BRILL

PORTUGUESE YEARBOOK OF THE LAW OF THE SEA
1 (2024) 117–134

PYLS

Opting Out of UNCLOS Tribunals: The Impact of *Maritime Delimitation in the Indian Ocean* (*Somalia v. Kenya*)

Marco Benatar
Legal Officer, International Tribunal for the Law of the Sea, Hamburg, Germany
Researcher, Vrije Universiteit Brussel, Brussels, Belgium
marco.benatar@vub.be

Valentin Schatz
Junior Professor of Public Law and European Law, Faculty of Sustainability, Leuphana University of Lüneburg, Germany
valentin.schatz@leuphana.de

Received 26 October 2023 | Accepted 9 November 2023 | Published online 15 July 2024

Abstract

On 2 February 2017, the International Court of Justice (ICJ) handed down its judgment on preliminary objections in the case concerning *Maritime Delimitation in the Indian Ocean* (*Somalia v. Kenya*) holding that it may proceed to the merits phase. Kenya had raised an objection rooted in Part XV ("Settlement of disputes") of the 1982 United Nations Convention on the Law of the Sea (UNCLOS). It contended that the Convention's dispute settlement system is an agreement on the method of settlement for its maritime boundary dispute with Somalia and therefore falls within the scope of Kenya's reservation to its optional clause declaration recognizing the Court's jurisdiction as compulsory. The reservation excludes "[d]isputes in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method or methods of settlement". This article provides an analysis of the ICJ's interpretation of Part XV of UNCLOS and assesses its potential implications for the Convention's dispute settlement mechanism.

Keywords

United Nations Convention on the Law of the Sea – international dispute settlement – choice of forum – International Court of Justice – International Tribunal for the Law of the Sea – Permanent Court of Arbitration

Introduction*

On 2 February 2017, the International Court of Justice ('ICJ' or 'Court') handed down its Judgment on Preliminary Objections in the case concerning *Maritime Delimitation in the Indian Ocean* (*Somalia v. Kenya*).[1] The applicant, Somalia, had requested the Court to delimit its single maritime boundary with neighbouring Kenya. Favouring a negotiated outcome over adjudication, the respondent challenged the jurisdiction of the Court and the admissibility of the application. By a clear majority, the ICJ rejected all objections thereby paving the way to the merits phase of the case, which was concluded by the Court's judgment on the merits of 12 October 2021.[2] One of the contentions invoked by Kenya was rooted in Part XV ("Settlement of disputes") of the 1982 United Nations Convention on the Law of the Sea ('UNCLOS' or 'Convention').[3] The respondent sought to convince the Judges that appropriate weight should be given to a reservation nestled in its declaration recognizing the jurisdiction of the Court as compulsory. The reservation, which Kenya withdrew together with its declaration on 28 September 2021,[4] excluded from the ICJ's purview "[d]isputes in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method or methods of settlement".[5] According to Kenya, the UNCLOS choice of forum rules fall within the reservation and, when applied properly, point to arbitration as the only method to which the parties can have recourse (lacking an agreement otherwise). While ultimately

* The views expressed in this article are those of the author and do not represent the opinion of the International Tribunal for the Law of the Sea.

1 *Maritime Delimitation in the Indian Ocean* (*Somalia v. Kenya*) (Preliminary Objections) [2017] ICJ Rep 3.

2 *Maritime Delimitation in the Indian Ocean* (*Somalia v. Kenya*) (Judgment) [2021] ICJ Rep 206.

3 UNCLOS (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397.

4 Kenya, 'Withdrawal of the Declaration under Article 36 (2) of the Statute', Declaration, 28 September 2021, C.N.281.2021.TREATIES-I.4, https://treaties.un.org/doc/Publication/CN/2021/CN.281.2021-Eng.pdf. All websites accessed on September 20, 2023, unless otherwise mentioned.

5 See Kenya, 'Compulsory Jurisdiction of the International Court of Justice', Declaration, 10 May 1965, 961 UNTS 183.

unsuccessful, Kenya's reliance on this strategy is remarkable in and of itself. Never before had the Court faced a Part XV UNCLOS-based jurisdictional challenge.

This article will first highlight some key features of Part XV UNCLOS. Next, it will explore the Court's take on Part XV of UNCLOS. Thereafter, this article considers potential ramifications of the ICJ's reasoning for UNCLOS tribunals. The final substantive section of this article examines the relevance of the Court's judgment in *Somalia v. Kenya* on dispute settlement under the United Nations 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 ('UNFSA')[6] and the recently adopted Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction ('BBNJ Agreement'),[7] which has yet to enter into force.

The Residual Jurisdiction of UNCLOS Tribunals

Part XV UNCLOS establishes an elaborate framework for resolving disputes concerning the interpretation or application of the Convention. Built into the system are a set of compulsory and binding procedures found in Part XV, Section 2 (which we will refer to as 'UNCLOS tribunals'). States Parties may choose from among four fora for the settlement of their disputes: the International Tribunal for the Law of the Sea (ITLOS), the ICJ, arbitration and special arbitration.[8] Arbitration, regulated in Annex VII UNCLOS, serves as the default option. This means that (a) if a State Party has not voiced a preference, it is considered to have selected arbitration, and (b) if the parties to the dispute have not accepted the same procedure, the dispute may be submitted only to an arbitral tribunal (unless the parties agree otherwise).[9] It follows that the

6 United Nations 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, Part VIII (adopted 4 August 1995, entered into force 11 December 2001) 2167 UNTS 88.

7 Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction (19 June 2023 (not yet in force)) UN Doc A/CONF.232/2023/4*.

8 UNCLOS (n 3), art 287 (1). On the comparative (dis)advantages of different fora, see Stephen Fietta and Robin Cleverly, *A Practitioner's Guide to Maritime Boundary Delimitation* (OUP 2016) 127–132.

9 UNCLOS (n 3), art 287 (3) and (5).

Court's jurisdiction in regard to law of the sea disputes can be derived from Part XV, Section 2, but so far has always been founded on another, external basis.

The obligatory scheme of arbitration and adjudication is not all-encompassing. The right to unilaterally submit a dispute to compulsory proceedings only kicks in "where no settlement has been reached by recourse to section 1".[10] Indeed, acting under Section 1, States Parties can resolve their dispute through any peaceful means of their own choosing. That includes international tribunals that do not derive their jurisdiction from Part XV, Section 2 or even non-adjudicatory bodies so long as they render binding decisions.[11] The 'choice of forum' provision that makes this possible is Article 282 UNCLOS:[12]

> If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree.[13]

The fact that parties can jointly sidestep Part XV, Section 2, implies that UNCLOS tribunals have *residual* jurisdiction.[14] Unlike some of the other specialized

10 Ibid., art 286.

11 Eg settlement of a technical dispute concerning straddling hydrocarbon deposits by an expert. Andrew Serdy, 'Article 282' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck/Hart/Nomos 2017) 1828–1829.

12 Nigel Bankes, 'Precluding the Applicability of Section 2 of Part XV of the Law of the Sea Convention' (2017) 48 Ocean Development & Intl L 239, 241; Bernard H Oxman, 'Courts and Tribunals: The ICJ, ITLOS, and Arbitral Tribunals' in Donald R Rothwell, Alex G Oude Elferink, Karen N Scott and Tim Stephens (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 401–402.

13 Part XV, Section 1 contains another provision enabling States Parties to opt out of UNCLOS compulsory procedures. See UNCLOS, art 281: "1. If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure. 2. If the parties have also agreed on a time-limit, paragraph 1 applies only upon the expiration of that time-limit."

14 Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (OUP 2004) 201–202.

regimes that populate the world of international litigation,[15] UNCLOS does not establish exclusivity in favour of its own tribunals. An exception to this rule is the competence of the Seabed Disputes Chamber of the ITLOS for disputes concerning activities in the Area.[16] Be that as it may, the compulsory procedures will only be trumped if the parties reach an agreement to that end; Article 282 of the Convention requires opting *out* not opting *in*.[17] Consent can be expressed "through a general, regional or bilateral agreement or otherwise". The Pact of Bogotá,[18] to give but one illustration, is a regional agreement that has provided the basis for the ICJ's jurisdiction in maritime cases between Latin American States Parties to UNCLOS.[19]

The phrase "or otherwise" should be elucidated. The *Virginia Commentary* explains that the "or otherwise" wording of Article 282 UNCLOS covers declarations made by both parties to a dispute recognizing the ICJ's jurisdiction as compulsory.[20] The overlap or matching of "optional clause declarations" (as

15 Eg Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 (ICSID Convention); Understanding on Rules and Procedures governing the Settlement of Disputes, Annex 2, Marrakesh Agreement establishing the World Trade Organization (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 401 (WTO DSU).

16 Robin Churchill, 'The General Dispute Settlement System of the UN Convention on the Law of the Sea: Overview, Context, and Use' (2017) 48 Ocean Development & Intl L 216, 221. Subject to a waiting period and failure to agree on a different court, the plenary ITLOS enjoys exclusive jurisdiction for prompt release proceedings and provisional measures pending the constitution of an Annex VII Arbitral Tribunal. UNCLOS, arts 290 (5) and 292.

17 *Southern Bluefin Tuna Case* (*New Zealand-Japan, Australia-Japan*), Award on Jurisdiction and Admissibility, Separate Opinion of Justice Sir Kenneth Keith (2000) 23 RIAA 1, para 17.

18 American Treaty on Pacific Settlement (Pact of Bogotá) (adopted 30 April 1948, entered into force 6 May 1949) 30 UNTS 55.

19 Eg *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean*; *Land Boundary in the Northern Part of Isla Portillos* (*Costa Rica v. Nicaragua*) (Merits) [2018] ICJ Rep, paras 45–46. Costa Rica also invoked the optional declarations that Nicaragua and itself had made as a basis of the Court's jurisdiction. Moreover, the latter dispute was not purely about law of the sea matters as it also involved questions of land sovereignty. See Pierre d'Argent, 'Le règlement des différends en-dehors de la convention des Nations Unies sur le droit de la mer' in Mathias Forteau and Jean-Marc Thouvenin (eds), *Traité de droit international de la mer* (Pedone 2017) 1040. Turning to regional courts, the European Court of Justice has expressly invoked UNCLOS, art 282 in support of its exclusive jurisdiction. See Case C-459/03 *Commission v. Ireland* [2006] ECR I-4635, para 125: "It follows from Article 282 of the Convention that, as it provides for procedures resulting in binding decisions in respect of the resolution of disputes between Member States, the system for the resolution of disputes set out in the Treaty establishing the European Community (EC Treaty) must in principle take precedence over that contained in Part XV of the Convention." See Igor V Karaman, *Dispute Resolution in the Law of the Sea* (Martinus Nijhoff 2012) 279.

20 Myron H Nordquist, Shabtai Rosenne and Louis B Sohn, *United Nations Convention on the Law of the Sea, 1982: A Commentary* (vol 5, Martinus Nijhoff 1989) 26–27. See

they are often called) is one way to establish the contentious jurisdiction of the Court.[21] The relevant provision, Article 36, para 2 ICJ Statute[22] reads:

> The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: the interpretation of a treaty; any question of international law; the existence of any fact which, if established, would constitute a breach of an international obligation; the nature or extent of the reparation to be made for the breach of an international obligation.

Resorting to compulsory procedures may also be barred as a result of Section 3 ("Limitations and exceptions to applicability of section 2").[23] Under Article 297, certain disputes pertaining to marine scientific research and fisheries are automatically excluded from the mandatory system. States Parties can also opt out of several categories of disputes (i.e., maritime delimitation, military and law enforcement activities, disputes before the United Nations (UN) Security Council) by issuing a declaration in accordance with Article 298. True to the spirit of flexibility underpinning Part XV, parties to a dispute that would normally be exempted or excluded due to Articles 297 or 298 can agree to submit their case to one of the four UNCLOS tribunals.[24]

On a final note, it should be recalled that the UNCLOS dispute settlement mechanism is not confined to the Convention alone.[25] Several treaties pertaining to the law of the sea incorporate Part XV *mutatis mutandis*, with or without modifications. This possibility is explicitly acknowledged in

---

also Tullio Treves, 'Conflicts between the International Tribunal for the Law of the Sea and the International Court of Justice' (1999) 31 NYU J Intl L & Politics 809, 812; Alan E Boyle, 'Some Problems of Compulsory Jurisdiction before Specialised Tribunals: The Law of the Sea' in Patrick Capps, Malcolm Evans and Stratos Konstadinidis (eds), *Asserting Jurisdiction: International and European Legal Perspectives* (Hart 2003) 244; Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (CUP 2005) 43–44.

21 At the time of writing, 74 States had made a declaration recognizing as compulsory the jurisdiction of the Court. See International Court of Justice, 'Declarations recognizing the jurisdiction of the Court as compulsory', https://www.icj-cij.org/declarations.

22 Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 15 UNCIO 355.

23 UNCLOS (n 3), art 286.

24 Ibid., art 299.

25 Ibid., art 288.

Article 288(2) UNCLOS.[26] The most prominent illustrations are Part VIII of the UNFSA and Part IX of the recently adopted BBNJ Agreement. If anything, greater use of Part XV only increases the significance of the Court's Preliminary Objections Judgment in *Maritime Delimitation in the Indian Ocean*.

The ICJ's Approach to Part XV UNCLOS

The ICJ had to determine whether Part XV UNCLOS precluded the case between Somalia and Kenya from advancing to the merits. In the respondent's view, Annex VII arbitration was the single method that the parties were deemed to have accepted because neither State Party had expressed a preference. Conversely, the applicant believed that the parties had opted out of Section 2 procedures for the settlement of their dispute by virtue of matching optional clause declarations under Article 36(2) ICJ Statute as permitted under Article 282 UNCLOS.

The Court's analysis centred on the extent to which the declarations of both parties conferred jurisdiction upon the Court. Declarations frequently include reservations,[27] which can have the effect of restricting or even excluding outright the Court's jurisdiction in a given case. Both litigants had made reservations. However, only one such exemption formulated by Kenya had the potential to deprive the ICJ of jurisdiction. Kenya made a carve-out for "[d]isputes in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method or methods of settlement".[28]

Had Kenya deposited a declaration "without relevant reservations"?[29] The respondent maintained that its reservation attested to "the significant role of alternative and more specialized dispute settlement systems and procedures".[30] As a *lex specialis* and *lex posterior*, Kenya argued, Part XV should

26 Tullio Treves, 'Article 288' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck/Hart/Nomos 2017) para 5.

27 Dapo Akande, 'Selection of the International Court of Justice as a Forum for Contentious and Advisory Proceedings (Including Jurisdiction)' (2016) 7 J Intl Dispute Settlement 320, 328: "Of the new declarations made in the last decade, only two were made without reservation, whereas in other cases some States which had previously made declarations under Article 36 (2) have amended them so as to include new reservations." On the notion of reservations made to optional clause declarations, see Gunnar Törber, *The Contractual Nature of the Optional Clause* (Hart 2015) 166–172.

28 Declaration (Kenya) (n 5).

29 *Mox Plant* (*Ireland v. United Kingdom*) (Provisional Measures) [2001] ITLOS Rep 95, Separate Opinion of Judge Treves, para 3.

30 *Somalia v. Kenya* (n 1) para 109. See also ibid., CR 2016/12 (Lowe) 37: "[N]ot all disputes can be put equally effectively and efficiently before each and every procedure for the

therefore prevail over the parties' optional clause declarations. The Judges were unanimous in rejecting this point. With respect to the *lex specialis*-derived contention, the Court held that the wording of the Kenyan reservation does not distinguish between highly specific and general agreements, thus rejecting this argument.[31] According to the Court, pleading *lex posterior* is at odds with the phrase "have agreed or *shall agree*" (emphasis added) in the reservation.[32]

The bench then embarked on an interpretation of Part XV UNCLOS, emphasizing the flexibility in the choice of means of dispute resolution and the precedence that Section 1 takes over Section 2 procedures. Subsequently, the Judges made three important findings in relation to Article 282: (1) the proviso "or otherwise" applies to optional clause declarations; (2) reservations in said declarations excluding disputes on particular subjects prevent agreement to the ICJ's jurisdiction from being reached; and (3) Kenyan-type reservations do not have that effect.[33]

The core of the Court's reasoning in support of this result derives from the *travaux préparatoires* of the Convention, i.e. the Third United Nations Conference on the Law of the Sea 1973–1982 (UNCLOS III).[34] More than half of the optional clause declarations that existed at the time of UNCLOS III had a Kenyan-type reservation. Notwithstanding their prevalence, the Court found that the *travaux préparatoires* reveal no intention on the part of the delegations to exclude most of the existing optional clause declarations in that period, namely those including Kenyan-type reservations. Thus, the Court held, such reservations cannot bar the application of Article 282.[35]

---

settlement of disputes. Any particular dispute will be more suited to some dispute settlement procedures than to others."

31 But see Patrick Abel, 'Negative Zuständigkeitskonflikte internationaler Gerichte durch Subsidiaritätsklauseln – Zur Bedeutung des Maritime Delimitation in the Indian Ocean-Urteils des IGH für die internationale Streitbeilegung' (2018) 78 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 339, 360–366, who argues that the Court should have applied the *lex specialis* principle to conclude that an arbitral tribunal under Annex VII of UNCLOS was competent to hear the dispute. However, the problem at issue was arguably one of interpreting the reservation in Kenya's optional clause declaration, not a conflict of norms that can be resolved through the *lex specialis* principle.

32 *Somalia v. Kenya* (n 1) para 120; ibid., Dissenting Opinion of Judge Robinson, para 4. For a critique of the Court's take on *lex specialis*, see Yoshifumi Tanaka, *The Peaceful Settlement of International Disputes* (CUP 2018) 233–235.

33 *Somalia v. Kenya* (n 1) paras 121–131.

34 See generally Tommy Koh, 'Negotiating the UN Convention on the Law of the Sea: A Practitioner's Reflection' in Simon Chesterman, David M Malone and Santiago Villalpando (eds), *The Oxford Handbook of United Nations Treaties* (OUP 2019).

35 *Somalia v. Kenya* (n 1) paras 127 and 129.

This aspect of the ICJ's Judgment warrants closer consideration. It is noteworthy that the Court, which consistently applies a stringent test of 'preponderance', found that the *travaux préparatoires* of a treaty provided a sufficient footing on which to base its jurisdiction.[36] It may also be observed that the Judgment does not explicitly refer to the case law of the ITLOS and Annex VII Arbitral Tribunals concerning the interpretation of Part XV.[37] Turning to the specifics, it stands to reason that the silence at UNCLOS III on this issue could plausibly be construed in other ways as well. After all, silence can 'say' many things. The absence of any debate on Kenyan-type reservations during UNCLOS III might stem from a broadly shared belief that such reservations rendered Article 282 inapplicable and that this needed no further comment.[38] Judge Robinson, the sole dissenter on the matter of Part XV in *Somalia v. Kenya* and a former Ambassador to UNCLOS III, drives home similar points in considerable detail.[39]

The Court also identified an additional albeit subsidiary legal basis for accepting jurisdiction. The ICJ took its cue from its predecessor, the Permanent Court of International Justice (PCIJ), which affirmed its competence to entertain a case should the alternative be a denial of justice resulting from a negative conflict of jurisdiction.[40] This approach proved prescient in light of

36 Ibid., para 116 (reiterating earlier case law on the preponderance test). See also Andrea Caligiuri, 'Les conditions pour l'exercice de la fonction juridictionnelle par les cours et les tribunaux prévus dans la CNUDM' (2017) 121 Revue générale de droit international public 945, 968.

37 The ICJ has however invoked the jurisprudence of the ITLOS and Annex VII Arbitral Tribunals in other cases. See e.g. *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast* (*Nicaragua v. Colombia*) (Judgment) [2023] paras. 58, 59, 71. See also Laurence Boisson de Chazournes, 'Plurality in the Fabric of International Courts and Tribunals: The Threads of a Managerial Approach' (2017) 28 European J Intl L 13, 42; Vladyslav Lanovoy, 'The Authority of Inter-State Arbitral Awards in the Case Law of the International Court of Justice' (2019) 32 Leiden J Intl L 561.

38 Marco Benatar and Erik Franckx, 'The ICJ's Preliminary Objections Judgment in Somalia v. Kenya: Causing Ripples in Law of the Sea Dispute Settlement?' (EJIL: Talk!, 22 February 2017) https://www.ejiltalk.org/the-icjs-preliminary-objections-judgment-in-somalia-v-kenya-causing-ripples-in-law-of-the-sea-dispute-settlement/); Abel (n 31) 353–354.

39 *Somalia v. Kenya* (n 1) Dissenting Opinion of Judge Robinson. For views supportive of Judge Robinson's dissenting opinion, see: Abel (n 31) 353–354; Bjørn Kunoy, 'The Scope of Compulsory Jurisdiction and Exceptions Thereto under the United Nations Convention on the Law of the Sea' (2021) 58 Canadian Yearbook of International Law 78, 99–103.

40 *Factory at Chorzów* (*Germany v. Poland*) (Jurisdiction) [1927] PCIJ Rep Series A No 9, 30; *Somalia v. Kenya* (n 1) para 132. On conflicts of jurisdiction, see Hugh WA Thirlway, 'The International Court of Justice and other International Courts' in Niels M Blokker and Henry G Schermers (eds), *Proliferation of International Organizations: Legal Issues* (Kluwer Law International 2001) 267–270; Abel (n 31) 354–360.

a subsequent declaration under Article 298(1)(a) UNCLOS filed by Kenya that excludes maritime delimitation from the Convention's compulsory dispute settlement system.[41] It was deposited nine days before the ICJ delivered its Judgment and is not mentioned in the ruling. That said, the denial of justice line of reasoning could be understood from the perspective of declarations under UNCLOS and/or the ICJ Statute that are filed after the institution of proceedings. One could point to the most recent reservation added to the United Kingdom (UK)'s optional clause declaration in response to proceedings brought by the Marshall Islands:[42] "any dispute which is substantially the same as a dispute previously submitted to the Court by the same or another Party."[43]

Ramifications for UNCLOS Tribunals

There is the real prospect of *Somalia v. Kenya* making waves in law of the sea dispute settlement where both parties have made optional clause declarations under Article 36(2) of the ICJ Statute and a Kenyan-type reservation applies

41 Kenya, 'Declaration under Article 298', 24 January 2017, United Nations Treaty Collection: United Nations Convention on the Law of the Sea, https://treaties.un.org: "The Government of the Republic of Kenya pursuant to Article 298 (1)(a)(i) of the United Nations Convention on the Law of the Sea, 1982, declares that it does not accept any of the procedures provided for in Part XV Section 2 of the Convention with respect to disputes concerning the interpretation or application of Articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles. The Republic of Kenya reserves the right at any time by means of a notification addressed to the Secretary General of the United Nations to add to, amend, or withdraw any of the foregoing reservations. Such notification shall be effective on the date of their receipt by the Secretary General." Kenya subsequently modified and expanded its declaration. See Kenya, 'Declaration under Article 298', 24 September 2021, United Nations Treaty Collection: United Nations Convention on the Law of the Sea, https://treaties.un.org. It should be specified that an Article 298(1)(a) UNCLOS declaration does not deprive the applicant of *all* avenues of compulsory dispute settlement given the existence of compulsory conciliation for maritime delimitation disputes that do not necessarily involve the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory. That said, compulsory conciliation does not result in a binding decision, and thus is not equivalent to adjudication or arbitration.

42 *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (*Marshall Islands v. United Kingdom*) (Preliminary Objections) [2016] ICJ Rep 833.

43 United Kingdom, Declaration recognizing the jurisdiction of the Court as compulsory, 22 February 2017, https://www.icj-cij.org/declarations/gb.

between them.[44] It is worth recalling that this class of reservation, i.e. "*ratione fori*",[45] is widespread.[46] Its origins go as far back as 1920s era declarations recognizing the jurisdiction of the PCIJ.[47] In addition to its prevalence, the reservation is generally considered benign.[48] Influential model clauses such as those found in the *Handbook on Accepting the Jurisdiction of the International Court of Justice* and a Recommendation of the Council of Europe include similarly worded reservations.[49]

First, the Court's *ratio* might in practical terms affect some States' choice of forum under UNCLOS.[50] Let us take the example of Canada. The latter country has inserted a Kenyan-style reservation into its optional clause declaration.[51] It has also selected the ITLOS and arbitration as its preferred fora under Part XV of UNCLOS.[52] The *Somalia v. Kenya* Judgment could be read to suggest that maritime disputes could be brought against Canada before the ICJ irrespective of its expressed intention that such disputes preferably be settled by the

44 Robert Kolb, 'Chronique de la jurisprudence de la Cour internationale de Justice en 2017' (2018) 28 Swiss Rev Intl & Eur L 59, 70.

45 Renata Szafarz, *The Compulsory Jurisdiction of the International Court of Justice* (Martinus Nijhoff 1993) 57–58.

46 Robert Kolb, *The International Court of Justice* (Hart 2013) 464–465.

47 See Michael Wood, 'The United Kingdom's Acceptance of the Compulsory Jurisdiction of the International Court' in Ole Kristian Fauchald, Henning Jakhelln and Aslak Syse (eds), *Dog Fred er ej det Bedste ...: Festskrift til Carl August Fleischer på hans 70-årsdag 26. august 2006* (Universitetsforlaget 2006) 637 (referring to the 1929 UK declaration); John G Merrills, 'Recent Practice with Regard to the Optional Clause: An Assessment' in Giuliana Ziccardi Capaldo (ed), *The Global Community: Yearbook of International Law and Jurisprudence 2015* (OUP 2016) 908 (referring to the 1921 Netherlands declaration).

48 Wood (n 47) 642–643.

49 'Handbook on Accepting the Jurisdiction of the International Court of Justice: Model Clauses and Templates' (2014) UN Doc A/68/963, para 29 (which is featured on the website of the ICJ); Recommendation CM/Rec (2008) 8 of the Committee of Ministers to member states on the acceptance of the jurisdiction of the International Court of Justice, 2.C.

50 Xiaohui Wu, 'Case Note: Maritime Delimitation in the Indian Ocean (*Somalia v. Kenya*), Judgment on Preliminary Objections' (2018) 17 Chinese J Intl L 841, 858–859. Admittedly, forum selection under Article 287 does not trump Article 282, hence the qualifier "in practical terms". See Nigel Bankes, 'The Relationship between Declarations under the Optional Clause of the Statute of the International Court of Justice and Part XV of the Law of the Sea Convention' (*NCLOS Blog*, 10 February 2017), https://site.uit.no/nclos/2017/02/10/the-relationship-between-declarations-under-the-optional-clause-of-the-statute-of-the-international-court-of-justice-and-part-xv-of-the-law-of-the-sea-convention/.

51 Canada, Declaration recognizing the jurisdiction of the Court as compulsory, 28 August 2023, https://www.icj-cij.org/declarations/ca.

52 Canada, Declaration under Article 287, https://www.itlos.org/en/main/jurisdiction/declarations-of-states-parties/declarations-made-by-states-parties-under-article-287/.

ITLOS or an arbitral tribunal.[53] Another potential impact is that States may be expected to specify those categories of law of the sea disputes they wish to exclude in their optional clause declarations.[54] The following *obiter dictum* from the Court's Judgment seems to imply as much:

> It is equally clear that if a reservation to an optional clause declaration excluded disputes concerning a particular subject (for example, a reservation excluding disputes relating to maritime delimitation), there would be no agreement to the Court's jurisdiction falling within Article 282, so the procedures provided for in Section 2 of Part XV would apply to those disputes, subject to the limitations and exceptions that result from the application of Section 3.[55]

Second, the ITLOS and Annex VII Arbitral Tribunals could very well be confronted with a Kenyan-type reservation applying between the parties appearing before them. What path UNCLOS tribunals would take in this respect remains speculative at present. Nonetheless, one can assume that attention would be paid to the attitude of the parties. The *Southern Bluefin Tuna Arbitration* is instructive. The parties to the proceedings had all lodged optional clause declarations pursuant to the ICJ Statute. Irrespective of that fact, Japan, which successfully challenged the arbitrators' jurisdiction on other grounds, did not raise that objection.[56] Given that Article 282 UNCLOS

53 A similar question could be posed as regards Madagascar, which has a reservation *ratione fori* in its optional clause declaration and selected only the ITLOS for the resolution of its UNCLOS-related disputes. International Court of Justice, 'Declarations recognizing the jurisdiction of the Court as compulsory – Madagascar, 2 July 1992' www.icj-cij.org/en/; United Nations Treaty Collection, 'United Nations Convention on the Law of the Sea – Declaration under Article 287, para 1 – Madagascar, 20 December 2012' http://treaties.un.org.

54 Kai-chieh Chan, 'The ICJ's Judgement in *Somalia v. Kenya* and Its Implications for the Law of the Sea' (2018) 34 Utrecht J Intl L & Eur L 195, 200. See also Natalie Klein and Kate Parlett, *Judging the Law of the Sea: Judicial Contributions to the UN Convention on the Law of the Sea* (OUP 2022) 62.

55 *Somalia v. Kenya* (n 1) para 128. In practice, several States do exempt specific types of marine or maritime disputes from their recognition of the ICJ's jurisdiction. For an illustration, see Japan's reservation: "any dispute arising out of, concerning, or relating to research on, or conservation, management or exploitation of, living resources of the sea." Japan, Declaration recognizing the jurisdiction of the Court as compulsory, 6 October 2015, https://www.icj-cij.org/declarations/jp. For further analysis, see Michael A Becker, 'Japan's New Optional Clause Declaration at the ICJ: A Pre-Emptive Strike?' (*EJIL*: Talk!, 20 October 2015) www.ejiltalk.org/japans-new-optional-clause-declaration-at-the-icj-a-pre-emptive-strike/.

56 See *Southern Bluefin Tuna Case* (n 17) para 39 (c).

is triggered "unless the parties to the dispute otherwise agree", abstention from invoking this argument could be viewed as an instance of acquiescence.[57]

Reluctant respondents, on the other hand, might argue that the dispute should have been submitted to the ICJ. Given ITLOS Judges' and Annex VII Arbitrators' consideration for the Court's jurisprudence,[58] it is possible that the reasoning expressed in the *Somalia v. Kenya* Judgment will exert influence on the approach to be adopted.[59] In any event, it seems prudent for an international tribunal dealing with Article 282 UNCLOS to take into account the outcome of relinquishing a case in favour of another forum. When the latter forum's jurisdiction is hampered by reservations, it may have to declare itself incompetent, leaving the dispute unadjudicated.[60]

Third, carve-outs for alternative means of dispute settlement come in different shades.[61] Three categories can be identified drawing on practice: general (referencing other means of peaceful settlement in a broad sense, such as Kenya); restricted (only certain methods); and matters excluded from judicial settlement or arbitration by way of agreement.[62] Do the Court's findings in *Somalia v. Kenya* extend to all classes of reservations *ratione fori*?[63] Suriname's optional clause declaration excludes "disputes in respect of which the parties, excluding the jurisdiction of the International Court of Justice, have agreed to settlement by means of arbitration, mediation or other methods of conciliation and accommodation".[64] The reservation could be read

57 P Chandrasekhara Rao and Philippe Gautier, *The International Tribunal for the Law of the Sea: Law, Practice and Procedure* (Edward Elgar 2018) 119. On the role played by acquiescence in establishing jurisdiction, see Jack Wass, 'Jurisdiction by Estoppel and Acquiescence in International Courts and Tribunals' (2016) 86 BYIL 155.

58 Including on matters of procedure, see Guillaume Le Floch, 'Le Tribunal international du droit de la mer: bilan et perspectives' in Guillaume Le Floch (ed), *Les 20 ans du Tribunal international du droit de la mer* (Pedone 2018) 39–43, 48–51 and 55–58.

59 Robin Churchill, 'Dispute Settlement in the Law of the Sea: Survey for 2017' (2018) 33 Intl J Marine & Coastal L 653, 677.

60 See Philippe Gautier, 'The Settlement of Disputes' in David Joseph Attard, Malgosia Fitzmaurice and Norman A Martínez Gutiérrez (eds), *The IMLI Manual on International Maritime Law* (vol 1, OUP 2014) 541.

61 Merrills (n 47) 908; Stanimir A Alexandrov, *Reservations in Unilateral Declarations Accepting the Compulsory Jurisdiction of the International Court of Justice* (Martinus Nijhoff 1995) 104–106.

62 Vanda Lamm, *Compulsory Jurisdiction in International Law* (Edward Elgar 2014) 140–141.

63 *Somalia v. Kenya* (n 1) para 129 specifically refers to reservations "with an effect similar to that of Kenya's reservation".

64 Suriname, Declaration recognizing the jurisdiction of the Court as compulsory, 31 August 1987, https://www.icj-cij.org/declarations/sr.

as excluding the Court's jurisdiction when Annex VII arbitration serves as the default mechanism between the parties.[65] The same logic arguably applies to a reservation in Latvia's ICJ declaration, which refers to "any dispute concerning a treaty, which provides either for recourse to some method of peaceful settlement that entails a binding decision or for a mechanism for monitoring implementation, whether or not they provide for access of Parties or any other persons or entities."[66] It is equally a matter of some conjecture how the Court's approach would relate to Norway's reservation, which explicitly contemplates dispute settlement under UNCLOS and UNFSA:

> [...] This declaration shall thereafter be tacitly renewed for additional periods of five years, unless notice of termination is given not less than six months before the expiration of the current period; provided, however, that the limitations and exceptions relating to the settlement of disputes pursuant to the provisions of, and the Norwegian declarations applicable at any given time to, the United Nations Convention on the Law of the Sea of 10 December 1982 and the Agreement of 4 December 1995 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, shall apply to all disputes concerning the law of the sea.[67]

Relevance for Dispute Settlement under the UNFSA and BBNJ Agreement

As stated in our initial overview of Part XV of UNCLOS, a considerable number of international agreements dealing with ocean issues incorporate Part XV *mutatis mutandis* either directly or in modified form.[68] To the extent that these agreements incorporate Article 282 or a modified version thereof,

65 Beatrice I Bonafé, 'Maritime Delimitation in the Indian Ocean (Somalia v. Kenya). Preliminary Objections' (2017) 111 AJIL 725, 730.

66 Latvia, Declaration recognizing the jurisdiction of the Court as compulsory, 24 September 2019, https://www.icj-cij.org/declarations/lv. For discussion of this declaration and the reservations it contains, see Valentin Schatz, 'The Snow Crab Dispute on the Continental Shelf of Svalbard: A Case-Study on Options for the Settlement of International Fisheries Access Disputes' (2020) 22 International Community Law Review 455, 465–468.

67 Norway, Declaration recognizing the jurisdiction of the Court as compulsory, 24 June 1996, https://www.icj-cij.org/declarations/no.

68 For a list of such agreements, see Treves (n 26) para 8.

the importance of the correct interpretation of this provision extends also to them.[69] By extension, the *Somalia v. Kenya* Judgment is of relevance in determining the relationship between optional clause declarations such as the ones discussed in the previous section and dispute settlement under treaties referring to Part XV of UNCLOS. Article 30(1) and (2) UNFSA are examples of direct incorporations of Article 282 UNCLOS via *mutatis mutandis* references. Accordingly, the reasoning in *Somalia v. Kenya* – if followed – should be transferrable. Similar observations may be made with respect to the recently adopted BBNJ Agreement. Already during the negotiations of this new agreement under UNCLOS, the then-President of the ITLOS shared his thoughts on design options for the dispute settlement provisions of the BBNJ Agreement:

> [...] I would like to take this opportunity to encourage negotiators to clarify the interplay between the application of Part XV of the Convention and other parallel arrangements or declarations conferring jurisdiction on other judicial bodies. In particular, in light of recent developments, it would be useful to clarify the relationship between declarations made under [Article 36 ICJ Statute] and the application of [Article 282 UNCLOS]. The legislative history of the Convention does not provide sufficient clarity on this matter.[70]

Notably, this statement was made shortly after the ICJ had rendered the *Somalia v. Kenya* Judgment in 2017. The drafters of BBNJ Agreement included dispute settlement provisions in Part IX.[71] Article 60(1) BBNJ Agreement provides for a

69 Natalie Klein, 'Law of the Sea Dispute Settlement Outside of the United Nations Convention on the Law of the Sea (UNCLOS) (2021)', in Hélène Ruiz Fabri (ed), *Max Planck Encyclopedia of International Procedural Law* (OUP, 2023) para 3.

70 'Statement by H.E. Vladimir Golitsyn, President of the International Tribunal for the Law of the Sea on the Report of the Tribunal at the Twenty-Seventh Meeting of States Parties to the United Nations Convention on the Law of the Sea, 12 June 2017', *ITLOS*, 2017 https://www.itlos.org/fileadmin/itlos/documents/statements_of_president/Golitsyn/27th_MSP_President_s_statement_NY_12_06_2017-E.pdf, 9–10. See also Vladimir Vladimirovich Golitsyn, 'The Potential Role of the Tribunal in light of its Experience after 20 Years' Judicial Activity' in ITLOS/TIDM (ed), *ITLOS at 20: Looking into the Future/Les 20 ans du TIDM: Regard sur l'avenir* (Compact Media 2018) 10–11; Joanna Mossop, 'Dispute Settlement in Areas beyond National Jurisdiction' in Vito de Lucia, Alex G. Oude Elferink and Lan Ngoc Nguyen (eds), *International Law and Marine Areas beyond National Jurisdiction: Reflections on Justice, Space, Knowledge and Power* (Brill 2022) 412.

71 On dispute settlement under the BBNJ Agreement, see generally: Liesbeth Lijnzaad, 'Dispute Settlement for Marine Biodiversity beyond National Jurisdiction: Not an

traditional *mutatis mutandis* incorporation of Part XV of UNCLOS. Article 60(2) BBNJ Agreement, however, is worded as follows: "[t]he provisions of Part XV of and Annexes V, VI, VII and VIII to the Convention shall be deemed to be replicated for the purpose of the settlement of disputes involving a Party to this Agreement that is not a Party to the Convention." This "replication" approach has been referred to by the President of the BBNJ Conference as "a 'mirror provision' to cover those parties who were not also party to the [Convention]".[72] It may be argued that the effect of the latter clause is comparable to Article 30(1) UNFSA. Together, these provisions of the BBNJ Agreement incorporate Article 282 UNCLOS in essentially the same manner as Article 30(1) and (2) UNFSA. That said, an innovation is present in Article 60(8) BBNJ Agreement, which states:

> The provisions of this article shall be without prejudice to the procedures on the settlement of disputes to which Parties have agreed as participants in a relevant legal instrument or framework, or as members of a relevant global, regional, subregional or sectoral body concerning the interpretation or application of such instruments and frameworks.

This statement does not modify the reference to Article 282 UNCLOS as it does not explicitly concern disputes under the BBNJ Agreement but instead refers to disputes under external agreements.[73] It may therefore be argued that Article 60(8) BBNJ Agreement merely recognizes that the dispute settlement procedures of external agreements are not affected by Part IX BBNJ Agreement insofar as disputes concern the interpretation or application of the external agreement.[74] As Part IX of the BBNJ Agreement in any event only covers

---

Afterthought', in Hélène Ruiz Fabri, Erik Franckx, Marco Benatar & Tamar Meshel (eds), *A Bridge Over Troubled Waters: Dispute Resolution in the Law of International Watercourses and the Law of the Sea* (Brill 2020) 147–182; Joanna Mossop, 'Dispute Settlement in Areas beyond National Jurisdiction', in Vito De Lucia, Alex Oude Elferink and Lan Ngoc Nguyen (eds), *International Law and Marine Areas beyond National Jurisdiction: Reflections on Justice, Space, Knowledge and Power* (Brill 2022) 392–420; Yubing Shi, 'Settlement of Disputes in a BBNJ Agreement: Options and Analysis' (2020) 122 Marine Policy 104156.

72 Statement by the President of the conference issued after the suspension of the fifth session, doc. A/CONF.232/2022/9, para. 52, available at: https://undocs.org/a/conf.232/2022/9.

73 Lan Ngoc Nguyen, Danae Georgoula and Alex Oude Elferink, 'Dispute Settlement Under the BBNJ Agreement: Accepting Part XV of the UNCLOS with a Twist' (EJIL: Talk!, 15 May 2023) https://www.ejiltalk.org/dispute-settlement-under-the-bbnj-agreement-accepting-part-xv-of-the-unclos-with-a-twist/.

74 But see ibid., who argue that Article 60(8) BBNJ Agreement "may be read as implying that dispute settlement procedures under other instruments and frameworks are insulated from the effect of the outcome of a related dispute settlement procedure under the BBNJ Agreement."

disputes concerning the interpretation or application of the BBNJ Agreement, the added effect of Article 60(8) remains to be determined in practice.

Concluding Thoughts

Beyond the practical ramifications addressed above, *Maritime Delimitation in the Indian Ocean* arguably signals a slight recalibration of law of the sea dispute settlement. In 1945, the founders of the United Nations sought to give pride of place to the ICJ for the settlement of legal disputes. Article 36(3) UN Charter provides that "[…] legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court."[75] During UNCLOS III, the delegations could not reach the same consensus in favour of the ICJ, nor the yet to be established ITLOS for that matter.[76] After painstaking and protracted discussions, they arrived at the following compromise in 1982: there would come a compulsory system, but priority would be given to arbitration (unless parties to a dispute agree otherwise).[77] This part of the package deal has shown great vitality, suffice it to mention the instrumental role of Annex VII Arbitral Tribunals in "heating up" the Permanent Court of Arbitration.[78] Fast-forward to the present day, the ICJ's Judgment has both established its jurisdiction with respect to a case that otherwise might not have been adjudicated and expounded on the Court's position in relation to the UNCLOS dispute settlement system. In doing so, the ICJ has provided an understanding of Part XV of UNCLOS, which

75 UN Charter, art 95 does still leave the door open to other adjudicatory bodies: "Nothing in the present Charter shall prevent Members of the United Nations from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future."

76 See Michael Wood, 'Choosing between Arbitration and a Permanent Court: Lessons from Inter-State Cases' (2017) 32 ICSID Rev 1, 5; Malcolm N Shaw, *Rosenne's Law and Practice of the International Court: 1920–2015* (5th edn, vol 2, Brill Nijhoff 2016) 825–826.

77 See Shabtai Rosenne, 'UNCLOS III – The Montreux (Riphagen) Compromise' in Adriaan Bos and Hugo Siblesz (eds), *Realism in Law-Making: Essays on International Law in Honour of Willem Riphagen* (Martinus Nijhoff 1986) 169–178.

78 Dapo Akande, 'The Peace Palace Heats Up Again: But Is Inter-State Arbitration Overtaking the ICJ?' (*EJIL*: Talk!, 17 February 2014) www.ejiltalk.org/the-peace-palace-heats-up-again-but-is-inter-state-arbitration-overtaking-the-icj/. See also 'Contribution of the Permanent Court of Arbitration to the Report of the United Nations Secretary-General on Oceans and the Law of the Sea, as at 16 June 2023' (*PCA*, 2023) https://pca-cpa.org/en/news/pca-publishes-contribution-to-2023-report-of-united-nations-secretary-general-on-oceans-and-the-law-of-the-sea/; UNGA Res. 77/322 (2023) (recognizing the significant growth of the PCA's services).

will assuredly continue to elicit scholarly analysis.[79] As we look to the future, the international community could take the *Somalia v. Kenya* Judgment as an invitation to consider how they wish to regulate the relationship between the ICJ and UNCLOS tribunals under future agreements.[80]

79 See e.g. Abel (n 31) 367–369.

80 On the interaction between the Court and other adjudicatory bodies, see generally Giorgio Gaja, 'Relationship of the ICJ with Other International Courts and Tribunals' in Andreas Zimmermann and Christian J Tams (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, OUP 2019) 647–660.