United Nations General Assembly | Sixth Committee

Report of the International Law Commission

(Agenda item 79)

CLUSTER II

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(check against delivery)

Mr./Madam Chair,

All protocol observed,

Brazil recalls that the draft guidelines on the "Settlement of disputes to which international organizations are parties" should be considered in light of the responsibility of international organizations for internationally wrongful acts.

According to the articles adopted by the Commission in 2011, "Every internationally wrongful act of an international organization entails the international responsibility of that organization".

While noting the clear preference for amicable methods of dispute settlement, such as consultations, and the limited availability of institutionalized means of dispute resolution, including third-party adjudication, such as arbitration and judicial settlement, we stress the need to avoid impunity for breaches of obligations attributable to international organizations.

Brazil acknowledges that disputes between States and international organizations can range from issues related to headquarters agreements, privileges and immunities, withdrawal from membership, and the scope and limits of the powers and mandates of organizations.

The possibility of addressing disputes involving "sui generis" subjects of international law deserves further reflection, as these entities are not explicitly mentioned in draft guideline 3.

Brazil asserts that disputes between States and international organizations should be settled in good faith and in a spirit of cooperation, as outlined in draft guideline 4.

We welcome draft guideline 6, which emphasizes the need for arbitration and judicial settlement to meet the requirements of independence and impartiality of adjudicators, and due process.

Diplomatic means of dispute settlement, such as consultations, presuppose a formal balance between the parties, without any legal subordination between them.

In this regard, it is essential that the commentaries to the guideline emphasize that an international organization endowed with judicial bodies should not engage in consultations with States parties while acting simultaneously as judge and party to a certain dispute.

Mr./Madam Chair,

I now turn to chapter V of the Commission's report, on "Subsidiary means for the determination of rules of international law".

Brazil welcomes the emphasis of draft conclusion 4 on the role played by the International Court of Justice.

As the only international judicial body with broad "ratione materiae" jurisdiction, the ICJ has developed a solid jurisprudence over decades.

As the principal judicial organ of the United Nations, all 193 member States are parties to its Statute, and its judges are elected taking into account geographical representation and the principal legal systems of the world.

These characteristics confer representativeness and legal authority on the International Court of Justice, contributing to the unity and coherence of international law.

We acknowledge that, according to the commentaries, the term "decisions" should be interpreted broadly to include not only final judicial rulings but also advisory opinions and provisional measures.

However, Brazil believes that the Commission should carefully reconsider the meaning attributed in the commentaries to the term "courts and tribunals".

We hold that the work of non-judicial bodies, such as the Human Rights Committee and the Inter-American Commission of Human Rights, has non-binding nature, and may not be understood as “decisions of courts and tribunals”, which should encompass only the work of those bodies vested with judicial authority.

In this context, Brazil calls upon the Commission to redraft paragraphs 8, 9 and 10 of the commentary to draft conclusion 8, in order to delete references to findings of non-judicial bodies, such as human rights commissions. Although such work may sometimes assist in determining rules of international law, reference to them is misplaced in the commentary to a conclusion on the weight of decisions of courts and tribunals.

Caution is also warranted when considering the decisions of national courts, as per draft conclusion 4, paragraph 2, especially given that the Commission and other international legal bodies often refer disproportionally to decisions from developed countries.

As Brazil highlighted in its comments on cluster I earlier this week, references to national decisions from developed countries may comprise over 96% of all domestic decisions mentioned in the commentaries to some products of the Commission.

My delegation also echoes the caution expressed by the Commission in its commentaries to draft conclusion 5. Teachings often do not seek to record the state of the law, but rather advocate for its development, potentially reflecting national or personal viewpoints of their authors.

In this context, instead of prescriptively stating that teachings are a subsidiary means, as per current draft conclusion 5, the Commission could consider redrafting it to acknowledge that teachings "may be used" as such. This language would align the conclusion with provisions of other products of the ILC, such as the drafts on the identification of customary international law and on peremptory norms of general international law.

At the same time, Brazil welcomes the reference to gender and linguistic diversity in draft conclusion 5.

My delegation supports draft conclusion 6, paragraph 1, which clearly states that subsidiary means are not a source of international law. Therefore, they do not create rights or obligations for states.

Brazil would appreciate further clarification on draft conclusion 6 paragraph 2. Some of the examples provided by the Commission in its commentaries seem to relate to the existence and content of rules of international law, as already stated in paragraph 1. Therefore, it is not always clear to exactly which other purposes subsidiary means would serve.

Draft conclusion 7 and its commentaries also require further consideration. Although titled "absence of legally binding precedent in international law," it focuses on instances where precedents are followed or even considered binding.

The Commission may consider redrafting conclusion 7 to state upfront that such decisions do not constitute legally binding precedent, in line with its title.

Additionally, the absence of “stare decisis” in international law could be further developed in the commentaries. In this regard, we note that the conventionality control by the Inter-American Court of Human Rights does not establish formally binding precedent.

Regarding draft conclusion 8, my delegation emphasizes that the weight of decisions of courts and tribunals as subsidiary means depends on their specific competence.

In this vein, while the authority of the International Court of Justice on general international law should be prioritized, statements by bodies with specific "ratione materiae" jurisdiction should be considered only within the scope of that competence.

I recall, in this regard, instances where specialized tribunals have adopted interpretations of general international law that are incompatible with the jurisprudence of the International Court of Justice, such as the customary international law avenue adopted by the Appeals Chamber of the International Criminal Court in 2019.

In this context, Brazil also supports draft conclusion 8 (b), which highlights that the weight of decisions as a subsidiary means depends on whether it is part of a body of concurring decisions.

In this regard, we also refer to the expansive interpretation of the concept of marine pollution recently advanced by the International Tribunal for the Law of the Sea.

Finally, Brazil calls upon the Commission to include in draft conclusion 8 an assessment of the extent to which a Court's interpretation reflects State practice on the matter, in particular the subsequent practice in the application of a treaty which establishes the agreement of the parties regarding its interpretation, as per article 31 (3) (b) of the Vienna Convention on the Law of Treaties.

In this respect, I recall that the International Criminal Court has adopted interpretations of the Rome Statute that are incompatible with unanimous State practice.

Such findings inevitably carry significantly less weight, and the Commission should carefully consider whether they qualify as subsidiary means for the determination of rules of international law.

I thank you.