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Dispute Settlement System under UNCLOS: Current Trends

An LKI Roundtable with Dr. Rüdiger Wolfrum, former Judge, and former President, International Tribunal for the Law of the Sea

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Three key takeaways from the round table with Professor Wolfrum -

- 1. The law of the sea is vital to regulating international relations. The sea is an area in which all states communicate, and which a single state cannot dominate.**
 - 2. It is therefore essential that disputes between states are settled in a way that preserves peace and good governance. The United Nations Convention on the Law of the Sea (UNCLOS) provides a mandatory dispute settlement mechanism.**
 - 3. International law, and therefore also the law of the sea, operates in a context of political change and cultural factors. For example, for the first time since the establishment of the International Court of Justice (ICJ) in 1945, there is no serving judge from the United Kingdom.**
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Introduction

- Professor Dr. Dres. h.c. Rüdiger Wolfrum, former Judge (1996-2017) and former President (2005-2008) of the International Tribunal for the Law of the Sea, addressed a Foreign Policy Round Table on “The Dispute Settlement System under UNCLOS: Current Trends” on 7 December 2017 at the Lakshman Kadirgamar Institute (LKI).
- This LKI Round Table was held in partnership with the Max Planck Foundation for International Peace and the Rule of Law.
- Among those attending were: Mrs. W. M. M. R. Adikari, Secretary, Ministry of Fisheries and Aquatic Resources Development; Admiral Jayanath Colombage, former Navy Commander; Mr. M. C. W. Pinto, Consultant to the Government of Sri Lanka on issues of international law; Mr. Gritakumar E. Chitty, former Registrar of ITLOS; as well as several President Counsels, senior academics, and representatives of international organisations.
- The Round Table was moderated by Dr. Dinusha Panditaratne, Executive Director of LKI.

Takeaways from Prof. Wolfrum’s Presentation:

Importance of the Law of the Sea

- Understanding the law of the sea requires awareness of geomorphological, geographic, and technological issues.
- The necessity of regulating freedoms of the sea has long been recognised; it was discussed by Hugo Grotius in his book ‘*Mare Liberum*’ or ‘The Freedom of the Seas.’
- The sea is the area of communication between all states. Communication must be promoted in international relations, and the sea cannot be dominated by a single nation.
- It is impossible to dominate the sea in the same way that land can be dominated. Certain stretches can be controlled, but not vast bodies of water like the Indian Ocean.

- The freedom of the seas must be regulated to preserve peace and good governance. One of the most elementary means of doing this is through a dispute settlement system.
 - The peaceful settlement of disputes is also an internationally recognised obligation, reflected in the UN Charter.

Dispute settlement under UNCLOS

- The United Nations Convention on the Law of the Sea (UNCLOS) provides a complex dispute settlement mechanism, under Part XV and Annexes V, VI, and VII.
- When a state ratifies UNCLOS, it is automatically subsumed under the dispute settlement system of UNCLOS.
 - States' participation in the dispute settlement system is mandatory. However, UNCLOS provides states with the option of choosing a particular dispute settlement body, such as the ICJ.
- The relevant dispute settlement bodies can interpret and apply UNCLOS, as well as other treaties related to the law of the sea.
- In practice, judges can additionally invoke, interpret, cite, and use general principles of international law. The International Tribunal on the Law of the Sea (ITLOS) has done so frequently and this is an accepted practice.

ITLOS Cases

- ITLOS is the primary tribunal for disputes under UNCLOS. Judges are proposed by governments, and most judges have backgrounds as diplomatic or legal advisors.
- ITLOS is composed of five judges from Asia and Africa, four judges from Latin America, three from Eastern Europe, and three or four from Western Europe.
- Most cases are generated from Africa and Asia and focus on maritime delimitation.
 - The International Court of Justice (ICJ) generally has compulsory jurisdiction with respect to cases from Latin America, due to pact among those countries.
 - Cases from European states are rare; this is likely due to each country having an advanced legal system for dispute resolution.

Criticisms of the Existing System

The dispute resolution system under UNCLOS is subject to the following critiques.

- The election of judges at the UN is politicised.
 - Judges of ITLOS are elected by states parties to UNCLOS, who generally decide on candidates based on their professional qualities and experience as well as the reputation of their country.
 - More recently, however, additional political factors are being considered that are unrelated to a candidate's qualifications. A current example is the recent non-election of Sir Christopher Greenwood, making it the first time that there will not be a British judge on the ICJ.

- States respond in diverse ways to litigation.
 - Being summoned to an international tribunal can create tensions in international relations. East Asian states, for example, may view the experience more negatively than those states where it is culturally more acceptable to settle disputes in court.
 - We should therefore be careful about advocating only one dispute settlement system, and should acknowledge other systems that are effective.
- States do not appear at the hearings.
 - Judgements and awards are binding, whether or not a state chooses to appear at the hearing of the case.
 - If a state chooses not to appear, this leads to additional work for the tribunal and disputes are not as satisfactorily settled.
- A state's legal culture, and the values and principles of its legal system, may not be adequately taken into account during dispute settlement.
- Most conflicts and cases are bilateral but nevertheless create international interest and have international implications.
 - For example, the decision over whether an island in the Spratly Islands is an island or a rock has ramifications for future international dialogue and decisions.
 - Yet the views of the international community are not sufficiently represented in the dispute settlement proceedings

Future Trend: Advisory Opinions and the Conciliation Committee

- Given the inadequacies of the present system, greater use should be made of the provisions in UNCLOS for advisory opinions and for a conciliation committee.
- Advisory opinions are non-binding, while still providing persuasive interpretations and recommendations. ITLOS has thus far issued one advisory opinion.
- The conciliation committee draws on an integrated approach of mediation and investigation, in which the involvement of both parties is key.
- The results of the advisory opinions and conciliation committee are most effective since they (1) allow many states to participate and present arguments to the relevant forum; and (2) preserve the sovereignty of states concerned.

Suggested Readings:

Wolfrum, R. (2008). *Freedom of Navigation: New Challenges*. International Tribunal on the Law of the Sea. [online] Available at:
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