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Beyond the ICJ: ADR in Interstate Disputes

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ABSTRACT

Inter-state disputes have been a hallmark of international relations throughout history, while their peaceful resolution forms the basis of global governance. Since its creation in 1945 by the United Nations Charter, the International Court of Justice (ICJ) has been the principal judicial body settling disputes between states on issues such as maritime and territorial boundaries, diplomatic protection, and treaty interpretation. Despite the ICJ's importance, however, natural limitations attend its functioning, because it can intervene only upon the mutual agreement of the states concerned, a constraint compounded by lengthy procedures that frustrate states. The rising number and complexity of international disputes expose deficiencies in the system, particularly those associated with its legal dimension. Although treaties and diplomacy serve as the traditional tools for dispute resolution, the broader context of addressing inter-state disputes through alternative dispute resolution (ADR) strategies has yet to be explored thoroughly. The academic literature largely treats ADR as a transitional process rather than as an integral part of the legal process. Questions such as consent-based jurisdiction, limited enforcement powers, and the underutilisation of arbitration in multilateral settings require further research. This article examines how methods of dispute settlement other than litigation may be used to achieve peaceful resolution of conflicts between states. It focuses on the function of ADR mechanisms, such as negotiation, mediation, conciliation, inquiry, and arbitration, in settling interstate disputes, whether through collaboration with the ICJ or independently. The aim is to assess, using treaties, case law, and academic discourse, whether such methods can complement existing judicial processes.

Keywords: *Inter-state disputes, Alternative dispute resolution, International Court of Justice, Arbitration, Mediation, Dispute settlement, International law, Annex VII of UNCLOS, Permanent Court of Arbitration.*

I. INTRODUCTION

Maintaining peace through dispute resolution between nations is undoubtedly one of the most crucial roles under international law.^{1,2} In accordance with Article 2(3) of the United Nations

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¹ CHARTER OF THE UNITED NATIONS arts. 92-96, June 26, 1945, 59 Stat. 1031, T.S. No. 993 [hereinafter U.N. CHARTER]; STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 36, June 26, 1945, 59 Stat. 1055 [hereinafter ICJ Statute].

² MALCOLM N. SHAW, INTERNATIONAL LAW 1015-20 (8th ed. 2017) (noting structural limitations of ICJ jurisdiction, including the consent requirement under Article 36 of the ICJ Statute).

Charter, member states must ensure that all disagreements between nations are resolved peacefully, with the aim of securing justice, harmony, and cooperation among nations. Chapter VI of the UN Charter sets out several procedures to accomplish this purpose, including negotiation, mediation, inquiry, arbitration, and judicial settlement.^{3,4}

In this context, the ICJ acts as the principal judicial organ of the United Nations and plays a central role. Since the institution's establishment, many important cases, such as the *Corfu Channel* case,⁵ maritime delimitation cases, and cases relating to state immunities, have been decided. Nonetheless, the compulsory jurisdiction of the ICJ is quite limited. According to Article 36(2) of the ICJ Statute, the consent of a state is required to bring any case before the Court in one of three ways: through the Optional Clause, a treaty clause, or a special agreement.⁶ In 2024, of the 193 UN member states, only 74 had declared their acceptance of the Optional Clause.⁷

In light of these weaknesses, alternative dispute resolution (ADR) has come into its own in addressing modern conflicts between states. Generally, states begin with diplomacy through negotiation; if this fails, they move on to good offices, mediation, conciliation, or arbitration through institutions such as the Permanent Court of Arbitration (PCA) and the International Tribunal for the Law of the Sea (ITLOS).

This article examines this larger domain of ADR beyond the ICJ. The inquiry evaluates the legal underpinning, institutional mechanisms, and efficacy of ADR methods in resolving disputes between states. It also draws on case studies to illustrate how ADR procedures can produce a resolution that is not merely an alternative but often a complement to judicial decisions. The analysis refers to the UN Charter, the PCA system, Part XV of the UNCLOS, the WTO dispute settlement procedure, and authoritative scholarly writing up to 2025.

II. LITERATURE REVIEW

A. Cesare Romano, *The proliferation of international judicial bodies: the pieces of the puzzle* (1999)

In a highly regarded article published in 1999 in the *New York University Journal of International Law and Politics*, Cesare Romano examined the striking rise in international

³ U.N. CHARTER art. 2, para. 3.

⁴ U.N. CHARTER art. 33, para. 1.

⁵ *Corfu Channel* (U.K. v. Alb.), Judgment, 1949 I.C.J. Rep. 4 (Apr. 9).

⁶ ICJ Statute art. 36(2).

⁷ INT'L COURT OF JUSTICE, Declarations Recognizing the Jurisdiction of the Court as Compulsory, <https://www.icj-cij.org/declarations> (last visited Mar. 12, 2025).

tribunals in the late twentieth century. Romano analysed the establishment of various courts and ad hoc tribunals, including ITLOS, WTO panels, and regional human rights tribunals, which together transformed the landscape of the judicial sphere. The key question he posed is whether the proliferation of tribunals contributes to the consolidation of international law.⁸

Romano's answer is multifaceted: while the increase in number poses risks of contradictory interpretation, it guarantees the development of jurisprudence specifically targeted at modern challenges. From this perspective, Romano does not perceive proliferation as chaotic; on the contrary, he regards it as the sign of a developing system of international law marked by variability and dynamism. He also highlights the problem of forum shopping, that is, the strategic selection of forums based on the needs of a particular state. Although it may appear to undermine order, it can also be seen as reinforcing order. Romano cites treaty sources and tribunal decisions, including UNCLOS arbitral rulings, to support his contentions.⁹

Romano's approach is useful to this study; indeed, the idea of dispute resolution beyond the ICJ is not accidental but emerges from careful institutional design. The role played by the tribunals dealing with dispute resolution and ADR, respectively, supports the hypothesis advanced below.

B. John G. Collier and Vaughan Lowe, **The settlement of disputes in international law (1999)**

In their book published by Oxford University Press, Collier and Lowe offer a complete survey of the various ways in which international disputes may be resolved. Their work discusses the full range of processes, including diplomacy, fact-finding, conciliation, arbitration, and judicial determination, within the context of the UN Charter's requirement of peaceful dispute resolution and the political dynamics at play.¹⁰

According to Collier and Lowe, states select their procedures on practical considerations such as control, confidentiality, and enforceability, rather than on any hierarchy of legality. Negotiation and mediation afford a government the opportunity to maintain control over the outcome; arbitration provides a legal conclusion to the dispute while still allowing some degree of influence over the constitution of the tribunal; and international litigation is pursued only where states require a precedent. The authors' conclusions rest on a rich account of state

⁸ Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 709, 712-15 (1999).

⁹ *Id.* at 730-40 (citing United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS], and various ICSID and PCA tribunal decisions).

¹⁰ JOHN G. COLLIER & VAUGHAN LOWE, *THE SETTLEMENT OF DISPUTES IN INTERNATIONAL LAW* 29-45 (Oxford Univ. Press 1999).

practice, the interpretation of treaties such as the Vienna Convention on the Law of Treaties, and the case law of the International Court of Justice.¹¹

Their evaluative model is used in this article to compare the two methods of conflict resolution: ADR and judicial settlement. More importantly, their account of how political pragmatism influences the choice of mechanism explains why, in modern conflicts, states tend to resort to arbitration or mediation rather than the ICJ.

C. Natalie Klein, *Dispute settlement in the UN Convention on the Law of the Sea* (2005)

Natalie Klein presents a comprehensive analysis of the dispute settlement system established under Part XV and Annexes V to VIII of UNCLOS in her 2005 book published by Cambridge University Press. She describes how this system combines compulsory mechanisms producing legally binding decisions under Article 286 with optional exceptions under Articles 297 and 298. Klein also analyses the functions of ITLOS, Annex VII tribunals, and Annex VIII experts in resolving distinct technical and legal issues.¹²

By analysing cases and preparatory works, she argues that UNCLOS exemplifies binding ADR within treaties at its highest level of sophistication. Her empirical research demonstrates that Annex VII arbitration has been highly effective because it not only offers legally binding decisions but also allows parties to appoint their own arbitrators. This analysis draws on the *travaux préparatoires* of UNCLOS, decisions of ITLOS, and numerous arbitral awards.¹³

Klein's analysis informs the discussion of the *Enrica Lexie* and South China Sea arbitrations later in this article. Her explanation of the exclusion under Article 298 shows why some states prefer arbitration to litigation before the International Court of Justice.

D. Gregory Shaffer, Manfred Elsig and Sergio Puig, *The law and politics of WTO dispute settlement* (2011)

In their study of the World Trade Organization's Dispute Settlement Understanding (DSU), Shaffer, Elsig, and Puig highlight its maturity as an example of a semi-judicial international system. Combining legal and political analysis, they demonstrate the use of consultation, panel adjudication, and appeals as a multi-stage process that combines ADR techniques with conventional adjudication. In assessing the institution's functioning through the stages of selection, interpretation, and compliance, they reveal the constant interaction between law and

¹¹ *Id.* at 67-90 (citing Vienna Convention on the Law of Treaties art. 33, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]).

¹² NATALIE KLEIN, DISPUTE SETTLEMENT IN THE UN CONVENTION ON THE LAW OF THE SEA 3-30 (Cambridge Univ. Press 2005).

¹³ *Id.* at 80-120 (citing UNCLOS Annex VII and ITLOS jurisprudence).

politics within the WTO's dispute management system.

Their principal finding is that the strength of the WTO lies in its hybrid nature: mandatory consultation operates as the ADR stage at which most disputes are resolved outside litigation. Official data indicate that, of the 631 consultations initiated by the end of 2024, more than half were resolved without proceeding to panels, illustrating the potential of negotiation within a legalised structure. The authors also note that the paralysis of the Appellate Body since 2019, resulting from the United States' refusal to appoint new members, exposes the vulnerability of such hybrid processes when political cooperation breaks down.^{14,15}

This research is invaluable for comparative institutional analysis. The DSU shows how the values of ADR, such as consent, flexibility, and staged escalation, may be incorporated into a rules-based system, while the Appellate Body crisis offers a cautionary lesson for reforms in international arbitration and conciliation.

III. HYPOTHESIS

Although the International Court of Justice (ICJ) remains a cornerstone of the international legal order, its structural shortcomings, particularly the absence of compulsory jurisdiction, the reliance on consent under Article 36 of its Statute, and the protracted duration of its proceedings, restrict its capacity to serve as the sole mechanism for the peaceful resolution of interstate disputes.

This article proposes that the systematic development and institutionalisation of alternative dispute resolution (ADR) techniques, such as negotiation, mediation, conciliation, inquiry, and arbitration, can effectively bridge the governance gaps created by those limitations. These processes should not be perceived as inferior or ancillary to judicial settlement; rather, they function as autonomous, authoritative, and increasingly indispensable instruments within the global framework for peaceful dispute resolution.

IV. RESEARCH METHODOLOGY

The methodology adopted is doctrinal analysis, comprising the interpretation and comparison of relevant primary and secondary legal materials. The primary instruments considered include

¹⁴ Gregory Shaffer, Manfred Elsig & Sergio Puig, *The Law and Politics of WTO Dispute Settlement*, in *THE POLITICS OF INTERNATIONAL ECONOMIC LAW* 1-40 (Tomer Broude et al. eds., Cambridge Univ. Press 2011); see also GREGORY SHAFFER, *DISPUTE SETTLEMENT AT THE WTO: THE DEVELOPING COUNTRY EXPERIENCE* (Cambridge Univ. Press 2006).

¹⁵ WTO, Dispute Settlement Gateway, https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm (last visited Mar. 10, 2025) (reporting 631 consultation requests filed by end-2024 and over 350 rulings issued); EUROPEAN PARLIAMENT RESEARCH SERV., *International Trade Dispute Settlement*, EPRS Briefing PE 762342, at 3-5 (Apr. 2024), [https://www.europarl.europa.eu/RegData/etudes/BRIE/2024/762342/EPRS_BRI\(2024\)762342_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2024/762342/EPRS_BRI(2024)762342_EN.pdf).

the Charter of the United Nations, the Statute of the ICJ, UNCLOS, the Optional Rules of the PCA, the DSU, and the VCLT.

The secondary materials comprise peer-reviewed articles accessible through academic databases such as JSTOR and Google Scholar, monographs from leading publishers such as Oxford University Press and Cambridge University Press, and records of international bodies including the International Law Commission (ILC).

The case analysis relies on publicly available rulings and awards issued by the ICJ, the PCA, ITLOS, and WTO panels or the Appellate Body. The research tests the working hypothesis through analytical reasoning grounded in these case studies, adopting a comparative framework to measure the relative effectiveness of ADR against traditional judicial settlement.

This mixed analytical and comparative design helps to expose both the theoretical coherence and the practical performance of ADR within interstate dispute resolution, ensuring that the conclusions rest on demonstrable legal practice rather than abstract principle.

V. OVERVIEW OF INTERSTATE DISPUTE RESOLUTION: THE ICJ FRAMEWORK

A. The ICJ as the principal judicial organ

The ICJ was established by Article 92 of the UN Charter as the principal judicial organ of the United Nations.¹⁶ Its Statute, annexed to the Charter, vests it with jurisdiction to decide cases contentious or advisory in nature. The Court is composed of fifteen judges elected by the UN General Assembly and Security Council for nine-year terms.¹⁷ Over more than seventy-five years, it has settled disputes covering diverse subject matter, from territorial sovereignty to the law of diplomatic immunity.

B. Jurisdictional constraints

The fundamental constraint on the ICJ's effectiveness is its consent-based jurisdiction. Article 36 of the ICJ Statute provides for three bases of jurisdiction: special agreements; treaty clauses; and Optional Clause declarations.¹⁸ In practice, many states, including several of the world's most powerful, have either not filed Optional Clause declarations or have filed declarations with broad reservations, effectively limiting the Court's reach. The United States withdrew its Optional Clause declaration following the *Nicaragua v. United States* case in 1984 and has not

¹⁶ U.N. CHARTER art. 92.

¹⁷ ICJ Statute arts. 3-4.

¹⁸ ICJ Statute art. 36(1)-(3).

re-filed.¹⁹ China has never accepted the Optional Clause, a fact directly relevant to the South China Sea dispute examined below.²⁰

C. Procedural limitations

Beyond jurisdiction, the ICJ's procedural framework involves extensive written and oral pleadings, typically lasting several years before a judgment is rendered. The average time to judgment in a contested case exceeds five years from filing to decision.²¹ This temporal reality makes the ICJ unsuitable for disputes that demand urgent resolution, such as maritime boundaries during a fishing season, armed border incidents, or commercial disputes with immediate economic consequences.

VI. ALTERNATIVE DISPUTE RESOLUTION MECHANISMS IN INTERNATIONAL LAW

A. Negotiation

Article 33(1) of the UN Charter expressly indicates that the first option available to disputing states is negotiation, the simplest form of dispute settlement. It entails direct conversation between the parties with the goal of reaching a mutually agreeable solution without the assistance of a third party.²²

International courts and tribunals have repeatedly held that numerous treaty regimes, especially those concerning arms control and the law of the sea, carry a good-faith obligation to negotiate.²³

The International Court of Justice affirmed the value of negotiation as a means of resolving boundary disputes in *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, even while rejecting Bolivia's argument that Chile was under a legal obligation to negotiate in good faith.²⁴

B. Good offices and mediation

Good offices refer to the facilitation of contact between disputing parties by a neutral third party, typically a state, international organisation, or prominent individual, without that party itself

¹⁹ *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), Jurisdiction and Admissibility, 1984 I.C.J. Rep. 392 (Nov. 26).

²⁰ *South China Sea Arbitration* (Phil. v. China), Award, PCA Case No. 2013-19, at 76-77 (Perm. Ct. Arb. July 12, 2016) [hereinafter *South China Sea Award*].

²¹ GLEIDER HERNANDEZ, *THE INTERNATIONAL COURT OF JUSTICE AND THE JUDICIAL FUNCTION* 140-45 (Oxford Univ. Press 2014).

²² U.N. CHARTER art. 33(1).

²³ *Pulp Mills on the River Uruguay* (Arg. v. Uru.), Judgment, 2010 I.C.J. Rep. 14, 67-68 (Apr. 20) (holding that a treaty obligation to negotiate constitutes a genuine legal obligation under international law).

²⁴ *Obligation to Negotiate Access to the Pacific Ocean* (Bol. v. Chile), Judgment, 2018 I.C.J. Rep. 507, 556-59 (Oct. 1).

participating in the substance of the negotiations.²⁵ Mediation goes further, with the third party actively participating in the negotiations and proposing solutions. Both mechanisms are formalised in Article 33 of the UN Charter and in the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes.²⁶

The United Nations Secretary-General has historically played a significant good-offices role, for example in facilitating the Comprehensive Peace Agreement in South Sudan (2005) and the Abyei Protocol negotiations.²⁷ The Organisation of Islamic Cooperation and the African Union have similarly deployed mediation in interstate contexts, demonstrating that regional organisations increasingly perform quasi-ADR functions in international dispute resolution.

C. Inquiry and conciliation

Inquiry, or fact-finding, involves the establishment of an independent commission tasked with ascertaining disputed facts. The mechanism was notably institutionalised under the 1899 Hague Convention following the Dogger Bank incident of 1904, in which Russia and Britain agreed to a fact-finding commission to determine responsibility for the Russian navy's attack on British fishing vessels.²⁸ Conciliation goes further still, with the third party proposing non-binding recommendations following both fact-finding and legal analysis.²⁹ UNCLOS Article 284 and Annex V provide for conciliation as a formal procedure in maritime disputes where a state has excluded binding arbitration under Article 298, a mechanism deployed in the 2016 Timor Sea conciliation between Timor-Leste and Australia.³⁰

D. Arbitration

Interstate arbitration is the arbitral procedure nearest to judicial resolution, and any award rendered by such a body is enforceable against the disputing parties. In this category of international dispute resolution, the Permanent Court of Arbitration, founded in 1899 under the Hague Conventions, is the longest-established and best-known body. As its name suggests, it is not a court but a permanent intergovernmental body intended to assist arbitral processes.³¹

Interstate arbitration has come to occupy an important position in modern times. UNCLOS Annex VII alone had given rise to more than thirty-five arbitrations as of 2024, addressing

²⁵ Collier & Lowe, *supra* note 10, at 25-28.

²⁶ Convention for the Pacific Settlement of International Disputes art. 3, Oct. 18, 1907, 36 Stat. 2199 [hereinafter 1907 Hague Convention].

²⁷ U.N. GEN. ASSEMBLY, Report of the Secretary-General on Good Offices, U.N. Doc. A/59/812 (Apr. 26, 2005).

²⁸ North Sea Fisheries (Dogger Bank) Inquiry Commission, 1905 Hague Court Reports 403 (1905).

²⁹ UNCLOS art. 284; UNCLOS Annex V.

³⁰ *In the Matter of the Timor Sea* (Timor-Leste v. Austl.), Conciliation Commission, PCA Case No. 2016-10, Final Report (May 9, 2018) [hereinafter Timor Sea Conciliation].

³¹ PERMANENT COURT OF ARBITRATION, About the PCA, <https://pca-cpa.org/en/about/> (last visited Mar. 1, 2025).

issues ranging from territorial waters and fisheries to pollution and the interpretation of UNCLOS provisions.³² Arbitration is also used throughout the WTO DSU process; it may be invoked, for example, under Article 21.3 to determine a reasonable period for implementation of measures adopted, and under Article 22.6 to authorise retaliation.³³

E. ITLOS and specialised tribunals

The International Tribunal for the Law of the Sea, established under UNCLOS Annex VI, provides a judicial body whose mandate is the resolution of UNCLOS disputes. Although ITLOS cannot be classified as an ADR body per se, its jurisdictional capacity supplements that of the ICJ in maritime disputes, and its rulings complement the arbitration system established under Annexes VII and VIII.³⁴ One especially specialised form of such purpose-built interstate adjudication is the ITLOS Seabed Disputes Chamber, which has sole jurisdiction over disputes relating to seabed operations in the Area.³⁵

VII. CASE ANALYSIS

A. The South China Sea Arbitration (Philippines v. China), PCA Case No. 2013-19 (2016)

Facts. After years of growing tension in the South China Sea, the Philippines instituted arbitration proceedings against China under Annex VII of UNCLOS on 22 January 2013. China claimed that the nine-dash line gave it historic rights over nearly the whole of the South China Sea, but the Philippines contested China's broad maritime claims. The Philippines requested a ruling on the status of various maritime features within the disputed area, the incompatibility of these claims with UNCLOS, and China's interference with Philippine fishing, navigation, and resource rights within areas that the Philippines maintained fell within its own exclusive economic zone (EEZ).³⁶

Question before the Tribunal. The Arbitral Tribunal was presented with three principal questions: whether China's claims to historic rights within the nine-dash line were compatible with UNCLOS; the legal status and entitlements of various maritime features in the South China Sea; and whether China had violated the Philippines' sovereign rights and freedoms under UNCLOS by interfering with Philippine activities, building artificial islands, and failing to prevent Chinese nationals from fishing within the Philippine EEZ.³⁷

³² PCA, 2024 Annual Report 12-14, <https://pca-cpa.org/en/news/2024-annual-report/> (last visited Mar. 5, 2025).

³³ Understanding on Rules and Procedures Governing the Settlement of Disputes arts. 21.3, 22.6, Apr. 15, 1994, 1869 U.N.T.S. 401 [hereinafter DSU].

³⁴ UNCLOS Annex VI, arts. 1-2.

³⁵ UNCLOS arts. 186-91.

³⁶ South China Sea Award, *supra* note 20, at 15-30.

³⁷ *Id.* at 67-90.

Arguments of the parties. In the Philippines' view, China's nine-dash line claim was incompatible with UNCLOS, a comprehensive agreement that superseded all previous historical claims. The Chinese acts violated UNCLOS, especially with respect to the EEZ, fishing activities, and the construction of artificial islands. The Philippines argued that features such as Mischief Reef, McKennan Reef, and Scarborough Shoal were low-tide elevations and therefore not eligible for any entitlements, or could generate at most a twelve-nautical-mile territorial sea.³⁸

China did not participate in the proceedings, on the basis that the case lay outside the Tribunal's jurisdiction because it involved maritime delimitation and questions of sovereignty over features, which it argued were not arbitrable under UNCLOS Articles 297 and 298. China further contended that instituting arbitration without first exhausting bilateral diplomatic processes amounted to bad faith.³⁹

Decision of the Tribunal. In its 2016 Award, the Tribunal upheld its jurisdiction over most of the claims made by the Philippines. On the merits, the Tribunal determined that China's claim to historic rights was incompatible with UNCLOS, because UNCLOS had already supplanted any previous rights and conferred a comprehensive set of maritime entitlements. It further found that all of the disputed high-tide features were either rocks within Article 121(3) or low-tide elevations, so that none of the features constituted islands capable of generating an EEZ under Article 121 of UNCLOS. The Tribunal held that China had violated its obligation to protect the marine environment and had encroached on the Philippines' EEZ rights by disrupting its fishing activities and oil-exploration projects.⁴⁰

Enforcement of ADR is inherently constrained where a powerful state rejects compliance, as evidenced by China's refusal to honour the Award. Even so, the Award has played a significant role in setting important norms, having been cited as a binding interpretation of UNCLOS in subsequent international agreements and academic literature.⁴¹

B. The *Enrica Lexie* Arbitration (Italy v. India), PCA Case No. 2015-28 (2020)

Facts. In February 2012, two Italian marines aboard the oil tanker *Enrica Lexie* opened fire on a fishing vessel, the *St. Antony*, off the coast of Kerala, India, killing two Indian fishermen. Italy maintained that the incident had occurred on the high seas, beyond India's contiguous zone;

³⁸ *Id.* at 203-26 (Philippines' Submissions 1-7).

³⁹ *Id.* at 76-77; see also China, Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines (Dec. 7, 2014), <https://www.fmprc.gov.cn>.

⁴⁰ South China Sea Award, *supra* note 20, at 471-76.

⁴¹ YOSHIFUMI TANAKA, THE INTERNATIONAL LAW OF THE SEA 465-70 (3d ed., Cambridge Univ. Press 2019).

India maintained that it had occurred within its EEZ. India arrested the Italian marines and subjected them to criminal proceedings under Indian law.⁴²

Question before the Tribunal. The questions before the UNCLOS Annex VII Tribunal were: whether India had jurisdiction to arrest and prosecute the Italian marines; whether Italy had violated India's sovereign rights or UNCLOS provisions by asserting immunity; and what remedies were appropriate.⁴³

Arguments of the parties. Relying on UNCLOS Article 97, which provides that only the flag state or the state of which the accused is a national may institute criminal proceedings in cases of collision or other navigational incidents on the high seas, Italy claimed that the incident had taken place in an area under its exclusive flag-state jurisdiction. Italy further relied on the marines' functional immunity as state agents carrying out official acts.⁴⁴ India contended that the incident had taken place inside its EEZ and that UNCLOS Article 97 did not apply; that India's sovereign rights in its EEZ included the right to board and detain vessels that had committed crimes against Indian nationals; and that the Italian marines enjoyed no immunity because they were not performing sovereign functions at the relevant time.⁴⁵

Decision of the Tribunal. On 21 May 2020, the Tribunal published its Award. By majority, it held that India had concurrent jurisdiction because the incident had taken place in its EEZ rather than on the high seas. However, applying UNCLOS Article 97, the Tribunal ruled that India had to refrain from exercising its criminal jurisdiction over the Italian marines and directed that Italy compensate India for the deaths of the Indian fishermen. The Tribunal's conclusion regarding immunity under general international law was especially noteworthy, since it confirmed that the functional immunity of state officials extends to criminal proceedings in other states where the acts were carried out in an official capacity.⁴⁶

C. Timor Sea Conciliation (Timor-Leste v. Australia), PCA Case No. 2016-10 (2018)

Facts. Timor-Leste and Australia had a long-standing dispute over maritime boundaries in the Timor Sea, including the status of the Greater Sunrise gas field. In 2016, Timor-Leste invoked the compulsory conciliation procedure under UNCLOS Annex V and Article 298(1)(a)(i), which mandates conciliation for disputes concerning maritime delimitation where a state has

⁴² *The "Enrica Lexie" Incident* (Italy v. India), Award, PCA Case No. 2015-28, paras. 1-22 (Perm. Ct. Arb. May 21, 2020) [hereinafter *Enrica Lexie Award*].

⁴³ *Id.* paras. 62-80.

⁴⁴ *Id.* paras. 256-80.

⁴⁵ *Id.* paras. 281-310.

⁴⁶ *Id.* paras. 892-908 (on jurisdiction and immunity), 1097-1100 (on compensation).

excluded binding arbitration. Australia had previously excluded compulsory arbitration for maritime boundary disputes under Article 298.⁴⁷

Question before the Commission. The conciliation commission was charged with assisting the disputing parties in reaching an amicable resolution of the boundary disputes in the Timor Sea, or with preparing a report should no agreement be reached.⁴⁸

Arguments of the parties. Timor-Leste sought a maritime boundary that would give it an equitable share of the Greater Sunrise field's revenue. The existing arrangement under the 2006 CMATS treaty was not perceived as equitable, and Timor-Leste argued that Australia had used its superior position during the negotiations to secure its own advantage. While accepting the Commission's jurisdiction over the dispute, Australia disputed several of the arguments raised by Timor-Leste.⁴⁹

Decision of the Commission. In its May 2018 Final Report, the Conciliation Commission recommended that a permanent maritime boundary treaty be concluded. Following the conciliation process, the parties negotiated and signed the Treaty between Australia and Timor-Leste Establishing Their Maritime Boundaries on 6 March 2018. This historic agreement gave Timor-Leste a share of the Greater Sunrise revenues and established the parties' maritime boundaries for the first time. It remains the most notable recent instance of compulsory conciliation leading to a final settlement of an interstate dispute.⁵⁰

D. The *Arctic Sunrise* Arbitration (Netherlands v. Russia), PCA Case No. 2013-27 (2015)

Facts. In September 2013, Russia detained the Dutch-flagged vessel *Arctic Sunrise*, belonging to Greenpeace International, and arrested its crew of thirty after activists attempted to board a Russian oil platform in the Russian EEZ in the Arctic. Russia seized the vessel and subjected the crew to criminal proceedings. The Netherlands initiated Annex VII arbitration under UNCLOS and also sought provisional measures from ITLOS.⁵¹

Question before the Tribunal. The Tribunal was asked to determine: whether Russia had the right under UNCLOS to board, seize, and detain the *Arctic Sunrise* and its crew; and whether Russia had violated UNCLOS provisions on freedom of navigation, the EEZ regime, and the

⁴⁷ Timor Sea Conciliation, *supra* note 30, at 1-15.

⁴⁸ *Id.* at 16-20.

⁴⁹ *Id.* at 31-52.

⁵⁰ Treaty between Australia and Timor-Leste Establishing Their Maritime Boundaries in the Timor Sea, Mar. 6, 2018, Austl.-Timor-Leste, <https://www.pca-cpa.org/en/cases/132/>.

⁵¹ *The "Arctic Sunrise"* (Neth. v. Russ.), Award, PCA Case No. 2013-27, paras. 1-20 (Perm. Ct. Arb. Nov. 17, 2015) [hereinafter *Arctic Sunrise Award*].

treatment of crew members.⁵²

Arguments of the parties. The Netherlands argued that UNCLOS did not authorise Russia to board and detain a flag-state vessel on the high seas or in the EEZ absent hot pursuit satisfying the requirements of UNCLOS Article 111, and that the detention of the crew violated their rights under UNCLOS Article 292. Russia declined to participate in the proceedings, asserting that the Tribunal lacked jurisdiction because the dispute concerned law-enforcement activities, an area excluded from compulsory arbitration under Article 297(2).⁵³

Decision of the Tribunal. In its 2015 Award, the Tribunal found by default that Russia had unlawfully seized and detained the *Arctic Sunrise* and its crew in violation of UNCLOS principles on freedom of navigation. It directed Russia to release the vessel and to provide restitution. Further demonstrating the enforcement gap in interstate arbitration where major powers choose not to participate, Russia released the vessel and crew before the Award was rendered but did not formally comply with the Tribunal's ruling or pay compensation.⁵⁴

VIII. FINDINGS

A. The ICJ's structural limitations create a systematic governance gap

The empirical record confirms that the ICJ's consent-based jurisdiction leaves a significant proportion of interstate disputes beyond its reach. As of 2025, more than 119 UN member states, including the permanent Security Council members China and the United States, lack enforceable Optional Clause declarations, structurally excluding major classes of disputes from ICJ adjudication.⁵⁵ This creates a governance gap that ADR mechanisms are uniquely positioned to fill.

B. ADR mechanisms produce binding outcomes in an increasing number of cases

The case analyses reveal that Annex VII arbitration under UNCLOS, interstate arbitration through the PCA, and compulsory conciliation through Annex V have all led to binding decisions in important disputes among states. The South China Sea, *Enrica Lexie*, and *Arctic Sunrise* awards are all binding instruments under UNCLOS. Although such decisions may be difficult to enforce where states fail to comply, the awards provide authoritative interpretations of international law.⁵⁶

⁵² *Id.* paras. 55-75.

⁵³ *Id.* paras. 76-100.

⁵⁴ *Id.* paras. 324-30.

⁵⁵ Int'l Court of Justice, *supra* note 7.

⁵⁶ Tanaka, *supra* note 41, at 468-71.

C. Conciliation can produce comprehensive and durable resolutions

The Timor Sea conciliation demonstrates that non-binding ADR processes, provided they are well institutionalised and accompanied by an effective conciliation body, can assist in reaching binding treaties as final outcomes. The 2018 maritime boundaries treaty between Australia and Timor-Leste is a more complete solution than any judicial award might have delivered, since it addressed not only boundaries but also resource-sharing and development infrastructure.⁵⁷

D. The WTO DSU represents a successful integration of ADR and quasi-judicial mechanisms

This is evident from the WTO DSU, which shows that incorporating ADR concepts, especially the use of consultation as a mandatory initial stage, within a quasi-judicial system enhances compliance and discourages adversarialism. In total, the WTO received 631 consultation requests between 1995 and the end of 2024, yet only 283 panels were established out of the 621 requests filed through 2023, showing that a large number of disputes were resolved before panel creation through consultation.⁵⁸ The Appellate Body crisis, however, reveals the vulnerability of such a system to political manipulation.⁵⁹

E. Enforcement remains the critical structural challenge

Across all the cases examined, the enforcement of ADR outcomes, including arbitral awards against states unwilling to comply, remains the most significant structural limitation. Unlike domestic arbitration, where national courts can enforce awards, interstate arbitration lacks a coercive enforcement mechanism equivalent to domestic execution. China's non-compliance with the South China Sea Award and Russia's non-compliance with the *Arctic Sunrise* Award illustrate the point. The academic literature consistently identifies enforcement as the Achilles' heel of interstate ADR.⁶⁰

F. Multiplicity of forums generates coordination challenges

The proliferation of ADR and quasi-judicial forums, including the ICJ, ITLOS, Annex VII tribunals, the PCA, and WTO panels, creates coordination challenges and risks of conflicting decisions. The ILC has addressed this through its work on the fragmentation of international

⁵⁷ Timor Sea Conciliation, *supra* note 30, Final Report paras. 90-120.

⁵⁸ WTO, Dispute Settlement Gateway, *supra* note 15; European Parliament Research Serv., *supra* note 15, at 3 (reporting that, of 631 consultation requests filed through end-2024, a substantial share was resolved prior to panel composition, with only 283 panels established out of 621 requests filed through 2023).

⁵⁹ Shaffer, Elsig & Puig, *supra* note 14, at 20-35; see also European Parliament Research Serv., *supra* note 15, at 5-8 (documenting the Appellate Body impasse and the rise of the Multi-Party Interim Appeal Arrangement as a stop-gap mechanism).

⁶⁰ ANTONIOS TZANAKOPOULOS, *DISOBEYING THE SECURITY COUNCIL: COUNTERMEASURES AGAINST WRONGFUL SANCTIONS* 78-82 (Oxford Univ. Press 2011).

law, which identified the risk of inconsistent rulings and proposed a hierarchy-of-norms approach for resolving conflicts.⁶¹ This finding underscores the need for greater institutional coordination between ADR forums and the ICJ.

IX. CONCLUSION AND RECOMMENDATIONS

This article began from the recognition that the International Court of Justice, while one of the most renowned tribunals in the world, suffers from structural constraints on its ability to resolve interstate disputes comprehensively. Its consent-based jurisdiction, its slow procedures, and the unwillingness of major powers to accept compulsory jurisdiction have left certain categories of interstate dispute beyond the scope of the Court's jurisdictional authority. The hypothesis that ADR mechanisms, including negotiation, mediation, conciliation, inquiry, and arbitration, are not merely auxiliary elements but essential components of the dispute resolution framework in international law is therefore supported.

The four case studies examined in this article, namely the South China Sea Arbitration, the *Enrica Lexie* Arbitration, the Timor Sea Conciliation, and the *Arctic Sunrise* Arbitration, demonstrate that ADR mechanisms, in particular UNCLOS Part XV and PCA-based mechanisms, have produced substantive results in several of the most notable interstate disputes of the twenty-first century. The Timor Sea Conciliation in particular shows that conciliation can be as successful as, and possibly more successful than, the judicial process, since it allows room for diplomatic manoeuvre.

The enforcement gap nevertheless remains a crucial structural weakness. China's failure to uphold the South China Sea Award and Russia's refusal to abide by the *Arctic Sunrise* Award show that, while the legal normativity of an award compels certain conduct on the part of states, behavioural compliance is another matter. The problem of non-compliance in the ADR process resembles that which arises before the International Court of Justice, as the *Nicaragua v. United States* case illustrates. This should not, however, be regarded as an intrinsic flaw of the process itself; rather, it is a warning that ADR cannot be treated as a standalone solution to the problem of interstate dispute governance.

In sum, while arbitration can contribute significantly to the effective settlement of international disputes, especially when compared with the ICJ, its full potential is unlikely to be realised unless measures are in place to ensure compliance with decisions issued under ADR processes.

⁶¹ INT'L LAW COMM'N, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) [hereinafter ILC Fragmentation Report].

Drawing on the findings of this article, the following recommendations are offered. First, states should extend their Optional Clause declarations under Article 36(2) of the Statute of the ICJ and narrow their reservations, so as to increase the compulsory jurisdiction of the principal judicial organ. Second, interstate treaties should incorporate mandatory pre-arbitration ADR steps, especially conciliation based on UNCLOS Annex V, ensuring that binding arbitration becomes a means of last resort rather than a first one. Third, the UN Security Council should establish better procedures for supervising compliance with interstate arbitral awards, making use of the mechanism provided by Article 94(2) of the UN Charter, under which disputes over violation of an award may be brought before the Council. Fourth, the PCA and other regional arbitration centres should elaborate standard rules for interstate ADR procedures, improving the protection of procedural rights and the enforcement of conciliation recommendations and arbitral awards. Fifth, the International Law Commission should continue its work on the harmonisation of international dispute resolution systems, building on the efforts launched in 2006 with its report on the fragmentation of international law.

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