Entities Other Than States Parties: Is the International Tribunal for the Law of the Sea Competent to Deal with Disputes between Private Entities or Persons?

Regarding “entities other than the States Parties,” article 20.2 of the Statute allows them to access to the Tribunal in two cases: “in any case expressly provided for in Part XI or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case.”

At first sight, the phrase entities or persons other than States Parties might include the States not-Parties (whether signatories or not of the Convention), the entities assimilated to the States Parties by article 305.1, subparagraphs c to f, as long as they do not consent to be bound by the Convention, the international intergovernmental organizations and, finally, private entities or persons (individuals), be they natural or juridical.

The cases expressly provided for in Part XI are those listed in article 187. As we have seen before, apart from regulating disputes between States on the interpretation or application of Part XI, the provision also allows certain entities or persons of a different nature access to the Seabed Disputes Chamber for certain categories of disputes. In particular, such entities other than States Parties, depending on the cases in question, include the International Seabed Authority (art. 187, paragraphs b to e), the Enterprise (paragraph c), as well as the State enterprises and natural or juridical persons referred to in article 153.2.b (art. 187, paragraphs c to e). So, apart from the cases mentioned here in this paragraph, for other entities or persons other than States Parties, there is no access to ITLOS pursuant to Part XI of the Convention. The same would be true, in respect to the SDC, as set out in article 37 ST, which references Section 5 Part XI.

On the other hand, what is the precise meaning of the expression “any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to the dispute”? Does it refer only to those agreements that may be

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1 See also articles 306 and 307.
qualified as international treaties or, on the contrary, would its meaning also encompass other agreements of a different nature? Obviously, if the expression ‘any other agreement’ exclusively equates to international treaties, only those entities empowered by international law with ius tractatum (that is, States, entities of article 305.1, subparagraphs c to f, and international inter-governmental organizations) have access to ITLOS; private entities or persons are not among them. On the contrary, if the expression ‘any other agreement’ does not refer only to international treaties, the chance for individuals to access to the Hamburg Tribunal, even through a private deal or contract, would be unobstructed.

The Virginia Commentary, when analyzing article 20.2 of the Statute, says that “There is no limit on such entities, provided they are specified in the agreement by which all the parties to a case have accepted the jurisdiction of the Tribunal. Such entities would include (...) State enterprises and natural or juridical persons”; although, “under article 288, paragraph 2, of the Convention, any such “agreement” must be related to the purposes of the Convention.” To the latter, the Commentary adds, subsequently, that: “It is to be noted that the word ‘agreement’ in articles 20 and 21 of this Annex [vi] is broader than the phrase ‘international agreement’ in article 288, paragraph 2 of the Convention”; and that “in view of the specific provision in article 20, paragraph 2, the procedures available under Part XI and Annex VI are thus available to other entities to the extent accepted by all the parties to the agreement (...), and the restrictions in other Parts of the Convention applicable to the disputes relating to the interpretation or application of the Convention are not applicable to disputes under such separate agreements.” Finally, further on in the text, the said publication states that “the reference to ‘public or private’ international agreements was deleted, but deletion of the word ‘international’ before ‘agreement’ implied that the particular definitions of ‘treaty’ in the Vienna Convention on the Law of Treaties of 1969 (...) would not be applicable to the agreements envisaged by article 20.”

Along the same lines, one might place the position of Vukas and Nelson, inter alia. In Vukas’ opinion, “On the basis of such agreements the Tribunal may be open to an even wider range of entities than the one envisaged in article 305 of the Convention, including, for example, other inter-governmental organizations than those referred to in article 305, paragraph 1 (f) or even non-governmental organizations active and competent in the field of the law of the...

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2 Commentary, vol.v, A.vi. 115 to 117.