

THE  
INTERNATIONAL  
TRIBUNAL  
FOR THE LAW  
OF THE SEA

Law, Practice and Procedure

P. CHANDRASEKHARA RAO  
PHILIPPE GAUTIER

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ELGAR INTERNATIONAL LAW AND PRACTICE

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### 1. HISTORICAL BACKGROUND

#### A. From *Mare liberum* to the Geneva Conventions

The law of the sea has been an integral part of international law since the inception of the modern law of nations in the seventeenth century. Suffice to **1.001**

recall that one of the major writings of Hugo Grotius is entitled ‘*Mare Liberum*’ (The freedom of the seas).<sup>1</sup>

**1.002** The history of the law of the sea is also linked intimately to the development of peaceful mechanisms for the settlement of disputes.<sup>2</sup> ‘*Mare Liberum*’ – a chapter of Grotius’ ‘*De Iure Praedae Commentarius*’ (Commentary on the Law of Prize and Booty)<sup>3</sup> – was a brief written ‘to justify the capture by [a ship of the Dutch East India Company] of a Portuguese galleon in the straits of Malacca in the year 1602’.<sup>4</sup> The *Alabama Claims* arbitration (1872)<sup>5</sup> between the United States and the United Kingdom, which signalled to the world that arbitration was a viable alternative to war, concerned a compensation case for damages caused during the US civil war by confederate ships built in UK shipyards. Likewise, the first contentious case submitted to the Permanent Court of International Justice (PCIJ) (*S.S. Wimbledon* (1923)),<sup>6</sup> as also to the International Court of Justice (ICJ) (*Corfu Channel Case* (1949)),<sup>7</sup> was connected with law of the sea background.

**1.003** The codification of the law of the sea is the result of a long process which started with The Hague peace conferences of 1899 and 1907. As a result of these conferences, two conventions dealing with the law of maritime warfare were adopted: the 22 August 1899 Convention (Convention III)<sup>8</sup> for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention<sup>9</sup> – later replaced by The Hague Convention (Convention X) of 18 October

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1 First published anonymously in 1608, see J. Brown Scott, ‘Introductory Note’ to the English translation of H. Grotius, *The Freedom of the Seas or the Right Which Belongs to the Dutch to Take Part in the East Indian Trade* (New York, Oxford University Press, 1916) v.

2 See, inter alia, P. Chandrasekhara Rao, ‘Law of the Sea, Settlement of Disputes’, in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (Oxford, Oxford University Press, 2011) [opil.ouplaw.com/home/EPIL](http://opil.ouplaw.com/home/EPIL).

3 Written in 1603, first published in 1868 at The Hague by Martinus Nijhoff; see J Brown Scott, note 1, v.

4 Ibid., vi.

5 *Alabama claims of the United States of America against Great Britain*, 14 September 1892, XXIX, RIAA, 125–34. See also *Award between the United States and the United Kingdom relating to the rights of jurisdiction of United States in the Bering’s sea and the preservation of fur seals*, 15 August 1893, XXVIII RIAA, 263–76.

6 *S.S. “Wimbledon”, Judgment, 1923, P.C.I.J., Series A, No. 1.*

7 *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949, 4.*

8 Entered into force on 4 September 1900. Replaced by The Hague Convention (X) of 1907. See: <https://ihl-databases.icrc.org/ihl/INTRO/155?OpenDocument>

9 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 22 August 1864. Entered into force on 22 June 1865. Replaced by the Geneva Conventions of 1906, 1929 and 1949 on the same subject. See: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=477CEA122D7B7B3DC12563CD002D6603&action=openDocument>

1907<sup>10</sup> – and the 18 October 1907 Convention (Convention XII) relating to the Creation of an International Prize Court – which never entered into force.

The First United Nations Conference on the Law of the Sea (Geneva, 24 February to 27 April 1958) was able, for the first time, to produce a comprehensive set of rules contained in four separate treaties adopted on 29 April 1958: the Convention on the Territorial Sea and the Contiguous Zone;<sup>11</sup> the Convention on the High Seas;<sup>12</sup> the Convention on Fishing and Conservation of the Living Resources of the High Seas;<sup>13</sup> and the Convention on the Continental Shelf.<sup>14</sup> **1.004**

The Conference also adopted a mechanism for the settlement of disputes contained in a separate agreement: the Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes.<sup>15</sup> By means of this protocol – which constitutes a first attempt to provide for a compulsory mechanism in disputes relating to law of the sea matters – States could accept in advance that disputes arising out of these conventions – with the exception of some provisions of the 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas – would be submitted to the ICJ.<sup>16</sup> At present, 38 States are bound by the Optional Protocol with respect to one or more conventions. It may be observed, however, that no case has ever been submitted to the ICJ on the basis of this protocol. **1.005**

The Second UN Conference on the Law of the Sea which took place from 17 March to 26 April 1960 did not lead to any new convention. No agreement could be reached at the conference on the two issues that had not been agreed upon in Geneva in 1958, i.e., ‘the questions of the breadth of the territorial sea and the fishery limits’.<sup>17</sup> **1.006**

10 Entered into force on 26 January 1910. Replaced in 1949 by the Geneva Convention (II). See: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=E5397A0FB560D0A9C12563CD002D6832&action=openDocument>

11 Entered into force on 10 September 1964, 52 States are parties (516 UNTS 205).

12 Entered into force on 30 September 1962, 63 States are parties (450 UNTS 11).

13 Entered into force on 20 March 1966, 39 States are parties (559 UNTS 285).

14 Entered into force on 10 June 1964, 58 States are parties (499 UNTS 311).

15 Entered into force on 30 September 1962, 38 States are parties (450 UNTS 169).

16 Art. II of the Optional Protocol specifies that it does not apply to arts 4, 5, 6, 7 and 8 of the Convention on Fishing and Conservation of the Living Resources of the High Seas, to which conciliation is applicable on the basis of arts 9, 10, 11, and 12 of that Convention.

17 United Nations General Assembly Resolution 1307 (XIII) adopted on 10 December 1958 (‘Convening of a second United Nations conference on the law of the sea’), operative paragraph 1.

B. The Third United Nations Conference on the Law of the Sea (1973–1982)<sup>18</sup>

- 1.007** In 1967, in a visionary speech<sup>19</sup> before the UN General Assembly, Arvid Pardo, the then Permanent Representative of Malta to the UN, introduced a proposal on behalf of Malta<sup>20</sup> calling for the negotiation of a new treaty.
- 1.008** The objective of this new convention would be to ensure that the seabed and the ocean floor beyond the limits of national jurisdiction would not be subject to national appropriation, but would be reserved exclusively for peaceful purposes and that their resources would be ‘exploited primarily in the interests of mankind, with particular regards for the needs of poor countries’.<sup>21</sup> This initiative set into motion a process which would lead to the Third UN Conference on the law of the sea.
- 1.009** Initial discussions took place in 1967 in the ‘*Ad Hoc* Committee to Study the Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction’, established by the General Assembly in its resolution 2340 (XII) of 18 December 1967, and then, from 1969 to 1973, in the ‘Committee on the Peaceful Uses of the Seabed and Ocean Floor Beyond the Limits of National Jurisdiction’ (‘Seabed Committee’), established by the General Assembly in its resolution 2467 (XXIII) of 21 December 1968.
- 1.010** In the Seabed Committee, some States expressed ideas – inspired by the model of the Geneva Conventions – in favour of a piecemeal approach for dealing with disputes relating to different matters (such as seabed mining, fisheries, protection of the marine environment, marine scientific research, high seas, continental shelf, etc), while others proposed to set up a general mechanism for the settlement of law of the sea disputes. In this context, reference may be made to the position of the US which took a firm view that a system of compulsory settlement of disputes ought to remain as one of the ‘essential aspects of an overall comprehensive law of the sea settlement’.<sup>22</sup> At

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18 See A. Adede, *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea: A Drafting History and a Commentary* (Dordrecht/Boston/Lancaster, Martinus Nijhoff, 1987) 43–55.

19 See Official Records of the United Nations General Assembly, 22nd session, First Committee, 1515th meeting and 1516th meeting, 1 November 1967, in UN Docs A/C.1/PV.1515 and A/C.1/PV.1516.

20 The item proposed by Malta was entitled ‘Examination of the question of the reservation exclusively for peaceful purposes of the seabed and the ocean floor, and the subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction, and the use of their resources in the interest of mankind’.

21 Official Records of the United Nations General Assembly, 22nd session, First Committee, 1516th meeting, 1 November 1967, in UN Doc. A/C.1/PV.1516, 2.

22 Statement of Ambassador John R. Stevenson, Main Committee of the United Nations Seabed Committee, 22 August 1973, (1973) *Department of State Bulletin*, 414.

the last session of the Seabed Committee (2 July–24 August 1973), the US introduced a set of draft articles on the subject of compulsory dispute settlement.<sup>23</sup> In addition to providing for the use of diplomatic methods or arbitration for the settlement of disputes, the draft articles envisaged the establishment of a Law of the Sea Tribunal which, at the request of any contracting party, would be competent to hear those disputes which would be subject to compulsory settlement procedures.<sup>24</sup>

The draft articles proposed by the US triggered informal consultations during the second session of the Third UN Conference on the Law of the Sea, held in Caracas from 20 June to 29 August 1974. As a result, a group of States presented at the end of that session a working paper<sup>25</sup> on dispute settlement, including a draft Statute of the proposed tribunal. **1.011**

This paper served as a basis for further deliberations at the Conference's third session (Geneva, 17 March–9 May 1975)<sup>26</sup> which led to the presentation of an informal text by the President of the Conference,<sup>27</sup> containing draft provisions on the settlement of disputes and a draft Statute of a 'Law of the Sea Tribunal' composed of 15 members. **1.012**

At the same session, it was felt necessary to prepare a single document which could serve as a basis for negotiations and the Chairmen of the three Committees<sup>28</sup> were then requested by the Conference to 'each prepare a single **1.013**

23 'United States of America: draft articles for a chapter on the settlement of disputes (dated 21 August 1973)', UN Doc. A/AC.138/97, in Report of the Committee on the Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction, vol. II, General Assembly Official Records: 28th Session, Supplement No. 21 (A/9021) (United Nations, 1973) 22–3. See H. Gary Knight, 'United States Oceans Policy: Perspective 1974', (1973) 49 *Notre Dame Law Review*, 241.

24 Art. 2 of the draft articles provided that:

any Contracting Party which is a party to a dispute relating to the interpretation or application of this Convention which is required by this Convention to be submitted to compulsory dispute settlement procedures on the application of one of the parties, may refer the dispute at any time to the Law of the Sea Tribunal.

United States of America: draft articles, *ibid.*, 22.

25 See the working paper on the settlement of law of the sea disputes proposed by Australia, Belgium, Bolivia, Colombia, El Salvador, Luxembourg, Netherlands, Singapore and United States of America, in UN Doc. A/CONF.62/L.7 (27 August 1974), in United Nations Conference on the Law of the Sea, Official Records, vol. III, Documents of the Conference (United Nations, New York 1975) 85.

26 It was during this session in Geneva that a meeting took place during a weekend in Montreux, where the 'Montreux formula' on the choice of compulsory mechanisms (which was later inserted in art. 287 of the Convention) was designed.

27 UN Doc. A/CONF.62/WP.9, 21 July 1975, in R. Platzöder (ed.), *Third United Nations Conference on the Law of the Sea: Documents*, Vol. I (New York, Oceana, 1982) 53.

28 First Committee: territorial sea, contiguous zone, straits used for international navigation, continental shelf, exclusive economic zone, high seas, land-locked countries, shelf-locked States and States with narrow shelves

negotiating text covering the subjects entrusted to his Committee'.<sup>29</sup> Together these three texts constituted the Informal Single Negotiating Text (ISNT).<sup>30</sup> In this context, it may be noted that the informal text<sup>31</sup> prepared by the Chairman of the First Committee contained a proposal for the setting up of a special tribunal – distinct from the 'Law of the Sea Tribunal' referred to in the informal text of the President of the Conference – which would be competent to deal with matters relating to the activities in the Area and function 'as one of the principal organs of the proposed International Seabed Authority'.<sup>32</sup>

**1.014** During the fourth session in New York (15 March–7 May 1976), the question of the settlement of disputes was for the first time debated in the plenary of the Conference. At that session, general approval was found for the establishment of a Seabed Disputes Chamber within the proposed Law of the Sea Tribunal. On the basis of the plenary discussions, the President presented a revision of his informal text<sup>33</sup> which was considered by the plenary at the fifth session (New York, 2 August–17 September 1976). It was during the sixth session (New York, 23 May–17 July 1977) that the Conference produced a single document consolidating all draft articles of the proposed Convention: the Informal Composite Negotiating Text (ICNT). Part XV of the ICNT dealt with the system for the settlement of disputes under the Convention. The ICNT was subsequently revised to become in 1980, at the ninth session held in New York (3 March–4 April 1980), the Draft Convention on the Law of the Sea. At that session, the Conference adopted the name of the new tribunal set up by the Convention: the International Tribunal for the Law of the Sea. After ten years of intense multilateral negotiations, the text of the UN Convention for the Law of the Sea was adopted and opened to signature on 10 December 1982.

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or short coastlines, rights and interests of States with broad shelves, archipelagos, enclosed and semi-enclosed seas, artificial islands and installations, regime of islands. Third Committee: preservation of the marine environment; development and transfer of technology. See UN Doc. A/CONF.62/29, in Third UN Conference on the Law of the Sea, Official Records, Vol. III, Documents of the Conference (United Nations, New York, 1975) 59.

29 Third UN Conference on the Law of the Sea, Official Records, vol. IV, Summary Records of Meetings, 55th Plenary Meeting (United Nations, New York, 1975) 26, para. 92. See also M.H. Nordquist (ed.-in-chief), *United Nations Convention on the Law of the Sea, 1982 – A Commentary*, Vol. I (Dordrecht/Boston/London, Martinus Nijhoff, 1985) 115.

30 UN Doc. A/CONF.62/WP.8, Parts I–III, in Platzöder, note 27, 3–52.

31 UN Doc. A/CONF.62/WP.8/Part I, see arts 24 (*ibid.*, 7) and 32 (*ibid.*, 10–11).

32 Introductory note by the President of the Conference to UN Doc. A/CONF.62/WP.9, para. 2, Platzöder, *ibid.*, 53.

33 UN Doc. A/CONF.62/WP.9/Rev.1 (6 May 1976), Platzöder, *ibid.*, 77.

### C. The Convention and the 1994 Agreement

The 1982 UN Convention on the Law of the Sea<sup>34</sup> ('the Convention') **1.015** contains 320 articles and nine annexes. It covers a whole range of matters, including, in particular, the legal regime of the different maritime areas (territorial sea, archipelagic waters, contiguous zone, exclusive economic zone (EEZ), continental shelf, high seas, the 'seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction' (the 'Area'),<sup>35</sup> as well as their delimitation, the regulation of activities – and the exercise of jurisdiction relating thereto – taking place in the oceans (navigation, overflight, laying of submarine cables and pipelines, fishing, scientific research, exploration and exploitation of mineral resources and deep seabed mining), and the protection of the marine environment. In this regard, the Convention has often been qualified as 'a constitution for the oceans'.<sup>36</sup>

The Convention contains more than 100 articles dedicated to the settlement **1.016** of disputes relating to the interpretation or application of its provisions (Part XV). The drafters of the Convention considered that effective dispute settlement is essential to ensure compliance with the delicate compromises incorporated in the Convention.

The Convention contains a number of provisions (e.g., on the regime of the **1.017** territorial sea and the freedoms of the high seas) which are generally considered as reflecting customary international law. It also contains new regulations which have contributed to the further development of the international law of the sea. Major innovations relate to the regime of the Area in Part XI and of the EEZ (Part V), the notion of archipelagic States (Part XI), the regulation of marine scientific research as well as the reinforcement of obligations in the field of the protection and preservation of the marine environment (Part XII).

The regime applicable to the Area and its resources, declared the 'common **1.018** heritage of mankind',<sup>37</sup> did not meet, however, the approval of a majority of industrialized States. In order to address these difficulties, a negotiation process – largely informal – was undertaken. As a result, the Agreement relating to the Implementation of Part XI of the UN Convention on the Law of the Sea of 10 December 1982 ('the 1994 Agreement relating to the

34 1833 UNTS 3. Entered into force on 16 November 1994: 167 States and the European Union are parties.

35 Convention, art. 1, para 1 (1).

36 'A Constitution for the Oceans', Remarks by Tommy T.B. Koh (Singapore), President of the Third UN Conference on the Law of the Sea, text available at: [www.un.org/Depts/los](http://www.un.org/Depts/los)

37 Convention, art. 136.

implementation of Part XI'),<sup>38</sup> was adopted on 28 July 1994, nearly four months before the entry into force of the Convention on 16 November 1994.

#### D. Future developments

- 1.019** The Convention and the 1994 Agreement relating to the implementation of Part XI are not the only multilateral treaties concluded in the field of the law of the sea. Some specific matters, which are addressed in general provisions contained in the Convention, have been the subject of additional agreements supplementing the Convention. They include the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, adopted on 4 August 1995;<sup>39</sup> and the Convention on the Protection of the Underwater Cultural Heritage, adopted on 2 November 2001.<sup>40</sup>
- 1.020** In addition, several other treaties – multilateral and bilateral – deal with the law of the sea or maritime matters. They may, for example, concern shipping matters, such as the conventions adopted under the auspices of the International Maritime Organization (IMO),<sup>41</sup> or fishing activities, such as the conventions adopted by the Food and Agricultural Organization (FAO)<sup>42</sup> or the conventions setting up regional fisheries management organizations or arrangements.<sup>43</sup>
- 1.021** The law of the sea, as every other branch of international law, is subject to further evolution, depending on the evolving needs of the international community. As a recent development, reference may be made to Resolution A/RES/69/292 adopted on 19 June 2015 in which the General Assembly of the United Nations decided 'to develop an international legally binding

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38 1836 UNTS 3. Entered into force on 28 July 1996: 149 States and the European Union are parties.

39 2167 UNTS 3. Entered into force on 11 December 2001: 85 States and the European Union are parties.

40 (2002) 41 ILM 40. Entered into force on 2 January 2009: 58 States are parties.

41 See e.g., Nairobi International Convention on the Removal of Wrecks, 18 May 2007, IMO document LEG/CONF.16/19 of 23 May 2007.

42 See e.g., Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, 24 November 1993, (1994) 33 ILM 969; Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, 22 November 2009, text available at: [http://www.fao.org/fileadmin/user\\_upload/legal/docs/2\\_037t-e.pdf](http://www.fao.org/fileadmin/user_upload/legal/docs/2_037t-e.pdf).

43 See e.g., Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, 5 September 2000, (2001) 40 ILM 278; Convention on the Conservation and Management of Fishery Resources in the South-East Atlantic Ocean, 20 April 2001, (2002) 41 ILM 257; Convention on Future Multilateral Cooperation in North-East Atlantic Fisheries, 18 November 1980, as amended on 11 November 2004, Report of the 23rd Annual Meeting of NEAFC, 37–38; Southern Indian Ocean Fisheries Agreement, 7 July 2006, text available at: [www.fao.org/Legal/treaties/035t-e.htm](http://www.fao.org/Legal/treaties/035t-e.htm)

instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction'. With a view to the holding of an inter-governmental conference, the General Assembly, in the said resolution, has established an open-ended preparatory committee with the task of making 'substantive recommendations to the General Assembly on the elements of a draft text of an international legally binding instrument under the Convention'.

## 2. THE SYSTEM FOR THE SETTLEMENT OF DISPUTES CONCERNING LAW OF THE SEA MATTERS

This section gives an overview of the mechanisms that are available for the settlement of disputes in law of the sea matters. To that end, three issues will be considered. The first addresses the procedures set out in the three sections (section 1 (General provisions); section 2 (Compulsory procedures entailing binding decisions) and section 3 (Limitations and exceptions to applicability of section 2)) which compose Part XV of the Convention. The second refers to the procedures entailing binding decisions which are available outside the scope of the compulsory procedures under Part XV of the Convention. The third briefly examines how the settlement of law of the sea related disputes has been implemented in international practice. **1.022**

### A. Settlement of disputes under the Convention (Part XV)

#### (a) *General provisions (s. 1)*

##### (i) *Obligation to settle disputes by peaceful means (art. 279)*

Article 279 recalls the general principle enshrined in article 33, paragraph 1, of the UN Charter, according to which '[t]he parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice'. Thus, recourse to non-peaceful means for the settlement of any dispute is prohibited. It may be added that, in some instances, a specific obligation to negotiate with a view to the settlement of a dispute or of a category of disputes may be provided for under the Convention.<sup>44</sup> **1.023**

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<sup>44</sup> See e.g., arts 74, paras 1 and 3, and 83, paras 1 and 3, of the Convention.

(ii) *Settlement of disputes by any peaceful means chosen by the parties*  
(art. 280)

**1.024** The Convention does not prefer one peaceful means of dispute settlement over another; the parties to a dispute are given complete autonomy 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’.

**1.025** If the States Parties which are parties to a dispute concerning the interpretation or application of the Convention agree to seek settlement of their dispute by a peaceful means of their own choice, they are under an obligation to act in good faith to try to settle the disputes through the selected means. In this context, they may agree on a time-limit for reaching a settlement through the peaceful means of their choice.<sup>45</sup>

(iii) *Procedure where no settlement has been reached by the parties* (art. 281)

**1.026** If the parties have agreed to seek the settlement of their dispute by a peaceful means of their own choice, article 281 specifies that the procedures provided for in Part XV 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’<sup>46</sup> or, if the parties have agreed on a time-limit, upon the expiration of such time-limit.<sup>47</sup>

**1.027** Disagreement between the parties over whether or not the procedure chosen by them excludes any further procedure under Part XV of the Convention is a dispute which will be subject to the provisions included in Part XV.

(iv) *Obligations under general, regional or bilateral agreements* (art. 282)

**1.028** Under article 282, 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.

Thus, article 282 gives a residual role to section 2 of Part XV vis-à-vis other procedures entailing binding decisions agreed upon between the parties.

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<sup>45</sup> This is expressly contemplated under *ibid.*, art. 281, para. 2.

<sup>46</sup> *Ibid.*, art. 281, para. 1.

<sup>47</sup> See *ibid.*, art. 281, para. 2.

(v) *Obligation to exchange views (art. 283)*

Whenever a dispute arises under the Convention, article 283, paragraph 1, of the Convention requires the parties to the dispute to ‘proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means’ **1.029**

Under paragraph 2, the obligation to exchange views expeditiously also applies where a procedure for dispute settlement ‘has been terminated without a settlement or where a settlement has been reached and the circumstances require consultation regarding the manner of implementing the settlement’ **1.030**

Failure to comply with these requirements may invalidate recourse to compulsory procedures under section 2 of Part XV. **1.031**

(vi) *Conciliation (art. 284)*

In section 1, emphasis is placed on conciliation as one of the peaceful means available to States Parties. The procedure applicable to voluntary conciliation is given in article 284. Where the parties agree to submit a dispute to voluntary conciliation, they may do so in accordance with the procedure under Annex V, section 1, to the Convention or another conciliation procedure.<sup>48</sup> Once the dispute is submitted to conciliation, the proceedings may be terminated only in accordance with the agreed conciliation procedure, unless the parties otherwise agree.<sup>49</sup> **1.032**

(vii) *Application of section 1 to disputes submitted pursuant to Part XI (art. 285)*

Article 285 of the Convention makes it clear that section 1 of Part XV ‘applies to any dispute which pursuant to Part XI, section 5, is to be settled in accordance with procedures provided for in this Part’. It adds that ‘[i]f an entity other than a State Party [this includes state enterprises and natural or juridical persons conducting activities in the Area] is a party to such a dispute, [section 1] applies *mutatis mutandis*’. In other words, article 285 makes the means indicated in article 33, paragraph 1, of the Charter of the United Nations applicable to disputes relating to the Convention under Part XI, section 5, thereof, between non-State entities as well as between those entities and States. **1.033**

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48 See *ibid.*, art. 284, para. 1.

49 See *ibid.*, art. 284, para. 4.

(b) *Compulsory procedures entailing binding decisions*

(i) *Obligation to abide by a compulsory procedure entailing binding decisions for disputes arising out of the Convention*

**1.034** In international law, no case may be brought before an international court or tribunal without the consent of all concerned. However, States may agree, before a dispute arises, to submit any dispute among them to a compulsory mechanism. In this context, the Convention represents a remarkable achievement by setting up a compulsory mechanism for the settlement of certain categories of disputes. Article 286 specifies that, if no settlement has been reached by recourse to section 1, any dispute concerning the interpretation or application of the Convention shall 'be submitted at the request of any party to the dispute to the court or tribunal' having jurisdiction under section 2, subject to limitations and exceptions provided for under section 3.

**1.035** Section 2 of Part XV contains two principles: the obligation to abide by a compulsory procedure entailing binding decisions for disputes arising under the Convention, subject to the limitations and exceptions contained in section 3 of Part XV, and the freedom of States Parties to select their preferred procedure under article 287 of the Convention.

(ii) *Choice of procedure*

**1.036** The 'Montreux Compromise'<sup>50</sup> reached in 1975 during the Third UN Conference on the Law of the Sea made possible an agreement on the procedures for the settlement of disputes. It is embodied in article 287 which makes the following procedures available to States Parties: the International Tribunal for the Law of the Sea; the ICJ; arbitration; and special arbitration.<sup>51</sup>

**1.037** The choice of procedure is made by means of a written declaration deposited with the Secretary-General of the UN. A State may make a written declaration when signing, ratifying or acceding to the Convention or 'at any time thereafter'.<sup>52</sup> An international organization which is party to the Convention may also make such a declaration '[a]t the time of deposit of its instrument of formal confirmation or of accession, or at any time thereafter'.<sup>53</sup> At present,

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50 See e.g., S. Rosenne, 'UNCLOS III – The Montreux (Riphagen) Compromise, Realism in Law-Making' in A. Bos and H. Siblesz (eds), *Realism in Law-Making: Essays on International Law in Honour of Willem Riphagen* (Dordrecht/Boston/Lancaster, Martinus Nijhoff, 1986) 169–78.

51 The Statute of the Tribunal is contained in Annex VI to the Convention. Arbitration under the Convention is regulated by Annex VII. Annex VIII 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).

52 Art. 287, para. 1, of the Convention.

53 Art. 7, para. 1, of Annex IX to the Convention.

the European Union is the only international organization which has become party to the Convention.

A declaration under article 287 does not affect the jurisdiction of the Seabed Disputes Chamber of the Tribunal as provided for in Part XI, section 5, of the Convention.<sup>54</sup> Nor does it alter the residual compulsory jurisdiction of the Tribunal or its Seabed Disputes Chamber in regard to the prescription of provisional measures under article 290, paragraph 5, of the Convention or the prompt release of vessels and crews under article 292 of the Convention. **1.038**

Pursuant to article 287, paragraph 4, '[i]f 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'. **1.039**

In the absence of declarations made by the parties to a dispute, or if the declarations made by them do not select the same forum, the dispute may be submitted to arbitration under Annex VII, unless the parties agree otherwise. Arbitration under Annex VII is therefore the default procedure under the Convention and this results from article 287, paragraphs 3 and 5. Paragraph 3 provides that a State Party which is a party to a dispute not covered by a declaration in force is deemed to have accepted arbitration in accordance with Annex VII. Under paragraph 5, when the parties to a dispute 'have not accepted the same procedure', the dispute 'may be submitted only to arbitration in accordance with Annex VII'. **1.040**

Paragraphs 6 and 7 of article 287 contain provisions 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'. Pursuant to paragraph 7, '[a] new declaration, a notice of revocation or the expiry of a declaration does not in any way affect proceedings pending before a court or tribunal having jurisdiction under this Article, unless the parties otherwise agree'. **1.041**

As of 1 March 2017, 55<sup>55</sup> States had made declarations under article 287,<sup>56</sup> which represents slightly less than one-third of the number of the parties (168) **1.042**

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54 See *ibid.*, art. 287, para. 2.

55 The number is further reduced to 48 if we take out three declarations which do not select any forum. See the declarations of Algeria, Cuba and Guinea-Bissau, whose object is to exclude the choice of the ICJ or to require the prior consent of all parties concerned before a case may be submitted to the ICJ.

56 Algeria, Angola, Argentina, Australia, Austria, Bangladesh, Belarus, Belgium, Bulgaria, Cabo Verde, Canada, Chile, Croatia, Cuba, Democratic Republic of the Congo, Denmark, Ecuador, Egypt, Estonia, Fiji,

to the Convention. Up to now, the Tribunal has been selected by 40 States,<sup>57</sup> the ICJ by 27,<sup>58</sup> arbitration by ten<sup>59</sup> and special arbitration by 11 States Parties.<sup>60</sup>

**1.043** To some extent, the system set out in article 287 of the Convention is comparable to the optional mechanism under article 36, paragraph 2, of the Statute of the ICJ. The two systems differ, however, on some points. Unlike the Statute of the ICJ, proceedings may be instituted under the Convention even in the absence of a declaration under article 287. In this case, arbitration becomes compulsory. In addition, reservations may be made by States to the declarations by which they accept the jurisdiction of the ICJ while no reservation may be made to the Convention,<sup>61</sup> with the exception of optional exceptions expressly permitted by article 298 of the Convention.

**1.044** From the limited number of declarations made under article 287, it may be inferred that in a majority of cases arbitration under Annex VII becomes compulsory. As regards the other fora referred to under article 287, it may be noted that no case has yet been submitted to the ICJ on the basis of declarations under article 287, and that, from among the 23 contentious cases submitted so far to the Tribunal, only three were submitted to it on the basis of declarations made under article 287 of the Convention.<sup>62</sup> It may be added that, even when arbitration under Annex VII is mandatory, parties may, after

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Finland, Germany, Greece, Guinea-Bissau, Honduras, Hungary, Italy, Latvia, Lithuania, Madagascar, Mexico, Montenegro, Netherlands, Nicaragua, Norway, Oman, Panama, Portugal, Russian Federation, Saint Vincent and the Grenadines, Slovenia, Spain, Sweden, Switzerland, Timor-Leste, Trinidad and Tobago, Tunisia, Ukraine, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, Uruguay.

57 Angola, Argentina, Australia, Austria, Bangladesh, Belarus, Belgium, Bulgaria, Cabo Verde, Canada, Chile, Croatia, Democratic Republic of the Congo, Ecuador, Estonia, Fiji, Finland, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Madagascar, Mexico, Montenegro, Netherlands, Oman, Panama, Portugal, Russian Federation, Saint Vincent and the Grenadines, Spain, Switzerland, Timor-Leste, Trinidad and Tobago, Tunisia, Ukraine, United Republic of Tanzania, Uruguay.

The declaration accepting the jurisdiction of the Tribunal made on 4 November 2009 by Myanmar was later withdrawn through a declaration transmitted to the Secretary-General of the United Nations on 14 January 2010 (see *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, ITLOS Reports 2012, 12, para. 8).

58 Australia, Austria, Belgium, Cabo 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, United Kingdom of Great Britain and Northern Ireland.

59 Belarus, Canada, Egypt, Germany, Portugal, Russian Federation, Slovenia, Timor-Leste, Tunisia, Ukraine.

60 Argentina, Austria, Belarus, Chile, Ecuador, Hungary, Mexico, Portugal, Russian Federation, Timor-Leste, Ukraine.

61 See art. 309 of the Convention: 'No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention.'

62 *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)*, note 57, 4; *M/V 'Louisa' (St Vincent and the Grenadines v. Kingdom of Spain)*, Judgment, ITLOS Reports 2013, 4; and *M/V 'Norstar'*

the institution of arbitral proceedings, agree to transfer the dispute to another forum for adjudication. In five cases, such a transfer took place.<sup>63</sup>

(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, and to optional exceptions set out in article 298. Article 299 makes it clear, however, that disputes ‘excluded under article 297 or excepted by a declaration made under article 298 from the dispute settlement procedures provided for in section 2’<sup>64</sup> may nevertheless be submitted to such procedures by agreement of the parties to the dispute. **1.045**

(i) *Limitations on applicability of section 2 (art. 297)*

Article 297, paragraph 1, begins by setting out several categories of disputes relating to the exercise by a coastal State of its sovereign rights or jurisdiction provided for in the Convention which are subject to the procedures under section 2.<sup>65</sup> Paragraph 2 of article 297 provides that the coastal State is not obliged to accept the procedures under section 2 for disputes regarding marine scientific research arising out of ‘(i) the exercise by the coastal State of a right or discretion in accordance with article 246; or (ii) a decision by the coastal State to order suspension or cessation of a research project in accordance with article 253’. Paragraph 3 provides that the coastal State is not obliged to accept the procedures under section 2 for disputes ‘relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise’. **1.046**

Disputes excluded from the compulsory mechanism of section 2 by virtue of article 297, paragraphs 2 or 3, are subject to a residual mechanism. Provision is **1.047**

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(*Panama v. Italy*), see the application instituting proceedings submitted to the Tribunal on 17 December 2015, available on the website of the Tribunal.

63 *M/V ‘SAIGA’ (No. 2) (St Vincent and the Grenadines v. Guinea); Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Union); Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar); M/V ‘Virginia G’ (Panama/Guinea-Bissau); Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d’Ivoire).*

64 Convention, art. 299, para. 1.

65 *Ibid.*, art. 297, para. 1, refers to the following cases:

- (a) 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;
- (b) when it is alleged that a State in exercising the aforementioned freedoms, rights or uses has acted in contravention of this Convention or of laws or regulations adopted by the coastal State in conformity with this Convention and other rules of international law not incompatible with this Convention; or
- (c) 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 which are applicable to the coastal State and which have been established by this Convention or through a competent international organization or diplomatic conference in accordance with this Convention.

made in article 297, paragraphs 2 (b) and 3 (b), for compulsory recourse to conciliation under Annex V, section 2:

- in regard to a dispute arising from an allegation by a researching State that with respect to a specific marine scientific project the coastal State is not exercising its rights under articles 246 and 253 in a manner compatible with the Convention;<sup>66</sup> and
- in regard to allegations of manifest failure by a coastal State to comply with its obligations or of arbitrary action on its part with respect to the living resources in its exclusive economic zone.<sup>67</sup>

**1.048** The recommendations of the conciliation commission are not, however, binding.<sup>68</sup> A disagreement as to whether a conciliatory commission has jurisdiction 'shall be decided by the commission'.<sup>69</sup>

(ii) *Optional exceptions to applicability of section 2 (art. 298)*

**1.049** Pursuant to article 298, States Parties may, without prejudice to the obligations arising under section 1, declare in writing that they do 'not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes':

- 'disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles';<sup>70</sup>
- disputes relating to military activities 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';<sup>71</sup>
- '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'.<sup>72</sup>

These declarations may be made upon signature or at any time thereafter and are to be deposited by States Parties with the Secretary-General of the United Nations.<sup>73</sup>

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66 See *ibid.*, art. 297, para. 2(b).

67 See *ibid.*, art. 297, para. 3(b).

68 See *ibid.*, arts 7, para. 2, and 14 of Annex V.

69 See *ibid.*, art. 13 of Annex V.

70 *Ibid.*, art. 298, para. 1(a)(i).

71 *Ibid.*, art. 298, para. 1(b).

72 *Ibid.*, art. 298, para. 1(c).

73 *Ibid.*, art. 298, para. 6.

As of 1 March 2017, 37 States<sup>74</sup> have made declarations with respect to all categories referred to in article 298 or with respect to some of them. Some States Parties restrict the scope of the limitations to a specific forum only<sup>75</sup> or declare that the disputes referred to in article 298 may only be submitted to a specific body.<sup>76</sup> **1.050**

When a State has made a declaration under article 298 in order to exclude delimitation disputes from the compulsory jurisdiction under Part XV, no court will be available to deal with this matter, except where the parties otherwise agree. That said, declarations under article 298 do not exempt States Parties from all obligations. Article 298, paragraph 1, states clearly that States Parties are still bound by the obligations ‘arising under section 1’ to settle disputes peacefully. The effect of this obligation is to oblige the States concerned to observe a certain restraint in the sense that they should avoid taking unilateral actions which could aggravate the dispute. **1.051**

When a State makes a declaration that it does not accept any one or more of the procedures in section 2 with respect to disputes relating to sea boundary delimitations or those involving historic bays or titles,<sup>77</sup> it shall: **1.052**

when such a dispute arises subsequent to the entry into force of [the] 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, accept submission of the matter to conciliation under Annex V, section 2; ... provided ... that 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.<sup>78</sup>

It may be noted that, in 2016, for the first time, recourse was taken to compulsory conciliation under Annex V of the Convention, on the basis of article 298 of the Convention, in a dispute between Timor-Leste and Australia.<sup>79</sup> **1.053**

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

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

76 In its declaration, Nicaragua only recognizes the competence of the ICJ with respect to disputes under art. 298.

77 See Convention, art. 298, para. 1(a)(i).

78 Ibid., art. 298, para. 1(a)(i).

79 The conciliation procedure was initiated by Timor-Leste on 11 April 2016 by way of a ‘Notification Instituting Conciliation Under Section 2 of Annex V of UNCLOS’ addressed to Australia pursuant to

**1.054** In the event that no solution can be found on the basis of the report of the conciliation commission, 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’.

(iii) *Right of the parties to agree upon a procedure (art. 299)*

**1.055** Disputes excluded by article 297 of the Convention or excepted, by a declaration made under article 298, from the compulsory procedures provided for in Part XV, section 2, may be submitted to such procedures ‘only by agreement of the parties to the dispute’. The parties are, however, free to agree to some other procedure for the settlement of such disputes or to reach an amicable settlement.

**B. Mechanisms entailing binding decisions outside the scope of the compulsory procedures under section 2 of Part XV**

**1.056** The Convention is by no means a complete code on the subject of settlement of law of the sea disputes. Article 280 of the Convention even recognizes the right of States Parties to agree to settle their disputes ‘by any peaceful means of their own choice’.

**1.057** In this context, it is important to bear in mind that disputes relating to law of the sea matters – including matters regulated by the Convention – may be submitted to a court or tribunal on a basis other than the compulsory mechanism contained in section 2 of Part XV. Parties to a dispute may, for example, agree that it will be submitted to an arbitral tribunal which will not be constituted under Annex VII or Annex VIII and which will be subject to the terms contained in the special agreement.

**1.058** Binding procedures may also be available under existing agreements for the settlement of disputes, such as the 1948 Revised General Act for the Pacific Settlement of International Disputes;<sup>80</sup> the Pact of Bogotá (1948 American Treaty on Pacific Settlement);<sup>81</sup> the 1957 European Convention for the Peaceful Settlement of Disputes, as well as on the basis of optional clause declarations under article 36, paragraph 2, of the Statute of the ICJ.<sup>82</sup>

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art. 298 and Annex V to the Convention: Permanent Court of Arbitration, Press Release dated 29 July 2016, available at: <https://pcacases.com/web/sendAttach/1813>.

<sup>80</sup> 71 UNTS 101.

<sup>81</sup> Signed on 30 April 1948, entered into force on 6 May 1949, 30 UNTS 84.

<sup>82</sup> It may be noted that, before the adoption of the Convention, the PCIJ and the ICJ had decided a number of cases involving law of the sea matters; in addition to the decisions already referred to (*supra*, Ch. 1, 1, A.), see e.g., *the ‘Lotus’, Judgment No. 9, 1927, P.C.I.J., Series A, No. 10; Fisheries (United Kingdom v. Norway)*,

It should be noted that the jurisdictional links referred to above are not necessarily limited to sea-related matters. They may be applicable with respect to a dispute involving issues which fall outside the scope of the compulsory mechanism under section 2 of Part XV, e.g. in the case of a dispute centred on the question of sovereignty over an island. **1.059**

(a) *Law of the sea disputes and the ICJ*

A few comments may be made regarding the role of the ICJ in the settlement of disputes under the Convention in light of its involvement in a number of cases involving law of the sea issues. **1.060**

Since the entry into force of the Convention, 13 contentious cases<sup>83</sup> involving law of the sea matters have been brought to the Court. Although the ICJ is one of the fora referred to by article 287 of the Convention, none of these cases was submitted on the basis of declarations made under this provision. **1.061**

Out of these 13 cases, three were based on declarations made under article 36, paragraph 2, of the Court's Statute,<sup>84</sup> five on article XXXI of the Pact of Bogotá,<sup>85</sup> two on declarations under article 36, paragraph 2, together with article XXXI of the Pact of Bogotá,<sup>86</sup> two on a special agreement,<sup>87</sup> and one on a bilateral agreement.<sup>88</sup> **1.062**

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*Judgment, I.C.J. Reports 1951, 116; North Sea Continental Shelf (Federal Republic of Germany/Netherlands; Federal Republic of Germany/Denmark), Judgment, I.C.J. Reports 1969, 3; Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974, 3; Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, Judgment, I.C.J. Reports 1974, 175.*

83 *Fisheries Jurisdiction (Spain v. Canada); Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia); Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras); Territorial and Maritime Dispute (Nicaragua v. Colombia); Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore); Maritime Delimitation in the Black Sea (Romania v. Ukraine); Maritime Dispute (Peru v. Chile); Whaling in the Antarctic (Australia v. Japan: New Zealand intervening); Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile); Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia); Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia); Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua); Maritime Delimitation in the Indian Ocean (Somalia v. Kenya).*

84 *Fisheries Jurisdiction (Spain v. Canada); Whaling in the Antarctic (Australia v. Japan: New Zealand intervening); Maritime Delimitation in the Indian Ocean (Somalia v. Kenya).*

85 *Territorial and Maritime Dispute (Nicaragua v. Colombia); Maritime Dispute (Peru v. Chile); Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile); Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia); Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia).*

86 *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras); Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua).*

87 *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia); Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore).*

88 *Maritime Delimitation in the Black Sea (Romania v. Ukraine).*

**1.063** With respect to States Parties to a dispute relating to the Convention, which have accepted the jurisdiction of the ICJ under article 287 of the Convention as well as under article 36, paragraph 2, of the Court's Statute, proceedings may be instituted before the Court on the basis of either its Statute or the provisions of the Convention. In these circumstances, a State willing to avoid the submission of certain law of the sea disputes to the ICJ will have to make a declaration under article 298 of the Convention and a reservation to its declaration under the Court's Statute.<sup>89</sup>

**1.064** That said, the two different systems – under the Convention and under the Court's Statute – do not offer similar options regarding the possibility of excluding from their scope certain categories of disputes. Under the Convention, this option is limited to the categories of disputes expressly identified under article 298 of the Convention, while the possibility of making reservations is more widely available under article 36 of the Statute of the Court.<sup>90</sup> It may be added that these different bases of jurisdiction function in parallel. In this context, a question may arise as to whether a State Party to the Convention which, through a declaration under article 298, has excluded delimitation disputes from the scope of Part XV may still be faced with proceedings before the ICJ if it has accepted the jurisdiction of the Court on the basis of article 36, paragraph 2, of the Court, without making a reservation excluding the same category of disputes from the Court's jurisdiction.<sup>91</sup>

*(b) Dispute settlement mechanisms under agreements other than the Convention*

**1.065** The Convention co-exists with other international agreements – either bilateral or multilateral – relating to law of the sea matters.

**1.066** A number of multilateral agreements relating to law of the sea matters<sup>92</sup> apply *mutatis mutandis* the mechanism contained in Part XV of the Convention to

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89 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 art. 298, para. 1(a), of the Convention with a view to excluding disputes relating to maritime boundaries from the application of the compulsory mechanism under s. 2 of Pt XV, and a second declaration was made under art. 36, para. 2, of the Statute of the ICJ to exclude from the jurisdiction of the Court 'any dispute concerning or relating to the delimitation of maritime zones'.

90 For example, the kind of reservation made by Canada under art. 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, could not be done pursuant to Part XV of the Convention. Art. 298, para. 1(b), of the Convention 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.

91 On this issue, see the ICJ's Order of 18 May 2017 in the *Jadhav Case (India v. Pakistan)*, Request for the Indication of Provisional Measures, in particular paras 22–26; text available on the website of the ICJ.

92 See: Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and

the settlement of disputes relating to their application, whether or not parties to these agreements are also parties to the Convention.<sup>93</sup> Sometimes, these agreements introduce variations as regards the application of Part XV of the Convention. For example, agreements may specify that Part XV constitutes a mandatory mechanism only in the absence of an agreement between the parties to submit the dispute to another mechanism,<sup>94</sup> or provide for the submission of the dispute to a specific procedure (arbitration, conciliation or ‘technical arbitration body’), unless the parties agree to submit the dispute to one of the fora listed in article 287, paragraph 1, of the Convention.<sup>95</sup>

Some agreements simply refer to diplomatic means without providing for a compulsory procedure entailing binding decisions,<sup>96</sup> or do not provide for any mechanism at all for the settlement of disputes.<sup>97</sup> In these instances, a dispute arising out of such an agreement could also relate to the violation of provisions of the Convention. In that case, proceedings may be instituted under Part XV of the Convention. Pursuant to article 293, paragraph 1, of the Convention, the competent judicial or arbitral forum could then apply the Convention as well as the provisions of the agreement. It has been argued, however, that, in the case of an agreement providing for a diplomatic mechanism, a dispute relating to both that agreement and the Convention should be subject to the diplomatic mechanism agreed by the parties – as *lex specialis* – instead of being

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Highly Migratory Fish Stocks, 4 August 1995, 2167 UNTS 3 (‘Fish Stocks Agreement’); Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, 5 September 2000, (2001) 40 ILM 278; Convention on the Conservation and Management of Fishery Resources in the South-East Atlantic Ocean, 20 April 2001, (2002) 41 ILM 257; Convention on the Protection of the Underwater Cultural Heritage, 2 November 2001, (2002) 41 ILM 40; Convention on Future Multilateral Cooperation in North-East Atlantic Fisheries, 18 November 1980, as amended on 11 November 2004; Report of the 23rd Annual Meeting of NEAFC, 37–8; Southern Indian Ocean Fisheries Agreement, 7 July 2006, [www.fao.org/Legal/treaties/035t-e.htm](http://www.fao.org/Legal/treaties/035t-e.htm); Nairobi International Convention on the Removal of Wrecks, 18 May 2007, IMO Doc. LEG/CONF.16/19 of 23 May 2007.

93 See, e.g., Fish Stocks Agreement, note 92, 2167 UNTS 3.

94 See the Convention on the Conservation and Management of Fishery Resources in the South-East Atlantic Ocean, 20 April 2001 (ad hoc expert panel), Convention on the Protection of the Underwater Cultural Heritage, 2 November 2001 (mediation by UNESCO) or Convention on Future Multilateral Cooperation in North-East Atlantic Fisheries, 18 November 1980, as amended on 11 November 2004 (ad hoc panel).

95 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972, 7 November 1996 (arbitration), (1997) 36 ILM 7; Framework Agreement for the Conservation of the Living Marine Resources on the High Seas of the South-Eastern Pacific, 14 August 2000 (conciliation or ‘technical arbitration body’), (2001) 45 Law of the Sea Bulletin, DOALOS (United Nations, New York) 70–78.

96 See, e.g., art. 16(1)–(2) of the Convention for the Conservation of Southern Bluefin Tuna of 10 May 1993 (1819 UNTS 360) (CCSBT 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.’

97 See, e.g., International Convention for the Regulation of Whaling of 2 December 1946 (161 UNTS 72); International Convention for the Conservation of Atlantic Tunas of 14 May 1966 (673 UNTS 63).

submitted to the procedure under section 2 of Part XV of the Convention. Under this approach, it would then have to be determined whether, by agreeing to follow a specific procedure, different from the procedure under Part XV, the parties to the dispute had intended to exclude any recourse to Part XV. If this were the case, pursuant to article 281 of the Convention, the parties would be deprived of having recourse to section 2 of Part XV in case the diplomatic procedure fails.<sup>98</sup>

- 1.068** Finally, other agreements contain clauses providing for the submission of disputes relating to their application to an international court or arbitral tribunal.<sup>99</sup> Reference may be made to the *Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention between Ireland and the United Kingdom of Great Britain and Northern Ireland*, which was dealt with by an arbitral tribunal constituted pursuant to the provision for the settlement of disputes contained in article 32 of the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention).<sup>100</sup>
- 1.069** Difficulties may arise where two dispute settlement procedures entailing binding decisions – one under the Convention and the other under another agreement – run in parallel in respect of different aspects of the same dispute.
- 1.070** In this context, a distinction may be made between two situations.

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98 This is the reasoning followed by the arbitral tribunal constituted to deal with the *Southern Bluefin Tuna Case (New Zealand v. Japan; Australia v. Japan)*; see *infra*, Ch. 3, 4, F. (b).

99 See, e.g., art. 10 of the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78):

Any dispute between two or more Parties to the Convention concerning the interpretation or application of the present Convention shall, if settlement by negotiation between the Parties involved has not been possible, and if these Parties do not otherwise agree, be submitted upon request of any of them to arbitration as set out in Protocol II to the present Convention.

See also art. 32, para. 1, of the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention):

Any disputes between Contracting Parties relating to the interpretation or application of the Convention, which cannot be settled otherwise by the Contracting Parties concerned, for instance by means of inquiry or conciliation within the Commission, shall at the request of any of those Contracting Parties, be submitted to arbitration under the conditions laid down in this Article.

Text available at: <http://www.ospar.org/convention>. See also the treaty of 17 February 1993 on the delimitation of the maritime frontier between the Republic of Cape Verde and the Republic of Senegal (1776 UNTS 322–326).

100 *Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention between Ireland and the United Kingdom of Great Britain and Northern Ireland*, Final Award, Decision of 2 July 2003, XXIII RIAA 59–151.

The first relates to separate cases relating to law of the sea matters. Reference may be made to the MOX Plant dispute between Ireland and the UK which triggered two different proceedings: arbitral proceedings under the OSPAR Convention on the basis of an alleged breach of article 9 on exchange of information and arbitral proceedings under Part XV of the Convention on the basis of an alleged breach of, inter alia, article 197 of the Convention, relating to the duty to cooperate. In June 2001, Ireland first requested the constitution of an arbitral tribunal under article 32 of the OSPAR Convention<sup>101</sup> before instituting arbitral proceedings under Part XV of the Convention in October 2001.<sup>102</sup> **1.071**

In such a case, it may be appropriate for each forum to carefully delimit the dispute submitted to it under the respective treaty, in order to avoid conflicting decisions. **1.072**

A different situation will arise in the case where the same factual background leads to two disputes relating to different matters, one concerning the law of the sea and submitted to the compulsory mechanism under Part XV, section 2, of the Convention, and the other relating to another legal matter and submitted to a compulsory mechanism under another international treaty. **1.073**

The Swordfish dispute between Chile and the EU is an example in this regard. After the EU brought the matter regarding the prohibition on unloading of swordfish in Chilean ports before the WTO Dispute Settlement Body for alleged violation of article VI and XI of the 1994 GATT,<sup>103</sup> Chile instituted arbitral proceedings under the Convention, alleging the breach by the EU of articles 64 (duty to cooperate to ensure conservation of highly migratory species) and 116–119 (conservation and management of the living resources of the high seas) of the Convention. The arbitral proceedings were later transferred to a special chamber of the Tribunal on the basis of an agreement between the parties.<sup>104</sup> **1.074**

In this case, in principle the situation could be divided into ‘self-contained’ or ‘distinct’ disputes which could be dealt with by different adjudicating bodies. It may, however, happen that the adjudicating body concerned, in handling the **1.075**

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101 Ibid.

102 *The MOX Plant Case (Ireland v. United Kingdom)*, Order N°6 of 6 June 2008, [www.pca-cpa.org/showpage.asp?pag\\_id=1288](http://www.pca-cpa.org/showpage.asp?pag_id=1288).

103 *Chile – Measures affecting the Transit and Importing of Swordfish*, DS193, see the joint communication from the EU and Chile on the termination of proceedings in WT/DS193/4 G/L/367/Add.1, of 3 June 2010.

104 *Conservation and Sustainable Exploitation of Swordfish Stocks (Chile/European Community)*, Order of 20 December 2000, ITLOS Reports 2000, 148.

dispute submitted to it, could be called upon to adjudicate on certain issues (relating e.g., to human rights<sup>105</sup> or the use of force at sea) which do not relate *stricto sensu* to law of the sea matters. In doing so, the court or tribunal concerned will have to bear in mind considerations of mutual respect and comity which should prevail between judicial bodies.

### C. International practice

**1.076** Since the entry into force of the Convention on 16 November 1994, a total of 33 contentious proceedings<sup>106</sup> – arbitral or judicial – have been instituted on

105 See e.g., art. 230 of the Convention which prohibits penalties other than monetary penalties with respect to certain environmental offences and which provides for the observance of recognized rights of the accused.

106 **ITLOS:** *M/V 'SAIGA' (St Vincent and the Grenadines v. Guinea)*, Prompt Release, Judgment, ITLOS Reports 1997, 16; *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999, 280; *'Camouco' (Panama v. France)*, Prompt Release, Judgment, ITLOS Reports 2000, 10; *'Monte Confurco' (Seychelles v. France)*, Prompt Release, Judgment, ITLOS Reports 2000, 86; *'Grand Prince' (Belize v. France)*, Prompt Release, Judgment, ITLOS Reports 2001, 17; *'Chaisiri Reefer 2' (Panama v. Yemen)*, Order of 13 July 2001, ITLOS Reports 2001, 82; *MOX Plant (Ireland v. United Kingdom)*, Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, 95; *'Volga' (Russian Federation v. Australia)*, Prompt Release, Judgment, ITLOS Reports 2002, 10; *Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore)*, Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003, 10; *Juno Trader' (St Vincent and the Grenadines v. Guinea-Bissau)*, Prompt Release, Judgment, ITLOS Reports 2004, 17; *'Hoshinmaru' (Japan v. Russian Federation)*, Prompt Release, Judgment, ITLOS Reports 2005–2007, 18; *'Tomimaru' (Japan v. Russian Federation)*, Prompt Release, Judgment, ITLOS Reports 2005–2007, 74; *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, ITLOS Reports 2012, 4; *M/V 'Louisa' (St Vincent and the Grenadines v. Kingdom of Spain)*, Judgment, ITLOS Reports 2013, 4; *'ARA Libertad' (Argentina v. Ghana)*, Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012, 332; *Arctic Sunrise' (Kingdom of the Netherlands v. Russian Federation)*, Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013, 230; *'Enrica Lexie' (Italy v. India)*, Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015, 182; *M/V 'Norstar' (Panama v. Italy)*, Preliminary Objections, Judgment, ITLOS Reports 2016, 44.

**Arbitration under Annex VII of the Convention:** *Southern Bluefin Tuna (New Zealand-Japan, Australia-Japan)*, Decision of 4 August 2000, XXIII RIAA 1–57; *the MOX Plant Case (Ireland v. United Kingdom)*, Order N°6 of 6 June 2008, [www.pca-cpa.org/showpage.asp?pag\\_id=1288](http://www.pca-cpa.org/showpage.asp?pag_id=1288); *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 of 11 April 2006, XXVII RIAA 147–251; *Arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname*, Award of 17 September 2007, XXX RIAA 1–144; *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, Decision of 1 September 2005, XXVII RIAA 133–45; *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Award of 7 July 2014, see information provided by the website of the PCA at: <https://pca-cpa.org/es/cases/18/>; *Dispute concerning the 'Marine Protected Area' related to the Chagos Archipelago (Mauritius v. United Kingdom)*, Award of 18 March 2015, see information provided by the website of the PCA at: <https://pca-cpa.org/es/cases/11/>; *the ARA Libertad Arbitration (Argentina v. Ghana)*, see information provided by the website of the PCA at: <https://pca-cpa.org/es/cases/65/>; *the South China Sea Arbitration (Republic of the Philippines v. People's Republic of China)*, see information provided by the website of the PCA at: <https://pca-cpa.org/es/cases/7/>; *the Atlanto-Scandian Herring Arbitration (the Kingdom of Denmark in respect of the Faroe Islands v. the European Union)*, see information provided by the website of the PCA at: <https://pca-cpa.org/es/cases/25/>; *Arctic Sunrise Arbitration (Netherlands v. Russia)*, see information provided by the website of the PCA at: <https://pca-cpa.org/es/cases/21/>; *the Duzgit Integrity Arbitration (Malta v. São Tomé and Príncipe)*, see information provided by the website of the PCA at: <https://pca-cpa.org/es/cases/53/>; *the Enrica Lexie Incident (Italy v. India)*, see information provided by the website of the PCA at:

the basis of the compulsory mechanism contained in section 2 of Part XV of the Convention. This indicates that the system is alive and is used by the members of the international community.

In addition to proceedings based on the compulsory mechanism set out in section 2 of Part XV of the Convention, 21 cases<sup>107</sup> relating to law of the sea matters have been submitted to an international court or tribunal since 16 November 1994. These cases were instituted on the basis of special agreements, optional declarations under article 36, paragraph 2, of the Statute of the ICJ, article XXXI of the 1948 Pact of Bogotá, or jurisdictional clauses contained in treaties. It may be observed that a large majority of those cases<sup>108</sup> were instituted pursuant to compulsory mechanisms put into place prior to the existence of a particular dispute. 1.077

<https://pca-cpa.org/es/cases/117/>; *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation)*, see information provided by the website of the PCA at: <https://pca-cpa.org/es/cases/149/>

107 **ITLOS:** *M/V 'SAIGA' (No. 2) (St Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, 10; *Conservation and Sustainable Exploitation of Swordfish Stocks (Chile/European Union)*, Order of 16 December 2009, ITLOS Reports 2008–2010, 13; *M/V 'Virginia G' (Panama/Guinea-Bissau)*, Judgment of 14 April 2014, ITLOS Reports 2014, 4; *Delimitation of the Maritime Boundary between the Republic of Ghana and the Republic of Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, Judgment of 23 September 2017.

**ICJ:** *Fisheries Jurisdiction (Spain v. Canada)*, Judgment, I.C.J. Reports 1998, 432; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, I.C.J. Reports 2002, 625; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, 659; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2012, 624; *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment, I.C.J. Reports 2008, 12; *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, 61; *Maritime Dispute (Peru v. Chile)*, Judgment, I.C.J. Reports 2014, 3; *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Judgment, I.C.J. Reports 2014, 226; *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Judgment of 24 September 2015, Preliminary Objection, text available on the website of the ICJ; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Judgment of 17 March 2016, Preliminary Objections, text available on the website of the ICJ; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Judgment of 17 March 2016, Preliminary Objections, text available on the website of the ICJ; *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)*, see ICJ's press release 2014/11 of 26 February 2014; *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Judgment of 2 February 2017, Preliminary Objections, text available on the website of the ICJ.

**Arbitration:** *Award of the Arbitral Tribunal in the second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation)*, decision of 17 December 1999, XXII RIAA 335–410; *Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention between Ireland and the United Kingdom of Great Britain and Northern Ireland*, Final Award, decision of 2 July 2003, XXIII RIAA 59–151; *Arbitration between the Republic of Croatia and the Republic of Slovenia concerning a territorial and maritime dispute between the two States*, [www.pca-cpa.org/shownewsb8f5.html?ac=view&pag\\_id=1261&nws\\_id=349](http://www.pca-cpa.org/shownewsb8f5.html?ac=view&pag_id=1261&nws_id=349); *Arbitration under the Timor Sea Treaty (Timor-Leste v. Australia)*, 23 April 2013, <https://pcacases.com/web/print/?cases=37>

108 It may be observed that, in each of the four cases submitted to the Tribunal on the basis of a special agreement, the special agreement was concluded to transfer to the Tribunal arbitral proceedings initially instituted under the compulsory mechanism under Part XV, section 2, of the Convention.

- 1.078** A total figure of 54 cases over a period of 22 years following the entry into force of the Convention sharply contrasts with the number of 17 cases<sup>109</sup> submitted to the ICJ or arbitral tribunal during a similar number of years during a similar period of time preceding the entry into force of the Convention (1972–94).
- 1.079** This indicates that whenever compulsory mechanisms are made available, they are widely used by the members of the international community.

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109 **ICJ:** 1994: *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*; 1991: *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*; *Passage through the Great Belt (Finland v. Denmark)*; 1988: *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*; 1986: *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*; 1982: *Continental Shelf (Libyan Arab Jamahiriya/Malta)*; 1981: *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States)*; 1978: *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*; 1976: *Aegean sea Continental Shelf (Greece v. Turkey)*; 1972: *Fisberies Jurisdiction (Federal Republic of Germany v. Iceland)*; *Fisberies Jurisdiction (United Kingdom v. Iceland)*.

**Arbitration:** *Dispute between Argentina and Chile concerning the Beagle Channel*, 18 February 1977, XXI RIAA, 53–264; *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic (UK, France)*, 30 June 1977–14 March 1978, XVIII RIAA, 3–413; *Case concerning the Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau*, decision of 14 February 1985, XIX RIAA 149–96; *Case concerning Filleting within the Gulf of St Lawrence between Canada and France*, decision of 17 July 1986, XIX RIAA 225–96; *Case concerning the Delimitation of Maritime Boundary between Guinea-Bissau and Senegal*, decision of 31 July 1989, XX RIAA 119–213; *Case concerning the Delimitation of Maritime areas between Canada and France*, decision of 10 June 1992, XXI RIAA 265–341.