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Maritime Dispute Settlement Law towards Sustainable Fishery Governance: The Politics over Marine Spaces vs. Audacity of Applicable International Law

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Abstract: The present article discusses and analyses the role and contribution of International Maritime Dispute Settlement Bodies in sustainable fishery governance. From a maritime dispute settlement perspective, the discussion on preserving marine biodiversity, including fisheries and ecosystems, is unprecedented. However, dispute settlement impacts on marine biodiversity require serious attention from the viewpoint of effective implementation of the United Nations Fish Stocks Agreement, International Environmental Law, and United Nations Convention on Law of the Sea. ‘Applicable law’ as primary contention, which could be utilised to preserve marine biodiversity, is preferably employed for ‘ship release’ and ‘delimitation’ issues under dispute settlement mechanisms. Perhaps, the political and legal obstacles in interpreting the ‘law of the sea’ are one area of critique, and the optional dispute settlement mechanism is another. All these significant issues are discussed to develop a rational approach utilising ‘applicable law’ to preserve marine biodiversity and develop sustainable fishery governance. The result will certainly help build a better understanding of the ‘applicable law’ jurisdiction that may be utilised to ensure the sustainability of marine biodiversity.

Keywords: maritime dispute settlement law; sustainable fishery governance; preservation of marine biodiversity; United Nations Convention on Law of the Sea (UNCLOS); International Environmental Law (IEL); International Tribunal for Law of the Sea (ITLOS); International Dispute Settlement Bodies (DSBs)



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1. Introduction

Between 1868 and 1873, the United States (US) Congress enacted legislation in order to limit the hunting of fur seals in the Bering Sea [1]. Accordingly, the Bering Sea area was leased to a multinational corporation for sealing under specific circumstances. The legislation maintained that the US had exclusive industrial rights over the fur seals in the adjacent areas [2]. The Congressional Acts allowed the US authorities to capture and detain foreign vessels involved in such idiosyncratic fishing. Later, several Canadian vessels under the British Imperial Flag involved in sealing were arrested and seized by US authorities, following which they were labelled by order of one of the US District Court and their crews were convicted [2]. The British government requested US authorities to release the vessels and determine the *mare clausum* (the jurisdiction of the coastal state over marine area) in the Bering Sea area for sealing and other fishing activities. In response, the US authorities raised concerns regarding the preservation of fur seals and their ecological impact on marine biodiversity in the Bering Sea area. A diplomatic negotiation between the US and Britain followed, eventually failing due to the industrial interests of states involved in the Bering Sea [1].

The infamous *Bering Sea (Fur Seals) Arbitration* involving Russia, the US, and Great Britain, to resolve the catastrophic impact on the marine biodiversity due to diminishing fur seals, somehow shaped the jurisdiction of the modern international courts in settling

maritime disputes [3]. The Arbitral Tribunal in the *Bering Sea Arbitration* established the principles of ‘precautionary approach’ and ‘preventive action’ concerning the content of the action, which may cause severe or irreversible damage to marine biodiversity. The given environmental principles were reiterated, particularly in the light of ‘scientific evidence regarding the action which may harm the marine biodiversity’, by the International Court of Justice (ICJ) in the *Corfu Channel Case* [4]. In a particular outlook, beyond the concept of ‘use of force’ in the maritime zones, the judgement in the *Corfu Channel Case* systemically integrated the law of the sea and law of naval warfare, which helped develop the law for the preservation of marine biodiversity [5].

It is also hypothetically contended that the arbitral tribunal’s decision in the *Trail Smelter Case* significantly impacted the development of Part XII (Protection of the Marine Environment) of the United Nations Convention of Law of the Sea (UNCLOS) [4,6,7]. As the trail smelter caused harm to the crop, it is argued that the extensional damage to the marine habitat and biodiversity due to sulphur emissions was realised by that arbitral tribunal. Through the judgements of the given cases, the principles of ‘precaution’ and ‘preventive action’ became a statutory *imprimatur* (an authority) of the International Environmental Law (IEL). It can also be noted that the upcoming marine ecological crisis was already an area of concern in transnational political space. Therefore, the International Maritime Dispute Settlement Bodies (DSBs) to date use the notion of ‘prudence and caution’, in effect, which means the application of ‘the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment’ [7,8].

Although the presence of the IEL in existing geopolitical spaces allowed the DSBs to enhance marine environmental protection, strict measures for sustainable fishery governance are still equivocal in modern maritime dispute settlement practice. As ‘sustainable fishery governance’ is a legal–scientific concept involving habitat and ecosystems, it can be contended that the politically influenced DSBs manoeuvred the whole concept of ‘marine biodiversity’. The ICJ, for example, in the first two *Fishery Jurisdiction Cases* (*United Kingdom v. Iceland*; *Federal Republic of Germany v. Iceland*), without any scientific details related to sustainable fishery governance, allowed fishing up to 50 nautical miles [9,10]. Theoretically, this decision of ICJ underpinned the fishing rights of coastal States up to 200 nautical miles (Exclusive Economic Zones or EEZ) under UNCLOS, and this allowed damage to marine biodiversity [9,10].

International Tribunal for Law of the Sea (ITLOS), phenomenally developed for maritime dispute settlement, reinforced ‘sustainable fishery governance’ as the objectivity of the UNCLOS in the first decisions of *MV Saiga Cases (1 and 2)* [11]. One of the judges of ITLOS, in *MV Saiga Case—1 (Provisional Measures)*, opined that the tribunal would prescribe to binding marine biodiversity preservation clauses under the UNCLOS in its future decisions [12], as ITLOS under UNCLOS, while exercising its jurisdiction for delimitation of maritime boundaries and release of vessels, must also deliberate on the serious harm caused to marine biodiversity. This practice of ITLOS became evident with the decisions of the *Southern Bluefin Tuna (SBT) Cases (Provisional Measures)* [13]. ITLOS, in the cases mentioned above, substantively ascertained its ecological jurisdiction and ruled the importance of marine biodiversity preservation by applying the multilateral (international) environmental agreements (MEAs) along with the UNCLOS. ITLOS employed the principle of ‘applicable law’ provided under the Vienna Convention on Law of the Treaties (VCLT), amalgamated IEL and UNCLOS, and yielded a firm and robust base of sustainable fishery governance in maritime dispute settlement practice [14–16].

However, most of the issues related to sustainable fishery governance were not addressed as per the applicable MEAs and IEL by the Special Arbitral Tribunals (Special Tribunals formed under the Compulsory procedures of UNCLOS except ITLOS) formed under Part XV of the UNCLOS. As in *MOX Plant* and *SBT (Jurisdiction and Admissibility) Cases*, the Special Tribunals in these cases refused to exercise their jurisdiction to amalgamate MEAs, IEL, and UNCLOS as provided under the ‘applicable law’ [17–19]. The ecological jurisdiction of ITLOS became controversial through these initial decisions of the Special

Tribunals and caused severe harm to marine ecosystem practice in dispute settlements. Moreover, in *Chagos Marine Protected Areas* and *Arctic Sunrise Cases*, the refusal of DSBs while applying ‘applicable law’ in a manner extending the jurisdiction provided under the UNCLOS challenged the previous stance of the ITLOS and ICJ [20,21].

In light of the above, it is argued that the DSBs have technically disregarded marine biodiversity preservation as the *ratione materiae* (the main purpose) of IEL and UNCLOS [22]. In matters related to marine biodiversity, the role of DSBs has been critiqued in various ways, and, to some extent, Part XV of the UNCLOS (Settlement of Disputes) has been generously evaluated [19]. The main contention in the existing literature regards the diplomacy of states over fishery governance for trade purposes which had ruled out the alignment of sustainability in the law of the sea [23]. It is also argued that there is a growing impact of global and regional politics on DSBs in maritime dispute settlement practice due to the fishery catches [24,25]. As in any international-public dispute settlement, the geostrategy and political economy are a state’s key concerns; there is no long-term agenda to preserve marine biodiversity. Such political influence of the states certainly questions the vitality of the UNCLOS dispute settlement mechanism.

This article focuses on the gaps in the UNCLOS dispute settlement mechanism, which has allowed political enmity and hindered the capability and capacity of the DSBs in the preservation of marine biodiversity. This article first analysed the usage of ‘applicable law’ in international maritime dispute settlement practice, particularly emphasising the ‘law compatible with the UNCLOS’. When the distinction between the usage of ‘compatible law’ and ‘applicable law’ became evident, the discussion followed the analysis of political influences on the role of DSBs in the development of sustainable marine biodiversity. Subsequently, a balanced opinion is formed to pave the way for a functional approach under UNCLOS. It is suggested that the jurisdiction of DSBs can be enhanced for marine biodiversity conservation and preservation if the technicality of legal tools and measures is utilised. A formal conclusion follows the discussion on the potential future role of the DSBs in the emerging context of the climate crisis impacting marine biodiversity.

2. Audacity of the ‘Applicable Law’ in Maritime Dispute Settlement towards Sustainable Marine Biodiversity

2.1. Emergence of Applicable Law in Fishery Governance

The global fishery governance landscape emerged with the two sets of provisions of UNCLOS related to impact and depletion of the fish stocks [26]. UNCLOS deals with EEZ areas to ensure that fishes are maintained and not endangered due to overexploitation by coastal states. The measures are designed to maintain and restore the harvested species at levels that can produce maximum sustainable yield (MSY) [27]. Moreover, the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (UN Fish Stocks Agreement) expanded the jurisdiction of the UNCLOS for the preservation of marine biodiversity [28]. In addition, the Convention on the Conservation Migratory Species (CMS), the Convention on International Trade in Endangered Species (CITES), and the Convention on Biological Diversity (CBD) are important instruments dealing with fishery governance [29–31].

Given the international legal instruments applicable for the preservation of marine biodiversity, it is contended thoroughly that the jurisdiction of the DSBs can be expanded in the context of sustainable fishery governance [22]. Although ITLOS in *MV Saiga Case*, while utilising the ‘applicable law’ provisions following ICJ’s verdict in *Corfu Channel Case*, expanded its jurisdiction and applied the law of the sea in conjunction with the law for the use of force, the overall UNCLOS dispute settlement system has so far been underutilised for taking preservation measures for marine biodiversity [32,33]. Even while observing the ITLOS practice, it became evident that it supervised ‘prompt releases’ instead of preservation measures. Out of 29 cases submitted, only one core marine environmental protection issue was brought to its attention [32,34]. There are possibly lacunas in the

procedures under the UNCLOS dispute settlement mechanism, which challenge the practice of DSBs regarding the maintenance of marine biodiversity.

The jurisprudence developed under the UNCLOS dispute settlement mechanism evidentially supports the argument that DSBs neglect the overall concept of ‘sustainability’ in ‘marine biodiversity’. Although the UNCLOS dispute settlement system is disappointing for sustainable fishery governance, it helps the economic stability of the coastal states (including their communities, fishers, maritime labourers, etc.). It has also been contended that the presage of ‘applicable law’ prioritised for prompt release cases and delimitation issues is crucial in establishing regimes for fishery economic development [35]. Moreover, when the DSBs try being preservationists, the subject matter ‘dispute settlement’ is lost. The conflict in jurisprudence between *SBT (Provisional Measures)* and *SBT (Jurisdiction and Admissibility)* confers that ITLOS attempted ‘preservation measures’ generally, and the Special Tribunal focused on the swift settlement for mutual cooperation [36,37]. Therefore, the Special Tribunal superseded the ITLOS decision owing to ‘stability and preservation’ not ‘strong sustainability’ [38].

In light of the economic viability based on fishery development, it is also opined that negotiations expand the canvas of the policy implementation arena, which can help align sustainable fishery governance with economic stability [39]. The swift expedition in decisions allows the states to focus on the single point rather than the multiplicity of concerns and to strengthen regional and national mechanisms for sustainable fishery governance. In addition, the cost effectiveness of negotiations offers practicality and flexibility, which affects the prudent nature of the decisions [40]. Therefore, the states’ trust in negotiations beyond DSBs is growing because the favourable and speedy decisions suit the states’ economic sustainability, which at some point preserves marine biodiversity [39,41]. Contrarily, this swiftness is challenged on the basis that, in any negotiation process, economic interests usually control the states’ political influence. As in a unique *Swordfish Dispute*, the settlement outside DSBs allowed harm to marine biodiversity [42]. The contention exists mainly on the part of the initial practice of ITLOS in preserving fisheries in *the MV Saiga (Provisional Measures)* and *SBT Cases*, in which the (flag and coastal) states’ economic activity halted. After that, the restriction imposed by the DSBs on themselves in exercising fishery jurisdiction led to both marine biodiversity and economic stability based on fisheries becoming more controversial.

Therefore, before going into an in-depth analysis of the ‘applicable law’ in the UNCLOS dispute settlement mechanism, it is necessary to understand the difference between ‘the law invoking the jurisdiction (under Article 286 of the UNCLOS)’ and ‘law (compatible) applicable after assuming jurisdiction (under Article 293 of the UNCLOS)’ [7]. As a DSB having jurisdiction under the ‘Compulsory Procedures Entailing Binding Decision’ of the UNCLOS, it shall apply the compatible rules of international law related thereto [7]. Any DSB can also assume jurisdiction if any MEA (including fishery law instruments) related to UNCLOS is submitted to it and is empowered to interpret and apply that MEA. The DSBs, in this case, are also not prejudiced if the parties agree to decide an issue using the principle ‘*ex aequo et bono (according to the right and good)*’ beside the legal provisions of UNCLOS [43]. However, this legal position contradicts the UNCLOS ‘compulsory procedure’ requirements because a DSB having jurisdiction over any dispute concerning an MEA may not require the parties’ consent [40]. Therefore, the precedents in maritime dispute settlement have become quite contentious due to the vast discretionary interpretative and remedial powers available to the DSBs.

It is also notable that the UNCLOS dispute settlement provisions establish a wide range of DSBs, and it is imperative to ensure that their *modus operandi* would be appropriate in dealing with issues of a similar nature [43]. Of the four UNCLOS dispute settlement options (ICJ, ITLOS, arbitration, and special arbitration) made available to the states, preference is given to special arbitral proceedings [44]. In addition, the special arbitral proceedings are relatively costly and have to be financed entirely by the states and may concern the use of public funds under scrutiny. Thus, it can be hypothetically conceded that the Special

Tribunals are constituted politically, and, in practice, it is a difficult task for them to satisfy the preconditions of the UNCLOS ‘applicable law’ for sustainable fishery governance [45]. This overabundance of the DSBs has led to the varying interpretation of the UNCLOS and the ‘applicable law’ (MEAs and IEL) connected thereto [45]. Therefore, the DSBs have both assumed and rejected ‘applicable law’ jurisdiction, albeit in more sensitive yet significant ways, such as through the clarification of the rules and principles governing fishery.

In general, the ‘applicable law’ provisions of VCLT and Statute of the ICJ do not expand or invoke the jurisdiction of DSBs [14,46]. Therefore, the jurisdiction of ITLOS is invoked under the provisions of the UNCLOS and not prejudiced from settling the questions related to ‘law not incompatible with’ [47]. Because the jurisdiction assumed under the Statute of the ITLOS ‘comprises all disputes and all applications submitted in accordance with the UNCLOS, and all matters specifically provided for in any other agreement which confers jurisdiction on the ITLOS’ [48,49]. Accordingly, ITLOS can assume jurisdiction on the basis of any agreement (MEA) directly conferring or in the extension of UNCLOS. *The MV Saiga Case* is notable here, through which ITLOS inaugurated its jurisdiction and used the ‘applicable law’, i.e., UNCLOS and law on the use of force [50]. Through this case, ITLOS challenged the overgeneralisation of international dispute settlement practice and somehow justified the expansion of the jurisdiction provided under UNCLOS, as well as the ITLOS Statute [12]. While concluding, ITLOS stated that the ‘use of force’ is outside the scope of UNCLOS but compatible, and application is required to avoid the multiplicity of the proceedings and strengthen future actions to be taken by DSBs in similar disputes [51].

2.2. Applicable Law in Fishery Dispute Resolution

In light of *the MV Saiga Case*, the scope granted to the jurisdiction of the DSBs is vast and enables multiple dimensions of interpreting the law of the sea by amalgamating UNCLOS and other compatible rules of international law. Following this, ITLOS advanced the provisional measures for sustainable fishery governance in *SBT (Provisional Measures) Cases* under provisions of MEAs and UNCLOS. ITLOS assumed jurisdiction in extenso that ‘general, regional, and bilateral agreement’ can be applied under the UNCLOS dispute settlement mechanism [7,37]. Although in *SBT (Provisional Measures) Cases*, the parties were abstained from fishing according to MEAs, the jurisdiction of ITLOS was invoked under the UNCLOS. However, notwithstanding the decision of ITLOS, the reluctance of applying ‘applicable law’ by the Special Tribunal in *the SBT (Jurisdiction and Admissibility) Case* invoked all sorts of creative arguments [36]. The criticism, interestingly, considered that the jurisdiction provided under UNCLOS is weak, and it also asserted that the precedential value of *the SBT (Jurisdiction and Admissibility) Case* will cause restrictive *renvoi* (choice of law) in future maritime dispute settlements.

The MOX Plant (Provisional Measures) Case was the test for the ITLOS (as well as for the DSBs) environmental *compétence de la compétence* (the powers of DSBs to assume their ecological jurisdiction, which may seem obvious) [52]. In this case, the jurisdiction of UNCLOS for marine biodiversity preservation would have been strengthened [53]. The issue concerned a nuclear plant operated by the United Kingdom in the Irish Sea, 184 kilometres away from Ireland’s coastline. Ireland invoked the jurisdiction of ITLOS, considering the substantive UNCLOS perspective, and put forth a Ministerial Declaration and the Convention for the Protection of the Marine Environment of the Northeast Atlantic (OSPAR Convention) [54,55]. Although ITLOS seemed attractive for provisional measures, it rejected the environmental claim in extenso submitted by Ireland against the United Kingdom and asserted that any non-UNCLOS perspective (OSPAR Convention) is inadmissible [23]. The decision restricted the *renvoi* of the ITLOS, even given uncertainty about precisely what provisional measures might be issued and how any DSB would resolve controversial ‘applicable law’.

Even though Ireland cited the *MV Saiga Case* in order to establish the authority of the ITLOS to determine the violation of a certain MEA, the issues of ‘applicable law’ were not that much logically answered in the decision of the *MOX Plant (Jurisdiction and Admissibility)*

Case [18,56]. ITLOS hypothetically contended that there is a distinction between jurisdiction provided under ‘applicable law’ and ‘international agreement related to the UNCLOS’ [56]. The Special Tribunal more technically handled this question constituted by the Permanent Court of Arbitration (PCA) at the request of Ireland for the final award of the dispute. The Special Tribunal followed the arguments submitted by the United Kingdom that any DSB constituted under the UNCLOS can determine ‘applicable law’ if there is a violation of secondary rules of international law. The applicability of VCLT is relevant if an MEA is constituted under the law of the sea provisions and there is any express *renvoi* provision [57]. In arriving at a decision, the Special Tribunal, unfortunately, certainly did not clarify the interpretation of ‘applicable law’ and ‘MEA related to the UNCLOS’. The decision was made with the majority of votes, which refused the plurality of the international law dealing with one issue in hand, i.e., the dispute under MEA should be resolved first, after which the UNCLOS dispute settlement mechanism can be used [58].

Unfortunately, the Special Tribunal never executed an award in the *MOX Plant* case and opined that ‘any dispute under an agreement does not become a dispute under the other (UNCLOS) due to the same substance of that dispute’ [59]. The *MOX Plant Dispute* arose under ‘the OSPAR Convention, which existed separately from the UNCLOS’. Thus, the Special Tribunal assumed jurisdiction *prima facie* and refused to continue because the issues under OSPAR Convention were narrower than under the UNCLOS. It was also stated that the OSPAR Convention establishes exclusive jurisdiction of the European Court of Justice [60]. Therefore, the Special Tribunal stayed the proceedings on the request of the United Kingdom and requested the parties to obtain the jurisdiction from the European Court of Justice according to the Treaty establishing the European Community (EC Treaty) and the Treaty establishing the European Atomic Energy Community (Euratom Treaty) [32]. Such a position of the Special Tribunal again gave weightage to an MEA over UNCLOS, and the stance of the European Court of Justice unequivocally, in this case, ruled out the importance of the law of international marine environmental protection.

The disposition of the DSB was later followed in *ARA Libertad*, *Chagos Marine Protected Areas*, and *Arctic Sunrise* cases [20,61–63]. The criticism was logically answered that ‘applicable law’, in the UNCLOS, does not inherently constitute a basis of jurisdiction and it requires ‘an agreement related thereto’. Without commenting on the previous decisions, such as the ITLOS in *MV Saiga* and *SBT (Provisional Measures)* cases, although submitted by the parties, the Special Tribunal’s decision in the *Arctic Sunrise Case* answered that ‘applicable law’ does not extend the scope of jurisdiction’ [64]. The Special Tribunal technically distinguished the *MV Saiga* and *Arctic Sunrise* cases on the basis of customary (primary rules of) international law and treaty law [63]. These decisions were quite controversial, in which DSBs opined that ‘applicable law’ was not used in *MV Saiga* and *Southern Bluefin Tuna Cases*, and, although used by the ITLOS, it constituted a weak position of the UNCLOS dispute settlement mechanism [65].

The fishery (and marine environmental) disputes settled somehow by the ITLOS as mentioned above are notable regarding the practice of DSBs in preserving marine biodiversity. The initial position of ITLOS seemed axiomatic in protecting marine biodiversity by using judicial powers and referring parties for negotiations. It was made clear by the Special Tribunal that the ITLOS and all other DSBs can only deal with issues that are submitted to it with the consent of the parties to a dispute. Thus, in *SBT (Admissibility and Jurisdiction)* and *Swordfish* cases, the DSBs were reluctant to apply the MEAs along with UNCLOS provisions because consent was missing [53]. Similarly, justiciability prevailed in the *MOX Plant Case* when ITLOS refused to expand environmental jurisdiction under ‘applicable law’ provisions. ITLOS attempted to vindicate the compulsory dispute settlement mechanism under the UNCLOS and established that the paradox of choice (also known as ‘the Montreux formula’) allowed the Special Tribunals to cast problems for using expansive jurisdiction with ‘applicable law’ [66,67].

2.3. Impartial Utilisation of Applicable Law for Fishery Preservation

Given above, the powers of DSBs were shrinking while interpreting ‘the law compatible with UNCLOS’. The impact of this practice on ITLOS was considerably prominent in *the Volga Case* [68]. *The Volga Case* was doctrinaire as a ‘vessel release issue’ by the ITLOS, but it was about illegal, unreported, and unregulated (IU) fishing [69]. ITLOS, in this case, disregarded Australian domestic legislation developed under the Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR) and remained silent on the implementation of the Fish Stocks Agreement [28,70]. A Russian vessel, *Volga*, involved in IU fishing in the Australian EEZ, was arrested and penalised thrice by Australian authorities under CCAMLR and domestic legislation. Russia submitted to ITLOS regarding the ‘prompt release’ of *Volga* as per the procedure laid down in UNCLOS. Australia argued that the CCAMLR’s provisions related to IU fishing must be considered, and that the tripartite monetary penalties and a nonfinancial bond for release applied to the *Volga* under domestic legislation should remain per se [71].

The potential role of ITLOS in *the Volga Case*, which was expected to be favouring sustainable fishery governance, was once again under intense criticism. Intriguingly, in this case, a fishery MEA (CCAMLR) was competing with the UNCLOS ‘prompt release measures’ [72]. ITLOS, while attempting to ‘preserve a balance between the economic interests of the flag state and the marine biodiversity of the coastal state’, prioritised UNCLOS over CCAMLR and contradicted previous precedents. With this idea of balancing and assuring a ‘reasonable bond or other security’, ITLOS ordered the release of the vessel and stated that ‘Australia’s demands were not reasonable under the UNCLOS provisions related to prompt release’ [73].

The assumption of jurisdiction by the ITLOS in *the Volga Case* was primarily based on UNCLOS prompt release measures. UNCLOS superseded the CCAMLR (an MEA), as ITLOS stated that this case was different from a fishery dispute [74]. Essentially, the *Volga Case* was not a fishery dispute submitted to the ITLOS by Australia; it was a ‘prompt release matter’ brought by Russia. Although the ITLOS opined that Australia was exorbitant in this case and requested to revise the penalty imposed by the domestic authorities, it also appreciated the actions taken by states in the CCAMLR area. In this way, the ITLOS accepted the CCAMLR’s application in that area in a sensible way and rejected the application of a fishery MEA in any dispute settlement in a technical way [32]. ITLOS also demonstrated its jurisdiction in a clear path that treatment of a pure fishery dispute would be different against any prompt release issue. Through this decision, finally, the issue of CCAMLR went to the Australian authorities for more stringent measures to control IU fishing as suggested by the ITLOS.

The point urged in *the Volga Case* that the DSBs are to settle disputes relating to specific situations and not make laws and solutions to the marine biodiversity also provided clarity that pollution- and fishery-related issues require coordinated action on the part of the states [75]. It also became apparent that the cases submitted to the DSBs are to clarify the obligations and responsibilities of states. The judgements contributed to the effective implementation of the UNCLOS, as DSBs encouraged the states to negotiate on measures for the conservation and management of marine biodiversity [36]. In view of this, the developed jurisprudence in international maritime dispute settlement gained recognition. The DSBs determined what role the UNCLOS dispute settlement system can play. Moreover, fishery preservation as an essential concomitant of the marine biodiversity under the UNCLOS was dealt with in a controversial manner but in a sensitive way, and this alarmed the international political arena regarding sustainable fishery governance.

Recognising the issues related to ocean sustainability, the International Seabed Authority (ISA) requested the ITLOS (Seabed Dispute Chambers) for an advisory opinion related to *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* [76]. Interestingly, this request came years after the Fish Stocks Agreement under the UNCLOS, as the ISA was already governing the exploration and exploitation in ‘the area’ long ago [77,78]. ITLOS, while responding to the request of ISA,

defined the ‘obligations of the states’ that are conducting economic activities in ‘the area’ beyond national jurisdiction. ITLOS defined the ‘obligations of the state’ by reading the relevant part that ‘states shall have the responsibility to ensure that activities in the area shall be carried out in conformity with the UNCLOS’ [79]. In this way, ITLOS underpinned the states’ due diligence and recognised applying the ‘precautionary approach’ as per the Rio Declaration on Environment and Development (Rio Declaration) [77,78]. It can be hypothetically contended that ITLOS as a DSB challenged its previous position and applied ‘applicable law’ provision through this opinion. At the same time, it is also notable that advisory opinion does not constitute an ‘obligation’ to be implemented, and the Rio Declaration was a ‘compatible law’ rather than an ‘applicable law’ [80].

With reservations, it can be said that ISA’s request was to define the ‘liabilities and obligations of the States in the Area’, and ITLOS advised with clarity. ITLOS trimmed its jurisdiction in this case, and it did so because it simultaneously imposed responsibility on ISA and the states [80]. ITLOS said that ‘if a state has taken all the necessary measures (policies, laws and regulations) to secure compliance, it shall not be liable for any damage to the marine biodiversity (including sustainable fishery governance)’ [79]. The states are obliged under the UNCLOS to assist the ISA, and ITLOS recognised the ‘direct obligations’ through the due diligence to ensure ‘best fishery governance practices’ [47]. ITLOS further adumbrated that ‘if damage occurred, and the state had failed to take all necessary and appropriate measures to ensure compliance, then the state would be liable’ [81]. From the perspective of IEL, this opinion is historical, and ITLOS set the highest standards for sustainable fishery governance by endorsing a legal obligation to conduct environmental impact assessments (EIA) [81]. Despite the relative clarity made on its jurisdiction, the position of ITLOS on EIA was somehow controversial because the ISA was empowered to determine environmental standards [81]. The approach made for EIA appeared towards a global approach rather than a national approach. Thus, ITLOS informed sensitively that judicial bodies are empowered to advise the relevant authorities on the interpretation and implementation of UNCLOS in conjunction with ‘compatible law’.

The disposition taken by the ITLOS in *Responsibilities and Obligations of States in the Area* was maintained in another advisory opinion requested by the *Sub-Regional Fisheries Commission (SRFC)* [82,83]. ITLOS assumed jurisdiction directed by the Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Fisheries Commission (CRFC) [84]. ITLOS reasoned that all matters referring closely to the purposes of the UNCLOS empowers CRFC officials for an advisory opinion [85]. ITLOS clearly endorsed CRFC as ‘compatible law’ under the relevant provisions of the UNCLOS for sustainable fishery governance. Although many states refused to accept the proceedings, ITLOS assumed jurisdiction on the basis of ICJ’s practice that advisory opinions are non-binding [86]. In such a manner, ITLOS proceeded without the consent of all states, as well as without answering that only one chamber within is allowed for an advisory opinion (i.e., Seabed Disputes Chambers).

The opinion requested by SRFC was related to IUU fishing and the responsibilities of the states under UNCLOS and an MEA (CRFC). ITLOS again edged its jurisdiction while answering controversial questions, such as the states’ obligation under CRFC in curbing IUU fishing [87]. Instead, ITLOS said that it is a primary responsibility of the states under UNCLOS ‘to take necessary measures to prevent, deter, and eliminate IUU fishing’. ITLOS strengthened its position by referring to the ‘obligation’ of the states as per opinion in *Responsibilities and Obligations of States in the Area* [88]. ITLOS also re-endorsed ‘due diligence’ and ‘liabilities’ of the states to preserve the marine biodiversity under the UNCLOS [89]. Furthermore, ITLOS requested states to ‘cooperate and coordinate’ according to ‘best scientific information’ to ‘ensure the preservation of marine biodiversity’, including fishery stock [90].

ITLOS as a DSB, through the advisory opinions, clarified that it could assume jurisdiction if any compatible law (with UNCLOS) confers jurisdiction to it [91]. For the

interpretation of UNCLOS, ITLOS can apply the ‘applicable law’ or ‘compatible law’ but cannot interpret any MEA without the consent of states (parties) [92]. For the purposes of advisory opinions, the consent of states is not necessary because opinions are not binding [88]. ITLOS can urge states (only) for taking particular legal and governance measures for fisheries because it is a ‘due diligence obligation’. In this way, ITLOS informed how far jurisdiction could be exercised under UNCLOS. The advisory opinions were balanced, bold, and forward-thinking in instances of *erga omnes* (towards all) for sustainable fishery governance.

Following the practice of the ITLOS and for the justiciability of marine biodiversity, a very recent decision of the Special Tribunal constituted under the PCA in the *South China Sea Dispute* is significant [93]. As the *South China Sea (Dispute)* is an area of crucial shipping lanes and enriched resources, this dispute *prima facie* (on the face of record) is considered a case of maritime boundary delimitation [94]. The decision in this dispute covers marine biodiversity issues from fishery, pollution, and development (of islands) perspectives [95]. The Special Tribunal stated that it could not assume jurisdiction on the violations related to the IEL, such as the CBD and CITES; nevertheless, the jurisdiction provided under the UNCLOS allows taking measures in preserving marine biodiversity [96]. The Special Tribunal, thus, relied on the provisions of UNCLOS for marine biodiversity preservation and was reluctant to utilise ‘applicable law’ provided to apply MEAs and IEL.

In the *South China Sea Dispute*, the Special Tribunal found grave violations of UNCLOS and regional MEAs by states in the South China Sea area. It urged to stop island-building activities and reinforce the preservation of marine ecosystems, including reefs and fisheries [97,98]. The Special Tribunal, while using its own expertise for scientific-environmental determinations, inter alia, relied on ITLOS’s advisory opinion ‘*Activities in the Area*’, and explained that it is the obligation of the states under (regional and international) MEAs and UNCLOS to preserve the marine resources (oil and gas), minerals, and fisheries to maintain marine biodiversity [93]. In addition to endorsing due diligence as a positive obligation and liability of the states concerning curb IUU fishing, the Special Tribunal also stated a negative obligation ‘not to degrade marine biodiversity’ by constructing artificial islands [99]. In this degree, the Special Tribunal achieved a complete description of sustainable fishery governance, including marine environment, ecosystems, and biodiversity.

The Special Tribunal’s substantive findings in the *South China Sea Dispute*, and the jurisprudence related to the fishery governance developed by ITLOS in Advisory Opinions were both based on the infamous decision of the ICJ in the *Pulp Mills Case* [100]. As in the *Pulp Mills Case*, the ICJ referred to ‘corpus of IEL’ as a ‘general obligation of states to ensure that the activities within their jurisdiction and control respect the environment of other states or areas beyond national control’ [101,102]. The ICJ in the *Pulp Mills Case* also considered the EIA and disclosure of environmental information as due diligence under the Rio Declaration and as part of IEL. The Special Tribunal and ITLOS as DSBs agreed to this position of the ICJ in quite a subtle manner by only stating the provisions of the UNCLOS related to marine environmental protection. Both the DSBs decided that the obligations related to marine biodiversity preservation are applicable to all the States in all maritime areas, i.e., ‘both inside the national jurisdiction of the state and beyond’ [86]. In sum, the recent interpretation of the UNCLOS by DSBs explained that the extent of the activities in the oceans, which cannot harm the marine biodiversity of other states, is necessary for sustainable fishery governance.

3. The Politics of the States over Marine Spaces

3.1. The Political Landscape of Southern Bluefin Tuna Cases

The political influence over the UNCLOS dispute settlement mechanisms is noteworthy, which hinders the proceedings and causes severe threats to sustainable fisheries governance. It is also pertinent to mention that the dogmatic decisions also precisely impact the national fishery governance regimes. The principal focus has been with respect to criti-

cal analysis of specific claims related to marine areas, fisheries, or vessels [32]. Governance of fisheries for sustainable marine biodiversity, whilst still an area of IEL blended with UNCLOS, is discussed in a limited fashion in the maritime dispute settlement domain [103]. The impetus is on the states' practice in maintaining marine areas because the UNCLOS objectives, purposes, and *travaux préparatoires* (documented aims) are unlimited, and the only canvas measuring applicability is 'governance of the fisheries' [104,105]. In this scenario, it can be argued that the criticism on DSBs generally ignores the state practice of fishery governance. There are procedural lapses in state practice of fishery governance, and this hinders the implementation of judicial decisions that may impact the sustainability of marine biodiversity [106]. Accordingly, the criticism on this ground can initially contend that political capture on fishery governance and limited jurisdiction provided under UNCLOS impedes the role DSBs in ensuring sustainable marine biodiversity.

The DSBs, while taking provisional measures, are prescribed 'to prevent serious harm to the marine biodiversity, pending the final decision' in many cases. Effective implementation of provisional measures by the states, even though ordered by the DSBs, was, and is still questionable. The Japanese position in *SBT Cases (Provisional Measures)* evidentially supports this argument [17]. As in *SBT Cases (Provisional Measures)*, the ITLOS, on request of Australia and New Zealand, restricted Japan's unilateral experimental fishing of southern bluefin tuna stock [107]. Japan contended the ITLOS interlocutory order on the basis that there is not going to be an irreparable loss to the southern bluefin tuna stock [108]. Japan also challenged the jurisdiction of ITLOS by characterising Convention for the Conservation of Southern Bluefin Tuna (CCSBT) as *lex specialis* (special law prevail over general law) over the UNCLOS [109]. Surprisingly, Japan agreed to the proceedings later, took provisional measures, and submitted to the ITLOS to prescribe Australia and New Zealand to resume negotiations for experimental fishing under the provisions of CCSBT [36].

Given the provisional decision of the ITLOS, it was expected that the formal Special Tribunal to be formed under the UNCLOS would uphold previous measures for sustainable fishery governance [110]. However, the Special Tribunal dashed the hopes, concluded that it lacked jurisdiction to ban any fishing, and revoked the previous order of the ITLOS [110]. While relinquishing its jurisdiction on the ground that the CCSBT specifically required consent of the parties in its dispute settlement proceedings, the Special Tribunal set aside the compulsory jurisdiction of UNCLOS and cast doubt on the historical development of the law of the sea [17]. The precedential value of this decision conflicted with the principle of 'applicable law', thereby drastically impacting the jurisdiction of the DSBs in applying IEL and UNCLOS for sustainable fishery governance [37]. Moreover, the CCSBT superseded the UNCLOS through this decision, and this suggests that if a trilateral MEA or fishery agreement can overthrow the UNCLOS, then national mechanisms of fishery governance can overrule the IEL.

3.2. The Disputed Decisions in Swordfish Cases

The Swordfish Dispute is an equivalent case dealing with the damage to fisheries, which also dismayed the preservation of marine biodiversity [42]. In this case, the European Community (EC) lodged its complaint before the World Trade Organisation (WTO) concerning the laws of Chile prohibiting the unloading of swordfish in Chilean ports. The EC's complaint was based on a violation of the General Agreement on Trade and Tariff (GATT) and claimed that measures taken by Chilean authorities are inconsistent with the WTO commitments [111]. In response, Chile submitted a case in the ITLOS concerning the conservation of the swordfish stock for overall sustainable marine biodiversity [112]. Unfortunately, the EC and Chile reached a provisional agreement prior to formal proceedings in ITLOS and WTO and governed the swordfish stock through their own regimes [113]. There have been contentions that if the IEL and UNCLOS would have *mutatis mutandis* (likewise) applied under the provision of 'applicable law', there were high chances that Chile would have succeeded in the conservation of the swordfish [53].

It was not realised that the ‘compatible law’ for the primary regulatory purposes of the UNCLOS is more relevant than the ‘applicable law’ for marine biodiversity. Moreover, the ‘applicable law’ is ill-defined, mutable, and applied inconsistently from case to case to serve the desired outcomes [114–116]. The argument that ‘the DSBs can expand their jurisdiction under UNCLOS and can apply IEL simultaneously under the phrase commonly referred to as ‘applicable law’ initially appears modest [40]. It becomes complex when the relevant provision used for dispute settlement under the UNCLOS seeks consistency of the IEL, which can be applied with the law of the sea [84,117]. The ‘applicable law’ for ‘applicability of other rules of international law’ contradicts itself regarding the interpretation of the UNCLOS [118]. The primary problem is the repetitive use of ‘other rules of international law’, and these other rules can be used under the UNCLOS for regulation of ‘territorial sea’, ‘innocent passage’, ‘ships’, ‘straits’, ‘exploration in the economic zone’, ‘using high seas’, and ‘underwater cultural heritage’ (see Articles 2, 19, 21, 31, 34, 58, 87, 138, 293, 297, and 303 of the UNCLOS). Therefore, the challenge faced by the DSBs in utilising ‘applicable law’ for sustainable fishery governance is technical because, in the UNCLOS, insufficient weight is given to marine environmental protection.

In this context and as discussed already, it is also notable that the states are entitled to submit any dispute related to fisheries [32]. Using the broad *locus standi* (position in front of the court) under the UNCLOS, the states attempted to invoke the ‘applicable law’ provision from the VCLT’s interpretation perspective [110]. However, the consent of the states for the VCLT’s ‘applicable law’ is relevant because ‘application of successive treaties relating to the same subject matter is conducted if there is any inconsistency’ [37]. The DSBs have used this VCLT provision for prioritising any MEA relating to fishery governance adopted post UNCLOS and explicitly refused to exercise compulsory dispute settlement provisions [37]. The MEAs ratified after UNCLOS, in this scenario, have become superior if not compatible with the UNCLOS, and they have challenged the vitality of the jurisprudence of DSBs.

In this context, it can be argued that the UNCLOS dispute settlement mechanism is satisfactory. Although the ITLOS offers speed and efficiency in taking provisional measures to preserve marine biodiversity, it does not suit the fishery-governing instruments of the states. The states, existing in modern geopolitics, require sustainable solutions, which are guaranteed by negotiations. The practitioners adopt the functional approach of negotiations in maritime dispute settlement and suggest that DSBs should avoid multiple objectives of UNCLOS and IEL [75]. The DSBs matter primarily because they create focal points for sustainable fishery governance by integrating UNCLOS and IEL; thus, conflicting MEAs disrupt the value of precedents by creating additional possible crucial biodiversity issues [36,100,119]. DSBs, through their precedents, create overlapping legal mandates contradicting each other, which weakens the states’ claims and obligations. This happens because international law is not well established in dispute settlement, and the option of having a DSB of choice under UNCLOS allows the states to bypass legal obligations [113]. Therefore, the decisions of the DSBs contend state ocean or fishery (or marine environmental) governance regimes with a lesser degree of clarity.

The outcomes of these practices indicate that the dispute settlement outside the DSBs have more authority in national fishery governance regimes and preserve marine biodiversity to an extent [43,120,121]. That said, the importance of international law is still unequivocal, as the political enmity of the states is established through MEAs to manoeuvre the UNCLOS dispute settlement mechanism [40,60,122]. For example, in the *Swordfish Dispute*, the rules of UNCLOS and GATT were inconsistent but influenced the provisional agreement between EC and Chile and established a supplementary judicial system under international law [113]. Similarly, the CCSBT is framed under the provisions of the UNCLOS and impacted the formal negotiations between Japan, New Zealand, and Australia [37]. The provisions of the UNCLOS, related to ‘states’ duty to cooperate for conservation of living resources and maintaining populations of harvested species to a sustainable yield’, remained applicable in agreements concluded through fisheries disputes.

The DSBs ignore the fact that the negotiations that led to UNCLOS came at a time of chaos in marine spaces and maritime disputes [99]. The MEAs, IEL, and UNCLOS can complement or clash in the existing global policy pattern. Thus, the rules created by DSBs in various conflicts caused uncertainty and provided an opportunity to examine the bargaining political power of the States over international law. In any such examination, the practitioners underpin the ‘political power of the states’ in negotiating disputes outside of the DSBs, as the bilateral agreements are more reliable than seeking the difficulties related to the interpretation of the inconsistent international law [53]. There were circumstances where the methods of ‘amicable dispute settlement’ prevailed over the compulsory procedures available in UNCLOS. The settlement outside the DSBs mutually benefited the states by forming clear, precise, and vital fishery governance mechanisms.

The above debate suggests that the criticism is based on a more idealistic approach. The imprecise boundaries provided under the UNCLOS compulsory dispute settlement mechanisms challenge the role of DSBs to intervene in national fishery governance mechanisms [49]. Accepting that the jurisdiction of the DSBs is precluded owing to the inconsistencies in international law, the reluctance to treat the disputes under the ‘applicable law’ provisions available in UNCLOS and VCLT is questionable [40]. However, the states followed the path of the UNCLOS dispute settlement mechanism and applied IEL and law of the sea provisions in outside settlement [72]. Conclusively, even with inconsistencies in international law, the DSBs remain relevant by narrowing the role of states in political-based bargaining. Therefore, it can be assumed that the jurisdiction of the DSBs can achieve sustainable fishery governance and preserve marine biodiversity by adopting a technical and functional approach.

4. The Way Forward

Although the DSBs were asked multiple times recently to restrict rather than expand their jurisdiction under ‘applicable law’, the effectiveness of ‘compatible law’ prevailed. The DSBs exercised jurisdiction because any MEA can be used to resolve the dispute under the UNCLOS. The interaction between the provisions related to ‘applicable law’ and ‘compatible law’ provided a functional and technical approach to DSBs to resolve conflicts by establishing a clear hierarchy among international legal instruments, i.e., UNCLOS, MEA, and IEL. The DSBs provided a clear direction when faced with inconsistent international law, and the VCLT’s ‘applicable law’ was used to bring fishery governance MEAs under one guiding body (UNCLOS) to create a common interpretation [123]. As VCLT established rules for treaty interpretation, DSBs adopted parameters in translating the UNCLOS [124]. Moreover, the UNCLOS codified customary law of the sea was primarily concerned with bilateral agreements of that time, and this weighs the argument that it is also applicable to most MEAs [125–127].

Before reaching any conclusion regarding the political control over the UNCLOS dispute settlement mechanism, it must be considered that the DSBs sensibly used ‘applicable law’ for sustainable fishery governance, as well as the economic interests of the states. If the DSBs established under the UNCLOS were influenced, it must have caused ignorance of ‘applicable law’. As discussed above, there were logical reasons provided by the DSBs when jurisdiction was declined under the MEAs prevailing over UNCLOS. The point is that the DSBs established under the UNCLOS have a lot of discretion in deciding matters related to fisheries [128,129]. In this scenario, the role of international organisations related to ocean governance also becomes pertinent because these organisations can invoke advisory jurisdiction related to fisheries under the UNCLOS [91]. The DSBs can exercise their jurisdiction to establish more state responsibility for sustainable fishery governance.

Having discussed the technical and functional approach of the DSBs to exercise fishery jurisdiction, the provisions related to the preservation of marine biodiversity of the UNCLOS are relevant. The question arises regarding ‘how the DSBs can benefit from any ‘MEA’ related to these provisions’. Against the applicability of the ‘applicable law’ for sustainable marine biodiversity, the ‘compatible law’ reflects that these provisions can be

expanded to an extent [32]. For example, in any event of a dispute, the interpretation of the provisions related to ‘regional cooperation for fisheries preservation’ in the UNCLOS becomes functional under that MEA. Moreover, regional cooperation has been increasingly observed in practice, the literature, and policy instruments [90]. There are regional fisheries agreements, as well as the United Nations Regional Sea Programmes, implemented by states [103]. While considering regionalism, the state practice of fishery governance aligns with the regional marine biodiversity preservation regimes. On account of this, the DSBs can extend jurisdiction under the regional MEAs (if not explicitly excluded) if it needs to interpret provisions related to ‘marine biodiversity preservation’ [130].

Most recently, regional cooperation has been endorsed for ‘climate action’ and in marine environmental governance practice as ‘ocean action’ [103]. The DSBs could face climate change in the near future because the anthropogenic changes in the physical, economic, social, behavioural, and other factors threaten sustainability in marine biodiversity. The judgement of ITLOS in *SBT (Provisional Measures)*, in this scenario, is quite relevant, as it highlighted ‘the protection and preservation of the living resources of the sea, adding in the conservation of the marine environment and the stock of bluefin tuna which was depleted to its lowest levels and was a serious threat to the biological diversity’ [131]. Considering the biological diversity, the climate change impact on marine biodiversity can expand the jurisdiction of the DSBs under the UNCLOS even to land-based sources of marine pollution impacting fisheries. Therefore, it can be assumed that there will be new challenges for the DSBs as faced by the international community in the law of the sea matters.

5. Conclusions

As the discussion of this article shows, the jurisprudence under UNCLOS illustrates trends in the field of sustainable fishery governance and marine biodiversity. This article is expected to serve as a starting point for understanding the complexities surrounding the DSBs using the ‘applicable law’ for marine biodiversity preservation. It is difficult to arrive at a normative conclusion concerning the exercise of ‘applicable law’ jurisdiction by the DSBs for sustainable marine biodiversity; it appears that assuring the balance between environment and development is going to challenge the jurisprudence applied so far. Furthermore, many of the questions raised in this article have yet to be answered by the DSBs. Previously, the primary issues relating to UNCLOS were delimitation, arrest and detention of ships, and fisheries, and, as of now, there are new global challenges. As a result, it is imperative that the DSBs engage in more significant discussions of the complex issues to prepare for the rising tide of dispute settlement impacting global ecological challenges.

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