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Creativity in Dispute Settlement relating to the Law of the Sea

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I. Introduction

David Caron was a careful but also creative international lawyer, and his scholarly attention turned toward not just international dispute resolution, but also the law of the sea.[2] The focus of this chapter is on creativity in dispute resolution relating to the law of the sea. When the 1982 U.N. Convention on the Law of the Sea (UNCLOS) was adopted in 1982, its dispute settlement procedures were heralded as highly creative in offering an array of possibilities for States (and even non-State actors).[3] Now that almost three decades have passed since the Convention's entry into force in 1994, can it be said that the promise of such creativity has been fulfilled?

It appears that the answer to that question is largely yes, not just in the modes by which dispute resolution is occurring (negotiation, mediation, conciliation, arbitration, and judicial settlement), but also in the wide-ranging issues being addressed within those modes, and perhaps even in the express and tacit dialogue occurring among the dispute settlers. The system, of course, is not perfect and could be more robust, but we may be amidst a "rising tide" of maritime dispute resolution, one that is strengthening and developing this area of the law. At the same time, a word of caution is in order; some aspects of the creativity found within the decisions of dispute settlers may well be giving at least some States pause as to the procedures they have unleashed.

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[2] See, e.g., David D Caron and Harry N Scheiber (eds), *The Oceans in the Nuclear Age: Legacies and Risks* (Brill 2010).

[3] U.N. Convention on the Law of the Sea (opened for signature 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS).

II. 1982 UNCLOS

As is well-known, UNCLOS seeks to regulate comprehensively virtually all aspects of the seas,[4] beginning with rules on the existence of baselines along the coasts of States; a few rules relating to internal waters that exist on the landward side of the baselines; then rules on the seaward side of the baselines in the territorial sea,[5] the contiguous zone,[6] the exclusive economic zone,[7] the continental shelf,[8] and finally the high seas.[9] Islands are capable of generating their own maritime zones, but much depends on, first, whether it is an "island," and, second, whether the island is a "rock" that cannot sustain human habitation or economic life of its own.[10] Special rules address straits,[11] archipelagos,[12] enclosed or semi-enclosed seas,[13] and even land-locked States.[14] Wide-ranging freedoms are acknowledged for all States on the high seas, including of navigation, overflight, laying of submarine cables and pipelines, construction of artificial installations, fishing, and scientific research;[15] many of these freedoms also operate in the exclusive economic zone subject to the provisions of that zone.[16] Warships benefit from these rules and from some special rules, such as relating to their immunity.[17]

UNCLOS also sets forth rules relating to exploitation of the deep seabed beyond national jurisdiction and, in that regard, creates an international organization—the International Seabed Authority—for decision-making and implementation, consisting principally of an Assembly (with equal representation from States Parties), a Council (with regional and interest group

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[4] For general analysis of the contemporary law of the sea, see Jean-Paul Pancracio, *Droit de la mer* (Dalloz 2010); James Harrison, *Making the Law of the Sea: A Study in the Development of International Law* (CUP 2011); Harry N Scheiber and Jin-Hyun Paik (eds), *Regions, Institutions, and the Law of the Sea: Studies in Ocean Governance* (Martinus Nijhoff 2013); David Freestone (ed), *The 1982 Law of the Sea Convention at 30: Successes, Challenges, and New Agendas* (Brill 2013); Donald R Rothwell et al. (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015); Donald R Rothwell & Tim Stephens, *The International Law of the Sea* (2nd edn Hart 2016); Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (Beck/Hart/Nomos 2017); Mathias Forteau and Jean-Marc Thouvenin (eds), *Traité de droit international de la mer* (Pedone 2017); Myron H Nordquist et al. (eds), *Legal Order in the World's Oceans: UN Convention on the Law of the Sea* (Brill 2018); Yoshifumi Tanaka, *The International Law of the Sea* (3rd edn CUP 2019); Philippe Vincent, *Droit de la mer* (2nd edn Larcier 2020); Robin Churchill, Vaughan Lowe and Amy Sander, The Law of the Sea (4th edn Manchester 2022).

[5] UNCLOS (n 3), pt. II, §§ 1-3.

[6] Ibid., pt. II, § 4.

[7] Ibid., pt. V.

[8] Ibid., pt. VI.

[9] Ibid., pt. VII.

[10] Ibid., pt. VIII.

[11] Ibid., pt. III.

[12] Ibid., pt. IV.

[13] Ibid., pt. IX.

[14] Ibid., pt. X.

[15] Ibid., art. 87.

[16] Ibid., art. 58(1).

[17] See ibid. arts. 29-33, 95, 102, 107, 110-11, 224, 236.

representation of States Parties), and a Secretariat.[18] As is well-known, disagreement over the original scheme for addressing the deep seabed resulted in a 1994 "implementing agreement" that significantly revised the deep seabed provisions.[19] Further, UNCLOS establishes important rules for environmental protection of the seas, which are so extensive that they arguably constitute an environmental treaty embedded within UNCLOS.[20] In addition to discrete parts of UNCLOS addressing marine scientific research[21] and the transfer of marine technology,[22] it sets forth throughout important rules relating to jurisdiction over ocean vessels, which give primary authority to the flag State, but recognize as well certain roles for coastal, port, and other States.

This brief *tour d'horizon* recalls the broad range and complexity of UNCLOS for the purpose of stressing why dispute settlement was viewed during the negotiations as essential for the Convention to succeed. Though the Convention is highly detailed, the drafters understood that disputes would arise regarding its interpretation and application, and without a means of resolving those disputes, the Convention might not succeed. A prime example in this regard are the rules on delimitation of exclusive economic zones and of continental shelves, which simply provide that such delimitation "shall be effected by agreement on the basis of international law … in order to achieve an equitable solution."[23] If States cannot reach such agreement "within a reasonable period of time," they may resort to UNCLOS dispute settlement procedures,[24] but there is no further guidance in the Convention as to how to resolve such disputes, thus inviting a degree of creativity.[25]

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[18] Ibid., pt. XI.

[19] Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (adopted 28 July 1994, entered into force 28 July 1996) 1836 UNTS 3.

[20] UNCLOS (n 3), pt. XII.

[21] Ibid., pt. XIII.

[22] Ibid., pt. XIV.

[23] Ibid., arts. 74(1) & 83(1).

[24] Ibid., arts. 74(2) & 83(2). On delimitation, see generally *International Maritime Boundaries* (Martinus Nijhoff, 1993-2020) (various editors; eight volumes to date); Rainer Lagoni and Daniel Vignes (eds), *Maritime Delimitation* (Martinus Nijhoff 2006); Yoshifumi Tanaka, *Predictability and Flexibility in the Law of Maritime Delimitation* (Hart 2006); Seoung-Yong Hong and Jon M Van Dyke (eds), *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea* (Martinus Nijhoff 2009); Bjarni Már Magnusson, *The Continental Shelf Beyond 200 Nautical Miles: Delineation, Delimitation and Dispute Settlement* (Brill 2015); Thomas Cottier, *Equitable Principles of Maritime Boundary Delimitation: The Quest for Distributive Justice in International Law* (CUP 2015); Stephen Fietta and Robin Cleverly, *A Practitioner's Guide to Maritime Boundary Delimitation* (OUP 2016); Alex G Oude Elferink et al. (eds), *Maritime Boundary Delimitation: The Case Law—Is it Consistent and Predictable?* (CUP 2018); Nicholas A Ioannides, *Maritime Claims and Boundary Delimitation: Tensions and Trends in the Eastern Mediterranean Sea* (Routledge 2020).

[25] ITLOS Vice-President and Judge Tomas Heider remarked on 10 June 2022, as part of Volterra Fietta's 40 Anniversary of UNCLOS Seminar Series, that the "decision of States at the Third Conference to codify only vague provisions on EEZ and continental shelf delimitation – agreeing only that the solution should be equitable – implicitly authorized international courts and tribunals to assert a creative function in developing the delimitation process."

Consequently, UNCLOS Part XV establishes an innovative system for the settlement of disputes.[26] Section 1 of Part XV obligates States to peacefully settle their disputes concerning the interpretation or application of the Convention and, to that the end, to pursue any agreed-upon method of dispute settlement or to consider pursuing conciliation in accordance with the procedures set forth in Annex V. If no settlement is reached under Section 1 methods, then Section 2 provides for compulsory dispute settlement before one of four possible venues: (1) the International Tribunal for the Law of the Sea (ITLOS), which is based in Hamburg; (2) the International Court of Justice (ICJ), which is based in The Hague; (3) ad hoc arbitration in accordance with UNCLOS Annex VII; or (4) a "special arbitral tribunal" constituted in accordance with Annex VIII for certain categories of disputes. When ratifying or acceding to the Convention, or at any time thereafter, a State may make a declaration choosing one or more of these venues; in the absence of a declaration, the State is deemed to have accepted arbitration under Annex VII. When a dispute arises, if the two States have chosen different venues and cannot agree upon which one to use, then the default is to go to Annex VII arbitration.

While it was believed important to include compulsory jurisdiction in UNCLOS, it was nevertheless viewed as necessary to establish certain automatic limitations and optional exceptions to that jurisdiction, which are contained in Section 3 of Part XV. These carve-outs can be quite important, such as an automatic limitation that precludes compulsory dispute settlement concerning the coastal State's determination of the allowable catch in the exclusive economic zone.[27] The optional exceptions, which may be invoked by a State when it joins UNCLOS, include disputes concerning maritime boundary delimitation, historic bays or titles, or military activities.[28] If one of these carve-outs preclude legally binding dispute settlement, the States nevertheless are obligated to pursue conciliation (a process sometimes referred to as "compulsory conciliation"), though that process does not result in a legally binding decision.

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[26] See generally Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (CUP 2005); Constantinos Yiallourides *Maritime Disputes and International Law: Disputed Waters and Seabed Resources in Asia and Europe* (Routledge 2019); Joanna Mossop, "Dispute Settlement in Areas beyond National Jurisdiction," in Vito De De Lucia et al. (eds), *International Law and Marine Areas beyond National Jurisdiction* 392 (Brill 2022).
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[27] UNCLOS (n 3), art. 297(3)(a).

[28] Ibid., art. 298. China, for example, has invoked all of these optional exceptions. See UN Treaty Collection, "United Nations Convention on the Law of the Sea," https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en> accessed 9 August 2022. On the potential for creative interpretation of the Section 3 carve-outs, with a focus on the South China Sea arbitration, see Natalie Klein, "The Vicissitudes of Dispute Settlement under the Law of the Sea Convention," 32 *Int'l J. Marine & Coastal L.* 332 (2017).

As of 2022, 168 States have become parties to UNCLOS,[29] and 151 of these States have become party to the 1994 Implementing Agreement.[30] Moreover, additional efforts to codify the law of the sea have continued apace. Some further agreements are global in nature, such as the agreement reached in 1995 to handle the vexing problem of fish that migrate between or "straddle" areas under the jurisdiction of two or more States or the high seas.[31] Other agreements are regional in nature, sometimes targeting specific issues, such as management of a particular species of fish.[32] Some agreements tackle unusual issues, such as how to handle ancient shipwrecks discovered on the floor of the ocean.[33] Because UNCLOS States Parties are committed to compulsory dispute resolution with respect to "any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted … in accordance with the agreement,"[34] there are about a dozen multilateral agreements and a few bilateral agreements in force that provide for resolution of disputes arising under those agreements through UNCLOS procedures.[35] Looking to the future, efforts are underway to conclude an agreement on biodiversity beyond national jurisdiction or "BBNJ."[36] Consequently, the law of the sea today is a complicated series of global, regional, and even bilateral agreements,[37] with a backdrop of well-established customary rules,[38] ensconced in a creative scheme for dispute settlement.

An important driver of many maritime disputes is the deep interest in exploitation of ocean resources, be it fish, energy, oil, gas, or minerals. Such interest has only increased since entry into force of UNCLOS in 1994, fueled in part by ever-increasing technologies that promote cost-efficient exploitation. The initial excitement in the 1970s about deep seabed mining faded

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[29] See "United Nations Convention on the Law of the Sea," (n 28).
[30] See UN Treaty Collection, "Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982," <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-6-a&chapter=21&clang=_en> accessed 9 August 2022.
[31] Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (adopted 4 August 1995, entered into force 11 December 2001), 2167 UNTS 3.
[32] Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (opened for signature 5 September 2000, entered into force 19 June 2004), 40 ILM 277.
[33] UNESCO Convention on the Protection of the Underwater Cultural Heritage (adopted 2 November 2001, entered into force 2 January 2009), 41 ILM 40.
[34] UNCLOS (n 3), art. 288(2).
[35] See International Tribunal for the Law of the Sea, "International Agreements Conferring Jurisdiction on the Tribunal", <https://www.itlos.org/en/main/jurisdiction/international-agreements-conferring-jurisdiction-on-the-tribunal/> accessed 9 August 2022.
[36] See UNGA Res. 72/249 (2017) (convening an intergovernmental conference to elaborate the text of an agreement); Cymie R Payne (ed), "Symposium on Governing High Seas Biodiversity," 112 *AJIL Unbound* 118 (2018).
[37] See, e.g., Treaty Concerning Pacific Salmon (United States–Canada) (adopted 28 January 1985, entered into force 17 March 1985) TIAS 11,091, 1469 UNTS 357 (further amended in June 1999, December 2002, May 2014).
[38] See, e.g., J Ashley Roach, "Today's Customary International Law of the Sea," 45 *Ocean Dev. & Int'l L.* 239 (2014).

by the 1990s, largely due to a collapse in world metal prices, the development of synthetics in place of some minerals, and the emergence of new sources in developing States. Even so, interest in seabed mining in this century has reemerged; the International Seabed Authority, set up under UNCLOS, has now approved numerous contracts with private entities for seabed exploration.[39] While not the only source of frictions among States, access to ocean resources underlies many of the disputes in this area of the law, and likely will for some time.

III. Negotiation

In light of the detailed rules available under the contemporary law of the sea, the increasing desire to exploit natural resources from the various zones, and the possibility of compulsory dispute settlement, it is perhaps of no surprise that States have been motivated, in the first instance, to negotiate with each other to resolve their disputes.[40] Identifying the existence of such negotiations is not always easy; States will often engage in negotiations quietly. Even so, various studies suggest that negotiations since the entry into force of UNCLOS in 1994 have flourished. For example, Igor Karaman catalogues more than sixty negotiations between States from 1994 to 2012; some of those negotiations succeeded, some have not, and others remain ongoing.[41]

Negotiations that succeeded have resulted in a number of international agreements, such as the 2004 Treaty between Australia and New Zealand establishing certain Exclusive Economic Zone and Continental Shelf Boundaries,[42] the 2008 Agreement between Mauritius and the Seychelles on the Delimitation of their Exclusive Economic Zones,[43] and the 2009 Maritime Boundary Delimitation Treaty between Barbados and France concerning delimitation between Barbados and France's overseas departments of Guadeloupe and Martinique.[44] In

[39] See Michael W Lodge, "The Deep Seabed," in Rothwell et al., *The Oxford Handbook of the Law of the Sea* (n 4) 226; Catherine Banet (ed), *The Law of the Seabed: Access, Uses and Protection of Seabed Resources* (Brill Nijhoff 2020). Much of that exploration is focused on copper, zinc, lead, and rare earth deposits formed near hydrothermal vents, where mineral-rich water rises up through the ocean floor. See Yves Fouquet and Denis Lacroix (eds), *Deep Marine Mineral Resources* (Springer 2014); Rahul Sharma (ed), *Deep-Sea Mining: Resource Potential, Technical and Environmental Considerations* (Springer 2017).

[40] See Sarah McLaughlin Mitchell and Andrew P. Owsiak, "Judicialization of the Sea: Bargaining in the Shadow of UNCLOS," 115 *AJIL* 579 (2021) (for a symposium on this article, see 115 *AJIL Unbound* 368-403 (2021)).

[41] Igor V Karaman, *Dispute Resolution in the Law of the Sea* 331-36 (Martinus Nijhoff 2012).

[42] Treaty between the Government of Australia and the Government of New Zealand establishing certain exclusive economic zone boundaries and continental shelf boundaries (Australia–New Zealand) (adopted 25 July 2004, entered into force 25 January 2006) 2441 UNTS 235.

[43] Agreement between the Government of the Republic of Mauritius and the Government of the Republic of Seychelles on the delimitation of the exclusive economic zone between the two states (Mauritius–Seychelles) (adopted 29 July 2008, entered into force 19 November 2008) 2595 UNTS 225.

[44] Agreement between the Government of the French Republic and the Government of Barbados on the delimitation of the maritime space between France and Barbados (Barbados–France) (adopted 15 October 2009, entered into force 1 January 2010) 2663 UNTS 163.

some instances, such agreements themselves provide for the possibility of dispute settlement in the event that a disagreement arises with respect to interpretation or application of the agreement.[45]

Creativity is clearly present in the process and substance of such negotiations. With respect to process, UNCLOS is crafted so as not to preclude States from negotiating outcomes *inter se* if there is political will to do so. Certainly, delimitation calls in the first instance for a negotiated outcome,[46] but even in other contexts, UNCLOS reflects an openness to the political will of States, whether it be in sharing the allowable catch in the exclusive economic zone;[47] determining the location of submarine cables or pipelines;[48] sorting out historic rights in archipelagic waters;[49] or addressing navigational, safety, and environmental matters in straits.[50] Even with respect to the resort to dispute settlement, the preference of the two States is paramount, superseding any mandatory dispute settlement.[51]

With respect to the substance of such negotiations, creativity is observable from the fact that States may negotiate outcomes that would not be possible if they left matters to a dispute settler required to follow a strict application of international law. In the context of maritime delimitation, for example, a dispute settler is typically limited to awarding sovereignty or jurisdiction over maritime areas solely to one State or the other.[52] Yet in a negotiated settlement of overlapping claims to maritime resources, States are free to establish joint development arrangements, whereby States largely set aside their legal claims (at least for the time being) and focus instead on practical measures to secure their underlying objectives.[53] Such an approach allows the States to maintain their respective claims regarding the boundary but to proceed on a more functional basis for both managing and exploiting the resources, even

[45] See Cissé Yacouba and Donald McRae, "The Legal Regime of Maritime Boundary Agreements," in David A Colson and Robert W Smith (eds), *International Maritime Boundaries* 3300-03 (5th edn Martinus Nijhoff 2005).
[46] UNCLOS (n 3), arts 74(1) & 83(1).
[47] Ibid., arts. 69(3), & 70(3).
[48] Ibid., art. 79.
[49] Ibid., art. 51.
[50] Ibid., art. 43.
[51] Ibid., art. 280 ("Nothing in this Part [XV] impairs the right of any States Parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their choice.").
[52] Karaman (n 41) at 186-87 (quoting Shigeru Oda, "Dispute Settlement Prospects in the Law of the Sea," in Shigeru Oda (ed), *Fifty Years of the Law of the Sea: Selected Writings of Shigeru Oda* 869 (Kluwer 2003)).
[53] Such arrangements are encouraged by UNCLOS (n 3), arts. 74(3) & 83(3).

in situations where the full extent of those resources are not known.[54] Dozens of joint development zones now exist, scattered across every region of the world.[55]

It is clear that negotiation is, by far, the most preferred method of dispute settlement under the law of the sea, with States turning to other forms of dispute settlement only when negotiations stall. David Anderson—a former legal adviser to the U.K. Foreign and Commonwealth Office and former ITLOS judge—notes that, when it comes to boundary delimitation, there are certain inherent advantages for States in pursuing negotiation. He writes that: "The parties retain control over a series of important issues, such as the precise results of the negotiations and in particular the course of the boundary lines; the way in which the line is defined; the terms and timing of the agreement; and its presentation to public opinion."[56] Indeed, he opines that "litigation always carries risks for the parties."[57]

IV. Mediation

By contrast, resort by States to mediation or "good offices" has been far more modest, apparently numbering less than a dozen since 1994.[58] Examples certainly exist, such as the Organization of America States' effort to mediate the territorial and maritime dispute between Belize and Guatemala,[59] or the U.N. Secretary-General's mediation of Equatorial Guinea and Gabon's maritime boundary dispute.[60] Mediation allows for the same creativity as is possible for negotiation; neither the mediator nor the disputing States are bound to solutions driven by strict application of the law. Further, this approach need not end at an effort to mediate, as the mediation might result in the States gaining sufficient confidence to pursue more formalized dispute resolution. For example, France's mediation of the Eritrea-Yemen maritime boundary

[54] Even though not dictated by rules of international law, arguably such actions may have an influence on the development of international law in this area. See David M Ong, "Joint Development of Common Offshore Oil and Gas Deposits: 'Mere' State Practice or Customary International Law?," 93 *AJIL* 771 (1999).
[55] Victor Prescott and Clive Schofield, *The Maritime Political Boundaries of the World* 264 (2nd edn Martinus Nijhoff 2005).
[56] David Anderson, "Negotiating Maritime Boundary Agreements: A Personal View," in Lagoni and Vignes (n 24), at 122-23 (reprinted in David Anderson, *Modern Law of the Sea: Selected Essays* 417 (Brill 2008)).
[57] Ibid., at 123.
[58] Karaman (n 41) at 337-38.
[59] See Montserrat Gorina-Ysern, "OAS Mediates in Belize-Guatemala Border Dispute," *ASIL Insights*, Vol. 5, Issue 20 (2000), <https://asil.org/insights/volume/5/issue/20/oas-mediates-belize-guatemala-border-dispute> accessed 9 August 2022.
[60] See Gbenga Oduntan, *International Law and Boundary Disputes in Africa* 168 (Routledge 2015); "Gabon and Equatorial Guinea set terms of UN mediation over disputed islands," *UN News Centre*, 20 January 2004, <http://www.un.org/apps/news/story.asp?NewsID=9499&Cr=gabon&Cr1=guinea> accessed 9 August 2022.

dispute ultimately led the States to reach agreement on resolving the dispute through arbitration.[61]

V. Conciliation

Prior to UNCLOS, conciliation of a dispute relating to the law of the sea was relatively rare, with the notable exception being the conciliation of the dispute between Iceland and Norway in 1981 concerning the continental shelf between Iceland and the Norwegian island of Jan Mayen.[62] Even so, conciliation as a method of dispute settlement is featured in UNCLOS Part XV, along with an annex devoted to its procedures.[63] One creative aspect of this procedure is the concept of "compulsory conciliation." If one of the automatic limitations or optional exceptions contained in Section 3 of Part XV precludes binding compulsory dispute settlement, the States Parties nevertheless may be *obligated* to pursue conciliation under Annex V, Section 2.[64] For example, if a State Party has exercised its right to opt out of binding compulsory dispute settlement concerning maritime boundary disputes or historic bays or titles, the State nevertheless is bound to accept submission to conciliation of any such dispute that arises after entry into force of UNCLOS.[65] Although compulsory conciliation does not result in a legally binding decision, the States Parties are required to negotiate an agreement on the basis of the commission's report and, if agreement is not reached, "the parties shall, by mutual consent, submit the question" to one of the Part XV, Section 2, compulsory dispute procedures.[66] The words "by mutual consent" suggest that a State may not be compelled to accept any particular binding dispute settlement procedure, though it has been suggested that the word "shall" introduces ambiguity in that regard, which might be tested through a unilateral application.[67]

Notwithstanding the emphasis of UNCLOS on conciliation, to date States still do not seem attracted to this method; the only conciliation under the Convention has been between Timor-Leste and Australia concerning their maritime boundary in the Timor Sea and associated issues. Timor-Leste unilaterally initiated the process, leading to the constitution of a

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[61] *Award of the Arbitral Tribunal in the First Stage of Proceedings (Territorial Sovereignty and the Scope of the Dispute) (Eritrea v Yemen)*, 22 RIAA 209, para. 77 (1996).

[62] *Conciliation Commission on the Continental Shelf Area between Iceland and Jan Mayen,* Report and Recommendations, 20 ILM 797, 803 (1981); see Elliot L Richardson, "Jan Mayen in Perspective," 82 *AJIL* 443(1988).

[63] Part XV, Section 1, is designed to promote settlement of disputes without resort to litigation. The conciliation procedure envisaged in Article 284 entails each party choosing two conciliators (of which one may be its national) from a list established by UNCLOS parties. The four conciliators then select a fifth to serve as chairperson. After considering the views of both parties, the panel is to issue a report in which it makes non-binding recommendations. UNCLOS Annex V is devoted to conciliation procedures.

[64] UNCLOS (n 3), Annex V, arts 11-14.

[65] Ibid., art. 298(1)(a)(i).

[66] Ibid., art. 298(1)(a)(ii).

[67] See Robert Beckman, "UNCLOS Part XV and the South China Sea," in S Jayakumar et al. (eds), *The South China Sea Disputes and the Law of the Sea* 246 (Edward Elgar 2014).

commission in 2016, which thereafter decided in favor of its competence. After several sessions with the parties, the process led in 2018 to the adoption by the two parties of a Treaty on Maritime Boundaries and to the Commission's issuance of a final report and recommendations.[68]

The best explanation for why conciliation is not attractive to States is probably that once States have decided to give up control over a dispute and to allow for a relatively formal decision by the third-party body, then States are inclined to go all the way by accepting that the ultimate decision should be legally binding, which means selecting arbitration or judicial settlement. Indeed, States may well prefer to lose an arbitration and use the fact of a legally-binding obligation to help tamp down political resistance at home, rather than to "lose" a conciliation and have no obligation to comply with the outcome.

VI. Arbitration

By contrast, arbitration of law of the sea disputes has proved to be popular since 1994, typically through arbitral tribunals convened under UNCLOS Annex VII. As in all arbitration, there is a fair amount of flexibility (if not creativity) in the procedures of the tribunal, and in their interplay with judicial settlement of disputes.[69] Generally, these tribunals consist of five arbitrators, with each party appointing one arbitrator, and then agreeing upon the remaining three (with the President of ITLOS serving as the appointing authority, if needed). The arbitral tribunal decides upon its own procedures, unless the parties agree otherwise, and hence the process can be more flexible than judicial settlement of disputes. As of 2022, fifteen Annex VII cases have been pursued, all but one administered under the auspices of the Permanent Court of Arbitration.[70] Perhaps creativity is best seen in the wide range of ancillary issues that counsel

[68] The documents, decisions, and treaty may be found at the website of the Permanent Court of Arbitration, <https://pca-cpa.org/en/cases/132/> accessed 9 August 2022.

[69] On judicial settlement, see infra section VII.

[70] *Southern Bluefish Tuna (New Zealand v Japan, Australia v Japan),* Award of 4 August 2000, 23 RIAA 1; *MOX Plant (Ireland v United Kingdom)* (proceedings terminated); *Land Reclamation in and around the Straits of Johor (Malaysia v Singapore),* Award of 1 September 2005, 27 RIAA 133; *Delimitation of the Exclusive Economic Zone and the Continental Shelf between Barbados and the Republic of Trinidad and Tobago (Barbados v Trinidad and Tobago),* Award of 11 April 2006, 27 RIAA 147; *Guyana v Suriname*, Award of 17 September 2007, 30 RIAA 1; *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh v India),* Award of 7 July 2014, 32 RIAA 1; *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom),* Award of 18 March 2015, 31 RIAA 359; *"ARA Libertad" (Argentina v Ghana)* (proceedings terminated); *South China Sea Arbitration (Philippines v China),* Award of 12 July 2016, 33 RIAA 166; *"Arctic Sunrise" (Netherlands v Russian Federation)*, Award of 10 July 2017, 32 RIAA 315; *Atlanto-Scandian Herring Arbitration (Kingdom of Denmark in respect of the Faroe Islands v European Union)* (proceedings terminated); *Duzgit Integrity Arbitration (Malta v São Tomé and Príncipe)*, Award of 18 December 2019; *The "Enrica Lexie" Incident (Italy v India)*, Award of 21 May 2020; *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v the Russian Federation)* , Award on Preliminary Objections of 21 February 2020 (proceedings still pending); *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine v the Russian Federation)*, Award on Preliminary Objections of 27 June 2022, (proceedings still pending).

have managed to place before these tribunals, which may well not have been anticipated when UNCLOS was crafted (and hence the resolution of which may be disturbing to some States).

Issues of sovereignty. For example, UNCLOS is not designed to resolve issues of sovereignty and, as such, Annex VII tribunals are not expected to determine whether a land mass is part of the territory of one of the disputing parties. At the same time, it is commonly said that the "land dominates the sea," which means that a State's rights and obligations in areas of the sea often turn upon sovereignty over adjacent land masses. This issue arose in the *Chagos Marine Protected Area Arbitration*, after the United Kingdom, in April 2010, declared a marine protected area at the Chagos Archipelago, which the United Kingdom administers as the "British Indian Ocean Territory." Mauritius disputes the United Kingdom's sovereignty over this territory, believing that the archipelago should have been included as part of the territory of Mauritius when Mauritius emerged from the period of colonization and became an independent State in 1968. Consequently, in 2010 Mauritius initiated a proceeding under UNCLOS before an Annex VII arbitral tribunal. UNCLOS allows a "coastal State" to establish a marine protected area adjacent to its coast, but one aspect of Mauritius' claims was that the United Kingdom was not the "coastal State" in respect of the Chagos Archipelago for the purposes of the Convention. Alternatively, Mauritius claimed that certain undertakings by the United Kingdom had endowed Mauritius with rights as a "coastal State" in respect of the Archipelago.

The tribunal found in 2015 by a majority of three votes to two that it lacked jurisdiction to consider either of these claims.[71] According to the tribunal, such claims—at their core—concerned the question of sovereignty over the Chagos Archipelago, not disagreements about the meaning of "coastal State" or some other issue relating to the marine protected area. Therefore, according to the tribunal, these claims were not truly a matter concerning the interpretation or application of UNCLOS. The Tribunal, however, did not assert that the issue of sovereignty could never be addressed in UNCLOS proceedings. Rather, the Tribunal said that it did "not categorically exclude that in some instances a minor issue of territorial sovereignty

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Five additional cases that started as Annex VII arbitrations were later transferred to ITLOS: *The M/V "Saiga" (No. 2) Case (Saint Vincent and the Grenadines v Guinea)*, ITLOS Reports 1999, 10; *Dispute Concerning Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh v Myanmar)*, ITLOS Reports 2012, 4; *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/ Côte d'Ivoire)*, ITLOS Reports 2017, 4; *The M/T "San Padre Pio" (No. 2) Case (Switzerland v Nigeria),* Order of Discontinuance (Dec. 29, 2021); *Dispute concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius v Maldives)* (pending).

[71] *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)*, Award of 18 March 2015, (n 70) paras. 203-21, 228-30, and 547(A)(1). The Tribunal also unanimously found that there was no dispute between the parties with respect to Mauritius' claim concerning submissions to the Commission on the Limits of the Continental Shelf, and therefore that the tribunal was not required to rule on whether it had jurisdiction over the claim. Ibid., paras. 331-50 and 547(A)(2).

could indeed be ancillary to a dispute concerning the interpretation or application of the Convention."[72] Indeed, it suggested "that an issue of land sovereignty might be within the jurisdiction of a Part XV court or tribunal if it were genuinely ancillary to a dispute over a maritime boundary or a claim of historic title."[73]

Undaunted, Mauritius thereafter successfully lobbied the UN General Assembly to seek an advisory opinion from the International Court of Justice on whether the separation of the Chagos Archipelago from Mauritius during the process of decolonization was unlawful.[74] The Court advised that it was, stating that, "having regard to international law, the process of decolonization of Mauritius was not lawfully completed when that country acceded to independence in 1968, following the separation of the Chagos Archipelago," and that "the United Kingdom is under an obligation to bring to an end its administration of the Chagos Archipelago as rapidly as possible."[75] With these findings in hand, Mauritius launched an Annex VII arbitration (thereafter placed before ITLOS) on maritime delimitation against the Maldives, which is located to the north of the Chagos Archipelago. The Maldives argued that ITLOS (sitting as a special chamber) lacked jurisdiction, since any delimitation between the Parties would necessarily have to find that Mauritius was (and the United Kingdom was not) sovereign over the Chagos Archipelago, a matter that the was in dispute.[76] The Chamber, however, concluded that the matter had been resolved by the ICJ's advisory opinion, finding that "determinations made by the ICJ in an advisory opinion cannot be disregarded simply because the advisory opinion is not binding" and that "[w]hile the process of decolonization has yet to be completed, Mauritius' sovereignty over the Chagos Archipelago can be inferred from the ICJ's determinations".[77]

The issue of sovereignty also hovered in the background of perhaps the most famous of the Annex VII arbitrations to date—that of the Philippines against China, which challenged China's claims to and activities in the South China Sea and the underlying seabed. China had been asserting some kind of claim, perhaps to sovereignty or more likely to "historic rights" or "historic title," over a rather large area of the South China Sea lying within what is known as the "nine-dash line," a line that has appeared on maps produced by China. Further, China claimed sovereignty over several islands or maritime features in the South China Sea. Given such

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[72] Ibid., para. 221.
[73] Ibid., para. 218.
[74] GA Res. 71/292 (22 June 2017).
[75] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, I.C.J. Reports 2019, 95, para. 183 (3)-(4).
[76] *Dispute concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius v Maldives)*, Judgment on Preliminary Objections of 28 January 2021, para. 101 et seq., < https://www.itlos.org/fileadmin/itlos/documents/cases/28/preliminary_objections/C28_Judgment_prelimobj_28.01.2021_orig.pdf> accessed 9 August 2022.
[77] Ibid., paras. 205, 246.

claims, it was unclear whether an UNCLOS case might be brought against China, since addressing issues of sovereignty is problematic. Even so, in 2013, the Philippines instituted arbitral proceedings against China under Annex VII, artfully avoiding in its pleading any request that the tribunal address issues of sovereignty. Rather, the Philippines focused on whether certain maritime features were capable of being islands (if not, then no State could exercise sovereignty over them); for maritime features that were islands, the Philippines focused on resolving rights to maritime entitlements in the South China Sea even if one were to assume Chinese sovereignty over those islands.

Framed in that way, and despite China's decision not to participate in the case, the tribunal found that it had jurisdiction[78] and then issued a final award in 2016.[79] Among other things, the tribunal concluded that, while Chinese navigators and fishermen (and those of other States) had historically made use of the islands in the South China Sea, there was no evidence that China had exercised *exclusive* control over the waters or their resources. Further, even if China previously had historic rights to resources in the waters of the South China Sea, such rights were extinguished to the extent that they were incompatible with the exclusive economic zones provided by UNCLOS to the States surrounding the South China Sea. As such, there was no legal basis for China to claim historic rights to resources of the sea areas within the "nine-dash line." The tribunal's wide-ranging decision addresses a host of other issues as well; particular attention has been paid to its interpretation of what is meant, in UNCLOS Article 121(3), by the phrase "rocks which cannot sustain human habitation or economic life of their own."[80]

Concerns with respect to sovereignty also arose in *Coastal Rights in the Black Sea, Sea of Azov and Kerch Strait*.[81] In that case, Ukraine filed an Annex VII arbitration against Russia alleging that Russia had violated Ukraine's rights as a coastal State, such as to the living and hydrocarbon resources. Russia raised as a preliminary objection that the tribunal lacked jurisdiction because the dispute in reality concerned Ukraine's claim to sovereignty over the Crimean peninsula. Ukraine responded by arguing that there was no sovereignty dispute since Russia had acted unlawfully in seizing Crimea from Ukraine in 2014 and, alternatively, that even if there was a sovereignty dispute, it was an ancillary matter.[82] In an award on preliminary

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[78] *South China Sea Arbitration (Philippines v. China)*, Award on Jurisdiction and Admissibility of 29 October 2015, 33 RIAA 1, 143-51, paras. 397-413.

[79] *South China Sea Arbitration (Philippines v China),* Award of 12 July 2016, 33 RIAA 166

[80] See, e.g., Yoshifumi Tanaka, "Reflections on the Interpretation and Application of Article 121(3) in the South China Sea Arbitration (Merits)," 48 *Ocean Dev. & Int'l L.* 365 (2017); Sean D Murphy, *International Law relating to Islands* 88-95 (Brill 2017).

[81] *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v Russia)*, Award on Preliminary Objections of 21 February 2020.

[82] Ibid., para. 161.

objections, the Tribunal unanimously upheld Russia's objection "to the extent that a ruling of the Arbitral Tribunal on the merits of Ukraine's claims necessarily requires it to decide, directly or implicitly, on the sovereignty of either Party over Crimea."[83] According to the Tribunal, the dispute over sovereignty was not ancillary to the interpretation or application of UNCLOS; whether Ukraine was a coastal State was a prerequisite to deciding a number of Ukraine's claims.[84] This outcome was consistent with the Annex VII arbitral award in the *Chagos* case.

Issues on the use of force. A different ancillary issue that has arisen concerns the use of force, and especially the difference between permissible maritime law enforcement and impermissible violation of the U.N. Charter. For example, in *Guyana v Suriname*, an Annex VII arbitral tribunal used UNCLOS Article 279 as a hook to address this issue; that article provides that the parties shall settle any dispute between them under UNCLOS "by peaceful means."[85] Seeing that article as allowing it to apply the *jus ad bellum* of the U.N. Charter and general international law, the tribunal found "that in international law force may be used in law enforcement activities provided that such force is unavoidable, reasonable and necessary."[86] In this instance, Suriname's action of sending a patrol vessel to order an oil rig to leave the contested waters did not meet such a standard and was thus determined to be an unlawful threat of force. That determination turned on the circumstances of the particular incident: the rig was approached at midnight and given twelve hours to leave; the rig was told if it didn't leave "the consequences will be yours"; and the men on the rig perceived that this meant military force would be used if they did not leave.[87]

In the context of using force, the "military activities" exception to UNCLOS dispute settlement may feature.[88] If so, the case law to date is less creative than confusing. Given that China had invoked the exception when adhering to UNCLOS, the *South China Sea* arbitral tribunal found that it had no jurisdiction over a Philippines claim concerning Chinese non-military vessels that had sought to prevent Philippine military vessels from resupplying its military personnel stationed at Second Thomas Schoal.[89] By contrast, the same tribunal found that the exception did not apply to a Philippines claim concerning Chinese military vessels used for land reclamation activities.[90] In the *Coastal Rights* case, Russia was not able to invoke the exception as a basis for excluding jurisdiction over Ukraine's case concerning coastal rights

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[83] Ibid., paras. 197, 492(a).
[84] Ibid., para. 195.
[85] UNCLOS (n 3), art. 279.
[86] *Arbitration Regarding the Delimitation of the Maritime Boundary Between Guyana and Suriname (Guyana v Suriname)*, Award of 17 September 2007, para. 445.
[87] Ibid., paras. 432-39.
[88] UNCLOS (n 3), art. 298(1)(b); see supra note 28 and accompanying text.
[89] *South China Sea Arbitration (Philippines v China),* Award of 12 July 2016, 33 RIAA 166, 597, paras. 1161-62.
[90] Ibid., 554-44, paras. 1026-28.

relating to Crimea. Russia's assertion that the dispute related to the 2014 Ukraine-Russia conflict was deemed by the Annex VII arbitral tribunal as insufficient for triggering the exception; to do so, the specific acts at issue in Ukraine's complaints had to constitute military activities.[91] Further, simply alleging a use of force to deny access to resources was not enough; among other things, the tribunal noted that maritime enforcement action and other "non-military" functions may be exercised equally by military and non-military vessels.[92]

At the provisional measures phase of *Detention of Three Ukrainian Naval Vessels*, ITLOS interpreted this exception when ordering Russia to release the Ukrainian naval vessels, as well as their crew, that had been detained in or near the Kerch Strait on 25 November 2018.[93] Although Russia had invoked the military activities exception when adhering to UNCLOS, ITLOS found it *prima facie* was not applicable to a situation where Russian naval vessels forcibly seized Ukrainian naval vessels and crew. According to ITLOS, the underlying dispute concerned the legal status of the Kerch Strait, which was not military in nature.[94] Moreover, the Ukrainian naval vessels had abandoned their effort to pass through the strait when they were nevertheless detained by Russia, which, according to ITLOS, cast the event as in the nature of a law enforcement rather than a military operation.[95] The lone dissenting judge regarded navigational activities at sea of a State's warships to be inherently "military" and regarded this particular incident as involving military activities by both sides.[96] The case then proceeded before an Annex VII arbitral tribunal, which at the jurisdictional phase carved a path between these two positions. On the one hand, the tribunal in found that that the events of 25 November 2018 were, up until a certain point in time, "military activities" excluded from the tribunal's jurisdiction; on the other hand, after that point in time, the arrest of the Ukrainian naval vessels were more in the nature of a law enforcement operation falling within its jurisdiction. The precise point in time when things changed was left for consideration at the merits phase.[97]

Issues on immunity. Issues concerning immunity, which are not central to the law of the sea, are nevertheless in play in some of these cases. For example, in a 2012 shooting incident at sea during a counter-piracy operation, two Italian marines on board an Italian-flagged commercial oil tanker, the *MV Enrica Lexie*, fired on a small fishing boat and killed two Indian

[91] *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v Russia)*, Award on Preliminary Objections of 21 February 2020, para. 331.
[92] Ibid., para. 335.
[93] *Detention of Three Ukrainian Naval Vessels (Ukraine v Russia)*, Order on Provisional Measures of 25 May 2019, para. 120.
[94] Ibid., paras. 68-72.
[95] Ibid, para. 73-76.
[96] Ibid., Dissenting Opinion of Judge Kolodkin, paras. 9-10.
[97] *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine v. Russia)*, Award on Preliminary Objections of 27 June 2022, para. 208(a), (b), (c).

fishermen who were mistaken for pirates. When Indian authorities charged the marines with murder, Italy claimed that they were entitled to functional immunity (immunity *rationae materiae*) for their conduct as members of the Italian armed forces. Thereafter, Italy requested a provisional measures order from ITLOS, asserting that India had infringed upon the immunity applicable to the marines. ITLOS prescribed provisional measures, as did an Annex VII arbitral tribunal established under UNCLOS Annex VII, resulting in a relaxation of bail conditions such that the two marines were allowed to return to Italy.[98] At the merits phase, the arbitral tribunal was confronted with whether it had jurisdiction to decide a claim concerning such immunity, given that none of the UNCLOS articles address such immunity (as opposed to immunity of warships).[99] In essence, the tribunal found that the issue of its entitlement to exercise jurisdiction over the incident could not be satisfactorily answered without first addressing the question of the immunity of the marines.[100] Quoting from the *Case Concerning Certain German Interests* before the PCIJ, the tribunal creatively found that the issue of immunity of the marines "belongs to those 'questions preliminary or incidental to the application' of the Convention."[101]

More squarely present in UNCLOS is the immunity of warships.[102] In *Detention of Three Ukrainian Naval Vessels*, ITLOS found at the provisional measures stage that the rights to immunity claimed by Ukraine for its three vessels (and their military and security crew) were plausible.[103] At the jurisdictional stage before the Annex VII arbitral tribunal, Russia focused its arguments on the lack of any immunity for the Ukrainian vessels within the territorial sea. The Annex VII tribunal, however, decided that the location of the seizure of the vessels was not yet determined, such that Russia's objection could only be addressed at the merits stage.[104]

VII. Judicial Settlement

Creativity in UNCLOS dispute resolution procedures is readily apparent in the allowance for negotiation and mediation, the emphasis on conciliation, and the openness to Annex VII (and the as-yet unused Annex VIII) arbitration. Yet the creativity arose not just in opening the door to those modes of dispute resolution, but also in keeping the door open for judicial

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[98] See *The "Enrica Lexie" Incident (Italy v India)*, Decision on Provisional Measures of 24 August 2015, ITLOS Reports 2015, 182; *The "Enrica Lexie" Incident Arbitration (Italy v India)*, Order on the Request for Prescription of Provisional Measures of 29 April 2016.

[99] *The "Enrica Lexie" Incident Arbitration (Italy v India)*, Award of 21 May 2020, paras. 796-99.

[100] Ibid., para. 808 ("The Arbitral Tribunal could not provide a complete answer to the question as to which Party may exercise jurisdiction without incidentally examining whether the Marines enjoy immunity.").

[101] Ibid (quoting *Case Concerning Certain German Interests in Polish Upper Silesia (Germany v Poland)*, Judgment of 25 August 1925, P.C.I.J. Series A, No. 6, p. 18).

[102] See UNCLOS arts. 32, 58, 95-96.

[103] *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine v. Russia)*, Award on Preliminary Objections of 27 June 2022, paras. 97-99.

[104] Ibid., paras. 152-55.

settlement, and to do so not just with the existing ICJ, but also through a new international court, ITLOS.[105] Not only have these judicial avenues for dispute resolution been active since 1994, again allowing for a wide range of issues to be resolved pacifically but, as indicated above, they have set in motion an important interplay or dialogue among arbitral and judicial bodies, whereby jurisprudence may be creatively developed and strengthened.

A. Contentious Cases

1. ITLOS

Creativity in relation to judicial settlement began with the creation of an entirely new international court in the form of ITLOS, which is based in Hamburg.[106] ITLOS consists of twenty-one judges elected by the UNCLOS States Parties. Each State Party may nominate up to two candidates, and no two judges may be nationals of the same State. Moreover, to preserve an equitable geographic distribution, there is an agreed distribution of seats among the regional groups. Members are elected for nine years and may be re-elected; the terms of one third of the members expire every three years.[107]

Though it is common to note the relatively light caseload of ITLOS at any given time, its presence as an institution available to address matters of urgent concern fills an important void that previously existed for the law of the sea. Thus, ITLOS may indicate provisional measures of protection, either for cases filed at ITLOS or for cases filed before an Annex VII tribunal,[108] if ITLOS considers that: (a) *prima facie* the relevant tribunal would have jurisdiction over the dispute, (b) "the urgency of the situation so requires," and (c) the measures are appropriate to the circumstances to preserve the rights of the parties pending final decision.[109] With respect to (b), although not identified as an express requirement in the Convention, the Tribunal's jurisprudence has evolved so as to include an assessment, first, of whether the rights being advanced by an applicant are at least "plausible," and then of whether there is urgency in

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[105] On how a State's domestic legal tradition influences its preferred dispute resolution forum, see Emilia Justyna Powell and Sara McLaughlin Mitchell, "Forum Shopping for the Best Adjudicator: Dispute Settlement in the United Nations Convention on the Law of the Sea," 9 *J. Territorial & Maritime Studies* 7 (2022).

[106] See Gudmundur Eiriksson, *The International Tribunal for the Law of the Sea* (Martinus Nijhoff 2000); P Chandrasekhara Rao and Rahmatullah Khan (eds), *The International Tribunal for the Law of the Sea: Law and Practice* (Martinus Nijhoff 2001); P Chandrasekhara Rao and Philippe Gautier (eds), *The Rules of the International Tribunal for the Law of the Sea: A Commentary* (Martinus Nijhoff 2006); M.G. García-Revillo, *The Contentious and Advisory Jurisdiction of the International Tribunal for the Law of the Sea* (Brill Nijhoff 2015); Bimal N Patel (ed), *Law of the Sea: International Tribunal for the Law of the Sea Jurisprudence: Case Commentary, Case-Law Digest and Reference Guide (1994-2014)* (Eastern Book Company 2015).

[107] UNCLOS (n 3), Annex VI.

[108] Ibid., art. 290(5); ibid., Annex VI, art. 25; see, e.g., *Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v the Russian Federation),* Provisional Measures Order of 25 May 2019.

[109] UNCLOS (n 3), art. 290(1) & (5).

protecting those rights.[110] If the rights are not plausible, then the extraordinary step of ordering provisional measures should not be taken to protect the asserted rights. The exact contours of the concept of "plausibility" of rights is somewhat elusive, but ITLOS and the ICJ appear to be in a dialogue on this matter; it would seem to require "something more than [a simple] assertion but less than [full] proof."[111]

Moreover, ITLOS has the ability to hear "prompt release" cases so as to address, on an expedited basis, situations where a coastal State has seized a foreign vessel and crew for violation of rules relating to its exclusive economic zone, but has failed to promptly release them, even upon the posting of a reasonable bond.[112] A creative feature in this regard is that natural or juridical persons may appear before ITLOS to seek the prompt release of a vessel and its crew when detained by a coastal State, though they only do so "on behalf of" the flag State of the detained vessel (and therefore must first receive authorization from that State).[113]

Rather than ITLOS as a whole deciding a contentious matter, a chamber of the tribunal may instead be convened if desired by the disputing parties.[114] Indeed, ITLOS has established chambers for summary procedure, fisheries disputes, marine environment disputes, and maritime delimitation disputes in an effort to foster such an approach. Further, there exists a Seabed Disputes Chamber, which is set up under UNCLOS Part XI and has jurisdiction over certain disputes concerning the deep seabed.[115] Again, there is some creativity in moving away from exclusively inter-State dispute settlement for seabed disputes. Not only may States Parties (and State enterprises) appear before the Seabed Disputes Chamber to resolve disputes relating to Part XI, but so may two entities created by the Convention—the International

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[110] See, e.g., *The "Enrica Lexie" Incident (Italy v India)*, Decision on Provisional Measures of 24 August 2015, ITLOS Reports 2015, 182, paras. 83-88.

[111] *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*, Provisional Measures, Order of 8 March 2011, Declaration of Judge Greenwood, I.C.J. Reports 2011, 47, para. 4; see also *Questions Relating to the Seizure and Detention of Certain Documents (Timor-Leste v Australia)*, Provisional Measures, Order of 3 March 2014, Dissenting Opinion of Judge Greenwood, I.C.J. Reports 2014, 195, para. 4; *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Provisional Measures, Order of 13 July 2006, Separate Opinion of Judge Abraham, I.C.J. Reports 2006, 141, para. 11.

[112] UNCLOS (n 3), arts 73 & 292. See, e.g., *M/V "Saiga" (Saint Vincent and the Grenadines v Guinea)*, ITLOS Reports 1997, 16.

[113] UNCLOS (n 3), art. 292(2).

[114] Ibid., Annex VI, art. 15(2).

[115] Ibid., arts 186-87.

Seabed Authority and the Enterprise[116]—as well as, in certain circumstances, natural or juridical persons and prospective contractors who have been sponsored by a State.[117]

Although twenty-nine cases have been filed at ITLOS as of 2022, they have mostly related to requests for provisional measures or for prompt release.[118] In recent years, however, ITLOS cases have begun expanding in scope. ITLOS has decided maritime boundaries between Bangladesh and Myanmar in the Bay of Bengal[119] and (by means of a chamber) between Ghana and Côte d'Ivoire in the Atlantic Ocean,[120] and there is currently pending before an ITLOS chamber the delimitation of the maritime boundary between Mauritius and Maldives.[121] Further, looking at the totality of its jurisprudence, ITLOS may be seen as shaping the law of the sea in myriad ways. For example, to understand permissible coastal State regulation of vessels operating on the seas, one might consider not just the text of UNCLOS, but also a series of ITLOS cases that, collectively, shed light on the matter: the *M/V "Norstar"* case indicated that bunkering of leisure vessels on the high seas is part of the freedom of navigation under Convention article 87;[122] the *M/V "Virginia G"* case maintained that generally the bunkering of fishing vessels in an exclusive economic zone can be regulated and enforced against by the coastal State;[123] the *M/V "Saiga" (No. 2)* case explained that, in such a circumstance, the coastal State cannot apply its customs laws and regulations, though it can do so with respect to artificial islands, installations, and structures;[124] and the *Duzgit Integrity* case supports the general proposition that an archipelagic State may regulate and enforce against ship-to-ship oil transfers in archipelagic waters.[125]

2. ICJ

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[116] The International Seabed Authority administers the resources of the deep seabed area. The Enterprise will serve as the Authority's mining operator, but as of 2022 has not yet been established. For a discussion of the possibility for investor claims relating to deep seabed mining being pursued under UNCLOS dispute settlement, see Alberto Pecoraro, *UNCLOS and Investor Claims for Deep Seabed Mining in the Area: An Investment Law of the Sea?* (June 21, 2020), <http://dx.doi.org/10.2139/ssrn.3632401> accessed 9 August 2022.

[117] UNCLOS (n 3), art. 187.

[118] See ITLOS website <www.itlos.org> accessed 9 August 2022.

[119] *Delimitation of the Maritime Boundary in the Bay of Bengal (No 16) (Bangladesh v Myanmar)*, Judgment of 14 March 2012, ITLOS Reports 2012, 4.

[120] *Delimitation of the Maritime Boundary in the Atlantic Ocean (No 23) (Ghana/Côte d'Ivoire)*, Judgment of 23 September 2017, Judgment, ITLOS Reports 2017, 4.

[121] See supra notes 76-77 and accompanying text.

[122] *M/V "Norstar" Case (Panama v Italy),* ITLOS Judgment of 10 April 2019, para. 219, <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.25/case_no_25_merits/C25_J_100419.pdf> accessed 9 August 2022.

[123] *M/V "Virginia G" Case (Panama v Guinea-Bissau)*, Judgment, ITLOS Reports 2014, 4, para. 217.

[124] *M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines v Guinea)*, Judgment, ITLOS Reports 1999, 10, para. 127.

[125] *Duzgit Integrity Arbitration (Malta v São Tomé and Príncipe)*, Annex VII Arbitral Tribunal, Award of 5 September 2016.

The ICJ has been very active in settling law of the sea disputes since 1994, continuing a role it has played since its inception. Jurisdiction might be established at the ICJ based on UNCLOS, but to date the Court's jurisdiction has been invoked in other ways, thereby allowing the Court at times to decide not just issues arising under the Convention, but other issues was well, including claims to sovereignty.[126] It is to be noted that David Caron was appointed judge ad hoc of the Court by Colombia in *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia)*, a case on which he sat until his passing.[127]

Keeping the ICJ in play for dispute resolution under UNCLOS was a wise move, as the Court's jurisprudence is significantly enriching our understanding of the interpretation and application of the Convention. For example, the methodology used by courts and tribunals for many years to delimit maritime areas varied considerably, and UNCLOS did little to clarify matters. But the ICJ, in its unanimous 2009 *Black Sea* judgment, indicated that, in cases where no agreement has been reached by the two States, usually a three-step approach to delimitation is appropriate. First, the tribunal should establish a provisional equidistance line, meaning a line every point of which is equidistant from the nearest basepoints of the two adjacent or opposite States.[128] Second, the tribunal should "consider whether there are factors calling for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result."[129] Third, the tribunal should "verify that the [delimitation] line … does not … lead to an inequitable result by reason of any marked disproportion between the ratio of the respective coastal lengths and the ratio between the relevant maritime area of each State by

[126] The principal ICJ cases relating to the law of the sea since 1994 have been: *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)*, Judgment of 16 March 2001, I.C.J. Reports 2001, 40; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)*, Judgment of 10 October 2002, I.C.J. Reports 2002, 303; *Territorial and Maritime Delimitation between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)*, Judgment of 8 October 2007, I.C.J. Reports 2007, 659; *Maritime Delimitation in the Black Sea (Romania v Ukraine)*, Judgment of 3 February 2009, I.C.J. Reports 2009, 61; *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Judgment of 19 November 2012, I.C.J. Reports 2012, 624; *Maritime Dispute (Peru v Chile)*, Judgment of 27 January 2014, I.C.J. Reports 2014, 3; *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v Nicaragua)* and *Land Boundary in the Northern Part of Isla Portillos (Costa Rica v Nicaragua)*, Judgment of 2 February 2018, I.C.J. Reports 2018, 139; *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)*, Judgment of 12 October 2021, I.C.J. Reports 2021; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia)*, Judgment of 21 April 2022, I.C.J. Reports 2022.

[127] He was replaced by Donald McRae. For the Court's final judgment, see *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia)*, Judgment of 21 April 2022, I.C.J. Reports 2022.

[128] *Maritime Delimitation in the Black Sea (Romania v Ukraine)*, Judgment of 3 February 2009, I.C.J. Reports 2009, 61, para. 119.

[129] Ibid., para. 120.

reference to the delimitation line."[130] This approach has now been utilized by Annex VII arbitral tribunals as well, such as in the *Bangladesh v India* maritime delimitation case.[131]

The fact that judicial and arbitral tribunals are in dialogue does not necessarily mean that they are always in agreement. Indeed, with the proliferation of dispute resolution bodies, there arises, quite naturally, a concern with fragmentation of international law. Yet some forms of disagreement can also be a method for creative development of the law, whereby courts and tribunals refine the relevant rules over time through a process of action and reaction. An example might be the types of measures that a State may pursue on a provisional basis in a disputed area of the continental shelf. In the *Aegean Sea Continental Shelf* case, Greece sought a provisional measures order requiring that both Greece and Turkey not engage in exploration activities in the Aegean Sea, arguing that Turkey's activities threatened the exclusivity of Greece's rights with respect to the extent and location of seabed resources. The dispute arose before the adoption of UNCLOS and thus the Court did not apply it; rather, it was applying its own rules and jurisprudence with respect to whether conditions existed meriting provisional measures of protection by the Court, prior to a judgment on matters of jurisdiction or the merits. The Court said that provisional measures are only warranted if necessary to ensure that States do not undertake activities that cause "physical damage to the seabed or subsoil" (as opposed to exploratory activity such as seismic exploration), do not establish installations on the continental shelf (as opposed to activities of a "transitory character"), and do not engage in actual appropriation or other use of natural resources.[132]

For ITLOS, however, whether such invasive activities are occurring within a disputed area of the continental shelf appears not to be the automatic touchstone when determining whether to issue an order on provisional measures of protection. The 2015 *Ghana/Côte d'Ivoire* Special Chamber's order on provisional measures accepted that drilling causes a "significant and permanent modification of the physical character of the area in dispute and … such modification cannot be fully compensated by financial reparations."[133] Yet the Chamber declined to order Ghana to suspend *existing* oil exploration and exploitation activities in the disputed maritime area.[134] Rather, it allowed exploitation of shelf resources to continue even within the disputed area, because suspending such activities would cause prejudice to Ghana

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[130] Ibid., para. 122.
[131] *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v India)*, Award of 7 July 2014, 32 RIAA 1.
[132] *Aegean Sea Continental Shelf Case (Greece v Turkey), Interim Protection*, Order of 11 September 1976, I.C.J. Reports 1976, 3, para. 30.
[133] *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures*, Order of 25 April 2015, ITLOS Reports 2015, 146, paras. 89-90.
[134] Ibid., paras. 99-100, 108.

(Ghana had been engaged in such exploitation before Côte d'Ivoire claimed that the area was part of its continental shelf) and could cause harm to the marine environment.[135]

Conversely, the Chamber found that some non-invasive activities may also merit provisional measures of protection. Thus, the Chamber found that acquisition and subsequent use of geological information concerning the disputed area created a risk of irreversible prejudice.[136] Ultimately, the Special Chamber ordered: (a) Ghana to "take all necessary steps to ensure that no new drilling either by Ghana or [by others] under its control take place in the disputed area"; (b) Ghana to "take all necessary steps to prevent information resulting from past, ongoing or future exploration activities conducted by Ghana, or with its authorization, in the disputed area that is not already in the public domain from being used in any way whatsoever to the detriment of Côte d'Ivoire"; (c) Ghana to "carry out strict and continuous monitoring of all activities undertaken by Ghana or with its authorization in the disputed area, with a view to ensuring the prevention of serious harm to the marine environment"; (d) both parties to "take all necessary steps [in the disputed area] to prevent serious harm to the marine environment, including the continental shelf and in its superjacent waters," and to "cooperate toward that end"; and (e) both parties to "pursue cooperation and refrain from any unilateral action that might lead to aggravating the dispute."[137] This approach reflects a creative development of the law in this area that begins with but goes well beyond the approach taken by the Court in the *Aegean Sea Continental Shelf Case*. In due course, it may help inform the Court's approach to such issues.

B. Advisory Opinions

Advisory opinions issued either by the ICJ or by ITLOS can also feature in dispute settlement under the law of the sea, and here too creativity may be observed. In addition to resolving contentious disputes, a chamber of ITLOS—known as the Seabed Disputes Chamber—has express authority to "give advisory opinions at the request of the Assembly or the Council on legal questions arising within the scope of their activities."[138] In response to certain questions posed by the Council, the Chamber issued its first advisory opinion in 2011 entitled *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*.[139] Among other things, the Chamber clarified that a State that sponsors contractors who engage in activities on the deep seabed is responsible for supervising them, including any drilling, dredging, or excavation. Further, States must engage in a precautionary

[135] Ibid.
[136] Ibid., para. 95.
[137] Ibid., para. 108(1).
[138] UNCLOS (n 3), art. 191.
[139] *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, ITLOS Reports 2011, 10.

approach with respect to such activities, must use best environmental practices, and must conduct environmental impact assessments.

In contrast with the Seabed Disputes Chamber, UNCLOS does not provide any express authority to ITLOS as a whole to issue advisory opinions. Even so, in 2013, the Sub-Regional Fisheries Commission, which is a fisheries commission comprising seven West African nations,[140] requested an advisory opinion from ITLOS. The Commission asked ITLOS four questions about the rights and obligations of flag and coastal States regarding fishing in the exclusive economic zone, such as to what extent a flag State may be held liable for illegal fishing activities conducted by vessels sailing under its flag.[141] Twenty-two UNCLOS States Parties filed written statements with ITLOS on these questions, as did the Commission and six other international organizations.[142] An oral hearing was held in 2014, at which ten States Parties appeared, as well as the Commission and two other international organizations,[143] thereby allowing a robust exchange of views on the issues at hand.

ITLOS's jurisdiction to issue advisory opinions was contested; many States Parties argued that it had no power to do so. Nevertheless, in 2015 ITLOS found that it is capable of providing advisory opinions,[144] hence opening the door to potentially wide-ranging guidance on the interpretation and application of UNCLOS, including on matters that are less susceptible to resolution through contentious cases. ITLOS then went on to provide a broad analysis of the obligations of flag States with respect to sustainable fisheries management, which one hopes will guide those States when regulating their flag vessels in another State's exclusive economic zone, not just off the coast of West Africa but worldwide.[145]

VIII. Commission on the Continental Shelf

UNCLOS also establishes a Commission on the Limits of the Continental Shelf (CLCS), which consists of twenty-one members who are "experts in the field of geology, geophysics or hydrography, elected by States Parties to this Convention from among their nationals, having due regard to the need to ensure equitable geographical representation, who shall serve in

[140] Those States are: Cape Verde; Gambia; Guinea; Guinea Bissau; Mauritania; Senegal; and Sierra Leone. The backdrop to this request were allegations by West African States that third State vessels were engaged in illegal, unreported, or unregulated fishing off the coast of West Africa that was imperiling fish stocks.
[141] *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion of 2 April 2015, ITLOS Reports 2015, 4, para. 2.
[142] Ibid., para. 17. Interestingly, the United States was also permitted to file a written statement even though it is not an UNCLOS party, apparently because it is a party to the 1995 Straddling Fish Stocks Agreement. Ibid., para. 24.
[143] Ibid., para. 29.
[144] Ibid., paras. 37-69.
[145] Ibid., paras. 85-219.

their personal capacities."[146] Strictly speaking, the CLCS is not a dispute resolution body. Having said that, it receives submissions from coastal States about their claims to continental shelves extending beyond 200 nautical miles and, after receiving comments from other States, it issues recommendations to the coastal State. If the coastal State establishes the limits to its extended continental shelf in a manner that takes into account these recommendations, then those limits shall be final and binding.[147] Thus, the CLCS is a new institutional mechanism that in the long-term may be important in reducing disputes among States regarding the permissibility of extended continental shelves. As of August 2022, the CLCS has received ninety-two submissions from States and has issued about thirty-five recommendations, some with respect to the same submission.[148]

One interesting issue is the interplay of applications to/recommendations by the CLCS and dispute resolution before other fora on delimitation of the outer continental shelf (OCS, meaning the shelf beyond 200 nautical miles). One particular question is whether an international court or tribunal should exercise jurisdiction to delimit the OCS between States with opposite or adjacent coasts if the CLCS has not yet made recommendations as to the existence of those States' respective shelves. The two processes—a CLCS recommendation as to whether/where a State may claim an OCS and an international tribunal's delimitation of the overlapping OCS of two States—are clearly distinct, the former being governed by UNCLOS Article 76 and the latter by UNCLOS Article 83.[149] Even so, it has been argued that until a coastal State actually demonstrates the existence of its claimed OCS by means of the CLCS process, an international court or tribunal should not delimit such a claim vis-à-vis another State. That argument presents a "chicken-and-the egg situation," however, in that the CLCS by its rules will not proceed with issuance of a recommendation in situations where there is a dispute over the delimitation of the relevant OCS, unless the States concerned so consent.[150] The CLCS is also slow in issuing recommendations and has a considerable backlog of submissions awaiting its examination.

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[146] UNCLOS (n 3), Annex II, art. 2.

[147] Ibid., art. 76(8); see Peter J Cook and Chris M Carleton (eds), *Continental Shelf Limits: The Scientific and Legal Interface* 20 (OUP 2000); Ted L McDorman, "The Role of the Commission on the Limits of the Continental Shelf: A Technical Body in a Political World," 17 *Int'l J. Marine & Coastal L.* 301 (2002); Michael Sheng-ti Gau, "The Commission on the Limits of the Continental Shelf as a Mechanism to Prevent Encroachment upon the Area," 10 *Chinese JIL* 3 (2011).

[148] See Commission on the Limits of the Continental Shelf, "Submissions, through the Secretary-General of the United Nations, to the Commission on the Limits of the Continental Shelf, pursuant to article 76, paragraph 8, of the United Nations Convention on the Law of the Sea of 10 December 1982," <http://www.un.org/depts/los/clcs_new/commission_submissions.htm> accessed 9 August 2022.

[149] *Delimitation of the Maritime Boundary in the Bay of Bengal (No 16) (Bangladesh v Myanmar)*, Judgment of 14 March 2012, ITLOS Reports 2012, 4, 99, para. 376.

[150] CLCS Rules of Procedure, CLCS/40/Rev.1 (2008), Rule 46 and Annex I, para. 5(a).

Consequently, so as to avoid an impasse, international courts and tribunals have gingerly but creatively proceeded with such OCS delimitations. In *Bangladesh/Myanmar*, both States had made submissions to the CLCS, but had not given consent for the CLCS to issue recommendations on each other's claims. Even so, ITLOS concluded that it had an obligation to delimit the overlapping area of the two OCS claims and proceeded to do so, albeit "without prejudice" to the subsequent establishment of each State's OCS.[151] Interestingly, the *apparent* existence of a OCS for both States based on uncontested scientific evidence influenced the Tribunal; it said that it "would have been hesitant to proceed with the delimitation of the area beyond 200 nm had it concluded that there was significant uncertainty as to the existence of a continental margin in the area in question."[152] In *Ghana/Côte d'Ivoire*, the two States had consented to CLCS examination of each other's submissions, despite overlapping claims, and Ghana had received affirmative recommendations, but no CLCS recommendation had yet been reached on Côte d'Ivoire's submission. Again, ITLOS (by special chamber) proceeded to delimit the overlapping OCS and, once again, did so based on there being "no doubt" that an OCS existed for Côte d'Ivoire.[153]

In *Somalia v Kenya*, the two States had made submissions to the CLCS, neither had received recommendations, and neither questioned that the other had an OCS. Even so, whether one or both States actually possessed an OCS was much less clear than in *Bangladesh/Myanmar* or in *Ghana/Côte d'Ivoire.* The International Court of Justice itself recognized this by noting that its adjusted equidistance line entailed the "possibility" of a "grey area" (an area where Kenya *might* possess sovereign rights to an OCS while Somalia possessed sovereign rights to the exclusive economic zone).[154] Yet, despite this uncertainty, the Court proceeded to delimit the area of the OCS as between the two States, a step that elicited concerns from some of the judges.[155]

IX. Conclusion

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[151] *Delimitation of the Maritime Boundary in the Bay of Bengal (No 16) (Bangladesh v Myanmar)*, Judgment of 14 March 2012, ITLOS Reports 2012, 4, 100, para. 379, 103, para. 394.

[152] Ibid., 115, para. 443.

[153] *Delimitation of the Maritime Boundary in the Atlantic Ocean (No 23) (Ghana/Côte d'Ivoire)*, Judgment of 23 September 2017, Judgment, ITLOS Reports 2017, 4, 136, para. 491 ("the Special Chamber has no doubt that a continental shelf beyond 200 nm exists for Côte d'Ivoire since its geological situation is identical to that of Ghana, for which affirmative recommendations of the CLCS exist.").

[154] Maritime Delimitation in the Indian Ocean (Somalia v Kenya), Judgment of 12 October 2021, I.C.J. Reports 2021, para. 197.

[155] See ibid., Separate Opinion of President Donoghue, para. 4 ("the Court has scant evidence regarding the existence, shape, extent and continuity of any outer continental shelf that may appertain to the Parties"); ibid., Individual Opinion, Partly Concurring and Partly Dissenting, of Judge Robinson, para. 9 ("the Court must have at hand reliable information confirming the existence of a continental margin in the area beyond 200 nautical miles if it is to be in a position to carry out a delimitation in that area. However, … the Court ignores this requirement.").

The existence of numerous inter-State maritime disputes today is self-evident, and they no doubt will continue in the years to come. While delimitation disputes obviously come to mind, many other sources of friction might also be mentioned: the resurgence of piracy, recurrent military incidents on the seas, the recovery of cultural or historical objects at sea, access to maritime genetic resources, disputes over islands, and the vexing issue of maritime smuggling of persons.[156] One issue likely to spawn future disputes relates to global climate change, which is causing a rise in sea levels due to the expansion of ocean water and the melting of glaciers and polar ice. That rise in sea levels is causing shifts in coastlines, with the potential for greater uncertainty in the location of baselines and of the seaward maritime zones. As David Caron well-observed, current law here may be misguided, as it calls for ambulatory baselines, rather than allowing States to "freeze" their baselines and maritime zones in place, thereby protecting their rights to maritime spaces.[157]

To resolve such disputes, the creativity of the drafters of UNCLOS will no doubt be put to good use; the Convention's substantive rules will be central, but the robust and varied dispute resolution procedures created by and available to States will also be important. Some creativity may be merited and essential when addressing vague, ambiguous or undefined terms, or when applying even clear rules and procedures by dispute settlers to unique circumstances that the UNCLOS drafters did not envisage. Yet it is important to keep in mind that, as creative a lawyer as David Caron was, he also worried about the potential overreach of dispute settlers,[158] and in particular that their creativity in resolving a problem might extend beyond the settled law and jurisdiction accorded to them by States. Given the importance of a transparent and well-grounded system of rules for inducing compliance by States and others, creativity in deciding cases relating to the law of the sea may be beneficial in measured doses, but it is perilous if unbounded.

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[156] See generally Natalie Klein, *Maritime Security and the Law of the Sea* (OUP 2011); Gemma Andreone (ed), *Jurisdiction and Control at Sea: Some Environmental and Security Issues* (Giannini Editore 2014).

[157] David D Caron, "When Law Makes Climate Change Worse: Rethinking the Law of Baselines in Light of a Rising Sea Level," 17 *Ecology L.Q.* 621 (1990).

[158] See, e.g., David D Caron, "The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority," 96 *AJIL* 857, 858 (2002) (expressing concern that arbitral panels might rely on the ILC articles without sufficient probing as to whether they reflect settled rules of international law).