



CHALLENGES IN THE IMPLEMENTATION OF UNCLOS – A REGIONAL PERSPECTIVE

Regional Perspectives for UNCLOS Dispute Settlement

Professor Natalie Klein

Outline

1. UNCLOS in the region and current disputes
2. Modes of dispute settlement available
3. UNCLOS dispute settlement procedures
4. Disputes concerning ports, navigation and overflight
5. Procedural considerations and incidental proceedings
6. Outcomes in UNCLOS dispute settlement

UNCLOS in the Region

Who are parties to UNCLOS?

While focus can be on the region, any state party to UNCLOS has standing to pursue a claim of a treaty violation (as seen in *Whaling in Antarctica*)

Country	Party to UNCLOS	Article 287	Article 298
Bahrain	YES	-	-
Egypt	YES	Annex VII arbitral tribunal	-
Iran	NO (sig only)	-	-
Iraq	YES	-	-
Israel	NO	-	-
Jordan	YES	-	-
Kuwait	YES	-	-
Lebanon	YES	-	-
Oman	YES	ICJ and ITLOS	-
Qatar	YES		
Saudi Arabia	YES	-	(1)(a)
Syria	NO	-	-
Tunisia	YES	ITLOS	Yes (all 298)
Turkey	NO	-	-
United Arab Emirates	NO (sig only)	-	-
Yemen	YES	-	-

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UNCLOS Dispute Settlement

Article 286: Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.

Section 1 essentially encourages states to settle disputes through diplomatic channels prior to reference to the compulsory procedures found in Section 2. Section 3 then sets out limitations and exceptions to the compulsory procedures (Articles 297 and 298).

Other Modes of Dispute Settlement

Core obligation to settle disputes by peaceful means (Article 279)

Article 280: Nothing in this Part impairs the right of any States 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.

Other treaties may be implicated and have their own dispute settlement procedures

Relevance of Other Modes of Dispute Settlement under UNCLOS

Provides options?

Prevents continuing under UNCLOS?

Most likely not, as per Articles 281 and 282 of UNCLOS.

Party to following multilateral conventions:

- Biodiversity
- Climate Change
- Climate Change-Kyoto Protocol
- Desertification
- Endangered Species
- Hazardous Waste
- Ozone Layer Protection,
- Ship Pollution

What about regional agreements?

Economic Agreement Between the GCC States

Article Twenty-one: Means of Transportation

Member States shall accord all means of passenger and cargo transportation belonging to any Member State, while transiting or entering their territories, the same treatment accorded to their national means of transportation, including the level of duties, taxes and facilities.

Article Twenty-two: Marine Transportation Services

Member States shall accord marine means of transportation belonging to any Member State and cargoes thereof the same preferential treatment they grant to their national counterparts in the use of their facilities, whether during docking or while calling at their ports, including fees and taxes, as well as services of pilotage, docking, freight, loading, unloading, maintenance, repair and storage.

...

Article Twenty-seven: Settlement of Disputes

1. The Secretariat General shall hear and seek to amicably settle any claims brought by any GCC citizen or official entity, regarding non-implementation of the provisions of this Agreement or enabled resolutions taken to implement those provisions.
2. If the Secretariat General could not settle a claim amicably, it shall be referred, with the consent of the two parties, to the GCC Commercial Arbitration Center to hear the dispute according to its Charter. Should the two parties not agree to refer the dispute to arbitration, or should the dispute be beyond the competence of the Center, it shall be referred to the judicial body set forth in Paragraph 3 of this Article.
3. A specialized judicial commission shall be formed, when deemed necessary, to adjudicate disputes arising from the implementation of this Agreement or resolutions for its implementation. The Financial and Economic Committee shall propose the charter of this commission.
4. Until the charter of the commission referred to in paragraph (3) above comes into force, all disputes which the two parties do not agree to settle through arbitration and which could not be amicably settled by the Secretariat General, shall be referred to the competent GCC committees for settlement.

Pan-Arab Free Trade Agreement (PAFTA)

Article XVIII:

The party-states shall cooperate to facilitate transport and communications among them by all means, on a preferential basis, and also to facilitate transit trade associated with the exchange of Arab goods among party-states.

Article XXI:

No party-state may enact legislation or make a decision which is in conflict with the provisions of this Agreement or which may block its enforcement.

...

Article XIII:

Disputes arising from the enforcement of this Agreement shall be submitted to the Council for resolution. It may refer them to a committee or sub-committees to which it shall delegate some of its powers. It may also apply thereto the dispute settlement provisions set forth in Chapter Six of the United Agreement for the Investment of Arab Capital in Arab States and its annex. In each case, the Council shall determine the method of settling a dispute.

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Choice of Forum

Article 287 provides a choice between:

- (a) the International Tribunal for the Law of the Sea established in accordance with Annex VI;
- (b) the International Court of Justice;
- (c) an arbitral tribunal constituted in accordance with Annex VII;
- (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.

ITLOS Judges

- Background, experience



Ad Hoc Arbitration – Annex VII



Default choice of forum

Appointment of arbitrators and
power of appointment

Rules of procedure

Confidentiality

Admissibility: *Monetary Gold* principle



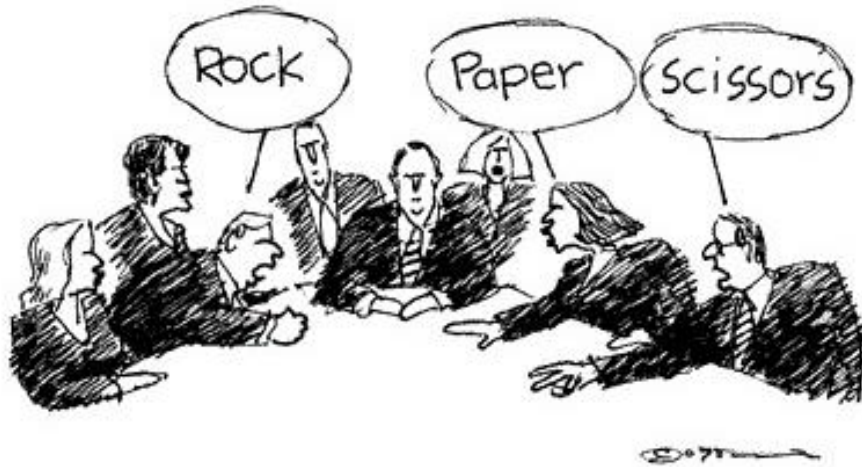
Foreign ministers Gareth Evans and Ali Alatas toast the signing of the Timor Gap Treaty while flying over the Timor Sea.
<http://www.laohamutuk.org/Oil/LNG/app2.htm>

The Court will not adjudicate a dispute where the interest of a given state forms the “very subject matter” of the dispute, and the state has not consented to ICJ jurisdiction in the matter.

Case Concerning East Timor:

It was not possible to determine Australia’s responsibility without first determining Indonesia’s responsibility for invading East Timor

As Indonesia had not consented to the Court’s jurisdiction, and its rights and obligations formed the very subject matter of the dispute, the matter could not be heard



Jameson, the mediator, uses his last remaining negotiating tool in an effort to break the stalemate.

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Exchange of Views

Article 283(1): When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.

Views regarding settlement,
not views regarding the
substantive claim
Self-judging by applicant

Subject Matter Jurisdiction

Article 288(1): A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part. ...

Article 288(4): In the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal.

Matters beyond UNCLOS?

Ports under customary international law

Freedom of overflight under ICAO

But note historic rights in *South China Sea* arbitration

Applicable Law

Article 293(1): A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.

Limitations to Compulsory Jurisdiction – Art 297(1)

- Disputes relating to the coastal State's exercise of sovereign rights or jurisdiction can be submitted to compulsory dispute resolution when the coastal State violates
 - the freedom of navigation,
 - right of over-flight or the right of laying of submarine cables and pipelines,
 - other internationally lawful uses of the sea; or
 - where the coastal State is exercising its jurisdiction in a manner inconsistent with international marine environmental rules and standards
- If a state violates the Convention and coastal State's laws while exercising above mentioned rights and freedoms (article 297)

Fisheries Disputes – Art 297(3)

- Disputes concerning the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance with section 2, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations.

Optional Exceptions to Compulsory Jurisdiction in Contentious Cases

- Sea boundary delimitations and historic bays or title
- Disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service
- Certain law enforcement activities
- Disputes in respect of which the Security Council of the United Nations is exercising the functions

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Possible UNCLOS Disputes?

Ports

Navigational rights

Overflight

Closure of Ports to Qatar

Saudi Ports Authority has stated all vessels bearing the Flag of Qatar, owned by a Qatari company/person or carrying Qatari personnel, will be denied entry into all Saudi Arabian ports. Any goods with Qatar origin or issued by Qatar should also not be discharged in Saudi Arabian ports.

The Head of Egypt's Maritime Transport Sector advised that 'All Qatari vessels are prohibited from entering Egyptian ports'.

Suez Canal chairman Mohab Mamish announced that Qatari vessels would be banned from the canal area's ports and its special economic zone. Qatari ships will still have access to the canal itself, as Egypt is bound by international treaty to allow access to the strategic waterway

The Ports and Maritime Affairs at Ministry of Transportation and Telecommunications stated: "All Bahrain Ports and territorial waters will remain suspended for marine navigation from and to State of Qatar effective from 6 June 2017."

Access to Ports

States have sovereignty over ports located within their territory, and may control what vessels enter their ports and under what conditions.

Ports are largely unregulated under UNCLOS, with the exception of indicating the relevance of ports for the purposes of delimiting the territorial sea, and providing for the exercise of port state jurisdiction for the purposes of enforcing requirements relating to the protection and preservation of the marine environment.

Access to ports is predominantly a matter of customary international law or is otherwise regulated by separate agreement.

Closing Ports

It is the right of the coastal State, as a corollary of the principle of state sovereignty, to close a port to foreign shipping.

Ports may be closed to safeguard good order on shore, to signal political displeasure, or to defend 'vital interests'.

'According to a great principle of public international law, the ports of every State must be open to foreign merchant vessels and can only be closed when the vital interests of the State so require.' *Saudi Arabia v Arabian American Oil Company (Aramco)* (1958) 27 ILR 117

Churchill and Lowe have argued that patently unreasonable or discriminatory closures or conditions of access may constitute an *abus de droit*.

Detention in Ports

In the *M/V Louisa*, ITLOS stated that Article 87 could not be interpreted so as to encapsulate 'a right to leave the port and gain access to the high seas notwithstanding [the vessel's] detention in the context of legal proceedings against it' where the vessel was arrested for activities conducted in the territorial sea.

In the *M/V Norstar*, a vessel arrested in port for activities on the high seas does render consideration of Article 87 relevant

In *ARA Libertad* provisional measures, the sovereign immunity of a warship detained in port provided *prima facie* jurisdiction for the prescription of provisional measures.

Navigating in Territorial Sea – Saudi Arabia

Saudi Foreign Minister Adel al-Jubeir ‘also said that his **government was exercising its "sovereign right" by blocking Qatar from using Saudi airspace, territorial waters and their mutual border...** “The seaports of Qatar are open. There is no blockade on them. Qatar can move goods in and out whenever they want. **They just cannot use our territorial waters.”** (*Al Jazeera*, 14 June 2017)

Navigating in Territorial Sea – Egypt

Container ships cross the Gulf of Suez towards the Red Sea before entering the Suez Canal, in El Ain El Sokhna in Suez, east of Cairo.

The Suez Canal Authority in Egypt and the Canal Economic Zone has aligned with the decision of the four countries to stop dealing with Qatar. **The Authority confirmed that Qatari ships are prohibited by law from passing or entering its ports and regional waters under the sovereignty of the Egyptian State. However, this does not affect the passage of Qatari ships in the international shipping lane.** The Suez Canal Authority runs one of the world's most important maritime lanes, and confirms that despite these measures, Qatari vessels will be able to cross the international waters as stipulated in the Treaty of Constantinople.

The Suez Canal authority committed as well to stop dealing with companies affiliated with Doha. Qatari ships will be prohibited from entering the canal's ports and waters which are under the sovereignty of the Egyptian state, in addition to facilities located at the coastal sites of the international lane lying within Egyptian territory.

Navigation in the Territorial Sea

The territorial sea, which includes its bed, subsoil and the airspace above it, is subject to the sovereignty of the coastal State, with the exception of the right of innocent passage, other provisions of the Convention as well as ‘other rules of international law’.

In the *Chagos Archipelago* arbitration, the Tribunal considered that ‘other rules of international law’ was intended to reference general international law rather than specific bilateral commitment between States.

The *Chagos Archipelago* Tribunal determined that general international law required the United Kingdom to act in good faith in its relations with Mauritius with regard to the exercise of sovereignty over the territorial sea.

Innocent Passage and Ports

Article 18(1): Passage means navigation through the territorial sea for the purpose of:

- (a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or
- (b) proceeding to or from internal waters or a call at such roadstead or port facility.

Article 25:

1. The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent.
2. In the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal State also has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject. ...

Closing Territorial Waters

Article 17: Subject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea.

Article 19(1): Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law.

Article 25(3): The coastal State may, without discrimination in form or in fact among foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises. Such suspension shall take effect only after having been duly published.

Freedom of Navigation

On the high seas (Article 87)

Article 58 provides that within a coastal State's EEZ, other States continue to enjoy the freedoms referred to in Article 87 and 'other internationally lawful uses of the sea related to these freedoms'.

In the exercise of these rights, other States must also demonstrate due regard for the rights of the coastal State and comply with the provisions of the Convention and other rules of international law that are compatible with the EEZ regime in UNCLOS.

Rights of passage also protected through straits and archipelagic waters

Overflight Dispute

Qatar has argued at the ICAO:

On 5 June 2017, the Government of the [Applicants] announced, with immediate effect and without any previous negotiation or warning, that Qatar-registered aircraft are not permitted to fly to or from the airports within their territories and would be banned not only from their respective national air spaces, but also from their Flight Information Regions (FIRs) extending beyond their national airspace even over the high seas.

Overflight

Sovereignty over the territorial sea extends to the airspace above those waters: Article 2

Freedom of overflight guaranteed in range of UNCLOS provisions

- EEZ: Article 58(1)

- High Seas: Article 87(1)(b)

- Archipelagic sea lanes: Article 53(3) and (4)

- Straits: Article 38(2)

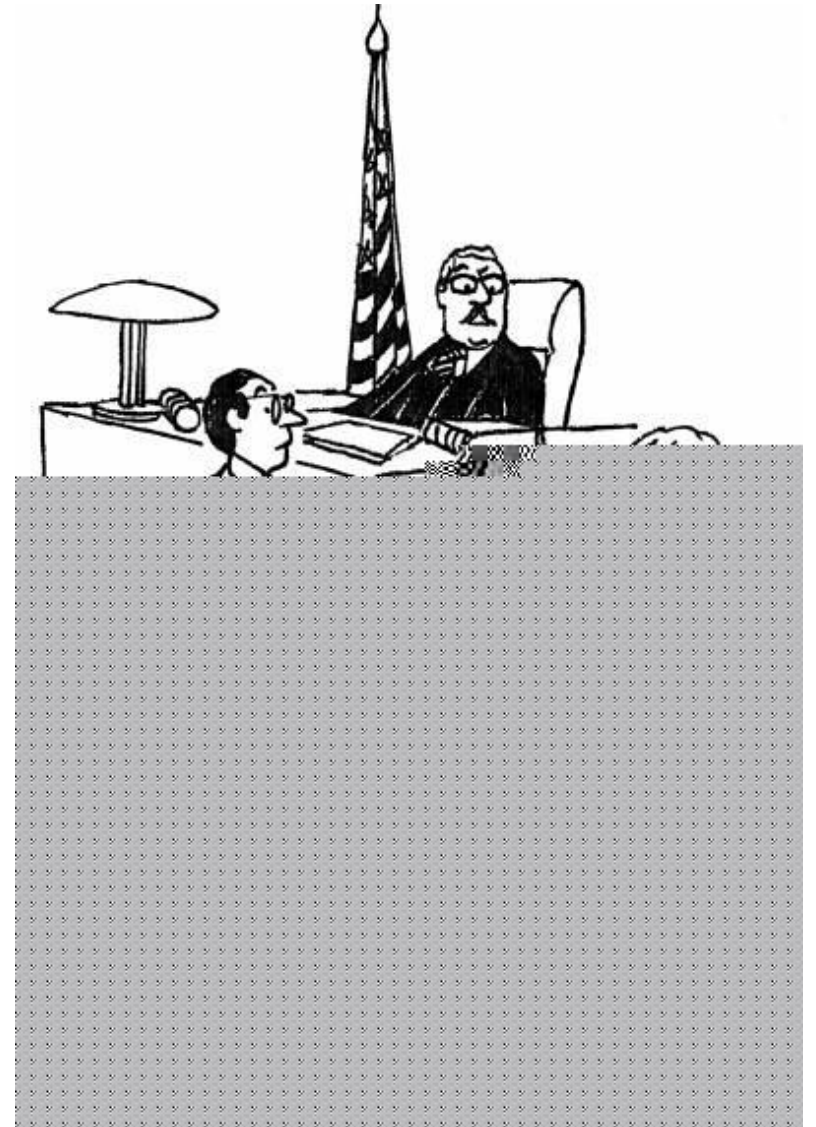
ICAO requirements remain relevant as per **Article 87(1)**: ‘...Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. ...’

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Procedural Considerations

Pleadings
Challenge to arbitrators?
Bifurcation?
Witnesses?
Use of Experts



Provisional Measures – Article 290

If a dispute has been duly submitted to a court or tribunal which considers that *prima facie* it has jurisdiction, the court or tribunal may prescribe any provisional measures.

Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea may prescribe provisional measures if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires such measures.

Provisional Measures – Requirements

1. *Prima facie* jurisdiction
2. Plausible character of the alleged rights in the principal request
3. The link between the alleged rights and the measures requested
4. Urgency and the risk of irreparable prejudice

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Outcomes / Reparations



"Don't spread it around, but on the really tough ones,
I just go with 'eenie, meenie, minie, moe.'"

"The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act."

ILC Articles on State Responsibility, Article 31
Jurisdiction to decide a case includes jurisdiction to determine remedies in that case

Remedy usually depends on the primary obligation breached and the remedy sought by the injured party
International law focuses on the restoration of the pre-existing legal relationship and the assurance that the legal obligation will not be breached again.

Forms of reparations:

Restitutio in integrum, compensation, satisfaction

***Costa Rica v Nicaragua* – Core Principles for Compensation**

- Should not have punitive or exemplary character
- Appropriate where restitution is materially impossible or unduly burdensome
- Court is to decide if there is a ‘sufficient causal nexus between the wrongful act and the injury suffered’
- Valuation of damage does not require perfect evidence for compensation (‘absence of adequate evidence as to the extent of material damage will not in all situations preclude an award of compensation for damage’)

Cessation and Guarantees of Non-Repetition

Cessation is similar to restitution in that it seeks to stop unlawful behaviour so as to restore the prior lawful situation

- Only available when there is a continuing unlawful act

Guarantees of non-repetition are not usually granted

- Once conduct is declared wrongful, it is assumed that a state will then act in good faith and not repeat wrongful conduct in the future

Broader Consequences

No enforcement mechanism
under UNCLOS

One aspect of a wider dispute



“I’m glad we settled our conflict this way.
War is expensive.”

Concluding Remarks