

# THE YALE LAW JOURNAL

## COMMENT

### Jurisdiction and Applicable Law Under UNCLOS

#### INTRODUCTION

In the recent case of *Chagos Marine Protected Area*,<sup>1</sup> a five-member tribunal constituted under the United Nations Convention on the Law of the Sea (UNCLOS)<sup>2</sup> held in its hands the fate of the Chagos Archipelago. One of the questions before the tribunal was whether it had the jurisdiction to declare that the British occupation of the Chagos Archipelago and the forcible removal of the Archipelago's indigenous population violated the fundamental right to self-determination. The answer hinged on a technical, procedural point: Does the applicable law provision of UNCLOS, Article 293(1), expand the jurisdiction of UNCLOS tribunals?<sup>3</sup>

The law was not on the side of the Chagossians. It is a well-established principle of international law that applicable law provisions do not expand the jurisdiction of international courts and tribunals.<sup>4</sup> So after Mauritius impliedly

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1. *Chagos Marine Protected Area (Mauritius v. U.K.)*, PCA Case Repository No. 2011-03, Award of Mar. 18, 2015, ¶ 181 [hereinafter *Chagos Marine Protected Area, Award*], <http://www.pcacases.com/pcadocs/MU-UK%2020150318%20Award.pdf> [<http://perma.cc/EMQ9-PQHS>].
  2. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].
  3. For the purposes of this Comment, an "UNCLOS tribunal" is any court or tribunal that exercises jurisdiction by virtue of UNCLOS. See *id.* art. 287(1); *infra* text accompanying note 23.
  4. See *Channel Tunnel Grp. Ltd. v. Sec'y of State for Transp. of the Gov't of the U.K.*, Partial Award of Jan. 30, 2007, 132 I.L.R. 1, ¶¶ 152-53; Access to Info. Under Article 9 of the OSPAR Convention (Ir. v. U.K.), PCA Case Repository, Final Award of July 2, 2003, 23 R.I.A.A. 59, ¶ 85; ERIC DE BRABANDERE, INVESTMENT TREATY ARBITRATION AS PUBLIC INTERNATIONAL LAW 123 n.3 (2014); Christoph Schreuer, *Jurisdiction and Applicable Law in Investment Treaty Arbitration*, 1 MCGILL J. DISP. RESOL. 1, 2 (2014).

asserted that Article 293(1) could expand the jurisdiction of the tribunal,<sup>5</sup> the United Kingdom—the other party to the dispute—quickly refuted the assertion, noting that “[t]his is an old debate, and one that, quite frankly, we should not be having.”<sup>6</sup> The tribunal ultimately ruled in favor of the United Kingdom on this point. But if the principle is so well-established and the debate so old, why did it receive so much attention in the written and oral stages of the proceedings?

The reason is straightforward but possibly appalling to international lawyers: UNCLOS tribunals have not uniformly conformed to the principle. As of September 2016, UNCLOS tribunals in seven cases have considered whether Article 293(1) can expand their jurisdiction. On the one hand, the tribunals in *M/V Saiga (No. 2)*,<sup>7</sup> *Guyana v. Suriname*,<sup>8</sup> and *M/V Virginia G*<sup>9</sup> (the *M/V Saiga* line of cases) effectively invoked Article 293(1) to expand their jurisdiction. On the other hand, the tribunals in *MOX Plant*,<sup>10</sup> *Chagos*,<sup>11</sup> *Arctic Sunrise*,<sup>12</sup> and

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5. It should be noted that Mauritius on the surface argued that Article 293(1) does not expand the jurisdiction of UNCLOS tribunals. *Chagos Marine Protected Area (Mauritius v. U.K.)*, PCA Case Repository No. 2011-03, Hearing on Jurisdiction and the Merits, Day 4, at 441, lines 1-2 [hereinafter *Chagos Marine Protected Area*, Hearing Day 4], <http://www.pccases.com/web/sendAttach/1574> [<http://perma.cc/9HH3-XVKX>]. Nevertheless, throughout the proceedings, Mauritius repeatedly invoked Article 293(1) to expand the jurisdiction of the tribunal. See *Chagos Marine Protected Area (Mauritius v. U.K.)*, PCA Case Repository No. 2011-03, Hearing on Jurisdiction and the Merits, Day 6, at 655, lines 13-16 [hereinafter *Chagos Marine Protected Area*, Hearing Day 6], <http://www.pccases.com/web/sendAttach/1576> [<http://perma.cc/44MC-VMSV>]; *Chagos Marine Protected Area*, Hearing Day 4, *supra*, at p. 440, lines 8-23; *Chagos Marine Protected Area (Mauritius v. U.K.)*, PCA Case Repository No. 2011-03, Memorial of the Republic of Mauritius of Aug. 1, 2012, ¶ 5.33 [hereinafter *Chagos Marine Protected Area*, Memorial of Mauritius], <http://www.pccases.com/web/sendAttach/1796> [<http://perma.cc/L9PL-K326>].
  6. *Chagos Marine Protected Area*, Hearing Day 6, *supra* note 5, at p. 655, lines 18-19.
  7. *M/V Saiga (No. 2) (St. Vincent v. Guinea)*, ITLOS Case No. 2, Judgment of July 1, 1999, ¶ 155 [hereinafter *M/V Saiga (No. 2)*, Judgment], [http://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_2/merits/Judgment.01.07.99.E.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_2/merits/Judgment.01.07.99.E.pdf) [<http://perma.cc/9PAQ-2UPA>].
  8. *Guyana v. Suriname*, Award of the Arbitral Tribunal of Sept. 17, 2007, 47 I.L.M. 166, ¶ 413 [hereinafter *Guyana v. Suriname*, Award].
  9. *M/V Virginia G (Pan. v. Guinea-Bissau)*, ITLOS Case No. 19, Judgment of Apr. 14, 2014, ¶ 359 [hereinafter *M/V Virginia G*, Judgment], [http://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no.19/judgment/C19-Judgment\\_14.04.14\\_corr2.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.19/judgment/C19-Judgment_14.04.14_corr2.pdf) [<http://perma.cc/W2NZ-LJPH>].
  10. *MOX Plant (Ir. v. U.K.)*, PCA Case Repository No. 2002-01, Procedural Order No. 3 of June 24, 2003, ¶ 19 [hereinafter *MOX Plant*, Procedural Order No. 3], <http://www.pccases.com/web/sendAttach/867> [<http://perma.cc/XDP8-3RWQ>].
  11. *Chagos Marine Protected Area*, Award, *supra* note 1, ¶ 181.

*Duzgit Integrity*<sup>13</sup> (the *MOX Plant* line of cases) stood by the principle, rejecting any expansion of jurisdiction under Article 293(1).<sup>14</sup> Other UNCLOS tribunals have simply not addressed the question.<sup>15</sup>

Despite this inconsistency in jurisprudence, the question of jurisdiction under Article 293(1) has received little attention among scholars. The eminent treatises on the law of the sea bypass the question entirely.<sup>16</sup> One commentator raised the issue in the context of the *M/V Saiga (No. 2)* dispute,<sup>17</sup> and another briefly touched on the issue in the context of the *MOX Plant* case.<sup>18</sup> But no

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12. Arctic Sunrise (Neth. v. Russ.), PCA Case Repository No. 2014-02, Award on the Merits of Aug. 14, 2015, ¶ 188 [hereinafter *Arctic Sunrise*, Award on the Merits], <http://www.pcacases.com/web/sendAttach/1438> [<http://perma.cc/A9PX-E2VR>].
  13. Duzgit Integrity (Malta v. São Tomé & Príncipe), PCA Case Repository No. 2014-07, Award of Sept. 5, 2016, ¶¶ 207-08 [hereinafter *Duzgit Integrity*, Award], <http://pcacases.com/web/sendAttach/1915> [<http://perma.cc/QA7Z-XFM3>].
  14. In addition, Judges Wolfrum and Cot emphasized in a joint separate opinion to ITLOS's order on provisional measures in *ARA Libertad* that jurisdiction under Article 288(1) and applicable law under Article 293(1) "have to be separated clearly." *ARA Libertad* (Arg. v. Ghana), ITLOS Case No. 20, Order of Dec. 15, 2012, Joint Separate Opinion of Judge Wolfrum & Judge Cot, ¶ 7, [http://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no.20/C20\\_Ord\\_15.12.2012\\_SepOp\\_Wolfrum-Cot\\_orig-no\\_gutter.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20_Ord_15.12.2012_SepOp_Wolfrum-Cot_orig-no_gutter.pdf) [<http://perma.cc/6GV3-9C2L>].
  15. In the recent case of *Philippines v. China*, the Philippines claimed in its memorial that China had breached the Convention on Biological Diversity. *Phil. v. China*, PCA Case Repository No. 2013-19, Memorial of the Philippines of Mar. 30, 2014, Vol. 1, ¶ 6.89, <http://www.pcacases.com/pcadocs/Memorial%20of%20the%20Philippines%20Volume%20I.pdf> [<http://perma.cc/A4VG-LQSR>]. Had the Philippines asserted this claim as a formal submission, it probably would have prompted the tribunal to consider whether Article 293(1) could expand its jurisdiction to adjudicate this claim. However, the Philippines ultimately made clear that it was not making such a claim as a formal submission. *Phil. v. China*, PCA Case Repository No. 2013-19, Award on Jurisdiction and Admissibility of Oct. 29, 2015, ¶ 282 [hereinafter *Phil. v. China*, Award on Jurisdiction and Admissibility], <http://www.pcacases.com/web/sendAttach/1506> [<http://perma.cc/DAA9-LKVQ>].
  16. See, e.g., A.O. ADEDE, THE SYSTEM FOR SETTLEMENT OF DISPUTES UNDER THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (1987) (not discussing jurisdiction under Article 293(1)); 5 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, 1982: A COMMENTARY 72-74 (Myron H. Nordquist et al. eds., 1989) (same); Bernard H. Oxman, *Courts and Tribunals: The ICJ, ITLOS, and Arbitral Tribunals*, in THE OXFORD HANDBOOK ON THE LAW OF THE SEA 394 (Donald R. Rothwell et al. eds., 2015) (same).
  17. James Harrison, *Safeguards Against Excessive Enforcement Measures in the Exclusive Economic Zone—Law and Practice*, in JURISDICTION OVER SHIPS 217, 228-29 (Henrik Rongbom ed., 2015).
  18. M. Bruce Volbeda, Comment, *The MOX Plant Case: The Question of "Supplemental Jurisdiction" for International Environmental Claims Under UNCLOS*, 42 TEX. INT'L L.J. 211, 225-26 (2006).

scholar has ever analyzed multiple cases interpreting Article 293(1) in a single text. Even the judgments and awards of UNCLOS tribunals do not dedicate much discussion to the subject. This Comment aims not only to fill this gap in the literature, but also to help inform pending and future UNCLOS disputes implicating Article 293(1), including the high-profile case of *Ukraine v. Russia*.

This Comment is organized as follows. Part I provides background on UNCLOS and explains why Article 293(1) does not expand the jurisdiction of UNCLOS tribunals. Part II explains how the UNCLOS tribunals in the *M/V Saiga (No. 2)* line of cases nonetheless exercised jurisdiction under Article 293(1). Part III then presents how the UNCLOS tribunals in the *MOX Plant* line of cases rejected jurisdiction under Article 293(1) but failed to recognize the legal error in the *M/V Saiga (No. 2)* line of cases. The Comment then concludes by noting how the failure to recognize this error may ultimately undermine the UNCLOS dispute settlement regime.

## I. UNCLOS AND ARTICLE 293(1)

A critical difference between domestic legal systems and the international legal order is that the latter lacks courts with compulsory jurisdiction.<sup>19</sup> One who suffers an injury under domestic law will usually be able to seek relief in a domestic court with jurisdiction over the claim, whereas one who suffers an injury under international law often cannot find a judicial forum with jurisdiction.

The drafters of UNCLOS sought to change this reality with respect to claims concerning the law of the sea. Famously characterized as “a constitution for the oceans,”<sup>20</sup> the Convention sets out in 320 articles and nine annexes a comprehensive body of law governing practically all matters relating to the law of the sea, such as maritime delimitation, environmental protection, fisheries management, and marine scientific research. Most importantly for the purposes of this Comment, Part XV of the Convention establishes a dispute settlement mechanism to ensure compliance with the Convention. Two provisions in Part XV are particularly relevant.

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19. PATRICK DAILLIER ET AL., *DROIT INTERNATIONAL PUBLIC* 959 (8th ed. 2009); STEPHEN C. MCCAFFREY, *UNDERSTANDING INTERNATIONAL LAW 1-2* (2d ed. 2015); Chester Brown, *Inherent Powers in International Adjudication*, in *THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION* 828, 834 (Cesare P.R. Romano et al. eds., 2013); Andreas Paulus, *International Adjudication*, in *THE PHILOSOPHY OF INTERNATIONAL LAW* 207, 208 (Samantha Besson & John Tasioulas eds., 2010).

20. Tommy T.B. Koh, *A Constitution for the Oceans*, in *THE LAW OF THE SEA*, xxxiii (U.N. Pub. Sales No. E.83.V.5, 1983).

First, the jurisdiction provision, Article 288(1), grants UNCLOS tribunals the jurisdiction to settle UNCLOS claims.<sup>21</sup> Consequently, aside from a few exceptions,<sup>22</sup> any state that suffers an injury under UNCLOS may seek relief from an UNCLOS tribunal. In theory, UNCLOS tribunals may take one of four forms: the International Tribunal for the Law of the Sea (ITLOS), the International Court of Justice (ICJ), an Annex VII tribunal, or an Annex VIII tribunal.<sup>23</sup> In practice, however, all UNCLOS tribunals have either been ITLOS or an Annex VII tribunal. ITLOS is a permanent judicial body composed of twenty-one judges.<sup>24</sup> By contrast, Annex VII tribunals are ad hoc arbitral tribunals normally composed of five arbitrators.<sup>25</sup> Together, ITLOS and Annex VII tribunals have been seized of twenty-one disputes (excluding prompt release cases) and have reached a decision on the merits in ten of those disputes.<sup>26</sup>

Second, the Convention's applicable law provision, Article 293(1), provides that UNCLOS tribunals "shall apply this Convention *and other rules of international law not incompatible with this Convention*."<sup>27</sup> Some have interpreted Article 293(1) to expand the jurisdiction of UNCLOS tribunals to include certain non-UNCLOS claims. Under this interpretation, Article 293(1) would grant UNCLOS tribunals the jurisdiction to declare whether states have violated certain non-UNCLOS rules of international law, such as the rules on the use of force, the rules on the acquisition of territory, and the rules of international human rights law. This interpretation, however, is incorrect.

A proper interpretation of Article 293(1) requires recourse to Article 31 of the Vienna Convention on the Law of Treaties (VCLT).<sup>28</sup> Article 31 is universal-

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21. UNCLOS, *supra* note 2, art. 288(1). For the purposes of this Comment, an "UNCLOS claim" is any claim "concerning the interpretation or application of [UNCLOS]." *Id.*

22. *See id.* pt. XV, § 3.

23. *Id.* art. 287. Technically, the ICJ is a "court" rather than a "tribunal," but this distinction is immaterial here because the ICJ has never exercised jurisdiction by virtue of Article 288(1).

24. *Id.* annex VI, art. 2(1).

25. *Id.* annex VII, art. 3.

26. For a list of all ITLOS cases, including prompt release cases, see *List of Cases*, ITLOS, <http://www.itlos.org/cases/list-of-cases> [<http://perma.cc/L6VC-B3KR>]. For a list of all Annex VII cases administered by the Permanent Court of Arbitration, see *UNCLOS*, PERMANENT CT. ARB., <http://pca-cpa.org/en/services/arbitration-services/unclos> [<http://perma.cc/QH2H-9HZR>]. The only Annex VII case not administered by the Permanent Court of Arbitration was *Southern Bluefin Tuna*, which was administered by the International Centre for Settlement of Investment Disputes. *Southern Bluefin Tuna* (Austl. & N.Z. v. Japan), Award on Jurisdiction and Admissibility of Aug. 4, 2000, 23 R.I.A.A. 1, ¶¶ 8-9.

27. UNCLOS, *supra* note 2, art. 293(1) (emphasis added).

28. Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

ly considered to reflect customary international law,<sup>29</sup> and scholars agree that international courts and tribunals must apply the Article when interpreting treaties.<sup>30</sup> Article 31 provides: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>31</sup> In other words, one must examine three items: the ordinary meaning of the text, the context, and the object and purpose of the treaty.

First, the ordinary meaning of the text of Article 293(1) conveys the notion that it does not expand the jurisdiction of UNCLOS tribunals. In fact, the very wording of the provision reveals that it only speaks to applicable law, not jurisdiction. Article 293(1) states: “A court or tribunal *having jurisdiction* under this section shall apply this Convention and other rules of international law not incompatible with this Convention.”<sup>32</sup> It therefore envisages a two-step process: first, the UNCLOS tribunal must determine whether it has jurisdiction (under Article 288); second, if it has jurisdiction (and only if it has jurisdiction), then the tribunal shall apply UNCLOS and “other rules of international law.” Given that Article 288(1) grants UNCLOS tribunals jurisdiction only over UNCLOS claims,<sup>33</sup> the “other rules of international law” should be interpreted as referring primarily to rules of international law that help UNCLOS tribunals exercise their jurisdiction over UNCLOS claims.<sup>34</sup>

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29. See *Oil Platforms (Iran v. U.S.)*, Judgment, Preliminary Objection, 1996 I.C.J. 803, ¶ 23 (Dec. 12); Jean-Marc Sorel & Valérie Boré Eveno, *Article 31 1969 Vienna Convention*, in 1 THE VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY 804, 818-819 (Olivier Corten & Pierre Klein eds., 2011); Matthias Herdegen, *Interpretation in International Law*, MAX PLANCK ENCYCLOPEDIA PUB. INT’L L. ¶ 7 (Mar. 2013), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e723> [<http://perma.cc/48YG-XYXG>].

30. RICHARD GARDINER, TREATY INTERPRETATION 40 (2010); TRINH HAI YEN, THE INTERPRETATION OF INVESTMENT TREATIES 107 (2014); Oliver Dörr, *Article 32. Supplementary Means of Interpretation*, in VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 571, 582 (Oliver Dörr & Kirsten Schmalenbach eds., 2012).

31. VCLT, *supra* note 28, art. 31.

32. UNCLOS, *supra* note 2, art. 293(1) (emphasis added).

33. *Id.* art. 288(1).

34. For example, in *Philippines v. China*, the Philippines asserted the claim that China had violated Articles 192 and 194 of UNCLOS (an UNCLOS claim). *Phil. v. China*, Award on Jurisdiction and Admissibility, *supra* note 15, ¶ 274. In light of Article 293(1), the tribunal held that it could “consider the relevant provisions of the [Convention on Biological Diversity] for the purposes of interpreting the content and standard of Articles 192 and 194 of [UNCLOS].” *Id.* ¶ 176. As a general matter, the “other rules of international law” of Article 293(1) may include (1) rules contained within international agreements granting jurisdiction to the tribunal under Article 288(2); (2) rules expressly referenced in *renvoi* provisions in

Second, the context of Article 293(1) affirms this interpretation. The official title of Article 288 is “Jurisdiction” and that of Article 293 is “Applicable Law,” reinforcing the fact that the Convention considers them to be two separate notions. One cannot use the applicable law provision (Article 293) to expand jurisdiction; otherwise, it would violate the jurisdiction provision (Article 288).

Third, the object and purpose of UNCLOS, as expressed in the Preamble, is to govern “all issues relating to the law of the sea.”<sup>35</sup> It is *not* intended to govern issues outside the law of the sea. Consequently, it makes sense that Article 293(1) cannot expand the jurisdiction of UNCLOS tribunals beyond their jurisdiction under Article 288(1) to resolve UNCLOS claims.

Therefore, Article 293(1) should not be interpreted as an expansion of the jurisdiction of UNCLOS tribunals beyond UNCLOS.

## II. CASES EXERCISING JURISDICTION

Despite this seemingly straightforward analysis, UNCLOS tribunals have invoked Article 293(1) to expand their jurisdiction to non-UNCLOS claims in three cases. The first was ITLOS’s second case: *M/V Saiga (No. 2)*. In 1997, Saint Vincent and the Grenadines (St. Vincent) instituted an UNCLOS arbitration against Guinea claiming, inter alia, that Guinea had violated the prohibition on the use of excessive force in the detention of ships when Guinean authorities arrested a ship registered in St. Vincent.<sup>36</sup> Although the prohibition is an established norm of customary international law,<sup>37</sup> it is not explicitly enshrined in UNCLOS.<sup>38</sup> The most pertinent provision concerning the use of force in UNCLOS is Article 301, but this provision prohibits only the threat or use of force “against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.”<sup>39</sup> ITLOS therefore con-

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UNCLOS; (3) secondary rules of general international law (e.g., treaty law, state responsibility, and diplomatic protection); and (4) rules to help interpret UNCLOS under Article 31(3)(c) of the VCLT.

35. UNCLOS, *supra* note 2, pmb1.

36. *M/V Saiga (No. 2)* (St. Vincent v. Guinea), ITLOS Case No. 2, Memorial of St. Vincent of June 19, 1998, ¶ 95, [http://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_2/merits/memorial\\_svg.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_2/merits/memorial_svg.pdf) [<http://perma.cc/AM74-AW7T>].

37. See *M/V Saiga (No. 2)*, Judgment, *supra* note 7, ¶ 156.

38. See *id.* ¶ 155; Tullio Scovazzi, *ITLOS and Jurisdiction over Ships*, in *JURISDICTION OVER SHIPS: POST-UNCLOS DEVELOPMENTS IN THE LAW OF THE SEA* 382, 395 (Henrik Ringbom ed., 2015).

39. UNCLOS, *supra* note 2, art. 301.

cluded that UNCLOS does not expressly regulate the use of force in the arrest of ships.<sup>40</sup> As a result, St. Vincent's claim that Guinea violated the prohibition on the use of excessive force in the detention of ships could not constitute a claim under Article 301, but rather constituted a non-UNCLOS claim based on customary international law. ITLOS, however, held:

Although the Convention does not contain express provisions on the use of force in the arrest of ships, *international law, which is applicable by virtue of article 293 of the Convention*, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law.<sup>41</sup>

According to the language above, ITLOS only relied on Article 293(1) to "apply" the prohibition on the use of excessive force, without making an express claim of jurisdiction. However, ITLOS ultimately made a formal determination that Guinea violated the prohibition,<sup>42</sup> which ipso facto amounted to an exercise of jurisdiction over the claim.<sup>43</sup> Remarkably, ITLOS did not provide any justification beyond the paragraph quoted above for this exercise of jurisdiction.

Then in 2004, in the case of *Guyana v. Suriname*, Guyana instituted proceedings against Suriname before an Annex VII tribunal claiming, inter alia, that Suriname was "internationally responsible for violating . . . the Charter of the United Nations, and general international law . . . because of its use of armed force" against a Canadian vessel licensed by Guyana.<sup>44</sup> Once again, although UNCLOS prohibits the use of force against "the territorial integrity or

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40. *M/V Saiga (No. 2)*, Judgment, *supra* note 7, ¶ 155.

41. *Id.* (emphasis added).

42. *Id.* ¶ 183(9).

43. A declaration by a judicial body that a state has violated a rule of international law is a paradigmatic example of the exercise of jurisdiction over a claim. See, e.g., Questions Relating to the Obligation to Prosecute or Extradite (*Belg. v. Sen.*), Judgment, 2012 I.C.J. 423, ¶¶ 49-52 (July 20); Application of the Interim Accord of 13 September 1995 (*Maced. v. Greece*), Judgment, 2011 I.C.J. 644, ¶ 58 (Dec. 5); *Avena and Other Mexican Nationals (Mex. v. U.S.)*, Judgment, 2004 I.C.J. 12, ¶¶ 27-28 (Mar. 31); *Oil Platforms (Iran v. U.S.)*, Judgment, 2003 I.C.J. 161, ¶ 31 (Nov. 6); *LaGrand (Ger. v. U.S.)*, Judgment, 2001 I.C.J. 466, ¶ 42 (June 27).

44. *Guyana v. Suriname*, PCA Case Repository, Reply of Guyana of Apr. 1, 2006, ¶ 10.1(3), <http://www.pcacases.com/web/sendAttach/1040> [<http://perma.cc/NR9U-3JB7>].



political independence of any State,”<sup>45</sup> the Convention does not prohibit the use of force against foreign vessels. Consequently, Guyana’s claim was a non-UNCLOS claim arising under general international law. In deciding how to deal with the non-UNCLOS claim, the tribunal simply cited *M/V Saiga (No. 2)* and held:

The International Tribunal for the Law of the Sea (“ITLOS”) [in *M/V Saiga (No. 2)*] interpreted Article 293 as giving it *competence* to apply not only the Convention, but also the norms of customary international law (including, of course, those relating to the use of force) . . . . In the view of this Tribunal this is a reasonable interpretation of Article 293 and therefore Suriname’s contention that this Tribunal had “no *jurisdiction* to adjudicate alleged violations of the United Nations Charter and general international law” cannot be accepted.<sup>46</sup>

Notably, not only did the Annex VII tribunal explicitly state that Article 293 gave it “competence”<sup>47</sup> (a synonym for “jurisdiction”<sup>48</sup>), but it also rejected Suriname’s contention that it had no “jurisdiction”<sup>49</sup> over the claim. Moreover, without any further explanation, the tribunal expressly declared in the *dispositif* of the award that it “ha[d] *jurisdiction* to consider and rule on Guyana’s allegation that Suriname has engaged in the unlawful use or threat of force contrary to the Convention, the UN Charter, and general international law.”<sup>50</sup> And like ITLOS in *M/V Saiga (No. 2)*, the *Guyana v. Suriname* tribunal ultimately made a formal finding of a violation of the prohibition on the threat of the use of force.<sup>51</sup> There is thus no question that it exercised jurisdiction under Article 293(1).

The most recent instance where an UNCLOS tribunal invoked Article 293(1) to expand its jurisdiction was the case of *M/V Virginia G*, where ITLOS

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45. UNCLOS, *supra* note 2, art. 301.

46. *Guyana v. Suriname*, Award, *supra* note 8, ¶¶ 405-06 (emphasis added) (citations omitted).

47. *Id.* ¶ 405.

48. CHITTHARANJAN F. AMERASINGHE, JURISDICTION OF INTERNATIONAL TRIBUNALS 60 (2003); see also JUAN JOSÉ QUINTANA, LITIGATION AT THE INTERNATIONAL COURT OF JUSTICE: PRACTICE AND PROCEDURE 3 n.1 (2015) (describing any distinction between jurisdiction and competence as “of little importance in practice”); 1 HUGH THIRLWAY, THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE: FIFTY YEARS OF JURISPRUDENCE 691-92 (2013) (critiquing proposed distinctions between jurisdiction and competence).

49. *Guyana v. Suriname*, Award, *supra* note 8, ¶ 406.

50. *Id.* ¶ 487(ii) (emphasis added).

51. *Id.* ¶ 488(2).

faced a situation very similar to that in *M/V Saiga (No. 2)*. In 2011, Panama instituted an UNCLOS arbitration against Guinea-Bissau for arresting an oil tanker registered in Panama. Like St. Vincent in *M/V Saiga (No. 2)*, Panama claimed, inter alia, that Guinea-Bissau had violated the prohibition on the use of excessive force in detaining the vessel.<sup>52</sup> Although Panama asserted that this prohibition arose under both “the Convention and . . . international law,”<sup>53</sup> UNCLOS, again, does not contain any provisions on the prohibition on the use of excessive force against a vessel.<sup>54</sup> Therefore, Panama’s claim, like St. Vincent’s claim, was a non-UNCLOS claim. In deciding whether it could exercise jurisdiction over this claim, ITLOS, like the *Guyana v. Suriname* tribunal, simply quoted the discussion on Article 293(1) in *M/V Saiga (No. 2)*,<sup>55</sup> and exercised jurisdiction over the claim by making a finding that there was no violation of the prohibition.<sup>56</sup>

In conclusion, even though Article 293(1) should not be invoked to expand the jurisdiction of an UNCLOS tribunal, the *M/V Saiga (No. 2)*, *Guyana v. Suriname*, and *M/V Virginia G* tribunals all effectively exercised jurisdiction under the provision—implicitly in *M/V Saiga (No. 2)* and *M/V Virginia G*, and explicitly in *Guyana v. Suriname*.

### III. CASES REJECTING JURISDICTION

Aside from the *M/V Saiga (No. 2)* line of cases, only four other UNCLOS tribunals—all Annex VII tribunals—have considered the question of whether Article 293(1) may expand their jurisdiction. In all four cases, the Annex VII tribunals correctly held that Article 293(1) could not enlarge their jurisdiction. But they did not go so far as to state that the *M/V Saiga (No. 2)* line of cases was incorrectly decided.

The first such case was *MOX Plant*. In 2001, Ireland brought an UNCLOS arbitration against the United Kingdom, claiming, inter alia, that the United Kingdom violated two norms of international environmental law with respect to a mixed oxide plant across the Irish Sea from Ireland.<sup>57</sup> As the environmen-

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52. *M/V Virginia G*, Judgment, *supra* note 9, ¶ 54(1)(10).

53. *Id.*

54. See sources cited *supra* note 38.

55. *M/V Virginia G*, Judgment, *supra* note 9, ¶ 359 (quoting *M/V Saiga (No. 2)*, Judgment, *supra* note 7, ¶¶ 155–56). For quoted text, see *supra* text accompanying note 41.

56. *M/V Virginia G*, Judgment, *supra* note 9, ¶ 362.

57. *MOX Plant (Ir. v. UK) (UNCLOS)*, PCA Case Repository, Memorial of Ireland of July 26, 2002, pt. I, ¶ 1.2, <http://www.pcacases.com/web/sendAttach/849> [http://perma.cc

tal norms in question are not enshrined in UNCLOS, the claims were undoubtedly non-UNCLOS claims. Yet Ireland cited *M/V Saiga (No. 2)* to argue that the tribunal had the authority to find a violation of the norms in question.<sup>58</sup> Although the Annex VII tribunal never issued a final award,<sup>59</sup> it famously stated in Procedural Order No. 3 that “there is a cardinal distinction between the scope of its jurisdiction under article 288, paragraph 1, of the Convention, on the one hand, and the law to be applied by the Tribunal under article 293 of the Convention, on the other hand.”<sup>60</sup> And in a formal statement released by its president, the tribunal asserted that any non-UNCLOS claims would be inadmissible.<sup>61</sup> In doing so, it did not attempt to reconcile the inconsistency between its holding and ITLOS’s judgment in *M/V Saiga (No. 2)*.

Then in 2010, in the case of *Chagos*, Mauritius brought an UNCLOS proceeding against the United Kingdom over the Chagos Marine Protected Area, requesting, inter alia, that the tribunal determine who—Mauritius or the United Kingdom—had sovereignty over the Chagos Archipelago.<sup>62</sup> As UNCLOS does not contain provisions on territorial sovereignty,<sup>63</sup> Mauritius’s claim was a non-UNCLOS claim. Yet Mauritius cited *M/V Saiga (No. 2)* and *Guyana v. Suriname* for the proposition that the tribunal could apply non-UNCLOS rules of international law to resolve the sovereignty claim as long as it was sufficiently connected with an UNCLOS claim.<sup>64</sup> The Annex VII tribunal first clarified that “[w]hether the Tribunal . . . may apply such exterior sources of law and ad-

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/AXG7-8E97] (describing the plant); *MOX Plant (Ir. v. U.K.) (UNCLOS)*, PCA Case Repository, Memorial of Ireland of July 26, 2002, pt. II, ¶ 6.21, <http://www.pccases.com/web/sendAttach/850> [<http://perma.cc/73J4-7FMS>] (describing the legal violations).

58. *Mox Plant*, PCA Case Repository, Memorial of Ireland of July 26, 2002, pt. II, ¶ 6.21 & n.36.
59. Ireland ultimately withdrew its claim for unrelated reasons. *MOX Plant (Ir. v. U.K.) (UNCLOS)*, PCA Case Repository, Press Release of June 6, 2008, <http://www.pccases.com/web/sendAttach/876> [<http://perma.cc/YVW8-Z3CE>].
60. *MOX Plant*, Procedural Order No. 3, *supra* note 10, ¶ 19.
61. *MOX Plant (Ir. v. U.K.) (UNCLOS)*, PCA Case Repository, Statement by the President of June 13, 2003, ¶ 5, <http://www.pccases.com/web/sendAttach/877> [<http://perma.cc/GX72-42KJ>]. Notably, in Procedural Order No. 3, the tribunal stated that any non-UNCLOS claims “may be” inadmissible. *MOX Plant*, Procedural Order No. 3, *supra* note 10, ¶ 19.
62. Mauritius characterized the request as a determination over the identity of the “coastal State.” *Chagos Marine Protected Area*, Memorial of Mauritius, *supra* note 5, at 155. However, the tribunal ultimately determined that the request “is properly characterized as relating to land sovereignty over the Chagos Archipelago.” *Chagos Marine Protected Area*, Award, *supra* note 1, ¶ 212.
63. See sources cited *infra* note 104.
64. *Chagos Marine Protected Area (Mauritius v. U.K.)*, PCA Case Repository No. 2011-3, Hearing on Jurisdiction and the Merits of Apr. 25, 2014, at 439, <http://www.pccases.com/web/sendAttach/1574> [<http://perma.cc/428D-AZXY>].

dress such matters raises a question of the scope of jurisdiction under the Convention.”<sup>65</sup> It then found that it did not have jurisdiction over the sovereignty claim.<sup>66</sup> Notably, although it summarized the parties’ arguments on Article 293(1), *M/V Saiga (No. 2)*, and *Guyana v. Suriname*,<sup>67</sup> the tribunal did not refer to any of them when explaining its decision.<sup>68</sup>

The third case that rejected an expansion of jurisdiction under Article 293(1) was *Arctic Sunrise*. In 2013, the Netherlands instituted UNCLOS proceedings against Russia, seeking, inter alia, a declaration that Russia had violated the International Covenant on Civil and Political Rights (ICCPR) in its arrest and detention of the Greenpeace activists aboard the *MV Arctic Sunrise*.<sup>69</sup> Since the ICCPR is a separate treaty not codified in UNCLOS, the Annex VII tribunal was confronted with a non-UNCLOS claim. In line with the jurisprudence of the *MOX Plant* and *Chagos* tribunals, the *Arctic Sunrise* tribunal expressly held that “Article 293(1) does not extend the jurisdiction of the tribunal”<sup>70</sup> and “Article 293 is not . . . a means to obtain a determination that some treaty other than the Convention has been violated.”<sup>71</sup> In applying this principle to the case before it, the tribunal declared: “This Tribunal does not consider that it has jurisdiction to apply directly provisions such as Articles 9 and 12(2) of the ICCPR or to determine breaches of such provisions.”<sup>72</sup>

Unlike the *MOX Plant* and *Chagos* tribunals, the *Arctic Sunrise* tribunal attempted to distinguish *M/V Saiga (No. 2)*. Despite its general statement on Article 293(1), the tribunal held:

In the case of some broadly worded or general provisions, it may also be necessary to rely on primary rules of international law other than the

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65. *Chagos Marine Protected Area*, Award, *supra* note 1, ¶ 203.

66. *Id.* ¶ 221.

67. *Id.* ¶¶ 180-86.

68. *Id.* ¶¶ 203-21.

69. *Arctic Sunrise (Neth. v. Russ.)*, PCA Case Repository No. 2014-02, Notification and Statement of the Claim of the Netherlands of Oct. 4, 2013, ¶ 37(1)(c), <http://www.pcacases.com/web/sendAttach/1314> [<http://perma.cc/3WY4-EQH4>]; *Arctic Sunrise (Neth. v. Russ.)*, PCA Case Repository No. 2014-02, Memorial of the Netherlands of Aug. 31, 2014, ¶ 175, <http://www.pcacases.com/web/sendAttach/1406> [<http://perma.cc/PN89-LP2Q>]; *Arctic Sunrise (Neth. v. Russ.)*, PCA Case Repository No. 2014-02, Second Supplemental Written Pleadings of the Netherlands of Jan. 12, 2015, at 6-7, <http://www.pcacases.com/web/sendAttach/1411> [<http://perma.cc/P5XW-CLHR>].

70. *Arctic Sunrise*, Award on the Merits, *supra* note 12, ¶ 188.

71. *Id.* ¶ 192.

72. *Id.* ¶ 198.

Convention in order to interpret and apply particular provisions of the Convention. Both arbitral tribunals and ITLOS have interpreted the Convention as allowing for the application of relevant rules of international law. Article 293 of the Convention makes this possible. For instance, in *M/V "SAIGA" No. 2*, ITLOS took account of general international law rules on the use of force in considering the use of force for the arrest of a vessel.<sup>73</sup>

This attempt to accommodate *M/V Saiga (No. 2)* is not convincing for two reasons. First, the tribunal failed to specify exactly which "broadly worded or general provision[]" was at play in *M/V Saiga (No. 2)*. The reality is that ITLOS had not specified any such substantive provision when explaining its exercise of jurisdiction over the use-of-force claim.<sup>74</sup> Second, the tribunal downplayed ITLOS's treatment of the use-of-force claim in *M/V Saiga (No. 2)*. As discussed above, ITLOS had declared a violation of the prohibition on the use of excessive force, which amounted to an exercise of jurisdiction. The *Arctic Sunrise* tribunal, however, stated that ITLOS merely "took account" of rules concerning the use of force.

The fourth and final case that rejected an expansion of jurisdiction under Article 293(1) was *Duzgit Integrity*. In 2013, just a few weeks after the Netherlands filed its claim against Russia, Malta instituted UNCLOS proceedings against São Tomé and Príncipe (São Tomé) over São Tomé's arrest of the Maltese vessel *Duzgit Integrity* in São Toméan archipelagic waters.<sup>75</sup> Malta argued, inter alia, that São Tomé's arrest, imprisonment, and fining of the master and crew of the vessel violated "generally applicable rules of international law related to fundamental human rights and humanitarian concerns."<sup>76</sup> As UNCLOS does not contain provisions on "human rights and humanitarian concerns," São Tomé argued that the tribunal did not have jurisdiction over these non-UNCLOS claims.<sup>77</sup> After considering both Article 288(1) and Article 293(1), the tribunal concluded that "[t]he combined effect of these two provisions is that the Tribunal does not have jurisdiction to determine breaches of obligations not having their source in the Convention (including human rights obli-

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73. *Id.* ¶ 191.

74. *M/V Saiga (No. 2)*, Judgment, *supra* note 7, ¶¶ 153-59.

75. See *Duzgit Integrity*, Award, *supra* note 13, ¶ 7; *Arctic Sunrise*, Award on the Merits, *supra* note 12, ¶ 21.

76. *Duzgit Integrity*, Award, *supra* note 13, ¶ 121(9); see *id.* ¶ 203.

77. *Id.* ¶ 204.

gations).”<sup>78</sup> As a result, the tribunal held that it was “not competent to determine if fundamental human rights obligations were violated by São Tomé.”<sup>79</sup>

Notably, the *Duzgit Integrity* tribunal attempted to reconcile this holding with *M/V Saiga (No. 2)* in two ways. First, it invoked the same argument as the *Arctic Sunrise* tribunal concerning “broadly worded or general provisions,” but, like the *Arctic Sunrise* tribunal, it failed to specify the provision in question in *M/V Saiga (No. 2)* and downplayed ITLOS’s treatment of the use-of-force claim in that case.<sup>80</sup> Second, again citing *M/V Saiga (No. 2)*,<sup>81</sup> it held:

The exercise of enforcement powers by a (coastal) State in situations where the State derives these powers from provisions of the Convention is also governed by certain rules and principles of general international law, in particular the principle of reasonableness. This principle encompasses the principles of necessity and proportionality. These principles do not only apply in cases where States resort to force, but to all measures of law enforcement. Article 293(1) requires the application of these principles.<sup>82</sup>

This justification, however, fails to recognize that the *M/V Saiga (No. 2)* tribunal, like the *Guyana v. Suriname* and *M/V Virginia G* tribunals, had made a formal finding in the *dispositif* of a violation of international law without reference to a particular provision of UNCLOS.<sup>83</sup> By contrast, when the *Duzgit Integrity* tribunal applied the principle of reasonableness to São Tomé’s conduct, its sole conclusion was that São Tomé had violated Article 40(3) of UNCLOS.<sup>84</sup> Consequently, the *Duzgit Integrity* tribunal did not fully justify ITLOS’s exercise of jurisdiction over the use-of-force claim in *M/V Saiga (No. 2)*.

The *MOX Plant* line of cases reveals an interesting phenomenon: although each Annex VII tribunal expressly or impliedly acknowledged that Article 293(1) does not expand the jurisdiction of UNCLOS tribunals, none of them stated that the *M/V Saiga (No. 2)* line of cases was wrongly decided. The *MOX Plant* and *Chagos* tribunals avoided addressing the cases entirely, and the *Arctic Sunrise* and *Duzgit Integrity* tribunals attempted to fit *M/V Saiga (No. 2)* into

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78. *Id.* ¶ 207.

79. *Id.* ¶ 210.

80. *Id.* ¶ 208 & n.384.

81. *Id.* ¶ 209 n.385.

82. *Id.* ¶ 209.

83. *Guyana v. Suriname*, Award, *supra* note 8, ¶ 488(2); *M/V Saiga (No. 2)*, Judgment, *supra* note 7, ¶ 183(9); *M/V Virginia G*, Judgment, *supra* note 9, ¶ 452(13).

84. *Duzgit Integrity*, Award, *supra* note 13, ¶¶ 261-62, 342(c).

an exception to the general principle. How can one explain this behavior? Four possible reasons are considered below.

First, as a legal matter, the tribunals in the *M/V Saiga* (No. 2) line of cases may have actually been correct in exercising jurisdiction over their respective claims, even if Article 293(1) was an incorrect basis for that jurisdiction. Instead, the tribunals could have plausibly invoked Article 288(1) as the source of jurisdiction, characterizing the claims as UNCLOS claims under Articles 56(2), 58(1), 58(3), 87(1), and/or 301.<sup>85</sup>

Second, as a policy matter, the tribunals in the *MOX Plant* line of cases may have considered the *M/V Saiga* (No. 2) line of decisions to be good public policy. One cannot overlook the fact that the non-UNCLOS claims in *M/V Saiga* (No. 2), *Guyana v. Suriname*, and *M/V Virginia G* were all related to the prohibition on the use of force in international law. The fact that the prohibition is a “cornerstone” of the U.N. Charter<sup>86</sup> and widely considered a *jus cogens* norm<sup>87</sup> may have discouraged the *MOX Plant*, *Chagos*, *Arctic Sunrise*, and *Duzgit Integrity* tribunals from criticizing the *M/V Saiga* (No. 2) line of decisions.

Third, as a political matter, the tribunals in the *MOX Plant* line of cases may have found it inappropriate to criticize the *M/V Saiga* (No. 2) and *M/V Virginia G* tribunals because of the composition of the tribunals themselves. The *MOX Plant*, *Chagos*, *Arctic Sunrise*, and *Duzgit Integrity* tribunals were all

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85. In *M/V Saiga* (No. 2), St. Vincent could have based the tribunal’s jurisdiction on Article 58(1), which contains a reference to Article 87(1), which provides that “[f]reedom of the high seas is exercised under the conditions laid down by . . . other rules of international law.” UNCLOS, *supra* note 2, art. 87(1) (emphasis added). In *Guyana v. Suriname*, Guyana could have based the tribunal’s jurisdiction on Articles 56(2) and 58(3), which contain references to “the rights and duties of other States” and “the rights and duties of the coastal State.” *Id.* arts. 56(2), 58(3). And in *M/V Virginia G*, Panama could have based the tribunal’s jurisdiction on Article 56(2). Alternatively, in all three cases, the applicants could also have attempted to bring the use-of-force claim under Article 301, claiming that the use of force in question was “inconsistent with the principles of international law embodied in the Charter of the United Nations.” *Id.* art. 301.

86. *Armed Activities on the Territory of the Congo* (D.R.C. v. Uganda), Judgment, 2005 I.C.J. 168, ¶ 148 (Dec. 19) (“The prohibition against the use of force is a cornerstone of the United Nations Charter.”); *Oil Platforms* (Iran v. U.S.), Judgment, 2003 I.C.J. 161, 290, ¶ 1.1 (Nov. 6) (Elaraby, J., dissenting) (“The principle of the prohibition of the use of force in international relations . . . is, no doubt, the most important principle in contemporary international law to govern inter-State conduct; it is indeed the cornerstone of the Charter.”).

87. See Oliver Dörr, *Use of Force, Prohibition of*, MAX PLANCK ENCYCLOPEDIA PUB. INT’L L. ¶ 1 (June 2011), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e427?prd=EPIL> [<http://perma.cc/Z4AT-3WG9>]; e.g., *Oil Platforms*, 2003 I.C.J. at 290, ¶ 1.1 (Elaraby, J., dissenting) (“The principle of the prohibition of the use of force in international relations . . . reflects a rule of *jus cogens* from which no derogation is permitted.”).

Annex VII tribunals composed of three or five ad hoc arbitrators,<sup>88</sup> whereas ITLOS, which decided *M/V Saiga (No. 2)* and *M/V Virginia G*, is a permanent judicial body composed of twenty-one judges elected for their expertise in the law of the sea.<sup>89</sup> The Annex VII tribunals therefore may have found it inappropriate to accuse ITLOS of having committed a legal error in light of the authority it commands by virtue of its permanence, size, and expertise.

Fourth, on an individual level, ITLOS judges and UNCLOS arbitrators come from the same circle of elite lawyers. As a result, the members of the tribunals in the *MOX Plant* line of cases may not have wanted to accuse their friends, colleagues, or even prior selves of having been wrong. Indeed, the President of the *MOX Plant* and *Arctic Sunrise* tribunals (Thomas A. Mensah)<sup>90</sup> was the President of ITLOS in *M/V Saiga (No. 2)*.<sup>91</sup> As for the *Chagos* tribunal, the President (Ivan Shearer)<sup>92</sup> was a member of the *Guyana v. Suriname* tribunal,<sup>93</sup> and three other members of the *Chagos* tribunal (Rüdiger Wolfrum, Albert Hoffman, and James Kateka)<sup>94</sup> were, respectively, the Vice-President of ITLOS in *M/V Saiga (No. 2)*,<sup>95</sup> the Vice-President of ITLOS in *M/V Virginia G*,<sup>96</sup> and a judge of ITLOS in *M/V Virginia G*.<sup>97</sup> Finally, with respect to the *Duzgit Integrity* tribunal, one member (Tullio Treves)<sup>98</sup> was a judge of ITLOS in *M/V Saiga (No. 2)*<sup>99</sup> and *M/V Virginia G*,<sup>100</sup> and another member (James Kateka)<sup>101</sup> was a judge of ITLOS in *M/V Virginia G*.<sup>102</sup>

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88. Annex VII tribunals are normally composed of five arbitrators. UNCLOS, *supra* note 2, annex VII, art. 3. However, in *Duzgit Integrity*, Malta and São Tomé agreed to have a tribunal composed of three arbitrators. *Duzgit Integrity*, Award, *supra* note 13, ¶ 9.

89. UNCLOS, *supra* note 2, annex VI, art. 2(1).

90. *Arctic Sunrise*, Award on the Merits, *supra* note 12, at i; *MOX Plant*, Procedural Order No. 3, *supra* note 10, at 1.

91. *M/V Saiga (No. 2)*, Judgment, *supra* note 7, at 3.

92. *Chagos Marine Protected Area*, Award, *supra* note 1, ¶ 17.

93. *Guyana v. Suriname*, Award, *supra* note 8, at 166.

94. *Chagos Marine Protected Area*, Award, *supra* note 1, ¶¶ 15, 17. Note that Rüdiger Wolfrum and James Kateka jointly wrote a dissenting and concurring opinion in *Chagos* that advocated a more expansive view of the tribunal's jurisdiction. See *Chagos Marine Protected Area (Mauritius v. U.K.)*, PCA Case Repository No. 2011-03, Dissenting & Concurring Opinion of Mar. 18, 2015, ¶¶ 29-45, <http://www.pcacases.com/web/sendAttach/1570> [<http://perma.cc/Q7AE-ZT94>].

95. *M/V Saiga (No. 2)*, Judgment, *supra* note 7, at 3.

96. *M/V Virginia G*, Judgment, *supra* note 9, at 3.

97. *Id.*

98. *Duzgit Integrity*, Award, *supra* note 13, at i.

99. *M/V Saiga (No. 2)*, Judgment, *supra* note 7, at 3.



One can therefore understand why the tribunals in the *MOX Plant* line of cases did not expressly state that the tribunals in the *M/V Saiga (No. 2)* line of cases had committed a legal error. These legal, policy, political, and individual pressures perhaps discouraged the *MOX Plant*, *Chagos*, *Arctic Sunrise*, and *Duzgit Integrity* tribunals from critiquing the *M/V Saiga (No. 2)*, *Guyana v. Suriname*, and *M/V Virginia G* tribunals.

## CONCLUSION

Although understandable, the failure of the tribunals in the *MOX Plant* line of cases to expressly recognize the legal error of the *M/V Saiga (No. 2)* line of cases may ultimately undermine the UNCLOS dispute settlement regime. Since the UNCLOS tribunals in the *M/V Saiga (No. 2)* line of cases exercised jurisdiction under Article 293(1) without significant reproach, UNCLOS tribunals may continue to be tempted to follow their path. Indeed, despite wide modern acceptance of the principle that applicable law provisions do not expand the jurisdiction of international courts and tribunals, ITLOS in the recent *M/V Virginia G* case still felt compelled to follow the precedent it set in *M/V Saiga (No. 2)*. And there is no guarantee that future tribunals will not extend their jurisdiction even further, beyond what ITLOS would have accepted in *M/V Saiga (No. 2)*. The Annex VII tribunal in *Guyana v. Suriname*, for example, appeared to take on a very expansive notion of its jurisdiction, ultimately holding that it had jurisdiction not only over claims concerning the use of force, but also over violations of the U.N. Charter, customary international law, and general international law.

Such a notion of jurisdiction would have significant consequences for *Ukraine v. Russia*. On September 14, 2016, Ukraine instituted arbitration proceedings against Russia under UNCLOS, claiming, inter alia, that Russia has interfered with “its rights as the coastal state in maritime zones adjacent to Crimea in the Black Sea, Sea of Azov, and Kerch Strait.”<sup>103</sup> The validity of this claim, however, depends on a Ukrainian claim of sovereignty over Crimea. As

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100. Tullio Treves was a judge ad hoc in this case. *M/V Virginia G*, Judgment, *supra* note 9, at 3.

101. *Duzgit Integrity*, Award, *supra* note 13, at i.

102. *M/V Virginia G*, Judgment, *supra* note 9, at 3.

103. *Statement of the Ministry of Foreign Affairs of Ukraine on the Initiation of Arbitration Against the Russian Federation Under the United Nations Convention on the Law of the Sea*, MINISTRY FOREIGN AFF. OF UKR. (Sept. 15, 2016), <http://mfa.gov.ua/en/press-center/news/50813-zajava-mzs-ukrajini-shhodo-porushennya-arbitrazhnogo-provadjhennya-prot-i-rosijsykoji-federaciji-vidpovidno-do-konvenciji-oon-z-morsykoogo-prava> [http://perma.cc/437H-CNHS].

territorial sovereignty disputes fall outside the scope of UNCLOS,<sup>104</sup> the tribunal may have to determine whether it may exercise jurisdiction over this non-UNCLOS sovereignty claim. Under the jurisprudence of *Guyana v. Suriname*, the tribunal could arguably invoke Article 293(1) to exercise such jurisdiction. But there are real doubts as to whether UNCLOS tribunals should have the jurisdiction to settle such prominent territorial sovereignty disputes.<sup>105</sup>

Any unwarranted expansion of jurisdiction is dangerous. It must be remembered that the international legal order depends on the consent of states. The reason UNCLOS tribunals are authorized to exercise jurisdiction over disputes in the first place is that the disputing states ratified or acceded to the Convention. If UNCLOS tribunals begin exercising jurisdiction over disputes for which states never intended to grant them jurisdiction, the legitimacy of UNCLOS dispute settlement may be questioned. Not only may more states follow in the steps of China and Russia in not participating in UNCLOS proceedings,<sup>106</sup> but the relatively few states who have not yet ratified or acceded to the Convention – such as the United States – may be less inclined to do so.

As a result, it is the responsibility of UNCLOS tribunals to exercise only the jurisdiction accorded to them. As the *M/V Saiga (No. 2)*, *Guyana v. Suriname*,

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104. See Irina Buga, *Territorial Sovereignty Issues in Maritime Disputes: A Jurisdictional Dilemma for Law of the Sea Tribunals*, 27 INT'L J. MARINE & COASTAL L. 59, 68 (2012) (“[P]ure territorial disputes do not fall within the jurisdiction of [Law of the Sea] tribunals.”); Paul C. Irwin, *Settlement of Maritime Boundary Disputes: An Analysis of the Law of the Sea Negotiations*, 8 OCEAN DEV. & INT'L L.J. 105, 114 (1980) (“Indeed it would be beyond the substantive scope of the Convention to determine the status of land territory. As substantive articles of the Convention do not relate to such matters, it would certainly be inappropriate for the dispute settlement provisions to cover them.”); Bernard H. Oxman, *Courts and Tribunals: The ICJ, ITLOS, and Arbitral Tribunals*, in THE OXFORD HANDBOOK OF THE LAW OF THE SEA 394, 400 (Donald R. Rothwell et al. eds., 2015) (noting that “land sovereignty questions are not addressed by [UNCLOS]”); Robert W. Smith & Bradford Thomas, *Island Disputes and the Law of the Sea: An Examination of Sovereignty and Delimitation Disputes*, in SECURITY FLASHPOINTS: OIL, ISLANDS, SEA ACCESS AND MILITARY CONFRONTATION 55, 66 (Myron H. Nordquist & John Norton Moore eds., 1998) (“[UNCLOS] does not contain any provisions in any of its articles that discuss the resolution of disputes over any territory . . .”) (emphasis omitted); Sienho Yee, *The South China Sea Arbitration (The Philippines v. China): Potential Jurisdictional Obstacles or Objections*, 13 CHINESE J. INT'L L. 663, 688-89 (2014) (“It is elemental that the law of the sea does not address sovereignty over continental or insular land territory.”).

105. See *Chagos Marine Protected Area*, Award, *supra* note 1, ¶¶ 219-21.

106. China did not participate in the *Philippines v. China* arbitration, and Russia is not participating in the *Arctic Sunrise* arbitration. See *Phil. v. China*, PCA Case Repository No. 2013-19, Award of July 12, 2016, at i, <http://www.pcacases.com/pcadocs/PH-CN%20-%2020160712%20-%20Award.pdf> [<http://perma.cc/92VJ-YX62>]; *Arctic Sunrise*, Award on the Merits, *supra* note 12, at iii.

and *M/V Virginia G* tribunals have made a legal error by relying on Article 293(1) to establish their jurisdiction over use-of-force claims, UNCLOS tribunals should not be afraid to say so. Avoiding the discussion or attempting to distinguish that line of cases is insufficient. Rather, an express—though, of course, diplomatic—refutation of that jurisprudence is necessary to preserve the legitimacy of UNCLOS proceedings. Otherwise, states may continue to invoke *M/V Saiga (No. 2)* and its progeny to expand the jurisdiction of UNCLOS tribunals.

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