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Editorial Comment

The South China Sea Arbitration: The Clinical Isolation and/or One-sided Tendencies in the Philippines' Oral Arguments

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Abstract

This brief paper comments on the clinical isolation and one-sided tendencies in the Philippines' oral arguments in the South China Sea arbitration, with illustrations from its arguments on (1) negotiation as the agreed exclusive choice for dispute settlement, (2) sovereignty matters, (3) the optional exception of delimitation-related disputes; (4) the optional exception of military activities disputes; and (5) environmental claims.

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Introduction

1. Unilaterally initiating the South China Sea arbitration, the Philippines essentially presented claims regarding (1) entitlements in a general way and/or the so-called nine-dash line (the dotted line in usual Chinese discussion); (2) the definition/status of several features and their entitlements; and (3) certain activities. China does not accept or participate in the proceedings and published on 7 December 2014 a 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[1] (China Position Paper). China argued that the Tribunal manifestly has no jurisdiction, essentially for the reasons that the subject matter of the Philippines' claims is in essence territorial sovereignty, that the two States have reached agreement to choose negotiation exclusively for settlement of relevant disputes, and that its 2006 declaration under Article 298 excepts all the disputes that can be excepted from the applicability of Section 2 of Part XV of the UNCLOS, including that presented by the Philippines, the subject matter of which constitutes an integral part of a delimitation dispute between the Philippines and China, or the resolution of which would amount to a de facto delimitation. In July 2015 the Arbitral Tribunal established at the request of the Philippines held oral hearings in the case unilaterally submitted by the Philippines. The transcripts were subsequently made public.[2] Apparent from these transcripts are the clinical isolation and/or one-sided tendencies in the Philippines' oral arguments: at times the Philippines took a particular instrument, provision, or maritime feature—or more of these—in isolation and built its arguments on such an approach; at times the Philippines presented only materials favorable to itself, while ignoring the need for a full picture. It would be of value to inquiring readers if some more balanced analyses are presented, from the perspective of an academic commentator. As many of the issues have been discussed in the China Position Paper as well as in my own paper, *The South China Sea Arbitration (The Philippines v. China): Potential Jurisdictional Obstacles or Objections*[3] (Yee Paper), I will only highlight or reemphasize some here, without attempting any comprehensive treatment. I will show the Philippine tendencies with illustrations from its arguments on (1) negotiation as the agreed exclusive choice for dispute settlement, (2) sovereignty matters, (3) the optional exception of

1 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, http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml (China Position Paper).

2 http://www.pcacases.com/web/view/7

3 Sienho Yee, The South China Sea Arbitration (The Philippines v. China): Potential Jurisdictional Obstacles or Objections, 13 Chinese JIL (2014), 663–739 (http://chinesejil.oxfordjournals.org/content/13/4/663.full.pdf+html) (Yee Paper).

delimitation-related disputes; (4) the optional exception of military activities disputes; and (5) environmental claims.

I. Negotiation as the agreed exclusive choice for dispute settlement

2. The first illustration of the Philippine tendencies is its set of arguments in response to China's position that there exists agreement between the two States through a series of bilateral instruments as well as the ASEAN-China Declaration of Conduct of Parties in the South China Sea (DOC), and thus compulsory arbitration under Section 2 of Part XV of UNCLOS has been precluded under Article 281. The Philippines simply took the DOC out of the pattern of instruments between itself and China and ignored China's emphasis on the series or totality of bilateral instruments and the DOC. Furthermore, the Philippines ignored the most explicit joint statement, a 1995 China-Philippines joint statement proclaiming that "a gradual and progressive process of cooperation shall be adopted with a view to eventually negotiating a settlement of the bilateral disputes" (China Position Paper, paras.31, 40). The phrase "eventually negotiating" clearly evinces the intent to choose only "negotiation" as the means of dispute settlement and to exclude all other means. Words must be given meaning. Moreover, the Philippines argued that its commitment to choose only negotiation is not binding, by stressing the political-or-not nature of the DOC, without discussing the cases which state that such nature is not dispositive; what is important is the unequivocal agreement on a commitment (ibid., para.38). States should now beware of the Philippines' promises in the future; they may all be non-binding, despite repeated reaffirmation.

3. It is also troubling that having made clear, through a series of instruments, its intention to be bound by choosing negotiation only, a State can simply claim that its commitment is political and non-binding. Commitments on dispute settlement are of a special nature and once made unequivocally clear, they are binding no matter in what contexts or in what documents or formats they are made. Furthermore, such promises are usually made for the benefit of maintaining stable bilateral relations, which should be sufficient to estop the maker from reneging on them.

II. Sovereignty matters

4. Another illustration of the Philippine tendencies is its set of arguments in response to China's position that the subject matter of the arbitration in essence is land territorial sovereignty over some islands in the South China Sea. Part XV of UNCLOS is not a general dispute settlement clause, but provides for settlement only of disputes concerning the interpretation or application of the convention, and Article 288(1) limits the jurisdiction of compulsory procedures to such disputes. As UNCLOS itself, its drafting history, and international case law such as the *Mauritius v. United Kingdom* arbitration

make clear,[4] disputes over land territorial sovereignty do not fall into those categories. Recognizing that the Tribunal has no jurisdiction over land territorial matters, counsel for the Philippines (Transcripts Day 1, 81–82; Day 2, 3) attempted to simply ask one to assess the various features in clinical isolation from other features, and to consider their status and entitlements under Articles 13 and 121 of UNCLOS in clinical isolation from other provisions and other relevant rules of international law, even if they paid lip service to them. Such clinical isolation is clearly wrong.

5. First of all, it is common knowledge (see China Position Paper, Part II) that China considers the features in issue as part of either Zhongsha Qundao or Archipelago (as far as Huangyan Dao or Scarborough Shoal is concerned) or Nansha Qundao or Archipelago (as far as the other features at issue are concerned) and that the features are to be considered as part of the relevant archipelagos for sovereignty and entitlement purposes. Any attempt to dismember or dissect the archipelagos and consider these features in isolation would present land territorial sovereignty problems.

6. Secondly, while Articles 13 and 121 do not in so many words spell out "land territorial sovereignty", the terms of each do embody this idea because they use phrases defined elsewhere with a "land territorial sovereignty" component built into them. Thus, as is made clear, the holder of entitlements is not a particular feature itself but the State that has sovereignty over it (China Position Paper, para.17; Yee Paper, paras.52 and 53). For example, Article 13(1) speaks of territorial sea, and Article 121, territorial sea, EEZ and continental shelf. Entitlements to such spaces only belong to a State, never to a physical mass. Territorial sea is described in Article 2(1): "The sovereignty of a *coastal State* extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea." Articles 55–56 define the EEZ as an area adjacent to the territorial sea in which the "coastal State" has rights and obligations. Article 76 starts out by stating, "[t]he continental shelf of a *coastal State* comprises […]". (Emphasis added.) Of course these are all incorporated in Articles 13 and 121 where the terms territorial sea, EEZ and continental shelf are used.

7. Thirdly, in relation to low-tide elevations there are dynamic elements that are dependent on acts of sovereignty. For example, Articles 7(4) and 47(4) (and probably their customary international law counterparts) allow the use of low-tide elevations as basepoints for drawing straight baselines under some circumstances. This element may have significant impact on the entitlement based on low-tide elevations.

8. Furthermore, counsel for the Philippines listed various cases as support for its low-tide elevations arguments, but failed to give sufficient information on whether those low-tide elevations are within a particular territorial sea, or on the basis for those decisions. A careful examination may be called for so as to make clear whether these

4 Permanent Court of Arbitration, The Republic of Mauritius v. The United Kingdom of Great Britain and Northern Ireland, http://www.pcacases.com/web/view/11.

decisions are indeed such support or whether the conclusory statements in those decisions are necessary or simply *obiter dicta*. Of course, whatever answer one gives to the question whether low-tide elevations are subject to appropriation does not affect the fact that this question is itself a territorial sovereignty question, not falling within the scope of the UNCLOS system of dispute settlement.

III. Optional exception of delimitation-related disputes

9. Yet another illustration is the Philippines' set of arguments regarding the optional exception of delimitation-related disputes from the jurisdiction of Section 2 courts or tribunals. Under Article 298, a State party to UNCLOS may declare in writing that it does not accept the jurisdiction of compulsory procedures over disputes "concerning the interpretation or application of Articles 15, 74 and 83 relating to sea boundary delimitations" (i.e., delimitation of the territorial sea, the exclusive economic zone, or continental shelf), "involving historic bays or titles", or relating to certain other specified matters such as military activities. In its 2006 declaration, China excluded all such disputes from compulsory dispute settlement. China argued that even if the Philippines' claims constituted disputes concerning the interpretation or application of UNCLOS, they would fall within the optional exception of delimitation-related disputes for the reasons that the subject-matter of the arbitration initiated by the Philippines constitutes an integral part of maritime delimitation between China and the Philippines, that the Philippines' claims have in effect covered the main aspects and steps in maritime delimitation, and that should the Arbitral Tribunal substantively address the Philippines' claims, it would amount to a de facto maritime delimitation (China Position Paper, Part IV).

10. In order to avoid the application of China's optional exception of delimitation-related disputes, counsel for the Philippines first argued (Transcripts Day 2, 39, et seq.) that the dispute is not an integral part of a delimitation dispute, and that entitlement is distinct from delimitation. And he illustrated his point by pointing to the Okinotorishima controversy, in which States such as China have objected to Japan's assertion of expansive full and extended entitlements based on that small rock. As clear arguments have been made (China Position Paper, Part IV; Yee Paper, paras.63–76) on the integral nature of delimitation and the close relationship between entitlement and delimitation, they need not be repeated here. It should be pointed out, however, that the Philippines' arguments here ignore the delimitation geographical framework or delimitation situation between the Philippines and China in the South China Sea and fail to mention the fact that Okinotorishima is very far away from any significant land territory of another State.

11. There exists a delimitation geographical framework or delimitation situation between the Philippines and China in the South China Sea (Yee Paper, paras.27 and 63; Tables 1 and 2, 698–699). This serves to fuse all the issues surrounding the

definition, status, and entitlements of these various features into one big delimitation dispute, and to call for a de-fragmentation approach to treating these sundry claims, into which the Philippines has deliberately fragmented the big delimitation dispute. The features at issue separately are located less than 400 nautical miles from the coasts of the Philippines. Furthermore, these features form part of China's relevant archipelagos. This framework or situation is such that the claims relating to or consequential on the status of Meiji Jiao (Mischief Reef), Ximen Jiao (McKennan Reef), Nanxun Jiao (Gaven Reef) and Zhubi Jiao (Subi Reef) embody delimitation questions; or these features should be considered as a part of Nansha Qundao as a unit for entitlement and delimitation purposes; or, even if we proceed on the logic of the Philippines, these features are within 200 nautical miles of other Chinese islands or ones claimed by China, thus giving rise to overlapping entitlements over these features, necessitating delimitation. Similarly, the claims relating to or consequential on the definition and status of Chigua Jiao (Johnson Reef), Huayang Jiao (Cuarteron Reef), Yongshu Jiao (Fiery Cross Reef), and their associated maritime areas, constitute claims whose resolution is an inherent part of, not to mention "relating to" or "concerning", a delimitation between the Philippines and China; or each is an island (rather than a rock) capable of generating full maritime entitlement; or these features should be considered part of Nansha Qundao for entitlement and delimitation purposes; or, even if we proceed on the logic of the Philippines, each is within 200 nautical miles from another Chinese island or one claimed by China, thus giving rise to overlapping entitlements over each feature's associated areas, with each scenario necessitating delimitation. This applies similarly to the part of the claims concerning Huangyan Dao (Scarborough Shoal), part of Zhongsha Qundao. Furthermore, Scarborough Shoal is within 350 nautical miles (the maximum distance for an extended continental shelf) of at least two Chinese islands.

12. The close relationship between the definition or classification of "rocks" and delimitation has been well recognized by States and scholars alike. For example, Barbara Kwiatkowska and Alfred H.A. Soons (now one of the arbitrators in the case under discussion) said in 1990:

> [T]he definition of rocks and their entitlement to maritime spaces, like the definition and entitlement of islands in general, forms an inherent part of maritime boundary delimitation between opposite/adjacent States and, as State practice clearly evidences, these issues will not give rise to controversies unless such delimitation is in dispute.[5]

5 Barbara Kwiatkowska and Alfred H.A. Soons, Entitlement to Maritime Areas of Rocks which Cannot Sustain Human Habitation or Economic Life of Their Own, 21 Netherlands YIL (1990), 181.

Again, Kwiatkowska and Soons said in 2011:

> In fact, with a single exception of Okinotorishima, *the issue of eventual application of Article 121(3) does not arise in practice unless in the context of specific maritime delimitations*, often intertwined with disputes over sovereignty, such as those involving Serpents Island […]. A complex maritime delimitation-related role took throughout the whole UNCLOS III a clear precedence over the original purpose of Article 121(3) envisaged by Ambassador Arvid Pardo (Malta) in 1967 of ensuring that insular features located far from their governing states—which he exemplified by such undoubtedly full Article 121(1)-(2) islands as Guam (United States), the Azores Archipelago (Portugal), and Easter Island (Chile), along with such potential Article 121(3) rock as Clipperton Island—could not generate broad maritime zones of these states in the middle of the oceans at the expense of [the] International Seabed Area.[6]

Thus as commentator Soons was prescient in distinguishing Okinotorishima from all the rest, singling it out as the only exception, apparently because of the existence of relevant delimitation geographical frameworks or delimitation situations.

13. Furthermore, counsel for the Philippines argues that Article 298 limits excludable disputes to those concerning the interpretation or application of Articles 15, 74, and 83, and that since "[n]othing in the dispute before this Tribunal requires it to interpret or apply Article 15, 74 or 83" (Transcripts Day 2, 50), it is therefore not covered by China's 2006 exceptions. Counsel first pointed to the placement in Article 298 of "the application of Articles 15, 74 and 83" before "relating to sea boundary delimitation", as if somehow this would narrow the scope of a dispute relating to sea boundary delimitation. This placement in fact only serves to take some paragraphs in Articles 15, 74 and 83, unrelated to delimitation, out of the scope of any optional exceptions, not to reduce the scope of delimitation-related disputes as these articles reflect or incorporate comprehensively the applicable international law on sea boundary delimitation. Article 15 provides for concrete criteria for the delimitation of the territorial sea, but that is not at variance with general international law. Articles 74 and 83, however, incorporate the applicable law as specified under Article 38 of the ICJ Statute. Under these articles as well as general international law, delimitation is a single integral operation, which at its irreducible core always includes the ascertainment of the entitlements of the parties and the overlap thereof, and then effecting a delimitation of the overlapping area, resulting in an amputation of the entitlements of each. Thus, a delimitation dispute must be taken as including entitlement claims as well as claims relating to

6 Barbara Kwiatkowska and Alfred H.A. Soons, Some Reflections on the Ever Puzzling Rocks-Principle under UNCLOS Article 121(3), The Global Community: YIL and Jurisprudence (2011), 114–115. Emphasis added; footnotes omitted.

relevant or special circumstances, rather than just "delimitation proper" if understood only as the drawing of the final line of delimitation or maritime boundary.

The terms in Articles 298, 15, 74 and 83 on this point are clear, so much so that there does not seem to be any need to resort to the drafting history. That history in any event supports this reading. During the drafting process, there was a suggestion to distinguish between "preliminary questions" ("specific circumstances, principles and methods") and the "final delimitation itself" and to give compulsory conciliation a competence smaller than that of a Section 2 procedure. But that distinction was not accepted, and "the delimitation dispute, as a whole", covering all delimitation matters, was to be given to compulsory conciliation.[7] As a delimitation dispute given to compulsory conciliation is ultimately made conterminous with that excluded by an applicable optional exception, this history shows that the drafters appreciated that a delimitation dispute includes one concerning any of the preliminary questions such as entitlement.

In the arbitration under discussion, the presence of the numerous islands and other features presents a particularly complex situation, because these features may present entitlement issues and their presence may also be a relevant circumstance to be considered and taken into account. Disputes about these issues are an inherent part of the delimitation dispute. This would also obtain with respect to the dotted line or "nine-dash line".

14. As Article 298 uses "concerning" and "relating to", the decisive question for decision is not what is comprised within "delimitation", but what *relates to* it. The terms "concerning", "relating to", and "involving" used in Article 298(1)(a) of UNCLOS, read in good faith in accordance with their ordinary meaning in their context in the convention, are all terms that give the word "dispute" a substantive scope or coverage broader than the content of "the interpretation or application of articles 15, 74 and 83", "sea boundary delimitations", or "historic bays or titles", even if such content is to be given a strict interpretation. Furthermore, the interpretation or application of Articles 15, 74, and 83 may involve other articles that are referenced to or incorporated in these articles expressly or implicitly. Common sense teaches that what is comprised within "delimitation" is necessarily related to it. Obviously a dispute on a step in the delimitation operation or process is a delimitation-related dispute; that is to say, a question whose resolution has a "bearing" or effect on the process is a dispute related to delimitation.

15. This point on the connotation of "concerning" or "relating to" is reflected in a line of cases such as the *Aegean Sea Continental Shelf* case at the International Court of

7 NG7/26, 1979, Negotiation Group 7 Chairman's Summary, as quoted in Shabtai Rosenne and Louis B. Sohn (vol. eds), 5 United Nations Convention on the Law of the Sea 1982: A Commentary (1989), 124–125; 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 (1987), 178 (Sohn alternatives); 179–182. See also Andrew Gou, Delimitation as an Exception to the UNCLOS Compulsory Dispute Settlement Procedures, http://ssrn.com/abstract=2661700, para.18.

Justice (ICJ Reports 1978, 42, para.81) and the *"LOUISA" Case* at the International Tribunal for the Law of the Sea (ITLOS Case No.18, Judgment of May 28, 2013, para.83). In the latter case, the ITLOS interpreted the word "concerning" in a declaration made under Article 287 of the UNCLOS in which Saint Vincent and the Grenadines declares that, "it chooses the International Tribunal for the Law of the Sea established in accordance with Annex VI, as the means of settlement of disputes concerning the arrest or detention of its vessels". The ITLOS held (ibid.):

> [T]he 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. This interpretation is reinforced by taking into account the intention of Saint Vincent and the Grenadines at the time it made the declaration, as evidenced by the submissions made in the Application. From these submissions, it becomes clear that the declaration of Saint Vincent and the Grenadines was meant to cover all claims connected with the arrest or detention of its vessels. On the basis of the foregoing, the Tribunal concludes that the narrow interpretation of the declaration of Saint Vincent and the Grenadines as advanced by Spain is not tenable.

As the term "concerning" is one frequently used to modify disputes in Part XV of the UNCLOS and elsewhere therein, it should be taken to have the same meaning throughout the entire UNCLOS dispute settlement system as well as the entire UNCLOS. That is to say, the term "concerning" in Article 287 or a declaration made thereunder has the same meaning as that in Article 298 or a declaration made thereunder.

16. Accordingly, the decisive question is not whether the claims made in a particular case require an explicit interpretation or application of Articles 15, 74 or 83, but whether the interpretation or application of another provision, such as Articles 13, 76 or 121 in this case, would have a bearing on the interpretation or application of Articles 15, 74 or 83. The answer is a clear "yes" in this matter because of the delimitation geographical framework and/or delimitation situation between the Philippines and China in the South China Sea. For example, Huangyan Dao is described to be about 120 to 140 nautical miles from the coast of the Philippines. Given such a geographical framework, interpreting Article 121 or applying it to Huangyan Dao in Zhongsha Qundao would have a substantial potential impact or bearing on the application of Articles 74 and 83. It is such potential impact or bearing that makes an optional exception of jurisdiction meaningful. The same situation similarly obtains with respect to the other features at issue in Nansha Qundao.

17. The claims regarding or consequential on the status of the "nine-dash line" constitute claims relating to delimitation or involving historic title or historic rights, since that line potentially serves as a title or a relevant circumstance in a delimitation

operation. Disputes about historic titles are excluded from compulsory arbitration on the basis of the express terms in Article 298 and China's 2006 declaration. Disputes about relevant circumstances are excluded because they would concern or have a bearing on the interpretation or application of Articles 74 and 83 or relate to sea boundary delimitation (of the EEZ and continental shelf). As a result, claims relating to whether such a historic right can be established, whether it would be a relevant circumstance, and what weight should be given to such a right in the delimitation operation would all be disputes "concerning the interpretation or application of Articles 15, 74 and 83 relating to sea boundary delimitations" under Article 298(1)(a). Accordingly, such claims have been excluded by China's 2006 declaration.

18. While substantive issues are beyond the scope of this comment, it should be pointed out that Andrea Gioia's entry on "Historic Titles" in the *Max Planck Encyclopedia of Public International Law* observes that "there is in principle no reason why an historic title could not be invoked in order to acquire sovereignty over a wider belt of territorial sea, or even special sovereign rights falling short of full territorial sovereignty beyond the territorial sea", and that "historic rights acquired in the past may still have a role to play in the delimitation of maritime boundaries between States whose coasts are opposite or adjacent to each other".

IV. Optional exception of military activities disputes

19. Yet another illustration is the Philippines' argument regarding the possible application of the military activities disputes exception under Article 298(1)(b). The Philippines tried its hardest to dilute the military dimension of China's facility construction on some of the maritime features at issue. As far as I am concerned, as a commentator, it is clear that China's activities are military in nature. They are response measures to military exercises in the vicinities and they are motivated by military considerations. An intelligent analyst would ask whether a State such as China, whose share in the $5 trillion annual trade going through the South China Sea is reported to be between 60 and 80 percent, would be content with leaving the safety and security of that trade in the hands of other States, particularly those who are conducting military exercises in the surroundings. These are eminently legitimate considerations for military planning. Of course at issue is not just China's self-interest, because ensuring the security and safety of this large amount of world trade redounds to the benefit of the whole world. How can China achieve its goals without sufficient military capabilities, commensurate with the need to provide a response to what others have been doing, to provide public goods to service the large volume of international trade going through the South China Sea, and to protect China's interest and that of the world in securing the safety and security of that trade?

20. Mass media reports are replete with news about the military dimension of China's facility constructions activities. A quick search will reveal reports (whose veracity is left for the readers) about mobile cannons placed, airfields built, on some of the features, and about military strategists calling for certain actions. Irrespective of

one's view on the wisdom of such reports, they no doubt testify to the military nature of China's activities, sufficient to trigger the military activities disputes exception that China made in its 2006 declaration.

V. Environmental claims

21. Still another illustration of the various tendencies in the Philippines' arguments is those in respect of jurisdiction over its environmental claims. The Philippines made various environmental claims which are centered on biodiversity matters. But such matters are more specifically dealt with by the Convention on Biological Diversity (CBD, 1760 UNTS 79), to which both China and the Philippines are parties. CBD provides for compulsory conciliation as the default means of dispute settlement, and thus should serve to preclude compulsory arbitration under UNCLOS. Counsel for the Philippines mounted a strong attack on the very sensible *Southern Bluefin Tuna Case* award, asserting that it "is almost universally disputed in the literature, and by other judicial decisions" (Transcripts Day 2, 114), citing to the ITLOS *Mox Plant* order, without mentioning either the aftermath of the *Mox Plant* order or the line of ICJ cases, each in line with that award. Nor did counsel address the possible application of Article 30 of the Vienna Convention on the Law of Treaties (VCLT) or the customary international law rule reflected therein.

22. CBD addresses the difficult topic of biodiversity and in Article 27 establishes compulsory conciliation as the default method of dispute settlement after negotiation has been exhausted and if the parties did not choose either arbitration or adjudication by the ICJ as compulsory in Article 27(4).

23. This default choice of conciliation in its compulsory genre[8] presents a potential conflict between CBD and UNCLOS, which contains provisions that deal with biodiversity, the same subject matter that CBD dedicates itself to. Now under Article 281 of UNCLOS, the parties may by agreement exclude a dispute concerning the interpretation or application of UNCLOS (including one on a subject matter that CBD deals with) from the applicability of the compulsory procedures under Section 2 of Part XV of UNCLOS. Does Article 27(4) of CBD constitute such an exclusion because the compulsory conciliation procedure is selected as the default procedure (as a result of the phrase "unless the parties otherwise agree")? One may attempt to find two disputes, one under CBD and one under UNCLOS, but such a distinction would be artificial because the realities on the ground show that the "two" disputes are the one and the same, relating to the same factual complex involving the same conduct.

8 For an analysis on this genre, see Sienho Yee, Conciliation and the 1982 UN Convention on the Law of the Sea, 44 Ocean Development and International Law (2013), 315–334.

24. This is the teaching from the *Southern Bluefin Tuna Case* arbitration between Australia, New Zealand and Japan.[9] There, a critical question was raised as to whether there existed two disputes separately under UNCLOS and the Convention for the Conservation of Southern Bluefin Tuna (the "1993 Convention" or "CCSBT") or just one which was excluded by Article 16 of the CCSBT read together with Article 281(1) of UNCLOS. The tribunal held:

> 54. […] [T]his dispute, while centered in the 1993 Convention, also implicates obligations under UNCLOS. It does so because the Parties to this dispute—the real terms of which have been defined above—are the same Parties grappling not with two separate disputes but with what in fact is a single dispute arising under both Conventions. To find that, in this case, there is a dispute actually arising under UNCLOS which is distinct from the dispute that arose under the CCSBT would be artificial.

As a result, the dispute was held to be outside the jurisdiction of the tribunal (para.65). The lesson to be learned is that when the same factual complex involving the same conduct is at issue, the fact that different species of law may apply to that complex does not turn the dispute into a series of disputes. This is also what ICJ cases such as *Legality of Use of Force* teach us (Yee Paper, paras.68–69). Similarly, the same reasoning and the same approach should apply to the relation between CBD and UNCLOS.

25. Even if one were to insist on seeing the dispute about the same subject matter under CBD as separate from one under UNCLOS, there would seem to be a conflict between the choice of means of dispute settlement under CBD and that under UNCLOS, which has to be resolved. One way to resolve this conflict would be to apply the *lex specialis* rule further and find that the more specific rule on the same matter would prevail, which also reflects the approach taken in the *Southern Bluefin Tuna Case* arbitration since the award in paragraphs 52 and 54 mentioned that the dispute centered on the 1993 Convention. As CBD is dedicated to biodiversity matters, the choice made under that convention should prevail over that under the more general UNCLOS. Secondly, because the dispute is about the same subject matter, biological diversity, which is the condition for triggering such a conflict, it would be difficult for a conscientious decision-maker not to see such a conflict within the meaning of Article 30 of VCLT. A resolution of this conflict under that article would give priority to CBD, which entered into force later in time for the Philippines. Article 22 of CBD and Article 311(2) of UNCLOS seem to deal with substantive matters and thus do not regulate conflicts between different choices of means of dispute settlement.

9 Southern Bluefin Tuna Case (Australia and New Zealand v. Japan), Award on Jurisdiction and Admissibility, 4 August 2000, https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnouncePDF&AnnouncementType=archive&AnnounceNo=7_10.pdf.

26. This outcome finds support in the *Mox Plant* saga. At the provisional measures stage the ITLOS adopted a decision (*The Mox Plant Case*, ITLOS Case No. 10, Provisional Measures, 3 December 2001) that favors the expansion of its jurisdiction in a potential conflict between UNCLOS and some regional treaties, without giving proper consideration to the potential conflict between UNCLOS and the other regional treaties and how to resolve it under Article 30 of VCLT. After the arbitration had moved forward, the European Commission, supported by the United Kingdom, the respondent, initiated a case before the European Court of Justice, which held that indeed that court had exclusive jurisdiction under the relevant regional treaties (ECJ Case C-459/03, 30 May 2006). The claimant, Ireland, ultimately withdrew its claims in the arbitration and the arbitral tribunal terminated the proceedings.[10] What is problematic is that the ITLOS was preoccupied with its finding that the "the rights and obligations under those agreements have a separate existence from those under the Convention" (ITLOS *Mox Plant* Order, para.50) and that "the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, inter alia, differences in the respective contexts, objects and purposes, subsequent practice of parties and *travaux préparatoires*" (ibid., para.51). Under Article 30 of VCLT, these seem to miss the point, because what is important is what arrangements for dispute settlement have been made under the "conflicting treaties", not the substantive result regarding the rights and obligations. That is to say, what are in conflict now are not yet the substantive decisions, but only the choices of means of dispute settlement. For this reason, the ITLOS's reasoning may not be to the point, and the proper solution would be to follow what Ireland later on was forced to do by the European Court of Justice.

Concluding remarks

27. The Philippines has made its oral arguments. They exhibit clear clinical isolation and one-sided tendencies. Enlightened eyes no doubt can see this and act accordingly. It is the duty of all relevant decision-makers having the task of dealing with such arguments to take the law as it is and make sensible decisions impartially and fairly. Any activist, cavalier attitudes intending to fix all the issues in the world, once and for all, for the States would simply take the decision-making away from the States themselves and lead to damaging results by leaving a mess behind, rather than settling a dispute.

10 http://www.pcacases.com/web/view/100