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# Judges Make UNCLOS Part XV

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Submitted in fulfilment of the requirements of the Degree of PhD

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## Abstract

One of the greatest achievements of the Third UN Conference on the Law of the Sea was the introduction of the compulsory dispute settlement system into the United Nations Convention on the Law of the Sea (UNCLOS) as an integral part (Part XV). The introduction of the compulsory jurisdiction system was due to the shared need for comprehensive and effective dispute settlement mechanisms to prevent discretionary interpretation and application of the Convention. Thus, Part XV of UNCLOS maintains the overall balance and holds the whole structure of the Convention.

Recently, the Part XV system of UNCLOS has been at the centre of controversies and debates among academics, which were mostly based on the views that tribunals have vigorously expanded the applicability of compulsory jurisdiction and that contradictions within the case-law have raised an inconsistency problem in interpreting and applying Part XV. However, the current thesis calls such criticisms into question. Instead, this research argues that the judicial findings concerning the compulsory dispute settlement system of UNCLOS can be analysed and assessed through the concept of judicial law-making.

Among the different ways of understanding the concept of judicial law-making, this thesis considers that courts and tribunals may create and shift the normative expectations of other subjects of international law through the interpretation of a treaty. International judicial bodies' interpretation of a norm in a treaty may inevitably affect all other states parties to the same treaty because their authority as judicial organs enables them to shape the meaning of the law and to make their decisions a reference point for other subjects of international law. In this regard, this thesis argues that judicial law-making may happen when international judicial bodies interpret the provisions of UNCLOS Part XV to find a way to apply the rules to actual cases.

In brief, the present thesis will show what rules Part XV tribunals have created concerning the compulsory dispute settlement procedures of UNCLOS and how this system has developed through the clarification of norms by international adjudication. In this respect, this research will propose a different perspective on the study of the dispute settlement system under UNCLOS and the role of Part XV tribunals.

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## Author's Declaration

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Printed Name: Hoon Cho

Signature:

## **Part I. Judicial Law-Making and UNCLOS Part XV**

## 1. General Introduction

### 1.1. An Introduction to UNCLOS Part XV

The present thesis focuses on international courts and tribunals' determinations on matters concerning the rules regulating dispute settlement procedures under the United Nations Convention on the Law of the Sea (hereinafter 'UNCLOS' or 'the Convention').<sup>1</sup> UNCLOS provides compulsory dispute settlement mechanisms through its Part XV by stipulating that specified judicial bodies may exercise compulsory jurisdiction over the submitted disputes. Accordingly, Article 286 of UNCLOS regulates that any dispute concerning the interpretation or application of the Convention can be submitted to the regulated court or tribunal at the request of any party to the dispute.<sup>2</sup>

The compulsory jurisdiction of a court in international law indicates the competence of the court to decide a unilaterally submitted case by an applicant according to the previous agreement and without the *ad hoc* consent of the respondent, even over the objection of the respondent.<sup>3</sup> Therefore, the acceptance of compulsory jurisdiction means that states give their agreement to a certain judicial body's exercise of jurisdiction in advance for future disputes.<sup>4</sup> The dispute settlement system of UNCLOS, Part XV, also regulates the compulsory jurisdiction for resolving a dispute concerning the interpretation or application of the Convention.

Part XV of UNCLOS consists of 21 articles divided into three sections. Section 1 is General Provisions (Articles 279-285) that regulate the pacific means of settling disputes other than compulsory jurisdiction. These are preconditions to the compulsory measures that must be satisfied before submitting the dispute to the compulsory procedures. The

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<sup>1</sup> Concluded on 10 December 1982 and entered into force on 16 November 1994.

<sup>2</sup> UNCLOS Part XV is a type of *compromissory clause* of a treaty. A treaty containing a *compromissory clause* means that it includes a clause stipulating a means of settling any disputes concerning the interpretation or application of that treaty (See; Hugh Thirlway, 'Compromis' (2006) Max Planck Encyclopedias of International Law, para. 2).

<sup>3</sup> See; Ruth C. Lawson, 'The Problem of the Compulsory Jurisdiction of the World Court' (1952) 46 The American journal of international law 219, p. 221. See also; *Nottebohm case (Preliminary Objection), Judgment of November 18th, 1953: I.C.J. Reports 1953, p. 111. p. 122.*

<sup>4</sup> Amelia Keene, 'Outcome Paper for the Seminar on the International Court of Justice at 70: In Retrospect and in Prospect Actes Du Seminaire Tenu À L'Occasion Du Soixante-dixième Anniversaire De La Cour Internationale De Justice: Bilan Et Perspectives' (2016) 7 Journal of international dispute settlement 238, p. 241.

substantive provisions for the compulsory measures are in Section 2, which is Compulsory Procedures Entailing Binding Decisions (Articles 286-296). Section 3 contains Limitations and Exceptions to Applicability of Section 2 (Articles 297-298).

The binding compulsory procedures of Part XV hold the whole structure of UNCLOS together and ensure its integrity.<sup>5</sup> During the negotiating process of the Third United Nations Conference on the Law of the Sea (hereinafter 'Third UN Conference') held between 1973 and 1982, a delicate compromise was required to reach an agreement on the final provisions of UNCLOS covering nearly all matters related to the oceans. Hence, in order not to expose this painfully worked out compromise to disintegration, a careful interpretation and application of the Convention must be guaranteed.<sup>6</sup> In this context, a compulsory dispute settlement system was introduced to preserve the integrity of the Convention and the balance struck by the drafters during the negotiation process.<sup>7</sup> For this reason, many states regarded the compulsory dispute settlement system as an essential element for achieving a package deal over the substantive rights and obligations under the Convention.<sup>8</sup>

The drafters of UNCLOS introduced the compulsory dispute settlement system into the Convention as an integral part, instead of as an optional protocol unlike most similar multilateral treaties in modern times.<sup>9</sup> Given states' traditional reluctance to submit their disputes to international courts<sup>10</sup> and past failed attempts to establish a general compulsory jurisdiction system among the international community,<sup>11</sup> this is a striking feature of this

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<sup>5</sup> Alan E. Boyle, 'Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction' (1997) 46 *The International and Comparative Law Quarterly* 37, p. 38; Louis B. Sohn, 'Settlement of Law of the Sea Disputes' (1995) 10 *The International Journal of Marine and Coastal Law* 205, p. 205. See also, Jonathan I. Charney, 'Entry into force of the 1982 Convention on the Law of the Sea' (1995) 35 *Virginia Journal of International Law* 381, p. 390.

<sup>6</sup> A. O. Adede, *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea: A Drafting History and A Commentary*, vol 10 (M. Nijhoff 1986), pp. 89 and 242. See also; James Harrison, 'Judicial Law-Making and the Developing Order of the Oceans' (2007) 22 *The International Journal of Marine and Coastal Law* 283, p. 287.

<sup>7</sup> Armand L. C. de Mestral, 'Compulsory Dispute Settlement in the Third United Nations Convention on the Law of the Sea: A Canadian Perspective' in Thomas Buergenthal (ed), *Contemporary Issues in International Law: Essays in honor of Louis B Sohn* (Engel 1984), p. 171.

<sup>8</sup> Adede, *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea: A Drafting History and A Commentary*, p. 241. See also, John R. Stevenson and Bernard H. Oxman, 'The Third United Nations Conference on the Law of the Sea: The 1975 Geneva Session' (1975) 69 *The American Journal of International Law* 763, p. 795.

<sup>9</sup> John Warren Kindt, 'Dispute Settlement in International Environmental Issues: the Model Provided by the 1982 Convention on the Law of the Sea' (1989) 22 *Vanderbilt Journal of Transnational Law* 1097, p. 1099.

<sup>10</sup> Anthony Giustini, 'Compulsory Adjudication in International Law: the Past, the Present, and Prospects for the Future' (1986) 9 *Fordham International Law Journal* 213, p. 214.

<sup>11</sup> For example, during both the Hague Peace Conferences in 1899 and 1907, enthusiastic attempts were made to support the adoption of the principle of compulsory arbitration for legal disputes (C. H. M. Waldock,

new law of the sea convention. Some appraise that one of the greatest achievements of the Third UN Conference was the successful introduction of a comprehensive dispute settling system into the new Convention as an integral part.<sup>12</sup> Furthermore, the entry into force of UNCLOS is also construed as one of the most important developments in the international dispute settlement system since the adoption of the Charter of the UN and the Statute of the International Court of Justice (hereinafter, 'ICJ').<sup>13</sup> Thus, at the final session of the Third UN Conference, President Koh of the Conference said that due to Part XV of the Convention, the world community's interest in the peaceful settlement of disputes and the prevention of the use of force in resolving disputes had been advanced.<sup>14</sup>

Now, Part XV of UNCLOS plays a crucial role in maintaining the overall balance within

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'Decline of the Optional Clause' (1955) 32 *British Yearbook of International Law* 244, pp. 256-257). However, most of the participants preferred a non-compulsory arbitration and even the states that proposed the compulsory mechanism were reluctant to introduce a complete compulsory arbitration. Thus, the idea of introducing compulsory arbitration even for a limited type of disputes failed to be accepted and was replaced by a voluntary system as a result of compromise (See; Giustini, 'Compulsory Adjudication in International Law: the Past, the Present, and Prospects for the Future', p. 220; Shabtai Rosenne, *The World Court: What It Is and How It Works*, vol 16 (5th completely rev. edn, Martinus Nijhoff 1995), p. 8; Terry D. Gill, *Rosenne's the World Court: What It Is and How It Works*, vol 41 (6th completely rev. edn, M. Nijhoff Publishers 2003), pp. 3-5; see also, Betsy Baker, 'Hague Peace Conferences (1899 and 1907)' (2009) *Max Planck Encyclopedias of International Law*). This was the same when states gathered to set up the Permanent Court of International Justice (hereinafter 'PCIJ'). Although the Committee of Jurists entrusted by the Council of the League of Nations with drafting the establishment of a new court recommended providing the Court with compulsory jurisdiction, instead, an optional compulsory jurisdiction which allowed states parties to declare their acceptance of the PCIJ's jurisdiction as obligatory either with or without conditions was taken as a compromise (See; Manley O. Hudson, 'Obligatory Jurisdiction under Article 36 of the Statute of the Permanent Court of International Justice' (1933) 19 *Iowa Law Review* 190, p. 190; Christian Tomuschat, 'Article 36' in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (Third edn, Oxford University Press 2019), pp. 717-719). More recently, during the discussion about building a new world court for the post World War II era, the report published in 1944 by the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice stated that the inclusion of compulsory jurisdiction in the Statute would deter numerous states from joining the Statute (, 'United Nation: Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice' (1945) 39 *The American Journal of International Law* 1, para. 58). Thus, in subsequent debates at the San Francisco Conference, the system of optional jurisdiction was considered more likely to secure general agreement among states at that time ('Documents of the United Nations Conference on International Organization, San Francisco, 1945, Report of Subcommittee D to Committee IV/1 on Article 36 of the Statute of the International Court of Justice', p. 558).

<sup>12</sup> Myron H. Nordquist and others, *United Nations Convention on the Law of the Sea 1982: A Commentary* (Nijhoff 1985), para. XV.1; See also, Tullio Treves, 'The Development of the Law of the Sea Since the Adoption of the UN Convention on the Law of the Sea: Achievements and Challenges for the Future' in Davor Vidas (ed), *Law, technology and science for oceans in globalisation: IUU fishing, oil pollution, bioprospecting, outer continental shelf* (Martinus Nijhoff 2010), p. 47.

<sup>13</sup> Boyle, 'Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction', p. 37. Robin Churchill mentions that the emphasis put on dispute settlement by UNCLOS Part XV has influenced many subsequent treaties concerning fisheries to provide some form of compulsory judicial settlement system. See; Robin Churchill, 'Trends in Dispute Settlement in the Law of the Sea: Towards the Increasing Availability of Compulsory Means' in Duncan French and others (eds), *International Law and Dispute Settlement: New Problems and Techniques* (Hart Pub 2010), pp. 159-160.

<sup>14</sup> Tommy T. B. Koh, 'A Constitution for the Oceans', Remarks by Tommy T. B. Koh, of Singapore, President of the Third United Nations Conference on the Law of the Sea'

<[https://www.un.org/depts/los/convention\\_agreements/texts/koh\\_english.pdf](https://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf)>; last visited – 15 August 2022.

the Convention.<sup>15</sup> Furthermore, as there are many other treaties on the law of the sea that directly introduce Part XV of UNCLOS for settling their disputes,<sup>16</sup> its significance goes far beyond the scope of the Convention. But, recently, the compulsory dispute settlement system of UNCLOS has been at the centre of controversies and debates among academics. Many authors have criticised judicial decisions concerning the rules of Part XV of UNCLOS based on two grounds. First, it has been blamed that alleged contradictions within case-law have given rise to an inconsistency problem in interpreting and applying Part XV.<sup>17</sup> Here, consistency matter indicates the adherence to past jurisprudence on interpreting Part XV rules by current and future courts and tribunals. Second, and in a similar vein, it has been criticised that the courts and tribunals seized of jurisdiction following the rules of Part XV (hereinafter ‘Part XV tribunals’) have vigorously attempted to expand the purview of compulsory jurisdiction beyond that conferred by the Convention.<sup>18</sup>

However, the main argument of this thesis is based on the doubts about the recent criticisms mentioned above: What if the case-law of Part XV tribunals on Part XV rules

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<sup>15</sup> James Harrison, *Making the Law of the Sea: A Study in the Development of International Law* (Cambridge University Press 2011), pp. 50-51.

<sup>16</sup> For example, Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, Annex, Section 3, paragraph 12; Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Article 30; Nairobi International Convention on the Removal of Wrecks, Article 15; 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters, 1972, Article 16; Convention on the Protection of the Underwater Cultural Heritage, Article 25. For more information on specific treaties on the regional fisheries management that use UNCLOS Part XV for settling disputes concerning them, see Churchill, 'Trends in Dispute Settlement in the Law of the Sea: Towards the Increasing Availability of Compulsory Means', pp. 158-161.

<sup>17</sup> See Natalie Klein, 'The Vicissitudes of Dispute Settlement under the Law of the Sea Convention' (2017) 32 *The International Journal of Marine and Coastal Law* 332. Most academic contributions pointing out the inconsistency between the case-law focus on the interpretation or application of a certain provision of Part XV. For example, concerning the interpretation of Article 281 of UNCLOS, see Sienho Yee, 'The South China Sea Arbitration Decisions on Jurisdiction and Rule of Law Concerns' (2016) 15 *Chinese Journal of International Law* 219. With regard to Article 293 of UNCLOS, see Peter Tzeng, 'Jurisdiction and Applicable Law Under UNCLOS' (2016) 126 *The Yale Law Journal* 242; Kate Parlett, 'Beyond the Four Corners of the Convention: Expanding the Scope of Jurisdiction of Law of the Sea Tribunals' (2017) 48 *Ocean Development and International Law* 284.

<sup>18</sup> See; Stefan Talmon, 'The Chagos Marine Protected Area Arbitration: Expansion of the Jurisdiction of UNCLOS Part XV Courts and Tribunals' (2016) 65 *The International and Comparative Law Quarterly* 927; Stefan Talmon, 'The Chagos Marine Protected Area Arbitration: A Case Study of the Creeping Expansion of the Jurisdiction of UNCLOS Part XV Courts and Tribunals' (2016) 9/2016 *Bonn Research Papers on Public International Law*; Chinese Society of International Law, 'The Tribunal's Award in the "South China Sea Arbitration" Initiated by the Philippines Is Null and Void' (2016) 15 *Chinese Journal of International Law* (Boulder, Colo); Natalie Klein, 'Expansions and Restrictions in the UNCLOS Dispute Settlement Regime: Lessons from Recent Decisions' (2016) 15 *Chinese Journal of International Law* (Boulder, Colo); Parlett, 'Beyond the Four Corners of the Convention: Expanding the Scope of Jurisdiction of Law of the Sea Tribunals'.

shows that the overall jurisprudence is rather being piled up convergently? What if the tribunals are not actually ‘expanding’ the purview of their jurisdiction?<sup>19</sup> As will be addressed and refuted in detail in Chapter 7, the current thesis calls those criticisms into question throughout the chapters. Instead, this research takes an alternative point of view to explain and assess the effect of those judicial determinations concerning the rules of UNCLOS Part XV. Here, it suggests that the concept of judicial law-making can be one of the alternative perspectives for analysing and assessing the judicial findings concerning the compulsory dispute settlement system of UNCLOS.

## 1.2. Understanding the Concept of ‘Judicial Law-Making’

*“Judicial legislation, so long as it does not assume the form of a deliberate disregard of the existing law, is a phenomenon both healthy and unavoidable.”*<sup>20</sup>

The primary mandate of international courts and tribunals is to settle disputes peacefully through the law.<sup>21</sup> To that end, judicial bodies interpret the rules of international law taking into consideration the surrounding circumstances. Thus, the traditional assumption of the role of international courts is that they will determine the contents of the law precisely and apply them accordingly, but not that they will create the law.<sup>22</sup> However, the peaceful settlement of the dispute is not the only function of international adjudication,<sup>23</sup> and the

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<sup>19</sup> Concerning the ‘expansion of jurisdiction’ in the recent contributions mentioned above, the authors do not provide exactly what the ‘expansion of jurisdiction’ means or indicates. Hence, as will be dealt with in detail in Chapter 7, Section 7.2, this concept will be understood as ‘an exercise of jurisdiction extensively to settle matters which cannot be covered by the original purview of jurisdiction regulated in UNCLOS Part XV’ throughout the current thesis.

<sup>20</sup> Hersch Lauterpacht, *The Development of International Law by the International Court* (Stevens 1958), p. 156.

<sup>21</sup> *Ibid*, p. 3; Armin von Bogdandy and Ingo Venzke, *In Whose Name?: A Public Law Theory of International Adjudication* (Oxford University Press 2014), p. 9.

<sup>22</sup> See; Tullio Scovazzi, ‘Where the Judge Approaches the Legislator: Some Cases Relating to Law of the Sea’ in Nerina Boschiero and others (eds), *International Courts and the Development of International Law: Essays in Honour of Tullio Treves* (T. M. C. Asser Press 2013), p. 299; Øystein Jensen, ‘General Introduction’ in Øystein Jensen (ed), *The Development of the Law of the Sea Convention: the Role of International Courts and Tribunals* (Edward Elgar Publishing 2020), p. 6.

<sup>23</sup> Stephan W. Schill, ‘System-Building in Investment Treaty Arbitration and Lawmaking’ in Armin von Bogdandy and Ingo Venzke (eds), *International Judicial Lawmaking: on Public Authority and Democratic*

concept of judicial law-making is in line with this point of view.

Judicial law-making in international law can be understood as the creation or shift of actors' normative expectations regarding what the law is and how they should act, by international adjudication.<sup>24</sup> Those who are affected by the judicial decisions may include states, international organisations, scholars, politicians and even other international courts and judges.<sup>25</sup> It implies that the effect of a judicial decision can reach beyond the individual cases,<sup>26</sup> even though its binding effect is confined to that specific case and the parties due to the general principle of *res judicata*.<sup>27</sup> Therefore, the concept of judicial law-making stresses that the decision of international courts may bring legal changes in international law, like altering the existing norms or creating new ones, which traditionally have required the consent of states parties.<sup>28</sup>

Sir Hersch Lauterpacht said that judicial law-making is a common feature of the

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*Legitimation in Global Governance* (Springer 2012), p. 139; Fuad Zarbiyev, 'Judicial Activism' (2018) Max Planck Encyclopedias of International Law, para. 15.

<sup>24</sup> Armin von Bogdandy and Ingo Venzke, 'International Courts as Lawmakers' in Rüdiger Wolfrum and Ina Gätzschmann (eds), *International Dispute Settlement: Room for Innovations?* (Springer 2013), p. 162.

<sup>25</sup> See; Christopher G. Weeramantry, 'Constitutional and Institutional Developments: The Function of the International Court of Justice in the Development of International Law' (1997) 10 *Leiden Journal of International Law* 309, p. 311; Nienke Grossman, 'The Normative Legitimacy of International Courts' (2013) 86 *Temple Law Review* 61, p. 63.

<sup>26</sup> Milan Kuhli and Klaus Günther, 'Judicial Lawmaking, Discourse Theory, and the ICTY on Belligerent Reprisals' (2011) 12 *German Law Journal* 1261, p. 1261; Bogdandy and Venzke, 'International Courts as Lawmakers', pp. 169-170; Markus Fyrnys, 'Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights' in Armin von Bogdandy and Ingo Venzke (eds), *International Judicial Lawmaking: on Public Authority and Democratic Legitimation in Global Governance* (Springer 2012), p. 330.

<sup>27</sup> Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Stevens 1953), pp. 337-338; John G. Collier and Vaughan Lowe, *The Settlement of Disputes in International Law: Institutions and Procedures* (Oxford University Press 1999), p. 261; Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford University Press 2003), p. 245; Vaughan Lowe, 'Res Judicata and the Rule of Law in International Arbitration' (1996) 8 *African Journal of International and Comparative Law* 38, p. 39; Chester Brown, *A Common Law of International Adjudication* (Oxford University Press 2007), p. 155. See also; *Interpretation of Judgments Nos. 7 and 9 (Chorzów Factory)*, P.C.I.J., No. 11, 1927, pp. 20-21; *Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections (Nigeria v. Cameroon)*, Judgment, I. C. J. Reports 1999, p. 31, para. 12; *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Tunisia v. Libyan Arab Jamahiriya)*, Judgment, I. C. J. Reports 1985, p. 192, para. 48.

<sup>28</sup> Eyal Benvenisti and George W. Downs, 'Prospects for the Increased Independence of International Tribunals' in Armin von Bogdandy and Ingo Venzke (eds), *International Judicial Lawmaking: On Public Authority and Democratic Legitimation in Global Governance* (Springer 2012), p. 109; IFLOS Virtual Event 13 Aug 2020: Law-Making in the Law of the Sea and Maritime Law, Liesbeth Lijnzaad, 'The Law-Making Function of the ITLOS' <<https://www.iflos.org/virtual-event-13-august-2020/#1605003193880-2e8b955d-8def6>>; last visited – 15 August 2022.



administration of justice in every society so it is an unavoidable phenomenon.<sup>29</sup> Concerning international law, similarly, some views construe judicial law-making as an inevitable aspect of international adjudication. For example, Armin von Bogdandy and Ingo Venzke argue that the creation of legal normativity in judicial practice takes place in the context of concrete cases, which implies that judicial law-making may happen inevitably.<sup>30</sup> Øystein Jensen refers to the law-making effect of international adjudication as ‘by-products’ of dispute settlement.<sup>31</sup> Even the ICJ mentions in its Handbook that a judgment of the ICJ does not simply decide a certain dispute, but also inevitably contributes to the development of international law.<sup>32</sup> Therefore, Alan Boyle and Christine Chinkin argue that denying the law-making power of international courts and tribunals is like ignoring the reality of their role as major law-makers in international law.<sup>33</sup>

What makes judicial law-making an ‘unavoidable’ phenomenon, as Sir Lauterpacht remarked, is the authority of international courts and tribunals concerning international law.<sup>34</sup> International courts and tribunals have an authority that enables them to influence and shape the meaning of international law, and to make their decisions a referencing point for other subjects of international law.<sup>35</sup> This authority derives from their status as judicial organs under international law.<sup>36</sup> In the case of the ICJ, for example, it is regarded that the Court can provide an authoritative voice on the meaning of international legal instruments and unwritten principles due to its position as the primary judicial institution of the UN.<sup>37</sup>

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<sup>29</sup> Lauterpacht, *The Development of International Law by the International Court*, p. 156; Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford University Press 2011), p. 263.

<sup>30</sup> Bogdandy and Venzke, 'International Courts as Lawmakers', p. 169. See also; Ingo Venzke, 'Making General Exceptions: The Spell of Precedents in Developing Article XX GATT into Standards for Domestic Regulatory Policy' in Armin von Bogdandy and Ingo Venzke (eds), *International Judicial Lawmaking: On Public Authority and Democratic Legitimation in Global Governance* (Springer 2012), p. 179.

<sup>31</sup> Jensen, 'General Introduction', p. 7.

<sup>32</sup> ICJ, *Handbook* (2019), p. 77 <<https://www.icj-cij.org/public/files/publications/handbook-of-the-court-en.pdf>>; last visited – 15 August 2022.

<sup>33</sup> Alan E. Boyle and Christine. M. Chinkin, *The Making of International Law* (Oxford University Press 2007), p. 268.

<sup>34</sup> Here, ‘authority’ indicates a form of power that may affect or direct the behaviour of others as to what they are required to do (See; Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon 1979), pp. 7-9; Karen J. Alter, Laurence R. Helfer and Mikael Rask Madsen, 'How Context Shapes the Authority of International Courts' in Karen J. Alter, Laurence R. Helfer and Mikael Rask Madsen (eds), *International Court Authority* (First edn, Oxford University Press 2018), pp. 25-26; Kenneth Ehrenberg, 'Joseph Raz's Theory of Authority' (2011) 6 *Philosophy compass* 884, pp. 884-885).

<sup>35</sup> Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford University Press 2012), p. 63.

<sup>36</sup> See; Michael Bothe, 'Legal and Non-Legal Norms – a meaningful distinction in international relations?' (1980) 11 *Netherlands Yearbook of International Law* 65, p. 65. Here, it is argued that the authority flows from the significance of the organ that makes a decision, along with the reasonableness and persuasiveness of that decision, which would eventually govern the conduct of states.

<sup>37</sup> Boyle and Chinkin, *The Making of International Law*, p. 269.

This applies to other international courts and tribunals, as well.

In this regard, the decisions of international judicial bodies are often regarded as evidence of the existing rules of law.<sup>38</sup> Sometimes, the authority of judicial bodies gives their decisions a greater significance than they may enjoy formally through the principle of *res judicata*.<sup>39</sup> Therefore, as Judge Rosalyn Higgins, the former President of the ICJ, mentions, even states that are not the parties to the case before international courts follow the judgments with the greatest interest as they regard every judgment as an authoritative pronouncement on the law.<sup>40</sup> This shows that the normative expectations of states and others are created and shifted by international adjudication.

Then, let us recall the main subject-matter of this research – judicial decisions on the rules of the compulsory dispute settlement system of UNCLOS. If judicial law-making is truly inevitable in the process of addressing the legal questions in a certain case, then we can also expect Part XV tribunals to make Part XV rules. As has been mentioned earlier, the current research construes that those jurisdictional findings given by the tribunals in the past and pending cases could have resulted in the law-making of Part XV rules. Thus, the purpose of this thesis is to check what rules Part XV tribunals have created concerning the compulsory dispute settlement procedures of UNCLOS and to assess their contributions. However, before proceeding to the substantive analysis, it is necessary to clarify the theoretical assumption of this research, including the use of the term ‘judicial law-making’ in the thesis. The following section will elucidate this point.

### 1.3. The Theoretical Assumption in this Thesis

There are many ways of understanding in which contexts judicial law-making may happen. As one instance, Judge Alvarez of the ICJ mentioned that the Court “creates” the law by declaring what the new international law of today is, based upon the present requirements

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<sup>38</sup> Lauterpacht, *The Development of International Law by the International Court*, p. 21; Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1994), p. 202.

<sup>39</sup> L. Oppenheim, Robert Y. Jennings and Arthur Watts, *Oppenheim's International Law* (9th edn, Longman 1992), p. 41.

<sup>40</sup> Higgins, *Problems and Process: International Law and How We Use It*, pp. 202-203. See also; Alter, Helfer and Madsen, 'How Context Shapes the Authority of International Courts', p. 34.

and the conditions of international society.<sup>41</sup> Following this perspective, judicial law-making is more like modifying the already existing law that is obsolete in many respects.<sup>42</sup> On the other hand, other views construe the tribunals' manifesting or recognising the new norm as evidence of judicial law-making of international law. Accordingly, some authors stress the law-making effects of international adjudication by focusing on the creation of customary international law through advisory opinions of international courts,<sup>43</sup> or the tribunals' acknowledgement of general principles of international law.<sup>44</sup> In contrast, a strict point of view contends that law-making is only possible when the binding legal rules *erga omnes* within a legal system are created by the creator with such competence, so the judicial law-making in international law cannot exist.<sup>45</sup>

Acknowledging these different ways of understanding and using the term 'judicial law-making', however, this thesis regards that the courts and tribunals may create and shift the normative expectations of other subjects of international law through the interpretation of a treaty.<sup>46</sup> Interpretation in international law essentially indicates the process of assigning meaning to the texts or other forms of statements to establish rights and obligations.<sup>47</sup> This

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<sup>41</sup> *International Status of South-West Africa, Advisory Opinion: I.C.J. Reports 1950, Dissenting Opinion of Judge Alvarez*, p. 177. See also; Katharina Zobel, 'Judge Alejandro Álvarez at the International Court of Justice (1946–1955): His Theory of a 'New International Law' and Judicial Lawmaking' (2006) 19 *Leiden Journal of International Law* 1017, p. 1032.

<sup>42</sup> *International Status of South-West Africa, Advisory Opinion: I.C.J. Reports 1950, Dissenting Opinion of Judge Alvarez*, p. 177.

<sup>43</sup> See; Karin Oellers-Frahm, 'Lawmaking Through Advisory Opinions?' in Armin von Bogdandy and Ingo Venzke (eds), *International Judicial Lawmaking: On Public Authority and Democratic Legitimation in Global Governance* (Springer 2012), pp. 79-86; Eyal Benvenisti, 'Customary International Law as a Judicial Tool for Promoting Efficiency' in Eyal Benvenisti and Moshe Hirsch (eds), *The Impact of International Law on International Cooperation: Theoretical Perspectives* (Cambridge University Press 2004), p. 86. In this sense, Alberto Alvarez-Jiménez describes that the ICJ is moving in the direction of the mandate that UN gave to the ILC (Alberto Alvarez-Jiménez, 'Methods for the Identification of Customary International Law in the International Court of Justice's Jurisprudence: 2000–2009' (2011) 60 *The International and Comparative Law Quarterly* 681, p. 709; more generally, pp. 682-685).

<sup>44</sup> See, Neha Jain, 'Judicial Lawmaking and General Principles of Law in International Criminal Law' (2016) 57 *Harvard International Law Journal* 111.

<sup>45</sup> Karl Doehring, 'Lawmaking of Courts and Tribunals Results in the Destruction of the Rule of Law' in Rüdiger Wolfrum and Ina Gätzschmann (eds), *International Dispute Settlement: Room for Innovations?* (Springer 2013), p. 325-326.

<sup>46</sup> In summarising the modalities of legal development taken by the ICJ suggested by the authors in the contributions within the book *The Development of International Law by the International Court of Justice*, one of the editors, Christian J. Tams mentions that "When called upon to apply a treaty, the Court can be influential by advancing a particular interpretation that often will be relied on outside the scope of the particular dispute. ... the Court operates within the established system of sources and can contribute to the development of international law through interpretation of a treaty ... "(Christian J. Tams, 'The ICJ as a 'Law-Formative Agency': Summary and Synthesis' in Christian J. Tams and James Sloan (eds), *The Development of International Law by the International Court of Justice* (Oxford University Press 2014), pp. 385-386).

<sup>47</sup> Matthias Herdegen, 'Interpretation in International Law' (2020) *Max Planck Encyclopedias of International Law*, para. 1.

process is not only for understanding a rule, but also for the process of applying or implementing it.<sup>48</sup> In this regard, Judge Liesbeth Lijnzaad of the International Tribunal for the Law of the Sea (hereinafter, 'ITLOS') mentions that "judicial interpretation implies clarifying the rules and reflecting on the relevant provisions of a treaty in the light of given facts".<sup>49</sup>

Since no legal text drafted by a human can be so perfect that it never raises any doubt on its actual scope or meaning, every legal text at national and international levels needs to be interpreted by those working with it.<sup>50</sup> Due to that elasticity in legal documents, interpretation is a creative process where a certain degree of discretion of the interpreter remains.<sup>51</sup> In this sense, H.L.A. Hart said that:

*"It is, however, important to appreciate why, apart from this dependence on language as it actually is, with its characteristics of open texture, we should not cherish, even as an ideal, the conception of a rule so detailed that the question whether it applied or not to a particular case was always settled in advance, and never involved, at the point of actual application, a fresh choice between open alternatives."*<sup>52</sup>

Christopher G. Weeramantry also argues that to apply the law, a choice (interpretation) should be made from the multitude of meanings within the language of that law, and thus the act of choice is like an act of creation.<sup>53</sup> Hence, one author refers to the interpretation as a "deeply subjective process",<sup>54</sup> while the International Law Commission (hereinafter 'ILC') described the interpretation of legal documents as "to some extent an art, not an exact science".<sup>55</sup> Judicial interpretation of a treaty cannot be different in this respect. Within judicial proceedings where the meaning of certain rules of international law is contested, international courts and tribunals do not always choose between the conflicting

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<sup>48</sup> Oliver Dörr, 'Article 31' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer Berlin Heidelberg 2018), p. 560. See also; Georg Schwarzenberger, 'Myths and Realities of Treaty Interpretation: Articles 27-29 of the Vienna Draft Convention on the Law of Treaties' (1968) 9 *Virginia Journal of International Law* 1, p. 8.

<sup>49</sup> Lijnzaad, 'The Law-Making Function of the ITLOS'.

<sup>50</sup> Dörr, 'Article 31', p. 260; see also, Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985), p. 146-148.

<sup>51</sup> See; Herdegen, 'Interpretation in International Law', para. 1; Joost Pauwelyn and Manfred Elsig, 'The Politics of Treaty Interpretation' in Jeffrey L. Dunoff and Mark A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press 2012), p. 450.

<sup>52</sup> H. L. A. Hart, *The Concept of Law* (Third edn, Oxford University Press 2012), p. 128.

<sup>53</sup> Weeramantry, 'Constitutional and Institutional Developments: The Function of the International Court of Justice in the Development of International Law', p. 314.

<sup>54</sup> Duncan French, 'Treaty Interpretation and The Incorporation Of Extraneous Legal Rules' (2006) 55 *The International and Comparative Law Quarterly* 281, p. 281.

<sup>55</sup> ILC, *Yearbook of the International Law Commission, Vol. 2* (1966), Draft Articles 27 and 28, p. 218, para. 4.

views raised by the disputing parties.<sup>56</sup> Instead, they fashion their own reasoning through their discretion.<sup>57</sup>

Here, though, one may raise the point that although the act of interpretation entails some creative aspects, still, interpretation is interpretation and not in itself law-making. From a similar perspective, Karl Doehring raised doubt that the concretisation of a legal rule through interpretation by a court does not imply the creation of a new rule but rather indicates that the thrust of the rule to be interpreted must be respected.<sup>58</sup> Moreover, international courts and tribunals are not the sole interpreters of a treaty, as other subjects of international law such as states, international organisations or legal scholars can raise interpretative claims about what a certain provision of a treaty means.<sup>59</sup> This implies that various interpretations concerning the same legal texts of a treaty can be made depending on who the interpreter is and in which context it is conducted.<sup>60</sup> Why, then, does the current thesis regard that the clarification of a norm through the interpretation, especially given by international courts, can create or shift others' normative expectations?

This is due to the characteristics of the main subject of our research, the rules of the compulsory dispute settlement system of UNCLOS. First, it should be noted that the rules contained in UNCLOS Part XV constitute the procedural law of a certain international adjudicating mechanism. Unlike substantive law which governs the rights and obligations of different actors, procedural law regulates the international judicial actions and their process. Therefore, as will be addressed in more detail in Chapter 2,<sup>61</sup> the relationship between an international court and its procedural law is quite different from that between judicial bodies and substantive rules of international law. This shows that, concerning specific procedural law, the interpretation given by international judicial bodies may enjoy authoritative status among other subjects of international law.

Even more generally, a decision by a court constitutes an authoritative interpretation of

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<sup>56</sup> Lauterpacht, *The Development of International Law by the International Court*, p. 21.

<sup>57</sup> Harrison, 'Judicial Law-Making and the Developing Order of the Oceans', p. 286.

<sup>58</sup> Doehring, 'Lawmaking of Courts and Tribunals Results in the Destruction of the Rule of Law', p. 325.

<sup>59</sup> See; Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists*, p. 16.

<sup>60</sup> Philip Allot, 'The Concept of International Law' (1999) 10 *European Journal of International Law* 31, pp. 36-37. See also; David Kennedy, 'Lawfare and Warfare' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press 2012), p. 167. From a similar perspective, Jan Klabbers argues that the meaning of a treaty is not "carved in stone" at the moment of its conclusion but rather that the debates continue (Jan Klabbers, 'On Rationalism in Politics: Interpretation of Treaties and the World Trade Organization' (2005) 74 *Nordic journal of international law = Acta Scandinavica juris gentium* 405, p. 406).

<sup>61</sup> See Chapter 2, Section 2.2.

certain provisions of a treaty, so it may affect all other states parties to the same treaty.<sup>62</sup> Such a point can be inferred from Article 63 of the Statutes of the ICJ.<sup>63</sup> Article 63(1) says “Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith.” And Article 63(2) allows such notified states to intervene in the proceedings. This provision well reflects that the ICJ’s interpretations are “undoubtedly authoritative”, and that others than the disputing parties would eventually adopt and take the Court’s interpretation of a treaty.<sup>64</sup> Thus, it shows that states’ normative expectations are created by judicial interpretation.<sup>65</sup> Given the authority of international courts on procedural law, the judicial interpretation of UNCLOS Part XV is not expected to be different.

Secondly, it should be considered that many interpretive ambiguities were left in the concluded provisions of UNCLOS Part XV. Lacunae can be found in treaties for several reasons, such as the drafters deliberately not addressing an issue, simply not being able to envisage the future circumstances, or being unable to reach an agreement on certain points.<sup>66</sup> When a treaty at issue entails gaps and lacunae concerning how the regulated rules or system should function, however, judicial interpretation goes beyond the mere interpretation ‘of something’ which already exists. That is because, facing lacunae within a treaty or any novel legal questions relating to it, international judicial bodies interpret the text and decide the issues not covered by the treaty.<sup>67</sup> Therefore, when international courts and tribunals interpret a treaty, they do not simply uncover the meaning which lies behind

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<sup>62</sup> See; Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge University Press 2005), p. 365; Lauterpacht, *The Function of Law in the International Community*, p. 263; Anthea Roberts, 'Subsequent Agreements and Practice: The Battle over Interpretive Power' in Georg Nolte (ed), *Treaties and Subsequent Practice* (Oxford University Press 2013), p. 95.

<sup>63</sup> Article 32 of the Statute of ITLOS corresponds to Article 63 of the Statute of the ICJ. In the former provision, the phrase “interpretation or application” was taken instead of “the construction of a convention” of the latter (See; Nordquist and others, *United Nations Convention on the Law of the Sea 1982: A Commentary*, para. A.VI.156).

<sup>64</sup> Alina Miron and Christine Chinkin, 'Article 63' in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (Third edn, Oxford University Press 2019), p. 1743, para. 2.

<sup>65</sup> See; Weeramantry, 'Constitutional and Institutional Developments: The Function of the International Court of Justice in the Development of International Law', p. 314.

<sup>66</sup> Brown, *A Common Law of International Adjudication*, pp. 40-41. Concerning the drafters’ choice to be deliberately silent on certain issues, see also; Edward Gordon, 'The World Court and the Interpretation of Constitutive Treaties: Some Observations on the Development of an International Constitutional Law' (1965) 59 *The American Journal of International Law* 794, pp. 804-805.

<sup>67</sup> David H. Anderson, 'Some Aspects of the Use of Force in Maritime Law Enforcement' in Nerina Boschiero and others (eds), *International Courts and the Development of International Law: Essays in Honour of Tullio Treves* (T. M. C. Asser Press 2013), p. 242; Ingo Venzke, 'The Role of International Court as Interpreters and Developers of the Law: Working out the Jurisgenerative Practice of Interpretation' (2011) 34 *Loyola of Los Angeles International & Comparative Law Review* 99, pp. 99-100.

the texts.<sup>68</sup> Instead, their interpretation becomes more like an establishment of the new rights and obligations which were not explicitly provided within it.

The judicial interpretation of UNCLOS Part XV would be no different in this respect. As will be addressed in depth in the next chapter,<sup>69</sup> legal ambiguities within Part XV were an inevitable outcome of the compromise required during the negotiating process between the drafters of UNCLOS. It indicates that when the tribunals interpret the rules of Part XV to fulfil their judicial function, they must determine through their discretion what a certain provision means and what it would require in a particular case. Then, due to their status as judicial organs under international law, their interpretations would become authoritative voices on the meaning of Part XV rules and affect the normative expectations of other states parties beyond the effect of *res judicata*. If we consider the essence of the concept of judicial law-making which is the creation or shift of other's normative expectations, this shows that the tribunals' interpretation of UNCLOS Part XV may also have a legislative effect.

Hence, for this thesis, the current research deems that international courts and tribunals can make the law through interpretation.<sup>70</sup> Hugh Thirlway says that when international judicial bodies settle a dispute, something must inevitably be clarified that had never been clarified or addressed before.<sup>71</sup> That is to say, although it is said that international courts and tribunals do not legislate the law but interpret the existing law,<sup>72</sup> this does not make the inevitable effects of judicial law-making go away.<sup>73</sup> Therefore, it will be regarded in this thesis that judicial law-making may happen when international judicial bodies interpret the provisions of UNCLOS Part XV to find a way to apply them to actual cases.

Accordingly, the main focus of the current research is on the tribunals' clarification of the norms within UNCLOS Part XV. One of the objectives that introduced the compulsory dispute settlement system into UNCLOS was to clarify the legal ambiguities within the

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<sup>68</sup> Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists*, p. 136. See also; Pauwelyn and Elsig, 'The Politics of Treaty Interpretation', p. 449-468.

<sup>69</sup> See Chapter 2, Section 2.1

<sup>70</sup> See Thomas Buergenthal, 'Lawmaking by the ICJ and Other International Courts' (2009) 103 Proceedings of the Annual Meeting - American Society of International Law 403, p. 403; Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists*, p. 136.

<sup>71</sup> Hugh Thirlway, 'Unacknowledged Legislators: Some Preliminary Reflections on the Limits of Judicial Lawmaking' in Rüdiger Wolfrum and Ina Gätzschmann (eds), *International Dispute Settlement: Room for Innovations?* (Springer 2013), p. 311.

<sup>72</sup> See; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, para. 18.

<sup>73</sup> Bogdandy and Venzke, 'International Courts as Lawmakers', p. 165. See also; See also Higgins, *Problems and Process: International Law and How We Use It*, p. 202.

Convention.<sup>74</sup> If we accept that clarifying the meaning of a norm and filling gaps in international law can be a way that international courts and tribunals make law,<sup>75</sup> Part XV tribunals' interpretations of the Convention may also have had law-making effects on the rules of UNCLOS, including those regulating the compulsory procedures of Part XV.

Judicial law-making by clarification includes crafting a new methodology to apply certain rules in given circumstances. One such example of the methodology established by international courts can be found in the rules for maritime delimitation.<sup>76</sup> Regarding the delimitation of the exclusive economic zone (hereinafter 'EEZ') and the continental shelf, UNCLOS Articles 74 and 83 mention that delimitation shall be effected by agreement based on international law, to achieve an equitable solution. However, since the language of these provisions is general and vague, international courts and tribunals have taken a creative role in determining how to achieve the 'equitable solution' specified in Articles 74 and 83 of the Convention.<sup>77</sup> The 'three-stage approach'<sup>78</sup> to the delimitation of the EEZ and the continental shelf was devised in this context and has, now, become an established methodology continuously taken in different maritime delimitation cases.<sup>79</sup> Likewise,

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<sup>74</sup> Charney, 'Entry into force of the 1982 Convention on the Law of the Sea', p. 391.

<sup>75</sup> Lauterpacht, *The Development of International Law by the International Court*, p. 5; Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists*, p. 135; Weeramantry, 'Constitutional and Institutional Developments: The Function of the International Court of Justice in the Development of International Law', p. 313; Brown, *A Common Law of International Adjudication*, p. 77; Richard H. Steinberg, 'Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints' (2004) 98 *The American journal of international law* 247, p. 248; Gleider I. Hernández, 'International Judicial Lawmaking' in Catherine Brölmann and Yannick Radi (eds), *Research Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar Publishing Limited 2016), p. 205.

<sup>76</sup> See; Alain Pellet and Daniel Müller, 'Article 38' in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (Third edn, Oxford University Press 2019), pp. 957-958, paras. 331-332; Umberto Leanza, 'International Courts and the Development of the International Law of the Sea on the Delimitation of the Continental Shelf' in Nerina Boschiero and others (eds), *International Courts and the Development of International Law: Essays in Honour of Tullio Treves* (T. M. C. Asser Press 2013); Vaughan Lowe and Antonios Tzanakopoulos, 'The Development of the Law of the Sea by the International Court of Justice' in Christian J. Tams and James Sloan (eds), *The Development of International Law by the International Court of Justice* (Oxford University Press 2014), pp. 189-190.

<sup>77</sup> Davor Vidas, 'Consolidation or Deviation? On Trends and Challenges in the Settlement of Maritime Delimitation Disputes by International Courts and Tribunals' in Nerina Boschiero and others (eds), *International Courts and the Development of International Law: Essays in Honour of Tullio Treves* (T. M. C. Asser Press 2013), p. 331; Tullio Scovazzi, 'Maritime Delimitation Cases before International Courts and Tribunals' (2006) *Max Planck Encyclopedias of International Law*, para. 3.

<sup>78</sup> (1) Construction of provisional equidistance line; (2) Determination whether relevant circumstances justify the adjustment of equidistance line; and (3) Verification of the absence of any marked disproportionality.

<sup>79</sup> *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, *I.C.J. Reports* 2009, p. 61, paras. 115-122; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, *I.C.J. Reports* 2012, p. 624, paras. 190-193; *Maritime Dispute (Peru v. Chile)*, Judgment, *I.C.J. Reports* 2014, p. 3, para. 180; *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)* and *Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)*, Judgment, *I.C.J. Reports* 2018, p. 139, para. 135; *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, *ITLOS Reports* 2012, p. 4, paras. 225-240; *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India*, Award of 7 July 2014, paras. 336-346.



certain methodologies crafted by Part XV tribunals concerning the rules regulating the compulsory dispute settlement procedures of UNCLOS are regarded here as a part of the judge-made law of Part XV.

Lastly, the present thesis considers judicial law-making through interpretation can contribute to the development of international law. Many authors construe that international courts and tribunals take a significant role in developing international law.<sup>80</sup> International courts and judges also see themselves as deliberate contributors in the development of international law, not just as arbiters in specific cases.<sup>81</sup> The *Oxford English Dictionary* defines development as ‘the action or process of bringing something to a fuller or more advanced condition’ and, specifically, ‘the explanation or elaboration of an idea, theory, etc.’<sup>82</sup> By this definition, judicial interpretation can develop international law as the decisions of courts and tribunals may contribute to the elaboration and advancement of international law through the clarification of ambiguous legal norms.<sup>83</sup> Therefore, this thesis regards that, given the absence of standing legislative organs and the difficulty surrounding the codification of international law, international adjudication can be a major channel for the development of international law.<sup>84</sup>

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<sup>80</sup> See; Oppenheim, Jennings and Watts, *Oppenheim's International Law*, p. 41; Charles de Visscher, *Theory and Reality in Public International Law* (Rev. edn, Princeton U.P 1968), p. 390; Higgins, *Problems and Process: International Law and How We Use It*, p. 202; Hernández, 'International Judicial Lawmaking', p. 203.

<sup>81</sup> Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists*, pp. 70-71.

<sup>82</sup> Oxford English Dictionary, ‘Development’, Oxford University Press <<https://www-oed-com.ezproxy.lib.gla.ac.uk/view/Entry/51434?result=8&rskey=V29TRT&>>; last visited – 15 August 2022.

<sup>83</sup> On the one hand, there are other views that see the relationship between judicial law-making and the development of international law differently. For example, former Judge of the ICJ, Mohamed Shahabuddeen construes that the creation of law is a possible outcome of the development of international law through international adjudication. In this sense, he says “if decisions of the Court cannot make law but can contribute to its development, presumably that development ultimately results in the creation of new law.” (Mohamed Shahabuddeen, *Precedent in the World Court* (Cambridge University Press 1996), p. 68.). On the other hand, in the *Reparation for Injuries Suffered in the Service of the United Nations* case, Judge Alvarez argued that the difference between two concepts is “a mere matter of words” so that “it is quite impossible to say where the development of law ends and where its creation begins.” (*Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion: I.C.J. Reports 1949, Individual Opinion by Judge Alvarez*, p. 190).

<sup>84</sup> Harrison, 'Judicial Law-Making and the Developing Order of the Oceans', p. 284; Oppenheim, Jennings and Watts, *Oppenheim's International Law*, p. 41.

#### 1.4. Necessity, Scope and Outline of the Research

Through the subsequent chapters, the current thesis will examine various aspects of the judge-made law of Part XV of UNCLOS. The necessity of conducting this research can be found in its potential academic contribution. Until now, there have been many academic works concerning the judicial determinations on the rights and obligations of Part XV of UNCLOS. Most of them, though, focused on either just a few widely known cases like the *South China Sea* arbitration,<sup>85</sup> some controversial issues like the ‘mixed-disputes’,<sup>86</sup> or the tendency of jurisdictional expansion of Part XV tribunals. In contrast, other Part XV tribunals’ contributions in relatively less-known cases have not received much attention yet. Many more procedural and jurisdictional issues also remain less noticed, although they deserve more attention and further study.

Unlike the recent works of many authors, however, this research will regard Part XV tribunals as the law-makers of the rules regulating the compulsory dispute settlement system of UNCLOS, not just as arbiters in given cases. Also, this research will analyse judicial determinations made in each of the cases from a comprehensive and interconnected manner, rather than considering them as separate or fragmentary. Therefore, instead of focusing on only a few cases, all the compulsory proceedings under UNCLOS Part XV will be examined to see the overall changes, developments or tendencies in interpreting and applying Part XV rules between the cases. This way of conducting research may show different outcomes than the existing academic works have shown. In this respect, the current thesis will be able to produce academic contributions by suggesting a new approach to the study of the dispute settlement system under UNCLOS and the role of Part XV tribunals.

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<sup>85</sup> E.g., see; Stefan Talmon, 'The South China Sea Arbitration: Is There a Case to Answer?' (2014) 2/2014 Bonn Research Papers on Public International Law; Jianjun Gao, 'The Obligation to Negotiate in the Philippines v. China Case: A Critique of the Award on Jurisdiction' (2016) 47 *Ocean development and international law* 272; Lori Fisler Damrosch, 'Military Activities in the UNCLOS Compulsory Dispute Settlement System: Implications of the South China Sea Arbitration for U.S. Ratification of UNCLOS' (2016) 110 *AJIL unbound* 273; Nong Hong, 'The South China Sea Arbitration: A Test for the Efficacy of Compulsory Mechanism of UNCLOS and Implications for Dispute Management in the Region' (2018) 10 *Asian Politics & Policy* 219. See also the contributions in *Chinese Journal of International Law*, Vol. 15, Issue 2, 2016, Special Issue on Jurisdiction and Admissibility in the South China Sea Arbitration.

<sup>86</sup> See; Irina Buga, 'Territorial Sovereignty Issues in Maritime Disputes: A Jurisdictional Dilemma for Law of the Sea Tribunals' (2012) 27 *The international journal of marine and coastal law* 59; Wensheng Qu, 'The Issue of Jurisdiction Over Mixed Disputes in the Chagos Marine Protection Area Arbitration and Beyond' (2016) 47 *Ocean development and international law* 40.

Accordingly, the current thesis covers all the cases brought before Part XV tribunals following the compulsory procedures under UNCLOS Part XV. This includes the cases which were once unilaterally brought before one of Part XV tribunals but then a special agreement was made to transfer the dispute to another Part XV tribunal.<sup>87</sup> Moreover, judicial determinations on Part XV rules given in the provisional measures proceedings of the cases above will be addressed. That is because even the determinations for finding *prima facie* jurisdiction may have an impact on other Part XV tribunals' decisions in subsequent cases, and they may show the acceptability of previously created or clarified legal points in the past cases. In this same context, the decisions of the compulsory conciliation commission constituted under Annex V of UNCLOS, though not part of Part XV tribunals, will be reviewed.<sup>88</sup> However, as the main focus here is on judicial interpretations of Part XV rules and their effects on the development of the dispute settlement system under the Convention, this research will not cover any of the disputing parties' responses to the rendered judgments or the compliance matters of the respective cases.

Therefore, this thesis will start by applying the concept of judicial law-making to UNCLOS Part XV in **Chapter 2** which constitutes **Part I** of this thesis along with the current chapter. Chapter 2 will first look at the negotiating history of UNCLOS Part XV to see in what respects the law-making role of Part XV tribunals was required. Moreover, as our main interest is in the rules regulating the compulsory dispute settlement system under UNCLOS, how the judicial law-making of procedural law is different from that of substantive law will be examined. Also, this chapter will scrutinise the feature of judicial law-making of Part XV, taking into account the structural characteristics of the Part XV system like the multiplicity of forums and the arbitral tribunal as a default forum.

The following chapters in **Part II** of the thesis substantively address the law-making effect on Part XV rules that Part XV tribunals have created. **Chapter 3** contains how Part XV tribunals have shaped the procedural preconditions to the compulsory procedures within Section 1 of Part XV, specifically, Articles 281, 282 and 283. All of them regulate the

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<sup>87</sup> Until now, the initial forum such cases were unilaterally brought before has been an arbitral tribunal constituted under Annex VII. Whereas the transferred forum has been ITLOS. Such cases are; *M/V "Saiga" (No. 2)* case, *Bay of Bengal (Bangladesh/Myanmar)* case, *M/V "Virginia G"* case, *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)* case, *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean* case, and *M/T "San Padre Pio" (No. 2)* case.

<sup>88</sup> As of August 2022, there is only one compulsory conciliation case. See; *Conciliation between Timor-Leste and Australia*.

rights and obligations of states parties concerning the peaceful settlement of the dispute before resorting to compulsory measures. However, many ambiguities can be found in those provisions concerning their meanings and the ways to implement the obligations that they regulate. Therefore, this chapter will mainly focus on Part XV tribunals' clarifications of what those provisions would require in actual cases.

**Chapters 4 and 5** deal with the applicability of the compulsory jurisdiction under UNCLOS Part XV. The applicability of the compulsory procedures in Section 2 of Part XV is the issue that should be determined in advance before Part XV tribunals exercise their jurisdiction over the merits of the submitted claims. This is not just concerned with the existence of disputes regarding the interpretation or application of the Convention, but also the limitations and exceptions to the compulsory measures regulated in Section 3 of Part XV. Accordingly, **Chapter 4** addresses how Part XV tribunals have determined the applicability of the compulsory procedures especially in terms of the subject-matter of the dispute itself. Here, the matters concerning the effect of declarations pursuant to Article 287, the claims raised over Article 300, and the characterisation of the claims within so-called 'mixed disputes' are also involved. Then, **Chapter 5** shows the clarified scope of the automatic limitations in Article 297 and the optional exceptions in Article 298 to the applicability of the compulsory procedures of Section 2 by Part XV tribunals.

**Chapter 6** looks at Part XV tribunals' decisions to exercise their compulsory jurisdiction beyond the four corners of UNCLOS. Since UNCLOS cannot regulate every single rule required for substantive rights and obligations within it, many provisions have to refer to other rules of international law. In that sense, Part XV tribunals have also made determinations over those non-UNCLOS issues to resolve UNCLOS disputes under certain grounds within Part XV. This chapter highlights how Part XV tribunals have developed and elaborated their jurisprudence on exercising compulsory jurisdiction over external sources of international law.

Lastly, the overall implication of this research will be presented in **Chapter 7** of **Part III** of the thesis. Based on the findings in Chapters 3 to 6, this chapter will answer two major questions concerning the recently raised claims of a lack of consistency between case-law and jurisdictional expansion. First, this chapter will refute the views arguing the contradictions between the case-law of Part XV tribunals on the rules of Part XV and suggest contributing factors to the convergent jurisprudence on Part XV. Second, this chapter will assess whether Part XV tribunals are truly expanding their purview of

compulsory jurisdiction, or more clarifying the norms within Part XV of UNCLOS. Then, this chapter will argue that the contributions of Part XV tribunals on the clarification of Part XV rules rather show the law-making of UNCLOS Part XV through international adjudication.

As a whole, all of these chapters will highlight the role of Part XV tribunals as law-makers of the compulsory dispute settlement system under UNCLOS and what the judge-made law of Part XV looks like.

## 2. Applying the Concept of Judicial Law-Making to UNCLOS Part XV

### 2.1. Where to Find Room for Judicial Law-Making in UNCLOS Part XV

#### 2.1.1. Contesting Views of States on the Introduction of Compulsory Procedures at the First UN Conference

Part XV of UNCLOS was an outcome of the law-making process of the diplomatic conferences during the Third UN Conference. Diplomatic conferences are one of the major channels of international law-making, where the plenipotentiary representatives of states assemble to negotiate and adopt a treaty text on a certain subject of international law.<sup>89</sup>

There had been a total of three convened United Nations Conferences on the Law of the Sea for creating the global law of the sea convention.<sup>90</sup> The Part XV system was created by the participating states of the Third UN Conference through lengthy negotiations.

However, what had a great influence on the elaboration of the overall structure and features of the dispute settlement system under UNCLOS was not just the discussions that took place during the Third UN Conference. Rather, the differing views of states concerning the introduction of the compulsory dispute settlement system shown in both the First United Nations Conference on the Law of the Sea (hereinafter ‘First UN Conference’) and the Third Conference have commonly affected the formation of the current Part XV system. Most of all, the consequent need for compromise between states during the negotiating process resulted in many ambiguities left within the rules of Part XV. Thus, Part XV of UNCLOS cannot be considered as the product solely of the Third UN Conference, separate

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<sup>89</sup> Kirsten Schmalenbach, 'Lawmaking by Treaty: Negotiation of Agreements and Adoption of Treaty Texts' in Catherine Brölmann and Yannick Radi (eds), *Research Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar Publishing Limited 2016), p. 97.

<sup>90</sup> The First and the Third UN Conference have resulted in the codification of the law of the sea conventions, respectively the 1958 Geneva Conventions on the Law of the Sea (hereinafter ‘1958 Geneva Conventions’) and UNCLOS. The Second United Nations Conference on the Law of the Sea was held from 17 March to 26 April 1960, following the request of the UN General Assembly to consider the topics of the breadth of the territorial sea and fishery limits, which had not been agreed upon in the 1958 Geneva Conventions on the Law of the Sea. The Second UN Conference resulted in the adoption of two resolutions (see; UNGA, 'Document A/CONF.19/L.15 Final Act of the Second United Nations Conference on the Law of the Sea'; UN Codification Division Publications web page – Diplomatic Conferences <[https://legal.un.org/diplomaticconferences/1960\\_los/](https://legal.un.org/diplomaticconferences/1960_los/)>; last visited – 15 August 2022).

from what had been discussed in the First UN Conference.

The First UN Conference<sup>91</sup> was convened by the General Assembly based on the report of the ILC submitted to the General Assembly in 1956,<sup>92</sup> in which the idea of adopting a compulsory dispute settling system was suggested.<sup>93</sup> As the ILC included clauses for the compulsory dispute settlement within the sections for the fishing and the continental shelf in its report,<sup>94</sup> the issue of the compulsory measures for settling disputes was also discussed in the Conference, especially in the committees for the fishery and the continental shelf.

In the draft articles of the ILC, the compulsory dispute settlement mechanisms were contained in Articles 57 and 73. Draft Article 57 suggested that any disagreement concerning fisheries should be submitted to an arbitral commission at the request of any of the parties unless the parties agreed to seek a solution by another pacific means. On the other hand, draft Article 73 regulated that any dispute concerning the continental shelf should be submitted to the ICJ at the request of any of the parties unless they agreed on other measures of pacific settlement.

The views of the negotiating parties concerning these proposals of the ILC were clearly divided. Some states supported the idea of adopting the mandatory dispute settlement system for the new law of the sea conventions for the sake of ensuring effectiveness<sup>95</sup> and objectivity in resolving disputes.<sup>96</sup> Other states argued that a compulsory system would be more suitable to address a technical area like fisheries<sup>97</sup> and to protect the newly invented

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<sup>91</sup> The First UN Conference was held from 24 February to 27 April 1958 in Geneva.

<sup>92</sup> UNGA, 'A/RES/1105(XI) International Conference of Plenipotentiaries to Examine the Law of the Sea'

<sup>93</sup> ILC, 'Document A/CN.4/104, Report of the International Law Commission to the General Assembly'.

<sup>94</sup> The concern over devising a compulsory dispute settlement was contained in the report of the Special Rapporteur, Mr. François, who was appointed for the codification of the topic of territorial waters and the high seas by the ILC. This report became the basis for the final report of the ILC submitted to the General Assembly (See; ILC, 'Document A/CN.4/97, Regime of the High Seas and Regime of the Territorial Sea, Report by J. P. A. François, Special Rapporteur'.

<sup>95</sup> UNGA, 'Document A/CONF.13/41, United Nations Conference on the Law of the Sea, Official Records, Volume V: Third Committee (High Seas: Fishing: Conservation of Living Resources)', 28<sup>th</sup> Meeting 11 April 1958 – USA (para. 26), 29<sup>th</sup> Meeting 12 April 1958 – Cuba (para. 15); The Netherlands (para. 32); France (para. 48).

<sup>96</sup> UNGA, 'Document A/CONF.13/42, United Nations Conference on the Law of the Sea, Official Records, Volume VI: Committee (Continental Shelf)', 34<sup>th</sup> Meeting 10 April 1958 – India (para. 11).

<sup>97</sup> UNGA, 'Document A/CONF.13/41, United Nations Conference on the Law of the Sea, Official Records, Volume V: Third Committee (High Seas: Fishing: Conservation of Living Resources)', 28<sup>th</sup> Meeting 11 April 1958 – USA (para. 35); Pakistan (para. 48), 29<sup>th</sup> Meeting 12 April 1958 – Australia (para. 28).

regimes like the continental shelf, which required further clarification.<sup>98</sup> Even more, some delegations expressed their support for the introduction of compulsory procedures for all disputes concerning the law of the sea, not just confined to fisheries or the continental shelf.<sup>99</sup>

Many contrasting views were also raised. Some states denied that introducing a mandatory dispute settlement system would lead to a failure to reach a final agreement as states would be reluctant to accept the compulsory jurisdiction of the courts and tribunals.<sup>100</sup> Some delegations said that it would be premature practically to use or introduce the compulsory measure at that time.<sup>101</sup> In addition, it was claimed that the compulsory procedure would be not appropriate to apply to this new regime (the continental shelf), which required a technical approach.<sup>102</sup> Even more, it was argued that states' free will to choose the means for settling disputes must be secured,<sup>103</sup> and thus, compulsory procedures should be left as a last resort, while other pacific means upon states' choice should remain as having priority.<sup>104</sup>

Consequently, although a total of four 1958 Geneva Conventions<sup>105</sup> were concluded at the

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<sup>98</sup> UNGA, 'Document A/CONF.13/42, United Nations Conference on the Law of the Sea, Official Records, Volume VI: Committee (Continental Shelf)', 34<sup>th</sup> Meeting 10 April 1958 – Sweden (para. 13); Federal Republic of Germany (para. 28); Venezuela (para. 31).

<sup>99</sup> Ibid, 34<sup>th</sup> Meeting 10 April 1958 – Switzerland (para. 17); Peru (para. 40), 35<sup>th</sup> Meeting 10 April 1958 – the Netherlands (para. 4).

<sup>100</sup> UNGA, 'Document A/CONF.13/41, United Nations Conference on the Law of the Sea, Official Records, Volume V: Third Committee (High Seas: Fishing: Conservation of Living Resources)', 6<sup>th</sup> Meeting 12 March 1958 – USSR (para. 13), 28<sup>th</sup> Meeting 11 April 1958 – Romania (para. 18), 29<sup>th</sup> Meeting 12 April 1958 – Argentina (para. 31); Mexico (para. 38), 30<sup>th</sup> Meeting 12 April 1958 – Ecuador (para. 8). UNGA, 'Document A/CONF.13/42, United Nations Conference on the Law of the Sea, Official Records, Volume VI: Committee (Continental Shelf)', 34<sup>th</sup> Meeting 10 April 1958 – Argentina (para. 35), 35<sup>th</sup> Meeting 10 April 1958 – Guatemala (para. 30).

<sup>101</sup> UNGA, 'Document A/CONF.13/42, United Nations Conference on the Law of the Sea, Official Records, Volume VI: Committee (Continental Shelf)', 35<sup>th</sup> Meeting 10 April 1958 – Mexico (para. 14); Venezuela (para. 32). UNGA, 'Document A/CONF.13/41, United Nations Conference on the Law of the Sea, Official Records, Volume V: Third Committee (High Seas: Fishing: Conservation of Living Resources)', 28<sup>th</sup> Meeting 11 April 1958 – Romania (para. 17), 29<sup>th</sup> Meeting 12 April 1958 – Guatemala (para. 39).

<sup>102</sup> UNGA, 'Document A/CONF.13/42, United Nations Conference on the Law of the Sea, Official Records, Volume VI: Committee (Continental Shelf)', 34<sup>th</sup> Meeting 10 April 1958 – Argentina (para. 22); Venezuela (para. 24), 35<sup>th</sup> Meeting 10 April 1958 – Mexico (para. 14).

<sup>103</sup> UNGA, 'Document A/CONF.13/41, United Nations Conference on the Law of the Sea, Official Records, Volume V: Third Committee (High Seas: Fishing: Conservation of Living Resources)', 28<sup>th</sup> Meeting 11 April 1958 – Bulgaria (para. 5); Mexico (para. 13); Belorussian Soviet Socialist Republic (para. 24); Yugoslavia (paras 39-41). UNGA, 'Document A/CONF.13/42, United Nations Conference on the Law of the Sea, Official Records, Volume VI: Committee (Continental Shelf)', 34<sup>th</sup> Meeting 10 April 1958 – Argentina (para. 1); Romania (para. 33).

<sup>104</sup> UNGA, 'Document A/CONF.13/41, United Nations Conference on the Law of the Sea, Official Records, Volume V: Third Committee (High Seas: Fishing: Conservation of Living Resources)', 29<sup>th</sup> Meeting 12 April 1958 – Costa Rica (para. 56).

<sup>105</sup> Convention on Fishing and Conservation of the Living Resources of the High Seas; Convention on the Continental Shelf; Convention on the High Seas; Convention on the Territorial Sea and the Contiguous Zone.



end of the First UN Conference, the clause for the compulsory dispute settlement procedures was only included in the Convention on Fishing and Conservation of the Living Resources of the High Seas, which corresponded to the ILC's draft Article 57. The compulsory measures for disputes other than fisheries were regulated by the Optional Protocol so that states parties could freely accept it upon their free will.<sup>106</sup> Accordingly, states parties to the 1958 Geneva Conventions could maintain their traditional preferences on voluntary and non-compulsory methods of dispute settlement, as the general compulsory mechanism failed to be introduced into the 1958 Geneva Conventions.<sup>107</sup>

However, adopting the compulsory dispute settlement measures through the Optional Protocol instead of introducing it as an integral part turned out to be ineffective and unsuccessful, mostly because, of around 70 states who had acceded to one or more of the 1958 Geneva Conventions, only 28 states accepted the Optional Protocol.<sup>108</sup> Moreover, the compulsory dispute settlement procedures regulated in the Convention on Fishing and Conservation of the Living Resources of the High Seas have had no practical use and most of the major coastal fishing states had never become a party to this convention.<sup>109</sup>

### 2.1.2. The Making of UNCLOS Part XV at the Third UN Conference

At the Third UN Conference, a more comprehensive mandatory dispute settlement system was introduced into the Convention. The Third UN Conference was convened by the General Assembly Resolution on 17 December 1970.<sup>110</sup> The General Assembly authorised the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction to act as a preparatory body for the Third UN Conference. The issue concerning dispute settlement measures was included again as one of the agenda items discussed by the Committee. According to the Committee report, the Committee had

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<sup>106</sup> Optional Protocol of Signature concerning the Compulsory Settlement of Disputes.

<sup>107</sup> Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, p. 17.

<sup>108</sup> Churchill, 'Trends in Dispute Settlement in the Law of the Sea: Towards the Increasing Availability of Compulsory Means', p. 155, footnote 52.

<sup>109</sup> Alan. E. Boyle, 'Problems of Compulsory Jurisdiction and the Settlement of Disputes Relating to Straddling Fish Stocks' (1999) 14 *The International Journal of Marine and Coastal Law* 1, p. 4.

<sup>110</sup> UNGA, 'A/RES/2750(XXV)[C], Reservation Exclusively for Peaceful Purposes of the Seabed and the Ocean Floor and the Subsoil thereof, Underlying the High Seas Beyond the Limits of Present National Jurisdiction and Use of Their Resources in the Interests of Mankind, and Convening of a Conference on the Law of the Sea'.

had differing views: a preference for procedures leading to a compulsory settlement of disputes and another preference for a non-binding process.<sup>111</sup> As such, it was commonly shared that the dispute settlement mechanism in the new treaty should be flexible enough to allow states a wide choice including non-compulsory procedures with non-binding decisions and formal compulsory procedures with binding decisions.<sup>112</sup>

In this context, the necessity of compulsory dispute settlement measures was raised along with the need for some exceptions to the applicability of such compulsory measures. For example, in introducing a “Working Paper on the Settlement of Law of the Sea Disputes”<sup>113</sup> to the Conference, the representative of El Salvador, which constituted co-chairmanship with Australia of an Informal Working Group,<sup>114</sup> emphasised that the carefully determined exceptions should be allowed.<sup>115</sup> That was due to the concern that without them, many states would hesitate to accede to the new treaty.<sup>116</sup> Thus, regulating the exceptions to the applicability of the compulsory measures was indeed to make a more effective and, as one author mentions, a ‘workable’ compulsory dispute settlement system.<sup>117</sup>

Substantial contents of the compulsory jurisdiction system had gone through a lengthy negotiation process with several versions of draft provisions.<sup>118</sup> After the end of the third

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<sup>111</sup> UNGA, 'Document A/8721, Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction', para. 87.

<sup>112</sup> Adede, *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea: A Drafting History and A Commentary*, p. 43.

<sup>113</sup> UNGA, 'Document A/CONF.62/L.7, Australia, Belgium, Bolivia, Colombia, El Salvador, Luxembourg, Netherlands, Singapore and United States of America: working paper on the settlement of law of the sea disputes'.

<sup>114</sup> An Informal Working Group was a separately established group by several delegations in order to deal with the issue of the settlement of dispute. Although the item of the settlement of disputes was to be discussed within the three main committees in the second session of the Third UN Conference, little attention had been paid to this subject. This group was voluntarily organised in this context (See; Nordquist and others, *United Nations Convention on the Law of the Sea 1982: A Commentary*, para. XV.4). Later, this Informal Working Group was re-organised as the Settlement of Disputes Group.

<sup>115</sup> UNGA, 'Document A/CONF.62/SR.51, Summary Records of Plenary Meetings, 51st Plenary Meeting', para. 9. See also; Adede, *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea: A Drafting History and A Commentary*, p. 39.

<sup>116</sup> Robin Churchill and Vaughan Lowe, *The Law of the Sea* (3rd edn, Manchester University Press 1999), pp. 454-455. Such a necessity for exceptions was regarded as crucial, especially for sensitive issues like those directly related to the territorial integrity of states (see; UNGA, 'Document A/CONF.62/SR.51, Summary Records of Plenary Meetings, 51st Plenary Meeting', para. 10).

<sup>117</sup> Armand de Mestral argues that the great majority of states participating in the negotiations of the Third UN Conference were in favour of some form and degree of compulsory dispute settlement but placed less priority upon achieving a comprehensive system. Therefore, in order to establish a workable compulsory dispute settlement system, states approached this issue with reservations on certain matters (See; Mestral, 'Compulsory Dispute Settlement in the Third United Nations Convention on the Law of the Sea: A Canadian Perspective', p. 170).

<sup>118</sup> J. G. Merrills, *International Dispute Settlement* (Sixth edn, Cambridge University Press 2017), p. 177.

session, the President of the Conference, Hamilton Shirley Amerasinghe, prepared the Informal Single Negotiating Text (hereinafter 'ISNT') on his initiative. The dispute settlement provisions were included as Part IV,<sup>119</sup> which was done to pave the way for discussing the issue of dispute settlement in the Conference as a whole, beyond the level of the Informal Working Group.<sup>120</sup> In introducing the ISNT at the fourth session, the President pointed out that an effective dispute settlement system would be crucial for maintaining the delicate equilibrium of the compromise and for ensuring the substance and intention of the new Convention to be interpreted both consistently and equitably.<sup>121</sup> As a result, from this fourth session, the Conference for the first time took up the issue of dispute settlement in a formal discussion in the plenary meetings based on Part IV of the ISNT.<sup>122</sup>

Part IV of the ISNT was intensely discussed eight times in full meetings of the Conference, the result of which became the basis for the revised version of the Text.<sup>123</sup> In the first revision of the ISNT, Part IV was divided into two specific sections.<sup>124</sup> The first section was comprised of less controversial articles that regulated the flexible choices that states could make from the most informal procedures to the procedures entailing binding decisions. The second section was composed of widely controversial provisions containing the compulsory procedures entailing binding decisions.

The first revision of Part IV of the ISNT was again examined in informal plenary meetings of the fifth session of the Conference. In this examination, a total of 745 statements of the delegations and over 140 substantive suggestions for changes were made.<sup>125</sup> Those suggestions were reflected in Part IV of the second revision of the Text, which was referred to as the Revised Single Negotiating Text (hereinafter 'RSNT'). Part IV of the RSNT was examined again at the sixth session of the Conference, and the subsequent changes were embodied as Part XV of the Informal Composite Negotiating Text (hereinafter 'ICNT'). This Part XV of the ICNT became the basis for Part XV of UNCLOS with only minor

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<sup>119</sup> Part IV of the ISNT consisted of 18 articles and 7 Annexes.

<sup>120</sup> Adede, *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea: A Drafting History and A Commentary*, p. 71; A. O. Adede, 'The Basic Structure of the Disputes Settlement Part of the Law of the Sea Convention' (1982) 11 *Ocean Development and International Law* 125, p. 127.

<sup>121</sup> UNGA, 'Document A/CONF.62/WP.9/Add.1, Memorandum by the President of the Conference on document A/CONF.62/WP.9', para. 6.

<sup>122</sup> Adede, 'The Basic Structure of the Disputes Settlement Part of the Law of the Sea Convention', p. 127

<sup>123</sup> Nordquist and others, *United Nations Convention on the Law of the Sea 1982: A Commentary*, para. XV.7.

<sup>124</sup> Adede, *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea: A Drafting History and A Commentary*, p. 90.

<sup>125</sup> UNGA, 'Document A/CONF.62/SR.76, 76th Plenary Meeting', para. 9.

changes.<sup>126</sup>

### 2.1.3. The Need for Further Development, and Judicial Law-Making

However, the close of the Conference and the conclusion of UNCLOS did not mean that there was no room for further development. Tullio Scovazzi says that it would be illusory to think that the conclusion of UNCLOS was the end of the whole developmental process of this Convention, and it should be subject to a continuous process of evolution and development.<sup>127</sup> As an integral part of the Convention, Part XV of UNCLOS cannot be different in this respect. Above all, many ambiguities and lacunae were left in UNCLOS Part XV.

Philip Allot describes a treaty as like “a disagreement reduced to writing”.<sup>128</sup> In general, a multilateral law-making process like the Third UN Conference is an intense process of negotiation where compromise is essential.<sup>129</sup> As the eventual parties to a treaty enter into negotiations with different ideas of what they want to achieve,<sup>130</sup> the more states involved in negotiating the drafting of a treaty, the greater the need for ambiguous texts for reconciliation between conflicting interests. Therefore, the process of compromise inevitably produces ambiguities in interpreting the exact meaning of the drafted provisions.<sup>131</sup> Similarly, the drafters of the constitutive treaty containing the primary source of procedural law may deliberately leave lacunae when they could not reach an agreement on certain issues.<sup>132</sup> For this reason, we may easily find that many multilateral conventions operate with flexible and abstract terms and concepts.<sup>133</sup>

This also applies to the procedural law for international adjudication like Part XV of UNCLOS. Part XV system was integrated into UNCLOS as a result of a compromise

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<sup>126</sup> Nordquist and others, *United Nations Convention on the Law of the Sea 1982: A Commentary*, para. XV.9.

<sup>127</sup> Tullio Scovazzi, *The Evolution of International Law of the Sea: New Issues, New Challenges*, vol 286 (Hague Academy of International Law, Recueil des cours, Brill 2001), pp. 122-123.

<sup>128</sup> Allot, 'The Concept of International Law', p. 43.

<sup>129</sup> Boyle and Chinkin, *The Making of International Law*, p. 9.

<sup>130</sup> Allot, 'The Concept of International Law', p. 43.

<sup>131</sup> Anthony Aust, *Modern Treaty Law and Practice* (Third edn, Cambridge University Press 2013), p. 205.

<sup>132</sup> Brown, *A Common Law of International Adjudication*, pp. 40-41.

<sup>133</sup> Jensen, 'General Introduction', p. 7. See also; Pauwelyn and Elsig, 'The Politics of Treaty Interpretation', p. 447.

between states.<sup>134</sup> During the negotiation process of the Third UN Conference, states' differing views on the extent to which compulsory jurisdiction should be given to the dispute settlement system of this new law of the sea convention needed to be reconciled.<sup>135</sup> For the drafters of Part XV of UNCLOS, similarly, a deliberate strategy of taking broad and ambiguous terms was required to make it acceptable by as many states as possible. Consequently, the compulsory jurisdiction system of Part XV was shaped based on a balance between the voluntary and compulsory ways of resolving a dispute.<sup>136</sup> Given all these efforts and compromise, finding lacunae and ambiguities in Part XV is no surprise.

In that regard, Part XV of UNCLOS in itself is an incomplete statutory document. That is to say, the finalised text of UNCLOS Part XV alone cannot always provide detailed guidance on how the compulsory dispute settlement system under UNCLOS should work and function in all different circumstances. Moreover, the drafters of this system could not fully predict the circumstances which might happen in the future concerning the procedural rules in Part XV.<sup>137</sup> Therefore, when any novel or unexpected situation arises concerning the interpretation or application of Part XV of UNCLOS, neither the texts of Part XV nor the negotiating records of the Third UN Conference can provide an explicit answer.<sup>138</sup> Thus, in UNCLOS Part XV, much remained to be clarified and developed.

This shows the aspects that the international courts and tribunals can contribute to the development of the Part XV system through interpretation, which would eventually lead to the creation and shift of others' normative expectations. Manley O. Hudson said;

*“...no system of law can depend solely on legislation for its development; however, the day-to-day application of the law must supply one of the elements of growth, and it is in this way that courts make their contribution.”*<sup>139</sup>

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<sup>134</sup> Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, p. 24; Igor V. Karaman, *Dispute Resolution in the Law of the Sea* (Martinus Nijhoff Publishers 2012), p. 6. See also; Kindt, 'Dispute Settlement in International Environmental Issues: the Model Provided by the 1982 Convention on the Law of the Sea', p. 1114.

<sup>135</sup> Karaman, *Dispute Resolution in the Law of the Sea*, p. 6. See also; Elliot L. Richardson, 'Dispute Settlement Under the Convention on the Law of the Sea: A Flexible and Comprehensive Extension of the Rule of Law to Ocean Space' in Thomas Buergenthal (ed), *Contemporary Issues in International Law: Essays in honor of Louis B Sohn* (Engel 1984); Yoshifumi Tanaka, *The International Law of the Sea* (Third edn, Cambridge University Press 2019), p. 534. See also; Mestral, 'Compulsory Dispute Settlement in the Third United Nations Convention on the Law of the Sea: A Canadian Perspective', p. 171.

<sup>136</sup> Tanaka, *The International Law of the Sea*, p. 534.

<sup>137</sup> Concerning this point in general, see; Brown, *A Common Law of International Adjudication*, pp. 40-41.

<sup>138</sup> See, e.g. *Chagos Marine Protected Area Arbitration between Mauritius and the UK, Award, 18 March 2015*, para. 215.

<sup>139</sup> Manley O. Hudson, *Progress in International Organization* (Stanford University Press 1932), p. 80.

When it comes to the rules of the dispute settlement system under UNCLOS, Part XV tribunals are the subjects who have practically interpreted and applied them to the given circumstances the most. Then, through their day-to-day application of the rules for the compulsory dispute settlement under UNCLOS, Part XV tribunals could also contribute to the development of this system. Richard H. Steinberg argued that the scope of judicial law-making depends on the extent to which ambiguities need to be clarified or gaps to be filled.<sup>140</sup> Following this view, the possibility of further development through international adjudication can be seen in UNCLOS Part XV. In this sense, Part XV tribunals could have taken a creative role since the system entered into force.

## 2.2. How Judicial Law-Making of Part XV Occurs

UNCLOS Part XV contains the procedural law of the compulsory dispute settlement system under the Convention. Given the relationship between the courts and their procedural law, judicial law-making of procedural law may not be the same as the law-making of substantive law. Then, what is the difference between the two? More importantly, how does judicial law-making of Part XV happen? To answer these questions, we first need to look at how the judicial law-making of substantive law occurs.

### 2.2.1. Judicial Law-Making of Substantive Law in General

The concept of judicial law-making indicates that international courts may affect actors' normative expectations, and such effects may reach beyond the confinement of individual cases. However, the law-making effect cannot be generated automatically simply by the rendering of the judgments or decisions. It is not self-evident that a certain judicial decision will serve as a guideline for the future conduct of all members of the international

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<sup>140</sup> Steinberg, 'Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints', p. 255. A similar point can be found in Jensen, 'General Introduction', p. 8.

community, particularly those who were not parties to the case.<sup>141</sup> Due to that, whether a rendered judicial decision can substantially affect other actors' normative expectations is out of the hands of that judicial body.<sup>142</sup> It rather depends on international legal actors' perceived acceptability of the judgments of the courts and tribunals.<sup>143</sup> That is especially the case when a judicial decision concerns the substantive law applied between the subjects of international law.

The actors of international law can freely decide to accept certain legal points determined by international courts and tribunals. Although not every actor's acceptance would be required for generating the law-making effect,<sup>144</sup> to have a substantial impact on the development of relevant rules of international law, the judicial decisions must persuade other actors of international law.<sup>145</sup> In the case of states parties, for example, if they generally accept the decisions of international courts and build their practice accordingly, then it can be considered that the law-making impact of international courts is substantial.<sup>146</sup> If not, in contrast, the decision may become marginalised or exceptional, with just minimal law-making effect.<sup>147</sup>

Likewise, the law-making effect of international judicial decisions would derive from the reception of those decisions by the international community in a voluntary manner.<sup>148</sup> Here, many international actors are invited to the legal process of adopting the reasonings and methods taken by judicial decisions.<sup>149</sup> All these processes eventually decide how and to what extent a judicial decision affects the development of the law. In some cases, the judicial decisions of international courts may in effect even demand that the domestic

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<sup>141</sup> Niels Petersen, 'Lawmaking by the International Court of Justice – Factors of Success' in Armin von Bogdandy and Ingo Venzke (eds), *International Judicial Lawmaking: On Public Authority and Democratic Legitimation in Global Governance* (Springer 2012), p. 414.

<sup>142</sup> See; Christian J. Tams and Antonios Tzanakopoulos, 'Barcelona Traction at 40: The ICJ as an Agent of Legal Development' (2010) 23 *Leiden Journal of International Law* 781, p. 785.

<sup>143</sup> Petersen, 'Lawmaking by the International Court of Justice – Factors of Success', p. 414.

<sup>144</sup> See; Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists*, p. 63

<sup>145</sup> Tams and Tzanakopoulos, 'Barcelona Traction at 40: The ICJ as an Agent of Legal Development', p. 785.

<sup>146</sup> Boyle and Chinkin, *The Making of International Law*, pp. 300-301; See also; Roberts, 'Subsequent Agreements and Practice: The Battle over Interpretive Power', p. 95.

<sup>147</sup> Boyle and Chinkin, *The Making of International Law*, p. 301.

<sup>148</sup> Oellers-Frahm, 'Lawmaking Through Advisory Opinions?', p. 94; See also, Lauterpacht, *The Development of International Law by the International Court*, p. 41.

<sup>149</sup> Hernández, 'International Judicial Lawmaking', p. 202.

authorities amend certain legislation thus affecting the regulatory autonomy of states.<sup>150</sup>

The development of the straight baseline system in international law can show such a process of judicial law-making of substantive law. Before the judgment was rendered in the *Fisheries Case* when the ICJ accepted the legality of taking the straight baselines for measuring maritime areas, no state practice had adopted this way of drawing baseline except Norway.<sup>151</sup> In this case, despite the UK's opposition based on the lack of supporting practice among the international community, the ICJ took a creative attitude in deciding that Norway's straight baselines can be construed as in conformity with international law.<sup>152</sup> Subsequently, following the decision of the ICJ in the *Fisheries Case*, the way of drawing the straight baseline had begun to be adopted by states through their domestic legislation.<sup>153</sup>

At the same time, the ICJ's decision on the legality of the straight baseline had also undergone various examinations and discussions among the international community. For example, in preparing the draft articles concerning the law of the sea in the mid-1950s, the ILC interpreted the decision of the ICJ concerning the straight baseline in *Fisheries Case* as 'expressing the law in force' at that time.<sup>154</sup> Accordingly, the ILC decided to include provisions regulating the drawing of a straight baseline in the Report to the General Assembly, which became the basis for the First UN Conference in 1958.<sup>155</sup> Finally, measuring the coastal state's maritime area by drawing the straight baseline upon conditions was introduced into one of the 1958 Geneva Conventions,<sup>156</sup> and later into UNCLOS.<sup>157</sup>

This example shows how international courts' decisions affect the development of the

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<sup>150</sup> See; Fyrnys, 'Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights', p. 345; Bogdandy and Venzke, 'International Courts as Lawmakers', p. 163.

<sup>151</sup> See; Farhad Talaie, 'The Issue of Straight Baselines in the International Law of the Sea and State Practice' (1999) 1999 Maritime studies (Canberra, ACT) 5, p. 8; *Fisheries case, Judgment of December 18th, 1951: I.C.J. Reports 1951, p. 116*; Scovazzi, 'Where the Judge Approaches the Legislator: Some Cases Relating to Law of the Sea', p. 300. See also; Tullio Scovazzi, 'Baselines' (2007) Max Planck Encyclopedias of International Law, para. 10.

<sup>152</sup> See; Boyle and Chinkin, *The Making of International Law*, p. 283; Scovazzi, 'Where the Judge Approaches the Legislator: Some Cases Relating to Law of the Sea', pp. 300-302.

<sup>153</sup> See; Coalter G. Lathrop, J. Ashley Roach and Donald R. Rothwell, *Baselines under the International Law of the Sea - Reports of the International Law Association Committee on Baselines under the International Law of the Sea* (Brill 2019), Appendix 1, Straight Baseline Segments, pp. 126-153; see also, Talaie, 'The Issue of Straight Baselines in the International Law of the Sea and State Practice', pp. 8-13.

<sup>154</sup> ILC, *Yearbook of the International Law Commission, Vol. 2* (1956), p. 267.

<sup>155</sup> UNGA, 'A/RES/1105(XI) International Conference of Plenipotentiaries to Examine the Law of the Sea'.

<sup>156</sup> Convention on the Territorial Sea and the Contiguous Zone, Articles 4 and 7.

<sup>157</sup> See; Articles 7, 8, 10 and 35 of UNCLOS.



substantive rules of international law.<sup>158</sup> The affirmation of the legality of this novel way of drawing a baseline by the ICJ had been examined by the international institution (ILC) and discussed within multilateral conferences (the First and Third UN Conferences), and then adopted by the treaties and domestic legislation of states. Throughout these different levels of examinations by international actors, what the ICJ determined in *Fisheries Case* has been substantially developed and enriched. Under UNCLOS, for instance, the straight baseline constitutes not just the mere methods of drawing the baseline but is also concerned with different rules such as the innocent / transit passage, or (historic) bay. Likewise, the judicial law-making of substantive law entails the examination and enrichment process of the international community. However, that is not the case concerning procedural law.

### 2.2.2. Court's Self-Regulation of Procedural Law, and Part XV

In the context of international adjudication, the term procedural law indicates various rules relating to international judicial actions.<sup>159</sup> Procedural law governs the mechanisms of the courts' judicial function as well as the methods by which states parties may enforce their rights in the courts.<sup>160</sup> That is to say, on the one hand, procedural law is the sum of the rules required for the courts to reach the rendering of the decision or judgment.<sup>161</sup> On the other hand, procedural law concerns the enforcement of the agreed rules of substantive law by providing the means by which states may seek the help of judicial bodies in resolving disputes.<sup>162</sup> Thus, in its wider sense, procedural law covers from the rules governing the composition of the court, costs, or pleadings, to the other rules relating to the court's

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<sup>158</sup> Concerning the process of judicial law-making through different legal discourses, see; Petersen, 'Lawmaking by the International Court of Justice – Factors of Success'.

<sup>159</sup> Robert Kolb, 'General Principles of Procedural Law' in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (Third edn, Oxford University Press 2019), p. 965.

<sup>160</sup> See; Stephen C. Yeazell, 'Procedural Law – Introduction' *Britanica Academic Online* <<https://academic-eb-com.ezproxy.lib.gla.ac.uk/levels/collegiate/article/procedural-law/109440>>; last visited – 15 August 2022.

<sup>161</sup> Hugh Thirlway described the procedure as “a way of getting somewhere”, and in the context of international judicial action, the destination of such a way is the rendering of the decision or judgment (Hugh Thirlway, 'Procedural law and the International Court of Justice' in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Grotius Publications 1996), p. 389).

<sup>162</sup> Kolb, 'General Principles of Procedural Law', pp. 965-966; Yeazell, 'Procedural Law – Introduction'.

competence and functioning.<sup>163</sup>

When referring to the procedural law of the dispute settlement system of UNCLOS, this indicates a wide range of rules including those regulating the jurisdiction of Part XV tribunals or the admissibility of claims, as well as the rules concerning how the proceedings are conducted. Therefore, for example, Article 293 comprises the procedural law too as this provision allows Part XV tribunals to apply other rules of international law not incompatible with the Convention in fulfilling their judicial function. Provisions within Sections 1 and 3 of Part XV are the same. Respectively, they govern the procedural preconditions to the compulsory measures and the limitations to the applicability of such measures. Since these provisions address how states parties' rights to bring a case before the tribunal must be invoked, they also correspond to the role of procedural law. In this respect, the rules within UNCLOS Part XV are the procedural law of the dispute settlement mechanisms of the Convention.

However, what we have to take into account is that, normally, international courts and tribunals take control of the implementation of the procedural law regulating the actual progression of the proceedings.<sup>164</sup> The most representative example is an international court's competence to determine itself the matters concerning its jurisdiction and admissibility, the *compétence de la compétence* (jurisdiction as to jurisdiction).<sup>165</sup> *Compétence de la compétence* constitutes one of the general practices of international judicial bodies and a rule of customary international law,<sup>166</sup> and that has been long confirmed by various international courts and tribunals.<sup>167</sup> UNCLOS Part XV stipulates *compétence de la compétence* in Article 288(4).<sup>168</sup> This competence ensures the exercise of the judicial functions that have been expressly conferred upon international courts and

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<sup>163</sup> Kolb, 'General Principles of Procedural Law', p. 965.

<sup>164</sup> See; Ingo Venzke, 'Antinomies and Change in International Dispute Settlement: An Exercise in Comparative Procedural Law' in Rüdiger Wolfrum and Ina Gätzschmann (eds), *International Dispute Settlement: Room for Innovations?* (Springer 2013), p. 241

<sup>165</sup> Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, p. 245.

<sup>166</sup> Robert Kolb and Alan Perry, *The International Court of Justice* (Hart Publishing 2013), pp. 601-606

<sup>167</sup> E.g. *Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV)*, *Advisory Opinion*, P.C.I.J. Series B - No. 16, 1928, p. 20; *Nottebohm case (Preliminary Objection)*, *Judgment of November 18th, 1953: I.C.J. Reports 1953, p. 111*, pp. 119-120. See; Chester Brown, 'The Inherent Powers of International Courts and Tribunals' (2006) 76 *British Yearbook of International Law* 195, pp. 212-215; Shabtai Rosenne, 'International Courts and Tribunals, Jurisdiction and Admissibility of Inter-State Applications' (2006) *Max Planck Encyclopedias of International Law*, paras. 23-24.

<sup>168</sup> Article 288(4) of UNCLOS regulates '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'.

tribunals.<sup>169</sup> Although the jurisdiction of every international court is based on the consent of states, *compétence de la compétence* is inherent in the judicial function, derived from an international judicial body's nature as a court of law.<sup>170</sup>

Similarly, when the statutory basis is silent or insufficient in certain aspects of the judicial process, international courts and tribunals can decide the directions to guide their work.<sup>171</sup> Unlike the substantive law applied between the subjects of international law, the procedural law of a judicial body is related to what international dispute settlement is about, what it is for and what it actually does.<sup>172</sup> Therefore, the court's law-making of procedural law certainly reflects the self-understanding of its role and function. Thus, the procedural understanding of the court itself eventually constitutes a structural characteristic of a certain adjudicative mechanism.<sup>173</sup>

Like judicial law-making of substantive law, judicial law-making of procedural law also takes place in the context of concrete cases. In international adjudication, there can be no such thing as litigation that does not raise any procedural question.<sup>174</sup> When a respondent state puts forward a series of objections, the court in charge must examine every single objection, and the courts' decisions on those points constitute essential parts of the final decision.<sup>175</sup> Here, the procedural law significantly develops in the practice of adjudication and under the direction of that judicial body.<sup>176</sup> However, contrary to the development of substantive law, international courts and tribunals become autonomous actors in influencing the procedural law, whereas other actors have only a minimal possibility to do

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<sup>169</sup> Brown, *A Common Law of International Adjudication*, p.71; Alexander Orakhelashvili, 'The Concept of International Judicial Jurisdiction: A Reappraisal' (2003) 2 *The Law and Practice of International Courts and Tribunals* 501, p. 537.

<sup>170</sup> Brown, *A Common Law of International Adjudication*, pp. 56-63;

<sup>171</sup> Venzke, 'Antinomies and Change in International Dispute Settlement: An Exercise in Comparative Procedural Law', p. 243; Brown, 'The Inherent Powers of International Courts and Tribunals', p. 201; Göran Sluiter, 'Procedural Lawmaking at the International Criminal Tribunals' in Shane Darcy and Joseph Powderly (eds), *Judicial Creativity at the International Criminal Tribunals* (Oxford University Press 2010), p. 315; Michael Ioannidis, 'A Procedural Approach to the Legitimacy of International Adjudication: Developing Standards of Participation in WTO Law' in Armin von Bogdandy and Ingo Venzke (eds), *International Judicial Lawmaking: On Public Authority and Democratic Legitimation in Global Governance* (Springer 2012), p. 223.

<sup>172</sup> See also, Venzke, 'Antinomies and Change in International Dispute Settlement: An Exercise in Comparative Procedural Law', pp. 235-236.

<sup>173</sup> Ioannidis, 'A Procedural Approach to the Legitimacy of International Adjudication: Developing Standards of Participation in WTO Law' p. 224.

<sup>174</sup> Elihu Lauterpacht, 'Principles of Procedure in International Litigation', *Recueil des cours, Collected Courses (Collected Courses of the Hague Academy of International Law)*, vol 345 (Martinus Nijhoff 2009), p. 409.

<sup>175</sup> Lauterpacht, *The Development of International Law by the International Court*, p. 37.

<sup>176</sup> Venzke, 'Antinomies and Change in International Dispute Settlement: An Exercise in Comparative Procedural Law', p. 243.

so.<sup>177</sup> For states, there will be little option but to follow what the court has decided, or to withdraw their acceptance of the court's jurisdiction.<sup>178</sup> Hence, interactions between judicial decisions on procedural law with other international law actors or the examination process can hardly be found.

An example of such law-making is the ICJ's decision about when the optional clause declaration under the Statute would take effect. In the *Right of Passage* case, the applicant, Portugal, initiated the proceeding on 22 December 1955, just three days after its acceptance of the ICJ's jurisdiction as compulsory (19 December 1955). Article 36(4) of the Statute regulates that the optional clause declaration shall be deposited with the Secretary-General of the UN who will, in turn, transmit the copies to other states parties and the Registrar. But there is no other guidance on when the declarations will take force. In this case, the ICJ determined that by the deposit of the declaration with the Secretary-General, the jurisdictional link between the newly declared state and the already declared states would be established.<sup>179</sup> The Court added that no other requirement would need to be satisfied like certain gaps of time for the declaration to take effect.<sup>180</sup> The decision in the *Right of Passage* case was reaffirmed later in another case<sup>181</sup> and became an established jurisprudence of the ICJ.

Following the ICJ's decision, it is now understood that the effect of the optional clause declaration takes effect directly and immediately upon its deposition.<sup>182</sup> The decision of the ICJ in the *Right of Passage* case has led states parties to attach reservations to their optional clause declaration to alleviate the effect of the immediate entry into force of a new declaration.<sup>183</sup> This practice shows that the normative expectations of states parties have been changed by the judgment of the ICJ. However, states parties have had no chance to participate in the developmental process which can be found in the development of the straight baseline system presented above. Here, except the Court itself, no other actors'

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<sup>177</sup> *Ibid*, p. 242.

<sup>178</sup> See; Ioannidis, 'A Procedural Approach to the Legitimacy of International Adjudication: Developing Standards of Participation in WTO Law', p. 235.

<sup>179</sup> *Case Concerning Right of Passage over Indian Territory (Preliminary Objections), Judgment of November 26th, 1957: I.C.J. Reports 1957, p. 125, p. 146.*

<sup>180</sup> *Ibid*, pp. 146-147.

<sup>181</sup> *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 275, paras. 25-26.*

<sup>182</sup> See, Tomuschat, 'Article 36', pp. 764-765, paras. 80-81.

<sup>183</sup> Giovanni Distefano and Aymeric Hêche, 'Optional Clause Declarations: International Court of Justice (ICJ)' (2018) Max Planck Encyclopedias of International Law, paras. 89-91; Malgosia Fitzmaurice, 'International Court of Justice, Optional Clause' (2021) Max Planck Encyclopedias of International Law, paras. 13-14.

considerations have affected the understanding of the direct and immediate effect of the optional clause declaration. Likewise, the decisions of international courts and tribunals just shape the procedural law, rather than persuade or interact with other actors of international law.<sup>184</sup>

This implies that the development of Part XV of UNCLOS is either like a self-regulating process largely governed by judicial determinations of Part XV tribunals. Throughout the past compulsory proceedings, Part XV tribunals have interpreted the procedural rules of the Part XV system and applied them to the given facts in the cases. In interpreting and applying the composing provisions, the decisions of Part XV tribunals must have enjoyed autonomous status in the development of Part XV, like the judicial law-making of procedural law above. Thus, what has had a major impact on the development of the compulsory adjudicative system under UNCLOS is none other than the tribunals' understandings of the Part XV system.

### 2.3. Judicial Law-Making of Part XV - By Whom?

#### 2.3.1. Multiple Forums of the Part XV System

Although it was more like self-regulation by judicial decisions, the making of Part XV by judicial bodies would be quite different from where a certain procedural law is only applicable to a single court or tribunal. Regarding the ICJ's determination on the direct and immediate effect of the optional clause declaration, for example, no other judicial bodies could have evaluated or examined the Court's decisions in the *Right of Passage* case. In such a case, a judicial decision just shapes the procedural law but does not compete with other tribunals' considerations on the same matter. In contrast, when it comes to Part XV of UNCLOS, a judicial body's determination on Part XV cannot but be reviewed or even evaluated by other tribunals, due to the multiplicity of forums of Part XV.

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<sup>184</sup> See also, Venzke, 'Antinomies and Change in International Dispute Settlement: An Exercise in Comparative Procedural Law', p. 242.

The multiplicity of forums in Part XV was a result of a compromise between the drafters during the negotiating process.<sup>185</sup> Generally, when establishing a procedure for securing binding decisions in a treaty, finding a judicial forum all parties can accept is the first problem.<sup>186</sup> During the Third UN Conference, the parties to this Conference showed different preferences in designating the forum for settling disputes concerning the interpretation or application of the Convention.<sup>187</sup> Some states supported the already established bodies like the ICJ, while some states argued that an independent law of the sea tribunal would be needed for this novel law of the sea regime. Some states favoured arbitration, and others asserted the need for a special body that would comprise experts to meet the technical and functional needs.

To solve this deadlock, a Montreux formula was suggested by which every contracting party would be required to choose the jurisdiction of one or more forums for compulsory measures when ratifying or expressing its consent to the new treaty. Eventually, this formula was introduced into the Convention as Article 287.<sup>188</sup> Article 287(1) of UNCLOS regulates that states can freely choose at any time one or more of the four forums for settling disputes concerning the interpretation or application of the Convention. The four enumerated forums are; (a) ITLOS, (b) the ICJ, (c) an arbitral tribunal constituted under Annex VII, and (d) a special arbitral tribunal constituted following Annex VIII.<sup>189</sup>

The procedural rules applicable to each tribunal, for instance, regarding the composition of the tribunal or written and oral proceedings, are regulated separately by the respective procedural documents. In the case of the ICJ, the Statute of the ICJ and the Rules of Court regulate those issues. For ITLOS, procedural rules are stipulated by Annex V of UNCLOS (Statute of ITLOS) and the Rules of the Tribunal. Annex VII of the Convention regulates basic rules applicable to the arbitral tribunals constituted thereunder and, following Article 5 of Annex VII,<sup>190</sup> each of the past tribunals have adopted Rules of Procedures for their proceedings. Although not yet instituted, a special arbitral tribunal under Annex VIII will

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<sup>185</sup> Anne Sheehan, 'Dispute Settlement under UNCLOS: The Exclusion of Maritime Delimitation Disputes' (2005) 24 *University of Queensland law journal* 165, p. 168.

<sup>186</sup> Merrills, *International Dispute Settlement*, p. 180.

<sup>187</sup> Nordquist and others, *United Nations Convention on the Law of the Sea 1982: A Commentary*, para. XV.5.

<sup>188</sup> Concerning this contextual background, please refer to; *ibid*, paras. XV.5, XV.287.1-287.8; Adede, *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea: A Drafting History and A Commentary*, p. 53.

<sup>189</sup> The separate Statutes and regulations for these forums except the ICJ are contained respectively in Annexes VI to VIII of the Convention. Article 318 (Status of Annexes) of UNCLOS regulates, these annexes form an integral part of the Convention.

<sup>190</sup> Article 5. Procedure, "Unless the parties to the dispute otherwise agree, the arbitral tribunal shall determine its own procedure, assuring to each party a full opportunity to be heard and to present its case."

be subject to this Annex and Articles 4 to 13 of Annex VII of UNCLOS since Article 4 of Annex VIII says that they will apply *mutatis mutandis* to the special arbitral proceedings. Nevertheless, they are not all sources of the rules of procedure applicable to them.<sup>191</sup> More importantly, Part XV of UNCLOS regulates the fundamental procedural rules for the compulsory dispute settlement proceedings such as the scope of jurisdiction, preliminary proceedings or the applicable law, commonly applied to each of them. That is to say, within a compulsory proceeding initiated following Part XV of UNCLOS, even the ICJ should be subject to the rules of Part XV concerning the issues above if such a case were brought before the ICJ upon states' choice made pursuant to Article 287.<sup>192</sup> What this structural characteristic implies is that a certain judicial decision concerning Part XV would be examined, evaluated, or even possibly denied by other Part XV tribunals.

### 2.3.2. Doubts and Concerns over the Structural Features of Part XV

In the case of a single court's judicial action, it is quite common to see that a body of jurisprudence established through cases on the same legal matter. Of course, the binding force of a judicial decision does not extend beyond the confinement of an individual case, even concerning similar or identical legal points that arise in other cases.<sup>193</sup> However,

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<sup>191</sup> See; Jean-Marc Sorel and Lena Chercheneff, 'International Courts and Tribunals, Procedure' (2019) Max Planck Encyclopedias of International Law, para. 1.

<sup>192</sup> Although Part XV generally governs overall matters regarding the compulsory dispute settlement proceedings initiated thereunder, there is an issue which is only stipulated by the Statute of the ICJ and the Rules of Court while Part XV keeps silence. That issue concerns the power of a tribunal or court to prescribe provisional measures. Article 41 of the Statute says "The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party". In the Rules of Court of the ICJ, Article 75 regulates that "The Court may at any time decide to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures which ought to be taken or complied with by any or all of the parties.". However, during the Third UN Conference, it was suggested that a court or tribunal's power to prescribe provisional measures *proprio motu* should be restricted and the prescription could be made only at the request of the parties. Therefore, Article 290(3) of UNCLOS regulates that "Provisional measures may be prescribed, modified or revoked under this article only at the request of a party to the dispute and after the parties have been given an opportunity to be heard." Only when a compulsory case is brought before the ICJ under UNCLOS Part XV, it was conceded that the ICJ would still be able to prescribe provisional measures *proprio motu* (see; Nordquist and others, *United Nations Convention on the Law of the Sea 1982: A Commentary*, para. 290.5; Karaman, *Dispute Resolution in the Law of the Sea*, p. 99).

<sup>193</sup> Chester Brown, 'Article 59' in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (Third edn, Oxford University Press 2019), pp. 1583-1584.

although there is no principle of *stare decisis* in international law,<sup>194</sup> international courts and tribunals do not depart from their previous decisions lightly.<sup>195</sup> Rather, they frequently seek guidance from their own previous decisions.<sup>196</sup> The ICJ also stated that it considers its previous decisions as a settled jurisprudence, although they are in no way binding on the Court.<sup>197</sup> Thus, persistent application of their previous determinations generates a new reference point for later cases.<sup>198</sup> In this sense, one author argues that decisions consistently piled upon decisions would eventually make law, as they have an impact upon the understanding of the law of others.<sup>199</sup>

However, as for Part XV, the formation of a coherent interpretation and application of procedural law consistently applied to different bodies cannot be taken for granted for three reasons. First of all, it should be noted that, under a system like Part XV, multiple judicial bodies are eligible to determine how the dispute settlement system works and functions. This reminds us of certain concerns raised over the multiplicity of judicial bodies in international law in general. Such concerns are mostly based on the lack of a formal link between different international judicial bodies and the absence of a structural hierarchy like in the domestic judicial system.<sup>200</sup> When the same legal question comes up before different

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<sup>194</sup> For example, Chester Brown says one of the functions of Article 59 of the Statute of the ICJ that regulates the principle of *res judicata* is to prohibit the application of the common law doctrine of *stare decisis* (ibid). See; Guido Acquaviva and Fausto Pocar, 'Stare Decisis' (2007) Max Planck Encyclopedias of International Law.

<sup>195</sup> Shahabuddeen, *Precedent in the World Court*, pp. 2-3; See also Acquaviva and Pocar, 'Stare Decisis', para. 13. Concerning the reasons for such reluctance of international courts and tribunals, see the contributions of authors; Venzke, 'The Role of International Court as Interpreters and Developers of the Law: Working out the Jurisgenerative Practice of Interpretation', p. 123; Lauterpacht, *The Development of International Law by the International Court*, p. 14; Kolb and Perry, *The International Court of Justice*, p. 1162; August Reinisch, 'The Role of Precedent in ICSID Arbitration' in Christian Klausegger and others (eds), *Austrian Arbitration Yearbook 2008* (Wolters Kluwer 2008), p. 498; Ingo Venzke, 'Between Power and Persuasion: On International Institutions' Authority in Making Law' (2013) 4 Transnational Legal Theory 354, p. 362; Hernández, 'International Judicial Lawmaking', p. 206; Joseph Powderly, *Judges and the Making of International Criminal Law*, vol 7 (Brill 2020), p. 255.

<sup>196</sup> Shahabuddeen, *Precedent in the World Court*, pp. 2-3, 74; See also, Powderly, *Judges and the Making of International Criminal Law*, p. 253; See also, Higgins, *Problems and Process: International Law and How We Use It*, p. 202.

<sup>197</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Preliminary Objections, Judgment, I.C.J. Reports 2008, p. 412, para. 53.

<sup>198</sup> See; Reinisch, 'The Role of Precedent in ICSID Arbitration', p. 498; Marc Jacob, 'Precedents: Lawmaking Through International Adjudication' in Armin von Bogdandy and Ingo Venzke (eds), *International Judicial Lawmaking: On Public Authority and Democratic Legitimation in Global Governance* (Springer 2012), p. 47; Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists*, p. 138.

<sup>199</sup> Weeramantry, 'Constitutional and Institutional Developments: The Function of the International Court of Justice in the Development of International Law', p. 313.

<sup>200</sup> Chester Brown, 'The Cross-Fertilization of Principles Relating to Procedure and Remedies in the Jurisprudence of International Courts and Tribunals' (2008) 30 Loyola of Los Angeles International & Comparative Law Review 219, pp. 219-220; Benedict Kingsbury, 'Foreword: Is the Proliferation of International Courts and Tribunals A Systemic Problem?' (1999) 31 New York University Journal of International Law & Politics 679, pp. 680-681; Speech by His Excellency Judge Gilbert Guillaume, President



judicial bodies, then, the possibility of divergent jurisprudence arising cannot be ruled out.<sup>201</sup> This implies that the decisions of different courts may cause inconsistent decisions on the same issue,<sup>202</sup> or the development of contradictory legal doctrines may undermine the coherence of international law.<sup>203</sup>

Similar concerns have been raised about the dispute settlement system of UNCLOS due to its structural characteristic of multiple forums. Some commentators considered that the potential inconsistent jurisprudence among different forums was the price of securing consensus on the comprehensive and compulsory binding dispute settlement system during the Third UN Conference.<sup>204</sup> Moreover, it was even raised that the increase of the volume of cases and the use of all four forums could lead to the problem of continuity and consistency in jurisprudence.<sup>205</sup> The former Judge of ITLOS, Tullio Treves, says that the multiplicity of forums in Part XV indicates that the uniformity of jurisprudence was not considered as a high priority by the negotiating states parties.<sup>206</sup>

Secondly, the tension among different forums can be an obstacle in establishing coherent jurisprudence on the interpretation and application of Part XV rules. In international law, setting up a new court in addition to the existing one can be challenging as tension or a

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of the International Court of Justice, to the Sixth Committee of the General Assembly of the United Nations, 27 October 2000, Gilbert Guillaume, 'The Proliferation of International Judicial Bodies: The Outlook for the International Legal Order' <<https://www.icj-cij.org/public/files/press-releases/9/2999.pdf>>, pp. 3-4, last visited – 15 August 2022.

<sup>201</sup> Rosalyn Higgins, 'The ICJ, the ECJ, and the Integrity of International Law' (2003) 52 *The International and Comparative Law Quarterly* 1, p. 19. See also, Rosalyn Higgins, 'A Babel of Judicial Voices? Ruminations from the Bench' (2006) 55 *The International and Comparative Law Quarterly* 791, pp. 792-796.

<sup>202</sup> Gilbert Guillaume, 'The Future of International Judicial Institutions' (1995) 44 *The International and Comparative Law Quarterly* 848, pp. 848-862; Brown, *A Common Law of International Adjudication*, p. 16; Brown, 'The Cross-Fertilization of Principles Relating to Procedure and Remedies in the Jurisprudence of International Courts and Tribunals', p. 220.

<sup>203</sup> See; Thomas Buergenthal, 'Proliferation of International Courts and Tribunals: Is It Good or Bad?' (2001) 14 *Leiden Journal of International Law* 267, p. 272; Jonathan I. Charney, 'The Impact on the International Legal System of the Growth of International Courts and Tribunals' (1999) 31 *New York University Journal of International Law & Politics* 697, p. 699; Giorgio Gaja, 'Relationship of the ICJ with Other International Courts and Tribunals' in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (Third edn, Oxford University Press 2019), p. 659; Gilbert Guillaume, 'Advantages and Risks of Proliferation: A Blueprint for Action Editorial Comments on the Proliferation of International Courts' (2004) 2 *Journal of International Criminal Justice* 300, p. 301.

<sup>204</sup> David H. Anderson, 'Legal Implications of the Entry into Force of the UN Convention on the Law of the Sea' (1995) 44 *The International and Comparative Law Quarterly* 313, p. 326; Boyle, 'Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction', p. 39.

<sup>205</sup> Boyle, 'Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction', p. 41.

<sup>206</sup> Treves, 'The Development of the Law of the Sea Since the Adoption of the UN Convention on the Law of the Sea: Achievements and Challenges for the Future', pp. 47-48.

competitive relationship between them may arise.<sup>207</sup> As an example, such tension was reflected in the speech of the former President of the ICJ Judge Gilbert Guillaume given in 2000 to the General Assembly, in which he said

*“... Before creating a new court, the international legislator should, I think, ask itself whether the functions it intends to entrust to the court could not properly be fulfilled by an existing court.”*<sup>208</sup>

Similarly, to the question concerning how the ICJ differs from other international courts, the ICJ emphasises its distinctive status as the only court exercising competence over general international law matters, unlike other specialised tribunals.<sup>209</sup> One article describes that this answer shows the ICJ’s recognition of “an implicit but clearly delineated” domain of the roles among different international courts.<sup>210</sup>

When autonomous, horizontal and even competitive relationships between the judicial bodies exist, we may hardly expect that they would cooperate.<sup>211</sup> Instead, as Benedict Kingsbury warns, the competition caused by the proliferation of international judicial bodies can lead to adverse comparisons being drawn between institutions and may force tribunals to rely more on their authority than explicit reasonings or textual sources to ensure effectiveness in resolving disputes.<sup>212</sup> In international law, there are no general rules by which to sort out questions of coordination or the tension between different international courts and tribunals.<sup>213</sup> For this reason, the multiplication of judicial bodies in international law has often been considered an unwelcome phenomenon in terms of the development of international law.<sup>214</sup> Multiple forums of UNCLOS Part XV cannot be free from this concern. During the Third UN Conference, whether the creation of a new tribunal

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<sup>207</sup> Pierre Bodeau-Livinec and Chiara Giorgetti, 'Developing International Law at the Bar: A Growing Competition Among International Courts and Tribunals' (2016) 15 *The Law and Practice of International Courts and Tribunals* 177, p. 183.

<sup>208</sup> Guillaume, 'The Proliferation of International Judicial Bodies: The Outlook for the International Legal Order', p. 5.

<sup>209</sup> ICJ, Frequently Asked Question <<https://www.icj-cij.org/en/frequently-asked-questions>>; last visited – 15 August 2022.

<sup>210</sup> Bodeau-Livinec and Giorgetti, 'Developing International Law at the Bar: A Growing Competition Among International Courts and Tribunals', p. 185.

<sup>211</sup> See; Mohamed Bennouna, 'How to Cope with the Proliferation of International Courts and Coordinate Their Action?' in Antonio Cassese (ed), *Realizing Utopia: the Future of International Law* (Oxford University Press 2012), p. 288.

<sup>212</sup> Kingsbury, 'Foreword: Is the Proliferation of International Courts and Tribunals A Systemic Problem?', p. 684.

<sup>213</sup> Tullio Treves, 'Conflicts Between the International Tribunal for the Law of the Sea and the International Court of Justice' (1999) 31 *New York University Journal of International Law & Politics* 809, p. 809.

<sup>214</sup> Bodeau-Livinec and Giorgetti, 'Developing International Law at the Bar: A Growing Competition Among International Courts and Tribunals', p. 183.

(ITLOS) would be just making an organ that was costly but not strictly needed was a point of controversy.<sup>215</sup> Thus, given that not just the ICJ but also ITLOS and even arbitral tribunals are set in Part XV to resolve a dispute concerning a single treaty, the potential tension could negatively impact the formation of the coherent interpretation of Part XV rules.

Lastly, the impermanency of the default forum for the compulsory proceedings under UNCLOS Part XV should be noted. According to Article 287(3), when a state party of a dispute is not covered by a declaration in force, that state would be deemed to have accepted the arbitration for the proceedings. Moreover, Article 287(5) regulates that when the disputing parties have not accepted the same forum, the dispute can be submitted only to arbitration under Annex VII unless otherwise agreed.<sup>216</sup> The point is that, technically, an arbitral tribunal constituted following Annex VII is an *ad hoc* tribunal.

Within the judicial practice of a permanent international court, repeated reference to previous decisions consequently results in a continuous jurisprudence in its judicial practice.<sup>217</sup> Unlike a pre-established permanent international court, an *ad hoc* tribunal is constituted especially for resolving a single individual case.<sup>218</sup> Hence, it is normally construed that arbitrators of *ad hoc* tribunals do not have the same long-term perspectives as judges of permanent international courts, and they will consider the resolution of the dispute brought before them as their sole task.<sup>219</sup> Under this premise, that the decisions of arbitral tribunals to become a link in the chain of continuous jurisprudence can hardly be expected.<sup>220</sup>

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<sup>215</sup> Carl-August Fleischhauer, 'The Relationship Between the International Court of Justice and the Newly Created International Tribunal for the Law of the Sea in Hamburg' (1997) Max Planck Yearbook of United Nations Law 327, p. 328.

<sup>216</sup> Originally, it was designed to give jurisdiction to the forum chosen by the defendant, but criticism was raised as this would encourage states to manipulate the situation and to become the defendant in a case to ensure the compulsory proceedings before the forums that they prefer (See; Adede, *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea: A Drafting History and A Commentary*, p. 53). Therefore, from the RSNT, arbitration was chosen as a proper solution when the choices of the parties were different or either party had not selected one of the forums (See; Nordquist and others, *United Nations Convention on the Law of the Sea 1982: A Commentary*, paras. XV.5 and XV.8). Setting arbitration as a secondary (default) choice was the most satisfactory alternative for states, including those that had not chosen arbitration in the first place (See; *ibid*, paras. 287.4-287.5).

<sup>217</sup> Lowe and Tzanakopoulos, 'The Development of the Law of the Sea by the International Court of Justice', p. 186.

<sup>218</sup> Lauterpacht, 'Principles of Procedure in International Litigation', pp. 489-493; Charles H. Brower, 'Arbitration' (2007) Max Planck Encyclopedias of International Law, para. 4.

<sup>219</sup> Brower, 'Arbitration', para. 5.

<sup>220</sup> Kolb and Perry, *The International Court of Justice*, pp. 49-50. See also, ICJ, *Handbook*, p. 14. Here, the ICJ says that one of the advancements achieved by the establishment of the PCIJ compared to arbitral

To date, a total of 15 compulsory arbitral proceedings following Annex VII of UNCLOS have been initiated,<sup>221</sup> while the rest of the compulsory cases have been addressed by ITLOS. This indicates that the rules of Part XV have been determined by 15 different arbitral tribunals and ITLOS. Then, what was the outcome of the multiple forums' conduct of their judicial function? Has the jurisprudence on Part XV been shaped inconsistently because of the different interpretations given by multiple forums, like the doubts and concerns mentioned above? The answer to this question can be found by examining the past determinations of Part XV tribunals on diverse matters concerning Part XV, which will be analysed in the following chapters.

## 2.4. Concluding Remarks

Part XV contains procedural law, which regulates the compulsory dispute settlement system of UNCLOS. Therefore, the development of Part XV would have been more like a self-regulating process by the relevant judicial decisions where states parties could have hardly participated. However, unlike the development of a certain procedural law that only applies to a single judicial body, judicial determinations on Part XV must have been reviewed and examined by the different Part XV tribunals of subsequent cases, due to its multiplicity of forums. Thus, what characterises the judicial law-making of Part XV is the self-regulation of procedural law by each of the different judicial bodies. Whether the relevant jurisprudence has been established in a convergent manner as a whole or not will be one of the main points to be examined in the following chapters within Part II of this thesis.

The range of the issues to be covered by the subsequent chapters is smaller than the entire scope of Part XV rules, as the selection was made based on two criteria. First, the main attention will be drawn to the judicial findings directly related to the rights and obligations of states parties concerning the compulsory procedures of UNCLOS Part XV. The essence

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tribunals was securing the competence to develop a constant practice and maintain continuity in its decisions, thereby contributing to both legal certainty and the development of international law.

<sup>221</sup> This figure does not include the cases that had originally been brought before the arbitral tribunals under Annex VII but were transmitted to ITLOS upon states parties' Special Agreements (As of August 2022).

of judicial law-making is the creation or shift of others' normative expectations on how they should act accordingly by the international adjudication. But, among the procedural issues associated with the Part XV system, many other norms have little relevance to the direct rights and obligations of the parties. In such a case, it would be hard to expect that the interpretations given by Part XV tribunals would have a significant impact on the creation or the shift of states parties' normative expectations concerning Part XV rules. Thus, to more clearly examine the law-making effect that Part XV tribunals may have, other issues less relevant to states parties' direct rights and obligations under Part XV procedures are not addressed.

The second criterion is whether the relevant jurisprudence has been sufficiently established by different Part XV tribunals through multiple cases. As has been mentioned above, the interpretation consistently applied by each Part XV tribunal and the jurisprudence established in a convergent manner may prove their judicial law-making effects. Since the purpose of this thesis is to check and assess the judicial contribution to the development of the Part XV system, it is necessary to study different judicial bodies' jurisprudence on its rules. Moreover, to examine the recent criticisms raised over the so-called jurisdictional expansion or the inconsistency problems introduced in Chapter 1, comparative studies between case-law must be conducted. For this reason, the issues of which the relevant jurisprudence has not yet been sufficiently accumulated, notwithstanding their importance, are not involved in the chapters below where the various judge-made rules of Part XV will be checked.

However, there were a few exceptions to the selection made based on these criteria. For example, the matters concerning the prompt release procedures within Article 292 are not addressed in Part II of this thesis, although they directly concern the rights and obligations of states parties. Since this procedure has been established as a regime separate and independent from the Part XV system,<sup>222</sup> it is difficult to say that it is a subject matter that fulfils the purpose of this thesis, which is to research the judicial law-making of the Part XV system. Accordingly, the judicial contributions to the development of the prompt release procedures are excluded from the following chapters.

Conversely, some issues are addressed in the subsequent chapters even though they have been addressed in only a small number of cases or by a single judicial forum for structural

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<sup>222</sup> David H. Anderson, 'Prompt Release of Vessels and Crews' (2008) Max Planck Encyclopedias of International Law, para. 4.

reasons. That is because those are the matters that may be dealt with by other Part XV tribunals in the future or may have relevance to other major issues in a broader context. For instance, the effect of the declaration made pursuant to Article 287 upon certain conditions has been determined, until now, only by ITLOS.<sup>223</sup> But, the possibility cannot be ignored that other tribunals may also address the same issue in future cases and that the decision made by ITLOS could affect other forums. Similarly, the question concerning the legal effect of a *contrario* reading of Article 298(1)(a)(i) was only determined by the arbitral tribunal of the *Chagos Marine Protected Area* case. Nevertheless, it has considerable relevance to the broader issue of the exercise of compulsory jurisdiction over matters beyond the four-corners of UNCLOS.<sup>224</sup> Hence, the matters that at first glance do not seem to meet the second criterion above are also included in Part II of this thesis.

Thus, the four chapters of Part II deal with issues related to the operation of the compulsory dispute settlement system of UNCLOS. And each of them analyses the judicial findings of Part XV tribunals regarding the procedural preconditions, the exercise of compulsory jurisdiction, the exceptions and limitations to the compulsory proceedings, and the exercise of jurisdiction beyond the Convention, respectively. In these chapters, the relevant rules provided in UNCLOS Part XV are presented first to see what was given in the concluded provisions of the Convention. Then, the tribunals' answers to questions that could not be answered and resolved solely by the given provisions are examined. Such judicial findings will show the judge-made rules of Part XV in various aspects.

The jurisprudence of international courts applying the law has itself a normative function as it results in an enrichment of the law, and thus generates a law-making effect.<sup>225</sup> Igor V. Karaman also stated that the most feasible way to know how the compulsory mechanism of Part XV works and functions is by examining the actual cases that proceeded following Part XV.<sup>226</sup> Likewise, the case analysis below will show how the compulsory dispute settlement system under UNCLOS has been developed and enriched in various respects by different Part XV tribunals.

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<sup>223</sup> Concerning this issue and the relevant judicial findings of ITLOS, please refer to Section 4.2.2 of Chapter 4.

<sup>224</sup> This point will be addressed in detail in Section 6.4.2 of Chapter 6.

<sup>225</sup> Kolb and Perry, *The International Court of Justice*, p. 1141.

<sup>226</sup> Karaman, *Dispute Resolution in the Law of the Sea*, p 17.

## **Part II. Judge-Made Rules of UNCLOS Part XV**

### 3. Judicial Law-Making of Preconditions to the Compulsory Procedures

#### 3.1. Given Procedural Preconditions in UNCLOS Part XV

##### 3.1.1. Section 1 of Part XV in General

Section 1 of Part XV constitutes the General Provisions for both the voluntary peaceful settlement of disputes and the compulsory jurisdiction system of the Convention. A treaty containing *compromissory clauses* usually sets the procedural preconditions to invoking the regulated dispute settlement procedures.<sup>227</sup> Section 1 of Part XV regulates such procedural preconditions which can be generally found in treaties containing *compromissory clauses*.

Section 1 protects the rights of states parties to choose freely their means for the peaceful settlement of a dispute.<sup>228</sup> Therefore, the overall objective of this Section is to ensure the settlement of disputes by peaceful means but not necessarily by the mechanism provided by Part XV of UNCLOS.<sup>229</sup> It was based on the assumption that those other means chosen by the parties to the dispute would also result in a settlement of the dispute.<sup>230</sup>

For instance, Article 280 guarantees that the parties to the dispute may agree to settle their dispute by any peaceful means other than provided in Part XV. This provision underlines that states parties are complete masters of the procedures to be used to settle their dispute.<sup>231</sup> Likewise, the overall function of other provisions in Section 1 is not different from that of Article 280. Given states' general reluctance to take recourse to international adjudication for settling their disputes,<sup>232</sup> it can be said that states parties' free will to resolve their disputes by their own means was well reflected in Section 1 of Part XV.<sup>233</sup> In

<sup>227</sup> Asier Garrido-Muñoz, 'Dispute' (2018) Max Planck Encyclopedias of International Law, para. 30.

<sup>228</sup> *Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan, Award on Jurisdiction and Admissibility*, 4 August 2000, *Separate Opinion of Justice Sir Kenneth Keith*, para. 3.

<sup>229</sup> *MOX Plant (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*, p.95, *Separate Opinion of Vice-President Nelson*, para. 2.

<sup>230</sup> Nordquist and others, *United Nations Convention on the Law of the Sea 1982: A Commentary*, para. 281.1.

<sup>231</sup> *Ibid*, para. 280.1.

<sup>232</sup> Giustini, 'Compulsory Adjudication in International Law: the Past, the Present, and Prospects for the Future', p. 214.

<sup>233</sup> Merrills, *International Dispute Settlement*, p. 178.



this respect, Louis B. Sohn appraises that Section 1 of Part XV shows a ‘user(states)-friendly’ characteristic of the dispute settlement system of UNCLOS.<sup>234</sup>

Section 1 of UNCLOS Part XV is composed of a total of seven provisions (from Articles 279 to 285). Article 279 obliges states parties to settle their disputes concerning interpretation and application of the Convention peacefully by taking the means as indicated in Article 33(1) of the Charter of the UN.<sup>235</sup> Moreover, Article 280 allows the parties to the dispute to depart from the provisions of Part XV and agree to use any alternative peaceful means to settle the dispute. Article 284 provides voluntary conciliation as an option to which states can resort to resolve a dispute concerning interpretation or application of the Convention, either through Annex V of UNCLOS or other conciliation procedures. Article 285 clarifies that the General Provisions in Section 1 apply to the disputes under Part XI,<sup>236</sup> even *mutatis mutandis* when an entity other than a state is the party to the dispute.

However, the key provisions of the preconditions in Section 1 are Articles 281, 282 and 283. Each of these provisions addresses the rights and obligations of states parties concerning the means for settling their dispute.

### 3.1.2. Main Precondition Clauses

Article 281 is a provision that, along with Article 282, permits settling a dispute outside the mechanism under Part XV subject to specific conditions.<sup>237</sup>

#### *Article 281*

#### *Procedure where no settlement has been reached by the parties*

*1. If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no*

<sup>234</sup> Sohn, 'Settlement of Law of the Sea Disputes', p. 206.

<sup>235</sup> Article 33(1) of the Charter of the UN stipulates “The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.”

<sup>236</sup> Part XI regulates the rules concerning the Area, which indicates the sea-bed and ocean floor and subsoil thereof beyond the limits of national jurisdiction (See; Article 1(1) of UNCLOS).

<sup>237</sup> Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, p. 34.

*settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.*

*2. If the parties have also agreed on a time-limit, paragraph 1 applies only upon the expiration of that time-limit.*

Article 281(1) says that if the parties to the dispute have agreed to seek settlement of the dispute by means of their own choice, the means will be applied instead of the procedures in Part XV. Accordingly, the dispute may only be submitted to the compulsory procedures in Section 2 only when two conditions are met. First, no settlement has been reached between the parties by recourse to such an agreed means. Here, the parties are not required to pursue the means of their choice indefinitely; whenever one of the parties to the dispute considers that the agreed means is no longer likely to lead to a settlement, then that party may resort to Part XV procedures for resolving the dispute.<sup>238</sup> Second, the Part XV system can be invoked when the agreement between the parties does not exclude ‘any further procedure’.

Article 282 also sets the rules allowing states parties to resort to other procedures to settle the UNCLOS dispute. During the negotiation process of UNCLOS Part XV, the prevailing view was that states would prefer to settle their dispute by recourse to the previously agreed measures between them, rather than giving priority to the compulsory procedure.<sup>239</sup> From this context, Article 282 was included as one of the preconditions to the compulsory proceedings of Section 2;

#### *Article 282*

#### *Obligations under general, regional or bilateral agreements*

*If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree.*

Article 282 may apply when there has been a standing bilateral or multilateral dispute

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<sup>238</sup> Nordquist and others, *United Nations Convention on the Law of the Sea 1982: A Commentary*, para. 281.3. This point has been continuously affirmed by the different Part XV tribunals – See; *Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan, Award on Jurisdiction and Admissibility*, 4 August 2000, para. 55; *South China Sea Arbitration between Philippines and China, Award on Jurisdiction and Admissibility*, 29 October 2015, para. 220.

<sup>239</sup> Nordquist and others, *United Nations Convention on the Law of the Sea 1982: A Commentary*, para. 282.1.

settlement agreement between the parties, whereas Article 281 is intended primarily to cover an *ad hoc* agreement to settle the particular dispute.<sup>240</sup> The wording of this article is quite clear. If the parties to the dispute have already agreed to solve their dispute by means that allows a unilateral initiation of a procedure entailing binding decisions, that procedure must be taken instead of the proceedings provided in part XV. Therefore, if that other agreement only provides non-binding measures such as conciliation or mediation, Article 282 cannot be invoked.<sup>241</sup> Moreover, this article can be applied to the statements between the parties if they entail a legally binding nature.<sup>242</sup>

A typical example of the ‘agreement’ within the meaning of Article 282 is the Optional Clause of the Statute of the ICJ.<sup>243</sup> According to Article 36(2) of the Statute, states can at any time declare their acceptance of the jurisdiction of the ICJ as *ipso facto* compulsory concerning any other states accepting the same obligation.<sup>244</sup> Although the declaration to accept the jurisdiction of the ICJ as obligatory does not constitute a ‘general, regional or bilateral agreement’, the term ‘otherwise’ was meant to include the acceptance of the Optional Clause.<sup>245</sup> Therefore, Article 282 can be triggered if both parties to the dispute have already accepted the compulsory jurisdiction of the ICJ following Article 36(2) of the Statute.<sup>246</sup>

Lastly, Article 283 obliges the states parties to exchange their views expeditiously concerning the means for settling their dispute peacefully. The main function of this article is to prevent the automatic progression from the non-compulsory procedures to the compulsory proceedings.<sup>247</sup>

### *Article 283 Obligation to exchange views*

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<sup>240</sup> *Arbitration between Barbados and Trinidad and Tobago, Award, 11 April 2006*, para. 200.

<sup>241</sup> Nordquist and others, *United Nations Convention on the Law of the Sea 1982: A Commentary*, para. 282.4.

<sup>242</sup> This has been affirmed by the tribunal of *South China Sea* case. While determining the applicability of Article 282 in this case, the tribunal examined bilateral statements between the Philippines and China. The tribunal’s conclusion was that since those statements do not constitute the legally binding agreements, Article 282 cannot bar the tribunal’s jurisdiction (*South China Sea Arbitration between Philippines and China, Award on Jurisdiction and Admissibility, 29 October 2015*, paras. 290-302). From this finding, it can be seen that the form of an agreement is not decisive.

<sup>243</sup> Regarding the relationship between Article 282 of UNCLOS and the Optional Clause within Article 36(2) of the Statute, see; *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Preliminary Objections, Judgment, I.C.J. Reports 2017, p. 3*, paras. 115-133.

<sup>244</sup> See; Fitzmaurice, ‘International Court of Justice, Optional Clause’.

<sup>245</sup> Nordquist and others, *United Nations Convention on the Law of the Sea 1982: A Commentary*, para. 282.3.

<sup>246</sup> Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, p. 44.

<sup>247</sup> Adede, ‘The Basic Structure of the Disputes Settlement Part of the Law of the Sea Convention’, p. 129.

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

*2. The parties shall also proceed expeditiously to an exchange of views where a procedure for the settlement of such a dispute has been terminated without a settlement or where a settlement has been reached and the circumstances require consultation regarding the manner of implementing the settlement.*

All three provisions above do not just protect the states parties' rights to resolve a dispute by their free will and choice but also set prerequisites that must be satisfied before unilaterally invoking the compulsory procedures. Nevertheless, like other provisions of UNCLOS, many ambiguities can be found as to how to satisfy those preconditions or implement the regulated obligations in the contexts of real disputes. For this reason, the questions concerning the interpretation and application of those provisions were frequently raised by the parties to disputes during past compulsory proceedings. What Part XV tribunals clarified did not simply uncover their meanings, but rather went beyond the given procedural preconditions in UNCLOS.

Accordingly, this chapter will examine Part XV tribunals' contributions to the clarification of the three main provisions above to assess judge-made preconditions to the compulsory measures of UNCLOS Part XV. This will include the clarified requirements being an 'agreement' within the meaning of Article 281 (Section 3.2) and the need for express exclusion of any further procedure to opt-out from the Part XV measures (Section 3.3). In addition, how Part XV tribunals have approached the issue of potential overlapping jurisdiction between Part XV and other procedures will be looked into (Section 3.4). Lastly, the obligation to exchange views within Article 283 in the jurisprudence of Part XV tribunals will be analysed (Section 3.5).

### 3.2. What is Required to be an 'Agreement' in Article 281?

As introduced above, for states parties to invoke the right to opt-out from the compulsory procedures of Part XV regulated in Article 281, there must be an 'agreement' within the meaning of this article. Here, one question arises – What is an 'agreement' in this context?

In other words, when certain states parties intend to make such an agreement to exclude the application of the compulsory procedures provided in Part XV between them, what agreement should be made? The conditions to be an agreement in Article 281 have been shaped and defined throughout Part XV tribunals' jurisprudence.

### 3.2.1. Examples of 'Agreement' in Early Judicial Proceedings

In the early cases of the compulsory proceedings under UNCLOS, no controversy occurred concerning the term 'agreement' within the meaning of Article 281(1). Therefore, Part XV judicial bodies had no chance to directly render their thoughts on the forms and nature of the required agreement. Rather, the tribunals simply checked each of the relevant agreements in the context of examining other requirements in Section 1 of Part XV.

The first arbitration case under Annex VII of UNCLOS, the *Southern Bluefin Tuna* case (hereinafter 'SBT' case) was the same. In this arbitration between Australia / New Zealand and Japan, the 'agreement' referred to was Article 16 of the Convention for the Conservation of Southern Bluefin Tuna (hereinafter 'CCSBT'). The rights and obligations contained in the CCSBT were the main subject matter of this case in connection with UNCLOS. In CCSBT, there was a dispute settlement provision – Article 16. The respondent of this case, Japan, referred to Article 16 of the CCSBT as an agreement for seeking settlement of the dispute within the meaning of Article 281.<sup>248</sup> Australia and New Zealand mentioned Article 16 of the CCSBT while claiming the inapplicability of Article 281.<sup>249</sup> In the proceedings for jurisdiction and admissibility, the arbitral tribunal also regarded Article 16 of the CCSBT as relevant to the agreement seeking the means for resolving a dispute under Article 281 of UNCLOS.<sup>250</sup> Thus, in this case, the recognized 'agreement' within the meaning of Article 281(1) was Article 16 of the CCSBT, a written treaty concluded between the parties in 1993.

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<sup>248</sup> *Southern Bluefin Tuna Case, Memorial on Jurisdiction of Japan, 11 February 2000*, para. 155.

<sup>249</sup> *Southern Bluefin Tuna Case, Reply on Jurisdiction of Australia and New Zealand, 31 March 2000*, paras. 74-89, 149-150.

<sup>250</sup> See; *Southern Bluefin Tuna Case (New Zealand v. Japan; Australia v. Japan), Request for Provisional Measures, Order, ITLOS, 27 August 1999*, para. 55. On the other hand, in the proceedings for prescribing provisional measures, the CCSBT was referred to by ITLOS in examining the applicability of Article 282 of UNCLOS (see; *Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan, Award on Jurisdiction and Admissibility, 4 August 2000*, para. 54).

However, not only written forms of agreement have been recognised as agreements under Article 281. In determining the *prima facie* jurisdiction for the provisional measures in the *Land Reclamation by Singapore in and around the Straits of Johor* case (hereinafter '*Land Reclamation case*'), ITLOS considered that Article 281 could be applied to the invitation of the respondent (Singapore) to resolve a dispute and the subsequent acceptance and participation in the negotiation by the applicant (Malaysia).<sup>251</sup> This shows that a series of states' actions like inviting and accepting to resolve a dispute through negotiation can be also regarded as agreements by states parties to seek settlement by the means of their choice.

This was further followed in the *Barbados v. Trinidad and Tobago* case.<sup>252</sup> In this arbitration, the tribunal acknowledged that for a reasonable period of time, there had been several discussions and rounds of formal negotiations between the two parties, but no agreement had been reached during that period.<sup>253</sup> From these historic records, the tribunal found that the parties have agreed in practice, although not through any formal agreement, to seek to settle their dispute through negotiations. The tribunal referred to this practice as a *de facto* agreement. Thus, what the tribunal determined was that even a *de facto* agreement which can be inferred from the parties' practice as shown in this case can correspond to an agreement within the meaning of Article 281.<sup>254</sup>

As mentioned earlier, the meaning of 'agreement' in Article 281 was not contested between the disputing parties during these early proceedings. This, in turn, resulted in a lack of chances in the early proceedings for Part XV tribunals to address directly the forms or nature required to be an agreement under this article. However, in later proceedings, the requirements to be an agreement within the meaning of Article 281 have been more clearly and directly rendered by Part XV tribunals. Those recent findings were not contradictory to the points which can be inferred from the earlier judicial decisions mentioned above. The

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<sup>251</sup> *Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003, p. 10, paras. 53-57.* In fact, the acceptance of the invitation by the respondent occurred after the initiation of the compulsory proceedings. Nonetheless, Article 281 does not require that such an agreement must be made before the initiation of the compulsory proceedings under Section 2 of Part XV. Article 280 rather regulates that states parties may agree "at any time" to settle a dispute by any other peaceful means of their own choice. Thus, it can be assumed that Malaysia's acceptance of Singapore's invitation after the commencement of the compulsory procedures was regarded as in compliance with Article 281 by ITLOS in that respect.

<sup>252</sup> Barbara Kwiatkowska, 'The 2006 Barbados/Trinidad and Tobago Award: A Landmark in Compulsory Jurisdiction and Equitable Maritime Boundary Delimitation' (2007) 22 *The International Journal of Marine and Coastal Law* 7, pp. 21-22.

<sup>253</sup> *Arbitration between Barbados and Trinidad and Tobago, Award, 11 April 2006, paras. 193-195.*

<sup>254</sup> *Ibid*, para. 200.

first requirement recognised was that such an agreement must entail a legally binding nature.

### 3.2.2. An ‘Agreement’ of a Legally Binding Nature

The need for a legally binding nature was firstly acknowledged in the *South China Sea* arbitration initiated by the Philippines against China. One of the contested issues between the parties to the dispute was whether there had been agreements between them within the meaning of this article. The main controversy concerned one document called ‘Declaration on the Conduct of Parties in the South China Sea’ (hereinafter ‘DOC’) which had been signed by both the Philippines and China along with other ASEAN<sup>255</sup> states in 2002. The contents of paragraph 4 of this document concern the settlement of the dispute and this paragraph was examined during the proceedings in the context of interpreting and applying Article 281.

Interestingly, there had been no different opinions between the parties about the required nature of the term ‘agreement’ in Article 281. Instead, the contrasting view was on the legal nature of paragraph 4 of the DOC. The Philippines argued that DOC is irrelevant to the proceedings since the DOC is not a legally binding instrument within the meaning of Article 281,<sup>256</sup> whereas, China argued that the text in paragraph 4 of the DOC entails a binding nature on both parties.<sup>257</sup> In examining the applicability of Article 281 to paragraph 4 of the DOC, the tribunal clarified that the term ‘agreement’ of this article means a legally binding agreement and this nature is necessary for invoking the rights regulated in Article 281.<sup>258</sup> In this context, after reviewing the contents of the DOC and the parties’ subsequent conducts, the tribunal stated that the DOC was not intended to be a legally binding document but rather an aspirational political document.<sup>259</sup>

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<sup>255</sup> Association of Southeast Asian Nations, established on 8 August 1967, <<https://asean.org/>>; last visited – 15 August 2022.

<sup>256</sup> *South China Sea Arbitration, Memorial of Philippines*, 30 March 2014, paras. 7.49-7.52.

<sup>257</sup> *South China Sea Arbitration, Position Paper of China on the Matter of Jurisdiction*, 7 December 2014, para. 38, <[https://www.fmprc.gov.cn/mfa\\_eng/wjdt\\_665385/2649\\_665393/201412/t20141207\\_679387.html](https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/2649_665393/201412/t20141207_679387.html)>; last visited – 15 August 2022.

<sup>258</sup> *South China Sea Arbitration between Philippines and China, Award on Jurisdiction and Admissibility*, 29 October 2015, para. 212.

<sup>259</sup> *Ibid.*, para. 217.

The tribunal's view on the need for a legally binding agreement for applying Article 281 can also be seen in its examination of the Treaty of Amity and Co-operation in Southeast Asia, of which both the Philippines and China were parties. The Treaty of Amity was examined under the premise that it could be relevant to the tribunal's jurisdiction by virtue under Article 281. Although Articles 13-15 of the Treaty of Amity regulate the means for settling a dispute between the parties, Article 16 says that those provisions shall not apply to a dispute unless all the parties to the dispute agree to their application to that dispute. From this point, the tribunal determined that while the Treaty of Amity itself is a legally binding agreement, Articles 13-15 are not legally binding since they only become binding if there is an additional specific agreement between the parties according to Article 16. As there had been no such agreement between the Philippines and China, the tribunal concluded that the dispute settling provisions of the Treaty of Amity cannot constitute an agreement within the meaning of Article 281.<sup>260</sup>

Some authors criticised the tribunal's determination, arguing that the tribunal failed to give a further explanation about how it reached that determination.<sup>261</sup> This view stems from the thought that the tribunal too simply examined whether the DOC or others constitute binding agreements within the meaning of the article without mentioning the reason for this conclusion. On the one hand, this criticism is understandable as both the text of Article 281 and the commentary are silent on the criteria for determining the existence of such agreements. Still, the tribunal's finding on this matter was, at least, not unprecedented or surprising. As has been checked in the early judicial decisions above, none of the early cases' examples of agreement regarded as relevant to Article 281 indicated the possibility that a non-binding agreement can be accepted.

Moreover, the tribunal's finding of the need for a legally binding nature was not inconsistent with the early judicial decisions of other Part XV tribunals where even *de facto* agreements were accepted. In both *Land Reclamation* case and *Barbados v. Trinidad and Tobago* case, the acknowledged examples of an agreement within the meaning of Article 281 were not the formal agreements but rather the ones inferred from statements or practices. However, those findings only concerned the form of agreements, so it was not

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<sup>260</sup> *Ibid.*, paras. 265-266.

<sup>261</sup> See; Gao, 'The Obligation to Negotiate in the Philippines v. China Case: A Critique of the Award on Jurisdiction', pp. 276-277.



meant that the non-binding agreement was acceptable.<sup>262</sup> In the *South China Sea* case, the tribunal, indeed, examined the bilateral statements between the parties to check the applicability of Article 281 but concluded that they were not acceptable in this case. That was not due to their forms as statements but their lack of legally binding nature confirmed by looking at the contents of those statements.<sup>263</sup> This finding rather emphasised that the decisive factor is the legal bindingness, not the specific form of an agreement.

Furthermore, the determination given in examining the Treaty of Amity within the *South China Sea* case has provided more detailed criteria compared to the *SBT* case award. In the *SBT* case, Article 16 of the CCSBT was simply regarded as the agreement under Article 281. However, Article 16(2) of the CCSBT said that any unresolved dispute shall be referred to the ICJ or to arbitration, with the consent of all parties to the dispute. Although this provision regulates the alternative means (ICJ or arbitration) for resolving a dispute, it would only become binding when all the parties to the dispute consent to such a referral. Hence, if applying the current criteria elaborated by the *South China Sea* arbitration above, Article 16 of the CCSBT could not be regarded as an agreement within the meaning of Article 281.<sup>264</sup>

In summary, the clarified requirement to be an agreement within the meaning of Article 281 in the *South China Sea* case arbitral award was that such an agreement should entail a legally binding nature, regardless of its form. Later, this requirement was reaffirmed by the conciliation commission constituted under Annex V of UNCLOS in the case between Timor-Leste and Australia. Although the conciliation commission under Annex V cannot be referred to as the composing forums of Part XV tribunals, the party seeking access to the compulsory conciliation procedures must also first meet the requirements of Section 1 of Part XV. Therefore, the applicability of Article 281 was also examined by the commission in this case in determining its competence over the case. After reviewing other Part XV tribunals' past determinations where only legally binding agreements were

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<sup>262</sup> This view was upheld in the recent compulsory conciliation case between Timor-Leste and Australia; *Conciliation between Timor-Leste and Australia, Decision on Australia's Objections to Competence*, 19 September 2016, para. 55.

<sup>263</sup> *South China Sea Arbitration between Philippines and China, Award on Jurisdiction and Admissibility*, 29 October 2015, paras. 241-244.

<sup>264</sup> Judge Kenneth Keith of the *SBT* case also pointed out this as he mentioned "Like article 280 (a savings provision), article 283, article 284 and in particular article 16(1), do not of themselves amount to an "agree[ment] to seek settlement of the dispute by a peaceful means of their own choice". Paragraph (2) of article 16 is also not an agreement on a method. Reference to the International Court or to arbitration must be separately agreed to in respect of the particular dispute, ..." (See; *Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan, Award on Jurisdiction and Admissibility*, 4 August 2000, *Separate Opinion of Justice Sir Kenneth Keith*, para. 8).

accepted, the conciliation commission concluded that Article 281 requires a legally binding agreement and a non-binding agreement cannot be permitted.<sup>265</sup> This determination was in line with the interpretation of Article 281 given in the *South China Sea* case.

### 3.2.3. An ‘Agreement’ Seeking for the Means to Resolve a Dispute

In addition to the requirement of a legally binding nature, the recent judicial decision in the *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* (hereinafter ‘*Coastal State Rights* case’) between Ukraine and Russia clarified another constituent in agreements regulated in Article 281. Let us first recall the text of Article 281(1). Here, the ‘agreement’ within this article should be the one that ‘seek settlement of the dispute by a peaceful means of their own choice’. In the *Coastal State Rights* case, what had been contested between the parties to the dispute was whether this phrase requires that an ‘agreement’ must specify any alternative means for resolving their dispute instead of Part XV procedures.

As one of the grounds for its objection to the arbitral procedures, Russia claimed that two relevant treaties were corresponding to Article 281 – Article 5 of the State Border Treaty (hereinafter ‘Border Treaty’) and Article 1 of the Azov/Kerch Cooperation Treaty (hereinafter ‘Cooperation Treaty’). Article 5 of the Border Treaty says “Settlement of questions relating to the adjacent sea areas shall be effected by agreement between the Contracting Parties in accordance with international law.” Article 1 of the Cooperation Treaty says “Settlement of questions relating to the Kerch Strait area shall be effected by agreement between the Parties.”

Russia’s claim was based on its basic perception that those provisions may cover any disputes concerning maritime activities in the Sea of Azov and the Kerch Strait, including any applicable UNCLOS disputes.<sup>266</sup> From this respect, Russia said that when a dispute is to be resolved by agreement, it is the natural consequence that the states should engage in

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<sup>265</sup> *Conciliation between Timor-Leste and Australia, Decision on Australia's Objections to Competence, 19 September 2016*, paras. 55-57. In examining the arbitral award given in the *SBT* case with regard to Article 281 of UNCLOS and the CCSBT, the commission simply emphasised that the CCSBT, which was “unequivocally a legally binding agreement”, had been accepted by the arbitral tribunal.

<sup>266</sup> *Coastal State Rights Arbitration between Ukraine and Russia, Preliminary Objections of Russia, 19 May 2018*, para. 225.

negotiation to resolve that dispute.<sup>267</sup> As the agreement should be the result of a certain process, Russia argued that it requires the parties' engagement in negotiation to reach that agreement.<sup>268</sup> Moreover, Russia claimed Article 281 contains no requirement of specificity of alternate means for settling a dispute.<sup>269</sup> Even if the necessity of specified alternate procedures applies here, Russia said that those treaties indicate that negotiation should be used.<sup>270</sup>

In contrast, Ukraine said that those two provisions are not dispute resolution provisions but simply express the parties' intent to reach a future agreement regarding the relevant issues.<sup>271</sup> Rather, Ukraine argued that it is common for states to memorialise their promise to negotiate in the future for the completion of other treaties, as can be found in the provisions above.<sup>272</sup> Ukraine claimed that both Article 5 of the Border Treaty and Article 1 of the Cooperation Treaty cannot correspond to the meaning of Article 281 as there are no alternate procedures specified that would apply in place of Part XV, which should be prescribed.<sup>273</sup>

This issue had never been raised between parties in past proceedings before the *Coastal State Rights* case. However, when we compare the two treaties at issue in this case with the previous examples argued as corresponding to agreements in Article 281, a clear difference can be found. For example, Article 16 of the CCSBT, which was referred to in the *SBT* case, says in its paragraph 2 that the dispute shall be referred to the ICJ or to arbitration. Though this provision would become a legally binding agreement under Article 281 of UNCLOS only if all the parties give their consent, it nonetheless enlisted the alternative means that states parties can take.

Although it was not admitted as an agreement within the meaning of Article 281, even paragraph 4 of the DOC mentions that the parties will undertake to resolve their dispute through friendly consultations and negotiation, without resorting to the threat of force. Here as well, specific measures—consultations and negotiations—were expressed. Thus, we can see that those examples previously raised as relevant to Article 281 commonly contain

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<sup>267</sup> *Ibid*, para. 229.

<sup>268</sup> *Coastal State Rights Arbitration between Ukraine and Russia, Reply of Russia, 28 January 2019*, para. 168.

<sup>269</sup> *Ibid*, para. 174.

<sup>270</sup> *Ibid*, para. 175.

<sup>271</sup> *Coastal State Rights Arbitration between Ukraine and Russia, Written Observations and Submissions of Ukraine on Jurisdiction, 27 November 2018*, paras. 148-150.

<sup>272</sup> *Ibid*, para. 154.

<sup>273</sup> *Ibid*, paras. 155-156.

the means which can be taken alternatively.

The approach of the tribunal of the *Coastal State Rights* case was not different from the past examples. The tribunal noted that generally, the notion of ‘agreement’ indicates the possible outcomes of taking any means of dispute settlement. Therefore, when it comes to the dispute settlement provisions, clarification of the method or means of dispute settlement, rather than the outcomes, would be expected.<sup>274</sup> The tribunal considered that merely mentioning the agreement in general or concluding the treaty itself cannot be regarded as a means of dispute settlement. Thus, the tribunal determined that neither Article 5 of the Border Treaty nor Article 1 of the Cooperation Treaty constitutes a dispute settlement clause, which is required for it to be an agreement within the meaning of Article 281 of the Convention.<sup>275</sup>

As a result of the tribunal’s findings in the *Coastal State Rights* case, it became necessary that the dispute settlement clause should mention the specified method or means for resolving the dispute to invoke the opt-out rights of Article 281. Thus, from now on, those who intend to resolve their dispute by means of their choice under Article 281 should bear in mind that a legally binding agreement containing alternative means for settling the dispute is required. This shows that, by the judicial decision of this case, the constituent for being an ‘agreement’ in Article 281 has been clarified.

#### 3.2.4. ‘Agreement’ as Defined by the Tribunals: A General Review

Article 281 is one of the key provisions for the functioning of the entire Part XV system as this provision contains a ground for states parties to have recourse to agreed means for settling UNCLOS disputes other than Part XV procedures. Among many other conditions that should be met to have its effect, the most fundamental is the existence of an ‘agreement’ within the meaning of Article 281. However, since the phrase ‘agreed to’ in Article 281 is too broad and general, many assumptions were made, such as whether this term only indicates the legally binding nature or whether even a political commitment or undertaking hardly considered as entailing the binding feature is allowed. Whether a

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<sup>274</sup> *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait, Award Concerning the Preliminary Objections of Russia, 21 February 2020*, para. 482.

<sup>275</sup> *Ibid.*, paras. 483-489.

specific form of agreement is required was also an issue.

Instead, what can be an ‘agreement’ within the meaning of Article 281 has been defined by Part XV tribunals. According to the jurisprudence of the tribunals, first, an agreement of Article 281 must entail a legally binding nature. Second, no specific form of agreement is required, such as a treaty in written form. Lastly, the parties’ agreement must specify the alternative means for resolving the dispute that will be applied in place of Part XV procedures. Considering that both the text of this article and the Commentary of the Convention (hereinafter ‘Virginia Commentary’)<sup>276</sup> keep silent on this issue, these findings show the judge-made meaning of an ‘agreement’ under Article 281. Hence, now, the tribunals’ jurisprudence can provide guidance on how to make such an agreement under Article 281 for states who intend to exclude the application of Part XV procedures. For states parties that have already made such agreements with other parties, the tribunals’ interpretation would make them re-consider and re-examine the existing agreements.

The effect of Part XV tribunals’ understanding of an ‘agreement’ within the meaning of Article 281 is, in principle, confined to the scope of UNCLOS and the functioning of the Part XV system only. Since each treaty exists independently and separately, even the identical provision of a different convention should not be construed as having the same meaning. Nevertheless, we cannot completely rule out the possibility that the jurisprudence on the meaning of ‘agreement’ under Article 281 may affect the understanding of other relevant rules with a similar function. That is because, as has been mentioned earlier, judicial decisions are frequently regarded as authoritative and persuasive pronouncements on a certain legal point at issue.<sup>277</sup>

For instance, the requirement of a legally binding agreement under Article 281 of UNCLOS may affect the interpretation of Article III(1) of the Optional Protocol to the Vienna Convention on Diplomatic Relations, Concerning the Compulsory Settlement of Disputes, which regulates that the parties ‘may agree to’ adopt a conciliation procedure instead of bringing a case before the ICJ.<sup>278</sup> The function of this provision is quite similar

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<sup>276</sup> Nordquist and others, *United Nations Convention on the Law of the Sea 1982: A Commentary*.

<sup>277</sup> An example showing this aspect can be checked in the judgment given in the *M/V “Louisa”* case (hereinafter ‘*M/V Louisa*’). As will be addressed in detail in Chapter 4, Section 4.2.2, ITLOS in this case determined the issue concerning the effect of a declaration made pursuant to Article 287 by referring to the established practice of the ICJ on Article 36(2) of the Statute of the ICJ (*M/V “Louisa” (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Judgment, *ITLOS Reports 2013*, p. 4, paras. 79-83).

<sup>278</sup> “1. Within the same period of two months, the parties may agree to adopt a conciliation procedure before resorting to the International Court of Justice.”

to Article 281 of UNCLOS as it allows the parties, upon their agreement, to resort to other means instead of the default measure. In the case of Article 281 of UNCLOS, it was determined that a legally binding agreement was necessary because it was difficult to accept that the parties could simply remove a default rule (compulsory dispute resolution) “without clearly expressing an intention to do so”.<sup>279</sup> As such, when faced with the question of the meaning of ‘agreement’ under Article III(1) of the Optional Protocol, which shares a similar function to that of Article 281, Part XV tribunals’ interpretation of Article 281 can be also referred to by other subjects of international law.

Accordingly, the tribunals’ interpretation of ‘agreement’ under Article 281 of UNCLOS may, in certain circumstances, have some impact on our understanding of other relevant rules. Those who can be affected include different international courts as they frequently seek guidance from other judgments to solve similar procedural law issues.<sup>280</sup> Thus, another interesting point will be to see how Part XV tribunals’ interpretation of ‘agreement’ under Article 281 would affect other treaty clauses with a similar function.

### 3.3. Should the Exclusion of Part XV Procedures be Explicitly Expressed?

#### 3.3.1. Contested Views Concerning the Award of the *Southern Bluefin Tuna Case*

It has been mentioned above that if the parties have agreed to settle their dispute by means of their own choice, according to Article 281, the dispute may only be submitted to the procedures of Part XV when two conditions are met. The first is that no settlement should have been reached between the parties by recourse to such an agreed means. The second is that Part XV procedures may only be resorted to when such an agreement does not exclude any further procedure. Accordingly, even though no settlement has been reached by

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<sup>279</sup> *South China Sea Arbitration between Philippines and China, Award on Jurisdiction and Admissibility*, 29 October 2015, paras. 224-225.

<sup>280</sup> Brown, *A Common Law of International Adjudication*, p. 240. This point will be addressed in detail later in Chapter 7, Section 7.1.

recourse to the chosen means, the procedures within Part XV can only be applied if that agreement does not exclude any further procedure, meaning Part XV procedures. This is a safeguard to protect the parties' freedom to choose the means and their will to have their dispute remain unsettled rather than to submit it to the compulsory procedures of UNCLOS.<sup>281</sup>

This indicates that for states parties to opt-out from Part XV procedures, the parties' agreement must include their intention not to submit their dispute to the compulsory procedures between them. However, the text of Article 281 does not provide details such as how the intention to exclude any further process should be expressed, or whether an implicit expression to exclude is allowed. Instead, the issue of how to express such an intention was first addressed and guided by the arbitral tribunal of the *SBT* case. In this case, the recognised 'agreement' under Article 281 was Article 16 of the CCSBT. Article 16(2) of the CCSBT says that any unresolved dispute shall be referred for settlement to the ICJ or to arbitration, with the consent of all parties to the dispute. However, there is no clear expression of exclusion of the applicability of Part XV procedures.

In that respect, Australia and New Zealand claimed that Article 281 requires an explicit expression of the exclusion of Part XV procedures so any implied provision would be not sufficient to have that effect.<sup>282</sup> In contrast, Japan focused on the expression of Article 16(2) of the CCSBT that no dispute shall be referred to the ICJ or arbitration without the parties' consent. Here, Japan contended that any further procedure would be excluded from this point.<sup>283</sup> Thus, as Article 16 of the CCSBT excludes further procedures without the consent of all parties, Japan claimed that this means the exclusion of any procedures including the compulsory measures of UNCLOS.<sup>284</sup>

In the proceedings for prescribing the provisional measures<sup>285</sup>, ITLOS broadly mentioned

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<sup>281</sup> Nordquist and others, *United Nations Convention on the Law of the Sea 1982: A Commentary*, para. 281.5.

<sup>282</sup> *Southern Bluefin Tuna Case, Hearing, Volume II, 8 May 2000*, p. 45.

<sup>283</sup> *Southern Bluefin Tuna Case, Hearing, Volume I, 7 May 2000*, p. 112.

<sup>284</sup> *Ibid.*, pp. 161-162.

<sup>285</sup> In this case, the proceedings for prescribing the provisional measures proceeded before ITLOS, while the phase for the jurisdiction and admissibility was addressed by the arbitral tribunal, according to Article 290(5). A court or tribunal to which a case is submitted has the competence to prescribe provisional measures if it considers that *prima facie* it has jurisdiction over the case. However, while an arbitral tribunal to which a dispute is being submitted is being constituted, Article 290(5) regulates that any court or tribunal agreed upon by the parties, or failing such agreement within two weeks from the date of the request for the provisional measures, then ITLOS, may prescribe the provisional measures.

that the CCSBT does not preclude recourse to the procedures provided in Part XV.<sup>286</sup> In contrast, in the phase for jurisdiction and admissibility of this case, the arbitral tribunal made an opposite decision on this matter. The majority opinion of the *SBT* arbitration was that although there was no clear indication within Article 16(2) of the CCSBT, an absence of an express exclusion of any procedure in that article was not decisive.<sup>287</sup> Rather, as Japan argued, the tribunal said this article was to exclude any further procedures including the compulsory proceedings under Section 2 of Part XV, unless not accepted by all the parties to the dispute.<sup>288</sup> As a result, the need for a clear expression of excluding the Part XV procedures in applying Article 281 was denied by the tribunal.

However, this majority opinion was opposed by one of the arbitrators, Sir Kenneth Keith. By appending his Separate Opinion, Judge Keith said that to settle the dispute concerning UNCLOS by recourse to the means other than the provided by Part XV, the parties are required to opt-out explicitly from any further procedures.<sup>289</sup> Considering the pivotal role the compulsory and binding peaceful settlement procedures of UNCLOS take and the overall structure of Part XV, he argued that a clear wording to exclude the obligations to submit a dispute to the UNCLOS binding procedures was necessary.<sup>290</sup>

The contrasting views on the need for the express exclusion of further procedures between the majority opinion and Judge Keith had drew diverse scholarly reactions. On the one hand, the majority opinion was welcomed by the authors with the views that states' freedom to choose the means for settling dispute should prevail over the compulsory procedures regulated in UNCLOS Part XV. As an example, Barbara Kwiatkowska appraises that, in light of the overall object and purpose of UNCLOS, including its relationship with other treaties, the interpretation given by the tribunal of the *SBT* case should be regarded as substantially in keeping with the intention of the drafters of the Convention.<sup>291</sup> Natalie Klein says that the decision of the tribunal in this case reaffirmed the fundamental importance attributed to the role of consent in international dispute

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<sup>286</sup> *Southern Bluefin Tuna Case (New Zealand v. Japan; Australia v. Japan), Request for Provisional Measures, Order, ITLOS, 27 August 1999*, para. 55.

<sup>287</sup> *Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan, Award on Jurisdiction and Admissibility, 4 August 2000*, para. 57.

<sup>288</sup> *Ibid.*

<sup>289</sup> *Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan, Award on Jurisdiction and Admissibility, 4 August 2000, Separate Opinion of Justice Sir Kenneth Keith*, para. 17.

<sup>290</sup> *Ibid.*, paras. 19-22.

<sup>291</sup> Barbara Kwiatkowska, 'The Southern Bluefin Tuna Arbitral Tribunal Did Get It Right: A Commentary and Reply to the Article by David A. Colson and Dr. Peggy Hoyle' (2003) 34 *Ocean Development and International Law* 369, p. 379.



settlement through adjudication.<sup>292</sup>

On the other hand, criticism was raised over the majority opinion on this matter.<sup>293</sup> For instance, Alan Boyle says that the effect of the tribunal's reading of Article 281 would be that the exclusion of resorting to Part XV procedures is possible only with an assumption that exclusion is what the parties intended.<sup>294</sup> Similarly, Igor V. Karaman appraises that the majority opinion makes the dispute settlement procedures of Part XV subordinate to the regional implementation agreements and thus, any agreements under 281(1) may exclude the reference of a dispute to the Part XV procedures on a mere assumption of the parties' intention.<sup>295</sup> Furthermore, David A. Colson and Peggy Hoyle criticise that the majority opinion in effect says the compulsory procedures of Part XV may be defeated by the consensual arrangements even when there is no clear manifestation of the parties' intention.<sup>296</sup>

These contrasting views between the majority opinion and the separate opinion of Judge Keith have continuously affected the claims of respondents and applicants in subsequent cases. For example, in the *Chagos Marine Protected Area Arbitration* (hereinafter '*Chagos MPA*' case), the UK raised an objection to the tribunal's jurisdiction based on Article 281 by citing the reasonings given by the tribunal in the *SBT* arbitration.<sup>297</sup> Whereas Mauritius refuted this claim by referring to the opinion of Judge Keith and refusing to take the majority opinion of the *SBT* arbitration tribunal.<sup>298</sup>

However, this second condition of Article 281 for resorting to the compulsory procedures of Part XV faced a complete turning point following the *South China Sea* case.

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<sup>292</sup> Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, p. 39.

<sup>293</sup> See; Cesare Romano, 'The Southern Bluefin Tuna Dispute: Hints of a World to Come . . . Like It or Not' (2001) 32 *Ocean Development and International Law* 313, pp. 331-332; Deborah Horowitz, 'Case Notes: Southern Bluefin Tuna case (Australia and New Zealand v Japan) (Jurisdiction and Admissibility): the Catch of Poseidon's Trident: the Fate of High seas Fisheries in the Southern Bluefin Tuna Case' (2001) 25 *Melbourne University Law Review* 810, pp. 810-830; Tim Stephens, 'The Limits of International Adjudication in International Environmental Law: Another Perspective on the Southern Bluefin Tuna Case' (2004) 19 *The International Journal of Marine and Coastal Law* 177, pp. 187-188; Patrizia Vigni, 'The Overlapping of Dispute Settlement Regimes: An Emerging Issue of International Law' (2001) 11 *The Italian Yearbook of International Law* 139, pp. 149-154.

<sup>294</sup> Alan E. Boyle, 'The Southern Bluefin Tuna Arbitration' (2001) 50 *The International and Comparative Law Quarterly* 447, p. 449.

<sup>295</sup> Karaman, *Dispute Resolution in the Law of the Sea*, p. 262.

<sup>296</sup> David A. Colson and Peggy Hoyle, 'Satisfying the Procedural Prerequisites to the Compulsory Dispute Settlement Mechanisms of the 1982 Law of the Sea Convention: Did the Southern Bluefin Tuna Tribunal Get It Right?' (2003) 34 *Ocean Development and International Law* 59, pp. 67-68.

<sup>297</sup> *Chagos Marine Protected Area Arbitration, Preliminary Objections to Jurisdiction of the UK, 31 October 2012*, paras. 5.39-5.42; *Chagos Marine Protected Area Arbitration, Counter-Memorial of the UK, 15 July 2013*, paras. 6.53-6.58.

<sup>298</sup> *Chagos Marine Protected Area Arbitration, Reply of Mauritius, 18 November 2013*, para. 7.124.

### 3.3.2. Shifted Interpretation in Subsequent Cases and New Reference Point

In the *South China Sea* case, one of the main jurisdictional claims for both China and the Philippines was whether Article 281 of UNCLOS requires clear wording to exclude the Part XV procedures in the agreements between the parties. Here, the views of the majority opinion of the *SBT* case arbitral tribunal and that of Judge Keith had affected the formation of each disputing parties' claims. Following the majority opinion of the *SBT* arbitration, China argued that Article 281 does not require a clearly expressed exclusion of any further proceedings and the absence of such clear wordings is not decisive.<sup>299</sup> In contrast, the Philippines supported the Separate Opinion of Judge Keith,<sup>300</sup> arguing that to exclude the applicability of compulsory procedures, such an intention should be plainly expressed.<sup>301</sup>

Interestingly, the tribunal's view on this matter was opposite to the decision of the tribunal of the *SBT* case. In supporting the Separate Opinion of Judge Keith, the tribunal said that the better view was that Article 281 requires a clear statement of exclusion of further procedures.<sup>302</sup> According to the tribunal, considering the overall purpose of UNCLOS as a comprehensive agreement and the drafters' will to regard Part XV as an essential element of this Convention, it is difficult to accept that the parties can remove such a pivotal part of the Convention without clearly expressing an intention to do so.<sup>303</sup> The tribunal's interpretation was based on its view of the overall design of UNCLOS system where the compulsory system is the "default" rule and any limitations and exceptions to the compulsory system were carefully defined in Section 3.<sup>304</sup> Thus, the tribunal concluded that Article 281 does not bar the tribunal's exercise of jurisdiction in this case since no agreement between parties explicitly excluded the recourse to Part XV procedures.

As after the award was rendered by the tribunal of the *SBT* case, the tribunal's

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<sup>299</sup> *South China Sea Arbitration, Position Paper of China on the Matter of Jurisdiction, 7 December 2014*, paras. 40, 82.

<sup>300</sup> *South China Sea Arbitration, Supplemental Written Submission of Philippines, 16 March 2015*, paras. 26.41-26.45.

<sup>301</sup> *South China Sea Arbitration, Memorial of Philippines, 30 March 2014*, paras. 7.64-7.65.

<sup>302</sup> *South China Sea Arbitration between Philippines and China, Award on Jurisdiction and Admissibility, 29 October 2015*, para. 223.

<sup>303</sup> *Ibid.*, para. 225.

<sup>304</sup> *Ibid.*, para. 224.

interpretation in the *South China Sea* case also caused mixed reactions in academics. For example, the Chinese Society of International Law criticised that the interpretation given by the tribunal is untenable, as the exclusion essentially depends on the genuine intention of the parties but not on the specific form of expression.<sup>305</sup> Similarly, it is even argued that the availability of compulsory jurisdiction under Part XV has been expanded due to the award since it required a more strict criterion to exclude the Part XV procedures.<sup>306</sup> A contrasting appraisal is that the tribunal's award provides better than the majority opinion of the *SBT* arbitration when a serious risk of undermining the compulsory measures was caused by its broad interpretation, as the tribunal's determination given in the *South China Sea* case contributed to consolidating the legal order established by UNCLOS.<sup>307</sup>

Apart from those responses, what we need to notice is that the meaning of this article was given in a novel way, deviating from the early decision of the *SBT* case. By rendering its interpretation, the tribunal of the *South China Sea* case directly refuted the past award and even appraised it as "not in line with the intended meaning of Article 281".<sup>308</sup> It was interesting that the tribunal directly refuted the former case's interpretation. Some said that as the tribunal of the *South China Sea* case had failed to follow and respect the precedent – the award of the *SBT* arbitration – it eventually hampered the value of consistency and legal security.<sup>309</sup> A further commented was that since the interpretation of the tribunal had departed from the early decision of the *SBT* case, there were now two conflicting decisions on how to interpret Article 281.<sup>310</sup>

However, the deviation from the decision of *SBT* case itself cannot be considered a strange or extraordinary situation in terms of international adjudication in general. Since there is no binding force of the precedents or the common law doctrine of *stare decisis* in international law, international courts and tribunals may choose not to follow past decisions.<sup>311</sup> Of

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<sup>305</sup> Chinese Society of International Law, 'The Tribunal's Award in the "South China Sea Arbitration" Initiated by the Philippines Is Null and Void', p. 479.

<sup>306</sup> Klein, 'Expansions and Restrictions in the UNCLOS Dispute Settlement Regime: Lessons from Recent Decisions', p. 406; Klein, 'The Vicissitudes of Dispute Settlement under the Law of the Sea Convention', p. 340.

<sup>307</sup> Yoshifumi Tanaka, *The South China Sea arbitration: Toward an International Legal Order in the Oceans* (Bloomsbury Publishing 2019), pp. 41-42.

<sup>308</sup> *South China Sea Arbitration between Philippines and China, Award on Jurisdiction and Admissibility*, 29 October 2015, para. 223.

<sup>309</sup> Yee, 'The South China Sea Arbitration Decisions on Jurisdiction and Rule of Law Concerns', p. 231.

<sup>310</sup> Klein, 'The Vicissitudes of Dispute Settlement under the Law of the Sea Convention', pp. 338-339.

<sup>311</sup> See; Lauterpacht, *The Development of International Law by the International Court*, p. 14; Acquaviva and Pocar, 'Stare Decisis', para. 13; Boyle and Chinkin, *The Making of International Law*, p. 294. See also; *Barcelona Traction, Light and Power Company, Limited, Preliminary Objection, Judgment, I.C.J. Reports 1964, Separate Opinion of Judge Tanaka*, p. 65.

course, when international courts and tribunals are willing to deviate from their jurisprudence, the reason why they do so must be provided.<sup>312</sup> Those reasons may include that they consider the original decision was wrong in the first place or no longer corresponds to the requirements of current international society.<sup>313</sup> When the present case can be distinguished from relevant precedents on the law or facts, such a decision can be made as well. Thus, for the sake of legal certainty and consistency, adherence to past jurisprudence should be maintained unless compelling reasons for changes exist in the case-law.<sup>314</sup>

The tribunal of the *South China Sea* case provided the detailed ground for its decision to deviate from the earlier decision of *SBT* case in two aspects – the text and context of Article 281 and the overall structure and purpose of the Convention.<sup>315</sup> Compared to the award of *SBT* case, where the tribunal simply stated that the absence of express exclusion is not decisive, these reasons were more detailed and clearer. Hence, the criticisms raised solely based on the fact that the tribunal of the *South China Sea* case decided to refute the majority opinion of the *SBT* case itself can be hardly acceptable.

Moreover, the matter of consistency was largely compensated by the decision in the subsequent the *Coastal State Rights* case. In this case, Russia contended that the proposition that Article 281 requires an express reference to disputes under UNCLOS is without any authority,<sup>316</sup> whereas, Ukraine claimed that Article 281 requires an express exclusion, by referring to the award of the *South China Sea* case.<sup>317</sup> As mentioned above, the tribunal found that neither Article 5 of the Border Treaty nor Article 1 of the Cooperation Treaty corresponded to an agreement seeking the settlement of the dispute. While explaining the reason for this determination, the tribunal focused on Article 4 of the Cooperation Treaty instead of Article 1, as an instance of such dispute resolving clauses. Article 4 of the Cooperation Treaty says that a dispute related to the interpretation and implementation of this Treaty should be settled through consultations and negotiations or

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<sup>312</sup> Venzke, 'The Role of International Court as Interpreters and Developers of the Law: Working out the Jurisgenerative Practice of Interpretation', p. 123; Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists*, p. 47; Lauterpacht, *The Development of International Law by the International Court*, p. 15; Boyle and Chinkin, *The Making of International Law*, p. 302.

<sup>313</sup> Shahabuddeen, *Precedent in the World Court*, p. 134.

<sup>314</sup> Brown, 'Article 59', p. 1588.

<sup>315</sup> *South China Sea Arbitration between Philippines and China, Award on Jurisdiction and Admissibility, 29 October 2015*, paras. 223-225.

<sup>316</sup> *Coastal State Rights Arbitration between Ukraine and Russia, Reply of Russia, 28 January 2019*, para. 171.

<sup>317</sup> *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait, Award Concerning the Preliminary Objections of Russia, 21 February 2020*, paras. 155-160.

other peaceful means selected by the disputing parties. By giving this article as an example, the tribunal determined that even this article cannot be a hurdle for the tribunal's jurisdiction since this article does not preclude the settlement of a dispute by arbitration under Annex VII.<sup>318</sup> This showed that the interpretation taken by the tribunal of the *South China Sea* case was accepted by the tribunal of the *Coastal State Rights* case.

This way of interpreting Article 281 was suggested by Judge Keith in the *SBT* case and was then upheld by the tribunal of the *South China Sea* case as it was thought to be in accordance with the overall structure and the conferred role of Part XV.<sup>319</sup> Hersch Lauterpacht said that the appended individual opinions of the judges, regardless of whether dissenting or separate, add vitality and may facilitate the fulfilment of developing and clarifying international law.<sup>320</sup> The Separate Opinion of Judge Keith was an exact example showing how appended individual opinions may develop and clarify international law. The need for an express exclusion of Part XV procedures argued by Judge Keith was finally upheld by subsequent tribunals and thus constituted the meaning of this article. Now, it can be appraised that the tribunal's determination given in the *South China Sea* case has become a new reference point in the interpretation and application of Article 281.

### 3.4. How to Cope with the Question of Potential Overlapping Jurisdiction?

One may raise a question concerning the situation where a certain dispute concerns not only the rights and obligations under UNCLOS but also those of other legal orders that contain its own dispute settling mechanism. This reminds us of the issue of overlapping jurisdiction between different international courts. In international law, the proliferation of international courts and tribunals creates overlapping jurisdictions, which may give rise to the problem of parallel competing proceedings concerning the same dispute.<sup>321</sup> What, then,

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<sup>318</sup> *Ibid*, para. 490.

<sup>319</sup> *South China Sea Arbitration between Philippines and China, Award on Jurisdiction and Admissibility*, 29 October 2015, para. 223.

<sup>320</sup> Lauterpacht, *The Development of International Law by the International Court*, p. 66.

<sup>321</sup> Brown, 'The Cross-Fertilization of Principles Relating to Procedure and Remedies in the Jurisprudence of International Courts and Tribunals', p. 220. Concerning the issue of overlapping jurisdiction in international law in general, see; Shany, *The Competing Jurisdictions of International Courts and Tribunals*; Vaughan

would be the relation between the jurisdiction of Part XV tribunals and that of other procedures on the same dispute under such circumstances, and how would that dispute have to be resolved?

When it comes to UNCLOS Part XV, both Articles 281 and 282 are relevant. In introducing the given procedural preconditions in Section 1 of UNCLOS Part XV above, we mentioned that Articles 281 and 282 allow states parties to resort to other procedures to settle an UNCLOS dispute. These two provisions open the possibility that the jurisdiction of other procedures may be involved in resolving disputes concerning the interpretation or application of the Convention. However, as we can see from the requirements within these two provisions, they not only allow such involvement but also restrict it by regulating some conditions to be satisfied to settle the dispute by recourse to other procedures. For this reason, both Articles 281 and 282 seem to be primarily intended to compete with 'external' jurisdictions outside the framework of UNCLOS.<sup>322</sup>

Igor V. Karaman said that the role of Articles 281 and 282 in resolving the problem of competing jurisdiction between Part XV tribunals and other procedures remains to be answered in future jurisprudence.<sup>323</sup> As Karaman expected, in applying Articles 281 and 282 to the given circumstances, Part XV tribunals have addressed and resolved this issue. However, within the case-law of Part XV tribunals, a substantial change has been made concerning how to address the overlapping jurisdiction between Part XV tribunals and other procedures. That change occurred between two cases, the *SBT* case and the *MOX Plant* case.

#### 3.4.1. Controversy over the Decision of the *Southern Bluefin Tuna* Case

In *SBT* case, the issue of overlapping jurisdiction was raised in connection with the CCSBT. The CCSBT was a treaty concluded between Australia, New Zealand and Japan in 1993 to conserve the southern bluefin tuna species. The dispute between the parties originated from Japan's unilaterally initiated Experimental Fishing Programme in 1998. The applicants'

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Lowe, 'Overlapping Jurisdiction in International Tribunals' (1999) 20 Australian Year Book of International Law 191.

<sup>322</sup> Karaman, *Dispute Resolution in the Law of the Sea*, p. 252.

<sup>323</sup> Ibid.

view was that Japan's conduct of this unilateral programme constitutes a breach of obligations under the CCSBT, UNCLOS and the customary international law.<sup>324</sup> As discussed above, the dispute settlement clause for the dispute concerning the CCSBT was regulated by Article 16. What was controversial was whether, if Article 16 of the CCSBT set up the chosen means for settling dispute concerning this treaty, this clause would also preclude the jurisdiction of the arbitral tribunal constituted following Annex VII of UNCLOS over all other claims concerning the interpretation or application of UNCLOS.

The applicants, Australia and New Zealand argued that the submitted dispute concerned the interpretation or application of the Convention.<sup>325</sup> The relief sought by the applicants was that Japan's unilateral experimental fishery for southern bluefin tuna had breached Articles 64 and 116 to 119 of UNCLOS. In contrast, Japan claimed that the dispute only concerned the implementation of the CCSBT, not UNCLOS.<sup>326</sup>

In the phase of prescribing the provisional measure, ITLOS confirmed that the applicability of the CCSBT to the parties does not exclude their rights under UNCLOS to invoke certain provisions concerning the conservation and management of southern bluefin tuna.<sup>327</sup> In this respect, ITLOS found that the fact that the CCSBT applies to the parties does not preclude them from resorting to the compulsory procedures of the Convention.<sup>328</sup> Similarly, in the proceedings for jurisdiction and admissibility, the arbitral tribunal admitted that in international law, more than one treaty frequently bears upon a particular dispute.<sup>329</sup> It decided that while the dispute between the parties was centred in the CCSBT, it also arose under UNCLOS.<sup>330</sup> Nevertheless, the tribunal concluded that a distinction between the disputes that arose under the CCSBT and under UNCLOS would be artificial, as it was a single dispute arising under both conventions between the same parties.<sup>331</sup> Thus, the tribunal ruled that its jurisdiction over all the submitted claims would be excluded by Article 16 of the CCSBT.

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<sup>324</sup> *Southern Bluefin Tuna Case, Statement of Claim and Grounds on Which It Is Based of Australia, 15 July 1999*, para. 28.

<sup>325</sup> *Southern Bluefin Tuna Case, Reply on Jurisdiction of Australia and New Zealand, 31 March 2000*, paras. 32-71, 98-103, 109-128.

<sup>326</sup> *Southern Bluefin Tuna Case, Memorial on Jurisdiction of Japan, 11 February 2000*, paras. 101-104.

<sup>327</sup> *Southern Bluefin Tuna Case (New Zealand v. Japan; Australia v. Japan), Request for Provisional Measures, Order, ITLOS, 27 August 1999*, para. 51.

<sup>328</sup> *Ibid.*, para. 55.

<sup>329</sup> *Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan, Award on Jurisdiction and Admissibility, 4 August 2000*, para. 52.

<sup>330</sup> *Ibid.*, para. 54.

<sup>331</sup> *Ibid.*,

This conclusion was hardly convincing. As the tribunal had already admitted, the single conduct of a state had resulted in the breach of more than one treaty. In such a case, the elements of an obligation under the CCSBT were different from those under UNCLOS.<sup>332</sup> Then, the (alleged) violation of obligations or rights in the respective treaties should be examined differently from the perspectives of each of the treaties. Moreover, since Article 16 of the CCSBT does not deal with the specific violation of the obligation under UNCLOS, it should not be admitted as an agreement of another peaceful means to settle the dispute concerning interpretation or application of UNCLOS, within the meaning of either Article 281 or 282.<sup>333</sup> However, the tribunal's determination was just that the disputes that arose under the CCSBT and UNCLOS were identical.

The tribunal's determination, in this case, was quite controversial among academics. On the one hand, some views uphold the tribunal's determination. For example, Natalie Klein says that the CCSBT sets out more detailed rules about the conservation and management of southern bluefin tuna compared with UNCLOS. Therefore, she argues that the greater weight should be attributed to the states' chosen mechanism for settling the dispute, rather than to the procedures under UNCLOS.<sup>334</sup> In contrast, Alan Boyle criticises that the tribunal had failed to give detailed reasons for its view on the inseparability of the dispute and justify the dismissal of the case.<sup>335</sup> This controversial decision of the arbitral tribunal of *SBT* case was later refuted by ITLOS and another Annex VII tribunal in the subsequent *MOX Plant* case.

### 3.4.2. Changed Approach Taken in the *MOX Plant* Case

The arbitration of the *MOX Plant* case was initiated on 25 October 2001 by Ireland against the UK concerning the plant for making 'Mixed Oxide Fuel (MOX)' in Sellafield, UK. Through its memorial, Ireland claimed that the UK, concerning the MOX Plant, breached its obligations under Articles 123, 192, 193, 194, 197, 206, 207, 211 and 213 of

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<sup>332</sup> Colson and Hoyle, 'Satisfying the Procedural Prerequisites to the Compulsory Dispute Settlement Mechanisms of the 1982 Law of the Sea Convention: Did the Southern Bluefin Tuna Tribunal Get It Right?', p. 68.

<sup>333</sup> Ibid.

<sup>334</sup> Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, p. 48.

<sup>335</sup> Boyle, 'The Southern Bluefin Tuna Arbitration', p. 450.



UNCLOS.<sup>336</sup> These provisions regulate the cooperation of states bordering semi-enclosed seas and the protection and preservation of the marine environment.

The issue of potential overlapping jurisdiction was raised by the UK concerning Article 282 of UNCLOS in the provisional measure proceedings. First, the UK claimed that the dispute settling procedures under the Convention for the Protection of the Marine Environment of the North-East Atlantic (hereinafter ‘OSPAR Convention’) should be applied in lieu of the procedures provided by Part XV of UNCLOS. Article 32 of the OSPAR Convention regulates the compulsory dispute settling procedures and says that any disputes between contracting parties relating to interpretation or application of the OSPAR Convention that cannot be settled otherwise, shall be submitted to arbitration at the request of any parties. On 15 June 2001, Ireland had already initiated the compulsory arbitration concerning the UK’s alleged breach of its obligation under Article 9 of the OSPAR Convention, which was about access to the information.<sup>337</sup>

In addition to this, the UK claimed that the Treaty Establishing the European Community (hereinafter ‘EC treaty’) and the Treaty Establishing the European Atomic Energy Community (hereinafter ‘EURATOM treaty’) also constitute regional agreements providing for alternative binding dispute settlement provisions.<sup>338</sup> Both Article 292 of the EC treaty and Article 193 of the EURATOM treaty regulate that a dispute concerning their interpretation or application should not be submitted to any method of settlement other than provided within those treaties. The UK argued that since the dispute raised by Ireland was to be determined by the dispute settlement procedures provided by those other agreements, the compulsory procedures in Part XV of UNCLOS should be excluded in accordance with Article 282 of UNCLOS.

In the proceedings for prescribing the provisional measures, however, ITLOS took a different approach from the majority opinion of the *SBT* arbitration. In determining the *prima facie* jurisdiction of the arbitral tribunal over the case, ITLOS said that the dispute settlement procedures under the OSPAR Convention, the EC treaty and the Euratom treaty

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<sup>336</sup> *MOX Plant Case, Memorial of Ireland, 26 July 2002*, para. 10.15.

<sup>337</sup> See; *Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention between Ireland and the United Kingdom of Great Britain and Northern Ireland, Final Award, Decision of 2 July 2003*. Regarding this OSPAR arbitration, see; Malgosia Fitzmaurice, ‘Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention’ (2003) 18 *The International Journal of Marine and Coastal Law* 541; Ted L. McDorman, ‘Access to Information under Article 9 of the OSPAR Convention (Ireland v. United Kingdom)’ (2004) 98 *The American Journal of International Law* 330

<sup>338</sup> *MOX Plant Case, Written Response of the UK to the Request for Provisional Measures, 15 November 2001*, para. 166.

were only for disputes concerning those treaties, not for disputes arising under the Convention.<sup>339</sup> Moreover, ITLOS said that even if those treaties contained identical rights or obligations with those of UNCLOS, the rights and obligations under these agreements have a separate existence from those under UNCLOS.<sup>340</sup> Therefore, ITLOS determined that since the dispute submitted to Annex VII arbitration concerned the interpretation or application of UNCLOS, only the dispute settlement procedures under the Convention are relevant to that dispute.<sup>341</sup>

This view of ITLOS was shared and followed by the arbitral tribunal constituted under Annex VII.<sup>342</sup> However, although the arbitral tribunal determined that the OSPAR Convention does not substantially cover the current dispute before the tribunal,<sup>343</sup> the tribunal approached the European Community issues carefully. The tribunal noted that the European Commission had already indicated in its Written Answer that it was examining the possibility that the European Court of Justice (hereinafter 'ECJ') could be seised of the question concerning the competence of the EC and the exclusive jurisdiction of the ECJ over the current issue.<sup>344</sup>

Later in 2006, the ECJ decided in the case of the European Commission against Ireland that since the EC is a party to UNCLOS, UNCLOS became the Community law and thus the dispute concerning the application and interpretation of such law shall be exclusively subject to the jurisdiction of the ECJ according to Article 292 of the EC treaty.<sup>345</sup> However, at the moment when the arbitral tribunal of the *MOX Plant* case made its order, in June 2003, the tribunal could not be certain about the matters concerning its jurisdiction in light of Articles 281 and 282. Since the above issues essentially concerned the internal operation

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<sup>339</sup> *MOX Plant (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, p.95, para. 49.*

<sup>340</sup> *Ibid.*, para. 50.

<sup>341</sup> *Ibid.*, para. 52.

<sup>342</sup> *MOX Plant Case, Order No. 3, Suspension of Proceedings on Jurisdiction and Merits, and Request for Further Provisional Measures, 24 June 2003, paras. 14-17.*

<sup>343</sup> *Ibid.*, para. 18.

<sup>344</sup> *Ibid.*, para. 21.

<sup>345</sup> *Case C-459-03, Commission of the European Communities v. Ireland, Judgment of the Court, 20 May 2006, paras. 119-123.* For further analysis and information regarding this case before the ECJ and the relationship between the EC law and UNCLOS, see; Tobias Lock, 'The European Court of Justice: What are the Limits of its Exclusive Jurisdiction?' (2009) 16 Maastricht Journal of European and Comparative Law 291, pp. 294-298; Esa Paasivirta, 'The European Union and the United Nations Convention on the Law of the Sea' (2015) 38 Fordham International Law Journal 1045; Nikolaos Lavranos, 'The MOX Plant and IJzeren Rijn Disputes: Which Court Is the Supreme Arbiter?' (2006) 19 Leiden Journal of International Law 223; Nikolaos Lavranos, 'Protecting Its Exclusive Jurisdiction: The Mox Plant-judgment of the ECJ' (2006) 5 The Law and Practice of International Courts and Tribunals 479; Tullio Treves, 'Fragmentation of International Law: the Judicial Perspective' (2009) 16 Agenda Internacional (Lima, Peru) 213, pp. 233-238.

of a separate legal order(EC) to be determined within its framework, the tribunal decided to suspend further proceedings on jurisdiction and the merits of the case until those issues had been resolved, in consideration of mutual respect and comity.<sup>346</sup> Finally, the *MOX Plant* arbitration was terminated as Ireland notified the tribunal of its withdrawal of the claim against the UK in the proceedings before the arbitral tribunal.<sup>347</sup>

Some may argue that the decision of the tribunal to suspend the proceedings disregarded the legal determination made by ITLOS in the proceedings for the provisional measures, and disregarded the structure of Part XV where a single judicial function for settling dispute system is envisaged.<sup>348</sup> However, the suspension of the proceedings for further clarification of the doubts about its jurisdiction does not mean the renouncement of its potential jurisdiction over the dispute, which exclusively concerns the interpretation or application of UNCLOS. As the tribunal expressed, it was uncertain at that moment whether the tribunal's jurisdiction could be firmly established concerning all or any of the claims in the dispute.<sup>349</sup> The tribunal did not renounce the whole jurisdiction over the dispute in the case of potential overlapping jurisdiction but rather decided to suspend until the other legal matters became clear enough to decide the applicability of Articles 281 and 282 of the Convention. Thus, the decision of the arbitral tribunal here cannot be construed as disregarding the decision of ITLOS but rather should be understood as taking a required preliminary step before deciding the applicability of Articles 281 or 282.<sup>350</sup>

Instead, the tribunal clearly pronounced that a Part XV tribunal seized of jurisdiction over a dispute concerning UNCLOS would not yield the jurisdiction to the court or tribunal under other treaties unless that judicial body certainly had jurisdiction in respect of UNCLOS.<sup>351</sup> ITLOS mentioned that, given the difference in the respective contexts, objects and purposes, the practice of parties or *travaux préparatoires*, even the application of identical

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<sup>346</sup> *MOX Plant Case, Order No. 3, Suspension of Proceedings on Jurisdiction and Merits, and Request for Further Provisional Measures, 24 June 2003*, paras. 20-28.

<sup>347</sup> *MOX Plant Case, Order No. 6, Termination of Proceedings, 6 June 2008*.

<sup>348</sup> Volker Röben, 'The Order of the UNCLOS Annex VII Arbitral Tribunal to Suspend Proceedings in the Case of the MOX Plant at Sella field: How Much Jurisdictional Subsidiarity?' (2004) 73 *Nordic Journal of International Law = Acta Scandinavica juris gentium* 223, p. 230.

<sup>349</sup> *MOX Plant Case, Order No. 3, Suspension of Proceedings on Jurisdiction and Merits, and Request for Further Provisional Measures, 24 June 2003*, para. 25.

<sup>350</sup> Robin Churchill and Joanne Scott, 'The MOX Plant Litigation: The First Half-Life' (2004) 53 *The International and Comparative Law Quarterly* 643, p. 657.

<sup>351</sup> Robin Churchill, 'MOX Plant Arbitration and Cases' (2018) *Max Planck Encyclopedias of International Law*, para. 20.

or similar provisions of different treaties may not result in the same consequence.<sup>352</sup> Therefore, concerning Article 282, it was determined that this article would only be applicable when other procedures have jurisdiction concerning disputes about the interpretation or application of UNCLOS.<sup>353</sup> This was a much more convincing approach to the application of Article 282 and even Article 281 concerning the issue of overlapping jurisdiction, compared to that of the *SBT* case arbitral award.<sup>354</sup>

### 3.4.3. Convergent Practices in Subsequent Cases

Since the *MOX Plant* case, Part XV tribunals' approaches to potential overlapping jurisdiction have been maintained in a convergent manner. The *South China Sea* case was one such example. In this case, the arbitral tribunal examined several instruments to see whether the relevant agreement between the disputing parties may cover the dispute concerning interpretation or application of the Convention so that the tribunal's jurisdiction would be excluded by applying Articles 281 and 282. The agreement the tribunal examined was Article 27 of the Convention on Biological Diversity (hereinafter 'CBD'), which covers disputes concerning the interpretation or application of the CBD. Since the Philippines' submissions No. 11 and 12(b) concerned China's alleged violation of its obligation under the Convention to protect and preserve the maritime environment, the tribunal focused on the potential overlap with the CBD.

Here, the tribunal followed the approach taken by ITLOS and the arbitral tribunal in the *MOX Plant* case. The tribunal firstly confirmed that, by Article 1 of the CBD, the objective of this treaty was to protect biological diversity in general, not just confined to the maritime environment,<sup>355</sup> whereas, the provisions of UNCLOS like Articles 192 and 194 concern the protection of the marine environment only. According to the tribunal, although

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<sup>352</sup> *MOX Plant (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, p.95, para. 51.*

<sup>353</sup> Churchill, 'MOX Plant Arbitration and Cases', para. 20.

<sup>354</sup> There are contrasting views. For example, Natalie Klein criticised the arbitral tribunal's approach as 'overly cautious and premature', rather than just assessing whether the preconditions in Article 282 had been met (Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, p. 51). See also, Barbara Kwiatkowska, 'The Ireland v United Kingdom (Mox Plant) Case: Applying the Doctrine of Treaty Parallelism' (2003) 18 *The International Journal of Marine and Coastal Law* 1.

<sup>355</sup> *South China Sea Arbitration between Philippines and China, Award on Jurisdiction and Admissibility, 29 October 2015, para. 285.*

the same facts could give rise to violations of both UNCLOS and the CBD, the violation of UNCLOS did not necessarily cause the violation of the CBD, which may invoke Article 27 of the CBD to settle the dispute.<sup>356</sup> For this reason, the tribunal concluded that a dispute under UNCLOS does not become a dispute under CBD merely because there is some overlap between the two, and thus the tribunal's jurisdiction would not be excluded.<sup>357</sup>

Such consistency in Part XV tribunals' approach can be also seen in the *Coastal State Rights* case. In this case, Russia claimed that the text of Article 5 of the Border Treaty and Article 1 of the Cooperation Treaty may cover disputes concerning the interpretation or application of the Convention, so Article 281 is applicable.<sup>358</sup> However, the tribunal did not need to address this matter as the tribunal had already found that they did not constitute dispute settlement clauses within the meaning of Article 281.<sup>359</sup> The tribunal felt it was not necessary to assess whether they can cover the dispute concerning the interpretation or application of UNCLOS.<sup>360</sup> Instead, "for the sake of completeness", the tribunal assessed whether Article 281 applies to Article 4 of the Cooperation Treaty. In assessing this article, the tribunal said that the scope of Article 4 of the Cooperation Treaty is only limited to disputes which arise under that treaty.<sup>361</sup> In other words, even if Article 4 of the Cooperation Treaty corresponds to an agreement for seeking resolution of a dispute, its purview does not extend to the dispute that arose under UNCLOS. This approach was in line with that of ITLOS and the arbitral tribunal of the *MOX Plant* case. From this point of view, even if the tribunal did examine the coverage of Article 5 of the Border Treaty and Article 1 of the Cooperation Treaty, the outcome would not be different from its conclusion regarding Article 4 of the Cooperation Treaty.

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<sup>356</sup> *Ibid.*

<sup>357</sup> *Ibid.*, paras. 285 and 319.

<sup>358</sup> *Coastal State Rights Arbitration between Ukraine and Russia, Preliminary Objections of Russia, 19 May 2018*, para. 225; *Coastal State Rights Arbitration between Ukraine and Russia, Reply of Russia, 28 January 2019*, para. 171.

<sup>359</sup> See Section 3.2.3 above.

<sup>360</sup> *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait, Award Concerning the Preliminary Objections of Russia, 21 February 2020*, para. 489.

<sup>361</sup> *Ibid.*, para. 490.

### 3.5. How Should Article 283 be Applied in Practice?

Article 283 of UNCLOS regulates that states parties should expeditiously exchange their views concerning the means for settling their dispute peacefully. This provision takes an important role in the operation of the overall dispute settling mechanism under UNCLOS since states cannot resort to the compulsory procedures in Section 2 without having exchanged views with the other party to the dispute.<sup>362</sup> However, this article is composed of quite general terms like ‘expeditiously’ or ‘exchange of views’.<sup>363</sup> For this reason, the Virginia Commentary appraises that since it contains only an implicit requirement rather than imposing any specific obligation, this article might be difficult to implement precisely.<sup>364</sup> Instead, through their past proceedings, Part XV tribunals have clarified and provided the requirements that must be met for satisfying the precondition of Article 283.

#### 3.5.1. (Un)Necessary Requirements

Part XV judicial bodies have continuously and consistently confirmed that the only required obligation within Article 283 is for states to engage in an expeditious exchange of views about peaceful means for settling a dispute.<sup>365</sup> This convergent view of different Part XV tribunals has been well reflected in the recent arbitral award of the ‘*Enrica Lexie*’ *Incident* (hereinafter ‘*Enrica Lexie*’) case, which says;

*“The Arbitral Tribunal notes that, when the dispute arose between the Parties, they expeditiously proceeded to an exchange of views at various diplomatic and political levels, aimed at settling the dispute by negotiations or other peaceful means. The Arbitral Tribunal further notes that both Parties agree that these efforts did not lead to an agreement regarding the settlement of the dispute. The Arbitral Tribunal is consequently of*

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<sup>362</sup> Karaman, *Dispute Resolution in the Law of the Sea*, p. 13.

<sup>363</sup> David H. Anderson, *Modern Law of the Sea: Selected Essays* (Publications on Ocean Development, Martinus Nijhoff Publishers 2008), p. 596.

<sup>364</sup> Nordquist and others, *United Nations Convention on the Law of the Sea 1982: A Commentary*, para. 283.5.

<sup>365</sup> *Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore)*, Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003, p. 10, para. 37; *M/V “Louisa” (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Provisional Measures, Order of 23 December 2010, ITLOS Reports 2008-2010, p. 58, para. 57; *Arctic Sunrise Arbitration between the Netherlands and Russia, Award on the Merits, 14 August 2015*, para. 151; *M/V “Norstar” Case (Panama v. Italy)*, Preliminary Objections, Judgment, ITLOS, 4 November 2016, para. 208.

*the view that the requirements of Article 283, paragraph 1, ... are satisfied.*"<sup>366</sup>

Along with the matter of what is required, Part XV judicial bodies have clarified what is not required to satisfy the precondition within Article 283. Most of all, they have confirmed that the obligation to exchange views does not require the parties to engage in resolving the dispute by recourse to other forms of peaceful measures. This was first recognised by the arbitral tribunal of the *Chagos MPA* arbitration.<sup>367</sup> In this case, it was found that before the commencement of the compulsory proceedings, Mauritius and the UK had shared their views on the settlement of the dispute by negotiation. The tribunal found that this is all that Article 283 requires.<sup>368</sup> This point was echoed by the subsequent arbitral tribunals of the *Arctic Sunrise* case and the *South China Sea* case.<sup>369</sup>

Second, the obligation to exchange views does not require all the issues ancillary to the main dispute to be enumerated within that exchange between the parties. In the *Barbados v. Trinidad and Tobago* case, the applicant claimed that since the issue of delimitation of the outer-continental shelf had not been consulted between the parties, the obligation within Article 283 was not satisfied. However, the tribunal found that the issue of delimitation of the outer continental shelf was already included in the main subject-matter of the dispute, which was the delimitation of the EEZ and the continental shelf. In such a case, the tribunal said that Article 283 does not require a separate exchange of views.<sup>370</sup> In the *Guyana v. Suriname* case, the arbitral tribunal said that the parties were not obliged to engage in separate sets of exchange of views about issues subsumed within or incidental to the main dispute.<sup>371</sup> Instead, as the tribunal of the *Chagos MPA* case clarified, Article 283 requires the parties to be aware of where they disagreed with sufficient clarity.<sup>372</sup>

Third, Article 283 does not require that the exchange of views contains the possibility of either parties' recourse to the compulsory proceedings, or to specify the provisions of the Convention which that party will rely upon. One of the functions of this article is to ensure

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<sup>366</sup> "Enrica Lexie" Incident Arbitration between Italy and India, Award, 21 May 2020, para. 247.

<sup>367</sup> *Chagos Marine Protected Area Arbitration between Mauritius and the UK*, Award, 18 March 2015, para. 378.

<sup>368</sup> *Ibid*, para. 385.

<sup>369</sup> *Arctic Sunrise Arbitration between the Netherlands and Russia*, Award on the Merits, 14 August 2015, para. 151; *South China Sea Arbitration between Philippines and China*, Award on Jurisdiction and Admissibility, 29 October 2015, para. 333.

<sup>370</sup> *Arbitration between Barbados and Trinidad and Tobago*, Award, 11 April 2006, para. 214.

<sup>371</sup> *Arbitration between Guyana and Suriname*, Award of the Arbitral Tribunal, 17 September 2007, para. 410.

<sup>372</sup> *Chagos Marine Protected Area Arbitration between Mauritius and the UK*, Award, 18 March 2015, para. 382.

that a state party would not be taken to the compulsory proceedings by surprise.<sup>373</sup> However, this does not mean that an applicant is obliged to caution a respondent in advance about the possibility of the progression to the compulsory proceedings, or to present specific claims that it might choose to advance before the tribunal.<sup>374</sup> In this sense, the fact that not all the matters were addressed in exchange of views with the same level of specificity as presented in the compulsory proceedings does not constitute a bar to the tribunal's jurisdiction.<sup>375</sup>

Lastly, the obligation to exchange views does not require the parties to the dispute to participate in negotiation before resorting to compulsory measures. The origin of this obligation was some delegations' appeals, raised during the Third UN Conference, for the primary obligation that the parties should make every effort to settle their dispute by recourse to negotiation before resorting to the compulsory procedures in Section 2.<sup>376</sup> Here, the term 'negotiation' indicates a substantive means for settling disputes like other measures such as mediation, conciliation or adjudication, rather than just communication between the parties. These attempts were reflected in Article 57 of the ISNT, which says that states must first seek a solution through other means including consultation or negotiation, before the initiation of the judicial proceedings.<sup>377</sup> However, such an obligation failed to be included in the final clause of UNCLOS. Instead, only an indirect duty to exchange views concerning how the dispute should be settled was included as Article 283.<sup>378</sup>

Still, some voices have been raised that Article 283 and other provisions of Section 1 of Part XV oblige states parties to engage in negotiation first, before resorting to the compulsory proceedings.<sup>379</sup> One author contends that the Annex VII arbitral tribunal in the *Barbados v. Trinidad and Tobago* case supported such an interpretation.<sup>380</sup> It is true that in

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<sup>373</sup> *Ibid*, para. 382.

<sup>374</sup> *Ibid*, para. 385.

<sup>375</sup> *South China Sea Arbitration between Philippines and China, Award on Jurisdiction and Admissibility*, 29 October 2015, para. 351; *Duzgit Integrity Arbitration between Malta and São Tomé and Príncipe, Award*, 5 September 2016, para. 201.

<sup>376</sup> Nordquist and others, *United Nations Convention on the Law of the Sea 1982: A Commentary*, para. 283.1.

<sup>377</sup> UNGA, 'Document A/CONF.62/WP.8/PartI, Informal Single Negotiating Text, Part I'.

<sup>378</sup> Nordquist and others, *United Nations Convention on the Law of the Sea 1982: A Commentary*, para. 283.1.

<sup>379</sup> See; Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, p. 33; Gao, 'The Obligation to Negotiate in the Philippines v. China Case: A Critique of the Award on Jurisdiction'; Deyi Ma, 'Obligation to Exchange Views under Article 283 of the United Nations Convention on the Law of the Sea: An Empirical Approach for Improvement' (2019) 12 *Journal of East Asia and International Law* 305, p. 308.

<sup>380</sup> Gao, 'The Obligation to Negotiate in the Philippines v. China Case: A Critique of the Award on Jurisdiction', p. 275.



this case, the tribunal said, “In practice, the only relevant obligation upon the Parties under Section 1 of Part XV is to seek to settle their dispute by recourse to negotiations...”.<sup>381</sup> Yet, this arbitral award should not be understood as indicating that all states parties are obliged to seek to settle their dispute through negotiation. As discussed in Section 3.2.1, in this case, the tribunal had already confirmed that both parties made a *de facto* agreement to resolve the dispute by recourse to negotiation. From this context, the tribunal determined that the only obligation upon Barbados and Trinidad and Tobago under Section 1 was engaging in negotiation to resolve the dispute.

In some cases, international agreements include provisions on recourse to the judicial settlement upon exhaustion of efforts to resolve the dispute by negotiations.<sup>382</sup> However, there is no general obligation in international law that states must engage in negotiation before recourse to the judicial settlement of a dispute. The ICJ said in the *Land and Maritime Boundary* case that there is no general rule in international law that the exhaustion of diplomatic negotiations constitutes a precondition for a matter to be referred to the Court.<sup>383</sup> Part XV tribunals’ views were in line with the judgment of the ICJ in the *Land and Maritime Boundary* case.<sup>384</sup> Thus, what Article 283 requires is that the views of states on the means for settling dispute must be exchanged, not seeking a settlement by recourse to negotiation.<sup>385</sup>

### 3.5.2. The Timing Factors

The timing of conducting an exchange of views is another important element in determining the fulfilment of the obligation within Article 283. Most of all, Article 283 fosters the disputing parties’ communication so that the opposing party will not lose the

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<sup>381</sup> *Arbitration between Barbados and Trinidad and Tobago, Award, 11 April 2006*, para. 206.

<sup>382</sup> Kari Hakapää, 'Negotiation' (2013) Max Planck Encyclopedias of International Law, para. 29.

<sup>383</sup> *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 275, para. 55.

<sup>384</sup> See; *Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003*, p. 10, para. 52; *M/V “Louisa” (Saint Vincent and the Grenadines v. Kingdom of Spain), Provisional Measures, Order of 23 December 2010, ITLOS Reports 2008-2010*, p. 58, para. 64; *Chagos Marine Protected Area Arbitration between Mauritius and the UK, Award, 18 March 2015*, para. 379; *South China Sea Arbitration between Philippines and China, Award on Jurisdiction and Admissibility, 29 October 2015*, para. 345.

<sup>385</sup> Nigel Bankes, 'Precluding the Applicability of Section 2 of Part XV of the Law of the Sea Convention' (2017) 48 *Ocean Development and International Law* 239, p. 255; Nordquist and others, *United Nations Convention on the Law of the Sea 1982: A Commentary*, paras. 283.1 and 283.5.

opportunity to present its views or suggest alternative means for settling the dispute other than by compulsory measures.<sup>386</sup> In this sense, consultations between the parties after the initiation of the compulsory proceedings can hardly be regarded as implementing the exchange of views within the meaning of Article 283. This was upheld by ITLOS in the proceedings for prescribing the provisional measures of the *Land Reclamation* arbitration. In this case, ITLOS determined that consultations held after the initiation of the arbitral proceedings do not have a bearing on the applicability of Article 283.<sup>387</sup>

The jurisprudence of Part XV tribunals has also recognised that the urgency of the situation may affect the timing factors of the obligation to exchange views. This was firstly admitted in the *Arctic Sunrise* case. In this case, the tribunal determined that the *Note Verbale* dated 3 of October 2013 from the Netherlands to Russia, delivered just one day before the commencement of the arbitral proceedings, can be construed as the exchange of views within the meaning of Article 283.<sup>388</sup> This was the only communication between the parties that specifically pertained to the means for settling the dispute as it was clarified that the Netherlands was considering compulsory proceedings under UNCLOS to resolve the dispute.

The reason for the tribunal's determination was based on the urgency of the situation of the dispute, as this case had a bearing on the detention of the vessel (*Arctic Sunrise*) and its crew. By 3 October 2013 when the Netherlands delivered its *Note Verbale* concerning the means to resolve the dispute by recourse to the compulsory proceedings, the Netherlands had requested the release of the ship and its crews several times, but Russia declined their requests. The tribunal determined that, as there had been no interest shown or intention by the respondent to engage in further discussions, urgently seeking a solution by recourse to the initiation of the arbitral proceedings was necessary for the Netherlands.<sup>389</sup>

However, as the tribunal clarified, such an exchange of views cannot suffice for satisfying the obligation within Article 283 in every case or normal circumstances.<sup>390</sup> In this case, the tribunal took a flexible approach to the obligation to exchange views due to the urgency of

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<sup>386</sup> Øystein Jensen and Nigel Bankes, 'Compulsory and Binding Dispute Resolution under the United Nations Convention on the Law of the Sea: Introduction' (2017) 48 *Ocean Development and International Law* 209, p. 211.

<sup>387</sup> *Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003, p. 10, para. 50.*

<sup>388</sup> *Arctic Sunrise Arbitration between the Netherlands and Russia, Award on the Merits, 14 August 2015, para. 153.*

<sup>389</sup> *Ibid.*, para. 155

<sup>390</sup> *Ibid.*, para. 153.

the situation of detention of the vessel and crew. Here, what was emphasised by the tribunal's determination was that Article 283 aims to foster the settlement of the dispute by recourse to peaceful means, and the obligation under this article should not be used unduly to delay the resolution of the dispute.<sup>391</sup>

The tribunal's approach to the obligation of Article 283 shown in the *Arctic Sunrise* case was followed by ITLOS in prescribing the provisional measures in the arbitration between Ukraine and Russia concerning the detention of Ukrainian naval vessels and their servicemen (hereinafter '*Detention of Ukrainian Naval Vessels and Servicemen*' case). On 19 March 2019, Ukraine requested Russia immediately to express its view concerning the proper means of settling the dispute within ten days. Ukraine explained the reason for adding a time-limit was to avoid ambiguity of the situation since whether and when Russia would agree to participate in an exchange of views were entirely not sure. Russia responded to Ukraine on 25 March 2019 that its comments to the issues raised by Ukraine would be sent separately. Having not received any views from Russia, arbitral proceedings under Annex VII of UNCLOS were commenced on 1 April 2019.

Here the controversial issue was concerning Ukraine's imposed deadline for requesting Russia to clarify its preferred means for settling the dispute. Russia claimed that a deadline was arbitrarily imposed, however, ITLOS said that the time-limit of ten days could not be considered arbitrary in light of the obligation of the parties to exchange their views expeditiously.<sup>392</sup> In this case, we can see that ITLOS considered the urgency of the situation where the respondent detained applicants' naval vessels. From this point, ITLOS found that the obligation to exchange views had been satisfied in this case.

### 3.5.3. An Obligation Not Imposed Indefinitely

When states parties could have agreed to take a specific means to settle their dispute after having exchanged their views, of course, the obligation under Article 283 can be regarded as satisfied. In that case, only the applicability of Article 281 to the submitted dispute will be examined to determine whether the agreed means can be applied to the dispute instead

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<sup>391</sup> *Ibid*, para. 154.

<sup>392</sup> *Detention of Three Ukrainian Naval Vessels Case (Ukraine v. Russia)*, Provisional Measures, Order, ITLOS, 25 May 2019, para. 86.

of the procedures regulated in Part XV. However, the parties to the dispute may fail to reach an agreement concerning how they would resolve the dispute. This may be because one party did not respond to another party's request to make such an agreement, or simply because each of them prefers different measures. If this is so, how far should states parties engage in the exchange of views before resorting to the compulsory procedures in Section 2?

The jurisprudence of Part XV tribunals has shown that Article 283 does not require states parties to exchange their views indefinitely. Section 1 of Part XV itself does not impose any indefinite obligation on states. Although the composing provisions of Section 1 constitute the preconditions that must be satisfied before recourse to the compulsory proceedings, Part XV tribunals have confirmed that states are not obliged to implement the obligations within it indefinitely.<sup>393</sup> In this sense, the tribunal in the *SBT* case stated that article 283 does not require one of the parties to the dispute to consult with another party indefinitely.<sup>394</sup> Instead, it has been consistently confirmed in numerous cases that a party is not obliged to continue with an exchange of views when it concludes that the possibilities of reaching an agreement have been exhausted.<sup>395</sup>

One may argue that the determination about the exhaustion of the possibility of reaching a positive result cannot but be made subjectively. That is true, but the fact that the parties can make such a subjective determination does not mean that the tribunal of the case would not examine whether the possibility of reaching an agreement has actually been exhausted. As

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<sup>393</sup> *Southern Bluefin Tuna Case (New Zealand v. Japan; Australia v. Japan)*, Request for Provisional Measures, Order, ITLOS, 27 August 1999, para. 60; *Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore)*, Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003, p. 10, para. 47; *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Provisional Measures, Order of 23 December 2010, ITLOS Reports 2008-2010, p. 58, para. 63.

<sup>394</sup> *Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan*, Award on Jurisdiction and Admissibility, 4 August 2000, para. 55.

<sup>395</sup> *MOX Plant (Ireland v. United Kingdom)*, Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, p.95, para. 60; *Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore)*, Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003, p. 10, para. 48; *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Provisional Measures, Order of 23 December 2010, ITLOS Reports 2008-2010, p. 58, para. 63; *"ARA Libertad" (Argentina v. Ghana)*, Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012, p. 332, para. 71; *Arctic Sunrise Arbitration between the Netherlands and Russia*, Award on the Merits, 14 August 2015, para. 76; *Chagos Marine Protected Area Arbitration between Mauritius and the UK*, Award, 18 March 2015, para. 385; *Arctic Sunrise Arbitration between the Netherlands and Russia*, Award on the Merits, 14 August 2015, para. 154; *South China Sea Arbitration between Philippines and China*, Award on Jurisdiction and Admissibility, 29 October 2015, para. 343; *Duzgit Integrity Arbitration between Malta and São Tomé and Príncipe*, Award, 5 September 2016, para. 198; *M/V "Norstar" Case (Panama v. Italy)*, Preliminary Objections, Judgment, ITLOS, 4 November 2016, para. 216; *Detention of Three Ukrainian Naval Vessels Case (Ukraine v. Russia)*, Provisional Measures, Order, ITLOS, 25 May 2019, para. 87; *M/T "San Padre Pio" (Switzerland v. Nigeria)*, Provisional Measures, Order of 6 July 2019, ITLOS Reports 2018-2019, p. 375, para. 73

Judge Chandrasekhara Rao of ITLOS presented in his Separate Opinion, the obligation within Article 283 must be discharged in good faith, and then the judicial bodies must examine whether this obligation has been fulfilled.<sup>396</sup> Likewise, during the past proceedings, each of the tribunals had examined and reviewed the records and facts before making their decision. Therefore, as Natalie Klein appraises, since Part XV tribunals have made decisions based on their assessment of the facts rather than just relying on the subjective determination of one of the parties, it can be said that the reviewing role of Part XV tribunals has been maintained.<sup>397</sup>

Within the case-law of Part XV tribunals, the most frequently cited ground for determining the exhaustion of the possibility of reaching an agreement was a party's failure to engage in the exchange of views with another party. Part XV tribunals have confirmed that the obligation to exchange views within the meaning of Article 283 applies not only to the applicant but equally to the respondent.<sup>398</sup> In other words, if the respondent has failed to comply with Article 283, then it cannot cause any impediment to the progression of the compulsory proceedings. Accordingly, Part XV tribunals have concluded that the applicant is not obliged to indefinite exchanges if the respondent has failed to respond to the applicant's suggestions about holding consultations.<sup>399</sup>

The decisions of the tribunals concerning Article 283 in the *Arctic Sunrise* case and the *Detention of Ukraine Naval Vessels and Servicemen* case were concluded in this same respect. In the *Arctic Sunrise* arbitration, the *Note Verbal* which had been delivered only a day before the institution of the compulsory proceedings was considered as constituting an exchange of views within the meaning of Article 283. Based on the urgency of the situation, the arbitral tribunal determined that since Russia had failed to respond to the Netherland's *Note Verbale* dated 3 October, the possibility of reaching an agreement between the parties

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<sup>396</sup> *Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003, p. 10, Separate Opinion of Judge Chandrasekhara Rao, para. 11.*

<sup>397</sup> Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, p. 63.

<sup>398</sup> *Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003, p. 10, para. 38; M/V "Norstar" Case (Panama v. Italy), Preliminary Objections, Judgment, ITLOS, 4 November 2016, para. 213; Detention of Three Ukrainian Naval Vessels Case (Ukraine v. Russia), Provisional Measures, Order, ITLOS, 25 May 2019, para. 88; M/T "San Padre Pio" (Switzerland v. Nigeria), Provisional Measures, Order of 6 July 2019, ITLOS Reports 2018–2019, p. 375, para. 74.*

<sup>399</sup> *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain), Provisional Measures, Order of 23 December 2010, ITLOS Reports 2008-2010, p. 58, paras. 58-65; M/V "Norstar" Case (Panama v. Italy), Preliminary Objections, Judgment, ITLOS, 4 November 2016, paras. 213-217.*

has been exhausted.<sup>400</sup> In the *Detention of Ukraine Naval Vessels and Servicemen* case, the determination was the same. Based on the urgency of the situation, ITLOS found that Russia had failed to engage in an exchange of views concerning the means for settling the dispute. For this reason, ITLOS concluded that an agreement between the parties could not be possibly yielded so that the requirements of Article 283 were satisfied before Ukraine's institution of the arbitral proceedings.<sup>401</sup>

### 3.5.4. Anti-Formalistic Approach

In actual circumstances between the parties to the dispute, the substantive negotiations concerning the parties' dispute are not neatly separable from an exchange of views on the proper means for settling a dispute.<sup>402</sup> Then, the formalistic approach to the obligation within Article 283 would be that the parties are always required to engage in separate communications just for seeking a means for resolving a dispute, as the term 'formalistic' refers to excessive adherence to certain prescribed forms.<sup>403</sup>

However, Part XV tribunals have taken an opposite approach to the formalistic view of necessarily requiring a separate exchange of views to proceed. Part XV tribunals' anti-formalistic approach can be traced back to the *SBT* case. In this case, the arbitral tribunal found that the negotiation undertaken as a means for settling their dispute in accordance with Article 16 of the CCSBT corresponded to the implementation of the obligation of exchange of views.<sup>404</sup> In other words, the tribunal's decision showed that the obligation to exchange views within Article 283 can also be satisfied by the substantive negotiation concerning the dispute.

This approach was further clarified by the arbitral tribunal in the *Barbados v. Trinidad and Tobago* case. In this case, the dispute between the parties concerned the interpretation and

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<sup>400</sup> *Arctic Sunrise Arbitration between the Netherlands and Russia, Award on the Merits, 14 August 2015*, paras. 154-156.

<sup>401</sup> *Detention of Three Ukrainian Naval Vessels Case (Ukraine v. Russia), Provisional Measures, Order, ITLOS, 25 May 2019*, paras. 86-88.

<sup>402</sup> *Chagos Marine Protected Area Arbitration between Mauritius and the UK, Award, 18 March 2015*, para. 381.

<sup>403</sup> Oxford English Dictionary, 'Formalism' <<https://www-oed-com.ezproxy.lib.gla.ac.uk/view/Entry/73433?redirectedFrom=formalism#eid>> ; last visited – 15 August 2022.

<sup>404</sup> *Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan, Award on Jurisdiction and Admissibility, 4 August 2000*, para. 55.

application of Articles 74 and 83 regarding the delimitation of the EEZ and the continental shelf. These articles require that the delimitation be effected by agreement based on international law. Here, the tribunal found that this necessarily involves the negotiation process between the parties to seek a means for settling the dispute.<sup>405</sup> In that circumstances, the tribunal determined that it was not reasonable to interpret Article 283 as requiring a further separate exchange of views when many years of substantive negotiations for delimitation had already failed to resolve a dispute.<sup>406</sup> Therefore, the tribunal concluded that an obligation to exchange views under Article 283 concerning the dispute regarding Articles 74 and 83 is subsumed within the negotiations that those articles require to take place. Moreover, the tribunal said that it would be “unrealistic” to require another round of exchange of views when the agreed means had failed to result in an agreement, since the required exchange of views was inherent in that failed means.<sup>407</sup>

The tribunals in the subsequent cases followed the same approach. In the *Chagos MPA* case, the tribunal said that the idealised form of an exchange of views that can be neatly distinguished from the substantive negotiations will rarely occur.<sup>408</sup> Instead, the tribunal pointed out that Article 283 should be applied without any undue formalism as to the manner and precision with which views were exchanged and understood.<sup>409</sup> The arbitral tribunal of the *South China Sea* case took the same approach as it mentioned that reality, in which diplomatic communications do not divide neatly between procedural and substantive matters, should be kept in mind in applying Article 283 of the Convention.<sup>410</sup>

Within the case-law of Part XV judicial bodies, Article 283 has been considered as intending to promote expeditious consultations between the parties and to prevent the unduly delay of resolving the dispute. In that respect, the anti-formalistic approach to the application of Article 283 was in line with the purpose of Article 283 which has been continuously emphasised in the case-law of Part XV tribunals.

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<sup>405</sup> *Arbitration between Barbados and Trinidad and Tobago, Award, 11 April 2006*, para. 201.

<sup>406</sup> *Ibid.*, para. 202.

<sup>407</sup> *Ibid.*, paras. 203-205.

<sup>408</sup> *Chagos Marine Protected Area Arbitration between Mauritius and the UK, Award, 18 March 2015*, para. 381.

<sup>409</sup> *Ibid.*, para. 382.

<sup>410</sup> *South China Sea Arbitration between Philippines and China, Award on Jurisdiction and Admissibility, 29 October 2015*, para. 332.

### 3.6. Concluding Remarks

The provisions in Section 1 constitute procedural preconditions to the compulsory proceedings in Section 2 and, ensure states' rights to settle their dispute by recourse to the means of their choice. However, the composing provisions of Section 1 are expressed in general terms that do not cover all eventualities. Given its significance for the functioning of overall dispute settling procedures of UNCLOS, the clear meaning of these articles and a practical way of applying them are crucial for both the dispute settling system of the Convention and the states parties. Concerning these interpretive ambiguities within this Section, Part XV tribunals have taken action to clarify how the procedural provisions should be interpreted and applied.

As we have seen, Section 1 of Part XV was where substantial changes and transitions in interpretation and application occurred between the cases, compared to Section 2 or 3 of Part XV. Most of those changes were made in refusing to follow the decision of the arbitral tribunal in the *SBT* case. For example, in determining the need for an express exclusion of Part XV procedures in interpreting Article 281 or dealing with the potential overlapping jurisdiction with other procedures, the majority opinion of *SBT* was refuted by other Part XV tribunals. Since then, however, the changed approaches have largely been followed by the subsequent cases and as a result, they have become new reference points for the states parties as well as other Part XV tribunals. In this respect, it would be difficult to appraise that the past judicial determinations remain contradictory and in conflict with each other.

Due to the contribution of Part XV tribunals, Section 1 of Part XV has been clarified compared to the time just after the conclusion of the Convention. Now, Article 281 is understood as requiring a legally binding agreement with a clear exclusion of Part XV procedures, to preclude the applicability of the compulsory proceedings in Section 2. To be an agreement 'to seek settlement of the dispute' within the meaning of this article, an agreement must specify the alternative means for settling disputes, such as negotiation, conciliation, or mediation. Moreover, in the case of overlapping jurisdiction, Part XV procedures would not be entirely precluded from exercising jurisdiction over the dispute unless other procedures may cover the dispute concerning the interpretation or application of UNCLOS. Lastly, how to implement the obligation within Article 283 has been guided in detail by the jurisprudence of Part XV tribunals so that it should not be an onerous



burden for the parties to the dispute, like requiring a formalistic approach or indefinite obligation.

Although there have been some novel approaches and some deviations from the past decision, they have become Part XV tribunals' jurisprudence on interpreting and applying those provisions. All of this shows what has been created by Part XV tribunals and how they have regulated the procedural preconditions to the compulsory proceedings.

## 4. Exercise of Compulsory Jurisdiction in the Jurisprudence of Part XV Tribunals

### 4.1. Given General Rules on the Subject-Matter Jurisdiction in Part XV

The existence of the dispute in the international adjudication process does not simply mean the existence of, as defined by the PCIJ, ‘a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons’.<sup>411</sup> Instead, it concerns the subject-matter jurisdiction of a certain judicial body. The subject-matter jurisdiction (jurisdiction *ratione materiae*) is about the matter of deciding whether the subject-matter of the dispute is such as a court or tribunal may have jurisdiction over.<sup>412</sup> As a court or tribunal may only exercise its jurisdiction if that dispute can be characterised as the one that falls within its subject-matter jurisdiction, the existence of such a dispute is a primary condition for the entire judicial proceeding.<sup>413</sup> Hence, the issue about the existence of the dispute relates to the jurisdictional requirements or limits that pertain to the identification of the matters over which a court or tribunal may exercise its jurisdiction.<sup>414</sup>

The jurisdiction of international courts and tribunals depends on various supplementary conditions added to the term ‘dispute’.<sup>415</sup> Therefore, the question of subject-matter jurisdiction of a court or tribunal must be examined with consideration of the applicability of various jurisdictional provisions to the submitted claims or matters. When it comes to the compulsory proceedings under UNCLOS, similarly, the ‘dispute’ that Part XV tribunals can exercise their jurisdiction is composed of certain conditions and limits regulated by several provisions.

The fundamental subject-matter jurisdiction of Part XV tribunals is regulated by Article

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<sup>411</sup> *The Mavrommatis Palestine Concessions*, P.C.I.J. Collection of Judgments, Series A – No. 2, August 30th, 1924, p. 11.

<sup>412</sup> Kolb and Perry, *The International Court of Justice*, p. 297.

<sup>413</sup> *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, p. 253, para. 55; *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p. 457, para. 55; Paolo Palchetti, ‘Dispute’ (2018) Max Planck Encyclopedias of International Law, para. 4; Jensen and Bankes, ‘Compulsory and Binding Dispute Resolution under the United Nations Convention on the Law of the Sea: Introduction’, p. 211.

<sup>414</sup> Palchetti, ‘Dispute’, para. 4; See also Beatrice I. Bonafe, ‘Establishing the Existence of a Dispute before the International Court of Justice: Drawbacks and Implications’ Questions of International Law <<http://www.qil-qdi.org/establishing-existence-dispute-international-court-justice-drawbacks-implications/>>; last visited – 15 August 2022.

<sup>415</sup> Garrido-Muñoz, ‘Dispute’, para. 27.

288(1);

*Article 288  
Jurisdiction*

*1. A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part.*

Accordingly, Part XV tribunals shall have jurisdiction over any dispute concerning the interpretation or application of the Convention.<sup>416</sup> However, as Article 286 says, the compulsory procedures within Section 2 must be subject to Section 3 and can only be initiated after all the preconditions of Section 1 have been satisfied. Thus, the ‘dispute’ to which the compulsory jurisdiction under UNCLOS is applicable indicates one that fulfils the requirements in Section 1 and does not fall under the exceptions in Section 3.<sup>417</sup>

Besides this very fundamental rule, many other issues of the subject-matter jurisdiction of Part XV tribunals have been raised in past compulsory proceedings. In some cases, questions were raised as to whether states parties can make declarations pursuant to Article 287 with conditions, and the effect of such declarations on the subject-matter jurisdiction of a certain judicial body. Moreover, claims concerning the alleged breach of Article 300 of UNCLOS caused controversies over the applicability of the compulsory jurisdiction. Recently, the issue of characterising the nature of the dispute within so-called ‘mixed disputes’ has arisen in connection with the purview of subject-matter jurisdiction of Part XV tribunals.

In those cases, Part XV tribunals have clarified how to exercise their compulsory jurisdiction concerning issues that are not clear under the given provisions of the Convention. This chapter will focus on their clarifications of various rules regarding the subject-matter jurisdiction under UNCLOS Part XV. Section 4.2. will look Part XV tribunals’ determinations on the fundamental matters relating to the applicability of compulsory jurisdiction. This includes questions about which claims can be regarded as disputes concerning the interpretation or application of the Convention, and what the effect is of the declaration made following Article 287 on the subject-matter jurisdiction of Part XV tribunals. Next, Section 4.3. will look at how the applicability of compulsory

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<sup>416</sup> Nordquist and others, *United Nations Convention on the Law of the Sea 1982: A Commentary*, para. 288.1.

<sup>417</sup> *Ibid*, para. 286.6.

procedures concerning the claims based on Article 300 of UNCLOS has been addressed by Part XV tribunals will be examined. Then, Section 4.4 will look into the crafted methodology for characterising the nature of the dispute within mixed disputes cases.

## 4.2. When can a Part XV Tribunal Exercise Compulsory Jurisdiction?

### 4.2.1. Existence of ‘Dispute’ Concerning the Interpretation or Application of UNCLOS

For a certain Part XV tribunal to exercise its jurisdiction, the claims submitted must concern the interpretation or application of UNCLOS. In the compulsory proceedings under UNCLOS, the applicant must clarify its claims and the grounds on which that application is based.<sup>418</sup> This indicates that whether the characteristic of the submitted dispute concerned the interpretation or application of UNCLOS will first be identified by the applicant when it brings the case before the tribunal.<sup>419</sup> However, the subject-matter of the dispute is not decided solely based on the applicant’s characterisation of its claims. According to the general practice of international courts, the tribunal should take charge of determining the subject-matter of the claims.

The ICJ, for example, has confirmed that it is for the Court itself to determine the subject-matter of the dispute on an objective basis by isolating the real issue and identifying the object of the claim, while it gives particular attention to the formulation of the dispute chosen by the applicant.<sup>420</sup> The objective approach here indicates that one party’s

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<sup>418</sup> Each of the statutory instruments of all four forums commonly clarifies this point; for ITLOS – Article 24(1) of the Statute of the ITLOS and Article 54(1) of the Rules of the Tribunal; for the ICJ – Article 40(1) of the Statute and Article 38(2) of the Rules of Court; for Annex VII arbitral tribunals – Article 1 of Annex VII; and for Annex VIII special arbitral tribunal – Article 1 of Annex VIII.

<sup>419</sup> Tullio Treves, ‘What have the United Nations Convention and the International Tribunal for the Law of the Sea to offer as regards Maritime Delimitation Disputes?’ in Rainer Lagoni and Daniel Vignes (eds), *Maritime Delimitation* (Martinus Nijhoff 2006), p. 77.

<sup>420</sup> *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, p. 253, paras. 30-31; *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p. 457, paras. 30-31; *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, p. 432, para. 31; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, I.C.J. Reports 2007, p. 832, para. 38; *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objection,

formulation of the claims cannot be the sole basis for determining the subject-matter of a dispute.<sup>421</sup> Likewise, determining the subject-matter of the submitted claims constitutes an ‘integral part of the Court’s judicial function’.<sup>422</sup> The ICJ’s approach has been followed by Part XV tribunals – ITLOS and Annex VII arbitral tribunals.<sup>423</sup>

According to the jurisprudence of Part XV tribunals, how the applicant composes its claims is not decisive in determining whether the submitted dispute can be truly regarded as concerning the interpretation or application of UNCLOS. Instead, Part XV tribunals have continuously stressed that there should be a substantive link between the subject-matter of the dispute and the invoked provisions of UNCLOS. In other words, if the invoked rights or obligations under UNCLOS cannot be applied to the given circumstances, Part XV tribunals would not determine that the submitted claims concerned the interpretation or application of the Convention.

This matter was first raised in the *SBT* case. As has been addressed in Chapter 3, the main issue of this case between the parties concerned the conservation and management of the southern bluefin tuna stock. Japan, on the one hand, argued that, as the dispute originated from the rights and obligations within the CCSBT,<sup>424</sup> not the UNCLOS, the claims raised by Australia and New Zealand cannot be the dispute concerning interpretation or application of the Convention.<sup>425</sup> Whereas, the applicants raised specific provisions such as Articles 64, 116-119 of the Convention as jurisdictional grounds for the tribunal.<sup>426</sup>

The arbitral tribunal firstly said that what profoundly divided the parties was whether the

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*Judgment, I.C.J. Reports 2015, p. 592, para. 26; Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, Judgment, I.C.J. Reports 2018, p. 292, para. 48.*

<sup>421</sup> See; James Harrison, 'Defining Disputes and Characterizing Claims: Subject-Matter Jurisdiction in Law of the Sea Convention Litigation' (2017) 48 *Ocean Development and International Law* 269, p. 270.

<sup>422</sup> *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007, p. 832, para. 138.*

<sup>423</sup> *Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan, Award on Jurisdiction and Admissibility, 4 August 2000, para. 48; Chagos Marine Protected Area Arbitration between Mauritius and the UK, Award, 18 March 2015, para. 208; South China Sea Arbitration between Philippines and China, Award on Jurisdiction and Admissibility, 29 October 2015, para. 150; Coastal State Rights Arbitration between Ukraine and Russia, Preliminary Objections of Russia, 19 May 2018, para. 151; "Enrica Lexie" Incident Arbitration between Italy and India, Award, 21 May 2020, para. 231.*

<sup>424</sup> The Convention for the Conservation of Southern Bluefin Tuna.

<sup>425</sup> *Southern Bluefin Tuna Case, Response and Counter-Request for Provisional Measures Submitted by Japan, 6 August 1999, para. 30; Southern Bluefin Tuna Case, Memorial on Jurisdiction of Japan, 11 February 2000, para. 100.*

<sup>426</sup> *Southern Bluefin Tuna Case, Statement of Claim and Grounds on Which It Is Based of Australia, 15 July 1999, para. 69.*

dispute had arisen solely under the CCSBT, or also under the Convention.<sup>427</sup> According to the tribunal, however, it is common to see that more than one treaty may bear on a certain dispute, as in this case (CCSBT and UNCLOS).<sup>428</sup> The tribunal said that to sustain the jurisdiction in a case invoked by a *compromissory clause* of a treaty, the claims must ‘reasonably relate to’ or be ‘capable of being evaluated in relation to’, the legal standards given by that treaty.<sup>429</sup> The provisions that Australia and New Zealand invoked concerned the highly migratory species and the rights and obligations concerning the living resources in the high seas.<sup>430</sup> The tribunal found that the rights and obligations regulated by those provisions can be applied to the matter regarding the conservation and management of the southern bluefin tuna, which is on the list of highly migratory species in Annex I of UNCLOS. In this sense, the tribunal construed that the subject-matter of the dispute between the parties had also arisen concerning the provisions of UNCLOS.<sup>431</sup> Thus, the tribunal found that the subject-matter of the dispute contained in the submissions of Australia and New Zealand concerned not just the CCSBT, but also the interpretation or application of the Convention.

The significance of the link between the subject-matter of the dispute and the invoked provisions of UNCLOS was emphasised again by ITLOS in the *M/V Louisa* case. The main dispute in this case concerned the boarding, search, detention and arrest of the vessel *M/V Louisa* and its crew. The flag state of this vessel was Saint Vincent and the Grenadines (hereinafter, ‘SVG’). These enforcement activities were conducted by the Spanish authorities while the vessel was anchored in the port within Spanish territory. Within the compulsory proceeding under UNCLOS, what SVG requested ITLOS to declare was that Spain had violated Articles 73, 87, 226, 227, 245 and 303 of the Convention.<sup>432</sup> Spain argued that, plainly, those provisions did not apply to the facts of the case so they could not serve as jurisdictional grounds for ITLOS to give a determination on

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<sup>427</sup> *Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan, Award on Jurisdiction and Admissibility, 4 August 2000*, para. 47.

<sup>428</sup> *Ibid.*, para. 52.

<sup>429</sup> *Ibid.*, para. 48.

<sup>430</sup> Article 64 Highly migratory species; Article 116 Right to fish on the high seas; Article 117 Duty of States to adopt with respect to their nationals measures for the conservation of the living resources of the high seas; Article 118 Co-operation of States in the conservation and management of living resources; and Article 119 Conservation of the living resources of the high seas.

<sup>431</sup> *Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan, Award on Jurisdiction and Admissibility, 4 August 2000*, para. 52.

<sup>432</sup> *M/V "Louisa" Case, Application Instituting Proceedings Before the International Tribunal for the Law of the Sea, Saint Vincent and the Grenadines, 23 November 2010*.

the submissions by SVG.<sup>433</sup>

In the phase of the merits, ITLOS decided that it lacked jurisdiction over the dispute concretised in the submissions of SVG. ITLOS emphasised that there must be a ‘link’ established between the facts advanced by the applicant and the provisions of the Convention raised in the claims for its jurisdiction.<sup>434</sup> However, ITLOS said that it could not find such links between the given circumstances and the rights and obligations within each of the provisions referred to by SVG.<sup>435</sup> For example, SVG argued that this vessel’s access to the high seas had been denied because of the detention of the vessel, so the freedom of vessels to navigate on the high seas provided in Article 87 was infringed.<sup>436</sup> However, Article 87 deals with the freedom of the high seas, which applies only to the high seas and the EEZ. ITLOS did not accept this claim as this article cannot apply to the facts of this case, where the vessel was detained while it was docked in a coastal state’s port, which was neither the high seas nor the EEZ.<sup>437</sup> Likewise, as there were no established links between the facts and the certain provisions of the Convention, ITLOS concluded that there had been no dispute concerning the interpretation or application of the Convention between the parties.<sup>438</sup> This approach has been maintained consistently in later cases such as *ARA Libertad* case (provisional measures),<sup>439</sup> *M/V “Norstar”* (hereinafter ‘*M/V Norstar*’) case,<sup>440</sup> and *M/T “San Padre Pio”* (hereinafter ‘*M/T San Padre Pio*’) case,<sup>441</sup> and the Annex VII arbitral tribunal’s award in the *Duzgit Integrity* case.<sup>442</sup>

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<sup>433</sup> *M/V “Louisa” Case, Counter-Memorial of Spain, 12 December 2011*, paras. 142-168.

<sup>434</sup> *M/V “Louisa” (Saint Vincent and the Grenadines v. Kingdom of Spain), Judgment, ITLOS Reports 2013, p. 4, para. 99.*

<sup>435</sup> *Ibid.*, paras. 100-125.

<sup>436</sup> *M/V “Louisa” Case, Reply of Saint Vincent and the Grenadines to the Counter-Memorial of Spain, 10 February 2012*, p. 26.

<sup>437</sup> *M/V “Louisa” (Saint Vincent and the Grenadines v. Kingdom of Spain), Judgment, ITLOS Reports 2013, p. 4, para. 109.*

<sup>438</sup> *Ibid.*, para. 151. The final decision of ITLOS was contrary to its earlier decision of ordering the provisional measures, in which ITLOS found that it had *prima facie* jurisdiction over the dispute (see; *M/V “Louisa” (Saint Vincent and the Grenadines v. Kingdom of Spain), Provisional Measures, Order of 23 December 2010, ITLOS Reports 2008-2010, p. 58, para. 70*). Concerning this opposite outcome, Judge Paik makes clear in his Declaration that a plausible connection between the claims of a party and the invoked jurisdictional provisions may be enough for *prima facie* jurisdiction, but it falls far short when a definitive finding on the jurisdiction must be made (*M/V “Louisa” (Saint Vincent and the Grenadines v. Kingdom of Spain), Judgment, ITLOS Reports 2013, Declaration of Judge Paik, para. 7*).

<sup>439</sup> *“ARA Libertad” (Argentina v. Ghana), Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012, p. 332, paras. 60-67.*

<sup>440</sup> *M/V “Norstar” Case (Panama v. Italy), Preliminary Objections, Judgment, ITLOS, 4 November 2016, para. 110.*

<sup>441</sup> *M/T “San Padre Pio” (Switzerland v. Nigeria), Provisional Measures, Order of 6 July 2019, ITLOS Reports 2018–2019, p. 375, paras. 56-60.*

<sup>442</sup> *Duzgit Integrity Arbitration between Malta and São Tomé and Príncipe, Award, 5 September 2016, para. 138.*

In the recent arbitral award concerning preliminary objections in the *Coastal State Rights* case, the tribunal also implied the point which had been confirmed by different Part XV tribunals. In this case, Russia argued that the Sea of Azov and the Kerch Strait have been internal waters of both Russia and Ukraine, even after the dissolution of the USSR. Since Russia considered that UNCLOS does not regulate the regime of internal waters, it contended that the disputes pertaining to the status of internal waters do not concern the interpretation or application of the Convention.<sup>443</sup> However, the tribunal did not accept the proposition that UNCLOS does not regulate the regime of internal waters, as this regime is governed by numerous provisions of this Convention.<sup>444</sup> The tribunal stressed that even for those regions designated as internal waters, the relevant questions will be whether a particular issue raised by the parties is regulated by the Convention or whether the certain conduct complained of implicates or raises questions about the interpretation or application of UNCLOS.<sup>445</sup> The tribunal then decided to reserve the issue of the status as internal waters to be addressed in the phase of the merits. The tribunal's determination above implies that the link between the given facts and certain provisions of UNCLOS is decisive in determining whether the subject-matter of the dispute concerns the interpretation or application of the Convention.

#### 4.2.2. The Effect of Declaration Pursuant to Article 287 with Condition(s)

As Article 288 clarifies, Part XV tribunals shall have jurisdiction over any dispute concerning the interpretation or application of the Convention. Since no reservations or exceptions can be made to this Convention unless expressly permitted by other provisions within it,<sup>446</sup> basically all parties to the Convention accept the same purview of subject-matter jurisdiction of procedures of Section 2. Especially, each of the arbitral tribunals constituted under Annex VII of UNCLOS, which functions as a default forum for the compulsory procedures of Part XV, always enjoys the same purview of subject-matter jurisdiction except when a declaration pursuant to Article 298(1) has been made.

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<sup>443</sup> *Coastal State Rights Arbitration between Ukraine and Russia, Preliminary Objections of Russia, 19 May 2018*, paras. 132-133.

<sup>444</sup> *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait, Award Concerning the Preliminary Objections of Russia, 21 February 2020*, para. 294.

<sup>445</sup> *Ibid.*, para. 296.

<sup>446</sup> Article 309 of UNCLOS.



However, when a dispute is brought before the forums other than the arbitral tribunal under Annex VII, the purview of subject-matter jurisdiction that a certain designated forum may exercise can differ depending on the cases or the parties to the dispute. According to Article 287, states parties can freely choose the means for the settlement of disputes concerning the interpretation or application of the Convention. However, some states have made a declaration to choose the means upon the condition concerning the scope of subject-matter jurisdiction of the chosen means. For example, Bangladesh made its declaration pursuant to Article 287 that it accepts the jurisdiction of ITLOS only for the settlement of the dispute between India or Myanmar relating to the maritime delimitation in the Bay of Bengal.<sup>447</sup> This declaration indicates that Bangladesh limits the purview of the compulsory jurisdiction of ITLOS only to the matters concerning the maritime delimitation in the specific region against designated parties.

What, then, would be the effect of such conditional declarations on the scope of subject-matter jurisdiction of a particular forum when either party to the case has already appended such conditions? To what extent can that forum exercise its jurisdiction? Concerning the optional clause declaration within the Statute of the ICJ, for example, Article 36(3) of the Statute explicitly regulates the relationship between them – the principle of reciprocity. The principle of reciprocity addresses the question of judicial fairness allowing one party to avail itself to invoke the reservations appended by the other party.<sup>448</sup> In other words, it enables the state that has made the wider acceptance of the jurisdiction of the Court to rely upon the reservations to the acceptance laid down by the other party.<sup>449</sup> Accordingly, when two different unilateral declarations are involved in one case, the jurisdiction is conferred to the ICJ only to the extent to which those declarations overlap.<sup>450</sup> In this sense, the principle of reciprocity not only governs the mutual relationship between the different states concerned, but also directly determines the scope of *ratione materiae* of the jurisdiction of the ICJ.<sup>451</sup>

When it comes to the optional exception declarations under Article 298, UNCLOS regulates the effect of different declarations on Part XV tribunals' jurisdiction. As will be

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<sup>447</sup> See; United Nations Treaty Collection <[https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtmsgno=XXI-6&chapter=21&Temp=mtmsg3&clang=\\_en#EndDec](https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtmsgno=XXI-6&chapter=21&Temp=mtmsg3&clang=_en#EndDec)>; last visited – 15 August 2022.

<sup>448</sup> Distefano and Héche, 'Optional Clause Declarations: International Court of Justice (ICJ)', para. 39. See also, Bruno Simma, 'Reciprocity' (2008) Max Planck Encyclopedias of International Law.

<sup>449</sup> *Interhandel Case, Judgment of March 21st, 1959: I.C.J. Reports 1959*, p. 6, p. 23.

<sup>450</sup> *Case of Certain Norwegian Loans, Judgment of July 6th, 1957: I.C.J. Reports 1957*, p. 9, p. 18.

<sup>451</sup> Tomuschat, 'Article 36', p. 734, para. 29.

addressed in detail below, Article 298(1) allows states parties to exclude one or more of the listed categories of the dispute from the purview of the compulsory jurisdiction of Section 2. Although it is up to states parties to exclude one or all the listed disputes, Article 298(3) says a state that has made a declaration shall not be entitled to submit any dispute, falling within the excepted category of disputes, to any procedure against another state party without the consent of that party. Similar to the principle of reciprocity, this provision regulates the relationship between the different exceptions made by declarations and their potential effect on the purview of a tribunal's subject-matter jurisdiction.

However, the Convention does not contain any rule regulating the relationship between the declaration pursuant to Article 287 and the purview of the subject-matter jurisdiction of a certain forum. Instead, such rules have been clarified by the judicial decisions of the proceedings under Part XV, especially by ITLOS. That was because, as has been mentioned earlier, only ITLOS has been used for the compulsory proceedings under UNCLOS except for Annex VII arbitral tribunals. Thus, until now, matters concerning the effect of the declaration pursuant to Article 287 and its effect on the purview of subject-matter jurisdiction have only been addressed by ITLOS.

Then, let us look at the relevant rules formulated by ITLOS. First, it was admitted that states parties can attach certain conditions in declaring to choose the means for the settlement of disputes. Article 287 keeps silent on whether states parties are permitted to choose certain forums for resolving the dispute upon condition. However, in the *M/V Louisa* case, ITLOS found that the Convention does not preclude a declaration limited to a particular category of disputes.<sup>452</sup> It recognised that some states parties to the Convention had limited the scope of their declarations under Article 287 and this had become a well-established practice of states under Article 36(2) of the Statute of the ICJ.<sup>453</sup>

ITLOS's acceptance of those declarations made upon conditions was presumably because these declarations would not practically restrict the applicability of the compulsory procedures of Section 2 of Part XV. Although a state has declared acceptance of a certain form only confined to a specific kind of dispute, that does not mean that a dispute not contained in that declaration can be completely exempted from the purview of the entire compulsory jurisdiction of UNCLOS. Article 287(3) says that a state party that is a party to

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<sup>452</sup> *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Judgment, ITLOS Reports 2013, p. 4, para. 79.

<sup>453</sup> *Ibid.*, para. 80.

a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration under Annex VII. Therefore, disputes other than those covered by the declaration pursuant to Article 287 shall still be within the purview of the subject-matter jurisdiction of an arbitral tribunal constituted under Annex VII.

Secondly, it was determined that the principle of reciprocity applies to the declarations under Article 287. ITLOS said in the *M/V Louisa* case that when states parties have made declarations of differing scope, the jurisdiction of the tribunals exists only to the extent to which the declarations of the two parties coincide.<sup>454</sup> Therefore, ITLOS determined that jurisdiction is conferred on itself only insofar as the dispute is covered by the more limited declaration.<sup>455</sup> This point was reaffirmed in the *M/V Norstar* case where ITLOS stated that the jurisdiction would be confined to the terms of the narrower of the two declarations.<sup>456</sup>

Additionally, the timing factor concerning when the declaration of Article 287 would come into effect was clarified by ITLOS. In the *M/V Louisa* case, the applicant, SVG, made a declaration pursuant to Article 287 only one day before it initiated the compulsory proceedings against Spain before ITLOS.<sup>457</sup> However, Article 287(8) only mentions that declarations shall be deposited with the Secretary-General of the UN, who shall transmit copies of them to other states parties. This phrase is identical to Article 36(4) of the Statute of the ICJ which governs the optional clause declaration.<sup>458</sup> As mentioned in Chapter 2, concerning the optional clause declaration, the ICJ determined that the effect comes into force directly and immediately upon its deposition.<sup>459</sup> Similarly, ITLOS determined that the Convention does not preclude the possibility of making a declaration immediately before filing a case.<sup>460</sup> This decision of ITLOS admitted the direct and immediate effect of the declaration under Article 287 upon deposition, as does the optional clause declaration under the Statute of the ICJ.

Through these judicial findings, the effect of declarations made pursuant to Article 287 on

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<sup>454</sup> *Ibid*, para. 81.

<sup>455</sup> *Ibid*, para. 82.

<sup>456</sup> *M/V "Norstar" Case (Panama v. Italy), Preliminary Objections, Judgment, ITLOS, 4 November 2016*, para. 58.

<sup>457</sup> SVG made a declaration under Article 287 on 22 November 2010 and then instituted proceedings by application on 23 November 2010.

<sup>458</sup> Article 36(4) says 'Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court.'

<sup>459</sup> See; *Case Concerning Right of Passage over Indian Territory (Preliminary Objections), Judgment of November 26th, 1957: I.C.J. Reports 1957, p. 125, p. 146; Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 275, paras. 25-26.*

<sup>460</sup> *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain), Judgment, ITLOS Reports 2013, p. 4, para. 79.*

the purview of subject-matter jurisdiction of a tribunal has been clearly formulated. Thus, states parties who have not yet made a declaration under Article 287 now recognise that they can declare to choose the forum for resolving disputes upon certain conditions. Also, in a case where two different conditions have been attached to the declarations, a judicial body can only exercise jurisdiction to the extent to which both declarations overlap. Moreover, it is now understood that the effect of such declarations takes force immediately upon their deposition.

All these points were not provided by the Convention itself but were created and established later by the judicial decisions of ITLOS. If similar issues arise within future proceedings before the ICJ or special arbitral tribunals under Annex VIII, what ITLOS has confirmed will also likely be referred to and followed by them.

#### 4.3. Article 300 of UNCLOS - Which Claims can be Decided?

##### 4.3.1. Article 300 as an Independent Jurisdictional Ground?

Article 300 of UNCLOS regulates the principle of good faith and prevents the abuse of rights. This article says;

*Article 300*  
*Good faith and abuse of rights*

*States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.*

The ‘good faith’ referred to in this article reflects the fundamental rule of *pacta sunt servanda*, and ‘abuse of rights’ here concerns the unnecessary or arbitrary exercise of rights, jurisdiction and freedoms or the misuse of powers by states parties.<sup>461</sup> Thus, Article 300 regulates that a right of the Convention should not be exercised in a fictitious way for

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<sup>461</sup> Nordquist and others, *United Nations Convention on the Law of the Sea 1982: A Commentary*, paras. 300.4-300.5.

a purpose completely different from the one originally granted or in an unreasonable manner.<sup>462</sup>

In terms of the applicability of the compulsory procedures of UNCLOS, though, one question may arise concerning this article – Can Article 300 alone become a jurisdictional ground for Part XV tribunals? Article 300 of UNCLOS contains no substantive rights or obligations except the general principles which must be complied with in conducting the rights, jurisdiction or freedoms regulated by the Convention. Since the compulsory procedures of Part XV can be applied to ‘any dispute concerning the interpretation or application of this Convention’, there is no doubt that an issue relating to Article 300 must be within the purview of jurisdiction of Part XV tribunals.<sup>463</sup> Nevertheless, whether or not a dispute concerning an alleged breach of the obligation to act in good faith or the duty not to abuse the rights may be an independent jurisdictional ground for the compulsory procedures apart from other substantive provisions is uncertain from the text of Part XV. If it is, how can Part XV tribunals determine the existence of independent violation without referring to the substantive rights or obligations? If not, how should states parties raise their claims concerning Article 300 of UNCLOS before the tribunals?

One author says that the possibility of Article 300 as an independent jurisdictional basis was already presented by an early judicial statement in the *SBT* case.<sup>464</sup> Indeed, in this case, both Australia and New Zealand argued that Japan had breached its obligation under Articles 64 and 116-110, and concerning Article 300 of the Convention.<sup>465</sup> However, the tribunal’s statement, in this case, did not answer whether Article 300 can be an independent jurisdictional ground for the compulsory procedures of Part XV. Instead, what the tribunal mentioned concerning the claims based on Article 300 was that a certain obligation of UNCLOS can provide a jurisdictional basis for the tribunal particularly with consideration for Article 300 of UNCLOS.<sup>466</sup> This cannot be understood as admitting any possibility of

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<sup>462</sup> Buga, 'Territorial Sovereignty Issues in Maritime Disputes: A Jurisdictional Dilemma for Law of the Sea Tribunals', p. 87.

<sup>463</sup> The Virginia Commentary says that the presence of highly subjective elements in this article is compensated by the fact that it comes within the scope of the compulsory procedures of Part XV (Nordquist and others, *United Nations Convention on the Law of the Sea 1982: A Commentary*, para. 300.6).

<sup>464</sup> Buga, 'Territorial Sovereignty Issues in Maritime Disputes: A Jurisdictional Dilemma for Law of the Sea Tribunals', p. 88.

<sup>465</sup> See; *Southern Bluefin Tuna Case, Request for the Prescription of Provisional Measures submitted by Australia*, 30 July 1999, para. 25; *Southern Bluefin Tuna Case, Request for the Prescription of Provisional Measures submitted by New Zealand*, 30 July 1999, para. 25; *Southern Bluefin Tuna Case, Statement of Claim and Grounds on Which It Is Based of Australia*, 15 July 1999, para. 45.

<sup>466</sup> “The Tribunal does not exclude the possibility that there might be instances in which the conduct of a State Party to UNCLOS and to a fisheries treaty implementing it would be so egregious, and risk

Article 300 as an independent jurisdictional basis for the tribunal apart from other substantive provisions of the Convention. In contrast, the jurisprudence of Part XV tribunals has shown that such a possibility cannot be accepted.

The matter of alleged violations of Article 300 has been frequently raised by parties to disputes in the compulsory proceedings under UNCLOS.<sup>467</sup> Throughout these proceedings, Part XV tribunals have confirmed that Article 300 alone cannot be the jurisdictional ground for the tribunals. This matter was first confirmed by ITLOS in the *M/V Louisa* case. In this case, SVG argued that Article 300 could independently be a basis for the jurisdiction of ITLOS.<sup>468</sup> In contrast, Spain contended that the principle of good faith must be applied to every one of the provisions of the Convention, but always within the framework of the Convention. For this reason, Spain argued that this article does not have ‘a life of its own’.<sup>469</sup> Concerning this matter, ITLOS said that Article 300 cannot be invoked on its own but may become relevant only when the rights, jurisdiction and freedoms recognised in the Convention are exercised in an abusive manner.<sup>470</sup> The determination of ITLOS indicated that claims concerning Article 300 must be raised with other substantive provisions of the Convention.

This point was further elaborated in the subsequent case of the *M/V “Virginia G”* (hereinafter ‘*M/V Virginia G*’). Here, ITLOS maintained that it is not sufficient to argue the breach of an obligation to act in good faith and in a manner constituting an abuse of rights, without invoking particular provisions.<sup>471</sup> Furthermore, ITLOS described that it is the duty of an applicant that when invoking Article 300, it should specify the concrete obligations and rights under the Convention, with reference to a particular article.<sup>472</sup> In this case, it was

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consequences of such gravity, that a Tribunal might find that the obligations of UNCLOS provide a basis for jurisdiction, having particular regard to the provisions of Article 300 of UNCLOS.” (*Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan, Award on Jurisdiction and Admissibility*, 4 August 2000, para. 64).

<sup>467</sup> The cases where alleged violation of Article 300 was raised by either an applicant or respondent are; *SBT* arbitration, *Sword Fish Stocks* case, *Land Reclamation* arbitration, *Barbados v. Trinidad and Tobago* arbitration, *M/V Louisa* case, *Chagos MPA* arbitration, *M/V Virginia G* case, *Arctic Sunrise* arbitration, *South China Sea* arbitration, *Duzgit Integrity* arbitration, *M/V Norstar* case and *Enrica Lexie* arbitration. In *South China Sea* arbitration, although China did not present any claim before the tribunal due to its decision not to participate, its Position Paper highlighted Article 300 in the context of arguing the arbitral proceedings as an abuse of procedures (See; *South China Sea Arbitration, Position Paper of China on the Matter of Jurisdiction*, 7 December 2014, para. 84).

<sup>468</sup> *M/V “Louisa” Case*, ITLOS/PV.12/C18/12/Rev.1, Verbatim Record, 11 October 2012, p. 5.

<sup>469</sup> *M/V “Louisa” Case*, ITLOS/PV.12/C18/11/Rev.1, Verbatim Record, 10 October 2012, p. 13.

<sup>470</sup> *M/V “Louisa” (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Judgment, ITLOS Reports 2013, p. 4, para. 137.

<sup>471</sup> *M/V “Virginia G” (Panama/Guinea-Bissau)*, Judgment, ITLOS Reports 2014, p. 4, para. 398.

<sup>472</sup> *Ibid.*, para. 399.

determined that the applicant of this case, Panama, invoked Article 300 of UNCLOS in general terms without making any reference to the specific obligations and rights which were exercised in an abusive manner by the respondent, Guinea-Bissau.<sup>473</sup> For this reason, ITLOS dismissed the claim of Panama concerning Article 300.<sup>474</sup> This approach of determining the applicability of compulsory procedures to the claims concerning Article 300 was reaffirmed in its later *M/V Norstar* case.<sup>475</sup>

The arbitral tribunals constituted under Annex VII have followed the jurisprudence of ITLOS. For example, in the *Chagos MPA* arbitration, the tribunal determined that Article 300 is necessarily linked to the alleged violation of another provision of the Convention.<sup>476</sup> Since Mauritius invoked Article 300 along with other rights and obligations of the Convention, the tribunal concluded that it had jurisdiction over the claim concerning Article 300 insofar as it related to the abuse of rights in connection with a violation of other provisions over which it had jurisdiction.<sup>477</sup> In the *Duzgit Integrity* arbitration, the tribunal stated that Article 300 is an example of the application of rules of general international law, although they are explicitly incorporated into the Convention.<sup>478</sup> Therefore, the tribunal concluded that Article 300 needs to be examined in connection with alleged violations of specific provisions, referring to the jurisprudence of ITLOS.<sup>479</sup>

In this same regard, whether or not Article 300 of UNCLOS was breached was determined by the legality of a certain act in question under other provisions invoked in connection with Article 300. In the *Enrica Lexie* case, one of Italy's claims was that India violated Article 100 of UNCLOS, read with Article 300, by failing to cooperate in the repression of piracy. Like other Part XV tribunals, the tribunal of this case confirmed that there must be an established link between the claim under Article 300 and the substantive rights or obligations recognised by other provisions of the Convention.<sup>480</sup> However, the tribunal had already concluded that India had not violated its duty to cooperate in the repression of piracy under Article 100 of UNCLOS. As the certain obligation with which the breach of

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<sup>473</sup> *Ibid.*, para. 400.

<sup>474</sup> *Ibid.*, para. 401.

<sup>475</sup> *M/V "Norstar" Case (Panama v. Italy), Preliminary Objections, Judgment, ITLOS, 4 November 2016*, paras. 131-132.

<sup>476</sup> *Chagos Marine Protected Area Arbitration between Mauritius and the UK, Award, 18 March 2015*, para. 303.

<sup>477</sup> *Ibid.*, para. 323.

<sup>478</sup> *Duzgit Integrity Arbitration between Malta and São Tomé and Príncipe, Award, 5 September 2016*, para. 218.

<sup>479</sup> *Ibid.*, para. 218.

<sup>480</sup> *"Enrica Lexie" Incident Arbitration between Italy and India, Award, 21 May 2020*, para. 729.

Article 300 was claimed was determined not to have been violated, the tribunal determined that Article 300 has not been violated. Therefore, the tribunal found that Article 300 could not be invoked in that case.<sup>481</sup>

The jurisprudence of Part XV tribunals also shows that Article 300 applies to the obligation to implement the judicial decision. In the *Arctic Sunrise* arbitration, the tribunal found Russia to have breached its obligation under Article 300 due to its failure to comply with the order of ITLOS prescribed in the proceedings for the provisional measures,<sup>482</sup> and its failure to pay deposits in this arbitration to cover the fees and expenses.<sup>483</sup> Each of these obligations to implement the provisional measures order and the rules concerning the expenses for the arbitration is respectively regulated by Article 290(6) of the Convention<sup>484</sup> and Article 7 of Annex VII.<sup>485</sup> Therefore, by mentioning Article 300, the tribunal said that states parties shall implement these obligations concerning procedural matters in good faith, as with all other obligations in the Convention.<sup>486</sup>

Through the convergent jurisprudence of Part XV tribunals, it is now certain that Article 300 of UNCLOS cannot be invoked as an independent jurisdictional ground for the compulsory procedures. Part XV tribunals have made it clear that they can exercise their jurisdiction over a claim concerning Article 300 only when such a claim is raised in connection with other provisions of the Convention. There can be no doubt that the jurisprudence of Part XV tribunals would affect states parties' normative expectations concerning how to raise their claims concerning Article 300 in future proceedings.

#### 4.3.2. Abuse of Judicial Proceedings and Article 300

On the one hand, Article 300 has often been raised as a ground for arguing the abuse of

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<sup>481</sup> *Ibid*, para. 730.

<sup>482</sup> *Arctic Sunrise Arbitration between the Netherlands and Russia, Award on the Merits, 14 August 2015*, para. 361.

<sup>483</sup> *Ibid*, paras. 363-371.

<sup>484</sup> Article 290(6) says 'The parties to the dispute shall comply promptly with any provisional measures prescribed under this article.'

<sup>485</sup> Concerning the expenses of arbitral proceedings, Article 7 of Annex VII regulates '... the expenses of the tribunal, including the remuneration of its members, shall be borne by the parties to the dispute in equal shares'.

<sup>486</sup> *Arctic Sunrise Arbitration between the Netherlands and Russia, Award on the Merits, 14 August 2015*, para. 366.



judicial proceedings. Abuse of legal procedure is a special application of the abuse of rights to judicial proceedings.<sup>487</sup> In international law, an abuse of rights happens when one state exercises a right in an arbitrary manner that may impede other states' exercise of rights or deviates from the purpose it was created for.<sup>488</sup> It is argued that an abuse of rights may be related to certain procedures if they are used with a malevolent intention to harm other states or achieve an improper advantage.<sup>489</sup> In this respect, Robert Kolb defines the abuse of procedures as follows;

*It consists of the use of procedural instruments or rights by one or more parties for purposes that are alien to those for which the procedural rights were established, especially for a fraudulent, procrastinatory, or frivolous purpose, for the purpose of causing harm or obtaining an illegitimate advantage, for the purpose of reducing or removing the effectiveness of some other available process, or for purposes of pure propaganda.*<sup>490</sup>

A provision in UNCLOS Part XV regulates the situation of potential abuse of the legal process. Article 294 says, 'A court or tribunal provided for in Article 287 to which an application is made in respect of a dispute referred to in Article 297 shall determine at the request of a party, or may determine *proprio motu*, whether the claim constitutes an abuse of legal process or whether *prima facie* it is well founded.' Article 297 sets the automatic limit to the application of compulsory procedures in Section 2 and enumerates the kinds of disputes excluded. Thus, Article 294 only intends to provide safeguards against abuse of the compulsory procedures within Section 2 of Part XV concerning the disputes that may be submitted to Part XV tribunals and those that should automatically be excluded by Article 297.<sup>491</sup>

However, the claims about the abuse of judicial proceedings referring to Article 300 concerned the commencement of the compulsory judicial procedures, not only certain matters like those regulated by Article 297. Then, as some states parties have claimed, can a unilateral institution of judicial proceedings in certain circumstances be truly regarded as an abuse of rights? We have just seen above that the jurisprudence of Part XV tribunals has

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<sup>487</sup> Kolb, 'General Principles of Procedural Law', p. 998, para. 49. Similarly, in the *Immunities and Criminal Proceedings* case, the ICJ implied that the application of an abuse of rights to certain judicial proceedings is possible in exceptional circumstances (see; *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, Judgment, I.C.J. Reports 2018, p. 292, paras. 144-152*).

<sup>488</sup> Alexandre Kiss, 'Abuse of Rights' (2006) Max Planck Encyclopedias of International Law, para. 1. See also, Oppenheim, Jennings and Watts, *Oppenheim's International Law*, p. 407.

<sup>489</sup> Robert Kolb, *Good Faith in International Law* (Hart Publishing 2017), p. 218.

<sup>490</sup> Kolb, 'General Principles of Procedural Law', p. 998, para. 49.

<sup>491</sup> See; UNGA, 'Document A/CONF.62/WP.10/Add.1, Memorandum by the President of the Conference on document A/CONF.62/WP.10'.

made it clear that to raise a claim by invoking Article 300, a substantive rights or obligation of UNCLOS must be specified. States parties' right to initiate the compulsory procedures within Section 2 of Part XV against another party is regulated by Article 286. Then, if Article 286 is specified by one party, can Article 300 be a jurisdictional ground for Part XV tribunals to address the issue of alleged abuse of judicial proceedings?

Part XV tribunals have clearly and consistently said 'No' to such a possibility. For instance, the tribunal of the *Barbados v. Trinidad and Tobago* case said that the unilateral invocation of the arbitration procedure cannot by itself be regarded as an abuse of rights contrary to Article 300 of the Convention.<sup>492</sup> In this case, the respondent argued that Barbados' employment of Article 286 to claim a single maritime boundary constituted an abuse of its rights. That was because, Trinidad and Tobago considered that Barbados' claim was incompatible with its previous recognition of the extent of the EEZ of Trinidad and Tobago and its domestic legislation.<sup>493</sup> However, the tribunal said that Article 286 conferred a unilateral right, and its exercise unilaterally and without agreement with the other party was a 'straightforward exercise of the right' conferred by the Convention.<sup>494</sup> In this respect, the tribunal did not regard Barbados' unilateral commencement of the compulsory procedures in accordance with Article 286 as constituting a violation of Article 300, especially abuse of its rights.

This issue arose again in the *South China Sea* arbitration. As will be shown in detail later in this chapter, China construed the Philippines' claims in this case as for advancing its position concerning a territorial sovereignty dispute in the region of the South China Sea between the two states. China argued the tribunal's lack of jurisdiction on the ground of Section 3 of Part XV, which sets the limitations and exceptions to the compulsory proceedings. In this context, China contended that although the right of all states parties to invoke the compulsory procedures in accordance with the Convention should be respected, the initiation of the current procedures by the Philippines constituted an abuse of the compulsory dispute settlement system under UNCLOS.<sup>495</sup> Again, in this case, the tribunal determined that the mere act of unilaterally commencing an arbitration under Part XV by a state party cannot constitute an abuse of rights, recalling the award given by the tribunal in

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<sup>492</sup> *Arbitration between Barbados and Trinidad and Tobago, Award, 11 April 2006*, para. 208.

<sup>493</sup> *Arbitration between Barbados and Trinidad and Tobago, Counter-Memorial of Trinidad and Tobago, 30 March 2005*, paras. 121-125.

<sup>494</sup> *Arbitration between Barbados and Trinidad and Tobago, Award, 11 April 2006*, para. 208.

<sup>495</sup> *South China Sea Arbitration, Position Paper of China on the Matter of Jurisdiction, 7 December 2014*, paras. 74, 84, 86.

the *Barbados v. Trinidad and Tobago* case.<sup>496</sup>

Until recently, numerous attempts have been made by respondent states to argue abuse of judicial proceedings by recourse to Article 300 within the past compulsory proceedings.<sup>497</sup> So far, none of these attempts has been accepted by any Part XV tribunals. As the ICJ mentioned in the *Immunities and Criminal Proceedings* case, the rejection of a claim based on a valid title of jurisdiction on the ground of abuse of process is only possible in exceptional circumstances.<sup>498</sup> Here, it should be noted that states can freely make a decision concerning what to submit to the international court, or how to compose their claims. Moreover, each state may have different thoughts on the jurisdictional limit of a certain judicial dispute settlement system following their own interpretation of the statutory document.

The ICJ mentioned that the acceptance of the optional clause of the Statute is a unilateral act of a state's sovereignty and, simultaneously, an act of establishing the potential for a jurisdictional link with other states who accept the same obligation.<sup>499</sup> UNCLOS Part XV cannot be different in this respect. States parties' signing, ratification, or accession to UNCLOS also establishes a jurisdictional link with other parties. This cannot be getting a right to unilaterally initiate compulsory procedures against others without accepting and consenting to other parties' exercise of their right unilaterally to submit a case to a certain Part XV tribunal even against themselves. In this sense, a unilateral commencement of

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<sup>496</sup> *South China Sea Arbitration between Philippines and China, Award on Jurisdiction and Admissibility*, 29 October 2015, para. 126.

<sup>497</sup> In the *Chagos MPA* case, the UK argued that "Hence, we say, the importance of a proper interpretation and application of the provisions of Part XV. Hence the grave danger in abuse of Part XV represented by Mauritius' arguments in the present case." (*Chagos Marine Protected Area Arbitration, Hearing on Jurisdiction and the Merits, Volume 6, May 1 2014*, p. 648). In the *Coastal State Rights* case, Russia contended that "This is an irrelevance. It is no doubt correct that a State could not manufacture a territorial dispute to defeat jurisdiction. Such conduct may qualify as an abuse of right/process, ..." (*Coastal State Rights Arbitration between Ukraine and Russia, Reply of Russia, 28 January 2019*, para. 34). Most recently, in the *Dispute concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean* (hereinafter 'Mauritius/Maldives' case), Maldives argued that "To use UNCLOS proceedings against the Maldives quite deliberately for the purpose of achieving an outcome which it could not obtain from the Court and which clearly falls outside the jurisdiction of an UNCLOS court or tribunal is by definition an abuse of process" (*Dispute Concerning Delimitation of the Maritime Boundary in the Indian Ocean (Mauritius/Maldives), Written Observations of Maldives, 15 April 2020*, para. 140). Originally, this case was initiated by Mauritius against the Maldives by submitting the dispute to the arbitral tribunal constituted under Annex VII. However, after having consultations with the President of ITLOS, the parties agreed to submit the dispute to a special chamber of ITLOS upon special agreement.

<sup>498</sup> *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, Judgment, I.C.J. Reports 2018, p. 292*, para. 150. See also, Andrew D. Mitchell and Trina Malone, 'Abuse of Process in Inter-State Dispute Resolution' (2018) Max Planck Encyclopedias of International Law, 2018.

<sup>499</sup> *Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, p. 432*, para. 46.

judicial proceedings would hardly be determined as ‘an abuse of legal process’ as stipulated in Article 294.

#### 4.4. How to Characterise the Nature of the Claims within the ‘Mixed Disputes’ Cases?

##### 4.4.1. ‘Mixed Disputes’ within the Proceedings under UNCLOS Part XV

During the negotiating process of UNCLOS, some states raised concerns over the situation where claims for land or insular territory are referred to the compulsory procedures by an applicant, under the guise of a maritime delimitation dispute.<sup>500</sup> The drafters’ concerns were reflected in the final text of Article 298(1)(a)(i). As will be discussed in detail later in Chapter 5, Article 298(1)(a)(i) says that states parties can exempt their dispute concerning maritime delimitation from the purview of compulsory jurisdiction upon declaration. Instead, this provision obliges states parties to accept the submission of the delimitation dispute to the compulsory conciliation commission established under Annex V. If that dispute necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular territory, such an obligation will be also exempted.<sup>501</sup>

The Virginia Commentary uses the term ‘mixed disputes’ to explain such disputes that include territorial issues as well as maritime boundaries.<sup>502</sup> In terms of the dispute settlement procedures under UNCLOS, the concept of ‘mixed disputes’ generally means UNCLOS disputes that necessarily involve the concurrent consideration of an unsettled dispute concerning territorial sovereignty or other rights over continental or insular land

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<sup>500</sup> Nordquist and others, *United Nations Convention on the Law of the Sea 1982: A Commentary*, para, 298.20; See also; Bernard H Oxman, 'Courts and Tribunals: The ICJ, ITLOS, and Arbitral Tribunals' in Donald Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2016), p. 400.

<sup>501</sup> Article 298(1)(a)(i) of UNCLOS.

<sup>502</sup> Nordquist and others, *United Nations Convention on the Law of the Sea 1982: A Commentary*, para, 298.20.

territory.<sup>503</sup> As we have seen, the orthodox usage of this term was to indicate a maritime delimitation dispute that involved the questions about disputed territory.<sup>504</sup>

However, recent controversies raised over the alleged examples of mixed disputes in certain compulsory proceedings under UNCLOS have been quite different from the early concerns suggested above. The orthodox example of mixed disputes was a kind of a case where territorial sovereignty issues arose incidentally to a dispute concerning maritime delimitation. In contrast, the recent examples of alleged mixed disputes were ones that none of the participants of the Third UN Conference ever expected to be disputes concerning the interpretation or application of the Convention.<sup>505</sup> Instead of maritime delimitation, territorial sovereignty issues have been raised in diverse contexts such as the meaning of 'coastal states' within the Convention,<sup>506</sup> the status of maritime features,<sup>507</sup> or the legal effects of past events on the rights and obligations under UNCLOS.<sup>508</sup> Likewise, recent examples of mixed disputes have become more diversified and complicated than orthodox examples that simply concern the concurrent territorial sovereignty matters of maritime delimitation.

The cases where controversies regarding mixed disputes arose were the *Chagos MPA* case, the *South China Sea* case and the *Coastal State Rights* case. In these cases, respondent states argued that the nature of the dispute did not concern UNCLOS since applicants' claims intended to advance their position in a territorial sovereignty dispute rather than to resolve UNCLOS disputes. In the *Chagos MPA* case, the UK construed the litigation as a part of the applicant's broader intention to raise sovereignty claims in as many forums as

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<sup>503</sup> Sheehan, 'Dispute Settlement under UNCLOS: The Exclusion of Maritime Delimitation Disputes', p. 182.

<sup>504</sup> See; Buga, 'Territorial Sovereignty Issues in Maritime Disputes: A Jurisdictional Dilemma for Law of the Sea Tribunals', p. 60; Louis B. Sohn, 'Peaceful Settlement of Disputes in Ocean Conflicts: Does UNCLOS III Point the Way?' (1983) 46 *Law and Contemporary Problems* 195, p. 198; Christine Sim, 'Maritime Boundary Disputes and Article 298 of UNCLOS: A Safety Net of Peaceful Dispute Settlement Options' (2018) 3 *Asia-Pacific Journal of Ocean Law and Policy* 232, pp. 262-263; P. Chandrasekhara Rao, 'Delimitation Disputes Under the United Nations Convention on the Law of the Sea: Settlement Procedures' in Thomas A. Mensah and others (eds), *Law of the Sea, Environmental Law, and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (Martinus Nijhoff 2007), p. 882; Talmon, 'The South China Sea Arbitration: Is There a Case to Answer?', p. 34; Treves, 'What have the United Nations Convention and the International Tribunal for the Law of the Sea to offer as regards Maritime Delimitation Disputes?', p. 77; Zou Keyuan and Qiang Ye, 'Interpretation and Application of Article 298 of the Law of the Sea Convention in Recent Annex VII Arbitrations: An Appraisal' (2017) 48 *Ocean Development and International Law* 331, p. 338; Talmon, 'The Chagos Marine Protected Area Arbitration: Expansion of the Jurisdiction of UNCLOS Part XV Courts and Tribunals', pp. 946-948.

<sup>505</sup> *Chagos Marine Protected Area Arbitration between Mauritius and the UK, Award, 18 March 2015*, para. 215.

<sup>506</sup> *Chagos MPA* arbitration.

<sup>507</sup> *South China Sea* arbitration.

<sup>508</sup> *Coastal State Rights* case.

possible, including the compulsory proceeding under UNCLOS.<sup>509</sup> In the *South China Sea* case, China argued that the intentions behind the initiation of the case were to put political pressure on China and gainsay China's sovereignty over the region of the South China Sea.<sup>510</sup> Lastly, in the *Coastal State Rights* case, Russia contended that the actual objective of Ukraine's claims was to advance its position in the parties' disputes over Crimean sovereignty.<sup>511</sup>

In terms of UNCLOS Part XV, the alleged mixed disputes raise the question of how to characterise the claims raised within the proceedings. When it comes to a 'purely' territorial sovereignty issue – if such a thing exists – it would certainly be beyond the purview of Part XV tribunals' jurisdiction, which is confined to the dispute concerning the interpretation or application of the Convention. However, in the situation where the UNCLOS issues are mixed with territorial sovereignty matters, a Part XV tribunal must first determine the nature of the submitted claims to decide whether it can exercise jurisdiction over the claims or not.

If the submitted claims are determined to be mainly about the interpretation or application of the Convention where the territorial sovereignty issue is incidental, the tribunal may exercise jurisdiction over the claims. In contrast, if the main thrust of the claims is determined to be the disputed territorial sovereignty issue where the rights or obligations of certain provisions of UNCLOS are minor matters, the tribunal would not be able to give a determination on those claims. In this sense, how to characterise the nature of the dispute within the claims has significance for the tribunals' decisions as whether they can exercise jurisdiction over the alleged mixed disputes.

Having encountered such issues, Part XV tribunals have crafted their own methodology to characterise the nature of the dispute within the parties' claims. This was first presented by the arbitral tribunal of the *Chagos MPA* case.

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<sup>509</sup> *Chagos Marine Protected Area Arbitration, Preliminary Objections to Jurisdiction of the UK, 31 October 2012*, para. 3.3.

<sup>510</sup> *South China Sea Arbitration, Position Paper of China on the Matter of Jurisdiction, 7 December 2014*, para. 22.

<sup>511</sup> *Coastal State Rights Arbitration between Ukraine and Russia, Preliminary Objections of Russia, 19 May 2018*, para. 25.

#### 4.4.2. The *Chagos MPA* Case

The main subject-matter of the dispute in this case was the Marine Protected Area ('MPA') established by the UK over the area including the Chagos Archipelago in 2010. However, two of Mauritius' final submissions raised controversy over the nature of those claims since they concerned the UK's alleged violation of the Convention because the UK is not a 'coastal state' of this region within the meaning of certain provisions of UNCLOS.<sup>512</sup> The Convention offers no guidance on how to identify a coastal state when sovereignty over the land territory fronting the coast is disputed.<sup>513</sup> Therefore, whether the issue of one state's status as a 'coastal state' concerned the interpretation or application of the Convention or not had been contested between the two parties.

The respondent, the UK, deemed the nature of the disputes contained in Mauritius' first and second submissions to be a matter of territorial sovereignty over the Chagos Archipelago. Although Mauritius raised the issue of the entitlement to declare the MPA based on specific provisions of the Convention, the UK argued that it would inevitably raise the question of which state has sovereignty over the islands.<sup>514</sup> Therefore, the UK said that the requests of Mauritius are artificial claims where the real issue of territorial sovereignty was merely connected to the term 'coastal state'.<sup>515</sup> In contrast, Mauritius claimed that the question about the UK's status as a 'coastal state' concerned the interpretation and application of the provisions using the term 'coastal state'.<sup>516</sup> Mauritius contended that the UK was rather trying to re-characterise the real issue of the disputes as concerning territorial sovereignty, to support its objection to the tribunal's jurisdiction.<sup>517</sup>

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<sup>512</sup> Among four final submissions of Mauritius, the first and second submissions concerned the status of the UK as a coastal state; (1) the United Kingdom is not entitled to declare an "MPA" or other maritime zones because it is not the "coastal State" within the meaning of inter alia Articles 2, 55, 56 and 76 of the Convention; and/or (2) having regard to the commitments that it has made to Mauritius in relation to the Chagos Archipelago, the United Kingdom is not entitled unilaterally to declare an "MPA" or other maritime zones because Mauritius has rights as a "coastal State" within the meaning of inter alia Articles 56(1)(b)(iii) and 76(8) of the Convention;

<sup>513</sup> *Chagos Marine Protected Area Arbitration between Mauritius and the UK, Award, 18 March 2015*, para. 203.

<sup>514</sup> *Chagos Marine Protected Area Arbitration, Preliminary Objections to Jurisdiction of the UK, 31 October 2012*, para. 3.5.

<sup>515</sup> *Ibid*, paras. 3.7-3.9. See also; *Chagos Marine Protected Area Arbitration, Counter-Memorial of the UK, 15 July 2013*, para. 4.7; *Chagos Marine Protected Area Arbitration, Rejoinder Submitted by the UK, 17 March 2014*, para. 5.1.

<sup>516</sup> *Chagos Marine Protected Area Arbitration, Memorial of Mauritius, 1 August 2012*, para. 5.25.

<sup>517</sup> *Chagos Marine Protected Area Arbitration, Written Observations of Mauritius on the Question of Bifurcation, 21 November 2012*, para. 29.

In dealing with this controversy, the tribunal firstly checked that there had been a long-standing territorial sovereignty dispute between the parties over the Chagos Archipelago based on the records presented by the parties.<sup>518</sup> However, the tribunal also shared that the disputes concerning the manner of the declaration of the MPA and its implementation had existed apart from the territorial sovereignty issue.<sup>519</sup> Therefore, concerning Mauritius' first and second submissions in which the issue of the UK's status as the coastal state was raised, the tribunal said that it must evaluate where the relative weight of the dispute lay: on the matter concerning the Convention or on the territorial sovereignty issue.<sup>520</sup> According to the tribunal, measuring the relative weight was to determine between (a) a dispute in which the issue of sovereignty formed just one aspect of a larger UNCLOS question; and (b) a dispute primarily concerning sovereignty where UNCLOS matters merely represented a manifestation of that dispute. Measuring the relative weight was, ultimately, to characterise the nature of the dispute in Mauritius' first and second claims.

Here, the tribunal focused on the potential impact of its decision in the case on the matter of the sovereignty dispute over the Chagos Archipelago. The tribunal said that the effect of the tribunal's confirmation of whether the UK was the coastal state would extend well beyond the matter of the validity of the MPA within the framework of UNCLOS.<sup>521</sup> Because, either way, the tribunal's decision on Mauritius' first and second submissions would eventually imply which state has sovereignty over the Chagos Archipelago. Therefore, the tribunal concluded that this could not be the sort of consequence achievable from a narrower dispute regarding the interpretation of the word 'coastal state' for certain provisions of the Convention.<sup>522</sup> As a result, the tribunal decided that Mauritius' first and second submissions were properly characterised as concerning the land sovereignty over the islands, while the differing views on the term 'coastal state' constituted a part of broader sovereignty claims.<sup>523</sup>

Regarding the tribunal's decision, one author says that the evaluation of the relative weight

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<sup>518</sup> *Chagos Marine Protected Area Arbitration between Mauritius and the UK, Award, 18 March 2015*, para. 209.

<sup>519</sup> *Ibid.*, para. 210.

<sup>520</sup> *Ibid.*, para. 211.

<sup>521</sup> *Ibid.*, para. 211.

<sup>522</sup> *Ibid.*, para. 211.

<sup>523</sup> *Ibid.*, paras. 212 and 230.



cannot be a scientific exercise but an inherently subjective exercise.<sup>524</sup> However, it must be noted that it is the tribunal's task to identify the object of the claim by isolating the real issue from what has been raised by the applicant, which is the general practice of international courts. Thus, the point to be focused on should be upon which basis the tribunal characterised the submitted claims. In this case, the tribunal provided that the potential impact of the tribunal's final award can be a basis for determining the nature of the dispute. This way of characterising disputes based on the potential effect of the tribunal's determination was followed and elaborated by the arbitral tribunal in the subsequent the *South China Sea* case.

#### 4.4.3. The *South China Sea* Case

In this case as well, whether the claims submitted by the Philippines were seeking the tribunal's determination on the issue of territorial sovereignty was contested between the parties. Among a total of 15 submissions of the Philippines, Submissions 3 to 7 concerned the status of certain maritime features in the South China Sea: whether they are islands, rocks or low-tide elevations or not was at the centre of the controversy relating to the mixed dispute.

China argued that the subject-matter of the submitted disputes concerned territorial sovereignty over maritime features in the South China Sea.<sup>525</sup> Although the Philippines repeatedly argued that it did not seek a determination on the territorial sovereignty issue, China deemed the claims of the applicant as deliberately characterised to circumvent the

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<sup>524</sup> Talmon, 'The Chagos Marine Protected Area Arbitration: A Case Study of the Creeping Expansion of the Jurisdiction of UNCLOS Part XV Courts and Tribunals', p. 10; Talmon, 'The Chagos Marine Protected Area Arbitration: Expansion of the Jurisdiction of UNCLOS Part XV Courts and Tribunals', pp. 933-934.

<sup>525</sup> *South China Sea Arbitration, Position Paper of China on the Matter of Jurisdiction, 7 December 2014*, paras. 9-10. China decided not to participate in the arbitral proceedings. Instead, China delivered its position on the jurisdiction of the tribunal and the merits of this case in the forms of government statements and Notes Verbales. Especially on the 7<sup>th</sup> of December, 2014, the Chinese Ministry of Foreign Affairs issued its 'Position Paper on the Matter of Jurisdiction in the South China Sea Arbitration' (hereinafter, 'Position Paper'). The tribunal decided to treat the Position Paper and certain communications from China as constituting a plea which argues that the tribunal does not have jurisdiction, and then decided to bifurcate the proceedings to determine the jurisdiction and the admissibility over the merits. (see; *South China Sea Arbitration, Procedural Order No. 4, Arbitral Tribunal, 21 April 2015*; Robin Churchill, 'Dispute Settlement in the Law of the Sea: Survey for 2015, Part ii and 2016' (2017) 32 *The International Journal of Marine and Coastal Law* 379, p. 393).

jurisdictional hurdles.<sup>526</sup> Hence, China stressed that the claims of the Philippines would inevitably require the tribunal to determine the sovereignty matters either ‘directly or indirectly’.<sup>527</sup> In contrast, the Philippines clarified that its claims were not asking which party may enjoy sovereignty over the insular features in this region.<sup>528</sup> Rather, the Philippines argued that the tribunal can determine the issues contained in the Philippines’ submissions even without deciding which party may enjoy sovereignty over specific maritime features.<sup>529</sup>

To characterise the dispute manifested in the claims of the Philippines, the tribunal suggested two criteria. According to the tribunal, (a) if the resolution of the Philippines’ claims would require the tribunal first to render a decision on sovereignty, either directly or indirectly, or (b) if the actual objective of the Philippines’ claims was to advance its position in the dispute over sovereignty between the parties, then the nature of the dispute could be determined as relating to territorial sovereignty.<sup>530</sup> The first criterion was to determine the potential effect of the tribunal’s decision on the submitted claims of the applicant, as the tribunal of the *Chagos MPA* case did. Concerning the second, determining the actual objective of the submitted claims was a newly added criterion in this case, in addition to determining the potential effect.

By applying the first standard, the tribunal determined that the claims of the Philippines can be fully addressed and examined by the tribunal, even from the premise that China has sovereignty over those features.<sup>531</sup> Concerning the Philippines’ Submission No. 3, for example, the tribunal did not need to address who has sovereignty over this feature since it only concerned this feature’s status as an island within the meaning of Article 121 of UNCLOS. In addition, given the limits on the submissions of the Philippines, the tribunal said that its decision would neither advance nor detract from either party’s claims to land sovereignty in the South China Sea.<sup>532</sup> Thus, the tribunal concluded that none of the Philippines’ submissions required the tribunal first to deliver its determination on the territorial sovereignty issue either directly or indirectly.

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<sup>526</sup> *South China Sea Arbitration, Position Paper of China on the Matter of Jurisdiction, 7 December 2014*, para. 14.

<sup>527</sup> *Ibid.*, para. 29.

<sup>528</sup> *South China Sea Arbitration, Supplemental Written Submission of Philippines, 16 March 2015*, paras. 26.6-26.24.

<sup>529</sup> *South China Sea Arbitration, Memorial of Philippines, 30 March 2014*, paras. 7.14, 7.16.

<sup>530</sup> *South China Sea Arbitration between Philippines and China, Award on Jurisdiction and Admissibility, 29 October 2015*, para. 153.

<sup>531</sup> *Ibid.*

<sup>532</sup> *Ibid.*

Unlike the first criterion, the second criterion had to be determined based on the applicant's position, which could be identified through the written and oral pleadings or the proofs presented by the parties. Here, the tribunal highlighted the Philippines' repeated statements before the tribunal that it should refrain from ruling on the matter of territorial sovereignty.<sup>533</sup> For example in its Memorial, the Philippines said "... the Philippines does not seek any determination by the Tribunal as to any question of sovereignty over islands, rocks or any other maritime features. The Tribunal is not invited, directly or indirectly, to adjudicate on the competing sovereignty claims to any of the features at issue (or any others)."<sup>534</sup> Moreover, in consideration of its determination that even the success of those submissions would not have any effect on the Philippines' sovereignty claims, the tribunal did not consider that the Philippines was seeking anything further.<sup>535</sup> Accordingly, the tribunal determined that the objective of the claims was not the disputed sovereignty issues.

An examination similar to the tribunal's approach to the second standard in the *South China Case* had been actually taken by the tribunal of the *Chagos MPA* case. In the *Chagos MPA* case, the tribunal said that before the initiation of the proceedings, there had been only scant evidence that Mauritius was concerned with the UK's implementation of UNCLOS in this region, compared to extensive records documenting the sovereignty dispute.<sup>536</sup> Moreover, the tribunal pointed out that even Mauritius had argued that the consequences of a judicial finding that the UK is not the coastal state would extend well beyond the matter of validity of the MPA. In oral proceedings, Mauritius argued "The Tribunal will do no more than state that Mauritius is the "coastal State" ... and that the Chagos Archipelago forms an integral part of the Republic of Mauritius."<sup>537</sup> Though not directly mentioned, the tribunal of the *Chagos MPA* case had, in fact, examined the actual objective of Mauritius' first and second claims based on written and oral pleadings presented by Mauritius and the historical records submitted as proofs.

Returning to *South China Sea* case, the tribunal accordingly concluded that the submitted

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<sup>533</sup> *Ibid.*

<sup>534</sup> *South China Sea Arbitration, Memorial of Philippines, 30 March 2014*, para. 1.16. See also, *South China Sea Arbitration, Hearing on Jurisdiction and Admissibility, Day 1, 7 July 2015*, pp. 76-77.

<sup>535</sup> *South China Sea Arbitration between Philippines and China, Award on Jurisdiction and Admissibility, 29 October 2015*, para. 153.

<sup>536</sup> *Chagos Marine Protected Area Arbitration between Mauritius and the UK, Award, 18 March 2015*, para. 211.

<sup>537</sup> *Chagos Marine Protected Area Arbitration, Hearing on Jurisdiction and the Merits, Volume 8, May 5 2014*, p. 1030.

claims were not seeking a determination on territorial sovereignty disputes.<sup>538</sup> Here, the tribunal referred to the ICJ's judgment in the *United States Diplomatic and Consular Staff in Tehran* case, which said, "... no provision of the Statute or Rules contemplates that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important."<sup>539</sup> The tribunal comprehensively examined each of the Philippines' claims by looking at the facts and the allegedly violated articles to determine whether the disputes concerned the interpretation and application of UNCLOS.<sup>540</sup> The tribunal then clarified that none of the tribunal's decisions was dependent on a finding of sovereignty, nor should anything in the tribunal's award be understood to imply a view concerning the question of land sovereignty.<sup>541</sup>

In this case, the tribunal elaborated a methodology to characterise the nature of the dispute within the claims. The tribunal applied the criteria to the award of the *Chagos MPA* case and appraised that the majority's decision given in that case was also based on the views that a decision on Mauritius' first and second submissions would have required an implicit decision on sovereignty, and that sovereignty was the true object of Mauritius' claims.<sup>542</sup> This shows that the opposite results of these two cases resulted from the application of common criteria. Later, this methodology was again followed by the arbitral tribunal of the *Coastal State Rights* case.

#### 4.4.4. The *Coastal State Rights* Case

This pending case concerns the coastal state's rights in the Black Sea, Sea of Azov and Kerch Strait, all of which surround the Crimea.<sup>543</sup> The claims of Ukraine mainly concerned Russia's alleged violations of the Convention, which resulted in hampering Ukraine's

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<sup>538</sup> *South China Sea Arbitration between Philippines and China, Award on Jurisdiction and Admissibility*, 29 October 2015, para. 153.

<sup>539</sup> *United States Diplomatic and Consular Staff in Tehran, Judgment*, I.C.J. Reports 1980, p. 3, para. 36, cited in *South China Sea Arbitration between Philippines and China, Award on Jurisdiction and Admissibility*, 29 October 2015 at para. 152.

<sup>540</sup> Lan Ngoc Nguyen, 'The Chagos Marine Protected Area Arbitration: Has the Scope of LOSC Compulsory Jurisdiction Been Clarified?' (2016) 31 *The International Journal of Marine and Coastal Law* 120, p. 131.

<sup>541</sup> *South China Sea Arbitration between Philippines and China, Award*, 12 July 2016, para. 5.

<sup>542</sup> *Ibid*, para. 153.

<sup>543</sup> As of August 2022, this arbitral proceeding is now pending.

exercise of its rights as a coastal state over these regions.<sup>544</sup>

Unlike the above two cases, where the parties to the dispute had no different views on the existence of relevant territorial sovereignty dispute, in this case, the existence of such a dispute has been contested between Ukraine and Russia.<sup>545</sup> Ukraine contended that its claims regarded UNCLOS since there had been no territorial sovereignty dispute with Russia and thus the related regions had been under Ukraine's sovereignty. Ukraine's view about the nature of the disputes was based on Russia's claim of sovereignty over Crimea being 'inadmissible' and 'implausible'.<sup>546</sup> Ukraine argued that the legal status of Crimea had not been changed and this fact was supported by the international communities' determinations including the General Assembly Resolutions.<sup>547</sup> Hence, Ukraine insisted that the tribunal should not take the opposite position of what the General Assembly called for.<sup>548</sup>

Concerning Ukraine's claims, Russia held that the status of Crimea had changed to Russian territory since 2014 by the referendum on 16 March and the following treaty of accession between the independent Crimea on 18 March in that year. Since Ukraine's claims were based on the status of Crimea not having changed, Russia deemed that the nature of Ukraine's requests were sovereignty claims over Crimea. Russia argued that the claims of Ukraine required a prior determination on which state is a coastal state entitled to exercise sovereignty and sovereign rights in the region.<sup>549</sup> Hence, Russia insisted that the submitted claims were the result of Ukraine's attempt to characterise the territorial disputes as concerning law of the sea issues.<sup>550</sup> Russia construed that the issue concerning sovereignty over the land territory was a central part of the claims where the relative weight of the dispute was on so the determination of such an issue would be an unavoidable prerequisite to addressing the specific claims.<sup>551</sup> In this respect, Russia concluded that the objective of

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<sup>544</sup> For the full requests of Ukraine, see *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait, Award Concerning the Preliminary Objections of Russia*, 21 February 2020, para. 17.

<sup>545</sup> Nevertheless, both in *Chagos MPA* case and *South China Sea* case, respective arbitral tribunals examined whether territorial sovereignty dispute actually existed. This point will be addressed in detail in Section 4.4.5.

<sup>546</sup> *Coastal State Rights Arbitration between Ukraine and Russia, Written Observations and Submissions of Ukraine on Jurisdiction*, 27 November 2018, paras. 25-60.

<sup>547</sup> *Ibid.*, para. 30.

<sup>548</sup> *Ibid.*, para. 33.

<sup>549</sup> *Coastal State Rights Arbitration between Ukraine and Russia, Preliminary Objections of Russia*, 19 May 2018, para. 4; *Coastal State Rights Arbitration between Ukraine and Russia, Reply of Russia*, 28 January 2019, para. 17.

<sup>550</sup> *Coastal State Rights Arbitration between Ukraine and Russia, Preliminary Objections of Russia*, 19 May 2018, para. 24.

<sup>551</sup> *Ibid.*, para. 42.

Ukraine's claims was to secure a favourable determination on sovereignty over Crimea.<sup>552</sup>

In contrast, Ukraine claimed that its submissions expressly sought a ruling on the interpretation or application of UNCLOS since the real dispute was about Ukraine's nullified rights under UNCLOS by Russia's breach of its obligation under the Convention.<sup>553</sup> Ukraine further claimed that Russia was rather trying to re-frame the case as territorial sovereignty disputes that were completely disconnected from the substantive UNCLOS claims, to evade its agreement under Part XV to arbitrate the disputes.<sup>554</sup> And Russia's objection was requesting the tribunal to accept Russia's claim of the allegedly changed legal status of Crimea.<sup>555</sup> Ukraine stressed that the tribunal's decision to dismiss this case would give Russia a concrete benefit, based on accepted violation of international law.<sup>556</sup> Moreover, Ukraine argued that even if a territorial sovereignty dispute existed, its claim concerned a series of serious and pervasive violations and the corresponding damage to Ukraine and third-party rights under UNCLOS.<sup>557</sup> Accordingly, Ukraine contended that the issue of sovereignty over land was not the real dispute in the present case, nor where the relative weight of the dispute lay.<sup>558</sup>

To characterise the nature of the claims of Ukraine, the tribunal assessed the potential effect of its decision on Ukraine's submissions by applying one of the standards suggested by the tribunal in the *South China Sea* case: determining whether the claims of Ukraine require the tribunal to give its decision on territorial sovereignty matters either implicitly or directly. The tribunal found that many of Ukraine's claims submitted to the tribunal were based on the premise that Ukraine is sovereign over Crimea. This meant was that, unless such a premise that Crimea belongs to Ukraine was to be confirmed at face value, the tribunal could not address the claims of Ukraine without first examining or rendering a

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<sup>552</sup> *Ibid.*, paras. 44-45.

<sup>553</sup> *Coastal State Rights Arbitration between Ukraine and Russia, Written Observations and Submissions of Ukraine on Jurisdiction*, 27 November 2018, paras. 4, 23; *Coastal State Rights Arbitration between Ukraine and Russia, Rejoinder of Ukraine on Jurisdiction*, 28 March 2019, para. 8.

<sup>554</sup> *Coastal State Rights Arbitration between Ukraine and Russia, Written Observations and Submissions of Ukraine on Jurisdiction*, 27 November 2018, para. 16.

<sup>555</sup> *Ibid.*, para. 32.

<sup>556</sup> *Ibid.*, para. 32; *Coastal State Rights Arbitration between Ukraine and Russia, Rejoinder of Ukraine on Jurisdiction*, 28 March 2019, para. 17.

<sup>557</sup> *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait, Award Concerning the Preliminary Objections of Russia*, 21 February 2020, para. 143 (cit no. 266; Jurisdiction Hearing, 14 June 2019, 28:14-29:2 (Thouvenin))

<sup>558</sup> *Coastal State Rights Arbitration between Ukraine and Russia, Rejoinder of Ukraine on Jurisdiction*, 28 March 2019, para. 51.

decision on the question of sovereignty over Crimea.<sup>559</sup> The tribunal said that even though the real objective of Ukraine's claims concerned the Convention as contended by Ukraine, many of its claims were still based on the premise that Ukraine was sovereign over Crimea.<sup>560</sup>

For this reason, the tribunal concluded that if the legal status of Crimea was not settled but disputed, contrary to what Ukraine argued, then the tribunal would not be able to decide the claims of Ukraine insofar as they were premised on the settled status of Crimea as part of Ukraine.<sup>561</sup> The tribunal took note of the reality that Russia's claim of its sovereignty over Crimea was disputed and opposed by Ukraine, without engaging in any analysis of whether Russia's claim of sovereignty was right or wrong.<sup>562</sup> Under this reality, the tribunal confirmed that there was a legal dispute concerning the legal status of Crimea, especially concerning sovereignty over this region. Moreover, the tribunal found that the parties' dispute regarding sovereignty over Crimea was not a minor issue ancillary to the dispute concerning the interpretation or application of the Convention.<sup>563</sup> In contrast, such an issue composed a prerequisite to the tribunal's decision on many of Ukraine's claims under the Convention.<sup>564</sup> Therefore, the tribunal characterised Ukraine's claims that were dependent on the premise that Ukraine was sovereign over Crimea as a territorial sovereignty dispute.<sup>565</sup>

The tribunal in this case applied one of two criteria for characterising the nature of the dispute given by the tribunal in the *South China Sea* case but did not examine whether the actual objective of the claims was to advance sovereignty claims over Crimea. Presumably, that was due to that the satisfaction of one criterion was enough to determine the characteristic of the submitted claims, as the tribunal of the *South China Sea* case provided.<sup>566</sup> However, even if the tribunal proceeded to examine the second standard to check the actual objective of Ukraine's claims, the result would not be different. Ukraine argued that the determination of the tribunal would not "materially" improve its position on the matter of sovereignty over Crimea, since Crimea's unchanged status as Ukraine's

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<sup>559</sup> *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait, Award Concerning the Preliminary Objections of Russia*, 21 February 2020, para. 152.

<sup>560</sup> *Ibid.*, paras. 152-153.

<sup>561</sup> *Ibid.*, para. 154.

<sup>562</sup> *Ibid.*, para. 178.

<sup>563</sup> *Ibid.*, para. 195.

<sup>564</sup> *Ibid.*

<sup>565</sup> *Ibid.*, para. 197.

<sup>566</sup> *South China Sea Arbitration between Philippines and China, Award on Jurisdiction and Admissibility*, 29 October 2015, para. 153.

territory had already been accepted internationally.<sup>567</sup>

However, the tribunal had already confirmed based on reality that there was an existing territorial sovereignty dispute over Crimea between the parties. Moreover, Ukraine's grounds for arguing the non-existence of such a dispute, inadmissibility and implausibility of Russia's sovereignty claims, were not accepted by the tribunal. In brief, the tribunal determined that neither the Resolutions of the General Assembly of the UN nor the principles of international law such as good faith or estoppel could prevent it from recognising the existence of the dispute.<sup>568</sup> Also, the tribunal was not sure about what the plausibility test was about, or how such a test could be taken.<sup>569</sup> Thus, for the tribunal, Ukraine's argument that its unquestioned sovereignty over Crimea should be regarded as an "internationally recognised background fact"<sup>570</sup> could not but be construed as that its actual objective was advancing its sovereignty claims over the region.

#### 4.4.5. What Next? - the *Enrica Lexie* Case and the *Mauritius/Maldives* Case

Due to the inherent sensitivity of the issue of territorial sovereignty, many states are reluctant to submit territorial sovereignty disputes to third-party dispute settlement procedures, not to mention those providing the compulsory binding mechanisms.<sup>571</sup> Therefore, when an alleged mixed dispute is referred to the compulsory procedures under Part XV, how to address the jurisdictional questions concerning such a dispute becomes crucial for both parties to the dispute and the tribunal in charge. For that reason, what past Part XV tribunals most needed was to craft a certain methodology that could be used to characterise the nature of disputes.

Such a methodology was especially elaborated by the tribunal of the *South China Sea* case. Here, the tribunal suggested that if the tribunal is first required to give a determination on

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<sup>567</sup> *Coastal State Rights Arbitration between Ukraine and Russia, Written Observations and Submissions of Ukraine on Jurisdiction, 27 November 2018*, para. 69.

<sup>568</sup> *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait, Award Concerning the Preliminary Objections of Russia, 21 February 2020*, paras. 167-182.

<sup>569</sup> *Ibid.*, paras. 183-190.

<sup>570</sup> *Ibid.*, para. 85(cit no. 116, Jurisdiction Hearing, 11 June 2019, pp. 32, 36 and 37).

<sup>571</sup> Qu, 'The Issue of Jurisdiction Over Mixed Disputes in the Chagos Marine Protection Area Arbitration and Beyond', p. 45.



territorial sovereignty matters directly or indirectly, or if the objective of claims is to advance either party's position in a territorial sovereignty dispute, then the nature of the dispute could be determined as relating to territorial sovereignty. The approach taken by the tribunal in the *South China Sea* case was not entirely novel but can be traced back to the *Chagos MPA* case arbitral award. This was followed by the tribunal in the *Coastal State Rights* case. In this context, these three cases showed that the methodology for characterising the nature of the dispute in alleged mixed disputes cases has been convergently established by the tribunals.

Concerning the methodology of Part XV tribunals in dealing with the matter of characterising the nature of the submitted claims, two noteworthy points have arisen in recent cases. The first is that Part XV tribunals' methodology for characterising the nature of the dispute in mixed disputes cases has influenced a different kind of dispute, where allegedly other than territorial sovereignty matters were mixed with UNCLOS issues. This can be seen in the *Enrica Lexie* case between Italy and India. The background of this arbitration concerned an incident that occurred on 15 February 2012, involving an oil tanker named 'Enrica Lexie', flying the Italian flag, and the death of two Indian fishermen on board an Indian vessel named 'St. Antony'. After this incident, the *Enrica Lexie* was escorted by an Indian naval vessel to an Indian port and two Italian marines were charged with the murder of the two Indian fishermen.<sup>572</sup>

Although the main subject-matter of the *Enrica Lexie* case concerned this incident, the parties to the dispute characterised the nature of the dispute quite differently. On the one hand, Italy argued that the dispute was about an incident that occurred approximately 20.5 nautical miles off the coast of India and India's subsequent exercise of its jurisdiction over the incident and the two Italian marines on board the vessel *Enrica Lexie*.<sup>573</sup> Therefore, Italy requested the tribunal to declare that India had violated UNCLOS by illegally exercising its jurisdiction over the *Enrica Lexie*, and had violated its obligation to respect the immunity of the two marines.<sup>574</sup> Italy claimed that the real issue of the case was the determination of which state was entitled under UNCLOS to exercise jurisdiction over the

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<sup>572</sup> *"Enrica Lexie" Incident Arbitration, Statement of Claim and Grounds on Which It Is Based of Italy*, 26 June 2015, paras. 10-25; *"Enrica Lexie" Incident Arbitration, Written Observations of India*, 26 February 2016, paras. 2.11-2.18; See also; Robin Churchill, 'Dispute Settlement in the Law of the Sea: Survey for 2019' (2020) 35 *The International Journal of Marine and Coastal Law* 621, pp. 652-653.

<sup>573</sup> See; *"Enrica Lexie" Incident Arbitration, Statement of Claim and Grounds on Which It Is Based of Italy*, 26 June 2015, paras. 6-9; *"Enrica Lexie" Incident Arbitration between Italy and India, Award*, 21 May 2020, para. 3.

<sup>574</sup> *"Enrica Lexie" Incident Arbitration between Italy and India, Award*, 21 May 2020, para. 75.

incident of 15 February 2012 and the two marines.<sup>575</sup> India, on the other hand, claimed that the core and real subject matter of the dispute was the question of whether marines are entitled to immunity from criminal proceedings, which does not concern the interpretation or application of the Convention and is therefore outside the purview of the tribunal's jurisdiction.<sup>576</sup>

To characterise the nature of the dispute within the claims of Italy, the tribunal first gave its attention to the description of Italy that the dispute concerned the interpretation or application of the Convention where the issue of immunity of the marines constituted one of several bases of the illegality of India's exercise of jurisdiction.<sup>577</sup> Then, the tribunal found that Italy's claims about India's alleged violation of the Convention were not solely based on the issue of immunity of the marines. From this perspective, the tribunal determined that the dispute contained in Italy's claims could be judged without determining the question of immunity.<sup>578</sup> This finding indicated that the issue of immunity constituted a part of a broader question of the interpretation or application of UNCLOS, which is within the purview of the tribunal's jurisdiction. The tribunal concluded that the nature of the dispute in the proceedings was a disagreement about which state was entitled to exercise jurisdiction over the incident of 15 February 2012, which raised questions under several provisions of the Convention.

According to the tribunal, the main thrust of the dispute between the parties was the interpretation or application of the Convention, rather than the matter of immunity of marines. Hence, the tribunal said that this dispute may raise the issue of immunity of the marines but was not limited to that issue.<sup>579</sup> This indicates that since the claims raised by Italy could be decided even without examining such an issue, the tribunal was not required first to decide the matter of immunity of marines directly or indirectly. Moreover, the tribunal highlighted that neither party characterised the dispute between them as one primarily relating to the immunity of marines in their pleadings.<sup>580</sup> For the tribunal, the actual objective of Italy's claims was not construed as advancing its position in the disputed non-UNCLOS issue, the matter of immunity of marines. In this respect, this case showed that the methodology taken in the so-called mixed dispute cases above was not

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<sup>575</sup> *Ibid*, paras. 223-225.

<sup>576</sup> *Ibid*, paras. 226-228.

<sup>577</sup> *Ibid*, paras. 236-238.

<sup>578</sup> *Ibid*, para. 239.

<sup>579</sup> *Ibid*, para. 243.

<sup>580</sup> *Ibid*, para. 242.

limited to the disputed territorial sovereignty issue, but was also applied to other issues allegedly mixed with UNCLOS disputes.

The second point is found in the recent *Mauritius/Maldives* case judgment on the preliminary objections raised by the Maldives.<sup>581</sup> The main subject-matter of the dispute concerned the maritime delimitation between two states – the area between the Maldives and the Chagos Archipelago. However, the Maldives argued that due to the existence of the dispute between Mauritius and the UK about the sovereignty issue over the Chagos Archipelago, ITLOS should not exercise its jurisdiction as the determination of which state had sovereignty over this region would be required to be answered first.<sup>582</sup> Accordingly, the Maldives raised its first and second preliminary objections based on, respectively, the Monetary Gold principle<sup>583</sup> and the lack of competence of ITLOS to address the territorial sovereignty dispute.

In the three alleged mixed dispute cases above, the first step the Part XV tribunals conducted was checking whether territorial sovereignty disputes existed between the disputing parties. This might be because if no such dispute existed, then the claims concerning the mixed dispute themselves could not be accepted since there was no issue to be mixed with UNCLOS matters. Thus, each of the Part XV tribunals in those cases first determined the existence of a territorial sovereignty dispute based on the historic records and by applying the elements to be a ‘dispute’ that have been generally acknowledged in international adjudication practice.<sup>584</sup>

However, in *Mauritius/Maldives* case, ITLOS only resorted to the authority of other judicial bodies’ pronouncements in determining the existence of the territorial sovereignty dispute, rather than examining the historic records or the generally acknowledged elements. In this case, the ground for ITLOS’s determination was the Advisory Opinion of the ICJ

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<sup>581</sup> *Dispute Concerning Delimitation of the Maritime Boundary Between Mauritius and Maldives in the Indian Ocean, Preliminary Objections, Judgment, ITLOS, 28 January 2021.*

<sup>582</sup> *Dispute Concerning Delimitation of the Maritime Boundary in the Indian Ocean (Mauritius/Maldives), Preliminary Objections of Maldives, 18 December 2019, paras. 45-62.*

<sup>583</sup> This principle derives from the ICJ’s *Monetary Gold* case judgment, which said “Where, as in the present case, the vital issue to be settled concerns the international responsibility of a third State, the Court cannot, without the consent of that third State, give a decision on that issue binding upon any State, either the third State, or any of the parties before it.” (See; *Case of the Monetary Gold Removed from Rome in 1943 (Preliminary Question), Judgment of June 15th, 1954: I.C.J. Reports 1954, p. 19, p. 33*).

<sup>584</sup> See; *Chagos Marine Protected Area Arbitration between Mauritius and the UK, Award, 18 March 2015, para. 209; South China Sea Arbitration between Philippines and China, Award on Jurisdiction and Admissibility, 29 October 2015, paras. 148-152; Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait, Award Concerning the Preliminary Objections of Russia, 21 February 2020, paras. 163-166.*

concerning the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965.<sup>585</sup> In its Advisory Opinion, the ICJ said that (1) the process of decolonisation of Mauritius was not lawfully completed because of the separation of the Chagos islands and (2) the UK was obliged to end its colonial administration of this region as rapidly as possible. ITLOS said that this Opinion can be interpreted as “suggesting Mauritius’ sovereignty over the Chagos Archipelago”.<sup>586</sup> Accordingly, ITLOS judged there was no territorial sovereignty dispute over the Chagos Archipelago at the time of the commencement of the current judicial proceedings.

It was quite disappointing that ITLOS did not provide any detailed explanation such as the legal effect of the Advisory Opinion of the ICJ, or the relationship between the generally acknowledged elements to be a dispute and the judicial findings of other courts.

Nevertheless, this may open up the possibility that relevant judicial findings of other international courts will have a great impact on Part XV tribunals’ decisions in determining the existence of territorial sovereignty disputes in future alleged mixed disputes cases.

Therefore, it will be interesting to see how this new approach taken by ITLOS will sustain in future cases and be elucidated further by other Part XV tribunals.

#### 4.5. Concluding Remarks

The phrase ‘any dispute concerning the interpretation or application’ is a common phrase for provisions stipulating the *compromissory clause* of a treaty.<sup>587</sup> However, since this phrase implies the broad and ambiguous scope of the subject-matter jurisdiction, a court or tribunal seised of jurisdiction should examine the extent to which it may exercise its jurisdiction over the submitted claims.<sup>588</sup> That is the same for UNCLOS Part XV as Article 288(1) regulates that ‘any dispute concerning the interpretation or application’ of the Convention can be subject to the compulsory jurisdiction of Part XV tribunals. Thus, Part

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<sup>585</sup> *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, I.C.J. Reports 2019, p. 95.

<sup>586</sup> *Dispute Concerning Delimitation of the Maritime Boundary Between Mauritius and Maldives in the Indian Ocean*, Preliminary Objections, Judgment, ITLOS, 28 January 2021, para. 174.

<sup>587</sup> Thirlway, 'Compromis', para. 3

<sup>588</sup> Tomuschat, 'Article 36', p. 753; See also, Garrido-Muñoz, 'Dispute', para. 28.

XV tribunals must determine the applicability of the compulsory procedures in Section 2 of Part XV to the given circumstances.

In determining the applicability of Part XV procedures, the primary task is to check the existence of a 'dispute' within the meaning of Article 288(1). Throughout past and pending compulsory proceedings, Part XV tribunals have encountered diverse legal questions regarding the applicability of Part XV procedures, derived from the matter of confirming the existence of such disputes. As can be seen, different Part XV tribunals' approaches have been accumulated and followed convergently in subsequent cases. Thus, the common jurisprudence of Part XV tribunals has now become guidance on how to determine the applicability of Part XV procedures.

For a certain dispute to be determined as concerning the interpretation or application of the Convention, it should be shown that a substantive link exists between the subject-matter of the dispute and the invoked provisions of UNCLOS. When states parties make a declaration pursuant to Article 287, they are allowed to append some conditions in choosing the means for the settlement of disputes. In such cases, Part XV tribunals have admitted that the principle of reciprocity would be applied, and the declarations pursuant to Article 287 would have a direct and immediate effect. Moreover, a dispute concerning Article 300 of UNCLOS must be accompanied by the specified rights or obligations regulated by other provisions of UNCLOS, since this article itself alone cannot be a jurisdictional ground for Part XV tribunals to exercise their jurisdiction. Lastly, concerning so-called mixed disputes cases, Part XV tribunals have established a methodology that can be used to characterise the nature of the dispute.

These examples show that the way to determine the applicability of Part XV procedures has been created and enriched through the jurisprudence of Part XV tribunals. However, determining the applicability of Part XV procedures is not just concerned with the existence of 'dispute' within the meaning of Article 288(1). It also covers how to interpret and apply the provisions within Section 3 of UNCLOS, in which the limitations and exceptions to the compulsory dispute settlement procedures are stipulated. The next chapter will see how Part XV tribunals have clarified the scope of excluded categories of disputes permitted by Articles 297 and 298.

## 5. Judge-Made Rules on Limitations and Exceptions to Compulsory Procedures

### 5.1. Given Clauses for the Exclusion of Compulsory Procedures in UNCLOS Part XV

During the Third UN Conference, limitations and exceptions to compulsory procedures were regarded as crucial for making a widely acceptable dispute settlement system for states. As seen in Chapter 2, the negotiators emphasised that there must be certain exceptions within the Convention to allow states parties to settle disputes concerning specific issues by recourse to the non-compulsory measures.<sup>589</sup> The need for such an exclusion was raised concerning some sensitive issues like matters directly related to the territorial integrity of a state.<sup>590</sup> This was because otherwise, many states would hesitate to join this new law of the sea convention or to accept the compulsory jurisdiction of Part XV tribunals.<sup>591</sup> Thus, the introduction of the Part XV system into the Convention was conditioned on the exclusion of certain issues from the obligatory procedures entailing binding decisions, especially for states who opposed the unlimited obligation to submit a dispute.<sup>592</sup> Likewise, the limitations within Part XV of UNCLOS show the crux of the compromise<sup>593</sup> and constitute the cornerstone of the overall dispute settlement system under Part XV.<sup>594</sup>

The limitations and exceptions to the applicability of the compulsory procedures are regulated in Section 3 of Part XV, which is composed of three Articles (297-299). Here, the main exemption provisions are Articles 297 and 298.

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<sup>589</sup> UNGA, 'Document A/CONF.62/SR.51, Summary Records of Plenary Meetings, 51st Plenary Meeting', para. 9.

<sup>590</sup> *Ibid*, para. 10.

<sup>591</sup> Churchill and Lowe, *The Law of the Sea*, pp. 454-455.

<sup>592</sup> Nordquist and others, *United Nations Convention on the Law of the Sea 1982: A Commentary*, para. 297.1.

<sup>593</sup> Kindt, 'Dispute Settlement in International Environmental Issues: the Model Provided by the 1982 Convention on the Law of the Sea', P. 1116.

<sup>594</sup> Adede, 'The Basic Structure of the Disputes Settlement Part of the Law of the Sea Convention', p. 130.

### 5.1.1. Automatic Limitations in Article 297

Article 297 addresses how the dispute settlement system will operate concerning the freedom of the high seas in the EEZ and on the continental shelf in which coastal states' sovereign rights and jurisdiction exist.<sup>595</sup> This article aims to balance the interests between the coastal states and the states with major navigational interests as well as geographically disadvantaged states including landlocked states.<sup>596</sup> Especially the latter states were keen to ensure the protection of certain rights through recourse to the compulsory dispute settlement procedures.<sup>597</sup> This was due to their shared belief that the non-resource uses of the EEZ and the continental shelf of other states were too great to entrust the continued securement of the relevant freedoms of the high seas by recourse to the traditional forms of dispute settlement.<sup>598</sup> As a result, those states' wishes were reflected in Article 297(1);

*Article 297  
Limitations on applicability of section 2*

*1. Disputes concerning the interpretation or application of this Convention with regard to the exercise by a coastal State of its sovereign rights or jurisdiction provided for in this Convention shall be subject to the procedures provided for in section 2 in the following cases:*

*(a) when it is alleged that a coastal State has acted in contravention of the provisions of this Convention in regard to the freedoms and rights of navigation, overflight or the laying of submarine cables and pipelines, or in regard to other internationally lawful uses of the sea specified in article 58;*

*(b) when it is alleged that a State in exercising the aforementioned freedoms, rights or uses has acted in contravention of this Convention or of laws or regulations adopted by the coastal State in conformity with this Convention and other rules of international law not incompatible with this Convention; or*

*(c) when it is alleged that a coastal State has acted in contravention of specified international rules and standards for the protection and preservation of the marine environment which are applicable to the coastal State and which have been established by this Convention or through a competent international organization or diplomatic conference in accordance with this Convention.*

Due to this provision, the basic freedoms and rights of the high seas such as navigation,

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<sup>595</sup> Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, pp. 125-126.

<sup>596</sup> Nordquist and others, *United Nations Convention on the Law of the Sea 1982: A Commentary*, para. 297.19.

<sup>597</sup> *Ibid.*, para. 297.19.

<sup>598</sup> Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, p. 143.

overflight and the laying of submarine cables and pipelines, and internationally lawful uses of the sea related to those freedoms are under the protection of the compulsory procedures of Section 2 of Part XV.<sup>599</sup>

However, unlike Article 297(1) which simply lists the category of disputes that must be subject to the compulsory procedures, Articles 297(2) and (3) mention the limitation concerning extent to which the jurisdiction of Part XV tribunals may apply. Article 297(2)(a) says;

*2. (a) Disputes concerning the interpretation or application of the provisions of this Convention with regard to marine scientific research shall be settled in accordance with section 2, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute arising out of:*

*(j) the exercise by the coastal State of a right or discretion in accordance with article 246; or*

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

Moreover, Article 297(3)(a) says;

*3. (a) Disputes concerning the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance with section 2, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations.*

As we can see, both Articles 297(2) and (3) use the term ‘except’ to limit the applicability of compulsory procedures to certain disputes respectively concerning marine scientific research and fisheries.

### 5.1.2. Optional Exceptions in Article 298

Along with the automatic limitations to the exercise of the compulsory jurisdiction of Part

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<sup>599</sup> Nordquist and others, *United Nations Convention on the Law of the Sea 1982: A Commentary*, para. 297.19.



XV tribunals, states parties are allowed to exclude certain disputes from the applicability of Section 2 of Part XV upon declarations. The categories of the disputes that can be exempted are specified in Article 298(1)(a) to (c);

*Article 298*  
*Optional exceptions to applicability of section 2*

*1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes:*

*(a) (i) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles ...*

*(b) disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3;*

*(c) disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations, unless the Security Council decides to remove the matter from its agenda or calls upon the parties to settle it by the means provided for in this Convention.*

During the negotiating process of UNCLOS, some delegations insisted that specific categories of disputes should not be submitted to a third-party adjudication.<sup>600</sup> As a result of a compromise between those delegations and other states, the optional exception clause was introduced into the Convention so that states parties may exempt themselves from the compulsory jurisdiction in Section 2. While UNCLOS does not allow any reservation to the Convention unless expressly permitted by other provisions of the Convention,<sup>601</sup> Article 298 is one such provision expressly permitting reservation.

The disputes that can be excluded from the purview of Part XV tribunals' jurisdiction are disputes concerning maritime delimitation, historic bays or titles, military activities, law-enforcement act, and the functions and tasks assigned to the Security Council of the UN. All these categories are traditionally sensitive issues for states, in terms of accepting a third-party binding dispute settlement.<sup>602</sup> As of August 2022, a total of 37 states have

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<sup>600</sup> Ibid, para. 298.1; Sheehan, 'Dispute Settlement under UNCLOS: The Exclusion of Maritime Delimitation Disputes', p. 166.

<sup>601</sup> Article 309 of UNCLOS.

<sup>602</sup> Merrills, *International Dispute Settlement*, pp. 183-184; Adede, 'The Basic Structure of the Disputes Settlement Part of the Law of the Sea Convention', p. 130; Keyuan and Ye, 'Interpretation and Application of Article 298 of the Law of the Sea Convention in Recent Annex VII Arbitrations: An Appraisal', p. 332.

appended declarations pursuant to Article 298(1) to exclude one or more categories of disputes from any of the procedures entailing binding decisions of Section 2<sup>603</sup>;

**Table 1** List of States Excluding Any of the Procedures Pursuant to Article 298(1)<sup>604</sup>

*\*(as of August 2022)*

<i>Declaration</i>	<i>D</i>	<i>H</i>	<i>M</i>	<i>L</i>	<i>SC</i>		<i>D</i>	<i>H</i>	<i>M</i>	<i>L</i>	<i>SC</i>
Algeria	0	0	0	0	0	Italy	0	0			
Angola	0	0				Kenya	0	0	0	0	0
Argentina	0	0		0	0	Malaysia	0	0			
Australia	0	0				Mexico	0	0	0	0	
Belarus	0		0	0	0	Montenegro	0	0			
Benin	0	0				Palau	0				
Cape Verde			0	0		Portugal	0	0	0	0	0
Canada	0	0	0	0	0	Rep. of Korea	0	0	0	0	0
Chile	0	0	0	0	0	Russia	0	0	0	0	0
China	0	0	0	0	0	Saudi Arabia	0	0	0	0	
Congo	0	0				Singapore	0	0			
DR Congo	0	0				Spain	0	0			
Ecuador	0	0	0	0	0	Togo			0		0
Egypt	0	0	0		0	Trinidad and Tobago	0	0			
Equatorial Guinea	0	0				Tunisia	0	0	0	0	0
France	0	0	0	0	0	Ukraine	0	0	0		
Gabon	0	0				UK	0	0	0	0	0
Greece	0	0	0	0	0	Uruguay				0	
Iceland	0										

*\*\* (D=Delimitation, H=Historic Bays or Titles, M= Military Activities, L= Law-Enforcement Activities, SC=Task of UNSC)*

As mentioned in Chapter 4, the principle of reciprocity applies to the declarations made pursuant to Article 298(1). Article 298(3) says that a state that has made a declaration shall not be entitled to submit any dispute falling within the excepted category of disputes to any procedure against another state party without the consent of that party. Though indirect,

<sup>603</sup> Some states parties declared the exclusion of the jurisdiction of certain Part XV tribunals over the disputes regulated in Article 298(1). For example, Cuba declared that it would not accept the jurisdiction of the ICJ over any disputes regulated in Articles 297 and 298. Similarly, Denmark declared that it would not accept the jurisdiction of an arbitral tribunal constituted in accordance with Annex VII of the Convention for any of the disputes listed in Article 298. In contrast, some states declared they would accept only certain means for resolving disputes regulated in Article 298(1). Nicaragua, for instance, declared that it would accept only recourse to the ICJ for settling the disputes set forth in Article 298.

<sup>604</sup> United Nations Treaty Collection <[https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mt\\_dsg\\_no=XXI-6&chapter=21&Temp=mtmsg3&clang=\\_en](https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mt_dsg_no=XXI-6&chapter=21&Temp=mtmsg3&clang=_en)>; last visited – 15 August 2022.

this implies that between the states parties declaring the different scope of the exception, Part XV tribunals can only exercise their jurisdiction over a dispute not excluded by any of the declarations of the parties, unless they have agreed otherwise.

In brief, Article 297 regulates the limitations on the applicability of Section 2 in which stipulated categories of the dispute would be automatically excluded from the purview of the jurisdiction of Part XV tribunals. On the other hand, Article 298 regulates the rules for the optional exceptions to the compulsory procedures. Accordingly, unless states parties choose to exclude the regulated disputes from the application of the compulsory procedures, they accept the exercise of Part XV tribunals' jurisdiction over the regulated disputes by Article 298. Then, as Article 299 regulates, a dispute excluded either by Article 297 or Article 298 can only be submitted to the compulsory procedures when the parties to the dispute agree to such submission.

Section 3 of Part XV is directly related to the applicability of the compulsory procedures under Part XV. Article 286 says that subject to Section 3, any dispute concerning the interpretation or application of the Convention shall be submitted to Part XV tribunals at the request of any party to that dispute. Thus, the matter of how to interpret and apply the rules regulating the limitations and exceptions to the compulsory jurisdiction has importance in determining the applicability of the compulsory procedures within the Convention to the given circumstances.

During the negotiating process of UNCLOS, it was argued that if there must be exceptions, they should be clearly formulated.<sup>605</sup> However, the text of both Articles 297 and 298 of the Convention can hardly be construed as providing precise guidance on the extent to which states parties are allowed to preclude themselves from the compulsory jurisdiction of Part XV tribunals. Hence, the two provisions have left many interpretive gaps and difficulties in applying the enlisted exceptions to actual events. Throughout past proceedings, these have been major sources for the jurisdictional contestations between the applicants and the respondents.

Instead, Part XV tribunals have clarified the rules on the limitations and exceptions to the applicability of compulsory procedures. This chapter will focus on the judicial determinations on the effect of the exemptions provided in Articles 297 and 298. First, how

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<sup>605</sup> Nordquist and others, *United Nations Convention on the Law of the Sea 1982: A Commentary*, para. 297.6; See also, UNGA, 'Document A/CONF.62/SR.58, Summary Records of Plenary Meetings, 58th Plenary Meeting', para. 10.

Part XV tribunals have approached the controversy over the exact scope of disputes automatically excluded from the purview of compulsory jurisdiction by Article 297(1) will be addressed in Section 5.2. Then, Part XV tribunals' clarification of the effect of the declaration made pursuant to Article 298 on the applicability of compulsory procedures will be examined in Section 5.3.

## 5.2. To What Extent are Compulsory Procedures Automatically Excluded under Article 297(1)?

As has been introduced above, Article 297(1) enumerates the examples of disputes about coastal states' exercise of sovereign rights or jurisdiction that should be subject to the compulsory procedures in Section 2 of Part XV. However, this entails ambiguity concerning how far disputes concerning coastal states' exercise of sovereign rights or jurisdiction should be subject to the compulsory procedures of Section 2. Although certain categories of disputes are specified in Articles 297(1)(a) to (c), they are not the only ones that may arise in connection with coastal states' sovereign rights or jurisdiction. In other words, there is no guidance as to whether only the disputes stipulated in Articles 297(1)(a)-(c) are subject to the compulsory procedures, or other disputes concerning coastal states' exercise of sovereign rights or jurisdiction are within the purview of jurisdiction.

Although it is included in the article regulating the limitations on the compulsory procedures of Section 2, Article 297(1) does not limit the applicability of Section 2 but only confirms it. In this context, it is unclear whether the three categories enumerated as Articles 297(1)(a) to (c) are the only disputes that Part XV tribunals may exercise their jurisdiction over concerning the freedom of the high seas and certain rights in the EEZ and the continental shelf. In fact, Part XV tribunals have occasionally encountered this issue in a number of past proceedings. Within the case-law of Part XV tribunals, there has been a major change in the interpretation of Article 297(1). As will be shown below, that change was based on the tribunals' consideration of the drafting records of this article during the Third UN Conference. Therefore, before moving on to the case analysis, it would be helpful to see how the draft articles that corresponded to Article 297(1) of the final Convention have been developed and changed.

### 5.2.1. Changes in the Drafting History of Article 297(1) of UNCLOS

Like other provisions composing the dispute settlement procedures of Part XV, several changes were made in drafting the current Article 297(1) of UNCLOS. The first draft article was contained in Part IV of the ISNT, submitted at the 4<sup>th</sup> Session. Article 18(1) of the ISNT said that ‘Nothing... shall require any Contracting Party to submit to the dispute settlement procedures provided for in the present Convention... except when it is claimed that a coastal State has violated...’.<sup>606</sup> Article 18(1) of the ISNT stated that disputes arising out of coastal states’ exercise of their jurisdiction would be generally excluded from the purview of the dispute settlement procedures provided by the Convention. Accordingly, only when the disputes are concerned with enumerated categories (freedom of navigation, overflight or laying cables and pipelines, or the internationally established criteria or standards), they shall be subject to the dispute settlement system provided by the new law of the sea convention.

Later, Article 18(1) of the ISNT became Article 18(1) of the first revision of Part IV of the ISNT.<sup>607</sup> This draft article mentioned that only specified cases within the provision can be resolved by recourse to the compulsory procedures of the Convention. Article 18(1) of the first revision of the ISNT said ‘Nothing... shall empower any Contracting Party to submit... any dispute in relation to the exercise of sovereign rights, exclusive rights or exclusive jurisdiction of a coastal State, except in the following cases...’. Here, the term ‘except’ was used again to show such an intention.

Article 18(1) of the first revision of the ISNT became Article 17(1) of the second revision of the Text, which was referred to as the RSNT.<sup>608</sup> There had been no substantial change in the expression of Article 17(1) of the RSNT except that the term ‘only’ was used instead of ‘except’ – ‘Disputes relating to the exercise by a coastal State of sovereign rights, exclusive rights or exclusive jurisdiction ... shall be subject to the procedures specified in section 2 only in the following cases...’.

However, from the next draft article corresponding to Article 17(1) of RSNT, which was

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<sup>606</sup> UNGA, 'Document A/CONF.62/WP.9, Informal Single Negotiating Text (Part IV)'.

<sup>607</sup> UNGA, 'Document A/CONF.62/WP.9/Rev.1, Informal Single Negotiating Text (Part IV)'.

<sup>608</sup> UNGA, 'Document A/CONF.62/WP.9/Rev.2, Revised Single Negotiating Text (Part IV)'.

Article 296(2) of the ICNT embodied at the end of the 6<sup>th</sup> Session of the Conference, restrictive words like ‘except’ or ‘only’ were no longer used.<sup>609</sup> Instead, it said ‘Subject to the fulfilment of the conditions specified in paragraph 1, such court or tribunal shall have jurisdiction to deal with the following cases...’.

During the 7<sup>th</sup> Session of the Conference, Negotiating Group 5 (hereinafter ‘NG5’) was established to deal with the issue of the settlement of disputes concerning the exercise of the sovereign rights of the coastal states, which was identified as a hard-core issue.<sup>610</sup> According to the report of the NG5, there had been a divergence of positions among the members concerning this issue.<sup>611</sup> Some states wanted all rights granted under the Convention to be protected by the effective settlement provisions. While, others felt that their sovereign rights would not be effectively exercised due to the abuse of legal process and proliferation of applications to the dispute settlement procedures. The report said that introducing the compulsory conciliation process instead of the judicial procedures for certain kinds of disputes had emerged as a compromise, and this suggestion gained widespread support.<sup>612</sup>

The NG5 then proposed a new draft Article 296(1), which said ‘disputes ... with regard to the exercise by a coastal State of its sovereign rights or jurisdiction provided for in the present Convention, shall be subject to the procedures specified in Section 2 of this part in the following cases...’.<sup>613</sup> In this draft article suggested by the NG5, restrictive words like ‘except’ and ‘only’ that had been used in former drafts were omitted. The proposed text was discussed during the 7<sup>th</sup> Session of the Conference which was believed that this text could bring the group of coastal states closer to consensus.<sup>614</sup> The text prepared by the NG5 was then included as Article 296(1) in the revised text of the ICNT.<sup>615</sup>

After several revisions, Article 296(1) of the revised ICNT became the current Article 297(1). The omission of the restrictive terms was continuously maintained until the

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<sup>609</sup> UNGA, ‘Document A/CONF.62/WP.10, Informal Composite Negotiating Text’.

<sup>610</sup> Nordquist and others, *United Nations Convention on the Law of the Sea 1982: A Commentary*, para. 297.14.

<sup>611</sup> UNGA, ‘Document A/CONF.62/RCNG/1, Reports of the Committees and Negotiating Groups on Negotiations at the Resumed Seventh Session Contained in a Single Document both for the Purposes of Record and for the Convenience of Delegations’, Results of the Work of the Negotiating Group on Item (5) of Document A/Conf.62/62, Report to the Plenary by the Chairman, Ambassador Constantin Stavropoulos (Greece), p. 117.

<sup>612</sup> *Ibid.*

<sup>613</sup> *Ibid.*, Annex A, Chairman’s Suggestion for a Compromise Formula, p. 120.

<sup>614</sup> Nordquist and others, *United Nations Convention on the Law of the Sea 1982: A Commentary*, 297.16.

<sup>615</sup> UNGA, ‘Document A/CONF.62/WP.10/Rev.1, Informal Composite Negotiating Text, Revision 1’.

finalised version of the draft article.<sup>616</sup> The Virginia Commentary assumed the reason for omitting the restrictive expressions was ‘presumably’ because other third-party dispute settlement procedure, such as conciliation introduced by NG5, were provided instead of judicial procedures.<sup>617</sup>

As the restrictive expressions were consequently omitted from the final clause, some may understand that disputes concerning the exercise of coastal states’ rights should be subject to the procedures of Section 2, except those expressly excluded by Articles 297(2) and (3). Still, as nothing was certain from the text and structure of Article 297, the opposite interpretation was also possible. Thus, this issue was left to be resolved by Part XV tribunals.

### 5.2.2. Orthodox View on Article 297(1) - the *Southern Bluefin Tuna Case Award*

Some early views on the meaning of Article 297(1) of UNCLOS were that the compulsory procedures in Section 2 of Part XV may only apply to the three enumerated cases contained in Articles 297(1)(a) to (c). For example, A. O. Adede interpreted the three categories of disputes described in paragraphs (a) to (c) of Article 297(1) as representing the only disputes subject to the compulsory procedures of Section 2.<sup>618</sup> In this respect, Adede said that those three paragraphs of Article 297(1) were a disappointment to those who had wished to establish a comprehensive compulsory system for settling disputes within the EEZ during the negotiations.<sup>619</sup> The view of Robin Churchill and Vaughan Lowe presented in 1999 was the same. They said that unless the dispute allegedly meets the situations described in three paragraphs of Article 297(1), this provision provides no ground for Part XV tribunals to exercise their jurisdiction over the dispute concerning the exercise of sovereign rights or jurisdiction by a coastal state within its EEZ.<sup>620</sup> This view was maintained in the contribution of John Collier and Vaughan Lowe published in the

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<sup>616</sup> See; UNGA, 'Document A/CONF.62/WP.10/Rev.2, Informal Composite Negotiating Text, Revision 2' and UNGA, 'Document A/CONF.62/WP.10/Rev.3, Informal Composite Negotiating Text, Revision 3'.

<sup>617</sup> Nordquist and others, *United Nations Convention on the Law of the Sea 1982: A Commentary*, 297.18.

<sup>618</sup> Adede, 'The Basic Structure of the Disputes Settlement Part of the Law of the Sea Convention', p. 137.

<sup>619</sup> Ibid.

<sup>620</sup> Churchill and Lowe, *The Law of the Sea*, p. 455

same year.<sup>621</sup>

This orthodox reading of Article 297(1) of UNCLOS was authoritatively admitted by the arbitral tribunal in the *SBT* case. In fact, the parties to the dispute, in this case, did not raise any claims concerning whether Article 297(1) restricts the tribunal's exercise of its jurisdiction over other than the three enumerated cases in paragraphs (a) to (c) of this provision. Instead, this issue was addressed by the tribunal in dealing with another main issue of this case, which was the comprehensiveness of the compulsory procedures under Part XV of UNCLOS.

As shown in Chapter 3, the tribunal of this case concluded that it lacked jurisdiction to deal with the applicants' claims by the effect of Article 281(1).<sup>622</sup> The ground for such consideration of the interpretation and application of Article 281(1) was that UNCLOS Part XV 'falls significantly short of establishing a truly comprehensive regime' of a compulsory jurisdiction system.<sup>623</sup> In explaining its view on this point, the tribunal mentioned that provisions comprising Section 3 of Part XV showed significant limitations on the applicability of compulsory procedures. Based on this, the tribunal said that the application of such procedures to disputes concerning the exercise of coastal states' sovereign rights or jurisdiction would be possible in certain specified cases only as regulated by Articles 297(1)(a)-(c).<sup>624</sup> Therefore, the tribunal regarded the three categories within Articles 297(1)(a)-(c) as the exhaustive list of disputes that the compulsory procedures of Section 2 may be applied to.

Although the tribunal accepted the orthodox reading of this article, the tribunal of *SBT* case did not give a reason why Article 297(1) should be interpreted in that way. Given the substantial changes made during the negotiating process, this was quite a disappointment. Nevertheless, the tribunal's determination on Article 297(1) in *SBT* case became an authoritative statement on how to interpret and apply this article. Subsequently, this view was followed by the respondent state in the *Guyana v. Suriname* case. One of the grounds for Suriname's jurisdictional objection about Guyana's third submission was that the dispute in this submission should be excluded by Article 297(1). Suriname regarded this article as allowing the tribunal to exercise its jurisdiction only over the three cases

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<sup>621</sup> Collier and Lowe, *The Settlement of Disputes in International Law: Institutions and Procedures*, p. 92.

<sup>622</sup> *Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan, Award on Jurisdiction and Admissibility, 4 August 2000*, paras. 56-58.

<sup>623</sup> *Ibid.*, paras. 62.

<sup>624</sup> *Ibid.*, paras. 61.



enumerated in Articles 297(1)(a) to (c).<sup>625</sup> Suriname argued that Guyana's third submission concerned a coastal state's enforcement of its sovereign rights concerning non-living resources. However, since such a dispute is not contained in Articles 297(1)(a) to (c), Suriname contended that Guyana's relevant submission must be dismissed. Although the tribunal did not examine the objection based on this ground but determined based on Article 297(3), Suriname's pleadings showed that the view of the tribunal of *SBT* arbitration was accepted as an authoritative statement on this provision.

Until the *Chagos MPA* case, this orthodox view on the meaning of Article 297(1) and its three paragraphs was maintained. Some scholars showed their concurring views with the decision of the tribunal in the *SBT* case. For example, Natalie Klein construes that when it comes to Article 297(1), the compulsory procedures are only available for "specifically-enumerated" freedoms and other internationally lawful uses of the sea, related to those freedoms.<sup>626</sup> Saiful Karim says that the disputes relating to a coastal state's exercise of sovereign rights can be submitted to compulsory procedures only when they are relevant to the three enumerated cases.<sup>627</sup> Bernard Oxman describes Article 297 as addressing the question of the extent to which a coastal state's exercise of sovereign rights or jurisdiction may be challenged by the compulsory procedures under Section 2 of Part XV. He adds that Article 297(1) limits such challenges to the three situations enumerated in paragraphs (a) to (c).<sup>628</sup> However, all of these normative expectations of states parties and scholars affected by the authoritative interpretation of Article 297(1) of the tribunal in the *SBT* case encountered a dramatic change in the *Chagos MPA* case.<sup>629</sup>

### 5.2.3. A New Interpretation of Article 297(1) - the *Chagos MPA* Case and Beyond

In the *Chagos MPA* case, the orthodox reading of Article 297(1) was completely denied. In

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<sup>625</sup> *Arbitration between Guyana and Suriname, Hearing Transcripts - December 2006 - Day 7, Vol. 7, 15 December 2006*, p. 1099.

<sup>626</sup> Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, p. 222.

<sup>627</sup> Saiful Karim, 'Litigating Law of the Sea Disputes Using the UNCLOS Dispute Settlement System' in Natalie Klein (ed), *Litigating International Law Disputes: Weighing the Options* (Cambridge University Press 2014), p. 264.

<sup>628</sup> Oxman, 'Courts and Tribunals: The ICJ, ITLOS, and Arbitral Tribunals', p. 404.

<sup>629</sup> Stephen Allen, 'Article 297 of the United Nations Convention on the Law of the Sea and the Scope of Mandatory Jurisdiction' (2017) 48 *Ocean Development and International Law* 313, p. 316.

this case, the issue of Article 297(1) was raised concerning Mauritius' fourth submission, which requested the tribunal to declare that the UK's MPA was incompatible with the provisions regulating the rights and obligations of both coastal states and others within the EEZ (Articles 55, 56, 63 and 64).<sup>630</sup> In examining the applicability of Article 297(1)(c) to Mauritius' fourth submission, the tribunal said that unlike Articles 297(2) and (3), which contain exceptions to the tribunal's jurisdiction, Article 297(1) is phrased entirely in affirmative terms.<sup>631</sup> Therefore, the tribunal considered that Article 297(1) does not limit the applicability of the compulsory procedures to only the enumerated cases.<sup>632</sup> Moreover, the tribunal regarded the textual construction of Article 297 as not implying such a limited effect. According to the tribunal, if Article 297(1) truly means that the tribunal may exercise jurisdiction over only enumerated cases, logically, there would be no need expressly to exclude certain disputes concerning marine scientific research and fisheries as regulated by Articles 297(2) and (3).<sup>633</sup>

To support this interpretation of the meaning of Article 297(1), the tribunal reviewed the lengthy preparatory work of the Convention during the Third UN Conference and the past draft articles shown in Section 5.2.1.<sup>634</sup> Here, the tribunal noted that restrictive words like 'except' or 'only' had been omitted from the draft articles through the negotiation process.<sup>635</sup> Moreover, although Article 294 imposes a procedural safeguard by restricting the abuse of legal process such as overflow of litigation concerning the enumerated cases in Article 297(1), the tribunal did not construe that it gives a limitation like what the orthodox reading of the article says.<sup>636</sup> In this respect, the tribunal determined that both Articles 297(1) and 294 do not restrict the tribunal from exercising jurisdiction over the disputes concerning the exercise of sovereign rights and jurisdiction other than the three enumerated cases.<sup>637</sup> Thus, it concluded that when a dispute concerns the interpretation or application of the Convention and none of the express exceptions in Articles 297(2) and (3) is applicable, the tribunal can exercise its jurisdiction over that dispute. Accordingly, it was determined that the parties' dispute does not necessarily need to fall under one of the cases

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<sup>630</sup> Article 55 Specific Legal Regime of the Exclusive Economic Zone; Article 56 Rights, Jurisdiction and Duties of the Coastal State in the Exclusive Economic Zone; Article 63 Stocks Occurring within the Exclusive Economic Zone and in an Area Beyond and Adjacent to It; Article 64 Highly Migratory Species.

<sup>631</sup> *Chagos Marine Protected Area Arbitration between Mauritius and the UK, Award, 18 March 2015*, para. 307.

<sup>632</sup> *Ibid.*, para. 308.

<sup>633</sup> *Ibid.*

<sup>634</sup> *Ibid.*, paras. 309-313.

<sup>635</sup> *Ibid.*, para. 314.

<sup>636</sup> *Ibid.*, para. 315.

<sup>637</sup> *Ibid.*, para. 317.

specified in paragraphs (a) to (c) of Article 297(1).<sup>638</sup>

Later in the *South China Sea* case, the issue of the meaning of Article 297(1) in terms of the purview of compulsory jurisdiction under UNCLOS Part XV was addressed again. Since China did not participate in the proceedings of this case, the tribunal decided to presuppose the potential jurisdictional objections and address them to determine its jurisdiction and admissibility. One of the issues thought to be relevant to the tribunal's jurisdiction was the contesting views on the meaning of Article 297(1) determined by different tribunals. The tribunal mentioned that this article could implicitly limit the jurisdiction over disputes concerning sovereign rights and jurisdiction in the EEZ only to the enumerated cases identified in Articles 297(1)(a) to (c), as interpreted in *SBT* case.<sup>639</sup> At the same time, the tribunal also recognised that the tribunal of the *Chagos MPA* case had recently declined to endorse such an orthodox interpretation.<sup>640</sup> However, the tribunal did not proceed to determine this issue, as the tribunal could make its decision on another basis without addressing the issue of the reading of Article 297(1). Although the tribunal did not expressly support the new interpretation of Article 297(1), this simple act of recognition seems to represent a sufficient signal for endorsing the change in interpreting Article 297(1).<sup>641</sup>

The tribunal's interpretation of Article 297(1) in the *Chagos MPA* case was contrary to the orthodox reading of this article which had been upheld by many authors and endorsed by the arbitral tribunal of the *SBT* case. Generally, for the sake of legal certainty and consistency, adherence to past jurisprudence should be maintained unless there are compelling reasons for changes in the case-law.<sup>642</sup> In the *Chagos MPA* case, the tribunal provided the detailed grounds for its new interpretation, which were the developmental process of draft articles and its consideration of the structure of Article 297. These showed sufficient reasons why the tribunal in this case decided to leave the early judicial decision and the orthodox views on this article which had endured until then.

Considering the established jurisprudence of Part XV tribunals on other provisions of Part XV, it can be expected that the change made by the tribunal of *Chagos MPA* case in

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<sup>638</sup> *Ibid.*

<sup>639</sup> *South China Sea Arbitration between Philippines and China, Award on Jurisdiction and Admissibility*, 29 October 2015, para. 359.

<sup>640</sup> *Ibid.*, para. 359.

<sup>641</sup> Allen, 'Article 297 of the United Nations Convention on the Law of the Sea and the Scope of Mandatory Jurisdiction', p. 326.

<sup>642</sup> Brown, 'Article 59', p. 1588.

interpreting Article 297(1) will be also maintained in subsequent cases. As seen in previous chapters, a tendency can be found between different Part XV tribunals that once a certain deviation from a past judicial decision has been made by one tribunal, the new interpretation or novel way of application is continuously followed by other tribunals in subsequent cases. The interpretation of Article 297(1) given by the tribunal of the *Chagos MPA* case will not be different in this respect. Hence, from now on, the construction of Article 297(1) favoured by the tribunal of the *Chagos MPA* case will have priority over the orthodox reading of this article.<sup>643</sup> For states parties and other Part XV tribunals, this new interpretation of Article 297(1) will serve as a new reference point to be considered.

### 5.3. To What Extent are Compulsory Procedures Optionally Excluded under Article 298(1)?

When neither of the disputing parties has made a declaration pursuant to Article 298(1), this provision has no bearing on the applicability of the compulsory procedures to the dispute between them. However, if a party has made such a declaration, the applicability of the compulsory procedures will depend on the effect of the declaration made pursuant to Article 298(1). In this sense, the extent to which states parties can be exempted from the compulsory procedures of Section 2 and, what disputes can be identified as relevant to the regulated categories in Article 298(1) become significant issues for determining the tribunal's jurisdiction over the case.

Given the importance of this article, it was unsurprising that the issue of interpreting and applying Article 298(1) has frequently been at the centre of jurisdictional contestations between the parties in past proceedings. Here, we will see how Part XV tribunals have contributed to clarifying the effect of declarations pursuant to paragraphs (a) and (b) of Article 298(1) and how to apply them to the given circumstances. However, since the dispute concerning the task assigned to the Security Council of the UN has not yet been submitted to any Part XV tribunal, the effect of declaration pursuant to Article 298(1)(c)

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<sup>643</sup> Allen, 'Article 297 of the United Nations Convention on the Law of the Sea and the Scope of Mandatory Jurisdiction', p. 326.

will not be covered in this section.

### 5.3.1. Disputes Concerning Maritime Delimitation

Article 298(1)(a) regulates that, upon declaration, states parties can exempt disputes regarding sea boundary delimitation from the compulsory procedures of Section 2. Chapter 4 discussed the importance of the existence of a dispute concerning the interpretation or application of the Convention in determining a jurisdiction over the case. Similarly, for the declaration made pursuant to Article 298(1)(a) to have its effect, it must be shown that the submitted disputes may constitute the dispute concerning the interpretation or application of Article 15, 74 or 83. Then, how can the existence of a dispute concerning sea boundary delimitation be determined?

Concerning what constitutes the maritime delimitation dispute, the decision of ITLOS in the case of delimiting the maritime boundary in the Bay of Bengal between Bangladesh and Myanmar (hereinafter '*Bay of Bengal (Bangladesh/Myanmar)*') provided a point to be noted. According to ITLOS, delimitation presupposes the existence of an area of overlapping entitlements. Thus, the first step in any delimitation should be to determine whether there are entitlements between the parties and, furthermore, whether they overlap.<sup>644</sup> One of the subject-matters of the dispute, in this case, was the delimitation of the continental shelf beyond 200 nm. Therefore, ITLOS said that it must first be determined whether the parties have overlapping entitlements to the continental shelf beyond 200 nm. If not, ITLOS mentioned that it would be dealing with just a "hypothetical question".<sup>645</sup>

Although the interpretation or application of Article 298(1)(a) was not directly addressed in this case, the findings of ITLOS pointed out that, to be a dispute concerning maritime delimitation, there must be a situation where states' entitlements overlap. When it comes to Article 298(1)(a), then, it can be also said that the declaration to exclude maritime delimitation cases from the compulsory procedures in Section 2 would only take effect when such a dispute concerns overlapping entitlements. The emphasis of ITLOS on the

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<sup>644</sup> *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012, p. 4, para. 397.*

<sup>645</sup> *Ibid*, paras. 398-399.

existence of the overlap in maritime entitlements has been followed by Annex VII arbitral tribunals in subsequent cases where the issue of the declaration pursuant to Article 298(1)(a) was at issue.

The *South China Sea* case was one such case. In 2006, China declared that it would not accept any of the procedures provided for in Section 2 of Part XV concerning all categories of disputes regulated in Article 298. In this case, as discussed above, China regarded the nature of disputes within the Philippines' claims as concerning a territorial sovereignty dispute. In addition, China argued that even accepting that the dispute concerned the interpretation or application of the Convention did not mean that the tribunal might exercise its jurisdiction over this case. Without specifying the submissions of the Philippines, China contended that the subject-matters of the dispute constitute an integral part of maritime delimitation, which falls within the purview of the declaration filed by China in 2006.<sup>646</sup> China considered maritime delimitation as a systematic process involving many factors like principles and methods of delimitation, the existence of entitlements and the status of maritime features.<sup>647</sup> In this respect, China argued that the Philippines' attempt to split and select some of the issues constituting maritime delimitation such as the issue of the status of maritime features for bringing them before the tribunal should not be accepted.<sup>648</sup>

The tribunal, however, did not accept the view presented by China. Although the tribunal agreed with China's point that maritime delimitation is an integral and systemic process, it said that a dispute over an issue that can be considered in the course of a maritime boundary delimitation would not automatically become a dispute over maritime boundary delimitation itself.<sup>649</sup> According to the tribunal, while fixing the extent of parties' entitlements and the area in which they overlap is commonly one of the first matters to be addressed in the delimitation of a maritime boundary, they are a distinct issue.<sup>650</sup> This confirmed that a maritime delimitation can only exist when the entitlements of states with opposite or adjacent coasts overlap, but a dispute only concerning claimed entitlements

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<sup>646</sup> *South China Sea Arbitration, Position Paper of China on the Matter of Jurisdiction, 7 December 2014*, para. 3.

<sup>647</sup> *Ibid.*, para. 67.

<sup>648</sup> *Ibid.*, para. 68.

<sup>649</sup> *South China Sea Arbitration between Philippines and China, Award on Jurisdiction and Admissibility, 29 October 2015*, para .155.

<sup>650</sup> *Ibid.*, para .156.

may also exist without overlap.<sup>651</sup> Based on this point, the tribunal concluded that the claims of the Philippines within its Submissions No. 1 to 4, 6 to 7, and 10 to 14 cannot be construed as a maritime delimitation dispute.

However, concerning the Philippines' Submissions No. 5<sup>652</sup>, 8<sup>653</sup> and 9<sup>654</sup>, the tribunal reserved its jurisdictional decision on those claims for consideration in conjunction with the merits. Here again, the tribunal emphasised the existence of an overlap between the maritime entitlements as a significant factor in determining the dispute concerning maritime delimitation. In rendering the decision to reserve, the tribunal mentioned that if any maritime feature claimed by China were to be an 'island' under Article 121 of UNCLOS,<sup>655</sup> which can generate maritime entitlements such as territorial sea, EEZ or continental shelf, then the resulting overlap would prevent the tribunal's exercise of jurisdiction by Article 298(1)(a).<sup>656</sup> However, in the merits phase, the tribunal determined that none of the high-tide features in the Spratly Islands was a fully entitled island for Article 121 of the Convention.<sup>657</sup> This indicated that there could be no maritime delimitation dispute in the region concerned in the Philippines' submissions. Finally, it was decided that the effect of China's 2006 declaration pursuant to Article 298(1) concerning the disputes over maritime delimitation could not exclude the tribunal from exercising its jurisdiction over those claims.

Similar to the *South China Sea* case, the tribunal in the *Coastal State Rights* case<sup>658</sup> noted

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<sup>651</sup> *Ibid.*

<sup>652</sup> 'Mischief Reef and Second Thomas Shoal are part of the exclusive economic zone and continental shelf of the Philippines.'

<sup>653</sup> 'China has unlawfully interfered with the enjoyment and exercise of the sovereign rights of the Philippines with respect to the living and non-living resources of its exclusive economic zone and continental shelf.'

<sup>654</sup> 'China has unlawfully failed to prevent its nationals and vessels from exploiting the living resources in the exclusive economic zone of the Philippines.'

<sup>655</sup> Article 121. Regime of islands

1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.
2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.
3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.

<sup>656</sup> *South China Sea Arbitration between Philippines and China, Award on Jurisdiction and Admissibility*, 29 October 2015, paras. 402, 405, 406.

<sup>657</sup> *South China Sea Arbitration between Philippines and China, Award*, 12 July 2016, paras. 473-647.

<sup>658</sup> Both the applicant and respondent of this case had made declaration pursuant to Article 298(1). Russia, on the one hand, declared on 12 March 1997 that it would not accept the compulsory procedures with respect to the disputes relevant to Article 298(1)(a) to (c). On the other hand, on 26 July 1999, Ukraine declared the exclusion of the disputes relevant to Article 298(1)(a) to (b) from the purview of the compulsory jurisdiction under Part XV.

that if an area exists where the entitlements overlap, the question of delimitation arises, and if not, no question of delimitation ensues.<sup>659</sup> Accordingly, the tribunal considered that to determine the applicability of the delimitation exception under Article 298(1)(a), one of the key questions would be whether there were entitlements of the parties and whether there was an area of overlapping maritime entitlements. The tribunal said that if such an area exists, the question of delimitation inevitably arises and the delimitation exception in Article 298(1)(a) may be triggered.<sup>660</sup>

However, as presented in the previous chapter, the main claims of Ukraine were based on the premise that Russia was not a coastal state of Crimea so it had no entitlement to exercise the relevant rights regulated in the Convention. The tribunal had already decided that it could not rule on any claims of Ukraine that required it to decide on the sovereignty of either party over Crimea. Therefore, the tribunal could not determine whether overlapping entitlements actually existed between the parties in the maritime areas around Crimea.<sup>661</sup> Thus, the tribunal concluded that it had no jurisdiction to decide whether an exception under Article 298(1)(a) could be established in this case.<sup>662</sup>

Nevertheless, this case reaffirmed that the question of entitlement alone cannot constitute the question of maritime delimitation, so it cannot trigger the delimitation exception of Article 298(1)(a). In this case, Russia said that any decision regarding the entitlement of a coastal state is part of the delimitation process, so it will inevitably affect the result of the delimitation.<sup>663</sup> Russia construed the expressions of ‘concerning’ and ‘relating to’ used in Article 298(1)(a)(i) as covering both the immediate subject of a dispute and the connected matters.<sup>664</sup> In this respect, Russia argued that Article 298(1)(a)(i) excluded not just disputes directly concerning Articles 15, 74 or 83, but also any other dispute having bearing on the entire delimitation process, including the issues of overlapping entitlements.<sup>665</sup>

The tribunal, however, did not accept this claim. The tribunal admitted that the determination of the existence and extent of maritime entitlements was one of the first

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<sup>659</sup> *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait, Award Concerning the Preliminary Objections of Russia*, 21 February 2020, para. 379.

<sup>660</sup> *Ibid.*, para. 381.

<sup>661</sup> *Ibid.*, para. 382.

<sup>662</sup> *Ibid.*

<sup>663</sup> *Coastal State Rights Arbitration between Ukraine and Russia, Preliminary Objections of Russia*, 19 May 2018, para. 162.

<sup>664</sup> *Ibid.*, para. 157.

<sup>665</sup> *Ibid.*, para. 161.



matters to be addressed in the delimitation.<sup>666</sup> The tribunal showed once again that the question of the factors which would require consideration in the process of delimitation could not constitute the dispute concerning maritime delimitation, by confirming that the existence of overlapping entitlements is a precondition to exclude the tribunal's jurisdiction following Article 298(1)(a).<sup>667</sup> This decision was in line with the findings of the *South China Sea* arbitral tribunal and the judgment of ITLOS in the *Bay of Bengal (Bangladesh/Myanmar)* case.

### 5.3.2. Historic Bays or Titles Disputes

Article 298(1)(a) also allows states parties not to accept Part XV tribunals' jurisdiction over a dispute involving historic bays or titles. When it comes to a dispute concerning maritime delimitation, Article 298(1)(a) states that 'disputes concerning the interpretation or application of Articles 15, 74 and 83 relating to sea boundary delimitations' can be exempted from Part XV tribunals' jurisdiction. However, unlike maritime delimitation disputes, Article 298(1)(a) only describes disputes 'involving historic bays or titles', without mentioning any specified provisions of the Convention. Hence, concerning such disputes, what the concept of 'historic bays' or 'historic titles' means is of importance for determining the effect of states parties' declarations pursuant to this article and the applicability of the compulsory procedures of Part XV.

On the one hand, the concept of a historic bay has been established through studies conducted by different international law institutions such as the ILC and international courts.<sup>668</sup> The concept of historic bays and the relevant states' practice has been studied along with the concept of 'historic waters'. In the *Fisheries Case*, the ICJ defined historic waters as the "waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title."<sup>669</sup> The Memorandum of the Secretariat of the UN Concerning Historic Bays classified the concepts of historic waters and historic bays based on just the geographical feature, as saying that 'historic rights are

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<sup>666</sup> *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait, Award Concerning the Preliminary Objections of Russia*, 21 February 2020, para. 379.

<sup>667</sup> *Ibid.*, paras. 379-381.

<sup>668</sup> *South China Sea Arbitration between Philippines and China, Award*, 12 July 2016, para. 205.

<sup>669</sup> *Fisheries case, Judgment of December 18th, 1951: I.C.J. Reports 1951, p. 116, p. 18.*

claimed not only in respect of bays but also in respect of other maritime areas which do not constitute bays'.<sup>670</sup> The study of the ILC also said that the term 'historic waters' has a wider scope than the term 'historic bays', and if a historic basis was made with respect to bays than to other waters, it has been referred to as historic bay rather than historic waters.<sup>671</sup> The ICJ mentioned that although there is no general or single 'régime' of historic waters or historic bays, they are under a distinct régime for each concrete or recognised case of historic waters or bays.<sup>672</sup> The term 'historic bay' within the meaning of UNCLOS was also intended to be equivalent to the shared meaning of historic bays acknowledged by the international community.<sup>673</sup>

Contrary to the concept of historic bays, whose meaning can be inferred from the relevant studies above, the concept of 'historic title' within the meaning of Article 298(1)(a) is not clear enough. UNCLOS contains no definition of 'historic title' or any similar terms.<sup>674</sup> Article 15 simply mentions that in the delimitation of the territorial sea, unless agreed otherwise, neither of the two states can extend their territorial sea beyond the median line except when there is a reason of historic title or other special circumstances. Natalie Klein argues that the scant elaboration on this matter was because the circumstances of individual cases varied too extensively to allow the formulation of a uniform standard.<sup>675</sup>

It was not until the *South China Sea* case that the concept of historic title and a historic bay within the meaning of Article 298(1)(a) was clarified. In this case, those concepts were addressed in the context of examining the applicability of the optional exception clause of Article 298(1)(a) concerning the Philippines' first and second submissions. Both the first<sup>676</sup> and second<sup>677</sup> submissions of the Philippines were about China's claims over its maritime entitlements beyond those permitted by the Convention and 'historic rights' within the so-

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<sup>670</sup> UNGA, 'Document A/CONF.13/1, Historic Bays: Memorandum by the Secretariat of the United Nations', para. 8.

<sup>671</sup> ILC, 'Document A/CN.4/143, Juridical Regime of Historic waters including historic bays - Study prepared by the Secretaria, Topic: Juridical régime of historic waters, including historic bays', para. 34. This study was requested by the Resolution of the UN General Assembly in which the ILC was requested to undertake the study of the juridical regime of historic waters including bays (A/RES/1453 (XIV), 7 December 1959).

<sup>672</sup> *Continental Shelf (Tunisia / Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, p. 18, para. 100.

<sup>673</sup> See; Nordquist and others, *United Nations Convention on the Law of the Sea 1982: A Commentary*, paras. 10.5(e) and 10.6.

<sup>674</sup> Ibid, para. 10.5(e).

<sup>675</sup> Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, p. 253.

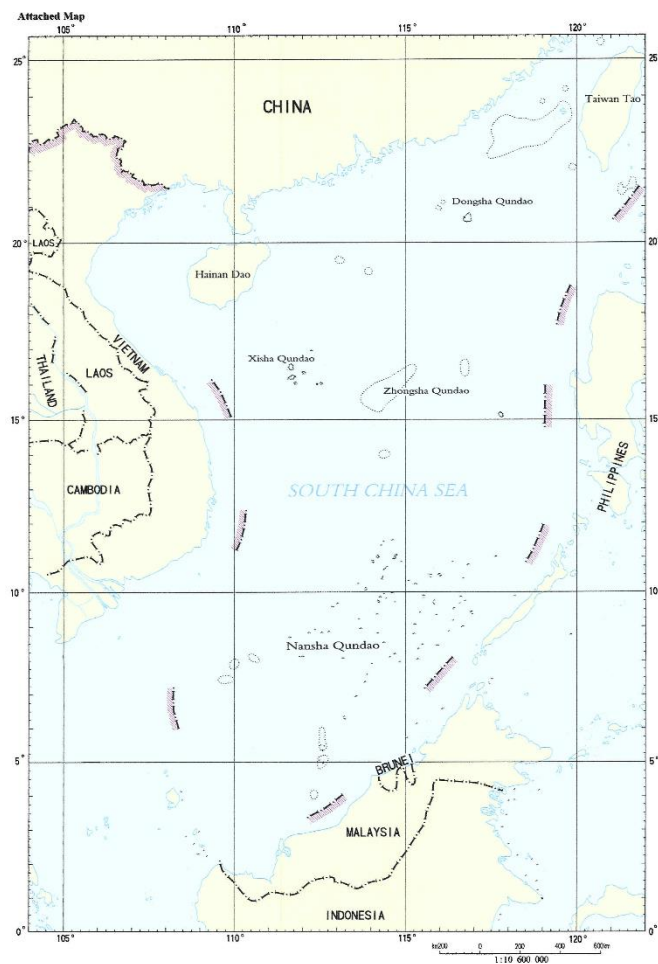
<sup>676</sup> 'China's maritime entitlements in the South China Sea, like those of the Philippines, may not extend beyond those permitted by the United Nations Convention on the Law of the Sea.'

<sup>677</sup> 'China's claims to sovereign rights and jurisdiction, and to "historic rights", with respect to the maritime areas of the South China Sea encompassed by the so-called "nine-dash line" are contrary to the Convention and without lawful effect to the extent that they exceed the geographic and substantive limits of China's maritime entitlements under UNCLOS.'

called ‘nine-dash line’, argued by China.

In 2009, China submitted two *Notes Verbales* to the Secretary-General of the UN which depicted the so-called ‘nine-dash line’ where China allegedly argues the existence of its historic rights within it.<sup>678</sup> In those *Notes Verbales*, China claimed that ‘China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil’.

**Figure 1** ‘Nine-Dash Line’ Attached to China’s Notes Verbales



<sup>678</sup> See; CML/17/2009, 7 May 2009 <[https://www.un.org/depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/chn\\_2009re\\_mys\\_vnm\\_e.pdf](https://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf)>(last visited – 15 August 2022) and CML/18/2009, 7 May 2009 <[https://www.un.org/Depts/los/clcs\\_new/submissions\\_files/vnm37\\_09/chn\\_2009re\\_vnm.pdf](https://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm.pdf)>(last visited – 15 August 2022).

What the Philippines pointed out in its first and second submissions was that China's claims of sovereign rights and jurisdiction were contrary to UNCLOS. Concerning the Philippines' claims, China mentioned that the dispute concerning historic bays or titles must be excluded from the tribunal's jurisdiction by its declaration made in 2006 pursuant to Article 298(1)(a).<sup>679</sup>

The tribunal firstly found that the historic bay exception could not be applied to this case since the South China Sea was not a bay within the meaning of the Convention.<sup>680</sup> Thus, the tribunal said that the relevant question to be answered was whether China's claim of a 'nine-dash line' was arguing its historic title within the region, and if so, what the potential implications for the tribunal's jurisdiction would be. After examining various records of the conferences and the works of different institutions concerning the usage of the terms indicating the rights derived from historical processes, the tribunal defined the meaning of the relevant terms.<sup>681</sup> According to the tribunal, 'historic title' is used specifically to refer to historic sovereignty to land or maritime areas. In this sense, the term 'historic waters' is simply for historic title over maritime areas typically exercised as a claim to the internal waters or territorial sea, whereas, the concept of 'historic bay' simply indicates a bay where a state claims historic waters. Therefore, the tribunal said that the reference to 'historic titles' in Article 298(1)(a) was a reference to claims of sovereignty over maritime areas derived from historical circumstances.

However, the tribunal did not regard China's claimed rights in the South China Sea as concerning the historic sovereignty over the land or maritime areas. Instead, the tribunal deemed that much of the area encompassed by the 'nine-dash line' fell within a claim to an EEZ or continental shelf drawn from the various maritime features within this area, rather than the territorial sea or internal waters.<sup>682</sup> By reviewing China's official statements and the documents, the tribunal found that China had claimed rights to the living and non-living resources within the 'nine-dash line', but had not considered those waters as forming a part of its territorial sea or internal waters.<sup>683</sup> On this basis, the tribunal deemed that China's claim of 'historic rights' may include fishing rights or rights of access, falling well

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<sup>679</sup> *South China Sea Arbitration, Position Paper of China on the Matter of Jurisdiction, 7 December 2014*, para. 58.

<sup>680</sup> *South China Sea Arbitration between Philippines and China, Award, 12 July 2016*, para. 205.

<sup>681</sup> *Ibid.*, para. 225.

<sup>682</sup> *Ibid.*, para. 207.

<sup>683</sup> *Ibid.*, paras. 208-214.

short of a claim of sovereignty.<sup>684</sup> According to the tribunal, Article 298(1)(a) was not intended to exclude the tribunal's jurisdiction over historic claims falling short of sovereignty.<sup>685</sup> The tribunal's findings indicated that China's claimed historic rights within the 'nine-dash line' did not concern the concept of historic title within the meaning of Article 298(1)(a). Thus, the tribunal concluded that the historic title exception pursuant to Article 298(1)(a) could not be applied to this case.

The tribunal of the *South China Sea* case elucidated when the historic bays or titles exception can be applied to by defining the meaning of the relevant terms 'historic bays' and 'historic titles'. Therefore, it can now be understood that rights deriving from historic circumstances but lesser than claims of sovereignty are not sufficient to invoke the exception in Article 298(1)(a). As of August 2022, the definitions of 'historic bays' and 'historic titles' within the meaning of Article 298(1)(a) given by the tribunal in the *South China Sea* case have not yet been reviewed by other Part XV tribunals.

In the pending *Coastal State Rights* case, Russia raised jurisdictional objections based on historic bays and titles exceptions concerning the claims about the activities in the Sea of Azov and the Kerch Strait. However, in the phase of jurisdiction and admissibility, the tribunal considered that Russia's objection may not adequately be addressed without touching upon the questions of the merits. Thus, the tribunal decided to reserve a determination on its jurisdiction concerning Russia's objection for consideration in conjunction with the merits of this case.<sup>686</sup> In the phase of the merits, the tribunal will examine whether the Sea of Azov and the Kerch Strait may constitute internal waters to which the claims for historic bays or titles can be applied. Given that the tribunal of the *Coastal State Rights* case has approached other jurisdictional provisions in line with what was decided by the tribunal of the *South China Sea* case, the concept of historic bays or titles clarified in that case is likely to be accepted by the tribunal in the phase of the merits.

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<sup>684</sup> *Ibid*, para. 225.

<sup>685</sup> *Ibid*, para. 226.

<sup>686</sup> *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait, Award Concerning the Preliminary Objections of Russia, 21 February 2020*, paras. 292-293, 388-389.

### 5.3.3. Military Activities and Law-Enforcement Activities Exception

Article 298(1)(b) is an exemption clause for states parties concerning disputes about military activities and those of certain law-enforcement activities. The Virginia Commentary explains that the origin of including this exception in the Convention was due to the concern of some delegations that the activities of naval vessels should not be subject to judicial proceedings where military secrets might have to be disclosed.<sup>687</sup> Likewise, the optional exception on this matter within Article 298(1)(b) reflects the states' desire to exclude military activities from the scope of the Convention.<sup>688</sup>

In this provision, the exception concerning law enforcement regulates clearly that among disputes concerning the coastal state's law enforcement activities, only those excluded by Articles 297(2) and (3) can be exempted from the purview of the compulsory jurisdiction.<sup>689</sup> In contrast, concerning military activities, Article 298(1)(b) broadly mentions that the 'dispute concerning military activities' can be excluded from the procedures of Section 2. Solely from the text of Article 298(1)(b), it is hard to know exactly when the military activities exception can be invoked, and how to determine such applicability.

The first point to be noted in addressing the question of the applicability of the military exception of Article 298(1)(b) is that, in reality, some law enforcement activities necessarily require the use of force.<sup>690</sup> For example, Article 73 of the Convention, titled 'Enforcement of laws and regulations of the coastal State', regulates that a coastal state can

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<sup>687</sup> Nordquist and others, *United Nations Convention on the Law of the Sea 1982: A Commentary*, para. 298.33. For more about the contextual background of military exception of Article 298(1)(b), see; Damrosch, 'Military Activities in the UNCLOS Compulsory Dispute Settlement System: Implications of the South China Sea Arbitration for U.S. Ratification of UNCLOS', pp. 273-275.

<sup>688</sup> Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, p. 280.

<sup>689</sup> See, *Arctic Sunrise Arbitration between the Netherlands and Russia, Award on Jurisdiction*, 26 November 2014, para. 72. Upon its ratification of the Convention, Russia declared that it did not accept the procedures of Section 2 of Part XV relating to the disputes concerning 'law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction', without mentioning Articles 297(2) or (3). Concerning Russia's declaration, however, the arbitral tribunal ruled that the law enforcement activities exception pursuant to Article 298(1)(b) is confined to Articles 297(2) and (3). Therefore, the tribunal said that Russia's declaration cannot create an exclusion that is wider in scope than what is permitted by 298(1)(b).

<sup>690</sup> In this respect, Yurika Ishii says that military activities can hardly be distinguished from other law enforcement activities (See; Yurika Ishii, 'The Distinction between Military and Law Enforcement Activities: Comments on Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine V. Russian Federation), Provisional Measures Order' EJIL: Talk! <<https://www.ejiltalk.org/the-distinction-between-military-and-law-enforcement-activities-comments-on-case-concerning-the-detention-of-three-ukrainian-naval-vessels-ukraine-v-russian-federation-provisional-measures-order/>>; last visited – 15 August 2022.

take measures such as boarding, inspection or arrest of vessels. However, it is difficult to imagine that such operations of inspecting or arresting a foreign vessel can be conducted without using force. According to Article 298(1)(b), the dispute concerning law enforcement activities not relevant to Articles 297(2) or (3) shall be submitted to the procedures provided in Section 2. In other words, there must be a case concerning the dispute about law enforcement activities involving the use of force, while the law-enforcement activities exception in Article 298(1)(b) is not applicable. Then, can the military activities exception of Article 298(1)(b) be applied to such a case since the use of force has been involved in a given situation?

When we look at the jurisprudence of Part XV tribunals, there is no chance of this. From the first compulsory case under UNCLOS, Part XV tribunals have acknowledged that, in international law, the use of force can be allowed in conducting law enforcement activities at sea under certain conditions.<sup>691</sup> This shows that the mere existence of the use of force in a certain case cannot change its nature as a dispute concerning military activities, which Article 298(1)(b) can be applied. Instead, Part XV tribunals have determined the nature of a dispute as concerning military activities based on the purpose of the conducts at issue.

This is in line with the structure of the text of Article 298(1)(b). In describing a dispute to which the exception is applicable, Article 298(1)(b) says that it may include military activities conducted by ‘government vessels and aircraft engaged in non-commercial service’.<sup>692</sup> According to this provision, regardless of the types of the ships such as warships, other naval vessels, or even non-military vessels, this exception is applicable if the nature of the dispute can be determined as concerning military activities. This shows that whether an activity is a military activity or not may depend on the purpose of the operation at issue, not on the fact that the activity is conducted by military vessels.<sup>693</sup>

Part XV tribunals have maintained this perspective. The issue of the applicability of the military activities exception was addressed in detail for the first time in the *South China*

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<sup>691</sup> *M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p. 10, paras. 155-156; *Arbitration between Guyana and Suriname, Award of the Arbitral Tribunal*, 17 September 2007, para. 445; *M/V “Virginia G” (Panama/Guinea-Bissau)*, Judgment, ITLOS Reports 2014, p. 4, para. 360; *Detention of Three Ukrainian Naval Vessels Case (Ukraine v. Russia)*, Provisional Measures, Order, ITLOS, 25 May 2019, para. 64; *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait, Award Concerning the Preliminary Objections of Russia*, 21 February 2020, paras. 335-336.

<sup>692</sup> Oxman, ‘Courts and Tribunals: The ICJ, ITLOS, and Arbitral Tribunals’, p. 407.

<sup>693</sup> See; Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, pp. 312-313; Talmon, ‘The South China Sea Arbitration: Is There a Case to Answer?’, p. 47.

*Sea* case. Although China did not directly mention the military activities exception in Article 298(1)(b), this issue was addressed concerning both China's island-building activities on certain maritime features,<sup>694</sup> and the stand-off situation between two states' vessels that happened around the Second Thomas Shoal.<sup>695</sup>

Concerning China's massive constructions over the regions in the South China Sea, it was alleged that China has constructed military facilities including airstrips and missile platforms over those features.<sup>696</sup> However, the tribunal said that Article 298(1)(b) could not be applied to the questions concerning those construction activities. The tribunal took note of China's repeated statements that its constructions and island-building activities were for civilian purposes such as maritime search and rescue, disaster prevention or navigation safety.<sup>697</sup> As China affirmed that civilian use comprises the primary reason for these activities, the tribunal accepted this position and decided not to consider those installations to be military in nature.<sup>698</sup> The tribunal's determination reaffirmed that just the existence of military assets concerning the dispute cannot characterise the question at issue as a dispute concerning military activities.

In contrast, concerning the events at Second Thomas Shoal, the tribunal determined that the military activities exception of Article 298(1)(b) can be applied to the relevant claims of the Philippines. According to the tribunal, the essential fact of the events at Second Thomas Shoal was the confrontation between the Philippines' armed forces and Chinese non-military vessels run by the navy, coast guard and government agencies, where Chinese military vessels were in the vicinity. The tribunal found that Chinese government vessels

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<sup>694</sup> Submission No. 11 says 'China has violated its obligations under the Convention to protect and preserve the marine environment at Scarborough Shoal, Second Thomas Shoal, Cuarteron Reef, Fiery Cross Reef, Gaven Reef, Johnson Reef, Hughes Reef and Subi Reef'. Submission No. 12 says 'China's occupation of and construction activities on Mischief Reef (a) violate the provisions of the Convention concerning artificial islands, installations and structures; (b) violate China's duties to protect and preserve the marine environment under the Convention; and (c) constitute unlawful acts of attempted appropriation in violation of the Convention.'

<sup>695</sup> Submission No. 14 – 'Since the commencement of this arbitration in January 2013, China has unlawfully aggravated and extended the dispute by, among other things: (a) interfering with the Philippines' rights of navigation in the waters at, and adjacent to, Second Thomas Shoal; (b) preventing the rotation and resupply of Philippine personnel stationed at Second Thomas Shoal; and (c) endangering the health and well-being of Philippine personnel stationed at Second Thomas Shoal.'

<sup>696</sup> Concerning the facilities which have been built on those maritime features, see the sources provided by Asia Maritime Transparency Initiative, run by the Center for Strategic & International Studies <<https://amti.csis.org/constructive-year-chinese-building/>>; last visited – 15 August 2022.

<sup>697</sup> *South China Sea Arbitration between Philippines and China, Award, 12 July 2016*, paras. 935-936, 1027, 1164. Concerning China's official statement, see; Foreign Ministry Spokesperson Lu Kang's Remarks on Issues Relating to China's Construction Activities on the Nansha Islands and Reefs, 16.06.2015 <<https://www.mfa.gov.cn/ce/ceus//eng/fyrth/t1273370.htm>>; last visited – 15 August 2022.

<sup>698</sup> *Ibid*, paras. 938, 1028, 1165.



had attempted to prevent the resupply and rotation of the Philippines' troops. The tribunal said that the military activities exception is applicable when the dispute itself concerns military activities, rather than certain military actions employed concerning that dispute.<sup>699</sup> In this sense, the tribunal considered that the purpose of the activities described above could only be deemed military.<sup>700</sup> The tribunal determined that this represented a 'quintessentially military situation', involving the military forces of one side and a combination of military and paramilitary forces on the other, arrayed in opposition to one another. Therefore, the tribunal concluded that the relevant disputes within the Philippines' submission should be excluded from its jurisdiction.<sup>701</sup>

This way of determining the applicability of the military activities exception presented by the tribunal of the *South China Sea* case, which focused on the purpose of the actions at issue, was followed by ITLOS in the proceedings for prescribing the provisional measures for the *Detention of Ukraine Naval Vessels and Servicemen* case. The main subject-matter of this dispute was the fact that three Ukrainian naval vessels and their naval personnel were arrested and detained by Russia in the Black Sea, while they were transiting through the Kerch Strait. Russia argued that since the three Ukrainian military vessels' "non-permitted 'secret' incursion" into Russian territorial waters was resisted by military personnel of the Russian coast guard, followed by the arrest of those vessels and personnel of the Ukrainian navy, this case was manifestly a dispute concerning military activities.<sup>702</sup> Whereas, Ukraine contended its claims were based on Russia's unlawful exercise of jurisdiction in a law enforcement context.<sup>703</sup>

ITLOS emphasised that in determining the applicability of the military activities exception, the nature of the activities must be evaluated objectively, taking into account the relevant circumstances of the case.<sup>704</sup> Here, ITLOS focused on the purpose of activities at issue as the tribunal of the *South China Sea* case did. ITLOS said that the distinction between military and law enforcement activities cannot be based solely on whether naval vessels

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<sup>699</sup> *Ibid*, para. 1158.

<sup>700</sup> Damrosch, 'Military Activities in the UNCLOS Compulsory Dispute Settlement System: Implications of the South China Sea Arbitration for U.S. Ratification of UNCLOS', p. 276.

<sup>701</sup> *South China Sea Arbitration between Philippines and China, Award, 12 July 2016*, para. 1161.

<sup>702</sup> *Detention of Three Ukrainian Naval Vessels Case, Memorandum of Russia, 7 May 2019*, para. 28.

<sup>703</sup> *Detention of Three Ukrainian Naval Vessels Case, Verbatim Record, ITLOS/PV.19/C26/1/Rev.1, 10 May 2019*, p. 19(37-40).

<sup>704</sup> *Detention of Three Ukrainian Naval Vessels Case (Ukraine v. Russia), Provisional Measures, Order, ITLOS, 25 May 2019*, para. 66.

are employed in the activities in question.<sup>705</sup> In this case, the underlying dispute leading to the arrest concerned the passage of Ukrainian naval vessels through the Strait. In the view of ITLOS, it was difficult to see that the passage of naval vessels itself amounted to military activity since the innocent and transit passage regimes of UNCLOS apply to all ships, including warships.<sup>706</sup> By examining the evidence submitted, ITLOS confirmed that the passage of those vessels through the Strait could not be considered, as alleged by Russia, a “non-permitted ‘secret’ incursion”.<sup>707</sup>

Moreover, the tribunal found that Russia’s denial of the passage of Ukrainian vessels through the Strait was based on its domestic regulation and security concerns following certain weather conditions.<sup>708</sup> This indicates that the core of the dispute was the parties’ differing interpretations of the regime of passage through the Kerch Strait, not its military nature.<sup>709</sup> Accordingly, ITLOS determined that the use of force Russia took in the process of arrest occurred in the context of law-enforcement activities rather than military operations.<sup>710</sup> Therefore, ITLOS considered that *prima facie* Article 298(1)(b) did not apply in the present case.

The arbitral tribunal of the *Coastal State Rights* case determined the applicability of the military activities exception in the same way. In this case, Russia claimed that the tribunal should not exercise its jurisdiction over the dispute manifested in certain claims of Ukraine, as the main thread of Ukraine’s claims was the alleged involvement of Russian military forces in Crimea.<sup>711</sup> Furthermore, since Ukraine maintained that Russia had illegally acquired sovereignty over Crimea by resorting to the use of military force, Russia argued that the entirety of the dispute must be excluded from compulsory jurisdiction.<sup>712</sup>

However, the tribunal did not accept Russia’s objection based on Article 298(1)(b) and said that the term ‘concerning’ employed in this provision circumscribes the exception to those disputes whose subject matter is military activities in itself.<sup>713</sup> Therefore, the tribunal ruled that a mere ‘causal or historical’ link between certain alleged military activities and the

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<sup>705</sup> *Ibid.*, para. 64.

<sup>706</sup> *Ibid.*, para. 68.

<sup>707</sup> *Ibid.*, paras. 69-70.

<sup>708</sup> *Ibid.*, para. 71.

<sup>709</sup> *Ibid.*, para. 72.

<sup>710</sup> *Ibid.*, paras. 73-74.

<sup>711</sup> *Coastal State Rights Arbitration between Ukraine and Russia, Preliminary Objections of Russia, 19 May 2018*, para. 148.

<sup>712</sup> *Ibid.*, para. 148.

<sup>713</sup> *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait, Award Concerning the Preliminary Objections of Russia, 21 February 2020*, para. 330.

activities in dispute cannot be sufficient to bar the tribunal's jurisdiction under Article 298(1)(b) of the Convention.<sup>714</sup> Moreover, the tribunal said that the mere existence of factors like the presence of military vessels which can be relevant in assessing whether a dispute concerns military activities by itself cannot be conclusive for triggering the military activities exception.<sup>715</sup>

The specified claims of Ukraine that Russia argued as concerning military activities were such as; Russia's exclusion of Ukraine from access to and exploitation of hydrocarbon fields and fisheries; the detention and release of Ukraine vessels by Russian military vessels; construction of a bridge and the resulting impediment of navigation; and preventing Ukraine from access to underwater cultural heritage. Although military personnel and vessels were involved in those operations, the tribunal determined that those operations were more like civilian or law enforcing activities, rather than conducted for the military purpose.<sup>716</sup> This re-affirmed that the mere existence or involvement of military vessels cannot constitute the dispute concerning military activities. Consequently, in this case, the tribunal rejected Russia's objection based on the military activities exception.<sup>717</sup>

Throughout the cases above, Part XV tribunals have shown how to determine the applicability of the military activities exception in Article 298(1)(b). The jurisprudence of Part XV tribunals says that in determining such applicability, the purpose of activities at issue is a decisive factor. Nevertheless, one may raise the concern that what 'military activities' are within the meaning of Article 298(1)(b) still has not been clarified. UNCLOS does not provide any detailed guidance on the use of force in exercising national jurisdiction at sea.<sup>718</sup> Based on this uncertainty, some authors raise the possibility that states may intentionally interpret and apply Article 298(1)(b) broadly to exempt a wider scope of disputes from the purview of the compulsory jurisdiction of Section 2.<sup>719</sup> As Part XV tribunals have not defined the exact meaning of 'military activities', it is true that its definition remains ambiguous. In the *South China Sea* case, for example, the tribunal did not move to address the meaning of 'military activities' since the confirmation of the existence of a 'quintessential military situation' was sufficient for the tribunal to rule the

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<sup>714</sup> *Ibid.*, para. 330.

<sup>715</sup> *Ibid.*, para. 334.

<sup>716</sup> *Ibid.*, paras. 336-340.

<sup>717</sup> *Ibid.*, para. 341.

<sup>718</sup> Anderson, 'Some Aspects of the Use of Force in Maritime Law Enforcement', p. 234.

<sup>719</sup> See; John King Gamble, 'The Law of the Sea Conference: Dispute Settlements in Perspective' (1976) 9 *Vanderbilt Journal of Transnational Law* 323, p. 331. See also; Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, pp. 291-292.

jurisdictional decision.<sup>720</sup> Since the tribunal did not provide exactly what ‘quintessentially military situation’ indicates, one author criticises that in the future disputes will doubtless arise concerning what is quintessentially military situation and what is not.<sup>721</sup>

However, it can be also regarded that Part XV tribunals in past proceedings have not needed to determine the definition or the precise scope of the term ‘military activities’ within the meaning of Article 298(1)(b). UNCLOS deliberately says little about the concept of military activities, such as in which maritime zones military activities are allowed, what kinds of operations can be conducted, or how to regulate them.<sup>722</sup> In fact, the participants of the Third UN Conference were not mandated to negotiate on the military activities or the use of weapons at sea.<sup>723</sup> That is to say, the primary goal of this Conference was the codification of the law of the sea for the progressive development of this field, not the rules regarding military activities. The lack of a definition of military activities in the Convention exactly shows the high political stakes concerning this issue between the parties that existed during the negotiating process of UNCLOS.<sup>724</sup>

Then, it would be rather beyond the purview of their jurisdiction for Part XV tribunals to give a definite meaning of the term ‘military activities’. Unlike the concept of maritime delimitation or the terms of ‘historic bays’ and ‘historic titles’ contained in Article 298(1)(a), the term ‘military activities’ is not used in the Convention other than in Article 298(1)(b). Therefore, the issue of interpretation or application concerning military activities would only be raised in the context of the optional exception pursuant to Article 298(1)(b). Thus, the only question that Part XV tribunals have been required to answer is the determination of when such an exception is applicable.

In this respect, Part XV tribunals have done their job correctly. They have provided guidance on when the military activities exception can be applied. Their convergent jurisprudence says that merely the factor to be considered in determining military operations such as the use of force or the involvement of military vessels and personnel is not sufficient to invoke the exception clause of Article 298(1)(b). Instead, Part XV tribunals have determined the applicability of this provision based on the nature of the

<sup>720</sup> *South China Sea Arbitration between Philippines and China, Award, 12 July 2016*, para. 1161.

<sup>721</sup> Klein, ‘The Vicissitudes of Dispute Settlement under the Law of the Sea Convention’, p. 360.

<sup>722</sup> Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, p. 280.

<sup>723</sup> Charlotte Beaucillon, ‘Limiting Third States’ Military Activities in the EEZ: ‘Due Regard Obligations’ and the Law on the Use of Force Applied to Nuclear Weapons’ (2019) 34 *The International Journal of Marine and Coastal Law* 128, p. 131.

<sup>724</sup> *Ibid.*, p. 132.

activities at issue by focusing on the purpose of such activities. Thus, Part XV tribunals have clarified in which context the military activities exception pursuant to Article 298(1)(b) is applicable and when it is not.

#### 5.4. Concluding Remarks

The ‘dispute’ to which the compulsory jurisdiction under UNCLOS is applicable indicates the one that fulfils the requirements in Section 1 and does not fall under the exceptions in Section 3.<sup>725</sup> Therefore, the question concerning the applicability of the compulsory procedures bears on the limitations and exceptions within Section 3 of Part XV, mostly regulated by Articles 297 and 298. These provisions play a crucial role in the entire functioning of the Part XV system as they concern not just the applicability of the compulsory procedures, but also the extent to which states parties can be exempted from accepting the compulsory jurisdiction. The categories of the disputes described in those provisions were considered as sensitive for states parties to resolve by recourse to the third-party compulsory measures.<sup>726</sup> This indicates that as much as the categories of such disputes, how to interpret and apply the exception clause of Articles 297 and 298 is also a sensitive issue for states parties.

In this sense, the contributions of Part XV tribunals concerning Section 3 of Part XV were clear. Part XV tribunals have clarified that disputes concerning coastal states’ exercise of their sovereign rights or jurisdiction should be subject to the compulsory procedures of Section 2, except those explicitly excluded by Articles 297(2) and (3). Each of the categories of disputes stipulated in Article 298(1) is the same. It has been clarified that the optional exception clause for maritime delimitation disputes is only applicable when a dispute concerns the existing overlap between the parties’ entitlements. Thus, the mere existence of components that must be considered in the delimitation process cannot convert

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<sup>725</sup> Nordquist and others, *United Nations Convention on the Law of the Sea 1982: A Commentary*, para. 286.6.

<sup>726</sup> See; UNGA, 'Document A/CONF.62/SR.51, Summary Records of Plenary Meetings, 51st Plenary Meeting', para. 10; Merrills, *International Dispute Settlement*, pp. 183-184; Adede, 'The Basic Structure of the Disputes Settlement Part of the Law of the Sea Convention', p. 130; Keyuan and Ye, 'Interpretation and Application of Article 298 of the Law of the Sea Convention in Recent Annex VII Arbitrations: An Appraisal', p. 332.

a certain issue into a maritime delimitation dispute. Moreover, the concept of historic bays and historic titles within the meaning of Article 298(1)(a) has been defined by Part XV tribunals. Due to that, states parties now have a clear idea of when the historic bays or titles exception may apply and the exact meaning of such optional exceptions. Lastly, Part XV tribunals have set up a methodology for determining the applicability of military activities exception to the given circumstances. Although the term 'military activities' has not been defined, their contributions were sufficient to let us know how this exception clause would work in reality.

Still, Section 3 of Part XV of UNCLOS has many gaps and lacunae to be developed and elaborated further. One such example is the issue of applicability of the compulsory procedures to the dispute concerning highly migratory species or straddling fish stocks.<sup>727</sup> As Article 297 only covers the EEZ where a coastal state may exercise its sovereign rights or jurisdiction, a fishery dispute within the high seas can be subject to the compulsory procedures within Section 2. However, when it comes to straddling fish stocks or highly migratory fish stocks, it is not certain whether a relevant dispute should be subject to the compulsory procedures or not.<sup>728</sup> In other words, a dispute concerning a fish stock straddling one or more EEZs, or EEZ and the high seas may arise. In that case, can such a dispute be subject to the compulsory procedures of UNCLOS? Although some authors say that Article 297(3) must be applied only to purely EEZ matters, not to matters concerning straddling fish stocks,<sup>729</sup> this cannot be ascertained from the text of Article 297(3) or other relevant provisions of the Convention. Even the implementing agreement of UNCLOS for straddling fish stocks and highly migratory fish stocks is silent on this issue.<sup>730</sup>

This was not an issue that had never been discussed during the negotiation process.<sup>731</sup> By

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<sup>727</sup> A relevant provision regarding such fish stocks within the Convention is Articles 63 and 64. See also the list of highly migratory species in Annex I of UNCLOS.

<sup>728</sup> See, Boyle, 'Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction', pp. 42-44; Boyle, 'Problems of Compulsory Jurisdiction and the Settlement of Disputes Relating to Straddling Fish Stocks', pp. 10-13; Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, pp. 165, 199-200.

<sup>729</sup> See; Boyle, 'Problems of Compulsory Jurisdiction and the Settlement of Disputes Relating to Straddling Fish Stocks', p. 25; Shabtai Rosenne, 'Settlement of Fisheries Disputes in the Exclusive Economic Zone' (1979) 73 *The American Journal of International Law* 89, p. 98; Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, pp. 203-204.

<sup>730</sup> Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. In Part VIII of this Agreement, regulations about settling disputes are stipulated. However, Article 30 only mentions that the settlement of disputes set out in part XV of UNCLOS applies *mutatis mutandis*, so there are no applicable rules for resolving the dilemma mentioned above.

<sup>731</sup> See; Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, pp. 199-200.

the end of the Third UN Conference, several states had suggested an amendment of Article 63(2) to allow the compulsory procedures of Part XV to handle issues concerning the conservation of straddling fish stocks within areas adjacent to the EEZ.<sup>732</sup> However, distant-water fishing states refused this proposal.<sup>733</sup> Oppositions were made to protect the fishing rights of third states on the high seas<sup>734</sup> and to prevent the extension of an already broad jurisdiction of coastal states.<sup>735</sup> Finally, this amendment was withdrawn by the suggesting states and it was not referred for a vote.<sup>736</sup>

As a result, this problem is now left as more than a technical question of treaty interpretation.<sup>737</sup> Unless states parties to UNCLOS agree to amend the Convention following Article 312 to make this issue clear or to make a supplementary agreement concerning this issue, it can only be solved by Part XV tribunals. Until now, they have had no chance to address this matter in detail, since there has been no dispute submitted to Part XV tribunals concerning this issue. However, if such a dispute is brought before a Part XV tribunal in the future, how to solve this dilemma will be elaborated by judicial decisions as they have contributed to do so regarding other issues concerning Section 3 of Part XV.

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<sup>732</sup> UNGA, 'A/CONF.62/L.114, Australia, Canada, Cape Verde, Iceland, Philippines, São Tomé and Príncipe, Senegal and Sierra Leone: amendments to article 63'.

<sup>733</sup> Edward L. Miles and William L. Burke, 'Pressures on the United Nations Convention on the Law of the Sea of 1982 Arising from New Fisheries Conflicts: The Problem of Straddling Stocks' (1989) 20 *Ocean Development and International Law* 343, p. 344.

<sup>734</sup> UNGA, 'Document A/CONF.62/SR.170, 170th Plenary Meeting' – German Democratic Republic (para. 7), Soviet Union (para. 27).

<sup>735</sup> UNGA, 'Document A/CONF.62/SR.171, 171st Plenary Meeting' – Bulgaria (para. 78).

<sup>736</sup> UNGA, 'Document A/CONF.62/SR.176, 176th Plenary Meeting'.

<sup>737</sup> Boyle, 'Problems of Compulsory Jurisdiction and the Settlement of Disputes Relating to Straddling Fish Stocks', p. 25.

## 6. Jurisdictional Basis of Part XV Tribunals Determining Non-UNCLOS Matters

### 6.1. Other Rules of International Law and UNCLOS

Although UNCLOS comprehensively covers various fields of ocean affairs, it cannot regulate every single rule that constitutes each of the substantive regimes of UNCLOS. Hence, as we can see through many provisions of UNCLOS that directly refer to ‘other rules of international law’ or ‘generally accepted international regulations’, the Convention needs to rely on external rules of international law in many aspects. For this reason, UNCLOS is also referred to as ‘not a self-contained treaty’.<sup>738</sup>

One example that shows this aspect is the rules concerning military activities. The minimal regulation of military activities in the Convention implies that the negotiators intended to let the use of naval force be regulated by the relevant customary international law or the Charter of the UN.<sup>739</sup> This can be seen in Article 301 of the Convention, which says ‘States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.’ From this example, we can see the Convention’s overall approach that let other rules of international law be used when dealing with matters not directly regulated by UNCLOS.

Strictly speaking, such matters are non-UNCLOS issues as they are regulated by other sources of international law. Then, what if certain disputes arise concerning the interpretation or application of the Convention involving non-UNCLOS matters? For example, Article 207 of the Convention obliges the states parties to adopt laws and regulations to prevent, reduce and control pollution of the marine environment from land-based sources by taking into account ‘internationally agreed rules, standards and recommended practices and procedures’. If a certain dispute concerns the interpretation or application of Article 207, especially concerning the internationally agreed rules or standards, may Part XV tribunals still exercise their jurisdiction over those external rules?

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<sup>738</sup> Mathias Forteau, 'Regulating the Competition between International Courts and Tribunals: the Role of *ratione materiae* Jurisdiction under Part XV of UNCLOS' (2016) 15 *The Law and Practice of International Courts and Tribunals* 190, p. 195.

<sup>739</sup> Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, p. 283.



Like other statutory documents of different international courts and tribunals, Part XV provides a clause concerning applicable law for Part XV tribunals to carry out their judicial function in such cases. Many treaties do not directly incorporate a broad range of other rules or impose some explicit limits for applying them.<sup>740</sup> Nevertheless, Article 31(3)(c) of the Vienna Convention on the Law of Treaties regulates that any relevant rules of international law applicable between the parties must be taken into account in interpreting the treaty. This rule highlights the international legal system as a whole as part of the context of every treaty concluded under international law.<sup>741</sup>

This is the same for Part XV of UNCLOS as regulated by Article 293;

*Article 293  
Applicable Law*

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

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

The purpose of this article is to prevent UNCLOS from being isolated from other rules of international law.<sup>742</sup> One example of applying Article 293 would be the situation when a Part XV tribunal inevitably needs to apply secondary rules such as the law of treaties or the rules of state responsibility.<sup>743</sup>

Article 293 of UNCLOS expressly allows Part XV tribunals to apply other rules of international law, including customary international law or the general principles of law to

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<sup>740</sup> Boyle and Chinkin, *The Making of International Law*, p. 274.

<sup>741</sup> 'Dörr, 'Article 31', para. 89.

<sup>742</sup> Loris Marotti, 'Between Consent and Effectiveness: Incidental Determinations and the Expansion of the Jurisdiction of UNCLOS Tribunals' in Angela Del Vecchio and Roberto Virzo (eds), *Interpretations of the United Nations Convention on the Law of the Sea by International Courts and Tribunals* (Springer International Publishing 2019), pp. 384-385.

<sup>743</sup> Michael Wood, 'The International Tribunal for the Law of the Sea and General International Law' (2007) 22 *The International Journal of Marine and Coastal Law* 351, p. 362; Marotti, 'Between Consent and Effectiveness: Incidental Determinations and the Expansion of the Jurisdiction of UNCLOS Tribunals', p. 385. This point has been explicitly affirmed by ITLOS in the recent *Dispute concerning delimitation of the maritime boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)* case (hereinafter '*Ghana/Côte d'Ivoire*' case). In this case, ITLOS said "The Special Chamber adds that Articles 286 and 288 of the Convention, according to which the jurisdiction of the dispute-settlement bodies under Part XV of the Convention concerns the interpretation and application of the Convention, do not bar it from deciding on international responsibility. Although the Convention does not contain rules concerning international responsibility, Article 293, paragraph 1, of the Convention provides for the possibility to have recourse to other rules of international law." (*Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, Judgment, ITLOS Reports 2017, p. 4, para. 555).

enrich or fill the gaps found in the Convention.<sup>744</sup> However, during past compulsory proceedings before Part XV tribunals, Article 293 was not the sole basis. Other grounds were argued by the disputing parties and confirmed by the tribunals for exercising jurisdiction over non-UNCLOS matters. In some cases, the tribunals admitted that their competence may stretch beyond the purview of the Convention by virtue of the incidental jurisdiction. On the other hand, in certain cases, the disputing parties claimed that Part XV tribunals can exercise their jurisdiction over such non-UNCLOS matters by the effect of *renvoi* elements.

These grounds (Article 293, incidental jurisdiction, *renvoi* elements) have in common their relevance to the issue of the exercise of compulsory jurisdiction over matters beyond the four-corners of UNCLOS. In this respect, in essence, they are linked to each other. Most importantly, they share a key question: To what extent may Part XV tribunals exercise their jurisdiction over non-UNCLOS matters? The issue of the exercise of compulsory jurisdiction over external matters based on the grounds above has raised many controversies within the cases brought before Part XV tribunals. Thus, how the tribunals have addressed those questions will constitute the main subject-matter of this chapter.

Accordingly, Part XV tribunals' jurisprudence on Article 293, incidental jurisdiction and *renvoi* elements will be respectively examined in the current chapter. The reason for such a categorisation is just that each of these grounds has been directly mentioned and invoked by past proceedings. Hence, although they are all related to the same issue of exercising jurisdiction over non-UNCLOS matters, the three categories will be examined in different sub-chapters. Here, it will also be interesting to see how the Part XV tribunals have approached this common issue based on different jurisdictional grounds. Therefore, first, Section 6.2 of this chapter will discuss how Part XV tribunals have addressed issues relating to other rules of international law under Article 293 of UNCLOS. Next, Section 6.3 will look into the exercise of incidental jurisdiction of Part XV tribunals over matters ancillary to UNCLOS disputes. Lastly, Section 6.4 will investigate *renvoi* elements along with the issue of a *contrario* reading of Article 298(1)(a)(i).

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<sup>744</sup> Elena Ivanova, 'The Cross-Fertilization of UNCLOS, Custom and Principles Relating to Procedure in the Jurisprudence of UNCLOS Courts and Tribunals' (2019) 22 Max Planck Yearbook of United Nations Law 142, p. 144; Marotti, 'Between Consent and Effectiveness: Incidental Determinations and the Expansion of the Jurisdiction of UNCLOS Tribunals', p. 384.

## 6.2. Can Article 293 be the Jurisdictional Ground for Part XV Tribunals?

Article 293 refers to “A court or tribunal having jurisdiction...”. The text of this article shows that Article 293 is only applicable to courts or tribunals that have already confirmed their jurisdiction over the submitted dispute. Thus, Article 293 itself does not confer jurisdiction over other rules of international law upon Part XV tribunals. As Article 288(1) regulates, the subject-matter jurisdiction of the compulsory jurisdiction within Part XV is on the dispute concerning the interpretation or application of the Convention. Accordingly, this article allows courts and tribunals to apply other rules of international law that are not incompatible with UNCLOS as needed to deal with the substantive rights and obligations within the Convention.

However, this process inevitably requires Part XV tribunals to give their determination on matters other than UNCLOS, such as what the relevant rules are, or even to confirm the violation of such external rules. In this respect, although the applicable law and the jurisdiction of the tribunal are two different things, the application of Article 293 can be intertwined with the issue of the tribunal’s subject-matter jurisdiction. Again, Article 293 is only applicable when it is necessary to refer to other rules for resolving UNCLOS disputes. However, as will be presented below, there have been states parties’ claims that this article allows Part XV tribunals to exercise their jurisdiction over other rules of international law, even ones which have no concern with the rights and obligations within UNCLOS.

Regarding the matter of the potential for Article 293 to serve as a jurisdictional ground for Part XV tribunals over other rules of international law, the text of the Convention remains silent. Instead, the decisions of Part XV tribunals have created normative expectations concerning the relationship between Article 293 and the purview of subject-matter jurisdiction of the tribunals. The case-law of Part XV tribunals shows how and in which contexts they gave their determinations on other rules of international law, and what the limit was of such an exercise of their jurisdiction over the four corners of the Convention.

### 6.2.1. Exercise of Jurisdiction over Other Rules of International Law by virtue of Article 293

In UNCLOS, many provisions directly involve the norms of other rules of international law by using phrase like ‘taking into account the internationally agreed rules, standards and other recommended practices and procedures.’ These provisions explicitly oblige states parties to comply with other rules of international law to implement the rights or obligations regulated by the Convention. Concerning such provisions, the jurisprudence of Part XV tribunals shows that Part XV tribunals may give their determination on relevant other rules of international law, by virtue of Article 293 of the Convention.

For example in the *Barbados v. Trinidad and Tobago* case, the main subject-matter of the dispute concerned the delimitation of the EEZ (Art. 74) and the continental shelf (Art. 83). Both Articles 74 and 83 directly refer to other rules of international law as they commonly say that the delimitation must be ‘effected by agreement on the basis of international law’. Here, the arbitral tribunal of the case said that Articles 74 and 83 along with Article 293 allowed it broadly to consider relevant legal rules in treaties or customary law, general principles of international law, the decisions of international courts and the contributions of the authors.<sup>745</sup> Accordingly, the tribunal checked the development of the rules constituting the delimitation process by looking at the decisions of other courts and tribunals and then determined the various elements that must be taken into account to delimit the EEZ and continental shelf.<sup>746</sup> This way of applying Article 293 has been followed by other Part XV tribunals in the subsequent similar *Bay of Bengal (Bangladesh/Myanmar)* case,<sup>747</sup> and the dispute concerning delimitation of the maritime boundary between Ghana and Côte d’Ivoire in the Atlantic Ocean (hereinafter ‘*Ghana/Côte d’Ivoire*’ case).<sup>748</sup>

This jurisprudence shows that Article 293 may serve as a jurisdictional ground for determining rules other than UNCLOS when those rules are explicitly and directly incorporated into the provisions of the Convention. However, there can be other cases where Part XV tribunals need to refer to other rules of international law, even though the

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<sup>745</sup> *Arbitration between Barbados and Trinidad and Tobago, Award, 11 April 2006*, para. 222.

<sup>746</sup> *Ibid.*, paras. 224-245.

<sup>747</sup> *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012, p. 4*, paras. 51-55.

<sup>748</sup> *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d’Ivoire), Judgment, ITLOS Reports 2017, p. 4*, paras. 91-99.

disputed provisions of the Convention do not directly incorporate external rules. In such cases, the jurisprudence of Part XV tribunals shows that Article 293 can be a jurisdictional ground for them to give a determination on other than UNCLOS matters.

The *M/V "Saiga" (No. 2)* case (hereinafter '*M/V Saiga (No.2)*') initiated by Saint Vincent and the Grenadines against Guinea was one of these cases. The main subject-matter of this dispute concerned Guinea's attack, boarding and arrest of the *M/V Saiga* at the southern limit of the Guinean EEZ. This vessel was a provisionally registered vessel of SVG. The applicant of this case claimed that Guinea unlawfully exercised the right of hot pursuit under Article 111 of UNCLOS, by using excessive force in detaining and arresting the *M/V Saiga*.<sup>749</sup> Thus, the applicant's claim of violation of the Convention was based on external rules that concerned the prevention of the excessive use of force.

In examining the claim of the applicant, ITLOS recognised that no provision within the Convention regulates the use of force in arresting ships.<sup>750</sup> Nevertheless, to resolve the dispute concerning Article 111 of this case, ITLOS exercised its jurisdiction over the alleged excessive use of force based on Article 293 of the Convention. ITLOS determined that Guinea used excessive force and endangered human life, thus violating 'the international law', which can be confirmed from the relevant practice, decisions of other tribunals and other treaties.<sup>751</sup> Here, ITLOS explained that this 'international law' applies to the current proceedings under Article 293 of UNCLOS.<sup>752</sup>

A similar approach was taken by the arbitral tribunal in the *Guyana v. Suriname* case. Along with the maritime boundary issue between the parties, one of the main subject-matters of the dispute was Suriname's alleged threat and use of force against the offshore exploratory activities conducted by Guyana's licensee company. Accordingly, Guyana's third claim was that Suriname's threat and use of force in the disputed maritime area had violated the Convention, the Charter of the UN and general international law. Specifically, Guyana argued that Suriname had violated Article 279, which regulates that any dispute between the states concerning the interpretation or application of the Convention should be

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<sup>749</sup> *M/V "SAIGA" (No. 2) Case, Memorial of Saint Vincent and the Grenadines, 19 June 1998*, para. 25; *M/V "SAIGA" (No. 2) Case, Reply of Saint Vincent and the Grenadines, 19 November 1998*, paras. 105-116.

<sup>750</sup> *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999*, p. 10, para. 155.

<sup>751</sup> *Ibid.*, paras. 156-159.

<sup>752</sup> *Ibid.*, para. 155.

settled by peaceful means.<sup>753</sup>

The arbitral tribunal of this case endorsed the decision of ITLOS in the *M/V Saiga (No. 2)* case as a reasonable interpretation of Article 293.<sup>754</sup> Accordingly, the tribunal denied accepting that the tribunal has no jurisdiction to adjudicate alleged violations of the Charter of the UN and general international law.<sup>755</sup> The tribunal found that Suriname had resorted to the use of force instead of accepting the repeated offers of Guyana to negotiate the disputed offshore exploratory activities.<sup>756</sup> By taking into account other rules and norms of international law concerning the threat or use of force and examining the testimonies of those who were involved in the incidents at issue, the tribunal concluded that Suriname's actions constituted a threat or the use of force, thereby contravening UNCLOS, the Charter of the UN and general international law.<sup>757</sup>

The decision of ITLOS in the *M/V Virginia G* case was based on the same way of applying Article 293. The applicant, Panama, claimed that the respondent, Guinea-Bissau, had used excessive force in boarding and arresting the *M/V Virginia G*, which resulted in the violation of UNCLOS and international law.<sup>758</sup> ITLOS in this case first referred to its earlier decision in *M/V Saiga (No. 2)* case on Article 293 and the use of force.<sup>759</sup> Based on this, ITLOS decided that the force used during the boarding of the *M/V Virginia G* did not go beyond reasonable and necessary limits, so it could not find that Guinea-Bissau had used excessive force.<sup>760</sup>

More recently in the *South China Sea* case, Article 293 was taken by the tribunal in the context of examining two different claims raised by the Philippines. First, in arguing China's violation of Articles 192 and 194 of the Convention, which oblige states parties to protect and preserve the marine environment, the Philippines stated that China's actions were inconsistent with the provisions of the CBD.<sup>761</sup> Concerning this claim, the tribunal said that Article 293 enables it to consider the relevant provisions of the CBD for the

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<sup>753</sup> Memorial of the Republic of Guyana, Volume I, 22 February 2005, paras. 10.1-10.23; *Arbitration between Guyana and Suriname, Reply of Guyana, 01 April 2006*, paras. 8.1-8.18.

<sup>754</sup> *Arbitration between Guyana and Suriname, Award of the Arbitral Tribunal, 17 September 2007*, para. 405.

<sup>755</sup> *Ibid.*, para. 406.

<sup>756</sup> *Ibid.*, para. 426.

<sup>757</sup> *Ibid.*, paras. 427-445.

<sup>758</sup> *M/V "Virginia G" Case, Memorial of Panama, 23 January 2012*, paras. 381-384.

<sup>759</sup> *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014, p. 4*, paras. 359-360.

<sup>760</sup> *Ibid.*, paras. 361-362.

<sup>761</sup> *South China Sea Arbitration, Supplemental Written Submission of Philippines, 16 March 2015*, paras. 11.1-11.3.

purpose of interpreting the contents and standards of Articles 192 and 194 of UNCLOS.<sup>762</sup>

Concerning the Philippines' submission No. 14(d) was the same. The Philippines claimed that since the commencement of the arbitral proceedings, China had unlawfully aggravated and extended the dispute by continuing construction activities at the disputed maritime area, which constituted another claim of the Philippines in this case. The Philippines argued that the obligation not to aggravate and extend a dispute has been recognised as a universally accepted principle by the PCIJ, and this obligation is consistent with Articles 279 and 300 of UNCLOS.<sup>763</sup> For the tribunal, Articles 279 and 300 could be sufficient jurisdictional grounds for dealing with the Philippines' claims, so it did not need to reach beyond the Convention to identify the source of relevant applicable law. Yet, the tribunal said that, if necessary, it may have recourse to a relevant principle of international law pursuant to Article 293.<sup>764</sup>

### 6.2.2. Established Limits on Applying Article 293

As we can see, Part XV tribunals have consistently shown that Article 293 can be a jurisdictional ground for determining legal questions regulated by other sources of international law, beyond the purview of the Convention. However, this does not mean that such an exercise of jurisdiction over other rules of international law can be conducted without limit. Part XV tribunals have also set limits to the exercise of their jurisdiction over other than UNCLOS matters under Article 293. According to the jurisprudence of Part XV tribunals, the consistently applied limit has been that Article 293 can be a jurisdictional ground only if other rules of international law are necessary to be relied upon to interpret and apply the provision of UNCLOS. That is to say, if the dispute is directly about those external sources themselves, Article 293 cannot be a jurisdictional ground for Part XV tribunals.

In the *MOX Plant* case, such a limitation was expressly confirmed. In this case, Ireland argued that the UK's operation of the MOX Plant had resulted in the violation of certain

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<sup>762</sup> *South China Sea Arbitration between Philippines and China, Award on Jurisdiction and Admissibility*, 29 October 2015, para. 176.

<sup>763</sup> *South China Sea Arbitration, Hearing on the Merits and Remaining Issues of Jurisdiction and Admissibility, Day 3, 26 November 2015*, pp. 75-76.

<sup>764</sup> *South China Sea Arbitration between Philippines and China, Award, 12 July 2016*, para. 1173.

provisions of the Convention concerning the maritime environment.<sup>765</sup> Here, Ireland relied on other rules of international law such as the OSPAR Convention, customary international law and other sources to supplement its claims.<sup>766</sup> Concerning Ireland's claim, the UK stated that Ireland was seeking to enlarge the jurisdiction of the tribunal by resorting to Article 293,<sup>767</sup> as the applicant relied upon various international instruments to allege that the UK had failed to comply with them.<sup>768</sup> Ireland, on the other hand, argued that it was not seeking to extend the jurisdiction of the tribunal by applying Article 293.<sup>769</sup> Regarding this matter, the arbitral tribunal said that there is a clear distinction between the purview of jurisdiction under Article 288(1) and the applicable law under Article 293.<sup>770</sup> Then, if any aspects of Ireland's claims arose directly under external rules other than UNCLOS, the tribunal said that such claims would not be admissible.<sup>771</sup> However, the tribunal found that this was not the case for Ireland's claims in the current proceedings, as Ireland had not failed to state and plead a case arising substantially under the Convention.<sup>772</sup>

The order of the arbitral tribunal of the *MOX Plant* case indicates that Article 293 cannot be a jurisdictional ground for Part XV tribunals when the dispute directly arises under external rules of international law, even if they are not incompatible with the Convention. The limitation set in this case was further strictly applied in the *Arctic Sunrise* case. This case concerned measures taken by Russian authorities, including the boarding, detention and arrest of the vessel *Arctic Sunrise*, flying the flag of the Netherlands, and its crew. One of the requests the Netherlands made before the tribunal was to declare that Russia had breached its obligations under Articles 9 and 12(2) of the International Covenant on Civil and Political Rights (ICCPR) and customary international law. The jurisdictional ground of these claims of the Netherlands was Article 293 of UNCLOS.<sup>773</sup>

In dealing with the Netherlands' claims based on the ICCPR, the tribunal stressed that Article 293 cannot be a means to obtain the tribunal's determination on whether a certain treaty other than UNCLOS has been violated or not unless permitted by Articles 288(2) or

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<sup>765</sup> The provisions that Ireland invoked in its relief sought were Articles 192, 193, 194, 207, 211 and 213, all of which are part of Part XII of UNCLOS, 'Protection and Preservation of the Marine Environment'.

<sup>766</sup> *MOX Plant Case, Memorial of Ireland*, 26 July 2002, Chapter 6. The Applicable Law.

<sup>767</sup> *MOX Plant Case, Counter-Memorial of the UK*, 9 January 2003, para. 4.25.

<sup>768</sup> *Ibid.*, para. 1.39.

<sup>769</sup> *MOX Plant Case, Reply of Ireland*, 7 March 2003, Chapter 5. Applicable Law.

<sup>770</sup> *MOX Plant Case, Order No. 3, Suspension of Proceedings on Jurisdiction and Merits, and Request for Further Provisional Measures*, 24 June 2003, para. 19.

<sup>771</sup> *Ibid.*

<sup>772</sup> *Ibid.*, para. 19.

<sup>773</sup> *Arctic Sunrise Arbitration, Memorial of the Netherlands*, 31 August 2014, paras. 158-177.



301.<sup>774</sup> By citing the judgment of ITLOS in the *M/V Saiga (No. 2)* case, the tribunal admitted that in the case of some broadly worded or general provisions of UNCLOS, it might be necessary to rely on other rules of international law to interpret and apply certain provisions of the Convention.<sup>775</sup> However, in the tribunal's point of view, the Netherlands' claims were rather inviting it directly to determine Russia's alleged breach of Articles 9 and 12(2) of the ICCPR, not to interpret or apply the provisions under the Convention.<sup>776</sup>

The tribunal drew the line between (a) the reference to other rules of international law to determine whether Russia's law enforcement such as boarding, arresting or detaining the *Arctic Sunrise* and its crew was conducted reasonably and proportionately, and (b) judgment solely for the breach of the ICCPR. The tribunal said that the former case would be to interpret the relevant provisions under UNCLOS by reference to the relevant context (ICCPR).<sup>777</sup> In contrast, the tribunal saw that the tribunal itself or the dispute settlement procedures provided in UNCLOS could not be a substitute for the ICCPR's enforcement regime.<sup>778</sup> Accordingly, the tribunal said that Article 293 did not extend the purview of jurisdiction,<sup>779</sup> and thereby concluded that it had no jurisdiction directly to apply the provisions under the ICCPR or to determine the relevant violations.<sup>780</sup>

This view has been followed by the arbitral tribunal of the subsequent *Duzgit Integrity* case. In this case, initiated by Malta against São Tomé and Príncipe, the contested issue was whether the tribunal may determine the violation of generally applicable rules of international law concerning fundamental human rights caused by the respondent's measures taken against the Maltese vessel *Duzgit Integrity* and its crew. According to the tribunal, the combined effect of Articles 288 and 293 was that the tribunal would not have jurisdiction to determine breaches of obligations not having their source in UNCLOS including human rights obligations, but could do so to assist the interpretation and application of the Convention.<sup>781</sup> From this respect, the tribunal said that, by virtue of

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<sup>774</sup> *Arctic Sunrise Arbitration between the Netherlands and Russia, Award on the Merits, 14 August 2015*, para. 192. Article 288(2) says that the tribunal may have jurisdiction over an international agreement related to the purposes of UNCLOS if it is agreed between the parties. Article 301 bans the parties from any threat or use of force against the territorial integrity or political independence of other states, or in any other inconsistency from the Charter of the UN in exercising the rights and obligations in the Convention.

<sup>775</sup> *Ibid.*, para. 191.

<sup>776</sup> *Ibid.*, paras. 193-195.

<sup>777</sup> *Ibid.*, para. 197.

<sup>778</sup> *Ibid.*

<sup>779</sup> *Ibid.*, para. 188.

<sup>780</sup> *Ibid.*, para. 198.

<sup>781</sup> *Duzgit Integrity Arbitration between Malta and São Tomé and Príncipe, Award, 5 September 2016*, para. 207.

Article 293, the only point the tribunal could determine was whether the measures taken by the respondent breached the principles of international law regulating all measures of law enforcement, such as reasonableness.<sup>782</sup> Thus, the tribunal concluded that it was not competent to determine Malta's claim regarding the alleged breach of fundamental human rights obligations by São Tomé and Príncipe, since the relevant claims were directly from other sources of international law, not from the Convention itself.<sup>783</sup>

In all the cases shown in this section, it has been consistently confirmed that Article 293 cannot be a jurisdictional ground for Part XV tribunals to exercise their jurisdiction over other rules of international law if the dispute was directly and solely based on other than UNCLOS. Part XV tribunals have clarified that Article 293 is only applicable for tribunals 'having jurisdiction'. This indicates that to bring external sources into proceedings under Part XV by applying Article 293, a dispute must be based on rights or obligations under UNCLOS, not from other sources of international law themselves.

### 6.3. Under What Circumstances Can Incidental Jurisdiction be Exercised?

#### 6.3.1. Incidental Jurisdiction over the Ancillary Matters to UNCLOS

Basically, the jurisdiction of international courts and tribunals rests on the consent of states.<sup>784</sup> This is a rarely contested premise for the exercise of their judicial function because all international judicial bodies have been established by agreements made between states.<sup>785</sup> However, concerning certain matters, the existence of their jurisdiction has been assumed even if the exercise of such powers is not regulated by statutory

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<sup>782</sup> *Ibid.*, paras. 209-210.

<sup>783</sup> *Ibid.*, para. 210.

<sup>784</sup> See; Hugh Thirlway, 'The Law and Procedure of the International Court of Justice 1960-1989: Part Nine' (1999) 69 *British Yearbook of International Law* 1, p. 21; Shabtai Rosenne and Yaël Ronen, *The Law and Practice of the International Court, 1920-2005, Vol. II, Jurisdiction* (4th edn, Martinus Nijhoff Publishers 2006), p. 549.

<sup>785</sup> Alexander Orakhelashvili, 'Consensual Principle' (2020) *Max Planck Encyclopedias of International Law*, para. 1.

documents or expressly conferred on them.<sup>786</sup> Such matters concern ancillary questions of a factor of law that must be decided to rule upon a primary question or main dispute over which the court or tribunal has jurisdiction.<sup>787</sup> International courts and tribunals may exercise their jurisdiction over such ancillary matters by reliance on the powers inherently given to them.<sup>788</sup> This is called incidental jurisdiction of international courts and tribunals, which is also often referred to as ‘inherent powers or jurisdiction’,<sup>789</sup> or ‘ancillary jurisdiction’<sup>790</sup> of international judicial bodies.<sup>791</sup>

Incidental jurisdiction of international courts and tribunals can be defined as jurisdiction over the issue beyond the primary jurisdiction that a court or tribunal needs to decide in connection with the case on the merits up to the final decision.<sup>792</sup> The exercise of incidental jurisdiction of international courts and tribunals is for the sake of ensuring the fulfilment of

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<sup>786</sup> Elihu Lauterpacht, 'Partial' Judgments and the Inherent Jurisdiction of the International Court of Justice' in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Grotius Publications 1996), p. 477; Brown, 'The Inherent Powers of International Courts and Tribunals', p. 212; Orakhelashvili, 'Consensual Principle', para. 6.

<sup>787</sup> Ben Love, 'Jurisdiction over Incidental Questions in International Law' (2017) 111 Proceedings of the Annual Meeting - American Society of International Law 316, p. 317; Tomuschat, 'Article 36', p. 738, para. 33.

<sup>788</sup> Brown, 'The Inherent Powers of International Courts and Tribunals', p. 198.

<sup>789</sup> Lauterpacht, 'Partial' Judgments and the Inherent Jurisdiction of the International Court of Justice', pp. 476-477; Louise Symons, 'The Inherent Powers of the ICTY and ICTR' (2003) 3 International Criminal Law Review 369, p. 370, ft. 5; Brown, 'The Inherent Powers of International Courts and Tribunals', p. 212; Chester Brown, 'Inherent Powers in International Adjudication' in Cesare Romanò, Karen J. Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press 2014), p. 830; Rosenne, 'International Courts and Tribunals, Jurisdiction and Admissibility of Inter-State Applications', para. 18; Jessica Liang, 'The Inherent Jurisdiction and Inherent Powers of International Criminal Courts and Tribunals: An Appraisal of Their Application' (2012) 15 New Criminal Law Review 375, p. 382; Luiz Eduardo Ribeiro Salles, *Forum Shopping in International Adjudication: the Role of Preliminary Objections*, vol 105 (Cambridge University Press 2014), p. 119. See also; *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, p. 253, para. 23; *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p. 457, para. 23.

<sup>790</sup> For example, Max Sorensen used the term ancillary jurisdiction to refer to the powers of the ICJ such as the power to indicate provisional measures pending its decision to preserve the respective rights of the parties or revising its judgments, which were in conformity with a general principle of international adjudication (see; Max Sorensen, *Manual of Public International Law* (Macmillan 1968), p. 707).

<sup>791</sup> These diverse ways to refer to the power of international courts and tribunals maybe because there is no clear definition of the meaning of incidental jurisdiction, as Shabtai Rosenne mentioned (See; Rosenne and Ronen, *The Law and Practice of the International Court, 1920-2005, Vol. II, Jurisdiction*, p. 583). In this respect, Peter Tzeng says that these terms have been used interchangeably by different authors (see; Peter Tzeng, 'The Implicated Issue Problem: Indispensable Issues and Incidental Jurisdiction' (2018) 50 New York University Journal of International Law & Politics 447, pp. 454-455, ft. 31). See also; Michèle Buteau and Gabriël Oosthuizen, 'When the Statute and Rules are Silent: The Inherent Powers of the Tribunal' in Richard May and others (eds), *Essays on ICTY Procedure and Evidence In Honour of Gabrielle Kirk McDonald* (Kluwer Law International 2001), p. 80.

<sup>792</sup> See; Rosenne and Ronen, *The Law and Practice of the International Court, 1920-2005, Vol. II, Jurisdiction*, p. 578; Callista Harris, 'Incidental Determinations in Proceedings under Compromissory Clauses' (2021) 70 The International and Comparative Law Quarterly 417, p. 433.

their function as judicial organs.<sup>793</sup> In this respect, the ICJ mentioned in the *Nuclear Tests* case that the Court is fully empowered to make “whatever findings may be necessary” by virtue of its incidental jurisdiction, and this jurisdiction is conferred upon it so that its basic judicial functions may be safeguarded.<sup>794</sup>

Generally, incidental jurisdiction of international courts and tribunals concerns the procedural law applicable for the progression of the judicial proceedings, such as *compétence de la compétence*, the right to frame the rules of procedures, or the power to prescribe provisional measures.<sup>795</sup> In some cases, such powers are codified by the rules of each of the courts and tribunals. For example, Section D of Rules of Court of the ICJ regulates ‘Incidental Proceedings’ where the powers of the Court, like concerning interim protection, preliminary objections, counter-claims or intervention are contained.<sup>796</sup> Section C of Part III of the Rules of ITLOS regulates its powers within these incidental proceedings.<sup>797</sup> However, even in the absence of such regulations, international courts and tribunals are thought to be entitled to exercise their incidental jurisdiction over procedural matters.<sup>798</sup> In this sense, Judge Sir Gerald Fitzmaurice said in his Separate Opinion that, although much of the ICJ’s incidental jurisdiction is specifically provided by the Statute or the Rules of the Court, it is truly an inherent power necessary for the Court’s function.<sup>799</sup>

However, the incidental jurisdiction of international courts and tribunals is not only

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<sup>793</sup> Brown, 'The Inherent Powers of International Courts and Tribunals', p. 209; Liang, 'The Inherent Jurisdiction and Inherent Powers of International Criminal Courts and Tribunals: An Appraisal of Their Application', p. 382; Rosenne, 'International Courts and Tribunals, Jurisdiction and Admissibility of Inter-State Applications', para. 18; Brown, 'Inherent Powers in International Adjudication', p. 838; Salles, *Forum Shopping in International Adjudication: the Role of Preliminary Objections*, p. 119; Orakhelashvili, 'Consensual Principle', para. 2.

<sup>794</sup> *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, p. 253, para. 23; *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p. 457, para. 23.

<sup>795</sup> Brown, 'The Inherent Powers of International Courts and Tribunals', p. 199; Marotti, 'Between Consent and Effectiveness: Incidental Determinations and the Expansion of the Jurisdiction of UNCLOS Tribunals', p. 389; Rosenne, 'International Courts and Tribunals, Jurisdiction and Admissibility of Inter-State Applications', para. 18; Rosenne and Ronen, *The Law and Practice of the International Court, 1920-2005, Vol. II, Jurisdiction*, p. 583; Brown, 'Inherent Powers in International Adjudication', p. 830; Tomuschat, 'Article 36', p. 738, para. 33; Symons, 'The Inherent Powers of the ICTY and ICTR', p. 371. See also; A. J. J. de Hoogh, 'Intervention Under Article 62 of The Statute and the Quest for Incidental Jurisdiction without the Consent of the Principal Parties' (1993) 6 Leiden Journal of International Law 17.

<sup>796</sup> Rules of Court (1978) <<https://www.icj-cij.org/en/rules>>; last visited – 15 August 2022.

<sup>797</sup> Rules of the Tribunal (2021) <[https://www.itlos.org/fileadmin/itlos/documents/basictexts/ITLOS\\_825.03.21.pdf](https://www.itlos.org/fileadmin/itlos/documents/basictexts/ITLOS_825.03.21.pdf)>; last visited – 15 August 2022.

<sup>798</sup> Lauterpacht, 'Partial' Judgments and the Inherent Jurisdiction of the International Court of Justice', pp. 476-477.

<sup>799</sup> *Case concerning the Northern Cameroons (Cameroon v. United Kingdom)*, Preliminary Objections, Judgment of 2 December 1963: I.C.J. Reports 1963, p. 15, Separate Opinion of Judge Sir Gerald Fitzmaurice, p. 103.

confined to procedural law.<sup>800</sup> When a certain court needs to address an ancillary issue to the main dispute over which that judicial body has jurisdiction, then it is acknowledged that the jurisdiction of that court may extend to cover such an issue.<sup>801</sup> That is to say, the exercise of incidental jurisdiction over other substantive law is also possible based on the necessity for the exercise of principal jurisdiction to decide the primary questions.<sup>802</sup> The PCIJ admitted its incidental jurisdiction over beyond the principal jurisdiction when it said, “the interpretation of other international agreements is indisputably within the competence of the Court if such interpretation must be regarded as incidental to a decision on a point concerning which it has jurisdiction.”<sup>803</sup> The view of the ICJ shown in recent judgments was not different from that of the PCIJ.<sup>804</sup> In this respect, incidental jurisdiction over substantive law can be defined as the jurisdiction of an international court or tribunal over matters that would otherwise be beyond the purview of the subject-matter jurisdiction, but that fall within that purview as they are ancillary to the main dispute.<sup>805</sup>

If incidental jurisdiction is considered as inherently given to international courts and tribunals in general, then Part XV tribunals should be regarded as having incidental jurisdiction over ancillary matters to UNCLOS dispute. The primary subject-matter jurisdiction of every Part XV tribunal only involves disputes concerning the interpretation or application of the Convention. However, there can be a case where the dispute concerning the interpretation or application of UNCLOS requires determination or consideration of other than UNCLOS matters. In such cases, it is acknowledged that Part XV tribunals have incidental jurisdiction to determine issues beyond the purview of their subject-matter jurisdiction to the extent that the determination on those issues is necessary

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<sup>800</sup> For example, it has been recognised that a court or tribunal has power to address the issues of judicial remedies or compensation. In *LaGrand* case, the ICJ said “Where jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required by the Court to consider the remedies a party has requested for the breach of the obligation.” (*LaGrand (Germany v. United States of America)*, Judgment, *I.C.J. Reports 2001*, p. 466, para. 48). Concerning this aspect, see also Lauterpacht, *The Development of International Law by the International Court*, pp. 245-248; Orakhelashvili, 'Consensual Principle', paras. 6-8.

<sup>801</sup> Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, pp. 266-267; Ole Spiermann, *International Legal Argument in the Permanent Court of International Justice: The Rise of the International Judiciary*, vol no. 34 (Cambridge University Press 2005), p. 217; Love, 'Jurisdiction over Incidental Questions in International Law', p. 317.

<sup>802</sup> Marotti, 'Between Consent and Effectiveness: Incidental Determinations and the Expansion of the Jurisdiction of UNCLOS Tribunals', p. 390; Salles, *Forum Shopping in International Adjudication: the Role of Preliminary Objections*, p. 120.

<sup>803</sup> *Case Concerning Certain German Interests in Polish Upper Silesia (Preliminary Objection)*, PCIJ, Series A – No. 6, August 25th 1925, p. 18.

<sup>804</sup> See; *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, *I.C.J. Reports 2019*, p. 7, para. 69; *Appeal relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar)*, Judgment, *I.C.J. Reports 2020*, p. 81, para. 61.

<sup>805</sup> Tzeng, 'The Implicated Issue Problem: Indispensable Issues and Incidental Jurisdiction', p. 454, ft. 31.

for the settlement of the dispute.<sup>806</sup>

One such example can be found in the maritime delimitation case, where determining a land boundary terminus is ancillary to the main dispute. In dealing with the maritime delimitation issue, especially between states with adjacent coasts, the primary task is to check where the land boundary terminus is located since the maritime entitlement originates from the land following the principle of ‘land dominates the sea’.<sup>807</sup> In this context, there can be a case that each of the parties’ views on the location of the land boundary terminus is different or even contested. Delimiting the boundary in the maritime area where states’ entitlements overlap is an issue concerning the interpretation or application of UNCLOS. In contrast, determining where the land boundary terminus lies is beyond the matter of UNCLOS since there are no relevant rules regulated in the Convention. This matter, then, can be regarded as an ancillary issue over which the tribunal in charge may exercise its incidental jurisdiction to decide primary question, which is delimiting the maritime boundary.

Part XV tribunals have encountered a few cases where the issue of exercising incidental jurisdiction over ancillary matters has arisen, including maritime delimitation cases. Having encountered such cases, Part XV tribunals have shown that they may exercise incidental jurisdiction over non-UNCLOS matters if necessary to address the submitted UNCLOS disputes. Moreover, the context and the extent to which the incidental jurisdiction applies and when it does not have been set by the tribunals. Based on this, let us look into how the relevant jurisprudence has developed and what is left to be further clarified by future Part XV tribunals.

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<sup>806</sup> Marotti, 'Between Consent and Effectiveness: Incidental Determinations and the Expansion of the Jurisdiction of UNCLOS Tribunals', p. 403.

<sup>807</sup> This principle has been acknowledged in numerous cases before international courts; *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969, p. 3, para. 86*; *Continental Shelf (Tunisia / Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982, p. 18, para. 73*; *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984, p. 246, para. 157*; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I. C. J. Reports 2001, p. 40, para. 185*; *Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009, p. 61, para. 77*; *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012, p. 4, para. 185*.

### 6.3.2. Early Cases of Part XV Tribunals - Maritime Delimitation Disputes

The first case in which Part XV tribunals encountered the issue of the exercise of jurisdiction over ancillary matters to the main dispute was the *Guyana v. Suriname* case. This case concerned maritime delimitation between two states. The arbitral proceedings had been unilaterally initiated by Guyana against Suriname. One of the main contested issues concerning the tribunal's jurisdiction was whether or not there had been an agreed land boundary terminus between the parties.

In 1934 when both Guyana and Suriname were, respectively, colonies of the UK and the Netherlands, the 'Mixed Boundary Commission' was established to delimit the boundary between the two states. In 1936, the Commission recommended that the border should be fixed at a certain point referred to as 'Point 61' or the '1936 Point'. The British and Dutch members of the Commission concluded that the maritime boundary in the territorial sea should be fixed at an azimuth of N10°E from Point 61 to the limit of the territorial sea. This Point was on the west bank of the Corentyne River, near the mouth of that river that separates the two states. However, according to the findings of the tribunal, no final agreement was reached between the UK and the Netherlands at that time due to the outbreak of the Second World War.<sup>808</sup>

Concerning the existence of an agreed land boundary terminus, Guyana argued based on the parties' past conduct that the parties had mutually adopted and agreed upon Point 61 as the terminal point of their land boundary and that, accordingly, it could be the basis for maritime delimitation.<sup>809</sup> Suriname contended that the parties had never agreed on the location of the land boundary terminus and it was doubtful whether this Point definitively fixed the land boundary terminus.<sup>810</sup> Suriname argued that if there was no agreement, the tribunal would not have jurisdiction over this dispute since it entailed a determination on the land boundary which was beyond the purview of the tribunal's jurisdiction.<sup>811</sup> Suriname added that if there was indeed an agreed territorial sea boundary, the tribunal would have jurisdiction over this case and Point 61 may provide "a perfectly adequate

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<sup>808</sup> *Arbitration between Guyana and Suriname, Award of the Arbitral Tribunal, 17 September 2007*, paras. 137-139.

<sup>809</sup> *Arbitration between Guyana and Suriname, Reply of Guyana, 01 April 2006*, paras. 4.8-4.11.

<sup>810</sup> *Arbitration between Guyana and Suriname, Rejoinder of Suriname, 1 September 2006*, paras. 2.15-2.23.

<sup>811</sup> *Ibid.*, paras. 2.10-2.14.

starting point” for the further delimitation.<sup>812</sup>

Nevertheless, in its award, the tribunal determined that the starting point of the maritime delimitation between Guyana and Suriname would be the intersection of the low water line of the west bank of the Corentyne River and the geodetic line of N10°E that passes Point 61.<sup>813</sup> This determination in effect followed the recommendation of the Mixed Boundary Commission that the boundary should be fixed based on Point 61. Concerning this determination, the tribunal explained that its findings would have no consequences for any land boundary so that Suriname’s jurisdictional objection would not arise since it only determined the starting point for the sea boundary, not the land boundary terminus.<sup>814</sup> Contrary to the tribunal’s assertion, this determination was sufficient to be regarded as implicitly deciding the location of the land boundary terminus, which was an ancillary matter to the maritime delimitation at issue.<sup>815</sup>

The exercise of incidental jurisdiction over ancillary matters in the context of Part XV proceedings was more clearly shown in the case of maritime delimitation in the Bay of Bengal between Bangladesh and India (hereinafter ‘*Bay of Bengal (Bangladesh/India)*’). The main dispute of this case was the delimitation of the maritime boundary between the two parties in the territorial sea, the EEZ and the continental shelf. Bangladesh and India shared the view that the land boundary terminus would be the starting point of the maritime boundary between them, and that terminus should be based on the described boundary line in the Radcliffe Award.<sup>816</sup> The Radcliffe Award was made by the Bengal Boundary Commission established in 1947, to demarcate the boundary in Bengal Province. Following the Radcliffe Award of the Commission, the East Bengal region became part of Bangladesh, which was at that time part of Pakistan, and the West Bengal area became part of India.

However, the parties to the dispute interpreted differently the exact location of the land boundary terminus regulated by the Radcliffe Award. Bangladesh argued that the land boundary terminus between the two parties was located at the coordination of 21°38’14” N

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<sup>812</sup> *Arbitration between Guyana and Suriname, Hearing Transcripts - December 2006 - Day 5, Vol. 5, 13 December 2006*, pp. 795-796.

<sup>813</sup> *Arbitration between Guyana and Suriname, Award of the Arbitral Tribunal, 17 September 2007*, para. 280.

<sup>814</sup> *Ibid.*, para. 308.

<sup>815</sup> See; Buga, ‘Territorial Sovereignty Issues in Maritime Disputes: A Jurisdictional Dilemma for Law of the Sea Tribunals’, p. 75.

<sup>816</sup> *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India, Counter-Memorial of India, 31 July 2012*, para. 4.1; *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India, Reply of Bangladesh, 31 January 2013*, para. 3.7.



– 89°06’39” E,<sup>817</sup> whereas, India argued that the location of the land boundary terminus was on the coordination of 21°38’40.4” N – 89°10’13.8” E.<sup>818</sup> In this respect, the respondent, India expressed its concern over the tribunal’s potential to determinate the new land boundary terminus which was not governed by the provisions of UNCLOS.<sup>819</sup>

Nevertheless, the tribunal considered that the determination of the land boundary terminus had to be decided to proceed with the delimitation process which constituted the main dispute of this case.<sup>820</sup> The tribunal said that even though examining the land boundary itself would be beyond its competence, it could do so only concerning the portion pertaining to the point where the land boundary enters the Bay of Bengal for maritime delimitation.<sup>821</sup> Finally, the tribunal decided the location of the land boundary terminus(21°38’40.2” N – 89°09’20.0” E) based on its own determination, neither following that of Bangladesh nor of India.<sup>822</sup>

As the arbitral tribunal of the *Bay of Bengal (Bangladesh/India)* case has stated, such an exercise of incidental jurisdiction was due to the necessity of dealing with those external matters to decide the main dispute within the purview of Part XV tribunals’ jurisdiction. The tribunal of the *Guyana v. Suriname* case was not different in this respect, since the determination of the starting point of maritime delimitation, which implied the location of the land boundary terminus, constituted the preliminary issue required to be determined for the entire maritime delimitation process. Thus, the two cases above showed the existence of the tribunals’ incidental jurisdiction over non-UNCLOS matters ancillary to the primary question of the interpretation and application of the Convention. Moreover, in these cases, the incidental jurisdiction was not exercised without limit but was confined to the portion pertaining to the relevant maritime area. Later, the exercise of incidental jurisdiction over non-UNCLOS matters in Part XV proceedings was further elaborated by the arbitral tribunal of the *Chagos MPA* case, which faced the same issue but in a context other than maritime delimitation disputes.

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<sup>817</sup> *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India, Memorial of Bangladesh, 31 May 2021*, paras. 5.4-5.11.

<sup>818</sup> *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India, Counter-Memorial of India, 31 July 2012*, paras. 4.1-4.36.

<sup>819</sup> *Ibid*, para. 4.1.

<sup>820</sup> *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India, Award of 7 July 2014*, para. 84.

<sup>821</sup> *Ibid*, para. 86.

<sup>822</sup> *Ibid*, para. 188.

### 6.3.3. Elaborated Criteria Presented in the *Chagos MPA* Case Award

In the *Chagos MPA* case, the issue of the exercise of incidental jurisdiction over the non-UNCLOS matter arose concerning Mauritius' first, second and fourth claims. Among them, Mauritius' first and second claims were that the UK was not entitled to declare the Marine Protected Area over the Chagos Archipelago. Since these claims would require the tribunal first to determine whether the UK or Mauritius had sovereignty over this area, the tribunal should have decided whether such an issue could be regarded as an ancillary matter that the tribunal could address by exercising its incidental jurisdiction.

Concerning this issue, the tribunal first articulated its views on the incidental jurisdiction of Part XV tribunals over non-UNCLOS matters in general. According to the tribunal, where a dispute's nature concerns the interpretation or application of the Convention, the jurisdiction of Part XV tribunals pursuant to Article 288(1) of UNCLOS extends to making such findings of fact or ancillary determinations of law necessary to resolve the dispute submitted to it.<sup>823</sup> In this case, the non-UNCLOS matter at issue concerned territorial sovereignty over the Chagos Archipelago. The tribunal did not categorically exclude all the relevant territorial sovereignty matters from Part XV tribunals' jurisdiction. Instead, the tribunal said that a minor issue of territorial sovereignty could be within the purview of its jurisdiction if it were indeed ancillary to a dispute concerning the interpretation or application of the Convention.<sup>824</sup>

However, the tribunal held that the current case was not such a case. As the tribunal clarified, the foremost precondition to exercising incidental jurisdiction over non-UNCLOS matters was that such external issues should be ancillary issues to the dispute necessary for the exercise of Part XV tribunals' primary jurisdiction. In other words, the main question should concern the interpretation or application of the Convention. However, as has been addressed in detail in Chapter 4, the tribunal had already characterised Mauritius' first and second claims as relating to a territorial sovereignty issue where the parties' differing views on the term 'coastal state' was only a single aspect of the larger dispute.<sup>825</sup> Therefore, as the primary questions to be judged had been determined not to

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<sup>823</sup> *Chagos Marine Protected Area Arbitration between Mauritius and the UK, Award, 18 March 2015*, para. 220.

<sup>824</sup> *Ibid.*, paras. 213.

<sup>825</sup> *Ibid.*, paras. 212 and 229.

concern the interpretation or application of the Convention, the tribunal lacked jurisdiction to address such claims.<sup>826</sup>

The tribunal's determination was in line with the decisions of the tribunals of the *Guyana v. Suriname* case and the *Bay of Bengal (Bangladesh/India)* case and even showed a far clearer standard. Like the awards of those two cases, the tribunal said that the tribunal's jurisdiction may reach beyond the purview of UNCLOS if such matters were genuinely ancillary to a dispute concerning interpretation or application of the Convention.<sup>827</sup>

However, in addition to that, the tribunal said that an incidental connection between the non-UNCLOS dispute and some matter regulated by the Convention would be insufficient to bring the dispute within the purview of the tribunal's jurisdiction following Article 288(1) if the real issue of the claim did not relate to the interpretation or application of the Convention.<sup>828</sup> This showed that the incidental jurisdiction of Part XV tribunals cannot be exercised when non-UNCLOS matters constitute the very subject-matter of the dispute and there is only a marginal connection between the dispute and certain provisions of the Convention. From the tribunal's perspective, Mauritius' first and second claims were a case where only the term 'coastal state' was taken from the Convention.

The tribunal's approach to this issue can also be seen in its determination on Mauritius' fourth submission.<sup>829</sup> Unlike the first and second submissions, the tribunal exercised its incidental jurisdiction in addressing Mauritius' fourth submission, especially concerning the questions about Articles 2(3) and 56(2) of the Convention.<sup>830</sup> What was concerned here was whether the relevant contents of the Lancaster House Undertakings<sup>831</sup> could be considered as 'other rules of international law' and 'rights and duties of other states' within the meaning of Articles 2(3) and 56(2). The Undertakings contained agreements made between the UK and political leaders of pre-independent Mauritius, such as returning the

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<sup>826</sup> *Ibid.*, paras. 221 and 230.

<sup>827</sup> *Ibid.*, para. 218.

<sup>828</sup> *Ibid.*, para. 220.

<sup>829</sup> The ground for the tribunal's jurisdiction over the fourth submission was on *renvoi* element in Article 297(1). This issue will be addressed in detail in this chapter.

<sup>830</sup> (4) The United Kingdom's purported "MPA" is incompatible with the substantive and procedural obligations of the United Kingdom under the Convention, including inter alia Articles 2, 55, 56, 63, 64, 194 and 300, as well as Article 7 of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks of 4 August 1995.

<sup>831</sup> This was made between the UK and political leaders of the pre-independent Mauritius as a result of negotiation concerning the detachment plan of the Chagos Archipelago from Mauritius. Finally, on 23 September 1965, both sides reached a provisional agreement. The key points of the agreement in paragraph 22 of the final record of the meeting were referred to as the Lancaster House Undertakings.

Chagos Archipelago to Mauritius when the need for defensive facilities in the islands disappeared or to ensure Mauritius' fishing rights.<sup>832</sup>

The status of the Lancaster House Undertakings did not concern the interpretation or application of the Convention. Since the Undertakings' legal effect was a central element of Mauritius' fourth submission, though, the tribunal found that its jurisdiction may reach the interpretation of the Undertakings to the extent necessary to determine the UK's alleged violation of the Convention.<sup>833</sup> Thus, the tribunal examined the relevant issues about the Undertakings, such as the parties' intention, its status, or the subsequent practices of the parties,<sup>834</sup> and then proceeded to give a determination on the merits.<sup>835</sup> This showed that the tribunal's incidental jurisdiction over non-UNCLOS matters (Lancaster House Undertakings) was exercised only when such external issues are ancillary to UNCLOS matters (Articles 2(3) and 56(2)) necessary to be addressed to decide on that primary question.

The criteria for Part XV tribunals' exercise of incidental jurisdiction over non-UNCLOS matters elaborated by the tribunal of the *Chagos MPA* case was followed by the arbitral tribunal of the *Coastal State Rights* case. In this case, whether the tribunal may exercise jurisdiction over the relevant territorial sovereignty matter or not had been raised as an issue relating to the tribunal's incidental jurisdiction. The tribunal said that the drafters of the Convention did not intend a sovereignty dispute to be a dispute concerning the interpretation or application of UNCLOS, as such a dispute was not even included in the limitations and exceptions stipulated in Section 3.<sup>836</sup> However, by referring to the award given in *Chagos MPA* case, the tribunal admitted that it may give a determination on sovereignty matters only in the exceptional situation where such matters are ancillary to a dispute concerning UNCLOS.<sup>837</sup> For example, in determining the implausibility claims raised by Ukraine, the tribunal said that it was necessary to assess Russia's claim of sovereignty to the extent necessary to verify the existence of a sovereignty dispute between

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<sup>832</sup> For the full texts of the Undertakings, see; *Chagos Marine Protected Area Arbitration, Memorial of Mauritius, 1 August 2012*, Annex 19, Record of a Meeting held in Lancaster House at 2.30 p.m. on Thursday 23rd September [1965], Mauritius Defence Matters, CO 1036/1253 at paras. 22-23.

<sup>833</sup> *Chagos Marine Protected Area Arbitration between Mauritius and the UK, Award, 18 March 2015*, para. 419.

<sup>834</sup> *Ibid.*, paras. 421-455.

<sup>835</sup> *Ibid.*, paras. 499-536.

<sup>836</sup> *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait, Award Concerning the Preliminary Objections of Russia, 21 February 2020*, para. 156.

<sup>837</sup> *Ibid.*, paras. 157-159.

the parties.<sup>838</sup>

However, in this case, the tribunal had already characterised the nature of Ukraine's claims as a territorial sovereignty dispute because those claims were dependent on the premise of Ukraine's sovereignty over Crimea.<sup>839</sup> Thus, the tribunal decided that the parties' dispute regarding sovereignty over Crimea was not a minor issue ancillary to UNCLOS dispute.<sup>840</sup> For this reason, the tribunal declined to exercise incidental jurisdiction over such a territorial sovereignty issue. This was similar to the decision of the arbitral tribunal of *Chagos MPA* case where the tribunal determined that the jurisdiction regulated in Article 288(1) may reach beyond UNCLOS only if such matters are ancillary to UNCLOS dispute, but not the subject-matter of the dispute itself.

#### 6.3.4. Points Left to be Clarified by Future Part XV Tribunals - the *Enrica Lexie* Case Award and the 'Necessity' Requirement

The tribunal of *Chagos MPA* case, followed by the tribunal of the *Coastal State Rights* case, elaborated when Part XV tribunals may and may not exercise incidental jurisdiction over ancillary matters other than UNCLOS. However, an issue remains to be clarified concerning the exercise of incidental jurisdiction in Part XV proceedings. This point has been well revealed through the arbitral award of the *Enrica Lexie* case between Italy and India. In this case, Italy claimed that India had acted inconsistently with UNCLOS by exercising its jurisdiction over Italian marines although they enjoyed immunity from criminal jurisdiction of other states. As addressed in Chapter 4, the tribunal characterised the nature of the dispute as not concerning the immunity of marines which lies beyond the four corners of the Convention but concerned its interpretation or application.<sup>841</sup>

Accordingly, the dispute was determined to concern which state was entitled to exercise jurisdiction over the incident of 15 February 2012 involving the "Enrica Lexie" and the "St. Antony", which includes the question of the immunity of the marines.<sup>842</sup>

Here, the tribunal determined that the issue of immunity of the marines was ancillary to the

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<sup>838</sup> *Ibid*, paras. 185-186.

<sup>839</sup> *Ibid*, para. 197.

<sup>840</sup> *Ibid*, paras. 194-196.

<sup>841</sup> "*Enrica Lexie*" *Incident Arbitration between Italy and India*, Award, 21 May 2020, para. 244.

<sup>842</sup> *Ibid*, para. 804.

main dispute brought before it. First, the tribunal stated that the relevant question was whether the issue of entitlement to exercise jurisdiction over the incident of 15 February 2012 could be “satisfactorily” answered even without addressing the question of the immunity of the marines.<sup>843</sup> The tribunal decided that, as the immunity from jurisdiction operates as an exception to an otherwise existing right to exercise jurisdiction, it could not provide a “complete answer” to the main question concerning which state may exercise jurisdiction without incidentally examining the applicability of that exception to the marines.<sup>844</sup> In this respect, the tribunal said that its competence may extend to the determination of the issue of immunity of the marines if that issue necessarily arises as an incidental question in the application of the Convention, even though there is no ground provided by the Convention.<sup>845</sup> In so doing, it was shown that the tribunal addressed non-UNCLOS matters by exercising incidental jurisdiction.<sup>846</sup>

However, the tribunal did not give the basis on which it determined the necessity of addressing the issue of immunity of the marines for deciding the main dispute. As mentioned above, the foremost precondition to exercising incidental jurisdiction over non-UNCLOS matters was that such matters should be ancillary issues necessary for the exercise of Part XV tribunals’ primary jurisdiction. However, as the tribunal clarified, both Italy and India had presented various other grounds, unrelated to the question of immunity, as to why each of them should or should not be entitled to exercise jurisdiction under different provisions of the Convention.<sup>847</sup> Moreover, in characterising the nature of the dispute, the tribunal had already found that the dispute contained in Italy’s claims could be judged without determining the question of immunity.<sup>848</sup> That is to say, the question of the immunity of the marines was one of several other aspects that require to be examined in resolving the parties’ dispute.<sup>849</sup> This implied that even without addressing the question of the immunity of the marines, the tribunal could have determined the issue of entitlement to exercise jurisdiction over the incident of 15 February 2012, although not ‘completely’ or ‘satisfactorily’.

That was not the case in other past proceedings under Part XV of UNCLOS. For example,

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<sup>843</sup> *Ibid.*, para. 805.

<sup>844</sup> *Ibid.*, para. 808.

<sup>845</sup> *Ibid.*, para. 809.

<sup>846</sup> *Ibid.*, paras. 810-811.

<sup>847</sup> *Ibid.*, para. 806.

<sup>848</sup> *Ibid.*, para. 239.

<sup>849</sup> *Ibid.*, para. 806.

in the *Guyana v. Suriname* case or the *Bay of Bengal (Bangladesh/India)* case, the issue of determining the land boundary terminus had to be preliminarily decided to proceed to the delimitation process, due to the principle of ‘land dominates the sea’.<sup>850</sup> In those cases, there was no other way for the tribunals to reach a final decision on the main dispute if the tribunals circumvented to give their determination on that ancillary matter. In contrast, in the *Enrica Lexie* case, the dispute between the parties would be decided without a determination on the question of immunity.<sup>851</sup> The minority opinions of the tribunal in this case pointed out this aspect. Judge Dr Sreenivasa Pemmaraju Rao said that there was no “inseparable or integral link” between the issue of immunity and the issue of entitlement to exercise jurisdiction over the incident.<sup>852</sup> Similarly, Judge Patrick Robinson also pointed out that unlike the majority opinion in the case, other Part XV tribunals in past proceedings did not simply decide that a non-UNCLOS matter was an incidental question but those decisions were made based on their determination that such matters were necessary for the resolution of the dispute.<sup>853</sup>

Similarly, many authors criticise and express concerns over the award of the tribunal of *Enrica Lexie* case concerning its exercise of incidental jurisdiction over the immunity of the marines. Some authors argue that the award of this case regrettably did not address the requirements for incidental jurisdiction that had been followed by other international courts and tribunals, including previous Part XV proceedings.<sup>854</sup> Some argue that the tribunal left significant room for jurisdiction over incidental matters other than UNCLOS.<sup>855</sup> Based on the ambiguities left in the tribunal’s award, one author even says that it may suggest that the tribunal simply assumed the immunity of marines from criminal jurisdiction to be a customary exception inherent in the application of the rules of UNCLOS concerning the

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<sup>850</sup> See; *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India, Award of 7 July 2014*, para. 84.

<sup>851</sup> *"Enrica Lexie" Incident Arbitration between Italy and India, Award, 21 May 2020*, para. 239.

<sup>852</sup> *"Enrica Lexie" Incident Arbitration between Italy and India, Award, 21 May 2020, Concurring and Dissenting Opinion of Dr. Sreenivasa Rao Pemmaraju*, para. 36.

<sup>853</sup> *"Enrica Lexie" Incident Arbitration between Italy and India, Award, 21 May 2020, Dissenting Opinion of Judge Patrick Robinson*, paras. 50-52.

<sup>854</sup> James G. Devaney and Christian J. Tams, 'In re Arbitration Between the Italian Republic and the Republic of India Concerning the "Enrica Lexie" Incident' (2021) 115 *The American Journal of International Law* 513, pp. 517-518. See also; Deepak Raju, 'The Enrica Lexie Award – Some Thoughts on “Incidental” Jurisdiction (Part II)' *Opinio Juris* <<http://opiniojuris.org/2020/07/22/the-enrica-lexie-award-some-thoughts-on-incidental-jurisdiction-part-ii/>>; last visited – 15 August 2022; Valentin J. Schatz, 'Incidental jurisdiction in the award in “The ‘Enrica Lexie’ Incident (Italy v. India)” – Part II' *Völkerrechtsblog of International Law & International Legal Thought* <<https://voelkerrechtsblog.org/incidental-jurisdiction-in-the-award-in-the-enrica-lexie-incident-italy-v-india-part-ii/>>; last visited – 15 August 2022.

<sup>855</sup> Eleni Methymaki and Christian J. Tams, 'Immunities and Compromissory Clauses: Making Sense of Enrica Lexie (Part II)' *EJIL: Talk!* <<https://www.ejiltalk.org/immunities-and-compromissory-clauses-making-sense-of-enrica-lexie-part-ii/>>; last visited – 15 August 2022.

right to exercise jurisdiction.<sup>856</sup>

As those dissenting opinions of the two arbitrators and many authors have correctly pointed out, the majority opinion in this case concerning its exercise of incidental jurisdiction left uncertainties, especially compared to past Part XV tribunals' approaches. Of course, the tribunal might have determined to address the question of immunity of marines to resolve the dispute "satisfactorily", even though it could decide on the main dispute without dealing with the issue of immunity of marines. Given that the judges of international courts are not deprived of the powers needed to ensure the fulfilment of their functions,<sup>857</sup> it is conceivable that the tribunal of the *Enrica Lexie* case did so to fulfil its function. However, even if so, in which aspect the tribunal determined the necessity of dealing with the question of immunity of marines for resolving the parties' dispute and how deeply that external issue concerned the dispute concerning the entitlement to exercise jurisdiction over the incident should be given.

This case was not the first time that questions about the 'necessity' requirement to the exercise of incidental jurisdiction had arisen within the context of Part XV proceedings. Controversy has also occurred over the arbitral award of the *Chagos MPA* case.<sup>858</sup> For example, Lan Ngoc Nguyen appraises that due to the insufficient explanation, the extent to which sovereignty matters could be deemed as ancillary to the interpretation or application of the Convention is still confusing.<sup>859</sup> Similarly, Kate Parlett says that this case may open the possibility that states will seek to use Part XV procedures to resolve disputes that cannot be closely related to the exercise of the rights and obligations under provisions of the Convention.<sup>860</sup> These views show that although the award of the tribunal in the *Chagos MPA* case has elaborated how Part XV tribunals may exercise incidental jurisdiction over non-UNCLOS matters, ambiguities remain, especially concerning the necessity requirements.

In this respect, we may find what needs to be clarified in the future compulsory

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<sup>856</sup> Attila M. Tanzi, 'Adjudication at the Service of Diplomacy: The *Enrica Lexie* Case' (2021) 12 *Journal of International Dispute Settlement* 448, p. 457.

<sup>857</sup> Brown, 'The Inherent Powers of International Courts and Tribunals', p. 209.

<sup>858</sup> Though not directly mentioned, Natalie Klein poses a negative perspective on the exercise of compulsory jurisdiction over non-UNCLOS matters which has been shown not just in the *Chagos MPA* case award but also in the *South China Sea* case award (Klein, 'Expansions and Restrictions in the UNCLOS Dispute Settlement Regime: Lessons from Recent Decisions', p. 415).

<sup>859</sup> Nguyen, 'The Chagos Marine Protected Area Arbitration: Has the Scope of LOSC Compulsory Jurisdiction Been Clarified?', p. 142.

<sup>860</sup> Parlett, 'Beyond the Four Corners of the Convention: Expanding the Scope of Jurisdiction of Law of the Sea Tribunals', p. 295.



proceedings under UNCLOS Part XV: the basis on which the necessity for the exercise of incidental jurisdiction is determined. Chester Brown argues that once the states parties consent to the referral of a dispute to a certain international judicial body, then it is up to that body to decide how it is to fulfil its judicial function.<sup>861</sup> Part XV tribunals cannot be different in dealing with questions concerning the interpretation or application of the Convention. Once states parties submit their disputes to a Part XV tribunal, then it is up to that tribunal to decide how to ensure the fulfilment of its judicial function over that case. However, this inevitably introduces a significant degree of flexibility in determining what can be submitted to Part XV of UNCLOS and leaves this question to be decided on a case-by-case basis.<sup>862</sup> Thus, to prevent ambiguities or uncertainties like in the award of *Enrica Lexie* case, how a tribunal has reached its conclusion must be provided clearly and in detail.

The exercise of incidental jurisdiction of international courts and tribunals requires a careful, prudent approach since it may impinge upon the principle of consent, especially concerning the jurisdiction of international adjudication.<sup>863</sup> When it comes to UNCLOS Part XV, this careful approach will be required more and more as the issue of incidental jurisdiction of Part XV tribunals is being raised in more diversified and complicated contexts. The recent examples of alleged ancillary matters were not confined to the matter of determining a land boundary terminus in maritime delimitation, but also include matters like ones concerning the decolonisation issue or the immunity of foreign officials from criminal jurisdiction. Thus, to show that Part XV tribunals indeed exercise their incidental jurisdiction carefully and prudently, they will need to clarify how they determine the necessity of dealing with external matters to resolve UNCLOS disputes, and how their judicial function can be satisfactorily fulfilled by doing so.

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<sup>861</sup> Brown, 'The Inherent Powers of International Courts and Tribunals', p. 209.

<sup>862</sup> Harrison, 'Defining Disputes and Characterizing Claims: Subject-Matter Jurisdiction in Law of the Sea Convention Litigation', p. 279.

<sup>863</sup> Marotti, 'Between Consent and Effectiveness: Incidental Determinations and the Expansion of the Jurisdiction of UNCLOS Tribunals', pp. 403-404.

## 6.4. Are There Other Sources for Exercising Jurisdiction Beyond the Convention?

### 6.4.1. The *Renvoi* Element in the Convention

Along with the application of Article 293 of the Convention and Part XV tribunals' exercise of incidental jurisdiction over ancillary matters, Part XV tribunals have established another ground for exercising their jurisdiction over non-UNCLOS matters: a *renvoi* element in the Convention. *Renvoi* is the doctrine or technique concerning the choice of law usually taken in the field of private international law in the case of conflict of laws; the term originated from the French for 'sending back'.<sup>864</sup> For example, let us imagine that a case entailing an international element has been brought before the court of State A and, according to State A's private international law, the law of State B should be the applicable law in this case. However, if the result of the application of the private international law of State B is that the case should be decided according to the law of either State A or a third State, then the court of State A would refer back to its law or refer to the law of the third jurisdiction. This reference indicates *renvoi*. Sometimes, this concept is also taken in the context of public international law. For example, Robert Kolb says that the coordination between international humanitarian law and human rights law takes place through the technique of *renvoi*.<sup>865</sup>

In the *Chagos MPA* case, the tribunal provided a detailed explanation about the *renvoi* element involved in Article 297(1). As seen in Chapter 5, the tribunal said that unlike Articles 297(2) and (3), which contain exceptions to the tribunal's jurisdiction, Article 297(1) is phrased entirely in affirmative terms.<sup>866</sup> In stating that Article 297(1) does not limit its jurisdiction under UNCLOS Part XV, the tribunal said that this article would rather expand the jurisdiction of the tribunal beyond that which would follow from the application of Article 288(1) alone. According to the tribunal, in addition to the disputes

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<sup>864</sup> See; David Alexander Hughes, 'The Insolubility of Renvoi and Its Consequences' (2010) 6 Journal of Private International Law 195, p. 197; Thomas Pfeiffer, 'Private International Law' (2008) Max Planck Encyclopedias of International Law, para. 19.

<sup>865</sup> Robert Kolb, 'Human Rights and Humanitarian Law' (2013) Max Planck Encyclopedias of International Law, paras. 35-37.

<sup>866</sup> *Chagos Marine Protected Area Arbitration between Mauritius and the UK*, Award, 18 March 2015, para. 307.

relating to the interpretation and application of the Convention itself, each of three specified cases in Article 297(1) of UNCLOS includes *renvoi* to sources of law beyond the Convention itself.<sup>867</sup> Article 297(1) regulates that disputes concerning the exercise of a coastal state's sovereign rights or jurisdiction shall fall within the purview of the compulsory jurisdiction under Part XV, in three enumerated cases;

*(a) when it is alleged that a coastal State has acted in contravention of the provisions of this Convention in regard to the freedoms and rights of navigation, overflight or the laying of submarine cables and pipelines, or in regard to other internationally lawful uses of the sea specified in article 58;*

*(b) when it is alleged that a State in exercising the aforementioned freedoms, rights or uses has acted in contravention of this Convention or of laws or regulations adopted by the coastal State in conformity with this Convention and other rules of international law not incompatible with this Convention; or*

*(c) when it is alleged that a coastal State has acted in contravention of specified international rules and standards for the protection and preservation of the marine environment which are applicable to the coastal State and which have been established by this Convention or through a competent international organization or diplomatic conference in accordance with this Convention.*

The tribunal found the *renvoi* elements in this provision such as, 'other internationally lawful uses of the sea specified in Article 58' in Article 297(1)(a), 'the laws and regulations adopted by the coastal State in conformity with this Convention and other rules of international law' in Article 297(1)(b), and 'specified international rules and standards for the protection and preservation of the marine environment' in Article 297(1)(c).<sup>868</sup> The tribunal said that Article 297(1) expressly expands the tribunal's jurisdiction to certain disputes involving the violation of legal instruments beyond the four corners of the Convention and that such disputes will not be dismissed as being insufficiently related to the interpretation and application of the Convention.<sup>869</sup>

In the *Chagos MPA* case, a *renvoi* element was identified in terms of finding the tribunal's jurisdiction over non-UNCLOS matters, concerning Mauritius' fourth relief sought. In its fourth submission, Mauritius argued that the UK's establishment of the MPA was not compatible with Articles 2, 55, 56, 63, 64, 194 and 300 of the Convention and Article 7 of

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<sup>867</sup> *Ibid.*, para. 316.

<sup>868</sup> *Ibid.*

<sup>869</sup> *Ibid.*

the 1995 Agreement.<sup>870</sup> Among the three enumerated cases in Article 297(1), the tribunal determined that the dispute concerning Mauritius' fourth submission fell within the class of disputes identified in Article 297(1)(c) of the Convention. The tribunal considered that the parties' dispute about the MPA was related to the preservation of the marine environment and that Mauritius' claims concerned the alleged violation of international rules and standards in this area.<sup>871</sup> The tribunal deemed that 'international rules and standards' as stipulated in Article 297(1)(c) not only refers to substantive rules and standards for preserving the maritime environment but also includes procedural rules in general international law such as the obligation to consult with other parties or give due regard to the rights of other states.<sup>872</sup> As seen in Section 6.3.3, the contents contained in the Lancaster House Undertakings were examined in this context.

Moreover, in addressing Mauritius' claims within its fourth relief sought that the UK had violated Articles 2 and 56, the tribunal resorted to *renvoi* elements within those provisions. Article 2(3) regulates that the exercise of sovereignty over territorial sea should be subject to 'other rules of international law', while Article 56(2) says that within the EEZ, coastal states shall have 'due regard to the rights and duties of other states'. The tribunal did not consider the Lancaster House Undertakings itself as general international law that the Convention obliges to comply as shown in Article 2(3). Instead, the tribunal regarded that the UK's obligation to have due regard to Mauritius' rights stipulated in the Lancaster House Undertakings could be relevant to this dispute.<sup>873</sup> This decision showed that the tribunal's jurisdiction may extend to a non-UNCLOS matter, which in this case concerned the Lancaster House Undertakings, based on the *renvoi* elements found in UNCLOS.

The *Chagos MPA* case implied that not only the *renvoi* element in Article 297(1) but also that of other provisions may become a ground for Part XV tribunals' exercise of compulsory jurisdiction over non-UNCLOS matters. Truly, many provisions in the Convention involve the *renvoi* element. Those provisions use phrases like 'other rules of international law' or 'generally accepted international rules and standards' in regulating substantive rights and obligations of the states parties. However, the tribunal's award in

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<sup>870</sup> Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.

<sup>871</sup> *Chagos Marine Protected Area Arbitration between Mauritius and the UK, Award, 18 March 2015*, para. 319.

<sup>872</sup> *Ibid.*, para. 322.

<sup>873</sup> See; *ibid.*, paras. 517, 519.

this case did not mean that the purview of compulsory jurisdiction can be extended without limit by the effect of the *renvoi* elements found in UNCLOS. As an instance, Article 297(1)(b) limits the exercise of jurisdiction to laws and regulations adopted by the coastal state concerning the freedoms, rights or uses stipulated in Article 297(1)(a).

The limitation of the effect of *renvoi* element in the Convention was affirmed by the tribunal in recent *Enrica Lexie* case award. In this case, the applicant, Italy, argued that the tribunal can exercise its jurisdiction over the issue of immunity of marines as Articles 2(3), 56(2) and 58(2) import the immunity of marines by *renvoi*.<sup>874</sup> Article 2(3) regulates that sovereignty over the territorial sea should be exercised subject to ‘other rules of international law’. Article 56(2) says that in the EEZ, the coastal state shall have due regard to ‘the rights and duties of other states’. Article 58(2) regulates that ‘other pertinent rules of international law’ should be applied to other states in the EEZ. Moreover, Italy raised that Articles 297(1)(a) and (b) can be grounds for the tribunal’s exercise of jurisdiction over the issue of immunity of marines, as a “subsidiary argument”.<sup>875</sup>

However, the tribunal concluded that none of these was relevant to the issue of immunity of marines. First, the tribunal determined that Articles 2(3), 56(2) and 58(2) are not pertinent and applicable in the current case, because, although these articles apply to the exercise of rights and duties in the territorial sea and the EEZ, India had exercised its jurisdiction only in its internal waters and on land when the Italian marines were arrested and detained.<sup>876</sup> In addition, the tribunal determined that the *renvoi* element in Article 297(1) could not be applied to this case because, as the tribunal had already found that Article 58 of the Convention did not apply to this case, neither did Article 297(1)(a).<sup>877</sup> Moreover, the tribunal did not consider that the issue of immunity of marine pertained to the exercise of freedoms, rights and uses of the sea regulated in Article 297(1)(b).<sup>878</sup> Therefore, in this case, the tribunal found other justification for its exercise of jurisdiction over the immunity of marines, as addressed above, which was the incidental jurisdiction over ancillary matters to resolve the UNCLOS dispute.

These two cases show that Part XV tribunals may exercise their jurisdiction over non-

<sup>874</sup> See; "*Enrica Lexie*" *Incident Arbitration between Italy and India, Award, 21 May 2020*, paras. 762-778.

<sup>875</sup> Memorial of Italy, 30 September 2016, paras. 8.16-8.19 and Reply on the Merits – Counter-Memorial on Jurisdiction – Counter-Memorial on India’s Counter-Claims, 11 August 2017, para. 2.50 (recited in Award at para. 779, ft no. 1425 and para. 793, ft. no. 1443).

<sup>876</sup> "*Enrica Lexie*" *Incident Arbitration between Italy and India, Award, 21 May 2020*, para. 798.

<sup>877</sup> *Ibid*, para. 801.

<sup>878</sup> *Ibid*, para. 802.

UNCLOS matters through the *renvoi* element found in numerous provisions in the Convention. However, like the application of Article 293 of the Convention and the exercise of incidental jurisdiction over ancillary matters, this cannot be the ground for unlimited exercise of jurisdiction beyond the four corners of UNCLOS. The tribunal of the *Enrica Lexie* case showed clearly that this would be invocable only when the dispute submitted to Part XV tribunals is relevant to the contents of the provisions of the Convention importing external rules or regulations by *renvoi*.

#### 6.4.2. Question Concerning a *Contrario* Reading of Article 298(1)(a)(i) and the Jurisdiction over Territorial Sovereignty Matter

One of the controversies raised concerning the exercise of compulsory jurisdiction under UNCLOS Part XV over territorial sovereignty issues was a *contrario* reading of Article 298(1)(a)(i). As one of the optional exception clauses from the compulsory dispute settlement system under UNCLOS, this article regulates that states parties can exempt disputes concerning the maritime delimitation or historic bays or titles from the purview of compulsory procedures in Section 2. However, the latter part of this provision says;

*... provided that a State having made such a declaration shall, when such a dispute arises subsequent to the entry into force of this Convention and where no agreement within a reasonable period of time is reached in negotiations between the parties, at the request of any party to the dispute, accept submission of the matter to conciliation under Annex V, section 2; and provided further that any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission;*

This provision says that although states parties can exclude disputes concerning the maritime delimitation or historic bays or titles from compulsory procedures, they shall accept the submission of those disputes to the conciliation procedure under Annex V which may be initiated by either party to the dispute when no agreement is reached in a reasonable time. However, when the dispute involves necessarily ‘the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory’, the obligation to accept the conciliation procedures can be exempted. The jurisdictional claim concerning the *contrario* reading of Article 298(1)(a)(i) focuses on the latter part of this provision.

Then, what exactly does the claim of a *contrario* reading of Article 298(1)(a)(i) argue? Here, it would be helpful to refer to the speech given by former ITLOS President Rüdiger Wolfrum at the ‘Informal Meeting of Legal Advisers of Ministries of Foreign Affairs’ in 2006. In this speech, President Wolfrum said;

... *This may be evidenced by a reading a contrario of article 298, paragraph 1(a), namely, in the absence of a declaration under article 298, paragraph 1(a), a maritime delimitation dispute including the necessarily concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory is subject to the compulsory jurisdiction of the Tribunal, or any other court or tribunal.*<sup>879</sup>

This speech indicated that in the absence of a declaration made pursuant to Article 298(1)(a)(i), unsettled territorial sovereignty matters necessarily concurrent to the maritime delimitation fall within the purview of the compulsory jurisdiction of Part XV tribunals. Some authors agree with President Wolfrum’s statement on the effect of a *contrario* reading of Article 298(1)(a)(i).<sup>880</sup> For example, Tullio Treves says that the argument about a *contrario* reading of this provision refutes the perspective that Part XV tribunals’ jurisdiction shall be automatically excluded whenever a case presents a territorial sovereignty dispute.<sup>881</sup> There have been contrary views, though.<sup>882</sup> For example, Zou Keyuan argues that although there is a view like a *contrario* reading of Article 298(1)(a)(i), it is generally understood that territorial disputes over offshore or islands are not within the purview of Part XV tribunals’ jurisdiction.<sup>883</sup> Moreover, Irina Buga argues that President Wolfrum’s interpretation would be hard to justify and this interpretation might have

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<sup>879</sup> Rüdiger Wolfrum, 'Statement by H.E. Judge Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs New York 23 October 2006' <[https://www.itlos.org/fileadmin/itlos/documents/statements\\_of\\_president/wolfrum/legal\\_advisors\\_231006\\_eng.pdf](https://www.itlos.org/fileadmin/itlos/documents/statements_of_president/wolfrum/legal_advisors_231006_eng.pdf)>; last visited – 15 August 2022.

<sup>880</sup> See; Treves, 'What have the United Nations Convention and the International Tribunal for the Law of the Sea to offer as regards Maritime Delimitation Disputes?', p. 77; Philippe Gautier, 'The International Tribunal for the Law of the Sea: Activities in 2005' (2006) 5 Chinese Journal of International Law (Boulder, Colo) 381, pp. 389-390.

<sup>881</sup> Treves, 'What have the United Nations Convention and the International Tribunal for the Law of the Sea to offer as regards Maritime Delimitation Disputes?', p. 77.

<sup>882</sup> E.g., Judge P. Chandrasekhara Rao argues that Article 298(1)(a)(i) suggests that the question of a mixed dispute would have remained within the competence of a conciliation commission. Though not directly refuted, Judge Rao’s view can be considered as contrary to the view concerning a *contrario* reading of Article 298(1)(a)(i), as his view deems that the UNCLOS dispute entailing territorial sovereignty issue should remain under the purview of competence of a conciliation commission of Annex V, rather than the compulsory jurisdiction of Section 2 of Part XV (see; Rao, 'Delimitation Disputes Under the United Nations Convention on the Law of the Sea: Settlement Procedures', p. 889).

<sup>883</sup> Zou Keyuan, 'The International Tribunal for the Law of the Sea: Procedures, Practices, and Asian States' (2010) 41 Ocean Development and International Law 131, p. 140.

prompted many states to make declarations pursuant to Article 298(1)(a)(i).<sup>884</sup>

Concerning these controversies, we may question whether a *contrario* reading of Article 298(1)(a)(i) indicates another or special source that grants Part XV tribunals' jurisdiction over the territorial sovereignty issue. President Wolfrum's statement concerning a *contrario* reading of Article 298(1)(a)(i) was, in fact, not very different from what we have already seen through the cases regarding the exercise of incidental jurisdiction over ancillary matters. In both the *Guyana v. Suriname* case and the *Bay of Bengal (Bangladesh/India)* case, the tribunals determined the concurrent issue about the location of the land boundary terminus as it was necessary for delimiting the maritime boundary. Here, we can find that the statement of President Wolfrum was in effect in line with the view taken by Part XV tribunals in past proceedings.

Nevertheless, in the *Chagos MPA* case, the controversy over a *contrario* reading of Article 298(1)(a)(i) arose in a completely different context from maritime delimitation or historic bays or titles. In this case, Mauritius argued that even in a circumstance where the interpretation or application of the term 'coastal state' required the tribunal to determine the issue of sovereignty over the Chagos Archipelago, no bar in the Convention prevented the tribunal from exercising its jurisdiction.<sup>885</sup> One of the grounds for this claim was the implication drawn from a *contrario* reading of Article 298(1)(a)(i). Mauritius suggested that in the absence of any declaration made by Mauritius and the UK under Article 298(1)(a), the Annex VII tribunal could determine any unsettled dispute concerning the sovereignty of other rights over the Chagos.<sup>886</sup> According to Mauritius, a *contrario* reading of Article 298(1)(a)(i) indicated that unless the declaration pursuant to this provision was made to exclude the jurisdiction of the tribunal, such disputes would fall within the purview of the compulsory procedures of Section 2 of Part XV.<sup>887</sup>

The UK did not accept such an effect of a *contrario* reading of Article 298(1)(a)(i). The respondent argued that a *contrario* interpretation of this article could support the possibility that the tribunal may exercise jurisdiction over land disputes that only arise in the context of maritime delimitation.<sup>888</sup> Therefore, it added that even in circumstances where no

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<sup>884</sup> Buga, 'Territorial Sovereignty Issues in Maritime Disputes: A Jurisdictional Dilemma for Law of the Sea Tribunals', p. 66, ft 42.

<sup>885</sup> *Chagos Marine Protected Area Arbitration, Memorial of Mauritius, 1 August 2012*, para. 5.26

<sup>886</sup> *Ibid.*, para. 5.26.

<sup>887</sup> *Chagos Marine Protected Area Arbitration, Reply of Mauritius, 18 November 2013*, para. 7.25.

<sup>888</sup> *Chagos Marine Protected Area Arbitration, Rejoinder Submitted by the UK, 17 March 2014*, para. 4.34.



declaration pursuant to Article 298(1)(a)(i) had been made, a *contrario* reading of this article could not make the territorial sovereignty dispute fall within the purview of compulsory jurisdiction.<sup>889</sup>

Concerning these contested views between the disputing parties, the tribunal clearly stated that a *contrario* reading of Article 298(1)(a)(i) could not imply such a broad purview of compulsory jurisdiction under UNCLOS. The tribunal focused on the text of Article 298(1)(a)(i) and said that this provision only related to the application of the Convention to disputes involving maritime boundaries and historic bays or titles.<sup>890</sup> Thus, the tribunal determined that a *contrario* reading of Article 298(1)(a)(i) would, at most, support the proposition that the territorial sovereignty issue might fall within the purview of Part XV tribunals if it were genuinely ancillary to a dispute concerning a maritime boundary or a claim of historic bays or titles.<sup>891</sup>

Again, this finding reaffirmed what had been established by Part XV tribunals' jurisprudence on the exercise of jurisdiction over ancillary matters, especially concerning concurrent maritime boundary or historic bays or titles disputes. It shows that the effect of a *contrario* reading of Article 298(1)(a)(i) does not provide any special or additional ground for Part XV tribunals' jurisdiction over the territorial sovereignty dispute other than the contexts that have been addressed in this chapter.

## 6.5. Concluding Remarks

At the final session of the Third UN Conference, President Koh of the Conference referred to the finalised Convention as a 'Constitution for the Oceans'.<sup>892</sup> The Convention regulates the rules for various ocean affairs and the different regimes of maritime areas like the EEZ or the sea-bed and ocean floor and subsoil located beyond the limits of national jurisdiction,

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<sup>889</sup> *Ibid*, para. 4.35.

<sup>890</sup> *Chagos Marine Protected Area Arbitration between Mauritius and the UK, Award, 18 March 2015*, para. 218.

<sup>891</sup> *Ibid*, para. 218.

<sup>892</sup> Koh, 'A Constitution for the Oceans', Remarks by Tommy T. B. Koh, of Singapore, President of the Third United Nations Conference on the Law of the Sea'.

also known as the ‘common heritage of mankind’.<sup>893</sup> Given the unprecedented and unequalled comprehensiveness of the Convention, we may feel this Convention is truly a ‘Constitution for the Oceans’.<sup>894</sup>

Nevertheless, the Convention cannot stipulate every single rule required to regulate all those regimes within it. Therefore, many provisions of the Convention either directly or indirectly refer to other rules of international law. This feature indicates that for Part XV tribunals to resolve a dispute concerning the interpretation or application of such provisions, they inevitably give their determinations over non-UNCLOS matters. Article 293 of UNCLOS allows Part XV tribunals to apply other rules of international law that are not incompatible with the Convention to fulfil their judicial function. However, Article 293 was not the sole jurisdictional basis for Part XV tribunals in the past compulsory proceedings. Rather, they have relied on various grounds for exercising their jurisdiction beyond the four-corners of the Convention.

Part XV tribunals have applied other rules of international law by virtue of Article 293 to resolve disputes even when the disputed provisions of the Convention do not directly incorporate external rules. Moreover, Part XV tribunals have exercised their incidental jurisdiction over substantive rules of UNCLOS in various cases. In addition, the *renvoi* element that can be found in numerous provisions in the Convention has been confirmed that they could serve as a jurisdictional basis for Part XV tribunals over non-UNCLOS matters.

At the same time, Part XV tribunals have established limits in exercising jurisdiction over non-UNCLOS matters. In applying Article 293, Part XV tribunals have consistently clarified that this provision can be a jurisdictional ground only if relying on those other rules of international law is necessary to interpret and apply UNCLOS. This approach of Part XV tribunals to the exercise of jurisdiction over other rules beyond the Convention can also be seen through their exercise of incidental jurisdiction and through the limited acceptance of the effect of a *contrario* reading of Article 298(1)(a)(i).

These contributions show Part XV tribunals’ self-understanding of their role and function

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<sup>893</sup> Article 136 of UNCLOS (see; Rüdiger Wolfrum, ‘Common Heritage of Mankind’ (2009) Max Planck Encyclopedias of International Law).

<sup>894</sup> David Freestone, ‘Introduction: The Law of the Sea Convention at 30: Successes, Challenges and New Agendas’ in David Freestone (ed), *The 1982 Law of the Sea Convention at 30: Successes, Challenges and New Agendas* (Martinus Nijhoff Publishers 2013), pp. 3-4.

in dealing with non-UNCLOS issues which may inevitably be concerned with the interpretation or application of the Convention. Except for given Article 293, which explicitly regulates the applicable law, all the findings above are not provided by the Convention but rather have been clarified and confirmed by Part XV tribunals. The case analysis in this chapter also reveals that the jurisprudence on the issues relating to the exercise of jurisdiction over non-UNCLOS matters has been followed and elaborated convergently by different Part XV tribunals. In this respect, we may find another law-making aspect of Part XV tribunals on the compulsory dispute settlement system under UNCLOS.

## **Part III. Final Remarks and Conclusion**

## 7. Appraisals

### 7.1. Convergent Jurisprudence of Part XV Tribunals and the Contributing Factors

Let us move on to an appraisal of the overall implication of the contributions of Part XV tribunals analysed in Chapters 3 to 6. Here, an examination of the recently raised criticisms introduced in Chapter 1 is necessary. One of the major criticisms raised over the compulsory dispute settlement under UNCLOS was that the different reasonings of the tribunals in past proceedings have resulted in the consistency problem. One author even argues that this shows the “vicissitudes” of the dispute settlement system under UNCLOS.<sup>895</sup> Given that convergent jurisprudence is crucial for the development of the Part XV system,<sup>896</sup> the first point to be examined is whether the tribunals have actually interpreted and implemented the rules of Part XV inconsistently.

The consistency matter pointed out by the authors above concerns adherence to past judicial decisions by current and future courts and tribunals. Therefore, the consistency of jurisprudence on the rules of Part XV cannot but be determined by checking the tribunals’ reasonings given in past and present proceedings from a comprehensive perspective. In other words, if a clarified or interpreted essence in a preceding case has been followed and accepted in subsequent cases, it can be considered that the consistency of jurisprudence is secured.

However, this does not mean that any changes that occur in the interpretation or application of the rules of Part XV will cause inconsistency problems. Some changes may occur without prejudice to the existing legal doctrines such as in ways of elaborating established conditions or methodologies. Moreover, even if a novel interpretation is given or it deviates from previous judicial decisions, the consistency can be largely compensated by subsequent judicial practice. In contrast, the problem of inconsistency jurisprudence may arise in circumstances when different or conflicting interpretations of the same clause are respectively accumulated. That is because, in such instances, it would be hard to know

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<sup>895</sup> Klein, 'The Vicissitudes of Dispute Settlement under the Law of the Sea Convention'.

<sup>896</sup> Please refer to Chapter 2, Section 2.3.1.

which judgments represent the authoritative pronouncement on the certain rule of Part XV in question.

However, what the current study found is that jurisprudence maintained convergently between Part XV tribunals exists. Some changes could indeed be found in Part XV tribunals' interpretations of certain provisions during past compulsory proceedings. But, even in cases where such deviations from earlier judicial interpretation happened, the changed interpretations were generally followed by the tribunals in subsequent cases.<sup>897</sup> This shows that, instead of inconsistency or divergent jurisprudence between the cases, the corpus of jurisprudence concerning Part XV remains not divergent even though different forums have interpreted and applied the same procedural rules.

For example, some authors regard the decisions of different tribunals concerning the effect of Article 293 on the compulsory jurisdiction under UNCLOS Part XV as showing inconsistency between the cases. Peter Tzeng argues that there have been contradictions between the cases where the tribunals expanded their jurisdiction by applying Article 293, such as in the *M/V Saiga (No. 2)* case, the *Guyana v. Suriname* case, and the *M/V Virginia G* case and where the tribunals rejected such an expansion, as in the *MOX Plant* case, the *Chagos MPA* case,<sup>898</sup> the *Arctic Sunrise* case and the *Duzgit Integrity* case.<sup>899</sup> Kate Parlett points out the inconsistency in the same manner as Peter Tzeng and argues that the precise effect of Article 293(1) and its potential to expand the jurisdiction are still open to debate.<sup>900</sup>

Yet, the only inconsistency between those cases was the outcomes drawn from applying the same common standard. In detail, despite different results of those cases, Part XV tribunals have consistently applied other rules of international law only when the main thrust of the dispute was based on the rights or obligations under UNCLOS. Thus, when one of the parties requested Part XV tribunals to determine the violation of a certain obligation directly originating from other than UNCLOS by applying Article 293, the

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<sup>897</sup> Sections 3.3.2 and 3.4.3 in Chapter 3 and Section 5.2.3 in Chapter 5.

<sup>898</sup> In *Chagos MPA* arbitration, the applicant, Mauritius, claimed that by applying Article 293, the tribunal must deal with the questions concerning the matter of the status as a 'coastal state' (*Chagos Marine Protected Area Arbitration, Hearing on Jurisdiction and the Merits, Volume 4, April 25 2014*). However, the arbitral tribunal did not determine the issue of Article 293 since it had already concluded that the dispute submitted by Mauritius was an issue of seeking territorial sovereignty, which the tribunal lacks jurisdiction to determine.

<sup>899</sup> See; Tzeng, 'Jurisdiction and Applicable Law Under UNCLOS'.

<sup>900</sup> Parlett, 'Beyond the Four Corners of the Convention: Expanding the Scope of Jurisdiction of Law of the Sea Tribunals'.

tribunals have consistently declined to do so by applying this same standard. Since the tribunals have commonly taken the same standard in applying Article 293, then, it is not appropriate to say that there have been inconsistencies or contradictions between the decisions of different Part XV tribunals.

Likewise, the jurisprudence of Part XV tribunals rather shows that those concerns over inconsistency are hardly acceptable. In international adjudication, courts and tribunals are usually willing to follow each other's judicial decisions.<sup>901</sup> Although the decisions of other international courts are in no way binding, they are treated as persuasive authority that can be relied upon.<sup>902</sup> When encountering the same legal issue, courts and tribunals are likely to take into account other judicial bodies' reasonings and analyses.<sup>903</sup> Some authors say this tendency implies international courts' desire to contribute consistently to the development of a specific legal order.<sup>904</sup> Similarly, concerning Part XV, convergent practices between ITLOS and different arbitral tribunals under Annex VII in determining procedural questions of Part XV have been maintained.

Concerning the convergent approaches to the interpretation and application of Part XV, several contributing factors can be suggested. The first is that, regardless of the types of forums to which disputes were submitted, all the compulsory proceedings of UNCLOS have been under the control of a single constitutive instrument, which is Part XV. Normally, even in the absence of an overarching legal framework about certain rules, international courts and tribunals borrow each other's reasonings to enrich and develop their mechanisms. Especially when faced with procedural issues not addressed in their

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<sup>901</sup> See; Elihu Lauterpacht, 'The Development of the Law of International Organisations by the Decisions of International Tribunals', *Recueil des cours, Collected Courses (Collected Courses of the Hague Academy of International Law)*, vol 152 (Martinus Nijhoff 1976), pp. 396-402; Jonathan I. Charney, 'Is International Law Threatened by Multiple International Tribunals?', *Recueil des cours, Collected Courses (Collected Courses of the Hague Academy of International Law)*, vol 271 (Martinus Nijhoff 1998), p. 373; Collier and Lowe, *The Settlement of Disputes in International Law: Institutions and Procedures*, pp. 262-263; Nathan Miller, 'An International Jurisprudence? The Operation of "Precedent" Across International Tribunals' (2002) 15 *Leiden Journal of International Law* 483; Brown, *A Common Law of International Adjudication*; Brown, 'The Cross-Fertilization of Principles Relating to Procedure and Remedies in the Jurisprudence of International Courts and Tribunals'; ICJ, *Handbook*, pp. 97-98. For recent examples, see the contributions in the chapter of Part 4 Forum: Jurisprudential Cross-Fertilization: An Annual Overview in Giuliana Ziccardi Capaldo, *The Global Community Yearbook of International Law and Jurisprudence 2018* (Oxford University Press 2019).

<sup>902</sup> Buerghenthal, 'Lawmaking by the ICJ and Other International Courts', p. 405.

<sup>903</sup> Charney, 'The Impact on the International Legal System of the Growth of International Courts and Tribunals', p. 705; Shany, *The Competing Jurisdictions of International Courts and Tribunals*, pp. 110-11; Lauterpacht, 'Principles of Procedure in International Litigation', pp. 527-528.

<sup>904</sup> Hernández, 'International Judicial Lawmaking', p. 212. See also; Pemmaraju Sreenivasa Rao, 'Multiple International Judicial Forums: a Reflection of the Growing Strength of International Law or Its Fragmentation?' (2004) 25 *Michigan Journal of International Law* 929, pp. 958-960.

constitutive treaties, they frequently refer to the practice of other judicial bodies.<sup>905</sup>

Likewise, international courts and tribunals seek guidance from other judicial decisions to fill the gaps in their statutory instruments, and then take a common approach to reach their determination on procedural matters.<sup>906</sup>

Common approaches to the interpretation and application of composing provisions between different courts and tribunals can especially be expected when there are similarities in drafting the constitutive instruments of different international judicial bodies.<sup>907</sup> This implies that such a tendency would likely be found between Part XV tribunals because, under the systemic framework of UNCLOS Part XV, the tribunals are subject to a single constitutive document. This means that each of the tribunals has not only commonly interpreted and applied Part XV to the dispute, but also encountered the same gaps and questions derived from it. Given international judicial bodies' general willingness to follow each other's decisions, the common constitutive treaty may have affected Part XV tribunals' convergent practices in interpreting and applying Part XV.

The second factor is that a limited number of judges and arbitrators have taken the judiciary role in the past and pending compulsory proceedings. In international adjudication, a relatively small number of people regularly comprise the international judiciary members, and the judges often serve on one or more different international courts.<sup>908</sup> Part XV tribunals are not different. An arbitral tribunal constituted under Annex VII, for example, must consist of 5 members of arbitrators unless the parties otherwise agree.<sup>909</sup> However, during the 15 past and pending arbitral proceedings, only 44 have been appointed as arbitrators to take the judiciary role. In detail, while 28 arbitrators have been appointed for only one case, 16 arbitrators have been appointed more than once.<sup>910</sup> Some arbitrators have been appointed in as many as five different proceedings.

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<sup>905</sup> Brown, *A Common Law of International Adjudication*, p. 240.

<sup>906</sup> Boyle and Chinkin, *The Making of International Law*, p. 298; Brown, 'The Cross-Fertilization of Principles Relating to Procedure and Remedies in the Jurisprudence of International Courts and Tribunals', p. 222.

<sup>907</sup> Brown, 'The Cross-Fertilization of Principles Relating to Procedure and Remedies in the Jurisprudence of International Courts and Tribunals', pp. 226-227.

<sup>908</sup> *Ibid.*, p. 235.

<sup>909</sup> UNCLOS Annex VII, Article 3. Constitution of Arbitral Tribunal.

<sup>910</sup> As of August 2022.



## List of Arbitrators in the Arbitral Tribunals Constituted under Annex VII

( ) the number of cases appointed

Case / Depository	President	Arbitrator #1	Arbitrator #2
	Appointed by Applicant		Appointed by Respondent
<i>Southern Bluefin Tuna / ICSID</i> <sup>911</sup>	Stephen M. Schwebel (2)	Florentino Feliciano	Per Tresselt
	Sir Kenneth Keith		Chusei Yamada
<i>MOX Plant / PCA</i> * (deceased)	Thomas A. Mensah (5)	Maître L. Yves Fortier	Gerhard Hafner (2)
	James Crawford		*Sir Arthur Watts (3) - Lord Mustill
<i>Land Reclamation by Singapore in and around the Straits of Johor / PCA</i>	M.C.W. Pinto (2)	Ivan Shearer (4)	Sir Arthur Watts (3)
	Kamal Hossain (2)		Bernard H. Oxman (2)
<i>Barbados v. Trinidad and Tobago / PCA</i>	Stephen M. Schwebel (2)	Francisco Orrego Vicuña (2)	Sir Arthur Watts (3)
	Vaughan Lowe (3)		Ian Brownlie
<i>Guyana v. Suriname / PCA</i>	L. Dolliver M. Nelson	Ivan Shearer (4)	Kamal Hossain (2)
	Thomas Franck		Hans Smit
<i>Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India / PCA</i>	Rüdiger Wolfrum (5)	Jean-Pierre Cot (2)	Ivan Shearer (4)
	Vaughan Lowe (3)		Pemmaraju Sreenivasa Rao
<i>Chagos Marine Protected Area Arbitration / PCA</i>	Ivan Shearer (4)	Albert Hoffmann	James L. Kateka (2)
	Rüdiger Wolfrum (5)		Sir Christopher Greenwood (2)
<i>The ARA Libertad Arbitration / PCA</i>	Bruno Simma	Awn Shawkat Al-Khasawneh	Bernard H. Oxman (2)
	Elsa Kelly		Thomas A. Mensah (5)
<i>The South China Sea Arbitration / PCA</i> * (appointed by the President of ITLOS)	Thomas A. Mensah (5)	Jean-Pierre Cot (2)	A.H.A. Soons (3)
	Rüdiger Wolfrum (5)		* Stanislaw Pawlak
<i>The Atlanto-Scandian Herring Arbitration / PCA</i>	Thomas A. Mensah (5)	Rüdiger Wolfrum (5)	M.C.W. Pinto (2)
	Francisco Orrego Vicuña (2)		Gerhard Hafner (2)
<i>The Arctic Sunrise Arbitration / PCA</i> * (appointed by the President of ITLOS)	Thomas A. Mensah (5)	Henry Burmester	Janusz Symonides
	A.H.A. Soons (3)		* Alberto Székely
<i>The Duzgit Integrity Arbitration / PCA</i>	A.H.A. Soons (3)	James L. Kateka (2)	-
	Tullio Treves		-
<i>The 'Enrica Lexie' Incident / PCA</i>	Vladimir Golitsyn (3)	Jin-Hyun Paik (2)	Patrick Robinson
	Francesco Francioni		Patibandla Chandrasekhara Rao
<i>Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait / PCA</i>	Jin-Hyun Paik (2)	Boualem Bouguetaia	Alonso Gómez-Robledo
	Vaughan Lowe (3)		Vladimir Golitsyn (3)
<i>Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen / PCA</i>	Donald McRae	Gudmundur Eiriksson	Rüdiger Wolfrum (5)
	Sir Christopher Greenwood (2)		Vladimir Golitsyn (3)

Moreover, among the 44 arbitrators of the arbitral tribunals under Annex VII, 14 have also

<sup>911</sup> International Centre for Settlement of Investment Disputes.

served as judges of ITLOS.<sup>912</sup> This shows that an overlap of the judiciary branch exists between different Part XV tribunals and that the procedural rules of Part XV have been interpreted and applied by a limited group of judges and arbitrators.

When there is an overlap of judiciary members between different courts, the same judges are likely to bring a common legal experience to their work and thus the same approach taken in a court or tribunal is likely to be taken again before another judicial body.<sup>913</sup> Hence, the overlap in the international judiciary branch can affect the common practice on procedural issues between different international judicial bodies. Then, a similar approach to the interpretation and application of Part XV would have been drawn by the same judges and arbitrators of the cases submitted to Part XV tribunals.

Lastly, one of the essential functions given to the compulsory jurisdiction system of UNCLOS was to secure uniformity in interpreting the Convention.<sup>914</sup> The new law of the sea treaty negotiated during the Third UN Conference was designed to cover vast fields of ocean affairs and the newly developed regimes like the EEZ. However, the drafters were concerned about the potential risk of breaking the achieved balance and compromise due to discretionary interpretation and application of the Convention.<sup>915</sup> Therefore, the effective dispute settlement system was considered crucial for maintaining the delicate equilibrium of the compromise and for ensuring that the new convention would be interpreted both consistently and equitably.<sup>916</sup> In this context, binding compulsory procedures in Part XV hold the whole structure of UNCLOS together and ensure integrity.<sup>917</sup>

Usually, when every international judicial body shares the same and general functions, the convergence in their jurisprudence will likely increase.<sup>918</sup> The common function that each of Part XV tribunals had to carry out in their past proceedings was not only the peaceful settlement of the disputes but also securing uniformity in interpreting and applying the

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<sup>912</sup> As of August 2022; Judge Bouem Bouguetaia, Patibandla Chandrasekhara Rao, Jean-Pierre Cot, Alonso Gómez-Robledo, Vladimir Golitsyn, Albert Hoffmann, James Kateka, Elsa Kelly, L. Dolliver M. Nelson, Jin-Hyun Paik, Stanislaw Pawlak, Tullio Treves, and Rüdiger Wolfrum.

<sup>913</sup> Brown, *A Common Law of International Adjudication*, pp. 230-231.

<sup>914</sup> UNGA, 'Document A/CONF.62/SR.51, Summary Records of Plenary Meetings, 51st Plenary Meeting', Introduction of document A/CONF.62/L.7, para. 9. See also; Adede, *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea: A Drafting History and A Commentary*, p. 39.

<sup>915</sup> Adede, *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea: A Drafting History and A Commentary*, p. 242.

<sup>916</sup> UNGA, 'Document A/CONF.62/WP.9/Add.1, Memorandum by the President of the Conference on document A/CONF.62/WP.9', para. 6.

<sup>917</sup> Boyle, 'Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction', p. 38; Sohn, 'Settlement of Law of the Sea Disputes', p. 205.

<sup>918</sup> Brown, *A Common Law of International Adjudication*, p. 230.

Convention. As the dispute settlement procedures of UNCLOS were introduced into the Convention as an integral part, the function given to Part XV tribunals must be applied to the interpretation and application of Part XV rules. Thus, this common function of Part XV tribunals has had an impact on the coherent maintenance of their jurisprudence on Part XV.

When necessary, Part XV tribunals have frequently referred to the jurisprudence of different international courts and tribunals concerning other rules of international law given outside the Part XV system.<sup>919</sup> In contrast, in dealing with matters about the rules of Part XV, they cannot but refer to each other's judicial decisions. Thomas Buergenthal says the general trend of international judicial bodies to refer to other judicial decisions has led to the enrichment and strengthening of contemporary international law.<sup>920</sup> Moreover, establishing constant judicial practice and maintaining continuity in judicial bodies' decisions can contribute to both legal certainty and the development of international law.<sup>921</sup> Similarly, the outcome of the tribunals' continuous reference to each other's judicial decisions concerning the rules of Part XV was the development of the procedural law of the compulsory jurisdiction system of UNCLOS and its enrichment through the cases.

## 7.2. Clarifying the Rules Rather than Expanding Compulsory Jurisdiction

The other criticism introduced in Chapter 1 was that Part XV tribunals have attempted to expand their jurisdiction beyond the scope conferred by the Convention. However, the tribunals' jurisprudence on the different aspects of the Part XV rules analysed in previous chapters rather calls into question this criticism: Have the recent judicial interpretations of Part XV rules truly resulted in the expansion of the applicability of compulsory jurisdiction regulated by UNCLOS?

To examine the claim of jurisdictional expansion by Part XV tribunals, the first point to be addressed is how we can understand the essence of the claim, the 'expansion of

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<sup>919</sup> See the contribution of Ivanova, 'The Cross-Fertilization of UNCLOS, Custom and Principles Relating to Procedure in the Jurisprudence of UNCLOS Courts and Tribunals'.

<sup>920</sup> Buergenthal, 'Lawmaking by the ICJ and Other International Courts', p. 405.

<sup>921</sup> In evaluating the establishment of the PCIJ as representing a great advance in the history of international legal proceedings, the ICJ mentioned this point along with other achievements (ICJ, *Handbook*, p. 14).

jurisdiction'. Unfortunately, academic contributions criticising Part XV tribunals' recent tendency to expand compulsory jurisdiction do not provide the exact meaning of 'expansion of jurisdiction'. 'Expansion' is defined "the action or process of spreading out or unfolding".<sup>922</sup> Accordingly, the expansion of something refers to stretching the space, view, or other things to reach what they did not originally or previously include. Applying this definition, 'the expansion of jurisdiction' by Part XV tribunals can be understood as 'an extension of the scope of compulsory jurisdiction provided by UNCLOS to settle matters which cannot be covered by its original purview of jurisdiction'.

This way of understanding, in fact, corresponds quite well to the views of scholars arguing the expansion of jurisdiction by the tribunals, especially the claims based on the point that Part XV was intentionally not established as a truly comprehensive regime,<sup>923</sup> or that resolving disputes by the means of states' choice should have priority over the compulsory measures.<sup>924</sup> For example, Stefan Talmon argues that the arbitral tribunal of the *Chagos MPA* case has considerably expanded the compulsory jurisdiction of UNCLOS Part XV.<sup>925</sup> The main thrust of his argument is that the tribunal adjudicated a dispute which should not have fallen within the purview of its compulsory jurisdiction by taking various means to expand that jurisdiction.<sup>926</sup> Similarly, one author says that the recent judicial interpretations of Section 1 of Part XV have potentially expanded the jurisdiction as they open the door to a dispute which could have been resolved by means other than those available under UNCLOS Part XV.<sup>927</sup> Moreover, the recent Part XV tribunals are said to have misinterpreted the exceptions in Section 3 in a way that expanded the scope of the compulsory procedures, which was not consistent with the drafters' intention.<sup>928</sup>

Regarding these claims of 'expansion of jurisdiction', however, we may raise an objection

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<sup>922</sup> Oxford English Dictionary, 'Expansion' <<https://www-oed-com.ezproxy.lib.gla.ac.uk/view/Entry/66424?redirectedFrom=expansion#eid>>; last visited – 15 August 2022.

<sup>923</sup> See; Talmon, 'The Chagos Marine Protected Area Arbitration: Expansion of the Jurisdiction of UNCLOS Part XV Courts and Tribunals', p. 929.

<sup>924</sup> See; Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, p. 39.

<sup>925</sup> Talmon, 'The Chagos Marine Protected Area Arbitration: Expansion of the Jurisdiction of UNCLOS Part XV Courts and Tribunals'; Talmon, 'The Chagos Marine Protected Area Arbitration: A Case Study of the Creeping Expansion of the Jurisdiction of UNCLOS Part XV Courts and Tribunals'.

<sup>926</sup> Talmon argues that Part XV tribunals have expanded the jurisdiction in three ways– reading down the procedural preconditions in Section 1 of Part XV; broadening the meaning of the phrase 'any dispute concerning the interpretation or application of the Convention' in Article 288; and restricting the limitations and exceptions in Section 3 of Part XV.

<sup>927</sup> Klein, 'Expansions and Restrictions in the UNCLOS Dispute Settlement Regime: Lessons from Recent Decisions', p. 407; Klein, 'The Vicissitudes of Dispute Settlement under the Law of the Sea Convention', p. 342.

<sup>928</sup> See; Chinese Society of International Law, 'The Tribunal's Award in the "South China Sea Arbitration" Initiated by the Philippines Is Null and Void', p. 474.

based on two grounds. First, it needs to be noted that those claims presuppose that explicit and intended criteria for interpreting and applying the rules of Part XV already exist in the Convention, and it is argued that such criteria must operate in the direction of limiting the applicability of compulsory measures. However, as seen in Chapter 2, the compulsory jurisdiction system of UNCLOS was not intended to be a complete compulsory system or *vice versa*, but rather was shaped based on a balance between the two.<sup>929</sup> Also, the drafters of Part XV of UNCLOS needed to take a deliberate strategy of using broad and ambiguous terms to make it acceptable to as many states as possible. Thus, given all those efforts and compromise, positing a common intention of the drafters underlying the text of the Convention cannot but be largely artificial.<sup>930</sup>

Let us take as an example – the claims raised over the judicial interpretations of Article 283 of UNCLOS. Some authors appraise that recent decisions of Part XV tribunals on Article 283 have resulted in the expansion of jurisdiction as they lowered the threshold of initiating the compulsory proceedings under Section 2.<sup>931</sup> The recent judicial findings that there is no need to clarify the specific provisions of the Convention or to follow specific formal requirements have been criticised with the assessment that the standard set for determining the fulfilment of the obligation within Article 283 has become practically meaningless.<sup>932</sup> In this sense, it is argued that the shift in interpreting Article 283 was in favour of allowing more disputes to be resolved under the compulsory procedures available in the Convention.<sup>933</sup>

However, those criticisms concerning Article 283 seem to over-emphasise one of this provision's functions as a hurdle for the progression of the compulsory proceedings. In contrast, Part XV tribunals have consistently placed weight on another purpose of this article which is to encourage the parties to consult expeditiously concerning the means for resolving a dispute. Moreover, as the Virginia Commentary points out, Article 283 is composed of general terms so it is hard to figure out how to satisfy this obligation only

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<sup>929</sup> Tanaka, *The International Law of the Sea*, p. 534.

<sup>930</sup> 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* (Cambridge, UK) 51, p. 52.

<sup>931</sup> Bankes, 'Precluding the Applicability of Section 2 of Part XV of the Law of the Sea Convention', p. 259; Klein, 'Expansions and Restrictions in the UNCLOS Dispute Settlement Regime: Lessons from Recent Decisions', p. 406; Ma, 'Obligation to Exchange Views under Article 283 of the United Nations Convention on the Law of the Sea: An Empirical Approach for Improvement', p. 311; Nguyen, 'The Chagos Marine Protected Area Arbitration: Has the Scope of LOSC Compulsory Jurisdiction Been Clarified?', p. 142.

<sup>932</sup> Chinese Society of International Law, 'The Tribunal's Award in the "South China Sea Arbitration" Initiated by the Philippines Is Null and Void', p. 482.

<sup>933</sup> Klein, 'The Vicissitudes of Dispute Settlement under the Law of the Sea Convention', p. 341.

from its texts.<sup>934</sup> In other words, no explicit standards or criteria were given concerning the way this article must be interpreted or applied accordingly.

Even compared to the past judicial decisions, it is hard to say that the recent judicial findings resulted in allowing more disputes to be submitted to the compulsory procedure. For instance, Part XV tribunals' recent confirmation that the exchange of views cannot be neatly distinguished from the substantive negotiation was not a novel approach or a deviation from the past but had already been implied by the tribunal in the *SBT* case. Then, upon which basis can the recent judicial decisions be viewed as having 'lowered' the threshold of satisfying the obligation to exchange views of Article 283? Likewise, it would be not persuasive to assert the expansion of compulsory jurisdiction by the tribunals, unless definite criteria other than such a common intention of states parties were provided.

Secondly, the claims of 'expansion of jurisdiction' runs the risk of oversimplifying the overall contribution of Part XV tribunals. If the case-law of Part XV tribunals only shows the tendency to exercise their jurisdiction extensively, like deciding matters other than UNCLOS, it would be quite plausible to say that they have been expanding the purview of their competence. Many authors raise concerns over the effect of expanding the jurisdiction of Part XV tribunals in this same respect.<sup>935</sup> However, when we look at examples of judicial findings that the purview of jurisdiction may cover non-UNCLOS matters, it becomes clear that this is not the case.

For instance, the jurisprudence of Part XV tribunals shows that, even though Article 293 may serve as a jurisdictional ground for determining other rules of international law, they cannot exercise jurisdiction if the dispute is directly and solely based on other than UNCLOS. Part XV tribunals have made it clear in many cases that "Article 293(1) does not extend the jurisdiction of a tribunal."<sup>936</sup> This shows that Part XV tribunals have not considered the determination on the other rules of international law to resolve a dispute arising out of UNCLOS as 'expansion of jurisdiction', which the authors above have referred to. Here, we may find that Part XV tribunals and the authors cited above have a

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<sup>934</sup> Nordquist and others, *United Nations Convention on the Law of the Sea 1982: A Commentary*, para. 283.5.

<sup>935</sup> See; Parlett, 'Beyond the Four Corners of the Convention: Expanding the Scope of Jurisdiction of Law of the Sea Tribunals', p. 291; Talmon, 'The Chagos Marine Protected Area Arbitration: A Case Study of the Creeping Expansion of the Jurisdiction of UNCLOS Part XV Courts and Tribunals', pp. 11-13, 28; Klein, 'The Vicissitudes of Dispute Settlement under the Law of the Sea Convention', p. 349.

<sup>936</sup> *Arctic Sunrise Arbitration between the Netherlands and Russia, Award on the Merits, 14 August 2015*, para. 188; *Duzgit Integrity Arbitration between Malta and São Tomé and Príncipe, Award, 5 September 2016*, para. 208; *M/V "Norstar" Case (Panama v. Italy), Preliminary Objections, Judgment, ITLOS, 4 November 2016*, para. 136.

different perception of what ‘expansion of jurisdiction’ means. Presumably, for Part XV tribunals, only the exercise of jurisdiction over the dispute directly and solely concerning the interpretation or application of other rules of international law would be regarded as ‘expansion of jurisdiction’.

In addition, Part XV tribunals have declined to exercise incidental jurisdiction over cases where external issues constitute the very subject-matter of the dispute rather than matters ancillary to the interpretation or application of UNCLOS. Some argue that the exercise of incidental jurisdiction of Part XV tribunals has potentially expanded the scope of the compulsory jurisdiction to the issues of undetermined sovereignty over maritime features.<sup>937</sup> However, in the *Chagos MPA* case, the tribunal concluded that the mere incidental connection between the disputed territorial sovereignty issue and certain provisions of UNCLOS could not provide a jurisdictional ground for Part XV tribunals. In contrast, the minority opinion of this case seemed closer to the authors’ appraisals above claiming jurisdictional expansion. In their Dissenting and Concurring Opinion to the arbitral award, the two arbitrators of this case, Judge James Kateka and Judge Rüdiger Wolfrum said that by declining jurisdiction over Mauritius’ first and second claims, the tribunal had missed the opportunity to deal with the issues surrounding the separation of the Chagos Archipelago from Mauritius.<sup>938</sup> However, from the point of view of the majority opinion, the exercise of jurisdiction over such issues could not be accepted as they were not ancillary matters necessary for resolving the main UNCLOS dispute. As a result, the tribunal of the *Chagos MPA* case required further conditions for exercising jurisdiction over external matters and thus elaborated the criteria concerning the incidental jurisdiction of Part XV tribunals.<sup>939</sup>

As we can see, Part XV tribunals have not only exercised jurisdiction over such external matters, but they have also provided certain limitations in applying various jurisdictional grounds to show in which contexts and how such jurisdictional grounds can be invoked. Then, can these established conditions and limitations still be regarded as evidence of an expanding tendency of the tribunals? If they were only construed as showing that the

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<sup>937</sup> Klein, 'The Vicissitudes of Dispute Settlement under the Law of the Sea Convention', p. 349. See also; Talmon, 'The Chagos Marine Protected Area Arbitration: Expansion of the Jurisdiction of UNCLOS Part XV Courts and Tribunals'; Talmon, 'The Chagos Marine Protected Area Arbitration: A Case Study of the Creeping Expansion of the Jurisdiction of UNCLOS Part XV Courts and Tribunals'.

<sup>938</sup> *Chagos Marine Protected Area Arbitration between Mauritius and the UK, Award, 18 March 2015, Dissenting and Concurring Opinion of Judge James Kateka and Judge Rüdiger Wolfrum*, para. 67.

<sup>939</sup> See; Marotti, 'Between Consent and Effectiveness: Incidental Determinations and the Expansion of the Jurisdiction of UNCLOS Tribunals', p. 395.

compulsory jurisdiction had been expanded, it would be oversimplifying the overall contributions of Part XV tribunals.

Instead of framing them as ‘expansion of jurisdiction’, what Part XV tribunals have achieved in general can be appraised as the clarification of the rules of the compulsory dispute settlement system under UNCLOS. When it comes to UNCLOS Part XV governing a certain procedural law, judicial clarification of it indicates the provision of an explicit answer and guidance to the question of how this system should work and function in real dispute circumstances. Concerning Article 283, as an example, Part XV tribunals have confirmed many (un)necessary requirements and the standards for fulfilling this article in practice by emphasising its purpose which is to encourage expeditious consultation between the parties about the pacific means for settling a dispute. Thus, it would be better to say that, having encountered diverse legal questions in past cases, Part XV tribunals have elaborated Article 283 to a great extent through their case-law.<sup>940</sup>

Clarification of Part XV rules by the tribunals is a much broader concept than the mere expression of expansion of jurisdiction. In other words, even though a certain judicial finding may imply the expansion tendency, that is not all we can find from a tribunal’s determination. Let us take as an example the interpretation of Article 297(1) of UNCLOS. This article was first interpreted as indicating that only the enumerated cases should be subject to the compulsory procedures in the *SBT* case, but this interpretation was later refuted by the tribunal of the *Chagos MPA* case.<sup>941</sup> This can be viewed as opening up the possibility of Part XV tribunals’ exercise of jurisdiction over a wide range of disputes concerning sovereign rights or jurisdiction of coastal states, especially compared to the arbitral award of the *SBT* case.<sup>942</sup> However, more importantly, the tribunal of the *Chagos MPA* case provided detailed grounds for deciding to take such an interpretation, unlike the tribunal of the *SBT* case. In the *Chagos MPA* case, the conclusion of the tribunal was based on its consideration of the textual construction of the entire Article 297 and the examination of the lengthy drafting history of the negotiation process. Thus, this was at least more convincing than the arbitral award of the *SBT* case, which simply rendered the interpretation of Article 297(1) without mentioning or examining the changes that occurred

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<sup>940</sup> Nguyen, ‘The Chagos Marine Protected Area Arbitration: Has the Scope of LOSC Compulsory Jurisdiction Been Clarified?’, p. 140.

<sup>941</sup> Please refer to Section 5.2 of Chapter 5 above.

<sup>942</sup> Talmon, ‘The Chagos Marine Protected Area Arbitration: A Case Study of the Creeping Expansion of the Jurisdiction of UNCLOS Part XV Courts and Tribunals’, p. 943.



during the negotiating process. In this sense, the award of the tribunal in the *Chagos MPA* case successfully clarified the scope of limitations regulated in Article 297(1) by providing sufficient grounds.<sup>943</sup>

To sum up, although many criticisms have arisen concerning the so-called ‘jurisdictional expansion’ trends or tendencies of Part XV tribunals, what we see through the cases is not the simple expansion of compulsory jurisdiction. During the Third UN Conference, some delegations opposed the unlimited obligation to submit a dispute to the compulsory system provided by UNCLOS.<sup>944</sup> Part XV tribunals’ decisions on the rules of the Part XV system did not, in conclusion, lead to a result contrary to the aspirations of those opposing delegations. Thus, unlike the criticisms above, Part XV tribunals have contributed to the clarification and elaboration of the compulsory dispute settlement system of UNCLOS in resolving jurisdictional questions raised within the past and present proceedings.

### 7.3. Judicial Law-Making and Judge-Made UNCLOS Part XV

The Part XV system was devised by the delegations of states participating in the Third UN Conference based on the shared need for comprehensive and effective dispute settlement mechanisms for the new law of the sea convention. However, that was not the end of the law-making process of UNCLOS Part XV. As seen in previous chapters, many ambiguities and gaps can be found in terms of how this compulsory dispute settlement system should work in practice and function in reality. The texts of UNCLOS Part XV were not always able to provide answers to these ambiguities and the novel questions raised concerning itself. In this respect, we could find room for further development in UNCLOS Part XV, to ensure its function as a workable and effective compulsory dispute settlement system.

As was the case at the Third UN Conference, of course, states parties may take that role through another round of diplomatic conferences, for example, for the revision of Part XV

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<sup>943</sup> Nguyen, ‘The Chagos Marine Protected Area Arbitration: Has the Scope of LOSC Compulsory Jurisdiction Been Clarified?’, p. 142.

<sup>944</sup> Nordquist and others, *United Nations Convention on the Law of the Sea 1982: A Commentary*, para. 297.1.

following Article 312 of the Convention.<sup>945</sup> However, the multilateral law-making process through diplomatic conferences is inevitably slow and takes additional time for being ratified by the states parties.<sup>946</sup> More importantly, a conference following Article 312 to amend the Convention has yet to be held.<sup>947</sup> Thus, to see how the dispute settlement system under UNCLOS developed, this thesis focused on other subjects of international law that could have contributed to the development of UNCLOS Part XV,<sup>948</sup> especially the international courts and tribunals seised of jurisdiction by it.

The contribution of Part XV tribunals to the clarification of the major procedural preconditions in Section 1 was quite clear. Article 281 is now understood to mean that to opt-out from the compulsory measures, there must be a legally binding agreement between the disputing parties specifying alternative means. Moreover, to have its effect, that agreement must explicitly express the parties' intention to exclude the applicability of Part XV procedures. In certain situation where a dispute concerns not only the rights and obligations of the Convention but also those of another legal order providing dispute settling procedures, it has been established that the compulsory jurisdiction over the UNCLOS dispute would not be superseded unless those measures from outside can cover the UNCLOS dispute. Lastly, various (un)necessary conditions for implementing the obligation to exchange views have been confirmed by Part XV tribunals emphasising that the main purpose of Article 283 is to encourage expeditious consultation about the means for resolving a dispute between the parties.

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<sup>945</sup> Article 312 of UNCLOS regulates that a state party may propose specific amendments to the Convention, other than those relating to activities in the sea-bed and ocean floor and subsoil beyond the limits of national jurisdiction, and request the convening of a conference to consider such proposed amendments. The Secretary-General of the UN shall then circulate such communication to all states parties and if not less than one half of the states parties reply favourably to the request within 12 months from the date of the circulation, the Secretary-General shall convene the conference.

<sup>946</sup> See; UNSC, 'Document S/25704, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)', para. 20. See also; Boyle and Chinkin, *The Making of International Law*, p. 113.

<sup>947</sup> See; Chris Whomersley, 'How to Amend UNCLOS and Why It Has Never Been Done' (2021) 9 *Korean Journal of International and Comparative Law* 72.

<sup>948</sup> Concerning the point that states are not the sole law-makers in international law, see; Eric C. Ip, 'Globalization and the Future of the Law of the Sovereign State' (2010) 8 *International Journal of Constitutional Law* 636, p. 637. With regard to international law-making by non-state actors, see the contributions in Catherine Brölmann and Yannick Radi, *Research Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar Publishing Limited 2016), Part III International Lawmaking Beyond the State; Ramses A. Wessel, Institutional Lawmaking: The Emergence of a Global Normative Web, pp. 179-199; Antonios Tzanakopoulos, Domestic Judicial Lawmaking, pp. 222-241; Mara Tignino, Quasi-Judicial Bodies; Michael S. Barr, International Lawmaking by Hybrid Bodies: The Case of Financial Regulation, pp. 262-285; Barbara K. Woodward, International Lawmaking and Civil Society, pp. 286-304; Jörg Kammerhofer, Lawmaking by Scholars, pp. 305-325. See also; Boyle and Chinkin, *The Making of International Law*, pp. 41-97.

Once the procedural preconditions in Section 1 are satisfied, the next issue is which disputes are subject to the compulsory dispute settlement system under UNCLOS. This thesis has examined matters relating to the applicability of compulsory jurisdiction by dividing them into two categories. The first category was the exercise of compulsory jurisdiction itself. The jurisprudence of Part XV tribunals shows that only when there is a substantive link between the dispute at issue and the invoked provisions of UNCLOS can the compulsory measures be resorted to. Moreover, it has been acknowledged that the declaration to choose the preferred means following Article 287 can be made upon condition(s), and the principle of reciprocity would then be applied to the purview of jurisdiction of that chosen forum. Additionally, Part XV tribunals have pronounced that claims solely based on Article 300 but not raised in connection with other provisions of UNCLOS cannot be acceptable. It has been continuously confirmed that this article cannot be a ground for arguing the abuse of legal process concerning unilaterally commenced proceedings. Furthermore, having encountered controversies over the nature of the dispute in so-called mixed disputes cases, Part XV tribunals have crafted a new methodology to characterise the nature of the claims and showed that this methodology may be applied to other contexts beyond territorial sovereignty matters.

The second category concerned the rules in Section 3 of Part XV. As Article 286 says, the ‘dispute’ to which the compulsory jurisdiction under UNCLOS is applicable is one that does not fall under the exceptions in Section 3.<sup>949</sup> Articles 297 and 298 regulate respectively the automatic limitations and optional exceptions to the compulsory measures in Section 2. Part XV tribunals have clarified the effects of these two provisions by showing exactly when each of the exception clauses can be applied. Therefore, Part XV tribunals have recently confirmed that disputes about coastal state’s exercise of sovereign rights or jurisdiction should fall within the purview of the compulsory jurisdiction unless expressly excluded by Articles 297(2) and (3). This refuted the orthodox view of the meaning of Article 297(1) that only the enumerated cases the provision would be subject to Part XV procedures. Moreover, Part XV tribunals have clarified which disputes may satisfy either of the excludable kinds of disputes set out in Articles 298(1).

This thesis has proved that Part XV tribunals’ law-making can be seen in the issues relating to the exercise of compulsory jurisdiction over other-than UNCLOS matters. Since the Convention is not a self-contained treaty, it inevitably needs to rely on other rules of

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<sup>949</sup> Nordquist and others, *United Nations Convention on the Law of the Sea 1982: A Commentary*, para. 286.6.

international law to regulate various rights and obligations within it. Therefore, how and to what extent the compulsory jurisdiction may stretch to such external matters are crucial questions for the overall functioning of the dispute settlement system under UNCLOS. The answers on this issue have been provided by Part XV tribunals. They have consistently applied other rules of international law by virtue of Article 293 only when the main thrust of the dispute was based on the rights and obligations within UNCLOS. In addition, the established jurisprudence of Part XV tribunals has shown that they may exercise incidental jurisdiction over ancillary matters beyond the four corners of the Convention necessary to resolve the UNCLOS dispute. The effect of the *renvoi* element in the Convention and the exact meaning of a *contrario* reading of Article 298(1)(a)(i) have been also confirmed by Part XV tribunals.

In Chapter 1, we set out our theoretical assumption that international courts may create and shift the normative expectations of other subjects of international law through the clarification of a norm in interpreting a treaty. What we can see from the case analysis above is that Part XV tribunals have contributed to the development of the Part XV system through the clarification of the rules within it, which has eventually led to the creation of others' normative expectations of Part XV rules. Considering the general close relationship between the procedural law and the courts and tribunals that apply it to the given circumstances, no other subjects of international law could have had such a huge impact on the continuing development of this system. Like other examples of judicial law-making of procedural law, the making of the Part XV system has been a process of defining what it is for and how it works based on the tribunals' self-understanding of their roles and functions. Thus, all the above findings show the features of the compulsory dispute settlement system of UNCLOS that were made by judges, not others.

## 8. Conclusion

The present thesis began by raising a question: If judicial law-making is inevitable in the process of international adjudication, what rules have international courts and tribunals made concerning the Part XV system of UNCLOS? By looking into all the judicial determinations of Part XV tribunals, we were able to see their contributions to the development of Part XV rules. They did this by creating additional requirements or conditions upon certain rights of states parties to fill the gaps between the texts of UNCLOS Part XV and the reality of actual disputes. When necessary, they crafted a specific methodology for dealing with novel questions that had never been expected by the drafters while negotiating the Part XV system. Moreover, Part XV tribunals have clarified what states parties should do and not do when seeking to resolve disputes by recourse to the compulsory procedures within the Convention. Above all, the approaches to the interpretation and application of Part XV rules taken by the different tribunals did not result in contradictions or a lack of consistency between them. Of course, many aspects still need to be further developed, created, filled or clarified. However, these points rather show that the law-making of Part XV by the courts and tribunals so far is not the end but will continue in future compulsory proceedings.

It has been almost 25 years since the first case was submitted to the compulsory dispute settlement procedures under UNCLOS Part XV.<sup>950</sup> The current research was conducted based on the thought that we should look back on how the development has been up to now, before moving on to the next 25 years and beyond. As mentioned earlier, most of the academic works of many authors have focused on widely known cases, certain topics or recent trends. This thesis, on the other hand, has taken a more comprehensive perspective to cover even the less-noticed cases and see the overall changes and development found in the case-law of Part XV tribunals. This was based on the assumption that the most feasible way to know how the compulsory system of Part XV works and functions would be by examining the actual cases submitted accordingly.<sup>951</sup> Therefore, this thesis was meant to present a different perspective to supplement the existing academic works, not to

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<sup>950</sup> As of 2022. The first case under UNCLOS Part XV was the *M/V Saiga (No.2)* case, which was originally initiated by the unilateral institution of the arbitral proceedings in accordance with Annex VII of UNCLOS of the applicant to this case on 22 December 1997. Later, this case was transferred to ITLOS following the agreement made between the parties.

<sup>951</sup> Karaman, *Dispute Resolution in the Law of the Sea*, p 17.

undermine the significance of the contributions of other authors.

In light of the concept of judicial law-making as the creation, development or change of normative expectations of other subjects of international law by international adjudication, the analysis in this research shows that the effect of judicial law-making on the compulsory dispute settlement system under UNCLOS was quite clear. Thus, this thesis concludes that Part XV tribunals have made Part XV of UNCLOS and will continue to do so in the face of many new questions and challenges.

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