

DISPUTE SETTLEMENT AND THE LAW OF THE SEA CONVENTION: PROBLEMS OF FRAGMENTATION AND JURISDICTION

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I. INTRODUCTION

THE entry into force of the 1982 United Nations Convention on the Law of the Sea ("UNCLOS"), on 16 November 1994, is probably the most important development in the settlement of international disputes since the adoption of the UN Charter and the Statute of the International Court of Justice. Not only does the Convention create a new international court, the International Tribunal for the Law of the Sea ("ITLOS"), it also makes extensive provision for compulsory dispute-settlement procedures involving States, the International Seabed Authority ("ISBA"), seabed mining contractors and, potentially, a range of other entities. Implementation of the Convention has spawned a number of inter-State disputes to add to the cases already before the International Court. The initiation of the ITLOS not only opens up new possibilities for settling these disputes but it also has implications for the future role of the International Court and *ad hoc* arbitration in the law of the sea and more generally. It contributes to the proliferation of international tribunals and adds to the potential for fragmentation both of the substantive law and of the procedures available for settling disputes. Judges Oda and Guillaume have argued that the ITLOS is a futile institution, that the UNCLOS negotiators were misguided in depriving the International Court of its central role in ocean disputes and that creation of a specialised tribunal may destroy the unity of international law.¹ The law of the sea, both judges argue, is an essential part of international law and any dispute concerning the application and interpretation of that law should be seen as subject to settlement by the International Court. Although they accept that more specialised bodies may be more appropriate for certain types of dispute, such as those involving technical expertise or the application of equity, their conception is essentially one in which a single judicial body—the International Court—

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1. S. Oda, "The ICJ Viewed from the Bench" (1993) 244-II Hag. Rec. 127-155, and "Dispute Settlement Prospects in the Law of the Sea" (1995) 44 I.C.L.Q. 863; G. Guillaume, "The Future of International Judicial Institutions" (1995) 44 I.C.L.Q. 848. See also E. Lauterpacht, *Aspects of the Administration of International Justice* (1991), pp.20-22.

exercises responsibility for the integrated development of a single system of international law. The purpose of this article is to consider how far these fears of fragmentation are justified and, in a more practical vein, how the new and quite complex system instituted by the 1982 UNCLOS will affect the litigation of law of the sea disputes, and what the role of the new ITLOS is likely to be.

II. THE UNCLOS DISPUTE-SETTLEMENT SCHEME

A. *The Role of Compulsory Dispute-Settlement in UNCLOS*

The emphasis placed on dispute-settlement procedures in the 1982 UNCLOS—and in particular on compulsory binding procedures—reflects the three central objectives of the negotiations which led to its adoption.² It is worth recalling what these were.

First, the Convention was intended to be a comprehensive code for the law of the sea as a whole, covering all relevant issues in a single text. Second, it was intended to be universal in character, a code which could obtain the widest possible support from States and which would as far as possible represent a consensus of views. Third, the Convention text was intended to be an integral whole, a “package deal”, which could be ratified only in full, without reservations, or not at all. Since the Convention deals with much that had been in dispute, much that is new and much that remains unresolved, it inevitably represents a complex balance of interests, and contains many inherently uncertain or ambiguous articles. In this context binding compulsory dispute settlement becomes the cement which should hold the whole structure together and guarantee its continued acceptability and endurance for all parties. Without such provision the Convention would inevitably be interpreted and applied differently by different States, even when acting entirely in good faith. As Sir Ian Sinclair has explained: “What is important—what is indeed crucial is that there should always be in the background, as a necessary check upon the making of unjustified claims, or upon the demand of justified claims, automatically available procedures for the settlement of disputes.”³ Thus the principal purposes of the Convention’s provisions on dispute settlement are to provide authoritative mechanisms for determining questions relating to the “interpretation or application” of the treaty, to guarantee the integrity of the text, and to control its implementation and development by States

2. See UNGA Res.2750 XXV(1970) and 3067 XXVIII(1973); Final Act, 3rd UN Conference on the Law of the Sea (1982); B. de Zulueta, Special Representative of the Secretary-General, in UN, *Official Text of the UN Convention on the Law of Sea*, Introduction; H. Caminos and M. Molitor, “Progressive Development of International Law and the Package Deal” (1985) 79 A.J.I.L. 871; B. Buzan, “Negotiating by Consensus” (1981) 75 A.J.I.L. 324.

3. I. Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, 1984), p.235.

parties.⁴ From this point of view compulsory dispute settlement is designed to prevent fragmentation of the conventional law of the sea.

A further purpose, and one of the main reasons for having a separate Seabed Disputes Chamber, is to ensure that a forum exists which can handle cases involving both States and other actors.⁵ The powers and responsibilities conferred on the International Seabed Authority made it desirable that that body should be able both to bring contentious proceedings against States to enforce certain provisions of the treaty and to be sued by States or by seabed contractors if it exceeds or misuses its powers. The Seabed Disputes Chamber is thus unique among international courts in the range of parties over which it exercises compulsory jurisdiction. But the ITLOS, too, has a broader jurisdiction *ratione personae* than the International Court. Although in compulsory cases it remains confined to hearing disputes between States, it also possesses a general consensual jurisdiction which potentially extends to other entities including international organisations and possibly even non-governmental organisations.⁶ Thus in generally broadening the range of parties which may be involved in international litigation the Convention can again be seen as seeking to avoid the fragmentation of disputes, and as promoting unity, integrity and inclusiveness.

Yet a closer examination of other aspects of the Convention's scheme shows that in a variety of different ways fragmentation is part of the price of securing consensus on compulsory, binding dispute settlement. Thus we face not merely a theoretical problem about the unity of international law but also a severely practical problem about the handling of complex disputes within a structure which, as we have seen, envisages significantly more extensive resort to compulsory settlement. These problems arise from two features which characterise Part XV of the Convention: the "cafeteria" approach to modes of settlement, and the "salami-slicing" of legal issues, requiring a sometimes arbitrary categorisation of different kinds of dispute, with different consequences for the mode of settlement and for the possibility of compulsory jurisdiction.

4. See generally L. Sohn, "Settlement of Disputes Relating to the Interpretation and Application of Treaties" (1976) 150-II Hag. Rec. 195, and "Settlement of Disputes Arising out of the Law of the Sea Convention" (1975) 12 San Diego L.R. 495, 516; B. Oxman, in A. Soons (Ed.), *Implementation of the Law of the Sea Convention through International Institutions* (1989), p.648; A. O. Adede, *The System for Settlement of Disputes under the UN Convention on the Law of the Sea* (1987), p.241; C. Chinkin, "Dispute Resolution and the Law of the Sea", in J. Crawford and D. Rothwell (Eds), *The Law of the Sea in the Asian Pacific Region* (1995), p.237; J. Merrills, *International Dispute Settlement* (2nd edn, 1991), chap.11; A. E. Boyle, "Settlement of Disputes Relating to the Law of the Sea and the Environment" (1996) *Thesaurus Acrosaurium* (forthcoming).

5. Adede, *idem*, chap.9; L. Sohn, "Settlement of Law of the Sea Disputes" (1995) 10 *Int.J. Marine and Coastal L.* 205.

6. See *infra* Part III.

B. The "Cafeteria" Approach

The essential problem here is the range of possible forums for compulsory settlement under the Convention. During the negotiations disagreements on the most acceptable and appropriate process were such that no single forum could be given general compulsory jurisdiction.⁷ The Soviet bloc continued to oppose any form of judicial settlement but would accept arbitration. Many developing States, and a few Western States such as France, would not accept the International Court, but some would accept a differently constituted specialist tribunal for the law of the sea, which eventually became the ITLOS. The opposition to the International Court thus meant that it could not be the only or even the primary forum for settlement of law of the sea disputes, as it had been under the 1958 Optional Protocol to the Geneva Conventions. Other States, while not opposed in principle to any particular procedure, did not believe that the widely differing range and character of disputes likely to arise under the Convention could all be accommodated satisfactorily in only one mode of settlement.

The solution, embodied in the so-called "Montreux formula", was to opt for flexibility to choose one or more of four different procedures for compulsory settlement under Part XV.⁸ The four procedures in this "cafeteria" approach are:

- (1) the International Tribunal for the Law of the Sea;
- (2) the International Court of Justice;
- (3) arbitration;
- (4) special arbitration.

A declaration indicating their preferred choice of compulsory procedures can be made by States parties at any time and revoked or modified on three months' notice. If no declaration is made, which at present is the case for most parties to the Convention, or if the parties to a dispute have made different choices, arbitration becomes the residual procedure, unless the parties otherwise agree.⁹ A simpler way of describing this system is to say that arbitration is compulsory unless the parties to a dispute have consented in advance or *ad hoc* to have it settled in some other way.

What this analysis shows is actual or potential fragmentation in two senses: there is no single forum for disputes arising under the Convention and there is no mechanism for ensuring uniformity in the outcome of similar cases before different tribunals. But neither problem is novel. Since 1958 the International Court has decided on their merits seven cases

7. Adede, *op. cit. supra* n.4, at pp.242 *et seq.*, and "Settlement of Disputes Arising Under the Law of the Sea Convention" (1975) 69 A.J.I.L. 798.

8. Art.287.

9. For details see Adede, *op. cit. supra* n.4, at pp.53 *et seq.*; Sohn, *op. cit. supra* n.5.

dealing principally or partly with the law of the sea;¹⁰ in the same period there have also been seven international arbitral awards on the same subject.¹¹ Most of these cases have been about maritime boundaries or fishing. The jurisprudence on the law of the sea has certainly been developed over this period; it may be arguable whether it has improved, but it does not appear to have noticeably fragmented. Although the views of courts on issues such as the interpretation of Article 6 of the Continental Shelf Convention or the juridical nature of the shelf have certainly changed, there has been no overt conflict between the decisions of the International Court on the one hand and of arbitration tribunals on the other. The jurisprudence may not be a seamless web, but it is more impressive for its continuity than for its discord. There is plausibility in the proposition that competition has if anything strengthened the jurisprudence and been healthy for the legal process.¹²

Judge Oda's fears for the unity of international law arising from the proliferation of tribunals and the "cafeteria" approach to selection of modes of settlement may seem from this perspective overstated. It is far from obvious that the International Court will cease to play a prominent role in deciding law of the sea cases, or that these cases will necessarily go to the ITLOS rather than to arbitration. What is clear is that the parties to the 1982 UNCLOS do have a very real choice of forum in which to settle their disputes. If the volume of cases grows significantly, and results in fuller use of the whole cafeteria, problems of consistency and continuity in the jurisprudence may result. For the present, however, it does seem that other forms of fragmentation—notably the "salami-slicing" of disputes—may be more problematic.

C. "Salami-Slicing" of Disputes

The problem we have just considered is one in which the same kind of dispute may come before four different kinds of tribunal, but in all cases will lead to a binding judgment. We now turn to a more complex and

10. *North Sea Continental Shelf Case* I.C.J.Rep. 1969, 3; *Fisheries Jurisdiction Cases* I.C.J.Rep. 1974, 3 and 175; *Tunisia/Libya Continental Shelf Case* I.C.J.Rep. 1982, 18; *Gulf of Maine Case* I.C.J.Rep. 1984, 246; *Libya/Malta Continental Shelf Case* I.C.J.Rep. 1985, 13; *Land, Island and Maritime Frontier Case* I.C.J.Rep. 1992, 35; *Jan Mayen Case* I.C.J.Rep. 1993, 38.

11. *Beagle Channel Arbitration* (1977) 52 I.L.R. 93; *Anglo-French Continental Shelf Arbitration* (1978) Cmnd.7438; *Sharjah/Dubai Boundary Arbitration* (1981) 91 I.L.R. 543; *Guinea/Guinea-Bissau Maritime Boundary Arbitration* (1985) 35 I.L.M. 251; *Franco-Canadian Fisheries Arbitration* (1986) 90 R.G.D.I.P. 151; *Guinea-Bissau/Senegal Maritime Delimitation Case* (1989) 83 I.L.R. 1; *St Pierre and Miquelon Arbitration* (1992) 95 I.L.R. 645.

12. J. Charney, "The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea" (1996) 90 A.J.I.L. 69. Cf. Guillaume, *op. cit. supra* n.1, at pp.861–862.

subtle problem in which we are required to categorise and separate different kinds of dispute, some of which will lead to binding compulsory settlement, others of which will not. This is almost bound to make settlement of some disputes—especially compulsory settlement—more difficult if not impossible. The categories we are most concerned with here are certain exclusive economic zone (“EEZ”) disputes, maritime boundaries, historic titles and deep seabed disputes. With the exception of seabed disputes these categorisations do not have a functional basis. They are not, in other words, treated differently because some other way of dealing with them is more appropriate, although in some cases it may be, but because they concern subjects which proved politically sensitive and where many of the rules involved are open-textured and flexible, such as delimitation based on equitable principles. The reluctance of some States to commit themselves to binding settlement in most of these cases was strong and understandable, particularly with regard to fisheries and boundaries, but it does seriously diminish the overall integrity of the Convention.

1. *EEZ disputes*

These present the most complex problems for dispute settlement. The practical effect of Article 297 of the Convention is that there is binding compulsory settlement for EEZ disputes which relate to navigation or protection of the environment, but not for disputes which relate to the coastal State’s exercise of its discretionary powers over fishing and marine scientific research within the EEZ. To complicate matters further, some, but not all, fisheries disputes excluded from binding compulsory settlement are subject instead to non-binding compulsory conciliation. Finally, under Article 298 States have the option of excluding from compulsory settlement certain disputes concerning law enforcement in the EEZ with regard to fisheries or scientific research.

The inclusion of navigation and protection of the environment within compulsory settlement was intended to restrain coastal State claims to “creeping jurisdiction” over shipping within the EEZ, and it reinforces a balance established by Parts V and XII in favour of freedom of navigation.¹³ But the exclusions from binding compulsory settlement are equally far-reaching and significant and do little for the already limited claims of States to fish or conduct research in the EEZ of another State. Such rights for other States as Articles 62, 69, 70 and 246 do create are exercisable only by agreement and, in the case of fishing, only on heavily qualified terms involving subjective judgments about conservation, harvesting capacity and total allowable catch. The dispute-settlement

13. See P. W. Birnie and A. E. Boyle, *International Law and the Environment* (1992), chap.7.

provisions for the EEZ reflect the reality that the management of EEZ resources is very much a matter for coastal State discretion,¹⁴ a point reinforced by Articles 297(2) and 297(3), which respectively prohibit a conciliation commission from questioning a coastal State's discretion over research, or from substituting its own discretion for that of the coastal State in fisheries matters.

In contrast, disputes over high seas fisheries and research are fully within the Convention's provisions on binding compulsory settlement. Thus, as regards fish, the crucial question is whether the dispute involves high seas freedoms or coastal State sovereign rights in the EEZ. But what if it involves both? Most of the more intractable fisheries disputes occur because the stocks in question straddle one or more EEZs, or straddle the EEZ and the high seas. This is true in particular of the Canada–Spain dispute in the Northwest Atlantic, and also of the North Pacific/Bering Sea.¹⁵ In most of these disputes it makes little sense to separate the question of high seas fishing from the management of fish stocks in the adjacent EEZ. Overfishing or poor management in one area will necessarily have an impact on the other. This is very clear in the Canada–Spain dispute. While Canada arguably has a good case for complaint with regard to fishing of the high seas by Spain and other EU States, and such a dispute is subject to compulsory settlement, Canada itself has accepted that its own management of the Canadian EEZ has resulted in overfishing.¹⁶ Yet this aspect of the dispute does not appear susceptible to compulsory settlement under the Convention. The consequence is that the parties have two options:

- (1) make an *agreed* submission of all the issues in dispute to a tribunal of their choice;
- (2) submit only the high seas issues to compulsory settlement.

The weakness of the former is precisely that it requires agreement, and of the latter that it fails to deal comprehensively with the dispute and is almost bound to fail for that reason. This may be simply another manifestation of the unsatisfactory nature of the Convention's treatment of fisheries, but that is little consolation for the fish. Nor does the 1995 Convention

14. See Arts.55–75, 192–262; W. T. Burke, *The New International Law of Fisheries* (1994), pp.59–80; B. Kwiatkowska, *The 200 Mile EEZ in the New Law of the Sea* (1989); D. Attard, *The Exclusive Economic Zone* (1987); F. Orrego-Vicuna, *The Exclusive Economic Zone* (1989).

15. See E. Meltzer, "Global Overview of Straddling and Highly Migratory Fish Stocks: The Non-Sustainable Nature of High Seas Fisheries" (1994) 25 O.D.I.L. 255; Burke, *ibid*; G. Ulfstein, P. Andersen and R. Churchill, *The Regulation of Fisheries: Legal, Economic and Social Aspects* (1986).

16. See P. Davies "The EC/Canadian Fisheries Dispute in the Northwest Atlantic" (1995) 44 I.C.L.Q. 927. In 1995 Canada and the EC concluded an Agreed Minute on the Conservation and Management of Fish Stocks: see (1995) 34 I.L.M. 1260.

on Straddling and Highly Migratory Stocks resolve the dilemma, since it mainly refers back to the dispute-settlement provisions of Part XV of UNCLOS.¹⁷

2. Maritime boundaries

Here the position is also complex. Maritime boundary disputes are in principle subject to compulsory binding settlement, even where they also involve disputed sovereignty over islands or other land territory. However, Article 298 allows States to make a declaration opting out of one or more of the four compulsory procedures with respect to disputes which concern delimitation of the territorial sea, EEZ or continental shelf, or which involve historic bays or titles. Where this right to opt out is exercised, an obligation arises to submit the dispute to non-binding conciliation unless it necessarily involves disputed sovereignty over islands or land territory, when no compulsory process of any kind is required. Thus the first problem is simply that some States will and others will not be subject to compulsory jurisdiction in boundary disputes, but admittedly that is no worse than the present position under general international law.

The second problem arises from the combination of Articles 297 and 298. Take a dispute involving EEZ claims around a disputed island or rock, such as Rockall, and the exercise of fisheries jurisdiction by one State within this EEZ. How do we categorise this dispute? Does it relate to the exercise of sovereign rights and law enforcement within the EEZ, excluded under Articles 297 and 298 from compulsory jurisdiction? Is it a maritime boundary dispute concerning the interpretation or application of Article 74 and excluded from binding compulsory jurisdiction under Article 298 if one of the parties has opted out under that Article? Does it necessarily involve disputed sovereignty over land territory so that even compulsory conciliation is excluded? Or is it a dispute about entitlement to an EEZ under Part V and Article 121(3) of the Convention? If it is the last, it is not excluded from compulsory jurisdiction under either Article 297 or 298. Much may thus depend on how our hypothetical dispute is put. If it is misuse of fisheries jurisdiction powers within the EEZ then it will surely be excluded under Article 297. But if it is an invalid claim to an EEZ contrary to Article 121(3) then it would appear not to be excluded. But suppose, instead, that it is reformulated as a claim that on equitable grounds the island or rock should be given no weight as a basepoint in a delimitation under Article 74? *Prima facie* this appears to be caught by Article 298(1). It is not necessary for present purposes to answer these questions, but they should suffice to show that everything turns in practice

17. Arts.27–32. Art.30 is summarised *infra* n.24. Art.32 imports the same exclusions from compulsory jurisdiction as are found in Art.297(3) of the Convention.

not on what each case involves but on how the issues are formulated. Formulate them wrongly and the case falls outside compulsory jurisdiction. Formulate the same case differently and it falls inside. So much for Lord Atkin's forms of action clanking their venerable chains to ensnare the unwary.¹⁸

The third problem arises at the outer margins of maritime boundaries. Suppose Canada and France are in dispute over their continental shelf boundary, as they were in the *St Pierre and Miquelon Arbitration*. Suppose further that their dispute extends beyond 200 miles to the outer limit of the geological shelf where it abuts on the deep seabed. Although it is for each State to determine for itself where the outer limit of the shelf lies, the Convention requires this to be done on the basis of recommendations made by the Commission on the Limits of the Continental Shelf.¹⁹ It further provides: "The actions of the Commission shall not prejudice matters relating to delimitation of boundaries between states with opposite or adjacent coasts."²⁰ The precise effect of these provisions is a matter of debate, but the possibility does exist of a State making a shelf claim which does not comply with Article 76 of the Convention or with the recommendations of the Commission on the Limits of the Continental Shelf. The possibility also exists of another State also claiming some of the same area as part of its shelf. Is this a maritime boundary dispute between two States subject potentially to compulsory jurisdiction of a court or tribunal under Part XV of the Convention unless either party has opted out under Article 298? Or is it a dispute concerning the boundary between the shelf and the deep seabed and involving two States and the international community? In the *St Pierre and Miquelon Arbitration* the tribunal refused to delimit the maritime boundary between Canada and France beyond 200 miles on the ground that it was not competent to carry out a delimitation affecting the rights of a party which was not before it—i.e. the international community as represented by the ISBA²¹—and it confined itself to dealing

18. *United Australia Ltd v. Barclays Bank Ltd* [1941] A.C. 1, 29: "When these ghosts of the past stand in the path of justice clanking their medieval chains the proper course for the judge is to pass through them undeterred."

19. Art.76(8) and Annex II, Art.7.

20. Annex II, Art.9. See also Art.76(10) and Art.134(4). "The phrase 'matters relating to delimitation of boundaries' emphasizes that the Commission is not to function in determining, or to influence negotiations on, the continental shelf boundary between states with overlapping claims ... It also indicates that the Commission is not to be involved in any matters regarding the determination of the outer limits of a coastal state's continental shelf where there is a dispute with another state over that limit. The Commission's role is to make recommendations on the outer limits of a coastal state's continental shelf, not to be involved in matters relating to delimitation of the continental shelf between States": M. Nordquist (Ed.), *UNCLOS 1982 Commentary*, Vol.II (1993), p.1017.

21. (1992) 95 I.L.R. 645, paras.75–82.

only with the bilateral issue of delimitation between the two States within the 200-mile EEZ. But where the deep seabed begins is not an abstract question: it can be answered only by reference to the outer limit of the continental shelf, which itself is determined by criteria which may include distance from the coastal State. The question then is: which coastal State? Only a delimitation will answer that issue where two States are potentially in contention. Thus where the deep seabed begins may depend first on how the shelf is delimited.²² Since neither the ISBA nor the Commission on the Limits of the Shelf has any competence to delimit the boundary between the shelf and the seabed, it may well be erroneous to say, as in the *St Pierre and Miquelon Arbitration*, that there are in effect three parties to this sort of dispute. But, if there are three parties, who has jurisdiction over them? The ISBA cannot be a party to compulsory jurisdiction proceedings in the International Court or the ITLOS under Part XV and cannot intervene in such proceedings regardless of the forum, because it is not a State. It can be a party, as can States, to a case under the Seabed Disputes Chamber's compulsory jurisdiction, but the Chamber has no compulsory jurisdiction to effect a maritime boundary delimitation or to determine the outer limit of the shelf, because neither matter involves the interpretation or application of Part XI.²³ At most the Chamber could be asked to give an advisory opinion under Article 191 on those aspects of the dispute which fell within the scope of the Seabed Authority's activities. Thus, if put in three-party terms this is not capable of being a compulsory jurisdiction case at all: it can be dealt with in all its aspects only by consent of all parties either in arbitration or before the ITLOS.

D. Compulsory and Consensual Jurisdiction: the Reality of UNCLOS

From what we have seen so far the reality of UNCLOS is that its provision for compulsory binding settlement of disputes is less impressive and comprehensive than it might seem at first sight. The most significant areas where the commitment to compulsory settlement is unequivocal are freedom of navigation and protection of the marine environment. The former is consistent with the Convention's general treatment of navigation interests and the strong lobbying of the maritime powers. The latter remains a novelty among even the most ambitious of environmental treaties, where compulsory conciliation is usually the most the parties are prepared to agree on. However, the main reason for such a strong regime in this

22. For analysis of this problem see D. M. McRae, "The Single Maritime Boundary: Problems in Theory and Practice", in E. D. Brown and R. Churchill (Eds), *The UN Convention on the Law of the Sea: Impact and Implementation* (1987), p.225.

23. Art.187. However, it might possibly be argued that the ISBA would have authority to bring proceedings by virtue of Art.187(b)(i), on the basis that a shelf claim which does not comply with Art.76 is a violation of Art.137 of Part XI.

Convention is once again the need to protect navigation from excessive interference on environmental grounds by coastal States, so this novelty is perhaps also less than it seems.

Elsewhere, and especially on those issues where disputes have been most numerous—fisheries and boundaries—we can see that the fragmentation resulting from the salami-slicing of issues leaves a largely empty shell which can be filled only if the parties agree on consensual submission of the dispute to whatever forum they choose. This does not mean there will be no cases on the Convention before international tribunals—all the arbitrations and most of the International Court's cases which have dealt with law of the sea issues until now have been cases of consensual, not compulsory, jurisdiction. Rather, it does remind us not to exaggerate the significance of compulsory jurisdiction in the judicial settlement of disputes. But it points also to a further level of fragmentation into compulsory and consensual forms of jurisdiction. The consequences of this can be seen clearly when we turn to the ITLOS.

III. THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

A. *Consensual Jurisdiction of the ITLOS*

Given that its compulsory jurisdiction is limited and that there is little prospect of seabed mining, some critics, including Judges Guillaume and Oda, have suggested that the Tribunal will have little to do. Nevertheless, it is important to remember that, although its primary purpose is to exercise compulsory jurisdiction over questions of interpretation and application of the 1982 Convention and other related agreements,²⁴ the ITLOS is not confined to deciding such matters. Because it also possesses a consensual jurisdiction, the possibility also exists of it taking on other matters. How broad this consensual jurisdiction may be is an unsettled question which can be answered in practice only by the Tribunal itself. Article 21 of the Statute of the Tribunal merely provides: "The jurisdiction of the

24. Related agreements under which compulsory jurisdiction may exist include the 1995 Agreement on Straddling and Highly Migratory Fish Stocks. Art.30 of which applies the provisions of Part XV of the Convention *mutatis mutandis* to disputes concerning interpretation and application of the Agreement or of any subregional, regional or global fisheries agreement relating to straddling or highly migratory stocks; and the 1994 Agreement on the Implementation of Part XI of the UNCLOS 1982. Art.2 of which provides for the Convention and the Agreement to be read as a single instrument and by implication would seem to import the dispute settlement procedures of Part XI. Ss.6 and 8 of the Agreement also do so explicitly for those matters to which they relate.

Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.” This can be read as a broad basis for consensual jurisdiction, whether under other treaties, or by *ad hoc* agreement of the parties to a dispute, but how broad depends on which among several possible interpretations is preferred.

1. UNCLOS and related disputes

Article 21 of the Statute should certainly be sufficient to enable the parties to refer any dispute concerning the 1982 Convention and related agreements to the Tribunal, including those which fall wholly or partly outside the provisions on compulsory jurisdiction. This conclusion is reinforced by Article 280, which emphasises the freedom of parties to agree at any time to settle a dispute concerning the Convention by any peaceful means of their own choice, and Article 299, which preserves the right of the parties to agree to submit to the Convention’s procedures matters otherwise excluded from compulsory jurisdiction by Article 297 or 298. In practice, as we have seen, it is quite likely that many fisheries and boundary disputes will have to be or will be more satisfactorily dealt with by consent before the ITLOS or some other forum rather than under compulsory jurisdiction, because of the problem of “salami-slicing” referred to earlier. Moreover, Article 22 of Annex VI also allows parties to treaties already in force and which concern the subject matter of the Convention to submit disputes arising under these treaties to the Tribunal by agreement. Such treaties would include the 1972 London Dumping Convention and the 1973/78 MARPOL Convention. Both the 1995 Straddling Fish Stocks Agreement and the 1993 Agreement on Compliance by Fishing Vessels also allow the parties by agreement to refer disputes to the ITLOS, the International Court or arbitration.²⁵

2. Law of the sea cases

The Tribunal’s consensual jurisdiction also appears broad enough to include disputes concerning the law of the sea that are governed by customary law rather than by the Convention. Although the Tribunal is required by Article 293 to apply the Convention and other rules of international law not incompatible with it, unless the parties agree that the case be decided *ex aequo et bono*, this applies only to the Tribunal’s

25. Art.9 of the 1993 Agreement to Promote Compliance with International Conservation and Management Measures by Vessels on the High Seas provides for parties to a dispute to refer it by agreement to ITLOS, the ICJ or arbitration. The possibility of consensual references under the 1995 Agreement on Straddling Fish Stocks would seem to be implicit in Arts.27–32 of that Agreement.

compulsory jurisdiction and does not determine the applicable law in consensual cases. In arbitration, and before the International Court, the parties already possess significant freedom to determine their own choice of law and there is no obvious reason why a similar freedom should not exist for cases taken to the Tribunal by agreement of the parties. Nor can it be suggested that the judges of the Tribunal will lack the requisite expertise to decide cases based on customary law. There is thus no obvious reason why it should not function as a specialised court for all law of the sea cases, if that is what the parties to a dispute desire.

3. *General international law disputes*

Can the Tribunal do more? Has it the power to decide issues having nothing to do with the law of the sea? Although it might be argued that it was never intended for the Tribunal to be a court of general jurisdiction, the Convention provides little warrant for confining the Tribunal's consensual jurisdiction to law of the sea cases. It is true that Article 288 limits compulsory jurisdiction to cases concerning the interpretation or application of the Convention or of any "*international agreement related to the purposes of the Convention*", but no comparable restriction is found in the Statute of the Tribunal (Annex VI). There, as we have seen, in addition to matters provided for in the Convention, Article 21 confers jurisdiction on the Tribunal over all matters provided for in "*any other agreement*". The implication of this difference in wording appears to be that an "*agreement*" need neither be a treaty nor need it relate to the purposes of the Convention. Moreover, even in compulsory jurisdiction cases, the Tribunal may have to decide matters of general international law that are not part of the law of the sea, and Article 293(1) allows for this.²⁶ Nor is there any neat division between a law of the sea case and other types of dispute. In some cases the delimitation of a maritime boundary may necessarily require a decision concerning disputed sovereignty over land, for example where an island is used as a basepoint for an EEZ or continental shelf claim. While parties to the Convention do have the option of excluding such disputes from compulsory jurisdiction under Article 298(1), the implication must be that, where this option is not exercised, a tribunal, including the ITLOS, may if necessary deal with both the land and the maritime dispute. If this is so in compulsory cases, there is no reason why the same should not also hold true in consensual cases, where the parties may also wish to have a land and maritime boundary delimited in the same proceedings, as in the *Land, Island and Maritime Frontier Case* or the *Dubai-Sharjah Arbitration*. If they can do so before the

26. "A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention."

International Court or in arbitration, why should they not also have the ability to use the ITLOS instead?

Thus, the broadest view of the Tribunal's consensual jurisdiction is that it may hear any case brought to it by the parties to a dispute, regardless of whether any law of the sea issue is involved. It is worth reiterating that nothing in the Statute prevents the Tribunal's jurisdiction evolving in this way, nor does the concept of admissibility provide any necessary limits to the type of case it may decide. While it might be argued that to allow the Tribunal to decide cases under general international law is to encroach on the International Court's primacy as principal judicial organ of the United Nations, the implication of a hierarchical relationship between the two courts finds no explicit echo in the Convention. Once again one has to pose the question: if the parties to such a dispute wish to take it to the ITLOS, rather than to the Court, why should they not be allowed to do so? The potential does exist therefore for the ITLOS to become a real competitor with the Court, not merely in law of the sea cases but more generally. Merely because there may be no seabed mining disputes, or no compulsory jurisdiction cases, does not mean that it need have no work. That being so, it is important to consider what factors might influence the parties to a dispute in their choice of judicial forum and, in particular, why they might prefer the ITLOS.

B. Why Choose the ITLOS?

There are three main factors which may influence a choice between the ITLOS and the International Court. Most obviously, the composition of the Tribunal is different. The judges must have "recognised competence in the field of the law of the sea".²⁷ They may thus have greater expertise in that area than some judges of the Court; equally some of the ITLOS judges may carry less weight as general international lawyers, but both points will depend entirely on who is elected to each body. It is evident from the first ITLOS election, held in August 1996, that the geographical basis of the Tribunal's membership and the greater number of judges have given developing States more prominence than they possess in the Court.²⁸ This difference in composition might affect the Tribunal's outlook and the outcome of cases, but this possibility is essentially speculative

27. Annex VI, Art.2.

28. Annex VI, Art.2(2) provides for representation of the principal legal systems and equitable geographical representation. At the first election it was decided that 5 seats would be allotted to Africa, 5 to Asia, 4 to Latin America and the Caribbean, 4 to Western Europe and others, and 3 to Eastern Europe. Judges elected in 1996 are: Akl (Lebanon), Anderson (UK), Caminos (Argentina), Eiriksson (Iceland), Engo (Cameroon), Kolodkin (Russia), Laing (Belize), Marotta (Brazil), Marsit (Tunisia), Mensah (Ghana), N'Diaye (Senegal), Nelson (Grenada), Park (South Korea), Rao (India), Treves (Italy), Vukas (Croatia), Warioba (Tanzania), Wolfrum (Germany), Yamamoto (Japan), Yankov (Bulgaria), Zhao (China).

at present. The suggestion of different outcomes may also do less than justice to the influence of judges from developing States in the present Court and to that Court's general sensitivity to the interests of developing States.

A second possible comparison is procedural, but here the advantages are more doubtful. In many respects, including the power to sit in chambers, to hear third-party intervention, and to grant interim measures of protection, the Tribunal is very similar to the International Court.²⁹ The Tribunal's judgments are binding in the same way as the Court's,³⁰ but they are not enforceable under Article 94(2) of the UN Charter. The possibility that the Tribunal will hear more cases and decide them more quickly than the Court has so far been able to do is again a speculative potential advantage, which depends entirely on how the Tribunal organises its business and the resources available to it. With 21 judges, of whom all save the President are part-time, it may not be easy for it to act more expeditiously than the full-time Court.

Third, in consensual cases there is potentially wider access to the Tribunal than to the Court, where contentious cases can involve States only and where international organisations are subject to judicial review only in advisory proceedings which they have initiated, or indirectly in the course of inter-State cases.³¹ Access is probably the most significant difference between the Court and the ITLOS: precisely who has standing before the Tribunal is a controversial question, however, and is considered below.

These comparisons do show that in contentious cases the ITLOS will enjoy some advantages over the Court; clearly where the parties are not States the Court is not an option at all. In other situations the benefits, if any, will become apparent only after the Tribunal has begun to operate.

C. Access to the ITLOS: Jurisdiction Ratione Personae

As Sir Robert Jennings has observed elsewhere,³² the International Court's narrow jurisdiction *ratione personae* reflects a conception of participation in the international legal system that is now 75 years old, increasingly anomalous, and out of step with contemporary international society. Other international tribunals, including those concerned with human rights,³³ commercial and investment disputes,³⁴ international

29. Art.290 and Annex VI, Arts.15, 25, 31, 32.

30. Annex VI, Art.33.

31. ICJ Statute, Art.34.

32. R. Y. Jennings, "The ICJ After 50 Years" (1995) 89 A.J.I.L. 493.

33. European Convention on Human Rights and Freedoms, Art.25; American Convention on Human Rights, Art.44.

34. 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

claims,³⁵ or the European Community have adopted broader rules on access and allow participation by private parties and, where necessary, international organisations. The same is true of the International Tribunal for the Law of the Sea, although here the position is more complex and the answer to the question who may be involved in proceedings before the Tribunal will vary according to the context. Three categories of disputes must be distinguished.

1. *Proceedings before the Seabed Disputes Chamber under Part XI*

As we have seen it proved necessary to give the Seabed Disputes Chamber compulsory jurisdiction over the wider range of entities potentially involved in disputes concerning Part XI of the Convention: States, State enterprises and private contractors involved in seabed mining, and the ISBA.³⁶

2. *Proceedings before a court or tribunal under Part XV*

The procedures provided for in Part XV are, unlike Part XI, open only to States parties, as provided in Article 291, but it should be noted that the term "States Parties", as used throughout the Convention, is given an extended definition by Article 1(2)(2).³⁷ In addition to States, it also includes those self-governing associated States and territories entitled to participate in the Convention under Article 305, and those international organisations whose participation is made possible by Annex IX, principally the European Community. All these entities are therefore entitled to be parties to proceedings before the ITLOS, or arbitration. For the European Community this is a significant advantage, since it remains unable, even within the terms of the Convention, to participate in cases before the International Court.³⁸

3. *Proceedings before the ITLOS under other agreements*

Article 20(2) of Annex VI provides that:

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

35. See D. Caron, "The Nature of the Iran-US Claims Tribunal and the Evolving Structure of International Dispute Resolution" (1990) 84 A.J.I.L. 104; W. Mapp, *The Iran-US Claims Tribunal* (1993); J. Crook, "The UN Claims Commission" (1993) 87 A.J.I.L. 144 and 1992 UN Claims Commission Report (1992) 31 I.L.M. 1018.

36. See Art.187.

37. See also Art.1(2) of the 1995 Agreement on Straddling and Highly Migratory Fish Stocks.

38. See Annex IX, Art.7.

Significantly, and unlike Article 291, this provision does not limit access only to States parties. Nor, when used in Article 20 of the Annex, is the term “entity” defined only by reference to those listed in Article 187 of Part XI, as it is when used in Article 37 of the Annex (dealing with access to the Seabed Disputes Chamber).

Moreover, like Article 21 of the Annex,³⁹ Article 20(2) uses the word “agreement” without further qualification, suggesting not only that it need not be a treaty, but that the parties to it do not have to have the capacity to conclude treaties.

Herein lies the basis for believing that the ITLOS is open to a potentially wider range of parties, including international organisations, non-governmental organisations, and other entities which are not States or whose international status is doubtful, such as Taiwan. Indeed, there seems no reason why “fishing entities”, to which the 1995 Agreement on Straddling and Migratory Fish Stocks⁴⁰ applies, should not fall under the terms of Article 20(2). On this reading of Article 20, access to the Tribunal in non-compulsory jurisdiction cases is primarily a matter for the parties to the dispute to determine; provided they can agree on giving it jurisdiction, the Tribunal will have the necessary competence, unlike the International Court, to hear whatever parties choose to appear before it.

Views may differ on whether this is a strained reading of Annex VI or whether it corresponds with the intention of the drafters. But it does make considerable sense to allow the Tribunal to accept cases which parties to the dispute want it to hear, even if they are not States. This is already possible in arbitration,⁴¹ and before other international tribunals. Given that the International Court cannot hear such cases without amendment of its Statute, and that this seems unlikely to happen soon, however desirable it may be in theory, it would be a beneficial advance for the Tribunal to be more broadly accessible. Indeed, in the case of “entities” such as Taiwan, the advantages of broader access are obvious, since this would provide a means of enabling Taiwan, or other disputed entities, to appear before an international tribunal without having to resolve the question of their Statehood or legal status, and without any implied recognition by the other party.

In contrast, it is difficult to see what would be gained by constraining the Tribunal’s general jurisdiction to an outmoded view of participation in the

39. *Supra* Part III.A.3.

40. Art.1(3).

41. Even NGOs can be parties to international arbitration with States: see the *Rainbow Warrior Arbitration (Greenpeace v. France)*. For details see C. Gray and B. Kingsbury, “Developments in Dispute Settlement: Inter-State Arbitration Since 1945” (1992) 63 B.Y.I.L. 104, n.39.

international legal system. It could not plausibly be argued that a narrow definition of access is necessary to give effect to the purposes of the Convention; on the contrary, as we saw at the beginning of this article, a more inclusive view of participation in the legal process will help reduce the risks of fragmentation and maintain the unity of international law. From this perspective the International Court's narrow jurisdiction *ratione personae* may be seen to pose more of a risk of fragmentation than does the proliferation of tribunals.

IV. CONCLUSIONS

It is evident both that States do have a wide choice of forum for the settlement of disputes arising under the 1982 UN Convention on the Law of the Sea and that the creation of the International Tribunal for the Law of the Sea has significantly widened the choice for the settlement of disputes in general international law, not only for States but for other entities also. It remains too early to assess how far competition between different international tribunals will promote the settlement of disputes, or whether it will fragment either the substantive law of the sea or international law in general. While there is a risk in the proliferation of international tribunals, the evidence so far suggests that a choice of forum is more beneficial than harmful.

It is also clear that while in certain respects the integrity of the 1982 UNCLOS as a universal code for the law of the sea is to some extent protected by the Convention's provisions on dispute settlement, the exceptions from the general principle of compulsory jurisdiction are such that procedural fragmentation is inevitable and will lead in practice to greater emphasis on consensual rather than compulsory settlement. In many of the most contentious cases likely to arise under the Convention the practical situation is thus little different from what prevails at present. Those who have to advise governments on the settlement of complex maritime disputes governed by the 1982 Convention will thus find that a certain amount of ingenuity may be needed to formulate a case that falls squarely within any form of binding compulsory jurisdiction.