their interests. The Court is restricted to the application and interpretation of currently valid international law. It cannot concern itself with requests to change the existing legal situation. Nevertheless, it must be recognized that it has a very important contribution to make in the further development of international law. For

this reason alone it is desirable that it often be seized. Decisional case law continuity can be achieved only where a multiplicity of cases are being decided and persuasive authority develop for other judicial and arbitral courts as well as for the practice of States.

From this point of view the little activity of the Court was viewed as unsatisfactory. Most of the participants attempted, through proposals of various types, to indicate how the Court might be activated.

On the other hand, a number of participants warned against overemphasizing the "crisis" of the Court, about which much has been said in recent years. The obvious tendency of States peaceably to settle their differences in other non-judicial ways was not an indication that their relations were bad. Depending on the type of case, a judicial decision which leaves one party the winner and the other the loser can create a situation which does not correspond to the needs of the litigant States for compromise and cooperation. However, it should not be forgotten that even serious political disputes, such as the *Alabama* case or the *British-Norwegian Fisheries* case indicate that judicial decisions can be useful even in matters where important interests are at stake.

Over and above its dispute-settling activity, the basic question of whether, when and how the Court should be authorized to deliver advisory opinions was discussed. The participants expressed varying opinions on the subject. Because of the unsatisfactory way in which advisory opinions of the I.C.J. have been treated in the United Nations, some scepticism was expressed about whether the Court should have the competence to deliver advisory opinions at all. The prevailing opinion was that the activity of the Court should be invigorated in both contentious cases as well as in advisory proceedings. Numerous practical suggestions were made concerning how this might be accomplished. As far as possible, it was urged that such suggestions could be carried out within the framework of the current Statute of the I.C.J.

2. The discussion on the composition and organization of the Court was partly devoted to an accentuation of the proposals put forward in debates which have been waged over the past few years in various committees and publications, partly to new proposals, however.

a) The necessity was unanimously recognized that the universal function which accrues to the Court both with regard to the potential litigants as well as with regard to the application of general international law must be expressed in the composition of the bench. It was advised that in selecting the judges measures must be taken to insure that African, Latin American and Asiatic legal cultures are represented. It was conceded that without an

amendment to its Statute the Court has recently been gradually developing into a more representative organ. An increase in the number of judges was not recommended, but it was emphasized that special requirements in the qualification of the judges must be set. It was deemed desirable to require that at least part of the members of the Court already have prior judicial experience at home. In every case an excellent knowledge of international law should be required. The numerical relationship of former judges to former professors on the bench has been balanced and has worked out well in practice.

b) The establishment of permanent regional chambers or other regional subdivisions of the Court was preponderantly rejected. A number of participants expressed the same kind of scepticism toward it as had been provoked by the idea of regional courts with general international law jurisdiction (similar to the former Central American Court). Reference was made to the danger which such regional courts would pose to the unity of legal development. The question of how permanent regional chambers and regional courts could be tied in with the plenum of the I.C.J. in order to guarantee the unity of the case law was touched upon but was not discussed in detail.

c) Some participants emphatically rejected the idea of permitting the litigating parties to exercise any influence, with the exception of the institution of the national judge, on the composition of the bench. The same would apply to the forming of a chamber to deal with a particular case (Article 26 of the Rules of Court). To be sure, the need could arise to appoint at least part of the judges to such chambers from a particular region. The procedure for constituting the court must, however, remain within the power of the Court. On the other hand it was pointed out that a degree of influence on or at least a knowledge of the composition of a chamber could induce potential litigants to submit their case to the Court. As an example of this problem the *Argentine-Chilean* case of the *Beagle Channel* was mentioned. In that case the decision was entrusted to an arbitral court composed of five members of the I.C.J. It was suggested that chambers for the decision of individual cases be composed of one *ad hoc* judge appointed by each of the parties and a third judge appointed by the Court from among its members. This procedure would have the advantage of combining the positive features of arbitration with the organization of the I.C.J. and would involve lesser expense.

d) Great importance was attached to the continuity of the composition of the bench. The case law of the Court suffers when the decision on the preliminary objections and the decision on the merits are not made by the same

judges. For this reason Article 27 (5) of the Rules of Court (version of 10 May 1972) was criticized.

3. Opinions on the principles and rules of law on which the Court must base its decisions are reported above (I. 3) in connection with the problems of judicial settlement in general. Over and above these, however, some special considerations arose with regard to the I.C.J. and this subject.

a) The Court, of all the institutions which serve to regulate judicial settlement, plays the most outstanding role in preserving the unity of international law. The great influence which the decisions of the Court have on other international judicial and arbitral courts was stressed. As has already been mentioned, the Court is in the best position to amalgamate the principles of the Charter with those of general international law. Moreover, it is the judicial institution in the international community which is especially capable of taking into account the changes which are taking place in classical international law. It can do this by evaluating the contributions which new trends in the community of States can make toward the formation of new customary law. This task is complicated by the often emphasized contradiction between "old" and "new" international law. The Court had to apply the modern law which has been created by a community of States which has doubled in number over the past few decades. In the opinion of some colloquium participants, this contrast is being exaggerated. Moreover, one should not overlook the attempts which have been made to preserve the unity of international law, *e. g.*, codification of parts of international law and attempts to influence the change from old to new by declarations of the General Assembly of the United Nations on principles and norms of present international law. On the other hand, the Court faces serious problems in applying traditional legal rules the continued validity of which is being questioned by a number of States today, *e. g.*, regarding the law of compensation for expropriations. Such rules represent a factor of uncertainty to many States which would perhaps otherwise be prepared to accept the jurisdiction of the Court.

Predictability in the legal rules and principles which the Court will apply to a particular case is an important element in strengthening the confidence of potential litigants. Although all participants were aware of the fact that uncertainty concerning important parts of the applicable law constitutes a significant reason for the reluctance of States to accept the jurisdiction of the Court, they were also reminded that even the classical international law did not, because it could not eliminate the anarchistic character of a legal community made up of sovereign States, guarantee certainty in the application of the law. This feature is today essentially retained by the principle of

sovereign equality. Therefore, one should not contrast the certainty of the old law with the uncertainty of the present legal situation and draw conclusions therefrom against the usefulness of the I.C.J. Rather, one should provide the Court with opportunities to reduce the uncertainties of the law by continuously developing principles in its decisional case law.

In addition, it was also pointed out that many observers tend to forget that the changes which are taking place in international law have not solely been caused by the more than 60 new States, but also by the appearance of new problem areas which were previously unknown, *e.g.*, environmental pollution, exploitation of the ocean bed and subsoil, technical mastery of space and celestial bodies.

b) In comparison with courts which have been formed by homogenous groups of States or which possess a functionally limited jurisdiction, the I.C.J. faces a much more difficult problem in dealing with sources of law. It was generally agreed that a court's chances of successfully developing the law increase in proportion to the degree of consensus among the litigants concerning the applicable law.

Generally speaking the I.C.J. has proceeded cautiously in developing new law in the past. To be sure, some judgments and advisory opinions must be excluded from this statement. It was recommended that the Court in the future should not create completely new law in deciding cases, but should rather confine itself to an approach in which interpretation and creation of law are indivisibly integrated with one another.

c) Many participants denied that resolutions of the U.N. General Assembly possessed any binding effect as principles and norms of international law. On the other hand, the significance of these resolutions as an indication of the legal convictions of the community of States was stressed. To this extent the I.C.J. can take them into account, even if it cannot use them as sources of law. If States were to conduct themselves in accordance with the tenor of such resolutions, customary law could be developed therefrom. It was also stated that the authority of U.N. resolutions as an indication of legal conviction is strong or weak depending on amount of support which they receive in the General Assembly. It does not appear to be either necessary or desirable to elevate resolutions of the General Assembly to the rank of a formal source of law within the meaning of Article 38 of the Statute. Otherwise the danger would arise that even more States than ever would avoid the I.C.J. It was deemed preferable to adhere to traditional methods for the formation of customary international law.

d) The formulation of sources of law in Article 38 has been criticized for some time. Among other things, it was suggested that the I.C.J., similar to

the Court of Justice of the European Communities (Article 164 E.E.C. Treaty), be simply empowered "to ensure observance of law and justice". In this way, the Court would be able to determine for itself the sources from which it derives law and justice.

4. The following questions are foremost in the deliberations concerning the jurisdiction of the Court in contentious cases: the problems of the optional clause; the division of disputes into two parts: one part to be settled by a judicial decision, the other to be left to the parties themselves for resolution; access to the Court.

a) States which do not want to declare themselves ready to submit unreservedly to the jurisdiction of the Court could be given the opportunity to agree to a judicial decision in certain restricted cases possessing especially suitable subject matter. It was suggested that all treaties between the parties, especially politically "neutral" agreements such as transportation, navigation and commercial agreements could fall into this category. The practicability of such restrictions was doubted by some, however. Reference was also made to the possibility of permissible reservations which do not render the submission to the Court's jurisdiction illusory as well as to the extension of the period during which the revocation of the submission is precluded. The fact that countries sympathetic to and opposing the optional clause were not identical with industrialized and developing countries was stressed as a favorable indication for the expansion of declarations of submission.

From several quarters came the suggestion that the Court hear not only *causes célèbres* but also routine matters of inter-State affairs. In this way the reluctance of States to accept the jurisdiction of the Court could be reduced, and the Court would have an opportunity to develop the necessary continuity in its decisional case law (see above II 1). In opposition to this, it was pointed out that the organization and procedure of the Court were not suited to such matters and would require essential changes.

b) There was substantial agreement that the binding nature of judgments constituted an essential element of "judicial settlement". On the other hand, it cannot be denied that a judgment of a court definitively determining the legal position of the parties is often ill-suited to end the conflict between the parties. There are many disputes which possess both justiciable and non-justiciable character. In such cases it is advisable to submit to the Court that part of the dispute which can be conclusively settled in a judicial proceeding, permitting the parties a free hand to negotiate a resolution of their other differences. The suggestion to submit to the Court only either the justiciable part of the dispute or a preliminary question of law by means of a special agreement while reserving a final disposition of the matter for negotiation

between the parties was seconded by so many participants at the colloquium that it is probably possible to state that there was a general consensus of opinion on the subject. In this connection the proceeding dealing with the Continental Shelf of the North Sea was often cited with approval. In that case the parties requested the Court only to determine the "principles and rules" which would be applicable for the delimitation of their shares of the continental shelf. They agreed to set the boundaries later in a treaty.

It was explained that a judgment must deal with an actual controversy. Purely abstract questions cannot be submitted to the Court in contentious cases.

c) According to the Statute, jurisdiction in contentious cases is restricted to States. The extension of standing to sue to international organizations is one way to revive the activity of the Court.

The inclusion of international organizations plays an important role especially in connection with the expansion of the competence of the Court to deliver advisory opinions (see below II. 5). It was, however, also suggested that international organizations be granted the capacity to be parties to both internal and external disputes. External disputes are those which arise between the organization and a non-member State based either on a treaty or on the international responsibility for its acts which the organization bears. Internal disputes deal with control over *ultra vires* acts of organs as well as with the rights and duties of member States as expressed in the Statute of the organization.

The question of whether this expansion of the jurisdiction of the I.C.J. is desirable was not answered unanimously. It was discussed together with the question of the expansion of the competence of the I.C.J. in advisory proceedings. The same category of cases which was mentioned with respect to contentious proceedings was also recommended for the admission of advisory proceedings.

5. Jurisdiction in advisory proceedings was regarded in its present state as unsatisfactory by many participants. The need for legal protection of member States, and possibly also non-member States, against *ultra vires* acts of international organizations can be provided not only in contentious, but also in advisory proceedings. This need will grow stronger as the activities of international organizations further expand into all areas of economic and social life. For this reason many participants expressed the view that the I.C.J. should be granted the opportunity of delivering advisory opinions at the request of interested States on the question of whether acts of an international organization fall within the powers conferred on it by its Charter or Statute. This control by the I.C.J. must be strictly confined to

legal questions, however. No interference should take place in areas reserved to the political discretion of the organization.

The suggestion, known from public discussions, to establish a "Review Committee" in the United Nations was by and large favorably accepted. Such a Committee would have the task of clarifying in advance political questions and of reducing the subject of the advisory opinion to the legal questions. On the other hand, stress was laid on the danger that legal protection might be diminished by the intermediate activities of the Committee because the requirement of the consent of the parties to judicial dispute settlement might be by-passed. There is a danger that the States, organs or persons concerned will be denied equality because they will be unable to make their views directly known to the Court. The possibility of withholding a dispute from the Court because of non-objective reasons must be prevented by an appropriate composition of the Committee and a suitable proceeding.

The establishment of a Review Committee would also enable the Court to draw up advisory opinions dealing with fundamental questions of law about which the administrative courts of various international organizations have differed. In this way the harmonization of administrative law of the international organizations can be furthered.

6. The revision of the rules of procedure by the new version of the Rules of Court of 10 May 1972 was favorably received.

a) However, doubts were expressed with regard to the demand that the procedure be shortened by reducing the number of written pleadings. A reply and rejoinder afford the parties with an opportunity to present new arguments which they could not take up in the initial pleadings because of lack of knowledge of the arguments of their opponents. Additional reference was made to the fact that the parties are themselves often not interested in a speedy proceeding. Other participants, however, supported the demand for acceleration of the proceedings by action of the Court.

b) The new provisions on preliminary objections (Article 67) received favorable endorsement because they could prove to be effective in preventing preliminary objections from being heard during the discussion on the merits or, conversely, the principal subject matter from being considered within the framework of the preliminary objections. The repetition of unsatisfactory proceedings such as the *South West African* case and the *Barcelona Traction* case should be avoided.

c) It was recommended that the procedure before the I.C.J. could include conferences on possible conciliation between the parties. The president could be assigned this duty. The Charter of the United Nations and the

Statute of the Court do not preclude the Court from encouraging conciliation. The introduction of a formal procedure of amicable settlement comes to mind. On the other hand, there is a danger that this procedure will be treated as a diplomatic activity and that it will prejudice the position of the president or the judge who takes part in it when he is later called upon to decide the case. It would be difficult for the parties not to draw conclusions concerning the attitudes of individual judges after having spoken with them in such conferences. In this connection the division of the proceedings modeled after the European Human Rights Convention was mentioned, although this would entail an amendment of the Statute. The European Human Rights Commission, which is composed of independent persons, has the task not only of reviewing the facts and the law, but also the duty of striving for a friendly settlement. Only after these efforts have failed and the Commission has delivered its report can application be made to the European Court of Human Rights.

d) The question of whether a new type of preliminary ruling should be introduced for contentious cases was also discussed. The subject of this preliminary decision would be questions of law which the highest national court of a country submits to the Court when, during the course of litigation pending before the national court, a preliminary question arises concerning the interpretation of an international treaty or a rule of general international law. Such a possibility is not open to the Court under its present Statute. Reference was made to Article 177 of the Treaty Establishing the European Economic Community which provides for such a procedure. The choice of this example indicates, however, that such a procedure is more suitable for regional or functionally restricted international organizations than it is for world-wide jurisdiction.

e) To some extent the demand was made that individual persons should be granted access to the Court. Since confering on them the status of party-litigants is probably out of the question, it was suggested that the needs of affected individuals be taken into account indirectly, as is the case in proceedings before the European Court of Human Rights. There, the views of individual persons who stand to be affected by the outcome of the case may be transmitted to the Court through the Human Rights Commission. Moreover, it is possible that the attorney for the interested person may be authorized by the Commission to participate under its responsibility in the oral arguments before the Court.

f) Several participants demanded that the costs of litigation be reduced in order to make it easier for penurious countries to gain access to the Court. For this purpose it was suggested that a legal aid fund be set up.

III. Regional and Specialized Courts

Deliberations on this theme were based not only on the experiences of regional and specialized courts, *e.g.*, the European Court of Human Rights and the former Central American Court, but also on those institutions which exercise judicial functions without being a court. The preparatory report contains a survey of these quasi-judicial institutions.

1. There was substantial agreement on the proposition that the decisive criterion for determining the efficiency of courts whose jurisdiction is restricted to a particular group of States is to be found not so much in geographical proximity as in the homogeneity of interests and legal principles existing within the group. It was stated that all presently existing regional courts are at the same time specialized courts, and that there is therefore currently no regional international court with general jurisdiction over all legal disputes between States. The result of this is that the problems of regional jurisdiction are largely identical with those courts which are functionally restricted to a particular treaty system or to a certain international organization. The homogeneity of a group of States of a particular region or of a particular social system manifests itself in the fact that the jurisdiction of the court established by it is more concerned with law-making treaties than is the case with world-wide specialized courts, which are more adapted to deal with predominantly technical questions of international relations.

2. The basic question of whether to promote the development of regional courts was answered in various ways. It was universally agreed that the establishment of such institutions need not necessarily create a danger to the unity of international law. Although some participants expressed this fear, others noted that experience so far has demonstrated that regional courts orient themselves to the decisional case law of the I.C.J. and themselves produce very valuable contributions to the development of general international law.

Even if, as has been noted above (II. 2b), the establishment of permanent regional chambers of the I.C.J. was by and large rejected, the wish was occasionally expressed that the courts should "come spatially closer" to the parties. This need can be met by holding sessions in places other than the normal seat of the I.C.J. or of the regional or special court in question.

The establishment of regional courts with restricted subject matter jurisdiction was by and large deemed to be useful. There are many political and legal reasons which prevent the I.C.J. from assuming their duties.

3. Where particularly intensive legal relations and a high degree of mutual interest exist, some participants expressed the view that courts could be set

up whose jurisdiction included norms of international law which do not possess universal validity. The unity of the general legal order would not thereby be endangered because the law applied by such courts would be embodied in regional sources of law, especially in treaties.

The greater homogeneity and solidarity which exists in Europe or in other parts of the world, *e. g.*, in Latin America, is a fitting starting point for the formation of special courts. In this connection it is necessary to underscore the special role which such institutions, particularly the Court of Justice of the European Communities, can play in the economic and political integration of groups of States.

The activity of the European Court of Human Rights was generally warmly praised. To criticism that the judicial protection given to human rights was restricted to individual liberties and was, because it did not include social rights, worthless to most countries, it was pointed out that only the traditional individual rights are justiciable and offer an opportunity for desirable judicial protection against arbitrary conduct by the State. Efforts to realize social rights are being made regionally, *e. g.*, in the European Social Charter.

4. Opinion was divided on the question of whether functionally specialized courts with jurisdiction over the norms of general international law were desirable. Approval and criticism were expressed concerning the new agreement of the Council of Europe on State immunity which provides for a court to settle disputes. Those in favour of the agreement were of the opinion that a regional court is better suited to further develop international law by progressive decision making than is the I.C.J.

The project of an International Maritime Court would, if realized, entail similar problems. The solution of these problems will depend on whether its jurisdiction is determined essentially by the still to be created regime of the sea and of the ocean bed or whether it will reach its decision on the basis of general international law.

5. Regional and specialized jurisdiction is restricted to a relatively well defined body of law. These courts apply general international law to the extent that the cases pending before them have a direct or indirect inter-State character. This occurs, for example, more often in the European Court of Human Rights than in the Court of Justice of the European Communities. The case law of the latter court reveals more constitutional law and administrative law traits. This is a result of the special and functional character of the Community Treaties. However, such courts apply general international law to fill in the gaps of the governing treaty and to interpret it.

6. The procedural rules of regional and specialized courts follow largely the model of the Statute of the I.C.J., but they do contain certain features peculiar to their subject matter jurisdiction.

Within the framework of the European Economic Community and the European Convention on Human Rights there are special bodies or organs possessing the right to file applications and complaints. They have either a direct position as parties or a special position in the judicial proceedings. Moreover, natural and juridical personalities are permitted direct access to the Court of Justice of the European Communities as parties. In the vast majority of cases the procedure before this court is not typical of that which characterizes inter-State disputes.

The same may be said of specialized courts whose jurisdiction is restricted to the internal law of international organizations. Such procedures can begin to serve as a model for inter-State jurisdiction only when the general international integration on a universal scale is much more advanced than it is at present.

On the other hand, the depoliticizing of a dispute through the mediation of a body acting objectively, which is done in some proceedings of specialized institutions, can be utilized for international jurisdiction. In discussing the problems of the I.C.J. (see above II. 6), it has already been indicated that the formation of a body which could effect a friendly settlement could orient itself to the model of the European Human Rights Commission.

7. The transferability of the experiences which have been gathered by existing regional and specialized courts to new institutions of a similar type in other countries depends on the comparability of conditions. The systems of the European Economic Community and of the European Human Rights Convention have had an influence on the shaping of the not at present functioning system of adjudication concerning corresponding matters in Latin America.

IV. Arbitration and Conciliation

At the discussion of the third theme of the colloquium there was an attempt to clarify the role which judicial institutions other than permanent courts play and can play in the settlement of international legal disputes.

1. Arbitration is characterized by the fact that it provides a binding settlement of a dispute on the basis of the law reached by judges who are generally appointed by the parties but who decide free of any directions from the parties. Arbitration includes both arbitral courts set up on an *ad hoc* basis by the parties as well as permanent bodies designed to handle

certain types of disputes. The decisive influence of the parties on the bench and the power which they normally have to appoint an equal number of arbitrators constitute the difference from genuine international courts. The binding settlement of disputes on the basis of law (and also *ex aequo et bono* in exceptional cases when the parties expressly agree) differentiates arbitration from other procedures of reviewing and resolving inter-State disputes. As a rule, conciliation does not end up with a binding decision. It is also less strictly bound to follow the law, although in many respects it is more like a judicial procedure than mediation and similar proceedings.

The terminological differentiation just mentioned between arbitration and conciliation is often not observed by States in their practice and by scholars in their discussions. "Conciliation Commissions" are occasionally called upon to make binding settlement of disputes (Conciliation Commissions set up pursuant to the Italian Peace Treaty). Sometimes the concept arbitration is used to designate the regulation of other than legal disputes. This vague terminology does not affect the substantive characteristics of the various proceedings.

2. The most recent practice of States indicates, as was repeatedly pointed out in the discussions in the colloquium, that there are hybrid forms of arbitration and conciliation. Thus, for example, the Convention on International Liability for Damage caused by Space Objects of 29 November 1971 makes possible a type of arbitral proceeding without a binding decision. Article IV (2) of the International Air Transport Agreement and Art. II (1) of the International Air Services Transit Agreement of 7 December 1944 provide for a "conciliation" proceeding with sanctions.

Participants also suggested that studies be made to determine whether conciliation and arbitration proceedings could be employed, depending on the type of dispute, in alternating sequence — also first arbitration and then conciliation — in order to combine the advantages of both types of proceedings more closely with one another.

Express notice was also taken of the dangers inherent in a departure from existing international law and in decisions and proposals based only on subjective evaluation or caprice and political expediency. The international community and the weaker States therein tend to be placed at a disadvantage when legal certainty and respect for the law decrease.

3. According to the prevailing opinion, general multilateral conventions on conciliation and compulsory arbitration have for some time now stood in disfavour with the States. The Geneva General Act and the attempts to revive it in the era of the United Nations have proved ineffective, just as have the "Model Rules for Arbitral Procedure". In addition, the European

Convention for the Peaceful Settlement of Disputes has met with little approval. The reason for this probably lies in the fact that States generally do not desire to take on any obligations whereby they are unable to foresee adequately the possible disputes and disputants which may arise. Even suggestions to add to general conciliation and arbitration conventions a list of subjects from which the States could select those which appear to be acceptable to them seems for the time being to have found little favour in practice.

To the extent that the text or appended optional protocol of recent multilateral conventions, *e. g.*, the Vienna Conventions on Diplomatic and Consular Relations, provide for procedure to settle disputes, the States appear to be likewise uninterested in recognizing these procedures. This attitude is difficult to understand and should be reviewed. These conventions cover limited subject matters and entail smaller risks in interpretation even if such risks cannot be avoided since treaty provisions possess a compromissary character.

The outlook for isolated *ad hoc* arbitration — the agreement to establish an arbitration tribunal to handle an already existing dispute — is, as recent experience has shown, favorable. It offers the parties numerous advantages, especially greater flexibility. They have the opportunity of determining the subject matter of the dispute and the relevant norms and can exercise considerable influence on the bench and on the procedure.

4. Altogether there are many factors to be considered when States decide in favour of or against proceedings by way of genuine international adjudication, arbitration or some other type of dispute settlement proceeding without binding effect on the basis of law. The points of view arguing for and against arbitration on the one hand and conciliation or similar proceedings on the other were put together by Rapporteur Professor Bindschedler in his report and were recognized as relevant by the participants in the discussion. Of special significance is the question of whether the existing international law is certain enough and appears attractive enough to the States. If this be not the case, then resort will often be had to non-legal standards with the consequent loss in judicial activity. It is also important to determine whether disputing States in a particular case prefer to have a binding decision or a non-obligatory proposal on applicable rules. In doing so, one should not lose sight of the fact that respect for a "binding" decision cannot be enforced, but rather depends on the good will of States. On the other hand, formally non-obligatory conciliation proposals, in particular when they are made on the basis of the law, are often voluntarily respected by the parties.

The value of the decision of an arbitration court as precedent for other

cases is not so great as that of a permanent court but, depending on the circumstances, it can be of considerable significance.

In conclusion, it was the prevailing view of the participants in the colloquium that the possibilities of judicial dispute settlement in the area of arbitration on the basis of law have not been sufficiently exploited and that more activity and further progress in this field is desirable.

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