

ZOOM OUT

The question:

Determining the existence and content of a dispute: In search for legal criteria

Introduced by Paolo Palchetti

The existence of a dispute between the Parties is a condition of the International Court of Justice's jurisdiction. In the last years, the International Court of Justice (ICJ) has repeatedly addressed the question of whether there existed a dispute between the parties (see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)*; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia)*; *Immunities and Criminal Proceedings (Equatorial Guinea v France)*). Most prominently, in the three cases concerning *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* for the first time the ICJ found that it lacked jurisdiction over the cases because there was no dispute. In its judgments of 5 October 2016, the Court set out the following requirement for the existence of a dispute: 'a dispute exists when it is demonstrated, on the basis of the evidence, that the respondent was aware, or could not have been unaware, that its views were "positively opposed" by the applicant' (para 38). The Court denied that the existence of a dispute may be inferred from the conduct of the parties after the institution of the proceeding by noting: 'If the Court had jurisdiction with regard to disputes resulting from exchanges in the proceedings before it, a respondent would be deprived of the opportunity to react before the institution of proceedings to the claim made against its own conduct' (para 40).

The ICJ's approach to the notion of dispute raises a number of issues: is this requirement of 'awareness' an innovation in the Court's case

law? What could be the rationale justifying the introduction of this requirement of awareness? Is the awareness test likely to have some effects on the optional clause system? How can a formalistic view of the dispute be reconciled with the principle of judicial economy and with the need not to encourage the proliferation of proceedings?

More broadly, the problem of determining the existence and content of a dispute has been recently addressed also by other international tribunals. In most cases, however, and particularly in the case of UNCLOS disputes, the real issue at stake concerned the identification of the subject-matter of the arbitration. This is so because such disputes must concern the interpretation and application of a specific convention. While the main issue at stake before these tribunals concerns the identification of the subject-matter of the dispute rather than its existence, it may be interesting to analyse this case law also in the light of the recent development in the ICJ's case law. Here again, a variety of questions may be raised: does the 'awareness' criterion developed by the ICJ find correspondence in the case law of other international tribunals? Is the ICJ's approach indicative of the emergence of a 'common' criterion of awareness of the dispute as pre-requisite to international adjudication? What are the criteria employed by international courts and tribunals for determining the subject-matter of a dispute? Can one say that they have resorted to a very low threshold in order to determine the existence of a dispute falling within its competence? Would such an approach be justified?

In order to stimulate the debate over this issue QIL asked Béatrice Bonafé to present her assessment of these new developments concerning the ICJ's approach to the notion of dispute. A group of scholars, comprising both highly established experts of the ICJ's procedure and younger scholars, have been invited to take part in the debate by commenting Bonafé's paper or by adding new perspectives to the problem.

