

Dispute Settlement in the UN Convention on the Law of the Sea

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included in Article 298, as it was considered inappropriate – and would be anomalous – for international courts and tribunals that hear disputes between sovereign States.²⁸³ The continued exemption of military vessels or aircraft from national jurisdiction was a strong reason not to exclude their activities entirely from the scope of international jurisdiction.²⁸⁴

However, the highly political nature of naval activities on the high seas has typically meant that the role of courts and tribunals has been marginal in the legal regulation of military uses of the oceans.²⁸⁵ The minimal substantive regulations along with an optional exclusion covering military activities on the high seas and in the EEZ are indicative of a preference on the part of States not to use compulsory third-party procedures for resolving disputes about military activities. The optional exclusion is beneficial to naval powers not wishing to have their military activities questioned through an international process. The exclusion satisfies “the preoccupation of the naval advisors . . . that activities by naval vessels should not be subject to judicial proceedings in which some military secrets might have to be disclosed.”²⁸⁶ An optional exclusion is also beneficial to coastal States that could use the exception to prevent review of any of their interference with naval exercises in their EEZ. The deliberate obfuscation of rights and duties in different maritime areas provides States with considerable leeway in deciding what actions to take and how certain disputes should be resolved. The intention of the States parties is respected through Article 298 in this regard. Permitting “military activities” to be excluded from compulsory dispute settlement reinforces the versatility allowed for this issue: “It is obvious that states can define military matters as broadly as they wish.”²⁸⁷ Such

²⁸³ “Doubts were raised . . . as to whether any vessels are entitled to sovereign immunity in a case brought before an international tribunal, as that doctrine applies only to domestic courts which are not allowed to bring before them a foreign sovereign, and as the very purpose of international tribunals is to deal with disputes between sovereign States.” 5 *United Nations Convention on the Law of the Sea 1982: A Commentary*, p. 135. The question should be raised, however, as to whether the same considerations should automatically apply to disputes involving non-State entities before international tribunals.

²⁸⁴ Singh, p. 168, n. 21; and 5 *United Nations Convention on the Law of the Sea 1982: A Commentary*, p. 136 (referring to the views of the New Zealand delegate).

²⁸⁵ The constrained judgments in the *Nuclear Tests* cases are exemplary in this regard. See *Nuclear Tests (Australia v. France; New Zealand v. France)*, 1974 ICJ 253, 457 (December 20).

²⁸⁶ 5 *United Nations Convention on the Law of the Sea 1982: A Commentary*, at 135. See also Noyes, “Compulsory Adjudication,” at 685 (noting that an exception was required for military activities because naval advisers were concerned about exposing military secrets in the course of judicial proceedings).

²⁸⁷ Gamble, “Dispute Settlement in Perspective,” at 331.