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JURISPRUDENTIAL AND JURISDICTIONAL ASPECTS, APPLICABLE NORMS AND DECISIONS OF THE ARBITRAL TRIBUNALS OF THE LAW OF THE SEA [1]

ASPECTOS JURISPRUDENCIALES Y JURISDICCIONALES, NORMAS APLICABLES Y DECISIONES DE LOS TRIBUNALES ARBITRALES DEL DERECHO DEL MAR

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Abstract: The present work is concentrated on the comparative analysis of the ICJ jurisprudential practice, ITLOS and of the various arbitral courts conformed to Annex VII relating to the interpretation of the provisions of the relative articles of UNCLOS (253, 283, 287, 288, 294, 298, 300 UNCLOS). The interpretation as we see has not been, through the jurisprudence, until now always uniform and coherent and the increase of the disputes submitted could involve the risk of a fragmentation of the procedural rules of the UNCLOS, also favored by a certain judicial activism that pushes the courts and tribunals to assert their jurisdiction also through a creative and innovative interpretation of procedural rules.

Key Words: UNCLOS, law of the sea, ITLOS, ICJ, arbitration, dispute of settlements.

Resumen: El presente trabajo se concentra en el análisis comparativo de la práctica jurisprudencial de la CIJ, del TIDM y de los diversos tribunales arbitrales conformes al Anexo VII relativo a la interpretación de las disposiciones de los artículos relativos de la CNUDM (253, 283, 287, 288, 294, 298, 300 CNUDM). La interpretación como vemos no ha sido, a través de la jurisprudencia, hasta ahora siempre uniforme y coherente y el aumento de las controversias presentadas podría implicar el riesgo de una fragmentación de las normas procesales de la CNUDM, favorecida también por un cierto activismo judicial que empuja a las cortes y tribunales a hacer valer su jurisdicción también a través de una interpretación creativa e innovadora de las normas procesales.

Palabras claves: CNUDM, derecho del mar, TIDM, CIJ, arbitraje, disputa de acuerdos.

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1.INTRODUCTION

The existence of a dispute can be ascertained by an arbitral tribunal when the parties involved have proceeded to fulfill the obligation to exchange views provided by art. 283 of the United Nations Convention on the Law of the Sea-Montego Bay 1982 (UNCLOS)[2] and

[2]For further details see: R.P. DUNNE, N.V.C. POLUNIN, P.H. SAND, M.L. JOHNSON, The creation of the Chagos marine protected area: A fisheries perspective, in Advances in Marine Biology, 69, 2014, pp. 82ss. D.A. COLSON, B.J. VOHRER, In re Chagos marine protected area (Mauritius v. United Kingdom), in American Journal of International Law, 109 (4), 2015, pp. 847ss. P.H. SAND, Fortress conservation Trumps human rights?, The "marine protected area" in the Chagos archipelago, in The Journal of Environment and Development, 21 (1), 2012, pp. 38ss. T. APPLEBY, The Chagos marine protected arbitration. A battle of four losers?, in Journal of Environmental Law, 27 (3), 2015, pp. 530ss. D.M. ONG, Implications of the Chagos marine protected area arbitral tribunal around for the balance between natural environmental protection and traditional maritime freedoms, in S. ALLEN, C. MONAGHAN (eds.), Fifty years of the British Indian ocean territory. The world as wall states, ed. Springer, Berlin, 2018, pp. 264ss. A. DEL VECCHIO, R.VIRZO, Interpretations of the United Nations Convention on the law of the sea by international courts and tribunals, ed. Springer, Berlin, 2019, pp. 194ss. The scope of art. 283 would be to assure the defendant state that part of a dispute is not taken by surprise by the decision of the other state that is part of that dispute to resort to mandatory procedures that lead to binding decisions without appropriate consultations but also "to facilitate recourse to peaceful dispute settlement (including compulsory procedures) by encouraging parties to consider different procedures as soon as a dispute arises and not to preclude or unduly delay the resolution of the dispute (...)", according to case: Arctic Sunrise (Kingdom of the Netherlands v. Russian Federation), award on the merits, 15 August 2015, par. 154). For the analysis of art. 283 UNCLOS see also: M. YU, Q. XIE, Why the award on jurisdiction and admissibility of the South China Sea arbitration is null and void? Taking article 283 of the UNCLOS as an example, in China Oceans Law Review, 45, 2017, pp. 50ss. P. PHAM, The South China Sea finally meets international law, in Chicago-Kent Journal of International and Comparative Law, 16 (2), 2016, pp. 8ss. S. RAO PEMMARAJU, The South China Sea arbitration (The Philippines v. China): Assessment of the award on jurisdiction and admissibility, in Chinese Journal of International Law, 15 (2), 2016, pp. 269ss.. P. DE CASTRO SILVERIA, G. LADEIRA GARBACCIO, Protest at sea: The Arctic Sunrise case and the clarification of coastal states rights, in Seqüência, 3, 2019. It is an obligation of conduct and not an obligation of result. In this sense, it may be useful to recall the jurisprudence of the ICJ which has had the opportunity to specify that: "(...) the obligation to negotiate is an obligation not only to enter into negotiations, but also to pursue them as far and possible with a view to concluding agreements (even if) an obligation to negotiate does not imply an obligation to reach agreement (...)". The obligation to exchange views does not an empty formality to be dispensed with at the whims of a disputant. The obligation in this regard must be discharged in good faith and its is the duty of the tribunal to examine whether this is being done (...)" as we can see in the ITLOS, Land reclamation in and around the Straits of Johor (Malaysia v. Singapore), provisional measures, order of 8 October 2003, separate opinion of Judge Rao, par. 11. The rule in question does not express itself on the consequences of failure to fulfill this obligation, that is, whether the consequence must be a rejection of the appeal by the court or the international court seised. See also in argument: C.A. MILES, Provisional measures before international courts and tribunals, Cambridge University Press, Cambridge, 2017. Y. TANAKA, Provisional measures prescribed by ITLOs and marine environmental protection, in American Journal of International Law, 108, 2014, pp. 365ss. K. MOHAMAD, Malaysia-Singapore: Fifty years of contentions 1965-2015, ed. The Other Press, Kuala Lumpur, 2015. T. TRUONG THUY, J.B. WELFIELD, L.T. TRANG, Building a normative order in the South China Sea. Evolving disputes expanding options, Edward Elgar Publishers, Cheltenham, 2019. D. ATTARD, M. FITZMAURICE, N.A. MARTINEZ GUTIERREZ, The IMLI manual on international maritime law, vol. 1: The law of the sea, Oxford University Press, Oxford, 2014. P.H.G. VRANCKEN, South Africa and the law of the sea, Martinus Nijhoff, The Hague, Boston, 2011, par. 13.5. A. VON BOGDANDY, I. VENZKE, In whose name? A public law theory of international adjudication, Oxford University Press, Oxford, 2014. A solution has been given since ITLOS nel case: M/V "Norstar", which is affirmed that: "the absence of a response from one state party to an attempt by another state party to exchange views on the means of settlement of a dispute arising between them does not prevent the tribunal from finding that the requirements of article 283 have been fulfilled (...)" (ITLOS, The M/V "Norstar" case (Panama v. Italy), preliminary objections judgments of 4 November 2016, par. 215). N. LUCAK, Georgia v. Russia Federation. A question of the jurisdiction of the International Court of Justice, in Maryland Journal of International Law, 27, 2012, pp. 328ss. This interpretation seems to go against the spirit of the rule which has as its objective not to take a state by surprise about the possibility of an appeal to a court or tribunal brought under section 2 of Part XV. An extension or modification of the claims of the applicant state to what emerged in the exchange of views between the parties would result in a surprise for the defendant state. For further details see also: B. KINGSBURY, International courts: Uneven judicialisation in global order, in J. CRAWFORD, M. KOSKENNIEMI (eds.), The Cambridge companion to international law, Cambridge University Press, Cambridge, 2012, pp. 217ss. J. BARRETT, R. BARNES (eds.), Law of the sea: UNCLOS as a living treaty, ed. British Institute of

to select by mutual agreement a particular means of resolving the dispute[3]. In particular in case Chagos marine protected area the arbitral tribunal has affirms that art. 283 cannot be understood as an obligation to negotiate the substance of the dispute (Chagos marine protected are arbitration (Mauritius v. United Kingdom), award of 15 March 2015, par. 378). The same tribunal has recognized that: "(...) in practice, substantive negotiations concerning the parties dispute are not neatly separated from exchanges of views on the preferred means of settling a dispute (...) it is unsurprising that in the jurisprudence on article 283 it is frequently not clear as to whether the communications that were considered sufficient for the purposes of article 283 were substantive or procedural in nature (...)" (par. 381). According to our opinion, the exchange of views envisaged by the aforementioned article entails an obligation to negotiate on the identification of the means of solving the dispute to which the parties will have to appeal. According to Testa[4]: In case South China Sea it has been recognized that: "(...) the Parties' many discussions and consultations did not address all of the matters in dispute with the same level of specificity that is now reflected in the Philippines' submissions" which is affirmed that: "this is to be expected and constitutes no bar to the Philippines claims" (South China Sea case (The Republic of Philippines v. People's Republic of China), award on jurisdiction and admissibility, 29 October 2015, par. 351). The arbitral tribunal attributing a different meaning to the judgment of the ICJ: Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), judgment preliminary exceptions, 1 April 2011, ICJ Reports 2011, par. 115ss and claimed that: "(...) the (UNCLOS) does not require the parties to set out the specifies of their legal claims in advance of dispute settlement (...)". The Court held, following a very detailed analysis of the positions expressed on the point by the parties, that the conditions set by art. 22 of the

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International and Comparative Law, London, 2016, pp. 386ss. S. YEE, Conciliation and the 1982 UN Convention on the law of the sea, in Ocean Development & International Law, 43, 2013, pp. 316ss. A. SARVARIAN, R. BAKER, F. FONTANELLI, V. TZEVELEKOS, (eds.), Procedural fairness in international courts and tribunals, British Institute of International and Comparative Law, London, 2015, pp. 260ss. C. WARD, The South China Sea arbitration (The Republic of the Philippines v. The People's Republic of China), in Australia International Law Journal, 2015-2016, 22, pp. 137ss. K.E. BOON, International arbitration in highly political situations: The South China Sea dispute and international law, in Washington University Global Studies Law Review, 13, 2014, pp. 489ss. C. WHOMERSLEY, The South China Sea: The award of the tribunal in the case brought by Philippines against China. A critique, in Chinese Journal of International Law, 15 (2), 2016, pp. 240ss. A. PROELSS, United Nations Convention on the law of the sea. A commentary, Hart Publishing/C.H. Beck, Oxford, München, 2017. Y. TANAKA, The South China Sea arbitration. Toward an international legal order in the oceans, Bloomsbury Publishing, New York, 2019. L. LANGER, The South China Sea as a challenge to international law and to international legal scholarship, in Berkeley Journal of International Law, 36(3), 2018, pp. 383-417. B.H. OXMAN, Courts and tribunals: The ICJ, ITLOS, and arbitral tribunals, in R.R. ROTHWELL, A.G. OUDE ELFERINK, K.N. SCOTT, T. STEPHENS, The Oxford handbook of the law of the sea, Oxford University Press, Oxford, 2015, pp. 398ss. M.D. EVANS, S. GALANI, Maritime security and the law of the sea: Help or hindrance?, Edward Elgar Publishers, Cheltenham, 2020, pp. 115ss. O. JENSEN, N. BANKES, Compulsory and binding dispute resolution under the United Nations Convention on the law of the sea: Introduction, in Ocean Development and International Law, 48 (3-4), 2017, pp. 212ss. K. FACH GÓMEZ, Key duties of international investment arbitrators: A transnational study of legal and ethical dilemmas, ed. Springer, Berlin, 2018. S. WU, K. ZOU, Arbitration concerning the South China Sea: Philippines versus China, ed. Routledge, New York, 2016, pp. 238ss. S. JAYAKUMAR, T. KOH, R. BECKMAN, T. DAVENDORT, H. DUY PHAN, The South China Sea arbitration. The legal dimension, Edward Elgar Publishers, Cheltenham, 2018, pp. 234ss. F.K. LIU, J. SPANGLER, South China Sea lawfare. Ilegal perspectives and international responses to the Philippines v. China arbitration case, ed. China Sea Think Tank, Taiwan Center for Security Studies, Taipei, 2016. H. DUY PHAN, L. NGOC NGUYEN, The South China Sea arbitration: Bindingness, finality and compliance with UNCLOS dispute settlement decisions, in Asian Journal of International Law, (81), 2018, pp. 38ss.

[3]C.F. AMERASINGHE, International arbitral jurisdiction, Martinus Nijhoff, Leiden, Boston, 2011, pp. 54 and 151ss.

[4] D. TESTA, Coastal State regulation of bunkering and ship-to-ship (STS) oil transfer operations in the EEZ: An analysis of State practice and of coastal state jurisdiction under the LOSC, in Ocean Development and International Law, 50 (4), 2019, pp. 364ss

Convention which is the subject of the dispute, pursuant to which the attribution of competence covers the matters that have not been resolved "by negotiation or the procedure expressly provided for in this Convention". In the previous interim order of 15 October 2008, however, the same Court had proposed a less formalistic interpretation, based on which the letter of the arbitration clause "does not, in its plain meaning, suggest that formal negotiations in the framework of the Convention or recourse to the procedure referred to in art. 22 thereof" (ICJ Reports 2008, pp. 353ss, pp. 388, par. 114). On the basis of this premise, it therefore considered that the fact that the negotiations between the parties had not expressly mentioned the 1965 Convention, par. 115.

The process of ascertaining the existence of the dispute is more complex when one of the parties denies the existence of the dispute[5]. In this case, international jurisprudence has formulated the criteria that serve to ascertain the real existence of a dispute between two or more parties, criteria to which the arbitral tribunals have drawn[6]. Assessment of the existence of a disagreement between the parties "is a matter for objective determination"[7].

If the respondent party in a judicial or arbitral proceeding does not recognize the existence of a dispute, the court or tribunal seised can ascertain it considering it implicit in the defendant state's total rejection of the complaints brought against it[8] or in the conduct held by the parties involved especially in the absence of diplomatic exchanges[9]. The existence of the dispute can be inferred from the silence of the defendant who refused to expressly

[5]F. ZARBIYEV, Judicial activism in international law. A conceptual framework for analysis, in Journal of International Dispute Settlement, 3 (2), 2012, pp. 248ss. A. BOYLE, UNCLOS dispute settlement and the uses and abuses of part XV, in Revue Belge de Droit International, 47, 2014, pp. 182ss. K. WELLENS, International law in silver perspective. Challenges ahead, ed. Brill, Bruxelles, 2015, pp. 144ss. G. ABI-SAAB, K. KEITH, G. MARCEAU, Evolutionary interpretation and international law, Bloomrbury Publishing, New York, 2019. C.J. TAMS, J. SLOAN, The development of international law by the international court of justice, Oxford University Press, Oxford, 2013, pp. 4ss. L.R. HELFER, K.J. ALTER, Legitimacy and lawmaking: A tale of three international courts, in Theoretical Inquiries in Law, 14 (2), 2013, pp. 481ss. T. RUYS, A. SOETE, "Creeping" advisory jurisdiction of international courts and tribunals?, The case of the international tribunal for the law of the sea, in Leiden Journal of International Law, 29 (1), 2016, pp. 158ss.

[6]PCIJ, Mavrommatis Palestine concessions (Greece v. Britain) of 30 August 1924, PCIJ Series A, n. 2, p. 6ss: "(...) a disagreement on a point or fact a conflict of legal views or of interests between two persons (...) the claim of one parties positively opposed by the other (…)". J. MCINTYRE, The declaratory judgment in recent jurisprudence of the International Court of Justice. Conflicting approaches to state responsibility, in Leiden Journal of International Law, 29 (1), 2016, pp. 180ss.

[7]Southern Bluefin Tuna (New Zealand-Japan, Australia-Japan), award of 4 August 2000, par. 44. South China Sea arbitration (The Republic of Philippines v. People's republic of China), award on jurisdiction and admissibility of 29 October 2015, par. 149. South China Sea arbitration (The Republic of Philippines v. People's Republic of China) award on jurisdiction and admissibility of 29 October 2015, par. 149, which is referred in the note 107 the case of the ICJ: South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), preliminary objections, sentence of 21 December 1962, ICJ Reports 1962, p. 328. J. MCINTYRE, The declaratory judgment in recent jurisprudence of the International Court of Justice. Conflicting approaches to state responsibility, op. cit., pp. 180ss. I. DE LA RASILLA DEL MORAL, Nihil novum sub soli since the South West Africa cases? On ius standi, the ICJ and community interests, in International Community Law Review, 10, 2008, pp. 172ss. P. TOMKA, G.I. HERNÁNDEZ, Provisional measures in the international tribunal of the law of the sea, in H.P. HESTERMEYER, D. KÖNIG, N. MATX-LÜCK, V. RÖBEN, A. SEIBERT-FOHR, P.T. STOLL, S. VÖNEKY, Coexistence, cooperation and solidarity. Liber amicorum Rüdiger Wolfrum, Martinus Nijhoff Publishers, Leiden, 2012, pp. 1763ss. D. LIAKOPOULOS, Complicity of States in the international illicit, ed. Maklu, Antwerp, Portland, 2020.

[8]ICJ, Interpretation of peace treaties with Bulgaria, Hungary and Romania, advisory opinion of 30 March 1950, ICJ Reports 1950, p. 74. D. LIAKOPOULOS, The role of not party in the trial before the International Court of Justice, ed. Maklu, Antwerp, Portland, 2020.

[9]ICJ, Obligations concerning negotiations relating to cessation of the nuclear arms race and to nuclear disarmament (Marshall Islands v. United Kingdom), Preliminary objections of 5 October 1996, par. 40. A. BIANCHI, Choice and (the awareness of) its consequences: ICJ's "structural bias" strikes again in the Marshall Islands case, in American Journal of International Law Unbound, 86, 2017.

contradict a complaint or to take a position on a matter submitted to the court or tribunal seized[10].

In south China sea case the arbitral tribunal has also introduced a further criterion for assessing the need in consideration as part of the process of ascertaining the existence of a dispute, namely: "The tribunal is obliged not to permit an overly technical evaluation of the parties' communications or deliberate ambiguity in a party's expression of its position to frustrate the resolution of a genuine dispute through arbitration (...)"[11]. It should be noted that the arbitral tribunal attributes the power to examine the parties' communications avoiding an overly technical assessment. This conduct risks damaging the ability to analyze the situation brought to its attention and would affect the decision to be taken regarding the assessment of the need or not of the dispute between the parties involved. The "deliberate ambiguity" aspect of one of the parties to the dispute regarding its position on the complaint is also introduced in the evaluation process. This aspect seems weightable in relation to the definition of the position held by a state that decides not to participate in the arbitration proceedings from the outset and due to the fact that what you want to configure as a deliberate ambiguity could simply be a position from which it should result the non-existence of the dispute as illustrated by the applicant on the grounds that: "The claim of one party is not positively opposed by the other"[12]. The new element introduced in the process of ascertaining the existence of a dispute being aimed at not frustrating "the resolution of a genuine dispute through arbitration"[13] seems rather designed to offer the arbitral tribunal a tool, depending on the circumstances, to be used to assert one's own competence.

Art. 288, par. 1 UNCLOS states that a court has jurisdiction "over any dispute concerning the interpretation or application of this Convention which is submitted to it"[14], the reference is to disputes existing at the time of filing the complaint[15]. It should be emphasized that the arbitral courts in identifying and characterizing the dispute based their assessments once again on the basis of the criteria recognized by the jurisprudence of the International Court

[10]South China Sea arbitration (The Republic of Philippines v. People's Republic of China), award on jurisdiction and admissibility of 29 October 2015, par. 163: "(...) where a party has declined to contradict a claim expressly or to take a position on a matter submitted for compulsory settlement, the tribunal is entitled to examine the conduct of the parties-or indeed the fact of silence in a situation in which a response would be expected-and draw appropriate inferences (...). the arbitral tribunal has referred the jurisprudence of the ICJ, especially the next cases: Land and maritime boundary (Cameroon v. Nigeria), preliminary objections of 11 June 1998, ICJ Reports, 1998, p. 89 and 1029ss; and Application of the international Convention on the elimination of all forms of racial discrimination (Georgia v. Russian Federation), preliminary objections of 1st April 2011, par. 30. in par. 162 was cited the cases: Applicability of the obligation to arbitrate under section 21 of the United Nations headquarters agreement of 26 June 1947, advisory opinion of 26 April 1988, par. 38 and Land and maritime boundary (Cameroon v. Nigeria), preliminary objections of 11 June 1998, par. 93. See also in argument: S.A.G. TALMON, The South China Sea arbitration: Observations on the award on jurisdiction and admissibility, in Chinese Journal of International Law, 15, 2016, pp. 310ss, parr. 20-25. S. JAYAKUMAR, T. KOH, R. BECKMAN, T. DAVENDORT, H. DUY PHAN, The South China Sea arbitration. The legal dimension, op. cit.,

[11]South China Sea arbitration (The Republic of Philippines v. People's Republic of China), award on jurisdiction and admissibility of 29 October 2015, par. 163.

[12]S. JAYAKUMAR, T. KOH, R. BECKMAN, T. DAVENDORT, H. DUY PHAN, The South China Sea arbitration. The legal dimension, op. cit.,

[13]J. HARRISON, Defining disputes and characterizing claims: Subject-matter jurisdiction in law of the sea Convention litigation, in Ocean Development & International Law, 48 (3-4), 2017, pp. 270ss.

[14]G.K. WALKER, Definitions for the law of the sea terms not defined by the 1982 Convention, Martinus Nijhoff Publishers, The Hague, 2011, pp. 66ss.

[15]The verification that the arbitral tribunal carries out about the date of commencement of the dispute which must be prior to the start of the procedure is an operation that concerns every single request presented in the claim by the appellant. See in this sense: Chagos marine protected area (Mauritius v. United Kingdom), award of 18 March 2015, parr. 348-349.

of Justice (ICJ). The arbitral tribunal is called "to examining the position of both parties"[16] and this decision must be based not only on "application and final submissions but on diplomatic exchanges, public statements and other pertinent evidence"[17]. As part of this process of identifying and characterizing the dispute, a distinction must be made “between the dispute itself and the arguments used by the parties to sustain their respective submissions on the dispute”[18].

The arbitral tribunal may also verify the admissibility of a new application introduced during the arbitral proceedings. In order to establish the admissibility of a new application[19] it is constituted by the nature of the link existing between that application and that contained in the complaint establishing the procedure. To be admissible, the new application must be implicit in the complaint or must derive directly from the question that is the subject of the complaint, since a mere general link between the two applications is not sufficient[20].

Once the existence of a dispute has been ascertained and its precise object, the arbitral tribunal can perform its function as an organ for the peaceful resolution of the dispute on the basis of ascertaining the presence of a specific title of jurisdiction.

In finis, the method used in this paper is that of a comparative nature with decisions from the ICJ and various arbitral cases. The first references remain the arbitration judgments and the cases of the ITLOS. The articles used are those that are based on the resolution of disputes that help the reader to better understand how a dispute is created and how to resolve it according to the ITLOS system which also provides for the creation of arbitral tribunals but as we see today the results are not so ”brilliant” and much debated both by jurisprudence and by various other courts worldwide such as the ICJ which uses the judgments of the ITLOS with less effective way and with the aim of the best interpretation of international law.

2.JURISDICTION RATIONE MATERIAE

Art. 288 UNCLOS defines the ratione materiae jurisdiction of the courts and tribunals, guaranteeing a broad jurisdiction over disputes relating to the law of the sea[21]. The court or

[16]ICJ, Fisheries jurisdiction (Spain v. Canada), jurisdiction of the court, sentence of 4 December 1998, Reports 1998, pp. 570, 575, par. 30. D. LIAKOPOULOS, The role of not party in the trial before the International Court of Justice, op. cit.,
[17]ICJ, Fisheries jurisdiction (Spain v. Canada), op. cit., par. 31.
[18]ICJ, Fisheries jurisdiction (Spain v. Canada), op. cit., par. 32
[19]ICJ, Certain phosphate lands in Nauru (Nauru v. Australia), preliminary objections, sentence of 26 June 1992, par. 67. ITLOS, M/V Louisa (Saint Vincent and the Grenadines v. Kingdom of Spain) sentence of 28 May 2013, par. 1421, which is referred the jurisprudence of the ICJ. M. SCHEININ, Human rights norms in "other" international courts, Cambridge University Press, Cambridge, 2019.
[20]The arbitral tribunal in case: South China Sea during the written phase of the arbitral proceedings the Philippines submitted an amended statement of claim in relation to the definition of the status of the maritime formation known as: "second Thomas Shoal". The arbitral tribunal did not proceed to a formal examination of the amended application in the light of the cited principles enunciated by international jurisprudence but simply authorized its presentation on the basis of art. 19 of Rules of procedure, which is affirmed that: "during the course of the arbitral proceedings a party may, if given leave by the arbitral tribunal to do so, amend or supplement its written pleadings (...)". See South China Sea arbitration (The Republic of Philippines v. People's Republic of China), award on jurisdiction and admissibility of 29 October 2015, parr. 42-43. According to S. TALMON, The South China Sea arbitration: Observations on the ward on jurisdiction and admissibility, op. cit., pp. 310ss.
[21]N. KLEIN, Dispute settlement in the UN Convention on the law of the sea, Cambridge University Press, Cambridge, 2015, pp. 40ss. N. KLEIN, Expansions and restrictions in the UNCLOS dispute settlement regime: Lessons from recent decisions, in Chinese Journal of International Law, 15 (2), 2016, pp. 404ss. C.R. SYMMONS, Historic waters and historic rights in the law of the sea: A modern reappraisal, ed. Brill, Bruxelles, 2019, pp. 26ss.

tribunal consulted must not only ascertain the existence of a title of jurisdiction but must also verify that there are no limits or exceptions (art. 298 UNCLOS)[22] placed in its jurisdiction. The more or less restrictive interpretation of the scope of these rules has a significant influence on the exercise of jurisdiction and in perspective on the convenience that the contracting parties of UNCLOS believe to have in addressing the mandatory procedures referred to in section 2 of part XV[23] o in relation to the different mandatory procedures provided in it on the opportunity to select one rather than the other.

The same art. 288 UNCLOS clarifies that if there is no identity of views between the parties to the dispute regarding the jurisdiction of the court, the latter will have to decide on its jurisdiction. It is a rule codified by customary international law (principle of compètence de la compètence)[24]; ; a cornerstone of the entire mandatory dispute resolution system established by UNCLOS[25]. Since the system is based on the freedom of choice of the dispute resolution procedure reserved to the contracting parties of the UNCLOS pursuant to art. 287 combined with the obligation to accept a mandatory procedure that implies a binding decision if a part of the dispute were authorized to challenge the jurisdiction of the court, the aforementioned obligation would be less[26].

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[22]A. PROELSS, United Nations Convention on the law of the sea. A commentary, op. cit.,

[23]For further analysis see: L.D.M. NELSON, The international tribunal of the law of the sea: Some issues, in P. CHANDRASEKHARA RAO, R. KHAN, The international tribunal of the law of the sea: Law and practice, Kluwer Law International, The Hague, 2001, pp. 49ss. ITLOS, The M/V "Virginia G" case (Panama v. Guinea-Bissau) sentence of 14 April 2014, Joint dissenting opinion of vice-President Hoffmann and judges Marotta Rangel, Chandrasekhara Rao, Kateka, Gao and Boiguetais, par. 46: "there is no provision of the Convention which is immune from interpretation by the competent judicial body. Therefore when the occasion arises the tribunal is competent to interpret every word and expression in the Convention. Any other view will be contrary to the rule of law". See also the Declaration of judge Treves alleged in sentence of ITLOS of 14 March 2012 in case Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh v. Myanmar): "(...) these limitations and exceptions undoubtedly apply to disputes submitted to adjudication under section 2 of Part XV of the Convention (namely on the basis of the compulsory jurisdiction of the courts and tribunals mentioned therein) as they are included in section 3, entitled: "Limitations and exceptions to applicability of section 2". They do not apply to cases submitted by the agreement of the parties on the basis of section 1. This difference alone seems to warrant close attention by the tribunal in future cases (...)" (par. 13). M. KAŁDUŃSKI, A commentary on maritime boundary arbitration between Bangladesh and India concerning the Bay of Bengal, in Leiden Journal of International Law, 28 (4), 2015, pp. 800ss.

[24]H. LAUTERPACHT, The function of law in the international community, Lawbook exchange, New Jersey, 2000, pp. 204ss. I. GLEIDER, The International Court of Justice and the judicial function, Oxford University Press, Oxford, 2014, pp. 128ss).

[25]A. PROELSS, The limits of jurisdiction ratione materiae of UNCLOS tribunals, op. cit., pp. 52ss.

[26]Arbitration according to art. 287, par. 3 and 5 constitutes a procedure par dèfaut respectively in Annex VII in the event that the contracting parties have not made any declaration in accordance with art. 287, par. 11 and in the event that the contracting parties have made a choice but none of the means selected is applicable to the subject of the dispute. These provisions made us believe that the one outlined in section 2 of Part XV of UNCLOS is a complete system of dispute resolution, a system in which it is always possible to identify a mandatory procedure that leads to binding decisions. In the event of a dispute, the problem arises of whether the parties have accepted the same procedure or whether the arbitration established in accordance with Annex VII must be used for dèfaut. In these situations, it can be noted that the choice of the means of resolving the dispute will be left to the decision of the appellant, even if the preliminary part before the court or court seised. In cases where the parties have selected different means of resolving disputes or have not made any divarication pursuant to art. 287, par. 1, the dispute should be brought par dèfaut before a court established in accordance with Annex VII but the parties of the mutual agreement always have the possibility to decide to transfer it to the competence of another of the courts indicated in art. 287, par. 1 UNCLOS or to resolve it by means identified outside the dispute resolution system provided for by UNCLOS. In this sense see: ITLOS, The M/V "Saiga" (No.2) case (St. Vincent and the Grenadines v. Guinea) following and agreement of 1998. Case concerning the conservation and sustainable exploitation of swordfish stocks in the South-Eastern Pacific Ocean (Chile/European Union) following and agreement of 2000. Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar) following the agreement of 2009. M/V "Virginia G" case (Panama/Guinea-Bissau) following the agreement of 2011. Dispute concerning delimitation of the maritime boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire) following the agreement of 2014. G. LE FLOCH (edir.), Les 20 ans du tribunal international du droit de la mer, ed. Pedone, Paris, 2018, pp. 146ss. M. GARCÍA GARCÍA-REVILLO, The contentious

3.JURISDICTION ON THE SO CALLED MIXED DISPUTES

The issue of the so called mixed disputes[27] was raised in the context of some arbitrations established in accordance with Annex VII[28]. In Guyana/Suriname case the applicant had unilaterally brought proceedings in an arbitral tribunal in connection with the dispute regarding the definition of the maritime border with Suriname. The question revolved around the recognition of point 61 as valid or not, identified by a mixed commission on borders in 1936 as a point from which to calculate the delimitation of the continental shelf and the exclusive economy zone between the two layers of the adjacent coasts. Suriname called into question the joint committee's decision claiming that it was a mere recommendation and did not constitute an agreement between the two states on the delimitation of the territorial sea[29]. It contested the exact location of point 61, that would inevitably have affected the delimitation of the maritime border[30]. Suriname believed that the court had been called "to determine unresolved statutes of the land boundary terminus in delimiting the maritime boundary"[31] and that this did not fall within its jurisdiction. On the contrary, the applicant considered that the dispute concerned exclusively the definition of the maritime border and that for the arbitral tribunal it was not necessary "to reach a

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and advisory jurisdiction of the international tribunal for the law of the sea, Martinus Nijhoff, Leiden, London, 2015. P. CHANDRASKEKHARA RAO, P. GAUTIER, The international tribunal for the law of the sea: Law, practice and procedure, Edward Elgar Publishers, Cheltenham, 2018.

[27]With regard to those disputes that require the preliminary treatment of issues relating to territorial sovereignty in order to be able to interpret or apply the rules of UNCLOS such as for example the rules on the delimitation of maritime spaces. For further details see: Z. KEYUAN, International tribunal for the law of the sea: Procedures, practices and asian states, in Ocean Development and International Law, 41 (2), 2010, pp. 132ss. S. YEE, Conciliation and the 1982 UN Convention on the law of the sea, op. cit., pp. 316ss. C. ZHANG, Problematic expansion on jurisdiction: Some observation on the South China Sea arbitration, in Journal of East Asia and International Law, 9, 2016, pp. 450ss. A.C. NEUMANN, Sovereignty disputes under UNCLOS: Some thoughts and remarks on the Chagos marine protected area dispute, in Cambridge International Law Journal, 4, 2015. P.K. MUKHERJEE, J. XU, Maritime law in motion, ed. Springer, Berlin, 2020, pp. 760ss.

[28]F. WEIGERT, A. AURÉLIO DE LACERDA BADARÓ, A convenção das Nações Unidas para o direito do mar e a instituição do tribunal internacional para o direito do mar, in Revista de Direito Internacional, 9 (1), 2012, pp. 44ss. A. PEREIRA DA SILVA, Arbitragem internacional sob o anexo VII da Convenção das Nações Unidas sobre o direito do mar e as controvèrsias mistas. Anàlise de casos recentes, in Revista de Direito Internacional, 16 (1), 2019.

[29]The UNCLOS provides through art. 281 the qualification of an international instrument as an agreement. In particular see the case: South China Sea arbitration (The Republic of Philippines v. The People's Republic of China), award on jurisdiction and admissibility, 29 October 2015, par. 216: "(...) the court was not seeking to determine whether an agreement on the submission of disputes was binding (...) but rather article 1 of the genocide Convention imposed an obligation to prevent genocide that was separate and distinct from other obligations in the genocide Convention. The court looked beyond the ordinary meaning of the word "undertake" to verify its understanding. Its thus gave weight to the object and purpose of the genocide Convention and the negotiating history of the relevant provisions (...)the argument of China that he bilateral statements mutually reinforce each other so as to render them legally binding. Repetition of aspirational political statements across multiple documents does not per se transform them into a legally binding agreement" (par. 244). In the same spirit also the thesis that a rule contained in a non-binding instrument could constitute an agreement seems to be in line with the jurisprudence of the ICJ. The ICJ has shown not to consider fundamental the form of the instrument in which an agreement is inserted or the name attributed to it but rather the need to verify the terms used in it and the particular circumstances in which it was elaborated as we can see in the case: Aegean Sea continental shelf (Greece v. Turkey), jurisdiction of the court, sentence of 19 December 1978, par. 96: Maritime delimitation and territorial questions (Quatar v. Bahrain), jurisdiction and admissibility, sentence of 1st July 1994, parr. 23-29; Land and maritime boundary (Cameroon v. Nigeria: Equatorial Guinea intervening) sentence of 10 October 2002, parr. 258, 262-263. D. LIAKOPOULOS, The role of not party in the trial before the International Court of Justice, op. cit.,

[30]Guyana believed that point 61 should be defined in the mouth of the Corentyne river in accordance with art. 9 UNCLOS while Suriname invoked the application of art. 10 UNCLOS on the bays. See arbitration between Guyana and Suriname, award of the arbitral tribunal of 17 September 2007, par. 171.

[31]Guyana and Suriname, op. cit., par. 168

finding of fact or law regarding land or riverine boundaries"[32]. The arbitral tribunal, recognizing point 61 as defined by an agreement that binds the two states in defining the border along the territorial sea, has been able to exercise its jurisdiction over the case without having to deal with any aspect with it to territorial sovereignty, has been able to exercise its jurisdiction on the case without having to deal with any aspect related to territorial sovereignty[33].

The issue, on the so called mixed disputes, arose again in the Chagos marine protected area case, in which the arbitral tribunal established in accordance with Annex VII, stated that: "The tribunal considers that the simple explanation for the lack of attention to this question is that none of the conference participants expected that a long-standing dispute over territorial sovereignty would ever be considered to be a dispute concerning the interpretation or application of the Convention (...)"[34]. The court has shown that it is aware of the fact that there were several disputes at the same time marked by mutual implications between the parties and that only a part of them had been submitted to a judicial solution[35]. It stressed that it was his job to evaluate: "where the relative weight of the dispute lies"[36]. In two obiter dicta, the arbitral tribunal has left open the possibility of exercising jurisdiction over some aspects relating to territorial misfortune which are ancillary with respect to the dispute relating to the interpretation or application of UNCLOS stating that: "(...) the jurisdiction of a court or tribunal pursuant to article 288 (1) extends to making such findings of fact or ancillary determinations of law as are necessary to resolve the dispute presented to it (...) does not categorically exclude that in some instances a minor issue of territorial sovereignty could indeed be ancillary to a dispute concerning the interpretation or application of the Convention (...)"[37].

These statements according to our opinion pose questions about the real possibility of discerning between issues relating to territorial sovereignty qualifiable as "major" or "minor" and about the meaning that must be attributed to the term ancillary with respect to a dispute relating to interpretation or application of the UNCLOS. The arbitral tribunal stressed that: "(...) Where the real issue in the case and the object of the claim[38] (…) do not relate to the interpretation or application of the Convention (…) an incidental connection between the dispute and some matter regulated by the Convention is insufficient to bring the dispute within the ambit of article 288 (1) (…)"[39].

The exercise of jurisdiction over the so called mixed disputes has also been taken into consideration in the arbitration relating to the South China Sea case, which is affirmed that: "(...) The essence of the subject-matter of the arbitration is territorial sovereignty over

[32]Guyana and Suriname, op. cit., par. 168
[33]Guyana and Suriname, op. cit., parr. 307-308.
[34]Chagos marine protected area arbitration (Mauritius v. United Kingdom), award of 18 March 2015, par. 215.
[35]Chagos marine protected area arbitration (Mauritius v. United Kingdom), op. cit., par. 209-211.
[36]Chagos marine protected area arbitration (Mauritius v. United Kingdom), op. cit., par. 211
[37]Chagos marine protected area arbitration (Mauritius v. United Kingdom), op. cit., par. 229
[38]The tribunal is of the view that the true object of the claim: "(...) (Nuclear tests (New Zealand v. France), judgment, ICJ Reports 1974, pp. 457ss), in Marutius second submission is to bolster Mauritius' claim to sovereignty over the Chagos arhcipelago. The tribunal also notes that the relief sought by Mauritius in its first and second submissions in the same: A declaration that the United Kingdom as not entitled to declare the MPA (...) the tribunal concludes that Mauritius' second submission is properly characterized as relating to the same dispute in respect of land sovereignty over the Chagos archipelago as Mauritius first submission (...) finds itself without jurisdiction to address Mauritious' second submission (...)". S. RANGANATHAN, Nuclear weapons and the Court, in American Journal of International Law Unbound, 111, 2017, pp. 90ss. R.C. BRUKE, Losers always whine about their test. American nuclear testing international law and the International Court of Justice, in Georgia Journal of International & Comparative Law, 39, 2011, pp. 344ss.
[39]Chagos marine protected area arbitration (Mauritius v. United Kingdom), op. cit., par. 220.

several maritime features in the South China Sea, which is beyond the scope of the Convention and does not concern the interpretation or application of the Convention (...)"[40]. The tribunal stressed that it would not have considered the Philippines' complaints if it had been convinced that the solution of the questions submitted by the appellant had required the court beforehand to expressly or implicitly rule on sovereignty and that the actual objective of the complaints was that "to advance its position in the parties' dispute over sovereignty"[41]. The arbitral tribunal established its jurisdiction over the case as the Philippines' complaints were unrelated to the general question of sovereignty and were exclusively related to the interpretation and application of two UNCLOS rules, art. 121, par. 3[42] and art. 13[43], that is to say the possibility that drains and emerging slums at low tide could generate maritime areas[44].

According to our opinion and of art. 288, par. 1 UNCLOS the jurisdiction of the arbitral tribunal can be based on the examination of single UNCLOS rules without keeping in mind that the division of the marine space into different areas is always measured starting from land formations according to the land dominates the sea principle and that the interpretation of the individual conventional rules should not be detached from the wider context of the treaty in which they are inserted[45].

In this sense it could be taken up again in the arbitral procedure established in accordance with Annex VII of Ukraine v. Russia[46], in which the applicant claims inter alia "its rights as the coastal state in maritime zones adjacent to Crimea in the Black Sea, sea of Azov and Kerch strait"[47]. Also this controversy is characterized as a mixed dispute[48]. Before verifying the existence of a title of jurisdiction, the arbitral tribunal will be called upon to rule on the definition of the precise subject of the dispute which seems to have significant similarities with the Chagos marine protected area as Ukraine seeks the protection of its own rights as

[40]Part II of 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 off the Philippines, 7 December 2014.

[41]South China Sea arbitration (The Republic of Philippines v. People's Republic of China), award on jurisdiction and admissibility, 29 October 2015, par. 141.

[42]R.C. BECKMAN, I. TOWNSEND-GAULT, C. SCHOFIELD, Beyond territorial disputes in the South China Sea: Legal framework for the joint development of hydrocarbon resources, Edward Elgar Publishers, Cheltenham, 2013, pp. 55ss. T. TRUONG THUY, J.B. WELFIELD, L.T. TRANG, Building a normative order in the South China Sea: Evolving disputes, expanding options, op. cit., M. SHENG-TI GAU, The interpretation of article 121 (3) of UNCLOS by the tribunal for the South China Sea arbitration: A critique, in Ocean Development & International Law, 50 (1), 2019, pp. 52ss.

[43]A. PROELSS, United Nations Convention on the law of the sea. A commentary, op. cit.,

[44]B. BING JIA, The principle of the domination of the land over the sea: A historical perspective on the adaptability of the law of the sea to new challenges, in German Yearbook of International Law, 57, 2014, pp. 64ss. N. KLEIN, The vicissitudes of dispute settlement under the law of the sea Convention, in International Journal of Marine and Coastal law, 32, 2017, pp. 17ss. K. MORTON, China's arbitration in the South China Sea: Is a legitimate maritime order possible?, in International Affairs, 92 (4), 2016, pp. 912ss. E. BLITZA, Auswirkungen des Meeresspiegelanstiegs auf maritime Grenzen, ed. Springer, Berlin, 2019, pp. 47ss.

[45]In this sense also the Preamble of UNCLOS which is affirmed that: "the problems of ocean space are closely interrelated and need to be considered as a whole (...)".

[46]Dispute concerning coastal state rights in the Black sea, sea of Azov and Kerch strait (Ukraine v. Russian Federation)

[47]Statement of the Ministry of foreign affairs of Ukraine on the initiation of arbitration against the Russian Federation under the United Nations Convention on the law of the sea of 15 September 2016. P.M. SLOBODA, Anexação da Crimeia pela Rússia: uma análise jurídica, in Revista Eletrônica de Direito Internacional, 13, 2014, pp. 9ss. R.G. VOLTERRA, G.F. MANDELLI, Á. NISTAL, The characterisation of the dispute concerning coastal state rights in the Black Sea, Sea of Azov, and Kerch Strait, in International Journal of Marine and Coastal Law, 33, 2018, pp. 6ss.

[48]W. QU, The issue of jurisdiction over mixed disputes in the Chagos marine protection area arbitration and beyond, in Ocean Development and International Law, 47 (1), 2016, pp. 40ss.

coastal states on the basis of UNCLOS seem to want essentially a ruling on the sovereignty on the Crimean peninsula disputed between the two states[49].

4.LIMITS TO JURISDICTION

The first limit to jurisdiction is found in art. 297 UNCLOS, where its wording of the standard would suggest that the mandatory procedures referred to in section 2 of part XV[50] would be applicable only in the cases strictly indicated by the standard[51].

In this sense the arbitral tribunal in the Southern Bluefin Tuna case recognizing that art. 297 requires: "Significant limitation on the applicability of compulsory procedures insofar as costal states are concerned" and: "(...) the exercise by a coastal state of its sovereign rights or jurisdiction in certain identified cases only, i.e.: a) cases involving rights of navigation, overflight, laying of submarine cables and pipelines or other internationally lawful uses of the sea associated therewith; and b) cases involving the protection and preservation of the marine environment (...)"[52]. This interpretation requires an examination of the exact spatial scope of par. 1 of art. 297 UNCLOS, which refers to "(...) disputes concerning the interpretation or application of UNCLOS with regard to the exercise by a coastal state of its sovereign rights or jurisdiction provided for in UNCLOS (...)"[53].

The expressions sovereign rights and jurisdiction are used only in relation to the powers that the coastal state exercises in its exclusive economic zone and on its continental shelf. All other maritime areas would be excluded from the scope of the rule in question. Also in relation to the powers exercised in the exclusive economic zone and on the continental shelf in light of the definition of the exact spatial scope of application of art. 297, par. 1 it is necessary to make some clarifications[54]. The provision should be understood in the sense of not excluding from its spatial scope also those disputes concerning the exercise of the freedoms of the high seas in relation to the international seabed area[55].

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[49]Crimea is considered by Ukraine: territory temporarily occupied "by Russia (see Law n. 1237-VII of 6 May 2014 on securing the rights and freedoms of citizens and the legal regime on the temporarily occupied territory of Ukraine) while it is considered by the Russia is an integral part of its territory due to the incorporation which took place following the outcome of a referendum on self-determination which took place in the territory on 16 March 2014 and the subsequent treaty of accession to the Russian federation of 18 March 2014. See also: S. TALMON, The Chagos marine protected area arbitration: Expansion of the jurisdiction of UNCLOS Part XV courts and tribunals, in International and Comparative Law Quarterly, 65, 2016, pp. 928ss.

[50]N. BANKES, Precluding the applicability of section 2 of part XV of the law of the sea Convention, in Ocean Development and International Law, 48 (3-4), 2017, pp. 242ss.

[51]S. ALLEN, Article 297 of the United Nations Convention on the law of the sea and the scope of mandatory jurisdiction, in Ocean Development & International Law, 48 (3), 2017, pp. 314ss.

[52]Southern Bluefin Tuna case (Australia and New Zealand v. Japan), award on jurisdiction and admissibility, 4 August 2000, par. 61.

[53]S. ALLEN, Article 297 of the United Nations Convention on the law of the sea and the scope of mandatory jurisdiction, op. cit.,

[54]B. COURMONT, F. LASSERRE, E. MOTTET, Assessing maritime disputes in East Asia: Political and legal perspective, ed. Routledge, London & New York, 2017.

[55]A.L.C. DE MESTRAL, Compulsory dispute settlement in the third United Nations Convention on the law of the sea. A canadian perspective, in T. BUERGENTHAL, Contemporary issues in international law. Essays in honor of Louis B. Sohn, N.P. Engel, Kehl, Arlington, Strasbourg, 1984, pag. 183: "(...) a close reading of the text leads to the conclusion that it is likely to be something of a paper tiger and is unlikely to restrict the generality of section II of part XV (...) the fundamental objective is to protect the integrity of certain rights and jurisdictions exercised by coastal mistakes in the exclusive economic zone and in fact this article faithfully reflects the nature of these rights (...)"; contra: F. ORREGO VICUÑA, The exclusive economic zone regime. Regime and legal nature under international law, Cambridge University Press, Cambridge, 1989, pp. 126ss, who argues that such an interpretation is exaggerated until it would mean that the sovereignty and jurisdiction of the coastal state could be subject to continuous judicial confrontation which certainly is not the scope of the provision (...)". See also in argument: Y. TANAKA, A dual approach to ocean governance: The cases of zonal and integrated management in international law of the sea, ed. Routledge, London & New York, 2016, pp. 52ss.

The rule has also been further investigated by the arbitral tribunal in the Chagos marine protected area case, which the tribunal has ascertained that it does not claim that disputes concerning sovereign rights and the jurisdiction of coastal states are subject to mandatory procedures only in the cases listed and stressed that a limiting reading of the application scope of the standard cannot be considered implicit[56]. It has been highlighted if a court had jurisdiction over the exercise of sovereign rights and jurisdiction only in some cases, there would have been no reason to foresee a separate provision such as that of art. 297, par 3 which excludes jurisdiction in cases of disputes concerning biological resources of the exclusive economic zone, as this type of controversy should have been considered already excluded by virtue of their non-inclusion in the list contained in art. 297, par. 1 UNCLOS[57]. The court based its opinion on the preparatory works of the standard from which it would emerge that the editors of UNCLOS, eliminating the term only of the original version of par. 1 have expressed the attention not to limit the use of mandatory procedures to the only disputes indicated in the provision. Art. 297, par 1 UNCLOS should be read as a rule that reaffirms jurisdiction over the cases indicated therein and in relation to them through art. 294[58] which imposes additional safeguards in favor of the parties to the dispute but does not impose any restriction on the possibility of evaluating disputes involving the exercise of sovereign rights and jurisdiction by coastal states in other cases[59].
The interpretation of the arbitral tribunal in the Chagos marine protected area case goes beyond the traditional reading of art. 297, par. 1 UNCLOS expanding the possibility of resorting to the mandatory procedures provided for in section 2 of part XV to any type of dispute concerning the exercise of sovereign rights and the jurisdiction of coastal states[60]. This interpretation would support an exercise of jurisdiction which is also based on the reference made in the norm to other norms of international law.

5.(FOLLOWS): DISPUTES CONCERNING THE PROTECTION AND PRESERVATION OF THE MARINE ENVIRONMENT

In the Chagos marine protected area, the United Kingdom had advocated a restrictive interpretation of the standard in question stating that par. 1 of art. 297 should be read as a whole; because the purpose of the rule would have been to protect the freedom of navigation, overflight and the laying of submarine cables and pipelines and to other uses of the sea that are internationally lawful by the measures adopted by coastal states to regulate marine pollution[61]. Even if the institution of protected sea areas (MPAs) and the ban on the marketing of fish in relation to the Chagos islands had been considered measures for environmental purposes this should have prevented the arbitral tribunal established in

[56]Chagos marine protected area arbitration (Mauritius v. United Kingdom), op. cit., par. 308.
[57]A. PROELSS, United Nations Convention on the law of the sea. A commentary, op. cit.
[58]A. PROELSS, United Nations Convention on the law of the sea. A commentary, op. cit.,
[59]Chagos marine protected area arbitration (Mauritius v. United Kingdom), op. cit., par. 317.
[60]L. NGOC NGUYEN, The Chagos marine protected area arbitration: Has the scope of LOSC compulsory jurisdiction been clarified?, in International Journal of Marine and Coastal Law, 31 (1), 2016, pp. 120ss. L. MGOC NGUYEN, The UNCLOS Dispute Settlement System: What Role Can It Play in Resolving Maritime Disputes in Asia?, in Asian Journal of International Law, 8 (1), 2018, pp. 94ss.
[61]Chagos marine protected area arbitration (Mauritius v. United Kingdom), op. cit., par. 235 and 239.

accordance with Annex VII from exercising its jurisdiction over case since fishing and management of biological resources did not fall within the scope of the standard[62].
The arbitral tribunal rejected this interpretation, because the protection of the marine environment and preservation fall within the scope of the rule and qualified the institution of the MPAs as a measure relating to the protection of the marine environment[63]. The court stressed that it also depends on the identification of international norms and standards to which coastal states must adhere and on their content. It is stated that the expression: "International rules and standards" refers not only to substantive norms and standards but also to procedural one such as "the obligation to consult with or give due regard to the rights of other states"[64]. The tribunal considered that: “Such procedural rules may indeed be of equal or even greater importance than the substantive standards existing in international law (...) the obligation to consult with and have regard for the rights of other states set out in multiple provisions of the Convention is precisely such a procedural rule and its alleged contravention is squarely within the terms of art. 297 (1) (c) (...)”[65].
A further question concerns the fact whether a state can challenge a coastal state for not having adopted national legislation for the protection and preservation of the marine environment even if that state is not directly affected by the failure to adopt measures but acts by virtue of an interest. general protection of the environment. Opinion that we can say partially shared because of the fact that some of the rules set by UNCLOS for the protection and preservation of the marine environment have the nature of erga omnes partes obligations.

6.(FOLLOWS): CONTROVERSIES ON SCIENTIFIC RESEARCH

Scientific research in the territorial sea of a state is carried out only with the express consent of the coastal state and under the conditions established by it[66], the spatial scope of art. 297, par 2 examined, concerns only the exclusive economic zone and the continental shelf of coastal states. The standard is designed to offer an effective position in favor of coastal states by subtracting them from any type of control in relation to their most important discretionary choices in the management of their exclusive economic zone and their continental shelf[67].
Although we do not have useful elements from the jurisprudence we can say in this circumstance of limits related to the coastal state according to art. 253 UNCLOS[68] the coastal state could be called to answer for abuse of law due to the violation of the right of

[62]S. YEE, Intervention in an arbitral proceedings under Annex VII to the UNCLOS?, in Chinese Journal of International Law, 14 (1), 2015, pp. 80ss. I.B. KARDON, China can say "no": Analyzing China's rejection of the South China Sea arbitration. Toward a new era of international law with chinese characteristics, in University of Pennsylvania Asian Law Review, 13, 2018, pp. 6ss.
[63]Chagos marine protected area arbitration (Mauritius v. United Kingdom), op. cit., par. 319
[64]A. PROELSS, United Nations Convention on the law of the sea. A commentary, op. cit.,
[65]Chagos marine protected area arbitration (Mauritius v. United Kingdom), op. cit., par. 322.
[66]Chagos marine protected area arbitration (Mauritius v. United Kingdom), op. cit., par. 279. See also: T. TANAKA, Protection of community interests in international law: The case of the law of the sea, in Max Planck Yearbook of United Nations Law, 15, 2011, pp. 332ss.
[67]In this sense see: L. LUKASZUK, Settlement of international disputes concerning marine scientific research, in Polish Yearbook of International Law, 16, 1987, pp. 39ss: "the coastal state may eschew the submission of any dispute involving marine scientific research to the procedures provided for in section 2 if this research has been or is about to be, conducted on its exclusive economic zone or on its continental shelf (...)".
[68]N. KLEIN, Maritime security and the law of the sea, Oxford University Press, Oxford, 2012.

access to the reasons for the decision as this would not allow to appreciate if the evaluation on the suspension or termination of the research activities was founded in example on incorrect tests[69].

7.(FOLLOWS): FISHERIES DISPUTES

Art. 297, par. 3, lett. b) contemplates the hypothesis in which upon request of one of the parties to a dispute the latter is subtracted from the peaceful regulation by means of mandatory procedures if a conciliation procedure is initiated in accordance with section 2 of Annex V UNCLOS[70].

The jurisprudence has interpreted the content of the exception foreseen in lett. a), par. 3 relating to fishing in the exclusive economic zone of a coastal state[71].

In the Guyana/Suriname case, the arbitral tribunal highlighted that the exception to the applicability of section 2 part XV does not buy the sovereign rights of coastal states over the non-biological resources of its exclusive economic zone[72]. In the Chagos marine protected area case, the arbitral tribunal had to define the scope of the exception invoked by the United Kingdom, which argued that the dispute with Mauritius concerning the establishment of the MPAs around the Chagos archipelago was a measure concerning the "sovereign rights with respect to living resources "and as such was to be excluded from the jurisdiction of the court[73]. The arbitral tribunal rejected the British thesis that characterized the MPAs as "solely a measure relating to fisheries"[74],also rejected that of Mauritius according to which it would have been possible to distinguish between the disputes concerning the sovereign rights of the coastal state in relation to the biological resources of its exclusive economic zone and disputes relating to the rights of other states in the exclusive economic zone:"(...) The two are intertwined, and a dispute regarding Mauritius' claimed fishing rights in the exclusive economic zone cannot be separated from the exercise of the United Kingdom's sovereign rights with respect to living resources (...)"[75].

Based on this approach, any dispute concerning fishing activities in the exclusive economic zone of a coastal state could be excluded from the mandatory procedures provided for in section 2 of part XV on the basis of the exception contemplated in art. 297, par. 3 UNCLOS[76]. This would make it impossible for a third-party user of that exclusive economic zone to resort to mandatory procedures in defense of their rights whenever a coastal state invokes such an exception to jurisdiction.

In the South China Sea case, the arbitral tribunal found that the disputed areas were located in the exclusive economic zone of the Philippines stating that: "(...) need to limit compulsory dispute settlement where a claim is brought against a state's exercise of its sovereign rights in respect of living resources in its own exclusive economic zone. These

[69]A. PROELSS, United Nations Convention on the law of the sea. A commentary, op. cit.,
[70]A. PROELSS, United Nations Convention on the law of the sea. A commentary, op. cit.
[71]Southern Bluefin Tuna case (Australia and New Zealand v. Japan), award on jurisdiction and admissibility, 4 August 2000, par. 41, lett. b) and c). The arbitral tribunal exercising its jurisdiction implicitly accepted this position. It should be remembered that in the present case the fisheries dispute related to situations occurring in the high seas, therefore beyond the spatial scope of application of the rule in question which is limited to those situations that take place in the exclusive economic zone of the coastal state.
[72]Arbitration between Guyana and Suriname, award of the arbitral tribunal, op. cit., parr. 411-416.
[73]Chagos marine protected area arbitration (Mauritius v. United Kingdom), op. cit., par. 245.
[74]Chagos marine protected area arbitration (Mauritius v. United Kingdom), op. cit., par. 286-290
[75]Chagos marine protected area arbitration (Mauritius v. United Kingdom), op. cit., par. 297.
[76]A. PROELSS, United Nations Convention on the law of the sea. A commentary, op. cit.,

provisions do not apply where a state is alleged to chave violates the Convention in respect of the exclusive economic zone of another state (...)"[77]. It can be argued that the dispute resolution system set out in section 2 of part XV of UNCLOS was conceived with the aim of offering the coastal state enhanced protection of the rights it holds in its exclusive economic zone in relation to fisheries by reason of the fact that pursuant to art. 297, par. 3[78], the exercise of these rights can be subtracted from the coastal state to resort to the mandatory procedures provided for in section 2 of part XV of UNCLOS and due to the fact that the same rule, if invoked by a third state, would not prevent the coastal state from resort to mandatory procedures in relation to those disputes concerning illegal fishing conducted by the third state in its exclusive economic zone[79].

The Barbados/Trinidad and Tobago of 2006[80], case must also be cited in the same spirit, which, although not bringing about the definition of the scope of the rule in question, shows the tendency of the arbitral tribunals to somehow circumvent the exception set by this according to their jurisdiction. The court was able to invite the parties not only to negotiate in good faith but also to conclude an agreement providing for the fishing of Barbados fishermen in the exclusive economic zone of Trinidad and Tobago to access on mutually acceptable conditions, in accordance with UNCLOS standards. The court de facto overcame what was initially an obstacle to the exercise of its jurisdiction and although it did not rule on the merits of the fisheries dispute, it dictated the way forward for its solution. The result produced is that of limiting the free choice of the parties in identifying the means they deem most appropriate for the solution of the dispute[81].

8.OPTIONAL EXCEPTIONS APPLICABLE TO JURISDICTION

Par. 2 of art. 298 UNCLOS certifies that a contracting state which has made a declaration of exclusion may withdraw it at any time or agree to submit a dispute excluded from that declaration to any of the settlement procedures provided for in UNCLOS. The provision does not indicate the form that the withdrawal of the exclusion declaration must take. It seems reasonable to believe that the withdrawal must take place in written form the same request for the formulation of the declaration. This conclusion is supported by the letter of par. 6 of art. 298, which establishes that the exclusion declarations and the notices of withdrawal of the same are deposited with the secretary general of the United Nations who transmits the relative copies to the contracting states of the UNCLOS[82]. Art. 298 contains

[77]The Republic of Philippines v. People's Republic of China, award of 12 July 2016, par. 695.
[78]A. PROELSS, United Nations Convention on the law of the sea. A commentary, op. cit.,
[79]N. KLEIN, The vicissitudes of dispute settlement under the law of the sea Convention, op. cit., pp. 21ss.
[80]Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them, award of the arbitral tribunal, 11 April 2006, par. 283 and 384. Q. XU, Reflections on the presence of third states in international maritime boundary delimitation, in Chinese Journal of International law, 18 (1), 2019, pp. 94ss. S. MINAS, J. DIAMOND, H. DOREMUS, Stress testing the law of the sea: Dispute resolution disasters and emerging, ed. Brill, Bruxelles, 2018, pp. 56ss. T. COTTIER, Equitable principles of maritime boundary delimitation: The quest for distributive justice in international law, Cambridge University Press, Cambridge, 2015, pp. 318ss. S. KOPELA, Historic titles and historic rights in the law of the sea in the light of the South China Sea arbitration, in Ocean Development & International Law, 48 (2), 2017, pp. 184ss.
[81]Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them, award of the arbitral tribunal, op. cit., parr. 293 and 385.
[82]K. ZOU, Q. YE, Interpretation and application of article 298 of the law of the sea Convention in recent Annex VII arbitrations: An appraisal, in Ocean Development and International Law, 48 (3-4), 2017, pp. 314ss. C. YIALLOURIDES, Maritime disputes and international law: Disputed waters and seabed resources in Asia and European, ed. Routledge, London & New York, 2019.

two provisions which are fundamental for defining the jurisdiction of a court or tribunal seized pursuant to section 2 of part XV: par. 3, which establishes that the contracting state that made an exclusion declaration has no right to submit a dispute falling within one of the excluded categories to any of the procedures referred to in UNCLOS without the consent of the other state party to the dispute. And par. 5 which specifies that a new exclusion declaration or the withdrawal of a declaration does not in any way prejudice proceedings pending before a court or tribunal unless the parties agree otherwise. These issues were identified in matters relating to maritime boundaries, bays or historical titles, military activities, the functions of the Security Council in maintaining international peace and security and in relation to disputes concerning these matters, it was decided by formalization. of art. 298 UNCLOS to allow states to make statements that excluded them from the scope of section 2 of part. XV[83].

9.DISPUTES CONCERNING "MARITIME BOUNDARIES" OR "BAYS OR HISTORICAL TITLES"

The possibility of making an exclusion declaration pursuant to art. 298, par 1, lett. a), i) does not apply to any of the disputes on maritime boundaries definitively resolved by an agreement between the parties nor to any of those disputes that must be resolved in accordance with a bilateral or multilateral agreement binding on the parties.
Suffice it to recall the Chagos marine protected area case which rejected the interpretation contrary to art. 298, par. 1, lett. a), i) UNCLOS which underlined that if it were necessary that in the provision it was expressly provided that the disputes concerning sovereignty were excluded from the mandatory conciliation, it would have followed that in the absence of a declaration of exclusion, the disputes would have had to fall within the scope of the rules on compulsory procedures[84]. Specifically, the court set the exact perimeter of the rule in the following terms: "(...)
an opposite 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 (...)"[85].
In the light of this jurisprudence it would be possible for an arbitral tribunal to define some sovereignty issues in the context of the solution of disputes concerning matters of maritime delimitation or bays or historical titles provided that the sovereignty issues are genuinely ancillary to the controversy.

10.(FOLLOWS): THE SCOPE OF THE EXCEPTION RELATING TO MARITIME BOUNDARIES.

[83]B.H. OXMAN, The rule of law and the united nations Convention on the law of the sea, in European Journal of International Law, 7, 1996, pp. 353ss, which is affirmed that: "(...) political character of article 298 is evident and must be accorded serious weight in interpreting the Convention (...)" (pag. 368). M.H. NORDQUIST, SH. ROSENNE, L.B. SOHN, United Nations Conventions on the law of the sea 1982. A commentary, Martinus Nijhoff Publishers, Dordrecht, Boston, London, 1989, pp. 109ss.
[84]A. PROELSS, United Nations Convention on the law of the sea. A commentary, op. cit.
[85]Chagos marine protected area (Mauritius v. United Kingdom) op. cit., par. 218. B. BING JIA, The principle of domination of the land over the sea: A historical perspective on the adaptability of the law of the sea to new challenges, op. cit., pp. 67ss. I. BUGA, Territorial sovereignty issues in maritime disputes. A jurisdictional dilemma for law of the sea tribunals, in International Journal of Marine and Coastal Law, 27, 2012, pp. 59ss.

The identification of the types of disputes concerning maritime boundaries would seem somewhat easy given the reference expressed to disputes concerning the interpretation or application of articles 15, 74 and 83[86], i.e. those disputes relating to the delimitation of the territorial sea of the exclusive economic zone and the continental platform between states with opposite or adjacent coasts.

The International Tribunal for the Law of the Sea (ITLOS) in case M/V "Louisa" was affirmed that: "(...) the use of term "concerning" in the declaration indicates that the declaration does not extend only to articles which expressly contain the world "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 (...)"[87]. In this sense we could say that the interpretation of art. 298, par. 1, lett. a) i) the term concerning would refer to any standard of the UNCLOS having a relationship with the maritime boundaries and bays or historical titles[88].

Interpretation also supported in the South China Sea case in relation to the dispute of those complaints submitted by the Philippines concerning the statutes of some maritime formations over which China itself claimed sovereignty[89]. In the case of Position paper of 7 December 2014 invoking the application of its exclusion declaration formulated pursuant to art. 298 UNCLOS[90], China claimed that: "(...) The Philippines' approach of splitting its maritime delimitation dispute with China and selecting some of the issues for arbitration, if permitted will inevitably destroy the integrity and indivisibility of maritime delimitation and contravene the principle that maritime delimitation must be based on international law as referred to in article 38 of the ICJ Statute and that "all relevant factors must be taken into account" (...)"[91]. According to our opinion, the decision on the matter was conditioned by the fact that in identifying the real object of the dispute brought to its attention, it stated that the latter did not constitute a dispute on the delimitation of the maritime borders by providing an interpretation of the notion of boundary delimitations limited to the sole hypothesis of defining a maritime border between states with opposite or adjacent coasts and with superimposable claims[92]. This restrictive interpretation of the notion of boundary delimitations led the arbitral tribunal to believe that its incompetence by virtue of the declaration of exclusion formulated by China could have been affirmed only if the maritime formations affected by the dispute and claimed by China had been classified as islands, to the senses of art. 121 UNCLOS. In that hypothesis the maritime areas that these islands

[86]A. PROELSS, United Nations Convention on the law of the sea. A commentary, op. cit.,
[87]ITLOS, The M/V "Louisa" case (Saint Vincent and the Grenadines v. Kingdom of Spain), sentence of 28 May 2013, par. 83. For further details see: CH. WHOMERSLEY, The South China Sea: The award of the tribunal in the case brought by Philippines against China. A critique, op. cit., pp. 242ss.
[88]M.J. AZNAR, The obligation to exchange views before the international tribunal for the law of the sea: A critical appraisal, in Revue Belge de Droit International, 47, 2014, pp. 238ss.
[89]In particular see the complaints n. 5, 8 and 9 of Philippines.
[90]On 25 August 2006, China made the following exclusion statement: "The Government of the people's Republic of China does not accept any of the procedures provided for in section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a)-(c) of article 298 of the Convention (...)".
[91]Position paper of the Government of the people's Republic of China on the matter of jurisdiction in the South China Sea arbitration by the Republic of the Philippines, 7 December 2014, par. 68. See also: South China Sea arbitration (The Republic of Philippines v. People's Republic of China), award on jurisdiction and admissibility, 29 October 2005, par. 366.
[92]South China Sea arbitration (The Republic of Philippines v. People's Republic of China), award on jurisdiction and admissibility, op. cit., par. 156.

would have generated would have overlapped the maritime areas generated by the archipelago of the Philippines giving rise to a dispute on the maritime boundaries[93]. Instead, in the decision on the merits, the arbitral tribunal held that the aforementioned maritime formations did not have the characteristics of islands and therefore was able to exercise its jurisdiction[94].

The correct interpretation of the scope of the exception provided for in art. 298, par. 1, lett. a) i) UNCLOS remains an uncertain issue as the conciliation commission between Timor-Leste and Australia created in accordance with Annex V UNCLOS and offered a broader interpretation of the notion of boundary delimitations. The commission has affirmed that: "(...) From an examination of articles 74 and 83 of the Convention that they address not only the actual delimitation of the sea boundary between states with opposite or adjacent coasts, but also the question of the transitional period pending a final delimitation and the provisional arrangements of a practical nature that the parties are called on to apply pending delimitation (...)"[95].

11.(FOLLOWS): THE SCOPE OF THE "BAYS OR HISTORICAL TITLES" EXCEPTION

The exception relating to bays or historical titles was first interpreted by an arbitral tribunal in the South China Sea case. The tribunal found itself having to define the nature of the historic rights claimed by China in its South Sea within the so called nine-dash line and to ascertain whether they were covered by the declaration of exclusion from the agreed state pursuant to art. 298 UNCLOS[96].

First of all, the court did not consider this aspect of the controversy a matter related to territorial sovereignty or the delimitation of a maritime border[97]. It focused on the concept of historical bay and underlined how it is a well-known concept in international law, referring to the meaning accepted in two documents elaborated within the framework of the United Nations on the subject[98]

[93]South China Sea arbitration (The Republic of Philippines v. People's Republic of China), award on jurisdiction and admissibility, op. cit., par. 394.

[94]South China Sea arbitration (The Republic of Philippines v. People's Republic of China), award of 12 July 2016, par. 629, which is affirmed that: "(...) nothing in the Convention prevents a tribunal from recognizing the existence of an exclusive economic zone or continental shelf, or of addressing the legal consequence of such zones, in an area where the entitlements of the state claiming an exclusive economic zone or continental shelf are not overlapped by the entitlements of any other state (...)".

[95]South China Sea arbitration (The Republic of Philippines v. People's Republic of China), op. cit., par. 97.

[96]CH. WHOMERSLEY, The South China Sea: The award of the tribunal in the case. Brought by Philippines against China. A critique, op. cit., pp. 247ss. S. TALMON, The South China Sea arbitration: Observations on the award on jurisdiction and admissibility, op. cit., pp. 312ss.

[97]Decision inspired from the ICJ in case: Continental shelf (Tunisia v. Lybian Arab Jamahiriya) sentence of 24 February 1982, ICJ Reports 1982, par. 100: "(...) the draft Convention of the third Conference on the law of the sea (containts) any detailed provisions on the règime of historic waters. Where is neither a definition of the concept nor an elaboration of the juridical règime of historic waters or historic bays (...) it seems clear that the matter continues to be governed by general international law which does not provide for a single règime for historic waters or historic bays but only for a particular règime for each of the concrete recognized cases of historic waters or historic bays (...)". D. LIAKOPOULOS, The role of not party in the trial before the International Court of Justice, op. cit.,

[98]Historic bays: Memorandum by the Secretariat of the United Nations, UN Doc. A/CONF.13/1, 30 September 1957. Juridical regime of historic waters, including historic bays, UN Doc. AS/CN.4/143 of 9 March 1962. Documents which are cited in South China Sea arbitration (The Republic of Philippines v. People's Republic of China), award of 12 July 2016, par. 205 and note 197.

and in light of this it was able to find that the South China Sea cannot be qualified as a bay[99]. The court retraced the genesis of the rule[100], analyzed the most recent jurisprudence of ICJ[101] and found the use of various expressions attributable to rights deriving from historical processes (historical rights, titles, waters and bays)[102], underlining that :"(...) This usage was understood by the drafters of the Convention and 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 nowhere mentioned in the Convention and the tribunal sees nothing to suggest that article 298 (1) (a) (i) was intended to also exclude jurisdiction over a broad and unspecified category of possible claims to historic rights falling short of sovereignty (...)"[103].

In light of these considerations, a restrictive interpretation of the notion of historical title emerges, the only link between which the coin UNCLOS is represented by the content of its art. 15[104]. The court held that: "(...) China does not claim historic title to the waters of South China Sea, but rather a constellation of historic rights short of title" and affirmed his jurisdiction on the case[105].

12.THE SCOPE OF THE EXCEPTION RELATING TO "MILITARY ACTIVITIES"

In the absence of a definition of these activities contained in the UNCLOS in the South China Sea case, the arbitral tribunal had the opportunity to dwell on the question of the scope of the exception on two occasions.

It should be emphasized that the arbitral tribunal accepted the qualification advanced by China regarding the civil nature of the activities carried out in the Mischief Reef area regarding the civil character of the activities carried out in the Mischief Reef area so as to exclude the applicability of art. 298, par. 1, lett. b)[106]. What should be stressed is that it was sufficient for the court to ascertain that a state has repeatedly stated over time that an activity had no military character because the exception to jurisdiction over military activities was not applicable. The court stated that art. 298, par. 1, lett. b) applies to "disputes concerning military activities" and not to military activities as such[107]. It stressed that if a state party has initiated a mandatory procedure under UNCLOS for a dispute that does not concern military activities, art. 298, par. 1, lett. b) does not come into play simply because the other party subsequently employed its military force in the course of the proceedings in relation to the dispute. The court specified that art. 298, par. 1, lett. b) does not limit its auxiliary jurisdiction to prescribe precautionary measures for military activities that take place in connection with a dispute that does not deal with military activities[108]. The arbitral tribunal held that China's actions in and around the Second Thomas Shoal and

[99]South China Sea arbitration (The Republic of Philippines v. People's Republic of China), op. cit., par. 205.
[100]South China Sea arbitration (The Republic of Philippines v. People's Republic of China), op. cit., parr. 215-217
[101]South China Sea arbitration (The Republic of Philippines v. People's Republic of China), op. cit., par. 224.
[102]South China Sea arbitration (The Republic of Philippines v. People's Republic of China), op. cit., par. 225.
[103]South China Sea arbitration (The Republic of Philippines v. People's Republic of China), op. cit., par. 226.
[104]M. LANDO, Judicial uncertainties concerning territorial sea delimitation under article 15 of the United Nations Convention on the Law of the Sea, in International & Comparative law Quarterly, 66 (3), 2017, pp. 592ss. M. LANDO, Maritime delimitation as a judicial process, Cambridge University Press, Cambridge, 2019, pp. 144ss.
[105]South China Sea arbitration (The Republic of Philippines v. People's Republic of China), op. cit., par. 229.
[106]South China Sea arbitration (The Republic of Philippines v. People's Republic of China), op. cit., par. 1028.
[107]A. PROELSS, United Nations Convention on the law of the sea. A commentary, op. cit.,
[108]South China Sea arbitration (The Republic of Philippines v. People's Republic of China), op. cit., par. 1158.

their interaction with the Filipino military forces operating on the spot constituted a separate controversy[109], "a dispute concerning military activities"[110], therefore it declined the exercise of jurisdiction[111]. It can only be noted with some perplexity that the different valorization of the term concerning in two similar situations resulted in the arbitral tribunal being able to assert its jurisdiction.

The activities of states in violation of the rules prohibiting the use of the sea for aggressive purposes can be classified as military activities. This is art. 301 entitled: Peaceful uses of the seas, which obliges the contracting states to refrain from resorting to the threat or use of force[112]. Art. 88 reserves the high seas for exclusively peaceful purposes and art. 141 imposes the same obligation in relation to the use of the international seabed area[113]. Disputes relating to military activities could also concern the violation of those rules, the practices of some states aimed at prohibiting the passage of warships in their territorial sea[114] or the use without prior authorization of their exclusive economic zone for military exercises and maneuvers[115]. These limitations of use are not expressly authorized by UNCLOS and are contested by other states[116].

13.(FOLLOWS): THE SCOPE OF THE EXCEPTION RELATING TO "FORCED EXECUTION ACTS"

In the Arctic Sunrise case, the arbitral tribunal rejected the thesis that proposed a broad reading of the exception so as to apply it to all acts of forced execution of laws adopted by the coastal state for the exercise of its sovereign rights and its jurisdiction and has stated that the exception applies only to enforced acts relating to fishing in the exclusive economic zone or marine scientific research in the exclusive economic zone or on the continental shelf[117]. According to the Tribunal disputes concerning forced execution acts adopted by the coastal state in relation to artificial islands, installations and structures and laying of submarine cables in its exclusive economic zone and on its continental shelf and disputes concerning the forced execution acts related the exploration and exploitation of the

[109]South China Sea arbitration (The Republic of Philippines v. People's Republic of China), op. cit., par. 1160.

[110]South China Sea arbitration (The Republic of Philippines v. People's Republic of China), op. cit., par. 1161: "(...) the tribunal finds that (...) 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. In connection with this stand-off, Chinese Government vessels have attempts to prevent the resupply and rotation of the Philippines on at least two occasions (...) as far as the tribunal is aware these vessels were not military vessels, China's military vessels have been reported to have been in the vicinity (...)".

[111]South China Sea arbitration (The Republic of Philippines v. People's Republic of China), op. cit., par. 1162.

[112]D.M. ONG, D. KRITSIOTIS, The IMLI treatise on global ocean governance. United Nations and global ocean governance, Oxford University Press, Oxford, 2018. J. KRASKA, R. PEDROZO, International maritime security law, Martinus Nijhoff Publishers, The Hague, 2013, pp. 304ss.

[113]A. PROELSS, United Nations Convention on the law of the sea. A commentary, op. cit.,

[114]The countries referred to are the following: Algeria, Argentina, Bangladesh, Cape Verde, Chile, China, Croatia, Egypt, Iran, Malta, Montenegro, Oman, Romania, Sao Tome and Principe, Serbia, Sudan, Sweden and Yemen .

[115]The countries referred to are the following: Bangladesh, Brazil, Cape Verde, India, Malaysia, Pakistan, Thailand, Uruguay.

[116]See the states who raised objections to the limitation of use of the exclusive economic zone for military activities, through a declaration made when the UNCLOS: Italy, Germany, the Netherlands, United Kingdom. See in argument: J. GENG, The legality of foreign military activities in the exclusive economic zone under UNCLOS, in Merkourios-Utrecht Journal of International and European Law, 38, 2012, pp. 22ss.

[117]Arctic Sunrise arbitration (Netherlands v. Russian Federation), award on jurisdiction 26 November 2014, par. 76. see also: ITLOS, Arctic Sunrise (Kingdom of the Netherlands v. Russian Federation), provisional measures, order of 22 November 2013, par. 45. A.G. OUDE ELFERINK, The Arctic Sunrise incident: A multi-faceted law of the sea case with a human rights dimension, in The International Journal of Marine and Coastal Law, 29, 2014, pp. 246ss.

resources of its continental shelf would not be excluded from the use of the mandatory procedures provided for in section 2 of Part XV[118].

The same interpretation of the exception of forced execution acts was also supported in the case of South China Sea[119], where the court did not enter into the merits of the interpretation of art. 298, par. 1, lett. b), in that it considered it had jurisdiction over the present case on the grounds that the acts of forced execution of China in the areas around certain maritime formations had not taken place in the exclusive Chinese economic zone, but in that of the Philippines[120].

14.JURISDICTION PURSUANT TO ART. 288, PAR. 2 UNCLOS

No arbitral tribunal constituted in accordance with Annex VII or other courses or courts referred to in art. 287 exercised their jurisdiction on the basis of art. 288, par. 2[121]. The fact that the rule in question confers specific jurisdiction on the courts and tribunals is confirmed by the positions taken by the states involved in the cases MOX Plant[122], Chagos marine protected area[123] and Arctic Sunrise[124].

The inclusion of this qualification in art. 288 seems to pursue the objective of contributing to a harmonization of the law of the sea, i.e. allowing the courts and tribunals referred to in art. 287 to interpret or apply international agreements "related to the purposes of UNCLOS" of which contracting parties are also non-contracting states of UNCLOS[125].

With regard to the first condition, the application of Part XV of UNCLOS is expressly referred to within their rules on the solution of disputes, which they implicitly recognize if they do not expressly pursue the purposes of UNCLOS[126]. The second condition for the

[118]See the case: Huyana/Suriname (Award of the arbitral tribunal, 17 September 2007), the arbitral tribunal exercised its jurisdiction over forced execution activities carried out by Suriname to prevent unauthorized drilling in a contested area of the continental shelf in reason of the fact that the parties had not made statements of exclusion of jurisdiction on the basis of art. 298. It is significant to underline how the court has faced the problem of verifying that it has jurisdiction in relation to acts of forced execution relating to the exploitation of the resources of the continental shelf by verifying the existence or not of declarations of exclusion, although once having ascertained the existence of these declarations, the interpretation of par. 1, lett. b) of art. 298.

[119]South China Sea arbitration (The Republic of Philippines v. People's Republic of China), hearing on jurisdiction and admissibility, Day 2, 8 July 2015.

[120]The court reached this conclusion stating that the maritime formations concerned (Mischief Reef, Second Thomas Shoal, GSEC101 block, Area 3, Area 4 and SC58 block) did not constitute islands within the meaning of art. 121 UNCLOS, therefore, did not generate marine spaces and in those areas China did not even enjoy historical rights, therefore they were part of the exclusive economic zone of the Philippines. See in particular: South China Sea arbitration (The Republic of Philippines v. People's Republic of China), award, 12 July 2016, parr. 690-695.

[121]A. PROELSS, United Nations Convention on the law of the sea. A commentary, op. cit.,

[122]Mox Plant case (Ireland v. United Kingdom), counter-memorial of the United Kingdom of 9 January 2003, par. 4.11. See also the Replay of Ireland vol. I, 7 March 2003, par. 4.2. I.V. KARAMAN, Dispute resolution in the law of the sea, ed. Brill, Leiden, Boston, 2012, pp. 126ss.

[123]Chagos marine protected area arbitration (Mauritius v. United Kingdom), award 18 March 2015, par. 168.

[124]Arctic Sunrise arbitration (Netherlands v. Russian Federation), award on the merits, 14 August 2015, par. 192, note 184.

[125]M.H. NORDQUIST, SH. ROSENNE, L.B. SOHN (eds.), United Nations Conventions on the law of the sea 1982. A commentary, Martinus Nijhoff Publishers, Dordrecht, Boston, London, 1989, pp. 48ss.

[126]At present these international agreements are as follows: Agreement to promote compliance with international conservation and management measures by fishing vessels on the High sea of 24 November 1993; 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; regional agreements in matter of fisheries: Convention on the conservation and management of highly migratory fish stocks in the Western and Central Pacific ocean of 5 September 2000; Convention on the conservation and management of fishery resources in the South Atlantic ocean of 20 April 2001; Convention on future multilateral cooperation in the North-east Atlantic fisheries of 18 November 1980, emended in 11 November 2004; Southern Indian Ocean Fisheries agreement of 7

exercise of jurisdiction must be understood as meaning that the international agreement must confer an express competence on the courts or tribunals referred to in art. 287[127]. Interpretation which has also been confirmed by the text of art. 21 of the statute of ITLOS, which establishes the competence of the ITLOS in accordance with art. 288 UNCLOS[128] and state practice[129].

In finis, it must be emphasized as on the basis of art. 288, par. 2 UNCLOS, the courts and tribunals referred to in art. 287[130] in principle do not find obstacles in the exercise of their jurisdiction in relation to the so called mixed disputes understood as cases in which territorial sovereignty issues should emerge as fundamental aspects of the controversy and not as ancillary with respect to the controversy itself, provided that there is a consensus of the parties to the dispute that emerge from the same international agreement that is asked to interpret or apply[131].

15.JURISDICTION PURSUANT TO ART. 300 UNCLOS

The use of art. 300 as the basis for the jurisdiction of a court or tribunal seised pursuant to section 2 of part XV has been the subject of analysis by ITLOS in M/V Louisa case[132]. Spain, as the defendant party had contested the use of art. 300 as a new title of jurisdiction noting that: "(...) Principle of good faith and the prohibition of the abuse of rights must be applied within the framework defined in article 300, namely (…) the rights (…) jurisdiction and (…) freedoms recognized in the Convention (…). The drafting of article 300 does not provide us with pointers to the interpretation of its object and purpose, except perhaps the fact that it comes in Part XVI of the Convention entitled General provisions, which permits us to draw our first conclusion, namely that the scope of the principle of good faith and the

July 2006; Amendment to the Convention on future multilateral cooperation in the Northwest Atlantic Fisheries of 28 September 2007. See also: Protocol to the Convention on the prevention of marine pollution by dumping of wastes and other matter of 7 November 1996; Convention on the protection of the underwater cultural heritage of 2 November 2001. Nairobi international Convention on the removal of wrecks of 18 March 2007. For further analysis see: A. DEL VECCHIO, R.VIRZO, Interpretations of the United Nations Convention on the law of the sea by international courts and tribunals, op. cit., A. PROELSS, United Nations Convention on the law of the sea. A commentary, op. cit.,

[127]In this sense see: P. TZENG, Supplemental jurisdiction under UNCLOS, in Houston Journal of International Law, 38 (2), 2016, pp. 500ss.

[128]In the advisory opinion on the Sub-regional fisheries commission, the ITLOS stressed that the word mater used in art. 21 of its statute has a broader scope than the word disputes contained in the text of art. 288, par. 2 UNCLOS, making it clear that there is no perfect parallelism of content between the two standards. ITLOS, Request for an advisory opinion submitted by the sub-regional fisheries commission, advisory opinion 2 April 2015, par. 56. For further details see: V. SCHATZ, Fishing for interpretation: The ITLOs advisory opinion on flag state responsibility for illegal fishing in the EEZ, in Ocean Development & International Law, 47 (4), 2016, pp. 330ss. Y. SHANY, Questions of jurisdiction and admissibility before international courts, Cambridge University Press, Cambridge, 2015, pp. 83ss. R.O. RUIZ, Spain before the advisory jurisdiction of the International Tribunal for the Law of the Sea, in Spanish Yearbook of International Law, 20, 2016, pp. 282ss.

[129]In case Mox Plant, the United Kingdom argued that the arbitral tribunal could have jurisdiction pursuant to art. 288, par. 2 only the other international agreements in question: "provided for UNCLOS dispute settlement" (Counter-memorial of the United Kingdom, 9 January 2003, par. 4.11), in case Chagos marine protected area arbitration, Mauritius affirmed that: "Article 288 (2) applies only to cases submitted pursuant to the provisions of a dispute settlement clause of an international agreement other than the Convention itself (...)". Chagos marine protected area arbitration (Mauritius v. United Kingdom), award, 18 March 2015, par. 269.

[130]A. PROELSS, United Nations Convention on the law of the sea. A commentary, op. cit.

[131]A. PROELSS, United Nations Convention on the law of the sea. A commentary, op. cit.

[132]ITLOS, M/V Louisa case (Saint Vincent and the Grenadines v. Kingdom of Spain) sentence of 28 May 2013, par. 96. R. OJINAGA RUIZ, M. DEL ROSARIO, The M/V "Louisa" case: Spain and the international tribunal for the law of the sea, in Spanish Yearbook of International Law, 17, 2013-2014, pp. 290ss.

prohibition of the abuse of rights is not limited to any given part of the Convention (...)"[133]. The ITLOS affirms that: "it is apparent form the language of article 300 of the Convention that article 300 cannot be invoked on its own, it becomes relevant only when the rights jurisdiction and freedoms recognised in the Convention are exercised in an abusive manner (...)"[134].

According to our opinion art. 300 could leave ample room for the jurisdiction of courts and tribunals if the abuse of law is assessed not only in the context of UNCLOS but also in relation to other areas of international law that have a connection with the UNCLOS. In this sense one should read the passage contained in the arbitration decision relating to the Southern Bluefin Tuna case which states that: "(...) 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 consequences of such gravity, that a tribunal might find that the obligations of UNCLOS provide a basis for jurisdiction (...)"[135].

It seems to us more appropriate to read this statement by the arbitral tribunal in the sense of not proposing the recourse to art. 300 as a title of subsidiary jurisdiction but rather as an indication by which it is emphasized that the appellant party can ask the court or the court seised to carry out a less stringent check on the subsistence requirements of its jurisdiction on the case when the dispute concerns serious and serious violations of substantive UNCLOS rules, highlighting the potential impact of harsh and serious violations of substantive rules on procedural requirements[136].

In the Barbados/Trinibad and Tobago case the latter state argued that Barbados' request for an equidistance line adjuster in the Caribbean sector was inadmissible and constituted an abuse of law under art. 300 UNCLOS since Barbados recognized Trinidad and Tobago's sovereign rights over the area south of the equidistance line[137]. The arbitral tribunal stated that: "The unilateral invocation of the arbitration procedure cannot by itself be regarded as an abuse of right contrary to article 300 of UNCLOS"[138].

The issue was brought up in more nuanced terms by China in the South China Sea case. In its position paper of 7 December 2014, China argued that the use of arbitration by the Philippines constituted: "An abuse of the compulsory procedures provided in the Convention "due to the fact that the dispute between the two countries, even though it concerned the interpretation or application of UNCLOS rules, was excluded from the use of

[133]Presentation by prof. Escobar Hernàndez, agent, Counsel and advocate of Spain, verbatin record, 10 October 2012, ITLOS/PV.12/C18/11/Rev. 1, p. 13.

[134]ITLOS, M/V Louisa case (Saint Vincent and the Grenadines v. Kingdom of Spain), op. cit., par. 137.

[135]Southern Bluefin Tuna case (Australia and New Zealand v. Japan) award on jurisdiction and admissibility, 4 August 2000, par. 64.

[136]See in argument: M. KAWANO, Compulsory jurisdiction under the law of the sea Convention: Its achievements and limits, in J. CRAWFORD, A. KOROMA, S. MAHMOUDI, A. PELLET (eds.), The international legal order: Current needs and possible responses. Essays in honour of Djamchid Momtaz, ed. Brill/ Martinus Nijhoff Publishers, Leiden, Boston, 2017, pp. 422 and 436ss.

[137]Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them, award of the arbitral tribunal, 11 April 2006, par. 88. R. WOLFRUM, The impact of article 300 of the UN Convention on the law of the sea on the jurisdiction of international courts and tribunals, in C. CALLIESS, T. STEIN (ed.), Herausforderungen an Staat und Verfassung. Liber amicorum für Torsten stein zum 70. Geburtstag, Nomos Verlag, Baden-Baden, 2015, pp. 384ss.

[138]Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them, award of the arbitral tribunal, op. cit., par. 208.

mandatory procedures by virtue of the exclusion declaration made by China to senses of art. 298 in relation to disputes concerning maritime boundaries[139].

16.JURISDICTION BASED ON UNCLOS NORMS WHICH REFER TO OTHER ONE OF INTERNATIONAL LAW.

In the Chagos marine protected area case, one of the complaints from Mauritius concerned the contestation of the proclamation by the United Kingdom of MPAs as it occurred in violation of the so called Lancaster Houser Undertakings (LHU) or unilateral declarations, the dispute was undoubtedly to be understood as a dispute that did not concern the interpretation or application of UNCLOS. Mauritius supported the jurisdiction of the arbitral tribunal claiming that the proclamation of the MPAs had violated articles 2, par. 3[140] and 56, par. 2 UNCLOS[141].

The arbitral tribunal after examining art. 2, par. 3 concluded that:"The balance of the authentic versions favours reading that provision to impose and obligation (...)"[142] and affirmed that "(...) the balance of the authentic versions favours reading that provision to impose an obligation"[143] and that this interpretation is pursuant "with the placement of article 2 (3) within the structural context of the Convention"[144] and with the object and scope of UNCLOS[145]. The court admitted that art. 2, par. 3 UNCLOS could form the basis for the exercise of additional jurisdiction if there was a state complaint based on the violation of general international law rules which coastal states must take into account when exercising their sovereignty over the territorial sea. With regard to the oppositions of Mauritius which invoked the LHU in the light of art. 56, par. 2 UNCLOS[146], the arbitral tribunal ruled that: "the ordinary meaning of due regard calls for the United Kingdom to have such regard for the rights of Mauritius as is called for by the circumstances and by the nature of those rights (...)"[147]. The rule does not appear to have been intended as a possible legal basis for invoking a title of additional jurisdiction.

Again in the Chagos marine protected area, the arbitral tribunal recognized a potential expansion of its jurisdiction in interpreting art. 297, par. 1 UNCLOS in relation to those types of disputes indicate in the law by reason of the references that the same as international law disputes[148]; as a sign of the potential expansion of the jurisdiction of the

[139]Position paper of the Government of the people's Republic of China on the matter of jurisdiction in the South China Sea arbitration by the Republic of the Philippines, 7 December 2014, par. 74. In particular see par. 84: "(...) 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 and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right (...)". P. TZENG, Ukraine v. Russia and Philippines v. China: Jurisdiction and legitimacy, in Denver Journal of International Law and Policy, 46, 2017, pp. 4ss.

[140]"The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law".

[141]"(…) in exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal state shall have due regard to the rights and duties of other states and shall act in a manner compatible with the provisions of this Convention (...)".

[142]Chagos marine protected area (Mauritius v. United Kingdom), op. cit., par. 502.

[143]Chagos marine protected area (Mauritius v. United Kingdom), op. cit., par. 503.

[144]Chagos marine protected area (Mauritius v. United Kingdom), op. cit., par. 504.

[145]Chagos marine protected area (Mauritius v. United Kingdom), op. cit., par. 514.

[146]P.D. GORLUP, Management of marine protected areas: A network perspective, Wiley & Sons, New York, 2017. R.C. BECKMAN, M. MCCREATH, J. ASHLEY ROACH, High seas governance: Gaps and challenges, ed. Brill, The Hague, 2018. G.K. WALKER, Definitions for the law of the sea: Terms not defined by the 1982 Convention, op. cit., pp. 235ss.

[147]Chagos marine protected area (Mauritius v. United Kingdom), op. cit., par. 475.

[148]Chagos marine protected area (Mauritius v. United Kingdom), op. cit., par. 316.

arbitral tribunals established in accordance with Annex VII. If we add to this that the permanent jurisdictions referred to in art. 287 UNCLOS[149] such as the ICJ and the ITLOs traditionally interpret the exercise of their jurisdiction in stricter terms by more diligently respecting the relevant rules on jurisdiction included in their respective statutes, the result that would result is a signal sent to the states to use more compulsory arbitration for the resolution of their disputes.

17.THE RELATIONSHIP BETWEEN "APPLICABLE LAW" AND "JURISDICTION"

The question of whether art. 293, par. 1 UNCLOS indicates the applicable law of the courts or tribunals referred to in art. 287 UNCLOS was dealt with before ITLOS and arbitral courts[150].

If you interpret this provision using the criteria indicated in art. 31 of Vienna Convention on the Law of Treaties (VCLT) the ordinary meaning to be attributed to the terms of the treaty in their context and in light of its object and purpose it can be found that: a) In relation to the terms to be attributed to the terms, the provision speaks of courts or tribunals "having jurisdiction"; this implies that the courts or tribunals must first establish their jurisdiction on the basis of art. 288 UNCLOS and only if such jurisdiction exists can the UNCLOS and the "other rules of international law" referred to in art. 293, par. 1; b) in relation to the context of the treaty, the provision in question is clearly entitled "applicable law"[151] while the "jurisdiction" of courts and tribunals is defined in art. 288 UNCLOS; c) in relation to the object and purpose of the section, the UNCLOS preamble makes clear that the latter discipline "all issues relating to the law of the sea" and not also matters outside it[152].

Before the ITLOS, in the M/V "Saiga" case (no. 2), Saint Vincent and the Grenadines had claimed excessive use of force in the detention of the ship registered in their country against Guinea. The rule invoked on the use of force against foreign ships is not enshrined in UNCLOS[153]. The court found that: "(...) The Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the Convention requires that the use of force must be avoided as far as possible and where force is unavoidable it must go beyond what is reasonable and necessary in the circumstances (...)"[154]. The ITLOS based the application of the ban on the use of force in the ship's stop operation on art. 293, par. 1 UNCLOS without expressing itself in any way on its jurisdiction. This constitutes a de facto exercise of jurisdiction over the complaint raised by Saint Vincent and the Grenadines. The statement by a judicial body

[149]A. PROELSS, United Nations Convention on the law of the sea. A commentary, op. cit.
[150]A. PROELSS, United Nations Convention on the law of the sea. A commentary, op. cit.,
[151]In this sense see also from the ITLOS: The Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian ocean (Mauritius/Maldives), order n. 2019/4 of 27 September 2019.
[152]A. PROELSS, United Nations Convention on the law of the sea. A commentary, op. cit.
[153]The UNCLOS regulates the use of force only in art. 19, par. 2, lett. a) in relation to the right of harmless passage in the territorial sea of a state ds part of ships, in art. 39, par. 1, lett. b) in relation to the right of passage of ships passing through straits and to art. 301 in connection with the peaceful use of the seas, which is affirmed that: "in exercising their rights and performing their duties under this Convention, state 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 (...)".
[154]ITLOS, M/V "Saiga" (No.2) (Saint Vincent and the Grenadines v. Guinea), sentence of 1st July 1999, par. 155.

about a state's violation of a rule of international law is considered a paradigmatic example of exercising jurisdiction over a complaint[155].

In the Guyana/Suriname case, the respondent state was "internationally responsible for violating (...) the charter of the United Nations and general international law (...) because of its use of armed force" against a Canadian ship licensed by Huyana. The UNCLOS does not regulate the ban on the use of force against foreign ships. The arbitral tribunal found itself deciding on a complaint that did not concern the interpretation or application of UNCLOS but a rule of general international law. The court citing the M/V Saiga case (n.2) stated that: "(...) Article 293 as giving it competence to apply not only the Convention, but also the norms of customary international law (…) the tribunal this is a reasonable interpretation of article 293 and therefore Suriname's contention that this tribunal had no jurisdiction to adjudicate alleged violations of the United Nations charter and general international law cannot be accepted (...)"[156]. The arbitral tribunal exercised its jurisdiction on the basis of art. 293, par. 1 UNCLOS. It stated that the rule conferred a "competence" on it[157] and rejected Suriname's challenge to the jurisdiction. The court went on to state that: "(...) It has jurisdiction to consider and rule on Guyana's allegation that Suriname has engaged in the unlawful use or threat of force contrary to the Convention, the UN Charter and general international law"[158].

In the M/V "Virginia G" case, the court limited itself to citing the jurisprudence relating to the M/V "Saiga" case (no. 2) to exercise its jurisdiction[159], although it subsequently ascertained that the rule on the prohibition of use of the force had not been violated in the present case[160].

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[155]In this sense see: ICJ, Questions relating to the obligation to prosecute or extradite (Belgium v. Senegal), sentence of 20 July 2012, in ICJ Reports 2012, parr. 49-52. A. NOLLKAEMPER, A. REINISCH, R. JANIK, International law in domestic courts. A case book, Oxford University Press, Oxford, 2019. K. OELLERS-FRAHM, Article 41, A. ZIMMERMANN, C. TOMUSCHAT, K. OELLERS-FRAHM, C.J. TAMS, M. KASHGAR, D. DIEHL, The statute of the International Court of Justice. A commentary, Oxford University Press, Oxford, 2019, pp. 1046ss. Application of the interim accord of 13 December 1995 (Macedonia v. Greece), sentence of 5 December 2011, ICJ Reports, 2011, parr. 644ss. Par. 58. J. GALBRAITH, Contemporary practice of the United States relating to international law, in American Journal of International Law, 113, 2019, pp. 134ss. Avena and other Mexican nationals (Mexico v. USA) sentence of 31 March 2004, in ICJ Reports of 2004, parr. 27-28. Oil platfrom (Iran v. USA) sentence of 6 November 2003, in ICJ Reports, 2003, par. 31. G. GORDON, The oil platforms opinion: An elephant in the eye of a needle, in Amsterdam Law Forum, 1 (2), 2009. LaGrand (Germany v. USA) sentence of 27 June 2001, in ICJ Reports, 2001, par. 42. E. ROBERT, The protection consulaire des nationaux en pèril? The ordinances in the conservative terms of renders for the International Court of Justice in the affairs of the Breard (Paraguay v. Etats-Unis) and LaGrad (Allemagne v. Etats-Unis), in Revue Belge de Droit International, 103, 1999, pp. 414ss. S. BAKER, Germany v. United States in the International Court of Justice. An international battle over the interpretation of article thirty-six of the Vienna Convention on consular relations and provisionals measures orders, in Georgia Journal of International & Comparative Law, 30, 2014, pp. 282ss. P.A. HEINLEIN, The United States and german interpretations of the Vienna Convention on consular relations. Is any constitutional court really cosmopolitan?, in Maryland Journal of International Law, 25, 2010, pp. 321ss.

[156]Arbitration between Guyana and Suriname, award of the arbitral tribunal, 17 September 2007.

[157]The concept of competence is synonymous with jurisdiction. See in this sense: C.F. AMERASINGHE, Jurisdiction of international tribunals, ed. Brill, the Hague, pp. 60ss. H. THIRLWAY, The law and procedure of the International Court of Justice: Fifty years of jurisprudence, Oxford University Press, Oxford, 2013, pp. 682ss. J.J. QUINTANA, Litigation at the International Court of Justice: Practice and procedure, ed. Brill/Martinus Nijhoff Publishers, Leiden, Boston, 2015, which is affirmed that the distinction between the two concepts is o little importance in practice.

[158]Arbitration between Guyana and Suriname, award of the arbitral tribunal, 17 September 2007, par. 487.

[159]M/V "Virginia G", case (Panama/Guinea-Bissau), sentence of 14 April 2014, par. 359, the ITLOS has cited the parr. 166 and 156 of the sentence of M/V "Saiga" (No.2).

[160]M/V "Virginia G", case (Panama/Guinea-Bissau), op. cit., par. 362; "the tribunal is of the view that the information provided to it by the parties does not indicate that excessive force was used against the M/V Virginia G and its crew. The tribunal considers that the standards referred to by the tribunal in the M/V "Saiga" (No.2)" case were met and therefore does not find that Guinea Bissau used excessive force leading to physical injuries or endangering human life during the boarding and sailing of the M/V Virginia G to the port of Bissau (...)". See also: Z. SCANLON, Upsetting the balance?

Turning to the arbitral tribunals where the exercise of jurisdiction pursuant to art. 293, par. 1 UNCLOS we refer to the MOX Plant case where the M/V "Saiga" case (no. 2) was cited to argue the jurisdiction of the arbitral tribunal to ascertain its violation. The arbitral tribunal did not adopt any final decision on this case but in order no. 3 clearly stated that "there is a cardinal distinction between the scope of its jurisdiction under article 288, par. 2, of the Convention on the one hand and the law to be applied by the tribunal under article 293 of the Convention on the other hand"[161].

In the Chagos marine protected area case the request from Mauritius had been argued on the basis that in light of the jurisprudence in M/V "Saiga" (No.2) and Guyana/Suriname cases, the court would have had a title to apply rules of international law to resolve the issue of sovereignty[162]. The arbitral tribunal although acknowledged that: "(…) Whether the tribunal, or other courts and tribunals convened pursuant to part XV of the Convention, may apply such exterior sources of law and address such matters raises a question of the scope of jurisdiction under the Convention"[163] it affirmed that it had no jurisdiction over the complaint sovereignty[164].

In the Arctic Sunrise case based on art. 293, par. 1 UNCLOS, the arbitral tribunal held that: "(...) Article 293 is not, however, a means to obtain a determination that some treaty other than the Convention has been violated (…) this tribunal does not consider that it has jurisdiction to apply directly provisions such as articles 9 and 12 (2) of the ICCPR or to determine breaches of such provisions"[165]. Art. 293, par. 1 UNCLOS refers to "other rules of international law not incompatible with this Convention"[166] it would have the purpose of providing interpretative guidelines for the application of the provisions of UNCLOS and not of favoring the application of other international law rules per se.

In the Duzgit integrity case the violation of generally and humanitarian concerns[167] in relation to the arrest, detention and fine imposed on the ship's captain and crew the court since the UNCLOS does not contain provisions on "human rights and humanitarian concerns"[168] has stated that:"The combined effect of article 288 (1) and article 293 (1) UNCLOS is that the tribunal does not have jurisdiction to determine breaches of

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The legality of vessel confiscation under the losc after the M/V Virginia G case, in The International Journal of Marine and Coastal Law, 33 (1), 2018, pp. 169ss. D. TESTA, Coastal state regulation of bunkering and ship-to-ship (STS) oil transfer operations in the EEA: An analysis of state practice of coastal state jurisdiction under the LOSC, in Ocean Development & International Law, 50 (4), 2019, pp. 366ss.

[161]MOX Plant case (Ireland v. United Kingdom), procedural order n. 3, 24 June 2003, par. 19. Statement by the president of 13 June 2003, par. 5: "(...) the tribunal agrees with the United Kingdom that there is a cardinal distinction to be drawn between the scope of its jurisdiction under article 288 of the Convention and the applicable law under article 293. It is also inclined to agree with the United Kingdom that aspects of the written pleadings of Ireland raised questions arising directly under others legal instruments and it agrees that to the extent this is so, any such claims would be inadmissible (...)". See also: N. LAVRANOS, The epilogue in the MOX Plant dispute: An end without fundings, in Nuclear Law and Policy, 1, 2011.

[162]Chagos marine protected area (Mauritius v. United Kingdom), op. cit., parr. 439-440

[163]Chagos marine protected area (Mauritius v. United Kingdom), op. cit., par. 203.

[164]Chagos marine protected area (Mauritius v. United Kingdom), op. cit., parr. 219 to 230.

[165]Arctic Sunrise arbitration (Netherlands v. Russian Federation), op. cit., parr. 188 and 192. M. FORTEAU, J.M. THOUVENIN, Traitè de droit international de la mer, ed. Pedone, Paris, 2017. M. LANDO, Maritime delimitation as a judicial process, op. cit.,

[166]Arctic Sunrise arbitration (Netherlands v. Russian Federation), op. cit., par. 191. In argument see also: P. TZENG, Jurisdiction and applicable law under UNCLOS, in The Yale Law Journal, 126, 2016, pp. 242ss: "(...) tribunals have made a legal error by relying on article 293 (1) to establish their jurisdiction over use-of-force claims (...)".

[167]The Duzgit integrity arbitration (Malta v. São Tomè and Principe), award 5 September 2016, par. 121 (9) and 203. For further details see: F. BAETENS, Legitimacy of unseen actors in international adjudication, Cambridge University Press, Cambridge, 2019, pp. 171ss.

[168]The Duzgit integrity arbitration (Malta v. São Tomè and Principe), op. cit., parr. 204

obligations not having their source in the Convention (including human rights obligations)"[169]. Consequently, it stated its incompetence in determining whether obligations relating to the protection of fundamental human rights had been violated by the defendant state[170]. The court relating to case 293 UNCLOS stated that: "The exercise of enforcement powers by a "coastal" state in situations where the state derives these powers form provisions of the Convention is also governed by certain rules and principles of general international law (…) these principles encompasses the principles of necessity and proportionality (…) do not apply in case where states resort to force, but to all measures of law enforcement (...)"[171]. The court offered a different reading of the rule of art. 293, par. 1 UNCLOS arguing that in some situations the UNCLOS rules alone do not define the legal framework of reference therefore in these cases certain rules and principles of general international law must also be taken into consideration. The interpretations provided on the two cases just mentioned were conceived to bring the system to coherence and both base this belief although they do not explicitly deal with the argument that the UNCLOS should not be conceived as a self-contained system[172].

In the South China Sea case, the competent court appears to have reopened the question relating to the exercise of jurisdiction based on art. 293, par. 1 UNCLOS[173], which the tribunal has affirms that the existence of an obligation of the parties to refrain from aggravating or extending the dispute with their conduct during the course of the arbitration procedure obligation reconstructed as a general principle of international law and part of those "other rules of international law not incompatible with the Convention"[174]. The arbitral tribunal was able to affirm China's responsibility for aggravating the dispute with the Philippines with the activities carried out in the South China Sea, in violation of "its obligations pursuant to articles 279, 296 and 300 of the Convention, as well as pursuant to general international law (...)"[175]. The expressions used by the arbitral tribunal do not produce cracks in the jurisprudential practice developed up to that moment. From the examination of the process of recognition of the existence of the rule that would impose the obligation not to aggravate or extend the dispute during the conduct of the arbitration proceedings, it can be deduced that the general principle of international law relied on has been reconstructed by the court through a process of abstraction and generalization of legal

[169]The Duzgit integrity arbitration (Malta v. São Tomè and Principe), op. cit., par. 207.
[170]The Duzgit integrity arbitration (Malta v. São Tomè and Principe), op. cit., par. 210.
[171]The Duzgit integrity arbitration (Malta v. São Tomè and Principe), op. cit., par. 209.
[172]A. BOYLE, Further development of the law of the sea Convention: Mechanisms for change, in International and Comparative Law Quarterly, 54 (3), 2005, pp. 564ss. R. CADDELL, E.J. MOLENAAR, Strengthening international fisheries law in an era of changing oceans, Bloomsbury Publishing, New York, 2019.
[173]For further details see: X. MA, Merits award relating to historic rights in the South China Sea arbitration: An appraisal, in Asian Journal of International Law, 8 (1), 2018, pp. 14ss. P.H. PIRANI DESOUZA SILVA, Artigo 293 da UNCLOS come clàusola jurisdictional?, in Revista de Ciências do Estado, 4 (1), 2019. A. KANEHARA, Validity of international law over historic rights: The arbitral award (merits) on the South China Sea dispute, in Japan Review, 2 (3), 2018, pp. 10ss.
[174]South China Sea arbitration (The Republic of Philippines v. The People's Republic of China), 12 July 2016, par. 1173: "(...) the tribunal considers for the reasons set out above, that the duty to abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and in general not allow any step of any kind to be taken which might aggravate or extend the dispute constitutes a principle of international law that is applicable to states engaged in dispute settlement as such (...).
[175]South China Sea arbitration (The Republic of Philippines v. The People's Republic of China), op. cit., par. 1203 (B) (16). S. YEE, The South China Sea arbitration (The Philippines v. China): Potential jurisdictional obstacles or objections, in Chinese Journal of International Law, 13, 2014, pp. 664ss.

principles affirmed in UNCLOS norms-in particular articles 279[176], 206 and 300- such as to be able to affirm that the principle enucleate is a general principle of law inferred from the legal system of UNCLOS and as such for the court qualifiable as other norm of international law not incompatible with UNCLOS. In using the expression "as well as pursuant to general international law", the arbitral tribunal simply wanted to point out for the sake of completeness that the violation of the obligation in question would be contestable also in the light of general international law. What seems clear is that China's liability has been established on the basis of the violation of UNCLOS rules and the jurisdiction of the arbitral tribunal has been exercised without having to invoke a title of additional jurisdiction.

It seems appropriate to distinguish with a certain neatness the jurisprudence in the M/V "Saiga" case (No. 2) and in the cases referred to it from the other cases in which the title of additional jurisdiction has been invoked on the base of rules of international law not relating to the use of force. It is believed that its application in the framework of UNCLOS and the possible ascertainment of its violation by courts or tribunals seized on the base of section 2 of part XV, finds its precise justification in art. 301 UNCLOS, which states that: "In exercising their rights and performing their duties under this Convention, States parties shall refrain from any threat or use of force against the territorial inconsistent with the principles of international law embodied in the charter of the United Nations (...)"[177]. It should be noted that the ex art. 293, par. 1 UNCLOS was rejected in the case just mentioned and the cases that referred to it were not openly criticized[178].

[176]D. ANDERSON, Peaceful settlement of disputes under UNCLOS in J. BARRETT, R. BARNES (eds.), Law of the sea: UNCLOS as a living treaty, ed. British Institute of International and Comparative Law, London, 2016, London, 2016, pp. 386ss. The reference to art. 2, par. 3 of the charter of the UN had double merit. On the one hand, that of incorporating into the UNCLOS the norm of a treaty of which not all states at the time of the negotiation and entry into force of the Convention were contracting parties, and on the other hand that of having sanctioned the agreement between the contracting parties to solve: "their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered". Another peculiarity of the formulation of art. 279 lies in the fact that it refers to the "means" referred to in art. 33, par. 1 of the charter of the UN and not used by the latter to reiterate that only disputes "the continuance of which is likely to endanger the maintenance of international peace and security" are subject to Chapter VI of the charter of the UN. The art. 279 should be read in conjunction with those UNCLOS regulations which oblige the contracting parties to take specific actions to resolve disputes. For example art. 74 UNCLOS specifies that states with opposite or adjacent coasts have the obligation to negotiate the delimitation of their exclusive economic zone in order to reach a fair solution and that if they do not reach an agreement within a reasonable period of time they must resort to the procedures provided for in part XV.

[177]B. OXMAN, The third United Nations Conference on the law of the sea: The ninth session (1980), in American Journal of International Law, 75, 1981, pp. 212ss. D. ATTARD, M. FITZMAURICE, N.A. MARTINEZ GUTIERREZ, The IMLI manual on international maritime law, vol. 1: The law of the sea, op. cit., In the same spirit see from the international ius cogens law: ICJ, Military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), sentence of 27 June 1986, in ICJ Reports, 1986, par. 188. T.D., GILL, The law of armed attack in the context of the Nicaragua case, in Hague Yearbook of International Law, 1988, pp. l32ss. L. DOSWALD-BECK, The legal validity of military intervention by invitation of the Government, in British Yearbook of International Law, 59, 1985, pp. 190ss. J.N., NORTON MOORE, The Nicaragua case and the deterioration of world order, in American Journal of International Law, 77, 1987, pp. 152ss. R.S.J., MACDONALD, The Nicaragua case: New answers to old questions, in Canadian Yearbook of International Law, 24, 1986, pp. 128ss. F.L., MORRISON, Legal issues in the Nicaragua opinion, in American Journal of International Law, 81, 1987, pp. 160ss. D.N. WHITE, C. HENDERSON, Research handbook on international conflict and security law, Edward Elgar Publishers, Cheltenham, 2013, pp. 197ss. J.R. CRAWFORD, Military and paramilitary activities in and against Nicaragua case (Nicaragua v. United States of America), in Max Planck Encyclopedia of Public International Law, 2011. E. SOBENES OBREGON, B. SAMSON, Nicaragua before the International Court of Justice: Impacts on international law, ed. Springer, Berlin, 2017.

[178]A. PROELSS, United Nations Convention on the law of the sea. A commentary, op. cit.

18.DISPUTES REGARDING THE INTERPRETATION OR APPLICATION OF THE ARBITRATION DECISION

Art. 12 of Annex VII prescribes that the resolution of such a dispute can be submitted to the same arbitral tribunal that adopted the decision to interpret or apply or to another court or tribunal identified on the basis of art. 287 UNCLOS[179].
This different formulation follows the lexical difference that is found in relation to art. 60 of the Statute of the ICJ which governs the jurisdiction of the court to interpret its own judgment[180]. These assessments can also be applied mutandis mutandi to art. 12 of Annex VII. The notion of disputes/desacuerdo should not be understood as meaning that there must be a real dispute between the parties involved within the meaning of art. 288 involved there must be a real dispute pursuant to art. 288 UNCLOS, but that it is sufficient that a different opinion or point of view exists in relation to the meaning and purpose of the arbitration decision to be interpreted[181]. Art. 12 also raises a further interpretative problem. The wording of the rule seems to evoke two distinct procedures, one relating to the interpretation of an arbitration decision and the other relating to the application of an arbitration decision. This reading stated that a proceeding on the application of an arbitration decision is admissible only and exclusively if a dispute arises regarding the incorrect or incomplete fulfillment of the obligations deriving from the original arbitration decision. Interpretation proceedings cannot be used in an attempt to have the original arbitration decision implemented or to have the arbitral tribunal ascertain the failure of the defendant to implement the original arbitration decision. This thesis is confirmed by the rules of many Rules of procedure[182], which exclusively explain procedures for interpreting arbitration decisions[183]. In the silence of the rules of procedure, the arbitral tribunals

[179]A. PROELSS, United Nations Convention on the law of the sea. A commentary, op. cit.
[180]In particular the ICJ in case of Request for interpretation of the judgment of 15 June 1962 in the case concerning the Temple of Preah Vihear (Cambodia v. Thailand), sentence of 11 November 2013, in ICJ Reports, 2013, par. 33 affirmed that: "(...) the existence of a dispute under article 60 of the statute does not require the same criteria to be fulfilled as those determining the existence of a dispute under article 36, par. 2 of the statute (...) it is not required that a dispute as to the meaning and scope of a judgment should have manifested itself in a formal way (...) it should be sufficient if the two Governments have in fact shown themselves as holding opposite views in regard to the meaning or scope of a judgment of the court (...)". A.C. TRAVISS, Temple of Preah Vihear. Lessons on provisional measures, in Chicago Journal of International Law, 13, 2012, pp. 327ss. J.D. CIORCIARI, Request for interpretation of the judgment of 15 June 1962 in the case concerning the Temple of Preah Vihear (Cambodia v. Thailand), in American Journal of International Law, 108 (2), 2014, pp. 290ss.
[181]A. PROELSS, United Nations Convention on the law of the sea. A commentary, op. cit.
[182]See also in argument: ITLOS, The M/T "San Padre Pio" (No. 2) case Switzerland/Nigeria, order 2020/1 of 7 January 2020. For further details before the final order see: V.P. COGLIATI-BANTZ, The South China Sea arbitration (The Republic of the Philippines v. The People's Republic of China), in International Journal of Marine Coastal Law, 31, 2016, pp. 762ss. R. LE BOEUF, Différend en mer de Chine méridionale (Philippines c. Chine), sentence arbitrale du 12 juillet 2016, in Annuaire Français de Droit International, 62, 2016, pp. 162ss. J.H. PAIK, South China Sea arbitral awards: Main findings and assessment, in Max Planck Yearbook of United Nations Law, 20, 2016, pp. 367ss. S. WU, K. ZOU (eds.), Arbitration concerning the South China Sea: Philippines versus China, op. cit., J.L. HEBERT, The South China Sea arbitration award and its widespread implications, in Oregon Review of International Law, 19, 2018, pp. 292ss. S. JAYAKUMAR, T. KOH, R. BECHMAN, T. DAVENPORT, H. D. PHAN, The South China Sea arbitration: The legal dimension, Edward Elgar Publishers, Cheltenham, 2018.
[183]See the Rules of procedure in the next arbitral cases: Guyana/Suriname, art. 16, Bay of Bengal maritime boundary arbitration between Bangladesh and India, art. 17, Chagos marine protected area arbitration (Mauritius v. United Kingdom), art. 16. The ARA Libertad arbitration (Argentina v. Ghana), art. 23. South China Sea arbitration (The Republic of Philippines v. People's Republic of China), art. 28. Barbados/Trinidad and Tobago, art. 17. The Atlanto-Scandian Herring arbitration (The Kingdom of Denmark in respect of the Faroe Islands v. The European Union), art. 23. Arctic Sunrise arbitration (Netherlands v. Russian Federation), art. 28. only in the rules of procedure in the cases: "Enrica Lexie" Incident (Italy v. India), art. 18 and Dispute concerning coastal state rights in the Black sea, sea of Azov and Kerch strait

themselves will define the methods for carrying out the interpretation procedure. It is reasonable to believe that in the absence of express terms for the submission of requests for interpretation in the texts of the Rules, the parties can submit these requests to the arbitration court without time limits.

The interpretation of the original arbitration decision cannot go beyond the limits established by the latter decision as res judicata. The interpretative decision can only ascertain or clarify that it constitutes the res judicata. It follows that any request for interpretation must take place in relation to the decision device and cannot relate to the reasons for the decision unless they are to be considered inseparable from the device[184]. In an interpretation judgment, no new facts can be considered nor can a decision be obtained on issues that the main judgment has not decided[185].

In the case of a singular problem in the original arbitration decision, we must ask whether the interpretation activity should continue or if the error should be considered as a new fact which, if taken into consideration, would lead to a revision of the original arbitration decision. In this sense see the ICJ in the case: Application for revision and interpretation of the judgment of 24 February 1982 in the case concerning the continental shelf (Tunisia/Liubyan Arab Jamahiriya) (Tunisia v. Libyan Arab Jamahiriya).

The court admitted the error and did not rule out the possibility of formulating an interpretation in this regard[186]. Although the court has no power to modify the original judgment, it seems reasonable to believe that its activity of interrogation can go so far as to indicate to the parties how to resolve any contradiction that emerges between the different parts of the sentence by clarifying the contradictions or even erasing errors. The court would be within the limits of its interpretative competence. We believe this conclusion is applicable mutatis mutandi, also to cases of interpretation of decisions taken by arbitral tribunals established in accordance with Annex VII.

Once rendered, the arbitration decision constitutes an integral part of the original arbitration decision as underlined by the Rules of procedure of the arbitral tribunals and as such also has the character of res judicata.

(Ukraine v. Russian Federation) art. 22 is used art. 12 of Annex VII which is referred a "interpretation or implementation of the award". For further details see also: M.H. NORD QUIST, J. NORTON MOORE, R. LONG, Challenges of the changing arctic: Continental shelf, navigation and fisheries, ed. Brill, Bruxelles, 2016, pp. 466ss. C. GIORGETTI, Challenges and recusals of judges and arbitrators in international courts and tribunals, ed. Brill, Bruxelles, 2015, pp. 273ss. V.K. BHATIA, M.GOTTI, A. HASLIM, International arbitration discourse and practices in Asia, ed. Routledge, London & New York, 2017. H.D. PHAN, International courts and state compliance. An investigation of the law of the sea cases, in Ocean Development & International Law, 50 (1), 2019, pp. 72ss. M.M. HASAN, A comparative study between arbitration and judicial settlement as means of maritime boundary dispute settlement, in Beijing Law Review, 2, 2018, pp. 76ss. D. LIAKOPOULOS, The legal status of the port state within the European Union. Comparative and jurisprudential aspects, in Revista de Derecho del Transporte, 23, 2019, pp. 102ss

[184]ICJ, 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), sentence of 25 March 1999, in ICJ Reports, 1999, par. 10. D. LIAKOPOULOS, The role of not party in the trial before the International Court of Justice, op. cit.,

[185]In the latter case, he may at most request an additional award in cases where the Rules of procedure of the arbitral tribunals contemplate the hypothesis.

[186]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), sentence of 10 December 1985, par. 50. See also the dissenting opinions of judges Oda and Bastid which expressed themselves in the opposite direction, since in their view the application of the Tunisian method would have led to the application of completely different methods of delimitation leading to the definition of a new boundary line. For the two judges, the only appropriate place to deal with the Tunisian request was to ask for a revision of the original sentence.

19.THE NULLITY OF AN ARBITRATION DECISION

In Part XV of UNCLOS and in Annex VII there are no rules governing the possibility for one of the parties to the dispute to request the annulment of an arbitration decision. The question arises as to whether the possibility of ascertaining the annulment of an arbitration decision is admissible even at a time subsequent to the adoption of the arbitration decision. In the absence of such an agreement, it is not possible to invoke the nullity of the arbitration decision by one of the parties to the dispute[187].

The commission of international law in the Model rules on arbitral procedure of 1958 identified among the reasons for requesting the annulment of an arbitral decision the following: Excess of power of the arbitral tribunal, corruption of a member of the tribunal; absence of reasons in the arbitration decision or serious non-compliance with a fundamental procedural rule; nullity of the commitment to resort to arbitration or of the arbitration compromise[188]. In practice, the non-application of an arbitration decision constitutes an international offense, as the obligation enshrined in art. 296, par. 1 UNCLOS and art. 11 of Annex VII relating to the final and binding nature of arbitration decisions[189].

In the first case relating to the arbitration award made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua), the court ruled in the sense of reiterating the validity of the arbitration decision. The Court has defines the nature of the competence that it was called to exercise specifying that: “(...) The award is not subject to appeal and the court cannot approach the consideration of the objections raised by Nicaragua on the validity of the award as a Court of Appeal. The court is not called upon to pronounce on

[187]In this sense, see the story produced following the adoption of the arbitration decision of 18 February 1977 relating to the dispute between Argentina and Chile concerning the Begal Canal. See the Communication from the court of arbitration to the parties of 12 January 1978, which the president of the arbitral court has affirmed that: "(...) confers no power on either party to reject or purport to nullify the award, but also that in view of the clear provisions of articles XIII and XIV of (…) any pronouncements in that sense must themselves be regarded as nullities, devoid of all legal force or effect (...)" (par. 7).

[188]In particular see art. 35. L. TRIGEAUD, La nullitè de l'acte juridictionnel en droit international public, LGDJ, Paris, 2011. K. OELLERS-FRAHM, Judicial and arbitral decisions, validity and nullity, in Max Planck Encyclopedia of Public International Law, 17, 2013.

[189]In this sense: The ritorsion is: "any conduct which is not inconsistent with any international obligation to the state engaging in it even though it may be a response to an internationally wrongful act" (Draft articles on responsibility of states for internationally wrongful acts with commentaries (2011), in Yearbook of the International Law Commission, vol. II, part 2, 2001, pp. 128ss. See the Report of 2016 by the Secretary General in giving an account of the adoption of the arbitration decision in the case South China Sea of 12 July 2016 which declared that: "(...) during the period under review an arbitral tribunal issued its final award on the merits of a case (...)" (Oceans and the law of the sea. Report by the Secretary-General, addendum, UN Doc. A/71/Add. 16 September 2016, par. 17). An example of intervention by the Security Council in support of the application of an arbitration decision made outside the UNCLOS system occurred in connection with the controversy between Eritrea and Ethiopia (Eritrea-Ethiopia boundary Commission. Decision regarding delimitation of the border between the State of Eritrea and the Federal Democratic Republic of Ethiopia, 13 April 2002). The Security Council con the Resolution 1560 (2004) (UN Doc. S/RES/1560 (2004) of 14 September 2004. Note that the resolution does not mention the Charter of the UN standard on the basis of which it was adopted. In light of the fact that it was adopted to renew the mandate of the United Nations Mission in Ethiopia and Eritrea (UNMEE) it is reasonable to believe that it was adopted on the basis of Chapter VI) intervened by recalling the primary responsibility of the two states involved in the apply the Algiers agreement and the decisions of the border committee and emphasizing the urgency of the Ethiopia: "to show the political will to reaffirm unequivocally its acceptance of the boundary Commission's decision and take the necessary steps to enable the Commission do demarcate the border without further delay (...)" (par. 7 of the cited Resolution). This event shows how the intervention of an international organization aimed at the application of an arbitration decision although it may be desirable does not always lead to the desired result and finds a significant limitation in the fact that the organization acts only for the pursuit of its statutes and not to protect the rule of law in international law. For further analysis see also: D. LIAKOPOULOS, Complicity of States in the international illicit, op. cit.,

whether the arbitrator's decision was right or wrong. These and cognate considerations have no relevance to the function that the court is called upon to discharge in these proceedings, which is to decide whether the award is proved to be a nullity having no effect (...)"[190].

The second case relating to the arbitration award of 31 July 1989 (Guinea-Bissau v. Senegal) relating to the existence and validity of an arbitration decision on the subject of maritime delimitation. In this case, for the first time the court was unilaterally brought under ex art. 36, par. 2 of the statute[191]. Such a hypothesis would open the way for those who contest the validity of the decisions taken by arbitral tribunals constituted in accordance with Annex VII to refer to the ICJ to ask in the silence of UNCLOS and the Rules of procedure on the point, the nullity of an arbitration decision[192]. We wish to examine the questions required between the South China Sea and Guinea-Bissau v. Senegal from the ICJ the incorrect characterization of the dispute could be considered as a hypothesis of excess of power by the arbitral tribunal since in the present case the jurisdiction would be exercised for a purpose other than that established by the norm attributing jurisdiction from which the matters of territorial sovereignty is initially excluded[193]. Otherwise the interpretation of art. 298 UNCLOS provided by the arbitral tribunal could not be part of the hypothesis of excess of power. In fact, a judgment which syndicates the interpretation provided by an arbitral tribunal about the rules of a treaty would be configured not as a nullity judgment but as an appeal judgment[194].

[190]ICJ, Case concerning the arbitral award made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua), sentence of 18 November 1960, par. 214. D. LIAKOPOULOS, The role of not party in the trial before the International Court of Justice, op. cit.,

[191]A. PROELSS, United Nations Convention on the law of the sea. A commentary, op. cit.

[192]In this sense: South China Sea, which China affirmed that: "(...) the award is null and void and has not binding force". See the statement of the Ministry of Foreign Affairs of the People's Republic of China on the award of 12 July 2016 of the arbitral tribunal in the South China Sea arbitration established at the request of the Republic of the Philippines, 12 July 2016. To date, China has not made any declaration of acceptance of the ICJ jurisdiction pursuant to art. 36, par 2 of its statute but could accept the jurisdiction of the court limited to the sole controversy concerning the validity of the arbitration decision made in the South China Sea case. Philippines made a broad declaration of acceptance of jurisdiction filed with the General Secretariat of the UN on January 18, 1972. See also the opinion of judge Mbaye who stressed that otherwise the ICJ should be considered a kind of "(...) cour de cassation for all states having made declarations under article 36, par. 2 of this statute with respect to all arbitral awards in cases to which those states are parties (...)". (ICJ, Arbitral award of 31 July 1989 (Guinea-Bisseau v. Senegal, sentence of 12 November 1991, Declaration of judge Mbaye)). In the present case, Guinea-Bissau had also criticized the interpretation contained in the arbitration ruling of the provisions of the arbitration agreement which defined the jurisdiction and had proposed a different interpretation of those rules. The ICJ pointed out that: "(...) the court does not have to enquire whether or not the arbitration agreement could, with regard to the tribunal's competence be interpretated in a number of ways, and if so to consider which would have been preferable (...) the court would be treating the request as an appeal and not as a recours en nullitè (...) the tribunal acted in manifest breach of the competence conferred on it by the arbitration agreement either by deciding in excess of or by failing to exercise its jurisdiction (...)". The court provided an example of manifest violation: "the failure of the tribunal properly to apply the relevant rules of interpretation to the provisions of the arbitration agreements which govern its competence (...) (par. 47) an arbitration agreement (compromis d'arbitrage) is an agreement between states which must be interpreted in accordance with the general rules of international law governing the interpretation of treaties (...)" (par. 48). D. LIAKOPOULOS, The role of not party in the trial before the International Court of Justice, op. cit.,

[193]L. TRIGEAUD, La nullitè de l'acte juridictionnel en droit international public, op. cit.,

[194]Also in the Arctic Sunrise Russia case he referred to an excess of court power. In particular see the Comment by Foreign Ministry spokesperson M. Zakharova on the international arbitration court ruling in the Arctic Sunrise case, 28 August 2015, which is affirmed that: "(...) the decisions does not fully take into account all the aspects of the incident (...) or the laws and judicial practices applicable to the case (...)". In none of the cases mentioned above did the arguments in support of the nullity of the arbitration decisions lead to the activation of specific cancellation procedures. C. SANTULLI, L'obligation d'exècuter les dècisions juridictionnelles internationales, in Revue Gènèrale de Droit International Public, 211, 2017, pp. 562ss.

20.THE IMPACT OF THE ARBITRATION DECISION ON THE RESOLUTION OF THE DISPUTE

The lack of respect for an arbitration decision is a symptomatic phenomenon based on the "norm" that states are always free to make their particular interests prevail over international commitments undertaken even when the international obligation derives from the use of a means of solving the disputes such as arbitration over which they have been able to exercise some control because of their participation in the definition of the rules necessary for its operation[195]. The arbitral decision can settle the dispute from a legal point of view but may not necessarily extinguish it. This means that the parties involved must continue to try to settle that dispute through the use of other peaceful means.

In the South China Sea case, the two states' position regarding the dispute involving them in the South China Sea was defined in a joint statement in the following terms: "(...) Both sides affirm that contentious issues are not the sum total of the China-Philippines bilateral relationship. Both sides exchange views on the importance of handling the disputes in the South China Sea in an appropriate manner (…) reaffirm the importance of maintaining and promoting peace and stability, freedom of navigation in and over-flight above the South China Sea, addressing their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations by sovereign States directly concerned in accordance with universally recognized principles of international law, including the charter of the United Nations and the 1982 UNCLOS (...)"[196]. This declaration of heads of state makes no reference to the arbitration decision ascertains the continuation of the controversy between the two countries concerning the South China Sea and identifies in consultations and direct negotiations the instrument to resolve it[197]. Does this new approach comply with the UNCLOS dictation?

It should be noted that an arbitration decision is binding between the parties to the dispute on the basis of art. 296 UNCLOS and art. 11 of Annex VII this does not seem to constitute an obstacle for the same parties to agree at a time after its adoption to resolve the dispute by

[195]Within this spirit we note the Beagle channel where the border between Argentina and Chile in the channel was defined by arbitration on 18 February 1977. Case concerning a dispute between Argentina and Chile concerning the Beagle Channel. Report and decision of the court of arbitration, 18 February 1977. Only after several years with the mediation of the Holy See did we arrive at a definitive solution to the controversy with the conclusion of the treaty of peace and friendship of 29 November 1984. For further details see: P. VAN AERT, The Beagle conflict, in Island Studies Journal, 11 (1), 2016, pp. 311ss. C. CHINKIN, F. BAETENS, Sovereignty, statehood and state responsibility, Cambridge University Press, Cambridge, 2015, pp. 259ss. H.N. SCHEBER, J.H. PAIK, Regions institutions and law of the sea. Studies in ocean governance, Martinus Nijhoff Publishers, The Hague, 2013, pp. 30ss. A. BIANCHI, D. PEAT, M. WINDSOR, Interpretation in international law, Oxford University Press, Oxford, 2015, pp. 252ss. M.G. COHEN, M. HÉBIÉ, Research handbook on territorial disputes in international law, Edward Elgar Publishers, Cheltenham, 2018, pp. 288ss. M. COLACRAI, When the border talks: Singularities of the Argentine-Chilean relationship in recent decades, in Estudios Fronterizos. Nuova Época, 17 (34), 2016, pp. 86ss.

[196]Joint statement of the People's Republic of China and the Republic of the Philippines, Beijing, 21 October 2016, par. 40, which is affirmed that: "(...) both sides recall the 2002 Declaration of the conduct of parties in the South China Sea (DOC) and the joint statement of the foreign Ministers of ASEAN Member States and China on the full and effective implementation of the DOC adopted in Bientiane on 25 July 2016 (...)" (par. 41). H. DUY PHAN, L. NGOC NGUYEN, The South China Sea arbitration: Bindingness, finality and compliance with UNCLOS dispute settlement decisions, op. cit., pp. 36ss.

[197]R. WOLFRUM, Advisory opinions: Are they a suitable alternative for the settlement of international disputes?, in R. WOLFRUM, I. GÁTSCHMANN (eds.), International dispute settlement: Room for innovations?, ed. Springer, Heidelberg, 2013, pp. 35ss. S. WU, M. VALENCIA, N. HONG, United nations Convention on the law of the sea and the South China Sea, ed. Routledge, London & New York, 2016.

other means[198]. A canvas and situation is registered in the hypothesis of succession over time of treaties set forth in art. 30, par. 4 of Vienna Convention of the Law of Treaties of 1969 and is compatible with art. 311, par. 3 UNCLOS, which is noted that: "(...) the object and purpose of this Convention and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other states parties of their rights or the performance of their obligations under this Convention (...)"[199]. In this sense, we can refer to the joint Declaration, intended as a subsequent agreement that applies in the present case instead of what is set out in articles 296 UNCLOS and of art. 11 of Annex VII or instead of the aforementioned arbitration decision. The diplomatic steps taken by the Philippines under ASEAN[200] and by both countries under ASEAN-China Summit[201] seem to confirm this reading.

21.THE FAILURE TO EXECUTE ARBITRATION DECISIONS AND ITS POSSIBLE IMPACT ON THE FUNCTIONING OF THE UNCLOS DISPUTE RESOLUTION SYSTEM.

The dispute settlement system set up within UNCLOS has not been challenged by the defaulting states (China-Russia) as we saw in the Arctic Sunrise and South China Sea case. It should be noted that in the Declaration of the Russian Federation and the People's Republic of China on the promotion of international law of 25 June 2016 the two states stressed the importance of this system by stating that: "(...) It is crucial for the maintenance of international legal order that all dispute settlement means and mechanisms are based on consent and used in good faith and in the spirit of cooperation and their purposes shall not be undermined by abusive practices (...)"[202]. These are two states that attach great importance to the fact that the resolution of disputes is based on consensus; a consent that must be expressed ad hoc in relation to the identification of the means of peaceful settlement which must be selected for each specific dispute and not a consent that must be considered as given in a preliminary and general way by the contracting parties at the time of ratification of UNCLOS. The Declaration highlights how UNCLOS standards should be "(...) applied consistently, in such a manner that does not impair rights and legitimate

[198]In the same spirit see also: Art. 54 of Convention for the pacific settlement of international disputes of 1899, which is affirmed that: "(...) the award (...) puts an end to the dispute definitively and without appeal"; art. 56: "(...) the award is only binding on the parties who concluded the "compromis""; art. 81 of Convention for the Pacific settlement of international disputes of 1907, which affirms that: "the award (...) settles the dispute definitively and without appeal" and art. 84: "(...) the award is not binding except on the parties in dispute".

[199]M. FITZMAURICE, O. ELIAS, P. MERKOURIS (eds), Treaty interpretation and the Vienna Convention on the Law of Treaties, 30 years on, Martinus Nijhoff, The Hague, 2010, pp. 9ss. G. NOUTE, Treaties and subsequent practice, Oxford University Press, Oxford, 2013, pp. 224ss. E. BJORGE, The evolutionary interpretation of treaties, Oxford University Press, Oxford, 2014. O. CORTEN, P. KLEIN, The Vienna Conventions on the law of treaties. A commentary, Oxford University Press, Oxford, 2011. O. DÖRR, Article 31. General rule of interpretation, in O. DÖRR, K. SCHMALENBACH (a cura di), Vienna Convention on the Law of Treaties. A commentary, Springer, Heidelberg-New York 2012, pp. 536ss. D. ROSENTRETER, Article 31 (3) c) of the Vienna Convention on the law of treaties and the principle of systemic integration in international investment law and arbitration, ed. Nomos, Baden-Baden, 2015, pp. 217ss. M. SAMSO, High hopes, scant resources: A word of scepticism about the anti-fragmentation function of article 31(3)(c) of the Vienna Convention on the Law of Treaties, in Leiden Journal of International Law, 24, 2011, pp. 5ss

[200]See the Joint communiquè of the 50th ASEAN Foreign Ministers' meeting of 5 August 2017

[201]See the Chairman's statement of the 20th ASEAN-China Summit of 13 November 2017.

[202]Declaration of the Russian Federation and the People's Republic of China on the promotion of international law, 25 June 2016. For further details see also: A.G. OUDE ELFERINK, The Russian Federation and the Arctic Sunrise case: Hot pursuit and other issues under the LOSC, in International Law Studies, 92, 2016, pp. 382ss.

interests of states parties and does not compromise the integrity of the legal regime established by the Convention (...)"[203]. In relation to legitimate interests, it is important to remember that the two cases cited concerned disputes that had particular characteristics in the Arctic Sunrise case, the jurisdiction of the arbitral tribunal was based on a restrictive interpretation of the exclusion clause pursuant to art. 298 UNCLOS and in the South China Sea case the jurisdiction had been affirmed by denying that the complaints filed by the Philippines mainly concerned a dispute over territorial sovereignty[204].

According to our opinion, the compromise reached in Montego Bay on the questions just mentioned and contained in the UNCLOS aprt XV does not prove to work effectively in practice. A probable mechanism that we can hypothesize can be set up within the framework of the UNCLOS by attributing specific power to the assembly of states that are part of the UNCLOS with the aim of sanctioning the defaulting states through the suspension of their voting rights in the Assembly of have been part of UNCLOS with the aim of sanctioning defaulting states through the suspension of their voting rights in the Assembly and participation in the definition of its budget[205]

but which in practice is difficult to achieve given the opposition of many states to the expansion of the functions of this body. A mechanism which, if envisaged, would have the advantage at least of representing an adequate form of political pressure on the defaulting states.

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[203]Declaration of the Russian Federation and the People's Republic of China on the promotion of international law, op. cit., par. 9.

[204]R.G. TOMAN, Jurisdictional requirements for arbitration under UNCLOS: Does the "South China Sea" decision bring long sough clarity to the scope of historic claims?, in International Law and Politics, 49, 2017, pp. 620ss. A.G. OUDE ELFERINK, The Arctic Sunrise incident: A multi-faceted law of the sea case with a human rights dimension, op. cit., pp. 246ss.

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