

**DISCUSSION OF THE PROVISIONS ON THE SETTLEMENT OF DISPUTES
UNDER THE LAW OF THE SEA CONVENTION (UNCLOS) 1982**

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ABSTRACT

This research explores the provisions on the settlement of disputes under The Law of The Sea Convention 1982 (UNCLOS). The authors will elaborate and discuss about the provisions on the settlement of disputes where it will be intended to discuss in this research. Before the discussion of the main issues are made, as for the introduction of this research, the authors will explain the historical background of The Law of The Sea and the history of the establishment of The United Nations Convention on The Law of The Sea (UNCLOS) 1982. The description starts from Part I UNCLOS 1958, and Part II UNCLOS 1960, and finally Part III UNCLOS 1982, where all of these have contributed to the existence and the need of the provisions on the settlement of disputes under Part XV (UNCLOS) 1982. The objectives of this research are firstly; to describe the history of The Law of The Sea and the establishment of The United Nations Convention on The Law of The Sea (UNCLOS) 1982, secondly to elaborate further about the provisions on the settlement of disputes under The Law of The Sea Convention 1982 (UNCLOS), and thirdly to discuss the leading cases that adopted the provisions on the settlement of disputes.

Keywords: Law of the Sea, UNCLOS 1982, historical background, the settlement of disputes, the judicial review.

**PERBINCANGAN MENGENAI PERUNTUKAN BERKAITAN PENYELESAIAN
PERTIKAIAN DI BAWAH KONVENSYEN UNDANG-INDANG LAUT (UNCLOS) 1982**

ABSTRAK

Kajian ini membincangkan peruntukan berkenaan dengan penyelesaian pertikaian di bawah Konvensyen Undang-Undang Laut 1982 (UNCLOS). Di dalam kajian ini, penulis akan menghuraikan dan membincangkan tentang peruntukan berkenaan penyelesaian pertikaian. Sebelum penulis mengupas perbincangan utama penulisan ini, penulis terlebih dahulu akan menjelaskan latar belakang Undang-Undang Laut serta sejarah penubuhan Konvensyen Undang-Undang Laut 1982 (UNCLOS). Di dalam penjelasan sejarah penubuhan UNCLOS tersebut, penulis akan bermula daripada Bahagian I UNCLOS 1958, seterusnya Bahagian II UNCLOS 1960, dan yang terakhir sekali Bahagian III UNCLOS 1982. Ketiga-tiga Bahagian ini sangat penting untuk dikupaskan memandangkan ketiga-tiganya adalah merupakan penyumbang terhadap kewujudan serta keperluan kepada peruntukan terhadap penyelesaian pertikaian di bawah Bahagian XV (UNCLOS) 1982. Objektif pertama penulisan ini ialah untuk menghuraikan sejarah Undang-Undang Laut dan penubuhan Konvensyen Undang-Undang Laut 1982 (UNCLOS). Objektif kedua pula ialah untuk menghuraikan lebih lanjut mengenai peruntukan berkenaan penyelesaian pertikaian di bawah Konvensyen Undang-Undang Laut 1982 (UNCLOS). Objektif ketiga pula ialah untuk membincangkan kes-kes utama yang telah menerima pakai peruntukan berkenaan penyelesaian pertikaian di bawah Bahagian XV (UNCLOS) 1982. Kajian ini dihasilkan dengan menganalisis pelbagai teks seperti kes-kes, statut, jurnal, dan buku-buku.

Kata Kunci: *Undang-Undang Laut, UNCLOS 1982, sejarah penubuhan, penyelesaian pertikaian, alasan kehakiman.*

INTRODUCTION

The Law of The Sea (LOS) is one of the important branches in International Law. The existence of this branch of law is one of the oldest branches compared to other branches of international law such as war, human rights, environment and so on (Zou Keyuan, 2009). The International Law of The Sea is one of the rules, regulation and principles that bind countries in relation to international relations especially relating maritime matters (Parlimen. Gov. My, 2020). The Law of The Sea is a body of Public International Law governing the geographic jurisdictions of coastal States and the rights and duties among States in the use and conservation of the ocean environment and its natural resources (P. Hoagland, 2001).

Its existence as an ocean constitution is not only important but also proven its acceptance signed by many countries regardless of region, western or eastern country, developed or developing country, coastal or otherwise (Tommy Koh, 1982). This constitution is known as The United Nations Convention on The Law of The Sea (UNCLOS) 1982, also called The Law of The Sea Convention or the Law of The Sea Treaty and it was adopted and signed in 1982.

According to the International Maritime Organization (IMO), UNCLOS is a comprehensive regime of law and order in the world's oceans and seas establishing rules governing all uses of the oceans and their resources. It embodied in one instrument traditional and rules for the uses of the oceans and at the same time introduces new legal concepts and

regimes and addresses new concerns. The Convention also provides the framework for further development of specific areas of the Law of The Sea (IMO, 2020).

Before The United Nations Convention on The Law of The Sea (UNCLOS) 1982 was adopted and signed, there's a Part I and Part II of UNCLOS. The first one is the four Geneva Conventions of April, 1958, which respectively concerned the territorial sea and the contiguous zone, the continental shelf, the high seas, fishing and conservation of living resources on the high seas (IUCN, 2020). This Part I UNCLOS 1958 attended by 86 states. Unfortunately, Part I of UNCLOS 1958 could not solve the breadth of territorial sea so the General Assembly requested the Secretary-General to convene a Second United Nations Conference on the Law of the Sea (Part II UNCLOS) to consider the topics of the breadth of the territorial sea and fishery limits, which had not been agreed upon in Part I UNCLOS 1958. The Conference was held from 17 March to 26 April 1960 (Legal UN, 2020). But unfortunately the Part II UNCLOS 1960 has failed to address the breadth of territorial sea and finally bring the establishment of the comprehensive convention of Part III UNCLOS 1982 (Vasileios P. Karakasis, 2014).

In the 1982 UNCLOS consist of Part XV which is the explanation about the settlement of disputes. The disputes settlement is one of the cornerstones of the new world order of the ocean (Dr Same Varayudej, 1997) where it will be intended to discuss in this research work. From the structural perspective, the settlement of disputes system in Part XV of UNCLOS 1982 can be divided into three sections; the first section is about the general provision; the second section is about the compulsory procedures entailing binding decisions; and the third section is about the limitations and exceptions to the compulsory procedures in section 2 (Dong Manh Nguyen, 2005).

SECTION 1 PART XV UNCLOS 1982

In the first section of Part XV of UNCLOS 1982, it contains from Article 279 until Article 285. In this first section is all about the general provisions when state parties having argument or disagreement among them. Article 279 obliges States Parties to settle disputes by peaceful means pursuant to Article 2 paragraph 3 of the Charter (Article 279 Of UNCLOS, 1982) of the United Nations, which reads that "[a] 11 Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered" and find a solution base on paragraph 1 of Article 33 of the Charter, which is laid down as follows "the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice" (Yuki Morimasa, 2017).

According to Yuki Morimasa the Article 280 of UNCLOS states that, the parties to a dispute have the right to choose the peaceful means to settle disputes by their own choice (Yuki Morimasa, 2017). Where a peaceful settlement arrangement has been reached by the parties to the dispute, the proceedings of Part XV shall apply only where no settlement has been reached (Article 281 Of UNCLOS, 1982). According to Article 282, where a general, regional or bilateral agreement in order to submit a dispute to a procedure entailing binding decisions exists, such procedure should be applied instead of the regime of dispute settlement under Part XV (Article 282 Of UNCLOS, 1982). This means that if Parties are not willing to follow the

UNCLOS dispute settlement regime, there is a possibility not to use the regime by an agreement that they made ahead as a precaution (Yuki Morimasa, 2017).

The parties to the dispute shall proceed expeditiously, by arbitration or other peaceful means, to the exchange of views concerning their resolution (Article 283 (1) of UNCLOS, 1982). The parties shall also proceed expeditiously to an exchange of views where the procedure for the resolution of such a dispute has been brought to an end without a settlement or where a settlement has been reached and the circumstances require consultation as to the manner in which the settlement is to be enforced (Article 283 (2) of UNCLOS, 1982). Moreover, the conciliation procedure referred to in Article 284 which take place where the parties to the dispute accept and reached an agreement on the conciliation procedure (Article 284 (1) (2) of UNCLOS, 1982). But if the invitation is not accepted or the parties do not agree upon the procedure, the conciliation proceedings shall be deemed to be terminated (Article 284 (3) of UNCLOS, 1982). Finally, Article 285 is about the application of this section to disputes submitted pursuant to Part XI Section 5, it shall be settled in accordance with the procedures laid down in this Section. If an individual other than a State Party is a party to such a dispute, this section shall apply *mutatis mutandis* (Article 285 of UNCLOS, 1982).

THE DESCRIPTION ON THE COMPULSORY PROCEDURES ENTAILING BINDING DECISIONS IN SECTION 2 PART XV UNCLOS 1982

Section 2 is generally deemed to be the core of the dispute settlement of the UNCLOS. If a dispute cannot be resolved under the provisions of Section 1, so Section 2 shall be enforced according to Article 286 where the dispute shall proceed to compulsory proceedings involving binding decisions. Any Party to the dispute shall submitted a request to the court or tribunal for the settlement of dispute (Article 286 of UNCLOS, 1982). According to the Article 287 (1), a State shall be free to choose the following means of settlement of disputes:-

- a) The International Tribunal for the Law of the Sea established in accordance with Annex VI;
- b) The International Court of Justice;
- c) An arbitral tribunal constituted in accordance with Annex VII;
- d) A special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.

A declaration made under paragraph 1 shall not affect or be affected by the obligation of a State Party to accept the jurisdiction of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea to the extent and in the manner provided for in Part XI, section 5. It means that the seabed disputes shall exclusively be submitted to the Seabed Disputes Chamber (Article 287 (2) of UNCLOS, 1982). A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII (Article 287 (3) of UNCLOS, 1982). A new declaration, a notice of revocation or the expiry of a declaration does not in any way affect proceedings pending before a court or tribunal having jurisdiction under this article, unless the parties otherwise agree (Article 287 (7) of UNCLOS, 1982). If the parties to a dispute have accepted the same procedure for the settlement of the dispute, it may be submitted only to that procedure, unless the parties otherwise agree (Article 287 (4) of UNCLOS, 1982). If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree (Article 287 (5) of UNCLOS, 1982). A declaration made under paragraph 1 shall remain in force until three

months after notice of revocation has been deposited with the Secretary-General of the United Nations (Article 287 (6) of UNCLOS, 1982). Declarations and notices referred to in this article shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the States Parties (Article 287 (8) of UNCLOS, 1982).

According to the Article 288 (1), a court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part. A court or tribunal referred to in article 287 shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement (Article 288 (2) of UNCLOS, 1982). The Seabed Disputes Chamber of the International Tribunal for the Law of the Sea established in accordance with Annex VI, and any other chamber or arbitral tribunal referred to in Part XI, section 5, shall have jurisdiction in any matter which is submitted to it in accordance therewith (Article 288 (3) of UNCLOS, 1982). In the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal (Article 288 (4) of UNCLOS, 1982). As for the conclusion from Article 288, a court and tribunal shall have jurisdiction over dispute on interpretation / application of an intern agreement which is submitted accordance to agreement.

About the participation of experts, according to the Article 289, in any dispute involving scientific or technical matters, a court or tribunal exercising jurisdiction under this section may, at the request of a party or *proprio motu*, select in consultation with the parties no fewer than two scientific or technical experts chosen preferably from the relevant list prepared in accordance with Annex VIII, article 2, to sit with the court or tribunal but without the right to vote (Article 289 of UNCLOS, 1982).

For the provisional measures, according to the Article 290, if a dispute has been duly submitted to a court or tribunal which considers that *prima facie* it has jurisdiction under this Part or Part XI, section 5, the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision (Article 290 (1) of UNCLOS, 1982). Provisional measures may be modified or revoked as soon as the circumstances justifying them have changed or ceased to exist (Article 290 (2) of UNCLOS, 1982). Provisional measures may be prescribed, modified or revoked under this article only at the request of a party to the dispute and after the parties have been given an opportunity to be heard (Article 290 (3) of UNCLOS, 1982). The court or tribunal shall forthwith give notice to the parties to the dispute, and to such other States Parties as it considers appropriate, of the prescription, modification or revocation of provisional measures (Article 290 (4) of UNCLOS, 1982).

Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea or, with respect to activities in the Area, the Seabed Disputes Chamber, may prescribe, modify or revoke provisional measures in accordance with this article if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures, acting

in conformity with paragraphs 1 to 4 (Article 290 (5) of UNCLOS, 1982). The parties to the dispute shall comply promptly with any provisional measures prescribed under this article (Article 290 (6) of UNCLOS, 1982).

Under Article 291, all the dispute settlement procedures specified in this Part shall be open to States Parties, and the procedures of dispute settlement specified in this Part shall be open to entities other than States Parties only as specifically provided for in this Convention (Article 291 (1) (2) of UNCLOS, 1982). For the prompt release of vessels and crews accordance with Article 292, where the authorities of a State Party have detained a vessel flying the flag of another State Party and it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security, the question of release from detention may be submitted to any court or tribunal agreed upon by the parties or, failing such agreement within 10 days from the time of detention, to a court or tribunal accepted by the detaining State under article 287 or to the International Tribunal for the Law of the Sea, unless the parties otherwise agree (Article 292 (1) of UNCLOS, 1982).

The application for release may be made only by or on behalf of the flag State of the vessel (Article 292 (2) of UNCLOS, 1982). The court or tribunal shall deal without delay with the application for release and shall deal only with the question of release, without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew. The authorities of the detaining State remain competent to release the vessel or its crew at any time (Article 292 (3) of UNCLOS, 1982). Upon the posting of the bond or other financial security determined by the court or tribunal, the authorities of the detaining State shall comply promptly with the decision of the court or tribunal concerning the release of the vessel or its crew (Article 292 (4) of UNCLOS, 1982). For the applicable law under section 2 of Part XV UNCLOS 1982, a court or tribunal that having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention (Article 293 (1) of UNCLOS, 1982). The provision under Article 293 (1) not prejudice the power of the court or tribunal having jurisdiction under this section to decide a case *ex aequo et bono*, if the parties so agree.

Under Article 294 states that a court or tribunal provided for in article 287 to which an application is made in respect of a dispute referred to in article 297 shall determine at the request of a party, or may determine *proprio motu*, whether the claim constitutes an abuse of legal process or whether *prima facie* it is well founded. If the court or tribunal determines that the claim constitutes an abuse of legal process or is *prima facie* unfounded, it shall take no further action in the case (Article 294 (1) of UNCLOS, 1982). Upon receipt of the application, the court or tribunal shall immediately notify the other party or parties of the application, and shall fix a reasonable time-limit within which they may request it to make a determination in accordance with paragraph 1 (Article 294 (2) of UNCLOS, 1982). Nothing in this article affects the right of any party to a dispute to make preliminary objections in accordance with the applicable rules of procedure (Article 294 (3) of UNCLOS, 1982).

According to the Article 295, any dispute between States Parties concerning the interpretation or application of this Convention may be submitted to the procedures provided for in this section only after local remedies have been exhausted where this is required by international law (Article 295 of UNCLOS, 1982). And the last one is about the finality and binding force of decisions. Article 296 (1) states that any decision rendered by a court or tribunal having jurisdiction under this section shall be final and shall be complied with by all

the parties to the dispute (Article 296 (1) of UNCLOS, 1982). Any such decision shall have no binding force except between the parties and in respect of that particular dispute (Article 296 (2) of UNCLOS, 1982).

THE DESCRIPTION ON THE LIMITATIONS & EXCEPTIONS TO APPLICABILITY OF SECTION 2 IN SECTION 3 PART XV UNCLOS 1982

Section 3 is all about the limitations and exceptions to applicability of section 2 of Part XV UNCLOS 1982. Under Section 3 of Part XV, there are two categories of exception to compulsory jurisdiction namely automatic exception and optional exceptions (Giang Nguyen Truong, 2018).

According to the Article 297 (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; (Article 297 (1) (a) of UNCLOS, 1982)

(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 (Article 297 (1) (b) of UNCLOS, 1982).

(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 (Article 297 (1) (c) of UNCLOS, 1982)

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, the exercise by the coastal State of a right or discretion in accordance with article 246; or a decision by the coastal State to order suspension or cessation of a research project in accordance with article 253 (Article 297 (2) (a) (i) (ii) of UNCLOS, 1982).

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 (Article 297 (2) (b) of UNCLOS, 1982).

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 (Article 297 (3) (a) of UNCLOS, 1982).

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 (Article 297 (3) (b) (i) (ii) (iii) of UNCLOS, 1982)

In no case shall the conciliation commission substitute its discretion for that of the coastal State (Article 297 (3) (c) of UNCLOS, 1982). The report of the conciliation commission shall be communicated to the appropriate international organizations (Article 297 (3) (d) of UNCLOS, 1982). 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 (Article 297 (3) (e) of UNCLOS, 1982).

Meanwhile according to the Article 298 (1) said that 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. (Article 298 (1) (a) (i) (ii) (iii) of UNCLOS, 1982).

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 (Article 298 (1) (b) of UNCLOS, 1982). 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 (Article 298 (1) (c) of UNCLOS, 1982).

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 (Article 298 (2) of UNCLOS, 1982). 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 (Article 298 (3) of UNCLOS, 1982). 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 (Article 298 (4) of UNCLOS, 1982). 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 (Article 298 (5) of UNCLOS, 1982). 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 (Article 298 (6) of UNCLOS, 1982).

The parties of disputes have a right to agree upon a procedure according to the Article 299 of Part XV UNCLOS 1982. 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 (Article 299 (1) of UNCLOS, 1982). 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 (Article 299 (2) of UNCLOS, 1982).

INTERNATIONAL DISPUTES CASES RELATED TO PART XV SETTLEMENT OF DISPUTES

Section 1 : General Provisions & Section 2 : Compulsory Procedures Entailing Binding Decisions :-

ITLOS, The “ARA Libertad” Case (Argentina v. Ghana) 2012, Provisional Measures. [Case No. 20].

In this case, Argentina (Applicant) request for the prescription of provisional measures under Article 290, paragraph 5, of the United Nations Convention On The Law Of The Sea over the illegal detention by Ghana (Respondent) of the warship Frigate ARA Libertad and further measures of constraint taken by the Respondent against the said warship. According to the Reports Of Judgements, Advisory Opinions And Orders, Order of 15 December 2012, page 344 and page 345 (para 68 until para 71) :

“68. Considering that article 283, paragraph 1, of the Convention reads as follows: When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means;

69. Considering that Argentina contends that the requirements of article 283 of the Convention have been satisfied in light of its efforts to exchange views and resolve the dispute and that it refers in this respect to the letter dated 4 October 2012 sent by the Minister of Foreign Affairs of Argentina to his Ghanaian counterpart, to requests made by the Argentine Ambassador accredited to Ghana as well as to the fact that it sent to Accra a high-level delegation which met with high officials of Ghana from 16 to 19 October 2012, and considering that these facts are not disputed by Ghana;

70. Considering that Argentina maintains that such exchanges of views and negotiations have failed to resolve the dispute;

71. Considering that the Tribunal has held that “a State Party is not obliged to continue with an exchange of views when it concludes that the possibilities of reaching agreement have been exhausted” (MOX Plant (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, p. 95, at p. 107, para. 60);

72. Considering that, in the circumstances of the present case, the Tribunal is of the view that the requirements of article 283 are satisfied;

For the compulsory procedures entailing binding decisions in Section 2 of Part XV UNCLOS, according to the same case and same Reports Of Judgements, page 349 (para 100) said that :

“100. Considering that, under the circumstances of the present case, pursuant to article 290, paragraph 5, of the Convention, the urgency of the situation requires the prescription by the Tribunal of provisional measures that will ensure full compliance with the applicable rules of international law, thus preserving the respective rights of the Parties”

And for these reasons, The Tribunal Unanimously :

(1) Prescribes, pending a decision by the Annex VII arbitral tribunal, the following provisional measures under article 290, paragraph 5, of the Convention: Ghana shall forthwith and unconditionally release the frigate ARA Libertad, shall ensure that the frigate ARA Libertad, its Commander and crew are able to leave the port of Tema and the maritime areas under the jurisdiction of Ghana, and shall ensure that the frigate ARA Libertad is resupplied to that end.

(2) Unanimously, Decides that Argentina and Ghana shall each submit the initial report referred to in paragraph 103 not later than 22 December 2012 to the Tribunal, and authorizes the President to request such information as he may consider appropriate after that date.

(3) Unanimously, Decides that each Party shall bear its own costs.

Section 3: Limitations And Exceptions To Applicability Of Section 2 :-

ITLOS, The “Arctic Sunrise” Case (Netherlands v Russian Federation) 2013, Provisional Measures. [Case No. 22].

In this case, the Russian Federation boarded, took control over and detained the “Arctic Sunrise”, a vessel that flies the flag of the Kingdom of the Netherlands, without the prior consent of the Flag State in the exclusive economic zone of the Russian Federation on 19 September 2013. The vessel was brought to Murmansk Oblast in the Russian Federation and the detention is continuing. Following the boarding of the vessel, authorities of the Russian Federation arrested and detained the crew, and initiated judicial proceedings against them. The detention and the judicial proceedings are continuing. In accordance with Section 2 of Part XV of UNCLOS and Article 1 of Annex VII to the Convention, the Kingdom of the Netherlands hereby submit the dispute between the Kingdom of the Netherlands and the Russian Federation to the arbitral procedure provided for in Annex VII to the Convention.

According to the Reports Of Judgements, Advisory Opinions And Orders, Order of 22 November 2013, page 240 and page 241 (para 41 until para 45) :

41. Considering that the Russian Federation, in its instrument of ratification of 12 March 1997, made the following declaration under article 298 of the Convention: The Russian Federation declares that, in accordance with

article 298 of the United Nations Convention on the Law of the Sea, it does not accept the procedures, provided for in section 2 of Part XV of the Convention, entailing binding decisions with respect to disputes concerning the interpretation or application of articles 15, 74 and 83 of the Convention, relating to sea boundary delimitations, or those involving historic bays or titles; disputes concerning military activities, including military activities by government vessels and aircraft, and disputes concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction; and 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. The Russian Federation, bearing in mind articles 309 and 310 of the Convention, declares that it objects to any declarations and statements made in the past or which may be made in future when signing, ratifying or acceding to the Convention, or made for any other reason in connection with the Convention, that are not in keeping with the provisions of article 310 of the Convention. The Russian Federation believes that such declarations and statements, however phrased or named, cannot exclude or modify the legal effect of the provisions of the Convention in their application to the party to the Convention that made such declarations or statements, and for this reason they shall not be taken into account by the Russian Federation in its relations with that party to the Convention;

42. Considering that, relying upon its declaration of 12 March 1997, the Russian Federation, in the note verbal dated 22 October 2013, states: Upon the ratification of the Convention on the 26th February 1997 the Russian Federation made a statement, according to which, inter alia, “it does not accept procedures provided for in Section 2 of Part XV of the Convention, entailing binding decisions with respect to disputes [. . .] concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction”. Acting on this basis, the Russian Side has accordingly notified the Kingdom of the Netherlands by note verbal (attached) that it does not accept the arbitration procedure under Annex VII to the Convention initiated by the Netherlands in regard to the case concerning the vessel “Arctic Sunrise”;

“43. Considering that the Netherlands contends that: The jurisdiction of the arbitral tribunal is not affected by the declaration of the Russian Federation upon ratification that “in accordance with article 298 of the United Nations Convention on the Law of the Sea, it does not accept the procedures, provided for in section 2 of Part XV of the Convention, entailing binding decisions with respect to [. . .] disputes concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction”. Under Article 298, paragraph 1(b), of the Convention, the optional exception in connection with disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction to the applicability of Section 2 of Part XV of the Convention only applies with respect to “disputes [. . .] excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3”. Such disputes concern marine scientific research and fisheries, respectively, neither of which is at issue in the present case;

44. *Considering that the Netherlands further contends that: Insofar as the Russian Federation intended the aforementioned declaration to apply to disputes other than those concerning marine scientific research and fisheries, this would be in contravention of Article 309 of the Convention, which provides: “No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention”. Furthermore, the Kingdom of the Netherlands upon ratification declared that it “objects to any declaration or statement excluding or modifying the legal effect of the provisions of the United Nations Convention on the Law of the Sea”;*

45. *Considering that, in the view of the Tribunal, the declaration made by the Russian Federation with respect to law enforcement activities under article 298, paragraph 1(b), of the Convention prima facie applies only to disputes excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3, of the Convention;”*

And for these reason, the Tribunal by 19 votes to 2, Prescribes, pending a decision by the Annex VII arbitral tribunal, the following provisional measures under article 290, paragraph 5, of the Convention:-

- 1) The Russian Federation shall immediately release the vessel Arctic Sunrise and all persons who have been detained, upon the posting of a bond or other financial security by the Netherlands which shall be in the amount of 3,600,000 euros, to be posted with the Russian Federation in the form of a bank guarantee;
- 2) Upon the posting of the bond or other financial security referred to above, the Russian Federation shall ensure that the vessel Arctic Sunrise and all persons who have been detained are allowed to leave the territory and maritime areas under the jurisdiction of the Russian Federation.

CONCLUSION

Disputes settlement is the process of resolving disputes between the State Parties of the Convention. The Charter of the United Nations requires all Members of the Organization to settle their international disputes by peaceful means in such a manner that international peace and security are not endangered. The United Nations Convention on the Law of the Sea builds on this commitment by providing a compulsory and binding framework for the peaceful settlement of all related disputes (Pence Law Library Guide, 2020). The existence and to the need of the provisions on the settlement of disputes under Part XV (UNCLOS) 1982 helps to improve the regional cooperation. Besides that, in international relation, disputes serve as an inexorable part of interstate behavior and it is widely accepted that, among various international disputes, territorial related disputes are considered to be the most perplexing issues that are incredibly difficult to manage (Giang Nguyen Truong, 2018). This topic is very interesting and needs to be discussed in more detail in the future.

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