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Panel 3: International Tribunal for the Law of the Sea

**Maritime Boundary Disputes and Compulsory
Third Party Dispute Settlement Mechanisms:
Unresolved Issues**

Robert Beckman

**Director, Centre for International Law (CIL)
National University of Singapore**

CIL
Centre for International Law
www.cil.nus.edu.sg



Part 1

Scope of Article 298 Declarations excluding Disputes on Maritime Boundary Delimitation

General Principle in UNCLOS on Resolution of Boundary Disputes

- If a dispute on the provisions on maritime boundaries arises between States parties to UNCLOS and it cannot be resolved by an exchange of views as set out in section 1 of Part XV, either party to the dispute may invoke the compulsory procedures entailing binding decisions in section 2 of Part XV and request an international court or tribunal to determine the maritime boundary

Example: Bay of Bengal Cases

- In October 2009 Bangladesh invoked the UNCLOS Dispute Settlement regime against both Myanmar and India
 - Both disputes would have gone to Annex VII Arbitration
 - Bangladesh and Myanmar subsequently agreed to refer the dispute to ITLOS, which decided the case on 14 March 2012.
 - The case between Bangladesh and India was decided by an Annex VII Arbitral Tribunal on 7 July 2014

Article 298. Optional Exceptions

1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes:
 - (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,**

Article 298 Declaration clearly excludes paragraph 1 of Articles 74 and 83

Articles 74 (and 83)

- 1. The delimitation of the EEZ / CS 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 Statute of the International Court of Justice, in order to achieve an **equitable solution**.

In other words, it prevents a Court or Tribunal from drawing the delimiting the maritime boundary in dispute

Limits of a 298 Declaration excluding disputes on maritime boundaries

- Exclusion under Article 298 does not exclude disputes on provisions in UNCLOS that may relate to or have an impact on maritime boundary delimitation:
 - Article 7. Straight Baselines
 - Article 121. Islands
 - Article 13. Low-tide Elevations

Philippines v China Arbitration: Award on Jurisdiction

- 156. In particular, the Tribunal considers that a dispute concerning the **existence of a entitlement to maritime zones** is distinct from a dispute concerning the delimitation of those zones in an area of overlap. . .
- 157. In these proceedings, the Philippines has challenged the **existence and extent of the maritime entitlements** claimed by China in the South China Sea. This **is not a dispute over maritime boundaries**. The Philippines has not requested the Tribunal to delimit any overlapping entitlements between the two States, and the Tribunal will not effect the delimitation of any boundary

Unresolved Issue: Does a 298 Declaration exclude a dispute on Articles 74(3) & 84(3)?

- 3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into **provisional arrangements of a practical nature** and, during this transitional period, **not to jeopardize or hamper** the reaching of the final agreement. Such arrangements shall be **without prejudice** to the final delimitation.

Does a 298 Declaration only apply to paragraph 1 of article 74 & 83?

- Article 298 language is **disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations**
- Does a 298 Declaration does not exclude disputes under paragraph 3 of article 74 & 83?
 - Dispute on whether a State has failed to exercise restraint in an area of overlapping boundaries
 - Dispute on whether a State has made every effort to enter into provisional arrangements of a practical nature

Object & Purpose of Art 298 exclusion

- The negotiating history of Article 298 indicates that States were focused only on whether states should be able to opt out of the binding dispute settlement procedures for disputes on the delimitation of maritime boundaries
- There is no indication whatsoever that the exclusion was also intended to exclude disputes on whether a State had breached its obligation to exercise restraint in an area of overlapping claims

Part 2

Referral of Maritime Boundary Disputes excluded by Declarations under Article 298 to Compulsory Non-binding Conciliation

Exception to 298 Declaration excluding disputes on maritime delimitation

provided that a State having made such a declaration shall, when such a dispute arises subsequent to the entry into force of this Convention [16 November 1994] 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;

Exception for referring “new disputes” to compulsory conciliation

- *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;

Issue of whether a dispute arose after 16 November 1994

- Intent of this language was to exclude “existing maritime boundary disputes” from compulsory non-binding conciliation
- Certain disputes will clearly not be excluded, for example, disputes on the delimitation of overlapping “outer continental shelf claims”
- It may not be clear whether certain maritime boundary disputes arose after 16 November 1994 – this would be a matter for the conciliation commission to decide

Issues on interpretation of second proviso

Second Proviso

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;

Intention of this provision is to exclude from compulsory conciliation “mixed disputes” that involve both overlapping maritime claims and sovereignty disputes over land territory

Mixed Disputes where determination of sovereignty not essential

- If an overlapping EEZ claims between two opposite States and the distance between the 2 States is less than 400 nm
 - If the disputed insular feature in the overlapping area is an **island** entitled to an EEZ of its own, the exclusion would apply
 - If the disputed insular feature in the overlapping area is a **rock** entitled to no EEZ or continental shelf of its own, the exclusion would not apply

Part 3

**Unresolved Issues on procedure
if parties fail to resolve the boundary
dispute by Compulsory Nonbinding
Conciliation**

Language in Article 298

(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;

“Shall by mutual consent”

- Phrase “shall by mutual consent” is arguably deliberately ambiguous in order to reach a consensus during negotiations
- One view is that the parties must agree to refer the dispute to one of the forums entailing binding decisions in section 2 of Part XV – ICJ, ITLOS, Annex VII Arbitration or Special Arbitration
 - If they are not able to agree as required, can one of the parties unilaterally refer the to dispute to Annex VII Arbitration ?
- Rationale: only “existing disputes” were to be exempt from the compulsory procedures

“Shall, by Mutual Consent”

- Another view is that the phrase ensures that no State can be forced to submit a maritime boundary delimitation dispute to compulsory third party dispute settlement without its consent
- **Rationale:** It would be an infringement of sovereignty to force a State to go to a court or tribunal without its consent
- **Conclusion:** Language is deliberately vague to please both side in negotiations leading to UNCLOS – Result is that the ITLOS or an Annex VII Arbitral Tribunal may have to clarify the ambiguity if the issue is raised in a case

Part 4

Issues concerning Compulsory Conciliation and Maritime Boundary Disputes

Functions of the Commission

Article 6. Functions of the Commission

- The Commission shall hear the parties, examine their claims and objections, and make proposals to the parties with a view to reaching an amicable settlement

Article 5. Amicable Settlement

- The Conciliation Commission may draw the attention of the parties to any measures which might facilitate an amicable settlement of the dispute

Report of the Conciliation Commission

Annex V, Article 7. Report

- The Commission shall report within 12 months of its constitution.
- Its report shall record any agreements reached and, failing agreement, its conclusions on all questions of fact or law relevant to the matter in dispute and such recommendation as the commission may deem appropriate for an amicable settlement.
- The report, including its conclusions or recommendations, shall not be binding upon the parties

Will Commissions Proceedings and Report be Confidential ?

Article 7 of Annex V states that:

- The Report shall be deposited with the UN Secretary-General
- The Report shall immediately be transmitted by him to the parties to the dispute

The Rules of Procedure will have to clarify whether:

- One of the parties could make the report (or part thereof) available to the public
- Whether the Report (or any part thereof) would be available to a Court or Tribunal in a subsequent proceeding

Rules of Procedure

- Article 4 of the Annex V provides that “The Commission shall, unless the parties otherwise agree, determine its own procedure.”
- One of the key issues will be whether the proceedings and the Report will be remain confidential, or any part of the Report of the Commission will be made public

Relevance of issue of whether compulsory procedures will apply

- Relevance of “Shall by Mutual Consent” language in Article 298
- If the parties believe that they must resort to one of the compulsory procedures if the conciliation process fails, it could effect:
 - Their position on the rules of procedure, especially on the confidentiality of the Report
 - Their willingness to agree to consider compromises suggested by the Conciliation Commission, unless the proceedings are without prejudice and will remain confidential

CONCLUSIONS

- **Several difficult issues concerning maritime boundary disputes and Article 298 Declarations remain unresolved**
- **It is likely that a case will arise in which either ITLOS or an Annex VII Tribunal will have to address these difficult issues**

Thanks for Your Attention

Robert Beckman

Director, Centre for International Law (CIL)

National University of Singapore

Email: CILDIR@NUS.EDU.SG

Website: WWW.CIL.NUS.EDU.SG