Contributions of LOSC Jurisprudence to Reaching and Justifying a Negotiated Outcome – and Contributions of Negotiated Settlements to the Law of the Sea

Rolf Einar Fife
Ambassador, Mission of Norway to the European Union, Brussels, Belgium
rolf.einar.fife@mfa.no

Abstract

Releasing the full potential of the United Nations Convention on the Law of the Sea (LOS C) also requires concluding agreements – and an understanding of the dynamics behind reaching agreement. Legal reasoning in negotiations is not divorced from judicial reasoning. Justification by drawing upon the latter may be required in the fundamental process of overcoming disagreement. Jurisprudence may provide arguments of acceptability for negotiating States. Moreover, negotiations should not merely be dismissed as ‘bargaining under the shadow of the Convention’. Rather, they may be part of a broader interaction with contributions of the judiciary and indicate future paths for the Convention's implementation. Furthermore, this may give rise to reflections on the roles of heuristics for negotiators and for policy- and decision-makers. This suggests revisiting the notion of legal policies of States – including how States should define unresolved issues and decide on the best timing and means for their effective resolution.

Keywords

The waves broke and spread their waters swiftly over the shore. One after another they massed themselves and fell; the spray tossed itself back with the energy of their fall. The waves were steeped deep-blue save for a pattern of diamond-pointed light on their backs which rippled as the backs of great horses ripple with muscles as they move. The waves fell; withdrew and fell again, like the thud of a great beast stamping.¹

Introduction²

Forty years after the adoption of the United Nations Convention on the Law of the Sea (LOS C), continued challenges related to its implementation are compounded by threats stemming notably from serious climate, biodiversity, development, and geopolitical risks.³ A release of the full potential of the work programme contained in the Convention calls for implementation of provisions that invite negotiated solutions. Further norm-creation, concrete problem-solving, and settlement of disputes may require agreements consistent with the Convention.⁴ Adequate response and adaptation to the above risks, acting within the comprehensive legal framework of the Convention, may require overcoming disagreement through consultation and negotiations.

Doctrinal analysis traditionally refers to treaties and other international agreements as a given source of ‘posited’ law. Its discussion of their creation tends to focus on principles and rules governing their formal conclusion, application, interpretation, breach, and termination. Preparatory work and the circumstances of their conclusion may provide evidence of formalisation of various stages and proposals, particularly in multilateral negotiations.

² Former Director General for Legal Affairs, Legal Adviser of the Norwegian Ministry of Foreign Affairs (2002–2014). The author alone is responsible for the content of this article, which does not represent a statement of position of the Government of Norway.
⁴ See also LOSC (n 3), Article 31(3) and (4). In the following, the term ‘agreement’ is used in a broad sense, including treaties and other negotiated instruments, by States or international organisations.
However, the analysis of such decisional steps does not necessarily reveal the decisive dynamics behind the process of overcoming disagreement.

Reaching agreement is sometimes assumed to result from a necessity due to a prevailing political context and the concrete need to resolve a problem, a balanced give-and-take leading to an ultimately irresistible ‘emerging consensus’, or a mere balancing of States’ national interests. However, negotiations may be more or less influenced by the relevant legal framework and its development. In the following, the focus will be set on the more fundamental question of ‘how to overcome disagreement’ in negotiations. This includes in particular whether, to what extent, and how legal arguments may weigh in. The question here will be how legal analysis and relevant sources of law could be helpful drivers in the dynamics that may lead to agreement.

Negotiations do not just consist of formulating negotiating positions and then letting political factors play out. Processes of political legitimation may benefit from legal justification. It is submitted here that they increasingly depend on it. Jurisprudence may influence State behaviour also in cases where the LOSC gives States broad discretion to choose solutions, including a freedom to adopt any delimitation line they can agree upon. Maturation of settled case law helps cement criteria of justification that may be helpful to either process or substance in negotiations. In turn, within the law of the sea, jurisprudence itself develops taking into account relevant State practice.

To the extent judgments might be compared to waves repeatedly breaking on the shore of States’ international legal policies, in the words of Virginia Woolf, ‘the spray tosses itself back with the energy of their fall’. How to overcome

5 Legal analysis may be more readily directed to the emergence of judicial reasoning and legal theory. This may also include analysis of the role played by individual actors in international institutions, see F Baetens (ed), Legitimacy of Unseen Actors in International Adjudication (CUP, Cambridge, 2019).

6 Overcoming differences by tacit agreement will not be considered here. Bilateral tacit agreement is seldom publicly disclosed. Its practical purpose may be premised on an understanding that it be without prejudice to the legal positions of the parties on some topic. As regards a rare case of a maritime boundary established by tacit agreement, see Maritime Dispute (Peru v. Chile), Judgment, ICJ Reports 2014, p. 3, para 99, referred to also in Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Judgment, ICJ Reports 2021, p. 206, at p. 228, para 52. See, moreover, ‘Draft Conclusions on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties’ in Report of the International Law Commission, UN Doc A/73/10 (2018), p. 51, notably draft conclusion 7(3) and commentary p. 63. As regards formative processes of customary law, see ‘Draft Conclusions on Identification of Customary International Law, with Commentaries’ in ILC Report, ibid., draft conclusion 5 (Conduct of the State as State Practice), commentary 5 and footnote 701) at p. 133 and draft conclusion 16 (Particular customary law).
disagreement is a concern common to both negotiations and judicial deliberations. The two phenomena may become less dissimilar than assumed.

Distinct Roles: The Vantage Point of a Participant

This article was written based on the author’s remarks at a seminar in Utrecht in 2022 on the law of the sea, where he had been invited to make an intervention related to ‘bargaining under the shadow of the Convention’. This could be seen as an invitation to add a distinct State perspective in norm-creation, as opposed to the role notably of international judges and academics. The mere term ‘bargaining’ may carry connotations of transactional haggling, or attempts to strike advantageous deals, based on national self-interest or other political considerations, as opposed, maybe, to objective, coherent or loyal implementation of the LOSC. The remarks attempted to counter, moderate or supplement assumptions that State negotiations are mainly deal-making, or ‘bargaining’, based on political considerations of national self-interest.

The basis for these particular reflections is drawn from a government practitioner’s experience. It is heavily indebted to the traditions and State practice of Norway. The latter include effecting a significant number of maritime delimitations, making use of all means of dispute settlement enumerated in the Convention. These comprise arbitration, conciliation, adjudication, and negotiated agreement. Negotiations have been increasingly influenced by settled case law.

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7 More than a dozen delimitation agreements have been concluded, in several cases with additional cooperation arrangements. An arbitral award of 1909 settled the delimitation of the territorial waters with Sweden, see The Grisbådarna case, Norway v. Sweden, Award, Permanent Court of Arbitration (PCA), [1909] 11 RIAA 155. The delimitation of the continental shelf between the island of Jan Mayen and Iceland was based on a conciliation procedure, see Conciliation Commission on the Continental Shelf area between Iceland and Jan Mayen: Report and recommendations to the governments of Iceland and Norway, Decision of June 1981, 27 RIAA 1–34; 20 ILM (1981) [797], cf. See also EL Richardson, ‘Jan Mayen in perspective’ (1988) 82(3) American Journal of International Law 443–458. Adjudication was effected by the ICJ in the judgment, Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark/Norway), Judgment, ICJ Reports 1993, p. 38 [Greenland/Jan Mayen]. See RR Churchill, ‘The Greenland-Jan Mayen case and its significance for the international law of maritime boundary delimitation’ (1994) 9(1) International Journal of Marine and Coastal Law 1. On a particular process of interaction of trilateral maritime delimitation in conjunction with submissions to the Commission on the Limits of the Continental Shelf with a view to establishing the outer limits of the continental shelf, cf. Agreed Minutes on the Delimitation of the Continental Shelf beyond 200 Nautical Miles between the Faroe Islands, Iceland and Norway in the Southern Part of the Banana Hole of the Northeast Atlantic (New York, 20 September
A narrative based on government experience might be distrusted as lacking in objectivity or critical distance. It might be suspected of being biased, of conscious or unconscious bias, or simply to be constrained, apologetic or instrumentalised. State interests represented in negotiations seldom disappear once a settlement has been reached. They may return, at a later stage, to influence the interpretation of what has been agreed. Moreover, States preserve a continuing relationship, which may subsequently include other, related negotiations. All of this may legitimately speak against indiscretion about internal dynamics that led to overcoming disagreement.

However, a long-time participant is part of a systemic structure of government and may be privy to institutional memory. Having to deal with parallel issues, together with internal corrective contradiction, which in a well-functioning institution may be vibrant, a participant may be steeped in internal institutional knowledge, related communicative systems and ‘grammar’. These may also promote discernment of unspoken nuance.

Moreover, institutional affiliation or relations are in this case obvious and publicly known, and sometimes easier to identify than for lawyers engaged in confidential consultancy, other forms of international legal advice to or representation of governments.8

It is therefore suggested that a second look at processes of inter-State negotiations, premises for overcoming disagreement and choice of means is warranted. Some limited suggestions will be drawn in the following on the above basis.

Pragmatics for Negotiators

When considering how to overcome disagreement, it may be useful to first take a step back. One must not assume that States have a low threshold for engaging in negotiations. Issues of the law of the sea are usually sensitive, and always delicate.9 A somewhat provocative starting point might therefore be the

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8 There may also be reason to question whether even critical theory can be really independent from lived experience, as has been done by Eribon (D Eribon, Principes d’une pensée critique (Librairie Arthème Fayard/Pluriel, Paris, 2016) 141–142).

9 Negotiations referred to are in a bilateral setting. Similar considerations may apply in multilateral forums.
general observation made by the social theorist Niklas Luhmann to the effect that ‘communication is improbable’.\textsuperscript{10} He noted problems and obstacles to be surmounted before communication can come about. These may also function as thresholds of discouragement and lead to abstention of communication if the prospects for it are thought to be inauspicious.\textsuperscript{11} While States cannot be assimilated to human beings (and political and legal analysis must guard against anthropomorphism), transposing this observation to international inter-State levels is no less relevant. There is a need to retain a keen understanding of the constant interaction between the domestic and international legal orders.\textsuperscript{12} Moreover, a grasp not least of the international political context, and of the often-complex bilateral set of interests between neighbouring States, is essential. Engaging in negotiations requires decisions that are usually not taken lightly.

Appropriate timing of first contacts, which allows for time to promote confidence-building, may be a key factor for success. While the legal criteria for ascertaining the existence of a ‘dispute’ might formally be satisfied, it may be more conducive to results to first talk of unresolved questions or issues, rather than of a dispute. In so doing, one may easier overcome discouraging barriers of communication. It may also be easier to define or refine priorities of problem-solving, including whether to divide between relevant issues or maritime areas to be considered. This may be done without triggering formal obligations and timelines in the LOSC’s Part XV on settlement of disputes, by utilising the full scope of LOSC Article 280 for parties to freely agree among themselves on how to proceed with the settlement of a dispute. This may include engaging first in exploratory contacts, without making announcements


\textsuperscript{11} Ibid., at p. 124.

\textsuperscript{12} When Georges Scelle spoke of a \textit{dédoublement fonctionnel} or ‘dual role’ of State agents and governmental authorities, he implied that international law largely depends on the dual role of individuals in domestic government and as agents on the international level. G Scelle, ‘Règles générales du droit de la paix’ (1933) 46 Recueil des cours, The Hague Academy of International Law, 327–696, at p. 358. This does not mean ‘serving two masters’ as ‘[g]enerally speaking international law demands from national agencies only the required result, leaving it up to those agencies to achieve the result by such means as the national system wills, in accordance with its own constitutional requirements’. J Crawford, ‘Chance, order, change: The course of international law – General course on public international law’ (2013) 36\textsuperscript{5} Recueil des cours, The Hague Academy of International Law 160–182.
about an opening of negotiations to settle a particular dispute. They may bring together technical experts to establish common parameters and promote confidence-building. Exchanging views on relevant case law may be useful to understand the needs at hand.

This speaks also in favour of a prudent choice of vocabulary to describe various phases of a negotiation process that fit the concrete context. While the legal concept of ‘dispute’ may indeed be applicable to a situation, it may be more helpful not to refer to it as such in public discourse and media. This has the advantage of leaving it to the parties concerned to decide on the best timing for different stages of clarification of conditions that may be conducive to progress. Referring to ‘contacts’ or ‘dialogue’, rather than ‘negotiations’, may in some cases contribute to useful management of expectations. Prior identification of relevant issues may also benefit from informal contacts, consultations, or mere technical exchanges. Jurisprudence may assist in such scaffolding of structure and language.

In the philosophy of language, semantics deals with conventional rules of meaning for expressions and their modes of combination.\footnote{ZG Szabó, ‘The distinction between semantics and pragmatics’ in E Lepore and BC Smith, \textit{The Oxford Handbook of Philosophy of Language} (OUP, Oxford, 2006) 361, at p. 363; see also K Korta and J Perry, ‘Pragmatics’ in EN Zalta (ed), \textit{The Stanford Encyclopedia of Philosophy} (Spring 2020 Edition) available at https://plato.stanford.edu/archives/spr2020/entries/pragmatics/; accessed 29 December 2022.} Agreed language makes semantics a point of departure of treaty interpretation.\footnote{Vienna Convention on the Law of Treaties (Vienna, 23 May 1969, in force 27 January 1980) \textit{UNTS} 331, Articles 31–33. The ’scaffolding’, or negotiating history with \textit{travaux préparatoires}, may be a subsidiary means of confirming the result of application of the general rule of interpretation, see Article 32.} From an international law perspective, one could venture that negotiations harbour an ideal ambition of making the objective ‘ordinary meaning’ of the terms ultimately agreed to become anchors of legal certainty and predictability. This ambition may be further helped by as clear a (textual) context as possible, together with an objectively identifiable ‘object and purpose’.

Compared to semantics, pragmatics involves perception – which is key in negotiations. It deals with the effects of a broader context on the information perceived. Such context includes events, time, and place, but also facts of relevant institutions which may affect the speaker.\footnote{Korta and Perry (n 13).} Treaty interpretation also involves, among other things, a combination of semantics and pragmatics, striving for a common, objective system of ‘decoding’. In international
negotiations, common references to background law, in the form of jurisprudence, may help overcome disagreement.

The legal theorist Neil MacCormick writes persuasively about the relationship between habits and rules, and about the importance of unspoken or even unconscious modes of behaviour for a social system, communication, and for the nature of law. When it comes to inter-State negotiations relating to the law of the sea, which are not primarily characterised by unspoken or unconscious modes of behaviour, it is useful to note how simplified forms of ‘language and grammar’ stemming from jurisprudence may help avoid pitfalls of misunderstanding or distrust.

State practice develops in an intense interaction between international legal assessments, foreign policy considerations, domestic legal frameworks, and practical problem-solving. Choices to be made in negotiating or submitting to adjudication lead us to ask whether a State develops a ‘foreign legal policy’, a notion explored by Guy de Lacharrière in 1983.

When leaving the French foreign ministry in 1964, the jurisconsult André Gros quipped that ‘there is nothing more dangerous for a State than to publish its legal doctrine’ because this may be used against it later in a case where it may have adjusted its approach: why simplify the task for an opponent in litigation? Nevertheless, there is scope for reflection on legal policies of States – including on how to define unresolved issues and decide on the best timing and means for their effective resolution. Heuristics include the study of beliefs and cognitive biases that people rely upon ‘to reduce the complex tasks of assessing probabilities and predicting values to simpler judgmental operations’. Main developments in international jurisprudence may be internalised. An increased unity and legal certainty in case law and treaty law may be helpful to promote common terminology, grammar, and narratives that may be conducive to enhanced mutual trust.

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18 Alabrune (n 17), at p. 148.
Lessons for Negotiators from Judicial Reasoning in Maritime Delimitation

Lessons learned from maritime delimitation may indicate that institutional memory, strategic goals, and tactical considerations may play more important roles than mere improvisation – and that jurisprudence may play an indirect role in more ways than sometimes assumed. This calls into play legal reasoning in negotiations, albeit presented in a different form than in judicial reasoning.

According to International Court of Justice (ICJ) President Guillaume in 2001, up to the 1980s case law and treaty law had been perceived as unpredictable and required contributions from the Court to achieve greater certainty. A new stage was reached with the 1993 Greenland-Jan Mayen judgment and ‘the law of maritime delimitations was completely reunified’. It promoted methodological clarity and systemic coherence by confirming a stage-based methodology and a refined understanding of relevant factors to achieve an equitable solution. As noted by President Guillaume, the Court had gradually established an authoritative case law. Later judgments have consolidated further what the Court itself has termed a ‘maritime delimitation methodology’, with clarity and predictability that has ‘assisted the Court in carrying out its task’. It may safely be added that it is also assisting States in delimiting their maritime boundaries.

Today, maritime delimitation negotiations cannot be said to take place in any bewildering, open-textured indeterminacy of the law. What might instead be said to characterise the state of this law is its strikingly dense texture. While preserving scope for flexibility permitting local adaptation, this jurisprudence is key to the interpretation of the reference made in the Convention to ‘agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice’.

This leads to an additional, distinct, and more indirect, impact of jurisprudence, than on the concrete judicial or arbitral settlement of a single dispute,

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21 As regards the importance of major disparities of coastal lengths to adjust a provisionally drawn median line, see, e.g., Greenland/Jan Mayen (n 7), paras 68–69. The Court excluded notably population or socio-economic disparities as relevant factors (paras 79–83).
22 Somalia v. Kenya (n 6), para 122. By extension, this reasoning has also been followed by the International Tribunal for the Law of the Sea and arbitral tribunals. References are only made here to the ICJ.
23 LOSC (n 3), Articles 74, 83.
or on the resolution of a particular question of interpretation or the identifica-
tion of, say, customary international law or of general principles. It may also
provide guidance, structure to negotiating and sequencing topics, and argu-
ments of acceptability for negotiating States.

A brief reference may, here, be made to the particularly challenging and
lengthy series of negotiations between Norway and the Soviet Union, then
with the Russian Federation, concerning the maritime delimitation of their
continental shelf and 200 miles zones. After first contacts in 1967, formal nego-
tiations started in 1974, followed by a series of consultations and negotiations
over decades. They were concluded in 2010 with the signing of a treaty estab-
lishing a maritime boundary of 1,680 km that subsequently entered into force
in 2011. The negotiations spanned more than 40 years and thus a major part
of the modern history of maritime delimitation of coastal zones recognised
by the Convention, and in parallel to other delimitation processes concluded
by Norway.

When preliminary agreement was announced in 2010 in a joint statement,
reference was made to relevant circumstances recognised under international
law. This reflected the importance of certain geographical features, includ-
ing significant disparities in coastal lengths. In the Government’s report to the
Norwegian Parliament, reference was made to recent case law of the ICJ, which
was considered to provide for a settled jurisprudence. This included the judg-
ments in Greenland/Jan Mayen (1993), Qatar/Bahrain (2001), Cameroon/

24 For a thorough analysis of context and the first decades of negotiation, see AG Oude
Elferink, The Law of Maritime Boundary Delimitation: A Case Study of the Russian Federa-
tion (Brill, Leiden, 1994).
25 Treaty between the Kingdom of Norway and the Russian Federation concerning Maritime
Delimitation and Cooperation in the Barents Sea and the Arctic Ocean (Murmansk, 15
(3) International Maritime Boundaries (2012), The American Society of International
Law, 1–37.
26 Joint Statement on Maritime Delimitation and Cooperation in the Barents Sea and the
Arctic Ocean, signed by the Foreign Ministers of Norway and the Russian Federation on
27 April 2010, see Norwegian Parliamentary Bill of 26 November 2020, Prop. 43 S (2010–
27 Ibid., Prop. 43 S, at p. 6.
28 Greenland/Jan Mayen (n 7).
29 Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judg-
ment, ICJ Reports 2001, p. 40.
30 Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equa-
31 Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, ICJ Reports
2009, p. 61.
In its 1993 judgment, the ICJ discussed the task of States in negotiation – and legal limits to considerations that they may take into account. It recalled its statement from the 1969 North Sea Continental Shelf cases, that in fact ‘there is no legal limit to the considerations which States may take account of’ in this context. Then, it distinguished the task of negotiating States from that of the Court. Quoting from its 1985 judgment in the Libya/Malta case, it emphasised that it could only take such considerations that are ‘pertinent to the institution of the continental shelf as it has developed within the law’. Otherwise, ‘the legal concept of continental shelf could itself be fundamentally changed by the introduction of considerations strange to its nature’.

However, as illustrated above, the settled methodological approach adopted in jurisprudence may provide guidance to States in negotiations. It may also assist in ‘de-politicising’ certain issues and in identifying elements for more technical discussion. It may provide the parties with criteria for broader political ‘acceptability’ at a later, and decisive, stage of parliamentary or other approval. Such negotiations are thus not divorced from judicial reasoning. The fundamental process of overcoming disagreement by focusing on an outcome that may gain sustainable acceptance requires justification, and may draw on key criteria of success of judicial reasoning. Settled jurisprudence may provide such arguments of acceptability.

Moreover, a methodology promoted by case law may assist States in sequencing and structuring negotiations. There may also be arguments in favour of coherence to avoid unforeseen consequential political reactions by third States. There also seems to be limited evidence of treaty practice that has diverged from the provisions of the Convention. With the described normative maturity, there may also be arguments for not considering a distinction between legal and political modes of peaceful settlement of disputes to be particularly useful.

Sequencing in phases may be useful, as would the elimination of issues that are irrelevant to actual problem-solving. This does not require negotiating parties to agree on a later common narrative as to method chosen if they
have reached agreement. Identifying topics and phases of discussion in accordance with a maritime delimitation methodology identified by the ICJ, could serve as ‘scaffolding’ in negotiations, which may be removed when agreement is reached. The key point of intellectual ‘milestones’ on the negotiating path is to identify potential ‘landing zones’ and build legitimacy for later political acceptance. Should a negotiated result depart significantly from what would have been a likely outcome if the issue were put before an international court, that would constitute an additional challenge in terms of acceptability and may need further justification.

Foreign Legal Policy Related to Choice of Means – The Example of Submarine Pipelines

Moreover, where State practice is limited and highly specialised, influence may work the other way round. An example concerns State and treaty practice regarding submarine pipelines as a main source of guidance on how to implement the LOSC.

The legal regime for submarine cables and pipelines is set out in Article 79 of the LOSC. Briefly put, their laying and operation are part of the freedoms of the high seas, as are navigation and overflight, when crossing other States’ continental shelf or exclusive economic zone. These coastal States have specified rights. The delineation of pipelines requires their consent. Moreover, they may take certain reasonable measures for specified reasons, and they have the right to set conditions for their entering territorial waters and land territory or for linking up with infrastructure subject to their jurisdiction. The exercise of the rights to explore and exploit natural resources on the continental shelf is in reality closely linked to these freedoms of transportation. Simply stated, for a significant number of practical purposes, the regime of cables and pipelines outside of territorial waters is not affected by delimitation of the continental shelf and the exclusive economic zone, as it is fundamentally based on the freedoms of the high seas.

The strategic importance of the legal regime of this critical infrastructure for the security of energy supply is commonplace today. The total length of the Norwegian submarine gas pipeline network is about 8,800 kilometres, roughly the distance from Oslo to Bangkok. It includes more than thirty submarine

pipelines and receiving terminals in other coastal States. The network is regulated and managed as a single integrated system to promote maximum efficiency and security of gas supplies.  

Bilateral agreements with the ‘receiving State’ are negotiated within the framework of Article 79, instead of relying mainly on contractual structures between market actors. This promotes legal clarity as to jurisdictional issues. The agreements establish a uniform jurisdictional system for the entirety of the pipeline, while they may allow for concurrent jurisdiction of two States for certain purposes. This also clarifies rights of inspection, taxation, and provides for other elements of predictability. The first such agreements were concluded with the United Kingdom in 1973 and the Federal Republic of Germany in 1977. The latest one to date is with Denmark in 2019 concerning Baltic Pipe.

The number of issues regulated and the bilateral agreements’ operation over time may therefore indicate useful pathways for implementation of Article 79 of the LOSC. They provide guidance as to how to substantiate various provisions of this article. Their strategic and practical importance will outlast

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40 CA Fleischer, Petroleumsrett (Universitetsforlaget, Oslo, 1983) 349–392. This treatise devoted forty pages to the international legal regime of submarine pipelines, including for security and taxation purposes. Later overviews of regulatory frameworks in Norway have internalised this international legal framework, see Y Bustnesli, O Boye Sivertsen, HP Nordby and T Ulleberg (eds), Oil and Gas Activities in Norway: Regulatory and Contractual Framework (Gyldendal, Oslo, 2021) 249–256, 301–311, 471–472.

41 Agreement between Norway and the United Kingdom relating to the transmission of petroleum by pipeline from the Ekofisk field and neighbouring areas to the United Kingdom (Oslo, 22 May 1973, in force on the same date) UNTS 27-05-1974, No. 12678. The agreement has been supplemented with supplementary instruments. Agreement between Norway and Germany relating to the transmission of petroleum by pipeline between the Ekofisk field and neighbouring areas to Germany (Bonn, 16 January 1974, in force 11 August 1975) UNTS 01-08-1979, No. 14870. The agreement has been supplemented with supplementary instruments.

a future transition away from fossil fuels over to renewable energy. This has to do with the assumed importance of critical submarine transport infrastructure for other purposes, including hydrogen or captured carbon dioxide.

The bilateral pipeline agreements have specific dispute resolution mechanisms, including a surveillance commission and arbitration based on strict timelines. Issues involving third States are governed by Article 79 and other applicable provisions on dispute settlement of the LOSC.

Some Reflections in the Guise of a Conclusion

The main proposition in this article is that, under the right conditions, several factors may promote negotiations and subsequent acceptance at political levels of a negotiated result. One such factor may be consolidated methodology promoted by case law that allows for the necessary flexibility in local adaptation, as we have seen emerging in maritime delimitation.

An even more fundamental question asked is whether seeking the justification of judgments is radically different, in reality, from the search for justification of agreements. In the case of maritime delimitation, it is submitted that such a question being at all asked is a tribute to the degree of maturity of this body of law, one achieved through an active interaction of State practice and jurisprudence.

Negotiations may promote or counter systemic coherence of the law of the sea, and thus have a bearing on the question of fragmentation of international law. This speaks in favour of States developing and refining their ‘international legal policy’. This may cover substantive topics, approaches to

43 In the 1973 agreement with the United Kingdom (n 42) for example, see Article 24 on a surveillance commission and Article 25 on arbitration.

44 The specific LOSC legal regime for submarine pipelines protects freedom of communication and energy security. Concerns about subordinating future regulatory needs, particularly in the field of protection of the environment, to protect investment on the basis of arbitration between investors and States, explains why Norway did not ratify the European Energy Charter Treaty (Lisbon, 17 December 1994, in force 16 April 1998, 2983 UNTS 103). At signature, on 16 June 1995, Norway declared, inter alia, that Part V on dispute settlement, and in particular Article 26 concerning settlement of disputes between an investor and a contracting Party, may give rise to problems with regard to Norwegian ratification.

negotiations, and dispute settlement. Such policy may also be reflected in negotiations by particular use of heuristics, semantics and, not least, pragmatics that may be helpful to overcome disagreement. To use less technical language and categorisations from the philosophy of language, it may be useful for States to carefully consider how to time, present and justify contacts, and choice of means and instrument with a negotiating party in a way that will be conducive to overcoming disagreement. This speaks in favour of a prudent choice of vocabulary and a conscious approach to timing and choice of means, but also a careful consideration of whether and how judicial reasoning may have matured to such an extent that it may become a helpful factor in negotiations in the consideration of substance, process, and ultimate justification of results.

The waves broke on the shore.\textsuperscript{46}

\textsuperscript{46} Woolf (n 1), at p. 248, the last sentence of The Waves.