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# THE LAW OF THE SEA AND SETTLEMENT OF MARITIME DISPUTES

**Introduction**

The provisions of norms and principles of international law concerning the delimitation of maritime boundaries are many and complex with scope for varying interpretation. It is not, therefore, surprising that they contribute to various disputes. Nevertheless, international agreements or conventions make provisions for settlement of disputes between nations. The Law of the Sea Conventions, therefore, have set forth certain norms and principles for the settlement of maritime disputes. These provisions have been formulated in conformity with Articles 2(3) and 33(1) of the Charter of the United Nations. The present study will deal with the role of these provisions concerning the settlement of maritime disputes. It will further discuss the practical approaches of different states to these provisions. Finally, attempts will be made to highlight the relevance of the Law of the Sea to maritime issues between Bangladesh and India.

## ROLE OF THE LAW OF THE SEA ( LOS ) PROVISIONS

The "Optional Protocol" prescribed by the United Nations Conference on the Law of the Sea, Geneva (1958) (UNCLOS I) deals with the chapter "Settlement of Disputes" purely in conformity with the Charter of the United Nations. The Third United Nations Conference on the Law of the Sea ( UNCLOS III ) also complies with the Charter. However, the device such as the "International Tribunal for the Law of the Sea" and its "Sea-Bed Dispute Chamber" or "ad hoc Chamber" can be regarded as a permanent judicial body designed for settling the LOS disputes. The establishment of

an effective system thus evolved, for the "settlement of disputes arising out of the convention should be regarded as one the pillars of the new world order in the ocean space itself".[1]

**Unclos I**

According to the "Optional Protocol"[2] the states-parties to it should undertake compulsory jurisdiction of the International Court of Justice, unless some other form of settlement is provided in the Convention or has been agreed upon by the parties. To this end, Article 1 of the protocol says : "Disputes arising out of the interpretation or application of any Convention on the Law of the Sea shall lie within the compulsory jurisdiction of the International Court of Justice, and may accordingly be brought before the Court by an application made by any party to the dispute being a party to this protocol".

It signifies that the states who have accepted the compulsory jurisdiction of the International Court of Justice ( ICJ ) and the states who have signed this protocol are equally entitled to apply to the court for the adjudication of the dispute. But it was provided that certain disputes should be settled by the provisions of the convention concerned.[2] Generally, it is not possible to exert pressure on the parties for settling the dispute. But if the dispute endangers international peace and security, the dispute should be settled subject to Article 33(2) of UN Charter. If a party to the dispute does not comply with the judgment rendered by the ICJ, the other party is entitled to have recourse to the Security Council under Article 94 of the Charter. Practically, the peaceful settlement

1. A. O. Adede, ' Settlement of Disputes arising under the Law of the Sea Convention", 66 (1975) *American Journal of International Law* (AJIL), p. 798.
2. For instance, according to the Convention on Fishing and Conservation of the Living Resources of the High Seas (Article 9) 1958, disputes arising out of Articles 4, 5, 6, 7, and 8 of this Convention should be settled by "Spccial Commistion". The "Optional Protocol" (Article 2, complies with this provison equally.

of a dispute depends on the goodwill of the parties concerned. Short of this, it is not possible to settle the dispute peacefully.

**Unclos III**

The chapter "Settlement of Disputes" as has been embodied in the UNCLOS III is complicated. Professor Brown has regarded it as of "considerable length and complexity"[3]. Compared to the UNCLOS I, the UNCLOS III has prescribed a number of provisions for the settlement of disputes between the states. In fact, the UNCLOS III has incorporated some new devices for the purpose. The LOS Convention has offered wide choice of modes for settling the disputes[4].

The LOS Convention imposes basic obligations on states-parties to settle disputes arising between or among them[5]. Parties may settle their disputes by means of choice, but if such means do not lead to binding settlement of the dispute, the parties may choose one

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or more of the following devices : (i) the International Tribunal for the Law of the Sea, (ii) the International Court of Justice, (iii) an

3. E. D. Brown, "Dispute Settlement", 5/3 (1981) *Marine Policy* p. 282.
4. The United Nations Convention on the Law of the Sea (Document A/CONF. 62/122, 7 October 1982) has adopted the 'International Tribunal for the Law of the Sea' (Annex VI), Sea-Bed Disputes Chamber (Annex VI, Section 4) and the Ad-Hoc Chambers of the Sea-Bed Disputes Chamber (annex VI, Section 4, Article 37).
5. 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 (Article 286).

Arbitral Tribunal, (iv) a Special Tribunal[6]. But if a dispute involves deep seabed mining, the state is required to submit the dispute to the Sea-Bed Disputes Chamber of the International Tribunal for the Law of the Sea.[7]

In any case, questions may arise how far all these devices will be effective to the settlement of disputes. According to Professor Brown it can rightly be pointed out that : "...it is sometimes difficult to remember that international law is still in large part a system of auto-interpretation in which the unqualified acceptance by States of an obligation to submit their disputes to a binding form of third-party settlement is still highly exceptional. Moreover, even when accepted, such obligations are frequently not honoured".[8]

In these circumstances, practical application of the provisions arising out of international law depends on the willingness of the states concerned. There is nothing to question that the purpose of all the devices incorporated by the UNCLOS III is to help the states to settle the LOS disputes peacefully. But if the states do not accept the device for settling the disputes as binding, then the failure of all the devices would be inevitable.

**What causes the LOS disputes**

Disputes may arise whenever there is competition between two or more parties to use the same sea space for the same purpose or for different but incompatible purposes.[9] Where a dispute arises out of a sea zone, the coastal state having any authority in that zone wants to treat the disputes to be fallen under its territorial jurisdiction.

6. Article 287.
7. *Ibid.*
8. E. D. Brown, "Dispute Settlement in the International Law of the Sea : Comments on UNCLOS III" in *Ocean Association of Japan, New Trends in Maritime Navigation, Proceedings of the Fourth International Ocean Symposium* 1979 (1980) p. 79.
9. E. D. Brown, "The Exclusive Economic Zone : Criteria and machinery for the resolution of international conflicts between different users of the EEZ", 4 (1977) *Maritime Policy and Management* p. 326.

As regards the delimitation of the "waters areas" on the landward side of the baselines, and the "territorial sea" the coastal states lay stress on the excercise of its territorial jurisdiction. The *Anglo-Norwegian Fisheries Case* (1951) is an example of the dispute of this category. From the Norwegian viewpoint, the dispute seems as falling under its territorial jurisdiction. Ultimately it was disposed of by the third-party settlement. This was possible because of the parties' acceptance of the jurisdiction of the International Court of Justice.

One country may claim jurisdiction over a certain ocean area through unilateral declaration or national legislation which other countries resist as a violation of international law. Disputes over delimiting continental shelf and economic zone may also be included in this category. These disputes over the interpretation of international law are of a most orthodox type and the International Court of Justice or an arbitral tribunal may be suited for their settlement. The judgment delivered by the International Court of Justice in the *North Sea Continental shelf Case* (1969), and the arbitral awards of the *Beagle Channel Case* (1977) between Argentina and Chile and the *United Kingdom France Channel Case* (1977), are such examples.

Another type of disputes may arise as to whether any domestic law applied to the case may or may not be considered with the requirements set forth in the new Law of the Sea. To this end, fishing can be taken as an example. If the optimum utilization of the resources within the exclusive economic zone becomes a rule in international law, then the coastal state is required to grant fishing rights to others for surplus stocks. But it may give rise to disputes between the coastal states and other fishing states over what constitute 'surplus'[10].

Disputes may arise between the coastal state and the land-locked and geographically disadvantaged states out of the claims to exploit

10. See Shigeru Oda, "The Role of International Court of Justice", 19 (1979) *Indian Journal of International Law* (IJIL) p. 164.

the surplus of the "allowable catch" of the living resources. With regard to the management of the "anadromous stocks"[11] and "catadromous species"[12], disputes may arise between the coastal states and the states claiming the right to high seas fisheries. As a matter of fact, the anadromous species have been given separate treatment as they represent a special species which travel far to sea, away from their rivers of origin and return to these rivers to reproduce[13].

As the state of origin is really the sole party in a position to assure the continuance of the runs, this state would possess sole management authority over them, in principle, the sole right of harvest. This would foreclose the fishing of these species on the high seas. In this regard disputes appear not only to arise between the coastal states concerned. Other states claiming the right to the high seas fisheries would proceed to challenge the coastal states.

In the case of pollution, if a coastal state is allowed to set legislation for ships to observe pollution-prevention measures that meet international standards, question would arise whether a specific piece of legislation by a coastal state meets international standards for pollution.

The regime of the 200 n.m. EEZ raises disputes among different coastal states. To this end, disputes arise out of its delimitation between opposite and adjacent states. Disputes may take place on different issues of the continental shelf. In determining the outer limit of the continental shelf particularly beyond 200 n.m, disputes may arise between the coastal state and the claimants to the "common heritage principle". As regards the delimitation of the continental shelf, disputes arise between the states with opposite and adjacent coasts. Different pleas may arise as to the principle applicable to the delimitation. A state may raise pleas to delimit the shelf by "median line" principle whereas, the counterpart by "special circumstances" or equitable principles". These pleas were

11. See LOS Convention, Article 66.
12. Article 67.
13. Article 66.

put forward in the *North Sea Continental Shelf Cases* and the *Anglo-French Arbitration.*

As regards the Barents Sea continental shelf delimitation, Norway followed median line principle whereas the Soviet Union invoked sector line principle arising out of "special circumstances". The Soviet Union clarified "special circumstances" situation mainly in two ways : (i) arctic legal arguments, which were based on the physical and climatic peculiarities of the region; (ii) the other arguments generally arising out of practical consideration, in the sense that they are not specially characteristic of the Arctic, but may be applied to any region whatever. The population density in the area is one example of this[14].

Norway rejected the sector principle on the ground that its use was highly controversial in international law. Apart from the Soviet Union, only Canada maintained this principle as the basis for a territorial claim in the Arctic. The USA and Denmark rejected the principle. Moreover, according to the official Soviet view, the sector principle applies exclusively to islands, not to ocean and continental shelf. The Norwegian view consequently is that it cannot be invoked in this case. Furthermore, Norway maintains that the term "special circumstances" refers to geographical factors, such as configuration of the coastline, the existence of islands, and so forth. For this reason, the economic, demographic, and security-political aspects of the area have no relevance in international law[15].

Libya and Tunisia have been experiencing a dispute regarding application of the principles for delimiting the continental shelf between them. Inspite of claims and counter-claims over the matter the two countries have entered an agreement to solve the delimitation by "equitable principles" subject to taking account of the relevant

14. Willy Ostreng, "The Continental Shelf Issues in the 'Eastern' Arctic Ocean, Implications of UNCLOS III with special reference to the Informal Composite Negotiating Text (ICNT)" in John King Gamble (ed), *Law of the Sea : Neglected Issues* (1979) p. 168.

15. *Ibid.*

circumstances and by that agreement they have referred the topic to the International Court of Justice for decision of the principles and rules of international law specifically to be applicable for the delimitation [16].

Disputes have arisen as to the delimitation of the continental shelf in the Aegean Sea between Turkey and Greece. The situation draws attention of international law and scholarly views on the subject[17]. The continental shelf claim of Greece pertaining to her islands near the shore of Turkey's mainland is disclaimed by Turkey. The plea for Turkey to reject Greece's claim is that the continental shelf surrounding the islands is the natural prolongation of Turkey's land territory. Both Greece and Turkey have agreed to study "state practice and international rules" on the subject with a view to deducing certain principles and practical criteria which could be of use in the delimitation of the continental shelf between two countries[18].

As regards the delimitation of the continental shelf in the region west of the mainland of Scotland, off the Hebridean Islands and Rockall Islet, disputes have arisen between the United Kingdom and Ireland. The disputes centre on the question of whether Rockall, a tiny uninhabited rock 180 miles west of Barra, can be used as a basepoint. Ireland disclaims it. However, the United Kingdom and Ireland have agreed to refer the dispute to an arbitration, following Irish protests after the United Kingdom designated under the Continental Shelf Act areas of the Rockall bank which Ireland considered fell within her sector. The Court's decision is likely to be

16. Libya—Tunisia : Agreement to submit question of the Continental Shelf to the International court of Justice, done at Tunis, 10 June 1977, enforced on 22 February 1978. 18 (1979) *International Legal Materials* (ILM) pp. 49-55.
17. *The Aegean Sea Continental Shelf Case* (Grecee *Vs. Turkey*) Request *for the Indication of Interim Measures of Protection Order*, 17 (1977) IJIL pp. 83-92.
18. Greece—Turkey : Agreement on Procedures for Negotiation of the Aegean Sea Continental Shelf Issue, done at Berne, 11 November 1976. *Ibid.*, p. 13.

influenced not only by the *North Sea Cases* but by the 1977 and 1978 decisions on the United Kingdom and French Channel and South-Western Approaches arbitration. For, it will not only raise questions concerning the outer limit of the shelf, but as in that case, delimitation between opposite and adjacent states, as the United Kingdom and Ireland face both situations because of the geography and geology of the disputed areas.[19]

In the Gulf of Siam the continental shelf claimed by Kampuchea passes through the islands belonging to Thailand and Vietnam. Kampuchea has to face a dispute both with Thailand and Vietnam for delimiting boundaries of the continental shelf. The dispute centres on the historical basis of the claims to various islands. Various attempts at negotiation have failed.[20]

Canadian-American disputes in the Gulf of Maine area started over oil rather than fish. As far back as 1964 Canada asserted her jurisdiction over the eastern part of Georges Bank by issuing offshore oil and gas exploratory permits out to the equidistance line. The United States did not object to Canada's claim until after the *North Sea Continental Shelf Cases*. Based on the 1958 Continental Shelf Convention as regards the definition of the "continental shelf" and the interpretation of the opinions of the International Court of Justice in the *North Sea Cases*, the United States advanced its claim that the entire Georges Bank is a "natural prolongation" of the United States, separated from Canada's shelf by the Northeast Channel which is deeper than 200 metres. The equidistance vs. special circumstances battle was on, with both sides having a number of good arguments supporting their respective positions[21].

19. R. P. Bartson and P. W. Birnie (eds), *The Maritime Dimension* (1980), George Allen & Unwin Ltd. London; p. 185.

20. *Ibid.*

21. See Hal Hills, "Georges Bank & the National Interest", 1/2 (1981) *New Direction in Ocean Law, Policy and Management, Dalhousie Oecan Studies Programme* 4. See also D. W. McRae, "Adjudication of the Maritime Boundaries in the Gulf of Maine", *17* (1979) *Canadian* Yearbook *of International Law* pp. 292-303.

On 14 February, 1979 Canadian and American negotiation teams announced a conclusion to negotiations on terms of (i) a proposed treaty to delimit the maritime boundary in the Gulf of Maine area; and (ii) a proposed agreement on East Coast fishery resources[22]. The documents directly linked to each other, were formally signed on 29 March, 1979. The agreement has come into force on 20 November, 1981[23].

**Delimitation disputes : Settlement procedures analysed**

The delimitation of the maritime boundaries such as the territorial sea, exclusive economic zone and the continental shelf between opposite and adjacent states is to be effected by agreement[24]. But if it is not possible to come to an agreement, then neither the TS and CZ Convention[25] nor the Continental Shelf Convention can specify the measures to be taken for the settlement of such disputes. In other words, in settling the disputes the states concerned have been considered as the sole arbiter. No machinery can be effective to the settlement of the disputes without the authority of these states.

However, if these states are singnatories to the "Optional protocol", they may accordingly be brought forward to the International Court of Justice. That means, each of the states to the dispute will be entitled to apply to the court for its settlement[26]. But, if the dispute endangers international peace and security, any member of the United Nations may bring the dispute to the attention of the Security Council or the General Assembly[27].

22. *Ibid.*
23. See 20 (1982) ILM pp. 1371 –1390.
24. See Convention on the Territorial Sea and the Contiguous zone (Doc. A/CONF. 13/L.52, 28 April 1958), Article 12; LOS Convention (1982), Article 15 ; Convention on the Continental Shelf (1958) (Doc.A/CONF. 13/L.55), Article 6 and the LOS Convention, articles 74, 83.
25. Convention on the Territorial Sea and the Contiguous zone (1958).
26. Supra., 2.
27. See UN Charter, Article 35.

As regards the disputes arising out of the delimitation of the territorial sea, exclusive economic zone and the continental shelf, the UNCLOS III has also laid stress on the states to settle the disputes by the agreement they entered or are likely to enter. From the articles[28] of the LOS Convention concerning the delimitation of these zones, it can be pointed out that on the failure of an agreement the states are required to settle the dispute by the devices as adopted in Article 287 provided the disputants accept the LOS treaty. But if the dispute endangers international peace and security, it will be automatically dealt with by the United Nations[29].

As a matter of fact, it can be observed that in settling the disputes arising out of different sea zones the provisions of the First and the Third Conferences do not differ. However, to this end, it is to be laid down that the "International Tribunal for the Law of the Sea" and its "Sea-Bed Chambers" of the UNCLOS III can be treated as a constituted judicial body of the LOS treaty.

## DISPUTES SETTLEMENT DEVICE : PRACTICAL APPLICATION

As a matter of fact, the UNCLOS III has dealt with the chapter "Settlement of Disputes" as a package deal of the LOS treaty. Whatever, devices and provisions have been prescribed by the LOS Conferences, they cannot basically be regarded as different from the provisions of Article 2(3) and 33(1) of the UN Charter and the statute of the International Court of Justice[30]. However, the UNCLOS III has made considerable contributions to the development of the LOS disputes settlement procedures.

It ought not to be forgotten that law is not merely a convenient device for the settlement of disputes. The law is something that can be made an effective instrument at a crisis and left out of account

28. Articles 74, 83.
29. Articles 33, 34, 35.
30. See Louis B. Sohn, "U.S, Policy Towards the Settlement of Law of the Sea Disputes", 17 (1976—77 *Virginia Journal of International Law* 20.

at other times. It is useful as a means of settlement only when, and so far as, a society has accepted the rule of law as its way of life.

**ICJ's compulsory jurisdiction**

There was a struggle for conferring general compulsory jurisdiction on the International Court of Justice when the United Nations Charter was framed. It was apparent in the debates that had arrived for futher advance toward compulsory jurisdiction. But the ideal could not be achieved due to the opposition of the Soviet Union and the United States. These two countries forced the Conference to adopt the old "Optional Clause" formula[31].

In spite of the enthusiasms apparent among the states that attended the San Francisco Conference, not many have accepted the compulsory jurisdiction of the court. As far back as 31 July 1965 only 40 in all[32], out of a United Nations membership of 115 states accepted the compulsory jurisdiction under Article 36 of the International Court of Justice. As time passed, new states emerged and the number of members of the United Nations has increased. But the states are not taking an interest in accepting the compulsory jurisdiction of the court. As for instance, till 31 July 1980, only 46 in all[33], out of 154 members af the United Nations have accepted the compulsory jurisdiction of the court. The reluctance in accepting the jurisdiction of the court is seen not only among the developed nations. It is equally observed among the developing nations.

No state appears to have accepted the compulsory jurisdiction of the court without reservation. In fact, none of the big powers has shown great faith in the court. With negotations and compromises as the prevalent methods of dealing with all threats to war, each

31. See Shabtai Rosenne, *The Law and Practice of the International Court* 1 (1965) A.W. Sijthoff, pp. 104-105.
32. See 19 (1964) *Yearbook of the International Court of Justice* (*ICJ Yearbook*) pp. 43-68.
33. See 34 (1979—80) *ICJ Yearbook* pp. 51-84.

nation remains intent upon preserving in tact its own freedom of independent decision and action in each situation that arises.[34]

It signifies that the acceptance of the compulsory jurisdiction of the ICJ is not encouraging. That is to say, the third-party dispute settlement procedure practically is not inspiring. As to its practical approach in the law of the sea Professor Brown says: "The background in the Law of the Sea area is similarly uninspiring. Only 34 States are bound by the Optional Protocol of Signature concerning

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the Compulsory Settlement of Disputes associated with the 1958 Geneva Conventions on the of Law the Sea and the attitudes of Iceland in *Fisheries Jurisdiction Cases*, France in the *Nuclear Test Cases* and Turkey in the *Aegean Continental Shelf Case* hardly reflect a very positive attitude to international adjudication"[35]

In the *Fisheries Jurisdiction Cases*[36] and the *Nuclear Test Cases*[37], Ireland and France challenged the jurisdiction of the court through court proceedings. In the *Aegean Sea Continental shelf Cases* Turkey informed the court on 20 April 1978 that it did not accept its

34. See R. P. Anand, *Studies in International Adjudication* (1969) Oceana Publications, p. 39.
35. E. D. Brown, "Dispute Settlement in the International Law of the Sea ; Comments on UNCLOS III" in *Ocean Association of Japan, New Trends in Maritime Navigation. Proceedings of the Fourth International Ocean Symposium*, 1979 Tokyo (1980) p. 75.
36. *United kingdom of Great Britain and Northern Ireland V. Iceland*, ICJ (1973), 12 (1973) ILM pp. 290—322.
37. *Australia* V. *France*, ICJ, 20 December 1975, General List 58. (1974) ICJ Report 253—455 : *New Zealand V. France*, ICJ, 20 Decemder 1874, General List 59. (1974) ICJ Report pp. 447—538.

jurisdiction and as such it was represented before the court. The court found that it had no jurisdiction.

The distribution of the acceptance of the jurisdiction categorically now in force is of interest. The states such as Colombia, Dominican Republic, Egypt, Haiti and Nicaragua accepted the jurisdiction having faith in the ICJ. Twenty states[38] recognised as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the International Court of Justice, in conformity with paragraph 2 of Article 36 of the Statute of the court. Each of these states provided the right to add, amend and withdraw the acceptance by notice. Fifteen states[39] accepted the jurisdiction of the court for a period of five years. Provisions also were made to enable the state concerned to terminate and extend the period.

Democratic Kampuchea accepted the compulsory jurisdiction of the court for a period of five years. But it was stated that after expiry of this period the jurisdiction will be treated as enforced until notice to the contrary is given by the country.[40] Some countries like Panama, Uganda and Uruguay accepted the jurisdiction purely on reciprocal basis[41].

It is important to note that several big powers, for example, France[42], Soivet Union and the People's Republic of China are not at present bound by the "Optional Clause". In fact, a hostile

38, Australia, Botswana, Canada, Gambia, India, Israel. Kenya, Leichtenstein, Malawi, Malta, Mauritius, Pakistan, Philippines, Portugal, Somalia, Sudan, Swaziland, Switzerland, Togo, and United Kingdom. See 34 (1979-80) *ICJ Yearbook* pp. 51—84.

39. Austria, Belgium, Costa Rica, Denmark, El Salvador, Finland, Japan, Liberia, Luxembourg, Mexico: Netherlands, New Zealand, Norway, Sweden, and the United States. *Ibid.*

40. *Ibid.*, p. 56.

41. *Ibid.*, pp. 73, 75, 82, 84.

42. France became an original signatory to the compulsory jurisdiction of the ICJ. But after the *Nuclear Test Cases* (1674) she has not renewed the jurisdiction.

attitude of the Soviet Union and other communist countries toward the Court is well-known. The legal argument behind the Soviet views is that the compulsory jurisdiction of the ICJ tantamounts to encroachment on the sovereignty of a state.

The attitude of the Afro-Asian states toward judicial settlement is not encouraging. The more immediate interest to this end is the apparently sceptical attitude of these states toward the International Court of Justice as a means for the judicial settlement of international disputes. It is frequently suggested that this is an indirect manifestation of the rebellion of the Afro-Asian states against the present system of international law and its alleged Euro-centric institutions. That means, "the historical record does not . . . justify any great optimism as to its possibility that by degrees the 'Optional Clause' may bring about a general system of compulsory jurisdiction[43]. But "It seems to be too much of a generalization to say that the oriental countries do not believe in the settlement of their disputes through legal means".[44]

**ICJ's compulsory jurisdiction and the LOS disputes**

It is significant to point out that the Law of the Sea became conventional in the 1958 Geneva Conference. As a matter of fact, the states which came into being in Asia and Africa after this Conference could not avail themselves of taking part in the Conference. But many of them have participated in the UNCLOS III.

With the passage of time, the states used to add, amend, extend and terminate the acceptance of the compulsory jurisdiction of the ICJ. As regards the Law of the Sea, the states, for example, Canada (1970), the Philippines (1971), El Salvader (1973), India (1974), New Zealand (1976) and Norway (1976) made exceptions to the

43. R.P Anand, *op., cit* p. 56.

44. C.H.M. Waldock, "Decline of the Optional Clause", 32 (1955-56) *British Yearbook of International Law* 246.

compulsory jurisdiction of the court[45]. Canada specified that "disputes arising out of or concerning jurisdiction or rights claimed or exercised in respect of the conservation, management or exploitation of the living resources of the sea, or in respect of the prevention of pollution or control of pollution or contamination of the marine environment in marine areas adjacent to the coast of Canada"[46] would not be treated subject to the compulsory jurisdiction of the ICJ. New Zealand made exceptions equally[47].

El Salvador mentioned that the disputes arising out of the territorial sea, continental shelf, continental slope, islands, bays, gulfs and the airspace superjacent to its land and maritime territory would be treated exception to the compulsory jurisdiction of the court[48]. Similar to this, exceptions were made by India. Furthermore, it was specified that the disputes relating to the continental margins, exclusive fishery zones, exclusive economic zone and the conduct of scientific research by foreign vassels would not be treated under the compulsory jurisdiction of the court.[49] In respect of the LOS disputes Norway stated that the compulsory jurisdiction would be effected subject to the outcome of the UNCLOS III on the chapter "Settlement of disputes"[50]. Philippines made exceptions to the compulsory jurisdiction of the court over the disputes arising out of the internal waters, archipelagic waters, territorial sea, continental shelf and the resource thereof[51].

With the passage of time the states are taking an interest in extending claims to the seas and their resources out of the provisions

45. The state such as, Australia much more before the UNCLOS III declared that the disputes arising out of the continental shelf, its resources and pear fisheries would be treated as exceptions to the compulsory jurisdiction of the ICJ. See (1965) *ICJ Yearbook*, p. 44.
46. See 34(1979-80) *ICJ Yearbook*, p. 54.
47. *Ibid.*, p. 73.
48. *Ibid.*, p. 59.
49. *Ibid.*, p. 63.
50. *Ibid.*, p. 74.
51. *Ibid.*, p. 77.

concerning baselines, territorial sea, exclusive economic zone (EEZ), and the continental shelf. The 200 n.m EEZ and the continental shelf practically will result in disputes outnumbered on the delimitation of these zones between opposite and adjacent states. But they are not taking an interest in accepting the compulsory jurisdiction of the ICJ to settle such disputes.

From the above observation, there arises no difficulties to reach an assumption that the third-party compulsory settlement procedure as adopted by the LOS Convention has little chance of being enforced among the states.

**Principles applicable to the settlement of the disputes**

Generally speaking, the states may be in conflict as regards any issues between them. Since international law in large part is a system of auto-interpretation, therefore, the degree of conflicts in this law is unending. If a dispute arises from a difference of opinion as to the existence or the interpretation of rights and obligations existing between states, this dispute can be settled by the ordinary procedure of contemporary international law. Conflicts between states, however, do not only arise because of difference of opinion as to the existence or the meaning of the law in force, but also not infrequently from the fact that one of the parties wishes to change the existing legal situation on the ground that is inequitable and contrary to objective justice.

Certain authors maintain that the latter disputes cannot be settled by a judicial procedure. They are of the opinion that the duty of the judge is always limited to the application of rights and obligations obtaining between the parties. An appeal to judicial settlement in international law, according to this conception, can never have as its object a change in the existing law. Consequently, they say, all differences which cannot be settled by applying the rules of law in fact should not be brought before the judge and should be considered as non-justiciable.

The Law of the Sea is a part of international law that gives rise to the most conflicting of the disputes between and among nations. Different issues are involved in this law. In delimiting the sea zones geographical, geological, geomorphological, historical and socio-economic issues arise between the states. The issues take place seriously particularly with the delimitation of water zones for example, the EEZ and the continental shelf. According to Sir Humphrey Waldock: "The difficulty is that the problem of delimiting the continental shelf is apt to vary from case to case in response to an almost infinite variety of geographical circumstances. In consequence, to attempt to lay down precise criteria for solving all cases may be to cause a chimera; for the task is always essentially one of appreciating the particular circumstances of the particular case"[52].

That is to say, it is not wise to rely upon a single principle as to the settlement of maritime boundary disputes. In order to settle a dispute arising out of the LOS provisions the UNCLOS III has not relied only upon any single machinery. Questions may arise as to what law should be applicable by the court or the tribunal authorised to adjudicate a dispute between the states. To this end, the UNCLOS III has complied with the provisions of the International Court of Justice as adopted in its Article 38. As has been seen, where the EEZ or the continental shelf delimitation dispute between opposite and adjacent states is not settled by agreement, the dispute ought to be settled subject to the device embodied in Article 287[53].

The 1958 TS and CZ Convention and the Continental shelf Convention suggested that the delimitation of the Sea zones should be effected by agreement. But what law should be applicable to the agreement in relation to the delimitation was not mentioned in the articles of these Conventions[54]. If the states are the signatory to the

52. Sir Humphrey M. Waldock, *The International Court and the Law of the Sea* (1979) p. 13.

53. *Supra.*, p. 2.

54. See TS and CZ Convention, Article 12, and the Continental Shelf Convention, Article 6.

"Optional protocol", then they should settle the dispute subject to the compulsory jurisdiction of the International Court of Justice[55]. In deciding the dispute the court will apply the law arising out of Article 38 of its statute[56]. That means, Article 38 appears to be applicable when the dispute is adjudicated by the court. But if the states wish to settle their dispute by "agreement", according to the 1958 Convention mentioned, these states are not required of applying the law arising out of Article 38 of the International Court of Justice. However, there is no restriction to apply the law subject to Article 38 of the court.

According to the LOS Convention, delimitation of the EEZ and the continental shelf between opposite and adjacent states is to be effected by 'agreement'[57]. The 'agreement' should be effected in conformity with Article 38 of the International Court of Justice. That is to say, they will have to apply the law arising out of the: (i) LOS Conventions (ii) international custom, (iii) general principles of law, (iv) judicial decisions and the teachings of most highly qualified publicists, and (v) case *ex aequo et bono*.

It signifies that the principles to be effected in the delimitation of the EEZ and the continental shelf should be based mainly upon general principles and norms of international law. At the same time they should be based upon international conventions such as the LOS Conventions expressly recognised by the contesting states and international customs. As far as judicial precedent and doctrine are concerned, they may serve too as subsidiary means for the determination of the rules of law. The judicial dicisions and the teaching of highly qualified publicists cannot have binding force except between the parties and in respect of that particular case. If the settlement of law are not authoritative and impartial, precedence may be given to the judicial decisions. According to Sir Hersch Lauterpacht: "It is to be expected that in a society of states in which

55. *Supra.*, p. 376.
56. *Supra.*, p. 2.
57. See LOS Convention, Article 76, 83.

opportunities for authoritative and impartial statements of the law are rare, there should be a tendency to regard judicial determination as evidence or, what is in fact the same, as a source of international law.[58]

If there is similarity of the dispute already adjudicated by the court with the dispute existing between the states, then the judicial decision can be treated as precedent for settling the dispute. It is a fact that infinite variety of circumstances is involved in the sea zones such as the EEZ and particularly in the continental shelf. Therefore, it is not surprising that in certain cases the laws arising out of the conventions, customs, general principles, judicial decisions and the teaching of the publicists may not be suitable to the adjudication of the dispute on the delimitation of these zones between opposite and adjacent states. Howerver, if the parties agree, then any of these provisions can be made applicable to the settlement of disputes between the states.

Besides these provisions, the parties to the dispute may decide a case *ex aequo et bono*. The *ex aequo et bono* clause means, the extraordinary procedure actually cannot be effected where there exists positive law. But if the dispute connot be settled by the law in force equitably, then *ex aequo et bono* clause should be applicable. According to M.O. Hudson: "The expression *ex aequo et bono* is used by way of contrast to the legal criteria enumerated... The intention, it is submitted, is precisely to provide for cases where the application of rules and principles of law is either inappropriate or impossible, and to enable the court to arrive at a decision according to what appears to it fair, reasonable, and expedient in the particular circumstances".[59]

58. Sir Hersch Lauterpacht, *The Development of International Law by the International Court* (1958) p. 14.

59. M.O. Hudson, *A Treatise on the Permanent Court of Justice* (1934), The Macmillan Company, p. 530.

It is to be borne in mind that "A decision *ex aequo et bono* presupposes the special consent of the parties"[60]. In any case, the court should be desired to settle the dispute and to satisfy the parties through a decision which will ensure peace. "An *ex aequo et bono* decision, which disregards the rights and obligations in force, will only be made on the basis of special request from both parties".[61] The *ex aequo et bono* principles should not be confused with law or equity in the strict legal sense. But it should be applied to the solution of a problem when no conventional rules, whether customary law or general principles of law, seem directly applicable to the case in hand. "It is a principle which is intended as a last resort in the judicial process of the court when all other measures cannot supply a solution or remedy ..."[62]. According to Article 293 of the LOS Convention:

1. "A Court or tribunal having jurisdiction under this section apply this Convention and other rules of international law not inconsistent with this Convention.

2. Paragraph 1 does not prejudice the power of the court or tribunal having jurisdiction under this section to decide a case *ex aequo et bono*, if the parties so agree".

Basically, there is no difference between this Article and Article 38 of the Statute of the International Court of Justice. The expression "other rules of international law" of paragraph 1 of Article 293 stated above may be used as regards the international custom, general principles of law, judicial decisions and the teachings of the most highly qualified publicists as adopted in paragraph 1 of Article 38 of the court. That is to say, it is easier to formutate the rules from paragraph 1 of Article 38 than paragraph 1 of Article 293.

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60. Dr. Max Habicht, *The Power of the International Judge to give a Decision "Ex Aequo Et Bono"* (1935), Constable & Co. Ltd. London, 6.
61. *Ibid.*, p. 42.
62. T.O. Elias, *New Horizons in International Law* (1980), Sijthoff & Noordhoff, p. 116.

It is suggested that the vague expression "other rules of international law" should as far as possible be replaced by specific terms. From this point of view, it is a feeling that it would be better if paragraph 1 of Article 293 of the LOS Convention is replaced by paragraph 1 of Article 38 of the International Court of Justice.

Whatever devices and provisions the UNCLOS III has provided for the settlement of dispute, they cannot be effected unless the states accept them. Whether the system of dispute settlement will be an integral part of the LOS Convention or will be treated as an optional protocol depends on the acceptance by the states. An optional protocol would be totally an inadequate way of dealing with the problem. As such, it is important to state that legal procedures should be accepted by the states so that the disputes between them can be settled by such procedures. In this regard, Professor Louis B Sohn says: "Effective legal procedures for dispute settlement are necessary to avoid political and economic pressures. While the larger and richer countries can apply extralegal, political and economic pressures to achieve their ends, it is especially important for small countries and for developing countries to have disputes directed into legal channels where the principle of equality before the law prevails"[63].

In any case, the settlement of dispute procedures as provided by the LOS Convention has been formulated as an integral part of the LOS "package deal". Article 309 of the Convention enables to state this assumption. According to this Article: "No reservation or exception may be made to this Convention unless expressly permitted by other articles of this Convention". That means, it can be pointed out that: "The choice for states is thus clear. They may accept or reject the Conventions as a whole. The assessment of the pros and cons of this immense instrument in terms of the national interest will be exceedingly difficult. Evolution of its provisions for disputed settlement and

63. Louis B. Sohn, "Settlement of the dispute of the Law of the Sea Convention", 12/3(1975) *The San Diego Law Review* p. 516.

of the adequacy of reservation built into the Convention will be an important part of that assessment"[64].

At the present time it is difficult to conclude whether the third-party dispute settlement procedures will be accepted as an integral part of the LOS treaty. It may be fully understandable that a group of states which may believe that their interest, views and legal approach represent a minority in posittion in the international community should be reluctant to accept the compulsory jurisdiction of an international tribunal.

It is equally natural that the states which have recently become independent and are passing through internal political, economic and social changes should hesitate to accept compulsory jurisdiction which they are apt to regard as a possible embarassment in the completion of their national and social revolutions. If, however, these attitudes are perpetuated beyond a certain stage, they weaken seriously the whole principle of third-party judgement which is an essential element in any satisfactory legal order. The question whether these attitudes represent a stage in development or a permanent attitude is, therefore, of primary importance for the future development of a universal system.

As has been stated, it may be borne in mind that there is no permanent attitude among the states to accept or avoid the compulsory jurisdiction of the International Court of Justice[65]. But the states actually appear to have accepted the compulsory jurisdiction subject to some reservations. There is no clear indication to be confident of a future development among the states as to the acceptance of the LOS dispute settlement procedures.

## BANGLADESH AND INDIA SITUATION

Bangladesh and India are two adjacent coastal states. Bangladesh is almost surrounded by India with Burma sharing a part of

64. E, D. Brown, "Dispute Settlement", 5/3 (1981) *Marine Policy* p. 286.
65. *Supra.*, p. 9.

her eastern border. The coast of Bangladesh is indented, broken and unstable. The configuration of the coast is concave. But the configuration of the coast of India which is concerned with the boundary delimitation of the sea zones with Bangladesh is convex. Different formations such as deltas and islands exist in the estuaries of the rivers and in the Bay of Bengal adjoining Bangladesh and India. Huge sediment deposits have made the continental shelf extensive in the Bay[66]. As time passes, new islands are coming up in the Bay near and off the coasts. To the south of the Bay lies Indian territory-Andaman and Nicobar group of Islands which are regarded as the continuation of the Burmese/Arakan Yoma[67]. The continental margin extending from the coasts of these countries reaches Sri Lanka to the south of Bangladesh and Indian Mainland. In effect, Bangladesh is a geographically disadvantaged state[68]. As adjacent states, Bangladesh and India are required to delimit each of the sea zones extending from the coast to the outer edge of the sea zone concerned.

Bangladesh has not accepted the compulsory jurisdiction of the ICJ. This cannot be regarded as a surprising phenomenon happening to Bangladesh. The country seems to be following the trend of the states who have not accepted the compulsory iurisdiction of the court. The statement of Bangladesh delegation made in the 62nd meeting of the UNCLOS III enables to point out that Bangladesh regards the settlement procedures as substantive part of the LOS conventions[69]. The country also prefers incorporation of a mandatory procedure applicable to the settlement of disputes. As a matter of fact, the chapter "Settlement of Disputes" can now be regarded to have been formulated as the substantive part of the

66. 5 (1976) UNCLOS III OR 41.
67. See F.J. Monkhouse, *Principles of Physical Geography* (1972), Fourth edition, London University Press, 342.
68. See Aaron L. Danzic, "A Funny Thing happned to Common Heritage on the Way to the Sea", 12/3 (1972) *The San Diego Law Review* p. 661.
69. See 5(1976) UNCLOS III OR 41.

UNCLOS III[70]. That means with the acceptance of the LOS treaty the chapter "Settlement of Disputes" appears to be automatically accepted.

Regarding the LOS matters, it may be noted that the states which are asserting claims to an excessive area of the seas and the resources thereof are seen not to have accepted the third-party settlement procedures as binding. Neither of the states for example, sixteen in number, who have been mentioned as the excessive claimants[71] to the baselines appears to have accepted the compulsory jurisdiction of the ICJ over the disputes arising out of such matters. Out of these states, Dominican Republic, Haiti, Philippines and the United Kingdom seem to have accepted the compulsory jurisdiction of the court[72]. But from a practical point of view, such disputes cannot be regarded as falling under this jurisdiction. Moreover, the Philippines clearly declared the disputes resulting from certain LOS matters should be treated as exception to the compulsory jurisdiction of the court[73].

The excessive 200 n.m territorial sea claimants[74] such as, Argentina, Benin, Brazil, Congo, Ecuador, Ghana, Guinea, Peru, Sierra Leone have not accepted the compulsory jurisdiction of the ICJ[75]. The 200 n.m territorial sea claimant states like El Salvador,

70. See LOS Convention, Article 309.

71. The maximum length for baselines is being extended to 222 n.m. In fact, excessive claims are being asserted as follows : Dominican Republic (45), Faroes (60), Burma (222.3), Madagascar (123), Venezuela (98.9), United Kingdom (40.25), Mozambique (60.4), Portuguese Guinea (79.0), Thailand (59.15), Philippines (140.05), Iceland (74), Indonesia (124), Gunea (120), Mauritania (89), Ecuador (130), Haiti (89). See Barry Hart Dubner, *The Law of Territorial Waters of Mid-Ocean Archielagic States* (1976), Martinus Nijthoff, p. 11.

72. *Supra.*, p. 10.

73. *Supra.*, p. 11.

74. See Robert B. Krueger, Myron H. Nordquist, "The Evolution of the 200-Mile Exclusive Economic Zone : State practice in the Pacific Basin", 19/2(1979-80) *Virginia Journal of International Law* pp. 390-398.

75. See 34 (1979-80) *ICJ Yearbook* pp. 51-64.

Panama and Somalia have become signatories to the compulsory jurisdiction but they made no statement as to the acceptance of the jurisdiction over the disputes resulting from the territorial sea. Furthermore, El Salvador specified the diputes arising out of certain LOS matters to be considered as exception to the compulsory jurisdiction of the court. Regarding the claimants to the EEZ and the continental shelf no state still has made acceptance of the compulsory jurisdiction of the ICJ over the disputes arising out of these sea zones.

As a matter of fact, Bangladesh is facing certain peculiarities in designing different sea zones individually and in delimiting the same with her neighbours particularly with India. In view of this and from the above observations it is easy to conclude that if the country accepts the compulsory jurisdiction of the ICJ, the acceptance will be subject to some reservations. It can also be submitted that the disputes arising from the LOS matters will be treated as exceptions to the jurisdiction of the court. That is to say, there is nothing to be confident of the compulsory jurisdiction of the ICJ over the LOS matters to be accepted by Bangladesh. In respect of the UNCLOS III settlement of disputes procedures, this assumption can equally be applicable to the country.

From the very beginning of her independence, India like most other countries of the world, has not shown much interest in third-party settlement of international disputes. Generally, she has preferred the less formal procedures of negotiation, concilation and mediation, which do not involve an element of compulsion, to any third-party binding judgment as is involved in arbitration and judicial settlement. It is interesting to note here that the Indian constitution makes it the duty of the Government to "foster respect for international law" and "encourage settlement of international disputes by arbitration[76].

76. Part IV, Directive Principles, Article 57.

Inspite of this principle embodied in the constitution, India has been extremely cautious in submitting her disputes to arbitration. Subject to certain exceptions India accepted the compulsory jurisdiction of the ICJ in 1959. With the passage of time, India began to specify more and more exceptions. In the year 1974 she renewed her acceptance of the jurisdiction and specified several exceptions. In the exceptions certain LOS disputes were specified not to be considered subject to the compulsory jurisdiction of the court[77].

The attitude of India toward third-party settlement of the LOS disputes is practically similar to her attitude toward the compulsory jurisdiction of the ICJ. This assumption can be followed through the statement of Indian delegation made in the 59th meeting of the UNCLOS III[78]. The delegation expressed that "procedures for settling disputes should be reserved for cases when the disputes could not be resolved by negotiations between the states concerned and should be based on the express agreement of the parties".[79]

Viewing with this, it was stated that the "Optional Protocol" as adopted in the UNCLOS I should be provided for the settlement of disputes. It realises that there is no possibility of India to accept any far-reaching obligations toward the third-party settlement.

But, if the LOS treaty is ratified, the chapter "Settlement of Disputes" as formulated by the UNCLOS III appears to be auto-

77. That is to say, the disputes with India concerning or relating to : (a) "the status of its territory or the modification or delimitation of its frontiers or any other matter concerning boundaries ; (b) the territorial sea, continental shelf and the margins, the exclusive fishery zone, the exclusive economic zone, and other zones of national matitime jurisdiction including for the regulation and control of marine pollution and the conduct of scientific research by foreign vessels ; (c) the condition and Status of its islands, bays and gulfs and that of the bays and gulfs that for historical reasons belong to it ; (d) the airspace superjacent to its land and maritime territory ; and (e) the determination and delimitation of its maritime boundaries". See 30 (1075-76) *ICJ Yearbook* p. 62.

78, See 5 (1976) UNCLOS III OR 17, 18.

79. *Ibid.*, 17, 42,

matically ratified[80]. To this end, it may be mentioned that while the states fail to settle the dispute by negotiation, concilation and by any other means, the third-party settlement under Article 287 of the LOS Convention will be binding. If there is no obligation of the states to be a signatory to this treaty, then, it is submitted that the chapter "Settlement of Disputes" will be the reason for the states of not ratifying the treaty. The statement of Mr. Figueredo of Venezuela enables to reach the assumption. It is reported to have said that his delegation would not agree to a formula which would give a blank cheque to an international jurisdiction "to settle matters affecting the sovereign intersts of our countries"[81].

It is a fact that India took active part in the deliberations of the UNCLOS I. But she had not been a signatory to any of the conventions[82]. It signifies to be sure of the probable negative attitude of India toward the third-party settlement to be arising from the UNCLOS III. However, if the LOS treaty is ratified and both Bangladesh and India are signatories to it, the LOS disputes should be settled subject to Article 287 of the LOS Convention. But the chapter "Settlement of Disputes" whether will be ratified with the ratification of the LOS treaty comes into question.

Furthermore, questions may arise whether Bangladesh and India will ratify the provision relating to the settlement of disputes of the LOS Convention. If not, then in any circumstances, they will have to settle the LOS disputes by their own means. That is to say, they must be determined to settle the boundaries of different sea zones between them. Otherwise, no third-party settlement can be made effective unless they accept the same. Pursuant to the "special circumstances" situations existing between the countries, it is reasonable to conclude that they should have no reservation toward the *ex aequo et bono* clause while the arbitration tribunal feels necessary to apply the clause for adjudicating the disputes.

80. See LOS convention, Article 309.
81. UN Press Release SEA/102, 24 April 1979, p. 2.
82. TS and CZ Convention, Hign Seas Convention, Fishing and Conservation of the Living Resources of the High Seas Convention, and the Continental Shelf Convention.