The Trend of Engagement of Asian and African States with ITLOS-A Preliminary Appraisal

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Abstract

The ITLOS is too young a tribunal, if the volume and variety of the cases it has been involved in is considered, instead of the time that has lapsed since its inception. Yet it has embarked on a journey to exercise certain elements of public authority, albeit not unequivocally, and craft its legitimacy from State consent. The oft-cited risks of fragmentation of the regime and incoherence in the jurisprudence that threatened the Tribunal's inception and existence have not materialized. The time is indeed ripe to metamorphose those not entirely baseless suspicions to the conviction that ITLOS is here to stay, and is striving to take strides in laying its authoritative premises for the future by contributing to the progressive development of the field. This paper has sought to revisit the journey and attempted to appraise, although in a preliminary fashion, the trend of engagement of Asian and African States, particularly the AALCO Member States, with the underutilized Tribunal. The prospect of broadening the scope of adjudication of the Tribunal has been considered and a few suggestions regarding means to ensure optimum utilization of the Tribunal to the advantage of the AALCO Member States have been adduced. The perceived potential of the Tribunal outweighs the criticisms against it, and AALCO Member States might stand to benefit by nurturing it and enabling it to promote its authority. The Tribunal, on its part, needs to take note of a few factors to invite a greater commitment of the AALCO Member States towards its functioning.

1. Introduction

The 1982 United Nations Convention on the Law of the Sea (hereafter UNCLOS, or the Convention), conceived as "a comprehensive constitution for the oceans which will stand the test of time",[1] is remarkable in the manner it proffers the States with a comprehensive set of voluntary and compulsory procedures for dispute settlement. Article 279 of the Convention asserts that the fundamental and preliminary obligation of all State parties is to settle disputes by the peaceful means indicated in Article 33 (1) of the Charter of the United Nations, and in accordance with Article 2 (3) of the Charter. Part XV of the UNCLOS was the outcome of a resolution of several conflicting perspectives, following much negotiation

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1 Tommy T.B. Koh, 'A Constitution for the Oceans', Remarks by the President of the Third United Nations Conference on the Law of the Sea at the final session of the Conference at Montego Bay (1982), <https://www.un.org/Dep ts/los/convention_ agreements/texts/koh_english.pdf> accessed 24 October 2020.

and creative[2] legal work, and incorporated within the main text of a major multilateral treaty, comprehensive, and in some cases, compulsory judicial settlement mechanisms, instead of relegating compulsory dispute settlement to an optional protocol.[3] Under Article 287 of the Convention, States parties were provided with an option to choose from a range of adjudicatory fora: the International Tribunal for the Law of the Sea (ITLOS, or the Tribunal), the International Court of Justice (ICJ), arbitration, or special arbitration before panel of experts.[4]

The availability of this wider range of options was in sharp contrast to the trend of settlement of disputes through either ad hoc arbitration or recourse to the World Court, i.e., the Permanent Court of International Justice (PCIJ) and its successor, the ICJ, as was the wont before UNCLOS came into being. Therefore, it is of little surprise that the ITLOS has alternatively been regarded as "the chief guardian of the 1982 Convention,"[5] or as a distractor from the UN system of justice focused on the ICJ, which, as already stated, now shares its formerly (practically) exclusive authority to decide matters involving the UNCLOS.[6]

The Tribunal has sought to contribute to the rule of law in two interrelated ways: first, by settling disputes peacefully, and second, by clarifying and developing international law.[7] The desire to attract additional State support has been central to the work of the ITLOS judges: ITLOS has negotiated a delicate path in seeking recognition by States by courting States to choose ITLOS as their dispute resolution body of choice for ocean law issues and being cautious in its interpretations of

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2 The flexible system of access to the procedures was devised by Professor Riphagen, known as the Montreux Formula; M Nordquist, S. Rosenne and L. Sohn (eds.), *UN Convention on the Law of the Sea 1982: A Commentary* (Vol 5, Netherlands, Martinus Nijhoff Publishers, 1989) 8-9.

3 Martin Tsamenyi *et. al.*, 'Fisheries Dispute Settlement under the Law of the Sea Convention: Current Practice in the Western and Central Pacific Region', in Q. Hanich and M. Tsamenyi (eds.), *Navigating Pacific Fisheries: Legal and Policy Trends in the Implementation of International Fisheries Instruments in the Western and Central Pacific Region*, (ANCORS, University of Wollongong, Australia, 2009) 146-62, 147 <http://ancors.uow.edu.au/images/publications/Navigating%20Pacific%20Fisheries%20Ebook/Chapter_6_Navigating_Pacific_Fisheries.pdf> accessed 20 August 2020.

4 See generally Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge University Press, 2005).

5 The Monte Confurco Case*, Seychelles v France*, ITLOS Application for Prompt Release, Dissenting Opinion of Judge Laing (2000): paragraph 3.

6 J. Noyes, 'International Tribunal for the Law of the Sea' (1998) 32(1) *Cornell International Law Journal* 110, footnote 9.

7 Jin-Hyun Paik, 'ITLOS at Twenty: Reflections on Its Contribution to Dispute Settlement and the Rule of Law at Sea', in Myron H. Nordquist, John Norton Moore and Ronán Long (eds.), *Legal Order in the World's Oceans* (Brill Nijhoff, 2017) 187-209.