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# **DISPUTE SETTLEMENT IN THE INTERNATIONAL LAW OF THE SEA**

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- 1 **Dispute settlement in international law requires consent to the jurisdiction**
- 1.1 The limited role of the International Court of Justice
- 1.2 Is the Security Council's role an exception to the consent principle?
- 1.3 Consent can be expressed in a number of ways
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- 2 **International law dispute settlement can take many forms**
- 2.1 The Montego Bay Convention provides for multiple forms of dispute settlement
- 3 **Jurisdiction *ratione materiae* limits on consent under the Montego Bay Convention**
- 4 **Conflicts of international law jurisdiction in relation to the Montego Bay convention**
- 5 **How much difference has the Convention made?**

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- 1 **Dispute settlement in international law requires consent to the jurisdiction**

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## 1 **Dispute settlement in international law requires consent to the jurisdiction**

International law knows no compulsory dispute settlement

***U.N. Charter Art. 2.3:*** “All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and. justice, are not endangered.”

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## **1 Dispute settlement in international law requires consent to the jurisdiction**

Exclusion from the discussion:  
Incidental jurisdiction

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## **1 Dispute settlement in international law requires consent to the jurisdiction (cont'd.)**

### 1.1 The limited role of the International Court of Justice

The ICJ is not the pinnacle of a hierarchy of courts with compulsory jurisdiction!

#### ***ICJ Statute Art. 36***

1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

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## **1 Dispute settlement in international law requires consent to the jurisdiction**

### 1.1 The limited role of the International Court of Justice

Cf. Statement by President of the ICJ Guillaume to the U.N. Sixth Committee and discussion, U.N. Press Release GA/L/3157 17th Meeting (AM) 27 October 2000

“The President of the International Court of Justice warned members of the General Assembly’s Sixth Committee (Legal) members this morning of the dangers of legal fragmentation and of inconsistency in case law, as a result of the proliferation of international courts... One option would be for the International Court of Justice to act as a court of appeal or review, he said. However, that possibility required strong political will on the part of States and far-reaching changes in the Court.... ”

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## **1 Dispute settlement in international law requires consent to the jurisdiction (cont'd.)**

### 1.1 The limited role of the International Court of Justice

Even the ICJ jurisdiction thus requires consent, but given such consent and jurisdiction, its judgments can be enforced by the Security Council:

#### ***U.N. Charter Art. 94***

1. ...

2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give to the judgment.

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- 1 **Dispute settlement in international law requires consent to the jurisdiction**
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## 1 **Dispute settlement in international law requires consent to the jurisdiction**

### 1.2 Is the Security Council's role an exception to the consent principle?

Security Council role in dispute settlement only relates to threat of a dispute to international peace and security (***U.N. Charter Chs. VI and VII***)

Security Council role in the event of a threat of a dispute to international peace and security is in principle to

RECOMMEND procedures for settlement of the dispute (***Ch. VI***)

TAKE ACTION to keep the peace (***Ch. VII***)

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## 1 **Dispute settlement in international law requires consent to the jurisdiction**

### 1.2 Is the Security Council's role an exception to the consent principle?

Security Council role in the event of a threat of a dispute to international peace and security is in principle to

RECOMMEND procedures for settlement of the dispute

### ***U.N. Charter Art. Article 36***

1. The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustment.
2. The Security Council should take into consideration any procedures for the settlement of the dispute which have already been adopted by the parties.
3. In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.

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## 1 **Dispute settlement in international law requires consent to the jurisdiction**

### 1.2 Is the Security Council's role an exception to the consent principle?

Security Council role in the event of a threat of a dispute to international peace and security is in principle to

TAKE ACTION to keep the peace

#### ***U.N. Charter Art. 39***

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 4 and 42, to maintain or restore international peace and security.

#### ***U.N. Charter Art. 42***

Should the Security Council consider ... [peaceful sanctions] ... inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security...

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## 1 **Dispute settlement in international law requires consent to the jurisdiction**

### 1.2 Is the Security Council's role an exception to the consent principle?

Settlement of disputes by the security council in its role related to maintaining the peace?

Subject thereto, compulsory dispute settlement therefore requires consent by the states parties to the dispute

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- 1 **Dispute settlement in international law requires consent to the jurisdiction**
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  - 1.2 Is the Security Council's role an exception to the consent principle?
  - 1.3 Consent can be expressed in a number of ways

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## 1 **Dispute settlement in international law requires consent to the jurisdiction**

### 1.3 Consent can be expressed in a number of ways

Types of consent to dispute settlement

Open-ended (ICJ Statute Art. 36.2)

Open-ended between particular states (*cf.* U.S. Constitution Art. 3.2, applying the original jurisdiction of the Supreme Court to “controversies between two or more states”, and Estatuto de la Corte Centroamericana de Justicia Art. 22, which, however, limits the jurisdiction *ratione materiae*)

Open-ended for particular subject matter (Law of the Sea type)

*Ad hoc* (by special agreement or *compromis*)

*Forum prorogatum*

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## 1 Dispute settlement in international law requires consent to the jurisdiction

1.3 Consent can be expressed in a number of ways

### ***ICJ Statute Art. 36.2:*** (the “optional clause”)

The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

- a. the interpretation of a treaty;
- b. any question of international law;
- c. the existence of any fact which, if established, would constitute a breach of an international obligation;
- d. the nature or extent of the reparation to be made for the breach of an international obligation.

Barbados and Dominica alone in the Anglophone Caribbean have made optional clause declarations (see *Status of a Diplomatic Envoy to the U.N. (Dominica v. Switzerland)*, filed and discontinued in 2006) – Haiti and Suriname have also made declarations

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## **1 Dispute settlement in international law requires consent to the jurisdiction**

### 1.3 Consent can be expressed in a number of ways

Open-ended for particular subject matter  
(Law of the Sea type)

Incorporated in treaty type (Montego Bay Convention)

Optional protocol type (1958 Optional Protocol of Signature concerning the Compulsory Settlement of Disputes (related to the 1958 Geneva Conventions on the Law of the Sea))

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- 1.4      The Montego Bay Convention includes the consent in its text

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## **1 Dispute settlement in international law requires consent to the jurisdiction**

1.4 The Montego Bay Convention includes the consent in its text

### ***Montego Bay Convention:***

***Arts.*** 74, 83, 186-191, 226, 264-265, 279-299, 309, 318  
***Annexes*** V, VI, VII, VIII, IX

Article 309: Reservations and exceptions

No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention.

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- 2 **International law dispute settlement can take many forms**

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## **2 International law dispute settlement can take many forms**

International law compulsory dispute settlement machinery

Arbitration [not historically ADR!]

Standing international tribunals

Combinations of the above (e.g. panels and standing tribunal combination, special chambers)

International law also uses non-paradigm non-binding methods of dispute settlement

negotiation, consultations

good offices, mediation, conciliation

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## **2 International law dispute settlement can take many forms**

A warning on labels (compulsory binding conciliation?)  
(see Treaty of Basseterre 1981 Art. 14)

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## **2 International law dispute settlement can take many forms**

### **2.1 The Montego Bay Convention provides for multiple forms of dispute settlement**

International law compulsory dispute settlement machinery

Arbitration [not historically ADR!]

Standing international tribunals

Combinations of the above (e.g. panels and standing tribunal combination, special chambers)

International law also uses non-paradigm non-binding methods of dispute settlement

negotiation, consultations

good offices, mediation, conciliation

The Montego Bay Convention uses all of the above!

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## **2 International law dispute settlement can take many forms**

### **2.1 The Montego Bay Convention provides for multiple forms of dispute settlement**

The Montego Bay Convention hierarchy

Non-choice systems

ITLOS and the Sea-Bed Disputes Chamber

Arbitration

[International Commercial Arbitration ] (not discussed here)

[Internal dispute settlement procedure for the ISA (ref. the Joint Appeals Board

<http://www.isa.org.jm/files/documents/EN/Regs/JAB-rop.pdf>] (not discussed here)

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## **2 International law dispute settlement can take many forms**

2.1 The Montego Bay Convention provides for multiple forms of dispute settlement

Non-choice systems

ITLOS and the Sea-Bed Disputes Chamber

***From the Montego Bay Convention:***

Article 290: Provisional measures

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

*See the Southern Bluefin Tuna Cases (Australia and New Zealand v*

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## 2 International law dispute settlement can take many forms

### 2.1 The Montego Bay Convention provides for multiple forms of dispute settlement

#### Non-choice systems

ITLOS and the Sea-Bed Disputes Chamber

#### ***From the Montego Bay Convention:***

Article 292: Prompt release of vessels and crews

1. Where the authorities of a State Party have detained a vessel flying the flag of another State Party and it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security, the question of release from detention may be submitted to any court or tribunal agreed upon by the parties or, failing such agreement within 10 days from the time of detention, to a court or tribunal accepted by the detaining State under article 287 or to the International Tribunal for the Law of the Sea, unless the parties otherwise agree.

2. The application for release may be made only by or on behalf of the flag State of the vessel...

See e.g. *the Saiga (St. Vincent and the Grenadines v. Equatorial Guinea)* (No. 2) Judgment, ITLOS Reports 1999 p. 10

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## 2 International law dispute settlement can take many forms

### 2.1 The Montego Bay Convention provides for multiple forms of dispute settlement

#### Non-choice systems

ITLOS and the Sea-Bed Disputes Chamber

#### ***From the Montego Bay Convention:***

Article 188: Submission of disputes to a special chamber of the International Tribunal for the Law of the Sea or an ad hoc chamber of the Sea-Bed Disputes Chamber or to binding commercial arbitration

1. Disputes between States Parties [concerning the interpretation of the Deep Seabed regime of the Convention] may be submitted:

(a)...

(b) at the request of any party to the dispute, to an ad hoc chamber of the Sea-Bed Disputes Chamber...

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## 2 International law dispute settlement can take many forms

### 2.1 The Montego Bay Convention provides for multiple forms of dispute settlement

Non-choice systems

Arbitration

#### ***From the Montego Bay Convention:***

Article 287: Choice of procedure

1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State shall be free to choose, by means of a written declaration, one or more of the ...means for the settlement of disputes concerning the interpretation or application of this Convention...
3. A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII.

See e.g. *Barbados/Trinidad and Tobago Arbitration* (2006)  
(downloadable through [www.pca-cpa.org](http://www.pca-cpa.org))

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## 2 International law dispute settlement can take many forms

### 2.1 The Montego Bay Convention provides for multiple forms of dispute settlement

Choice systems

Pre-selected modes

Common modes, including ITLOS or the ICJ

Optional declarations: cf. **ICJ Statute art. 36.2** and **Montego Bay Convention art. 287.1**

From the ITLOS Statute (**Montego Bay Convention Annex VI**):

Article 22 Reference of disputes subject to other agreements

If all the parties to a treaty or convention already in force and concerning the subject-matter covered by this Convention so agree, any disputes concerning the interpretation or application of such treaty or convention may, in accordance with such agreement, be submitted to the Tribunal.

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## **2 International law dispute settlement can take many forms**

### **2.1 The Montego Bay Convention provides for multiple forms of dispute settlement**

Exclusions from the discussion:

self-help?

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Jurisdiction *ratione materiae* issue in the Montego Bay Convention

Excluded from compulsory jurisdiction automatically  
Montego Bay Convention Art. 297

Excludable from compulsory jurisdiction by declaration  
Montego Bay Convention Art. 298

Trinidad and Tobago declaration of 13 February 2009 (after the Barbados boundary arbitration)

[http://www.un.org/los/convention\\_agreements\\_declarations.htm#](http://www.un.org/los/convention_agreements_declarations.htm#)

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## 3 Jurisdiction *ratione materiae* limits on consent under the Montego Bay Convention

Jurisdiction *ratione materiae* issue in the Montego Bay Convention

Excluded from compulsory jurisdiction automatically

### ***Montego Bay Convention Art. 297***

2. (a)...the coastal State shall not be obliged to accept the submission to such settlement of any dispute arising out of [its discretion under the Convention to prohibit or order suspension or cessation of a research project in its EEZ and on its continental shelf]
3. (a)... the coastal State shall not be obliged to accept the submission to [compulsory dispute] settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations.

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## 3 Jurisdiction *ratione materiae* limits on consent under the Montego Bay Convention

Compulsory non-binding conciliation

### ***Montego Bay Convention Art. 297***

2. (a)...the coastal State shall not be obliged to accept the submission to such settlement of any dispute arising out of [its discretion under the Convention to prohibit or order suspension or cessation of a research project in its EEZ and on its continental shelf]

(b) A dispute arising from an allegation by the researching State that with respect to a specific project the coastal State is not exercising its rights ... in a manner compatible with this Convention shall be submitted, at the request of either party, to conciliation under Annex V, section 2, provided that the conciliation commission shall not call in question the exercise by the coastal State of its discretion to designate specific areas ... or of its discretion to withhold consent ....

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## 3 Jurisdiction *ratione materiae* limits on consent under the Montego Bay Convention

Compulsory non-binding conciliation

### ***Montego Bay Convention Art. 297***

3. (a)... the coastal State shall not be obliged to accept the submission to [compulsory dispute] settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations.
- (b) Where no settlement has been reached ... a dispute shall be submitted to conciliation under Annex V, section 2, at the request of any party to the dispute ...

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## 3 Jurisdiction *ratione materiae* limits on consent under the Montego Bay Convention

Compulsory non-binding conciliation

### ***Montego Bay Convention Art. 297***

3. ((b) Where no settlement has been reached ... a dispute shall be submitted to conciliation under Annex V, section 2, at the request of any party to the dispute, when it is alleged that:
  - (i) a coastal State has manifestly failed to comply with its obligations to ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not seriously endangered;
  - (ii) a coastal State has arbitrarily refused to determine, at the request of another State, the allowable catch and its capacity to harvest living resources with respect to stocks which that other State is interested in fishing, or
  - (iii) a coastal State has arbitrarily refused to allocate to any State... the whole or part of the surplus it has declared to exist.
- (c) In no case shall the conciliation commission substitute its discretion for that of the coastal State.

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*Permanent Court of Arbitration: The Mox Plant Case (Ireland v. United Kingdom)*, Order No. 3 24 June 2003, §§28-30 and *Commission v. Ireland* ECJ Case C-459/03), [2006] All ER (EC) 1013

*Swordfish (Chile v. EC/EU)*

*Chile – Swordfish* WTO DS193 (proceedings suspended)

ITLOS Case No. 7 (removed from list of cases 2009)

*Factortame Ltd. v. Transport Secretary (No. 2)* [1991] 1 Lloyd's Rep. 10 at 29-30

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## 5 How much difference has the Convention made?

*Barbados v. Trinidad and Tobago* and the subsequent Trinidad and Tobago declaration

Expanded jurisdictions or compulsory dispute settlement as the cause?

Cases of Convention irrelevance in history, e.g.:

*Bering Sea Arbitration* 28 Rep. International Arbitral Awards 263  
(1893)

*Muscat Dhows Arbitration* (PCA 1905) (see [www.pca-cpa.org](http://www.pca-cpa.org))

*Anglo-Norwegian Fisheries Case* [1951] ICJ Rep. 116

*Military and Paramilitary Activities in Nicaragua (Nicaragua v. U.S.)* [1986] ICJ Rep. 14 paras. 213 – 214

*Cameroon/Nigeria Boundary Preliminary Objections* [1998] ICJ Rep 275

Conflicting jurisdiction situations (*supra*)

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