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A TRIBUTE TO LOUIS SOHN—IS THE DISPUTE SETTLEMENT SYSTEM UNDER THE LAW OF THE SEA CONVENTION WORKING?

BERNARD H. OXMAN*

It is not possible for me to convey to you fully my sense of personal and professional honor at being invited to participate in this symposium in remembrance of Professor Louis Sohn.

Louis Sohn and I first had the opportunity to work closely together when he, the late John R. Stevenson, then Legal Adviser of the Department of State, and I began to formulate the position of the United States with respect to the settlement of disputes in connection with the negotiation of a new Convention on the Law of the Sea (Convention). When John Stevenson and I first elaborated on U.S. views regarding preparations for the Third U.N. Conference on the Law of the Sea in the *American Journal of International Law*, we took the then-unprecedented step of indicating not only that the United States would seek a system of compulsory and binding third-party dispute settlement as an integral part of any new convention but also that the utility of any such convention was in significant measure linked to the inclusion of a compulsory dispute settlement system.¹

This suggests an appropriate perspective on the topic suggested by Sean Murphy for my remarks today, namely whether the dispute settlement system is working. For in significant measure, this question affords us a seamless transition from the first panel this morning, which addressed a similar question with respect to the Convention as a whole. To determine whether the dispute settlement system is working, we must consider its objectives, and those objectives include but are not necessarily limited to the overall goals of the Convention as a whole.

In this regard, we might consider that the dispute settlement system set forth in the Convention functions simultaneously as part of two regimes. The first regime, which explains its very existence, is the regime for the oceans. That regime is established by a very

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1. See John R. Stevenson & Bernard H. Oxman, *The Preparations for the Law of the Sea Conference*, 68 AM. J. INT'L L. 1, 31 (1974).

widely ratified Convention that emerged from the political cauldron of decades of international negotiation and constitutional processes that would be difficult to duplicate. Viewed in that context, the dispute settlement system is part and parcel of a much larger system of treaty obligations expressly assumed by the parties to the Convention in their own interest and in the general interest.

The second regime, which transcends that Convention, is the broader regime for the settlement of international disputes. In this respect, it is useful to recall two central points about that broader regime: first, states continue to adhere to the position that express consent is required to afford jurisdiction to an international tribunal; second, the majority of states have not accepted compulsory arbitration or adjudication of all or even most international legal disputes, including some of the most intractable.

Let me try to orient the Convention's dispute settlement system within that broader regime for the settlement of disputes. What is noteworthy about the Convention is not that it contains exceptions to compulsory jurisdiction; that is to be expected given the fact that the default position in international law is no compulsory jurisdiction at all. What is noteworthy about the Convention is that it reverses the default position that characterizes the general international regime of dispute settlement: compulsory arbitration and adjudication are accepted by the parties to the Convention as the norm, on condition of important limitations and exceptions without which this could not have been achieved and, in my view, could not be sustained even now.

This nuanced relationship between rule and exception is evident from the structure of Part XV of the Convention. Article 286 is the very first article of Section 2 on compulsory settlement of disputes. It provides: "Subject to Section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to Section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this Section."² In just a few words, this text makes clear that compulsory settlement of law of the sea disputes under the Convention is the default position, but that this position is reached only once the qualifications and exceptions to jurisdiction in Sections 1 and 3, and the jurisdictional provisions of Section 2, have been factored into the equation.

2. United Nations Convention on the Law of the Sea art. 286, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter LOSC].

Thus, it is not correct to regard Section 2 on compulsory jurisdiction as comprising the system for dispute settlement under the Convention. Section 2, to be sure, is a very important and innovative part of that system, but Sections 1 and 3 are also part of that system. Similarly, it is not correct to regard the new International Tribunal for the Law of the Sea (ITLOS), which just celebrated its tenth anniversary, as comprising the system for compulsory jurisdiction under the Convention. That Tribunal, to be sure, is a very important and innovative part of the Convention's dispute settlement system. For most disputes, however, there are two default procedures for compulsory jurisdiction over disputes arising under the Convention. First, there are compulsory procedures entailing a binding decision accepted by the parties under other agreements outside of the Convention. This includes parties' declarations under the Statute of the International Court of Justice (ICJ) and, it would appear, the constitutive instruments of the European Union. Second, there is compulsory arbitration under Annex VII of the Convention.³

It would, in my view, be correct to regard the dispute settlement system of the Convention as one of the elements of a gradual shift to greater acceptance of compulsory jurisdiction in international affairs. It would not be correct, however, to regard this objective as in and of itself a primary explanation for the existence of the system. One would search the Convention in vain for that particular perspective, notwithstanding the fact that much of its preamble was drafted by supporters of compulsory jurisdiction. The general norm regarding dispute settlement set forth in the Convention is copied more or less verbatim from Article 33 of the U.N. Charter, which of course does not establish a requirement of arbitration or adjudication.⁴

In short, there is nothing in the Convention text as such to support the ambitious interpretations that have emerged in some quarters regarding the reach of the Convention's compulsory jurisdiction provisions in general, and those concerning the ITLOS in particular. If anything, there is much to suggest that such ambitions could set off a counter-productive reaction among parties and would-be parties alike—a reaction that might prejudice the Convention's dispute settlement system and that might not be limited to the law of the sea. In this respect, there are clear warning signals on the horizon. An increasing number of parties to the

3. *See id.* annex VII.

4. U.N. Charter art. 33.

Convention that did not originally exercise their right to file declarations under Article 298 of the Convention (excluding certain categories of disputes from compulsory jurisdiction) are now, years later, filing such declarations. China did so just a few months ago.⁵ Explanations for such action may vary, but it should not surprise us to learn that one of the explanations may be rooted in improvident speculation regarding the scope of the compulsory dispute settlement obligations under the Convention.

There were, to be sure, many people who believed deeply that their work on the dispute settlement system of the Convention would contribute to the development of a global compulsory dispute settlement system. First among them was Louis Sohn. He labored tirelessly and successfully as a member of the U.S. delegation to achieve this. But Louis Sohn was wise enough to understand that pressing this point was likely to have the opposite effect in many foreign quarters, not to mention in some of the constituencies he represented. The measure of achievement in the Convention's dispute settlement system is the tapestry of procedural complexity and substantive qualification that provided sufficient reassurance to render agreement on compulsory jurisdiction possible in this treaty and more plausible in future treaties.

In this regard it is interesting to note that the Convention's dispute settlement system has now been incorporated by reference into a number of other global and regional treaties that address specific aspects of the law of the sea. This includes an extraordinary provision in the 1995 Implementing Agreement regarding fish stocks that incorporates the Convention's dispute settlement system not only into that Agreement but also into regional arrangements mandated by that Agreement.⁶ For those who follow such matters, the effect is largely to reverse, for parties to the 1995 Agreement, the jurisdictional conclusion reached in the Southern Bluefin Tuna (SBT) arbitration—a result, to be sure, presciently foreseen and subtly encouraged by the very arbitral tribunal that decided that it did not have jurisdiction under the Convention

5. See United Nations Convention on the Law of the Sea: Declarations made upon Signature, Ratification, Accession or Succession or Anytime Thereafter, http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm (last visited July 13, 2007).

6. See 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. 30(3), Aug. 4, 1995, 34 I.L.M. 1542.

itself.⁷ In context, I think it is fair to conclude that it was the imperatives of effective implementation of the provisions regarding conservation and management of living resources in the Convention that, in the end, prompted express agreement on this further expansion of the reach of the Convention's dispute settlement procedures—an agreement that now includes Japan, the successful respondent in the SBT arbitration.

Let us then turn to some of the substantive objectives of the Convention that the dispute settlement system was intended to reinforce. One of the primary purposes of the compulsory dispute settlement system was to enforce and fine-tune the careful balance struck by the Convention between the rights of coastal states and the freedoms enjoyed by all states. With respect to freedom of navigation, this balance was achieved by the ITLOS decision on the merits in the SAIGA case.⁸ With respect to protection of ships and crews arrested for fisheries and pollution violations from prolonged detention pending trial, this balance was achieved by the ITLOS prompt release procedure.⁹ A second purpose of the dispute settlement system was to enforce and fine-tune the relevant provisions of the Convention mandating protection and preservation of the marine environment as well as conservation of high seas living resources. While ITLOS has used provisional measures powers to further the environmental and conservation goals of the Convention,¹⁰ the results on the merits have been mixed.

I had the honor to participate in one of the most interesting of the environmental cases, the land reclamation dispute between Malaysia and Singapore. In that case, there was a unanimous ITLOS provisional measures order requiring the parties jointly to commission a one-year study of the environmental effects of the land reclamation project in question.¹¹ The parties settled the dispute following completion of the study. The settlement included implementation of recommendations for minimizing any adverse environmental effects of the project.

7. See Southern Bluefin Tuna Case (Austl. & N.Z. v. Japan), 119 I.L.R. 508 (Int'l Trib. L. of the Sea 2000).

8. See *M/V Saiga* (St. Vincent v. Guinea), 120 I.L.R. 143 (Int'l Trib. L. of the Sea 1999).

9. See LOSC, *supra* note 2, art. 292.

10. See, e.g., Southern Bluefin Tuna Cases (Austl. v. Japan; N.Z. v. Japan), 117 I.L.R. 148 (Int'l Trib. L. of the Sea 1999); MOX Plant Case (Ir. v. U.K.), 41 I.L.M. 405 (Int'l Trib. L. of the Sea 2001).

11. Land Reclamation by Singapore in and around Straits of Johor (Malay. V. Sing.) (Req. Provisional Measures) (Order of Oct. 8, 2003) (Int'l Trib. L. of the Sea 2003), available at http://www.itlos.org/case_documents/2003/document_en_230.pdf.

Needless to say, quite apart from its substantive purposes, an important object of the Convention's dispute settlement provisions is to promote peaceful settlement of law of the sea disputes. In this regard, it is reassuring to note that the record of compliance with dispute settlement decisions rendered under the compulsory jurisdiction provisions of the Convention is excellent. The objective of promoting peaceful settlement of disputes is particularly evident in regard to maritime boundary delimitation disputes between opposite or adjacent states. Absent declarations excluding such disputes, they are subject to compulsory jurisdiction under the Convention. That jurisdiction was invoked by Malaysia in one part of the land reclamation case,¹² by Barbados in the recently concluded Annex VII arbitration with Trinidad and Tobago,¹³ and by Guyana in the Annex VII arbitration with Suriname.¹⁴

Beyond the decided cases, we need to consider whether the Convention's dispute settlement system has promoted the unilateral restraint and mutual cooperation necessary to avoid disputes or settle them without arbitration or adjudication. One ITLOS case suggests that it does.¹⁵ Many observers would agree that voluntary compliance with the law, voluntary restraint, and voluntary agreement settling disputes are perhaps the most significant indicia of success for any system of rules. The problem is that these indicia of success are very difficult to discern, let alone measure.

It may well be that the reason the number of prompt release cases being brought before ITLOS has declined is that detaining states have learned from the ITLOS decisions to take their prompt release obligations seriously. If so, then the objectives of the prompt release procedure would be realized. The only problem is in ascertaining and measuring the role of the prompt release procedure in that success. To put it differently, would that success exist, at least in the same degree, without the existence of the prompt release procedure?

The international law of the sea is a branch of public international law. Perhaps an even broader measure of success would be

12. *See id.*

13. Dispute Concerning the Maritime Boundary Between Barbados and Trinidad and Tobago (Barb. v. Trin. & Tobago), <http://pca-cpa.org> (Oct. 30, 2004).

14. Dispute Concerning the Maritime Boundary Between Guyana and Suriname (Guy. v. Surin.), <http://pca-cpa.org> (Feb. 22, 2005).

15. The Chaisiri Reefer 2 Case (Pan. v. Yemen) 2000 ITLOS Case No. 9, Order 2001/3 (July 6, 2001), available at http://www.itlos.org/case_documents/2001/document_en_104.pdf (detained vessel released on bond after application for prompt release filed with ITLOS, but before the Tribunal acted).

whether the dispute settlement system of the Convention has furthered the objectives of a coherent system of international law. That certainly seems to be the case. The decisions rendered under the Convention clearly evidence an awareness of its role within the larger system, a system in which the ICJ is the principal judicial organ of the United Nations. In this connection, I must confess to a certain measure of astonishment when I read learned commentaries that suggest that the unprecedented achievement of an integrated, widely-ratified regime for the governance of some two-thirds of the planet (including, as part of that regime, a compulsory and binding dispute settlement system) somehow resulted in some horrifying fragmentation of international law. Let me hasten to assure you that I have the same reaction to such fretting about other international law regimes as well, including trade and human rights. The maturation of international law into the kind of complex body of regimes and procedures that has long characterized developed systems of law should be an object of celebration. I for one do not long for the simpler days when we could fit it all into one course and one under-utilized court.

True enough, we must turn our attention to the kinds of questions of substantive and procedural coordination that were previously addressed only by municipal law and private international law. Louis Sohn, who began his career working on questions of conflict of laws,¹⁶ would have surely reminded us that the new questions of coordination faced by public international law have been addressed in other contexts with some success. He would have pointed to primary and secondary sources that made clear that no matter how new the context in which these questions are posed, there is something to be learned from the fruits of the kind of thorough and scholarly search for precedent and analogy that all of us came to expect from Louis Sohn.

Four different tribunals have sat on different aspects of the MOX Plant dispute between Ireland and the United Kingdom. So what? If we are ever to learn how to manage a complex system, these kinds of things must happen. At the end of the day, the applicant did not get what it wanted from any one of those four tribunals. What did emerge is a reassuring display of restraint and common sense by the Annex VII tribunal constituted under the Convention. This was followed by a breathtaking assertion of exclusive community jurisdiction by the European Court of Justice (ECJ) whose full

16. See Thomas Buergenthal, *Louis B. Sohn (1914–2006)*, 100 AM. J. INT'L L. 623 (2006).

implications for the dispute settlement system under the Convention, and perhaps other treaties, have yet to be understood. One of the most interesting aspects of this saga is that the ECJ was able to determine its role in the system by reference both to European instruments and to the overall dispute settlement structure of the Convention, which can unquestionably accommodate a role for regional tribunals.

Many people today are holding their breath in anticipation of a possible decision by Chile and the European Community (EC) to proceed with the cases respectively brought under the Convention and World Trade Organization instruments in connection with their dispute over fishing for swordfish. If so, the real question is unlikely to be a clash of tribunals, but an appreciation of whether, and to what extent, the global regimes for the oceans and for international trade have an impact on each other. The different tribunals are merely institutional instruments of the respective regimes. Viewed from this perspective, it becomes reasonably clear that the trade regime has very little to say about whether the EC violated its conservation obligations on the high seas and that the Convention has very little to say about whether Chile violated its trade obligations with respect to European ships in its ports. None of the potential combinations of outcomes in the two fora necessarily entails any inconsistency.

There is, of course, the possibility that rights and obligations under one regime do, or should, inform outcomes under the other. Thus, it is possible that a decision as to the legality of Chilean measures under the trade regime might, in some measure, be informed by the extent to which those measures constituted a legitimate attempt to secure respect for international conservation obligations under the law of the sea regime. In that case, an interesting procedural question would be posed: would it make more sense for a trade panel to decide the conservation question itself or, knowing that an expert chamber of ITLOS constituted under the Convention was seized of that underlying question directly, should it await the outcome of the law of the sea litigation? Such a decision would turn not on an a priori hierarchy of tribunals or regimes but on a sensible decision as to the most rational order of litigation in that particular case. That is the kind of sensible determination made by the Annex VII tribunal in the MOX Plant litigation when it decided to await a decision of the ECJ, and, perhaps more to the point, the kind of sensible *lis pendens* decision made by municipal courts every day.

So, to answer Sean Murphy's question about whether the dispute settlement system is working: I think every successful legal institution is in some measure a work in progress. That is very much part of its function. The only way we can achieve true stability and predictability in the law over time is by measured change. Viewed from that perspective, I think there is good reason to conclude that the dispute settlement system under the Convention is working reasonably well now and may work even better in the future. It will embrace, as intended, not only standing and ad hoc tribunals constituted under the Convention but also the ICJ and other standing and ad hoc tribunals, both global and regional.

For this reassuring prospect, we are indebted to many people. In the forefront is Louis Sohn.

Thank you.