The General Dispute Settlement System of the UN Convention on the Law of the Sea: Overview, Context, and Use

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ABSTRACT
This article provides an introduction to the contributions in this special issue of Ocean Development & International Law. It offers an overview of the dispute settlement provisions of the UN Convention on the Law of the Sea, placing them in the context of dispute settlement in international law generally, and explaining the extent to which they have been used so far.

INTRODUCTION

The UN Convention on the Law of the Sea (LOSC)\(^1\) contains three distinct, albeit interrelated, systems of dispute settlement. These systems govern the following types of dispute:

1. Disputes between states parties relating to the interpretation and application of the LOSC, other than disputes falling in categories 2 and 3 below. The system for settling such disputes, referred to hereafter as the general dispute settlement system of the LOSC, is set out in Part XV of the LOSC.

2. Disputes relating to the mining of minerals in the International Seabed Area (the Area). Unlike the general dispute settlement system, the system for settling disputes relating to mining in the Area is applicable not only to disputes concerning the LOSC but also to disputes over the interpretation and application of various other instruments, such as the regulations and contracts made by the International Seabed Authority (the Authority). Furthermore, potential parties to such disputes include not just states parties but a range of nonstate actors, including the Authority, the Enterprise (the Authority’s mining arm), state enterprises, and natural and legal persons. Moreover, although the general system of dispute settlement gives the disputants a considerable choice of fora for settling a dispute (as discussed later in this article), disputes relating to mining in the Area are, subject to some limited qualifications, dealt with exclusively by a single body, the Sea Bed Disputes Chamber. The system for settling
disputes relating to mining in the Area is set out in section 5 of Part XI of the LOSC, rather than Part XV.

3. Disputes between a flag state, exercising diplomatic protection on behalf of a natural or legal person owning a ship having its nationality, and a state that has detained such a ship for alleged illegal fishing in its exclusive economic zone (EEZ) or for a pollution offense, where the dispute concerns the alleged failure by the detaining state promptly to release the vessel on payment of a bond or other security. The procedure for dealing with such disputes is set out in Article 292 of the LOSC.

This article does not deal with categories 2 and 3 of dispute settlement. The second has yet to be used. This is probably because there has yet to be any commercial mining in the Area and because the decision-making processes of the Authority are designed to minimize the chances of a dispute arising. The specialized prompt release procedures of Article 292 are the subject of a separate article by Seline Trevisanut in this collection.

I begin with a brief overview of the relevant provisions of the LOSC governing the general dispute settlement system, explaining the reasons for their inclusion in the LOSC and placing them in the context of dispute settlement in international law generally. This is followed by an analysis of the use so far made of judicial settlement under Part XV.

Background, overview, and context

The first attempt by the United Nations (UN) to codify the law of the sea, the First UN Conference on the Law of the Sea in 1958, did not result in the inclusion of any provisions on dispute settlement in any of the four conventions adopted at that conference, with the limited exception of the Convention on Fishing and Conservation of the Living Resources of the High Seas. That convention provided for certain kinds of disputes concerning its provisions to be submitted by any party to the dispute to a special commission for binding decision. Instead, the conference adopted an Optional Protocol providing that any dispute relating to the interpretation or application of any of the four conventions could be referred by any party to the dispute to the International Court of Justice (ICJ), unless the parties agreed to arbitration instead. In addition, the parties could also agree to conciliation; if one of the parties did not accept the recommendation of the conciliation commission, the other party could refer the matter to the ICJ. The Optional Protocol was not widely accepted. Of the 70 or so states parties to one or more of the Geneva Conventions, only 28 accepted the Optional Protocol. In addition, a further nine states signed the protocol but did not ratify any of the conventions. In practice, no party to a dispute concerning the Geneva Conventions ever invoked the Optional Protocol’s provisions.

The approach to dispute settlement at the First UN Conference on the Law of the Sea set a pattern that was followed at other UN lawmaking conferences during this period. Thus, the Vienna Conventions on Diplomatic Relations and on Consular Relations, adopted in 1961 and 1963, respectively, each have attached to them an optional protocol on dispute settlement containing provisions very similar to those of the Geneva Law of the Sea Optional Protocol.

By the time of the Third UN Conference on the Law of the Sea (1973–1982), attitudes to dispute settlement had moved on from those of the late 1950s and early 1960s. It was by then not uncommon for multilateral treaties to contain provisions for “compulsory dispute settlement” (meaning that either party to a dispute concerning the interpretation or
application of a particular treaty that has not been settled through negotiation or other agreed means may refer the dispute for settlement by a judicial body (the ICJ or an arbitral tribunal) without the consent of the other party to the dispute. As I show in the following, the LOSC, unlike the 1958 Conventions, provides for such compulsory settlement of disputes.

There are various reasons why the LOSC continued a trend to include provisions for compulsory dispute settlement in multilateral treaties. First, a number of developed states, including the United Kingdom and the United States, made it clear that they could not accept some of the proposed substantive innovations in the LOSC, which they thought would produce disputes, without compulsory dispute settlement. Second, it was thought that the possibility of compulsory dispute settlement would protect the integrity of the LOSC text, particularly the many delicate compromises with which it abounds, would prevent it from unraveling in the face of unilateral state action, and would ensure its uniform interpretation. Third, compulsory dispute settlement was seen by developing and weaker states as a means of countering the political, economic, and military pressures of more powerful and developed states.

Before providing for the possibility of compulsory dispute settlement in section 2 of Part XV, the LOSC sets out obligations relating to the settlement of disputes by consensual means in section 1 of Part XV. The first provision of section 1, Article 279, requires states parties to “settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3 of the Charter of the United Nations and, to this end, [to] seek a solution by the means indicated in Article 33, paragraph 1, of the Charter.” The latter lists the peaceful means of dispute settlement referred to in Article 2(3) of the UN Charter. They are “negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of [the parties’] own choice.”

Section 2 of Part XV of the LOSC goes on to provide what is to happen if the parties are unable to resolve a dispute consensually using one or more of these means. Article 286 is the crucial provision. It states:

Subject to section 3, any dispute concerning the interpretation and application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.

The various elements of this provision require some explanation. Taking them in turn, section 3 sets out various exceptions to the compulsory dispute settlement system provided by Article 286. First, Article 297 provides that a coastal state is “not obliged to accept” referral by another state to legally binding settlement of disputes concerning the exercise of its rights in respect of fisheries [Article 297(3)] and marine scientific research [Article 297(2)] in its EEZ. Thus, coastal states may initiate judicial proceedings concerning their EEZ fisheries and scientific research rights, but may block cases being brought against them. The reason for this exception is said to be because of political sensitivity concerning the EEZ provisions of the LOSC, which represent a careful and delicate balance between the interests of coastal states and the interests of other states. Second, Article 298 provides that a state may at any time after signing the LOSC make a declaration stating that it does not accept compulsory dispute settlement in relation to disputes concerning maritime boundaries with neighboring states or those involving historic bays or titles, disputes concerning military
activities and certain kinds of law enforcement activities in the EEZ, and/or disputes in respect of which the Security Council is exercising the functions assigned to it by the UN Charter. Only about one-fifth of the parties to the LOSC have so far made declarations under Article 298. The low number of declarations is rather surprising, as Article 298 is said to have been necessary in order to secure agreement on the inclusion of a system of compulsory dispute settlement in the LOSC. More specifically, the reason why the delimitation of maritime boundaries may be excluded from compulsory settlement is because of the preference of many states to determine boundaries by direct negotiation rather than involving a third party and because of the degree of national interests involved in such determination. The exceptions relating to military activities, law enforcement, and the Security Council reflect the political and security sensitivities of many states; the linkage between law enforcement and coastal state rights excluded from compulsory dispute settlement under Article 297; and a desire to avoid possible conflicts between the LOSC’s dispute settlement procedures and action taken by the Security Council. The small number of declarations under Article 298 suggests that the assumptions on which those exceptions are based may be questionable. Some of the matters excepted from compulsory judicial settlement under Articles 297 and 298, namely, certain kinds of disputes relating to fisheries and marine scientific research in the EEZ and maritime boundary delimitation, are subject to compulsory conciliation. The latter functions in much the same way as compulsory conciliation under the Vienna Convention on the Law of Treaties and some other multilateral treaties, including the fact that the report of the conciliation commission setting out its recommendations for settlement is not binding. The only instance so far of these compulsory conciliation provisions being invoked occurred in April 2016, when Timor-Leste initiated compulsory conciliation proceedings against Australia over their maritime boundary. The exceptions in Articles 297 and 298 are discussed in more detail in the articles by Stephen Allen and Keyuan Zou in this collection.

The next phrase in Article 286 that requires comment is “any dispute concerning the interpretation and application of this Convention.” The ambit of this phrase has been the subject of considerable analysis in some of the cases settled through judicial or arbitral proceedings. That case law is examined in the article by James Harrison in this collection.

The final phrase in Article 286 that requires comment is “the court or tribunal having jurisdiction under this section.” Article 287 lists four courts and tribunals: the International Tribunal for the Law of the Sea (ITLOS), the ICJ, an arbitral tribunal constituted in accordance with Annex VII of the LOSC, and a special arbitral tribunal for certain kinds of dispute (fisheries, environmental, scientific research, and navigation) constituted in accordance with Annex VIII. A state party to the LOSC may at any time specify one or more of those four fora as its preferred means for settling disputes. If the parties to a dispute have specified a preference for the same forum, that will be the forum for hearing the dispute. Where the parties’ choices of forum do not coincide, or where one or more of the parties to the dispute has not made a choice, the dispute will be dealt with by an Annex VII arbitral tribunal. As of 1 December 2016, only 47 of the 168 states parties to the LOSC had made declarations. Statistically, therefore, the likelihood is that most disputes will be referred to Annex VII arbitration; so far, this is in fact what has happened in practice, as explained in the following. Giving parties to the LOSC a choice of forum was necessary in order to obtain agreement on the inclusion of a system of compulsory dispute settlement in the LOSC, as states were unable to agree on a single forum. It is therefore surprising that there have not been more
declarations. This may be due as much to bureaucratic inertia in national governments as anything else.

Of the four possible fora listed in Article 287, the ICJ requires little comment here. Its role under Part XV of the LOSC is essentially no different from its role under any other compromissory clause in a treaty giving it jurisdiction in accordance with Article 36(1) of its statute. Consequently, it cannot hear disputes involving parties to the LOSC that are not parties to its statute or otherwise entitled to appear before it. There are currently four such parties to the LOSC: the Cook Islands, the European Union (EU), Niue, and the state of Palestine. Likewise, little needs to be said about Annex VII arbitration, which functions very much like a typical interstate arbitration. The ITLOS and Annex VIII arbitration require more comment.

The ITLOS was created by the LOSC. It is largely modeled on the ICJ, but there are some significant differences. It has 21, rather than 15, judges, presumably in order to allow for somewhat greater geographical representation. The judges are elected, and the ITLOS as a whole is financed, by the states parties to the LOSC rather than by the UN. Judges are required to be persons “enjoying the highest reputation for fairness and integrity and of recognised competence in the field of the law of the sea.”23 rather than simply international law, as is the case with the ICJ. One of the main reasons for establishing a new international court as an alternative to the ICJ was because at the time that the LOSC was being negotiated, there was considerable distrust of the ICJ by both developing states and the then Communist states.24 Developing states saw the ICJ as a legally conservative and Western-dominated body, especially following its decisions in the Northern Cameroons and South West Africa Cases,25 which were given only a few years before the commencement of the Third UN Conference on the Law of the Sea. As for the then Communist states, they were ideologically opposed to the judicial settlement of disputes as it conflicted with their belief that international law should be based entirely on the consent of States.

Annex VIII special arbitration was included in the LOSC to reflect the importance of scientific and technical issues in the kinds of disputes to which such arbitration applies and also in recognition of the value of fact-finding and inquiry as a means of settling such disputes.26 Annex VIII has several noteworthy features. Arbitrators are preferably to be chosen from four lists of experts in the fields of the categories of dispute covered by Annex VIII, drawn up and maintained by the Food and Agriculture Organization (FAO), the United Nations Environment Programme (UNEP), the Inter-Governmental Oceanographic Commission, and the International Maritime Organization (IMO), respectively. Each state party may nominate to each of these lists two experts in each field “whose competence in the legal, scientific or technical aspects of such field is established and generally recognised and who enjoy the highest reputation for fairness and integrity.”27 Thus, arbitrators need not be, and in most cases probably will not be, legally qualified. In addition to their normal arbitration function, Annex VIII tribunals may also be used at any time, if the parties to a dispute so agree, to “carry out an inquiry and establish the facts giving rise to the dispute,” and, if the parties so request, to “formulate recommendations.”28 Thus, rather unusually, an Annex VIII tribunal may engage in both diplomatic and judicial means of dispute settlement. However, the chances of such a tribunal being used in any capacity are at present rather remote, as only 11 parties to the LOSC (three of which are landlocked) have chosen Annex VIII arbitration as a preferred means of settlement.
In the light of the preceding commentary on its provisions, what article 286 essentially provides is that any dispute concerning the interpretation or application of the LOSC that cannot be settled by the parties to the dispute by diplomatic or judicial means of their own choice may, subject to the exceptions in Article 297 or 298 (if either party has made a declaration under the latter), be unilaterally referred by either party to one of the four possible fora listed in Article 287 for a legally binding decision. It is thus a compromissory clause providing for compulsory judicial settlement of a fairly common kind. Such clauses were included in a number of multilateral treaties concluded before the LOSC and are found in many multilateral treaties concluded since. Indeed, in the first two cases ever heard by an international court, the Wimbledon and Mavrommatis Cases, the jurisdiction of the Permanent Court of International Justice was based on compromissory clauses that were essentially of the same nature as Article 286.

While from a legal point of view there is nothing particularly novel or unusual about Article 286 (except for the considerable choice of fora), achieving consensus at the Third UN Conference on the Law of the Sea on the inclusion of compulsory dispute settlement in the LOSC was a substantial political achievement, given that some of the conference participants, the then Communist states and various developing states, tended at that time to be opposed to the inclusion of compulsory dispute settlement in multilateral treaties. It is an achievement, like the conclusion of the LOSC as a whole, that today, after more than 20 years of relatively successful operation, we may perhaps tend to take too much for granted.

Unlike the Dispute Settlement Understanding (DSU) of the World Trade Organization (WTO) or the ICSID Convention, the LOSC dispute settlement system does not attempt to establish a monopoly for dealing with disputes concerning the interpretation and application of the LOSC, other than for disputes concerning seabed mining in the Area, for which the Sea-Bed Disputes Chamber has in principle exclusive competence. Indeed, the LOSC emphasizes that it is always open to the parties to agree to a means of settlement other than those in Part XV. In practice this possibility is being used. For example, in 2014 Costa Rica and Somalia each chose to refer their maritime boundary delimitation disputes with, respectively, Nicaragua and Kenya to the ICJ under the optional clause (Article 36(2) of the ICJ’s Statute) rather than under Part XV of the LOSC. The reasons have not been made public. In the Somalia/Kenya Case, it may be that cost was a factor. If the dispute had been brought under Part XV of the LOSC, it would have been heard by an Annex VII tribunal, for whose costs the parties would have had to pay. Costa Rica, however, had little choice but to bring its case before the ICJ under the optional clause (and under Article XXXI of the Pact of Bogotá, which is a regional equivalent of Article 36(2) of the ICJ’s Statute applying to Latin American States) because it had not made a declaration under Article 287, meaning that in principle, an Annex VII tribunal would have been the forum for hearing the case. However, Nicaragua has made a declaration under Article 298 accepting only the ICJ as the forum for the determination of maritime boundary disputes.

Article 286 (together with Article 288(1), which provides that “[a] court or tribunal referred to in Article 287 shall have jurisdiction over any dispute concerning the interpretation and application of this Convention which has been submitted to it in accordance with this Part”) is, or ought to be, the lynchpin of Part XV, especially for determining whether a court or tribunal has jurisdiction to hear a dispute concerning the interpretation and application of the LOSC. In practice, and in my view regrettably, Article 286 has at times not been applied correctly by judicial bodies in determining whether they have jurisdiction.
While such bodies correctly consider whether a dispute exists, and, if so, whether it concerns the interpretation or application of the LOSC, and whether any of the exceptions in Articles 297 and 298 apply, they do not always go on to consider, as Article 286 stipulates, whether “no settlement has been reached by recourse to section 1.” This provision surely requires a judicial body, in determining whether it has jurisdiction, to appraise what efforts the parties have made to settle the dispute by using the consensual means set out in section 1 of Part XV, and if no meaningful efforts have been made, to decline jurisdiction. However, judicial bodies tend not to do this but instead simply consider whether there has been an exchange of views between the parties “regarding its settlement by negotiation or other peaceful means,” as required by Article 283, the bare minimum of an exchange being regarded as sufficient to satisfy this requirement. This approach has been particularly evident in the case law of the ITLOS on provisional measures, when the ITLOS determines whether prima facie it, or an Annex VII tribunal, as the case may be, has jurisdiction. Considering Article 283 as a substitute for Article 286 matters less in provisional measures cases, but when it happens in the main proceedings of a case, its consequences may be serious. The most troubling example is the Arctic Sunrise Case (Netherlands v. Russia).

This case concerned the seizure and detention of a Greenpeace ship, the Arctic Sunrise, by Russia on 19 September 2013. The Netherlands, the flag state of the Arctic Sunrise, initiated arbitration against Russia before an Annex VII tribunal on 4 October 2013. The tribunal did not consider at what point in time the dispute arose. In my view, the earliest that it could have arisen was 29 September, when for the first time the Netherlands protested the seizure of the Arctic Sunrise. More likely, it was on 3 October, when the Netherlands informed Russia that it disagreed with the latter’s interpretation of the LOSC. Thus, there was either one day, or at most five days, between the dispute arising and the initiation of arbitral proceedings. It is difficult to see how in either time frame there could have been a meaningful attempt to settle the dispute in accordance with section 1 of Part XV, as Article 286 requires if an Annex VII tribunal is to have jurisdiction. However, the tribunal did not mention Article 286 at all. Instead, it discussed the issue solely in terms of Article 283, reaching the conclusion that a note sent to Russia on 3 October 2013 by the Netherlands in which the latter stated that “there seems to be merit in submitting this dispute to arbitration” under the LOSC and that it “is considering initiating such arbitration as soon as feasible” amounted to an exchange of views for the purpose of Article 283, even though the tribunal acknowledged that this was the only communication between the parties regarding the means for settling the dispute and that it was “brief, one-sided (in the sense that Russia did not make any counter-proposal or accept the proposal to arbitrate) and took place only a day before the commencement of arbitration. Such an exchange of views may not suffice in every case.”

That last sentence must surely be correct if Article 283 is to mean anything. The “exchange of views” sufficed in the Arctic Sunrise Case, according to the tribunal, because of “the urgency, from the perspective of the Netherlands, of securing the release of the Arctic Sunrise and its crew.” That appears almost to presuppose that Russia’s seizure and detention of the ship were illegal. The Arctic Sunrise Case presents an interesting comparison with another case where Russia was also the defendant, Georgia v. Russia. In this case, Georgia sought to found the jurisdiction of the ICJ on a compromissory clause in the International Convention on the Elimination of All Forms of Racial Discrimination that in its essence was very similar to Article 286 of the LOSC. The ICJ found that it lacked jurisdiction because the parties could not possibly
have made a realistic effort to settle their dispute under the Convention in the three
days between the time when the dispute arose and Georgia making its application to
the ICJ.40

Use of the general dispute settlement system of the LOSC

I turn now to consider the use that has so far been made of the general dispute settlement
system of the LOSC since the entry into force of the LOSC in 1994. As far as section 1 of
Part XV is concerned, there is no official record of the use that has been made of the various
means of dispute settlement referred to in Article 279. A considerable number of disputes
relating to the LOSC have been settled through negotiation (e.g., maritime boundaries and
navigational disputes), and it is possible that a few disputes have been resolved through
mediation or the agency of the UN or a regional organization. There do not, however, appear
to be any examples of disputes relating to the LOSC being resolved through conciliation,
inquiry, or consensual judicial means.

With section 2 of Part XV, the position is different. Here there is a comprehensive public
record of practice. I analyze this practice by considering first the number of cases, then the
parties to the cases, and finally the subject matter of the cases.

Number of cases

From the entry into force of the LOSC in 1994 up until 1 December 2016, 21 cases had been
referred under Article 286 for judicial settlement (see Table 1). A decision on the merits had
been given in 10 cases, seven cases had been disposed of without a decision on the merits,
and four cases were pending. Of the seven cases that ended without a decision on the merits,
two cases ended when the judicial body concerned found that it lacked jurisdiction, four
cases were withdrawn at the joint request of the parties as they had reached an out-of-court
settlement, and one case was withdrawn unilaterally (the MOX Plant Case) because the
applicant, Ireland, had breached European Union (EU) law by bringing the case against a
fellow EU Member State.

Table 1. Number of cases and means of settlement as of 1 December 2016.

<table>
<thead>
<tr>
<th>ITLOS</th>
<th>Annex VII arbitration</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cases brought</td>
<td>7</td>
<td>14</td>
</tr>
<tr>
<td>Decisions on merits</td>
<td>3 (Saiga No 2 (St. Vincent v. Guinea), Bangladesh/Myanmar, Virginia G (Panama v. Guinea Bissau))</td>
<td>7 (Barbados/Trinidad &amp; Tobago, Guyana/Suriname, Bay of Bengal (Bangladesh/India), Chagos Marine Protected Area (Mauritius v. United Kingdom), Arctic Sunrise (Netherlands v. Russia), South China Sea (Philippines v. China), Duzgit Integrity (Malta v. São Tomé and Principe))</td>
</tr>
<tr>
<td>Decisions finding a lack of jurisdiction</td>
<td>1 (Louisa (St. Vincent v. Spain))</td>
<td>1 (Southern Bluefin Tuna (Australia and New Zealand v. Japan))</td>
</tr>
<tr>
<td>Cases withdrawn</td>
<td>1 (Swordfish (Chile v. EU))</td>
<td>4 (MOX Plant (Ireland v. United Kingdom), Land Reclamation (Malaysia v. Singapore), Libertad (Argentina v. Ghana), Atlanto-Scandian Herring (Denmark (Faroes) v. EU))</td>
</tr>
<tr>
<td>Cases pending</td>
<td>2 (Ghana/Côte d’Ivoire, Norstar (Panama v. Italy))</td>
<td>2 (Enrica Lexie (Italy v. India), Ukraine v. Russia))</td>
</tr>
</tbody>
</table>
Of the total of 21 cases, 19 were initiated as arbitrations under Annex VII of the LOSC, thus bearing out the point made earlier that the relatively small number of declarations by states selecting a preferred forum for the settlement of disputes means that statistically most cases will be referred to Annex VII arbitration. However, in five of those 19 cases the parties subsequently agreed to transfer proceedings to the ITLOS. In one of those transferred cases, the *Virginia G Case*, the applicant, Panama, proposed to the defendant, Guinea-Bissau, that the case be transferred to the ITLOS because the dispute would then be resolved “in a less costly manner.” By this Panama presumably meant that the parties would not have to pay the fees and expenses of the arbitrators and a registrar and the cost of hiring premises for the arbitration. With the ITLOS, the equivalent costs are met from its budget, which is funded by all the parties to the LOSC. It may well be that such financial considerations were, in part at least, the reasons for the transfer of the other four cases to the ITLOS.

Thus, Annex VII arbitral tribunals have dealt, or are dealing, with 14 of the 21 cases. Not surprisingly, each of these 14 tribunals has been differently constituted. However, a relatively limited number of persons have been used as arbitrators—a total of 40, compared with a theoretical maximum of 63 if each tribunal had been completely differently constituted. There has been a core of five arbitrators, each of whom has sat in three or more cases. The trend toward the same people being used as arbitrators has become more pronounced in recent cases. One-third of the arbitrators are past or serving judges of the ITLOS. Part of the reason is probably because in the majority of the cases the parties have been unable to agree on the appointment of the three “neutral” arbitrators, who have consequently, in accordance with Article 3(e) of Annex VII of the LOSC, been appointed by the President of the ITLOS. The involvement of a limited number of arbitrators may help to explain why in general there have been no significant differences in the interpretation and application of the LOSC, either between the tribunals or between the tribunals and the ITLOS, thus avoiding the fragmentation of the law that has occurred, for example, with the differently constituted arbitral tribunals dealing with investor-state disputes under the ICSID Convention. Another factor in promoting uniformity in the interpretation of the LOSC may be the lack of diversity in the composition of arbitral tribunals. Arbitrators are predominantly white, middle-aged (or older) men. Thus far, there has only been one female arbitrator, Judge Elsa Kelly, who is also so far the only female ITLOS judge. Of the 40 people used as arbitrators, 23 are nationals of states that belong to the Eastern Europe and Western Europe and Others Groups of the UN, including four of the five arbitrators who have sat in three or more cases. Interestingly, in the one instance where there has been a significant divergence in the interpretation of the LOSC, in the *Southern Bluefin Tuna Case*, which concerned Article 281, the tribunal contained no members who were or would become ITLOS judges and only one member who would participate in another Annex VII tribunal.

No cases have yet been heard by either the ICJ or Annex VIII arbitration. The probable reason is the relatively small number of states choosing the ICJ and Annex VIII as a preferred means of settlement. Only 27 states have so far selected the ICJ as their preferred forum. Of these states, 16 are members of the EU. The competence of EU Member States to engage in LOSC litigation is restricted by the fact that the EU has exclusive competence in some matters covered by the LOSC (notably fisheries). In relation to these matters, EU Member States therefore have no competence to engage in litigation. Furthermore, under EU law, an EU Member State is generally precluded from using the dispute settlement procedures of the LOSC for settling a dispute with another EU Member State relating to the LOSC.
and instead must use the Court of Justice of the European Union. These factors reduce the likelihood of the ICJ being used to settle LOSC disputes under Part XV. As for Annex VIII special arbitration, as mentioned earlier, only 11 states have selected it as a preferred means, and of these states, three are landlocked.

Should we be surprised, or even disappointed, that there have not been more than 21 cases? In my view we should not. The settlement of disputes between states by judicial means has traditionally been exceptional, haphazard, and sporadic, and this continues very largely to be the case, notwithstanding the considerable increase in the number of international courts in the past two decades. Thus, since the LOSC came into force in 1994, only 60 cases (excluding requests for the interpretation or revision of previous judgments) have been brought before the ICJ (17 of which are multiple applications, i.e., a state institutes proceedings concerning the same dispute against a number of defendant states), even though the ICJ has a much broader base of jurisdiction than the LOSC judicial bodies; at least 11 interstate disputes have been determined by arbitration, and a handful of interstate cases have been dealt with by regional human rights courts and the courts of regional economic cooperation/integration organizations.

The one exception to the relative rarity of interstate litigation is the DSU of the WTO. The DSU came into being six weeks after the LOSC entered into force, with roughly the same number of parties; by the end of 2014, there had been 162 panel rulings (i.e., judicial decisions). Unlike the LOSC dispute settlement system, the DSU applies to the settlement of disputes relating not to a single treaty, but to the 20 “covered agreements” of the WTO. However, collectively those 20 agreements probably contain no greater number of treaty articles than the LOSC and its annexes. Furthermore, a high proportion of panel rulings relate to a single agreement, the General Agreement on Tariffs and Trade. Overall, therefore, the DSU experience is very different from that of the LOSC. On occasion, it is suggested that the DSU shows that international litigation “works” and is something to be emulated. There is, however, another way of looking at the operation of the DSU. According to this alternative view, either the provisions of the WTO covered agreements are not very clearly drafted, or WTO members are not very good at complying with those agreements, or, more likely, a combination of the two. While it may be true that resort to litigation occurs more readily in WTO disputes than in most other kinds of disputes because there is more at stake economically, there still has to be a dispute in the first place.

There are a number of reasons why, with the exception of WTO disputes, states generally prefer to avoid the use of international courts and tribunals to settle their disputes and use diplomatic means (primarily negotiations) instead. Such means allow states to retain control of the dispute—international litigation can be unpredictable—and make it easier for them to compromise since they are not bound by strict rules of law and the parameters of the dispute. Diplomatic means are cheaper and often will be quicker than litigation, and allow states to avoid the possibly unwelcome publicity that may come with litigation. States will not be keen to litigate if they think that they may lose, or if they think that relations with the state with which they are in dispute will significantly worsen as a consequence of litigation. They are only likely to litigate if they think that they will win or are prepared to lose, or if they desire a legally binding or certain outcome (as with a maritime boundary, for example), or if it is evident that there is no prospect of settling by diplomatic means a dispute whose resolution is seen as essential. Weaker states in asymmetric power relationships with states with which they have a dispute will tend to favor judicial means over negotiations, where a
more powerful state will be able more easily to press its view. States may also litigate for
domestic political purposes—to show domestic stakeholders adversely affected by a dispute
that something is being done to advance their cause or so that blame for an inevitably
unpopular outcome can be attached to an international court (as in the Gulf of Maine
Case,53 for example). All these factors help to explain why more disputes concerning the
LOS C have not been referred for judicial settlement under section 2 of Part XV. In addition,
it may be that the possibility of such unilateral referral has induced the settlement of some
disputes by consensual means in order to avoid litigation, although I am not aware of any
such cases. It may also be that the existence of the exceptions to compulsory dispute settle-
ment in Articles 297 and 298 has led to some disputes not being referred to judicial settle-
ment that might otherwise might have been, although again I am not aware of any such
instances.

In recent years, there has been a significant increase in the rate at which cases have
been referred for judicial settlement under section 2 of Part XV of the LOSC. Fourteen
of the 21 cases have been referred in the past 7 years, compared with seven cases
brought in the previous 15 years. It may therefore be that in the not too distant future,
the extent to which the LOSC judicial bodies are used will be rather greater than has
been the case up to now. Certainly, there continues to be no shortage of disputes.
There are, for example, some 200 areas where the maritime zones of two or more states
overlap and where no boundary has yet been agreed, and where in many cases the par-
ties actively disagree over the location of the boundary. Furthermore, the LOSC suffers
from widespread systemic noncompliance, including illegitimately drawn baselines,
claims to coastal state jurisdiction in the contiguous zone and EEZ in excess of that
permitted by the LOSC, illegal fishing, the use of substandard ships, and so on.54 Such
noncompliance is regularly protested by other states (thus indicating a dispute55), but
has hardly ever, so far, been followed up by recourse to the compulsory dispute settle-
ment procedures of the LOSC. A former president of the Third UN Conference on the
Law of the Sea has bemoaned such instances of noncompliance, and called for more of
them to be protested and followed by the institution of judicial proceedings.56 However,
unless a state has been directly and adversely affected by such systemic noncompliance,
it is unlikely to want to incur the cost and bother of litigation. On the other hand,
thanks to recent developments in the law, it is no longer necessary for a state to show
that it has a legal interest in the alleged noncompliance when commencing litigation.
The ICJ has held, reflecting Article 48 of the International Law Commission’s Draft
Articles on State Responsibility,57 that any party to a multilateral treaty may bring pro-
ceedings before an international court alleging noncompliance with that treaty by
another party without having to show that it has been specially affected by such
noncompliance.58

But back to the present, and the question of whether we should be disappointed at
the number of cases, even if not surprised. Some academics may be disappointed that
there have not been more cases to illustrate the meaning of some of the still ambiguous
and unclear provisions of the LOSC, or more cases to comment on—although the 2016
award in the South China Sea Case should keep some academics going for some con-
siderable time. The cost-conscious may be concerned that the ITLOS, whose running
costs are around €10.5 million a year,59 has not had more business, although it should
be pointed out that it has had more than the seven cases already referred to. It has
also dealt with nine applications for prompt release; made nine provisional measures orders (six in cases being heard by Annex VII arbitral tribunals and three in the cases that it itself has dealt with); and given two advisory opinions. However, this still averages out at only around one case a year.

However, any concerns about the relatively small number of cases that have been referred for judicial settlement under Part XV of the LOSC are largely misplaced. What is important is that disputes are settled peacefully; the means by which they are settled is a secondary issue. Disputes that remain unresolved are likely to cause increasing tensions between the states concerned, and may risk spilling over into the use of force. A solution to a dispute that is freely negotiated will probably give each state something of what it is looking for and is likely to be complied with. Neither of these things will necessarily happen with litigation. One should therefore beware of thinking that judicial settlement is inherently superior to other means of dispute settlement. However, rather than relying solely on negotiations to resolve disputes, states should be more willing to explore the possibilities of using third party diplomatic means. For disputes that involve incidents at sea, where the parties disagree as to what actually happened, as for example in the Enrica Lexie and Arctic Sunrise Cases, inquiry, which in the past has often been used to resolve such disputes, may well be a more suitable remedy than litigation.

**Participants in LOSC litigation**

Turning now from the number of cases to the states that have been parties to them, Table 2 shows participation by states parties in LOSC litigation in terms of the informal geopolitical groups into which the UN divides its members. Nine states have been parties to two cases, while 25 have been parties to a single case. The 34 states that have so far participated in LOSC litigation constitute just under 20% of the parties to the LOSC. Of the nine states that have been involved in two cases, three (Bangladesh, Panama, and St. Vincent and the Grenadines) were the applicant in both cases, while the remaining states were either the defendant in both cases (the EU, India, Russia, and the United Kingdom) or the applicant in one case and the defendant in the other (Ghana and Italy). This does not suggest that any particular state party is especially litigious. Litigants are spread fairly evenly among the UN’s geopolitical groups, with the exception of the East European group; however, the latter’s membership is considerably smaller than most other UN groups. One should beware of reading too

<table>
<thead>
<tr>
<th>Group</th>
<th>Total membership of group</th>
<th>Number of applicants</th>
<th>Number of defendants</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Africa</td>
<td>54</td>
<td>2</td>
<td>5</td>
<td>7</td>
</tr>
<tr>
<td>Asia-Pacific</td>
<td>54</td>
<td>4</td>
<td>6</td>
<td>10</td>
</tr>
<tr>
<td>Eastern Europe</td>
<td>23</td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>Latin America and Caribbean</td>
<td>33</td>
<td>8</td>
<td>2</td>
<td>10</td>
</tr>
<tr>
<td>Western Europe and Others</td>
<td>29</td>
<td>7</td>
<td>6 (including EU)</td>
<td>13</td>
</tr>
<tr>
<td>Total</td>
<td>193</td>
<td>22</td>
<td>21</td>
<td>43 (34 different states parties)</td>
</tr>
</tbody>
</table>
much into the figures in Table 2, particularly the propensity or otherwise for states from a particular region to engage in LOSC litigation. The numbers of cases and litigants are too small for any conclusions of this kind to be drawn.

**Subject matter of the cases**

Table 3 shows, in a somewhat simplified fashion, the subject matter of the 21 cases that have so far been brought before LOSC judicial bodies. Nearly 40% of the cases have been brought by a flag state alleging that one of its vessels has been seized and detained by a coastal state in violation of the LOSC, while nearly 25% concern maritime boundary delimitation. Between them these two categories account for eight of the 10 cases for which a decision on the merits has been given. An informed observer at the time of the conclusion of the LOSC in 1982 would probably have been surprised to learn that nearly two-thirds of the first 21 cases would concern the detention of vessels and maritime boundary delimitation. Such an observer would probably have assumed that most disputes over the detention of vessels would have been resolved under the prompt release procedures of Article 292. Furthermore, our observer would probably have assumed that the possibility for states to opt out of the compulsory dispute settlement procedures for maritime boundary disputes would mean that there would be few, if any, cases on this subject. With the benefit of hindsight, we now know that few states have exercised that option, and that even where they have, they may later withdraw their opt-out and bring a case before a judicial body for a maritime boundary to be determined where they consider that it is in their interest to do so, as Ghana has done in the case of its maritime boundary dispute with Côte d’Ivoire. We also now know that maritime boundary delimitation has become one of most popular subjects for litigation before the ICJ.

Instead, our observer of 1982 might have expected that most cases would have concerned disputes of the kind that prompted the inclusion of Part XV in the LOSC, in other words, disputes over the interpretation and application of the innovative and compromise

**Table 3. Subject matter of the cases as of 1 December 2016.**

<table>
<thead>
<tr>
<th>Subject</th>
<th>ITLOS</th>
<th>Annex VII</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Seizure and detention of vessels</td>
<td>4 (Saiga No 2) (St. Vincent v. Guinea), Louisa (St. Vincent v. Spain), Virginia G (Panama v. Guinea-Bissau), Norstar (Panama v. Italy)</td>
<td>4 (Libertad (Argentina v. Ghana), Arctic Sunrise (Netherlands v. Russia), Duzgit Integrity (Malta v. São Tomé and Príncipe), Enrica Lexie (Italy v. India))</td>
<td>8 (4 decisions on the merits, 1 lack of jurisdiction, 1 withdrawn, 2 pending)</td>
</tr>
<tr>
<td>Maritime boundary delimitation</td>
<td>2 (Bangladesh/Myanmar, Ghana/Côte d’Ivoire)</td>
<td>3 (Barbados/Trinidad &amp; Tobago, Guyana/Suriname, Bangladesh/India)</td>
<td>5 (4 decisions on the merits, 1 pending)</td>
</tr>
<tr>
<td>Fisheries</td>
<td>1 (Swordfish (Chile v. EU))</td>
<td>2 (Southern Bluefin Tuna (Australia and New Zealand v. Japan), Atlanto-Scandian Herring (Denmark (Faroes) v. EU))</td>
<td>3 (no decisions on the merits—2 withdrawn, 1 lack of jurisdiction)</td>
</tr>
<tr>
<td>Environmental</td>
<td>0</td>
<td>3 (MOX Plant (Ireland v. United Kingdom), Land Reclamation (Malaysia v. Singapore), Chagos MPA (Mauritius v. United Kingdom))</td>
<td>3 (1 decision on the merits, 2 withdrawn)</td>
</tr>
<tr>
<td>Other</td>
<td>0</td>
<td>2 (South China Sea (Philippines v. China), Ukraine v. Russia)</td>
<td>2 (1 decision on the merits, 1 pending)</td>
</tr>
</tbody>
</table>
provisions of the LOSC or between weak and powerful states. In practice, relatively few cases have so far been of this kind. While it is obviously a rather subjective judgment to decide whether a particular case falls within either of these categories, arguably the only cases that fall into the first category are the Saiga No 2 and Virginia G Cases (on the nature of coastal state rights in the EEZ—the Enrica Lexie Case may also turn out to be of this kind, depending on how the arbitral tribunal finds the facts), the maritime boundary cases, and the South China Sea Case (on the distinction between uninhabitable rocks and other islands). Most disputes concerning the innovative and compromise provisions of the LOSC or the meaning of its provisions that are unclear or ambiguous have not been litigated and remain unresolved; instead, states parties have preferred to protest against the claims of others that they consider to be inconsistent with the LOSC and assert their own position. As regards disputes between weak and powerful states, only five disputes at most fall within this category, namely, the MOX Plant (Ireland v. United Kingdom), Swordfish (Chile v. EU), Chagos Marine Protected Area (Mauritius v. United Kingdom), South China Sea (Philippines v. China), and Ukraine v. Russia Cases. While the Chagos MPA Case is clearly a David versus Goliath type of case, the essence of the dispute was not really about the LOSC at all but about sovereignty over the Chagos archipelago, with the LOSC dispute settlement system being used by Mauritius, ultimately unsuccessfully, as a means to try to resolve the sovereignty dispute. Likewise, the Ukraine v. Russia Case also appears to be an attempt to use the LOSC to resolve what is in essence a territorial dispute, the Russian annexation of Crimea.

Looking in a little more detail at the cases that have been brought, the cases that concern the seizure and detention of foreign vessels are a mixed bunch. Three cases concern the seizure and detention of tankers supplying oil to foreign vessels in the EEZ or archipelagic waters (the Saiga No 2, Virginia G, and Duzgit Integrity Cases). The other three decided cases concern the seizure and detention of a foreign vessel following the alleged search for archaeological remains in the territorial sea and internal waters (the Louisa Case), protest against Russian hydrocarbon activity in the Arctic (the Arctic Sunrise), and alleged nonpayment of a debt by the flag state (the Libertad). In the two pending cases the facts are contested by the parties and still have to be established judicially.

The four decided maritime boundary cases have followed the jurisprudence of the ICJ in delimiting the single maritime boundary within 200 nautical miles (nm) of the baseline, but have broken new ground in delimiting continental shelf boundaries beyond 200 nm (the Bangladesh/Myanmar and Bangladesh/India Cases) and in interpreting the provisions of the LOSC dealing with provisional arrangements pending determination of a boundary and the obligation not to jeopardize or hamper the reaching of a boundary agreement (the Guyana/Suriname Case). Of the three fisheries cases, two concerned the obligation to cooperate over the conservation and management of highly migratory species (the Southern Bluefin Tuna and Swordfish Cases), while the third case was about the obligation in Article 63(1) of the LOSC to cooperate over the conservation and management of shared stocks (the Atlanto-Scandian Herring Case). None of these cases ended with a decision on the merits, so the scope of the obligations concerned was not clarified. Of the three environmental cases, the two that ended without a decision on the merits concerned potential pollution of the Irish Sea by nuclear matter (the MOX Plant Case) and Singapore's land reclamation activities in the Straits of Johor (the Land Reclamation Case). The third case, the Chagos MPA Case, although labeled as environmental, was in reality primarily a sovereignty dispute (as explained in the preceding) and the arbitral tribunal’s award has little to say about the
environmental provisions of the LOSC. The *South China Sea* award also dealt with environmental matters, particularly obligations in the LOSC relating to rare and fragile ecosystems, as well as a variety of other issues, including historic rights and titles, the distinction between uninhabitable rocks and other islands, and the legal significance of low-tide elevations. The notification and statement of claim in the *Ukraine v. Georgia Case* were not publicly available at the time of writing, so it is not yet known what issues of the LOSC have been raised in this case.

Often it is assumed that once an international court or tribunal has given a decision on the merits of a case, the dispute in question has been resolved. Such an assumption is far from being correct in relation to disputes decided under Part XV of the LOSC. At least five of the 10 decisions on the merits have given rise to problems of compliance (information on the position in relation to the other five cases is not publicly available). In the *Barbados/Trinidad and Tobago Case*, the arbitral tribunal determined that the boundary between the EEZs and continental shelves of Barbados and Trinidad and Tobago terminated in the east where it intersected the previously agreed boundary between Trinidad and Tobago and Venezuela. That point was within 200 nm of the baselines of Trinidad and Tobago, thus cutting off Trinidad and Tobago from any continental shelf beyond. Nevertheless, that has not prevented Trinidad and Tobago subsequently making a submission to the Commission on the Limits of the Continental Shelf in which it effectively ignores the arbitral tribunal’s award. In the two *Bay of Bengal Cases*, the ITLOS and an Annex VII arbitral tribunal determined the boundaries between the continental shelves beyond 200 nm of Bangladesh and Myanmar and Bangladesh and India, respectively. In a note of 22 October 2015 to the UN Secretary-General, Bangladesh argues that Myanmar’s revised submission to the Commission on the Limits of the Continental Shelf, following the judgment of the ITLOS, is not in conformity with that judgment. Notwithstanding the award of the Annex VII tribunal, Bangladesh has not yet withdrawn its objection to the Commission considering the submission of India, presumably because it regards India’s submission, made in 2009 and not (yet) subsequently revised, as being incompatible with the tribunal’s award.

The best-known cases of noncompliance concern the *Arctic Sunrise* and *South China Sea Cases*. In both cases the defendants, Russia and China, respectively, refused to participate in the proceedings before the Annex VII arbitral tribunals, and immediately after the latter delivered their awards, announced that they did not accept the tribunals’ decisions. These actions are clearly a major blow to the integrity, authority, and legitimacy of the LOSC dispute settlement system. It remains to be seen how serious this will be, and whether it will fatally undermine the LOSC system. Some grounds for optimism are provided by the experience of the ICJ. In the 1970s and 1980s, there were half a dozen cases brought before the ICJ where the defendant state refused to appear or abide by the subsequent judgment. As with the current situation concerning the LOSC, two of those cases concerned permanent members of the Security Council—France in the *Nuclear Tests Cases* and the United States in the *Nicaragua Case*. At the time there were widespread concerns expressed for the future of the ICJ. However, the ICJ recovered from that experience and there have been no cases of states refusing to appear since the 1980s. Arguably, the ICJ enjoys today as great a prestige and authority as at any time in its history.

It is interesting to view the actions of Russia and China in the *Arctic Sunrise* and *South China Sea Cases* in the light of a joint Declaration on the Promotion of International Law,
issued by the two states on 25 June 2016. The declaration contains an important paragraph on dispute settlement, which in part reads as follows:

The Russian Federation and the People’s Republic of China reaffirm the principle of peaceful settlement of disputes and express their firm conviction that States shall resolve their disputes through dispute settlement means and mechanisms that they have agreed upon … It is crucial for the maintenance of international legal order that all dispute settlement means and mechanisms are based on consent and used in good faith and in the spirit of cooperation, and their purposes shall not be undermined by abusive practices.

The paragraph refers to dispute settlement being based on agreement and consent. Of course, in becoming parties to the LOSC, Russia and China agreed to its system of dispute settlement. However, the references to agreement and consent in the declaration should perhaps be taken as meaning consent to a particular form of settlement for a specific dispute, rather than consent being given in the abstract and in advance by ratifying the LOSC. The declaration also contains a paragraph on the LOSC, which reads:

The Russian Federation and the People’s Republic of China emphasize the important role of the 1982 United Nations Convention on the Law of the Sea in maintaining the rule of law relating to activities in the Oceans. It is of utmost importance that the provisions of this universal treaty are applied consistently, in such a manner that does not impair rights and legitimate interests of States Parties and does not compromise the integrity of the legal regime established by the Convention.

A key phrase here is “legitimate interests of States Parties,” with which, the declaration asserts, the LOSC must be consistently applied. The response of China to the South China Sea award may be contrasted with its behavior in the WTO, membership of which also requires advance acceptance of compulsory dispute settlement. Although China has lost a number of cases under the DSU, it has to date complied with all the rulings against it. These cases generally have great economic significance and therefore could also be described as relating to its “legitimate interests.”

The failure of Russia and China to accept the awards in the Arctic Sunrise and South China Sea Cases draws attention to the fact that the LOSC contains no mechanism designed to ensure compliance with judicial decisions given under Part XV. In this respect it differs, formally at least, from the ICJ and the WTO’s DSU. In the case of the ICJ, Article 94(2) of the UN Charter provides that if a losing state fails to comply with a judgment, the UN Security Council “may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.” In the 70 years of the ICJ’s existence, this provision has never been used, even though there have been a number of cases where a losing party has failed to comply with a judgment. In the case of the WTO, Article 22 of the DSU allows a winning state to take retaliatory action against a losing state that has not complied with a ruling of a panel or the appellate body. This is effectively a form of institutional countermeasures. With the LOSC, it would be possible for a winning state to take countermeasures against a losing state that failed to comply with a judgment of the ITLOS or an Annex VII tribunal, as such failure would be a breach of Article 296(1) of LOSC. However, as has been discovered with the DSU, it is often difficult in practice for a weak state to employ countermeasures against a powerful state, either because it cannot take action on a scale that is likely to be effective or because it risks harming itself. Although at the regional level there are examples of mechanisms that are effective in compelling states to comply with court
judgments, for example, the Court of Justice of the European Union may fine States that do not comply with its judgments,\textsuperscript{78} it seems unlikely that such a mechanism will be introduced into global dispute settlement systems.

The only mechanism at the global level that seems to be fairly effective in securing compliance with international obligations, albeit not obligations to comply with judicial decisions, is the noncompliance procedures found in several multilateral environmental agreements, where noncompliance may be sanctioned by the withdrawal of benefits, such as voting rights and financial and technical assistance. In theory, the LOSC Meeting of States Parties could possibly serve as such a mechanism in relation to noncompliance with the decisions of LOSC judicial bodies. However, it currently lacks an explicit power to do so. It seems very unlikely that it would be prepared to consider itself as having an implied competence for this purpose, given the opposition of many state parties to any enlargement of the role of the Meeting of States Parties.\textsuperscript{79} In any case, the only kind of sanction that the Meeting of States Parties would seem able to impose on a state that was not complying with a judicial decision given under Part XV would be to withdraw its right to vote in elections for members of the ITLOS and to participate in the determination of its budget. Such a sanction is unlikely to be effective.

Just as it should not be assumed that a decision on the merits will resolve a dispute, so it should also not be assumed that litigation that does not result in a decision on the merits is without relevance to the resolution of the dispute. In three of the seven completed LOSC cases that did not result in a decision on the merits, litigation contributed to the solution of the dispute. This came about because of the power of the ITLOS under Article 290(5) of the LOSC to prescribe provisional measures where the Annex VII arbitral tribunal hearing the case is yet to be constituted. The ITLOS has at times used this power to play a conflict-management role and to engender better relations between the parties to the dispute, albeit at times its actions seem difficult to reconcile with a strict reading of Article 290. The first of the three cases where ITLOS provisional measures helped to settle the dispute was the Southern Bluefin Tuna Case, in which Australia and New Zealand claimed that an experimental fishing program for southern bluefin tuna by Japan breached obligations of the LOSC relating to the conservation and management of highly migratory species. Although the arbitral tribunal hearing the case subsequently found that it lacked jurisdiction,\textsuperscript{80} the provisional measures earlier prescribed by the ITLOS, which required the parties to avoid action that would aggravate the dispute, and to limit their catches and resume negotiations on conservation and management measures without delay, prompted the parties to renew such negotiations in a more cooperative spirit and have been credited by several commentators with playing a significant role in the eventual resolution of the dispute.\textsuperscript{81} Second, in the Land Reclamation Case, the ITLOS ordered the parties to enter into consultations to establish a group of independent experts to conduct a study to determine the effects of Singapore’s land reclamation activities on the marine environment of the Straits of Johor and to propose, as appropriate, measures to deal with any adverse effects of such reclamation.\textsuperscript{82} Proceedings before the Annex VII Tribunal that were due to deal with the merits phase of the case were effectively suspended while the group of independent experts established pursuant to the ITLOS Order carried out its work. On the basis of a report from the group, the parties were able to conclude an agreement that constituted a full and final settlement of the dispute.\textsuperscript{83} The third case where ITLOS provisional measures helped to settle the dispute was the Libertad Case, which concerned the detention of an Argentinian naval training vessel in a port in Ghana.
pursuant to an order from a Ghanaian court in order to satisfy payment of an Argentinian government debt. The ITLOS prescribed a provisional measure ordering the release of the vessel. Ghana complied with the order four days after it was made, thus effectively resolving the dispute. The parties subsequently requested the Annex VII tribunal to terminate proceedings. In the other two cases that were settled, the Swordfish and Atlanto-Scandian Herring Cases, it may be that the institution of proceedings under the LOSC (and also of parallel proceedings under the DSU of the WTO) induced the parties to settle, but I am not aware of any information that publicly and explicitly shows this.

Conclusions

Shorn of its detail, the system of compulsory dispute settlement found in section 2 of Part XV of the LOSC amounts to a fairly standard kind of compromissory clause: disputes that cannot be settled by consensual means may be unilaterally referred by either party to the dispute to binding judicial settlement. Although most compulsory dispute settlement clauses in treaties provide for referral either to the ICJ and/or arbitration, the LOSC provides for referral to a choice of four possible fora—two types of arbitration, the ICJ, or a court created by the LOSC, the ITLOS. Although the LOSC compulsory dispute settlement system is of a fairly standard kind, its inclusion in the LOSC was nevertheless a major political achievement. It is one thing to agree on the inclusion of a system of compulsory dispute settlement in a treaty with a fairly limited subject matter (as has been done on dozens of occasions, both before and especially since the adoption of the LOSC); it is quite another to obtain consensus on the inclusion of such a system in a treaty as extensive and wide-ranging as the LOSC, especially at a time when a significant number of states engaged in its negotiation, Communist and more radical developing states, were ideologically opposed to the use of international courts to settle disputes.

Achieving such a consensus did, however, come at a price. Various categories of dispute are excluded from compulsory dispute settlement—some automatically under Article 297 (disputes concerning the exercise of coastal states’ rights relating to fisheries and marine scientific research in the EEZ), and others only where states have opted to exclude them by making a declaration under Article 298, which in practice only a small minority of states parties have so far done. Achieving consensus also required giving states a choice of fora for settling disputes, as well as allowing states the possibility of agreeing on a means of settling a dispute outside the framework of section 2 of Part XV of the LOSC. This means that there is a risk that the LOSC will be interpreted differently by different courts and tribunals. So far, however, there have been only rather limited divergences in interpretation.

Since the entry into force of the LOSC in 1994, the compulsory dispute settlement system in Part XV has, up to now at least, functioned in much the same way as interstate litigation (with the exception of the WTO’s DSU) has always done. Thus, there have been relatively few cases (around one a year on average); the occurrence and subject matter of litigation has been rather random and unpredictable; and only a small minority of states has engaged in litigation. Not all decisions on the merits of a case have (yet) been complied with by the losing state, and apart from the possible employment of countermeasures by the winning state, there is no obvious mechanism to induce a losing state to comply. Only time will tell whether this turns out to be a significant problem that will undermine the efficacy and legitimacy of the LOSC’s compulsory dispute settlement system.
Notes


2. While there have been no disputes referred for settlement, the Chamber has delivered one advisory opinion, Responsibilities and Obligations of States with respect to Activities in the Area, Advisory Opinion of 1 February 2011, ITLOS Reports 2011, 10.


4. Articles 9–12 of the Convention. These provisions were never invoked, probably because the Convention was never ratified by the major fishing states and therefore remained largely a dead letter.


6. Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes (adopted 18 April 1961, entered into force 24 April 1964), 500 U.N.T.S. 241; and Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes (adopted 24 April 1963, entered into force 19 March 1967), 596 U.N.T.S. 487. Unlike the optional protocol to the Geneva Conventions, the optional protocols to the two Vienna Conventions have formed the jurisdictional basis for a number of cases referred to the ICJ.


14. Rosenne and Sohn, supra note 8, 109–110; Klein, supra note 11, 256.
15. Klein, supra note 11, 229, 256, and 262.
17. Articles 297(2), 297(3), and 298(1)(a) and Annex V of the LOSC.
19. See Press Release of the Permanent Court of Arbitration of 22 August 2016, www.pcacases.com/web/sendAttach/1869. In September 2016, the Conciliation Commission rejected Australia’s claim that it was not competent to conduct the conciliation; see Conciliation between Timor-Leste and Australia, Decision on Australia’s Objection to Competence, 19 September 2016, available on the Permanent Court of Arbitration (PCA) website at pcacases.com/web/sendAttach/1921.
20. LOSC, Articles 287(1), (3), (4) and (5).
21. This total includes the limited declarations as to subject matter made by Bangladesh, Panama, and St. Vincent and the Grenadines. The total does not include declarations made by Algeria, Cuba, and Guinea-Bissau excluding use of the ICJ for the settlement of disputes either absolutely or without their consent. Details of the declarations made under Art. 297 can be found at www.un.org/depts/los/settlement_of_disputes/choice_procedure.htm, accessed 25 January 2017.
22. Adede, supra note 8, 49–54, 243–4 and 283; Anderson, supra note 8, 390.
23. LOSC, Annex VI, Article 2(1).
24. Klein, supra note 11, 54–55; Anderson, supra note 8, 386.
26. Rosenne and Sohn, supra note 8, 441–45.
27. LOSC, Annex VIII, Article 2(3).
28. Ibid., Article 5.
29. See supra note 7.
31. Case of the SS “Wimbledon” (Great Britain, France, Italy and Japan v. Germany), [1923] PCIJ Rep Series A No 1; and The Mavrommatis Palestine Concessions Case (Greece v. Great Britain), [1924] PCIJ Rep Series A No 2.
34. Supra note 7, Articles 26–27.
35. See Articles 280–2 of the LOSC and the discussion of these provisions in the article by Nigel Bankes in this collection.
37. These events are recorded in paragraph 61 of the tribunal’s award on jurisdiction; see In the Matter of the Arctic Sunrise Arbitration (Netherlands v. Russia) (Jurisdiction), 26 November 2014, www.pcacases.com/web/sendAttach/1325. In his dissenting opinion in the provisional measures phase of the case before the ITLOS, Judge Golitsyn considered that the dispute arose on 3 October; see The “Arctic Sunrise” Case (Kingdom of the Netherlands v. Russian Federation) (Provisional Measures), Order of 22 November 2013, dissenting opinion of Judge Golitsyn, para. 12, ITLOS Reports 2013, 230. The ITLOS itself did not offer a view as to when the dispute arose.
39. Ibid., para. 154.
42. These figures refer to only 13 of the cases, as detailed information on the arbitrators in the Ukraine v. Russia Case was not available at the time of writing. The total number of possible arbitrators is 63 rather than 65 (13 times five) because in the Duzgit Integrity Case there were only three arbitrators compared with the normal five. For limited information on the Ukraine v. Russia Annex VII arbitration see Press Release from the Ukraine Ministry of Foreign Affairs, December 22, 2016, indicating that the five-person arbitral panel had been constituted: mfa.gov.ua/en/press-center/news/53422-na-pochatku-2017-roku-rozpochnetsya-rozglyad-spravi-ukrajina-proti-rosiy sykoji-federaciji-zgidno-z-konvencijeu-oon-z-morsykogo-prava, accessed 25 January 2017.
45. See the EU’s declaration made on becoming a party to the LOSC, www.un.org/depts/los/convention_agreements/convention_declarations.htm
47. According to Karen Alter, there are “now at least twenty-four permanent international courts.” See K. J. Alter, The New Terrain of International Law (Princeton University Press, 2014), 4. The overwhelming majority of the thousands of cases decided by these courts are disputes between natural or legal persons and states or prosecutions of natural persons before international criminal courts.
48. For a list of the cases, see www.icj-cij.org/docket/index.php?p1=3&p2=2, accessed 25 January 2017. Ten of the 60 cases are law of the sea cases.
49. The ICJ’s jurisdictional bases comprise, according to Article 36 of its Statute, cases referred to it by special agreement; compromissory clauses in preexisting treaties, of which there are several hundred (for a list, see www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=4, accessed 25 January 2017); and declarations made by states under the so-called optional clause (Article 36(2) of the statute), of which there are currently 72 (for a list, see www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3, accessed 5 August 2016).
50. This is the number of cases (excluding Annex VII arbitrations) listed on the website of the Permanent Court of Arbitration (PCA), https://pcacases.com/web/allcases, accessed 25 January 2017. There may have been a small number of arbitrations that are not listed there. Annex VII arbitrations therefore account for more than half of the interstate arbitrations initiated since the entry into force of the LOSC that are listed on the PCA’s website. Of the 11 non-Annex VII arbitrations, four concern the law of the sea.
52. Ibid., 208.


55. In international law, a dispute, according to the ICJ, is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons, where the claim of one person is positively opposed by the other. See Georgia v. Russia, supra note 40 at 84, for a summary of the ICJ’s case law on this matter.


60. See the list of ITLOS cases at www.itlos.org/cases/list-of-cases, accessed 25 January 2017.

61. Interestingly, Judge David Anderson, who has a long experience of being both a negotiator (as a legal adviser at the UK Foreign and Commonwealth Office for many years) and an international judge (as a member of the ITLOS), considers that negotiation is the preferred means to settle disputes: see Anderson, supra note 8, 413.


63. The discrepancy shown in Table 2 between the number of applicants and the number of respondents is due to the fact that in the Southern Bluefin Tuna Case there were two applicants (Australia and New Zealand) but only one respondent (Japan).

64. I have listed each case under a single heading, even though some cases cover more than one subject, labeling the case by what I consider to be its predominant subject matter.

65. For the avoidance of doubt, it should be made clear that these cases are quite distinct from the prompt release of vessel cases brought under Article 292 of the LOSC, which are discussed in the article by Seline Trevisanut included in this collection.

66. Barbados/Trinidad and Tobago case, supra note 44, paras. 374 and 381–82.


Ministry of Foreign Affairs of the Russian Federation M. V. Zakharova Regarding the Arbitral Award in the Case of the Arctic Sunrise (25 August 2015) (in Russian at www.mid.ru/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/1707214), accessed 25 January 2017, as quoted in A. G. Oude Elferink, “The Russian Federation and the Arctic Sunrise Case: Hot Pursuit and Other Issues Under the LOSC,” (2016) 92 International Law Studies 381, 383. Although not accepting the tribunal’s 2015 award in the Arctic Sunrise case, Russia has in practice complied with the ruling because it had already released the Arctic Sunrise and its crew from detention well before the tribunal’s ruling. However, in its 2015 award, the tribunal reserved the matter of possible compensation for Russia’s illegal acts for further determination, which had not yet occurred at the time of writing. Thus, it remains to be seen what Russia’s response will be to any ruling that it should pay compensation to the Netherlands.


74. Paragraph 5 of the declaration.

75. Paragraph 9 of the declaration.

76. For a list of cases brought against China, see www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm, accessed 25 January 2017. Click on individual cases to find China’s response. As regards Russia’s practice in the DSU, at the time of writing, there had been only one definitive ruling against it, but the period of time for implementation of the panel’s report had not expired.


78. Treaty on the Functioning of the European Union, supra note 46, Article 260.


80. Southern Bluefin Tuna Case, supra note 44.


82. Case Concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore) (Provisional Measures), Order of 8 October 2003, ITLOS Reports 2003, 10, para. 106.

83. Case Concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), Award on Agreed Terms of 1 September 2005, www.pcacases.com/web/sendAttach/1126. The text of the settlement agreement is annexed to the award.


86. www.pcacases.com/web/sendAttach/429.