Angela Del Vecchio · Roberto Virzo
Editors

Interpretations of the United Nations Convention on the Law of the Sea by International Courts and Tribunals

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Preface

At the end of the 6th Ordinary Conference of the Association International du Droit de la Mer, "International Tribunals and the United Nations Convention on the Law of the Sea", held at the University of Sannio (Benevento, Italy) on 3–4 November 2016, the speakers accepted our invitation to expand their in-depth presentations into essays, in English or French, for publication in a collective volume.

Already during the planning of the conference, it seemed appropriate to us that there should be a dialogue between international law experts on the decisions of international courts and tribunals where questions have been raised about the interpretation of the United Nations Convention on the Law of the Sea (UNCLOS).

Indeed, to date, a significant number of disputes concerning the interpretation or application of UNCLOS have been submitted, by virtue of Part XV of the Convention, to the International Tribunal for the Law of the Sea or to ad hoc arbitral tribunals. In addition, both the latter and other international courts (including, quite often, the International Court of Justice) or quasi-judicial bodies (like the Appellate Body of the World Trade Organization) have had occasion to rule on the matter, albeit on the basis of legal instruments other than UNCLOS.

Thus, given such a rich jurisprudence, important issues relating to the interpretation of UNCLOS needed to be addressed and examined, including, among others, the role of the interpretative criteria set out in the 1969 Vienna Convention on the Law of Treaties, the interpretation of the rules of procedure of courts and tribunals seized on the basis of UNCLOS and current jurisprudential trends, both in the relevant case law of each court/tribunal and with respect to specific aspects of the law of the sea (marine environment protection, maritime delimitation, coastal State rights in the different maritime zones, etc.).

It is our hope that this volume, by offering an account of the law and practice of many international courts and tribunals and focusing on the various, multifaceted aspects of UNCLOS interpretation as found in their case law, will be a useful working tool for academics and practitioners alike.

We would like to express our deep gratitude to all the distinguished authors of the chapters. We also owe a special debt to Mario Gervasi and Andrea Insolia, who with

unfailing commitment and great expertise helped us read the manuscript drafts and ensure compliance with the editorial guidelines.

Finally, we wish to dedicate this volume to the memory of Professor Benedetto Conforti, who made an outstanding contribution to the study of the international law of the sea and conveyed his passion for this subject to generations of students and researchers.

Rome, Italy
Benevento, Italy
31 August 2018

Angela Del Vecchio
Roberto Virzo

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Giuseppe Cataldi

Abstract This article is focused on the scientific work of Benedetto Conforti on the Law of the Sea, placing special emphasis on what is considered his "functionalist" theory, a theory that was fully developed in the book on the legal regime of the seas ("*Il regime giuridico dei mari*", 1957) and then applied, through the decades, to various phenomena of the Law of the Sea. Conforti reworked the concept of government power over marine spaces proposing it in terms of an extension of the power of control of the coastal State in the pursuit of certain, specific interests, first identified in fishing, customs supervision, etc., and then in all attainable utilities in adjacent waters. Hence, an assertion of a "functional" control of coastal interests, and a denial of a spatial control. Conforti developed practical applications of this theory in parallel with other issues such as the relationship between the EEZ and previous agreements, the possibility of extending the EEZ concept to the Mediterranean, the principles relating to delimitation. Even in writing about this matter, Conforti was consistent in using a method directed to identifying the legal problems and to attain solutions based on a study of practice, with which he was constantly confronted, using an approach that is particularly appropriate to the Law of the Sea. This was perfectly consistent with his pragmatism, which led him to be often ready to revise his views and to avoid purely theoretical discussions.

This Chapter is the English version of the article "Il contributo di Benedetto Conforti al diritto internazionale del mare", published in Rivista di diritto internazionale 2017, 100:98–111.

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1 Introduction. The Functionalist Theory in the Book "Il regime giuridico dei mari"

It is not the intent of this article to provide a general analysis of the scientific contribution of Benedetto Conforti, nor of his memory. For this purpose, we refer to the extensive accounts written by other colleagues and pupils of the much-lamented Maestro.[1]

The law of the sea holds a pre-eminent position in the scientific writings of Benedetto Conforti. This area of international law was in fact the object of his research from the very beginning of his scholarly activities and accompanied him throughout his life. As we will attempt to demonstrate, even in writing of this topic the Maestro was always coherent in using methods aimed at the immediate identification of the juridical problem and the search for solutions based on the analysis of practice.

After his initial 'minor' writings and while still very young Benedetto Conforti first approached the law of the sea as he was preparing his first monograph. One that his mentor, Rolando Quadri, had suggested, encouraging him to continue along the path that he himself had undertaken with an important work published in 1939 and that is still of great usefulness today, "Le navi private nel diritto internazionale". These were the years in which the United Nations' International Law Commission promoted the vast undertaking of codifying such rules and that eventually led to the four Geneva Conventions of 1958. In attempting to delineate the legal regime of the seas in a systematic and thorough manner Conforti develops a convincing and original critique of the 'territorialization' of marine spaces, that is, of the idea that a regime analogous to that of territorial sovereignty could be applied to the seas. Using an inductive method, he demonstrated, through an attentive and thorough study of practice, the erroneousness of this approach as far back as the period during which the debate was focused on the so called 'dominion of the seas', an erroneousness that issued from "an excessive, and forced generalization, postulated on the doctrine of the era and never doubted by subsequent doctrine, of individual phenomena found in said marine spaces".[2] His radical rethinking of the concept of government authority over marine spaces leads to viewing such authority in 'functional' terms, that is, an extension of the coastal State's authority because of specific interests identified on a case by case basis, such as fishing, customs oversight, etc. Over time these interests expanded, from fishing and customs control to all the benefits that could be derived from adjacent waters, and consequently there was an "evolution in the value of the interest at the basis of the enforcing action of the coastal State, from an interest in ostensible marine utility, to a typical local interest", that is, interest in the undisturbed continuation of the life of the coastal community.[3]

[1] See articles by Iovane (2015), Francioni (2016), Tesauro (2016); for specific areas of Conforti's activities see also Giardina (2016), Pisillo Mazzeschi (2016) and Raimondi (2016).

[2] Conforti (1957), p. 27 ff (our translation).

[3] *Ibidem*, p. 242 ff (our translation).

Hence the assertion of 'functional' protection of coastal interests, and the negation of spatial protection, with reference also to contemporaneity, that is, the era of the Geneva codification. As we will soon see, the results of this codification confirmed these theses, and, as will note later on, the "functionalist" theory will reappear in later writings of the Maestro as it contextualized the evolution of international practice on the subject. A functional delimitation of the power of the State can also be accompanied by a spatial delimitation when its exercise must be contained within certain geographic limits; but can also be envisaged, one might say, in its 'pure' state, without considering the space in which the State intervention takes place. His theory is thus correct and convincing, notwithstanding the fact that in certain contexts the spatial criterion later prevailed, as is the case, surely the most evident, of the territorial sea. In this writer's opinion, by the way, affirmation of the territoriality of this marine space took place in an era preceding the one indicated in Conforti's writings.[4]

2 The Geneva Codification and the Application of the Functionalistic Theory to Individual Cases

The trend toward progressive expansion of the power of coastal States over adjacent seas is doubtless the most noticeable phenomenon that emerges in observing the practice of the international law of the sea, from the earliest to the contemporary. The Geneva Codification attempted to resolve the conflict of interest between coastal State and other States, a conflict that became increasingly exacerbated after World War II as a consequence of economic growth, the rebirth of commerce, technological evolution and the new concerns of international policy. This attempt was accomplished by giving preference to the spatial criterion, certainly simpler compared to the functional criterion that instead implied a detailed inquiry by the interpreter and was also more "reassuring" from the perspective of legal certainty. There was, however, a problem, perhaps one that was underestimated by the codifiers but that Conforti pointed out in his monograph, and that is that the choice of a spatial criterion is logical only if accompanied by an exact delimitation of space! On this the delegations did not agree, first with regard to the maximum extension of the territorial sea, defined by means of the spatial criterion but without any indications regarding its outer boundary[5]; and secondly with reference to the contiguous zones in matters regarding customs police or fishing, and the continental shelf. Conforti will later indicate all the limits of the four Conventions issuing from the Geneva codifications in a specific commentary following the conclusion of negotiations.

[4] On this point see Cataldi (1990), p. 78, note 187.

[5] International Convention on the Territorial Sea and the Contiguous Zone, Geneva, 29 April 1958, 516 UNTS 2015, Art. 1: "[t]he sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea. This sovereignty is exercised subject to the provisions of these articles and to other rules of international law".

This general evaluation seems particularly significant: "[t]he Geneva agreements did not succeed in entirely removing from the assessment of general law, and its related uncertainties, the conflict of interests that exists between the coastal State and other States. In our humble opinion this consideration indicates the limits of a positive judgment regarding the results of the Conference".[6] The message is all too clear. Notwithstanding several important merits, which Conforti acknowledges and comments upon, regarding the clarification of several provisions of the law of the sea, the codification basically failed in its objective, for recourse to customary laws to try to resolve the conflict between coastal State and other States, and thus to evaluate the admissible limits of the 'historical' principle of freedom of the seas, is more necessary than ever.

History will soon prove the Maestro's perplexities regarding the Geneva Codification to be true. It is a well-known fact that the four conventions were ratified by a limited number of States and, what is more important, they soon demonstrated their inadequacy in dealing with the demands for a new international economic order by States coming out of the process of decolonization. And in fact, as early as the beginning of the seventies work began on the third United Nations Conference on the Law of the Sea, a conference that in 1982 will lead to the Convention of Montego Bay (UNCLOS).

In a series of subsequent writings Conforti confirms his 'functionalist' theory, applying it to several cases. First, in a brief article concerning a 'classic' of the law of the sea, wartime contraband in peacetime. In this writing he examines an incident that occurred on the high seas (capture by French authorities of a Czech merchant ship suspected of transporting weapons to the Algerian guerilla). On the high seas exception to the power of the flag State is justified, in this case, only because there is an exercise of government authority recognized as functional to the pursuit of specific interests admitted by international law.[7]

In a similar manner, with respect to fishing, the controversy that placed Iceland in opposition to the United Kingdom consequent to Iceland's decision to reserve fishing in the adjacent seas to national fishermen is viewed by Conforti in functionalistic terms. He demonstrates the weakness of the United Kingdom's claim, which was based on 'historical titles', given the strong and qualified interest of Iceland, that is on the crucial needs of the community, as the inhabitants of the island had depended economically on fishing since time immemorial.[8] A few years later this problem will be taken up once again in more general terms. Conforti takes note of the evolution of case law on fishing rights and thus of the new limit of 12 miles that became affirmed over time, to the point of theorizing that, within this limit, for purposes of fishing control, no specific justification based on the economic and social interests of coastal populations is required as such interests are to be considered implicitly present.[9] In this article he pinpoints the precise moment in which the

[6] Conforti (1958), specifically p. 218 (our translation).

[7] Conforti (1959a).

[8] Conforti (1959b).

[9] Conforti (1966).

consensus of the States regarding the exact measurement of marine territory in spatial terms is formed. The International Court of Justice (ICJ) did not demonstrate the same 'readiness' to understand these aspects as in the ruling handed down on 25th July 1974 in the case between Iceland and the United Kingdom (*Fishery Jurisdiction Case*), it emphasized the 'historical and preferential rights' of the United Kingdom, in contrast to prevailing practice. It is no accident that this decision is one of the greatest examples of ICJ decisions that have never been implemented.

3 His Writings During the Period of Crisis of the Principle of "Freedom of the Seas" and of the Third Conference on the Law of the Sea

During the 1960s and 1970s, the international law of the sea was characterized by a significant state of uncertainty as tensions between coastal States and States interested in freedom of navigation, between coastal States and 'land-locked' States, between industrialized States and developing States, reached their highest level. The exact scope of the principle of 'freedom of the seas' was discussed continuously, and the progressive expansion of research and exploitation's activities on the continental shelf made the legal setup of the various institutions even more complex. Regarding this latter aspect, in 1969 the ICJ issued a ruling, that in many respects is considered historical, in the controversy between the Federal Republic of Germany on the one hand and Denmark and the Netherlands on the other, regarding delimitation of the North Sea continental shelf.[10] In this case the ICJ refuted the customary nature of the criterion of equidistance regarding the continental shelf as envisaged by the 1958 Geneva Convention. But what is interesting here is the fact that once again Conforti, in commenting this decision, and though agreeing with the solution reached by the ICJ, reiterated the need to recur to a functional criterion in evaluating the scope of the rights of coastal States in the absence of a certain geographic limit, a limit whose existence the ICJ had excluded, though opting for a 'spatial' type solution.[11] The regime of freedom of the seas, he points out, seems by now to be 'compromised', yet without attaining the goal of legal certainty. Regarding the resources of the shelf that were well beyond coastal claims, it should be noted that he did not conceal his sympathies for the claims of developing States, and thus for the internationalization of resources according to the proposals that were being discussed in the United Nations General Assembly at the time.[12]

The crisis of the customary principle of freedom of the seas, a noteworthy and fundamental rule of the international law of the sea, was intensifying because of two

[10] ICJ, *North Sea Continental Shelf Cases* (*Federal Republic of Germany* v. *Denmark*; *Federal Republic of Germany* v. *The Netherlands*), Judgment, 20 February 1969.

[11] Conforti (1969a).

[12] Conforti (1969b).

reasons. On the one hand the 'creeping jurisdiction' of coastal States, on the other the inadequacy of this principle to manage new State claims of an essentially economic nature. Conforti therefore questions the persistent validity of this principle and its role in light of the supervening practice.[13] In the course of the first sessions of the third Conference on the Law of the Sea the consent of all the States was already self-evident concerning the establishment of the new institution of an Exclusive Economic Zone (EEZ) which broke away from the traditional discipline of relations between coastal State and other States. Conforti points out the inverse role of functional powers in such a marine space, since functional powers in the EEZ are no longer an attribute of the coastal State but of the other States! In the event of doubt, he states, it is not the principle of freedom of the sea that prevails, but rather each State (coastal and third State) is obliged to remain within its own limits. He draws attention to the decline of the principle of freedom of the seas also in areas beyond coastal jurisdiction. In this case, it is interesting to note that, while at first[14] he affirmed the need to recur to the principle of freedom of the seas until such time as there was an agreement between States involved in the codification, in writing of a 'stand-still or freezing clause' regarding this principle, to which he attributed a 'freezing' effect in respect of any demand for appropriation of the resources of the seabed, he later revised his position in light of the developments of the Third Conference on the Law of the Sea, stating that unilateral exploitation is possible if the collective interest is safeguarded.[15]

There accordingly emerges a distinctive trait in Conforti's scientific production. By continuously reviewing the developments in international practice, he demonstrates that he is always ready to revise his positions. This is especially obvious in the field of the law of the sea, for it was during these years of his greatest scientific involvement that several important changes in practice emerged. Perhaps the most significant example is contained in the first edition of his manual of international law, where he finally admits the existence of the institution of the territorial sea in customary law.[16] On the other hand, he did not neglect pointing out where practice

[13] Conforti (1975a).

[14] *Ibidem*, *passim*.

[15] Conforti (1978).

[16] Conforti (1976), p. 132: "[i]n admitting the existence of the territorial sea in light of customary law we abandon a position that is strongly defended in many previous writings, starting with the book 'Il regime giuridico dei mari', Naples, 1957, chapter V. At the time we maintained that it was impossible to equate the territorial sea to the territory because of the absence of an agreement between States on the external limit of the territorial sea (even the Geneva Convention contains no regulation in this regard), a boundary that some States wanted to restrict to 3 miles from the coast, others extended to 6, 12, 15… and even up to 200 miles! It truly seemed impossible or at the very least extremely contradictory to configure a territory…without borders. And we believed therefore that a State had only functional powers over adjacent seas, powers that could not be exercised within spatial limits but only when indispensable to ensure the undisturbed continuation of the life of coastal communities. The reason for this…surrender is exactly the opposite of the reason we defended such position: one of the results of the Third Conference on the Law of the Sea, evident in the work of the Caracas session (1974) and the Geneva session (1975), is the general acceptance of the 12-mile limit" (our translation). Note that his strenuous defense of application of the theory

was still uncertain and ambiguous, consequently revealing the limits of his analysis.[17]

Returning to the EEZ, it must be said that during the years in which this new institution was becoming consolidated in international law, doctrine was engaged not only in defining the breadth and limits of the zone's regime but also in describing its legal nature as a whole, qualifying this space as part of the open sea, the territorial sea, or as a *sui generis* zone, according to circumstances. In perfect coherence with his pragmatism, and with his beliefs regarding other, similar discussions, Conforti defined this problem as "sterile as it is theoretical".[18] Vice versa, he focused on a central question in those years, one that was crucial but incomprehensibly little studied and analyzed, and that is the relationship between the new customary norm authorizing the coastal State to establish an EEZ up to 200 miles from the coast and previous conventional norms by which coastal States were bound to a different discipline, one that was much more liberal in respect of other States. In this case, Conforti wondered, is application of the EEZ imposed as a *ius superveniens* or must priority be given to previous agreements, as sources of special law *ratione materiae* or *personarum*? The question was significant, both from a general aspect, that is with respect to the theoretical 'accommodation' regarding the succession over time of international norms, and, specifically, in light of the existence of agreements, especially on the concession of fishing rights, to be compared with the evolution of international practice (note that UNCLOS had yet to be signed). Faced with the issue of the validity of bilateral agreements on fishing rights entered into by France and Spain (country not yet part of the European Community), the Court of Justice in Luxemburg unhesitatingly sided with the prevalence of customary law.[19] Conforti however criticizes this conclusion. Unless subsequent customary law is

of functional powers even to spaces off the coast lasted up to the year prior: Conforti (1975b).

[17] See Conforti (1975c), specifically p. 645 (*incipit* to par. 2), where the author refers to "factors that indicate the beginning of a new discipline, one that perhaps better fulfills the needs of the era" (our translation). However, in light of the conflicts that still exist within the international community, he adds that "*Rebus sic stantibus* it is inevitable that the matter subject of this discussion be presented in accordance with traditional principles" (our translation).

[18] Conforti (1983a), p. VI our translation. An example of another theoretical discussion that did not greatly interest the Maestro was the 'monistic' and 'dualistic' debate regarding the relationship between the international order and the domestic order. He warned, in fact, most recently in Conforti (2015), p. 336, that "whether one adopts one or the other, the substance doesn't change: what is important is to describe how the various categories of international laws are applied and coordinated with domestic laws" (our translation). These same considerations are contained in his final writing on the law of the sea, where he refers to a passage of the famous ruling of 1927 handed down by the Permanent Court of International Justice in the *Lotus Case* in which it is stated, regarding the dispute between monists and dualists: "que l'on adopte l'un ou l'autre des deux systèmes exposés ci-dessus, on abouti, dans le cas d'espèce, au même résultat" (*CPJI Recueil 1927*, p. 21). Conforti (2014), p. 2623, adds: "[a]llow us to point out that the scarce practical relevance of the dispute between monists and dualists is what we have always maintained" (our translation).

[19] ECJ, *Burgoa*, C-812/79, Judgment, 14 October 1980, ECLI:EU:C:1980:231, with commentary by Cataldi (1982).

"unequivocally directed toward modifying or abrogating the treaty", he maintains, one must be very cautious in considering the old agreements to be rescinded. This is due to a number of considerations, among which was surely the tendency of the modern international community to favor written law, as well as the increasing cooperation between States, of which the agreement is the typical legal instrument.[20]

4 Italy, the Mediterranean and the Law of the Sea

Several of the Maestro's writings are of particular interest as his analysis can be applied to cases regarding our country and, in more general terms, to the Mediterranean. An effective example is the 1976 ruling of the Naples' *Tribunale* that was very innovative when it was first pronounced. The ruling stated that repressive action against a ship on the high seas was legitimate because of the uninterrupted link constituted by fast motor boats transporting contraband goods between the ship and the coast. Conforti approved this solution, viewing it as confirmation of his theory of functional powers.[21]

It is also important to re-read his commentary on the decisions handed down by the ICJ on the delimitation of the continental shelf between Libya and Malta.[22] In this controversy Italy also played a role as it had requested to intervene in the case. Though the petition was declared inadmissible it was important simply to make the request in order to safeguard Italian interests. Regarding this ruling, Conforti criticizes the ICJ's recourse to equity, as this was done not subordinately or in a subsidiary capacity but principally, considering such principle as customary law. Since there were no mandatory and consolidated rules on delimitation, affirmation of the ICJ with which he agrees, the conclusion could not however be imposed by a judicial 'praetorian' decision of the ICJ, which he defines as having become a "commission of delimitation". In other words, he does not contest the solution but, once again, the method. Furthermore, his critique also concerns UNCLOS provisions on the EEZ and continental shelf delimitation, modelled on the case law of the ICJ. Reference to the agreement in these provisions is useless, he claims, and it is certainly not what one would expect as a solution by a codification convention, which should provide the exact rule to be followed in cases where there is no

[20] Conforti (1983b), also published in English: Conforti (1980–1981). Other reasons that support his solution are: the diffidence expressed by a number of countries regarding customary law; the elimination from the Vienna Convention on the Law of Treaties of any reference to the possibility of repealing and modifying the international agreement by subsequent custom; formulation of Art. 38 of the Statute of the International Court of Justice that, though it does not establish a hierarchical order, places treaties in the forefront when indicating sources. See Conforti (1983b), p. 5.

[21] Tribunal of Naples, *Pulos* case (ship *Olimpios Hermes*), Judgment, 17 December 1976. See Conforti (1977).

[22] ICJ, *Continental Shelf* (*Libyan Arab Jarnahiriya* v. *Malta*), Judgment, 3 June 1985.

agreement![23] Several of the principal issues dealt with in this article were taken up once again shortly after by the Author in another article in which he ponders, in more general terms, the applicability of a typically 'oceanic' institute such as the EEZ to the Mediterranean.[24] According to Conforti, provisions on delimitation should dictate criteria, methods and rules. And this should also be the aim of an international decision on the matter, rather than drawing lines of delimitation of disputed spaces. Though we can agree with this position in general terms, we must also note that legal practice continues to be applied in the very manner he criticized. Furthermore, in the long-standing debate regarding the solutions reached by the ICJ on maritime delimitation, there exists a common observation, and one that merits attention, that if international courts were to limit their duties as hoped for by Conforti, their rulings would probably leave the parties dissatisfied, perhaps obliging them to recur to an interpretative decision of the preceding ruling in order to translate general criteria into an actual boundary. One must also point out that every delimitation is a unique and distinctive case, depending on specific circumstances, and thus it is difficult to envisage rules that can be automatically applied to all.[25]

To this end, concerning the delimitation of marine spaces, and in light of the specificity of the Mediterranean, he proposed, in a realistic manner, that the insistence on collaboration regarding enclosed and semi-enclosed seas as contained in UNCLOS Articles 122 and 123 be interpreted as an effort to implement, at the very least in a bilateral manner, forms of joint exploitation of economic resources. The question of delimitation and the exact limits of the EEZ, in such a reduced space, should defer to global agreements on the exploitation of resources for the benefit of all. Here he concludes with a phrase that will recur often in his writings, and that we also have made our own, for it condenses in a few words the very essence of the issue of delimitation: "a boundary is important when it delimits communities, not when it relates to the exploitation of resources".[26]

This idea also serves as the background to another issue of interest to Conforti, both as a scholar and as an expert working for the Foreign Ministry during the bilateral negotiations with Tunisia: the question of fishing rights in the Strait of Sicily. In an article dedicated to this topic, he specifically addresses the crucial issue of the exclusive fisheries zone declared by Tunisia in the waters near the Pelagic islands.[27] He points out that according to developments in the law of the sea, this claim does not appear to be illegal as long as the same rights are guaranteed to Italy. He therefore posits the theory of a delimitation agreement between the two coastal States, based on geographic datum and on the rules enacted by the two coastal States (regarding Italy the 1979 Ministerial Decree declaring the space a protected zone

[23] Conforti (1986).

[24] Conforti (1987).

[25] With reference to this different formulation, see for example, precisely in comment to the observations contained in Conforti's article mentioned in the previous note, Arangio Ruiz (1987). For observations on this topic, in general terms, see Weil (1988).

[26] Conforti (1987), p. 180.

[27] Conforti (1993), also published in Italian: Conforti (1995).

"of fisheries restocking") and certainly not on historical claims, by now no longer applicable given the evolution of the new law of the sea. Unfortunately, to date this issue has progressed no further. Rather, in 2005 Tunisia declared an EEZ unilaterally, fixing its outer boundary coincident with the line of demarcation envisaged in the 1971 bilateral agreement with Italy, the latter however relating only to the continental shelf.[28]

One of Conforti's activities as an expert on the law of the sea is little known but is nevertheless highly interesting. I refer to the consultations and opinions he provided to the *Ente Nazionale Idrocarburi* (ENI) when ENI was negotiating for concession rights to explore and exploit oil resources in offshore areas in which sovereignty was often controversial. For example, in a typewritten document dated 6th April 1978 and now in my possession, he provides an opinion *pro veritate* on "Chinese claims over the Nansha islands" that is impressively current, as it concerns the status of several islands in the South China Sea (or Oriental Sea as referred to by Vietnam), that is currently at the center of sharp controversies placing China in opposition to other States of the area, and regarding which an arbitration decision between the Philippines and China was issued on 16th July 2016 pursuant to UNCLOS Annex VII. In that document Conforti explains that territorial sovereignty is acquired over the mainland and then eventually spreads to adjacent waters, thus where there is no human settlement one cannot legally claim sovereignty over the seas.

5 His Final Writings

In his last two writings on the law of the sea the Maestro, as usual, deals with legal questions that are currently of great relevance and interest, the resurgence of the phenomena of piracy and criminal jurisdiction on the high seas (the case of the Italian Navy officers held captive in India).[29]

This second paper analyses the controversial question of jurisdiction regarding two Italian naval officers accused of causing the death of two Indian fishermen.[30] Excluding every 'emotional' element that is unfortunately present in other writings regarding a controversy that has drawn the attention of the international public, he focuses solely on the maritime aspect of the issue, eschewing from his analysis the question of functional immunity to be conceded to the two officers. On the basis of remote but famous precedents, which he reviews (cases *Franconia*, *Costa Rica Packet* and *Lotus*) Conforti concludes that in this case India does have at least a concurrent jurisdiction in light of two links of the alleged crime with the Indian community: the Indian nationality of the victims and the fact that the event took

[28] On this issue see Cataldi (2010).

[29] The two papers commented here are the only ones written by the Maestro and quoted in this report that do not also appear in Conforti (2003).

[30] Conforti (2014).

place on an Indian boat. He also warns against the possible, and erroneous, recourse to Art. 97 UNCLOS which, in prohibiting any State other than the flag state or the national state of the author of the incident from exercising its jurisdiction, makes exclusive reference to collisions and other incidents of navigation.

The other paper seems very relevant as in a certain sense it concludes that discourse initiated in far-off 1957 in his book on the "Regime giuridico dei mari". In this text Conforti discusses the merits and importance of the functional dimension of State power in marine spaces in modern international law, that is, in an era marked by the emergence, especially within UNCLOS, of 'spatial' institutions to the benefit of the coastal State.[31] An initial example of this importance is customs surveillance. He demonstrates that States take a functional approach in safeguarding this interest, and that therefore the limit of 24 miles envisaged today for the contiguous zone is not consistent with customary law. This thesis does not appear to be exaggerated; it is sufficient to observe the data contained in practice revealing the exercise of powers of prevention and repression extending well beyond such a limit, and this also with reference to such sectors as drug trafficking or migrant trafficking as per recent Italian case law.[32] The same conclusion is then reached regarding State powers over piracy. The power of prevention and repression of each State over foreign ships involved in this phenomenon ceases if the ship is in the territorial sea of another State. But if the coastal State is not able to exercise effective control in its territorial sea, the functional rule regarding piracy is no longer restricted by the need to respect territorial space and any State can thus intervene. He consequently states that in the case of Somalia (Failed State), both the adoption of an *ad hoc* resolution by the UN Security Council authorizing intervention by other States within 12 miles from the coastline of that country, and the agreement of the 'provisional government' of that country, were not necessary in enacting prevention and repression of piracy. He then qualifies such actions as 'pleonastic'. Other examples of the exercise of functional powers are found in international practice with reference to other sectors of the law of the sea. Conforti names them all, demonstrating, more than 50 years from its initial formulation, the persisting validity of his theoretical construct.

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The 'General Rule of Interpretation' in the International Jurisprudence Relating to the United Nations Convention on the Law of the Sea

Roberto Virzo

Abstract The international jurisprudence relating to the United Nations Convention on the Law of the Sea (UNCLOS) has largely relied on the interpretative criteria specified in the 1969 Vienna Convention on the Law of Treaties (VCLT), in particular in those set out in Article 31, which establishes the "general rule of interpretation". Indeed, not only Article 31 VCLT fits well with the structure and nature of a treaty like UNCLOS, but international courts and tribunals often apply the general rule of interpretation to avoid endorsing a unilateral interpretation of UNCLOS, as well as to lay stress on the progressive emergence of new rules that reflect a change in the interests of the international community as a whole. One can most certainly commend a jurisprudence that clearly seeks to restrain creeping jurisdiction (where its only purpose is to protect the interests of a coastal State, rather than also to protect the interests of the international community) and, therefore, the new forms of "sovereigntism", imperialism and unilateralism that, in recent years, have unfortunately characterized the external relations of an ever-increasing number of States.

1 Introduction

The international jurisprudence relating to the United Nations Convention on the Law of the Sea[1] ("UNCLOS" or "the Convention") sheds valuable light on the interpretation of this important multilateral treaty.

That jurisprudence is quite extensive and consists of orders, judgments and opinions issued by different international courts and tribunals. This is not surprising: on the one hand, a plurality of arbitral and judicial bodies may have jurisdiction under Parts XI and XV of UNCLOS for the settlement of disputes concerning the

[1] Montego Bay, 10 December 1982; entry into force: 16 November 1994; 1833 UNTS 3.

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application or interpretation of the Convention[2]; on the other hand, international courts and tribunals that operate outside the UNCLOS framework have had the chance to rule on UNCLOS provisions relevant to the issues raised before them. For a discussion of the interpretations of UNCLOS made by the various judicial and arbitral bodies, I refer the reader to the chapters in this book that specifically deal with one or more of those bodies. I will briefly return to this issue in my conclusions, where I consider whether, on the whole, the multiplicity of courts and tribunals has led to the development of a consistent international jurisprudence.

Here, I am primarily concerned with the methods and the object of interpretation. In my view, the international jurisprudence on UNCLOS has largely relied on the interpretative criteria specified in the 1969 Vienna Convention on the Law of Treaties (VCLT),[3] at Articles 31 to 33.[4] The International Court of Justice (ICJ) has clarified on a number of occasions—including in the context of disputes concerning UNCLOS—that its approach is to "apply the rules on interpretation to be found in Articles 31 and 32 of the [1969] Vienna Convention on the Law of Treaties",[5] which it considers to be "reflective of customary international law".[6] The same approach has been adopted by numerous international courts and tribunals[7]—including the International Tribunal for the Law of the Sea (ITLOS)[8]—and was recently endorsed by the International Law Commission (ILC) itself in the 2018 Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties[9] (to which I will return in paragraph 5).

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[2] For further analysis and references, see Klein (2005), Virzo (2008), Karaman (2012) and Caligiuri (2018).

[3] Vienna, 23 May 1969; entry into force: 27 January 1980; 1155 UNTS 331.

[4] As is well known, Articles 31–33 of the Convention on the Law of Treaties between States and International Organizations or between International Organizations, adopted on 21 March 1986 in Vienna and not yet entered into force, are identical to Articles 31–33 VCLT.

[5] See, for example, and for references to prior case law, ICJ, *Maritime Delimitation in the Indian Ocean* (*Somalia* v. *Kenya*), Preliminary Objections, Judgment, 2 February 2017, para. 63.

[6] *Ibidem*. Due to the customary law character of these provision, in a previous judgment the Court held that "neither the circumstances that Nicaragua is not a party to the Vienna Convention on the Law of Treaties nor the fact that the treaty which is to be interpreted here considerably pre-dates the drafting of the said Convention has the effect of preventing the Court from referring to the principles of interpretation set forth in Articles 31 and 32 of the Vienna Convention". See ICJ, *Dispute Regarding Navigational and Related Rights* (*Costa Rica* v. *Nicaragua*), Judgment, 13 July 2009, para. 47.

[7] For a list of important decisions by international courts and tribunals recognizing the customary law character of the interpretative criteria set out in Articles 31 and 32 VCLT, see Crema (2017), pp. 26–27, footnotes 87 and 89.

[8] ITLOS, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Request for Advisory Opinion Submitted to the Seabed Dispute Chamber)*, Advisory Opinion, 1 February 2011, para. 57.

[9] Cf. ILC, Report of the work of the 17th session (2018), pp. 11–117. The topic of "Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties" was placed on the agenda of the Commission in 2012 (64th session), but is actually a development of the Commission's work on "Treaties over Time" started in 2009 (61st session). Georg Nolte was appointed Special Rapporteur in 2012. In 2016 (68th session) the ILC transmitted the Draft con-

More in particular, it seems to me that the "general rule of interpretation" under Article 31 VCLT fits well with the structure and nature of a treaty like UNCLOS, which (i) consists of 320 articles and 9 annexes, (ii) contains important conflict clauses regulating the relationship with other international agreements, (iii) is a framework convention that needs to be supplemented by subsequent agreements (some of which have already been concluded and are currently in force), and (iv) can be interpreted by taking into account "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation",[10] including the practice of the International Seabed Authority (ISA) and other international organizations exercising competences pursuant to specific UNCLOS provisions.

In the next sections I will examine, therefore, to what extent international tribunals called upon to rule on the interpretation of UNCLOS have expressly relied on the interpretative principles and criteria set out in Article 31 VCLT.

2 The Relevance of Good Faith

As is well known, under the VCLT a treaty must be interpreted[11] and performed[12] in good faith.[13] In addition to these obligations, Article 300 UNCLOS provides that "States parties shall fulfil in good faith the obligations assumed under this Convention". Two observations are in order about the exact scope of this provision. In the first place, even though Article 300 UNCLOS "contains a positive injunction on the parties to act in good faith",[14] international jurisprudence has emphasized that it is not an autonomous provision, since it operates only in relation to the application or interpretation of other substantive and procedural obligations imposed by UNCLOS. For example, ITLOS has observed that

> the obligation 'to seek to agree…' under article 63, paragraph 1, and the obligation to cooperate under article 64, paragraph 1 of the Convention are 'due diligence' obligations which

clusions to Governments for comments and observations. Draft conclusion 2(1) reads: "Articles 31 and 32 of the Vienna Convention on the Law of Treaties set forth, respectively, the general rule of interpretation and the rule on supplementary means of interpretation. *These rules also apply as customary international law*" (emphasis added).

[10] See Arts. 31 (3) (b) VCLT.

[11] See Arts. 31 VCLT.

[12] See Arts. 26 VCLT. It may be recalled that already in 1910 an arbitral tribunal established under the Permanent Court of Arbitration (PCA) ruled that "according to the principle of international law […] treaty obligations are to be executed in perfect good faith", PCA, *The North Atlantic Fisheries Case* (*Great Britain/United States of America*), Award, 7 September 1910, *Reports of International Arbitral Awards*, p. 188. See also Carreau and Marrella (2018), p. 161.

[13] On the principle of good faith in international law see, among many others, Kolb (2000). For a recent discussion of good faith in treaty interpretation, and for further references, see Linderfalk (2018).

[14] O'Brien (2017), p. 1939.

> require the States concerned to consult with one another in good faith, pursuant to article 300 of the Convention. The consultations should be meaningful in the sense that substantial effort should be made by all States concerned, with a view to adopting effective measures necessary to coordinate and ensure the conservation and development of shared stocks.[15]

On the other hand, the same Tribunal has ruled that the obligation to implement the Convention in good faith cannot be invoked on its own and that, on the contrary, an applicant, when invoking Article 300 UNCLOS, has the duty to "specify the concrete obligations and rights under the Convention, with reference to a particular article, that may not have been fulfilled by a respondent in good faith".[16] The same view was expressed by the Arbitral Tribunal constituted under Annex VII UNCLOS in the *Duzgity Integrity* case:

> Article 300 is an overarching provision which applies to all provisions of the Convention. It is not a stand-alone provision.[17]

In the second place, where an international court or tribunal decides to rule on Article 300 UNCLOS, a further issue arises as to whether the contracting parties have actually interpreted or applied a specific UNCLOS provision in good faith. Since proving good faith is not easy,[18] there is a tendency in international jurisprudence to apply a positive presumption.[19] In the *Enrica Lexie* case, for instance, the Arbitral Tribunal, quoting from an order previously issued by the ICJ,[20] stated that "once a State has made an undertaking as to its conduct, 'its good faith in complying' with such an undertaking 'is to be presumed'".[21]

Moreover, rather than having a predetermined, objective meaning in the context of treaty interpretation, the principle of good faith "appears to be a fundamental requirement of reasonableness"[22] (because the aim in applying it is to avoid manifestly absurd or unreasonable results), which makes it especially relevant to the choice of the interpretative criteria that may be used on the basis of general international law as reflected in Article 31(1) VCLT. There is thus no hierarchy between the

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[15] ITLOS, *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC) (Request for Advisory Opinion Submitted to the Tribunal)*, Advisory Opinion, 2 April 2015, para. 210.

[16] ITLOS, *The M/V "Virginia G" Case* (*Panama/Guinea-Bissau*), Judgment, 14 April 2014, para. 399.

[17] PCA, *The Duzgit Integrity Arbitration* (*Malta* v. *São Tomé and Principe*), Award, 5 September 2016, para. 216.

[18] Sorel (2006), p. 1309.

[19] See PCA, *The Chagos Marine Protected Area Arbitration* (*Mauritius* v. *United Kingdom*), Award, 18 March 2015, para. 447 (quoting *Affaire du lac Lanoux (Espagne/France)*, Award, 16 November 1957, para. 8: "il est un principe général de droit bien établi selon lequel la mauvaise foi ne se présume pas"); and PCA, *South China Sea Arbitration* (*Philippines* v. *China*), Award, 12 July 2016, para. 1200.

[20] ICJ, *Questions Relating to the Seizure and Detention of Certain Documents and Data* (*Timor-Leste* v. *Australia*), Provisional Measures, Order, 3 March 2014, para. 44.

[21] PCA, *The "Enrica Lexie" Incident* (*Italy* v. *India*), Provisional Measures, Order, 29 April 2016, para. 130.

[22] Dörr (2018), p. 587.

three elements of the general rule of interpretation contained in that provision, and courts or other interpreting bodies are required to take all of them into account along with their interplay.[23] Ultimately, good faith must guide the entire process of interpretation.[24] and "the result obtained must be appreciated in good faith"[25] as well.

3 The Interplay Between the Interpretative Criteria Under Article 31(1) VCLT

If it is true that

> [p]ursuant to article 31 of the [1969] Vienna Convention, [UNCLOS] is to be interpreted in good faith in accordance with the ordinary meaning of its terms in their context and in the light of its object and purpose,[26]

then international judges should verify which of the alternative criteria set out in the "general rule of interpretation" actually apply in a particular case and, rather than choosing one among them, assess the possible interplay of the applicable criterion or criteria with other approaches.

That remains true even for the literal interpretation criterion, which, more than any other method reflects a preference for an objectivist approach to the interpretation of the text of a treaty—an approach on which, as is well known, the VCLT is based.

This is because, to begin with, 'ordinary meaning' cannot be extracted from the text through linguistic analysis alone, especially when finding that meaning "requires a choice from a range of possible meanings"[27] that the parties did not expressly intend, either originally or subsequently.[28] Rather, "the true meaning of a text has to be arrived at by taking into account all the consequences which normally and reasonably flow from that text".[29]

An example of this can be found in the case of the *Delimitation of the Maritime Boundary in the Bay of Bengal*, where ITLOS examined the notion of "natural prolongation" contained in Article 76 (1) UNCLOS, as well as its possible applicability to a coastal State's request to extend its continental shelf beyond 200 nm.

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[23] Salerno (2017), p. 197; Dörr (2018), p. 580.

[24] Capotorti (1984), p. 37.

[25] Sinclair (1984), p. 121.

[26] ITLOS, *Delimitation of the Maritime Boundary in the Bay of Bengal* (*Bangladesh/Myanmar*), Judgment, 14 March 2012, para. 372.

[27] Gardiner (2015), p. 222.

[28] Indeed, it should be recalled that, under Art. 31(4) VCLT, "[a] special meaning shall be given to a term if it is established that the parties so intended".

[29] Sinclair (1984), p. 121.

As noted by the Tribunal, natural prolongation was first introduced by the ICJ in the *North Sea Continental Shelf Case*[30] "as a fundamental notion underpinning the regime of the continental shelf".[31] However, the expression is not defined in the text of the ICJ's judgment[32] or, most importantly, in UNCLOS. Bangladesh invited the Tribunal to adopt a literal interpretation, arguing that, in its ordinary meaning, the expression "natural prolongation of its land territory" in Article 76(1) "refers to the need for geological as well as geomorphological continuity between the land mass of the coastal State and the seabed beyond 200 nm", and that "[w]here, as in the case of Myanmar, such continuity is absent, there cannot be entitlement [to outer shelf areas] beyond 200 nm".[33] The Tribunal rejected Bangladesh's argument and, going beyond the ordinary meaning of the expression, clarified that

> the reference to natural prolongation in article 76, paragraph 1, of the Convention, should be understood in light of the subsequent provisions of the article defining the continental shelf and the continental margin. Entitlement to a continental shelf beyond 200 nm should be determined by reference to the outer edge of the continental margin, to be ascertained in accordance with article 76, paragraph 4. To interpret otherwise is warranted neither by the text of article 76 nor by its object and purpose.[34]

Several international courts and tribunals have applied all of the VCLT criteria of interpretation simultaneously, including with respect to Articles 281 and 282 UNCLOS and the subordination clauses contained therein.[35]

Both of these articles apply solely to disputes concerning also or only UNCLOS and do not refer to a means of settlement of other categories of international

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[30] ICJ, *North Sea Continental Shelf Case* (*Federal Republic of Germany* v. *Netherlands*; *Federal Republic of Germany* v. *Denmark*), Judgment, 20 February 1969, para. 19. See also, for instance, paras. 41, 43, 85, 95, 101.

[31] *Delimitation of the Maritime Boundary in the Bay of Bengal* (*Bangladesh/Myanmar*), Judgment, para. 432.

[32] Paik (2015) pp. 584–585 notes that "[t]he Court in the 1969 Judgment used the term 'natural prolongation' on numerous occasions. Despite its recurring use, the term did not necessarily carry the same nuance from one paragraph to another. In addition, the term itself received no definition form the outset. The result was obvious, an extreme ambiguity on the meaning of natural prolongation. The matter became much worse since the paragraphs have been subsequently referred to and quoted out of context".

[33] *Delimitation of the Maritime Boundary in the Bay of Bengal* (*Bangladesh/Myanmar*), Judgment, para. 426.

[34] *Ibidem*, para. 437.

[35] Article 281 UNCLOS reads: "1. If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure. 2. If the parties have also agreed on a time-limit, paragraph 1 applies only upon the expiration of that time-limit". Article 282 UNCLOS reads: "If the States parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such a dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree".

controversies which, in case, can be chosen if both parties to a dispute concerning the Convention have agreed to submit it to such a procedure. The parties' consent may be expressly stated, or implied from the instrument that provides for recourse to the dispute settlement procedure. In other words, as observed by the Arbitral Tribunal constituted under Annex VII in *Barbados* v. *Trinidad and Tobago*, it must be a procedure "which could cover the UNCLOS dispute".[36] Failing that, we are left with the hypothesis envisaged by ITLOS in its order on Ireland's request for provisional measures in the *MOX Plant* case, according to which where a dispute "concerns the interpretation or application of the Convention [UNCLOS] and no other agreement, only the dispute settlement procedures under the Convention are relevant to that dispute".[37]

It was precisely in the course of the complex procedural history of the *MOX Plant* dispute[38] that the Court of Justice of the European Communities (CJEC, now Court of Justice of the European Union, CJEU), having noted that some UNCLOS provisions—in this case, the provisions concerning the protection of the marine environment—"come within the scope of Community competence which the Community has elected to exercise by becoming a party to the Convention [UNCLOS]",[39] found that:

> the provisions of the Convention relied on by Ireland in the dispute relating to the MOX Plant and submitted to the Arbitral Tribunal are rules which form part of the Community legal order. The Court therefore has jurisdiction to deal with disputes relating to the interpretation and application of those provisions and to assess a Member State's compliance with them.[40]

More specifically, the CJEC's exclusive jurisdiction was based on what was then Article 292 ECT (now Article 344 TFEU), which stipulated that the Member States "undertake not to submit a dispute concerning the interpretation or application of the [ECT] to any method of settlement other than those provided for therein". The Luxembourg Court considered that UNCLOS "makes it possible to avoid such a breach of the Court's exclusive jurisdiction in such a way as to preserve the autonomy of the Community legal system". And it added:

> It follows from Article 282 of the Convention that, as it provides for procedures resulting in binding decisions in respect of the resolution of disputes between Member States, the system for the resolution of disputes set out in the EC Treaty must in principle take precedence over that contained in Part XV of the Convention.[41]

Put differently, the reasoning of the CJEC does not contradict the interpretation that Article 282 applies only to procedures to which the parties have agreed or are bound to submit their UNCLOS dispute. Indeed, in the *MOX Plant* case, the dispute

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[36] PCA, *Barbados* v. *Trinitad and Tobago Arbitration*, Award, 11 April 2006, para. 200.

[37] ITLOS, *The MOX Plant Case* (*Ireland* v. *United Kingdom*), Provisional Measures, Order, para. 52.

[38] For a discussion of the dispute, and for further references, see Lavranos (2006).

[39] CJEC, case C-459/03, *Commission* v. *Ireland*, Judgment, 30 May 2006, para. 120.

[40] *Ibidem*, para. 121.

[41] *Ibidem*, paras 124–125.

concerned UNCLOS provisions on the protection of the marine environment over which the European Community (now the EU) exercises its jurisdiction.

The ICJ has also ruled on the interpretation of Article 282. It has done so by taking into account the object and purpose of Part XV UNCLOS, as well as the possible effects of the provision.

In its Judgment on the preliminary objections raised by Kenia (the defendant State) in the case concerning the *Maritime Delimitation in the Indian Ocean*, the ICJ pointed out that UNCLOS State parties may agree to submit a dispute to binding settlement procedures other than those specified in Section II of Part XV of UNCLOS not only through an agreement, but also through unilateral declarations of acceptance of the Court's compulsory jurisdiction made under the optional clause in Article 36(2) of the Court's Statute. Indeed, according to the Court (which, besides, made reference to the *travaux préparatoires* of the Third United Nations Conference on the Law of the Sea,[42] thus resorting to one of the supplementary means of interpretation mentioned in Article 32 VCLT).

> Article 282 makes no express reference to an agreement to the Court's jurisdiction resulting from optional clause declarations. It provides, however, that an agreement to submit a dispute to a specified procedure that applies in lieu of the procedures provided for in Section 2 of Part CV may not only be contained in a 'general, regional or bilateral agreement' but may also be reached 'otherwise'. The ordinary meaning of Article 282 is broad enough to encompass an agreement to the jurisdiction of this Court that is expressed in optional clause declarations.[43]

However, Kenya's optional clause declaration contained a reservation to the effect that the Court would not have jurisdiction over disputes in respect of which the parties "have agreed or shall agree to have recourse to some other method or methods of settlement".[44]

As a consequence, the ICJ was confronted with the possible interplay between the subordination clause in Article 282 UNCLOS and the reservation contained in Kenya's optional clause declaration, which could also be regarded as a subordination clause. In addition to creating a kind of circular reference, such an interplay may lead to "a negative conflict of jurisdiction involving the danger of a denial of justice", as noted by the ICJ[45] (which quoted from the Judgment of the Permanent Court of International Justice in the *Factory of Charzów* case).[46]

It was precisely to avoid that result[47] that the Court interpreted Article 282 not only in a purposive manner—after all, the object and purpose of this Article is to ensure that UNCLOS disputes are resolved through binding settlement procedures

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[42] *Maritime Delimitation in the Indian-Ocean* (*Somalia* v. *Kenya*), Preliminary Objections, Judgment, para. 127.

[43] *Ibidem*, para. 126.

[44] *Ibidem*, para. 119.

[45] *Ibidem*, para. 132.

[46] PCIJ, *Factory at Chorzów, Claims for Indemnity*, Jurisdiction, Judgment, 26 July 1927, p. 30.

[47] Bonafé (2017), p. 729, notes that "[t]he Court's real concern was the certainty of dispute settlement".