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The UNCLOS Dispute Settlement System

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Introduction

Part XV of the 1982 United Nations Convention on the Law of the Sea (UNCLOS)[1] establishes a system of compulsory binding dispute settlement for any dispute relating to the interpretation or application of any provision of UNCLOS. Therefore, in principle, if a dispute arises between two States parties on the interpretation or application of a provision in UNCLOS, and the dispute cannot be resolved through consultation and negotiation, either party to the dispute may unilaterally invoke the system of compulsory procedures entailing binding decisions contained in section 2 of Part XV.[2] These procedures involve binding decisions by an international court or arbitral tribunal.

However, there are certain limitations and exclusions to the system of compulsory procedures entailing binding decisions in section 2 of Part XV. For example, under article 298 States have the right to "opt out" of compulsory procedures entailing binding decisions for disputes on the interpretation or application of UNCLOS concerning military activities as well as for disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles. Therefore, disputes on these issues cannot be taken to any form of third party dispute settlement under Part XV of UNCLOS without the consent of both parties to the dispute.

This paper will analyze the dispute settlement system in UNCLOS. Firstly, it will review the system of compulsory binding dispute settlement set out in Part XV of UNCLOS. Second, it will examine the limitations and optional exceptions to the system of compulsory binding dispute settlement. Third, it will examine the advisory jurisdiction of the International Tribunal for the Law of the Sea (ITLOS).

I. UNCLOS Dispute Settlement Regime: An Overview

The Package Deal

The dispute settlement regime in UNCLOS is the most complex system ever included in a global convention.[3] It was part of the "package deal" agreed to at the start of the nine year negotiations leading to the adoption of UNCLOS in 1982. Under the package deal, States agreed to accept the Convention in

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1 Adopted in Montego Bay, Jamaica, on 10 December 1982, 1833 UNTS 3 (entered into force on 16 November 1994) (UNCLOS). As of 09 August 2013, 165 States and the European Union were parties to UNCLOS, <www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm#The%20United%20Nations%20Convention%20on%20the%20Law%20of%20the%20Sea>. All website references provided in this paper are current as at 26 September 2013 except where otherwise noted.

2 *Ibid*, article 286.

3 On the UNCLOS dispute settlement system generally, see Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge University Press, 2005).

its entirety, with no right to make reservations and, that as a general principle, all disputes concerning the interpretation or application of any provision in the Convention would be subject to the system of compulsory procedures entailing binding decisions.[4] In other words, when States become parties to UNCLOS, they consent in advance to the system of compulsory binding dispute settlement in the Convention.

Choices of Arbitration or Adjudication available to States Parties

The "default" rule in UNCLOS is that if there is a dispute between two States concerning the interpretation or application of any provision in the Convention, it is subject to the system of compulsory procedures entailing binding decisions in section 2 of Part XV. States are obligated to first exchange views to try to resolve the dispute by following the procedures set out in section 1 of Part XV.[5] However, where no settlement has been reached by recourse to section 1, the dispute may be unilaterally submitted *at the request of any party to the dispute* to the court or tribunal having jurisdiction under section 2.[6]

The court or tribunal which has jurisdiction to hear a dispute depends in part on whether the parties to the dispute have exercised their right to select a procedure for resolving disputes to which they are party.[7] Under article 287, a State is free to choose, by means of a written declaration, one or more of four procedures for the settlement of disputes concerning the interpretation or application of the Convention. States can choose between two methods of adjudication and two methods of arbitration. The choices are: adjudication before the International Court of Justice (ICJ); adjudication before the International Tribunal for the Law of the Sea (ITLOS); arbitration under Annex VII of UNCLOS; or special arbitration under Annex VIII of UNCLOS.[8] A State may indicate their choice of procedure when signing, ratifying or acceding to UNCLOS, or at any time thereafter.[9]

If two States parties to a dispute have elected the same procedure, the dispute may only be referred to that procedure, unless the parties otherwise agree.[10] If the States parties to the dispute have not elected the same procedure, or if one of them has not made a choice of procedure, the dispute may be submitted only

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4 Tommy Koh and S Jayakumar, 'Negotiating Process of the Third United Nations Conference on the Law of the Sea', in Myron H. Nordquist (ed), *United Nations Convention on the Law of the Sea 1982: A Commentary* (Martinus Nijhoff, Volume I, 1985) 29-134.

5 UNCLOS, article 283, *supra* note 1.

6 *Ibid*, article 286.

7 *Ibid*, article 288.

8 *Ibid*, article 287(1).

9 *Ibid*, article 287(1).

10 *Ibid*, article 287(4).

to arbitration under Annex VII, unless the parties otherwise agree.[11] For example, in 2010, Bangladesh invoked the dispute settlement system in UNCLOS against both India and Myanmar concerning the UNCLOS provisions on maritime boundary delimitation. None of the three States concerned had made a choice of procedure under article 287. Therefore, the dispute between Bangladesh and India as well as the dispute between Bangladesh and Myanmar would proceed to arbitration under Annex VII.[12] However, Bangladesh and Myanmar subsequently agreed to take their dispute to ITLOS rather than to arbitration.[13] Consequently, Bangladesh will be going to arbitration in its dispute with India but its dispute with Myanmar was heard by ITLOS in 2012.

Applicable Law and Finality of Decisions

Article 288 of UNCLOS provides that the relevant court or tribunal shall have jurisdiction over any dispute concerning the interpretation or application of a provision in UNCLOS. However, in resolving the dispute, the court or tribunal is not restricted to applying the provisions of UNCLOS. Article 293 of UNCLOS provides that a court or tribunal having jurisdiction shall apply the Convention as well as other rules of international law not incompatible with the Convention.

Whether the dispute goes to one of the two methods of adjudication or to one of the two methods of arbitration, the decision rendered by a court or tribunal having jurisdiction is final, and must be complied with by all the parties to the dispute.[14]

Request for Provisional Measures

A State party to a dispute which is referred to dispute settlement under section 2 may also request provisional measures to either; (1) preserve the respective rights of the parties, or (2) prevent serious harm

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11 *Ibid*, article 287(5).

12 On October 8, 2009, the People's Republic of Bangladesh instituted arbitral proceedings concerning the delimitation of the maritime boundary between Bangladesh and the Republic of India pursuant to article 287 and Annex VII, article 1 of UNCLOS. The Permanent Court of Arbitration acts as Registry in this arbitration. <www.pca-cpa.org/showpage.asp?pag_id=1376>.

13 *Dispute Concerning the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal*, Case No. 16, International Tribunal for the Law of the Sea (ITLOS). The dispute had initially been submitted to an arbitral tribunal to be constituted under Annex VII UNCLOS through a notification dated 8 October 2009, made by the People's Republic of Bangladesh to the Union of Myanmar. However, on 14 December 2009, proceedings were instituted before ITLOS after both States submitted declarations to ITLOS accepting its jurisdiction to hear the case. ITLOS delivered its Judgment on 14 March 2012, <www.itlos.org/index.php?id=108>.

14 UNCLOS, article 296(1), *supra* note 1.

to the marine environment.[15] The only prerequisite is that the court or tribunal to which the dispute has been duly submitted must first determine that *prima facie* it has jurisdiction under Part XV or Part XI.[16]

Such provisional measures are legally binding.[17] Even if a dispute is being referred to an arbitration tribunal, a State party may request provisional measures from ITLOS pending the establishment of the arbitral tribunal if ITLOS "considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires".[18]

General Provisions in Section 1 of Part XV

The guiding principle in Part XV is that the "will of the parties" shall prevail.[19] The parties to a dispute on the interpretation or application of the provisions of UNCLOS may, by agreement, select any peaceful means they wish for settling their dispute.[20] Even if one of the dispute settlement procedures provided for in UNCLOS has commenced, the parties can agree "at any time" to adopt a special method for resolving their dispute.[21]

When a dispute arises between parties concerning the interpretation or application of the provisions of the Convention, the parties to the dispute are obliged to proceed expeditiously to an "exchange of views" regarding its settlement by negotiation or other peaceful means.[22]

If one of the parties feels that the dispute cannot be resolved through direct negotiations, it may invite that other party to submit the dispute to conciliation in accordance with the procedure in Annex V, section 1, or another conciliation procedure.[23]

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15 *Ibid*, article 290(1).

16 *Ibid*, article 290(1).

17 *Ibid*, article 290(6).

18 *Ibid*, article 290(5).

19 Natalie Klein *supra* note 3 at 29.

20 UNCLOS, article 279, *supra* note 1. Charter of the United Nations (entered into force 24 October 1945), article 33(1), <www.un.org/en/documents/charter/chapter6.shtml>.

21 UNCLOS, article 280, *supra* note 1.

22 *Ibid*, article 283.

23 *Ibid*, article 284(1).

II. Limits on Compulsory Procedures Entailing Binding Decisions

Limitations under Article 297

Article 297 of UNCLOS sets out limitations on the applicability of the compulsory procedures in section 2. It reflects the complex balance struck between the interests of coastal States and other States in the exclusive economic zone (EEZ).[24] In the negotiations leading to the Convention coastal States maintained that their exercise of sovereign rights and jurisdiction in the EEZ should not be subject to the compulsory procedures in section 2. On the other hand, user States argued that they must have the right to resort to section 2 in cases where coastal States exceeded their rights and jurisdiction or interfered with the rights and freedoms all States enjoy in the EEZ.[25]

Article 297(1) is actually not a limitation on the applicability of the compulsory procedures in section 2 of Part XV. Instead, it expressly provides that a dispute on the interpretation or application of certain provisions of UNCLOS will be subject to the compulsory procedures entailing binding decision. The reason for this is that the language of articles 56 and 58 on the EEZ contain a number of carefully crafted compromises. The drafters of the Convention anticipated that disputes were likely to arise on the interpretation and application of articles 56 and 58. Therefore, they expressly provided in article 297(1) that disputes concerning the interpretation or application of UNCLOS with regard to the exercise by a coastal State of its sovereign rights or jurisdiction provided for in the Convention shall be subject to the procedures provided for in section 2 in the following cases:

> (a) when it is alleged that a coastal State has acted in contravention of the provisions of this 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 article 58;
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> (b) when it is alleged that a State in exercising the aforementioned freedoms, rights or uses has acted in contravention of this Convention or of laws or regulations adopted by the coastal State in conformity with this Convention and other rules of international law not incompatible with this Convention; or
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> (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 which are applicable to the coastal State and which have been established by this Convention or through a competent international organization or diplomatic conference in accordance with this Convention.

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[24] Natalie Klein *supra* note 3 at 125-126.

[25] Myron H. Nordquist (ed), *United Nations Convention on the Law of the Sea 1982: A Commentary* (Martinus Nijhoff, Volume V, 1988) 87-106.

The effect of article 297(1) is that if a dispute arises concerning activities by other States in the EEZ of a coastal State, such disputes would in principle be subject to the procedures in section 2. One example would be if a coastal State alleges that another State is engaging in activities in its EEZ other than those which it may conduct under article 58, that is, the freedoms of overflight, navigation, the laying of submarine cables and pipelines, and other lawful uses of the sea relating to those such freedoms. Another example would be when a coastal State attempts to enforce national environmental regulations on ships passing through its EEZ, and such regulations exceed those allowed by applicable conventions of the International Maritime Organization on ship-source pollution.[26] In both these cases article 297(1) provides that the dispute would be subject to the compulsory procedures in section 2.

Articles 297(2) and 297(3) contain "limitations" on the applicability of the compulsory procedures entailing binding decisions in section 2. They provide that certain kinds of disputes will be subject to non-binding third party conciliation procedures under Annex V rather than being subject to binding third party adjudication or arbitration.

Article 297(2) provides that disputes on the interpretation or application of the provisions of UNCLOS with respect to *marine scientific research* are subject to compulsory procedures in section 2, except for disputes arising out of the exercise by the coastal State of its discretionary powers under articles 246 and 253. Article 246 gives coastal States the discretion to withhold their consent to the conduct of a research project in their EEZ in certain circumstances. Article 253 gives the coastal State the right to require the cessation of a research project in certain circumstances. Disputes regarding the exercise of discretionary powers by the coastal State under these two articles are excluded from the compulsory procedures in section 2, but are subject to compulsory conciliation under Annex V, provided that the conciliation commission shall not call into question the exercise by the coastal State of its discretion to designate specific areas or withhold consent for the conduct of a marine scientific research project.[27]

Article 297(3) provides that the general rule is that disputes on *fisheries provisions* in UNCLOS are subject to the compulsory procedures in section 2. However, any dispute relating to sovereign rights of a coastal State with respect to the *living resources* in its EEZ (or the exercise of such sovereign rights) is exempted. And, as explained below, States can make a declaration under article 298 excluding law enforcement activities in regard to the exercise of sovereign rights and jurisdiction excluded from section 2 under article 297(2) and (3). Nevertheless, if it is alleged that the coastal State has arbitrarily

[26] UNCLOS, article 211(5), *supra* note 1.

[27] *Ibid*, article 297(2)(b).

exercised its discretionary powers or manifestly failed to comply with its obligations to ensure that the maintenance of the living resources in its EEZ is not seriously endangered, the dispute may be referred to compulsory conciliation.[28]

Article 297(3) only excludes the exercise of the sovereign rights of the coastal State with respect to living resources. The exercise of enforcement jurisdiction by coastal States over foreign vessels engaged in fishing contrary to the laws and regulations of the coastal State is subject to the compulsory procedures in section 2. In particular, the flag State may refer the issue of release from detention of the vessel or its crew to any court or tribunal under article 292 where the coastal State fails to promptly release them upon the posting of a bond or other security.[29] The court or tribunal will only deal with the question of release, "without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew."[30]

Optional Exceptions under Article 298

Section 3 of Part XV also gives States the right to "opt out" of the compulsory binding dispute settlement system in section 2 for certain categories of disputes. Article 298 provides that States parties have the option to formally declare to the UN Secretary-General that they do not accept section 2 for certain categories of disputes, including the following:

- the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles;
- disputes concerning military activities and disputes concerning law enforcement activities relating to enforcement of rights and jurisdiction of coastal States over resources in the EEZ;
- disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations.

Several States in Asia, including Australia, China, Korea, and Thailand, have exercised their right to exclude these categories of disputes from the system of compulsory binding dispute settlement in

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28 *Ibid*, article 297(3)(b).

29 By September 2013, there are 10 cases dealing with Prompt Release among the total 21 cases registered with ITLOS, <www.itlos.org/index.php?id=35&L=0>.

30 UNCLOS, article 292(3), *supra* note 1.

section 2 of Part XV.[31] For example, on 25 August 2006, China submitted a declaration under article 298 providing that:

> The Government of the People's Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a) (b) and (c) of Article 298 of the Convention.[32]

It should be noted that the exclusion of certain categories of disputes from the jurisdiction of court or tribunal under article 298 declarations are not "self-judging". A party to a dispute cannot determine whether the exclusions do or do not apply in a given case. Article 288(4) makes it clear that in the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by a decision of that court or tribunal.

States can make a declaration pursuant to article 298 when signing or ratifying the UNCLOS or at any time thereafter. For example, Australia ratified UNCLOS on 5 October 1994. On 22 March 2002, it submitted a Declaration under article 298 stating that it does not accept any of the procedures provided for in section 2 of Part XV with respect of disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations as well as those involving historic bays or titles.[33]

Disputes Related to Military Activities and Certain Law Enforcement Activities

China's declaration under article 298 excludes disputes relating to military activities. Therefore, any dispute on whether a State has a right under article 58 of UNCLOS to conduct military activities such as military surveys or military exercises in the EEZ of China would be excluded from the compulsory binding dispute settlement system in UNCLOS. Any dispute concerning military activities by China in the maritime zones of another State would also be excluded.

China's declaration also excludes disputes relating to law enforcement activities in relation to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297(2) or (3). This in effect excludes only a narrow category of law enforcement activities, that is,

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31 The official texts of declarations and statements which contain optional exceptions to the applicability of Part XV, Section 2, under article 298 of UNCLOS are available online on the web page of the UN Treaties Collection under Status of Treaties, <http://treaties.un.org/Pages/ParticipationStatus.aspx>.

32 China, Declaration made after ratification (25 August 2006), Declaration under article 298, <www.un.org/Depts/los/convention_agreements/convention_declarations.htm#China%20Upon%20ratification>.

33 Australia, made after ratification (22 March 2002), Declaration under article 287 and 298, <www.un.org/Depts/los/convention_agreements/convention_declarations.htm#Australia%20after%20ratification>.

those relating to the enforcement of fisheries activities and marine scientific research activities, which activities are already excluded from the compulsory binding dispute settlement system under articles 297(2) and (3). Disputes relating to other types of law enforcement activities, such as disputes concerning interference with a seismic survey vessel of another State or disputes concerning the arrest of foreign fishing vessels in areas of overlapping claims would not be excluded by the declaration.

Disputes Related to Matters being Addressed by the United Nations Security Council

China's declaration also excludes disputes in respect of which the Security Council is exercising the functions assigned to it by the Charter of the United Nations, unless the Security Council decides to remove the matter from its agenda or calls upon the parties to settle it by the means provided for in UNCLOS.[34] The purpose of this exception is to avoid a conflict between a dispute settlement procedure initiated under Part XV of UNCLOS and action that the United Nations Security Council might be taking in the exercise of its responsibility to maintain international peace and security under Chapter VII of the United Nations Charter. For example, if armed conflict were to break out between claimant States over the disputed islands in the South China Sea, the matter may be referred to the Security Council. In such a case, one of the parties to the dispute may not be able to invoke the dispute settlement procedures in UNCLOS on the issue of whether the use of military force by a claimant State was a violation of UNCLOS.

Disputes on Maritime Boundary Delimitations

An article 298 declaration also excludes "disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations". Note that this provision does not exclude all disputes "concerning maritime boundaries" or all disputes "relating to maritime boundaries". It only excludes disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations. Therefore, to fall within the exclusion, the dispute must be concerning the interpretation or application of article 15 (on territorial sea boundaries), article 74 (on EEZ boundaries) or article 83 (on continental shelf boundaries). Examples of disputes relating to the interpretation or application of articles 74 and 83 would be disputes on what basepoints should be used to draw a median line between opposite States, whether relevant circumstances such as the length of the coastline require the adjustment of the median line, what effect should be given to off-shore islands, etc.

Although disputes on the interpretation or application of articles 74 and 83 relating to "sea boundary delimitations" can be excluded under the article 298 declaration, there may nevertheless be issues with

[34] Charter of the United Nations, articles 39, 41 and 42, *supra* note 20.

respect to the interpretation or application of articles 74 and 83 which are **not covered** by the exclusion. Not all the paragraphs in articles 74 and 83 deal with "sea boundary delimitations". For example, under paragraph 3 of articles 74 and 83 of UNCLOS, State parties have an obligation to "make every effort to enter into provisional arrangements of a practical nature" and not to engage in activities which would "jeopardize or hamper the reaching of the final agreement" on the maritime boundaries. If a State refuses to enter into discussions regarding provisional arrangements of a practical nature, there would be a dispute on whether it has breached its obligation under articles 74 and 83 to make every effort to enter into provisional arrangements of a practical nature. Also, if a claimant State authorized drilling in an area in dispute, an issue would arise as to whether it has breached its obligation not to engage in activities which would jeopardize or hamper the reaching of a final agreement on the maritime boundaries. Therefore, a court or arbitral tribunal could interpret article 298 strictly and rule that it only excludes disputes relating to the boundary delimitations, not disputes on the obligations of States pending agreement on the delimitation of boundaries.

Disputes on Historic Bays and Titles, Historic Waters and Historic Rights

Article 298 provides that disputes on "historic bays and titles" may be excluded. Part II of UNLCOS on the territorial sea contains one provision referring to historic bays and one provision referring to historic title. Article 10 sets out rules for enclosing bays with straight baselines, but provides in paragraph 6 that its provisions do not apply to "so-called 'historic' bays." Article 15 on the delimitation of territorial sea provides that the normal rule for delimiting territorial sea boundaries does not apply where it is necessary by reason of "historic title" or other special circumstances to delimit the territorial seas of the two States in a way which is at variance with the normal rule. The fact that the terms "historic bays and titles" appear in Part II of UNCLOS on territorial seas suggest that the terms are used to refer to maritime space that is similar to internal waters or territorial sea.

Another issue is whether disputes relating to "historic waters" would fall within the exclusion in article 298 of disputes relating to "historic bays or titles". With the exception of the provision in article 15, the law on historic waters is governed by the principles and rules of general international law. As indicated in the preamble to UNCLOS, matters not regulated by UNCLOS continue to be governed by the rules and principles of general international law. It is not clear whether the exclusion in article 298 of disputes relating to "historic bays or titles" would also include disputes on claims to "historic waters" but it is reasonable to conclude that it would. There is no generally agreed definition of historic waters, but it is generally agreed that it is wider in scope than historic bays. A working definition that has been proposed by a leading scholar on the subject is as follows:

> Waters over which the coastal State, contrary to the generally applicable rules of international law, clearly, effectively, continuously, over a substantial period of time, exercises sovereign rights with the acquiescence of the community of States.[35]

The ICJ has stated that the term "historic waters" was generally understood to mean "waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title".[36]

In his recent book of the subject, Professor Clive Symmons has stated that certain requirements are necessary to support claims to historic title to "historic waters".[37] First, with respect to the exercise of authority, there must be a formal, clear and consistent claim to sovereignty over the waters. Second, the claim must have been adequately publicized with clear notification of the claim to other States, such as by a formal declaration. Third, there must have been continuity of the claim over time and the effective exercise of jurisdiction by the claiming State. Finally, there must have been knowledge of, and acquiescence to the claim by other States.

Another issue is whether "historic rights" would also fall within the exclusion in article 298 of disputes relating to "historic bays or titles". Some Chinese scholars have maintained that historic rights continue to be governed by the principles and rules of general international law and that these rights were not affected by the fact that UNCLOS has entered into force.[38] In support of this argument they could cite the final line in the Preamble to UNCLOS, which states that "matters not regulated by this Convention continue to be governed by the rules and principles of general international law". The counter to this argument is that the right to exercise rights and jurisdiction over natural resources in ocean space is regulated by the provisions in UNCLOS in great detail, and is not a matter not regulated by the Convention.

Compulsory Conciliation under Annex V

Even if a State makes a declaration under article 298 to exclude disputes relating to maritime boundary delimitation and historic bays and titles from the compulsory binding dispute settlement procedures in

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35 L.J. Bouchez, *The Regime of Bays in International Law* (Leyden, A.W. Sythoff, 1964), 281.

36 *Fisheries Case (United Kingdom v. Norway)*, Judgment of 18 December 1951, ICJ, at 130, <www.icj-cij.org/docket/files/5/1809.pdf>. *Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening)*, Judgment of 11 September 1992, ICJ, at 588, para 384, <www.icj-cij.org/docket/files/75/6671.pdf>.

37 Clive R. Symmons, *Historic Waters in the Law of the Sea: A Modern Re-Appraisal* (Martinus Nijhoff, 2008) 111-245.

38 See Zhiguo Gao and Bing Bing Jia, 'The Nine-Dash Line in the South China Sea: History, Status and Implications' (2013) 107 *American Journal of International Law* 98 at 119.

section 2 of Part XV, such disputes may nevertheless be subject to the compulsory conciliation procedures in Annex V of UNCLOS. Article 298 provides that:

> (a) (i) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles, provided that a State having made such a declaration 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; and provided further 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;
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> (ii) after the conciliation commission has presented its report, which shall state the reasons on which it is based, the parties shall negotiate an agreement on the basis of that report; if these negotiations do not result in an agreement, the parties shall, by mutual consent, submit the question to one of the procedures provided for in section 2, unless the parties otherwise agree;
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> (iii) this subparagraph does not apply to any sea boundary dispute finally settled by an arrangement between the parties, or to any such dispute which is to be settled in accordance with a bilateral or multilateral agreement binding upon those parties;

Therefore, if a dispute arises after 16 November 1994 (the date of entry into force of UNCLOS) on the delimitation of the maritime boundary between two States parties to UNCLOS, and it does not concern the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory, it could be referred to compulsory conciliation under Annex V.

However, if the delimitation of the maritime boundaries is in an area which would also require the concurrent consideration of an unsettled dispute concerning sovereignty over off-shore islands, the dispute would not be subject to the compulsory conciliation. The only recourse would be to resolve the issues by bilateral negotiations or by other procedures agreed to by the parties.

The procedures for compulsory conciliation are set out in Annex V of UNCLOS. A conciliation commission would be established, and it would study the problem and issue a report.[39] The report is not legally binding on the parties, but the parties would be under a legal obligation to negotiate in good faith on the basis of the conciliation report.[40] This requirement forces parties to abandon their traditional positions and negotiate in good faith to try to reach an agreement on the basis of the conciliation report.

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39 UNCLOS, Annex V, article 2, *supra* note 1.

40 *Ibid*, Annex V, articles 5 and 7.

Although the parties are not required to reach an agreement, they are legally obligated to negotiate in good faith to try to for such end.

If they are unable to reach agreement after negotiations on the basis of the report, it is not entirely clear what happens. Article 298 provides that

> if these negotiations do not result in an agreement, the parties *shall, by mutual consent*, submit the question to one of the procedures provided for in section 2, unless the parties otherwise agree. [emphasis added]

Opinions differ on the meaning of the phrase "*shall, by mutual consent*, submit the case to either arbitration or adjudication as provided in section 2." The language appears to be intentionally vague. It could be argued that if the parties cannot reach agreement based on the non-binding conciliation report, they must then agree to refer the dispute to one of the four compulsory procedures entailing binding decisions in section 2. However, some writers opine that the phrase "by mutual consent" means that no State party can be forced to refer the case to arbitration or adjudication without their express consent.[41] Given this ambiguity, a dispute could arise between two States parties on the interpretation or application of this language in article 298. In such case, that dispute would be subject to the system of compulsory procedures entailing binding decisions in section 2 of Part XV of UNCLOS.

What does seem clear is that if there is a dispute on how to delimit the maritime boundary between the EEZ measured from the coast of a claimant State and the territorial sea or EEZ claimed from a disputed off-shore island, such a dispute would not be subject to the compulsory conciliation procedure. This is because the maritime boundary could not be determined without addressing the issue of which State has the better claim to sovereignty over the disputed island. Article 298 expressly provides 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.

Disputes on Provisions not Excluded by Article 298

The system of compulsory procedures entailing binding decisions in section 2 of Part XV of UNCLOS would apply to disputes between claimant States concerning the interpretation or application of the provisions of UNCLOS which are not within the exclusion in article 298. They include:

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[41] For a history of the negotiations leading to this clause, see Myron H. Nordquist (Volume V, 1988) *supra* note 25 at 109-134. The commentators conclude in paragraph 298.31 that "the agreement to resort to one of the procedures in section 2 can come into effect only be mutual consent". Their view is that if no agreement can be reached to refer it to one of the procedures for adjudication or arbitration, the only obligation that remains is the general obligation set out in article 283(1) to proceed expeditiously to an exchange of views regarding settlement of the dispute by further negotiations or other peaceful means. See also, Natalie Klein (2005) *supra* note 3 at 260-1.

1. A dispute on whether a feature meets the definition of an island under article 121(1) because it is a naturally formed area of land, surrounded by water, which is above water at high tide.

2. A dispute on whether an island is a rock which cannot sustain human habitation or economic life of its own within article 121(3) and is therefore not entitled to an EEZ or continental shelf of its own.

3. A dispute on whether a feature is a low-tide elevation pursuant to article 13.

4. A dispute on whether the use of straight baselines by a State is consistent with article 7.

5. A dispute on the interpretation or application of article 6 on reefs.

III. Prospects for an ITLOS Advisory Opinion

There is no provision in UNCLOS or in the Statute of ITLOS which permits States parties or institutions created by UNCLOS to request an advisory opinion from ITLOS on legal questions. However, the Rules of the Tribunal, adopted in 1996 by the Tribunal pursuant to article 16 of its Statute, give the Tribunal the authority to give advisory opinions in certain circumstances. The Tribunal's advisory jurisdiction is based on article 21 of the Statute of the Tribunal, which states that the jurisdiction of the Tribunal comprises all disputes and all applications submitted to it and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.

Article 138 of the Rules of the Tribunal reads as follows:

> 1. The Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for an advisory opinion.
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> 2. A request for an advisory opinion shall be transmitted to the Tribunal by whatever body is authorized by or in accordance with the agreement to make the request to the Tribunal.
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> 3. The Tribunal shall apply *mutatis mutandis* articles 130 to 137.

There is no express authority in either UNCLOS or the ITLOS Statute for this provision. Furthermore, there is no precedent for it in the rules of the International Court of Justice.[42] The status and legal basis of article 138(1) has been the subject of analysis by government officials and judges of the tribunal.[43] Although some concern has been raised on whether the Tribunal exceeded its powers in

[42] P. Chandrasekhara Rao & Ph. Gautier (ed), *The Rules of the International Tribunal for the Law of the Sea: A Commentary* (Martinus Nijhoff, 2006) 393.

[43] See Ki-Jun You, "Advisory Opinions of the International Tribunal for the Law of the Sea: Article 138 of the Rules of the Tribunal, Revisited" (2008) 39 *Ocean Development & International Law* 360; Tafsir Malick

providing for advisory jurisdiction in article 138(1) of the Rules of the Tribunal, commentators have concluded that there has largely been a positive reaction to the rule empowering ITLOS to give advisory opinions in certain circumstances.[44]

If a body were to request an advisory opinion pursuant to article 138(1), it would be difficult for any State to challenge the authority of the Tribunal to do so. In any case, if such a challenge were made, article 288(4) of UNCLOS provides that in the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal. Therefore, it would be up to the Tribunal itself to determine whether it has the authority it has vested in itself under article 138 of its Rules of Procedure.

Under article 138(1), the Tribunal can give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for an advisory opinion. Three requirements must be met.

First, there must be an agreement between States that is related to the purposes of UNCLOS. This could be a multilateral agreement, a regional agreement or even a bilateral agreement, so long as the agreement is related to the purposes of the Convention.

Second, the agreement must specifically provide for the submission of a request for an advisory opinion from the Tribunal. The international agreement should state who can request an advisory opinion and set out the procedure for making such request. The agreement could provide that the States parties to the agreement can make the request when there is a consensus to do so. The agreement could also establish a body and authorize that body to request an advisory opinion if it believes an opinion would assist it in carrying out its functions and objectives.

Third, the advisory opinion must be on a legal question. This presumably would be a legal question relating to the Convention. The Tribunal is likely to follow the jurisprudence of the International Court of Justice in determining whether there is a legal question.[45]

Would it be possible for some or all of the States bordering the South China Sea to request an advisory opinion on legal issues relating to the interpretation and application of UNCLOS? It could be possible if two or more States entered into an agreement relating to the purposes of the Convention which

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Ndiaye, "The Advisory Function of the International Tribunal for the Law of the Sea" (2010) 9 *Chinese Journal of International Law* 565.

44 Ki-Jun You, *ibid*, at 364.

45 On this issue, see *Legality of the Threat or Use of Nuclear Weapons Case*, Advisory Opinion, (1996) ICJ Reports, 232-234, para 13.

authorized them to request an advisory opinion from ITLOS. For example, the claimant States could enter into an international agreement to clarify the legal status of the features in the Spratly Islands. The agreement could establish a technical body to review the features to determine which are completely submerged at low tide, which are low tide elevations, which meet the definition of islands in article 121(1), and which may be rocks as defined in article 121(3). The treaty could then authorize the technical body to request an advisory opinion from ITLOS on legal questions relating to their functions and responsibilities. For example, they could request an advisory opinion from ITLOS on what factors to take into account when interpreting article 121(3) of UNCLOS.

An example of how a group States can bring a request for an advisory opinion to ITLOS is found in *Case No. 21, Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, which arose in 2013.[46] The seven States comprising the SRFC (Cape Verde, Guinea, Guinea-Bissau, Mauritania, Senegal, Sierra Leone and Gambia) are parties to the 2012 *Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the SRFC* (MCA Convention). Article 33 of the MCA Convention provides that "[t]he Conference of Ministers of the SRFC may authorize the Permanent Secretary of the SRFC to bring a given legal matter before the International Tribunal for the Law of the Sea for advisory opinion". On 27 March 2013, at its 14th Extraordinary Session, the Conference of Ministers of the SRFC adopted a Resolution instructing the Permanent Secretary of the SRFC to refer four questions to the ITLOS for an advisory opinion.

IV. Conclusions

The general principle in the system of dispute settlement system in UNCLOS is that any dispute on the interpretation or application of a provision of the Convention which cannot be resolved through consultation or negotiation may be unilaterally referred by one of the parties to the compulsory procedures entailing a binding decision by an international court or tribunal. Disputes on the interpretation or application of most of the articles in UNCLOS are subject to these procedures.

There are certain limitations and exceptions to this principle in articles 297 and 298, but they are rather limited in scope. Also, although boundary delimitation disputes on the interpretation or application of articles 15, 74 and 83 may be excluded from the compulsory procedures entailing binding decisions, they may nevertheless be subject to the non-binding third party conciliation procedures in Annex V of UNCLOS, provided that the boundary delimitation disputes arise after 1994, and provided that they do

[46] *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, ITLOS Case No.21 (27 March 2013), <www.itlos.org/index.php?id=252&L=0%20and%207%3D2>.

not require the concurrent consideration of an unsettled dispute concerning sovereignty or other rights over continental shelf or insular land territory.

There is also the prospect of two or more States entering into an agreement which enables them to request an advisory opinion from ITLOS under article 138 of its Rules of the Procedure on issues or questions of how some of the intentionally vague provisions in the Convention are to be interpreted.

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