SUPPLEMENTAL JURISDICTION UNDER UNCLOS

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I. INTRODUCTION

There is a rising tide of dispute settlement under the United Nations Convention on the Law of the Sea (UNCLOS),[1] if not yet a tsunami.[2] In 2015 alone, UNCLOS tribunals rendered three groundbreaking awards in *Chagos*,[3] *Arctic Sunrise*,[4] and *Philippines v. China*,[5] issued two orders prescribing provisional measures in *Ghana/Côte d'Ivoire*[6] and *Enrica Lexie*,[7] and delivered an unprecedented advisory opinion in *Sub-Regional Fisheries Commission*.[8] As of May 2016, a total of six cases are pending before UNCLOS tribunals,[9] and a seventh is in the pipeline: Ukraine has expressed its intention to institute UNCLOS proceedings against Russia over Crimea.[10] Although much has yet to be written about all of these cases, one

1. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

2. Sean D. Murphy, A Rising Tide: Dispute Settlement Under the Law of the Sea, Lalive Lecture (July 15, 2015).

3. Chagos Marine Protected Area (Mauritius v. U.K.), PCA Case No. 2011-03, Award (Mar. 18, 2015) [hereinafter *Chagos*, Award].

4. Arctic Sunrise (Neth. v. Russ.), PCA Case No. 2014-02, Award on the Merits (Aug. 14, 2015) [hereinafter *Arctic Sunrise*, Award on the Merits].

5. Philippines v. China, PCA Case No. 2013-19, Award on Jurisdiction and Admissibility (Oct. 29, 2015) [hereinafter *Philippines v. China*, Award on Jurisdiction and Admissibility].

6. Delimitation of the Maritime Boundary Between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire), ITLOS Case No. 23, Order (Apr. 25, 2015).

7. The "Enrica Lexie" Incident (Italy v. India), ITLOS Case No. 24, Order (Aug. 24, 2015).

8. Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission, ITLOS Case No. 21, Advisory Opinion (Apr. 2, 2015) [hereinafter *Sub-Regional Fisheries Commission*, Advisory Opinion].

9. These six cases are *Arctic Sunrise*, *Duzgit Integrity*, *Enrica Lexie*, *Ghana/Côte d'Ivoire*, *M/V Norstar*, and *Philippines v. China*.

10. Gaiane Nuridzhanyan, *Ukraine vs. Russia in International Courts and Tribunals*, EJIL (Mar. 9, 2016), http://www.ejiltalk.org/ukraine-versus-russia-in-international-courts-and-tribunals/; Julian Ku, *As Ukraine Prepares to Take Russia to UNCLOS Arbitration Over Crimea, I Predict Russia's Likely Reaction*, OPINIO JURIS (Feb. 1, 2016), http://opiniojuris.org/2016/02/01/ukraine-prepares-to-take-russia-to-unclos-arbitration/.

development must not be swept away by the current: the supplemental jurisdiction of UNCLOS tribunals.[11]

As a preliminary matter, three terms must be defined. First, as used in this article, an "UNCLOS tribunal" is any judicial body exercising jurisdiction under UNCLOS.[12] Second, an "UNCLOS dispute" is any dispute concerning the interpretation or application of UNCLOS. And third, a "non-UNCLOS dispute" is any dispute concerning the interpretation or application of a rule of international law outside UNCLOS.

In light of these definitions, "supplemental jurisdiction" is simply "the jurisdiction of UNCLOS tribunals over non-UNCLOS disputes." Almost every recent dispute brought before an UNCLOS tribunal has raised questions of supplemental jurisdiction. Yet while commentators have long recognized the broad jurisdiction of UNCLOS tribunals over UNCLOS disputes,[13] they have given relatively little attention to the supplemental jurisdiction of UNCLOS tribunals over non-UNCLOS disputes. Indeed, to this day, no court, tribunal, or commentator has pieced together or even tried to piece together a comprehensive theory of supplemental jurisdiction. This article aims to do just that.

This is not to say that supplemental jurisdiction under UNCLOS has gone completely unnoticed. Although the literature lacks a comprehensive treatment of the topic, commentators have discussed specific applications of supplemental jurisdiction. For example, one of the liveliest debates in the law of the sea today is whether UNCLOS tribunals may exercise jurisdiction over a territorial sovereignty dispute in the context of a maritime delimitation dispute — the so-called "mixed dispute" question.[14]

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11. The notion of "supplemental jurisdiction" has been used in the UNCLOS context once before. *See* M. Bruce Volbeda, Comment, The MOX Plant Case*: The Question of "Supplemental Jurisdiction" for International Environmental Claims Under UNCLOS*, 42 TEX. INT'L L.J. 211 (2006).

12. *See infra* note 26 and accompanying text.

13. *E.g.*, Alan E. Boyle, *Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction*, 46 INT'L & COMP. L.Q. 37, 37 (1997); Natalie Klein, *The Effectiveness of the UNCLOS Dispute Settlement Regime: Reaching for the Stars?*, 108 ASIL PROC. 359, 359 (2015).

14. Some commentators argue that UNCLOS tribunals may exercise such jurisdiction. *E.g.*, GUDMUNDUR EIRIKSSON, THE INTERNATIONAL TRIBUNAL FOR THE LAW

In addition, commentators have discussed whether UNCLOS tribunals properly exercised (or refused to exercise) jurisdiction over disputes concerning the use of force in *M/V Saiga (No. 2)*[15] and *Guyana v. Suriname*,[16] over disputes arising from international environmental agreements in *MOX Plant*,[17] over

OF THE SEA 113 (2000); Boyle, *supra* note 13, at 44; Philippe Gautier, *The International Tribunal for the Law of the Sea: Activities in 2005*, 5 CHINESE J. INT'L L. 381, 389-90 (2006); P. Chandrasekhara Rao, *Delimitation Disputes Under the United Nations Convention on the Law of the Sea: Settlement Procedures*, *in* LAW OF THE SEA, ENVIRONMENTAL LAW AND SETTLEMENT OF DISPUTES 877, 891-92 (Tafsir Malick Ndiaye & Rüdiger Wolfrum eds., 2007); Tullio Treves, *What Have the United Nations Convention and the International Tribunal for the Law of the Sea to Offer as Regards Maritime Delimitation Disputes?*, *in* MARITIME DELIMITATION 63, 77 (Rainer Lagoni & Daniel Vignes eds., 2006); Rüdiger Wolfrum, Pres. of the Int'l Tribunal for the Law of the Sea, Statement to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs, at 6 (Oct. 23, 2006), https://www.itlos.org/fileadmin/itlos/documents/statements_of_president/wolfrum/legal_advisors_231006_eng.pdf. Other commentators argue that UNCLOS tribunals may not exercise such jurisdiction. *E.g.*, Bing Bing Jia, *The Principle of the Domination of the Land over the Sea: A Historical Perspective on the Adaptability of the Law of the Sea to New Challenges*, 57 GER. Y.B. INT'L L. 63, 86 (2014); Sienho Yee, The South China Sea Arbitration (The Philippines v. China): *Potential Jurisdictional Obstacles or Objections*, 13 CHINESE J. INT'L L. 663, 689 (2014). Still other commentators have discussed the question without taking a particular side. *E.g.*, Irina Buga, *Territorial Sovereignty Issues in Maritime Disputes: A Jurisdictional Dilemma for Law of the Sea Tribunals*, 27 INT'L J. MARINE & COASTAL L. 59, 70-71, 91 (2012); Bernard H. Oxman, *Courts and Tribunals: The ICJ, ITLOS, and Arbitral Tribunals*, *in* THE OXFORD HANDBOOK OF THE LAW OF THE SEA 394, 400 (Donald R. Rothwell et al. eds., 2015); Yoshifumi Tanaka, *Current Legal Developments: International Tribunal for the Law of the Sea*, 28 INT'L J. MARINE & COASTAL L. 375, 383-84 (2013); Xinjun Zhang, *Mixed Disputes and the Jurisdictional Puzzle in Two Pending Cases:* Mauritius v. U.K. *and* The Philippines v. China, 7 J. EAST ASIA & INT'L L. 529, 533-36 (2014).

15. Richard Caddell, *Platforms, Protestors, and Provisional Measures: The* Arctic Sunrise *Dispute and Environmental Activism at Sea*, 2014 NETH. Y.B. INT'L L. 359, 379 n.80 (2015); Philippe Gautier, *The Settlement of Disputes*, *in* I THE IMLI MANUAL ON INTERNATIONAL MARITIME LAW 533, 548 & n.56 (David Joseph Attard et al. eds., 2014); James Harrison, *Safeguards Against Excessive Enforcement Measures in the Exclusive Economic Zone — Law and Practice*, *in* JURISDICTION OVER SHIPS 217, 228-29 (Henrik Rongbom ed., 2015).

16. Alexander Aizenstatd, Guyana v. Suriname *Maritime Boundary Arbitration*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2011), ¶ 12; Caddell, *supra* note 15, at 379 n.81; Stephen Fietta, *Case Comment on* Guyana/Suriname, 102 AM. J. INT'L L. 119, 127 (2008); Jianjun Gao, *Comments on* Guyana v. Suriname, 8 CHINESE J. INT'L L. 191, 200-01 (2009).

17. Volbeda, *supra* note 11, at 218-34.

territorial sovereignty disputes in *Chagos*[18] and *Philippines v. China*,[19] and over human rights disputes in *Arctic Sunrise*.[20] But commentators have not expressly recognized the common thread weaving all these cases together: they are all examples of an UNCLOS tribunal exercising (or refusing to exercise) jurisdiction over a non-UNCLOS dispute. That is, they all raise issues of supplemental jurisdiction. Only by considering all of these cases together can one develop a coherent understanding of the supplemental jurisdiction of UNCLOS tribunals.

This article is organized as follows. Part II provides background on jurisdiction under UNCLOS (Part II.A), supplemental jurisdiction under UNCLOS (Part II.B), the relevant case law (Part II.C), and the gap in the literature on the subject of supplemental jurisdiction (Part II.D). Part III then provides a detailed analysis of four major sources of supplemental jurisdiction under UNCLOS, from the least controversial to the most controversial: Article 288(2) (Part III.A); Article 293(1) (Part III.B); zonal *renvoi* provisions (Part III.C); and the principle of effectiveness (Part III.D). Part IV then concludes the article.

II. BACKGROUND

A. Jurisdiction Under UNCLOS

A critical difference between domestic legal systems and the international legal order is that the latter lacks courts with compulsory jurisdiction.[21] One who suffers an injury under

18. Buga, *supra* note 14, at 76-77; Zhang, *supra* note 14, at 530-36.

19. Yee, *supra* note 14, at 689; Zhang, *supra* note 14, at 532; Andreas Zimmermann & Jelena Bäumler, *Navigating Through Narrow Jurisdictional Straits:* The Philippines – PRC South China Sea Dispute *and UNCLOS*, 12 L. & PRAC. INT'L CTS. & TRIBUNALS 431, 450-51 (2013).

20. Caddell, *supra* note 15, at 379; Douglas Guilfoyle & Cameron A. Miles, *Current Development: Provisional Measures and the* MV Arctic Sunrise, 108 AM. J. INT'L L. 271, 284-85 (2014).

21. PATRICK DAILLIER ET AL., DROIT INTERNATIONAL PUBLIC 959 (8th ed. 2009); Chester Brown, *Inherent Powers in International Adjudication*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 828, 834 (Cesare P.R. Romano et al. eds., 2013); Mary Ellen O'Connell & Lenore VanderZee, *The History of International Adjudication*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION, *supra*, at 40,

domestic law will usually be able to seek relief in a domestic court with jurisdiction over the dispute, whereas one who suffers an injury under international law will often not be able to find a judicial forum with jurisdiction.

The drafters of the United Nations Convention on the Law of the Sea sought to change this reality with respect to disputes concerning the law of the sea. Famously characterized as "a constitution for the oceans,"[22] the Convention sets out in 320 articles and nine annexes a comprehensive body of law governing practically "all issues relating to the law of the sea,"[23] such as fisheries management, environmental protection, marine scientific research, and maritime delimitation. To ensure compliance with its provisions, the Convention provides for a compulsory[24] and binding[25] dispute settlement procedure that can take place before four judicial bodies: the International Tribunal for the Law of the Sea (ITLOS), Annex VII arbitral tribunals, Annex VIII arbitral tribunals, and the International Court of Justice (ICJ).[26] For convenience, though at the expense of precision, this article refers to all four judicial bodies as "UNCLOS tribunals."[27]

Article 288(1) of the Convention establishes the jurisdiction of UNCLOS tribunals. It provides that UNCLOS tribunals "shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part."[28] Although the language "any dispute concerning the interpretation or application of this Convention" and close variants thereof are commonly found in the dispute settlement clauses of treaties,[29] there is no consensus over its

41; Andreas Paulus, *International Adjudication*, *in* THE PHILOSOPHY OF INTERNATIONAL LAW 207, 208 (Samantha Besson & John Tasioulas eds., 2010).

22. 17 Official Records of the Third United Nations Conference on the Law of the Sea, 185th Plen. Mtg., 11, ¶ 47, U.N. Doc. A/CONF.62/SR.185 (Dec. 6, 1982).

23. UNCLOS, *supra* note 1, pmbl.

24. *Id.* art. 286.

25. *Id.* art. 296(1).

26. *Id.* art. 287(1).

27. Technically, the ICJ is a "court" rather than a "tribunal."

28. *Id.* art. 288(1).

29. *E.g.*, Convention for the Protection of the Marine Environment of the North-East Atlantic art. 32(1), Sept. 22, 1992, 2354 U.N.T.S. 67 [hereinafter OSPAR Convention];

exact meaning.[30] Few, however, would disagree with two conclusions that the ICJ has drawn from such language. First, the jurisdiction over disputes "concerning the interpretation or application" of a treaty includes, *inter alia*, the jurisdiction to declare whether a State Party has breached the treaty.[31] Second, the jurisdiction over disputes "concerning the interpretation or application" of a treaty does *not* include the jurisdiction to declare whether a State Party has breached a rule of international law outside the treaty.[32] Although disputes over whether a State has breached a rule of international law are just one of many types of disputes, they will be the focus of this article because most if not all disputes concerning supplemental jurisdiction under UNCLOS are disputes over whether a State has breached a rule of international law.

Treaty Concerning the Reciprocal Encouragement and Protection of Investment, Arg.-U.S., art. 8(1), Nov. 14, 1991, 31 I.L.M. 124; Convention on Environmental Impact Assessment in a Transboundary Context art. 15, Feb. 25, 1991, 1989 U.N.T.S. 309; Treaty for the Prohibition of Nuclear Weapons in Latin America art. 24, Feb. 14, 1967, 634 U.N.T.S. 326; Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes art. 1, Apr. 24, 1963, 596 U.N.T.S. 487; Convention on the Prevention and Punishment of the Crime of Genocide art. 9, Dec. 9, 1948, 78 U.N.T.S. 277; Convention on International Civil Aviation art. 84, Dec. 7, 1944, 15 U.N.T.S. 295.

30. *See* Avena and Other Mexican Nationals (Mex. v. U.S.), Order, Provisional Measures, 2003 I.C.J. Rep. 77, 93, ¶¶ 1-2 (Feb. 5) (declaration by Oda, J.); Vienna Convention on Consular Relations (Para. v. U.S.), Order, Provisional Measures, 1998 I.C.J. Rep. 248, 260, ¶ 3 (Apr. 9) (declaration by Oda, J.); LaGrand (Ger. v. U.S.), Order, Provisional Measures, 1999 I.C.J. Rep. 9, 18, ¶ 3 (Mar. 3) (declaration by Oda, J.); LaGrand (Ger. v. U.S.), Judgment, Jurisdiction, Admissibility, Merits, 2001 I.C.J. Rep. 466, ¶ 42 (June 27); *id.*, at 525, ¶ 3 (dissenting opinion by Oda, J.); *id.*, at 544, ¶¶ 8-10 (separate opinion by Parra-Aranguren, J.).

31. Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, Merits, 2012 I.C.J. Rep. 422, ¶¶ 49-52 (July 20); Application of the Interim Accord of 13 September 1995 (Maced. v. Greece), Judgment, 2011 I.C.J. Rep. 644, ¶ 58 (Dec. 5); Avena and Other Mexican Nationals (Mex. v. U.S.), Judgment, 2004 I.C.J. Rep. 12, ¶¶ 27-28 (Mar. 31); Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. Rep. 161, ¶ 31 (Nov. 6); LaGrand (Ger. v. U.S.), Judgment, Jurisdiction, Admissibility, Merits, 2001 I.C.J. Rep. 466, ¶ 42 (June 27).

32. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, Merits, 2007 I.C.J. Rep. 43, ¶ 147 (Feb. 26); Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. Rep. 161, ¶ 42 (Nov. 6); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, Merits, 1986 I.C.J. Rep. 14, ¶ 271 (June 27).

With this understanding, one can summarize the function of Article 288(1) rather succinctly: Article 288(1) grants UNCLOS tribunals jurisdiction over UNCLOS disputes (i.e. whether a State Party has breached UNCLOS), but not over non-UNCLOS disputes (i.e. whether a State Party has breached a non-UNCLOS rule of international law).

There are, however, two exceptions to this general statement. First, there are certain UNCLOS disputes over which UNCLOS tribunals do not have jurisdiction by virtue of Section 3 of Part XV of the Convention.[33] This article does not focus on these exceptions. Second, there are certain non-UNCLOS disputes over which UNCLOS tribunals nonetheless have jurisdiction by virtue of certain provisions of the Convention or general principles of international law. This article refers to such jurisdiction as "supplemental jurisdiction" and the provisions and principles granting such jurisdiction as "sources of supplemental jurisdiction." These exceptions are the focus of this article.

B. Supplemental Jurisdiction Under UNCLOS

The term "supplemental jurisdiction" is not a term of art in public international law. Rather, the term derives from U.S. law, where supplemental jurisdiction is the jurisdiction of federal courts over non-federal claims. Under 28 U.S.C. § 1367, the extent to which a federal court may exercise supplemental jurisdiction over a non-federal claim is clear: it may do so if and only if the non-federal claim "form[s] part of the same case or controversy" as a federal claim.[34] Under UNCLOS, however, the extent to which an UNCLOS tribunal may exercise supplemental jurisdiction over a non-UNCLOS claim is often not clear: it depends on the source of supplemental jurisdiction.

There are four major sources of supplemental jurisdiction under UNCLOS: (1) Article 288(2); (2) Article 293(1); (3) zonal

33. UNCLOS, *supra* note 1, pt. XV, sec. 3.

34. 28 U.S.C. § 1367 (2012).

renvoi provisions; and (4) the principle of effectiveness.[35] This article explores each of these sources in depth in Part III.

C. Relevant Case Law

A small but growing number of UNCLOS tribunals have examined one or more of these sources of supplemental jurisdiction. Their judgments, awards, and/or orders will be quoted, cited, and critiqued throughout this article. So as not to interrupt the substantive discussions in Part III, this Part provides a brief summary of the six major cases — as relevant to the supplemental jurisdiction question — in chronological order.

The first UNCLOS tribunal to confront the question of supplemental jurisdiction was ITLOS in *M/V Saiga (No. 2)*. The case revolved around a dispute between Saint Vincent and the Grenadines (St. Vincent) and Guinea over an incident that occurred in the exclusive economic zone (EEZ) of Sierra Leone.[36] On the morning of October 28, 1997, the oil tanker *Saiga* (registered in St. Vincent), was waiting outside the EEZ of Guinea for the arrival of fishing vessels to which it was to supply gas oil.[37] At around nine o'clock, a Guinean patrol boat approached, and without issuing any signal or warning, fired shots at the *Saiga*.[38] The Guinean officers then boarded the vessel, fired shots indiscriminately on the deck, and used gunfire to stop the engine, damaging the ship and injuring two individuals.[39] Less than two months later,[40] St. Vincent instituted UNCLOS proceedings against Guinea for, *inter alia*, arresting and detaining the *Saiga* and its crew in violation of Articles 56(2) and 58 of UNCLOS.[41] In addition, St. Vincent asserted a non-UNCLOS claim: it argued that Guinea had breached the customary prohibition on the use

35. This is not a comprehensive list of all sources of supplemental jurisdiction under UNCLOS. For example, there are many non-zonal *renvoi* provisions in UNCLOS that could provide for supplemental jurisdiction.

36. M/V Saiga (No. 2) (St. Vincent v. Guinea), ITLOS Case No. 2, Judgment, ¶¶ 28, 30, 33 (July 1, 1999) [hereinafter *M/V Saiga (No. 2)*, Judgment].

37. *Id.* ¶ 33.

38. *Id.* ¶¶ 33, 153-54, 157-58.

39. *Id.* ¶ 158.

40. *Id.* ¶ 1.

41. *Id.* ¶ 30.

of excessive force.[42] In its judgment of July 1, 1999, ITLOS acknowledged that "the Convention does not contain express provisions on the use of force in the arrest of ships."[43] However, it found jurisdiction over the use of force dispute and held that Guinea had breached the prohibition.[44]

A few years later, questions of supplemental jurisdiction arose again before an Annex VII tribunal in *MOX Plant*. This case concerned a dispute between Ireland and the United Kingdom over a mixed oxide (MOX) plant. In 2001, British Nuclear Fuels received authorization from the U.K. government to operate a MOX plant at Sellafield, 184 kilometers across the Irish Sea from Ireland.[45] Concerned with radioactive discharges into the Irish Sea, Ireland had for years opposed the project.[46] After the United Kingdom refused to release unredacted versions of two privately commissioned reports relating to the plant,[47] Ireland instituted UNCLOS proceedings against the United Kingdom for, *inter alia*, not having sufficiently assessed the environmental impact of the plant in violation of Articles 206 and 207 of UNCLOS.[48] In

42. Memorial Submitted by St. Vincent (June 19, 1998), ¶¶ 5, 95-99, M/V Saiga (No. 2) (St. Vincent v. Guinea), ITLOS Case No. 2 [hereinafter *M/V Saiga (No. 2)*, Memorial of St. Vincent]; Reply Submitted by St. Vincent (Nov. 19, 1998), ¶¶ 117-20, M/V Saiga (No. 2) (St. Vincent v. Guinea), ITLOS Case No. 2 [hereinafter *M/V Saiga (No. 2)*, Reply of St. Vincent]; *M/V Saiga (No. 2)*, Judgment, *supra* note 36, ¶ 153. Note that UNCLOS does actually contain a general prohibition on the use of force in UNCLOS, *supra* note 1, art. 301. Nevertheless, neither the parties nor the tribunal ever invoked it, perhaps because Article 301 applies only to "any threat or use of force *against the territorial integrity or political independence* of any State" and only when State Parties are "exercising their rights and performing their duties under [UNCLOS]." *Id.* (emphasis added).

43. *M/V Saiga (No. 2)*, Judgment, *supra* note 36, ¶ 155.

44. *Id.* ¶¶ 155, 159.

45. Access to Info. Under Article 9 of the OSPAR Convention (Ir. v. U.K.), PCA Case Repository, Final Award, ¶¶ 15-17, 37 (July 2, 2003) [hereinafter *MOX Plant (OSPAR)*, Final Award]. The facts of the case are set forth in greater detail in an earlier case between Ireland and the United Kingdom brought under the OSPAR convention but involving the same underlying dispute as the Annex VII case.

46. *Id.* ¶ 23.

47. *Id.* ¶¶ 32, 36, 39, 43.

48. Memorial of Ireland (July 26, 2002), ¶¶ 5.2, 7.81-.85, MOX Plant (Ir. v. U.K.), PCA Case Repository [hereinafter *MOX Plant (UNCLOS)*, Memorial of Ireland]; Reply of Ireland (Mar. 7, 2003), ¶¶ 4.1, 9.2, MOX Plant (Ir. v. U.K.), PCA Case Repository [hereinafter *MOX Plant (UNCLOS)*, Reply of Ireland].

addition, Ireland put forth non-UNCLOS claims: it argued that the United Kingdom had breached, *inter alia*, the Sintra Ministerial Declaration and the OSPAR Convention, both of which contained rules on transparency.[49] Although the tribunal never rendered a final award in the case, through a Statement by the President[50] and its Procedural Order No. 3,[51] the tribunal specified that Ireland's claims arising directly under legal instruments outside of UNCLOS were inadmissible.

Four years later, another Annex VII tribunal rendered an award concerning supplemental jurisdiction under UNCLOS in *Guyana v. Suriname*. The dispute had its origins in 1998, when Guyana had granted a concession to a Canadian company to explore for oil in waters disputed between Guyana and Suriname.[52] On June 3, 2000, two patrol boats from the Surinamese navy approached the Canadian company's drill ship, ordered it to leave the disputed waters within twelve hours (or else "the consequences would be theirs"[53]), and escorted it throughout its departure.[54] After a series of unsuccessful negotiations, in February 2004, Guyana instituted UNCLOS proceedings against Suriname to delimit the maritime boundary between Guyana and Suriname.[55] In addition, Guyana sought a declaration that Suriname had breached the prohibition on the threat of force in violation of the U.N. Charter and general

49. *MOX Plant (UNCLOS)*, Memorial of Ireland, *supra* note 48, ¶¶ 6.17-.18, 6.36; *MOX Plant (UNCLOS)*, Reply of Ireland, *supra* note 48, ¶ 5.30. Ireland nonetheless asserted that it "ha[d] not invited the Arbitral Tribunal to exercise jurisdiction under any other international agreement" besides UNCLOS. *Id.* ¶ 4.2.

50. Statement by the President (June 13, 2003), ¶ 5, MOX Plant (Ir. v. U.K.), PCA Case Repository [hereinafter *MOX Plant (UNCLOS)*, Statement by the President].

51. Procedural Order No. 3 (June 24, 2003), ¶ 19, MOX Plant (Ir. v. U.K.), PCA Case Repository, [hereinafter *MOX Plant (UNCLOS)*, Procedural Order No. 3].

52. Guyana v. Suriname, PCA Case No. 2004-04, Award, ¶ 150 (Sept. 17, 2007) [hereinafter *Guyana v. Suriname*, Award].

53. *Id.* ¶ 438.

54. *Id.* ¶ 151.

55. Notification Under Article 287 and Annex VII, Article I of UNCLOS and the Statement of Claim and Ground on Which It Is Based Submitted by Guyana (Feb. 24, 2004), ¶ 33(1), Guyana v. Suriname, PCA Case No. 2004-04 [hereinafter *Guyana v. Suriname*, Notification and Statement of Claim of Guyana].

international law.[56] Although a non-UNCLOS dispute, in its award of September 17, 2007, the tribunal held that it had jurisdiction to adjudicate the violation of the prohibition on the threat of force under the U.N. Charter and general international law,[57] and declared that Suriname had breached that prohibition.[58]

Much more recently, in March 2015, yet another Annex VII tribunal ruled on questions of supplemental jurisdiction in *Chagos Marine Protected Area*. The dispute centered around the Chagos Archipelago, which before 1965 constituted a part of Mauritius, then a colony of the United Kingdom. In 1968, Mauritius declared its independence from the United Kingdom, but in exchange, the United Kingdom three years earlier had obtained Mauritius's consent — allegedly under duress[59] — to detach the archipelago from it under certain conditions laid out in a set of unilateral undertakings by the United Kingdom called the Lancaster House Undertakings (LHU).[60] Decades later, in April 2010, the United Kingdom established a Marine Protected Area (MPA) over the Chagos Archipelago.[61] In response, Mauritius instituted UNCLOS proceedings against the United Kingdom, claiming, *inter alia*, that the United Kingdom was not the "coastal State" of the Chagos Archipelago, such that its establishment of the MPA violated UNCLOS.[62] The United Kingdom, however, argued that seeking a declaration of the identity of the "coastal State" was effectively a dispute over the

56. *Id.* ¶ 33(2); Memorial of Guyana (Feb. 22, 2005), ¶ 10.12, Guyana v. Suriname, PCA Case No. 2004-04 [hereinafter *Guyana v. Suriname*, Memorial of Guyana]; Reply of Guyana (Apr. 1, 2006), ¶ 8.1, Guyana v. Suriname, PCA Case No. 2004-04 [hereinafter *Guyana v. Suriname*, Reply of Guyana]. Guyana also argued that Suriname's alleged threat of force breached various provisions of UNCLOS. *Guyana v. Suriname*, Notification and Statement of Claim of Guyana, *supra* note 55, ¶ 33(2); *Guyana v. Suriname*, Memorial of Guyana, *supra*, ¶ 10.12; *Guyana v. Suriname*, Reply of Guyana, *supra*, ¶ 8.1.

57. *Guyana v. Suriname*, Award, *supra* note 52, ¶ 406.

58. *Id.* ¶¶ 438-40, 488(2).

59. Memorial of the Republic of Mauritius (Aug. 1, 2012), ¶¶ 1.23, 6.25, 6.29, 6.30, Chagos Marine Protected Area (Mauritius v. U.K.), PCA Case No. 2011-03 [hereinafter *Chagos*, Memorial of Mauritius].

60. *Chagos*, Award, *supra* note 3, ¶¶ 78, 81.

61. *Id.* ¶ 152.

62. *Id.* ¶ 158(1).

breach of the LHU, and consequently a dispute over sovereignty, a non-UNCLOS dispute.[63] In its award of March 18, 2015, the tribunal held that it did not have jurisdiction to determine who had sovereignty over the Chagos Archipelago.[64] However, it found jurisdiction to determine whether the MPA violated UNCLOS,[65] and ultimately found that it did.[66]

Five months later, the Annex VII tribunal in *Arctic Sunrise* addressed questions of supplemental jurisdiction in its Award on the Merits.[67] The dispute between the Netherlands and Russia arose on September 18, 2013, when Greenpeace International used the *Arctic Sunrise* (registered in the Netherlands) to stage a protest at a Russian offshore oil platform within Russia's EEZ.[68] The following day, Russian authorities boarded, seized, and detained the vessel, and arrested the thirty persons on board.[69] In response, the Netherlands instituted UNCLOS proceedings against Russia, claiming that Russia had breached various provisions of UNCLOS by arresting the *Arctic Sunrise*.[70] In addition, the Netherlands argued that Russia breached the International Covenant on Civil and Political Rights (ICCPR) by detaining the individuals,[71] raising a non-UNCLOS dispute. The tribunal, however, ultimately held that it did not have the jurisdiction to determine breaches of the ICCPR.[72]

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63. *Id.* ¶ 164.

64. *Id.* ¶ 221.

65. *Id.* ¶ 323.

66. *Id.* ¶¶ 536, 541.

67. *Arctic Sunrise*, Award on the Merits, *supra* note 4.

68. *Id.* ¶ 3.

69. *Id.*

70. Notification and Statement of Claim of the Netherlands (Oct. 4, 2013), ¶ 37(1)(a)-(b), Arctic Sunrise (Neth. v. Russ.), PCA Case No. 2014-02 [hereinafter *Arctic Sunrise*, Notification and Statement of Claim of the Netherlands].

71. *Arctic Sunrise*, Award on the Merits, *supra* note 4, ¶¶ 193-95; *Arctic Sunrise*, Notification and Statement of Claim of the Netherlands, *supra* note 70, ¶ 37(1)(I). In particular, the Netherlands alleged violations of Article 9 (right to liberty) and Article 12(2) (right to leave any country) of the ICCPR. *Id.* Notably, the individuals were released on bail in late November, and the arrest of the Arctic Sunrise was lifted in June of the following year. *Arctic Sunrise*, Award on the Merits, *supra* note 4, ¶ 3.

72. *Arctic Sunrise*, Award on the Merits, *supra* note 4, ¶ 198.

Finally, the most recent UNCLOS tribunal to address questions of supplemental jurisdiction was the Annex VII tribunal in *Philippines v. China*. The Philippines and China, among many other States, have made overlapping claims of sovereignty and/or jurisdiction over the waters and many of the maritime features of the South China Sea. In January 2013, the Philippines instituted UNCLOS proceedings against China, claiming that (1) UNCLOS governs the Philippines' and China's rights and obligations in the South China Sea, to the exclusion of China's claims of "historic rights"; (2) certain maritime features should be characterized as islands, rocks, low-tide elevations, or submerged banks; and (3) China's activities in the South China Sea have interfered with the exercise of the Philippines' rights and freedoms.[73] China, however, argued that "[t]he subject-matter of the Philippines' claims is in essence one of territorial sovereignty over several maritime features in the South China Sea,"[74] which would be a non-UNCLOS claim. Nevertheless, in its Award on Jurisdiction and Admissibility, the tribunal rejected China's objection,[75] holding that it had jurisdiction over all of the Philippines' Submissions on which it could reach a decision on jurisdiction at that stage in the proceedings.[76] In addition, in its Memorial, the Philippines argued that China had breached the Convention on Biological Diversity (CBD),[77] yet the Philippines ultimately asserted that such a breach was not one of its claims.[78] In any case, the tribunal appeared to hold that it would not have had jurisdiction over a

73. *Philippines v. China*, Award on Jurisdiction and Admissibility, *supra* note 5, ¶¶ 4-6.

74. MINISTRY OF FOREIGN AFFAIRS OF CHINA, POSITION PAPER OF THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA ON THE MATTER OF JURISDICTION IN THE SOUTH CHINA SEA ARBITRATION INITIATED BY THE REPUBLIC OF THE PHILIPPINES ¶ 9 (2014) [hereinafter *Philippines v. China*, POSITION PAPER OF CHINA], http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml.

75. *Philippines v. China*, Award on Jurisdiction and Admissibility, *supra* note 5, ¶ 153.

76. *Id.* ¶ 413(G)-(I). In particular, the tribunal found that, of the fifteen submissions made by the Philippines, the tribunal had jurisdiction over seven, could not yet determine its jurisdiction over another seven, and needed clarification over one.

77. *Id.* ¶ 174.

78. *Id.* ¶ 176.

dispute concerning a violation of the CBD.[79] As of the time of this writing, the tribunal has not yet rendered an award on the merits.

These six cases form the crux of UNCLOS jurisprudence on supplemental jurisdiction. Other decisions of international courts and tribunals are also relevant and therefore will be introduced in many of the discussions in Part III. The cases mentioned above, however, will be the focus of the analysis of this article.

D. Literature Gap

As mentioned in Part I, many commentators have effectively raised the question of supplemental jurisdiction under UNCLOS. But they have all confined their analysis to just one or two specific disputes (or types of disputes), and/or just one or two sources of supplemental jurisdiction.

For example, the expansive literature on the mixed dispute question has focused exclusively on the exercise of supplemental jurisdiction over territorial sovereignty disputes.[80] Similarly, relevant commentary on *M/V Saiga (No. 2)* and *Guyana v. Suriname* has only asked whether an UNCLOS tribunal may exercise jurisdiction over a use of force dispute under Article 293(1).[81] In an analogous fashion, relevant commentary on *MOX Plant* only focuses on supplemental jurisdiction over environmental agreements under Article 288(2) and Article 293(1),[82] relevant commentary on *Chagos* and *Philippines v. China* only discusses the jurisdiction of the tribunals over territorial sovereignty disputes,[83] and relevant commentary on *Arctic Sunrise* focuses exclusively on supplemental jurisdiction over human rights claims under Article 293(1).[84]

Some of the commentators cited above take positions on whether or not the UNCLOS tribunal in the case before them should exercise supplemental jurisdiction. This is concerning because (1) one's understanding of how supplemental jurisdiction

79. *Id.* ¶¶ 174-78.
80. *See supra* note 14.
81. *See supra* notes 15-16.
82. *See supra* note 17.
83. *See supra* notes 18-19.
84. *See supra* note 20.

applies to one specific dispute necessarily impacts and is impacted by one's understanding of how it applies to other disputes; and (2) one's understanding of how one source of supplemental jurisdiction functions necessarily impacts and is impacted by one's understanding of how other sources function. Therefore, if one wishes to develop a coherent theory of supplemental jurisdiction — and if one wants UNCLOS tribunals to exercise supplemental jurisdiction in a consistent manner — then one must examine a broad variety of disputes and multiple sources of supplemental jurisdiction in a holistic fashion. As far as the author is aware, no court, tribunal, or commentator has ever done so.

III. SOURCES OF SUPPLEMENTAL JURISDICTION UNDER UNCLOS

As stated above,[85] there are four major sources of supplemental jurisdiction under UNCLOS. This Part examines each of these sources from least controversial to most controversial: (1) Article 288(2) (Part III.A); (2) Article 293(1) (Part III.B); (3) zonal *renvoi* provisions (Part III.C); and (4) the principle of effectiveness (Part III.D).

For each source, this article will proceed in three stages; the first two stages are descriptive, whereas the third is normative. In the first stage ("Jurisdiction"), the article will address the question: Does the source grant UNCLOS tribunals supplemental jurisdiction over non-UNCLOS disputes?[86] To answer this question, where the source is a provision of UNCLOS, the article will interpret the source in accordance with Articles 31 to 33 of the Vienna Convention on the Law of Treaties (VCLT)[87] and examine the trends in case law, if any.

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85. *See supra* Part II.B.

86. For the purposes of this article, this question is equivalent to the question: Does the source grant UNCLOS tribunals the power to determine whether a State has breached a non-UNCLOS rule of international law? *See supra* Part II.A. The word "power" is used here to avoid prejudicing the question of whether UNCLOS tribunals' ability to determine whether a State has breached a non-UNCLOS rule of international law is a question of jurisdiction or one of applicable law.

87. Article 31 of the VCLT instructs that one examine "the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331. This

In the second stage ("Scope"), the article will address the question: What is the scope of non-UNCLOS disputes over which the source grants such jurisdiction?[88] Once again, to answer this question, where the source is a provision of UNCLOS, the article will interpret the source in accordance with Articles 31 to 33 of the VCLT and examine the trends in case law, if any.

In the third and final stage ("Public Order"), the article will use the information presented in the first two stages to answer the question: *Should* the source grant UNCLOS tribunals supplemental jurisdiction? In doing so, the article will consider what is best for the public order of the world's oceans, especially in light of how that source of supplemental jurisdiction would apply in a broad variety of cases, and how it could interact with other sources of supplemental jurisdiction.

When taking into consideration the public order of the world's oceans, the main concern will be to avoid an excessive expansion or restriction of the jurisdiction of UNCLOS tribunals. An excessive expansion of jurisdiction could encourage non-participation in UNCLOS proceedings,[89] increase non-compliance with the awards of UNCLOS tribunals, and decrease the probability that non-State Parties like the United States accede to the Convention. On the other hand, an excessive restriction of jurisdiction could diminish the usefulness of the dispute settlement mechanism of the Convention. Therefore, an appropriate balance must be struck.

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can be reduced to three elements: text, context, and object and purpose. Article 32 permits recourse to "supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion" to confirm the meaning resulting from the Article 31 examination, or to determine the meaning if the Article 31 examination leads to an obscure or ambiguous meaning, or to a manifestly absurd or unreasonable result. *Id.* art. 32. Article 33 provides that where a treaty is equally authoritative in two or more languages and there is a difference in the meaning of the text in those languages, then "the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted." *Id.* art. 33.

88. For the purposes of this article, this question is equivalent to the question: What is the scope of the non-UNCLOS rules of international law that the source grants UNCLOS tribunals the power to determine whether a State has breached? *See supra* Part II.A.

89. China is not participating in the *Philippines v. China* arbitration, and Russia is not participating in the *Arctic Sunrise* arbitration.

A. Supplemental Jurisdiction Under Article 288(2)

Article 288(2) is the least controversial source of supplemental jurisdiction. It provides that UNCLOS tribunals "shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement."[90]

1. Jurisdiction

Does Article 288(2) grant UNCLOS tribunals supplemental jurisdiction over non-UNCLOS disputes? Both an interpretation of Article 288(2) and the jurisprudence of UNCLOS tribunals lead to an affirmative answer.

a. Treaty Interpretation

The text of Article 288(2) expressly grants UNCLOS tribunals jurisdiction over non-UNCLOS disputes. The context supports this interpretation: the language of Article 288(2) parallels that of Article 288(1), which grants UNCLOS tribunals jurisdiction over UNCLOS disputes. The object and purpose of UNCLOS does not suggest an alternative interpretation, so the overall clarity of the provision renders recourse to the *Convention's travaux préparatoires unnecessary.*

b. The Trend in Case Law

As far as the author is aware, no UNCLOS tribunal has ever established its jurisdiction based on Article 288(2).[91] Nevertheless, States and at least one UNCLOS tribunal have affirmed this possibility in the context of disputes. In *MOX Plant*, both the United Kingdom[92] and Ireland[93] acknowledged that the

90. UNCLOS, *supra* note 1, art. 288.

91. In *Sub-Regional Fisheries Commission*, however, ITLOS controversially found advisory jurisdiction through the application of analogous (though not perfectly analogous) provisions in the ITLOS Statute and the ITLOS Rules. *Sub-Regional Fisheries Commission*, Advisory Opinion, *supra* note 8, ¶¶ 38, 69.

92. Counter-Memorial of the United Kingdom (Jan. 9, 2003), ¶ 4.11, MOX Plant (Ir. v. U.K.), PCA Case Repository, [hereinafter *MOX Plant (UNCLOS)*, Counter-Memorial of the United Kingdom].

93. *MOX Plant (UNCLOS)*, Reply of Ireland, *supra* note 48, ¶ 4.2.

tribunal could have jurisdiction over a non-UNCLOS dispute under Article 288(2). Similarly, in *Chagos*, Mauritius and the United Kingdom agreed on the jurisdiction-conferring power of Article 288(2).[94] In addition, the tribunal in *Arctic Sunrise* acknowledged that Article 288(2) could serve as a source of jurisdiction over a non-UNCLOS dispute.[95]

2. Scope

What is the scope of non-UNCLOS disputes over which Article 288(2) grants supplemental jurisdiction? Once again, there is very little controversy over the answer to this question.

a. Treaty Interpretation

The text of Article 288(2) specifies two conditions that limit the scope of non-UNCLOS disputes to which it applies: (1) the dispute must concern the interpretation or application of an international agreement "related to the purposes of [UNCLOS]"; and (2) the dispute must be submitted to the UNCLOS tribunal "in accordance with the agreement."[96]

Neither of these conditions has attracted much controversy. The first condition is relatively straightforward: although one can always debate what counts as "related to the purposes of [UNCLOS]," at least the inquiry is clear. The second condition is more ambiguous, but there appears to be general acceptance that it means that the agreement must expressly confer jurisdiction on an UNCLOS tribunal.[97]

An acceptance of this interpretation can be seen in the ITLOS Statute. Article 21 of the Statute provides: "The jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters *specifically provided for in any other agreement which confers jurisdiction on*

94. *Chagos*, Award, *supra* note 3, ¶¶ 169, 269.

95. *Arctic Sunrise*, Award on the Merits, *supra* note 4, ¶ 192 n.184.

96. UNCLOS, *supra* note 1, art. 288.

97. *See, e.g.*, CATHRIN ZENGERLING, GREENING INTERNATIONAL JURISPRUDENCE 227 (2013).

the Tribunal."[98] Although this article pertains only to the jurisdiction of ITLOS, it can be seen as a reflection of Article 288 UNCLOS: the language "all disputes and all applications submitted to it in accordance with this Convention" reflects Article 288(1), and the language "all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal" reflects Article 288(2).[99] Therefore, the ITLOS Statute effectively equates "the submission of a dispute in accordance with an agreement" to "the agreement's conferral of jurisdiction."

b. The Trend in Case Law

Various States have confirmed this interpretation of Article 288(2). In *MOX Plant*, the United Kingdom argued that the tribunal could have jurisdiction under Article 288(2) only if the other international agreements in question "provide[d] for UNCLOS dispute settlement."[100] Similarly, in *Chagos*, Mauritius asserted that "Article 288(2) applies only to cases submitted pursuant to the provisions of a dispute settlement clause of an international agreement other than the Convention itself,"[101] and the United Kingdom agreed.[102]

3. Public Order

In summary, the widely accepted interpretation of Article 288(2) is that an UNCLOS tribunal may exercise jurisdiction under Article 288(2) only if: (1) the international agreement is "related to the purposes of [UNCLOS]"; and (2) the international agreement confers jurisdiction on an UNCLOS tribunal.[103] Since

98. United Nations Convention on the Law of the Sea, Annex VI, Statute of the International Tribunal for the Law of the Sea art. 21, Dec. 10, 1982, 1833 U.N.T.S. 397, 561 (emphasis added).

99. In *Sub-Regional Fisheries Commission*, ITLOS held that the word "matter" in Article 21 of the ITLOS Statute was broader than the word "dispute" in Article 288(2) UNCLOS, reflecting that they are not perfectly parallel. *Sub-Regional Fisheries Commission*, Advisory Opinion, *supra* note 8, ¶ 56. Nevertheless, for the present purposes, in the context of jurisdiction, the two provisions complement one another.

100. *MOX Plant (UNCLOS)*, Counter-Memorial of the United Kingdom, *supra* note 92, ¶ 4.11.

101. *Chagos*, Award, *supra* note 3, ¶ 269.

102. *Id.* ¶ 264.

103. The website of ITLOS refers to and catalogs ten multilateral agreements that grant ITLOS jurisdiction under Article 288(2). *Competence*, ITLOS,

the conferral of jurisdiction in the international agreement must be express, there is little concern over an excessive expansion or restriction of the jurisdiction of UNCLOS tribunals. States can be expected to be fully aware of exactly what they are agreeing to when including such a jurisdictional provision.

B. Supplemental Jurisdiction Under Article 293(1)

Relative to Article 288(2), there is slightly more controversy concerning the question of whether Article 293(1) constitutes a grant of supplemental jurisdiction. Article 293(1) provides: "A court or tribunal having jurisdiction under this section shall apply this Convention and *other rules of international law* not incompatible with this Convention."[104]

1. Jurisdiction

Does Article 293(1) grant UNCLOS tribunals supplemental jurisdiction over non-UNCLOS disputes? A proper interpretation of Article 293(1) leads to a negative answer. Nevertheless, an examination of the jurisprudence of UNCLOS tribunals reveals one line of cases that asserts the contrary.

a. Treaty Interpretation

The text of Article 293(1) suggests that the provision in and of itself does not constitute a grant of jurisdiction. Rather, it envisages a two-step process whereby the UNCLOS tribunal first determines whether it has jurisdiction under a separate provision ("A court or tribunal having jurisdiction under this section . . . "), and only afterwards applies the applicable law (" . . . shall apply this Convention and other rules of international law not incompatible with this Convention."). The context of Article 293(1) affirms this interpretation: Article 293 is entitled "Applicable Law," whereas Article 288 — a clear grant of

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https://www.itlos.org/jurisdiction/competence/ (last visited May 23, 2015); *Relevant Provisions of International Agreements Conferring Jurisdiction on the Tribunal*, ITLOS, https://www.itlos.org/fileadmin/itlos/documents/basic_texts/Relevant_provisions.12.12.07.E.pdf (last visited May 23, 2015). There may be other bilateral agreements that confer such jurisdiction, or there may be other agreements that confer jurisdiction on other UNCLOS tribunals.

104. UNCLOS, *supra* note 1, art. 293(1) (emphasis added).

jurisdiction — is entitled "Jurisdiction."[105] The object and purpose of the Convention does not suggest an alternative interpretation, and the *travaux préparatoires* do not shed any more light on the question.[106] Therefore, a straightforward interpretation of Article 293(1) under the VCLT leads to the conclusion that the provision does not constitute a grant of supplemental jurisdiction.

b. The Trend in Case Law

UNCLOS tribunals generally agree that Article 293(1) speaks only to applicable law, not jurisdiction. However, the UNCLOS tribunals in one line of cases — *M/V Saiga (No. 2)*, *Guyana v. Suriname*, and *M/V Virginia G* — effectively invoked Article 293(1) as a grant of jurisdiction to determine violations of customary rules concerning the use of force. This Part will first examine these three cases, followed by the remaining relevant jurisprudence of UNCLOS tribunals.

It will be recalled that in *M/V Saiga (No. 2)*, St. Vincent sought a declaration that Guinea had breached the customary prohibition on the use of excessive force in detaining the *Saiga* without invoking a specific provision of UNCLOS.[107] Since Guinea did not dispute the jurisdiction of ITLOS over the claim, the jurisdictional question was not litigated.[108] In its judgment, however, ITLOS justified its jurisdiction over the claim by holding:

> Although the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the Convention, requires that the use of force must

105. The title of a provision is not necessarily determinative of its function. *See* Channel Tunnel Grp. Ltd. v. Sec'y of State for Transp. of the Gov't of the U.K., PCA Case Repository, Partial Award, ¶ 98 (Jan. 30, 2007) [hereinafter *Eurotunnel*, Partial Award]. However, in this case it provides a confirmation of the ordinary meaning of the text.

106. 5 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 72-74 (Myron H. Nordquist et al. eds., 1995) [hereinafter 5 VIRGINIA COMMENTARY].

107. *See supra* note 42 and accompanying text.

108. *See M/V Saiga (No. 2)*, Memorial of St. Vincent, *supra* note 42, ¶¶ 95-99; Counter-Memorial of Guinea (Oct. 16, 1998), M/V Saiga (No. 2) (St. Vincent v. Guinea), ITLOS Case No. 2; *M/V Saiga (No. 2)*, Reply of St. Vincent, *supra* note 42, ¶¶ 117-20; Rejoinder Submitted by Guinea (Dec. 28, 1998) ¶ 113, M/V Saiga (No. 2) (St. Vincent v. Guinea), ITLOS Case No. 2.

> be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law.[109]

In this short paragraph, ITLOS decided that it could determine whether Guinea had breached the customary prohibition on the use of excessive force for the simple reason that Article 293(1) granted it the authority to "apply" other rules of international law. It did not expressly employ the word "jurisdiction," but by assuming this authority, ITLOS effectively held that Article 293(1) granted it jurisdiction over a non-UNCLOS dispute — that is, Article 293(1) granted it the power to determine whether a non-UNCLOS rule of international law had been breached. Indeed, ITLOS ultimately found that Guinea had breached the prohibition on the use of excessive force.[110] This application of Article 293(1) did not escape the scrutiny of commentators,[111] but it has since been reaffirmed on two occasions.

It was first reaffirmed by the Annex VII tribunal in *Guyana v. Suriname* in 2007. It will be recalled that Guyana had sought a declaration that Suriname had breached the prohibition on the threat of force under the U.N. Charter and general international law.[112] As in *M/V Saiga (No. 2)*, there was at first no discussion over whether the tribunal had the jurisdiction to determine whether a State breached a non-UNCLOS rule of international law. In its Rejoinder, however, Suriname raised a jurisdictional objection. It characterized Guyana's claim as one that "relate[s] only to violations of the UN Charter and general international law,"[113] and argued that "[t]he Tribunal has no jurisdiction to adjudicate alleged violations of the UN Charter and general

109. *M/V Saiga (No.2)*, Judgment, *supra* note 36, ¶ 155.

110. *Id.* ¶ 159.

111. *See supra* note 15.

112. *See supra* note 56 and accompanying text.

113. Rejoinder of Suriname (Sept. 1, 2007), ¶ 4.11, Guyana v. Suriname, PCA Case No. 2004-04.

international law."[114] The tribunal, however, disagreed.[115] Citing to *M/V Saiga (No. 2)*, the tribunal stated:

> The International Tribunal for the Law of the Sea ("ITLOS") has interpreted Article 293 as giving it *competence* to apply not only the Convention, but also the norms of customary international law (including, of course, those relating to the threat or use of force). … In the view of this Tribunal this is a reasonable interpretation of Article 293 and therefore Suriname's contention that this Tribunal had "no *jurisdiction* to adjudicate alleged violations of the United Nations Charter and general international law" cannot be accepted.[116]

Notably, not only did the tribunal state that Article 293 gave it "competence"[117] (a synonym of "jurisdiction"), but it also rejected Suriname's contention that it had no "jurisdiction"[118] over the non-UNCLOS dispute. Furthermore, the tribunal expressly declared in the *dispositif* of the award that it "ha[d] *jurisdiction* to consider and rule on Guyana's allegation that Suriname has engaged in the unlawful use or threat of force contrary to . . . the UN Charter, and general international law."[119] Indeed, the tribunal ultimately found that Suriname had violated the prohibition on the threat of force under the U.N. Charter and general international law.[120]

This application of Article 293(1) was reaffirmed a second time in the lesser known case of *M/V Virginia G* in 2014. The facts of that case are similar to those of *M/V Saiga (No. 2)*. In August 2009, Guinea-Bissau had arrested the *M/V Virginia G*, an oil tanker registered in Panama, for providing gas oil to fishing vessels in the EEZ of Guinea-Bissau.[121] Panama subsequently

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114. *Id.* ¶ 4.7; Hearing Transcripts, Day 7 (Dec. 15, 2006) at 986, 1092, Guyana v. Suriname, PCA Case No. 2004-04.

115. *Guyana v. Suriname*, Award, *supra* note 52, ¶¶ 402-06.

116. *Id.* ¶¶ 405-06 (emphasis added).

117. *Id.* ¶ 405.

118. *Id.* ¶ 406.

119. *Id.* ¶ 487(ii) (emphasis added).

120. *Id.* ¶ 488(2).

121. M/V Virginia G (Pan. v. Guinea-Bissau), ITLOS Case No. 19, Judgment, ¶¶ 55, 59, 62 (Apr. 14, 2014) [hereinafter *M/V Virginia G*, Judgment].

instituted proceedings against Guinea-Bissau for violating not only various UNCLOS provisions, but also the customary prohibition on the use of excessive force.[122] Although Panama asserted that this prohibition arose under both "the Convention and . … international law,"[123] UNCLOS does not contain any provisions on the prohibition on the use of excessive force at sea; therefore, it was a non-UNCLOS dispute. Nevertheless, ITLOS — in line with *M/V Saiga (No. 2)* and *Guyana v. Suriname* — approvingly quoted the paragraph from *M/V Saiga (No. 2)* reproduced above,[124] and exercised jurisdiction over the dispute.[125]

Aside from this one line of cases, UNCLOS tribunals have been very clear about distinguishing "jurisdiction" from "applicable law." Just four years after ITLOS's judgment in *M/V Saiga (No. 2)*, the Annex VII tribunal in *MOX Plant* famously stated in its Procedural Order No. 3 that "there is a cardinal distinction between the scope of its jurisdiction under article 288, paragraph 1, of the Convention, on the one hand, and the law to be applied by the Tribunal under article 293 of the Convention, on the other hand."[126] Indeed, in that case, although Ireland had asked the tribunal to determine whether the United Kingdom had breached certain non-UNCLOS rules of international law,[127] even Ireland did not argue that Article 293(1) alone granted the tribunal the power to do so.[128] And ultimately, through a Statement by the President[129] and its Procedural Order No. 3,[130] the tribunal specified that Ireland's claims arising directly under other legal instruments were inadmissible.

Then in 2012, in a joint separate opinion to ITLOS's order on provisional measures in *ARA Libertad*, Judge Rüdiger Wolfrum and Judge Jean-Pierre Cot noted:

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122. *Id.* ¶ 54.
123. *Id.*
124. *Id.*
125. *Id.* ¶ 362.
126. *MOX Plant (UNCLOS)*, Procedural Order No. 3, *supra* note 51, ¶ 19.
127. *See supra* note 49 and accompanying text.
128. *MOX Plant (UNCLOS)*, Reply of Ireland, *supra* note 48, ¶ 5.5.
129. *MOX Plant (UNCLOS)*, Statement by the President, *supra* note 50, ¶ 5.
130. *MOX Plant (UNCLOS)*, Procedural Order No. 3, *supra* note 51, ¶ 19.

> According to [Article 288(1)] the Tribunal is mandated only to decide on disputes concerning the interpretation and application of the Convention. … Article 293 of the Convention provides that the Tribunal may have recourse to general international law not incompatible with the Convention. These two issues have to be separated clearly. … A dispute concerning the interpretation and application of a rule of customary law therefore does not trigger the competence of the Tribunal unless such rule of customary international law has been incorporated in the Convention.[131]

The other members of the tribunal had not taken a position on the supplemental jurisdiction question, as they had found that — at least on the *prima facie* standard required for provisional measures — the customary rule in question had been incorporated into UNCLOS.[132] But as Judges Wolfrum and Cot were not convinced that the customary rule had been incorporated into the Convention, they made the remark reproduced above that Article 293(1) could not serve as a basis for jurisdiction.

More recently, in *Chagos*, the Annex VII tribunal declared in its award that "the Parties are largely in agreement that Article 293 does not, of itself, constitute a basis of jurisdiction. …"[133] And in *Arctic Sunrise*, when confronted with the question of whether it could determine violations of the ICCPR, the Annex VII tribunal answered negatively, holding that "Article 293(1) does not extend the jurisdiction of a tribunal."[134]

None of these tribunals, however, expressly held that the *M/V Saiga (No. 2)* line of cases was incorrectly decided. In *MOX Plant*, Ireland cited to *M/V Saiga (No. 2)* to establish the authority of the tribunal to determine a violation of certain

131. ARA Libertad (Arg. v. Ghana), ITLOS Case No. 20, Order of Dec. 15, 2012, Joint Separate Opinion of Judge Wolfrum & Judge Cot, ¶ 7.

132. In particular, the tribunal found on a *prima facie* standard that the customary rule on the immunity of warships had been incorporated into Article 32 UNCLOS. ARA Libertad (Arg. v. Ghana), ITLOS Case No. 20, Order of Dec. 15, 2012, ¶¶ 60-67; *see* Tanaka, *supra* note 14, at 382.

133. *Chagos*, Award, *supra* note 3, ¶ 181.

134. *Arctic Sunrise*, Award on the Merits, *supra* note 4, ¶ 188.

non-UNCLOS rules of international law,[135] but the tribunal did not address the case. In *Chagos*, Mauritius invoked *M/V Saiga (No. 2)* and *Guyana v. Suriname*,[136] and the United Kingdom attempted to distinguish them.[137] But the tribunal, after having summarized the parties' arguments on the two cases,[138] did not reference either of them when explaining its decision.[139] In *Arctic Sunrise*, however, the tribunal attempted to distinguish *M/V Saiga (No. 2)*. After noting that Article 293(1) permits UNCLOS tribunals to "rely on primary rules of international law other than the Convention in order to interpret and apply particular provisions of the Convention" and to apply "relevant rules of international law," it emphasized how in *M/V Saiga (No. 2)*, ITLOS had "[taken] account of general international law rules on the use of force in considering the use of force for the arrest of a vessel."[140] Presumably, the *Arctic Sunrise* tribunal was inferring that ITLOS had applied the customary prohibition on the use of excessive force to interpret Article 225,[141] or possibly Article 301 of the Convention.[142] However, it should be noted that ITLOS in *M/V Saiga No. 2* had used Article 293(1) as its source of jurisdiction without invoking any other provision of UNCLOS.[143] So the *Arctic Sunrise* tribunal's generous interpretation of the M/V Saiga (No. 2) judgment appears to have given ITLOS more than the benefit of the doubt.

In summary, UNCLOS tribunals have repeatedly held that Article 293(1) does not grant them the power to determine whether a State has breached a non-UNCLOS rule of international law.[144] However, one line of cases — *M/V Saiga*

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135. *MOX Plant (UNCLOS)*, Memorial of Ireland, *supra* note 48, ¶ 6.21 & n.36.

136. *Chagos*, Award, *supra* note 3, ¶ 183.

137. *Id.* ¶ 173.

138. *Id.* ¶¶ 173, 183.

139. *Id.* ¶¶ 203-21.

140. *Arctic Sunrise*, Award on the Merits, *supra* note 4, ¶ 191.

141. One commentator has suggested that ITLOS in *M/V Saiga (No. 2)* should have invoked Article 225 UNCLOS to establish its jurisdiction. Harrison, *supra* note 15, at 229.

142. The tribunal expressly cited Article 301 in the subsequent paragraph. *Arctic Sunrise*, Award on the Merits, *supra* note 4, ¶ 192. *But see supra* note 42.

143. *See supra* notes 42-44 and accompanying text.

144. Other international courts and tribunals have interpreted similar applicable law provisions in other international agreements the same way. *Eurotunnel*, Partial

(No. 2), *Guyana v. Suriname*, and *M/V Virginia G* — suggests that UNCLOS tribunals nevertheless have the power to determine whether a State has breached customary rules concerning the use of force.

2. Scope

What is the scope of non-UNCLOS disputes over which Article 293(1) grants jurisdiction? The answer to this question depends on whether one considers Article 293(1) to be a valid source of supplemental jurisdiction. If one accepts that Article 293(1) grants supplemental jurisdiction, then the answer is the scope of the phrase "other rules of international law" in Article 293(1). If one does not accept this interpretation of Article 293(1), then the answer is none. However, even in this latter scenario, in order to better understand Article 293(1), it is still helpful to determine the scope of the phrase "other rules of international law."

a. Treaty Interpretation

Does the phrase "other rules of international law" include *any and all* other rules of international law, or only *certain* other rules of international law? There are a variety of perspectives one could potentially take. The authoritative *Virginia Commentary*, in its commentary to Article 138 (another provision where the phrase "other rules of international law" appears), states that the phrase "presumably refers to all the rules of international law…, including customary international law and treaty law . . . ."[145] The Law of the Sea Committee of the American Branch of the International Law Association (ILA Committee), on the other hand, has taken the position that the phrase "other rules of international" refers first and foremost to the law of armed conflict, though potentially to other rules of international law as

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Award, *supra* note 105, ¶¶ 150-53; *MOX Plant (OSPAR)*, Final Award, *supra* note 45, ¶ 85; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 43, ¶ 147 (Feb. 26).

145. *See* 6 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 117 (Myron H. Nordquist et al. eds., 1995) [hereinafter 6 VIRGINIA COMMENTARY].

well.[146] And, as will be discussed below, tribunals and States have taken a range of other perspectives on the scope of Article 293(1).

An analysis of Article 293(1) in accordance with the VCLT does not appear to resolve this disagreement. The text of Article 293(1) expressly limits the scope of "other rules of international law" with only one condition: the rule must be consistent with UNCLOS.[147] Nevertheless, the text does not provide any more clarity. As for context, it should be noted that the phrase "other rules of international law" appears eleven times throughout the Convention,[148] so one could potentially look to the other usages of the phrase to help interpret it in the context of Article 293(1). However, the ILA Committee has recognized that the scope of the phrase in Article 293(1) may actually differ from its scope in other parts of the Convention.[149] Indeed, the origins of the phrase in each of the different provisions that contain it are not all the same. To make things more complicated, neither the object and purpose nor the *travaux préparatoires*[150] provide any information on interpreting the scope of the phrase "other rules of international law" in Article 293(1). Therefore, one must turn to the jurisprudence of UNCLOS tribunals.

b. The Trend in Case Law

It is critical to recognize that a tribunal's interpretation of the scope of Article 293(1) depends on the tribunal's determination of whether Article 293(1) grants supplemental jurisdiction. In cases where the tribunal considers Article 293(1) as a source of jurisdiction, the tribunal would probably be keener on limiting its scope. On the other hand, in cases where the tribunal does not consider that Article 293(1) can grant jurisdiction, the tribunal would probably be more liberal in its interpretation of the scope

146. DEFINITIONS FOR THE LAW OF THE SEA 267 (George K. Walker ed., 2012).

147. UNCLOS, *supra* note 1, art. 293(1).

148. *Id.* arts. 2(3), 19(1), 21(1), 31, 34(2), 58(3), 87(1), 138, 293, 297(1)(b), Annex III, art. 21(1). In addition, Article 58(2) contains the phrase "other pertinent rules of international law." *Id.* art. 58(2). Article 139(2) contains the phrase "the rules of international law." *Id.* art. 139(2). Article 303(4) contains the phrase "other international agreements and rules of international law." *Id.* art. 303(4).

149. DEFINITIONS FOR THE LAW OF THE SEA, *supra* note 146, at 267.

150. 5 VIRGINIA COMMENTARY, *supra* note 106, at 72-74.

of the provision. In this Part, the former will first be discussed, followed by the latter.

If one accepts that Article 293(1) grants supplemental jurisdiction, then the relevant cases are *M/V Saiga (No. 2)*, *Guyana v. Suriname*, and *M/V Virginia G*. As noted above, the relevant passage from *M/V Saiga (No. 2)*, which was subsequently approvingly quoted in *Guyana v. Suriname*[151] and *M/V Virginia G*,[152] is:

> Although the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law.[153]

This passage does not set clear limits on the scope of the phrase "other rules of international law" referenced in Article 293(1). A narrow interpretation of this holding is that the phrase merely incorporates the prohibition on the use of excessive force in the arrest of ships. However, one could interpret this passage to mean that the phrase includes all rules concerning the use of force ("the use of force must be avoided as far as possible"), all rules concerning "humanity" ("[c]onsiderations of humanity must apply in the law of the sea"), or even all rules of international law ("international law, which is applicable by virtue of article 293 of the Convention").

ITLOS in *M/V Virginia G* did not elaborate on this point. However, the Annex VII tribunal in *Guyana v. Suriname* did. It held that the "other rules of international law" in Article 293(1) encompassed not just the prohibition on the threat of force — which it was asked to apply — but also "the norms of customary international law," as well as "the United Nations Charter and general international law."[154] It is not clear, however,

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151. *Guyana v. Suriname*, Award, *supra* note 52, ¶ 405.

152. *M/V Virginia G*, Judgment, *supra* note 121, ¶ 359.

153. *M/V Saiga (No. 2)*, Judgment, *supra* note 36, ¶ 155.

154. *Guyana v. Suriname*, Award, *supra* note 52, ¶¶ 405-06.

whether the tribunal would also have extended the scope of "other rules of international law" to conventional law.

It is perhaps relevant to note here that the OSPAR tribunal in *MOX Plant*, after appearing to find that an applicable law provision could grant the tribunal supplemental jurisdiction,[155] seemingly held that the phrase "the rules of international law" in an applicable law provision encompassed customary law and general principles of law, but not conventional law.[156]

Yet another proposition for defining the scope of the phrase "other rules of international law" in the context of extending the jurisdiction of UNCLOS tribunals by way of Article 293(1) came from Mauritius in *Chagos*. Mauritius had argued that the phrase in Article 293(1) encompasses any and all other rules of international law, such as the law on self-determination, but only if they are "necessary" to resolve issues that are "sufficiently closely connected" to the dispute.[157] The tribunal, however, did not address this proposition, as it held that "the Parties are largely in agreement that Article 293 does not, of itself, constitute a basis of jurisdiction . . . ."[158]

If one accepts, on the other hand, that Article 293(1) does not grant any jurisdiction, but merely allows UNCLOS tribunals to "apply" (i.e., "consider" or "take into account," not "determine the breach of") other rules of international law, then one can look to other UNCLOS jurisprudence on the topic.

In *MOX Plant*, the United Kingdom and Ireland litigated the question, but the Annex VII tribunal never rendered an award. The United Kingdom specified that the "other rules" of Article 293(1) become "relevant" in four ways: (1) "[w]here they arise incidentally in the determination of [an UNCLOS dispute]," in particular "in the case of secondary rules of international law, such as those relating to State responsibility or the law of

155. *See MOX Plant (OSPAR)*, Final Award, *supra* note 45, ¶¶ 85-86 (using the words "applicability" and "applicable" in the context of discussing the "competence" of the tribunal).

156. *Id.* ¶¶ 84-85.

157. *Chagos*, Award, *supra* note 3, ¶ 177.

158. *Id.* ¶ 181.

treaties";[159] (2) "[w]here they are to be taken into account, together with the context, in interpreting a treaty in accordance with articles 31 and 32 of the [VCLT]";[160] (3) "where they are relevant by virtue of an agreement falling within article 288(2);[161] and (4) where there is an express *renvoi* provision of UNCLOS to those rules.[162] Seeking to invoke many non-UNCLOS instruments, Ireland naturally favored a broader interpretation of "other rules." Ireland argued that the "other rules" of Article 293(1) encompassed all rules of international law — conventional law, customary law, general principles of law,[163] as well as "standards and practices"[164] — that were "relevant"[165] or "related"[166] to UNCLOS either because they could be used to help interpret UNCLOS provisions,[167] or because they were the subject of UNCLOS *renvoi* provisions.[168]

In a similar fashion, the scope of the phrase "other rules of international law" was litigated in *Chagos*, but the tribunal never rendered a decision on the matter.[169] While Mauritius appeared to take the position that Article 293(1) could extend the

159. *MOX Plant (UNCLOS)*, Counter-Memorial of the United Kingdom, *supra* note 92, ¶ 4.3; Rejoinder of the United Kingdom (Apr. 24, 2003), ¶¶ 5.2, 5.15, MOX Plant (Ir. v. U.K.), PCA Case Repository [hereinafter *MOX Plant (UNCLOS)*, Rejoinder of the United Kingdom].

160. *MOX Plant (UNCLOS)*, Counter-Memorial of the United Kingdom, *supra* note 92, ¶ 4.31; *MOX Plant (UNCLOS)*, Rejoinder of the United Kingdom, *supra* note 159, ¶ 5.2.

161. *MOX Plant (UNCLOS)*, Counter-Memorial of the United Kingdom, *supra* note 92, ¶ 4.31; *MOX Plant (UNCLOS)*, Rejoinder of the United Kingdom, *supra* note 159, ¶ 5.15.

162. *MOX Plant (UNCLOS)*, Rejoinder of the United Kingdom, *supra* note 159, ¶¶ 5.2, 5.15.

163. *MOX Plant (UNCLOS)*, Memorial of Ireland, *supra* note 48, ¶ 6.1.

164. *Id.* ¶ 6.36.

165. *Id.* ¶ 6.7; *MOX Plant (UNCLOS)*, Reply of Ireland, *supra* note 48, ¶ 5.5.

166. *MOX Plant (UNCLOS)*, Memorial of Ireland, *supra* note 48, ¶ 6.2; *MOX Plant (UNCLOS)*, Reply of Ireland, *supra* note 48, ¶ 5.4.

167. *MOX Plant (UNCLOS)*, Memorial of Ireland, *supra* note 48, ¶ 6.3; *MOX Plant (UNCLOS)*, Reply of Ireland, *supra* note 48, ¶ 5.4.

168. *MOX Plant (UNCLOS)*, Memorial of Ireland, *supra* note 48, ¶ 6.5; *MOX Plant (UNCLOS)*, Reply of Ireland, *supra* note 48, ¶ 5.4.

169. The tribunal did, however, define the scope of "other rules of international law" in Article 2(3). *See infra* note 291 and accompanying text.

jurisdiction of the tribunal,[170] the United Kingdom largely followed the arguments it had put forth in *MOX Plant*. It argued that Article 293(1) only "permits reference" to other rules of international law where (1) there is a *renvoi* provision; (2) where the tribunal has jurisdiction under Article 288(2); or (3) where secondary rules of general international law such as those on treaty interpretation or State responsibility apply.[171]

Notably, in *M/V Virginia G* and *Sub-Regional Fisheries Commission*, ITLOS implicitly (in the former) and explicitly (in the latter) supported parts of the United Kingdom's argument. In *M/V Virginia G*, despite the portion of the judgment citing to *M/V Saiga (No. 2)*, ITLOS — without expressly invoking Article 293(1) — used multiple non-UNCLOS international agreements to help it interpret terms in the Convention.[172] Then in *Sub-Regional Fisheries Commission*, ITLOS expressly invoked Article 293(1) in applying not only the International Law Commission's (ILC) Draft Articles on State Responsibility,[173] but also the convention that had granted ITLOS jurisdiction to render the advisory opinion.[174] These actions effectively endorsed the United Kingdom's position that the phrase "other rules of international law" encompassed (1) rules to be taken into account under Article 31 of the VCLT; (2) secondary rules of general international law; and (3) rules contained in an agreement granting the tribunal jurisdiction.

Furthermore, the tribunals in *Arctic Sunrise* and *Philippines v. China* appear to agree with the United Kingdom's positions in *MOX Plant* and *Chagos*. In *Arctic Sunrise*, the tribunal agreed that Article 293(1) allows a tribunal to apply rules that would give effect to *renvoi* provisions,[175] as well as "foundational or secondary rules of general international law such as the law of treaties or

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170. *See supra* note 157 and accompanying text.

171. Rejoinder of the United Kingdom (Mar. 17, 2014), ¶ 4.25, Chagos Marine Protected Area (U.K. v. Mauritius), PCA Case No. 2011-03 [hereinafter *Chagos*, Rejoinder of the United Kingdom].

172. *M/V Virginia G*, Judgment, *supra* note 121, ¶ 216.

173. U.N. GAOR, 56th sess., Supp. No. 10, Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, U.N. Doc. A/56/10 (2001).

174. *Sub-Regional Fisheries Commission*, Advisory Opinion, *supra* note 8, ¶ 62.

175. *Arctic Sunrise*, Award on the Merits, *supra* note 4, ¶ 188 & n.180.

the rules of State responsibility" that are "necessary" to properly interpret and apply provisions of UNCLOS.[176] And the tribunal furthermore agreed that, presumably under Article 31 of the VCLT, "it may also be necessary to rely on primary rules of international law other than the Convention in order to interpret and apply particular provisions of the Convention."[177] As an example of this proposition, in *Philippines v. China*, the tribunal held that "Article 293(1) of [UNCLOS], together with Article 31(3) of the Vienna Convention on the Law of Treaties, enable[d] it in principle to consider the relevant provisions of the [Convention on Biological Diversity] for the purposes of interpreting the content and standard of Articles 192 and 194 of [UNCLOS]."[178] It added that such practice had "been confirmed in other recent cases," citing not only *Arctic Sunrise*, but also *M/V Saiga (No. 2)* and *M/V Virginia G*.[179]

In summary, if one accepts that Article 293(1) is not a source of supplemental jurisdiction, there appears to be general consensus that UNCLOS tribunals may apply four types of "other rules of international law":

1. Rules contained within international agreements granting jurisdiction on the tribunal under Article 288(2);
2. Rules expressly referenced in *renvoi* provisions in UNCLOS;
3. Secondary rules of general international law (e.g., treaty law, State responsibility, diplomatic protection); and
4. Rules to help interpret UNCLOS under Article 31(3)(c) of the VCLT.

Note, however, that even though under this theory Article 293(1) does not grant UNCLOS tribunals jurisdiction to determine whether these rules have been violated, UNCLOS tribunals could nonetheless have jurisdiction to determine whether the first two types of rules are violated, as discussed in Part III.A.1 (for Article

176. *Id.* ¶ 190.

177. *Id.* ¶ 191.

178. *Philippines v. China*, Award on Jurisdiction and Admissibility, *supra* note 5, ¶ 176.

179. *Id.* ¶ 282 & n.267.

288(2)) and as will be discussed in Part III.C.1 (for *renvoi* provisions).[180]

3. Public Order

An examination of the jurisprudence of UNCLOS tribunals reveals a divergence between tribunals that have applied Article 293(1) as a grant of jurisdiction and tribunals that have rejected such an application. Nevertheless, as discussed in Part III.B.1, an interpretation in accordance with the VCLT suggests that Article 293(1) should not constitute a grant of supplemental jurisdiction. Indeed, interpreting Article 293(1) otherwise could lead to an unreasonable result for public order. As the OSPAR tribunal in *MOX Plant* held with respect to an analogous provision in the OSPAR Convention: "Interpreting [the applicable law provision to grant jurisdiction] would transform it into an unqualified and comprehensive jurisdictional regime, in which there would be no limit *ratione materiae* to the jurisdiction of a tribunal established under the . . . Convention."[181]

One could, of course, still consider Article 293(1) as a grant of jurisdiction and avoid this problem by limiting the scope of the "other rules international law" referenced in Article 293(1). In fact, it appears that ITLOS in *M/V Saiga (No. 2)* and *M/V Virginia G* attempted to do just that by focusing only on rules on the use of force and "considerations of humanity." However, the *Guyana v. Suriname* tribunal's declaration that the "other rules of international law" in Article 293(1) extended to customary international law, general international law, and the U.N. Charter, in addition to Mauritius's claim that it encompassed all rules necessary to resolve disputes "sufficiently closely connected," reveal that, in light of the broad phrasing of "other rules of international law," there are constant pressures to widen its scope. Indeed, limiting the scope of Article 293(1) would probably not be completely faithful to the rules of treaty

180. Part III.C.1 only discusses zonal *renvoi* provisions, but the theory for their granting supplemental jurisdiction is the same as that for all *renvoi* provisions.

181. *MOX Plant (OSPAR)*, Final Award, *supra* note 45, ¶ 8. The applicable law provision of the OSPAR Convention provides: "The arbitral tribunal shall decide according to the rules of international law and, in particular, those of the Convention." OSPAR Convention, *supra* note 29, art. 32(6)(a).

interpretation, as there is no indication in the text, context, object and purpose, or *travaux préparatoires* that the phrase "other rules of international law" was intended to encompass only certain rules of international law. Consequently, in the interests of public order, Article 293(1) should probably not constitute a grant of supplemental jurisdiction at all. Rather, restricting the relevance of Article 293(1) to the four purposes indicated at the end of Part III.B.2, appears to be the most appropriate way of interpreting the provision in light of considerations of public order.

Such an interpretation would moreover be consistent with the jurisprudence of other international courts and tribunals. First and foremost, the ICJ has made clear that it only has the "jurisdiction" to determine whether a State has breached an international obligation if that State has consented to such jurisdiction,[182] even though Article 38(1) of the ICJ Statute instructs the Court to "apply" treaties, custom, and general principles of law.[183] Similarly, the tribunal in *Eurotunnel* held that it only had the "jurisdiction" to determine whether a party had breached the Concession Agreement,[184] even though Clause 40.4 of the Concession Agreement allowed the tribunal to "appl[y]" or have "recourse" to other rules of international and municipal law.[185] Furthermore, the OSPAR tribunal in *MOX Plant* held that it only had the jurisdiction to determine a breach of the OSPAR Convention,[186] even though Article 32(6)(a) of the OSPAR Convention provided that the tribunal "shall decide according to the rules of international law."[187] Establishing a jurisprudence consistent with the decisions of other international courts and tribunals would promote the objective, as articulated by the ICJ in *Diallo*, of achieving "the necessary clarity and the essential consistency of international law."[188]

182. *See supra* note 32.

183. Statute of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1055.

184. *Eurotunnel*, Partial Award, *supra* note 105, ¶¶ 150-53.

185. *Id.* ¶ 86.

186. *MOX Plant (OSPAR)*, Final Award, *supra* note 45, ¶ 85.

187. OSPAR Convention, *supra* note 29, art. 32(6)(a).

188. Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Judgment, Merits, 2010 I.C.J. Rep. 639, ¶ 66 (Nov. 30). The context from which this quote is drawn is slightly

One might feel discomforted by the fact that this interpretation seemingly implies that UNCLOS tribunals could not exercise jurisdiction over disputes concerning the use of force, as the tribunals did in *M/V Saiga (No. 2)*, *Guyana v. Suriname*, and *M/V Virginia G*. Nevertheless, this conclusion is not necessarily correct. It is possible that those tribunals could have still exercised jurisdiction over the use of force disputes by invoking Articles 56(2), 58(2), 58(3),[189] 225,[190] and/or 301.[191] Although it is not absolutely certain that these provisions, some of which will be discussed in Part III.C, would provide the tribunal with jurisdiction over disputes concerning the use of force, they could at the very least serve as legitimate grounds for the tribunal to take into consideration non-UNCLOS rules on the use of force.

Therefore, in the interests of public order, future UNCLOS tribunals should adopt the interpretation of Article 293(1) reached through the application of Article 31 of the VCLT: they should refuse to recognize Article 293(1) as a source of supplemental jurisdiction.

C. Supplemental Jurisdiction Under Zonal Renvoi Provisions

The third major source of supplemental jurisdiction under UNCLOS is a group of seven provisions which the author calls "zonal *renvoi* provisions." They form a subcategory of a larger group of provisions referred to as the "*renvoi* provisions" of the Convention: the provisions that contain express references to non-UNCLOS rules of international law. There are approximately sixty *renvoi* provisions in UNCLOS,[192] although

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different: the ICJ was determining how much weight it should ascribe to the interpretations of the International Covenant on Civil and Political Rights by the Human Rights Committee. Nevertheless, the underlying rationale regarding the importance of consistency in international law still applies here.

189. *See infra* Part III.C (discussing the exercise of supplemental jurisdiction under zonal *renvoi* provisions such as Articles 56(2), 58(2), and 58(3)).

190. *See supra* note 141 and accompanying text.

191. *See supra* note 142 and accompanying text.

192. *See, e.g.*, UNCLOS, *supra* note 1, arts. 2(3), 19, 21(1), 21(2), 21(4), 23, 31, 34(2), 39(1)(b), 39(2), 39(3)(a), 41(3), 42(1)(b), 53(8), 56(2), 58(2), 58(3), 60(3), 60(5), 60(6), 61(3), 74(1), 83(1), 87(1), 92(1), 94(3)(b), 94(5), 108(1), 109(2), 116, 119(1)(a), 138, 139(2), 194(4),

the actual number depends on how one defines a "*renvoi* provision." Importantly, they come in all shapes and sizes, and therefore their legal effects are not all the same. Some may grant UNCLOS tribunals supplemental jurisdiction over non-UNCLOS disputes, while others may not.

As examining all of the *renvoi* provisions of the Convention would be an exhaustive endeavor, this Part focuses solely on one type — arguably the most important type — of *renvoi* provision: the zonal *renvoi* provisions. Although they have not received the attention they deserve,[193] the zonal *renvoi* provisions are very potent sources of supplemental jurisdiction because they apply to nearly all activities within certain maritime zones. The texts of the seven zonal *renvoi* provisions — with their *renvoi* language italicized — are reproduced in relevant part below.[194]

Territorial Sea	Article 2(3): The sovereignty over the territorial sea is exercised subject to this Convention *and to other rules of international law*.

207(1), 208(3), 211(5), 212(1), 213, 214, 216(1), 217(1), 218(1), 219, 220(1), 220(2), 220(3), 222, 223, 226(1), 228(1), 230(1), 230(2), 235(1), 297(1), 301, 303(4), 304.

193. As far as the author of this article is aware, the *Chagos* tribunal is the only UNCLOS tribunal to have noted this group of provisions. *Chagos*, Award, *supra* note 3, ¶ 503. In addition, the ILA Committee and Professor George K. Walker have highlighted many of these provisions in cataloguing UNCLOS provisions that contain references to "other rules of international law." DEFINITIONS FOR THE LAW OF THE SEA, *supra* note 146, at 35 n.78, 267-68; George K. Walker, *Defining Terms in the 1982 Law of the Sea Convention: The Last Round of Definitions Proposed by the International Law Association (American Branch) Law of the Sea Committee*, 36 CAL. W. INT'L L.J. 133, 149 n.51 (2005). Nevertheless, there are some differences in the list of zonal *renvoi* provisions catalogued by the *Chagos* tribunal, the ILA Committee, Professor Walker, and this article.

194. Other provisions could be considered to be zonal *renvoi* provisions, such as Articles 19(1), 21(1), 21(4), 31, 52(1), and the omitted part of Article 58(3). Articles 19(1) and 21(4) were not included because they provide that only one type of activity (innocent passage) must conform to other rules of international law. Article 21(1) and the omitted part of Article 58(3) were not included because again they provide that only one type of activity (the adoption of municipal laws and regulations) must conform to other rules of international law. Article 31 was not included because it focuses on the responsibility of a flag State for its warships rather than setting the boundary for lawful activity in a certain zone. Article 52(1) could be considered a zonal *renvoi* provision because it includes a reference to Articles 19(1), 21, and 31; however, it was not included for the same reasons that those three provisions were not included as described above.

International Straits	Article 34(2): The sovereignty or jurisdiction of the States bordering [straits used for international navigation] is exercised subject to this Part *and to other rules of international law*.
Exclusive Economic Zone	Article 56(2): In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to *the rights and duties of other States* . . . .
	Article 58(2): Articles 88 to 115 *and other pertinent rules of international law* apply to the exclusive economic zone in so far as they are not incompatible with this Part.
	Article 58(3): In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to *the rights and duties of the coastal State* . . . .
High Seas	Article 87(1): Freedom of the high seas is exercised under the conditions laid down by this Convention *and by other rules of international law*.
The Area	Article 138: The general conduct of States in relation to the Area shall be in accordance with the provisions of this Part . . . *and other rules of international law* . . . .

Peculiarly, there is no zonal *renvoi* provision for the continental shelf.[195] At first glance, Article 78(2), reproduced

195. The *Chagos* tribunal, however, listed Article 78(2) in its catalogue of zonal *renvoi* provisions. *See Chagos*, Award, *supra* note 3, ¶ 503.

below, appears to be one, but it is limited to "other rights and freedoms of other States *as provided for in this Convention*."[196] Earlier proposals at the Third United Nations Conference on the Law of the Sea (UNCLOS III) — the Conference that concluded in the adoption of UNCLOS — had included the "shall have due regard to the rights and duties of other States" language that is now found in the zonal *renvoi* provisions on the EEZ.[197] However, a later compromise proposal that was eventually adopted limited the rights and freedoms to those "as provided for in the present Convention."[198] The *travaux préparatoires* do not reveal the purpose behind this change; rather, the focus of the delegations was on ensuring that the coastal State's rights over its continental shelf did not infringe on the other rights and freedoms established in the Convention, such as those concerning the EEZ and the high seas.[199]

Continental Shelf	Article 78(2): The exercise of the rights of the coastal State over the continental shelf must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other States *as provided for in this Convention*.

1. Jurisdiction

Do the zonal *renvoi* provisions grant UNCLOS tribunals supplemental jurisdiction over non-UNCLOS disputes? A proper interpretation of the provisions and the relevant case law lead to an affirmative answer for Articles 2(3), 34(2), 87(1), and 138, but an ambiguous answer for Articles 56(2), 58(2), and 58(3).

196. UNCLOS, *supra* note 1, art. 78(2) (emphasis added).

197. *See* 2 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 903-04 (Myron H. Nordquist et al. eds., 1995) [hereinafter 2 VIRGINIA COMMENTARY].

198. *Id.* at 905-06.

199. *Id.* at 901-07.

a. Treaty Interpretation

None of the zonal *renvoi* provisions in and of themselves grant UNCLOS tribunals supplemental jurisdiction over non-UNCLOS disputes. However, since Article 288(1) grants UNCLOS tribunals the jurisdiction to determine whether a State has breached UNCLOS provisions,[200] where those provisions require compliance with non-UNCLOS rules of international law, UNCLOS tribunals must also have the jurisdiction to determine whether a State has breached those non-UNCLOS rules. The question, then, is whether the zonal *renvoi* provisions require compliance with non-UNCLOS rules.

Articles 2(3), 34(2), and 87(1) all use the present tense ("is exercised"), which makes it unclear whether they require compliance with the referenced "other rules of international law" (i.e., are prescriptive) or simply describe a state of affairs (i.e., are descriptive).[201] However, the Arabic, Chinese, French, Russian, and Spanish versions of the Convention — all of which are equally authentic with the English version[202] — suggest that these provisions do require compliance. The Arabic, Chinese, French, Russian, and Spanish versions of the three articles also use the present tense,[203] but in those languages the present tense is often used to express prescriptions (not mere descriptions) in international agreements. Given that the English version is ambiguous but the other versions are not as ambiguous, the meaning that best reconciles the texts, per Article 33 of the VCLT, would probably be one that imposes an obligation of compliance with non-UNCLOS rules of international law.

The context of the Convention supports the notion that provisions in the present tense can be of a prescriptive nature. As Mauritius pointed out in *Chagos*, Article 95 UNCLOS uses the

200. UNCLOS, *supra* note 1, art. 288(1); *see supra* Part II.A.

201. *See* 3 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY, at xliii-xliv (Myron H. Nordquist et al. eds., 1995) [hereinafter 3 VIRGINIA COMMENTARY] (noting how the Drafting Committee at UNCLOS III agreed to not use the word "shall" where the present tense adequately conveys the meaning).

202. UNCLOS, *supra* note 1, art. 320.

203. For example, in Article 2(3), the Arabic version uses "تمارس," the Chinese version uses "行使," the French version uses "s'exerce," the Russian version uses "осуществляется," and the Spanish version uses "se ejerce."

present tense in providing that "[w]arships on the high seas have complete immunity from the jurisdiction of any State other than the flag State," while Article 96 UNCLOS uses the "shall" construction in providing that non-commercial State ships "shall . . . have complete immunity from the jurisdiction of any State other than the flag State."[204] As the argument goes, it would be unreasonable to interpret only one of these provisions as granting actual immunity. The conclusion, then, is that UNCLOS sometimes uses the present tense to convey the same prescriptive meaning that "shall" implies. Indeed, the English language group of the Drafting Committee at UNCLOS III noted in its preliminary harmonization report that "'shall' should not be used where the present tense adequately conveys the meaning."[205]

Article 58(2) also uses the present tense, but instead uses the word "apply," which carries with it many ambiguities, as discussed in Part III.B.1 in the context of Article 293(1). Articles 56(2) and 58(3), on the other hand, employ the word "shall," which ordinarily requires compliance. However, in both cases, the word "shall" is followed by the phrase "have due regard to," rendering it ambiguous whether these provisions actually require compliance with the referenced "rights and duties" of other States. The context of the phrase in Article 58(3) suggests that it does not require compliance: the "due regard" obligation in Article 58(3) is juxtaposed with an obligation of "shall comply,"[206] which suggests that the "due regard" obligation at the very least does not amount to an obligation of strict compliance. Otherwise, the drafters would probably have used the same terminology.

Finally, Article 138 employs the word "shall" and does not contain any ambiguous language afterwards.[207] It is therefore

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204. Reply of Mauritius (Nov. 18, 2013), ¶ 6.14, Chagos Marine Protected Area (U.K. v. Mauritius), PCA Case No. 2011-03 [hereinafter *Chagos*, Reply of Mauritius].

205. 2 VIRGINIA COMMENTARY, *supra* note 197, at xlv (quoting the preliminary harmonization report of the English language group of the Drafting Committee).

206. For applications of the "shall comply" part of the provision, which can also be considered a *renvoi* provision, see *M/V Saiga (No. 2)*, Judgment, *supra* note 36, ¶¶ 121, 131-32; *Sub-Regional Fisheries Commission*, Advisory Opinion, *supra* note 8, ¶ 134. For the reason why this part of Article 58(3) was not included as a zonal *renvoi* provision in this article, see *supra* note 194.

207. UNCLOS, *supra* note 1, art. 138.

clear that Article 138 requires compliance with the "other rules of international law." Notably, Article 78(2), the zonal non-*renvoi* provision on the continental shelf, also contains clear mandatory language.[208]

In addition to this examination of the text and context of the zonal *renvoi* provisions, it may be helpful to turn to the *travaux préparatoires*. Each provision will be discussed in turn.

Article 2(3) UNCLOS is based on Article 1(2) of the Convention on the Territorial Sea and the Contiguous Zone (1958),[209] which in turn was based on Article 1(2) of the ILC Articles Concerning the Law of the Sea (1956),[210] which in turn was based on Article 1 of Appendix 1 of the Report of the Second Committee on the Territorial Sea at the 1930 Hague Conference on the Codification of International Law.[211] In fact, the language of the provision has not changed significantly — having always maintained the present tense — from the 1930 Report to UNCLOS. Article 1 of Appendix 1 of the 1930 Report provided: "Sovereignty over [the territorial sea] is exercised subject to the conditions prescribed by the present Convention and the other rules of international law."

Notably, the Second Committee at UNCLOS III drafted this provision not intending it to form part of a multilateral treaty, but rather as a codification of existing international law. Indeed, the 1930 Report — like the 1956 ILC Articles and the 1958 Territorial Sea Convention — did not contain a mandatory dispute settlement mechanism. Rather, the Second Commission was merely specifying what many prominent commentators preceding and following the Report opined: a State's sovereignty over its maritime entitlements, like over its territory, *must* be exercised

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208. *Id.* art. 78(2).

209. Convention on the Territorial Sea and the Contiguous Zone art. 1(2), Apr. 29, 1958, 516 U.N.T.S. 205.

210. *Report of the International Law Commission to the General Assembly*, [1956] 2 Y.B. Int'l L. Comm'n 255, 265, U.N. Doc. A/CN.4/104. For the Special Rapporteur's commentary on an earlier version of the articles (called the "Draft Regulation"), see J.P.A. François (Special Rapporteur), *First Report of the Special Rapporteur*, [1952] 2 Y.B. Int'l L. Comm'n 25, U.N. Doc. A/CN.4/53.

211. M. François (Rapporteur), *Report of the Second Committee: Territorial Sea* (Apr. 10, 1930), League of Nations Doc. C.230.M.117.1930.V, *reprinted in* 3 VIRGINIA COMMENTARY, *supra* note 201, at 461-87.

within the rules established by international law.[212] Therefore, the use of the present tense should not be taken to mean that the provision is merely intended to be descriptive. To the contrary, it represents a principle that has always been considered to be prescriptive.[213]

The legislative history of Article 34(2) is more ambiguous. Compared to Article 2(1), Article 34(2) has a relatively short history: although there had been multiple drafts submitted to the Sea-Bed Committee on passage through straits used in international navigation,[214] the precursor to Article 34(2) originated in a proposal by Spain at the second session of UNCLOS III in 1974.[215] Although the initial proposal had used the present tense, subsequent drafts had actually employed the "shall" formulation, stating that "[t]he sovereignty or jurisdiction of the strait State *shall be* exercised subject to . . . other rules of international law."[216] This language did not remain, however, and there is no indication as to why it was changed back to the present tense.[217]

The text of Articles 56(2) and 58(3) — and in particular the language of "shall have due regard to" — originated from a proposal put forth by the Informal Group of Juridical Experts (the Evensen Group) at the third session of UNCLOS III in 1975.[218] As the *Virginia Commentary* notes for Article 56(2), this language "balances the rights, jurisdiction and duties of the coastal State with the rights and duties of other States in the exclusive economic zone."[219] Although the history of these two provisions does not provide much indication as to whether the obligation of

212. Fisheries (U.K. v. Nor.), Judgment, 1951 I.C.J. Rep. 3, 116, 158-85 (Dec. 8) (dissenting opinion by McNair, J.); 1 ROBERT JENNINGS & ARTHUR WATTS, OPPENHEIM'S INTERNATIONAL LAW 600-01 § 187 (9th ed. 2008); PHILIP C. JESSUP, LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION 104 (1929).

213. For the *Chagos* tribunal's examination of the *travaux préparatoires*, see *Chagos*, Award, *supra* note 3, ¶¶ 505-14.

214. 2 Official Records of the Third United Nations Conference on the Law of the Sea, 2d comm., 14th mtg., 135, 136-37, U.N. Doc. A/CONF.62/C.2/SR.14 (July 23, 1974).

215. 2 VIRGINIA COMMENTARY, *supra* note 197, at 296.

216. *Id.* at 297.

217. *Id.* at 298.

218. *Id.* at 531, 558.

219. *Id.* at 543.

"due regard" requires compliance with non-UNCLOS rules of international law, the phrase is also employed in Article 87(2) in the context of having "due regard for the interests of other States." There, the *Virginia Commentary* traces the phrase back to the language of "reasonable regard" in Article 2 of the 1958 High Seas Convention, and notes how the ILC Commentary to the corresponding article in the 1956 ILC Articles (Article 27) explains that "States *are bound to refrain* from any acts that might adversely affect the use of the high seas by nationals of other States."[220] This interpretation is many steps removed from the "due regard" language of Articles 56(2) and 58(3), but supports the notion that Articles 56(2) and 58(3) impose an actual obligation on States.

Article 58(2) originally did not exist in the Evensen Group's initial proposal.[221] However, it was included in the informal single negotiating text prepared at the third session.[222] There, the proposal provided: "The provisions of articles 74, 76 to 97 and 100 to 102 and other pertinent rules of international law *shall* apply to the exclusive economic zone . . . ."[223] The purpose was thus to apply elements of the high seas to the EEZ.[224] At the fourth session, the word "shall" was removed, but there is no indication that it was intended to change the meaning of the provision.[225]

Article 87(1), in turn, was based on Article 2 of the 1958 High Seas Convention, which in turn was based on Article 27 of the 1956 ILC Articles Concerning the Law of the Sea.[226] However, the precursor to the language of "is exercised under the conditions laid down by this Convention and other rules of international law"

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220. *Report of the International Law Commission to the General Assembly*, *supra* note 210, at 265, 278 (emphasis added). The *Virginia Commentary* refers back to this commentary as a general interpretation of the phrase "due regard" in respect of Article 87(2) UNCLOS. 3 VIRGINIA COMMENTARY, *supra* note 201, at 86.

221. 2 VIRGINIA COMMENTARY, *supra* note 197, at 558.

222. *Id.* at 559. For background on the informal single negotiating text, see Third United Nations Conference on the Law of the Sea, 1973-1982, UNITED NATIONS (last visited Mar. 17, 2016), http://legal.un.org/diplomaticconferences/lawofthesea-1982/lawofthesea-1982.html.

223. 2 VIRGINIA COMMENTARY, *supra* note 197, at 559 (emphasis added).

224. *Id.*

225. *Id.* at 560.

226. 3 VIRGINIA COMMENTARY, *supra* note 201, at 74.

was not contained in the ILC Articles, but rather only added in the High Seas Convention based on a controversial proposal by Mexico.[227] It is not clear what the intentions were with regards to this addition.

Finally, the origin of Article 138 — the General Assembly's 1970 Resolution on the Declaration of Principles Governing the Sea-Bed — confirms the fact that it requires compliance with "other rules of international law": the Resolution similarly used the mandatory language of "shall."[228]

In any case, tracing back the legislative history of these provisions to before UNCLOS III may not be very relevant for one reason: the first versions of those provisions were drafted without consideration of the dispute settlement mechanism in Part XV UNCLOS. Whether the language was supposed to be prescriptive or not did not matter as much at the time. Only after the modern versions of those provisions were incorporated into the Convention were they linked to a compulsory dispute settlement mechanism. Therefore, one should be careful about relying completely on this legislative history.

b. The Trend in Case Law

For many years, there was no significant case law on supplemental jurisdiction under the zonal *renvoi* provisions. In 2015, however, the *Chagos* and *Arctic Sunrise* tribunals addressed the question.

The *Chagos* tribunal confronted the question of supplemental jurisdiction under Articles 2(3) and 56(2). As discussed above in Part II.C, one of Mauritius's claims was that the United Kingdom's declaration of the MPA breached the Lancaster House Undertakings (LHU). Since UNCLOS does not contain any provisions regarding the LHU or unilateral declarations in general, the dispute was undoubtedly a non-UNCLOS dispute.

227. *Id.* at 74 & n.2; 4 Official Records of the United Nations Conference on the Law of the Sea, 2d comm., annex 112, 115, U.N. Doc. A/CONF.13/C.2/L.3 (Mar. 12, 1958); 4 Official Records of the United Nations Conference on the Law of the Sea, 2d comm., 22d mtg., 55, 55, ¶ 2, U.N. Doc. A/CONF.13/C.2/SR.21-25 (Mar. 31, 1958).

228. G.A. Res. 2749 (XXV), Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction, ¶ 6 (Dec. 12, 1970); *see* 6 VIRGINIA COMMENTARY, *supra* note 145, at 113.

Nevertheless, Mauritius sought to bring the claim under the jurisdiction of the Annex VII tribunal by arguing that the declaration of the MPA breached Articles 2(3) and 56(2).

First, Mauritius argued that the MPA breached Article 2(3).[229] Mauritius reasoned that, assuming the United Kingdom had sovereignty over the Chagos Archipelago, its declaration of the MPA was an exercise of sovereignty over its territorial sea. And, since this sovereignty was not exercised subject to "other rules of international law" (i.e., the LHU), the United Kingdom had breached Article 2(3). The United Kingdom, on the other hand, argued that Article 2(3) is descriptive rather than prescriptive.[230] According to the United Kingdom, Article 2(3) only describes the "basic principle"[231] and "obvious fact"[232] that sovereignty is exercised subject to the rules of international law;[233] it does not "incorporate other treaties, nor *a fortiori* unilateral undertakings, into the Convention,"[234] nor does it establish "a free-standing and unlimited obligation of compliance with all rules of international law."[235]

Nevertheless, the tribunal disagreed with the United Kingdom. After reviewing Article 2(3) in the six languages of the Convention, it concluded that "the balance of the authentic versions favours reading that provision to impose an obligation."[236] It further held that this interpretation of Article 2(3) was supported by the "structural context" and the object and

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229. *Chagos*, Memorial of Mauritius, *supra* note 59, ¶¶ 1.27(iii), 5.23(ii), 7.2, 7.8, 7.22-.27; *Chagos*, Reply of Mauritius, *supra* note 204, ¶¶ 1.48(iii), 6.4-7.3.

230. *See* Preliminary Objections of the United Kingdom (Oct. 31, 2012), ¶ 5.48, Chagos Marine Protected Area (U.K. v. Mauritius), PCA Case No. 2011-03 [hereinafter *Chagos*, Preliminary Objections of the United Kingdom]; Counter-Memorial of the United Kingdom (July 15, 2013), ¶¶ 6.62, 8.5-.7, Chagos Marine Protected Area (U.K. v. Mauritius), PCA Case No. 2011-03 [hereinafter *Chagos*, Counter-Memorial of the United Kingdom]; *Chagos*, Rejoinder of the United Kingdom, *supra* note 171, ¶¶ 8.2-.7.

231. *Chagos*, Counter-Memorial of the United Kingdom, *supra* note 230, ¶ 8.5(b).

232. *Chagos*, Preliminary Objections of the United Kingdom, *supra* note 230, ¶ 5.48; *Chagos*, Counter-Memorial of the United Kingdom, *supra* note 230, ¶ 6.62.

233. *Chagos*, Counter-Memorial of the United Kingdom, *supra* note 230, ¶ 8.5(b).

234. *Chagos*, Preliminary Objections of the United Kingdom, *supra* note 230, ¶ 5.48; *Chagos*, Counter-Memorial of the United Kingdom, *supra* note 230, ¶ 6.62.

235. *Chagos*, Counter-Memorial of the United Kingdom, *supra* note 230, ¶ 8.5(c).

236. *Chagos*, Award, *supra* note 3, ¶¶ 501-02.

purpose of the Convention.[237] It finally examined the legislative history behind the provision, which it considered to reinforce its conclusion that Article 2(3) required compliance with non-UNCLOS rules of international law.[238] In other words, the tribunal accepted that Article 2(3) could serve as a grant of supplemental jurisdiction.

Mauritius also argued that the United Kingdom breached the LHU under Article 56(2).[239] As a reminder, Article 56(2) provides: "In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States . . . ."[240] In a fashion analogous to its Article 2(3) argument, Mauritius argued that "the rights and duties" of Mauritius included its fishing rights arising from the LHU.[241] Therefore, effectively, Mauritius claimed that the United Kingdom's declaration of the MPA breached the LHU, and thereby breached Article 56(2) UNCLOS because the United Kingdom did not "have due regard to the rights" of Mauritius. Unsurprisingly, the United Kingdom disagreed.[242] It held that the phrase "have due regard to the rights and duties of other States" in Article 56(2) "stops well short of an obligation to give effect to such rights and duties."[243]

The tribunal ultimately chose a middle ground. It recognized that Article 56(2) imposes an obligation on the coastal State,[244] but held that the obligation does not require strict compliance with the rights of other States.[245] Rather, it equated the obligation to have "due regard" with the obligation to exercise good faith, such that the United Kingdom was required not only to conduct

237. *Id.* ¶¶ 503-04.

238. *Id.* ¶¶ 505-14.

239. *Chagos*, Memorial of Mauritius, *supra* note 59, ¶¶ 5.23(v), 7.28-.32; *Chagos*, Reply of Mauritius, *supra* note 204, ¶¶ 6.76-.82.

240. UNCLOS, *supra* note 1, art. 56(2).

241. *Chagos*, Reply of Mauritius, *supra* note 204, ¶¶ 6.76-.82.

242. *See Chagos*, Counter-Memorial of the United Kingdom, *supra* note 230, ¶¶ 6.8-.9, 8.35-.38; *Chagos*, Rejoinder of the United Kingdom, *supra* note 171, ¶¶ 8.28-.30.

243. *Chagos*, Counter-Memorial of the United Kingdom, *supra* note 230, ¶ 8.36; *Chagos*, Rejoinder of the United Kingdom, *supra* note 171, ¶ 8.28.

244. *Chagos*, Award, *supra* note 3, ¶ 518.

245. *Id.* ¶ 519.

consultations with Mauritius, but also to engage in a balancing exercise between its own rights and interests and those of Mauritius.[246] And since the United Kingdom did not conduct appropriate consultations and did not balance its own rights and interests with those of Mauritius, the tribunal held that the United Kingdom had breached Article 56(2).[247]

It is therefore difficult to conclude whether the tribunal considered that it could exercise supplemental jurisdiction under Article 56(2). On the one hand, the tribunal indeed exercised jurisdiction over a dispute concerning a non-UNCLOS rule of international law. On the other hand, the tribunal did not require strict compliance with that non-UNCLOS rule.

This very issue arose once again in *Arctic Sunrise*. Over the course of the proceedings, the Netherlands invoked Articles 56(2) and 58(2) of UNCLOS to establish the jurisdiction of the tribunal to determine a violation of non-UNCLOS rules of international law — Articles 9 and 12(2) of the ICCPR — in arresting and detaining the *Arctic Sunrise* and its crew within Russia's EEZ.[248] The tribunal, however, held that it may only "have regard to general international law in relation to human rights in order to determine whether law enforcement action . . . was reasonable and proportionate."[249] It emphasized that doing so would not be the same as, nor would it require, a determination of whether there had been a breach of Articles 9 and 12(2) of the ICCPR,[250] noting that the ICCPR "has its own enforcement regime and it is not for this Tribunal to act as a substitute for that regime."[251] In other words, it could not exercise supplemental jurisdiction under Articles 56(2) and 58(2).

At first glance, it may seem that the *Chagos* and *Arctic Sunrise* tribunals' interpretations of Article 56(2) were inconsistent, as the former exercised jurisdiction with respect to non-UNCLOS rules of international law, whereas the latter did

246. *Id.* ¶¶ 520, 534.

247. *Id.* ¶¶ 534-36.

248. *Arctic Sunrise*, Award on the Merits, *supra* note 4, ¶¶ 193-94.

249. *Id.* ¶ 197.

250. *Id.*

251. *Id.*

not. Nevertheless, upon closer examination, it appears that the decisions of the two tribunals are actually quite consistent. Both tribunals agreed that Article 56(2) does not impose an obligation of compliance with non-UNCLOS rules of international law. The only reason why they came to seemingly opposite conclusions is that the *Chagos* tribunal addressed an additional obligation: it held that Article 56(2) imposes an obligation of good faith with respect to non-UNCLOS rules. The *Arctic Sunrise* tribunal, on the other hand, neither accepted nor rejected such an interpretation. Rather, it ultimately held that Russia had breached Article 56(2) because its boarding, seizure, and detention of the *Arctic Sunrise* did not comply with the Convention;[252] there was thus no need to determine whether Russia had exercised good faith with respect to non-UNCLOS rules of international law.

Although not dealing with the question of supplemental jurisdiction, ITLOS in its most recent advisory opinion confirmed that Article 58(3) — like Article 56(2) under the interpretation of the *Chagos* and *Arctic Sunrise* tribunals — does not impose obligations of strict compliance with non-UNCLOS rules of international law. In *Sub-Regional Fisheries Commission*, ITLOS was asked to elaborate on the obligations of States with respect to vessels flying their flag. ITLOS ultimately held that Article 58(3) imposes an affirmative obligation (in that case a due diligence obligation[253]), but that it is an obligation of conduct rather than one of result.[254] Therefore, it does not require strict compliance with "the rights and duties" of other States.

These interpretations of Articles 56(2) and 58(3) are consistent with the ICJ's application of the "reasonable regard" obligation of Article 2 of the High Seas Convention in *Fisheries Jurisdiction*.[255] There, the Court had to balance Iceland's preferential fishing rights and the United Kingdom's traditional fishing rights, neither of which it considered to be "absolute."[256] The Court ultimately held that Iceland's unilateral extension of

252. *Id.* ¶ 333.

253. *Sub-Regional Fisheries Commission*, Advisory Opinion, *supra* note 8, ¶ 134.

254. *Id.* ¶ 129.

255. Fisheries Jurisdiction (U.K. v. Ice.), Judgment on the Merits, 1974 I.C.J. Rep. 3, ¶ 67 (July 25).

256. *Id.* ¶ 7.

its exclusive fisheries limits had infringed the principle of "pay[ing] reasonable regard to the interests of other States" enshrined in Article 2 of the High Seas Convention,[257] imposing on the parties an obligation to negotiate to achieve an equitable solution.[258] However, especially in light of the two sets of fishing rights at stake, the Court did not hold that Article 2 required strict compliance with the other State's rights.

In summary, although jurisprudence on zonal *renvoi* provisions is sparse, the little case law there is affirms that Article 2(3) may serve as a source of supplemental jurisdiction, whereas Articles 56(2), 58(2), and 58(3) are more ambiguous: they do not impose obligations of compliance with non-UNCLOS rules of international law, but they may impose obligations of good faith with respect to non-UNCLOS rules.

2. Scope

What is the scope of non-UNCLOS disputes over which the zonal *renvoi* provisions grant jurisdiction? The straightforward answer is "other rules of international law" for Articles 2(3), 34(2), 87(1), and 138, "pertinent rules of international law" for Article 58(2), and "the rights and duties" of other States for Articles 56(2) and 58(3).

a. Treaty Interpretation

Articles 2(3), 34(2), 87(1), and 138 contain the familiar phrase "other rules of international law." As discussed above in the context of Article 293(1), this phrase does not contain any indication as to whether it refers to *any and all* other rules of international law or only *certain* rules of international law, and there is no indication that the phrase should be interpreted consistently across the Convention.[259] Indeed, as will be examined

257. *Id.* ¶ 67.

258. *Id.* ¶¶ 73-74; *see also* Alexander Proelss, *The Law on the Exclusive Economic Zone in Perspective: Legal Status and Resolution of User Conflicts Revisited*, 26 OCEAN Y.B. 87, 94-95 (2012) (concluding that, after considering the ICJ's judgment, "the specific content of the 'reciprocal due regard rule' contained in Article 56(2) and Article 58(3) of UNCLOS is far from clear").

259. *See supra* notes 147-150 and accompanying text.

here, the origins of the zonal *renvoi* provisions differ from that of Article 293(1), and even from each other.

Article 58(2) does not add any clarity with the additional adjective "pertinent"; however, it seemingly has a narrower scope than that of "other rules of international law." Articles 56(2) and 58(3) contain even vaguer language: "the rights and duties" of other States. This language is also unclear as to which rules of international law it actually refers to. Like "other rules of international law," "the rights and duties" of States also appears on multiple occasions throughout the Convention, though without much guidance as to its scope.

As this brief examination of the text and context of the zonal *renvoi* provisions does not lead to any definitive conclusions on their scope, and as the object and purpose is equally unhelpful, one must turn to the *travaux préparatoires*.

The legislative history of Article 2(3) reveals some information on the scope of "other rules of international law," which, as a reminder, has origins in Article 1 of the 1956 ILC Articles.[260] In its commentary to Article 1, the ILC noted:

> (3) Clearly, sovereignty over the territorial sea cannot be exercised otherwise than in conformity with the provisions of international law.
>
> (4) Some of the limitations imposed by international law on the exercise of sovereignty in the territorial sea are set forth in the present articles which cannot, however, be regarded as exhaustive. Incidents in the territorial sea raising legal questions are also governed by the *general rules of international law*, and these cannot be specially codified in the present draft for the purposes of their application to the territorial sea. *That is why "other rules of international law" are mentioned in addition to the provisions contained in the present articles*.
>
> (5) It may happen that, by reason of some special relationship, geographical or other, *between two States*, rights in the territorial sea of one of them are granted to the other in excess of the rights recognized in the present draft. It is not the Commission's intention to limit in any

260. *See supra* text accompanying notes 209-210.

> way any more extensive right of passage or other right enjoyed by States *by custom or treaty*.[261]

Two passages are relevant here. The fifth paragraph notes that the Commission did not intend to limit "any . . . other right enjoyed by States by custom or treaty," thereby implying that the Commission wanted to subject the exercise of sovereignty over the territorial sea to both customary and conventional law — a relatively broad interpretation of "other rules of international law." Nevertheless, the fourth paragraph is perhaps more revealing: the ILC directly states that the very reason "why 'other rules of international law' are mentioned" is that "[i]ncidents in the territorial sea raising legal questions are also governed by the *general rules of international law*."[262] Therefore, the commentary suggests that, at least in the context of Article 2(3), the "other rules of international law" refer only to general rules of international law.

As for Article 34(2), as mentioned above, the language of the provision originated in a proposal by Spain.[263] The Spanish delegate had noted that there were two different "schools of thought" on straits used for international navigation at the Conference: one school maintained that international straits remained part of the territorial sea of the coastal State, while the other maintained the opposite.[264] Spain belonged to the former school,[265] and in its original version of Article 34(2) stated that the coastal State would exercise its "sovereignty" (not "sovereignty or jurisdiction," as Article 34(2) currently reads) in its straits "in accordance with the Convention and with other rules of international law."[266] Perhaps, then, it was an appeasement to the other school that Spain had included the

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261. *Report of the International Law Commission to the General Assembly*, *supra* note 210, at 265 (emphasis added).

262. *Id.* (emphasis added).

263. *See supra* note 215 and accompanying text.

264. 2 Official Records of the Third United Nations Conference on the Law of the Sea, *supra* note 214, at 136.

265. *Id.*

266. 3 Official Records of the Third United Nations Conference on the Law of the Sea, 2d conf., 2d sess., 187, 188, U.N. Doc. A/CONF.62/C.2/L.6 (July 10, 1974).

phrase "other rules of international law." Yet it is not clear what its scope was intended to be.

With regards to Articles 56(2) and 58(3), as discussed above, the language of the two provisions originated from a proposal put forth by the Informal Group of Juridical Experts (the Evensen Group) at the third session of UNCLOS III in 1975.[267] In that original proposal, the "rights and duties," although not specifically limited, appeared to refer to the "rights and duties provided for in this Convention" mentioned in the first paragraph of both draft articles.[268] In those drafts, the rights and duties of the coastal State included resource exploitation, energy production, preservation of the marine environment, scientific research, and the establishment of artificial structures;[269] and the rights and duties of all States included freedom of navigation and overflight and the laying of submarine cables and pipelines.[270] And a subsequent proposal by the Group of 77 for Article 56(2) specified that the coastal State shall have due regard to "the rights of other States . . . *as specified in this Convention*."[271]

Article 58(2), as mentioned above, also originated at the third session; however, there is no indication why the word "pertinent" was included in the phrase "other pertinent rules of international law."[272] In fact, the Drafting Committee at the resumed eighth session recommended that the word "pertinent" be deleted in all cases of the phrase "pertinent rules of international law" throughout the Convention.[273] Yet, ultimately, this recommendation was not accepted.[274]

As for Article 87(1), as mentioned above, the precursor to the language of "is exercised under the conditions laid down by this Convention and other rules of international law" was added into

267. *See* 2 VIRGINIA COMMENTARY, *supra* note 197, at 531, 558.

268. *Id.*

269. *Id.* at 531.

270. *Id.* at 558.

271. *Id.* at 533.

272. *Id.* at 558-59.

273. 12 Official Records of the Third United Nations Conference on the Law of the Sea, 8th sess., 95, 104, U.N. Doc. A/CONF.62/L.40 (Aug. 22, 1979).

274. 14 Official Records of the Third United Nations Conference on the Law of the Sea, 9th sess., 139, 143, U.N. Doc. A/CONF.62/L.63/Rev.1 (Oct. 22, 1980).

Article 2 of the High Seas Convention based on a controversial proposal by Mexico.[275] It continued with slight stylistic changes into the present Convention text.[276] In the context of Article 87(1), the *Virginia Commentary* suggests one example for which "other rules of international law" would be applicable: prohibitions on nuclear weapons tests.[277]

Finally, Article 138, as mentioned above, originated in the General Assembly's 1970 Resolution on the Declaration of Principles Governing the Sea-Bed.[278] The text of the Resolution had provided:

> States shall act in the area in accordance with the applicable principles and rules of international law, including the *Charter of the United Nations* and the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* . . . in the interests of maintaining international peace and security and promoting international co-operation and mutual understanding.[279]

Although the text had originally been proposed verbatim at the 1971 session of the Sea-Bed Committee,[280] by the third session of UNCLOS III, the provision only provided that "States shall act in, and in relation to, the Area *in accordance with the provisions of this Convention and the United Nations Charter* . . . ."[281] The United States later proposed the introduction of "applicable principles of international law," including the Friendly Relations Declaration.[282] At the fourth session, the text was amended to state: "the general conduct of States in relation to the Area shall be in accordance with the provisions of this Part of the Convention, *and other pertinent rules of international law*,

275. *See supra* note 227 and accompanying text.

276. 3 VIRGINIA COMMENTARY, *supra* note 201, at 74-81.

277. *Id.* at 85.

278. 6 VIRGINIA COMMENTARY, *supra* note 145, at 113.

279. G.A. Res. 2749 (XXV), *supra* note 228, ¶ 6 (emphasis added).

280. 6 VIRGINIA COMMENTARY, *supra* note 145, at 113.

281. *Id.* at 115 (emphasis added).

282. *Id.*

including the Charter of the United Nations."[283] The word "pertinent" was deleted on recommendation of the Drafting Committee.[284] In its commentary to this article, the *Virginia Commentary* states that the expression "other rules of international law" "presumably refers to all the rules of international law . . . , including customary international law and treaty law . . . ."[285]

b. The Trend in Case Law

As far as the author is aware, only one UNCLOS tribunal has ever directly addressed the scope of supplemental jurisdiction granted by a zonal *renvoi* provision. In *Chagos*, the tribunal had the opportunity to address the scope of Article 2(3), agreeing with the interpretation reached above on the basis of the *travaux préparatoires*: it encompasses only general rules of international law.[286]

As a reminder, Mauritius had argued that the United Kingdom had breached Article 2(3) UNCLOS because its declaration of the MPA was in breach of the LHU (a set of unilateral undertakings), which allegedly fell within the scope of "other rules of international law" in Article 2(3).[287] As described above, although the United Kingdom pleaded otherwise, the tribunal had agreed with Mauritius that Article 2(3) imposed a prescriptive obligation on the United Kingdom to comply with "other rules of international law."

The United Kingdom, however, had a second counterargument: it argued that the "other rules of international law" in Article 2(3) refers only to "general rules of international law,"[288] not to "specific bilateral treaty obligations," let alone

283. 5 Official Records of the Third United Nations Conference on the Law of the Sea, 4th sess. 125, 129, U.N. Doc. A/CONF.62/WP.8/Rev.1/PartI (May 6, 1976), *partially reprinted in* 6 VIRGINIA COMMENTARY, *supra* note 145, at 115 (emphasis added).

284. 12 Official Records of the Third United Nations Conference on the Law of the Sea, *supra* note 273, at 95, 104.

285. 6 VIRGINIA COMMENTARY, *supra* note 145, at 117.

286. *Chagos*, Award, *supra* note 3, ¶¶ 515-16.

287. *Chagos*, Memorial of Mauritius, *supra* note 59, ¶¶ 1.27(iii), 5.23(ii), 7.2, 7.8, 7.22-.27; *Chagos*, Reply of Mauritius, *supra* note 204, ¶¶ 1.48(iii), 6.4-6.19, 7.68-.70.

288. There is no accepted definition of "general rules of international law" or "general international law." However, it can be defined in contrast with "special" or

unilateral undertakings.[289] Therefore, the tribunal did not have the jurisdiction to determine whether the declaration of the MPA had breached the LHU.[290] On this point, the tribunal, after having examined the *travaux préparatoires* of Article 2(3), ultimately agreed with the United Kingdom.[291] Nevertheless, it should be noted that the tribunal held that the "general rules of international law" included an obligation to act in good faith,[292] an obligation equivalent to that imposed by Article 56(2),[293] which it found the United Kingdom to have violated.[294]

It should also be noted that in *Arctic Sunrise*, even though the tribunal held that it could not determine whether there had been a violation of human rights law, it agreed with the Netherlands that "it may have regard to general international law in relation to human rights in order to determine whether law enforcement action . . . was reasonable and proportionate."[295] It is not clear, however, whether this "having regard" to human rights law was a product of the *renvoi* language in Articles 56(2) and 58(2), or the consequence of, say, Article 293(1).

3. Public Order

This examination of the seven zonal *renvoi* provisions reveals that different enforcement regimes apply in different maritime zones. First and foremost, the continental shelf — unlike all other maritime zones — does not contain a zonal *renvoi* provision.[296] Second, the EEZ's *renvoi* provisions Articles 56(2) ("due regard"), 58(2) ("apply"), and 58(3) ("due regard") — unlike seemingly all other *renvoi* provisions — apparently do not impose an obligation of compliance with non-UNCLOS rules. Third, the scope of Articles 56(2) and 58(3) ("rights and duties"), and possibly also

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"specific" rules of international law, such as bilateral treaties. Int'l Law Comm'n, Rep. on the Work of Its Fifty-Eighth Session, U.N. Doc. A/61/10, at 410 n.1017 (2006).

289. *Chagos*, Counter-Memorial of the United Kingdom, *supra* note 230, ¶ 8.6.

290. *Id.* ¶¶ 6.62, 8.5.

291. *Chagos*, Award, *supra* note 3, ¶ 516.

292. *Id.* ¶ 517.

293. *Id.* ¶ 520.

294. *Id.* ¶ 536.

295. *Arctic Sunrise*, Award on the Merits, *supra* note 4, ¶ 197.

296. *See supra* text accompanying notes 195-199.

Article 58(2) ("other pertinent rules of international law"), appears to differ from the scope of the other four zonal *renvoi* provisions ("other rules of international law").

This inconsistency is not ideal for the public order of the world's oceans. It does not make sense for the requirement to comply with non-UNCLOS rules to exist in one maritime zone but not another.[297] Such a regime awkwardly incentivizes States to be more compliant with non-UNCLOS rules in certain maritime zones than others, and to strategically engage in unlawful activities in certain maritime zones rather than others. Instead, it would make more sense if the drafters intended to impose the same obligation — be it one of mandating compliance or not — on States no matter what maritime zone is at issue. Moreover, it would also further the goal of the Convention "to settle all issues relating to the law of the sea [in light of the fact that] the problems of ocean space are closely interrelated and need to be considered as a whole."[298] It is perhaps for this reason that the *Chagos* tribunal came up with an interpretation of Articles 2(3) and 56(2) that rendered the obligations imposed by the two provisions equivalent.[299]

That said, the examination in this Part of the legislative history behind the zonal *renvoi* provisions reveals that they have very different histories. Therefore, it perhaps makes sense, from a historical perspective, that they impose different obligations of compliance. It is for this same reason that it perhaps also makes sense that the scope of "other rules of international law" in the zonal *renvoi* provisions, or at least as the *Chagos* tribunal defined it for Article 2(3) ("general rules of international law"), does not accord with the scope of "other rules of international law" for Article 293(1).[300]

Putting the issue of consistency aside, there is also the question of whether it makes sense for these zonal *renvoi* provisions to grant supplemental jurisdiction over non-UNCLOS rules of international law in the first place. There are some risks

297. *See Chagos*, Award, *supra* note 3, ¶ 503.

298. UNCLOS, *supra* note 1, pmbl.

299. *See supra* text accompanying notes 244-247, 291-294.

300. *See supra* text accompanying notes 148-149.

to take into consideration. For example, as the United Kingdom argued in *Chagos*, it is very possible that one State could institute UNCLOS proceedings against another State with respect to an investment located in a maritime area, claiming non-compliance with an investment treaty.[301] Few would disagree that the jurisdiction of UNCLOS tribunals should not extend to investment disputes. Similarly, a State could potentially institute UNCLOS proceedings against a nuclear weapon State Party to the Nuclear Nonproliferation Treaty (NPT) that has ratified or acceded to UNCLOS — China, France, Russia, or the United Kingdom — claiming non-compliance with the disarmament provisions of the NPT with respect to actions in any maritime area (e.g., the presence of nuclear submarines in a State's territorial waters). Few would disagree that the jurisdiction of UNCLOS tribunals should not extend to disputes over compliance with the NPT.

It is perhaps for this reason that the *Chagos* tribunal ultimately decided to limit the scope of "other rules of international law" of Article 2(3) to only "general rules of international law." There is of course no consensus over the scope of "general rules of international law," but it would at the very least probably exclude conventional rules that have not crystallized into customary international law.[302]

D. Supplemental Jurisdiction Under the Principle of Effectiveness

The fourth major source of supplemental jurisdiction is the principle of effectiveness, known as *effet utile* in French and *ut res*

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301. *Chagos*, Counter-Memorial of the United Kingdom, *supra* note 230, ¶ 8.5(c) (citing Malaysian Historical Salvors BHD v. Malaysia, ICSID Case No. ARB/05/10, Award on Jurisdiction (May 17, 2007)). Note, however, that Article 281(1) UNCLOS could prevent an UNCLOS tribunal from exercising jurisdiction over a claim arising from an investment treaty with a dispute resolution clause that excludes any further procedure of settlement. Article 281(1) was applied in this fashion in *Southern Bluefin Tuna*. Southern Bluefin Tuna (Austl. & N.Z. v. Japan), Award on Jurisdiction and Admissibility, 23 R.I.A.A. 1, ¶¶ 56-65 (Aug. 4, 2000).

302. *See supra* note 288.

magis valeat quam pereat in Latin.[303] As the principle is merely one of treaty interpretation, it is perhaps peculiar to consider it a "source" of jurisdiction.[304] Acknowledging that another term may be more appropriate, this article nonetheless refers to this fourth source as the "principle of effectiveness" so as to avoid any connotations that other terms may carry with them.[305]

As famously formulated by Sir Gerald Fitzmaurice, the principle of effectiveness provides:

> Treaties are to be interpreted with reference to their declared or apparent objects and purposes; and 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.[306]

This principle can serve as a source of supplemental jurisdiction if one accepts that an UNCLOS tribunal may exercise jurisdiction over a non-UNCLOS dispute in cases where doing so would give full effect to its exercise of jurisdiction over an UNCLOS dispute. That said, this application of the principle is limited by the principle of consent, under which an international court or tribunal may not settle a dispute if the parties have not consented to such a settlement. The dynamic between these two principles was perhaps best summarized by the ICJ in *Libya/Malta*, where it held that it "must not exceed the jurisdiction conferred upon it by the Parties, but it must also exercise that jurisdiction to its full extent."[307]

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303. Some commentators consider that the "principle of effectiveness" contains two distinct rules: the rule of *effet utile* and the rule of *ut res magis valeat quam pereat*. *See* HUGH THIRLWAY, 1 THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE 293-94 (2013).

304. As far as the author is aware, only one other commentator has expressly invoked the principle of effectiveness in support of expanding the jurisdiction of UNCLOS tribunals. *See* Buga, *supra* note 14, at 78.

305. *See infra* text accompanying notes 314-320.

306. Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points*, 1957 BRIT. Y.B. INT'L L. 203, 211.

307. Continental Shelf (Libya/Malta), Judgment, Merits, 1985 I.C.J. Rep. 13, ¶ 19 (June 3).

Such an application of the principle of effectiveness is not confined to theory. The Permanent Court of International Justice (PCIJ) in both *Mavrommatis Palestine Concessions*[308] and *German Interests in Polish Upper Silesia*[309] exercised jurisdiction over matters that did not fall within the express confines of its grant of jurisdiction.[310] And commentators have subsequently explained these instances as applications of the principle of effectiveness.[311] Furthermore, just last year, in *Croatian Genocide*, the ICJ appears to have endorsed such an application of the principle of effectiveness. There, the Court held that its jurisdiction was founded solely on the compromissory clause of the Genocide Convention and it thus had "no power to rule on alleged breaches of other obligations under international law."[312] Nevertheless, it subsequently noted that "[that] does not prevent the Court from considering, in its reasoning, whether a violation of international humanitarian law or international human rights law has occurred to the extent that this is relevant for the Court's determination of whether or not there has been a breach of an obligation under the Genocide Convention."[313]

Notably, the principle of effectiveness is often associated with other terminology that may at first seem applicable here, such as "implied powers," "inherent jurisdiction," "ancillary jurisdiction," and "incidental jurisdiction." However, these four terms are

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308. Mavrommatis Palestine Concessions (Greece v. U.K.), Judgment, 1924 P.C.I.J. (Ser. A) No. 2, at 28 (Aug. 30).

309. German Interests in Polish Upper Silesia (Ger. v. Pol.), Judgment, 1925 P.C.I.J. (Ser. A) No. 6, at 18 (Aug. 25).

310. *See* BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 266-67 (2006); IBRAHIM F. I. SHIHATA, THE POWER OF THE INTERNATIONAL COURT TO DETERMINE ITS OWN JURISDICTION 194-98 (1965); OLE SPIERMANN, INTERNATIONAL LEGAL ARGUMENT IN THE PERMANENT COURT OF INTERNATIONAL JUSTICE 217-18 (2005).

311. *E.g.*, HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE PERMANENT COURT OF INTERNATIONAL JUSTICE 72-74 (1934); SHIHATA, *supra* note 310, at 194-98.

312. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), Judgment, Merits, 2015 I.C.J. Rep., ¶ 85 (Feb. 3) (quoting Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, Merits, 2007 I.C.J. Rep. 43, ¶ 147 (Feb. 26)).

313. *Id.*

inapposite to describe the jurisdiction of an UNCLOS tribunal over a non-UNCLOS dispute. The term "implied powers" refers to the powers of an international organization,[314] not to those of a judicial body.[315] And the terms "inherent jurisdiction,"[316] "incidental jurisdiction,"[317] and "ancillary jurisdiction"[318] are most often used to refer to jurisdiction over procedural matters (such as ordering provisional measures, issuing procedural orders, bifurcating proceedings, and ruling on counterclaims), not

314. Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. Rep. 66, ¶ 25 (July 8); Effect of Awards of Compensation Made by the U.N. Administrative Tribunal, Advisory Opinion, 1954 I.C.J. Rep. 47, 57-60 (July 13); Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. Rep. 174, 182 (Apr. 11). The ICJ did not expressly use the term "implied powers" in *Effect of Awards of Compensation* or *Reparation for Injuries*, but in *Nuclear Weapons in Armed Conflict*, the ICJ implied that those two cases were indeed cases of "implied powers." Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. Rep. 66, ¶ 25 (July 8).

315. Prosecutor v. Tihomir Blaškić, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Appeals Chamber, ICTY Case No. IT-95-14, ¶ 25 n.27 (Oct. 29, 1997); Paolo Gaeta, *Inherent Powers of International Courts and Tribunals*, *in* MAN'S INHUMANITY TO MAN 353, 362-64 (Lal Chand Vohrah et al. eds., 2003); Friedl Weiss, *Inherent Powers of National and International Courts: The Practice of the Iran-US Claims Tribunal*, *in* INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY 183, 188 (Christina Binder et al. eds., 2009).

316. Nuclear Tests (Austl. v. Fr.), Judgment, 1974 I.C.J. Rep. 253, ¶ 23 (Dec. 20); Nuclear Tests (N.Z. v. Fr.), Judgment, 1974 I.C.J. Rep. 457, ¶ 23 (Dec. 20); In the Matter of El Sayed, Case No. CH/AC/2010/02, Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing, ¶¶ 45-46 (Special Tribunal for Lebanon, Appeals Chamber Nov. 10, 2010); Iran v. United States, Decision No. DEC 134-A3/A8/A9/A14/B61-FT, Decision Ruling on Request for Revision by Iran, ¶ 59 (Iran-U.S. Claims Tribunal July 1, 2011); Brown, *supra* note 21, at 829, 832-39; Martins Paparinsks, *Inherent Powers of ICSID Tribunals: Broad and Rightly So*, *in* INVESTMENT TREATY ARBITRATION AND INTERNATIONAL LAW 11 (Todd Weiler & Ian Laird eds., 2012); Weiss, *supra* note 315, at 187-99.

317. Northern Cameroons (Cameroon v. U.K.), Judgment, Preliminary Objections, 1963 I.C.J. Rep. 15, 103 (Dec. 2) (separate opinion by Fitzmaurice, J.); TIM HILLIER, SOURCEBOOK ON PUBLIC INTERNATIONAL LAW 559 (1998); SHABTAI ROSENNE, 2 THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 1920-1996, at 598-99 (1997); Christian Tomushcat, *Article 36*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE 633, 656 (Andreas Zimmermann et al. eds., 2d ed. 2012); Andreas Zimmermann, *Ad Hoc Chambers of the International Court of Justice*, 8 PA. ST. INT'L L. REV. 1, 24-31 (1989).

318. MAX SØRENSEN, MANUAL OF PUBLIC INTERNATIONAL LAW 707 (1968); Michèle Buteau & Gabriël Oosthuzien, *When the Statute and Rules Are Silent: The Inherent Powers of the Tribunal*, *in* ESSAYS ON ICTY PROCEDURE AND EVIDENCE 65, 80 (Richard May et al. eds., 2001).

substantive matters. A handful of commentators employ the term "incidental jurisdiction" to also refer to an expansion of the substantive jurisdiction of a judicial body,[319] but this is not its common usage.[320] For this reason, this article avoids using these four terms, and instead employs the broader notion of the principle of effectiveness.

In the UNCLOS context, the principle of effectiveness is at the center of the mixed dispute debate: those in favor of jurisdiction argue that an UNCLOS tribunal may exercise jurisdiction over a territorial sovereignty dispute (a non-UNCLOS dispute) in order to give full effect to its exercise of jurisdiction over a maritime boundary delimitation (an UNCLOS dispute). In light of the prominence of this debate, this Part focuses primarily on the mixed dispute scenario. However, it should be kept in mind that the principle of effectiveness has broader applications for the supplemental jurisdiction of UNCLOS tribunals. For example, if Ukraine follows through on its plan to institute UNCLOS proceedings against Russia over maritime resources off the coast of Crimea,[321] it may argue that, in order to give full effect to this exercise of jurisdiction, the tribunal also has jurisdiction to determine who has sovereignty over Crimea.

1. Jurisdiction

Can an UNCLOS tribunal exercise jurisdiction over a non-UNCLOS dispute under the principle of effectiveness? The answer is not very clear.

a. Treaty Interpretation

The text of Article 288(1) provides that UNCLOS tribunals "shall" have jurisdiction over UNCLOS disputes, but it does not expressly state that they "shall not" have jurisdiction over

319. *E.g.*, LUIZ EDUARDO SALLES, FORUM SHOPPING IN INTERNATIONAL ADJUDICATION 120 (2014); SPIERMANN, *supra* note 310, at 217.

320. One commentator expressly notes that the invocation of the principle of effectiveness to expand the substantive jurisdiction of a judicial body must be distinguished from the notion of "incidental jurisdiction." SHIHATA, *supra* note 310, at 194 n.7.

321. *See supra* note 10 and accompanying text.

non-UNCLOS disputes. As a result, if one applies the principle of effectiveness, it appears that UNCLOS tribunals should be able to exercise jurisdiction over any non-UNCLOS disputes whose resolution would help give full effect to the resolution of the UNCLOS dispute. Nevertheless, allowing for such expanded jurisdiction appears to undermine the principle of consent. So the verdict based on the text of the treaty alone is not clear.

The context of Article 288(1) does not provide any further clarification. For the question of mixed disputes, however, there does appear to be one contextual clue. Many prominent commentators, including former ITLOS President Rüdiger Wolfrum,[322] former ITLOS Judge Tullio Treves,[323] and ITLOS Registrar Philippe Gautier,[324] have interpreted Article 298(1)(a)(i) *a contrario sensu* to reach the conclusion that, at least in the context of mixed disputes, UNCLOS tribunals can exercise supplemental jurisdiction over territorial sovereignty disputes.[325] Article 298(1)(a)(i) provides in relevant part:

> When signing, ratifying or acceding to this Convention or at any time thereafter, a State may . . . declare in writing that it does not accept [binding dispute settlement] with respect to . . . disputes concerning . . . sea boundary delimitations . . . provided that . . . a State having made such a declaration shall . . . accept submission of the matter to conciliation . . . and provided further that any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty [i.e., mixed disputes] shall be excluded from such submission . . . .[326]

As the argument goes, the presence of an exclusion for mixed disputes in Article 298(1)(a)(i) demonstrates that mixed disputes generally fall within the jurisdiction of UNCLOS tribunals. Nevertheless, this *a contrario* reading is far from conclusive, as

322. Wolfrum, *supra* note 14, at 4, 6.

323. Treves, *supra* note 14, at 77.

324. Gautier, *supra* note 14, at 389-90.

325. *See* 5 VIRGINIA COMMENTARY, *supra* note 106, at 117-18 (noting that the concern that States would disguise sovereignty disputes as delimitation disputes led to the inclusion of the language on sovereignty disputes in Article 298(1)(a)).

326. UNCLOS, *supra* note 1, art. 298(1)(a)(i).

one could also argue that the exclusion in Article 298(1)(a)(i) is just an assurance *ex abundanti cautela* that even in cases where only conciliation is involved, mixed disputes would still be excluded from the jurisdiction of UNCLOS tribunals. As former ITLOS President P. Chandrasekhara Rao noted, "[t]here is no clear statement in the preparatory work of the Convention on the meaning to be given to this clause."[327]

As a result, commentators have split on the issue. Some prominent commentators, such as Judge Rao, Judge Treves, Judge Wolfrum, and Dr. Gautier, support the notion that, at least in the context of mixed disputes, UNCLOS tribunals may exercise supplemental jurisdiction over territorial sovereignty disputes.[328] However, other commentators maintain that UNCLOS tribunals may not exercise jurisdiction over territorial sovereignty disputes, even if they must be resolved to decide a maritime delimitation dispute validly brought under UNCLOS.[329]

Putting the text and the context aside, the object and purpose of the Convention, as well as its *travaux préparatoires*, do not provide any clues regarding whether an UNCLOS tribunal can exercise supplemental jurisdiction over a non-UNCLOS dispute under the principle of effectiveness. So one must once again turn to case law for clarification.

b. The Trend in Case Law

Recent international disputes raising the issue of supplemental jurisdiction under the principle of effectiveness are few and far in between. One may think that the issue must have come up in at least some of the many maritime delimitation cases brought before the ICJ. As former ICJ President Shi Jiuyong wrote, "many maritime delimitation cases require the Court to decide, as a preliminary step, questions of sovereignty over disputed islands or certain coastal regions of land territory."[330] For example, in *Qatar v. Bahrain*, the ICJ noted that "[i]n order to determine what constitutes Bahrain's relevant coasts and what

327. Rao, *supra* note 14, at 887.

328. *See supra* note 14.

329. *See supra* note 14.

330. Shi Jiuyong, *Maritime Delimitation in the Jurisprudence of the International Court of Justice*, 9 CHINESE J. INT'L L. 271, 275 (2010).

are the relevant baselines on the Bahraini side, the Court must first establish which islands come under Bahraini sovereignty."[331] Indeed, in that case, just as in various other cases, the ICJ exercised jurisdiction over both the maritime delimitation and the territorial sovereignty elements of the dispute. Nevertheless, the question of supplemental jurisdiction never arose in these cases because the ICJ always had jurisdiction over both elements of the dispute by virtue of the parties' agreement.

There have been, on the other hand, three UNCLOS tribunals that touched on the question of supplemental jurisdiction under the principle of effectiveness, though not always directly, and never by explicit reference to the principle.

In two of these cases, *Guyana v. Suriname* and *Philippines v. China*, the respondent State — in a manner reminiscent of the *Monetary Gold* and *East Timor* cases before the ICJ[332] — actually argued for a reverse application of the principle of effectiveness. That is, instead of asking the tribunal to exercise jurisdiction over a non-UNCLOS dispute in order to give effect to an exercise of jurisdiction over an UNCLOS dispute, the respondent asked the tribunal to *not* exercise jurisdiction over an UNCLOS dispute because doing so would require an exercise of jurisdiction over a non-UNCLOS dispute. As the *Guyana v. Suriname* and *Philippines v. China* tribunals ultimately found the resolution of the non-UNCLOS dispute unnecessary for the resolution of the UNCLOS dispute,[333] they did not rule on the question of whether they could exercise jurisdiction over the non-UNCLOS dispute. In a third case, *Chagos*, Mauritius effectively invoked the principle of effectiveness to convince the tribunal to exercise jurisdiction

331. Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahr.), Judgment, Merits, 2001 I.C.J. Rep. 40, ¶ 186 (Mar. 16).

332. *E.g.*, Monetary Gold Removed from Rome in 1943 (It. v. Fr., U.K. & U.S.), Judgment, 1954 I.C.J. Rep. 19 (June 15); East Timor (Port. v. Austl.), Judgment, 1995 I.C.J. Rep. 90 (June 30). The key difference between those cases and the present scenario, of course, is that those cases involved an indispensable *party* over which there was no jurisdiction *ratione personae*, whereas the present scenario involves an indispensable *dispute* over which there is no jurisdiction *ratione materiae*.

333. Note, however, that the *Philippines v. China* tribunal reserved a final decision on its jurisdiction over many of the Philippines' claims for its award on the merits, which as of this writing has not yet been rendered. *Philippines v. China*, Award on Jurisdiction and Admissibility, *supra* note 5, ¶¶ 398-99, 402, 405-06, 409-12.

over a non-UNCLOS dispute. The tribunal ultimately held that, in that specific case, the tribunal could not exercise jurisdiction over the non-UNCLOS dispute; however, it left the possibility open for such an exercise of supplemental jurisdiction in other cases. A closer examination of these three cases follows.

It will be recalled that in *Guyana v. Suriname*, Guyana had asked the Annex VII tribunal to delimit the maritime boundary between Guyana and Suriname. Suriname, however, argued that delimiting the maritime boundary necessarily required a determination of the "unresolved status of the land boundary terminus,"[334] which did not fall within the tribunal's jurisdiction.[335] Therefore, Suriname argued, the tribunal did not have the jurisdiction to delimit the maritime boundary.[336] Guyana, on the other hand, argued that "the Parties [had] always been in agreement as to . . . the land boundary terminus and the starting point of maritime boundary claims,"[337] such that the tribunal was not required to "reach a finding of fact or law regarding land or riverline boundaries."[338] The tribunal ultimately found in favor of Guyana. It held that even if there was no agreed point for the land boundary terminus, there was an agreed starting point for the maritime boundary, such that it did not need to address the question of its supplemental jurisdiction.[339]

China raised a similar objection to the tribunal's jurisdiction in *Philippines v. China*. As will be recalled, the Philippines had asked the Annex VII tribunal to declare that China had violated multiple UNCLOS provisions through its activities in the South China Sea. China, however, argued that adjudicating the claims of the Philippines necessarily required a determination of the sovereignty over certain maritime features, which did not fall

334. *Guyana v. Suriname*, Award, *supra* note 52, ¶ 168.

335. Counter-Memorial of Suriname (Nov. 1, 2005), ¶ 2.1, Guyana v. Suriname, PCA Case No. 2004-04 [hereinafter *Guyana v. Suriname*, Counter-Memorial of Suriname]; *Guyana v. Suriname*, Award, *supra* note 52, ¶ 174.

336. *Guyana v. Suriname*, Counter-Memorial of Suriname, *supra* note 335, ¶ 2.12; *Guyana v. Suriname*, Award, *supra* note 52, ¶ 174.

337. *Guyana v. Suriname*, Award, *supra* note 52, ¶ 168.

338. *Id.* ¶ 168.

339. *Id.* ¶ 308.

within the tribunal's jurisdiction.[340] Therefore, China argued, the tribunal did not have jurisdiction over the Philippines' claims.[341] The Philippines, on the other hand, argued that "[n]one of [its] submissions require the Tribunal to express any view at all as to the extent of China's sovereignty over land territory, or that of any other state."[342] Indeed, the Philippines distinguished its case from *Chagos*, noting how in that case it was clear that the tribunal had to make a prior determination on sovereignty to address the principal claim.[343] The tribunal ultimately found in favor of the Philippines, holding that "[none] of the Philippines' Submissions require an implicit determination of sovereignty."[344]

The tribunal in *Chagos* addressed the question of jurisdiction under the principle of effectiveness more directly, though still not by explicit reference to the principle. As a reminder, in *Chagos*, Mauritius requested the tribunal to determine whether the United Kingdom or Mauritius had sovereignty over the Chagos Archipelago. Although land sovereignty disputes are non-UNCLOS disputes, Mauritius sought to bring the claim within the jurisdiction of the UNCLOS tribunal by arguing that in order to determine whether the United Kingdom's declaration of the MPA breached UNCLOS, the tribunal was required to determine who had sovereignty over the Chagos Archipelago (i.e., who was the "coastal State" under Articles 2, 55, and 76 of UNCLOS). Interestingly, the United Kingdom did not dispute that the tribunal could, under certain circumstances, exercise jurisdiction over non-UNCLOS disputes. In particular, it stated: "We do not, of course, contend for the existence of any implicit

340. *Philippines v. China*, POSITION PAPER OF CHINA, *supra* note 74, ¶ 29; *Philippines v. China*, Award on Jurisdiction and Admissibility, *supra* note 5, ¶¶ 134-37. China raised a similar argument with regards to maritime delimitation. *Philippines v. China*, POSITION PAPER OF CHINA, *supra* note 74, ¶¶ 57-85; *Philippines v. China*, Award on Jurisdiction and Admissibility, *supra* note 5, ¶¶ 138-39.

341. *Philippines v. China*, POSITION PAPER OF CHINA, *supra* note 74, ¶ 29; *Philippines v. China*, Award on Jurisdiction and Admissibility, *supra* note 5, ¶ 137.

342. *Philippines v. China*, Award on Jurisdiction and Admissibility, *supra* note 5, ¶ 141.

343. *Id.* ¶ 142.

344. *Id.* ¶ 153.

exclusion of all land sovereignty matters from article 288(1) . . . ."[345]

However, the United Kingdom argued that, in the case before it, the test for exercising such jurisdiction was not met.[346] The tribunal ultimately accepted the United Kingdom's test, and turned down jurisdiction over the sovereignty dispute.[347] However, it effectively left open the possibility that other UNCLOS tribunals could exercise supplemental jurisdiction over a non-UNCLOS dispute under the principle of effectiveness.[348]

2. Scope

Assuming that an UNCLOS tribunal may exercise jurisdiction over a non-UNCLOS dispute under the principle of effectiveness, what conditions must be met for such an exercise of jurisdiction? More specifically, what must the relationship be between the non-UNCLOS dispute and the UNCLOS dispute? There is a lack of consensus on this front, and very little case law that helps answer the question.

To better understand how the principle of effectiveness may be invoked to expand jurisdiction under general international law, the case law of the PCIJ is of service. In *Mavrommatis Palestine Concessions*, the PCIJ had jurisdiction to interpret or apply the 1922 Mandate for Palestine, but not the Protocol of Lausanne. However, the Court held that "the Court has jurisdiction to apply the Protocol of Lausanne *in so far as this is made necessary* by Article 11 of the Mandate."[349] Then in *German Interests in Polish Upper Silesia*, the PCIJ held that it could exercise jurisdiction over "questions preliminary or incidental" to a matter over which it had jurisdiction.[350] It went on to hold: "[T]he interpretation of other international agreements is indisputably within the competence of the Court if such

345. *Chagos*, Award, *supra* note 3, ¶ 174.

346. *See infra* text accompanying notes 362-363.

347. *Chagos*, Award, *supra* note 3, ¶ 220.

348. *Id.* ¶ 221.

349. Mavrommatis Palestine Concessions (Greece v. U.K.), 1924 P.C.I.J. (Ser. A) No. 2, at 28 (Aug. 30) (emphasis added).

350. German Interests in Polish Upper Silesia (Ger. v. Pol.), 1925 P.C.I.J. (Ser. A) No. 6, at 18 (Aug. 25) (emphasis added).

interpretation *must be regarded as incidental* to a decision on a point in regard to which it has jurisdiction."[351] Interestingly, the PCIJ used the criterion of "necessity" in *Mavrommatis Palestine Concessions*, then used one of "incidental" in *German Interests in Polish Upper Silesia*. It is thus unclear whether both or only one of these conditions is necessary.

Although not directly applicable, it is important to note that the notions of "implied powers" and "inherent jurisdiction" mentioned above[352] stress the "necessity" requirement. As the ICJ held in a series of advisory opinions, the "implied powers" of an international organization are those that "are conferred upon it *by necessary implication* as being essential to the performance of its duties,"[353] that "arise[] by *necessary intendment*" out of its founding instrument,[354] and that are "*necess[ary]* . . . in order to achieve [its] objectives."[355] And as the ICJ held in *Nuclear Tests*, the "inherent jurisdiction" of a judicial body is the jurisdiction "to take such action *as may be required*" and "to make whatever findings [as] *may be necessary*" to, *inter alia*, provide for the orderly settlement of all matters in dispute.[356] Thus, it appears that the requirement of "necessity" plays a critical role in justifying the expansion of powers of international entities, be they international organizations or judicial bodies.

a. Treaty Interpretation

The text, context, object and purpose, and *travaux préparatoires* of UNCLOS do not provide any indication about the scope of the principle of effectiveness in the context of

351. *Id.* (emphasis added).

352. *See supra* text accompanying notes 314-318.

353. Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. Rep. 174, 182 (Apr. 11) (emphasis added).

354. Effect of Awards of Compensation Made by the U.N. Administrative Tribunal, Advisory Opinion, 1954 I.C.J. Rep. 47, 57 (July 13).

355. Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. Rep. 66, ¶ 25 (July 8).

356. Nuclear Tests (Austl. v. Fr.), Judgment, 1974 I.C.J. Rep. 253, ¶ 23 (Dec. 20) (quoting Northern Cameroons (Cameroon v. U.K.), Judgment, Preliminary Objections, 1963 I.C.J. Rep. 15, 29 (Dec. 2)); Nuclear Tests (N.Z. v. Fr.), Judgment, 1974 I.C.J. Rep. 457, ¶ 23 (Dec. 20) (same).

supplemental jurisdiction under UNCLOS. Nevertheless, commentators have provided their own interpretations.

One of the most widely cited remarks on the mixed dispute question are those of former ITLOS President Rüdiger Wolfrum in 2006. Before the legal advisers to the foreign ministries of many States, he remarked: "Issues of sovereignty or other rights over continental or insular land territory, *which are closely linked or ancillary to maritime delimitation*, concern the interpretation or application of the Convention and therefore fall within its scope."[357] Notably, he did not make any reference to the necessity requirement. Rather, his remarks contain just one limitation on the non-UNCLOS disputes that would fall under the supplemental jurisdiction of an UNCLOS tribunal: the non-UNCLOS dispute must be "closely linked or ancillary" to the UNCLOS dispute.

Other prominent commentators in support of jurisdiction over mixed disputes, however, have focused on the necessity requirement. Former ITLOS Judge Gudmundur Eiriksson famously stated that "questions of customary international law and other questions outside the four corners of the Convention and other agreements would be addressed [by the Tribunal], were it *necessary* to reach a decision on the question raised."[358] Similarly, former ITLOS President P. Chandrasekhara Rao remarked that UNCLOS tribunals are "competent to deal with a mixed dispute, [but they] may not deal with disputed land territory issues if there is no *necessary* connection between them and the dispute concerning sea boundary delimitation."[359]

b. The Trend in Case Law

Although the tribunals in *Guyana v. Suriname* and *Philippines v. China* were asked to restrict rather than expand their jurisdiction based on the relationship between the UNCLOS and non-UNCLOS disputes in question, they effectively agreed that the question was whether the relationship was one of necessity. The *Chagos* tribunal analyzed the question in greater

357. Wolfrum, *supra* note 14, at 6.

358. EIRIKSSON, *supra* note 14, at 113.

359. Rao, *supra* note 14, at 892; *accord* Buga, *supra* note 14, at 77-78 (agreeing with the necessity test).

depth. In fact, since the United Kingdom did not dispute that UNCLOS tribunals may exercise supplemental jurisdiction over non-UNCLOS disputes,[360] the real question before the tribunal was the scope of the principle of effectiveness.

Mauritius argued that "questions of public international law [that are] *sufficiently closely connected* to [the UNCLOS] dispute . . . are questions the Tribunal can *and must* consider,"[361] a proposition similar to Judge Wolfrum's "closely linked or ancillary" test. The United Kingdom, on the other hand, proposed a different test. It argued that the tribunal having jurisdiction over an UNCLOS dispute may exercise jurisdiction over a non-UNCLOS dispute only if the UNCLOS dispute (as opposed to the non-UNCLOS dispute) is the "principal issue."[362] Put another way, it argued that if the non-UNCLOS dispute was the "heart" of the claim, then the tribunal would not have jurisdiction over the claim.[363] As applied, the United Kingdom argued that since the principal issue and the heart of the claim in the case before it was the sovereignty dispute over the Chagos Archipelago (the non-UNCLOS dispute), the tribunal did not have the jurisdiction to settle it.

The majority of the tribunal ultimately held in favor of the United Kingdom, rejecting Mauritius's argument. It held:

> [W]here a dispute concerns the interpretation or application of the Convention, the jurisdiction of a court or tribunal pursuant to Article 288(1) extends to making such findings of fact or ancillary determinations of law as are necessary to resolve the dispute presented to it. Where the "real issue in the case" and the "object of the claim" do not relate to the interpretation or application of the Convention, however, an incidental connection between the dispute and some matter regulated by the Convention is insufficient to bring the dispute, as a whole, within the ambit of Article 288(1).[364]

360. *Chagos*, Award, *supra* note 3, ¶ 174.

361. *Id.* ¶ 177.

362. *Id.* ¶ 173.

363. *Id.* ¶ 170.

364. *Id.* ¶ 220 (citations omitted).

Effectively, the majority imposed two independent requirements on exercising jurisdiction over non-UNCLOS disputes. First, the settlement of the non-UNCLOS dispute must be "necessary" to resolve the UNCLOS dispute. Second, the non-UNCLOS dispute must only be "ancillary" to the UNCLOS dispute, effectively adopting the United Kingdom's tests of "principal issue" and "heart of the claim" but with different language. Notably, two members of the tribunal, ITLOS Judges Kateka and Wolfrum, wrote a dissent to this holding, arguing that only "a nexus between the case in question and the Convention has to exist."[365]

In summary, one can roughly categorize the various positions on the scope of jurisdiction under the principle of effectiveness made by commentators, the *Chagos* tribunal, and States into four general positions, from the least stringent to the most stringent:

1. UNCLOS tribunals may exercise supplemental jurisdiction under the principle of effectiveness if the non-UNCLOS dispute is "closely linked or ancillary"[366] or "sufficiently closely connected"[367] to the UNCLOS dispute;
2. UNCLOS tribunals may exercise supplemental jurisdiction under the principle of effectiveness if resolving the non-UNCLOS dispute is "necessary" for resolving the UNCLOS dispute;[368]
3. UNCLOS tribunals may exercise supplemental jurisdiction under the principle of effectiveness if (1) resolving the non-UNCLOS dispute is "necessary" for resolving the UNCLOS dispute; and (2) the non-UNCLOS dispute is "ancillary" to the UNCLOS dispute;[369] or

365. Philippines v. China, PCA Case No. 2013-19, Award on Jurisdiction and Admissibility, Dissenting and Concurring Opinion of Judge James Kateka and Judge Rüdiger Wolfrum, ¶ 45 (Oct. 29, 2015).

366. This is the position of Judge Wolfrum. *See supra* text accompanying note 357.

367. This was the position of Mauritius in *Chagos*. *See supra* text accompanying note 361.

368. This is the position of Judge Eiriksson, *see supra* text accompanying note 358, Judge Rao, *see supra* text accompanying note 359, and Irina Buga, *see* Buga, *supra* note 14, at 77-78.

369. This was the position of the *Chagos* tribunal, *see supra* text accompanying note 364, and the United Kingdom in *Chagos*, see *supra* text accompanying notes 362-363.

4. UNCLOS tribunals may not exercise supplemental jurisdiction under the principle of effectiveness.[370]

3. Public Order

It is difficult to arrive at a normative conclusion concerning the exercise of supplemental jurisdiction under the principle of effectiveness. However, a few remarks should be made on each of the four positions enumerated above.

Adopting the first position would arguably grant UNCLOS tribunals overly expansive jurisdiction. In light of the fact that UNCLOS tribunals may exercise supplemental jurisdiction over non-UNCLOS international agreements under Article 288(2) and *renvoi* provisions (though not necessarily under all the zonal *renvoi* provisions discussed in this article), adopting this position would effectively give UNCLOS tribunals very expansive jurisdiction. It would moreover make States much more wary about including compromissory clauses in new international agreements, thereby inhibiting (rather than promoting) the settlement of disputes.

Taking the second position would also grant UNCLOS tribunals quite expansive jurisdiction. This is particularly true in light of the zonal *renvoi* provisions. An applicant State could argue that in order to resolve a dispute arising from a zonal *renvoi* provision, the tribunal must resolve another dispute of international law, which could be based on a treaty or other rule of international law, a dispute over which UNCLOS tribunals were not envisioned to have the power to adjudicate. Returning to the example of the Nuclear Nonproliferation Treaty (NPT), one could imagine a scenario where a State institutes UNCLOS proceedings against an NPT nuclear weapon State claiming breach of the prohibition on the threat of force on the high seas and invoking Article 87(1) (the zonal *renvoi* provision for the high seas) to establish the tribunal's jurisdiction. The applicant State could credibly argue that the UNCLOS tribunal necessarily must determine whether the State is, as a general matter, in breach of

370. This was the position of Suriname in *Guyana v. Suriname*, *see supra* text accompanying note 336, China in *Philippines v. China*, *see supra* text accompanying note 341, Professor Jia, *see* Jia, *supra* note 14, at 86, and Professor Yee, *see* Yee, *supra* note 14, at 689.

the NPT to determine whether it is breaching the prohibition on the threat of force in the high seas. Nevertheless, as noted above, few would disagree that UNCLOS tribunals should not be deciding disputes concerning compliance with the NPT, especially if that was the principal objective of the applicant State to begin with.

For this reason, adopting the third position is probably preferable to adopting the first two, at least in the interests of public order. The extra test of whether the non-UNCLOS dispute is "ancillary" to or the "heart" of the dispute would at the very least screen out States that try to take advantage of the dispute settlement mechanism under UNCLOS through "creative" jurisdictional arguments. The catch is that — for better or for worse — UNCLOS tribunals would have a lot of discretion in deciding whether a non-UNCLOS dispute is "ancillary" to or the "heart" of a dispute. A comforting point, however, is that the PCIJ had effectively adopted the two tests comprising this position (necessary and ancillary) in *Mavrommatis Palestine Concessions* and *German Interests in Polish Upper Silesia*.[371]

Finally, the fourth position — rejecting supplemental jurisdiction under the principle of effectiveness entirely — would make things cleaner. However, it may exclude many disputes that the parties to UNCLOS intended for UNCLOS tribunals to resolve. Indeed, the respondent State would be the one invoking "creative" arguments: as long as it can find some "creative" non-UNCLOS dispute that appears "necessary" to be resolved before resolving the principal UNCLOS dispute, then it may be able to invoke that non-UNCLOS dispute to undermine the tribunal's jurisdiction, just as Suriname and China tried to do in *Guyana v. Suriname* and *Philippines v. China*, respectively.[372]

IV. CONCLUSION

In conclusion, this article submits that UNCLOS tribunals should be able to exercise supplemental jurisdiction under Article 288(2), some zonal *renvoi* provisions, and the principle of

371. *See supra* notes 349-351 and accompanying text. The PCIJ, however, used the word "incidental" instead of "ancillary."

372. *See supra* text accompanying notes 334-344.

effectiveness, though probably not under Article 293(1). Nevertheless, careful limits must be placed on the supplemental jurisdiction of UNCLOS tribunals so as not to give them too much adjudicatory power. As the *Chagos* tribunal demonstrated, one way to limit supplemental jurisdiction under zonal *renvoi* provisions is to interpret "other rules of international law" to mean only general rules of international law. And one way to limit supplemental jurisdiction under the principle of effectiveness is to require not only that the resolution of the non-UNCLOS dispute be "necessary" for the resolution of the UNCLOS dispute, but also that the non-UNCLOS dispute be merely "ancillary" to the UNCLOS dispute. Whether these are the optimal limits to place on these sources of supplemental jurisdiction is a question on which this article does not directly opine. But they certainly strike a balance — a much needed balance — between granting UNCLOS tribunals excessive jurisdiction and unnecessarily curtailing their jurisdiction.

As stressed in Part I, the interactions between the four sources of supplemental jurisdiction presented in this article are critical. One should not reach conclusions on how one source should function in a single dispute without seriously considering how it would impact and be impacted by other sources, and how it would function in other disputes. Otherwise, the dispute settlement system of UNCLOS would be prone to abuse and either excessively expansive or restrictive notions of supplemental jurisdiction. If these interactions between the sources of supplemental jurisdiction continue to be ignored, it will only be a matter of time until clever lawyers — on both the applicant and respondent sides — invoke all sorts of "creative" arguments to found or undermine the jurisdiction of UNCLOS tribunals. At that point in time, it may be too late to revert back from the jurisprudence of prior tribunals. Therefore, UNCLOS tribunals should be proactive in recognizing this issue in advance.

In addition, it must be remembered that there are many other *renvoi* provisions in the Convention[373] that allow UNCLOS tribunals to exercise supplemental jurisdiction over a broad variety of non-UNCLOS disputes not considered in the present

373. *See supra* note 192 and accompanying text.

article. They should also be taken into account in studying the scope of the jurisdiction of UNCLOS tribunals.

It is therefore the hope of the author that this article will serve as a mere starting point for understanding the complexities surrounding the supplemental jurisdiction of UNCLOS tribunals. Many of the questions raised in this article have yet to be answered, and have yet to be litigated or arbitrated before UNCLOS tribunals. As a result, it is imperative that we engage in greater discussion of these complex issues, so as to prepare ourselves not just for the rising tide of dispute settlement, but also for the looming tsunami.