# "INTERNATIONAL DISPUTE SETTLEMENT IN UNCLOS"

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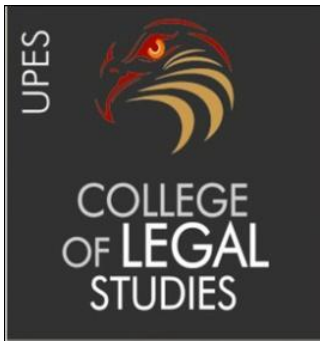
**This dissertation is submitted in partial fulfillment of the degree of B.A., LL.B. (Hons.)**


**UNIVERSITY OF PETROLEUM AND ENERGY STUDIES**

**COLLEGE OF LEGAL STUDIES**

**DEHRADUN**

**2017**

# CERTIFICATE

This is to certify that the research work entitled **"International Dispute Settlement in UNCLOS"** is the work done by Anita Mohanty under my guidance and supervision for the partial fulfillment of the requirement of B.A., LL.B. (Hons.) degree at College of Legal Studies, University of Petroleum and Energy Studies, Dehradun.

Shipra Chauhan

Asst. Professor

22nd March, 2017

# DECLARATION

I declare that the dissertation entitled "International Dispute Settlement in UNCLOS" is the outcome of my own work conducted under the supervision of Ms. Shipra Chauhan, at College of Legal Studies, University of Petroleum and Energy Studies, Dehradun.

I declare that the dissertation comprises only of my original work and due acknowledgement has been made in the text to all other material used.

Anita Mohanty

22nd March, 2017

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# ABBREVIATIONS

| | | |
|---|---|---|
| 1. | UNCLOS/LOSC | The United Nations Convention on the Law of the Sea, 1982 |
| 2. | ADR | Alternative Dispute Resolution |
| 3. | DSU | Dispute Settlement Understanding |
| 4. | WTO | World Trade Organisation |
| 5. | GATS | General Agreement on Trade in Services |
| 6. | GATT | General Agreement on Tariffs and Trade |
| 7. | AT/AB | Appellate Tribunal/Appellate Body |
| 8. | DSB | Dispute Settlement Body |
| 9. | UNCLOS (III) | The United Nations Conference on the Law of the Sea |
| 10. | EEZ | Exclusive Economic Zone |
| 11. | NM | Nautical Miles |
| 12. | UNSC | The United Nations Security Council |
| 13. | ICJ | International Court of Justice |
| 14. | ITLOS | International Tribunal for the Law of the Sea |
| 15. | SDC | Seabed Dispute Chamber |
| 16. | UN | United Nations |
| 17. | UNGA | United Nations General Assembly |
| 18. | PCIJ | Permanent Court of International Justice |
| 19. | UNEP | The United Nations Environment Programme |
| 20. | IOC | Intergovernmental Oceanographic Commission |
| 21. | IMO | International Maritime Organisation |
| 22. | FAO | Food and Agriculture Organisation of the United Nations |
| 23. | Sec. Gen. UN | The United Nations Secretary-General |
| 24. | ISA | International Seabed Authority |
| 25. | UN Charter | The Charter of the United Nations |
| 26. | ANZ | Australia, New Zealand |
| 27. | CCSBT | Convention for the Conservation of Southern Bluefin Tuna |
| 28. | BIT | Bi-lateral Investment Treaty |
| 29. | UNTAET | United Nations Transitional Administration in East Timor |
| 30. | SCS | South China Sea |
| 31. | CS | Continental Shelf |
| 32. | UN-CLCS | United Nations Commission on the Limits of the Continental Shelf |
| 33. | WW-II | World War II |
| 34. | U.S. | The United States of America |
| 35. | ASEAN | The Association of Southeast Asian Nations |
| 36. | PCA | Permanent Court of Arbitration |
| 37. | NIEO | New International Economic Order |

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# ACKNOWLEDGEMENT

Firstly, I would like to take this opportunity to express gratitude towards my mentor, Ms. Shipra Chauhan for her support and guidance. Secondly, I would like to thank the Library and IT staff for providing with their assistance that led to the successful completion of my dissertation. And lastly, I would like to thank my family and all my friends for their love and support.

Thank You

Anita Mohanty

# PREFACE

## STATEMENT OF PROBLEM

One of the most important principles of the UN system is the peaceful settlement of disputes. It is a customary law principle and is laid down in several conventions. This principle relates to international disputes between countries. International disputes are those disputes in which the claims made by parties are subject to International Law. This paper will deal with the principle of International Dispute Settlement in UNCLOS. Part XV of UNCLOS deals with the dispute settlement regime. The provisions of International Dispute Settlement under UNCLOS are considered necessary to balance the interests of all member states as against the increased jurisdictional rights empowered by the Convention upon the coastal states. This paper will lay down in detail the fundamental elements, problems arising, probable solutions, criticisms and recent developments occured with respect to International Dispute Settlement in UNCLOS. UNCLOS lays down a compulsory dispute settlement regime that comes into picture when the member states are not able to resolve the conflicts that arise using peaceful means of their own choice. It will also discuss elaborately the South China Sea dispute, it's implications, and the current stance of member states to get a better understanding of the topic.

## IDENTIFICATION OF ISSUES

1. Has the International Dispute Settlement Regime under UNCLOS succeded in achieving the aim and objective with which it was introduced?
2. Whether the implementation of Dispute Settlement Regime in UNCLOS has been effectively done?
3. Whether it has any positive or negative impacts? And whether appropriate measures have been undertaken to facilitate or tackle the same?
4. Does there exist a question regarding the relevance of Dispute Settlement Regime in UNCLOS with respect to the development of the law of the sea?

## SCOPE OF THE RESEARCH

The UNCLOS is one of the most important constitutive instruments in International Law. It is unusual in itself because the treaty regulates the right of usage of the world's largest resource, and simultaneously also contains a mandatory dispute settlement system. The main aim of the treaty is not to endanger international peace and security, and therefore it provides for a compulsory and binding framework for the peaceful settlement of related disputes. The scope of research work in this paper would extend to analysing the introduction and effective implementation of International Dispute Settlement in UNCLOS. Part XV of the treaty will be thoroughly scrutinised. The ambit of my research would extend to understanding the issues related to this concept, compulsory binding of dispute settlement judgements in UNCLOS, it's long - term effect on other nations, and effective measures with the help of the South China Sea dispute.

## RESEARCH METHODOLOGY

This paper will lay down a holistic overview of the topic. The methodology adopted for this paper will be doctrinal research. It will be based upon the available legal texts, legal doctrines, preparative work and case laws. A theoritical approach will be adopted to obtain clarity about the concept, relative issues, solutions and developments in the recent past. An analytical approach will also be adhered to and with the assistance of case laws, we will understand the drawbacks in the regime, the effect it has on other countries (economic, socio-political, etc.) and thus give tentative suggestions for better and efficient functioning.

## HYPOTHESIS

International Dispute Settlement in UNCLOS - A change in approach to tackle the contemporary conflicts between nations. It has always been the need of the hour because of the ever - increasing disputes between member states in context of jurisdictional rights over maritime boundaries, powers and responsibilities.

# INTRODUCTION

Among the many instruments that bear the responsibility of ensuring that social lives are peaceful, harmonious and wholesome, the process of dispute resolution is indispensable. As a process, it aims at attempting to check, resolve and alleviate conflicts arising out of disputes, consequently enabling the concerned persons, organizations and groups to maintain harmony whilst achieving a well- rounded sense of cooperation.[1] It can thus be successfully stated that the process of dispute resolution is indeed the sine qua non of social life and social order security, in the absence of which the goal of harmonious societal living may fail to be achieved and individuals and groups may fail to carry on their lives together.[2]

As a term, Alternative Dispute Resolution (ADR) refers to several different modes of resolving a wide variety of legal disputes. As a process, it is resorted to by the professional, business world in dealing with matters of commercial significance and by the common man as an alternative to the impracticability of filing law suits in the pursuit of timely justice. It is a fact rather well known that judicial courts tend to be backlogged with dockets that result in delays of years for parties to have their cases heard and decided. Historically, this was a major reason why alternative justice delivery mechanisms were developed - as a response to delayed justice delivery systems on part of judicial courts.

Alternative dispute redressal methods are achieving greater recognition and significance in the field of law and commerce, at both national and international levels.[3] Alternate dispute resolution methods, due to their diverse and unique nature can ably help parties resolve disputes in an expeditious and inexpensive manner. These methods can be employed in almost all contentious matters that are capable of being resolved by due process of law, be it civil, commercial, industrial and familial disputes.[4] In the course of this study, we may successfully conclude that alternate

[1] *Different Modes of Alternative Dispute Resolution (ADR)*, (Feb 20, 2017), http://shodhganga.inflibnet.ac.in/bitstream/10603/44117/9/09_chapter%203.pdf

[2] PARK AND BURGER, INTRODUCTION TO THE SCIENCE OF SOCIOLOGY (Createspace Independent Publishing Platform, 2016) , (735).

[3] Different Modes, *supra* note 1.

[4] Hindu Marriage Act (1955), Industrial Dispute Act, (1947), The Code of Civil Procedure (1908), The Family Court Act (1984).

methods of dispute resolution may just offer highly viable solutions to disputes without being an impediment to economic growth.

The WTO Agreement is the source that provides for the discipline that is applicable to all dispute settlement procedures by way of the Understanding on Rules and Procedures Governing the Settlement of Disputes or Dispute Settlement Understanding (DSU). Provisions allowing for special or extra procedures are provided under Articles XXII and XXIII of GATS General Agreement on Trade in Services. For additional reference, reliance may be had upon the procedures and rules of the Appellate Body. Procedures for mediation, conciliation, arbitration, consultation, panel procedures and other relevant procedures make for a core part of the main mechanism of the process of Alternative Dispute Resolution.[5]

**Mechanism**

The type of disputes subject to the mechanism Paragraph 1, Article 1 of the DSU provides that the rules and procedures of the DSU shall apply to the following.

1. Disputes brought pursuant to the consultation and dispute settlement provisions of the Agreements listed in Appendix 1 to the DSU; and
2. Consultations and the settlement of disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization (WTO Agreement).[6]

It is the Dispute Settlement Body's responsibility to handle the adept settlement of disputes. The Body which is the General Council in another guise, consists of all WTO members and functions as the lone authority concerned with the establishment of "expert panels" who exercise their power and knowledge to consider the case, to finally accept or reject the panels' findings or the results of an appeal. The implementation of recommendations and rulings also rests within the ambit of power of the Dispute Settlement Body. Additionally, when a country refuses to comply with a ruling, it is within the Body's legitimate exercise of power to authorize retaliation.

[5] *Dispute Settlement Procedures Under WTO*, (Mar 15, 2017), http://www.meti.go.jp/english/report/downloadfiles/2012WTO/02_16.pdf
[6] *Id*.

• First stage: consultation (up to 60 days). Before taking any other action, the countries in dispute must communicate with one another to gauge if they can settle their differences internally. If that fails, they can approach the WTO Director-General to mediate or try to help in any other possible manner.

• Second stage: the panel (up to 45 days for a panel to be appointed, plus 6 months for the panel to conclude). If consultations fail, the complaining country can ask for a panel to be appointed. The country "in the dock" can block the creation of a panel once, but when the Dispute Settlement Body meets for a second time, the appointment can no longer be blocked (unless there is a consensus against appointing the panel). Officially, the panel helps the Dispute Settlement Body make rulings or recommendations. But because the panel's report can only be rejected by consensus in the Dispute Settlement Body, its conclusions may be difficult to overturn. The panel's findings have to be based on the agreements cited. The panel's final report should normally be given to the parties to the dispute within six months. In cases of urgency, including those concerning perishable goods, the deadline is shortened to three months.

**Consultation**

GATT has traditionally tended to attach significant importance to bilateral consultation, and with time, numerous disputes have been settled in such a manner. Special consultation and review procedures are provided for, *for instance, as under Article XIII at paragraph 2 (which specifies that a contracting party shall, upon request by another contracting party regarding fees or charges connected with importation/exportation, review the operation of its laws and regulations). Another example would be the "1960 GATT decision on arrangements for consultations on restrictive business practices" (which specifies that a contracting party shall, upon request by another contracting party regarding the business practice by which international trade competitions would be limited, give sympathetic consideration and provide an adequate opportunity for consultation).* However, in prescribing that "formal" consultation takes place prior to panel procedures – paragraph 1 of Article XXII and paragraph 1 of Article XXIII of GATT play a key role.

1. Consultation under Article XXII and Article XXIII, respectively

Regarding the difference between the two provisions, consultation under Article XXII covers any matter affecting the operation of GATT, while the coverage of consultation under Article XXIII is limited to certain matters. Specifically, Article XXIII provides that a contracting party may make representations or proposals to another contracting party if the former party considers that any benefit accruing to it directly or indirectly under GATT is being nullified or impaired or that the attainment of any objective of GATT is being impeded as the result of:

a. the failure of another contracting party to carry out its obligations under GATT, or
b. the application by another contracting party of any measure, whether or not it conflicts with the provisions of GATT, or
c. the existence of any other situation.

Therefore disputes relating to "nullification or impairment of any benefit otherwise to accrue under GATT" may be brought to consultation under Article XXIII. Yet another frame of difference between the two concepts of consultation is a third country's participation; it is permitted only with respect to consultations under Article XXII. Similar differences can be seen in the relation between Article XXII and Article XXIII of GATS.

2. Consultation under Article 4 of DSU

The DSU specifies that the principles of the management of disputes as under Articles XXII and XXIII of GATT (paragraph 1, Article 3 of DSU) are adhered to. Article 4 of DSU provides for consultation procedures and rules and specifies that each party should give sympathetic consideration to any representations made by another party and should provide adequate opportunity for consultation. It provides that the parties which enter into consultations should attempt to obtain satisfactory adjustment of the matter concerned. According to the DSU (paragraph 4, Article 4), a request for consultations shall be effective when such request is submitted in writing, gives reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint and is notified to the DSB (Dispute Settlement Body of WTO). It provides that the party to which a request is made shall reply within 10 days after the date of its receipt and shall enter into consultations in

good faith within a period of no more than 30 days after the date of receipt of the request, with a view to reaching a mutually satisfactory solution (paragraph 3, Article 4 of DSU). WTO Members other than the consulting parties are to be informed in writing of requests for consultations, and any Member that has a substantial trade interest in consultations may request to join in the consultations as a third party. It is also provided that the party to which the request for consultations is addressed may reject the said third party's desire to join in the consultations when the party considers that "the claim of substantial trade interest is not well-founded" (paragraph 11, Article 4 of DSU).

The working of the panels is described in some detail in the agreement. The main stages of working could be said to be as follows:

- Before the first hearing: each side in the dispute presents its case in writing to the panel.
- First hearing: the complaining country (or countries), the responding country, and those that have announced they have an interest in the dispute, make their case at the panel's first hearing.
- Rebuttals: the countries involved submit written rebuttals and present oral arguments at the panel's second meeting.
- Experts: if one side raises scientific or other technical matters, the panel may consult experts or appoint an expert review group to prepare an advisory report.
- First draft: the panel submits the descriptive (factual and argument) sections of its report to the two sides, giving them two weeks to comment. This report does not include findings and conclusions.
- Interim report: The panel then submits an interim report, including its findings and conclusions, to the two sides, giving them one week to ask for a review.
- Review: The period of review must not exceed two weeks. During that time, the panel may hold additional meetings with the two sides.
- Final report: A final report is submitted to the two sides and three weeks later, it is circulated to all WTO members. If the panel decides that the disputed trade measure does break a WTO agreement or an obligation, it recommends

that the measure be made to conform to WTO rules. The panel may suggest how this could be done.

- The report becomes a ruling: The report becomes the Dispute Settlement Body's ruling or recommendation within 60 days unless a consensus rejects it. Both sides can appeal the report (and in some cases both sides do).

**Appeals**

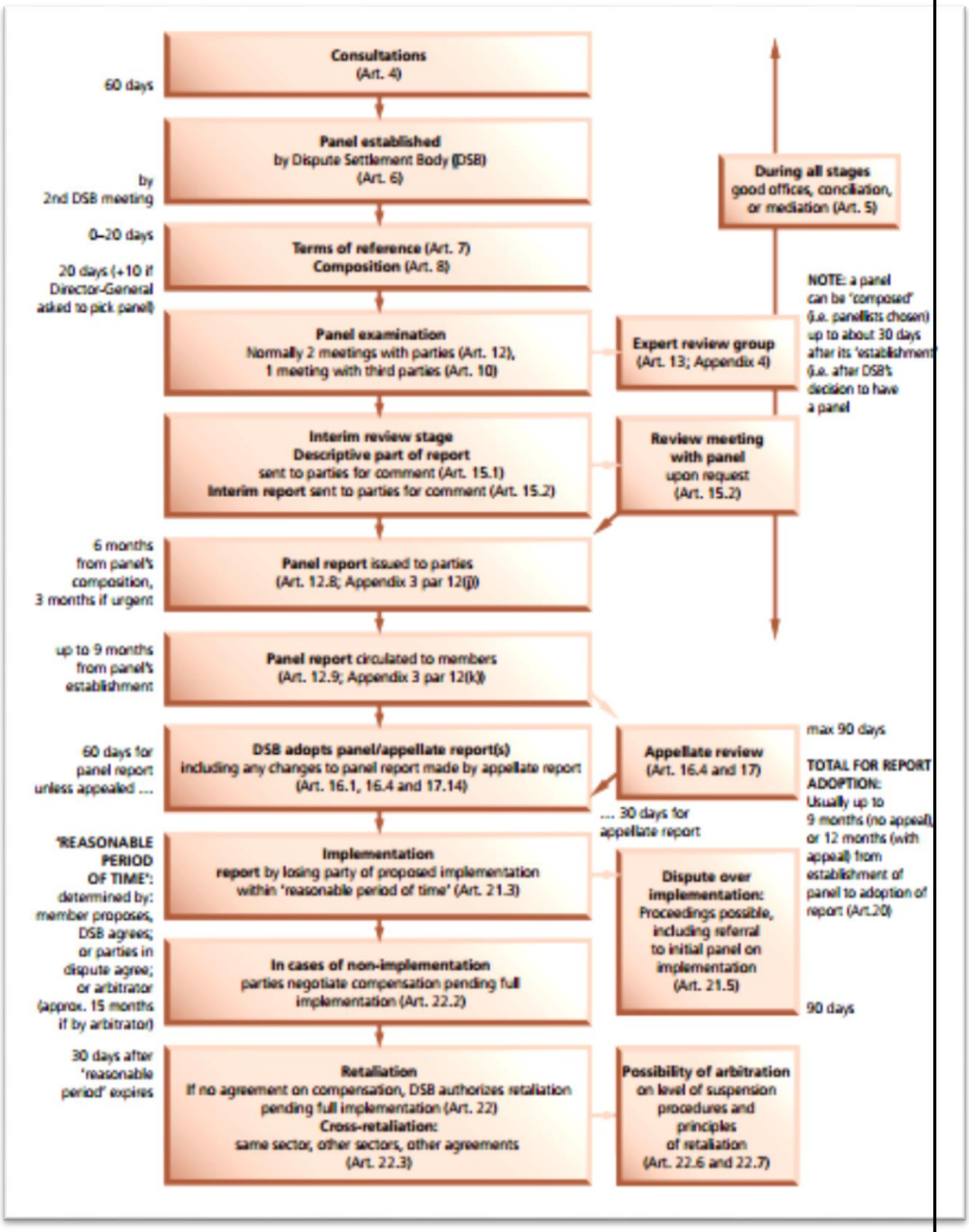
A panel's ruling can be appealed against from either side. On some occasions, both sides to the dispute may choose to effect an appeal. The appeals must find their basis in points of law such as legal interpretation: existing evidence cannot be re-examined and new issues cannot be examined. Each appeal is heard by three members of a permanent seven-member Appellate Body set up by the Dispute Settlement Body and broadly representing the range of WTO membership. Members of the Appellate Body enjoy a term of four years and must be individuals who have achieved recognition and stature in the field of law and international trade, not affiliated with any government.

The appeal can uphold, modify or reverse the panel's legal findings and conclusions. Normally appeals should not last more than 60 days, with an absolute maximum of 90 days. The Dispute Settlement Body has to accept or reject the appeals report within 30 days and rejection is only possible by consensus.

Following a decision and prior to the imposition of trade sections, there arise other aspects that must be addressed. At this stage, the losing party must implement the concerned policy in keeping with the respective ruling or recommendation. The dispute settlement agreement lays specific focus on the aspect that "prompt compliance with recommendations or rulings of the DSB (Dispute Settlement Body) is essential in order to ensure effective resolution of disputes to the benefit of all Members".

In the case that, that the country which is the target of the complaint loses, it must follow the recommendations of the panel report or the appeal report and must duly state its intention to do so at a Dispute Settlement Body meeting held within 30 days of the report's adoption. If immediate compliance with the recommendation may not be viable, the member, in such a situation, may be provided a "reasonable period of time" to do so. If it fails to act within this period, it has to enter into negotiations with

the complaining country (or countries) in order to determine mutually-acceptable compensation - for instance, tariff reductions in areas of particular interest to the complaining side. If after 20 days, no satisfactory compensation is arrived at, the complaining side may approach the Dispute Settlement Body for permission to impose limited trade sanctions ("suspend concessions or obligations") against the other side. The Dispute Settlement Body must grant this authorization within 30 days of the expiry of the "reasonable period of time" unless there is a consensus against the request. In principle, the sanctions should be imposed in the same sector as the dispute. If such imposition fails to be viable and effective, the sanctions can be imposed in a different sector of the same agreement. In turn, if this is not effective or practicable and if the circumstances are serious enough, the action can be taken under another agreement. The objective of such a provision is to ensure the minimization of chances of actions being carried over into unrelated sectors while allowing the concerned actions to be effective at the same time. In any case, how adopted rulings are monitored and implemented is the responsibility of the Dispute Settlement Body.


Consultations
(Art. 4)
60 days
Panel established
by Dispute Settlement Body (DSB)
(Art. 6)
by
2nd DSB meeting
Terms of reference (Art. 7)
Composition (Art. 8)
0–20 days
20 days (+10 if Director-General asked to pick panel)
Panel examination
Normally 2 meetings with parties (Art. 12),
1 meeting with third parties (Art. 10)
Expert review group
(Art. 13; Appendix 4)
Interim review stage
Descriptive part of report
sent to parties for comment (Art. 15.1)
Interim report sent to parties for comment (Art. 15.2)
Review meeting
with panel
upon request
(Art. 15.2)
6 months
from panel's
composition,
3 months if urgent
Panel report issued to parties
(Art. 12.8; Appendix 3 par 12(j))
up to 9 months
from panel's
establishment
Panel report circulated to members
(Art. 12.9; Appendix 3 par 12(k))
60 days for
panel report
unless appealed ....
DSB adopts panel/appellate report(s)
including any changes to panel report made by appellate report
(Art. 16.1, 16.4 and 17.14)
Appellate review
(Art. 16.4 and 17)
.... 30 days for
appellate report
max 90 days
'REASONABLE
PERIOD
OF TIME':
determined by:
member proposes,
DSB agrees;
or parties in
dispute agree;
or arbitrator
(approx. 15 months
if by arbitrator)
Implementation
report by losing party of proposed implementation
within 'reasonable period of time' (Art. 21.3)
Dispute over
implementation:
Proceedings possible,
including referral
to initial panel on
implementation
(Art. 21.5)
90 days
In cases of non-implementation
parties negotiate compensation pending full
implementation (Art. 22.2)
30 days after
'reasonable
period' expires
Retaliation
If no agreement on compensation, DSB authorizes retaliation
pending full implementation (Art. 22)
Cross-retaliation:
same sector, other sectors, other agreements
(Art. 22.3)
Possibility of arbitration
on level of suspension
procedures and
principles
of retaliation
(Art. 22.6 and 22.7)
During all stages
good offices, conciliation,
or mediation (Art. 5)
NOTE: a panel
can be 'composed'
(i.e. panellists chosen)
up to about 30 days
after its 'establishment'
(i.e. after DSB's
decision to have
a panel
TOTAL FOR REPORT
ADOPTION:
Usually up to
9 months (no appeal)
or 12 months (with
appeal) from
establishment of
panel to adoption of
report (Art.20)

## International Dispute Settlement in UNCLOS

The United Nations Convention for the Law of the Sea (UNCLOS) establishes a compulsory dispute settlement regime for resolving disagreements between member states. Critics of the Convention have argued that the mandatory dispute resolution provisions force member states to cede too much control over the dispute resolution process to an international body. They have also argued that the dispute resolution process is biased against the United States, and that the United States tends to fare poorly in international arbitration proceedings.[7]

"Part XV of the Convention covers the subject of settlement of disputes concerning the interpretation or application of UNCLOS.[8]Part XV's first section begins with a reiteration of the general obligation on states to adhere to peaceful settlement of disputes, according to due process of law and as per the agreement.[9] This part contains the right for states to agree at any time to settle their disputes by way of their own preferred choice of dispute redressal, in which case, the dispute is exempt from the Part XV procedures except where no settlement has been reached and the agreement does not exclude any further procedure.[10] Dispute settlement procedures in other general, regional or bilateral agreements which entail binding decisions are to apply in lieu of the Part XV procedures.[11] In all cases, when disputes arise states are to expeditiously exchange views regarding their settlement and may elect to proceed to voluntary conciliation".[12]

But, in the situation where states have been unable to maintain peaceful resolution of disputes, and no other procedure for resolution of the dispute has otherwise been agreed upon then, under Section 2 of Part XV, they stand under the obligation to submit their dispute to either the International Tribunal for the Law of the Sea, the International Court of Justice, an Arbitral Tribunal established pursuant to

[7] Julia Brower, Christina Koningisor, Ryan Liss, and Michael Shih, *UNCLOS Dispute Settlement In Context: The United States' Record In International Arbitration Proceedings,* YALE L.J. 253, (2012).
[8] *Id*.
[9] United Nations Convention on the Law of the Sea, art 279, Dec 10, 1982, 21 ILM 1261.
[10] United Nations Convention on the Law of the Sea, arts 280 and 281, 1982, 21 ILM 1261.
[11] United Nations Convention on the Law of the Sea, art 282, 1982, 21 ILM 1261.
[12] United Nations Convention on the Law of the Sea, arts 283 and 284, 1982, 21 ILM 1261.

Annex VII or a special Arbitral Tribunal established pursuant to Annex VIII.[13] Parties' prior declarations will decide the choice of tribunal and when no common choice is agreed, Annex VII shall be referred to by default.[14] It may be said in other words that an Annex VII arbitral tribunal is the default situation unless states have agreed otherwise. The court or tribunal so chosen has jurisdiction over any dispute concerning the interpretation or application of UNCLOS, or of any other international agreement related to the purposes of UNCLOS where the parties so agree, subject to a number of exceptions set out in Section 3 of Part XV.[15] Stating in broader terms, these exceptions relate to the exercise by coastal states of their sovereign rights within the exclusive economic zone (EEZ) relating to conservation and management of living resources and the conduct of marine scientific research.[16] States are also free to choose to make declarations relating to exempting disputes concerning maritime boundary delimitation, historic bays or titles, military activities, law enforcement activities, or disputes in respect of which the United Nations Security Council is exercising its functions, from the compulsory regime.[17]

When member states cannot resolve conflicts using a "peaceful means of their own choice", the compulsory settlement regime established by UNCLOS is triggered.[18] The procedures governing this regime are contained in Part XV, Section 2 (Articles 286-296) of the Convention.

Articles 286 and 287 confer jurisdiction over UNCLOS-related disputes to four bodies: the International Tribunal for the Law of the Sea ("the Tribunal"), the International Court of Justice (ICJ), an arbitral tribunal constituted per Annex VII of UNCLOS, or a special arbitral tribunal constituted per Annex VIII.[19] Article 287 allows states to choose one or more of those bodies as their preferred tribunal for settling disputes.[20] In the absence of an Article 287 declaration, or if the disputants cannot agree on a mutually acceptable dispute settlement procedure, the dispute will

[13] Rosemary Rayfuse, *The Future Of Compulsory Dispute Settlement Under The Law of the Sea Convention*, VUW LAW REVIEW, 683, 692 (2005).
[14] United Nations Convention on the Law of the Sea, arts 286 and 287, 1984.
[15] United Nations Convention on the Law of the Sea, art 288, 1984.
[16] United Nations Convention on the Law of the Sea, art 297, 1984.
[17] Rosemary, *Supra* note 13, at 687
[18] United Nations Convention on the Law of the Sea, art 28, 1984.
[19] United Nations Convention on the Law of the Sea, art 287, 1984.
[20] *Id*.

automatically be referred to an Annex VII arbitral tribunal.[21] The parties may agree to an appellate procedure in advance; otherwise, the arbitral tribunal's decision remains final.[22]

There exist certain categories of disputes that are exempt from this otherwise comprehensive regime. For instance, Article 297 offers exemptions for certain types of marine scientific research7 and for certain disputes involving fisheries.[23] And Article 298 allows a member state to reject binding dispute resolution procedures involving three categories of disputes: maritime boundary disputes, disputes involving military activities, and disputes involving matters before the United Nations Security Council.[24] In the recent past, the United States has indicated that it will request exemptions for all three Article 298(1) categories should it ratify UNCLOS.[25]

In the event that the United States requests these exemptions and also refuses to issue an Article 287 declaration accepting the Tribunal's jurisdiction, it would be subject to the Tribunal's decisions under only two limited circumstances.[26] First, the tribunal is empowered to impose provisional measures in the interim period before an Annex VII or Annex VIII arbitral tribunal can be established.[27]This has been a rare but not unprecedented occurrence. *In 1999, the Tribunal ordered Japan to refrain from certain types of Bluefin Tuna fishing in the interim period before an Annex VII arbitral panel could be convened*.[28] If the United States ratifies the treaty, it is possible that the Tribunal could require it to accept provisional measures. Second, the Tribunal may exercise indirect influence over proceedings when disputing parties cannot agree on the members of an Annex VII arbitral panel. If the case may be so, the President of the Tribunal could step in and designate panel members for the two states, and may also designate one particular member as the panel's president.[29]

[21]United Nations Convention on the Law of the Sea, art 287 (3), 1984.
[22]United Nations Convention on the Law of the Sea, Annex VII, art 11, 1982, 21 ILM 1261.
[23] United Nations Convention on the Law of the Sea, art.297, 1982, 21 ILM 1261.
[24] United Nations Convention on the Law of the Sea, art.298, 1982, 21 ILM 1261.
[25] Brower, *Supra* note 7 at 258.
[26]*Id*.
[27]United Nations Convention on the Law of the Sea, art 290(5), 1982, 21 ILM 1261.
[28] Southern Bluefin Tuna Cases (N.Z. v. Japan; Austl. v. Japan), Case Nos. 3-4, ITLOS Order of Aug. 27, 1999
[29] United Nations Convention on the Law of the Sea, Annex VII, art 3(e), 1982, 21 ILM 1261..

**Assessment of the loss of control argument**

Critics of UNCLOS suggest that the treaty does not give the United States enough control over the dispute resolution process. In particular, the treaty allows disputants to request provisional relief from the Tribunal before an Annex VII arbitral panel can be constituted. The Tribunal will grant these requests if it deems provisional relief necessary to "preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision."[30]As of 2011, five Annex VII provisional measure requests had been submitted, and all were granted.[31]

This provision however, is contained within a much broader institutional structure with three additional characteristics. First, Article 281(1) offers state parties the ability to settle disputes in a non-UNCLOS forum when certain criteria are met.[32] Second, Article 298(1)(c) allows state parties to avoid UNCLOS's binding dispute resolution procedures for any kind of dispute that the Security Council is considering.[33] Finally, the UNCLOS dispute resolution system operates in tandem with a unique enforcement regime.

**Exception to UNCLOS**

Jurisdiction Under Article 281(1)

Article 281(1), by way of its nature and working, may offer an exception to UNCLOS compulsory dispute settlement procedures. Article 281(1) provides that if the parties to a dispute "have agreed to seek settlement of the dispute by a peaceful means of their own choice," the mandatory arbitration provisions 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."[34]

*It was in the Southern Bluefin Tuna case, one of the five Annex VII provisional measure request cases where an Annex VII arbitral tribunal interpreted the*

[30] United Nations Convention on the Law of the Sea, art 290(1), 1982, 21 ILM 1261.
[31] Brower, *Supra* note 7 at 261.
[32] United Nations Convention on the Law of the Sea, art 281(1), 1982, 21 ILM 1261.
[33] United Nations Convention on the Law of the Sea, art 298(1)(c), 1982, 21 ILM 1261.
[34] United Nations Convention on the Law of the Sea, art.290(1), 1982, 21 ILM 1261.

*mechanism to bring it to use in the case brought by Australia and New Zealand against Japan.*[35] *As per the arbitral tribunal, the dispute fell within the scope of two treaties: the Law of the Sea Convention and the trilateral 1993 Convention for the Conservation of Southern Bluefin Tuna between Japan, Australia and New Zealand. The panel held that, due to the terms of the latter treaty, Article 281(1) prevented exercise of jurisdiction over the dispute.*[36]

An explicit, but limited exception to binding arbitration is already provided under Article 282 of UNCLOS. It specifically states that dispute settlement procedures of other agreements may be applied "in lieu of" UNCLOS proceedings so long as such procedures are binding.[37] However, *the Southern Bluefin Tuna case* expanded the arbitral tribunal's interpretation of Article 281(1) to apply more broadly from thereon. In the arbitral tribunal's view, the 1993 Convention precluded resort to any dispute resolution procedure under the UNCLOS regime, despite the absence of express language to that effect in the Convention.[38] In arriving at this conclusion, the tribunal emphasized the fact that the 1993 convention contemplates resort to judicial settlement or arbitration only if all parties to the dispute agree (and Japan did not agree in the instant case).[39] The tribunal held that such overlap in jurisdiction implied that the 1993 Convention imposed prohibitions on the parties from turning to any further procedure under UNCLOS.[40]Therefore, regional agreements may excuse parties from binding arbitration under UNCLOS even if those agreements do not contain a binding dispute settlement provision, subject to the tribunal's interpretation.

This decision's authority, however, remains unsettled and faces a fair degree of criticism. *In 2006, an Annex VII panel in solving a dispute between Barbados and Trinidad and Tobago reached a different understanding of the scope of the Article 281 exception.*[41]It was held in the particular case that Article 281's intention was not to be made applicable to standing agreements and instead, it was primarily "intended to cover the situation where the parties have come to an ad hoc agreement as to the

[35] Tuna case, *Supra* note 35, at 39
[36]*Id*.
[37]United Nations Convention on the Law of the Sea, arts 281-282, 1982, 21 ILM 1261.
[38] Tuna case, *Supra* note at 35 at 20
[39]*Id*.
[40]*Id*.
[41] Barb. v. Trin. & Tobago, 27 R.I.A.A. 147 (Award) (UNCLOS Arb. Trib. 2006)

means to be adopted to settle the particular dispute that has arisen."[42]As per this understanding, Article 282 provides for the only way whereby states can rely on an existing regional or bilateral agreement (*like the 1993 Bluefin Tuna Convention*) to avoid UNCLOS jurisdiction. Thus, it may be safe to say that the interpretation made by the 2006 arbitral tribunal offers a much more constrained exception to the binding dispute resolution mechanisms of UNCLOS.

Regarding the scope of Article 281, it is rather unclear which interpretation may be adopted by Annex VII tribunals in future cases. Article 296 of UNCLOS expressly provides that any decision rendered under the UNCLOS dispute settlement provisions "shall have no binding force except between the parties and in respect of that particular dispute."[43]Consequently, there may arise conflicting decisions on part of tribunals and there appears to be no reconciliatory mechanism under UNCLOS to address the said matter. For practical purposes however, arbitral panels may rely on past Annex VII tribunal decisions as persuasive value to establish consistent substantive legal rulings.[44] Relying on a particular survey of maritime delimitation cases, it was found that, "Although there are only two UNCLOS precedents, it appears that UNCLOS tribunals are likely to have a relatively high number of citations to decisions of other UNCLOS tribunals."[45]These maritime delimitation precedents also "cite decisions by other bodies more frequently than both 'pure' ad hoc tribunals and the ICJ."[46] Thus, the situation may arise where Article 281(1) may offer an exception to UNCLOS binding dispute procedures if future tribunals do indeed follow the tribunal's interpretation in the *Southern Bluefin Tuna case.*

Jurisdiction Under Article 298(1)(c)

Article 298(1)(c) allows a state to declare that it will not accept UNCLOS's binding dispute resolution procedures for "disputes in respect of which the Security Council . . . is exercising the functions assigned to it by the U.N. Charter . . . , 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."[47] The scope of subsection (c)

[42]*Id*.
[43]United Nations Convention on the Law of the Sea, art 296, 1982, 21 ILM 1261.
[44] Brower, *Supra* note 7 at 291
[45]*Id*.
[46]*Id*.
[47] United Nations Convention on the Law of the Sea, art 298(1)(c), 1982, 21 ILM 1261.

is not limited to certain subject matters, unlike other Article 298(1) exceptions. But the provision is constrained in three ways. First, by its express terms, subsection (c) operates only while the dispute remains on the Security Council's agenda. Security Council practice establishes that motions to place or remove an item on the agenda are procedural and are thus not subject to the veto.[48]Second, if a matter is placed on the Security Council's agenda, it may bring in political costs, particularly if the state relying on subsection (c) is interpreted to be seeking the Security Council's jurisdiction to avoid the process of arbitration or to otherwise abuse the Council's mandate. Third, while a state may wish for minimization of public awareness of the dispute, once a matter is placed on the Security Council's agenda, it may generate substantial publicity regarding both the dispute and the state's efforts to avoid arbitration, thereby defeating the intended purpose.[49]

## UNCLOS Enforcement Mechanisms

The enforcement framework of UNCLOS is established by Article 296 of the Convention. It provides 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,"[50] and that "any such decision shall have no binding force except between the parties and in respect of that particular dispute."[51]Annex VI to UNCLOS reiterates such wording of the provisions and states that the Tribunal's decisions are "final" and "shall be complied with by all the parties to the dispute,"[52]as does Annex VII to the Convention, which declares that an arbitral award "shall be complied with by the parties to the dispute."[53]

These provisions appear to have found their origins in Article 94(1) of the United Nations Charter, which provides that "each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."[54]However, references to the Security Council are visibly absent from

[48] Brower, *Supra* note 7 at 257
[49]*Id.*
[50] United Nations Convention on the Law of the Sea, art 296(1), 1982, 21 ILM 1261.
[51]United Nations Convention on the Law of the Sea, art 296(2), 1982, 21 ILM 1261.
[52] United Nations Convention on the Law of the Sea, Annex VI, art 33(1), 1982, 21 ILM 1261.
[53]United Nations Convention on the Law of the Sea, Annex VII, art 11, 1982, 21 ILM 1261.
[54] United Nations Charter, art 94, para. 1, June 26, 1945, 1 UNTS XVI.

Article 296 and Annexes VI and VII, in which Article 94 provides the power to "make recommendations or decide upon measures to be taken to give effect to the judgment" upon request of an aggrieved party.[55] Therefore, although "the Tribunal's judgments are binding in the same way as the ICJ's, . . . they are not enforceable under Article 94(2) . . . ."[56]

The Tribunal's former president, P. ChandrasekharaRao endorsed such understanding of the enforcement mechanisms and according to him, the decision of compliance with any judgment "is left solely to the parties submitting themselves to the jurisdictions" of any court or tribunal constituted under the aegis of UNCLOS.

However, there arises a good faith obligation on their part to comply with the concerned decision. The aggrieved State is free to secure compliance by its own means permitted by international law and also by way of recourse to more general diplomatic steps. The option for third States to validly act in support of the court decision exists as well.[57]

Further, Article 39 of Annex VI, which governs the enforcement of decisions rendered by ITLOS's specially constituted Seabed Disputes Chamber, provides evidence in support of this interpretation. Article 39 provides for the following:

That the decisions of the chamber shall be enforceable in the territories of the States Parties in the same manner as judgments or orders of the highest court of the State Party in whose territory the enforcement is sought.[58]

As is pointed out in *Medellín v. Texas by Justice Stevens*, such language is sharply in contrast with Article 94(1) of the Charter.[59] Provided that there exists a lack of a self-execution provision with regard to the other dispute resolution mechanisms of UNCLOS (that is, other than the Seabed Disputes Chamber), a robust regime for

[55] *Id*.
[56] Alan E. Boyle, *Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction*, 46 INT'L & COMP. L.Q. 37, 51 (1997).
[57] P. ChandrasekharaRao, *International Tribunal for the Law of the Sea: An Overview*, THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA: LAW AND PRACTICE 1, 11, (2001)
[58] United Nations Convention on the Law of the Sea, Annex VI, art 39, 1982, 21 ILM 1261.
[59] 552 U.S. 491, 534 (2008) (Stevens, J., concurring)

enforcement appears to be absent. Taking such fact into consideration, concerns regarding the "loss of control" may well be stated to be overstated in appearances.[60]

## Canons/Mechanisms of International Dispute Settlement

For the settlement of sea disputes, the United Nations Convention on the Law of the Sea gives autonomy to the state parties to resolve their conflicts through various dispute settlement mechanisms. The concerned parties can settle their disputes through negotiation or any other diplomatic measures between them.

According to the Article 287 of the United Nations Convention, one state has the right to choose one or more of the following means for the settlement of their disputes concerning the interpretation and application of this Convention:

- The International Tribunal for the Law of the Sea – ITLOS
- The International Court of Justice – ICJ
- An Arbitral Tribunal constituted in accordance with Annex VII
- A Special Arbitral Tribunal constituted in accordance with Annex VIII

### The International Tribunal for the Law of the Sea (ITLOS)

The International Tribunal for the Law of the Sea (ITLOS) is an independent judicial body established by the United Nations Convention on the Law of the Sea (UNCLOS), signed at Montego Bay, Jamaica, on December 10, 1982. The Tribunal is located at Hamburg, Germany. The ITLOS was established for the purpose of bringing the dispute settlement system of UNCLOS into full operation. It aimed at the settlement of the disputes arising out of the interpretation and application of the Convention. The Tribunal comprises of 21 independent members. These members are elected from among persons having highest reputation for justice and integrity and having recognition in the field of the law of the sea.

The Tribunal is open to the States and the international organizations which are parties to the Convention. It is also open to entities other than the State Parties. The

[60] Brower, *Supra* note 7 at 260.

jurisdiction of the Tribunal comprises all disputes submitted to it in accordance with the Convention. It also extends to all matters specifically provided for in any other agreement which grants jurisdiction on the Tribunal. Unless the parties otherwise agree, the authority of the Tribunal is compulsory in matters relating to the immediate release of vessels and crews under Article 292 of the Convention and to provisional measures pending the constitution of an arbitral under Article 290, paragraph 5, of the Convention.[61]

The disputes are presented before the Tribunal either by written application or by notification of a special agreement.

**The International Court of Justice (ICJ)**

The International Court of Justice is the principal judicial branch of the United Nations (UN). It was established in June 1945 by the Charter of the United Nations and it started functioning in April 1946. It is seated in the Peace Palace in Hague, Netherlands.[62]The role of the Court is to resolve legal disputes submitted to it by the States in accordance to the international laws. The Court also advises on legal matters referred to it by authorized United Nations organs and specialised agencies.

The Court comprises of 15 judges who hold office for a term of 9 years. The judges are elected by the United Nations General Assembly and the Security Council. No two judges may be nationals of the same country. The Court is assisted by a Registry, its administrative organ. The Court succeeded the Permanent Court of International Justice. The Statute of ICJ is the main constitutional document constituting and regulating the court. The cases submitted before the ICJ follow a standard pattern.

**Arbitration**

Arbitration is one of the mechanisms of dispute settlement. It is a process in which a dispute is submitted by an agreement of the parties, to the arbitrators who make a binding decision on the dispute. While opting for the arbitration method of dispute settlement, the parties go for a private dispute resolution procedure instead of going to

[61]Unnamed, *TheTtribunal*, INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA, 2, (Mar 11, 2017), https://www.itlos.org/the-tribunal/
[62]Unnamed, *The Court*, INTERNATIONAL COURT OF JUSTICE, 1, Mar 11, 2017), http://www.icj-cij.org/court/index.php?p1=1

court.[63] The Arbitration under Annex VII is used for the settlement of disputes between parties that have not made a declaration for choosing the procedure or for parties that have not accepted the same procedure for settlement of dispute. The party to the dispute may submit its case before the Arbitration by a written notification addressed to the other party. The notification shall be accompanied by a statement of the claim and the ground on which it is based.

The Arbitration comprises of 5 members preferably from a list of arbitrators. The arbitrators' list is prepared and maintained by the Secretary General of the United Nations. Every state party is entitled to nominate 4 arbitrators to constitute the list. The arbitrators who have been nominated by the state parties shall possess similar qualifications as those who have been nominated for member of the Tribunal.

When the case is brought before the Arbitration, the party instituting the proceedings shall appoint one member, preferably to be chosen from the list of arbitrators, who maybe its national. The other party against whom the case is made has to appoint one member among its nationals from the list of arbitrators within 30 days of receipt of notification addressed by the party that brings the case. The other 3 members of the Arbitration shall be appointed by an agreement between the parties and shall be chosen preferably from the list of arbitrators. These 3 members may be nationals of the third States unless the parties otherwise agree. The parties will choose a President from among the 3 members. If the party against which the case is brought up does not do so within that period or the parties are not able to reach an agreement on the appointment, then the President of the International Tribunal for the Law of the Sea, upon request and in consultation with the parties shall make the necessary appointment.

According to Article 5 of Annex VII of the Convention, the arbitral tribunal shall determine its own procedure, giving an opportunity to each party to be heard and to present the case. The decisions of the arbitral tribunal are determined by the majority votes of its members. In case there is an equality of votes, then the President will have a casting vote. The award mentions the subject matter of the dispute and states the reasons on which it is based, and the name of the members who have participated.

[63]Unnamed, *What is Arbitration?*,WORLD INTELLECTUAL PROPERTY ORGANISATION, 1, (Mar 11, 2017). http://www.wipo.int/amc/en/arbitration/what-is-arb.html

The award shall be final and without appeal, unless the parties to the dispute have agreed in advance to an appellate procedure. It will be binding upon the parties.

**Special Arbitration**

A special arbitral tribunal is established under Annex VIII of the Convention. It is one of the four means for settlement of dispute concerning the interpretation or application of the articles of the Convention relating to:

(1) fisheries,
(2) protection and preservation of marine environment,
(3) marine scientific research, or
(4) navigation, including pollution from vessels and by dumping.

A party to the dispute may submit its case before the special arbitral tribunal by written notification addressed to the other party or parties to the dispute. A statement of the claim and the grounds on which it is based is mentioned in the notification.

The special arbitral tribunal consists of five members to be preferably chosen from a list of experts. The list of experts shall be established and maintained in respect of each of the field of fisheries, protection and preservation of marine environment, marine scientific research and navigation, including pollution from vessels and by dumping. The list of experts shall be prepared and maintained, in the field of fisheries by the Food and Agriculture Organization of the United Nations, in the field of protection and preservation of marine environment by the United Nations Environment Programme, in the field of marine scientific research by the Intergovernmental Oceanographic Commission and in the field of navigation, including pollution from vessels and by dumping, by the International Maritime Organization. Each state party is entitled to nominate two experts. The qualification of the experts requires legal, scientific, technical competence and enjoy the highest reputation for justice and integrity.

When a case is brought before the special arbitral tribunal, the party instituting the proceeding appoints two members from the list of experts relating to the matters of dispute, one who may be its national. The other party against whom the case is brought up, has to choose two members preferably from the list of experts relating to the matters of the dispute within 30 days of receipt of the notification. Any one of the

two members may be its national. The parties to the dispute shall appoint the President of the special arbitral tribunal preferably chosen from the appropriate list, who may be a national of the third State. If the parties are unable to agree upon the appointment of the President, then the Secretary General of the United Nations upon request by a party to dispute, shall appoint the President of the special arbitral tribunal. If the party against which the case is made, has not chosen the two members from the list, then the Secretary General of the United Nations, on request of the party shall make an appointment.

The procedure of the special arbitral tribunal is dispute settlement is not different from the procedure of dispute settlement by the arbitral tribunal.

Other than the four mechanisms of dispute settlement as mentioned in Article 287 of the United Nations Convention, another mode can also be used for resolving any disputes arising between the state parties. This mode for settlement of disputes is negotiation

**Negotiation**

Negotiation is a method by which people settle differences. It is a process by which compromise or agreement is reached while avoiding argument and dispute. There are many forms of negotiation which are used in many situations. These situations include international affairs, the legal system, government, industrial disputes or domestic relationships.

In order to achieve desirable result while resolving disputes using the negotiation method, one has to follow a structural approach. The process of negotiation involves the following stages:

- Preparation
- Discussion
- Clarification of goals
- Negotiate towards a win-win outcome
- Agreement
- Implementation of a course of action

Preparation:

Prior to any negotiation, a decision regarding some aspects have to be taken. These include deciding the date and place of conducting the meeting, the members who will preside over the meeting. So, before making any action plans, one has to make certain arrangements.

Discussion:

During the discussion stage, both the parties to the dispute put forward their opinions. The parties present what they understand of the case.

Clarifying goals:

Clarification is an essential element of the negotiation process. After the discussion is made, there might be disagreements between the parties relating to the opinions and viewpoints. Therefore, it is very important that these misunderstandings should be cleared before proceeding further so as to yield the maximum benefit from the negotiation process.

Negotiate towards a win-win outcome:

A win-win outcome is usually considered the best outcome. It concentrates on providing positive results to both the parties. Both the parties should feel that their opinions and viewpoints have been heard and taken into consideration. It is not always possible to have a win-win outcome but it should be the ultimate objective of any negotiation process.

Agreement:

Agreement can be achieved only when the understanding of both parties' views and interests have been taken into consideration. An agreement needs to made perfectly clear so that both the parties know what has been decided.

Implementing a course of action:

After all the above mentioned steps have been followed, then an action plan is determined. A course of action is devised after all the discussion and deliberation. The action plan has to be then implemented.[64]

## NEED OF DISPUTE SETTLEMENT REGIME UNDER UNCLOS

"The Third United Nations Conference on the Law of the Sea, which adopted the 1982 Convention on the Law of the Sea, recognized that the interpretation and application of the provisions of the 1982 Convention might give rise to differences of opinion among States and other entities involved in the application of the Convention's provisions."[65]

It was accepted that differences could arise, for example, "with respect to the interpretation or application of the provisions relating to the powers, rights and obligations of the coastal States vis-a-vis other States and other entities in the maritime zones declared to be within national jurisdiction; or those dealing with the powers and responsibilities of the International Sea-Bed Authority in its relations with States Parties and other entities and persons engaged in activities in the international Area."[66] It was the general view of the Conference that, where such disagreements arose, they should be resolved by peaceful means in such a way that the rights of both the powerful aswell as the weak are given protection.

As the first President of the Conference remarked in this context, *"effective dispute settlement would ... guarantee that the substance and intention within the legislative language of the Convention will be interpreted consistently and equitably".*[67]

For this purpose, the conference agreed to establish procedures for dispute settlement which would be acceptable to the States. But "the Conference was aware that States

[64]Unnamed, What is negotiation?, SKILLS YOU NEED, 2, (Mar 11, 2017), https://www.skillsyouneed.com/ips/negotiation.html

[65] Thomas A. Mensah, *The Dispute Settlement Regime of the 1982 United Nations Convention on the Law of the Sea*, MAX PLANCK YEARBOOK OF UNITED NATIONS LAW, 12, (1999)

[66]*Id*.

[67] Third United Nations Conference on the Law of the Sea, Official Records, Vol. 5,112, Statement reproduced IN DOC. A/CONE62/WP.9/ADD.L, PARA. 6. (1982)

are not always willing to submit their disputes for binding settlement to the existing international judicial bodies. The reasons for the reluctance of States to accept compulsory and binding settlements oftheir disputes by international courts are many and various."[68]

On the other hand, there was general recognition of the need to ensure that all disputes concerning the interpretation and application of the Convention would be settled by peaceful means. "In line with the relevant provisions of the United Nations Charter and the general principles of international law, it was accepted that peaceful settlement should involve, as a first step, recourse to procedures mutually acceptable to the parties to the dispute, i.e. through peaceful means of their own choice".[69]

For this reason the Convention specifically states that nothing in the regime established under it would *"impair the right of any State Parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice".*[70]

However, "there was consensus in the conference that, where States are not able to settle their disputes through such means of their choice, they should be obliged to submit the disputes for settlement by mechanisms established internationally."[71]

[68]Mensah, *Supra* note 65 at 15.
[69]United Nations Charter, art 33, para. 1, June 26, 1945, 1 UNTS XVI.
[70]United Nations Convention on the Law of the Sea, art 280 Dec 10, 1982, 21 ILM 1261.
[71] A.O. Adede, *The System for Settlement of Disputes Under the United Nations Convention on the Law of the Sea,1984,* 240, (1987).

## Dispute Settlement Obligations under PART XV, Section 1 of UNCLOS

"The provisions of Part XV, including section 1, are only applicable when there is a dispute and it relates to either the interpretation or application of UNCLOS." In addition to the requirement that there be a dispute, it is a further principle that the dispute must be legal or justiciable in that it must be capable of being settled by the application of principles and rules of international law. The classic definition of 'dispute' is that given by the "*Permanent Court of International Justice (PCIJ) in the Mavrommatis Palestine Concessions (Preliminary Objections) case:"*

A dispute is a disagreement on a point of law or fact, a conflict of legal views or of the interests between two persons.[72]

"The ICJ has stated that the mere assertion or denial that a dispute exists is not conclusive of the existence of a dispute.[73] Nor is the mere existence of conflicting interests between the parties, a mere institution of proceedings, or a purely theoretical disagreement on a point of law or fact.[74] In the*Southern Bluefin Tuna Case*[75] before ITLOS, Japan maintained that the dispute was scientific rather than legal."[76]

'The Tribunal referred to the Mavrommatis definition and the judgment of the ICJ in the South West Africa Cases in which it was held that it must be shown that the claim of one party is positively opposed by the other'.[77]

The Tribunal concluded that the differences between the parties also concerned points of law, and thus the requirement that there be a dispute was satisfied.[78]

"Whether in fact a dispute exists will be an objective matter for the court or tribunal to determine on a case by case basis.[79] With respect to the delimitation of maritime

[72] Greece v United Kingdom [1924] PCIJ (ser A) No 2, 11
[73] United States of America v Iran (Merits) [1980] ICJ Rep 3
[74]South-West Africa Cases (Ethiopia v South Africa; Liberia v South Africa) (Preliminary Objections) [1962] ICJ Rep 328, 547, 566.
[75] Tuna case, *Supra* note 35, at 35
[76]*Id*.
[77]South-West Africa Cases *Supra* note 74.
[78] Tuna case, *Supra* note 35, at 36

boundaries, this is clearly an issue which relates to the interpretation and application of UNCLOS. The determination of whether there is in fact a dispute over a boundary should also be relatively straight forward through an examination of the respective claims of the parties as to where they believe the boundary should be."

"As to the situation between Australia and East Timor, Australia claims that the boundary should be based upon principles of natural prolongation whereas East Timor favors the use of an equidistance line."[80] As the claims of Australia and East Timor are positively opposed by each other, it is clear that this preliminary requirement of there being a dispute is satisfied.

## Obligation to Settle Disputes Pursuant to Existing Agreements

"If the parties to a dispute have agreed to seek settlement by a peaceful means of their own choice, the procedures provided for in Part XV 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.[81] This provision allowing parties to a dispute to resort to means of settlement outside of UNCLOS was based on the assumption that these other means would result in a settlement of the dispute."[82]

"Article 281 makes it clear that when a settlement is not reached through the procedure chosen by the parties, Part XV will become applicable. The Article is qualified by the requirement that the agreement between the parties does not exclude any further procedure. Further, if the parties have also agreed on a time-limit, resort to Part XV procedures will only apply upon the expiration of that time-limit."[83] This Article raises a number of questions.

*"At the outset it is necessary to consider whether the parties have in fact agreed to seek settlement of the dispute through a peaceful means of their own choice. What*

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[79] Unnamed, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, [1950] ICJ Rep 65, 1 (1950)

[80]Unnamed, *Senate Foreign Affairs, Defense and Trade Legislation Committee, Australian Senate, Official Committee Hansard Budget Estimates Hearing,* June 2 2004,159

[81] United Nations Convention on the Law of the Sea, art 298(2), Dec 10, 1982, 21 ILM 1261.

[82] A/CONF.62/L.7 (1974), section 4, III Off. Rec. 85.

[83] United Nations Convention on the Law of the Sea, art 298(2), Dec 10, 1982, 21 ILM 1261.

*constitutes agreement? And does the agreement provide for the settlement of disputes concerning the interpretation or application of UNCLOS?"*

This first issue may be easy to identify in a treaty or a memorandum of understanding but less so in the absence of a formal document, for example in the case of diplomatic communications.

"In *the Malaysia v Singapore* Case before ITLOS, Singapore maintained that after its invitation to Malaysia to resolve the differences between them was accepted by Malaysia and meetings between the parties were held, *a consensual process of negotiation had commenced and, as a legal consequence, both States had embarked upon a course of negotiation under Article 281 of UNCLOS in an effort to arrive at an amicable solution of the dispute between them.*[84]"

'The Tribunal held that Article 281 was not applicable as Malaysia accepted the invitation after it had already instituted proceedings under Annex VII of UNCLOS, and because both Malaysia and Singapore agreed that meetings would be without prejudice to Malaysia's right to proceed with the arbitration pursuant to Annex VII or to request the Tribunal to prescribe provisional measures.'[85]

*"In summary, there was no 'agreement' under Article 281. Despite Singapore's unsuccessful attempt to claim that the 'agreement to negotiate' fell under Article 281, it could be implied from the Order of the Tribunal that an 'agreement' under Article 281 does not need to be contained in a formal document such as a treaty. Such an interpretation stems from the reasoning of the Tribunal that Article 281 was not applicable because the negotiations were 'without prejudice'. The Tribunal did not find that Article 281 was not applicable because of the form of the agreement."*[86]

Even if there is a formal agreement such as a treaty in existence between the parties, it is necessary to examine whether the agreement seeks to settle disputes concerning the interpretation or application of UNCLOS. 'This raises the issue of treaty parallelism. This issue was raised in the Southern Bluefin Tuna Cases between Australia, New Zealand (ANZ) and Japan. ANZ and Japan negotiated the Convention for the

[84] Malaysia v Singapore) [2003] ITLOS Case No 12,
[85] *Id*.
[86] Adele, Supra note 71

Conservation of Southern Bluefin Tuna[87] (CCSBT) in anticipation of the entry into force of UNCLOS and intended the CCSBT to implement the provisions of UNLCOS calling for cooperation regarding conservation.'

*"A dispute arose with respect to Japan's experimental fishing program. After no settlement was reached through the dispute settlement provisions of the CCSBT, ANZ instituted proceedings pursuant to Part XV of UNCLOS.[88] Japan challenged the jurisdiction of firstly ITLOS and then the Annex VII arbitral tribunal on the basis that the dispute should be governed by the CCSBT and not UNCLOS, because the CCSBT is the lexspecialis which supplants the UNCLOS provisions."[89]*

'Japan was not successful on this point at either ITLOS or the Annex VII arbitral tribunal. In the Southern Bluefin Tuna (Jurisdiction and Admissibility) Award, the Annex VII arbitral tribunal rejected Japan's lexspecialis argument and accepted that there is frequently a parallelism of treaties such that the conclusion of an implementing convention does not necessarily vacate the obligations imposed by the framework convention.'[90]

Since, 'the mere fact that the parties entered into the CCSBT did not make UNCLOS nugatory. As pointed out by Australia, this would make the mandatory dispute settlement provisions of UNCLOS a *paper umbrella which dissolves in the rain*[91] As the Annex VII arbitral tribunal viewed the dispute under the CCSBT as the same dispute under UNCLOS, it was necessary to examine the terms of the CCSBT to see whether the parties intended to exclude the UNCLOS dispute settlement process.'

*"These issues become particularly important when the agreement purports to exclude further procedures, as it may bar the States to the agreement from unilaterally resorting to the procedures in section 2 of Part XV. The last phrase of Article 281(1) envisages the possibility that the parties, in their agreement to resort to a particular procedure, may specify that this procedure shall be an exclusive one and that no other procedures may be resorted to even if the chosen procedure should not lead to a settlement."*

[87] The Convention for the Conservation of Southern Bluefin Tuna, May 10 1993, [1994] ATS UNTS 1819.
[88](2001) 25 Melbourne University Law Review, 810, 814.
[89] Adele, *Supra* Note 71.
[90] Tuna Supra Note 35 at 1100
[91]*Id* at 1384.

'*In the Southern Bluefin Tuna (Jurisdiction and Admissibility) Award, despite the fact that ITLOS had decided that there was prima facie jurisdiction so as to impose provisional measures*,'[92] the Annex VII arbitral tribunal viewed Article 281 as a bar to its jurisdiction to hear the dispute, as it concluded that the dispute settlement provisions of the other convention did exclude further procedures.

'This Award has been criticized as the dispute settlement provisions of the other convention in question did not expressly exclude further procedures.[93]*The MOX Plant case between the United Kingdom and Ireland, only one year after Southern Bluefin Tuna Award, presented ITLOS with the opportunity to add to the jurisprudence on this issue.*'

"Whilst *the MOX Plant case* was concerned with whether an agreement between the parties fell within Article 282, a number of the judges in their separate opinions made statements regarding the interpretation of Part XV that would also be applicable to Article 281." Judge in the case stated that-

*"If the objective of Part XV of the Convention is taken into account such agreement among the parties to a conflict cannot be presumed. An intention to entrust the settlement of disputes concerning the interpretation or application of the Convention to other institutions must be expressed explicitly in respective agreements."*[94]

It would therefore seem that if the issue of an Article 281 agreement arose in the future, the court or tribunal deciding the matter might depart from the reasoning in the Southern Bluefin Tuna Award in light of the 'guidance' of ITLOS in the MOX Plant Order.

*"A further issue to consider when applying this Article is how to determine that no settlement has been reached. Can one party to the dispute determine this fact on its own, or is it necessary for the parties to agree that there is no chance for them to reach a settlement?"*[95]

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[92] New Zealand v Japan; Australia v Japan (Provisional Measures) ITLOS Case Nos. 3 & 4, Order of 27 August 1999

[93]Jon M Van Dyke, *Louis B Sohn and the Settlement of Ocean Disputes* 33 GEORGE WASHINGTON INTERNATIONAL LAW REVIEW 31(2001).

[94]Mox Plant Case (Ireland v United Kingdom) (Provisional Measures) ITLOS Case No 10, Separate Opinion of Judge Wolfrum, [5]

[95] Adele, *Supra* Note 71.

'If a party submits a case to one of the procedures specified in Part XV and the other party objects and claims that there is still a chance to reach a settlement by the chosen procedure, the tribunal or court to which the matter is submitted will have to decide this preliminary objection to its jurisdiction. This was done, for instance, by the ICJ in the *North Sea Continental Shelf case*.'[96]

'More recently, the issue has been considered by ITLOS in the *Malaysia v Singapore Case*.[97] The Tribunal reiterated its previous findings in the *Southern Bluefin Tuna Case* in which it held that a State Party is not obliged to pursue procedures under Part XV, section 1, of the Convention when it concludes that the possibilities of settlement have been exhausted.[98] This finding was in the context of an exchange of views under Article 283; however, the principles would appear to be the same'.

"The effect of Article 281 on disputes which are the subject of an Article 298 exception is that if there is a 281 agreement in place between the parties and it does exclude further procedures, then the procedures in Part XV will not apply to the settlement of the dispute. Thus, the dispute settlement obligations contained within Article 298 itself, which will be discussed below, will also not apply to the dispute."

[96] Unnamed, *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany & Netherlands) (Merits)* [1969] ICJ Rep 3, 47-48, [87].
[97] Malaysia v Singapore) [2003] ITLOS Case No 12, Order of 8 October 2003, [47-48], [52].

[98] New Zealand v Japan; Australia v Japan) (Provisional Measures) ITLOS Case Nos. 3

## PROBLEMS with respect to the International Dispute Settlement in UNCLOS

The Tribunal has not fully developed its capability as the specialized judicial part of the international community for the dispute settlementconcerning the application of the Convention on the Law of the Sea.

At the time when the cost and efficiency of international institutions is increasingly under scrutiny, the Tribunal cannot afford to have its jurisdiction and efficiency questioned at such an early stage in its operational life. This is something, however, over which the Tribunal will have little control. Its only practical response is to completely and aptly go about its tasks so as to promote confidence in its potential, thereby attracting higher support for its role.

"From the developments since the entry into force of the LOSC, it is increasingly becoming clear that the positive predictions that commentators had made about the future caseload of the Tribunal are far from being fulfilled." For example, Ted McDorman had written - "it is anticipated that the specialized ocean expertise of the LOS Tribunal willincrease the willingness of disputants to bring their ocean conflicts to the Tribunal." Today, the Tribunal continues to be under-utilised, and year after year makes its standard appeal before the annual meeting of member nations to the LOSC requesting states to opt ITLOS under Article 287 as preferred institution for dispute settlement.

There is also enough number of reasons to believe that ITLOS "will be able to live up to the community expectations only when litigants make full use of it." But if the fails to portray an image in front of the states of a body pronouncing unbiased and well-reasoned decisions, it would not be seeing many cases even though it "remains ready, to resolve a much wider range of disputes concerning the interpretation and application of the Convention."

ITLOS appears to have its eye especially on maritime boundary delimitation cases. The fulfilment of this exciting wish does not look to be easy to attain given the fact that ITLOS is clearly in competition with other options of international dispute settlement. This is very important in comparison with the ICJ, which has a proven

record in the settlement of maritime boundary disputes, and has successfully continued its monopoly in this area of contentious jurisdiction till the present date. For instance the case pertaining to maritime delimitation brought by Romania against Ukraine in ICJ under a Treaty on Relations of Co-operation and Good-Neighbourliness, and its Additional Agreement, both of them came into force on 22/10/1997.

It is important to note that the mentioned case was instituted in ICJ on 16/9/2004, at a time when the Tribunal had been long established and its docket was also free. Keith Highet's prediction looks to be coming true that the newly instituted "unseasoned" Tribunal being "seemingly divorced from the settled jurisprudence of the International Court, may be a deterrent to its selection by States Parties." As Lowe and Churchill have noted, it would worth regretting if a specialised tribunal such as ITLOS, drawing on the legal wisdom from states all over the globe, is merely confined within its residual jurisdiction of prompt release and provisional measure cases, as it presently is. It would be undesirable if the Tribunal were simply left idle and allowed to under-utilize its resources, after all the efforts that went into its establishment, and all the inputs that are being made in keeping it running. It would be a welcome development if important cases were to be put before the Tribunal. There is no doubt in the fact that the Tribunal has been making significant contribution to the peaceful settlement of disputes under the LOSC. As has been clearly stated by the United Nations General Assembly in its 59th Session, the Tribunal plays a vital role and is an authority for interpretation and application and implementation of the Convention.

There are valid reasons to rely that the Tribunal has already proved itself to be successful in its internal organizationalong with its primary tasks to settlement of disputes regarding the interpretation as well as application of the LOSC, and related agreements. "However, seen in the light of the implications resulting from the Tribunal's prompt release jurisprudence, the same cannot be said for its role inpromoting the environmental and conservation goals of oceans governance as aimed under the LOSC."[99]

[99] AnshumanChakraborty*Dispute Settlement Under The United Nations Convention On The Law of The Sea and Its Role In Oceans Governance* VICTORIA UNIVERSITY OF WELLINGTON, 4 (2006), https://core.ac.uk/download/pdf/41335904.pdf

While it is only justified to give credit to the Tribunal for the appreciable efforts done by it so far, it is also fair to bring to notice, with due respect, some of the loopholes in its jurisprudence. It can be anticipated that the Tribunal will in the coming years would develop its jurisprudence more efficiently and considering the goals of oceans governance.

As mentioned above, any State making an Article 298 declaration is, nevertheless, obliged to submit to conciliation. However, there are various exceptions to this compulsion. Completely excluded from the obligation to submit to conciliation are disputes that arose before the entry into force of UNCLOS.[100] It is thus essential to scrutinise the distinction between 'past' and 'future' conflicts.

As far as future conflicts are concerned there are 3 further exclusions from mandatory conciliation:

(a) Mixed disputes[101] it refers to those disputes that essentially involve the concurrent consideration of any unsettled conflict concerning sovereignty or related rights over continental or insular land territory;

(b) Disputes finally settled by an arrangement between the parties,[102] probably also including an agreement resulting from acceptance by the parties of a judicial or arbitral decision, for instance those rendered by the ICJ in disputes between Libya and Malta and betweenLibya and Tunisia[103]; and

(c) Disputes that are to be settled considering the bilateral agreement binding upon the parties to the dispute.[104]

From these exclusions, the issue of past disputes raise lot of questions. Asevery dispute may have some roots in the past, specifically sea boundary delimitation disputes, a clear distinction is difficult to draw. As to this problem, it was brought to notice during the inter- session discussions of the working group at UNCLOS III that as per the international jurisprudence and rules of jurisdiction there is a huge discretionary element in the decisions regarding the so-called crucial date of when a

[100]United Nations Convention on the Law of the Sea, art 298(1)(a)(i), Dec 10, 1982, 21 ILM 126.
[101] *Id.*
[102]*Id* at art 298(1)(a)(iii)
[103]Continental Shelf (Tunisia/Libyan Arab Jamahiriya) [1982] ICJ Rep 3; Continental Shelf (Libyan Arab Jamahiriya/Malta), [1985] ICJ Rep 13.
[104]United Nations Convention on the Law of the Sea, art 298(1)(a)(iii), Dec 10, 1982, 21 ILM 126.

dispute arises.[105] Parties that opposed the exclusion of past conflicts from mandatory procedures underlined the problems caused by the vagueness of the criteria the proposed difference would be based on. On the other side, those who preferred to limit mandatory conciliation to 'future' conflicts only, were scared of the creation of a system which might provoke States to re-open past disputes or revive old claims, and in such a way to destabilize already existing conditions.[106]

This exclusion of past disputes is interesting in light of the dispute between Australia and East Timor. Is it a dispute that arose before or after the UNCLOS came into force? In order to ascertain the date of the dispute, it is essential to scrutinize the background to this issue.

*The question of delimitation of the maritime boundaries in the Timor Sea was dealt for the very first time by Australia and Indonesia in the wake of withdrawal by Portugal the administering authority, and subsequent annexation of East Timor by Indonesia in 1975.* "Australia's *de jure* recognition of Indonesian sovereignty over East Timor in 1979 paved the way for negotiations between Australia and Indonesia on the area known as the 'Timor Gap' which had been left un-delimited by the 1972 seabed treaty between Australia and Indonesia."[107] As Australia and Indonesia failed to agree on a permanent seabed boundary, they entered into a joint development agreement which provisionally dealt with the territory in dispute. The so-called 'Timor Gap Treaty'[108] was particularly stated to be without prejudice to the positions of the parties considering the permanent continental shelf delimitation.

In October 1999, Indonesia relinquished its control over East Timor. Pursuant to UNSC resolution 1272/1999 of 29/10/1999 the United Nations Transitional Administration in East Timor (UNTAET) assumed responsibility for administration of East Timor from that date. Thus, the Treaty ceased to be in forceon this date. "In order for East Timor to share the output of resources exploited in the Timor Gap, Australia and UNTAET exchanged notes on behalf of the people of East Timor in

[105] Adele, *Supra* note 71
[106] *Id.*
[107] Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia establishing Certain Seabed Boundaries in the Area of the Timor and Arafura Seas Oct 9 1972, 1973 ATS 32
[108] Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia [Timor Gap Treaty], opened for signature Dec 11, 1989, 1991 ATS 9

February 2000 to effectively continue, *mutatis mutandis*, the terms of the Timor Gap Treaty without prejudice to the position of the future independent government of East Timor."

"Upon East Timor's independence on 20/5/2002, Australia and East Timor signed the 'Timor Sea Treaty' which entered into force in April 2003.[109] Whilst there are a differences between the former 'Timor Gap Treaty' with Indonesia and the new 'Timor Sea Treaty' with East Timor, the concept is similar in that it creates a joint development area to enable exploitation to continue pending final delimitation of the maritime boundary." As mentioned earlier, negotiations are presently being held between East Timor and Australia regarding the final boundary.

Noting the definition of dispute, it looks quite clear that there was in fact a dispute between Australia and Indonesia in that each State's claim pertaining to the territorial boundary was opposed by the other. The Timor Gap Treaty did not resolve this dispute as it was merely in the nature of a provisional agreement without prejudice to the positions of the parties as to the final territorial boundary. This dispute arose in the early 1980's and it makes it very clear that it arose before the entry into force of UNCLOS. The question to consider is whether the current dispute with East Timor is an extension of the old dispute with Indonesia and thus a past dispute, which is excluded from compulsory conciliation, or whether East Timor's independence creates a break in the chain. The effect of this state succession on the question of 'past disputes' has not been put to test. However, on examining the definition of dispute, as a new State is involved in the matter, it would be regarded a new dispute. "It is relevant here that UNCLOS excludes past disputes rather than 'past facts and situations'. In relation to a reservation which referred to disputes only and did not exclude the consideration of past facts or situations, the PICJ held that the Court's jurisdiction over disputes arising subsequent to the exclusion date is not limited to situations or facts subsequent to that date."[110]As will be seen below, if the jurisdiction of the conciliation commission were to be put to question on this basis, the

[109]Timor Sea Treaty between the Government of East Timor and the Government of Australia [Timor Sea Treaty], May 20, 2002, 2003 ATS 13.
[110]The Mavrommatis Palestine Concessions (Greece v United Kingdom) [1924] PCIJ (ser A) No 2, 35.

conciliation commission would have to figure out for itself whether it has valid jurisdiction and thus would have to rule on this issue.[111]

The system has not functioned as might have been expected.

In addition to the non-use of various novel features of the UNCLOS dispute settlement mechanism and the types of cases there are a number of other ways in which the UNCLOS dispute settlement mechanism has not functioned as might have been anticipated. They include:

- "The low number of declarations under Article 287 choosing a preferred forum, with only just over 25% of States parties having made such declarations." The low number is shocking given that while drafting Part XV, having a choice of forum was said to be of crucial importance to acceptance of the proposed dispute settlement mechanism. Bureaucratic inertia may be a relevant reason for the low number. Whatever the reason, it has made it clear that most disputes have been referred, and the same will continue, at least initially, to an Annex VII tribunal. Five of the 18 disputes so far initiated under Annex VII arbitration were later transferred by agreement to the ITLOS, probably in order to reduce the cost of litigation. This may lead us to conclude that that the real reason for the low number of declarations under Article 287 is not because States have a genuine preference for arbitration.

- "The lack of declarations under Article 298 excluding certain types of dispute (just over 20%)." Again the low number of declarations is shocking, as for various States the inclusion of Article 298 was a condition for agreeing to have a quasi-compulsory dispute settlement mechanism in UNCLOS. The reasons behind lack of declarations is not obvious. A possible outcome is that there have been more maritime delimitation cases than might have been anticipated.

- "No cases have yet been referred under Article 286 to either the ICJ or Annex VIII arbitration." This might be because of the fact that small numbers of States selecting these for as their preferred method of settlement and the fact

[111]Sheehan, *Anne, Dispute Settlement under UNCLOS: The Exclusion of Maritime Delimitation Disputes* [2005] UQLawJl 7; (2005) 24(1) UNIVERSITY OF QUEENSLAND LAW JOURNAL, 165 (2005).

that the inclusion of Annex VIII arbitration in UNCLOS was in the nature of a concession to the then Soviet bloc.

- The capability of the ITLOS to give advices in relation to issues other than Part XI – though not for issues under the rest of UNCLOS. It was broadly considered, and argued by various States in the proceedings concerning the advisory opinion requested by the Sub-Regional Fisheries Commission, that UNCLOS could give advices only with relation to issues concerning the activities of the Authority. [112]However, in 2015 in a proceedings referred to, the ITLOS held that it could give an advices where an arrangement other than UNCLOS provides for requests for advices to be made to it.

- The non-appearance of China and Russia in the *South China Sea and Arctic Sunrise cases*. It might be considered that having ratified UNLOS with its dispute settlement mechanism, parties would appear in cases brought against them. China as respondent in the WTO where it appears to have implemented adverse findings against it without difficulty.

There seems to be something in the nature for dispute settlement systems not to function as expected, e.g.

WTO Dispute Settlement Regime - It is skeptic whether its drafters anticipated that there would be a conflict registered very frequently; a panel ruling every 6 weeks; seventy percent of panel decisions appealed; and the EU and the USA to be the most lawless members of the WTO considering the numbers of cases brought against them and being the respondent States in the handful of cases with serious compliance problems.

## Reluctance of States to utilise formal means of Dispute Settlement

The states have many options and strategies which they might apply to resolve inter-state disputes.Although litigation is one of such formal means of dispute settlement, it

[112]United Nations Convention on the Law of the Sea, art 191, Dec 10, 1982, 21 ILM 126

is certainly not the most popular.[113] It is understood that negotiation is still one of the basic means of settling international disputes peacefully.[114]

UNCLOS in Part XV deals with the settlement of disputes concerning the interpretation or application of UNCLOS. The Section 1 of Part XV begins with the statements of general obligation on states to settle their disputes by agreement and to do so peacefully.[115] It preserves the right for states to agree at any time to settle their disputes by a means of their choice, in which case, the dispute is exempt from the Part XV procedures except where no settlement has been reached and the agreement does not exclude any further procedure.[116] Dispute settlement procedures in other general, regional or bilateral agreements which entail binding decisions are to apply in lieu of the Part XV procedures.[117] In all cases, when disputes arise states are to expeditiously exchange views regarding their settlement and may elect to proceed to voluntary conciliation.[118]

The reason why States don't indulge in International adjudication in a major way because the decision rendered goes out of the parties purview whereas the negotiation processes negotiation allows the parties to retain more control over their dispute, However, international adjudication continues to occupy a prominent place in the world, and various theories and arguments have been advanced to explain their success and need.[119]The present problem with international dispute settlement, and with emphasis to the law of the sea, is not the means of dispute resolution but instead is the mere reluctance of states to utilize them.

If the example of Tribunal is taken, since its inception, though its Registry received many requests for information on the institution of prompt release cases, often cases

[113] Howard S Schiffman*The Dispute Settlement Mechanism of UNCLOS: A Potentially Important Apparatus for Marine Wildlife Management* (1998) 1 (2) JIWLP 293, 306, 1998
[114]David Anderson, *Negotiation and Dispute Settlement" in Malcolm Evans (ed) Remedies in International Law – The Institutional Dilemma,* Hart Publishing, Oxford, 1998, 111, 112, (1998).
[115]United Nations Convention on the Law of the Sea, art 279, Dec 10, 1982, 21 ILM 126.
[116]United Nations Convention on the Law of the Sea, art 280 and 281, Dec 10, 1982, 21 ILM 126.
[117]United Nations Convention on the Law of the Sea, art 282, Dec 10, 1982, 21 ILM 126.
[118]United Nations Convention on the Law of the Sea, arts 283, Dec 10, 1982, 21 ILM 126.
[119]Eric A Posner and John C Yoo, *A Theory of International Adjudication* , INTERNATIONAL LEGAL STUDIES WORKING PAPER SERIES, PAPER 1, (2005)

were not brought to the Tribunal, as "negotiations between parties had proved successful."[120]

In certain scenario Resolution of disputes through Arbitration is a much moveable option for the states.It is because the non-legal political or technical disputes are dealt with proper care by means of arbitration. Nevertheless, the reluctance of states to utilize formal dispute settlement mechanisms also extends to arbitration, perhaps sometimes to a greater degree than adjudication. This is probably because there is an alleged confusion about the role of arbitration, whether it is negotiatory or adjudicatory.[121] Arbitration is also observed as a mere supportive dispute resolution mechanism rather than a fundamental one. Though in many treaties, arbitration is the preferred form of settlementmachinery in an event of dispute, but it has not been in much practice by the states. The continued reluctance of states to utilize the dispute settlement procedures can significantly ruin the prospects of dispute settlement to play a role in oceans governance.

## Limitations and Optional exceptions to Compulsory Dispute Settlement Procedures

The disputes in the inter-state arena are generally resolved amicably by the way of negotiations but where, however, states have been unable to peacefully resolve their disputes and no other procedure for resolution of the dispute has otherwise been agreed upon then, under Section 2 of Part XV, they are obliged to submit their dispute to either the International Tribunal for the Law of the Sea, the International Court of Justice, an Arbitral Tribunal established pursuant to Annex VII or a special Arbitral Tribunal established pursuant to Annex VIII.[122] The choice of tribunal will depend on prior declarations made by the parties, and when no common choice is agreed then Annex VII arbitration is the default position.[123] In other words, an Annex VII arbitral tribunal is the norm unless states have agreed otherwise. The court or tribunal so chosen has jurisdiction over any dispute concerning

[120]Judge Dolliver Nelson, *PresIdent of ITLOS (Statement on the Report of the Tribunal at the Fifteenth Meeting of States Parties to the Convention on the Law of the Sea*, *New York*, (June 16 2005).
[121]J L Simpson and Hazel Fox, *International Arbitration: Law and Practice*, Stevens, London, 1959.
[122] Rosemary, *Supra* note 13, at 650
[123]United Nations Convention on the Law of the Sea, arts 286 and 287, Dec 10, 1982, 21 ILM 126.

the interpretation or application of UNCLOS, or of any other international agreement related to the purposes of UNCLOS where the parties so agree, subject to a number of exceptions set out in Section 3of Part XV.[124]

Broadly speaking, these exceptions relate to the exercise by coastal states of their sovereign rights within the exclusive economic zone (EEZ) relating to conservation and management of living resources and the conduct of marine scientific research.[125] States are also at liberty to make declarations exempting disputes relating to maritime boundary delimitation, historic bays or titles, military activities, law enforcement activities, or disputes in respect of which the United Nations Security Council is exercising its functions, from the compulsory regime.[126]

The limitations and exceptions to the operation of the compulsory dispute settlement procedures under the Convention are few in number.[127] The acceptance of the provisions on dispute settlement by many participants at UNCLOS III was conditional upon the inclusion of certain exceptions to the operation of the compulsory dispute settlement machinery. These limitations are noteworthy not only because they played an vital role in the widespread acceptability of the "package deal" that the Law of the Sea Convention is, but also because they restrict the scope of the dispute settlement mechanisms of the Convention, and hence curtail their chances to help the oceans governance regime. It is true that the possibility of the dispute settlement mechanisms under the Convention has been limited considerably by the limitation and optional exceptions, and these have been deeply criticised.It is also contended that since the LOSC "*is a complex document, embodying many ambiguous compromises, some conflicting provisions and quite a few clauses requiring further elaboration in the future*",[128] the odds of inter-state misunderstandings and disputes regarding the seascontinue to be on the rise. Therefore, if states were to change their present attitude towards third-party dispute settlement and invoke the procedures under Part XV

[124]United Nations Convention on the Law of the Sea, arts 286 and 287 Dec 10, 1982, 21 ILM 126.
[125]United Nations Convention on the Law of the Sea, art 297, Dec 10, 1982, 21 ILM 126.
[126]United Nations Convention on the Law of the Sea, art 298, Dec 10, 1982, 21 ILM 126.
[127]John King Gamble Jr*The 1982 UN Convention on the Law of the Sea: Binding Dispute Settlement?*, (1991) 9 B U Intl L J 39.
[128]Jorge R Coquia*Settlement of Disputes in the UN Convention of the Law of the Sea* (1985) 25 (2) Indian J Intl L 171, 188.(1985)

where suitable,[129] the dispute settlement instruments under the Convention would be have a much more prominent role in the future. Had it not been for the exceptions, a wide range of important oceans disputes would be subject to determination under the compulsory dispute settlement procedures. Arguably, being seized of any such major dispute, a dispute settlement body would have been able to have a significant influence on oceans governance. [130]

## A better fututre for International DisputeSettlement in Oceans Governance

Some of the main ways in which dispute settlement under the LOSC can contribute to oceans governance had been identified in part IV of chapter 2. Though a few of the provisions have not been fulfilled so far, them being:

*(i) management of multiple ocean use conflicts,*

*(ii) maritime boundary delimitation,*

*(iii) strengthening of regimes and institutions, and*

*(iv) unification of the substantive legal provisions of the Convention.*[131]

It is anticipated however that in future some of the above mentioned goals would be fulfilled and the dispute resolution would come in the fore front and play a much greater role in ocean governance. It could only be possible if there is an increase in the use of Annexure VII of arbitral tribunals for releasing disputes relating to maritime boundaries.

The use of the residual jurisdiction of ITLOS for expeditious release of disputes and provisional measures would maintain the frequency, however it can be anticipated that as the jurisdiction of SDC is invoked in issues involving ISA and private parties,

[129]P W Birnie, *Legal Techniques of Settling Disputes: The 'Soft Settlement' Approach* in WILLIAM E BUTLER (ED) PERESTROIKA AND INTERNATIONAL LAW (MartinusNijhoff Publishers, Dordrecht, 1990) 177, 191

[130]Anshuman, *Supra* note 99 at 196

[131]Jon M Van Dyke, *Giving Teeth to the Environmental Obligations in the LOS Conventionin* ALEX G OUDE ELFERINK AND DONALD R ROTHWELL (EDS) OCEANS MANAGEMENT IN THE 21ST CENTURY: INSTITUTIONAL FRAMEWORKS AND RESPONSES, 167, 168. (MartinusNijhoff Publishers, Le*Id*en, 2004)

the use of ITLOS would increase. As the commercial exploitation of seabed resources improves and becomes more sustainable, the seabed operations would also increase with it.

As technology develops, the seabed operations too increase which automatically commercial exploitation of seabed resources. The world has become more aware about its surroundings with major world event like both World Wars, Cold War; there is little scope to anticipateany radical change in the attitude of states towards judicial modes of dispute settlement, as possible under Part XV of the Convention. States have always desired to use informal means to resolve their disputes where they can retain maximum control over the outcome of the dispute settlement process. Despite the availability of a wide range of options for the settlement of oceans disputes, states have made little use of them, and therefore third-party adjudication has contributed little to oceans governance.Nevertheless, the international dispute resolution have not seen much of third party adjudication, but looking at the increased scope business opportunity in the oceans, the role of oceans governance has a lot of potential and hence cannot be rulecannot be ruled out in light of its many advantages..

## SOUTH CHINA SEA DISPUTE

## A detailed case study of the South China Sea dispute – China's claim over historic water in the SCS region, dispute over jurisdictional rights over Spratly Islands, Paracel Islands, etc.

Nations have conflicts amongst themselves in lieu of a variety of subject matters. One such are is claiming of jurisdiction over the sea or the islands present therein. To deal with such conflicting claims of jurisdiction by nations what came into picture was the United Nations Convention on the Law of the Sea, 1982. The United Nations Convention on the Law of the Seas, 1982 lays down several provisions for settlement of issues or tensions arising between nations in the context of the sea areas, lands etc. The UNCLOS provides for one of the most sophisticated methods of dispute settlement. The interpretation or application of any provision of UNCLOS is very important in the sense that where any dispute arises between member states with respect to the above two, then UNCLOS provides for compulsory procedures laying down binding decisions on the states. A member state is free to choose from the options available under the UNCLOS to take it's issues for settlement such as the International Court of Justice, the International Tribunal for the Law of the Sea etc.[132]

Part XV, of the United Nations Convention on the Law of the Sea, 1982[133], deals with the settlement of disputes with respect to any dispute arising between nations in context of law of the seas. To elaborate on some of the important provisions of the UNCLOS are as follows- Part XV lays down several provisions that elaborately discuss about the dispute settlement. This part of UNCLOS is primarily divided into 3 categories – the first deals with the general provisions from Article 279 – 285,[134] the second deals with procedures and choice or mode of settlement of dispute by the parties, and the binding decisions henceforth, the provisions for which are accordingly

[132]Tara Davenport,*The Dispute Settlement System of the United Nations Convention on the Law of the Sea: An Assessment after 20 Years*, American Society of International Law, 2 https://www.asil.org/blogs/dispute-settlement-system-united-nations-convention-law-sea-assessment-after-20-years, ( Last updated on April 13, 2014 9:45pm)
[133] United Nations Convention on the Law of the Sea, art 287 Dec 10, 1982, 21 ILM 126
[134]*Id.*

laid down in Article 286 – 296[135]and the third deals with certain limitations and exceptions, the provisions of this part are laid down in Article 297 - 299."

## Background of the South China Sea Dispute

The South China Sea dispute is with respect to jurisdictional rights over this huge area by several countries. This particular area is very important for the growth of economy and trade of the surrounding states, as it provides an extremely suitable medium for shipping of variety of goods, etc. Not only this, but the South China Sea area is very rich in resources itself for example oil, natural gas and fisheries. Many countries which surround the disputed large area of South China Sea claim jurisdictional rights over certain abundantly rich islands in this area and natural resources available. Due to this there have ensued fights with regards to territorial rights of nations. In this case territorial rights over the Paracel islands in the northern part of the sea and the Spartly islands in the southern part of the sea have been claimed by the countries namely China, Philippines, Taiwan, Vietnam, Brunei, and Malaysia. Now all these nations claim sovereignty rights over the islands and the natural resources available in the South China Sea area.

"China, through its *"nine-dash line"* map and many statements, has claimed at the very least sovereignty over all the islands and rocks in the South China Sea and rights over the adjacent waters. There have been several issues with neighbouring states who are claiming such territorial rights over such sea water areas and islands. The claims made by the other five nations are conflicting in nature. As a result of their over-lapping interests the matter does not seem to become any better. Over the years the matter has intensified more. Thus it has also put a severe impact on the internal and external security of all these nations."[136]

The sovereign rights or the territorial rights claimed by the several countries areconflicting in nature.

[135] *Id.*
[136] Paul Gewirtz, *Limits of Law in the South China Sea* , EAST ASIAN POLICY STUDIES, 13, (May 8, 2016) https://www.brookings.edu/wp-content/uploads/2016/07/Limits-of-Law-in-the-South-China-Sea-2.pdf

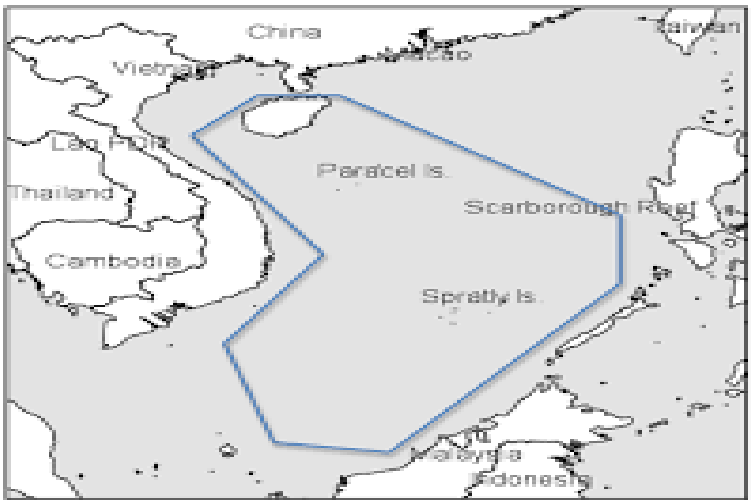
China expressly stated that she had historical territorial rights over the South China Sea area. China has further validated these jurisdictional claims by backing the same by documents and imperial maps left behind by the *Ming dynasty*.

In the recent times whatever laws or policies have been laid down in lieu of the economic condition or maritime rights of China, they have been such keeping in mind and giving importance to the South China Sea area. In whichever ways China could benefit from it has remained the main agenda. It has thus majorly affected the maritime laws of China. Keeping in mind the perks that will work as advantages to China's economic and geo-political conditions certain provisions have been accordingly laid down.

Thus, the Law of the People's Republic of China on the Exclusive Economic Zone and the Continental Shelf (1998) stated that "the provisions in this Law shall not affect the historic rights enjoyed by China. In 2008, China Marine Surveillance began to conduct 'regular maritime patrols' in these waters. In 2009, China submitted a diplomatic note protesting against the counter claims made by Vietnam and Malaysia to the United Nations Commission on the Limits of the Continental Shelf, with a map of the SCS attached to it.[137]

[137]AbhishekPratap Singh, *South China Sea Arbitration: An Analysis*, INSTITUTE FOR DEFENCE STUDIES AND ANALYSES, 1, (May 13, 2016),http://www.*Id*sa.in/*Id*sacomments/south-china-sea-arbitration-an-analysis_apsingh_130516

## A graphical representation of the South China Sea Dispute




## The importance of the South China Sea Area

This is plays a vital role in world geography. The neighbouring states nearby the South China Sea area are greatly affected by it. With the rise of this severe issue and countries claiming territorial rights, how their own national interests will be impacted is the question of the hour. The resolution of the South China Sea dispute majorly depends on the national and international interests of the nations who are affected by the same.

This region is of great importance economically, commercially and politically to all the nations surrounding it. Since a very long period of time it has had geo-political importance, which lasts till date. It has very efficiently acted as a mode of carrying out trade and commerce amongst many nations around the world, and this comprises of nations in the European region, Asian countries etc. It is to be noted that the South China Sea area played a pivotal role during the World War II, as it served as a military force base for Japan. At that point of time it held strategic importance of its own. Besides that this huge area is abundant in natural resources. The South China Sea dispute primarily throws light on two points, the first being the converging jurisdiction claims and second the ever disputed territorial issues over the group of islands in this area.

## Geographical and strategic importance of the South China Sea area (political and military)

South China Sea is located in the Pacific Ocean zone and stretches to about 3,500,000 square kilometre. More specifically it is situated to the south of China, east of Vietnam and Malaysia, west of Philippines and extends to the Strait of Malacca. This area comprises of a group of islands which include the Paracel islands, Spartly islands, Pratas islands, Scarborough islands etc. These are of utmost importance to all the surrounding countries because of their geographic strategic location.

Further the South China Sea area is very important as it contributes near about 45-55% of the global sea route trade, from different countries all over the globe. Not only this but this area is full of resources be it living or non-living. It acts as a homeland for various natural gas, petroleum and minerals. Besides this it is also home to a plethora of aquatic flora and fauna. This area is one of the largest producers of natural

fisheries or seafood all over the world. It supplies about 12 – 15% of the total seafood annually available in the markets worldwide. For the people in the neighbouring countries of China, Vietnam, Philippines etc the marine flora and fauna form a good mode of occupation, and by way of this all these nations hugely amount to their as well as global fisheries resources.

The analysis of the South China Sea area's geopolitical importance is extremely essential. This area ever since the World War II, has served as an important zone of political and military importance. There are several reasons for China's dominance over this area over the years till date. China in the present times is one the most powerful nations from every aspect be it economic, political or military etc. If the South China Sea area gets dominated by the Chinese government then it would lead to the Republic of China becoming undisputedly strong. With this the Chinese government can strengthen its defence forces immensely, and it could also achieve sky-high limits in context of internal and global trade and economy. With the possible advent of this happening and China probably becoming a super power, the USA strikes to keep a balance by time and again with the other small neighbouring countries, make efforts or take steps to check China's jurisdictional dominance over the South China Sea area.

The South China Sea zone has acted as a military zone with the commencement of the World War II. It acted as a strategic base camp for the Japanese naval forces during the attack of the USA on the Hiroshima and Nagasaki areas of Japan, respectively. Since then till 2016 it continues to be one of the most vital areas in respect of military bases. The USA has several joint defence or military bases in this area. Other nations such as Japan, South Korea, Vietnam, Philippines, Indiaetc have their joint military bases in this particular area. Therefore the US government has to regularly keep an eye the Chinese activities in the South China Sea are.

Besides the USA – China ongoing tensions with respect to the South China Sea area, the neighbouring countries of Japan, Philippines, Vietnam, Malaysia and Indonesia have their own internal interest in the South China Sea zone. Furthermore, Japan, Philippines and Vietnam have become "strategic partners" on the South China Sea area dispute. All the three nations have signed this joint declaration in respect of the South China Sea. In lieu of the strategic partners joint declaration project, Japan and

Philippines have also successfully initiated their very first joint naval manoeuvre in the South China Sea.

China claims a majority percentage of jurisdictional rights over the South China Sea islands, and by de facto it controls a very large part of this area. The main political objective of China is to continue it's status quo or dominance over the South China Sea are. China already has to tackle the issues advented by the US, besides that it has disputes with Japan, Taiwan and Philippines in lieu of the Spartly and Paracel islands. These are some of the majoe reasons China wants to establish a very strong position over the neighbouring nations with respect to the rights and usage of the South China Sea area. As a result of so much of the ensuing tension China is also trying to establish a very strong and combatful defence system in order to maintain its dominance over the South China Sea area.[138]

To discuss the military importance of this area is as follows ; going back in time to the World War II, the South China Sea zone was used as a base for deploying naval forces by both the US and Japan, and since then it has continued to remain as a strategically important place for the defence system of neighbouring countries to sustain. Then again at the time of the Vietnam war in the year 1972, the US led naval forces conducted some mining mission in the South China Sea area. However if it is to be analysed that over the years because of these two major happening it has affected the geographical land or islands in the South China Sea zone. It was just for the naval forces to have worked efficiently in this area.

There have been two maritime campaigns in the past which primarily focussed on acquiring the lands in the South China Sea. The first one was the Battle of the Paracel Islands that occurred on January 19, 1974 between the naval forces of China and their maritime adversaries that was the Vietnam navy. China successfully secured permanent control over the Crescent Group of the Paracel Islands after defeating Vietnamese maritime forces.

The second case was the 1988 Johnson South Reef Skirmish between the People's Liberation Army Navy forces and the Socialist Republic of Vietnam Navy vessels. This naval battle took place in the Spratly Islands on 14 March, 1988. China established its active presence around the Spratly Islands right after the decisive

[138] *Id.*

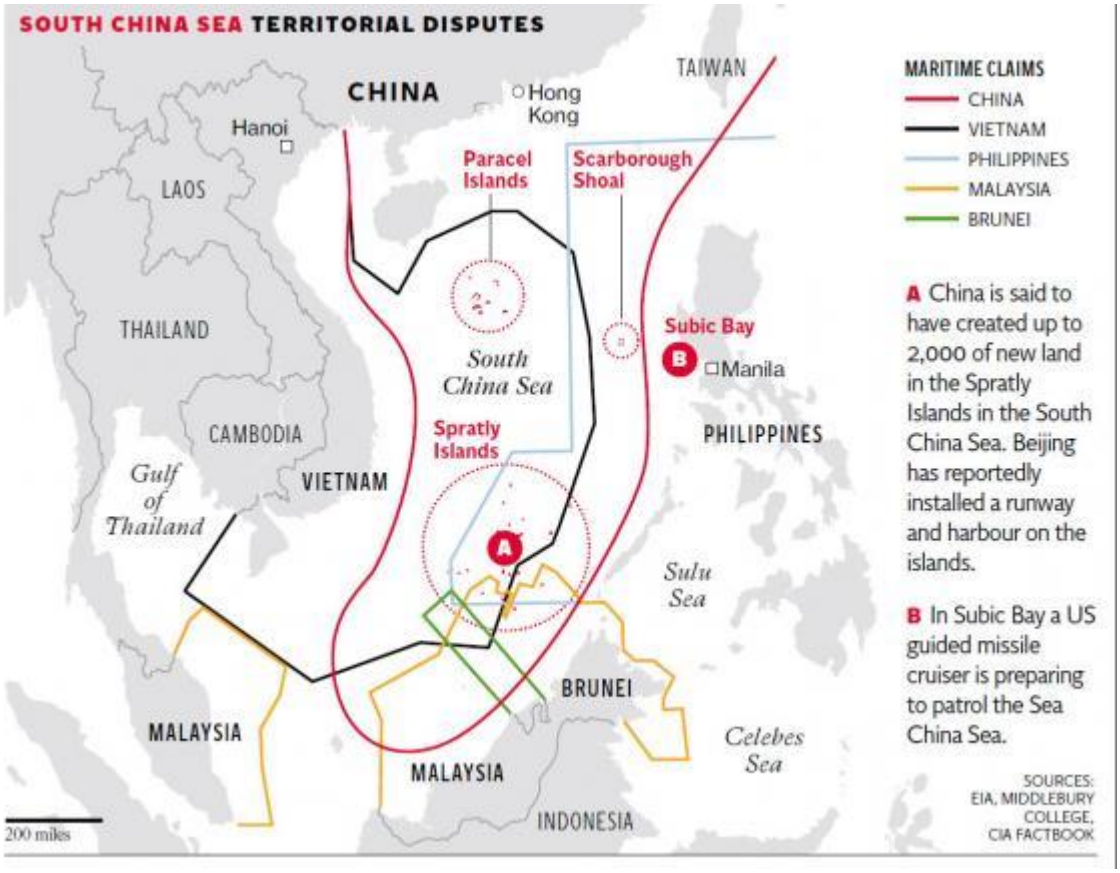
victory from a less than thirty-minute maritime engagement. By the end of 1988, China held six footholds on the land features in the Spratly Islands.

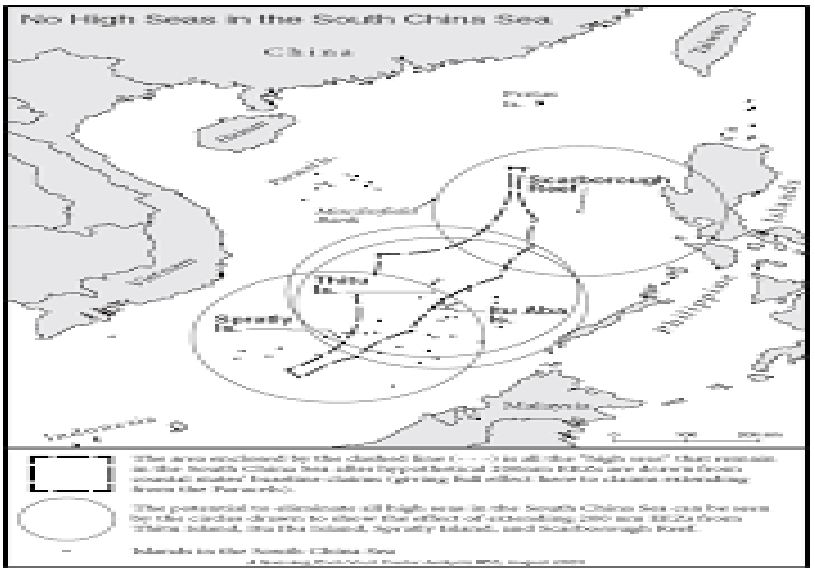
The important point is that freedom of navigation in the South China Sea was never affected by these two naval campaigns specifically targeted on obtaining islands but fought with naval vessels to exclude adversary's maritime presence around these land features.[139]

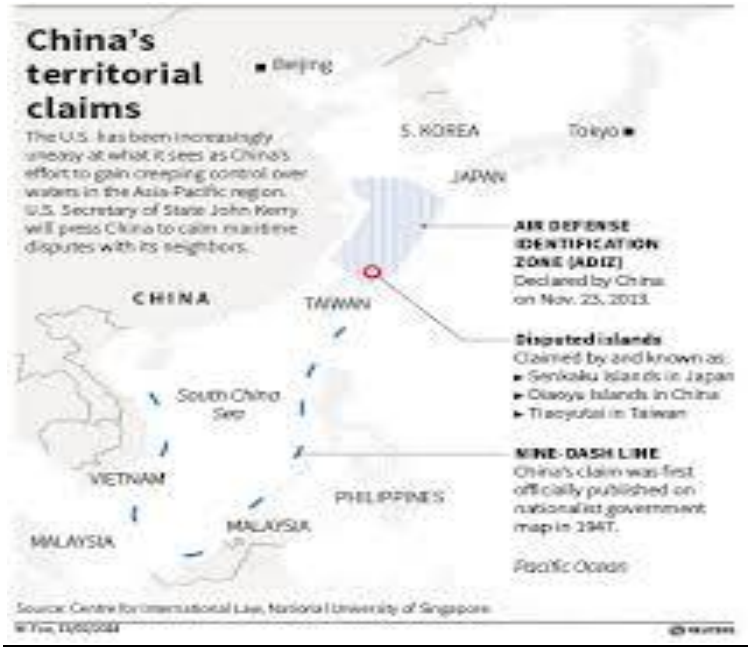
**I**

[139]Ching Chang, *Assessing The Military Significance of The South China Sea Land Features*, CENTER FOR INTERNATIONAL MARITIME SECURITY, 2, (JULY 26, 2016**),**http://cimsec.org/assessing-military-significance-south-china-sea-land-features/26798

**mages that depict the South China Sea Dispute**






## Main issues – overlapping jurisdictional claims and the territorial dispute over groups of mid – ocean islands.

The main issue of the South China Sea deals with the jurisdictional claims and territorial dispute over the group of islands in this disputed area. It majorly deals with the claims over acquiring, imposing dominance or usage of the resources available in these islands in the South China Sea.

China considers that she has had since a very long time traditional rights over the South China Sea. By continuing to influence this area China clearly intends to attain the position of greatest super power giving competition to the western powers, particularly the US.

The South China Sea issue has gained immense limelight over the years. Now the main problem in this case is China's interference and dominance rights over the islands as mentioned above. In this particular dispute China's national interest stands as against that of some other neighbouring Southeast Asian countries such as Philippines, Taiwan, Vietnam, Malaysia etc as to the usage of the South China Sea. The South China Sea provides some the world's most important maritime borders or territories. China has been coercively exercising rights over these areas and this stands against the interests (economic, geographical and political) of the concerned countries. China has in the recent past adhered to several measures which show that she has been imposing greater forceful control over the South China Sea waters.

These water areas have been categorised as international waters, but still China has exercised claims over these. She has done several acts to justify the same, for instance China has seized several small reefs, land formations etc. She has also build up artificial islands on the South China Sea since 2013 for strengthening its military forces. China has also tightened its onshore guards and patrolling and does not allow foreign or non-Chinese ships to enter a particular international water zone in the South China Sea. With all these steps undertaken by China it can be well deduced that she is all set to place her domination over these islands, and her intention is not to strictly abide by the norms of international law, especially that of UNCLOS, 1982 which governs the South China Sea dispute.

The latest development with regards to the South China Sea is that Philippines had challenged China's territorial rights over these islands. It thus took the matter to an international tribunal. Now the tribunal decided in favour Philippines. It was stated that China had threatened Philippines ships and also exercised unwanted control over the same. China also according to its own whims and fancies has gone records to use the South China Sea and the islands present there to enhance its own national interest. As regards the tribunal's decision is considered, China holds it invalid. China was not even present during any of the tribunal's proceedings and further stated that the respective tribunal had no jurisdiction to try the case, and thus ignored the tribunal's decision.

Most importantly in this case, the tribunal has rejected the *nine-dash line claim* by China through which China is exercising her jurisdictional claims over the South China Sea zone.

## What is the concept of nine-dash line used by China to exercise territorial claims over South China Sea?

This little line has shown up on official Chinese maps since the 1940s (it began with 11 dashes). It demarcates a vast but vague stretch of ocean from China's southern coast through most of the South China Sea. China has never clarified the line's exact coordinates. But it sweeps across waters and some small islands that are claimed by five other nations. It seems to go many miles beyond what is allowed under the United Nations treaty on maritime territorial issues, which China signed. These are the areas where China has been building islands, installing runways and running

patrols. For China, the line represents long-lost historical claims that the country, after two centuries of weakness, is finally strong enough to recover. For the other nations, the line is a symbol of what they characterize as a naked power grab by China.[140]

## Why has the South China Sea dispute gained so much prominence?

China's absolute desire to increase its economic power and maintain its status quo over the South China Sea is one of the major reasons why several other countries are disputing it. Due to this case countriessuch as Japan, Philippines, Taiwan, Vietnam, Malaysia etc have by and large become a constant part of this dispute. Now due to China's domination over the South China Sea region it is going to largely affect the sea route. All the countries involved want this zone to be open sea trade route therefore all of them stand against China to acquire territorial claims over this area.

Moreover it is also mainly about China's rise to become global super power. With the US intervening in this matter, for example the particular dispute addressed between China and Philippines, the US involvement was necessary by way of treaty agreement signed between both the nations. And as a result of this the US supports Philippines. The western power gaining strength poses great threat to China. This is completely intolerant by the Chinese government.

## The South China Sea Dispute - effect of the judgement, impact on the ASEAN countries and India's role

The South China Sea Dispute is one of the major issues affecting all the ASEAN countries and many more. With the case filed by Philippines and the judgement thus declared by the respective tribunal, China is not ready to accept the judgement. No doubt this judgement has a very severe impact. It has lead to internal dispute further more amounting to cracks between the strengthening relations of the ASEAN countries.

[140] Max Fisher, *The South China Sea: Explaining the Dispute*, THE NEW YORK TIMES, July 14, 2016

The judgement laid down by the permanent court of arbitration at the Hague, seems to be quite advantageous for Philippines. It is indeed to be treated as a victory. But with this China is not at all satisfies, and ultimately it has resulted in affecting the interests of the member states of this multilateral organisation i.e., ASEAN.

In the late 1990s ASEAN include nations such as Vietnam, Myanmar, Cambodia and Laos. It was done to strengthen ties between nations and also enhance their economic and political conditions. One of the important reasons cited by the ASEAN diplomats is that the membership in this organisation will act as a shield and the countries will not fall in the sphere of influence of China. There have been problems since the time of expansion. As such the objective has not been meted out. What happens in reality is these smaller nations have a major trading relation with China and are protective about the same, and primarily because of this these nations are not able to build strong relations with non-regional powerful countries in order to enhance their trade, economy, welfare and political condition.

The issue of South China Sea has further made the situation more tensing. It has created rifts within the ASEAN framework itself.

China is undoubtedly an economic and political giant in the international forefront. But it is notable on the part of smaller countries such as Philippines and Vietnam (ASEAN) to make a determined claim over their territorial rights in the South China Sea area, and not fully letting China dominate.

To discuss some of the latest developments in the South China Sea Dispute -

"In April 2015 satellite images revealed that China had begun building a large airstrip on reclaimed land on Fiery Cross Reef in the Spratly Islands. China insisted that the airstrip was for civilian purposes, but many were highly sceptical, with fears being expressed that China might impose an 'air defence zone' over the area, as it did over the East China Sea, where it has overlapping claims with Japan, in 2013."[141]

As of in 2016, China's foreign minister made a tour to several South East Asian countries such as Cambodia, Laos, Brunei etc, and during this the main agenda

[141] Unnamed, The South China Sea Dispute: July 2016 update, www.parliament.uk, July 12, 2016, http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7481

discussed was the South China Sea issue. There were further discussions on enhancing the political and economic ties amongst China and the other countries. One of the important features discussed during this time was China's "dual-track approach". By way of this concept the territorial disputes are to be solved between China and the South East Asian nations. This approach endorses the handling of disputes bilaterally by the directly affected countries, and the joint maintenance of peace and stability in the South China Sea by both China and ASEAN.[142]

One of the major reasons why China is doing this is to gain support of the neighbouring nations. China wants herself to be backed by these countries so that they will eventually support her in the South China Sea dispute.

"Following the visits, the Chinese foreign ministry published a four-point consensus that Wang claimed was agreed upon with his counterparts in Brunei, Cambodia and Laos. The consensus stated that, first, disputes over the Spratly islands are not an ASEAN–China issue and should not have any implications on China–ASEAN relations. Second, every sovereign state is free to choose their own way to resolve rows and no unilateral decision can be imposed on them. Third, dialogues and consultations under Article 4 of the DOC are the best way to solve the South China Sea disputes. Fourth, China and ASEAN together can effectively maintain peace and security in the region."[143]

Further the situation becomes more tensing. Because of the above mentioned points, it certainly marks a striking difference in objectives of the countries part of the ASEAN. Some of the countries are claiming their rights over the usage of the South China Sea and there are others who support China, because she provides them with several aids to develop their overall economic welfare.

After the decision was given by the arbitration tribunal in the Hague – China's claim over the South China Sea region by way of its "nine-dash line" concept was held invalid by the tribunal. This concept as such is not recognised by the UNCLOS. The decision was not only victorious for Philippines but also for some other countries who were claiming usage of this disputed area, especially the ones who were claiming their

[142]SampaKundu, China divides *ASEAN in the South China Sea, East Asia Forum,* May 21, 2016, http://www.eastasiaforum.org/2016/05/21/china-divides- asean-in- the-south- china-sea/
[143]*Id.*

rights extending 200 nautical miles from their shores to the sea. These countries include Malaysia, Indonesia, Vietnam, and Brunei. Not only this, China was also blamed that she had prevented Philippines to access the usage of this disputed area. And there were charges of environmental pollution as well against China.

The ruling laid down by the tribunal is binding in nature. But China is not willing to abide by it. It has called upon by the U.S., Japan and Australia have called on all the member parties to abide by this ruling. "Since the ruling, China has started up long-range bomber patrols far into the sea, declared new naval exercises and said it would continue its efforts to build up artificial islands in disputed waters. The U.S. has said it will continue flying and sailing military aircraft and vessels across the sea to assert freedom of navigation rights, a practice that has increased as the dispute has grown. Before the ruling, France called on Europe to enter the fray by sending ships to assert freedom of navigation. Onlookers are watching to see if China moves to declare an Air Defense Identification Zone in an attempt to regulate air traffic over the area. Some $5 billion in trade passes through the waters each year."[144]

As discussed above, due to the mentioned reasons it has therefore led to dispute between the ASEAN member nations.

India's role in the South China Sea Dispute – India's major concern with this regard is her own national interest. The main reason behind this is maintaining peaceful relations with China and as well to maintain free and hassle-free trade route through the South China Sea. "Like Russia, India is getting involved in the South China Seas issue as neutral parties. The foreign ministers of China, Russia and India recently released a trilateral communiqué which sent a clear signal that Moscow and New Delhi supports Beijing's position and that the South China Sea dispute should not be internationalized but resolved by the parties concerned bilaterally."[145]

The South China Sea dispute ruling will have a major impact on not only Philippines and China but also several other countries, here in case we will throw some light on

[144]Ben Otto, *5 things about ASEAN and the South China Sea Dispute*, THE WALL STREET JOURNAL, (2016)
[145] Lin Xieyi, *Why is India getting involved in the South China Sea dispute?*, (June 17, 2016) https://www.quora.com/Why-is- India-getting- involved-in- the-South- China-Sea

India. It will have impact on India's security on the national and global front and also affect the economic welfare. "It has been quoted thatIndia has a range of interests in this region like "creation of a 'blue' ocean economy including protection of offshore infrastructure and maritime resources, safety of trade and sea lanes of communication and a regionally favourable geostrategic maritime-position."[146]

The PCA ruled that the general obligation in Article 192 of the United Nations Convention on the Law of the Sea (UNCLOS) requires that States "ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control."

"The ruling is of utmost significance to India. With the PCA negating Chinese claims over South China Sea, Indian naval warships can now move through the region under UNCLOS without informing the Chinese. The Chinese, by claiming 80 per cent of South China Sea, have been asking India to notify Beijing of movement of Indian warships through those shipping lanes. The Chinese navy started conveying its intention by mild harassment of the Indian warships passing through those waters. In July 2011, an Indian navy ship INS Airawat passing through the South China Sea, allegedly got into a confrontation with Chinese naval ships which claimed that the Indian vessel was in Chinese waters."[147]

Therefore, it can be concluded that for the development of overall economic, political and social condition of India the South China Sea dispute plays an essential role. Moreover for a positive boom in India's present status in the international market getting to use the South China Sea is crucial. India also needs to maintain her relations with the South East Asian countries and giants like the U.S., Japan etc. At the same time it need to done on a parallel footing with China.

Thus all these points are to be kept in mind and India must accordingly plan its measures and policies keeping in mind to what extent the South China Sea issue will affect it.

[146]IndraniBagchi, *South China Sea ruling will affect India's economic interest*, THE TIMES OF INDIA, (July 12, 2016)
[147]Sushant Singh, *South China Sea Judgement: Here's how it matters to India*, THE INDIAN EXPRESS, (July 13, 2016).

## How is the International Dispute Settlement Regime helpful in resolving conflicts?

## State's choice of Process for Dispute Settlement

There is a general understanding amongst the nations that the disputes concerning the interpretation of the convention as well as its application should be settled by peaceful means. In accordance to the provisions of UNCLOS and the customary principles established in international law, it is agreed that peaceful settlements by the nations are supposed to involve, firstly through the procedures mutually accepted by the parties of a dispute. For this purpose the convention states that nothing established under it would "impair the right of any State Parties to agree at any time to settle a dispute between them concerning interpretation or application of this Convention by any peaceful means of their own choice."[148] Though this is a novel thought to not impose settlement procedures. It was included with the thought to respect a States' Sovereign choice. But this provision has attracted some criticism from the international community. There was a consensus in a conference that, where the states are not able to settle disputes through the means of their choice, due to their being a lack of consensus between the parties regarding the choice of procedure. They then should be obliged to submit to the settlement of disputes by some mechanisms, which are established internationally.[149]

The convention goes all out to eliminate any ambiguity and to cover all possibilities regarding disputes. Therefore, the convention established an effectual 'two-tier' system of judicial settlement. Part XV of UNCLOS consists of 3 sections. Section 1 deals with the fundamental principles concerning dispute settlement, they settle disputes through the traditional international law procedures, which are based on mutual agreement of parties to the disputes. While section 2 deals with specific procedures which entail compulsory procedures to be followed in cases where parties are not forthcoming with a mutual agreement, these give binding decisions. Whereas, section 3 deals with limitations and exceptions to the applicability of the "mandatory" provisions set out by section 2.

[148] United Nations Convention on the Law of the Sea, art 280, Dec 10, 1982, 21 ILM 1261.
[149] *Id.*

Furthermore, subject to the limitations and exceptions set by section 3 for procedures of section 2, all disputes that cannot reach settlement by the recourse available in section 1, such parties can submit a request to a court or tribunal having jurisdiction under section 2.[150]

Therefore, the compulsory dispute resolution procedures that are detailed in section 2 are of a subsidiary nature, meaning the parties first have to attempt to resolve these disputes through procedures detailed in section 1. If they fail to do so, or are unable to reach a conclusive understanding only then should the provisions of section 2 should be followed. Therefore, it does not put a compulsion the States at first. This principle is also mirrored in Article 298 which gives the parties rights to exclude the sea boundary delimitation disputes from the applicability of section 2 without affecting the obligations set under section 1.[151] Only if parties cannot come to a settlement under section 1 can they proceed with the dispute under the court or tribunal having jurisdiction under section 2. Article 287 provides a choice between four forums for dispute settlement, them being:

a. the International Tribunal for the Law of the Sea (ITLOS)

b. the International Court of Justice (ICJ)

c. an arbitral tribunal constituted in accordance with Annex VII to UNCLOS

d. a special arbitral tribunal constituted in accordance with Annex VIII to UNCLOS.[152]

This flexible procedure structure made for dispute settlement is the result of the member States to be able to agree on any one third-party forum to which parties of a dispute could turn to if informal dispute resolutions failed.[153] It was debated and decided in the third UNCLOS. This Article reflects the need of UNCLOS to establish balance between the freedom of the States to be able to choose a settlement procedure and the need to reach a settlement which is binding in regard of the subject of the dispute. A State is free to choose one or more of the means given by a written

[150]United Nations Convention on the Law of the Sea, arts 286, Dec 10, 1982, 21 ILM 126.
[151]*Id.* At 280
[152]Mensah, *Supra* note 65 at 16
[153] John E Noyes, *The International Tribunal for the Law of the Sea,* 32 CORNELL INTERNATIONAL LAW JOURNAL 109, 119,(1998).

declaration while sinning, acceding or ratifying to UNCLOS or any time afterwards.[154]

This flexibility in UNCLOS may be beneficial in most cases as it creates a balance. Though, it does not work always and creates problems of ambiguity sometimes. Also, certain forums mentioned like ICJ take a lot of time and are very expensive which proves disadvantageous for under developed or developing nations.

## Compulsory Dispute Settlement

The compulsory dispute settlement regime of UNCLOS is criticized by a lot of international scholars. The question of whether or in what way has this contributed in the settlement of disputes.

When we look at the number of cases resolved by the tribunal, there have been 6 cases which were brought under compulsory dispute resolution under part XV. Out of which ITLOS resolved 4 cases, declined jurisdiction in 1 case and one case was settled even before the tribunal got to hear the case. ITLOS has generally resolved cases under its jurisdiction in a prompt and expeditious manner. However, the number of cases actually resolved is actually quite low and it is not clear whether the number of expeditious proceedings would increase. It is believed that as the tribunal refines the parameters of reasonableness of bond, it is anticipated that the number of expeditious releases of applications would drop in the future.

The provisional measures provided by Article 290 have had mixed results. Till date none of the cases decided by ITLOS have they ever prescribed the provisional measures. Nonetheless, they have prescribed in every case the measures which they appreciated to be what was needed and have basically ordered the parties to corporate amongst each other. Only in one case called *MV Saiga case* has there been a hearing of the dispute on the merits of the case. Over more, the Straits of Johor case is still pending in with the tribunal. It is argued that due to the application of the prescription of provisional measures instead of merit discussions have forced parties to return to negotiating. Hence, it could be said that the proceedings have not provided an actual

[154]United Nations Convention on the Law of the Sea, art 287 Dec 10, 1982, 21 ILM 126.

resolution of the dispute, as it is irrelevant that the parties have eventually resolved the dispute themselves. This shows the ineffectiveness of the tribunal. It is a fact that not many cases have arisen in the recent years pertaining to the compulsory dispute settlement under part XV, though the cases that do arise in front of the tribunal are relived promptly and expeditiously.

It is essential to note that quantity wise the track record of the tribunal may be impressive, but the qualitative record is more disappointing. For example in the case of Southern Blue fin Tuna Case the award given simply placed a large range of disputes outside the preview of Part XV.

The prompt release of cases has resulted in a decline of reasonability of bonds. These decisions are also criticized for not taking account of non-economic values like conservation of living resources. The tribunal needs to look deeper into the issues at hand, should way the merits of the case, way the odds and properly pass an award relating the issue to a proper solution. Disposing of cases quickly is not that important as it is important to resolve disputes and issues reasonable and giving due considerations to the resultant issues that may arise.

It is still early to comment on the compulsory dispute settlement provisions of UNCLOS as it is still developing. At present there exists the “litigation habit” by which the states utilize Part XV procedures in a provisional measure to attempt to influence their negotiations with the other parties.

The past of compulsory dispute resolution is affective in some ways. However, its future is not that bright either. It is either due to the procedures and institutions established or due to development of the law in the wake of UNCLOS. The implication of this would result in states finding creative outlets, so their disputes do not fall under the ambit of Part XV’s compulsory settlement regime. As it is that there are a limited number of members who have accepted the jurisdiction of ITLOS. If ITLOS keeps finding issues with its own jurisdiction and as its ambit decreases it would end up being a white elephant it was initially criticized of being. Hence, it is important for ITLOS to change its approach towards prompt release of cases and focus on giving out substantial awards.

Therefore, it is suggested that the ITLOS needs a radical change in its outlook towards prompt releases and work on going into the merits of the cases that come into its jurisdiction. Also, there is an ardent need to increase the scope of its jurisdiction and the types of cases it can deal with for the betterment of the ITLOS. It is also necessary for keeping the compulsory dispute resolution functional and useful in the years to come ahead.

## Speedy Justice

Though no one can stop certain unforeseen delays, the tribunal places a great importance on dealing with the release of applications promptly and in expedient manner. The rules laid down in UNCLOS along with complementary texts of the resolution on internal judicial practices and the Guidelines given for the preparation and presentation of cases. These clearly state the obvious intention of the Tribunal to proceed with the cases in an expedited manner. Article 112(1) of the rules state that :

*"The Tribunal shall give priority to applications for release of vessels or crews over all other proceedings before the Tribunal. However, if the Tribunal is seized of an application for release of a vessel or its crew and of a request for the prescription of provisional measures, it shall take the necessary measures to ensure that both the application and the request are dealt with without delay."*[155]

It is clear from the above provision that the Tribunal has the highest regard for the prompt disposal of cases before it. Even if faced by a provisional measures case, the tribunal deals with both without there being any delay in the proceedings. It is commendable to note the dedication of the Tribunal for the disposal of cases in a prompt manner. One of the most amazing characterizes of the Tribunal is its expediency, especially the cases involving the prompt release of the disputed vessels. As it is said that *"salutary feature of its jurisprudence is the deliberate speed with which its delivers its decisions."*[156] It dispenses speedy justice in minor international disputes. The Tribunal also emphasis on the elementary considerations of humanity, as well as the due process of law without any unnecessary delays.[157] The maximum

[155] Article 112(1) of the Rules of the Tribunal
[156] Bernard Oxman and Vincent P Bantz, *The 'Grand Prince* (Belize v. France)" (2002) 96 AJIL 219
[157] Ted L McDorman ,*An Overview of International Fisheries Disputes and the International Tribunal for the Law of the Sea*, 40 Can YIL 119, 146, (2002).

time the ITLOS takes to release cases is a mere 30 days. Here is a list of cases dealt by the Tribunal:

| Sl. No. | Name of the Case | Type of Case | Applicant | Respondent | Date of Application | Date of Judgment | Time Spent on ITLOS Docket |
|---|---|---|---|---|---|---|---|
| 1. | *The "M/V Saiga" Case* | Prompt Release | Saint Vincent and the Grenadines | Guinea | 13/11/1997 | 04/12/1997 | 21 Days |
| 2. | *The "M/V Saiga" (No 2) Case* | Provisional Measures | Saint Vincent and the Grenadines | Guinea | 13/01/1998 | 11/03/1998 | 57 Days |
| 3. | *Southern Bulefin Tuna Case* | Provisional Measures | New Zealand & Australia | Japan | 30/07/1999 | 27/08/1999 | 28 Days |
| 4. | *The "Camouco" Case* | Prompt Release | Panama | France | 17/01/2000 | 07/02/2000 | 21 Days |
| 5. | *The "Monte Confurco" Case* | Prompt Release | Seychelles | France | 27/11/2000 | 18/12/2000 | 21 Days |
| 6. | *The "Grand Prince" Case* | Prompt Release | Belize | France | 21/03/2001 | 20/04/2001 | 30 Days |
| 7. | *The MOX Plant Case* | Provisional Measures | Ireland | United Kingdom | 09/11/2001 | 03/12/2001 | 24 Days |
| 8. | *The "Volga" Case* | Prompt Release | Russia | Australia | 02/12/2002 | 23/12/2002 | 21 Days |
| 9. | *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor* | Provisional Measures | Malaysia | Singapore | 05/09/2003 | 08/10/2003 | 33 Days |
| 10. | *The "Juno Trader" Case* | Prompt Release | Saint Vincent and the Grenadines | Guinea-Bissau | 18/11/2004 | 18/12/2004 | 30 Days |

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It is clear that except two cases that took 30 days the Tribunal has successfully completed its duty in a prompt manner giving it an utmost priority. The Tribunal has promoted international peace and security by encouraging peaceful settlements amongst its member states and working with them towards a final settlement beneficial for both parties. It is safe to conclude thus, that the role of ITLOS has portrayed a constructive part in the international relations over the Oceans.[159]

These prompt releases of cases are intended to provide interim relief and are generally not concerned with merits. As they are only interlocutory in nature, they do not influence state policies. Therefore, the effect of these expeditious proceedings though constructive, has not had much consequence in the governance of the Oceans. So, the negative aspects of Part XV have not yet done any actual harm. Though they are,

[158] Anshuman, *Supra* note 99 at 199

[159] Joseph Akl, *Question of Time-Limits in Urgent Proceedings before the Tribunal in* M H NORDQUIST AND J N MOORE (EDS) CURRENT MARINE ENVIRONMENTAL ISSUES AND THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA, 75, 77 (Kluwer Law International, The Hague, 2001)

indeed present there. It is suggested that such elements should be looked into before they do any harm to State relations. Though, the lack of these provisional certainties can be seen in the South China Sea case, as the Tribunal has failed to be useful in that aspect[160].

## Developing countries and ITLOS

As a permanent international judicial body, ITLOS is an *"institutional mechanism for the stability, integrity and viability of the international legal order over the seas and oceans"*[161] Hence ITLOS plays an important role to play in the law of the sea and ocean governance. Large part of the world is still constituted of "developing countries", some of them are land locked but many of them use huge areas of the ocean space. As developing countries are usually burdened with lack of human and financial resources, hence face many challenges in the way towards sustainable development. For such States sustainable ocean governance is a question of capacity to implement. Even if the political leaders enact laws it is difficult to enforce them due to lack of resources. [162]

ITLOS is doing its bit in helping theses countries to empower themselves so as they are able to contribute towards better Ocean Governance. It is beneficial to note that the support that the Tribunal provides to these developing nations goes beyond the mandate of ordinary courts and Tribunals. For developing nations such help is good for capacity building. Not only do the developing countries influence the Oceans to a significant extent but due to their rapidly increasing population they are most likely to be affected by rising sea levels and other such phenomena in the long run. Therefore, the global ocean governance would be beneficial to both ITLOS as well as the developing countries.

The developing nations also played a big part in the establishment of ITLOS as well as in the development of the Laws of the seas. They fought a hard battle for changing

[160] BRIAN J ROTHSCHILD (ED) GLOBAL FISHERIES: PERSPECTIVES FOR THE 1980S, 247, 256, (Springer-Verlag, New York, 1983).
[161] *Id.*
[162] David M Dzidzornu, *Coastal State Obligations and Powers Respecting EEZ Environmental Protection Under Part XII of the UNCLOS: A Descriptive Analysis,* 8 Colo J Intl Envtl L & Poly 283, 287(1997).

old laws. Hence, it is understandable that UNCLOS makes special reference to the developing nations.[163]

A developing country is defined as *"a poor or undeveloped country that is becoming more advanced economically and socially."*[164]

The establishment of an effective system of dispute settlement was an important step in the development of the new world. Borgese has commented on this aspect as *"Developing countries were clearly in the avant-garde of innovation, and the industrialized states in defence of the status quo. It became clear that the new law of the sea that would emerge from UNCLOS III would be a piece of the New International Economic Order (NIEO) which was the aspiration of the new countries."*[165]As an effective dispute settlement procedures are important in avoiding economic, political and military pressures. This is because wealthy nations can apply extra-legal and political pressures the developing nations need to rely on legal channels to get justice. Therefore, compulsory dispute settlement under UNCLOS can serve as an important instrument in diplomacy efforts and also provide a check on the powerful nations.

Though, developing nations and ITLOS have come far in each other's company. It is through the continuous efforts made by the developing nations that UNCLOS and ITLOS are at the position here. The developing nations contribute heavily to the development of ITLOS in the form of monetary contributions, human resource contributions and diplomatic support. In turn developing nations have received continues support from ILTOS. They both have grown in this symbiotic relationship. Though, ITLOS can do more than this, they can extend training and other such assistance to appropriate entities in the developing nations.[166] This would further encourage the developing nations participation in the dispute settlement process. The laws also need to be more sympathetic towards the difficulties faced by such nations.

[163]Gurdip Singh, *United Nations Convention on the Law of the Sea Dispute Settlement Mechanisms* ACADEMIC PUBLICATIONS, NEW DELHI, 3 (1985).
[164] Unnamed, *The Concise Oxford Dictionary of Current English*, 9 ed, Oxford University Press, Oxford, (1995).
[165] John R Stevenson and Bernard H Oxman, *The Future of the United Nations Convention on the Law of the Sea*, 88 AJIL 488, 490, (1994).
[166] International Ocean Institute Training on Ocean Affairs, Business Strategy 2005 - 2008

It is hoped that in future developing nations would participate more in the dispute settlement process of UNCLOS. [167]

The compulsory dispute settlement procedures of UNCLOS are necessary but are not sufficient for good Ocean governance. As little can be achieved without active participation and co-operation amongst nations. As international law is not hard law, it is not very binding without the corporation within the nations on whom it is binding. It is only binding through consent. The full potential of disput settlement is not being realized in its entirety. The nations are still reluctant in utilizing the formal dispute settlement procedures and the limitations and optional exceptions to the compulsory dispute settlement procedures are mainly responcible for this. It leads to a limited role that is being played by dispute settlement so far as noted earlier there are very few cases that come to ITLOS or any other body. This needs to be corrected as the future of dispute settlement would be in jeopardy if it is left to be continued in the way it is right now. Hence, a radical change is needed.

Also, the states need to make more effort as well. The States need to realize the potential of dispute resolution and need to take the opportunity to go for settlement of dispute to such forums. They need to amend the political will of their country to bring relevant disputes to the dispute settlement bodies. It is only fair not to expect remedies for all ocean grievances but it is worthwhile to give an opportunity to try resolving such disputes by the proper forums established.

[167] Judge RüdigerWolfrum, *President of ITLOS (Statement on Agenda Item 75 (a) at the Plenary of the Sixtieth Session of the United Nations General Assembly, New York*, 17 (2005).

## Conclusion

It is difficult to survive without oceans and as the world grows they get more and more crowded, with trade routes, sea passages, etc. To top all that the recent climate changes have predicted a bleak future. Hence, it becomes increasingly important for humankind to govern the Oceans properly and without conflict. It is not good for the nations to play a blame game all states need to work together to govern the Oceans properly.

High hopes were associated with the inception and incorporation of the dispute settlement provisions of UNCLOS. It was said that *"[t]he stability of the new regime for the oceans, which is likely to encompass many novel principles and institutions, will depend to a large extent on the establishment and effective functioning of the [dispute] settlement procedures."*[168]

The peaceful settlement of international disputes is not only an obligation of the nations but it is also in the best interest of the concerned nations as they must follow it if they want to establish an environment where they can grow and develop, especially in the case of territorial issues like the South China sea dispute. The Laws of the Sea Convention regulates all uses of the oceans, even the dispute settlements arising out of interpretations of the convention itself. It is crowned as the 'most important development' in the dispute settlement in the international forum after the UN charter itself. The dispute settlement of UNCLOS provides a legal framework to the States to solve their disputes regarding the LOS. Though, the UNCLOS doesn't deal with issues of sovereign rights on islands directly, it does determine issues relating to boundaries and entitlement of islands and other related maritime disputes. Hence, the dispute of the South China Sea also comes under its ambit.

Hence, the UNCLOS can act as a starting point for the States to peacefully resolve the South China Sea dispute, by giving them fundamental and internationally acceptable legal path to take. To delimitate the maritime boundaries for the disputed islands, the parties to the dispute should enter into provisional agreements which should not hamper their ability to aim for a final agreement.

[168] Louis B Sohn, *Towards a Tribunal for the Oceans*,5-6 REVUE IRANIENNE DES RELATIONS INTERNATIONALES 247, 258 (1975-76).

For a long time now the states involved in the SCS dispute have been looking for a long term solution to the problem regarding the Spratly islands on the basis of UNCLOS. There have been mixed results as for a long time the situation had remained peaceful due to the efforts of the UNCLOS, but the recent refusal of China to adhere to the award given by the ITLOS, the situation presently has become complicated. Though the situation is not yet as tense as it was back in the 1990's, it is not a rosy situation also. If it were not for the collective efforts being made by all the nations the situation would have gotten much worse.

Due to the efforts of various entities the ASEAN countries and China had reached a declaration to normalize the issue. The parties to the declaration had committed themselves to the provisions of UNCLOS. But the recent events have once again disturbed the peace of the area and America as well as India is being greatly affected by it. With the involvement of US, things are anticipated to escalate. The recent issue started as China did not honor the previous tripartite agreement, which gave joint rights of exploration to the three parties. But China disobeying such has developed artificial islands over the area in secrete. The situation has now become tense as the open defiance of China of the UNCLOS agreement has proved UNCLOS quite useless.[169]

At this juncture the eyes of the world are on the dispute settlement of UNCLOS and how it would tackle this dispute. It is the ultimate test of success of the dispute settlement provisions of UNCLOS. [170]

From the previously stated points it may be concluded that it is undeniable that the dispute settlement regime of UNCLOS has merits, but obviously so it also falls short on many accounts as well. The regime is quite flexible as it provides a reasonably wide range of options for the states to pick from for settling their disputes. But it is also comprehensive to an extent that it also insures that its provisions can be enforced by way of mandatory provisions like compulsory dispute resolution so as its results could be binding. It is also 'user-friendly', so as to put it mildly, as it allows and

[169]Dong Manh Nguyen, *Settlement of disputes under the 1982 United Nations Convention on the Law of the Sea The case of the South China Sea dispute*, DEPARTMENT OF INTERNATIONAL LAW AND TREATIES, MINISTRY OF FOREIGN AFFAIRS OF VIETNAM, 7, (Mar 13, 2017), http://www.un.org/depts/los/nippon/unnff_programme_home/fellows_pages/fellows_papers/nguyen_0506_vietnam.pdf

[170]HrvojeHranjsk, *Recent developments surrounding the South China Sea*, FOX NEWS WORLD, January 29, 2017 at 1.

accommodates certain legitimate concerns of the member states who might want to exclude certain 'sensitive national interests' from the scope of compulsory settlements. The UNCLOS compulsory dispute settlement regime was never intended to be comprehensive though, it seems to be more restricted in its scope than originally intended by its makers. A conclusion could also be drawn the perhaps the compulsory dispute resolution is rather ineffective for anything but straightforward and technical disputes. The implementation of the provisions does continue to contribute towards growth of the legal profession; its contribution towards the advancement of the law of the Sea is limited.

The practice of the Tribunal in discounting merits of the case in prompt release of cases is defiantly having a negative impact and is causing uncertainty amongst the states with coast lines. Though, this prompt release is believed to be chiefly beneficial for ocean governance as it advances co-operation amongst disputing nations. Though it has been largely beneficial to the parties its effect in ways of magnitude is really less significant[171].

In total the dispute settlement regime advances the rule of law though it realizes the necessary limits of international law in a world of sovereign nations, who are quite enthusiastic about their sovereign rights and seldom do consider international harmony over their national interest. In a counter view it can be said that the convention does not have enough "teeth" to subject every possible dispute under compulsory dispute settlement. However, international law cannot be rigid for the simple reason that it is a soft law and attains its validity from the disciples it imposes the law upon. As people who form the law are the ones being governed by it, it is acceptable to say that a more radical regime would not have been accepted by the nations taking part in the 1982 convention.

For establishing a stronger role of dispute settlement a few factors must contribute.

- The member states should be willing to use dispute settlement processes to settle their disputes. Hence, enabling in clarifying the grey areas of law that exist.

[171]Anshuman, *Supra* note 99 at 197

- The political entities of the member States should be willing to carry out any award given as a result of dispute settlement.
- The Tribunal must maintain enough credibility with the member States.
- There should be international as well as domestic pressure on the politicians governing the concerned States, to ensure that the decisions given by the dispute settlement bodies are enforced properly.[172]

It is important to ponder upon the possibility that maybe certain radical changes could be made to the convention now, as times have changed and the nations have evolved to become more co-operative. But then again in the light of the recent developments in the SCS dispute, it might not be so. Therefore, until and unless the member nations are willing to make some radical changes in the provisions it is difficult to believe that any change would come forth in the dispute settlement process under UNCLOS.

[172]Rosemary, *Supra*note 13, at 640.

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