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The South China Sea: UNCLOS and State Practice

UNCLOS Dispute Settlement Regime

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The Context - General Principles of International Law on Settlement of Disputes

- UN Charter Obligation: peaceful settlement of disputes
- No referral to Third Party without consent of both States
- States can “consent” to third party referral by:
 1. **ad hoc agreement** for a particular dispute
 2. **optional clause declaration** under Art 36(2) of ICJ Statute
 3. **dispute settlement clause in a treaty** – consent in advance for either party to take dispute on interpretation or application of that treaty to a court or tribunal

Part 1

UNCLOS Part XV

Rationale for DSM in Part XV

- States negotiating UNCLOS recognized that a dispute settlement mechanism (DSM) must be part of “package deal”
- necessary to have an effective method of peacefully resolving future disputes on interpretation or application of the provisions of the Convention
- necessary to ensure that the agreed text of Convention had stability, certainty and predictability
- necessary to protect the agreed package of compromises against destruction through unilateral interpretations

Guiding Principle of DSM in Part XV

- General principle is that the “will of the parties” shall prevail
- Parties to a dispute may by agreement select any method they wish for settling their dispute
- Even if one of the DS procedures provided for in UNCLOS has started, the parties can agree “at any time” to adopt a special method for resolving their dispute

Structure of Part XV

- Section 1. General Provisions
- Section 2. Compulsory Procedures Entailing Binding Decisions
- Section 3. Limitations and Exceptions to the Applicability of Section 2

Article 279. Peaceful Means

- States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2 (3) of the UN Charter
- To this end, parties to the shall seek a solution by the means indicated in Article 33(1) of the UN Charter :
 - (1) negotiation, (2) enquiry, (3) mediation, (4) conciliation,
 - (5) arbitration, (6) judicial settlement , or
 - (7) other peaceful means of their choice

Article 283. Obligation to Exchange Views

- 1. When a dispute arises, the parties shall proceed expeditiously to an exchange of views regarding its **settlement by negotiation** or other peaceful means.
- 2. The parties shall also proceed expeditiously to an **exchange of views** where:
 - a procedure for the settlement of such a dispute 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.

Article 284. Conciliation

1. A party to a dispute may invite the other party or parties to submit the dispute to **conciliation** in accordance with the procedure under Annex V, section 1, or another conciliation procedure.
2. If the invitation is accepted and if the parties agree upon the conciliation procedure to be applied, any party may submit the dispute to that procedure.
3. If the invitation is not accepted or the parties do not agree upon the procedure, the conciliation proceedings shall be deemed to be terminated.

Invocation of Compulsory Procedures Entailing Binding Decisions in Section 2

Article 286. Application of procedures under this section

Subject to section 3 [Limitations and Exceptions]

any dispute concerning the interpretation or application of this Convention shall,

where no settlement has been reached by recourse to section 1,

be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.

Section 2 and “consent theory”

- General principle is that, subject to the exceptions in Section 3, any dispute between parties over the interpretation or application of a provision of the Convention which cannot be resolved by the procedures in Section 1, is subject to the system of compulsory procedures entailing binding decisions in Section 2
- By becoming a party to UNCLOS, State Parties are giving their consent in advance to the procedures in Section 2 which allow one party to unilaterally refer the dispute to adjudication or arbitration if it cannot be resolved by negotiation

Choice of Procedure - Article 287

- A State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention:
 1. INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA (ITLOS) established in accordance with Annex VI;
 2. INTERNATIONAL COURT OF JUSTICE (ICJ);
 3. ARBITRAL TRIBUNAL constituted in accordance with Annex VII;
 4. SPECIAL ARBITRAL TRIBUNAL constituted in accordance with Annex VIII

“Default Procedure”

Article 287 (5):

If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to ARBITRATION in accordance with Annex VII, unless the parties otherwise agree.

- Since none of the claimants to sovereignty over islands in the South China Sea have selected a procedure, the default procedure (Arbitration under Annex VII) would apply, unless they otherwise agree

Rationale for Limitations and Exceptions in Articles 297 & 298

- Disputes on certain provisions in UNCLOS are so sensitive in some States that if they were subject to the compulsory procedures entailing binding decisions in section 2, it could prevent those States from becoming parties to the Convention
- Therefore, the drafters had to strike a balance between the desire for a universally accepted Convention and the desire to have disputes on all the provisions subject to the compulsory procedures entailing binding decisions
- **Compromise: Limitations and Exceptions in 297 and 298**

Article 297. Limitations on Applicability of Section 2

- 297(2) & (3) exclude from Section 2 the discretionary decisions of coastal States in regulating Marine Scientific Research and disputes concerning the conservation & management of Fisheries in its EEZ
- 297(1) provides that two categories of disputes are subject to the compulsory procedures entailing binding decisions in section 2:
 - disputes on the exercise of freedoms and rights in the EEZ as provided in article 58
 - disputes on whether a coastal State has acted in contravention of specified international rules and standards to protect the marine environment

Article 298. Optional Exceptions to Applicability of Section 2

States parties have option to formally declare that they do not accept Section 2 for following categories of disputes:

- 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 rights and jurisdiction of coastal States over fishing and marine scientific research in the EEZ
- Disputes in respect of which the UN Security Council is exercising the functions assigned it by the UN Charter

Disputes concerning provisions on maritime boundary delimitation

- Article 298 Declaration does not exclude all disputes **relating to** maritime boundaries or all disputes **concerning** maritime boundaries
- Article 298 Declaration only excludes disputes on the **interpretation or application of articles 15, 74 and 83** relating to sea boundary delimitations
- Therefore, to be excluded the dispute must be about the interpretation or application of these 3 provisions

Article 74 & 83 on delimitation of EEZ and Continental Shelf

- *Article 74/83. Delimitation of the EEZ / Continental Shelf between States with Opposite or Adjacent Coasts*
- 1. The delimitation of the **EEZ / continental shelf** between States with opposite or adjacent coasts shall be effected **by agreement on the basis of international law**, as referred to in Article 38 of the ICJ Statute, **in order to achieve an equitable solution**.
- 2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the **procedures provided for in Part XV**.

Dispute over whether a Court or Tribunal has Jurisdiction

Article 288. Jurisdiction

- 1. A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part.
- 4. In the event of a dispute over whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal.

Applicable Law [Article 293]

- Article 293 provides that a court or tribunal having jurisdiction under this section shall apply
 - this Convention and
 - other rules of international law not incompatible with this Convention.

Binding Force of Decisions

Article 296 provides that:

1. Any decision rendered by a court or tribunal having jurisdiction under this section shall be final and shall be complied with by all the parties to the dispute.
2. Any such decision shall have no binding force except between the parties and in respect of that particular dispute.

Part 2

Annex VI Arbitration

Appointment of Arbitrators

- Total of 5 Arbitrators
- Party instituting proceedings appoints one arbitrator at the same time that it institutes proceedings
- Other Party then has 30 days to appoints one member
- Remaining three arbitrators appointed by agreement of the parties, but if they are unable to agree, they shall be appointed by the President of ITLOS
- If other Party fails to cooperate, the Party instituting the proceedings may request the ITLOS President to appoint the remaining 4 arbitrators from the UN list of arbitrators

Arbitral Procedure

- Unless the Parties to the dispute otherwise agree, the arbitral tribunal shall determine its own procedure, assuring to each party a full opportunity to be heard and to present its case
- Parties to the dispute have a duty to facilitate the work of the arbitral tribunal, and shall provide it with all relevant documents, facilities and information

Default of Appearance

Annex VII, Article 9

- If one party fails to appear to defend the case, other party may request tribunal to continue and make an award
- Absence of a party or failure to defend case is not a bar to the proceedings
- Before making an Award, the arbitral tribunal must satisfy itself that :
 - (1) it has jurisdiction; and
 - (2) the claim is well founded in fact and law

Finality of the Award

- The Award is final and without appeal
- It shall be complied with by the parties to the dispute
- There is no mechanism by which the Tribunal can enforce the Award

Settlement of the Case / Provisional Measures

- The case can be settled by agreement of the parties at any time prior to the issuance of the Award
- Once the Arbitral Tribunal has been established, it can request Provisional Measures from the Tribunal

Interpretation or Implementation of the Award

- Any controversy between the Parties regarding the interpretation or implementation of the Award may be submitted by either Party for decision to the arbitral tribunal

Thanks for your Attention !

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