CHAPTER 3

Choice of Forum for Settlement of Law of the Sea Disputes

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1 Introduction: Choice of Forum Agreements in Public and Private International Law

Choice of forum agreements have two potential objects. One is to agree on resort to a forum. The other is to exclude resort to other fora. The first is the typical object of such an agreement. The second is optional. Absent express language to that effect, the second may or may not be implied by the first in fact or in law. Neither public nor private international law contains a general norm limiting access to one, and only one, forum for settlement of a dispute.

There are nevertheless crucial differences between public and private international law in this regard. While the jurisdiction of *ad hoc* arbitral tribunals in both public and private international law depends on agreement, where the defendant is a private party there is likely to be a standing court in at least one state with jurisdiction to adjudicate a dispute between the parties notwithstanding the absence of agreement. That is not necessarily so where the defendant is a state. The jurisdiction of municipal courts over foreign states is limited by international law rules and related statutes, especially those regarding immunities of states. For this and other reasons, states generally do not sue each other in municipal courts. They resort to international courts and tribunals, if there is jurisdiction.

The jurisdiction of an international court or tribunal is understood to require express consent of the parties to the dispute. This is so even if the forum is a standing court or tribunal.[1] The obligation of states to settle disputes peacefully under Articles 2 and 33 of the Charter of the United Nations is not understood to confer jurisdiction on any court or tribunal, or to oblige the parties to do so. The fact that every UN member is party to the

1 The question of the authority of the UN Security Council under Chapter 7 of the UN Charter and the question of the jurisdiction of international criminal tribunals are beyond the scope of this essay.

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Statute of the International Court of Justice (ICJ) does not mean that it has accepted the Court's jurisdiction to adjudicate a dispute under Article 36 of the Statute.

2 Compulsory Jurisdiction under the Law of the Sea Convention

The foregoing point should not be overlooked. Absent consent of the parties, there is no international court or tribunal with jurisdiction to adjudicate a dispute between states. The primary function of Section 2 of Part XV of the United Nations Convention on the Law of the Sea (UNCLOS) is to provide that consent in advance with respect to disputes concerning the interpretation or application of the Convention.[2] The selection of a specific forum for that purpose, while important to securing consent to jurisdiction, may be viewed as secondary to the objective of assuring that there is some court or tribunal with jurisdiction to render a binding decision.[3]

That was the perspective of many delegations during the negotiation of the Convention. For example, the United States indicated that it regarded the inclusion of provisions for compulsory jurisdiction as integral to the achievement of the objectives of the Convention.[4] A primary objective was the establishment of order, stability and predictability in the law of the sea. This required stemming the tide of unilateral claims that undermined that objective and threatened global mobility. Compulsory jurisdiction was viewed as a means to discourage claims that prejudice navigation and communications rights under the Convention, and thus as a helpful supplement to diplomatic and other measures, including the exercise of rights in areas affected by such claims. The object was to encourage compliance by enabling any state, not just

2 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS or the Convention).

3 In contrast, the 1958 Geneva Conventions on the Law of the Sea did not provide for compulsory jurisdiction. Rather, they were accompanied by an optional protocol on settlement of disputes, which was never applied. See Tullio Treves, 1958 Geneva Conventions on the Law of the Sea, UN, 2008 Introductory Note <http://legal.un.org/avl/pdf/ha/gclos/gclos_e.pdf> Accessed 22 October 2018. The 1956 draft articles on the law of the sea prepared by the International Law Commission, which formed the basis for the 1958 conventions, included compulsory arbitration of disputes regarding high seas fishing and compulsory jurisdiction of the ICJ over disputes regarding the continental shelf. ILC 'Articles Concerning the Law of the Sea' (1956) vol II, ILCYB 256, arts 57–59, 73.

4 John R Stevenson and Bernard H Oxman, 'The Preparations for the Law of the Sea Conference' (1974) 68 AJIL 1, 8, 31–32.

the United States, to challenge unlawful claims and actions in a tribunal empowered to render a binding decision.

3 Choice of Forum under the Law of the Sea Convention

Opinions differed on the general question of the respective advantages of standing tribunals and *ad hoc* arbitral tribunals. There was yet a further nuance, namely the question of the relative advantages of the existing standing tribunal and a new specialized standing tribunal. In this connection, a number of delegations concluded at the time that, however desirable it might be to select the ICJ as the forum, that option would pose problems with respect to access for entities other than states,[5] and in any event it would not be possible to achieve agreement on compulsory jurisdiction if all parties to the Convention were required to accept the jurisdiction of the ICJ for this purpose. Flexibility with respect to choice of forum, including but not limited to the establishment of a new specialized standing tribunal, would significantly enhance the prospects for support of compulsory jurisdiction as an integral element of the Convention.

My role in the formulation and negotiation of these positions earned me a memorable lunch with the venerable Judge Manfred Lachs, who served on the ICJ from 1967 to 1993 and as its president from 1973 to 1976. Evidently concerned about the impact on the ICJ, Judge Lachs tried to persuade me that the creation of a new standing international tribunal for the law of the sea was a

5 'Only states may be parties in cases before the Court'. See Statute of the International Court of Justice (signed 26 June 1945, entered into force 24 October 1945) 33 UNTS 993 (ICJ Statute) art 34. The 'States Parties' to UNCLOS include states as well as certain entities other than states that have competence over the matters governed by the Convention, including the competence to enter into treaties in respect of those matters, notably the European Union as well as certain self-governing associated states and territories. See UNCLOS, arts 1(2), 305–307, Annex IX. The dispute settlement provisions of the Convention apply to all 'States Parties'. UNCLOS, art 291(1). The International Tribunal for the Law of the Sea (ITLOS) is 'open to entities other than States Parties in any case expressly provided for in Part XI [deep seabed mining] or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case'. See UNCLOS, Annex VI, art 20(2). The dispute settlement provisions of Part XI, including those concerning the jurisdiction of the Seabed Disputes Chamber of ITLOS, include among potential parties the International Seabed Authority, the Enterprise (its commercial mining organ), and natural and juridical persons engaged in deep seabed mining activities. UNCLOS, arts 153(2)(b), 187, 188(2)(a). An application for prompt release of a detained vessel or crew may be made by 'or on behalf of' the flag state of the vessel. See UNCLOS, art 292(2).

bad idea. Finding him unmoved by my arguments on the merits, I indicated that it was unlikely that we would be able to secure consensus on compulsory jurisdiction without the inclusion of a new standing tribunal. Judge Lachs replied that this might be too high a price to pay.

There were of course others who shared his skepticism about the creation of a new standing tribunal for law of the sea disputes. Still others were unhappy with the idea of having to resort to any standing international court, including the ICJ. This group notably included the leader of the French delegation in the law of the sea negotiations, Guy Ladreit de Lacharrière. France's position in this regard may well have been influenced by its experience with the *Nuclear Tests* cases in the ICJ.[6] Lacharrière was not content with the compromise that emerged from an informal meeting in Montreux in 1975 to the effect that a dispute generally may be submitted only to the forum selected in the respondent's declaration, be it the ICJ, a new standing tribunal, or an *ad hoc* arbitral tribunal.[7] France desired not only the right to subject itself to suit only in an arbitral tribunal, but the right to sue in an arbitral tribunal without regard to the respondent's declaration. In the course of yet another memorable lunch, Lacharrière unambiguously conveyed his strength of feeling on the issue by assuring me that failure of the law of the sea negotiations would not prompt a day of mourning on the streets of Paris. France succeeded. And not without a touch of Gallic irony, Lacharrière was later elected to the ICJ.

4 Arbitration as the Default Procedure

What these vignettes illustrate is that choice of forum matters not only at the point at which lawyers decide whether and where to sue, but at a much earlier stage when governments are deciding whether a treaty will provide

6 *Nuclear Tests Case* (*Australia v France*) (Judgment) [1974] ICJ Rep 253, paras 13–15, 41, 51–52; *Nuclear Tests Case* (*New Zealand v France*) (Judgment) [1974] ICJ Rep 457, paras 13–15, 44, 53–55. Concern about the creation of a new standing tribunal continued even after the establishment of the ITLOS. See Gilbert Guillaume, 'The Future of International Judicial Institutions' (1995) 44 ICLQ 848; Shigeru Oda, 'Dispute Settlement Prospects in the Law of the Sea' (1995) 44 ICLQ 863.

7 For an account of the Montreux compromise, see Shabtai Rosenne, 'UNCLOS III: The Montreux (Riphagen) Compromise' in A Bos and H Siblesz (eds), *Realism in Law-Making: Essays on International Law in Honour of Willem Riphagen* (Martinus Nijhoff 1986) 169; Andronico O Adede, *The System for Settlement of Disputes Under the United Nations Convention on the Law of the Sea: A Drafting History and a Commentary* (Martinus Nijhoff 1987) 53.

for the right to sue at all. Both Lachs and Lacharrière were firm in their very different attitudes toward the role of the ICJ at the time. But both attitudes did mean that, in the end, and with limited exceptions, arbitration under Annex VII is the residual forum for compulsory jurisdiction under the Convention,[8] unless the parties have both determined otherwise by agreement or by declarations under Article 287 of the Convention that select the ICJ or the International Tribunal for the Law of the Sea (ITLOS) or, for certain categories of disputes, special arbitration under Annex VIII.[9] As a result, arbitration under Annex VII is the applicable forum under Article 287 in most situations at present, either because both parties file declarations opting for Annex VII arbitration or because the same forum is not selected in the parties' respective declarations, including where at least one party files no declaration and is therefore deemed to have accepted arbitration under Annex VII.[10]

8 There is a list of arbitrators under Annex VII to which each State Party to the Convention may name up to four individuals. See UNCLOS, Annex VII, art 2. The parties to a dispute are encouraged but not required to select from the list. UNCLOS, Annex VII, art 3(b)-(d). If the parties fail to appoint or agree on one or more arbitrators, Annex VII provides that the ITLOS president makes the appointment from the list 'in consultation with the parties'. UNCLOS, Annex VII, art 3(e). Article 280 specifies that nothing in Part XV 'impairs the right of any States Parties to agree at any time to settle a dispute … by any peaceful means of their own choice'. It would accordingly appear that, if the parties concur, the president may appoint individuals whose names do not appear on the list. The names of the three arbitrators appointed by the ITLOS president 'in consultation with the two parties in the dispute' concerning the vessel *ARA Libertad* do not appear on the list. See ITLOS Press Release, 'Three Arbitrators Appointed in the Arbitral Proceedings Instituted by the Argentine Republic Against the Republic of Ghana in Respect of a Dispute Concerning the Vessel *ARA Libertad*' (5 February 2013) ITLOS/Press 189. For the depositary notifications regarding the list of arbitrators under Annex VII, see <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en> accessed 20 June 2018.

9 The appointment procedure under Annex VIII differs in a number of respects from that under Annex VII. Under Annex VIII there are four different lists from which members are drawn that are comprised of experts in particular fields rather than one list of experts in the law of the sea generally; each party appoints two of the five members of the panel rather than one; the relevant time period for the parties to agree on appointment of the president of the special arbitral tribunal is shorter than that for agreement on three arbitrators under Annex VII; in the absence of a relevant appointment by the parties, the appointing authority is the Secretary-General of the United Nations rather than the president of ITLOS.

10 Because arbitration under Annex VIII applies only to certain categories of disputes, a dispute concerning other matters would be one 'not covered by a declaration' that refers only to Annex VIII; the state making the declaration would be deemed to have accepted arbitration under Annex VII with respect to such a dispute. See UNCLOS, art 297(3).

5 The International Tribunal for the Law of the Sea

Supporters of a new standing tribunal for disputes concerning the interpretation and application of the Convention succeeded not only in creating it, but in endowing it with jurisdiction over three types of proceedings notwithstanding the declarations of the parties: provisional measures pending the constitution of an arbitral tribunal under Section 2 of Part XV,[11] prompt release of detained vessels and crew,[12] and, with respect to the Seabed Disputes Chamber of ITLOS, interpretation or application of the deep seabed mining provisions of Part XI and related annexes.[13] The first two of these are characterized by a need for urgent action by a tribunal, a need that cannot readily be fulfilled by an *ad hoc* arbitral tribunal that has yet to be constituted. They accounted for much of the case load of ITLOS in its early years.

The role of the ITLOS president in the constitution of an arbitral tribunal, as well as the role of ITLOS with respect to provisional measures pending the constitution of the arbitral tribunal, have proved significant in bringing the merits of a dispute before ITLOS in situations where a dispute has been submitted to arbitration pursuant to Article 287 of the Convention.[14] Even after the dispute is submitted to arbitration, it is open to either party to suggest that the parties agree that the dispute be heard by some other forum.[15] Moreover,

11 UNCLOS, art 290(5). The 1995 Implementation Agreement regarding straddling and highly migratory fish stocks incorporates by reference the dispute settlement provisions of UNCLOS with respect to the interpretation and application of that agreement and of any sub-regional, regional or global fisheries agreement relating to such fish stocks. States that are not party to UNCLOS are nevertheless permitted to declare that ITLOS may not prescribe provisional measures without their agreement. No such declaration has been made to date. 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 4 August 1995, entered into force 11 December 2001) 2167 UNTS 3, arts 30(1)–(2), 31(3). For declarations of the parties to the 1995 Agreement, see <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-7&chapter=21&clang=_en> accessed 20 June 2018.

12 UNCLOS, art 292(1).

13 UNCLOS, arts 187, 287(2), 288(3). Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (adopted 28 July 1994, entered into force 28 July 1996) 1836 UNTS 3 (Part XI Implementation Agreement) Annex, s 3(12), s 6(1)(f)(ii), s 8(1)(f).

14 For a list of cases transferred from Annex VII arbitral tribunals to ITLOS, see Patibandla Chandrasekhara Rao and Philippe Gautier, *The International Tribunal for the Law of the Sea: Law, Practice and Procedure* (Edward Elgar 2018) 106.

15 This includes a chamber of either the ICJ or ITLOS that is constituted for that specific dispute. See ICJ Statute, art 26(2)-(3); UNCLOS, Annex VI, art 15(2). While this bears some

in the event that the parties are unable to agree on one or more of the three arbitrators to be appointed jointly, the matter may be referred by either party to the ITLOS president, who has the power to make the appointments in consultation with the parties. Those consultations of course bring counsel for both parties together at ITLOS headquarters. Similarly, if there is a request for ITLOS to prescribe provisional measures pending the constitution of an arbitral tribunal, there is likely to be advance consultation on procedural issues at ITLOS headquarters.

A *The Saiga Case*

The Tribunal's very first dispute is instructive in this regard. Initially, St. Vincent and the Grenadines submitted a request to ITLOS to order prompt release of the SAIGA, a ship detained by Guinea. The ship was not immediately released following the ITLOS judgment ordering release.[16] St. Vincent and the Grenadines then submitted the dispute on the merits to an Annex VII arbitral tribunal, and requested that ITLOS prescribe provisional measures releasing the ship pending the constitution of the arbitral tribunal. In the course of consultations with the ITLOS president regarding the pending proceedings, the parties informed him that they had agreed to transfer the dispute on the merits to ITLOS.[17] The agreement on transfer states that it emerged from a 'recent exchange of views between the two Governments, including through the good offices of the President of the International Tribunal for the Law of the Sea'.[18]

In the *Saiga* case, the fact that the parties had already participated in prompt release proceedings before ITLOS, and were facing provisional measures proceedings before ITLOS, may have made it easier for them to conclude that ITLOS should adjudicate the merits as well. To the extent that the applicant may have had concerns about expeditious proceedings, ITLOS had already demonstrated its ability to act promptly, and the parties' counsel were

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resemblance to arbitration, there are important differences. One is that, apart from party-appointed *ad hoc* judges, the members of a chamber are selected from among members of the standing tribunal; there is no such limitation in arbitration. See n 8. Another is that the parties may not have the same measure of flexibility with respect to procedure. Yet another is that the costs of the court or tribunal and its personnel and facilities are ordinarily borne by all UN members with respect to the ICJ and all parties to UNCLOS with respect to ITLOS.

16 *M/V 'Saiga'* (*No 1*) (*Saint Vincent and the Grenadines v Guinea*) (Prompt Release, Judgment of 4 December 1997) ITLOS Reports 1997, 16.

17 *M/V 'Saiga'* (*No 2*) (*Saint Vincent and the Grenadines v Guinea*) (Provisional Measures, Order of 11 March 1998) ITLOS Reports 1998, 24, para 12.

18 ibid para 14.

in a position to discuss the course of proceedings on the merits with the ITLOS president and staff. Also, their experience in the prompt release proceedings may have allayed other concerns they may have had. To these parties ITLOS was already a known quantity in existence and able to act, while an arbitral tribunal's composition and timing were speculative, and its locus, staff support, and procedural rules remained to be determined. It may also be noted that the respondent retained counsel from Hamburg. And then there is the matter of cost. Arbitration requires that the parties to the case, typically both parties, bear the costs of the arbitrators' remuneration and expenses, registry functions, and facilities. That is not the case with respect to ITLOS, whose costs are borne by the parties to the Convention as a whole.

B *The Bay of Bengal Maritime Delimitation Cases*

The first maritime delimitation case to be brought before ITLOS was also subject to arbitration under the choice of forum provisions of Article 287 of the Convention. Bangladesh had submitted its delimitation dispute with Myanmar in the Bay of Bengal to arbitration under Annex VII. A month later Myanmar filed a declaration under Article 297, paragraph 1, of the Convention accepting the jurisdiction of ITLOS over the dispute, and invited Bangladesh to do the same. A month thereafter Bangladesh did the same, and notified the ITLOS Registry that the dispute was now before ITLOS.[19]

Bangladesh submitted its delimitation dispute with India in the Bay of Bengal to arbitration under Annex VII at the same time that it submitted its dispute with Myanmar to arbitration under Annex VII.[20] The India case was not, however, transferred to ITLOS. But the counter-memorial in the India case, the second round of written pleadings, the site visit, and the oral hearings were all deferred until after the ITLOS judgment in the Myanmar case.[21]

In considering the fact that only one of the two cases was transferred to ITLOS, it is interesting to note that there was substantial overlap of counsel

19 *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* (*Bangladesh/Myanmar*) (Judgment of 14 March 2012) ITLOS Reports 2012, 4, paras 1–5, 8, 9. Myanmar thereafter withdrew its declaration accepting the jurisdiction of ITLOS. Bangladesh noted that under UNCLOS Article 287 this had no effect on the jurisdiction of ITLOS over the dispute already submitted.

20 Letter from Dr Dipu Moni, Minister for Foreign Affairs of Bangladesh, to Judge José Luis Jesus, President of ITLOS (13 December 2009) para 2 <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/Notification_Bangladesh_14.12.09.pdf> accessed 25 June 2018.

21 *Bay of Bengal Maritime Boundary Arbitration* (*The People's Republic of Bangladesh v The Republic of India*), PCA Case No 2010–16, Award (7 July 2014) paras 22, 29, 31, 34, 41.

representing Bangladesh in both cases, as well as substantial overlap of outside counsel representing India and Myanmar in the respective cases. Moreover three of the five arbitrators who rendered the award in the India case also sat in the Myanmar case, two of them having been appointed as arbitrators by the ITLOS president.

Bangladesh initially appointed the same arbitrator in both cases, and then appointed him as judge *ad hoc* when the Myanmar case was submitted to ITLOS. When he thereafter withdrew as arbitrator in the India case he also withdrew as judge *ad hoc* in the Myanmar case. Bangladesh replaced him with the same individual in both positions.[22] One difference -- a difference that is sometimes overlooked -- is that Myanmar and India did not name the same party-appointed arbitrators.[23]

The *Saiga* and *Bay of Bengal* cases remind us that choice of forum very much depends on timing and context. Parties to the Convention limited their range of choices at the time article 287 of the Convention was negotiated, but gave themselves options. Then they made a specific choice when they decided whether to file a declaration under Article 287 or to simply be deemed to have accepted arbitration under Annex VII by not filing a declaration. While that choice had the effect of determining the forum absent further agreement between the parties, it did not, both in principle and in practice, preclude such further agreement following submission of the dispute or, indeed, preclude filing a new declaration.

6 Development and Coherence of the Law

In the context of any given case, legal counsel is likely to prefer submission of the dispute to a forum that is most conducive to advancement of the client's objectives. Those objectives may transcend merely winning the case against the other party. If, for example, the dispute in principle engages issues that arise not only as against the adverse party in the case but as against other

22 *Bangladesh/Myanmar* (n 19) paras 13–16; *Bay of Bengal Arbitration* (n 21) paras 4, 8.

23 India chose Dr Pemmaraju Sreenivasa Rao, while Myanmar chose ITLOS Judge Patibandla Chandrasekhara Rao. See Bangladesh Letter to ITLOS (n 20) para 3. Both are Indian nationals. When the Myanmar case was transferred to ITLOS, Myanmar chose a different individual to serve as judge *ad hoc* since Judge Chandrasekhara Rao was already on the bench. *Bangladesh/Myanmar* (n 19) para 13. Had the India case been brought before ITLOS with Judge Chandrasekhara Rao sitting on the bench, India would not have had the opportunity to appoint a judge *ad hoc*.

states as well – say a dispute over the nature and extent of coastal state entitlements or high seas freedoms – then a state may have an interest in the probability that the outcome of the case may influence the perceptions of third states as well.

This concern is not limited to the parties to a case.[24] One or more of the legal issues posed may be of interest to a significant number of states: for example, whether the refueling of another vessel or aircraft is a freedom of the high seas preserved in the exclusive economic zone (EEZ), and if so whether the activity is nevertheless subject to the jurisdiction of the coastal state in some respects, such as when the vessel being refueled is fishing in the zone.[25] True enough, non-parties to the case are not legally bound by the judgment or the award. The common-law notion of *stare decisis* may not be part of international law,[26] and may not apply to arbitral awards in any event. But the truth of the matter is that decisions of international courts and tribunals do influence perceptions of what the law is.[27] The reputations of those who made the decision, the persuasiveness of the opinion, the transparency of the proceedings, and the fact that members of a standing tribunal are diverse and elected on a broad base are among the factors that may be relevant in this regard.

The inclusion of compulsory dispute settlement provisions in a major multilateral treaty such as the Law of the Sea Convention thus has a double function. The primary objective of course is to ensure the peaceful settlement of disputes. But there is also a desire to provide for authoritative articulations by learned jurists of what the text means and how it applies in different and evolving circumstances. In this regard one may ask whether there is a contradiction between the latter objective and the decision to afford a range of choices as to the forum, including a new specialized standing tribunal and an emphasis on the jurisdiction of *ad hoc* arbitral tribunals. With that many courts and tribunals, isn't there a risk of inconsistency that is, at its heart, in tension with this objective?

Insofar as the law of the sea is concerned, one can test that hypothesis with respect to the numerous maritime delimitation cases that have been tried. The substantive text of the Law of the Sea Convention on delimitation

24 See Daniel Bethlehem, 'The Secret Life of International Law' (2012) 1 CJICL 23, 31–33.

25 The issue of refueling vessels fishing in the EEZ was addressed in *M/V 'Virginia G'* (*Panama/Guinea-Bissau*) (Judgment of 14 April 2014) ITLOS Reports 2014, 4, paras 206–223.

26 See ICJ Statute, art 59; UNCLOS, Annex VI, art 33(2).

27 Indeed, it is not unusual for governments to take matters beyond the limits of *stare decisis* and include in diplomatic and legal instruments general language – dictum if you will – derived from the opinions of the ICJ or some other tribunal.

of overlapping EEZs and continental shelves is not detailed: it requires agreement on the basis of international law in order to achieve an equitable solution.[28] Such a provision invites authoritative explication. Many delimitation cases have been heard by the ICJ. Others have gone to arbitration and more recently to ITLOS. The law itself, as articulated by these tribunals, has undergone marked development and change since the ICJ decided the *North Sea Continental Shelf* cases.[29] All of these fora have contributed to this process. And what we have witnessed is not chaos but, rather, remarkable consistency in the development of the articulation of the underlying law of maritime delimitation and the task of tribunals in applying that law, punctuated by citation of decisions of other courts and tribunals.

Those who feared what a new standing tribunal would do might note that, in its *Bay of Bengal* judgment, ITLOS not only applied the three-part methodology articulated by the ICJ in its unanimous *Black Sea* judgment,[30] but for the first time also applied that methodology to the delimitation of the continental shelf beyond 200 miles.[31] And those who wonder about the influence of arbitral awards on the development of the law might note that the award in the Anglo-French Channel Islands arbitration[32] began the arduous process, eventually embraced by the ICJ itself, of walking the law of delimitation back from the open-ended indeterminacy of the standards articulated in the *North Sea Continental Shelf* opinion, or that the award in the *Barbados/Trinidad and Tobago* arbitration[33] advanced the development of a more coherent delimitation methodology along the lines the ICJ was already working out and thereafter crystallized in the *Black Sea* case.

This remarkable consistency may be due to a variety factors, including in particular the fact that judges and arbitrators are well aware of the desirability of maintaining reasonable coherence and consistency. This may have been aided by what we might call cross-fertilization. Both the parties and the ITLOS president have appointed one or more current or former ICJ and ITLOS judges

28 UNCLOS, arts 74, 83.

29 *North Sea Continental Shelf Cases* (*Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands*) (Judgment) [1969] ICJ Rep 3.

30 *Maritime Delimitation in the Black Sea* (*Romania v Ukraine*) (Judgment) [2009] ICJ Rep 61, paras 118–122.

31 *Bangladesh/Myanmar* (n 19) para 455.

32 *Case Concerning the Delimitation of the Continental Shelf Between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, Arbitral Award (30 June 1977) para 70.

33 *Barbados v The Republic of Trinidad and Tobago*, PCA Case No 2004-02, Award of the Arbitral Tribunal (11 April 2006) para 242.

to Annex VII arbitral tribunals.[34] An ICJ judge was appointed judge *ad hoc* of the ITLOS special chamber in the maritime delimitation case between Ghana and Côte d'Ivoire.[35] Both of the *ad hoc* judges in the ICJ *Black Sea* case were also on the bench in the ITLOS *Bay of Bengal* case, and two members of the bench in the latter case were thereafter *ad hoc* judges in the ICJ case between Nicaragua and Colombia.[36]

But not all arbitral panels constituted under Annex VII have a majority drawn from the ICJ and ITLOS. The *Southern Bluefin Tuna* case was the first arbitration under the Law of the Sea Convention. The composition of the panel was agreed by the parties. While its president was the immediate past ICJ president, the panel included no other ICJ or ITLOS judges.[37]

The *Arctic Sunrise* arbitration was instituted by the Netherlands against the Russian Federation, which declined to participate. The president of the tribunal was a former ITLOS judge and president, and one member had sat on ITLOS as an *ad hoc* judge, but there were no sitting ICJ or ITLOS judges on the panel.[38] However, in an intriguing twist perhaps, the agent for the Netherlands in that case, as well as the Russian ambassador to the Netherlands during the arbitration, were both elected to ITLOS in 2017.

7 Relationship to Compulsory Jurisdiction under Other Treaties

The underlying approach of the Convention, namely that forum selection is flexible provided that some international court or tribunal has jurisdiction to

34 In the Chagos arbitration, three members of the panel were sitting ITLOS judges, one was a sitting ICJ judge, and the president had served on ITLOS as a judge *ad hoc*. See *Chagos Marine Protected Area Arbitration* (*The Republic of Mauritius v The United Kingdom of Great Britain and Northern Ireland*), PCA Case No 2011-03, Award (18 March 2015). In the South China Sea arbitration, three of the members of the panel were sitting ITLOS judges, and the president of the panel was a former ITLOS judge and its first president. See *South China Sea Arbitration* (*The Republic of Philippines v The People's Republic of China*), PCA Case No 2013–19, Award (12 July 2016).

35 *Dispute Concerning Delimitation of the Maritime Boundary Between Ghana and Côte d'Ivoire in the Atlantic Ocean* (*Ghana/Côte d'Ivoire*) (Judgment of 23 September 2017) ITLOS Reports 2017.

36 *Territorial and Maritime Dispute* (*Nicaragua v Colombia*) (Judgment) [2012] ICJ Rep 624.

37 *Southern Bluefin Tuna Between Australia and Japan, and Between New Zealand and Japan*, Award on Jurisdiction and Admissibility (4 August 2000).

38 *Arctic Sunrise Arbitration* (*The Kingdom of the Netherlands v The Russian Federation*), PCA Case No 2014-02, Award on the Merits (14 August 2015).

render a binding decision in the dispute, extends beyond the Convention itself. Here the Convention yields to other compulsory third-party procedures agreed by the parties.[39] Pursuant to Article 282, the compulsory jurisdiction provisions of Part XV do not apply if the dispute concerning the interpretation or application of the Convention may be submitted by any party to the dispute to a procedure entailing a binding decision under another agreement or instrument.[40] There is no requirement that the other agreement contain an express reference to law of the sea disputes or itself exclude resort to the dispute settlement procedures of Section 2 of Part XV.

Article 282 applies where the parties to a dispute have accepted the jurisdiction of the ICJ by agreement or by declaration in accordance with Article 36 of its Statute if that acceptance applies to their dispute concerning the interpretation or application of the Convention.[41] This is so even if neither has opted for the ICJ under Article 287 of the Convention. The same may be true of regional courts. It may be recalled that the European Court of Justice, in concluding that Ireland was not acting in accordance with EU law when it submitted the MOX Plant dispute with the UK to arbitration under the Law of the Sea

39 See Nigel Bankes, 'Precluding the Applicability of Section 2 of Part XV of the Law of the Sea Convention' (2017) 48 Ocean Dev & Intl L 239.

40 The requirement that there be an agreement to submit the dispute to 'a procedure that entails a binding decision' does not specify the precise nature of the procedure. It presumably includes either arbitration or adjudication as generally understood. Whether it includes other third-party dispute settlement procedures that depart in some respects from that general understanding may depend on the precise context and nature of the procedures. The mere existence of an agreement delegating authority to an international institution or other third party to create a legally binding obligation affecting the dispute might not be sufficient to exclude jurisdiction under Article 282 (although it might of course be relevant to the merits or to admissibility of the claim). One may note in this connection that the question of the role of the UN Security Council is addressed in an optional, not a mandatory, exception to jurisdiction by UNCLOS Article 298(1)(c) and that this exception applies only if the Council 'is exercising the functions assigned to it' by the UN Charter 'in respect of the dispute' and does not apply if the 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'.

41 'The phrase "or otherwise" in Article 282 … encompasses agreement to the jurisdiction of the Court resulting from optional clause declarations'. *Maritime Delimitation in the Indian Ocean* (*Somalia v Kenya*) (Preliminary Objections) [2017] ICJ Rep 3, para 128. See Marco Benatar and Erik Franckx, 'The ICJ's Preliminary Objections Judgment in Somalia v. Kenya: Causing Ripples in Law of the Sea Dispute Settlement?' (22 February 2017) EJIL Talk <https://www.ejiltalk.org/the-icjs-preliminary-objections-judgment-in-somalia-v-kenya-causing-ripples-in-law-of-the-sea-dispute-settlement/> accessed 25 June 2018.

Convention, itself cited Article 282 of the Law of the Sea Convention as well, stating that '[i]t follows from Article 282 of the Convention that, as it provides for procedures resulting in binding decisions in respect of the resolution of disputes between Member States, the system for the resolution of disputes set out in the EC Treaty must in principle take precedence over that contained in Part XV of the Convention'.[42]

The Law of the Sea Convention requires compliance with a variety of international rules and standards elaborated in or under other multilateral agreements. Some of those agreements permit any party to a dispute concerning such rules or standards to submit it a procedure entailing a binding decision. Where the states concerned are party to such an agreement, deference to the dispute settlement system of the other agreement is expressly required by the Part XI Implementation Agreement in connection with the GATT/WTO constraints on subsidies that are incorporated by reference.[43] One might argue for the same conclusion under Article 282 with respect to other issues and other agreements, including those concluded under IMO auspices, that provide for compulsory arbitration or adjudication of disputes regarding the interpretation or application of standards incorporated by reference into the Law of the Sea Convention.[44] However, the issues may not be precisely the same. It may be that, where appropriate, suspension of proceedings on grounds of comity may make more sense in this situation than a hard and fast jurisdictional decision.[45]

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42 Case C-459/03 *Commission v Ireland* [2006] ECR I-4635, para 125.

43 Part XI Implementation Agreement, s 6(1)(f)(i).

44 Article 16 of the 1996 London Protocol on ocean dumping would appear to be drafted on this assumption. It provides for arbitration under Annex 3 of the Protocol of unresolved disputes regarding the interpretation or application of the Protocol 'unless the parties to the dispute agree to use one of the procedures listed in paragraph 1 of Article 287 of the 1982 United Nations Convention on the Law of the Sea'. 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (adopted 7 November 1996, entered into force 24 March 2006) 36 ILM 1, art 16. UNCLOS Article 210 provides for the establishment through the competent international organization of global rules and standards regarding pollution by dumping, and specifies that '[n]ational laws, regulations and measures shall be no less effective in preventing, reducing and controlling such pollution than the global rules and standards'.

45 See *The MOX Plant Case* (*Ireland v United Kingdom*), PCA Case No 2002-01, Order No 3: Suspension of Proceedings on Jurisdiction and Merits, and Request for Further Provisional Measures (24 June 2003); *The MOX Plant Case* (*Ireland v United Kingdom*), PCA Case No 2002-01, Order No 4: Further Suspension of Proceedings on Jurisdiction and Merits (14 November 2003).

8 Relationship to Non-Binding Dispute Settlement Procedures

It is important to distinguish the issue posed by Article 281 of the Convention. It accords much more limited priority to agreed dispute settlement procedures that do not entail a binding decision. Article 281 may delay, but it does not exclude, resort to the compulsory jurisdiction provisions of Section 2 of Part XV, provided that the other agreement 'does not exclude any further procedure'.[46] The conclusion in the *Southern Bluefin Tuna* arbitration that the exclusion of resort to a further procedure under the other agreement need not be express, but may be implied, has not been embraced in subsequent cases.[47] That reaction would itself appear to be consistent with the underlying proposition that some international court or tribunal should have jurisdiction to render a binding decision in a dispute between parties to the Convention concerning its interpretation or application, absent an express limitation or exclusion under some other agreement or Section 3 of Part XV.

Section 3 sets forth express limitations and exceptions to compulsory arbitration or adjudication under Section 2 of Part XV. Articles 297 and 298 of that section also contain an unusual alternative in three situations where compulsory arbitration or adjudication is excluded, namely compulsory conciliation. The provisions regarding exclusion from compulsory arbitration or adjudication of certain disputes concerning marine scientific research and fishing in coastal areas and delimitation of maritime boundaries nevertheless permit either party to submit certain excluded disputes to conciliation under Annex V, although the conclusions of the conciliation commission are not legally binding.[48]

Compulsory conciliation under the Convention applies to certain disputes that are subject to a limitation or exception to compulsory arbitration or

46 See *Conciliation Between the Democratic Republic of Timor-Leste and The Commonwealth of Australia*, PCA Case No 2016-10, Decision on Australia's Objections to Competence (19 September 2016). Australia claimed that the Commission's competence was precluded under Article 281 because a treaty between the parties (CMATS) contained an article that barred either party from seizing any court, tribunal or other dispute settlement mechanism with their maritime boundary dispute. The Commission determined that CMATS is not an agreement between the parties 'to seek settlement of the dispute by a peaceful means of their own choice' because it simply bars such action; it does not provide any settlement options for maritime boundary disputes. Therefore, CMATS could not result in a legally binding agreement that would preclude jurisdiction under Article 281.

47 See the analysis and citations in the *South China Sea Arbitration* (*The Republic of Philippines v The People's Republic of China*), PCA Case No 2013–19, Award on Jurisdiction and Admissibility (29 October 2015) paras 223–225.

48 UNCLOS, Annex V, arts 7(2), 14.

adjudication under the Convention. The connection between the two is apparent on the face of it: the reference to conciliation immediately follows the reference to the relevant exception to compulsory arbitration or adjudication in the same paragraph of the same article; the textual link is particularly obvious in the wording of Article 298(1)(a) with respect to maritime boundaries. Accordingly, the broader the competence of a conciliation panel, the broader the apparent exception to compulsory arbitration or adjudication under the Section 2 of Part XV of the Convention. In the particular context of compulsory conciliation proceedings, it is by no means clear that the interests of the parties are completely adverse to each other on the question of the scope of the exception to compulsory arbitration or adjudication under the Convention. This is especially true where the state that did not initiate the conciliation proceedings is also a state that wishes to avoid binding arbitration or adjudication of the dispute. One must treat jurisdictional precedent from conciliation proceedings with caution.[49] A conciliation commission's conclusions as to its competence may well be influenced not only by the parties' views but by the commission's mandate to facilitate an amicable settlement of the dispute by the parties themselves.[50]

9 Relationship to Other Convention Organs

The fact that Article 287 of the Convention renders arbitration the default system should not divert our attention from standing international courts. They form part of a broader institutional structure. The UN Charter expressly refers to the ICJ as the principal judicial organ of the United Nations.[51] While there is no comparable reference to ITLOS in the Law of the Sea Convention, it is one of three institutions expressly created by the Convention itself. The other two are the International Seabed Authority and the Commission on the Limits of the Continental Shelf. In this respect it is interesting to look at the relationship between the Tribunal and the other institutions.

The Convention creates a Seabed Disputes Chamber within ITLOS.[52] The chamber has review powers with respect to the Seabed Authority that are in

49 The conciliation commission decides its competence in the event of disagreement between the parties. See UNCLOS, Annex V, art 13.

50 ibid arts 5, 6.

51 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, art 92.

52 UNCLOS, art 186, Annex VI, art 14.

some sense analogous to the powers of municipal administrative tribunals.[53] The Convention makes clear that while contract disputes between the Seabed Authority and a miner are to be submitted to commercial arbitration at the request of a party to the dispute, any question that arises regarding the interpretation of Part XI of the Convention and related Annexes must be referred to the Seabed Disputes Chamber for a ruling.[54] It is evident from this provision that concerns about review of institutional regulatory powers by *ad hoc* arbitral panels are neither novel nor limited to investment treaties. Indeed, this issue was foreseen when the United States was the first to broach the possibility of creating a new standing tribunal. The idea emerged in the context of the deep seabed mining regime, and in that connection the United States made clear that the tribunal should have significant review powers over the international regulatory system, at the behest of both states and private investors, so as to ensure adherence to the requirements and limitations set forth in the Convention.[55]

The Convention does not expressly spell out the relationship between the Commission on the Limits of the Continental Shelf and either ITLOS or any other tribunal.[56] The Commission is not a dispute settlement body. It operates

53 UNCLOS, arts 187(b), 189.

54 ibid art 188(2).

55 See UNGA 'Report of the Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction' UN GAOR 25th Session Supp No 21 UN Doc A /8021 (1970) 1, 30–76 (United States); Draft Articles for a Chapter on the Settlement of Disputes (21 Aug 1973) UN Doc A/AC.138/97 (1973) 12 ILM 1220. 'The timely availability of impartial dispute settlement machinery, applicable both to disputes between states and operators and disputes with organs of the Authority, is considered essential by a number of states, including the United States. … [T]he United States has now complemented what amounts to a comprehensive set of proposals on basic substantive issues involved in the negotiations with new draft articles providing for the resolution by a new Law of the Sea Tribunal of disputes not settled by other means. … While the articles permit a variety of agreed means for settling disputes, the choice of a new specialized tribunal rather than the International Court of Justice was based on considerations of expertise, on the special "administrative law" functions the tribunal may have in connection with the deep seabeds, and on the greater flexibility in allowing private parties to appear before such a tribunal in specific instances, such as essentially "contractual" disputes under the international regime for the deep seabeds'. Stevenson and Oxman (n 4) 8, 31–32 (footnotes omitted).

56 The Convention provides that 'actions of the Commission shall not prejudice matters relating to delimitation of boundaries between States with opposite or adjacent coasts'. See UNCLOS, Annex II, art 9. Moreover, the Commission's Rules of Procedure provide, 'In cases where a land or maritime dispute exists, the Commission shall not consider and qualify a submission made by any of the States concerned in the dispute. However, the Commission may consider one or more submissions in the areas under dispute with prior

ex parte and has no binding powers as such. But coastal states are afforded the extraordinary right to establish 'final and binding' seaward limits of their continental shelves 'on the basis of' Commission recommendations regarding the limits those states submitted for Commission review.[57]

For some time both the ICJ and arbitral tribunals either declined to proceed to delimit overlapping continental shelf entitlements beyond 200 miles where the question of the limits of the respective entitlements of the parties to the case had yet to be addressed by the Commission,[58] or found means to avoid the need to do so.[59] It was ITLOS, in the *Bay of Bengal* case, that was the first international tribunal to delimit the continental shelf beyond 200 miles. Among the 136 paragraphs expressly devoted to the analysis of that issue in its opinion, the following may be of particular interest in the context of this study:

> 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. The same is true of other bodies referred to in the Convention.[60]

The last sentence quoted expressly acknowledges the role of other bodies referred to in the Convention. But the institutional perspective of the paragraph would appear to be that of a tribunal created by the Convention itself . It might not have been articulated in quite the same way in an opinion by another court or tribunal to which the Convention refers.

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consent given by all States that are parties to such a dispute'. See 'Rules of Procedure of the Commission on the Limits of the Continental Shelf' Commission on the Limits of the Continental Shelf (New York 17 March-18 April 2008) 21th Session (17 April 2008) UN Doc CLCS/40/Rev.1, Rule 46, Annex I.

57 UNCLOS, art 76(8).

58 *Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea* (*Nicaragua v Honduras*) (Judgment) [2007] ICJ Rep 659, para 319 ('in no case may the [delimitation] line [drawn by the Court] be interpreted as extending more than 200 nautical miles ... any claim of continental shelf rights beyond 200 miles must be in accordance with Article 76 of UNCLOS and reviewed by the Commission on the Limits of the Continental Shelf established thereunder').

59 *Barbados v Trinidad and Tobago Arbitration* (n 33) paras 213, 217(ii), 384(ii) (finding jurisdiction to delimit the continental shelf beyond 200 nm) and 368 ('the single maritime boundary which the Tribunal has determined is such that, as between Barbados and Trinidad and Tobago, there is no single maritime boundary beyond 200 nm'.).

60 *Bangladesh/Myanmar* (n 19) para 373.

10 Conclusion

It is evident that we are faced with a sometimes daunting array of fora as well as factors relevant to a choice among them. If this is relatively new to public international law, it is a standard feature of municipal law and private international law. It may well be regarded as a sign of maturation, as the idea of compulsory jurisdiction, long accepted in municipal law and private international law, takes firmer hold in public international law. True, the complexity on which I touched may have been born of expediency. But like many other developments in the law, it survives and thrives because it serves a useful purpose.

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