A Bridge over Troubled Waters

Dispute Resolution in the Law of International Watercourses and the Law of the Sea

Edited by

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CHAPTER 2

Third-Party Intervention and Involvement in Inter-State Arbitration

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1 Introduction

The focus of this contribution is on inter-State arbitration, where one might expect to see the highest priority paid to party autonomy.[1] But there is a need to see this against the wider background. The contribution discusses the legal basis for third-party intervention in arbitral proceedings, as well as some alternatives to full-fledged intervention, and other ways of seeking to safeguard the legal interests of third parties.[2] It does so in light of the particular arrangements set forth in Part XV and Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS). Part XV may be seen as a kind of laboratory for comparing methods of dispute settlement.[3]

The contribution is divided into the following sections: the present introductory remarks, which among other things distinguish various types of arbitration and various possible forms of involvement (whether called intervention or not) (I); followed by some brief ccomments about the nature of dispute settlement under Part XV of UNCLOS (II). There is then an historical account of intervention (III). Possible intervention in arbitrations under UNCLOS is considered next (IV). The *South China Sea Arbitration* between the Philippines

1 It should be noted that some of the arguments considered in this article can equally be said to apply to intervention in a conciliation under Part XV of UNCLOS, although the different considerations that may exist in such a non-adjudicative procedure merit their own in-depth discussion.

2 The position of third parties in international law has been the subject of some important studies. See eg Christine Chinkin, *Third Parties in International Law* (OUP 1993).

3 Part XV provides for a choice of forums for the settlement of disputes under UNCLOS: ICJ, ITLOS, Annex VII arbitral tribunals, and Annex VIII 'special arbitral tribunals' (the last of which have never been used). In addition, cases may by agreement be referred to chambers of the ICJ and ITLOS. See Bernard H Oxman, 'Courts and Tribunals: The ICJ, ITLOS, and Arbitral Tribunals' in D Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 394–415; Tullio Treves, 'Article 287' in A Proelß, *United Nations Convention on the Law of the Sea: A Commentary* (Hart Publishing 2017) 1849–1863.

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and China will be described in so far as it is relevant to the theme of this contribution (V), followed by brief conclusions (VI).

The involvement of third parties in inter-State litigation is becoming more common. While this will normally be by way of actual or attempted intervention, other less formal ways of indicating an interest are also employed. In recent years, such involvement has been particularly evident in the case of law of the sea disputes. It has not so far proved as common in the cases of fresh-water disputes. This is understandable since the former often involve maritime areas in which more than two States may have an interest. While this may also be the case with fresh-water disputes, these are, in the nature of things, more likely to be purely bilateral. Exceptions could be multi-State rivers such as the Danube and the Rhine, and lakes bordered by more than two States, such as the Caspian or Lake Chad. In any event, the principles discussed in this contribution may be equally applicable to fresh-water and law of the sea litigation.

Decisions rendered by international courts and tribunals are binding only between the parties to the case; they have no force except between the parties and in respect of the particular case.[4] They are not binding on third parties.[5] There is no system of binding precedent (*stare decisis*) in general international law.[6] Nevertheless, judgments and awards may influence the law, and third parties are often very interested in inter-State proceedings between other States.[7]

4 Statute of the International Court of Justice (signed 26 June 1945, entered into force 24 October 1945) 33 UNTS 993 (ICJ Statute) art 59; United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS) art 296.2.

5 In this contribution, 'third parties' refers primarily to States, but may also refer to international organisations, such as the European Union, or to entities that may be seen as representing the broader international community, like the International Seabed Authority. The term does not cover non-appearing parties, who are not 'third States' but parties in the full sense and bound by the decision, whether or not they choose not to appear.

6 See, generally, Mohamed Shahabuddeen, *Precedent in the World Court* (CUP 1996).

7 Alex G Oude Elferink, 'Third States in Maritime Delimitation Cases: Too Big a Role, Too Small a Role, or Both?' in A Chircop, T McDorman and S Rolston (eds), *The Future of Ocean Regime-Building: Essays in Tribute to Douglas M. Johnson* (Martinus Nijhof 2009) 611; Philippe Gautier, 'Standing of NGOs and Third-Party Intervention Before the International Tribunal for the Law of the Sea' (2014) 1 RBDI 205; Robert G Volterra, 'Arbitrating Maritime Disputes: Evolving Approaches to Maritime Features and Third Party Interests in UNCLOS Arbitration' in S Minas and HJ Diamond (eds), *Stress Testing the Law of the Sea: Dispute Resolution, Disasters, and Emerging Challenges* (Brill Nijhoff 2018) 55. On intervention more generally, see Shabtai Rosenne, *Intervention in the International Court of Justice* (Springer 1993).

Such interests may be various:

- Perhaps most obviously, a State which claims an entitlement in a maritime area being delimited in bilateral proceedings between two other States has a clear interest in the outcome. There are well-established ways to safeguard the interests of third States in such proceedings, not least by drawing a delimitation line that continues in a specific direction until it reaches the point where the interests of a third State come into play.[8] But sometimes, as in the Western Caribbean, the position may be very complicated, and purely bilateral resolution of bilateral delimitation can lead to difficulties. An interesting question in this regard is how far a delimitation creates an objective situation that all States are bound to recognise, at least if they do not swiftly object. In this connection, it is interesting to consider the assertion by the Special Chamber in *Ghana/Côte d'Ivoire* that a delimitation line laid down by a court has a constitutive nature and is not merely declaratory.[9]
- States within the region or sub-region, or within a semi-enclosed sea, may have concerns that a bilateral delimitation between two States may establish some kind of a regional practice or precedent. Such concerns were touched on in the *Black Sea*[10] case and in *Ghana/Côte d'Ivoire*,[11] but it seems that in neither case was the court impressed.
- The findings of an international court or tribunal as to the status of maritime features (such as submerged reefs, low-tide elevations, islands, or that sub-set of islands referred to as 'rocks' in article 121.3 of UNCLOS) may be of great interest to third States. *Philippines v China* is a classic case in that regard.[12]
- More generally, third States may have a great interest in findings of law by international courts and tribunals and the application of such findings to its

8 See eg *Maritime Delimitation in the Black Sea* (*Romania v Ukraine*) (Judgment) [2009] ICJ Rep 61, para 219.

9 In *Dispute Concerning Delimitation of the Maritime Boundary Between Ghana and Côte d'Ivoire in the Atlantic Ocean* (*Ghana/Côte d'Ivoire*) (Judgment) ITLOS Reports 2017, paras 590–591. Both parties argued that a delimitation judgment was only of a declaratory nature. The Special Chamber disagreed, finding that '[o]nly a decision on delimitation establishes which part of the continental shelf under dispute appertains to which of the claiming States. This means that the relevant judgment gives one entitlement priority over the other. Such a decision accordingly has a constitutive nature and cannot be qualified as merely declaratory.'

10 See eg *Maritime Delimitation in the Black Sea* (n 8) paras 174–178.

11 *Maritime Boundary Ghana and Côte d'Ivoire* (n 9) para 323.

12 *South China Sea Arbitration* (*The Republic of Philippines v The People's Republic of China*), PCA Case No 2013–19, Award (12 July 2016).

own circumstances. It has even been suggested that States should routinely consider judgments and consider reacting publicly where they disagree. Otherwise the law as stated by, say, the ICJ, is likely over time to become accepted as being a correct statement of the law.[13] But that is a counsel of perfection.

It is as well to note at the outset three important distinctions that may be relevant to the question of intervention in UNCLOS annex VII arbitrations. First, we should recall the basic distinction, to be found in the Statutes of the International Court of Justice (ICJ) and of the International Tribunal for the Law of the Sea (ITLOS) between discretionary intervention and intervention 'as of right'.[14] In the first case, a State wishing to intervene has to show that it has 'an interest of a legal nature which may be affected by the decision'. In the second case, it is sufficient that the intervening State is a party to a treaty whose interpretation or application is in question (UNCLOS in the case of ITLOS). This distinction is related to the question whether the intervening State becomes a party or remains a non-party to the case.[15]

Second, one needs to distinguish between arbitral proceedings where there are pre-existing rules, at least in part (as is the case under UNCLOS Annex VII), and such procedures where the rules are developed entirely *de novo*, either by agreement of the parties, or by the tribunal itself under delegated authority from the parties.

And, third, while arbitration has in the past been optional in the sense that it requires *ad hoc* agreement in each case, increasingly there are cases where arbitration is agreed in advance, and so may be seen as compulsory, which is usually the case with arbitration under UNCLOS annex VII.

Third States may be involved in inter-State litigation in a wide range of ways.[16] In addition to formal intervention, with which this contribution is chiefly concerned, these may include:

13 Daniel Bethlehem, 'The Secret Life of International Law' (2012) 1 CJICL 23, 31–33.

14 ICJ Statute, arts 62–63; Statute of the International Tribunal for the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 561 (ITLOS Statute) arts 31–32.

15 In ICSID investor/State arbitrations, there is the practice of 'non-disputing party submissions'. See ICSID Rules of Procedure for Arbitration Proceedings (adopted 25 September 1967, entered into force 1 January 1968, as amended 2006) ICSID/15, art 37(2). See also UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, UNGA Res 68/109 (16 December 2013) UN Doc A/RES/68/109, art 5.

16 This contribution does not cover participation in advisory proceedings, though where a request for an advisory opinion involves what is in effect a bilateral dispute the participation of other States (whether 'on one side' or in a neutral fashion) may seem like

- Transmitting a submission (sometimes called a *livre blanc*) to the court or tribunal. This is most often done by a non-participating Party, since a non-Party may seek to intervene in the normal way. We have seen this in cases before the ICJ. In the *Arctic Sunrise Arbitration* (*Netherlands v. Russia*) case, Russia submitted a position paper to the arbitral tribunal. Owing to the fact that the document was submitted only a few days before the issuance of the Award on the merits, the arbitral tribunal decided to take no formal action in this regard.[17] In the *South China Sea Arbitration*, China, a party to the case which chose not to participate in the proceedings, transmitted a "Position Paper" on Jurisdiction; and Viet Nam, a non-party to the case, transmitted a *Note Verbale* as to its legal interests related to the case.[18]
- Attendance as observers at an otherwise closed hearing. This happened in the *South China Sea Arbitration*, when Malaysia, Indonesia, Vietnam, Thailand, Brunei and Japan were permitted to observe the hearing.[19]
- Requesting copies of the written pleadings before they are made publicly available. This happens quite often in cases before the ICJ.[20] The purpose may be to consider whether or not to request to intervene formally. It may also be a gentle way of indicating to a court or tribunal the third State's interest.
- Sometimes a third State (or more often a non-participating Party) may make its legal views known in more indirect ways, such as by publishing a comment or by commissioning an article or blog by some learned author (the commissioning being generally undisclosed but hardly unnoticed). This is

intervention or participation as an *amicus*. See for recent examples, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, (Advisory Opinion) [2019] ICJ Rep 95.

17 *Arctic Sunrise Arbitration* (*The Kingdom of the Netherlands v The Russian Federation*), PCA Case No 2014-02, Award on the Merits (14 August 2015) para 68.

18 Erik Franckx and Marco Benatar, 'Non-Participation in Compulsory Procedures of Dispute Settlement: The People's Republic of China's Position Paper in the South China Sea Arbitration and Beyond' in A Føllesdal and G Ulfstein (eds), *The Judicialization of International Law: A Mixed Blessing?* (OUP 2018) 183.

19 PCA Press Release No 149084 (13 July 2015) <https://pcacases.com/web/sendAttach/1304> accessed 21 January 2019.

20 Rules of Court (adopted 14 April 1978, as amended 2005) (ICJ Rules) art 53(1); Rules of the Tribunal (adopted 28 October 1997, as amended 2018) (ITLOS Rules) art 67(1).

> not entirely satisfactory. The commissioning is hardly likely to remain unknown, and the origin of the piece will at least be the subject of much speculation. A one-sided essay is unlikely to do credit to its author, and at the same time is unlikely to be of much benefit to the State. On the other hand, such writings can serve the purpose of floating detailed legal argument, to a certain degree at arm's length.[21] This may be done before or after a judgment or award has been delivered, or both.[22]

Another way of taking into account the positions of more than two States is to engage in multi-party litigation. Here the third State is a party from the outset. This possibility is expressly envisaged in annex VII to UNCLOS.[23] Another quite common scenario is where two or more cases are heard by the same court or tribunal in parallel, whether formally joined or not.[24]

2 Dispute Settlement under Part XV of UNCLOS

Part XV of UNCLOS, while marked with a considerable degree of flexibility, is intended to be a coherent system. It makes provision for a choice among four compulsory procedures entailing binding decisions (Article 287), as well as referring to other methods such as negotiation, fact-finding and conciliation.

In the 24 years since the entry into force of UNCLOS on 16 November 1994, there have been about 35 cases of inter-State litigation where jurisdiction was founded on its Part XV. It is not easy to quantify them given the complexities of Part XV. There have been 25 cases before ITLOS (of which nine were prompt

21 In this regard, note in particular the careful description in Stefan Talmon and Bing Bing Jia (eds), *The South China Sea Arbitration: A Chinese Perspective* (Hart Publishing 2014) v-vi. The editors say that '[t]he book does not intend to set out or represent in any way the official position of the Chinese Government but endeavours to serve as a kind of *amicus curiae* brief of interested academics acting in their capacity as independent experts in international law.' At the time of writing, Talmon and Jia evidently considered it unlikely that China 'will set out its position in an official publication that will be submitted to the Tribunal in an informal manner … or in letters or other informal communications to the Tribunal.'

22 For a critical reflection, see eg the Chinese Society of International Law, 'The South China Sea Arbitration Awards: A Critical Study' (2018) 17 Chinese J Intl L 207. For a comment on the reaction thereto, see Sienho Yee, 'Attention to the Chinese Society's Critical Study and Our Standing Invitation to Respond' (2018) 17 Chinese J Intl L 757.

23 UNCLOS, Annex VII, arts 1, 3(g)-(h).

24 For example, the *Legality of Use of Force* cases initiated by the Federal Republic of Yugoslavia (Serbia and Montenegro) before the ICJ.

release cases and six provisional measures); and nine before arbitral tribunals under Annex VII to the Convention. While there have been none before the ICJ where jurisdiction was based on UNCLOS, that Court has continued to have cases in which the interpretation of UNCLOS (or the customary international law of the sea that may or may not be reflected in UNCLOS) was central. There has been one conciliation under Annex V;[25] but no cases before a special arbitral tribunal under Annex VIII.

Writers have sought to address the advantages and disadvantages of arbitration and judicial settlement.[26] One aspect of arbitration that is often seen as an advantage is 'party autonomy' or 'party control'. Whether and if so how far that turns out to be an advantage in practice, for one or both parties, is a question. The present contribution concerns one specific aspect of party autonomy that is generally seen as in the interests of one or more parties to an arbitration, and which until recently had hardly been questioned: their control over intervention by third parties. This has now been much discussed in connection with the *Philippines v China* arbitration.

In a characteristically well-researched article, completed on 1 March 2015 (when *Philippines v China* was in full swing), Professor Sienho Yee of Wuhan University concluded, in no uncertain terms, that "[i]ntervention in international proceedings is only possible with the consent of the parties to a case", and that "UNCLOS, including Annex VII thereto, does not contain such consent".[27] He makes good points, yet — as will be shown below — the position is not as clear as he suggests. A more nuanced view may be found in a recent

25 See *Conciliation Between the Democratic Republic of Timor-Leste and The Commonwealth of Australia*, PCA Case No 2016-10, Report and Recommendations of the Compulsory Conciliation Commission Between Timor-Leste and Australia on The Timor Sea (9 May 2018).

26 Michael Wood, 'Choosing Between Arbitration and a Permanent Court: Lessons from Inter-State Cases' (2017) 32 ICSID Review 1.

27 Sienho Yee, 'Intervention in an Arbitral Proceeding under Annex VII to the UNCLOS?' (2015) 14 Chinese Journal of International Law 79, 96, para 40. (Para 40 reads in full: '[i]Intervention in international proceedings is only possible with the consent of the parties to a case expressed either as a general consent for a certain category of matters, or as a specific consent for a particular case or a particular request for intervention. The UNCLOS, including Annex VII thereto, does not contain such consent … to intervention in an Annex VII arbitral proceeding, although intervention is possible by separate consent if given by the parties in an act additional to UNCLOS. Article 5 of Annex VII authorizing rule-making does not extend so far as to allow an Annex VII arbitral tribunal to make, without agreement of the parties, a rule that would permit intervention. Nor does such a tribunal have any inherent power that would allow it to permit intervention without the consent of the parties.').

book chapter by Judith Levine and Garth Schofield, who emphasise the context of annex VII arbitration within the UNCLOS dispute settlement system, and the fact that intervention in such arbitrations by definition concerns the interpretation or application of a treaty to which the intervening State is a party, assuming it is a party to UNCLOS. Intervention in an annex VII arbitration thus corresponds to intervention 'as of right' under article 32 of the ITLOS Statute and article 63 of the ICJ Statute.[28]

Intervention may be welcome to the parties; it may be unwelcome to them. It may be welcome to one party and unwelcome to the other.

At the ICJ, and at the ITLOS, there are reasonably clear and well-understood provisions in the respective statutes for intervention by third States (as well as rules of procedure and case-law on the matter). Such provision is usually absent in the case of arbitration; it seems to have been a widely-held view that intervention should not be possible in inter-State arbitration, unless the parties have expressly agreed to allow it, whether by general or specific agreement (to borrow Professor Yee's helpful terminology). Nor is there any recent example of third-party intervention in inter-State arbitration.

Yet there is no principle of arbitration that precludes third-party intervention.[29] In fact, '[t]he very concept of intervention was first addressed in Article 56 of the Hague Convention for the Pacific Settlement of International Disputes of 1899 in the context of arbitration.'[30] Article 84 of the 1907 Hague Convention followed the same approach.[31] These provisions of the Hague Conventions were the origin of the provisions on intervention in the Statute of the International Court of Justice (ICJ).[32] Moreover, there are contemporary

28 Judith Levine and Garth L Schofield, 'Navigating Uncharted Procedural Waters in a Rising Sea of Cases at the Permanent Court of Arbitration' in S Minas and HJ Diamond (eds), *Stress Testing the Law of the Sea: Dispute Resolution, Disasters, and Emerging Challenges* (Brill Nijhoff 2018) 95.

29 A point recognised as early as *Affaire du Guano* (*Chili v France*), Award (5 July 1901) XV UNRIAA 315–316.

30 Andreas Zimmermann, 'International Courts and Tribunals, Intervention in Proceedings' in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law*, vol 5 (OUP 2012) 571, para 2. Hague Convention for the Pacific Settlement of International Disputes of 1899 (adopted 29 July 1899, entered into force 4 September 1900) 1 AJIL 103.

31 Hague Convention for the Pacific Settlement of International Disputes of 1907 (adopted 18 October 1907, entered into force 26 January 1910) 2 AJIL Supp 43. This provision inspired Article 63 of the PCIJ Statute, see John L Simpson and Hazel Fox, *International Arbitration* (Praeger 1959) 184.

32 Statute of the International Court of Justice (opened for signature 26 July 1945, entered into force 24 October 1945).

examples of conventions expressly contemplating intervention in inter-State arbitration.[33]

Notwithstanding the lack of practice, it is not to be excluded that an inter-State tribunal may have the power to permit a third State to intervene in the proceedings. In which case, in exercising any such power, a tribunal should have regard to various factors, including the principle of good administration of justice. And were it to exercise such a power, it is likely to follow the practice of the ICJ on the matter. Generalizations are probably not helpful; each tribunal, and each case, will need to be considered individually.

3 History of Intervention in International Proceedings

Professor Yee writes that "the first significant proposal to introduce intervention in international arbitration or any international proceedings" was article 16 of the *Institut de Droit International*'s 1875 resolution that was part of its *Règlement* for international arbitral procedure.[34] Article 16 of the *Règlement* read:

> Ni les parties, ni les arbitres ne peuvent d'office mettre en cause d'autres Etats ou des tierces personnes quelconques, sauf autorisation spéciale exprimée dans le compromis et consentement préalable du tiers.
>
> L'intervention spontanée d'un tiers n'est admissible qu'avec le consentement des parties qui ont conclu le compromis.

As mentioned above, the first international instruments containing clauses regarding intervention were found in the Hague Conventions, notably in the context of arbitration, albeit in a period where there were no permanent international courts in existence. Article 56 of the Hague Convention for the Pacific Settlement of International Disputes of 1899 read:

33 See Minamata Convention on Mercury (adopted 10 October 2013, entered into force 16 August 2017) 55 ILM 582, Annex E, art 10 (which reads: 'A Party that has an interest of a legal nature in the subject matter of the dispute that may be affected by the decision may intervene in the proceedings with the consent of the arbitral tribunal.').

34 Yee, 'Intervention under Annex VII' (n 27) 81.

> The Award is only binding on the parties who concluded the 'Compromis'.
>
> When there is a question of interpreting a Convention to which Powers other than those concerned in the dispute are parties, the latter notify to the former the 'Compromis' they have concluded. Each of these Powers has the right to intervene in the case. If one or more of them avail themselves of this right, the interpretation contained in the Award is equally binding on them.

Article 84 of the Hague Convention for the Pacific Settlement of International Disputes of 1907 was similar in its content.

These articles inspired what would become Article 63 of the Statute of the Permanent Court of International Justice (PCIJ), Article 63 of the Statute of the ICJ, and Article 32 of ITLOS. As explained above, the scenario contemplated in these articles is that of intervention 'as of right', and the judgment given is binding on the intervening party as it is on the parties to the dispute. The rationale behind this right is that all parties to a convention have an interest in its application and interpretation.

Article 62 of the PCIJ Statue and Article 62 of the ICJ Statue added another form of intervention. The latter states:

1. Should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene.
2. It shall be for the Court to decide upon this request.

Here, as opposed to intervention under Article 63, there is no right to intervene, rather it is discretionary in nature. Also, the ICJ has found that in this case the judgment of the Court will not be binding on the intervening party, which is not a party to the case.[35] This is not the case in the later ITLOS Statute, Article 31.3 of which states that

> If a request to intervene is granted, the decision of the Tribunal in respect of the dispute shall be binding upon the intervening State Party in so far as it relates to matters in respect of which that State Party intervened.

35 See *Case Concerning the Land, Island and Maritime Frontier Dispute* (*El Salvador/Honduras*) (Judgment on the Application by Nicaragua for Permission to Intervene) [1990] ICJ Rep 92, paras 421–423.

Over the years, there was one case in which requests for intervention were filed before the PCIJ which were granted.[36] There have been requests in 13 cases before the ICJ,[37] five of which have been granted.[38]

4 Annex VII Arbitration

This section will show, first, that there are arguments indicating that an arbitral tribunal may sometimes have the power to permit a State to intervene in proceedings instituted under Annex VII UNCLOS (A). Second, in exercising

36 The first contentious case to come before the Permanent Court of International Justice, the *SS Wimbledon* in 1923, involved the Kiel Canal. It was concerned with passage through a canal running exclusively through the territory of one State and the interpretation of Article 380 of the Versailles Peace Treaty. It is of great interest, being a rare instance of a multi-party case (United Kingdom, France, Italy and Japan v Germany) with, in addition, an intervening State (Poland). The intervention was allowed under Article 63 PCIJ Statute (intervention as of right when the interpretation of a treaty to which the intervening State is party is at issue before the Court). See *Case of the SS Wimbledon* (Judgment on the Question of Intervention by Poland) [1923] PCIJ Rep Series A No 1.

37 *Haya de la Torre Case* (*Colombia/Peru*) (Judgment) [1951] ICJ Rep 71; *Nuclear Tests Case* (*Australia v France*) (Judgment) [1974] ICJ Rep 253; *Nuclear Tests Case* (*New Zealand v France*) (Judgment) [1974] ICJ Rep 457; *Case Concerning the Continental Shelf* (*Tunisia/Libyan Arab Jamahiriya*) (Judgment) [1982] ICJ Rep 18; *Case Concerning the Continental Shelf* (*Libyan Arab Jamahiriya/Malta*) (Judgment) [1985] ICJ Rep 13; *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*) (Merits) [1986] ICJ Rep 14; *Case Concerning the Land, Island and Maritime Frontier Dispute* (*El Salvador/Honduras, Nicaragua Intervening*) (Judgment) [1992] ICJ Rep 351; *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests* (*New Zealand v France*) *Case* (Order) [1995] ICJ Rep 288; *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria* (*Cameroon v Nigeria, Equatorial Guinea Intervening*) (Judgment) [2002] ICJ Rep 303; *Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan* (*Indonesia/Malaysia*) (Judgment) [2002] ICJ Rep 625; *Territorial and Maritime Dispute* (*Nicaragua v Colombia*) (Judgment) [2012] ICJ Rep 624; *Jurisdictional Immunities of the State* (*Germany v Italy, Greece Intervening*) (Judgment) [2012] ICJ Rep 99; *Whaling in the Antarctic* (*Australia v Japan, New Zealand Intervening*) (Merits) [2014] ICJ Rep 226.

38 *Haya de la Torre* (n 38); *Land, Island and Maritime Frontier Dispute* (Nicaragua Intervention) (n 36); *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria* (*Cameroon v Nigeria*) (Order on the Application by Equatorial Guinea for Permission to Intervene) [1999] ICJ Rep 1029; *Jurisdictional Immunities of the States* (*Germany v Italy*) (Order on Application by the Hellenic Republic for Permission to Intervene) [2011] ICJ Rep 494; *Whaling in the Antarctic* (*Australia v Japan*) (Order on Declaration of Intervention of New Zealand) [2013] ICJ Rep 3.

that discretionary power, and in deciding whether to grant permission to intervene, a tribunal should have regard to various factors, including the principle of good administration of justice and the need to ensure the coherence of the dispute settlement system under Part XV UNCLOS (B). Third, a tribunal may find it helpful to refer to the statutes, rules and practice of the International Tribunal for the Law of the Sea (ITLOS) and the International Court of Justice (ICJ) in order to determine the procedures and grounds for intervention (C).

A *A Tribunal May Have the Power, under Annex VII of UNCLOS, to Permit Intervention*

The procedural law applicable to an Annex VII tribunal is to be found, first and foremost, in Annex VII of UNCLOS, read and applied in the context of the Convention as a whole, and in particular Part XV, which sets out the dispute settlement system of the Convention. The law and practice of the ITLOS and of the ICJ are part of this system, and the powers of an Annex VII tribunal should be seen in the context of the system.

Article 4 of Annex VII reads:

> An arbitral tribunal constituted under article 3 of this Annex shall function in accordance with this Annex and the other provisions of this Convention.

Article 5 of Annex VII, entitled 'Procedure', provides:

> Unless the parties to the dispute otherwise agree, the arbitral tribunal shall determine its own procedure, assuring to each party a full opportunity to be heard and to present its case.

Article 5 confers a broad power upon the Tribunal to determine its own procedure. The Tribunal is empowered to take any and all procedural steps that it considers necessary for the good administration of justice. This is confirmed by the *Virginia Commentary*, written shortly after the adoption of the Convention. After noting the open-ended character of article 5, the *Commentary* continues:

> Several consequences flow from the open-ended wording of article 5. *The rules of procedure may allow for the intervention of a third State having an interest in the settlement of the dispute*, thus opening the possibility that the tribunal's award may be opposable to that third State.[39]

39 Myron H Nordquist, Shabtai Rosenne and Louis B Sohn (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol V (Martinus Nijhoff 1989) 431 (emphasis

The *Commentary* thus recognises that an Annex VII tribunal, in the exercise of its procedural powers, may provide an opportunity for a third State to intervene. So too does the recent article by two members of the PCA staff.[40]

There are two express limits on the Tribunal's power to determine its own procedure:

(i) the Tribunal may only determine its own procedure to the extent that the parties have not otherwise agreed; so, if the Parties want to agree to exclude third party intervention, they can.

(ii) In determining its own procedure, the Tribunal must assure each party a full opportunity to be heard and to present its case.

In most cases under Annex VII, the Parties have not "otherwise agreed"; we do not think it can be argued, for example, that by their silence on the matter in the rules the parties have 'otherwise agreed'. And obviously the acceptance of intervention will in no way detract from each Party's "full opportunity to be heard and to present its case."

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added). The regulation of intervention is a procedural matter, as is shown by its treatment in the ITLOS Rules, where it is dealt with in Part III on Procedure. It is likewise dealt with under the heading 'Procedure' in the ICJ Statute. Similar powers have been exercised by other international courts and tribunals to set in place detailed rules on a wide range of procedural matters not otherwise covered by the constituent instruments of the court or tribunal in question: see, for example, the former European Commission on Human Rights and European Court of Human Rights (as regards interim measures).

40 Levine and Schofield (n 28) 113–114 ('Among the Convention's mechanisms for the compulsory settlement of international disputes, both ITLOS and the ICJ have established procedures for a third State to request to intervene in the proceedings. Annex VII to the Convention, in contrast, is silent on the question and neither expressly provides for, nor precludes, the intervention of a third State in the proceedings. While the possibility of intervention could readily be addressed in any rules of procedure agreed to by the parties, this has not formed part of the rules adopted in Annex VII proceedings to date. The permissibility of such an application would thus be subject to any rules of customary law or general principles applicable to the conduct of international proceedings and otherwise within the general discretion of the tribunal under Article 5 of Annex VII to "determine its own procedure, assuring each party a full opportunity to be heard and to present its case." [And that] Annex VII exists within a menu of dispute resolution options available through Article 287 of the Convention. Nothing in either the Convention or its negotiating history suggests that the choice between ITLOS and the ICJ, on the one hand, and arbitration on the other was intended to substantively alter the possibility for other States Parties to the Convention to play a role in the proceedings. [Further pointing that] [b]eyond the Convention itself, there is broad support for the right of other States Parties to a multilateral treaty to intervene in dispute resolution proceedings initiated pursuant to that treaty', citing The Hague Conventions of 1899 and 1907, and the work of the ILC in the 1950s).

The opportunity to intervene, moreover, will ensure the right of an interested third party also to be heard. For an Annex VII tribunal to acknowledge and give effect to that right would be consistent with the development of the institution of intervention, and with the practice of third-party participation in other institutionalized arbitral and similar bodies.

B *Factors Relevant to the Exercise of an Annex VII Tribunal's Powers in Respect of Intervention*

Among the factors which an Annex VII tribunal may wish to consider in determining whether to permit intervention are the following.

The importance of the institution of intervention in inter-State litigation is well recognized in the law and practice of the ICJ and in Articles 31 and 32 of the Statute of the ITLOS. In the specific context of UNCLOS, it has been said:

> Given the development of international law and the growing legal interdependence of States it is questionable whether a restrictive approach to intervention should prevail.[41]

An Annex VII tribunal is in a particular position, distinct from *ad hoc* arbitral tribunals set up by a bilateral *compromis*. It is part of a system of institutional arbitration, and it is an integral part of the overall dispute settlement system under Part XV of UNCLOS, which provides for a system of compulsory procedures entailing binding decisions, a 'comprehensive dispute settlement framework,' as it was called by the Tribunal in the *Chagos Islands Marine Protected Area* arbitration (*Republic of Mauritius v The United Kingdom of Great Britain and Northern Ireland*).[42] It was well understood by the drafters of the

41 Rüdiger Wolfrum, 'Intervention in the Proceedings Before the International Court of Justice and the International Tribunal for the Law of the Sea' in V Götz, P Selmer and R Wolframs (eds), *Liber Amicorum Günther Jaenicke zum 85. Geburtstag* (Springer 1998) 427, 428–429 (footnotes omitted).

42 *Chagos Islands Marine Protected Area Arbitration* (*Republic of Mauritius v The United Kingdom of Great Britain and Northern Ireland*), PCA Case No 2011-03, Reasoned Decision on Challenge (30 November 2011) para 168 ('The Tribunal … refers to Article 287(1) of the Convention, which gives States the option alternatively to submit a case to ITLOS, the ICJ, or arbitration under Annex VII (or, for purposes not relevant here, under Annex VIII). Article 287(1), together with Article 286 of the Convention, forms the expression of States' consent to the comprehensive dispute settlement framework created by the Convention. It cannot have been the intention behind that framework that different conditions would apply to the independence and impartiality of adjudicators in the third

Convention that dispute settlement under the Convention was not fragmentary but was to constitute a system.[43] Whatever "[s]pecial procedures" or "competing jurisdictions" the final draft of the Convention might contain, it was understood that these would "find a place in a general or comprehensive dispute settlement system."[44]

As is the case before the ITLOS and the ICJ, the main factor that a tribunal will wish to have in mind in deciding whether to grant a request for intervention is the good administration of justice, including the need for efficiency and the need to deal with the case as a whole.

C *The Procedures and Grounds for Intervention*

In order to exercise its power to decide whether to grant a request to intervene in the proceedings, an Annex VII tribunal may either act *ad hoc*, if this is provided under its Rules of Procedure, or first adopt appropriate rules of procedure on intervention, where this is permitted under its Rules. In either case, it would seem appropriate to base itself on the Statute and Rules of the ITLOS and upon the Statute, Rules and practice of the ICJ.

Articles 31 and 32 of the Statute of the ITLOS, which are in section 3 entitled 'Procedure', deal respectively with requests to intervene and the right to intervene. Articles 99 to 104 of the Rules of the ITLOS[45] set out further details concerning the application of Articles 31 and 32.[46]

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forum (arbitration under Annex VII) in comparison with the ICJ or ITLOS. In this context, where an Annex VII tribunal is an alternative forum to ITLOS or the ICJ, the Tribunal takes the view that only the rules applying to, and practice of, inter-State tribunals are of relevance to the qualification and challenge of arbitrators in proceedings under Annex VII.').

43 See eg 'Statements by Delegations' Third United Nations Conference on the Law of the Sea (New York, 8 March–30 April 1982; 22–24 September 1982; Montego Bay, 6–10 December 1982) 11th Sess 192nd Plen (9 December 1982) UN Doc A/CONF/62/SR.192, paras 18 (Mr Ghazali Shafie, Malaysia), 114 (Mr Wolf, Austria), 214 (Mr Tull, Barbados); 'Weekly Report by the Co-Chairmen on the Activities of the Workshop' Third United Nations Conference on the Law of the Sea (New York, 2 August–17 September 1976) 5th Sess 1st Comm (30 August 1976) UN Doc A/CONF.62/C.1/SR.32, para 10 (Mr Engo, Cameroon); 'Settlement of Disputes' Third United Nations Conference on the Law of the Sea (New York, 15 March–7 May 1976) 4th Sess 62nd Plen (7 April 1976) UN Doc A/CONF/62/SR.62, para 18 (Mr Nyamdo, Mongolia).

44 Mr Baja (Philippines): *Official Records,* vol V, UN Doc A/CONF/62/SR.62, 42, para 85 (Mr Baja, Philippines).

45 ITLOS/8, 17 March 2009.

46 The corresponding provisions of the ICJ Statute and the Rules of Court are similar, see ICJ Statute, arts 62–63; ICJ Rules, arts 81–86.

D *Conclusion as to the Power of an Annex VII Tribunal*

An Annex VII arbitral tribunal will generally have the power to permit intervention. Whether it should do so in any particular case is another matter.

If the tribunal considers it necessary, for example because a Party indicates that it objects to the intervention, the Tribunal may wish to hear the Parties and the State seeking to intervene on whether to accede to the Request. This would be in accordance with the rules and practice of the ICJ and of the ITLOS.[47]

5 South China Sea Arbitration (Philippines v. China)

The question of a possible intervention was much discussed in connection with the Annex VII arbitration brought by the Philippines against China.[48] In that case, there was no formal intervention, though, as appears from the proceedings, specially-interested States were involved in three ways: first, a number of States requested copies of the written pleadings; second, Viet Nam submitted a paper which was considered by the Tribunal; and third, States which requested to be permitted to attend the otherwise closed hearings were allowed to do so as observers.

The Philippines commenced arbitration under Annex VII of UNCLOS on 22 January 2013. China adopted a position of non-acceptance and non-participation in the proceedings, but nevertheless followed them very closely and submitted a "Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines".[49] The Tribunal was composed of one arbitrator appointed by the Philippines (Wolfrum) and four others, including the president, appointed by the President of the ITLOS (Mensah, Cot, Pawlak, Soons). The tribunal issued two awards: an Award on jurisdiction and admissibility dated 29 October 2015;[50] and a final Award dated 12 July 2016.[51]

On 12 April 2014, the Tribunal received a *Note Verbale* from Viet Nam, stating that "Viet Nam's legal interests and rights may be affected" by the arbitration, and requesting that the Embassy "be furnished with all copies of the pleadings and documents annexed thereto, and any documents relevant to

47 See ICJ Rules, art 84(2); ITLOS Rules, art 102(2).

48 *South China Sea*, Award (n 12).

49 ibid para 37.

50 *South China Sea Arbitration* (*The Republic of Philippines v The People's Republic of China*), PCA Case No 2013–19, Award on Jurisdiction and Admissibility (29 October 2015).

51 *South China Sea*, Award (n 12).

the proceedings." Viet Nam further reserved "the right to seek to intervene if it seems appropriate and in accordance with the principles and rules of international law, including the relevant provisions of UNCLOS."[52] The Tribunal stated that it would address the permissibility of intervention in these proceedings "only in the event that Viet Nam in fact makes a formal application for such intervention." Such a request was not in fact made.[53] The Tribunal conveyed a copy of Viet Nam's *Note Verbale* to the Parties, inviting comments. The Philippines responded, stating that it did "not consider that 'Viet Nam's legal interests and rights may be affected' by the proceedings in the present case", recalling in this connection the sections of its Memorial pertaining to third parties. Nevertheless, "in the interests of transparency, and because Viet Nam is also a coastal State in regard to the South China Sea," the Philippines consented to the request that Viet Nam be provided with copies of the pleadings, and left it to the discretion of the Tribunal to furnish Viet Nam with other "documents relevant to the proceedings." China did not comment on Viet Nam's requests. On 24 April 2014, the Tribunal agreed to grant Viet Nam access to the Memorial of the Philippines and its annexed documents and noted that the Tribunal would consider in due course Viet Nam's request for access to any other relevant documents.[54]

In its Award of 12 July 2016, the Tribunal noted that

> Throughout June and July 2015, the Tribunal received requests from several States, interested in the arbitration, for copies of relevant documents and for permission to attend the Hearing on Jurisdiction. After seeking the views of the Parties on each occasion, the Tribunal granted such requests from Malaysia, Japan, Viet Nam, Indonesia, Thailand, and Brunei.[55]

The preamble to the Rules of Procedure adopted by the *Philippines v China* Tribunal on 27 August 2013 recalls Article 5 of Annex VII, referred to above.[56] The Rules do not exclude the possibility of intervention. Indeed, they confirm that the Tribunal has the authority to deal with any procedural questions which may arise and which are not expressly addressed in the Rules, in accordance with Article 1, paragraph 2, of those Rules:

52 ibid para 36.
53 ibid para 43.
54 *South China Sea*, Award on Jurisdiction and Admissibility (n 50) para 183.
55 *South China Sea*, Award (n 12) para 50.
56 *South China Sea Arbitration* (*The Republic of Philippines v The People's Republic of China*), PCA Case No 2013–19, Rules of Procedure (27 August 2013) preambular para 7.

> To the extent that any question of procedure is not expressly governed by these Rules or by Annex VII or other provisions of the Convention, and the Parties have not otherwise agreed, the question shall be determined by the Arbitral Tribunal after seeking the views of the Parties.

Thus, the absence of a provision expressly governing a question of procedure does not determine the question; it is for the Tribunal to determine the question itself.[57] It is also open to the Tribunal to adopt a rule addressing the question, providing that the Rules "are subject to such modifications or additions as the Arbitral Tribunal may find appropriate after seeking the views of the Parties."[58]

6 Conclusions

In conclusion, there are undoubtedly conflicting considerations as to the desirability of permitting intervention, in various guises, in inter-State arbitration. On the one hand, arbitration is classically thought of as an *ad hoc* institution, a main advantage of which was to allow the two States involved control over the process and its procedure; on the other, if intervention is a procedural matter intended to assist the good administration of justice, it should not be categorically excluded from such arbitrations. These point, at the very least, to the need for a cautious approach. Intervention cannot simply be ruled out across the board, but neither should it be permitted too freely.

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57 cf ibid art 26(2) (by which an appeal procedure is expressly excluded; the opportunity of appeal may not be introduced by determination of the Tribunal but, instead, only if 'the Parties agree in advance to an appellate procedure').

58 ibid art 1(1).

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