Douglas Guilfoyle and Natalie Klein* – Written evidence (UNC0001)

The UN Convention on the Law of the Sea Dispute Settlement System

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1. How is UNCLOS enforced?

The UN Convention on the Law of the Sea (UNCLOS) is often referred to as a "constitution for the oceans". Like most public or constitutional law, it is not directly enforced. Rather, a series of authoritative dispute settlement bodies were established under the Convention in order to make final determinations of rights and obligations under UNCLOS. The parties to UNCLOS are predominantly sovereign, independent States. Therefore, at the international level, constructing direct enforcement mechanisms is difficult. This does not mean, however, that the UNCLOS dispute settlement system was included by the 140 to 160 States that participated in hard-fought negotiations over nine years as an act of idealism. Kingsbury explains the attraction of including dispute settlement systems in a treaty:

> Less powerful states in particular require assurances that the promises of powerful states are credible. … [Winning] a case may provide some bargaining leverage, but they rely much more on the prospect that the court process and eventual decision will help mobilise other major states to put pressure on the powerful [respondent] state in order to maintain the rule-governed system [of international law] and respect for its institutions.[1]

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[1] Benedict Kingsbury, "International Courts: Uneven Judicialisation in Global Order" in James Crawford and Martti Koskenniemi (eds.), *The Cambridge Companion to International Law* (Cambridge: Cambridge University Press, 2012), 217-18.

In any event, on many matters the dispute settlement system routinely works. While one can readily identify outliers, where governments ostensibly reject the results of dispute settlement in *Philippines v China* or *Somalia v Kenya*, the great majority of maritime boundary awards are complied with. This is for the simple reason that commercial actors will not invest in, for example, oil and gas exploitation under conditions of legal uncertainty.

The rest of this submission proceeds as follows:

- it first lays out the background leading to a dispute settlement system being included in UNCLOS (and the reasons for its complexity);
- it then provides an outline of the workings of the dispute settlement system; and
- concludes with observations on what may be considered successes of the UNCLOS dispute settlement procedures.

2. Background: why have a compulsory dispute settlement system in UNCLOS?

It is important to note that the UNCLOS dispute settlement system is *compulsory*. This was not a foregone conclusion during UNCLOS III negotiations. A.O. Adede, who chaired the dispute settlement working group, recorded vigorous differences of opinion during the negotiations both as to whether the Convention should contain a compulsory dispute settlement system and, if so, which subject matters it should cover.[2] Even on questions as sensitive as maritime boundary delimitation, there were strong calls for a compulsory dispute settlement system to apply. Ambassador Padro argued, for example: "[I]t was difficult to credit the good faith of a country in signing a convention if it then refused to allow conflicts about [any and every part of] the application of that convention to be settled by some independent organ or authority."[3] Developing States and smaller powers were, however, split. Having just secured jurisdiction over extensive fishing zones through the creation of the Exclusive Economic Zone (EEZ), some developing States were not keen to have their exercise of

[2] A.O. Adede, *The System for Settlement of Disputes Under the United Nations Convention on the Law of the Sea: A Drafting History and a Commentary* (Dordrecht: Martinus Nijhoff, 1987) especially at 88–9, 104–8, 128–32.

[3] Myron H. Nordquist, Shabtai Rosenne, and Louis B. Sohn (eds.), *United Nations Convention on the Law of the Sea, 1982: A Commentary* (Dordrecht: Martinus Nijhoff, 1989) vol. V at 131.

discretionary powers to regulate EEZ fishing subject to (potentially complex and expensive) judicial review.[4] On the other hand, for some less powerful States the dispute settlement system was a *sine qua non* of their consent to the whole.[5]

In this case, given that the Convention was negotiated as one grand bargain, any system that allowed States to adopt unilateral and self-serving interpretations risked undermining the integrity of compromises reached on specific issues and the Convention as a whole. A compulsory dispute settlement system was thus seen by many as providing a useful break on the possibility of fragmented and diverse interpretations of the Convention's provisions. Even major naval powers were, on the whole, in favour of a compulsory dispute settlement system in order to promote consistent interpretation of the Convention and prevent "creeping jurisdiction" being asserted by coastal States in a manner that might impinge upon navigational freedoms. In the end, as "many of the 1982 Convention rules contain lacunae or, inevitably, are generally phrased, and since some state practice is of doubtful consistency with them, the availability of judicial or arbitral proceedings offers an exceptional [and necessary] opportunity to clarify the law and to resolve disputes" between State parties.[6] Thus it was that the President of the Conference, Ambassador Amerasinghe, said that "[d]ispute settlement procedures will be the pivot upon which the delicate equilibrium of the compromise [reached] must be balanced".[7]

3. The UNCLOS dispute settlement system in outline: what does it cover and how does it work?

The dispute settlement system as established in the Convention is contained in Part XV. It is, in principle, *compulsory* and *comprehensive* but contains,

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[4] See for example: Official Records of the Third United Nations Conference on the Law of the Sea (1973-1982), Vol V, 36.
[5] Alan E. Boyle, "Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction" (1997) 46(1) International and Comparative Law Quarterly 37-54, 38.
[6] David John Harris, *Cases and Materials on International Law* (7th ed, Sweet & Maxwell, 2010), 418.
[7] UN Conference on the Law of the Sea III, Memorandum by the President of the Conference on Document
A/CONF.62/WP.9, UN Doc. A/CONF.62/WP.9/ADD.1 (1976), at 122, para. 6; quoted in *South China Sea Arbitration (Philippines v. China)*, Permanent Court of Arbitration, Award on Jurisdiction and
Admissibility, 29 October 2015, para. 255.

nonetheless, a number of wide exceptions. [8] The result is complex.[9] In essence, the starting principle of Part XV is that "any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached … [through preliminary or alternative mechanisms], be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction".[10] Thus, the dispute settlement procedure is both comprehensive and compulsory, *unless an exception applies*.

The major such exceptions are now found in Articles 297(2) and (3) of the Convention. They expressly exclude from compulsory dispute settlement disputes over marine scientific research (as an EEZ or continental shelf activity) and fisheries regulation (within the EEZ) but provide for a system of compulsory but non-binding conciliation in such cases. In addition, States may also choose to make an elective declaration that they do not accept the application of Part XV to certain sensitive subject matters, principally: maritime boundary disputes (which are again subjected to an alternative and mandatory conciliation procedure) military activities and EEZ law enforcement activities in respect of marine scientific research or fisheries management.[11]

Notably, however, all of these exceptions are subject to a further exception. Article 297(1) contains a jurisdiction affirming provision listing categories of *disputes which can never be excluded* from Part XV dispute settlement: disputes concerning either freedom of navigation or "specified international rules and standards for the protection and preservation of the marine environment".[12] The subject matter scope of the dispute settlement system is thus one in which all conflicts concerning the Convention are covered (everything is in), unless an exception excludes them (some things are out), unless a further jurisdiction affirming provision applies (some things can be brought back in).

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[8] See generally: Natalie Klein, *Dispute settlement in the UN Convention on the Law of the Sea* (Cambridge University Press 2005).
[9] This complexity is in part the consequence of numerous options generated by Professor Louis B. Sohn of Harvard, participating as part of the US delegation. In early 1979 he produced an options paper containing "seven models and fifteen variants" which proved too lengthy to discuss in Committee. He later presented a paper containing 28 variant dispute settlement possibilities, which he subsequently expanded to 45 possibilities. He was eventually prevailed upon later in 1979 to present a paper containing only four variants. See: Adede, 176-178.
[10] Article 286, UNCLOS. See commentary by Tullio Treves in Proelss (ed*), UNCLOS Commentary*, 1844-1849.
[11] See now: Article 298(1), UNCLOS and commentary by Andrew Serdy in Proelss (ed*), UNCLOS Commentary*, 1918-1932.
[12] Klein, *Dispute Settlement*, 141-2.

Finally, there were divisions of opinion among States as to which body should have jurisdiction to hear such disputes during UNCLOS III negotiations. There were differences of opinion as to whether to entrust such a function: only to the International Court of Justice (an idea unpopular with developing States); only to a new International Tribunal for the Law of the Sea (ITLOS) established under the Convention (unpopular with developed States that did not wish their disputes heard by an untested, and potentially expensive, new body); or only to ad hoc arbitral tribunals (to maximize party choice over the composition of the arbitration panel). In the end, the system adopted was to make all three mechanisms available.[13] Parties to the Convention may make a declaration as to their preferred dispute settlement forum. However, in the absence of such declarations by parties to a dispute, or where the parties have expressed different preferences, the system defaults to arbitration.

The complexity of this system lends itself to States carefully framing their dispute as being about subject matters within Part XV jurisdiction, even if logically this results in only one aspect of a broader dispute being presented. Boyle has referred to this approach as "salami-slicing" and, as he predicted, States have used the technique to bring proceedings against recalcitrant respondent States on sensitive issues in a number of cases.[14] Nonetheless, the validity of this approach and its consistency with the letter and spirit of the Convention has generated a degree of controversy.[15]

4. Successes of UNCLOS dispute settlement

After a relatively quiet start, the use of Part XV dispute settlement appears to have been expanding in recent years (see Annex).[16] Relative to some other international courts or dispute settlement processes, such as those in regional

[13] See now Article 287 UNCLOS and commentary by Tullio Treves in Proelss (ed), *United Nations Convention on the Law of the Sea*, 1849-1857.
[14] See generally: Boyle, "Dispute Settlement and the Law of the Sea Convention".
[15] Natalie Klein, "The Effectiveness of the UNCLOS Dispute Settlement Regime: Reaching for the Stars" (2014) 108 American Society of International Law, Proceedings of the Annual Meeting 359-364; Natalie Klein, "The Vicissitudes of Dispute Settlement under the Law of the Sea Convention" (2017) 32 International Journal of Marine and Coastal Law 332-363; Stefan Talmon, "The Chagos Marine Protected Area Arbitration: Expansion of the Jurisdiction of UNCLOS Part XV Courts and Tribunals" (2016) 65 International & Comparative Law Quarterly 927-951.
[16] One can view the docket of ITLOS at: https://www.itlos.org/cases/list-of-cases/. Many of the arbitration cases heard under the auspices of the Permanent Court of Arbitration at present arise under Part XV of UNCLOS: http://www.pcacases.com/web/allcases/..

human rights mechanisms or under the World Trade Organisation, the case load under UNCLOS remains modest. It has been suggested that the 'shadow' of compulsory dispute settlement moderates State decision-making and behaviour.[17] In some instances, cases have not proceeded beyond the provisional measures stage before being settled.[18] The very existence of compulsory jurisdiction in a highly-subscribed multilateral treaty regulating issues of critical importance is notable in its own right.

It is possible to speculate that smaller States (or the lawyers representing them) have found the (in principle) compulsory nature of Part XV, coupled with the near universal membership of UNCLOS, attractive given the general difficulties of bringing litigation at the international level in what is generally a consent-based system.[19] There have undoubtedly been instances where smaller States have been able to 'level the playing field', or at least tilt it slightly more in their favour, through the compulsory procedures.[20]

The compulsory dispute settlement regime has allowed for the advancement of the law of the sea. Judicial interpretation has elucidated some provisions of the Convention, such as the meaning of rocks and islands under Article 121, and accounted for changing technology, as recognized in the methods of signaling ships during a hot pursuit under Article 111. The decisions sometimes reflect an understanding of 'the package deal' involved in concluding UNCLOS. For example, some cases have provided opportunities for affirming the balances that must exist between coastal State rights in the EEZ and other State's interests in the freedom of navigation within that maritime zone.[21]

The operation of the UNCLOS dispute settlement regime has occasionally been called into question. As noted above, the 'salami slicing' litigation tactics have occasionally resulted in one complex dispute being heard in several different

[17] Sara McLaughlin Mitchell & Andrew P. Owsiak, 'Judicialization of the Sea: Bargaining in the Shadow of UNCLOS' (2021) 115 *American Journal of International Law*, 579–621.
[18] Eg, *Land Reclamation*, *ARA Libertad*.
[19] See further: Douglas Guilfoyle, 'The South China Sea Award: How Should We Read the UN Convention on the Law of the Sea?' (2018) 8 Asian Journal of International Law 51 - 63; Douglas Guilfoyle, "Governing the oceans and dispute resolution: An evolving legal order?" in Leon Wolff and Danielle Ireland-Piper (eds), *Global governance and regulation: Order and disorder in the 21st century* (Routledge, 2018), Chapter 11.
[20] Examples include the *Timor Sea Conciliation*, *Chagos Marine Protected Area (Mauritius v UK)*, *South China Sea (Philippines v China)*, and *The Arctic Sunrise (Netherlands v Russia)*.
[21] This theme has been especially evident in applications for the prompt release of vessels upon payment of a reasonable bond under Article 292 of UNCLOS.

fora.[22] While UNCLOS contains provisions designed to accommodate the resolution of maritime disputes in alternative fora,[23] it has been more common for tribunals constituted under UNCLOS to exercise jurisdiction than defer to those other dispute settlement procedures.[24] The scope of the exceptions to compulsory jurisdiction has also been tested in different cases and most commonly been drawn narrowly to maximise opportunities to exercise jurisdiction. Nonetheless, no serious backlash against the UNCLOS dispute settlement regime, or UNCLOS itself, has eventuated to date.[25]

[22] For example, Ireland's complaints about the commission of the mixed oxide facility on the Irish Sea was heard before a tribunal constituted under the OSPAR Treaty, a tribunal constituted under UNCLOS and at the European Court of Justice.
[23] As evident in Articles 280-283.
[24] The notable excepts are the *MOX Plant* arbitration when the UNCLOS tribunal stayed its proceedings pending the outcome of the European Court of Justice case and the *Southern Bluefin Tuna* arbitration where the tribunal found it lacked jurisdiction because of the alternative procedure available under the Convention for the Conservation of Southern Bluefin Tuna.
[25] While China refused to appear in *Philippines v China* and subsequently denounced the award, it has remained party to UNCLOS and hence left open the possibility of further cases being filed against it. While Russia has similarly refused to appear in *Arctic Sunrise* and *Three Ukrainian Naval Vessels*, there was some evidence of compliance and Russia remains a party to UNCLOS.

ANNEX

Disputes heard under UNCLOS Part XV (excluding cases brought before the ICJ)

Concluded disputes heard by Annex VII arbitration (Permanent Court of Arbitration)

Year	Parties	Case	Issue
2020	Italy/India	*Enrica Lexie*	Flag state jurisdiction
2019	Malta/São Tomé and Príncipe	*The Duzgit Integrity*	Bunkering (refueling at sea)
2016	Philippines/China	*South China Sea*	Classification of maritime features; historic rights
2015	Mauritius/United Kingdom	*Chagos Archipelago*	Rights in the Archipelago and its waters
2014	Netherlands/Russia	*Arctic Sunrise*	Freedom of navigation
2014	Bangladesh / India	*Bay of Bengal*	Maritime boundary
2014	Denmark/European Union	*Atlanto-Scandian Herring*	Fisheries
2013	Argentina/Ghana	*ARA Libertad*	Immunity of warships
2008	Ireland/United Kingdom	*MOX Plant*	Marine environmental protection
2007	Guyana/Suriname	*Maritime Boundary Delimitation*	Maritime boundary
2006	Barbados/Trinidad & Tobago	*EEZ/Continental Shelf Delimitation*	Maritime boundary
2005	Malaysia/Singapore	*Land Reclamation/Straits of Johor*	Maritime boundary

Concluded disputes heard by the International Tribunal for the Law of the Sea

Year	Parties	Case	Issue
2019	Switzerland/Nigeria	*The M/T "San Padre Pio" Case*	Provisional Measures
2019	Ukraine/Russian Federation	*Case concerning the detention of three Ukrainian naval vessels*	Provisional Measures

2019	Panama/Italy	*The M/V "Norstar" Case*	Bunkering (refueling at sea)
2017	Ghana/Côte d'Ivoire	*Dispute concerning delimitation of the maritime boundary in the Atlantic Ocean*	Maritime boundary
2015	Italy/India	*Enrica Lexie*	Provisional Measures
2015	Sub-Regional Fisheries Commission (SRFC)	*Request for an Advisory Opinion submitted by the SRFC*	Advisory Opinion
2014	Panama/Guinea-Bissau	*The M/V "Virginia G" Case*	Bunkering (refueling at sea)
2013	Netherlands/Russia	*Arctic Sunrise*	Provisional Measures
2013	St. Vincent & Grenadines/Spain	*The M/V "Louisa" Case*	Provisional Measures
2012	Bangladesh/Myanmar	*Bay of Bengal*	Maritime boundary
2012	Argentina/Ghana	*ARA Libertad*	Provisional Measures
2011	International Seabed Authority	*Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*	Advisory Opinion
2009	Chile/European Union	*Conservation and Sustainable Exploitation of Swordfish*	Fisheries
2007	Japan/Russia	*The "Tomimaru" Case*	Prompt Release
2007	Japan/Russia	*The "Hoshinmaru" Case*	Prompt Release
2004	St. Vincent & Grenadines/ Guinea-Bissau	*The "Juno Trader" Case*	Prompt Release
2003	Malaysia/Singapore	*Land Reclamation/Straits of Johor*	Provisional Measures
2002	Russia/Australia	*The "Volga" Case*	Prompt Release
2001	Ireland/United Kingdom	*The MOX Plant Case*	Provisional Measures
2001	Panama/Yemen	*The "Chaisiri Reefer 2"*	Prompt Release
2001	Belize/France	*The "Grand Prince" Case*	Prompt Release
2000	Seychelles/France	*The "Monte Confurco" Case*	Prompt Release
2000	Panama/France	*The "Camouco" Case*	Prompt Release
1999	New Zealand/Japan	*Southern Bluefin Tuna Cases*	Provisional Measures
1999	Australia/Japan	*Southern Bluefin Tuna*	Provisional

		Cases	Measures
1999	St. Vincent & Grenadines/Guinea	*The M/V "SAIGA" (No. 2)*	Provisional Measures
1997	St. Vincent & Grenadines/Guinea	*The M/V "SAIGA"*	Prompt Release

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