NON-APPEARANCE AND COMPLIANCE IN THE CONTEXT OF THE UN CONVENTION ON THE LAW OF THE SEA DISPUTE SETTLEMENT MECHANISM*

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ABSTRACT

This paper examines the nature and effects of default proceedings in disputes between State Parties governed by the United Nations Convention on the Law of the Sea ("UNCLOS"), in three sections. In the first section, the general provisions of the UNCLOS on the settlement of disputes, as well as the different choices of procedure available under Article 287, are discussed, concluding with a discussion on the impact of the rule of *kompetenz-kompetenz* on the Convention. The second section of the paper highlights the problems that scholars have identified in default proceedings, by discussing the proceedings for the non-appearance of a party in light of the different means of settlement of disputes under the Convention. The third section of the paper attempts to identify the factors that generally affect a State's compliance with decisions rendered by international courts.

Grounded on the foregoing discussion, this paper seeks to shed light on why State Parties pursue cases even when default is imminent and the disadvantages of default proceedings are grave.

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INTRODUCTION

Among the achievements of the United Nations Convention on the Law of the Sea[1] ("Convention") is its establishment of a mechanism for compulsory procedures in dispute settlement. Disputes concerning the interpretation or application of the Convention or of an international agreement related to the purposes of the Convention are subject to compulsory dispute settlement.[2] States Parties are free to choose the means for settling disputes set out in Paragraph 1 of Article 287 of the Convention and, in the absence of a declaration of their choice of procedure, the default procedure would be through arbitration under Annex VII of the Convention.[3]

There are, however, exceptions and limitations to the compulsory dispute settlement procedures provided in the Convention. Articles 297 and 298 of the Convention enumerate these limitations and optional exceptions, respectively. While the limitations and exceptions were necessary compromises for the realization of the Convention, they also enlarge the room for debate on whether or not the tribunals or courts enumerated in Article 287 of the Convention have jurisdiction to resolve a dispute. This, in turn, increases the chances of having default proceedings.[4]

What is the goal to be achieved by a State litigant in default proceedings? This question is asked because, while the Convention explicitly provides that the decision rendered by the court or tribunal shall be final and complied with by all the parties to the dispute,[5] it does not provide for a mechanism for ensuring compliance with its decision. The absence of a compliance mechanism is not unique to the Convention. The International Court of Justice (ICJ) also does not have its own enforcement or compliance mechanism.[6] While ICJ decisions may

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[1] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3. [hereinafter "Convention"].

[2] Convention, art. 288, ¶¶ 1-2.

[3] Convention, art. 287, ¶ 3.

[4] The word "default" is used in two contexts in this paper. First, the term is used as the procedure that applies when parties do not agree on the choices made available under Article 287 of the Convention. Second, the term is used as a procedure when a party does not appear in the proceedings. To make a distinction between the two, any reference to the former is qualified as "default procedure," while the latter is interchangeably called "default proceedings" or "non-appearance." For purposes of this paper, default proceedings take place when the non-appearance of a party occurs either in the jurisdictional phase of the proceedings or during the determination of the merits of the case.

[5] Convention, art. 296.

[6] B.A. Ajibola, *Compliance with Judgments of the International Court of Justice, in* COMPLIANCE WITH JUDGMENTS OF INTERNATIONAL COURTS 13 (M.K. Bulterman & M. Kuijer eds., 1996). According to Ajibola, the ICJ's functions are the following:

be enforced through the Security Council,[7] the remedy is limited to matters of peace and security. Without political manoeuvrings from the winning party, the absence of an enforcement procedure renders compliance close to impossible. What, then, will the value of a judgment be if it cannot be enforced?

This paper is divided into three parts. The first part discusses the provisions in Part XV of the Convention on the settlement of disputes. The section starts with the general provisions on the settlement of disputes, among the core principles of which are the obligation of parties to settle disputes by peaceful means and the freedom of the disputing parties to settle their disputes by any peaceful means of their own choice. This part continues with the different choices of compulsory procedures entailing binding decisions available under Article 287 of the Convention, and the historical applications and effects of the limitations and optional exceptions in Articles 297 and 298 of the Convention to these compulsory procedures entailing binding decisions. This part ends with the application of *kompetenz-kompetenz*[8] in relation to the challenges to the court or tribunal's jurisdiction by virtue of Articles 297 or 298 of the Convention.

While the Convention provides for a comprehensive dispute settlement system, it does not prevent parties from not appearing, in practice. The arbitration between the Philippines and China[9] is an example, while another is the *Arctic Sunrise*[10] case before the International Tribunal for the Law of the Sea ("Tribunal"). The second part of the paper discusses the proceedings for non-

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1. The issuing of orders or directives in respect of any interlocutory matter;
2. The indication of provisional or interim measures or any request filed as such by any of the parties regarding a case before the Court whereby the Court could grant or refuse such application in its order;
3. The rendering of advisory opinion when it is requested to do so by the Security Council, the General Assembly or any other organ or specialized agency of the United Nations;
4. The pronouncement of judgments in cases where at the instance of one of the parties a preliminary objection is raised before the Court with regard to the issue of jurisdiction and admissibility;
5. The delivery of judgments pronounced as the final decision of the Court after the hearing of the case on its merits.

[7] U.N. CHARTER ch. VII.

[8] The inherent power of an international tribunal to decide whether it has jurisdiction over a dispute. Also referred to as *la compétence de la compétence. See* ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAW 401 (2nd ed., 2010).

[9] Republic of the Philippines v. People's Republic of China, PCA Case No. 2013-19 (Perm. Ct. Arb.), *available at* http://www.pca-cpa.org/showpage.asp?pag_id=1529.

[10] Arctic Sunrise (Neth. v. Russ.), ITLOS Case No. 22, *available at* http://www.itlos.org/index.php?id=264.

appearance of a party in the different means of settlement of disputes under the Convention, and the rules on default as found in the Statute of the Tribunal and the Statute of the ICJ, and for the arbitral tribunal constituted under Annex VII ("Annex VII Tribunal") and the special arbitral tribunal constituted under Annex VIII ("Annex VIII Tribunal") of the Convention. Where available, cases applying default proceedings before these entities are discussed with emphasis on how the court or tribunal resolved the issue of default. This part ends by highlighting the problems and issues that legal scholars have identified in default proceedings.

The fact that proceedings do continue and are concluded despite the non-appearance of a party is discussed in the third part of the paper, which also attempts to identify the factors that affect a State's compliance with decisions rendered by international courts, in general.

Finally, the paper ends with why States Parties pursue a case even when default is imminent and the disadvantages of default proceedings are grave.

I. DISPUTE SETTLEMENT UNDER THE UN CONVENTION ON THE LAW OF THE SEA

A. General Background and Preliminary Considerations

The Convention integrates within itself a system for dispute settlement. It is unlike its predecessor, the 1958 Geneva Conventions on the Law of the Sea, where the dispute settlement procedures are found in an optional protocol.[11] States Parties to the Convention are automatically bound by the terms of the Convention, including its dispute settlement procedures, upon becoming a member of the same.[12] Nevertheless, States Parties can agree to settle a dispute through a different procedure in lieu of the system in the Convention provided that it results in a binding decision.[13] All States Parties, however, have the obligation to settle disputes by peaceful means.[14] This obligation is derived from the principle in Article 2 of the Charter of the United Nations,[15] with a slight

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[11] United Nations Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes, Apr. 29, 1958, 450 U.N.T.S. 169.

[12] V MYRON H. NORDQUIST, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982, A COMMENTARY (Shabtai Rosenne & Louis B. Sohn eds., 1989).

[13] Convention, art. 280-282.

[14] Convention, art. 279.

[15] U.N. CHARTER art. 2, ¶ 3. It provides:

expansion in scope in the sense that resort to peaceful settlement of disputes remains to be an obligation even if there is no threat to peace.[16]

Part XV of the Convention provides for the modalities of dispute settlement. It is divided into three sections. The first section sets out the general principles for dispute settlement. The second section focuses on compulsory procedures entailing binding decisions. The last section deals with the limitations and optional exceptions to the application of the aforementioned second section.

The establishment of a compulsory dispute settlement procedure with binding decisions was found necessary by the drafting parties in view of the innovative and possibly contentious provisions of the Convention which the developed States believed could result in disputes. The developed States took the position that innovations in the Convention would only be acceptable if there was a dispute settlement mechanism to resolve the disputes arising from these provisions.[17] From their view, these disputes could only be resolved through a dispute settlement mechanism that was both compulsory and binding in its result.[18]

The developing States also favored the establishment of a compulsory dispute settlement system because they viewed it as a means to address the problem of political, economic and military pressures from more powerful States.[19] It was hoped that through this system, less powerful States would have an equal standing before the law.[20]

> The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles:
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> 3. All Members shall settle their international disputes by peaceful means in such manner that international peace and security, and justice, are not endangered."

[16] NORDQUIST, *supra* note 12, at 18.

[17] Robin Churchill, *Trends in Dispute Settlement in the Law of the Sea: Towards the Increasing Availability of Compulsory Means, in* INTERNATIONAL LAW AND DISPUTE SETTLEMENT, NEW PROBLEMS AND TECHNIQUES (Duncan French, Matthew Saul & Nigel White eds., 2010), at 155-156 *citing* C. Chinkin, *Dispute Resolution and the Law of the Sea: Regional Problems and Prospects, in* THE LAW OF THE SEA IN THE ASIAN-PACIFIC REGION (J. Crawford & DR Rothwell eds., 1995), at 245 and AE Boyle, *Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction*, 46 INT'L & COMP. L.Q. 1, 38-39 (1997).

[18] J.G. MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT 185 (4th ed., 2005).

[19] Churchill, *supra* note 17.

[20] A.O. ADEDE, SYSTEM FOR SETTLEMENT OF DISPUTES UNDER CONVENTION ON THE LAW OF THE SEA 53 (1987).

A system of compulsory dispute settlement could also safeguard the Convention from unilateral interpretation of States and was considered by the drafters as a means for parties to have a uniform interpretation of the Convention.[21] Further, the knowledge that there was a readily available dispute settlement mechanism could serve as a deterrent for States from committing acts in blatant violation of the Convention.[22]

While there was an agreement to have a system for compulsory dispute settlement, there was no concurrence on the specific dispute settlement mechanism. The delegates eventually had a consensus that, in principle, every State would be bound by a system of compulsory dispute settlement in the future Convention, with each party deciding the precise form.[23] This consensus was reached during the meeting in Montreux in 1975, thus, the name "Montreux Formula."[24] The Montreux Formula was later refined so that in case the disputing parties do not agree on a procedure to settle their dispute, the dispute would be submitted to arbitration.[25] This is reflected in Article 287, under Section 2 of Part XV of the Convention.

Although the term "compulsory procedures," by its literal meaning, suggests that the procedures are obligatory, the occurrence of a dispute does not give rise to its automatic application. The compulsory procedures stipulated in Section 2 of Part XV are only available if it has been shown that the parties have not reached a settlement upon recourse to Section 1 of Part XV.[26]

Section 1 of Part XV speaks of the obligation to settle disputes by peaceful means,[27] the recognition of the right of parties to settle the dispute by any peaceful means of their own choice,[28] and the obligation to proceed to an exchange of views towards a peaceful settlement of a dispute concerning the interpretation or application of the Convention.[29] Where the parties have agreed to settle the dispute by means of their own choice, the dispute settlement provisions of the Convention will apply only if no settlement has been reached by the parties and the agreement does not exclude any further procedure, or, if

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[21] Churchill, *supra* note 17, at 156 *citing* ADEDE, *supra* note 20, at 49-54, 243-244 & 283.

[22] MERRILLS, *supra* note 18, at 185.

[23] David Anderson, *Negotiation and Dispute Settlement, in* REMEDIES IN INTERNATIONAL LAW: THE INSTITUTIONAL DILEMMA 77 (Malcolm D. Evans ed., 1998).

[24] *Id.*

[25] *Id.*

[26] Convention, art. 286.

[27] Convention, art. 279.

[28] Convention, art. 280.

[29] Convention, art. 283.

the parties agreed on a time limit, after the expiration of such limit.[30] Where the disputing parties have an agreement that the dispute is to be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of Part XV unless otherwise agreed upon by the parties.[31] These are the pre-conditions before the compulsory procedures for dispute settlement become available to disputing parties.

B. Compulsory Procedures Entailing Binding Decisions

The inclusion of compulsory dispute settlement procedures in the Convention means that States Parties are bound to settle their disputes through the procedure in the Convention and that the decision arising from that settlement will be binding on the parties.[32]

Article 287 of the Convention gives States Parties four choices on the means for settling of disputes. To express its preference, a party must make a written declaration to that effect. The four fora available to a party are the Tribunal, the ICJ, the Annex VII Tribunal, and the Annex VIII Tribunal.

There are three possibilities that can happen under the Montreux Formula. First, if the disputing parties made the same choice for dispute settlement, then the dispute may only be submitted through that procedure unless the parties agree otherwise.[33] Second, if the disputing parties have chosen different means for dispute settlement, the dispute can only be submitted for arbitration under Annex VII unless the parties otherwise agree subsequently.[34] Third, if a party has not made any declaration of its preferred means of dispute settlement, it is deemed to have accepted arbitration under Annex VII.[35] From the foregoing, it is apparent that arbitration under Annex VII is the mechanism resorted to in cases where the litigants have not made the same choice in their declaration or where they have not made any declaration of a choice at all.

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[30] Convention, art. 281.

[31] Convention, art. 282.

[32] ADEDE, *supra* note 20, at 16. During the Caracas sessions in 1974, the Informal Working Group identified 11 issues on dispute settlement. From those 11 issues, the Group made a distinction between "procedures not entailing a binding decision" and "means of settlement resulting in a binding decision." The term "procedures not entailing a binding decision" refers to "non-compulsory dispute settlement procedures" or the informal procedures, while the term "means of settlement resulting in a binding decision" refers to compulsory dispute settlement procedures including arbitration and settlement as it is now understood in the Convention.

[33] Convention, art. 287, ¶ 4.

[34] Convention, art. 287, ¶ 5.

[35] Convention, art. 287, ¶ 2.

Except for the arbitral tribunal constituted under Annex VIII, the jurisdiction of the appropriate court or tribunal in Article 287 encompasses any dispute concerning the interpretation or application of the Convention.[36] It also has jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of the Convention.[37] For the Annex VIII Tribunal, its jurisdiction is limited to disputes concerning fisheries, the protection and preservation of the marine environment, and marine scientific research and navigation.[38]

C. Distinction between Compulsory Jurisdiction and Compulsory Dispute Settlement Procedures

Compulsory procedures entailing binding decisions, as discussed earlier, are not the same as compulsory jurisdiction. For compulsory procedures, the parties are to choose among the bodies listed in Article 287 of the Convention. The Montreux Formula does not operate when there is compulsory jurisdiction on a certain entity because, in such cases, the Convention itself identifies the proper court or body that can resolve an issue in dispute.

The Tribunal has compulsory jurisdiction for cases for provisional measures where the relief sought is either to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment.[39] Another application for the Tribunal's compulsory jurisdiction is in cases for prompt release of crews and vessels;[40] here, the Tribunal shall deal only with the question of release and without prejudice to the merits of the case. The Tribunal also has jurisdiction over disputes involving the activities in the International Sea-Bed Area.[41] However, the Tribunal, as a whole, does not assume that function; rather, it is the Sea-Bed Disputes Chamber of the Tribunal which has exclusive jurisdiction over disputes concerning the Area.[42]

Compulsory jurisdiction can also be extended to the Tribunal when a separate agreement[43] related to the purposes of the Convention confers

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[36] *See* ADEDE, *supra* note 20, at 102.

[37] Convention, art. 288, ¶ 1-2.

[38] Churchill, *supra* note 17.

[39] Convention, art. 290, ¶ 1.

[40] Convention, art. 292.

[41] Convention, part XI, sec. 5.

[42] Convention, art. 187.

[43] Examples of these agreements are the 1995 Fish Stocks and Highly Migratory Fish Stocks Agreement; the 1996 Protocol to the 1972 Convention on the Prevention of Marine

jurisdiction upon it. This permitted practice is reflected in Article 21 of the Statute of the Tribunal, which states that the jurisdiction of the Tribunal "comprises all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal."

D. Limitations and Exceptions

The negotiating States were conscious from the beginning that dispute settlement procedures integrated into the Convention would only be acceptable if certain issues were excluded from the coverage of compulsory application,[44] considering that the Convention prohibits States from making reservations to the terms of the Convention.[45]

When the draft for dispute settlement was presented for debate, many speakers favored not to have any exceptions to its scope of application. Nevertheless, if exceptions were going to be inevitable, the speakers expressed their preference to have these interpreted and applied in a restrictive manner.[46]

Eventually, the Informal Plenary[47] agreed to make a distinction among the exceptions: those limitations that would apply automatically and those that would require a declaration.[48] These are now what are classified as "limitations" under Article 297 and "optional exceptions" under Article 298, respectively.

When a State opts to exclude any of the issues in Article 298 of the Convention for compulsory dispute settlement, it cannot, at the same time, initiate compulsory dispute settlement proceedings against another State on the issues it identified as within the scope of its optional exclusions.[49] These exceptions and limitations are not self-judging.[50] It is for the court or tribunal to determine whether it has the jurisdiction to decide on a particular matter.[51] This

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Pollution by Dumping of Wastes and their Matter; and the 2000 Agreement for the Conservation of Fishery Resources in the High Seas of the South-East Pacific, among others.

[44] NORDQUIST, *supra* note 12, at 87.

[45] NATALIE KLEIN, DISPUTE SETTLEMENT IN THE UN CONVENTION ON THE LAW OF THE SEA 121 (2005).

[46] NORDQUIST, *supra* note 12, at 92. This refers to the fourth session of the Conference in 1976.

[47] Fifth session of the Conference, 1976.

[48] NORDQUIST, *supra* note 12, at 96. *See also* Hugo Caminos, *The Jurisdiction and Procedure of the International Tribunal for the Law of the Sea: An Overview, in* GOVERNING OCEAN RESOURCES, NEW CHALLENGES AND EMERGING REGIMES, A TRIBUTE TO JUDGE CHOON-HO PARK 259-273 (Jon M. Van Dyke, Sherry P. Broder, Seokwoo Lee & Jin-Hyun Paik eds., 2013).

[49] Convention, art. 298, ¶ 3.

[50] KLEIN, *supra* note 45, at 123 *citing* NORDQUIST, *supra* note 11, at 140.

[51] Convention, art. 288, ¶ 4.

is a reiteration of an international law principle and, at the same time, a safeguard against potential abuse from self-serving interpretations by States.[52]

1. Limitations

Article 297 of the Convention enumerates the limitations of the applicability of the compulsory dispute settlement mechanism. By limitation, it means that the compulsory dispute settlement mechanism does not apply to the issues enumerated in Article 297. Among the most contentious issues during the drafting of the Convention was whether disputes concerning the exclusive economic zone ("EEZ") should be included as among those cases where compulsory dispute should or should not apply.[53] While some States made it a "fundamental objective" to protect the rights and jurisdictions of the coastal State in its EEZ,[54] there were also those that wanted to safeguard the interests of other States affected by this protection.[55]

In the 1976 sessions, a representative from a coastal State presented the position that a coastal State should be free to exercise its jurisdiction over the EEZ and that disputes occurring in that zone should be excluded from compulsory dispute settlement.[56] Non-coastal States, on the other hand, saw the importance of having compulsory dispute settlement procedures for disputes in the EEZ to ensure the protection of the rights and interests of third states.[57] Other delegates saw the exception of the exercise of sovereign rights over the EEZ from compulsory dispute settlement as a means of protecting coastal states from numerous disputes.[58]

Article 297 of the Convention was designed to address the above interests and concerns. It was intended to balance the interests of the coastal States and of the other States. Principally, the object of Article 297 is to "provide safeguards against an abuse of power by a coastal State and at the same time to avoid an abuse of legal process by other States."[59] As an added precaution against subjecting coastal States to the abuse of legal process while in the exercise of their sovereign rights over the EEZ, the Convention empowers the

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[52] MERRILLS, *supra* note 18, at 190.

[53] NORDQUIST, *supra* note 12, at 92.

[54] ADEDE, *supra* note 20, *citing* A.L.C. de Mestral, *Compulsory Dispute Settlement in the Third United Nations Convention on the Law of the Sea: A Canadian Perspective, in* CONTEMPORARY ISSUES IN INTERNATIONAL LAW, ESSAYS IN HONOR OF LOIS B. SOHN 183 (Thomas Burgenthal ed., 1984).

[55] ADEDE, *supra* note 20, at 142.

[56] *Id.* at 87.

[57] *Id.*

[58] *Id.*

[59] *Id.* at 142.

tribunal or court to determine if the claim constitutes an abuse of legal process or is *prima facie* unfounded, in which case, it shall take no further action. This determination is done upon request of a party or *proprio motu*.[60]

In the spirit of attaining the goal of creating a balance between the interests of the coastal State and of other States that are landlocked or have navigational interests, the final draft of the Convention included navigation, overflight, the laying of submarine cables and pipelines, and other internationally lawful uses of the sea as among those that can be submitted for compulsory dispute settlement procedures.[61]

Thus, despite the general protection for the interests of coastal States in their respective EEZs, compulsory dispute settlement is available when it is alleged that:

> 1) [t]he coastal State has acted in contravention of the provisions on the freedoms and rights of navigation, overflight or the laying of submarine cables and pipelines, or in regard to other internationally lawful uses of the sea;
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> 2) [a] State in exercising the mentioned freedoms has violated or acted in contravention with the Convention or other laws adopted by the coastal State not incompatible with the Convention; and
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> 3) [the] coastal State has acted in contravention of specified international rules and standards for the protection and preservation of the marine environment [...][62]

The subsequent paragraphs of Article 297 of the Convention specifically deal with two sub-issues on the exercise of a coastal State's sovereign rights, namely: marine scientific research and fisheries.[63] Coastal States are not obliged to accept the submission to compulsory dispute settlement for disputes concerning the interpretation or application of the Convention when the issue concerns the conduct of marine scientific research in the coastal State's EEZ or its continental shelf.[64] Compulsory dispute settlement is also not available for

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[60] Convention, art. 294.

[61] NORDQUIST, *supra* note 12, at 105.

[62] Convention, art. 297.

[63] *See* Arctic Sunrise (Neth. v. Russ.), ITLOS Case No. 22, Separate Opinion of Wolfrum, *J.* and Kelly, *J.*, ¶ 10, *available at* http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Order/C22_Ord_22.11.2013_sep.op.Wolfrum-Kelly_orig_Eng.pdf. *See also id.*, Separate Opinion of Jesus, *J.*, ¶ 5(c)(ii)), *available at* http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Order/C22_Ord _22_11_2013_sep_op_Jesus_rev_Eng.pdf.

[64] Convention, art. 297, ¶ 2(a), *in relation to* Convention, art. 246, 253.

disputes regarding fisheries when the issue relates to the coastal State's sovereign rights over the living resources in its EEZ, 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.[65]

Stated another way, disputes regarding or relating to the exercise of sovereign rights by a coastal State cannot, in general, be submitted for resolution to a compulsory dispute settlement system in Section 2 of Part XV. The exceptions are the three instances listed above and disputes concerning marine scientific research and fisheries. For these kinds of disputes, compulsory dispute settlement entailing binding decisions is available. However, when the marine scientific research is exercised in the coastal State's EEZ or continental shelf, or when the dispute on fisheries is exercised within a coastal State's EEZ, the compulsory dispute settlement mechanism is not available.

Perhaps a better way of remembering this maze of exclusions is to put in mind the Convention's historical background. In negotiating for a dispute settlement procedure relating to the exercise of sovereign rights by coastal States, compulsory judicial procedures were limited to non-resource uses of the EEZ.[66] This is reflected in Article 297 of the Convention. Resource uses of the EEZ, both living and non-living, were excluded from compulsory dispute settlement. For disputes on these matters, parties may resort to conciliation.[67] Despite this simplification, however, there are still points in Article 297 that need further clarification.

Disputes on marine scientific research in the EEZ and the continental shelf as well as exploitation of living resources in the EEZ are explicitly excluded from those that can be resolved through a compulsory dispute settlement system entailing binding decisions. However, if the practices in these areas threaten the protection and preservation of the marine environment, could the issue be pursued through Section 2 of Part XV? For example, if a coastal State permits a fishing vessel to fish in its EEZ despite the vessel's non-compliance with international standards to control pollution from ships, could this be a subject of compulsory dispute mechanism as a coastal State's alleged violation of international rules and standards for the protection of the marine environment? Apparently, yes. However, if we modify the example above, this time alleging overfishing by the coastal State that would have a significant impact on the

[65] Convention, art. 297, ¶ 3. Note, however, that disputes under this paragraph shall be submitted to conciliation under Annex V, Section 2, subject to certain conditions.

[66] ADEDE, *supra* note 20, at 172.

[67] *Id.*

marine environment, would this still be covered by compulsory dispute settlement mechanism or would this activate the limitation in Paragraph 3 of Article 297?

An issue likewise arises with respect to disputes concerning practice in fisheries on straddling fish stocks. Fish stocks can straddle either in the respective EEZs of two coastal States or between an EEZ and the high seas. While fisheries in the EEZ are excluded form compulsory dispute settlement system, practices in fisheries beyond the EEZ are not.[68] Straddling fish stocks in the high seas can also be in a regime determined by the regional fisheries management organization ("RFMO") in the area where these fish stocks thrive.[69] Consequently, the dispute on the very same straddling fish stocks can be a subject of two different legal regimes—one where the compulsory dispute mechanism may apply, and one in which it may not.[70] It is not very sensible to apply two legal regimes for fishery issues in the EEZ and those in the high seas if the dispute involves the very same fish stocks.[71]

2. Optional Exceptions

For the optional exceptions in Article 298 of the Convention to be applicable, a State has to make a declaration that it does not accept the compulsory dispute settlement provisions of Article 287 for disputes relating to (i) sea boundary delimitations, or those involving historic bays and titles, (ii) military activities and law enforcement activities, and (iii) those in respect of which the Security Council of the United Nations is exercising the functions assigned to it.

While reservations can be declared for disputes relating to sea boundary delimitations or those involving historic bays and titles, these disputes can, nevertheless, be resolved through conciliation provided that these disputes occur after the entry into force of the Convention. However, if a dispute necessarily involves sovereignty or other rights over land territory, then it cannot be submitted for conciliation.[72] Assuming that the dispute continued to conciliation proceedings, the disputing parties are to negotiate on the basis of the

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[68] Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, art. 32, U.N. Doc. A/CONF.164/37 (Sept. 8, 1995).

[69] Churchill, *supra* note 17, at 157.

[70] A.E. Boyle, *supra* note 17, at 44-45. *See also* YOSHIFUMI TANAKA, THE INTERNATIONAL LAW OF THE SEA 402 (2012).

[71] Boyle, *supra* note 17, at 43.

[72] Convention, art. 298, ¶ 1(a).

conciliation commission's report. If the parties do not arrive at an agreement, they can agree to submit the question to an arbitral body or tribunal under Article 287 of the Convention. However, they can also agree to the contrary.[73] The Convention does not provide for a solution if the parties choose the latter option.

The inclusion of sea boundary delimitation in compulsory dispute settlement was among the major issues faced by the drafters of the Convention. It was contentious for a number of reasons.

There were apprehensions from the delegates that sea boundary delimitation would be used as a tool for furthering a territorial claim.[74] Some delegates also wanted States to identify a specific regional body that would eventually settle the sea boundary delimitation if they could not agree among themselves that the Convention itself should provide for such a compulsory dispute settlement mechanism. These delegates were of the view that no category of law of the sea disputes would be left without a compulsory dispute settlement procedure.[75] However, the proposal to require States that opted for the optional exclusion of sea boundary delimitation to indicate an alternative procedure that would likewise lead to binding decisions had to be withdrawn because of the difficulty of finding an acceptable and appropriate body that could be tasked with this duty or one that would be open to all parties to the Convention.[76] Or, the party might also not know in advance which entity would be most appropriate as it could not anticipate all the circumstances of a delimitation settlement or dispute. The delegates nevertheless emphasized that there should be a peaceful and compulsory settlement for all categories of the law of the sea.[77]

With respect to historic bays and titles, there are at least three factors to be taken into consideration in determining the acquisition of historic title to a maritime area. First, there must be an effective exercise of sovereignty over the area by the claiming State; second, the exercise of sovereignty must be for a prolonged period of time; and third, the attitude of other States on this claim must be of general toleration, giving special importance to the attitude to the neighbouring States.[78]

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[73] Convention, art. 298, ¶ (1)(a)(iii).

[74] ADEDE, *supra* note 20, at 132. This refers to the 1977 session of the Conference.

[75] *Id.* at 107-108.

[76] *Id.* at 132-133.

[77] *Id.* at 133.

[78] *Judicial Regime of Historic Waters, Including Historic Bays*, U.N. Doc. A/CN.4/143 (Mar. 9), 1962, *available at* http://legal.un.org/ilc/sessions/14/14docs.htm (last visited Jan. 30, 2014).

3. Interplay of Exceptions and Limitations

Professor Boyle makes an illustration of the interplay between Articles 297 and 298 through a hypothetical scenario. To quote:

> Take a dispute involving EEZ claims around a disputed island or rock, such as Rockall, and the exercise of fisheries jurisdiction by one State within this EEZ. How do we categorize the dispute? Does it relate to the exercise of sovereign rights and law enforcement within the EEZ, excluded under Articles 297 and 298 from compulsory jurisdiction? Is it a maritime boundary dispute concerning the interpretation or application of Article 74 and excluded from binding compulsory jurisdiction under Article 298 if one of the parties has opted out under that Article? Does it necessarily involve disputed sovereignty over land territory so that even compulsory conciliation is excluded? Or is it a dispute about entitlement to an EEZ under Part V and Article 121 (3) of the Convention? If it is the last, it is not excluded from compulsory jurisdiction under either Article 297 or 298. Much may thus depend on how our hypothetical dispute is put. If it is a misuse of fisheries jurisdiction powers within the EEZ then it will surely be excluded under Article 297. But if it is an invalid claim to an EEZ contrary to Article 121 (3) then it would appear not to be excluded. But suppose, instead, that it is reformulated as a claim that on equitable grounds the island or rock should be given no weight as a basepoint in a delimitation under Article 74? *Prima facie* this appears to be caught by Article 298 (1). [...] [E]verything turns in practice not on what each case involves but on how the issues are formulated.[79]

While the similarity of this scenario from the facts of the case now pending dispute between the Republic of the Philippines and People's Republic of China[80] is apparent, this article was published almost two decades ago, in 1997.

This paper will refrain from discussing the Philippines-China case, but it is sufficient to say at this point that it is possible for issues to interplay. Inversely, a respondent State can deny a court or tribunal's jurisdiction by interpreting the claims of an applicant State as among those issues covered by the limitations or exceptions even if the applicant did not state the issue in that

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[79] AE Boyle, *supra* note 17, at 44.

[80] Republic of the Philippines v. People's Republic of China, PCA Case No. 2013-19 (Perm. Ct. Arb.), *available at* http://www.pca-cpa.org/showpage.asp?pag_id=1529 (accessed Jan. 21, 2014).

manner. In any case, the question of jurisdiction may become contentious between parties.

This has already happened in the case between the Republic of the Philippines and People's Republic of China,[81] and also between the Kingdom of the Netherlands and the Russian Federation.[82] The issue of non-appearance of a party because of the court's alleged absence of jurisdiction was also confronted by the ICJ in several cases to be discussed in the latter part of this paper.

No matter the reason that a party may bring forward to question the jurisdiction of a court or tribunal, it should be put to mind that under the fourth paragraph of Article 288 of the Convention, it is for the court or tribunal, and not for an applicant or respondent, to decide whether the said court or tribunal has jurisdiction.[83] The rule of *kompetenz-kompetenz* is found in most statutes of international courts and tribunals, granting to such courts and tribunals the power to issue an indisputable determination on all the issues raised before it. The ICJ, for instance, reflects this rule in the sixth paragraph of Article 36 of its Statute. The Inter-American Court of Human Rights and the European Court of Human Rights are also among the many other courts that uphold this rule.[84]

Despite the rule on *kompetenz-kompetenz*, however, parties still refuse to appear before an international court or tribunal by arguing that the said body lacks jurisdiction. When this happens, the rules on default by a party come into play. The incidence of default proceedings and the court or tribunal's approach to this issue is discussed in the next section of this paper.

II. RULES AND PRACTICE ON NON-APPEARANCE OF INTERNATIONAL COURTS AND TRIBUNALS

The Convention gives a State Party a choice on the adjudicatory body it wishes to have the jurisdiction to settle the dispute concerning the interpretation of the Convention, or the interpretation or application of an international agreement related to the purposes of the Convention.[85] The rules on or treatment of default would depend on the rules of that adjudicatory body. The

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[81] *Id.*

[82] Arctic Sunrise (Neth. v. Russ.), ITLOS Case No. 22, *available at* http://www.itlos.org/index.php?id=264.

[83] Convention, art. 288, ¶ 4.

[84] THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, A COMMENTARY 643 (Andreas Zimmerman, et al. eds., 2006).

[85] Convention, art. 288, ¶ 1-2.

bodies enumerated in Article 287 are the Tribunal, the ICJ, the Annex VII Tribunal, and the Annex VIII Tribunal.

A. The Tribunal

Article 28 of the Statute of the Tribunal states the following for default procedures:

> When one of the parties does not appear before the Tribunal or fails to defend its case, the other party may request the Tribunal to continue the proceedings and make its decision. Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings. Before making its decision, the Tribunal must satisfy itself not only that it has jurisdiction over the dispute, but also that the claim is well founded in fact and law.

The Arctic Sunrise case.[86] The first case for the Tribunal where a party was in default is the *Arctic Sunrise* case.

The *Arctic Sunrise* case is a request for provisional measures in accordance with the fifth paragraph of Article 290 of the Convention.[87] The Arctic Sunrise is a vessel registered in the Netherlands. According to the Netherlands, Russian authorities boarded the vessel on September 19, 2013 while it was in the EEZ of Russia. The vessel was later detained along with the 30 persons on board.[88] Among the reliefs requested by the Netherlands to the Tribunal was for Russia to re-supply the Arctic Sunrise, allow the vessel to leave from its place of detention, release the crew members of the Arctic Sunrise and permit them to leave Russian territory.[89]

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[86] Arctic Sunrise (Neth. v. Russ.), ITLOS Case No. 22, *available at* http://www.itlos.org/index.php?id=264.

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

[88] Arctic Sunrise (Neth. v. Russ.), ITLOS Case No. 22, Order (Nov. 22, 2013), ¶ 59, *available at* http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Order/C22_Ord_22_11_2013_orig_Eng.pdf.

[89] *Id.* at ¶ 35.

Russia manifested to the Registry of the Tribunal its non-acceptance to the arbitral procedure under Annex VII and its intention not to participate in the proceedings of the Tribunal for the prescription of provisional measures as requested by the Netherlands.[90] Russia based its refusal to participate in the proceedings from the declaration it made in its instrument of ratification done on March 12, 1997, where it manifested its non-acceptance of compulsory procedures entailing binding decisions to disputes concerning law-enforcement activities with regard to the exercise of sovereign rights or jurisdiction.[91]

In dealing with Russia's lack of participation in the proceedings, the Tribunal declared that

> the absence of a party or failure of a party to defend its case does not constitute a bar to the proceedings and does not preclude the Tribunal from prescribing provisional measures, provided that the parties have been given an opportunity of presenting their observations on the subject.[92]

Although the Order did not address directly the application of Article 28 of the Statute of the Tribunal, thorough discussions were supplied by several judges of the Tribunal in their separate opinions.

Judges Wolfrum and Kelly explained in their joint separate opinion that the requisite in Article 28 of the Statute of the Tribunal—that the Tribunal must satisfy itself that the "claim is well founded in fact and in law"—covers all proceedings before the Tribunal, including provisional measures. They noted that while provisional measures as provided in Article 290 of the Convention only requires the Tribunal to establish *prima facie* jurisdiction, Article 28 of the Statute of the Tribunal requires that the claim must be well founded in fact and in law. They harmonized the two articles by interpreting the phrase "well founded in fact and in law" in Article 28 to apply in accordance with the standards for a particular dispute. In other words, if a provisional measures proceeding only requires *prima facie* jurisdiction for the Tribunal to acquire jurisdiction, then the requisite that the claim must be well founded in fact and in law must likewise be satisfied under *prima facie* standards only.

Further, Judges Wolfrum and Kelly emphasized that the existence of default provisions in the Statute does not grant a party the right not to appear in the proceedings.

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[90] *Id.* at ¶ 9, 46, *quoting* the *Note Verbale* of Oct. 22, 2013 from the Russian Federation.
[91] *Id.* at ¶ 41.
[92] *Id.* at ¶ 48.

Judge Paik shared the same view as Judges Wolfrum and Kelly on the applicability of Article 28 of the Statute for cases on the merits and for provisional measures. He likewise interpreted the term "claim" in the Article 28 to cover both a claim on the merits and one for provisional measures.

B. The International Court of Justice

Article 53 of the ICJ's Statute has the following provision in cases of default:

> 1. Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim.
>
> 2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36[93] and 37,[94] but also that the claim is well founded in fact and law.

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[93] Statute of the International Court of Justice art. 36, June 26, 1945, 33 U.N.T.S. 993 [hereinafter "ICJ Statute"], It provides:

> 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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> 2. 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:
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> a. the interpretation of a treaty;
>
> b. any question of international law;
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> c. the existence of any fact which, if established, would constitute a breach of an international obligation;
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> d. the nature or extent of the reparation to be made for the breach of an international obligation.
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> 3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.
>
> 4. Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court.
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> 5. Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.
>
> 6. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

[94] ICJ Statute, art. 38. It provides:

The ICJ has had several occasions to apply Article 53. Below are brief summaries of these cases, with emphasis on how the ICJ tackled the issue of defaulting parties.

Corfu Channel Case.[95] This case was instituted by the Government of the United Kingdom against the Government of Albania on a dispute arising from the incidents in the Corfu Strait, where two British destroyers struck mines in Albanian waters, damaging two British vessels and resulting in the loss of life of the members of its navy.

Albania was not a member of the United Nations during the time of the incident. When the dispute was referred to the Security Council, Albania was invited by the body to participate in the discussions, which it did. The Security Council adopted a resolution recommending the referral of the dispute to the ICJ.[96]

The United Kingdom then submitted an Application to the ICJ. Albania opposed this action through a letter dated July 2, 1947, contending that the Application was not in conformity with the Security Council recommendation as it was done through unilateral application. Nevertheless, it expressed in the same letter its preparedness to appear before the ICJ.

The ICJ interpreted the letter as a voluntary acceptance of its jurisdiction.[97] Subsequent to this ruling, the parties concluded a Special Agreement for the ICJ to judge, among others, the questions of whether Albania was responsible for the explosions and, assuming that it was, if there was a duty to pay compensation.

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1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequoet bono*, if the parties agree thereto.

[95] Corfu Channel (U.K. v. Alb.), Judgment Order, 1949 I.C.J. 244 (Dec. 15).

[96] Corfu Channel (U.K. v. Alb.), Judgment of Preliminary Objection, 1948 I.C.J. 15.

[97] *Id.*

The Judgment of April 9, 1949[98] held that Albania was responsible for the explosions.

Albania actively defended itself in the case until the ICJ rendered a judgment on the merits. It was only during the third phase of the case (the assessment of amount of compensation)[99] when Albania did not defend its case in the proceedings. Albania was of the view that it was beyond the terms of the Special Agreement for the ICJ to determine the amount of compensation due. The ICJ said that this issue was resolved in its Judgment of April 9, 1949 and the matter was, therefore, *res judicata.* The ICJ proceeded with the case following Article 53 of its Statute, which obliges it to determine whether the claims of the Applicant are well founded in fact and in law. In determining the soundness of the claims, the ICJ said that it was not compelled to examine the accuracy of all the details in the submissions as it was "sufficient for the Court to convince itself by such methods as it consider[ed] suitable that the submissions [were] well founded."[100]

Dr. Ecer (Judge *ad hoc* designated by Albania) was of a different view. For him, the standard of lesser degree of accuracy for the details in applying Article 53 should not be implemented in a case such as the Corfu Channel when the non-appearing State had appeared and presented its case in the earlier stages of the court proceedings. These kinds of cases should not be treated as pure default, according to him.[101]

Anglo-Iranian Oil Company Case.[102] In 1933, the Imperial Government of Iran had an agreement with the Anglo-Iranian Oil Co., Ltd. ("oil company"), a company incorporated in the United Kingdom. In 1951, Iran nationalized the oil industry that eventually led to a dispute between the oil company and Iran.

Adopting the cause of the oil company, the United Kingdom instituted proceedings before the ICJ against Iran on May 26, 1951. Both the United Kingdom and Iran made Declarations accepting the jurisdiction of the ICJ in accordance with the second paragraph of Article 36 of the ICJ Statute. The United Kingdom asked for the restitution of the oil company or for compensation for its expropriation by Iran.

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[98] Corfu Channel (U.K. v. Alb.), Judgment Order, 1949 I.C.J. 244 (Dec. 15).

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] Anglo-Iranian Oil Co. (U.K. v. Iran), Judgment Order, 1952 I.C.J. 93 (July 22).

On June 22, 1951, the United Kingdom requested for provisional measures pending the resolution of the dispute.[103] Iran objected to the request for provisional measures, contending that the ICJ had no jurisdiction in the case. Iran did not appear during the hearing of the case. The ICJ subsequently made an Order issuing certain provisional measures.[104] While the Order mentioned that Iran did not participate during the hearing of the case, it did not discuss the repercussions or the implications of Iran's non-appearance.

During the deliberation on the merits of the case, Iran submitted, in lieu of a counter-memorial, a document declaring its refusal to recognize the jurisdiction of the ICJ. Despite this, it was able to amply present its position by means of its submissions before the ICJ.

The ICJ ultimately found that it did not have jurisdiction over the case.

Nottebohm Case.[105] The Government of the Principality of Liechtenstein filed an Application before the ICJ against the Republic of Guatemala. Both Liechtenstein and Guatemala made prior declarations accepting the compulsory jurisdiction of the ICJ. Liechtenstein alleged that Mr. Nottebohm was its national and that Guatemala acted contrary to international law and is therefore liable for unjustly detaining and expelling Mr. Nottebohm from Guatemala and from sequestering and confiscating his property.

Instead of a counter-memorial, Guatemala sent a communication to the ICJ. Guatemala presented its position to the ICJ by means of this communication. One of the contentions of Guatemala was that its declaration accepting the compulsory jurisdiction of the ICJ was only for a period of five years which already expired when Liechtenstein filed its Application.

Guatemala did not send a representation during the hearing of the case. In deciding that it had jurisdiction, the ICJ said that it had the right to decide its own jurisdiction and had the power to interpret for this purpose the instruments which governed that jurisdiction.

Guatemala eventually participated in the case on the merits.

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[103] Anglo-Iranian Oil Co. (United Kingdom of Great Britain and Northern Ireland v. Iran), Order (July 5, 1951), *available at* http://www.worldcourts.com/icj/eng/decisions/1951.07.05_oil_co2.htm

[104] *Id.*

[105] Nottebohm (Liech. v. Guat.), Judgment Order, 1953 I.C.J. 111 (Nov. 18).

Trial of Pakistani Prisoners of War.[106] Pakistan instituted proceedings against India before the ICJ over a dispute on the charges of genocide committed against 195 Pakistani prisoners of war or civilian internees while in Indian custody. India did not consent to the jurisdiction of the ICJ and did not appear during the hearing for provisional measures. Since Pakistan was expecting to negotiate with India on matters including the reliefs sought in the interim measures, it requested the ICJ to postpone its request for provisional measures to facilitate the negotiations.[107] The ICJ issued an Order setting the dates of submissions of both parties and did not discuss India's non-appearance.

The case was later discontinued upon the request of Pakistan because the Parties resolved the dispute through negotiations.[108]

Fisheries Jurisdiction Cases (Federal Republic of Germany v. Iceland[109] **and United Kingdom v. Iceland**[110]**).** This dispute concerned the proposed extension of the fisheries jurisdiction of the Government of Iceland. The United Kingdom, as Applicant, cited the first paragraph of Article 36 of the ICJ Statute and the Exchange of Notes[111] dated March 11, 1961 between the Parties.

During the jurisdiction phase of the case, Iceland informed the ICJ by letter that it did not grant jurisdiction to the ICJ and will not appoint an Agent for the proceedings. The United Kingdom maintained that the Exchange of Notes was either a treaty or a convention in force which gave the ICJ the jurisdiction to resolve disputes, including Iceland's claim for an extended fisheries jurisdiction.

Iceland did not submit any pleadings, was not represented in the hearings, and did not give any submissions.

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[106] Trial of Pakistani Prisoners of War (Pak. v. India), Interim Protection Order 1973 I.C.J. 328 (Jul. 13).

[107] *Id.*

[108] Trial of Pakistani Prisoners of War (Pak. v India), Order, 1973 I.C.J. 347 (Dec. 15).

[109] Fisheries Jurisdiction (W. Ger. v. Ice.), 1973 I.C.J. 49; Fisheries Jurisdiction (W. Ger. v. Ice.), 1974 I.C.J. 175.

[110] Fisheries Jurisdiction (U.K. v. Ice.), 1973 I.C.J. 3; Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. 3.

[111] The Exchange of Notes stipulated: "The Icelandic Government will continue to work for the implementation of the Althing Resolution of May 5, 1959, regarding the extension of fisheries jurisdiction around Iceland, [...] and, in case of a dispute in relation to such extension, the matter shall, at the request of either party, be referred to the International Court of Justice."

On the issue of Iceland's non-participation in the case, the ICJ said that it regretted Iceland's failure to plead in the case. Nevertheless, it had to examine its jurisdiction *proprio motu* in accordance with jurisprudence and further by Article 53 of the ICJ Statute. The Court also noted that Iceland failed to follow the second paragraph of Article 62 of the Rules of Court which requires a party to set out the facts and law on which its objection is based.

Iceland acted in the same manner during the merits phase of the case[112] but sent a letter expressing its non-acquiescence to any of the allegations or contentions of law made by the United Kingdom.

The ICJ once again relied on Article 53 of the ICJ Statute in proceeding with the resolution of the case on the merits despite Iceland's non-participation. In applying the principles of international law in this case, the ICJ considered upon its own initiative all rules of international law which might have been relevant to the settlement of the dispute. It expressly did not impose upon the parties the burden of establishing or proving rules of international law.

In evaluating the case, it took into consideration the legal arguments of the United Kingdom and the various communications sent by Iceland. According to the ICJ, it acted with circumspection and had taken special care, considering that respondent State was absent.

The fisheries case between the Federal Republic of Germany and Iceland was likewise revolved on the same issue and Iceland's non-participation was treated in the same manner as in its Fisheries case with the United Kingdom.

Nuclear Tests Cases (Australia v. France[113] and New Zealand v. France[114]). The issue for the two cases was the legality of the atmospheric nuclear tests conducted by France in the South Pacific. The respective Applications of New Zealand and Australia invoked the first paragraph of Article 36 and Article 37 of the ICJ Statute and the General Act for the Pacific Settlement of International Disputes[115] or, in the alternative, the second and fifth paragraphs of Article 36 of the ICJ Statute.

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[112] Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. 3, ¶ 13.

[113] Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253.

[114] Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J. 457.

[115] 1928 General Act for the Pacific Settlement of International Disputes, Sept. 26, 1928, 93 L.N.T.S. 343.

In both cases, France did not submit any pleading, was not represented during the hearings, and made no formal submissions before the ICJ. It, however, submitted a letter (dated May 16, 1973) manifesting its refusal to accept the ICJ's jurisdiction and requesting for the withdrawal of the case from the ICJ's roster.

The ICJ treated the non-appearance and non-participation of France in the two cases in a very similar fashion. It stated that while it regretted France's failure to present its arguments, it had to proceed with the case. In reaching its conclusion, the ICJ gave due regard to the evidence and arguments presented and raised by the applicant States and also to any relevant evidence. From these considerations, it assessed the existence of its jurisdiction and determined that the applications were well-founded in fact and in law.[116]

The ICJ's Judgment did not make a decision because it took notice of the statements from France, through various official sources, manifesting its intention to cease the conduct of atmospheric nuclear tests. The ICJ did not issue a decision because it interpreted France's statements as having the effect of ending the dispute among the Parties.

Aegean Sea Continental Shelf Case.[117] Greece submitted an Application to the ICJ requesting for a judicial declaration of Greece's entitlement to a continental shelf and for the determination of the boundary of the continental shelves between Greece and Turkey.

Although Turkey neither appeared in the hearings nor presented any submissions, it conveyed its observations to the ICJ by means of a letter. The ICJ examined the question of its jurisdiction *proprio motu* according to the terms of Article 53 of the ICJ Statute.

Greece based the ICJ's jurisdiction on Article 17 of the General Act for the Pacific Settlement of International Disputes in conjunction with Article 36 and 37 of the ICJ Statute and the Brussels Joint Communique made by Greece and Turkey.

The ICJ took note of the reservations made by Greece in the General Act where it excluded disputes relating to the territorial status of Greece from the procedures of the General Act . It treated the present dispute as relating to the territorial status of Greece within the meaning of the reservations made by Greece. With respect to the Brussels Joint Communique, it did not see the

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[116] *Nuclear Tests* cases, at ¶ 15 (in both cases).

[117] Aegean Sea Continental Shelf (Greece v. Turk.), 1978 I.C.J. 3.

Communique as a commitment to accept submission of the dispute to the ICJ by unilateral application.

The Court did not find that it had jurisdiction in the dispute.

United States Diplomatic and Consular Staff in Tehran.[118] The United States of America instituted proceedings against the Islamic Republic of Iran concerning the dispute over the seizure and holding as hostages members of the diplomatic corps and consular staff of the United States as well as other United States nationals.

Iran did not file any pleading before the ICJ. It was not represented during the hearings and did not file any submissions. However, it sent letters to the ICJ conveying its position. In dealing with Iran's absence, the ICJ reiterated its statement in the Corfu Channel case,[119] to quote:

> While Article 53 thus obliges the Court to consider the submissions of the party which appears, it does not compel the Court to examine their accuracy in all their details; for this might in certain unopposed cases prove impossible in practice. It is sufficient for the Court to convince itself by such methods as it considers suitable that the submissions are well founded.

The ICJ had to rely on the above-mentioned principle because of its limited access to official documents. The United States could not access its diplomatic and consular premises, personnel and archives in Iran to establish its factual allegations. Most of the evidence considered by the ICJ were sourced from newspaper, radio and television reports, including statements from Iranian officials.

Military and Paramilitary Activities in and against Nicaragua.[120] The Government of Nicaragua instituted proceedings before the ICJ against the United States for the dispute on the responsibility for the military and paramilitary activities in and against Nicaragua. The United States participated in

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[118] United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3.

[119] Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 244.

[120] Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14.

the proceedings for the request for provisional measures,[121] and the proceedings for the determination of the ICJ's jurisdiction and the admissibility of the case.[122]

In its Judgment dated November 26, 1984[123] on the ICJ's jurisdiction and the admissibility of the case, the ICJ found that it had jurisdiction on the basis of Article 36 of the ICJ Statute and the Treaty of Friendship, Commerce and Navigation between the disputing countries.

After the ICJ issued the November 26, 1984 Judgment, the United States reiterated to the Court, by a letter, its view that the ICJ had no jurisdiction in the case and that the ICJ's Judgment was erroneous. It manifested through the same letter its intention not to participate further in the proceedings relating to the case.

Because of the United States' non-participation in the merits stage of the proceedings, the ICJ had to resort to Article 53 of the ICJ Statute. The ICJ expounded its discussion on default proceedings unlike its previous treatment of this behaviour. It clarified the legal repercussions of default proceedings, to wit:

> 1. A case will continue without the participation of the non-appearing State;[124]
>
> 2. The non-appearing State will be bound by the eventual judgment in accordance with Article 59 of the Statute;[125]
>
> 3. The Court "must attain some degree of certainty as in any other case that the claim of the party appearing is sound in law, and, so far as the nature of the case permits, that the facts on which it is based are supported by convincing evidence;"[126]
>
> 4. The Court is not solely dependent on the arguments of the parties before it with respect to the applicable law in deciding whether the claim is well founded in law;[127]

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[121] Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Provisional Measures Order, 1984 I.C.J. 169 (May 10).

[122] Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392.

[123] *Id.*

[124] Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 24.

[125] *Id.*

[126] *Id.*

[127] *Id.*

> 5. The Court is not bound to the material submitted by the parties in examining the facts of the case but its own enquiries cannot make up for the absence of one of the parties.[128]
>
> 6. The absent party forfeits the opportunity to counter the factual allegations of its opponent;[129]
>
> 7. While the appearing party has to prove the allegations it makes, the Court is not compelled to examine the accuracy of the submissions "in all their details."[130]

C. The Arbitral Body Constituted under Annex VII and Annex VIII of the Convention

The arbitral body constituted under Annex VII determines its own procedure, as long as the procedure shall assure that each party shall have the opportunity to be heard and to present its case.[131] In instances of default, Annex VII specifies the standards that have to be met by the constituted arbitral body in this manner:

> ARTICLE 9. *Default of Appearance.*
>
> If one of the parties to the dispute does not appear before the arbitral tribunal or fails to defend its case, the other party may request the tribunal to continue the proceedings and to make its award. Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings. Before making its award, the arbitral tribunal must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law.[132]

The special arbitral tribunal constituted in accordance with Annex VIII of the Convention follows the same guidelines as provided in Annex VII of the Convention, both in terms of the drafting of its own rules of procedure and the standards to be complied with in cases of default.[133]

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[128] *Id.* at 25.
[129] *Id.* at 25.
[130] *Id.* at 25.
[131] Convention, annex VII, art. 5.
[132] Convention, annex VII.
[133] Convention, annex VIII, art. 4.

The Republic of the Philippines v. The People's Republic of China.[134] The arbitral body constituted for the dispute between the Philippines and China is in accordance with Annex VII of the Convention. On January 22, 2013, the Philippines served China with a Notification and Statement of Claim. China rejected the Philippines' notification through a *Note Verbale* dated February 19, 2013. On August 1, 2013, China addressed a *Note Verbale* to the Permanent Court of Arbitration reiterating its position that it was not accepting the arbitration initiated by the Philippines and that it was not participating in the proceedings.[135]

In addition to Article 9 of Annex VII of the Convention, the rules of procedure[136] of the arbitral tribunal for this dispute provides the following:

> In the event that a party does not appear before the Arbitral Tribunal or fails to defend its case, the Arbitral Tribunal shall invite written arguments from the appearing party on, or pose questions regarding, specific issues which the Arbitral Tribunal considers to have not been canvassed, or have been inadequately canvassed, in the pleadings submitted by the appearing party. The appearing party shall make a supplemental written submission in relation to the matters identified by the Arbitral Tribunal within three months of the Arbitral Tribunal's invitation. The supplemental submission of the appearing party shall be communicated to the non-appearing party for its comments which shall be submitted within three months of the communication of the supplemental submission. The Arbitral Tribunal may take whatever other steps it may consider necessary, within the scope of its powers under the Convention, its Annex VII, and these Rules, to afford to each of the Parties a full opportunity to present its case.[137]

1. Observations

Default proceedings open concerns, both in terms of procedure and the merits of the case, distinct from cases where both parties actively participate. While it may not appear as adversarial as when both parties actively participate in the resolution of a case, it has its own issues that may not always be addressed

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[134] Republic of the Philippines v. People's Republic of China, PCA Case No. 2013-19 (Perm. Ct. Arb.), *available at* http://www.pca-cpa.org/showpage.asp?pag_id=1529.

[135] PCA First Press Release, Aug. 27, 2013, *available at* http://www.pca-cpa.org/showpage.asp?pag_id=1529 (last visited Jan. 17, 2014).

[136] *Id.*

[137] Republic of the Philippines v. People's Republic of China, PCA Case No. 2013-19, Rules of Procedure [hereinafter "Rules of Procedure"], art. 25, ¶ 2, *available at* http://www.pca-cpa.org/showpage.asp?pag_id=1529 (last visited Feb. 15, 2014).

by the rules. Moreover, default proceedings, in most cases, lead to judgments that are, to say the least, a challenge to comply with.

Despite the prevalence of the *kompetenz-kompetenz* rule in most international courts including the bodies created pursuant to the Convention, the basis for non-appearance in the cases previously discussed is the allegation of lack of jurisdiction of the court or tribunal.

The rules for default under the rules of the Tribunal, the ICJ and Annex VII all provide that the body can proceed to grant the relief prayed for provided that it has jurisdiction and the claim is well founded in fact and law. These rules reflect the guiding principle for all default proceedings of *audi alteram partem*, whereby a court is required to listen to the arguments and evaluate the evidence presented by the parties before it gives a decision in a contentious case.[138] It is enough that both parties are given an equal opportunity to present their case before the court or tribunal. If one of the parties does not or refuses to participate in the proceedings, the court can still proceed with its judgment.[139]

There are certainly advantages for the appearing party in default proceedings. The non-appearing party cannot counter the factual allegations of the other and the court or body will not compel itself to examine the accuracy in all the details of a party's submission. The effects of default as set out in the *Nicaragua* case appear to be fair and reasonable for both parties.

The details of its actual application, however, subject the applicant to hurdles that otherwise would not have been there had the respondent cooperated and appeared before the tribunal or the court. These difficulties are brought about by the necessity for the adjudicatory body to arrive at a conclusion in an objective manner. In the experience of some practitioners,[140] these hurdles actually work in favor of the respondent. To quote Sir Fitzmaurice, "the injustice to the plaintiff State arises precisely from the Court's determination not to be unfair to the defendant State by penalizing it for its non-appearance in the proceedings."[141] What follows are some of the reasons for this position.

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[138] H.W.A. THIRLWAY, NON-APPEARANCE BEFORE THE INTERNATIONAL COURT OF JUSTICE 43 (1985).

[139] *Id.*

[140] For example, Fitzmaurice, O'Connell and Thirlway.

[141] Gerald Fitzmaurice, *The Problem of the 'Non-Appearing' Defendant Government, in* THE BRITISH YEARBOOK OF INTERNATIONAL LAW 91, 95 (1982).

When a State respondent does not appear before an international court or tribunal, it does not mean that any of its statements outside the court will be refused evaluation in order for the court to arrive at its decision. In practice, States Parties, although vehemently refusing to participate in the proceedings, would submit, before the adjudicatory body, a statement that is not technically considered a pleading.[142] In the Separate Opinion of Fitzmaurice in the *Fisheries Case*,[143] he expressed his view of the inequity that results from the act of a non-appearing State of not formally providing the court with submissions and yet providing it with letters and telegrams that had gone into the merits of the case. According to Fitzmaurice, this gives the impression that the action was intended for Iceland to present its position as if it actually appeared before the Court while allowing her to retain the position of non-recognition on the proceedings and its outcome.

Another mode for a respondent to informally convey its position is by means of press releases. These materials may consciously or unconsciously influence the evaluation of the case. As these can come from different sources, the applicant could be forced to have a shotgun approach to address all the informal statements made by the respondent outside of the court proceedings. There are risks for the applicant in taking this route. These statements may have come from unverified sources and subsequently denied by the respondent, or these statements may be inconsistent or contradictory, thus making a comprehensive reply to these statements not possible.

This predicament was experienced by the Tribunal as expressed by Judge *Ad Hoc* Anderson, where he stated in his Declaration for the *Arctic Sunrise* case that the Tribunal had to resort to diplomatic communications, legislation and court decisions from the Russian Federation which were "both incomplete and in places inconsistent."[144]

Still in the *Arctic Sunrise* case, the Order of the Tribunal itself admitted its difficulty in evaluating the nature and scope of the respective rights of the parties that could have been easier done had Russia provided it with more information, both in facts and in law.[145]

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[142] *See id.* at 94. Fitzmaurice quotes O'Connel in the latter's pleading before the ICJ for the Agean case where, in the transcript, O'Connel cited the Fisheries Jurisdiction cases, the Nuclear Tests cases and the Pakistan Prisoners of War case where this practice was done.

[143] Fisheries Jurisdiction (U.K. v. Ice.), 1973 I.C.J. 3.

[144] Arctic Sunrise (Neth v. Russ.), ITLOS Case No. 22, Dec'n of Anderson, *J.*, ¶ 2, *available at* http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Order/C22_Ord_22.11.2013_decl.Anderson_orig_Eng.pdf.

[145] *Id.* at ¶¶ 54-55.

The arbitral tribunal in the dispute between the Republic of the Philippines and China[146] anticipated this difficulty and provided in its rules that the tribunal can pose questions regarding specific issues which it considers to have not been canvassed or inadequately canvassed by the appearing party.[147] Nevertheless, there are still questions that only the absent respondent is competent to address.

It has also been observed that the effect of the failure to object seems to be graver when both parties participate in the proceedings, treating the said non-action as acquiescence from the part of opponent. Meanwhile, when a party does not appear, its failure to object can be given varying interpretations.[148]

Non-appearing States Parties may also have the view that they are not bound by the decision of the court or tribunal since they did not appear in the proceedings, seeing the proceedings as *res inter alios acta* and the judgment a mere "academic expression of opinion."[149] One of the justifications for this action is the notion that the court or tribunal has no jurisdiction in the proceedings against the non-appearing State. [150]

The adjudicatory body, in general has this tendency to give more allowances to a non-appearing party, because it does not have the mechanism to coerce a State to participate in the proceedings. While a State may have the obligation to go through compulsory dispute settlement as a party to the Convention, it might still decide not to participate in the proceedings and get away with it.

Thirlway observes that respondent States seem to enjoy a privilege in non-appearance, as succinctly put in the report on the legislative intention of Article 53 of the ICJ Statute:

> The essential condition for the exercise of jurisdiction in such a case is and must be, that the plaintiff, although proceeding *ex parte*, should present its case as fully as if the defendant were present, and that the court be especially mindful of the interests of the absent defendant. This does not mean that the court shall take sides. It does mean,

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[146] Republic of the Philippines v. People's Republic of China, PCA Case No. 2013-19, *available at* http://www.pca-cpa.org/showpage.asp?pag_id=1529.

[147] Rules of Procedure,art. 25, ¶ 2.

[148] THIRLWAY, *supra* note 138, at 102.

[149] THIRLWAY, *supra* note 138, at 46, citing as example the letter from the French Ambassador to the Registrar, ICJ Pleadings, Nuclear Tests, Vol. II, 363, No. 46. *See also* Fitzmaurice, *supra* note 141, at 98.

[150] THIRLWAY, *supra* note 138, at 46.

> however, that *the court, without espousing the cause of the defendant, shall, nevertheless, act as its counsel.* There is an apt French phrase to the effect that "the absent are always wrong". *The court must go on the assumption that the absent party is right*, not wrong until the plaintiff has proven him to be wrong. There is no alternative except to refuse jurisdiction, if the defendant does not appear, or to compel the presence of the defendant. The world is not ripe for this.[151]

The disadvantages of actions in default do not end with the proceedings. When a respondent refuses to appear in the proceedings, chances are, it will also not comply with the judgment.[152]

III. COMPLIANCE

Shabtai Rosenne observed that studies on judicial settlement of international disputes are comparatively disinterested in the post-adjudication phase.[153] Perhaps this is due to the notion that compliance with international law is not done by enforcement. According to Warioba,[154] international law is a "compliance-based system[,] not an enforcement based system"[155] with its order coming from the development of universal values which would then facilitate the acceptance of rules without the need to resort to enforcement.[156] Fitzmaurice shares this notion of a global conviction (he bases his notion on the conviction of what is just) that would prompt States to follow international law without actual need of an enforcement mechanism.[157] But if parties to a dispute have different, if not opposing, perceptions on what is just, this notion of uniformity seems futile. Where, then, would international law lead us? And how can enforcement be done?

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[151] THIRLWAY, *supra* note 138, at 81, *citing* James Brown Scott, *Report to the Trustees of the Carnegie Endowment on the Proceedings of the Advisory Committee of Jurists.* (Emphasis supplied.) *See also* THIRLWAY, *supra* note 138, at 25.

[152] Colter Paulson, *Compliance with Final Judgments of the International Court of Justice since 1987,* 98 AM. J. INT'L L. 434, 435 (2004). He derived this conclusion from the table of cases reflecting non-appearance and non-compliance by States Parties from 1947 to 1987 presented by Charney, *Disputes Implicating the Institutional Credibility of the Court, in* THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 310 (1987).

[153] I SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 197, 202.

[154] Joseph S. Warioba, *Monitoring Compliance with and Enforcement of Binding Decisions of International Courts,* in V MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 50 (2001).

[155] *Id.*

[156] *Id* at 51.

[157] Gerald Fitzmaurice, *The Foundations of the Authority of International Law and the Problem of Enforcement,* 19 MOD. L. REV. 1, 12-13 (1956).

Having no enforcement mechanism, it can be difficult to ensure compliance with the decisions of international courts requiring some overt action from disputing States. This can be even more difficult when, during the court proceedings, the respondent State did not participate. What are the chances that this non-participating State will comply with a court's judgment?

While there can be non-compliance even when parties fully participate in the proceedings, this part of the paper examines the compliance of States Parties with decisions rendered in default proceedings.

For purposes of this paper, compliance[158] is defined as the "acceptance of the judgment as final, and reasonable performance in good faith of any binding obligation."[159] Good faith in compliance is giving effect to the judgment while avoiding its superficial implementation or avoiding the judgment entirely.[160]

A. Compliance with Judgments Rendered in Default Proceedings

Of the default cases decided by the ICJ discussed in the previous chapter, only four actually required compliance from the court's judgment.[161] The rest were resolved without requiring further action from any of the parties.[162] Among the default cases requiring overt action for compliance, none complied within a reasonable period of time.

The ICJ's December 15, 1949 judgment[163] in the *Corfu Channel* case ordered Albania to pay the United Kingdom GBP 843,947.00. Although the United Kingdom attempted on several occasions to secure this compensation, the claim was only settled 43 years after the judgment was rendered through a Memorandum of Understanding in May 1992, where Albania agreed to deliver

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158 Compliance as defined here should be understood as compliance with international court decisions and not with international law *per se.*

159 Paulson, *supra* note 152, at 434-461.

160 Paulson, *supra* note 152, at 436.

161 The *Corfu Channel* case, the *Fisheries Jurisdiction* cases, the *United States Diplomatic and Consular Staff in Tehran* case, and the *Military and Paramilitary Activities in and against Nicaragua* case.

162 The ICJ found that it had no jurisdiction in the *Anglo-Iranian Oil Co.* and *Aegean Sea Continental Shelf* cases; in the *Nottebohm* case, it found the claim of Liechtenstein inadmissible; the *Pakistani Prisoners of War* case was later withdrawn because of an agreement between the disputing parties; and the ICJ did not rule on the *Nuclear Tests* cases because of France's intention to cease from conducting the atmospheric nuclear tests which was the subject of the dispute.

163 Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 244.

1,574 kilograms of gold and USD 2,000,000 as final settlement for the said claim.[164]

The ICJ's decisions[165] in the *Fisheries Jurisdiction* cases filed separately by the United Kingdom and Germany against Iceland ordered the Parties to negotiate for the delimitation of rights and interests of the between them and to regulate equitably the issues of catch-limitation, share allocations and other related restrictions. The issue on the 50-nautical mile fisheries zone claimed by Iceland became moot because of the Convention. No express compliance was made by Ireland prior to the Convention.

In the *United States Diplomatic and Consular Staff in Tehran* case,[166] Iran was ordered to release the diplomatic and consular staff and other United States nationals held hostage; place in the hands of the protecting power the premises, property, archives and documents of the United States Embassy and Consulate in Iran; and make reparations to the government of the United States. Through the Algerian Accords, the United States agreed to withdraw all pending or future claims before the ICJ arising from this incident.[167] The Parties also agreed to settle and terminate the claims between them through binding arbitration,[168] for which reason the Iran-United States Claims Tribunal was created.[169] To date, the Iran-United States Claims Tribunal is still in active operation.

In *Military and Paramilitary Activities in and Against Nicaragua*, the ICJ decided that the acts of the United States that brought forth this case were in breach of customary international law, as well as its treaty with Nicaragua. The ICJ ordered the United States to cease from committing such acts and to make reparations to Nicaragua.[170] Nicaragua brought the matter to the United Nations Security Council because of the continued non-compliance by the United States with the ICJ's decision. However, the call for immediate compliance to the ICJ's judgment was vetoed by the United States.[171] This issue became a subject during the 41st session of the General Assembly where it resulted in a General

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[164] Ajibola, *supra* note 6, at 19-20.

[165] Fisheries Jurisdiction (W. Ger. v. Ice.), 1974 I.C.J. 175; Fisheries Jurisdiction (U.S. v. Ice.), 1974 I.C.J. 3.

[166] United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3.

[167] Declaration of the Government of the Democratic and Popular Republic of Algeria, at 6, ¶ 11, *at* http://www.iusct.net/General%20Documents/1-General%20Declaration%E2%80%8E.pdf (last visited Jan. 31, 2014).

[168] *Id.* at 3, ¶ B.

[169] Claims Settlement Declaration, *at* http://www.iusct.net/General%20Documents/2-Claims%20Settlement%20Declaration.pdf (last visited Jan. 31, 2014).

[170] Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14.

[171] U.N. SCOR, 41st Sess., 2718th mtg. at 43-49, U.N. Doc. S/PV.2718 (1986).

Assembly Resolution[172] calling for the full and immediate compliance with the ICJ's Judgment.[173] The United States still did not comply with this resolution.

In the Tribunal's experience in the *Arctic Sunrise* case, Russia released the detailed crew but the vessel remains detained as of the time of this writing.[174]

With the knowledge that international courts in general do not have the power over a State to compel it to comply, when is it strategic to pursue international litigation? What are the instances when States tend to comply? While there are no definite answers to these questions, this paper will provide a presentation of the various theories and identified factors on why States comply with international court decisions and why at times they do not.

It is beyond the scope of this paper to deliberate on the merits of these theories and factors. Rather, this paper will simply present these views with the objective of permitting the interested reader to assess whether or not the case in mind has elements that could contribute to better compliance. It is hoped that with this presentation, States will be more guided and will be more strategic in their decision to pursue international court litigation—even when the court has compulsory jurisdiction.

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[172] General Assembly Resolutions are, in general, recommendatory. This is reflected in Articles 10 and 14 of the UN Charter, to wit:

> ARTICLE 10. The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.
>
> * * *
>
> ARTICLE 14. Subject to the provisions of Article 12, the General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations.

[173] G.A. Res. 31, U.N. GAOR, 41st Sess., 513rd mtg. at 23 , U.N. Doc. A/RES/41/31 (1986), *available at* http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/41/31&Lang=E&Area=RESOLUTION (last visited Jan. 31, 2014).

[174] Greenpeace International, *Live-Latest Updates from the Arctic Sunrise Activists*, *at* http://www.greenpeace.org/international/en/news/features/From-peaceful-action-to-dramatic-seizure-a-timeline-of-events-since-the-Arctic-Sunrise-took-action-September-18-CET/ (last visited Jan. 31, 2014).

B. Theories on Compliance with International Law

There are several theories and identified factors expounded by legal and political science scholars on compliance with international agreements. While these theories focus more on compliance with international agreements, these theories are closely linked to international court decisions, as the latter are by-products of international agreement interpretations.

From the realist perspective, international law is used by a State for the promotion of its national interest. As much as possible, a State would not want international law to restrain its foreign policies.[175]

Rational functionalism, on the other hand, views compliance with international agreements by States as a means of solving problems that they would otherwise have difficulty resolving.[176] For functionalists, a central reason for why States comply is related to reputation.[177] With increasing transparency and access to information about other States, the reputational costs for non-compliance is enhanced.[178] Functionalists also think that transparency and reciprocity are factors for compliance in a small group scenario, where State Parties constantly deal with each other, thus, the crucial role of international organizations.[179]

Another perspective is the normative view, which believes that "law could influence compliance only in the presence of a social system marked by shared norms and beliefs."[180] There is also another theory developed by Fisher which suggests that that there will be better compliance when the parties share a commonly held notion of what is fair and moral—that if the rule reflects *malum in se* rather than *malum prohibitum*, then the better chances of compliance.[181]

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[175] Beth A. Simmons, *Compliance with International Agreements*, 1 ANN. REV. POL. SCI. 79 (1998), *citing* H.J. MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE (6th ed., 1985).

[176] Simmons, *supra* note 175, at 80, *citing* R.B. Bilder, *International Third Party Dispute Settlement*, 17 DENV. J. INT'L L. & POL'Y 471 (1989).

[177] *Id.* at 81.

[178] *Id.*

[179] *Id.*

[180] *Id.* at 85, *citing* H. BULL, THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS (1977).

[181] *Id.* at 87, *citing* R. FISHER, IMPROVING COMPLIANCE WITH INTERNATIONAL LAW (1981).

Then there is the managerial theory. The managerial theory dictates that governments generally tend to keep their international promises[182] and consequently, when they enter into international agreements, States change their behaviour, and their relationships and expectations of one another.[183] Countries enter into agreements to which they can comply.[184]

Managerialists see non-compliance as not always a deliberate and calculated act,[185] but a result of ambiguities, capacity limitations and complications in its implementation.[186]

There is also the enforcement approach to compliance, where non-compliance can lead to the negative consequences.[187] Under this approach, States select international rules which they are already complying with or to which they intend to comply. For rules that do not fall under these categories, an enforcement mechanism is necessary to ensure compliance.[188]

C. Compliance with Judgments of International Courts

Directly addressing the issue of compliance with international court decisions, Alter has made several propositions when States are likely to comply.[189] Before she proceeded with her propositions in her paper, she identified the resort to international courts as an enforcement approach to compliance.[190] She qualified her propositions as a way to analyze the varying influence of international courts to State behaviour.[191]

1. When it is in the interest of the States to comply with international agreements, international courts can enhance

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[182] Abram Chayes and Antonia Handler Chayes, *Compliance without Enforcement: State Behavior under Regulatory Treaties*, 47 NEGOTIATION J. 311 (1991).

[183] Abram Chayes & Antonia Handler Chayes, *On Compliance*, 47 INT'L ORG 176 (1993).

[184] Kal Raustiala and David G. Victor, THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENT COMMITMENTS: THEORY AND PRACTICE 659-708 (David G. Victor, Kal Raustiala and Eugene B. Skolnikoff eds., 1998) at 662.

[185] *Id.*

[186] *Id. See also* Jonas Talberg, *Paths to Compliance: Enforcement, Management, and the European Union,* International Organization 56, 3, Summer 2002, 609-643 at 613.

[187] Karen J. Alter, *Do International Courts Enhance Compliance with International Law?,* 25 REV. ASIAN & PAC. STUD. 52 (2003).

[188] *Id.* at 54, *citing* G. Downs, D. Rocke & P. Barsoom, *Is the Good News about Compliance Good News About Cooperation?*, 50 INT'L ORG 379 (1996).

[189] *Id.* at 51-78.

[190] *Id.* at 52.

[191] *Id.* at 51.

compliance by providing clarity on the terms of the agreement and dissuade parties from deviating from said terms.[192]

2. International courts enhance compliance in a multilateral setting where reciprocity is not as easy to impose as compared to a bilateral setting.[193]

3. Where only a small group is burdened with the costs of compliance but compliance benefits many, international courts may bear the brunt from the losers.[194] For this proposition, Alter presents the international court as the one identified by States benefiting from a court decision as the one to blame, in order to appease the States disadvantaged with the compliance.[195]

4. International courts are effective when parties desire predictability in the result where the same rules are applied.[196]

5. International courts may pressure governments to comply with international agreements when only formal compliance is required (such as ratifying international rules, legislating international principles into national law, or abolishing national laws unacceptable in international law).[197]

6. International courts are unlikely to enhance compliance in aspirational agreements where the cause for non-compliance is the lack of capacity to comply with the commitments.[198]

7. Non-compliance is likely if domestic consensus (as reflected by the society) does not support the international law.[199] In contrast, where the internal society supports the international law and the government, though committed, does not observe it, then the society can challenge the government's non-compliance before an international court.[200]

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[192] *Id.* at 64.
[193] *Id.* at 64-65.
[194] *Id.* at 65.
[195] *Id.*
[196] *Id.*
[197] *Id.* at 66.
[198] *Id.*
[199] *Id.* at 67.
[200] *Id.*

8. In "extreme and fluid" situations like security, States will not want to delegate decision-making power to international courts.

9. Countries with moderate powers are more likely to comply with international courts because weak countries may not have the capacity to comply while the strongest powers are able to bear the negative consequences of non-compliance and even of an international sanction[201]

10. If a State does not have the capacity to comply, compliance with international courts is unlikely.[202]

11. Democratic regimes are more likely to comply with international courts than non-democratic regimes.[203]

12. Compliance with international court rulings is likely if nearby States generally do the same.[204]

In sum, national interest, options for other solutions, shared norms and beliefs, reputation, clarity or non-ambiguity of the principles, and the threat of negative consequences are considerations for a State when it decides to comply or not comply with international agreements.

From the perspective of international courts, they are more likely to enhance compliance when the terms of the agreement are clear; reciprocity is difficult to impose; it is necessary to make decisions not beneficial to all; there is need for predictability; it is to provide pressure to encourage formal compliance; there is domestic consensus supporting compliance; there is capacity to comply; States have democratic regimes; and neighbouring States behave similarly.

CONCLUSION

The dispute settlement working group of the 1974 Caracas Session focused on four fundamental themes. Ambassador R. Galindo Pohl of El Salvador made a summary of these points as follows:[205]

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[201] *Id.* at 69.
[202] *Id.* at 70.
[203] *Id.* at 71.
[204] *Id.*

> 1. An effective method for the settlement of disputes on the basis of law is needed in order to avoid political and economic pressures. Law is the more appropriate method for regulating international relations and for preserving the equality of States, regardless of their political, economic and military might.
>
> 2. It is desirable to achieve the greatest possible uniformity in the interpretation of the Convention.
>
> 3. In view of the advantages of obligatory settlement of disputes, any exceptions have to be determined with great care.
>
> 4. The system of dispute settlement must constitute an integral part of the Convention.[206]

The Convention as it is now is faithful to these themes. However, jurisdiction is a point that must be settled before an adjudicatory body can deliberate on the merits. The deliberation has expanded further because of the limitations and optional exceptions set out in the Convention. These limitations and exceptions, however, are necessary compromises for the realization of the Convention. What is left to be done prospectively is for the prudent interpretation of these exceptions, faithful to the themes quoted above.

If an applicant State determines that its cause is justiciable by virtue of the Convention, the next question is the reaction of the respondent State. A respondent State may interpret the case differently and would not recognize a body's jurisdiction through the Convention. If this happens, default proceedings may arise.

As already discussed in this paper, default proceedings have unique issues that can work against the applicant; furthermore, the chances of non-compliance from these proceedings are high. Why would a State pursue an international court action despite these obstacles and the poor probability of actually realizing the orders or decision of the adjudicatory body, should they be favorable to the applicant? The factual circumstances and, consequently, the factors to be considered for each case would vary.

It is this author's opinion that a party, in general, would only pursue a costly international adjudication if it is fully convinced of the merits of its action

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[205] Adede, *supra* note 20, at 39. This summary was presented during the last plenary meeting of the Session.

[206] *Id.*

and resort to non-judicial means were fruitless. On the assumption of a decision favorable to the applicant, this decision, although not complied with, is an instrument that recognizes the applicant's rights in the international community; this, in turn, would have a moral and political effect on the respondent's and applicant's respective relations with other States.

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