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The UNCLOS Dispute Settlement Mechanism: Effectiveness and Limitations

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Abstract

The UNCLOS provides for a dispute settlement mechanism (UNCLOS-DSM) in Part XV, which has proven so far to have had mixed results. On the one hand, it has worked *effectively* in settling UNCLOS disputes, while, on the other hand, inherent *limitations* concerning its functions and powers under UNCLOS remain at play. This article is devoted to analysing this inherent ambivalence in order to present the current reality but also to consider the future possibilities of the UNCLOS-DSM. Although expectations concerning the UNCLOS-DSM have suddenly risen following the *South China Sea* case, it should be noted that the UNCLOS-DSM is not a panacea empowered to settle all kinds of dispute.

Key words: UNCLOS, dispute settlement, Part XV, ITLOS, Annex VII arbitration

1. Introduction

The United Nations Convention on the Law of the Sea ('UNCLOS') establishes a particular mechanism of dispute settlement ('UNCLOS-DSM'),[1] that has contributed much to the settlement of complex disputes, including that of the *South China Sea* case ('the *SCS* case'). This mechanism has attracted much interest on the part of practitioners and academics.

On the one hand, the UNCLOS-DSM may be evaluated as having functioned *effectively* and successfully, largely due to the compulsory jurisdiction conferred to the Annex VII arbitral tribunal (i.e., an UNCLOS institution and key feature of the UNCLOS-DSM regime). In other words, once a State becomes a State Party to UNCLOS, it is deemed to accept the compulsory jurisdiction pursuant to Article 287 of UNCLOS. Within this mechanism, no State Party to UNCLOS may deny jurisdiction on at least several categories of dispute. In addition, the effectiveness of UNCLOS-DSM is attributable not only to the compulsory jurisdiction of an Annex

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1 As to the general introduction to the UNCLOS-DSM, *see* Dai Tamada (forthcoming 2019), 'UNCLOS Dispute Settlement Mechanism: Contribution to the Integrity of UNCLOS', *Japanese Yearbook of International Law*, Vol. 61.

VII arbitral tribunal, but, more generally, to the broader UNCLOS-DSM and the collaborative function of ITLOS and Annex VII arbitral tribunals, hence the need to analyse the mechanism as a whole, and as a combination of several fora.
On the other hand, the UNCLOS-DSM is not a panacea for solving all kinds of dispute, given the *limitations* to its powers and functions. The issue of non-compliance with Annex VII arbitral tribunal awards abundantly highlights the limitations inherent to the UNCLOS-DSM.

2. Effectiveness of UNCLOS-DSM

The UNCLOS-DSM comprises several fora (such as the International Tribunal for the Law of the Sea and the Annex VII tribunal) and different procedures (such as prompt releases, provisional measures and so on), which mix various concepts and procedures that have been developed in international courts and tribunals.

2.1. Compulsory Jurisdiction: Article 287

A key characteristic of the UNCLOS-DSM can be found in its compulsory jurisdiction established by Article 287 of UNCLOS, which is entirely different to the optional clause of the Statute of the International Court of Justice.[2] *First*, under Article 287(1), upon accession each State Party, by declaration, chooses one or more means of dispute settlement, among ITLOS, ICJ, Annex VII arbitral tribunal, and Annex VIII arbitral tribunal. *Second*, if the choice of two disputing parties coincide, the dispute between them may be submitted only to that procedure.[3] Otherwise, the dispute may be submitted only to an Annex VII arbitral tribunal.[4] *Third*, if a Party has made no declaration under Article 287(1), it is deemed to have accepted the jurisdiction of an Annex VII arbitral tribunal.[5]

2.1.1. Compulsory Jurisdiction of Annex VII Tribunal

The above mechanism illustrates the default compulsory jurisdiction of an Annex VII tribunal, which is expected to function as the last resort. In fact, even though many State Parties make no declaration as per the requirement of Article 287(1), they are by default deemed to accept the jurisdiction of an arbitral tribunal established under Annex VII should a relevant dispute arise. Therefore States Parties, once acceded to UNCLOS, accept the compulsory settlement of any relevant dispute, through, at the very minimum, the arbitral procedure of Annex VII. Here, one witnesses a key

2 Article 36(2) of the ICJ Statute.
3 Article 287(4): 'If the parties to a dispute have accepted the same procedure for the settlement of the dispute, it may be submitted only to that procedure, unless the parties otherwise agree'.
4 Article 287(5): 'If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree'.
5 Article 287(3): 'A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII'.

characteristic of the UNCLOS-DSM – namely, that it was a product of compromise between competing needs, and it expresses the balance of power at the time of negotiations. Compulsory jurisdiction is not conferred upon the ITLOS, which is a permanent court, but rather to a tribunal constituted under Annex VII which is essentially *ad hoc* arbitration. In other words, although the drafters of UNCLOS created a powerful mechanism of compulsory jurisdiction for particular disputes, they afforded it only to Annex VII arbitral tribunals, as a means of maintaining party autonomy and as much discretionary power of the disputing parties may be maintained within a functional DSM.[6]

2.1.2. Reverse phenomenon

Further to the foregoing, the operation of the UNCLOS-DSM has led to some interesting results: trends arise in relation to the number of disputes referred to UNCLOS-DSM procedures—namely, that ITLOS has been relied upon mainly for emergency procedures—in the form of the prompt release and the emergent provisional measures—while there is greater recourse to Annex VII arbitration in relation to the merits of disputes (cf., Table 1).

Table 1: Number of cases under UNCLOS-DSM (as of 1 October 2018)

ITLOS	- Judgment (prompt release) - Order (provisional measures) - Judgment (jurisdiction/preliminary objections) - Judgment (merits) - Advisory Opinions	8 9 2 4 2
Annex VII tribunals	- Award (jurisdiction and admissibility) - Award (merits, including jurisdiction) - Award (compensation) - Order (provisional measures)	3 7 1 1

The above table demonstrates the trends for ITLOS to be used mainly in emergency procedures, while, Annex VII arbitration at the merits phase. Although this may perhaps appear counter-intuitive to some, it is worth noting that this had been envisaged by the drafters of UNCLOS. In other words, in relation to resolving the merits of disputes, State Parties had preferred recourse to *ad hoc* arbitral procedures over recourse to ITLOS as a means of maintaining party autonomy.

2.2. The Condition of Jurisdiction: Article 281

Compulsory jurisdiction does *not* mean that there is no jurisdictional requirement under UNCLOS-DSM. For instance, the condition under Article 281(1)[7] has long

6 As we shall see below, Annex VII tribunal is an *ad hoc* arbitration, in the sense that the procedural rules applicable to it are not fully provided by UNCLOS, but must be decided by the disputing parties in each case. Here, the disputing parties widely maintain the discretion to control the arbitral procedure.

7 Article 281(1): 'If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided

been discussed. Although it admits the priority of any 'peaceful means' chosen by the disputing parties, the applicable criteria remain uncertain, namely whether any *implicit* exclusion of the UNCLOS-DSM in any other international instrument is sufficient for Article 281 to operate. Interestingly, in arbitration practice, this criterion has shifted from requiring an *implicit* exclusion (cf., the *Southern Bluefin Tuna* case) to requiring an *explicit* exclusion (cf., the *SCS* case). In the former case, the Annex VII arbitral tribunal had stated that:

> […] the existence of such a body of treaty practice […] tends to confirm the conclusion that States Parties to UNCLOS may, by agreement, preclude subjection of their disputes to section 2 procedures in accordance with Article 281(1). To hold that disputes implicating obligations under both UNCLOS and an implementing treaty such as the 1993 Convention – as such disputes typically may – must be brought within the reach of section 2 of Part XV of UNCLOS would be effectively to deprive of substantial effect the dispute settlement provisions of those implementing agreements which prescribe dispute resolution by means of the parties' choice.[8]

Here, the Annex VII tribunal was unable to establish its jurisdiction due to adopting the *implicit* exclusion approach under Article 281,[9] which was supported by some scholars[10] while criticized by others, on the ground that it restricts the exercise of jurisdiction.[11] Consequent criticism was instrumental in influencing a subsequent Annex VII tribunal to reverse this stance in the *SCS* case,[12] in which the tribunal, observing that the Convention on Biological Diversity and UNCLOS are 'parallel environmental regimes',[13] had stated that:

> [t]his conclusion is supported by the fact that Article 27 of the CBD *does not expressly exclude* recourse to dispute settlement procedures under Section 2 of Part XV of the Convention. For the reasons outlined above in connection with the DOC, the Tribunal is of the view that *a clear exclusion of Part XV procedures is required in order for Article 281 to present an obstacle for the Tribunal's jurisdiction* (emphasis added).[14]

By requiring the 'clear exclusion' of the UNCLOS-DSM, the *SCS* tribunal adopted the *explicit* exclusion criterion in the establishment of jurisdiction. The consequent

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for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure'.

8 *The Southern Bluefin Tuna case (Australia v. Japan; New Zealand v. Japan)*, Award on Jurisdiction and Admissibility (August 4, 2000), para. 63.

9 Natalie Klein, 'Expansions and Restrictions in the UNCLOS Dispute Settlement Regime: Lessons from Recent Decisions', *Chinese Journal of International Law*, Vol. 15 (2016), p.406.

10 Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (2005), pp. 35-43; Natalie Klein, *supra* note 9, p.405.

11 Separate Opinion of Justice Sir Kenneth Keith, attached to the Award, paras.15 and 17; Astrid Wiik, 'Choice or Default? UNCLOS, Other Dispute Settlement Systems and Choice of Procedure Pursuant to Article 287 UNCLOS', in Bartłomiej Krzan ed., *Jurisdictional Competition of International Courts and Tribunals* (2012), p.126.

12 In the oral pleadings, the Philippines insisted that the interpretation given in the *Southern Bluefin Tuna* case was wrong. Hearing on Jurisdiction and Admissibility, Day 2 (July 8, 2015), by Professor Boyle, p.116; Hearing on Jurisdiction and Admissibility, Day 3 (July 13, 2015), by Professor Boyle, p.47.

13 *The South China Sea case (Philippines v. China)*, Award on Jurisdiction and Admissibility (October 29, 2015), para.285.

14 *Ibid*., para.286.

effect of this new approach is to broaden the scope of compulsory jurisdiction under the UNCLOS-DSM.[15]

2.3. Existence of the Entitlement Dispute

Compulsory jurisdiction does not mean that all kinds of dispute may be submitted to the UNCLOS-DSM. As shall become apparent below, several categories of dispute are exempted from the scope of compulsory jurisdiction, pursuant to Articles 297 and 298. In seeking to prevent the application of those exceptions, Applicant States tend to formulate their claim as pertaining to a dispute falling within the scope of compulsory jurisdiction. For instance, in the *SCS* case, the Philippines alleged the existence of an *entitlement* dispute, different to and separate from a territorial *sovereignty* and/or a maritime *delimitation* dispute. Were the dispute to be categorised as a *sovereignty* dispute, there could be no recourse to the Annex VII tribunal procedure on the basis of compulsory jurisdiction, since the jurisdiction of such a tribunal would *ratione materiae* be limited to 'dispute[s] concerning the interpretation or application of this Convention [UNCLOS]'.[16] Were it categorized as a *delimitation* dispute, it would fall within the scope of China's optional declaration under Article 298(1)(a)(i) and, consequently, would have to be excluded from the tribunal's compulsory jurisdiction. On this issue, the tribunal in the event admitted the existence of an *entitlement* dispute, independent and separable from a maritime *delimitation* dispute, in the following manner:

> […] A maritime boundary may be delimited only between States with opposite or adjacent coasts and overlapping entitlements. In contrast, a dispute over claimed entitlements may exist *even without overlap*, where—for instance—a State claims maritime zones in an area understood by other States to form part of the high seas or the Area for the purposes of the Convention (emphasis added).[17]

As is clarified here, an *entitlement* dispute may even occur between two States in such instances whereby they are sufficiently remote in relation to each other for no possibility of maritime delimitation between them. In understanding the background and impact of the above finding, it seems necessary to refer to the issue of the Oki-no-Tori Shima (i.e., the Okinotori islands situated on the Palau-Kyushu Ridge in the Philippine Sea). With regard to the legal status of the Okinotori islands under Article 121, there had been a difference of opinion between, on the one hand, Japan (regarding it as an *island* thus holding implications for EEZ and Continental Shelf rights) and, on the other, China and South Korea (regarding it as a *rock* possessing no EEZ or continental shelf),[18] even though the area in question is situated far from

15 Natalie Klein, *supra* note 9, p.406.
16 Articles 286 and 288 of UNCLOS. Since UNCLOS does not touch upon territorial sovereignty issues, there can be no sovereignty dispute concerning the interpretation or application of UNCLOS.
17 *The South China Sea case (The Philippines v. China)*, Award on Jurisdiction and Admissibility (October 29, 2015), para. 156.
18 Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/2/2009 (February 6, 2009).

these two countries, leaving no possibility of maritime delimitation. In opposition to China's claim, Japan had stated that China and South Korea do not 'possess any maritime area nearby which might overlap with the areas generated from the coastline of this island. They thus have *no direct interest* in the legal status of this island' (emphasis added).[19] In the *SCS* case, the position of China was used by the Philippines as 'a textbook case' in how an entitlement dispute may occur without any overlap of maritime zones or the presence of a maritime delimitation.[20] To summarise, the Annex VII tribunal relied *implicitly* on China's position regarding the Okinotori islands for justifying the existence of an entitlement dispute, independently from any maritime delimitation dispute. This finding, indispensable for the tribunal to establish its jurisdiction, however expands the notion of *dispute* in the sense that an entitlement dispute can exist, in an extremely *abstract* form, between several States even without any overlap of maritime areas inter-se.

2.4. Collaboration between the Two Fora

The UNCLOS-DSM has enhanced its effectiveness thorough the collaborative scope between the ITLOS and the Annex VII arbitration procedures.

2.4.1. Emergency Procedures of ITLOS

The fact that an Annex VII tribunal is *ad hoc* arbitral tribunal means that there are structural disadvantages at play such as taking a considerable length of time—at least several months—to constitute a tribunal by nominating five arbitrators. As a result, a tribunal faced with an emergent request for provisional measures, has no means to respond to that urgency. In this respect, ITLOS is expected to compensate for this shortcoming, since, as a standing tribunal, it is able to respond to emergent requests *at any time*. Two special procedures are provided for this purpose – namely the prompt release (Article 292) and the emergent provisional measures (Article 290(5)). It should be noted *first* that, in relation to both, ITLOS functions as a *de facto* default procedure, under Article 292(1)[21] and Article 290(5).[22] *Second*, by exercising its residual jurisdiction in the prompt release and the emergent provisional measures, ITLOS compensates for the shortcoming of the Annex VII tribunal.[23] In this

19 Note Verbale from the Permanent Mission of Japan to the United Nations to the Secretary-General of the United Nations, PM/12/078 (April 9, 2012).

20 Hearing on Jurisdiction and Admissibility, Day 2 (July 8, 2015), Professor Oxman, pp. 41-42. It was stated that 'China recognises the fundamental distinction between an entitlement on the one hand, and delimitation on the other. Unlike such questions of entitlement, delimitation engages only the legal interests of states whose zones overlap, and only the areas where zones overlap'.

21 Article 292(1) provides that the question of release from detention may be submitted to '*any court or tribunal agreed upon by the parties* or, *failing such agreement within 10 days from the time of detention*, to a court or tribunal accepted by the detaining State under article 287 or to the ITLOS, unless the parties otherwise agree' (emphasis added). It is clear that the disputing parties can choose any court or tribunal for the prompt release claim. Insofar as it is unrealistic to reach an agreement within 10 days, however, ITLOS has worked as a *de facto* default procedure for prompt release. In fact, there has been no case of prompt release dealt with by any other forum than ITLOS.

22 Under Article 290(1), the power to render provisional measures orders is conferred not only on ITLOS, but on any court or tribunal provided for in Article 287.

23 José Luis Jesus, 'The Contribution of the Compulsory Jurisdiction Mechanism to the Effective Application of Dispute Settlement System of the 1982 United Nations Convention on the Law of the Sea: The Case of ITLOS', in Shicun Wu et

sense, this interplay between fora and procedures is an example of a 'cooperative relationship' within the UNCLOS-DSM.[24] *Third*, in the initial period, ITLOS was characterized as a Tribunal for emergency procedures, since it was not dealing with any *merits* cases except in the *SAIGA No.2* case. Its successful handling of emergency cases, however, has contributed to its success since it 'earned a reputation for being able to administer justice in an expeditious and cost-effective manner' through the emergency procedures.[25]

2.4.2. Cost-Saving by Shifting Cases to ITLOS

Compared with the permanent court, *ad hoc* arbitration has a further disadvantage: the associated costs for the fees of arbitrators and facilities.[26] ITLOS is free to use for the disputing parties,[27] while they have to bear the fees of arbitrators in Annex VII arbitration[28] which results in the latter generally becoming more expensive than the former.[29] This has directly influenced the choice of forum by the disputing parties in certain ways. *First*, in five cases, the parties initiated the procedure under Annex VII for the sole purpose of establishing jurisdiction, and then reached agreement to transfer the case to ITLOS to resolve the dispute 'in a less costly manner'[30] and to use the ITLOS facilities.[31] *Second*, the Special Chamber of ITLOS was deliberately chosen by the parties in *Ghana/Côte d'Ivoire*[32] and *Chile/EU*.[33] It should be recalled that when the parties choose the Special Chamber, its composition is not substantially different from that of an Annex VII arbitration insofar as the parties may have a say in the selection of the Chamber's members.[34] In this way ITLOS, especially its Special Chamber, can function as a supplement or alternative to Annex VII arbitration.[35]

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al. eds., *UN Convention on the Law of the Sea and the South China Sea* (2015), p.11; Jin-Hyun Paik, 'ITLOS at Twenty: Reflections on Its Contribution to Dispute Settlement and the Rule of Law at Sea', in Myron H. Nordquist et al. eds., *Legal Order in the World's Oceans: UN Convention on the Law of the Sea* (2018), p.191.

24 Astrid Wiik, *supra* note 11, p.142.

25 Vladimir Golitsyn, 'Opening Statement of the President of the Tribunal', in *The Contribution of the International Tribunal for the Law of the Sea to the Rule of Law: 1996-2016* (2018), p.5.

26 As to the fees for agents, counsels, and advocates, there is no difference between ITLOS and Annex VII arbitration.

27 Article 19(1) of the ITLOS Statute: 'The expenses of the Tribunal shall be borne by the States Parties and by the Authority on such terms and in such a manner as shall be decided at meetings of the States Parties'.

28 For aiding developing countries, the Financial Assistance Fund was established in PCA in 1994, available at <https://pca-cpa.org/en/about/structure/faf/>.

29 However, this depends on the timetable of each case. There may be no difference in cost between seven years of ITLOS proceedings and three-and-a-half years of Annex VII proceedings. Philippe Sands, 'Of Courts and Competition: Dispute Settlement under Part XV of UNCLOS', in Rüdiger Wolfrum et al. eds., *Contemporary Developments in International Law: Essays in Honour of Budislav Vukas* (2016), p.795.

30 *The M/V "Virginia G" case (Panama v. Guinea-Bissau)*, Notification of arbitration submitted by Panama (3 June 2011), p.3.

31 It is said that ITLOS has 'a well-organized Registry'. P. Chandrasekhara Rao, 'ITLOS: The Conception of the Judicial Function', in Holger P. Hestermeyer et al. eds., *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum, Vol. II* (2012), p.1760.

32 Pieter Bekker and Robert van de Poll, 'Ghana and Côte d'Ivoire Receive a Strict-Equidistance Boundary', *ASIL Insights*, Vol. 21, issue 11 (2017).

33 Alan Boyle, 'UNCLOS Dispute Settlement and the Uses and Abuses of Part XV', *Revue belge de droit international*, Vol. 47 (2014), p.190.

34 Article 15(2) of the ITLOS Statute: '[…] The composition of such a chamber shall be determined by the Tribunal *with the approval of the parties*' (emphasis added).

35 Jin-Hyun Paik, *supra* note 23, p. 193.

2.4.3. Provisional Measures Order by Annex VII Tribunal

Not only ITLOS, but also the Annex VII tribunal is empowered to render a provisional measures order, pursuant to Article 290(1). As a result, even after ITLOS has rendered an emergent provisional measures order, under Article 290(5), there remain possibilities for an Annex VII tribunal to issue a different order for provisional measures. This actually occurred in the *Enrica Lexie* case, in which Italy had requested first that ITLOS prescribe two provisional measures – namely, that (a) India refrain from taking or enforcing any judicial or administrative measures, and that (b) India take all measures necessary to ensure that restrictions on the liberty, security and movement of the Marines be immediately lifted.[36] While claim (a) was admitted by ITLOS,[37] claim (b) was rejected for the following reason:

> the Tribunal does not consider it appropriate to prescribe provisional measures in respect of the situation of the two Marines *because that touches upon issues related to the merits of the case* (emphasis added).[38]

Subsequently, Italy submitted a slightly modified claim (b) to an Annex VII arbitral tribunal, which, accepting this claim, prescribed a provisional measure.[39] This means that, while ITLOS is expected to function at the early stages of a dispute, especially in relation to the emergent provisional measures procedure, it is unable, conversely, to touch upon issues closely related to the merits of the case. In turn, the Annex VII arbitration procedure, being conducive to also addressing the merits of a dispute, is more appropriate for dealing with issues closely connected to the merits and, based on this advantage, can thus supplement that particular shortcoming of ITLOS.

2.5. Interim Evaluation

The *effectiveness* of the UNCLOS-DSM in actual dispute settlement lies in the following: *First*, Annex VII tribunals, conferred the default compulsory jurisdiction, have shown a tendency to expand their jurisdiction, by lowering the threshold of the requirement under Article 281, and by admitting the independent existence of an *entitlement* dispute. *Second*, while compulsory jurisdiction is conferred to Annex VII tribunals, ITLOS does not enjoy compulsory jurisdiction on the *merits* of a dispute, and consequently still generally functions as an emergency procedure. In terms of their combined effect, however, the two fora collaborate to cover their respective shortcomings, and, in total, to contribute to the peaceful settlement of inter-State disputes within UNCLOS-DSM. This integral entity comprising several fora and procedures is the most notable characteristic and advantage of the UNCLOS-DSM, which has successfully enhanced its effectiveness in actual cases of dispute settlement.

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36 *The Enrica Lexie case (Italy v. India)*, ITLOS, Provisional Measures Order (August 24, 2015), para.29.
37 *Ibid*., para.141 (cf, the operative part).
38 *Ibid*., para.132.
39 In its Order, the Annex VII tribunal stated that 'a) Italy and India shall cooperate, including in proceedings before the Supreme Court of India, to achieve a relaxation of the bail conditions of Sergeant Girone so as to give effect to the concept of considerations of humanity, so that Sergeant Girone, while remaining under the authority of the Supreme Court of India, may return to Italy during the present Annex VII arbitration'. *The Enrica Lexie case (Italy v. India)*, Annex VII Tribunal, Provisional Measures, Order (Apr 29, 2016), para.132.

3. Limitations of UNCLOS-DSM

Contrary to its effectiveness, analysed in the foregoing, there are significant shortcomings at play within the UNCLOS-DSM stemming from its basic structure and actual cases. Undoubtedly, the UNCLOS-DSM, being the result of a large-scale package-deal at the UN Conference on the Law of the Sea, was no panacea from the outset. The particular shortcomings under review relate to: the limitations and exceptions to compulsory jurisdiction (3.1.); non-compliance with awards (3.2.); those based on the excess of power doctrine (3.3.); and to the lack of some procedural rules and requirement (3.4.).

3.1. Limitations and Exceptions to Compulsory Jurisdiction

The jurisdiction mechanism of the UNCLOS-DSM is a complex bundle, due to the package-deal at the drafting of Part XV of UNCLOS. On the one hand, the Annex VII arbitration procedure is a residual or default procedure, allowing for the exercise of compulsory jurisdiction pursuant to Article 287 UNCLOS. On the other hand, it is subject to exceptions stipulated in Section 3 of Part XV ('Limitations and exceptions to applicability of section 2'), which is composed of Articles 297 (limitations on applicability of section 2) and 298 (optional exceptions to applicability of section 2). For instance, disputes relating to sea boundary delimitations can be exempted, by a contracting Party, from the scope of compulsory jurisdiction. This means that significant categories of dispute under UNCLOS cannot be settled in a compulsory manner by UNCLOS-DSM.[40]

3.1.1. Limitations on Application: Article 297

Article 297, entitled 'limitations on applicability of section 2', provides a category of disputes which cannot be submitted to compulsory means of dispute settlement, stipulated in section 2. *First*, jurisdiction cannot be established on a 'marine scientific research' dispute, if it arises out of (i) the exercise by the coastal State of a right or discretion in accordance with article 246 or (ii) a decision by the coastal State to order suspension or cessation of a research project in accordance with article 253.[41] *Second*, although 'fisheries' disputes shall be settled in accordance with section 2, '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 […]'.[42]

3.1.2. Optional Exceptions: Article 298

Article 298,[43] entitled 'Optional exceptions to applicability of section 2', provides

40 Alan Boyle, *supra* note 33, p.184. This situation is called 'salami slicing'. Alan Boyle, 'Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction', *International and Comparative Law Quarterly*, Vol. 46 (1997), p.37.
41 Article 297(2)(a)(i) and (2)(a)(ii).
42 Article 297(3)(a).
43 Article 298(1)(a)(i): 'When signing, ratifying or acceding to this Convention or at any time thereafter, a State may,

exceptions to compulsory jurisdiction, enabling contracting States to exclude certain categories of dispute, including disputes relating to 'sea boundary delimitations', 'historic bays or titles' (Article 298(1)(a)(i)), 'military activities' (Article 298(1)(b)), or to allow for the exercise of the UN Security Council's function (Article 298(1)(c)). In the case of 'sea boundary delimitations', there still remains a possibility for the disputing parties to have recourse to compulsory *conciliation*, as had been the case between Timor-Leste and Australia.[44] In other cases, however, insofar as a dispute relates to such category, there is *no* possibility to use dispute settlement means. In this sense, the extent of compulsory jurisdiction within UNCLOS is not absolute and, given the significance of 'sea boundary delimitations' disputes to stable if not peaceful inter-State relations, this shortcoming is not negligible.

3.1.3. Applicability to a Potential Japan-China Dispute

How should one evaluate, for instance, the possibility to refer a hypothetical dispute between Japan and China to the UNCLOS-DSM, such as that relating to the Senkaku/Diayou islands, or to the rights and/or entitlements to the maritime natural, including living, resources within disputed areas?[45] Both countries have made no declaration under Article 287(1)[46] and are thus deemed to have accepted the compulsory jurisdiction of a tribunal under the Annex VII arbitration procedure, pursuant to Article 287(3). Japan makes no declaration under Article 298,[47] while China makes it for excluding all categories of disputes under Article 298(1)(a), (b), and (c).[48] As a result, therefore, if one of two seeks to submit a dispute to the Annex VII arbitration procedure, it cannot, for instance, establish jurisdiction on a dispute relating to a sea boundary delimitation, pursuant to Article 298(1)(a)(i).[49]

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without prejudice to the obligations arising under section 1, *declare* in writing that it *does not accept* any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes: (a) (i) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to *sea boundary delimitations*, or those involving *historic bays or titles* […]' (emphasis added).

44 PCA Case No. 2016-10, In the Matter of the Marine Boundary between Timor-Leste and Australia (the 'Timor Sea Conciliation'), before a Conciliation Commission constituted under Annex V to the 1982 United Nations Convention on the Law of the Sea between the Democratic Republic of Timor-Leste and the Commonwealth of Australia. The Report and Recommendations of the Compulsory Conciliation Commission between Timor-Leste and Australia on the Timor Sea, made public on 9 May 2018, *available at* <https://pcacases.com/web/view/132>.

45 The Government of Japan does not admit the existence of a *dispute* on the Senkaku islands. In its *Basic View on the Sovereignty over the Senkaku Islands*, it states that '[t]here is no doubt that the Senkaku Islands are clearly an inherent part of the territory of Japan, in light of historical facts and based upon international law. Indeed, the Senkaku Islands are under the valid control of Japan. *There exists no issue of territorial sovereignty* to be resolved concerning the Senkaku Islands' (emphasis added), *available* at <https://www.mofa.go.jp/region/asia-paci/senkaku/basic_view.html>. This suggests that Japan has no intention to submit a *sovereignty dispute* on the Senkaku/Diaoyu islands to UNCLOS-DSM.

46 ITLOS, Declarations made by States Parties under article 287, available at https://www.itlos.org/en/jurisdiction/declarations-of-states-parties/declarations-made-by-states-parties-under-article-287/. If a country is not listed there, this means that it has made no declaration.

47 ITLOS, Declarations made by States Parties under article 298, *available at* <https://www.itlos.org/en/jurisdiction/declarations-of-states-parties/declarations-made-by-states-parties-under-article-298/>. If a country is not listed there, this means that it has made no declaration.

48 Declaration of China: 'The Government of the People's Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a) (b) and (c) of Article 298 of the Convention'.

49 As mentioned earlier, a dispute on territorial sovereignty is beyond the scope of UNCLOS, since there is no provision to regulate this issue. Thus, Annex VII tribunal has no jurisdiction on it, in accordance with Articles 286 and 288.

There appear to remain, however, several possibilities of recourse to UNCLOS-DSM. *First*, if a dispute could be well formulated as to relate to an *entitlement* dispute – not a territorial sovereignty dispute and/or a sea boundary delimitation dispute – this will enable the establishment of jurisdiction for an Annex VII tribunal, thus circumventing China's optional declarations. However, such a strategy may not be a realistic option for the disputing parties and their circumstances. *Second*, there remains another possibility for recourse under the conciliation procedure, as mentioned earlier. However, given that territorial disputes are exempted from the scope of compulsory conciliation,[50] there remains only a possibility of *voluntary* conciliation under Article 284.

3.2. Non-compliance with Awards

A further, more sensitive, issue relating to the shortcomings of the UNCLOS-DSM, is the lack of a mechanism of enforcing UNCLOS-DSM decisions/outcomes. It should be recalled that although the United Nations contains a mechanism to enforce the judgments of the ICJ[51] this has been revealed ineffective in important cases such as the *Nicaragua* case, in which the United States, the unsuccessful respondent, had rejected to abide by the 1986 Judgment. As the United States exercised its veto in the Security Council, the operation of the UN enforcement mechanism was blocked.[52] What is more, UNCLOS provides for no mechanism of enforcement whatsoever.[53] Article 12(1) of Annex VII provides a means of solving this issue, albeit ineffectively.[54] In this regard there has been non-compliance with UNCLOS-DSM outcomes in two cases under the Annex VII arbitration procedure. *First*, in the *Arctic Sunrise* case, the respondent, Russia, neither appeared before the ITLOS[55] nor is abiding by the ITLOS Order of provisional measures[56] and the Award of an Annex VII arbitral tribunal. *Second*, similarly, in the *South China Sea* case, the respondent, China, did not appear before the Annex VII tribunal, and denied the legal validity of the tribunal's Awards by expressing its intention not to abide by them.[57] Although there are similarities between these two cases, illustrated by non-appearance and the rejection of the awards, a significant difference is at play in that China, in the *South*

50 Article 298(1)(a)(i) provides that the compulsory conciliation procedure can be used, provided that 'any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning *sovereignty or other rights over continental shelf or insular land territory* shall be excluded from such submission' (emphasis added).

51 Article 94(2) of the UN Charter: '[i]f any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment'.

52 In this regard, there is no difference between the ICJ and the UNCLOS-DSM, insofar as the Respondents were Russia and China, who may exercise their veto even against UN Security enforcement proceedings of ICJ judgments.

53 Georgios Zekos, 'Arbitration as a Dispute Settlement Mechanism Under UNCLOS, the Hamburg Rules, and WTO', *Journal of International Arbitration*, Vol. 19 (2002), p. 502.

54 Article 12(1) of the Annex VII: '[a]ny controversy which may arise between the parties to the dispute as regards the interpretation or *manner of implementation* of the award may be submitted by either party for decision *to the arbitral tribunal which made the award*' (emphasis added). It is obvious that this mechanism is not effective if faced to the non-compliance.

55 *The Arctic Sunrise case (the Netherlands v. Russia)*, Award on the Merits (14 August 2015), para.7.

56 *Ibid*., para.360.

57 Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award of July 12, 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines (July 12, 2016), *available at* <http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1379492.shtml>.

China Sea case, has invoked the *excess of power* doctrine for denying the legal effect of the award. This is reminiscent of the *Nicaragua* case, in which the United States, alleging the lack of jurisdiction of the ICJ, refused to abide by its judgment. This is the reason one ought to examine carefully the Chinese assertions to distinguish the political expediencies from the legal considerations at play.[58]

3.3. Applicability of the Excess of Power Doctrine to UNCLOS-DSM

The *excess of power* doctrine (also called the *ultra vires* doctrine) has been the most controversial issue in the procedure of international courts and tribunals, since, once such arguments are accepted, they allow respondent States to regard awards as null and void and, thus having no binding force. In this regard, it is necessary to examine the two procedural principles, namely competence-competence and *res judicata*, which, cumulatively, are understood to exclude the application of the excess of power doctrine.[59]

3.3.1. The Principle of Compétence-Compétence

Compétence-compétence means the power of a court or tribunal to decide its own jurisdiction. Reflecting the terms of the ICJ Statute,[60] Article 288(4) of UNCLOS also stipulates this principle.[61] There remains, however, a controversy on whether the compétence-compétence doctrine is limited by other principles or rules of international law. On this issue, the answer would depend on the court or tribunal, according to the ICJ's jurisprudence. *First*, as to an *ad hoc* tribunal, its compétence-compétence is regarded as a *relative* power limited by the norms of treaty interpretation including the good faith principle. In fact, the ICJ has considered whether some 'manifest' overreach/excess on the part of a court or tribunal in establishing its jurisdiction is at play. This notion is adopted also in Article 55(1)(b) of the ICSID Convention.[62] It constitutes a rather high threshold for the ICJ to affirm an excess of power of an arbitral tribunal. As a result, there has hitherto been no case in which the ICJ has confirmed the invalidity of an arbitral award on the basis of the notion that there has been some 'manifest' overreach/excess. *Second*, on the other hand, as to the possibility of the excess of power *by the ICJ*, the answer is entirely different. Contrary to *ad hoc* arbitration, the ICJ itself denied the possibility of its own excess of power, by stating that its compétence-compétence, stipulated in Article

58 In this context, it is worth noting that the Chinese Society of International Law made public its criticism against the *SCS* award. Chinese Society of International Law, 'The South China Sea Arbitration Awards: A Critical Study', *Chinese Journal of International Law*, vol.17(2) (2018), pp.207-748. It can be reasonably assumed that the group of scholars is not sufficiently impartial or independent, and that it was organised and directed, for this purpose, by the government of China.

59 Dai Tamada, 'Applicability of the Excess of Power Doctrine to the ICJ and Arbitral Tribunals', *The Law and Practice of International Courts and Tribunals*, vol.17, no.1 (2018), pp.251-270.

60 Article 36(6) of the ICJ Statute: 'In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court'.

61 Article 288(4) of UNCLOS: '[i]n 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'.

62 Article 52(1)(b) of the ICSID Convention: 'Either party may request annulment of the award […] on one or more of the following grounds: […] (b) that the Tribunal has *manifestly* exceeded its powers' (emphasis added).

36(6) of the Statute, is 'sole' competence and absolute power. At the same time, the ICJ applied the principle of *res judicata* for denying the possibility of an excess of power.[63]

3.3.2. The Principle of *Res Judicata*

The principle of *res judicata* stipulates that the decisions of international courts and tribunals, including judgments and awards, are legally binding and final. Reflecting the terms of the ICJ Statute,[64] Article 296 of UNCLOS contains this principle.[65] Although several notions are cast differently in UNCLOS to how they exist in the ICJ Statute, there is no substantive difference between the two with regard to the principle of *res judicata*. On the other hand, UNCLOS admits two means of challenging the legal effect of awards: *first*, Article 11 of Annex VII admits the possibility of *appeal*,[66] however, this is not applicable to the *SCS* case since there has been no agreement from the outset in relation to China; and, *second*, Article 12 of Annex VII provides a special procedure for the *implementation* of an award,[67] however, this, as well, is inapplicable to the *SCS* case without the 'agreement of all the parties to the dispute' under Article 12(2).

3.3.3. Exclusion of the Excess of Power

Further to the foregoing, an excess of power may be admitted by a third-party adjudicatory body only where the original award had exceeded its jurisdiction *manifestly*. In other words, even when the interpretation establishing jurisdiction given by an award was *debatable*, *arguable*, *doubtful*, *unacceptable*, or *erroneous*, this alone would not be enough to conclude that there has been an excess of power. Were the above to be applied to the *SCS* case, a tribunal's finding and understanding of the applicable provisions would not be beyond criticism. It should be said, however, that a mere error of interpretation alone does not constitute a 'manifest' excess and thus does not necessarily lead to a finding of an excess of power. To conclude, the assertion of China that the *SCS* award is null and void on account of an excess of power by the tribunal is not in and of itself legally justifiable. To be clear, although it may be reasonably argued that the *SCS* Award contains several *doubtful* understandings of UNCLOS provisions, this is not sufficient in determining whether there has been an excess of power.

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63 For details, *see* Dai Tamada, *supra* note 59, pp.266-270.

64 Article 59 of the ICJ Statute: 'The decision of the Court has no binding force except between the parties and in respect of that particular case'. Article 60: 'The judgment is final and without appeal […]'.

65 Article 296(1): 'Any decision rendered by a court or tribunal having jurisdiction under this section shall be *final* and *shall be complied with* by all the parties to the dispute' (emphasis added). Article 296(2): 'Any such decision shall have no binding force except between the parties and in respect of that particular dispute'.

66 Article 11 of Annex VII: 'The award shall be final and without appeal, *unless the parties to the dispute have agreed in advance to an appellate procedure*. It shall be complied with by the parties to the dispute' (emphasis added).

67 Article 12(1) of Annex VII: 'Any controversy which may arise between the parties to the dispute as regards the interpretation or *manner of implementation* of the award may be submitted by either party for decision to *the arbitral tribunal* which made the award. For this purpose, any vacancy in the tribunal shall be filled in the manner provided for in the original appointments of the members of the tribunal' (emphasis added). Article 12(2) of Annex VII: 'Any such controversy may be submitted to *another court or tribunal* under article 287 *by agreement of all the parties to the dispute*' (emphasis added).

3.4. Lack of Procedural Rules and Requirements

The UNCLOS-DSM, in relation to ITLOS and the Annex VII arbitration procedure, has inherited procedural rules as established by international courts and tribunals albeit differently. While the ITLOS Statute (Annex VI) had been drafted on the basis of the ICJ Statute, several rules of procedure, including on jurisdiction, timelines for submissions, provisional measures, and advisory jurisdiction, are different.[68] On the other hand, Annex VII, generally reflecting the procedural rules of *ad hoc* arbitration, leaves the disputing parties in each to agree on procedure, and where there is no agreement, to the tribunal to determine the specific procedure.[69] Perhaps somewhat unsurprisingly, the latter has given rise to several issues of procedure.

3.4.1. Lack of the Intervention Procedure

Inter-State dispute settlement has been, and generally is, *bilateral* for settling *bilateral* disputes,[70] and this bilateral nature has necessitated the confidentiality of the procedure.[71] The UNCLOS-DSM to some extent maintains this bilateral nature. As an example, while the ITLOS Statute allows intervention of the third party States,[72] Annex VII does not contain the same procedure for arbitral proceedings. The issue of the permissibility of intervention under Annex VII was considered (but left unsettled) in the *SCS* case, in which several countries expressed their interest in the subject-matter of the dispute.[73] As to the possibility of Vietnam's intervention,[74] the disputing Parties took different views. The Philippines left the issue to be decided by the arbitral tribunal,[75] while China flatly denied any such possibility.[76] As Vietnam eventually chose not to request to intervene, the tribunal missed the opportunity to express its opinion on this issue. It seems worthwhile, however, to refer to an opinion that, based on the multilateral nature of UNCLOS, intervention under UNCLOS-DSM ought to widely be accepted.[77] It is also worth reiterating that in relation to

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68 Astrid Wiik, *supra* note 11, p.151.

69 Article 5 of Annex VII: '[u]nless the parties to the dispute otherwise agree, the arbitral tribunal shall determine its own procedure, assuring to each party a full opportunity to be heard and to present its case'.

70 The bilateralism of inter-State dispute settlement is typically reflected in Article 59 of the ICJ Statute which provides that '[t]he decision of the Court has no binding force except *between the parties* and *in respect of that particular case*' (emphasis added).

71 For instance, in *Barbados v. Trinidad and Tobago*, the arbitral tribunal established under Annex VII, in line with the wishes of the Parties, denied the request of Guyana to access a copy of the written pleadings. *The Barbados v. Trinidad and Tobago case*, Annex VII Tribunal, Award (April 11, 2006), para.10.

72 Article 31(1) of the ITLOS Statute: 'Should a State Party consider that it has an interest of a legal nature which may be affected by the decision in any dispute, it may submit a request to the Tribunal to be permitted to intervene'.

73 Vietnam, Malaysia, Singapore, Indonesia, Brunei, Japan, and Thailand. The *South China Sea* case, Annex VII Tribunal, Award (October 29, 2015), paras.15, 79, and 84. Five countries (namely, Indonesia, Japan, Malaysia, Thailand, and Vietnam) were present at the arbitral proceedings as observer States. *Ibid*., para.86.

74 Although Vietnam expressed its intention of intervening and reserved the 'right to seek to intervene' (Award, paras.54, 57, and 184), in the event it chose not to (*ibid*., para.186).

75 According to the Philippines, '[the] tribunal's broad discretion on procedural matters encompasses the power to permit intervention'. *Ibid*., paras.62, 185.

76 In the Chinese Ambassador's First Letter (February 6, 2015), China expressed its 'firm opposition' to intervention by other States as being 'inconsistent with the general practices of international arbitration'. *Ibid*., paras.64, 185.

77 Mathias Forteau, 'Third-Party Intervention as a Possible Means to Bridge the Gap between the Bilateral Nature of Annex VII Arbitration and the Multilateral Nature of UNCLOS', in International Symposium on the Law of the Sea, *The Rule of Law in the Seas of Asia: Navigational Chart for Peace and Stability* (2015, Ocean Division, International Legal Affairs

litigation, where any Party of UNCLOS has standing to invoke the responsibility of another Party, the right to intervene should, theoretically, at the very least, be admitted with no restriction.

3.4.2. Lack of Consistency between Decisions

The bilateralism in the procedure also applies to the legal effect of the decisions of the UNCLOS-DSM, in the sense that decisions – including provisional measures orders[78] and prompt release decisions –[79] are legally binding only on the parties to the dispute in question.[80] Undoubtedly, this principle of *res judicata* also applies to Annex VII arbitration.[81] This generally means that another tribunal in some other case is not bound by any previous arbitration outcomes (that are not relevant to the parties), and, consequently, there can be no binding case law per se. As a consequence, there is no legal compulsion on a tribunal to follow previous arbitral decisions, thus allowing additional scope for inconsistency to arise within the body of arbitral decisions. In fact, there has been inconsistency within UNCLOS-DSM. *First*, as mentioned early on in this paper, the condition of jurisdiction under Article 281 has shifted from the *Southern Bluefin Tuna* case (an Annex VII tribunal) to the *South China Sea* case (an Annex VII tribunal), thus giving rise to some inconsistency between different Annex VII tribunals in different cases. *Second*, the requirements for applying estoppel were expressed in the *Chagos MPA* case,[82] which, however, were not followed in the later *M/V "Norstar"*[83] and the *Ghana/Côte d'Ivoire* cases.[84] This is an example of inconsistency between an Annex VII tribunal and the ITLOS, including its Special Chamber.

It should be acknowledged that, in the short term, inconsistent or conflicting interpretations of applicable law may be inevitable in the international dispute settlement mechanism. However, in the long run, there must be efforts to resolve and harmonise any inconsistent and conflicting interpretations concerning identical provisions into consistent jurisprudence, in order to maintain the integrity of the UNCLOS provisions but also of the UNCLOS-DSM.

Bureau, Ministry of Foreign Affairs, Japan), pp.160-174.

78 Article 290(6): 'the parties to the dispute shall comply promptly with any provisional measures prescribed under this article'.

79 Article 292(4): '[…] the authorities of the detaining State shall comply promptly with the decision of the court or tribunal concerning the release of the vessel or its crew'.

80 Article 296(1): 'any decision rendered by a court or tribunal having jurisdiction under this section shall be final and shall be complied with by all the parties to the dispute' and Article 296(2): 'any such decision shall have no binding force except between the parties and in respect of that particular dispute'.

81 In addition to UNCLOS Article 296, Article 11 of Annex VII provides that '[t]he award shall be final and without appeal, unless the parties to the dispute have agreed in advance to an appellate procedure. It shall be complied with by the parties to the dispute'.

82 *The Chagos Marine Protected Area case (Republic of Mauritius v. the U.K.)*, Annex VII Tribunal, Award (March 18, 2015), para.438.

83 In the *M/V "Norstar"* case, the ITLOS did not rely on the criteria applied in the *Chagos MPA* case, but, rather, on those expressed in the *Bay of Bengal* case. *The M/V "Norstar" case (Panama v. Italy)*, ITLOS, Preliminary Objections Judgment (4 November 2016), para.306.

84 In *Ghana/Côte d'Ivoire*, the Special Chamber of ITLOS, in the same way, relied on the criteria applied in the *Bay of Bengal* case. *Dispute concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, the ITLOS Special Chamber, Judgment (23 September 2017), para.242.

4. Conclusions

First, the drafters of UNCLOS attempted to establish a powerful mechanism of dispute settlement within the regime of UNCLOS. The most important function, expected to be performed by UNCLOS-DSM at that moment, was to maintain the balance of rights and obligations within UNCLOS which had been barely achieved by a large-scale package-deal in the conference. In the cases addressed under the UNCLOS-DSM, the latter has met the expectations of the drafters by interpreting and clarifying unclear provisions of UNCLOS, and by developing the basic legal notions in UNCLOS. Through this practice, the UNCLOS-DSM has gradually increased its *effectiveness* which is largely found on factors including the compulsory jurisdiction of Annex VII tribunals; the expansion of jurisdiction by lowering the threshold of Article 281; and the admission of entitlement disputes individually and separately from territorial sovereignty disputes and maritime delimitation disputes. In addition, as a characteristic feature, the UNCLOS-DSM exhibits collaborative features concerning the ITLOS and Annex VII tribunals, which is rare in relation to other means of dispute settlement.

Second, on the other hand, limitations are also at play in relation to the UNCLOS-DSM – namely, the exclusion of several categories of dispute from compulsory jurisdiction; the lack of an effective enforcement mechanism for arbitral awards; the lack of procedural rules (such as in relation to third party intervention); and the lack of procedural requirements (such as the need for consistency in decisions). Many of those shortcomings are not particular to the UNCLOS-DSM, but are also present, to some extent, in many other means of inter-State dispute settlement.

Lastly, when considering the function of UNCLOS-DSM in realising the integrity of UNCLOS and in achieving balance between rights and obligations of the contracting parties, it should be recalled that a tribunal established under Annex VII is not an institutional and permanent tribunal, but merely an instance of *ad hoc* arbitration. As a result, it is not free from the drawbacks attributable to the *ad hoc* nature of that procedure. Here, one is perhaps confronted with the inevitable tension between the *multilateralism* in the need of integrity within the regime of UNCLOS vis-à-vis the *bilateralism* of UNCLOS-DSM in the need to safeguard the interests of the parties to confidentiality and so on. Based on this, it should be concluded that, were the UNCLOS-DSM to rapidly enhance and broaden its functions and powers, it could run into the risk of deteriorating the structure of UNCLOS-DSM, which, itself, is a product of negotiations that sought to give effect to the particular balance of rights and obligations that existed at the time. That said, the gradual rationalisation of the UNCLOS-DSM, in a manner that does not undermine the two conflicting aspects of the UNCLOS-DSM in the actual operation of the mechanism, would be advisable.