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International Law and dispute settlement mechanism

O Direito Internacional e o mecanismo de solução de controvérsias

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Abstract

The DSM, or Dispute Settlement Mechanism, in the absence of a judicial body, is the closest representation of a supreme court or judicial institution in a regional bloc or other international organisation. The search for a peaceful settlement of disputes in the international arena had led to the development of the DSM during the 20th and into the 21st century. The DSM acts as an impartial third party, wherein it intervenes in any international conflict to offer feasible solutions for both sides.

Resumo

O MSC, ou Mecanismo de Solução de Controvérsias, na ausência de um órgão judicial, é a representação mais próxima de uma Corte Suprema ou de instituição judiciária em um bloco regionl ou em organização internacional diversa. A busca por um meio pacífico de solução de disputas no meio internacional levou à criação do MSC ao longo dos séculos XX e XXI. O MSC age como um terceiro imparcial, na medida em que ele intervém em conflitos internacionais com o intuito de ofertar soluções possíveis para as partes envolvidas.

Keywords: International law, Dispute Settlement Mechanism, intergovernmentalism, supranationalism.

Palavras-chave: Direito Internacional, Mecanismo de Solução de Controvérsias, integovernamentalismo, supranationalismo.

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International Law and Dispute Settlement Mechanisms (DSMs)

Since the Cold War, international law has been subjected to rapid alterations and developments in order to accommodate the existence of well-connected international communities and the current changes occurring and arising within the regional blocs, which originally formed these nations. As Mendes (2005, p. 56)

affirms, "Some movements associated with globalisation and regionalisation caused significant fissures within the nation-state (borders/citizenship/currency/security)".

International law has undergone a transitionary development in which the former framework of international law, which concentrated on co-ordination, changed its focus more to co-operation between involved parties (Friedmann, 1964). As such, in the present framework, an active pursuance of common goals between those who are engaged in or subject to international law can be seen. With the evolution of international law, forms of mastery within the legal system can be found. Such examples of subordination can be found in the existence of obligations described as jus cogens and erga omnes whose practice and purpose present more of an academic interest than being of actual, practical use.

The so called "vertical" structure of international law is manifest in the European Union, where the legal system is currently based on treaties. Its implementation is subject to mechanisms of administrative and judicial control and can be directly applied to member states. Thus, currently there are two ways in which international law can be seen: firstly as vertical and, secondly as horizontal. Vertical law usually refers to the classical structure of law that occurs in a sovereign state where there is a higher authority that imposes a rule of law on the people, as for example, as in the domestic law in the United States, where a law system translates the requirements of the Constitution in the form of executive orders, rules and regulations.

In international law between sovereign states, however, one state is not in a legally dominant or authoritative position over the other, so they are considered to be equal and have a horizontal structure, such as in international treaties. Despite the changes within the international community, international law remains as being predominantly horizontal in an inter-state system. However, some vertical features of international law are accepted by states, as a result, for example, of prevalence to international agreements, particularly concerning human rights.

The binding force of such vertical international law subjects the states and other actors in the international community to a legal rule independent of their expressed content. As Aaken (2009, p. 491) affirms,

> classical functions of the nation-state, such as safeguarding individual liberty, freedom, and safety, are transferred to the international sphere. The European Court of Human Rights even declared the European Convention on Human Rights to be a 'constitutional instrument of European public order (…) having a peremptory character'.

The current state of international law is challenging. A big dilemma remains over the applicable rules, basis of legitimacy, methods of transparency, and application and maintenance of democratic guidelines within the system itself. In the work of Soares (2004, p. 201), we read:

> the relationship between international and domestic law is one of the most complex, as despite its difficult placement in theory of Law, it still has influence in practice, particularly when law enforcers are faced with contradictory regulatory devices. Those contradictory

> devices originate from the legislative process, including constitutional representatives, and other from norms of international law, either *jus scriptum* (international treaties and conventions), either *jus nonscriptum* (international custom)

The compounding of these perplexing quandaries contributes to the old problem that international law, as well as any international system, has long been trying to solve, which is, that of enforcing the genuine process of regulation and evaluation of policies that regional blocs and their intra-organisations are pursuing.

An expression of international law, within the context of regionalism, lies in its mechanism or procedures for dispute settlement. The Dispute Settlment Mechanism (DSM) has long been one of the crucial issues within the realm of international law. Entities entering into a DSM, who are commonly member nations, a state or private parties, usually appeal to their substantive and procedural rights under cover of the international law. The concept behind the DSM is that under cover of international law, private parties and several officials of a regional bloc can use their rights to adequate protection, participation in the process of international law, and fair unbiased judgment in the case of any complaint from an organization or state officials. Thus, this is designed to result in a fair trial and proper hearing of a complainant's problems. Complaints and cases are borne from controversial proceedings, agreements and policies that can be considered as having a direct effect over a group of people who are in violation of their rights.

Yet, because of the co-equal structure involved, international law does not take into account the differences between intra-organizations and its officials, differences that usually cause conflicts and disunity within the regional bloc itself.

This contradiction has been perceived as portraying "two sides" of international law and the DSM, where both sides can enjoy the articulated subjectivity of international law in its totality.

In such a situation, enforcement of violations can be difficult, for example, if a member nation of a treaty has broken a particular treaty promise, there is no power above the party members to enforce the agreement.

It is for this reason that many horizontal laws, as in the case of treaties, have created dispute resolution panels or some other neutral tribunal to settle disputes, for example, the International Court of Justice (ICJ).

The relationship between international law and the dispute settlement mechanisms can be judged by the capacity of the latter to represent and make use of international law in order to conduct fair trials and administer protection and rights to organizations, officials, and individuals that are caught or involved in a conflict between opposing parties.

However, although it is common for treaties to create panels such as these where members can expect to have their disputes dealt with fairly, some international relations experts believe that the state of international law is one of persistent anarchy (Lau and Johnson, 2013).

Legal system and its integration into dispute settlment mechanism

Despite the relationship between international law and the Dispute Settlement Mechanism, uncertainty is still a reality. This uncertainty has been attributed to the normative expansion experienced in international law and to the current dilemma about its changing role, thereby casting doubt upon the pronouncement of judgement of international law with respect to the Dispute Settlement Mechanism. This doubt has also resulted in confusion among leading officials of regional blocs and international organisations regarding the necessity of applying the law in certain activities and issues. The reason for this impending doubt lies in the complex structure of certain policies, whose intricate nature can hardly even categorized.

In addition, according to Nakagawa (2006), the current framework of international law cannot be implemented or can only offer partial results, since full solutions do not exist. However, through the codification of international law and specific topics therein, there is still a slight possibility that the uncertainty surrounding the state of international law can be solved.

One possible method towards providing a solution lies in the identification of the basic principles of international law. By renewing priority over principles, it is thought that a normative structure could be put together in an integrated manner in which it would be possible to avoid the negative effects commonly attributed to the dispersion of international law in a decentralised society. In return, it would pave the way for the logical interpretation of the law. The reason for the renewed interest in the basic principles of international law can be attributed to the growing absence of a systematic explanation of state practice and international legislation (Brack, 2001). Furthermore, the existence of fragmented law-making bodies in the international community has intensified the misinterpretation of international laws which in turn has negatively affected decision-making in the Dispute Settlement Mechanism and tribunals within regional blocs. [1]

The participation of the states and their broad consent could improve the success of identifying the key principles of international law. In this sense, Biggs (2005, p. 81) recommends states

> to participate fairly frequently as interested third parties in disputes that affect their interests, even if only indirectly. This kind of participation does not involve large costs and it enables governments to familiarize themselves with the procedures and workings of the system, and thereby acquire the experience they need to cope successfully with future disputes.

This interaction would not only allow a careful application and evaluation of key principles for each member state, but it would also allow the improvement of the sustainability and universality of

1 Brack underlines the risk of duplication of effort and lack of coordination, and the likelihood of countries 'shopping around' for the forum in which they are most likely to be successful. In this sense, Brack (2001, p. 3) exemplifies with the EU–Chile swordfish dispute: "the EU request[ed] the establishment of a WTO dispute panel while Chile initiated proceedings before the International Tribunal for the Law of the Sea. Fortunately – or unfortunately from the point of view of academics poised to write about the clash of dispute forums – the case was resolved by agreement between the two countries on 25 January 2001".

international rules. In theory, it would gradually lead to a careful insertion of international law into the various branches of the regional bloc; in their turn, its member states would also gradually be able to learn about the nature and basic principles that act as a framework for international law. This new approach could be significant, considering that there have been numerous cases over the years in which the incorrect interpretation of international law has been considered to be the primary reason for the subjective nature of their trials (Baptista, 2001). It would also be a positive move, in the sense that the decision and policy-making body of each regional bloc would be able to adjust or adapt itself to the key principles of international law, in order to avoid future problems with its policies.

The DSM plays an important role in this process namely, in the milieu of the recently renewed interest in the key principles of international law. The role of the Dispute Settlement Mechanism in every international and regional organization is to lend an ear to complaints and to evaluate policies, norms, patterns of governance as well as activities. During this process, principles of international law are being applied or act mainly as the legal source for the judgment and criteria for evaluation. In this process, in most cases, the probability of giving an incorrect interpretation of international law is sure to result in the making of inadequate decisions (Gallagher, 2008).

Unresolved cases also occur, as shown in instances where international law could not reach any appropriate conclusion for the complaint. The DSM often acts as the representative of international law and in situations where problems originate from such representation, it is possible that the whole process of the Dispute Settlement Mechanism can be affected and compromised. If this were to occur, the result would then be uncertainty and doubt over the whole body of the DSM.

Supranationalism, developments and limitations of international law

Some features of international law have been retained, such as the horizontal and vertical perspectives, although they have undergone some significant changes in the last few decades. It has been noted that international law has been subjected to rapid developments during the 20th and 21st centuries, wherein the international community, including the actors composing it, took a more aggressive stance towards globalisation and regionalism.

As it tried to accommodate the new system and rules indirectly imposed by both of the above-mentioned forces, contemporary international law gained greater complexity and was forced to change and adapt. As a result, some of these innovations and modifications prompted a new framework for international law, with new interrelated systems. Such an accumulation of different logics is characterized: a) by its own, autonomous forms of interpretation of law which make their own rules and b) as well as by its integration of rules of the various international legal subsystems. For instance, the rules of international environmental law (a subset of the international law system) can even be inconsistent with the rules of international economic law, which in turn collide with the logic of human rights, and so on. (Varella, 2014).

One of the developments which led to the formation of this new framework was the limitation of state sovereignty which was introduced in order to accommodate international organizations and to intensify the role of individuals, elevating their status and giving emphasis to their rights, for fairer trials (Varella, 2014). Such scenario has also highlighted the importance of democracy, which shares its premise of protection and the duty of the state to guarantee not only its law but also what is in the realm of international law.

The gradual transfer of powers is accompanied by the limitations and ensures that leaders and leading officials control both intra and inter-regional organizations, indirectly or directly. However, certain activities of international organizations are sometimes exempt from state sovereignty.

This kind of development has been observed in the EU. In fact, integration processes are not alike. Although both the EU and Mercosur have reached the Customs Union stage, the EU has continued its movement towards deeper integration and increasing institutionalization at a regional and often supranational level while Mercosur, diversely, has remained at the Customs Union stage and has taken the option to follow a pattern of intergovernmental mechanics, where politicization prevails over institutionalization.

As the Oxford Dictionary indicates, supranational implies 'having power or influence that transcends national boundaries or governments'. Such a concept is largely observed in the praxis of three European institutions — the Commission, the European Court of Justice, and the European Parliament. These bodies are supranational, wherein

> power is transferred to a central authority which exists at a level above the nation state, and which exercises its powers independently of the Member States (Shaw, 1996, p. 12).

These intra-organizations have played significant roles, in effect overshadowing the three functions of the modern state in supremacy since they have a supranational prerogative to legislate and formulate policy (legislative branch), to administer and implement policy (executive branch), and to interpret policy and adjudicate disputes (judicial branch) (Tsebelis and Garrett, 2001).

It is also important to underline the growing role of the 'Council system' as it can be placed at the institutional heart of decision-making in the EU. This system is composed of the EU Council (of Ministers) and the European Council, which

> plays a pivotal role in making Union policy. While ostensibly representing the interests of the EU's 28 member states, the Council system is also composed of European institutions and it is not merely intergovernmental…[it is] best seen as a hybrid of intergovernmental and ***supranational*** elements (Lewis, 2016, p. 129).

Specifically relating to the European Council, art. 16 of the Treaty on European Union defines that,

> 1. **The Council shall, jointly with the European Parliament**, exercise legislative and budgetary functions. It shall carry out policy-making and coordinating functions as laid down in the Treaties.
>
> 2. The Council shall consist of a representative of each Member State at ministerial level, who may commit the government of the Member State in question and cast its vote.
>
> 3. **The Council shall act by a qualified majority** except where the Treaties provide otherwise.

Thus, besides the existence of the co-decision procedure (art. 16, 1) – known currently as the ordinary legislative procedure and in which Parliament has the same powers as the Council – there are several areas where the Council is entitled to make decisions through a qualified majority (art. 16, 3). In conjunction with the Parliament, the Council shall exercise legislative and budgetary functions. In addition, the Lisbon Treaty extended the scope of qualified majority voting (QMV) to more than 40 areas such as in agriculture, freedom, security, and justice under which both the Parliament and the Council decide on legislative acts on parity.

Those EU legislative acts have taken the form of regulations and directives, subjected to the effects of EU supranational laws, including direct effect and supremacy. Taking Judicial Co-operation in Criminal Matters as an example, article 82 of the TFEU[2] specifies that:

> 1. Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83.
>
> The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures to:
>
> (a) lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions;
>
> (b) prevent and settle conflicts of jurisdiction between Member States;
>
> (c) support the training of the judiciary and judicial staff;
>
> (d) facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.
>
> 2. To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension**, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure**, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States.

2 Source: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012E/TXT&from=EN. Retrieved on 10 May, 2016.

Thus, it is possible to verify a shift from intergovernmentalism to supranationalism in several areas in the EU through the role of the Council and the Parliament in the ordinary legislative procedure, and the subsequent transposition of EU legislation into national laws.

The practice of supranationalism is not, however, easily implemented – it demands experience in addition to technical and human skills. Innovations and forward moves undertaken by international law since the 1980's have been attributed to the introduction of treaties and modifications, in both the domestic and international spheres. Policies and agreements are factors in speeding up the formation of new sets of rules and guidelines which are established to accommodate the newly signed treaties and negotiations. One significant aspect of this process is the creation of judicial bodies or arbitrary tribunals which implement, monitor and administer international rules. Probably, the biggest representation of a judicial body would be the Dispute Settlement Mechanism. As made apparent by its name this mechanism or procedure aims at securing a positive solution to disputes, complaints, and conflicts which arise between two opposing parties in inter and intra-regional organizations. It is close in form or manifestation to a legal body in which controversial policies and conflicting views are evaluated and subjected to judgment. Similar resolution bodies, like the DSM, have the capacity to initiate changes in terms of identifying potential threats of discord and sources of inefficiency in their organization.

However, this power – to identify threats and inefficiency with the accompanying power to make changes – has become one of the prominent factors leading to the perplexity which now prevails in international organizations. During particular dispute processes of the DSM, it has emerged that domestic issues have been found to be embedded in the use of international law, this state of affairs having been effected during the time that the changes described above were made. This has led to much confusion (Varella, 2014).

Another significant development in international law is that it has become transparent and has attracted active participation from public and private citizens, this being made possible by the advances in technology, which have enabled people from all around the world to attend meetings or record events and to reprint documentation about cases. This scenario has never been a disadvantage for international law, since active participation and transparency indicate that an organization or a court safeguards the rights of the people through learning or knowing official documents.

Lastly, one of the paramount developments in international law has been the increasing number of domestic courts applying for international law in customary rules and treaties. This has been one of the notorious trends of the last decade or so, especially in places where there are "intra" and "inter" regional organizations such as Mercosur.

What has particularly led the judicial bodies of countries to rely on or use international law has been their emerging need for the proper interpretation of existing key principles and rules as are found in international law. Many of the changes and developments of international law have been attributed to the growing influence and reception of globalisation and regionalism.

International law had to be improved in order to maintain order in autonomous conflicts and to prevent problems arising not only i) from the existing complex structures and the policies formulated

during inter and intra-regional trade talks, but also ii) in the formulation of agreements, security and other relevant accords.

It has adapted and prepared itself for any future problems associated with globalisation and regionalism, one of its manifestations being the creation of judicial bodies that act as dispute settlement mechanisms. This has been one of the basic manifestations of the innovation of international law, as a way of gradually spreading its basic principles to the citizens of particular countries. One of the biggest problems in international law lies in the misconception and lack of appropriate sources of interpretation. Despite the developments and innovations attached to international law, there are still cases that cannot be solved or evaluated, owing to the misinterpretation of certain laws (Gallagher, 2008).

Therefore, the only feasible solution is to develop and further enhance the framework of domestic law. This would not only improve the knowledge of the people and of state officials alike but would also allow the key principles of international law to lead to a better understanding of judicial processes among intra and inter regional organizations. International law is meant to govern, but if the people as well as the leading officials and state members do not know the mechanics sustaining it, then conflict and inappropriate decision-making could be the outcomes (Baptista, 2001).

This is why most Dispute Settlement Mechanisms have been subject to several upgradings and evaluation and for most of the time, the struggle is to determine whether the application of international law is being administered carefully through the use of facts and key principles which constitute proper judgment on the case in question.

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