57th Session of the Asian-African Legal Consultative Organization
8-12 October 2018, Tokyo

Introductory remarks on the peaceful settlement of disputes

by
Mr. Miguel de Serpa Soares
Under-Secretary-General for Legal Affairs and
United Nations Legal Counsel
10 October 2018

Excellencies,

Mr. Secretary-General,

Professor Yakushiji,

Ladies and Gentlemen,

Introduction: problematic and unproblematic disputes

There is a tendency to see disputes between States as a negative phenomenon — something pathological — something that must be prevented and, if they occur, to be quickly resolved and removed.

I am not so sure about that.

Disputes between States are a normal part of international life. Unless humans suddenly become angels, we will always have them.

Indeed, some might even say that they are inherent to the process by which international law is made.

Unless we think that customary international law must remain static, a principal means by which that law evolves and changes is through States taking actions that do not accord with the existing law, in a deliberate attempt to challenge that law and replace it with a new one.

That new law is then crystallized by the States that are driving for change "holding out" — resisting attempts to get them to back down and accept the status quo — until others come around to their way of thinking.

We only need to think of the history of the development of the law relating to exclusive economic zones to realize that this is so.

This makes it difficult for me to think that the international legal system wants all disputes without exception to be resolved.

Some disputes, however, are clearly problematic: in particular, those that, if left unresolved, could deteriorate and eventually put international peace and security at risk.

Whatever kinds of disputes the **UN** Charter may require Member States to settle, it certainly imposes on them an obligation to settle disputes of that type.

The principle of the free choice of means

However, what this obligation entails can only be fully understood in the light of another fundamental principle of international law that is reflected in Article 33 of the Charter: the principle of free choice of means.

This principle means, as a general proposition, that States party to a dispute are not required to use any particular method or specific means to resolve their dispute — even negotiations, as both the General Assembly and, most recently, the International Court of Justice have affirmed.

They are free to choose whatever means they like — provided that it is peaceful in nature; provided that it is not of such a nature as to potentially aggravate the situation so as to endanger international peace and security; and provided that its nature is such as to potentially make it more difficult to settle, or impede the settlement of, the dispute between them. They are even free to innovate and invent their own means.

Admittedly, in the Friendly Relations Declaration of 1970 and then in the Manila Declaration of 1982, the General Assembly affirmed that the parties shall agree upon "such peaceful means as may be appropriate to the circumstances and nature of the dispute" in hand.

However, there is little indication in State practice that parties to a dispute understand themselves to be subject to specific, substantive constraints on the means of settlement that they may choose.

Thus, it has sometimes been said that negotiations, with their inherent process of give and take, are not appropriate for the settlement of disputes of a legal nature. Yet how many treaties and conventions require the parties to a dispute regarding its interpretation or application to try to resolve their differences through this means before engaging in other means of settlement?

Again, it has been said that arbitral tribunals and courts are not appropriate means for the resolution of disputes that are of a non-legal nature. But does not the International Court of Justice have the jurisdiction to decide cases *ex aequo et*

bono, if the parties agree; and did not many treaties before the Second World War and after empower tribunals or third persons to decide disputes between the parties *ex aequo et bono* by laying down, with binding effect, the terms of a settlement between them?

I think, then, that we must read the words of both the Friendly Relations Declaration and the Manila Declaration as an injunction to the parties to seek to identify the means that is best suited in all the circumstances to promote the early and effective resolution of the specific dispute between them.

The principle of consent

. . . then, when it is read with the principle of the free choice of means and the principle of consent, it must necessarily entail that they must make positive efforts in good faith and in a spirit of co-operation to reach agreement with each other on the means of settlement that they are to use.

Again, this is an obligation of conduct and not of result. States are not under an obligation to agree on a means, but to try to do so.

(It is an interesting question whether, if a State has a means available to it that it can require the other State to use, it must do so. But we can leave that for another day.)

As I have previously mentioned, States are not under any obligation to have resort to negotiations as a means for the settlement of their disputes.

But, having seen what we have seen, I would think it would be difficult to resist the conclusion that, here, there is a duty to negotiate — a duty to negotiate with a view to reaching agreement on the means of settlement to be used.

They may discuss whether to enlist the assistance of a third party to assist them in that task — a good officer or a mediator. But the fundamental duty to negotiate will always be there.

Good faith in negotiations

This being so, if not for its own sake, it would certainly be useful to spell out what the principle of good faith entails in the conduct of negotiations.

The learning 6outb in(l)-3(- Tm0 G[T)4(h)-3(e)-40(l)-3(earn)]TJETQ0.00000912 0 612 792 reW

- refrain from any action or statement that might aggravate or widen the dispute or that might make more difficult or impede its early resolution

- and exercise caution and restraint in the treatment of all matters relating to the negotiating process, so as to enable the negotiations to take place in a favourable atmosphere that is most conducive to their success.

This second, negative obligation has frequently been further articulated along the following lines, with both negative and positive facets. Thus, it has been said that each party must:

- avoid public accusations against, and the public attribution of hostile motives to, the other party

- moderate the language and tone of its written communications and public pronouncements about the other party in connection with the subject of the dispute

- make moderate the language an0 reW*nBT/F514.04 Tf1 0 0 1 108.02 6804.43 Tm0 g0 G[(m)

¶ to refuse to reach an agreement that is unsatisfactory to oneself, provided that this is not done in bad faith

¶

We can distinguish two ways in which he or she may do this. In some cases, a good officer's role is limited to the first; in other cases, it embraces the second.

The first is by helping the parties to understand each other — and even themselves — and so assists them in their efforts to find a settlement.

Here, the good officer helps the parties to identify their interests and formulate proposals and to understand the positions, proposals and interests of the other side, in a back-and-forth process, either with the parties in the same room or apart — perhaps even in their own capitals.

Thus, the Personal Representative of the Secretary-General on the Border Controversy between Guyana and Venezuela shuttled back and forth between Georgetown and Caracas in a process of this kind for several months during the first half of 2017, before bringing the parties together later in the year at Greentree, New York.

The second type of substantive contribution that the good officer may make to the negotiations is a "stronger" one: not only helping the parties to make their own proposals and understand and appreciate those of the other side, but actually making his or her own proposals for the resolution of the dispute in hand.

In this last case, good offices are very much a synonym for mediation.

Interesting in this regard is the announcement by the Secretary-General of the appointment in 2017 of his fourth Personal Representative on the Border Controversy between Guyana and Venezuela, Mr. Dag Nylander, whom he described as conducting good offices "with a strengthened mandate of mediation".

A good officer may be limited in his or her tasking to making the first of these two kinds of contribution — helping the parties to help themselves. Or, as this announcement shows, his or her tasking may be [illegible]

offi12 0 612 792 re W* n BT /F5 [<00B2>]e sp ake

other party and to formulate and present its proposals can come to have characteristics of the good officer “helping” the parties to reach the solution that he or she thinks best suited to accommodating the interests of both.

It can also readily be appreciated how a good officer may make different kinds of contributions at different times.
It will typically only be where he or she has fully earned the trust of the parties that he or she will feel comfortable enough to make his or her own proposals for solution of the dispute in hand; either that or when it comes to a “last throw of the dice”.

I should say one other thing about the nature of good offices.

The method can be employed as a means to help the parties either to start or to resume negotiations, the good officer dropping out of the picture once the parties

Of course, it follows from what I have said earlier that the Secretary-General cannot force himself

Conclusion

I am aware that I have said quite a lot today.

I have described what I think that the obligation to settle disputes by peaceful means entails.

As a necessary adjunct to that, I have described what the principle of good faith requires in the context of negotiations — concentrating on where negotiations are used as a means of settlement but noting the relevance of that to what is required of the parties when they need to agree upon a means of settlement.

And I have outlined what two peaceful means of settlement that are particularly important in UN practice involve — good offices and mediation.

I will now leave the floor for Professor Yakushiji to talk about some examples of the peaceful settlement of disputes in Asia and Africa and an overview of some trends in the field.

Thank you.