

The Vicissitudes of Dispute Settlement under the Law of the Sea Convention

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Abstract

The *South China Sea Arbitration* raises important questions about the potential operation of the dispute settlement system enshrined in Part xv of the United Nations Convention on the Law of the Sea (LOS). This article explores the scope and different limitations that we are seeing in the interpretation of the LOSC dispute settlement regime with a particular focus on the *South China Sea Arbitration*. This examination questions the contours of the LOSC Part xv dispute settlement regime and its utility in resolving disputes relating to the South China Sea.

Keywords

South China Sea – jurisdiction – dispute settlement – LOSC

* This article was originally based on a conference paper presented in Brussels in March 2015: N Klein, ‘The limitations of UNCLOS Part XV dispute settlement in resolving South China Sea disputes: The South China Sea—An international law perspective conference’ (9 March 2015) *SSRN*, available at <http://ssrn.com/abstract=2730411>. After the decisions on jurisdiction and the merits in the *South China Sea Arbitration* were released, an updated version of the paper was prepared and presented at the Public International Law Colloquium on Maritime Disputes Settlement, 15–16 July 2016, hosted by the Hong Kong International Arbitration Centre and the Chinese Society of International Law: N Klein, ‘Expansions and restrictions in the UNCLOS dispute settlement regime: Lessons from recent decisions’ (2016) 15(2) *Chinese Journal of International Law* 403–415. This article is an expanded and updated version of those earlier conference papers. I acknowledge the insights learned from other participants at these conferences and appreciate the comments of the editors in the preparation of this final article.

You say either and I say either,
 You say neither and I say neither
 Either, either Neither, neither
 Let's call the whole thing off.

You like potato and I like potahto
 You like tomato and I like tomahto
 Potato, potahto, Tomato, tomahto.
 Let's call the whole thing off.¹

Introduction

The interpretation and application of international law are often apparent where there are shared expectations as to what behaviour is required to align with particular norms. We sometimes find that more than one norm has bearing in relation to a particular factual scenario and choices need to be made about whether those norms are being properly interpreted or applied in that context. Is one interpretation more valid than another? Is it a tomato or a tomahto? Are we actually making choices between two different things, or about the same thing but expressed differently? In making that choice, what are the justifications and what are the consequences? The arbitration relating to the South China Sea prompts these sorts of questions when contemplating the role of dispute settlement in the United Nations Convention on the Law of the Sea (LOSC or Convention).² This article examines how the LOSC dispute settlement regime has been interpreted and applied in recent decisions, most particularly in the *South China Sea Arbitration*,³ and queries whether we should have just “call[ed] the whole thing off”.

¹ G Gershwin and I Gershwin, *Let's Call the Whole Thing Off* (1937).

² United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, in force 16 November 1994) 1833 *UNTS* 396 (hereinafter “LOSC”).

³ *South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, Award on Jurisdiction and Admissibility (29 October 2015), PCA Case No. 2013–19, available at <http://www.pcacases.com/web/view/7> (hereinafter “*South China Sea (Jurisdiction)*”); *South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, Award (12 July 2016), PCA Case No. 2013–19, available at <http://www.pcacases.com/web/view/7> (hereinafter “*South China Sea (Final Award)*”).

In doing so, the purpose of this article is to consider vicissitudes in the dispute settlement regime set out in Part xv of the LOSC. When we discuss the vicissitudes of life, there may be reference to a negative or unfortunate turn of events. Yet vicissitudes can simply indicate that there are changes and those alternations or contrasts are not necessarily positive or negative; what is important to recognize is that shifts are occurring. Judicial interpretations of provisions in Part xv are of fundamental importance in the operation of the dispute settlement regime under LOSC. It is in the actual decisions that the contours of the dispute settlement process may be discerned. Whether those provisions are interpreted restrictively or broadly will implicate how states choose to resolve maritime disputes in the future.

To frame our discussion, we must recall that Part xv of the LOSC consists of three sections. Section 1 sets out general obligations to settle disputes peacefully and anticipates that a variety of dispute settlement processes will be available to and used by States Parties. Section 2 provides for resort to compulsory procedures entailing binding decisions and indicates core aspects of the use of international arbitration or adjudication for resolution of LOSC disputes. Section 3 consists of two articles that are intended to reflect limitations on and exceptions to the resort to arbitration or adjudication.

Holding these three sections together is Article 286, which provides:

Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.

This provision requires us to consider: what possible effect Section 1 might have; what are disputes concerning the interpretation or application of the Convention; and how do the exceptions and limitations of Section 3 apply. Each of these dimensions of Part xv were at play in the *South China Sea Arbitration* and I examine them in turn in the sections that follow. This article focuses on particular provisions of each of these Sections, highlighting where we can see the shifting approaches to LOSC dispute settlement. Notably from the *South China Sea* decision, we can discern a trend in favour of broadening the opportunities for a court or tribunal to exercise compulsory jurisdiction under the LOSC. Having examined the different interpretations of diverse provisions in Part xv of the LOSC, I conclude by considering the relevance of this approach for the broader dispute in the South China Sea.

Section 1 of Part xv

Article 281

The LOSC dispute settlement regime sits within our general requirements to settle disputes peacefully under international law. Section 1 of Part xv recognizes that states have a wide choice of means in determining how they will resolve disputes concerning the law of the sea. Section 1 therefore acknowledges the existence of other dispute settlement techniques that states may use, including the dispute settlement choices that may be enshrined in other treaties relating to the law of the sea. Under Section 1 of Part xv of the LOSC, these alternative means are acceptable as viable alternatives to adjudication or arbitration under Section 2 of Part xv.

One such provision allowing for alternative mechanisms is Article 281, entitled 'Procedure where no settlement has been reached by the parties'. Article 281(1) provides:

If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.

This article acknowledges the common situation of states accepting alternative methods of dispute settlement over maritime issues in their bilateral and multilateral relations, and sets out the circumstances for where these methods should prevail over the compulsory procedures available in the LOSC. Some multilateral maritime agreements have referred disputes to the LOSC dispute settlement regime.⁴ The most notable example in this regard is the 1995 Fish Stocks Agreement.⁵ Regional fisheries agreements more commonly have their

4 International Tribunal for the Law of the Sea, 'International agreements conferring jurisdiction on the Tribunal', available at <https://www.itlos.org/jurisdiction/international-agreements-conferring-jurisdiction-on-the-tribunal/>.

5 United Nations 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 (New York, 4 December 1995, in force 11 December 2001) 2167 *UNTS* 3.

own dispute settlement regimes,⁶ and bilateral agreements may include dispute settlement clauses intended to capture the parties' preferred means of dispute settlement to resolve the law of the sea disputes arising under that treaty.

The parameters of Article 281 were tested in *Southern Bluefin Tuna*, where Australia and New Zealand instituted proceedings against Japan under the LOSC, challenging the legality of Japan's experimental fishing program.⁷ Although Australia, New Zealand and Japan were managing the southern bluefin tuna fisheries under a trilateral agreement,⁸ Australia and New Zealand claimed that Japan's actions also violated provisions of the LOSC. The Arbitral Tribunal held that Australia and New Zealand were precluded from bringing claims against Japan because the trilateral agreement, the 1993 Convention for the Conservation of Southern Bluefin Tuna, had its own dispute settlement clause that fell within the terms of Article 281. I have previously argued—and maintain—that the decision in *Southern Bluefin Tuna* was correct.⁹ However, the decision has been subjected to significant academic criticism.¹⁰

Commentators have suggested that *Barbados/Trinidad and Tobago* moved away from or limited the position espoused in *Southern Bluefin Tuna*,¹¹ but the wording of the judgment relied on in this regard is far from decisive and does not clearly indicate that Article 281 will not prevail over the procedure otherwise available in Part xv of LOSC. The relevant passage from the judgment reads as follows:

Article 281 applies where Parties 'have agreed' to seek settlement of their dispute by a peaceful means of their own choice. [...] it would appear

6 See e.g. Convention for the Conservation of Southern Bluefin Tuna (Canberra, 10 May 1993, in force 20 May 1994) 1819 *UNTS* 359, at Art. 16; Agreement for the Establishment of the Indian Ocean Tuna Commission (Rome, 25 November 1993, in force 27 March 1996) 1927 *UNTS* 329, at Art. XXIII.

7 Australia and New Zealand initially sought provisional measures before the International Tribunal for the Law of the Sea (ITLOS). *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), Provisional Measures*, Order (27 August 1999) 38 *ILM* 1624.

8 Convention for the Conservation of Southern Bluefin Tuna (Canberra, 10 May 1993, in force 20 May 1994) 1819 *UNTS* 359.

9 N Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge University Press, Cambridge, 2005) 35–43.

10 See e.g. IV Karaman, *Dispute Resolution in the Law of the Sea* (Brill, Leiden, 2012) 260 (and sources cited therein).

11 See e.g. B Kwiatkowska, 'The 2006 *Barbados/Trinidad and Tobago* Award: A landmark in compulsory jurisdiction and equitable boundary delimitation' (2007) 22(1) *International Journal of Marine and Coastal Law* 7–60, at p. 27.

that Article 281 is intended primarily to *cover the situation where the Parties have come to an ad hoc agreement* as to the means to be adopted to settle the particular dispute which has arisen. Where they have done so, then their obligation to follow the procedures provided for in Part xv will arise where no settlement has been reached through recourse to the agreed means and where their agreement does not exclude any further procedure.¹²

The reasoning of the *Barbados/Trinidad and Tobago* Tribunal to limit the operation of Article 281 to apply only to *ad hoc* agreements appears to run against the explicit wording of that provision. Moreover, it is unclear what a court or tribunal may consider to be an ‘*ad hoc*’ dispute settlement agreement. Seemingly any bilateral agreement adopted to resolve a specific issue may be classed as ‘*ad hoc*’.

These points of difficulty from *Barbados/Trinidad and Tobago* remain unresolved for the moment. Instead, the focus from the decision on Article 281 in *Southern Bluefin Tuna* has been on whether there must be an explicit exclusion of other dispute settlement procedures within the alternative dispute settlement regime for Article 281 to apply. The *Southern Bluefin Tuna* Arbitral Tribunal determined that an implicit exclusion of other dispute settlement procedures is sufficient,¹³ whereas commentators and the dissenting judgment of Judge Kenneth Keith in *Southern Bluefin Tuna* would require an explicit exclusion.¹⁴

In the *South China Sea Arbitration*, this issue arose because China had argued that the Philippines was required to negotiate the dispute existing between the parties, and this obligation arose from different bilateral and multilateral agreements. Rather than being bound potentially by any dispute settlement regime enshrined in a binding agreement between the Philippines and China, the Philippines urged the Tribunal to adopt the dissenting view of Judge Kenneth Keith and focus on explicit exclusions of the LOSC dispute settlement regime.¹⁵ The Tribunal considered the majority approach of *Southern Bluefin Tuna* and the dissent of Judge Kenneth Keith, concluding that “the better view is that

12 *Barbados/Trinidad and Tobago Arbitration*, Award (11 April 2006) 45 *ILM* 800, at para. 200 (emphasis added).

13 *Southern Bluefin Tuna Cases (Australia v. Japan; New Zealand v. Japan)*, Award on Jurisdiction and Admissibility (4 August 2000) 39 *ILM* 1359, at para. 57.

14 *Ibid.*, at paras. 13 and 17–19 (Separate Opinion of Justice Keith).

15 *South China Sea (Jurisdiction)* (n 3), at para. 210.

Article 281 requires some clear statement of exclusion of further procedures”.¹⁶ The Tribunal remarks that this “requires an ‘opting out’ of Part xv procedures”.¹⁷

On this basis, seemingly any treaty relating to ocean matters adopted post 1982, or at least subsequent to the entry into force of the LOSC in 1994, must have an explicit exclusion of LOSC dispute settlement (an ‘opt out’) as part of its dispute settlement provisions. If it does not, the parties’ preferred choice of dispute settlement under that treaty will not be upheld as prevailing by a court or tribunal constituted under the LOSC. The consent to specific dispute settlement procedures in these other treaties thus runs the risk of being negated unless the negotiators had the foresight to exclude explicitly resort to the LOSC at the time of drafting. If states do not want to find their law of the sea disputes that arise under a bilateral or regional agreement being referred to compulsory procedures entailing binding decisions under the LOSC, there may now be a need for an additional agreement to clarify the exact preference for dispute settlement beyond what has already been included in a treaty’s dispute settlement clause.

How did the Tribunal reach this conclusion, contrary to the finding in *Southern Bluefin Tuna*? The *South China Sea* Tribunal states that it “shares the views of ITLOS in its provisional measures orders in the *Southern Bluefin Tuna* and *MOX Plant* cases”.¹⁸ However, the International Tribunal for the Law of the Sea (ITLOS) did not mention Article 281 at all in its provisional measures order in *MOX Plant*, though two of the separate judgments did.¹⁹ ITLOS made a passing reference to Article 281 in listing one of Japan’s arguments in its provisional measures order for *Southern Bluefin Tuna*,²⁰ but the Tribunal’s Order does not otherwise set out any discussion of the meaning of Article 281. There do not appear to be any views to share with ITLOS in this regard, contrary to what was stated in *South China Sea*.

There are now two conflicting decisions on the interpretation of Article 281. The *South China Sea* Tribunal’s judgment reflects an affirmation of the view that an explicit exclusion of further procedures, indeed perhaps an explicit exclusion of LOSC procedures, is necessary for Article 281 to prevent the exercise

16 *Ibid.*, at para. 223.

17 *Ibid.*, at para. 224.

18 *Ibid.*, at para. 223.

19 *MOX Plant Case (Ireland v. UK)*, *Provisional Measures*, Order (3 December 2001) (Separate Opinion of Vice-President Nelson and Separate Opinion of Judge Treves), available at <https://www.itlos.org/en/cases/list-of-cases/case-no-10/>.

20 *Southern Bluefin Tuna* (n 7), at para. 56.

of jurisdiction. This decision has the effect of broadening the availability and scope of compulsory jurisdiction under the LOSC.

Further interpretation of Article 281 has been set out in a recent decision on jurisdiction and competence by a Conciliation Commission constituted under Annex V of the LOSC.²¹ In 2016, Timor-Leste commenced compulsory conciliation proceedings against Australia in an attempt to resolve their maritime boundary dispute in the Timor Sea. The Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS Treaty) between Australia and Timor-Leste placed a moratorium on maritime boundary delimitation and in doing so, the parties agreed in Article 4:

4. Notwithstanding any other bilateral or multilateral agreement binding on the Parties, or any declaration made by either Party pursuant to any such agreement, neither Party shall commence or pursue any proceedings against the other Party before any court, tribunal or other dispute settlement mechanism that would raise or result in, either directly or indirectly, issues or findings of relevance to maritime boundaries or delimitation in the Timor Sea.

5. Any court, tribunal or other dispute settlement body hearing proceedings involving the Parties shall not consider, make comment on, nor make findings that would raise or result in, either directly or indirectly, issues or findings of relevance to maritime boundaries or delimitation in the Timor Sea. Any such comment or finding shall be of no effect, and shall not be relied upon, or cited, by the Parties at any time.²²

For dispute settlement, Article 11 provides: “Any disputes about the interpretation or application of this Treaty shall be settled by consultation or negotiation”. The validity of the CMATS Treaty was contested between the parties.²³

21 *Timor-Leste v. Australia Conciliation*, Decision on Australia’s Objections to Competence (19 September 2016), available at <https://pcacases.com/web/view/132> (hereinafter “*Timor-Leste Conciliation*”).

22 Treaty on Certain Maritime Arrangements in the Timor Sea (Sydney, 12 January 2006, in force 23 February 2007) 2007 *ATS* 12.

23 It may be noted that in a separate arbitration, Timor-Leste challenged the validity of the CMATS Treaty. See DK Anton, ‘The Timor Sea Treaty Arbitration: Timor-Leste challenges Australian espionage and seizure of documents’ *ASIL Insights* (26 February 2014), available at <https://www.asil.org/insights/volume/18/issue/6/timor-sea-treaty-arbitration-timor-leste-challenges-australian-espionage>. In the context of the conciliation proceedings, Timor-Leste subsequently withdrew from the CMATS Treaty and terminated the arbitrations against Australia. Ben Doherty, ‘Timor-Leste

In the first phase of the conciliation process, the Commission considered if the CMATS Treaty constituted an agreement under Article 281 “to seek settlement of the dispute by a peaceful means of their own choice”.²⁴ The Commission characterized the CMATS Treaty as “an agreement *not* to seek settlement of the Parties’ dispute over maritime boundaries for the duration of the moratorium”.²⁵ As such, an agreement not to pursue dispute settlement for the stated period of time, according to the Commission, was not a dispute settlement means of the parties’ own choice. There is no explanation as to why a bilateral agreement choosing very explicitly to resolve the maritime boundary dispute at a later point in time was not a valid choice of dispute settlement for the purposes of Article 281. The curious outcome that resulted was that the engagement of the parties in the conciliation process under the LOSC placed them in violation of commitments under the CMATS Treaty. Instead, we have been presented with another scenario where Article 281 did not apply and the LOSC dispute settlement prevailed.

This approach to Article 281 runs the risk of denuding agreed dispute settlement provisions in many oceans-related treaties of proper effect. But it does allow scope for more cases to be resolved under the compulsory procedures available in the LOSC dispute settlement regime instead.

Article 283

Before states may institute arbitration or adjudication under the LOSC, Section 1 of Part XV also requires in Article 283 that states proceed to an exchange of views when a dispute concerning the interpretation or application of the LOSC arises. More precisely, Article 283(1) reads:

When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.

As Article 283 specifically references a dispute concerning the interpretation or application of the LOSC, an argument could be raised that the LOSC must be invoked during the exchange of views for this requirement to be satisfied.

drops espionage claims against Australia in maritime border dispute’, *The Guardian*, 24 January 2017, available at <https://www.theguardian.com/world/2017/jan/24/timor-leste-drops-espionage-claims-against-australia-in-maritime-border-dispute>.

²⁴ *Timor-Leste Conciliation* (n 21), at para. 61.

²⁵ *Ibid.*, at para. 62 (emphasis in original).

The precise timing to invoke the LOSC had not been considered as relevant in earlier cases,²⁶ although the arguments on this point have suggested that there was a threshold that required referencing LOSC provisions in the exchange of views.

Rather than focus on the subject matter of the dispute, the *Chagos Archipelago* Tribunal placed a different emphasis on the interpretation of Article 283. The Tribunal in that case reviewed the wording of Article 283 and concluded the obligation is one to exchange views regarding the means for resolving the dispute, not an obligation to negotiate the substance of the dispute.²⁷ This approach would not require the parties to specify what dispute concerning the interpretation or application of the LOSC was at issue but would entail discussion as to how the dispute was to be settled between the parties. No “undue formalism as to the manner and precision” of the exchange of views was required.²⁸

The Arbitral Tribunal in *Arctic Sunrise* also followed this approach,²⁹ and the *South China Sea* Tribunal reaffirmed this interpretation.³⁰ The *Arctic Sunrise* Arbitral Tribunal further indicated that “Article 283(1) does not require the Parties to engage in negotiations regarding the subject matter of the dispute”.³¹

The threshold established under Article 283 is low on any interpretation that we now have of the provision. States typically discuss how a dispute should be resolved in the context of negotiations or discussions over a point of controversy. As to when or whether specific provisions of LOSC provisions must be referenced, the reality of international practice is that the LOSC will often be cited in the context of affirming a state’s legal position. It would normally be expected that states refer to the means of resolving disputes, as well as the substance of the dispute, when exchanging views on an issue that has arisen between them.³² Our progressive understanding of Article 283 indicates that the requirement to exchange views will not usually prove too difficult for

26 See Klein (n 9), at p. 64 (referring to *Southern Bluefin Tuna* and *MOX Plant* on this point).

27 *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award (18 March 2015), at para. 378, available at <https://www.pcacases.com/web/view/11> (hereinafter “*Chagos Archipelago*”).

28 *Ibid.*, at para. 382.

29 *Arctic Sunrise Arbitration (Netherlands v. Russia)*, Award on the Merits (14 August 2015), at paras. 149–156, available at <http://www.pcacases.com/web/view/21>.

30 *South China Sea (Jurisdiction)* (n 3), at para. 333.

31 *Ibid.*, at para. 151.

32 *Ibid.*, at para. 332.

a state to establish once it reaches the point that it decides to institute arbitration or adjudication.³³

In sum, the recent interpretations of provisions in Section 1 of Part XV would see a potential expansion of jurisdiction: opening the doors to disputes that may have otherwise been resolved by means or procedures other than those available under the LOSC. How we have understood provisions like Articles 281 and 283 has shifted in more recent decisions, with the swing in favour of allowing more disputes to be resolved under the compulsory procedures available in the LOSC.

Section 2, Article 288: Identifying and Characterising a Dispute

Establishing that a dispute falls within the subject matter jurisdiction of a court or tribunal constituted under the LOSC entails an assessment of whether the dispute concerns “the interpretation or application” of the LOSC, as well as whether it falls within an exception to the LOSC dispute settlement procedure. The characterization of the dispute will naturally depend on the particular aims of the states concerned. That is, does the government want the dispute resolved through arbitration or adjudication under the LOSC or not? The lawyers engaged in the dispute will then frame the case accordingly. As Boyle rightly noted: “[E]verything turns in practice not on what each case involves but on how the issues are formulated. Formulate them wrongly and the case falls outside compulsory jurisdiction. Formulate the same case differently and it falls inside”.³⁴ It necessarily falls to judges to make the determination as to whether there is a dispute concerning the interpretation or application of the Convention.³⁵

The International Court of Justice (ICJ) has had cause to examine the subject matter of disputes before it in order to determine whether a dispute falls

33 Talmon goes so far as to suggest that it seems ‘highly unlikely’ that Article 283 will ever prevent recourse to compulsory dispute settlement procedures. See S Talmon, ‘The Chagos Marine Protected Area Arbitration: Expansion of the jurisdiction of UNCLOS Part XV courts and tribunals’ (2016) 65(4) *International and Comparative Law Quarterly* 927–951.

34 AE Boyle, ‘Dispute settlement and the Law of the Sea Convention: Problems of fragmentation and jurisdiction’ (1997) 46(1) *International and Comparative Law Quarterly* 37–54, at p. 38.

35 LOSC (n 2), at Art. 288(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”.

within its jurisdiction.³⁶ The ICJ summarized its approach from previous cases in its recent decision on the *Obligation to Negotiate Access to the Pacific Ocean*.³⁷ In that case, Chile had argued that the subject matter of Bolivia's claim was "territorial sovereignty and the character of Bolivia's access to the Pacific Ocean".³⁸ Chile considered that Bolivia's Application obfuscated the true subject matter of the claim.³⁹ Bolivia contended that the case was a distinct matter concerning an obligation to negotiate sovereign access to the sea.⁴⁰

In resolving these claims, the ICJ stated that it must determine the subject matter of the dispute on an objective basis, taking into account the positions and pleadings of both parties, in order to isolate the real issue in the case.⁴¹ Yet in doing so, there is an emphasis on how the applicant has formulated the dispute and what facts the applicant has identified as the basis of its claim.⁴² The ICJ stated:

[...] while it may be assumed that sovereign access to the Pacific Ocean is, in the end, Bolivia's goal, a distinction must be drawn between that goal and the related but distinct dispute presented by the Application, namely, whether Chile has an obligation to negotiate Bolivia's sovereign access to the sea and, if such an obligation exists, whether Chile has breached it. The Application does not ask the Court to adjudge and declare that Bolivia has a right to sovereign access.⁴³

The Court therefore was willing to proceed on the narrow and precise question presented by Bolivia irrespective of the wider implications of the dispute.

In the *Chagos Archipelago*, the Arbitral Tribunal had to determine the subject matter of the dispute in order to ensure that it was resolving a dispute

36 The Court's Statute and its Rules require applicants to specify the "precise nature of the claim" in the applications instituting proceedings. Statute of the International Court of Justice (San Francisco, 26 June 1945, in force 24 October 1945) 59 *Stat.* 1031, at Art. 40(1); Rules of the International Court of Justice (14 April 1978, in force 1 July 1978), at Art. 38(1), available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=3&>

37 *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Preliminary Objection, Judgment* (24 September 2015), available at <http://www.icj-cij.org/docket/files/153/18746.pdf>.

38 *Ibid.*, at para. 28.

39 *Ibid.*, at para. 32.

40 *Ibid.*, at para. 30.

41 *Ibid.*, at para. 26.

42 *Ibid.*

43 *Ibid.*, at para. 32.

concerning the interpretation or application of the LOSC. In an earlier paper,⁴⁴ I had considered the *Chagos Archipelago* case to be an unusual one for submission under the LOSC because central to the case was the question of whether the United Kingdom could be viewed as the relevant coastal state for establishing a Marine Protected Area.⁴⁵ The United Kingdom rightly criticised the approach by Mauritius, arguing the claim sought to contest the question of territorial sovereignty.

The *Chagos Archipelago* Tribunal acknowledged the earlier jurisprudence of the ICJ, but there was less emphasis on the view of the applicant in its approach.⁴⁶ Instead, the Tribunal stated:

For the purpose of characterizing the Parties' dispute, however, the Tribunal must evaluate where the relative weight of the dispute lies. Is the Parties' dispute primarily a matter of the interpretation and application of the term 'coastal State', with the issue of sovereignty forming one aspect of a larger question? Or does the Parties' dispute primarily concern sovereignty, with the United Kingdom's actions as a 'coastal State' merely representing a manifestation of that dispute? In the Tribunal's view, this question all but answers itself.⁴⁷

The Tribunal was quite clear in ascertaining that two of the submissions by Mauritius that queried whether the United Kingdom had acted lawfully as a "coastal State" went to a question of territorial sovereignty.⁴⁸

Having characterized the dispute as such, the *Chagos Archipelago* Tribunal then examined whether such a dispute fell within its jurisdiction as a dispute concerning the interpretation or application of the LOSC. The majority of the Tribunal concluded that such a determination necessarily concerned the ownership rights over the land generating the maritime zone and *prima facie* was outside the scope of the LOSC.⁴⁹ As a result, the dispute was not one

44 N Klein, 'The effectiveness of the UNCLOS dispute settlement regime: Reaching for the stars?' (2014) 108 *Proceedings of the Annual Meeting (American Society of International Law)* 359–364.

45 P Prows, 'Mauritius brings UNCLOS arbitration against the United Kingdom over the Chagos Archipelago' (5 April 2011) *ASIL Insight*, available at <http://www.asil.org/insights/volume/15/issue/8/mauritius-brings-UNCLOS-arbitration-against-united-kingdom-over-chagos>.

46 *Chagos Archipelago* (n 27), at para. 229.

47 *Ibid.*, at para. 211.

48 *Ibid.*, at para. 212.

49 *Ibid.*, at paras. 207–212 and 229–230.

concerning the interpretation or application of the LOSC and the Tribunal did not have jurisdiction to decide Mauritius' claims on this point.

The minority in *Chagos Archipelago* disagreed on this argument relating to the characterization of the dispute, but instead took the position that the dispute could not be qualified as one about the sovereignty of the Chagos Archipelago.⁵⁰ Judges Kateka and Wolfrum adhered more closely to the approach of the ICJ in this regard, and opted to focus on the wording used in the submission by Mauritius. On this basis, the minority judges concluded:

The differing views on the coastal State are the dispute before the Tribunal and the issue of sovereignty over the Chagos Archipelago is merely an element in the reasoning of Mauritius and not to be decided by the Tribunal.⁵¹

Although the minority judges took the position that the sovereignty issue did not have to be decided, they nonetheless proceeded to assess whether the excision of the Chagos Archipelago at the time of Mauritian independence was lawful and concluded it was not.⁵² To reach such a conclusion appears to cut against their initial characterization of the dispute, including that sovereignty did not have to be decided in the course of resolving Mauritian claims.

The question of whether the dispute concerned contested territorial sovereignty or was one concerning the interpretation or application of the LOSC was considered in the *South China Sea Arbitration*. China considered that the case submitted by the Philippines fundamentally concerned a question of territorial sovereignty and hence was outside the scope of LOSC dispute settlement entirely.⁵³ The Philippines instead focused one of the core aspects of its case on different provisions of the LOSC and followed an approach of seeking determinations of maritime entitlements to particular marine features, which can be done in the absence of knowledge of the ownership of those features. The Philippines dismissed the relevance of sovereignty to any consideration of what the maritime entitlement of some land might be. They did so on the basis that the status of a particular feature as a rock or island does not alter

⁵⁰ *Ibid.*, at para. 9 (Dissenting and Concurring Opinion of Judges Kateka and Wolfrum).

⁵¹ *Ibid.*, at para. 17 (Dissenting and Concurring Opinion of Judges Kateka and Wolfrum).

⁵² *Ibid.*, at paras. 70–80 (Dissenting and Concurring Opinion of Judges Kateka and Wolfrum).

⁵³ People's Republic of China, 'Position paper of the Government of the People's Republic of China on the matter of jurisdiction in the South China Sea Arbitration initiated by the Republic of the Philippines' (7 December 2014), at paras. 4–29, available at http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml (hereinafter "*China's Position Paper*").

depending on which state might be sovereign over that feature but is instead an objective determination.⁵⁴

I find that the arguments of the Philippines in this regard run against the fundamental nature of maritime space. We have long operated with the principle that land dominates the sea,⁵⁵ and the ICJ has recognised this proposition on a variety of occasions.⁵⁶ It may be suggested that the consequence of the land dominating the sea is that all that must be demonstrated is that there is land for there to be maritime entitlements. This approach appears to have been endorsed by the Philippines.

But what are the maritime entitlements? They are rights of sovereignty, of sovereign rights to the marine resources, and of jurisdiction over activities occurring in designated marine areas. These are distinct rights enshrined in Article 2 of the LOSC, which establishes the territorial sea, or in Article 56 of the LOSC, establishing the EEZ. We should also recall the important status of the continental shelf, which exists *ipso facto* and *ab initio* appertains to the coastal state. These entitlements belong to a state, a political entity, and have no relevance to an abstract physical land mass.

That maritime entitlements accrue to a state is an inexorable consequence of the nature of the entitlement. Indeed, each of the maritime entitlements in question is explicitly tied to the state. If we take the language of Article 2(1) of the LOSC:

The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea (emphasis added).

This provision clearly anticipates that sovereignty, as the maritime entitlement of a particular land mass, is that belonging to the coastal state.

The contiguous zone is inherently linked to a coastal state, as the powers granted to the coastal state therein reference ‘a zone contiguous to its territorial sea’.⁵⁷ It is a zone to be measured from the same baselines used to draw the

54 *South China Sea (Jurisdiction)* (n 3), at para. 144.

55 See e.g. *Grisbådarna (Norway v. Sweden)*, Award (23 October 1909) 11 RIAA 147.

56 See e.g. *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* [1969] ICJ Rep 3, pp. 51–52; *Territorial and Maritime Dispute (Nicaragua v. Colombia)* [2012] ICJ Rep 624, p. 674; *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* [2009] ICJ Rep 61, p. 89.

57 LOSC (n 2), at Art. 33(1) (emphasis added).

breadth of the territorial sea.⁵⁸ The entitlement to such a zone allows a coastal state to exercise rights to prevent and punish specific acts that are relevant to protecting aspects of the security of that state.

Article 55 defines the EEZ as an area adjacent to the territorial sea, and in which the coastal state and other states have specified rights and obligations. The “coastal State” has sovereign rights and jurisdiction in accordance with Article 56; hence the entitlements are directly linked to ownership of the land by a state. The definition of the continental shelf immediately identifies the “continental shelf of a coastal State”.⁵⁹ What is the point of an entitlement if we don’t know who is entitled?

But the Philippines would have us focus on the interpretation and application of Article 121 regarding the regime of islands and Article 13 on low-tide elevations. Could these provisions be assessed in isolation and applied in relation to identified marine features? In relation to Article 121, we are provided with a basic definition of an island and then once classified as an island, “the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory”.⁶⁰ As already demonstrated, each entitlement to those maritime zones is linked to the existence of a coastal state; that is, a relevant political entity capable of exercising the rights and obligations that flow from the maritime entitlements.

Article 121(3), which defines the negative entitlement of rocks (in that they are not entitled to a continental shelf or EEZ, but presumably still to a territorial sea), does not provide such a clear linkage between a coastal state and the maritime entitlements accruing to that state as may be seen in the other LOSC provisions discussed. Equally, Article 13 on low-tide elevations references such features being used as a basepoint for measuring a territorial sea, without explicitly linking that territorial sea to the coastal state in that specific provision. Yet it would be quite odd to suggest that a rock can be so classified or a low-tide elevation identified, and they are thereby deemed to be a land mass giving rise to sovereignty over maritime space without knowing which political entity is entitled to that sovereignty.

This emphasis on land is unremarkable when it is recalled that our conceptual framework in international law is usually territory-based. The very concept of sovereignty “protects the plenary jurisdiction of that sovereign State

58 *Ibid.*, at Art. 33(2).

59 *Ibid.*, at Art. 77 (emphasis added).

60 *Ibid.*, at Art. 121(2).

over its territory and the people on it”.⁶¹ Land is of prime value, because it is an area that people can inhabit and over which states can exert physical control. Land is the predicate for maritime rights—hence our distinction between coastal states, land-locked states and geographically disadvantaged states. If we did not assume that states were entitled to maritime space extending from their coasts, then very different legal regimes would have developed to better account for the rights of states that lack coasts and immediate access to the ocean. Certainly, this approach is one countenanced by the ICJ, which “has made clear that maritime rights derive from the coastal State’s sovereignty over the land, a principle which can be summarized as ‘the land dominates the sea’”.⁶²

The *South China Sea* Tribunal considered that it had to ensure there were disputes in existence between the parties and that those disputes concerned the interpretation and application of the LOSC.⁶³ An objective approach was called for,⁶⁴ even while acknowledging that the dispute was multifaceted and not all aspects of the dispute were before the Tribunal.⁶⁵ The Tribunal “does not accept [...] that it follows from the existence of a dispute over sovereignty that sovereignty is also the appropriate characterisation of the claims the Philippines has submitted in these proceedings”.⁶⁶ The Tribunal appears to have been persuaded in the characterization of the dispute by the fact that its decisions did not require a determination of sovereignty as a prerequisite to the resolution of the Philippines’ claims nor did it consider that the Philippines was endeavouring to advance its own position in the sovereignty dispute.⁶⁷ The *South China Sea* case could be distinguished from the *Chagos Archipelago Arbitration* as the latter case concerned implicit decisions on sovereignty whereas the Philippines in the former case was not even seeking such an implicit determination.⁶⁸

I would instead suggest that it is imperative for any court or tribunal in deciding whether it has jurisdiction under Article 288 not to examine provisions

61 S Besson, ‘Sovereignty’ in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, Oxford, 2011), available at <http://opil.ouplaw.com/home/epil>. As Besson explains, sovereignty as a concept is multifaceted and contextual.

62 *North Sea Continental Shelf* (n 56), at p. 51, para. 96; *Aegean Sea Continental Shelf (Greece v. Turkey)* [1978] ICJ Rep 3, at p. 36, para. 86.

63 *South China Sea (Jurisdiction)* (n 3), at para. 148.

64 *Ibid.*, at para. 150.

65 *Ibid.*, at para. 152.

66 *Ibid.*

67 *Ibid.*, at para. 153.

68 *Ibid.*

such as Article 121(3) or Article 13 of the LOSC in isolation but to recall that these provisions are very much tied in to a larger schema that divides maritime space into various zones as measured from terrestrial features, and accords rights and obligations to states by virtue of the state's ownership of the relevant land mass that generates those maritime zones. Interpretations as to whether a particular feature is a rock or an island, or a low-tide elevation attached to a continental shelf necessarily link to other provisions of the Convention. When these linkages are recognized, it is evident that the undetermined sovereignty is a critical issue and that maritime entitlements cannot (or should not) be articulated when there is uncertainty as to which state those entitlements accrue.

The dispute related to contested maritime features therefore does indeed go beyond any interpretation or application of the LOSC because of the undetermined sovereignty over these features. The LOSC does not contain provisions on unresolved questions of territorial sovereignty.⁶⁹ When the interpretations are placed in their complete contextual setting, the central dispute cannot be seen as one uniquely relating to the interpretation or application of the LOSC. A blinkered examination of provisions in dispute under the LOSC has the potential to expand what disputes are resolved within the compulsory procedures of the LOSC dispute settlement regime.

Section 3, Article 297

Fisheries Disputes

The limitations and exceptions in Section 3 of Part XV of the LOSC that are set out in Article 297 indicate the disputes that are excluded from arbitration or adjudication, as well as which disputes relating to sovereign rights are within jurisdiction for arbitration or adjudication. As discussed in *Chagos Archipelago*,

69 With the exception of excluding the possibility of compulsory conciliation of maritime boundary delimitation disputes where a state has made a declaration excluding delimitation disputes from the procedures available in Section 2 of Part XV. LOSC (n 2), at Art. 298(1)(a), which excludes "disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles, provided that a State having made such a declaration shall, when such a dispute arises subsequent to the entry into force of this Convention and where no agreement within a reasonable period of time is reached in negotiations between the parties, at the request of any party to the dispute, accept submission of the matter to conciliation under Annex V, section 2; and provided further that any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission".

Article 297 reaffirms the grant of jurisdiction in Article 288(1) of the LOSC but does carve out particular exceptions from compulsory procedures.⁷⁰

One such exception concerns fishing in the EEZ. Article 297(3) provides for compulsory procedures entailing binding decisions to be available for disputes relating to fishing “except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise”. This provision *prima facie* denies the availability of adjudication or arbitration to challenge any actions of the coastal state in relation to fishing in its EEZ.

In the *Chagos Archipelago* case, the United Kingdom asserted that the Marine Protected Area (MPA) around the Chagos Archipelago was a measure concerning “sovereign rights with respect to living resources”. The UK emphasized that the MPA “is properly characterized as a fisheries measure”,⁷¹ and as such was to be excluded from jurisdiction under Article 297(3)(a). Mauritius considered that even if the MPA was so understood, the limitation from Article 297(3) would not apply because that provision insulated the coastal state’s actions from compulsory dispute settlement procedures but would not exclude the consideration of the rights of other states in relation to fishing in the EEZ.⁷²

The Tribunal did not accept the British characterization of the MPA as “solely a measure relating to fisheries”.⁷³ There was considerable evidence before the Tribunal, including many government pronouncements, which demonstrated that the purposes of the MPA went well beyond fisheries management.⁷⁴ Nonetheless, the Tribunal still had to consider whether a dispute about fishing rights, which was protected under an agreement known as the Lancaster House Undertakings, was justiciable in light of the exclusion in Article 297(3) (a). In this regard, the Tribunal rejected the submission by Mauritius that it was possible to consider a dispute relating to the fishing rights of other states within the EEZ as distinct from the rights of the coastal state in the EEZ, so that the former would fall within jurisdiction whereas a dispute on the latter would be excluded. The Tribunal remarked:

In nearly any imaginable situation, a dispute will exist precisely because the coastal State’s conception of its sovereign rights conflicts with the

70 See *Chagos Archipelago* (n 27), at para. 316.

71 *Ibid.*, at para. 245.

72 *Ibid.*, at para. 250.

73 *Ibid.*, at para. 286.

74 *Ibid.*, at paras. 286–290.

other party's understanding of its own rights. In short, the two are intertwined, and a dispute regarding Mauritius' claimed fishing rights in the exclusive economic zone cannot be separated from the exercise of the United Kingdom's sovereign rights with respect to living resources.⁷⁵

The approach of the *Chagos Archipelago* Tribunal would therefore maintain the strong position that any disputes relating to fishing activities occurring in the EEZ are excluded from arbitration or adjudication under the LOSC.

However, doubt seems to have been cast on the inter-connected nature of sovereign rights relating to fishing in the EEZ in the *South China Sea* Final Award. The Philippines challenged China's fishing activities in an area determined in the Award to be part of the Philippines' EEZ. Seemingly, a challenge to China's assertion of fishing rights against the fishing rights claimed by the Philippines would constitute a dispute relating to fishing in the EEZ. Yet, the Philippines argued that Article 297(3) did not apply because that provision only excluded disputes relating to the coastal state's actions. As China was not considered the coastal state, no examination of the coastal state's exercise of sovereign rights over fish was required.⁷⁶ It could be expected that if a third state has acted inconsistently with the fisheries requirements of a coastal state then the dispute may certainly concern the coastal state's decision-making over fisheries in the EEZ.

As with *Chagos Archipelago*, an argument could be raised that these issues are once again intertwined and thus fall within the exclusion of Article 297(3). Yet a difference appears to exist between the two cases, albeit quite a subtle one. In *Chagos Archipelago*, Mauritius was complaining about the lack of due regard shown by the coastal state for other users. In *South China Sea*, the Tribunal noted that the *Chagos Archipelago* case therefore concerned a "reversed situation [to the one before the Tribunal] of the regard owed by the coastal State to the rights and duties of other States within its exclusive economic zone".⁷⁷ The Tribunal considered that Article 297(3)(a) limited access to compulsory dispute settlement

[...] where a claim is brought against a State's exercise of its sovereign rights in respect of living resources in its *own* exclusive economic zone.

75 *Ibid.*, at para. 297.

76 *South China Sea (Final Award)* (n 3), at para. 682.

77 *Ibid.*, at para. 742.

These provisions do not apply where a State is alleged to have violated the Convention in respect of the exclusive economic zone of another State.⁷⁸

As a consequence of these decisions, coastal state rights over fisheries are not only firmly insulated from third-party review under Article 297(3), but they are further protected—if not empowered—by still allowing the coastal state recourse to arbitration and adjudication if necessary to challenge any unlawful fishing activity by a third state in its EEZ. In other words, coastal state authority over fishing in its EEZ is thus virtually unreviewable,⁷⁹ but review can be availed of by the coastal state if it wishes to challenge the fishing activities of other states within its EEZ. At the same time, the exception in Article 297(3), which seemed to exclude any and all disputes concerning fishing in the EEZ from arbitration or adjudication, has been narrowed in *South China Sea*.

Marine Environmental Disputes

Another provision in Article 297 that has recently been assessed by arbitral tribunals is paragraph (1)(c), which addresses disputes relating to the protection and preservation of the marine environment. This provision affirms the authority of courts or tribunals to examine such disputes but prompts questions as to what disputes concerning the marine environment may be outside the scope of compulsory dispute settlement under the LOSC.

In *Chagos Archipelago*, the United Kingdom sought to establish a restrictive reading of Article 297(1)(c) in the event the Tribunal did not accept its argument that the MPA in question constituted a fisheries measure excluded from compulsory jurisdiction under Article 297(3). Mauritius took the position that the MPA was an environmental measure, and as such it was undoubtedly within the jurisdiction of the Tribunal in accordance with Article 297(1)(c). According to this provision, the Tribunal may exercise jurisdiction:

when it is alleged that a coastal State has acted in contravention of specified international rules and standards for the protection and preservation of the marine environment which are applicable to the coastal State and

⁷⁸ *Ibid.*, at para. 695.

⁷⁹ Article 297 does allow for the possibility of conciliation but the factual predicate to allow for this process would be difficult to achieve. See Klein (n 9), at pp. 185–188. Note also that the *Chagos Archipelago* Tribunal would exclude from compulsory dispute settlement any disputes relating to straddling stocks or highly migratory species where the dispute concerns measures pertaining to those fish within the EEZ of a state. *Chagos Archipelago* (n 27), at para. 300.

which have been established by this Convention or through a competent international organization or diplomatic conference in accordance with this Convention.⁸⁰

The UK contended that this provision had to be understood in the context of navigational rights and should be viewed as a protection against coastal states misusing their powers to regulate marine pollution.⁸¹

The Tribunal assessed whether environmental disputes within compulsory procedures entailing binding decisions were limited to those addressing international rules and standards on marine pollution. The Tribunal considered that reference to rules and standards were not only those established by the LOSC but could also include the obligation to consult with or give due regard to the rights of other states.⁸² In this regard, the narrow British position was rejected. This interpretation was appropriate because of the important role that procedural obligations have in international environmental law, along with substantive standards.⁸³ Similarly, in the *South China Sea Arbitration*, the Tribunal had no difficulty in considering that it had jurisdiction to resolve disputes concerning provisions relating to the protection and preservation of the marine environment.⁸⁴

In rejecting a narrow interpretation of Article 297(1)(c), as well as accepting jurisdiction over disputes relating to Article 194, the *Chagos Archipelago* Tribunal and *South China Sea* Tribunal have affirmed the importance that the LOSC dispute settlement regime could serve in resolving a wide variety of marine environmental law disputes.

Section 3, Article 298

Maritime Boundary Disputes

In the *South China Sea* case, China consistently submitted that the dispute essentially concerned maritime boundary delimitation and was excluded from

80 LOSC (n 2), at Art. 297(1)(c).

81 *Chagos Archipelago* (n 27), at paras. 235 and 239.

82 *Ibid.*, at para. 322.

83 *Ibid.*

84 The only issue concerned the potential relevance of the military activities exception. *South China Sea (Final Award)* (n 3), at para. 938. This argument is discussed further below in relation to that exception.

compulsory arbitration by virtue of its declaration under Article 298 of LOSC.⁸⁵ China argued in its Position Paper that the Philippines could not divide issues into discrete parts, given the integral process involved in maritime boundary delimitations.⁸⁶ To do so, in China's view, would potentially denude Article 298 exceptions of any value in LOSC dispute settlement.⁸⁷ China thus argued that determining whether a maritime feature was a rock or island to ascertain to what maritime zones that feature is entitled is an essential part of a sea boundary delimitation.

In response, the Philippines submitted that a question of maritime delimitation could only arise once it is determined that there are overlapping maritime entitlements, but such a finding was not integral to the process.⁸⁸ The Philippines relied on the position that the entitlement could be determined and the result of such a determination may not lead to overlapping maritime zones (if, for example, the feature was a rock or a low-tide elevation), so no sea boundary delimitation would be necessitated. From the Philippines' perspective, these steps should be viewed as discrete and distinct.

The Philippines further presented a strict interpretation of Article 298 to limit the scope of the exception. As such, the Philippines considered that Article 298(1)(a) was only relevant if the Tribunal was called on to interpret or apply one of the provisions expressly mentioned in that clause—namely, Articles 15, 74 and 83 on the delimitation of the territorial sea, EEZ and continental shelf, respectively.⁸⁹ In the opinion of the Philippines, to look beyond the specific provisions listed would lead to an overly expansive exclusion of jurisdiction at the behest of one of the parties to the dispute.

The key point of distinction between the Philippines' and China's positions thus centred on what is integral to maritime boundary delimitation and what is not. The Tribunal did note its agreement with China "that maritime boundary delimitation is an integral and systemic process".⁹⁰ Nonetheless, the Tribunal was not willing to accept that a determination of maritime entitlements of features situated between states, and hence potentially creating states with opposite or adjacent coasts, would form part of that integral process. The Tribunal stated:

85 See *China's Position Paper* (n 53).

86 *Ibid.*, at paras. 67–68.

87 *Ibid.*, at para. 74.

88 *South China Sea (Jurisdiction)* (n 3), at para. 146.

89 *Ibid.*, at para. 374.

90 *Ibid.*, at para. 155.

In particular, the Tribunal considers that a dispute concerning the existence of an entitlement to maritime zones is distinct from a dispute concerning the delimitation of those zones in an area where the entitlements of parties overlap. While fixing the extent of parties' entitlements and the area in which they overlap will commonly be one of the first matters to be addressed in the delimitation of a maritime boundary, it is nevertheless a distinct issue. A maritime boundary may be delimited only between States with opposite or adjacent coasts and overlapping entitlements.⁹¹

A better view is that something that will "commonly be one of the first matters to be addressed in the delimitation of a maritime boundary" should be excluded from jurisdiction under Article 298. That should be the case because such matters are part of the delimitation of the territorial sea, EEZ and continental shelf, which fell outside the *South China Sea* Tribunal's jurisdiction. The Tribunal provides no reason for separating out the process as it has.

The interconnectedness of the delimitation process was evident in the Tribunal's initial decision on jurisdiction in *South China Sea*. The Tribunal considered that the resolution of certain Philippine submissions could be prevented at the merits stage if the Tribunal determined that China had an overlapping entitlement in the area in question; it would only be in the absence of China's overlapping entitlement that the claims could otherwise be resolved.⁹² This recognition highlighted that the Tribunal was indeed conducting the first part of a maritime boundary delimitation and arguably the Tribunal should have been prevented from undertaking this task by virtue of Article 298(1)(a). The decision begs the question as to what other parts of the maritime delimitation process will be segregated in the same manner. Could we arrive at the point that the 'delimitation' is considered to be the actual drawing of the line and a court or tribunal may otherwise undertake all steps leading up to that point, including the articulation of the principles to be utilized in the delimitation as occurred in the *North Sea Continental Shelf* cases?

Historic Title

Article 298(1)(a) also potentially excludes disputes relating to historic bays and title from the scope of compulsory dispute settlement under the LOSC. This provision was also at issue in the *South China Sea Arbitration* because one of the possible justifications for China's nine-dash line could be based on historic

91 *Ibid.*, at para. 156.

92 *Ibid.*, at para. 157.

rights.⁹³ The United States had undertaken an analysis of the possible legal bases for China's nine-dash line,⁹⁴ and assessed it: first, as a claim to sovereignty over the islands within the line; second, as a national boundary; and third, as based on historic rights.⁹⁵ The United States concluded that the nine-dash line could not be legally established on the basis of historic title or historic rights because it lacked the required notoriety.⁹⁶

The Philippines sought to separate out claims relating to historic rights to those specifically referenced in Article 298(1)(a), namely those "involving historic bays or titles". The Philippines argued that a dispute concerning historic rights lay outside of the LOSC, but that the connection to the LOSC still meant the dispute was one that concerned interpretation or application. Agreeing with this argument, the Tribunal noted:

A dispute concerning the interaction of the Convention with another instrument or body of law, including the question of whether rights arising under another body of law were or were not preserved by the Convention, is unequivocally a dispute concerning the interpretation and application of the Convention.⁹⁷

This statement could be read very broadly to allow the resolution of disputes concerning legal rights that touch on the LOSC to be settled within the LOSC dispute settlement regime. Yet it would seemingly be more reasonable to understand the statement as focused on resolving what is or is not covered by the Convention rather than also resolving any matter regulated by a body of law that interacts with the LOSC. Future decisions will need to have close regard to what properly falls within its jurisdiction in resolving a dispute.

A decision on the Philippines' claim challenging China's asserted historic rights could only be made at the merits stage, as the Tribunal reasoned it

93 *Ibid.*, at para. 99.

94 United States Department of State, Office of Ocean and Polar Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, 'China: Maritime claims in the South China Seas' (2014) 143 *Limits in the Seas* 1–24, available at <http://www.state.gov/documents/organization/234936.pdf>.

95 In its paper, the United States asserted that the nine-dash line was illegal as a unilateral delimitation and further that it could not be considered as a lawful assertion of historic rights: *ibid.*, at pp. 14–15, 15–22.

96 *Ibid.*, at pp. 17–19.

97 *South China Sea (Jurisdiction)* (n 3), at para. 168.

needed to determine the nature and validity of China's historic rights before being able to conclude if such a decision would then fall within Article 298.⁹⁸

At the merits stage, the Philippines addressed the distinction between the "historic rights" claimed by China, and the concept of "historic bays or titles" as noted in Article 298 of the LOSC. Based on the evidence before the Tribunal, the Philippines drew three conclusions that supported the proposition that China's claim of historic rights was distinct from historic bays or titles. The first was that China's statements and actions demonstrated that its "historic rights" claim is not a claim to "historic bays or historic title"; the second was that China itself did not characterize its claim as one of "historic bays or historic title"; and the third was that China chose not to invoke the Article 298 exclusion of disputes concerning "historic bays or historic title" in its Position Paper, despite invoking the exception in respect to maritime delimitation.⁹⁹ Furthermore, the Philippines argued the importance of the distinction between the terms "historic rights" and "historic title" in Chinese,¹⁰⁰ and submitted that "historic title" could only apply to waters directly appurtenant to the coast that lie within the limits of the territorial sea, and not beyond.¹⁰¹ Although there were difficulties in determining the nature of China's claim as it did not participate in the arbitration or make submissions on the issue, the Philippines relied on the above points to demonstrate that China's claim of historic rights was to be considered distinct from "historic bays or titles".

The distinction drawn by the Philippines may not have been tenable because once a dispute "involves" historic title, it falls within Article 298. Arguably, even a dispute as to whether a claim is based on historic rights or historic title still "involves" historic title and is excluded from jurisdiction. This latter view aligns with the common sense approach articulated in the *Chagos Archipelago Arbitration* in recognizing that states did not necessarily want key sovereignty-related issues subjected to arbitration or adjudication.¹⁰² However, this position was not adopted in the *South China Sea Arbitration*.

98 *Ibid.*, at para. 398.

99 *South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, Transcript Day 1—Hearing on the Merits and Remaining Issues of Jurisdiction and Admissibility (24 November 2015), PCA Case No. 2013–19, at p. 44, available at <http://www.pcacases.com/web/view/7>.

100 *Ibid.*, at p. 34.

101 *Ibid.*, at p. 47.

102 *Chagos Archipelago* (n 27), at para. 217.

In its Final Award, the *South China Sea* Tribunal looked to the evolution of references to historic bays, titles and rights in the international law of the sea.¹⁰³ The various terms were differentiated as follows:

The term ‘historic rights’ is general in nature and can describe any rights that a State may possess that would not normally arise under the general rules of international law, absent particular historical circumstances. Historic rights may include sovereignty, but may equally include more limited rights, such as fishing rights or rights of access, that fall well short of a claim of sovereignty. ‘Historic title’, in contrast, is used specifically to refer to historic sovereignty to land or maritime areas. ‘Historic waters’ is simply a term for historic title over maritime areas, typically exercised either as a claim to internal waters or as a claim to the territorial sea, although “general international law ... does not provide for a single ‘régime’ for ‘historic waters’ or ‘historic bays’, but only for a particular régime for each of the concrete, recognised cases of ‘historic waters’ or ‘historic bays’”. Finally, a ‘historic bay’ is simply a bay in which a State claims historic waters.¹⁰⁴

On this basis, it appears the exception in Article 298(1)(a) covers only those disputes that involve historic sovereignty rather than broader, and lesser, claims of historic waters.¹⁰⁵ The elucidation of the substantive body of law should therefore clarify the scope of the exception in Article 298(1)(a), and has affirmed a narrow restriction to access compulsory arbitration or adjudication.

Law Enforcement

Under Article 298(1)(b), states further have the option of excluding disputes involving military activities and certain law enforcement activities from compulsory arbitration or adjudication. The law enforcement activities that may be excluded are those “disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3”. Article 297(2) addresses marine scientific research and Article 297(3) concerns fisheries.

103 *South China Sea (Final Award)* (n 3), at para. 217.

104 *Ibid.*, at para. 225.

105 “The Tribunal is of the view that this usage was understood by the drafters of the Convention and that the reference to ‘historic titles’ in Article 298(1)(a)(i) of the Convention is accordingly a reference to claims of sovereignty over maritime areas derived from historical circumstances”. *Ibid.*, at para. 227.

The scope of this exception was considered in the *Arctic Sunrise*, as the Netherlands challenged the legality of Russia's actions in arresting Greenpeace protestors who had staged a protest against an offshore oil platform in the Russian EEZ. Rather than adopt a broad reading of the exception so as to apply to any law enforcement activities undertaken by a coastal state, the Tribunal confirmed that the exception in Article 298(1)(b) only applies to law enforcement actions for fishing or marine scientific research in the EEZ.¹⁰⁶ Law enforcement in relation to artificial installations or in connection with the exploration and exploitation of continental shelf resources could be resolved under Section 2 of Part xv. The *Arctic Sunrise* Tribunal therefore affirmed the narrow scope of this exception.

The *South China Sea* Tribunal also examined the applicability of this exception under Article 298 in assessing the Philippines' claims that China had violated the LOSC through its enforcement of its fisheries regulations in a disputed maritime area. In the course of its Final Award, the Tribunal determined that the maritime area in question would be part of the Philippines' EEZ and thus assessed China's fishing regulation and enforcement in this context. Although on its face it would appear that China's actions constituted law enforcement actions over fisheries in the EEZ and would thus be excluded under Article 298(1)(b), the Tribunal accepted that this exception would not apply in relation to law enforcement activities undertaken by third states in a coastal state's EEZ; the exception only applies to exclude disputes concerning the coastal state's law enforcement activities in its EEZ from compulsory arbitration or adjudication. In doing so, the Tribunal determined it had jurisdiction to decide that China was in violation of the LOSC. This decision further narrows the instances where the law enforcement exception may be considered applicable, and thereby expands the scope of compulsory jurisdiction.

Military Activities

Article 298 does not specify what "military activities" might be excluded from the scope of compulsory procedures entailing binding decisions. There is thus considerable potential for judicial discretion in determining what may or may not constitute "military activities" for the purpose of this exception.

In the *South China Sea* Final Award, the Tribunal considered the exception in the context of its assessment of the legality of China's land reclamation activities, which the Philippines claimed were in violation of various provisions relating to the protection and preservation of the marine environment.

¹⁰⁶ *Arctic Sunrise Arbitration (Netherlands v. Russia)*, Award on Jurisdiction (26 November 2014), at para. 76, available at <http://www.pcacases.com/web/view/21>.

Given the political controversy concerning China's activities and concerns as to whether the land reclamation activity has been for military purposes, the Tribunal considered briefly if the military activities exception would preclude examination of this conduct. In this regard, the Tribunal indicated that where a state disavows that its activities are military in nature then this characterization is of distinct relevance. Consequently, the exception could not apply in these circumstances.¹⁰⁷

Whereas disavowing the military nature of certain conduct had implications in assessing the applicability of this exception, a state's failure to make a claim objecting to jurisdiction under the military activities exception did not prevent the exception from applying. This latter perspective was articulated in the *South China Sea* Final Award in response to the Philippines' claims that China had unlawfully aggravated the dispute in its actions subsequent to the commencement of the arbitration.

Contrary to the view of the Philippines that the military activities exception did not apply because it had never been invoked by China, the Tribunal considered that such an explicit claim was not necessary.¹⁰⁸ Instead, the Tribunal emphasized "the relevant question to be whether the dispute itself concerns military activities, rather than whether a party has employed its military in some manner in relation to the dispute".¹⁰⁹ The facts before the Tribunal relating to the incidents at Second Thomas Shoal were deemed to be a "quintessentially military situation" and hence covered by Article 298(1)(b).¹¹⁰ No doubt disputes will arise in the future as to what is "quintessentially military" and what is not.

Conclusion

The situation in the South China Sea remains one of the critical flashpoints in international security. The competing territorial claims between neighbouring states over a variety of islands, rocks, low-tide elevations and other marine features and resulting maritime boundary disputes appear intractable in many respects. When one of the claimant states takes a particularly assertive stance

107 *South China Sea (Final Award)* (n 3), at paras. 893 and 934 ff. See further *ibid.*, at paras. 1012 and 1028 in relation to Mischief Reef.

108 *Ibid.*, at para. 1156.

109 *Ibid.*, at para. 1158.

110 *Ibid.*, at para. 1161.

against another claimant, concerns rightly arise that conflict might escalate and consume the region.

The enduring importance of the obligation to settle disputes by peaceful means, as enshrined in the UN Charter¹¹¹ and as part of customary international law,¹¹² is especially acute for the South China Sea. This obligation to settle disputes by peaceful means does not specify which peaceful means must be used, but at least has the effect of ruling out forceful means as a choice for dispute settlement.

Within the spectrum of settling disputes by peaceful means, states have an option, as articulated plainly in Article 33 of the UN Charter, to seek resolution by “negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice”. This choice is reinforced in Article 279 of the LOSC for disputes that concern the law of the sea.

A corollary of states’ choice of means for dispute settlement is the principle of consent, particularly when it concerns referring disputes for binding resolution by third parties, or, in other words, for arbitration or adjudication.¹¹³ The consent of states can be manifested in a variety of ways and the LOSC is a notable regime for the fact that states consent to compulsory procedures entailing binding decisions by dint of becoming parties to the LOSC. Yet it is important to discern carefully to what states have consented.

The LOSC dispute settlement regime is not comprehensive because not every law of the sea dispute that concerns the interpretation or application of the LOSC can be referred to compulsory procedures entailing binding decisions. As has been discussed in this article, within Section 1 of Part XV, states are given options for resolving their disputes through a variety of methods, including those procedures that have been previously agreed between the parties for different law of the sea disputes.¹¹⁴ The resort to arbitration or adjudication is further limited by Section 3 of Part XV, which explicitly excludes the availability of compulsory procedures for certain types of disputes as described in Article 297 and further provides states with the option of excluding categories

111 Charter of the United Nations (San Francisco, 26 June 1945, in force 24 October 1945) 1945 *ATS* 1, at Art. 2(3).

112 See e.g. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)* [1986] ICJ Rep 14, para. 290.

113 As discussed in R Beckman, ‘UNCLOS Part XV and the South China Sea’ in S Jayakumar, T Koh and R Beckman (eds), *The South China Sea Disputes and Law of the Sea* (Edward Elgar, Cheltenham, 2014) 229–264, at p. 229.

114 See Klein (n 9), at pp. 53–59.

of disputes in accordance with Article 298 of the LOSC. This system provides states with important flexibility in how disputes are settled and this flexibility should ensure the ongoing feasibility of the LOSC dispute settlement regime.

This feasibility may be cast into doubt depending on how the LOSC dispute settlement regime is interpreted and applied. The shifting scope of jurisdiction to resolve disputes under the LOSC may be considered the product of a living constitution; one that should be expected to evolve over time. The responsibility that falls to the arbitrators and judges within this dynamic is significant. De Mestral has described this situation in the following way:

It is most unlikely that a dynamic court exercising its powers under the [UN Convention on the Law of the Sea] will have much difficulty both in finding that it possesses jurisdiction in a particular case, and in finding that the Convention contains rules appropriate for the resolution of virtually all disputes arising under it.¹¹⁵

Part of the justification for such an argument lies in the “principle of effectiveness”, which anticipates “allowing the tribunals to fulfill their judicial function”.¹¹⁶ Tempering such judicial enthusiasm has to be the principle of consent. This principle refers to the need for sovereign states to consent to be bound by the decisions of international courts and tribunals and ultimately underlines the foundation of jurisdiction for those courts and tribunals.¹¹⁷

115 ALC de Mestral, ‘Compulsory dispute settlement in the Third United Nations Convention on the Law of the Sea: A Canadian perspective’ in T Buergenthal (ed), *Contemporary Issues in International Law: Essays in Honour of Louis B. Sohn* (N.P. Engel, Kehl, 1984) 169–188, at p. 171.

116 I Buga, ‘Territorial sovereignty issues in maritime disputes: A jurisdictional dilemma for law of the sea tribunals’ (2012) 27(1) *International Journal of Marine and Coastal Law* 59–95, at pp. 65–66, citing R Wolfrum, ‘Statement to the informal meeting of legal advisers of Ministries of Foreign Affairs’ (New York, 23 October 2006), available at https://www.itlos.org/fileadmin/itlos/documents/statements_of_president/wolfrum/legal_advisors_231006_eng.pdf.

117 The principle has been emphasized in a variety of cases. It was articulated by the Permanent Court of International Justice as follows: “It is well established in international law that no State can, without its consent, be compelled to submit its dispute with other States either to mediation or to arbitration, or to any other kind of pacific settlement”. *Status of Eastern Carelia, Advisory Opinion* [1923] PCIJ Series B, No. 5, 27. The ICJ stated: “One of the fundamental principles of the Court’s Statute is that it cannot decide a dispute between States without the consent of those States to its jurisdiction”. *East Timor (Portugal v. Australia)* [1995] ICJ Rep 90, at para. 26.

Ensuring we have the correct balance between these two principles is critical for the actual and perceived success of any international dispute settlement regime.

For the judges in the *South China Sea Arbitration*, the broader consequences of the judgment relate to the politics of the dispute in the region and, from a legal perspective, the decision of the Arbitral Tribunal strictly only binds the Philippines and China. Yet it is undeniable that this Tribunal has addressed one of the most potentially volatile security issues in the world—millions of dollars in international trade and in resource exploitation are at stake, as well as an unfolding political and power dynamic that could influence world affairs for decades to come. Is this really what the LOSC dispute settlement regime was intended for? Given the key limitations with respect to the role of dispute settlement in the LOSC, it would seem that there are only narrow avenues to keep China's varied assertions in check this way. Is some resistance through the procedures available under the LOSC still better than none at all? Differences of opinion will clearly persist.

... For we know we need each other so we
Better call the calling off off,
Let's call the whole thing off.