DOALOS/UNITAR BRIEFING ON DEVELOPMENTS IN OCEANS AFFAIRS AND THE LAW OF THE SEA 20 YEARS AFTER THE CONCLUSION OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

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Remarks on Settlement of Disputes: Compulsory Procedures Entailing Binding Decisions

by

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I want to thank the organizers of this briefing for inviting me. It is a privilege to be here in the company of such distinguished participants and guests. It is also a special, if daunting, honor to be asked to speak immediately after the opening historical overview of the United Nations Convention on the Law of the Sea and the regime of the oceans by Ambassador Felipe Paolillo, and immediately prior to the remarks by Judge Gudmundur Eiriksson on the International Tribunal for the Law of the Sea.

Let me begin by complimenting the organizers on their decision to begin the detailed part of this briefing with dispute settlement. It emphasizes a central feature of the Convention that is not characteristic of many other multilateral treaties with significant political content, namely that arbitration and adjudication of disputes is treated as an integral part of the regime. As the President of the Third United Nations Conference on the Law of the Sea, Ambassador Tommy Koh of Singapore, observed 20 years ago at the final session at Montego Bay, the mandatory system of dispute settlement in the Convention is one of the reasons for concluding that the Conference achieved its fundamental objective of producing a comprehensive constitution for the oceans that will stand the test of time.

The dispute settlement provisions of the Convention represent nothing less than a collective decision to alter the traditional relationship between the existence of a right and the application of power that had long bedeviled the law of the sea. The late Ambassador John R. Stevenson, who was principally responsible for leading the United States into the Third UN Conference on the Law of the Sea, was among the first to articulate this as a fundamental criterion for measuring the success and utility of a new convention. But he was far from alone. The reasons for this are complex. In general, one might say that many less powerful states sought an alternative to the influence of power in the formation, application and maintenance of rights at sea, while many more powerful maritime states sought an alternative to the costs, risks and instability of a system that repeatedly required choosing between acquiescence in and confrontation with a bewildering array of unilateral claims.

The very process of negotiating a multilateral law-making treaty is of course part of the solution to this problem. But then what? Is there sufficient incentive to ratify a law-making treaty if it does not contain important institutional provisions open only to the

parties? Even if the treaty is widely ratified, will the multilateral order ostensibly imposed by the treaty disintegrate as states increasingly feel free to act on increasingly ambitious unilateral interpretations of what the treaty does and does not require? Can the law ever provide the stability we seek from it unless it also provides mechanisms for authoritative interpretation and orderly adaptation to changing circumstances?

Many treaties contain dispute settlement provisions. The question a lawyer asks is: "What do they add to the existing obligations of states under Articles 2 and 33 of the United Nations Charter to settle their disputes peacefully by means of their own choice?" In many cases, the answer is, "Not much." In this case, the answer is, "A great deal." Surely less than some hoped for. But much more than experience suggested was likely.

Two features are central. First, the dispute settlement system in the Convention is not relegated to an optional protocol. The Convention as a whole, including Part XV on settlement of disputes, is a single so-called package deal that does not permit reservations.

Second, the dispute settlement provisions are based on the premise that any party to the dispute may submit it to binding arbitration or adjudication, and in that context carve out important qualifications and exceptions. I would like to pay special tribute to the first President of the Third UN Conference on the Law of the Sea, the late Ambassador Hamilton Shirley Amerasinghe of Sri Lanka, who personally oversaw the negotiations on settlement of disputes, for his understanding that in diplomacy and law there are differences between a glass that is less than full and a glass that is not empty, and for his skill and determination in ensuring that this Convention would be negotiated from the starting premise of a full glass. It is regrettable that the award of the first arbitral tribunal formed under the Convention does not seem to reflect the full implications of this history, a history that is forthrightly evident in the text of Article 286 of the Convention.

The Principle of Compulsory Jurisdiction and the Exceptions

There are three types of qualifications and exceptions to the basic principle set forth in Article 286 that any dispute concerning the interpretation or application of the Convention that is not settled by other means shall be submitted to arbitration or adjudication at the request of any party to the dispute.

First, Articles 280 and 281 of the Convention preserve the right of the parties to agree to settle a dispute concerning the interpretation or application of the Convention by means of their own choice, including means other than arbitration or adjudication. Even if the dispute is not settled by such means, if the parties agreed to exclude any further procedure, then the compulsory procedures of Part XV of the Convention do not apply. Whether the agreement to exclude any further procedure must be express, or may be inferred, was a central issue addressed in the first arbitration under the Convention. Not everyone is satisfied with the conclusion reached by a majority of the arbitrators that the agreement to exclude jurisdiction under the Law of the Sea Convention may be inferred, even in the absence of any reference to disputes arising under the Convention or to the dispute settlement procedures set forth in the Convention or any other treaty, if the dispute also arises under another agreement that requires the specific consent of the parties in each case for arbitration or adjudication of disputes with respect to the interpretation or application of that agreement. My own reading of two opinions by the

International Tribunal for the Law of the Sea, one rendered before the arbitral award and one since, is that its approach to the relationship between the Law of the Sea Convention and other agreements is more nuanced and more consistent with the text of the Convention and the intent of the drafters.

Second, Article 297 of the Convention provides that a coastal state shall not be obliged to accept the submission to arbitration or adjudication of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, or any dispute arising out of its exercise of certain rights with respect to scientific research in the exclusive economic zone or on the continental shelf. At the same time, the first paragraph of Article 297 makes clear that disputes with regard to the exercise by a coastal state of its sovereign rights or jurisdiction shall be subject to arbitration or adjudication in three types of cases that may be briefly summarized as follows:

--when it is alleged that a coastal state has acted in contravention of the provisions of the Convention in regard to the freedoms and rights of navigation, overflight or the laying of submarine cables and pipelines, or certain related uses;

--when it is alleged that a state exercising these freedoms and rights has acted in contravention of the Convention;

--when it alleged that a coastal state has acted in contravention of specified international rules and standards for the protection and preservation of the marine environment.

Third, Article 298 of the Convention gives states the option of filing declarations at any time excluding specified types of disputes from arbitration or adjudication. These may be briefly summarized as follows:

--disputes concerning delimitation of maritime boundaries between neighboring states;

--disputes concerning military activities, and disputes concerning certain coastal state law enforcement activities respect to fisheries and scientific research in areas subject to its jurisdiction;

--disputes in respect of which the UN Security Council is exercising its functions under the Charter, unless the Security Council removes the matter from its agenda or calls upon the parties to settle it by the means provided for in the Convention.

Choice of Forum

There was a considerable difference of opinion during the Conference regarding the forum to which a party could submit a dispute subject to compulsory jurisdiction under the Convention. Some preferred the International Court of Justice. Some preferred to create a new standing tribunal. Some preferred arbitration. Among the difficulties posed with respect to use of the International Court of Justice is that it is open only to states.

Notwithstanding this difference of opinion, there was general agreement on two related points. First, Article 280 makes clear that the parties are free to agree on any forum they wish. Second, Article 282 makes clear that if the parties have agreed by virtue

of some other instrument that such a dispute shall, at the request of any party to the dispute, be submitted to a particular forum for a binding decision, that procedure applies in lieu of the dispute settlement procedures set forth in the Convention. Among other things, this provision not only preserves but defers to the jurisdiction that states choose to confer on the International Court of Justice pursuant to Article 36 of its Statute. Similarly, the Implementing Agreement Regarding Part XI, which incorporates by reference the provisions on subsidies and other provisions of the GATT and associated agreements with respect to deep seabed mining, provides that the WTO dispute settlement procedures, rather than those set out in the Convention, apply to disputes regarding these particular provisions that arise between parties to those trade agreements.

The procedure that applies in the absence of an agreed choice of forum incorporates all three preferences. Article 287 of the Convention provides that a State may file a declaration selecting one or more of the following: the International Tribunal for the Law of the Sea established by the Convention, the International Court of Justice, or an arbitral tribunal established in accordance with the Convention. However a state is not required to file a declaration, and a large number of states have not done so. In the absence of an applicable declaration, Article 287 provides that the state is deemed to have accepted arbitration under Annex VII of the Convention.

If the parties have accepted the same forum, the dispute may be submitted to that forum. If the parties have not accepted the same forum, the dispute may be submitted only to arbitration under Annex VII. In sum, unless the parties have chosen another forum, the dispute can be submitted only to arbitration.

The late Ambassador Elliot Richardson, who represented the United States at the Conference from 1977 to 1980, was a widely admired statesman who had many extraordinary qualities. One of them was that he was reluctant to pass judgment on others; the furthest he would normally go was to observe that an individual has the defects of his virtues. The same may hold true of institutions.

A significant virtue of ad hoc arbitration is that the parties get to choose the arbitrators to the extent they can agree.

One defect of this virtue is that it takes considerable time to select the arbitrators. What happens in the interim if the problem is urgent? This difficulty arises in two contexts under the Convention. First, what happens to the right to request urgent provisional measures to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment pending a final decision? Second, what happens to the right to secure compliance with the provisions of the Convention that require prompt release on bond of foreign vessels and crews arrested for fisheries or pollution violations? In such situations, absent rapid agreement of the parties, the only available forum is one already in existence. Thus, without regard to the declarations of the parties, the Convention confers jurisdiction on the International Tribunal for the Law of the Sea to deal with these matters. Pursuant to Article 290, it may be asked to prescribe binding provisional measures pending the constitution of an arbitral tribunal; pursuant to Article 292, it may be asked to order prompt release on bond of arrested vessels or crew. Most of the decisions rendered by the Tribunal to date were in response to applications under these two provisions.

Another possible defect of this virtue is that states that are not party to the dispute have no direct role in the selection of the arbitrators, that the composition of the arbitral panel may not reflect the diversity of perspectives of the parties to the Convention, and that there is not necessarily any continuity in the composition of ad hoc tribunals. This may pose particular problems where the unified administration of a regime is entrusted to an international organization, in this case the International Seabed Authority established by the Convention. Part XI, in Articles 186 to 191, has its own jurisdictional provisions regarding disputes concerning mining activities in the international seabed area. They apply not only to states but to the Seabed Authority and to private seabed mining companies. The Seabed Disputes Chamber of the International Tribunal for the Law of the Sea is accorded jurisdiction over such disputes, although in some cases the parties may agree to submit the dispute to another chamber of the Tribunal. Disputes that arise under a mining contract may also be submitted by either the Seabed Authority or the miner to commercial arbitration, but any question of interpretation of the Convention must be referred by the arbitral panel to the Seabed Disputes Chamber for a ruling.

Evaluation

There is a temptation to measure the success of a dispute settlement system by the number of cases heard and resolved. But that is not necessarily the only perspective. Voluntary compliance and restraint, after all, are the ultimate goals of any legal system. Negotiated agreement is usually the best way to resolve differences. The Convention's dispute settlement system may strengthen the position of those who counsel a government to respect its obligations under the Convention and avoid actions whose legality is doubtful. It may also facilitate the negotiation of differences by encouraging the parties to consider what a tribunal might do in the absence of agreement.

The cumulative impact of the dispute settlement provisions of the Convention must be assessed in light of the fact that the sea covers over two-thirds of the planet, that the Convention prescribes concrete principles and rules applicable to all activities at sea, and that these activities engage diverse and substantial political, security, economic, environmental, communications, human rights, scientific, and even recreational interests. Even in contexts that are less comprehensive and complex, and perhaps less important to the majority of states, those who are experienced in global multilateral negotiation know how hard it can be to achieve consensus on meaningful texts that do more than avoid or codify the conflicting positions, and that do more than admonish governments to endeavor to cooperate in achieving a lofty goal. They also know how hard it can be to achieve agreement that any party to a dispute may ask a tribunal to render a decision binding on the parties. Moreover, they know how hard it is to achieve widespread ratification of a treaty that does both of these things.

In concluding these remarks, let me say that I recognize that it may be regarded as immodest for a participant in the negotiations to stress the magnitude of the obstacles that were overcome and the importance of what is being achieved by widespread adherence to the United Nations Convention on the Law of the Sea.

But that doesn't mean it isn't true.

Thank you very much.