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58th Plenary meeting

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58th meeting

Monday, 5 April 1976, at 11.05 a.m.

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

Composition of the Drafting Committee

1. The PRESIDENT said that if he heard no objection he would take it that members agreed that Austria would replace the Netherlands on the Drafting Committee.

It was so decided.

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

2. The PRESIDENT drew attention to document A/CONF.62/WP.9/Add.1, which contained two errors: one in the last line of paragraph 31, where the word "justifiable" in the English version should read "justiciable"; the other in foot-note 7, where "Austria" should be replaced by "Australia". He also pointed out that foot-note 27, which referred to the proposal by Canada and a number of other States, made it clear that the document in question referred only to fisheries and fisheries jurisdiction. Finally, he urged members to avoid a procedural discussion on the status of the documents in question and to try to keep their statements brief.

3. Mr. GALINDO POHL (El Salvador), commenting in a preliminary manner on document A/CONF.62/WP.9, stressed the need for any future convention to include a chapter on the settlement of disputes. Concerning the impact of *lex ferenda* on the settlement of disputes, he said that when new norms of international law were created they should be accompanied by clearly defined means of ensuring that they were implemented. When it was a question of codification, one could rely on the lax means of settlement of disputes now available, which were based on three principles: the compulsoriness of peaceful settlements, free choice of means by States, the will of States as the sole source of the jurisdiction of international tribunals. The recent experience of international conferences was not very edifying so far as the settlement of disputes was concerned, for little progress had been made since the days of the League of Nations. When norms which reflected precarious balances of opposing interests were involved, provision for their effective implementation was essential to their acceptance.

4. Generally speaking, his delegation would like to see in the draft a greater reflection of the maritime zones adopted in other chapters of the single negotiating text. The use and exploitation of the sea waters and the subsoil thereof could require special treatment because of the marine environment. He pointed out that to accept the substantive norms in the absence of effective implementation procedures would most likely contribute to perpetuating differences between States with all the tensions that would entail. It might be expected that agreement could be reached, in principle at least, on a common frame of reference, which was a prerequisite for a meaningful dialogue and negotiation. Ensuring that the convention included a system for the settlement of disputes would make it possible to avoid the following difficulties: uncertainty concerning correct understanding of the agreed norms, which could arise even when States acted in good faith; disputes deriving from different interpretations of the rules; unilateral extension of concessions reflected in the rules, which would upset the original political balance; evasion of the objective of the convention, which was to ensure peaceful activities in the ocean spaces; and the period needed to consolidate the new rules, which would undoubtedly be fraught with legitimate doubts.

5. The main question in the settlement of disputes continued to revolve around the international tribunal. Perhaps, as far as the law of the sea was concerned, the time had come to develop Article 33 of the Charter of the United Nations through the prior selection of specific relevant and precise means for settling disputes. It was to be hoped that specific means would be adopted by the current Conference and that compulsory jurisdiction would be established for certain matters. Experience had shown that the type and composition of the tribunal must form part and parcel of the acceptance in principle of the idea of such a tribunal. There would seem more reason to opt for a permanent tribunal to interpret and implement agreed norms, although it was for States to determine in each specific case by what means a dispute should be resolved. In order to win the broadest possible support, States should be given latitude to choose the type of tribunal even though that was not the best solution from the legal point of view. It was also essential that, under certain circumstances, the resolutions of the law of the sea tribunal, the International Court of Justice, courts of arbitration or international organizations should be binding.

6. He wished to rebut the argument generally advanced to the effect that an international tribunal was incompatible with the principle of State sovereignty, pointing out that States were the sole source of the competence of such tribunals and, in the case of conventions the main body of which was composed of norms of *lex ferenda*, it was States which approved the substantive and adjective rules. Nor was the argument concerning the uncertainty of customary international law valid, since, by definition, the convention would contain sufficient generally accepted substantive rules. Moreover, since the convention would be the product of the co-operation of all countries in the world, the argument that international law was predominantly European in origin could not be used.

7. The composition proposed in annex I C, article 3, was highly interesting, for it would indeed be best to guarantee if possible in the convention itself equitable geographical representation. Naturally, interim provisions would be required until such time as a sufficient number of countries had acceded to the convention. Alternatively, the Conference might issue a declaration on that point, there being precedents in the declarations of the Law of the Sea Conference of 1958. The tribunal, which was the last resort in the settlement of disputes, should be integrated with the other means provided under international law; however, that did not imply that all disputes should be submitted to the tribunal. The aim of a good system for the settlement of disputes was not to open the door to litigation but to provide appropriate instruments according to the nature of the dispute, for not all disputes should be submitted to compulsory jurisdiction. In line with that thinking, it would be better to refer to "consultation" rather than "exchange of views" in article 4 of the chapter on settlement of disputes. Consultations were more formal and detailed and included consideration of the settlement of the dispute.

[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).

procedure should normally be conclusive, and in the interest of speed and certainty there should normally be no appeal.

15. His delegation also felt that it was desirable to establish a new tribunal as an alternative to the International Court of Justice in order to settle disputes relating to the interpretation of the convention and that the new law of the sea tribunal should have jurisdiction in a dispute unless the parties had accepted the jurisdiction of the Court.

16. It was most important that the law of the sea should be fixed and certain and that the system for settling disputes should be prompt and just. However, it would still be useful to leave scope for arbitration and conciliation, and the system established in the annex to the Vienna Convention on the Law of Treaties[2] was a convenient precedent which should be adapted to meet the special needs of parties to disputes relating to the law of the sea.

17. The acceptability of conciliation to the majority of States was demonstrated by General Assembly resolution 1995 (XIX) which established the United Nations Conference on Trade and Development. The applicability of conciliation to even such sensitive areas as human rights was shown by the acceptance of 82 States from all regions of the conciliation machinery established by Part II of the International Convention on the Elimination of All Forms of Racial Discrimination, 1966.[3]

18. The most difficult problem was that of exceptions and reservations and of the types of disputes in which the parties might be free to exclude a system of binding settlement. If exceptions were too numerous or too broadly defined, the value of the system would be reduced and the possibility of securing agreement on compromises subject to future interpretation would also be diminished.

19. A solution to the problem of settlement of disputes had to reflect a balance between the rights of the coastal State over its resources and the rights of others. Where the rights of other States were not involved, the coastal State might well be accorded the exclusive right to enforce decisions made in the exercise of absolute discretion. Where there were alternative or competing uses of an area, and where the rights of the international community or another State were involved, the implications of the revolutionary new legal concept of the economic zone had to be considered.

20. Mr. CHEOK (Singapore) said that the convention which finally emerged would be a finely balanced package covering the rights and obligations relating to the economic zone, the right of transit of international straits, the rights of land-locked and geographically disadvantaged States and the powers and competence of the Authority to administer the common heritage of mankind. It was of paramount importance that such a negotiated balance not be disturbed by unilateral and arbitrary interpretation. His delegation therefore supported the concept of a compulsory procedure for settlement of disputes. Well-designed legal procedures would give smaller countries an effective means to vindicate their rights against larger countries, and since even the large and powerful countries had an interest in the peaceful settlement of disputes, both would gain by the effective application of agreed rules under equality before the law. A compulsory settlement procedure would ensure a certain degree of uniformity in the interpretation of the convention. It could prevent a dispute from deteriorating into a serious conflict, and it would enhance the role of law in international relations and make for rational and effective enforcement of the new law of the sea.

21. Past precedents on the compulsory settlement of disputes, with their optional provisions, had proved disappointing and unsatisfactory. Of course, compulsory settlement procedures should be applicable only when attempts to reach an amicable settlement diplomatically had failed.

22. The forms of compulsory settlement procedure could include reference of disputes to the International Court of Justice, to a law of the sea tribunal and to arbitration as well as other special procedures. A number of procedures might be given equal standing and the defendant might be allowed the choice of a forum. What was essential, however, was that all inter-State disputes concerning the interpretation and application of the convention should be settled in accordance with the procedures established by the convention and not in the domestic tribunals of the coastal State, that the application of the dispute settlement procedure should be mandatory and not optional and that any procedure chosen by the disputants should result in a binding decision.

23. The single negotiating text submitted by the President had successfully amalgamated the various earlier proposals within the limits of practicality. It was based on the assumption that binding provision for the settlement of disputes was necessary and would allow the parties freedom to choose among the various means of settlement. It was successful in blending together general and functional dispute settlement methods and provided that most of the procedures were available not only to States but also to international organizations and private persons. With respect to the question which had been raised regarding possible limitations on the compulsory settlement procedures, his delegation felt that the exclusion of disputes relating to maritime zones within national jurisdiction would reduce greatly the value of a dispute settlement provision and that exceptions should be kept to a minimum in order to ensure that the rights negotiated and incorporated in the convention were not negated by subjective interpretation.

24. The compulsory settlement of disputes on the basis of strict legality was also in the interest of the developing countries. It would protect their rights under the convention and would protect them against extra-legal, political and economic pressures from larger and stronger countries.

25. His delegation hoped that the single negotiating text on the settlement of disputes would prove generally acceptable; it reflected the views of many delegations and could form a basis for a final compromise solution.

26. Mr. KOZYREV (Union of Soviet Socialist Republics) said that the strengthening of peace and security and the development of international co-operation should serve as the basic guideline in the application of the legal provisions of the new convention as well as in the settlement of related issues. That goal could not be achieved through procedures alone. The new convention had to minimize, even if it could not eliminate, the possibility of friction and disputes between States. Its provisions, especially those on questions of substance, had to be mutually acceptable in order to create the most favourable conditions for the implementation of appropriate procedures for settling disputes.

27. The most effective means of dispute settlement was direct negotiations between the parties concerned. Most important in that connexion were the provisions stipulating that if a dispute arose between States the parties should proceed expeditiously to exchange their views regarding settlement and the provisions regarding consultations and the exchange of information with respect to the adoption by States of certain measures provided for in the convention and affecting other States. In the absence of successful negotiations, provision would have to be made for an appropriate range of dispute settlement procedures and for the

[2] See *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.

[3] General Assembly resolution 2106 A (XX).

right of every State Party to the convention to choose the procedures it found most suitable. The nature of the procedure, however, should be determined by the nature of the dispute and the convention should clearly stipulate that, unless otherwise agreed by the Parties, a dispute between them could be settled only by a procedure accepted by the Party against which the proceedings had been instituted.

28. It was obvious that the convention should exempt certain categories of disputes from dispute settlement procedures. Such exceptions, however, should not include "disputes arising out of the exercise of discretionary rights by a coastal State pursuant to its regulatory and enforcement jurisdiction under the present Convention." The value of the procedures of dispute settlement would be considerably diminished if they did not protect the legitimate rights and interests of other States Parties to the convention.

29. His delegation also felt it necessary to point out that disputes relating to the interpretation and application of the convention could by their very nature only be disputes between States and therefore only States could be parties to the dispute. To allow private companies and various intergovernmental organizations to resort to the dispute settlement procedures would be unwarranted both from the standpoint of substance and from the juridical point of view. An abnormal situation would arise if a private company could start a dispute with States by trying to impose upon them an interpretation of the provisions of the convention which was most favourable to the company. The right of private companies to take a sovereign State to court would violate the principle of sovereignty. Private companies should not be given direct access to the dispute settlement procedures. If the State whose nationality the private company possesses were not involved in the dispute, no international dispute should arise under the terms of the convention. With respect to international organizations, the Charter of the United Nations did not authorize the United Nations to participate in disputes with States in matters relating to the interpretation and application of any convention, and it was therefore unreasonable to include in the convention a general rule of law granting such a right to other international organizations.

30. Mr. BEEBY (New Zealand) said that his delegation had always believed that it would be essential to include, as an integral part of the convention, machinery for the compulsory third party settlement of disputes arising out of the interpretation or application of the convention. Because of the vast area of law under discussion at the Conference and the novelty of much of that law, many of the articles of the new convention would have quite a general character and would have to be developed and made more precise through their application to particular situations by the practice of States and of the International Sea-Bed Authority. The new convention would thus leave ample scope for differing interpretations, and it was essential that there should be a system for the compulsory, impartial and third party settlement of disputes arising from it. If the Conference did not provide for such a system, it, like other law-making conferences of recent years, would have failed to establish a permanent and stable solution to the problems confronting it.

31. The dispute settlement procedure should ensure that the injunction of the Charter of the United Nations that international disputes should be settled by peaceful means was observed. That principle was clearly of paramount importance in relation to a Conference which was determining the fate of four sevenths of the earth's surface. An effective dispute settlement procedure should ensure the uniform interpretation and application of the convention, giving certainty and solidarity to the new law of the sea, and should cement the delicate accommodation of interests which the new convention would represent. It should also ensure that the interests of developing countries and small countries were protected and his delegation attached great weight to that consideration. The availability of neutral legal procedures in which the principle of equality prevailed would shelter small and developing countries from the pressures which might otherwise be brought to bear on them by more powerful nations. Since virtually the whole of the international community would have participated in creating the new convention, individual countries should be prepared to commit themselves to the agreed procedures for the settlement of disputes.

32. With regard to the problem of finding an acceptable judicial body to which disputes arising out of the new convention should be sent, his delegation believed that the proposal made at the second session of the Conference that each State at the time of its adherence to the convention should be able to choose the International Court, *ad hoc* arbitral tribunals or the proposed new Law of the Sea Tribunal as the body it favoured would constitute a means of satisfying the competing preferences of different States which had given rise to so much disagreement at the first session of the Conference. However, his delegation did not think that the proposals made in document A/CONF.62/WP.9 whereby the Law of the Sea Tribunal would become the primary tribunal represented an improvement. The concept of choice of jurisdiction which had evolved at the second session was simpler and more likely to be acceptable to States which had a strong preference for one or another of the three proposed methods of dispute settlement.

33. With regard to the question raised in part I of the single negotiating text (see A/CONF.62/WP.8) as well as in the new document as to whether there should be one tribunal for disputes relating to the international area of the sea-bed and another for disputes relating to other parts of the convention, his delegation believed that it would be both expensive and unnecessary to create two new tribunals and it could see no reason why a tribunal concerned with disputes relating to the international area of the sea-bed should not have a wider role.

34. With regard to the question of special procedures, he noted that the procedure for settling disputes relating to the international area might be said to be special in the sense that, unless the parties agreed otherwise, only one body would deal with such disputes. There was also a case for creating special procedures to deal with the highly technical issues which might arise in relation to fisheries, pollution and scientific research. However, the Conference should not assume that all disputes relating to fisheries, pollution or scientific research would be best dealt with by a special procedure, since disputes might arise regarding each of those topics which related exclusively to the interpretation of one or more provisions of the convention. The Conference should also consider very carefully what procedures should apply if a particular dispute appeared to involve both technical issues and the question of the interpretation of one or more provisions of the convention. The best solution to that problem might be to provide that, if either party took the view that an issue other than a technical one was raised, the dispute should be dealt with under the general, and not the special, procedure. The Conference should avoid complicated and unwieldy procedures under which matters dealt with by a specialist body would be reviewable by one of the general dispute settlement tribunals; his delegation believed that decisions taken under special procedures should be limited to technical issues and should be final.

35. His delegation believed that if too many exceptions were made to a system of compulsory judicial settlement, both the system and the relevant rules of substantive law