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VOLUNTARY AND COMPULSARY PROCEDURES OF MARITIME DISPUTES UNDER THE UNITED NATIONS CONVENTION ON THE LAW OF SEA

Summary

This article focuses on analysis of the progressive dispute-settlement mechanism embodied in the United Nations Convention on the Law of the Sea. Special attention is given to the general international law principle of peaceful settlement of international disputes and its reflection in the procedures under consideration. The research is based on the relevant conventional provisions.

Key words: *law of the sea, peaceful settlement of international disputes, the United Nations Convention on the Law of the Sea*

Since the end of the XIX century procedures for the settlement of international disputes have been based on the "peaceful settlement" principle. The primary international legal instruments comprise inter alia the International Conventions for the Pacific Settlement of Disputes adopted in the Hague in 1899 and 1907. Both documents relied on arbitration, good offices, mediation, inquiry and conciliation as the most preferable mechanisms for international conflicts resolution. (2)

Being of the general character the abovementioned procedures were used as a central point for the recent establishment of dispute settlement mechanisms under specific treaty regimes. One of such particular examples is provided for by the United Nations Convention on the Law of the Sea 1982 (hereinafter the UNCLOS) (1).

With this respect it is worth to mention that States for the first time agreed on the procedures for the settlement of the law of the sea disputes in 1958 at the First United Nations Conference on the Law of the Sea. Settlement of fishery disputes was regulated by the Convention on Fishing and Conservation of the Living Resources of the High Seas, 1958 (8) while settlement of all other disputes "arising out of the interpretation or application of any Convention on the Law of the Sea of 1958" fell under the procedures of the Optional Protocol of Signature concerning the Compulsory Settlement of Disputes (9). However, the fact that none of these procedures proved to be effective led to the elaboration of the new dispute settlement mechanism.

Two basic principles of dispute settlement can be identified from the provision in Section 1 (UNCLOS). First, states parties are obliged to settle disputes by peaceful means. This obligation becomes clear from an analysis of Articles 279, 283 and 285. Secondly, states parties have been granted high degree of flexibility in choosing the means to settle their disputes. This theme can be identified from an analysis of Articles 280, 281, 282 and 284. (7).

Article 279 stipulates that the basic obligation of states parties is to settle all disputes that concern the interpretation or application of the LOSC by peaceful means. Article 283 obliges states parties to a dispute to initiate and maintain an effective system for exchange of views and talks with regard to the settlement of disputes. Article 285 provides that entities other than states are free to have recourse to the provisions under this Section to peacefully settle their disputes arising pursuant to Section 5 of Part XI (3, p 210).

Under the second theme of flexibility as identified in Section 1, states parties are free to choose the mode they may adopt in settling a dispute as long as the means are peaceful. Article 280 stipulates that states parties may at any time mutually agree to refrain from using the dispute settlement provisions of the LOSC and settle a dispute between them by any peaceful means of their choice. Under Article 281, if the parties agree to settle a dispute by any peaceful means of their choosing, the procedures under Part XV can only be invoked if no settlement is reached, and the agreement between them excludes no further procedure. Further, if the parties have agreed on a time limit, Part XV procedures can be utilised only on the expiry of the time limit (4, p 121).

Article 282 provides for a situation where disputant states parties are also signatories to an agreement of a general, regional or bilateral nature. If under such agreement they have bound themselves to use a dispute settlement procedure that would entail a binding decision, such a procedure would have precedence over those in Part XV of the LOSC. As will be seen later in this chapter, it is this provision that proved to be a hurdle for the jurisdiction of an Annex VII arbitral tribunal in the Southern Bluefin Tuna Case – Australia and New Zealand v Japan (5).

Article 284 provides that any party to the dispute may invite the other to submit the dispute to conciliation. However, if the other party rejects the invitation or abstains from accepting it by its inaction, the process fails. In a

case where the invitation is accepted, it is again left to the parties to choose the procedure to be adopted for the conciliation either under Annex V, section 1, or another conciliation procedure. Again, if the parties are unable to reach an agreement with regard to the procedure, the process is terminated midway and parties are free to initiate the compulsory procedures entailing binding decisions under Part XV, Section 2 of the LOSC, after an exchange of views. (6)

In general, the abovementioned procedures are considered to be voluntary. Pursuant to Article 285 of the UNCLOS they inter alia apply to any dispute with respect to activities in the Area as well as mutatis mutandis to any dispute to which an entity other than a State Party is a party. Thus, relying on Article 279 it may be concluded that the means indicated in Article 33 (1) of the Charter are applicable to disputes arisen between non-State entities as well as between such entities and States on the interpretation or application of the Convention.

Another progressive procedure was adopted in Section 2 of Part XV. Thus, pursuant to Article 286 any dispute concerning the interpretation or application of the UNCLOS, where no settlement has been reached by recourse to the abovementioned provisions, shall be submitted at the request of any party to a dispute to the court or tribunal having jurisdiction under this section. The relevant dispute settlement procedure is compulsory and entails binding decision. It can be invoked without necessity to conclude any additional agreement between the parties to a dispute, and the final decision may be rendered despite nonparticipation of the other party in the proceedings (9, p. 4-5, 12-14).

Nevertheless, the provisions of Section 2 are not absolute. Their application is limited subject to provisions of Articles 280-283 of the UNCLOS which entitle parties at their discretion to choose other peaceful means of dispute settlement and Section 3 of Part XV which gives the opportunity to exempt certain categories of disputes from the compulsory jurisdiction of the courts and tribunals under. Section 2.

Moreover, Article 287 provides options with regard to the choice of procedure. Parties to the Convention upon submitting a declaration are allowed to select a court or tribunal they prefer from the following list: the International Tribunal for the Law of the Sea (hereinafter the ITLOS), the International Court of Justice (hereinafter the ICJ), an arbitral tribunal constituted in accordance with Annex VII or a special arbitral tribunal constituted in accordance with Annex VIII for specified categories of disputes. Respective declaration can be submitted by a State Party when signing, ratifying or acceding to the UNCLOS or any time thereafter. In those cases when parties to a dispute have selected different procedures or one of the parties concerned has not submitted any declaration, arbitration under Annex VII was chosen to be an alternative. Otherwise, a dispute has to be submitted to the commonly agreed procedure. In every instance, the choice of procedure under Article 287 shall not affect the obligation of States Parties to accept the jurisdiction of the Seabed Disputes Chamber of the ITLOS pursuant to Part XI, Section 5 of the UNCLOS.

Whatever choice is made, a court or tribunal referred to above shall have jurisdiction over any dispute concerning the interpretation or application of the UNCLOS or of an international agreement related to the purposes of the UNCLOS, which is submitted to it in accordance with the agreement between parties to a dispute, that actually extends the scope of dispute settlement mechanism of the Convention comparing to provision of Article 279. In the event of a dispute with respect to the jurisdictional matters this issue has to be decided by the court or tribunal in question (Article 288). The ITLOS pending case Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC) is an illustrative example that addresses jurisdictional matters of the court (7).

In accordance with Article 290 the recognition of prima facie jurisdiction of one the courts or tribunals considered above may also be used as a basis for provisional measures prescription. For this purpose the urgency of the situation is crucial. Moreover, the relevant measures have to be requested solely by a party to a dispute and after the parties have been given an opportunity to be heard. Finally, provisional measures shall be aimed at preservation of the respective rights of the parties to the dispute or prevention of serious harm to the marine environment, pending the final decision (6) including those of the later constituted arbitral tribunal (7, p. 23).

The prescription of provisional measures has to be distinguished from the procedure of the prompt release of vessels and crews addressed in Article 292 of the UNCLOS. Thus, prompt release procedures may be initiated by the flag State (8) or on its behalf [6] when detention was exercised under Articles 73 (2), 220 (7) and (8), 226 (1) "b" and "c" of the UNCLOS. With this question any court or tribunal agreed upon the parties may be addressed unless parties failed to reach such agreement within 10 days from the time of detention. In this event a court or tribunal accepted by the detaining State under Article 287 or the ITLOS will have jurisdiction of compulsory nature. In any case, the release shall be conducted without prejudice to any merits of the case and only upon the posting of reasonable bond or other financial security determined by the court or tribunal. Parties to a dispute shall also take into account general provisions of Articles 291, 293, 295 and 296 of the UNCLOS.

Thus, all the dispute settlement procedures specified in Part XV of the UNCLOS are opened to States Parties as well as to entities other than States Parties when specifically provided for in the Convention.

Law applicable by the respective courts and tribunals shall comprise not only the UNCLOS but also other rules of international law not incompatible with the conventional provisions. Moreover, if parties so agreed the courts and tribunals are entitled to decide a case under their jurisdiction ex aequo et bono. Incorporation of this possibility into the UNCLOS dispute settlement procedures was based on Article 38 (2) of the Statute of the ICJ. Additional provisions on the applicable law appear in Article 21 of Annex III and Articles 24, 38 of Annex VI of the Convention.

In any events, the above analyzed dispute settlement procedures shall be invoked only after exhaustion of local remedies where this is required by international law. Exceptions are, for instance, when there is no adequate local remedy available in the State concerned, the dispute is of the purely interstate character or the procedure of the prompt release of vessels and crews shall be exercised pursuant to Article 292 of the UNCLOS. In these cases no exhaustion of local remedies is required.

As a result of dispute resolution a court or tribunal renders a decision which is considered to be final and binding between the parties in respect of this particular case.

However, not all disputes concerning interpretation and application of the UNCLOS are subject to the compulsory dispute settlement procedures of Section 2 entailing binding decision. The relevant exclusions and exceptions are contained in Articles 297 and 298.

Thus, Article 297 while guaranteeing protection of the basic freedoms and rights over the sea and other its uses under Section 2 of Part XV completely excludes number of disputes in the field of marine scientific research and fisheries from this compulsory adjudication leaving parties to a dispute with the right in these cases to invoke either Section 1of Part XV or conciliation procedures. In its turn, Article 298 entitles States Parties at the time of signing, ratifying, acceding to the UNCLOS or any time thereafter to declare exceptions to applicability of Section 2 of Part XV towards the settlement of particular disputes relating to maritime delimitations, historic bays or titles, military and law enforcement activities as well as disputes in respect of functions of the Security Council of the UN assigned by the Charter of the UN. Such declarations shall be made in writing and be deposited with the Secretary-General of the UN. After excepting on the basis of Article 298 a particular category of dispute such State Party loses its right to bring to compulsory adjudication such category of dispute against any other State Party even when the later has not made any similar declaration.

Moreover, not all of the exceptions under Article 298 are absolute. Disputes under subparagraph 1 (a) of this article if excepted are still subject to compulsory conciliation procedures. At the same time all three categories of disputes addressed as optional exceptions in Article 298 remain subject to Section 1 of Part XV. It is also important to emphasize that the validity and applicability of these exceptions shall not be judged by States Parties themselves but shall be thoroughly considered and decided upon by the relevant court, tribunal or conciliation commission in every case under consideration (see Article 288 (4) and Article 13 of Annex V).

In any event, pursuant to the provisions of Article 299, derived from the general rule of Article 280, any dispute excluded or excepted under Articles 297 and 298 may still be submitted to compulsory adjudication or any other peaceful dispute settlement procedure by an agreement of the parties to a dispute.

In addition, the UNCLOS contains provisions regarding the settlement of disputes in Articles 186-191, 264, 265, Annexes V, VI, VII, VIII and Article 7 of Annex IX. They also have to be considered thoroughly if any relevant dispute arises or particular judicial body is chosen for deciding on a case.

Conclusion

The adoption of the UNCLOS is a significant development in the settlement of the law of the sea disputes which relies on justice, peace and security. As an innovation, the Convention provides for dispute settlement procedures not only of consensual but also of compulsory nature. Aiming at the specialization of international adjudication, on the basis of the UNCLOS provisions a new international tribunal was established, i.e. the ITLOS. Moreover, certain dispute-settlement schemes embodied in the Convention apply to disputes which involve not only States but also other entities such as, for instance, international organizations parties to the Convention, International Seabed Authority and seabed mining contractors. In principle, a wide choice of forum and flexibility of the procedures offered by the UNCLOS if applied truly strengthen cooperation and friendly international relations among States Parties.

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