

Third United Nations Conference on the Law of the Sea

1973-1982

Concluded at Montego Bay, Jamaica on 10 December 1982

Document:-

A/CONF.62/WP.9/Add.1

Memorandum by the President of the Conference on document A/CONF.62/WP.9

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)*

DOCUMENT A/CONF.62/WP.9/ADD.1*

Memorandum by the President of the Conference on document A/CONF.62/WP.9

[Original: English]
[31 March 1976]

1. The Conference will meet in plenary session on 5 April 1976 to hold a general debate on the item "Settlement of disputes" which appears as item 21 on the list of subjects and issues. It was the decision of the Conference that this item should be dealt with by each Committee in so far as it was relevant to their respective mandates.

2. The informal single negotiating text presented by the Chairman of the First Committee (A/CONF.62/WP.8/Part I)² provides in article 24, paragraph 1, for the establishment of a tribunal as one of the principal organs of the proposed International Sea-Bed Authority and deals in article 32 with the jurisdiction, powers and functions, and composition of the tribunal and other related matters.

3. This is in conformity with paragraph 15 of General Assembly resolution 2749 (XXV), which contains the Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction.

4. The chairman of the Second Committee in article 137 of his informal single negotiating text (A/CONF.62/WP.8/Part II)² and the Chairman of the Third Committee, in article 37 of his text (A/CONF.62/WP.8/Part III),² have not made special provision for the settlement of disputes.

5. I deemed it fit, therefore, to produce an informal single negotiating text on this item in order to facilitate the work of the Conference. The introduction to A/CONF.62/WP.9 explains the reason for the presentation of this text, and this was further clarified at the 57th plenary meeting and at the 14th meeting of the General Committee held on 15 March 1976.

6. Although there had not been any real occasion for delegates to indicate their position on this item or to present proposals, the precedent established in regard to the preparation of an informal single negotiating text by each of the chairmen of the Committees was seen by me as calling for an initiative on my part in this matter, especially as the provision of effective dispute settlement procedures is essential for stabilizing and maintaining the compromises necessary for the attainment of agreement on a convention. Dispute settlement procedures will be the pivot upon which the delicate equilibrium of the compromise must be balanced. Otherwise the compromise will disintegrate rapidly and permanently. I should hope that it is the will of all concerned that the prospective convention should be fruitful and perma-

nent. Effective dispute settlement would also be the guarantee that the substance and intention within the legislative language of the convention will be interpreted both consistently and equitably.

7. The informal single negotiating text on settlement of disputes cannot, however, claim to have the same status and character as the other three informal single negotiating texts as there has been no general discussion of the item. To remedy that omission I secured agreement to a general debate on the item being held in the plenary. After the general debate, the plenary will be invited to consider whether or not the President should prepare an informal single negotiating text on dispute settlement in the same manner and on the same conditions and subject to the same understanding in regard to the status and character of the text as those relating to the three Committees.

8. The informal single negotiating text on settlement of disputes consists of a chapter containing 18 articles and 7 annexes, namely:

Annex I A: Conciliation

Annex I B: Arbitration

Annex I C: Statute of the Law of the Sea tribunal

Annex II A: Special procedure—fisheries

Annex II B: Special procedure—pollution

Annex II C: Special procedure—scientific research

Annex III: Information and consultation.

9. The detailed elaboration of various procedures rather than the imposition of general obligations which would leave wide open the manner or mode of procedure to be adopted would, it was felt, lead to the easier and better evaluation of the efficacy of each of the procedures suggested. There is little doubt that in the assessment of any procedure, the details of the procedure would significantly affect the acceptability of the procedure itself. It is with this in mind that many of the details of procedure have been spelt out.

GENERAL OBLIGATION TO SETTLE DISPUTES
BY PEACEFUL MEANS

10. The first four articles which incorporate the fundamental principle of modern international law as contained in Articles 2 and 33 of the Charter of the United Nations and in paragraph 15 of the Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction should, I hope, have very wide support. While imposing the general obligation to exchange views and to settle disputes by peaceful means, these articles give complete freedom to the parties to

* Incorporating documents A/CONF.62/WP.9/Add.1/Corr.1 and 2 of 2 April 1976.

² 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), document A/CONF.62/WP.8.

utilize the method of their choosing, including direct negotiation, good offices, mediation, conciliation, arbitration or judicial settlement.

11. To go back to the proposals before the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor, Beyond the Limits of National Jurisdiction, all of which have been taken into account in the preparation of the text, 15 African States expressed in article IX, of their proposal before the Committee the need to have recourse to the procedure established under the relevant regional arrangements.³ This has been supported in the Declaration of the Organization of African Unity on the issues of the law of the sea.⁴

12. There is provision for general, regional or special agreements or some other instrument or instruments under which contracting parties, which are parties to a dispute, would assume the obligation to settle any dispute by resorting to arbitration or judicial settlement in accordance with the relevant agreement or instrument under which they assume that obligation, but the parties are free to agree otherwise (art. 3).

13. My interpretation of the phrase "unless the parties agree otherwise", appearing in that provision, is that if the parties to a dispute have assumed the obligation referred to, there can be no release from that obligation without the concurrence of all parties to the dispute who have entered into the special agreement or other instrument referred to there. Any other interpretation would weaken the effect of the provision. Its strength and merit would lie in its binding character.

14. An exchange of views is also prescribed whenever any procedure for settlement has failed to bring about a settlement.

15. The text, therefore, whilst imposing the general obligation does not limit in any way the method for dispute settlement that the parties may wish to utilize. It is hoped that there would be a consensus on these provisions.

16. I have also taken into account the work of the informal working group, under the co-chairmanship of Ambassador Galindo Pohl (El Salvador) and Ambassador Harry (Australia), and later Dr. Adede (Kenya), which came into being in response to the generally felt need for a study and assessment of the subject of dispute settlement. Although working throughout in an extremely informal manner at the second session at Caracas, its deliberations led to the nine members' proposal (A/CONF.62/L.7).⁵ This was followed by its work in Geneva which resulted in document SD/Gp./2nd session/No.1/Rev.5.

CONCILIATION

17. Annex IA on conciliation is linked to the main chapter (art. 7). In the absence of a provision for special procedure in other chapters of the convention, a party to a dispute is free to invite the other party or parties to resort to the conciliation procedure contained in the annex. After the invitation is accepted, conciliation procedure under the annex may be set in motion by any party to the dispute.

³ See *Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 21*, vol. III, sect. 29.

⁴ *Ibid.*, vol. II, sect. 2.

⁵ See *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. III (United Nations publication, Sales No. E.75.V.5).

18. It is open to parties to the dispute, in cases where the conciliation procedure has not resulted in a settlement, to resort to the general settlement procedures (*ibid.*, para. 4).

19. As the conciliation procedure is applicable only where no special procedure is provided for in any other chapters of the Convention (*ibid.*, para. 1), if a dispute is not settled by conciliation, the final recourse is to the general settlement procedures specified.

THE RELATIONSHIP BETWEEN THE SPECIAL PROCEDURES AND GENERAL PROCEDURES

20. Special procedures leading to binding decisions in respect of the technical and scientific fields such as fisheries, pollution and scientific research as well as the procedures regarding matters of a contractual nature for activities in the international sea-bed area would appear to be most appropriate and desirable. There may be a divergence of views as to whether this alone would suffice or whether general mandatory procedures are necessary, and also whether technical chambers or committees of the fora functioning under the general procedures could deal with disputes of a technical or scientific nature, thus obviating the need for special procedures.

21. One approach to the problem is formulated in the text, providing a comprehensive system which incorporates both general and special procedures. The links of the special procedures to the relevant parts of the convention will have to be examined and specified. Another matter at issue is whether committees constituted under the annexes relating to special procedures would be entrusted with the task of interpreting the convention or limited to its application only, as proposed in the text.

22. In dealing with the general procedures the text prescribes that where the application of the procedures referred to earlier has not resulted in a settlement, the dispute shall be settled in accordance with the general procedures (art. 8).

CHOICE OF TRIBUNAL

23. Whilst giving the Law of the Sea tribunal a central position in the settlement of disputes, the text provides that parties shall be liable to the jurisdiction of the Law of the Sea tribunal and bound by its decisions unless they agree to conferring jurisdiction on an arbitral tribunal or the International Court of Justice (art. 9), but the parties are free first to invoke the provisions and procedures referred to earlier in search of a settlement. The Law of the Sea tribunal is not the primary tribunal. The choice of tribunal is left to the parties to the dispute provided they all agree on either the arbitral tribunal or the International Court of Justice. It is only if they fail to agree on arbitration or the International Court of Justice that the dispute must, as provided in the text, go before the Law of the Sea tribunal. The principle of finality finds expression here.

24. If the parties to a dispute have recognized as compulsory the jurisdiction of an arbitral tribunal or the International Court of Justice, the jurisdiction of the Law of the Sea tribunal would lapse and be ousted. The findings of the body whose jurisdiction is recognized as compulsory (art. 9) would be binding.

25. Any provision which would give a contracting State party the right to choose between arbitration or the International Court of Justice or the Law of the Sea tribunal and upon the exercise of this option compel the other party or parties to bring the dispute for settlement before that particular body would offend against the principles of justice as it could give

one of the contracting parties the opportunity to manipulate any potentially controversial situation in such a way as to compel the other party to follow it to the tribunal chosen by the former. No party to a dispute should be compelled to follow the other party to a particular tribunal or body, unless it concurred in the choice of that forum. Accordingly, the provisions of A/CONF.62/WP.9 give contracting parties the option of selecting the forum they wish, or arbitration and the dispute would be dealt with there if both parties have exercised the same option. If they are not so agreed, the jurisdiction of the Law of the Sea tribunal is mandatory.

APPELLATE PROCEDURES

26. There is no provision for cross appeals as between the International Court of Justice, the Law of the Sea tribunal and arbitration, from one to the other. In regard to the findings of fact made by the committees contemplated in the special procedures, it would probably be most acceptable if they were final, except where gross error has been committed (art. 10, para. 3). However, in an attempt to prevent such special committees from each going its own way and looking solely to its own technical area of concern, be it fisheries, pollution or any other, and taking the over-all interests of the convention into account, some degree of appellate control would seem necessary. The text restricts the appellate supervision to cases where there has been: (a) A lack of jurisdiction, (b) Infringement of basic procedural rules, (c) Abuse or misuse of power, (d) Gross violation of the convention, provided, however, the special procedure does not expressly exclude appeals. This would guarantee uniformity of application and interpretation of the convention and maintain the delicate balance of the compromise leading to the convention.

EXPERT ADVICE

27. The text gives the tribunal or International Court of Justice in the exercise of its primary jurisdiction access to expert opinion and leaves the tribunal or the International Court of Justice, where the dispute is not settled on the basis of the expert committee's opinion, free to consider the other aspects of the dispute, provided one of the parties makes such a request to the tribunal or the Court (art. 11). There would be a lack of finality here unless one party takes the initiative. Accordingly, the question arises for consideration as to whether the tribunal or Court concerned should not, immediately on the failure to settle the dispute, proceed to deal with it. It should be borne in mind that it is the contracting parties who, of their own free will, are left to recognize as compulsory the jurisdiction of one of the tribunals or the International Court of Justice.

PARTIES HAVING ACCESS TO THE TRIBUNALS

28. Within the provisions of the three parts of the single negotiating text presented by the chairmen of the Committees, rights and duties have been imposed upon parties other than contracting States. For the effective settlement of disputes that could arise in relation to these provisions, especially with regard to contractual or other arrangements relating to the exploitation of the area of the sea-bed beyond the limits of national jurisdiction, and the rights accorded to territories under foreign occupation or colonial domination, some form of access to the dispute settlement procedures would seem necessary. To that end provision has been made in the text (art. 13) for a limited degree of access.

29. On the question of the right of access to the dispute settlement procedure, I realize that there is a body of opinion

which prefers to limit such access to States and to the International Sea-Bed Authority. Any others seeking judicial remedy would have to entrust their case to the State or States of which they are a national.

COMPOSITION AND FUNCTIONS OF THE LAW OF THE SEA TRIBUNAL

30. To ensure that the composition of the law of the sea tribunal takes into account the consensus arrived at in reaching the law of the sea convention by the various groups participating in the consensus, an attempt has been made to formulate a method of selection of the judges of the tribunal reflecting this consensus (see annex IC, art. 3). It is only in this way that the regional groups could feel a real sense of participation in its functions and thus ensure their willingness to accept it. The general procedures for the functioning of the tribunal and its powers are on the lines of the Statute of the International Court of Justice and other international judicial tribunals.

EXCEPTIONS

31. The final article is an attempt to compromise the extreme and conflicting views regarding the question of including or excluding certain disputes relating to the economic zone from binding dispute settlement procedures. This is not merely a procedural or marginal issue but a substantive one and any final formulation of treaty provisions on the subject must take into account the decisions arrived at within the committee concerned and be the result of negotiation. I am fully aware of the implication of two proposals before the Sea-Bed Committee, one appearing in article F and one in the document presented by Ecuador, Panama and Peru⁶ and the other in article 13 of the document presented by Canada, India, Kenya, Madagascar, Senegal and Sri Lanka⁷ proposing that disputes within this zone be dealt with exclusively by the authorities of the coastal State. The solution may be to include third party dispute settlement procedures for certain types of disputes whilst others are excluded, but this again is only one suggestion among the many possibilities. There is also the view that it is not an infringement of rights to ensure that the limits of those rights and the corresponding obligations in the context of the interpretation or application of the convention should be justifiable before an appropriate forum.

32. This article is liable to be misunderstood as leaving room for the exclusive jurisdiction of a coastal State to be questioned. It is not the exclusive jurisdiction that is meant to be questioned, but the manner of its exercise.

33. I appreciate that there are certain aspects of dispute settlement which are highly controversial, such as the question whether in an area outside the territorial sea and in which the coastal State exercises sovereignty, matters in dispute should be kept exclusively within the jurisdiction of the coastal State.

34. In conclusion I should like to point out that any provision in the informal single negotiating text on these and other matters must not be construed as indicating a strong preference for the procedure stipulated in the text but merely as a basis on which negotiation might take place.

⁶ *Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 21, vol. III, sect. 44.*

⁷ *Ibid.*, sect. 27.