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25 Settlement of Disputes

INTRODUCTION

Dispute settlement was bound to generate interest among professional legal experts in whatever capacity they were involved in the proceedings of the Third United Nations Conference on the Law of the Sea given that it is one of the topics in the forefront of legal science. This was especially true since the proclaimed aim of this international gathering was clearly to define a new law of the sea laying down new rules governing maritime areas and maritime-based activities which, at the same time, would modernize conventional public international law, introduce greater justice into international relations and herald a new international economic order.

In generating political and legal innovations, the new law of the sea was bound to lead to strains in international relations, so the best approach appeared to be to prevent disputes by establishing a written system for dispute settlement.

This avant-garde approach to law of the sea disputes should not mean that the importance of law of the sea problems in the development of the general system for international dispute settlement should be overlooked. The classic international "inquiry" under the 1899 system of The Hague, was used in four cases concerning all aspects of maritime navigation *(Dogger Bank, Tavignano-Camouna-Gaulois, Tubantia* and *Red Crusader)*. Similarly, the conciliation procedure was set up in order to deal with certain maritime incidents in Antwerp in May 1940 between Belgium and Denmark. The *Alabama* case first established arbitration as a legal procedure for settling disputes. The first legal act of the Permanent Court of International Justice was to rule in the *Lotus* case, and similarly, for the International Court of Justice, in the *Corfu Channel* case. So we can see that law of the sea problems represented milestones in dispute settlement law which eventually developed into a general mechanism on which a theoretical approach could be based.

The procedural adage *"electa una via"* means that if the declaration expires or if one choice is revoked in favour of another, this will have no effect on any proceedings which have already been initiated. In general international law, this rule allows examination of problems encountered to be made with minimum difficulty in the event of a State expressing its acceptance of the jurisdiction of the International Court of Justice after a dispute has arisen.

The Convention in effect sanctions any failure to comply with the obligation to make a declaration of choice as laid down in Article 287. Silence is taken in all cases to mean acceptance of arbitration in accordance with Annex VII, as stated in paragraphs 3 and 5 of Article 287. The explanation for this is straightforward. Arbitration has two major advantages; the binding nature of the decision and the extensive possibilities for parties to participate actively in the proceedings. In addition, the general structure of the Part XV machinery shows a gradual tendency towards institutionalizing judicial obligation. The process of dispute settlement under Part XV involves two successive stages:

- an initial phase of optional settlements by diplomatic negotiations and conciliation;
- a second phase of compulsory procedures entailing binding decisions if the first stage is not successful.

However, provision has been made for some exceptions to binding judicial decisions.

SECTION 1 PROCEDURES ENTAILING OPTIONAL DECISIONS

Unlike "compulsory procedures entailing binding decisions" which are covered in Section 2 of Part XV, the procedures dealt with here are compulsory in that parties are obliged to use them in the event of disputes arising. However, the parties to the dispute are not bound by any solution arrived at by such procedures.

There are two such procedures: exchanges of views and conciliation.

Subsection 1 EXCHANGES OF VIEWS

In order to introduce a measure of compulsion into the text, Article 283, under the heading "obligation to exchange views", in fact provides for diplomatic procedures for peaceful settlement of disputes.

This heading actually stemmed from some confusion over the purpose of exchanging views. Those who drafted the informal basic text intended to

prompt parties to enter into negotiations in order to define by common agreement and as swiftly as possible the procedure for settling disputes. However, this interpretation met with reservations from delegations opposed to a shift towards procedures for settling disputes entailing binding decisions without the explicit consent of the respondent.

Article 283 therefore does not impose on States Parties a binding outcome, but compulsory means: not to refuse to enter into diplomatic negotiations, and to enter into such negotiations expeditiously. As far as the participants were concerned, exchanging views was designed to make it easier to decide on a means of settlement acceptable to both parties rather than resolve the dispute.

There are no explicit provisions on the duration of such negotiations. Article 283 uses the term "expeditiously". On analysis, it would appear that two obligations could be singled out – to enter into negotiations with the other party and to lay down a deadline for exchanging views – but only the first of these was taken up, since the strongest objections were voiced against any idea of placing a deadline on the duration of diplomatic negotiations.

Subsection 2 CONCILIATION

Conciliation, which can be defined as a method of settling international disputes whereby they are considered by a body set up for that purpose or accepted by the parties and which is instructed to propose a settlement to them, is the second means of dispute settlement contained in the Law of the Sea Convention which does not entail binding decisions. This procedure is covered by Article 284 and Annex V.

The conciliation procedure was the highest common denominator between those in favour of compulsory recourse to a specific procedure for settling disputes and those opposed to any binding solution being imposed on the parties to a dispute. These apparently conflicting requirements led to acceptance, by consensus, of a distinction between compulsory and optional conciliation and of a single conciliation procedure.

Paragraph 1 Areas Where *Ratione Materiae* Jurisdiction Is Subject to Compulsory Conciliation

Article 284, paragraph 1, recalls the possibility for any State party to a dispute to invite the other party or parties to submit the dispute to conciliation. Thus, the Convention merely takes up the traditional provisions on this matter. However, one fundamental innovation was to establish the concept of compulsory conciliation for settling disputes related to particular matters in the Convention.