

The Rule of Law in the Seas of Asia - Navigational Chart for Peace and Stability -

“Compulsory Dispute Settlement Procedures under UNCLOS

- Their Achievements and New Agendas -”

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Introduction

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1. Significance and Limits of the Enhanced Compulsory Jurisdiction of International Courts and Tribunals

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Article 281, Paragraph 1 of UNCLOS

Article 16 of CCSBT

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1. Significance and Limits of the Enhanced Compulsory Jurisdiction of International Courts and Tribunals

Article 281 of UNCLOS (*Procedure where no settlement has been reached by the parties*)

1. If the State Parties which are parties to a dispute concerning the interpretation or application of this Convention agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means **and the agreement between the parties does not exclude any further procedure.**
2. If the parties have also agreed on a time-limit, paragraph 1 applies only upon the expiration of that time-limit.

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1. Significance and Limits of the Enhanced Compulsory Jurisdiction of International Courts and Tribunals

Article 16 of CCSBT

1. If any dispute arises between two or more of the Parties concerning the interpretation or implementation of this Convention, those Parties shall consult among themselves with a view to having the dispute resolved by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice.
2. Any dispute of this character not so resolved shall, **with the consent in each case of all parties to the dispute**, be referred for settlement to the International Court of Justice or to arbitration; but **failure to reach agreement on reference to the International Court of Justice or to arbitration shall not absolve parties to the dispute from the responsibility of continuing to seek to resolve it by any of the various peaceful means referred to in paragraph 1 above.**
3. In cases where the dispute is referred to arbitration, the arbitral tribunal shall be constituted as provided in the Annex to this Convention . The Annex forms an integral part of the Convention.

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1. Significance and Limits of the Enhanced Compulsory Jurisdiction of International Courts and Tribunals

(1) Findings of the Arbitral Tribunal in the *Southern Bluefin Tuna* Cases (Decision of 4 August 2000)

(iii) Two Additional Comments on the Compulsory Dispute Settlement Procedures under UNCLOS

* “UNCLOS falls significantly short of establishing a truly comprehensive regime of compulsory jurisdiction entailing binding decisions”.

* “a significant number of international agreements with maritime elements, entered into after the adoption of UNCLOS, exclude with varying degrees of explicitness unilateral reference of a dispute to compulsory adjudicative or arbitral procedures.”

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1. Significance and Limits of the Enhanced Compulsory Jurisdiction of International Courts and Tribunals

(1) Findings of the Arbitral Tribunal in the *Southern Bluefin Tuna* Cases (Decision of 4 August 2000)

(iv) Role of Article 300

“The Tribunal does not exclude the possibility that there might be instances in which the conduct of a State Party to UNCLOS and to a fisheries treaty implementing it would be so egregious, and risk consequences of such gravity, that a Tribunal might find that the obligations of UNCLOS provide a basis for jurisdiction, having particular regard to the provisions of Article 300 of UNCLOS. While Australia and New Zealand in the proceedings before ITLOS invoked Article 300, in the proceedings before this Tribunal they made clear that they do not hold Japan to any independent breach of an obligation to act in good faith.”

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1. Significance and Limits of the Enhanced Compulsory Jurisdiction of International Courts and Tribunals

Article 300 of UNCLOS (*Good faith and abuse of rights*)

State Parties shall fulfil **in good faith** the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of rights.

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1. Significance and Limits of the Enhanced Compulsory Jurisdiction of International Courts and Tribunals

(2) Requirements for the Exercise of the Compulsory Jurisdiction under UNCLOS in the Subsequent Cases

(i) The *M/V “Louisa”* Case (Saint Vincent and the Grenadines v. Spain) (ITLOS, Judgment of 28 May 2013)

* Scope of the Declaration under Article 287

The scope of the Declaration of Saint Vincent is more limited with regard to the compulsory jurisdiction of ITLOS than that of Spain.

* Dispute Concerning the Interpretation or Application of UNCLOS (Articles 73, 87, 226, 227 and 303)

* Dispute Concerning the Interpretation or Application of Article 300

... New Argument Introduced by Saint Vincent after the Closure of the Written Proceedings

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1. Significance and Limits of the Enhanced Compulsory Jurisdiction of International Courts and Tribunals

Declaration of Saint Vincent and the Grenadines

“In accordance with Article 287, of the 1982 United Nations Convention on the Law of the Sea of 10 December 1982, I have the honour to inform you that the Government of Saint Vincent and the Grenadines declares that **it chooses the International Tribunal for the Law of the Sea established in accordance with Annex VI, as the means of settlement of disputes concerning the arrest or detention of its vessels.**”

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1. Significance and Limits of the Enhanced Compulsory Jurisdiction of International Courts and Tribunals

(2) Requirements for the Exercise of the Compulsory Jurisdiction under UNCLOS in the Subsequent Cases

(ii) The *Arctic Sunrise* Case (Netherlands v. Russia) (Award on Jurisdiction of 26 November 2014)

- * Dispute Concerning the Boarding and Detention of the Vessel in Russia's EEZ and the Detention of the Persons on Board by Russian Authorities
- * Russia's Refusal to Appear before ITLOS at the Stage of the Proceedings for the Provisional Measures Pursuant to Article 290, Paragraph 5
- * Order of Provisional Measures on 22 November 2013
- * The Netherlands wished to continue the proceedings.

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1. Significance and Limits of the Enhanced Compulsory Jurisdiction of International Courts and Tribunals

(ii) The *Arctic Sunrise* Case (continued)

- * Award on Jurisdiction of 26 November 2014

The Arbitral Tribunal did not admit Russia's plea concerning jurisdiction on the basis of the limited scope of Russia's Declaration made upon ratification of UNCLOS. It considered that **Russia's Declaration could exclude from the compulsory jurisdiction under UNCLOS only the dispute concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction which are also excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3. It concluded that the present dispute did not fall within the disputes provided in article 297, paragraph 2 or 3.**

One of the Disputes excluded by Russia's Declaration from the Compulsory Dispute Settlement Procedures
= "Disputes Concerning Law-enforcement Activities in Regard to the Exercise of Sovereign Rights or Jurisdiction"

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1. Significance and Limits of the Enhanced Compulsory Jurisdiction of International Courts and Tribunals

(3) Competence of ITLOS to Prescribe the Provisional Measures Pursuant to Article 290 of UNCLOS

(i) Earlier Precedents

- * *Southern Bluefin Tuna Cases* (New Zealand v. Japan; Australia v. Japan)
 - ... Order of 27 August 1999
- * *The MOX Plant Case* (Ireland v. United Kingdom)
 - ... Order of 3 December 2001
- * *Land Reclamation by Singapore in and around the Straits of Johor* (Malaysia v. Singapore)
 - ... Order of 8 October 2003

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1. Significance and Limits of the Enhanced Compulsory Jurisdiction of International Courts and Tribunals

(3) Competence of ITLOS to Prescribe the Provisional Measures Pursuant to Article 290 of UNCLOS

(ii) Release of a Vessel and the Persons on Board Detained

- * *The M/V “Louisa” Case* (Saint Vincent and the Grenadines v. Spain)
 - ... Order of 23 December 2010
- * *The “ARA Libertad” Case* (Argentina v. Ghana)
 - ... Order of 15 December 2012
- * *The Arctic Sunrise Case* (Netherlands v. Russia)
 - ... Order of 22 November 2013

(iii) Compulsory Jurisdiction System and the Prescription of the Provisional Measures

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2. Problems of Compliance with or the Enforcement of the Decisions of International Courts and Tribunals

- (1) Relationship between the Enhancement of Compulsory Jurisdictions and the Binding Effect of Their Decisions
- (2) Meaning of the “Legally Binding” Effect of the Decisions
- (3) Lack of the Ultimate Measures for the Enforcement of the Decisions of International Courts and Tribunals
- (4) Problems of One Party’s Non-appearance

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3. Relationships or Conflicts between Some of Particular Features of Maritime Disputes and the Basic Principles of the Procedures of International Courts and Tribunals

- (1) Two Particular Features of Maritime Dispute
- (2) Relationships or Conflicts between Some of Particular Features of Maritime Disputes and the Basic Principles of the Procedures of International Courts and Tribunals
 - (i) Subject Matter of a Dispute Concerning the National Legislations or Enforcement Measures Taken by National Authorities
 - (ii) Importance of the National Legal System of a Contracting State in the Process of Complying with the Obligations and Exercising Its Rights or Jurisdiction under UNCLOS

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(iii) Competence of International Courts and Tribunals to Examine the Legality or Compatibility of the National Legal System of a Sovereign State

* The M/V “*Saiga*” (No. 2) (Saint Vincent and the Grenadines v. Guinea)
(ITLOS, Judgment of 1 July 1999)

“by applying its customs laws to a customs radius which includes parts of the exclusive economic zone, Guinea acted in a manner contrary to the Convention”

and

“[a]ccordingly, the arrest and detention of the *Saiga*, the prosecution and conviction of its Master, the confiscation of the cargo and the seizure of the ship were contrary to the Convention.”

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(iii) Competence of International Courts and Tribunals to Examine the Legality or Compatibility of the National Legal System of a Sovereign State

* The M/V “*Virginia G*” (Panama v. Guinea-Bissau)
(ITLOS, Judgment of 14 April 2014)

None of the national laws concerned was *per se* contrary to the relevant provisions of UNCLOS.

However, Guinea-Bissau violated the obligation under Article 73, paragraph 1, because the confiscation of the vessel and the gas oil on board in the circumstances of this case was “not necessary either to sanction the violation committed or to deter the vessels of their operators from repeating this violation”.

Guinea-Bissau violated the obligation under Article 73, paragraph 4, by failing to notify the flag State of the detention and arrest of the M/V *Virginia G* and subsequent actions taken against this vessel and its cargo.

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3. Relationships or Conflicts between Some of Particular Features of Maritime Disputes and the Basic Principles of the Procedures of International Courts and Tribunals

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(iii) Competence of International Courts and Tribunals to Examine the Legality or Compatibility of the National Legal System of a Sovereign State
Possibility of the Arguments Concerning the Legality of the National Legislations or the Conduct of State Organs pursuant to National Laws

* The M/V “*Louisa*”

* The “*ARA Libertad*”

Dispute Concerning the Detention of a Warship and the Immunity enjoyed by Warships

Ruling of the Superior Court of Judicature in the Supreme Court of Ghana, 20 June 2013

... Compliance with the Order of Provisional Measures

Final Settlement of the Dispute between the Parties

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3. Relationships or Conflicts between Some of Particular Features of Maritime Disputes and the Basic Principles of the Procedures of International Courts and Tribunals

“From the standpoint of international law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures. The Court is certainly not called upon to interpret the Polish law as such, but there is nothing to prevent the Court’s giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention.”

(cited by ITLOS in the cases of the *Saiga* (No. 2) and the M/V “*Virginia G*” from the Judgment of the PCIJ in the *Case concerning Certain German Interests in Polish Upper Silesia*, 1926, P.C.I.J. Series A, No. 7, p. 19)

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3. Relationships or Conflicts between Some of Particular Features of Maritime Disputes and the Basic Principles of the Procedures of International Courts and Tribunals

(3) Multilateral Elements in One Maritime Dispute

(i) Multilateral Elements in One Maritime Dispute

(ii) Essentially Bilateral Nature of the Procedures of International Courts and Tribunals

(iii) Intervention

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3. Relationships or Conflicts between Some of Particular Features of Maritime Disputes and the Basic Principles of the Procedures of International Courts and Tribunals

(3) Multilateral Elements in One Maritime Dispute

(v) *Territorial and Maritime Dispute (Nicaragua v. Columbia)*

* Judgment of 4 May 2011 (Application by Costa Rica for Permission to Intervene) ... Intervention as a Non-party

* Judgment of 4 May 2011 (Application by Honduras for Permission to Intervene) ... Intervention as a Party, or Alternatively as a Non-party

* Judgment of 19 November 2012

“UNCLOS, according to its Preamble, is intended to establish ‘a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the sea and oceans, the equitable and efficient utilization of their resources. The Preamble also stresses that ‘the problems of ocean space are closely interrelated and need to be considered as a whole’”.

“the delimitation was one which must take into account the need of contributing to the public order of the oceans.”

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4. Positive and Negative Effects of the Proliferation of International Courts and Tribunals with Compulsory Jurisdiction

(1) Development and Clarification of the Law of the Sea through the Decisions of International Courts and Tribunals

(i) Development of the Rules and Methods of Maritime Delimitation through the Cases of International Courts and Tribunals

Three Stages for Maritime Delimitation of the Continental Shelf and the EEZ

- * Establishment of a Provisional Equidistance Line
- * Consideration of the Relevant Factors to Adjust or Shift the Provisional Equidistance Line
- * Disproportionality Test

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4. Positive and Negative Effects of the Proliferation of International Courts and Tribunals with Compulsory Jurisdiction

(1) Development and Clarification of the Law of the Sea through the Decisions of International Courts and Tribunals

(ii) Delimitation of the Continental Shelf beyond 200 Nautical Miles

* *Bay of Bengal* (Bangladesh/Myanmar)

(ITLOS, Judgment of 14 March 2012)

→ Pending Cases before the ICJ

* Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia), Filed on 16 September 2013

* Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Filed on 28 August 2014

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4. Positive and Negative Effects of the Proliferation of International Courts and Tribunals with Compulsory Jurisdiction

(2) Negative Effects of the Co-Existence of International Courts and Tribunals with Enhanced Compulsory Jurisdiction

(i) Forum-Shopping

(ii) Misuse or Abusive Use of Compulsory Jurisdictions

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Concluding Remarks

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Thank you.