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18 Courts and Tribunals: The ICJ, ITLOS, and Arbitral Tribunals

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The ICJ, ITLOS, and Arbitral Tribunals

1 Introduction

Most disputes that arise between private parties including nationals of different States are subject to the jurisdiction of the courts of one or more States. Administrative and criminal proceedings against private persons for the enforcement of rules at sea including international rules ordinarily take place in municipal courts and tribunals.¹

(p. 395) The situation with respect to disputes between States is different. States are reluctant to submit such disputes to each other's courts. Subject to certain exceptions for commercial and other activities, States are immune from suit in foreign courts and sovereign property is immune from execution.² Also, the jurisdiction of a municipal court over its own government may be limited by the laws of that State.

Thus, unlike dispute settlement between private parties, settlement of disputes between States is generally not regulated by municipal law and municipal courts. Rather, it is a question of international law regulated by treaty. Because States are not subject to the jurisdiction of international tribunals absent express consent, an important function of dispute settlement clauses in treaties is to indicate whether such consent is granted and, if so, with respect to which disputes before which tribunals.³ Similar considerations may apply to intergovernmental organizations.

2 The Obligation of States to Settle Disputes Peacefully

Article 2(3) of the 1945 Charter of the United Nations provides that '[a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered.' Article 33(1) of the Charter elaborates:

The 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,

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(p. 396) mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

The key words are 'peaceful means of their own choice.' These provisions do not require States to use a specific means for settling disputes. Subject to the powers of the UN Security Council, they do not require a State to accept submission of a dispute to a third party, whether or not the outcome is a legally binding decision. Article 284 of the 1982 United Nations Convention on the Law of the Sea (LOSC) expressly affords States the option to

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submit a dispute to a conciliation commission in accordance with Section 1 of Annex V of the Convention but only if they agree. This is so even though Annex V provides that '[t]he report of the commission including its conclusions or recommendations shall not be binding upon the parties'⁴. The jurisdiction of international tribunals to render legally binding decisions be they standing courts and tribunals or ad hoc arbitral tribunals depends on the consent of the States party to the dispute. This is true even of the International Court of Justice (ICJ) the principal judicial organ of the United Nations.

Thus dispute settlement clauses in treaties that merely repeat or refer back to Article 33 of the Charter add little if anything. Even provisions for binding third-party settlement of disputes regarding the interpretation or application of a treaty may be optional.

- if they are contained in a separate instrument that must itself be accepted as was the case with the dispute settlement protocol to the 1958 conventions on the law of the sea or
- if they are subject to reservations or
- if they require the subsequent consent or agreement of the parties to the dispute which was the case for example with the dispute settlement provisions of the Convention for the Conservation of Southern Bluefin Tuna that were at issue in the *Southern Bluefin Tuna* arbitration brought under the dispute settlement provisions of the LOSC.⁵

One means of consenting to the jurisdiction of an international tribunal is for the parties to enter into a special agreement to submit to that tribunal a dispute that has already arisen. This however leaves it to each of the parties including the State whose conduct is challenged to decide whether to agree. It denies the aggrieved party something that municipal legal systems ordinarily take for granted namely access to impartial tribunals empowered to render justice according to

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(p 397) law. Comparable access to an international tribunal can be assured only if there is advance consent to jurisdiction.

The notion of party autonomy operates on two different levels in this context. The first requires agreement on the type of dispute settlement means to be employed including whether a dispute may be submitted to binding arbitration or adjudication. In the case of the LOSC this is reflected in key clauses of Section 1 of Part XV. Article 279 refers back to Articles 2(3) and 33(1) of the UN Charter. Article 280 preserves 'the right of any States Parties 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'. Article 283 adds that when a dispute arises between States parties concerning the interpretation or application of the Convention the parties 'shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means'.⁶

Second if the selected means entail resort to a third party then there must also be agreement on the identity of that party be it a mediator a conciliator an arbitrator or a court or tribunal. A decision to resort to binding arbitration or adjudication in the abstract would not ordinarily be understood to confer jurisdiction on any particular tribunal. But as Article 288(2) of the LOSC makes clear the parties are free to confer jurisdiction by agreement even if they are not otherwise subject to the jurisdiction of a particular court or tribunal.

3 The duty to Arbitrate or Adjudicate Disputes under the LOSC

Section 2 of Part XV of the LOSC establishes advance consent to arbitration and adjudication of disputes and sets forth the relevant details. It begins with Article 286 which provides

Subject to section 3 any dispute concerning the interpretation or application of this Convention shall where no settlement has been reached by recourse to section 1 be

References

(p 398) submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.

The key words establishing advance consent to jurisdiction and dispensing with any need for the consent of the respondent after the dispute arises are 'at the request of any party to the dispute'.

This has three principal effects. First the court or tribunal to which the dispute is submitted by one of the parties itself determines whether it has jurisdiction.⁷ Second that court or tribunal is also empowered to prescribe legally binding 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'.⁸ Because there may be an urgent need for such measures (1) provisional measures may be prescribed before the court or tribunal makes a definitive decision on jurisdiction over the merits of the case.⁹ and (2) where a dispute is submitted to an arbitral tribunal under Section 2 of Part XV the International Tribunal for the Law of the Sea (ITLOS) is empowered to prescribe provisional measures pending the constitution of the arbitral tribunal 'if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires'.¹⁰ While the power of ITLOS to prescribe provisional measures in such circumstances terminates with the constitution of the arbitral tribunal the measures remain in effect until modified or terminated by the arbitral tribunal.¹¹ and the determination of the urgency of the need for such measures is not limited to the time period prior to the constitution of the arbitral tribunal.¹²

Third the court or tribunal having jurisdiction under Section 2 of Part XV of the LOSC is empowered to render a judgment or award that is legally binding on both parties.¹³ This is so whether or not the respondent participates

in the proceedings or in the constitution of an arbitral tribunal¹⁴ TLOS stressed this point in the 'Arctic

 References


(p. 399) *Sunrise*' case and applied it in proceedings regarding provisional measures pending the constitution of an arbitral tribunal¹⁵

4 Choice of Forum for Compulsory Settlement of LOSC Disputes

For purposes of compulsory jurisdiction under Section 2 of Part XV of the LOSC Article 287 permits States parties to make declarations accepting the CJ¹⁶ TLOS arbitration under Annex V or for certain types of disputes arbitration under Annex V A State that makes no relevant declaration is deemed to have accepted arbitration under Annex V if the applicant and respondent have made (or are deemed to have made) the same choice then the dispute may be submitted only to that forum if they have made different choices then the dispute may be submitted only to arbitration under Annex V unless they agree otherwise

The result is that unless both parties have chosen the same forum by parallel declarations or agreement the procedure for compulsory settlement under Section 2 of Part XV is arbitration under Annex V There are however three exceptions

- disputes under Part X of the LOSC and the 1994 Implementation Agreement are subject to the jurisdiction of the Seabed Disputes Chamber of TLOS or commercial arbitration¹⁷
- requests for provisional measures may be submitted to TLOS pending the constitution of an arbitral tribunal to which the dispute is being submitted under Section 2 of Part XV¹⁸

 References

(p. 400)

- applications for prompt release of a detained vessel and crew under Article 292 may be submitted either to TLOS or to any court or tribunal accepted by the detaining State under Article 287

5 Nature of the Dispute

Part XV applies to disputes concerning the interpretation or application of the LOSC What about so-called 'mixed' disputes that involve law of the sea issues addressed by the Convention as well as other issues? A typical example is a dispute concerning a maritime boundary that also involves a sovereignty dispute over an island from which coastal State rights may be generated in the disputed area¹⁹

Three different situations should be distinguished in respect of 'mixed' disputes First States may submit a 'mixed' dispute to the CJ arbitration or some other forum without regard to the dispute settlement provisions of the LOSC Many have done so²⁰ While such disputes may involve the interpretation or application of the substantive provisions of the LOSC the jurisdiction of the court or tribunal is based on some other instrument

Second there would appear to be nothing to preclude States from agreeing to submit a 'mixed' dispute to TLOS or an Annex V arbitral tribunal That agreement would be the source of jurisdiction²¹

Third the submission by only one party of a 'mixed' dispute to a court or tribunal under Section 2 of Part XV of the LOSC poses the question of whether Article 286 and related provisions of Section 2 constitute the requisite consent to jurisdiction by the other party is it a dispute concerning the interpretation or application of the LOSC? A negative response would appear to follow from the fact that land sovereignty questions are not addressed by the LOSC and that there is no indication that becoming party to the LOSC entails consent to adjudicate disputes regarding sovereignty over land territory However some contend that there might be jurisdiction where the land sovereignty question is incidental or ancillary to the main subject of the dispute²²

 References

(p. 401) 6 Procedural Limitations on Jurisdiction under Section 2 of Part XV

Article 286 applies only 'where no settlement has been reached by recourse to section 1 of Part XV' Section 1 itself imposes procedural requirements that reflect the principle of the right of the parties to agree on the means for settling the dispute

Article 281 provides that if the parties 'have agreed to seek settlement of the dispute by a peaceful means of their own choice the procedures provided for in this 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' Article 282 provides that if the parties to the dispute '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'

The distinction between the two is that Article 282 of the LOSC applies only to a procedure that entails a binding decision to which the dispute may be submitted at the request of the aggrieved party alone Article 282 therefore does not derogate from the principle of compulsory jurisdiction reflected in Section 2 of Part XV it merely defers to other agreements that afford the aggrieved party the right to submit the dispute to binding arbitration or adjudication in this connection it is not clear how much specificity might be required to exclude jurisdiction under the LOSC For example does Article 282 apply where both parties have not made declarations accepting the

jurisdiction of the CJ under Article 287 of the LOSC but have made general declarations under Article 36(2) of the CJ Statute that would cover the dispute regarding the interpretation or application of the LOSC but that do not refer specifically to such disputes or to the LOSC? In this regard it should be borne in mind that the question is not whether the aggrieved party may submit the dispute to the CJ but whether that party is precluded by Article 282 from submitting the dispute to the otherwise applicable procedure under Section 2 of Part XV of the LOSC. Construing Article 282 strictly so as to afford the aggrieved party a choice of forum may entail some tactical

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(p. 402) advantage but it ought not be considered a calamity. The CJ is not wanting for cases. Private international law provides useful guidance to TLOS and Annex V tribunals regarding comity in such situations including practice regarding *lis pendens*.²³

Article 282 is primarily a matter of choice of forum. Article 281 poses more serious issues regarding compulsory jurisdiction in principle. It applies to agreements regarding means for settlement of the dispute that do not necessarily entail a binding decision and to which the dispute may not necessarily be submitted only by one party. The deference to such agreements is therefore more limited. The requirement that no settlement has been reached by recourse to such means may entail delay but does not preclude ultimate resort to binding arbitration or adjudication by the aggrieved party under Section 2 of Part XV. However, Article 281 also requires that the agreement does not exclude any further procedure. Since the agreement need not itself provide the aggrieved party with the right to submit the dispute to binding arbitration or adjudication without the specific consent of the respondent, this provision does derogate from the principle of compulsory jurisdiction reflected in Section 2 of Part XV. Given the large number of agreements regarding maritime matters that contain dispute settlement provisions that do not establish compulsory jurisdiction, the interpretation and application of this provision can have a significant impact in practice on the effect of Section 2 of Part XV. This may explain the reluctance of other tribunals to rely on the finding in the *Southern Bluefin Tuna* arbitration that the dispute settlement clauses of the Southern Bluefin Tuna Conservation Convention, which do not provide for compulsory jurisdiction, impliedly preclude resort to the compulsory jurisdiction provisions of Section 2 of Part XV of the LOSC.²⁴ Prior to reaching this conclusion, the award quoted the applicants' argument that this position renders the compulsory jurisdiction provisions of the LOSC 'a paper umbrella which dissolves in the rain'.²⁵

While the same question of scope may arise under both Articles 281 and 282, the context and consequences are different and so may be the answers. For example, is it necessary that the other agreement apply to the dispute arising under the LOSC as such, or is it sufficient that it be the same dispute in substance even if it arises under another treaty? TLOS seemed to adhere to the former position in its provisional measures decisions in *Southern Bluefin Tuna* and *MOX Plant*, while the arbitral tribunal in *Southern Bluefin Tuna* took the latter position.²⁶

 References

(p. 403) Article 283 provides that when a dispute arises, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.²⁷ This may entail some good faith efforts to explore the possibilities for agreement before a party may institute proceedings under Section 2 of Part XV. It has not, however, been interpreted to require a State to wait indefinitely.²⁸

Article 295 incorporates the international law rule of exhaustion of local remedies. That rule typically applies in situations of diplomatic protection where the claim relates to an injury to a national of a State rather than to the State itself. TLOS has ruled that interference with navigation in contravention of the Convention constitutes a wrong to the flag State in its own right.²⁹ In that context, the flag State may claim damages for injury to crew members and losses sustained by the owners of the ship and its cargo, without regard to the nationality of those persons.³⁰

7 Substantive Limitations on Jurisdiction under Section 2 of Part XV

Article 286, the first article in Section 2 of Part XV, begins with the words '[s]ubject to section 3'. Section 3 of Part XV sets forth limitations (in Article 297) and exceptions (in Article 298) to applicability of Section 2, that is, to the scope of compulsory jurisdiction under Section 2 of Part XV of the Convention. Section 3 does not apply in cases in which jurisdiction is based on another agreement, unless that agreement itself incorporates the relevant provisions of Part XV by reference.³¹

 References

(p. 404) 7.1 Article 297

Article 297 addresses the question of the extent to which the exercise of coastal State sovereign rights or jurisdiction can be challenged by resort to arbitration or adjudication under Section 2 of Part XV of the Convention. The first paragraph establishes the basic rule, generally limiting such challenges to the three situations enumerated in that paragraph, of which the first and third are the most important.

The first enumerated situation in which compulsory jurisdiction is preserved applies where it is alleged that the coastal State has contravened the provisions of the Convention regarding navigation, overflight, submarine cables, and pipelines and related activities. This includes, among other things, interference with navigation resulting from regulatory or enforcement measures with respect to pollution from ships that exceed the authority of the coastal State under the LOSC or otherwise contravene the Convention.³²

The third enumerated situation in which compulsory jurisdiction is preserved applies where it is alleged that the coastal State has contravened specified international environmental rules and standards that are applicable to the coastal State. The reference is to rules and standards that are determinate and specific.³³ Such rules and standards are typically found in MO conventions and their technical annexes. The duty of the coastal State to implement such rules and standards in the exercise of its rights with respect to seabed activities, offshore installations, and dumping can be found in Articles 208(3), 210(6), 214, and 216.

There is no express reference to particular zones of coastal State jurisdiction in paragraph 1 of Article 297. While the term 'sovereign rights' is used by the Convention in connection with the EEZ and the continental shelf, the word 'jurisdiction' is used more generally, and both terms embrace rights that are subsumed within the broader term 'sovereignty' that is used in connection with internal waters, archipelagic waters, and the territorial sea.³⁴ It may not make much difference whether the limitation on compulsory jurisdiction set forth in paragraph 1 of Article 297 is understood to apply to internal waters, archipelagic waters, and the territorial sea (including straits), since rights of navigation and overflight may be the principal issues subject to compulsory jurisdiction, whether or not the paragraph applies.


 References

(p 405) Paragraphs 2 and 3 of Article 297 impose significant limitations on the jurisdiction of a court or tribunal under Section 2 of Part XV with respect to the exercise of coastal State rights regarding scientific research in the EEZ and on the continental shelf (Art 297(2)) and regarding fishing in the EEZ (Art 297(3)).³⁵ The absence of a specific reference to the territorial sea in paragraphs 2 and 3, and to the continental shelf in paragraph 3, presumably reflects the absence of relevant duties in the Convention regarding coastal State regulation of such matters in those areas. In procedural terms, therefore, the appropriate objection might be to admissibility of the claim rather than to jurisdiction, but the expected outcome ordinarily would be the same.

Paragraphs 2 and 3 of Article 297 afford either party the right to submit to conciliation pursuant to Section 2 of Annex V, certain disputes excluded from compulsory arbitration or adjudication by those paragraphs. The respondent is 'obliged to submit to such proceedings' which may continue in its absence. As in the case of conciliation by agreement, the report of the conciliation commission is not binding on the parties.³⁶ No State has thus far instituted conciliation proceedings under this provision.

7.2 Article 298

Article 309 of the LOSC provides '[n]o reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention.' Article 298 enumerates specific optional exceptions to compulsory jurisdiction under Section 2 of Part XV. A State may invoke one or more of those exceptions by declaration at the time it becomes party to the Convention or at any time thereafter. The declaration remains effective until modified or withdrawn, and applies to cases brought against or by the declarant under Section 2 of Part XV. Declarations under Article 298 have been made by a significant minority of parties to the Convention.

 References

(p 406) Paragraph 1(a) of Article 298 permits a State to exclude from compulsory jurisdiction under Section 2 of Part XV 'disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles'. The final text of paragraph 1 emerged from a negotiating group whose mandate was maritime boundaries between States with opposite or adjacent coasts, substance as well as dispute settlement.³⁷

Like paragraphs 2 and 3 of Article 297, paragraph 1(a) of Article 298 provides for compulsory conciliation of excluded disputes, subject to an exclusion for a dispute that necessarily involves concurrent consideration of a land sovereignty dispute.³⁸ However, paragraph 1(a) goes on to provide that after the conciliation commission has presented its report, 'the parties shall negotiate an agreement on the basis of that report; if these negotiations do not result in an agreement, the parties shall, by mutual consent, submit the question to one of the procedures provided for in section 2, unless the parties otherwise agree.' No State has thus far instituted conciliation proceedings under this provision. Were a State to do so, and were those proceedings to fail to result in agreement, an issue might arise regarding the meaning of the clause requiring the parties to submit the question to arbitration or adjudication under Section 2 of Part XV 'by mutual consent'. It seems reasonably clear that a court or tribunal would not have jurisdiction under this clause absent such consent. But what of a court or tribunal that would otherwise have jurisdiction under Section 2 of Part XV? Are we to suppose that the delegations that insisted on the right to exclude maritime boundary disputes between States with opposite or adjacent coasts from arbitration or adjudication, often as a condition of their acceptance of Section 2 of Part XV or Article 309, and the governments and parliaments that approved the Convention on that understanding nevertheless consented to the binding jurisdiction of a court or tribunal on the question of a duty to agree to submit the excluded dispute to arbitration or adjudication?

Paragraph 1(b) of Article 298 permits a State to exclude from compulsory jurisdiction under Section 2 of Part XV '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

 References

(p 407) tribunal under article 297, paragraph 2 or 3'. The text focuses on the nature of the activity. Depending on the laws and practices of the flag State, a warship, military aircraft, or other government vessel or aircraft may be engaged in only one type of activity or may be engaged in either military activities or law enforcement activities at

different times. The distinction is important. The exception for law enforcement activities is limited to the exercise of sovereign rights or jurisdiction excluded from Section 2 of Part XV by Article 297 paragraph 2 or 3 namely enumerated coastal State rights concerning marine scientific research in the EEZ and on the continental shelf or concerning fishing in the EEZ.³⁹ The exclusion for military activities is not so limited.⁴⁰ No State has thus far invoked the military activities exception.⁴¹ Nor has it been contended that the exception for enforcement of coastal State fisheries laws in its EEZ is a bar as such to proceedings under Article 292 for prompt release on bond of fishing vessels arrested in the EEZ where the detaining State has made a declaration under Article 298(1)(b).⁴²

Article 298(1)(c) permits a State to exclude from compulsory jurisdiction under Section 2 of Part XV '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'. This text presumably encompasses all the functions of the Council under the Charter including those provided for in Chapters V and VI. The provision does not authorize the Council to confer jurisdiction rather it permits the Council to remove an obstacle to jurisdiction posed by its own agenda. In this regard it should be noted that issues of institutional authority and coordination pertinent to the relationship between the exercise of the functions of the Council under the Charter and those of a court or tribunal under the Convention may arise independently of any declaration under Article 298.

 References

(p 408) although Council action where there is a declaration may have the effect of clarifying the Council's position

8 Institutional Constraints on the Exercise of Jurisdiction

A court or tribunal to which a dispute is submitted does not exist in an institutional vacuum. Other institutions including other courts and tribunals may have actual or potential functions that are in some measure related to the dispute in question. Some of the potential problems of overlapping functions are averted by express jurisdictional limitations.⁴³ But these do not exhaust the full range of possibilities.

Where the dispute concerns provisions of another instrument that are incorporated by reference and that instrument contains its own dispute settlement procedures should the parties to such an instrument be required to use those procedures at least as an initial matter? Section 6(1)(b) of the 1994 Implementation Agreement regarding Part X incorporates by reference 'the General Agreement on Tariffs and Trade its relevant codes and successor or superseding agreements' in that connection paragraph 1(f)(i) specifies that parties to those agreements shall have recourse to the dispute settlement procedures of such agreements with respect to disputes concerning their provisions.

A number of issues may be relevant in deciding whether similar deference is appropriate in connection with other instruments whose provisions are incorporated by reference into the LOSC be it as a jurisdictional matter under Articles 281 and 282 or as a question of whether the exercise of jurisdiction should be deferred or declined. These include the risk of inconsistent rulings whether the incorporated rules are closely linked to specialized dispute settlement organs with unique competence to interpret and apply those rules whether the meaning of the incorporated rules is the central legal issue in the case whether the issue posed is one of first impression and whether the rules are incorporated as such or only by virtue of a reference to generally accepted international rules or the like.⁴⁴

Another difficulty involves the question of which court or tribunal should decide related issues pending before more than one court or tribunal in proceedings affecting the same parties. After arbitral proceedings under LOSC Annex V had

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(p 409) commenced in the *MOX Plant* case brought by Ireland against the United Kingdom the Commission of the European Communities informed the European Parliament that it was considering whether to institute proceedings in the European Court of Justice against Ireland under relevant Community instruments. The Annex V Tribunal observed that

in these circumstances there is a real possibility that the European Court of Justice may be seized of the question whether the provisions of the Convention on which Ireland relies are matters in relation to which competence has been transferred to the European Community and indeed whether the exclusive jurisdiction of the European Court of Justice with regard to Ireland and the United Kingdom as Member States of the European Community extends to the interpretation and application of the Convention as such.⁴⁵

While the interpretation and application of Article 282 of the LOSC was of course within the jurisdiction of the Annex V Tribunal the underlying questions 'essentially concern the internal operation of a separate legal order (namely the legal order of the European Communities)' and 'are to be determined within the institutional framework of the European Communities'.⁴⁶ Whatever their positions on the jurisdictional issues Ireland and the United Kingdom were not themselves competent to definitively determine their obligations under European Community law. Accordingly the arbitral Tribunal while remaining seized of the dispute decided to suspend further proceedings on jurisdiction and the merits 'bearing in mind considerations of mutual respect and comity which should prevail between judicial institutions both of which may be called upon to determine rights and obligations as between two States'.⁴⁷

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(p 410) Another such difficulty involves the question of the relationship between a court or tribunal on the one hand and a political or administrative body on the other hand. The Convention addresses this issue in connection with the relationship between the Sea-Bed Disputes Chamber of TLOS and the International Seabed Authority (ISA). Article 189 of the LOSC expressly confirms the Chamber's power 'among other things to entertain 'claims concerning excess of jurisdiction or misuse of power' but prohibits the Chamber from substituting its discretion for that of the Authority.

Similar issues could arise with respect to regional and other fisheries management organizations. Such organizations have important conservation and management functions on the high seas under Articles 63-64 and Part V of the LOSC as well as the 1995 Implementation Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks (FSA). The ability of these organizations to command the level of agreement among their members necessary to fulfil their functions varies considerably. Often the issue is more likely to be non-performance or under-performance rather than over-reaching. For this reason, the 1995 FSA places special emphasis on the power of courts and tribunals to prescribe binding provisional measures, expressly including conservation as one of the objectives of such measures.⁴⁸ Among other things, this looming power conferred on courts and tribunals to impose urgently needed conservation measures that may endure for at least the remainder of a fishing season may stimulate more constructive behaviour in the organizations themselves.⁴⁹

Both the CJ and TLOS have had the occasion to consider whether to exercise their power to delimit the continental shelf beyond 200 nautical miles (nm) in light of the provisions of Article 76(8) and Annex of the LOSC and the role of the Commission on the Limits of the Continental Shelf (CLCS). Both before and after TLOS delimited the continental shelf beyond 200 nm,⁵⁰ the CJ declined to do so pending review of the status of the areas by the CLCS.⁵¹ In neither of the CJ cases had the parties made full submissions to the CLCS (and one of the parties in the

 References

(p 411) second case was not even party to the LOSC). Nor was the status of the relevant areas beyond 200 nm as continental margin clearly and uncontroversially established. This difference between the TLOS and CJ cases is a particularly important consideration given the fact that neighbouring coastal States both may have expansive views of the extent of their entitlements in the area off their coasts and less than optimum concern for the direct or indirect impact of their positions on the limits of the international seabed area and the common heritage of mankind. Such considerations prompted both the detailed criteria and constraints in Article 76 regarding the limits of the continental shelf beyond 200 nm and the creation of the CLCS under Article 76(8) and Annex of the Convention.⁵²

In the case between Bangladesh and Myanmar, TLOS observed:

The Convention sets up an institutional framework with a number of bodies to implement its provisions including the Commission, the International Seabed Authority and this Tribunal. Activities of these bodies are complementary to each other so as to ensure coherent and efficient implementation of the Convention.⁵³

In this regard, TLOS distinguished between determination of the seaward limits of the continental shelf under Article 76 'a matter with respect to which the CLCS makes recommendations that become 'final and binding' if implemented by the coastal State' and delimitation of overlapping entitlements to the continental shelf under Article 83 'with respect to which the 'function of settling disputes...is entrusted to dispute settlement procedures under article 83 and Part XV of the Convention' which include international courts and tribunals'.⁵⁴ In considering 'whether it can and should in the present case determine the entitlements of the Parties to the continental shelf beyond 200 nm' under Article 76,⁵⁵ TLOS distinguished between issues that are 'predominantly legal in nature'⁵⁶ on the one hand and 'scientific and technical issues arising in the implementation of article 76 on the basis of submissions [to the CLCS] by coastal States'⁵⁷ on the other hand. In

 References

(p 412) light of these and other considerations, including the unique characteristics of the continental margin in the Bay of Bengal and the fact that the persistence of the delimitation dispute precluded the CLCS under its rules from performing its recommendatory functions with respect to the parties' submissions,⁵⁸ TLOS determined that the parties had overlapping entitlements to the continental shelf beyond 200 nm under Article 76 and delimited those entitlements without prejudice to the question of their seaward limits or the rights of third States.

9 Entities other than States

Because the definition of States parties to the Convention includes certain entities other than States, those entities are also subject to the dispute settlement provisions of the Convention.⁵⁹ This includes an international organization such as the European Union, which is a party to the Convention in its own right with respect to 'matters governed by this Convention in respect of which competence has been transferred to the organization by its members States which are Parties to this Convention'.⁶⁰ Article 305 also refers to certain self-governing territories and associated States.

Article 187 of the LOSC includes within the jurisdiction of the TLOS Sea-Bed Disputes Chamber not only disputes involving States parties but those involving the International Seabed Authority⁶¹ and private individuals.

or companies sponsored by States parties that have or seek a contract from the SA for exploration or exploitation of the non-living resources of the international seabed Area. Under Article 188(2) a dispute concerning the interpretation or application of a contract with respect to such exploration or exploitation 'shall be submitted at the request of any party to the dispute to binding commercial arbitration unless the parties

 References

(p 413) otherwise agree'⁶² However when the dispute 'also involves a question of the interpretation of Part X and the Annexes relating thereto' the arbitral tribunal must refer that question to the Sea-Bed Disputes Chamber for a ruling. It would accordingly appear that judicial review functions with respect to the Authority are focused on the Chamber.⁶³

Article 292 of the Convention provides that an application for prompt release may be made 'by or on behalf of the flag State of the vessel'. This formulation was intended as a compromise with those who advocated direct access in prompt release proceedings for the owner or operator of the detained ship.⁶⁴ But the TLOS Rules reflect a traditional State-centric position in which the intended compromise all but vanishes. Essentially all that remains in practice is the ability of the owner or operator to hire counsel if the State agrees. This does not of course require any distinction between applications made 'by' or 'on behalf of' the State. Be that as it may, the Convention text would appear to allow a flag State to implement the intended compromise if it wishes for example by enacting a general statute designating the class of persons (such as a vessel owner or operator) authorized to file an application for prompt release on its behalf with notice to the flag State but without the need for specific authorization in each case.

10 Applicable Law

The LOSC does not exist in isolation. It forms part of the corpus of international law. Thus Article 293 provides that a court or tribunal with jurisdiction under Section 2 of Part XV 'shall apply this Convention and other rules of international law not incompatible with this Convention'.⁶⁵

At the same time it should be borne in mind that the LOSC is a comprehensive convention. The preamble begins with a reference to 'all issues relating to the law of the sea' and ends by specifically limiting the application of other rules of international law to 'matters not regulated by this Convention'. This is best understood as referring to rules other than those arising under the law of the sea such as rules concerning the law of treaties or the law of State responsibility.

 References

(p 414) Of course the text of the Convention may itself specifically incorporate certain rules of international law including law of the sea rules. Perhaps the best-known example is the reference to international law in Articles 74(1) and 83(1) regarding delimitation of the EEZ and the continental shelf. But even in that context TLOS took care to make clear that the reference is to be understood and applied in light of the provisions of the Convention.⁶⁶

To be sure the meaning of the text of the Convention may itself be clarified by reference to rules found in other instruments or customary international law such as those that help explain the provenance, wording, or function of the text. This does not however entail the application of rules external to the Convention.

In addition care should be taken to avoid conflating the question of applicable law with the question of jurisdiction.⁶⁷ Under Section 2 of Part XV of the LOSC jurisdiction is limited to disputes concerning the interpretation and application of the Convention. Other rules of international law may be applied as such in that context only if they relate to matters not regulated by the Convention and only if they are not incompatible with the Convention.

11 Advisory Opinions

The only references to advisory opinions in the Convention are to those of the TLOS Sea-Bed Disputes Chamber in response to a request from the Assembly or Council of the International Seabed Authority.⁶⁸ There is no mention of advisory opinions in the provisions of the Convention regarding jurisdiction under other agreements.⁶⁹ However Article 138(1) of the Rules adopted by the Tribunal provides

 References

(p 415) that '[t]he 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'. The question of the basis for this rule may be addressed in connection with a pending request for an advisory opinion.⁷⁰

12 Conclusion


The award in the *Southern Bluefin Tuna* arbitration gave rise to a debate as to whether the dispute settlement regime of the LOSC is comprehensive. That is the wrong question. The LOSC itself is comprehensive and Part XV applies to all disputes concerning the interpretation or application of the Convention.

Under Part XV and related provisions of the LOSC not all of these disputes are subject to arbitration or adjudication under Section 2 of Part XV. Some are subject to the dispute settlement procedures of other treaties

at least as a first step or perhaps definitively especially where those procedures entail a binding decision in many if not most cases this is a matter of pre-requisites to jurisdiction or choice of forum neither of which in the end excludes arbitration or adjudication

Other disputes are excluded by Section 3 from arbitration or adjudication under Section 2 of Part XV if these excluded disputes are not subject to the jurisdiction of a court or tribunal under some other treaty they can still be submitted by special agreement in this respect the problem if problem there be arises not from the Convention but from the fact that under international law a State is not subject to the jurisdiction of an international court or tribunal absent express consent

In that light the significance of the LOSC is clear As of this writing it has attracted 166 parties The fact that all States that become party to the Convention thereby consent to arbitration or adjudication of most disputes concerning its interpretation and application represents a remarkable and abidingly important step forward in furthering the rule of law in international affairs

 References

Footnotes:

¹ The Law of the Sea Convention builds on that foundation See 1982 United Nations Convention on the Law of the Sea Arts 73-94 and 292(3) (hereinafter LOSC) Section 6 of Part X relies on municipal authorities and municipal courts of flag States port States and coastal States for enforcement of international environmental standards Article 235(2) adds

States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction

Even after an international tribunal has rendered judgment there may be an enforcement role for municipal courts especially in cases that involve private parties Annex V Art 39 provides that decisions of the Sea-Bed Disputes Chamber of the International Tribunal for the Law of the Sea 'shall be enforceable in the territories of the States Parties in the same manner as judgments or orders of the highest court of the State Party in whose territory the enforcement is sought'

² The provisional measures order of the International Tribunal for the Law of the Sea (TLOS) in the *ARA Libertad* case emphasized the immunity of warships from the jurisdiction of foreign States and their courts *ARA Libertad (Argentina v Ghana)* (Provisional Measures) [2012] TLOS Rep 21 [97]

³ But it should be borne in mind that the underlying dispute may involve one or more private parties and at least some aspects of that dispute may well be within the civil administrative or criminal jurisdiction of a municipal court insofar as the private parties are concerned A growing number of bilateral and multilateral treaties provide for arbitration of investment disputes between States and private foreign investors in order to minimize political risk and encourage investment

⁴ LOSC n 1 Annex V Art 7(2)

⁵ *Southern Bluefin Tuna (Australia v Japan; New Zealand v Japan)* (Jurisdiction and Admissibility) (2000) XX RAA 1 43-4 [57] [58]

⁶ While direct consultations between diplomatic or other government representatives would ordinarily be the means used LOSC n 1 Art 283 does not specify those or any other particular methods for exchanging views This accommodates concerns expressed by certain Arab and other delegations about direct official contact that could arise for example in the absence of recognition or diplomatic relations

⁷ 1945 Statute of the International Court of Justice Art 36(6) (hereinafter CJ Statute) LOSC n 1 Art 288(4)

⁸ LOSC n 1 Art 290(1) and (6) Arts 7(5) 16(2) and 31(2) of the 1995 Agreement for the Implementation of the Provisions of the UN Convention on the Law of the Sea relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (hereinafter FSA) include conservation of these stocks within the functions of provisional measures under Art 290 of the LOSC

⁹ The jurisdictional standard for doing so is that there is a basis upon which jurisdiction over the merits might be founded *Fisheries Jurisdiction (UK v Iceland)* (Interim Protection Order) [1972] CJ Rep 12 [17] *M/V 'Saiga' (No 2) (St Vincent and the Grenadines v Guinea)* (Provisional Measures) [1998] TLOS Rep 24 [29] *Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan)* (Provisional Measures) [1999] TLOS Rep 280 [52]

¹⁰ LOSC n 1 Art 290(5)

¹¹ *bid*

¹² *Land Reclamation (Malaysia v Singapore)* (Provisional Measures) [2003] TLOS Rep 10 [65] [69]

¹³ LOSC n 1 Art 296 Annex V Art 33 Annex V Art 11 Annex V Art 4

¹⁴ LOSC n 1 Annex V Art 28 Annex V Arts 3 and 9 Annex V Arts 3 and 4

¹⁵ *'Arctic Sunrise' (Netherlands v Russia)* Provisional Measures Order of the International Tribunal for the Law of the Sea (22 November 2013) [46] [57] The fact that the text of the LOSC expressly addresses the effect of non-participation may be understood to imply that a State is not obliged to participate but a different view was expressed by two judges in the *'Arctic Sunrise'* case *bid* Joint Separate Opinion of Judges Wolfrum and Kelly [5] [6]

¹⁶ The reference to the CJ is presumably subject to the requirements of the Court's Statute For example the States parties to the LOSC as defined in Art 1(2)(2) of that Convention include entities that may not be States

within the meaning of Art 34 of the Court's Statute to which the Court is open under Art 35 of its Statute

¹⁷ LOSC n 1 Arts 188 288(3) The 1994 Agreement Relating to the implementation of Part X of the LOSC provides in Art 2 that it applies together with Part X as a single instrument and also contains specific references to the dispute settlement provisions of the LOSC (hereinafter 1994 implementation Agreement)

¹⁸ LOSC n 1 Art 290(5)

¹⁹ Where a party to the dispute has elected to exclude maritime boundary disputes from jurisdiction under Art 298(1)(a) either party may submit the dispute to conciliation 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'

²⁰ A recent example between parties to the LOSC is *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea Intervening)* (Judgment) [2002] CJ Rep 303

²¹ LOSC n 1 Art 288(2) Annex V Arts 20 22

²² Statement by TLOS President Wolfrum before the UN General Assembly (8 December 2006) [7] available at <http://www.itlos.org/fileadmin/itlos/documents/statements_of_president/wolfrum/ga_081206_eng.pdf> The statement was made before TLOS received its first maritime delimitation case The question of jurisdiction to determine sovereignty over land territory has been raised in a pending arbitration See *The Republic of Mauritius v The United Kingdom of Great Britain and Northern Ireland* LOSC Annex V Tribunal (pending) available at <http://www.pca-cpa.org/show_page.asp?pag_id=1429> Such a question also arose in the *Guyana/Suriname* maritime boundary arbitration with respect to the terminus of the land frontier but the tribunal did not find it necessary to address the issue in its award *Arbitration between Guyana and Suriname* (2007) XXX RAA 1 [174] [185] and [280] (hereinafter *Guyana/Suriname*) The question of *prima facie* jurisdiction with respect to the immunity from detention of a visiting warship in port was addressed in the TLOS provisional measures order in the *ARA Libertad* case n 2 [60] [67]

²³ See Y Shany 'Contract Claims vs Treaty Claims Mapping Conflicts Between CSD Decisions on Multisourced Investment Claims' (2005) 99 *American Journal of International Law* 835 849 51

²⁴ The author of this chapter analysed the award and its implications in BH Oxman 'Complementary Agreements and Compulsory Jurisdiction' (2001) 95 *American Journal of International Law* 277

²⁵ *Southern Bluefin Tuna* (Jurisdiction and Admissibility) n 5 [41(k)]

²⁶ *Southern Bluefin Tuna* (Provisional Measures) n 9 [55] *MOX Plant (Ireland v United Kingdom)* (Provisional Measures) [2001] TLOS Rep 95 [48] [53] *Southern Bluefin Tuna* (Jurisdiction and Admissibility) n 5 [56] [64] It is unclear whether Ireland's withdrawal on 15 February 2007 of its claim in the *MOX Plant* arbitration under LOSC Annex V is properly regarded as entailing the application of Art 282 or the separate and independent application by Ireland of its obligations under a binding judgment of the European Court of Justice (ECJ) holding that the constitutive instruments of the European Union prohibited Ireland from submitting the *MOX Plant* dispute with the United Kingdom to arbitration under the LOSC *Commission v Ireland* (Case C-459/03) [2006] ECR - 4635

²⁷ See n 6

²⁸ See *MOX Plant* (Provisional Measures) n 26 [60]

²⁹ *MV 'Saiga' (No 2) (St Vincent and the Grenadines v Guinea)* (Judgment) [1999] TLOS Rep 10 [97] and [98] *MV 'Virginia G' (Panama v Guinea-Bissau)* Judgment of the International Tribunal for the Law of the Sea Case No 19 (14 April 2014) [157] The latter judgment also held that failure to comply with the requirements of Art 73 regarding enforcement of fisheries regulations in the EEZ constitutes a violation of the rights of the flag State in its own right *bid*

³⁰ *MV 'Saiga' (No 2)* (Judgment) n 29 [103] [109] *MV 'Virginia G'* n 29 [125] [129]

³¹ For such an incorporation by reference see FSA n 8 Art 30(1) An agreement to transfer a dispute to TLOS that had been submitted to arbitration under Section 2 of Part XV does not necessarily waive objections to jurisdiction or admissibility See *MV 'Saiga' (No 2)* (Provisional Measures) n 9 [14] and [27] [30] *MV 'Virginia G'* n 29 [2] [5] and [98] [101]

³² Such measures are not excluded from compulsory jurisdiction under the subsequent paragraphs of Art 297 those provisions specifically refer to coastal State jurisdiction with respect to marine scientific research and with respect to marine living resources

³³ The French text refers to 'règles ou normes internationales déterminées' the Russian text to 'конкретные международные нормы и стандарты' and the Spanish text to 'reglas y estándares internacionales específicos'

³⁴ The word 'jurisdiction' is used in Arts 27 and 28 regarding the territorial sea and in Art 34 regarding straits used for international navigation

³⁵ Unlike paragraph 1 of Article 297 which directly addresses which disputes are subject to settlement under Section 2 of Part XV paragraph 2 and 3 provide that 'the coastal State shall not be obliged to accept the submission to such settlement' of the disputes to which they refer This wording might suggest the need for express objection during the proceedings The *Barbados/Trinidad and Tobago* award concluded that ruling upon the rights and duties of the Parties in relation to fisheries within [a Party's exclusive economic zone is] outside the jurisdiction of this Tribunal because Article 297(3)(a) stipulates that a coastal State is not obliged to submit to the jurisdiction of an Annex V Tribunal "any dispute relating to [the coastal State's] sovereign rights with respect to the living resources in the exclusive economic zone" and Trinidad and Tobago has made plain that it does not consent to the decision of such a dispute by this Tribunal

See *Barbados/Trinidad and Tobago* (2006) XXV RAA 147 [276] (emphasis added)

³⁶ See LOSC n 1 Annex V Art 7(2)

³⁷ Virtually all discussion of this exclusion at the Third United Nations Conference on the Law of the Sea (UNCLOS) and thereafter relates to delimitation of maritime boundaries between States with opposite or adjacent coasts. There has been very little discussion of the reference to historic bays or titles, its association with the exclusion for maritime boundaries, or its relation to the two substantive provisions that use those terms, Arts 10(6) and 15. The dispute between El Salvador and Honduras regarding the Gulf of Fonseca looms large in the history of the inclusion of the reference to historic bays or titles in this context. Ambassador Reynaldo Galindo Pohl of El Salvador was co-chair of the influential informal negotiations on dispute settlement and presented the first set of drafts with bracketed options to the Conference, almost all of which contained the reference. It remains to be seen what a court or tribunal faced with the issue may make of this.

³⁸ See n 19.

³⁹ The Russian declaration under Art 298 tracks the wording of the article but omits the qualifying words 'excluded under article 297 paragraph 2 or 3'. TLOS limited the declaration by those qualifying words. *'Arctic Sunrise'* n 15 [41] [45]. This interpretation of a similar approach to the Russian declaration was also adopted by the LOSC Annex V Tribunal. *'Arctic Sunrise' Arbitration (Kingdom of the Netherlands v Russian Federation)* (Award on Jurisdiction) (26 November 2014) [69], available at <http://www.pca-cpa.org/showpage.asp?pag_id=1556>

⁴⁰ In either case, the question is whether the flag State is subject to jurisdiction. There is no question of jurisdiction over the vessel or aircraft.

⁴¹ Argentina withdrew its declaration regarding military activities prior to instituting proceedings in its dispute with Ghana regarding detention of the naval training ship *ARA Libertad*. See Argentina 'After ratification' (26 October 2012) in Division for Ocean Affairs and the Law of the Sea (Doalos) *Declarations and Statements*, available at <http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#Argentina_after_ratification>

⁴² The law enforcement exception was invoked by France in Art 292 proceedings in connection with the applicant's challenge to the confiscation of the detained fishing vessel ordered by a French court. *Grand Prince (Belize v France)* (Prompt Release) [2001] TLOS Rep 17 [60].

⁴³ The limitations set forth in the LOSC n 1 Arts 281, 282, 292, and 298 were previously discussed.

⁴⁴ The question of references to international law is discussed in Section 10 below.

⁴⁵ *MOX Plant Arbitration (Ireland v United Kingdom)* Procedural Order No 3 of the Arbitral Tribunal (24 June 2003) 7 [21], available at <http://www.pca-cpa.org/showpage.asp?pag_id=1148>

⁴⁶ *bid* [24].

⁴⁷ *bid* [29]. The ECJ ultimately decided that Ireland's institution of the proceedings under LOSC Annex V violated its obligations under European law, and Ireland thereafter withdrew the case submitted to arbitration. See n 26.

Different aspects of the swordfish dispute between Chile and the European Union were submitted by the former to arbitration under the LOSC (and subsequently by mutual agreement transferred to a special chamber of TLOS) and by the latter to a panel under the World Trade Organization (WTO) Dispute Settlement Understanding. The former case basically posed the question of EU compliance with the conservation requirements of the LOSC, while the latter basically posed the question of whether Chile's exclusion of EU fishing vessels from Chilean ports violated the 1994 General Agreement on Tariffs and Trade (GATT). While the dispute was ultimately settled and the cases withdrawn, had that not occurred, it is possible that certain issues might have been relevant to both proceedings. For example, the issue of the EU's compliance with its conservation obligations under the LOSC were also considered relevant to the WTO proceedings, then the question might have arisen as to whether one forum should await decision on that issue by the other. In this connection, it would seem that the TLOS chamber might have greater familiarity with that particular issue.

The dispute with respect to *Atlanto-Scandia* herring might have posed similar issues. See *Atlanto-Scandia Herring Arbitration (Denmark in respect of the Faroe Islands v EU)* Submitted to a LOSC Annex V Tribunal (16 August 2013), available at <http://www.pca-cpa.org/showpage.asp?pag_id=1554> *European Union Measures on Atlanto-Scandia Herring* Denmark Request for consultations 4 November 2013 (WT/DS469). The parties withdrew both cases by agreement on 21 August 2014.

⁴⁸ See n 8.

⁴⁹ The humourist HL Mencken observed 'Conscience is the inner voice that warns us somebody may be looking.' See HL Mencken *A Mencken Chrestomathy* (Alfred A Knopf New York 1956) 617.

⁵⁰ *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)* [2012] TLOS Rep 4 [342] [476] (hereinafter *Bangladesh/Myanmar*). An Annex V arbitral tribunal thereafter delimited the continental shelf beyond 200 nm between Bangladesh and India in the Bay of Bengal. *Bay of Bengal Maritime Boundary Arbitration (Bangladesh/India)* Award of the LOSC Annex V Tribunal (7 July 2014) [438] [480], available at <http://www.pca-cpa.org/showpage.asp?pag_id=1376>. Three of the five arbitrators had participated in the prior TLOS judgment.

⁵¹ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)* (Judgment) [2007] CJ Rep 659 [319]. *Territorial and Maritime Dispute (Nicaragua v Colombia)* (Judgment) [2012] CJ Rep 624 [125] [131]. Nicaragua subsequently brought a new action against Colombia with respect to delimitation of the continental shelf. *Delimitation of the Continental Shelf (Nicaragua v Colombia)* Application instituting Proceedings filed in the International Court of Justice (16 September 2013), available at <<http://www.icj-cij.org/docket/files/154/17532.pdf>>

⁵² Those concerned with protecting the common heritage may have breathed a sigh of relief when the CJ declined to consider Colombia's audacious contention that its status as a non-party not only relieves it of the duty

to comply with the institutional provisions of the LOSC but confers upon it the exceptional benefit of a continental shelf that is not limited by the detailed substantive criteria and constraints set forth in Art 76. See *Territorial and Maritime Dispute (Nicaragua v Colombia)* n 51 [117] [118]. In light of the fact that the CJ did find paragraph 1 of Art 76 to be declaratory of customary international law, it may be noted that TLOS concluded that 'the notion of natural prolongation and that of continental margin under article 76 paragraphs 1 and 4 ...refer to the same area' and that 'the reference to natural prolongation in article 76 paragraph 1 of the Convention should be understood in light of the subsequent provisions of the article defining the continental shelf and the continental margin' *Bangladesh/ Myanmar* n 50 [434] [437].

⁵³ *Bangladesh/Myanmar* n 50 [373].

⁵⁴ *bid* [376].

⁵⁵ *bid* [402].

⁵⁶ *bid* [413].

⁵⁷ *bid* [411].

⁵⁸ *bid* [385] [392].

⁵⁹ LOSC n 1 Art 1(2)(2). See n 16. In what has been understood to be a reference to Taiwan, FSA n 8 Art 1(3) provides that the Agreement 'applies mutatis mutandis to other fishing entities whose vessels fish on the high seas'. But the Agreement's provisions on settlement of disputes refer only to States or States parties, and paragraph 3 does not incorporate these fishing entities into the definition of States parties. On the other hand, the 2000 Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, which was negotiated in light of the LOSC and the FSA, provides in Annex paragraph 3 for arbitration of disputes involving a fishing entity. More generally, it may be noted that LOSC n 1 Annex V Art 20 provides that TLOS 'shall be open to entities other than States Parties...in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case'.

⁶⁰ LOSC n 1 Art 305 and Annex X.

⁶¹ including the Enterprise.

⁶² LOSC n 1 Annex Art 13(15) contains a similar provision regarding the financial terms of such a contract.

⁶³ The Chamber is also the only dispute settlement body to which requests for advisory opinions may be submitted by the Assembly or the Council of the Authority under Art 191.

⁶⁴ And perhaps a labour union that represents detained crew members.

⁶⁵ With respect to the Seabed Disputes Chamber, Annex V Art 38 adds the rules and regulations adopted by the Seabed Authority and mining contracts with the Authority.

⁶⁶ LOSC n 1 Arts 74(1) and 83(1) 'state that delimitation must be effected on the basis of international law, as referred to in article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution...Accordingly, the law applicable under the Convention with regard to delimitation of the exclusive economic zone and the continental shelf includes rules of customary international law. It follows that the application of such rules in the context of articles 74 and 83 of the Convention requires the achievement of an equitable solution, as this is the goal of delimitation prescribed by these articles' *Bangladesh/Myanmar* n 50 [183].

⁶⁷ See *MOX Plant* (Procedural Order No 3) n 45 [19].

⁶⁸ LOSC n 1 Arts 159(10), 191 Annex V Art 40(2). Such an opinion was rendered by the Chamber in *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* [2011] TLOS Rep 10.

⁶⁹ LOSC n 1 Art 288(2) refers to jurisdiction over a 'dispute' concerning the interpretation or application of an international agreement related to the purposes of the Convention. LOSC n 1 Annex V Art 21, the TLOS Statute, refers to jurisdiction over all 'matters' specifically provided for in any other agreement which confers jurisdiction on the Tribunal, although the articles that precede and follow this provision refer in the context of submissions under other agreements to 'case', 'all parties to that case', and 'disputes'. The 1995 FSA n 8 also makes no mention of advisory opinions. Art 30 incorporates the provisions of Part XV of the LOSC with respect to 'any dispute between States Parties' concerning the interpretation or application of the Agreement or of a sub-regional, regional, or global fisheries agreement relating to straddling fish stocks or highly migratory fish stocks to which they are parties.

⁷⁰ *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)* (2013) available at <<http://www.itlos.org/index.php?id=252#c1276>>