

# United Nations Convention on the Law of the Sea

A Commentary

edited by

Alexander Proelss

Assistant Editors:

Amber Rose Maggio

Eike Blitza

Oliver Daum

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submission, unless the reference to 'Philippine sovereignty' should be read as 'Philippine sovereign rights' because the features would fall into the Philippines' EEZ by process of elimination of their territorial character.

#### 5. 'shall, by mutual consent, submit the question'

- 23 The apparent contradiction between the obligatory nature of 'shall' and the following words requiring 'mutual consent' to the section 2 procedures after an unsuccessful conciliation of a maritime boundary dispute was pointed out during the negotiation of Art. 298. The two elements can nonetheless be reconciled by interpreting the obligation not as being to consent after all to the jurisdiction of a court or tribunal ousted by the original declaration, but rather to engage in good faith in a negotiation to that possible end without prejudging its outcome.<sup>54</sup> Even so, there would seem to remain scope for an argument, based on the warnings sounded by some States in the negotiations of the dangers of letting maritime boundary disputes persist indefinitely, that the effect of a declaration under Art. 298 (1)(a) is merely to interpose a compulsory conciliation before the more normal course of events under section 2 of Part XV can proceed.<sup>55</sup>

#### 6. 'settled in accordance with a bilateral or multilateral agreement binding upon those parties'

- 24 This is an exception to the optional exception for maritime boundary disputes. As what is binding is the agreement of the parties to substitute another procedure for settling their dispute, rather than the outcome of that procedure, the result is that the optional exception yields not only to procedures leading to binding outcomes under Art. 282, but also to any others covered by Art. 280 that do not have this characteristic.<sup>56</sup>

#### 7. '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'

- 25 The objective at which this phrase is aimed is that of achieving congruence between the disputes regarding the coastal State's rights in its EEZ in relation to MSR and fisheries, automatically exempt under Art. 297 from the otherwise compulsory procedures of section 2 of Part XV, and the further optional exception extending the scope of the exemption to ancillary law-enforcement activities by the coastal State. In other words, where a dispute about MSR or fisheries in the EEZ would not be automatically exempt, a declaration under Art. 298 (1)(b) will not extend to any activity by the coastal State to enforce its law.<sup>57</sup>
- 26 In the exchange of views between the parties preceding the *Arctic Sunrise* case, concerning the detention by Russia of a vessel flagged to the Netherlands and its crew that had been protesting against an oil rig in Russia's EEZ, Russia informed the Netherlands that it did not accept the Annex VII arbitration initiated by the latter because of its declaration under Art. 298 (1)(b) 'with respect to disputes [...] concerning law-enforcement activities in regard

<sup>54</sup> Nordquist/Rosenne/Sohn (note 3), 130 (esp. footnote 36 and accompanying text) and 134; see also Klein (note 1), 260-262 and Adede (note 1), 280. Rainer Lagöni, Festlandssockel, in: Graf Vitzthum (note 5), 166, 285 questions the realism of any assumption that States will consent to move to some compulsory procedure after a failed conciliation.

<sup>55</sup> Keith Highet, Maritime Boundary Disputes and Settlement, in: Mochtar Kusuma Atmadja/Thomas A. Mensah/Bernard H. Oxman (eds), Sustainable Development and Preservation of the Oceans: The Challenges of UNCLOS and Agenda 21 (1997), 745, 767-770 and 774.

<sup>56</sup> Nordquist/Rosenne/Sohn (note 3), 133-134. See further Serdy on Art. 280 MN 6; Serdy on Art. 282 MN 11-14.

<sup>57</sup> Nordquist/Rosenne/Sohn (note 3), 136-137.

to the exercise of sovereign rights or jurisdiction'. The Netherlands argued that this could not oust the jurisdiction of ITLOS to hear its provisional measures application because such a declaration could affect only disputes 'excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3', i.e. those concerning MSR and fisheries respectively, neither of which was at issue in that case. ITLOS agreed and went on to hold that the Annex VII tribunal would *prima facie* have jurisdiction over the dispute, thus grounding its own jurisdiction to prescribe provisional measures under Art. 290 (5).<sup>58</sup>

The Annex VII tribunal confirmed this reasoning in deciding that it had jurisdiction. Before the tribunal, the Netherlands argued that, in the light of Art. 309 of the Convention which prohibits the making of reservations and Art. 310 which invalidates any interpretative declaration to the extent that it departs from the Convention, Russia's declaration could be treated in one of only two ways. It could either be read down as ITLOS had done to bring it into conformity with Art. 298 (1)(b) by inserting the missing words 'excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3', so limiting the exemption to disputes concerning enforcement of MSR and fisheries laws, making it inapplicable to the present case, or be interpreted as purporting to exclude from binding dispute settlement under the Convention all disputes concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction, whether or not they concern MSR or fisheries, which would either invalidate the declaration under Art. 310 or transform it into a reservation or exception prohibited by Art. 309 of the Convention. Either way, according to the Netherlands, the declaration could have no effect on the tribunal's jurisdiction.<sup>59</sup>

The tribunal understood Russia's denial of its jurisdiction as indicating that it wished to see its declaration applied without the implication into it of the missing words, but took the view that it could not exclude from the jurisdiction of the procedures in section 2 of Part XV of the Convention every dispute concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction, only that subset of these which are also excluded from jurisdiction under paragraph 2 or 3 of Art. 297. It thus adopted the reading-down option which it considered was mandated by the combined operation of Arts. 309 and 310, preventing the Russian declaration from creating an exclusion wider in scope than permitted by Art. 298 (1)(b), a conclusion for which it found support in a subsequent paragraph of the Russian declaration relating to Art. 310 declarations by other States.<sup>60</sup> As it had not been argued that the present dispute came within the categories of fisheries or MSR dealt with by these paragraphs, and the tribunal found nothing in the documentary record to suggest otherwise, it agreed with the Netherlands that Russia's declaration did not exclude the dispute from the compulsory procedures of section 2 of Part XV of the Convention, and concluded that it had jurisdiction to proceed to the merits of the case.<sup>61</sup>

In addition, it might have been possible for France to invoke its declaration under Art. 298 (1)(b) to deny the jurisdiction of ITLOS in all three prompt release cases under Art. 292 that it has defended,<sup>62</sup> as the setting of a bond for release of a detained fishing vessel relates at least indirectly, and arguably directly, to the enforcement of its fisheries laws. The fact that it did so

<sup>58</sup> ITLOS, 'Arctic Sunrise' Case (Netherlands v. Russian Federation), Provisional Measures, Order of 22 November 2013, ITLOS Reports (2013), 230, 246-247 (paras. 72-77). See also: *ibid.*, Joint Separate Opinion of Judges Wolfrum and Kelly, 256, 259 (paras. 8 and 10) and *ibid.*, Separate Opinion of Judge Jesus, 262, 264 (para. 5(c)(i)-(iii)).

<sup>59</sup> PCA, *Arctic Sunrise Arbitration* (Netherlands v. Russian Federation), Award on Jurisdiction of 26 November 2014, 9-10 and 13 (paras. 55-58 and 68), available at: [http://www.pca-cpa.org/2014-02%20Award%20on%20Jurisdiction1f28.pdf?fil\\_id=2845](http://www.pca-cpa.org/2014-02%20Award%20on%20Jurisdiction1f28.pdf?fil_id=2845).

<sup>60</sup> *Ibid.*, 12-14 (paras. 67-70 and 72).

<sup>61</sup> *Ibid.*, 15-16 (paras. 76-77).

<sup>62</sup> ITLOS, 'Camouco' (Panama v. France), Prompt Release, Judgment of 7 February 2000, ITLOS Reports (2000), 10; ITLOS, 'Monte Confurco' (Seychelles v. France), Prompt Release, Judgment of 18 December 2000, ITLOS Reports (2000), 86; ITLOS, 'Grand Prince' (Belize v. France), Prompt Release, Judgment of 20 April 2001, ITLOS Reports (2001), 17.

only once, and then only in relation to a narrow point, suggests *a contrario* that France took the view that Art. 292 applications are not generally subject to Art. 298 (1)(b) declarations.<sup>63</sup> The single instance was in *The Grand Prince*, where France argued that Belize's challenge to the conformity with the Convention of its laws on confiscation of the vessel as the penalty for illegal fishing took the application beyond the question of prompt release into the matter of how France exercised its sovereign rights in its EEZ. Accordingly the French declaration served to oust the jurisdiction of any Part XV forum. The point did not need to be decided by ITLOS, as it found another ground for holding that it had no jurisdiction in the case.<sup>64</sup>

#### 8. 'may [...] withdraw [a declaration]'

30 While Art. 298 (2) makes no provision for amendment of a declaration, the text should not be interpreted in such a way as to exclude this possibility, as exactly the same result can be achieved by withdrawing a declaration and (as is specifically contemplated by Art. 298 (5)) substituting a new one.<sup>65</sup>

31 The lack of a distinction between withdrawal and substitution on one hand and amendment on the other is seen in the '*ARA Libertad*' Case, in order to launch which Argentina amended its 1995 declaration opting out of section 2 for all categories of disputes under Art. 298. It did this by 'withdraw[ing] with immediate effect the optional exceptions to the applicability of section 2 of part XV of the Convention provided for in that article' in relation to military activities by government vessels and aircraft engaged in non-commercial service.<sup>66</sup> Neither Ghana nor ITLOS challenged this.

#### 9. 'Declarations and notices of withdrawal of declarations [...] shall be deposited with the Secretary-General'

32 Art. 298 (6) is silent as to when a declaration or the notice of its withdrawal takes effect, but the ICJ has held in the *Right of Passage over Indian Territory Case* that a declaration accepting the Court's jurisdiction under the similarly silent Art. 36 (2) of its Statute took immediate effect as from the time of its deposit.<sup>67</sup>

### Article 299

#### Right of the parties to agree upon a procedure

1. A dispute excluded under article 297 or excepted by a declaration made under article 298 from the dispute settlement procedures provided for in section 2 may be submitted to such procedures only by agreement of the parties to the dispute.

2. Nothing in this section impairs the right of the parties to the dispute to agree to some other procedure for the settlement of such dispute or to reach an amicable settlement.

**Bibliography:** *Alan E. Boyle*, *Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction*, ICLQ 46 (1997), 37–54; *Natalie Klein*, *Dispute Settlement in the UN Convention on the Law of the Sea* (2005); *John Merrills*, *International Dispute Settlement* (5th edn. 2011); *Myron H. Nordquist/Shabtai Rosenne/Louis B. Sohn* (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. V (1989)

<sup>63</sup> *Klein* (note 1), 310, also argues against such a possibility.

<sup>64</sup> '*Grand Prince*' (note 62), at 36 (para. 60).

<sup>65</sup> *Nordquist/Rosenne/Sohn* (note 3), 115.

<sup>66</sup> ITLOS, '*ARA Libertad*' (*Argentina v. Ghana*), Provisional Measures, Order of 15 December 2012, ITLOS Reports (2012), 332, 339–340 (para. 34).

<sup>67</sup> ICJ, *Right of Passage over Indian Territory* (*Portugal v. India*), Preliminary Objections, Judgment of 26 November 1957, ICJ Reports (1957), 125, 145–147.