Dispute settlement mechanism under the UNCLOS 1982

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The Law of the Sea dispute settlement mechanism is an area of great academic, economic, and political interest where the relationship between public and private law is in full evolution and constantly shows new challenges. Historically, the law of the sea was split between public and private domains. We speak of it mostly in the context of interstate relations, and private issues are often relegated to admiralty or maritime law (addressing liens, injury to seamen, etc.) However, the Law of the Sea travels, the public and private domains, and public international law gradually fused into the national legal system in ways that affect individuals on several issues concerning, for example, safety, navigation, environmental protection, conservation and exploitation of resources, scientific research, and civil and criminal jurisdiction. Also, oil companies are very concerned with the delimitations of maritime zones, and fishing fleets are concerned with rights and obligations in the Exclusive Economic Zone (EEZ). Private activity is often the catalyst for conflicts between States as to rights and obligations on the sea. These conflicts demand methods for dispute settlements, and many were borrowed from national legal systems.

States mostly remain the featured players in these forms of dispute settlement methods. Still, there are some avenues for private actors to engage in as their interests almost always lie behind the interests of State actors. The following means of dispute settlement under the Law of the Sea have flourished since 1994, and key developments and cases will be highlighted: Negotiation, Conciliation, Arbitration, Judicial Settlement, and Commission on the Continental Shelf.

The Law of the Sea Convention (LOSC) seeks to comprehensively regulate virtually all aspects of the law of the seas, set rules on the formation of Baselines and internal waters, and on the seven maritime zones (Internal waters, Territorial Sea, the Contiguous Zone, the EEZ, the Continental Shelf, the High Seas and the Area).

Islands can generate some or all of the maritime zones. Article 121 of the LOSC provides that an "island" is a naturally created form of land above the water at high tide which can generate all maritime zones if it can sustain human habitation and economic life. However, an island that cannot sustain human habitation and economic life on its own is a "rock," which only generates Territorial Seas.

Part XI of the Convention attracted much attention during the negotiations as it provides rules pertaining to the exploitation of the Deep Seabed Area and institutional structures (including a Counsel and an Assembly). Part XII of the Convention sets forth rules for environmental protection of maritime areas. Some of these rules are regarded as a sophisticated environmental law treaty embedded within the LOSC. Since 1994, we have acquired a very detailed set of rules relating to the conduct of State and non-State actors in relation to the seas.

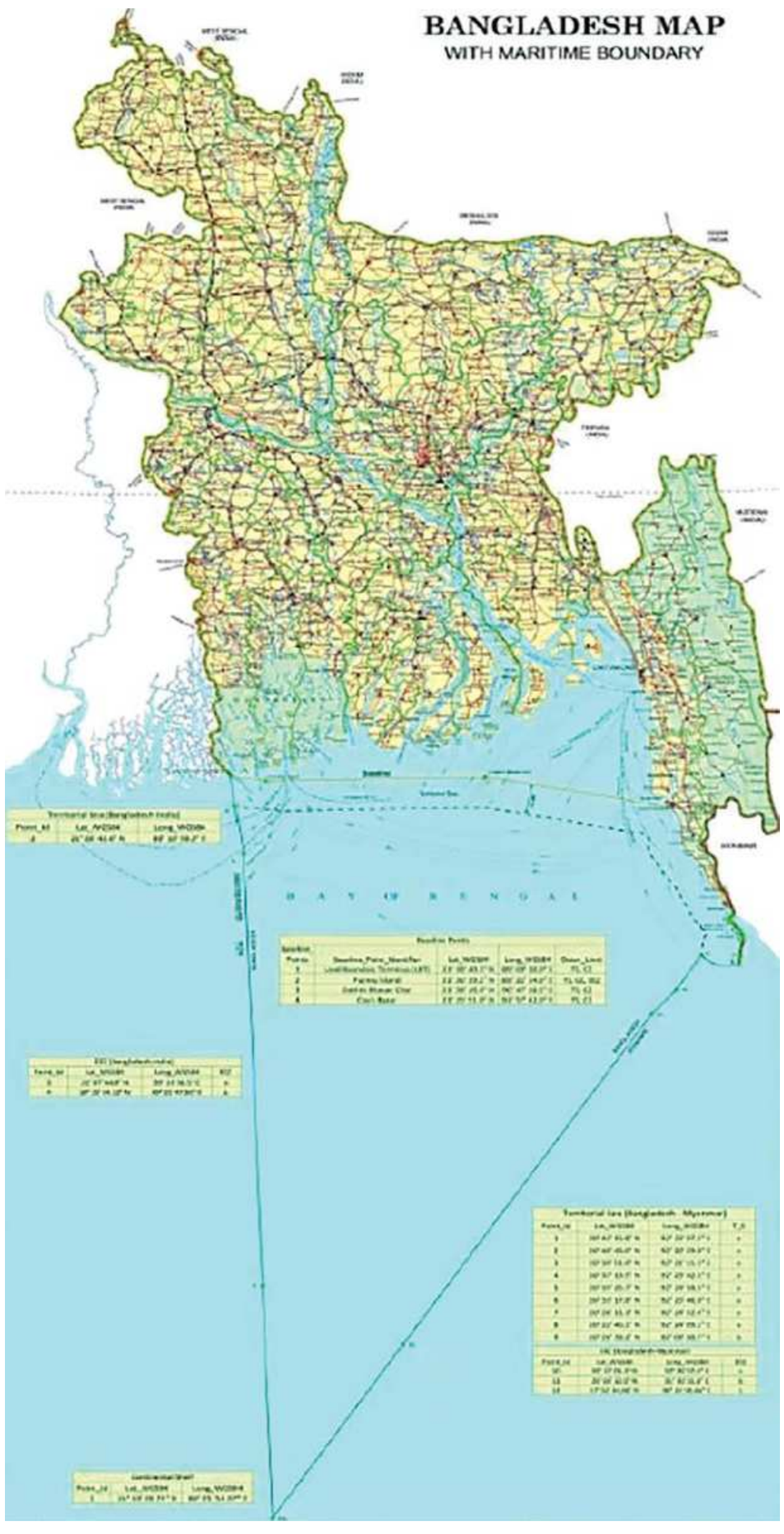
These rules offer a template to evaluate whether conduct is permissible or not. Some of these rules are not very clear, such as the rules on the delimitation of the zones between States. When we refer to the appropriate rules in case of a dispute on the zones, the Convention provides that the process to delimit the EEZ and Continental Shelf "shall be effected by agreement on the basis of international law in order to achieve an equitable solution", which is a fairly indeterminate way of saying that States should get together to reach agreements and be guided by equitable ideas, but does not provide how the delimitation process should go forward. If States cannot reach an agreement through negotiation without a reasonable amount of time, they would then be expected to resort to dispute settlement procedures under the LOSC provided in Part XV of the Convention. Part XV of the Convention establishes a very innovative system for the settlement of disputes. Section One includes non-compulsory dispute procedures and calls upon States to pursue negotiations or conciliation. If these avenues do not solve the dispute, Section Two sets forth the compulsory dispute procedures, which include the International Tribunal for the Law of the Sea (ITLOS) under Annex VI, the International Court of Justice (ICJ), the creation of an Arbitral Tribunal under Annex VII, and the creation of a Special Arbitral Tribunal formed as a panel of experts, not necessarily lawyers, to deal with a dispute arising out of a particular area (e.g. fisheries, marine environment, scientific research, navigation, etc.)

When joining the Convention, new members select one of the four mechanisms set out above. When a dispute arises, and both parties have selected the same mechanism upon joining, they are obligated to use it. When a member has failed to make a selection, it is deemed to have chosen an Arbitral Tribunal under Annex VII by default. When both parties have selected different options upon joining, they are both deemed to have selected an Arbitral Tribunal under Annex VII. In short, arbitration is the default process.

It was considered essential to establish certain automatic and optional carve-outs to the compulsory dispute settlement methods. These are provided for in Part XV and include, inter alia, an automatic exception to compulsory dispute settlement, which prevents one from challenging the determination of the allowable catch before the ICJ, ITLOS or an Arbitral Tribunal. There are also optional methods that a State can invoke upon joining the Convention (e.g. one member might choose not to accept compulsory dispute resolution with respect to a dispute on delimitations, disputes concerning historic bays, or disputes concerning military activities). For example, when China ratified the LOSC, it invoked all three optional exclusions and then claimed that there was no basis to go after China for any claim relating to these matters.

There are now 168 State members to the LOSC and 147 State parties to the 1994 Agreement relating to the Deep Seabed ("Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982"). The detailed rules under the contemporary law of the sea, the increasing interest in exploiting resources and the threat of compulsory dispute settlement mechanisms encourage States to enter into negotiations. Identifying the fact that negotiations are going forward is difficult as States often keep them quiet. Negotiations sometimes lead to the resolution of the dispute in the form of a treaty or other forms of dispute resolution mechanisms. Negotiation is by far the method of dispute settlement preferred by States, and other avenues are only considered when negotiations stall.

In the context of boundary delimitation, there are some real disadvantages in pursuing compulsory dispute mechanisms and considerable advantages in negotiating. During negotiations, the parties retain control over a series of fundamental issues, including the precise result of the boundaries delimited, the way the line is being defined, the terms and the timing of the agreement and the way the agreement is presented publicly. It is generally believed that litigation always carries risks for the parties. The range of legal findings available to the tribunal is more restricted than the range of options open to the negotiators. When appearing before a tribunal applying international law, the parties operate within a specific frame that lacks flexibility and leaves little room for creativity and tends to favour always one side while failing to consider the interests of all actors. However, during negotiations, the parties pursue a process of joint development in the maritime space and can set aside the legal dispute to focus on practical measures to secure each party's underlying objective, particularly when each party wishes to pursue different types of exploitation. Conciliation is provided for in Part XV of the LOSC but is rarely used by States. The 1981 Iceland/Norway Continental Shelf Dispute Regarding Jay Mayen Island is one of the few conciliations ever recorded. States are not inclined to use conciliation because once they decide to give up control over the dispute and allow for a formal decision by a third-party body, States prefer to go all the way to an ultimately binding decision.



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Sometimes, the parties will reach an impasse during the negotiations but need to resolve the dispute as they might not otherwise be able to exploit resources. They will then turn to compulsory dispute resolution. The more familiar States become with the process, the more likely they are to prefer compulsory Law of the Sea dispute resolution in the future. Since 1994, arbitration has become the most popular means to solve maritime disputes. Under Annex VII of The LOSC, the tribunals are composed of five arbitrators, each party to the dispute appoints an arbitrator, and they jointly appoint the remaining three. If it is needed, the President of ITLOS serves as the appointing authority. The arbitral tribunal decides on its own procedures, which provides for a lot of flexibility. Some examples of the LOSC Annex VII Arbitrations include Bangladesh vs India ("Bay of Bengal Maritime Boundary Arbitration") and Bangladesh vs Myanmar in the ITLOS (Map enclosed), Mauritius vs the UK ("Chagos Archipelago Arbitration"), Argentina vs Ghana ("ARA Libertad Arbitration"), Malta vs Sao Tome and Principe ("Duzgit Integrity Arbitration"), and Denmark in respect of the Faroe Islands vs European Union.

The LOSC does not, by itself, seek to address issues of sovereignty over territory. It is therefore essential to keep in mind, in the analysis of the Annex VII arbitrations, that jurisdictional problems arise whenever the tribunals are asked to rule on what State has sovereignty over a specific territory. In the Philippines vs China arbitration, the Philippines are challenging China's activity in the South China Sea and Seabed Area and argues that China's claims over the area delimited by the "Nine-Dash Line" are not lawful under the LOSC. The Philippines are therefore seeking a finding that China's claims over this area are unlawful. The Philippines are also asking the tribunal to determine whether some features claimed by both the Philippines and China qualify as islands and a finding regarding the Philippines' rights beyond its EEZ. China rejected the tribunal's jurisdiction inter alia on the ground that the essence of the subject matter of the dispute is sovereignty. States are using arbitration increasingly because tribunals are quick at issuing decisions and give the parties a lot of control over the procedure. A downside of arbitration is the fact that it is more expensive than court proceedings.

One significant feature of the LOSC is the creation of a new institution, the ITLOS in Hamburg, which may hear both contentious and non-contentious cases for Law of the Sea dispute resolution. 21 judges elected for nine years by the State parties serve on ITLOS. Each State party can nominate up to two candidates. There is a process to ensure equitable distribution among the judges, and the term of one-third of them expires every three years. ITLOS operates somewhat similarly to the ICJ in terms of having some permanence to the institution and a rotation system. ITLOS has the particularity of being able to hear "prompt release" cases taking place on an expedited basis when a coastal State has seized a foreign vessel and its crew (usually in its EEZ) and brought it into its ports. Standing is not limited to State actors, and natural or juridical persons may appear before ITLOS (although they have to obtain the permission of their flag State).

Despite the availability of this very robust court in Hamburg capable of hearing contentious and non-contentious cases, litigation before ITLOS has been very modest. The 22 cases registered are almost all related to "prompt release" matters, and ITLOS rarely decides cases on the merits. Although States mostly prefer going before the ICJ, more and more cases are being registered before ITLOS (such as ITLOS Case No. 16 "Dispute concerning the delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal" and ITLOS Case No. 23 "Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean").

Undoubtedly, the number one forum for States seeking judicial settlement concerning the Law of the Sea is the ICJ which is not limited to the Law of the Sea issues and may then decide sovereignty and maritime matters. The ICJ jurisprudence is fairly robust and contributes significantly to our understanding of how the Law of the Sea disputes should be decided. For example, for many years, the methodology used for delimiting was quite uncertain. But in the past decades, the jurisprudence, in particular concerning Black Sea disputes, has established a three-part approach to delimitation (first, the tribunal draws a provisional equidistant line from base points on the coasts of both States parties to the delimitation dispute; second, the tribunal considers factors calling for adjustments such as a small bump on the coast of one State which drastically impacts the provisional equidistant line; third, the tribunal conducts a proportionality analysis whereby it looks at the two parts of water delimited, looks at the ratio and the coastlines and decides whether there is a significant disproportion in the maritime spaces awarded to each State). There is a lot of flexibility in the tribunal's approach, and the contemporary jurisprudence shows that context, particularly in the presence of islands or other features, matter a lot. Depending on their size, islands will sometimes matter a great deal and will be determinative of where the provisional equidistant line is drawn, or will sometimes be pushed aside by the tribunal and will not be used in deciding the case. Geographic considerations are the dominant force driving these cases. Issues about which State entity should be entitled to which area, economic resources and which actor is more environmentally sound are not considered.

The ICJ or ITLOS may render Advisory Opinions. ITLOS recently issued its first Advisory Opinion for the West African Sub-Regional Fisheries Commission. There is also a possibility to obtain an Advisory Opinion from the Seabed Dispute Chamber, a subunit of ITLOS, which can both hear disputes between State and non-State actors and issue Advisory Opinions. The LOSC created a Commission to hear the numerous Extended Continental Shelf Claims and their underlying scientific arguments. The Commission consists of 21 members, experts in the field of geology and physics, who will rule on the claims and issue a Recommendation as to where the limit of the Continental Shelf should be drawn and which, if followed, is considered a binding delimitation vis-à-vis all the parties to the LOSC. About eighty States have filed submissions before the Commission to obtain such Recommendations, and twenty-two Recommendations have been issued so far.

In conclusion, it can be said that there is indeed a rising tide in dispute settlement under the law of the sea driven by the number of detailed rules now available, the increasing interest in the resources at sea and in conserving these resources, and the prospect of compulsory dispute settlement hanging over State actors. New forms of the dispute are now starting to emerge. Global climate change is generating a significant amount of disputes as seas are rising from the melting of glaciers, arctic ice and the expansion of water generally.

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