Excerpts

Third United Nations Conference on the Law of the Sea

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60th Plenary meeting

Extract from the *Official Records of the Third United Nations Conference on the Law of the Sea, Volume V (Summary Records, Plenary, General Committee, First, Second and Third Committees, as well as Documents of the Conference, Fourth Session)*

stipulation could lead to a dangerous undermining of the security mechanism of the United Nations. It was for the Security Council alone to decide whether or not a dispute threatened international peace and security, and, on that basis, to take the measures which it deemed appropriate. Consequently, article 18, paragraph 2, should be amended so that the disputes referred to would be excluded *ipso jure* from the procedures provided for in the convention.

The meeting rose at 6 p.m.

60th meeting

Tuesday, 6 April 1976, at 10.15 a.m.

President: Mr. H. S. AMERASINGHE (Sri Lanka).

Settlement of disputes *(continued)* (A/CONF.62/WP.8,[1] WP.9 and Add.1)

It was decided to permit the International Ocean Institute, a non-governmental organization which had been invited to the Conference and was represented by an observer, to take part in the current debate.

1. Mr. RIPHAGEN (Netherlands), speaking also on behalf of the delegations of Belgium and Luxembourg, said that dispute settlement was not a separate branch of international law, but was related to the substantive rules in different fields of international law. With regard to the law of the sea, difficulties would arise not only as a result of traditional and new uses of the sea, but also because new concepts had emerged, such as the concepts of mankind and of environment, both transcending traditional notions of nations and territory. Those concepts required a measure of international management, including international procedures for the settlement of disputes. The development of such procedures was in the interests of all States. The abstract rules which were to be elaborated, particularly in relation to the marine environment, required methods for the settlement of disputes which conflicting interests were likely to generate. Whatever differences of opinion still existed as to the contents of the rules on dispute settlement, a balance must be struck between the interests of coastal States, those of the other users of the sea and those of the international community as a whole. That would be impossible without a set of rules the primary object of which was a functional division of rights to be exercised within the same ocean space or spaces by the various entities involved. In that respect the seas would continue to be treated in a way totally different from the way land was treated in international law.

2. While the contents of the rights of the various entities in the various maritime zones were necessarily different, their status was always the same. Thus, if the concept of an economic zone was accepted, within that zone some rights would be reserved for the coastal State while others would continue to be enjoyed by all States. But from the legal point of view all those rights would be "sovereign," whatever their practical importance for the States concerned. Such a division of rights had difficulties the solution of which required not only international rules, such as those in the single negotiating text, but also international machineries. Furthermore, the functional division would be different in different maritime zones and those zones would have to be delimited and divided both among States and among States and the international community, in particular the Authority. There again, the delimitation would be quite different from the delimitation of land, since there were no natural boundaries in the seas and the seas would never be the normal habitat of man. Nevertheless, for legal purposes, it was necessary to draw boundaries in the seas. The numerous provisions on the subject in the single negotiating text were and probably would remain rather vague, since it was virtually impossible to cover all existing geographical situations by abstract rules. There again, international machinery for reaching decisions in concrete situations was essential.

3. The new law of the sea convention provided for a completely new type of international organization, namely, the Authority. It was obvious that the Authority must be subject to international rules limiting its powers and regulating the legal relationships it entered into with other entities and, generally, its activities affecting the interests of other entities, whether States or natural or juridical persons. The traditional rules and procedures relating to the interpretation and application of the constitutions of existing international organizations and their contracts did not suffice. The Authority must be subject to some form of judicial control. Accordingly, compulsory dispute settlement was an essential element of any new legal order for the seas. The choice between the various possible methods of dispute settlement must also correspond to the specific character of the applicable rules and to the subject-matter of the particular dispute. Different procedures should therefore be envisaged, while seeking to avoid creating problems of positive or negative conflicts of competence between those procedures. Furthermore, the common principle underlying those procedures should be that ultimately a binding and final decision must be reached.

4. The system of dispute settlement would necessarily be complicated, since a simple, uniform solution would hardly do justice to the great variety of situations. Furthermore, care must be taken to admit a negotiated settlement at all times. In that connexion, the three delegations on whose behalf he was speaking favoured the idea underlying annex III, entitled "Information and consultation," of the single negotiating text submitted by the President of the Conference (A/CONF.62/WP.9). Should direct consultations and negotiations fail after a certain period of time, impartial third-party assistance should be accepted. Accordingly, a compulsory conciliation procedure along the lines of that provided for in the Vienna Convention on the Law of

[1] See *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. IV (United Nations publication, Sales No. E.75.V.10).

Treaties[2] of 1969 should be provided for in the future convention for disputes to which no "special procedures" applied. Third-party assistance need not necessarily be directed towards a negotiated settlement of the dispute; in appropriate cases, it could be directed towards an agreed method of settling the dispute through fact-finding judicial interpretation.

5. If conciliation failed, there should be a compulsory dispute settlement procedure entailing a binding decision. It was at that stage that a differentiation in procedures according to the subject-matter of the dispute should be envisaged, as was the case in annexes II A (Fisheries), II B (Pollution) and II C (Scientific research) to document A/CONF.62/WP.9. Other special procedures would be required for other topics, such as disputes between an operator and the Authority, regarding the management of sea-bed resources in the international zone. Incidentally, where the issue was the validity of decisions taken by the Authority, there was bound to be a special procedure and prior negotiation or conciliation were obviously excluded.

6. For disputes to which no special procedures applied, a general procedure of compulsory judicial settlement should be provided for. The choice was between the International Court of Justice, a new permanent tribunal or arbitration. In that connexion, he recalled that in 1972 the International Court of Justice had adopted several important amendments to its rules of procedure. It was now possible for the parties to a dispute to have it settled by a chamber of the Court, the composition of which was determined in consultation with the parties. That new procedure gave greater flexibility to the Court and filled the gap between judicial settlement and arbitration.

7. It was the conviction of the delgations on whose behalf he was speaking, that undoubtedly no consensus on the choice of a particular body would be possible in the future convention. The choice should be left to each contracting party. A contracting party which did not make such a choice should be considered to have accepted the choice made by the contracting party with which it was involved in a dispute. Each contracting party should at least subject itself to one of the three general methods for the final settlement of disputes when no special procedures applied.

8. In any dispute the need for interim measures of protection might arise, particularly if it concerned law of the sea matters where interference with the movement of vessels and aircraft was involved. The competence to prescribe such measures should appertain to the tribunal which, in the final stage, was empowered to settle the dispute. That would present no problem if the International Court of Justice or the law of the sea tribunal was accepted by the parties. If a special procedure applied or the parties had accepted only the general procedure of arbitration, the need for interim measures of protection might arise before the tribunal was constituted. In such cases, another permanent judicial body should be competent to prescribe such measures pending the constitution of the tribunal, which in turn should be empowered to review the decision taken.

9. Under the general rules of international law no proceedings could be instituted before an international tribunal unless local remedies had been exhausted. That rule, which was a matter of dispute in the doctrine of international law, could be varied or done away with in a treaty. There were good practical reasons for that, if only to advance the speedy settlement of disputes. He recalled in that connexion that in many cases involving the application of the future convention, the rule of exhaustion of local remedies did not apply anyway and that there were many countries where national courts were not empowered to apply treaty rules and other rules of international law if their application was incompatible with the application of their national legislation. Nothing in the future convention should deny States parties to a dispute their right to decide by common agreement on any procedure for the settlement of their dispute other than those provided for in the convention. Nor was there any reason automatically to substitute the procedures in the convention for any previously agreed procedures between the States parties which entailed binding decisions.

10. The question whether entities other than sovereign States should be able to initiate one or more of the procedures provided for in the future convention was closely linked with the substantive rules which were yet to be negotiated. However, it could safely be assumed that there would be clauses in the convention giving rights to and imposing obligations on entities other than States, in particular the Authority and operators. Access of those entities to the dispute settlement procedures should in any case be allowed.

11. Lastly, the dispute settlement system of the convention should apply to all disputes relating to the interpretation or application of the convention. There was no justification for any of the exceptions mentioned in article 18 of the single negotiating text submitted by the President. That article was based to a large extent on confusion between the competence of a tribunal and the rules to be applied. It was obvious that a claimant had to allege that the defendant had exceeded his rights or had not fulfilled his obligations under the convention. If such an allegation were made, the applicable dispute settlement procedure should be followed and the question whether the allegation was well founded in law and in fact could hardly be "preliminary."

12. Particularly unjustified was the exception in article 18, paragraph 2 *(d)*, relating to "disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations." That provision was in clear contradiction to Article 36 of the Charter of the United Nations and it was open to the controversy about when the Security Council was actually exercising its functions. Furthermore, any of the permanent members of the Security Council, whether or not involved in the dispute, could through its veto power prevent the Security Council from determining proceedings under the future convention would not interfere with the exercise of its functions. If it was at all necessary to provide for the case in which the same dispute that was brought before the Security Council was at the same time the object of a dispute settlement procedure under the future convention, it should at least be required that the Security Council should decide that the procedure under the convention was in fact interfering with the exercise of the Council's functions, before the procedure provided for in the convention was discontinued. Indeed, the Security Council could take such a binding decision at any time, even in the absence of such a provision in the future convention, let alone any reservation of any State party to that convention, a reservation which in any event could affect only disputes in which that State was the defendant.

13. Mr. ZEA (Colombia) said that his delegation believed that document A/CONF.62/WP.9 could serve as a basis for negotiation, even though it did not agree with several of the provisions therein. The text should be studied in a forum to which all delegations had access, so that the work on it could be completed.

14. It was essential that the settlement of disputes should be an integral part of the new convention on the law of the

[2] *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), document A/CONF.39/27.

the general system and the special procedures, could not be intended to exclude the traditional tribunals from exercising their jurisdiction. The new procedures were designed to provide additional facilities and did not in any way conflict with existing régimes of judicial and arbitral settlement. It was essential to endeavour to provide as many and as effective means as possible for the settlement of disputes. To that end, it would be helpful to observe a number of fundamental principles or guidelines. First, flexibility was essential in order to achieve a balanced solution, which was vital to the successful conclusion of a Conference of such magnitude. Secondly, the choice of methods or procedures for the settlement of disputes should be made by the parties themselves, especially when proceedings were to be instituted against States. The consent of States was still the basis of international adjudication, although there were several ways of indicating such consent. Thirdly, no attempt should be made to lay down a strict hierarchy among the various methods and procedures available, the selection of which should also be at the option of the parties. Fourthly, the special procedures should be streamlined so as to avoid an excessive number of concurrent specialized jurisdictions and to ensure a practical division of labour without totally eliminating the possibility of some overlapping. Fifthly, in view of the independence of each system or procedure, appellate jurisdiction was difficult to justify; however, the possibility of reviewing certain cases within the same or allied systems should not be precluded. Sixthly, concurrence of jurisdiction, rather than conflict, would, in fact, operate to improve the quality of adjudication. As parties were likely to use the procedures most attractive to them, each system would strive to inspire the confidence of States. Seventhly, acceptance by States of the different procedures for the settlement of disputes could be further encouraged and facilitated if States could be assured that the law to be applied by the tribunals would not only be just and equitable but would also take into account the interests of countries which had taken little or no part in the development of traditional international law. Eighthly, the draft convention should aim at the widest possible acceptance and participation by States. It should not in any way seek to impose on unwilling States any new procedure or a choice of available jurisdictions or procedures. Although the consent of States was a sound basis for jurisdiction, there appeared to be no need to secure the approval of parties to the dispute in order to appoint members of a given tribunal. Ninthly, in order to facilitate wider acceptance and participation, States should be accorded the possibility of making exceptions or reservations with regard to the nature of the disputes, as well as with regard to parties to the disputes. Such exceptions or reservations should not, however, render illusory or arbitrary the general obligation to settle disputes. Tenthly, since the settlement of a dispute was a matter between the States concerned alone, the choice of procedures or jurisdiction should be made by the States themselves. Eleventhly, the Conference should strive for moderation and be guided by practical considerations in its efforts to find alternative solutions to the delicate problem of dispute settlement. Lastly, he believed that work could be expedited by the adoption of a single negotiating text, which could serve as a basis for future negotiations.

53. His delegation reserved the right to make further observations regarding specific parts of the draft convention at an appropriate time.

54. Mr. FUJISAKI (Japan) said that, in his delegation's view, the establishment of machinery for the settlement of disputes relating to the interpretation and application of the new convention on the law of the sea was no less important than the elaboration of the substantive articles of the convention. Agreement on a compulsory dispute settlement procedure must be an essential element in an over-all solution of major issues in the current negotiations. That was all the more necessary since the new legal instrument would have to strike a delicate balance between the rights, obligations and interests of States within the framework of a wider jurisdiction of coastal States than had previously been recognized. His delegation therefore had certain apprehensions that disputes might arise more frequently than had been the case in the past.

55. His delegation wished to emphasize that the general obligation of States to settle their disputes by peaceful means and their right to choose their own methods should be recognized and respected as having equal validity and strength in the field of the law of the sea as in all other fields of international law. Thus, his delegation could support articles 1 to 5 of document A/CONF.62/WP.9 which incorporated that principle. Moreover, when an agreement existed between parties to a dispute whereby they had assumed an obligation to settle any given dispute by recourse to a particular method, that agreement should have precedence over the procedures agreed upon in the new Convention. Article 3 and the explanations given in paragraphs 12 and 13 of the memorandum by the President (A/CONF.62/WP.9Add.1) were of special relevance in that regard.

56. His delegation also wished to emphasize the necessity of making the general obligation to settle disputes an integral part of the future convention. In his delegation's view, the solution adopted at the First United Nations Conference on the Law of the Sea in 1958, in the form of an Optional Protocol of Signature, was insufficient and unacceptable.

57. The question of excepting certain matters from the obligation to settle a dispute, which was dealt with in article 18 of document A/CONF.62/WP.9, was related to the question of the acceptance of compulsory settlement of disputes. Without going into details, he wished to state that his delegation could not agree to such exceptions because they undermined the principle of the compulsory settlement of disputes. On that point his delegation fully shared the views expressed at the previous meeting by the delegation of the Federal Republic of Germany.

58. From the practical standpoint, his delegation favoured the functional approach, which envisaged special procedures for the settlement of various categories of disputes. The scope of the law of the sea was very broad; it would therefore seem appropriate to establish several organs, each with a specific field of responsibility (questions of the sea-bed, fisheries, pollution and the like). In order to ensure the speedy settlement of disputes, those organs should be empowered to take final and binding decisions and should be constituted on a permanent basis. By expressing support for the functional approach, his delegation did not mean to exclude a general system for the settlement of disputes. There might well be instances in which the International Court of Justice, as the principal judicial organ of the United Nations, could play an important role. His delegation was unable to support the establishment of the proposed law of the sea tribunal because there was every likelihood that the problems which would arise under the law of the sea régime could be solved by the existing judicial system. Moreover, the establishment of a new tribunal would give rise to duplication and to conflicts of competence between it and the International Court of Justice.

59. In conclusion, he expressed the hope that the question would be dealt with more comprehensively and perhaps more formally than in the past, in view of the importance that many delegations attached to it.

60. Mr. WOLF (Austria) said that, from the very beginning