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Center for Oceans Law and Policy
University of Virginia School of Law

UNITED NATIONS CONVENTION
ON THE LAW OF THE SEA
1982

A COMMENTARY

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Volume V

Articles 279 to 320
Annexes V, VI, VII, VIII and IX
Final Act, Annex I, Resolutions I, III and IV

Myron H. Nordquist

Editor-in-Chief

Shabtai Rosenne and Louis B. Sohn

Volume Editors



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SECTION 3
LIMITATIONS AND EXCEPTIONS TO APPLICABILITY OF
SECTION 2

Article 297

Limitations on applicability of section 2

1. Disputes concerning the interpretation or application of this Convention with regard to the exercise by a coastal State of its sovereign rights or jurisdiction provided for in this 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;
 - (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
 - (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.
2. (a) Disputes concerning the interpretation or application of the provisions of this Convention with regard to marine scientific research shall be settled in accordance with section 2, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute arising out of:
 - (i) the exercise by the coastal State of a right or discretion in accordance with article 246; or
 - (ii) a decision by the coastal State to order suspension or cessation of a research project in accordance with article 253.
- (b) A dispute arising from an allegation by the researching State that with respect to a specific project the coastal State is not exercising its rights under articles 246 and 253 in a manner compatible with this Convention shall be submitted, at the request of either party, to conciliation under Annex V, section 2, provided that the conciliation commission shall not call in question the exercise by the coastal State of its discretion to designate specific areas as referred to in article 246, paragraph 6, or of its discretion to withhold consent in accordance with article 246, paragraph 5.
3. (a) Disputes concerning the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance

with section 2, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations.

- (b) Where no settlement has been reached by recourse to section 1 of this Part, a dispute shall be submitted to conciliation under Annex V, section 2, at the request of any party to the dispute, when it is alleged that:
 - (i) a coastal State has manifestly failed to comply with its obligations to ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not seriously endangered;
 - (ii) a coastal State has arbitrarily refused to determine, at the request of another State, the allowable catch and its capacity to harvest living resources with respect to stocks which that other State is interested in fishing; or
 - (iii) a coastal State has arbitrarily refused to allocate to any State, under articles 62, 69 and 70 and under the terms and conditions established by the coastal State consistent with this Convention, the whole or part of the surplus it has declared to exist.
- (c) In no case shall the conciliation commission substitute its discretion for that of the coastal State.
- (d) The report of the conciliation commission shall be communicated to the appropriate international organizations.
- (e) In negotiating agreements pursuant to articles 69 and 70, States Parties, unless they otherwise agree, shall include a clause on measures which they shall take in order to minimize the possibility of a disagreement concerning the interpretation or application of the agreement, and on how they should proceed if a disagreement nevertheless arises.

SOURCES

1. A/CONF.62/L.7 (1974), section 11, Alternative B, III Off. Rec. 85, 92 (Australia et al.).
 2. A/CONF.62/WP.9 (ISNT, Part IV, 1975), article 18, V Off. Rec. 111 (President).
 3. A/CONF.62/WP.9/Add.1 (1975), paras. 31-34, V Off. Rec. 122 (President).
 4. A/CONF.62/WP.9/Rev.1 (ISNT, Part IV/Rev.1, 1976), article 18, V Off. Rec. 185 (President).
 5. A/CONF.62/WP.9/Rev.2 (RSNT, Part IV, 1976), article 17, VI Off. Rec. 144 (President).
 6. A/CONF.62/WP.10 (ICNT, 1977), article 296, VIII Off. Rec. 1, 48.
 7. A/CONF.62/WP.10/Add.1 (1977), VIII Off. Rec. 65, 70 (President).
 8. A/CONF.62/WP.10/Rev.1 (ICNT/Rev.1, 1979, *mirneo.*), article 296.
- Reproduced in I Platzöder 375, 494-95.

9. A/CONF.62/L.41 (1979), reproduced in A/CONF.62/91 (1979), XII Off. Rec. 71, 94 (Chairman, Third Committee).
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11. A/CONF.62/L.50 (1980), XIII Off. Rec. 80 (Chairman, Third Committee).
12. A/CONF.62/L.52 and Add.1 (1980), XIII Off. Rec. 86 (President).
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14. A/CONF.62/WS/5 (1980), XIII Off. Rec. 104 (Argentina).
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17. A/CONF.62/L.78 (Draft Convention, 1981), article 297, XV Off. Rec. 172, 220-221.

Drafting Committee

18. A/CONF.62/L.75/Add.5 (1981, mimeo.).
19. A/CONF.62/L.82 (1981), XV Off. Rec. 243 (Chairman, Drafting Committee).
20. A/CONF.62/L.152/Add. 25 (1982, mimeo.).
21. A/CONF.62/L.160 (1982), XVII Off. Rec. 225 (Chairman, Drafting Committee).

Informal Documents

22. SD.Gp/2nd Session/No.1/Rev.5 (1975, mimeo.), article 17; reissued as A/CONF.62/Background Paper 1 (1976, mimeo.), article 17 (Co-Chairmen, SD.Gp). Reproduced in XII Platzöder 108 and 194.
23. NG5/16 (1978), reproduced in A/CONF.62/RCNG/1 (1978), X Off. Rec. 13, 120 (Chairman, NG5).
24. NG5/17 (1978), reproduced in A/CONF.62/RCNG/1 (1978), X Off. Rec. 13, 117 (Chairman, NG5). [The symbol "NG5/17" has been dropped from the reproduction of this document in the English version of X Off. Rec].
25. NG5/18 (1978), reproduced in A/CONF.62/RCNG/2 (1978), X Off. Rec. 126, 168 (Chairman, NG5).
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COMMENTARY

297.1. The acceptance by many participants in the Third U.N. Conference on the Law of the Sea of the provisions for the settlement of disputes relating to the interpretation of the Law of the Sea Convention was, from the very beginning, conditioned on the exclusion of certain issues from the obligation to submit them to a procedure entailing a binding decision.

There was no doubt that the basic obligations of Part XV, section 1, relating to the settlement of disputes by means agreed upon by the parties to the dispute (articles 279 to 284) should apply to all disputes arising under the Convention. Beyond that, however, there was some opposition to an unlimited obligation to submit a dispute to a procedure entailing a binding decision. When Ambassador Reynaldo Galindo Pohl (El Salvador) introduced the first general draft on the settlement of disputes at the second session of the Law of the Sea Conference (1974), he immediately highlighted the need for exceptions from obligatory jurisdiction with respect to "questions directly related to the territorial integrity of States." Otherwise, a number of States might have been dissuaded from ratifying the Convention or even signing it.¹

297.2. The document presented at Caracas by an informal working group (Source 1) suggested three basic options on the subject, each of which was defended strongly within the group. First, the integrity of the compromise package to be embodied in the Convention was to be preserved at all cost; therefore, an effective dispute settlement system must apply "to all disputes relating to the interpretation and application of this Convention" (*ibid.*, Alternative A). Second, the dispute settlement machinery should have no jurisdiction over specified categories of issues, or its jurisdiction over those issues should be limited to non-binding decisions (*ibid.*, Alternatives B.1 and B.2). The third option contained an "opt-out" system which would allow States to exclude specified categories of disputes completely from dispute settlement or at least from procedures entailing binding decisions (*ibid.*, Alternatives C.1 and C.2). In specifying the categories of disputes that could be excluded, the group listed such categories as: (a) disputes arising out of the normal exercise of regulatory or enforcement jurisdiction (except in cases of gross or persistent violation of the Convention or abuse of power) or, alternatively, disputes arising out of the normal exercise of discretion by a coastal State pursuant to its regulatory and enforcement jurisdiction under the Convention (except in cases involving an abuse of power); (b) disputes concerning sea boundary delimitation between States, including those involving historic bays or limits of the territorial sea; (c) disputes concerning vessels and aircraft entitled to sovereign immunity under international law, and similar cases in which sovereign immunity applies; (d) disputes concerning military activities; and (e) other categories that may be agreed upon.

297.3. On the basis of further negotiations at the third session of the Conference (1975), the informal negotiating group presented a concrete draft of provisions on dispute settlement (Source 22), which in article 17 tried to limit a State's right to make exceptions, by specifying the categories of disputes in which a State can choose not to participate in whole or in part. That text read as follows:

¹ 51st plenary meeting (1974), para. 10, I Off. Rec. 213.

1. When ratifying this Convention, or otherwise expressing its consent to be bound by it, a State may declare that, with respect to any dispute arising out of the exercise by a coastal State of its exclusive jurisdiction under this Convention, it limits its acceptance of some of the dispute settlement procedures specified in this Convention to those situations in which it is claimed that a coastal State has violated its obligations under this Convention by:

(a) interfering with the freedoms of navigation or overflight or of the laying of submarine cables or pipelines, or related rights and duties of other States;

(b) failing to have due regard to other rights and duties of other States under this Convention;

(c) not applying international standards or criteria established by this Convention or in accordance therewith; or

(d) abusing or misusing the rights conferred upon it by this Convention (*abus ou détournement de pouvoir*) to the disadvantage of another Contracting Party.

2. If one of the parties to a dispute has made such a declaration and if the parties to a dispute are not in agreement as to whether the dispute involves a violation of this Convention specified in the preceding paragraph, this preliminary question shall be submitted to decision by the tribunal having jurisdiction under Articles 9 and 10 of this Convention.

3. Whether or not it has made a declaration under paragraph 1 of this Article, a State may declare, when ratifying this Convention, or otherwise expressing its consent to be bound by it, that it does not accept some [or all] of the procedures for the settlement of disputes specified in this Convention with respect to one or more of the following categories of disputes:

(a) Disputes arising out of the exercise of discretionary rights by a coastal State pursuant to its regulatory and enforcement jurisdiction under this Convention, except in cases involving an abuse of power.

(b) Disputes concerning sea boundary delimitations between adjacent States, or those involving historic bays or titles, provided that the State making such a declaration shall indicate therein a regional or other third-party procedure, [whether or not] entailing a binding decision, which it accepts for the settlement of these disputes.

(c) Disputes concerning military activities, including those by government vessels and aircraft engaged in non-commercial service, but law enforcement activities pursuant to this Convention shall not be considered military activities.

(d) Disputes or situations 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, unless the Security Council has determined that specified proceedings under this Convention would not interfere with the exercise of such functions in a particular case.

(e)

*Article 298**Optional exceptions to applicability of Section 2*

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, 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;
- (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;
- (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;
- (b) disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3;
- (c) 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, 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 this Convention.

2. A State Party which has made a declaration under paragraph 1 may at any time withdraw it, or agree to submit a dispute excluded by such declaration to any procedure specified in this Convention.

3. A State Party which has made a declaration under paragraph 1 shall not be entitled to submit any dispute falling within the excepted category of disputes to any procedure in this Convention as against another State Party, without the consent of that party.

4. If one of the States Parties has made a declaration under paragraph 1(a), any other State Party may submit any dispute falling within an excepted category against the declarant party to the procedure specified in such declaration.

5. A new declaration, or the withdrawal of a declaration, does not in any way affect proceedings pending before a court or tribunal in accordance with this article, unless the parties otherwise agree.

6. Declarations and notices of withdrawal of declarations under this article shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the States Parties.

SOURCES

1. A/CONF.62/L.7 (1974), section 11, alternative C, III Off. Rec. 85, 92 (Australia et al.).
2. A/CONF.62/WP.9 (ISNT, Part IV, 1975), article 18, V Off. Rec. 111, 115 (President).
3. A/CONF.62/WP.9/Add.1 (1976), paras. 31-34, V Off. Rec. 122 (President).
4. A/CONF.62/WP.9/Rev.1 (ISNT, Part IV/Rev.1, 1976), article 18, V Off. Rec. 185, 190 (President).
5. A/CONF.62/WP.9/Rev.2 (RSNT, Part IV, 1976), article 18, VI Off. Rec. 144, 148 (President).
6. A/CONF.62/WP.10 (ICNT, 1977), article 297, VIII Off. Rec. 1, 48.
7. A/CONF.62/WP.10/Add.1 (1977), VIII Off. Rec. 65, 70 (President).
8. A/CONF.62/WP.10/Rev.1 (ICNT/Rev.1, 1979, mimeo.), article 298. Reproduced in I Platzöder 375, 495-96.
9. A/CONF.62/L.45 (1979), reproduced in A/CONF.62/91 (1979), XII Off. Rec. 71, 110 (President).
10. A/CONF.62/L.47 (1980), Annex, XIII Off. Rec. 76 (Chairman, NG7).
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13. A/CONF.62/WS/5 (1980), paras. 21-24, XIII Off. Rec. 104 (Argentina).
14. A/CONF.62/L.59 (1980), paras. 5-7, XIV Off. Rec. 130 (President).
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16. A/CONF.62/L.78 (Draft Convention, 1981), article 298, XV Off. Rec. 172, 221.

Drafting Committee

17. A/CONF.62/L.75/Add.6 (1981, mimeo.).
18. A/CONF.62/L.82 (1981), XV Off. Rec. 243 (Chairman, Drafting Committee).

Informal Documents

19. SD.Gp/2nd Session/No.1/Rev.5 (1975, mimeo.), article 17; reissued as A/CONF.62/Background Paper 1 (1976, mimeo.), article 17 (Co-Chairmen, SD.Gp). Reproduced in XII Platzöder 108 and 194.
20. NG7/20 (1978, mimeo.) (Chairman, NG7). Reproduced in IX Platzöder 408.
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22. NG7/27 (1979, mimeo.) (Chairman, NG7). Reproduced in IX Platzöder 438.
23. NG7/30 (1979, mimeo.) (Israel). Reproduced in IX Platzöder 451.
24. NG7/37 (1979, mimeo.) (Chairman, NG7). Reproduced in IX Platzöder 457.
25. NG7/45 (1979, mimeo.), article 298(1)(a), reproduced in A/CONF.62/91 (1979), XII Off. Rec. 71, 107 (Chairman, NG7).
26. SD/3 (1980, mimeo.) (President). Reproduced in XII Platzöder 239.
27. SD/3/Add.1 (1980, mimeo.) (President). Reproduced in XII Platzöder 257.

COMMENTARY

298.1. In view of the general reluctance to allow reservations to the Law of the Sea Convention and, at the same time, the insistence of some delegations that certain categories of disputes could not be submitted to third-party adjudication, an agreement was reached early in the Conference on the need for a list of well-defined classes of disputes which may be exempted from such adjudication by a declaration filed in advance (see para. 309.6 below). Once the special concerns of the coastal States with respect to their special rights in the exclusive economic zone were satisfied by the provisions which now are incorporated in article 297 (see article 297 Commentary), several other issues remained that had to be taken care of by an exemption clause. Prominent among these issues were disputes relating to sea boundary delimitations, historic bays or titles, military and law enforcement activities, and issues relating to the maintenance of international peace and security which are being dealt with by the Security Council of the United Nations. The provisions relating to each of these categories developed along different lines and will be dealt with separately, after a general consideration of the drafting history of this article.

298.2. The idea of a specific exemption clause for certain categories of disputes was considered early in the Conference by the informal working group on the settlement of disputes in 1974. While some of its members believed that the integrity of the compromise packages to be embodied in the Convention had to be preserved at all costs against unravelling by reservations that would actually result in a disintegration of the package, the majority agreed that various States consider certain matters to be so sensitive that they should not be subject to the far-reaching dispute settle-

ment procedures being envisaged for inclusion in the Convention. Consequently, the working group listed in its report (Source 1) alternative formulations of various items suggested by its members, without trying to decide at that time on the general desirability of a particular item or on its most appropriate formulation. These items related to disputes concerning the exercise of a State's regulatory or enforcement jurisdiction, sea boundary delimitations, historic bays, vessels and aircraft entitled to sovereign immunity under international law, and military activities.

298.3. Further negotiations at the third session of the Conference (1975) enabled the enlarged informal working group to prepare a more definitive draft of the list of disputes that could be excepted by a declaration (Source 19, para. 3). It included the following items:

(a) Disputes arising out of the exercise of discretionary rights by a coastal State pursuant to its regulatory and enforcement jurisdiction under this Convention, except in cases involving an abuse of power.

(b) Disputes concerning sea boundary delimitations between adjacent States, or those involving historic bays or titles, provided that the State making such a declaration shall indicate therein a regional or other third-party procedure, [whether or not] entailing a binding decision, which it accepts for the settlement of these disputes.

(c) Disputes concerning military activities, including those by government vessels and aircraft engaged in non-commercial service, but law enforcement activities pursuant to this Convention shall not be considered military activities.

(d) Disputes or situations 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, unless the Security Council has determined that specified proceedings under this Convention would not interfere with the exercise of such functions in a particular case.

Although this list was supposed to be open-ended, no further items were ever added to the list. Further, the first item was soon removed in view of the elaboration of more precise provisions with respect to the applicability of dispute settlement procedures to disputes relating to the exercise by the coastal State of its sovereign rights or jurisdiction (see para. 297.7 above).

298.4. The working group's draft of article 17, paragraph 3, was revised slightly by President Amerasinghe for inclusion in article 18, paragraph 2, of his first draft of a new Part IV of the ISNT (Source 2). The only substantive change he made was to omit the reference to abuse of power in subparagraph (a), so that this subparagraph read:

(a) Disputes arising out of the exercise of discretionary rights by a coastal State pursuant to its regulatory and enforcement jurisdiction under the present Convention[.]

298.5. During the plenary debate on the settlement of disputes at the fourth session of the Conference (1976) (see para. 297.6 above), issues were raised

with respect to each item on the list of optional exceptions (which will be discussed later in this Commentary). In light of that debate, President Amerasinghe omitted old subparagraph (a) relating to discretionary rights of a coastal State, renumbered the remaining three subparagraphs, and revised the new subparagraph 2(c) of article 18 (Source 4) to read:

(c) disputes in respect of which the Security Council of the United Nations, while exercising the functions assigned to it by the Charter of the United Nations, determines that specified proceedings under the present Convention interfere with the exercise of such functions in a particular case.

Apart from that, there was only a small drafting change in new subparagraph (b) relating to law enforcement activities.

298.6. In light of the discussion in the Informal Plenary at the fifth session of the Conference (1976), the President again revised his draft. He separated the optional exceptions from "limitations on the applicability of section 2," and devoted the new article 18 of the RSNT, Part IV (Source 5), solely to optional exceptions, adding provisions about the effect of the exclusionary declarations and the procedure of making and withdrawing declarations. Up to this time, some of these clauses were common to the provisions on limitations and on optional exceptions (see also para. 297.9 above).

298.7. The new text of article 298 [then article 18 of Part IV of the RSNT (see Source 5)] read:

1. A Contracting Party when ratifying or otherwise expressing its consent to be bound by the present Convention, or at any time thereafter, may declare that it does not accept any one or more of the procedures for the settlement of disputes specified in Section 2 with respect to one or more of the following categories of disputes:

(a) Disputes concerning sea boundary delimitations between adjacent or opposite States, or those involving historic bays or titles, provided that the State making such a declaration shall indicate therein a regional or other third party procedure, entailing a binding decision, which it accepts for the settlement of such disputes;

(b) Disputes concerning military activities, including those by government vessels and aircraft engaged in non-commercial service, provided that law enforcement activities pursuant to the present Convention shall not be considered military activities;

(c) Disputes in respect of which the Security Council of the United Nations, while exercising the functions assigned to it by the Charter of the United Nations, determines that specified proceedings under the present Convention interfere with the exercise of such functions in a particular case.

2. Any disagreement between the parties to a dispute as to the applicability of this article shall be decided in accordance with paragraph 3 of article 10.