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Compulsory Settlement of EEZ Fisheries Enforcement Disputes under UNCLOS: "Swallowing the Rule" or "Balancing the Equation"?

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Abstract

While there is a widely held view that disputes concerning fisheries in the exclusive economic zone (EEZ) are largely exempt from the compulsory jurisdiction of courts and tribunals as a result of far-reaching exceptions in Part XV of the 1982 *United Nations Convention on the Law of the Sea* (LOSC), this is not the case for all EEZ fisheries disputes. This article examines the specific question of disputes concerning the *enforcement* of fisheries laws and regulations in the EEZ, and considers how the Part XV framework has been—or could be—used and interpreted for the compulsory settlement of EEZ fisheries enforcement disputes. It examines the obligation of prompt release established in Article 292, the option to exclude compulsory jurisdiction with respect to law enforcement activities concerning EEZ fisheries by written declaration under Article 298(1)(b), and the opportunity to bring disputes concerning EEZ fisheries enforcement within the scope of compulsory jurisdiction under Article 297(1) by characterising them as relating to the freedom of navigation or the protection and preservation of the marine environment. Framing its enquiry by reference to the question posed in this special issue, the article argues that, rather than "swallowing the rule" of compulsory jurisdiction, the jurisdictional scheme established for EEZ fisheries enforcement disputes helps to "balance the equation" and support the effectiveness of Part XV in protecting the compromises that are embodied in the LOSC.

A. Introduction

There is a widely held view that disputes concerning fisheries in the exclusive economic zone (EEZ) are largely exempt from compulsory dispute settlement, because the far-reaching exceptions under Part XV of the 1982 *United Nations Convention on the Law of the Sea* (LOSC or the Convention)[1] generally prevent judicial review of coastal State decisions in this area.[2] This is certainly true for many disputes concerning the coastal State's exercise of sovereign rights over living resources in the EEZ—but it is not the case for *all* EEZ fisheries disputes. This article examines the specific context of disputes concerning the *enforcement* of fisheries laws and regulations in the EEZ and considers how the Part XV framework has been—or could be—used and interpreted for the compulsory settlement of EEZ fisheries enforcement disputes. This enquiry is framed by the context of this special issue, which asks whether "the exception swallows the rule", inviting us to consider the relationship between the general "rule" in Part XV that all disputes concerning the interpretation or application of the LOSC are subject to compulsory settlement before an international court or tribunal, and the automatic "exception" in Article 297(3)(a) that generally precludes the application of that rule to disputes in respect of fishing and fisheries in the exclusive economic zone (EEZ). In the specific context of EEZ fisheries enforcement disputes, however, Article 297(3)(a) is not the only relevant exception in Part XV.

The jurisdictional framework governing coastal State enforcement of fisheries laws and regulations in the EEZ embodies some of the most fundamental tensions in the LOSC, and some of the most important compromises. The provisions of Part V demonstrate an expectation not only that coastal States will exercise their sovereign rights over living resources by establishing laws and regulations to govern fishing in the EEZ,[3] but a recognition that there will be occasions when foreign vessels will violate those laws and regulations, and that it will be necessary for coastal States to exercise enforcement jurisdiction in

1 *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 3 [LOSC].

2 See, eg, N. Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (2005), 176; R. Churchill, 'The Jurisprudence of the International Tribunal for the Law of the Sea Relating to Fisheries: Is There Much in the Net?' 22 *International Journal of Marine and Coastal Law* (2007) 3, 383, 389; D. R. Rothwell & T. Stephens, *The International Law of the Sea*, 2nd ed. (2016), 494.

3 LOSC, *supra* note 1. Arts. 56(1)(a) and 62(4).

response.[4] This pragmatic approach to the enforcement of coastal State *rights* is balanced by the establishment of coastal State *responsibilities*, which are designed to protect and preserve the legitimate freedoms of other States and their vessels. These include the requirements that the coastal State's regulations be "consistent with" the LOSC, that enforcement be limited to what is "necessary" to ensure compliance, that vessels and their crews be promptly released upon the posting of a reasonable bond or other security, that penalties for EEZ fishing offences not include corporal punishment or (without the agreement of the relevant State) imprisonment, and that flag States be promptly informed about the arrest of their vessels.[5]

The balance between rights and responsibilities for the conduct of fisheries enforcement in the EEZ established in Part V is carried through to Part XV of the Convention, where it informs the extent to which—and the circumstances in which—disputes involving different types of EEZ fisheries enforcement activities are subject to the compulsory jurisdiction of international courts and tribunals. This is reflected in:

- the obligation in Article 292 for all coastal States to submit to judicial proceedings in cases where it is alleged that their exercise of enforcement jurisdiction has not complied with the provisions for prompt release in Article 73(2)—which is designed to protect the rights of flag States and their vessels from unbridled coastal State authority;
- the option in Article 298(1)(b) for coastal States to exempt their law enforcement activities from compulsory dispute settlement in cases where the relevant laws and regulations involve the exercise of sovereign rights or jurisdiction that would automatically be exempt from compulsory jurisdiction pursuant to Article 297(3)(a) or (b)—which preserves the coastal State's discretion in exercising EEZ fisheries jurisdiction; and
- the opportunity in Article 297(1)(a) and (c) for coastal State enforcement activities to be subject to compulsory jurisdiction where it is alleged that the underlying laws and regulations do not legitimately attempt to regulate fishing, but instead contravene the navigational freedoms of other States or the rules for the protection and preservation of the marine

4 *Ibid*., Art. 73(1). This point reflects the framing provided by Professor Natalie Klein during the symposium on which this special issue is based, in her presentation on the LOSC fisheries dispute settlement framework.

5 *Ibid*., Art. 73(1)-(4).

environment—which functions as a broader check on the overall balance between the rights attributed to coastal and other States in the EEZ.

Pursuant to these provisions, despite the automatic "exception" for EEZ fisheries disputes provided by Article 297(3)(a), some disputes concerning the *enforcement* of EEZ fisheries laws are nonetheless effectively returned within—or, more accurately, remain within—the general "rule" of compulsory settlement. As a result, in the context of EEZ fisheries enforcement disputes it can be difficult to maintain a clear focus on what is the "rule" and what the "exception"—and beyond the question of whether the automatic exception for EEZ fisheries swallows the general rule of compulsory settlement, in the case of EEZ fisheries enforcement disputes it might be reasonable to ask whether there are other rules and exceptions in Part XV that swallow the automatic exception itself.

Rather than going down this wormhole, it is important to recall that at the level of principle, all the elements of Part XV—rules and exceptions alike—are part of a single framework specifically designed to protect and preserve the integrity of the compromises embodied in the substantive provisions of the LOSC. This is particularly true in the sensitive context of rights and interests in the EEZ, in relation to which the drafting of Part XV had to balance "extreme and conflicting views regarding the question of including or excluding certain disputes relating to the economic zone from binding dispute settlement procedures".[6] With this in mind, this article suggests that in the specific context of EEZ fisheries *enforcement* disputes, rather than "swallowing the rule" of compulsory jurisdiction, the jurisdictional scheme in Part XV helps to "balance the equation", and support the effectiveness of the LOSC dispute settlement framework as the "pivot upon which the delicate equilibrium of the compromise must be balanced".[7]

The first section of this article (Section B) lays the groundwork for this discussion by outlining the framework for the settlement of disputes in Part XV of the LOSC with a particular focus on identifying its jurisdictional effects, and how it might apply to EEZ fisheries law enforcement disputes. The subsequent sections consider how this framework has been—or could be—used

6 *Memorandum by the President of the Conference on Document A/CONF.62/WP.9*, UN Doc A/CONF.62/Wp.9/Add.1, 31 March 1976, reproduced in *Official Records of the Third United Nations Conference on the Law of the Sea, Volume V (Summary Records, Plenary, General Committee, First, Second and Third Committees, as Well as Documents of the Conference, Fourth Session*), 124.

7 *Ibid*., 122.

and interpreted for the compulsory settlement of EEZ fisheries enforcement disputes. Section C considers the obligation to submit to compulsory settlement in relation to prompt release applications under Article 292; Section D explores the effect of the option to exclude EEZ fisheries law enforcement disputes from compulsory settlement under Article 298(1)(b); and Section E considers the opportunities that might exist to seek the compulsory settlement of EEZ fisheries enforcement disputes under Article 297(1)(a) and (c). The final section draws on this analysis to provide some conclusions about the jurisdictional effect of the scheme for EEZ fisheries enforcement dispute settlement in Part XV of the LOSC (Section F).

B. The Part XV Framework for the Settlement of EEZ Fisheries Enforcement Disputes

The jurisdictional scheme for the settlement of EEZ fisheries enforcement disputes under the LOSC must be understood within the broader framework of Part XV. As described in detail in the many excellent works examining Part XV,[8] this framework is characterised by three distinct but inter-related Sections: Section 1 contains general provisions to encourage the peaceful settlement of disputes; Section 2 establishes procedures for the compulsory settlement of disputes; and Section 3 provides some limitations on and exceptions to compulsory settlement for specific categories of disputes.

I. Sections 1 and 2: Optional and Compulsory Settlement

Section 1 of Part XV provides a range of general provisions intended to encourage States to settle their disputes peacefully through traditional, consent-based processes including negotiation, conciliation, and the use of dispute settlement procedures established by the parties in other agreements or on an *ad hoc* basis. Some of these provisions have specific relevance to the scheme and scope of jurisdiction under Part XV. For example, if the parties to a dispute have agreed on alternative routes or mechanisms for the settlement of disputes involving the interpretation or application of the LOSC, the procedures in Part XV will not

[8] See, eg, Klein, *supra* note 2; C. Rao & P. Gautier, *The International Tribunal for the Law of the Sea: Law and Practice* (2018); B. H. Oxman, 'Courts and Tribunals: The ICJ, ITLOS and Arbitral Tribunals' in D. R. Rothwell *et al*., (eds), *The Oxford Handbook of the Law of the Sea* (2015), 395; R. Churchill, 'The General Dispute Settlement System of the UN Convention on the Law of the Sea: Overview, Context, and Use', 48 *Ocean Development & International Law* (2017) 1.

apply—thus providing an upfront 'carve-out' from any mandatory jurisdiction that might otherwise apply under Part XV (Articles 281 and 282).[9] Parties to the LOSC also have the right to settle disputes concerning the interpretation or application of the LOSC using peaceful means of their own choice at any time (Article 280), and must exchange views regarding the settlement of the dispute by peaceful means (Article 283)—a requirement which operates as a "condition precedent" to the compulsory jurisdiction of a court or tribunal under Part XV.[10]

If a dispute cannot be settled by the means set out in Section 1 of Part XV, any party to a dispute can invoke the compulsory procedures in Section 2. Pursuant to the general "rule" of compulsory dispute settlement in Article 286, any dispute concerning the interpretation or application of the LOSC can be submitted to a court or tribunal having jurisdiction under Section 2. Such proceedings give rise to final and binding decisions (Article 296). As a result, upon becoming Party to the LOSC, all States acquire both the right to institute binding dispute settlement proceedings against another Party or Parties and the obligation to submit to such proceedings. The choice of forum procedure in Article 287 enables Parties to lodge a written declaration indicating their preferred forum for dispute settlement—the International Tribunal for the Law of the Sea (ITLOS or the Tribunal), the International Court of Justice (ICJ or the Court), or an arbitral tribunal constituted in accordance with Annex VII or Annex VIII of the LOSC.[11] Article 287 also establishes a procedure for determining the forum to be used where the parties to the dispute have chosen different forums (or have not made a choice). Article 288 confirms that the courts and tribunals referred to in Article 287 have jurisdiction over any dispute

9 The effect of Art. 281 is to exclude jurisdiction under Part XV if the parties to a dispute have agreed to resolve it by another means and, even though no resolution is reached by those means, the agreement between the parties specifically excludes any further resort to the LOSC dispute resolution procedures. The effect of Art. 282 is to exclude jurisdiction under Part XV if the parties to the dispute have agreed to another dispute resolution procedure pursuant to a general, regional or bilateral agreement, but only if that procedure entails a binding decision.

10 This requirement is incorporated into Section 2 by reference in Art. 286. See *The M/V "Louisa" (Saint Vincent and the Grenadines v. Spain)*, ITLOS, *Case No. 18*, Judgment, 28 May 2013, Separate Opinion of Judge Ndiaye, paras. 23-26.

11 Since the United Nations Secretary-General is the depositary for these declarations, official information on their content can be found through the United Nations Treaty Collection. However, unofficial versions are available on the ITLOS website: 'Declarations made by States Parties under article 287', available at https://www.itlos.org/en/main/jurisdiction/declarations-of-states-parties/declarations-made-by-states-parties-under-article-287/ (last visited 8 September 2022).

concerning the interpretation or application of the LOSC which is submitted to them in accordance with Part XV and can determine their own jurisdiction in the case of a dispute. And of particular relevance to this article, Section 2 also provides for residual compulsory jurisdiction in circumstances requiring expeditious action—namely, allegations of a failure to promptly release vessels and crews in accordance with the provisions of the LOSC (Article 292), and requests for the prescription of provisional measures (Article 290).[12]

II. Section 3: Automatic Limitations and Optional Exceptions

Critically, the general "rule" of compulsory dispute settlement established in Section 2 is subject to the automatic limitations and optional exceptions established in Section 3 of Part XV.[13] These limitations and exceptions address a range of issues in relation to which States were reluctant to accept compulsory dispute settlement during the LOSC negotiations. They relate primarily to disputes that might be considered to involve matters of "vital national concern", such as a coastal State's exercise or enforcement of sovereign rights over living resources in the EEZ, maritime boundary delimitation, and the conduct of military activities.[14] But Section 3 does not only limit or exclude the application of compulsory jurisdiction—it also specifically *confirms* a number of issues in relation to which Section 2 is applicable and compulsory settlement procedures *do* apply. These involve the exercise of traditional freedoms of the high seas in areas under coastal State jurisdiction—including the freedoms and rights of navigation, the protection and preservation of the marine environment, and the conduct of marine scientific research—as well as fisheries disputes which do not relate to the coastal State's sovereign rights in the EEZ. These automatic limitations, optional exceptions and positive confirmations are contained in Articles 297 and 298, which share a common origin in the negotiations of the LOSC,[15] but produce a range of quite specific jurisdictional effects in relation

12 S. Trevisanut, 'Twenty Years of Prompt Release of Vessels: Admissibility, Jurisdiction, and Recent Trends' 48 *Ocean Development & International Law* (2017) 3-4, 300, 300.

13 LOSC, *supra* note 1, Art. 286.

14 G. Guillaume, 'The Future of International Judicial Institutions', 44 *The International and Comparative Law Quarterly* (1995) 4, 848, 855.

15 For a useful account of the history and development of the exceptions and limitations in Arts. 297 and 298 of the LOSC, see eg: S. Nandan, S. Rosenne & L. B. Sohn (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary, Volume V* (1989), 87–105; A. Serdy, 'Article 297' and 'Article 298'in A. Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (2017), 1906-1932.

to different issues. As these Articles are critical to the jurisdictional scheme for EEZ fisheries enforcement disputes, it is useful to outline them in greater detail.

Article 297 is focused on balancing the interests of coastal States and other States in relation to activities in the EEZ and on the continental shelf. To achieve this balance, Article 297 both confirms that compulsory dispute settlement procedures *do* apply to certain categories of dispute, and automatically *limits* their application to other categories of dispute.[16] Specifically, paragraph 1 of Article 297 confirms that the compulsory procedures established in Section 2 *do* apply to disputes involving allegations that:

- a coastal State has contravened the freedoms and rights of navigation, overflight, the laying of submarine cables or pipelines, or other internationally lawful uses of the sea specified in Article 58 (Article 297(1)(a));
- a State exercising such freedoms, rights or uses has contravened relevant laws of the coastal State or other rules of international law (Article 297(1)(b)); and
- a coastal State has contravened specified international rules and standards for the protection and preservation of the marine environment (Article 297(1)(c)).

Paragraphs 2 and 3 of Article 297 similarly confirm that the compulsory procedures in Section 2 apply to disputes concerning the interpretation or application of the LOSC with respect to marine scientific research and fisheries, respectively. But these paragraphs also *exclude* compulsory settlement for disputes relating to:

[16] In recent years there has been a significant debate about the interpretation to be given to Art. 297(1). While the "orthodox" view has generally been that a coastal State is immune from challenge with regard to the exercise of its sovereign rights *except* in the specific cases enumerated in Art. 297, the Arbitral Tribunal in the 2015 *Chagos Arbitration* adopted a different construction, based on a starting assumption that courts and tribunals retain compulsory jurisdiction in all cases other than those excluded by Art. 297: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of the Arbitral Tribunal, 18 March 2015, Reports of Arbitrial Awards PCA Case No. 2011-03, paras 306-322. See *infra*, Section E(I), and generally S. Allen, 'Article 297 of the United Nations Convention on the Law of the Sea and the Scope of Mandatory Jurisdiction', 48 *Ocean Development & International Law* (2017) 3–4, 313.

- the exercise of coastal State rights and discretions regarding scientific research (Article 297(2)(a)); or

the exercise of coastal State sovereign rights over living resources in the EEZ, including its discretionary powers to determine the allowable catch, its harvesting capacity, the allocation of surpluses to other States, and the terms and conditions established in its laws and regulations (Article 297(3)(a)).[17]

Adopting the formulation used in this special issue, the limitations in Article 297(3)(a) thus establish an automatic "exception" that generally precludes the application of the "rule" of compulsory settlement to disputes in respect of fishing and fisheries in the EEZ.

Article 298 provides States Parties with the *option* to exclude certain categories of dispute from the compulsory dispute settlement procedures established in Section 2. Article 298 is not focused specifically on the EEZ in the same way as Article 297. Instead, it addresses a range of issues that the LOSC negotiators considered were "too sensitive" to be submitted to compulsory dispute settlement leading to a binding outcome.[18] This includes disputes relating to:

- maritime boundary delimitations or historic bays or titles (Article 298(1)(a));[19]
- military activities, or law enforcement activities regarding the exercise of sovereign rights or jurisdiction which are excluded from compulsory jurisdiction under Article 297(2) or (3) (Article 298(1)(b)); and
- the maintenance of international peace and security, being dealt with by the United Nations Security Council (Article 298(1)(c)).

As an "optional exception" rather than an "automatic limitation" to the compulsory procedures in Section 2, the exclusions under Article 298 only apply

17 While these categories of dispute are exempt from the compulsory procedures in Section 2, Part XV nonetheless provides that where no resolution can be reached by recourse to Section 1, any party to the dispute may request that it be submitted to compulsory conciliation in accordance with procedures specified in Annex V of the LOSC: LOSC, *supra* note 1, Arts. 297(2)(b) and (3)(b).

18 Nandan, *supra* note 15, 109; Serdy, *supra* note 15, 1921.

19 Similarly to disputes which are automatically excluded from the compulsory procedures in Section 2 by virtue of Art. 297(2)(a) and (3)(a), disputes excluded by declaration under Art. 298(1)(a) which arise subsequent to the entry into force of the LOSC can be submitted to compulsory conciliation under Annex V: LOSC, *supra* note 1, Art. 298(1)(a)(i).

if a Party specifically exercises the option by lodging a written declaration to exclude compulsory dispute settlement in relation to one or more categories of dispute.[20] Such declarations are based on reciprocity—meaning that any State which has made a declaration under Article 298(1) exempting itself from compulsory proceedings may not institute such proceedings against another State with respect to any dispute falling within the scope of its own declaration (Article 298(3)). Importantly, declarations under Article 298(1) are not "self-judging" and do not automatically bar the institution of proceedings under Section 2, so the question of jurisdiction remains to be determined by the relevant court or tribunal.[21] And consistent with the underlying emphasis throughout Part XV on the consent of the parties to the dispute, even where a dispute is automatically excluded from compulsory settlement under Article 297 or excepted by a declaration under Article 298, it can still be submitted for settlement by agreement between the parties.[22]

III. Mechanisms for the Settlement of EEZ Fisheries Enforcement Disputes

This brings us to the question of whether—and how—disputes involving the enforcement of fisheries laws and regulations in the EEZ can be subject to compulsory settlement under this framework. As noted above, Article 297(3)(a) provides an "automatic exception" from compulsory settlement for disputes relating to the coastal State's exercise of sovereign rights over living resources in the EEZ, including its discretionary powers to determine the allowable catch, its harvesting capacity, the allocation of surpluses to other States, and the terms and conditions established in its laws and regulations. While it is thus true that

20 Since the United Nations Secretary-General is the depositary for these declarations, official information on their content can be found through the United Nations Treaty Collection. However, unofficial versions are available on the ITLOS website: 'Declarations made by States Parties under article 298', available at https://www.itlos.org/en/main/jurisdiction/declarations-of-states-parties/declarations-made-by-states-parties-under-article-298/ (last visited 19 September 2022).

21 Klein, *supra* note 2, 123. See, for example, the Tribunal's consideration of the jurisdictional effect of Russia's declaration under Article 298(1)(b) in 'Arctic Sunrise Arbitration (Netherlands v. Russia)', Award on Jurisdiction, 26 November 2014, 32 *Reports on International Arbitral Awards*, 186, 200-204, paras 65-78 [*Arctic Sunrise Arbitration*].

22 LOSC, *supra* note 1, Art. 299. This is consistent with the specification in Art. 280 that nothing in Part XV impairs the rights of States Parties to agree at any time to settle a dispute between them involving the interpretation or application of the LOSC using any peaceful means of their own choice.

in the context of EEZ fisheries disputes, the provisions of Part XV establish a "very far-reaching exception"[23] to jurisdiction and "largely insulate the decisions of the coastal State from review",[24] this is not necessarily the case with respect to disputes regarding the actions taken by the coastal State to *enforce* those decisions. In fact, Part XV contains three mechanisms which enable the compulsory settlement of disputes involving the enforcement of EEZ fisheries laws and regulations in certain situations.

The first is Article 292, which provides compulsory jurisdiction with respect to the prompt release of vessels and crew detained by a coastal State in relation to fisheries offences committed in its EEZ. The prompt release procedure is an *obligation*; it applies automatically to all States Parties to the LOSC, and there is no possibility to opt out or limit its application.

The second mechanism is a corollary of the law enforcement activities exception in Article 298(1)(b). It arises as a result of the optional exception to compulsory jurisdiction for "law enforcement activities in regard to the exercise of sovereign rights or jurisdiction" which are excluded from the jurisdiction of a court or tribunal under Part XV by virtue of Article 297(2) or (3). In contrast to prompt release, this is effectively an *optional* exception which operates like a displaceable presumption; pursuant to Article 298(1)(b), compulsory dispute settlement *does* apply to such law enforcement activities *unless* a State Party has made a written declaration stating that it does not accept such procedures.

The third mechanism arises under Article 297(1), pursuant to which compulsory jurisdiction *does* apply to disputes in which it is alleged that a coastal State has contravened the freedoms and rights of navigation or acted in contravention of specified international rules and standards in the protection and preservation of the marine environment. This basis of jurisdiction could be described as an *opportunity*, since it may allow disputes to be framed in a way that brings them within the remit of compulsory dispute settlement, even though they relate to the enforcement of fisheries regulations.

Each of these mechanisms will be examined individually in the following Sections in order to identify both their intended and actual operation. This discussion focuses particularly on revealing the way in which—and the extent to which—States have engaged with these mechanisms, their actual or potential interpretation by international courts and tribunals, and the questions and possibilities that remain open in relation to compulsory settlement of EEZ fisheries enforcement disputes.

[23] Churchill, *supra* note 2, 389.
[24] Klein, *supra* note 2, 176.

C. Article 292: The Obligation to Submit to Prompt Release Proceedings

The first mechanism that enables the compulsory settlement of EEZ fisheries enforcement disputes is the procedure for the prompt release of vessels and crew established in Article 292 of the LOSC. Article 292 applies in cases where a fishing vessel and crew have been arrested for EEZ fisheries offences under Article 73(1), and the coastal State (or "detaining State")[25] has not complied with the requirement in Article 73(2) to promptly release the vessel or its crew upon the posting of a reasonable bond or other security. In such cases, an application for release may be made to a court or tribunal by or on behalf of the flag State under Article 292.[26] The application may be submitted to any court or tribunal agreed upon by the parties or—if such agreement cannot be reached within 10 days from the time of detention—to a court or tribunal accepted by the coastal State under Article 287 of the LOSC, or to ITLOS.

The prompt release mechanism was introduced to the LOSC to counterbalance the coastal State's rights to arrest and detain foreign vessels for fishing and pollution offences in the EEZ. Originally introduced and championed

[25] LOSC, *supra* note 1, Art. 292 (1).

[26] To date, all except one of the cases initiated under Art. 292 have involved EEZ fisheries enforcement and the alleged infringement of the requirements for prompt release of vessels and crew in Art. 73(2). However, the application of the prompt release mechanism in Art. 292 is not limited to Art. 73(2)—it is expressed to apply in cases where the detaining State "has not complied with the provisions of [the LOSC]" for the prompt release of a vessel or its crew. Accordingly, Art. 292 could also be invoked based on Art. 220(7) in relation to vessels detained for proceedings under Art. 220(6) (with respect to vessel source pollution causing damage to the coastal State), and under Art. 226(1)(b) in relation to vessels detained for investigation under Arts. 216 (with respect to pollution by dumping) and 218 or 220 (with respect to vessel source pollution). The only prompt release application not to have been based on Art. 73 is the *Heroic Indun* proceedings, initiated by the Marshall Islands on 10 November 2022 to seek prompt release of a crude oil carrier and its crew which had been arrested by Equatorial Guinea. This case was not based on Arts. 220 or 226 either. Rather, the Application submitted by the Marshall Islands asserted that Art. 292 should be subject to a "non-restrictive interpretation" and that applications for prompt release under Art. 292 are not restricted to Arts. 73, 220 or 226: The *"Heroic Indun" Case (Marshall Islands v Equatorial Guinea)*, ITLOS, *Case No. 30, Prompt Release*, Application Submitted by the Republic of the Marshall Islands, 9 November 2022, paras 59–70. Since the Marshall Islands requested discontinuance of the case on 15 November 2022, this assertion was not considered by ITLOS—and since this case has no basis in Art. 73(2) and no bearing on the role of prompt release in relation to EEZ fisheries disputes, it is not discussed further in this article.

by the United States,[27] it was intended to offset any "overly enthusiastic implementation of the coastal State's enforcement powers" by providing a procedural safeguard against the prolonged detention of vessels and crews—and against the potentially significant financial damage that such detention could inflict on shipowners.[28] Like other provisions relating to the balance between sovereign rights and freedoms, Article 292 involved a number of important (and controversial) compromises, and has from the outset been subject to significant criticism—including in a particularly critical piece from Judge Oda (writing extra-judicially in 1995), who stated that "the whole structure of provisions for the prompt release of vessels and their crews under Article 292 … does not make any sense and is in fact unworkable."[29]

Notwithstanding this criticism, nearly one third of all the cases instituted before ITLOS have involved an application under Article 292 for the prompt release of vessels and crew based on an alleged infringement of the requirements in Article 73(2).[30] Of these nine cases:

- six have resulted in a judgment on the question of compliance with the requirements of the LOSC (*The M/V "Saiga" Case*,[31] *The "Camouco" Case*,[32]

[27] On the development of the prompt release procedure, see, eg, Nandan, *supra* note 15, 67–70; T. Treves, 'Article 292' in A. Proelss (ed.), *United Nations Convention on the Law of the Sea: A Commentary* (2017), 1881, 1883.

[28] Klein, *supra* note 2, 86. In the context of prompt release of fishing vessels and crew under Article 73(2), ITLOS has stated that the obligation also includes "elementary considerations of humanity and due process of law" and that "a concern for fairness" is one of the purposes of the provision: *The "Juno Trader" Case (Saint Vincent and The Grenadines v. Guinea-Bissau)*, ITLOS, *Case No. 13, Prompt Release*, Judgment, 18 December 2004, para 77 [*The "Juno Trader" Case*].

[29] S. Oda, 'Dispute Settlement Prospects in the Law of the Sea', 44 *International and Comparative Law Quarterly* (1995) 4, 863, 866–867.

[30] At the time of writing, 29 cases had so far been instituted before ITLOS, of which nine were founded on Arts. 292 and 73(2). See https://www.itlos.org/en/main/cases/list-of-cases/ (last accessed 9 September 2022). While Art. 292 provides for prompt release proceedings to be submitted to any court or tribunal agreed upon by the parties, in practice, this procedure has fallen entirely to ITLOS.

[31] "*Saiga*" *(Saint Vincent and the Grenadines v. Guinea)*, ITLOS, *Case No. 1, Prompt Release*, Judgment, 4 December 1997 [*The M/V "Saiga" Case*].

[32] "*Camouco*" *(Panama v. France)*, ITLOS, *Case No. 5, Prompt Release*, Judgment, 7 February 2000 [*The "Camouco" Case*].

The "Monte Confurco" Case,[33] *The "Volga" Case*,[34] *The "Juno Trader" Case*,[35] and *The "Hoshinmaru" Case*);[36]

- one was dismissed for a lack of jurisdiction (*The "Grand Prince" Case*);[37]
- one was dismissed for a lack of object (and thus admissibility) (*The "Tomimaru" Case*);[38] and
- one was discontinued by agreement (*Chaisiri Reefer*).[39]
- Notably, all of these cases relate to a single ten-year period—between 1997 and 2007—and no prompt release cases based on Article 73(2) have been brought since. While this provides food for thought about the future role of Article 292 in the overall operation of Part XV,[40] some key

33 "*Monte Confurco*" *(Seychelles v. France)*, ITLOS, *Case No. 6, Prompt Release*, Judgment, 18 December 2000 [*The "Monte Confurco" Case*].

34 *"Volga" (Russian Federation v. Australia)*, ITLOS, *Case No. 11, Prompt Release*, Judgment, 23 December 2002 [*The "Volga" Case*].

35 *"Juno Trader"*, *supra* note 28.

36 *"Hoshinmaru" (Japan v. Russian Federation)*, ITLOS, *Case No. 14, Prompt Release*, Judgment, 6 August 2007 [*The "Hoshinmaru" Case*].

37 *"Grand Prince" (Belize v. France)*, ITLOS, *Case No. 8, Prompt Release*, Judgment, 20 April 2001 [*The "Grand Prince" Case*].

38 *"Tomimaru" (Japan v. Russian Federation)*, ITLOS, *Case No. 15, Prompt Release*, Judgment, 6 August 2007 [*The "Tomimuaru" Case*].

39 *"Chaisiri Reefer 2" (Panama v. Yemen)*, ITLOS, *Case No. 9, Prompt Release*, Order, 13 July 2001. The Chaisiri Reefer case was discontinued by the parties in consequence of having reached a settlement on the release of the vessel, its crew and cargo.

40 There could be a number of reasons why no Art. 73(2) prompt release cases have been brought since 2007. One possibility is that the prompt release decisions issued by ITLOS have sufficiently clarified the application of Article 73—but this is not supported by the literature, which notes that these decisions lack clarity and fail to clearly establish how the criteria they set out are to be weighted or applied in practice: see, eg, the views discussed in C. Goodman, *Coastal State Jurisdiction over Living Resources in the Exclusive Economic Zone* (2021), 258. Another possibility is that States have found alternative avenues to seek the release of vessels and crew—such as through provisional measures applications under Article 290 of the LOSC, in which the release of vessels and/or crew have been ordered in a number of recent cases: *"ARA Libertad" (Argentina v. Ghana)*, ITLOS, *Case No. 20*, *Provisional Measures*, Order of 15 December 2012; *"Arctic Sunrise" (Netherlands v. Russian Federation)*, ITLOS, *Case No. 22, Provisional Measures*, Order of 22 November 2013; *Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation)*, ITLOS, *Case No. 26, Prompt Release*, Order of 25 May 2019; *"San Padre Pio" (Switzerland v. Nigeria)*, ITLOS, *Case No. 27, Provisional Measures*, Order of 6 July 2019. However, since none of these cases involved a fishing vessel or crew, this seems unlikely

themes regarding its role and contribution to date can be found in the broader body of evidence arising from these nine cases. These cases reveal three things that have had a significant influence on the jurisdictional effect of Article 292: the obligatory nature of prompt release; the strict interpretation of procedural issues relating to the exercise of jurisdiction; and a restrictive approach to questions of admissibility.

I. The Obligatory Nature of the Prompt Release Mechanism

Most obviously—but perhaps also most importantly—Article 292 is an obligation and has universal application. There are no exceptions to the requirement to submit to proceedings under Article 292. In particular, even though they concern "law enforcement activities" related to the exercise of sovereign rights or jurisdiction over living resources in the EEZ, proceedings under Article 292 are not excluded from compulsory settlement by the operation of Articles 297 or 298(1)(b). This was confirmed by Judges Wolfrum and Yamamoto in the *M/V "Saiga" case*,[41] and is consistent with the practice of States relating to prompt release proceedings. For example, while the failure to promptly release a vessel and crew arrested under Article 73(1) is arguably itself a law enforcement activity that would fall within the scope of a declaration under Article 298(1)(b), in responding to prompt release proceedings, coastal States have *not* sought to assert that such a declaration precludes the institution of proceedings under Article 292 to review compliance with the prompt release obligation in Article 73(2).[42]

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to be the reason that Art 73. prompt release cases have not been instituted under Art. 292. Other more likely reasons include: that the outcomes of previous decisions have deterred the institution of prompt release cases; that flag States and/or coastal States consider that the costs of such cases are too high (in terms of time, money, reputation and relationships), and have chosen to find other routes to resolve differences of opinion about what constitutes a "reasonable bond"; or that the international community's approach to the importance and severity of illegal fishing has changed, such that flag States or vessel owners no longer take issue with the bonds set by coastal States in the same way.

41 *The M/V "Saiga" Case*, *supra* note 31, Dissenting Opinion of Vice-President Wolfrum and Judge Yamamoto, para. 18.

42 For example, both France and Russia have made declarations under Art. 298(1)(b) excluding compulsory jurisdiction over "law enforcement activities" relating to the exercise of sovereign rights and jurisdiction excluded from the jurisdiction of a court or tribunal under Art. 297(2) or (3). However, as coastal States responding to proceedings under Art. 292 relating to the failure to comply with the prompt release obligation in Art. 73(2), neither has argued that their Art. 298(1)(b) declaration precluded the institution

Further confirmation of this approach can be found—by distinction—in the "*Grand Prince*" case, in which the flag State (Belize) sought to invoke Article 292 against the coastal State (France) in order to secure the release of a vessel in circumstances where the domestic judicial proceedings had concluded, and the vessel had been confiscated pursuant to the operation of national law. France argued that since the penalty of confiscation had already been applied in an exercise of France's enforcement powers under Article 73(1), there was no issue of prompt release, and no grounds for a proceeding under Article 292.[43] France asserted that the case instead concerned a "dispute" of a different kind relating to the exercise by France of its sovereign rights; that such disputes do not fall within Article 292; and that France *was* thus entitled to rely on its declaration under Article 298(1)(b) to reject the submission of the dispute to compulsory settlement.[44]

In this connection, it is perhaps important to note that the prompt release mechanism established in Article 292 is not, strictly speaking, a procedure for the compulsory settlement of "disputes" under the LOSC. The word "dispute" does not appear in the text of Article 292, which is instead framed by reference to "the question of release from detention",[45] and a court or tribunal considering a prompt release application is specifically restricted to dealing with this question.[46] Nonetheless, prompt release is "a definite procedure, it is not preliminary or incidental."[47] Accordingly, Article 292 is best understood as providing an exceptional grant of compulsory jurisdiction which is uniquely limited to enforcing the duty of prompt release—and can thus be distinguished from disputes "concerning the interpretation or application" of the LOSC as

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of the prompt release proceedings. See: *The "Camouco" Case*, *supra* note 32; *The "Monte Confurco" Case*, *supra* note 33; *The "Hoshinmaru" Case*, *supra* note 36; *The "Tomimaru Case"*, *supra* note 38.

43 *The "Grand Prince" Case*, *supra* note 37, Written Observations of France (Revised Translation of 4 April 2001).

44 *Ibid*. The proceedings were dismissed by ITLOS for a lack of jurisdiction—although this related to a lack of documentary evidence that Belize was the flag State of the vessel when the application for prompt release was made, rather than a lack of jurisdiction with respect to the "dispute" itself as asserted by France. However, the Separate Opinion of Judge Anderson and the Declaration of Judge *ad hoc* Cot both indicated some support for the position put by France: *The "Grand Prince" Case*, *supra* note 37, Separate Opinion of Judge Anderson, 55-57; Declaration of Judge *ad hoc* Cot, 51-52.

45 LOSC, *supra* note 1, Art. 292(1).

46 LOSC, *supra* note 1, Art. 292(3).

47 *The M/V "Saiga" Case*, *supra* note 31, Dissenting Opinion of Vice-President Wolfrum and Judge Yamamoto, para. 6.

envisaged in Article 288, including those regarding the legality of fisheries law enforcement activities.[48] As described by Judge Anderson, it is a "special procedure … which exists alongside the normal procedures for the settlement of disputes concerning the interpretation of the [LOSC] provided for in the remainder of Part XV".[49]

But regardless of whether or not Article 292 is formally categorized as a "dispute" for the purposes of Part XV, it is clear that most prompt release cases meet the general definition of a dispute under international law: they involve a "disagreement on a point of law or fact, a conflict of legal views or of interests"[50] and a claim of one party that is positively opposed by the other party.[51] And since they involve judicial consideration and entail binding decisions on coastal State actions relating to EEZ fisheries enforcement, they are certainly relevant to this inquiry about how—and whether—the Part XV framework for the settlement of EEZ fisheries enforcement disputes serves to maintain the balance of interests in the LOSC.

II. Strict Application of the Conditions Required to Establish Jurisdiction

While the reach of the Tribunal's compulsory jurisdiction *rationae personae* under Article 292 is very broad—in that it applies to all States by obligation and without exception—its application has been restrained by the procedural conditions on the exercise of that jurisdiction. In this respect, the caselaw shows that the Tribunal has adhered strictly to the text of Article 292 in considering the conditions precedent to the exercise of jurisdiction, including by ensuring that jurisdiction is both adequately *enabled* and appropriately *limited*. Article 292 establishes four conditions that must be fulfilled in order for a tribunal to have jurisdiction in prompt release proceedings:[52]

48 B. H. Oxman & V. P. Coglianti-Bantz, 'The Grand Prince Case', 96 *American Journal of International Law* (2002) 1, 219, 224 fn. 43.

49 *The "Grand Prince" Case*, *supra* note 37, Separate Opinion of Judge Anderson, 57. Similarly, *The M/V "Saiga" Case*, *supra* note 31, Dissenting Opinion of Judge Anderson, para. 11.

50 *Mavrommatis Palestine Concessions*, PCIJ Series A, No. 2 (1927), 11; cited by the Tribunal in *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, *Provisional Measures*, ITLOS, Cases No. 3 and 4, Order of 27 August 1999, para. 44 [*Southern Bluefin Tuna*].

51 *South West Africa (Liberia v. South Africa; Ethiopia v. South Africa) Preliminary Objections*, Judgment, ICJ Reports 1962, 319, 328; cited by the Tribunal in *Southern Bluefin Tuna*, *supra* note 49, para. 44.

52 Even if there is no disagreement between the parties regarding its jurisdiction, ITLOS "must satisfy itself that it has jurisdiction to deal with the case as submitted": ITLOS,

- both the coastal and flag States must be Parties to the LOSC;[53]
- the vessel must have been "detained" by the coastal State;[54]
- more than 10 days must have passed since the vessel was detained, and the parties have not agreed to submit the question of release to another court or tribunal;[55] and
- the proceedings must be instituted "by or on behalf of the flag State of the vessel".[56]

The first three conditions are uncontroversial and have been easily established in all cases.[57] The third condition has proved more ambiguous and has given rise to jurisdictional challenges in four of the eight cases that have been considered under Article 292.[58] This has allowed ITLOS to clarify several things about this requirement.

"Saiga" (Saint Vincent and the Grenadines v. Guinea), Case No. 2, Judgment, 1 July 1999, para. 40 [*M/V "Saiga" (No. 2)*]. See also *The "Grand Prince" Case*, *supra* note 37, para. 77: "a tribunal must at all times be satisfied that it has jurisdiction to entertain the case submitted to it. For this purpose, it has the power to examine *proprio motu* the basis of its jurisdiction."

53 LOSC, *supra* note 1, Art. 292(1).

54 *Ibid*.

55 *Ibid*.

56 *Ibid*., Art. 292(2).

57 Although there has never been a dispute as to whether or not a *vessel* has been "detained" for the purpose of Article 292, in some cases the coastal State has argued that the *crew* are not detained along with the vessel, particularly in cases where they are not physically in detention but are subject to judicial supervision and have had their passports removed. However, ITLOS has not addressed this as a question of jurisdiction, but as part of its substantive consideration of whether or not the coastal State has failed to comply with the requirements of Article 73(2). The effect of these decisions is that crew should be considered to be "detained" (meaning that their release can be ordered by ITLOS) unless they are free to leave the coastal State without conditions. See: *The "Camouco" Case*, *supra* note 32, para. 71; *The "Monte Confurco" Case*, *supra* note 33, para. 90; *The "Hoshinmaru" Case*, *supra* note 36, paras. 74–77; *The "Juno Trader" Case*, *supra* note 28, paras. 78–80.

58 *The M/V "Saiga" Case*, *supra* note 31; *The "Grand Prince" Case*, *supra* note 37; *The "Juno Trader" Case*, *supra* note 28 and *The "Tomimaru" Case*, *supra* note 38. As Mensah has noted (writing after the expiry of his term as an ITLOS Judge), some of the declarations and separate opinions in *The Grand Prince Case* appeared to suggest that the nationality of the vessel is a question of admissibility rather than jurisdiction: T. A. Mensah, 'The Tribunal and the Prompt Release of Vessels', 22 *International Journal of Marine and Coastal Law* (2007) 3, 425, 432.1982. However, this is clearly included in Art. 292(2)

First, prompt release proceedings may be made 'on behalf of' a flag State by private persons (such as vessel owners) representing private interests, provided that the person making the application is authorized by the flag State and that a copy of the application and all supporting documents is delivered to the flag State in accordance with the requirements of Article 110 of the Rules of the Tribunal.[59] This has proved to be the dominant practice in prompt release proceedings: only three of the applications instituted under Article 292 have been made by the flag State and involved representation from government officials;[60] the other cases have been instituted and prosecuted on behalf of the flag State by private legal practitioners, authorized by the flag State and presumably retained by vessel owners. This has given rise to some concern about *whose* interests are being protected through a prompt release application, and how that should affect the Tribunal's consideration of what is a "reasonable" bond within the discretion of the coastal State and what is necessary to preserve the interests of the flag State.[61]

Second, regardless of whether the Applicant in a prompt release case is the flag State itself or a private person acting on behalf of the flag State with its authorization, ITLOS has confirmed that the Applicant bears the initial burden of establishing the nationality of the vessel and thus proving its competence to take up the question of prompt release under Article 292.[62] In determining the nationality of a vessel, ITLOS will take into account the conduct of the flag State "at all times material to the dispute".[63] In the context of Article 292, this means that the Applicant must be able to demonstrate that the vessel was registered under its flag both at the time it was arrested *and* at the time prompt release proceedings were instituted. Thus, in the "*Grand Prince*" case, ITLOS found that it did not have jurisdiction because the documentary evidence submitted by the Applicant failed to establish that Belize was the flag State of the vessel when the Application was made.[64] In contrast, in the *Juno Trader case*,

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of the LOSC as a condition for making an application for release, and it has consistently been treated by ITLOS as a question of jurisdiction.

59 *The M/V "Saiga" Case*, *supra* note 31, paras. 43–44. See ITLOS, *Rules of the Tribunal*, ITLOS/8, 25 March 2021, available at https://www.itlos.org/en/main/basic-texts-and-other-documents/ (last accessed 9 September 2022).

60 *The "Volga" Case*, *supra* note 34 (instituted by the Russian Federation) and *The "Hoshinmaru"*, *supra* note 36 and *"Tomimaru" Cases*, *supra* note 38 (brought by Japan).

61 See, eg, the discussion in Goodman, *supra* note 40, 256–259.

62 *The "Grand Prince" Case*, *supra* note 37, para. 67.

63 *The M/V "Saiga" (No. 2) Case*, *supra* note 52, para. 68.

64 *The "Grand Prince" Case*, *supra* note 37, para. 93: "the Tribunal concludes that the documentary evidence submitted by the Applicant fails to establish that Belize was the flag State of the vessel when the Application was made."

the Tribunal found there was no evidence to support the Respondent's claim that the Applicant was *not* the flag State on the date on which the application for prompt release was submitted, and so there was no bar to jurisdiction.[65]

Third, the Tribunal has confirmed that the question of ownership—as opposed to nationality—is not a matter for consideration under Article 292,[66] and that a change in ownership of the vessel—even if it results from confiscation by the coastal State—does not automatically result in a change of flag, unless the new owner has initiated procedures to this effect.[67] In other words, as Oxman has explained, ITLOS has "distinguished between transfer of title and transfer of registry".[68] This is demonstrated in the "*Juno Trader*" and "*Tomimaru*" cases, both of which involved challenges to jurisdiction by the Respondent (the coastal State) on the basis that the Applicant was not the flag State at the time the proceedings were instituted because the ownership of the vessels had changed as a result of confiscation by the coastal State. In both cases, ITLOS found that there was no legal basis for holding that there had been a definitive change in the nationality of the vessel, and thus jurisdiction was not precluded on that basis.[69]

As these cases demonstrate, this strict approach to the application of jurisdictional requirements helps to maintain the balance of rights and interests established in Article 292. It ensures that, even though compulsory jurisdiction over prompt release proceedings applies to all States without exception, this jurisdiction is only exercised in cases where the jurisdictional requirements established in the LOSC are actually met. This is an important constraint on the broad powers of compulsory jurisdiction that can be exercised under Article 292—but it is not the only one. This brings us to the question of admissibility.

III. A Restrictive Approach to Questions of Admissibility

If the relevant court or tribunal establishes that it has jurisdiction in prompt release proceedings, it must consider any challenges to the admissibility of the application that might be raised by the Respondent. While jurisdiction is

65 *The "Juno Trader" Case*, *supra* note 28, para. 64: "there is no legal basis for the Respondent's claim that [the Applicant] was not the flag State of the vessel on 18 November 2004, the date on which the Application for prompt release was submitted."

66 *The M/V "Saiga" Case*, *supra* note 31, para. 44.

67 *The "Tomimaru" Case*, *supra* note 38, para. 70.

68 B. H. Oxman, 'The "Tomimaru"' (2008), 102 *American Journal of International Law* 316, 319 [Oxman, The Tomimaru].

69 *The "Juno Trader" Case*, *supra* note 28, paras. 63-65; *The "Tomimaru" Case*, *supra* note 38, para. 70.

a question of establishing whether the tribunal has the competence or authority to adjudicate, the question of admissibility relates to whether the tribunal should decline to exercise that authority for some reason other than the ultimate merits of the case.[70] Like the questions arising in relation to its exercise of jurisdiction, an examination of the caselaw helps to clarify the approach that has been taken by ITLOS in exercising this right when considering admissibility in prompt release cases.

It is convenient to start by ruling out the things that will *not* render a prompt release application inadmissible. First, provided that a minimum of 10 days have passed since the vessel was detained, there is no particular maximum time limit on when an application for prompt release can be lodged—the requirement of "promptness" relates to the release of vessel and crew by the coastal State, and not to the institution of proceedings under Article 292 by the flag State.[71] Second, there is no requirement that proceedings before the domestic courts of the coastal State be concluded or exhausted before prompt release proceedings are instituted. In this regard, as ITLOS pointed out in the "*Camouco*" *case*, Article 292 is not an appeal against a decision of a national court but provides for an independent remedy.[72] Moreover, requiring the exhaustion of domestic remedies before the institution of prompt release proceedings would have the effect of extending (rather than limiting) the period of detention, and defeat the object and purpose underpinning the procedure.[73] Third, in terms of admissibility, it does not matter *why* a vessel and crew has not been released—so the fact that the detaining State has not set a bond, the flag State or vessel owner has not posted a bond, or even that there is no legislative or administrative mechanism for setting, posting or receiving a bond will not affect the admissibility of the application.[74]

70 See further: G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951-4: Questions of Jurisdiction, Competence and Procedure' (1958), 34 *British Year Book of International Law* 1, 12–13; Y. Y. Shany, 'Jurisdiction and Admissibility' in C. Romano, K. J. Alter & Y. Shany (eds), *The Oxford Handbook of International Adjudication* (2013), 787–788.

71 *The "Camouco" Case*, *supra* note 32, para. 54. However, the Tribunal has also noted that given the objective of Art. 292, "it is incumbent upon the flag State to act in a timely manner" and "take action within a reasonable time either to have recourse to the national judicial system of the detaining State or to initiate a prompt release procedure": *The "Tomimaru" Case*, *supra* note 38, para. 77.

72 *The "Camouco" Case*, *supra* note 32, para. 58.

73 *Ibid*., paras. 57-58.

74 Mensah, *supra* note 55, 433. See also *The M/V "Saiga" Case*, *supra* note 31, para. 77; *The "Camouco" Case*, *supra* note 32, para. 63.

The key question—really the *only* question—that ITLOS has considered relevant in determining whether an application under Article 292 is admissible is whether it is based on an allegation that the detaining State has not complied with the provisions of the LOSC—and specifically Article 73(2)—for the prompt release of the vessel or its crew on the posting of a reasonable bond or other financial security.[75] Consistent with this interpretation of Article 292, ITLOS has distinguished between allegations of violations of Article 73(2), which *are* admissible, and allegations of violations of Article 73(3) and (4), which are *not* admissible under Article 292.[76] Allegations relating to violations of other provisions of the LOSC relating to the freedom of navigation are similarly out of scope.[77] As Klein points out, the effect of this "narrow" interpretation of Article 292 is to exclude consideration of any substantive issues beyond the actual release of the vessel and the reasonableness of the bond.[78] Issues that are *related* to release and reasonableness, but do not themselves constitute a violation of Article 73(2)—such as the notification to the flag State, the fairness of domestic proceedings, the use of force in the course of arrest, or the validity of underlying laws and regulations—will be inadmissible and outside the scope of prompt release proceedings.[79]

Notwithstanding this ring-fencing, there is still a risk that the Tribunal's consideration of admissibility could intrude into the ultimate "merits" of the application—particularly if sufficient care is not taken to distinguish between the question of whether an allegation of non-compliance with Article 73(2) has been made (which is a question of admissibility), and the question of whether that allegation is "well-founded" (which is a question of merits).[80] This distinction was not well made in the first prompt release case considered by the Tribunal (*M/V "Saiga"*), in which issues of allegation and admissibility were conflated with questions of substance and merit.[81] However, the Tribunal has since clarified

75 *Supra* note 26, with the exception of the short-lived *"Heroic Indun" Case*, all the cases so far instituted under Art. 292 have related to alleged violations of Art. 73(2) rather than Arts. 220 or 226.

76 *The "Camouco" Case*, *supra* note 32, para. 59; *The "Monte Confurco" Case*, *supra* note 33, para. 63.

77 *The "Camouco" Case*, *supra* note 32, para. 60.

78 Klein, *supra* note 2, 95.

79 *Ibid*.

80 *The "Camouco" Case*, *supra* note 32, Dissenting Opinion of Judge Treves, para. 2. As Judge Treves notes: "As the two questions are distinct, it become possible, in principle, to give a negative answer to the second while having answered the first in the affirmative."

81 See, eg, Mensah, *supra* note 58, 435; Churchill, 'The Jurisprudence of ITLOS', *supra* note 2, 403.

its approach, and in subsequent cases it has adopted a consistent practice of distinguishing between the allegation of non-compliance as a requirement for admissibility, and the need to consider whether an application is "well-founded" in taking a decision on the merits.[82] This distinction is clearly visible in the "*Volga*" *case*, in which the Applicant (Russia) alleged that the Respondent (Australia) had not complied with the requirement of prompt release under Article 73(2) because the bond set was unreasonable. The Respondent accepted that the application was admissible under Article 292, but contested the allegation of non-compliance under Article 73(2), which the Tribunal then considered as a question of "merit".[83]

Finally—and returning to the question of how the confiscation of a vessel affects jurisdiction in a prompt release proceeding—while the key date for determining issues of admissibility is the date on which the proceedings are filed, subsequent events may occur which render an application inadmissible. This can be seen in the "*Hoshinmaru*" *case*, in which the setting of a bond by the Respondent after the proceedings were filed was found to narrow the dispute between the Parties, but not to remove its object—since the Applicant maintained that the bond was unreasonable, and an allegation of non-compliance with Article 73(2) thus remained.[84] An example to the opposite effect is the "*Tomimaru*" *case*, in which a final appeal against the confiscation of the vessel was dismissed by the Supreme Court of the Russian Federation shortly after the closure of the prompt release hearings before ITLOS. ITLOS cautioned against the possibility that confiscation of a fishing vessel could be used to upset the balance of interests established in the LOSC, but ultimately distinguished between the situation in which proceedings regarding the confiscation of a vessel are still before the domestic courts of the detaining State and are thus admissible and can be considered by the Tribunal; and the situation in which all available domestic procedures have been exhausted and any decision by ITLOS to release the vessel would contradict the concluded proceedings of the appropriate domestic forum.[85] Effectively, once the confiscation of a vessel is final, the flag State cannot allege a violation of Article 73(2), and the application is without object and inadmissible.

It is clear that the potential effect of compulsory jurisdiction over prompt release has been significantly narrowed by the Tribunal's approach

82 Mensah, *supra* note 55, 435.
83 *The "Volga" Case*, *supra* note 34, paras. 58-59.
84 *The "Hoshinmaru" Case*, *supra* note 36, paras. 64-66.
85 *The "Tomimaru" Case*, *supra* note 38, para. 75.

to admissibility—in particular, its rejection of the broad and 'non-restrictive' interpretation of prompt release offered by the Applicant in *M/V "Saiga"*, and its restriction of Article 292 to proceedings involving alleged violations of a provision of the LOSC that specifically requires the prompt release of the vessel or crew on the posting of a reasonable bond or other security (namely, Articles 73, 220 and 226). This approach is critical to maintaining the balance embedded in Part XV of the LOSC. First, and at a general level, it ensures that the prompt release procedure is not transformed into one "covering most cases concerning the arrest of ships", which would undermine the choice of procedure provided for in Article 287(1) of the LOSC.[86] And second, in the context of EEZ fisheries and sovereign rights, it is necessary to ensure that the prompt release procedure does not allow the Tribunal's jurisdiction to "creep" into other issues—such as the conduct of enforcement under the other paragraphs of Article 73, or the fisheries regulations in relation to which the enforcement activities took place.[87]

It must be noted, however, that the balance of rights and interests in the LOSC cannot be maintained by jurisdictional safeguards alone. While a detailed discussion of the merits of prompt release proceedings is beyond the scope of this article, it is nonetheless important to observe that ITLOS' approach to the substantive task of balancing coastal and flag State interests under Article 73(2) has drawn significant criticism in the literature, and even in the jurisprudence.[88] In this respect, as Judge Oda has noted, the only substantive issue for determination by a court or tribunal under Article 292 is the "reasonableness" or otherwise of the bond to be imposed on vessels to be promptly released.[89] However, the Tribunal has made clear that in order to assess

86 *The M/V "Saiga" Case*, *supra* note 32, Dissenting Opinion of Vice-President Wolfrum and Judge Yamamoto, para. 18.

87 Klein, *supra* note 2, 95–96.

88 See, eg, C. Brown, '"Reasonableness" in the Law of the Sea: The Prompt Release of the Volga', 16 *Leiden Journal of International Law* (2003) 3, 621, 630; R. Baird, 'Illegal, Unreported and Unregulated Fishing: An Analysis of the Legal, Economic and Historical Factors Relevant to Its Development and Persistence', 5 *Melbourne Journal of International Law* (2005) 2, 299, 321; Churchill, 'The Jurisprudence of ITLOS', *supra* note 2, 410; D. R. Rothwell & T. Stephens, 'Illegal Southern Ocean Fishing and Prompt Release: Balancing Coastal and Flag State Rights and Interests', 53 *International and Comparative Law Quarterly* (2004) 1, 171, 183–4; R. Rayfuse, 'The Future of Compulsory Dispute Settlement under the Law of the Sea Convention', 36 *Victoria University of Wellington Law Review* (2005) 4, 683, 692. See also, *The "Volga" Case*, *supra* note 34, Dissenting Opinion of Judge Shearer, para. 19 and Dissenting Opinion of Judge Anderson, paras. 63-64.

89 Oda, *supra* note 29, 866.

the "reasonableness" of a bond it will be guided by the "balance of interests" emerging from Articles 73(2) and 292—which it has defined to involve a process of reconciling "the interest of the flag State to have its vessel and its crew released promptly with the interest of the detaining State to secure appearance in court of the Master and the payment of penalties".[90]

This approach has been criticised as inappropriately favouring flag States, failing to recognise the broader range of interests implicitly affected by prompt release—including the private rights and duties of vessel owners, and the common interests of the international community—and failing to adequately consider the practical issues associated with the illegal, unreported and unregulated (IUU) fishing and the broader "mischief" that the LOSC seeks to address.[91] Accordingly, while the Tribunal's restrained approach to the jurisdictional issues associated with Article 292 has helped to maintain the balance of rights and interests embedded in Parts V and XV of the LOSC, there are risks that this could be undermined by its expansive approach to its role in determining the "reasonableness" of a bond.

D. Article 298(1)(b): The Option to Exclude (or Accept) Compulsory Jurisdiction

The second mechanism for the compulsory settlement of EEZ fisheries enforcement disputes arises as a corollary of the optional exception in Article 298. Article 298(1)(b) enables an LOSC Party to exempt itself from compulsory jurisdiction in relation to "law enforcement activities in regard to the exercise of sovereign rights or jurisdiction" which are excluded from the jurisdiction of a court or tribunal under Part XV by virtue of Article 297(2) or (3). This optional exception operates like a displaceable presumption; pursuant to Article 298(1)(b), the compulsory dispute settlement procedures in Section 2 of the Part XV *do* apply to such law enforcement activities *unless* a State Party has made a written declaration stating that it does not accept such procedures. In other words, the default position in Article 298(1)(b) is that EEZ fisheries enforcement disputes are subject to compulsory settlement under Section 2, but this may be excluded by the lodgement of a written declaration.[92]

90 *The "Monte Confurco" Case*, *supra* note 33, paras. 71-72.

91 See the discussion of these issues and the views cited in Goodman, *supra* note 40, 261-264.

92 Procedurally, this is the reverse of the approach embodied in Art. 297(3)(a), pursuant to which the default position is that EEZ fisheries disputes are automatically excluded from

Like prompt release under Article 292, the mechanism in Article 298 allowing optional exceptions from compulsory settlement was the result of significant compromises during the LOSC negotiations.[93] But in contrast to Article 292, which serves specifically as a counterbalance to the sovereign rights of coastal States, Article 298 functions primarily as a "safety valve" between state sovereignty and compulsory dispute settlement, allowing states to exclude certain sensitive issues—including some EEZ fisheries law enforcement disputes—from the procedures in Section 2 of Part XV.[94] This "safety valve" makes compulsory dispute settlement an *option* rather than an obligation. This means that coastal States have a choice: they can submit to the compulsory settlement of EEZ fisheries enforcement disputes should they arise (by doing nothing); or they can remove this possibility by exercising the option to lodge a written declaration. But this option is not unlimited. The extent to which compulsory jurisdiction may be excluded by declaration under Article 298(1)(b) is circumscribed by the limits of the activities covered by Article 297(2) and (3). Accordingly, disputes concerning EEZ fisheries law enforcement activities can only be excluded in so far as they relate to the coastal State's "sovereign rights with respect to the living resources in the exclusive economic zone or their exercise."[95]

In further contrast to Article 292, despite the concerns expressed during the LOSC negotiations about the potential for compulsory dispute settlement to interfere with sovereign rights, very little use has been made of the optional exception for EEZ fisheries law enforcement in Article 298(1)(b)—both in terms of the number of declarations that have been made by coastal States seeking to exclude compulsory jurisdiction, and in terms of the number of disputes that have been brought against coastal States who have *not* made a declaration. Even though very few States Parties to the LOSC have lodged declarations excluding compulsory settlement for EEZ fisheries law enforcement activities, there is only one instance in which a dispute centred on the enforcement of EEZ fisheries laws has been instituted unilaterally against any of the Parties who have *not* made such declarations. And even in that single instance (which ultimately became *The M/V "Virginia G" Case*), while the dispute was originally instituted by Panama on a unilateral basis, relying on the absence of a declaration by

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compulsory jurisdiction—but they may be submitted to a court or tribunal by agreement between the parties, as confirmed in Art. 299.

93 See, eg, Nandan, *supra* note 15, 107; Serdy, *supra* note 15, 1918.

94 K. Zou & Q. Ye, 'Interpretation and Application of Article 298 of the Law of the Sea Convention in Recent Annex VII Arbitrations: An Appraisal', 48 *Ocean Development & International Law* (2017) 3-4, 331, 331–332.

95 LOSC, *supra* note 1, Art. 297(3)(a).

Guinea-Bissau under Article 298(1)(b), it was transferred to ITLOS pursuant to a special agreement between the parties, which then provided the basis of the Tribunal's jurisdiction.[96]

This overview highlights three key issues that help to reveal the operation and effect of Article 298(1)(b) in limiting (or enabling) the compulsory settlement of disputes concerning the enforcement of fisheries laws in the EEZ. The first issue relates to the scope of the automatic exemption for EEZ fisheries disputes in Article 297(3)(a)—and in particular, the extent of the laws and regulations that give effect to the coastal State's "sovereign rights" over living resources in the EEZ, and thus fall within Article 298(1)(b). The second issue relates to the scope of the "law enforcement activities" that can be covered by the optional exception in Article 298(1)(b), and the jurisdictional treatment of the underlying laws and regulations that such activities seek to enforce. And the third issue relates to the practical effect of Article 298(1)(b), and the way in which—or the extent to which—coastal States have approached the option to exclude EEZ fisheries enforcement activities from compulsory jurisdiction.

I. The Scope of the Automatic Exception in Article 297(3)(a)

Since Article 298(1)(b) is an optional exception *to* jurisdiction, and not a basis *for* jurisdiction, it is useful to start by revisiting the framework for dispute settlement in Part XV through the lens of its potential application to disputes involving the coastal State's enforcement of fisheries laws and regulations in the EEZ. The starting point is Article 286, pursuant to which "any dispute" concerning the interpretation or application of the Convention is subject to compulsory settlement "subject to Section 3". In the context of fisheries disputes, Article 286 is subject to Article 297(3)(a), which provides that:

> "disputes concerning the interpretation or application of this Convention with regard to fisheries shall be settled in accordance with Section 2, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the

[96] There is a second case in which compulsory jurisdiction was initially used to institute proceedings relating to fisheries enforcement—which ultimately became *The M/V "Saiga" (No. 2) Case*, *supra* note 52—but since it was specifically characterised by the Applicant (Saint Vincent and the Grenadines) as a dispute about the freedom of navigation under Article 297(1)(a) and *not* about EEZ fisheries enforcement, it is not considered in this Section, but in the discussion on Article 297(1), *infra*, Section E.

> exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States, and the terms and conditions established in its conservation and management laws and regulations."

Clearly, Article 297(3)(a) does not exclude compulsory jurisdiction over *all* fisheries disputes—indeed, it specifically *confirms* the application of compulsory jurisdiction to disputes regarding fisheries *except* those relating to the coastal State's sovereign rights over living resources in the EEZ—but the actual scope and extent of its application remain contentious. For example, it does not appear to exclude compulsory dispute settlement in respect of the coastal State's exercise of sovereignty over living resources in the territorial sea, or sovereign rights over living resources on the continental shelf, even though such exclusions might be considered logical, given the nature of the coastal State's rights in those maritime zones—although this issue is subject to differing views in the literature and jurisprudence,[97] and differing interpretations have been offered by States in their submissions before international courts and tribunals.[98]

[97] The literature contains a range of views about this. See, eg, Oxman, who suggests that the absence of a reference to the territorial sea and continental shelf in Art. 297(3) reflects the absence of relevant duties regarding coastal State regulation of such matters in those areas under the LOSC, and that an objection to compulsory settlement could successfully be made in such a case, but on the basis of admissibility rather than jurisdiction: Oxman, *supra* note 8, 405. However, Shearer draws the opposite conclusion: I. Shearer: 'The Development of International Law with Respect to the Law Enforcement Roles of Navies and Coast Guards in Peacetime' in M. N. Schmidt & L. C. Green (eds), *The Law of Armed Conflict: Into the Next Millenium*, 428, 443–444. The decisions of arbitral tribunals seem to confirm that compulsory settlement in disputes relating to the territorial sea and continental shelf is *not* precluded by Art. 297(3)(a). In the context of the continental shelf, the Arbitral Tribunal in the *Chagos Arbitration* concluded that since sedentary species are excluded from the regime of the EEZ, questions of their protection are "beyond any possible application of Article 297(3)(a)" and were thus subject to compulsory jurisdiction: *Chagos Arbitration*, *supra* note 16, para. 304. In the context of the territorial sea, the Arbitral Tribunal in the *South China Sea Arbitration* found that the law enforcement activities exception in Art. 298(1)(b) (the scope of which is determined by reference to Art. 297(3)(a)) only concerns a coastal State's rights in its EEZ and does not apply to incidents in a territorial sea: *South China Sea Arbitration (Philippines v. China)* Award of the Arbitral Tribunal, 12 July 2016, PCA Case No. 2013-19 para 929 [*South China Sea Arbitration*].

[98] For example, different interpretations have been offered by Russia and Ukraine in their submissions to the Arbitral Tribunal in the *Dispute Concerning Coastal State Rights*

Potentially more significant (at least for the purposes of this enquiry), is the question of whether the automatic exception established in Article 297(3)(a) in relation to the coastal State's exercise of "sovereign rights" with respect to the living resources of the EEZ includes the *enforcement* of fisheries laws and regulations. Churchill has suggested that since enforcement of fisheries legislation is part of a coastal State's "sovereign rights" in respect of the living resources of the EEZ, it is debatable whether Article 298(1)(b) adds anything to the automatic exception in Article 297(3)(a).[99] This proposition requires investigation, since it implies that EEZ fisheries enforcement disputes could be exempt from compulsory settlement by virtue of Article 297(3)(a) even if no declaration has been lodged under Article 298(1)(b).

On the one hand, strong support for such an interpretation could be drawn from Article 73(1) of the LOSC, which empowers the coastal State "in the exercise of its sovereign rights" to take such measures as may be necessary to enforce its laws and regulations, including boarding, inspection, arrest and judicial proceedings. This approach is logically attractive, and is supported by ITLOS' finding in the "*Virginia G*" *case* that the term "sovereign rights" encompasses all rights necessary for and connected with the exploration, exploitation, conservation and management of the natural resources, "including the right to take the necessary enforcement measures".[100] On the other hand, this interpretation would render the law enforcement activities exception in Article 298(1)(b) redundant—at least with respect to fisheries.[101] It is also inconsistent with the drafting history of Articles 297 and 298.

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in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. Russian Federation), Award Concerning the Preliminary Objections of the Russian Federation, 21 February 2020, PCA Case No. 2017-06 (see the summary of the Arbitral Tribunal in paras. 397-402) [*Dispute Concerning Coastal State Rights*].

99 Churchill, *supra* note 2, 390.

100 *"Virginia G" (Panama v. Guinea-Bissau)*, ITLOS, *Case No. 19*, Merits, Judgment, 14 April 2014, para. 211 [*The Virginia G Case*].

101 Indeed, the fact that the scope of Art. 298(1)(b) is defined by reference to Art. 297(2) and (3) reinforces the likelihood that law enforcement activities are not covered by Art. 297(3). In this respect, the interpretation suggested by Churchill would alter the application of Art. 298(1)(b) as between disputes involving marine scientific research under Art. 297(2) (in relation to which there is no suggestion that the automatic exception for disputes involving a coastal State's exercise of a "right or discretion" includes enforcement activities), and disputes involving fishing in the EEZ under Art. 297(3) (in relation to which the automatic exception for the coastal State's exercise of "sovereign rights" is suggested to extend to enforcement).

Unfortunately, the official records of the Third United Nations Conference on the Law of the Sea do not record any specific discussion that shows whether States intended for the automatic exception in the provision which ultimately became Article 297(3)(a) to extend to the *enforcement* of EEZ fisheries laws.[102] However, they do reveal the history of the optional exception for law enforcement activities in Article 298(1)(b), which developed separately from Article 297. As Klein explains, law enforcement activities were originally included in the draft text during the LOSC negotiations as a way of defining (by contrast) the extent of the "military activities" to be excluded from compulsory settlement.[103] But this gave rise to some objections: if military activities were to be exempted but law enforcement activities were not, the effect would be to exempt disputes concerning the actions of third State military vessels in the maritime zones of coastal States from compulsory settlement, but not to exempt disputes concerning the law enforcement activities of coastal States in their own EEZs. Accordingly, the draft text was amended "so as to give law enforcement activities similar immunity to military activities",[104] and ultimately narrowed "to align the law enforcement activities that may be excluded by declaration with the exercise of the sovereign rights and jurisdiction which were excluded from the compulsory jurisdiction of a court or tribunal."[105] This ensured that

102 The relevant provisions in the very first Informal Single Negotiating Text prepared by the President of the Conference in 1975 included an automatic exception from compulsory jurisdiction for "any dispute arising out of the exercise by a coastal State of its exclusive jurisdiction under the present Convention" (Art. 18(1)), and an optional exception for "disputes arising out of the exercise of discretionary rights by a coastal State pursuant to its regulatory and enforcement jurisdiction under the present Convention" (Art. 18(2)(a)): "Informal Single Negotiating Text (Part IV)", Document A/CONF.62/WP.9, 21 July 1975, *Official Records of the Third United Nations Conference on the Law of the Sea, Volume V (Summary Records, Plenary, General Committee, First, Second and Third Committees, as well as Documents of the Conference, Fourth Session*). However, the optional exception for disputes relating to "regulatory and enforcement jurisdiction" was omitted from all subsequent drafts of the text. While the automatic exception was retained in subsequent drafts (taking a variety of forms and using a variety of descriptions, including "sovereign rights, exclusive rights, and exclusive jurisdiction"), no further reference was made to "enforcement" in the context of the text that would become Art. 297(2) and (3).

103 Klein, *supra* note 2, 307–308.

104 'Memorandum by the President of the Conference on Document A/CONF.62/WP.10', UN Doc. A/CONF.62/WP.10/Add.1, 22 July 1977, *Official Records of the Third United Nations Conference on the Law of the Sea, Volume VIII (Informal Composite Negotiating Text, Sixth Session)*, 70.

105 'Report of the President on the work of the informal plenary meeting of the Conference on the settlement of disputes', UN Doc. A/CONF.62/L.52/ and Add.1, 29 March and 1

the optional exception for law enforcement activities aligned with Article 297(2) and (3), and did not apply to activities falling under compulsory jurisdiction pursuant to Article 297(1).[106]

The question of whether the automatic exception in Article 297(3)(a) includes the enforcement of fisheries laws and regulations has not been considered by a court or tribunal. Nor is it specifically discussed in the literature, where most discussions on dispute settlement do not address it, or simply accept that the exemption in Article 297(3)(a) does *not* extend to disputes concerning the enforcement of coastal State regulations without further enquiry. For example, Rao and Gautier state that:

> "in the absence of a declaration under article 298, paragraph 1(b), disputes concerning law enforcement activities by a coastal State with respect to fisheries and marine scientific research in the EEZ (eg, as regards the lawfulness of the use of force or the exercise of hot pursuit in the arrest of a vessel conducting allegdly unlawful fishing activities) are not exempted from the scope of section 2 by virtue of Article 297."[107]

Writing about the effect of Article 298(1)(b), Treves notes that "the limitations in Article 297, or at least in its second and third paragraphs, must be interpreted restrictively, as otherwise one could have argued that law enforcement activities are to be seen together with the sovereign rights or jurisdiction they protect".[108] Nandan, Rosenne and Sohn describe Articles 297 and 298 as "parallel exceptions",[109] and Serdy describes Article 298(1)(b) as a "further optional exception extending the scope of the exemption [in Article 297] to ancillary law-enforcement activities by the coastal State".[110]

Notwithstanding the logical attraction of interpreting the exercise of sovereign rights to include the *enforcement* of those rights, in light of the drafting history, the literature, and the specific inclusion of an optional exception in

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April 1980, *Official Records of the Third United Nations Conference on the Law of the Sea, Volume XIII (Summary Records, Plenary, General Committee, First and Third Committees, as well as Documents of the Conference, Ninth Session)* 86, para. 7.

106 Nandan, *supra* note 15, 136; Klein, *supra* note 2, 308; Serdy, *supra* note 15, 1921–1923.

107 Rao, *supra* note 8, para. 3.064.

108 T. Treves, 'The Law of the Sea Tribunal: Its Status and Scope of Jurisdiction After November 16, 1994' 55 *Heidelberg Journal of International Law* (1995) 421, 437.

109 Nandan, *supra* note 15, 137.

110 Serdy, *supra* note 15, 1930.

Article 298(1)(b)—and without any specific practice or jurisprudence to the contrary—it seems safe to accept that the automatic exception in Article 297(3)(a) does *not* extend to EEZ fisheries law enforcement activities. This means that disputes concerning such activities can only be exempt from compulsory jurisdiction by a written declaration under Article 298(1)(b).

II. The Scope of the Optional Exception in Article 298(1)(b)

Having concluded that law enforcement activities do not fall within the scope of the automatic exception in Article 297(3)(a), we can consider the scope of the optional exception in Article 298(1)(b). As an "optional" exception, the scope of Article 298(1)(b) requires examination from two perspectives. First, the scope of the "law enforcement activities" that are excluded from compulsory jurisdiction if a coastal State lodges an optional declaration under Article 298(1)(b). And second, from the reverse perspective, the scope of the issues that can be considered by a court or tribunal if the coastal State has *not* lodged such a declaration. In other words, how far does compulsory jurisdiction over "law enforcement activities" extend?

It is convenient to start by considering the scope of the jurisdiction that can be *excluded* by an Article 298(1)(b) declaration. It is clear on the face of the text that the extent to which compulsory jurisdiction over EEZ fisheries enforcement disputes may be excluded under Article 298(1)(b) is circumscribed by the scope of the activities covered by Article 297(3)—which is itself limited. Accordingly, disputes about EEZ fisheries law enforcement activities can only be excluded in so far as they relate to the coastal State's "sovereign rights with respect to the living resources in the exclusive economic zone or their exercise."[111]

The scope of this exception was tested in the *Arctic Sunrise Arbitration*, which concerned Russia's boarding, seizure, and detention of a Dutch-flagged Greenpeace vessel engaged in a protest against oil exploration in the Russian EEZ. Russia declined to formally participate in the proceedings, but claimed via diplomatic note that the actions of its personnel relating to the *Arctic Sunrise* and its crew were exempt from examination on the basis of its declaration under Article 298(1)(b), which was expressed to apply to "disputes concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction".[112] Since the enforcement activities subject to dispute in *Arctic Sunrise* related to a safety

[111] LOSC, *supra* note 1, Art. 297(3)(a).

[112] Russia, *Note Verbale* dated 22 October 2013, reproduced in *Arctic Sunrise Arbitration*, *supra* note 21, para. 9.

zone around an oil platform—and did not relate to marine scientific research or fisheries—the Arbitral Tribunal dismissed Russia's jurisdictional objection, observing that a declaration under Article 298(1)(b) cannot exclude "every dispute" that concerns "law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction",[113] and that a State cannot, through a written declaration, "create an exclusion that is wider in scope than what is permitted by Article 298(1)(b)."[114] In other words, if a dispute about fisheries in the EEZ "would not be automatically exempt from compulsory settlement under Article 297(3)(a), a declaration under Article 298(1)(b) will not extend to any activity by the coastal State to enforce its law."[115]

In practice, it seems likely that the effective scope of a declaration under Article 298(1)(b) would exclude compulsory jurisdiction with respect to any actions undertaken by the coastal State to enforce a law or regulation regarding fishing in the EEZ, including:

113 *Ibid*.
114 *Ibid*., para. 72.
115 Serdy, *supra* note 15, 1930.

- the conduct of enforcement activities within the scope of Article 73, including boarding, inspection, arrest and judicial proceedings;[116]
- the conduct of hot pursuit under Article 111, provided the pursuit related to an offence against a fisheries law or regulation in the EEZ;[117] and
- the use of force in the conduct of such enforcement activities or hot pursuit.[118]

However, a declaration under Article 298(1)(b) would not preclude a court or tribunal from examining the enforcement of laws or regulations relating to living resources on the continental shelf or in the territorial sea,[119] or from considering other "unprotected" issues which might arise on the facts of the same dispute, such as navigational freedoms or the protection and preservation of the marine environment.[120]

116 See, for example, Russia's submissions on preliminary objections in the *Dispute Concerning Coastal State Rights*, stating that "Article 298(1)(b) covers law enforcement measures, which include boarding, inspection, arrest and judicial proceedings, in accordance with Article 73(1) of [the LOSC]": *Dispute Concerning Coastal State Rights*, *supra* note 98, para. 149.

117 This approach might be resisted by a flag State on the basis that hot pursuit is not an EEZ fisheries enforcement activity and would fall outside the scope of the coastal State's exercise of sovereign rights or jurisdiction under Art. 297(3)(b) on the basis that it is addressed in Part VII of the Convention (High Seas). However, the right of hot pursuit only arises if a foreign-flagged vessel breaches a coastal State law in one of its maritime zones (including a fisheries law in the EEZ) and is not restricted to the high seas but must begin in (and can pass through and end in) areas under the national jurisdiction of one or more coastal States. Accordingly, there are strong arguments to support the assertion that hot pursuit arising from the violation of a fisheries law in the EEZ would fall within the exception for EEZ fisheries law enforcement activities under Art. 298(1)(b).

118 This approach might be resisted by a flag State on the basis that a dispute about the use of force is only "ancillary" to a dispute concerning the use of force in a fisheries enforcement activity or hot pursuit, and thus falls outside the scope of the coastal State's sovereign rights or jurisdiction under Art. 297(3)(b) and the exception in Art. 298(1)(b). However, it is difficult to see how questions about the use of force by a coastal State in the conduct of an EEZ fisheries enforcement activity or a hot pursuit arising from the violation of a fisheries law in the EEZ could be separated from the enforcement activity or hot pursuit itself, particularly given ITLOS' finding that the use of force must be considered in light of what is "reasonable and necessary in the circumstances": *The M/V "Saiga" (No. 2) Case*, *supra* note 52, para. 155; *The "Virginia G" Case*, *supra* note 100, paras. 359–362.

119 *Chagos Arbitration*, *supra* note 16, para. 304; *South China Sea Arbitration*, *supra* note 97, para. 929. See the discussion in notes 97–98 above, and associated text.

120 *South China Sea Arbitration*, *supra* note 97, para. 928 fn. 1079. See also the discussion *infra*, Section E.

A more difficult question is whether an Article 298(1)(b) declaration would exclude judicial review of EEZ fisheries law enforcement activities that are specifically prohibited (or specifically required) by the LOSC—such as the failure to comply with the restrictions in Article 73(3) on the penalties that may be imposed for EEZ fishing offences, or the failure to fulfil the requirements in Article 73(4) to notify the flag State of enforcement actions taken. In theory, this should depend on whether the activities are undertaken "in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal" under Article 297(3)(a). In the case of law enforcement activities that are specifically *contrary* to the LOSC, it might be reasonable to assume that they cannot be undertaken in the exercise of sovereign rights under Article 297(3), and thus fall outside the exclusion in Article 298(1)(b).[121]

A further question that might arise is whether enforcement activities could be said to fall outside the scope of Article 298(1)(b) on the basis that they were not "necessary" to ensure compliance with the LOSC or did not seek to ensure compliance with laws and regulations that were "in conformity with" the LOSC, as required by Article 73(1). Like the allegations in the previous example, such allegations would, if proved, be contrary to the LOSC. However, in this instance, application of the Article 297(3)(a) test might lead to a different result: it might be argued that such laws and regulations fall within the scope of the coastal State's discretion under Article 297(3)(a), and that their enforcement (including any questions about its "necessity") is thus effectively excluded by a declaration under Article 298(1)(b). Of course, all of these examples will depend on the circumstances of the case—but drawing out the various issues and small distinctions nonetheless provide some guidance about the possible scope of a declaration under Article 298(1)(b).

So what is the scope of jurisdiction in the reverse situation, where a coastal State has *not* lodged an optional declaration with respect to EEZ fisheries law enforcement activities? While this has never been tested, it seems likely that compulsory jurisdiction over EEZ fisheries law enforcement activities would end where the automatic exception for the coastal State's sovereign rights over living resources in Article 297(3)(a) begins. This flows from the basic structure of Part XV: since all disputes concerning the interpretation or application of the LOSC are subject to compulsory settlement unless an exception applies, then it is logical to assume that even if a coastal State had not lodged a declaration

[121] While this is a question of jurisdiction, its resolution may require a court or tribunal examine the merits of the case in order to determine whether or not the enforcement activities were contrary to the LOSC.

under Article 298(1)(b) precluding the consideration of enforcement activities, any issues falling within the automatic exception in Article 297(3)(a) would still be protected from review. In practice, this would require a court or tribunal to consider the lawfulness of actions taken by a coastal State to enforce its fisheries laws or regulations without being able to consider the lawfulness of the laws or regulations themselves. While this would no doubt present some challenges, it is possible to contemplate a court or tribunal considering the legality of the way in which a boarding was conducted, force was used, or hot pursuit was undertaken, without necessarily considering the lawfulness of the laws and regulations which those actions were seeking to enforce. Alternatively, it might be possible to proceed as if the laws themselves were (hypothetically) consistent with the LOSC, and simply consider the lawfulness of the actions taken to enforce them, in the circumstances of the case.

In some cases, there might be an overlap between actions with an enforcement effect that are automatically excluded from jurisdiction under Article 297(3)(a), and actions that are considered to be "law enforcement activities" requiring specific exclusion by declaration under Article 298(1)(b). For example, actions which are enabled or envisioned by the "terms and conditions" established in the coastal State's laws and regulations under Article 62(4) (and are thus automatically exempt from jurisdiction under Article 297(3)(a)), might also legitimately constitute "law enforcement activities" in the sense of Article 298(1)(b)—such as boarding and inspecting vessels in accordance with the conditions of their fishing licence, in order to monitor or verify compliance with catch limits, reporting requirements, or the carriage of vessel positioning equipment.[122] The question is, which regime takes priority—the compulsory settlement of law enforcement activities (which has not been excluded by the coastal State), or the automatic exception of the exercise of sovereign rights? While the resolution

[122] For example, in its submissions on preliminary objections in the *Dispute Concerning Coastal State Rights*, Russia argued that Ukraine's allegations regarding Russian breaches of Art. 73 "fall both within the law enforcement exception under Article 298(1)(b), and within Article 297(3)(a) which covers 'the terms and conditions established [by the coastal State] in its conservation and management laws and regulations', including the determination of sanctions in cases of non-compliance": *Dispute Concerning Coastal State Rights*, *supra* note 98, Preliminary Objections of the Russian Federation, 19 May 2018, para. 192. In its Award on Preliminary Objections, the Arbitral Tribunal found that since the activities subject to dispute occurred in an area that could not be determined to constitute the EEZ of Russia or Ukraine, the conditions for the application of Art. 297(3)(a) had not been met. Accordingly, the Tribunal did not consider Russia's argument about the substantive effect of the exceptions under Arts 298(1)(b) and 297(3)(a): *Dispute Concerning Coastal State Rights*, *supra* note 98, paras. 357–358.

of such overlaps would necessarily depend on the facts of the case, it would be important to consider the broader jurisdictional scheme of Part XV, in order to avoid undermining its careful balance of rights and interests. For example, since Part XV does provide an option for coastal States to exclude their EEZ fisheries law enforcement activities from compulsory jurisdiction, it might be most appropriate to accept that conduct which both constitutes "law enforcement activities" *and* falls within the scope of 297(3)(a) is automatically exempt from compulsory jurisdiction, even if the coastal State in question has not lodged a declaration under Article 298(1)(b).

III. The State of Practice: How and Against Whom can Disputes be Instituted?

Of course, since there are effectively no instances of compulsory dispute settlement under Part XV involving the enforcement of EEZ fisheries laws, the preceding discussion about the substantive scope and effect of Article 298(1)(b) is almost entirely hypothetical. In order to gain a realistic picture of the actual effect of Part XV compulsory dispute settlement on the balance of rights and interests under the LOSC, it is important to consider the more 'procedural' aspects of jurisdiction relating to the optional exception in Article 298(1)(b)—in particular, *under what conditions* and *against whom* EEZ fisheries enforcement disputes can be instituted in practice.

The best starting point for a practical inquiry of this sort is the Notification by which Panama originally instituted Annex VII arbitral proceedings against Guinea-Bissau under Article 286 of the LOSC, in relation to a dispute arising from Guinea-Bissau's arrest of the Panama-flagged vessel *Virginia G* for supplying gasoil to fishing vessels in Guinea-Bissau's EEZ without authorization.[123] In the Statement of Claim attached to this Notification, Panama noted that:

[123] 'Letter dated 3 June 2011 from Mr Garcia-Gallardo to the Minister of Foreign Affairs, International Cooperation and Communities of Guinea-Bissau', extracted in *The "Virginia G" Case*, *supra* note 100, Notification of Special Agreement submitted by Panama, 4 July 2011, 10.

- both parties to the dispute were (and had been at all relevant times) States Parties to the LOSC;
- neither party had availed itself of the power under Article 298 to make exceptions to the applicability of Section 2 of Part XV of the LOSC; and
- neither party had made a written declaration pursuant to Article 287(1) with respect to a choice of forum.[124]

Accordingly, Panama claimed, Section 2 of Part XV applied to the dispute, and both parties were deemed to have accepted Annex VII arbitration. Panama also noted that the jurisdictional 'pre-condition' in relation to the exchange of views under Article 283 in Section 1 of Part XV had been complied with and argued that an Annex VII Arbitral Tribunal would thus have jurisdiction in terms of Article 288(1) of the LOSC. Of course, since Panama and Guinea-Bissau subsequently entered into a special agreement to transfer the proceedings to ITLOS, the sufficiency of these assertions for establishing jurisdiction was never tested—but they are a useful illustration of the likely procedural requirements for establishing jurisdiction under Section 2 of Part XV if there is no Article 298(1)(b) declaration in place and the dispute involves EEZ fisheries law enforcement.

The jurisprudence also provides some guidance on the procedures and limitations that apply if there *is* an Article 298(1)(b) declaration in place. Importantly, a declaration under Article 298(1)(b) does not have to be specifically invoked, but, once made, "excludes the consent of the declaring State to compulsory settlement with respect to the specified category of disputes" unless that State otherwise agrees.[125] However, since such declarations are not self-judging, their validity and effect remains to be determined by the relevant court or tribunal.[126] In recent years, the validity and effect of an Article 298(1)(b) declaration relating to law enforcement activities has arisen for determination in three separate cases—and in each case, the Tribunal has determined that the declaration does *not* exclude jurisdiction.[127]

As discussed above, in the *Arctic Sunrise Arbitration*, the Arbitral Tribunal found that Russia's Article 298(1)(b) declaration did not apply because it sought to exclude activities which were not within the scope of Article 297(3)(a) (and

124 *Ibid*., Annex 3, 'Statement of Claim and Grounds on Which it is Based', 3 June 2011, 16.
125 *South China Sea Arbitration*, *supra* note 97, para. 1156.
126 See *supra* note 22 and associated text.
127 Art. 298(1)(b) declarations have also been invoked to object to jurisdiction in disputes involving "military activities", but this issue is beyond the scope of this article.

thus not within the scope of 298(1)(b)).[128] In the *South China Sea Arbitration*, the Arbitral Tribunal found that China's declaration was inapplicable in two different instances in which it might have been invoked: in one instance, this was because the Article 298(1)(b) law enforcement activities exception only applies in the context of the EEZ (and the relevant part of the dispute related to the territorial sea);[129] and in another instance it was because the exception only offers protection to a coastal State in respect of law enforcement activities with respect to living resources in its own EEZ, and does not apply where a State is alleged to have violated the LOSC in the EEZ of another State (in this case, that of the Philippines).[130]

Most recently, in the *Dispute Concerning Coastal State Rights*, the Arbitral Tribunal found that in order for the Article 298(1)(b) law enforcement activities exception to apply, "both the sovereign character of the rights allegedly exercised by the declaring State and the entitlement of the declaring State to the area in question as that State's exclusive economic zone must be objectively established."[131] Since the Tribunal had determined that a dispute existed between the parties (Russia and Ukraine) regarding sovereignty over the area in question, it had no jurisdiction to make a determination in respect of that dispute, or decide any of the consequential questions, including whether the area in which the law enforcement activities had taken place constituted the EEZ of either Russia or Ukraine. Accordingly, the conditions for the application of Article 298(1)(b) relating to EEZ fisheries enforcement were not met, and Russia's objection to jurisdiction under that provision was not effective.[132]

In summary, on the basis of these decisions, it seems clear that the EEZ fisheries law enforcement activities exception under Article 298(1)(b):

128 See *supra* notes 112–114 and associated text.
129 *South China Sea Arbitration*, *supra* note 97, para. 1045.
130 *Ibid*., para. 695.
131 *Dispute Concerning Coastal State Rights*, *supra* note 98, para. 356.
132 *Ibid*., paras. 357-358.

- does not have to be specifically invoked, but applies automatically to exclude compulsory jurisdiction unless the coastal State agrees otherwise;
- is only valid if—and to the extent that—the relevant court or tribunal so determines;
- does not extend to law enforcement activities in the territorial sea or on the continental shelf;
- can only be invoked in relation to the law enforcement activities of the coastal State, undertaken in relation to the living resources of its own EEZ; and
- will only be effective if the coastal State's rights to the EEZ have been objectively established.

The conditions and limitations established in these three cases appear to confirm—and perhaps even extend—the "relatively strict" interpretation to the invocation of Article 298(1)(b) that has been taken in the literature.[133] But they do not provide a full picture of the way in which States Parties to the LOSC have approached Article 298(1)(b) in practice.

In practice, notwithstanding the recent flurry of jurisprudence relating to the Article 298(1)(b) declarations of Russia and China,[134] very limited use has been made of the optional exception for law enforcement activities. To put these cases in context: they involved jurisdictional objections by two of only 21 States who have lodged declarations under Article 298(1)(b) excluding jurisdiction for disputes involving EEZ fisheries law enforcement activities.[135] While these 21 States can neither be compulsorily submitted to such disputes, nor institute such

133 Zou, *supra* note 94, 341.

134 That is, the *Arctic Sunrise Arbitration*, *supra* note 21, *the South China Sea Arbitration*, *supra* note 97 and the *Dispute Concerning Coastal State Rights*, *supra* note 98.

135 See *supra* note 20. The 21 States Parties whose Art. 298(1)(b) declarations clearly intend to exclude disputes involving EEZ fisheries law enforcement activities from any compulsory jurisdiction are Algeria, Argentina, Belarus, Canada, Cape Verde, Chile, China, Ecuador, Egypt, France, Greece, Korea, Mexico, Portugal, Russia, Saudi Arabia, Thailand, Togo and Tunisia. There are six States Parties who have sought to restrict the forum in which such disputes may be compulsorily settled but have not excluded compulsory settlement. These are: Cuba and Guinea-Bissau (not the ICJ); Nicaragua (only the ICJ); and Denmark, Norway and Slovenia (not an Annex VII Tribunal). There are also a number of States Parties whose Art. 298(1)(b) declarations exclude military activities, but do not refer to law enforcement activities. The latter two categories are not included in the figures used in this article.

disputes, there are 147 other States Parties to the LOSC for whom there is no bar to compulsory proceedings under Part XV in disputes concerning fisheries enforcement in the EEZ. And yet—with the single exception of Panama's institution of arbitral proceedings against Guinea-Bissau, which was in any case submitted to ITLOS by agreement—there are no examples of EEZ fisheries enforcement disputes being instituted under Part XV of the LOSC. This gives the impression both that States are not particularly concerned about being subject to compulsory jurisdiction in relation to EEZ fisheries enforcement disputes *and* that States are not particularly eager to institute such disputes.

This impression is reinforced by the fact that of the 71 States Parties to the LOSC who have lodged optional declarations under Article 36(2) of the *Statute of the International Court of Justice* accepting the compulsory jurisdiction of the ICJ,[136] at least 64 appear to accept the Court's compulsory jurisdiction for disputes concerning EEZ fisheries enforcement.[137] Curiously, eight of these States are amongst the 21 who have lodged optional declarations under Article 298(1)(b) excluding compulsory jurisdiction under Part XV of the LOSC.[138] This means that for these eight States, disputes concerning EEZ fisheries law enforcement activities are excluded from compulsory settlement under Part XV of the LOSC pursuant to their declarations under Article 298(1)(b) *excepting* compulsory jurisdiction but are not excluded from compulsory settlement by

136 'Declarations recognizing the jurisdiction of the Court as compulsory', available at https://www.icj-cij.org/en/declarations (last accessed 9 September 2022). A total of 73 States have made declarations under Art. 36(2), but two of them (Cambodia and Peru), are not Parties to the LOSC, and so are not counted for the purposes of this article.

137 Like declarations under Art. 298(1)(b) of the LOSC, the validity and effect of declarations under Art. 36(2) of the Statute is ultimately a matter for determination by the Court. The vast majority of the 71 declarations from LOSC Parties clearly do not exclude jurisdiction with respect to disputes arising in relation to fisheries, and none specifically mention fisheries *enforcement*. However, the text of the declarations of seven States (Barbados, Bulgaria, Djibouti, Honduras, India, Japan and New Zealand) appears to exclude jurisdiction for disputes involving the exercise of sovereign rights or jurisdiction over resources in the EEZ, or the exploration, exploitation, conservation and management of resources in the EEZ. Since these declarations could be argued to encompass fisheries-related law enforcement activities, these seven States have been subtracted from the total of 71. Accordingly, there are 64 States Parties to the LOSC that appear to have accepted compulsory jurisdiction over EEZ fisheries enforcement pursuant to Art. 36(2) declarations under the ICJ Statute.

138 Canada, Egypt, Greece, Mexico, Portugal, Togo, the United Kingdom and Uruguay.

the ICJ pursuant to their declarations under Article 36(2) of the Court's Statute *accepting* such jurisdiction.[139]

Accordingly, in practice:

- only 13 States Parties to the LOSC have excluded all means of compulsory dispute settlement in relation to EEZ fisheries enforcement disputes,[140]
- 147 States Parties have not exercised their option to exclude compulsory settlement of such disputes under Part XV of the LOSC, and
- 64 States Parties have actively accepted compulsory settlement of such disputes by the ICJ, pursuant to voluntary declarations under Article 36(2) of the Statute.

More broadly, it is worth noting that through their declarations under Article 36(2) of the ICJ Statute, these 64 States have accepted compulsory jurisdiction with respect to not only the *enforcement* of EEZ fisheries laws, but the underlying laws and regulations themselves—which are automatically exempted from compulsory jurisdiction under Part XV of the LOSC pursuant to Article 297(3)(a).

[139] There could be a range of explanations for this. For example, it could be a simple oversight on the part of the State making the declaration: if the declarations were made at different times and involved different officials, the interaction between these frameworks could have been overlooked, and consequential updates not made. For some States, it could reflect a view that by phrasing the Art. 36(2) declaration to accept the ICJ's jurisdiction in respect of "all disputes" *except* those in regard to which the Parties have agreed "to some other method of peaceful settlement" (or similar), any disputes arising under the LOSC would be excluded from the jurisdiction of the ICJ, given the dispute settlement framework established in Part XV (see, eg, the declarations of Canada, Portugal and the United Kingdom). However, this sort of interpretation has been rejected by the ICJ, which has found that a declaration under Art. 36(2) of the Statute falls within the scope of Art. 282 of the LOSC and applies "in lieu" of the procedures in Section 2 of Part XV: *Maritime Delimitation in the Indian Ocean (Somalia v Kenya), Preliminary Objections*, Judgment, ICJ Reports 2017, 3, para. 130. Another potential explanation is that these States want to ensure that any such disputes are heard by the ICJ, rather than by an Annex VII Tribunal, which would be the default forum for the settlement of a dispute under the LOSC if the other Party had not selected a forum (or had selected a different forum) under Art. 287(1). However, the United Kingdom is the only State to have selected solely the ICJ as its preferred means of dispute settlement under Art. 287(1).

[140] Algeria, Argentina, Bahamas, Cape Verde, Chile, China, Ecuador, France, Korea, Russia, Saudi Arabia, Thailand and Tunisia.

E. Article 297(1)(a) and (c): The Opportunity to Characterise the Dispute

Given the state of affairs described in the preceding Section—in particular, the limited reliance of States on both exceptions *to* compulsory jurisdiction and grounds *for* compulsory jurisdiction—it is perhaps unnecessary to look too much further for ways in which EEZ fisheries enforcement disputes might compulsorily be settled. However, if a case arises where an optional declaration under Article 298(1)(b) prevents the institution of such proceedings and the coastal State will not otherwise agree to submit the dispute to settlement, there is still one further option that could be explored. This involves Article 297(1)(a) and (c).

As outlined in Section B, Article 297(1)(a) and (c) confirm that compulsory jurisdiction *does* apply to disputes in which it is alleged that a coastal State has contravened the freedoms and rights of navigation or acted in contravention of specified international rules and standards in the protection and preservation of the marine environment. The extent to which this provision might be invoked in relation to EEZ fisheries enforcement disputes depends on the way in which the regulations underlying the dispute are characterised:

- if they are characterised as involving the exercise of sovereign rights or jurisdiction under Article 297(3), then any activities to enforce them will be exempt from compulsory jurisdiction if the coastal State has invoked the law enforcement activities exception under Article 298(1)(b)); but
- if they are characterised as constituting a breach of the freedom of navigation of other States under Article 297(1)(a), or of international marine environmental protection rules under Article 297(1)(c), then they will be subject to compulsory settlement pursuant to Section 2 of the LOSC.

As Serdy points out, there is ample scope for disagreement about whether a dispute falls under Article 297, Article 298 or neither of these, depending on how its facts are characterised.[141] Accordingly, this basis of jurisdiction could be described as an *opportunity*, since it may allow disputes to be framed in a way that brings them within the scope of compulsory jurisdiction under Article 297(1)(a)

[141] Serdy, 'Article 298', *supra* note 15, 1921. See also A. E. Boyle, 'Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction', 46 *International and Comparative Law Quarterly* (1997) 1, 37, 43–44.

or (b), even though they relate to the enforcement of fisheries regulations and might be considered subject to automatic exception or optional exclusion under Articles 297(3)(a) and 298(1)(b).[142]

I. The Characterisation of the Dispute

This opportunity was taken up by Saint Vincent and the Grenadines in its dispute with Guinea involving the *M/V "Saiga"*, an oil tanker flagged to Saint Vincent and the Grenadines, which had been arrested by Guinea for bunkering three fishing vessels in the Guinean EEZ. Following the prompt release decision from ITLOS in *M/V "Saiga"*, Saint Vincent and the Grenadines drew on Article 297(1)(a) to institute compulsory proceedings against Guinea on the merits. Since neither Party had lodged a declaration under Article 287(1) selecting a preferred means for dispute settlement, both Parties were deemed to have accepted arbitration in accordance with Annex VII of the LOSC. Accordingly, Saint Vincent and the Grenadines submitted the dispute for compulsory resolution by an Arbitral Tribunal constituted in accordance with Annex VII of the LOSC.[143]

Despite having itself implicitly characterised the dispute as relating to EEZ fisheries enforcement in the prompt release phase of the proceedings, in instituting compulsory proceedings Saint Vincent and the Grenadines took a different approach, framing the dispute as a question of the freedom of navigation. In a request to ITLOS for provisional measures (pending the establishment of the Arbitral Tribunal), Saint Vincent and the Grenadines argued:

> "This is a dispute concerning inter alia the contravention by Guinea of the provisions of the Convention in regard to the freedoms and

[142] In order to limit the possibility for this opportunity to be abused, Art. 294 specifically envisages a "preliminary proceeding" to consider whether the claim constitutes an abuse of legal process or is *prima facie* unfounded—in which case no further action would be taken in the case. Such proceedings can be requested by a party or instituted by the relevant court or tribunal of its own accord, but in practice have generally been addressed as preliminary objections in accordance with applicable rules of procedure. See, eg, *Arbitration under Annex VII of UNCLOS (Philippines v. China)*, Award of the Arbitral Tribunal on Jurisdiction and Admissibility, 29 October 2015, PCA Case No. 2013-19, paras. 124-129.

[143] *"Saiga" (Saint Vincent and the Grenadines v. Guinea), Provisional Measures*, ITLOS, Case No. 2, Request for the Prescription of Provisional Measures Submitted by Saint Vincent and the Grenadines, 13 January 1998, para. 22 [*The M/V "Saiga" (No. 2), Provisional Measures*].

> rights of navigation or in regard to other internationally lawful uses of the sea specified in Article 58 of the Convention. Accordingly, by application of Article 297(1)(a) the dispute is one in respect of which Guinea has accepted the jurisdiction of arbitration proceedings under Part XV Section 2 of the Convention."[144]

This characterisation was rejected by Guinea, which—despite having itself insisted during the prompt release phase that its bunkering laws rested on customs jurisdiction[145]—argued that the proceedings involved a dispute concerning the interpretation or implementation of the provisions of the LOSC with regard to fisheries and was thus regulated by Article 297(3)(a) and exempt from compulsory jurisdiction.[146]

Given the preliminary nature of the provisional measures proceedings, the jurisdictional issue for consideration by ITLOS was limited to whether the Arbitral Tribunal to be constituted under Annex VII would have *prima facie* jurisdiction over the dispute—which ITLOS found was provided by Article 297(1), without providing any further detail or reasoning.[147] However, like the "*Virginia G*" case, the broader jurisdictional issue did not ultimately arise for consideration, since the parties decided to transfer the dispute to ITLOS by agreement, thus commencing the proceedings which would become the *M/V "Saiga" (No. 2) case*, and removing the need to consider the application of compulsory jurisdiction under Article 297(1).[148]

A similar question about the interaction between Article 297(1) and Article 297(3)(a) arose for consideration in the *Chagos Arbitration*, but this time in relation to marine environmental protection standards and the application of paragraph (c) of Article 297(1). The *Chagos dispute* concerned Mauritius' challenge to the United Kingdom's establishment of a marine protected area (MPA) around the Chagos Archipelago. This involved a difficult jurisdictional

144 *Ibid*., para. 23.

145 *The M/V "Saiga" Case*, *supra* note 31, paras. 60-72.

146 *The M/V "Saiga" (No. 2)*, *Provisional Measures*, *supra* note 143, Statement in Response Submitted by Guinea, 30 January 1998, para. 4. Guinea had not—and to date still has not—lodged a written declaration under Art. 298(1)(b), so an objection to jurisdiction could not be made on the grounds that it had been excluded in that way.

147 LOSC, *supra* note 1, Art. 290(5).

148 In the merits phase of the proceedings, Guinea did not reiterate its objection based on Art. 297(3), but confirmed instead that, in its view, the basis for the Tribunal's jurisdiction was the agreement between the parties transferring the proceedings to ITLOS: *The M/V "Saiga" (No. 2) Case*, *supra* note 52, para. 44.

question: did the dispute involve the protection and preservation of the marine environment within the scope of Article 297(1)(c) (as Mauritius asserted); or was it a dispute concerning sovereign rights over living resources in the EEZ, automatically exempt from compulsory jurisdiction under Article 297(3)(a) (as the United Kingdom asserted)?

The Arbitral Tribunal's decision in the *Chagos Arbitration* departed quite significantly from the "orthodox" understanding of Article 297(1) in a number of respects, described in more detail in a number of excellent articles.[149] Of most relevance to this discussion, the Tribunal concluded that Article 297(1) *reaffirms* jurisdiction over the cases enumerated in sub-paragraphs (a) to (c), but does not *restrict* jurisdiction over disputes concerning the exercise of sovereign rights and jurisdiction in other cases, providing that none of the express exceptions in Article 297(2) or (3) are applicable.[150] As a result, the Tribunal found that its jurisdiction over the dispute was established by Article 288(1) of the LOSC, except with respect to any portions of the dispute that it considered subject to Article 297(3), which would automatically be excluded.[151] Applying this test to the case at hand, the Tribunal concluded that the dispute between the parties in relation to the compatibility of the MPA with the LOSC was not limited to the living resources of the EEZ, but when "properly characterised" related more broadly to the preservation of the marine environment.[152] Accordingly, compulsory jurisdiction over this aspect of the dispute was not excluded entirely by the exception in Article 297(3),[153] but rather "reaffirmed" by Article 297(1).[154]

Although the *Chagos Arbitration* decision does not relate specifically to the *enforcement* of fisheries laws in the EEZ, it neatly demonstrates the potential jurisdictional effects of "characterising" a dispute in one way or another. In this respect, as the *Chagos Tribunal* noted, it is for the court or tribunal itself, "while giving particular attention to the formulation of the dispute chosen by the Applicant, to determine on an objective basis the dispute dividing the parties,

149 See, eg, Allen, *supra* note 16; B. Kunoy, 'The Scope of Compulsory Jurisdiction and Exceptions Thereto under the United Nations Convention on the Law of the Sea' [2020] *Canadian Yearbook of International Lawnternational Law* 1; S. Talmon, 'The Chagos Marine Protected Area Arbitration: Expansion of the Jurisdiction of UNCLOS Part XV Courts and Tribunals', 65 *International and Comparative Law Quarterly* (2016) 4, 927.

150 *Chagos Arbitration*, *supra* note 16, para. 317.

151 *Ibid*., para. 319.

152 *Ibid*., paras. 304 and 319.

153 *Ibid*., para. 304.

154 *Ibid*., paras. 304-319.

by examining the position of both parties",[155] and in doing so, "to isolate the real issue in the case and to identify the object of the claim".[156] While courts and tribunals are supposed to do this objectively, it will not always be easy. As Talmon astutely observes, "the characterisation of a dispute is not a scientific exercise with only one correct answer. On the contrary, any evaluation of where the 'relative weight' of a dispute lies is an inherently subjective exercise."[157] Insofar as a dispute involves enforcement activities, this evaluation will almost certainly concern the underlying laws and regulations subject to enforcement, rather than the *enforcement* activities themselves—but as the *Saiga* example shows, Article 297(1) potentially provides an alternative route to compulsory jurisdiction for disputes involving the enforcement of laws and regulations relating to fisheries in the EEZ, provided they can be "characterised" in a relevant way.[158]

II. The Scope of Jurisdiction under Article 297(1)

While much more could be said about the jurisdictional scope of Article 297(1) generally, such a discussion exceeds the scope of this article, with its specific focus on jurisdiction over EEZ fisheries enforcement disputes. There are, however, three final observations that should be made, which arise from the relationship between Article 297(1) and the broader framework for EEZ fisheries enforcement disputes. First, for the avoidance of any doubt, and as confirmed in the *South China Sea Arbitration*,[159] the optional exception in Article 298(1)(b) does *not* exclude consideration of cases under Article 297(1)—only Article 297(2) and (3).

Second (and as discussed in the preceding Section), while a dispute concerning enforcement activities that are characterised as relating to *fisheries* can be subject to compulsory jurisdiction in the absence of a declaration under Article 298(1)(b), the scope of that jurisdiction is still limited by the

155 *Ibid*., para. 208, citing *Fisheries Jurisdiction (Spain v. Canada)*, Judgment, ICJ Reports 1998, 432, 448 para. 30.

156 *Chagos Arbitration*, *supra* note 16, para. 208, citing Nuclear Tests Case (New Zealand v. France), Judgment, ICJ Reports 1974, 457, 466 para. 30.

157 Talmon, *supra* note 149, 933.

158 It is possible to envisage other ways in which an EEZ fisheries enforcement dispute might be characterised in order to bring it within the compulsory dispute settlement procedures under Part XV. For example, in the situation where a fisheries enforcement dispute arises in an EEZ generated by a maritime feature whose status is under dispute, a flag State might formulate the dispute as concerning the status of the feature and its entitlement to generate maritime zones under the LOSC.

159 *South China Sea Arbitration*, *supra* note 97, para. 928, fn 1029.

automatic exception in Article 297(3)(a)—meaning that only the lawfulness of the enforcement activities, and not the underlying laws and regulations, can be examined. In contrast, if a dispute concerning enforcement activities is characterised as relating to the *freedom of navigation* under Article 297(1)(a), or the *protection and preservation of the marine environment* under Article 297(1)(c), the compulsory jurisdiction of the court or tribunal will extend to the examination of not only the actions undertaken to enforce the laws and regulations, but the validity of underlying laws and regulations themselves. This would significantly alleviate some of the challenging jurisdictional distinctions arising from the relationship between Article 298(1)(b) and 297(3)(a) discussed above.

Third, and as a caveat to the previous point, even if a dispute involving enforcement activities in the EEZ is characterised as relating to the freedom of navigation or the protection and preservation of the marine environment, the automatic exception in Article 297(3)(a) will still provide protection from compulsory jurisdiction for any question regarding the validity of the coastal State's laws and actions relating to fishing. In this respect, complex jurisdictional issues are still likely to arise, particularly in relation to activities at sea which involve overlaps between the "sovereign rights" of coastal States and the "user rights" of other States. These are the situations in which the compulsory jurisdiction of courts and tribunals must be interpreted in a way that will help to "balance the equation" and support the effectiveness of the Part XV framework in bringing balance to the compromises embedded in the LOSC.

F. Conclusion: "Swallowing the Rule" or "Balancing the Equation"?

This brings us back to the central question of this special issue: does the automatic "exception" for disputes in respect of fishing and fisheries in the EEZ swallow the general "rule" of compulsory settlement? In the specific context of EEZ fisheries *enforcement*, the short answer to this question is "no"—and the longer answer is that, notwithstanding the many hypotheticals which could be posed in relation to EEZ fisheries enforcement disputes, the last 25 years has demonstrated that the practical effect of the exceptions to compulsory jurisdiction has been very limited. This is reflected in the way that States Parties to the LOSC have engaged with the provisions of Part XV in the context of EEZ fisheries enforcement disputes, and in the approach of courts and tribunals to interpreting the relevant provisions of the LOSC. Drawing on the practice and

jurisprudence examined in this article, this Section provides some conclusions about the Part XV framework for the settlement of EEZ fisheries enforcement disputes, and shows that rather than "swallowing the rule" of compulsory jurisdiction, it helps to "balance the equation" that is established in the LOSC between the rights and interests of coastal States and other States in the EEZ.

First—and going directly to the question of balance—the practical effect of Part XV is to ensure that EEZ fisheries enforcement disputes are neither *entirely subject* to compulsory jurisdiction by virtue of Section 2, nor *entirely excluded* from compulsory jurisdiction pursuant to Article 297(3)(a). In this respect, rather than taking a binary approach and classifying all EEZ fisheries enforcement disputes as either "compulsory" or "not", the inter-related and overlapping provisions in Part XV establish a more nuanced scheme under which jurisdiction applies to different extents under different circumstances. Whether this is due to insightful drafting during the LOSC negotiations, judicious application of the relevant provisions by States Parties, or the prescient interpretation of courts and tribunals—or a combination of all of these—the overall effect has been to produce a "balance"; neither compulsory settlement nor automatic exception, but something in between.

For example, as the discussion above has shown:

- all States are obliged to accept compulsory jurisdiction in the narrow situations giving rise to prompt release cases under Article 292, and nine such proceedings have been instituted and responded to;
- while all coastal States have the option to exempt a broad category of EEZ fisheries law enforcement activities from compulsory jurisdiction under Article 298(1)(b), very few States have exercised this option, and a significant number have also accepted the compulsory jurisdiction of the ICJ over such disputes; and
- there are only two instances in which a State has relied on compulsory jurisdiction to institute dispute settlement proceedings concerning EEZ fisheries enforcement activities — the *M/V "Virginia G" case* and the *M/V "Saiga" (No. 2) case* — and in both instances, the proceedings were submitted to ITLOS by agreement anyway.

Second, in the limited number of cases in which questions of compulsory jurisdiction have been considered, the jurisprudence suggests that courts and tribunals have taken a restrictive approach to interpreting the pre-conditions for jurisdiction under Articles 292, 297(1) and 298(1)(b). This is evident, for example,

in the strict approach that ITLOS has taken to determining the nationality of vessels in proceedings under Article 292, which ensures that prompt release applications are only made by the flag State of the vessel, and that the Tribunal's decisions do not undermine the operation of the coastal State's internal domestic legal processes. ITLOS has also taken a restrictive approach to questions of admissibility in prompt release cases, ring-fencing the scope of the procedure by refusing to consider any allegations beyond the failure to promptly release a vessel and crew upon payment of a reasonable bond.

Importantly, this "restrictive" approach does not apply only in relation to the extent to which proceedings can be instituted *against* coastal States; it also affects the extent to which limitations on jurisdiction can be relied on *by* coastal States. This is demonstrated, for example, in the restrictive interpretation that has been adopted with respect to the geographic scope of the automatic exception for EEZ fisheries disputes in Article 297(3)(a)—and thus, necessarily, the optional exception in Article 298(1)(b))—pursuant to which coastal States are not exempt from compulsory jurisdiction in relation to disputes concerning fishing activities in their territorial sea or on their continental shelf, and the exception will only apply in cases where the coastal State's rights to the EEZ have been objectively established.

Third, it is clear that the question of characterisation is critical to the jurisdictional scheme for EEZ fisheries enforcement disputes; as Boyle has observed, "everything turns in practice not on what each case involves but on how the issues are formulated."[160] Given the general absence of instances in which EEZ fisheries enforcement disputes have been instituted on the basis of compulsory jurisdiction, the difficult hypotheticals about their potential characterisation that are envisaged in Sections D and E of this article have not yet arisen for consideration in practice — at least, not as a matter of jurisdiction. However, some of the key questions decided in the *M/V "Virginia G" case* and the *M/V "Saiga" (No. 2) case* — such as whether bunkering is part of the freedom of navigation or whether it can be regulated by the coastal State pursuant to its sovereign rights over living resources in the EEZ — could easily have been part of a dispute about jurisdiction, if those cases had not been submitted to ITLOS by agreement. So although this remains in the realm of hypothesis, a court or tribunal called upon to consider complex issues of characterisation as a matter

[160] Boyle, *supra* note 141, 44-45.

of jurisdiction might well find that they are not of an "exclusively preliminary character",[161] and defer their consideration to the merits phase.

Finally, while the scope of compulsory jurisdiction under Articles 297(1) and 298(1)(b) has arisen for consideration in a number of recent cases — some of which have given rise to criticism about the "creeping jurisdiction" of courts and tribunals[162] — it is important to note that EEZ fisheries enforcement has not been the central issue in dispute in any of these cases.[163] Rather, they demonstrate a trend toward relying on Articles 297(1) and 298(1)(b) as a basis for invoking and limiting jurisdiction in cases beyond the intended scope of those provisions — in particular, disputes about sovereignty over land territory and questions of delimitation — and the "creative or strategic use of the [LOSC] compulsory dispute settlement mechanism in order to gain a ruling on issues that have nothing to do with the law of the sea."[164] Accordingly, these cases must be understood in context: they do not relate to the effectiveness or otherwise of the Part XV framework for the settlement of *EEZ fisheries enforcement disputes*, but the desire of Parties to push the boundaries of Part XV in order to find avenues for the institution of disputes on other issues, for which compulsory jurisdiction does not exist. In this respect, a careful approach to characterisation will be critical to maintaining the compromise embodied in the LOSC regime—even beyond the question of EEZ fisheries enforcement.

In conclusion, while it may be true that most disputes concerning *EEZ fisheries* are exempt from compulsory jurisdiction, this is not the case in the specific context of EEZ fisheries *enforcement* disputes. In practice, given the demonstrated reluctance of LOSC States Parties to institute disputes about EEZ fisheries enforcement — as well as their apparent willingness to be subject to such disputes, and to submit them to judicial settlement by agreement — there doesn't seem to be any likelihood that the provisions in Part XV relating to EEZ fisheries enforcement disputes will "swallow the rule" of compulsory settlement. Instead, as the law, practice and jurisprudence examined in this article has demonstrated, the Part XV framework for the settlement of EEZ

161 See, eg, Art. 97(6) of the Rules of the Tribunal. Similar procedures are often found in the rules of procedure adopted for Annex VII Tribunals. See further J. Harrison, 'Defining Disputes and Characterising Claims: Subject-Matter Litigation in Law of the Sea Convention Litigation', 48 *Ocean Development & International Law* (2017) 3-4, 269, 275.

162 See, eg, Talmon, *supra* note 149, 950.

163 In particular, the *Arctic Sunrise Arbitration*, the *South China Sea Arbitration*, the *Chagos Arbitration*, and the *Dispute Concerning Coastal State Rights*.

164 Talmon, *supra* note 149, 950.

fisheries enforcement disputes has shown itself to be a nuanced, differentiated jurisdictional scheme which — in practice, if not in principle — has generally served to "balance the equation" and support the overall effectiveness of the compromises embedded in Part V of the LOSC.

However, the past is not always a good indicator of the future. Changing circumstances, new priorities, emerging technologies and unforeseen events may give rise to new and different types of EEZ fisheries enforcement disputes which compel States to seek judicial settlement of new and emerging issues. In future, the fisheries enforcement disputes arising for settlement under Part XV might relate to illegal fishing underpinned by the climate-driven redistribution of fish stocks, to navigational restrictions associated with offshore renewable energy installations, to different perspectives on the impacts of sea-level rise on maritime zones or the status of maritime features, or to enforcement activities involving autonomous marine vehicles or remote surveillance technologies. It remains to be seen how the rules and exceptions of this jurisdictional scheme might cope with the new and different pressures which such new and different types of disputes might bring — and whether it will continue to "balance the equation" or will ultimately "swallow the rule".