

UNIT 19.- THE PEACEFUL SETTLEMENT OF INTERNATIONAL DISPUTES: JURISDICTIONAL MEANS OF SETTLEMENT

1. GENERAL ASPECTS. 2. INTERNATIONAL ARBITRATION. (A) ORIGINS AND EVOLUTION. (B) CHARACTERISTICS. (C) OPERATION. 3. THE INTERNATIONAL JUDICIAL SETTLEMENT. (A) INTERNATIONAL COURTS. (B) THE INTERNATIONAL COURT OF JUSTICE. I. ORGANIZATION. II. LITIGATION FUNCTION. III. ADVISORY FUNCTION. (C) OTHER INTERNATIONAL TRIBUNALS.



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1.- General aspects

- The means of a jurisdictional nature: arbitration and judicial settlement.
 - ❖ The settlement of the dispute is entrusted to an impartial third party, the arbitrator or judge, who exercises his jurisdiction (*juris dictio*) by issuing a binding decision for the parties based on law.
 - ❖ Based on the will of the parties and, therefore, disputes arising between States cannot be submitted to arbitration or judicial settlement without their consent. It may precede or follow the origin of the dispute, but it is in any case necessary for the arbitral or judicial body to exercise its jurisdiction.
 - ❖ Malleable nature of the jurisdictional settlement is particularly notable in the case of arbitration, which is easily adaptable to the design that States may wish to configure.
 - ❖ The solution of the dispute, contained in the decision of the arbitral or judicial body, will be binding on the parties.
 - ❖ Appropriate for the settlement of legal disputes, but, given the relativity of the distinction between legal disputes and political disputes, what determines recourse to a judicial means of settlement is not the nature, legal or political, of the dispute, but the willingness of the parties to submit it to arbitral or judicial settlement.

2. International arbitration

a) Concept and historical evolution

- Jurisdictional means of dispute settlement between subjects of international law carried out by arbitrators chosen by the parties, on the basis of international law, the result of which is expressed in a binding decision called a judgment or arbitral award.
- It is the oldest jurisdictional dispute settlement procedure.
- Over time, arbitration has been applied not only to disputes between States but also to disputes between States and other subjects of international law, in particular international organizations.
 - ❖ Agreement of 26 June 1947 concerning the Headquarters of the United Nations, concluded between the United States and the UN, which establishes, in Article 21, the obligation to have recourse to arbitration to settle disputes which may arise between the Parties.
- Arbitration between States and other actors who do not have the status of subjects of international law, such as individuals (natural or legal persons), has also acquired a growing presence in international practice.
- Arbitration is currently undergoing a process of increasing revitalization, particularly in financial, territorial and environmental disputes.

b) The voluntary nature of the resource to arbitration

- Recourse to arbitration is based exclusively on the will of the parties, so that the basis of arbitration is to be found in the agreement of the parties who establish it to settle a dispute existing between them.
- Consent: Three typical modalities known respectively as arbitration commitment, arbitration agreement and arbitration clause.
 - ❖ An arbitration commitment: an ad hoc international agreement entered into by the parties after a dispute has arisen between them, exclusively for the purpose of settling the dispute by arbitration.
 - ❖ Arbitration agreement: Treaties, usually multilateral, whose purpose is precisely the peaceful settlement of disputes that may arise between the parties in the future and which provide for compulsory recourse to arbitration.
 - ❖ Arbitration Clause: In addition, many bilateral and multilateral treaties relating to various matters contain an "arbitration clause" providing for the submission to arbitration of some or all disputes that may arise in the future in connection with the interpretation or application of the treaty.

- The jurisdiction is based on the consent of the States parties to the dispute and is limited to the exercise of the functions assigned to it.
 - ❖ Scope of the tribunal's jurisdiction will therefore be specified in the arbitration settlement treaty, in the arbitration clause of the applicable agreement or in the specific arbitration settlement agreement.
 - ❖ Once the arbitration proceedings have been initiated, the arbitral tribunal is the sole judge of its own jurisdiction in the event of any question arising therefrom.

c) Conduct of the arbitration proceedings

- 1st step: Constitution of the arbitral tribunal
 - ❖ In accordance with the provisions of the treaty or agreement establishing the obligation to resort to arbitration or the commitment to submit to arbitration entered into by the parties.
 - ❖ Sole arbitrator (sole arbitrator) or a collegiate body (arbitral tribunal), is constituted for the specific case and is extinguished as soon as its functions are completed.
- The applicable law: determined by the parties.
- The arbitration procedure: fixed by the parties in the agreement or compromise by which arbitration is resorted to or, failing that, shall be established by the arbitration body itself.
 - ❖ In 1958, ILC model rules on arbitral procedure which are very detailed and have been used only to a limited extent.
 - ❖ General rule: , a written and an oral phase. The treatment of procedural issues that may arise (preliminary objections, failure of one of the parties to appear, interim measures, counterclaims, etc.) are regulated along the usual lines of contentious jurisdictional proceedings.

d) *Arbitration award*

- The arbitration award: decision adopted by the arbitrator or tribunal and is binding on the parties to the dispute, is final and must be immediately enforceable.
 - ❖ Adopted by the vote of the sole arbitrator or, as the case may be, of the majority of the members of the tribunal.
 - ❖ Must be in writing and legally reasoned.
 - ❖ Possibility of "individual opinions" or "statements" explaining their vote, as well as "dissenting opinions" in which they express their disagreement with the award.
 - ❖ Binding effect: on the parties and has the authority of *res judicata*;
 - ✓ Relative *res judicata* limited to the parties to the arbitration and in respect of the matter decided therein.
 - ❖ The arbitral award resolves the dispute definitively, without the possibility of further appeal to another arbitral or judicial instance.
 - ✓ Interpretation (interpretation or correction of material errors) or review (new facts) before the same body that has issued the arbitration award, but this can only be done with the prior consent of the parties.
 - ❖ Nulity of the arbitral award: limited grounds (excess of the court's power;.....

corruption of a member of the court; failure to state reasons for the judgment or key violation of a fundamental rule of procedure; nullity of the stipulation to resort to arbitration or of a compromise.

❖ Immediately enforceable.

3. International judicial settlement

a) Concept and historical evolution

- Judicial settlement: submission of international disputes to a pre-constituted and permanent tribunal whose decisions are binding on the parties.
- The desire to establish a permanent international jurisdiction has been a constant in the international community, although its effective realization has proved difficult.
 - ❖ Central American Court of Justice, established by virtue of an agreement between the five Central American republics in 1907.
 - ❖ The first international jurisdiction of universal scope was the Permanent Court of International Justice (PCIJ), 1921-1946.
 - ❖ The Charter of the United Nations Organization of 1945 established the current International Court of Justice (ICJ), which succeeded the former PCIJ.
 - ❖ Currently, in addition to the International Court of Justice, there are various international tribunals, universal or regional in scope, whose purpose is the peaceful settlement of disputes by jurisdictional means: proliferation of international judicial instances is criticized on the basis of problems of fragmenting the jurisprudence.

- Pre-established and permanent judicial bodies whose purpose is to settle under international law disputes that may arise in the future between the parties.
- Their constitution, jurisdiction and rules of procedure are determined by their respective statutes and developed in their rules of procedure.
- Recourse to judicial settlement depends on the will of the parties, exceptionally there are some cases of compulsory jurisdiction (ECtHR).

b) International Court of Justice

- Principal judicial organ of the UN and its Statute is part of the UN Charter.
 - ❖ Is the only international court with general jurisdiction to hear any case brought before it by the parties on any subject matter.
 - ❖ It is a pre-constituted and permanent judicial institution that is ready to carry out its mission at any time, in accordance with the provisions of its Statute and Rules of Procedure.
- Organization and composition:
 - ❖ 15 members, elected by the SC and the GA, no two of whom may be of the same nationality. Always judges of 5 permanent members of SC.
 - ❖ Term of nine years from among persons of high moral character who possess the qualifications required for appointment to the highest judicial offices in their respective countries, or who are jurisconsults of recognized competence in the field of international law.
 - ✓ since 1946 distribution of the number of members of the Court as follows: Africa: 3; Latin America: 2; Asia: 3; Eastern Europe: 2; Western Europe and other States: 5.

- ✓ Institution of the Judge ad hoc (Article 31 of the Statute): Since judges of the nationality of the litigating parties retain their right to participate in the proceedings, in cases where there is a judge of the nationality of one of the parties, any other party may designate a person of its choice to sit as a judge. Likewise, if the Court does not include among the judges hearing the case any judge of the nationality of the parties, each of the parties may designate one.
- ❖ As a general rule: plenary session, but it may also constitute Chambers composed of three or more judges.
 - ✓ Chamber for summary proceedings composed of five judges.
 - ✓ Certain categories of cases (labor disputes, transit and communications): Chambers of three or more judges (have had practically no activity to date).
 - ✓ Ad hoc Chambers: may be constituted at any time by the Court at the request of the parties to hear a specific case.
- ❖ Assisted by a Secretariat, headed by a Secretary elected by the Court.
- ❖ **Exercise of contentious functions:** Contentious jurisdiction, the purpose of which is the settlement of legal disputes between States- Article 38(1) of the Statute, which states that its function is "to decide disputes submitted to it in accordance with international law."
 - ✓ Jurisdiction *ratione personae*: Exclusively disputes between States (member States of the UN; non-members of the UN that become parties to the Statute under the conditions established; and even to States that are neither members, under the conditions established by the SC (art. 53.3 Stat).

- ✓ Subject-matter jurisdiction (ratione materiae): all disputes" brought before it by the parties (art. 36,1 Stat). In principle, they shall concern legal questions (article 36, 2 Stat):
 - the interpretation of a treaty;
 - any question of international law;
 - the existence of any fact which, if established, would constitute a breach of an international obligation;
 - the nature or extent of the reparation to be made for the breach of an international obligation.
- But the question of whether a dispute is or not a "legal dispute" must be decided by the Court itself.
- ✓ Law applicable: must decide "in accordance with international law" (Art. 38.1 Stat), although it also has the power to decide a dispute ex aequo et bono, if the parties so agree (Art. 38.2).
- ✓ Modalities of voluntary submission to the Court: The consent may be expressed in various ways:
 - by an ad hoc commitment: compromise after the dispute has arisen whereby they decide to submit the solution to the Court. It is itself an international agreement subject to the Vienna Convention (registration and notification).
 - by a general dispute settlement treaty or by an arbitration clause provided for in a specific treaty: concluded prior to the occurrence of the dispute.

- by the so-called "optional clause of compulsory jurisdiction" (art. 36,2 Stat): unilateral declarations (formulated in different times) generate a mutual encounter that serve as a basis for the Court's jurisdiction over future disputes. PROBLEM: reservations and conditions formulated by States.
- by the so-called *forum prorogatum*: acceptance of its jurisdiction was derived from conclusive facts, deduced from the conduct of the States, by virtue of the institution called forum prorogatum. In this case, submission to the jurisdiction of the Court is produced by tacit acceptance, through conclusive facts, when the respondent State acts in such a way as to establish that it has accepted the jurisdiction of the Court in the face of the application presented by another State.
- ✓ The contentious procedure:
 - Initiation: either jointly by the parties by means of a notice of commitment or unilaterally by the plaintiff, by means of a written request or application addressed to the Secretary of the Court.
 - Indication of the subject matter of the dispute and the parties.
 - The parties are represented before the Court by their respective agents and may also have counsel and counsel enjoying privileges and immunities.
 - Absolute respect for the equality of the Parties.
 - Incidents: preliminary objections concerning the inadmissibility of the application or the lack of jurisdiction of the Court to hear the case; provisional measures to be taken to safeguard the rights of each of the parties; where a party fails to appear before the Court or refrains from defending its case, etc).

- End: judgment or sentence.
 - Must be reasoned and must mention the names of the judges who have taken part in it (art. 56 of the Statute).
 - Any of the judges has the right to have his/her individual opinion (agreement with the judgment, but not with the reasoning of the majority) or dissenting opinion (dissenting vote dissenting from the decision of the majority) added to the judgment (art. 57 of the Statute).
 - It shall be signed by the President and the Secretary.
 - It shall be read in public session after having been duly notified to the parties (art. 58 of the Statute).
 - Binding on the parties to the litigation and on the case that has been decided, i.e. it enjoys the so-called relative authority of *res judicata* (art. 59 of the Statute).
 - UN Charter: each member of the UN undertakes to comply with the decision of the Court in any litigation to which it is a party.
 - If one of the parties to a dispute fails to comply, Article 94 of the Charter provides that the other party may refer the matter to the Security Council: if it deems it necessary, make recommendations or take measures to enforce the judgment.
 - It is final and not subject to appeal.

- Possibility of filing an appeal for interpretation before the Court, in case of disagreement on the meaning or scope of the judgment (Art. 60 of the Statute), or for review, in case of discovery of a fact of such a nature as to be a decisive factor and which, when the judgment was rendered, was unknown to the Court and to the party requesting review (Art. 61 of the Statute).
 - Each party shall bear its own costs, unless otherwise ordered by the Court.
- ❖ **Exercise of the advisory function:** give advisory opinions on any legal question at the request of any body authorized to do so by the Charter of the United Nations, or in accordance with the provisions thereof. The purpose is to provide legal advice to organs and institutions that request it.
 - ✓ Organs and agencies authorized to request Advisory Opinions (art. 96 Charter):
 - Directly authorized by the Charter:
 - GA and SC, on any legal question.
 - Authorized by the GA: Other United Nations organs "within the scope of their activities".
 - ECOSOC, Trusteeship Council, Interim Commission of the GA.
 - fifteen United Nations specialized agencies.
 - ✓ Procedure:
 - the Court must examine whether it has the competence to issue an AO.

- it must satisfy itself that the question raised is of a legal nature: questions which are formulated in legal terms and which raise problems of international law ... susceptible, by their very nature, of receiving an answer based on law".
- that the requesting agency is duly authorized
- that the question raised has arisen within the sphere of activities of the requesting agency.
- The exercise of the Court's advisory jurisdiction is discretionary. In practice, the Court has never refused to give an advisory opinion.
- Initiation: Submission of a written request by the authorized body or agency.
 - The written request must formulate in precise terms the question in respect of which consultation is sought and must be accompanied by all documents likely to throw light on the question.
 - The Registrar shall notify all States entitled to appear before the Court.
 - Possibility of intervention of States and IO that in opinion of the Court, may be able to provide any information relevant to the matter which is the subject of the request for an opinion.
- Ends: Advisory opinion.
 - Public hearing, after notification to the Secretary-General of the United Nations and to the representatives of the Members of the United Nations, of the other States and of the international organizations directly concerned.

- It has no binding effect since its content constitutes an opinion rendered by the Court for the knowledge and consideration of the organ or body of the Organization that has requested it.



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