

**UNCLOS DISPUTE SETTLEMENT IN CONTEXT:  
THE UNITED STATES' RECORD IN INTERNATIONAL ARBITRATION PROCEEDINGS**

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*Executive Summary*

The United Nations Convention for the Law of the Sea (UNCLOS) establishes a compulsory dispute settlement regime for resolving disagreements between member states. Critics of the Convention have argued that the mandatory dispute resolution provisions force member states to cede too much control over the dispute resolution process to an international body. They have also argued that the dispute resolution process is biased against the United States, and that the United States tends to fare poorly in international arbitration proceedings.

This report addresses the first criticism by examining possible exceptions to mandatory dispute resolution provisions. At least one Annex VII tribunal has interpreted Article 281(1) of UNCLOS to permit states to contract around the mandatory dispute resolution provision through regional agreements. However, a subsequent tribunal applied a much more constrained interpretation of the Article 281 exception. Ultimately, the impact of this exception will depend upon which interpretation is applied. The report also examines the scope of the Article 298(1)(c) exception, which exempts from binding resolution “disputes in respect of which the Security Council . . . is exercising the functions assigned to it by the [U.N.] Charter.” This exception is not confined to specific subject matters, but it is limited by the procedural difficulties of adding or removing an item from the Security Council’s agenda, as well as by the political costs that such an effort entails. Finally, the report notes that UNCLOS’s compulsory dispute settlement regime is not accompanied by similarly robust enforcement provisions.

The report addresses the second criticism by examining the United States’ record in arbitration proceedings under eighteen multilateral treaties containing mandatory dispute resolution provisions, as well as a series of bilateral aviation agreements that provide for mandatory dispute resolution. Fifteen of those agreements have yielded very few readily identifiable arbitration proceedings involving the United States. The record of the United States under the three agreements through which there have been arbitral proceedings of note is as follows:

- The World Trade Organization (WTO): The United States has been highly successful in the cases it has initiated (winning 90%), but less successful in those in which it has served as the respondent (winning 19%). However, many of the losses were in cases where only relatively minor economic or political concerns were at stake.
- The North American Free Trade Agreement (NAFTA): Three disputes have been brought to arbitration. The arbitral panels have ruled against the United States in all

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three instances. Yet there has not been a new arbitration dispute brought under NAFTA since 2001.

- The 1944 Convention on Civil Aviation: Disputes must be brought to a governing council before they can be appealed to an arbitral body. Only five disputes have been brought under the Convention, and the council has never issued a decision on the merits of a dispute. A series of related bilateral agreements contain mandatory arbitration requirements, and the United States has been involved in five arbitration disputes arising from them. The arbitration panels found in favor of the United States in four of these five cases. The fifth case settled.

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Critics of the United Nations Convention for the Law of the Sea frequently make two types of arguments against ratifying the treaty. The first type, which we call “the loss of control argument,” asserts that various provisions of the treaty do not give the United States enough control over the dispute resolution process. The second type, which we call the “bias argument,” warns that the United States tends to fare poorly in international arbitration disputes, and that ratifying the treaty would force the United States to comply with arbitral panel awards imposed through an unfair and partisan process. This report considers each argument in turn. It concludes that neither finds significant support in either the text of UNCLOS or the United States’ current record before international arbitral bodies.

### **I. OVERVIEW OF THE UNCLOS ARBITRATION REGIME**

UNCLOS establishes a compulsory dispute settlement regime that is triggered when member states cannot resolve conflicts using a “peaceful means of their own choice.”<sup>1</sup> The procedures governing this regime are contained in Part XV, Section 2 (Articles 286-296) of the Convention.

Articles 286 and 287 confer jurisdiction over UNCLOS-related disputes to four bodies: the International Tribunal for the Law of the Sea (“the Tribunal”), the International Court of

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<sup>1</sup> United Nations Convention on the Law of the Sea art. 28, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

Justice (ICJ), an arbitral tribunal constituted per Annex VII of UNCLOS,<sup>2</sup> or a special arbitral tribunal constituted per Annex VIII.<sup>3</sup> Article 287 allows states to choose one or more of those bodies as their preferred tribunal for settling disputes.<sup>4</sup> In the absence of an Article 287 declaration, or if the disputants cannot agree on a mutually acceptable dispute settlement procedure, the dispute will automatically be referred to an Annex VII arbitral tribunal.<sup>5</sup> The parties may agree to an appellate procedure in advance; otherwise, the arbitral tribunal's decision is final.<sup>6</sup>

Certain categories of disputes are exempt from this otherwise comprehensive regime. For example, Article 297 offers exemptions for certain types of marine scientific research<sup>7</sup> and for certain disputes involving fisheries.<sup>8</sup> And Article 298 allows a member state to reject binding dispute resolution procedures involving three categories of disputes: maritime boundary disputes, disputes involving military activities, and disputes involving matters before the United Nations Security Council.<sup>9</sup> The United States has previously indicated that it will request exemptions for all three Article 298(1) categories should it ratify UNCLOS.<sup>10</sup>

In the event that the United States requests these exemptions and also refuses to issue an Article 287 declaration accepting the Tribunal's jurisdiction, it would be subject to the Tribunal's decisions under only two limited circumstances. First, the tribunal is empowered to impose provisional measures in the interim period before an Annex VII or Annex VIII arbitral tribunal can be established.<sup>11</sup> This has been a rare but not unprecedented occurrence. In 1999, the Tribunal ordered Japan to refrain from certain types of bluefin tuna fishing in the interim period before an Annex VII arbitral panel could be convened.<sup>12</sup> If the United States ratifies the treaty, it is possible that the Tribunal could require it to accept provisional measures. Second, the Tribunal may exercise indirect influence over proceedings when disputing parties cannot agree on the members of an Annex VII arbitral panel. If so, the President of the Tribunal may step in and designate panel members for the two states, and may also designate one particular member as the panel's president.<sup>13</sup>

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<sup>2</sup> Special tribunals may be convened for disputes involving fisheries, protection of the marine environment, scientific research, and navigation. *Id.* Annex VIII, art. 1.

<sup>3</sup> *Id.* art. 287.

<sup>4</sup> *Id.* art.

<sup>5</sup> *Id.* art. 287(3). Article 282 also provides that

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 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.

*Id.* art. 282.

<sup>6</sup> *Id.* Annex VII, art. 11.

<sup>7</sup> *Id.* art. 297(2).

<sup>8</sup> *Id.* art. 297(3).

<sup>9</sup> *Id.* art. 298(1).

<sup>10</sup> S. EXEC. REP. NO. 110-9, at 19 (2007).

<sup>11</sup> UNCLOS, *supra* note 1, art. 290(5).

<sup>12</sup> Southern Bluefin Tuna Cases (N.Z. v. Japan; Austl. v. Japan), Case Nos. 3-4, ITLOS Order of Aug. 27, 1999 [hereinafter Southern Bluefin Tuna Order], [http://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_3\\_4/Order.27.08.99.E.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_3_4/Order.27.08.99.E.pdf).

<sup>13</sup> UNCLOS, *supra* note 1, annex VII, art. 3(e).

## II. ASSESSMENT OF THE LOSS OF CONTROL ARGUMENT

Critics of UNCLOS suggest that the treaty does not give the United States enough control over the dispute resolution process. In particular, the treaty allows disputants to request provisional relief from the Tribunal before an Annex VII arbitral panel can be constituted. The Tribunal will grant these requests if it deems provisional relief necessary to “preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision.”<sup>14</sup> As of 2011, five Annex VII provisional measure requests had been submitted, and all were granted.<sup>15</sup>

However, this provision is embedded within a much broader institutional structure with three additional characteristics. First, Article 281(1) offers state parties the ability to settle disputes in a non-UNCLOS forum when certain criteria are met. Second, Article 298(1)(c) allows state parties to avoid UNCLOS’s binding dispute resolution procedures for any kind of dispute that the Security Council is considering. Finally, the UNCLOS dispute resolution system operates in tandem with a unique enforcement regime. We discuss each in turn.

### A. Exception to UNCLOS Jurisdiction Under Article 281(1)

Article 281(1) may offer an exception to UNCLOS compulsory dispute settlement procedures. Article 281(1) provides that if the parties to a dispute “have agreed to seek settlement of the dispute by a peaceful means of their own choice,” the mandatory arbitration provisions 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.”<sup>16</sup>

The scope of the article was first interpreted by an Annex VII arbitral tribunal in one of the five Annex VII provisional measure request cases, the Southern Bluefin Tuna case, brought by Australia and New Zealand against Japan.<sup>17</sup> The arbitral tribunal determined that the dispute fell within the scope of two treaties: the Law of the Sea Convention and the trilateral 1993 Convention for the Conservation of Southern Bluefin Tuna between Japan, Australia and New Zealand.<sup>18</sup> The panel held that, due to the terms of the latter treaty, Article 281(1) prevented it from exercising jurisdiction over the dispute.<sup>19</sup>

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<sup>14</sup> *Id.* art. 290(1).

<sup>15</sup> Laurence Boisson de Chazournes, *The International Tribunal for the Law of the Sea*, in *THE RULES, PRACTICE, AND JURISPRUDENCE OF INTERNATIONAL COURTS AND TRIBUNALS* 120-22 (Chiara Giorgetti ed., 2012). Those cases are: *St. Vincent and the Grenadines v. Guinea*; *Ireland v. United Kingdom*; *Malaysia v. Singapore*; and *New Zealand and Australia v. Japan*. *Id.* at 120 n.86. This final dispute warrants some discussion since it is addressed further below. ITLOS granted Australia and New Zealand’s request for provisional measures against Japan in a dispute concerning the preservation of Southern bluefin tuna. The Tribunal order contained five provisional measures, including ordering Japan to refrain from engaging in any “experimental fishing” of the Southern bluefin tuna without first securing permission from New Zealand and Australia. *See Southern Bluefin Tuna Order*, *supra* note 12, at 1628. The Tribunal also instructed Japan to ensure its citizens’ yearly catch of Southern bluefin tuna did not exceed a previously agreed upon amount. *Id.* As discussed more fully in Section V below, however, the Annex VII tribunal later revoked these provisional measures.

<sup>16</sup> UNCLOS, *supra* note 1, art. 281(1).

<sup>17</sup> *Southern Bluefin Tuna Case (N.Z. & Austl. v. Japan)*, Award on Jurisdiction and Admissibility, 39 I.L.M. 1359 (UNCLOS Arb. Trib. 2000) [hereinafter *Southern Bluefin Tuna Case Award*].

<sup>18</sup> *Id.* ¶ 52; Boisson de Chazournes, *supra* note 15, at 127.

<sup>19</sup> *Southern Bluefin Tuna Case Award*, *supra* note 17, ¶¶ 55-59.

Notably, Article 282 of UNCLOS already provides an explicit, but limited, exception to binding arbitration under UNCLOS. Specifically, it states that dispute settlement procedures of other agreements may be applied “in lieu of” UNCLOS proceedings so long as such procedures are binding.<sup>20</sup> However, the arbitral tribunal’s interpretation of Article 281(1) in the Southern Bluefin Tuna case expanded the exception to apply more broadly. In the arbitral tribunal’s view, the 1993 Convention precluded resort to any dispute resolution procedure under the UNCLOS regime, despite the absence of express language to that effect in the Convention.<sup>21</sup> In arriving at this conclusion, the tribunal emphasized the fact that the 1993 convention contemplates resort to judicial settlement or arbitration *only* if all parties to the dispute agree (and Japan did not agree in the instant case).<sup>22</sup> This overlapping jurisdiction, the tribunal held, meant that the 1993 Convention implicitly prohibited the parties from turning to any further procedure under UNCLOS.<sup>23</sup> In short, the panel concluded that a state may be excused from UNCLOS’s compulsory dispute provisions if it has agreed in a separate treaty to an alternative dispute resolution procedure that excludes a compulsory procedure, even if the text of the separate treaty does not explicitly preclude resort to an alternative procedure.<sup>24</sup> Thus, under the tribunal’s interpretation, regional agreements may excuse parties from binding arbitration under UNCLOS *even if* those agreements do not contain a binding dispute settlement provision.

This decision’s precedential authority, however, remains unsettled.<sup>25</sup> An Annex VII panel convened in 2006 to resolve a dispute between Barbados and Trinidad and Tobago reached a different understanding of the scope of the Article 281 exception.<sup>26</sup> It held that Article 281 of the Convention is not intended to apply to standing agreements.<sup>27</sup> Rather, it is “intended primarily to cover the situation where the Parties have come to an *ad hoc* agreement as to the means to be adopted to settle the particular dispute that has arisen.”<sup>28</sup> Under this view, Article 282 provides the only way states can rely on an existing regional or bilateral agreement (like the 1993 Bluefin Tuna Convention) to avoid UNCLOS jurisdiction. Thus, the 2006 arbitral tribunal interpretation offers a much more constrained exception to the binding dispute resolution mechanisms of UNCLOS.

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<sup>20</sup> UNCLOS, *supra* note 1, arts. 281-282.

<sup>21</sup> Southern Bluefin Tuna Case Award, *supra* note 17, ¶¶ 55-58.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* ¶ 59.

<sup>24</sup> *Id.* ¶¶ 55-62; Jacqueline Peel, *A Paper Umbrella Which Dissolves in the Rain? The Future for Resolving Fisheries Disputes Under UNCLOS in the Aftermath of the Southern Bluefin Tuna Arbitration*, 3 MELB. J. INT’L L. 53, 66 (2002) (“[T]he tribunal [found] . . . that despite the absence of any express exclusion of part XV procedures, article 16 impliedly excludes resort to compulsory procedures under *UNCLOS* because it contemplates judicial or arbitral settlement of the dispute only with the consent of all parties.”).

<sup>25</sup> The panel’s decision was criticized for creating an overly broad exception to the mandatory arbitration provision. Under the Southern Bluefin Tuna panel’s interpretation of Article 281, one scholar argued, Articles 281 and 282 may collectively “be reduced to a single simple proposition: regional agreements exclude UNCLOS dispute settlement. But if that is the law, why then does UNCLOS need two articles to achieve what could be expressed in one sentence? The obvious answer is that Article 281 was never intended to have the meaning attributed to it in this case.” Alan Boyle, *Some Problems of Compulsory Jurisdiction Before Specialised Tribunals: The Law of the Sea*, in *ASSERTING JURISDICTION: INTERNATIONAL AND EUROPEAN LEGAL APPROACHES* 243, 249 (Patrick Capps, Malcolm Evans & Stratos Konstadinidis eds., 2003).

<sup>26</sup> *Barb. v. Trin. & Tobago* (Award) (UNCLOS Arb. Trib. 2006), [http://www.pca-cpa.org/showfile.asp?fil\\_id=178](http://www.pca-cpa.org/showfile.asp?fil_id=178).

<sup>27</sup> *Id.* ¶ 200; Barbara Kwiatkowska, *The Landmark 2006 UNCLOS Annex VII Barbados/Trinidad and Tobago Maritime Delimitation (Jurisdiction & Merits) Award*, 39 GEO. WASH. INT’L L. REV. 573, 588 (2007).

<sup>28</sup> *Barb. v. Trin. & Tobago*, *supra* note 26, ¶ 200(ii).

It is unclear which interpretation of the scope of Article 281 Annex VII tribunals will adopt in future cases. Article 296 of UNCLOS expressly provides that any decision rendered under the UNCLOS dispute settlement provisions “shall have no binding force except between the parties and in respect of that particular dispute.”<sup>29</sup> Thus, different tribunals may issue conflicting decisions and UNCLOS appears to contain no mechanism to reconcile them.<sup>30</sup> Yet in practice, arbitral panels may rely on past Annex VII tribunal decisions as persuasive precedent in order to establish consistent substantive legal rulings.<sup>31</sup> One survey of maritime delimitation cases found that, “Although there are only two UNCLOS precedents, it appears that UNCLOS tribunals are likely to have a relatively high number of citations to decisions of other UNCLOS tribunals.”<sup>32</sup> These maritime delimitation precedents also “cite decisions by other bodies more frequently than both ‘pure’ *ad hoc* tribunals and the ICJ.”<sup>33</sup> Ultimately, if future tribunals do follow the tribunal’s interpretation in the Southern Bluefin Tuna case, Article 281(1) may offer an exception to UNCLOS binding dispute procedures.

*B. Exception to UNCLOS Jurisdiction Under Article 298(1)(c)*

Article 298(1)(c) allows a state to declare that it will not accept UNCLOS’s binding dispute resolution procedures for “disputes in respect of which the Security Council . . . is exercising the functions assigned to it by the [U.N.] Charter . . . , unless the Security Council decides to remove the matter from its agenda or calls upon the parties to settle it by the means provided for in this Convention.”<sup>34</sup> Unlike the other Article 298(1) exceptions, the scope of subsection (c) is not limited to certain subject matters. However, this provision is constrained in three ways. First, by its express terms, subsection (c) operates only while the dispute remains on the Security Council’s agenda. Security Council practice establishes that motions to place or remove an item on the agenda are procedural and are thus not subject to the veto.<sup>35</sup> Second,

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<sup>29</sup> UNCLOS, *supra* note 1, art. 296.

<sup>30</sup> IGOR V. KARAMAN, DISPUTE RESOLUTION IN THE LAW OF THE SEA 314 (2012) (“[E]ven though Articles 281 and 282 . . . are called to help resolve the jurisdictional conflicts between the [UNCLOS] dispute settlement system and the external dispute settlement systems, the fact that these provisions may be applied and interpreted differently by two or more tribunals is not excluded.”).

<sup>31</sup> An analogy can be made to the International Court of Justice, which, despite containing a provision nearly identical to Article 296 in its Statute, has tended to treat its prior decisions as persuasive precedent. *See* Gilbert Guillaume, *The Use of Precedent by International Judges and Arbitrators*, 2 J. INT’L DISP. SETTLEMENT 5, 12 (2011) (“[T]he International Court of Justice does not recognize any binding value to its own precedent. However, it takes it into great consideration. It is nonetheless prepared to reconsider jurisprudence on the request of the parties or *ex officio*. These reviews usually result in confirmation of earlier decisions, particularly in procedural matters. However, developments are not excluded, particularly with regard to substantive law, based on changes in the law and international society.”).

<sup>32</sup> Pieter H.F. Bekker, *Taking Stock Before ITLOS Takes Off: A Citation Analysis and Overview of the Maritime Delimitation Case Law 6* (unpublished manuscript) (available at <http://www.gmat.unsw.edu.au/ablos/ABLOS10Folder/S6P1-P.pdf>).

<sup>33</sup> *Id.*

<sup>34</sup> UNCLOS, *supra* note 1, art. 298(1)(c).

<sup>35</sup> The U.N. Charter does not address whether the vote to place or remove an item on the Security Council’s agenda is procedural or not. However, the practice of the Security Council indicates that such a vote is procedural. *See Repertoire of the Practices of the Security Council: Voting*, U.N. SECURITY COUNCIL 136 & n.6 (2004), [http://www.un.org/en/sc/repertoire/2000-2003/00-03\\_4#page=4.pdf](http://www.un.org/en/sc/repertoire/2000-2003/00-03_4#page=4.pdf) (noting that, while from “2000 to 2003[] there was no instance in which the vote indicated the procedural character of the matter under consideration,” in “previous volumes of the *Repertoire*, such instances” included “inclusion of items in the agenda . . . [and] removal of an item from the list of matters of which the Security Council is seized”).

placing a matter on the Security Council's agenda may entail political costs, particularly if the state relying on subsection (c) is perceived to be engaging the Security Council's jurisdiction to avoid arbitration or to otherwise abuse the Council's mandate. Third (and relatedly), while a state may wish to minimize public awareness of the dispute, placing a matter on the Security Council's agenda may generate substantial publicity regarding both the dispute and the state's efforts to avoid arbitration.

### C. *UNCLOS Enforcement Mechanisms*

Article 296 of UNCLOS establishes the Convention's enforcement framework. It provides that "[a]ny decision rendered by a court or tribunal having jurisdiction under this section shall be final and shall be complied with by all the parties to the dispute,"<sup>36</sup> and that "[a]ny such decision shall have no binding force except between the parties and in respect of that particular dispute."<sup>37</sup> Annex VI to UNCLOS echoes this language, declaring that the Tribunal's decisions are "final" and "shall be complied with by all the parties to the dispute,"<sup>38</sup> as does Annex VII to the Convention, which declares that an arbitral award "shall be complied with by the parties to the dispute."<sup>39</sup> Annex VIII does not contain any such language.

These provisions appear to be derived from Article 94(1) of the United Nations Charter, which provides that "[e]ach Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."<sup>40</sup> However, conspicuously absent from Article 296 and Annexes VI and VII is any reference to the Security Council, in which Article 94 vests the ability to "make recommendations or decide upon measures to be taken to give effect to the judgment" upon request of an aggrieved party.<sup>41</sup> Thus, although "[t]he Tribunal's judgments are binding in the same way as the [ICJ's], . . . they are not enforceable under Article 94(2) . . ."<sup>42</sup> The same logic applies to judgments rendered by arbitral tribunals constituted under Annex VII and, to an even greater extent, Annex VIII.

This understanding of the enforcement mechanisms has been endorsed by P. Chandrasekhara Rao, the Tribunal's former president. In his view, compliance with any judgment "is left solely to the parties submitting themselves to the jurisdictions" of any court or tribunal constituted under the aegis of UNCLOS:

There is, however, a good faith obligation undertaken by them to comply with the decision. It is open to the injured State to secure compliance by its own means permitted by international law in this regard as also by recourse to more general diplomatic steps. Third States could also validly act in support of the court decision.<sup>43</sup>

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<sup>36</sup> UNCLOS, *supra* note 1, art. 296(1).

<sup>37</sup> *Id.* art. 296(2).

<sup>38</sup> *Id.* Annex VI, art. 33(1).

<sup>39</sup> *Id.* Annex VII, art. 11.

<sup>40</sup> U.N. Charter art. 94, para. 1.

<sup>41</sup> *Id.* art. 94, para. 2.

<sup>42</sup> Alan E. Boyle, *Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction*, 46 INT'L & COMP. L.Q. 37, 51 (1997).

<sup>43</sup> P. Chandrasekhara Rao, *International Tribunal for the Law of the Sea: An Overview*, in THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA: LAW AND PRACTICE 1, 11 (P. Chandrasekhara Rao & Rahmatullah Khan eds., 2001).



Further evidence in support of this interpretation appears in Article 39 of Annex VI, which governs the enforcement of decisions rendered by ITLOS’s specially constituted Seabed Disputes Chamber. Article 39 provides:

The decisions of the chamber shall be enforceable in the territories of the States Parties in the same manner as judgments or orders of the highest court of the State Party in whose territory the enforcement is sought.<sup>44</sup>

As Justice Stevens points out in *Medellin v. Texas*, this language contrasts sharply with Article 94(1) of the Charter—to say nothing of UNCLOS itself.<sup>45</sup> Given the lack of a self-execution provision with regard to the other dispute resolution mechanisms of UNCLOS (that is, other than the Seabed Disputes Chamber), a robust regime for enforcement seems to be absent. In light of this reality, concerns regarding the “loss of control” incumbent in ratifying UNCLOS appear to be overstated.

### III. ASSESSMENT OF THE BIAS ARGUMENT

Critics of UNCLOS argue that the United States tends to fare poorly in international arbitration disputes, and that ratifying the treaty would force the United States to comply with arbitral tribunal awards imposed through an unfair and partisan process. Senator David Vitter (R-LA) claimed, during a 2007 Senate Foreign Relations Committee hearing, that “in the current international environment, these tribunals and arbitral panels are very likely to be stacked against [the United States].”<sup>46</sup> On this narrow question, an examination of the United States’ track record in mandatory arbitration in other contexts may be helpful. The United States has joined at least eighteen multilateral treaties that contain mandatory dispute resolution provisions, as well as a series of bilateral aviation agreements. This Part examines the United States’ experience with these agreements.

#### A. *World Trade Organization*

There are notable similarities between the WTO and UNCLOS, both in structure and in scope. Like UNCLOS, the WTO is a multilateral agreement with a broad mandate and reach. It also requires mandatory arbitration in the event that two disputing members are unable to reach consensus. In addition, many more disputes have arisen under the WTO than under any of the other aforementioned eighteen treaties. For these reasons, among others, the WTO offers the most useful analogue to UNCLOS.<sup>47</sup> Thus, an in-depth analysis of the United States’ dispute

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<sup>44</sup> UNCLOS, *supra* note 1, annex VI, art. 39.

<sup>45</sup> 552 U.S. 491, 534 (2008) (Stevens, J., concurring).

<sup>46</sup> *The United Nations Convention on the Law of the Sea (Treaty Doc. 103-39): Hearings Before the S. Comm. on Foreign Relations*, 119th Cong. 123-24 (2007) (statement of Sen. David Vitter).

<sup>47</sup> It is worth noting that while similarities exist between the dispute resolution processes under the two regimes, the mechanisms of enforcement differ greatly. *See, e.g.*, HJÖRTUR B. SVERRISSON, COUNTERMEASURES, THE INTERNATIONAL LEGAL SYSTEM, AND ENVIRONMENTAL VIOLATIONS 320 (2008) (discussing the enforcement mechanisms of the two regimes and specifically juxtaposing the “relatively effective mechanism under WTO” and the “weak regime of enforcement of ITLOS decisions under UNCLOS”). For example, the Dispute Settlement Body of the WTO can authorize a prevailing state party to undertake countermeasures against the losing state party if it

resolution record under the WTO may predict how the United States would fare under UNCLOS. Under the WTO mandatory dispute resolution provision, an arbitral panel's decision is automatically adopted unless every member state rejects its finding.<sup>48</sup> The WTO also bars states from imposing unilateral economic sanctions in response to another state's violation of trade rules: all sanctions are instead routed through and approved by the WTO.<sup>49</sup> If a party fails to comply with the panel ruling, the two parties must negotiate a settlement agreement.<sup>50</sup> This usually takes the form of either compensation for the trade violation or denial of access to a state's domestic market.<sup>51</sup> If no agreement is reached, a second panel will convene to authorize the prevailing state to impose sanctions on the violator state, up to a maximum level determined by the panel.<sup>52</sup>

The United States has enjoyed an impressive record of success in the cases it has initiated at the WTO. Complainants tend to be more successful in general—from 1995 to 2004, the complaining party won 81.4% of panel rulings and 78.4% of appellate decisions.<sup>53</sup> But the United States fared even better than the average, winning 92% of the cases it initiated at the panel level and 76% of cases before the appellate board, according to one comprehensive academic study.<sup>54</sup> The United States Trade Representative (USTR) has also analyzed the United States' record in the WTO from 1995 to August 2012. It concluded that, as a complainant, the United States won on the core issues in 90% of cases in which litigation was completed at the WTO.<sup>55</sup> Looking beyond the numbers, the United States has also used the WTO mechanisms to

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does not rectify its breach of WTO rules or pay compensation within a certain timeframe. Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules are Rules—Toward a More Collective Approach*, 94 AM. J. INT'L L. 335, 336-37 (2000). No such option exists under the UNCLOS dispute settlement regime.

<sup>48</sup> Marrakesh Agreement Establishing the World Trade Organization annex II, art. 16(4), Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement].

<sup>49</sup> *Id.* annex II; see also Rachel Brewster, *Rule-Based Dispute Resolution in International Trade Law*, 92 VA. L. REV. 251, 256 (2006) (describing the WTO system's "attempt to centralize dispute settlement").

<sup>50</sup> Marrakesh Agreement, *supra* note 48, annex II, art. 22; see also Brewster, *supra* note 49, at 256-57.

<sup>51</sup> Marrakesh Agreement, *supra* note 48, annex II, art. 22.

<sup>52</sup> *Id.* annex II, art. 22(6)-(7).

<sup>53</sup> John Maton & Carolyn Maton, *Independence Under Fire: Extra-Legal Pressures and Coalition Building in WTO Dispute Settlement*, 10 J. INT'L ECON. L. 317, 328 (2007). This study analyzed 138 cases initiated at the WTO between 1995 and 2004. At the panel level, the complainant won 113 of those cases, and the respondent won 25. *Id.* at 329. However, the figures cited are not representative of the total number of cases filed. The authors report that their data set contained the following exceptions: "the list was limited to disputes in which a substantive decision had been reached by 31 December 2004, due to the lack of sufficient economic data after this point; the analysis excludes reports which simply confirm a mutually agreed solution between the parties; and, in order to preserve the clarity of the model, rulings following challenges under Article 21.5 DSU are also omitted." *Id.* at 324. In total, there were 352 complaints filed at the WTO between 1995 and 2004. Kara Leitner & Simon Lester, *WTO Dispute Settlement 1995-2001—A Statistical Analysis*, 15 J. INT'L ECON. L. 315, 317 (2012). One scholar has posited that the high success rate of complainants can be explained by judicial activism on the part of WTO adjudicators. He argues that the desire of WTO adjudicators to "curb national authorities' power to engage in actions inconsistent with a liberal view of international trade" yields such disparate outcomes for complainants and respondents. Juscelino F. Colares, *A Theory of WTO Adjudication: From Empirical Analysis to Biased Rule Development*, 42 VAND. J. TRANSNAT'L L. 383, 439 (2009).

<sup>54</sup> Maton & Maton, *supra* note 53, at 329. Within the limited data set used by these authors, the United States initiated twenty-four cases at the WTO between 1995 and 2004. It won twenty-two and lost two of those cases at the panel level. Seventeen cases were appealed, and the United States won thirteen and lost four cases at the appellate level. *Id.* In total, the United States initiated eighty cases at the WTO between 1995 and 2004. Leitner & Lester, *supra* note 53, at 317.

<sup>55</sup> United States Trade Representative, *Snapshot of WTO Cases Involving the United States* (Aug. 8, 2012), [www.ustr.gov/sites/default/files/Snapshot%20Aug8.fin\\_.pdf](http://www.ustr.gov/sites/default/files/Snapshot%20Aug8.fin_.pdf) [hereinafter USTR Report]. The USTR's assessment

effectively enforce two of its most important trade agreements: the Agreement on Trade-Related Aspects of Intellectual Property Rights and the Agreement on the Application of Sanitary and Phytosanitary Measures.<sup>56</sup>

As a respondent, the United States has been less successful.<sup>57</sup> In the WTO's first decade of operation, the United States won 19% of cases as a respondent at the panel level, compared with a 18.6% success rate overall.<sup>58</sup> The United States fared even more poorly before the appeals board. It was successful in only 13% of cases in which it served as the responding party, compared with a 21.6% rate of success overall.<sup>59</sup> The USTR found that the United States won on the core issues in 19% of concluded cases in which it served as responding party between 1995 and 2011, and resolved the dispute without completing litigation in 24% of concluded cases.<sup>60</sup>

It is important to note, however, that a strict win-loss analysis is not likely to capture the nuance involved in examining the positive or negative outcomes in a WTO trade agreement. One scholar has characterized most of the United States' losses in the first decade of the WTO as ones of "relatively minor economic or political importance."<sup>61</sup> Even in the areas in which the United States has suffered its most serious setbacks—cases involving antidumping and other trade remedies—some scholars have suggested that the losses have imposed only minimal practical costs. "[T]he US does not seem thus far to have been noticeably constrained in its ability to impose safeguards and antidumping/countervailing duties as a result of its losses at the WTO," wrote one observer in 2005.<sup>62</sup>

Furthermore, there are three circumstances under which a technical "loss" at the WTO may actually yield a beneficial outcome for the United States, which would not be accounted for by reviewing the ratio of wins and losses alone. The paradigmatic example of this is an efficient breach. The WTO system permits efficient breach by requiring that retaliatory sanctions be authorized by the WTO and by tying the level of such sanctions to the harm suffered by the nonbreaching party.<sup>63</sup> This makes "the WTO system . . . a rough analog to an expectation

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appears to be more critical than a common methodology scholars employed, which involves identifying how many "arguments" each party won within a case, and designating as the ultimate winner whichever party won more arguments overall. See, e.g., Marc D. Froese, *Between Surveillance and Transparency: Trade Policy Review and North American Dispute Settlement at the WTO* 17 (2012), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2038036](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2038036); Maton & Maton, *supra* note 53, at 326-27. For at least one case—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (DS381)—that scholars would have designated as a marginal win using this methodology, see Froese, *supra*, at 19. The USTR characterizes it as "U.S. did not prevail on the core issues." See USTR Report, *supra* note 55 (referring to (47) Tuna (Mex.)).

<sup>56</sup> William J. Davey, *The WTO Dispute Settlement System: The First Ten Years*, 8 J. INT'L ECON. L. 17, 26 (2005).

<sup>57</sup> *Id.*

<sup>58</sup> Maton & Maton, *supra* note 53, at 329 tbl. 1. These percentages reflect the limited data set used by the authors. Within that data set, sixty-seven cases were initiated against the United States. The United States lost fifty-four and won thirteen of those cases at the panel level. Overall, 138 cases were brought to the WTO. The respondent won 25 and lost 113 of those cases. *Id.*

<sup>59</sup> *Id.* Again, these percentages reflect the limited data set used by the authors. Of the fifty-five cases that were appealed, the United States lost forty-eight and won seven at the appellate level. *Id.* Overall, the respondent won 22 and lost 80 of the 102 cases that were appealed. *Id.*

<sup>60</sup> See USTR Report, *supra* note 55.

<sup>61</sup> Jeffrey L. Dunoff, *Does the U.S. Support International Tribunals? The Case of the Multilateral Trade System*, in *THE SWORD AND THE SCALES: UNITED STATES AND INTERNATIONAL COURTS AND TRIBUNALS* 322, 352 (Cesare P.R. Romano ed., 2009).

<sup>62</sup> Davey, *supra* note 56 (manuscript at 26).

<sup>63</sup> Eric A. Posner & Alan O. Sykes, *Efficient Breach of International Law: Optimal Remedies, "Legalized Noncompliance," and Related Issues*, 110 MICH. L. REV. 243, 260-61 (2011).

damages system; it makes breach costly—but not prohibitively so.”<sup>64</sup> Thus, in certain cases it may be in a party’s best interest to breach, as the benefit gained by doing so outweighs the particular sanction. While these situations would technically appear in the “loss” category, they should not be counted as a negative outcome for the United States.<sup>65</sup>

A similar circumstance is the “politically” efficient breach. The predecessor to the WTO, the General Agreement on Tariffs and Trade (GATT), allowed the imposition of immediate, unilateral sanctions. In contrast, the WTO requires that all conflicts be resolved under the auspices of its dispute resolution body, which results in delayed sanctions. Moreover, such sanctions can compensate only for the injury sustained *after* the panel has ruled.<sup>66</sup> As a result, in certain instances, the United States may provide short-term protections for specific domestic interests without incurring immediate penalty and, if it complies after the panel has ruled, without ever having to compensate the prevailing state party.<sup>67</sup> Such circumstances may also appear as a “loss” even though the United States experiences no true detriment.

The third circumstance in which a technical loss at the WTO may misrepresent the effect on U.S. interests involves those situations where the government relies on the requirement of compliance with the WTO to achieve domestic acceptance of what would otherwise be an unpopular trade decision. Such situations would likewise appear as a loss for the United States, when in fact the true calculation of benefits is far more complex. The benefits of this political calculus may be enjoyed under the UNCLOS regime as well.

#### B. *North American Free Trade Agreement*

Under Chapter 20 of the North American Free Trade Agreement (NAFTA), a dispute between two parties to the treaty is first submitted to country-to-country negotiations. If negotiations are unsuccessful, the dispute is referred to the Free Trade Commission. If the disagreement remains unresolved, it is submitted to a five-member arbitral panel.<sup>68</sup> All three parties are to maintain a roster of up to thirty experts in law or international trade willing to serve as panelists; if an arbitral panel is requested, each disputing party is to select two individuals who are citizens of *the other* disputing party, “normally” from that party’s roster.<sup>69</sup> The panel chair is to be selected by agreement between both parties, and if consensus cannot be reached, one party, chosen by lot, selects a chair who is not a citizen of the selecting country.<sup>70</sup> However, as none of the parties has maintained rosters,<sup>71</sup> an ad hoc appointment process is required for each panel.<sup>72</sup>

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<sup>64</sup> *Id.* at 261.

<sup>65</sup> For the purposes of this report, the impact of this efficient breach argument is relevant only as a means of qualifying the win-loss calculus at the WTO. UNCLOS allows for the imposition of provisional measures, UNCLOS, *supra* note 1, art. 290, and thus the efficient breach benefits will not be as great under the UNCLOS regime.

<sup>66</sup> Brewster, *supra* note 49, at 258.

<sup>67</sup> *See id.* at 269.

<sup>68</sup> John Kirton, NAFTA Dispute Settlement Mechanisms: An Overview 4 (May 27, 2004) (unpublished manuscript), <http://www.envireform.utoronto.ca/publications/john-kirton/may27-2004.pdf>.

<sup>69</sup> North American Free Trade Agreement arts. 2009, 2011, U.S.-Can.-Mex., Dec. 17, 1992, 107 Stat. 2057 (1993).

<sup>70</sup> *Id.* art. 2011.

<sup>71</sup> David A. Gantz, *The United States and NAFTA Dispute Settlement: Ambivalence, Frustration, and Occasional Defiance* 387 (Ariz. Legal Studies, Discussion Paper No. 06-26, 2009), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=918542](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=918542); *Rosters for NAFTA Dispute Settlement Panels and Committees*, NAFTA SECRETARIAT, <http://www.nafta-sec-alena.org/en/view.aspx?conID=779> (last visited Dec. 8, 2012).

Only three decisions have been issued under Chapter 20.<sup>73</sup> The United States was a party to all three disputes—once as a defendant, and twice as a plaintiff. The arbitral panel ruled against the United States in all three cases.<sup>74</sup> There are a variety of reasons for the infrequent use of the Chapter 20 arbitration procedure. Chief among these is the fact that NAFTA does not preclude resort to the WTO for most matters that fall under either agreement,<sup>75</sup> and there “appears to be a preference among all three NAFTA Parties for WTO dispute settlement over Chapter 20.”<sup>76</sup> In addition, the U.S. government has approached Chapter 20 and its predecessor under the U.S.-Canada Free Trade Agreement with some skepticism, viewing the decisions of the predecessor process as not particularly well reasoned.<sup>77</sup> Finally, most significant trade-related issues in the region since September 11th have involved concerns such as national security and immigration, which “are not easily addressed under NAFTA.”<sup>78</sup> The parties have instead relied substantially on “negotiations and joint planning” to address these issues over the past decade.<sup>79</sup>

### C. *1944 Convention on Civil Aviation*

The 1944 Convention on Civil Aviation was one of the first multilateral treaties to establish a compulsory dispute resolution mechanism. The Convention provides for the creation of an International Civil Aviation Organization (ICAO) comprising an assembly, a council, and “such other bodies as may be necessary.”<sup>80</sup> The assembly consists of one representative of each member state.<sup>81</sup> The council consists of a twenty-one-state governing body whose representatives are elected by the assembly for three-year terms.<sup>82</sup> Under Article 84, any dispute that cannot be negotiated is referred to the council for resolution.<sup>83</sup> The decision of the council may be appealed to either the International Court of Justice<sup>84</sup> or an ad hoc tribunal. However, only five disputes have ever been brought under Article 84. The council has never issued a decision on the merits of a dispute.<sup>85</sup>

The infrequency with which cases are brought for resolution appears to demonstrate *prima facie* that mandatory arbitration clauses will rarely force the United States to accept a

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<sup>72</sup> Gantz, *supra* note 71, at 387.

<sup>73</sup> *Id.* at 388 (noting that, as of 2009, only three decisions had been rendered). As of November 29, 2012, the website of the NAFTA Secretariat indicates that this is still the case. *Decisions and Reports*, NAFTA SECRETARIAT, <http://www.nafta-sec-alena.org/en/DecisionsAndReports.aspx?x=312> (last visited Dec. 8, 2012).

<sup>74</sup> Gantz, *supra* note 71, at 388-89.

<sup>75</sup> *Id.* at 387.

<sup>76</sup> *Id.* at 391.

<sup>77</sup> *Id.* at 390.

<sup>78</sup> *Id.* at 390.

<sup>79</sup> *Id.* at 391.

<sup>80</sup> Convention on International Civil Aviation art. 43, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 [hereinafter 1944 Convention].

<sup>81</sup> *Id.* art. 48.

<sup>82</sup> *Id.* art. 50.

<sup>83</sup> *Id.* art. 84.

<sup>84</sup> *Id.* While the Convention refers to the Permanent Court of International Justice, pursuant to Article 37 of the Statute of the International Court of Justice, any treaty provision providing for a hearing before the Permanent Court of International Justice should now be read as providing for a hearing before the International Court of Justice. Statute of the International Court of Justice art. 37, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

<sup>85</sup> Jon Bae, *Review of the Dispute Settlement Mechanism Under the International Civil Aviation Organization: Contradiction of Political Body Adjudication*, J. INT’L DISP. SETTLEMENT (forthcoming) (manuscript at 6), available at <http://jids.oxford.org/content/early/recent>.

decision it opposes. However, a closer examination of these five cases complicates this conclusion. Two of the five cases that were ultimately resolved before the ICAO issued a decision involved the United States. In the first instance, a 1998 dispute with Cuba, the United States reached an agreement brokered by the ICAO once it became clear the ICAO would rule against it.<sup>86</sup> In the second dispute, a 2000 disagreement with the European Union over aircraft noise emission, the council ruled in favor of the United States on the three procedural questions at issue, but did not rule on the merits. The council did not issue a ruling on the central issue—“whether ICAO environmental standards establish the maximum requirements that may be imposed.”<sup>87</sup> The United States and the EU eventually reached an agreement, brokered by the ICAO, on the issue.<sup>88</sup>

#### D. *Bilateral Aviation Agreements*

The 1944 Convention on Civil Aviation provides that “[n]o scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization.”<sup>89</sup> In response to this provision, nations around the globe have entered into a series of bilateral aviation agreements that stretch back to World War II. These have established country-specific contracts, tailored to meet the needs of the two individual nations. And these contracts may take many forms, including “treaties, inter-governmental agreements, executive agreements, conventions, protocols, or exchanges of diplomatic notes.”<sup>90</sup>

Early bilateral agreements called for adjudication or an advisory report by the ICAO.<sup>91</sup> More modern bilateral aviation agreements, however, provide instead for the establishment of an ad hoc arbitral tribunal, usually comprising three members, to resolve disputes arising out of the agreement.<sup>92</sup> The “typical” modern agreement “permits each nation to designate one of three arbitrators who will comprise the arbitral tribunal. The third arbitrator, who typically will not be a national of either contracting party, is to be selected by the two arbitrators already chosen.”<sup>93</sup>

As of 2004, there have been only six arbitrations convened to resolve disputes arising out of these bilateral agreements.<sup>94</sup> Five have involved the United States.<sup>95</sup> The United States was the plaintiff in four of these cases, and the defendant in one.<sup>96</sup> The arbitral panels have found in favor of the United States in four of these cases.<sup>97</sup> In the fifth case, the United States and the opposing party settled before the arbitral tribunal reached a decision.<sup>98</sup>

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<sup>86</sup> Paul Stephen Dempsey, *Flights of Fancy and Fights of Fury: Arbitration and Adjudication of Commercial and Political Disputes in International Aviation*, 32 GA. J. INT’L & COMP. L. 231, 277 (2004).

<sup>87</sup> *Id.* at 286.

<sup>88</sup> *Id.* at 285.

<sup>89</sup> 1944 Convention, *supra* note 80, art. 6.

<sup>90</sup> Dempsey, *supra* note 86, at 236.

<sup>91</sup> *Id.* at 234, 241.

<sup>92</sup> *Id.* at 234.

<sup>93</sup> *Id.* at 242.

<sup>94</sup> *Id.* at 234.

<sup>95</sup> *Id.* at 234-35.

<sup>96</sup> *Id.* at 234-35, 243-58, 258-67.

<sup>97</sup> *Id.* at 243-58. Dempsey observes that, in the first such dispute involving the U.S., while France won on one of the specific legal questions at issue, the U.S. won both an “economic and equitable victory” as the Tribunal allowed U.S. carriers to continue service not on the basis of the strict terms of the agreement, but on the basis of prior French

### *E. Other Agreements*

We identified 15 other multilateral agreements to which the United States is a party that contain compulsory dispute settlement provisions. Almost none, however, have resulted in arbitration involving the United States that can readily be identified.<sup>99</sup> Nor have any of the arbitrations significantly impacted U.S. interests. The fifteen agreements are:

- Antarctic Protocol on Environmental Protection, signed at Madrid, October 4, 1991, entered into force January 14, 1998, articles 18-20 (arbitration)<sup>100</sup>
- International Coffee Agreement, 2001, article 42 (Council)<sup>101</sup>
- Straddling Fish Stocks Agreement, 1995, article 30 (special arbitration)<sup>102</sup>
- MARPOL 1973/1978, article 10 & Protocol I (arbitration)<sup>103</sup>
- Offenses on Aircraft, Tokyo, 1963 article 24(1) (arbitration; ICJ as default)<sup>104</sup>
- Seizure of Aircraft, The Hague, 1970, article 12(1) (arbitration; ICJ as default)<sup>105</sup>
- Safety of Civil Aviation, Montreal, 1971, article 14(1) (arbitration; ICJ as default)<sup>106</sup>
- Internationally Protected Persons, 1973, article 13 (arbitration; ICJ as default)<sup>107</sup>
- Taking of Hostages, 1979, article 61(1) (arbitration; ICJ as default)<sup>108</sup>
- Physical Protection of Nuclear Material, 1979, article 17(2) (arbitration; ICJ as default)<sup>109</sup>

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consent. *Id.* at 246. In a dispute between the U.K. and U.S., the U.S. received a favorable finding from the panel on a preliminary ruling; however, the dispute was ultimately resolved through negotiations. *Id.* at 262-63.

<sup>98</sup> *Id.* at 267.

<sup>99</sup> We identified arbitrations involving the United States under only one agreement: the International Coffee Agreement (ICA) (one arbitration against Brazil). The United States prevailed in its arbitration case against Brazil under the ICA. See KABIR-UR-RAHMAN KHAN, *THE LAW AND ORGANISATION OF INTERNATIONAL COMMODITY AGREEMENTS* 147 (1982).

<sup>100</sup> Protocol on Environmental Protection to the Antarctic Treaty, Oct. 4, 1991, 30 I.L.M. 1455 (1991).

<sup>101</sup> International Coffee Agreement 2001, *opened for signature* Sept. 28, 2000, 2161 U.N.T.S. 312 (2001).

<sup>102</sup> United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, Agreement for the Implementation of the Provisions of the United Nations Convention of the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, U.N. Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, Sept. 8, 1995, 34 I.L.M. 1542. The agreement provides that “[t]he provisions relating to the settlement of disputes set out in Part XV of the Convention apply mutatis mutandis to any dispute between States Parties to this Agreement concerning the interpretation or application of this Agreement, whether or not they are also Parties to the Convention.” *Id.* art. 30(1).

<sup>103</sup> International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973, 1340 U.N.T.S. 184 (1973).

The Convention was modified by the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973, with annexes and protocols, Feb. 17, 1978, 1340 U.N.T.S. 61 (1978).

<sup>104</sup> Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219.

<sup>105</sup> Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105.

<sup>106</sup> Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 177.

<sup>107</sup> Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents art. 13, *opened for signature* Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167.

<sup>108</sup> International Convention Against the Taking of Hostages, Dec. 17, 1979, G.A. Res. 34/146, 34 U.N. GAOR Supp. (No. 46), U.N. Doc. A/34/46, 18 I.L.M. 1456 (1979).

<sup>109</sup> Convention on the Physical Protection of Nuclear Material art. 17(2), *opened for signature* Mar. 3, 1980, T.I.A.S. 11080, 1456 U.N.T.S. 101.

- Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation) 1988, article 16 (arbitration; ICJ as default)<sup>110</sup>
- Marking of Plastic Explosives, 1991, article XI(1) (arbitration; ICJ as default)<sup>111</sup>
- International Tropical Timber Agreement, 1994, article 31 (Council)<sup>112</sup>
- Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (Article VIII & Annex) 1969<sup>113</sup>
- Highly Migratory Fish Stocks of Western/Central Pacific (Article 30) 2000<sup>114</sup>

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<sup>110</sup> Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation art. 16, Mar.10, 1988, 1678 U.N.T.S. 221.

<sup>111</sup> Convention on the Marking of Plastic Explosives for the Purpose of Detection at art. XI(1), Mar. 1, 1991, 2122 U.N.T.S. 359.

<sup>112</sup> International Tropical Timber Agreement, 1994 art. 31, *opened for signature* Apr. 1, 1994, 1955 U.N.T.S. 81.

<sup>113</sup> International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties art. VIII & Annex, Nov. 29, 1969, 970 U.N.T.S. 211.

<sup>114</sup> Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean art. 30, Sept. 5, 2000, T.I.A.S. 13115.