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ORIGINAL ARTICLE

INTERNATIONAL LAW AND PRACTICE

Dislodging the compulsory dispute settlement mechanism: Analysis of Article 281 of UNCLOS

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Abstract
Article 281 of UNCLOS allows states parties to a dispute to set aside the compulsory dispute resolution procedures under Section 2 of Part XV. This article discusses the recent jurisprudence that appears in the interpretations of Article 281. It discusses in turn whether, first, Article 281 provides requirements for agreements under Article 281(1) to activate the opt-out procedure from the compulsory dispute settlement mechanism; second, whether such agreements under Article 281(1) must include an explicit exclusion from the procedures under Section 2 of Part XV of UNCLOS; and, finally, whether agreements under Article 281(1) must include a compulsory dispute settlement procedure allowing binding decisions. It is concluded that Article 281 is not designed for compulsory dispute settlement procedures, which is the object and purpose of Article 282. Instead, Article 281 opts for consensual dispute settlement mechanisms which, under certain circumstances, may set aside the compulsory dispute settlement mechanism in Section 2 of Part XV.

Keywords: Article 281; consensual dispute settlement; dispute settlement mechanism; jurisprudential differences; UNCLOS

1. Introduction

The jurisdiction of international courts and tribunals is contingent upon the consent of all states involved. This is a well-established principle of international law.[1] No consent, no jurisdiction. Thus, courts and tribunals have regarded the question of jurisdiction as fundamental as 'their judgments, if rendered in excess of power, may be treated as null'.[2] Consent to jurisdiction may be expressed through different means. First, states may lodge declarations under Article 36(2) of the Statute of the International Court of Justice (ICJ), where they commit themselves on a voluntary basis to accept the

[1]*Case of the Monetary Gold Removed from Rome in 1943 (Italy v. United Kingdom of Great Britain and Northern Ireland and United States of America)*, [1954] ICJ Rep. 19, at 32. See also *Rights of Minorities in Upper Silesia (Minority Schools) (Germany v. Poland)*, [1928] PCIJ (Ser. A) No 15, at 22; *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment of 26 June 1992, [1992] ICJ Rep. 260; *East Timor (Portugal v. Australia)*, Judgment of 30 June 1995, [1995] ICJ Rep., at 101. In *Status on Eastern Carelia*, the PCIJ noted that '[i]t is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement', *Status on Eastern Carelia*, Advisory Opinion, [1923] PCIJ (Ser B) No. 5, at 27.

[2]*Mavrommatis Jerusalem Concessions*, [1927] PCIJ (Ser A) No. 2, at 60 (Judge M. Moore, Dissenting Opinion). Yet, this statement should be tempered as it is a well-established rule under international law that only the relevant international forum is competent to determine its own jurisdiction, i.e., the so-called *kompetenz-kompetenz* principle enshrined in Article 36(6) of the Statute of the International Court of Justice. See *Nottebohm (Liechtenstein v. Guatemala)*, Preliminary Objections, Judgment of 18 November 1953, [1953] ICJ Rep., at 119. The principle prevails even in disputes where the seisin of the relevant international forum showed grave defects. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Preliminary Objections, Judgment of 18 November 2008, [2008] ICJ Rep., at 441–2, paras. 85–86.

ICJ's compulsory jurisdiction.[3] Second, states may also enter into special agreements to refer a dispute to a competent court or tribunal for resolution. Finally, courts and tribunals may also receive jurisdiction pursuant to compromissory clauses in a bilateral or multilateral agreement. What is important is the expression of a state's unequivocal acceptance of jurisdiction, whatever the form of the seisin of the relevant court or tribunal.[4]

It is generally accepted that Part XV of the United Nations Convention on the Law of the Sea (UNCLOS) establishes a general and comprehensive dispute settlement mechanism.[5] By ratifying UNCLOS, states parties have, subject to Articles 297 and 298, accepted compulsory jurisdiction in regard to 'any dispute concerning the interpretation or application of [UNCLOS]'.[6] Further, the dispute settlement mechanism also gives jurisdiction to the courts and tribunals referred to in Article 287(1) of UNCLOS in regard to 'any dispute concerning the interpretation or application of an international agreement related to the purpose of [UNCLOS], which is submitted to it in accordance with the agreement'.[7] A recent example is the conclusion on 4 March 2023 of the draft agreement under UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ Agreement).[8] Yet, the dispute settlement procedures in Section 2 of Part XV may be set aside in favour of other dispute settlement procedures. This is apparent from Article 282 and Article 281 of UNCLOS.[9] Article 281(1) provides that:

[3]The relevant part of Art. 36(2) of the ICJ Statute provides: 'The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court.'

[4]*Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment of 4 June 2008, [2008] ICJ Rep., at 204, para. 62; *The Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Preliminary Objections, Judgment of 25 March 1948, [1948] ICJ Rep., at 278; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment of 3 February 2006, [2006] ICJ Rep., at 18.

[5]1982 United Nations Convention on the Law of the Sea, 1833 UNTS 3. See 'One of the significant achievements of the Third United Nations Law of the Sea Conference was the development of a comprehensive system for the settlement of the disputes that may arise with respect to the interpretation or application of [UNCLOS].' M. H. Nordquist, S. Rosenne and L. B. Sohn, *United Nations Convention on the Law of the Sea 1982: A Commentary* (1993), vol. 5, para. XV.1. See also A. L. C. de Mestral, 'Compulsory Dispute Settlement in the United Nations Convention on the Law of the Sea: A Canadian Perspective', in T. Buergenthal (ed.), *Contemporary Issues in International Law: Essays in Honor of Louis Sohn* (1984), 169; E. L. Richardson, 'Dispute Settlement Under the Convention on the Law of the Sea: A Flexible and Comprehensive Extension of the Rule of Law to Ocean Space', in Buergenthal, ibid., at 149. For a different view see conclusions of the arbitral tribunal in the *Southern Bluefin Tuna* case, where it is concluded, in a finding which has not been followed by other arbitral tribunals that UNCLOS 'falls significantly short of establishing a truly comprehensive regime of compulsory jurisdiction entailing binding decisions'. *Southern Bluefin Tuna (Australia v. Japan; New Zealand v Japan)*, Award on Jurisdiction and Admissibility, (2000) 23 UNRIAA 1, para. 62.

[6]Excerpt from Art. 288(1) of UNCLOS, ibid.

[7]Excerpt from Art. 288(2) of UNCLOS, which has driven Tullio Treves to refer to it as a 'System for Law of Sea Dispute Settlement', T. Treves, 'A System for Law of the Sea Dispute Settlement', in D. Freestone, R. Barnes and D. Ong (eds.), *The Law of the Sea: Progress and Prospects* (2006), 417.

[8]2023 Draft Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction (BNNJ Agreement). Consistent with Art. 55(1) of the BBNJ Agreement, '[d]isputes concerning the interpretation or application of this Agreement shall be settled in accordance with the provisions for the settlement of disputes provided for in Part XV of the Convention'. The website of the International Tribunal for the Law of the Sea (ITLOS) contains a list of international agreements under Art. 288(2). The list is not exhaustive, see N. Bankes, 'The Jurisdiction of the Dispute Settlement Bodies of the Law of the Sea Convention with Respect to Other Treaties', (2021) 52 *Ocean Development of International Law* 346. It has been observed that 'the without prejudice provision of [Article 55(7) of the BBNJ Agreement] may have broader implications than articles 281 and 282. It may be read as implying that dispute settlement procedures under other instruments and frameworks are insulated from the effect of the outcome of a related dispute settlement procedure under the BBNJ Agreement'. L. N. Nguyen, D. Georgoula and A. Oude Elferink, 'Dispute Settlement under the BBNJ Agreement: Accepting Part XV of the UNCLOS with a Twist', *EJIL:Talk!*, 15 May 2023, available at www.ejiltalk.org/dispute-settlement-under-the-bbnj-agreement-accepting-part-xv-of-the-unclos-with-a-twist/.

[9]Art. 282 provides: 'If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request

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> If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.

Accordingly, states parties to UNCLOS may enter into other treaty engagements rendering inoperative the compulsory dispute settlement mechanism in Section 2 of Part XV.[10] While the interrelations of Article 281 and Article 282 of UNCLOS may call for further scrutiny,[11] this article focuses on Article 281 of UNCLOS. Its analysis considers customary treaty interpretation rules under the Vienna Convention on the Law of Treaties (VCLT).[12] It also examines how courts and tribunals have interpretated Article 281.[13] It has been noted that Article 281 'appear[s] essentially innocuous'.[14] If true, this would make it all the more difficult to understand why courts and tribunals have adopted 'diametrically opposed interpretations of Article 281'.[15]

A key question is whether Article 281 requires that the agreement in question establishes an effective judicial and arbitral mechanism capable of resolving a dispute that can be triggered unilaterally by either of the disputing parties.[16] On the one hand, in the *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait*, the arbitral tribunal noted that the clauses of the treaties in dispute '*do not* constitute dispute settlement clauses. Considering this finding, it is not necessary for the Arbitral Tribunal, [to determine] whether its jurisdiction is excluded pursuant to Article 281 of the Convention'.[17] On the other hand, in its judgment on preliminary objections in *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya)*, the ICJ observed that agreements under Article 281 also include 'a means of settlement that does not lead to a binding decision'.[18] The ICJ referred to Article 281 as an *a contrario* reference to Article 282. Accordingly, the reference to Article 281 is *obiter*.[19] Yet, the ICJ did observe that Article 281 allows states parties to agree 'to procedures that do *not lead* to a binding

of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree.'

[10]It has been observed that 'Articles 281 and 282 render the normative policy principle as contained in Article 280 more concrete.' R. Wolfrum, 'Conciliation under the UN Convention on the Law of the Sea', in C. Tomuschat, R. Pisillo Mazzeschi and D. Thürer (eds.), *Conciliation in International Law* (2016), 171, at 177.

[11]On this issue see N. Bankes, 'Precluding the Applicability of Section 2 of Part XV of the Law of the Sea Convention', (2017) 48 *Ocean Development of International Law* 239; see Wolfrum, ibid., at 178.

[12]1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331. The ICJ has observed in numerous cases that Arts. 31 and 32 of the VCLT reflect international customary law. See *Maritime Dispute (Peru v. Chile)*, Judgment of 27 January 2014, [2014] ICJ Rep. 3, at 28, para. 57; *Genocide Convention (Bosnia v. Serbia)*, Judgment of 26 February 2007, [2007] ICJ. Rep. 43, at 110, para. 160; *Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment of 17 December 2002, [2002] ICJ Rep. 625, at 645, para. 37; *Case Concerning Kasikilil Sedudu Island (Botswana/Namibia)*, Judgment of 13 December 1999, [1999] ICJ Rep. 1045, at 1059, para. 18; *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment of 3 February 1994, [1994] ICJ Rep. 6, at 21, para. 41.

[13]While customary treaty interpretation is based on a single rule, it relies on four different components, including the context, all of which 'are to be applied together, not individually'. *Prosecutor v. Slobodan Miloševic*, Reasons for Decision on Assignment of Defence Counsel, Case No. IT-02-54-T, 22 September 2004, para. 31.

[14]D. A. Colson and P. Hoyle, 'Satisfying the Procedural Prerequisites to the Compulsory Dispute Settlement Mechanisms of the 1982 Law of the Sea Convention: Did the Southern Bluefin Tuna Tribunal Get it Right?', (2003) 34 *Ocean Development & International Law* 59.

[15]See Nguyen, Georgoula and Elferink, *supra* note 8.

[16]Yet, R. Wolfrum argues that agreements under Art. 281 'are not required to contain a compulsory dispute settlement system'. See Wolfrum, *supra* note 10, at 177.

[17]*Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. Russian Federation)*, PCA Case 2017-06, Award on Preliminary Objections, 21 February 2020, at 141, para. 489 (emphasis added).

[18]*Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Judgment of 2 February 2017, [2017] ICJ Rep. 3, at 48, para. 122.

[19]While the distinction between *obiter dictum* and *ratio decidendi* is important in a legal order that relies on *stare decisis*, 'it is not conducive to clarity to apply the work of the Court, the supposedly rigid delimitation between obiter dicta and ratio decidendi applicable to a legal system based on the strict doctrine of precedent'. H. Lauterpacht, *The Development of*

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result . . . and *accords priority* to such agreed procedures over the procedures of Section 2 of Part XV'.[20] While the observation can hardly be seen as *ratio decidendi* to the operative paragraphs of the judgment, it appears unequivocal that the interpretative approach stands in stark contrast to the interpretation of the arbitral tribunal in the *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait.* In the view of the ICJ:

> . . . if no settlement has been reached by recourse to such means, either of those States parties may submit the dispute to the court or tribunal having jurisdiction under Section 2 of Part XV, unless their agreement to such means of settlement excludes the procedures entailing a binding decision in Section 2.[21]

Accordingly, Section 2 of Part XV can be made inoperative by a consensual dispute settlement procedure, which does not resolve the dispute, but only where the parties included an exclusion clause in the Article 281 agreement. While this appears clear, in the *South China Sea Arbitration*, the arbitral tribunal viewed the same question differently, noting that 'repeated insistence by one party on negotiating indefinitely until an eventual resolution *cannot* dislodge the "backstop of compulsory, binding procedures" provided by Section 2 of Part XV'.[22] Of particular interest is that the conflicting three abovementioned judgments and awards were made in only a five-year interval. Finally, the differences that have appeared in the interpretation and application of Article 281 of UNCLOS is by no means limited to the above-mentioned characteristics.

This article, first, examines whether Article 281 of UNCLOS provides formal requirements for agreements to activate the opt-out procedure in Article 281. Second, it considers whether Article 281 requires an explicit exclusion from the procedures under Section 2 of Part XV of UNCLOS. Third, it analyses whether agreements under Article 281 must include a compulsory dispute settlement procedure allowing binding decisions. Finally, it concludes that Article 281 is not designed for compulsory dispute settlement procedures, which is the object and purpose of Article 282. Instead, Article 281 opts for consensual dispute settlement mechanisms which, under certain circumstances, may set aside the compulsory dispute settlement mechanism in Section 2 of Part XV notwithstanding the chosen procedure not being able to resolve the dispute.

2. Typology of agreements

This section considers whether the procedures under Article 281 of UNCLOS apply only in regard to binding agreements under international law prior to addressing whether agreements under Article 281 must be *ad hoc* of nature in regard to a particular dispute or alternatively relate to disputes that may arise under the treaty in question.

2.1 Legally binding agreements

It is well established that form is not an area where international law imposes strict requirements.[23] On this issue, Article 281(1) of UNCLOS is illustrative. It relies on the concept

International Law by the International Court (1958), at 61. On this issue see also R. Y. Jennings, 'The Judiciary, International and National, and the Development of International Law', (1996) 45 *International & Comparative Law Quarterly* 10.

[20]See *Maritime Delimitation in the Indian Ocean*, *supra* note 18, at 49, para. 126 (emphasis added).

[21]Ibid., at 48, para. 122.

[22]*South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, PCA Case 2013-30, Award on Jurisdiction and Admissibility, 29 October 2015, at 95, para. 247 (emphasis added). The arbitral tribunal relies on the statement to the same effect by Justice Sir Kenneth Keith in his Separate Opinion in *Southern Bluefin Tuna (Australia v Japan; New Zealand v Japan)*, Award on Jurisdiction and Admissibility, (2000) 23 UNRIAA 1, at 56, para. 26 (Judge Sir Kenneth Keith, Dissenting Opinion).

[23]*Nuclear Tests (New Zealand v. France)*, Jurisdiction and Admissibility, Judgment of 20 December 1974, [1974] ICJ Rep. 457, at 473, para. 48.

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of 'agreement'[24] and complements Article 280 of UNCLOS, which states that nothing in Part XV of UNCLOS prejudices the rights of states parties to choose other peaceful means of their choice.[25] Accordingly, there is a strong presumption that an *agreement* on means to resolve the dispute would have to be 'in written form and governed by international law'. Yet, it does not necessarily need to be 'embodied in a single instrument' as the agreement can be 'in two or more related instruments and whatever its particular designation'.[26] However, the *Case concerning Land Reclamation by Singapore in and around the Straits of Johor* before the International Tribunal for the Law of the Sea (ITLOS) suggests that a definition of 'agreement' in Article 281(1) is not necessarily analogical to the VCLT's definition of a treaty.[27] In that case, meetings between the disputing parties were found capable of constituting an agreement under Article 281(1). While susceptible to constitute an agreement under Article 281 of UNCLOS, ITLOS was of the view that Article 281 was not activated because the disputing parties had held consensual dispute settlement meetings after Malaysia had instituted Annex VII arbitration procedures. The interpretation appears to conflate the general obligation under international law, as reflected in Article 279 of UNCLOS,[28] to seek to settle disputes by means indicated in Article 33(1) of the UN Charter, with the specific procedure provided for in Article 281(1). This may be problematic. As indicated in the title of Article 281,[29] the dispute settlement procedure covered in this provision expands on, rather than is part of, the general obligation to settle disputes by peaceful means. Yet, the arbitral tribunal in *Barbados* v. *Trinidad and Tobago* adopted a similar reasoning to ITLOS. In this dispute, the parties had 'agreed in practice, although not by any formal agreement, to seek to settle their dispute through negotiations'.[30] The '*de facto* agreement' of the disputing parties was not conducive to resolving the dispute.[31] Therefore, 'by way of Article 281(1) the procedures of Part XV are applicable'.[32] It is difficult to accept that conduct can be classified as a de facto agreement for the purposes of Article 281(1). This was certainly not the case in the circumstances of the dispute at hand. The dispute between Barbados and Trinidad and Tobago was first and foremost a delimitation dispute. The de facto arrangement in question can hardly be seen to constitute undertakings going beyond the general obligations in Article 74(1) and Article 83(1) of UNCLOS. It may be held that Article 281(1) arguably does not require binding agreements under international law. Yet, the conclusions in the *South China Sea Arbitration* and *Timor Sea Conciliation* go in another direction.

The *South China Sea Arbitration* considered whether Article 281 requires a legal foundation based on the international law of treaties. The question was whether the 2002 China–ASEAN Declaration on the Conduct of Parties in the South China Sea (DOC) was a binding agreement under international law. According to the arbitral tribunal, this was a requisite for constituting an agreement under Article 281 of UNCLOS. The arbitral tribunal observed that the DOC 'was not intended to create legal rights and obligations'. Therefore, it did not constitute 'a legally binding document, but rather an aspirational political document'.[33] According to the arbitral tribunal, the fact that the DOC was not a legally binding

[24]Excerpt from Art. 281(1) of UNCLOS, *supra* note 5.

[25]A. Proelss (ed.), *The United Nations Convention on the Law of the Sea: A Commentary* (2017), at 1821. Further, while Art. 280 provides that nothing in Part XV of UNCLOS impairs the right of States Parties 'to settle' any dispute by peaceful means of their own choice, Art. 281 uses the expression 'to seek settlement' rather than 'to settle', which is the expression used in Art. 280.

[26]Excerpt from Art.2(1)(a) of the VCLT.

[27]*Case Concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, Provisional Measures, Order of 8 October 2003, [2003] ITLOS Rep. 10, at 21, para. 56.

[28]Art. 279 of UNCLOS is titled 'Obligation to settle disputes by peaceful means' and reads as follows: 'States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations and, to this end, shall seek a solution by the means indicated in Article 33, paragraph 1, of the Charter.'

[29]The title of Art. 281 of UNCLOS is 'Procedure where no settlement has been reached by the parties'.

[30]*Barbados v. Trinidad and Tobago*, PCA Case 2004-02, Award of 11 April 2006, at 62, para. 200(ii).

[31]Ibid.

[32]Ibid.

[33]See *South China Sea Arbitration, supra* note 22, at 84, para. 217.

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agreement was 'sufficient to dispose of the issue of the DOC for the purposes of Article 281'.[34] According to this reasoning, Article 281 is only triggered in the event that parties have undertaken international binding legal commitments. The Conciliation Commission in *Timor Sea Conciliation* also adopted this interpretation. It observed that, while Article 281 does not expressly state that an agreement 'must be legally binding for the article to apply, the Commission nevertheless considers that Article 281 requires a legally binding agreement'.[35] The conciliation commission added that it would be inconceivable to accept an understanding that Article 281 would allow 'a non-binding agreement to preclude the application of the compulsory dispute settlement provisions of Part XV'.[36] While the interpretative differences are stark and do relate to different factual matrixes, it is submitted that conclusions of the Conciliation Commission and that of the arbitral tribunal in the *South China Sea Arbitration* appear conclusive.

2.2 Ad hoc agreements

It is well established that Article 31 of VCLT embodies a single rule that includes four elements.[37] These elements 'are to be applied together, not individually'.[38] However, '[i]nterpretation must be based above all upon the text of the treaty'.[39] This arises because, under customary treaty interpretation rules, 'language is never innocent'.[40]

It is noteworthy that Article 281(1) uses the article 'the' prior to 'dispute'. Accordingly, Article 281(1) covers settlements of 'the dispute', rather than 'any' dispute. One can argue that Article 281(1) accordingly relies on agreements concluded in respect to dispute settlement procedures applicable to an identifiable dispute rather than in regard to disputes that may arise in regard to a particular treaty. By contrast, the expression 'any dispute' in, *inter alia*, Articles 279, 285, and 286 relate to general obligations *senso largo* in resolving disputes. The text in Article 281(1) supports the proposition that its scope can be seen, first and foremost, to concern agreements on dispute settlement procedures relating to a particular and well identifiable dispute. This reasoning conforms with the conclusions of the arbitral tribunal in *Barbados* v. *Trinidad and Tobago*. The arbitral tribunal observed that 'Article 281 is intended primarily to cover the situation where the Parties have come to an *ad hoc* agreement as to the means to be adopted to settle the particular dispute which has arisen'.[41] This conclusion was reached by analogy to Article 282, which applies 'where the Parties have a standing bilateral or multilateral dispute settlement agreement which could cover the UNCLOS dispute which has arisen between them'.[42] Yet, as noted earlier, the observations of the arbitral tribunal rely on the *a priori* questionable understanding that a non-binding agreement under international law could constitute an agreement for purposes of Article 281(1). Accordingly, one should avoid drawing firm conclusions from *Barbados* v. *Trinidad and Tobago*.

The drafting history of Article 281(1) supports the proposition that the inclusion of the article 'the' prior to the enumeration of 'dispute' was not coincidental.[43] Article 5 of Part IV of the

[34]Ibid., at 85, para. 219.

[35]*Timor Sea Conciliation (Timor-Leste v. Australia)*, Decision on Competence, 19 September 2016, at 13–14, para. 56.

[36]Ibid., at 14, para. 57.

[37]It follows from the *travaux préparatoires* that the use of a singular rule rather than several rules was a conscious and deliberate choice: 'the [ILC] desired to emphasize that the process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule'. See 'Commentary to Article 28', in International Law Commission, *Yearbook of the International Law Commission* (1996), vol. II, at 222–3.

[38]See *Prosecutor v. Slobodan Milošević*, *supra* note 13, at para. 31.

[39]See *Case Concerning the Territorial Dispute*, *supra* note 12, at 21–2, para 41.

[40]P. Reuter, 'Quelques réflexions sur le vocabulaire du droit international', in *Mélanges offerts à M. le Doyen Louis Trotabas* (1970), at 431.

[41]See *Barbados v. Trinidad and Tobago*, *supra* note 30, at 62, para. 200(ii).

[42]Ibid.

[43]Art. 32 of the VCLT provides in its relevant part that '[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31'.

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Informal Single Negotiating Text is the precursor of Article 281.[44] Article 5 used the expression 'a dispute'.[45] This expression was maintained in the Revised Single Negotiating Text of 1976.[46] It became 'any dispute' in the Informal Composite Negotiating Text of 1977,[47] prior to becoming 'the dispute' in the Final Draft Convention Text of 1981.[48] One question is whether the *travaux préparatoires* are conclusive for this question. The fact that the preparatory works can be seen to document that the inclusion of the article 'the' was not coincidental does not necessarily support a conclusion that it was deliberate in order to narrow the scope of Article 281 accordingly. Yet, it is surprising that courts and tribunals have not paid attention so far to the inclusion of the article 'the' in Article 281(1). By omitting to comment upon the article 'the', where disputing parties are seeking recourse to Article 281 pursuant to general agreements, the arbitral tribunals have considered seemingly that general agreements with no nexus to an identifiable dispute can constitute agreements under Article 281(1),[49] waiving the application of Section 2 of Part XV.[50] In any event, it would appear difficult to accept the premise that agreements clearly relating to the objectives of UNCLOS, providing for alternative consensual dispute settlement procedures, are made void for reasons that Article 281(1) would be limited to identifiable disputes rather than being a general consensual dispute settlement mechanism. As will be discussed in Section 3 of this article, numerous regional fisheries management organizations have opted for general consensual dispute settlement mechanisms the application of which could be made redundant, if a too rigid interpretation be made in regard to the article 'the' in Article 281(1) of UNCLOS.

The correct proposition is that Article 281(1) of UNCLOS does not necessarily only apply to agreements that relate to identifiable disputes but can also extend to other agreements with general dispute settlement procedures.

3. Exclusion clause

Whether Article 281(1) requires an explicit exclusion clause has generated significant controversy.[51] This section, first, considers the recent practice of courts suggesting that an explicit exclusion clause is required. It then considers the practice of relevant regional organizations on consensual dispute settlement procedures none of which rely on an exclusion clause but all of which clearly and unequivocally seek exclusiveness.

3.1 Practice of courts and tribunals

An agreement under Article 281(1) must include an exclusion clause in order to waive the procedures in Part XV of UNCLOS. This can be seen to arise from the ordinary meaning of Article

[44]See Proelss, *supra* note 25, at 1821.

[45]UNCLOS III, Informal Single Negotiating Text (Part IV), UN Doc. A/CONF.62/WP.9 (1975), OR V, 112.

[46]UNCLOS III, Revised Single Negotiating Text (Part IV), UN Doc. A/CONF.62/WP.9/REV.2 (1976), OR. VI, 144, 145.

[47]UNCLOS III, Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10 (1977), OR VIII, at 1, 45–6 (Art. 283).

[48]UNCLOS III, Draft Convention on the Law of the Sea, UN Doc. A/CONF.62/L.78 (1981), OR XV, 172, 218 (Art. 281).

[49]Reference can be made to the 2002 China–ASEAN Declaration on the Conduct of Parties in the South China Sea (DOC), which China in its Position Paper argued was an agreement under Art. 281(1) of UNCLOS. As discussed before, the arbitral tribunal dismissed the Chinese position on the basis that the DOC was not a legally binding agreement under international law. See *South China Sea Arbitration*, *supra* note 22, at 84, para. 217.

[50]In the *Barbados and Trinidad and Tobago* case, the arbitral tribunal concluded that to allow general agreements to fall within the umbrella of Art. 281 would be difficult to reconcile with the purpose and object of Art. 282 of UNCLOS. See *Barbados v. Trinidad and Tobago*, *supra* note 30, at 62, para. 200(ii).

[51]Judge Sir Kenneth Keith observed that the term 'exclude' in Art. 281 must require an 'opting out' from Part XV rather than a positive act of 'opting in'. See *Southern Bluefin Tuna*, *supra* note 22, para. 17 (Judge Sir Kenneth Keith, Dissenting Opinion). See also A. Boyle, 'Some Problems of Compulsory Jurisdiction before Specialised Tribunals: The Law of the Sea', in P. Capps, M. Evans and S. Konstadinidis (eds.), *Asserting Jurisdiction: International and European Legal Perspectives* (2003), 246; B. Kwiatkowsk, 'The Southern Bluefin Tuna Arbitral Tribunal Did Get It Right: A Commentary and Reply to the Article by David A Colson and Dr. Peggy Hoyle', (2003) 34 *Ocean Development & International Law* 369.

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281(1): the compulsory dispute settlement procedures in Section 2 of Part XV apply only where no settlement has been reached by use of the relevant means 'and the agreement between the parties does not *exclude* any further procedure'.[52] However, the inaugural arbitral tribunal under Part XV of UNCLOS found that an implicit opt-out provision may suffice to make Section 2 of Part XV inoperative. According to the tribunal, 'the absence of an express exclusion of any procedure is not decisive'.[53] More recently, the arbitral tribunal in the *South China Sea Arbitration* firmly concluded that an explicit exclusionary provision was a necessary condition for an agreement under Article 281(1) of UNCLOS.[54]

There is no uniform practice in judgments and awards of international courts and tribunals competent under Section 2 of Part XV as to whether an exclusionary provision is a necessary criterion for an Article 281(1) agreement.[55] As mentioned, the arbitral tribunal in the *Southern Bluefin Tuna* found that the absence of an express exclusion of any procedure was not decisive.[56] It set aside the premise underlying the Order on provisional measures of ITLOS under Article 290(5)[57] of UNCLOS. Yet, this interpretation was rejected in the *South China Sea Arbitration*. There, the disputing parties disagreed on whether an express exclusion was required. On Article 27 of the Convention on Biological Diversity,[58] the arbitral tribunal stressed that 'a clear exclusion of Part XV procedures is required in order for Article 281 to present an obstacle for ITLOS's jurisdiction'.[59] The clear reasoning of the arbitral tribunal in the *South China Sea Arbitration* was also adopted in *Maritime Delimitation in the Indian Ocean*. The ICJ observed that nothing prevents parties from agreeing to settle a dispute by any peaceful means of their own choice. Disputing parties are not prevented from relying on Section 2 of Part XV 'unless their agreement to such means of settlement excludes the procedures entailing a binding decision in Section 2'.[60]

A textual reading of Article 281(1) cannot but put some emphasis on the adverb 'only' in that provision, consistent with which the procedures in Part XV of UNCLOS 'apply only' under certain conditions, which are enumerated. A plain reading of Article 281(1) suggests an exclusion clause is a constitutive criterion. This observation is also made having in mind the important role that Part XV has in the overall architecture and institutional system established by UNCLOS. The compulsory dispute settlement mechanism resulted from a delicate balance during the Third Conference[61] and is considered a pillar for the proper functioning of

[52]Excerpt from Art. 281(1) of UNCLOS, *supra* note 5 (emphasis added).

[53]See *Southern Bluefin Tuna*, *supra* note 5, para. 57.

[54]Regarding the above-mentioned finding of the arbitral tribunal in the *Southern Bluefin Tuna* case, see the statement of the arbitral tribunal in the *South China Sea Arbitration* on the decision on jurisdiction and admissibility that 'the better view' is that Art. 281 of UNCLOS requires an explicit exclusion. See *South China Sea Arbitration*, *supra* note 22, at 86, para. 223.

[55]On this issue, it has been observed elsewhere that 'seemingly any treaty relating to ocean matters … must have an explicit exclusion of [UNCLOS] dispute settlement … If it does not, the parties' preferred choice of dispute settlement under that treaty may not be upheld under Article 281'. N. Klein, 'Expansions and Restrictions in the UNCLOS Dispute Settlement Regime: Lessons from Recent Decisions', (2015) 15 *Chinese Journal of International Law* 403, at 406.

[56]See *Southern Bluefin Tuna*, *supra* note 5, para. 57.

[57]Art. 290(5) of UNCLOS provides: 'Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea or, with respect to activities in the Area, the Seabed Disputes Chamber, may prescribe, modify or revoke provisional measures in accordance with this article if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures, acting in conformity with paragraphs 1 to 4.'

[58]1992 Convention on Biological Diversity, 1760 UNTS 79.

[59]Ibid., at 105, para. 286.

[60]See *Maritime Delimitation in the Indian Ocean*, *supra* note 18, at 48, para. 122.

[61]Yoshifumi Tanaka has observed on this that 'there is a risk that the effectiveness of the compulsory procedures may be seriously undermined by the liberal interpretation of Article 281' of UNCLOS. Y. Tanaka, *The International Law of the Sea* (2023), 537. In the same vein, Nigel Bankes has observed that '[w]here the parties have not agreed on a time limit, the matter

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UNCLOS[62] as is illustrated in the fact that only a narrow area, subject to conditions, was left to the discretion of states parties to exclude the application of Section 2 of Part XV.[63] It may be difficult to accept that such a system may be set aside absent an explicit provision to this effect. It should be noted that the expression 'apply only' was already included in the Informal Single Negotiating Text.[64] It was not adjusted in the Revised Single Negotiating Text,[65] nor in its first,[66] second,[67] or third revisions.[68] Therefore, it is curious that the Virginia Commentary to UNCLOS notes that the last sentence of Article 281(1) 'envisages the *possibility* that the parties, in their agreement to resort to a particular procedure, *may* also specify that this procedure shall be an exclusive one'.[69] According to this reasoning, the parties to an agreement under Article 281(1) may, but need not necessarily, include a provision that the dispute settlement procedures therein are exclusive. The arbitral tribunal in the *South China Sea Arbitration*, upon concluding that an explicit clause is required in order to deactivate Part XV of UNCLOS, and relying on the *travaux préparatoires* for this purpose, paid, it is apparent, lip service to the above excerpt from the Virginia Commentary.[70]

A related question is how to construe the expression 'any further procedure'.[71] Must the exclusion clause refer explicitly to Section 2 of Part XV to deactivate Section 2 of Part XV? Alternatively, would a more general exclusion clause be sufficient? In the *Southern Bluefin Tuna* case, the arbitral tribunal opined in more general terms that 'the absence of an express exclusion of any procedure is not decisive'.[72] This repeats the text of Article 281. Yet, in the *South China Sea Arbitration*, the arbitral tribunal found that Article 281 'requires an "opting out" of Part XV procedures'.[73] Accordingly, a general exclusion clause would not necessarily fulfil the requirement. A similar reasoning appears also in *Maritime Delimitation in the Indian Ocean* where the ICJ noted that Article 281 requires an exclusion of 'the procedures entailing a binding decision in Section 2'[74] and also in *Coastal State Rights*.[75] The predominant, and persuasive, trend accordingly is the requirement to exclude the application of Part XV of UNCLOS in order to activate Article 281(1) of UNCLOS.

The fact that Article 281(1) requires an exclusion clause finds also some support in the *travaux préparatoires*. It is noteworthy that the Informal Single Negotiating Text of 1974 and the revised Single Negotiating Text of 1977, together with its subsequent revisions, all rely on the expression 'preclude', rather than 'exclude'. It is only in the Final Draft Convention Text that 'exclude' replaced 'preclude'.[76] According to the Cambridge Dictionary, 'to preclude' means 'to prevent

will be governed by customary law. Under customary law, a state is not obliged to continue negotiations when it concludes that the possibilities of settlement have been exhausted'. See Bankes, *supra* note 11, at 249.

[62]On this issue see L. B. Sohn, 'Settlement of Disputes Arising Out of the Law of the Sea Convention', (1975) 12 *San Diego Legal Review* 516. Other authors have also noted that creating an effective dispute settlement mechanism 'should be regarded as one of the pillars of the new world order in the ocean space'. A. O. Adede, 'Settlement of Disputes Arising under the Law of the Sea Convention', (1975) 69 *American Journal of International Law* 798.

[63]See UNCLOS, *supra* note 5, Art. 298(1).

[64]UNCLOS III, Australia et al., Working Paper on the Settlement of Law of the Sea Disputes, UN Doc. A/CONF.62/L.7 (1974).

[65]See UNCLOS III, Revised Single Negotiating Text (Part IV), *supra* note 46.

[66]UNCLOS III, UN Doc. A/CONF.62/WP.10/Rev.1.

[67]UNCLOS III, UN Doc. A/CONF62/WP.10/Rev.2.

[68]UNCLOS III, /CONF.62/WP.10/Rev.3.

[69]M. H. Nordquist et al. (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary* (1993), vol. 5, para. XV.1, at para 281.5 (emphasis added).

[70]See *South China Sea Arbitration*, *supra* note 22, at 87, para. 208.

[71]Excerpt from Art. 281(1) of UNCLOS, *supra* note 5.

[72]See *Southern Bluefin Tuna*, *supra* note 5, para. 57.

[73]See *South China Sea Arbitration*, *supra* note 22, at 87, para. 224.

[74]See *Maritime Delimitation in the Indian* Ocean, *supra* note 18, at 48, para. 122.

[75]See *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait*, *supra* note 17, at 141, para. 489.

[76]UNCLOS III, A/CONF.62/L.78.

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something or make it impossible'.[77] Meanwhile, 'to exclude' means 'to intentionally not include something' or 'to prevent ... something from ... taking part in an activity'.[78] The expression 'to exclude' is a self-standing clause. This implies that the inclusion of an exclusion clause is sufficient for activating Article 281. Conversely, the expression 'to preclude' would imply requiring that the agreement provide further actions. Accordingly, determining whether the criteria of Article 281(1) are fulfilled would be subject to casuistic findings. It is thus apparent that the fact that *preclude* was deleted and replaced with *excluded*, supports the conclusion that in order to render inoperative the application of Part XV of UNCLOS, an agreement under Article 281 must rely on an exclusion clause. Yet, it is another question whether the exclusion must be explicit or contextual.

It is well established that form 'is not a domain in which international law imposes any special or strict requirements'.[79] The 'principal emphasis [lies] on the intention of the parties [which are] free to choose what form they please provided their intention results from it'.[80] Accordingly, the question arises if it matters for purposes of determining whether an agreement falls within Article 281(1) of UNCLOS, whether the agreement in question necessarily relies on an explicit exclusionary clause. Is it not sufficient if the intention of the parties clearly supports the conclusion that a consensual dispute settlement mechanism is sought to have the effect of setting aside the compulsory dispute settlement mechanism in Section 2? It may be argued that Article 281(1) does not necessarily entail the requirement of an explicit exclusion clause but may also rely on a provision with tantamount effect, which demonstrates an intention to the same effect. In fact, were Article 281(1) necessarily to rest on an explicit exclusion clause would entail that consensual and quasi-compulsory dispute settlement procedures in the constitutive agreements of, e.g., some regional fisheries management organizations could be made redundant, notwithstanding the unequivocal intention that the procedures in question are sought to be exclusive.

3.2 Practice reflected in regional treaties

A number of regional fisheries management organizations include consensual dispute settlement provisions. Yet, none of these agreements rely on an explicit clause that excludes the application of the compulsory dispute settlement mechanism in Section 2 of Part XV of UNCLOS. The application of these dispute settlement mechanisms could be made redundant were one to conclude therefrom that such procedures do not fall within Article 281(1) of UNCLOS.

Consistent with the constitutive treaty of the South Pacific Regional Fisheries Management Organization (SPRFMO),[81] decisions on participatory fishing rights can be adopted by majority voting but a state party can object to a decision adopted by the SPRFMO Commission.[82] Admissible grounds for instigating an objection procedure include alleging that the decision unjustifiably discriminates against the Commission member or is inconsistent with the provisions of the SPRFMO Convention or other relevant international law as reflected in UNCLOS or the UN Fish Stocks Agreement.[83] If the *ad hoc* panel finds that the measure, which is objected to, discriminates or is inconsistent with the SPRFMO Convention, UNCLOS, or the UN Fish Stock

[77]Available at www.dictionary.cambridge.org/dictionary/english/preclude.

[78]Available at www.dictionary.cambridge.org/dictionary/english/exclude.

[79]See *Nuclear Tests*, *supra* note 23, at 473, para 48.

[80]*Temple of Preah Vihear (Cambodia v. Thailand)*, Preliminary Objections, Judgment of 26 March 1961 [1961] ICJ Rep. 17, at 31.

[81]2009 Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean, 2899 UNTS (SPRFMO Convention).

[82]On the consensual dispute settlement provisions in the SPRFMO Convention see B. Mansfield, 'Consensus: A Good Goal but a Bad Rule? Decision Making in Regional Fisheries Management Organisations and the Implementation of the UN Fish Stocks Agreement', (2016) 5 *ANZIL Perspective*, at 2.

[83]See SPRFMO Convention, *supra* note 81, Art. 17(2)(c).

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Agreement, the Commission must meet within 60 days to revise the measure.[84] If the *ad hoc* panel does not uphold the objection, the measure becomes binding unless the dispute is referred to the compulsory dispute settlement mechanism under Section 2 of Part XV. Article 34(2) of the SPRFMO Convention provides that, where the dispute is not resolved under the consensual dispute settlement provisions, the procedures in Section 2 of Part XV may be triggered.[85] Yet, the SPRFMO Convention does not include an explicit exclusion clause. Thus, could the compulsory dispute settlement mechanism in UNCLOS be activated before any *ad hoc* panel considers the objection under the SPRFMO Convention? If the approach in the *South China Sea Arbitration* would guide that analysis, the answer would be yes: any party to the dispute could refer its resolution to binding adjudication or, as appropriate, arbitration under Section 2 of Part XV. Similarly, the Convention establishing the Northwest Atlantic Fisheries Organization (NAFO) provides for *ad hoc* panel procedures in the event of disputes on the interpretation or application of the NAFO Convention or disputes on the interpretation or application of a management measure adopted by the NAFO Commission.[86] Contrary to the SPRFMO Convention, panels are not automatically established under the NAFO Convention where states use the objection procedure. Any party to the dispute 'may submit the dispute to non binding *ad hoc* panel proceedings'.[87] Where the findings of the *ad hoc* panel do not facilitate resolving the dispute, 'any of the Contracting Parties to the dispute may submit the dispute to compulsory proceedings entailing binding decisions' under Section 2 of Part XV of UNCLOS.[88]

Notwithstanding the differences in SPRFMO and NAFO, the consensual procedures therein would never reach the threshold established in the *South China Sea Arbitration* although an intention is apparent, consistent with which the contracting parties to those regional fisheries management organizations clearly sought to establish procedures for resolving relevant fisheries disputes. Further, the *ad hoc* panel procedures ensure swift consideration of any disputes.[89] This contrasts with inter-state adjudication, which often involve lengthy pluri-annual proceedings. Of particular relevance is also that whereas UNCLOS was adopted in 1982, SPRFMO was adopted in 2009, while the amended text of the constitutive treaty of NAFO was adopted in 2008 and entered into force in 2017. Notwithstanding whether Article 281(1) should rely on an explicit exclusion clause, the rules applying in conflict of norms could not be ignored in the interpretation of the relevant provisions in the SPRFMO and NAFO constitutive treaties.[90] One rule is *lex posteriori derogat prior*.[91] These agreements entered into force approximately 30 years after UNCLOS

[84]1995 United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 2167 UNTS 3.

[85]Art. 34(2) of the SPRFMO Convention provides: 'In any case where a dispute is not resolved through the means set out in paragraph 1, the provisions relating to the settlement of disputes set out in Part VIII of the 1995 Agreement shall apply, mutatis mutandis, to any dispute between the Contracting Parties.'

[86]1978 Convention on Cooperation in the Northwest Atlantic Fisheries, 1135 UNTS 369. NAFO 29th Annual Meeting – September 2007, GC Doc 07/4 Amendment to the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, available at https://www.nafo.int/Portals/0/PDFs/key-publications/NAFOConvention.pdf, Art. XV(3) (NAFO Convention).

[87]Excerpt from Art. XV(3) of ibid.

[88]Excerpt from Art. XV(6) of ibid.

[89]In the SPRFMO, the panel is due to be established 30 days upon the expiration of the 60-day objection period. Once established the panel is due to deliver its findings and recommendations within 45 days. See SPRFMO Convention, *supra* note 81, Art. 17(5)(a). Under Art. 7 of Annex II to the NAFO Convention, *ad hoc* panels shall within 90 days from the establishment of the *ad hoc* panel make its report and recommendations.

[90]On this conflict of norm see J. Pauwelyn, *Conflict of Norms in Public International Law – How WTO Law Relates to other Rules of International Law* (2009), 525; N. Matz-Luck, 'Norm Interpretation across International Regimes: Competences and Legitimacy', in M. A. Young (2012), *Regime Interaction in International Law: Facing Fragmentation*, 201; J. Crawford and P. Nevill, 'Relations between International Courts and Tribunals: The "Regime Problem"', in Young, ibid., at 235.

[91]The SPRFMO was adopted in 2010 and entered into force in 2012. The amendment to NAFO was adopted in 2007 and entered into force in 2017.

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entered into force. Further, they clearly indicate the intention to establish consensual dispute settlement procedures that should be exhausted before states parties can refer disputes to the general compulsory dispute settlement procedures in Section 2 of Part XV. Accordingly, whereas the conventions of SPRFMO and NAFO do not contain explicit exclusionary provisions, under the application of relevant conflict of norms, they could, nonetheless, amount to exclusion clauses giving priority to these consensual dispute settlement procedures.

4. Dispute settlement mechanism

Article 281(1) cannot be read to mean that parties to a dispute on the interpretation or application of UNCLOS must pursue any agreed means of settlement indefinitely.[92] Parties may abandon this mean where it is reasonable that the means will not be fructuous. Yet, depending on the procedures chosen, the fact that a dispute is not amenable to be resolved under the chosen consensual dispute settlement procedure(s) foreseen in an Article 281(1) agreement need not imply that either party may refer the dispute to binding dispute settlement procedures under Section 2 of Part XV.

4.1 Nature of procedures under Article 281

It is well established that nothing prevents states parties to UNCLOS in a dispute on the interpretation or application of UNCLOS to agree at any time 'to settle a dispute ... by any peaceful means of their own choice' per Article 280 of UNCLOS.[93] Thus, states can choose the means 'to settle' disputes regarding the interpretation or application of UNCLOS. According to the arbitral tribunal in *Southern Bluefin Tuna*, Article 280 is part of the context for Article 281.[94] This is difficult to accept when Article 280 gives discretion to the parties 'to settle' disputes,[95] whereas Article 281, on its face, does not cover dispute settlement mechanisms stricto sensu, but provides for procedures allowing 'to seek settlement' rather than 'to settle'.[96]

The distinctiveness of adjudication and arbitration is the ability to make a final and binding decision that resolves a dispute with the effect of res judicata. Article 281 clearly does not envisage specific dispute settlement procedures.[97] As discussed earlier, Article 282, by contrast to Article 281, covers dispute settlement mechanisms, but the text of Article 281(1) supports the proposition that the dispute settlement procedure in an Article 281(1) agreement must not necessarily be a compulsory dispute settlement mechanism. Instead, the text suggests that the dispute settlement procedures must be consensual. This follows from the formula 'to seek settlement'.[98] However, in *Coastal State Rights*, the arbitral tribunal suggested a contrary interpretation. It was observed that the relevant provisions in the treaty between Russia and Ukraine 'do not constitute dispute settlement clauses' and therefore 'it is not necessary for the Arbitral Tribunal, in assessing whether its jurisdiction is excluded pursuant to Article 281 of the Convention, to examine the further questions.'[99] Accordingly, the arbitral tribunal 'rejects the Russian Federation's objection that it

[92]To this effect see *Southern Bluefin Tuna*, *supra* note 5, para. 55; *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, Order of 27 August 1999, [1999] ITLOS Rep. 280, at 295, para. 60; *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor*, *supra* note 27, para. 47; *MOX Plant (Ireland v. United Kingdom)*, Order of 3 December 2001, [2001] ITLOS Rep. 95, at 107, para. 60.

[93]Excerpt from Art. 280 of UNCLOS, *supra* note 5.

[94]See *Southern Bluefin Tuna*, *supra* note 5, at 42, para. 55.

[95]Excerpt from Art. 280 of UNCLOS, *supra* note 5.

[96]Excerpt from Art. 281(1) of UNCLOS, *supra* note 5.

[97]Rüdiger Wolfrum has noted that agreements under Art. 281 'are not required to contain a compulsory dispute settlement system'. See Wolfrum, *supra* note 10, at 178.

[98]Excerpt from Art. 281(1) of UNCLOS, *supra* note 5.

[99]See *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait*, *supra* note 17, at 141, para. 489.

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has no jurisdiction pursuant to Article 281 of [UNCLOS]'.[100] This observation reflects a questionable, but unequivocal, understanding of the arbitral tribunal that Article 281(1) relies necessarily on dispute settlement clauses *stricto sensu*. While the arbitral rendered its view very clearly, a contrary interpretation is apparent in the *Maritime Delimitation in the Indian Ocean*. According to the ICJ, Article 281(1) agreements can be limited 'to a means of settlement that does not lead to a binding decision'.[101] Consequently, according to the ICJ, an agreement under Article 281(1) must not necessarily provide for a dispute settlement mechanism capable of producing binding decisions.

These different understandings are incompatible. Yet, a textual interpretation of Article 281(1) clearly rejects an interpretation whereby only compulsory dispute settlement mechanisms will fall within the ambit of Article 281(1). The object and purpose of Article 281(1) is to allow disputing parties to agree to seek settlement by certain other means than those provided for in Section 2 in Part XV. In doing so, it allows the parties to choose a procedure that may become exclusive, in the absence of a particular timeline limiting its exclusiveness. Indeed, requiring compulsory dispute settlement procedures, enabling a body to make final and binding decisions under international law, is tantamount to subsuming Article 282 within Article 281(1). Accordingly, the context does not support the approach embraced by the arbitral tribunal in *Coastal State Rights.* While the learned arbitrators decided otherwise, it is difficult to accept the proposition that the expression 'have agreed to seek settlement'[102] by any standard can be read to mean have *agreed to settle*. The *travaux préparatoires* also support this conclusion. The Informal Single Negotiating Text included a criterion similar to the reasoning of the arbitral tribunal in *Coastal State Rights*, in which Article 5 of Part IV foresaw a procedure in which '[t]he Contracting Parties which are parties to a dispute have agreed *to settle* a dispute by a peaceful means of their own choice'.[103] Yet, the expression 'to seek agreement' replaced 'to settle' in the Revised Single Negotiating Text[104] which remained intact in the final formula that was retained in Article 281(1). Courts and tribunals competent in future disputes may or may not read into Article 281(1) an additional criterion that proper dispute settlement mechanisms be included. However, the text of Article 281(1) clearly does not require such a criterion. Neither does the context, as appears in Article 282 of UNCLOS. This leads to another, inextricably linked, question of whether the exclusiveness of the consensual procedure chosen under Article 281(1) remains operative and exclusive where the chosen procedure cannot effectively resolve the dispute between the parties.

4.2 Deadlocks

Article 281(2) of UNCLOS specifies that the exclusiveness of a procedure chosen under Article 281(1) may be limited in time where the parties have specified a particular duration for the consensual dispute settlement procedure.[105] Thus, the disputing parties can unilaterally rely on the compulsory dispute settlement mechanism in Section 2 of Part XV upon the expiration of the relevant timeframe, where the consensual dispute settlement procedure has not resolved the dispute. A more difficult question is whether parties are precluded from using Section 2 of Part XV procedures where they did not specify a particular timeframe within which the consensual procedure would be exclusive in the event the consensual procedure failed to resolve the dispute.

Allowing opt-outs for consensual dispute settlement procedures which are exclusive and therefore bar Section 2 of Part XV could be seen to undermine Section 2 of Part XV of UNCLOS.

[100] Ibid., at 141, para. 491.

[101] See *Maritime Delimitation in the Indian Ocean*, *supra* note 18, at 48, para. 122.

[102] Excerpt from Art. 281(1) of UNCLOS, *supra* note 5.

[103] See UNCLOS III, Informal Single Negotiating Text, *supra* note 45 (emphasis added).

[104] See UNCLOS III, Revised Single Negotiating Text (Part IV), *supra* note 46.

[105] Art.281(2) provides: 'If the parties have also agreed on a time-limit, paragraph 1 applies only upon the expiration of that time-limit.'

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It has been argued that waiving the compulsory dispute settlement system in the circumstances described above would 'dismantle the compulsory dispute settlement system under the Convention' given that the dispute settlement procedures under Article 281 agreements are consensual in nature.[106] Similarly, it has been observed elsewhere that '[t]he requirement that no settlement has been reached by recourse to such means may entail delay, but does not preclude ultimate resort to binding arbitration or adjudication by the aggrieved party under Section 2 of Part XV'.[107] Another consistent opinion is that 'the Part XV system is applicable only where no settlement is reached'.[108] Accordingly, states parties have full autonomy to decide by their own choice how to settle a dispute on the interpretation or application of UNCLOS. However, the parties to the dispute retain their right to have recourse to Section 2 of Part XV to trigger the compulsory dispute settlement mechanism, where no settlement has been reached under the consensual dispute settlement procedure in the relevant Article 281(1) agreement. This view can be seen to be supported in Article 286 of UNCLOS.[109]

As will be seen below, it is difficult to accept the proposition that any party to a dispute, for which the parties agreed to an exclusive consensual dispute settlement procedure, without time limitations, under Article 281(1) could unilaterally trigger the compulsory dispute settlement procedures in Section 2 of Part XV. A commentary on Article 286 observed that the compulsory dispute settlement mechanism in Section 2 of Part XV applies in regard to disputes where the disputing parties have not agreed, or do not agree on 'submitting a dispute to another mechanism that produces a binding decision (Art. 280 and Art. 282) or have not excluded binding settlement in case they do not reach a settlement "by peaceful means of their own choice" (Art. 281)'.[110] *A fortiori*, where states parties have excluded Section 2 of Part XV, by complying with the requirements in Article 281(1), that the resolution of the dispute is forestalled would not be a justification to trigger Section 2. This appears a sound interpretation of Article 286. Accordingly, recourse to Section 2 of Part XV is precluded notwithstanding the dispute not being resolved. Allow either party to refer the dispute to procedures under Section 2 of Part XV, despite an agreement to a consensual and exclusive dispute settlement procedure under Article 281(1), would be 'doing violence to [the] terms'[111] of Article 281(1), which may be difficult to accept.

Article 31 of VCLT does not rely on any canons of treaty interpretation.[112] However, it is recognized that *effet utile* has 'an important role in the law of treaties'.[113] It is also 'one of the fundamental principles of interpretation of treaties'.[114] It may add weight to the illumination of the object and purpose test.[115] Under the principle of *effet utile*, '[a]n interpreter is not free

[106]See Wolfrum, *supra* note 10, at 178.

[107]B. 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), 394, at 402.

[108]R. Churchill, V. Lowe and A. Sander, *The Law of the Sea* (2022), at 864.

[109]The relevant provisions of Art. 286 of UNCLOS provide that 'any dispute concerning the interpretation or application of [UNCLOS] shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section'.

[110]See Proelss, *supra* note 25, at 1845.

[111]*Free Zones of Upper Savoy and the District of Gex (France v. Switzerland)*, [1929] PCIJ Ser A, No 2, at 13.

[112]On this issue see A. Pellet, 'Canons of Interpretation under the Vienna Convention', in J. Klingler, Y. Parkhomenko and C. Salonidis (eds.), *Between the Lines of the Vienna Convention? Canons and Other Principles of Interpretation in Public International Law* (2019), 1.

[113]*Fisheries Jurisdiction (Spain v. Canada)*, Judgment of 4 December 1998, [1998] ICJ Rep. 432, at 452. Gerald Fitzmaurice stressed the importance that an interpretation requires that 'particular provisions are to be interpreted so as to give them their fullest weight and effect consistent with the normal sense of the words and with other parts of the text, and in such a way that a reason and a meaning can be attributed to every part of the text'. G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951 – 4: Treaty Interpretation and Other Treaty Points', (1953) 30 *British Yearbook of International Law* 204, at 211. On *effet utile* see C. Braumann and A. Reinisch, 'Effet Utile', Klingler, Parkhomenko and Salonidis, ibid., at 72.

[114]See Case *Concerning the Territorial Dispute*, *supra* note 12, at 24, para. 51.

[115]G. Guillaume, 'Methods and Practice of Treaty Interpretation by the International Court of Justice', in G. Sacerdoti, A. Yanovich and J. Bohanes (eds.), *The WTO at Ten – The Contribution of the Dispute Settlement System* (2006), 29, at 469.

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to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility'.[116] Per the International Law Commission's discussion on *effet utile*, the question is whether Article 281 'is open to two interpretations' in which one 'does and the other does not enable the treaty to have appropriate effects'.[117] If so, 'good faith and the objects and purposes of the treaty demand the former interpretation should be adopted'.[118]

Article 281(2) appears to support the view that an agreement under Article 281(1) with no time-limitations indefinitely waives the compulsory dispute settlement procedures under Section 2 of Part XV. If the parties to a dispute on the interpretation or application of UNCLOS decide, they may consistently with Article 281(2) limit the time duration of the exclusiveness of the chosen procedure. If disputing parties could refer a dispute to Section 2 of Part XV where they have agreed to a procedure under the last sentence of Article 281(1), but they did not agree to a particular duration of such exclusiveness under Article 281(2), this would frustrate the effect of Article 281(2). By contrast, if either party was foreclosed from referring the dispute to a compulsory mechanism under Section 2 of Part XV, this would comply with the apparent intention of Article 281(2).

Of note, the Informal Single Negotiating Text provided an additional constitutive criterion for agreements to be concluded under Article 281(1). In addition to being exclusive, an agreement under Article 281(1) would have necessarily included a time-clause beyond which the compulsory dispute settlement mechanism in Section 2 of Part XV would be possible. Article 5 of Part IV of the Informal Single Negotiating Text provided that where disputing parties have agreed, first, to settle a dispute by a peaceful means of their own choice and, second, 'on a time-limit for such proceedings, the procedure specified in this chapter shall apply only after the expiration of that time limit.'[119] Consequently, the inclusion of a time-limit, upon which either of party would be entitled to rely on the compulsory dispute settlement mechanism, was a constitutive criterion for what became Article 281 of UNCLOS. However, this time-limit was deleted in the Revised Single Negotiation Text[120] but instead allowing an optional time-limit, but not constitutive, to follow an Article 281 agreement. Accordingly, the *travaux préparatoires* support the conclusion that, where parties have concluded a valid agreement under Article 281(1), but they did not include a time limit, the referral of the dispute to the compulsory dispute settlement under Section 2 of Part XV would only be possible where agreed by both disputing parties.

Finally, this conclusion appears also in the Virginia Commentary. It is observed that valid Article 281 agreements exclude other dispute settlement mechanisms, including those within Section 2 of Part XV, 'even if the chosen procedure should not lead to a settlement. While this may be considered an undesirable result, it is consistent with the basic principle of Part XV, that the parties are free to decide how they want their dispute to be settled'.[121] However, in the *South China Sea Arbitration*, the arbitral tribunal noted that 'repeated insistence by one party on negotiating indefinitely until an eventual resolution cannot dislodge the "backstop of compulsory, binding procedures" provided by Section 2 of Part XV'.[122] The arbitral tribunal noted further that, where endeavours under Article 281 fail or become futile, this would not imply that either party to the dispute 'has relinquished its right to have recourse to the other means of dispute settlement set out in Section 2 of Part XV'.[123] However, the arbitral tribunal did not substantiate this interpretation

[116]Appellate Report United States - Standards for Reformulated and Conventional Gasoline, adopted 20 May 1996, WT/DS2/9, at 23.

[117]Report of the Commission to the General Assembly, Report of the International Law Commission on the work of its 18th session, 4 May–19 July 1966, ILC Yearbook 1966 (II), UN Doc. A/CN4/SerA/1966/Add1, at 219.

[118]Ibid.

[119]See UNCLOS III, Informal Single Negotiating Text, *supra* note 45.

[120]See UNCLOS III, Revised Single Negotiating Text (Part IV), *supra* note 46.

[121]See Nordquist et al., *supra* note 69, para. XV.1, para. 281.5 (emphasis added).

[122]See *South China Sea Arbitration*, *supra* note 22, at 95, para. 247.

[123]Ibid.

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or explain how it could comply with customary treaty interpretative rules. This matter was also addressed by the ICJ, although as an obiter, in *Maritime Delimitation in the Indian Ocean*. The ICJ observed that nothing prevents states parties to agree among themselves to a means of settlement that does not lead to a binding decision. Yet, according to the ICJ, if no settlement has been reached by recourse to such means, either party to the dispute 'may submit the dispute to the court or tribunal having jurisdiction under Section 2 of Part XV, *unless* their agreement to such means of settlement excludes the procedures entailing a binding decision in Section 2'.[124] Accordingly, notwithstanding the inability to resolve the dispute under the chosen procedures within the Article 281 agreement, neither disputing party may unilaterally refer the dispute to an otherwise competent forum under Article 287(1) of UNCLOS. However, given the proceedings in question, the ICJ did not detail this question as fully as the arbitral tribunal in the *South China Sea Arbitration*. Thus, it remains to be seen whether the ICJ would reach the same conclusion where the relevant procedure failed to resolve the dispute, but disallowing, in principle, to apply the dispute settlement procedures under Section 2. While the subject is critical for the general application of Part XV of UNCLOS, it is of note that courts and tribunals have viewed this question differently. As a result, it is difficult to draw any firm conclusions on the practice of courts and tribunals. However, customary treaty interpretative rules support the conclusion that a chosen dispute settlement procedure under Article 281(1) is exclusive, and effectively dislodges Section 2 of Part XV, where the agreement does not contain any time limitation under Article 281(2), notwithstanding whether the chosen alternative consensual procedure can in fact resolve the dispute.

5. Conclusion

It has been said that Article 281 of UNCLOS 'raises several interpretative questions which still require a solution by the international courts and tribunals concerned'.[125] In fact it is difficult to disagree with the view that courts and tribunals have proposed 'diametrically opposed interpretations of Article 281'.[126] This appears mainly in three different fashions. First, whether Article 281(1) must rely on a legally binding agreement under international law or whether non-binding political statements are sufficient for triggering the procedure(s) in question suggests differences of interpretation that by no means can hardly be seen innocuous. Second, the differences as to the question whether Article 281(1) requires a dispute settlement mechanism *stricto sensu* or whether consensual dispute settlement procedures are sufficient for purposes of setting aside the general application of the compulsory dispute settlement mechanism in Section 2 of Part XV is symptomatic of what generally has been characterized as 'diametrically opposed interpretations of Article 281'.[127] Third, and most remarkably, the different understanding as to whether Section 2 of Part XV is a backstop where the chosen dispute settlement procedure in Article 281 fails to resolve the dispute suggests that the different views apparent in the interpretation of Article 281 touches upon fundamental differences as to the overall structure and application of Part XV of UNCLOS.

While international law does not depend on the *stare decisis* doctrine, there can be no doubt that uniformity in the judicial interpretation of treaty provisions is inherent in any legal system, including the international legal order. It is uncontested that it is less challenging to ensure consistent application or interpretation of a treaty where only one court or tribunal has competence to decide on disputes that relate to the interpretation of a particular treaty. Yet, this may for obvious reasons be slightly more difficult where different courts and tribunals have

[124]See *Maritime Delimitation in the Indian Ocean*, *supra* note 18, at 48, para. 122 (emphasis added).
[125]See Wolfrum, *supra* note 10, at 177.
[126]See Nguyen, Georgoula and Oude Elferink, *supra* note 8.
[127]Ibid.

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competence to decide disputes relating to the same treaty. It is reasonable to put forward the proposition that the main reason for the different interpretations of Article 281 finds its reason in Article 287(1) of UNCLOS, allowing different courts and tribunals competence in respect to disputes concerning the interpretation or application of UNCLOS. In particular, the fact that Annex VII arbitration is the fallback procedure is amenable to further contribute to such differences.

Notwithstanding the differences that appear unequivocally in the interpretation and application of Article 281, the following three general propositions are made in respect to Article 281 of UNCLOS. All three propositions apply cumulatively to ensure that a dispute settlement procedure under Article 281 effectively dislodges the application of Section 2 of Part XV, even in situations where the procedure in question fails to resolve the dispute. First, the agreement concluded under Article 281(1) must be binding under international law and governed by the VCLT. Second, the textual interpretation of Article 281(1) suggests that an agreement under Article 281(1) must include an exclusion clause, but which need not, depending on the circumstances, be explicit. Where no time-limitation under paragraph 2 of Article 281 is included in the relevant agreement, the exclusiveness of the chosen procedure is untouchable and may only be revoked in the presence of agreement of the involved disputing parties.

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