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20 The Settlement of Disputes

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(p. 533) 20. The Settlement of Disputes

20.1 Introduction

A distinct feature—and weakness—of public international law, in comparison with municipal law, is the lack of a compulsory judicial system. Recourse to mechanisms for the settlement of disputes depends on the consent of the parties concerned. In the absence of such consent, injured parties might be unable to seek redress before an international court or tribunal and breaches of international obligations could then remain unchallenged.

Compulsory settlement of disputes should not be seen as a notion alien to international law. As early as 1899, during the first Hague Conference and at a time when the creation of a world court was first considered by the international community, the creation of a mandatory mechanism for the peaceful settlement of international disputes was already proposed. It may also be recalled that the system of optional declarations under Article 36 of the Statute of the Permanent Court of International Justice (PCIJ)—now transposed in the Statute of the International Court of Justice (ICJ)—is the result of a compromise between proponents and opponents of a compulsory jurisdiction of the PCIJ. These efforts towards the establishment of a compulsory mechanism for the settlement of international disputes were, however, not successful, and today the principle remains that no case may be brought before an international court or tribunal without the consent of all concerned.

That said, it may be noted that compulsory mechanisms for the settlement of international disputes have developed in international law through multilateral—general[1] or regional[2]—or bilateral treaties, by which subjects of international law (p. 534) commit themselves to submit disputes—or at least certain categories of disputes—to a judicial or arbitral body. Likewise, a limited number of multilateral treaties regulating specific matters have established compulsory mechanisms for the settlement of disputes arising out of the application or interpretation of their provisions.[3]

It is against this background that the system for the settlement of disputes in law of the sea matters should be examined. At the outset, it is useful to note the difference between the approaches contained in the treaties adopted by the two major international conferences convened to deal with these issues, i.e. the First UN Conference on the Law of the Sea and the Third UN Conference on the Law of the Sea.

The system put into place by the 1958 Geneva conventions is characterized by a certain degree of fragmentation. The law of the sea is divided into four areas regulated by four distinct conventions, each of them addressing a specific topic (territorial sea and contiguous zone, continental shelf, fishing and conservation of the living resources of the high seas, and high seas). By the conclusion of a separate 'Optional Protocol', the States have the possibility to accept in advance that disputes arising out of these conventions will be submitted to the ICJ.[4] At present, 38 States are bound by the Optional Protocol with respect to one or several conventions. So far, no case has ever been submitted to the ICJ on the basis of this protocol.

Contrary to the 1958 Geneva conventions, the 1982 United Nations Convention on the Law of the Sea (UNCLOS) is drafted in the form of a single treaty which contains a comprehensive and robust Part (Part XV) devoted to the settlement of disputes relating to the application or interpretation of its provisions. Each 'State Party' to UNCLOS—this expression including *mutatis mutandis* international organizations parties thereto[5]—is *ipso facto* bound by Part XV. At present 165 States and the European Union are parties to UNCLOS, and a number of international cases have been instituted on the basis of Part XV.

Section 20.2 of this Chapter gives an overview of the system for the settlement of disputes under UNCLOS, and examines the different compulsory procedures to (p. 535) which may be referred disputes relating to UNCLOS. Section 20.3 refers to the mechanisms for the settlement of disputes contained in other international instruments related to the law of the sea, while Section 20.4 contains an assessment of the functioning of the system set out by UNCLOS.

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20.2 The Mechanism for the Settlement of Disputes Under the UN Convention for the Law of the Sea

The provisions on the settlement of disputes[6] are mainly contained in Part XV of UNCLOS.[7] Part XV contains three sections. Section 1 recalls the general obligation to settle disputes by peaceful means and reserves the right of the parties to a dispute to have recourse to the diplomatic means (negotiations, good offices, mediation, conciliation, and enquiry) referred to in Article 33 of the UN Charter. Where no settlement has been reached through section 1, section 2, entitled 'Compulsory Procedures entailing binding decisions' comes into play. On that basis, any dispute concerning the interpretation or application of UNCLOS may be submitted, at the request of any party to the dispute, to the court or tribunal having jurisdiction under UNCLOS. The compulsory mechanism instituted by section 2 is, however, subject to certain limitations and exceptions which are contained in section 3.

20.2.1 Recourse to peaceful means of the choice of the parties (s 1)

(a) Obligation to settle disputes by peaceful means (Article 279)

Section 1 begins (Article 279) with a reference to the general obligation of States to settle disputes by peaceful means in accordance with Article 2 paragraph 3 of the Charter of the United Nations and, to this end, to seek a solution through the means indicated in Article 33 paragraph 1 of the Charter. This does not mean that, on this basis, States have the obligation to seek the settlement of any dispute in which they are involved. Disputes may legitimately remain unsettled, as long as peace and security are not threatened. But the provision makes it clear that the settlement of any dispute has to be sought by peaceful means. In addition, specific provisions contained in international agreements may provide for an obligation to (p. 536) take specific actions for the settlement of the disputes. For example, Article 74 UNCLOS specifies that States with opposite or adjacent coasts need to agree on the delimitation of their exclusive economic zones (EEZs) (paragraph 1) and that, 'if no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV' (paragraph 2).[8]

(b) Settlement of disputes by any peaceful means chosen by the parties (Article 280)

Part XV has a residual character in the sense that States parties may agree to select another mechanism for the settlement of their dispute. This is made clear by Article 280 which specifies that States parties have the right 'to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice'. If this is the case, the settlement of the dispute will be governed by the terms of the agreement between the parties. In Part XV, a particular emphasis is placed on conciliation as one of the peaceful means available to States parties. The procedure applicable to conciliation is outlined in Article 284, and is further elaborated in Annex V to UNCLOS.

(c) Procedure where no settlement has been reached by the parties (Article 281)

If the parties to a dispute agree to settle it by a peaceful means of their own choice, it is important for them to know what their options will be if the selected means is not successful in resolving the dispute. Article 281[9] addresses this situation: 'If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.' Two elements here need to be kept in mind: (i) the parties to a dispute relating to UNCLOS have agreed to settle this dispute by a

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means of their own choice; (ii) the procedures in Part XV will again apply if no settlement has been reached by recourse to such means, and if recourse to Part XV was not excluded in the agreement between the parties.

(i) Agreement on another means to settle a dispute concerning the interpretation or application of UNCLOS

Any mechanism binding on the parties does not necessarily trigger the application of Article 281. The parties have to agree on a procedure for the settlement of a dispute arising out of UNCLOS. Dispute settlement mechanisms, such as those created by the treaties establishing the European Union (European Court of Justice) or the WTO (dispute settlement (p. 537) mechanism), are certainly mandatory for member States of the European Union or the WTO, but they are not intended to deal with disputes under UNCLOS and do not constitute 'another means' referred to by Article 281 UNCLOS.

A slightly different situation may arise, however, in the case of a procedure included in a treaty regulating a matter related to the law and containing provisions similar to those included in UNCLOS. Whenever a dispute arises which may concern both UNCLOS and that other treaty, the question may be asked as to whether the procedure contained in the said treaty would satisfy the requirement of Article 281. This situation arose in the context of the arbitral proceedings instituted under Annex VII to UNCLOS to handle the *Southern Bluefin Tuna Case (Australia and New Zealand v Japan)*. The States concerned were parties to the 1982 Convention as well as to the 1993 Convention for the Conservation of Southern Bluefin Tuna, the latter enouncing provisions similar to Articles 64 and 116 to 119 UNCLOS. The 1993 Convention did not contain any compulsory mechanism for the settlement of disputes. Pursuant to its Article 16,[10] parties to a dispute had to consult among themselves with a view to having the dispute resolved by diplomatic means and, if the dispute would remain unresolved, they could agree to submit it to the ICJ or arbitration.

The arbitral tribunal had then to decide whether the mechanism contained in the 1993 Convention could be considered as a means chosen by the parties to settle a dispute concerning the interpretation or application of the 1982 Convention—in that case Article 281 would receive application—or whether the clause was only relevant for disputes relating to the 1993 Convention and therefore would not affect the application of Part XV of UNCLOS. In its award of 4 August 2000, the arbitral tribunal observed that the dispute before it 'while centered in the 1993 Convention, also implicate[d] obligations under UNCLOS'.[11] In its view, the parties to the dispute were 'grappling not with two separate disputes but with what in fact is a single dispute arising under both Conventions. To find that, in this case,

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(p. 538) there is a dispute actually arising under UNCLOS which is distinct from the dispute that arose under the CCSBT (Commission on the Conservation of Southern Blue Fin Tuna) would be artificial.'[12] It then accepted 'Article 16 of the 1993 Convention as an agreement by the Parties to seek settlement of the instant dispute by peaceful means of their own choice'[13] under Article 281 UNCLOS.

Another view could have been taken on this issue. It could indeed have been contended that Article 16 of the 1993 Convention did only relate to disputes arising out of this particular Convention and was not intended to apply to disputes regarding UNCLOS. In this respect, reference may be made to the finding of the International Tribunal for the Law of the Sea (ITLOS, 'the Tribunal') on a similar issue relating to Article 282 UNCLOS, a provision which—like Article 281—gives to the parties to a dispute under UNCLOS the option of agreeing to settle it outside the scope of Part XV. In the *MOX Plant Case*, the Tribunal found that procedures for the settlement of disputes included, inter alia, in UNCLOS for the Protection of the Marine Environment of the North-East Atlantic (OSPAR) were applicable to disputes concerning this particular Convention but not to

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disputes arising under UNCLOS.[14] In the view of the Tribunal, even if other treaties did contain 'rights or obligations similar to or identical with the rights or obligations set out in UNCLOS, the rights and obligations under those agreements have a separate existence from those under UNCLOS'.[15] In support of its finding, the Tribunal noted that 'the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, inter alia, differences in the respective contexts, objects and purposes, subsequent practice of parties, and *travaux préparatoires*'.[16]

(ii) No settlement has been reached and the agreement between the parties does not exclude any further procedure

Under Article 281, the parties retain the right to return to Part XV of UNCLOS if their efforts to settle their dispute are not successful. However, this option only exists if 'the agreement between the parties does not exclude any further procedure'. The interpretation of this provision played a crucial role in the award delivered by the arbitral tribunal in the *Southern Bluefin Tuna* case. Pursuant to Article 16 of the 1993 Convention, disputes which are not resolved by the peaceful means chosen by the parties 'shall, with the consent in each case of all parties to the dispute, be referred for settlement to the International Court of Justice or to arbitration'. The arbitral tribunal found that, by referring unresolved disputes to compulsory procedures with the consent of all parties to the dispute, 'the intent of Article 16 is to remove proceedings under that Article from

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(p. 539) the reach of the compulsory procedures of section 2 of Part XV of UNCLOS, that is, to exclude the application to a specific dispute of any procedure of dispute resolution that is not accepted by all parties to the dispute'.[17]

As may be seen, the reasoning of the arbitral tribunal presupposes the implied intent of the drafters of the 1993 Convention to exclude any other procedure. Doubts may be expressed regarding a construction the result of which is to prevent States parties to UNCLOS from their right to use the mechanisms set up by Part XV. It is difficult to conceive how the mere insertion, in an agreement dealing with law of the sea matters, of a clause which simply repeats Article 33 of the United Nations Charter, could be interpreted as an implied intent to defeat an important objective enshrined in UNCLOS.[18] In a matter of such great importance as the settlement of disputes, it seems logical to require that the decision to exclude the application of Part XV should be based on a clear and express manifestation of consent.

(d) Obligations under general, regional or bilateral agreements (Article 282)

Article 282 establishes an order of priority among the different mechanisms which may exist for the settlement of disputes. Under that provision, the system instituted by UNCLOS plays a residual role vis-à-vis other mechanisms. When States parties 'to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree'. Three conditions have to be fulfilled for the application of Article 282. First, an agreement is required; second the agreement needs to institute a 'procedure that entails a binding decision'; and third, the procedure should be intended to settle 'a dispute concerning the interpretation or application' of UNCLOS.

As regards the first condition, Article 282 refers to general, regional, or bilateral agreements, and adds the expression 'or otherwise'. This option is generally understood as covering the declarations made by States under Article 36 paragraph 2 of the Statute of the ICJ, by which they accept, on condition of reciprocity, the jurisdiction of the Court.[19]

(p. 540) In requiring that the parties should agree to a procedure entailing a binding decision, the

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second condition preserves the integrity of the compulsory mechanism under Part XV. In other terms, States that wish to avoid the application of section 2 need to agree on a procedure with equivalent binding effect (e.g. arbitration or ICJ). A simple commitment to a diplomatic means would not be sufficient here for the application of Article 282.[20] For example, before the Tribunal, in the *Southern Bluefin Tuna Cases*, Japan invoked Article 282 and argued that the provision on the settlement of disputes contained in Article 16 of the 1993 Convention for the Conservation of Southern Bluefin Tuna would prevail over Part XV of UNCLOS.[21] However, the Tribunal did not accept the argument, for the reason that Article 16 did not institute any mechanism entailing binding decisions.[22]

Pursuant to the third condition, the agreed mechanism should settle disputes arising out of UNCLOS. In light of the general competence of the ICJ, this may, for example, be the case for declarations under Article 36 paragraph 2 of the Statute of the Court. However, as indicated in the comments regarding Article 281, the condition is not met with respect to compulsory mechanisms entailing binding decisions which are contained in treaties concluded to regulate matters other than those covered by UNCLOS.[23]

An additional question concerns the mandatory character of Article 282. In other words, is the judicial body to which a dispute is submitted under UNCLOS required to examine this argument *proprio motu*? While the provision uses the expression 'shall apply', which indicates an obligation, it also states that parties may otherwise agree. This may be the case when the parties to a dispute do not invoke the application of Article 282. In this respect, it may be observed that, in the *Southern Bluefin Tuna* cases, each of the three parties to the disputes had made

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(p. 541) a declaration in favour of the ICJ under Article 36 paragraph 2 of the Statute of the ICJ, but none of them invoked Article 282.

Whenever an international court or tribunal examines the application of Article 282, it should not lose sight of the consequences of a possible 'renvoi' in favour of another judicial body. States which agreed to another mechanism for the settlement of disputes relating to UNCLOS could have expressed reservations limiting the scope of their consent, with, as a result, the possible exclusion of that particular dispute from the scope of the said mechanism. It would then be unfortunate for a judicial body to remove a case from its docket in favour of another court, under Article 282, while that court would ultimately declare itself incompetent.

(e) Obligation to exchange views (Article 283)

Under section 1, States parties may agree to have recourse to diplomatic means in order to settle their dispute. They are not obliged to do so and any party to the dispute may prefer to submit the matter to an international court or tribunal. Prior to the institution of legal proceedings under section 2, the party concerned must, however, comply with the requirements contained in Article 283 of UNCLOS, entitled 'obligation to exchange views'. While in general international law, there is no rule prescribing parties to negotiate before submitting a dispute to an international court,[24] UNCLOS sets out a specific obligation for the parties to a dispute to 'proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means'.[25] Article 283 does not use the expression 'negotiation'; it refers to an 'exchange of views'. It may also be inferred from the wording of Article 283 ('regarding its settlement by negotiation or other peaceful means') that this provision does not oblige the parties to necessarily discuss the substance of the dispute. They must exchange views expeditiously on proposed ways to settle the dispute 'by negotiation or other peaceful means' and the latter expression includes arbitration and judicial settlement pursuant to Article 33 of the UN Charter. It may thus be maintained that the parties to a dispute should at least exchange views on the course of action that they propose or intend to follow

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(p. 542) regarding its settlement.[26] In its decisions, the Tribunal has taken the view that 'a State Party is not obliged to continue with an exchange of views when it concludes that the possibilities of reaching agreement have been exhausted'.[27]

It should be added that an international court will only exercise its contentious jurisdiction if it is seized of a particular dispute, i.e. a 'disagreement on a point of law or fact, a conflict of legal views or of interests'.[28] In other words, it is not sufficient to simply affirm that a violation of international law has occurred, the prospective applicant should be able to show that its particular claim was 'positively opposed by the other' party.[29] This, in turn, presupposes that the main elements of the dispute were communicated to the other party. The exchange of view under Article 283 will therefore play a useful role in defining the subject matter of the dispute. On the other hand, once the dispute was brought to the knowledge of the other State party and has been the subject of an expeditious exchange of correspondence between the parties concerned, the future applicant is not obliged to continue to exchange views 'when it concludes that the possibilities of reaching agreement have been exhausted'.[30]

Paragraph 2 of Article 283 relates to the situation where a procedure chosen by the parties for the settlement of their dispute (e.g. by negotiations or conciliation) has terminated, with or without a settlement. If a settlement is reached, no specific issue arises except if the circumstances 'require consultation regarding the manner of implementing the settlement'. If no settlement is reached, the parties are

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(p. 543) required to proceed expeditiously to an exchange of views regarding further ways to settle the dispute. This logically means that the parties share the view that the diplomatic procedure initially selected will not lead to any success, or at least that one of them is so convinced. In the latter instance, that party will have to notify the other that in its view it has become purposeless to continue seeking the resolution of the dispute through the selected means and to express its views on actions to be taken, for example, by recourse to judicial settlement. While the rationale behind this provision seems clear, its implementation may raise some practical difficulties, as illustrated by the arbitration between Barbados and the Republic of Trinidad and Tobago relating to the delimitation of the EEZ and the continental shelf between them. In this case, the arbitral tribunal had to deal with issues relating to the interpretation of both paragraphs 1 and 2 of Article 283. Prior to the institution of proceedings by Barbados, the parties had negotiated for several years the delimitation of their EEZ and continental shelf pursuant to Articles 73 and 84 UNCLOS. Before the arbitral tribunal, Trinidad and Tobago argued that Barbados had not complied with Article 283 since it had not proceeded to an 'exchange of views' following the failure of the negotiation.[31] In its award, the arbitral tribunal noted that Articles 74 and 83 'impose an obligation to agree upon delimitation, which necessarily involves negotiations between the Parties, and then takes the Parties to Part XV when those negotiations have failed to result in an agreement'.[32] In such a context, in its view, there was no need to require the parties to proceed to a separate exchange of views under Article 283 paragraph 1 UNCLOS on ways to settle the dispute.[33] The same conclusion would be reached if the negotiations held by the parties under Articles 74 and 83 UNCLOS 'could be regarded as a "procedure for settlement" which had been "terminated without a settlement" so as to bring paragraph 2 of Article 283 into play, and by that route require the Parties to "proceed expeditiously to an exchange of views" after the unsuccessful termination of their delimitation negotiations'.[34] In (p. 544) addition, the arbitral tribunal took the view that the requirement to hold a separate exchange of views could have led the other party to make a declaration excluding the delimitation of maritime boundaries from the application of the compulsory system set out by UNCLOS,[35] with, as a result, the negation of the right of the applicant to unilaterally seek a judicial

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settlement of the dispute.

The position of the arbitral tribunal on Article 283 seems to be restricted to the specific circumstances regarding the negotiation of maritime boundaries pursuant to Articles 74 and 83 UNCLOS. As the tribunal put it: 'The requirement of Article 283(1) for settlement by negotiation is, in relation to Articles 74 and 83, subsumed within the negotiations which those Articles require to have already taken place.'[36] Nevertheless, there are arguments which could be opposed to the reasoning of the tribunal. It could for example be argued that Article 283 is 'perfectly capable of fitting the circumstances of boundary negotiations'[37] and that, when the negotiations prove not to be successful, the parties could proceed to a brief exchange of views or one of them could inform the other of the method of settlement that it proposes to follow in accordance with Article 283 paragraph 2 UNCLOS. It could also be maintained that no real dispute exists between the parties as long as the negotiations are going on and that '[i]t is only when the parties fail to reach agreement that the opposing views of the parties take "definite shape" and, consequently, a dispute may be said to arise',[38] then requiring a prompt exchange of views under Article 283(1) UNCLOS. Finally, it may be added that it would be difficult to justify a breach of Article 283 on the grounds that the prospective respondent, alerted by the exchange of views, could then make a declaration excluding the dispute from the compulsory mechanism under Article 298(1)(a). Under UNCLOS, the right of a State to unilaterally submit a dispute to an arbitral body is not 'absolute' and is subject to the requirements contained, inter alia, in Articles 283 and 298. This does not imply that the future applicant should be naive. Article 283 refers to an expeditious exchange of views and, once the condition is fulfilled, the interested party could then file an application without delay.

(p. 545) 20.2.2 Compulsory procedures entailing binding decisions (section 2)

Section 2 of Part XV combines two principles: the obligation to submit disputes arising out of UNCLOS to a compulsory procedure entailing binding decisions, and the freedom of States to select their preferred procedure. In this connection, the following procedures are available to States parties pursuant to Article 287: the Tribunal, the ICJ, arbitration, and special arbitration. Specific rules regarding the new mechanisms set up by UNCLOS are contained in separate annexes to UNCLOS.[39]

(a) Choice of procedure (Article 287)

Pursuant to Article 287 UNCLOS, States parties may select one or more means (the Tribunal, the ICJ, arbitration, and special arbitration) for the settlement of disputes, by virtue of declarations to be submitted to the Secretary-General of the United Nations. 'If the parties to a dispute have accepted the same procedure for the settlement of the dispute, it may be submitted only to that procedure, unless the parties otherwise agree'.[40] 'A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII.'[41] In the absence of declarations made by the parties to a dispute, or if the declarations do not select the same forum, the dispute will be submitted to arbitration under Annex VII, save where otherwise agreed by the parties. Declarations under Article 287 may be made at the time of signature of, ratification of, or accession to UNCLOS or at any time thereafter.

As of 1 June 2014, according to the information available on the website of the UN Treaty Collection, the number of declarations was forty-nine,[42] which represents approximately one third of the number of States parties (166). Of these forty-nine declarations, the Tribunal has been selected by thirty-seven States parties,[43] the ICJ by

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(p. 546) twenty-seven States parties,[44] arbitration (annex VII) by ten States parties[45] and special

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arbitration (annex VIII) by eleven States parties.[46] In light of the limited number of declarations made under Article 287,[47] it is likely that, in a majority of cases, arbitral proceedings will be the residual mandatory procedure. Even in this hypothesis, parties may, after the institution of arbitral proceedings, agree to transfer the dispute to another forum for adjudication.[48]

According to Article 287 paragraph 1 UNCLOS, States parties may select 'one or more' of the means referred to in this provision. When different means are selected by one State party (e.g. the Tribunal and the ICJ), the declaration may either abstain from giving any order of priority or specify that there is no order of priority between them,[49] or give an order of preference.[50] Whenever two State parties have selected two similar means (e.g. the Tribunal and the ICJ) but with the indication of a different order of priority, a question could be raised as to whether, in such a situation, the parties 'have accepted the same procedure' or whether arbitration, as the residual compulsory mechanism, should apply. In such a case, it would seem that the parties have actually selected similar mechanisms,[51] even if in a different order of priority, and that the choice of the preferred one will then be left to the applicant.

(p. 547) To a certain extent, the system set out in Article 287 UNCLOS and the optional mechanism under Article 36 paragraph 2 of the Statute of the ICJ are comparable. The two systems differ, however, on some points. Unlike the Statute of the ICJ, proceedings may be instituted under UNCLOS in the absence of a declaration under Article 287. In this case, arbitration will simply be the compulsory means. In addition, reservations can be made by States to the declarations by which they accept the jurisdiction of the ICJ while such reservations are not permitted under UNCLOS.[52] In this respect, it is interesting to observe a relatively recent practice in the implementation of Article 287 UNCLOS, which consists for a State party to select a forum for a specific dispute or a particular category of disputes. As an illustration, reference may be made to the *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* which was submitted to the Tribunal on the basis of the separate declarations made by Myanmar and Bangladesh under Article 287.[53] Both declarations mentioned that they were made in relation to the dispute relating to the delimitation of maritime boundary between the two countries in the Bay of Bengal. Likewise, the *M/V 'Louisa' Case* was submitted to the Tribunal on the basis of declarations under Article 287 UNCLOS, made by Spain and Saint Vincent and the Grenadines, respectively. While the declaration of Spain selected the Tribunal as a means for the settlement of all disputes arising out of UNCLOS, the declaration of Saint Vincent was limited to 'disputes concerning the arrest or detention of vessels'. This new development does not seem to raise particular concerns. Nothing prevents States parties from limiting the competence of a particular forum chosen under Article 287 UNCLOS to a certain category of disputes. Such restriction should not be seen as a 'reservation' since it does not exclude the application of provisions of UNCLOS. Disputes not covered by such a declaration are simply subject to compulsory arbitration pursuant to Article 287 paragraphs 3 or 5 UNCLOS.

Article 287 paragraphs 6 and 7 contains important procedural rules applicable in case of notice of revocation of a declaration or notification of a new declaration. Pursuant to paragraph 6: 'A declaration made under paragraph 1 shall remain in force until three months after notice of revocation has been deposited with the Secretary-General of the United Nations' and, pursuant to paragraph 7: 'A new declaration, a notice of revocation or the expiry of a declaration does not in any (p. 548) way affect proceedings pending before a court or tribunal having jurisdiction under this article, unless the parties otherwise agree'.[54]

(b) Applicable law

Pursuant to Article 293 paragraph 1 UNCLOS, a court or tribunal having jurisdiction under section 2 will apply the 'Convention and other rules of international law not incompatible with this Convention'.[55] Suffice to say that, in this connection, this provision enables international courts and tribunals, in their consideration of law of the sea-related cases, to examine issues which are not regulated by UNCLOS[56] and to apply general international law and relevant treaties binding on the

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parties to the dispute.

(c) Limitations and exceptions to applicability of section 2

The right of a State party to unilaterally institute proceedings is subject to limitations *ratione materiae*, as provided for in Article 297, as well as to the optional exceptions to applicability of section 2 set out in Article 298. Disputes which are 'excluded under Article 297 or excepted by a declaration made under Article 298 from the dispute settlement procedures provided for in section 2' (Article 299 paragraph 1) may nevertheless be submitted to such procedures by agreement of the parties to the dispute.

(i) Limitations on applicability of section 2 (Article 297)

By virtue of Article 297 paragraphs 2 and 3, disputes relating to the sovereign rights of—or their exercise by—a coastal State[57] with respect to the living resources in its EEZ (paragraph 3), and disputes relating to the exercise by a coastal State of its rights and discretion under Articles 246[58] and 253[59] regarding marine scientific research

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(p. 549) in its EEZ (paragraph 2) are excluded from the compulsory judicial mechanism provided for in Part XV, section 2, of UNCLOS.

From this, it should not be concluded that all disputes relating to the EEZ are excluded from the application of section 2 of UNCLOS. Article 297 does not only contain limitations. In its paragraph 1, it enumerates categories of disputes which may be submitted to judicial or arbitral bodies, for example 'when it is alleged that a coastal State has acted in contravention of specified international rules and standards for the protection and preservation of the marine environment'[60] or 'when it is alleged that a coastal State has acted in contravention of the provisions of this Convention in regard to the freedoms and rights of navigation, overflight or the laying of submarine cables and pipelines, or in regard to other internationally lawful uses of the sea specified in Article 58'.[61] It is precisely the latter provision which was invoked by the applicant in the *M/V 'Saiga' (No. 2) Case* as a basis for the jurisdiction of the Tribunal, while the respondent contended that the jurisdiction was excluded by virtue of Article 297 paragraph 3(a).[62]

There are other examples of disputes relating to the EEZ which are not excluded by virtue of Article 297 paragraphs 2 and 3. As an illustration, we may consider disputes relating to law enforcement measures adopted by a coastal State in order to ensure compliance with its laws and regulations relating to fisheries in its EEZ.[63] Should we then consider that a dispute regarding the lawfulness of the boarding of a vessel allegedly engaged in illegal fishery activities is excluded from section 2, on the grounds that it relates to the exercise of sovereign rights by the coastal State? A negative response to this question seems plausible, in light of Article 298(1)(b), by which a State, through an optional declaration, may precisely exclude from the scope of section 2 disputes 'concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under Article 297 paragraph 2 or 3'. Such optional declaration only makes sense if those disputes are not already excluded on the basis of Article 297. It may then reasonably be maintained that Article 297(3), essentially covers—as it is stated therein—'the terms and conditions established [by the coastal State] in its conservation and management laws and regulations' including the determination of sanctions in cases of non-compliance, but does not refer to disputes relating to the exercise of law enforcement activities, for example when it is alleged that the coastal State has used force without proportion. In addition, Article 297 is limited to disputes concerning rights or discretion granted by UNCLOS to the coastal State. Therefore the provision will not apply to measures which are not in

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(p. 550) conformity with UNCLOS, such as imprisonment penalty for violations of fisheries laws.[64]

Disputes excluded from the compulsory mechanism of section 2 by virtue of Article 297 paragraphs 2 or 3, are subject to a residual mechanism. Disputes between the coastal State and the researching State, for example when it is alleged that the costal State did not grant its consent to marine scientific research activities in a manner compatible with UNCLOS, will be, at the request of either party, submitted to conciliation under Annex V to UNCLOS. However, the conciliation commission cannot 'call in question' the exercise by the coastal State of its discretionary powers.[65] Likewise, conciliation may take place at the request of any party for certain categories of disputes relating to fisheries in the EEZ, when it is alleged that 'a coastal State has manifestly failed to comply with its obligations to ensure…that the maintenance of the living resources in the exclusive economic zone is not seriously endangered'[66] or has not complied with its obligation under UNCLOS to determine the allowable catch[67] or to allocate the surplus of living resources in its EEZ.[68] In this context, the conciliation commission will also be prevented from substituting 'its discretion from that of the coastal State'.[69]

(ii) Optional exceptions to applicability of section 2 (Article 298)

Under Article 298, States parties may, by way of declarations deposited with the Secretary-General of the United, exclude the application of section 2 with respect to one or more of the following categories of disputes:

- 'disputes concerning the interpretation or application of Articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles…' (paragraph 1(a));
- 'disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under Article 297 paragraph 2 or 3' (paragraph 1(b));

(p. 551) • 'disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations, unless the Security Council decides to remove the matter from its agenda or calls upon the parties to settle it by the means provided for in this Convention' (paragraph1(c)).

As of 1 June 2014, the number of declarations under Article 298 was 36.[70] Those declarations are made with respect to all categories referred to in Article 298 or to some of them. An interesting feature to note is the practice of some States parties to restrict the scope of the limitations to a specific forum only[71] or to declare that the disputes referred to in Article 298 may only be submitted to a specific body.[72]

Declarations under Article 298 do not exempt States parties from all obligations. They are made, pursuant to Article 298(1), 'without prejudice to the obligations arising under section 1' of Part XV. In addition, States which have excluded disputes relating to sea boundary delimitations or those involving historic bays or titles have the obligation, 'when such a dispute arises subsequent to the entry into force of this Convention and where no agreement within a reasonable period of time is reached in negotiations between the parties, at the request of any party to the dispute, [to] accept submission of the matter to conciliation under Annex V'.[73] In order to assess whether the obligation to submit the dispute to conciliation is applicable, it will be necessary to determine whether the dispute has arisen before or after the date of the entry into force of UNCLOS. Mandatory submission to conciliation under Article 298 paragraph 1(a), is itself subject to an exception. Article 298 paragraph 1(a), *in fine*, specifies that mixed disputes, i.e. 'any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission'.[74] Is it possible to infer from this

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(p. 552) provision any consequence on the scope of the compulsory mechanism under section 2 in the sense that 'mixed disputes' would be excluded from such mechanism? This does not seem to be the case. This clause intends to limit the obligation to have recourse to conciliation for a specific category of dispute in the event of a declaration made under Article 298 paragraph 1(a). It has no relevance as regards the scope of application *ratione materiae* of the procedures provided for in section 2 in the absence of such a declaration.[75]

If a solution cannot be found after the conciliation commission has presented its report, the parties have, under Article 298(1)(a)(ii), the obligation 'by mutual consent, [to] submit the question to one of the procedures provided for in section 2, unless the parties otherwise agree'. There is so far no example of a dispute that went through the procedural steps of Article 298(1)(a). It may simply be noted that the provision in subparagraph (a)(ii) is not perfectly clear since it obliges States to submit the dispute to a compulsory procedure entailing binding decisions while at the same time providing that this should take place 'by mutual consent'. If there is no consent between the parties, for example because one of the parties is reluctant to submit the dispute to a judicial body, it could be argued that this would constitute a new dispute, not relating to the delimitation of maritime boundaries, which could then be subject to the compulsory mechanism contained in section 2 of Part XV.

20.2.3 International Tribunal for the Law of the Sea

The International Tribunal for the Law of the Sea[76] was created by the 1982 United Nations Convention on the Law of the Sea,[77] with its seat in the 'Free and Hanseatic City of Hamburg in the Federal Republic of Germany'.[78] It is composed of twenty-one members elected by the States parties to UNCLOS 'from among persons enjoying the highest reputation for fairness and integrity and of recognized (p. 553) competence in the field of the law of the sea'.[79] They serve for a term of nine years and may be re-elected. Elections take place on a triennial basis. The composition of the Tribunal has to ensure the representation of the principal legal systems of the world and equitable geographical distribution.[80]

Cases may be dealt with by the Tribunal or by one of its standing chambers, 'composed of three or more of its elected members…for dealing with particular categories of disputes'.[81] Parties to a dispute may also request the Tribunal 'to form a chamber for dealing with a particular dispute'.[82] The Composition of such an ad hoc chamber is determined by the Tribunal with the approval[83] of the parties'.[84] From among the standing chambers, specific attention has to be paid to the Seabed Disputes Chamber, which is composed of 11 elected members of the Tribunal and has quasi exclusive competence to deal with matters referred to it in accordance with Part XI of UNCLOS relating to the exploration and exploitation of the International Seabed Area. The Statute of the Tribunal specifies that '[a] judgment given by any of the chambers…shall be considered as rendered by the Tribunal'.[85]

When a judge of the Tribunal has the nationality of one of the parties to the case, the other party may choose a judge ad hoc who will participate in the case as a member of the Tribunal. Likewise, if there is no judge of the nationality of the parties, each party may appoint a judge ad hoc.[86]

In any dispute involving scientific or technical matters, the Tribunal may, at the request of a party or *proprio motu*, select, in consultation with the parties, no fewer than two scientific or technical experts chosen preferably from the relevant list prepared in accordance with Annex VIII, Article 2, to sit with the Tribunal but without the right to vote.[87]

(a) Jurisdiction of the Tribunal

(i) Jurisdiction *ratione materiae*

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The core competence of the Tribunal is to deal with disputes concerning the interpretation or application of UNCLOS. In other words, whenever a dispute relates to the interpretation of UNCLOS or whenever

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(p. 554) it is alleged that a State has not complied with a provision of UNCLOS, the Tribunal has jurisdiction to deal with such a case, subject to the limitations and optional exceptions contained in Articles 297 and 298.

The jurisdiction of the Tribunal is not limited to disputes arising out of UNCLOS; it also comprises 'all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal'.[88]

UNCLOS provides that the International Seabed Authority may address requests for advisory opinions to the Seabed Disputes Chamber of the Tribunal. In addition, requests for advisory opinions may be submitted to the Tribunal pursuant to Article 138 of the Rules of the Tribunal.

(ii) Jurisdiction *ratione personae*

In handling disputes relating to UNCLOS, the Tribunal is open to 'States Parties to the Convention',[89] this expression referring to the 165 States which have ratified, or acceded to, UNCLOS as well as to the European Union.

Pursuant to Article 20(2) of the Statute of the Tribunal,[90] entities other than States parties have access to the Tribunal in two situations: 'in any case expressly provided for in Part XI' and 'in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case'. Before giving an overview of the two different situations contemplated under this provision, it should be mentioned that whenever an entity other than a State party or the Authority is party to a case to the Tribunal, it will have to contribute towards the expenses of the Tribunal, in accordance with Article 19 of the Statute of the Tribunal.

> '…in any case expressly provided for in Part XI'

Activities relating to the exploration and exploitation of the Area, regulated by Part XI of UNCLOS, may be conducted by entities other than States and to that extent those entities have, in case of disputes, access to the Seabed Disputes Chamber of the Tribunal. Article 187 of UNCLOS gives a description of the different entities which may appear before the Chamber: 'States Parties', International Seabed Authority, the Enterprise,[91] State enterprises, and natural or juridical persons which are parties to a contract.

References

(p. 555)
'…any other agreement conferring jurisdiction on the Tribunal…'

Furthermore, Article 20(2) of the Statute specifies that the Tribunal is open to entities other than States parties in cases 'submitted pursuant to any other agreement conferring jurisdiction on the Tribunal…'. The provision refers to 'any other agreements', and not to 'international agreements' as this is the case in Article 288 UNCLOS. Article 288 UNCLOS deals with the competence granted to any court or tribunal referred to in Article 287 (the Tribunal, the ICJ, and arbitral tribunals), while Article 20 has been drafted specifically to cover the situation of the Tribunal. Therefore, the question has been raised in the legal literature[92] as to whether the terms contained in Article 20(2) could encompass agreements involving subjects of municipal law: for example, an agreement between a State and a private entity—a classification society or a non-governmental organization (NGO)—or even an agreement between two private entities. That said, the expression 'any other

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agreement conferring jurisdiction on the Tribunal' certainly includes international agreements—bilateral or multilateral—concluded by subjects of international law (States or international organizations not parties to UNCLOS) and which include a dispute settlement clause conferring jurisdiction on the Tribunal.

(b) Institution of contentious proceedings before the Tribunal and conduct of cases

Pursuant to Article 24 of the Statute, disputes concerning the interpretation or application of UNCLOS may be submitted to the Tribunal either by special agreement or by unilateral application.

Special agreements are agreements under international law. In the practice of the Tribunal so far three cases have been filed on the basis of a special agreement.[93] In these instances, the agreements entered into force upon their signature without the need for ratification. This simplified procedure may be explained by the fact that, by ratifying UNCLOS, States have already accepted a compulsory mechanism for the settlement of their disputes pursuant to Article 287 UNCLOS. In the absence of any choice expressed under Article 287 paragraph 1 arbitration under Annex VII is then the compulsory procedure. Therefore, in the context of the compulsory jurisdiction provided for by UNCLOS, the effect of a special agreement is simply to implement or modulate an existing obligation by substituting the Tribunal for arbitration as the forum to which the dispute will be submitted.

Proceedings may be instituted by unilateral request in cases where the Tribunal has compulsory jurisdiction under UNCLOS, whenever unilateral application is

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(p. 556) provided for in an agreement to submit to the Tribunal disputes relating to UNCLOS, or whenever parties to the dispute have both accepted the jurisdiction of the Tribunal on the basis of declarations made under Article 287 UNCLOS.

Proceedings[94] before the Tribunal consist of two parts: written proceedings (memorial and counter-memorial and, if authorized by the Tribunal, reply and rejoinder) and oral proceedings (oral statements by agents, counsel, and advocates, as well as presentation of evidence and testimony by experts and witnesses). While the rules of procedure applicable to cases before the Tribunal are modelled on those of the ICJ, they contain several specific features.[95] First of all, the Tribunal, and in particular its Seabed Dispute Chamber, are open to non-State entities and this is reflected in different provisions of the Rules.[96] Second, the Rules contain precise time limits, for example, as regards the submission of written pleadings,[97] the filing of preliminary objections,[98] and the fixing of the date for the opening of the oral proceedings.[99] In addition, short time limits are fixed for the opening of the hearing and the rendering of judgment in proceedings for the prompt release of vessels and crews under Article 292 UNCLOS. The Rules of the Tribunal also provide for 'preliminary proceedings',[100] an incidental procedure which is different from 'preliminary objections'.[101]

References

(p. 557) (c) Compulsory jurisdiction of the Tribunal

The Tribunal (or its Seabed Disputes Chamber) is competent to adjudicate certain disputes between States parties independently of any declaration or expression of consent by the respondent State. This so-called 'compulsory jurisdiction' of the Tribunal applies to the following categories of disputes:

- Disputes relating to Part XI of UNCLOS;

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- Proceedings for the prompt release of vessels and crews (Article 292 UNCLOS);
- Proceedings for the prescription of provisional measures pending the constitution of an arbitral tribunal (Article 290(5) UNCLOS).

(i) Disputes relating to Part XI UNCLOS (Articles 187 and 188 UNCLOS)

According to Article 288(3) UNCLOS, the Seabed Disputes Chamber 'shall have jurisdiction in any matter which is submitted to it in accordance therewith'. The jurisdiction of the Seabed Disputes Chamber is further elaborated in Article 187 which defines the specific categories of disputes in respect of which the Chamber is competent, as follows:

> Disputes between States Parties concerning the interpretation or application of this Part and the Annexes relating thereto.[102]

These disputes relate to the interpretation or application of Part XI of UNCLOS and its Annexes III and IV, as well as the provisions of the 1994 Agreement. The Chamber has no exclusive jurisdiction over such disputes since Article 188 paragraph 1 UNCLOS offers the parties two other possibilities: either to agree to submit the dispute to a special chamber of the Tribunal (Article 188 paragraph 1(a)), or, at the request of any party, to submit it to an ad hoc chamber of the Seabed Disputes Chamber (Article 188, paragraph 1(b)).

> Disputes between a State Party and the Authority.[103]

Under this provision, the Seabed Disputes Chamber has exclusive jurisdiction over two types of dispute:

- Acts or omissions of the Authority or of a State party alleged to be in violation of Part XI or its annexes or of rules, regulations and procedures of the Authority adopted in accordance therewith; and
- Acts of the Authority alleged to be in excess of jurisdiction or a misuse of power.

> Disputes between parties to a contract, being States Parties, the Authority or the Enterprise, state enterprises and natural or juridical persons referred to in Article 153, paragraph 2(b). [104]
>
> (p. 558)

This category refers to contractual disputes between the parties to a contract, which may include States parties, the Authority, the Enterprise, State enterprises, and natural or juridical persons concerning '(a) The interpretation or application of a relevant contract or a plan of work'; or '(b) Acts or omissions of a party to the contract relating to activities in the Area and directed to the other party or directly affecting its legitimate interests'.

It should be added that the jurisdiction of the Chamber over disputes referred to in Article 187 subparagraph (c)(i)—regarding a contract or a plan of work—is not exclusive. Pursuant to Article 188(2), such dispute is, at the request of any party to it, to be submitted to binding commercial arbitration, unless the parties agree otherwise. Arbitration is to be conducted in accordance with the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules. However, the commercial arbitral tribunal has no jurisdiction to decide any question of interpretation of UNCLOS, including the 1994 Agreement. If such a question of interpretation arises, that question must be referred to the Seabed Disputes Chamber for a ruling[105] and the arbitral tribunal will have to comply with this ruling in its award.[106]

> Disputes between the Authority and a prospective contractor.[107]

This category involves 'pre-contractual' disputes between the Authority and a prospective contractor 'concerning the refusal of a contract or a legal issue arising in the negotiation of the

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contract'. The possibility for a prospective contractor to submit a case to the Chamber is subject to conditions contained in Article 187(1)(d).[108]

> Disputes between the Authority and a State Party, a state enterprise or a natural or juridical person sponsored by a State Party as provided for in Article 153, paragraph 2(b), where it is alleged that the Authority has incurred liability as provided in Annex III, Article 22.[109]

These disputes concern the alleged responsibility or liability of the Authority for 'any damage arising out of wrongful acts' in the exercise of its powers and functions.[110]

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(p. 559)
> Any other disputes for which the jurisdiction of the Chamber is specifically provided in this Convention.[111]

Examples of such disputes may be found in Article 185(2) UNCLOS (suspension of a State party from the exercise of its rights for gross and persistent violation of the provisions in Part XI) or in section 3 (decision-making), paragraph 12, of the Annex to the 1994 Agreement (disapproval of a plan of work).[112]

It should be observed that, in dealing with those different disputes, the jurisdiction of the Chamber is limited by Article 189 which states that the Chamber 'shall have no jurisdiction with regard to the exercise by the Authority of its discretionary powers' and 'in no case shall it substitute its discretion for that of the Authority.' Article 189 also specifies that the Chamber 'shall not pronounce itself on the question of whether any rules, regulations and procedures of the Authority are in conformity with this Convention, nor declare invalid any such rules, regulations and procedures'. It is, however, difficult to see how the Chamber could avoid addressing, to a certain extent, issues relating to the legality of the rules, regulations, and procedures of the Authority when it is called upon to decide certain claims expressly mentioned in Article 189.[113]

(ii) Prompt release proceedings (Article 292 UNCLOS)

Under UNCLOS,[114] a State party which detains a foreign vessel for certain categories of offences (fishery[115] and pollution) is obliged to release the vessel and/or its crew upon the posting of a reasonable bond. Whenever the flag State of the detained vessel alleges that this obligation was not complied with, it may submit the dispute relating to the release of the vessel and its crew to the Tribunal after ten days from the date of detention, unless otherwise agreed by the parties to the dispute.

The application for the prompt release of a vessel and/or its crew may be made by the flag State or by another person acting on its behalf, for example, by the vessel's

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(p. 560) owner or a legal representative.[116] However, in both instances, the flag State remains the party to the proceedings. Article 292 paragraph 2 UNCLOS expressly contemplates the possibility for the flag State to authorize another person to act on its behalf with respect to prompt release proceedings. Under the Rules of the Tribunal, the competent State's authority may also give such an authorization prior to the existence of any dispute and notify the Tribunal accordingly.[117]

So far, nine prompt release proceedings have been submitted to the Tribunal and all these cases were based on Article 73 paragraph 2 UNCLOS, which, in the context of enforcement of fishery offences in the EEZ, expressly states that 'arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security'. Other provisions of UNCLOS, concerning the release of vessels detained for pollution offences, may also provide a basis for the

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institution of prompt release proceedings.[118]

Upon receipt of the application, the Registrar transmits a certified copy of the application to the detaining State which may submit a statement in response no later than 96 hours before the hearing. The further proceedings are oral and a hearing is fixed at the earliest possible date 'within a period of 15 days commencing with the first working day following the date on which the application is received'. Normally, each of the parties is given one day to present its case at the hearing. The application is treated as a matter of urgency and, under the strict time limits provided for under the Rules, the judgment should be delivered within a period of one month following the date of the filing of the case.

The decision of the Tribunal is in the form of a judgment and is read at a public sitting to be held not later than 14 days after the closure of the hearing. If the Tribunal decides that the allegation of the flag State is well-founded, it determines the amount, nature and form of the bond or financial security to be posted for the release of the vessel or crew. 'Unless the parties agree otherwise, the Tribunal shall determine whether the bond or other financial security shall be posted with the Registrar or with the detaining State.'[119]

References

(p. 561) **(iii)** Provisional measures pending the constitution of an arbitral tribunal (Article 290 (5) UNCLOS)

Article 290 UNCLOS[120] contemplates two different categories of provisional measures proceedings. The first one relates to the classical function of interim measures of protection consisting in giving the possibility to any party to a dispute on the merits to request the prescription of provisional measures 'to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision'. The second category is referred to in Article 290 paragraph 5 UNCLOS and constitutes a case of compulsory competence of the Tribunal. Pursuant to paragraph 5 Article 290, whenever arbitral proceedings are instituted, any party to the dispute may request the Tribunal to prescribe provisional measures pending the constitution of the arbitral proceedings. The rationale of this procedure is to avoid that the rights of the parties—and the marine environment—are left without any protection during the period of time which is necessary to constitute the arbitral tribunal.[121]

The request may be made after a time limit of two weeks from the date of the request for provisional measures. It is thus important for the party instituting provisional measures to send a request for provisional measures to the respondent at the same time or as soon as possible thereafter, since the time limit of two weeks will only start once the latter request is made.

Under Article 290 paragraph 5, the Tribunal may prescribe provisional measures if 'the urgency of the situation so requires.' The urgency in this particular procedure has to be assessed not for the period of time remaining until the judgment on the merits is delivered, but for the period of time until the arbitral tribunal is constituted and is ready to deal with a request for the prescription of provisional measures.[122]

References

(p. 562) That period may cover a few months,[123] a relatively short period of time. Nevertheless, a State which is facing a serious risk of damage to its rights or to the marine environment may find this procedure helpful. For example, in the *MOX Plant Case*, Ireland, in instituting proceedings on 25 October 2001, intended to prevent the commissioning of the new MOX (Mixed Oxide Fuel) Plant in Sellafield which was scheduled to take place on or around 20 December 2001.

Provisional measures may be prescribed under Article 290 UNCLOS in order to 'preserve the respective rights of the parties to the dispute' or 'to prevent serious harm to the marine

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environment.' The first objective contained in the provision (the preservation of the respective rights of the parties) corresponds to the wording of Article 41 paragraph 1 of the Statute of the ICJ.[124] Pursuant to the jurisprudence of the Court, the required threshold for indicating provisional measures is the existence of a risk that the rights could suffer 'irreparable harm',[125] i.e. that they could no longer be exercised by the party entitled to them.[126] The second objective indicated in Article 290 ('to prevent serious harm to the marine environment') does not require a risk of irreparable harm and may be used to protect the marine environment beyond the area under national jurisdiction.

In its jurisprudence, the Tribunal paid great attention to the procedural rights of the parties which, in its view, deserve to be properly protected. Such rights are particularly important in environmental cases where the lack of cooperation between the parties (e.g. as regards exchange of information or notification of potential risks) may have a serious impact on the substantive rights of the parties. In the *MOX Plant Case*, the Tribunal ordered the parties to cooperate[127] with a (p. 563) view to exchanging information on the consequences of the operation of the plant and monitoring the risks resulting from it. In the *Land Reclamation* case, the Tribunal went further and ordered the parties to establish a group of independent experts with the task of determining the effects of Singapore's land reclamation and to propose, as appropriate, measures to deal with any adverse effects of such activities.[128]

(d) Disputes relating to other agreements

In accordance with Article 21 of the Statute if the Tribunal, the jurisdiction of the Tribunal comprises 'all matters specifically provided for in any' agreement (other than UNCLOS) 'which confers jurisdiction on the Tribunal'. A number of agreements have been concluded which contain provisions stipulating that disputes arising out of the interpretation or application of these agreements could be submitted to the Tribunal.[129]

Article 22 of the Statute also gives to States parties which are 'all the parties to a treaty or convention already in force and concerning the subject matter covered by this Convention' the option to agree to submit to the Tribunal so agree, any disputes concerning the interpretation or application of such treaty or convention may, in accordance with such agreement, be submitted to the Tribunal.

(e) Advisory proceedings

(i) Advisory proceedings before the Seabed Disputes Chamber

Pursuant to Article 191 UNCLOS, the Seabed Disputes Chamber is competent to give advisory opinions at the request of the Assembly of the Council of the International Seabed Authority 'on legal questions arising within the scope of their activities.'[130]

In accordance with Article 159 paragraph 10 UNCLOS, the Chamber may also give advisory opinions, at the request of the Assembly, 'on the conformity with the Convention of a proposal before the Assembly on any matter'. The competence of the Chamber under this provision is rather broad since it relates to 'any matter'

References

(p. 564) before the Assembly, and may be activated by one fourth of the members of the plenary organ of the Authority.

A request for an advisory opinion must be 'accompanied by all documents likely to throw light upon the question', these documents being filed 'at the same time as the request or as soon as possible thereafter'.[131] As provided for under Article 134 of the Rules, '[t]he written statements and documents annexed shall be made accessible to the public as soon as possible after they have

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been presented to the Chamber.'

In accordance with Article 133 of the Rules, advisory proceedings consist in written pleadings, as well as oral proceedings if so decided by the Chamber or its President if the Chamber is not sitting.[132] Participation in the proceedings is open to States parties to UNCLOS and, under certain conditions, to intergovernmental organizations. In accordance with Article 133 paragraph 2 of the Rules, the Chamber 'shall identify the intergovernmental organizations which are likely to be able to furnish information on the question [and] [t]he Registrar shall give notice of the request to such organizations.' These organizations will 'be invited to present written statements on the question within a time-limit fixed by the Chamber' (paragraph 3) and such 'statements shall be communicated to States Parties and organizations which have made written statements' (paragraph 3). The organizations identified by the Chamber under Article 133 paragraph 2 are also 'invited to make oral statements at the proceedings'.[133] The Chamber may also authorize the submission of additional written statements supplementing the statements already made.[134]

After completion of the deliberations, a date is fixed for the reading of the advisory opinion at a public sitting of the Tribunal. The time allocated to the whole procedure must take into account Article 138 UNCLOS which specifies that advisory opinions 'shall be given as a matter of urgency'. In addition, Article 132 of the Rules provides for that '[i]f the request indicates that an urgent answer is necessary, the Tribunal will "take all appropriate steps to accelerate the procedure".'

There are no provisions in the Rules which address the possibility for NGOs to participate in advisory proceedings as *amicus curiae.*[135] The issue of participation of

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(p. 565) NGOs in proceedings did arise for the first time in Case No. 17, when Greenpeace International and the World Wide Fund for Nature (WWF) submitted a petition requesting permission to participate in the proceedings as *amici curiae* together with a 'memorial'. In light of the existing rules, the request was not granted. The Chamber decided, however, that, while the 'memorial' was not part of the case file, it would be transmitted to the States parties, the Authority, and the intergovernmental organizations that had submitted written statements and that, as a document publicly available, it would be posted on the Tribunal's website.[136]

(ii) Advisory proceedings before the Tribunal

Pursuant to Article 138 of the Rules, the Tribunal may give an advisory opinion on a legal question 'if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion'. While the Statute of the Tribunal does not expressly refer to advisory proceedings before the Tribunal, it provides, nevertheless, a legal basis for the exercise of such competence. Pursuant to Article 21 of the Statute,[137] the Tribunal has jurisdiction for 'all matters specifically provided for in any other agreement [other than UNCLOS] which confers jurisdiction on the Tribunal'. The expression 'matters' is broader than the term 'disputes'[138] and may be considered as referring to both contentious and advisory proceedings.

In light of the Statute of the ICJ, under which advisory proceedings are only initiated by certain intergovernmental organizations, the question may be asked as to whether the advisory jurisdiction of the Tribunal is available only to international organizations or also to States. In the case of the Tribunal, Article 138 of the Rules specifies that the request of an advisory opinion should be expressly provided for in 'an international agreement related to the purposes of the Convention'. This expression refers to an agreement concluded by the subjects of international law, including States and international organizations, and its wording does not seem to support the view that it would be restricted to international organizations.

Paragraph 2 of Article 138 of the Rules states that the request for an advisory opinion is transmitted to the Tribunal 'by whatever body' is authorized pursuant to an international agreement related to

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the purposes of UNCLOS. Here also the term 'body' does not appear to be limited to organs of international

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(p. 566) organizations[139] and this expression seems to be broad enough to refer to both international organizations and States.[140]

In advisory proceedings, the Tribunal is requested to give a non-binding opinion on a 'legal question'.[141]A legal question is a question 'framed in terms of law',[142] which raises 'problems of international law'[143] and is 'by its very nature susceptible of a reply based on law'.[144] It differs from a 'dispute' which is 'a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons'.[145] This does not mean that the request for an opinion could not relate to a legal question actually pending between States parties. On the contrary, the Rules of the Tribunal—as the corresponding rules of the ICJ—contemplate such a possibility by providing that, when the Tribunal determines that the request for an advisory opinion relates to a legal question pending between two or more parties, the parties concerned may choose a judge ad hoc.[146] However, the opinion should not have the result of deciding on the merits of a dispute pending between two States parties.[147] This limitation is important in order to avoid 'circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent'.[148]

Article 138 paragraph 3 of the Rules of the Tribunal specifies that the rules applicable to advisory proceedings before the Tribunal are similar to those applicable to advisory proceedings before the Seabed Disputes Chamber.[149] The latter include, pursuant to Article 130 paragraph 2, 'provisions of the Statute and of [the] Rules

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(p. 567) applicable in contentious cases' to the extent they are recognized to be applicable by the Tribunal.

20.2.4 International Court of Justice

The ICJ is one of the institutions referred to in Article 287 which may be selected by States parties as a means for the settlement of their disputes under UNCLOS. As of 1 June 2014, twenty-seven States parties have selected the ICJ as a forum for the settlement of disputes under Article 287.[150] If the parties to a dispute have selected the ICJ by declarations made under Article 287, any of them may submit the dispute to the Court by unilateral application.

Disputes relating to the law of the sea may also be submitted to the ICJ on the basis of the provisions of its Statute as annexed to the Charter of the United Nations. States may then submit a case on the basis of declarations made by the parties to the dispute pursuant to Article 36 paragraph 2 of its Statute.

With respect to States parties to a dispute relating to UNCLOS which have accepted the jurisdiction of the ICJ under Article 287 UNCLOS as well as under Article 36 paragraph 2 of the Statute, proceedings may be instituted before the Court either on the basis of its Statute or the provisions of UNCLOS. In these circumstances, a State willing to avoid the submission of certain categories of disputes to the ICJ will have to take action both under UNCLOS and the Statute of the Court. This is, for example, the approach adopted by Australia which made two declarations on the same day, on 22 March 2002. One declaration was made under Article 298(1)(a) UNCLOS with a view to excluding disputes relating to maritime boundaries from the application of the compulsory mechanism under section of Part XV,[151] and a second declaration was made under Article 36(2) of the Statute of the ICJ to exclude from the jurisdiction of the Court 'any dispute concerning or

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relating to the delimitation of maritime zones'.[152]

That said, the two different systems—under UNCLOS and the Court's Statute—do not offer similar options regarding the possibility of excluding from their scope

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(p. 568) certain categories of disputes. Under UNCLOS, this option is limited to the categories of disputes expressly identified under Article 298 UNCLOS, while the possibility of making reservations is widely available under Article 36 of the Statute of the Court. For example, the kind of reservation made by Canada under Article 36 of the ICJ's Statute, on the basis of which the Court declared itself incompetent in the *Fisheries Jurisdiction* case between Spain and Canada,[153] could not be done pursuant to Part XV of UNCLOS. Indeed, Article 298(1)(b) UNCLOS permits a State party to exclude law enforcement activities only as regards the exercise of sovereign rights or jurisdiction in the EEZ, not on the high seas.

States parties to UNCLOS may also conclude a special agreement[154] in order to submit to the Court a dispute relating to the law of the sea, or containing issues concerning the law of the sea, on the basis of the general competence of the Court under its Statute. In addition, a case relating to law of the sea matters, or involving issues relating to them, can be submitted to the Court on the basis of a clause contained in a treaty relating to the law or a treaty concluded for the settlement of disputes, such as the 1948 American Treaty on Pacific Settlement of Disputes (Pact of Bogotá),[155] the 1949 Revised General Act for the Pacific Settlement of International Disputes, or the 1957 European Convention for the Peaceful Settlement of Disputes.

In dealing with cases arising out of the application or interpretation of UNCLOS, the ICJ will function in accordance with the provisions of its Statute and its Rules. In other words, procedural innovations contained in UNCLOS—for example the preliminary proceedings provided for in Article 294 UNCLOS[156]—will be

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(p. 569) implemented by the Court on the basis of the provisions contained in its Statute and Rules.

20.2.5 Arbitration

Arbitration is the residual compulsory mechanism available to States parties whenever parties to a dispute did not make any declaration under Article 287 or whenever their declarations do not select the same means for the settlement of disputes. Arbitration may also be selected by States parties as their preferred means for the settlement of disputes under Article 287.

The specificity of arbitration under Annex VII to UNCLOS is that arbitral proceedings are instituted in the form of a unilateral application and do not require the prior conclusion of a special agreement ('*compromis*'). Pursuant to Article 1 of Annex VII, 'any party to a dispute may submit the dispute to the arbitral procedure provided for in this Annex by written notification addressed to the other party or parties to the dispute.' The Annex requires that the notification should be 'accompanied by a statement of the claim and the grounds on which it is based' (Article 1) and should also contain the name of one member of the arbitral tribunal appointed by the applicant (Article 3(b)). Annex VII contains precise rules regarding the nomination of the arbitrators. It also provides for the drawing up and maintenance of a list of arbitrators by the Secretary-General of the UN, each State party being entitled to nominate four arbitrators (Article 2). The members of the arbitral tribunal are chosen preferably on this list, except in the situation referred to in Article 3(e) where the nomination 'shall be made from the list'.

Within 30 days of the receipt of the application, the respondent has to appoint one member of the arbitral tribunal. If it fails to do so, the applicant may, within a period of two weeks from the

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expiration of the time limit of 30 days, request the President of the Tribunal to make the necessary appointment. The three other members, including the President of the arbitral body, shall be appointed by agreement of the parties within 60 days of the receipt of the application. In the absence of such an agreement, any party is entitled, within a period of two weeks from the expiration of the time limit of 60 days, to request the President of the Tribunal to make the necessary appointments. The President is required to make the appointments 'within a period of 30 days of the receipt of the request and in consultation with the parties. The members so appointed shall be of different nationalities and may not be in the service of, ordinarily resident in the territory of, or nationals of, any of the parties to the dispute.'[157] This provision has already been implemented in different disputes between States parties to UNCLOS.[158] It

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(p. 570) may be added that the procedure for the composition of the arbitral tribunal is determined by Article 3 of Annex VII 'unless the parties otherwise agree'.[159] The parties to the dispute may therefore reach agreements on specific issues, such as an extension of the time limits provided for in Article 3.

The procedure applicable to the proceedings shall be determined by the tribunal on the understanding that the arbitral tribunal will ensure 'to each party a full opportunity to be heard and to present its case'.[160]

The arbitral award is 'final and without appeal, unless the parties to the dispute have agreed in advance to an appellate procedure.'[161] Any controversy regarding the interpretation or the implementation of the award 'may be submitted by either party for decision to the arbitral tribunal which made the award. For this purpose, any vacancy in the tribunal shall be filled in the manner provided for in the original appointments of the members of the tribunal.'[162] It may be noted that Annex VII also contemplates the possibility to submit such controversy 'to another court or tribunal under article 287 by agreement of all the parties to the dispute'.[163]

20.2.6 Special arbitration

Special arbitration under Annex VIII is the fourth means which may be selected by States parties under Article 287 as their preferred means for the settlement of 'one or more of the categories of disputes specified' in Annex VIII ('(1) fisheries, (2) protection and preservation of the marine environment, (3) marine scientific research, or (4) navigation, including pollution from vessels and by dumping').[164] With respect to the States parties which made such a declaration, whenever a dispute under UNCLOS relates such categories, it may then be submitted, at the request of any party to the dispute, to the special arbitral procedure regulated under Annex VIII to UNCLOS.

The special arbitral tribunal will be composed of members chosen preferably from the relevant lists of experts maintained by the competent international organizations.[165] The procedure for the nomination of members follows *mutatis mutandis* (p. 571) the provisions contained in Annex VII, except that the appointing authority in special arbitration is the Secretary-General of the United Nations. An interesting feature of the special arbitration procedure is that it expressly contemplates the possibility for the special arbitral tribunal, at the request of the parties, 'to carry out an inquiry and establish the facts giving rise to the dispute',[166] the findings of fact of the arbitral body being 'considered as conclusive as between the parties'.[167] Likewise, at the request of the parties, the arbitral tribunal 'may formulate recommendations which, without having the force of a decision, shall only constitute the basis for a review by the parties of the questions giving rise to the dispute'.[168] For the rest, the rules for arbitral proceedings are equally applicable *mutatis mutandis* to special arbitration under Annex VIII.

20.3 Settlement of Law of the Sea Disputes on the Basis of

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Provisions Contained in other International Instruments Related to the Purposes of UNCLOS

UNCLOS is not the only international agreement regulating the use of the sea. A number of other conventions do exist, including the 1958 Geneva conventions, which may contain clauses applicable to the disputes arising out of their application or interpretation. However, it should be underlined that States and international organizations are free to incorporate the mechanism contained in Part XV of UNCLOS in other international agreements—multilateral or bilateral—related to the law of the sea and thus make it applicable to disputes relating to the agreements concerned. Likewise, agreements—multilateral or bilateral—may provide that the settlement of the disputes arising out of their application shall be submitted to one of the fora identified in Part XV, section 2, of UNCLOS. Such possibilities are expressly contemplated in Article 288 paragraph 2 which states: 'A court or tribunal referred to in Article 287 shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement.'

Several conventions have been concluded,[169] either as agreements implementing the provisions of UNCLOS or as independent agreements, which refer to Part XV

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(p. 572) of UNCLOS. No uniform approach is, however, adopted by these legal instruments as regards the way they make use of the provisions contained in Part XV. With one exception,[170] these agreements establish a mandatory mechanism either by making Part XV of UNCLOS applicable *mutatis mutandis*[171] or by referring to Article 287 UNCLOS.[172] A majority of the agreements also stipulate that the use of Part XV should be first preceded by recourse to diplomatic means.[173] In some of them, Part XV is used as a residual mechanism, in the case that no other specific procedure is agreed upon by the parties.[174]

(p. 573) The 1995 Agreement relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (FSA, 'Fish Stocks Agreement') is an illustration of an agreement incorporating Part XV of UNCLOS. Article 30 paragraph 1 of the Agreement extends *mutatis mutandis* the mechanism contained in Part XV of UNCLOS to the disputes arising out of its application or interpretation between States parties to the Agreement, 'whether or not they are also Parties to the Convention' (paragraph 1). Article 30 paragraph 2 contains an important provision since it has the effect of making Part XV of UNCLOS *mutatis mutandis* applicable to all disputes between States parties to the Agreement concerning regional fisheries agreements to which they are parties. Logically, the provision would come into play when the agreement in question does not contain any mechanism for the settlement of disputes. With respect to agreements containing a dispute settlement mechanism which does not lead to a binding decision (e.g. diplomatic negotiations or conciliation), the question would then be to determine whether, once such diplomatic means have failed, the parties to the disputes are entitled to make use of Part XV, section 2, or are deprived from doing so because they had intended to exclude the provisions of Part XV pursuant to Article 281 UNCLOS.[175] The Agreement also makes use of the system of declarations set out in Article 287 UNCLOS. Under paragraph 3 of Article 30, a declaration made by a State party to UNCLOS under Article 287 will apply to the settlement of disputes under the Agreement, unless that State party has accepted another procedure for the settlement of disputes relating to the Agreement pursuant to Article 287 UNCLOS. As regards parties to the Agreement which are not States parties to UNCLOS, paragraph 4 provides that they may choose by a written declaration one or more of the means set out in Article 287 and that this article shall apply to disputes arising out of the Agreement.[176]

20.4 Conclusion

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Two tables are reproduced, which give an overview of the manner in which the system put into place by UNCLOS is functioning in practice. On that basis, we may compare the number of cases submitted to international courts and tribunals during a period of approximately 17 years preceding the entry into force of

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(p. 574) UNCLOS (from 1 January 1978 to 15 November 1994) (Table 20.1) with the number of cases[177] submitted during a similar period of time following the entry into force of UNCLOS (from 16 November 1994 to 31 December 2011) (Table 20.2).

Table 20.1 Total cases (1978–1994)

Total cases (1978–1994)		**12**
ICJ		**8**
	Delimitation	7 [78]
	Navigation/environment	1 [79]
Arbitration		**4**
	Delimitation	3 [80]
	Fisheries	1 [8]

These data show that there is a substantial increase in the number of cases relating to the law of the sea submitted to international judicial institutions after the entry into force of UNCLOS. This may be seen as evidence of the vitality of the mechanism put into place by UNCLOS. This increase is largely due to the compulsory mechanism provided for under UNCLOS (20 cases out of 35 cases were instituted on the basis of compulsory jurisdiction (prompt release, provisional measures under Article 290 paragraph 5, and arbitration under Annex VII) during the period 1994–2011; in addition, in three cases, special agreements were

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(p. 575) concluded to transfer to the Tribunal arbitral proceedings that had already been instituted under Annex VII).

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Table 20.2 Total cases (1994–2011)

Total cases (1994–2011)		**35**
ITLOS		**18**
Urgent proceedings		13
	Prompt release	9 [82]
	Provisional measures (protection of the marine environment/fisheries)	4 [83]
Merits		5
	Marine environment/fisheries	1 [84]
	Navigation	3 [85]
	Delimitation	1 [86]
ICJ		**7**
	Delimitation	5 [87]
	Law enforcement measures on the high seas/Fisheries	1 [88]
	Fisheries	1 [89]
Arbitration		**10**
Arbitration under annex VII to UNCLOS		7
	Delimitation	3 [90]
	Marine environment	4 [9]
Other arbitral tribunals		2
	Delimitation	2 [92]
	Marine environment	1 [93]

(p. 576) The tables also show the plurality of fora to which law of the sea disputes may be submitted on the basis of a variety of jurisdictional links. Many writings have been devoted for the past fifteen years to the risks posed by a plurality of international courts and tribunals on the unity of international law. It should, however, be observed that, in the majority of the cases, the major problem facing States which seek judicial redress is not to choose among different courts, but simply to get access to a court. It is only in limited instances, and in particular under UNCLOS, that a compulsory mechanism does exist and, even in this context, in most of the cases only one forum —arbitration—will be the sole compulsory means available to States parties. In this connection, it may also be noted that the judicial decisions delivered so far by international courts and tribunals on the basis of UNCLOS show that the concerns expressed vis-à-vis the risk of fragmentation of international law should not be overestimated. No evidence of contradiction has been observed and it may be noted that the International Tribunal for the Law of the Sea, in its decisions, paid great

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attention to the jurisprudence of the ICJ and arbitral tribunals as well as existing rules of general international law, such as the rules on the interpretation of treaties as codified in the 1969 Vienna Convention. This seems to indicate a trend towards unity rather than diversity.

References

Footnotes:

[1] See e.g. the Revised General Act for the Pacific Settlement of International Disputes (adopted 28 Apr. 1949) 71 UNTS 101.

[2] See e.g. the American Treaty on Pacific Settlement (Bogotá, signed 30 Apr. 1948, entered into force 6 May 1949) 30 UNTS 84 (Pact of Bogotá); or the 1957 European Convention for the Peaceful Settlement of Disputes, 320 UNTS 244.

[3] See e.g. the mechanisms established under the European Convention on Human Rights and Fundamental Freedoms (Rome, 4 Nov. 1950, entered into force 3 Nov. 1953) 213 UNTS 222 (ECHR) or the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), *The WTO Dispute Settlement Procedures* (3d edn, WTO and Cambridge University Press, 2012) 1–36.

[4] See, however, the exception contained in Art. II of the Optional Protocol of Signature concerning the Compulsory Settlement of Disputes (Geneva, adopted 29 Apr. 1958, entered into force 30 Sept. 1962) 450 UNTS 169, which specifies that it does not apply to some provisions of the Convention on Fishing and Conservation of the Living Resources of the High Seas (Geneva, adopted 29 Apr. 1958, entered into force 20 Mar. 1966) 559 UNTS 285, Arts 4, 5, 6, 7, and 8, to which conciliation is applicable on the basis of Arts 9, 10, 11, and 12 of that Convention.

[5] See United Nations Convention on the Law of the Sea (Montego Bay, opened for signature 10 Dec. 1982, entered into force 16 Nov. 1994) 1833 UNTS 3 (UNCLOS), Art. 1(2)(2).

[6] See e.g. MH Nordquist et al. (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary* (Martinus Nijhoff, 1991) vol. IV; JG Merrills, *International Dispute Settlement* (3rd edn, Cambridge University Press, 1998) 170–96; N Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge University Press, 2005); I Karaman, *Dispute Resolution in the Law of the Sea* (Martinus Nijhoff, 2012).

[7] Provisions on contentious and advisory proceedings before the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (ITLOS) are contained in UNCLOS, Part XI, s 5 (Arts 186–191). UNCLOS, Annexes V, VI, VII, and VIII contain provisions on conciliation, ITLOS, arbitration, and special arbitration, respectively.

[8] See e.g. D Anderson, 'The negotiation of maritime boundaries' in C Schofield et al. (eds), *Essays in Honour of Professor Gerald Blake* (Kluwer Academic Publishers 2002) 157–72.

[9] See e.g. P Gautier, 'Le règlement obligatoire des différends relatifs au droit de la mer et la pratique des États' (2009) 1 *The Global Community: YB Int'l L & Jurisprudence* 107.

[10] Convention for the Conservation of Southern Bluefin Tuna (Canberra, 10 May 1993, entered into force 30 May 1994) 1819 UNTS 360, Art. 16 (Southern Bluefin Tuna Convention):

> (1) If any dispute arises between two or more of the Parties concerning the interpretation or implementation of this Convention, those Parties shall consult among themselves with a view to having the dispute resolved by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice. (2.) Any dispute of this character not so resolved shall, with the consent in each case of all parties to the dispute, be referred for settlement to the International Court of Justice or to arbitration; but failure to reach agreement on reference to the International Court of Justice or to arbitration shall not absolve parties to the dispute from the responsibility of continuing to seek to resolve it by any of the various peaceful means referred to in paragraph 1 above.

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[11] *Southern Bluefin Tuna (New Zealand v Japan, Australia v Japan)*, Award on Jurisdiction and Admissibility, 4 Aug. 2000, 23 RIAA 1–57, 18, para 54 (*Southern Bluefin Tuna*, Award, 4 Aug. 2000).

[12] *Southern Bluefin Tuna*, Award, 4 Aug. 2000, para 54.

[13] *Southern Bluefin Tuna*, Award, 4 Aug. 2000, para 54.

[14] See *MOX Plant (Ireland v United Kingdom)*, Provisional Measures, Order, 3 Dec. 2001, [2001] ITLOS Rep 95, 106, para 49 (*MOX Plant*, Order, 3 Dec. 2001).

[15] *MOX Plant*, Order, 3 Dec. 2001, para 50.

[16] *MOX Plant*, Order, 3 Dec. 2001, para 51.

[17] *Southern Bluefin Tuna*, Award, 4 Aug. 2000, para 57.

[18] On this matter, see e.g. B Oxman, 'Complementary Agreements and Compulsory Jurisdiction', (2001) *AJIL* 277; P Gautier, 'Le Tribunal international du droit de la mer, le règlement des différends relatifs à la Convention des Nations Unies de 1982 et la protection de l'environnement' (2004) 16 *L'Observateur des Nations Unies* 45; A Serdy, 'The Paradoxical Success of UNCLOS Part XV: A Half-Hearted Reply to Rosemary Rayfuse' (2005) *Victoria U Wellington L Rev* 719.

[19] See MH Nordquist et al. (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary* (Martinus Nijhoff, 1989) vol. V, 27.

[20] Incidentally, it may be noted that a similar condition is contained in the European Convention for the Peaceful Settlement of Disputes (signed 29 Apr. 1957, entered into force 30 Apr. 1958) 320 UNTS 93, Art. 28(1): 'The provisions of this Convention shall not apply to disputes which the parties have agreed or may agree to submit to another procedure of peaceful settlement. Nevertheless, in respect of disputes falling within the scope of Article 1 ["all international legal disputes"], the High Contracting Parties shall refrain from invoking as between themselves agreements which do not provide for a procedure entailing binding decisions.'

[21] For the text of Art. 16 of the Southern Bluefin Tuna Convention, see (n 10).

[22] See *Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan*), Provisional Measures, Order, 27 Aug. 1999, [1999] ITLOS Rep 294, paras 53 and 54 (*Southern Bluefin Tuna*, Order, 27 Aug. 1999).

[23] See e.g. the *MOX Plant Case* where the United Kingdom argued that the main elements of the dispute were 'governed by the compulsory dispute settlement procedures of the OSPAR Convention or the EC Treaty or the Euratom Treaty' (*MOX Plant*, Order, 3 Dec. 2001, [2001] ITLOS Rep 105, para 43). ITLOS stated that 'the dispute settlement procedures under the OSPAR Convention, the EC Treaty and the Euratom Treaty deal with disputes concerning the interpretation or application of those agreements, and not with disputes arising under the Convention', *MOX Plant*, Order, 3 Dec. 2001, [2001] ITLOS Rep 106, para 49).

[24] See *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria:* Equatorial Guinea intervening) [1998] ICJ Rep 303, para 56: 'Neither in the Charter nor otherwise in international law is any general rule to be found to the effect that the exhaustion of diplomatic negotiations constitutes a precondition for a matter to be referred to the Court.…A precondition of this type may be embodied and is often included in compromissory clauses of treaties. It may also be included in a special agreement whose signatories then reserve the right to seize the Court only after a certain lapse of time.'

[25] Non-compliance with UNCLOS, Art. 283 was invoked before ITLOS in the following cases: *MOX Plant,* Order, 3 Dec. 2001, [2001] ITLOS Rep 106–7, paras 54–60; *Land Reclamation in and around the Straits of Johor (Malaysia v Singapore*), Provisional Measures, Order, 8 Oct. 2003, [2003] ITLOS Rep 18–20, paras 33–51; *M/V 'Louisa' (Saint Vincent and the Grenadines v Kingdom of Spain*), Provisional Measures, Order, 23 Dec. 2010, [2008–2010] ITLOS Rep 67–8, paras 54–65 (*M/V 'Louisa'*, Order, 23 Dec. 2010). See also *Southern Bluefin Tuna*, Order, 27 Aug. 1999, [1999] ITLOS Rep 295, paras 56–60.

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[26] An additional issue may arise when, further to a notification from the future applicant, no response is given by the future respondent. This situation did occur in the context of the *M/V 'Louisa'* case (Provisional Measures), where, prior to the institution of proceedings, the applicant (Saint Vincent and the Grenadines) informed the respondent (Spain), through a note verbale dated 26 Oct., of the existence of a dispute and of its 'plans to pursue an action before the International Tribunal for the Law of the Sea to rectify the matter absent immediate release of the ships and settlement of damages'. (*M/V 'Louisa'*, Order, 23 Dec. 2010, [2008–2010] ITLOS Rep 67–8, para 60). On 24 Nov. 2010, when the case was filed with ITLOS, no response had yet been received from the Respondent. Before ITLOS, Spain claimed that no exchange of views had taken place contrary to what is required by Art. 283. (See *M/V 'Louisa'* Order, 23 Dec. 2010, [2008–2010] ITLOS Rep 67, para 54). Recalling its position that 'a State Party is not obliged to continue with an exchange of views when it concludes that the possibilities of reaching agreement have been exhausted' (*M/V 'Louisa'*, Order, 23 Dec. 2010, [2008–2010] ITLOS Rep 68, para 63), ITLOS concluded that, in these circumstances, the applicant had fulfilled the requirement of UNCLOS, Art. 283. The position of ITLOS was not adopted unanimously on that point. For the dissenting Judges, the obligation to exchange views is not 'an empty formality' (dissenting opinion of Judge Wolfrum, *M/V 'Louisa'* [2008–2010] ITLOS Report 85, para 27) and such exchange should take place with a view to settling the dispute. In this respect, in the view of Judge Treves, the *note verbale* of 26 Oct. 2010 does not 'contain any indication that Saint Vincent and the Grenadines had the intention to exchange views regarding the settlement of the dispute "by negotiation or other peaceful means"' (dissenting opinion of Judge Treves, *M/V 'Louisa'* [2008–2010] ITLOS Rep 90, para 11).

[27] *MOX Plant*, Order, 3 Dec. 2001, [2001] ITLOS Rep 107, para 60.

[28] *Mavrommatis Palestine Concessions*, Judgment No. 2, [1924] PCIJ Ser. A, No. 2, 11.

[29] *South West Africa,* Preliminary Objections, Judgment [1962] ICJ Rep 328.

[30] *MOX Plant*, Order, 3 Dec. 2001, [2001] ITLOS Rep 107, para 60.

[31] *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the EEZ and the continental shelf between them*, Decision, 11 Apr. 2006 (2006) 27 RIAA 147, 171–2, para 77: 'Citing the *Virginia Commentary*, Trinidad and Tobago maintains that "Article 283(2) ensures that a party may transfer a dispute from one mode of settlement to another, especially one entailing a binding decision such as arbitration under Annex VII, 'only after appropriate consultations between all parties concerned'".'

[32] *Arbitration between Barbados and Trinidad and Tobago* (2006) 27 RIAA 207, para 201. In this respect, see UNCLOS Arts 74(2) and 83: '(2) If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.'

[33] *Arbitration between Barbados and Trinidad and Tobago* (2006) 27 RIAA 206, para 202: 'The Tribunal consequently concludes that Article 283(1) cannot reasonably be interpreted to require that, when several years of negotiations have already failed to resolve a dispute, the Parties should embark upon further and separate exchanges of views regarding its settlement by negotiation. The requirement of Article 283(1) for settlement by negotiation is, in relation to Articles 74 and 83, subsumed within the negotiations which those Articles require to have already taken place.'

[34] *Arbitration between Barbados and Trinidad and Tobago* (2006) 27 RIAA 207, para 205. ITLOS adds: 'To require such a further exchange of views (the purpose of which is not specified in Article 283(2)) is unrealistic.'

[35] *Arbitration between Barbados and Trinidad and Tobago* (2006) 27 RIAA 207, para 204: 'That unilateral right would be negated if the States concerned had first to discuss the possibility of having recourse to that procedure, especially since in the case of a delimitation dispute the other State involved could make a declaration of the kind envisaged in Article 298(l)(a)(i) so as to opt out of the arbitration process.'

[36] *Arbitration between Barbados and Trinidad and Tobago* (2006) 27 RIAA 206, para 202.

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[37] D Anderson, 'Article 283 of the United Nations Convention on the Law of the Sea' in TM Ndiaye and R Wolfrum (eds), *Liber Amicorum Judge Thomas A. Mensah* (Martinus Nijhoff, 2007) 863.

[38] P Chandrasekhara Rao, 'Delimitation Disputes under the United Nations Convention on the Law of the Sea: Settlement Procedures', *Liber Amicorum Judge Thomas A. Mensah* (n 37) 894.

[39] The Statute of the International Tribunal for the Law of the Sea is contained in UNCLOS, Annex VI (ITLOS Statute). Arbitration under UNCLOS, Art. 287 is regulated by Annex VII ('Arbitration'). Annex VIII ('Special arbitration') deals with special arbitration which may be instituted for certain categories of disputes (disputes relating to fisheries, protection and preservation of the marine environment, marine scientific research and navigation, including pollution from vessels, and by dumping). Annexes form an integral part of UNCLOS (see UNCLOS, Art. 318).

[40] UNCLOS, Art. 287(4).

[41] UNCLOS, Art. 287(3).

[42] Algeria, Angola, Argentina, Australia, Austria, Bangladesh, Belarus, Belgium, Canada, Cape Verde, Chile, Croatia, Cuba, Democratic Republic of the Congo, Denmark, Ecuador, Egypt, Estonia, Fiji, Finland, Germany, Greece, Guinea-Bissau, Honduras, Hungary, Italy, Latvia, Lithuania, Madagascar, Mexico, Montenegro, Netherlands, Nicaragua, Norway, Oman, Portugal, Russian Federation, Saint Vincent and the Grenadines, Slovenia, Spain, Sweden, Switzerland, Timor-Leste, Trinidad and Tobago, Tunisia, Ukraine, United Kingdom, United Republic of Tanzania, and Uruguay.

[43] Angola, Argentina, Australia, Austria, Bangladesh (for the settlement of two delimitation disputes relating to the Bay of Bengal), Belarus (with respect to prompt release proceedings), Belgium, Canada, Cape Verde, Chile, Croatia, Democratic Republic of the Congo, Ecuador, Estonia, Fiji, Finland, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Madagascar, Mexico, Montenegro, Oman, Portugal, Russian Federation (with respect to prompt release proceedings), Saint Vincent and the Grenadines (for the settlement of disputes concerning the arrest or detention of its vessels), Spain, Switzerland, Timor-Leste, Trinidad and Tobago, Tunisia, Ukraine (with respect to prompt release proceedings), United Republic of Tanzania, and Uruguay.

[44] Australia, Austria, Belgium, Cape Verde, Croatia, Denmark, Ecuador, Estonia, Finland, Germany, Honduras, Hungary, Italy, Latvia, Lithuania, Mexico, Montenegro, Netherlands, Nicaragua, Norway, Oman, Portugal, Spain, Sweden, Timor-Leste, Trinidad and Tobago, and United Kingdom.

[45] Belarus, Canada, Egypt, Germany, Portugal, Russian Federation, Slovenia, Timor-Leste, Tunisia, and Ukraine.

[46] Argentina, Austria, Belarus, Chile, Ecuador, Hungary, Mexico, Portugal, Russian Federation, Timor-Leste, and Ukraine.

[47] Out of 20 contentious cases filed so far with ITLOS, two cases, the *M/V 'Louisa' (Saint Vincent and the Grenadines v Kingdom of Spain)*, Judgment, 28 May 2013, and the *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, 14 Mar. 2012, [2012] ITLOS Rep 4, were instituted before ITLOS on the basis of declarations made under UNCLOS, Art. 287.

[48] This approach was adopted so far in four cases: *M/V 'Saiga' (No. 2) (Saint Vincent and the Grenadines v Guinea)*, Judgment, 1 July 1999, [1999] ITLOS Rep 10; *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile v European Community)*, Order, 20 Dec. 2000, [2000] ITLOS REP 148; *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*; and *The M/V 'Virginia G' Case (Panama/Guinea-Bissau)*, Judgment, 14 Apr. 2014.

[49] See e.g. the declarations made by Australia on 22 Mar. 2002, Belgium on 13 Nov. 1998, Canada on 7 Nov. 2003, Estonia on 26 Aug. 2005, Finland on 21 June 1996, and Italy on 26 Feb. 1997.

[50] See e.g. the declarations made by Argentina on 1 Dec. 1995, Austria on 14 July 1995, Cabo Verde on 10 Aug. 1987, Chile on 25 Aug. 1997, and Germany on 14 Oct. 1994.

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[51] In this respect, see e.g. the declaration of Belgium (n 49) stating that it selects ITLOS and the ICJ 'in view of its preference for pre-established jurisdictions'. See also the declaration of Italy (n 49) stating that '[i]n accordance with article 287, paragraph 4, Italy considers that it has chosen "the same procedure" as any other State Party that has chosen the International Tribunal for the Law of the Sea or the International Court of Justice.'

[52] As an illustration, we may refer to the condition included in some declarations under Art. 36 of the Statute of the ICJ by which States exclude from the scope of their acceptance 'any dispute in respect of which any other party to the dispute has accepted the compulsory jurisdiction of the Court only in relation to or for the purpose of the dispute; or where the acceptance of the Court's compulsory jurisdiction on behalf of any other party to the dispute was deposited less than 12 months prior to the filing of the application bringing the dispute before the Court' (see e.g. the declarations made by Australia and the United Kingdom under Art. 36(2) of the Statute of the ICJ).

[53] Declarations made by Myanmar on 4 Nov. 2009 and by Bangladesh on 12 Dec. 2009.

[54] This situation occurred for example in the *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*. Having made a declaration under Art. 287 accepting the jurisdiction of ITLOS, Myanmar withdrew its declaration on 14 Jan. 2010.

[55] UNCLOS, Art. 293(2) also provides for the possibility 'to decide a case *ex aequo et bono*, if the parties so agree'.

[56] See e.g. *M/V 'Saiga' (No. 2)*, Judgment, [1999] ITLOS Rep 10, para 155:

> In considering the force used by Guinea in the arrest of the *Saiga*, the Tribunal must take into account the circumstances of the arrest in the context of the applicable rules of international law. Although the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law.

[57] As examples, UNCLOS, Art. 293(3)(a) refers to the 'discretionary powers [of the coastal State] for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations'.

[58] UNCLOS, Art. 246 relates to the right of the coastal State to regulate, authorize, and conduct marine scientific research in its EEZ.

[59] UNCLOS, Art. 253 refers to the suspension or cessation of marine scientific research activities in the EEZ.

[60] UNCLOS, Art. 297(1)(c).

[61] UNCLOS, Art. 297(1)(a).

[62] See *M/V 'Saiga' (No. 2) (Saint Vincent and the Grenadines v Guinea)*, Provisional Measures, Order, 11 Mar. 1998, [1998] ITLOS Rep 37, para 27.

[63] See UNCLOS, Art. 73(1), which refers to 'boarding, inspection, arrest and judicial proceedings'.

[64] UNCLOS, Art. 73(3): 'Coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment.'

[65] UNCLOS, Art. 297(2)(b). See the discretionary powers referred to in Art. 246(5) (to withhold consent) and (6) (designation of specific areas). See, however, Art. 246(6) which expressly states that the 'coastal States may not exercise their discretion to withhold consent under subparagraph

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(a) of that paragraph in respect of marine scientific research projects' conducted on the continental shelf beyond 200 nautical miles.

66 UNCLOS, Art. 297(3)(b)(i).

67 See UNCLOS, Art. 297(3)(b)(ii).

68 See UNCLOS, Art. 297(3)(b)(iii).

69 UNCLOS, Art. 297(3)(c).

70 Angola, Argentina, Australia, Belarus, Canada, Cape Verde, Chile, China, Cuba, Democratic Republic of the Congo, Denmark, Ecuador, Equatorial Guinea, France, Gabon, Ghana, Guinea-Bissau, Iceland, Italy, Mexico, Montenegro, Nicaragua, Norway, Palau, Portugal, Republic of Korea, Russian Federation, Saudi Arabia, Slovenia, Spain, Thailand, Trinidad and Tobago, Tunisia, Ukraine, United Kingdom, and Uruguay.

71 See e.g. the declarations made by Angola, Denmark, Norway, or Slovenia (limitations applicable to arbitral proceedings only) or by Cuba and Guinea-Bissau (limitations applicable to the ICJ only).

72 In its declaration, Nicaragua only recognizes the competence of the ICJ with respect to disputes under UNCLOS, Art. 298.

73 UNCLOS, Art. 298(1)(a)(i). On this matter, see P Chandrasekhara Rao, 'Différends relatifs à la délimitation en vertu de la Convention des Nations Unies sur le droit de la mer: Procédures de règlement' (2006) *Annuaire du droit de la mer* 11–31; T Treves, 'What have the United Nations Convention and the International Tribunal for the Law of the Sea to offer as regards Maritime Delimitation Disputes?' in R Lagoni and D Vignes, (eds) *Maritime Delimitation* (Martinus Nijhoff, 2006) 63–78.

74 UNCLOS, Art. 298 para 1(a)(i). See also a further exception contained in UNCLOS, Art. 298(1)(a)(iii): 'this subparagraph does not apply to any sea boundary dispute finally settled by an arrangement between the parties, or to any such dispute which is to be settled in accordance with a bilateral or multilateral agreement binding upon those parties'.

75 The applicability of the compulsory mechanism under s 2 to mixed disputes is a question which has not yet been dealt with by the jurisprudence. In the Guyana-Suriname arbitration, Suriname argued that section applies to disputes on the delimitation of maritime boundaries but not to 'any question relating to the land boundary between the Parties territorial disputes' (para 308; see also para 175 of the award (available on the PCA website)). In its award of 17 Sept. 2007 (text available on the PCA website), the arbitral tribunal did not deal directly with this argument. It fixed an appropriate starting point for the maritime delimitation while stating that '[t]he Tribunal's findings have no consequence for any land boundary that might exist between the Parties' (para 308).

76 See e.g. P Chandrasekhara Rao and R Khan, *The International Tribunal for the Law of the Sea: Law and Pratice* (Kluwer, 2001); G Eiriksson, *The International Tribunal for the Law of the Sea* (Martinus Nijhoff, 2000); P Chandrasekhara Rao and P Gautier (eds), *The Rules of the International Tribunal for the Law of the Sea: A Commentary* (Martinus Nijhoff, 2006); M-T Infante Caffi, 'The International Tribunal for the Law of the Sea' in R Mackenzie, C Romano, Y Shany, and P Sands (eds), *The Manual on International Courts and Tribunals* (Oxford University Press, 2010) 40–71.

77 As of 1 June 2014, 165 States and one international organization (European Union) are parties to it.

78 UNCLOS, Annex VI, Art. 1(2).

79 UNCLOS, Annex VI, Art. 2 para 1.

80 See UNCLOS, Annex VI, Art. 2(2).

81 UNCLOS, Annex VI, Art. 15(1).

82 UNCLOS, Annex VI, Art. 15(2).

83 Compare with Art. 26(2) of the ICJ's Statute which states that the number of judges to constitute

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such a chamber—not the composition—'shall be determined by the Court with the approval of the parties'.

84 UNCLOS, Annex VI, Art. 15(2).

85 UNCLOS, Annex VI, Art. 15(5).

86 See UNCLOS, Annex VI, Art. 17.

87 See UNCLOS, Art. 289 and the ITLOS Rules of Procedure (adopted in 28 October 1997, as amended 15 March and 21 September 2001 and 17 March 2009), Art. 42 (ITLOS Rules). These experts are to be distinguished from experts who may be called by the parties, or at the initiative of ITLOS, to give evidence in the proceedings of a case (see ITLOS Rules, Arts 72 and 77).

88 UNCLOS, Annex VI, Art. 21.

89 UNCLOS, Annex VI, Art. 20(1).

90

> 2. The Tribunal shall be open to entities other than States Parties in any case expressly provided for in Part XI or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case.

91 The provisions of UNCLOS relating to the role of the Enterprise have to be read together with the provisions of the 1994 implementation Agreement and in particular s 2 (entitled 'The Enterprise') of its Annex.

92 See e.g. T Mensah, 'The Jurisdiction of the International Tribunal for the Law of the Sea' (1999) 63 *RabelsZ* 330; T Mensah, 'International Tribunal for the Law of the Sea and the Private Maritime Sector' (1999) 27(7) *Int'l Business Lawyer* 319 ff.

93 *M/V 'Saiga' (No. 2),* Judgment [1999] ITLOS Rep 10; *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile v European Community)*; *M/V 'Virginia G' (Panama v Guinea-Bissau)*.

94 The rules applicable to proceedings before the Tribunal are contained in the ITLOS Rules. Useful information on the way cases are handled by the Tribunal and on the manner in which applications and pleadings should be filed may be found in the Resolution on the Internal Judicial Practice of the Tribunal and in the Guidelines on the Preparation and Presentation of Cases, respectively.

95 See e.g. T Treves, 'The rules of the International Tribunal for the Law of the Sea' in Chandrasekhara Rao and Khan (n 76) 135–59; Chandrasekhara Rao and Gautier (n 76).

96 See e.g. the following articles of the ITLOS Rules: Art. 22 regarding the designation of a judge ad hoc by international organizations or other entities other than a State; Art. 57(2), relating to a request for clarification addressed to an international organization as to the scope of its competence in the subject matter of the dispute; and Arts 115–123 concerning the procedure applicable before the Seabed Disputes Chamber.

97 See ITLOS Rules, Art. 59(1), according to which '[t]he time-limits for each pleading shall not exceed six months'.

98 Pursuant to ITLOS Rules, Art. 97(1), 'any objection to the jurisdiction of the Tribunal or to the admissibility of the application, or other objection the decision upon which is requested before any further proceedings on the merits, shall be made in writing within 90 days from the institution of proceedings.' Compare with the Rules of the International Court of Justice (1978, as amended 5 Dec. 2000), Art. 79 para 1 (ICJ Rules), which requires that preliminary objections should be raised 'not later than three months after the delivery of the Memorial'.

99 See ITLOS Rules, Art. 69(1), which provides that the date of the opening of the hearing 'shall fall within a period of six months from the closure of the written proceedings unless the Tribunal is satisfied that there is adequate justification for deciding otherwise'.

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[100] ITLOS Rules, Art. 96.

[101] ITLOS Rules, Art. 97. Preliminary proceedings under the Rules implement UNCLOS, Art. 294 which request a court or tribunal provided for under UNCLOS, Art. 287 'to which an application is made in respect of a dispute referred to in article 297' to 'determine at the request of a party, or may determine *proprio motu*, whether the claim constitutes an abuse of legal process or whether prima facie it is well founded' (UNCLOS, Art. 294(1)).

[102] UNCLOS, Art. 187(a).

[103] UNCLOS, Art. 187(b).

[104] UNCLOS, Art. 187(c).

[105] UNCLOS, Art. 188(2)(b) states that 'if, at the commencement of or in the course of such arbitration, the arbitral tribunal determines, either at the request of a party or *proprio motu,* that its decision depends upon a ruling of the Seabed Disputes Chamber, the arbitral tribunal shall refer the question to the Seabed Disputes Chamber for such ruling'.

[106] See UNCLOS, Art. 188(2)(b).

[107] UNCLOS, Art. 187(1)(d).

[108] The prospective contractors must have 'been sponsored by a State as provided in article 153, paragraph 2(b), of the Convention'; 'duly fulfilled the conditions referred to in…article 4, paragraph 6', of Annex III to the Convention; and 'duly fulfilled the conditions…referred to in article 13, paragraph 2', of Annex III to UNCLOS, as amended by the 1994 Agreement (relating to the payment of a fee in an expected amount of US$ 250,000 (Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (1994 Agreement) (adopted 28 July 1994, applied provisionally 16 Nov. 1994, entered into force 28 July 1996), 1836 UNTS 3, see 1994 Agreement, Annex, s 1 para 6(a)(ii)).

[109] UNCLOS, Art. 187(1)(e).

[110] See also UNCLOS, Art. 168 para 2.

[111] UNCLOS, Art. 187(f).

[112] See, however, 1994 Agreement, s 6 (production policy), para 1(b) and (f), referring commercial disputes to the WTO dispute settlement mechanism.

[113]

> [C]laims that the application of any rules, regulations and procedures of the Authority in individual cases would be in conflict with the contractual obligations of the parties to the dispute or their obligations under this Convention, claims concerning excess of jurisdiction or misuse of power, and to claims for damages to be paid or other remedy to be given to the party concerned for the failure of the other party to comply with its contractual obligations or its obligations under this Convention.

On this matter, see L Caflisch, 'The settlement of disputes relating to activities in the international seabed area' in C Rozakis and C Stephanou (eds), *The New Law of the Sea* (Elsevier, 1983) 303–44.

[114] See e.g. J Akl, 'La procédure de prompte mainlevée du navire ou prompte libération de son équipage devant le Tribunal international du droit de la mer' (2001) *Annuaire du Droit de la Mer* 219–46; P Gautier, 'Urgent Proceedings before the International Tribunal for the Law of the Sea' (2009) 8 *Issues in Legal Scholarship*, <http://www.bepress.com/ils/iss11/art5> accessed 23 May 2014.

[115] See e.g. UNCLOS, Art. 73.

[116] In six cases, out of nine in total, proceedings were instituted on behalf of the flag State: *M/V 'Saiga' (Saint Vincent and the Grenadines v Guinea)*, Prompt Release, Judgment, [1997] ITLOS Rep

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16; *'Camouco' (Panama v France)*, Prompt Release, Judgment, [2000] ITLOS Rep 10; *'Monte Confurco' (Seychelles v France)*, Prompt Release, Judgment, [2000] ITLOS Rep 86; *'Grand Prince' (Belize v France)*, Prompt Release, Judgment, [2001] ITLOS Rep 17; *'Chaisiri Reefer 2' (Panama v Yemen)*, Order, 13 July 2001, [2001] ITLOS Rep 82; *'Juno Trader' (Saint Vincent and the Grenadines v Guinea-Bissau)*, Prompt Release, Judgment, [2004] ITLOS Rep 17.

117 See ITLOS Rules, Art. 110(2).

118 See UNCLOS, Arts 220(6) and (7), and 226(1)(b) and (c).

119 ITLOS Rules, Art. 113(3). On this matter, see the Guidelines concerning the posting of a bond or other financial security with the Registrar (available on the ITLOS website).

120 See e.g. S Rosenne, *Provisional Measures in International Law: The International Court of Justice and the International Tribunal for the Law of the Sea* (Oxford University Press, 2005); R Wolfrum, 'Provisional measures of the International Tribunal for the Law of the Sea' (1997) 37(3) *Indian J Int'l L* 420.

121 The following cases were submitted to ITLOS on the basis of UNCLOS, Art. 290(5): *Southern Bluefin Tuna*, Award, 4 Aug. 2000; *MOX Plant* [2001] ITLOS Rep 95; *Land Reclamation in and around the Straits of Johor (Malaysia v Singapore)*, Provisional Measures, Order, 8 Oct. 2003, [2003] ITLOS Rep 10; *ARA 'Libertad' (Argentina v Ghana)*, Provisional Measures, Order, 15 Dec. 2012, [2012] ITLOS Rep 332; *'Arctic Sunrise' (Kingdom of the Netherlands v Russian Federation)*, Provisional Measures, Order, 22 Nov. 2013. It may also be added that the request for the prescription of provisional measures in the *M/V 'Saiga' (No. 2)* case ([1999] ITLOS Rep 10) was initially instituted on the basis of UNCLOS, Art. 290(5) of UNCLOS, before being dealt with under Art. 290(1), further to a special agreement between the parties.

122 See *Land Reclamation in and around the Straits of Johor*, paras 67 and 68:

> 67. *Considering* that, under article 290, paragraph 5 of UNCLOS, the Tribunal is competent to prescribe provisional measures prior to the constitution of the Annex VII arbitral tribunal, and that there is nothing in article 290 of UNCLOS to suggest that the measures prescribed by the Tribunal must be confined to that period.
>
> 68. *Considering* that the said period is not necessarily determinative for the assessment of the urgency of the situation or the period during which the prescribed measures are applicable and that the urgency of the situation must be assessed taking into account the period during which the Annex VII arbitral tribunal is not yet in a position to 'modify, revoke or affirm those provisional measures' remain applicable beyond that period.

123 Pursuant to the time limits contained in UNCLOS, Annex VII, Art. 3, the constitution of the arbitral tribunal should be completed at the latest 104 days after the institution of the arbitral proceedings. Parties to a dispute may, however, agree to an extension of the deadline fixed in Annex VII. Once constituted, the arbitral tribunal would still have to meet to determine its own procedure and deal with administrative matters before being fully operational.

124

> The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.

125 See P Gautier, 'Mesures conservatoires, préjudice irréparable et protection de l'environnement' in *Liber Amicorum Jean-Pierre Cot* (Bruylant, 2009) 131–54.

126 So far ITLOS has not pronounced itself expressly on this question. It made, however, reference to this notion in the operative part of its judgment in *Land Reclamation in and around the Straits of Johor (Malaysia v Singapore)*, Provisional Measures, Order, 8 Oct. 2003, [2003] ITLOS Rep 28: 'Directs Singapore not to conduct its land reclamation in ways that might cause irreparable

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prejudice to the rights of Malaysia or serious harm to the marine environment, taking especially into account the reports of the group of independent experts.'

127 See *MOX Plant*, Order, 3 Dec. 2001, [2001] ITLOS Rep 105, operative provision 1:

> *Prescribes*…the following provisional measure under article 290, paragraph 5 of UNCLOS: Ireland and the United Kingdom shall cooperate and shall, for this purpose, enter into consultations forthwith in order to: (a) exchange further information with regard to possible consequences for the Irish Sea arising out of the commissioning of the MOX plant; (b) monitor risks or the effects of the operation of the MOX plant for the Irish Sea; (c) devise, as appropriate, measures to prevent pollution of the marine environment which might result from the operation of the MOX plant.

128 See *Land Reclamation in and around the Straits of Johor*, Order, 8 Oct. 2003, [2003] ITLOS Rep 28, operative provision 1(a):

> Malaysia and Singapore shall cooperate and shall, for this purpose, enter into consultations forthwith in order to: (a) establish promptly a group of independent experts with the mandate (i) to conduct a study, on terms of reference to be agreed by Malaysia and Singapore, to determine, within a period not exceeding one year from the date of this Order, the effects of Singapore's land reclamation and to propose, as appropriate, measures to deal with any adverse effects of such land reclamation….

129 See n 169.

130 See *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)*, ITLOS Case No. 17, Advisory Opinion of 1 Feb. 2011.

131 ITLOS Rules, Art. 131.

132 See ITLOS Rules, Art. 133(4).

133 See e.g. *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, ITLOS Case No. 17, Order 2010/3, 18 May 2010, in which the President of the Chamber decided that the Authority 'and the organizations invited as intergovernmental organizations to participate as observers in the Assembly of the Authority are considered likely to be able to furnish information on the questions submitted to the Seabed Disputes Chamber for an advisory opinion.'

134 See ITLOS Rules, Art. 133(3).

135 The same situation prevails at the ICJ. Faced with unsolicited information submitted to it, the ICJ has, however, issued directions on this matter (Practice Direction XII). According to this Practice Direction, documents presented by NGOs are not part of the case file but are 'treated as publications readily available and may accordingly be referred to by States and intergovernmental organizations presenting written and oral statements'. They are to be 'placed in a designated location in the Peace Palace' where they may be consulted by States and intergovernmental organizations presenting written or oral statements in the case.

136 See ITLOS Case No. 17, Advisory Opinion of 1 Feb. 2011, paras 13 and 14.

137 UNCLOS, Annex VI, Art. 21: 'The jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any agreement which confers jurisdiction on the Tribunal.'

138 As this is evidenced by the expression 'any matters' in UNCLOS, Art. 288(3) which covers both the contentious and advisory proceedings before the Seabed Disputes Chamber.

139 See, *contra*, T Treves, 'Introduction: Advisory Opinions under the Convention and the Rules of the Tribunal' in MH Nordquist and J Norton Moore (eds.), *Current Marine Environmental Issues and*

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the International Tribunal for the Law of the Sea (Martinus Nijhoff, 2001) 92.

140 As an illustration, it could be maintained that a joint commission instituted by an inter-State agreement relating to e.g. delimitation, fisheries, or pollution matters could be entrusted with the task of, inter alia, submitting a request for advisory opinion to ITLOS. Likewise, the Meeting of States Parties to the United Convention on the Law of the Sea, as a joint body of the parties to the Convention, could decide to address a request for an advisory opinion to ITLOS. Such a decision could be contained in a resolution adopted by the meeting, which would record the agreement between the States parties to submit to ITLOS a request for an advisory opinion.

141 ITLOS Rules, Art. 138(1).

142 *Western Sahara*, Advisory Opinion [1975] ICJ Rep 18, para 15.

143 *Western Sahara*, Advisory Opinion [1975] ICJ Rep 8, para 15.

144 *Legal consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 153, para 37.

145 *Mavrommatis Palestine Concessions* [1924] PCIJ Ser. A, No. 2, 11.

146 See ITLOS Rules, Arts 138(3) and 130(2).

147 In other words, the advisory opinion 'should not be tantamount to adjudicating on the very subject matter of [a] underlying concrete bilateral dispute'; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Separate Opinion of Judge Owada [2004] ICJ Rep 265, para 13.

148 *Western Sahara*, Advisory Opinion [1975] ICJ Rep 25, para 33.

149 See ITLOS Rules, Arts 130–7.

150 See n 44.

151 UNCLOS, Art. 298(1)(a):

> The Government of Australia further declares, under paragraph 1(a) of article 298 of the United Nations Convention on the Law of the Sea done at Montego Bay on the tenth day of December one thousand nine hundred and eighty-two, that it does not accept any of the procedures provided for in section 2 of Part XV (including the procedures referred to in paragraphs (a) and (b) of this declaration) with respect of disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations as well as those involving historic bays or titles.

152 More precisely, the declaration excludes from the jurisdiction of the Court 'any dispute concerning or relating to the delimitation of maritime zones, including the territorial sea, the exclusive economic zone and the continental shelf, or arising out of, concerning, or relating to the exploitation of any disputed area of or adjacent to any such maritime zone pending its delimitation'.

153 See the declaration of Canada of 10 May 1994, reproduced in *Fisheries Jurisdiction (Spain v Canada),* Jurisdiction of the Court, Judgment [1998] ICJ Rep 438–9:

> …(2) I declare that the Government of Canada accepts as compulsory *ipso* facto and without special convention, on condition of reciprocity, the jurisdiction of the International Court of Justice, in conformity with paragraph 2 of Article 36 of the Statute of the Court, until such time as notice may be given to terminate the acceptance, over all disputes arising after the present declaration with regard to situations or facts subsequent to this declaration, other than:…
>
> > *(d)* disputes arising out of or concerning conservation and management measures taken by Canada with respect to vessels fishing in the NAFO Regulatory Area, as defined in the Convention on Future Multilateral Co-operation in the Northwest Atlantic Fisheries, 1978, and the enforcement of such measures.

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[154] See e.g. *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment [2008] ICJ Rep 12; *Maritime Delimitation in the Black Sea (Romania v Ukraine)*, Judgment [2009] ICJ Rep 61.

[155] See e.g. *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)*, Judgment [2007] ICJ Rep 659; *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Judgment [2012] ICJ Rep 624; *Maritime Dispute (Peru v Chile)*, Judgment.

[156] Compare e.g. the ICJ Rules which provide only for the procedure of preliminary objections (Art. 79) with the ITLOS Rules which make a distinction between preliminary proceedings based on UNCLOS, Art. 294 (ITLOS Rules, Art. 96) and preliminary objections (ITLOS Rules, Art. 97).

[157] UNCLOS, Annex VII, Art. 3(e).

[158] See e.g. in 2009 as regards the dispute concerning the delimitation of the maritime boundary between Bangladesh and India in the Bay of Bengal and in 2011 with respect to the dispute between Mauritius and the United Kingdom of Great Britain and Northern Ireland concerning the 'marine protected area' related to the Chagos Archipelago.

[159] UNCLOS, Annex VII, Art. 3 (chapeau).

[160] UNCLOS, Annex VII, Art. 5.

[161] UNCLOS, Annex VII, Art. 11.

[162] UNCLOS, Annex VII, Art. 12(1).

[163] UNCLOS, Annex VII, Art. 12(2).

[164] UNCLOS, Annex VIII, Art. 1.

[165] UNCLOS, Annex VIII, Art. 2 (1):

> [I]n the field of fisheries by the Food and Agriculture Organization of the United Nations, in the field of protection and preservation of the marine environment by the United Nations Environment Programme, in the field of marine scientific research by the Intergovernmental Oceanographic Commission, in the field of navigation, including pollution from vessels and by dumping, by the International Maritime Organization.

[166] UNCLOS, Annex VIII, Art. 5(1).

[167] UNCLOS, Annex VIII, Art. 5(2).

[168] UNCLOS, Annex VIII, Art. 5(4).

[169] See e.g. FAO, Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (Rome, concluded 24 Nov. 1993, entered into force 24 Apr. 2003) 2221 UNTS 91 (FAO Compliance Agreement); Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 Dec. 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (New York, adopted 4 Dec. 1995, entered into force 11 Dec. 2001) 2167 UNTS 88 (FSA); 1996 Protocol to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London, opened for signature 7 Nov. 1996, entered into force 24 Mar. 2006) 36 ILM 1 (London Protocol); Framework Agreement for the Conservation of the Living Marine Resources on the High Seas of the South-Eastern Pacific (14 Aug. 2000) (2001) *Law of the Sea Bulletin* 70 (Galapagos Agreement); Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (Honolulu, 5 Sept. 2000) 2275 UNTS 43 (WCPT Convention); Convention on the Conservation and Management of Fishery Resources in the South-East Atlantic Ocean (Windhoek, 20 Apr. 2001, entered into force 13 Apr. 2003) 2221 UNTS 189 (SEAFO Convention); Convention on the Protection of the Underwater Cultural Heritage (Paris, 2 Nov. 2001, entered into force 2 Jan. 2009) (2002) 41 ILM 37 (CPUCH); Convention on Future Multilateral Cooperation in North-East Atlantic Fisheries (London, 18 Nov. 1980, entered into force 17 Mar. 1982, as amended on 12 Nov. 2004) 1285 UNTS 129 (NEAFC Convention); Southern

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Indian Ocean Fisheries Agreement (Rome, 7 July 2006, entered into force Mar. 2011); Nairobi International Convention on the Removal of Wrecks (18 May 2007) 46 ILM 697. Clauses may also be found in bilateral agreements; see e.g. Agreement of 20 Dec. 1996 between the Government of the Kingdom of Norway and the Government of the Kingdom of Belgium concerning the course of the 'NorFra' gas pipeline on the Belgian continental shelf; Exclusive Economic Zone Co-operation Treaty between the State of Barbados and the Republic of Guyana concerning the exercise of jurisdiction in their exclusive economic zones in the area of bilateral overlap within each of their outer limits and beyond the outer limits of the exclusive economic zones of other States (London, 2 Dec. 2003, entered into force 5 May 2004); Treaty on the Delimitation of the Maritime Frontier between the Republic of Cape Verde and the Republic of Senegal (17 Feb. 1993, entered into force 20 Mar. 1994). See also P Gautier, 'The International Tribunal for the Law of the Sea: Activities in 2008' (2009) 8 *Chinese J Int'l Law* 441.

170 See FAO Compliance Agreement, Art. IX para 3: '(3) Any dispute of this character not so resolved shall, with the consent of all Parties to the dispute, be referred for settlement to the International Court of Justice, to the International Tribunal for the Law of the Sea upon entry into force of the 1982 United Nations Convention on the Law of the Sea or to arbitration.'

171 See e.g. FSA; the WCPT Convention; CPUCH.

172 See Art. 7 of Treaty of 19 Sept. 2003 on the Delimitation of the Maritime Frontier between the Islamic Republic of Mauritania and the Republic of Cape Verde.

173 See e.g. Art. 15 paras 1 and 2 of the Nairobi International Convention on the Removal of Wrecks (18 May 2007): '(1) Where a dispute arises between two or more States Parties regarding the interpretation or application of this Convention, they shall seek to resolve their dispute, in the first instance, through negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice. (2) If no settlement is possible within a reasonable period of time not exceeding twelve months after one State party has notified another that a dispute exists between them, the provisions relating to the settlement of disputes set out in Part XV of the United Nations Convention on the Law of the Sea, 1982, shall apply mutatis mutandis, whether or not the States party to the dispute are also States Parties to the United Nations Convention on the Law of the Sea, 1982.'

174 See the SEAFO Convention (ad hoc expert panel); CPUCH (mediation by UNESCO); NEAFC Convention (ad hoc panel); 1996 London Protocol (arbitration); Galapagos Agreement (conciliation or technical arbitration body).

175 See Section 20.2.1(c)(ii).

176 As of 1 June 2014, there were 81 States parties to the FSA. Of the States parties to the FSA which are also parties to UNCLOS, only Canada made a specific declaration pursuant to FSA, Art. 30 in order to select arbitration. The United States, which is not party to UNCLOS, made a declaration in order to select a special arbitral tribunal.

177 The cases reported do not include requests for interpretation or revision of judgments previously rendered in law of the sea matters. Likewise, no reference is made to cases involving only an issue of sovereignty over a territory or an island (e.g. *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment [2002] ICJ Rep 625). See also Gautier (n 169).

178 1994: *Case Concerning Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria:* Equatorial Guinea intervening) [2002] ICJ Rep 303; 1991: *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)* [2001] ICJ Rep 40; 1988: *Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway)* [1993] ICJ Rep 38; 1986: *Case Concerning Land, Island and Maritime Frontier Dispute (El Salvador v Honduras:* Nicaragua intervening*)* [1992] ICJ Rep 351; 1982: *Case Concerning Continental Shelf (Libyan Arab Jamahiriya v Malta)* [1985] ICJ Rep 13; 1981: *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States)* [1984] ICJ Rep 246; 1978: *Case Concerning Continental Shelf (Tunisia v Libyan*

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Arab Jamahiriya) [1982] ICJ Rep 18.

179 1991: *Case Concerning Passage through the Great Belt (Finland v Denmark)* [1992] ICJ Rep 348.

180 *Case Concerning the Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau*, Decision, 14 Feb. 1985, (1985) 19 RIAA 149; *Case Concerning the Delimitation of Maritime Boundary between Guinea-Bissau and Senegal*, Decision, 31 July 1989, (1989) 20 RIAA 119; *Case Concerning the Delimitation of Maritime areas between Canada and France*, Decision, 10 June 1992, (1992) 21 RIAA 265.

181 *Case Concerning Filleting within the Gulf of St Lawrence between Canada and France*, Decision, 17 July 1986, (1986) 19 RIAA 2256.

182 1997: *M/V 'Saiga' (Saint Vincent and the Grenadines v Guinea)*, Prompt Release, Judgment, [1997] ITLOS Rep 16; 2000: *'Camouco' (Panama v France)*, Prompt Release, Judgment, [2000] ITLOS Rep 10; *'Monte Confurco' (Seychelles v France)*, Prompt Release, Judgment, [2000] ITLOS Rep 86; 2001: *'Grand Prince' (Belize v France)*, Prompt Release, Judgment, [2001] ITLOS Rep 17; *'Chaisiri Reefer 2' (Panama v Yemen)*, Order, 13 July 2001, [2001] ITLOS Rep 82; 2002: *'Volga' (Russian Federation v Australia)*, Prompt Release, Judgment, [2002] ITLOS Rep 10; 2004: *'Juno Trader' (Saint Vincent and the Grenadines v Guinea-Bissau)*, Prompt Release, Judgment, [2004] ITLOS Rep 17; 2007: *'Hoshinmaru' (Japan v Russian Federation)*, Prompt Release, Judgment, [2005–2007] ITLOS Rep 18; *'Tomimaru' (Japan v Russian Federation)*, Prompt Release, Judgment, [2005–2007] ITLOS Rep 74.

183 1999: *Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan)*, Provisional Measures, Order, 27 Aug. 1999, [1999] ITLOS Rep 280; 2001: *MOX Plant (Ireland v United Kingdom)*, Provisional Measures, Order, 3 Dec. 2001, [2001] ITLOS Rep 95; 2003: *Land Reclamation in and around the Straits of Johor* (*Malaysia v Singapore*), Provisional Measures, Order, 8 Oct. 2003, [2003] ITLOS Rep 10.

184 2000: *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile v European Union)*, Order, 16 Dec. 2009, [2008–2010] ITLOS Rep 13.

185 1998: *M/V Saiga (No. 2)* [1999] ITLOS Rep 10; 2010: *M/V 'Louisa' (Saint Vincent and the Grenadines v Kingdom of Spain)*, Judgment, 28 May 2003; 2011: *M/V 'Virginia G' (Panama/Guinea-Bissau)*, Judgment, 14 Apr. 2014.

186 2009: *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, [2012] ITLOS Rep 4.

187 2008: *Maritime Dispute (Peru v Chile*); 2004: *Maritime Delimitation in the Black Sea (Romania v Ukraine)*; 2003: *Sovereignty over Pedra Branca v Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v Singapore)*; 2001: *Territorial and Maritime Dispute (Nicaragua v Colombia)*; 1999: *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras).*

188 1995: *Fisheries Jurisdiction (Spain v Canada)*, Jurisdiction of the Court, Judgment, [1998] ICJ Rep 432.

189 2010: *Whaling in the Antarctic (Australia v Japan:* New Zealand intervening), Judgment, 31 Mar. 2014.

190 2004: *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them*, Decision, 11 Apr. 2006; (2006) 27 RIAA 147; *Arbitral tribunal constituted pursuant to Art. 287, and in accordance with Annex VII, of the United Nations Convention on the Law of the Sea in the matter of an arbitration between Guyana and Suriname*, Award, 17 September 2007, [2008] 47 ILM 164; 2009: *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India*, Award, 7 July 2014.

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[191] 1999: *Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan)*, Award, 4 Aug. 2000, (2000) 23 RIAA 1–57; 2001: *The MOX Plant case (Ireland v United Kingdom)*, PCA, Order No. 6 (termination of proceedings), 6 June 2008; 2003: *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v Singapore)* PCA, Award, 1 Sept. 2005; 2010: *The Republic of Mauritius v The United Kingdom of Great Britain and Northern Ireland.*

[192] 1996: Arbitration between Eritrea and Yemen, Award of 17 December 1999 in the second stage of the proceedings (maritime delimitation), (1999) 22 RIAA 335–410. 2009: *Arbitration between the Republic of Croatia and the Republic of Slovenia*.

[193] *Dispute concerning access to information under article 9 of the OSPAR Convention (Ireland v The United Kingdom of Great Britain and Northern Ireland)*, Award, 2 July 2003, (2006) 27 RIAA 59–151.

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