ЗАРУБЕЖНОЕ И МЕЖДУНАРОДНОЕ ПРАВО

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Cases relating to the law of the sea: Issues of jurisdiction of the International Court of Justice

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The law of the sea (LOS) cases regularly appear on the International Court of Justice's (ICJ) docket, allowing it to rule on important substantive aspects of this branch of international law. The article focuses on the way these cases have "carved" the Court's approaches to jurisdictional issues throughout its history. Combining theoretic and practical considerations, the study explores and assesses each jurisdictional basis set forth in Art. 36 of the Statute of the ICJ through the lens of law of the sea disputes considered by the Court: special agreements, jurisdictional clauses of treaties and "Optional clause" declarations. The study also analyses the modern trends in the settlement of the law of the sea disputes in the ICJ, their root causes, the practical "strengths and weaknesses" of various jurisdictional tools for seizin the ICJ, as well as the consequences of some of its key judgments for the future of dispute resolution in the law of the sea. The article also challenges — from a purely legal standpoint — the relevant terms (jurisdiction, competence, reservations and conditions) used in academic sources, political discourse and even in official documents on the jurisdiction of the Court. Due to a variety of fora that may be chosen by States to refer the LOS disputes, the study offers a helpful recapitulation of how the Court's general approaches to jurisdiction were applied in the specific context of the LOS cases, which may serve as a basis for further comparative studies of jurisdictional approaches of other bodies competent to deal with the LOS disputes, inter alia providing valuable information for decision-makers on the prospects of lodging a potential application.

Keywords: law of the sea, jurisdiction, competence, optional clause, unilateral declaration, compromis, special agreement, compromissory clause, forum prorogatum.

1. Introduction

A significant part of the caseload of the International Court of Justice (ICJ) concerns issues of the law of the sea (LOS) despite the abundance of other institutional options for resolving such disputes (including the International Tribunal for the Law of the Sea (ITLOS) or arbitral tribunals). The ICJ has already dealt with such important legal issues as maritime boundary delimitation, straight and normal baselines, the territorial sea, the continental shelf and exclusive economic zones, alleged violations of the legal regime of maritime spaces, issues of fisheries jurisdiction and conservation of marine living resources, protection of the marine environment, etc. This paper strives to demonstrate that these cases have also had an important impact on the emergence of the Court's general approaches on procedural issues concerning its jurisdiction.

Sections 1.1–1.2 introduce the terminology used by the authors and the scope of the research. In Section 2.1 the paper focuses on the LOS cases brought to the Court by special agreements. The procedural peculiarities of the LOS cases brought before the ICJ *via* jurisdictional clauses are scrutinized in Section 2.3. Section 2.4 concerns the LOS cases of the ICJ where "Optional clause" declarations provide for the jurisdictional basis, which is followed by a Conclusion (Section 3).

1.1. The terms "competence" and "jurisdiction" of the ICJ, "reservations" and "conditions" in unilateral declarations

Before going into the jurisdictional questions dealt with by the Court in the LOS disputes, it is appropriate to make some preliminary observations concerning the terminology. Firstly, the terms "competence" and "jurisdiction" of the ICJ are used interchangeably in some authoritative English-language sources (Thirlway 2016, 38; Shaw 2017, 808–816) and even by the Court itself[1]. However, within the meaning of the UN Charter, the term "competence of the Court" is broader than the term "jurisdiction of the Court" and covers it. The latter is used only in connection with *disputes of the States* that are resolved by the ICJ, whereas the former applies when generally referring to the ICJ as one of the main organs of the UN, as well as its *advisory* functions. This is confirmed by the fact that in Chapter II of the Statute of the Court ("Competence of the Court", "*Competence de la Cour*") the term "jurisdiction" appears only in Art. 36, which deals with disputes submitted to the Court, while Art. 34 and 35 do not mention this term. Since this article deals only with contentious cases referred to the ICJ, the term "jurisdiction" is used as more appropriate.

Another preliminary comment on the terminology is linked to the fact that the jurisdiction of the Court in a particular judicial case is based on the principle of consent of the States concerned (Tomuschat 2019, 728), which according to Art. 36 of the ICJ Statute may be expressed by:

— referral of the case by a special agreement (or *compromis*) concluded between the disputing States;

— invocation of a jurisdictional clause of a treaty;

— unilateral declaration of a State recognizing the jurisdiction of the Court, which "may be made unconditionally or on condition of reciprocity…" or "for a certain time".

[1] Certain Expenses of the United Nations (Art. 17, para. 2, of the Charter), Advisory Opinion, 20 July 1962, [1962]. *I. C. J. Reports* 151, p. 168. Accessed June 25, 2023. https://www.icj-cij.org/public/files/case-related/49/049-19620720-ADV-01-00-EN.pdf.

These conditions of unilateral declarations are sometimes called "reservations" in the legal literature (Alexandrov 1995, VII; Tomuschat 2019, 758, 775) and even in UN documents[2]. There is however a legal difference between the term "reservation" and the term "on condition". The legal effects of the use of "reservations" are specified in the 1969 Vienna Convention on the Law of Treaties (Art. 21)[3]. Since unilateral declarations regarding the ICJ jurisdiction are not treaties (as they are defined by Art. 2 of the 1969 Vienna Convention), the term "reservations" is not mentioned in Art. 36 (3) of the Statute relating to unilateral declarations. Thus, in this paper we follow the language of the ICJ Statute and do not use the term "reservations in the declarations".

1.2. The scope of the study

For the purposes of this article a case is regarded as one concerning the LOS if one or more parties to the relevant dispute or the ICJ invoked provisions of treaties or rules of customary international law which fall within this branch of international law. In most of the LOS cases the ICJ has established its jurisdiction, which indicates, *inter alia,* their significance in carving the Court's approaches to jurisdictional questions. It also shows that referral of the law of the sea disputes to the ICJ has been rather consistent throughout the years, the Court being seized of such cases sometimes every two years, sometimes every five years (with the only exception in the period from 1949 to 1967). All main jurisdictional grounds were invoked almost evenly in the practice of the ICJ on the LOS matters. The so-called *forum prorogatum* (another foundation for the Court's jurisdiction where it is based on the consent of the respondent State to an application filed unilaterally without sufficient legal ground) is rather rare, so it is not addressed specifically in this research. The study presents the analysis of the Court's jurisdictional approaches in LOS cases in Sections 2.1–2.3.

2. Basic research

2.1. Cases related to the law of the sea filed in the ICJ by special agreements

A special agreement is regarded as a favorable way for States to agree to the jurisdiction of the ICJ over a certain existing dispute (Crawford 2012, 726; Thirlway 2016, 43; Tomuschat 2019, 744). The growing trend of using such agreements to refer disputes to the Court began in the early 1980's (Higgins 1995, 187–188) and gradually faded away. Nevertheless, some of the widely cited LOS cases were brought to the Court on this jurisdictional basis, and their analysis gives rise to a number of important conclusions (2.1.1–2.1.3).

[2] Report of the Secretary General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992 "An Agenda for Peace: Preventive diplomacy, peacemaking and peace-keeping", 17 June 1992, A/47/277-S/24111. Accessed June 25, 2023. https://digitallibrary.un.org/record/144858.

[3] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980), 1155 U.N.T.S. 332. Accessed June 25, 2023. https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

2.1.1. Limited de facto scope of application of special agreements

While *de jure* the Statute of the ICJ contains no limitations as to the scope of cases referred by a *compromis*, in practice this mechanism is primarily used to resolve territorial and maritime delimitation issues and only where mutual interest of the Parties exists (Tomuschat 2019, 744–745; Mackenzie et al. 2010, 36). For example, in the *Gulf of Maine case (Canada / USA)* the negotiations of the Parties were unsuccessful (Elferink et al. 2019, 105–106). Referring the dispute to the Court by a special agreement allowed the governments not only to settle the disagreement and delimit the maritime spaces, but also to "save face" before the voters (Collier, Lowe 2000, 9). Indeed, where political stakes are high, the population of a disputing State would be readier to accept the outcome of the dispute rendered by a competent impartial judicial body. For instance, after protracted bilateral negotiations and even mediation by the Organization of the American States the long-standing Belize — Guatemala border dispute was brought before the ICJ by a Special Agreement which explicitly provided that the submission of the dispute was conditioned on "the approval of their citizens in national referenda" (Churchill 2020, 659).

Out of many issues related to the LOS, questions of maritime delimitation have the biggest chances of becoming the subject-matter of a *compromis*-based case. Other issues (such as exploitation of marine natural resources; fisheries jurisdiction; protection and preservation of the marine environment, etc.) found their way to the Court mainly by means of jurisdictional clauses of the relevant treaties or unilateral declarations.

2.1.2. Disagreements regarding the legal qualification of a joint document of the parties

In several LOS cases the ICJ had to determine the legal nature of a document invoked as a *compromis* due to the fact that the circumstances of its conclusion and ambiguity of its provisions called into question whether States genuinely intended to endow the ICJ with jurisdiction to adjudicate a certain dispute. In *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*[4] the Court qualified the protocol signed following negotiations by the Foreign Ministers of Bahrain, Qatar and Saudi Arabia as a *compromis* despite Bahrain's arguments that it was a record of negotiations rather than an international agreement (Xue 2017, 72). In contrast, in the *Aegean Sea Continental Shelf case (Greece v. Turkey)* the Court refused to recognize as a special agreement the joint press release of the Heads of Government of Greece and Turkey after exchange of views, although it observed that "it knows of no rule of international law which might preclude a joint communiqué from constituting an international agreement to submit a dispute to… judicial settlement"[5].

The positions of the Court can be understood by comparing the provisions of the documents in question and the circumstances of their conclusion. In the dispute between Qatar and Bahrain the ICJ indicated that the relevant document (titled "Minutes") con-

[4] Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, 1 July 1994, [1994]. *I. C. J. Reports* 112. Accessed June 25, 2023. https://www.icj-cij.org/sites/default/files/case-related/87/087-19940701-JUD-01-00-EN.pdf.

[5] Aegean Sea Continental Shelf (Greece v. Turkey), Jurisdiction of the Court, Judgment, 19 December 1978, [1978]. *I. C. J. Reports* 3, 39, para. 96. Accessed June 25, 2023. https://www.icj-cij.org/sites/default/files/case-related/62/062-19781219-JUD-01-00-EN.pdf.

cerned consultations between the Foreign Ministers of Bahrain and Qatar in the presence of the Minister for Foreign Affairs of Saudi Arabia. The document stated what the Parties had previously "agreed", and provided for the continuation of good offices of the King of Saudi Arabia, and considered the circumstances in which the dispute could be referred to the Court, and even indicated the need to withdraw the case if a solution to the dispute was found while it was pending before the ICJ. Thus, the "Minutes" constituted, in the Court's view, an agreement creating rights and obligations under international law. The ICJ dismissed Bahrain's arguments that the nonfulfillment by the Parties of the relevant domestic procedures and late registration of the text with the UN Secretariat (and non-registration of the document with the General Secretariat of the Arab League) indicated the lack of intention to conclude a treaty.

What then made the Court to decide in the *Aegean Sea Continental Shelf case* that a similar joint communiqué (issued following an exchange of views between the Prime Ministers of Greece and Turkey) did not amount to a *compromis*? The Court explicitly noted that the document's form was not conclusive of its nature and went on to examine in detail its terms, circumstances of conclusion and especially the context (namely the preceding diplomatic exchanges). In the ICJ's view, the text of the communiqué (including the words "decided", "should be resolved" which were highlighted by the Applicant) was not sufficient to overrule the consistent position of Turkey voiced in diplomatic contacts with the Greek side that it was ready to consider a *joint* submission of the dispute to the Court by a *compromis* after defining its concrete scope. Thus, as can be seen from these LOS cases, the Court analyzes in detail not only the specific provisions of the document in question, but also the circumstances of its preparation and conclusion, placing attention on the common will of the Parties formulated in the document.

2.1.3. Disagreements between the parties regarding the subject-matter of a dispute covered by a special agreement

Another feature of special agreements is that, although the existence of the Court's jurisdiction in most cases is not contested by the Parties, they can differ as to which questions are submitted to judicial settlement. In the case of *Qatar v. Bahrain* both Parties acknowledged the existence of the dispute, but disagreed whether certain issues (for example, the status of the Hawar Islands) were part of it. The Court used a special procedure by which it delivered two judgments on jurisdiction and admissibility. In 1994 the ICJ determined in principle the existence of a special agreement between the Parties, and enabled them to submit "the entire dispute" to the Court jointly or separately. In 1995 the ICJ issued its second judgment on jurisdictional issues, in which it determined the subject-matter of the dispute on the basis of the positions received from the Parties separately (Bahrain continued to insist on the absence of the Court's jurisdiction, while Qatar sent a list of aspects falling within it). Subsequently the Court ruled on the merits of the dispute in 2001. Thus, the subject-matter of a dispute is a key element in defining the jurisdiction of the ICJ and usually presents difficulties when drawing up a special agreement by the Parties.

2.2. Cases related to the law of the sea brought before the ICJ by a jurisdictional clause

A growing number of cases are filed with the ICJ by means of compromissory clauses of multilateral treaties (Tomuschat 2019, 748; Abraham 2016, 299). As the former President of the Court H. Owada noted in 2010, the percentage of cases based on such clauses increased from 15 % in the 1980s to 40 % at the end of the last century and further to over 50 % in the 2000s (Owada 2010). This trend continues, and the mechanism of jurisdictional clauses of multilateral agreements is highly relevant today. However, this basis of jurisdiction cannot be regarded as "one-size-fits-all" since it has some peculiarities that will be further demonstrated.

2.2.1. Scarce number of jurisdictional clauses successfully invoked in ICJ proceedings

Although many treaties contain compromissory clauses enabling recourse to the ICJ[6], they generally date several decades back (Thirlway 2016, 44; Akande 2016, 320) and most of them have never been used. A number of multilateral and bilateral treaties concerning different areas of the LOS contain such jurisdictional clauses: some of them provide for unilateral referral of the dispute to the ICJ by any Party, whereas others require consent of the disputing States in order to seize the ICJ. The latter category bears resemblance to special agreements and thus blurs the distinction between these jurisdictional bases.

Paradoxically, the 1982 UN Convention on the Law of the Sea (UNCLOS) is not listed on the Court's official website despite the explicit reference to the ICJ in Art. 287. This could be explained by the fact that under the multi-tribunal system established by Part XV of UNCLOS the dispute-settlement body which may exercise compulsory jurisdiction is determined by the combination of the disputing States' written declarations of preference for one or more of the procedures enumerated in Art. 287 of UNCLOS: the ITLOS, the ICJ, the arbitral tribunal of general (Annex VII) or specialized (Annex VIII) competence (Treves 2007, 929). In case none of the States in question have made a choice, the default option is arbitration in accordance with Annex VII (Gautier 2014, 568; Rosenne 2007, 991). Therefore, for a dispute regarding the interpretation or application of UNCLOS to reach the ICJ, both Parties should elect it as their preference. No cases have been lodged under UNCLOS Art. 287 with the ICJ, even though according to some agreements containing jurisdictional clauses the Parties specifically mention UNCLOS and the Court extensively refers to its provisions in its judgments. Nevertheless, the Court has recently been asked to analyze the dispute settlement mechanism of UNCLOS as will be shown further.

The jurisdictional clause contained in Art. XXXI of the 1948 American Treaty on Pacific Settlement ("the Pact of Bogotá" or "the Pact")[7] adopted within the framework of the Organization of American States has actively been used. The Pact provides for the jurisdiction of the ICJ in all disputes of a juridical nature arising among the Parties. For

[6] Official website of the ICJ. Accessed June 25, 2023. https://www.icj-cij.org/treaties.

[7] American Treaty on Pacific Settlement (adopted 30 April 1948, entered into force 6 May 1949), OAS, Treaty Series, No. 17 and 61. Accessed June 25, 2023. https://treaties.un.org/pages/showDetails.aspx?objid=0800000280162ab6.

instance, the Pact was used by Nicaragua to base the Court's jurisdiction in the territorial and maritime dispute with Colombia, which at the time was not a party to UNCLOS (Churchill 2008, 624). The Court upheld Colombia's preliminary objections regarding the part of the dispute relating to sovereignty over the San Andres Archipelago, but established its jurisdiction to adjudicate on other aspects[8]. This judgment played an important role in clarifying the relationship between the Pact of Bogotá and unilateral declarations under the "Optional clause" system. The ICJ dismissed Colombia's argument that the Court's finding of jurisdiction under the Pact of Bogotá deprived it of the possibility to examine the existence of its jurisdiction on the basis of the Parties' "Optional clause" declarations. The ICJ noted that the plurality of agreements providing for its jurisdiction manifested the intention of the Parties to open additional access to the Court.

In 2008 after unsuccessful attempts to negotiate a settlement of the dispute Peru applied to the ICJ against Chile invoking Art. XXXI of the Pact of Bogotá. Although the dispute concerned the delimitation of the boundary between the maritime zones, Peru as a non-Party to UNCLOS could not base its application on Part XV of the Convention (Churchill 2009, 613). Likewise, in December 1999 Nicaragua brought its application against Honduras basing the jurisdiction of the Court on the Pact of Bogotá and the "Optional clause" declarations (Churchill 2008, 615).

Therefore, despite a large number of treaties governing certain issues of the LOS that could potentially be used to engage the ICJ, States seem to be more willing to rely upon treaties of a general nature. This trend could be explained by attempts of States to secure a broader scope of questions capable of being referred to the ICJ, whereas claims under specific treaties would be limited to the interpretation and application in the specific context; availability of an unambiguous "jurisdictional link" between the applicant and the respondent; avoiding the costs of arbitration; and, quite possibly, successful examples from the relevant practice of the ICJ.

2.2.2. Unstable nature of the system of compromissory clauses and unpredictability of their application

A week after the Court's judgment on the merits in the *Territorial and Maritime Dispute case (Nicaragua v. Colombia)* in 2012 Colombia withdrew from the Pact of Bogotá demonstrating its disagreement with the position of the ICJ — just as El Salvador did in 1973. These examples shed light on another problematic aspect of the system of jurisdictional clauses — its instability, which also limits their application as a jurisdictional basis due to the fact that the State's consent to a treaty containing such provisions can be withdrawn at any time.

However, depending on the exact wording of the provisions of a treaty containing a jurisdictional clause the latter can be used to base the Court's jurisdiction even after the State's withdrawal. For example, Colombia's withdrawal from the Pact of Bogotá did not preclude Nicaragua's application to the ICJ. In its preliminary objections Colombia referred to Art. LVI of the Pact which provides in Para. 1 that this treaty "shall cease to be in force with respect to the State denouncing it" one year after the notification of such with-

[8] Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment, 13 December 2007, [2007]. *I. C. J. Reports* 832. Accessed June 25, 2023. https://www.icj-cij.org/case/124; (Churchill 2008, 624).

drawal, whereas according to Para. 2 the denunciation "shall have no effect with respect to pending procedures initiated prior to the transmission of the particular notification". The respondent interpreted this provision as having no bearing on the substantive obligations stemming from the Pact while limiting any procedures initiated after the notification of denunciation.

The Court dismissed this interpretation since it would annul most of the articles of the Pact governing different procedures (good offices and mediation; investigation and conciliation; judicial settlement and arbitration) and thus run counter to the meaning of Para. 1 of Art. LVI (aimed at preserving the legal force of the Pact during the one-year period at issue) as well as to the object and purpose of the Pact of Bogotá (to promote peaceful settlement of disputes by way of these procedures). Therefore, the ICJ established its jurisdiction[9]. Interestingly, after the one-year period noted above elapsed Colombia itself brought counter-claims against Nicaragua based on Art. XXXI of the Pact of Bogotá which led the Court to consider the question of the lapse of jurisdictional title[10]. The ICJ ruled that this defect had no bearing on jurisdiction since the latter extended to all phases of the case (counter-claims being intrinsically linked to the principal claims).

Given the limited "pool" of treaties with "effective" jurisdictional clauses aggravated by the withdrawal therefrom by some States, applicants make use of the fact that such clauses are often formulated broadly (Thirlway 2016, 42). Some States resorted to treaties that were not completely relevant to the matter in question, trying to pass the dispute "through the eye of a needle"[11] of a jurisdictional clause. In the *Aegean Sea Continental Shelf case*[12] Turkey did not expect to be brought to the ICJ by Greece by way of the jurisdictional clause of the 1928 General Act for the Pacific Settlement of International Disputes (Alexandrov 1995, 15). Although the Court ultimately found no basis for its jurisdiction, Turkey was forced into a lengthy legal process (1976–1978). This trend of framing a multifaceted dispute within the terms of a specific treaty ratified by both relevant Parties has not been opposed by the Court.

There are also no precise requirements for the content and wording of jurisdictional clauses. In the *Fisheries Jurisdiction case (Federal Republic of Germany v. Iceland)* and *Fisheries Jurisdiction case (United Kingdom v. Iceland)*, the Court found that such a clause was contained in the Exchanges of Notes[13]. According to the ICJ, there are no formal requirements for the expression of the State's consent. This factor also adds to the overall

[9] Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia), Preliminary Objections, Judgment, 17 March 2016, [2016]. *I. C. J. Reports* 100. Accessed June 25, 2023. https://www.icj-cij.org/sites/default/files/case-related/154/154-20160317-JUD-01-00-EN.pdf (Churchill 2017, 422).

[10] Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Counter-Claims, Order, 15 November 2017, [2017]. *I. C. J. Reports* 289. Accessed June 25, 2023. https://www.icj-cij.org/sites/default/files/case-related/155/155-20171115-ORD-01-00-EN.pdf.

[11] Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, 6 November 2003, [2003]. *I. C. J. Reports* 326 (Separate Opinion of Judge Simma). Accessed June 25, 2023. https://www.icj-cij.org/case/90.

[12] Aegean Sea Continental Shelf (Greece v. Turkey), Jurisdiction of the Court, Judgment, 19 December 1978, [1978]. *I. C. J. Reports* 3, 15.

[13] Fisheries Jurisdiction Case (Germany v. Iceland), Jurisdiction of the Court, Judgment, 2 February 1973, [1973]. *I. C. J. Reports* 49, 58, Accessed June 25, 2023. https://www.icj-cij.org/sites/default/files/case-related/56/056-19730202-JUD-01-00-EN.pdf; Fisheries Jurisdiction Case (United Kingdom v. Iceland), Jurisdiction of the Court, Judgment, 2 February 1973, [1973]. *I. C. J. Reports* 3, 13. Accessed June 25, 2023. https://www.icj-cij.org/sites/default/files/case-related/55/055-19730202-JUD-01-00-EN.pdf.

unpredictability of the use of compromissory clauses for bringing disputes to the ICJ and should be taken into account when the documents referring to a certain mode of dispute settlement are drafted. If the Parties have no wish to make unilateral seizin of the ICJ possible, the documents in question should avoid the wording which would imply it.

2.3. Cases related to the law of the sea brought before the ICJ via *the "optional clause" declarations*

2.3.1. Special nature of the "optional clause" declarations

Some of the key judgments concerning the LOS clarify the ICJ's approaches to the legal nature of declarations recognizing its jurisdiction as compulsory ("Optional clause" declarations). In the *Fisheries Jurisdiction case (Spain v. Canada)*[14] the Court recognized their dualistic features — namely the co-existence of a unilateral (State's declaration) and a treaty (provisions of the Statute of the ICJ) components — and confirmed the applicability of the law of treaties only "to the extent compatible with the *sui generis* character" of such declarations.

The declaration (the "unilateral component") is determined by each State at its own discretion and thus does not fall under the *pacta sunt servanda* principle and can be altered or withdrawn rather freely, unless certain restrictions of this right are included in the declaration itself (Alexandrov 1995, 13). This results in a high degree of legal uncertainty of the "Optional clause" system. For example, just one day before the filing of Nicaragua's application in *Territorial and Maritime Dispute* Colombia terminated its "Optional clause" declaration. In that case, however, the Court found "no practical purpose" in analyzing Colombia's preliminary objections regarding the legal effect of such termination due to its finding of jurisdictional basis in Art. XXXI of the Pact of Bogotá.

While instances where States withdraw their "Optional clause" declarations after unfavorable Court judgments are a last-resort political measure and rare, this is not the case for changing such declarations. Japan altered its unilateral declaration in 2015 — following the judgment in the *Whaling in the Antarctic case* rendered against it (Churchill 2015, 636) — to exclude "any dispute arising out of, concerning, or relating to research on, or conservation, management or exploitation of, living resources of the sea" from its consent to the jurisdiction of the Court. Likewise, in March 2002 (two months before the date of independence of East Timor) Australia altered its 1975 unilateral declaration[15] to exclude disputes "concerning or relating to the delimitation of maritime zones… or arising out of, concerning, or relating to the exploitation of any disputed area of or adjacent to any such maritime zone pending its delimitation" (a corresponding change was also made to Australia's acceptance of ITLOS jurisdiction by means of a declaration under Art. 298 (1) of UNCLOS). These cases illustrate that for some States certain LOS issues remain sensitive and requiring other means of potential dispute settlement, and also that the unilateral component of the "Optional clause" system makes it prone to political factors.

[14] Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, 4 December 1998, [1998]. *I.C.J. Reports* 432, 453. Accessed June 25, 2023. https://www.icj-cij.org/sites/default/files/case-related/96/096-19981204-JUD-01-00-EN.pdf.

[15] Declarations recognizing the jurisdiction of the Court as compulsory, Australia. 22 March 2002. Accessed June 25, 2023. https://www.icj-cij.org/declarations/au.

Another type of *ratione materiae* conditions encountered by the ICJ in cases concerning the LOS excludes disputes "falling within the jurisdiction of the State in question". For instance, the relevant provision of Canada's unilateral declaration and its legality came under the Court's scrutiny in the *Fisheries Jurisdiction case (Spain v. Canada)*. The ICJ recognized that the application of this condition did not depend "upon the will of its author" and did not breach Art. 36 of the Statute.

In the *Land and Maritime Boundary between Cameroon and Nigeria* case[16] the Court clarified its position regarding another category of unilateral declarations conditions — *ratione temporis*. Nigeria argued that on the date of Cameroon's application to the ICJ (March 29, 1994) it was unaware of the applicant's acceptance of the Court's jurisdiction since the UN Secretary-General sent copies of Cameroon's unilateral declaration to the Parties to the Statute almost a year after it had been made (March 3, 1994). Nigeria insisted that Cameroon "acted prematurely" in violation of the obligation to act in good faith and abused the "Optional clause" system. The ICJ did not uphold such a limited interpretation of unilateral declarations. According to the Court, the text of a unilateral declaration may lack a requirement that a certain period should expire after the date of the declaration before an application can be lodged against the declaring State. Such a factor makes it possible for potential applicants (that are Parties to the "Optional clause" system) to initiate proceedings immediately. This judgment illustrates the special nature of the "Optional clause" system, showing that a State's consent to the Court's compulsory jurisdiction extends to relations with States that have previously acceded to the same clause. Simultaneously such an acceptance of the jurisdiction becomes a standing "offer" to other States that have not yet recognized the Court's jurisdiction under Art. 36 (2) of the Statute.

2.3.2. Specifics of interpretation of "optional clause" declarations due to their sui generis nature

As illustrated by several judgments regarding the LOS, when interpreting "Optional clause" declarations the Court is usually focused on the individual intentions of a particular State that made such a unilateral declaration, which are evidenced not only by the text of the declaration, but also by its holistic context, the circumstances of its drafting as well as its purpose. In the *Fisheries Jurisdiction case (Spain v. Canada)* the Applicant referred to the principle of effectiveness to prove the need to interpret the conditions contained in the unilateral declaration in a way that would not undermine its object and purpose — namely the recognition of the compulsory jurisdiction of the ICJ. The ICJ confirmed that interpretation of "Optional clause" declarations (and the conditions contained therein) is aimed at establishing the existence of a State's consent to the Court's jurisdiction within the limits determined by this State. The ICJ refused to interpret such conditions restrictively, because they "define the parameters of the State's acceptance" of jurisdiction (Tomuschat 2019, 767). The Court confirmed the significance of the principle of effectiveness in the law of treaties and in its case-law, while noting that the terms of unilateral declarations should be interpreted in a manner consistent with the effect sought by the State concerned. Thus, in order to establish Canada's intention at the time of the adoption of the unilateral

[16] Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Preliminary Objections, Judgment, 11 June 1998, [1998]. *I. C. J. Reports* 297. Accessed June 25, 2023. https://www.icj-cij.org/sites/default/files/case-related/94/094-19980611-JUD-01-00-EN.pdf.

declaration, the ICJ analyzed, in particular, the public statements of Canadian ministers, parliamentary debates, legislative initiatives and press releases. It noted, for example, the link between the new Subpara. 2 (d) of Canada's declaration and its new legislation on the protection of coastal fisheries (Kwiatkowska 2001, 20), which in the Court's view clearly indicated the intention to exclude from its jurisdiction any questions that might arise regarding the international legality of the amended legislation and its application.

Another remarkable contribution of the *Fisheries Jurisdiction case (Spain v. Canada)* relates to the international legality of acts excluded from the ICJ's jurisdiction by way of conditions inserted in unilateral declarations. Spain argued that Canada's interpretation of the condition contained in Subpara. 2 (d) of its unilateral declaration was at odds with the ICJ Statute, the UN Charter and general international law, and therefore could not be upheld. The Court confirmed that States may limit their consent to its jurisdiction "sometimes precisely because they feel vulnerable about the legality of their position or policy". The ICJ stressed the need to distinguish two concepts: the acceptance by a State of the Court's jurisdiction (requiring consent) and the compliance of certain acts with the norms of international law (which can be examined by the Court only when considering the issue on the merits after establishing the existence of jurisdiction). Therefore, according to the ICJ, interpretation of conditions contained in unilateral declarations is immune from the "legality test" of acts already excluded from the jurisdiction of the Court, which was an important development in the Court's jurisprudence (Kwiatkowska 1999, 507). However, judges Weeramantry, Bedjaoui and Vereshchetin issued dissenting opinions arguing *inter alia* that "if a violation of a bedrock principle of international law is brought to its attention, [the ICJ cannot] pass by this illegality on the basis that it is subsumed within the reservations clause".

2.3.3. Interrelation of ICJ jurisdiction with other dispute resolution mechanisms

Interpretation of conditions contained in "Optional clause" declarations may at times lead to questions concerning their interaction with other dispute resolution mechanisms. In *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)* one of the preliminary objections concerned the relation between the provisions of UNCLOS on dispute settlement and the unilateral declaration under Art. 36 (2) of the Statute. The multi-tribunal dispute settlement machinery of UNCLOS can be used only when other equivalent mechanisms (which are binding for the disputing Parties) are not applicable (Treves 2007, 932). According to Art. 282 of UNCLOS, if the Parties to a dispute concerning the interpretation or application of the Convention "have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in [Part XV of UNCLOS], unless the Parties to the dispute otherwise agree". Therefore, this rule on its plain reading prioritizes the acceptance of the jurisdiction of the ICJ under Art. 36 (2) of the Statute over the compulsory jurisdiction system of UNCLOS (Treves 2007, 933). However, would this conclusion be different depending on the contents of the State's "Optional clause" declaration?

Precisely this issue arose in the *Maritime Delimitation in the Indian Ocean* case due to the fact that Kenya's unilateral declaration contained a condition excluding disputes

in regard to which the Parties "have agreed or shall agree to have recourse to some other method or methods of settlement" from the jurisdiction of the ICJ. Kenya asserted that such "other method" entailed arbitration under Annex VII to UNCLOS as provided by Para. 3 of Art. 287 of the Convention (since neither Party had made a declaration on the choice of dispute settlement procedure pursuant to Para. 1 of the same article). The respondent did not dispute the general precedence of "Optional clause" jurisdiction over Part XV mechanisms envisaged by UNCLOS. However, Kenya maintained that in the specific circumstances of that case such precedence was reversed, because its unilateral declaration could not be regarded as an agreement under Art. 282 UNCLOS (that would apply "in lieu of the procedures provided for in [Part XV]") due to a condition contained therein. The respondent also based its argument on the *lex specialis* and *lex posterior* character of Part XV of UNCLOS compared to the "Optional clause" declarations of the Parties.

The Court referred to the *travaux préparatoires* of UNCLOS to confirm the intention of the negotiators to ensure that "Optional clause" declarations fall within the scope of Art. 282 (although the majority of such declarations include a condition analogous to Kenya's)[17]. The ICJ was mindful that a different conclusion would have been at odds with the result envisaged by Art. 282, namely to give priority to declarations under Art. 36 (2) of the Statute (Churchill 2018, 676). Thus, the Court upheld its jurisdiction in the case giving special consideration to Kenya's intent as reflected in its declaration (namely to ensure that the dispute is subject to a means of settlement), rather than as argued by Kenya in pleadings (that the condition implied the lack of the consent to the Court's jurisdiction on issues concerning the interpretation or application of UNCLOS).

The Court drew a distinction between unilateral declarations containing a condition akin to Kenya's and those "exclud[ing] disputes concerning a particular subject (for example… disputes relating to maritime delimitation)", which, unlike the former, would not amount to an agreement "to have recourse to some other method… of settlement" under Art. 282 UNCLOS and would thus trigger the application of the procedures of Section 2 of Part XV. This position in particular, as well as the Court's treatment of the condition of Kenya's unilateral declaration in general, raised criticism from one of the judges[18] and the academic community (Churchill 2018, 676–677; Benatar, Franckx 2017), as well as warnings for States to revise their "Optional clause" declarations in case their intention was not to exclude the procedures of Part XV of UNCLOS (Bankes 2017; Benatar, Franckx 2017). Others, however, positively assessed the Court's conclusion given that declining of its jurisdiction did not guarantee the examination of the application under the procedures of Part XV UNCLOS[19]. Curiously, nine days prior to the Court's judgment (and several days after the Court's deliberations) Kenya exercised its right under Art. 298 UNCLOS to exclude "disputes concerning the interpretation or application of Art. 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles" from compulsory

[17] Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Preliminary Objections, Judgment, 2 February 2017, [2017] *I. C. J. Reports* 3, 49, para. 129. Accessed June 25, 2023. https://www.icj-cij.org/sites/default/files/case-related/161/161-20170202-JUD-01-00-EN.pdf.

[18] Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Dissenting opinion of judge P. Robinson, [2017]. *I. C. J. Reports* 67. Accessed June 25, 2023. https://www.icj-cij.org/sites/default/files/case-related/161/161-20170202-JUD-01-04-EN.pdf.

[19] International Conference "A Bridge Over Troubled Waters: Dispute Resolution in the Law of International Watercourses and the Law of the Sea", 25–26 September 2017. Accessed June 25, 2023. https://www.youtube.com/watch?v=EgT7uys5IDE (Remarks of Professor B. H. Oxman, at 1:29:16).

dispute settlement. Furthermore, on 24 September 2021 Kenya extended the scope of its declaration[20] "with respect to all the categories of disputes referred to in Para. 1 (a) (b) and (c) of Art. 298 of the Convention".

On a side-note, similar questions of the interrelation of the ICJ jurisdiction with the competence of other bodies in the field of the LOS arose in the *Nicaragua v. Honduras* case[21] (albeit not in the context of preliminary objections) in respect of the Commission on the limits of the Continental Shelf (CLCS)[22]. Commentaries to UNCLOS (Nandan, Rosenne 1993, 882) draw attention to the well-defined legal status of the CLCS, which is limited to matters of purely scientific and technical nature, with its recommendations lacking normative qualities[23]. The key legal question is as follows: should the ICJ refrain from exercising its jurisdiction in cases where the CLCS is *prima facie* involved? More specifically, this question could be divided in three parts. First, if the ICJ is to delimit the continental shelf beyond 200 nm, is Art. 76 of UNCLOS (including reference to the CLCS) always applicable? Second, is the ICJ obliged to refrain from exercising jurisdiction until the CLCS issues its recommendation on the outer limit of the continental shelf? If the second answer is positive, the third part of the question arises: does this apply to cases where one of the disputing States is not a Party to UNCLOS?

As correctly observed, the ICJ and other courts and tribunals "express uncertainty on whether their jurisdiction extends to the delimitation of the continental shelf beyond the 200 nm limit or not, and how it should relate to the CLCS" (Elferink et al. 2019, 324). In the *Nicaragua v. Honduras* case neither Party specified a concrete seaward end to the delimitation line in their documents submitted to the ICJ. In these circumstances the Court refused to "rule on an issue when in order to do so the rights of a third party that is not before it, have first to be determined"[24]. Interestingly, neither Party to the dispute nor any "third States" asked the Court to consider such potential third-party interests. It is also important that the Court confirmed its possibility to delimit the maritime boundary between the Parties while noting that it extends beyond the 82nd meridian — where third-State rights allegedly existed — without affecting such rights. The ICJ preferred not

[20] Kenya's Declaration under Art. 298 UNCLOS. 2021. Accessed June 25, 2023. https://www.itlos.org/en/main/jurisdiction/declarations-of-states-parties/declarations-made-by-states-parties-under-article-298.

[21] Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment of 8 October 2007, [2007]. *I. C. J. Reports* 659. Accessed June 25, 2023. https://www.icj-cij.org/sites/default/files/case-related/120/120-20071008-JUD-01-00-EN.pdf.

[22] The CLCS considers submissions of the coastal States regarding the outer limits of their continental shelf — only where those limits extend beyond 200 nm from the baselines. The CLCS examines a coastal State's submission in the context of criteria for delineation provided in Art. 76 of UNCLOS and makes recommendations. The limits of the shelf established by a coastal State on the basis of such recommendations are "final and binding". Only States-Parties to UNCLOS can make submissions to the CLCS, encompassing the majority of coastal States, but leaving out a dozen of others (such as the USA). The CLCS does not have any functions relating to the delimitation of the continental shelf according to Art. 83 of UNCLOS (between the continental shelf of one State and the continental shelf of another neighboring State).

[23] Doctrinal disputes concern the question whether any part of the seabed beyond 200 nm firstly is to be delineated (from the Area) and only afterwards delimited between States. UNCLOS does not provide for such a sequence, stipulating that all provisions of Art. 76 "are without prejudice to the question of delimitation of the continental shelf" and thus prioritizing Art. 83. In practice some States have made a submission to the CLCS, others have delimited the continental shelf beyond 200 nm without submitting any data thereto.

[24] Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment of 8 October 2007, [2007]. *I. C. J. Reports* 756, Para. 312.

to delimit the continental shelf beyond 200 nm, which might have been reasonable in the circumstances. However, it stated that "any claim of continental shelf rights beyond 200 miles must be… reviewed by the [CLCS]", which was criticized by a number of legal scholars. Thus, the ICJ held it could not accept the proceedings on the delimitation of the continental shelf beyond 200 nm in the absence of a recommendation by the CLCS.

Such a "subordination" by the ICJ of its jurisdiction to the limited competence of the CLCS was unconvincing. UNCLOS does not provide for the authority of the CLCS to legally qualify that a particular area is a continental shelf or not. In fact, even the composition of the CLCS — 21 "experts in the field of geology, geophysics and hydrography" (Art. 2 of Annex II to UNCLOS) — demonstrates that it is not capable to make *any legal qualification* relating to the status of maritime spaces. It is not the CLCS that establishes the limits of the continental shelf beyond 200 miles, but rather the coastal State which initially does it. Such a State submits the relevant information to the CLCS, which considers it in light of the relevant criteria of delimitation provided in Art. 76 of UNCLOS. The CLCS provides also scientific and technical advice — only "if requested by the coastal State concerned" (Art. 3 of Annex II to UNCLOS). Thus, the "legal voice" of a relevant coastal State (rather than the "technical voice" of the CLCS) is decisive in the qualification of a concrete part of the sea-bed as its continental shelf.

The priority of CLCS's competence was not recognized later by ITLOS[25]. It did not overestimate the role of the CLCS (being only part of the *delineation* of the continental shelf from the Area) and, unlike the ICJ, emphasized the competence of "international courts and tribunals" to *delimit* the continental shelf between States with opposite or adjacent coasts both within and beyond 200 miles. According to ITLOS, declining jurisdiction over the dispute waiting for the CLCS recommendation "would leave the Parties in a position where they may be unable to benefit fully from their rights over the continental shelf". This is especially relevant to States that pronounced their rights over the continental shelf beyond 200 miles in national laws. Thus, as correctly observed, in *Bangladesh*/*Myanmar* "the ITLOS seemingly departs from the ICJ's *obiter dictum*, finding that there is no requirement that the CLCS has issued recommendations before the Tribunal may proceed with the delimitation beyond 200 nm" (Elferink et al. 2019, 335).

3. Conclusions

Given the considerable number of cases relating to the LOS that are regularly brought before the ICJ, jurisdictional issues remain a pertinent topic in the legal literature and legal policy of States. The approaches used by international judicial bodies to establish jurisdiction often determine not only the outcome of a given case, but also the degree of States' confidence in such tribunals and hence their political will to refer disputes thereto. The ICJ holds a prominent place among the plethora of dispute settlement bodies. By thoroughly examining its jurisdiction when considering each specific case, the ICJ contributes to the practical development of different jurisdictional bases set out in Art. 36 of the Statute. This study also demonstrates that the ICJ generally strives to maintain consistency of its juris-

[25] Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment of 14 March 2012, [2012]. *ITLOS Reports* 4. Accessed June 25, 2023. https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/published/C16-J-14_mar_12.pdf.

prudence, treating issues of ascertaining consent of a State to its jurisdiction with great caution both in the LOS cases and beyond.

When interpreting special agreements relevant to the LOS litigations, the ICJ analyzed in detail a number of corresponding factors including specific provisions of a document used as a jurisdictional basis, along with the circumstances of drafting such a document. The use of special agreements has decreased, which could be explained by their *de facto* effectiveness mainly in disputes of territorial nature with the common interest of the relevant parties to submit such disputes to the Court, as well as by the uncertainties in the legal nature of the document in question (whether it constitutes a special agreement) and also potential discrepancies in the Parties' legal positions regarding the subject-matter of the dispute.

The number of applications to the Court in accordance with jurisdictional clauses of multilateral treaties has risen. Nevertheless, their scope of application is likewise limited due to a number of factors: only a handful of existing jurisdictional clauses (predominantly contained in general treaties rather than specialized LOS agreements) were invoked in the ICJ proceedings, and no new ones have been included into treaties for over ten years; States' reservations to treaties concerning jurisdictional provisions; attempts to "stretch" the jurisdictional clauses to situations that are only indirectly related to the subject-matter of a relevant treaty; overall instability of the system of jurisdictional clauses. As to the interpretation of jurisdictional clauses, the ICJ practice demonstrates that the principle of effectiveness played an important role in some of the LOS cases.

As demonstrated by the LOS cases analyzed in the study, a number of factors appear to reduce the effectiveness of Art. 36 (2) of the ICJ Statute, namely a high level of instability of the "Optional clause" system due to simplicity of procedure for changing and withdrawing unilateral declarations, the practice of including various conditions therein, as well as tactical advantages of remaining outside this system. Therefore, about a third of the UN Member States (including one Permanent Member of the UN Security Council) have joined the "Optional clause" system, and most of them have limited the scope of disputes capable of being referred to the ICJ unilaterally. This complicates the entire system of "Optional clause" and the jurisdictional phase of the relevant proceedings due to, *inter alia,* difficulties of application of inventive conditions contained in some unilateral declarations. In interpreting "Optional clause" declarations, the ICJ applies the law of treaties rules only insofar as they do not contradict the special legal nature of such declarations, giving priority to the intention of a declaring State, as well as to the effect it sought to achieve by conditions inserted therein.

The analysis also shows that each jurisdictional basis set forth in Art. 36 of the Statute of the ICJ has its advantages and disadvantages, but is generally aimed at fulfilling its own functions, and is effective in different circumstances and acceptable to States in different situations. The Statute of the ICJ undoubtedly takes into account the political juncture, which existed in 1943–1945, being far from readiness of all its signatories to unconditionally accept the jurisdiction of the principal judicial body of the UN. While there have been repeated calls for the universal and compulsory jurisdiction of the Court since its establishment, this does not seem realistic today and in the near future. However, the existing variety of jurisdictional bases enables States to choose an acceptable degree of consent to the Court's jurisdiction and to use the available judicial mechanisms to support their national interests. While a number of practical procedural problems continue to appear

in the Court's activities due to certain factors considered, the Court strives to handle issues of establishing its jurisdiction with caution, which might ultimately encourage States' confidence in this judicial mechanism for resolving LOS cases.

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