

*Melissa Lo**

**The UN Convention on the Law of the Sea after the *South China Sea*
Arbitration: Is ‘mandatory’ dispute settlement a *shore* thing?**

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Abstract

This paper addresses the effect of the South China Sea arbitration between the Philippines and China on the dispute settlement mechanism under the United Nations Convention on the Law of the Sea (UNCLOS). The Tribunal's decision regarding their own jurisdiction has broadened the scope for future international courts and tribunals in holding jurisdiction over disputes regarding the law of the sea. Various academics have criticised the Tribunal's interpretation, regarding it as ill-founded in law and biased towards the Philippines. However, through an assessment of all the arguments submitted in the jurisdiction Award, relevant case law, academic commentary, and the travaux préparatoires of UNCLOS, I argue that the Tribunal's decision on jurisdiction is consistent with the joint aims of the Convention. Although China has refused to acknowledge the Awards made and therefore they have not made as significant an impact as hoped for, this decision has triggered political negotiations by all littoral states of the South China Sea. And although the impact of the Tribunal's interpretation of jurisdiction has not yet been tested in another UNCLOS dispute, the Award has nevertheless illustrated to nation states that delay tactics for peaceful settlement will not be tolerated and the UNCLOS mandatory dispute settlement scheme aims to fulfil this very purpose.

Key words: *South China Sea, arbitration, United Nations Convention on the Law of the Sea, UNCLOS, jurisdiction, dispute resolution*

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I Introduction

On 22 January 2013, the Republic of Philippines (**Philippines**) initiated compulsory arbitration proceedings under Article 287 and Annex VII of the United Nations Convention of the Law of the Sea¹ (UNCLOS²) over maritime disputes between the Philippines and the People's Republic of China (**China**) in the South China Sea. China declared that it would neither accept nor participate in the arbitration proceedings. Nevertheless, the five-member Tribunal continued and ordered the proceedings be bifurcated so that it could deal with questions of jurisdiction and admissibility first before assessing the merits. The Award on Jurisdiction and Admissibility³ was registered with the Permanent Court of Arbitration on 29 October 2015. The Final Award on the Merits⁴ was rendered by the Tribunal on 12 July 2016. The Award is the first international ruling for disputes in the South China Sea, creating the basis to settle disputes in the sea accordance with international law, specifically using UNCLOS.⁵

The *South China Sea* arbitration has caused controversy throughout the international arbitration world, not only through the Tribunal's assumption of jurisdiction but also in a much wider international political context. Scholars and critics have questioned whether the Tribunal was correct in holding they had jurisdiction under UNCLOS and have further evaluated the effects of making such a decision. Consequently, it is important to unpack the functions of the UNCLOS dispute settlement, whether the Tribunal interpreted the Convention correctly in holding they had jurisdiction to hear the Philippines' claims, and

¹ United Nations Convention on the Law of the Sea 1833 UNTS 398 (opened for signature 10 December 1982, entered into force 16 November 1994).

² I will be using both 'UNCLOS' and 'the Convention' in reference to the UN Convention on the Law of the Sea throughout this paper.

³ *The South China Sea Arbitration (The Republic of Philippines v The People's Republic of China) (Jurisdiction and Admissibility)* PCA 2013-19 29 October 2015.

⁴ *The South China Sea Arbitration (The Republic of Philippines v The People's Republic of China) (Award)* PCA 2013-19 12 July 2016.

⁵ Jeong Gab Yong "A Study on the China's "Nine-Dash" Line: The Award of the PCA (July 12, 2016)" in James Borton *Islands and Rocks in the South China Sea: Post-Hague Ruling* (Xlibris, 2017) 99 at 101.

the potential effects of the jurisdictional Award on the Convention's dispute settlement regime.

This paper specifically focuses on jurisdictional issues and the interpretation of the compulsory dispute settlement procedure under UNCLOS in light of the *South China Sea* arbitration. As such, issues of admissibility or the merits of the Philippines' claims, although they are just as contentious, are outside the scope of this paper. Further, while it is acknowledged that China's non-appearance at the Tribunal hearings has influenced the Tribunal's decision to assume jurisdiction, this paper will not analyse the impacts of China's denial to participate in the arbitration proceedings in any great detail.

The critical question in this analysis is whether the Convention should be read as either 'sovereigntist', prioritising party choice and state sovereignty, or as a 'package-deal', where wide-reaching jurisdiction upholds the integrity of the Convention. This paper will traverse through a variety of sources to arrive at an answer, including past cases and scholarly opinion regarding jurisdictional issues of the UNCLOS mandatory dispute settlement scheme, scholarly opinion on the jurisdictional scope of this mandatory dispute settlement scheme, and the principles and aims enunciated through the preparatory documents of UNCLOS. It is abundantly clear that the *South China Sea* Awards have established an attraction towards the package-deal approach, with a desire to uphold the integrity of the Convention, rather than the sovereigntist approach which prioritises party choice and autonomy. In light of the joint aims of the Convention, I believe this approach is both principled and appropriate. The move towards a 'package deal' approach will hopefully bring about a notion of finality and certainty to the UNCLOS dispute settlement regime. Regardless of whether this Award has any sizeable effect on resolving the disputes and claims within the South China Sea, it will be an effective stepping stone in emphasizing the importance of having a mandatory dispute settlement procedure in such a wide-reaching and global subject matter.

This paper proceeds in the following order: Section II introduces UNCLOS and describes the functioning of the dispute settlement system of UNCLOS. Section III explains how the

dispute settlement procedure under UNCLOS was interpreted, in relation to the contentious issues within the *South China Sea* case, prior to the *South China Sea* arbitration. Section IV gives a brief introduction to the South China Sea Arbitration and analyses each parties' arguments in relation to each issue and what the Tribunal ultimately decided. Section V proposes a more principled approach for interpreting the dispute procedures under, utilising the themes conveyed in current academic commentary, as well as the *travaux préparatoires* of the Convention. It then discusses the tensions of what the Tribunal held in the jurisdiction award, the consequences of such an interpretation, and whether the Tribunal interpreted the dispute settlement provisions correctly. Section VI concludes, bringing together the *South China Sea* Tribunal's interpretation of UNCLOS and the implications of the Award on not only future claims and dispute within the South China Sea, but for future arbitration disputes globally under the Convention.

II The 1982 United Nations Convention on the Law of the Sea

A The Convention at a glance

The international law of the sea is governed by three principles: the principle of freedom, the principle of sovereignty, and the principle of the common heritage of mankind.⁶ UNCLOS sought to codify these principles and customary international law that governed the international law of the sea. The law of the sea was progressively codified through three UN Conferences on the Law of the Sea. The Third UN Conference on the Law of the Sea (**UNCLOS III**) (1973-1982), was characterised by the universality of the participants, its long duration and the enormity of the task.⁷

The Convention can be characterised by four main features: (i) comprehensiveness of issues covered by the Convention, (ii) determination of the maximum breadth of the territorial sea, (iii) establishment of compulsory procedures of dispute settlement, and (iv) establishment of three new institutions, namely the International Seabed Authority, the

⁶ Yoshifumi Tanaka *The International Law of the Sea* (2nd ed, Cambridge University Press, United Kingdom, 2015) at 16.

⁷ At 38.

International Tribunal for the Law of the Sea (**ITLOS**), and the Commission on the Limits of the Continental Shelf.⁸ It is important to note that UNCLOS forms an integral whole consisting of a series of compromises. Therefore, it is not possible for a state to pick favourable obligations and commitments and disregard the unfavourable. This approach lends integrity to the Convention and iterates a package-deal approach, as introduced in UNCLOS III as a principal procedure for negotiations.⁹ Therefore, Article 309 of the Convention prohibits reservations or exceptions to the Convention unless expressly permitted by other articles in the Conventions.¹⁰

As a whole, UNCLOS lays down a comprehensive regime to govern many complex issues concerning the governance of the seas and oceans. It enshrines the notion that all problems of ocean space are closely interrelated and need to be addressed as a whole.¹¹ It essentially covers every aspect of human activity in the seas and oceans of the world. The Convention oversees a huge range of areas, including navigational rights, territorial sea limits, the legal status of resources on the seabed beyond the limits of national jurisdiction, the conservation and management of living marine resources, and the protection of the marine environment.¹²

B The Dispute Settlement Mechanism in the Convention

UNCLOS establishes a unique mechanism for dispute settlement, combining both voluntary and compulsory procedures.¹³ The mechanism for the settlement of disputes is incorporated into the main Convention, making it obligatory for parties to the Convention

⁸ Tanaka, above n 6, at 31.

⁹ At 31-32.

¹⁰ United Nations Convention on the Law of the Sea, above n 1, art 309.

¹¹ United Nations “United Nations Convention on the Law of the Sea 1982: Overview and Full text” (28 March 2018) United Nations Oceans and Law of the Sea
<http://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm>.

¹² United Nations Convention on the Law of the Sea, above n 1.

¹³ Tanaka, above n 6, at 417.

to employ the procedure in case of a dispute with another party.¹⁴ The compulsory and binding nature of the procedures and decisions contribute to secure the uniform interpretation of the Convention. Further, it creates a flexible system allowing the State Parties to choose one or more of the different procedures for compulsory settlement set out in the Convention.¹⁵ This is a unique mechanism for reconciling the principle of free choice of means with compulsory procedures for dispute settlement.

In order to reconcile the two elements of the principle of free choice of means and the need to establish compulsory procedures for dispute settlement, the Convention sets out a two-tier system.¹⁶ First, State Parties must settle disputes between them concerning the interpretation or application of UNCLOS by peaceful means of their own choice.¹⁷ Second, and only if the dispute cannot be settled through non-compulsory procedures, that dispute must then be settled in accordance with the compulsory procedures set out in section 2 of Part XV.

Part XV is divided into three sections: section 1 is the first obstacle to engage in compulsory dispute settlement under the Convention, allowing states to ‘circumvent’ the system by agreement of other binding and peaceful settlement. Section 2 then provides for compulsory dispute settlement, while section 3 excludes, and allows states to exclude, certain further disputes from the system. It is clear, therefore, that the compulsory dispute settlement system is essentially a compromissory clause. The first step for its engagement is to establish that a dispute exists between the parties, and that this dispute concerns the interpretation or application of the Convention.¹⁸

¹⁴ Ted L. McDorman “The South China Sea Arbitration and the Future of the Law of the Sea Convention Dispute Settlement Regime” (2017) 14(1) *Soochow Law Journal* 43 at 45.

¹⁵ Tanaka, above n 6, at 418.

¹⁶ At 420.

¹⁷ United Nations Convention on the Law of the Sea, art 279.

¹⁸ Antonios Tzanakopoulos “Resolving Disputes over the South China Sea under the Compulsory Dispute Settlement System of the UN Convention on the Law of the Sea” (2017) 14(1) *Soochow Law Journal* 119 at 122.

Section 1 of Part XV sets out several preconditions to set the compulsory procedures in motion. Article 280 allows the agreement of the parties to overrule the compulsory system in favour of any peaceful means of dispute settlement. There is, however, an obligation to exchange views regarding its settlement by negotiation or other peaceful means as a preliminary to any further steps.¹⁹ If the peaceful means agreed to do not lead to a resolution or settlement of the dispute, and if the parties have not excluded further procedures, only then can the compulsory system operate.²⁰ Lastly, if the parties agreed, through general, regional, or bilateral agreement or otherwise, that such dispute shall be submitted to a procedure that entails binding decision, this shall preclude the operation of the compulsory system.²¹

Section 2 provides for the compulsory dispute settlement system of the Convention. Article 287 outlines the options available to states who are party to the Convention. A court or tribunal referred to in Article 287 of the Convention has broad jurisdiction over any dispute, outlined in Article 288, concerning the interpretation or application of the Convention. As states will be mandatorily bound to settle any dispute concerning the Convention (which covers essentially all human activity in the seas and oceans) through this dispute settlement mechanism, the broad powers given to courts and tribunals make the dispute settlement mechanism unusually strong in international law.²²

Section 3 of Part XV provides either for disputes which lie outside the ambit of the compulsory dispute settlement system,²³ or for disputes that may be unilaterally excluded by declaration of any state party.²⁴ Article 297 sets out automatic limitations on

¹⁹ United Nations Convention on the Law of the Sea, above n 1, art 283.

²⁰ Article 281.

²¹ Article 282.

²² Dr Surya P. Subedi “The Disputes in the South China Sea and the 1982 United Nations Convention of the Law of the Sea” (2017) 14(1) *Soochow Law Journal* 15 at 28.

²³ United Nations Convention on the Law of the Sea, above n 1, art 297.

²⁴ Article 298.

jurisdiction, where disputes involving the exercise of sovereign rights with respect to living resources in the Exclusive Economic Zone (**EEZ**) will be exempt from compulsory procedures. Consequently, the scope of compulsory procedures can change according to the formulation of a dispute.²⁵ Article 298 sets out optional exceptions where disputes concerning maritime delimitation, military activities, and disputes concerning law enforcement activities in regard to sovereign rights or jurisdiction can be declared outside the scope of the Convention's compulsory dispute settlement system by state parties.²⁶

In essence, the dispute settlement mechanism under UNCLOS rests on the balance between the voluntary and compulsory procedures. In this regard, the Convention can be seen to strike a balance between the compulsory procedures and the flexibility of the selection of an appropriate forum on the basis of the consent of disputing parties.²⁷

III UNCLOS Dispute Settlement Before the South China Sea Arbitration

C Alternate Means of Dispute Settlement (Section 1 of Part XV)

The most recent case concerning the interpretation of section 1 of Part XV is the *Southern Bluefin Tuna*²⁸ case. This case involved a dispute between Australia and New Zealand on the one hand, and Japan on the other, concerning the Convention for the Conservation of Southern Bluefin Tuna (**CCSBT**) in 1993. Australia and New Zealand instituted proceedings under Part XV of UNCLOS when Japan claimed to be able to undertake an experimental fishing programme and the parties were unable to reach agreement as to the quotas of fish stocks. Australia and New Zealand sought provisional measures from ITLOS, and then the constitution of an arbitral tribunal under Annex VII of UNCLOS.²⁹ They claimed that Japan failed to conserve, and to cooperate in the conservation of the

²⁵ Tanaka, above n 6, at 428.

²⁶ At 429.

²⁷ At 449.

²⁸ *Southern Bluefin Tuna (Australia and New Zealand v Japan) (Jurisdiction and Admissibility)* (2000) RIAA, Vol. XXIII 49.

²⁹ Campbell McLachlan *Lis Pendens in International Litigation* (Martinus Nijhoff, The Hague, 2009) at 330.

highly migratory species in breach of UNCLOS. In response, Japan contended that the dispute was solely concerned with the CCSBT and that in any event, they already had peaceful means of settlement of the parties' choice in Article 16 of the CCSBT, which excluded any further procedure and therefore barring jurisdiction under section 1 of Part XV.³⁰

The Tribunal in *Southern Bluefin Tuna* stated that there was a single dispute arising under both Conventions, and held the CCSBT excluded application of any procedure of dispute resolution that is not accepted by all parties to the dispute.³¹ Justice Keith dissented on the *Southern Bluefin Tuna* Tribunal's Award, emphasising the key intention of framers of UNCLOS to create a mandatory system of dispute settlement.³² Keith J pointed out that the two sets of procedures under UNCLOS and the CCSBT were parallel but not fully coincident and held that the language under Article 16 of the CCSBT was not specific enough to exclude the parties' rights to resort to mandatory dispute settlement under UNCLOS.³³ He considered:³⁴

Strong particular wording would appear to be required, given the presumption of the parallel and overlapping existence of procedures for the peaceful settlement of disputes appearing in the international judicial practice.

The majority decision in *Southern Bluefin Tuna* also contrasts with the view held by ITLOS in its provisional measure order in *Southern Bluefin Tuna*,³⁵ in which the latter upheld prima facie jurisdiction. The ITLOS held that the existence of another treaty did not exclude a party's right to invoke UNCLOS.³⁶

³⁰ *Southern Bluefin Tuna (Jurisdiction and Admissibility)*, above n 28, at [34].

³¹ McLachlan, above n 29, at 333.

³² At 333.

³³ At 333.

³⁴ *Southern Bluefin Tuna (Jurisdiction and Admissibility)*, above n 28, Dissenting Opinion of Keith at [18].

³⁵ *Southern Bluefin Tuna (New Zealand and Australia v Japan) (Provisional Measures)* Order of 27 August 1999, ITLOS Reports 1999 at 280.

³⁶ McLachlan, above n 29, at 332.

Moreover, the ITLOS Tribunal in the *MOX Plant*³⁷ case had consistent views as the Tribunal in *Southern Bluefin Tuna*. In the *MOX Plant* case, Ireland brought claims against the United Kingdom concerning the operation of the MOX nuclear reprocessing plant at Sellafield. The dispute produced four relevant decisions: a judgment of the ITLOS for provisional measures, an arbitration award under the relevant Convention, an order in an Annex VII arbitration under UNCLOS, and a judgment from the European Court of Justice brought by the European Commission against Ireland alleging that the other proceedings were in breach of Ireland's European law obligations.³⁸ The ITLOS emphasised the separate and distinct nature of each of the treaty regimes,³⁹ therefore holding that it had jurisdictional competence to order provisional measures and that Ireland was entitled to constitute an arbitral tribunal under UNCLOS. When the substantive claim came before the Annex VII Tribunal, however, the Tribunal decided that there was a real risk of European competence over the dispute (from the European Court of Justice) which justified a stay of proceedings, pending that hearing.

Based on the latest cases prior to the *South China Sea* case on Section 1 of Part XV of UNCLOS, the leading interpretation is one prioritising a sovereigntist approach where party choice is emphasised and prioritised over the comprehensiveness of the Convention's dispute settlement regime. An indication towards an agreement to resolve disputes with an alternative measure appears to be enough to trigger a bar to jurisdiction of mandatory dispute settlement under UNCLOS. Although the views of various academics and provisional measure Tribunals on this interpretation differ, precedent views this interpretation as striking an appropriate balance, where the mandatory nature of the UNCLOS dispute settlement scheme allows party choice and autonomy in the peaceful settlement of disputes.

³⁷ *MOX Plant (Ireland v United Kingdom) (Provisional Measures)* Order of 3 December 2001, ITLOS Report 2001.

³⁸ McLachlan, above n 29, at 332.

³⁹ *MOX Plant (Provisional Measures)*, above n 37, at [49]-[52].

D Automatic Limitations and Optional Exceptions (Section 3 of Part XV)

As previously explained in Part II, section 3 sets out certain limitations and exceptions to jurisdiction which a court or tribunal may exercise with respect to disputes concerning the interpretation and application of the Convention. Article 297 sets out limitations on jurisdiction that apply automatically to any dispute between state parties and the Convention. Article 298 then set out further, optional exceptions that a state party may activate by declaration.

There is a distinction between matters of fundamental state sovereignty and matters which while of significance for state sovereignty are also vital to the efficient conduct and mutual recognition of rights and interests on the part of all state in the maritime domain. Article 298 of the Convention seeks to reflect a balance between these two concepts by recognising that for some states, matters regarding maritime boundary delimitation, and historic bays and titles, should not initially be subject to determination by a court or tribunal.⁴⁰ Accordingly, the Convention permits states to elect to exclude disputes relating to historic bays or title and maritime delimitation of the territorial sea, EEZ, and continental shelf.⁴¹

On the issue of sovereignty and maritime delimitation, the *Chagos Marine Protected Area*⁴² Tribunal held that the disputes submitted to it involved an implicit determination of sovereignty and therefore jurisdiction was barred by Article 297. The Tribunal based this view on a decision that Mauritius' first and second submissions would have required an implicit decision on sovereignty and that sovereignty was the true object of Mauritius' claims. Hence, any implicit and explicit determination of sovereignty, despite the phrasing of the claims made, will bar jurisdiction of the Tribunal.

⁴⁰ Donald R. Rothwell "Conciliation and Article 298 Dispute Resolution Procedures under the Law of the Sea Convention" in Keyuan Zou and Shicun Wu *Arbitration concerning the South China Sea: Philippines versus China* (Ashgate Publishing, Surrey, 2016) 55 at 69.

⁴¹ Natalie Klein *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge University Press, Cambridge, 2015).

⁴² *Chagos Marine Protected Area (Mauritius v. United Kingdom)*, Award of 18 March 2015, at [317].

As for issues of historic title, while contention in prior cases has been scarce, the *Anglo-Norwegian Fisheries* case⁴³ from the ICJ infers that historic titles normally refer to the exercise of sovereignty and would create historic waters resembling the regime of internal or territorial waters depending on the acceptance of the right of innocent passage.⁴⁴ Consequently, if a dispute concerns one of historic title, as defined in the *Anglo-Norwegian Fisheries* case, Article 298(1)(a) would bar jurisdiction of the Tribunal.

Based on the leading and latest case history, the interpretation of Section 3 of Part XV appears to favour the sovereigntist approach, where declarations by parties to carve out specific dispute topics were treated with high significance. If the dispute submitted to the tribunal or court has an implicit determination of the subject matter stated in Article 297 or declared under Article 298, the tribunal or court will be unwilling and reluctant to hold that they have jurisdiction.

IV The South China Sea Arbitration

This section seeks to outline how the *South China Sea* Arbitral Tribunal has diverged from past cases in interpreting Part XV of UNCLOS, looking at section 1 of Part XV and section 3 of Part XV respectively.

E An Introduction

The South China Sea is a large, semi-enclosed sea with six littoral⁴⁵ states (Brunei, China, Indonesia, Malaysia, the Philippines, and Vietnam) who are all parties to UNCLOS and have all made claims regarding sovereignty over maritime features and regarding maritime zones within that Sea.⁴⁶ The *South China Sea* Arbitral Awards have collectively clarified

⁴³ *Fisheries (United Kingdom v. Norway)*, Award of 18 December 1951, ICJ Reports.

⁴⁴ *Fisheries*, above n 43, at 130; Sophia Kopela “Historic Titles and Historic Rights in the Law of the Sea in the Light of the South China Sea Arbitration” (2017) 48(2) *Ocean Development and International Law* 181 at 187-188.

⁴⁵ The term “littoral” (adj.) means “relating to or situated on the shore of the sea or a lake”. English Oxford Dictionaries “Definition of littoral in English” (2018) Oxford University Press <<https://en.oxforddictionaries.com/definition/littoral>>.

⁴⁶ Tzanakopoulos, above n 18, at 120.

many murky issues and problems inherent in the provisions of UNCLOS and therefore are significant not only for other South China Sea disputes, but also for contested maritime rights and responsibilities in other maritime areas of the world.⁴⁷

The Philippines sought rulings in respect of three inter-related matters:⁴⁸ First, a declaration that the rights and obligations of China and the Philippines in regard to the waters, seabed, and maritime features of the South China Sea are governed by UNCLOS and that China's claims based on "historic rights" encompassed within the "nine-dash line" are inconsistent with the Convention and consequently invalid. Second, determinations as to whether, under the Convention, certain maritime features claimed by both parties are properly characterised as islands, rocks, low-tide elevations, or submerged banks. Third, declarations that China had violated the Convention by interfering with the Philippines' sovereign rights and freedoms under the Convention and through construction and fishing activities that have harmed the marine environment.

Although China refused to accept or participate in proceedings, it has articulated its position in public statements and diplomatic Notes Verbales.⁴⁹ The Chinese Ministry of Foreign Affairs published a "Position Paper", which was treated as constituting a plea concerning jurisdiction in the arbitration proceedings.⁵⁰ China had three overarching reasons on why the Tribunal lacked jurisdiction:⁵¹ First, the essence of the case is about territorial sovereignty over maritime features of the South China Sea, which is outside the scope of the Convention. Second, the two states have agreed, through the Declaration on the Conduct (**DOC**) in the South China Sea and other ways, to settle disputes through

⁴⁷ Thomas Schoenbaum "The South China Sea decision: what happens next?" (2016) 22(4) JIML 291 at 291.

⁴⁸ *The South China Sea Arbitration (Jurisdiction and Admissibility)*, above n 3, at [4]-[6].

⁴⁹ "Notes verbales" is a French term, which literally means "verbal note" in English. It is an unsigned diplomatic note, of the nature of a memorandum, written in the third person. Speake and LaFlaur *The Oxford Essential Dictionary of Foreign Terms in English* (Oxford University Press, 2002).

⁵⁰ *The South China Sea Arbitration (Jurisdiction and Admissibility)*, above n 3, at [122].

⁵¹ Kenneth Keith "Reflections on the South China Sea arbitration rulings" (2017) 42(1) *New Zealand International Review* 5 at 6-7.

negotiations. Third, even if the claims fall under UNCLOS, the dispute is about maritime delimitations, a matter that China excludes jurisdiction by its declaration made in conformity with the Convention under Article 298.

In order for the Tribunal to have jurisdiction, the claims must be disputes concerning the interpretation or application of the Convention.⁵² Consequently, preconditions of tribunal jurisdiction must be satisfied (section 1 of Part XV) and specific limitations and optional exceptions must be precluded (section 3 of Part XV) to access the compulsory dispute settlement system in section 2 of Part XV. The Tribunal ultimately held it had jurisdiction to hear the Philippines submissions, therefore satisfying section 1 and 3 of Part XV of the Convention.

The Tribunal held it had jurisdiction to address seven of the Philippines' submissions.⁵³ The Tribunal reserved the decision on jurisdiction of another seven of the Philippines' submissions for consideration in conjunction with the merits, as they were not of an exclusive preliminary character and the decision of jurisdiction would be dependent upon a determination based on the merits.⁵⁴ The Tribunal asked for further direction and narrowing of scope by the Philippines for the last submission and reserved that decision of jurisdiction for consideration in conjunction with the merits.⁵⁵

The key rulings from the *South China Sea* arbitration are:⁵⁶

- (1) China's nine-dash line claim has neither a basis in contemporary international law, nor in historical fact.

⁵² United Nations Convention on the Law of the Sea, above n 1, art 288.

⁵³ *The South China Sea Arbitration (Jurisdiction and Admissibility)*, above n 3, at [413].

⁵⁴ At [413].

⁵⁵ At [413].

⁵⁶ Nguyen Manh Hung "The Permanent Court of Arbitration's Award on the South China Sea Dispute Between the Philippines and China: Views from America" in James Borton *Islands and Rocks in the South China Sea: Post-Hague Ruling* (Xlibris, 2017) 116 at 117.

- (2) None of the features in the Spratly Islands are islands eligible of an EEZ and a continental shelf. Therefore, the rocks and reef can only claim at best a 12-mile territorial sea.
- (3) Mischief Reef, the Scarborough Shoal, and the Second Thomas Shoal are all within the EEZ of the Philippines.
- (4) China has violated international law by preventing the Philippine fishermen to fish in their traditional fishing area and by causing environmental damage to part of the South China Sea.

In coming to these conclusions, the Tribunal made important interpretations of UNCLOS's dispute settlement provisions in holding that it had jurisdiction to hear the Philippines' claims. Each of the key jurisdictional preconditions that were eventually held to be met shall be analysed and discussed accordingly.

F Alternate Means of Dispute Settlement (Section 1 of Part XV)

The Tribunal first had to analyse, by reference to the provisions in Section 1 of Part XV of the Convention, whether there were circumstances that would preclude access to the compulsory dispute resolution procedures and thus bar jurisdiction over the Philippines' claims. In particular, the Tribunal examined China's position that the Philippines is precluded from recourse to arbitration because the parties agreed to resolve their disputes in the South China Sea through friendly consultations and negotiations.

1 China's Arguments

China stated in their Position Paper that the two states have agreed, through the Declaration on the Conduct in the South China Sea and other ways, to settle disputes through negotiations. China ultimately contended that for all disputes over the South China Sea, including the claims in this arbitration, the only means of settlement agreed by the parties is negotiation, to the exclusion of other means and without any time limit for the negotiations.⁵⁷ Due to this agreement, China argued that they agreed on a peaceful

⁵⁷ *The South China Sea Arbitration (Jurisdiction and Admissibility)*, above n 3, at [196].

mechanism of their own choice, which precludes recourse to the compulsory procedures in Part XV, Section 2.⁵⁸

Looking specifically at the DOC, China argued that by signing this instrument, both parties undertook a mutual obligation to settle their disputes in relation to the South China Sea through “friendly consultations and negotiations” and therefore sought settlement by peaceful means of their own choice within the meaning of Article 281. China stated that a binding “agreement” under Article 281 is shown when there is a “clear intention” to establish rights and obligations between parties, irrespective of the form or designation of the instrument. Thus, China focused on the word “undertake” in paragraph 4 of the DOC.⁵⁹ China also acknowledged that the DOC did not contain any express exclusion to further procedure but relied upon the position adopted by the Tribunal in *Southern Bluefin Tuna* that the absence of an express exclusion was not decisive. Rather, China stated that third-party settlement was obviously excluded by virtue of paragraph 4 of the DOC and the Parties’ reaffirmation in the DOC as a means for settling disputes.⁶⁰

China further pointed to a series of bilateral documents to show that China and the Philippines’ have a longstanding agreement to settle their disputes through negotiations to the exclusion of any other means of settlement. It argued that various political Joint Statements (1995, 1999, 2000, 2001, 2004, and 2011) displayed the long-standing agreement to resolve their disputes in the South China Sea by friendly negotiations.⁶¹ China contended that the repeated use of the word “agree” evinced a clear intention to establish obligations between the two countries and is therefore binding.⁶² It also asserted that these bilateral statements “obviously produced the effect of excluding any means of third-party settlement” by virtue of China’s continual insistence of peaceful settlement of disputes through negotiations and an expectation that negotiations will “eventually” settle the

⁵⁸ *The South China Sea Arbitration (Jurisdiction and Admissibility)*, above n 3, at [191].

⁵⁹ At [203], citing China’s Position Paper, at [38].

⁶⁰ At [204].

⁶¹ At [231]-[234].

⁶² At [235].

disputes and therefore emphasizes that negotiations is the only means the parties have chosen for dispute settlement.⁶³

The Tribunal further evaluated whether the Treaty of Amity or the Convention on Biological Diversity (**CBD**) could bar the Tribunal's jurisdiction by Article 281 or 282 and raised possible objections in their own capacity, as China refused to participate in the proceedings and therefore did not argue on these instruments.

2 *The Philippines' Arguments*

The Philippines argued that the DOC did not pose as an obstacle for the Tribunal's jurisdiction. First, it argued that the DOC was not a legally binding "agreement" but merely a non-binding political document that was never intended to create legal rights and obligations. In showing this to be the case, the Philippines relied upon the aspirational language used, the circumstances of the DOC's adoption, and the parties' subsequent conduct.⁶⁴ The Philippines also submitted that in the alternative that the DOC was a binding document, no settlement had been reached through negotiations and argued that it was entirely justified in concluding that continued negotiations would be futile. Further, the Philippines' argued that even if the DOC was binding, it does not exclude recourse to the dispute settlement procedures established in Section 2 of Part XV of the Convention. The Philippines argued that there needed to be express exclusion to recourse and that such a view was consistent with the context of Article 281, the decisions of ITLOS in *Southern Bluefin Tuna* and *MOX Plant*, and the dissent of Justice Keith in *Southern Bluefin Tuna*.⁶⁵ Lastly, the Philippines' argued that China should not be able to rely upon the DOC to avoid jurisdiction due to China's own conduct in "flagrant disregard" of the DOC.

In contention of the political Joint Statements made by the parties, the Philippines argued that, as with the DOC, none of the bilateral instruments invoked could be said to constitute

⁶³ *The South China Sea Arbitration (Jurisdiction and Admissibility)*, above n 3, at [237], citing China's Position Paper, at [40].

⁶⁴ At [208].

⁶⁵ At [210].

a legally binding agreement. The Philippines asserted that the joint statements relied upon are “commonplace” in international practice and do not purport to establish binding legal obligations.⁶⁶ Nevertheless, it stated that the statements did not explicitly or implicitly exclude recourse to dispute settlement under Part XV of the Convention. Rather, the statements merely reaffirm the DOC through aspirational political statements and therefore do not fall within Article 281.

The Tribunal invited the Philippines to address the question of whether the Treaty of Amity or the CBD could bar jurisdiction by virtue of Article 281. Looking specifically at the Treaty of Amity, the Philippines acknowledged that it was a legally binding document. However, the Philippines contended that the language in Article 13, 14 and 15 refer to encouraging language rather than invoking a compulsory nature to their settlement of disputes.⁶⁷ Further, the Philippines stated that Article 17 of the Treaty of Amity made it “crystal clear” that the parties could have recourse to other modes of peaceful settlement identified in Article 33(1) of the UN Charter and therefore did not exclude further recourse.⁶⁸ In relation to the CBD, the Philippines argued that the CBD’s dispute settlement procedures exclusively applied to the interpretation or application of the CBD, not UNCLOS. Additionally, even if it concerned the interpretation or application of UNCLOS, the Philippines argued that express exclusion of further procedures was needed, which the CBD did not have.⁶⁹

The Tribunal further invited the Philippines to address whether Article 282 would bar jurisdiction through the same instruments evaluated with Article 281 (DOC, the Joint Statements, Treaty of Amity, and the CBD). The arguments regarding Article 282 ran similar to Article 281, where the DOC, the Joint Statements, and the Treaty of Amity did

⁶⁶ *The South China Sea Arbitration (Jurisdiction and Admissibility)*, above n 3, at [238].

⁶⁷ At [260]-[262].

⁶⁸ At [264].

⁶⁹ At [278].

not entail binding decisions.⁷⁰ Lastly, it submitted that the CBD does not constitute an agreement regarding the interpretation or application of UNCLOS, thus does not apply.⁷¹

3 *The Tribunals Decision*

In its choice of language generally, the Tribunal stressed the comprehensive and binding nature of the dispute settlement system.⁷² This can be seen by the Tribunal's emphasis that only legally binding agreements could have effect under Articles 281 and 282 and showing a clear preference of express language to exclude section 2 of Part XV.⁷³ The Tribunal held that the DOC was not a legally binding agreement and had no intention to create legal rights and obligations. Rather, the Tribunal held it to be an aspirational political document. The Tribunal found that the majority's approach in *Southern Bluefin Tuna* was not in line with the intended meaning of Article 281 and was against the integrity of the Convention.⁷⁴

In relation to the Joint Statements relied upon by China, the Tribunal preferred the view of the Philippines. It interpreted the language of the joint statements to be suggestive of aspirational arrangement rather than a legally binding agreement and in any event, did not contain any exclusions of further procedures.⁷⁵ Furthermore, the Tribunal addressed China's argument that the repeated reaffirmation of negotiations as the means of dispute settlement had the effect of excluding Section 2 of Part XV of the Convention. It was established that negotiation was indeed the preferred means for both China and the Philippines. The Tribunal held, however, that the repeated insistence of negotiations by one party until an eventual resolution cannot dislodge the "backstop of compulsory, binding procedures" provided by Section 2 of Part XV.⁷⁶

⁷⁰ *The South China Sea Arbitration (Jurisdiction and Admissibility)*, above n 3, at [294] and [305].

⁷¹ At [314].

⁷² Douglas Guilfoyle "The South China Sea Award: How Should We Read the UN Convention on the Law of the Sea?" (2018) 8 *Asian Journal of International Law* 51 at 56-57.

⁷³ *The South China Sea Arbitration (Jurisdiction and Admissibility)*, above n 3, at [217].

⁷⁴ At [223].

⁷⁵ At [243]-[246].

⁷⁶ At [247].

As stated above, the Tribunal further evaluated whether the Treaty of Amity or the CBD could constitute a bar to jurisdiction. China was silent on these instruments, as it did not participate in proceedings. Instead, the Tribunal developed possible objections through these instruments and evaluated, considering these objections and the Philippines' position on these matters, whether they could indeed bar jurisdiction by virtue of Article 281. The Tribunal preferred the Philippines arguments and views on both the Treaty of Amity and the CBD, where it ultimately held that neither barred their jurisdiction. In relation to the Treaty of Amity, it stated that although it was a legally binding agreement, it did not prescribe a particular form and clearly did not exclude recourse to compulsory dispute settlement procedures under UNCLOS.⁷⁷ Regarding the CBD, the Tribunal acknowledged there was some overlap in subject matter with the Convention and the CBD but held that this overlap was not sufficient to bring the CBD within the meaning of Article 281 of the Convention.⁷⁸ Moreover, this conclusion was supported by the fact that the Tribunal was of the view that a clear exclusion of further procedure is needed to present an obstacle for the jurisdiction of the Tribunal, which the CBD did not have.⁷⁹

The Tribunal then analysed whether Article 282 would bar jurisdiction through either the DOC, the Joint Statements, the Treaty of Amity, or the CBD. The DOC was already found not to be a legally binding document and further did not provide expressly for a compulsory binding procedure. The Joint Statements do not constitute binding agreements either.⁸⁰ The Treaty of Amity did not bar jurisdiction either, as although it was a binding agreement, it did not contain an agreement to binding dispute resolution which precluded recourse to other modes of peaceful settlement.⁸¹ Lastly, despite the CBD being a legally binding agreement, the Tribunal found that the CBD did not bar jurisdiction either, as the Tribunal did not find the CBD to constitute an agreement for the settlement of disputes concerning

⁷⁷ *The South China Sea Arbitration (Jurisdiction and Admissibility)*, above n 3, at [265].

⁷⁸ At [284].

⁷⁹ At [286].

⁸⁰ At [299]-[301].

⁸¹ At [307]-[310].

the interpretation or application of the Convention. Further, the CBD dispute settlement procedures do not entail a compulsory process involving a binding decision.⁸²

Noting the language in the *South China Sea Award*,⁸³ the Tribunal essentially asserted a presumption of non-exclusivity,⁸⁴ favouring a premise against the ability to opt out of the dispute settlement system. The *South China Sea* Tribunal therefore shared a view with the ITLOS in the *Southern Bluefin Tuna* and *MOX Plant* case for provisional measures orders, as well as Keith J's dissenting judgment, on the intended interpretation of Article 281.

G Automatic Limitations and Optional Exceptions (Section 3 of Part XV)

China has availed itself of the opportunity of making a declaration under Article 298, completely removing from the compulsory dispute settlement system all matters allowed under the provision. The effect of the Chinese declaration is to preclude consideration of disputes regarding delimitation of any maritime boundaries, as well as of disputes “involving historic bays or titles”⁸⁵ with respect to any of the procedures provided for in section 2 of Part XV, including an Annex VII Arbitral Tribunal. Moreover, although China did not raise any objection to jurisdiction on the basis of any automatic limitation set out in Article 297, the Tribunal acknowledged that jurisdiction would be barred if the claims related to overlapping maritime entitlements.⁸⁶

4 Historic Title

Claims of historic title effectively seek to restrict the rights of the international community in those waters. Historic waters are defined as “waters over which the coastal State clearly, effectively, continuously, and over a period of time, exercises [its] sovereign rights with the acquiescence of the community of states”. The presence of historic title may affect the

⁸² *The South China Sea Arbitration (Jurisdiction and Admissibility)*, above n 3, at [317]-[320].

⁸³ At [224].

⁸⁴ Tzanakopoulos, above n 18, at 137.

⁸⁵ United Nations Convention on the Law of the Sea, above n 1, art 298(1)(a)(i).

⁸⁶ *South China Sea Arbitration (Jurisdiction and Admissibility)*, above n 3, at [359].

drawing of maritime boundary, as delimitation of territorial sea requires consideration of historic title.⁸⁷

The Tribunal, therefore, had to overcome an important jurisdictional obstacle under Article 298(1)(a)(i). A literal interpretation of this exception would seem to exclude from the tribunal's jurisdiction the issue of validity of the nine-dash line. However, the Tribunal dealt with the jurisdictional obstacle by first defining the dispute over the nine-dash line as a dispute over the source and existence of maritime entitlements (and therefore not maritime delimitation), and secondly defined whether China's claim involved historic 'title'.⁸⁸

China's Arguments

China, in putting forward its claim over the South China Sea, including through the "nine-dash line", has referred to 'historic *rights*' in the area. It is not exactly clear what the Chinese 'historic' claims refer to, but the effect of the declaration under Article 298 is claimed to have been to exclude any consideration of the nine-dash line, to the extent that it represents claim to historic title.

China insisted that from the ancient dynasty of Han, or Ming, China had effective control over the South China Sea and argued that other coastal countries never protested or raised objections to China's claims to the South China Sea.⁸⁹ The 'nine-dash line' is a cartographic denotation that was developed, first by the Republic of China in the 1940s, and then by the People's Republic of China in the 1950s, and subsequent years to affirm Chinese control over the islands and maritime areas of the South China Sea.⁹⁰ In sum, China appears to claim that it ought to enjoy sovereignty over the vast majority of the South

⁸⁷ Natalie Klein, above n 41, at 249.

⁸⁸ Schoenbaum, above n 47, at 295.

⁸⁹ Jeong Gab Yong, above n 5, at 102.

⁹⁰ Thomas Schoenbaum "The South China Sea Arbitration Decision: The Need for Clarification" (2016) 110 AJIL 290 at 291.

China Sea, as established through China's long-standing historical presence and display of authority in the region.⁹¹

The Philippines' Arguments

The Philippines' argued that Article 298 does not apply with respect to "historic bays and titles", as it contended that China is not claiming such title in the South China Sea. Through examination of the term 'historic title' in the Chinese text of the Convention and the references to historic rights in China's Exclusive Economic Zone and Continental Shelf Act,⁹² the Philippines stated that China claimed, 'historical rights' as distinguished from 'historic title'. Further, it argued that the concept of 'historic title' in Article 298 of the Convention had a specific and limited meaning, pertaining only near-shore areas and only to disputes over the delimitation of historic bays. As the disputes claimed regarding historic title in the *South China Sea* arbitration did not concern the delimitation of historic bays or title, the Philippines' was of the view that Article 298(1)(a)(i) does not apply here and therefore does not bar jurisdiction of the arbitral Tribunal.

The Tribunal's Decision

The Tribunal understood China's claimed rights to the living and non-living resources within the nine-dash line but does not consider that those waters form part of its territorial sea or internal waters. To obtain territorial sovereignty of a state or historic titles, discovery, pre-occupation, effective control, prescription, or acquisition should be considered by international law.⁹³ The Tribunal examined China's legislation, activities, and official statements to examine the nature and scope of China's claim.⁹⁴ China had unequivocally stated that it respects freedom of navigation and overflight in the South China Sea. Within the territorial sea, the Convention does not provide for the freedom of overflight or freedom

⁹¹ Florian Dupuy and Pierre-Marie Dupuy "A Legal Analysis of China's Historic Rights Claim in the South China Sea" (2013) 107 AJIL 124 at 125.

⁹² People's Republic of China, Exclusive Economic Zone and Continental Shelf Act (26 June 1998), art 14.

⁹³ Jeong Gab Yong, above n 5, at 102.

⁹⁴ Sophia Kopela, above n 44, at 183.

of navigation, beyond the right of innocent passage.⁹⁵ Accordingly, the Tribunal particularly stressed this commitment by China and found that China did not consider that area equivalent to its territorial sea or internal waters. The fact that China had never sought to restrict freedom of navigation in practice led the Tribunal to conclude that the historic claim, albeit ambiguous, is not a sovereignty claim to a territorial sea or internal waters.⁹⁶

The Tribunal drew a sharp distinction between historic ‘title’ and historic ‘rights’ in the Final Award on the Merits. “Historical title” is used specifically to refer to historic sovereignty to land or maritime areas.⁹⁷ In contrast, the term “historic rights” is general in nature and can describe any rights that a state may possess that would not normally arise under the general rules of international law, absent particular historical circumstances. In the law of the sea, the term “historic rights” originates from the narrower category of “historic waters”. This is a category that has its roots in historic fact that states through the ages claimed and maintained sovereignty over maritime areas which they considered vital to them without paying much attention to divergent and changing opinions about what general international law might prescribe with respect to the delimitations of the territorial sea.⁹⁸

The Tribunal viewed this type of usage to be understood by the drafters of the Convention and that reference to ‘historic titles’ in Article 298(1)(a)(i) of the Convention is accordingly referencing claims of sovereignty over maritime areas derived from historical circumstances.⁹⁹ The Tribunal, therefore, held that the scope of the exception in Article 298 is limited to historic ‘title’, which does not include historic ‘rights’.

The Tribunal supported the terminological distinction by comparing China’s public statements and the official Chinese text of the Convention. China invoked its “historic

⁹⁵ United Nations Convention on the Law of the Sea, above n 1, art 17.

⁹⁶ Sophia Kopela, above n 44, at 183.

⁹⁷ *The South China Sea Arbitration (Award)*, above n 4, at [225].

⁹⁸ Dupuy and Dupuy, above n 91, at 137.

⁹⁹ Sophia Kopela, above n 44, at 183.

rights” (lì shǐ xìng quán lì, or 历史性权利) in the South China Sea, rather than historic title (lì shǐ xìng suǒ yǒu quán, or 历史性所有权).¹⁰⁰ The Tribunal was aware that China’s usage had not been entirely consistent, but considered variances from the vast majority of usage likely represented an error or imprecise drafting, rather than a claim by China to sovereignty over the entirety of the South China Sea.

The Tribunal decided that historic title constitutes one form of historic right. In the Tribunal’s attempt to provide clarity on this, it noted that ‘historic rights’ is general in nature and can describe any rights that a state may possess that would not normally arise under the general rules of international law. This may include sovereignty, but may equally include more limited rights, such as fishing rights or rights of access that fall well short of a claim of sovereignty.¹⁰¹ The Tribunal interpreted the reference to historic sovereignty to land or maritime areas as ‘historic title’. Historic rights short of sovereignty, however, were seen to take two distinct forms: historic rights short of sovereignty, which have a quasi-territorial or zonal impact beyond the territorial sea; and nonexclusive historic rights (mainly related to fishing rights).¹⁰² The exercise of exclusive sovereign rights (short of sovereignty) could lead to the establishment of historic rights with a quasi-territorial zonal impact beyond the territorial sea. This could relate to both the continental shelf and the EEZ. The scope of the zonal impact would be determined and restricted to these activities – e.g. exclusive fishing rights or exploitation of resources. It seems that this is how the Tribunal have perceived the Chinese historic claims. They are supposedly a zonal historic claim short of sovereignty but based on sovereign rights related to exclusive fishing rights and exploitation of resources.¹⁰³

Yet, the dispositive proof that China’s claim is not one to historic title lies in China’s conduct, which is incompatible with a claim that the waters of the South China Sea

¹⁰⁰ *The South China Sea Arbitration (Award)*, above n 4, at [227].

¹⁰¹ At [225].

¹⁰² Sophia Kopela, above n 44, at 188.

¹⁰³ At 188-189.

constitute China's territorial sea or internal waters. As China did not claim historic title, but rather a constellation of historic rights short of title, the Tribunal held it had jurisdiction to consider the Philippine's submissions.¹⁰⁴ China's lack of participation in the hearing may have aided the Tribunal and the Philippines here, as China ultimately preferred to leave the assertion to this claim a vague political pronouncement, and never stated the precise legally-intended effect of the "nine-dash" line.¹⁰⁵

In holding that China had historic rights short of historic title, the Tribunal found that the combination of Article 311 and 293(1) demonstrated that only pre-existing rights that are either expressly "permitted or preserved such as in Articles 10 and 15" or compatible with UNCLOS would be preserved.¹⁰⁶ The Tribunal observed that principles set out in Article 30(3) of the VCLT and Article 293 of UNCLOS provide that the Convention will prevail over earlier, incompatible rights or obligations. However, these provisions and articles relied upon by the Tribunal do not correctly analogise with the relationship between the Convention and historic rights as rules of customary international law.¹⁰⁷ The only relevant point that the Convention entails with respect to customary international law was not actually referenced by the Tribunal. The Convention's preamble affirms that "matters not regulated by the Convention [continue] to be governed by the rules of general international law".¹⁰⁸ Accordingly, historic rights cannot be superseded by general treaty without explicit reference to them.¹⁰⁹

5 Sovereignty and Maritime Delimitation

China argued that the Philippines' requests for the determination of certain maritime features was a determination of maritime delimitation and therefore territorial sovereignty.

¹⁰⁴ Schoenbaum, above n 47, at 296.

¹⁰⁵ At 296.

¹⁰⁶ Sophia Kopela, above n 44, at 184.

¹⁰⁷ At 184.

¹⁰⁸ United Nations Convention on the Law of the Sea, above n 1, Preamble.

¹⁰⁹ Sophia Kopela, above n 44, at 184.

As China made a declaration as per Article 298(1)(a)(i), it argued that the Tribunal lacks jurisdiction.

China's Arguments

China considers that the issues presented by the Philippines for arbitration constitute an integral part of maritime delimitation between China and the Philippines.¹¹⁰ Further, China considered that the Philippines should have first taken up the issues with China before a decision can be taken on whether or not it can be submitted to arbitration.

China's Position Paper did not raise any further objections based on Article 298. Nevertheless, the Tribunal examined *proprio motu* whether any further exceptions to its jurisdiction follow from Article 298. It found that the Tribunal's jurisdiction over some of the submissions could be barred if a feature claimed by China were found to be an island within the meaning of Article 121 of the Convention, as it would be entitled to an EEZ or continental shelf and therefore overlap with those generated by the Philippines archipelago. If this is the case, there would need to be a determination of delimitation of overlapping entitlements first before resolving the merits of the Philippines' claims, which would be outside the scope of the Tribunal's jurisdiction.¹¹¹ However, the Tribunal noted that this issue would not arise if it was found that none of the features claimed are islands which generate their own EEZ or continental shelf.

The Philippines' Arguments

The Philippines, first and foremost, rejected China's contention that the Parties' disputes constituted, as a whole, an integral part of maritime boundary delimitation. The Philippines submitted that Article 298 had no effect unless the Tribunal was called to interpret or apply Article 15, 74, or 83, which relate to the actual delimitation of the territorial sea, EEZ, or

¹¹⁰ Ministry of Foreign Affairs of the Peoples Republic of China "Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines" (7 December 2014) <https://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1368895.htm>, at [68].

¹¹¹ *The South China Sea Arbitration (Award)*, above n 4, at [369].

the continental shelf.¹¹² Further, the Philippines submitted that questions of maritime delimitation only arise in the context of overlapping entitlements of coastal states.¹¹³ As the claims made by the Philippines have no situations of overlapping entitlements which potentially require delimitation, this does not exclude the jurisdiction of the Tribunal.

The Tribunal's Decision

First, the Tribunal ultimately held that the Philippines' request for the determination of the specified maritime features did not determine sovereignty. The exception of any maritime boundary delimitation is also crucial. Maritime delimitation involves the determination of the outer boundary of a maritime zone as measured from a state's basepoints and baselines. The delimitation may mark the point that the high seas begins or, in areas where there is insufficient water area for states to have their full entitlement to maritime zones, attributes zones of jurisdiction, sovereign rights, or sovereignty between states with opposite or adjacent coasts.¹¹⁴

Therefore, the Tribunal effectively decided not to decide as to its jurisdiction on almost half of the submissions. It found that, depending on its findings on the merits of various maritime features in the South China Sea generating entitlements, its jurisdiction over many of the submissions of the Philippines would be precluded, as then the Tribunal would be required to venture into delimitation. Accordingly, any dispute that necessarily involved the concurrent consideration of any dispute concerning sovereignty was excluded from consideration.¹¹⁵

It is argued by the Philippines that the dispute brought to the Tribunal is not one about maritime delimitation. The Philippines successfully sought to carve out distinct and limited 'disputes' over which the Tribunal could decide, so as to avoid issues of sovereignty falling out of the scope of Part XV of the Convention and issues of delimitation excluded by the

¹¹² At [374].

¹¹³ *The South China Sea Arbitration (Award)*, above n 4, at [375].

¹¹⁴ Natalie Klein, above n 41.

¹¹⁵ Tanaka, above n 6, at 429.

Chinese declaration under Article 298. The Tribunal was convinced of the Philippines argument, consequently distinguishing the *Chagos Marine Protected Area* Arbitration, where it was held that there was no jurisdiction over certain claims, as it was not a coastal state under the Convention. The *South China Sea* Tribunal indicated that this decision was made because any such determination by the *Chagos* Tribunal would have required the Tribunal to determine ‘first’ sovereignty, which did not fall within the scope of the Convention.¹¹⁶ By contrast, the Tribunal in the *South China Sea* case held that no determination had to be made ‘first’. It stated specifically that its finding would not have to determine explicitly or implicitly questions of sovereignty over any of the maritime features at play in the dispute.

Significantly, the Tribunal found in the Merits Award that the features asked to be determined by the Philippines in their submissions did not have the characteristics necessary to have an EEZ or continental shelf.¹¹⁷ Further, it concluded that both Mischief Reef and Second Thomas Shoal, despite being defined as both low-tide elevations (and therefore not generating any maritime zones of their own), are located within 200 nautical miles of the Philippines’ coast and are located in an area that is not overlapped by the entitlements generated by any maritime features claimed by China. Accordingly, Mischief Reef and Second Thomas Shoal form part of the EEZ and continental shelf of the Philippines.¹¹⁸ Due to these findings made by the Tribunal, none of the features generated their own maritime zones and did not bar jurisdiction, through Article 298, as no delimitation exercise was demanded upon.

V How should the UNCLOS Dispute Settlement Scheme be read?

In light of the *South China Sea* arbitration, this section analyses the reactions and schools of thought from academic scholars across the globe on the interpretation the Tribunal made on the UNCLOS dispute settlement scheme. It draws from commentary through academic

¹¹⁶ *South China Sea Arbitration (Jurisdiction and Admissibility)*, above n 3, at [153].

¹¹⁷ *South China Sea Arbitration (Award)*, above n 4, at [643]-[646].

¹¹⁸ At [646]-[647].

literature, the *travaux préparatoires* of the Convention, as well as the arguments and interpretations presented in the jurisdiction Award, to inform on the intended and correct lens for the interpretation of the dispute settlement scheme under UNCLOS.

H The Reaction of the Tribunal's Ruling: Academic Commentary

In analysing and surveying academic literature and commentary of the *South China Sea* arbitration from scholars, there are clear thematic streams of thought and arguments on each jurisdictional issue and decision. There are also common observations made by scholars regarding the Award as a whole and the implications and future effects the *South China Sea* dispute will have within the South China Sea and also to the functionality of the UNCLOS dispute settlement scheme.

Interestingly but not surprisingly, Chinese international law scholars were almost uniform in supporting the Chinese government's view that the *South China Sea* Tribunal lacked jurisdiction.¹¹⁹ The Chinese Society of International Law published an article in the Chinese Journal of International Law, which declared a strong support on the position of the Chinese Government, stating the Tribunal had no legal basis and the Tribunal's Award on jurisdiction was "null and void" with "no binding effect on China".¹²⁰ Chinese scholars have disagreed somewhat over whether the government adopted the right strategy in failing to appear before the Tribunal to argue the case but have, for the most part, stayed silent on the matter, explaining privately that it was impossible for Chinese scholars located in China to publish this view in Chinese journals.¹²¹ Ku attributes this unanimity of Chinese legal opinion to two factors. First, Chinese academics may be unwilling to dissent out of fear of censorship or soft retribution in the domestic academic job market. Second, the unanimity

¹¹⁹ Anthea Roberts *Is International Law International?* (Oxford University Press, 2017) at 240.

¹²⁰ Chinese Law Society of International Law "The Tribunal's Award in the "South China Sea Arbitration" Initiated by the Philippines Is Null and Void" (2016) Chinese Journal of International Law 457 at 458.

¹²¹ Roberts, above n 119, at 242.

may result from the genuine belief of most Chinese legal scholars that the arbitral Tribunal erred in asserting jurisdiction.¹²²

Western international lawyers, on the other hand, have been split on the correctness of the Tribunal's decision on jurisdiction. In relation to the issue of Article 281 and whether there had been an agreement to settle by other means, academics were not too critical, observing that the Tribunal interpreted the UNCLOS drafters' intentions differently than previous tribunals and courts before them.¹²³

The determination made by the Tribunal in regard to Article 298 (namely, historic rights, maritime delimitation and sovereignty) had more critical discussion. In the matter of historic rights, critics believed the ruling lacked clarity and logical coherence,¹²⁴ and that a ruling which would leave the possibility of the existence of the nine-dash line would have been better for the Parties and other littoral states to enter negotiations.¹²⁵ On the other hand, supporters of the Tribunal's decision saw the decision as legitimate in law, where China's assertiveness and reiteration of claims of the nine-dash line were seen as minimally persuasive and ambiguous from a legal perspective.

Scholarly debate concerning maritime delimitation and sovereignty were largely critical of how the framing of the Philippines claim was essentially the determining factor of whether they fell within Article 298(1)(a)(i) of the Convention. Nonetheless, other academics find the Tribunal's reasoning sound in legal principle. These academics have argued that when

¹²² Julian Ku "China's Legal Scholars Are Less Credible After South China Sea Ruling" (14 July 2016) Foreign Policy < <https://foreignpolicy.com/2016/07/14/south-china-sea-lawyers-unclos-beijing-legal-tribunal/>>.

¹²³ John Noyes "In Re Arbitration Between the Philippines and China" (2016) 110(1) AJIL 102 at 107.

¹²⁴ Sophie Kopela, above n 44, at 186.

¹²⁵ Thomas Schoenbaum "The South China Sea Arbitration Decision: The Need for Clarification" (2016) 110 AJIL 290 at 293-295.

you frame the question as one of the status of maritime features, rather sovereignty over them, the question falls within the scope of UNCLOS Part XV.¹²⁶

Critics of the Tribunal's Award as a whole viewed the Tribunal as expanding its competence, found the Award groundless both in fact and in law, and biased in their construction of the Convention.¹²⁷ Regardless of whether the Tribunal was correct in asserting jurisdiction, the Western scholars almost all viewed China as bound by the decision.¹²⁸ Most importantly, the majority scholars appeared to contemplate the magnitude and effect of the Award¹²⁹ and universally determined that enforcement of the Award was not an option. Rather, academics found the Award to be a stepping stone in negotiations within the South China Sea. Although the Duterte Administration in the Philippines has stated that the Award is a "mere paper judgment", the government nevertheless sees this as an opportunity to form better relations with China and to enter bilateral talks.¹³⁰ Moreover, China paradoxically decided to turn the ruling into an opportunity to lower tensions and to restart negotiations.¹³¹ The common theme among all academics, therefore, is that this Award has opened up the opportunity for not only the Philippines and China to re-enter bilateral negotiations with a better bargaining position for the Philippines, but has also opened up opportunities in regional politics for negotiations

¹²⁶ Douglas Guilfoyle "The South China Sea Arbitration: The Influence of Law of the Sea Power?" (Richard Cooper Memorial Lecture 2016, Monash University Faculty of Law, Melbourne, 8 September 2016); Guilfoyle, above n 72, at 56; Schoenbaum, above n 47, at 295.

¹²⁷ Chinese Society of International Law, above n 120, at 458 and 482; Xiaoyi Zhang "Problematic Expansion on Jurisdiction: Some Observation on the South China Sea Arbitration" (2016) 9 *Journal of East Asia and International Law* 449 at 451 and 465.

¹²⁸ Roberts, above n 119, at 244.

¹²⁹ Except McDorman, "Future of UNCLOS Dispute Settlement Regime", where he stated that it is unlikely to have any significant effect on the future of UNCLOS's dispute settlement regime.

¹³⁰ Renato Cruz De Castro "The 12 July 2016 Permanent Court of Arbitration's (PCA) Award: The Philippines' Lawfare versus China's Realpolitik in the South China Sea Dispute" (2017) 8(3) *International Journal of China Studies* 347 at 366.

¹³¹ Feng Zhang "Assessing China's Response to the South China Sea arbitration ruling" (2017) 71(4) *Australian Journal of International Affairs* 440 at 455.

for other littoral states of the South China Sea and to recalibrate their policies in broaching other claims.¹³²

I The Intended Lense for Interpretation

6 Section 1 of Part XV

What can be seen, through analysis of past and present case law, are two approaches in how the Convention should be interpreted. On one side, there is an intention of having a wider scope of compulsory dispute settlement, as seen with the *South China Sea* Tribunal. On the other side, there is an intention having a narrower scope, which was undoubtedly the view of the *Southern Bluefin Tuna* Tribunal. These two cases exhibit diametrically opposed views on how comprehensive the Convention's dispute settlement regime intended to be. Where *Southern Bluefin Tuna* prioritises the value of maximising party choice, *South China Sea* prioritises the integrity of the Convention.¹³³

The question posed is accordingly this: Should the Convention be read as narrow and “sovereignist”, where the system was designed to be less comprehensive and one should interpret the exceptions to the dispute settlement system widely, in order not to exceed the bargain struck by the parties?¹³⁴ Or, should the Convention be read as a package deal with a wider scope, and thus the exceptions to the dispute settlement system are interpreted narrowly in order to protect the integrity of the Convention?¹³⁵

The main emphasis in Section 1 of Part XV is that parties are free to choose whatever peaceful means they prefer for dispute settlement. *Southern Bluefin Tuna* asserted that the

¹³² Guilfoyle, above n 126; Zhang, above n 131, at 441-442; De Castro, above n 130, at 361, Angelo Jimenez “Philippines’ Approaches to the South China Sea Disputes: International Arbitration and the Challenges of a Rule-Based Regime” in Huang and Billo *Territorial Disputes in the South China Sea* (Palgrave Macmillan, London, 2015) 99 at 99.

¹³³ Guilfoyle, above n 72, at 59.

¹³⁴ At 54.

¹³⁵ At 54.

UNCLOS mechanism would not override the dispute settlement provisions in other law of the sea treaties and the selection may include non-binding and non-compulsory procedures.¹³⁶ A preference for traditional, consent-based modes of dispute resolution is evident in this approach.

Nevertheless, the *South China Sea* Tribunal, in support of their interpretation, quoted drafters of the Convention to unearth the overall object and purpose of the Convention as a comprehensive agreement. The drafters recalled that “the system for the settlement of disputes must form an integral part and an essential element of the Convention”.¹³⁷ Gamble noted that the consensus among experts was that agreement on binding dispute settlement methods was critical to the success of the treaty, where ambiguities and imprecision in the Convention would be counterbalanced with the confidence of third party dispute settlement.¹³⁸ As a narrower reading relies on “implicit” exclusion, as seen in *Southern Bluefin Tuna*,¹³⁹ it is arguable that more is needed to trigger section 1 of Part XV. Yet, political reality dictated that exceptions needed to be made. The nature and degree of the exceptions is vitally important¹⁴⁰ to maintain the overarching mission of providing a comprehensive agreement with mandatory and binding dispute settlement procedures. Thus, there is a risk with the *South China Sea* interpretation of being overtly formalistic and therefore neglecting the essence of the consensus itself and intention of the parties.¹⁴¹

Through analysis of the *travaux préparatoires*, it is apparent that Section 1 of Part XV was developed to ensure the widest possibility of achieving peaceful dispute settlement.

¹³⁶ Klein, above n 176, at 123.

¹³⁷ *South China Sea Arbitration (Jurisdiction and Admissibility)*, above n 3, at [225].

¹³⁸ J.K. Gamble “The Law of the Sea Conference: Dispute Settlement in Perspective” (1976) 9 Vand. J. Transnat’l L. 323 at 324.

¹³⁹ Rosemary Rayfuse “The Future of Compulsory Dispute Settlement Under the Law of the Sea Convention” (2005) 36 VUWLR 683 at 707.

¹⁴⁰ Gamble, above n 138, at 340.

¹⁴¹ Chris Whomersley “The South China Sea: The Award of the Tribunal in the Case Brought by Philippines against China – A Critique” (2016) Chinese Journal of International Law 239 at 258; Chinese Society of International Law, above n 120, at 480.

Consequently, voluntary procedures should prevail and be a precondition before submitting parties to mandatory dispute settlement through Section 2 of Part XV.¹⁴² Nevertheless, President Amerasinghe of UNCLOS III interpreted Article 282 as having a binding character, where “there can be no release from that obligation without the concurrence of all parties to the dispute who have entered into the special agreement... [as] any other interpretation would weaken the effect of the provision”.¹⁴³ This indicates that although party choice is important, the court or tribunal must be relatively certain of the voluntary agreement to opt out of the UNCLOS dispute settlement scheme. Following this reasoning, it is appropriate to need explicit and express provision or agreement by all parties to the dispute that they have chosen alternative binding procedure to the exclusion of all other procedures before being barred from UNCLOS jurisdiction.

7 Section 3 of Part XV

When looking at the UNCLOS drafter’s intentions in section 3 of Part XV, it is clear that although maritime delimitation and historic title disputes may be subject to compulsory dispute settlement, the interests from sovereign states were too great to surrender these matters *entirely* to international arbitration or adjudication.¹⁴⁴ Maritime delimitation lies at the very heart of sovereignty and therefore has fundamental importance. The variety of political, strategic, social, and economic factors involved in the allocation of maritime areas have lent support for the resolution through political channels rather than third-party decision.¹⁴⁵ Consequently, it is this tradition of politically negotiated agreements that is reinforced in UNCLOS through Article 298.

¹⁴² Nordquist *United Nations Convention on the Law of the Sea, 1982: A Commentary* v. 5 (Kluwer Academic Publishers, 1985-) at 20-26.

¹⁴³ Nordquist, above n 142, at 27, citing President Amerasinghe in United Nations Conference on the Law of the Sea III A/CONF.62/WP.9/Add.1 (1976) at [13].

¹⁴⁴ Natalie Klein, above n 41.

¹⁴⁵ Natalie Klein, above n 41.

Historic Title

The Tribunal had to overcome an important jurisdictional obstacle under Article 298(1)(a)(i). A literal interpretation of this exception would seem to exclude from the tribunal's jurisdiction the issue of validity of the nine-dash line. However, the Tribunal dealt with the jurisdictional obstacle by first defining the dispute over the nine-dash line as a dispute over the source and existence of maritime entitlements (and therefore not maritime delimitation), and secondly defined whether China's claim involved historic 'title'.¹⁴⁶

The ICJ in the *Anglo-Norwegian Fisheries* case inferred that historic titles refer to the exercise of sovereignty, creating historic waters resembling the regime of internal or territorial waters depending on the acceptance of the right of innocent passage.¹⁴⁷ Furthermore, the UN Study on Historic Waters, noted that in principle, the scope of historic title emerging from continued exercise of sovereignty should not be wider in scope than the scope of the sovereignty actually exercised.¹⁴⁸ Historic claims originated from the fact that states laid claims and exercised their jurisdiction over areas of the sea adjacent to their coasts as they considered it vital to their security and/or to their economy.¹⁴⁹ Historic rights, therefore, should be perceived not to be incompatible with UNCLOS but as exceptions recognised in general international law. Major writers accept, and therefore affirm, that historic rights are exceptional rights that deviate from generally applicable rules.

Overall, it is evident that the Tribunal's distinguishing of historic 'title' and historic 'rights' is well-founded in law. The Tribunal, agreeing with the Philippines' submission, perceives China's historic claim to be an exercise of exclusive rights (short of sovereignty)¹⁵⁰ that lead to the establishment of historic rights with a quasi-territorial zonal impact beyond the

¹⁴⁶ Schoenbaum, above n 47, at 295.

¹⁴⁷ *Fisheries*, above n 43, at 130; Sophia Kopela, above n 44, at 187-188.

¹⁴⁸ United Nations Secretariat *Juridical Regime of Historic Waters including historic bays*, AC/CN.4/143 (1962) at [168].

¹⁴⁹ Sophia Kopela, above n 44, at 186.

¹⁵⁰ *South China Sea Arbitration (Award)*, above n 4, at [214].

territorial sea.¹⁵¹ Although scholars have critiqued the Tribunal's interpretation to be arbitrary, briefly analysed, and too dismissive of the existence of traditional fishing rights¹⁵² under customary law,¹⁵³ further scrutiny of the law on historic title and rights has demonstrated that the Tribunal was open in holding such an interpretation of China's claim as they did. Read in the context of the Convention, China's commitment in respecting both freedom of navigation and overflight indicate that China do not see the nine-dash line to be equivalent to territorial seas or internal waters.¹⁵⁴ Accordingly, although the Tribunal narrowed the scope and contemporary relevance of historic claims under the Convention, their decision of China's claim was well-founded, as China's claim lacked sound legal basis and essentially maintained strategic ambiguity to delay any finite decision on the nine-dash line.

Further, this interpretation was aided and abetted by China, which of course, did not participate and never stated the precise legally-intended effect of the nine-dash line.¹⁵⁵ Perhaps if China had appeared before the Tribunal at the jurisdiction hearing, they could have made stronger arguments towards their assertion of historic title. China's assertiveness and reiteration of claims of the nine-dash line can only be seen as minimally persuasive and obscure from a legal perspective. This preference to leave the assertion to vague and ambiguous political pronouncement and maintenance of strategic negotiations at a bilateral basis and at a diplomatic level indicates that China may have no legal basis to

¹⁵¹ Sophia Kopela, above n 44, at 188-189.

¹⁵² *South China Sea Arbitration (Award)*, above n 4, at [805]-[806]. In respect to the evidence, the Tribunal noted that "matters of evidence should be approached with sensitivity" and specifically referred to the fact that the storied of these traditional fishermen "have not been the subject of written records" and "that certain livelihoods have not been considered of interest to official record keepers or to the writers of history does not make them less important to those who practice them".

¹⁵³ Thomas Schoenbaum "The South China Sea Arbitration Decision: The Need for Clarification" (2016) 110 *AJIL* 290 at 293-295.

¹⁵⁴ *South China Sea Arbitration (Award)*, above n 4, at [213].

¹⁵⁵ Schoenbaum, above n 47, at 296.

stand on. This supplements the Tribunal's freedom to define the nine-dash line to suit its purpose.¹⁵⁶

Sovereignty and Maritime Delimitation

It can be difficult to see how questions of entitlements generated by maritime features are not inextricably intertwined with issues of delimitation as well as with issues of sovereignty over the relevant features.¹⁵⁷ In particular, low-tide elevations fringing other insular features in the South China Sea may have important impact in the determination of basepoints from which the various entitlements generated by the insular features are measured. Therefore, the characterization of a particular feature one way or the other will have far reaching effects regarding delimitation, especially in a situation where sovereignty over all the relevant features remains contested. Nevertheless, the area claimed in this case must be divided to determine the reach of each State's competence.¹⁵⁸

The carving-out exercise done by the Tribunal does appear artificial, given the inherently intertwined nature of sovereignty over features, the entitlements that these generate considered as a whole, and potential overlaps of such entitlements. The determination of the nature of maritime features and the entitlements they generate may not require that the Tribunal 'first' determine sovereignty over them, but it certainly has the consequence of prejudging some of the sovereignty claims.¹⁵⁹ It becomes clear, after examining past cases,¹⁶⁰ that issues of legal status of maritime features strongly *affect* the result of the

¹⁵⁶ Dupay and Dupay "A Legal Analysis of China's Historic Rights Claim in the South China Sea" (2013) 107(1) AJIL 124 at 141; Guilfoyle, above n 126; Schoenbaum, above n 47, at 296; Jeong Gab Yong, above n 5, at 102-103; Kopela, above n 44, at 183.

¹⁵⁷ Tzanakopoulos, above n 18, at 140.

¹⁵⁸ Klein, above n 41.

¹⁵⁹ Antonios, above n 18.

¹⁶⁰ For example, *Tunisia v Libya*, *Canada v US*, *Libya v Malta*, *Eritrea v Yemen*, *Qatar v Bahrain*, and *Romania v Ukraine*.

settlement of maritime boundary disputes.¹⁶¹ Even when such disputes were requested to be handled ‘first’, issues concerning legal status of maritime features constitutes an integral part of maritime boundary delimitation. A clear example is if the Tribunal declared that a particular feature is a low-tide elevation. This determination not only defines whether the feature can generate maritime delimitations, but it also defines its sovereignty status. This therefore may engage the Tribunal in a delimitation exercise for which it has no jurisdiction and may create implications on claims of third states. Fragmenting the legal evaluation meant that the Tribunal selectively neglected the real practical effect of these claims and therefore prejudged some of the sovereignty claims.¹⁶²

Nevertheless, the Tribunal’s decision was sound in legal principle in holding jurisdiction if one looks at the intelligently framed requests of the Philippines. Indeed, a determination of the maritime features may have future consequences on State sovereignty, depending upon the determination of the maritime features. However, the Tribunal did not concurrently decide these. Rather, the Tribunal was fully capable of seeking determination as to whether the features constituted islands, rocks, low-tide elevations, and so forth, and thus whether they could generate maritime entitlements,¹⁶³ without simultaneously deciding upon sovereignty. Accordingly, framing the question as one of the status of maritime features and not of sovereignty over them, would come within UNCLOS Part XV, as Alan Boyle had long predicted (and indeed advised Philippine counsel to do so).¹⁶⁴

Even though, upon deeper analysis, we find that the Tribunal is legally sound in its finding that its decisions in determining certain maritime features did not necessarily define State

¹⁶¹ Michael Sheng-ti Gau “The Legal Status of Maritime Features in the Sino-Philippine South China Sea Arbitration: Admissibility and Jurisdiction” in Keyuan Zou and Shicun Wu *Arbitration concerning the South China Sea: Philippines versus China* (Ashgate Publishing, Surrey, 2016) 71 at 82-83.

¹⁶² Whomersley, above n 141, at 250-251; Chinese Society of International Law, above n 120, at 469-471; Antonios, above n 18; Michael Sheng-ti Gau “The Legal Status of Maritime Features in the Sino-Philippine South China Sea Arbitration: Admissibility and Jurisdiction” in Keyuan Zou and Shicun Wu *Arbitration concerning the South China Sea: Philippines versus China* (Ashgate Publishing, Surrey, 2016) 71 at 82-83.

¹⁶³ Antonios, above n 18.

¹⁶⁴ Guilfoyle, above n 72, at 56; and Guilfoyle, above n 126, Schoenbaum, above n 47, at 295.

sovereignty, it had the effect of influencing delimitation and sovereignty regardless. This conflicts with *Chagos*, where implied decisions of sovereignty barred jurisdiction. When analysing why the automatic and optional limitations and exceptions to the compulsory dispute settlement scheme was initially drafted into the Convention, it was clear that Section 3 had the purpose of protecting sovereignty and party choice. There was an overall acceptance by the participants in UNCLOS III from the very beginning that there would be provisions for the settlement of disputes, conditioned on the exclusion of certain issues from the obligation to submit them to a procedure entailing a binding decision.¹⁶⁵ The interests from sovereign states were too great to surrender these matters *entirely* to international arbitration or adjudication. It was found that political negotiations may be better suited, if the states desired, in peacefully settling disputes concerning maritime delimitation, historic title, and ultimately State sovereignty. If the Tribunal's interpretation goes against this purpose, as it clearly does in this case, the Tribunal should have interpreted the scope of section 3 and how it applies to the Philippines' claims differently.

However, regard must also be had on the overarching purpose of the Convention and the importance stressed by UNCLOS III of having the dispute settlement scheme as a central and integral part of the Convention. The aim was to ensure there could be peaceful dispute settlement between State parties, whether through political negotiations or through other peaceful means like arbitration. Indeed, many delegates at UNCLOS III emphasised a preference to have no exceptions, but if there must be some, every proposed exception should be formulated very clearly, and its scope and application should be interpreted restrictively.¹⁶⁶ It is abundantly clear that China has expressed their preference of political negotiations as their avenue of resolving disputes. However, when examining China's success throughout time on their bilateral and multilateral negotiations, it is questionable whether their assertion of peaceful settlement through negotiations are ceasing to be in good faith and perhaps is merely continuing a pretence of negotiation while continuing to act in bad faith. In matters of delimitation, regard should be had on arbitrary interpretations

¹⁶⁵ Nordquist, above n 142, at 87.

¹⁶⁶ At 92.

and unilateral measures by states strong enough to impose their will through political negotiations. There is still a need to protect smaller and weaker states through the law to safeguard their legitimate rights.¹⁶⁷

Past experience has shown that bilateral negotiations are not effective in the South China Sea. This is evident, for example, when observing the dialogue between China and Vietnam, where Vietnam has constantly remained ready to negotiate but China has maintained postponement of negotiations while continuing to send new military contingents to contested islands.¹⁶⁸ There has also only been one case of bilateral negotiation agreement regarding maritime delimitation and fishery corporation. Other projects of common development with China have failed, exemplifying the lack of willingness and ability to compromise.¹⁶⁹ Consequently, the lack of positive results and the continuing of such conveys the idea that any proposals made by China for negotiations will be seen as nothing but a fig-leaf for China's pursuit of the South China Sea and will therefore cast grave doubts in China's sincerity.¹⁷⁰

It is also very important to note that the exceptions were not made to be self-judging. Their applicability in a particular case cannot be determined by their invocation by the State Party against which a complaint is brought. Indeed, Article 288(4) of the Convention makes it clear that in the event of a dispute as to whether a court or tribunal has jurisdiction, "the matter shall be settled by decision of that court or tribunal". This principle ("*Competence-competence*") therefore becomes influential in how the interpretation of the Convention should be read, where the granting of discretion to the courts and tribunals to determine their own jurisdiction allows not only the context of the particular circumstance, but also the spirit, integrity, and aim of the Convention to colour the determination of jurisdiction.

¹⁶⁷ At 94.

¹⁶⁸ Dimitry Mosyakov "New Challenges and New Reality in the Conflict in the South China Sea" in James Borton *Islands and Rocks in the South China Sea: Post-Hague Ruling* (Xlibris, 2017) 154.

¹⁶⁹ Gerhard Wills "The Award by the Permanent Court of Arbitration: Challenge or Change for China?" in James Borton *Islands and Rocks in the South China Sea: Post-Hague Ruling* (Xlibris, 2017) 158 at 163.

¹⁷⁰ At 163.

There must be a time where the pretence of negotiation and peaceful settlement through that dispute resolution mechanism should desist. If negotiations are not working, the pursuit for peaceful settlement of disputes should persist, which is where the UNCLOS mandatory dispute settlement procedures should appropriately step in. It is apparent that China may not be entirely sincere in its desire for peaceful settlement. Rather, it appears to be a prolonged attempt to keep other littoral states of the South China Sea at bay, waiting for ‘peaceful negotiations’, while China pre-emptively asserts its sovereignty throughout the South China Sea with their military. Hence, the need to base decisions of disputes off international law to address any power imbalances of these states and the overarching aim to ensure there is peaceful settlement should override the aim of party choice here. The Convention will allow state parties to choose their avenue of peaceful settlement and will even allow limitations of jurisdiction on certain topics regarding sovereignty. But if the spirit of the Convention has been contradicted by a state party and is therefore being abused and exploited, then an interpretation that is well-founded in legal principle and leans towards a wider scope for compulsory dispute settlement under the Convention does not appear to be such a bad thing. Indeed, it is apparent that the Tribunal were inclined in this way. Therefore, this interpretation falls squarely in line with the aims and purpose of UNCLOS and Article 33 of the UN Charter.

8 *The UNCLOS Convention as a whole*

Grasping how to interpret a treaty or Convention turns on considering the Vienna Convention on the Law of Treaties (**VCLT**).¹⁷¹ A treaty shall be “interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.¹⁷² Interpretation, therefore, must be

¹⁷¹ United Nations Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980).

¹⁷² Article 31.

observed in light of the treaty's aims, its nature, and its end,¹⁷³ while considering interpretations of the treaty by courts and tribunals.¹⁷⁴ Recourse may also be had to supplementary means of interpretation in order to confirm or determine the meaning when interpreting according to the ordinary meaning. This includes the *travaux préparatoires*, or the *travaux préparatoires*, of the treaty and the circumstances of its conclusion.¹⁷⁵

Accordingly, regard must be had to the backdrop of when the Convention was entered into and the core ambitions they envisioned the system to have, considering the views of the parties to the Convention. By the time the Convention entered into force, dispute resolution in international relations had altered.¹⁷⁶ In this context, relying more on the rule of law than on political and economic pressures became a fast trend. The exceptions and limitations on the mandatory system in UNCLOS demonstrates that states did not view mandatory jurisdiction as necessary for every issue regulated under the Convention.¹⁷⁷ Part XV had been construed to reflect the political dynamic of the Third Conference and it is evident that the regime carefully tailored issue areas to ensure the greatest workability possible. The carve-out clauses and limitations were seen to accord with political realities of State preferences for political, rather than third-party, settlement when dealing with these matters.¹⁷⁸ Therefore, the framers of the Convention sought to respect (perhaps to a fault) the freedom of states to choose their own methods of dispute settlement – judicial or otherwise.¹⁷⁹

In drafting the dispute settlement system texts for the Convention, four fundamental aims were espoused as the basis of the dispute settlement procedures. First, the settlement of

¹⁷³ Mark E. Villiger *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers, The Netherlands, 2009) at 427.

¹⁷⁴ Vienna Convention on the Law of Treaties, above n 171, art 31.

¹⁷⁵ Article 32.

¹⁷⁶ Natalie Klein, above n 41, at 23.

¹⁷⁷ At 23.

¹⁷⁸ At 229.

¹⁷⁹ McLachlan, above n 29, at 329.

disputes was to be based on law to avoid the political and economic pressures of more powerful states.¹⁸⁰ Second, the greatest possible uniformity would be sought in the interpretation of the Convention through the system. Third, exceptions would be carefully determined in order to enhance the obligatory character of the settlement regime. Fourth, the dispute settlement system had to constitute an integral part of the Convention, rather than an optional protocol.¹⁸¹

The overarching purpose of Section 2 of Part XV is to set out a flexible mechanism for the interpretation and application of the Convention that accommodates the different preferences of states for international dispute resolution.¹⁸² The system demonstrates the sensitivity of states when it comes to involvement in a mandatory dispute mechanism. Some allowances had to be made for a specific range of disputes for which states were unwilling to submit to compulsory procedures entailing binding decisions. Gamble notes that “it is clear that whenever one makes the quantum jump from non-binding to binding modes of dispute settlement a whole new set of considerations is introduced necessitating many qualifications and escape clauses”.¹⁸³

Articles 279 and 280 of UNCLOS provide two cardinal principles: the first is the principle of peaceful settlement of international disputes, the second principle concerns free choice of means in dispute settlement, which is confirmed by various instruments (Article 33(1) of the UN Charter, second principle of the 1970 Friendly Relations Declaration).¹⁸⁴ Accordingly, peaceful settlement means chosen by the parties prevail over the dispute settlement procedures embodied in Part XV of the Convention.

In analysing the *travaux préparatoires* of the Convention, regard must be had to the various meetings at the Third United Nations Conference on the Law of the Sea. However, the

¹⁸⁰ Klein, above n 41, at 21.

¹⁸¹ At 21.

¹⁸² Klein, above n 41, at 119.

¹⁸³ Gamble, above n 138, at 331.

¹⁸⁴ Tanaka, above n 6, at 419-420.

format of informal negotiations and work sessions of closed off negotiation groups at UNCLOS III diminishes the opportunity to truly understand the drafters' and states' intentions, as official records only provide for a partial account of the negotiations. Consequently, Plant argues that a special emphasis should be placed upon the opinions and writing of the delegates who attended the Conference.¹⁸⁵ However, such sources should nevertheless be treated with caution, as there is a danger that the opinions of the delegates may only provide a partial account of negotiations; they were, after all, acting on behalf of their governments.¹⁸⁶ Nevertheless, the delegates opinions in the meetings of the Plenary can shed light on how the parties to the *South China Sea* dispute saw the Convention. Although this should not, in and of itself, colour how the Tribunal should interpret the Convention, it can help us understand the positions each party was in. Moreover, the reports made by the Chairman of various negotiating groups and the President of the Conference in the *travaux préparatoires* can enlighten us on the overarching aims and progress had as a general consensus of all the states in attendance.

The Chinese delegate, from very early meetings of UNCLOS III, have consistently held that states should “settle disputes through negotiation and consultation on equal footing and on the basis of mutual respect for sovereignty and territorial integrity”.¹⁸⁷ Moreover, they strongly believed that problems with scope of the state sovereignty and exclusive jurisdiction of sovereign state should be handled in accordance with its own laws and regulations. The Chinese delegate therefore did not consider compulsory jurisdiction of an international judicial organ to be appropriate. Consequently, the Chinese delegate stated that dispute settlement procedures should form a separate optional protocol so that countries could decide for themselves whether to accept or not.¹⁸⁸ This view was

¹⁸⁵ G Plant “The Third United Nations Conference on the Law of the Sea and the Preparatory Commission: Models for United Nations Law-Making?” (1987) 36(3) *International & Comparative Law Quarterly* 525 at 552.

¹⁸⁶ James Harrison “Evolution of the Law of the Sea” (2007) at 226.

¹⁸⁷ United Nations Conference on the Law of the Sea III 60th Meeting U.N. Doc. A/CONF.62/SR.60 (1976) at 24, at [27].

¹⁸⁸ At [28].

consistently held throughout the meetings of UNCLOS III, where even near the end of Plenary meetings, the Chinese delegate was still concerned with the questions of reservations and stated that the Chinese government would not agree to any article that did not permit reservations in actual practice.¹⁸⁹ Despite this constant reluctance for a mandatory dispute settlement scheme and a persistence to resolve disputes through political negotiations, significantly, China ultimately decided to ratify the Convention. This can only indicate that China concluded that the benefits outweighed the disadvantages and committed to the whole package of the Convention despite their disagreement with the inclusion of the mandatory dispute settlement system.

The Philippines, on the other hand, believed that for the Convention to be effective, the settlement of disputes should include compulsory jurisdiction leading to a binding decision by the jurisdictional organ concerned.¹⁹⁰ The Philippines' delegate stated that the dispute settlement machinery should assume a role that supplements traditional and direct bilateral negotiations, thereby being as broad as politically possible. However, the new dispute settlement system should be undertaken *only* when existing machinery were inadequate.¹⁹¹

The President of the Conference, Ambassador Amerasinghe, expressed the view that the introduction of the dispute settlement procedures will be the pivot upon which the delicate equilibrium of the compromise must be balanced. He found that effective dispute settlement procedures are essential for stabilising and maintaining the compromises necessary for the attainment of agreement on the Convention.¹⁹² Effective dispute settlement would also aim to guarantee that the substance and intention within the legislative language of the Convention will be interpreted both consistently and equitably. The President of the Conference also spoke about the exceptions granted in the dispute

¹⁸⁹ United Nations Conference on the Law of the Sea III *126th Meeting* U.N. Doc. A/CONF.62/SR.125 (1980) at 21.

¹⁹⁰ United Nations Conference on the Law of the Sea III *62th Meeting* U.N. Doc. A/CONF.62/SR.62 (1976).

¹⁹¹ United Nations Conference on the Law of the Sea III *62th Meeting* U.N. Doc. A/CONF.62/SR.62 (1976).

¹⁹² United Nations Conference on the Law of the Sea III *Memorandum by the President of the Conference* U.N. Doc. A/CONF.62/WP.9/ADD.1 (1976) at 122, at [6].

settlement procedures, stating that the exceptions were made as an attempt to compromise the extreme and conflicting views regarding the question of including or excluding certain disputes relating to economic zones from binding dispute settlement procedures.¹⁹³

Overall, it is apparent that the inclusion of compulsory dispute settlement provisions in the Convention implies an increased willingness to place the development of international law in the hands of independent adjudicators who can provide a sense of finality, certainty, and consistency. In doing so, however, courts and tribunals must be aware of the inherent limitations on the judicial function which restricts how far they can develop the law. This is because there has been deep-rooted concern and apprehension of states mandatorily dispensing jurisdiction on disputes that may determine sovereignty within the law of the sea.

The most notable joint aims that have inescapable conflict and inherent tension are the need to have carve-outs and limitations to encourage efficiency and peaceful settlement through political negotiations and the need to base decisions off international law to address any power imbalances of states. In reconciling the joint aims of the Convention, the most appropriate and effective way in interpreting the jurisdictional scope of the mandatory dispute settlement scheme is to measure the effects of such an interpretation against the joint aims. If the broad effects of the interpretation sufficiently address these aims, then it can only connote a sense of success in treaty interpretation. Accordingly, if the Tribunal's interpretation in the *South China Sea* case sufficiently address the joint aims as expressed through UNCLOS III negotiations, then their interpretation of the Convention's dispute settlement scheme should be welcomed by the party states and the international community at large. Throughout the analysis of this paper, it is apparent that the Tribunal's interpretation *does* sufficiently address these aims. Evaluation of prior peace settlement attempts between the parties ultimately found that there is a need for the Convention's

¹⁹³ United Nations Conference on the Law of the Sea III *Memorandum by the President of the Conference* U.N. Doc. A/CONF.62/WP.9/ADD.1 (1976) at 122, at [31].

mandatory dispute settlement mechanism, where international law intervention proves essential to ensure that a dispute moves towards a resolution.

VI Implications of the South China Sea Arbitration

There is no doubt the *South China Sea* Tribunal has made some significant and contentious decisions throughout the arbitration. Nevertheless, it is evident that the Tribunal's decisions and interpretations have been well-founded in law and consistent with the joint aims of the Convention. The international recognition through an arbitral tribunal of the invalidity of China's "nine-dash line" is a hugely significant and prominent matter. An explicit intention to read and interpret the mandatory dispute settlement scheme within UNCLOS as central to the Convention will open the scope for mandatory dispute settlement for law of the sea disputes around the world.

Regardless of whether the Tribunal made the "correct" decision, there is no doubt that this Award will have implications and effects not only within the South China Sea area but to other disputes within UNCLOS and how the dispute settlement scheme under the Convention will be interpreted by other international courts and tribunals. This section will first look at the effects this case already has made upon the South China Sea area and speculates upon any future implications it may have. It will then examine the effects this case will have on the dispute settlement scheme of UNCLOS and how it will be interpreted in future disputes across the globe.

J The South China Sea

If we examine the *South China Sea* Arbitration and the effects it has made not only upon the Philippines and China, but also the other littoral states of the South China Sea, the future may appear relatively dim. At first sight, it appears that the Awards have had little effect thus far. China has persistently refused to accept that the Tribunal had jurisdiction. Consequently, it has viewed both the Award on Jurisdiction and Admissibility, and the Award on the Merits as invalid and unenforceable. China has therefore continued to assert sovereignty over the majority of the South China Sea and have continued to use the marine

features in Scarborough Shoal and the Spratly Islands. Furthermore, the Philippines' President, Rodrigo Duterte, has stated that the Award is merely an avenue to friendly negotiations with China in settling the disputes surrounding claims to the South China Sea. This reaction by the Philippines may appear to mitigate any significance or momentousness to the Tribunal's Awards on claims in the South China Sea and could arguably be seen as a mere piece of paper.

Nevertheless, this paper submits that this Award is an important stepping stone in the peaceful settlement of conflicting claims between the littoral states to the South China Sea. It is of critical importance to take a broader view of what the purpose of the *South China Sea* arbitration process is and to see it within the larger context in which it arises. Initially, the *Southern Bluefin Tuna* decision was viewed as a failure. Yet the case demonstrates that the initiation of international legal dispute settlement processes can be incredibly useful and effective as a step in the resolution of a dispute, particularly where there may be a power imbalance between the states concerned.¹⁹⁴ Following the enlightening views made by Bill Mansfield, the dispute settlement process itself, including the comments and signals from the relevant tribunal, may be of more importance than the formal elements of any decision.¹⁹⁵ Accordingly, although the formal elements of the *South China Sea* decision may not have had the effect the international community had hoped for, it still remains to be an extremely valuable step in resolving disputes in the South China Sea. The *South China Sea* decision has received full support from ASEAN member states and from the international community at large.¹⁹⁶ This gives a strong indication that negotiations between states in the South China Sea can move forward with a more even and equal ground between a more powerful State, such as China and the smaller states like the Philippines and Vietnam. This decision will remain a fact of history that in 2016, China was found to have been in violation of several of its commitments as a signatory of

¹⁹⁴ Bill Mansfield "The Southern Bluefin Tuna Arbitration: Comments on Professor Barbara Kwiatkowska's Article" (2001) 16(2) *International Journal of Marine & Coastal Law* 361 at 362.

¹⁹⁵ Mansfield, above n 194, at 362.

¹⁹⁶ Dimitry Mosyakov "New Challenges and New Reality in the Conflict in the South China Sea" in James Borton *Islands and Rocks in the South China Sea: Post-Hague Ruling* (Xlibris, 2017) 154 at 155.

UNCLOS. This will remain on the international community's mind and indeed China's mind when holding future negotiations.

Indeed, negotiations towards peaceful settlement have already been set into motion. An agreement on a Single Draft South China Sea Code of Conduct Negotiating Text (**SDNT**) was made by the foreign ministers of ASEAN and their Chinese counterpart in August 2018, and it will serve as the basis for the adoption of a Code of Conduct (**COC**) in the South China Sea.¹⁹⁷ The SDNT explicitly states that it is “not an instrument to settle territorial disputes or maritime delimitation issues” and further acknowledges that the Code will not address nor affect legal questions relating to the settlement of disputes, maritime boundaries, or permissible maritime entitlements under international law of the sea and enshrined in UNCLOS.¹⁹⁸

Interestingly, a very large portion of the SDNT is devoted to the prevention, management, and settlement of disputes in the South China Sea. It does not, however, contain any specific reference to the binding dispute mechanisms included in UNCLOS. The present text of the SDNT does not mention the duty of state parties to UNCLOS to immediately comply with awards issued through arbitral proceedings established under Annex VII.¹⁹⁹ It has been proposed that parties settle their disputes “through friendly negotiations, enquiry, mediation, conciliation, and other agreed means”. Failing that, disputants should then utilise the dispute settlement mechanism of the Treaty of Amity.²⁰⁰ Further, the SDNT does not include any reference thus far to the COC as a treaty under international law. It does contain a proposal for consent to be bound and that no Contracting Party may hold reservations when signing the COC. This may indicate that the final COC may be a binding agreement to settle disputes through agreement or otherwise through the procedures set out

¹⁹⁷ Carl Thayer “A Closer Look at the ASEAN-China Single Draft South China Sea Code of Conduct” (3 August 2018) *The Diplomat* < <https://thediplomat.com/2018/08/a-closer-look-at-the-asean-china-single-draft-south-china-sea-code-of-conduct/>>.

¹⁹⁸ Single Draft South China Sea Code of Conduct, s 2.

¹⁹⁹ Thayer, above n 197.

²⁰⁰ Thayer, above n 197.

in the Treaty of Amity, which could arguably bar jurisdiction of UNCLOS's mandatory dispute settlement regime, using section 1 of Part XV.

Currently, the SDNT is seen to be a "living document" in attempting to develop a final and binding Code for littoral states of the South China Sea. Whether the *South China Sea* Award has coloured and encouraged such a development is arguable. A willingness for all ASEAN members and China to establish a consensus of solidarity and kinship within the South China Sea could be attributed to the landmark *South China Sea* case. Nevertheless, it will be fascinating to see how the Contracting states deal with UNCLOS's dispute settlement regime. In particular, it will be interesting to see whether the final COC will bar jurisdiction for the mandatory system in place completely or will still leave the option open to parties to follow the Philippines' footsteps in using arbitration to settle disputes when it is clear the opposing party refuses to settle peacefully or is acting in bad faith.

K Dispute Settlement under UNCLOS

With the *South China Sea* Awards establishing an attraction towards the package-deal approach and a desire to prioritise the integrity of the Convention, a notion of finality and certainty to the UNCLOS dispute settlement regime is a possibility. Regardless of whether this Award has any sizeable effect on disputes and claims surrounding the South China Sea, I predict that it will be an effective stepping stone in establishing the importance of having a mandatory dispute settlement procedure. The Tribunal's decision to interpret the dispute settlement scheme in a way that successfully reconciles the Convention's joint aims will set a positive precedent in ensuring peaceful dispute settlement between nation states, especially when the procedures already in place through other various instruments have evidentially failed to settle such disputes.

The Ukraine served on Russia a Notification and Statement of Claim under Annex VII to UNCLOS on 16 September 2016. This referred to a dispute concerning the coastal state

rights in the Black Sea, Sea of Azov, and Kerch Strait.²⁰¹ According to a statement from the Ukrainian Ministry of Foreign Affairs, the claim will focus on Russia's actions in the maritime zones bordering Crimea, which appears to be parallel in the approach pioneered by the Philippines in the *South China Sea* case.²⁰² The Ukraine will seek to avoid Russia's declaration under Article 298 excluding jurisdiction relating to sea boundary delimitations by focusing on specific actions Russia has taken in the Crimea maritime zones, which the Ukraine will assume is part of the Ukraine; thus not asking the tribunal to rule on sea boundaries or declare that the annexation of Crimea is illegal in any way.²⁰³ There was speculation that Russia would behave the same way they did in the *Arctic Sunrise* case and which China did in the *South China Sea* case, by simply not appearing. However, it is clear that Russia has allocated agents and counsel for the arbitration and is therefore participating fully in the hearings.²⁰⁴ The pleadings in the *Ukraine v Russian Federation* case started in early 2017,²⁰⁵ with Ukraine's Memorial submitted in early 2018,²⁰⁶ and has not concluded as of yet. Whether the arbitral Tribunal in this case will take the *South China Sea* Tribunal's interpretation of UNCLOS and the dispute settlement regime as precedent will be integral in exhibiting whether the *South China Sea* Award will have a lasting effect on future cases under UNCLOS.

²⁰¹ Permanent Court of Arbitration "Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v The Russian Federation)" < <https://pca-cpa.org/en/cases/149/>>.

²⁰² Julian Ku "Ukraine's UNCLOS Arbitration Claim Against Russia May Depend Upon Philippines-China Precedent" (17 September 2016) *Opinio Juris* < <http://opiniojuris.org/2016/09/17/ukraines-unclos-arbitration-claim-against-russia-may-depend-upon-philippines-china-precedent/>>.

²⁰³ Ku, above n 202.

²⁰⁴ Permanent Court of Arbitration, above n 201.

²⁰⁵ Ministry of Foreign Affairs of Ukraine "The hearing of the case Ukraine v Russian Federation under UNCLOS will start at the beginning of 2017" (23 December 2016) < <https://mfa.gov.ua/en/press-center/news/53422-na-pochatku-2017-roku-rozpochnetysya-rozglyad-spravi-ukrajina-proti-rosijsykoji-federaciji-zgidno-z-konvencijeju-oon-z-morsykogo-prava>>.

²⁰⁶ Ministry of Foreign Affairs of Ukraine "Statement of Ukraine's Foreign Ministry on the Filing of its Memorial in Arbitration Proceedings against the Russian Federation under the UN Convention on the Law of the Sea" (19 February 2018) < <https://mfa.gov.ua/en/press-center/news/63052-zajava-mzs-ukrajini-shhodo-podachi-ukrajinoju-memorandumu-v-arbitrazhnomu-provadhenni-proti-rf-za-konvencijeju-oon-z-morsykogo-prava>>.

What remains to be seen is that the ongoing expansion and retraction of the jurisdiction to resolve disputes under UNCLOS is considered the product of a living constitution, which is expected to evolve over time. The principle of effectiveness, which anticipates an allowance for tribunals to fulfil their judicial function is tempered by the principle of consent, where there is a need for sovereign states to consent to be bound by the decisions of international courts and tribunals.²⁰⁷ This ultimately underlies the foundation of jurisdiction for those courts and tribunals. It is arguable that parties who have ratified UNCLOS have implicitly consented to be bound by these decisions made through the Convention's dispute settlement scheme. However, the carve-outs and limitations still engrained within the Convention remain to be fundamental to its existence, and therefore unavoidable in considering party consent and jurisdiction. There needs to be a correct balance between these two principles for success of any international dispute settlement regime.

As of yet, no further cases have been released regarding the contentious jurisdictional issues raised in the *South China Sea* case. It is, therefore, hard to analyse whether the *South China Sea* case will have any sizeable impact upon the dispute resolution mechanism under UNCLOS and whether international courts and tribunals will follow the footsteps towards prioritising the comprehensiveness and integrity of UNCLOS throughout their interpretation of the Convention and determining jurisdiction. One can only guess what kind of impact this Award will have on the future of the Convention's dispute settlement scheme. Through analysis of the past cases regarding jurisdictional issues of the UNCLOS mandatory dispute settlement scheme, scholarly opinion and commentary on the *South China Sea* Award, the principles and aims vocalised through the drafters and preparatory documents of UNCLOS, and the response of littoral states of the South China Sea (as evident by the SDNT), it can be said that the *South China Sea* Tribunal made a bold but

²⁰⁷ Natalie Klein "Expansions and Restrictions in the UNCLOS Dispute Settlement Regime: Lessons from Recent Decisions" (2016) 15(2) Chinese Journal of International Law 403 at [39].

effective interpretation on jurisdiction, which will only benefit peaceful dispute settlement under the Convention throughout the world.

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