Interpretation and Application of Article 298 of the Law of the Sea Convention in Recent Annex VII Arbitrations: An Appraisal

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Abstract

Article 298 of the U.N. Convention on the Law of the Sea allows State Parties to exclude certain categories of disputes from the compulsory procedures entailing binding decisions. This provision serves as a "safety valve" by excluding sensitive issues mainly related to sovereignty. This article examines the three recent Annex VII Arbitral Awards (the *South China Sea Arbitration*; the *Arctic Sunrise Arbitration*; and the *Chagos Marine Protected Area Arbitration*) that assessed the interpretation and application of Article 298.

Keywords: LOS Convention, compulsory procedures, *Chagos Arbitration*, *Arctic Sunrise Case*, *South China Sea Arbitration*

I. Introduction

Article 298 of the United Nations Convention on the Law of the Sea (hereinafter the LOSC or the Convention)[1] allows a State to declare when signing, ratifying, or acceding to the Convention, or at any time thereafter, that it does not accept the procedures available under Section 2 of Part XV of the Convention in relation to five categories of disputes, namely those relating to: sea boundary delimitations; historic bays or titles; military activities; law enforcement activities; and issues relating to the maintenance of international peace and security which are being dealt with by the Security Council of the United Nations.[2] Such declarations have been made by a number of States.[3]

The interpretation and application of Article 298 has been at the center of three recent cases submitted to Annex VII arbitral tribunals under the LOSC. In the *South China Sea Arbitration*,[4] China refused to participate in the proceedings, relying in part on its Article 298 declaration. In the *Arctic Sunrise Arbitration* between the Netherlands and Russia,[5] the Tribunal's jurisdiction also turned in part, on the interpretation and application of Article 298(1)(b). The *Chagos Marine Protected Area Arbitration* between Mauritius and the United Kingdom also involved the choice between an expansive or a restrictive interpretation of Article 298.[6]

Article 298 was a compromise between State sovereignty and the compulsory dispute settlement procedures in the Convention,[7] and serves as a "safety valve" by allowing State Parties to exclude certain disputes related to sensitive issues of sovereignty from the application of Section 2 of Part XV in order to accommodate near-global acceptance of the Convention.

This article focuses on the relevant issues arising in the above-mentioned three recent cases concerning the interpretation and application of Article 298, and in particular paragraph 1 of that Article. The first section introduces the general background and purpose of Article 298 and points out the importance of the existence of a "dispute concerning the interpretation or application of this Convention"[8] that is necessary in order to trigger the compulsory procedures. The second part discusses three core issues related to the "interpretation or application" of the Convention stipulated in Article 298(1)(a), namely: "maritime delimitation;" "historic bays or titles;" and "concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory." The third part discusses the wording regarding disputes concerning "military activities" and "law enforcement activities" of the type found in Article 298 (1)(b). Finally, a number of conclusions will be drawn.

II. Limitations Applied in Compulsory Procedures under the LOS-C~~onvention~~

Other articles in this collection describe the general background of Part XV of the Convention and the relationship between the three different sections of Part XV.[9] Article 298 falls within Section 3 and establishes a set of optional exceptions to the general rule of Section 2. These exceptions all relate to important sovereignty or security concerns.

The balance to be struck between international law and State sovereignty has always been contentious and the Convention strikes a well-designed compromise between State sovereignty and compulsory dispute settlement. The scant normative or descriptive criteria in the Convention in respect of maritime delimitation and historic bays and titles coupled with the high stakes often involved in maritime territorial issues rendered acquiescence to compulsory procedures

unacceptable to some States.[10] Moreover, international adjudicative processes may not necessarily be the most appropriate means to resolve disputes relating to armed conflict and naval activities in maritime areas where the freedoms of the high seas are exercised.[11] In response to these concerns, the informal working group charged during the negotiation of the Convention with the settlement of disputes agreed as early as 1974 determined that certain matters were so sensitive that they should not be subject to the compulsory and binding dispute settlement procedures being envisaged for inclusion in the Convention.[12]

The principal purposes of the Convention's compulsory procedures was: to provide authoritative mechanisms for determining legal questions relating to the "interpretation or application" of the Convention; to guarantee the integrity of the text; and to safeguard its implementation and development by States Parties. Compulsory jurisdiction in the LOSC is designed to ensure authoritative articulation of the meaning of the public order established by the Convention and to enhance compliance with its substantive principles and rules. The obligations in the Convention to establish and cooperate in the development of a variety of complementary agreements and institutions entails both rights and responsibilities. Compulsory jurisdiction exists to ensure that a failure to reach agreement in these contexts does not result in activities at sea that violate the Convention, including its environmental and conservation norms.[13] From this point of view, compulsory dispute settlement was designed to prevent fragmentation of the conventional law of the sea.[14] As Anne Sheehan writes:

> Whilst it may seem that allowing exceptions to the compulsory and binding dispute settlement procedures detracts from the "package deal" nature of [the Convention], the fact is that the dispute settlement provisions were a "package deal" themselves.

> Without the exceptions listed in Article 298, many States would not have been prepared to accept compulsory dispute settlement at all.[15]

The interpretation and application of Article 298 similarly needs to balance the States Parties' sovereignty with the integrity of the Convention.

The ambit of Article 298 is subject to two implied limitations, namely, the existence of a dispute and that the dispute concerns the interpretation or application of the Convention. Adjudicative bodies must evaluate these two limitations in order to determine whether they have jurisdiction over a matter. In the process of determining the existence of a dispute, judicial and arbitral bodies often conflate the question of the existence of a dispute with the second that the dispute must relate to the "interpretation or application" of the treaty. For example, in *Ecuador v. United States of America*,[16] Ecuador instituted arbitral proceedings concerning the interpretation and application of Article II(7) of the Treaty between the United States and Ecuador concerning the Encouragement and Reciprocal Protection of Investment (the U.S.-Ecuador BIT), pursuant to Article VII of the Treaty. In its *Award*, the Arbitral Tribunal points out that:

> In construing the meaning of this grant of jurisdiction to State-to-State arbitral tribunals, the Tribunal must determine whether a "dispute" exists between the Parties. However, there is a qualification regarding which disputes the Tribunal may assert jurisdiction over – it must be a dispute "concerning the interpretation or application of the Treaty." More precisely, the issue to be addressed is whether there is a dispute between the Parties over the interpretation or application of Article II(7) of the Treaty.[17]

Sometimes a tribunal may readily conclude that these requirements have been satisfied. For example, in the *Arctic Sunrise Arbitration*, the Tribunal indicated that it "is satisfied that there is a dispute between the Parties concerning the interpretation and application of the Convention."[18] That said, it must be noted that the submissions of States to international adjudicative bodies rarely

contain an express request that a tribunal provide an interpretation or make the meaning of certain articles or paragraphs in the Convention clear. Instead, disputes appear in various manners and tribunals must identify the boundary between "interpretation or application" of disputes over which it would have jurisdiction and other kinds of disputes. There is no universal standard as to what constitutes "interpretation or application" and tribunals and courts proceed on a case-by-case basis.

In determining the existence of a dispute concerning the interpretation or application of a treaty between two parties, judicial or arbitral bodies take into account the "formulation of a dispute" by the applicant and assess the question on an "objective basis."[19] In the case between Spain and Canada on the topic of fisheries jurisdiction, the International Court of Justice (ICJ) stated that:

> [p]aragraph 1 of Article 40 of the Statute of the Court requires moreover that the "subject of the dispute" be indicated in the Application; and, for its part, paragraph 2 of Article 38 of the Rules of Court requires "the precise nature of the claim" to be specified in the Application. In a number of instances in the past the Court has had occasion to refer to these provisions. It has characterized them as "essential from the point of view of legal security and the good administration of justice" and, on this basis, has held inadmissible new claims, formulated during the course of proceedings, which, if they had been entertained, would have transformed the subject of the dispute originally brought before it under the terms of the Application [and] [i]t is for the Court itself, while giving particular attention to the formulation of the dispute chosen by the Applicant, to determine on an objective basis the dispute dividing the parties…[20]

Annex VII tribunals under the Convention have taken a similar approach. In the *Chagos Arbitration*, the Tribunal was asked to find that "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."[21] On the face of it, the dispute was a dispute about

the interpretation of the term "coastal state,"[22] but the Tribunal concluded that in fact the dispute concerned territorial sovereignty.[23] The United Kingdom's second P~~p~~reliminary O~~o~~bjection to jurisdiction was that "a tribunal has no jurisdiction under article 286, Part XV, section 2 unless (a) there is a dispute between the parties concerning the interpretation or application of the Convention ... [n]either of these requirements has been met as regards Mauritius' other (non-sovereignty) claims in the present case,"[24] and referred further to the absence of a dispute in later paragraphs in its Preliminary Objections.[25] The Tribunal pointed out that:

> [T]he Tribunal evaluates where the weight of the Parties' dispute lies. In carrying out this task, ...the Tribunal is entitled, and indeed obliged, to consider the context of the submission and the manner in which it has been presented in order to establish the dispute actually separating the Parties.[26]

It is the responsibility of a tribunal to evaluate the core dispute between the parties in order to prevent one party from presenting a dispute which is outside the jurisdiction of the tribunal in whole or in part. In doing so, a tribunal has a relatively broad discretion to identify, and even redefine, the dispute. As a result, a tribunal's view of the "core issue" may deviate from that asserted in a State's presentation.

In the *South China Sea Arbitration*, the Philippines~~'~~ in its First Submission asked the Tribunal to declare that "China's maritime entitlements in the South China Sea, like those of the Philippines, may not extend beyond those expressly permitted by the United Nations Convention on~~by~~ the Law of the Sea."[27] Arguably, a State cannot identify a dispute by repeating the rights and obligations that exist according to the provisions of the Convention without clearly expressing the *de facto* breach of the relevant provisions. The Tribunal dealt with the Philippines' First and Second

Submissions together.[28] In the Tribunal's view, "the Philippines' Submissions No. 1 and 2 reflect a dispute concerning the source of maritime entitlements in the South China Sea and the interaction of China's claimed 'historic rights' with the provisions of the Convention."[29] The Tribunal treated this dispute as "a dispute about historic rights in the framework of the Convention."[30] In doing so, the Tribunal combined the two claims and conflated the core issue of the first with that of the second so as to find that a dispute existed between the two parties.

III. "Interpretation or Application of the Convention" as a Limitation in Article 298(1)(a)

The wording "interpretation or application of the Convention" is in the text of Article 298(1)(a) with respect to Articles 15, 74 and 83 of the Convention. This confirms that the main purpose of the compulsory procedure is to resolve disputes arising from differences of "interpretation or application" of the Convention.

1. Maritime Delimitation

Article 298(1)(a)(i) applies to "disputes *concerning* the interpretation or application of articles 15, 74 and 83 *relating to* sea boundary delimitations..."[31] These italicised terms must be interpreted in accordance with, among other things, the principle of good faith,[32] bearing in mind that the language of "sea boundary delimitations" is only found in Article 298(1)(a) of the Convention and not elsewhere. The same approach also applies to the term "concerning" in the military activity exception (paragraph (c)).[33] Based on this, it has been argued that both paragraphs should be interpreted non-restrictively.[34]

Articles 74 and 83 leave both negotiators and third party decision-makers with considerable discretion in determining maritime boundaries such that there is room to doubt whether there is

any legal rule at all.[35] Sir Robert Jennings has questioned whether the Convention formula differs in reality from a decision *ex aequo et bono*.[36] In any event, it is clear that matters "concerning the interpretation or application of articles 74 and 83" as well as matters "relating to sea boundary delimitations" potentially have a broad meaning.

Prior to the *South China Sea Arbitration*, China made a declaration pursuant to Article 298 activating all of the optional exceptions to jurisdiction.[37] In the "Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines," of 7 December 2014, China recalled its declaration and stated that "[t]he issues presented by the Philippines for arbitration constitute an integral part of maritime delimitation between China and the Philippines,"[38] and are thus "falling within the scope of the declaration filed by China in 2006 in accordance with the Convention, which excludes, *inter alia*, disputes concerning maritime delimitation from compulsory arbitration and other compulsory dispute settlements."[39]

The Tribunal, however, held that:

> A maritime boundary may be delimited only between States with opposite or adjacent coasts and overlapping entitlements. In contrast, a dispute over claimed entitlements may exist even without overlap, where – for instance – a State claims maritime zones in an area understood by other States to form part of the high seas or the Area for the purposes of the Convention.
>
> In these proceedings, the Philippines has challenged the existence and extent of the maritime entitlements claimed by China in the South China Sea. This is not a dispute over maritime boundaries.[40]

In expounding on the term "concerning," with respect to the arrest or detention of vessels, in the M/V "*Louisa*" *Case*, the International Tribunal of the Law of the Sea (ITLOS) held that "the

use of the term 'concerning' in the declaration indicates that the declaration does not extend only to articles which expressly contain the word 'arrest' or 'detention' but to any provision of the Convention having a bearing on the arrest or detention of vessels".[41] Similarly, in analysing the scope of disputes "relating to the territorial status" in the *Aegean Sea Continental Shelf Case*, the ICJ held that:

> [t]he question for decision in whether the present dispute is one 'relating to the territorial status of Greece', not whether the rights in dispute are legally to be considered as "territorial" rights; and a dispute regarding entitlement to and delimitation of areas of continental shelf tends by its very nature to be one relating to territorial status.[42]

The Tribunal noted in the *South China Sea Arbitration* that Article 298(1)(b) applies to "disputes concerning military activities" and not to "military activities" as such. Accordingly, the Tribunal considered the relevant question to be whether the dispute itself concerns military activities rather than whether a party has employed its military in some manner in relation to the dispute.[43] The interpretation of "concerning" by the Tribunal in one context can be seen as inconsistent with its view of the wording in a different context.

Of further note is the *Conciliation between the Democratic Republic of Timor-Leste and the Commonwealth of Australia*. Timor-Leste initiated compulsory conciliation proceedings against Australia based on Article 298(1)(a)(i) with respect to the following matters:

> First ... the Commission can assist the Parties to reach an agreement on the delimitation of permanent maritime boundaries...[A] second task for the Commission is to assist Australia and Timor-Leste to agree on appropriate transitional arrangements in the disputed maritime areas...[A] third task for the Commission, and one related to the issue of transitional arrangements, concerns the post-CMATS arrangements.[44]

Australia objected that these submissions amounted to an attempt to expand the competence of the Commission to include issues that are "outside Article 298 of [the Convention], because they do not *concern* the matters in that article."[45] The Commission, however, disagreed noting that: "[i]t is apparent from an examination of these articles of the Convention [*i.e.,* articles 15, 74 and 83] that they address not only the *actual delimitation* of the sea boundary between States with opposite or adjacent coasts, but also the question...that the Parties are called on to apply pending delimitation."[46] Thus, the Commission concluded that the matters raised by Timor-Leste did not fall outside of the competence of the Commission. In doing so the Commission interpreted the term "disputes concerning the interpretation or application of articles 15, 74 and 83" as not being confined to disputes over the maritime boundary delimitation itself.

In view of the above, in order for a adjudicative body to establish its competence and jurisdiction over cases it must proceed carefully in its interpretation of Article 298(1)(a)(i) and avoid contradictory interpretations. An interpretation of Article 298(1)(a)(i) which fails to give full effect to a State's declaration disturbs the balance between States' sovereignty and compulsory procedures and may lead State P~~p~~arties to distrust the compulsory procedures under the Convention.

2. Historic Bays, Historic Titles and Historic Rights

The optional exceptions allowed by Article 298 include "disputes involving historic bays or titles." Of the recent arbitrations, only the *South China Sea Arbitration* touches upon this exception.

The Philippine~~'s~~' Submission 2 was framed as follows:

> 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 [the LOSC].[47]

In the 2014 "Position Paper," China, while defending its non-participation in the *Arbitration* on a number of grounds, did not mention or clarify the legal status of the U-shaped line (nine-dash line) and related historic rights in the South China Sea.[48]

While there is no specific definition of historic rights in international law, the term "historic rights" differs from "historic waters", "historic bays", and "historic titles".[49] The clarification of these terms and the relationship between them was a crucial task for the Tribunal since the definition of these terms has implications for the Tribunal's jurisdiction under Article 298.

The Tribunal acknowledged that China's silence as to the legal status of the U-shaped line and related historic rights in the South China Sea made it difficult to assess China's claims and forced it to consider China's actual conduct.[50] In situations involving historic rights, it is always difficult to define whether a dispute is about maritime delimitation. However, the Tribunal took the view that the relevant provision of the Convention is "clear that the exception extends to 'disputes...involving historic bays or titles,' whether or not such disputes involve delimitation."[51] The Tribunal reviewed the relevant drafting history of the Convention respecting this wording, and sought to clarify the scope of the above terms.[52] The Tribunal considered that:

> the reference to "historic titles" in Article 298(1)(a)(i) of the Convention is accordingly a reference to claims of sovereignty over maritime areas derived from historical circumstances... Other "historic rights," in contrast, are not mentioned in the Convention, and the Tribunal sees nothing to suggest that Article 298(1)(a)(i) was intended to also exclude jurisdiction over a broad and unspecified category of possible claims to historic rights falling short of sovereignty.[53]

The Tribunal examined China's historical claims and concluded that "China has invoked its 'historic rights' (li shi xing quan li, or 历史性权利) in the South China Sea, rather than historic title (li shi xing suo you quan, or 历史性所有权)", as China had not at any point claimed "sovereignty over the entirety of the South China Sea."[54] Based on this, the Tribunal concluded that it had jurisdiction to consider the Philippines' Submissions No. 1 and 2.

A critical problem which the Tribunal did not touch upon is the relationship between "disputes involving historic bays or titles" and the "interpretation or application of the Convention." Although Article 298(1)(a)(i) does not qualify "disputes involving historic bays or titles" by reference to the "interpretation or application of the Convention," Articles 286 to 288, as mentioned above, imply this qualification. Thus, the argument is that all disputes outside the scope of "interpretation or application of the Convention," including those involving historic rights, are excluded from the compulsory procedures. Seen in this light, the reason Article 298 only mentions "historic bays" and "historic titles" is that these are the terms used elsewhere in the Convention (Article 10(6) refers to "historic bays" and Article 15 to "historic title"). Although the expression "existing rights... traditionally exercised in such waters" occurs in Article 47(6), and "traditional fishing rights" is used in Article 51(1), both are in the Part of the Convention that deals specifically with the archipelagic States regime (Part IV). The Tribunal recognises this when it stated that: "[t]he only other direct usage of the term [i.e., historic title], [is] in Article 15 of the Convention, where historical sovereignty would understandably bear on the delimitation of the territorial sea. Other 'historic rights', in contrast, are nowhere mentioned in the Convention."[55] Thus, disputes

involving "historic rights" should be regulated by customary international law rather than the Convention. Unfortunately the Tribunal neither explored nor accepted this approach.

This is problematic since in order for the Tribunal to establish jurisdiction over the "historic rights" of China in the South China Sea, it should have made an express reference to particular provisions in the Convention. The term "historic title" seems most relevant. A leading scholar on the law of the sea has opined that "[h]istoric title in Article 298, which is a permissible basis for a State to exempt itself from compulsory dispute settlement, must have a broader meaning than the term historic title in Article 15 where the existence of historic title merely displaces equidistance as a method of delimitation."[56] China appears to take the view that Article 298 should apply to discussions of "historic rights," as evidenced in a short note posted on the website of the Chinese Mission to the European Union that:

> [T]he negotiating history and official languages of the UNCLOS, as well as the wording of its Article 298 show that "historic titles" under Article 298 do not refer to sovereignty only. Consequently, the dispute involving China's historic rights is covered by Article 298, and should be excluded from compulsory arbitration.[57]

The Tribunal rejected China's position.[58]

3. Territorial Sovereignty

While territorial sovereignty disputes is referenced in Article 298(1)(a)(i), the context is 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 … submission [to conciliation]." Arguably, this wording provides no explicit answer regarding jurisdiction over territorial sovereignty.[59] A question exists whether the scope of a tribunal's

"interpretation or application of the Convention" may relate to a so-called "mixed dispute" i.e., a dispute involving territorial as well as a maritime dispute.[60]

It is to be recalled that former ~~then~~ ITLOS President R. Wolfrum addressed this issue in a speech in 2006 where he argued that territorial sovereignty issues as part of a maritime dispute fa~~a~~ll~~s~~ fully within the jurisdiction of law of the sea tribunals.[61] President Wolfrum emphasised that a reading of Article 298(1)(a)(i) *a contrario sensu* indicated~~s~~ that mixed disputes (in the absence of a declaration) fall within a tribunal's compulsory jurisdiction.

In the *Chagos Arbitration*, the Tribunal had to resolve the issue of its jurisdiction by assessing "the extent to which Article 288(1) accords the Tribunal jurisdiction in respect of a dispute over land sovereignty when, as here, that dispute touches in some ancillary manner on matters regulated by the Convention."[62]

The Tribunal adopted the "ancillary jurisdiction" theory to examine its jurisdiction over land territorial issues which *per se* would be outside the scope of the interpretation or application of the Convention. As with ancillary jurisdiction, incidental jurisdiction has long been recognised by international judicial organs. In the 1925 *German Interests Case*, the Permanent Court of International Justice held that:

> It is true that the application of the Geneva Convention is hardly possible without giving an interpretation of Article 256 of the Treaty of Versailles and the other international stipulations cited by Poland. But these matters then constitute merely questions preliminary or incidental to the application of the Geneva Convention. Now 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 in regard to which it has jurisdiction.[63]

In the 1926 *Compagnie pour la Construction du Chemin de Fer d'Ogulin a la Frontiere*, *S.A. Arbitration*, the ownership of property was in dispute and the defendant contested the Tribunal's jurisdiction to decide that question. The Arbitral Tribunal held that the question of ownership was an incidental question and that "incidental questions arising in the decision of a case ought to be examined by the judge competent to decide on the principal issue, unless the law provides otherwise..."[64]

The above approach may be criticised as undermining the principle of *extra compromisum arbiter nihil facere potest*. The ICJ, for example, has refrained from accepting jurisdiction in several cases involving mixed disputes. In the 1954 *Monetary Gold Case*[65] and the 1995 *East Timor Case*,[66] the ICJ declined jurisdiction on the grounds that in each case the matter was dependent on the prior judgment of other hitherto un-submitted disputes with a third party, jurisdiction over which was absent due to the lack of consent from third parties.[67]

In the *Chagos Arbitration*, the majority of the Tribunal concluded that Mauritius' claim reached beyond the idea of ancillary jurisdiction. The Tribunal was convinced that:

> Article 298(1)(a)(i) relates only to the application of the Convention to disputes involving maritime boundaries and historic titles. At most, an *a contrario* reading of the provision supports the proposition that an issue of land sovereignty might be within the jurisdiction of a Part XV court or tribunal if it were genuinely ancillary to a dispute over a maritime boundary or a claim of historic title...This case, however, is not such a dispute...The Parties' dispute regarding sovereignty over the Chagos Archipelago does not concern the interpretation or application of the Convention.[68]

Thus, the Tribunal confirmed that while in some instances a minor issue of territorial sovereignty could indeed be ancillary to a dispute concerning the interpretation or application of the Convention, if the underlying dispute regarding sovereignty over the land territory is

predominant, an adjudicative body established pursuant to the Convention has no jurisdiction to address the dispute.

IV. "Interpretation or Application of the Convention" as a Limitation in Article 298(1)(b)

Article 298(1)(b) allows a party to exclude:

> 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.

This provision covers military activities and law enforcement activities with regard to "marine scientific research" and "fisheries". Both the *South China Sea Arbitration* and the *Arctic Sunrise Arbitration* touched upon one or more of these terms.

1. Military Activities

In the *South China Sea Arbitration*, the Tribunal was obliged to consider the military activities exception its applicability in order to determine its jurisdiction.[69] The Philippines argued that China had "repeatedly characterised its island-building as being for civilian purposes",[70] and "'mixed-use projects' and situations 'in which a military unit is used to protect other activities' are not covered by the military activities exception".[71] The Philippines also noted that "[t]he Chinese People's Liberation Army is expressly tasked by the constitution to 'participate in national reconstruction', and has an extensive record of civil projects."[72]

In assessing whether China's land reclamation activities at the seven reefs were military in nature, the Tribunal took note of China's repeated statements that its installations and island-

building activities were intended to fulfill civilian purposes.[73] This led the Tribunal to conclude that it:

> will not deem activities to be military in nature when China itself has consistently resisted such classifications and affirmed the opposite at the highest level. Accordingly, the Tribunal accepts China's repeatedly affirmed position that civilian use comprises the primary (if not the only) motivation underlying the dramatic alterations on Mischief Reef. As civilian activity, the Tribunal notes that China's conduct falls outside the scope of Article 298(1)(b) and concludes that it has jurisdiction to consider the Philippines' Submission.[74]

As for China's interference in the rotation and resupply of Philippine personnel at Second Thomas Shoal, the Philippines argued that the military activities exception in Article 298(1)(b) of the Convention did not exclude jurisdiction because the relevant activities consisted of law enforcement activities "largely carried out by CCG [China Coast Guard] and CMS vessels seeking to enforce China's purported 'jurisdiction'."[75]

The Tribunal concluded that:

> the essential facts at Second Thomas Shoal concern the deployment of a detachment of the Philippines' armed forces that is engaged in a stand-off with a combination of ships from China's Navy and from China's Coast Guard and other government agencies.[76]

Although aware that these vessels were not military vessels, the Tribunal decided that "these facts fall well within the exception" based on the fact that "China's military vessels have been reported to have been in the vicinity."[77] Thus, the Tribunal set a low threshold for the application of Article 298(1)(b). The conflicting interpretation and application of Article 298(1)(b) by the Tribunal is obvious – it treated China's land reclamation activities as civil projects even though they "involve military personnel" on the one hand, but on the other, it deemed "the involvement of the military

forces" as "a quintessentially military situation" when Philippines provided resupply to its stationed military personnel at Second Thomas Shoal.[78]

2. Law Enforcement Activities

Article 298(1)(b) allows a State to exclude disputes concerning law enforcement activities from compulsory procedures entailing binding decisions provided that they are enforcement activities "in regard to the exercise of sovereign rights or jurisdiction" that are "excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3". Paragraph 2 deals with marine scientific research and paragraph 3 deals with fisheries enforcement activities by the coastal State.

In the *Arctic Sunrise Arbitration*, Russia, while taking the position of non-participation, stressed in its *Note Verbale* of 22 October 2013 that its investigative activities related to the *Arctic Sunrise* and its crew were covered by Russia's declaration under Article 298 with respect to disputes concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction.[79]

The Tribunal, however, accepted the submission of the Netherlands that Russia's declaration was broader than that permitted by Article 298. The Tribunal observed that a declaration cannot exclude from compulsory and binding jurisdiction "every dispute" that concerns "law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction."[80] It can only exclude disputes concerning law enforcement activities that are covered by paragraphs 2 or 3 of Article 297 and the dispute in this situation related to enforcement procedures in relation

to a safety zone established for exploitation of the resources of the continental shelf and not in relation to either marine scientific research or fisheries.[81]

In the *South China Sea Arbitration*, the Tribunal also pointed out that "the law enforcement activities exception concerns a coastal State's rights in its exclusive economic zone and does not apply to incidents in a territorial sea. Thus, the exception could not be relevant to incidents at Scarborough Shoal."[82]

The literature generally supports a relatively strict interpretation of this provision. For example, Natalie Klein takes the view that: "[c]learly, from the terms of Article 298(1)(b), only law enforcement activities pertaining to fishing or marine scientific research in the EEZ may be excluded as law enforcement."[83] Similarly, former ITLOS Judge Tullio Treves has opined that "disputes concerning law enforcement activities...must be interpreted restrictively, as otherwise one could argue that law enforcement activities are to be seen together with the sovereign rights or jurisdiction they protect."[84]

V. Conclusions

Recent Annex VII arbitrations dealing with the interpretation of Article 298 are confusing and self-contradictory. Some of the Annex VII arbitral tribunals have failed to identify whether or not there is a dispute. In other cases they have adopted an unduly narrow interpretation of the term "disputes concerning or relating to sea boundary delimitation" in Article 298(1)(a) so as to read it as disputes only over maritime boundary delimitation itself. The *South China Sea Tribunal* did not recognise that the term "disputes involving historic bays or titles" has to be qualified by the term

"interpretation or application of the Convention" and did not take into account the drafting history of the Convention as well as previous jurisprudence.

The fundamental purpose of the dispute settlement mechanism under the Convention, as a component of the modern legal order of the oceans established by the Convention, is to contribute to the peaceful settlement of maritime disputes. The Convention proclaims in its Preamble the common belief among States Parties that "the codification and progressive development of the law of the sea achieved in this Convention will contribute to the strengthening of peace, security, cooperation and friendly relations among all nations ....".[85] In order to achieve these objectives, Annex VII and other tribunals must interpret and apply the dispute settlement provisions of the Convention in a comprehensive and integral manner. If the dispute settlement provisions are misinterpreted the outcome will not only fail to settle particular disputes, but additionally will intensify the conflicts and further complicate the situations in disputed areas.

This article has argued that Article 298 is a safety valve critical in maintaining the balance between the sovereignty of States and the integrity of the Convention. Future Annex VII arbitral tribunals must pay closer attention to the purpose and background of Article 298.

[1] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 *U.N.T.S.* 396.

[2] *Ibid*., Art. 298(1).

[3] For the declarations, see the Division of Ocean Affairs and the Law of the Sea (DOALOS) website at <www.un.org/depts>.

[4] *Arbitration between the Republic of the Philippines and the People's Republic of China, UNCLOS Annex VII Arbitral Tribunal*, *Award*, 12 July 2016, available on the Permanent Court of Arbitration website at <www.pca-cpa.org>.

[5] The *"Arctic Sunrise" Arbitration* (Kingdom of the Netherlands v. Russian Federation), *Award on the Merits*, 14 August 2015, available on the PCA website, supra note 4.

[6] *Chagos Marine Protected Area Arbitration* (Mauritius v. United Kingdom)*, Final Award*, 18 March 2015, available on the PCA website, supra note 4.

[7] Myron H. Nordquist, Shabtai Rosenne and Louis B. Sohn (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary,* (Martinus Nijhoff, 1989, Vol.5) (the *Virginia Commentary*), 109-110.

[8] LOSC, supra note 1, Art. 288(1).

[9] See: Robin Churchill, "The General Dispute Settlement System of the U.N. Convention on the Law of the Sea: Overview, Context and Use;"; Nigel Bankes, "Precluding the Applicability of Section 2 of Part XV of the Law of te Sea Convention"; and James Harrison, "Defining Disputes

and Characterizing Claims: Subject-Matter Jurisdiction in Law of the Sea Convention Litigation" in this issue~~collection~~.

[10] Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge University Press, 2005), 278-279.

[11] *Ibid*., 313.

[12] *Virginia Commentary*, supra note 7, 109-110.

[13] Bernard H. Oxman, "Complementary Agreements and Compulsory Jurisdiction," (2001) 95 *American Journal of International Law* 277, 278.

[14] Alan E. Boyle, "Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction," (1997) 46 *International and Comparative Law Quarterly* 37, 39.

[15] Anne Sheehan, "Dispute Settlement under UNCLOS: the Exclusion of Maritime Delimitation Disputes," (2005) 24 *University of Queensland Law Journal* 165, 166.

[16] *The Republic of Ecuador v. The United States of America*, *Award*, 29 September 2012, available on the PCA website, supra note 4.

[17] *Ibid*., para. 208.

[18] The *Arctic Sunrise Arbitration*, supra note 5, para. 143.

[19] A dispute in an international judicial or arbitral procedure is "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons." *Mavromattis Palestine Concessions (Greece v United Kingdom)* (Preliminary Objections) *Permanent Court of International Justice Reports*, Series A, No 2, 11.

[20] *Fisheries Jurisdiction Case* (Spain v. Canada), *Jurisdiction of the Court*, [1998] *I.C.J. Reports*, 432, paras. 29-30.

[21] *Chagos Arbitration*, supra note 6, para. 158.

[22] *Ibid*., para. 176.

[23] *Ibid*., para. 212.

[24] *Ibid*., Preliminary Objections of the United Kingdom, para. 4.1.

[25] *Ibid*., see Preliminary Objections of the United Kingdom, paras. 4.3 and 6.12.

[26] *Ibid*., para. 229.

[27] *South China Sea Arbitration*, supra note 4, para. 112.

[28] The Philippine~~'~~s' Second Submission reads:

> China's claims to sovereign rights 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 expressly permitted by [LOSC].

Ibid., para. 112.

[29] *Ibid*., *Award on Jurisdiction and Admissibility* 29 October 2015, para. 164.

[30] *Ibid*., para. 168.

[31] Emphasis added.

[32] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 *U.N.T.S.* 331, Art. 31.

[33] LOSC, supra note 1, Art. 298(b).

[34] See: Andrew Gou, "Delimitation as an Exception to the UNCLOS Compulsory Dispute Settlement Procedures" (September 16, 2015), available at

<ssrn.com/abstract=2661700 orhttp://dx.doi.org/10.2139/ssrn.2661700> accessed 23 January 2017.

[35] Klein, supra note 10, 245.

[36] Robert Y. Jennings, "The Principles Governing Marine Boundaries", in Kay Hailbronner, *et al*. (eds.), *Staat und Volkerrechtsordnung: Festschrift fur Karl Doehring* (Springer-Verlag, 1989), 397, 408.

[37] See, DOALOS website, supra note 3.

[38] "Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines," 7 December 2014, available at <www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml> accessed 23 January 2017, para. 68.

[39] *Ibid*., para. 72.

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[40] *South China Sea Arbitration*; *Award on Jurisdiction and Admissibility*, supra note 29, paras. 156-157.

[41] *M/V "Louisa"* (Saint Vincent and the Grenadines v. Kingdom of Spain), *ITLOS Reports 2013*, para. 83.

[42] *Aegean Sea Continental Shelf* (Greece v. Turkey) [1978], *Jurisdiction*, [1978] *I.C.J. Reports*, para. 86.

[43] *South China Sea Arbitration*, *Award*, supra note 4, para. 1158.

[44] *Conciliation between The Democratic Republic of Timor-Leste and The Commonwealth of Australia*, *Decision on Australia's Objection to Competence*, 19 September 2016, available on the PCA website, supra note 4, para. 96.

[45] *Ibid*., para. 94 (emphasis added).

[46] *Ibid*., paras. 95-97 (emphasis added).

[47] Philippines' Memorial, 30 March 2014, available on the PCA website, supra note 4, 271.

[48] "Position Paper," supra note 38.

[49] Keyuan Zou and Liu Xinchang, "The Legal Status of the U-shaped Line in the South China Sea and Its Legal Implications for Sovereignty," (2015) 14 *Chinese Journal of International Law* 57.

[50] *South China Sea Arbitration*; *Award*, supra note 4, para. 206—.

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[51] *Ibid*., para. 215.

[52] *Ibid*., paras. 217-225.

[53] *Ibid*., para. 226.

[54] *Ibid*., para. 227.

[55] *Ibid*., para. 226.

[56] Ted L. McDorman, "Rights and Jurisdiction over Resources in the South China Sea: UNCLOS and the Nine-Dash Line," in S. Jayakumar, Tommy Koh and Robert Beckman, (eds.), *The South China Sea Disputes and Law of the Sea* (Cheltenham: Edward Elgar 2014), 144, 152.

[57] China, "A Preliminary Report of the Facts Related to the Issue of Historic Rights Involved in the South China Sea Arbitration and the Applicability of Laws in This Case, 30 June 2016,"

available at <www.chinamission.be/eng/more/SouthChinaSeaIssue160420001/t1376547.htm> accessed 23 January 2017.

[58] See generally: Keyuan Zou, "Historic Rights in the South China Sea Arbitration Case: A Preliminary Reflection", (2016) 1 *Asia-Pacific Journal of Ocean Law and Policy* 268, 271.

[59] *Chagos Arbitration*, supra note 6, para. 215.

[60] See: *Virginia Commentary*, supra note 7, 117.

[61] R. Wolfrum, Statement to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs, New York, 23 October 2006, available at: <www.itlos.org/fileadmin/itlos/documents/statements_of_president/wolfrum/legal_advisors_231006_eng.pdf>.

[62] *Chagos Arbitration*, supra note 6, para. 213.

[63] *Certain German Interests in Polish Upper Silesia*, *Preliminary Objections*, Judgment of 25 August 1925, *P.C.I.J. Series A*, No. 6, 18.

[64] See: Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* (Grotius Publications Limited, 1987), 266-267.

[65] *Monetary Gold Removed from Rome* (Italy v. France, United Kingdom v. United States), [1954], *I.C.J. Reports*, 32-34.

[66] *Case concerning East Timor* (Portugal v. Australia), [1995] *I.C.J. Reports* 105. See also: *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, [2008] *I.C.J. Reports* 2.

[67] See: Xinjun Zhang, "Mixed Disputes and the Jurisdictional Puzzle in Two Pending Cases: Mauritius v. U.K. and The Philippines v. China," (2014) 7 *Journal of East Asia & International Law* 529 , 533.

[68] *Chagos Arbitration*, supra note 6, paras. 218-221.

[69] *South China Sea Arbitration*, supra note 4, para. 130.

[70] *Ibid*., Jurisdictional Hearing Transcript. (Day 2), 74-76 and see also Merits Hearing Transcript (Day 3), 88.

[71] *Ibid*., Merits Hearing Transcript (Day 4), 104 and see also Jurisdictional Hearing Transcript (Day 2), 81-82, (Day 3), 57.

[72] *Ibid*., para. 1013.

[73] *Ibid*., para. 935.

[74] *Ibid*., para. 1028.

[75] *Ibid*., para. 1131.

[76] *Ibid*., para. 1161.

[77] *Ibid*.

[78] *Ibid*.

[79] Russian Federation, *Note Verbale* to the Permanent Court of Arbitration, dated 27 February 2014, available on the PCA website, supra note 4.

[80] "*Arctic Sunrise" Arbitration*, supra note 5, *Award on Jurisdiction*, 26 November 2014, para. 69.

[81] *Ibid.*

[82] *South China Sea Arbitration*, supra note 4, para. 929.

[83] Klein, supra note 10, 313.

[84] Tullio Treves, "The Jurisdiction of the International Tribunal for the Law of the Sea", in P. Chandrasekhara Rao and Rahmatullah Khan (eds.), *The International Tribunal for the Law of the Sea: Law and Practice*, (Kluwer Law International, 2001), 111, 121.

[85] LOSC, supra note 1, P~~p~~reamb~~u~~le~~ar~~, para. 7.