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

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4 Optional Exceptions to Applicability of Compulsory Procedures Entailing Binding Decisions

Introduction

Article 298 of the Convention allows for States parties to exclude certain categories of disputes from compulsory procedures entailing binding decisions. States may declare when signing, ratifying, or acceding to the Convention, or at any time thereafter, that they do not accept the procedures available under Section 2 for those disputes specified in Article 298.¹ The declaration is without prejudice to the consent-based procedures set out in Section 1 of Part XV.² While a State is entitled to withdraw its declaration, a State may not submit a dispute subject to a declaration to any procedure under the Convention without the consent of the other State.³

Declarations permitted under Article 298 relate, first, to maritime delimitation disputes in relation to the territorial sea, EEZ, or continental shelf of States with opposite or adjacent coasts, as well as disputes involving historic bays or title. Second, States may opt to exclude disputes relating to military activities, as well as law enforcement activities relating to marine scientific research and fishing in the EEZ. Finally, disputes in respect of which the Security Council is exercising its functions under the UN Charter may also be excluded from compulsory procedures entailing binding decisions at the election of States. This chapter explores these categories of disputes and the role that dispute settlement is expected to play and what justifications can be posited for the possible exclusion of these disputes. While mandatory jurisdiction is either not

¹ UNCLOS, art. 298(1). Declarations and notices of withdrawals of declarations are to be deposited with the UN Secretary-General. *Ibid.*, art. 298(6).

² *Ibid.*, art. 298(1).

³ *Ibid.*, art. 298(3). A State may agree to submit an otherwise excluded dispute to any procedure specified in the Convention. *Ibid.*, art. 298(2).

enforcement activities are only excluded from mandatory jurisdiction at the option of the State whereas Article 297 expressly includes navigation disputes relating to the EEZ and the continental shelf, the balance in the Convention would appear to be in favor of resolving navigation disputes through compulsory procedures entailing binding decisions. The aim of accommodating the competing interests of coastal and third States in navigation can "best be attained, and disruptive confrontation avoided, if the navigational articles are interpreted in a manner to give continuing efficacy to that balance."³⁹⁶ As compulsory dispute settlement is necessary for the operation of the navigation regime established in UNCLOS, these interests should be weighted accordingly.

Settlement of Other Law Enforcement Disputes

Other aspects of the Convention that relate to the powers of States parties to enforce various laws relating to the uses of the oceans are not excluded from compulsory procedures entailing binding decisions, unless some other exception applies. Articles 27 and 28 relate to the exercise of civil and criminal jurisdiction over vessels (and jurisdiction over persons on those vessels) passing through territorial seas. Enforcement activities may also be undertaken in the contiguous zone. According to Article 33, States may exercise the control necessary to prevent and punish the infringement of their customs, fiscal, immigration, or sanitary laws and regulations within their territory or territorial sea in a zone extending twenty-four miles from their baselines. Enforcement activities may also be undertaken on the high seas in respect of fishing, piracy, slave trading, and unauthorized broadcasting through the right of visit and the right of hot pursuit.

The right of visit is exclusively available to warships on the high seas,³⁹⁷ and "exists as an exception to the general principle of the exclusive jurisdiction of the flag State over ships flying its flag, set out in article 92."³⁹⁸ The right of hot pursuit has long been accepted as part of the law of the sea.³⁹⁹ "The right of hot pursuit – an exception to the freedom of the high seas – is at the same time a right of the littoral State established for the effective protection of areas under its

³⁹⁶ Grunawalt, at 456. ³⁹⁷ UNCLOS, art. 110(1).

³⁹⁸ 3 *United Nations Convention on the Law of the Sea 1982: A Commentary*, pp. 238-39.

³⁹⁹ See O'Connell, 2 *International Law of the Sea*, pp. 1078-79 (describing the entrenched position of the right and consequent lack of controversy over the right during the progressive codification of the law of the sea). See also Reuland, at 557.

sovereignty or jurisdiction."⁴⁰⁰ Article 111 sets out the basic right and a number of qualifications on the way the right may be exercised.⁴⁰¹ The right of visit is only ascribed to warships whereas the right of hot pursuit may be undertaken by warships as well as ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect. In this regard, it may be possible to discern some overlap between law enforcement activities and military activities. The distinction between law enforcement and military activities may become relevant since many enforcement activities are undertaken by military vessels. The question thus arises as to what extent the military activities exception may exclude disputes relating to law enforcement activities undertaken by military vessels.

The right of visit for the enforcement of various laws under the Convention must be distinguished from the right of visit and search that may be exercised by a belligerent State against all merchant ships during time of war.⁴⁰² "The right of visit and search is a war right; it can only be expressed in time of peace by virtue of an express stipulation in an international treaty, or in the course of maintaining the security of navigation by a generally recognised usage in the interests of all nations."⁴⁰³ The right of visit granted under UNCLOS is expressly for the enforcement of designated prescriptions set out in the Convention with respect to vessels that are not accorded immunity. Unlike the right of visit, the Convention does not specify that the right of hot pursuit may not be exercised against foreign military and government vessels. McDougal and Burke take the view that in light of the immunity of these vessels, the enforcing ship should not be authorized to pursue and seize warships or other government vessels not engaged in commercial service.⁴⁰⁴ The right of hot pursuit is necessary to ensure the effective application and enforcement of coastal regulations and "as such, is merely ancillary to the substantive measures intended to be applied."⁴⁰⁵

It is difficult to assert that the right of hot pursuit and the right of visit are not law enforcement activities rather than military activities as both acts involve the enforcement of specific laws. The mere fact that

⁴⁰⁰ Nicholas M. Poulantzas, *The Right of Hot Pursuit in International Law* (1969), p. 39.

⁴⁰¹ O'Connell notes that these qualifications, which were included in the drafting of the High Seas Convention, were more detailed than customary doctrine but could be viewed as reasonable corollaries of it. O'Connell, *2 International Law of the Sea*, p. 1079.

⁴⁰² See C. John Colombos, *The International Law of the Sea* (6th ed., revised, 1967), pp. 753-54.

⁴⁰³ *Ibid.*, p. 311. ⁴⁰⁴ McDougal and Burke, p. 895.

⁴⁰⁵ *Ibid.*, p. 896. See also *ibid.*, pp. 894 and 902.

these rights are exercised by military and government vessels does not justify a characterization of "military activities" for the purposes of Article 298. Clearly, from the terms of Article 298(1)(b), only law enforcement activities pertaining to fishing or marine scientific research in the EEZ may be excluded as "law enforcement." Furthermore, the drafting history of this provision would indicate that all law enforcement activities besides those specified are subject to compulsory procedures entailing binding decisions.⁴⁰⁶ The military activities exception is not intended, and not needed, to insulate from mandatory jurisdiction disputes that are more properly construed as law enforcement activities.

Conclusion

The use of force, military activities, and law enforcement are subject to minimal normative regulation under the Convention. The application of all provisions of UNCLOS in times of armed conflict is unclear (but unlikely) and deliberate vagueness was preferred with respect to a range of naval activities on the high seas and in the EEZ of coastal States. Part XV nonetheless anticipates that these disputes will arise in relation to the interpretation and application of the Convention as Article 298 permits States to exclude disputes relating to military activities as well as disputes that are threats to international peace and security and are thus subject to the functions of the Security Council. The implication from this procedural device is that international legal processes are not necessarily required as the means to resolve disputes relating to armed conflict and naval activities in maritime areas where the freedoms of the high seas are exercised. The military activities exception and the Security Council exception can work to the advantage of States with greater naval power if they wish to resolve these disputes through political avenues.⁴⁰⁷ Coastal States can also take advantage of the military activities exception if they have the capability to interfere with naval operations of third States in their territorial sea and EEZ and do not wish to have their actions subject to adjudication or arbitration.⁴⁰⁸

⁴⁰⁶ See notes 377–81 and accompanying text. Singh, p. 148 ("military activities" were initially excluded from compulsory dispute settlement on the understanding that law enforcement activities pursuant to the Convention would not be considered as military activities).

⁴⁰⁷ "From a military point of view the new LOS Convention protects to the fullest extent the security interests of the naval powers." Rauch, at 230.

⁴⁰⁸ Janis, at 56–57 (noting that this would not be detrimental for the naval power if it was in a position to exert its relative physical advantage).