The MOX Plant Case: The Question of "Supplemental Jurisdiction" for International Environmental Claims Under UNCLOS

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SUMMARY

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I. INTRODUCTION

The case of *Ireland v. United Kingdom*,[1] currently underway at the Permanent Court of Arbitration in The Hague, raises interesting questions of jurisdiction and applicable law for international environmental claims under the United Nations Convention on the Law of the Sea (UNCLOS, or the Convention).[2]

In this dispute concerning radioactive waste pollution in the Irish Sea produced by an English nuclear fuel reprocessing facility, Ireland argues that certain UNCLOS provisions allow Convention tribunals to enforce not only UNCLOS directives, but "other rules of international law not incompatible with this Convention" as well.[3] As a result, Ireland's claim draws not only from UNCLOS, but also from more than twenty additional international agreements and instruments to which the United Kingdom may be bound.[4] In response, the United Kingdom argues that UNCLOS provides no such jurisdiction to the Tribunal, and as such, the basis for much of Ireland's suit is improper.[5]

The theory advanced by Ireland in many ways resembles the practice of supplemental jurisdiction as developed in American case law and legislation, which permits the attachment of non-federal claims to valid federal claims when they are all part of the same case or controversy.[6] Properly speaking, there is no international law concept analogous to supplemental jurisdiction in U.S. federal law; however, the parallels are striking in this case

1. MOX Plant Case (Ir. v. U.K.), "Dispute Concerning the MOX Plant, International Movements of Radioactive Materials, and the Protection of the Marine Environment of the Irish Sea" (Perm. Ct. Arb., decision pending as of January 2007).

2. *See* United Nations Convention on the Law of the Sea, art. 288(4), *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (*entered into force* Nov. 16, 1994) [hereinafter UNCLOS].

3. Memorial of Ireland, pt. 2, at 113 (Perm. Ct. Arb. July 26, 2002) [hereinafter Memorial of Ireland], *available at* http://www.pca-cpa.org/PDF/Ireland%20Memorial%20Part%20I.pdf.

4. *Id.*

5. *See* Counter-Memorial of the United Kingdom, MOX Plant (Ir. v. U.K.), at 21 (Perm. Ct. Arb. Jan. 9, 2003) [hereinafter Counter-Memorial of the United Kingdom], *available at* http://www.pca-cpa.org/PDF/UK%20Counter%20-Memorial.pdf.

6. 28 U.S.C. § 1367(a) (2006).

and will be explored in an effort to understand how such an approach might be understood within the context of UNCLOS.

If the Tribunal permits a kind of supplemental jurisdiction for Ireland's non-UNCLOS claims, the decision could have far-reaching implications for future litigation under UNCLOS, significantly expanding the power of a Convention already considered "the strongest comprehensive environmental treaty now in existence or likely to emerge for quite some time."[7] Conversely, a rejection of supplemental jurisdiction could limit similar suits to claims deriving strictly from UNCLOS, which provides powerful dispute resolution procedures but largely conceptual rights and obligations.

As this is a question of first impression for an UNCLOS Tribunal in a case that is, at the time of this writing, still in progress, and as UNCLOS Tribunals possess wide latitude in determining their jurisdiction and applicable law,[8] it is not possible to predict which view the court is likely to endorse. With that caveat, it is nevertheless possible to show that the Convention's language, its negotiating history, the customary rules of treaty interpretation, general scholarly commentary, and a comparison with U.S. federal practice lend support to Ireland's "supplemental" approach.

II. BACKGROUND

A. Introduction

This case concerns a mixed oxide fuel plant (MOX Plant) in Sellafield, England, on the eastern shores of the Irish Sea.[9] Mixed oxide or "MOX" is a nuclear fuel—produced by reprocessing spent nuclear waste—that can itself be used by nuclear power plants for energy production.[10] A decision by the British government in 2001 opened the way for commissioning and operation of the MOX plant in question here, which Ireland claims will both directly and indirectly cause radioactive wastes to be discharged into the Irish Sea.[11]

B. The Irish Sea

"The most radioactive sea in the world"[12]

7. Letter of Submittal of former U.S. Secretary of State, Warren Christopher, to former U.S. President William J. Clinton (Sept. 23, 1994), *in Special Supplement, Message from the President of the United States and Commentary Accompanying the United Nations Convention on the Law of the Sea and the Agreement Relating to the Implementation of the Part XI Upon Their Transmittal to the United States Senate for its Advice and Consent*, 7 GEO. INT'L ENVTL. L. REV. 77, 81 (1994).

8. *See* UNCLOS, *supra* note 2, art. 288 ("In the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal"); 5 CTR. FOR OCEANS LAW AND POLICY, UNIV. OF VIRGINIA, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, 1982: A COMMENTARY para. 288.5 (Myron H. Nordquist et al. eds., 1989) [hereinafter NORDQUIST COMMENTARY VOL. V] ("There is no appeal available from such a decision [determining jurisdiction].").

9. Counter-Memorial of the United Kingdom, *supra* note 5.

10. *Id.*

11. Memorial of Ireland, *supra* note 3.

12. *Id.*

Radioactive waste is of concern regardless of its location, but such pollutants are especially troubling in the Irish Sea, the body of water separating Ireland from the United Kingdom. The Irish Sea is a semi-enclosed sea connected with the Atlantic Ocean by two narrow channels to the north and south.[13] These limited inlets, the relatively constrained movement of water to and from the Sea, and the pronounced gyre effect within the Sea "reduce[ ] the effective amount of water for dilution . . . and tend[ ] to cause elevated levels of radionuclides [released into the Sea] to be drawn towards the vicinity of the western Irish Sea gyre," along the eastern coast of Ireland.[14]

These features exacerbate existing problems with radioactive waste in the Irish Sea. The OSPAR Quality Status Report 2000 estimates that 200 kgs of plutonium currently pollute the Sea, and that "discharge of huge volumes of low level liquid waste from the Sellafield pipeline" has deposited at least "1/4 of a tonne of plutonium . . . in the Irish Sea which has become the most radioactive sea in the world."[15]

Ireland relies upon the Irish Sea for "fishing, transport, recreation, gravel extraction, renewable energy . . . tourist trade . . . [and] water sports," among other uses, and is naturally sensitive to any further degradation of the resource.[16] A substantial portion of the Irish population also lives alongside or works in trades impacted directly by the quality of the Sea.[17] Sea-related tourism alone produces approximately £4 billion per year, and provides employment for nearly 150,000 people.[18]

C. The MOX Plant

The MOX plant at issue is a recent addition to Sellafield, a British nuclear processing site that has been operating since 1947 on the eastern shores of the Irish Sea.[19] The site was originally the Royal Ordnance factory, used for production of plutonium piles for defense purposes.[20] In 1957, the site was the location of the Windscale Fire, the "first major accident in the history of nuclear power," which released a still-unknown quantity of radioactive isotopes into the atmosphere.[21] Current activities at the site include reprocessing spent nuclear fuel in Magnox and Thermal Oxide Reprocessing Plants (THORP), and the manufacture of MOX.[22] The relationship between the THORP and MOX plants is significant: according to Ireland, the Sellafield operation seeks to retain existing customers of THORP reprocessing (such as Japan, Germany, Switzerland, Sweden, and the Netherlands) by also offering MOX processing, which allows such customers to have their plutonium residue from spent nuclear waste returned to them in the form of

13. *Id.* at 6 (citing 2 MICHAEL HARTNETT, A REVIEW OF THE OCEANOGRAPHY OF THE IRISH SEA app. 7 at 375 et seq.). Ireland argues that the detrimental effect of this gyre was not known or understood at the time that the U.K. decided to construct the MOX Plant on the eastern shores of the Irish Sea, and that new information provides, in part, a basis for reevaluating the propriety of the MOX Plant operation. *Id.* at 6-7.

14. *Id.*

15. *Id.* at 9 n.22.

16. *Id.* at 9-10.

17. Memorial of Ireland, *supra* note 3, at 8.

18. *Id.* at 8-9.

19. *Id.* at 16.

20. *Id.*

21. *Id.*

22. *Id.*

MOX fuel.[23] Because of this, Ireland treats the impending MOX Plant development and the existing THORP Plant as integral parts of a single problem.[24]

D. Commissioning the MOX Plant

The regulatory process concerning the proposed MOX Plant extended over a period of nine years.[25] British Nuclear Fuels Limited (BNFL) first submitted a planning application in 1992, and an Environmental Statement "showed that the radioactive discharges from the MOX Plant would be negligible."[26] Permission to begin construction was granted, and the MOX Plant was completed in August 1995.[27] In 1996, BNFL applied for variations to the discharge authorizations granted under the Radioactive Substances Act 1993, and, following rigorous debate, independent expert consultations, a "data falsification incident," and five rounds of public hearings, the U.K.'s Health and Safety Executive in December 2001 finally authorized plutonium commissioning of the MOX Plant pursuant to the Nuclear Installations Act 1965.[28] Ireland notes that the two independent reports on which the hearings were based were "heavily censored on alleged grounds of 'commercial confidentiality.'"[29] Ireland further argues that such censorship made it impossible to evaluate the economic justification for the plant, and the linkage of the MOX Plant to the ongoing viability of THORP.[30]

E. Regulatory Background

While the United Kingdom flatly denies that the Tribunal has jurisdiction beyond the terms of UNCLOS, which will be discussed below, it notes at some length the extensive regulations to which the nuclear industry is already subject.[31] These regulations include: (1) the International Atomic Energy Agency's (IAEA) regulations; (2) the Convention on Nuclear Safety; (3) the Convention on the Physical Protection of Nuclear Material; (4) the Joint Convention on Safety of Spent Fuel Management and on the Safety of Radioactive Waste; (5) IAEA Regulations for the Safe Transport of Radioactive Material; (6) the International Maritime Organization (IMO); (7) the International Commission on Radiological Protection (ICRP); (8) the European Community and EURATOM; (9) the OSPAR Convention and Commission; (10) the U.K. Environment Agency; (11) the U.K. Nuclear Installations Inspectorate; and (12) the Office of the U.K. Health and Safety Executive, among others.[32] The United Kingdom insists that the MOX Plant complies with all such applicable regulations.[33]

23. *See* Memorial of Ireland, *supra* note 3, at 19-20.
24. *See id*. at 20.
25. Counter-Memorial of the United Kingdom, *supra* note 5, at 22.
26. *Id.*
27. *See id.* at 23.
28. *See generally id.* at 24-27.
29. Memorial of Ireland, *supra* note 3, at 71.
30. *Id.*
31. *See* Counter-Memorial of the United Kingdom, *supra* note 5, at 27.
32. *Id.* at 27-37.
33. *See generally id.*

F. Scientific and Technical Overview

Ireland asserts that "this case is not a dispute over science."[34] Ireland believes that the scientific facts demonstrate that the United Kingdom has failed to meet its obligations under UNCLOS, which incorporates various obligations under additional international agreements.[35] The United Kingdom responds that the science *is* in dispute[36] and, more importantly for the purposes of this discussion, emphasizes that Ireland has brought a claim on grounds that exceed the facts and the jurisdiction of the Tribunal.[37] A brief overview of the science at issue is useful here.

The primary concern of Ireland's claim is the possible release of radioactive wastes into either the atmosphere or water in such a way as to further pollute the Irish Sea.[38] While Ireland does call attention to radioactive discharges from the MOX Plant,[39] it primarily argues that that development of the MOX Plant will prolong and expand operation of the Sellafield THORP Plant, a much less benign facility, which in tandem produce violations of various legal obligations to which the United Kingdom is subject.[40]

According to the U.K. Radioactive Substances (Basic Safety Standards) Direction 2000 (BSS Direction 2000), emissions from any new source of radiation must not exceed 0.3 millisieverts per year.[41] The United Kingdom notes that the Environment Agency has already reported that "the [estimated] dose to the most exposed UK group . . . to gaseous discharges from the MOX Plant to be 0.000002 millisieverts per year (two thousandths of a millionth of a sievert)," whereas the "average radiation dose to members of the United Kingdom population is 2.2 millisieverts per year from natural background sources."[42] The exposure to any "critical group" in Ireland from MOX Plant discharges is calculated to be 0.000000024 millisieverts per year (2.4 hundred thousandths of a millionth of a sievert).[43] Further, in a worst-case scenario analysis, the United Kingdom calculated that the largest considered discharge would expose a very narrow group of the Irish population to 1.98 microsieverts of radiation, which "would not be significant from the health point of view" according to a European Commission Opinion.[44] Ireland does not particularly challenge this data, except to argue for evaluating MOX Plant and THORP emissions together.[45]

The lack of a linkage between the plants is strongly questioned by Ireland.[46] The PA Consulting Group Report, one of the two heavily censored reports mentioned above, concluded that the MOX Plant would make a profit over the life of the plant without taking "sunk capital costs" into consideration; that is, the report failed to consider the cost of building the plant when evaluating its profitability.[47] It also appears that the Report further

34. Memorial of Ireland, *supra* note 3, at 3.
35. *Id.* at 113.
36. Counter-Memorial of the United Kingdom, *supra* note 5, at 14.
37. *Id.* at 97-107.
38. *See generally* Memorial of Ireland, *supra* note 3.
39. *Id.* at 3, 5, 13, 52-53.
40. *See* Memorial of Ireland at 3, 5, 13.
41. Counter-Memorial of the United Kingdom, *supra* note 5, at 60.
42. *Id.*
43. *Id.* at 61.
44. *Id.* at 62.
45. *See generally* Memorial of Ireland, *supra* note 3.
46. *Id.* at 52.
47. *Id.* at 73.

ignored security and safety costs advisable in a post-September 11, 2001 world.[48] So without considering the £470 million cost of construction and other advisable costs, the censored Report concludes that the plant will achieve a profit of £199-216 million over its lifespan.[49] Ireland notes that "[n]ot only will the plant therefore contribute to the added pollution of the Irish Sea . . . it will also lose the company (or the British taxpayer) more than £250 million."[50] The negative balance sheet leads Ireland to conclude that the MOX and THORP plants make no economic sense without a linkage between them, despite the government's denials and censored reports.[51]

G. Case Posture

Following several rounds of correspondence and hearings that failed to assuage Ireland's concerns, in October 2001 Ireland instituted arbitration proceedings against the United Kingdom pursuant to Article 287 of UNCLOS.[52] Under the authority of Annex VII of UNCLOS, hearings were held at the International Tribunal for the Law of the Sea (ITLOS) in Hamburg in November 2001. In December 2001, ITLOS unanimously prescribed that Ireland and the United Kingdom "shall co-operate and shall . . . (a) exchange further information with regard to possible consequences for the Irish Sea arising out of the commissioning of the MOX plant; (b) monitor risks or the effects of the operation of the MOX plant for the Irish Sea; [and] (c) devise, as appropriate, measures to prevent pollution of the marine environment which might result from the operation of the MOX plant."[53] Having failed to resolve their differences after pursuing these directives, Ireland has submitted the current claim to mandatory arbitration proceedings.[54]

Ireland and the United Kingdom are both parties to UNCLOS, and either may avail itself of the Convention's authority to settle disputes under Part XV.[55] At the initial ITLOS proceeding in 2001, the United Kingdom challenged the Tribunal's jurisdiction, claiming that Ireland should have brought suit under some other treaty, such as the 1992 OSPAR Convention, the EC Treaty, and/or the EURATOM Treaty.[56] Ireland responded that "there is no reason why the existence of narrower rights under other treaties should bar Ireland from relying upon its wider rights under the UNCLOS."[57] ITLOS unanimously rejected the United Kingdom's challenge to its jurisdiction based on UNCLOS Article 282, which provides for dispute resolution procedures for signatories to the Convention.[58] Ireland now argues that this earlier rejection of the United Kingdom's challenge to jurisdiction means that the current Tribunal cannot now reject jurisdiction without the United Kingdom

48. *Id.* at 73.

49. *Id.* at 74.

50. *Id.*

51. *See* Memorial of Ireland, *supra* note 3, at 19-20.

52. *Id.* at 82.

53. The MOX Plant Case (Ir. v. Kingdom), 2001 ITLOS Case No. 10, Order, at 13, para. 1 (Dec. 3, 2001) [hereinafter ITLOS Order], *available at* http://www.itlos.org/case_documents/2001/document_en_197.pdf.

54. *See* Memorial of Ireland, *supra* note 3, at 251-53.

55. UNCLOS, *supra* note 2.

56. Transcript of Oral Proceedings (Verbatim Record), at 25-26, MOX Plant Case (ITLOS 2001), *available at* http://www.itlos.org/case_documents/2001/document_en_195.pdf.

57. *Id.* at 97.

58. ITLOS Order, *supra* note 53, at 10, para. 53, *available at* http://www.itlos.org/case_documents/2001/document_en_197.pdf.

fulfilling a burden to show some exceptional reason for rejecting jurisdiction at this stage of the case.[59]

III. THE DISPUTE

The above facts set the stage for Ireland's claim against the United Kingdom, namely, that the United Kingdom has violated various of its obligations under UNCLOS and other international agreements in commissioning the MOX Plant in Sellafield. It is alleged that theMOX Plant will directly and indirectly—through its extension of the THORP Plant's viable lifespan—increase the risk of radioactive pollution of the Irish Sea.

A. Ireland's UNCLOS Claims

The foundational claims that Ireland brings against the United Kingdom originally relied upon twelve different UNCLOS articles that emphasize cooperation among signatory states and protection of the environment.[60] Ireland contends that UNCLOS confers rights that are much broader—procedurally and substantively—than any other treaty it might invoke, which explains Ireland's reluctance to pursue its entire bundle of claims under any other regime, as the United Kingdom has suggested that it do.[61] Indeed, "[t]he provisions of UNCLOS Article 123, concerning the duty of co-operation and co-ordination in semi-enclosed seas, colour the application of all the other UNCLOS Articles, giving them a particular legal context altogether lacking in other legal instruments."[62] The United Kingdom does not challenge the legitimacy of UNCLOS-specific claims to be heard in UNCLOS Tribunals, but it adamantly protests the attempt to apply non-UNCLOS law in the same forum: "Ireland is tr[y]ing to shoe-horn into UNCLOS, for a decision by the Tribunal, a raft of non-UNCLOS measures which are not properly justiciable in this case . . . ."[63]

B. Ireland's Non-UNCLOS Claims

The more startling aspect of Ireland's claim is its reliance on more than twenty different non-UNCLOS agreements, which Ireland alleges place specific obligations upon the United Kingdom that may be applied and enforced under UNCLOS.[64] These international agreements provide a broad array of specific obligations that relate to specific

59. *See* Transcript of Proceedings Day Two (Revised), at 4, MOX Plant (Ir. v. U.K.) *available at* http://www.pca-cpa.org/PDF/MOX%20-%20Day%20Two.pdf.

60. Ireland specifically references UNCLOS articles 123, 192-94, 197, 206-07, 211-13, 217, and 222. Memorial of Ireland, *supra* note 3, at 95. *See generally* UNCLOS, *supra* note 2, arts. 123, 192-94, 197, 206, 207, 211-13, 217, & 222 In its rejoinder, however, the United Kingdom's reading of Ireland's original claims and later retractions indicate that Ireland's suit alleges breach of only "six provisions of UNCLOS, namely, articles 123, 194, 206, 213 and 222." Rejoinder of the United Kingdom, MOX Plant (Ir. v. U.K.) at 66 (Apr. 24, 2003), *available at* http://www.pca-cpa.org/ENGLISH/RPC/#Ireland%20v.%20United%20Kingdom%20(%22OSPAR%22%20Arbitration).

61. Memorial of Ireland, *supra* note 3, at 97.

62. *Id.*

63. Transcript of Proceedings Day Three (Revised), at 33, MOX Plant (Ir. v. U.K.) (Perm. Ct. Arb. 2003) *available at* http://www.pca-cpa.org/ENGLISH/RPC/#Ireland%20v.%20United%20Kingdom%20(%22OSPAR%22%20Arbitration).

64. Memorial of Ireland, *supra* note 3, at 113, 117, 185, 187, 189, 214.

UNCLOS claims.[65] The non-UNCLOS agreements to which Ireland refers include, among others, the 1985 European Community Directive 85/337 on Environmental Impact Assessment (as amended), the 1991 UNECE (United Nations Economic Commission for Europe) Convention on Environmental Impact Assessment in a Transboundary Context, the 1987 UNEP (United Nations Environment Programme) Goals and Principles of Environmental Impact Assessment, the 1995 Global Programme of Action, the 1991 Espoo Convention, the 1980 Convention on the Physical Protection of Nuclear Material, IAEA Guidelines on Physical Protection of Nuclear Material and Nuclear Facilities, instruments of the United Nations International Maritime Organization, the 1972 London Dumping Convention, and the 1992 OSPAR Convention.[66]

IV. JURISDICTION AND APPLICABLE LAW

A. Introduction

Central to Ireland's claims, and to the United Kingdom's defense, is the question of jurisdiction. Ireland argues that the UNCLOS Tribunal has jurisdiction to hear the core UNCLOS claims, and, having achieved that basic jurisdiction, UNCLOS itself grants the Tribunal a kind of supplemental jurisdiction to apply "other rules of international law not incompatible with this Convention."[67] The United Kingdom, on the other hand, argues that the Convention specifically prohibits the application of non-UNCLOS agreements unless such agreements specifically provide for UNCLOS adjudication.[68] The dispute concerning jurisdiction and applicable law derives primarily from the following two UNCLOS articles:

Article 288: "Jurisdiction"

> (1) A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part.
>
> (2) A court or tribunal referred to in article 287 shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement.
>
> . . .
>
> (4) In the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal.[69]

Article 293: "Applicable Law"

> (1) A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.

65. *Id.*
66. *Id.* at 115-17.
67. UNCLOS, *supra* note 2, art. 293(1).
68. Counter-Memorial of the United Kingdom, *supra* note 5, at 97-107.
69. UNCLOS, *supra* note 2, art. 288.

> (2) Paragraph 1 does not prejudice the power of the court or tribunal having jurisdiction under this section to decide a case *ex aequo et bono*, if the parties so agree.[70]

The most contentious aspect of these two articles is the possible contradiction between the scope of UNCLOS jurisdiction and the scope of applicable law. Article 288 primarily grants jurisdiction to disputes arising under UNCLOS, and specifically to non-UNCLOS disputes if the underlying non-UNCLOS agreements expressly grant UNCLOS jurisdiction to hear such claims.[71] On the other hand, Article 293 requires that UNCLOS tribunals "shall apply this Convention and other rules of international law not incompatible with this Convention."[72] Ireland's novel suit achieves general jurisdiction under Article 288 by asserting UNCLOS claims, and having met that threshold requirement, it then seeks application of both UNCLOS and non-UNCLOS law under Article 293.[73] The United Kingdom responds that only specific claims that satisfy the jurisdiction requirements of 288 may be addressed by an UNCLOS tribunal.[74]

B. Article 288: "Jurisdiction"

1. Interpreting the Article

Ireland's argument that UNCLOS distinguishes between jurisdiction and applicable law is persuasive. Indeed, the two articles upon which the parties rely are titled, respectively, "Jurisdiction" (Article 288) and "Applicable Law" (Article 293).[75] The confusion arises from references in both articles to jurisdiction and the applicability of non-UNCLOS law. In a certain light, the applicable law provisions under Article 288, which is actually the "Jurisdiction" article, can appear to contradict the applicable law provisions in Article 293, which *is* the "Applicable Law" article. Depending on one's interpretation of the terms of Article 288, then, there is either a conflict or compatibility with Article 293. Specifically, there appear to be two possible interpretations of Article 288(2).

First, if Article 288(2) is understood to apply even when the Tribunal has jurisdiction for an existing UNCLOS claim, then it would seem to diminish the potential of supplemental jurisdiction under Article 293(1) enormously, as the United Kingdom observes that none of the international agreements cited by Ireland contain express provisions permitting settlement of disputes under UNCLOS; thus, none of those claims could be brought to UNCLOS "in accordance with the [non-UNCLOS] agreement." This is the United Kingdom's interpretation, which understands UNCLOS to say that unless a non-UNCLOS agreement expressly invites UNCLOS jurisdiction over its provisions, UNCLOS cannot reach such claims, even when such claims are intimately bound up with existing UNCLOS claims.[76]

70. *Id.* art. 293.

71. *Id.* art. 288.

72. *Id.* art. 293.

73. Memorial of Ireland, *supra* note 3,

74. Counter-Memorial of Ireland, *supra* note 5, at 13.

75. *See, e.g.*, *id.* at 13; Memorial of Ireland, *supra* note 3, at 99; Reply of Ireland, *supra* note 79, at 45.

76. There appears to be no scholarship that has addressed the argument that Article 288 requires the non-UNCLOS agreement to expressly submit itself to UNCLOS adjudication. Lakshman D. Guruswamy, for example, identifies a two-step process for evaluating the jurisdiction of UNCLOS to hear claims arising under other "international agreement[s]": "First, is UNCLOS, by its own terms, empowered to settle disputes under the South Pacific Convention? In order to answer this question, the South Pacific Convention must qualify as an

Interpreting Article 288(2) in this way would necessarily require the Tribunal to consider only the UNCLOS claims contained in Ireland's suit. In hearings before the Tribunal, the United Kingdom described the result in this way: "Once the non-UNCLOS dimension of Ireland's allegations is stripped away—as must necessarily be the case—any residual content of Ireland's case under UNCLOS, i.e., that part of Ireland's case that is justiciable before this Tribunal, emerges as both uncertain and insufficiently particularised."[77]

George Walker and John Noyes describe a scenario in which such an interpretation of Article 288(2) would apply: "For example, the Straddling Stocks Agreement incorporates by reference the dispute settlement provisions of the Law of the Sea Convention, thus authorizing the jurisdiction of the International Tribunal for the Law of the Sea (ITLOS)—an institution created by the Law of the Sea Convention—or another court or tribunal in cases involving the interpretation or application of that Agreement."[78]

Second, if, on the other hand, Article 288(2) is understood only to describe the conditions under which UNCLOS tribunals have jurisdiction to hear non-UNCLOS claims *in the absence* of any other UNCLOS jurisdiction or claims—note that there is no reference to the presence of UNCLOS jurisdiction as a condition precedent in this section of the Article—then Article 288(2) may be understood simply to augment the traditional form of supplemental jurisdiction contemplated under 293(1), extending a non-supplemental form of jurisdiction to cases in which an external agreement expressly brings its provisions within the ambit of UNCLOS procedure. This interpretation understands UNCLOS to say that even in the absence of UNCLOS claims, UNCLOS will have jurisdiction to hear claims under non-UNCLOS agreements, if those agreements expressly welcome UNCLOS jurisdiction over those claims. Ireland does not appear to advance this interpretation, preferring merely to clarify that it "has not invited the Arbitral Tribunal to exercise jurisdiction under any other international agreement, pursuant to Article 288(2) of UNCLOS."[79]

If Article 293(1) is understood to confer a standard form of supplemental jurisdiction, in which the presence of UNCLOS jurisdiction and UNCLOS-based claims may open the door to additional, related, non-UNCLOS claims that are "not incompatible" with UNCLOS, then the Article would seem to be incompatible with the first interpretation of Article 288(2), but not the second. The Tribunal's interpretation of Article 288(2) will be a critical indicator of Ireland's prospects for sustaining the varied claims that it makes.

'international agreement related to the purposes of [UNCLOS]' as contemplated by Article 288(2)." The "relatedness" is determined by comparing the purposes of the non-UNCLOS agreement with those of UNCLOS itself. The second question concerns "whether an UNCLOS Tribunal may claim jurisdiction in the face of competing claims . . . " by another tribunal. The question of whether the other regime expressly submits itself to UNCLOS jurisdiction appears not to arise in this analytical scheme. Lakshman D. Guruswamy, *Should UNCLOS or GATT/WTO Decide Trade and Environment Disputes?*, 7 MINN. J. GLOBAL TRADE 287, 302-04.

77. Transcript of Proceedings Day Three (Revised), *supra* note 63, at 43.

78. George K. Walker & John E. Noyes, "*Words, Words, Words*" *Definitions for the 1982 Law of the Sea Convention*, 32 CAL. W. INT'L L.J. 343, 375-76 n.117 (2002) (citing Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, arts. 7(4)-(6), 27-32, U.N. Doc. A/CONF.167/37, *reprinted in* 34 I.L.M. 1542, 1553, 1569-70 (1995) (entered into force Dec. 11, 2001)).

79. Reply of Ireland, MOX Plant (Ir. v. U.K.) 45 (Perm. Ct. Arb. Jan. 9, 2003), *available at* http://www.pca-cpa.org/ENGLISH/RPC/#Ireland%20v.%20United%20Kingdom%20(%22OSPAR%22%20Arbitration).

One of the potential dangers of the position advanced by Ireland is the possibility for conflicting decisions by multiple international courts on the same dispute. International courts are not in the habit of enjoining other international courts, and as such, identical suits might arise in multiple fora.[80] Tribunal Judge Professor James Crawford observes that under such circumstances, "[i]f there is a possibility of a conflict between those two decisions, exactly the same legal person may be required to do and not to do X and required to do or not to do X vis-a-vis the same other legal person. I do not think that any legal system or any institution which had regard to the systematic aspects of its position would want to encourage that."[81]

If the Tribunal's interpretation of Article 288(2) does not preclude jurisdiction in this case, it must then address the meaning of Article 293(2) to determine what other international laws might apply here. Walker and Noyes propose that

> Article 293(1)'s reference to "other rules of inter-national law not incompatible with this Convention" could encompass the sources set forth in Article 30(5) of the Straddling Stocks Agreement. This last, straightforward reading corresponds to the ordinary meaning of the phrase, and fully accords with the view that the Law of the Sea Convention is a framework agreement, looking to compatible sources of international law to help flesh out its content. Accounts of the negotiating history of Article 293(1) also do not indicate that its "other rules" clause is limited to the LOAC.[82]

2. Negotiation History

In April 1976, the "Informal Single Negotiating Text" of the Convention contained Article 10, "Extent of Jurisdiction," which was substantially longer and more detailed than the present formulation in Article 288.[83] It was comprised of ten paragraphs (rather than four), and contained the following provisions corresponding to the current Article 288 paragraphs (1) and (2): "The forum . . . shall . . . be entitled to exercise its jurisdiction with respect to: (a) Any dispute . . . relating to the interpretation or application of the present Convention"[84] and "[a]ny dispute relating to the interpretation or application of an international agreement related to the purposes of the present Convention which provides that any such dispute be decided in accordance with this Chapter."[85] In November of that same year, a "Revised Single Negotiating Text" contained a substantially condensed Article 10 that retained the above-cited provisions corresponding to the current Article 288, and added a provision corresponding to Article 288(4): "In the event of disagreement between the parties to a dispute as to whether the court or tribunal . . . has *jurisdiction*, the matter shall be settled by the decision of that court or tribunal."[86] This provision would operate in an international tribunal in a similar manner to a longstanding principle in U.S. federal law

80. Transcript of Proceedings Day Three (Revised), *supra* note 63, at 67.

81. *Id.*

82. Walker & Noyes, *supra* note 78, at 376-77.

83. 1 THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA: DOCUMENTS 54-55 (Renate Platzöder ed., 1982) [hereinafter PLATZÖDER VOL. I].

84. *Id.* at 86.

85. *Id.* at 87.

86. *Id.* at 277.

that courts have jurisdiction to determine whether they have jurisdiction,[87] and the consequences are important for *Ireland v. United Kingdom*, where the United Kingdom has expressly challenged the tribunal's jurisdiction to hear non-UNCLOS claims.[88]

Article 288 in the 1979 "Informal Composite Negotiating Text/Revision 1" adopts text that is substantially identical to the final version, including the four-paragraph scheme,[89] which is repeated in the 1980 "Draft Convention on the Law of the Sea (Informal Text)."[90]

The consistent message of these drafts reflects the primacy of "interpretation or application" of the Convention for establishing jurisdiction.[91] The second element that appears consistently from 1976 onwards is the provision that became paragraph 2, providing jurisdiction for claims brought under non-UNCLOS agreements that expressly confer jurisdiction upon UNCLOS tribunals for that purpose.[92] Myron Nordquist notes that "this provision would contribute to a harmonization of the law of the sea for the benefit of all concerned, including States which have not become parties to the Convention but are parties to other agreements 'related to the purposes of this Convention.'"[93]

However, two issues relevant to *Ireland v. United Kingdom* remain undefined in Article 288.

First, paragraph 2 permits UNCLOS tribunals to hear non-UNCLOS claims if the non-UNCLOS agreement expressly confers jurisdiction upon UNCLOS.[94] Does this requirement of an express grant of jurisdiction apply *only* in the absence of a proper UNCLOS claim, or does that requirement remain in effect even when there is a proper UNCLOS claim among other non-UNCLOS claims?

Second, a related question concerns the definition of "dispute" within paragraph 1. If "any dispute concerning . . . this Convention" may be understood to mean only that a bundle of claims comprising a single "dispute" contain at least one or more expressly UNCLOS claims, then such a dispute may properly include non-UNCLOS claims.[95] However, if "dispute" is to be restricted solely to UNCLOS claims, then jurisdiction would extend only to expressly UNCLOS claims, and the remaining bundle of related claims under other agreements would be jettisoned.

UNCLOS does not appear to provide a clear answer:

> [UNCLOS] maintains a cautious silence about the conditions for the existence of a dispute in relations between the Parties; the definition of a dispute appeared to

87. *See generally Ex parte* McCardle, 73 U.S. 318 (1868); *see also* 2 HAGUE ACAD. OF INT'L LAW, A HANDBOOK OF THE NEW LAW OF THE SEA 1375 (Rene-Jean Dupuy & Daniel Vignes eds., 1991) [hereinafter HANDBOOK] ("The judicial body nominated therefore exercises unlimited jurisdiction by deciding on its own competence, determining the applicable law . . . . This reiteration [in Article 288(4)] of the principle that the court or tribunal shall decide on its own jurisdiction is not an innovatory feature in the development of international law.").

88. *See* Transcript of Proceedings Day Three (Revised), *supra* note 77, at 41-43.

89. *See* PLATZÖDER VOL. I, *supra* note 84, at 492.

90. 2 THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA: DOCUMENTS, at 297-98 (Renate Platzöder ed., 1982) [hereinafter PLATZÖDER VOL. II].

91. NORDQUIST COMMENTARY VOL. V, *supra* note 8, at 47.

92. *Id.* at 47-48.

93. *Id.* at 48.

94. UNCLOS, *supra* note 2, art. 288.

95. *Id.*

> be somewhat self-evident in the minds of the delegates and it would seem that reference has to be made to the approach adopted by the International Court in order to define a dispute as a divergence of opinion.[96]

The express requirement of a jurisdictional grant for non-UNCLOS claims certainly makes sense when no UNCLOS claims of any kind are present; would an express grant still be required when the same "dispute" concerns both UNCLOS and non-UNCLOS agreements? The negotiating history and the commentaries appear silent on this point.

C. Article 293: "Applicable Law"

The more remarkable assertion by Ireland concerns the application of extra-Convention law to an UNCLOS proceeding. Ireland points to Article 293(1), which instructs the Annex VII Tribunal to apply "[UNCLOS] and other rules of international law not incompatible with [the] Convention."[97] Ireland thus argues that "[i]t follows that the rules of international law which the Annex VII Tribunal is called upon to apply . . . [in the current dispute] are to be found *both* in the relevant provisions of UNCLOS *and* in 'other rules of international law which are not incompatible' with the Convention."[98] Further, the negotiating history behind UNCLOS and ITLOS precedent show that UNCLOS tribunals may properly apply "rules of customary and conventional international law, as well as general principles of law recognized by civilised nations."[99]

The United Kingdom characterizes the effect:

> Through the prism of applicable law [advanced by Ireland], the jurisdiction of the Tribunal is thus dramatically enlarged. The Dispute is no longer about the interpretation or application of UNCLOS and no other agreement. Rather, it is about the interpretation or application of a much wider body of international law said to be incorporated into and applicable as part of UNCLOS.[100]

Under this view, the Tribunal is to apply non-UNCLOS international law in two ways:

First, "the content of certain rules in UNCLOS establishing in general terms obligations will be informed and developed by the existence of rules of international law arising outside UNCLOS."[101] That is, the existing, prevailing framework of international law may be called upon to give substance and specificity to the general terms employed by UNCLOS. Thus, UNCLOS is not to be viewed as a "static instrument," but instead as a living document, the "content and effect [of which] evolve over time, to take into account developments in international law and changes in the state of scientific knowledge and understanding."[102]

Second, an Annex VII Tribunal may expressly direct a party to UNCLOS "to implement or to take into account international rules, standards or practices arising outside

96. HANDBOOK, *supra* note 87, at 1340.

97. UNCLOS, *supra* note 2, art. 293.

98. Memorial of Ireland, *supra* note 3, at 99.

99. *Id.*; *see, e.g.*, GUDMUNDUR EIRIKSSON, THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA 145-47 (Kluwer Law Intl., The Hague, 2000).

100. Counter-Memorial of the United Kingdom, *supra* note 5, at 98.

101. Memorial of Ireland, *supra* note 3, at 99.

102. *Id.* at 100.

UNCLOS in order to fulfil [*sic*] their obligations under the 1982 Convention."[103] A number of UNCLOS provisions exemplify precisely this mechanism.

Thus, UNCLOS "assumes an integrating function," allowing and instructing Tribunals to implement a wider body of law than those contained strictly within the four corners of the Convention's articles.[104] The Convention's only limitation on this function, Ireland emphasizes, is the requirement that such international rules are "not incompatible" with UNCLOS, a phrasing that suggests wide latitude.[105] The categories of "[other] rules of international law" that Ireland wishes to impose include "(1) internationally agreed rules set forth in other international treaties, (2) rules of customary international law, and (3) internationally agreed standards and recommended practices and procedures, including those adopted by international organisations at the regional and global levels."[106]

Under the first category, international treaties, one might look to the OSPAR Commission, formed under the OSPAR Convention, to which the United Kingdom is a party, which established a specific "requirement that the United Kingdom *substantially* reduce and eliminate discharges of radioactive substances into the Irish Sea."[107]

Under the second category, customary (or general) international law, Ireland invokes the precautionary principle as it emerges from the ILC's (International Law Commission) Articles on Prevention of Transboundary Harm from Hazardous Activities, adopted in 2001.[108] The OSPAR Convention itself articulates this principle, as well, in the following terms:

> [P]reventive measures are to be taken when there are reasonable grounds for concern that substances or energy introduced, directly of [*sic*] indirectly, into the marine environment may bring about hazards to human health, harm living resources and marine ecosystems, damage amenities or interfere with other legitimate uses of the sea, even when there is no conclusive evidence of a causal relationship between the inputs and the effects.[109]

Under the third category, internationally agreed standards, Ireland identifies a number of internationally adopted codes and guidelines to which the United Kingdom has expressed support and commitment.[110]

D. Articles 287 and 288

In contrast to Ireland's reliance on Article 293, the United Kingdom refers to Articles 287 and 288. Article 287 provides that parties to a dispute "shall be free to choose . . . one

103. *Id.*

104. *Id.* at 110.

105. *Id.* (internal quotations omitted); *see also* UNCLOS, *supra* note 2, art. 293.

106. Memorial of Ireland, *supra* note 3, at 102.

107. *Id.* at 103 (quoting OSPAR Decision 2000/1 on Substantial Reductions and Elimination of Discharges, Emissions and Losses of Radioactive Substances, with Special Emphasis on Nuclear Reprocessing (vol. 3(1), Annex 78, OSPAR Decision 2000/1 on the Review of Authorisations for Discharges or Releases of Radioactive Substances from Nuclear Reprocessing Activities (vol. 3(1), Annex 79)).

108. Memorial of Ireland, *supra* note 3, at 105.

109. *Id.* at 105 (quoting OSPAR Convention of 1992, art. 2(2)(a)) (internal quotations omitted).

110. *Id.* at 109.

or more of the following means [which include ITLOS and Annex VII Tribunals] for the settlement of disputes concerning the *interpretation or application of this Convention*."[111] The specific reference to "interpretation or application of this Convention" suggests that the Tribunal's jurisdiction should be confined to application of UNCLOS.[112] Article 288(2) appears to reinforce that argument, as it provides for the enlargement of the jurisdiction of a tribunal only when the parties so agree and when the extra-Convention rules permit it:

> A court or tribunal referred to in article 287 shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is *submitted to it in accordance with the agreement*.[113]

Because none of the twenty or more international "agreements" to which Ireland refers specifically provides for UNCLOS dispute settlement, the United Kingdom concludes that the Tribunal does not have the enlarged jurisdiction contemplated by Article 288(2).[114]

Further, it is established practice that member states of the European Community Treaty and the EURATOM Treaty will "undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein."[115] Because a large portion of Ireland's case draws heavily from European Community and EURATOM law, "Ireland's claims are more properly brought under the Community Treaties, [and] this Tribunal lacks jurisdiction."[116]

E. Jurisdiction Versus Applicable Law: The Case for Supplemental Jurisdiction Under UNCLOS

There is a strong argument that the United Kingdom confuses jurisdiction with applicable law.[117] The language of Article 293(1) itself conditions the application of extra-Convention law upon the presence of jurisdiction: "A court or tribunal *having jurisdiction* under this section shall apply this Convention and other rules of international law not incompatible with this Convention."[118] Jurisdiction is thus a condition precedent for any wider application of law that might follow, a distinction that echoes the Anglo-American concept of supplemental jurisdiction.[119]

The advantages of providing for something like supplemental jurisdiction of extra-Convention claims were not lost on the participants that established UNCLOS. Sir Roger Jackling recognized this feature in representing the United Kingdom's view in advocating that UNCLOS provide "an efficient and effective framework into which . . . conventions

111. UNCLOS, *supra* note 2, art. 287(1) (emphasis added).

112. *Id.*

113. *Id.* art. 288(2) (emphasis added).

114. Counter-Memorial of the United Kingdom, *supra* note 5, at 2.

115. *Id.* at 102 (quoting European Community Treaty art. 292 and EURATOM Treaty art. 193 containing identical language).

116. *Id.* at 103.

117. Reply of Ireland, *supra* note 79, at 47 (noting "it is an elementary proposition that the question of applicable law is an entirely distinct question from that of jurisdiction").

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

119. *See*, *e.g.*, United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966) (finding that a "common nucleus of operative fact" permits a claim, given federal jurisdiction, to include both federal and state claims together).

and others could be incorporated . . . ."[120] Supplemental jurisdiction permits the hearing of several related claims together in a single forum, thus avoiding the inefficiency of myriad claims in multiple fora.[121]

The problem in this case concerns the meaning of the two seemingly contradictory provisions in UNCLOS: Article 293(1), which provides that UNCLOS tribunals having jurisdiction "shall apply this Convention and other rules of international law not incompatible" with UNCLOS, and Article 288(2), which suggests that an UNCLOS tribunal shall only exercise such supplemental jurisdiction over any other international agreement if such claims are submitted to the UNCLOS tribunal in conformity with the other, non-UNCLOS agreement.[122]

V. INTERPRETING UNCLOS

A. Introduction to UNCLOS

In order to understand what these UNCLOS provisions might mean, it is helpful to review the background of this extraordinary treaty. UNCLOS was established in 1982 after fourteen years of negotiations by 150 countries under the Third United Nations Conference on the Law of the Sea.[123] It represents a multi-national undertaking that "remains the most complex and all-encompassing treaty in the history of the United Nations."[124] As of 2002, 137 nations had become parties to the Convention.[125] The original purpose articulated during its first negotiating session in 1973 "and carried through to the end of the Conference, contained the standard item 'Adoption of a convention dealing with all matters relating to the law of the sea, pursuant to paragraph 3 of General Assembly resolution 3067 (XXVIII) of 16 November 1973 . . . .'"[126] The end result of the Conference was, and remains, ambitious:

120. Reply of Ireland, *supra* note 79, at 50 (quoting Sir Roger Jackling, Third UN Conference on the Law of the Sea, Official Records, vol. II, 374, para. 30 (15th Meeting, 3d Comm.)) (internal quotations omitted).

121. *Gibbs*, 383 U.S. at 725-26; *see also* GEOFFREY C. HAZARD, JR. ET AL., PLEADING AND PROCEDURE, STATE AND FEDERAL CASES AND MATERIALS 423 (8th ed., 1999).

122. John Noyes notes some of the other restrictions inherent in Article 288, which are not specifically questioned in this case, but which support the view that UNCLOS does not open the gates wide to any and all other international laws or rules. Specifically, Noyes notes that Article 288(2) requires that the "other . . . agreement[s]" provision is limited to "*international* agreement[s]," and further, those agreements must be "related to the purposes of this Convention." These implicit limitations narrow the range of obligations that might rightly be brought before and UNCLOS Tribunal. John E. Noyes, *The International Tribunal for the Law of the Sea*, 32 CORNELL INT'L L.J. 109, 132 (1998).

123. BERNARDO ZULETA, THE LAW OF THE SEA: UNITED NATIONS CONVENTION ON THE LAW OF THE SEA at xix, U.N. Sales No. E.83.V.5 (1983).

124. EIRIKSSON, *supra* note 99, at 3.

125. U.N. CONVENTION ON THE LAW OF THE SEA, OCEANS: THE SOURCE OF LIFE, 20TH ANNIVERSARY (1982-2002) at 16, [hereinafter UNCLOS OCEANS], *available at* http://www.un.org/Depts/los/convention_agreements/convention_20years/oceanssourceoflife.pdf. The United States has yet to ratify the treaty, and thus is "unable to take advantage of the environmental jurisdiction of UNCLOS tribunals and will be precluded from access to its dispute settlement procedures." Instead, it has tended to engage in "unilateral action to protect the international environment," which is a violation of its obligations under GATT, to which it is a signatory. Guruswamy, *supra* note 76, at 297.

126. NORDQUIST COMMENTARY VOL. V, *supra* note 8, at xv. For the full text of the Convention's November 16, 1973 plenary meeting resolution, see 1 CTR. FOR OCEANS LAW AND POLICY, UNIV. OF VIRGINIA, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, 1982: A COMMENTARY 188 (Myron H. Nordquist et al. eds.,

> It established for the first time one set of rules for the oceans, bringing order to a system fraught with potential conflict. Its scope is vast: it covers all ocean space, with all its uses, including navigation and overflight; all uses of all its resources, living and non-living, on the high seas, on the ocean floor and beneath, on the continental shelf and in the territorial seas; the protection of the marine environment; and basic law and order.[127]

As the MOX Plant Case is the first of its kind to raise such penetrating questions about jurisdiction and applicable law under UNCLOS, and because UNCLOS itself is unique among international agreements in terms of its scope and comprehensive structure, an examination of the Convention negotiating history should be helpful in understanding how a tribunal might approach the kind of dispute in question here.[128] While other aspects of the Convention evolved dramatically over time, the provisions resulting in Articles 288 and 293 remained largely intact throughout.

B. Negotiation History: Article 293

Like Article 288, early versions of Article 293 looked substantially similar to the final version, and most modifications involved paring down its provisions.[129] In July 1975, Article 16(1) (as it was then designated) in the "Informal Single Negotiating Text" provided that "the Court shall apply the law of the present Convention, other rules of international law, and any other applicable law."[130] Paragraph 3 is almost identical to the final Article 293(3), but paragraph 2, which directed Convention courts to "ensure that the rule of law is observed in the interpretation and application of the present Convention" was removed in the November 23, 1976 "Revised Single Negotiating Text."[131]

As with Article 288, these early negotiation documents leave several questions unanswered regarding Article 293. Once an UNCLOS tribunal has established jurisdiction under Article 288, through the presence of an UNCLOS claim, or a claim arising under a non-UNCLOS agreement that has expressly conferred jurisdiction upon UNCLOS, "shall" a tribunal then apply *any* "other rules of international law not incompatible with this Convention"?[132] Or is the tribunal restricted to just those other international agreements conferring jurisdiction under 288(2)?

C. Article 311: Relation to Other Conventions and Agreements

Article 311, titled "Relation to other conventions and international agreements," fails to shed new light on Articles 288 or 293.[133] The most relevant section, paragraph 2, provides that:

1989) [hereinafter NORDQUIST COMMENTARY VOL. I].

127. UNCLOS OCEANS, *supra* note 125, at 1.

128. As of this date, no other law review articles appear to have examined this history with respect to Articles 288 and 293 ("Jurisdiction" and "Applicable Law").

129. *See* PLATZÖDER VOL. I, *supra* note 84, at 56.

130. *Id.*

131. *Compare id.* at 56 *with id.* at 279.

132. UNCLOS, *supra* note 2, art. 293

133. UNCLOS, *supra* note 2, art. 311.

> This Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.[134]

This limitation says nothing about whether UNCLOS may apply non-UNCLOS law in the absence of an express grant of jurisdiction from that non-UNCLOS agreement. Even under Article 311(2), a tribunal could enforce a non-UNCLOS agreement in the absence of that express grant without "alter[ing such] . . . rights and obligations."[135] It could be argued that application of UNCLOS's extensive dispute resolution procedures for the purpose of prosecuting non-UNCLOS claims, where those agreements lack viable dispute resolution procedures, represents a fulfillment of the rights and obligations under those other agreements, and not in any way an alteration of them. Indeed, it is precisely to avail itself of these procedures that Ireland has deliberately sought out UNCLOS process for non-UNCLOS claims.

VI. EXTRINSIC ANALYSIS

A. UNCLOS as a "Constitution," not a "Statute"

The distinction between constitutions and statutes provides a useful, if imperfect, analogy for evaluating the operation of UNCLOS. A constitution is "[t]he fundamental and organic law of a nation or state that establishes the institutions and apparatus of government, defines the scope of governmental sovereign powers . . . ."[136] A statute, by contrast, is "[a] law passed by a legislative body; [specifically], legislation enacted by any lawmaking body . . . ."[137] Both constitutions and statutes provide operative, enforceable law, but the former provide overarching principles guiding statutory legislation and superseding those statutes that are not compliant or compatible with those constitutional norms.[138] Constitutions, being necessarily abstract, principled, and obdurate, must rely on extra-constitutional sources of law (that are not incompatible with that constitution) to provide precise, and somewhat more transitory legal directives to address the concrete concerns of everyday legal disputes.[139]

If UNCLOS was intended to serve solely as an autonomous, freestanding statutory code for the administration of rights and obligations contained within the four corners of that document alone, Ireland's interpretation of Article 293(1) would carry little weight in seeking enforcement of obligations that arise from non-UNCLOS agreements. From this perspective, it could be argued, the Article merely references "other rules of international law not incompatible with this Convention" in order to provide *interpretive guidance* for the application of UNCLOS provisions, not the *application* of non-UNCLOS agreements.[140]

134. *Id.*
135. *Id.* art. 311(2).
136. BLACK'S LAW DICTIONARY 330 (8th ed. 2004).
137. *Id.* at 1448.
138. Marbury v. Madison, 5 U.S. 137, 177 (1803)
139. GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 163-64 (5th ed., 2005).
140. *See* EIRIKSSON, *supra* note 99, at 145. "[A]rticle 293 provides for primacy of the Convention and allows

However, there is considerable reason to view UNCLOS more like a constitution that plays an organizational and coordinating role with respect to external legal agreements, and less like a hermetic statute operating as an island unto itself. Writing just shortly after finalization of the Convention, Tommy T. B. Koh of Singapore, President of the Third United Nations Conference on the Law of the Sea, articulates the constitutional, non-statutory nature of UNCLOS. It was the "fundamental objective" of the Convention, he writes, to "produc[e] a comprehensive constitution for the oceans which will stand the test of time."[141] Additionally, Koh identifies as one of the Convention's "major themes" that it was "not [intended to be] a codification Convention. The argument that . . . the Convention codifies customary law or reflects existing international practice is factually incorrect and legally insupportable."[142] Instead, the Convention is an instrument that enables diverse "nations . . . to harmonize their actions," an agreement that "celebrate[s] human solidarity and the reality of interdependence."[143] The very first line of the preamble to UNCLOS echoes this understanding in stating that "the States Parties to this Convention [were] Prompted by the *desire to settle*, in a spirit of mutual understanding and co-operation, *all issues relating to the law of the sea* . . . ."[144] Thus, UNCLOS was intended to serve as the organizing principle around which all sea-related disputes and agreements would revolve.

The Convention "is unique among the major law-making treaties in establishing, as an integral part of its provisions, a comprehensive system for the [binding] settlement of disputes."[145] Lakshman Guruswamy notes that the "certainty and security of outcome" ensured by UNCLOS settlement procedures were established in response to an awareness of "the difficulty of achieving . . . [its] goals given that the absence of determinative and binding interpretations and rulings by a system of compulsory dispute settlement leaves room for destabilizing unilateral interpretations and acts."[146]

ITLOS Judge Gudmundur Eiriksson, who has been intimately involved with the development and implementation of UNCLOS, identifies four reasons for this "evident departure from the norm": (1) A "near-passionate belief of many participants in the negotiations . . . in the ideal of the peaceful settlement of disputes"; (2) the desire for a "secure system of conflict resolution in the face of [proliferating] new concepts in international law and institutions"; (3) the aversion of certain states to participate in the

the application of other rules of international law only provided they are not incompatible with the Convention. This provision would seem fair enough as regards cases concerning the interpretation or application of the Convention, but may give some pause, if taken literally, in cases concerning the application or interpretation of other treaties . . . ." The latter scenario is precisely that presented by *Ireland v. United Kingdom. See id.*

141. Tommy T. B. Koh, *Remarks at the Third United Nations Conference on the Law of the Sea A Constitution for the Oceans*, at xxxiii, *available at* http://www.un.org/Depts/los/convention_agreements/texts/koh_english.pdf.

142. *Id.* at xxxiv. This is the conventional understanding of the Convention, notwithstanding language in the preamble that "the codification and progressive development of the law of the sea achieve in this Convention will contribute to the strengthening of peace, security, co-operation and friendly relations among all nations . . . ." UNCLOS, *supra* note 2, pmbl.

143. Koh, *supra* note 141, at xxxvii.

144. UNCLOS, *supra* note 2, pmbl. (emphasis added).

145. EIRIKSSON, *supra* note 99, at 11; *see also* THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A HISTORICAL PERSPECTIVE, *available at* http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm ("Provisions for the settlement of disputes arising out of an international treaty are often contained in a separate optional protocol. Parties to the treaty could choose to be bound by those provisions or not by accepting or not accepting the Protocol. The Convention on the Law of the Sea is unique in that the mechanism for the settlement of disputes is incorporated into the document, making it obligatory for parties to the Convention to go through the settlement procedure in case of a dispute with another party.").

146. Guruswamy, *supra* note 76, at 295.

International Court of Justice; and (4) the desire for a "specialized organ to deal with deep seabed mining disputes."[147] The first two reasons have the most relevance for an interpretation of Article 293(1).

The impetus for such an approach becomes apparent in the context of the proliferation of international agreements concerning the seas and oceans of the world. While international treaties readily articulate agreements among parties, they often do little to establish enforcement or dispute resolution procedures.[148] The proliferation of such agreements, their inevitable contradictions, and the absence of dispute resolution provisions produced a surfeit of ineffective law.[149] In the absence of effective dispute resolution procedures among myriad agreements, the use of force between opposing parties becomes increasingly likely, a prospect that many of the negotiation delegates sought passionately to avoid.[150]

B. Integrative Role Evident in UNCLOS

UNCLOS may perform this integrative role in relation to non-UNCLOS agreements in three ways. First, Article 288(2), "Jurisdiction," provides that an UNCLOS "court or tribunal . . . shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement."[151] That is, if a non-UNCLOS agreement related to the purposes of UNCLOS specifies that disputes are to be resolved via submittal to an UNCLOS tribunal, then UNCLOS tribunals are obliged to hear such suits and apply the legal rules established by that *non*-UNCLOS agreement. This provision illustrates not only the capacity for UNCLOS to adjudicate non-UNCLOS claims, but the intention that it do so under certain circumstances.[152] The provision also illustrates the kind of comprehensivity of purpose to which President Koh referred above.[153]

Second, Article 293(1), "Applicable Law," provides that "[a] court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention."[154] The instruction here is clear and mandatory; assuming jurisdiction is proper to begin with, the tribunal *shall* apply non-UNCLOS law that is properly submitted to it. While a number of questions arise on this point, as we shall see below, there is no question that the Convention signatories intended UNCLOS to serve as a mechanism for the application of non-UNCLOS law. It is this second provision that is most at issue in *Ireland v. United Kingdom*.

147. EIRIKSSON, *supra* note 99, at 11.

148. PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 191 (2d ed., 2003) (noting "[s]overeign interests have, however, led states [i.e., the signatories to international agreements] to be unwilling to transfer too much enforcement power to international organisations and their secretariats, although there are some indications that this reluctance is being overcome."). Sands identifies UNCLOS as one example where such reluctance subsided. *Id.* at 192.

149. EIRIKSSON, *supra* note 99, at 11.

150. ITLOS Judge Gudmundur Eiriksson, who was intimately involved with the development and implementation of UNCLOS, identifies as one of the driving imperatives for the Convention the "near-passionate belief of many participants in the negotiations . . . in the ideal of peaceful settlement of disputes." EIRIKSSON, *supra* note 99, at 11.

151. UNCLOS, *supra* note 2, art. 288(2).

152. *Id.*

153. *Id.*; *see supra* notes 141-143 and accompanying text.

154. UNCLOS, *supra* note 2, art. 293(1).

The third mechanism by which UNCLOS may accommodate non-UNCLOS law appears in Article 293(2), which provides that Article 293(1) "does not prejudice the power of the court or tribunal having jurisdiction under this section to decide a case *ex aequo et bono*, if the parties so agree."[155] That is, if parties wish to do so, they may agree to submit their dispute to an UNCLOS tribunal for equitable resolution that is not bound by any particular legal agreement, including UNCLOS. This provision allows UNCLOS to serve as an equitable forum untethered to any particular legal regime, including UNCLOS, though one would expect such a tribunal proceeding *ex aequo et bono* to draw upon the general intentions and outlines of UNCLOS principles in reaching a decision. While this third mechanism is not an issue in this case, it nevertheless reflects the wide latitude granted to tribunals, under certain circumstances, to leverage the machinery of UNCLOS for legal claims foreign to the Convention.

Both of the "Applicable Law" provisions allow an UNCLOS tribunal to draw upon law that is external to the Convention itself. Under paragraph 2, the court is permitted to escape the limits of the Convention rules themselves and apply equitable principles, and it is permitted for parties and even non-UNCLOS agreements to designate UNCLOS as the forum and framework for dispute resolution.[156] Paragraph 2 is not at issue in *Ireland v. United Kingdom*, but it does reflect the degree to which the UNCLOS scheme was intended to avail itself of non-UNCLOS law.

It is the interpretation of paragraph 1, however, that is most at issue here, and which will ultimately determine the fate of this case. The language is remarkably clear and direct on its face, and yet we are to be cautioned in taking the language too literally.[157] Under what circumstances may a tribunal apply "other rules of international law not incompatible with this Convention"? May it apply any other such rules? May it apply such rules in the absence of any UNCLOS claims? If UNCLOS claims are required, how substantial must those claims be in relation to the other not-incompatible non-UNCLOS claims?

Another indication of the Convention's operation as a guiding framework rather than a purely autonomous statutory code may be seen in the express provision that other treaties and agreements may confer jurisdiction upon the Tribunal for interpretation and application of non-UNCLOS law.[158]

C. Straddling Stocks Agreement

John Noyes provides a helpful analysis of what might qualify as acceptable "other rules of international law" under Article 293(1) in light of the Straddling Stocks Agreement (SSA), which was enacted in order to implement various provisions of UNCLOS.[159] Noyes notes that the SSA, enacted under the authority of UNCLOS itself, echoes the language of

155. UNCLOS, *supra* note 2, art. 293(2). The term *ex aequo et bono* is defined as "[a]ccording to what is equitable and good." BLACK'S LAW DICTIONARY, *supra* note 136, at 600.

156. UNCLOS, *supra* note 2, art. 293.

157. EIRIKSSON, *supra* note 99, at 145 ("This provision . . . may give some pause, if taken literally, in cases concerning the application or interpretation of other treaties . . . .").

158. *Id.* at 4 (noting that three international treaties have already conferred jurisdiction upon UNCLOS to settle disputes arising under their articles).

159. Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. U N. Doc. A/CONF.164/37 (Sept. 8, 1995) [hereinafter Straddling Stocks Agreement], *available at* http://www.un.org/Depts/los/convention_agreements/convention_overview_fish_stocks.htm.

UNCLOS Article 293. In SSA Article 30, "Procedures for the settlement of disputes," paragraph 5 provides that:

> Any court or tribunal to which a dispute has been submitted under this Part shall apply the relevant provisions of the Convention [UNCLOS], of this Agreement and of any relevant subregional, regional or global fisheries agreement, as well as generally accepted standards for the conservation and management of living marine resources and *other rules of international law not incompatible with the Convention* [i.e., UNCLOS], with a view to ensuring the conservation of the straddling fish stocks and highly migratory fish stocks concerned.[160]

Noyes argues that it would be inconsistent to interpret the umbrella provisions under UNCLOS more restrictively than the same language adopted within a subsidiary Agreement, such as the SSA:[161]

> Article 293(1)'s reference to "other rules of inter-national law not incompatible with this Convention" could encompass the sources set forth in Article 30(5) of the Straddling Stocks Agreement. This . . . straightforward reading corresponds to the ordinary meaning of the phrase, and fully accords with the view that the Law of the Sea Convention is a framework agreement, looking to compatible sources of international law to help flesh out its content.[162]

The fact that the SSA enumerates a more specific list of possible sources of international law than UNCLOS does not undermine a broad reading of the UNCLOS provisions. First, the SSA's list is as broad as the provisions in UNCLOS itself. Indeed, rather than adopting a narrower range of international law, Article 30(5) of the SSA merely supplements the broad UNCLOS language with a list of illustrative legal sources to be included within the broader sweep of "other rules of international law."[163] Additionally, even if the SSA were to adopt a more restrictive list of applicable law, such an approach would be consistent with the role of UNCLOS as a "constitution" or "framework agreement," under which more narrowly constructed regulatory agreements might arise.[164]

In a review of the UNCLOS negotiating history, it has been observed that "[t]he concision of the phrasing" in Article 293(1), which avoids declaring a definitive list of acceptable "sources of positive international law," was a response to "resistance to a European-centred approach to the theory of the sources of public international law."[165] One can also imagine that the enumeration of any such list would have subjected the Convention to obsolescence in the rapidly changing environment of international agreements, the vagaries of which UNCLOS sought to address.

It is particularly important to note that the language of 293(1) did change in the course of the negotiations from incorporating "any other rule of law" to the much more narrow

160. *Id.* art. 30(5) (emphasis added).

161. Walker & Noyes, *supra* note 78, at 376.

162. *Id.* at 376-77 (taking particular exception to the suggestion that "other rules of international law" might refer exclusively to the law of armed conflict).

163. *Id.* at 379.

164. Walker & Noyes, *supra* note 78, at 379.

165. HANDBOOK, *supra* note 87, at 1377.

description, "other rules of *international* law not incompatible with this Convention."[166] The former construction would have "raised difficulties of interpretation, in particular regarding the creation of an international legal régime [i.e., UNCLOS] by national legal instruments. Referring solely to international law represented the highest common denominator among the parties."[167]

D. Principles of Statutory Construction and Contract Interpretation

Additional canons of interpretation may provide some guidance in understanding UNCLOS provisions. For example, the maxim to interpret an agreement as a whole simply suggests that a valid interpretation must enable Article 288 and Article 293 to work together compatibly. Interpretations that would avoid internal contradiction within the Convention would be preferred over those that do not.

And, as noted above, the limitation in Article 311(2) appears to pose no bar against employing UNCLOS process for the purposes of prosecuting non-UNCLOS claims so long as such dispute resolution process does not "alter . . . rights and obligations" under those non-UNCLOS claims.[168]

The maxim *expressio unius exclusio alterius*[169] might be applied to Article 288(2) to show that the omission in this clause of any reference to UNCLOS suggests that the clause only applies in the absence of a dispute concerning UNCLOS. In that case, Article 288 would not bar a supplemental jurisdiction approach when claims arising under non-UNCLOS agreements are part of the same "dispute" arising under UNCLOS.

VII. SUPPLEMENTAL JURISDICTION IN U.S. FEDERAL LAW

A. Early Caselaw

In the first half of the twentieth century, U.S. caselaw developed a principle of supplemental jurisdiction that allowed federal courts to hear non-federal claims (i.e., state law claims) appended to federal claims when they were bound up in the same dispute.[170] In 1933, the Supreme Court in *Hurn v. Oursler* held that pendency was proper only when "the claims . . . so precisely rest upon identical facts as to be little more than the equivalent of different epithets to characterize the same group of circumstances."[171] In 1966, the U.S. Supreme Court in *United Mine Workers of America v. Gibbs* held that *Oursler*'s "limited

166. *Id.* (emphasis added).

167. *Id.*

168. UNCLOS, *supra* note 2, 311(2).

169. Edwin W. Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833, 853 (1964). The term *expressio unius exclusio alterius* is defined as "to express or include one thing implies the exclusion of the other, or of the alternative." BLACK'S LAW DICTIONARY, *supra* note 136, at 620.

170. *See generally* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1488 (5th ed., 2003); Gene R. Shreve, *Symposium A Reappraisal of the Supplemental-Jurisdiction Statute Title 28 U.S.C. § 1367 Introduction*, 74 IND. L.J. 1 nn.1-4 (1998); Dietzsch v. Huidekoper, 103 U.S. 494 (1880); Siler v. Louisville & Nashville R. Co., 213 U.S. 175 (1909); Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356 (1921); Wichita R.R. & Light Co. v. Public Util. Comm'n, 260 U.S. 48 (1922); Kentucky Natural Gas Corp. v. Duggins, 165 F.2d 1011 (6th Cir. 1948).

171. Hurn v. Oursler, 289 U.S. 238, 246 (1933).

approach is unnecessarily grudging."[172] Instead, the *Gibbs* Court articulated greater endorsement for "pendent" or "supplemental" claims: "Under the [Federal] Rules [of Civil Procedure], the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged."[173] The Court continued:

> Pendent jurisdiction, in the sense of judicial power, exists whenever there is a claim "arising under (the) Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ," U.S. Const., Art. III, §2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case." The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in federal courts to hear the whole.[174]

Once a federal court found subject matter jurisdiction for the federal claim, additional state law claims could be appended so long as they derived from a "common nucleus of operative fact."[175]

In *Owen Equipment & Erection Co. v. Kroger*, the Supreme Court further refined the common law doctrine to reject supplemental jurisdiction in cases relying upon diversity for federal subject matter jurisdiction if appended claims against impleaded third parties would destroy the diversity that gave rise to federal jurisdiction at the outset.[176] The holding re-emphasized the importance of establishing an inviolable foundation of federal jurisdiction prior to and as an ongoing prerequisite to assertion of supplemental jurisdiction.[177] If granting supplemental jurisdiction would negate the foundational federal jurisdiction, that supplemental jurisdiction cannot be granted: "It is a fundamental precept that federal courts are courts of limited jurisdiction. The limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded."[178]

Throughout the *Gibbs* and *Kroger* era, supplemental jurisdiction was understood to be at the discretion of the court, not an absolute right attaching to plaintiffs: "Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them."[179]

172. United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

173. *Id.* at 724.

174. *Id.* at 725 (internal emphasis omitted).

175. *Id.* at 724.

176. Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 374 (1978).

177. *Id.* at 374.

178. *Id.* at 374.

179. *Gibbs*, 383 U.S. at 725 (internal quotations omitted); *see also* GEOFFREY C. HAZARD, JR. ET AL., PLEADING AND PROCEDURE, STATE AND FEDERAL CASES AND MATERIALS 416 (8th ed., 1999) (citing Aldinger v. Howard, 427 U.S. 1 (1976) as a telling example of a case in which the court exercised its discretion to reject supplemental jurisdiction where the federal and state law claims all arose out of the same set of facts, but the plaintiff would have been able to sue all the defendants in state court. Lacking the incentive of judicial economy,

B. The Supplemental Jurisdiction Statute

In 1990, Congress codified the common law doctrines represented by *Gibbs* and *Kroger* in 28 U.S.C. §1367, "Supplemental Jurisdiction," which states, in part, that:

> [I]n any civil action of which the district courts have original jurisdiction, the district courts *shall have supplemental jurisdiction over all other claims that are so related* to claims in the action within such original jurisdiction that they form *part of the same case or controversy* under Article III of the U.S. Constitution . . . .[180]

The proviso to this principle is that such supplemental jurisdiction will not be permitted if federal subject matter jurisdiction is based on diversity and the joinder of parties under the proposed supplemental jurisdiction would violate diversity requirements (as per the *Kroger* holding).[181]

The federal supplemental jurisdiction statute has been criticized, primarily for some of its unnecessarily complex provisions and for the way it lends itself to undesirable results when judges apply it in a "wooden" fashion, among other things.[182] This criticism concerns the failure of the statute to fully live up to the beneficial objectives—for which supplemental jurisdiction was developed under the common law.[183] Nevertheless, the general view holds that the interests of judicial economy, convenience, and fairness to litigants are often well-served by the application of supplemental jurisdiction.[184]

C. Comparison to UNCLOS

For the purposes of evaluating UNCLOS, the bifurcated analysis of federal jurisdiction and applicable law is remarkably resonant. Under principles of supplemental jurisdiction in the United States, the jurisdiction analysis does not dictate applicable law; it merely determines whether there is federal jurisdiction for the case or controversy at issue. Once that jurisdiction is established, it is the case or controversy, as understood within Article III of the Constitution—i.e., the "dispute" in UNCLOS parlance—that determines what law is properly to be applied. In a similar fashion, the express distinction that UNCLOS makes between jurisdiction over a given "dispute" in Article 288 and applicable law in Article 293 indicates that the two factors are not synonymous. If the Convention drafters intended applicable law to be determined by means of the jurisdictional analysis under Article 288, Article 293 would be entirely superfluous.

The United Kingdom argues that Article 293(1) must conform to the limitations of Article 288(2) to "ensure[] that there will be symmetry between the jurisdiction of a Part XV court or tribunal and the law that it is required to apply."[185] But it is precisely this kind of "symmetry" that supplemental jurisdiction in U.S. law is understood to avoid.

supplemental jurisdiction was not warranted.).

180. 28 U.S.C. § 1367(a) (2000) (emphasis added).

181. *Id.* § 1367(b) (2000); *.see also Kroger*, 437 U.S. at 365.

182. *See generally* Gene R. Shreve, *supra* note 170 nn.1-4 (1998) (citing other contributors to the Symposium, especially Richard D. Freer, John B. Oakley, Thomas D. Rowe, and Joan Steinman).

183. *Id.*

184. *Id.*

185. Rejoinder of the United Kingdom, *supra* note 60, at 72.

Adherence to pure symmetry allows the jurisdictional analysis to determine the applicable law, which would preclude hearing all of the claims within a case or controversy as understood by the Constitution in a single proceeding. That kind of symmetry offers a kind of aesthetic appeal and a simplicity at the threshold of adjudication, but it fails to serve the interests of judicial economy and consistent enforcement of claims.

Further, supplemental jurisdiction does retain a different kind of symmetry: symmetry concerning the case or controversy. Under the supplemental jurisdiction statute, the same case determines both the availability of jurisdiction and, having found jurisdiction, the applicable law. It is the case or the dispute that ensures a kind of symmetry, not jurisdiction.

The United Kingdom argues that Article 293(1) "does not mandate the wholesale incorporation into and application as part of UNCLOS of every far-flung rule of customary or conventional international law merely by reference to a test of compatibility with UNCLOS."[186] Indeed, the American practice of supplemental jurisdiction also does not operate in such a fashion. It is not sufficient under the supplemental jurisdiction statute, for example, that non-federal law be merely "compatible" with federal law to permit applicability. If such were the case, every federal case would also become a forum for every imaginable state law claim.

Instead, as discussed above, the statute requires that the federal and state law claims be "*so related* to claims in the action within such original jurisdiction that they form *part of the same case or controversy*" under the Constitution.[187] It is the logical relationship to the claims providing original jurisdiction that opens the door to supplemental jurisdiction, not mere compatibility to federal law. The language of UNCLOS Article 293(1), on the other hand, predicates the application of "other rules of international law" on compatibility, which, considered in isolation, could produce the kind of "outright alarm" that the United Kingdom describes, "turn[ing] UNCLOS dispute settlement into a wider procedure of compulsory dispute settlement of more general application, the only test of competence of which would be some remote connection with a substantive provision of UNCLOS."[188]

However, Articles 288 and 293 need not be read in such an exaggerated fashion. If, applying the general approach of American supplemental jurisdiction, the dispute determines both the availability of jurisdiction to hear the case and—having established jurisdiction—the law applicable to that dispute, then Ireland's theory of "applicable law" under UNCLOS should not raise quite the alarm that the United Kingdom suggests.

VIII. CONCLUSION

What would be the implications should the Tribunal reject Ireland's interpretation? Depending on the nuances of the holding, states may come to understand that unless their non-UNCLOS agreements specifically confer jurisdiction upon UNCLOS, they need not fear enforcement via UNCLOS's substantial procedural and dispute resolution provisions. Likewise, states will be required to rely upon the weak or non-existent dispute resolution provisions of those non-UNCLOS agreements. As such, states that pollute less would remain significantly disadvantaged over those that pollute more.

186. *Id.*

187. 28 U.S.C. § 1367 (a) (2006)(emphasis added).

188. Rejoinder of the United Kingdom, *supra* note 60, at 72.

Should the Tribunal adopt Ireland's general position, however, states large and small would be placed on notice that UNCLOS provides enforcement machinery applicable to a wide range of non-UNCLOS agreements. No doubt this would produce concern, as any number of non-UNCLOS agreements may have been concluded primarily because of the absence of effective enforcement provisions. Parties are all too willing to accept unfavorable terms in the interests of diplomacy or politics when the terms are clearly unenforceable. If UNCLOS renders that bargaining position untenable, states may find it harder to reach future agreements, and may find themselves in uncomfortable positions with regard to prior, now-enforceable agreements that are "not incompatible" with UNCLOS. In this way, by harmonizing or integrating a panoply of international agreements under its umbrella, UNCLOS might produce a reactionary avoidance of international accord, which might be susceptible to adjudication under UNCLOS, and an amplification of tensions susceptible to non-peaceful resolution, defeating one of the core objectives of the Convention.

On the other hand, the benefits arising from supplemental jurisdiction under UNCLOS would be substantial and may outweigh the imagined liabilities. The absence of dispute resolution procedures renders many international agreements ineffectual, and the alternatives offered by UNCLOS may provide a corrective effect for other legal regimes.[189] Myriad overlapping and contradictory international agreements frustrate any state's efforts to protect its interests or prosecute its rights. If a kind of supplemental jurisdiction is found to be proper under UNCLOS, the dispute resolution process and harmonizing effect that UNCLOS offers to non-UNCLOS agreements—and the resultant leveling of the enforcement playing field among Convention signatories—should prove beneficial to all who depend upon the oceans as "the common heritage of mankind."[190]

189. *See, e.g.*, Guruswamy, *supra* note 76, 296-97 ("The primary reasons for nations to have recourse to UNCLOS are found in the environmental shortcomings of GATT/WTO. Hitherto, it appears that GATT/WTO has exercised judicial suzerainty, because it has enjoyed a monopoly over trade-environment litigation. According to conventional wisdom, unregulated monopolies stifle competition and result in huge inefficiencies, inequities, and even abuse. GATT/WTO has been behaving like a judicial monopoly, conscious that its decisions cannot be challenged or overturned. The possibility of a countervailing judicial force, and competition for jurisdiction, could have a salutary effect on GATT and even lead it to pay genuine attention to reform.").

190. UNCLOS, *supra* note 2, art. 136.