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Dispute Settlement under the UNCLOS with Special Reference to Compulsory Procedures: An Appraisal

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ABSTRACT

This paper examines the dispute settlement mechanism under the United Nations Convention on the Law of the Sea (UNCLOS), 1982 specially highlighting the compulsory procedures entailing binding decisions. The purpose of this study is to evaluate the applicability and effectiveness of the dispute settlement provisions of the UNCLOS. The study uses a legal and doctrinal research methodology followed by an analytical approach. In identifying and interpreting data, both primary and secondary legal sources are considered. The study finds that the dispute settlement mechanism of the UNCLOS is unique, flexible, user friendly and equally effective, although there are some limitations and exceptions to the compulsory procedures set out by the Convention itself. Hence, it is concluded that the state parties to the Third UN Conference on the law of the Sea did absolutely the right thing incorporating the dispute settlement mechanism in the Convention itself rather than doing the same in an optional protocol, thus making

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the Convention comprehensive and exhaustive among the global powers.

INTRODUCTION

Oceans are the lifelines of human civilization. Life itself evolved from the oceans. The ocean is as massive as 72 percent of the Earth's surface that covers 140 million square miles (UN, 2021). From ancient time oceans have been playing a crucial role in supporting the human civilization. Every State in the world has economic, political, strategic, and social interests in the oceans. These interests are evident in a variety of maritime activities such as fishing, shipping of goods, hydrocarbon and mineral extraction, naval missions, and scientific research. The usages of the oceans have significantly changed from ancient times when seas were primarily used for navigation and fishing. Nowadays, Oceans have separated and brought us together at the same time. All States now share interests in the oceans. These transformations have guided to the expansion of a complex pattern of ownership of maritime zones and control of maritime activities over the last few decades. The multiplicity of claims over maritime zones gave rise to a high degree of regulation the international law (Klein, 2005).

The basic international instrument governing oceans is the United Nations Convention on the Law of the Sea (UNCLOS, 1982). UNCLOS defines the rights and obligations of States and other international actors in different maritime areas and in relation to various uses of the oceans (Klein, 2005). Besides providing for a legal regime for various uses and features of the oceans, UNCLOS also contains a comprehensive and sophisticated dispute settlement provisions ever drafted (Romano, 2004). UNCLOS is one of the very few international conventions that provides for mandatory jurisdiction over disputes arising from the interpretation and application of the Convention. Generally, international disputes are settled through diplomatic efforts and only submitted to adjudication or arbitration with the consent of the disputed parties. Hence, the compulsory arbitration procedure of UNCLOS is certainly a distinct feature in international law and politics (Klein, 2005).

This paper aims at analyzing the dispute settlement mechanism of the UNCLOS 1982 in a critical manner to evaluate their effectiveness and applicability in current days. The study focuses on both the general and the compulsory procedures of settlement of disputes in such a way to identify the strengths and weaknesses of the dispute settlement system.

SIGNIFICANCE OF INCORPORATION OF DISPUTE SETTLEMENT PROVISIONS IN THE UNCLOS

The compulsory dispute settlement procedures contained in Part XV of the UNCLOS have been considered the central component of the package deal emerged from the Third UN Conference on the Law of the Sea (Shearer, 2004). Nowadays, it is contended that the incorporation of dispute settlement mechanism in the UNCLOS rather than in an optional protocol

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has actually strengthened the Convention itself. Such a wise step has made these provisions a power generator of the whole UNCLOS. It is undoubtedly a major development (Adede, 1982), a unique aspect (Kindt, 1989) and a huge step forward in the development of international law (Borgese, 1993).

However, some experts also have argued that it would have been much more effective if the dispute settlement provisions were incorporated with the Convention as an optional protocol (Sohn, 1983). During the Third United Nations Conference on the Law of the Sea (1973-1982), some states suggested the same (Nordquist, Rosenne & Sohn, 1989). Nevertheless, the majority states felt that including these provisions in an optional protocol rather than making it integral part of the Convention would weaken the Convention itself and jeopardize the ratification process worldwide (Sohn, 1983). This decision was made form the lesson learned after the failure of the dispute settlement provisions of the 1958 Four Geneva Conventions on the Law of the Sea. The dispute settlement provisions under these conventions were included in an optional protocol. However, most of the state parties to the conventions did not show that much interest to ratify the optional protocol. By then, only forty states accepted the Optional Protocol (Optional Protocol, 1958). As a result, not a single dispute was referred to the optional protocol. Thus, it can be said that the delegates of the Third Law of the Sea Conference have rightly decided to incorporate the dispute settlement provisions integrated within the UNCLOS itself.

DISPUTE SETTLEMENT PROCEDURE

The dispute settlement procedure is laid down in Part XV of the UNCLOS from Article 279 to 299. Part XV contains a complex dispute settlement mechanism that includes both traditional systems based on consent of the State as well as compulsory provisions. This part consists of three sections. Section one (Articles 279-285) sets out general provisions that deal with settlement of disputes through traditional means based on mutual agreement of parties. This section is used to resolve disputes using methods as demanded by situation, not through some predetermined methods. It includes non-compulsory dispute settlement procedures like diplomatic initiatives, negotiation, mediation, conciliation etc. Section two (Articles 286-296) contains some compulsory provisions resulting binding decisions. This section sets forth more specific procedures where agreement between the parties fails or there is no agreement. This compulsory dispute procedures include the International Tribunal for the Law of the Sea (ITLOS) under Annex VI, the International Court of Justice (ICJ), the creation of an Arbitral Tribunal under Annex VII, and the creation of a Special Arbitral Tribunal formed as a panel of experts under Annex VIII, to deal with a dispute arising out of a particular area i.e., fisheries, marine environment, scientific research, navigation, etc (International Arbitration, 2021). Section three (Articles 297-299) stipulates some limitations and exceptions to the compulsory procedures in relation to specific areas. Although compulsory dispute settlement procedure is fundamental for

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effective operation of the Convention, the emphasis in Part XV is given on consent-based dispute settlement and choice of procedures. Thus, the compulsory dispute settlement mechanism is clearly limited to a procedural level when traditional consent-based methods are available and on a substantive level with respect to the disputes that are excluded from mandatory jurisdiction (Klein, 2005).

General provisions

From the provisions of Section One of Part XV, two basic principles of dispute settlement can be identified. The first principle is that states parties are required to settle disputes relating to interpretation or application of the UNCLOS by peaceful means. An analysis of Articles 279, 283 and 285 give a clarity of this obligation. The second principle granted the states parties high degree of flexibility in choosing the methods to settle their disputes. This can be identified from an analysis of Articles 280, 281, 282 and 284 (Chakraborty, 2006). According to Article 279, it is the obligation of the state parties to settle any dispute between them concerning the interpretation or application of the UNCLOS using traditional peaceful procedures provided for under general international law and specifically indicated in Article 33, paragraph 1 of the UN Charter. The reason behind referring to Article 33 of the UN Charter is that it highlights different consent-based modes of dispute settlement before initiating compulsory provisions, i.e. negotiation, inquiries, mediation, conciliation, arbitration, exchange of views between the parties or judicial settlement (Klein, 2005). This section also recommends states parties to a dispute to initiate and maintain an effective system for exchange of views and talks with regard to the settlement of disputes in Article 283. The procedure of this section is also open to non-state entities as per Article 285, such as mining consortia, who are parties to dispute dealing with deep seabed mining under Part XI of this Convention (Varayudej, 1997).

State parties are free to choose the methods of settlement of disputes as long as they are peaceful. It is stipulated in Article 280 that states parties may at any time mutually agree to refrain from using the dispute settlement provisions of the UNCLOS and settle a dispute between them by any peaceful means of their own choice. Article 281(1) provides that if the state parties agree to settle a dispute by any peaceful means of their own choice, the procedures of Part XV only applies if no settlement has been reached, and the agreement between the parties does not exclude further procedure. Moreover, Article 281(2) states that if the parties have agreed on a time limit, the procedures of Part XV apply only if the time limit expires. However, if the parties agree to settle the dispute through conciliation, the may decide to follow the conciliation procedure under Section 1 of Annex V to the Convention of any other conciliation procedure. For this, a party to a dispute need to invite the other party to submit the dispute to conciliation under Article 284. If the invitation is rejected or if it is accepted but the parities could not agree on the procedure, the conciliation is deemed to be terminated. Under Annex V, a Conciliation Commission is formed whose

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members are selected by the disputed parties. The findings and recommendations of the Commission are not binding upon the parties but assist them to resolve the dispute. The Convention also stipulates in Article 282 that a dispute might be submitted to a particular procedure entailing binding decision if the parties have agreed, pursuant to a general, regional, or bilateral international agreement, that such a dispute shall be settled through that procedure. This procedure would have superiority over those mentioned in Part XV (Chakraborty, 2006).

Compulsory procedures entailing binding decisions

Compulsory procedures under Section 2 can be initiated only when no settlement has been achieved by recourse to peaceful means. According to Article 286, when state parties fail to settle their disputes through the various means available under Section 1, disputes can be submitted at the request of any party to the appropriate judicial forum for binding decision subject to the terms of the Convention. Under Section 2, the parties to the dispute do not need to consent to the referral of the dispute to a court or tribunal, rather the dispute can be submitted at the request of just one of the disputing parties (Klein, 2005). There is a number of judicial forum where the dispute can be submitted. As per Article 287(1), states may select their preferred forum in the form of a declaration at the time of signing, ratifying, or acceding to the Convention, or at any time thereafter. These forums include:

a) The international Tribunal for the Law of the Sea (ITLOS) established under Annex VI to the Convention;
b) The International Court of Justice (ICJ), one of the permanent organs of the UN system;
c) An Arbitral Tribunal constituted pursuant to Annex VII to the Convention; and
d) A Special Arbitral Tribunal constituted in accordance with Annex VIII to the Convention for disputes falling within the categories specified therein.

It is also stated in Article 287(3) and 287(4) that where a state party is not covered by a declaration in force with regard to its choice of procedure, or where both parties have not accepted the same procedure for the settlement of the dispute, the ultimate forum would be the Annex VII Arbitral Tribunal. This flexibility of choosing forums was made available to the states parties so that consensus could be achieved on compulsory dispute settlement at the Third Conference (Klein, 2005). Article 288(1) specifies that these courts and tribunals have jurisdiction over any dispute concerning the interpretation or application of the UNCLOS if the dispute is duly submitted to them. Article 288(2) mentions that such court or tribunal also has jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of the UNCLOS, which is submitted to it in accordance with that agreement. Article 288(3) further states that the Seabed Dispute Chamber of ITLOS or any other arbitral tribunal mentioned in Part XI Section 5 of the UNCLOS

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has jurisdiction over disputes in accordance with the procedure specified therein. In case any question is raised as to whether a court or tribunal has jurisdiction over a matter, it is completely within the competence of such court or tribunal in question to decide conclusively on the validity of such jurisdiction, Article 288(4) stipulates.

Article 289 suggests that in case of a dispute involving scientific or technical issues, a court or tribunal having jurisdiction may at the request of a party or on its own motion choose at least two scientific or technical experts in consultation with the parties to guide it. These experts are chosen from a list prepared in accordance with Article 2 of Annex VIII, and do not have the right to vote in the adjudicative process. According to Article 290, any court or a tribunal to which a dispute has been submitted may prescribe appropriate provisional measures 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. These provisional measures may be prescribed, modified or revoked considering the circumstances and only at the request of a party to the dispute, and after the parties to the dispute have been given an opportunity of being heard. The court or tribunal shall give notice to the parties to the dispute and to other relevant state parties about such prescription, modification or revocation and the parties to the dispute shall comply promptly with any provisional measures prescribed (Islam, 2012).

Article 291 assures that all the dispute settlement procedures specified in Part XV are open to states parties only and can be open to entities other than states parties if specifically mentioned in UNCLOS, such as Part XI, Section 5. Article 293 provides provision for applicable law. In solving a dispute, a court or tribunal applies the provisions of the UNCLOS and other rules of international law that are consistent with the provisions of UNCLOS. If the parties to the dispute agree, a court or tribunal is also empowered to decide a case in accordance with what is just, equitable and good. Article 295 mentions that a dispute may only be referred to the compulsory procedures only if all kinds of local remedies have been exhausted. That means compulsory procedures are the last resort for the parties to the dispute. Finally, Article 296 provides that the decision of a court or tribunal having jurisdiction under this section is final and must be complied with by all the parties to the dispute. However, such decision shall have no binding force on anybody except between the parties and in respect of that particular dispute. Thus, the flexibility provided to parties to the dispute in choosing forum under compulsory procedure certainly strengthened the mechanism, but created some doubts about the accomplishment of one of the main objectives while drafting Part XV, that is to maintain the uniformity and coherence of UNCLOS's case laws (Lemus, 2021).

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LIMITATIONS AND EXCEPTIONS

Although state parties are required to accept the compulsory procedure, the jurisdiction of all the respective courts and tribunals is subject to a number of important qualifications and limitations (Mensah, 1998). As per Article 297, a court or tribunal referred to in article 287 which has been accepted by a state party will have capability to deal with a dispute in which it is alleged that the state party has acted in contravention of the Convention's provisions relating to the freedoms, rights or obligations in regard to specified international lawful uses of the sea or the laws and regulations of the coastal state adopted in accordance with the Convention or other rules of international law, or applicable international rules and standards for the protection and preservation of the marine environment. Nevertheless, this competency is subject to some limitations and exceptions which are specified in Articles 297 and 298 of the Convention (Mensah, 1998). So, a state party is not bound to accept the submission of certain disputes arising out of the exercise by that state of a right or discretion in respect of marine scientific research. Disputes relating to the sovereign rights of the coastal State with respect to living resources in the exclusive economic zone or the exercise of such rights are also excluded from the competence of a court or tribunal (Islam, 2013).

Besides these exceptions, the Convention also identifies a number of optional exceptions that can be activated by states parties if they so choose. Under Article 298, a state party has the right to exclude from the jurisdiction of the court or tribunal certain categories of disputes which include-

a) disputes concerning the interpretation or application of provisions of the Convention relating to sea boundary delimitations or involving historic bays or titles;
b) disputes concerning military activities and law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of the Tribunal pursuant to article 297 para. 2 or 3 of the Convention.
c) disputes in respect of which the Security Council of the United Nations is exercising functions assigned to it under the Charter of the United Nations.

In some cases, States Parties are required by the Convention to submit disputes mentioned in article 297 or 298 to conciliation under Annex V to the Convention. However, the conclusions and recommendations of a conciliation commission appointed under Annex V are not binding on the parties. Thus, such disputes cannot be considered to be covered by the compulsory procedures under Section 2 of Part XV of the Convention (Mensah, 1998).

DISPUTE SETTLEMENT THROUGH STANDING JUDICIAL BODIES

Out of the four forums mentioned in Article 287(1) of the UUCLOS, two are standing or permanent judicial bodies, i.e. ICJ and the ITLOS. The ICJ is one of the permanent organs of the United Nations system established

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under a Statute annexed to the UN Charter. The ICJ cannot exercise jurisdiction over disputes involving all Member States of the United Nations even though it is a principal organ of the United Nations. Until and unless a state has accepted the jurisdiction of the ICJ, it cannot deal with cases involving that state. By the time of the Third UN Conference on the Law of the Sea, some states were unwilling to accept the jurisdiction of the ICJ. As a result, the drafters of the UNCLOS considered it unrealistic to make the ICJ the only forum for the settlement of disputes relating to the Convention. That's why the made the ICJ one of the four forums for compulsory procedures opened only for those states who have accepted its jurisdiction. The other standing forum is the International Tribunal for the Law of the Sea (ITLOS). This tribunal was established under Annex VI of the ITLOS as an alternative of the ICJ. There was a general agreement in the Third Law of the Sea Conference on the need for a standing court with organized rules and procedure to which matters related to law of the sea could be submitted for final and binding decisions. Therefore, the Conference finally decided to establish ITLOS in addition to the ICJ for those state parties who are somehow not comfortable with the jurisdiction of the ICJ (Mensah, 1998).

DISPUTE SETTLEMENT THROUGH AD HOC ARBITRAL TRIBUNALS

The Conference also considered that some states also might not accept ITLOS as a compulsory forum for the settlement of all their disputes. For them, it was decided to arrange other alternative procedures which might give them a wide array of choice in composition of the bodies to which their disputes might be submitted. State parties who do not wish to use either the ICJ or the ITLOS can agree to submit their disputes in arbitral tribunals whose members are selected by themselves. Hence, two arbitral tribunals are suggested by the Convention; an Arbitral Tribunal constituted under Annex VII and a Special Arbitral Tribunal constituted under Annex VIII. Arbitration under Annex VII is a comprehensive procedure that is available to deal with disputes arising in connection with the provisions of the Convention as a whole; whereas, special arbitration under Annex VIII is confined to special categories of disputes, namely those relating to fisheries, the protection and preservation of the marine environment, marine scientific research and navigation, including pollution from vessels and by dumping (Mensah, 1998).

CRITICISMS OF COMPULSORY DISPUTE SETTLEMENT

After entry into force of the UNCLOS, the compulsory dispute settlement provisions were criticized severely. It was argued that because of the limitations and exceptions under Section 3 of Part XV, a lot of disputes would not be subject to the compulsory procedures at all (Rayfuse, 2005). There were also criticisms about the wide range of forums on the ground that each forum has different functions and it is impossible to ensure that their procedures and method would be appropriate for each of the disputes submitted to them. Some judges of the ICJ also warned that choice of

tribunals could give rise of competing interpretations of international law and law of the sea in a non-uniform manner and thus, would result to fragmentation of international law and the law of the sea and inconsistent decisions in different tribunal in similar disputes. Most importantly, they considered ITLOS to be a judicial competitor to the ICJ and an unnecessary and unhelpful addition to the proliferation of international tribunals (Rayfuse, 2005).

Basically, the main concern of the commentators was the possibility for both substantive and procedural fragmentation of the law of the sea. Substantive fragmentation is related to the issue of consistency and continuity in the development and application of legal principles, while procedural fragmentation is related to the issue of the availability and appropriateness of the dispute settlement forum. Although these two types of fragmentation are separate and distinct in many aspects, they are also fundamentally entangled. For example, choice of forum may have implications for the characterization of a dispute, and vice versa, which will in turn have implications for the substantive resolution of the dispute (Rayfuse, 2005).

CONCLUSION

In conclusion, it can be said that the dispute settlement provisions of the UNCLOS may not be perfect, but they are arguably the best that could be attained, considering the political forces that governed the Third Law of the Sea Conference. The dispute settlement regime has many advantages undoubtedly; although it has some flaws too. The provisions are flexible in the sense that they allow the state parties to settle their disputes using a wide range of options and forums. They are also comprehensive considering that most of the provisions can be enforced as mandatory procedures that may result in binding decisions. The mechanism is also user friendly because it allows the state parties to exclude some vital and sensitive issues involving national interest out of the compulsory procedures; although some consider it as a weakness of the system. It might be a matter of great debate that the dispute settlement regime of the UNCLOS did not get enough teeth as every dispute cannot be made subject of compulsory procedures which is indeed true. However, this exception undoubtedly increased the acceptability of the dispute settlement regime as well as the whole Convention.

Thus, it is rational to conclude that the dispute settlement provisions under Part XV of the UNCLOS have been proved to be fundamentally constructive in nature. Furthermore, the negative components of the Part XV did not cause any real harm to oceans governance till date. So, it is expected that in future the states will utilize the provisions of Part XV to a greater extent with positive attitude and constructively.

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