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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 paper is designed to provide an introduction to the papers of this symposium that follow by giving 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.

Key words

Arbitration; conciliation; environmental disputes; fisheries disputes; International Court of Justice; International Tribunal for the Law of the Sea; maritime boundary disputes; seizure and detention of vessels

Introduction

The UN Convention on the Law of the Sea (LOSC)¹ contains three distinct, albeit inter-related, 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 non-State actors, including the Authority, the Enterprise (the Authority's mining arm), State enterprises, and natural and legal persons. Furthermore, whereas the general system of dispute settlement gives the disputants a considerable choice of forum for settling a dispute (as will be seen), 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, rather than Part XV.

¹ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 396.

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 EEZ or for a pollution offence, 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 paper will not deal with the last two systems of dispute settlement. The second has yet to be used. This is probably because to date there has been no commercial mining in the Area and because the decision-making processes of the Authority are designed to minimise the chances of a dispute arising.² The specialized prompt release procedures of Article 292 are not discussed in this paper because they are the subject of a separate paper in this Symposium. In discussing the LOSC's general dispute settlement system, I will begin with a brief overview of the relevant provisions of the LOSC, explaining the reasons for their inclusion in the LOSC and placing them in the context of dispute settlement in international law generally. This will be followed by an analysis of the use so far made of judicial settlement under Part XV.

Background, overview and context

At the first attempt made by the United Nations (UN) to codify the law of the sea, the First UN Conference on the Law of the Sea held in 1958, no provisions on dispute

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.

settlement were included 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,³ which 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.⁴ 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; and if one of the parties did not accept the recommendation of the conciliation commission, the other party could refer the matter to the ICJ.⁵ 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 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 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 law-making 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 very similar provisions to the Geneva law of the sea Optional Protocol.⁶

³ Convention on Fishing and Conservation of the Living Resources of the High Seas (adopted 29 April 1958, entered into force 20 March 1966) 559 UNTS 285.

⁴ Arts 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.

⁵ Optional Protocol of Signature concerning the Compulsory Settlement of Disputes arising from the Law of the Sea Conventions (adopted 29 April 1958, entered into force 30 September 1962) 450 UNTS 170.

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 UNTS 241; and

By the time of the Third UN Conference on the Law of the Sea (1973-82), attitudes to dispute settlement had moved on from those of the late 1950s and early 1960s. It was beginning to become not uncommon for multilateral treaties to contain provisions for “compulsory dispute settlement”.⁷ By this phrase I mean the possibility for 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 to 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 we will shortly see, 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.⁸ First, a number of developed States, including the United Kingdom and the USA, 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.⁹ Second, it was thought that the possibility of compulsory dispute settlement would

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 UNTS 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.

⁷ For examples from this period, see Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159, Art 64; International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195, Art 22; Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Art. 66; and International Convention for the Prevention of Pollution from Ships (adopted 2 November 1973, entered into force 2 October 1983) 1340 UNTS 61, Art. 10.

⁸ For an authoritative account of the negotiations leading to the inclusion of a compulsory dispute settlement system in the LOSC, see S Rosenne and LB Sohn (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. V (Martinus Nijhoff 1989), especially at 5-15. See also AO Adede, *The System for Settlement of Disputes under the UN Convention on the Law of the Sea* (Martinus Nijhoff 1987), Part I. For an excellent succinct and recent account by one of the participants in the negotiations, see D Anderson, ‘Peaceful Settlement of Disputes under UNCLOS’ in J Barrett and R Barnes (eds), *Law of the Sea; UNCLOS as a Living Treaty* (British Institute of International and Comparative Law 2016) 385, 386-92.

⁹ Rosenne and Sohn, *supra* note 8, 6; C Chinkin, ‘Dispute Resolution and the Law of the Sea: Regional Problems and Prospects’ in J Crawford and DR Rothwell (eds), *The Law of the Sea in the Asian-Pacific Region* (Nijhoff 1995) 237, 245; AE Boyle, ‘Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction’ (1997) 46 ICLQ 37, 38-9; Anderson, *supra* note 8, 389-90.

protect the integrity of the LOSC text, particularly the many delicate compromises with which it abounds, prevent it from unravelling in the face of unilateral State action, and ensure its uniform interpretation.¹⁰ Thirdly, 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.¹¹

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 Conventions 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:

¹⁰ See the Memorandum by the President of the Third UN Conference on the Law of the Sea, Doc A/CONF.62/WP.9/Add 1 (1976), para 6, *Official Records of the Third UN Conference on the Law of the Sea*, Vol. V (United Nations 1976) 122. See also Adede, *supra* note 8, 241; Anderson, *supra* note 8, 400.

¹¹ N Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge University Press 2005) 52-53. See also TA Mensah, ‘The Role of Peaceful Dispute Settlement in Contemporary Ocean Policy and Law’ in D Vidas and W Østreng (eds), *Order for the Oceans at the Turn of the Century* (Kluwer 1999) 81, 82.

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 with which it is in dispute to legally binding settlement of disputes concerning the exercise of its rights concerning fisheries and marine scientific research 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.¹² 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 neighbouring 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 298.¹³ The low number of declarations is rather surprising, as Article 298 is said to have been necessary in order to secure agreement

¹² Klein, *supra* note 11, 125-6 and 225-6.

¹³ For a list of declarations, see <www.un.org/depts/los/settlement_of_disputes/choice_procedure.htm> accessed 28 August 2016.

on the inclusion of a system of compulsory dispute settlement in the LOSC.¹⁴ 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.¹⁵ 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.¹⁶ 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.¹⁷ 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,¹⁸ 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.¹⁹ The

¹⁴ Rosenne and Sohn, *supra* note 8, 109-110; Klein, *supra* note 11, 256.

¹⁵ Klein, *supra* note 11, 229, 256 and 262.

¹⁶ *Ibid*, 284 291 and 308-9.

¹⁷ Arts 297(2), 297(3) and 298(1)(a) and Annex V of the LOSC.

¹⁸ See JG Merrills, *International Dispute Settlement* (5th edn, Cambridge University Press 2011) 69-74 and 174-176.

¹⁹ See Press Release of the Permanent Court of Arbitration of 22 August 2016, <www.pcacases.com/web/sendAttach/1869> accessed 28 August 2016. In September the Conciliation Commission rejected Australia's claim that it was not competent to conduct the conciliation: see

exceptions in Articles 297 and 298 are discussed in more detail in the papers by Stephen Allen and Keyuan Zou in this Symposium.

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. That case law is examined in the paper by James Harrison in this Symposium so there is no need for discussion of it here.

The final phrase in Article 286 that requires comment is “the court or tribunal having jurisdiction under this section.” What this “court or tribunal” is, is explained in Article 287. The latter 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’ choice of forum does 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.²⁰ As of 1 December 2016 only 47 of the 168 States parties to the LOSC had made declarations.²¹ Statistically, therefore, the likelihood is that most disputes will be referred to Annex VII arbitration; and so far

Decision on Australia’s Objections to Competence, 19 September 2016
<www.pcacases.com/web/sendAttach/1921> accessed 4 January 2017.

²⁰ UNCLOS, Art 287(1), (3), (4) and (5).

²¹ This total includes the limited declarations as to subject matter made by Bangladesh, Panama and St. Vincent. 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 are at
<www.un.org/depts/los/settlement_of_disputes/choice_procedure.htm> accessed 28 August 2016.

this has in fact happened in practice, as will be explained below. 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.²² 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. Its role under Part XV of the LOSC is essentially no different to 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 inter-State arbitration. The ITLOS and Annex VIII arbitration require more comment. The ITLOS was created by the LOSC. It is largely modelled 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 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

²² Adede, *supra* note 8, 49-54, 243-4 and 283; Anderson, *supra* note 8, 390.

²³ LOSC, Annex VI, Art 2(1).

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 FAO, UNEP, the Inter-Governmental Oceanographic Commission and the 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,

²⁴ Klein, *supra* note 11, 54-55; Anderson, *supra* note 8, 386.

²⁵ *Case concerning the Northern Cameroons (Cameroon v. United Kingdom)* (Preliminary Objections) [1963] ICJ Rep 15; and *South West Africa Cases (Ethiopia and Liberia v. South Africa)* (Second Phase) [1966] ICJ Rep 6.

²⁶ Rosenne and Sohn, *supra* note 8, 441-445.

²⁷ LOSC, Annex VIII, Art 2(3).

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 land-locked) have chosen Annex VIII arbitration as a preferred means of settlement.

Returning to Article 286 in the light of the above commentary on its provisions, what the article 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 the dispute 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 LOSC²⁹ and are found in many multilateral treaties concluded since.³⁰ Indeed, in the first two cases ever heard by an international court, the *Wimbledon* and *Mavrommatis* cases,³¹ 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 perhaps the considerable choice of forum), achieving consensus at the Third UN Conference on the Law of the Sea on the inclusion of

²⁸ Ibid, Art 5.

²⁹ See note 7.

³⁰ For a list of multilateral treaties that include compulsory reference to the ICJ, see <www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=4> accessed 3 August 2016. For a list of multilateral treaties that provide for compulsory reference to arbitration, see <<https://pca-cpa.org/en/documents/other-conventions-and-rules/>> accessed 29 August 2016.

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.

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.³² 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)³³ or the ICSID Convention,³⁴ 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 emphasises that it is always open to the parties to agree a means of settlement other than those in Part XV.³⁵ 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, on the other hand, had little choice but to bring its case before the ICJ under the optional clause (and the Pact of Bogotá) because it had not made a declaration under Article 287, meaning that in

³² Anderson, *supra* note 8, 380-381.

³³ Agreement establishing the World Trade Organization, Annex 2 Understanding on Rules and Procedures governing the Settlement of Disputes (adopted 15 April 1994, entered into force 1 January 1995) (1995) 33 ILM 1125.

³⁴ Note 7, Arts 26-27.

³⁵ See Arts 280-2 of the LOSC and the discussion of these provisions in the paper by Nigel Bankes in this Symposium.

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.³⁶ This approach has been particularly evident in the case law of the

³⁶ For a discussion of the case law on Article 283, see D Anderson, ‘Article 283 of the United Nations Convention on the Law of the Sea’ in TM Ndiaye and R Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Thomas A. Mensah* (Martinus Nijhoff 2007) 847.

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 the 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.³⁷ 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

³⁷ These events are recorded in para 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> accessed 29 August 2016. 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.

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.”³⁸ 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.”³⁹ 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

³⁸ *In the Matter of the Arctic Sunrise Arbitration (Netherlands v. Russia)* (Merits), 14 August 2015, paras 152-3, <www.pcacases.com/web/sendAttach/1438> accessed 29 August 2016.

³⁹ *Ibid*, para 154.

⁴⁰ *Case concerning the Application of the International Convention on the Elimination on All Forms of Racial Discrimination (Georgia v. Russian Federation)* (Preliminary Objections) [2011] ICJ Rep 70, 135-140.

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 analyse 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 at the end of this paper). 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 EU law by bringing the case against a fellow EU Member State.

Of the total of 21 cases, 19 were initiated as arbitration 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”.⁴¹ 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.⁴² There has been a core of five arbitrators, each of whom has sat in three or more cases. The trend towards the same people being used as arbitrators has become more pronounced in recent cases. A third of the arbitrators are

⁴¹ Letter of 3 June 2011 from Panama to Guinea-Bissau, attached to the Notification of Panama to the ITLOS
<https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.19/Notification_submitted_by_Panam_a.pdf> accessed 5 January 2017.

⁴² These figures refer to only 13 of the cases, as 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.

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 factors mentioned 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.⁴³ 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. There has so far been only one female arbitrator, Judge Elsa Kelly, who is also so far the only female ITLOS judge. 23 of the 40 people used as arbitrators 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, which concerns Article 281, the tribunal taking the divergent view, that in the *Southern Bluefin Tuna* case, contained no members who were or became ITLOS judges and only one member who sat in another Annex VII tribunal.⁴⁴

⁴³ UNCTAD, *Reform of Investor Dispute Settlement: In Search of a Roadmap* (2013)

<http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf> accessed 5 January 2017.

⁴⁴ For the view of the tribunal in the *Southern Bluefin Tuna Case* on Art 281, see *Southern Bluefin Tuna Case (Australia v. Japan; New Zealand v. Japan)* (2000) (Jurisdiction and Admissibility) XXIII RIAA 1, 42-46 (paras 55-65). For views of Art 281 that differ, see the *Southern Bluefin Tuna Case (Australia v. Japan; New Zealand v. Japan)* (Provisional Measures), Order of 27 August 1999 ITLOS Reports 1999, 280, paras 56-60; *Arbitration between Barbados and Trinidad and Tobago relating to the Delimitation of the Exclusive Economic Zone and the Continental Shelf* (2006) XXVII RIAA 147, 205-6 (para 200); and *South China Sea Case (Philippines v. China)* (Jurisdiction and Admissibility) (2015), para 223-225, <<http://www.pcacases.com/web/sendAttach/1506>> accessed 8 January 2017.

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. 27 States have so far selected the ICJ as a preferred means. 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).⁴⁵ 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.⁴⁶ 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.⁴⁷ 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

⁴⁵ See the EU's declaration made on becoming a party to the LOSC <http://www.un.org/depts/los/convention_agreements/convention_declarations.htm> accessed 5 August 2016.

⁴⁶ Treaty on the Functioning of the European Union (adopted 13 December 2007, entered into force 1 December 2009) [2010] OJ C83/47, Art. 344, as interpreted and applied by the Court of Justice in Case C-459/03, *Commission v Ireland* [2006] ECR I-4635.

⁴⁷ According to Karen Alter, there are "now at least twenty-four permanent international courts": see KJ 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.

applications, i.e. a State institutes proceedings concerning the same dispute against a number of defendant States),⁴⁸ even though the ICJ has a much broader base of jurisdiction than the LOSC judicial bodies;⁴⁹ approximately 11 inter-State disputes have been determined by arbitration;⁵⁰ and a handful of inter-State cases have been dealt with by regional human rights courts and the courts of regional economic co-operation/integration organizations. The one exception to the relative rarity of inter-State litigation is the DSU of the WTO. Since the DSU came into being, six weeks after the LOSC entered into force and with roughly the same number of parties, and up until the end of 2014, there had been 162 panel rulings (i.e. judicial decisions).⁵¹ 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,⁵² so overall the DSU experience is very different from that of the LOSC. On occasions 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. This is that it suggests that the provisions of the WTO covered

⁴⁸ For a list of the cases, see <www.icj-cij.org/docket/index.php?p1=3&p2=2> accessed 5 August 2016. 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 pre-existing 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 3 August 2016); 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 5 August 2016. 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 inter-State 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.

⁵¹ K Leitner and S Lester, ‘WTO Dispute Settlement 1995-2014 – A Statistical Analysis’ (2015) 18 *Journal of International Economic Law* 203, 209.

⁵² *Ibid*, 208.

agreements are either not very clearly drafted or that WTO members are not very good at complying with those agreements or, more likely, that it is 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 as, unlike an international court, 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 that relations with the State with whom 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 favour 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 LOSC 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 settlement in Articles 297 and 298 has led to some disputes not being referred to judicial settlement 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 seven 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 parties actively disagree over the location of the boundary. Furthermore, the LOSC suffers from widespread systemic non-compliance, 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 sub-standard ships, etc.⁵⁴ Such non-compliance is regularly protested by other States (thus

⁵³ *Gulf of Maine case (Canada/USA)* (Merits) [1984] ICJ Rep 246; T McDorman, *Saltwater Neighbors: International Ocean Law Relations between the United States and Canada* (OUP 2009) 140.

⁵⁴ For more details, see R Churchill, 'Compliance with the UN Convention on the Law of the Sea: Problems and Prospects' in H-J Koch, D König, J Sanden and R Verheyen (eds), *Legal Regimes for Environmental Protection: Governance for Climate Change and Ocean Resources* (Brill 2015) 288, 290-3; and JA Roach and RW Smith, *Excessive Maritime Claims* (3rd edn, Martinus Nijhoff 2012).

indicating a dispute⁵⁵), but has hardly ever, so far, been followed up by recourse to the compulsory dispute settlement procedures of the LOSC. A former president of the Third UN Conference on the Law of the Sea has bemoaned such instances of non-compliance, 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 non-compliance, 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 non-compliance 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 proceedings before an international court alleging non-compliance with that treaty by another party without having to show that it has been specially affected by such non-compliance.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 considerable time. The cost-conscious may be concerned that the

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.

⁵⁶ TBB Koh (untitled) in *United Nations Convention on the Law of the Sea at Thirty: Reflections* (United Nations 2013) 105, 106 <www.keepeek.com/Digital-Asset-Management/oecd/international-law-and-justice/united-nations-convention-on-the-law-of-the-sea-at-thirty_1b866746-en#.WG5if014iUk#page113> accessed 5 January 2017.

⁵⁷ Draft Articles on the Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, 2001, Vol. II (Part II), 31.

⁵⁸ See *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (Merits) [2012] ICJ Rep 422, 449-50 (paras. 66-69); and *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)* (Merits) [2014] ICJ Rep 226. In the latter case the ICJ simply assumed that Australia had standing to challenge Japan's alleged non-compliance with the International Convention for the Regulation of Whaling, without discussing the matter.

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 referred to above. 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.⁶⁰ Nevertheless, 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.⁶¹ 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 disputes over

⁵⁹ Report of the Twenty-Sixth Meeting of States Parties, SPLOS/303 (2016), 8 < <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/245/62/PDF/N1624562.pdf?OpenElement> > accessed 5 January 2017. By way of comparison, the ICJ currently costs around US\$26 million a year.

⁶⁰ See the list of ITLOS cases at <www.itlos.org/cases/list-of-cases/> accessed 31 August 2016.

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.

incidents at sea where the parties disagree as to what occurred,⁶² 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 (at the end of this paper) shows participation by States parties in LOSC litigation in terms of the informal geo-political groups into which the UN divides its members.⁶³ 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 per cent of the parties to the LOSC. Of the nine States that have been involved in two cases, three (Bangladesh, Panama and St Vincent) 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 geo-political 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 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.

⁶² For example, the Dogger Bank, the Red Crusader and Mavi Marmara incidents. On the first two, see Merrills, *supra* note 18, 42-4 and 48-51; on the third, see Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident, September 2011 <www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf> accessed 8 January 2017.

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).

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.⁶⁴ Nearly 40 per cent 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,⁶⁵ while nearly 25 per cent concern maritime boundary delimitation. Between them these two categories account for eight of the ten 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 if he or she had been told 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 that is in their interest, 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..

⁶⁴ I have listed each case under a single heading, even though some cases cover more than one subject, labelling 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 Art. 292 of the LOSC, which are discussed in the paper by Seline Trevisanut below.

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 provisions of the LOSC or between weak and powerful States. In practice, relatively few cases have so far been of these kinds. 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. UK)*, *South China Sea (Philippines v. China)* and *Ukraine v. Russia* cases. While the *Chagos MPA* case is clearly a David v. Goliath type of case, the essence of the dispute was not really about the LOSC at all but about sovereignty over the Chagos archipelago, 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 non-payment 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 labelled as an environmental one, was in reality primarily a sovereignty dispute (as explained above) 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 I do not yet know what issues of the LOSC have been raised in this case.

Lay persons, and some international lawyers, tend to assume 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 ten decisions on the merits have given rise to problems of compliance (I do not know what the position is in relation to the other five cases). 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.⁶⁶ 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

⁶⁶ *Barbados/Trinidad and Tobago* case, supra note 44, paras 374 and 381-2.

effectively ignores the arbitral tribunal's award.⁶⁷ 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.⁶⁸ 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.⁶⁹

The best-known cases of non-compliance 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 the latter delivered their awards, announced that they did not accept the tribunals' decisions.⁷⁰ These actions are clearly a major blow to the integrity,

⁶⁷ The submission is at

<www.un.org/depts/los/clcs_new/submissions_files/tto49_09/tto2009executive_summary.pdf> accessed 5 September 2016. See in particular pp. 14-18.

⁶⁸ The note is at

<www.un.org/depts/los/clcs_new/submissions_files/mmr08/2015_10_22_BGD_NV_UN.pdf> accessed 5 September 2016.

⁶⁹ See information at

<www.un.org/depts/los/clcs_new/submissions_files/submission_ind_48_2009.htm> accessed 5 September 2016.

⁷⁰ Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines, 12 July 2016

<http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1379492.shtml> accessed 8 January 2017; and Commentary of the Official Spokesperson of the 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 8 January 2017, as quoted in AG 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

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* cases⁷¹ and the USA in the *Nicaragua* case.⁷² 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 2016.⁷³ The Declaration contains an interesting and 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

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.

⁷¹ *Nuclear Tests Case (Australia v. France)* [1974] ICJ Rep 253; *Nuclear Tests Case (New Zealand v. France)* [1974] ICJ Rep 457.

⁷² *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)* (Merits) [1986] ICJ Rep 14.

⁷³ At <<https://www.lawfareblog.com/text-russia-china-joint-declaration-promotion-and-principles-international-law>> accessed 11 August 2016.

based on consent and used in good faith and in the spirit of cooperation, and their purposes shall not be undermined by abusive practices.⁷⁴

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.⁷⁵

A key phrase here is “legitimate interests of States parties”, consistently with which, the Declaration asserts, the LOSC must be applied. The relevance of this to the *South China Sea* case, in particular, is very obvious. The response of China to the *South China Sea* award presents an interesting contrast with its behaviour 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.⁷⁶ These cases generally have great economic

⁷⁴ Para 5 of the Declaration.

⁷⁵ Para. 9 of the Declaration.

⁷⁶ For a list of cases brought against China, see https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm accessed 5 September 2016.

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 quite 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 counter-measures. With the LOSC, it would be possible for a winning State to take counter-measures 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 counter-measures 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.⁷⁷ Although at the regional level there are examples of

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 definitive ruling against it, but the period of time for implementation of the panel’s report had not expired.

⁷⁷ For an example, see DS285 *United States – Measures affecting the Cross-Border Supply of Gambling and Betting Services*, where it was very difficult for Antigua to take effective action against the USA. Details of the case are available at: <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm> accessed 5 September 2016. See also H Mahncke, ‘Sovereignty and Developing Countries: Current Status and Future Prospects at the WTO’ (2009) 22 *Leiden Journal of International Law* 395, 407-8.

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,⁷⁸ it seems impossible to see such mechanisms being 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 non-compliance procedures found in several multilateral environmental agreements, where non-compliance 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 non-compliance 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.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,

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

⁷⁹ See RR Churchill, 'The 1982 United Nations Convention on the Law of the Sea' in DR Rothwell, AG Oude Elferink, KN Scott and T Stephens (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 24, 41.

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 that 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 programme 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,⁸⁰ the provisional measures earlier prescribed by the ITLOS, which required the parties to avoid action that would aggravate the dispute, limit their catches and resume negotiations on conservation and management measures without delay, prompted the parties towards renewing such negotiations in a more co-operative spirit and have been credited by several commentators with playing a significant role in the eventual resolution of the dispute.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

⁸⁰ *Southern Bluefin Tuna Case*, supra note 44.

⁸¹ See, for example, B Mansfield, 'Compulsory Dispute Settlement after the Southern Bluefin Tuna Award' in AG Oude Elferink and DR Rothwell (eds), *Oceans Management in the 21st Century: Institutional Frameworks and Responses* (Martinus Nijhoff 2004) 255, 259-261 and 263-269; and T Stephens, 'The Limits of International Adjudication in International Law: Another Perspective on the Southern Bluefin Tuna Case' (2004) 19 IJMCL 177, 183-187.

such reclamation.⁸² Proceedings before the Annex VII Tribunal that was 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.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 made a provisional measure ordering the release of the vessel.⁸⁴ Ghana complied with the order four days after it was made, thus effectively resolving the dispute.⁸⁵ The parties subsequently requested the Annex VII tribunal to terminate proceedings.⁸⁶ 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

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 <<http://www.pcacases.com/web/sendAttach/1126>> accessed 8 January 2017. The text of the Settlement Agreement is annexed to the Award.

⁸⁴ *The “ARA Libertad” Case (Argentina v. Ghana)* (Provisional Measures), Order of 15 December 2012, ITLOS Reports 2012, 332.

⁸⁵ *Annual Report of the International Tribunal for the Law of the Sea for 2012*, UN Doc SPLOS/256 (2013), para 71 <http://www.itlos.org/fileadmin/itlos/documents/annual_reports/annual_report_2012.pdf> accessed 8 January 2017.

⁸⁶ <<http://www.pcacases.com/web/sendAttach/429>> accessed 8 January 2017.

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. Whereas 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 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), 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 has 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 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 inter-State 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 counter-measures 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.

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

	ITLOS	Annex VII arbitration	Total
Cases brought	7	14	21
Decisions on merits	3 (<i>Saiga No 2 (St. Vincent v. Guinea)</i> , <i>Bangladesh/ Myanmar, Virginia G (Panama v. Guinea Bissau)</i>)	7 (<i>Barbados/ Trinidad & Tobago, Guyana/ Suriname, Bay of Bengal (Bangladesh/ India)</i> , <i>Chagos Marine Protected Area (Mauritius v. United Kingdom)</i> , <i>Arctic Sunrise (Netherlands v. Russia)</i> , <i>South China Sea (Philippines v. China)</i> <i>Duzgit Integrity (Malta v. São Tomé and Príncipe)</i>)	10
Decisions finding a lack of jurisdiction	1 (<i>Louisa (St. Vincent v. Spain)</i>)	1 (<i>Southern Bluefin Tuna (Australia and New Zealand v. Japan)</i>)	2
Cases withdrawn	1 (<i>Swordfish (Chile v. EU)</i>)	4 (<i>MOX Plant (Ireland v. United Kingdom)</i> , <i>Land Reclamation (Malaysia v. Singapore)</i> , <i>Libertad (Argentina v. Ghana)</i> , <i>Atlanto-Scandian Herring Denmark (Faroes) v. EU</i>)	5
Cases pending	2 (<i>Ghana/Côte d'Ivoire, Norstar (Panama v. Italy)</i>)	2 (<i>Enrica Lexie (Italy v. India)</i> , <i>Ukraine v. Russia</i>)	4

Table 2. Parties to the Cases by UN Geo-Political Groups as at 1 December 2016

Group	Total membership of group	Number of applicants	Number of defendants	Total
Africa	54	2	5	7
Asia-Pacific	54	4	6	10
Eastern Europe	23	1	2	3
Latin America and Caribbean	33	8	2	10
Western Europe and Others	29	7	6 (including EU)	13
Total	193	22	21	43 (34 different States parties)

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

	ITLOS	Annex VII	Total
Seizure and detention of vessels	4 (<i>Saiga No 2</i>) (<i>St. Vincent v. Guinea</i>) <i>Louisa</i> (<i>St. Vincent v. Spain</i>), <i>Virginia G</i> (<i>Panama v. Guinea-Bissau</i>), <i>Norstar</i> (<i>Panama v. Italy</i>)	4 (<i>Libertad</i> (<i>Argentina v. Ghana</i>), <i>Arctic Sunrise</i> (<i>Netherlands v. Russia</i>), <i>Duzgit Integrity</i> (<i>Malta v. São Tomé and Príncipe</i>), <i>Enrica Lexie</i> (<i>Italy v. India</i>))	8 (4 decisions on the merits, 1 lack of jurisdiction, 1 withdrawn, 2 pending)
Maritime boundary delimitation	2 (<i>Bangladesh/ Myanmar, Ghana/Côte d'Ivoire</i>)	3 (<i>Barbados/ Trinidad & Tobago, Guyana/ Suriname, Bangladesh/India</i>)	5 (4 decisions on the merits, 1 pending)
Fisheries	1 (<i>Swordfish</i> (<i>Chile v. EU</i>))	2 (<i>Southern Bluefin Tuna</i> (<i>Australia and New Zealand v. Japan</i>), <i>Atlanto-Scandian Herring</i> (<i>Denmark (Faroes) v. EU</i>))	3 (no decisions on the merits – 2 withdrawn, 1 lack of jurisdiction)
Environmental	0	3 (<i>MOX Plant</i> (<i>Ireland v. United Kingdom</i>), <i>Land Reclamation</i> (<i>Malaysia v. Singapore</i>), <i>Chagos MPA</i> (<i>Mauritius v. United Kingdom</i>))	3 (1 decision on the merits, 2 withdrawn)
Other	0	2 (<i>South China Sea</i> (<i>Philippines v. China</i>), <i>Ukraine v. Russia</i>)	2 (1 decision on the merits, 1 pending)