The Scope of Compulsory Jurisdiction and Exceptions Thereto under the *United Nations Convention on the Law of the Sea*

La portée et les limites de la compétence obligatoire de règlement des différends en vertu de la *Convention des Nations Unies sur le droit de la mer*

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Abstract

The establishment of a compulsory dispute settlement mechanism in the *United Nations Convention on the Law of the Sea* (*UNCLOS*) is intended to be the guarantor of the proper application of the convention. Yet the decisions of courts and tribunals seized pursuant to the procedures under Section 2 of Part XV of *UNCLOS* are in many regards difficult to reconcile and in some regards unable to form the basis for a *jurisprudence constante*. This article examines on an empirical basis the scope and limits of the compulsory dispute settlement mechanism under *UNCLOS*, as applied by international courts and tribunals during a period of twenty years since the first decision in the *Southern Bluefin Tuna* case until the recent decision on preliminary objections in the *Dispute Concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean*.

Résumé

La mise en place d'un mécanisme obligatoire de règlement des différends dans la *Convention des Nations Unies sur le droit de la mer* se veut le garant de la bonne application de la convention. Pourtant, les décisions des cours et tribunaux saisis conformément aux procédures prévues à la section 2 de la partie XV de la convention sont à bien des égards difficiles à concilier et, à certains égards, ne peuvent pas constituer la base d'une jurisprudence constante. Cet article examine sur une base empirique la portée et les limites du mécanisme obligatoire de règlement des différends en vertu de la convention, tel qu'appliqué par les cours et tribunaux internationaux pendant une période de vingt ans depuis la première décision dans l'affaire du *Thon à nageoire bleue* jusqu'à la récente sentence sur les exceptions préliminaires dans le *Différend relatif à la délimitation de la frontière maritime entre Maurice et les Maldives dans l'océan Indien*.

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Introduction

State consent is generally considered a quintessential factor in the formation of international law,[1] from which premise the Permanent Court of International Justice (PCIJ) in a landmark case[2] pronounced that "[r]estrictions on the independence of States cannot … be presumed."[3] While the exact contours of this *obiter dictum* remain forever vague,[4] it is indisputable that consent remains, if not an essential, then at least a critical component in the formation of international law.[5] Consent is also the

[1] Commentators observe that "a State is not subject to any external authority unless it has voluntarily consented to such authority." Louis Henkin, "International Law: Politics, Values, and Functions" (1989) 216:4 Rec des Cours 9 at 27. The Permanent Court of International Justice (PCIJ) observed in *Lotus* that "[t]he rules of law binding upon States … emanate from their own free will." *Case of the S.S. "Lotus" (France v Turkey)* (1926), PCIJ (Ser A) No 10 at 18 [*Lotus*]. In *Barcelona Traction*, the International Court of Justice (ICJ) observed that "[h]ere as elsewhere, a body of rules could only have developed with the consent of those concerned." *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Second Phase) (Belgium v Spain)*, [1970] ICJ Rep 3 at 47. Finally, in *Military and Paramilitary Activities*, the ICJ observed that "in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise." *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, [1986] ICJ Rep 14 at 135, para 269.

[2] The *Lotus* case, *supra* note 1, is considered to be "one of the landmarks of twentieth-century jurisprudence." Henkin, *supra* note 1 at 278. The so-called *Lotus* principle has also been subject to firm criticism. Ian Brownlie observed in this regard that "[i]n most respects the Judgment of the Court is unhelpful in its approach to the principles of jurisdiction, and its pronouncements are characterized by vagueness and generality." Ian Brownlie, *Principles of Public International Law*, 6th ed (Oxford: Oxford University Press, 2003) at 301.

[3] *Lotus*, *supra* note 1 at 18.

[4] Immediately after holding that restrictions upon the independence of states cannot be presumed, the PCIJ presumed one such restriction: "Now the first and foremost restriction imposed by international law upon a State is that — failing the existence of a permissive rule to the contrary — it may not exercise its power in any form in the territory of another State." *Lotus*, *supra* note 1 at 18–19. Henkin observes that "instead of the presumption of State independence and autonomy, the [PCIJ] seemed to begin with a presumption that a State was not fully autonomous." Henkin, *supra* note 1 at 278–79.

[5] Alain Pellet noted nearly twenty years ago that according "to the voluntarist analysis of international law … our natural reflex is to say that where there is State will, there is international law: no will, no law." Alain Pellet, "The Normative Dilemma: Will and Consent in International Law-Making" (2002) 12 Australian YB Intl L 22.

guarantor of sovereign equality among sovereign states. Yet international law is not only composed of hard law texts. Soft law instruments, which do not necessarily require state consent, play a prominent role in international law.[6] The sparse case law of the International Court of Justice (ICJ) that relies on the above-mentioned principle in the *Lotus* case supports an understanding that neither a strict interpretation of the *Lotus* principle nor a "general presumption of legality in the absence of a prohibition accords with the court's view of international law today."[7] Yet, due to the genome of international law — that is, a legal order that is primarily, although not exclusively, composed of sovereign subjects — the general lack of coercive enforcement mechanisms in international law, at least in so far as concerns sovereign states, is the necessary corollary of a legal regime that is based on state consent. As a result, multilateral conventions framed and adopted according to a consensus rule will often include ambiguous provisions regarding subject matters that, for various reasons, may be seen as delicate. In the now famous observation of Philip Allot, this phenomenon lends support to characterizing a treaty as "a disagreement reduced to writing."[8] The relevant parts of the *United Nations Convention on the Law of the Sea* (*UNCLOS*) that deal with compulsory jurisdiction are no exceptions in this regard.[9]

According to Section 2 of Part XV of *UNCLOS*, "*any* dispute concerning the interpretation or application of this Convention" can be submitted by any party to the dispute to the court or tribunal having jurisdiction under this section.[10] *UNCLOS* does not allow any reservations,[11] but the compulsory dispute settlement mechanisms in the convention "n'aient qu'une fonction supplétive vis-à-vis de n'importe quel mécanisme obligatoire de

[6] The International Law Commission's (ILC) *Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, UN Doc A/56/83 (10 August 2001) [*ILC Articles on State Responsibility*], are symptomatic. Alain Pellet notes that "[i]t is a fact that the influence of ILC texts is not dependent on the conclusion of a convention [although] the majority of the ILC members … *mistakenly* believed that the success of an ILC draft could only be measured by a treaty law yardstick and that there could be no salvation without a treaty." Alain Pellet, "The ILC's Articles on State Responsibility for Internationally Wrongful Acts and Related Texts" in James Crawford, Alain Pellet & Simon Ollesen, eds, *The Law of International Responsibility* (Oxford: Oxford University Press, 2011) 75 at 86–87 [emphasis added]. See also David D Caron, "The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority" (2002) 96:4 Am J Intl L 857.

[7] Hugh Handeyside, "The Lotus Principle in ICJ Jurisprudence: Was the Ship Ever Afloat?" (2007) 29 Mich J Intl L 87.

[8] Philip Allott, "The Concept of International Law" (1999) 10:1 Eur J Intl L 37 at 43.

[9] 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) [*UNCLOS*].

[10] *Ibid*, art 288(1) [emphasis added].

[11] *Ibid*, art 309: "No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention."

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règlement en vigueur entre les parties."[12] Section 3 of Part XV of *UNCLOS* provides for general exceptions and also an exhaustive list of facultative exceptions to compulsory jurisdiction under Section 2. The relevant provisions of Section 3 of Part XV are not deprived of ambiguity, requiring the meticulous attention of courts and tribunals seized under Section 2 of Part XV, given that "jurisdiction only exists within the limits within which it has been accepted."[13] This point of fact is certainly a reason for which international courts and tribunals have taken different views on critical provisions regarding the compulsory dispute settlement mechanism, including the general and facultative exceptions thereto.

There is no exception as such to the fundamental principle enshrined in Article 59 of the *Statute of the International Court of Justice* (*ICJ Statute*).[14] International law is not based on *stare decisis*, notwithstanding that ensuring consistency with previous interpretations of treaty provisions is deemed critical for ensuring the legitimacy of international law — particularly in so far as concerns clauses in regard to jurisdiction since the exercise of jurisdiction necessarily presumes the existence of jurisdiction. Yet critical provisions in regard to the limits of compulsory jurisdiction under *UNCLOS* have been subject to diametrically opposite constructions, some of which have been justified on the basis of a "better view,"[15] although interpretation in the relevant cases is governed by customary treaty interpretation rules, as reflected in the *Vienna Convention on the Law of Treaties* (*VCLT*).[16] Elsewhere it has been observed that "Part XV is excessively complicated."[17] Be that as it may, such differences are susceptible to raise concerns as they are, *per se*,

[12] Tullio Treves, "Le tribunal international du droit de la mer et la multiplication des juridictions internationales" (2000) 83 Rivista di Diritto 731 [Treves, "Le tribunal international"].

[13] *Phosphates in Morocco (Italy v France)* (1938), PCIJ (Ser A/B) No 74 at 23.

[14] 26 June 1945, Can TS 1945 No 7 (entered into force 24 October 1945) [*ICJ Statute*]. In *Land and Maritime Boundary between Cameroon and Nigeria*, the Court explicitly acknowledged the possibility that there may be circumstances where it will not rely on its precedents: "There can be no question of holding Nigeria to decisions reached by the Court in previous cases. The real question is whether, in this case, there is cause not to follow the reasoning and conclusion of earlier cases." *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)*, Preliminary Objections, [1998] ICJ Rep 275 at 292, para 28 [*Land and Maritime Boundary between Cameroon and Nigeria*].

[15] Expression used by the Annex VII arbitral tribunal in the *South China Sea Arbitration (Philippines v China)*, PCA Case no 2013-18, Award on Jurisdiction and Admissibility (29 October 2015) at 86, para 223 [*South China Sea Arbitration*].

[16] 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) [*VCLT*].

[17] Alan Boyle, "Some Problems of Compulsory Jurisdiction before Specialised Tribunals: The Law of the Sea" in P Capps, M Evans & S Konstadinidis, eds, *Asserting Jurisdiction: International and European Legal Perspectives* (Oxford: Hart Publishing, 2003) 246 [Boyle, "Some Problems"].

capable of "run[ning] counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent," notwithstanding the complexity of the provisions in question.[18] Further, where international courts and tribunals take conflicting views on critical jurisdictional provisions in multilateral treaties, it will indubitably encourage disobedience to the judgments and awards of international courts and tribunals as it may contravene "the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent."[19] It should not be forgotten that, in the international legal order, where sovereign states are the primary actors, the final and binding nature of judgments and awards of international courts and tribunals is premised on the fundamental presumption that these courts and tribunals are "deemed to know what the law is."[20]

Article 297 of *UNCLOS* provides an exhaustive list of matters that are not subject to the compulsory dispute settlement mechanism. In addition, Article 298 allows states to make use of optional exceptions to the compulsory dispute settlement mechanism in regard to some sensitive matters that are also exhaustively enumerated. The elaboration of optional exceptions to the compulsory system under Section 2 was the only means of reaching consensus on the extension of compulsory dispute settlement to disputes relating to the material scope of those exceptions. Recently, a number of cases have been referred to international courts and tribunals that have addressed questions that hitherto have not been subject to any dispute settlement under Part XV of *UNCLOS*, including matters falling within Article 298 of the convention.[21] In this light, this article addresses the scope of the limits to the compulsory dispute settlement mechanism under *UNCLOS*, which, by necessary implication, also calls for determining the scope of the compulsory jurisdiction mechanism itself. The purpose is to

[18] *Case of the Monetary Gold Removed from Rome in 1943 (Italy v United Kingdom of Great Britain and Northern Ireland and United States of America)*, [1954] ICJ Rep 19 at 32. See also *Rights of Minorities in Upper Silesia (Minority Schools) (Germany v Poland)* (1928), PCIJ (Ser A) No 15 at 22; *Certain Phosphate Lands in Nauru (Nauru v Australia)*, [1992] ICJ Rep 260; *East Timor (Portugal v Australia)*, [1995] ICJ Rep 101. In *Eastern Carelia*, the PCIJ noted that "[i]t is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement." *Eastern Carelia* (1923), Advisory Opinion, PCIJ (Ser A) No 5 at 27.

[19] W*estern Sahara*, Advisory Opinion, [1975] ICJ Rep 12 at 24.

[20] *Case Concerning the Payment in Gold of Brazilian Federal Loans Contracted in France (France v Brazil)* (1929), PCIJ (Ser A) No 21 at 124.

[21] In an article published in 2015, Bernard Oxman noted that "[n]o State has thus far invoked the military activities exception." Bernard Oxman, "Courts and Tribunals: The ICJ, ITLOS and Arbitral Tribunals" in Donald R Rothwell et al, eds, *The Oxford Handbook of the Law of the Sea* (Oxford: Oxford University Press, 2015) 394 at 407 [Oxman, "Courts and Tribunals"]. Yet this exception has been raised in a number of cases in recent years.

determine on an objective basis the lateral scope of matters that are beyond the compulsory dispute settlement mechanism in the convention.

First, the *renvoi* mechanisms in Articles 281 and 282 of *UNCLOS*, respectively, will be examined. It will be concluded that the contours of these provisions are difficult to carve out, especially in light of the relevant findings of courts and tribunals competent to resolve disputes that involve the interpretation and application of these provisions. The decisions are not consistent in a number of important respects. This is particularly the case regarding Article 281, which has been characterized as a "super provision,"[22] whereas the interaction of Article 282 of *UNCLOS* with Article 36(2) of the *ICJ Statute* remains not fully clear. Second, the general limitations under Article 297 will be examined, an analysis that will focus in particular on Articles 297(1) and 297(3)(a). It will be concluded that the recent findings of courts and tribunals, while not entirely consistent, are contributing to a clearer understanding of these complex provisions. Third, the scope of the optional exceptions under Article 298(1) will be examined in light of the recent rulings of international courts and tribunals competent to rule on these critical provisions for the purposes of Part XV of *UNCLOS*. It will be concluded that a coherent understanding of the scope of the exceptions under Article 298(1)(a)(i) appeared to have emerged but that this must now be questioned in light of the recent findings of the Special Chamber of the International Tribunal for the Law of the Sea (ITLOS) in the *Dispute Concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean*.[23] Likewise, interpretations of the exceptions in regard to military activities under Article 298(1)(b) do not appear to be fully coherent.

Renvois to Other Procedures

The establishment of a compulsory and "comprehensive"[24] dispute settlement mechanism was considered a major achievement in the adoption of the final text during the third United Nations Conference on the Law of the

[22] Bing Bing Jia, "The Curious Case of Article 281: A 'Super' Provision within UNCLOS" (2015) 46:4 Ocean Dev & Intl L 268.

[23] *Dispute Concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius v Maldives)*, Judgment, Preliminary Objections (28 January 2021) [*Mauritius v Maldives*].

[24] Expression used in the *Virginia Commentary*: "One of the significant achievements of the Third United Nations Law of the Sea Conference was the development of a comprehensive system for the settlement of the disputes that may arise with respect to the interpretation or application of [*UNCLOS*]." Myron H Nordquist et al, eds, *United Nations Convention on the Law of the Sea 1982: A Commentary* (Leiden: Brill, 1993), vol 5, para XV.1 [*Virginia Commentary*].

Sea (Third Conference).[25] It was by all means part and parcel of the so-called package deal to which no reservations were available except if explicitly authorized by *UNCLOS*.[26] This stands in stark contrast to the 1958 *Geneva Conventions*,[27] which have no compulsory dispute settlement mechanisms but only an optional protocol,[28] allowing states parties to voluntarily accept compulsory jurisdiction in regard to the interpretation or application of those conventions.[29] While Part XV of *UNCLOS* establishes a comprehensive regime of compulsory dispute settlement, this does not mean that states parties to the convention are not able to have recourse to dispute settlement mechanisms other than the procedures under Part XV of *UNCLOS*. However, the *renvoi* provisions in Part XV appear difficult to construe and have given rise to varying understandings. As we shall see, international courts and tribunals share different views regarding whether the triggering of Article 281 may be achieved by a mere implicit recognition to this effect or whether an explicit statement is required. More importantly, it will be shown that the interpretation that courts and tribunals appear to give Article 281 results in a meaning that "was never intended."[30] Finally, the scope of Article 282 of *UNCLOS* will be examined, including its interactions with declarations made under Article 36(2) of the *ICJ Statute*.

[25] It is observed that Part XV of *UNCLOS* is an "integral part and an essential element of the Convention." *Memorandum by the President of the Third Conference on Document A/CONF.62/WP.9*, UN Doc A/CONF.62/WP.9/ADD.1 (1982) at 122, para 6 [*Memorandum by the President*].

[26] On this issue, see Grégoire Lehoux, "La Troisième Conférence sur le droit de la mer et le règlement obligatoire des différends" (1980) 18 ACDI 31.

[27] On 29 April 1958, the United Nations Conference on the Law of the Sea opened for signature four conventions: (1) the *Convention on the Territorial Sea and the Contiguous Zone*, 29 April 1958, 516 UNTS 205 (entered into force 10 September 1964); (2) the *Convention on the High Seas*, 29 April 1958, 450 UNTS 11 (entered into force 30 September 1962); (3) the *Convention on Fishing and Conservation of the Living Resources of the High Seas*, 29 April 1958, 559 UNTS 285 (entered into force 20 March 1966); and (4) the *Convention on the Continental Shelf*, 29 April 1958, 499 UNTS 311 (entered into force 10 June 1964) [collectively, *Geneva Conventions*].

[28] The *Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes*, 29 April 1958, 450 UNTS 169 (entered into force 30 September 1962). Only thirty-eight states ratified the *Optional Protocol*, which provides for compulsory jurisdiction of the ICJ for all disputes concerning the interpretation or application of the *Geneva Conventions*. It has never been applied in practice. See Tullio Treves, "1958 Geneva Conventions on the Law of the Sea" (2008), online: *UN Audiovisual Library of International Law* <https://legal.un.org/avl/pdf/ha/gclos/gclos_e.pdf>.

[29] It was observed at the beginning of the Third Conference that an "optional protocol would be a totally inadequate way of dealing with" disputes and "to relegate dispute settlement to an optional protocol might jeopardize the ratification and even the signing of" *UNCLOS*. Louis B Sohn, "Settlement of Disputes Arising Out of the Law of the Sea Convention" (1975) 12 San Diego L Rev 516.

[30] Boyle, "Some Problems," *supra* note 17 at 249.

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A FORMALISTIC REQUIREMENT

According to Article 281(1) of *UNCLOS*, states parties may "agree[] to seek *settlement* of the dispute by a peaceful means of their *own* choice."[31] Accordingly, states parties apparently by entering into an agreement or understanding may decide to waive procedures under Part XV of *UNCLOS*. In these situations, the procedures provided for in Part XV "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."[32]

It is well known that in the *Southern Bluefin Tuna* case, the arbitral tribunal constituted under *UNCLOS* Annex VII considered an implicit exclusion sufficient for the purposes of setting aside Part XV of *UNCLOS*.[33] It observed that:

> The effect of this express obligation to continue to seek resolution of the dispute by the listed means of Article 16(1) [of the *Convention for the Conservation of Southern Bluefin Tuna*] is not only to stress the consensual nature of any reference of a dispute to either judicial settlement or arbitration. That express obligation equally imports, in the Tribunal's view, that the intent of Article 16 is to remove proceedings under that Article from the reach of the compulsory procedures of Section 2 of Part XV of *UNCLOS*.[34]

The award was diametrically opposed to the provisional measures ruling of ITLOS, which held that "the fact that the Convention of 1993 applies between the parties does not preclude recourse to the procedures in Part XV, Section 2 of [*UNCLOS*]."[35] Yet, in the view of arbitral

[31] *UNCLOS*, *supra* note 9, art 281(1) [emphasis added].

[32] *Ibid.*

[33] *Southern Bluefin Tuna (Australia v Japan; New Zealand v Japan)*, Award on Jurisdiction and Admissibility (2000), 23 UNRIAA 1 (*UNCLOS* Annex VII) [*Southern Bluefin Tuna* (Arbitral Tribunal)].

[34] *Ibid* at para 57; *Convention for the Conservation of Southern Bluefin Tuna*, 10 May 1993, 1819 UNTS 359 (entered into force 20 May 1994) [*CCSBT*].

[35] *Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan)*, Provisional Measures, Order of 27 August 1999, [1999] ITLOS Rep 280 at para 55 [*Southern Bluefin Tuna* (ITLOS)]. Bernard Oxman observes in this regard that "the arbitral tribunal [in *Southern Bluefin Tuna*] was presided over by a judge who, among other things, had devoted considerable attention to arbitration as both a scholar and an arbitrator and who had addressed numerous jurisdictional questions in that context and during a long and distinguished tenure on the ICJ culminating in his service as its president. Moreover, while many of the judges of the ITLOS had been active and prominent participants in the negotiation of [*UNCLOS*] over many years, of the arbitrators only Per Tresselt had played such a role. Whether judges are at their best when dealing with issues to which they have devoted great attention in the past is a question not easily resolved." Bernard Oxman, "Complementary Agreements and

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tribunal, "the absence of an express exclusion of any procedure is not decisive."[36]

The construction of the Annex VII arbitral tribunal has been much criticized,[37] including by Judge Sir Kenneth Keith who observed that the term "exclude" in Article 281 must require an "opting out" from Part XV rather than a positive act of "opting in."[38] Yet, interestingly, as this observation appears to be overlooked by commentators, courts, and tribunals, the *Virginia Commentary* provides in this regard that "[t]he last phrase of article 281, paragraph 1, envisages the possibility that the parties, in their agreement to resort to a particular procedure, *may* also specify that this procedure shall be an exclusive one."[39] The use of the facultative expression "may" would appear to support the understanding that exclusivity need not be explicit but may be implicit in line with the conclusions of the arbitral tribunal in *Southern Bluefin Tuna*.[40] Yet subsequent decisions appear non-equivocal as to the requirement of explicit exclusion.[41]

Article 281 of *UNCLOS* was given ample consideration in the *South China Sea Arbitration*.[42] In so far as concerns the implications, if any, of the absence of an express exclusion of other procedures, the arbitral tribunal noted that

Compulsory Jurisdiction" (2001) 95 Am J Intl L 283 at 284, n 32 [Oxman, "Complementary Agreements"].

[36] *Southern Bluefin Tuna* (Arbitral Tribunal), *supra* note 33 at para 57.

[37] Alan Boyle opined that the approach of the arbitral tribunal "is likely to remain controversial," "[w]ith all due respect to the learned arbitrators, … simply lacks conviction," and results in giving Article 281 a meaning that "was never intended." Boyle, "Some Problems," *supra* note 17 at 248–49.

[38] *Southern Bluefin Tuna* (Arbitral Tribunal), *supra* note 33, Separate Opinion of Sir Kenneth Keith at para 17.

[39] *Virginia Commentary*, *supra* note 24 at para 281.5 [emphasis added].

[40] Commentators have different views on whether the exclusive nature of the alternative procedures must be explicit or implicit. See David Colson & Peggy Hoyle, "Satisfying the Procedural Prerequisites to the Compulsory Dispute Settlement Mechanisms of the 1982 Law of the Sea Convention: Did the Southern Bluefin Tuna Tribunal Get It Right?" (2003) 34:1 Ocean Dev & Intl L 59; Barbara Kwiatkowska, "The Southern Bluefin Tuna Arbitral Tribunal Did Get It Right: A Commentary and Reply to the Article by David A Colson and Dr. Peggy Hoyle" (2003) 34:3–4 Ocean Dev & Intl L 369; Jon M Van Dyke, "Louis B Sohn and the Settlement of Ocean Disputes" (2000) 33 George Washington Intl L Rev 31.

[41] The International Tribunal for the Law of the Sea (ITLOS) was also given an opportunity to comment upon the application of Article 281 in the *Mox Plant* case. While the agreement in question concerned the application of *UNCLOS*, *supra* note 9, art 282, several judges made use of the opportunity to touch upon Article 281 in their separate opinions, in which the requirement of an express statement of exclusion from Part XV was embraced. See e.g. *Mox Plant Case (Ireland v United Kingdom)*, PCA Case no 2002-01, Order on Provisional Measures (3 December 2001), Separate Opinion of Judge Wolfrum at 5.

[42] *South China Sea Arbitration*, *supra* note 15.

the agreement[43] on which China based its position in regard to the application of Article 281 of *UNCLOS* "states that the Parties undertake to resolve their disputes 'without resorting to the threat or use of force', [but] it does not say that the Parties undertake to resolve their disputes 'without resorting to third-party settlement'. It could have, but it does not."[44] It therefore failed to constitute an agreement under Article 281. The implication of this reasoning is that any agreement that does not explicitly exclude the application of Part XV could not constitute an agreement within the meaning of Article 281(1) of *UNCLOS*. This arises since, in the view of the arbitral tribunal, "Article 281 requires some clear statement of exclusion of further procedures"[45] in order for "Article 281 to present an obstacle for the Tribunal's jurisdiction."[46] The arbitral tribunal observed further that an agreement under Article 281 can constitute a waiver of Part XV of *UNCLOS* — that is, making inoperative the procedures under Part XV — provided that three cumulative criteria are fulfilled. According to the arbitral tribunal, Part XV will only be "available if (i) no settlement has been reached by recourse to the agreed means, (ii) the Parties' agreement does not exclude any further procedure, and (iii) any agreed time limits have expired."[47] These criteria are listed as exhaustive and cumulative. They are cumulative since, prior to listing the third criterion, the conjunction "and" appears.[48] The third criterion relates to Article 281(2), which does not call for further attention, whereas the first and second criteria relate to Article 281(1). Of these, the first criterion is somewhat axiomatic as Section 2 will obviously only be available to address outstanding disputes. Thus, the second criterion is critical and, in fact, provides the bulk of different interpretations and understandings.

In the *South China Sea Arbitration*, having concluded that the instrument on which China sought to rely was not a binding agreement and therefore *per se* could not constitute an agreement within the perimeters of Article 281, the arbitral tribunal had nevertheless continued with the exercise of determining whether an explicit exclusion is required, for the sake of "completeness."[49] In the *Dispute Concerning Coastal State Rights in the Black*

[43] *China-ASEAN Declaration on the Conduct of the Parties in the South China Sea*, 4 November 2002, online: *ASEAN* <https://asean.org/?static_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea-2>.

[44] *South China Sea Arbitration*, *supra* note 15 at 86, para 222.

[45] *Ibid* at 86–87, para 223.

[46] *Ibid* at 121, para 286.

[47] *Ibid* at 76, para 195.

[48] *UNCLOS*, *supra* note 9, art 281(1) also contains a conjunction to this effect.

[49] *South China Sea Arbitration*, *supra* note 15 at 85, para 219.

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Sea, Sea of Azov, and Kerch Strait,[50] in contrast, the Annex VII arbitral tribunal concluded that the alleged Article 281 agreement did not contain "dispute resolution clauses" and, therefore, that "it is not necessary for the Arbitral Tribunal [to determine] whether its jurisdiction is excluded pursuant to Article 281 of the Convention."[51] Based on principles of judicial economy, it could not be expected that the arbitral tribunal would undertake further analysis of the issue of express exclusivity. Yet, in light of the contradictory findings of courts and tribunals on this question, it nevertheless could have been expected that the arbitral tribunal might undertake this supplementary analysis for the sake of "completeness," to use the expression of the arbitral tribunal in the *South China Sea Arbitration*,[52] particularly since the latter held this to be a "better view" in comparison to that expressed in previous decisions.[53] The omission to do so could be seen to support an understanding that this question is not finally settled. Further, in its conclusions, the arbitral tribunal in the *Dispute Concerning Coastal State Rights* did not rely explicitly or implicitly on the three criteria articulated in the *South China Sea Arbitration*.[54] Accordingly, it remains unknown whether there was agreement on this test among the arbitrators in the *Dispute Concerning Coastal State Rights*.

It is noteworthy that express exclusion appears to have the upper hand in the interpretation of Article 281 — at least in so far as concerns making inoperative the procedures under Section 2 of Part XV of *UNCLOS*. Elsewhere it has been observed on this particular issue that "seemingly any treaty relating to ocean matters … must have an explicit exclusion of *UNCLOS* dispute settlement. … If it does not, the parties' preferred choice of dispute settlement under that treaty may not be upheld under Article 281."[55] This formalist condition appears to disregard the object and purpose of establishing a comprehensive dispute settlement mechanism, which rather emphasizes the intentions of the parties[56] and therefore

[50] *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v Russian Federation)*, PCA Case 2017-06, Award Concerning the Preliminary Objections of the Russian Federation (21 February 2020) [*Dispute Concerning Coastal State Rights*].

[51] According to the arbitral tribunal, "it is not necessary for the Arbitral Tribunal, in assessing whether its jurisdiction is excluded pursuant to Article 281 of the Convention, to examine the further questions of whether [the relevant provisions in the agreement] exclude recourse to dispute settlement under Part XV of the Convention." *Ibid* at 141, para 489.

[52] *South China Sea Arbitration*, *supra* note 15 at 85, para 219.

[53] *Ibid* at 86, para 223.

[54] *Ibid* at 76, para 195.

[55] Natalie Klein, "Expansions and Restrictions in the UNCLOS Dispute Settlement Regime: Lessons from Recent Decisions" (2016) 15:2 Chinese J Intl L 403 at 406.

[56] The case law is rich on this aspect. See *Aegean Sea Continental Shelf (Greece v Turkey)*, [1978] ICJ Rep 3 at 39, para 96 [*Aegan Sea*]; *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)*, Jurisdiction and Admissibility, [1994] ICJ Rep 112 at 120, paras 23–29 [*Case Concerning Qatar and Bahrain*].

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appears to stand at odds with the above requirement of explicit or implicit exclusiveness. It is fair to suggest that such formalism is alien to international law, which largely relies on normativity as a development tool and is epitomized by the general lack of any formalistic requirements for an agreement to constitute a treaty under international law.[57] Whatever the appellation of a document, its classification as an agreement that is governed by the *VCLT* takes into account its various provisions, as well as the "particular circumstances in which it was drawn up," with a view to determining whether it "merely give[s] an account of discussions and summarise[s] points of agreement and disagreement" or whether the document "enumerate[s] commitments to which the parties have consented" and therefore "create[s] rights and obligations for parties under international law."[58] By the same token, the fact that a treaty is not made public pursuant to the relevant procedures under Article 102 of the *Charter of the United Nations* "does not actually have any consequence for the actual validity of the agreement."[59] Finally, to attribute such importance to explicit exclusiveness of an alternative procedure is simplistic and appears to disregard matters of substance in regard to the interpretation and application of Article 281. It is noteworthy that in a paper published subsequent to the award on jurisdiction and admissibility in the *South China Sea Arbitration*, Judge Rüdiger Wolfrum, one of the arbitrators participating in the award, observed that Article 281 of *UNCLOS* "raises several interpretative questions which still require a solution by the international courts and tribunals concerned."[60] In point of fact, whether there are particular requirements to fulfill in regard to the alternative dispute settlement procedure under the first criterion in the *South China Sea Arbitration* appears to be one such question, which will be addressed below.

NATURE OF PROCEDURES

In *Barbados v Trinidad and Tobago*, the arbitral tribunal observed that where the parties to a dispute have chosen a particular procedure under Article 281, "their obligation to follow the procedures provided 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

[57] See *VCLT*, *supra* note 16, art 2(1)(a).

[58] *Case Concerning Qatar and Bahrain*, *supra* note 56 at 121, para 25.

[59] *Ibid* at 122, para 29. *Charter of the United Nations*, 26 June 1945, 1 UNTS 15 (entered into force 24 October 1945).

[60] Rüdiger Wolfrum, "Conciliation under the UN Convention on the Law of the Sea" in C Tomuschat, RP Mazzeschi & D Thürer, eds, *Conciliation in International Law* (Leiden: Brill Nijhoff, 2016) 171 at 177.

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procedures."[61] Since the agreement in question "did not exclude any further procedures, *and* since their chosen peaceful settlement procedure — negotiations — failed to result in a settlement of their dispute," the relevant provisions under Part XV allowed the commencement of arbitral proceedings thereunder.[62] The conditions in question appear cumulative. The question arises whether the presence of an exclusive provision, but the absence of settlement, would nonetheless result in making Part XV inoperative. In its observations on the scope and nature of Article 281 of *UNCLOS*, including its structure, the arbitral tribunal in the *South China Sea Arbitration* essentially observed that Article 281 "requires an 'opting out' of Part XV procedures."[63] Making Part XV of *UNCLOS* inoperative is not contingent upon the nature of the procedures established by the agreement but, rather, upon the fulfilment of essentially one formal criterion of exclusion. Following this logic of the arbitral tribunal implies recognizing that two or more parties can make the entire functioning of Part XV of *UNCLOS* redundant if only they intend — explicitly —the procedure to which reference is made in the last phrase of Article 281 to be exclusive, notwithstanding the substantive undertaking of any such exclusive procedure.[64]

This understanding also appears to permeate the reasoning of the ICJ in its decision in *Somalia v Kenya (Maritime Delimitation)*.[65] According to the ICJ, states parties to *UNCLOS* are free to agree between themselves "to a means of settlement that does not lead to a binding decision of a third party (e.g., conciliation). However, if no settlement has been reached by recourse to such means, either of those states parties may submit the dispute to the court or tribunal having jurisdiction under Section 2 of Part XV, *unless* their agreement to such means of settlement excludes the procedures entailing a binding decision in Section 2 (Art. 281, para. 1)."[66] Consequently, where the exclusiveness of such a procedure appears explicitly, it is not relevant whether the procedures in question are not

[61] *Barbados v Republic of Trinidad and Tobago*, PCA Case no 2004-02, Award (11 April 2006) at 62, para 200(ii) [*Barbados v Trinidad and Tobago*] [emphasis added].

[62] *Ibid* [emphasis added].

[63] *South China Sea Arbitration*, *supra* note 15 at 87, para 224.

[64] The conciliation commission established under *UNCLOS*, *supra* note 9, art 298 and Annex V, when referring to the decisions on jurisdiction and admissibility of the arbitral tribunals in *Southern Bluefin Tuna* and the *South China Sea Arbitration*, observed that "Article 281 has been considered as a potential bar to the jurisdiction of courts and tribunals acting under Part XV of the Convention." *Timor Sea Conciliation (Timor-Leste v Australia)*, PCA Case no 2016-10, Decision on Australia's Objections to Competence (9 May 2018) at 11, para 50.

[65] *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)*, Preliminary Objections, [2017] ICJ Rep 3 [*Maritime Delimitation in the Indian Ocean*].

[66] *Ibid* at 48, para 122 [emphasis added].

vested with powers to settle the dispute. This understanding, which appears to contrast with the observations of Bernard Oxman on this particular question,[67] calls for two observations.

First, given the particular formulation of the first of the three criteria established by the arbitral tribunal in the *South China Sea Arbitration*,[68] it may be inferred that the settlement procedure in question is not of the adjudicative kind. The reasons for this are twofold: on the one hand, the provision makes use of the expression "seek to settle," while, on the other hand, adjudicative procedures *per se* are meant to resolve a dispute.[69] In point of fact, an international court or tribunal exercising its competence is obligated to "exercise that jurisdiction to its full extent."[70] The forum is compelled to "decide the whole of the *petitum* entrusted to it."[71] For a court or tribunal to "discharge itself from carrying out that primary obligation must be considered as highly exceptional and a step to be taken only when the most cogent considerations of judicial propriety so require,"[72] in which case, the court or tribunal has to "refuse" to exercise its jurisdiction.[73] From this background, it would appear unlikely that courts and tribunals under Part XV would be able to settle a dispute to the extent that adjudicative fora to which reference is allegedly made in an agreement under Article 281 of *UNCLOS* are not vested with these powers. The proposition follows accordingly that the expression "procedure" under Article 281 of *UNCLOS* does not relate to an adjudicative procedure where fora are vested with the power to make binding decisions, from which it may further be inferred that the material scope of this provision does not purport to cover dispute settlement procedures. This consideration cannot be ignored when construing Article 281(1) of *UNCLOS* with a view to determining whether conciliatory procedures may set aside otherwise binding dispute settlement provisions.

Second, to the extent that the procedure in Article 281 nevertheless relates to adjudicative proceedings, there can be no expectation of any

[67] Oxman notes that "[t]he requirement that no settlement has been reached by recourse to such means may entail delay, *but does not preclude ultimate resort* to binding arbitration or adjudication by the aggrieved party under Section 2 of Part XV." Oxman, "Courts and Tribunals," *supra* note 21 at 402 [emphasis added]. Yet Oxman also notes that Article 281 "does derogate from the principle of compulsory jurisdiction reflected in Section 2 of Part XV." *Ibid.*

[68] *South China Sea Arbitration*, *supra* note 15 at 76, para 195.

[69] See also the difference of language in *UNCLOS*, *supra* note 9, art 282.

[70] *Continental Shelf* (*Libya v Malta*), [1985] ICJ Rep 13 at 23, para 19.

[71] *Case Concerning the Frontier Dispute (Burkina Faso v Republic of Mali)*, [1986] ICJ Rep 554 at 579, para 50.

[72] *Nuclear Tests (Australia v France)*, [1974] ICJ Rep 253, Joint Dissenting Opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga, and Sir Humphrey Waldock at para 22.

[73] *Land and Maritime Boundary between Cameroon and Nigeria*, *supra* note 14 at 37.

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further procedures since, it must be assumed unless otherwise agreed, the decisions in question are binding and final. This raises challenges for the construction of the expression "exclude any further procedure."[74] It is clear that "further" is not used as an adverb but, rather, as an adjective. Also, "procedure" is not plural but, rather, singular. These details appear to be important as the expression "further procedure"[75] cannot be construed to be identical to the expression "the procedures provided for in this Part,"[76] which is plural and refers unquestionably to Section 2. The adjective "further" appears to indicate that the procedure in question entails means other than those referred to under Article 281(1). Yet, while the English version of Article 281(1) makes use of the pronoun "any," the French, Spanish, and Russian versions use expressions that vary in a non-negligible manner, referring to the equivalent of exclusion of the possibility of initiating another procedure rather than of "*any* other procedure"[77] *tout court.*[78]

As mentioned earlier, interestingly, in *Barbados v Trinidad and Tobago* the arbitral tribunal noted 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."[79] Yet, under this interpretation, the procedure is considered susceptible to settle the dispute. The question arises indubitably whether an agreement that excludes procedures under Section 2 may constitute an Article 281 agreement if the procedures do not share characteristics belonging to dispute settlement mechanisms — that is, that entail binding decisions and thus the settlement of disputes. It should be noted that in the *Dispute Concerning Coastal State Rights*, the arbitral tribunal explicitly appeared to embrace the view that to constitute a procedure within the meaning of Article 281 of *UNCLOS,* the mechanism in question must be a dispute settlement procedure. The arbitral tribunal observed in this regard that no provisions in the putative Article 281 agreements could be classified as "a means of dispute settlement."[80] On this basis alone, according to the arbitral tribunal, the

[74] *UNCLOS, supra* note 9, art 281(1).

[75] *Ibid.*

[76] *Ibid.*

[77] *Ibid* [emphasis added].

[78] The French version provides: "[E]t si l'accord entre les parties n'exclut pas la *possibilité* d'engager *une* autre procédure" [emphasis added]. The Spanish version provides: "[Y] el acuerdo entre las partes noexcluya la *posibilidad* de aplicar *otro* procedimiento" [emphasis added]. The Russian version provides: "исоглашение между сторонами не исключает *применения любой* другой процедуры" [emphasis added].

[79] *Barbados v Trinidad and Tobago, supra* note 61 at para 200(ii). Natalie Klein observes that this finding "goes against the explicit wording of that provision." Klein, *supra* note 55 at 406.

[80] *Dispute Concerning Coastal State Rights, supra* note 50 at 138, para 483.

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agreements in question "do not constitute dispute settlement clauses."[81] This fact made any consideration of whether the proceedings were of an exclusive nature redundant.[82] Consequently, in the view of the arbitral tribunal, the means to which reference is made in Article 281 are dispute settlement procedures — that is, mechanisms that are susceptible to settle the dispute independently of the considerations of the disputing parties. Yet, as noted earlier, this statement stands in contradiction to the observations of the ICJ in the *Somalia v Kenya* decision in which the ICJ indicated that Article 281 agreements may be limited "to a means of settlement that does not lead to a binding decision of a third party."[83]

To accept that Article 281 may set aside Section 2 provided only that the exclusiveness of the procedure is confirmed notwithstanding the nature of the procedure in question appears difficult to reconcile with the fact that Part XV of *UNCLOS* was considered the "pivot upon which the delicate equilibrium of the compromise must be balanced."[84] By the same token, the question arises whether a conciliation procedure enshrined in a putative Article 281 agreement could make the entire dispute settlement mechanism in Section 2 inoperative, notwithstanding that its conclusions *per se* are not binding. The *Virginia Commentary* provides in this regard that the parties, in their agreement to resort to a particular procedure, may also specify that this procedure shall be an exclusive one "even if the chosen procedure should not lead to a settlement."[85] Characterizing Article 281 as "a super provision" under such circumstances would certainly not be too far-fetched.[86] However, it is difficult to reach any dispositive conclusions based on the foregoing statement taking into account that the same commentary provides that "[i]f, however, such a settlement is not reached through the procedure chosen by the parties, article 281 makes it clear that in such a case Part XV will become applicable, and any party will be entitled to resort then to the procedures specified in this Part."[87]

It appears unambiguous that the arbitral tribunal in the *Dispute Concerning Coastal State Rights* followed the rationale that underlies the latter rather than the former quotation from the *Virginia Commentary*. The question that arises is: what importance to attribute to the *Virginia Commentary* in the interpretation of provisions under the convention, in particular when these *a priori* are not consistent? It should not be ignored that the *Virginia Commentary* is

[81] *Ibid.*

[82] *Ibid* at 141, para 489.

[83] *Maritime Delimitation in the Indian Ocean, supra* note 65 at 48, para 122.

[84] *Memorandum by the President, supra* note 25 at 122, para 6.

[85] *Virginia Commentary, supra* note 24 at para 281.5 [emphasis added].

[86] Bing Jia, *supra* note 22 at 268.

[87] *Virginia Commentary, supra* note 24 at para 281.1.

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only meant as a substitute, although an important one, "in the absence of an official legislative history for the Convention, for an objective and comprehensive analysis of the articles in the Convention."[88] A treaty interpreter need not always limit interpretation of the provisions of *UNCLOS* by circumscribing the exercise to align with the observations in the *Virginia Commentary*, at least where there are objective reasons for questioning the conclusions therein. The above commentary regarding Article 281 would appear constitutive of such a circumstance.

The provisions of Part XV of *UNCLOS* are of such a type that "derogation from [them] is incompatible with the effective execution of the object and purposes of the Convention"[89] and, consequently, impermissible given that "[u]niformity in the interpretation of the Convention should be sought [and] a few carefully defined exceptions should be allowed."[90] Such waivers could become a subterfuge for a number of states, acting in concert, to make *de facto* reservations to Part XV of *UNCLOS* (even though the convention does not allow any reservations or exceptions unless expressly permitted by the convention)[91] if the alternative procedures in Article 281 "are not required to contain a compulsory dispute settlement system."[92] To exemplify this point, applying the criterion of exclusiveness under the standard established by the arbitral tribunal in the *South China Sea Arbitration* would allow Article 16 of the *Convention on the Conservation of Southern Bluefin Tuna* to set aside Part XV procedures, so long as there is a fundamental inability of the alternative procedure in question to result in a binding decision on the parties.[93] This would follow since either party would remain entitled to block referral of the dispute to an adjudicative forum.[94] Yet, "[e]ven if Article 281 were intended also to cover dispute settlement clauses in agreements such as the 1993 *CCSBT* [*Convention for the Conservation of Southern Bluefin Tuna*], one comes back to the question: how is it possible to read into one agreement (the 1993 *CCSBT*) an intention to preclude resort to compulsory procedures in the event of disputes arising under another agreement (the 1982 *UNCLOS*)?"[95] After all, the fact that the compulsory procedures

[88] *Ibid* at 12.

[89] *UNCLOS*, *supra* note 9, art 311(3).

[90] *Virginia Commentary*, *supra* note 24, vol 5 at para XV.4.

[91] *UNCLOS*, *supra* note 9, art 309.

[92] Wolfrum, *supra* note 60 at 178.

[93] On this case, see Alan Boyle, "The Southern Bluefin Tuna Arbitration" (2001) 50 ICLQ 447.

[94] According to art 16(2) of the *CCSBT*, *supra* note 34, "[a]ny dispute of this character not so resolved shall, *with the consent in each case of all parties* to the dispute, be referred for settlement to the [ICJ] or to arbitration" [emphasis added].

[95] Boyle, "Some Problems," *supra* note 17 at 249.

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in Section 2 of Part XV "n'aient qu'une fonction supplétive" is only true in so far as concerns a "mécanisme obligatoire de règlement."[96] Where the alternative procedure is not constitutive of a *règlement*, it is devoid of status as a *mécanisme*.

On the one hand, it could be argued that Article 281 cannot be considered a provision allowing such *de facto* exceptions to Part XV of *UNCLOS*. On the other hand, as has been observed elsewhere, it could also be argued that

> even if one continues to apply the broadest view of *Lotus* that restrictions on the freedom of action of States are not to be presumed, this freedom includes the freedom to contract. … Is the rule of consent itself merely a manifestation of a broader principle, rooted in *Lotus* perhaps, not only that acceptance of compulsory jurisdiction is not to be presumed but that retention of the right to agree to jurisdiction in each case is to be presumed?[97]

The response to the above question must be in the negative. The contrary response would imply that the model of an optional protocol on dispute settlement mechanisms, applicable under the 1958 *Geneva Conventions* but intentionally excluded during the Third Conference, would be reintroduced in the era of *UNCLOS*. In this regard, it was observed at the beginning of the Third Conference that an "optional protocol would be a totally inadequate way of dealing with" disputes.[98] In point of fact, this observation was considered of such importance during the Third Conference that to relegate dispute settlement "to an optional protocol" was considered liable to "jeopardize the ratification and even the signing of" *UNCLOS*.[99] However, whether Article 281 of *UNCLOS* would allow opting out from Section 2 regardless of whether the alternative procedure is vested with the required characteristics allowing for resolution of the dispute, or whether those characteristics are indeed compulsory in order to opt out, raises the question of what role to attribute to Article 282 of *UNCLOS*. The latter interpretation might appear to be disqualified on the basis that it would make Article 282 redundant. However, the better view appears to be that Article 281 is not meant to allow for a complete opt-out from Section 2 in the absence of a provision requiring settlement of the dispute.

[96] Treves, "Le tribunal international," *supra* note 12 at 731.

[97] Oxman, "Complementary Agreements," *supra* note 35 at 284.

[98] Sohn, *supra* note 29 at 516. Elsewhere it was also observed, shortly after the fourth session of the Third Conference, that creating an effective dispute settlement mechanism "should be regarded as one of the pillars of the new world order in the ocean space." AO Adede, "Settlement of Disputes Arising under the Law of the Sea Convention" (1975) 69 Am J Intl L 798.

[99] Sohn, *supra* note 29 at 516.

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PARALLELISM OF TREATIES

Article 282 is not an exception to Section 2 of Part XV but allows autonomous choices of forum notwithstanding the binding nature of section 2 of Part XV. Under Article 282, where parties to a dispute regarding the interpretation or application of *UNCLOS* "have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree."[100] Surprisingly, this provision has been given relatively modest attention in scholarly writings,[101] although some adjudicative fora have addressed its scope and meaning.

Given the general nature of a broad range of provisions of *UNCLOS*, it will be no surprise that disputes relating to the interpretation or application of *UNCLOS*[102] will often also extend to disagreements over the interpretation or application of other treaties. *UNCLOS* in fact foresees that the law to be applied by courts and tribunals established under Section 2 of Part XV is not limited to the law of the sea governed by *UNCLOS*.[103] In the *MOX Plant* case, the respondent advanced the argument that the real dispute between the parties was governed by equivalent compulsory dispute settlement procedures provided for in other applicable treaties. According to ITLOS, notwithstanding that rights or obligations in other treaties are "similar to or identical with the rights or obligations set out in [*UNCLOS*], the rights and obligations under those agreements have a separate existence from those under" *UNCLOS*.[104] Further, according to ITLOS, as "the dispute before the Annex VII arbitral tribunal concerns the interpretation or application of [*UNCLOS*] and no other agreement, *only* the dispute settlement procedures under [*UNCLOS*] are relevant to that dispute."[105] Consequently, courts and tribunals competent under alternative treaties do not have jurisdiction over disputes concerning the interpretation or application of *UNCLOS*. This is

[100] *UNCLOS*, *supra* note 9, art 282.

[101] See e.g. James Harrison, "Defining Disputes and Characterizing Claims: Subject-Matter Jurisdiction in Law of the Sea Convention Litigation" (2017) 48:3–4 Ocean Development & Intl L 269.

[102] As to the difference between interpretation and application, see Anastasios Gourgourinis, "The Distinction between Interpretation and Application of Norms in International Adjudication" (2011) 2:1 J Intl Dispute Settlement 31.

[103] *UNCLOS*, *supra* note 9, art 293(1) provides: "A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention."

[104] *MOX Plant (Ireland v United Kingdom)*, Provisional Measures, [2001] ITLOS Rep 95 at para 50.

[105] *Ibid* at para 52 [emphasis added].

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because, according to ITLOS, "the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, *inter alia*, differences in the respective contexts, objects and purposes, subsequent practice of parties and *travaux préparatoires*."[106] Parts of this statement appear to be penetrated in the separate observations of Judge Treves, who argued that when a dispute, which may involve substantive matters under *UNCLOS*, in fact relates to a different agreement — "even [one that] set[s] out obligations overlapping with those set out in" *UNCLOS* — that agreement is not an agreement that falls within Article 282 of *UNCLOS*.[107] Agreements that fall within Article 282, according to Judge Treves, are those

> defined as encompassing disputes concerning the interpretation or application of [*UNCLOS*], be they agreements for the settlement of disputes specifically mentioned as relating to the interpretation or application of [*UNCLOS*], agreements for the settlement of disputes in general (including the acceptance, by both parties, without relevant reservations, of the optional clause of Article 36, paragraph 2, of the [*ICJ Statute*]), and agreements for the settlement of categories of disputes defined so that they may include those concerning the interpretation or application of [*UNCLOS*] (such as, for instance, disputes concerning maritime navigation).[108]

Judge Treves' interpretation clearly favours the jurisdiction of fora under Section 2 of Part XV of *UNCLOS*. Yet, the conclusions of the arbitral tribunal in the *South China Sea Arbitration* did not go along with this construction of Article 282. According to that arbitral tribunal, four conditions need to be present in order to activate Article 282 of *UNCLOS*: "(a) that the parties must have agreed through a 'general, regional or bilateral agreement or otherwise' that, (b) at the request of any party to the dispute, (c) the dispute shall be submitted to a procedure 'that entails a binding decision,' and (d) that the parties have not otherwise agreed to retain access (i.e., to opt back in) to the Part XV, Section 2 procedures."[109] These criteria are not similar to those listed in the separate opinion of Judge Treves in *Mox Plant*. In particular, the arbitral tribunal in the *South China Sea Arbitration* stated the second and third criteria to require that, "(b) at the request of any party to the dispute, (c) the dispute *shall be submitted* to a procedure 'that entails a binding decision.'"[110]

[106] *Ibid* at para 51.

[107] *Ibid*, Separate Opinion of Judge Treves at para 3.

[108] *Ibid*.

[109] *South China Sea Arbitration*, *supra* note 15 at 106, para 291.

[110] *Ibid* [emphasis added].

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Yet, according to Article 282, "such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision."[111] The embedded clause in Article 282 appears subsequent to "shall" and prior to "be." It therefore appears that, where a party in accordance with any of the agreements enumerated in Article 282 refers the dispute to an agreed alternative adjudicative forum, the latter has exclusive jurisdiction not only over matters under that agreement but also those parts of *UNCLOS* that are disputed, provided that the decision leads to a binding decision. This is not the same as concluding that the party in question is obliged to submit the dispute to the relevant alternative forum, which appears to be the meaning that results from the construction of the arbitral tribunal in the *South China Sea Arbitration*. It would indubitably follow from the construction of the arbitral tribunal that, were a forum under Section 2 of Part XV seized under those conditions, it would have to defer jurisdiction.[112]

Interestingly, while the arbitral tribunal in the *South China Sea Arbitration* enumerated four required conditions in order to activate Article 282 of *UNCLOS*, the proposition that five criteria need to be fulfilled would be no exaggeration. This is because the arbitral tribunal held that a reason for which one of the agreements in question could under no circumstances fall within the scope of Article 282 was that it "does not provide *expressly* for a compulsory binding procedure 'in lieu of' the Part XV procedures."[113] It is reasonable to infer from the above that, in the mindset of the arbitral tribunal, the dispute settlement mechanism in Part XV of *UNCLOS* is not superseded by an alternative dispute settlement mechanism in the absence of an "express" exclusionary provision under another agreement.

Article 282 of *UNCLOS* may still be open to constructions that will carve out a consolidated understanding, which in the current state of affairs cannot be seen to be the case. The opinions expressed by courts and tribunals to date, while in no sense abundant, are not sufficiently crystallized to constitute a case law upon which disputing parties may rely with certainty.

[111] *UNCLOS*, *supra* note 9, art 282.

[112] Yet, Churchill observes that if an applicant state can make out a "plausible case that a dispute involves the interpretation and application of the Convention, the court or tribunal concerned will have jurisdiction, notwithstanding the fact that the dispute may also relate to the interpretation and application of another treaty." Robin Churchill, "Some Reflections on the Operation of the Dispute Settlement System of the UN Convention on the Law of the Sea During Its First Decade" in David Freestone, Richard Barnes & David M Ong, eds, *The Law of the Sea: Progress and Prospects* (Oxford: Oxford University Press, 2006) 388 at 401.

[113] *South China Sea Arbitration*, *supra* note 15 at 108, para 302 [emphasis added].

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ARTICLE 282 AGREEMENTS AND ARTICLE 36(2) DECLARATIONS

In 2015, Bernard Oxman observed that Article 282 "does not derogate from the principle of compulsory jurisdiction reflected in Section 2, Part XV; it merely defers to other agreements" that allow an applicant to submit a dispute to binding arbitration or adjudication under those agreements.[114] Yet the exact contours of Article 282 were held to be unclear. In particular,

> does Article 282 apply where both parties have not made declarations accepting the jurisdiction of the ICJ under Article 287 of [*UNCLOS*] but have made general declarations under Article 36(2) of the *ICJ Statute* that would cover the dispute regarding the interpretation or application of [*UNCLOS*] but that do not refer specifically to such disputes or to [*UNCLOS*]? … [T]he question is not whether a party to the dispute may submit the dispute to the ICJ but, rather, whether that party is precluded by Article 282 from submitting the dispute to the other applicable procedure under Section 2 of Part XV of [*UNCLOS*].[115]

In *Somalia v Kenya*, these particular issues were disputed, which called into question the ordinary meaning of the expression "or otherwise" in Article 282 of *UNCLOS*. The optional declaration of Kenya accepting compulsory jurisdiction under Article 36(2) of the *ICJ Statute* accepted jurisdiction over all disputes other than "[d]isputes in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method or methods of settlement," one of which, according to Kenya, was Section 2, Part XV of *UNCLOS*. Due to the fact that neither Somalia nor Kenya had identified the ICJ as the preferred forum under Article 287(1)[116] of *UNCLOS*, but had instead abstained from making any such choice, both parties were, it was alleged by the respondent, deemed to have accepted the competence of an arbitral tribunal to be established under Annex VII to the convention, in accordance with Article 287(3)[117] of *UNCLOS*. Somalia rejected these arguments, asserting that an optional declaration made

[114] Oxman, "Courts and Tribunals," *supra* note 21 at 401.

[115] *Ibid.*

[116] According to *UNCLOS*, *supra* note 9, art 287(1), "[w]hen signing, ratifying or acceding to this Convention or at any time thereafter, a State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention: (a) [ITLOS]; (b) the [ICJ]; (c) an arbitral tribunal constituted in accordance with Annex VII; (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein."

[117] According to *UNCLOS*, *ibid*, art 287(3), "[a] State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII."

under Article 36(2) of the *ICJ Statute* "takes priority over the dispute resolution procedures contained in Article 287 of *UNCLOS*."[118] The ICJ based its interpretation of "or otherwise" in Article 282 on a circularity argument presented by Somalia, together with an apparently extralegal, quantitative assessment of reservations similar to that of Kenya in effect at the time of the Third Conference, as well as the preparatory work.[119]

That the expression "or otherwise" in Article 282 is considered *a renvoi* to declarations made pursuant to Article 36(2) of the *ICJ Statute* is noncontroversial and overwhelmingly shared by scholars.[120] Yet this is not the same as saying that reservations included in such optional declarations are to be disregarded due to an alleged overarching hierarchy between optional declarations and procedures under Section 2 of Part XV. Such an approach could be seen to override the intentions of the state in question, which, it is recalled, has a quintessential function in the interpretation of unilateral acts accepting compulsory jurisdiction such as declarations under Article 36(2) of the *ICJ Statute*.[121] The main argument that appears in the judgment is an acceptance of the Catch-22 argument proposed by Somalia — that is, if the reservation in the optional declaration of Kenya were to be construed to refer to Article 282, the latter would bounce it back to the optional declaration, resulting in an irresolvable conflict. Yet this particular reasoning appears to ignore the importance of reservations and qualifications in declarations under Article 36(2) of the *ICJ Statute*. One member of the bench in *Somalia v Kenya* characterized

[118] *Maritime Delimitation in the Indian Ocean*, *supra* note 65 at 44, para 111.

[119] *Virginia Commentary*, *supra* note 24 at 26–27, para 282.3.

[120] Yoshifumi Tanaka observes that "[t]here appears to be little doubt that the optional clause under art 36(2) is 'a procedure that entails a binding decision' set out in Article 282. It would seem to follow that between two States which have accepted the optional clause, the jurisdiction of the ICJ prevails over procedures under Part XV of [*UNCLOS*] by virtue of Article 282." Yoshifumi Tanaka, *The International Law of the Sea* (Cambridge: Cambridge University Press, 2015) at 423–24. Commenting on Article 282, Treves notes that "the consensual aspect — which seems to be the fundamental requirement of Article 36, paragraph 2 — undoubtedly exists, so that it is reasonable to conclude that the parties have agreed 'otherwise.'" Tullio Treves, "Conflicts Between the International Tribunal for the Law of the Sea and the International Court of Justice" (1999) 31:4 NYUJ Intl L & Pol 809 at 812. Boyle observes also to this effect that "two States which have made declarations in similar terms under art 36(2) will remain subject to the compulsory jurisdiction of the ICJ even in the LOS Convention cases." Alan E Boyle, "Problems of Compulsory Jurisdiction and the Settlement of Disputes Relating to Straddling Fish Stocks" (1999) 14:1 Intl J Marine & Coastal L 1 at 7.

[121] *Maritime Delimitation in the Indian Ocean*, *supra* note 65 at 45, para 116. See also *Border and Transborder Armed Actions (Nicaragua v Honduras)*, Jurisdiction and Admissibility, [1988] ICJ Rep 69 at 76, para 16, quoting *Factory at Chorzów (Germany v Poland)* (1927), PCIJ (Ser A) No 9 at 32; *Fisheries Jurisdiction (Spain v Canada)*, Jurisdiction, [1998] ICJ Rep 432 at 450, para 38 [*Fisheries Jurisdiction*].

such reasoning as "unmeritorious."[122] Yet, according to the ICJ, a contrary conclusion "would mean that, by ratifying a treaty which gives priority to agreed procedures resulting from optional clause declarations (pursuant to Article 282 of *UNCLOS*), states would have achieved precisely the opposite outcome, giving priority instead to the procedures contained in Section 2 of Part XV."[123]

It may be questioned whether this conclusion of the ICJ pays true recognition to the intention of the reservation of Kenya in its optional declaration. This question arises since it is undisputed that the "consensual bond"[124] that arises from optional declarations under Article 36(2) of the *ICJ Statute* exists "only to the extent to which the Declarations coincide in conferring it."[125] In his powerful dissenting opinion, Judge Patrick Robinson asserted that, due to the "lucid and unambiguous text [in the Article 36(2) optional declaration of Kenya,] it would be wholly unreasonable to conclude that the optional clause declarations between Kenya and Somalia constitute an agreement that falls within the scope of Article 282 when Part XV of [*UNCLOS*] sets out in Article 287 other methods of settlement."[126] The argument of Judge Robinson can be further substantiated in the following manner. Following the analysis of the ICJ, it would be immaterial whether Kenya had actively made use of the options under Article 287(1) of *UNCLOS* and had chosen either ITLOS or arbitration under Annex VII or, for example, whether it had made a declaration pursuant to Article 298(1)(a)(i) of the convention according to which only ITLOS or Annex VII tribunals would be the competent fora in regard to disputes relating to delimitation of maritime and continental shelf areas.[127] It would appear difficult to accept the proposition that such a choice made under Article 287(1) should not be the context for the purposes of determining the intention of the optional declaration of Kenya under Article 36(2) of the *ICJ Statute*—and, in particular, the reservations therein. However, it would likewise appear difficult to sustain the above argument in a manner that would be consistent with the analysis of the ICJ. This is so because, regardless of its

[122] *Maritime Delimitation in the Indian Ocean*, *supra* note 65, Dissenting Opinion of Judge Patrick Robinson at 71, para 19.

[123] *Ibid.*

[124] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, Jurisdiction and Admissibility, [1984] ICJ Rep 392 at 418, para 60.

[125] *Certain Norwegian Loans (France v Norway)*, [1957] ICJ Rep 9 at 23.

[126] *Maritime Delimitation in the Indian Ocean*, *supra* note 65, Dissenting Opinion of Judge Patrick Robinson at 72, para 17.

[127] To this effect, see the declarations pursuant to Article 298(1)(a)(i) of *UNCLOS* of Cuba and Guinea-Bissau, declaring that they reject the jurisdiction of the ICJ for any types of disputes that are covered by Section 2 of Part XV, online: <www.un.org/Depts/los/settlement_of_disputes/choice_procedure.htm>.

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merits, the reasoning embedded in the ICJ's conclusions would simply not allow such interpretations.

Judge Robinson also expressed virulent criticism of the quantitative argument of the ICJ, according to which, at the commencement of the Third Conference, more than half of the optional declarations under Article 36(2) of the *ICJ Statute* contained reservations similar to that of Kenya. According to the ICJ, this number of similar or identical reservations allegedly supported the conclusion that such declarations are part and parcel of what is captured by the expression "or otherwise" in Article 282.[128] According to the ICJ, "Article 282 should therefore be interpreted so that an agreement to the Court's jurisdiction through optional clause declarations falls within the scope of that Article and applies 'in lieu' of procedures provided for in Section 2 of Part XV, *even* when such declarations contain a reservation to the same effect as that of Kenya."[129] On this issue, Judge Robinson observed that "[a]lthough the majority's numerical focus is deeply flawed, one cannot help but engage with that approach if only to observe that the majority to which it clings is not a significant one."[130] Judge Robinson further asserted that "[t]he approach of the majority is untenable. … What is called for is not a quantitative assessment but a qualitative evaluation of the impact of the reservation on the optional clause declarations and thus, on whether there is an agreement that falls within the scope of Article 282."[131] In a convincing manner, Judge Robinson made the following *a contrario* argument: "Since the majority has a majoritarian fixation it would seem that the reasoning in paragraph 129 would also lead to the conclusion that the *travaux préparatoires* should be construed as evidencing an intention to exclude from the scope of Article 282 optional clause declarations with reservations different from that of Kenya, but which, unlike Kenya's, do not constitute the majority of the universe of declarations in the relevant period."[132] Yet, according to the ICJ, the procedures in Section 2 "are residual to the provisions of Section 1,"[133] from which it reached the conclusion that Article 282 should "be interpreted so that an agreement to the Court's jurisdiction through optional clause declarations falls within the scope of that Article and applies 'in lieu' of procedures provided for in Section 2 of Part XV, even when such declarations contain a reservation to the same effect as that of Kenya."[134]

[128] *Maritime Delimitation in the Indian Ocean*, *supra* note 65 at 50, para 129.

[129] *Ibid* at 51, para 130 [emphasis added].

[130] *Ibid*, Dissenting Opinion of Judge Patrick Robinson at 73, para 22.

[131] *Ibid* at 74, para 24.

[132] *Ibid* at 74, para 25.

[133] *Maritime Delimitation in the Indian Ocean*, *supra* note 65 at 49, para 125.

[134] *Ibid* at 51, para 130.

It appears from these observations that, while the decision of the ICJ on jurisdiction and admissibility in *Somalia v Kenya* garnered general approval among the judges on the bench, there remain questions surrounding Article 282 that surely will be addressed in future disputes before the ICJ, ITLOS, and Annex VII arbitral tribunals. Such questions will arise since it may not be the case that ITLOS or an Annex VII arbitral tribunal will decline jurisdiction as these fora may not necessarily agree that a state in a situation similar to that of Kenya, or one that has made a deliberate choice under Article 287 (1) similar to those mentioned above should be, to use Oxman's expression, "precluded by Article 282 from submitting the dispute to the other applicable procedure under Section 2 of Part XV of [*UNCLOS*]."[135]

Limitations to Jurisdiction under Section 2

Article 297 is intended to provide certain limitations to the compulsory dispute settlement procedures in Section 2 of Part XV. The drafting technique employed during the Third Conference has resulted in what could be seen as unfortunate language given the challenges it has caused for the interpretation and application of some of its provisions. This arises in particular regarding Article 297(1) which apparently employs reaffirmative language in regard to jurisdiction under Article 288(1). This appears problematic since it is contained in a provision covering general exceptions to compulsory jurisdiction, raising the question whether the enumerated list is exhaustive or merely reaffirmative. Article 297(3) of *UNCLOS* relates to fisheries. It also employs similarly convoluted drafting techniques as Article 297(1). It is noteworthy that the apparent developments in the case law seem to suggest that all measures related to fisheries within the exclusive economic zone (EEZ) are beyond the scope of Section 2 of Part XV of *UNCLOS*. Yet it will be established that, consistent with customary treaty interpretative rules, Article 297(3) does not allow this interpretation.

Scope and Nature of Article 297(1) of *UNCLOS*

Section 3 of Part XV of *UNCLOS* contains three articles. The first bears the title "Limitations on Applicability of Section 2" and contains three paragraphs. The second paragraph of Article 297[136] does not cause any

[135] Oxman, "Courts and Tribunals," *supra* note 21 at 401.

[136] Article 297(2)(a) deals with areas that are exempted from jurisdiction while Article 297(2)(b) relates to applicable compulsory conciliation procedures in regard to disputes under sub-paragraph (a). Article 297(2)(a) provides: "Disputes concerning the interpretation or application of the provisions of this Convention with regard to marine scientific research shall be settled in accordance with Section 2, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute arising out of: (i) the exercise by the coastal State of a right or discretion in accordance with article 246; or (ii) a

challenges of extraordinary amplitude in so far as concerns its interpretation, while the first paragraph is curiously crafted and calls for further scrutiny. This arises as it provides a list of areas over which jurisdiction is confirmed, even though the provision is a limitative clause in regard to compulsory jurisdiction. According to Article 297(1), "[d]isputes concerning the interpretation or application of this Convention with regard to the exercise by a coastal State of its sovereign rights or jurisdiction provided for in this Convention shall be subject to the procedures provided for in Section 2 in the following cases."[137] Thus, while the apparent purpose of Article 297 of *UNCLOS* is to limit jurisdiction regarding the application of Section 2, Article 297(1) is susceptible to create uncertainty on the ambit of those limitations. This arises since, subsequent to the expression "the following cases," Article 297(1) enumerates three categories of disputes in which courts and tribunals under Section 2 of Part XV are vested with jurisdiction, notwithstanding the fact that the provision in question is designated as an exception. In point of fact, "Article 297 does not provide any exception to Article 288(1) of *UNCLOS*. It is phrased entirely in affirmative terms."[138]

Two interrelated questions arise in this regard. First, why would the drafters limit jurisdiction in confirmative language? Second, given the confirmative language in a provision that deals with limitations to compulsory jurisdiction, is the listed enumeration of categories exhaustive? In this regard, the arbitral tribunal in the *Southern Bluefin Tuna* case observed that "[p]aragraph 1 of Article 297 limits the application of such procedures to disputes concerning the exercise by a coastal State of its sovereign rights or jurisdiction in certain identified cases *only*."[139] It has been noted that this construction of Article 297(1) "had the effect of implying an 'only' into the paragraph."[140] Accordingly, the enumeration in Article 297(1) appears exhaustive. While there is no obligation to do so,[141] it is noteworthy that the arbitral tribunal in *Southern Bluefin Tuna* had no recourse to the *travaux*

decision by the coastal State to order suspension or cessation of a research project in accordance with article 253."

[137] *UNCLOS*, *supra* note 9, art 297(1).

[138] *Chagos Marine Protected Area (Republic of Mauritius v United Kingdom of Great Britain and Northern Ireland)*, PCA Case no 2011-03 (18 March 2015) at 119, para 307 [*Chagos Marine Protected Area*].

[139] *Southern Bluefin Tuna* (Arbitral Tribunal), *supra* note 33 at para 61.

[140] Stephen Allen, "Article 297 of the United Nations Convention on the Law of the Sea and the Scope of Mandatory Jurisdiction" (2017) 48:3–4 Ocean Development & Intl L 313 at 316.

[141] Article 32 of the *VCLT* provides supplementary means of interpretation, recourse to which is optional. However, it is settled practice that courts and tribunals refer to the *travaux préparatoires* to confirm interpretations under the *VCLT*, *supra* note 16, art 31, regardless of whether the conclusion thereunder is sufficiently clear.

préparatoires with a view to confirming its construction according to the general rules of interpretation under Article 31 of the *VCLT*, pursuant to which the provisions in paragraph 1 of Article 297 shall be given their "ordinary meaning … in their context and in light of [*UNCLOS*'s] object and purpose."[142] In point of fact, in an apparently bold statement,[143] the arbitral tribunal claimed that *UNCLOS* "falls significantly short of establishing a truly comprehensive regime of compulsory jurisdiction entailing binding decisions."[144] The arbitral tribunal accordingly declined jurisdiction, while none of the twenty-two ITLOS judges sitting on the bench[145], it should be recalled, dissented to the establishment of *prima facie* jurisdiction[146] in the provisional measures case under Article 290(5) of *UNCLOS*.[147]

[142] *Ibid*, art 31(1).

[143] Gudmundur Eiriksson has observed that "[t]he Convention is unique among the major law-making treaties in establishing, as an integral part of its provisions, a comprehensive system for the settlement of disputes. … That such a result was attained represented a reversal of the trend then prevailing in international negotiations." Gudmundur Eiriksson, *The International Tribunal for the Law of the Sea* (Leiden: Brill, 2000) at 12. To this effect, the representative of the United States observed on 6 April 1976: "The developing factual (as distinguished from legal) situation in the oceans is one in which every country increasingly believes that it has, in effect, the option of pronouncing and attempting to achieve relevant acquiescence in its interpretation of the law. … Given the current trends in the law of the sea, there is reason to believe the process might continue even if a treaty were widely ratified. In the broadest sense, the purpose of the law of the sea negotiations is to put an end to the direct relationship that such a system entails between the enjoyment of a right and the application of power. A system of compulsory, impartial, third-party adjudication is thus an essential element of the overall structure." *Third United Nations Conference on the Law of the Sea, Official Records*, vol 5, UN Doc A/CONF.62/SR.61 (1976) at 31, paras 17–18. The representative of Australia stated on 5 April 1976, "many provisions of the convention would be acceptable *only* if their interpretation and application were subject to expeditious, impartial and binding decisions." *Third United Nations Conference on the Law of the Sea, Official Records*, vol 5, UN Doc A/CONF.62/SR.58 (1976) at 9, para 12 [emphasis added].

[144] *Southern Bluefin Tuna* (Arbitral Tribunal), *supra* note 33 at para 62.

[145] Yet, as Judge Paik has observed, "[t]he methodology and the standard of appreciation to be applied for a definitive finding of jurisdiction cannot be identical with those for a *prima facie* finding. While 'plausible connection' may be enough for prima facie jurisdiction, it falls short for the present case, in which a definitive finding on the Tribunal's jurisdiction must be made. It should surprise no one that different standards for a jurisdictional link can lead to different conclusions." *M/V "Louisa" (Saint Vincent and the Grenadines v Spain)*, Judgment, [2013] ITLOS Rep 4 at para 18, Declaration of Judge Paik.

[146] ITLOS applied a standard for *prima facie* jurisdiction first articulated by the ICJ in the *Fisheries Jurisdiction* cases, which requires a finding that there is a basis upon which jurisdiction on the merits might be founded. *Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v Iceland; Federal Republic of Germany v Iceland)*, Interim Measures, [1972] ICJ Rep 15.

[147] The relevant part of Article 290(5) reads: "Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon

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However, this construction of the arbitral tribunal was shared not only in early writings[148] but also more recently.[149]

The confusion that arose from the above finding of the arbitral tribunal in the *Southern Bluefin Tuna* case should be seen in the curious context of the remaining paragraphs of Article 297. While paragraph 2 and, albeit to a lesser degree, paragraph 3 exclude in an unequivocal manner enumerated categories of cases from the application of the procedures under Section 2 of Part XV, the same does not apply to paragraph 1. Textual construction of a treaty provision is a prominent step in the interpretation process as the "[i]nterpretation must be based above all upon the text of the treaty."[150] In fact, textual construction reflects the intention of the contracting parties to a treaty.[151] Against this background, it has been concluded that "the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur."[152] Given the wording of Article 297(1), it could be argued that the approach of the arbitral tribunal in the *Southern Bluefin Tuna* case attributes an ordinary meaning to the terms of that provision. It has been observed elsewhere that "Article 297 *UNCLOS* is not very clearly drafted; it first affirms the obligation to have recourse to compulsory dispute settlement and then establishes limits which, if interpreted broadly, may deprive the dispute settlement mechanism of all of its

by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, [ITLOS] or, with respect to activities in the Area, the Seabed Disputes Chamber, may prescribe, modify or revoke provisional measures in accordance with this article if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires."

[148] Churchill and Lowe have observed that "Article 297(1) provides that no dispute concerning the exercise by a coastal State of its sovereign rights or jurisdiction within its EEZ is subject to 'the compulsory procedures entailing binding decision' set out in section 2 of Part XV of LOSC unless it is alleged" that one of the conditions enumerated in paragraph 1 is present. Robin Churchill & Vaughan Lowe, *The Law of the Sea*, 3rd ed (Manchester: Manchester University Press, 1999) at 455.

[149] Oxman has expressed the view that Article 297(1) "establishes the basic rule generally limiting … challenges to the three situations enumerated in that paragraph." Oxman, "Courts and Tribunals," *supra* note 21 at 404.

[150] *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya v Chad)*, [1994] ICJ Rep 6 at 21, para 41.

[151] For the "intention test," see e.g. *Temple of Preah Vihear (Cambodia v Thailand)*, Preliminary Objections, [1961] ICJ Rep 17 at 31; *Aegean Sea*, *supra* note 56 at 39, para 96; *Case Concerning Qatar and Bahrain*, *supra* note 56 at 120, para 23; *Chagos Marine Protected Area*, *supra* note 138 at 168, para 426.

[152] *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, [1950] ICJ Rep 4 at 8.

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meaning concerning the exercise of the coastal State's rights in respect of the [EEZ]."[153]

In fact, the conclusion of the arbitral tribunal in the *Southern Bluefin Tuna* case can be seen to concord with the canon *expressio unius est exclusio alterius*.[154] This canon, famously illustrated in *Petroleum Development v Sheikh of Abu Dhabi*,[155] sets a "well established presumption"[156] in treaty interpretation that cannot be completely ignored, provided it assists in establishing the ordinary meaning, context, and object and purpose of the relevant terms in Article 297(1) of *UNCLOS*.[157] It would certainly appear that the reasoning of the arbitral tribunal in the *Southern Bluefin Tuna* case was influenced by the above-mentioned canon. However, that analysis paid no attention to the preparatory works, which may be seen to support an opposite conclusion. Consistent with Article 288(1) of *UNCLOS*, "[a] court or tribunal referred to in article 287 shall have jurisdiction over *any* dispute concerning the interpretation or application of this Convention."[158] While Article 297 obviously limits the extent of jurisdiction established by Article 288(1) of *UNCLOS*, Article 288(1) does appear to establish a general presumption of compulsory jurisdiction, both of which are context for the purposes of fulfilling the requirements of Article 31(1) of the *VCLT*.

The issue of the material scope and meaning of Article 297(1) also arose in the *Chagos Marine Protected Area* arbitration. There the arbitral tribunal took not only a different approach from that of the arbitral tribunal in *Southern Bluefin Tuna* but also one that could be perceived as a genuine "interpretative *volte face*."[159] According to the arbitral tribunal in *Chagos Marine Protected Area*, Article 297(1) "reaffirms, but does not limit, the

[153] Wolfrum, *supra* note 60 at 174.

[154] The canon is described as meaning "express mention excludes other items." Brownlie, *supra* note 2 at 604. Its relevance for treaty interpretation will, however, depend on the context.

[155] The umpire in the *Abu Dhabi Arbitration* characterized the canon in the following terms: "If I have a house and a garden and two hundred acres of agricultural land and if I recite this and let to X 'my house and garden', it seems obvious that the two hundred acres are excluded from the lease." *Petroleum Development Ltd v Sheikh of Abu Dhabi* (1951), 18 ILR 144 at 150.

[156] *Tokios Tokelés v Ukraine*, ICSID Case no ARB/02/18, Decision on Jurisdiction (29 April 2004).

[157] However, it is well known that the so-called canons of treaty interpretation are not part of Article 31 of the *VCLT*. On this issue, see Alain Pellet, "Canons of Interpretation under the Vienna Convention" in Joseph Klingler, Yuri Parkhomenko & Constantinos Salonidis, eds, *Between the Lines of the Vienna Convention? Canons and Other Principles of Interpretation in Public International Law* (Alphen aan den Rijn: Kluwer, 2019) 1.

[158] *UNCLOS*, *supra* note 9, art 288(1) [emphasis added].

[159] Allen, *supra* note 140 at 321.

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Tribunal's jurisdiction pursuant to Article 288(1) of the Convention."[160] Further, according to the arbitral tribunal, "[i]f Article 297(1) were understood to mean that a Tribunal would have jurisdiction over the exercise of sovereign rights and jurisdiction only in the specified cases, there would have been no need for Article 297(3) to expressly exclude disputes over the living resources of the [EEZ]: such disputes would be excluded already, by virtue of their non-inclusion in the list of cases set out in Article 297(1)."[161]

Notwithstanding the arbitral tribunal's apparently unequivocal view on this point, it decided also to examine the history in regard to Article 297 with a view to confirming the construction it had reached pursuant to the general rule of interpretation reflected in Article 31(1) of the *VCLT*. According to the arbitral tribunal, Article 297(1) "underwent a series of substantial revisions that dramatically changed its structure and content."[162] The arbitral tribunal noted that, in early drafts of what became Article 297, the draft provision "*did* provide that compulsory dispute resolution would only apply to the three cases."[163] The arbitral tribunal noted among other changes the omission of "only" in the final text of what became Article 297(3)(a). This omission could not be seen other than as having a significant bearing.[164] According to the arbitral tribunal, "the drafting history confirms the conclusion it reached from the textual construction of Article 297. Article 297(1) reaffirms a tribunal's jurisdiction over the enumerated cases."[165] However, the arbitral tribunal added some apparently unnecessary ambiguity when observing that "Article 297(1) thus expressly *expands* the Tribunal's jurisdiction to certain disputes involving the contravention of legal instruments beyond the four corners of the Convention itself."[166] Whereas Article 297(1) reaffirms jurisdiction, it clearly cannot be seen to expand jurisdiction in comparison to Article 288(1) since the basis for reaffirmation is Article 288(1) itself.

Leaving aside the latter caveat, it is clear that two radically opposed interpretations have been put forward by arbitral tribunals established

[160] *Chagos Marine Protected Area*, *supra* note 138 at 120, para 308.

[161] *Ibid*.

[162] *Ibid* at 120, para 309.

[163] *Ibid* at 120, para 310 [emphasis in original].

[164] However, some reservations have been expressed in regard to the methodology of the arbitral tribunal in the *Chagos Marine Protected Area* arbitration. Stephen Allen contends that the arbitral tribunal's reading of the *Virginia Commentary* was not comprehensive, as it "glossed over the deep divisions that persisted between the negotiating parties as to the precise terms of Article 297 during the last stage of the Convention's finalization." Allen, *supra* note 140 at 323.

[165] *Chagos Marine Protected Area*, *supra* note 138 at 128, para 317.

[166] *Ibid* at 127–28, para 316 [emphasis added].

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under the same provisions of *UNCLOS*[167] and, it must be assumed, that follow the same customary treaty interpretative rules. There can be no doubt that these jurisdictional developments will affect how states are inclined to interpret *UNCLOS* and raise ancillary questions of significant importance for the extent to which courts and tribunals will be committed, if not obliged,[168] to follow the findings of courts and tribunals that have rendered decisions in previous cases. Yet, insofar as concerns whether interpretation of Article 297 (1) is now to be considered finally settled, it should be noted that the applicant in the *South China Sea Arbitration* revised its interpretation of Article 297(1), as expressed in its memorial, to be in line with the conclusion of the arbitral tribunal in *Chagos Marine Protected Area*.[169]

SCOPE AND NATURE OF ARTICLE 297(3)(A) OF *UNCLOS*

Article 297(3) is a complex provision. A reason for this complexity is the object of this particular provision. It deals with the question of jurisdiction under Part XV regarding fisheries in waters under national jurisdiction. This matter was sensitive during the Third Conference given opposing positions of states on the legal nature of the water column superjacent to the continental shelf. Ambiguity on sensitive issues is certainly a common phenomenon in multilateral treaty drafting exercises. As observed by Christine Gray, "[t]ypically the price of consensus has been ambiguity on the crucial issues that divide states."[170] This is true of the compromise crystallized in Article 297(3).

It would appear that fisheries-related measures are subject to Section 2, except those that are enumerated in Article 297(3)(a). Yet, consistent with

[167] In the *South China Sea Arbitration*, the arbitral tribunal recognized that *UNCLOS*, *supra* note 9, art 297(1) has been interpreted in two different fashions. *South China Sea Arbitration*, *supra* note 15 at 127, para 359.

[168] *UNCLOS*, *supra* note 9, art 296(1)–(2) provides: "1. Any decision rendered by a court or tribunal having jurisdiction under this section shall be final and shall be complied with by all the parties to the dispute. 2. Any such decision shall have no binding force except between the parties and in respect of that particular dispute." The rule derives from the *ICJ Statute*, *supra* note 14, art 59.

[169] In the *South China Sea Arbitration*, the applicant expressed in its memorial, which was submitted prior to the *Chagos Marine Protected Area* award, that "[p]aragraph 1 [of Article 297] excludes from jurisdiction disputes concerning a coastal State's 'exercise' of its sovereign rights and jurisdiction, except those listed in subparagraphs (a)-(c)." *South China Sea Arbitration*, *supra* note 15, Memorial of the Philippines, vol 1 (30 March 2014) at para 7.96. Subsequently, in the jurisdictional hearing, the applicant endorsed the view expressed in the *Chagos Marine Protected Area* award, asserting that "Article 297(1) confirms and expands jurisdiction over environmental disputes, but does not limit it." *South China Sea Arbitration*, *supra* note 15, Transcript of Hearing on Jurisdiction and Admissibility, Day 2 (8 July 2015) at 104.

[170] Christine Gray, *International Law and the Use of Force*, 3rd ed (Oxford: Oxford University Press, 2008) at 9.

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Article 297(3)(b), any party to a dispute under the exceptions in Article 297(3)(a) can nevertheless refer such disputes to compulsory conciliation procedures if no agreement is reached pursuant to procedures under Section 1 of Part XV.[171] This structure makes it even more important to determine the exact scope of the exceptions to compulsory jurisdiction under Article 297(3)(a):

> Disputes concerning the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance with Section 2, 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 [EEZ] or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations.[172]

This provision's first reference to fisheries is not preceded with a reference to maritime areas under national jurisdiction, while the second reference does include such explicit qualification. Two propositions could be made. First, high seas fisheries are generally subject to procedures under Section 2 of Part XV. Second, disputes regarding coastal states' sovereign rights with respect to the living resources in the EEZ or their exercise, including their discretionary powers for determining the total allowable catch, harvest capacity, and the terms and conditions established in their conservation and management laws and regulations, are not subject to the procedures in Section 2. Yet it is difficult to accept that general rules of interpretation allow the conclusion that all EEZ fisheries-related matters are excluded from Section 2 of Part XV.[173] The absence of a reference to the EEZ prior to the mention of "fisheries" in the first part of Article 297(3)(a) merely

[171] *UNCLOS*, *supra* note 9, art 297(3)(b) provides: "(b) Where no settlement has been reached by recourse to section 1 of this Part, a dispute shall be submitted to conciliation under Annex V, section 2, at the request of any party to the dispute, when it is alleged that: (i) a coastal State has manifestly failed to comply with its obligations to ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not seriously endangered; (ii) a coastal State has arbitrarily refused to determine, at the request of another State, the allowable catch and its capacity to harvest living resources with respect to stocks which that other State is interested in fishing; or (iii) a coastal State has arbitrarily refused to allocate to any State, under articles 62, 69 and 70 and under the terms and conditions established by the coastal State consistent with this Convention, the whole or part of the surplus it has declared to exist."

[172] *UNCLOS*, *supra* note 9, art 297(3)(a).

[173] Yet, Natalie Klein observes that "Article 297 largely insulates the coastal State from review when it comes to fisheries." Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge: Cambridge University Press, 2005) at 175–76.

supports the understanding that the reaffirmation of jurisdiction therein relates to all fisheries, including EEZ fisheries. The *travaux préparatoires* appear to confirm such an understanding:

> Disputes relating to fisheries were divided into three categories: those that would remain subject to adjudication (namely *all those that do not fall into* the other two categories), those that would be completely excluded from adjudication (and, like all other disputes, would remain only subject to Section 1 of Part XV), and those that would be subject to compulsory resort to conciliation.[174]

It follows from the above that, if it fails to be excluded, a fisheries-related matter is part of the category "that would remain subject to adjudication."[175] Thus, if a category is not (1) subject to compulsory resort to conciliation or (2) completely excluded from Section 2, it is subject to procedures under Section 2. It therefore needs to be determined whether there are EEZ fisheries-related matters that do not fall within the coastal state's "sovereign rights with respect to the living resources in the [EEZ] or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations,"[176] all of which are completely excluded from Section 2.

In the *Dispute Concerning Coastal State Rights*, the respondent advanced an *obiter dictum* of the arbitral tribunal in the *Southern Bluefin Tuna* case in its submission that "[d]isputes concerning living resources within 200 nautical miles are specifically and automatically excluded from binding compulsory dispute settlement by Article 297(3)(a)."[177] Yet the arbitral tribunal in the *Southern Bluefin Tuna* case merely observed that "[u]nder paragraph 3 of Article 297, Section 2 procedures are applicable to disputes concerning fisheries but, and this is an important 'but,' the coastal State is not obliged to submit to such procedures where the dispute relates to its sovereign rights or their exercise with respect to living resources in its EEZ."[178] The proposition that this statement supports the idea that all EEZ fisheries-related matters are excluded from the procedures under Section 2 of Part XV appears inapposite. It merely duplicates the relevant terms of Article 297(3)

[174] *Virginia Commentary*, *supra* note 24, vol 2 at 105 [emphasis added].

[175] *Ibid.*

[176] *UNCLOS*, *supra* note 9, art 297(3)(a).

[177] *Dispute Concerning Coastal State Rights*, *supra* note 50, Preliminary Objections of the Russian Federation, vol 1 (19 May 2018) at 61, para 182 [*Dispute Concerning Coastal State Rights* (Preliminary Objections of Russia)].

[178] *Southern Bluefin Tuna* (Arbitral Tribunal), *supra* note 33 at para 61.

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(a) without further qualification. For reasons extraneous to Article 297(3)(a), the arbitral tribunal in the *Dispute Concerning Coastal State Rights* noted that the "interference by the Russian Federation with fisheries activities alleged by Ukraine occurred within an area that cannot be determined to constitute the [EEZ] of the Russian Federation or Ukraine,"[179] and, therefore, the conditions for the application of Article 297(3)(a) were not considered to be met. Thus, due to the particular setting that governs this dispute, as it follows from the decision on preliminary objections, the final award on the merits will very likely not touch upon the above-mentioned questions.

In the *Chagos Marine Protected Area* arbitration, Judges James Kateka and Rüdiger Wolfrum observed in their joint dissenting opinion

> that Article 297(3)(a) of the Convention contains two parts. The first part says that disputes concerning fisheries shall be settled in accordance with Section 2 of Part XV. That is a confirmation of jurisdiction and not a limitation. The limitation starts with the word "except". If the first part of this clause — the confirmation of jurisdiction — is to retain some meaning, not all disputes on fisheries can be interpreted as "… any dispute relating to its sovereign rights with respect to living resources." The second part of the clause must be narrower in scope than the scope of the first part.[180]

The above observation appears clearly supported in the preparatory works,[181] which reinforce the understanding that the absence of a reference to the EEZ prior to the mention of fisheries in the first part of Article 297(3)(a) should not be construed to mean a reaffirmation of jurisdiction in regard to high seas fisheries only. In the same line of reasoning, Judges Kateka and Wolfrum persuasively concluded that, contrary to the view expressed by the respondent, "[t]he protection of the biodiversity does not come under the sovereign rights concerning the protection and management of living resources. It is a matter of the protection of the environment…. Considering that this is a decision on an MPA [marine protected area], rather than a decision on fishing, Article 297(3)(a) of the Convention does not apply."[182]

The scope of Article 297(3)(a) in regard to straddling and highly migratory species was addressed in the *Chagos Marine Protected Area* arbitration. According to the applicant, the marine protected area enforced by the respondent was inconsistent with Articles 63 and 64 of *UNCLOS*. The

[179] *Dispute Concerning Coastal State Rights*, *supra* note 50 at 116, para 402.

[180] *Chagos Marine Protected Area*, *supra* note 138, Joint Dissenting Opinion of Judges James Kateka and Rüdiger Wolfrum at 15, para 58.

[181] *Ibid.*

[182] *Ibid* at 15, paras 56–57.

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applicant argued that "[t]he dispute is *not* based on the purported sovereign rights of the UK [United Kingdom] as a coastal State in relation to living resources in the EEZ[; rather] the dispute concerns the *rights of Mauritius*."[183] According to the respondent, "Article 297(3)(a) bars jurisdiction over measures relating to straddling and highly migratory fish stocks in the [EEZ],"[184] an argument that penetrated the reasoning of the arbitral tribunal, which — symptomatically — appears in paragraph 297 of the award of the arbitral tribunal:

> The United Kingdom's undertaking with respect to fishing rights is clearly related to living resources and — insofar as it applies to the [EEZ] — falls under the exclusion from jurisdiction set out in Article 297(3)(a). In this respect, the Tribunal does not accept Mauritius' argument that a distinction can be made between disputes regarding the sovereign rights of the coastal State with respect to living resources, and disputes regarding the rights of other States in the exclusive economic zone (with only the former excluded from compulsory settlement).[185]

Consequently, according to the arbitral tribunal, "Articles 63 and 64 (as well as the 1995 Fish Stocks Agreement) are, on their face, measures in respect of fisheries and in their application in the [EEZ] are subject to the exclusion in Article 297(3)(a).… The Tribunal also finds no basis … for the proposition that the exclusion in Article 297(3) does not apply to procedural obligations."[186] Consequently, the exclusion from compulsory jurisdiction that follows from Article 297(3)(a) relates to substantive as well as procedural undertakings in regard to EEZ prerogatives, including the material scope of Article 63(1)–(2) of *UNCLOS*. Concluding accordingly, the arbitral tribunal appeared to substantiate its position by referring to the conclusions of the arbitral tribunal in the *Barbados v Trinidad and Tobago* case in so far as concerns flying fish. Upon referring to the latter decision, the arbitral tribunal in the *Chagos Marine Protected Area* arbitration held that any EEZ "undertaking with respect to fishing rights is clearly related to living resources and … falls under the exclusion from jurisdiction set out in Article 297(3)(a)."[187] Yet it appears that the reference to *Barbados v Trinidad and*

[183] *Chagos Marine Protected Area*, *supra* note 138, Transcript of Hearing on Jurisdiction and Merits, Day 4 (25 April 2014) at 477, para 35 [emphasis in original].

[184] *Chagos Marine Protected Area*, *supra* note 138 at 103, para 257.

[185] *Ibid* at 116, para 297.

[186] *Ibid* at 117, para 300. *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, 4 August 1995, 2167 UNTS 3 (entered into force 11 December 2001).

[187] *Chagos Marine Protected Area*, *supra* note 138 at 116, para 297.

Tobago, due to the particular prevailing circumstances in that case, was inapposite for the purpose of substantiating the conclusion of the arbitral tribunal in *Chagos Marine Protected Area* in so far as concerns its understanding of the proper meaning of the terms of Article 297(3)(a) of *UNCLOS*. This is because the material object under scrutiny in *Barbados v Trinidad and Tobago* was not substantiated under Article 62(2) of *UNCLOS* in regard to any right of access.[188] In fact, the claim of Barbados to a right of access to fish in the EEZ of Trinidad and Tobago was "made on the basis that such a right could be awarded by the Tribunal as a remedy *infra petita* in the dispute concerning the course of the maritime boundary."[189] Thus, the arbitral tribunal assessed the claim of Barbados only because Trinidad and Tobago had accepted that the arbitral tribunal undertake this exercise.[190] According to the arbitral tribunal, "it does not have jurisdiction to make an award establishing a right of access for Barbadian fishermen to flying fish within the EEZ of Trinidad and Tobago, because that award is outside its jurisdiction by virtue of the limitation set out in *UNCLOS* Article 297(3)(a) and because, viewed in the context of the dispute over which the Tribunal does have jurisdiction, such an award would be *ultra petita*."[191] Yet, while flying fish for present purposes is a shared stock under Article 63(1) of *UNCLOS*, ensuring access to the EEZ certainly is not part and parcel of the procedural obligations underlying Article 63(1). Quite the contrary, its effective application, contrary to Article 63(2), presumes and is contingent upon the presence of the relevant fish stocks in the maritime areas under national jurisdiction of the relevant coastal state, which, in principle, does not make the exercise of sovereign rights contingent upon access to the EEZ of a third state. Access arrangements may be part of a matrix arrangement on allocation in a comprehensive management and conservation scheme in regard to shared fish stocks, but certainly fall outside the obligations under Article 63(1) of *UNCLOS*. Further, under any imaginative standard, the accommodation of a claim of a right of access would necessarily be a substantive, rather than a procedural, obligation.

[188] Article 62(2) of *UNCLOS* provides: "The coastal State shall determine its capacity to harvest the living resources of the exclusive economic zone. Where the coastal State does not have the capacity to harvest the entire allowable catch, it shall, through agreements or other arrangements and pursuant to the terms, conditions, laws and regulations referred to in paragraph 4, give other States access to the surplus of the allowable catch, having particular regard to the provisions of articles 69 and 70, especially in relation to the developing States mentioned therein."

[189] *Barbados v Trinidad and Tobago*, *supra* note 61 at 85, para 277.

[190] The arbitral tribunal observed that the matter was beyond the jurisdiction allowed under Article 297(3)(a) but "both Parties have requested that the Tribunal express a view on the question of Barbadian fishing within the EEZ of Trinidad and Tobago." *Barbados v Trinidad and Tobago*, *ibid* at 87, para 283.

[191] *Ibid.*

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Consequently, it can be concluded that the reference on which the arbitral tribunal in *Chagos Marine Protected Area* relied to substantiate its understanding that procedural undertakings under Article 63 are not subject to Section 2 of Part XV appears largely inapposite. Rather, in line with the observations of Judges Kateka and Wolfrum,[192] the question is whether there are procedural obligations that do not relate to the enumerated list of EEZ fisheries-related matters in Article 297(3) and that thus fall within the reaffirmative jurisdictional clause in the first part of Article 297 (3)(a) of *UNCLOS*. The arbitral tribunal in *Chagos Marine Protected Area* failed to make this distinction. This being said, it is undisputed since the arbitral tribunal's findings in the *South China Sea Arbitration* that Article 297(3) (a) relates to situations "where a claim is brought against a State's exercise of its sovereign rights in respect of living resources in its own [EEZ]. These provisions do not apply where a State is alleged to have violated the Convention in respect of the [EEZ] of another State."[193] Yet breaches of Article 63(1) of *UNCLOS*, for obvious reasons, cannot relate to alleged breaches of State A in so far as concerns the exercise of sovereign rights of State B in its EEZ. It is a stand-alone obligation, but obviously connected to Article 56(2) of *UNCLOS*.

To the extent that courts and tribunals intend to follow the approach of the arbitral tribunal in *Chagos Marine Protected Area*, it should be expected that the *ratio decidendi* will be assessed in light of the above-mentioned observations. It should be borne in mind that Article 56(1)(a) of *UNCLOS* should also be construed in juxtaposition to Article 56(2), according to which "the coastal State shall have due regard to the rights and duties of other States."[194] Thus, while the obligation of due regard is related to the principle of coastal states' sovereign rights, it is an independent obligation. The principle of due regard has a long-standing history in international law. It was characterized by Lassa Oppenheim in 1912 in the following terms: "A State, in spite of its territorial supremacy, is not allowed to alter the natural conditions of its own territory to the disadvantage of the natural conditions of the territory of a neighbouring State."[195] The procedural obligation enshrined in Article 63 of *UNCLOS* is inextricably connected with Article 56(2) of the convention, albeit not in any manner that is susceptible to transform the *pactum de contrahendo* obligation of states to seek to agree on

[192] *Chagos Marine Protected Area*, *supra* note 138, Joint Dissenting Opinion of Judge James Kateka and Judge Rüdiger Wolfrum at 15, para 58.

[193] *South China Sea Arbitration (Philippines v China)*, PCA Case no 2013-18, Award on Merits (12 July 2016) at 279, para 695 [*South China Sea Arbitration* (Merits)].

[194] *UNCLOS*, *supra* note 9, art 56(2).

[195] Lassa Oppenheim, *International Law: A Treatise*, 2nd ed (London: Longmans, Green and Company, 1912) at 220.

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joint management and conservation measures in regard to shared and, as appropriate, straddling fish stocks.[196]

Given its omission from the list of areas excepted from Section 2 of Part XV, it would certainly appear that procedural obligations under Article 63 of *UNCLOS* may be scrutinized by a forum established under Section 2 of Part XV. While the ruling of the arbitral tribunal in *Chagos Marine Protected Area* is not, to use an expression of Gilbert Guillaume, a "*jugement isolé*," it need not, with due respect to the learned arbitrators in question, necessarily be considered an authoritative precedent for the reasons expressed above.[197] The separate opinion of Judge Jin-Hyun Paik in ITLOS's *Sub-Regional Fisheries Commission* advisory opinion, subsequent to the decision in the *Chagos Marine Protected Area* arbitration, is particularly lucid in this regard. Judge Paik stressed that obligations *vis-à-vis* third states with respect to the application of Article 63(1) go hand in hand with the immutable principle that coastal states have sovereign rights to living resources within their EEZ. Yet, according to Judge Paik, not being enumerated in the list of limitations in Article 297(3)(a) implies that "any dispute arising from the alleged failure to comply with the obligation under article 63, paragraph 1, of *UNCLOS*, unlike those disputes arising from the exercise of sovereign rights of the coastal State with respect to the living resources in its EEZ, can be submitted to the compulsory procedure under Part XV, Section 2, of the Convention."[198] Accordingly, in the view of Judge Paik, the list of exceptions enumerated in Article 297(3)(a) of *UNCLOS* is exhaustive and consequently does not entail that all EEZ fisheries-related measures are beyond the application of Section 2 of Part XV.

It remains to be seen how courts and tribunals in future cases will construe Article 297(3)(a). However, it has been established beyond any doubt that the reliance of the arbitral tribunal in the *Chagos Marine Protected Area*

[196] In *Railway Traffic Between Lithuania and Poland*, the PCIJ observed in a now famous ruling that "an obligation to negotiate does not imply an obligation to reach an agreement." *Railway Traffic Between Lithuania and Poland* (1931), Advisory Opinion, PCIJ (Ser A/B) No 42 at 16. Francisco Vicuna has characterized the obligation under *UNCLOS*, *supra* note 9, art 63(1) as follows: "There is no obligation to enter into such agreements as evidenced by the expression 'shall seek.'" Francisco Orrego Vicuna, *The Exclusive Economic Zone–Regime and Legal Nature under International Law* (Cambridge: Cambridge University Press, 1989) at 61. In so far as concerns the precise scope of the obligation under Article 63(1)–(2) for the coastal State, see Bjørn Kunoy, "The Ambit of Pactum de Negotiatium in the Management of Shared Fish Stocks: A Rumble in the Jungle" (2012) 11 Chinese J Intl L 689.

[197] Gilbert Guillaume, "Le précédent dans la justice et l'arbitrage international" (2010) 137:3 JDI 685 at 690.

[198] *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion, 2 April 2015, [2015] ITLOS Rep 4, Separate Opinion of Judge Jin-Hyun Paik at 117, para 37 [*Request for Advisory Opinion by SRFC*].

arbitration on the ruling in *Bardados v Trinidad and Tobago*, in so far as concerns its finding that all EEZ fisheries-related measures are beyond the scope of Section 2 of Part XV, must be assessed *de novo*. It also remains to be seen whether the observations of Judge Paik in the above-mentioned separate opinion and the conclusions of Judges Kateka and Wolfrum in their above-mentioned joint dissenting opinion will have a bearing on future deliberations on this important question regarding the application of Section 2 to EEZ fisheries-related measures.

Optional Exceptions

Article 298(1) of *UNCLOS* allows states optionally to except disputes regarding three different areas from the compulsory procedures under Section 2 of Part XV. First, Article 298(1)(a)(i) allows states to except disputes concerning the interpretation or application of Articles 15, 74, and 83 relating to sea boundary delimitations or those involving historic bays or titles. Recent decisions of international courts and tribunals have contributed to the genesis of a consolidated meaning of some of these components, including matters that were addressed by the arbitral tribunal in the *South China Sea Arbitration* (even if vehemently contested by the respondent in those proceedings). Second, Article 298(1)(b) allows states to except disputes concerning military activities from compulsory jurisdiction. The notion of "military activities" has not "been dwelled upon by international courts and tribunals in case law since the entry into force of the Convention,"[199] but recent decisions of international courts and tribunals have established, albeit not consistently, an apparent bar on which states may rely to trigger the exception under this provision. Third, Article 298(1)(b) also allows states to except from Section 2 of Part XV 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(2)–(3).

Delimitation and Historic Bays or Titles Exceptions

The application of the procedures under Section 2 of Part XV in regard to any of the subjects identified in Article 298(1)(a)(i) raises significant challenges where the title to *terra firma*, generating the respective maritime entitlements, is disputed. The challenges are structural and confined to consideration of whether a dispute over title to such territory is a "dispute concerning the interpretation or application of th[e] Convention."[200] It is

[199] *Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v Russian Federation)*, Provisional Measures, Order of 25 May 2019, Separate Opinion of Judge Gao at 5, para 18 [*Case Concerning Ukrainian Naval Vessels*].

[200] *UNCLOS*, *supra* note 9, art 288(1).

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well established that courts and tribunals, notwithstanding the particular provisions of governing compromissory clauses, are vested with jurisdiction to make such findings of fact or ancillary determinations of law as are necessary to resolve the dispute.[201] Yet an incidental connection between the dispute and *UNCLOS* has been considered "insufficient to bring the dispute, as a whole, within the ambit of Article 288(1)."[202] Accordingly, only in disputes where the "real issue in the case" and the "object of the claim" relate to interpretation of *UNCLOS* will Part XV become applicable.[203] Whether courts and tribunals competent under Part XV of *UNCLOS* can assume their jurisdiction to extend to disputes over territory has been given some attention in recent decisions.

In the *Chagos Marine Protected Area* arbitration, the arbitral tribunal upheld the argument of the respondent according to which accepting jurisdiction over territorial disputes is impermissible under *UNCLOS*. If a dispute over title to *terra firma* were to be understood as a dispute concerning the interpretation or application of *UNCLOS*, there would obviously have been opt-out exceptions "for States not wishing their sovereignty claims to be adjudicated."[204] Further, the arbitral tribunal ruled that to conclude to the contrary "would do violence to the intent of the drafters of the Convention."[205] For this reason, the arbitral tribunal concluded that the parties' dispute regarding sovereignty over the Chagos Archipelago did not fall within its jurisdiction. While two of the arbitrators dissented on this issue,[206] the decision of the arbitral tribunal must be seen as authoritative for the purposes of applying Article 288(1) of *UNCLOS* in so far as concerns disputed titles to *terra firma*.

However, it should also be borne in mind that the arbitral tribunal expressly observed that it "does not categorically exclude that in some instances a minor issue of territorial sovereignty could indeed be ancillary to a dispute concerning the interpretation or application of the Convention."[207] It would be necessary to determine "where the relative weight of the dispute lies," implying that the arbitral tribunal would be precluded from exercising jurisdiction in regard to a dispute that "primarily

[201] *Certain German Interests in Polish Upper Silesia* (*Germany v Poland*) (1925), PCIJ (Ser A) No 6 at 18. On incidental powers, see also *Prosecutor v Dusko Tadic*, ICTY Case no IT-94-I_AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995) at paras 20–22.

[202] *Chagos Marine Protected Area*, *supra* note 138 at 90, para 220.

[203] *Nuclear Tests (New Zealand v France)*, [1974] ICJ Rep 457 at 466, para 30 [*Nuclear Tests*].

[204] *Chagos Marine Protected Area*, *supra* note 138 at 89, para 217.

[205] *Ibid* at 90, para 219.

[206] *Ibid*, Joint Dissenting Opinion of Judges James L Kateka and Rüdiger Wolfrum at 6–12.

[207] *Chagos Marine Protected Area*, *supra* note 138 at 90, para 221.

concern[ed] [land] sovereignty."[208] It would have been permissible for the arbitral tribunal to rule on a dispute "primarily [concerning] a matter of the interpretation and application of the term 'coastal State,' with the issue of [land] sovereignty forming one aspect of a larger question."[209] The arbitral tribunal, in assessing the different arguments, ruled that the preponderant weight of the dispute related to title to the Chagos Archipelago, and, therefore, an exercise of jurisdiction would be unjustified.[210]

In the *South China Sea Arbitration*, the applicant was obviously of the view that its claims regarding Chinese activities and certain maritime features in the South China Sea that were occupied by China were disputes regarding *UNCLOS*. China expressed two overarching objections to the putative classification of the dispute by the Philippines. According to China, the dispute concerned (1) territorial sovereignty over several maritime features in the South China Sea and (2) matters that appertained to maritime delimitation and that were, therefore, excluded in any event from compulsory jurisdiction given its declarations to this effect in accordance with Article 298(1)(a)(i).

To address such matters, the "applicant's notification and statement of claim instituting the proceedings ha[d] particular significance."[211] It is well established that the "nature of the dispute may have significant jurisdictional implications, including whether the dispute can fairly be said to concern the interpretation or application of the Convention or whether subject-matter based exclusions from jurisdiction are applicable."[212] In order to conform to jurisdictional requirements, courts and tribunals are required, "on an objective basis,"[213] to "isolate the real issue in the case and to identify the object of the claim,"[214] a process not limited to interpreting the submissions of the parties but also "diplomatic exchanges, public statements and other pertinent evidence."[215]

In its objective assessment of the dispute before it, the arbitral tribunal in the *South China Sea Arbitration* observed at the outset that there was clearly a

[208] *Ibid* at 87, para 211.

[209] *Ibid.*

[210] On this issue, see Whensheng Qu, "The Issue of Jurisdiction over Mixed Disputes in the Chagos Marine Protection Area Arbitration and Beyond" (2016) 47:1 Ocean Dev & Intl L 40.

[211] *"Enrica Lexie" Incident (Italy v India)*, PCA Case no 2015-28 (21 May 2020) at 62, para 233.

[212] *South China Sea Arbitration*, *supra* note 15 at 58, para 150. See also *Nuclear Tests*, *supra* note 203 at 466, para 30; *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v France) Case*, [1995] ICJ Rep 288 at 304, para 55.

[213] *Fisheries Jurisdiction*, *supra* note 121 at 448, para 30.

[214] *Nuclear Tests*, *supra* note 203 at 466, para 30.

[215] *Fisheries Jurisdiction*, *supra* note 121 at 448, para 31.

sovereignty dispute between the parties but that this dispute could not prejudice the classification of the claims of the applicant.[216] The arbitral tribunal observed that its jurisdiction did not extend to claims the resolution of which would "expressly or implicitly" require the settlement of a territorial dispute.[217] According to the arbitral tribunal, however, none of the submissions of the applicant "require[d] an implicit determination of sovereignty."[218] In a very important statement, the arbitral tribunal also observed 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."[219] In the decision on the merits, the arbitral tribunal further developed this observation to mean that, "[w]hile all sea boundary delimitations will concern entitlements, the converse is not the case: all disputes over entitlements do not concern delimitation."[220] This statement implied, accordingly, that the arbitral tribunal was vested with competence to determine whether the features in question were islands that fall under Article 121(2) or rocks within the meaning of Article 121(3) of *UNCLOS*. This ruling must be considered significant since the determination of entitlements is indeed a prerequisite for delimitation.[221] Yet, according to the arbitral tribunal, this "is a distinct issue."[222] In fact, had the arbitral tribunal concluded to the contrary, its jurisdiction would have been precluded in relation to submissions 3, 4, 5, 6, and 7 of the applicant.[223]

Prior to proceeding accordingly, the arbitral tribunal first sought to determine whether the second set of optional exceptions in Article 298 (1)(a)(i) — that is, those involving historic bays or titles — could be

[216] In *Fisheries Jurisdiction*, the ICJ observed that, in order to identify its task in any proceedings, "[i]t is for the Court itself, while giving particular attention to the formulation of the dispute chosen by the Applicant, to determine on an objective basis the dispute dividing the parties, by examining the position of both parties." *Fisheries Jurisdiction*, *supra* note 121 at 448, para 30.

[217] *South China Sea Arbitration*, *supra* note 15 at 59, para 153.

[218] *Ibid* at 60, para 153.

[219] *Ibid* at 61, para 156.

[220] *South China Sea Arbitration* (Merits), *supra* note 193 at 85, para 204.

[221] Stefan Talmon notes in this regard that establishing entitlements to maritime features in areas of overlapping claims "necessarily entails delimitation." Stefan Talmon, "The South China Sea Arbitration: Is There a Case to Answer?" in Stefan Talmon & Bing Bing Jia, eds, *The South China Sea Arbitration: A Chinese Perspective* (Oxford: Hart Publishing, 2014) 15 at 56.

[222] *South China Sea Arbitration*, *supra* note 15 at 61, para 156.

[223] Commentators have observed elsewhere that the claims of the applicant in the *South China Sea Arbitration* "constitute in essence one big dispute on the delimitation." Sienhoo Yee, "The South China Sea Arbitration (The Philippines v. China): Potential Jurisdictional Obstacles or Objections" (2014) 13 Chinese J Intl L 708.

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considered activated in this particular case. China had unequivocally claimed that its rights to the maritime area landward of the nine-dash line was "formed in the long historical course,"[224] implying that the arbitral tribunal was obligated to assess the applicability of the second alternative under Article 298(1)(a)(i).[225] In order to address submissions 1 and 2 of the applicant, it was thus required that the arbitral tribunal undertake an interpretation of the notion of "historic title," an enumerated exception in Article 298(1)(a)(i). Historic title "refer[s] to historic sovereignty to land or maritime areas," while "[h]istoric rights may include sovereignty, but may equally include more limited rights, such as fishing rights or rights of access, that fall well short of sovereignty."[226] Historic title is understood as sovereignty over maritime areas that derives from historic circumstances, while "historic rights are nowhere mentioned in the Convention, and the Tribunal sees nothing to suggest that Article 298(1)(a)(i) was intended to also exclude jurisdiction over a broad and unspecified category of possible claims to historic rights falling short of sovereignty."[227] Finally, in a persuasive manner, the arbitral tribunal also referred to dispositive evidence[228] in support of its ruling that the Chinese claims of "historic rights" were under no circumstances, notwithstanding their nomenclature, claims "to historical title."[229] Accordingly, claims of a historic nature cannot as such be considered to fall within one of the optional exceptions to compulsory jurisdiction.

The Philippines requested that the arbitral tribunal declare that certain maritime features "are part of the [EEZ] and continental shelf of the Philippines"[230] or, alternatively, that certain Chinese undertakings had interfered with the generic rights of the applicant in its EEZ. According to the arbitral tribunal, it would only consider this submission if it could be determined that "China could not possess any potentially overlapping

[224] Ministry of Foreign Affairs, People's Republic of China, *Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award on Jurisdiction and Admissibility of the South China Sea Arbitration by the Arbitral Tribunal Established at the Request of the Republic of the Philippines* (30 October 2014), Annex 649 to *South China Sea Arbitration* (Merits), *supra* note 193.

[225] The arbitral tribunal noted that the English text of Article 298(1)(a)(i) could be understood to mean that the exception only applies to delimitations involving historic bays or titles, whereas the remaining official texts do not provide such ambiguity. The arbitral tribunal favoured the broader understanding under the texts other than the English version, as this "best reconciles the different versions." *South China Sea Arbitration* (Merits), *supra* note 193 at 92, para 216.

[226] *Ibid* at 96, para 225.

[227] *Ibid* at 96, para 226.

[228] *Ibid* at 86–92, paras 207–14.

[229] *Ibid* at 97, para 228.

[230] *Ibid* at 61, para 157.

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entitlement in that area."[231] To the extent that the arbitral tribunal found the features in question to constitute rocks within the meaning of Article 121(3) of *UNCLOS*, this would necessarily imply that seaward of the outer limit of the territorial sea would be the EEZ of the Philippines.[232] Likewise, if the maritime features were considered to be low tide elevations within the meaning of Article 13(2) of *UNCLOS*, they were *per se* unable to generate any maritime entitlements whatsoever that could interfere with the EEZ of the Philippines.[233] The arbitral tribunal concluded that none of the high-tide features in the Spratly Islands were islands under Article 121(3) of *UNCLOS* and therefore did not generate any entitlement beyond the maximum twelve nautical mile breadth of the territorial sea. Consequently, there was "no possible entitlement by China to any maritime zone in the area of either Mischief Reef or Second Thomas Shoal and no jurisdictional obstacle to the Tribunal's consideration of the Philippines' Submission No. 5."[234]

Having concluded accordingly, the arbitral tribunal was able to proceed with "consideration of the Philippines' Submissions No. 8 through 13, concerning Chinese activities in the South China Sea."[235] It is apparent that the arbitral tribunal, rather than determining whether the preponderant weight of the dispute depended on a disagreement over sovereign title to *terra firma*,[236] approached the question by deciding that resolution of the dispute did not call for an express or implicit settlement of a territorial dispute.[237] Yet, it can be seen that, while the Chinese assertion of being a coastal state is not a sovereignty claim as such, it does to some extent signal a disagreement over sovereignty — that is, a disagreement about whether China has a vested sovereign title to *terra firma* in the form of an island within the scope of Article 121(2) of *UNCLOS*. On the one hand, the inclusion of such a disagreement within Article 288(1) of *UNCLOS* appears slightly bold since the conclusion of the arbitral tribunal obviously would have been different if the Philippines had also asserted an Article 121(2) entitlement to the features in question. Thus, it follows that, where the entitlement is challenged but not sovereignty, Article 298(1)(a)(i) is not triggered. On the other hand, Article

[231] *Ibid.*

[232] The arbitral tribunal observed that taking into account "China's repeated invocation of 'rights formed in the long historical course' and its linkage of this concept with the 'nine-dash line' indicates that China understands its rights to extend, in some form, beyond the maritime zones expressly described in the Convention." *Ibid* at 86, para 207.

[233] The arbitral tribunal considered the following maritime features as low-tide elevations: (1) Hughes Reef, (2) Gaven Reef (South), (3) Subi Reef, (4) Mischief Reef, and (5) Second Thomas Shoal. *Ibid* at 174, para 383.

[234] *Ibid* at 260, para 646.

[235] *Ibid* at 260, para 648.

[236] *Chagos Marine Protected Area*, *supra* note 138 at 90, para 221.

[237] *South China Sea Arbitration*, *supra* note 15 at 59, para 153.

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121 of *UNCLOS* clearly includes substantive criteria for features to generate territorial sea entitlements and for features to also generate EEZ and continental shelf entitlements. To dismiss the submissions of the Philippines under these circumstances could have been seen as reading exceptions into Article 298(1)(a)(i) that do not follow from the letter of the law.

The decision of the arbitral tribunal in the *Dispute Concerning Coastal State Rights* is also instrumental in furthering our understanding of the extent to which disputed title to territory can be included in disputes that are sought to be resolved pursuant to compulsory procedures under Section 2 of Part XV. The respondent argued that Ukraine's claim "turns on, and is rooted in, a pre-supposition of unlawful conduct by Russia in Crimea in 2014."[238] The arbitral tribunal noted that "while Ukraine formulates its dispute with the Russian Federation in terms of the alleged violation of its rights under the Convention … many of its claims in the Notification and Statement of Claim are based on the premise that Ukraine is sovereign over Crimea."[239] Further, the applicant "submits that this premise must be accepted … because the Russian Federation's claim of sovereignty over Crimea is inadmissible and implausible."[240] Thus, the arbitral tribunal concluded that "the claims submitted by Ukraine in its Notification and Statement of Claim rest on the premise that the territorial status of Crimea is settled."[241]The applicant argued further that it would nullify or make nugatory the application of Part XV were the arbitral tribunal to uphold the objection of the respondent. And, according to the applicant, this would imply that in "any future case concerning violations of a coastal State's rights, the respondent State accused of breaching *UNCLOS* could easily nullify its consent to compulsory dispute resolution by asserting a baseless territorial claim, and thereby manufacturing a territorial dispute."[242]

The applicant also sought to distinguish the situation in Crimea in support of its argument that the findings of the arbitral tribunals in the *Chagos Marine Protected Area* arbitration and the *South China Sea Arbitration*, respectively, did not constitute authoritative precedents in so far as concerned determining the scope of the tribunal's jurisdiction in its dispute with Russia. Those cases "involved longstanding and acknowledged sovereignty disputes, with no question as to the plausibility of the sovereignty claims on each side, and no resolution of the General Assembly [of the United Nations] addressing

[238] *Dispute Concerning Coastal State Rights* (Preliminary Objections of Russia), *supra* note 177 at 3, para 7.

[239] *Dispute Concerning Coastal State Rights*, *supra* note 50 at 47, para 152.

[240] *Ibid.*

[241] *Ibid* at 56, para 185.

[242] *Dispute Concerning Coastal State Rights*, *supra* note 50, Written Observations and Submissions of Ukraine on Jurisdiction (27 November 2018) at 19, para 41 [*Dispute Concerning Coastal State Rights*, Ukraine's Written Observations].

the inadmissibility of one set of claims."[243] According to the applicant, "[t]he objective reality is that there has been no change in the status of Crimea as an unquestioned part of Ukraine. … Even an express ruling of the Tribunal re-affirming that Crimea is part of Ukraine — something Ukraine expressly does not seek — would not materially improve Ukraine's legal position on that settled matter."[244] Against this background, according to the applicant, the sovereignty claim of the respondent "cannot be the basis for a declination of jurisdiction that would permit Russia to violate [*UNCLOS*] while escaping its consent to arbitrate, while also grievously weakening the framework for dispute resolution established under the Convention."[245]

Not surprisingly, the respondent vehemently disputed the merits of the claim of the applicant.[246] Whether Crimea is Ukrainian or Russian territory has been discussed at length elsewhere and will not be further examined in this article.[247] The arbitral tribunal observed that the claims of the applicant in so far as concerns its rights as a coastal state are based on the "premise that Ukraine is sovereign over Crimea, and thus the 'coastal State' within the meaning of various provisions of the Convention it invokes."[248] The arbitral tribunal noted unequivocally that to entertain the claims of Ukraine would go beyond the scope of its jurisdiction under Article 288(1) and violate the intention of the drafters of *UNCLOS*. This is evidenced by the mere fact that "a sovereignty dispute is not included either in the limitations on, or in the optional exceptions to, the applicability of compulsory dispute settlement procedures"[249] which, according to the arbitral tribunal, "supports the view that the drafters of the Convention did not consider such a dispute to be 'a dispute concerning the interpretation or application of the Convention.'"[250]

While the applicant submitted that the obligation of non-recognition under Article 41 of the International Law Commission's *Articles on State Responsibility,*[251] in regard to serious breaches of obligations under a

[243] *Ibid* at 23, para 51.

[244] *Ibid* at 26, para 58.

[245] *Ibid* at 27, para 60.

[246] *Dispute Concerning Coastal State Rights* (Preliminary Objections of Russia), *supra* note 177 at 21, para 58.

[247] For an illustrative list, see Robert Geib, "Russia's Annexation of Crimea: The Mills of International Law Grind Slowly but They Do Grind" (2015) 91 Intl Leg Studies 425; Christian Maxsen, "The Crimea Crisis: An International Law Perspective" (2014) 74 Heidelberg J Intl L 367; Antonello Tancredi, "The Russian Annexation of the Crimea: Questions Relating to the Use of Force" (2014) 1 Questions Intl L 5.

[248] *Dispute Concerning Coastal State Rights, supra* note 50 at 47, para 152.

[249] *Ibid* at 48–49, para 156.

[250] *Ibid* at 49, para 156.

[251] The *ILC Articles on State Responsibility, supra* note 6, art 41 provide that "[n]o State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation."

peremptory norm of general international law, obliged the arbitral tribunal to declare the sovereignty claim of Russia to Crimea to be inadmissible, the arbitral tribunal was unable to entertain that submission. The applicant bolstered its claim by referring to numerous resolutions of the United Nations General Assembly (UNGA) calling on all states not to recognize an alteration to the territorial status of Crimea.[252] The arbitral tribunal recognized that its jurisdiction extends to interpreting documents of international organizations, including UNGA resolutions. Yet to interpret the UNGA resolutions pursuant to the position argued by Ukraine would amount to entertaining jurisdiction to resolve disputed title to *terra firma*, which the arbitral tribunal held "it has no jurisdiction to do."[253] Interestingly the arbitral tribunal observed nevertheless that "the UNGA resolutions in question are framed in exhortatory language [and] were not adopted unanimously or by consensus but with many States abstaining or voting against them."[254] There would appear to have been no need to make these statements given the lack of jurisdiction to entertain the submission. This raises the question whether the arbitral tribunal may have reasoned otherwise had the UNGA resolutions in question been adopted on a quasi unanimous basis and in less exhortatory language. Nevertheless, "without engaging in any analysis of whether the Russian Federation's claim of sovereignty is right or wrong,"[255] the arbitral tribunal dismissed the inadmissibility submission of Ukraine on the grounds that it went beyond the scope of its jurisdiction under Article 288(1) of *UNCLOS*. According to the arbitral tribunal, the pivotal element in determining whether it had jurisdiction to entertain the relevant submission was "whether a dispute as to which State has sovereignty over Crimea exists."[256] In the affirmative, it would have to decline jurisdiction, unless the territorial dispute was only remote in comparison to the principal points of contention. In the negative, jurisdiction would exist. Thus, there was a requirement to determine whether a dispute, in the jurisdictional meaning of the term, existed.

The criteria determining the existence *vel non* of a dispute are well established by decisions of international courts and tribunals.[257] The claim

[252] UNGA Resolution 68/262 (27 March 2014) calls on "all States, international organizations and specialized agencies not to recognize any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol on the basis of the above-mentioned referendum and to refrain from any action or dealing that might be interpreted as recognizing any such altered status."

[253] *Dispute Concerning Coastal State Rights, supra* note 50 at 54, para 176.

[254] *Ibid* at 55, para 175.

[255] *Ibid* at 55, para 178.

[256] *Ibid* at 57, para 188.

[257] In the now famous Mavrommatis decision, the PCIJ observed that a dispute "is a disagreement on a point of law or fact, a conflict of legal views or of interests" between the disputing

of one of the disputing parties must be "positively opposed by the other and … the two sides must 'hold clearly opposite views' concerning the question of the performance or non-performance of certain international obligations."[258] The determination of the existence of a dispute is a matter for "objective determination"[259] from which it follows that a "mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its inexistence."[260] The arbitral tribunal in the *Dispute Concerning Coastal State Rights* observed on this note that the threshold for establishing the existence of a dispute "is *rather low* [but] a mere assertion would be insufficient in proving the existence of a dispute."[261] Yet, the arbitral tribunal noted that this does not mean that the "validity or *strength* of the assertion should be put to a plausibility test or other test in order to verify the existence of a dispute."[262] It observed that since 2014 there exists a dispute of which neither party could be unaware, and, for this reason, it was not possible to "accept Ukraine's argument that the Russian Federation's claim of sovereignty is implausible."[263] It follows accordingly that the determination of whether there exists a dispute *vel non* related to *terra firma* was conducted on an objective basis. Taking into account Article 288(1) of *UNCLOS*, the arbitral tribunal was unable to entertain jurisdiction on this submission of the applicant.

It would appear from the findings of the arbitral tribunals in *Chagos Marine Protected Area,* the *South China Sea Arbitration*, and the *Dispute Concerning Coastal State Rights* that a uniform approach has crystallized in so far as concerns whether the fora under Section 2 of Part XV may exercise jurisdiction where the real object of a dispute relates to title to *terra firma*. Yet the conclusions of the ITLOS Special Chamber in the *Dispute Concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean* introduces complexity to the question.[264] This dispute is of a particular kind, given the track record of previous arbitral proceedings between Mauritius and the United Kingdom and the subsequent rendering of an

parties. *Mavrommatis Palestine Concessions (Greece v United Kingdom)*(1924), PCIJ (Ser A) No 2, at 11.

[258] *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v India)*, Jurisdiction and Admissibility, [2016] ICJ Rep 255 at 269, para 34.

[259] *Ibid* at 270, para 36.

[260] *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)*, Preliminary Objections, [1962] ICJ Rep 319 at 328 [*South West Africa Cases*].

[261] *Dispute Concerning Coastal State Rights, supra* note 50 at 57, para 188 [emphasis added].

[262] *Ibid* [emphasis added].

[263] *Ibid* at 57, para 190.

[264] *Mauritius v Maldives, supra* note 23.

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advisory opinion by the ICJ.[265] The ICJ was "of the *opinion* that, having regard to international law, the process of decolonization of Mauritius was not lawfully completed when that country acceded to independence in 1968, following the separation of the Chagos Archipelago."[266] The ICJ was also "of the *opinion* that the United Kingdom is under an obligation to bring to an end its administration of the Chagos Archipelago as rapidly as possible."[267]

One cannot truly describe these observations of the ICJ as operative paragraphs as an "advisory opinion as such has no binding force"[268] and consequently is unable to constitute *res judicata*. It is for these very reasons that the consent of states that are not in agreement on the relevant pending legal questions is not needed, contrary to contentious cases where the consent of the disputing parties is a necessary requisite for jurisdiction. In point of fact, "[t]he situation is different in regard to advisory proceedings even where the Request for an Opinion relates to a legal question actually pending between States."[269] Yet, according to the ITLOS Special Chamber, the principle of consent "does not mean that the advisory opinion could not entail implications for the disputed issue of sovereignty."[270] According to the Special Chamber, the rendering of the advisory opinion resulted in "determinations"[271] that the United Kingdom's continued administration of the Chagos Archipelago "is an unlawful act of a continuing character, entailing its international responsibility."[272] Further, while it is "generally recognized that advisory opinions of the ICJ cannot be considered legally binding," it is, according to the Special Chamber, equally recognized that an advisory opinion "entails an authoritative statement of international law."[273] Consequently, "judicial determinations made in advisory opinions carry no less weight and authority than those in judgments because they are made with the same rigour and scrutiny by the 'principal judicial organ' of the [UN] with competence in international law."[274]

This conclusion of the Special Chamber raises questions that touch on the very foundation of international law, including how to construe the so-called

[265] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, [2019] ICJ Rep 95.

[266] *Ibid* at 149, para 183(3) [emphasis added].

[267] *Ibid* at 149, para 183(4) [emphasis added]

[268] *Request for Advisory Opinion by SRFC, supra* note 198 at 26, para 76.

[269] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, First Phase, Advisory Opinion, [1950] ICJ Rep 65 at 71.

[270] *Mauritius v Maldives, supra* note 23 at 51, para 168.

[271] *Ibid* at 53, para 173.

[272] *Ibid.*

[273] *Ibid* at 61, para 202.

[274] *Ibid* at 62, para 203.

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'weight and authority' of advisory opinions in as much as they are judicial decisions. There can be no doubt that international law is not based on precedent and that *res judicata*[275] is only applicable as between the disputing parties. In point of fact, the inclusion of Article 59 in the *ICJ Statute* was intended to exclude any role for the doctrine of *stare decisis* in international law.[276] However, it is undisputed that precedents nevertheless have a potent role in international law.[277] Thus, it is noteworthy, given the above-mentioned premise, how the "weight and authority" (to use an expression of the Special Chamber) of an ICJ advisory opinion can result in depriving the differences that exist between Mauritius and the United Kingdom of the status of a dispute on sovereignty over the Chagos Archipelago. This is material as it is not possible to construe the Special Chamber's decision to entertain jurisdiction other than as a finding that the territorial dispute is settled.[278] Yet the United Kingdom strongly rejects any understanding pursuant to which it is not sovereign over the Chagos Archipelago and persistently holds to its position that the issue in question "remains at heart a bilateral sovereignty dispute between Mauritius and the United

[275] On *res judicata*, see Eliahu Harnon, "*Res Judicata* and Identity of Actions: Law and Rationale" (1966) 1 Israel LR 539. See also Hersch Lauterpacht, *The Development of International Law by the International Court,* 2nd ed (London: Stevens & Sons, 1958) at 325–26; Derek Bowett, "*Res Judicata* and the Limits of Rectification of Decisions by International Tribunals" (1996) 8 African J Intl & Comparative L 577 at 577–79.

[276] Mohamed Shahabuddeen, *Precedent in the World Court: Hersch Lauterpacht Memorial Lectures* (Cambridge: Cambridge University Press, 1996) at 97–103.

[277] This understanding was epitomized in the *Land and Maritime Boundary* case, in which the ICJ observed that "[t]here can be no question of holding [a state] to decisions reached by the Court in previous cases" that do not have binding effect for that state: "The real question is whether, in [the current] case, there is cause not to follow the reasoning and conclusions of earlier cases." *Land and Maritime Boundary between Cameroon and Nigeria*, *supra* note 14 at 292, para 28. Likewise in the *Croatian Genocide* case, the ICJ observed that "[w]hile some of the facts and the legal issues dealt with in those cases arise also in the present case, none of those decisions were given in proceedings between the two Parties to the present case (Croatia and Serbia), so that, as the Parties recognize, no question of *res judicata* arises (Article 59 of the [*ICJ Statute*]). To the extent that the decisions contain findings of law, the Court will treat them as it treats all previous decisions: that is to say that, while those decisions are in no way binding on the Court, it will not depart from its settled jurisprudence unless it finds very particular reasons to do so." *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, Preliminary Objections, [2008] ICJ Rep 412 at 428, para 53.

[278] Consistent with the principle that the land dominates the sea, entitlement to maritime areas is a necessary corollary of sovereign title to *terra firma*. The ICJ has observed in this regard 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'…. Following this approach, sovereignty over the islands needs to be determined prior to and independently from maritime delimitation." *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)*, [2007] ICJ Rep 659 at 699, para 126.

Kingdom."[279] Nevertheless, given the Special Chamber's ruling, the position of the United Kingdom cannot be conceived other than as a "mere assertion [of] the existence of a dispute."[280] Consequently, it can be concluded that the standard established in the *Dispute Concerning Coastal State Rights*, according to which the threshold for establishing the existence of a dispute "is rather low,"[281] was not followed by the arbitral tribunal in the *Dispute Concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean*.

To summarize, it is concluded that the case law of courts and tribunals regarding the scope of the exceptions under Article 298(1)(a)(i) has appeared to crystallize around an understanding that the jurisdiction of courts and tribunals under Part XV of *UNCLOS* does not extend to territorial disputes, except where such disputed elements are only incidental. Further, the threshold for determining the existence of a territorial dispute has been set at a relatively low level. Yet this coherent approach has been challenged by the ruling of the Special Chamber in the *Dispute Concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean*. The facts of that case are peculiar and are unlikely to be reproduced. Thus, it remains to be seen to what extent the reasoning in that decision will impact future disputes regarding the interpretation and application of *UNCLOS* that also relate to territorial disputes.

MILITARY ACTIVITIES

Accepting compulsory jurisdiction in regard to disputes involving military activities was a sensitive topic during the Third Conference.[282] A compromise was crystallized in Article 298(1)(b), under which states parties may declare in writing that they do not accept the procedures in Section 2 of Part XV in regard to two alternative areas relating to the use of force. The first relates to "disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service."[283]

[279] Upon the adoption of UNGA Resolution 73/295, 22 May 2019, seeking an "advisory opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965," the United Kingdom representative declared that "[t]he United Kingdom has no doubt about our sovereignty over the British Indian Ocean Territory." UNGA Resolution 73/295, UNGAOR, 73rd Sess, UN Doc A73/PV.83 (22 May 2019), UN Doc A73/PV.83 (22 May 2019) at 25.

[280] *South West Africa Cases*, *supra* note 260 at 328.

[281] *Dispute Concerning Coastal State Rights*, *supra* note 50 at 57, para 188 [emphasis added].

[282] It has been observed that twenty-seven states have made declarations pursuant to Article 298(1)(b) in regard to the military activities exception, which witnesses the sensitivity that this particular matter is susceptible to raise. *Case Concerning Ukrainian Naval Vessels*, *supra* note 199, Separate Opinion of Judge Gao at 3, para 11.

[283] *UNCLOS*, *supra* note 9, art 298(1)(b).

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The expression "military activities" is not subject to any definition in *UNCLOS*[284] and, until recently, has been addressed only vaguely.[285] Some commentators have advocated a broad understanding of "military activities" as including but "not limited to actions by warships and military aircraft or government vessels and aircraft engaged in non-commercial service."[286] It has also been observed that Article 298(1)(b) recognizes state preferences not to use "compulsory third-party procedures for resolving disputes about military activities," the characterization of which can "be made in accordance with strategic policies [in order to] protect[] States from formal international review through legal processes of the elect."[287] Yet placing too much focus on what constitutes a military activity *stricto sensu* is susceptible of blurring the understanding of Article 298(1)(b) of *UNCLOS*. In point of fact, recent decisions of courts and tribunals appear to establish, while not in an entirely consistent manner, a high bar for the application of the exception in Article 298(1)(b).

In the *South China Sea Arbitration*, the notion "military activities" was given extensive consideration. The arbitral tribunal stressed the importance of the fact that "Article 298(1)(b) applies to 'disputes *concerning* military activities' and not to 'military activities' as such."[288] Consequently, what matters is whether the dispute as such concerns military activities rather than whether a State was involved in military activities "in some manner in relation to the dispute."[289] Accordingly, not every military operation will be classified a military activity under Article 298(1)(b) as the determination of such a typology will in each and every case be qualified pursuant to a determination of whether the activity relates to a dispute regarding the interpretation or application of *UNCLOS*. Notwithstanding whether actions have been taken by military forces, the activities must be "objectively classified as military in nature" in order to trigger the military exception under Article 298(1)(b).[290]

The use of the preposition "concerning"[291] military activities in Article 298(1)(b) was given particular attention in the *Dispute Concerning Coastal*

[284] However, Article 19(2) can, for purposes of determining the application of Article 298(1)(b), be considered relevant to the extent that a vessel purporting to pass through the territorial sea undertakes any of the activities listed in the former. See *Case Concerning Ukrainian Naval Vessels*, *supra* note 199, Separate Opinion of Judge Jesus at 3–5.

[285] *Case Concerning Ukrainian Naval Vessels*, *supra* note 199, Separate Opinion of Judge Gao at 5, para 18.

[286] Talmon, *supra* note 221 at 57–58.

[287] Klein, *supra* note 173 at 291–92.

[288] *South China Sea Arbitration* (Merits), *supra* note 193 at 455, para 1158 [emphasis in original].

[289] *Ibid.*

[290] *Dispute Concerning Coastal State Rights*, *supra* note 50 at 98, para 338.

[291] *UNCLOS*, *supra* note 9, art 298(1)(b).

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State Rights. According to the applicant, the ordinary meaning of "concerning" was "about" or "in reference to."[292] Accordingly, a mere causal link between a military activity and a dispute would not qualify for the military activity exception. This was supported by the argument that "[h]ad the States Parties intended to allow such a broad and sweeping application of Article 298(1)(b), they would have used different language, such as 'arising out of,' or 'in connection with.'"[293] On this issue, the arbitral tribunal appeared to uphold the arguments of the applicant when ascertaining that the "Convention employs the term 'concerning,' in contrast to other terms, such as 'arising out of,' 'arising from,' or 'involving,' used [in Articles 151(8), 289, 297(1), 297(2(a), and 297(2)(b)] to characterise disputes."[294] As such, the preposition "concerning," according to the arbitral tribunal, "circumscribes the military activities exception by limiting it to those disputes whose subject matter is military activities."[295] By the same token, "a mere 'causal' or historical link between certain alleged military activities and the activities in dispute cannot be sufficient to bar an arbitral tribunal's jurisdiction under Article 298(1)(b)."[296]

Whether or not a military vessel is employed in operations that can be considered military in nature does not prejudice the determination of whether these operations relate to military activities within the meaning of Article 298(1)(b). Accordingly, whether the vessel is military is not "conclusive" for determining whether the military exception is applicable.[297] It might seem uncontroversial to assert that, absent evidence to the contrary, it can ordinarily be assumed that interactions of military vessels constitute "military activities." Yet, while this may be acceptable in light of the definition of military activities by the above-mentioned commentators, it appears from practice that this cannot be asserted with certainty. Whether or not the activities are pursued by law enforcement or naval vessels is not material for the purpose of Article 298(1)(b) of *UNCLOS*. The use of force by a military vessel may be classified as a law enforcement activity, while the use of force by a law enforcement vessel may be characterized as military activity. Accordingly, the nature of the vessels conducting the operations concerned should not be given preponderant weight as the "traditional distinction between naval vessels and law enforcement vessels in terms of their roles has become considerably blurred."[298]

[292] *Dispute Concerning Coastal State Rights*, Ukraine's Written Observations, *supra* note 242 at 57, para 125.

[293] *Ibid.*

[294] *Dispute Concerning Coastal State Rights, supra* note 50 at 95, para 330.

[295] *Ibid.*

[296] *Ibid.*

[297] *Ibid* at 96, para 334.

[298] *Case Concerning Ukrainian Naval Vessels, supra* note 199 at 17, para 64.

In the *South China Sea Arbitration*, the arbitral tribunal appeared to establish a low standard for finding that military operations constitute "military activities" within the meaning of Article 298(1)(b). The involvement in that case of military and paramilitary vessels appears to have contributed to the establishment of this low standard, which does not appear to pay attention to whether the military operations themselves are at the core of the dispute. The arbitral tribunal noted the standoff over the Second Thomas Shoal during which Chinese governmental vessels sought to prevent the resupply and rotation of Philippine troops. While there were no Chinese military vessels involved in the standoff, these were "reported to have been in the vicinity."[299] It remains unclear whether this pseudo-presence of military vessels was a conclusive factor for determining that such a situation "represents a quintessentially military situation," particularly as the vessels in question were "arrayed in opposition to one another."[300] In any event, it is apparent that the arbitral tribunal favoured the establishment of a standard according to which any use of force falls within the military activities exception.[301]

Such a standard is significantly lower than the general criterion established in the *Dispute Concerning Coastal State Rights*. In the latter case, the arbitral tribunal expressed the view that the military activities exception in Article 298(1)(b) could only be triggered in regard to disputes whose subject matter relates to military activities.[302] This higher standard was also clearly enshrined in the provisional measures order of ITLOS in the *Case Concerning the Detention of Three Ukrainian Naval Vessels*.[303]

In the *Dispute Concerning Coastal State Rights*, the arbitral tribunal was explicit as to the insufficiency of a use of force as such to bring a case within the ambit of Article 298(1)(b). According to the arbitral tribunal, it was not possible to classify the alleged use of physical force in order to exclude Ukraine from access to, and exploitation of, hydrocarbon fields and fisheries as military activities within the meaning of Article 298(1)(b) of *UNCLOS*.[304] In support of its conclusion, the arbitral tribunal noted that the use of force alleged by Ukraine "appears to have been directed towards maintaining civilian activities such as the exploitation of hydrocarbons and fisheries."[305]

In the *Case Concerning Ukrainian Naval Vessels*, ITLOS, in establishing *prima facie* jurisdiction, refused to accept that firing warning shots and then targeted shots against a naval vessel that resulted in damaging the vessel

[299] *South China Sea Arbitration* (Merits), *supra* note 193 at 456, para 1161.

[300] *Ibid.*

[301] *Ibid.*

[302] *Dispute Concerning Coastal State Rights*, *supra* note 50 at 95, para 330.

[303] *Case Concerning Ukrainian Naval Vessels*, *supra* note 199.

[304] *Dispute Concerning Coastal State Rights*, *supra* note 50 at 97, para 336.

[305] *Ibid.*

and injuring servicemen amounted to military activities within the meaning of Article 298(1)(b) of *UNCLOS*. It should be borne in mind that the statement of claim of Ukraine related to the immunity of three Ukrainian naval vessels and not to the use of force by Russia,[306] while the dispute between the parties was essentially limited to rights concerning transit of the Kerch Strait. In reaching its conclusion, ITLOS meticulously assessed the sequence of events in order to determine whether the use of force related to the alleged breaches of *UNCLOS* rather than determining whether the use of force was a breach of a convention concluded between the parties in 2003.[307] This distinction has substantial implications in so far as concerns the application of Article 298(1)(b), notwithstanding that ITLOS has previously concluded "that a warship is an expression of the sovereignty of the State whose flag it flies"[308] and that one could expect that firing shots at such a vessel would naturally constitute military activities. While there can be no doubt that coast guard vessels of the respondent fired at military vessels of the applicant, the actions in question failed to qualify as military activities under Article 298(1)(b), notwithstanding that the situation clearly fell within the parameters of a "quintessential military situation" as described by the arbitral tribunal in the *South China Sea Arbitration*.[309]

ITLOS dissected the course of events in a timeline with three different incidents.[310] The three Ukrainian naval vessels sought to transit the Kerch Strait to the port of Berdyansk in the Sea of Azov but were blocked by Russian coast guard vessels. According to Russia, referring to numerous official statements of Ukraine supporting the classification of the use of force as military activities, "[w]hilst it is not in any way accepted that Russia engaged in an unlawful use of force, including any act of aggression, it is clear that it is common ground that the incident concerned military activities."[311] Yet ITLOS took the view that, in order to determine "the nature of the activities

[306] The Ukrainian statement of claim claimed: "In seizing and detaining the Ukrainian naval vessels the 'Berdyansk,' the 'Yani Kapu,' and the 'Nikopol,' Russia breached its obligations to accord foreign naval vessels complete immunity under Articles 32, 58, 95 and 96 of the Convention; In detaining the 24 crewmen of 'Berdyansk,' the 'Yani Kapu,' and the 'Nikopol,' and initiating criminal charges against the crewmen, Russia further breached its obligations under Article 32, 58, 95 and 96 of the Convention." *Case Concerning Ukrainian Naval Vessels*, *supra* note 199 at 6, para 22.

[307] *Ibid* at 19–20, paras 71–76.

[308] *ARA Libertad (Argentina v Ghana)*, Provisional Measures, Order of 15 December 2012, [2012] ITLOS Rep 332 at 348, para 94. See also the observation of Kraska, according to whom "[w]arship immunity is based on the principle of State sovereignty and legal equality among States." James Kraska, "Military Operations" in Rothwell et al, *supra* note 21, 866 at 872.

[309] *South China Sea Arbitration* (Merits), *supra* note 193 at 456, para 1161.

[310] *Case Concerning Ukrainian Naval Vessels*, *supra* note 199 at 18–20, paras 68–77.

[311] *Ibid* at 12, para 32.

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in question,"[312] it was necessary to shed light on "whether the arrest and detention took place in the context of a military operation or a law enforcement operation."[313]

The cause of the incident was the Russian Federation's denial of passage by the Ukrainian naval vessels through the Kerch Strait and the attempt by those vessels to proceed nonetheless, whereupon the vessels were ordered to wait in the vicinity of an anchorage where they were held for eight hours. From the above background, the ITLOS concluded that "at the core of the dispute was the Parties' differing interpretation of the regime of passage through the Kerch Strait. In the view of the Tribunal, such a dispute is not military in nature."[314] ITLOS stressed also that force was employed in the process of arrest and "the context in which such force was used is of particular relevance."[315] After being held for eight hours, the Ukrainian naval vessels abandoned their mission to transit the Kerch Strait and sailed away. The Russian coast guard then resorted to force as the Ukrainian naval vessels ignored the order to stop. Accordingly, the use of force did not relate to the dispute, which, as mentioned earlier, was centred on transiting the Kerch Strait. ITLOS therefore concluded that the use of force in question concerned "a law enforcement operation rather than a military operation."[316] Yet, in the event that force had been used during the tentative transit of the Kerch Strait, that conclusion, without doubt, would have been different in so far as concerns the refusal to classify the acts as military activities. In such a situation, there would not have been a mere causal link between the dispute and the use of force.

Interestingly, ITLOS did not consider whether the conduct of the Ukrainian vessels was itself constitutive of military activities, including whether "secret" operations, as alleged by Russia in its memorandum,[317] could be considered non-innocent and, therefore, in light of the circumstances of this particular case, military activities.[318] However, given that the order concerned a request for provisional measures, any such finding would indubitably have involved undertaking a review on the merits and, therefore, been beyond the scope of the proceedings.

The characterization by a state of its own conduct is, in principle, immaterial in so far as concerns the application of Article 298(1)(b) of *UNCLOS*. This principle applies in particular where a respondent state objects to the

[312] *Ibid* at 17–18, para 66.

[313] *Ibid* at 18, para 67.

[314] *Ibid* at 19, para 72.

[315] *Ibid* at 19, para 73.

[316] *Ibid* at 20, para 74.

[317] *Ibid*, Memorandum of Russian Federation (7 May 2019) at 10, para 28.

[318] *Case Concerning Ukrainian Naval Vessels*, *supra* note 199, Separate Opinion of Judge Jesus at 3–5.

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availability of the procedures in Section 2 of Part XV and therefore characterizes the acts in question as military activities. *A fortiori*, where a state, although not appearing in the proceedings, has repeatedly classified the activities in question as civilian prior to the proceedings, it is difficult not to attach preponderant weight to such classification *proprio motu*. In the *South China Sea Arbitration*, the applicant raised this argument in so far as concerns Submission no. 12. According to the applicant, the respondent had repeatedly stated that the facilities at Mischief Reef were being built for civilian use.[319] Accordingly, the involvement of the military in land reclamation activities could not automatically result in this activity becoming a military activity within the meaning of Article 298(1)(b).[320] Judging from meeting reports between the Philippines and China, it would appear that China had not, *vis-à-vis* the Philippines, claimed that the activities in question were military activities.[321] Quite the contrary; the arbitral tribunal therefore attributed weight to China's repeated and unequivocal characterization of the construction and installations on Mischief Reef as not pursuing militarization. For these reasons, the arbitral tribunal concluded that it would "not deem activities to be military in nature when China itself has consistently resisted such classifications and affirmed the opposite at the highest level."[322]

Yet, as ITLOS observed in the *Case Concerning Ukrainian Naval Vessels*, the characterization of activities by a state "can be subjective and at variance with the actual conduct."[323] Consequently, it is conceivable that statements that are in contradiction with previous unequivocal declarations can also be plainly disregarded, an illustration of which appears also in the *Dispute Concerning Coastal State Rights*. There the respondent relied on the importance that the arbitral tribunal in the *South China Sea Arbitration* attached to the repeated statements of China to the effect that its activities on Mischief Reef were civilian.[324] Given Ukraine's alleged characterization in multiple fora of the activities of Russia as military, Russia argued that both parties were in fact in agreement that the dispute related to military activities,[325] which was said to be a straightforward recognition that there was no need to address this matter at the merits stage of the proceedings.[326] Further, while

[319] *South China Sea Arbitration*, *supra* note 15, Transcript of Hearing on Jurisdiction and Admissibility, Day 2 (8 July 2015) at 75–76.

[320] *Ibid* at 82–83.

[321] *South China Sea Arbitration* (Merits), *supra* note 193 at 409–10, paras 1019–22.

[322] *Ibid* at 413, para 1028.

[323] *Case Concerning Ukrainian Naval Vessels*, *supra* note 199 at 17, para 65.

[324] *Dispute Concerning Coastal State Rights*, *supra* note 50, Reply of the Russian Federation (28 January 2019) at 58, para 145.

[325] See *ibid* at 59, para 147.

[326] *Ibid*.

"categorically reject[ing] any allegation that it has engaged in unlawful military activities,"[327] the only reason for which the respondent objected to jurisdiction according to the first alternative in Article 298(1)(b) was due to express statements to this effect by the applicant.[328] The arbitral tribunal did not accept the submission of the applicant, emphasizing instead the requirement of an objective determination of the activities in question.

To summarize, recent decisions of courts and tribunals have significantly contributed to an understanding of the military activities exception in Article 298(1)(b) of *UNCLOS*. The findings in the *Dispute Concerning Coastal State Rights*, on the one hand, and in the *Case Concerning Ukrainian Naval Vessels*, on the other, epitomize the jurisprudential *acquis* on this particular topic. These decisions have elucidated the interpretation and application of Article 298(1)(b). It is noteworthy that, among the five arbitrators that constituted the arbitral tribunal in the *Dispute Concerning Coastal State Rights*, three are incumbent ITLOS judges. The arbitral tribunal was also presided by Judge Paik who, during the proceedings and deliberation on the award concerning the preliminary objections of the Russian Federation, was also president of ITLOS. The interpretative approaches taken by ITLOS and the arbitral tribunal in regard to Article 298(1)(b) are similar. This is obviously no coincidence.

LAW ENFORCEMENT ACTIVITIES

Other than allowing an optional exception to the application of procedures under Section 2 of Part XV in regard to disputes concerning military activities, Article 298(1)(b) also permits exceptions from compulsory jurisdiction regarding "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."[329] The distinction between "military activities" and "law enforcement activities" is an important element in regard to the application of Article 298(1)(b).[330] Law enforcement activities in regard to areas that are not covered by Article

[327] *Ibid* at 55, para 137.

[328] See *Dispute Concerning Coastal State Rights*, Ukraine's Written Observations, *supra* note 242 at para 130.

[329] *UNCLOS*, *supra* note 9, art 298(1)(b).

[330] Reliance on the second enumerated exception in Article 298(1)(b) is tantamount to a recognition that the dispute relates to interpretation or application of Article 297(2)–(3). In the award on jurisdiction in the *Arctic Sunrise Arbitration*, the arbitral tribunal observed that it followed from the respondent's reliance on the law enforcement exception in Article 298(1)(b) that "Russia considers that the present dispute falls within that category of disputes and is, therefore, excluded from the jurisdiction of the Tribunal." *Arctic Sunrise Arbitration (Kingdom of Netherlands v Russian Federation)*, PCA Case no 2014-02, Award on Jurisdiction (26 November 2014) at 12–13, para 67 [*Arctic Sunrise*].

297(2)–(3) of *UNCLOS* are subject to the procedures under Section 2 of Part XV. This arises since the exception in regard to law enforcement activities in Article 298(1)(b) only relates to disputes concerning the application of Article 297(2)–(3) — that is, only law enforcement activities in regard to the exercise of sovereign rights and jurisdiction excluded from compulsory jurisdiction pursuant to the provisions of Article 297(2)–(3). Consequently, a military operation or paramilitary operation that does not pass the bar for constituting military activities within the meaning of Article 298(1)(b) will only be excepted from Section 2 of Part XV if the operation in question relates to the exercise of the above-mentioned sovereign rights and jurisdiction. Consequently, it can be asserted that the law enforcement activities exception is more circumscribed than the military activities exception. Yet whether this is the case depends obviously on the standard to be met in order to constitute military activities within the meaning of Article 298(1)(b).

For these purposes, the applicant in the *South China Sea Arbitration* stressed that none of its claims related to Chinese violations of the subject matter of Article 297(2)–(3) of *UNCLOS*. Consequently, the law enforcement exception was said to be inapplicable.[331] In fact, this was emphatically stressed by the applicant in submitting that its "claims only concern areas where China has no entitlement to an EEZ or continental shelf."[332] Where states make use of the optional law enforcement exception to compulsory jurisdiction under Article 298(1)(b) of *UNCLOS*, such a declaration "does not exclude from the jurisdiction of the procedures in Section 2 of Part XV of *UNCLOS* any dispute that concerns 'law enforcement activities in regard to the exercise of sovereign rights or jurisdiction' unless the dispute is also excluded from the jurisdiction of a court or tribunal under paragraph 2 or 3 of article 297."[333]

Russia's declaration under Article 298(1)(b) of *UNCLOS* failed to limit itself to law enforcement activities in regard to the areas that fall within Article 297(2)–(3). To accept the plea that the optional exception to compulsory jurisdiction should accordingly be understood to cover other areas would be tantamount to making a reservation to *UNCLOS*. It was not a difficult undertaking for the arbitral tribunal confronted with this situation in the *Arctic Sunrise* arbitration to observe that, notwithstanding the wording of a declaration pursuant to Article 298(1)(b), a declaring state "cannot create an exclusion that is wider in scope than what is permitted by article 298(1)(b)."[334]

[331] According to the applicant, it "makes no claims regarding China's exercise of its rights … to regulate marine scientific research … or the exercise of sovereign rights with respect to living resources in China's EEZ." *South China Sea Arbitration*, *supra* note 15, Memorial of the Philippines, vol 1 (30 March 2014) at para 7.154.

[332] *Ibid.*

[333] *Arctic Sunrise*, *supra* note 330 at 13, para 69.

[334] *Ibid* at 14, para 72.

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The law enforcement activities exception makes a *renvoi* to sovereign rights and jurisdiction in the EEZ. Accordingly, addressing a claim of a party according to which a law enforcement measure of a third state is in violation of its rights under *UNCLOS*, whether or not the area is subject to final delimitation lines, may prejudice the final settlement of possible maritime boundary disputes. In the *South China Sea Arbitration,* the arbitral tribunal expressed the view that a claim relating to a breach of rights under *UNCLOS* by law enforcement activities of a third state can only be addressed, barring agreement to the contrary, if the incident occurred in a maritime area that is not under dispute according to objective criteria. According to the arbitral tribunal, "if any maritime feature claimed by China within 200 nautical miles of these areas were to be a fully entitled island for purposes of Article 121, the 'resulting overlap and the exclusion of boundary delimitation from the Tribunal's jurisdiction by Article 298, would prevent the Tribunal from addressing the submissions.'"[335] In the *Dispute Concerning Coastal State Rights*, the arbitral tribunal observed that "the sovereign character of the rights allegedly exercised by the declaring State and the entitlement of the declaring State to the area in question as that State's [EEZ] must be objectively established for the optional exception to apply."[336] The arbitral tribunal had already noted that a dispute existed objectively regarding which of the parties held title to Crimea. Yet, in the absence of jurisdiction to address this matter, it was not possible to determine "who is the coastal State with respect to the waters adjacent to Crimea. … Nor can any claims [be determined] which depend upon the premise that one or the other Party is sovereign over Crimea."[337] Accordingly, the arbitral tribunal rejected the objection of the Russian Federation since the conditions for applying Article 298(1)(b) were not met.

There is still no case law that upholds the invocation of an exception to compulsory jurisdiction according to the law enforcement activities exception. Courts and tribunals have nevertheless been able to establish some guiding principles that will assist in states' understanding of this particular exception. Further, the interpretation that courts and tribunals have attached to the preposition "concerning" in regard to the application of the military activities exception must also be seen to apply *mutatis mutandis* in regard to determining which enforcement measures fall within the second alternative of Article 298(1)(b). Consequently, it must be expected that a mere causal link between the measure in question and the claim of the applicant will not be sufficient to bring the latter within the scope of the law enforcement activities exception.

[335] *South China Sea Arbitration* (Merits), *supra* note 193 at 178, para 395.

[336] *Dispute Concerning Coastal State Rights*, *supra* note 50 at 103, para 356.

[337] *Ibid.*

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Conclusion

The importance of a compulsory dispute settlement mechanism as an integral part of *UNCLOS* cannot be overestimated. While early decisions observed that Part XV of *UNCLOS* falls short of establishing a truly comprehensive dispute settlement mechanism,[338] subsequent decisions have clearly rectified this incongruous observation. It is undisputed today that Section 2 of Part XV is an effective tool to ensure the implementation of the provisions of *UNCLOS* other than those that are explicitly excepted from such procedures. A general reason for which states advocated for a compulsory dispute settlement mechanism as an integral part of *UNCLOS* was to ensure uniform application of the convention.[339] It is exactly for this reason that it is noteworthy that courts and tribunals have taken different approaches regarding the construction and interpretation of a number of provisions of *UNCLOS*. The differences also encompass diametrically opposite views on critical jurisdictional clauses, which, notwithstanding the binding and final nature of judgments and awards rendered under Section 2 of Part XV, challenge the legitimacy of these decisions. This arises since the final and binding nature of judgments and awards of international courts and tribunals depends on the fundamental presumption that these courts and tribunals are "deemed to know what the law is," which in turn necessarily requires uniform constructions, or at least interpretations that are not diametrically opposed.[340]

Whether Article 281 of *UNCLOS* requires explicit exclusion from Section 2 or, alternatively, merely an implication to this effect for an agreement to fall within Article 281 is subject to two different schools of thought. The *Southern Bluefin Tuna* case supports the idea that an express statement of exclusiveness is an inherent requirement under Article 281. The arbitral tribunal in the *South China Sea Arbitration* challenged the correctness of this position when it embraced a completely different construction, which it characterized as a "better view."[341] The arbitral tribunal in the *Dispute Concerning Coastal State Rights* did not completely follow the method of the arbitral tribunal in the *South China Sea Arbitration* for reasons that are alien to substantive interpretation of Article 281 of *UNCLOS*. However, its failure to address whether Article 281 embraces an express requirement, contrary to the approach of the arbitral tribunal in the *South China Sea Arbitration*, supports the view that this question is not yet entirely settled.

More importantly, it appears that the imposition of a formal and simplistic requirement of implicit or express exclusion pays little more than lip service

[338] *Southern Bluefin Tuna* (Arbitral Tribunal), *supra* note 33 at para 62.

[339] *Virginia Commentary*, *supra* note 24, vol 5, para XV.4.

[340] *Case Concerning the Payment in Gold of Brazilian Federal Loans Contracted in France (France v Brazil)* (1929), PCIJ (Ser A) No 21 at 124.

[341] *South China Sea Arbitration*, *supra* note 15 at 86, para 223.

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to the role of Section 2 of Part XV. Following the approaches of courts and tribunals outlined herein, states are in a position to exclude the application of Section 2 of Part XV, in regard to matters that would otherwise be subject to Section 2 procedures, simply by making a statement to this effect, notwithstanding whether an alternative procedure is able to resolve the dispute in question. This shifts the purpose of Article 281 of *UNCLOS*, which, it can be stated, is not intended to relate to adjudicative procedures and therefore, *ipso jure*, cannot be seen to set aside procedures under Section 2 notwithstanding an express or implicit statement to this effect. Yet this argument appears redundant if the approach embraced by the arbitral tribunal in the *Dispute Concerning Coastal State Rights* is followed in future cases. In that case, the exclusivity *vel non* of other procedures would be contingent, at the outset, upon whether the procedures in question are capable of resulting in a binding decision.[342] This raises the question whether the real focus of Article 281 should be, consistent with the finding of the arbitral tribunal in *Barbados v Trinidad and Tobago*, *ad hoc* arrangements rather than conciliatory procedures in regional or multilateral agreements.[343]

Article 282 of *UNCLOS* has also been subject to interpretative developments. Yet, given the embryonic understanding regarding the construction of this provision, it appears that a solid interpretation has still to crystallize. There is no common understanding of what agreements fall, and under what circumstances, under Article 282 of *UNCLOS*. Further, insofar as concerns the expression "or otherwise," the views expressed by Judge Robinson in *Somalia v Kenya* appear persuasive to such an extent that it is far from certain that a forum other than the ICJ under Section 2 of Part XV, seized under similar circumstances in the future, would defer jurisdiction.

The interpretation that courts and tribunals under Section 2 of Part XV have attributed to the structure of Article 297(1) has also been subject to conflicting approaches. Yet the conclusions of the arbitral tribunal in the *Chagos Marine Protected Area* arbitration regarding the reaffirmative nature of Article 297(1) appears sound and has settled any uncertainties in regard to this question. Indeed, it is difficult to imagine that the arbitral tribunal in the *Southern Bluefin Tuna* case would have reached the conclusion it did had it followed the analysis of the arbitral tribunal in *Chagos Marine Protected Area*. However, the exceptions that follow from Article 297(3) of *UNCLOS* are still subject to some uncertainty. The reference by the arbitral tribunal in the *Chagos Marine Protected Area* arbitration to the conclusions of the arbitral tribunal in *Barbados v Trinidad and Tobago* in order to substantiate the proposition that all EEZ fisheries-related measures are categorically excepted from Article 297(3)(a) of *UNCLOS* is inapposite. To the contrary,

[342] *Dispute Concerning Coastal State Rights*, *supra* note 50 at 138, para 483.

[343] *Barbados v Trinidad and Tobago*, *supra* note 61 at para 200(ii).

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there is ample support for the proposition that the exceptions under Article 297(3)(c) provide an exhaustive list of EEZ fisheries-related measures that are excepted from procedures under Section 2 of Part XV. Accordingly, it may be asserted that EEZ fisheries-related areas that do not fall within the enumerated list of categories in Article 297(3)(a) are subject to the procedures under Section 2 of Part XV of *UNCLOS*.

In recent decisions of courts and tribunals seized pursuant to the procedures under Section 2 of Part XV of *UNCLOS*, there appears to be a clear understanding that it is impermissible to construe Article 288(1) of the convention in such a fashion as to permit courts and tribunals to exercise jurisdiction regarding disputed title to *terra firma*. Yet it is not to be understood that Article 288(1) of *UNCLOS* prevents incidental jurisdiction over such disputed titles where the real issue of the dispute is within the perimeters of the convention.[344] This approach was to a large extent followed by the arbitral tribunal in the *Dispute Concerning Coastal State Rights* and would appear well settled. The latter tribunal has also in an elaborate manner clarified the meaning of disputed territory, rejecting an implausibility test for the purposes of characterizing whether the claimed title to *terra firma* is effective or merely inadmissible due to the events underlying the genesis of the dispute in question. Yet the recent decision of the ITLOS Special Chamber in the *Dispute Concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean* introduces new elements to any such discussion, although the factual and legal matrices in that particular dispute are so unique that it remains to be determined what, if any, impact the conclusions of the Special Chamber may have on the previously well-established case law on this particular question.

A consistent line of reasoning also appears to have emerged to some extent with respect to interpretation of the exceptions under Article 298(1)(b) of *UNCLOS*. It is particularly the order on provisional measures of ITLOS in the *Case Concerning Ukrainian Naval Vessels* that epitomizes the establishment of a relatively high bar for accepting military activity exceptions. While the conclusions of ITLOS appear to some extent to depart from the threshold established in the *South China Sea Arbitration*, they appear largely reflected in the decision of the arbitral tribunal in the *Dispute Concerning Coastal State Rights*. Given the lack of a general definition of military activities in *UNCLOS* and in general international law, the construction that courts and tribunals attribute to this notion can be seen as being of significant importance for the future application of this exception under Article 298(1)(b) of the convention and in international law in general.

[344] *Chagos Marine Protected Area*, *supra* note 138 at 90, para 221.

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