

### SEPARATE OPINION OF JUDGE JESUS

The argument for submission of disputes to the procedure of negotiation has been often raised by parties to disputes before this Tribunal as a precondition to be fulfilled before the parties can resort to this Tribunal or to any other dispute settlement procedure referred to in Part XV of the Law of the Sea Convention (hereinafter referred to as “the Convention”).

In cases of provisional measures under article 290, paragraph 5, the *prima facie* jurisdiction of this Tribunal has always been challenged, as in the instant case of land reclamation between Malaysia and Singapore, on the basis that the Annex VII arbitral tribunal lacks jurisdiction over the dispute, since the possibility of settling the dispute through negotiations has not been exhausted.

Though the Order regarding this case of land reclamation deals with this issue in a way that commands my general support, the Order does not expand on the reasoning behind its conclusions to the extent that I would have thought advisable, in light of the weight given to it by the Respondent during the proceedings.

For this reason, I thought it would be appropriate for me to make, as a matter of general interpretation of articles 279, 281 and 283 of the Convention, the following points regarding my views on this important issue.

The three articles of the Convention referred to above have different functions in canvassing the legal treatment of this issue.

*Firstly*, article 279, which states that

States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations and, to this end, shall seek a solution by the means indicated in Article 33, paragraph 1, of the Charter,<sup>1</sup>

has the function of stating a general obligation of States not to resort to a method of settling disputes other than by peaceful means.

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<sup>1</sup> Article 33, paragraph 1, of the United Nations Charter states that “The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice”.

While this article establishes an obligation to settle disputes only by peaceful means, it does not, however, create an obligation for States to settle their dispute specifically through negotiations, as a means of dispute settlement, or through any other peaceful means in particular.

In a way, this article is the flip side of the general principle of international law, as embodied in the United Nations Charter,<sup>2</sup> in accordance with which States should not resort to the use of or threat of the use of force as way of settling their disputes. Article 279 in effect couches this same principle in a positive way.

It, therefore, cannot be read as meaning or implying that States are obliged to submit their disputes to the procedure of negotiation, instead of resorting to another peaceful means.

There is nothing in the Convention or for that matter in international law that imposes a general obligation on States to settle their disputes through negotiation, instead of resorting to another peaceful means of their choice.

*Secondly*, the obligation to resort to negotiations and not to another peaceful means in dealing with a particular dispute can only result from an undertaking voluntarily entered into by the States concerned through a treaty provision or through any other legally valid or relevant form of expression of State consent. Such a view is to be found in article 281 of the Convention, which reads as follows:

1. If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.
2. If the parties have also agreed on a time-limit, paragraph 1 applies only upon the expiration of that time-limit.

In this case, when a State has agreed to settle its dispute with another State through negotiation, as a particular peaceful dispute settlement device, article 281 of the Convention then creates an obligation for the States concerned not to resort to another means of peaceful dispute settlement until it is determined that negotiations have not led to a settlement of the dispute or, where an agreed time limit has been set by the two parties, until the period has elapsed.

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<sup>2</sup> See Article 2, paragraph 4, of the United Nations Charter.

It seems, therefore, clear that States are only obliged (prior to resorting to this Tribunal, the arbitral tribunal or any other procedure under Part XV) to submit their disputes to negotiation, as a particular means of peaceful dispute settlement, and to stick to it up until such time as it is determined that it has not produced a settlement, if they have agreed to do so.

The point that might be raised in this connection is whether a State that has formally undertaken through a treaty provision (or through another form of expression of State consent) to settle a given dispute in which it is or might be involved with another State through a particular procedure (be it the procedure of negotiation or any other peaceful means) can ignore the agreed procedure, disregarding its treaty undertaking in this respect and unilaterally declaring that the possibility of such a procedure to produce a settlement has been exhausted.

This Tribunal has addressed this point, by recognizing<sup>3</sup> that “a State Party is not obliged to pursue procedures under Part XV, section 1 of the Convention when it concludes that the possibilities of settlement have been exhausted”.

This view is, once again, reaffirmed in paragraph 47 of this Order on land reclamation.

While I concur in the interpretation made by this Tribunal in the *MOX Plant Case*,<sup>4</sup> in respect of article 283, since this article imposes on States only an obligation to proceed expeditiously to an exchange of views regarding a choice of procedure by the parties to settle their dispute, I do not concur entirely in the interpretation of the Tribunal in the case of article 281.

In my view, if the States parties to a dispute have agreed through a treaty provision or otherwise to settle their disputes through a particular settlement procedure, the determination of whether that procedure has run its course without producing a settlement is to be made by the concurrence of the two parties.

A withdrawal from such a procedure by one of the States parties to the dispute, based on its unilateral assessment that the possibilities of reaching a settlement through the agreed procedure have been exhausted, without the acquiescence of the other State party, can indeed constitute cause for objecting to the jurisdiction of this Tribunal, the arbitral tribunal, or any other procedure set forth under Part XV, if, in the circumstances of a concrete situation, it can be demonstrated, as a matter of evidence, that the possibility of that procedure producing a settlement has not indeed been exhausted.

<sup>3</sup> *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999, p. 280, paragraph 60.

<sup>4</sup> See *MOX Plant (Ireland v. United Kingdom)*, Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, p. 95, paragraph 60.

*Thirdly*, article 283 serves a different purpose from that pursued by article 281 and cannot be seen or taken to create an obligation for States to negotiate, as a procedure to settle their disputes.

This article, which only creates the obligation of States to exchange views on certain matters, reads as follows:

1. When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.
2. The parties shall also proceed expeditiously to an exchange of views where a procedure for the settlement of such a dispute has been terminated without a settlement or where a settlement has been reached and the circumstances require consultation regarding the manner of implementing the settlement.

There are three different instances in which this article subjects States to the obligation to exchange views:

- (a) an exchange of views regarding the settlement of a dispute by negotiation or other peaceful means, therefore not imposing an obligation on any State to submit the settlement of the dispute itself to the negotiation procedure, which as said before, under the Convention and international law in general, neither the procedure of negotiation nor any other particular peaceful means can be imposed on States unless accepted or agreed upon by them through a treaty provision or otherwise, as implied in articles 279 and 281;
- (b) an exchange of views when a chosen procedure has not produced a settlement;
- (c) an exchange of views when consultations are required to discuss the manner in which a settlement that has been reached may be implemented.

From the above it becomes clear that none of the above situations can possibly be construed as imposing negotiation as a means of dispute settlement. This article cannot, therefore, be interpreted or construed, contrary to the arguments adduced by the Respondent during the land reclamation proceedings, as providing a negotiation procedure for the settlement of the dispute itself, one that has to be exhausted before resorting to the Annex VII arbitral tribunal or to any other procedure indicated in Part XV.



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The very purpose of this article indicates that, if after an expeditious exchange of views the two parties to a dispute have not chosen a given settlement procedure, then they are not obliged to continue the exchange of views, since each party is free not to accept a particular settlement procedure, unless bound by a treaty provision or otherwise.

*(Signed)* José Luis Jesus

