Law of the Sea, Settlement of Disputes
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Subject(s):
UNCLOS (UN Convention on the Law of the Sea)

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A. Traditional Dispute Settlement Procedures

1 Generally speaking, the procedures for the settlement of all types of disputes in the field of international law were, until recently, the same (→ Peaceful Settlement of International Disputes). Dispute settlement in international law involved recourse to such traditional methods as → negotiation, inquiry (→ Fact-Finding), → good offices, → conciliation, → mediation, → arbitration, and judicial settlement (→ Judicial Settlement of International Disputes). The → Permanent Court of International Justice (PCIJ) as well as the → International Court of Justice (ICJ) decided a number of cases where questions of the law of the sea were involved. The landmark decisions rendered by these courts and the results of other dispute settlement procedures mentioned above include the → Alabama Arbitration (1872), the Bering Sea Fur Seals Arbitration (1893; → Bering Sea), the Case of the SS Wimbledon (1923) (→ Wimbledon, The), the Case of the SS Lotus (1927) (→ Lotus, The), the → Palmas Island Arbitration (1928), the → Corfu Channel Case (1949), the → Fisheries Case (United Kingdom v Norway) (1951), the → North Sea Continental Shelf Cases (1969), the → Fisheries Jurisdiction Case (Spain v Canada) (1974), the → Continental Shelf Arbitration (France v United Kingdom) (1977), the → Beagle Channel Dispute (1977), the → Continental Shelf Case (Libyan Arab Jamahiriya/Malta) (1985), the → Maritime Boundary between Guinea and Guinea-Bissau Arbitration (Guinea v Guinea-Bissau) (1985), the → Fisheries Jurisdiction Cases (United Kingdom v Iceland; Federal Republic of Germany v Iceland) (1998), and the → Land and Maritime Boundary between Cameroon and Nigeria Case (Cameroon v Nigeria) (2002).

2 These traditional dispute settlement procedures are still available for the settlement of → law of the sea disputes, as they are for other disputes. None of the traditional procedures are compulsory. The ICJ has dealt with law of the sea disputes on the basis of its jurisdiction as provided for in its Statute: jurisdiction conferred on the ICJ by a special agreement or by means of the ‘optional clause’ in Art. 36 (2) ICJ Statute (→ Compromis; → International Court of Justice, Optional Clause). It is noteworthy that the ICJ handed down several judgments, by which it made a significant contribution to the jurisprudence on the law of the sea, especially on issues concerning the delimitation of → territorial sea[s], the → continental shelf, and the → exclusive economic zone.


4 However, the initiative taken by Arvid Pardo, the then Ambassador of Malta to the United Nations, in the UN General Assembly in 1967 set in motion a process that involved deliberations on all aspects of the law of the sea, including dispute settlement procedures, first in an Ad Hoc Committee to Study the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction (1967; → International Seabed Area), then in the Committee on the Peaceful Uses of the Sea-Bed and Ocean Floor Beyond the Limits of
National Jurisdiction (‘Sea-Bed Committee’ 1969–73; → Peaceful Purposes), and finally in the Third United Nations Conference on the Law of the Sea (‘UNCLOS III’ 1973–82). In the Sea-Bed Committee, proposals were made for dealing in a piecemeal fashion with disputes that might arise on various issues, such as seabed mining, fisheries (→ Fisheries, Coastal; → Fisheries, High Seas; → Fisheries, Sedentary), protection of the marine environment (→ Marine Environment, International Protection), conduct of → marine scientific research, → high seas, continental shelf, territorial sea, and straits (→ Straits, International). Some proposals, however, provided for the settlement of law of the sea disputes in general, and the most prominent among them was the proposal made by the United States on the last day of the last session of the Sea-Bed Committee in August 1973. This proposal envisaged, inter alia, the establishment of a Law of the Sea Tribunal with jurisdiction to settle disputes falling under compulsory dispute settlement procedures and to handle cases requiring urgent action including requests for → prompt release of vessels and crews (→ International Tribunal for the Law of the Sea [ITLOS]). This proposal served as a basis for informal consultations in the latter part of the second session of UNCLOS III held in Caracas in 1974. The Caracas session established an informal working group, which prepared a working paper on dispute settlement, including a draft statute of the proposed tribunal. This paper served as a basis for further deliberations at the Conference’s third to tenth sessions and their negotiating texts. It was only at the fifth session of the Conference held in New York in 1976 that general approval was found for the establishment of a Seabed Disputes Chamber within the proposed Law of the Sea Tribunal. The dispute settlement provisions took their final form only when the UN Convention on the Law of the Sea as a whole was adopted in 1982.

B. Part XV of the UN Convention on the Law of the Sea

5 The UN Convention on the Law of the Sea was opened for signature on 10 December 1982. More than 100 of its articles deal with dispute settlement in a comprehensive manner. The dispute settlement provisions constitute an integral part of the Convention. It establishes both voluntary and compulsory procedures for dispute settlement. The drafters of the UN Convention on the Law of the Sea considered that effective dispute settlement was essential to balance the delicate compromises incorporated in the Convention and to guarantee that it would be interpreted both consistently and equitably (→ Equity in International Law; → Interpretation in International Law). For the first time, the UN Convention on the Law of the Sea provides for the access of entities other than States to an international tribunal in their disputes with a State or international organization (→ International Courts and Tribunals, Standing).

6 The dispute settlement procedures in the UN Convention on the Law of the Sea are set out in its Part XV. Part XV is analogous to the procedure of the ICJ under its Statute. It makes no difference whether a dispute concerning the law of the sea is submitted to the ICJ either under Part XV UN Convention on the Law of the Sea or under the Statute of the ICJ. The choice of procedure has, however, an important effect on → interim (provisional) measures of protection as Art. 290 (1) UN Convention on the Law of the Sea permits the court or tribunal to prescribe provisional measures to prevent serious harm to the marine environment, pending the final decision of that court or tribunal, a possibility which is not contemplated in Art. 41 ICJ Statute. Part XV UN Convention on the Law of the Sea contains three sections; they evolve logically from one to the other and are thus well structured.
1. Voluntary Dispute Settlement Procedures

7 Section 1 of Part XV (Arts 279–285 UN Convention on the Law of the Sea) contains dispute settlement procedures well known in general international law. The basic principle embodied in Art. 279 UN Convention on the Law of the Sea declares that States Parties are required to settle any dispute between them concerning the interpretation or application of the Convention by peaceful means, as specified in Art. 33 (1) UN Charter, i.e., through negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. Thus, recourse to non-peaceful means is impermissible for the settlement of any dispute under the UN Convention on the Law of the Sea. The Convention does not prefer one peaceful means of dispute settlement over another.

8 The parties are given complete autonomy to choose ‘at any time’ the peaceful means of their own choice to settle a dispute between them; as a consequence, they may by agreement discontinue any procedure and have recourse to an alternative peaceful means of dispute settlement (Art. 280 UN Convention on the Law of the Sea).

9 In further elaboration of the principle of parties’ autonomy, the UN Convention on the Law of the Sea provides that in respect of a dispute concerning the ‘interpretation or application of this Convention’, if the States Parties have agreed to seek settlement of their dispute by a peaceful means of their own choice, the procedures provided for in Part XV 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’ or upon the expiration of the time limit agreed upon by the parties for reaching a settlement by a peaceful means of their choice (Art. 281 UN Convention on the Law of the Sea). The peaceful means chosen by the parties may even fall outside the Convention. Differences between the parties over whether or not the procedure chosen by the parties precludes the possibility of settlement will have to be decided by the court or tribunal to which the dispute is submitted.

10 The exclusion of the procedures provided for in Part XV will arise only if the agreement between the parties contains procedures different from those referred to above for resolving disputes concerning ‘the interpretation or application of this Convention’. The fact that the agreement contains provisions similar to the provisions of the UN Convention on the Law of the Sea is not material in this regard: Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan) (Provisional Measures) (27 August 1999; → Southern Bluefin Tuna Cases). Further, the words ‘and the agreement between the parties does not exclude any further procedure’ in Art. 281 (1) UN Convention on the Law of the Sea signify that even if the dispute is not settled by the chosen procedure, if the parties agreed to exclude any further procedure, then the procedures provided for in Part XV do not apply. In its Award on Jurisdiction and Admissibility of 4 August 2000, the first Arbitral Tribunal to be established under Annex VII to the UN Convention on the Law of the Sea, in the Southern Bluefin Tuna Cases, held that non-binding dispute settlement provisions of a regional fisheries agreement applied to the exclusion of the procedures provided for in Part XV (→ International Courts and Tribunals, Jurisdiction and Admissibility of Inter-State Applications). The view of the Arbitral Tribunal that the agreement to exclude ‘any further procedure’ may be inferred from the provisions of the regional fisheries agreement has been widely criticized. The more widely shared view is that such exclusion of any further procedure should follow from clear wording in the agreement lest the compulsory dispute resolution provisions of the UN Convention on the Law of the Sea be undermined.
11 The UN Convention on the Law of the Sea also provides that a dispute must be submitted to a procedure that entails a binding decision if the parties have so agreed, through a general, regional, or bilateral agreement or otherwise; and in that event the procedure provided for in Part XV would not apply, unless the parties otherwise agree (Art. 282 UN Convention on the Law of the Sea). This allows any party to a dispute to have the dispute settled in accordance with a procedure previously agreed upon if such procedure entails a binding decision. It matters little whether such agreement was reached prior to the entry into force of the Convention or thereafter. The agreement referred to in Art. 282 UN Convention on the Law of the Sea may be recorded ‘otherwise’, for example, through separate declarations, such as declarations made under Art. 36 (2) ICJ Statute. To fall within the ambit of Art. 282 UN Convention on the Law of the Sea, the agreement shall provide for the settlement of disputes concerning what the Convention calls ‘the interpretation or application of this Convention’ and not of any other instrument (MOX Plant [Ireland v United Kingdom] [Provisional Measures] [3 December 2001] para. 38; → MOX Plant Arbitration and Cases). Even if the other instrument contains rights or obligations similar to or identical with the rights or obligations set out in the UN Convention on the Law of the Sea, the rights and obligations under that instrument have a separate existence from those under the UN Convention on the Law of the Sea. Consequently, the interpretation or application of that instrument cannot be said to be a case concerning ‘the interpretation or application’ of the UN Convention on the Law of the Sea (at paras 39–53).

12 When a dispute arises between States Parties to the UN Convention on the Law of the Sea, the Convention requires the parties to the dispute to proceed ‘expeditiously’ to an exchange of views regarding its settlement by negotiation or other peaceful means. Further, the obligation to exchange views expeditiously also applies where a procedure for dispute settlement 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 (Art. 283 UN Convention on the Law of the Sea). A State Party to a dispute is not obliged to pursue negotiation or other peaceful means under Part XV, section 1, when it concludes that the possibilities of settlement have been exhausted (Southern Bluefin Tuna Cases [27 August 1999] para. 60). The obligation to exchange views is not an empty formality, to be dispensed with at the whim of a disputant.

13 Where the parties agree to submit a dispute to voluntary conciliation, they may do so in accordance with the procedure under Annex V, section 1 UN Convention on the Law of the Sea or another conciliation procedure. Once the dispute has been submitted to a conciliation procedure, the proceedings may be terminated only in accordance with such procedure, unless the parties agree otherwise. If one party or the other does not agree to submit the dispute to conciliation or the parties do not agree upon the conciliation procedure, the conciliation proceedings are deemed to be terminated (Art. 284 UN Convention on the Law of the Sea).

14 Section 1 of Part XV also applies to any dispute, which pursuant to Part XI, section 5 UN Convention on the Law of the Sea is to be settled in accordance with procedures provided for in this part. If an entity other than a State Party (including state enterprises and natural or juridical persons) is a party to such a dispute, section 1 applies mutatis mutandis (Art. 285 UN Convention on the Law of the Sea). Thus, Art. 285 makes the means indicated in Art. 33 (1) UN Charter applicable to disputes between non-State entities, such as international organizations and multinational corporations, as well as between those entities and States.
15 Notwithstanding section 1 or section 3 of Part XV, there is no bar to the parties, by agreement, directly taking recourse to a compulsory procedure that entails a binding decision under Part XV, section 2 UN Convention on the Law of the Sea. There is no limitation on the freedom of the parties to agree to settle any dispute between them by compulsory dispute settlement procedures (Art. 299 UN Convention on the Law of the Sea). Section 1 of Part XV applies only where there is no such agreement between the parties.

2. Compulsory Dispute Settlement Procedures

16 If parties fail to settle a dispute by voluntary means, they are obliged to resort to compulsory procedures entailing binding decisions provided for in section 2 of Part XV, subject to the limitations and exceptions contained in the UN Convention on the Law of the Sea. States Parties to the Convention are deemed to have accepted these compulsory procedures by becoming parties to the Convention. Section 2 of Part XV starts off with Art. 286, which states the conditions subject to which the compulsory procedures embodied therein come into play. By virtue of this article, the questions that need to be answered are whether the ‘limitations’ on the applicability of section 2 set out in Art. 297 UN Convention on the Law of the Sea apply to the dispute in question; and whether the disputant State has made a declaration that it does not accept any one or more of the compulsory procedures provided for in section 2 with respect to one or more of the categories of disputes specified in Art. 298 of the Convention. Arts 297 and 298 UN Convention on the Law of the Sea do not, however, stand in the way of the States concerned arriving at an agreement for submitting their dispute to any of the compulsory procedures specified in section 2. A further requirement of Art. 286 UN Convention on the Law of the Sea is that compulsory dispute settlement procedures can be invoked only ‘where no settlement has been reached by recourse to section 1’, unless, of course, the parties to the dispute otherwise agree. In short, if the limitations and exceptions to the applicability of section 2 as specified in section 3 are not applicable and if the requirements of section 1 are satisfied, under Art. 286 UN Convention on the Law of the Sea, any dispute concerning the interpretation or application of the Convention ‘shall … be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction’ under section 2. It is not a requirement that both the parties shall agree to such submission.

17 Art. 287 UN Convention on the Law of the Sea specifies which court or tribunal will have jurisdiction under the Convention. It deals with ‘choice of procedure’, and, in its para. 1, it provides that a State is free to choose one or more of the following four compulsory procedures entailing binding decisions for the settlement of disputes concerning the interpretation or application of the UN Convention on the Law of the Sea: a) the ITLOS; b) the ICJ; c) an arbitral tribunal constituted in accordance with Annex VII; d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein. Annexes VII and VIII to the UN Convention on the Law of the Sea deal with the mechanics of institutional arrangements concerning arbitration and special arbitration, respectively. Whereas the special arbitral procedure provided for in Annex VIII may be invoked in a dispute concerning the interpretation or application of the Convention relating to a) fisheries, b) protection and preservation of the marine environment, c) marine scientific research, or d) navigation, including pollution from vessels and by dumping (→ Marine Pollution from Ships, Prevention of and Responses to; → Navigation, Freedom of), there is no such limitation with regard to invocation of the arbitral procedure in Annex VII.
The ‘Montreux Compromise’ embodied in Art. 287 UN Convention on the Law of the Sea, which provides for a plurality of adjudicating bodies of equal standing, made agreement on the Convention in general, and procedures for the settlement of disputes in particular, possible. The availability of a plurality of options to choose the appropriate means of dispute settlement is seen by some as a step that could undermine the unity of international law (→ Fragmentation of International Law). Such a view runs counter to what the drafters of the UN Convention on the Law of the Sea had intended. There is also no material to suggest that judicial decentralization has inhibited the coherence of international law. The Resolution on the United Nations Decade of International Law, adopted by the UN General Assembly at its 54th Session (UNGA Res 54/28 UN Doc A/RES/54/28 [17 November 1999]), recognizes that the establishment of tribunals in recent times constitutes ‘significant events’ within the United Nations Decade. Besides, the entry of non-State disputants in international adjudication made the ICJ unsuitable for litigation of disputes in respect of the → international seabed area.

Resort to the ITLOS is listed as the first of a number of means for the settlement of disputes in Art. 287 UN Convention on the Law of the Sea, which the Member States are free to choose from. This was probably due to several factors. Among others, the jurisdiction of the ITLOS under the UN Convention on the Law of the Sea is wider than that of any other court or tribunal referred to in Art. 287. Unless the parties agree otherwise, the ITLOS has a residual compulsory jurisdiction in regard to the prescription of provisional measures under Art. 290 (5) UN Convention on the Law of the Sea and → prompt release of vessels and crews under Art. 292. The Seabed Disputes Chamber of the ITLOS has compulsory jurisdiction in disputes with respect to activities in the international seabed area to the extent provided for in Part XI, section 5 UN Convention on the Law of the Sea. At the request of any party to the dispute, such disputes can also be decided by an ad hoc chamber of the Seabed Disputes Chamber. The Seabed Disputes Chamber is also authorized to give advisory opinions at the request of the Assembly or the Council of the → International Seabed Authority (ISA) on legal questions arising within the scope of its activities.

The choice of procedure may be affected by means of a written declaration submitted when signing, ratifying, or acceding to the UN Convention on the Law of the Sea or ‘at any time thereafter’. Such declarations do not, however, affect the jurisdiction of the Seabed Disputes Chamber of the ITLOS as provided for in Part XI, section 5 UN Convention on the Law of the Sea.

Art. 287 (3) UN Convention on the Law of the Sea provides that a State Party which is a party to a dispute not covered by a declaration in force is deemed to have accepted arbitration in accordance with Annex VII. Art. 287 (4) UN Convention on the Law of the Sea provides that if the parties to a dispute have accepted ‘the same procedure’ for the settlement of the dispute, it may be submitted only to that procedure, unless the parties otherwise agree. Art. 287 (5) UN Convention on the Law of the Sea provides that, if the parties to a dispute have not accepted ‘the same procedure’, it may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree. Out of the present 160 States Parties to the UN Convention on the Law of the Sea, only 43 have filed declarations under Art. 287. When no declaration is made, a preference for arbitration under Annex VII is presumed. It is doubtful whether the consequences of not filing a declaration have been fully considered by States. It may be for this reason that the UN General Assembly has, in its annual resolutions on Oceans and the Law of the Sea (eg UNGA Res 65/37 [7 December 2010] UN Doc A/RES/65/37), been encouraging States Parties to the UN Convention on the Law of the Sea that have not yet done so to consider...
making a written declaration choosing from the means for the settlement of disputes set out in Art. 287 UN Convention on the Law of the Sea.

22 Art. 288 UN Convention on the Law of the Sea determines the scope of the jurisdiction of a court or tribunal referred to in Art. 287. That jurisdiction extends primarily to disputes concerning ‘the interpretation or application’ of the UN Convention on the Law of the Sea. It further extends over any dispute concerning ‘the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement’. It is not necessary that parties to such agreements be parties to the UN Convention on the Law of the Sea before a court or tribunal exercises its jurisdiction under Art. 288. There are currently ten such agreements. The prominent example is the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (‘Straddling Fish Stocks Agreement’), which provides that the provisions relating to the settlement of disputes set out in Part XV UN Convention on the Law of the Sea apply mutatis mutandis to any dispute arising out of the interpretation or application of these agreements. The Straddling Fish Stocks Agreement also makes its dispute settlement mechanism applicable to disputes concerning sub-regional, regional, or global fisheries agreements relating to → straddling or highly migratory fish stocks which are the subject of these agreements. Art. 288 UN Convention on the Law of the Sea further provides that the Seabed Disputes Chamber and any other chamber or arbitral tribunal referred to in Part XI, section 5 UN Convention on the Law of the Sea shall have jurisdiction in any matter which is submitted to them in accordance therewith. In the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by that court or tribunal.

23 Provision is made for the appointment of scientific or technical experts to sit with the court or tribunal but without the right to vote (Art. 289 UN Convention on the Law of the Sea). Their role is similar to that of assessors in the ICJ. If a court or tribunal to which a dispute has been duly submitted considers prima facie that it has jurisdiction under Part XV or Part XI, section 5, it may prescribe, at the request of a party, any provisional measures to ‘preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision’ (Art. 290 (1) UN Convention on the Law of the Sea). An obligation is imposed on the parties to ‘comply promptly’ with such measures. The ITLOS may also prescribe provisional measures to prevent damage to fish stocks in accordance with Art. 31 (2) Straddling Fish Stocks Agreement. Provision is also made for securing prompt release of vessels or crews upon the posting of a reasonable bond or other financial security (Art. 292 UN Convention on the Law of the Sea).

24 A court or tribunal having jurisdiction under section 2 of Part XV is required to apply the UN Convention on the Law of the Sea and other rules of international law not incompatible with the Convention. It may decide a case → ex aequo et bono, if the parties so agree (Art. 293 UN Convention on the Law of the Sea). If a court or tribunal exercising compulsory jurisdiction determines that a claim ‘constitutes an abuse of legal process or is prima facie unfounded’, it is called upon to take no further action in the case (Art. 294 UN Convention on the Law of the Sea). Whatever the rules of international law relating to the exhaustion of local remedies might be, they would apply also to disputes concerning the law of the sea (Art. 295 UN Convention on the Law of the Sea; → Local Remedies, Exhaustion of). It has been held that it is not logical to read the requirement of exhaustion of local remedies into Art. 292 UN Convention on the Law of the Sea (‘Camouco’ Case [Panama v France] [Prompt Release]). It is declared that any decision rendered by a court or tribunal exercising compulsory jurisdiction under section 2 of Part XV shall be final and shall be complied with by all the parties to the dispute. However, such decision binds only the parties to the dispute and then only in respect of that particular dispute (Art. 296 UN
Convention on the Law of the Sea). It is interesting to note that Art. 21 of Annex III to the
UN Convention on the Law of the Sea provides that any final decision rendered by a court
or tribunal having jurisdiction under the Convention relating to the rights and obligations of
the ISA and of a contractor shall be enforceable in the territory of each State Party.

3. Limitations and Exceptions

25 Part XV, section 3 UN Convention on the Law of the Sea contains limitations and
exceptions to the applicability of the compulsory dispute settlement procedures contained
in section 2 of the Convention. Art. 297 (1) provides that disputes with regard to the
exercise by a coastal State of its sovereign rights or jurisdiction shall be subject to the
compulsory procedures provided in section 2 in three types of cases:

   a) when it is alleged that a coastal State has acted in contravention of the
   Convention in regard to the freedoms and rights of navigation, overflight, or the
   laying of submarine cables and → pipelines, or in regard to other internationally
   lawful uses of the sea specified in Art. 58 UN Convention on the Law of the Sea;

   b) when it is alleged that a State exercising these freedoms, rights, or uses has
   acted in contravention of this Convention or of laws or regulations enacted by the
   coastal State; and

   c) when it is alleged that a coastal State has acted in contravention of specified
   international rules and standards for the protection and preservation of the marine
   environment.

26 Art. 297 (2) and (3) UN Convention on the Law of the Sea, while providing for the
application of compulsory dispute settlement procedures to marine scientific research and
fisheries, exempt a coastal State from the obligation of submitting to such procedures any
dispute arising out of its exercise of certain rights with respect to marine scientific research
in the exclusive economic zone or on the continental shelf, or any dispute relating to its
sovereign rights with respect to the living resources in the exclusive economic zone (see
also Arts 264 and 265 UN Convention on the Law of the Sea).

27 Provision is made in Art. 297 (2) (b) and (3) (b) UN Convention on the Law of the Sea,
for obligatory recourse to conciliation under Annex V, section 2, in the following
circumstances: in regard to a dispute arising from an allegation by a researching State that
with respect to a specific marine scientific project the coastal State is not exercising its
rights under Arts 246 and 253 in a manner compatible with the Convention (Art. 297 (2) (b)
UN Convention on the Law of the Sea); and in regard to allegations of manifest failure by a
coastal State to comply with its obligations or of arbitrary action on its part with respect to
the living resources in its exclusive economic zone (Art. 297 (3) (b) UN Convention on the
Law of the Sea). The recommendations of the conciliation commission are not, however,
binding (Annex V, Arts 7 (2) and 14). A disagreement as to whether a conciliatory
commission has jurisdiction ‘shall be decided by the commission’ (Annex V, Art. 13).

28 In negotiating agreements pursuant to Arts 69 and 70 UN Convention on the Law of the
Sea with respect to access to coastal fisheries, coastal States and → land-locked States and
geographically disadvantaged States shall include sufficient measures for minimizing the
possibility of disagreement concerning the interpretation or application of these
agreements, as well as measures on how they shall proceed if a disagreement nevertheless
arises (Art 297 (3) (e) UN Convention on the Law of the Sea).
Art. 298 UN Convention on the Law of the Sea deals with three types of disputes, which States may exclude by written declaration from any or all of the compulsory dispute settlement procedures provided for in section 2 of Part XV. These are:

a) disputes concerning Arts 15, 74 and 83 UN Convention on the Law of the Sea relating to sea boundary delimitations or historic bays or titles;

b) disputes concerning military activities or law enforcement activities by a coastal State with respect to fisheries and marine scientific research in areas subject to its jurisdiction; and

c) disputes in respect of which the UN Security Council is exercising its functions under the UN Charter. When a State makes a declaration that it does not accept any one or more of the procedures in section 2 of Part XV with respect to disputes referred to in a) above, it shall, when such a dispute arises subsequent to the entry into force of this Convention and where no agreement within a reasonable period of time is reached in negotiations between the parties, at the request of any party to the dispute, accept submission of the matter to conciliation under Annex V, section 2, provided that ‘any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission’. This proviso clearly suggests that where no declarations are made under Art. 298 UN Convention on the Law of the Sea, any of the adjudicating bodies mentioned in Art. 287 are competent to deal with sea boundary delimitations even when they involve consideration of disputes mentioned in the proviso.

Disputes excluded by Art. 297 UN Convention on the Law of the Sea or exempted by Art. 298 from application of the compulsory dispute settlement procedures provided for in Part XV, section 2, may be submitted to such procedures ‘only by agreement of the parties to the dispute’. The parties are, however, free to agree to some other procedure for the settlement of such disputes or to reach an amicable settlement (Art. 299 UN Convention on the Law of the Sea).

C. Other Instruments

The UN Convention on the Law of the Sea is by no means a complete code on the subject of settlement of law of the sea disputes, although it is undoubtedly the main instrument in that regard. Art. 288 UN Convention on the Law of the Sea confers jurisdiction on a court or tribunal referred to in Art. 287 to deal with disputes concerning the interpretation or application of other international agreements related to the ‘purposes of the Convention’. The Statute of the ITLOS contained in Annex VI to the UN Convention on the Law of the Sea confers jurisdiction on the ITLOS over all matters provided for in ‘any other agreement’ (Art. 21 ITLOS Statute).

There are several bilateral and multilateral agreements giving effect to one aspect or the other of the UN Convention on the Law of the Sea or to the broad principles set out therein. This is so especially in relation to fisheries and environmental matters. Such agreements may also involve obligations arising under them as also under the Convention. Difficult problems may arise where two dispute settlement procedures—one under the UN Convention on the Law of the Sea and the other under another agreement—run in parallel in respect of the same or substantially the same dispute or of different aspects of the same dispute.
33 Questions may arise as to how to avoid a conflict of decisions on the same issue. The problems are less severe in cases where ‘self-contained’ and ‘distinct’ disputes may be made out of the provisions concerning resolution by different adjudicating bodies. Where such distinct disputes cannot be made out, and where both adjudicating bodies are simultaneously called upon to determine rights and obligations of the parties, each body may have to examine, on an objective basis, which body would be required to deal with the ‘most acute’ or ‘main’ elements of the dispute and then take a decision on suspending the proceedings before it until such a time as the other body has had occasion to decide the most acute elements of the dispute. No clear judicial guidelines have yet emerged in this regard. It may be that each case will have to be dealt with on its merits, bearing in mind considerations of mutual respect and → comity which should prevail between judicial bodies (see MOX Plant Case [Ireland v United Kingdom] [Order No 3] [Suspension of Proceedings on Jurisdiction and Merits and Requests for Further Provisional Measures] para. 28).

D. Evaluation

34 The system established by the UN Convention on the Law of the Sea with regard to the settlement of law of the sea disputes certainly constitutes a step forward in comparison with the traditional dispute settlement mechanisms. It forms an integral part of the Convention and includes compulsory procedures entailing binding decisions. Of course, several major disputes are exempted from compulsory dispute settlement. This cannot be seen as a negative development. Some disputes require political decisions within the framework of the UN Convention on the Law of the Sea. Direct negotiations between the parties to a dispute play a great role in this regard.

35 While providing for more than one adjudicating body, the drafters of the UN Convention on the Law of the Sea did not perceive any danger to the unity of international law. These bodies fulfil complementary needs. It is to be hoped that each body, although autonomous in itself, will have due regard to the decisions rendered by the other adjudicating bodies, thus ensuring the harmonious development of the law of the sea. At the same time, it may be noted that the UN Convention on the Law of the Sea does not foresee uniformity of interpretation as a necessary objective.

36 Little information is available regarding the extent to which States Parties have made use of the dispute settlement mechanisms provided for in the UN Convention on the Law of the Sea. The effect of the provisions in Part XV, section 1 is necessarily a matter of speculation. There has been very limited invocation of the compulsory procedures provided for in Part XV, section 2. Whereas, as of January 2011, 18 cases have been submitted to the ITLOS (of these, only four cases were instituted by special agreement of the parties and the remaining on account of the compulsory jurisdiction of the ITLOS), five cases involving important issues concerning the law of the sea have been submitted to arbitration. It is doubtful as to how far these submissions to arbitration may be seen as preferred procedure of States Parties. The frequency with which dispute settlement mechanisms are invoked is not the only way to measure their significance. In some cases the very existence of these mechanisms has acted as a restraint on arbitrary actions of States or promoted voluntary compliance.

37 Under-utilization of the dispute settlement provisions, if any, is not due to any serious shortcomings or ambiguity in such provisions. The underlying reasons for this are political rather than legal. In the final analysis, these provisions, however perfect they are, can come to life only when litigants make use of them. It is worth noting that the dispute settlement mechanisms in the UN Convention on the Law of the Sea, when tested, have underlined their usefulness in the resolution of law of the sea disputes ‘by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations’ (Art. 279 UN
Convention on the Law of the Sea). What is also important to realize is that all disputing parties under the UN Convention on the Law of the Sea, whether they be States, international organizations, or multinational corporations, can seek redress through independent judicial institutions. This is a step forward in the development of a coherent international legal order based on justice and equity.

38 States Parties could also usefully explore having recourse to a dispute-settlement body as a partner in preventive diplomacy rather than as an alternative of last resort. The experience of the ITLOS in this regard is a useful pointer in this direction.

Select Bibliography


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