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Non-Compulsory Settlement of Disputes in 1982 UNCLOS and the Jurisdictional Conundrum

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***Abstract*: The following essay is written regarding the provision of Noncompulsory settlement of disputes provided in Article 298 of the United Nations Convention on Law of the Sea which allows the parties to make the prior declaration regarding the exclusion of certain issues from the jurisdiction of the convention and thereby from the institutions provided for in the convention for the redressal of those disputes. The essay is divided into five parts namely the Introduction, Issues, Analysis, Suggestions and the Conclusion. Through Introduction it gives the brief overview of the provision and the convention, through Issues it highlights the various problems which have arisen as a result of the provision including the instances where the countries used it against the very purpose for which it was drafted. The Analysis section includes the study of various reasons as to why the countries are choosing to adopt Article 298 even though it acts as a weapon firing both the ways. The last two parts are the suggestions and the conclusion where the essay covers the steps which should be taken into consideration in order to solve the issues thereby keeping in mind the objective of the drafters of providing flexibility to the countries. The essay derives its sources from the various books as well as research papers written by reputed authors.**

***Keywords*: Non Compulsory Settlement of Disputes, Article 298, United Nations Convention on Law of the Sea, Issues, Analysis, Suggestions.**

1. Introduction

United Nations convention on law of the sea has been the guiding instrument for the nations around the world for peaceful settlement of disputes since its inception in 1982. Circumscribing within itself innovative methods of doing away with the disputes related to the maritime affairs of the countries, by keeping the 'will' of the countries towards the purpose of it in the centre of its objectives it has attracted till the January of 2021, Hundred and sixty seven countries who have ratified the convention. Among the various provisions of it, the focus of this study will be on the optional exceptions to applicability of section 2 provided in Part XV of the convention's Article 298 where the instrument goes on to give certain exceptions to the compulsory settlement of disputes providing the states with a choice to keep outside the complete jurisdiction of it some disputes which the states do not wish to reach a compulsory settlement. Article 287 of section-2 mentions the choice of procedure which the signatories are free to make including freedom to choose one or more of the following methods to 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.

If the parties to the dispute have accepted the same methods in their declarations then the dispute will be resolved by that method unless the parties otherwise agree. In the situation where parties have accepted different methods of resolution of disputes then it will be settled by compulsory arbitration. The method which a state will choose is guided by the International standing of the state, regional and global relations, the types of disputes it has and expects to face, its topology and its previous experiences with global dispute settlement bodies. To take the case of Cuba which has a coastline of 3570 miles, it has not accepted any one of the above mentioned methods and has indeed rejected the jurisdiction of ICJ for the settlement of any kind of disputes. The convention on law of the sea thus makes an attempt to bring on the same stage of peaceful settlement the countries who wish to have more control over the manner in which they wish to settle their disputes. Not only can this but states also give preference of the above mentioned disputes as first, second and third. The following provisions were flexible enough to attract the countries and provide practical solutions to the problems but the convention goes one step further and mention certain specific disputes which they can not only avoid from the procedure mentioned in Article 287 but also from the arena of compulsory settlement altogether including Arbitration. Another point to be noted here is that the countries who have accepted an exception under Article 298 is also exempted from bringing any dispute against any other state regarding that exception, thus acting as a sword which cuts both the ways.

The convention through Article 298 reads as:

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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) 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;

b) 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;

c) 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;

d) 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;

e) 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.[1]

Article 15, 74 and 83 of the convention talks about settling of disputes between the states concerning delimitation of territorial seas, delimitation of Exclusive Economic Zones and delimitation of continental shelf's respectively. Delimitation refers to the drawing of boundaries between various states where the state enjoys the exclusive rights over maritime resources including plants and animals. The territorial sea extends up to 12 nautical miles, the special economic zones for 200 nautical miles and the continental shelves which may extend beyond 200 nautical miles. The disputes thus occurs when these areas overlap and start creating regular conflicts between the states. The convention though makes the mention of conciliation as the last method of dispute resolution for the states which have adopted the option of noncompulsory settlement of disputes but at the end its report will be non-binding too and the problem might drag on for much longer a time then the parties to the dispute may themselves have wanted it to stretch. The chamber of the ICJ in the Gulf of Maine Case affirmed this point by stating that: "No maritime delimitation in-between states with opposite or adjacent coasts may be effected unilaterally by one of those states" Thus on this point UNCLOS goes against the very nature of the International law.

But in practice it is a common scenario all over the world. Of the World's 512 potential maritime boundaries, fewer than half have been agreed, creating uncertainty and room for disputes for the remainder. In addition, maritime boundary disputes regularly occur over commercial, economic, and security interests and are a common but underrated investment risk in the energy sector [ ]. With such large number of things at stake the convention instead of providing quick resolution of disputes delays and sometimes makes it even impossible for a solution to reach that it endanger the very nature for which it was drafted in the first place.

A reference can be made of the beau fort dispute between the Canada and United States which is still unresolved, between the Canadian territory of Yukon and the U.S. state of Alaska. Canada claims the maritime boundary to be along the 141st meridian west out to a distance of 200 nmi (370 km; 230 mi), following the Alaska–Yukon land border. The position of the United States is that the boundary line is perpendicular to the coast out to a distance of 200 nmi (370 km; 230 mi), following a line of equidistance from the coast. This difference creates a wedge with an area of about 21,000 km2 (8,100 sq mi) that is claimed by both nations [1].

The sub-clause (b) brings outside the scope of the compulsory settlement the military activities including military activities by government vessels and aircraft engaged in non-commercial service. This by far can be the most serious repercussion which could take place as a result of the option for noncompulsory settlement of disputes. The reference to military activities in the paragraph will definitely involve the use of military force by a nation except providence of the innocent passage through the sea. The most prominent example of the above mentioned issue can be the dispute between Russia and Ukraine regarding Sea of Azov which has led to the widespread problems at an International level and even ended up with sanctions on Russia.

The conflict arose in 2003 when the Russian authorities started to build a dam towards the Tuzla Island. Ukraine then established a border garrison on the island for a closer surveillance. The reason for the conflict was the fact that Tuzla Island's strategic location gave Ukraine full rights over the main channel in the Strait of Kerch and, thus, the access to the Sea of Azov. The conflict was based on the division of the Black Sea Fleet and a lease agreement of the Sevastopol Naval facilities. The point to be raised here is that these conflicts might have been avoided if both Russia and Ukraine had not taken the pathway of Noncompulsory settlement of dispute under Article

298 and the dispute could be referred to an International body for a peaceful and quick settlement of disputes. But in order to understand the various sub ways in which the nations had taken use of Article 298 and the conclusions which can be drawn from the practices, for the purpose of this essay we will divide them into certain groups which are of concern to us excluding the countries those have adopted any methods apart from the below mentioned criteria's.

Table 1
Articles

Does not accept any of the procedures provided for in Part XV, section 2, with respect to disputes specified in article 298	Algeria, Argentina, Canada, China, Egypt, France, Greece, Republic of Korea, Portugal, Russian Federation, Thailand, Tunisia, Ecuador.
Does not accept only sub clause (a) with respect to any of the procedures mentioned in Article 287.	Australia, Democratic Republic of Kongo, Equatorial Guinea, Gabon, Italy, Kenya, Montenegro, Palau , Singapore, Spain, Trinidad and Tobago.
Does not accept either sub clause(a) and (b)/(b) and (c)/(c) and (a) with respect to any of the procedures mentioned in Article 287.	Belarus, Mexico, Saudi Arabia, United kingdom of Great Britain and Northern Ireland, Togo, Ukraine.
Does not accept only sub clause (b) with respect to any of the procedures mentioned in Article 287.	Uruguay

Apart from the countries mentioned in the above table there are countries with declarations accepting some of the procedures mentioned in Article 287 with some of the exceptions of Article 298 like Angola and Denmark does not accept an arbitral tribunal constituted in accordance with Annex VII for the categories of disputes specified in article 298, paragraph 1 (a), of the Convention while Cuba specifically rejects the jurisdiction of ICJ with respect to the provisions of Article 297 and Article 298.

2. Analysis of Reason for Choice of Non-Compulsory Settlement of Disputes

The principle objective of this article is the determination of possible patterns which might have led the countries to avoid the International tribunals and methods including the International Court of Justice. Ongoing through the respective maritime policies of these states one can have an idea of the reason why these states have opted out of the procedures.

1) Local legislations

These countries have their own local administrations which are responsible for activities related to continental shelves and military activities. For example Port Activities and Public Maritime Estate Bureau in Algeria is responsible for looking after the delimitation of the public maritime domain boundaries and prosecuting any violators, enforcing laws and regulations of the public maritime domain, controlling the application of the rules related to the use and exploitation of the natural and artificial maritime domain, studying all measures which can ensure the protection of the public maritime estate. In case of Canada The Oceans Act recognizes Canada's maritime jurisdiction through the definition of baselines, internal waters, the twelve nautical mile territorial sea, the twenty-four nautical mile contiguous zone, the two hundred nautical mile exclusive economic zone, and continental shelf in accordance with the 1982 Law of the Sea Convention. In particular, the Act confirms the authority for the enforcement of a federal law that is a customs, fiscal, immigration or sanitary law within the contiguous zone. In addition, the Act grants authority to prevent entry into Canada, powers of arrest and search and seizure. A comprehensive national and international legal framework supports this requirement, as well as effective intelligence and enforcement capabilities.

Meanwhile China's policies towards its maritime affairs is well known around the world, In 2016 China took the most drastic steps of all and established its own maritime court to protect its rights and sovereignty over its waters.

2) Internal politics

Internal politics among the nations of the world where most of the countries are guided through the democracy in which the public opinion chooses the government, it is next to impossible for the countries to ignore the sentiments of the people. The government does not give an opportunity to the opposition party making any issue by which they can oppose against the government influencing the people of the country. In the same way, the people do not pressurize the government to settle the dispute due to their ignorance about the sea and the sea resources, thus the maritime boundary dispute between or among states is prolonged.[3] By keeping out the areas which attract most of the problems in the International sphere the government's save themselves from the public opinion even at the cost of national interest but an important point to be notified here is that it is generally the lack of confidence among the states which motivate them to avoid the compulsory settlement.

3) Expansionist policies

The principles of equality and equal treatment is what guides the machinery of the International Organizations and conventions which forms the very basis of International law. But it would be an unpopular opinion to say that these very principles are the ones which were the reason for these organizations to come into existence, the concept of how powerful a state is, has and will drive the International decisions, the formation of security council where the most powerful states of that time kept some crucial roles into their own hands is the very embodiment of the idea that security council and so does the united nations would never have come into the existence if it were not for the special privileges provided to these dominant states. The powerful tries to exert its will on the weak and this is a guiding factor for many powerful states like China, Russia and the United Kingdom who have had claims of their own over some historically disputed territories and hesitate little to exercise them on those territories even by the use of force . Though not entirely in the mind of the nation leaders when the convention came into existence but the evidence of these policies is very much apparent in the opening of the new routes with the melting of the arctic, the dispute over the opening of the Northwest Passage, as shorter maritime navigation routes become available and states argue over who controls those waterways.

The U.S. Coast Guard estimated that shipping via these new routes will be two weeks faster than traditional routes, such as the Suez Canal to adapt to the changes brought about in the Arctic. The United States, Russia, and China have all devised strategies for how they intend to pursue their respective interests. The U.S. introduced the National Strategy for the Arctic Region in 2013, and in 2018 China released its own Arctic Policy. But far and away the most active Arctic power has been Russia, who has taken efforts to assert its maritime claims, develop resources, and even begin militarizing the region. Also as far as the Northwest Passage through the Canadian Arctic archipelago is concerned Canada insists the Northwest Passage is intrinsically Canadian while the United States maintains the idea that the Northwest Passage is an international strait and should remain open for free navigation.

4) Exploitation of resources

With the continuous advancement in the technology nations around the world have acquired various skill sets to exploit their natural environment including the water bodies in order to fulfill the various human needs thus trying to boost their economies which directly relates to more income for the nations, better standard of living for the inhabitants and more power and stature among the nations of the world. World oceans including the sea bed are rich in variety of resources including but not limited to fisheries, metals like cobalt, nickel and the fuel resources of petroleum and other crude oils which can prove out to be a deal breaker for the financial future of the country. Article 56 sub-clause (a) of the convention which talks about Rights, jurisdiction and duties of the coastal State in the exclusive economic zone says that in the exclusive economic zone, the coastal State has:

a) Sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds.[1]

A failure to avoid the compulsory settlement of disputes over the exploitation of such oceanic resources, countries not only harm themselves but the environment too as the unchecked exploitation of the resources always takes a negative toll on the environment. The importance of the resources for the countries is very much evident from the fact that immediately before the convention came into existence and while the final conferences and deliberations were taking place among the members, the countries unilaterally passed a number of enactments regarding the sea bed mineral resources. For example the United states of America passed Deep Seabed Hard Mineral Resources Act, 1980, Federal Republic of Germany passed Interim Regulation on Deep Seabed Mining, 1982 and United kingdom passed Deep Sea Mining (temporary provisions) act, 1981, though these enactments only carried their jurisdiction within their territorial waters but is evident of the interest of the countries in these mineral resources.

5) Historic claims

The disputes over the control of the sea and the naval routes among the nations isn't something new and has existed since the concept of state and empire came into existence. The states which have already have had such disputes among them might have chosen to avoid the procedures provided for in the UNCLOS altogether or even if one of the state parties to the dispute have opted for Non-Compulsory settlement of disputes then it would have exhausted its and the opposite states' rights altogether. Some of these nations have opted for a bilateral agreement through which they have established their own limitations on the seas. For instance the Agreement between the Government of the Kingdom of Thailand and the Government of the Socialist Republic of Vietnam on the delimitation of the maritime boundary between the two countries in the Gulf of Thailand of 9 August 1997 was the first time Vietnam defined a maritime boundary. The delimitation line constitutes the continental shelf and the economic zone boundary in which the Vietnamese side received 32.50 % of the overlapping area.

The second maritime boundary agreement between Vietnam and its neighboring countries was the Agreement between the People's Republic of China and the Socialist Republic of Vietnam on the Delimitation of the Territorial Sea, the Exclusive Economic Zone and Continental Shelf in Beibu Bay/Gulf of Tonkin of 25 December 2000. The agreement was a culmination of a negotiation process between Vietnam and China that had started as early in 1974.

3. Suggestions

1. Though the conventions motive behind providing the option of Noncompulsory settlement of disputes in the form of conciliation can be regarded as a tool to bring the nations of varying interest on the same stage and in the least provide an opportunity for mutual dialogue to be created for the resolution of disputes but the reports of the commissions which are being set up are of course not obligatory, according to J.G Merrills such commissions face a dilemma as they try their best to make their solution as successful as possible supported by logic and reasoning but they refrain from making any legal arguments either in favor or in against of the points raised by them. In support of his argument it can be said that the reason behind these things is the membership of the commissions which generally consist of diplomats though lawyers, if people well versed in the law and with the relevant experience in the field of International dispute settlement are given the task of conciliation then they can provide such solutions to the problems that on rational grounds their proposals become so strong that countries find it hard to decline.
2. Another problem related with the first is that the appointment of people well versed with the subjects of law and International disputes is not just enough, to be well versed in law and to apply those principles is an altogether different thing, if the people well versed in law are put in the commission of conciliation and instead of applying the legal principles of International law they try to adopt the methods of diplomacy then the required results might not

be achieved because in that case the very nature of problem gets transferred from being legal to being political.

To counter to some extent the provisions of Article 298 followed by the failure of conciliation, a provision should be added in order to avoid the escalation of the disputes in favor of world peace that in case of the failure of conciliation after a fixed term of two years if the nations in the dispute fail to arrive at a mutually agreed solution then compulsory reference of matter to the security council should be made. Such addition of provisions would without much decline in flexibility of the provision and still keeping the very objective of permanently solving the dispute in the frame of reference serve the purpose. An added advantage of this would be that it will provide more motivation for the countries to seriously consider the reports of the commission and also will be a check point in controlling the uncontrolled activities of the nations in the sea.

4. Conclusion

Thus it can be concluded that, though it is very much necessary in the International politics where all the sovereign nations of the world come together for the upliftment of their mutual relations and the redressal of their disputes that the relevant provisions of any convention has enough flexibility to attract all those nations to the stage but at the same time provide enough within it that respecting though the sovereignty of the nations and their citizens it does bound them with a due process of law and justice so that peace and tranquility of the planet can be maintained both, by the process of checks as well as proportionate compulsion.

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