THE *CHAGOS* ISLANDS AWARD: EXPLORING THE RENEWED ROLE OF THE LAW OF THE SEA IN THE POST-COLONIAL CONTEXT

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ABSTRACT

The United Nations Convention on the Law of the Sea (UNCLOS) is gaining momentum as a true constitution of the seas. In the past couple of years the law of the sea has extended its reach, becoming a tool for the resolution of broader questions related to historical injustices and the re-distribution of power. This article focuses on a ruling issued in 2015 by the Arbitral Tribunal constituted under Annex VII of the UNCLOS in the dispute between the United Kingdom and Mauritius. This award represents a fascinating exposé of a number of international legal issues arising in the context of post-colonial interaction between a former colony and its erstwhile colonialist overlords. While established on the basis of the authority conferred by UNCLOS, the tribunal did not confine itself to discussing issues relating to the law of the sea. Rather, the award's analysis extends to addressing the international legal status of agreements concluded in the context of decolonization, the capacity and agency of colonies in international law,

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the definition and extent of state sovereignty over maritime zones, and general principles of law, including the rules of treaty interpretation.

INTRODUCTION

In 1967, Malta's enthusiastic proposal to the United Nations General Assembly to establish some form of international jurisdiction and control over the seabed and the ocean floor was met with suspicion by a number of states.[1] The skeptical states believed existing international law to be reasonable and substantive on the issue and that further regulation would impede investment and exploration.[2] It is thus widely accepted that the price of securing consensus on compulsory, binding dispute settlement under UNCLOS,[3] adopted in 1982, incorporated an intricate system of opt-outs and other hurdles aimed at protecting states' sovereignty.[4] This solution allowed reluctant states to commit themselves to the UNCLOS, whilst simultaneously limiting their

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1 *See* U.N. GAOR, 22nd Sess., 1515th mtg. ¶ 4, U.N. Doc. A/C.1/PV.1515 (Nov. 1, 1967).

2 *See id.* ¶¶ 4–6.

3 *See* U.N. Convention on the Law of the Sea, U.N. Doc. A/CONF.62/122 (Oct. 7, 1982) [hereinafter UNCLOS].

4 *E.g.*, Alan E. Boyle, *Dispute Settlement and the Law of the Sea Convention*, 46 INT'L & COMP. L.Q. 37, 39–42 (1997).

exposure to an unfavorable ruling that might potentially undermine any claimed maritime rights.

The past two years witnessed awards in two significant law of the sea arbitration cases, namely the *Chagos* and *Philippines v. China* cases. These rulings demonstrated that since the time of its adoption, the UNCLOS has expanded its reach. The Convention is evolving beyond being a collection of a highly technical set of articles aimed at securing minimum standards of compliance with the principles of freedom of navigation and environmental protection. It is turning into a true constitution of the seas, but this process is not without its pitfalls and challenges.

In July 2016, the *Philippines v. China* arbitration ruling upheld the Philippines' claims that China violated the UNCLOS by establishing the so-called nine-dash line enveloping the South China Sea, interfering with the Philippines' exclusive economic zone (EEZ), and endangering the marine environment.[5] The *South China Sea* award denounced claims by China that it had historic rights to living and non-living resources within the relevant area of the South China Sea.[6] This ruling attracted worldwide attention, as it altered the political dynamics in the region and challenged China's position as the regional hegemon. Shortly after the judgment was released, China issued a statement asserting that the award was null and void.[7] It remains to be seen how China handles the situation going forward as non-compliance will inevitably affect China's standing on an international legal plane.[8]

In contrast, the *Chagos* case, decided a year earlier, did not grab the headlines with the same intensity, dealing, as it did, with a more contained issue. The dispute arose in the context of the United Kingdom's establishment on April 1, 2010, of a Marine Protected Area (MPA) in the waters surrounding the Chagos Archipelago, a territory administered by the United Kingdom as the British Indian Ocean

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5 *In re* the South China Sea (Phil. v. China), PCA Case No. 2013-19, Award, ¶ 1203 (2016).

6 *Id.*

7 MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE'S REPUBLIC OF CHINA, 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 (2016), http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1379492.html.

8 *See* Mincai Yu, *The South China Sea dispute and the Philippines Arbitration Tribunal: China's policy options*, 70 AUSTL. J. INT'L AFF. 215, 234 (2016).

Territory (BIOT).[9] Mauritius's mounting assertiveness with respect to the islands in the years preceding this decision did not alter the United Kingdom's plans.[10]

This article focuses on the *Chagos* award by using it as a case study for the renewed role of the law of the sea. Despite its limited focus, the *Chagos* arbitration emerged in the broader context of a longstanding dispute between the United Kingdom and Mauritius over the status of the archipelago. It is evident from the analysis of the award that the facts of the case permitted a certain degree of flexibility for the tribunal to declare itself without jurisdiction in this dispute due to its strong territorial grounding.[11] The linguistic intricacies of substantive provisions also opened up the possibility of narrowing down their scope so as to find that no violation had occurred. The tribunal nonetheless stretched the law and used a number of creative techniques to expand the applicability of the UNCLOS both jurisdictionally and on the merits.

This article demonstrates the expanding scope of the UNCLOS. Section I analyzes the facts of the case in conjunction with the discussion on the merits. This choice is not incidental. The unprecedented detail of the diplomatic correspondence brought before the tribunal revealed multiple asymmetries involved in colonial relations and formed the evidentiary core of the findings on the merits. Section II examines jurisdictional issues, and, in particular, the tribunal's approach to the UK's objections that the dispute relates to territorial sovereignty and thus falls outside of the scope of the Convention, as well as its opt-out claims. The article's aim is to demonstrate the UNCLOS's fluidity when it comes to defining the boundaries of the dispute at stake.

Section III studies the techniques of treaty interpretation employed in the course of the award. It is thus dedicated to the *methods* via which the UNCLOS's meaning is stretched. The *Chagos* case offers valuable insights into a variety of techniques of treaty interpretation, particularly to the extent that international treaties interplay with extraneous norms of international law. While the bench eschewed overt

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[9] *In re* the Chagos Marine Protected Area (Mauritius v. U.K.), PCA Case No. 2011-03, ¶¶ 2–5 (2015); *In re* the Chagos Marine Protected Area (Mauritius v. U.K.), PCA Case No. 2011–03, annex MM-166 (2015).

[10] Chagos Marine Protected Area, PCA Case No. 2011-03, ¶ 126.

[11] Stefan Talmon, *The Chagos Marine Protected Area Arbitration: Expansion of the Jurisdiction of UNCLOS Part XV Courts and Tribunals*, 65 INT'L & COMP. L.Q. 927, 929 (2016) (discussing the broad interpretation of Part XV of UNCLOS, establishing compulsory jurisdiction, in the Chagos case).

references to customary law and general international law, the arbitrators nonetheless employed a number of methods set out in the 1969 Vienna Convention on the Law of Treaties (VCLT) to expand the relevant articles of UNCLOS to the extent necessary to establish its jurisdiction and define the nature of the dispute. Finally, Section IV goes beyond a strict legal analysis and explores the role of the award in delivering justice to Mauritius following decades of an imbalanced relationship with its former sovereign. These broader connotations of the ruling demonstrate huge potential of the law of sea in addressing issues of post-colonial justice, self-determination, and distribution of power.

I. THE *CHAGOS* AWARD: FACTS AND MERITS

The *Chagos* award demonstrates in unprecedented detail the diplomatic minutiae involved in a colonial entity negotiating its independence. The facts of this negotiation, and events subsequent and related thereto, are germane to the present discussion: they strongly shaped the tribunal's arguments, raising the question once again as to whether law or facts should come first in the resolution of such disputes.

This part of the article will provide the reader with an in-depth description of the facts of the case and the grounds of the tribunal's decision on the merits. The two topics are intertwined as the discussion of the substantive provisions hinges on historical intricacies of the dispute: the circumstances in which Mauritius was persuaded to come to an arrangement with the United Kingdom concerning the Chagos Archipelago in the 1960s.

The discussion on the merits focused on the potential incompatibility of the MPA with four provisions of UNCLOS, namely Articles 2(3) (sovereignty over the territorial sea), 56(2) (usage of exclusive economic zone while respecting the rights of other states), 194 (pollution prevention), and 300 (good faith and abuse of rights). The bench examined these articles in the light of the United Kingdom's Undertakings[12] to return the islands when they were no longer needed for

[12] The legal status of the Lancaster House Undertakings is interesting in its own right as, for example, the Tribunal took the view that the agreement that objectified them was in 1965 (when concluded) a matter of British Constitutional law, since it regulated the relations between the British Government and a colony, becoming an international agreement with the independence of Mauritius in 1968. *See* Chagos Marine Protected Area, PCA Case No. 2011-03, ¶¶ 424–25. It is enough, for the purposes of this paper, to note that the Tribunal considered the undertakings on the UK's side as binding. *Id.* ¶ 448.

defensive purposes and to restitute any mineral resources discovered near or around them.[13] The tribunal eventually found that the United Kingdom had breached its obligations in relation to the first three articles but not the last.[14]

The judges assessed the compatibility of the MPA with the UNCLOS using a two-stage test. First, they examined the content of Mauritius's rights, both pursuant to the Convention and otherwise. Next, they addressed the question of whether the United Kingdom violated the UNCLOS by declaring the MPA.[15]

A. THE CONTENT OF MAURITIUS'S RIGHTS

The matter of the excision of the Chagos Archipelago dates back to July, 1961 when the United Kingdom informed its strategic ally—the United States—of its plan to withdraw its military operations from the Indian Ocean. Thereafter, the two countries engaged in bilateral talks aimed at finding a suitable location to house a joint defensive facility in order to maintain a military presence in the region and "accommodate the United States' desire to use certain islands in the Indian Ocean for defense purposes."[16] The island Diego Garcia in the remote Chagos Islands, which were part of the British colony of Mauritius, was the preferred location of the United States.[17]

From 1965, a series of bilateral discussions ensued between the UK and Mauritius, treating, *inter alia*, the possible excision of the Chagos Archipelago.[18] The outcome of these negotiations was formalized via the Lancaster House Undertakings of September 1965.[19] The agreement included details of: compensation paid to Mauritius for the detachment of the islands; formal affirmation of the intent of the UK authorities to return them to Mauritius when they were no longer required; an undertaking as to the return of any oils and minerals discovered around the islands to Mauritius; and assurances that the

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[13] *Id.* ¶ 338.

[14] *Id.* ¶ 547.

[15] *Id.* ¶ 389.

[16] *Id.* ¶¶ 69–70.

[17] *In re* the Chagos Marine Protected Area (Mauritius v. U.K.), PCA Case No. 2011-03, annex MM-5–6 (2015).

[18] Chagos Marine Protected Area, PCA Case No. 2011-03, ¶ 421.

[19] "Lancaster House Undertakings" is the terminology used by the Tribunal in the Chagos Award to refer to points (i) through (viii) of paragraph 22 of the record of the meeting held at Lancaster House on the afternoon of 23 September 1965. *Id.* ¶¶ 77, 421.

United Kingdom would negotiate with the United States to guarantee that Mauritius would enjoy fishing rights around the Archipelago.[20]

With regard to the first issue in the *Chagos* matter, namely, the content of rights at stake, Mauritius argued that the Lancaster House Undertakings constituted binding legal commitments, while the United Kingdom objected that these commitments could have been binding only as a matter of its domestic constitutional law.[21] Mauritius was an overseas territory rather than an independent state in 1965; consequently, it could not conclude a binding international legal agreement with the United Kingdom.[22] The United Kingdom also argued that the Undertakings could not be qualified as a binding unilateral commitment because there was never an intention its part to be bound.[23] Mauritius responded that the United Kingdom should be estopped from claiming that its commitments were not binding because subsequent practice demonstrated that the United Kingdom had continuously reaffirmed said commitments.[24]

In this context, Mauritius claimed that it did not consider the Lancaster House Undertakings as constituting a valid expression of its own consent to the detachment of the archipelago because it had acted under duress, while the United Kingdom had violated its obligations with respect to self-determination.[25] Mauritius further qualified its position on the validity of its consent, arguing that its own position pertaining to consent did not undermine the fact that subsequent practice on the part of the United Kingdom rendered the commitments binding. Per Mauritius, the binding nature of the Undertakings stemmed not from Mauritius's agreement to the archipelago's excision, but from the fact that the United Kingdom "*retained the territory after making them*."[26]

The judges scrutinized the record of negotiations preceding the 1965 Undertakings in an attempt to ascertain the respective parties' intent. They concluded "the undertakings provided by the United Kingdom at Lancaster House formed part of the quid pro quo through which Mauritian agreement to the detachment of the Chagos Archipelago

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[20] *Id.* ¶¶ 73–77.

[21] *Id.* ¶¶ 393–406.

[22] *Id.* ¶ 400; *see also* STEPHEN ALLEN, THE CHAGOS ISLANDERS AND INTERNATIONAL LAW 128–29 (2014).

[23] Chagos Marine Protected Area, PCA Case No. 2011-03, ¶ 402.

[24] *Id.* ¶ 397.

[25] *Id.* ¶ 393.

[26] *Id.* ¶ 394.

from Mauritius was procured."[27] Nothing in the records indicated that the United Kingdom intended anything less than a binding commitment.[28] It is for the observer to assess whether and to what extent the UK government's decision to grant independence to Mauritius three years later was connected to the compromise reached in the Undertakings. It is the opinion of the authors, however, that the facts in this case may be interpreted as a constant power game between the UK and Mauritius, and that it is not implausible to read the decision (and the promise) to grant independence to Mauritius as intimately connected with the outcome of the Lancaster House meeting.[29]

The tribunal agreed with the UK submission that the 1965 Lancaster House Undertakings could not be classified as constituting an agreement under international law.[30] This situation, however, was held to have changed in 1968 when Mauritius became independent. Mauritian independence elevated the agreement between the parties to the international legal plane, rendering the circumstances of its conclusion irrelevant for the determination of the respective parties' intent.[31] This solution was particularly elegant, as it allowed the tribunal to eschew the question of duress at the moment of the agreement's conclusion.[32]

The tribunal agreed with Mauritius that the United Kingdom could not denounce the Lancaster House Undertakings as purely political and not legally binding because of the principle of estoppel.[33] It held that a party may not make a serious representation as to their future conduct, which is relied upon by the other party, only to renege upon the assurance at a later date.[34] Such a representation may also be given via acquiescence.[35] Having acquiesced to a particular situation, a party

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[27] *Id.* ¶ 421.

[28] *Id.* ¶ 423.

[29] *See id.* ¶ 396 (describing Mauritius' position).

[30] *See id.* ¶ 424.

[31] *See id.* ¶ 425.

[32] *See* ALLEN, *supra* note 22, at 108–20 (discussing duress, error, and *rebus sic stantibus* due to a material breach by the UK in using Diego Garcia in a manner not agreed upon); *cf.* Garth Abraham, *Paradise Claimed: Disputed Sovereignty over the Chagos Archipelago*, 128 S. AFR. L.J. 63, 89–90 (2011) (arguing that Mauritius was not bound by the Lancaster House Undertakings, as it did not expressly consent to them after independence).

[33] Chagos Marine Protected Area, PCA Case No. 2011-03, ¶ 439.

[34] *See* Arnold D. McNair, *The Legality of the Occupation of the Ruhr*, 5 BRIT. Y.B. INT'L L. 17, 34 (1924); *see also* Iain C. MacGibbon, *Estoppel in international law*, 7 INT'L & COMP. L.Q. 468, 471 (1958).

[35] Derek W. Bowett, *Estoppel Before International Tribunals and Its Relation to Acquiescence*, 33 BRIT. Y.B. INT'L L. 176, 202 (1957). In the Gulf of Maine case, the ICJ discussed the differences

cannot then proceed to challenge it.[36] The arbitrators conceded that the purpose of this principle is to ensure that states act in good faith in their relations with other states, reflecting the longstanding mainstream understanding of estoppel in international law.[37]

The International Court of Justice (ICJ) clarified the meaning of estoppel in *Cameroon v. Nigeria*, where it held that estoppel requires consistent and clear declarations by one state and a corresponding change of position to its own detriment by another state.[38] The arbitrators in the *Chagos* award elaborated upon this understanding by adding that representations must have been made by authorized agents and that the state invoking the estoppel must have been entitled to rely on the representations made by the other state.[39]

The tribunal concluded that, subsequent to its independence in 1968, Mauritius was entitled to rely upon—and did rely upon—the Lancaster House Undertakings as constituting a binding legal basis for the return of the islands to Mauritius when they were no longer required for defense purposes by the United Kingdom, for the preservation of oils and minerals discovered around the archipelago, and as a basis for ensuring that fishing rights in the area would remain available to

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between acquiescence and estoppel. The Court noted that the two concepts "are . . . based on different legal reasoning, since acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent, while estoppel is linked to the idea of preclusion." *See* Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), Judgment, 1984 I.C.J. Rep. 246, ¶ 130.

[36] MALCOLM SHAW, INTERNATIONAL LAW 102 (6th ed. 2008).

[37] *See* H. LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW: WITH SPECIAL REFERENCE TO INTERNATIONAL ARBITRATION 204–05 (1927); Georg Schwarzenberger, *The Fundamental Principles of International Law*, in 87 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 191, 303–04 (1955); BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 198 (1994) (discussing estoppel under the heading of "responsibility" as a general principle of law).

[38] Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, 1998 I.C.J. Rep. 275, ¶ 57 (June 11); *see also* Temple of Preah Vihear (Cambodia v. Thailand), Merits, 1962 I.C.J. Rep. 6 (June 15) (dealing specifically with estoppel and acquiescence).

[39] Indeed, instances of representation via an authorized agent would seem to stretch still further, to the extent that the key factor is not whether an agent was in fact authorised, but whether the state with whom said agent had dealings believed him or her to be. *See* Legal Status of Eastern Greenland (Den. v. Nor.), Judgment, 1933 PCIJ (ser. A/B) No. 53, ¶¶ 90, 182, 187, 201–02 (holding that on the basis of remarks made by the Norwegian Foreign Minister during the Paris Peace Conference, Norway was precluded from contesting Denmark's sovereign title to the island of Greenland, despite the fact that Norway contended, *inter alia*, that the Foreign Minister was exceeding his ministerial brief).

Mauritius.[40] The tribunal noted numerous renewals of commitments and reassurances to Mauritius by successive UK governments over a period of forty years.[41]

With regard to Mauritian fishing rights in the territorial waters of the archipelago, the United Kingdom argued for a narrow understanding of any rights arising on the basis of the Undertakings due to the scope of the commitment and the limited scale of fishing undertaken by Mauritius in the past.[42] The arbitrators disagreed with this approach, holding that the United Kingdom was under a positive obligation to ensure that fishing rights would remain available to Mauritius.[43] Parallels may further be drawn with the fact that until 1980, Mauritius did not object to UK sovereignty over the archipelago. Had Mauritius known that its fishing rights would be assessed not on the basis of the Undertakings, but rather based on whether it had aggressively pursued those rights, it might well have done so.

B. THE UK VIOLATIONS

On the merits, after having established that Mauritius possessed certain rights with respect to the Chagos Archipelago flowing from the 1965 Lancaster House Undertakings, the tribunal went on to consider whether the United Kingdom's declaration that the MPA infringed upon those rights was incompatible with several provisions of the Convention.[44] This discussion centered around the limitations on UK sovereignty due to Mauritius's rights.

The arbitrators analyzed Article 2(3) of the Convention, which prescribes that sovereignty over the territorial sea is exercised subject to the UNCLOS and to other rules of international law.[45] The tribunal examined this article insofar as it related to Mauritius's fishing rights in the territorial sea. Mauritius insisted that this provision imposes an obligation of compliance, requiring the United Kingdom to exercise its sovereignty within the limits of international law.[46] The rules of

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[40] *In re* the Chagos Marine Protected Area (Mauritius v. U.K.), PCA Case No. 2011-03, ¶ 448 (2015).

[41] *Id.* ¶¶ 429–33, 439.

[42] *Id.* ¶¶ 449–50.

[43] *Id.* ¶ 453.

[44] *Id.* ¶ 456.

[45] UNCLOS, *supra* note 3, art. 2(3).

[46] Chagos Marine Protected Area, PCA Case No. 2011-03, ¶¶ 267–68 (2015).

international law pertinent to this case are those that require the coastal state to respect traditional fishing rights. The same provisions decree that the coastal state must respect its obligations to protect fishing and mineral rights of other states, honor commitments given by heads of state, and, finally, consult in matters that may affect the other state.[47]

The United Kingdom disagreed with this reading of Article 2(3), branding it "descriptive" rather than "executory."[48] Mauritius responded that the English version was indeed ambiguous, but that the French and Russian texts pointed to an obligation.[49] After having examined the text of this provision in different languages, the tribunal agreed with Mauritius that the balance of the authentic versions favored reading the provision in question so as to impose an obligation.[50]

In contrast with Article 2(3), Article 56(2) is specific, clearly providing for an obligation for the coastal state to have "due regard."[51] It prescribes, "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."

Mauritius contended that Article 56(2) imposes an unambiguous obligation on the United Kingdom to have due regard for the rights of other states within the exclusive economic zone, which includes respecting the rights of Mauritius.[52] Due regard implies refraining from acts that interfere with the rights of other states, including, in this case, Mauritius.[53] The United Kingdom objected that "due regard" is not tantamount to "giving effect," but rather entails "not ignoring."[54] Mauritius retorted that neither the ordinary meaning of the text nor the Commentary of the International Law Commission (ILC) thereto support such a reading.[55] Moreover, Mauritius insisted that Article 56(2) necessarily imposes the duty to consult other states when their rights can be affected.[56] Such an interpretation is aligned with the general position of the International Tribunal for the Law of the Sea (ITLOS), which

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47 *See id.* ¶ 462.
48 *Id.* ¶ 466.
49 *Id.* ¶ 461.
50 *Id.* ¶ 502.
51 *Id.* ¶ 519.
52 *Id.* ¶ 471.
53 *Id.*
54 *Id.* ¶¶ 475–76.
55 *Id.* ¶ 472.
56 *Id.* ¶ 473.

considers the duty to cooperate as a fundamental principle in the prevention of pollution of the marine environment under the Convention and general international law.[57]

In the *MOX Plant* case, the ITLOS ordered provisional measures that consisted of orders directed at the UK and Ireland to cooperate, and, for this purpose, to enter into consultations on matters relating the commission of the MOX plant at Sellafield in the United Kingdom.[58] The purpose of this imposition was to monitor possible environmental risks of the plant's operation for the Irish Sea.[59] The duty to cooperate implied also consultations and obligations to exchange information, weighing on both parties, and particularly incumbent upon the party whose action carried environmental risk.[60] It is therefore more than understandable that Mauritius claimed such interpretation for the purposes of establishing a state's obligations in the EEZ. The United Kingdom disagreed, arguing that the drafters would have used the word "consultations" and not "due regard" if they had wished to include such an express obligation. The United Kingdom claimed that it had complied with the latter "due regard" standard by including Mauritius in the negotiations at all levels.[61]

The arbitrators examined the UK's approach to consultations with the United States as a "practical example of due regard and a yardstick against which the communications with Mauritius can be measured."[62] A record of these talks was presented to the tribunal. It was evident that in this instance both parties—the United States and the United Kingdom—were considerate of one another's interests.[63] The arbitrators failed to detect similar zeal in the United Kingdom's negotiations with Mauritius.

The bench specifically reprimanded the United Kingdom for not conducting bilateral talks with Mauritius in parallel with its public

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[57] MOX Plant Case (Ir. v. U.K.), Case No. 10, Order of Dec. 3, 2001, ITLOS Rep. 95, 82, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/Order.03.12.01.E.pdf; *see also* Case Concerning Land Reclamation by Singapore in and Around the Straits of Johor (Malay. v. Sing.), Case No. 12, Order of Oct. 8, 2003, ITLOS Rep. 10, 92, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_12/12_order_081003_en.pdf.

[58] MOX Plant Case, Case No. 10, ¶ 89.

[59] *Id.*

[60] *See* ARBITRATION CONCERNING THE SOUTH CHINA SEA: PHILIPPINES VERSUS CHINA 199 (Shicun Wu & Keyuan Zou eds., 2016).

[61] Chagos Marine Protected Area, PCA Case No. 2011-03, ¶ 478 (2015).

[62] *Id.* ¶ 528.

[63] *Id.* ¶ 526.

consultations and for creating false expectations.[64] In November 2009, during bilateral discussions concerning the MPA, Mauritius insisted that issues related to the establishment of any such zone must take place in the context of further bilateral consultations.[65] The United Kingdom interpreted this as a request for details, rather than a challenge to its right to establish the zone per se.[66] In subsequent exchanges, the United Kingdom reassured Mauritius that public consultations would not prejudice the bilateral talks between the parties, while Mauritius reaffirmed its objections to the establishment of the MPA.[67]

The tribunal concluded that the UK's obligation to act in good faith or to have "due regard" to the rights of Mauritius necessarily entailed consultations and the balancing of competing interests.[68] The United Kingdom did not meet these requirements, as it did not provide sufficient information to the other party for consultations nor did it endeavor to balance the rights of Mauritius with its own rights. Consequently, there was a violation of Articles 2(3) and 56(2).[69]

The tribunal also referred to Article 194 of the Convention.[70] This provision deals with measures to prevent pollution of the marine environment by states either jointly or individually through the imposition of "an obligation to 'endeavor to harmonize' policies on pollution of the marine environment whenever joint action is "appropriate."[71] In particular, the fourth section of Article 194 requires that states, when taking measures to prevent pollution, should refrain from unjustifiable interferences with activities carried out by other states in exercise of their rights and pursuant to the Convention.[72]

The United Kingdom argued for the inapplicability of this provision to fishing measures, such as the MPA. In contrast, Mauritius claimed that the MPA aimed to protect the environment within the meaning of this article and that trying to characterize it as a mere ban on commercial fishing was disingenuous.[73] Mauritius further argued that this

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[64] *Id.* ¶¶ 531–32.

[65] *In re* the Chagos Marine Protected Area (Mauritius v. U.K.), PCA Case No. 2011-03, annex MM-115 (2015).

[66] *See* Chagos Marine Protected Area, PCA Case No. 2011-03, ¶¶ 134–36.

[67] *Id.* ¶¶ 139–40.

[68] *Id.* ¶ 534.

[69] *Id.* ¶¶ 534–36.

[70] *Id.* ¶ 537; *see also* UNCLOS, *supra* note 3, art. 297(1)-(5), at 134–36.

[71] *See* Chagos Marine Protected Area, PCA Case No. 2011-03, ¶ 299.

[72] UNCLOS, *supra* note 3, art. 194(4).

[73] Chagos Marine Protected Area, PCA Case No. 2011-03, ¶ 482.

provision imposes an obligation to endeavor to act in harmony with neighboring and concerned states when it comes to protecting the environment.[74] Such a position implies the sharing of information, the exchange of ideas, and some degree of consultation.[75] In these circumstances, a total ban on all activities as an anti-pollution measure unjustifiably interfered with the fishing rights of Mauritius.[76] The United Kingdom did not accept the duty to coordinate its policy on marine pollution with Mauritius.[77]

The tribunal held that Article 194 was applicable. The arbitrators pointed to section 5 of the same article, holding that the measures referred to therein are not limited to those aiming at controlling pollution alone. Thus, they concluded that a broader interpretation of the article was necessary. On this basis, the provision could be applied with regard to the establishment of the MPA.[78]

The arbitrators further equated the requirement of section 4 to "refrain from unjustifiable interferences" with the demands of good faith and "due regard" contained in Articles 2(3) and 56(2).[79] One could argue that this treatment of three distinct linguistic formulations as identical constitutes an example of extreme harmony in the interpretation of legal provisions, if such a concept can be said to exist. As was the case with the other stated obligations, the requirement to refrain from unjustifiable interferences was adjudged to necessitate a balancing act between the competing interests and an evaluation of the various alternatives. The arbitrators' conclusion was that a violation of Article 194(4) had occurred.[80] This approach implied that the environmental grounds justifying the declaration of the MPA could potentially have outweighed Mauritius's fishing rights, but that for such a conclusion to be drawn required significant and detailed studies, which the United Kingdom failed to conduct.[81]

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[74] *Id.* ¶ 483.

[75] *Id.*

[76] *Id.* ¶ 486.

[77] *Id.* ¶ 487.

[78] *Id.* ¶ 538.

[79] 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. *See* UNCLOS, *supra* note 3, art. 56(2).

[80] Chagos Marine Protected Area, PCA Case No. 2011-03, ¶¶ 540–41.

[81] It would seem, furthermore, that the threshold for such studies is rather high. As Allen notes, in 2002, the UK conducted a fairly comprehensive survey concerning the possibility and feasibility

Article 300 of the UNCLOS was the only substantive provision in the dispute that *did not* give rise to a violation.[82] It prescribes that states should fulfill their obligations in good faith and not engage in an abuse of rights. Not finding a violation pursuant to this article is rather striking, given the fact that a violation of Article 2(3) was upheld, where the tribunal found, *inter alia,* an absence of good faith.[83]

Mauritius based its argument on the text of a cable originating from the US Embassy, stating that the environmental protection purpose of the MPA represented a smokescreen, whereas the true intention of the United Kingdom was to prevent future resettlement.[84] This cable was leaked through the WikiLeaks website. The judges did not attribute a great degree of evidentiary weight to the WikiLeaks document, consequently dismissing suggestions of an ulterior motive in this case.[85] It should perhaps be noted that such an approach allowed the tribunal to avoid a potentially interesting discussion as to whether the "fruit of the poisonous tree" doctrine should apply in such cases, since the WikiLeaks document had been procured without the consent of the party in question, and, potentially, illegally.[86]

One might also speculate as to what would have transpired had WikiLeaks not obtained the document in question. If Mauritius had been aware of the document's existence—though not its content—and the United Kingdom had prevented its release for *raison d'état*, the tribunal would perhaps have repeated the *Corfu Channel* formula, whereby, if exclusive control over evidence exists, the handicapped victim state is allowed a more liberal recourse to inferences of fact and circumstantial evidence.[87] WikiLeaks's intervention—paradoxically—may have weakened the Mauritian case in this instance.

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of resettlement of the Chagossian population, that took into account, *inter alia*, of the "virtually pristine ecosystem inhabited by a multitude of rare fauna and florae." A further feasibility report was commissioned in 2008. *See* ALLEN, *supra* note 22, at 252, 265.

82 Chagos Marine Protected Area, PCA Case No. 2011-03, ¶ 543.

83 *Cf. In re* the South China Sea (Phil. v. China), PCA Case No. 2013-19, Award, ¶ 477 (2016) (finding the violation to be in relation to the duty to settle dispute by peaceful means).

84 Chagos Marine Protected Area, PCA Case No. 2011-03, ¶ 494.

85 *Id.* ¶¶ 542–43.

86 The question as to whether this doctrine applies in international law—particularly in inter-state affairs—remains an open one. While the doctrine was touched upon by the European Court of Human Rights (ECtHR) in *Gäfgen v. Germany* (Application no. 22978/05) before the Grand Chamber on February 3, 2009, it has never, to the authors' knowledge, been examined in the context of general public international law. *See* Gäfgen v. Germany, App. No. 22978/05, Eur. Ct. H. R. (2009), https://hudoc.echr.coe.int.

87 Corfu Channel Case (U.K. v. Alb.), Judgment, 1949 I.C.J. Rep. 4, 19 (Apr. 9).

II. JURISDICTIONAL OBJECTIONS AND THE ISSUE OF TERRITORIAL SOVEREIGNTY

The *Chagos* tribunal exhibited significant courage and creativity when assessing the case on the merits. It expanded the meaning of Article 2(3) UNCLOS and established that a number of violations had been committed by the UK. In contrast, the discussion pertaining to jurisdiction was more constricted. The more cautious approach displayed may well have been due to the potential implications for the discipline at large of any decision that accepted to consider a dispute as potentially qualifying for an opt out or an exception under the UNCLOS. In particular, the bench adopted a conservative view of what constitutes "a dispute concerning the interpretation or application of this Convention pursuant to Article 288(1) of the UNCLOS."[88]

A. THE NATURE OF THE DISPUTE

Mauritius raised four submissions before the tribunal: first, that the United Kingdom was not entitled to declare the MPA because it was not the coastal state within the meaning of the Convention;[89] second, that the MPA infringed upon Mauritius's rights as the coastal state;[90] third, that the United Kingdom should not prevent the Commission on the Limits of the Continental Shelf from making recommendations to Mauritius; and, last, that the MPA was incompatible with the substantive and procedural obligations incumbent upon the United Kingdom by virtue of UNCLOS.[91] Only the final claim gave rise to the jurisdiction of the tribunal. The first two submissions led to a discussion concerning the characterization of the dispute and the issues falling within the jurisdiction of the tribunal, since the claims were necessarily mixed, that is, concerning both land territory and seawaters. Mauritius appended the third claim at a later stage of the proceedings, and in the opinion of the tribunal it did not give rise to a dispute, because the United Kingdom affirmed its willingness to cooperate on the issue.[92]

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88 Chagos Marine Protected Area, PCA Case No. 2011-03, ¶ 205.

89 UNCLOS, *supra* note 3, arts. 2, 55, 56, 77.

90 *Id.* arts. 56(1)(b)(iii), 76(8).

91 *See id.* arts. 2, 55, 56, 63, 64, 194, 300; *see also* Chagos Marine Protected Area, PCA Case No. 2011-03, ¶ 158.

92 Chagos Marine Protected Area, PCA Case No. 2011-03, ¶ 349.

The majority of the tribunal found itself without jurisdiction over both the first and the second Mauritian claims. In arriving at this conclusion, the arbitrators first looked at the nature of the dispute. There are divergent views as to whether Law of the Sea Tribunals may declare themselves competent to adjudicate mixed disputes, notwithstanding the lack of express basis under the UNCLOS. Some scholars claim that, because the law of the sea constitutes an integral part of international law, the tribunal in question could move beyond a narrow reading of the Convention and adjudicate on related issues, including territorial sovereignty.[93] Some practitioners have voiced similar views; former President of the ITLOS Rüdiger Wolfrum argued in 2006 that territorial issues in maritime disputes *fall fully* within the jurisdiction of the Law of the Sea tribunals.[94] In his Separate Opinion in *Southern Bluefin Tuna*, Justice Keith also noted the intended "comprehensiveness" of the UNCLOS as a dispute settlement mechanism.[95] The ICJ, for its part, has noted on multiple occasions the functional inseparability of maritime sovereignty from territorial sovereignty more generally.[96] In contrast, the more conservative view holds that the silence of the UNCLOS on the matter must be interpreted so as to exclude mixed disputes touching upon territorial sovereignty from the jurisdiction of the Law of the Sea

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[93] Irina Buga, *Territorial Sovereignty Issues in Maritime Disputes: A Jurisdictional Dilemma for Law of the Sea Tribunals*. 27 INT'L J. OF MARINE & COASTAL L. 59, 63 (2012); *see also* ALEXANDER YANKOV, THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA AND THE COMPREHENSIVE DISPUTE SETTLEMENT SYSTEM OF THE LAW OF THE SEA 45 (2006); THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA 113 (Gudmundur Eiriksson ed., 2000).

[94] *See generally* INT'L TRIBUNAL FOR THE LAW OF THE SEA, STATEMENT BY H.E. JUDGE RÜDIGE WOLFRUM (2006), https://www.itlos.org/fileadmin/itlos/documents/statements_of_president/wolfrum/legal_advisors_231006_eng.pdf.

[95] Southern Bluefin Tuna (Austl v. Japan, N.Z. v. Japan), 23 R.I.A.A. 1, 55–56 (2000) (separate opinion of Justice Sir Kenneth Keith); *see also* David A. Colson & Dr. Peggy Hoyle, *Satisfying the Procedural Prerequisites to the Compulsory Dispute Settlement Mechanisms of the 1982 Law of the Sea Convention: Did the Southern Bluefin Tuna Tribunal Get It Right?* 34 OCEAN DEV. & INT'L L. 59 (2003); MOX Plant Case (Ir. v. U.K.), Case No. 10, Order of Dec. 3, 2001 (separate opinion by Wolfrum, J.), https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/sep.op.Jesus.E.orig.pdf.

[96] "[C]ontinental shelf rights are legally both an emanation from and an automatic adjunct of the territorial sovereignty of the coastal State . . . a dispute regarding those rights would, therefore, appear to be one which may be said to 'relate' to the territorial status of the coastal State." Aegean Sea Continental Shelf (Greece v. Turkey), Judgement, 1978 I.C.J. Rep. 3, 35–36 (Dec. 19). "To plot that [maritime delimitation] line the Court would first have to determine which State has sovereignty over the islands and rocks in the disputed area. The Court is bound to do so whether or not a formal claim has been made in this respect." Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.), Judgement, 2007 I.C.J. Rep. 659, ¶ 114 (Oct. 8).

Tribunal,[97] with previous instances of Annex VII Tribunals straying beyond the Convention branded as "egregious" instances of prevarication by some commentators.[98] States seem to consider that Law of the Sea tribunals are generally not competent to handle mixed disputes.[99]

In the *Chagos* case, the arbitrators adopted a minimalist viewpoint, holding that the dispute with respect to Mauritius's first submission—that the UK was not entitled to declare the MPA because it was not the coastal state within the meaning of the Convention—might be properly characterized as relating to land sovereignty over the archipelago. The disagreement about the meaning of the "coastal state" merely constituted one tenet of this larger disagreement.[100] The arbitrators proceeded to establish whether claims over territorial sovereignty could be characterized as "a dispute concerning the interpretation or application of this Convention" pursuant to Article 288(1) of the UNCLOS.[101] The *travaux préparatoires* provided no clarity on this score; the negotiating records of the Convention contain no explicit answer, because none of the participants had envisaged that such a situation might arise.[102]

The arbitrators looked for inspiration in another provision of the UNCLOS, namely Article 298(1)(a)(i), which prescribes exceptions to the compulsory dispute settlement procedure under the Convention.[103] The majority held that had the drafters intended sovereignty claims to fall within the jurisdiction of the tribunal, they would have included an

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[97] *See, e.g.*, Bing 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*, 57 GER. Y.B. INT'L L. 24 (2014); Sienho Yee, *The South China Sea Arbitration (The Philippines v. China): Potential Jurisdictional Obstacles or Objections*, 13 CHINESE J. INT'L L. 663, 688 (2014); UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, 1982: A COMMENTARY 381 (Myron H. Nordquist et al. eds., 1989).

[98] In reference to the Guyana v. Surinam Arbitration, Matz Lück pithily notes: "you go through the relatively narrow framework of a dispute under a particular treaty, and you are confronted with the sea of international law, and you are free to swim in the sea at large." NELE MATZ-LÜCK, NORM INTERPRETATION ACROSS INTERNATIONAL REGIMES: COMPETENCES AND LEGITIMACY 240–41 (2012); *see also* Maritime Delimitation (Guyana v. Suriname), 30 R.I.A.A. 1 (Perm. Ct. Arb. 2007).

[99] *See, e.g.*, Damir Arnaut, *Stormy Waters on the Way to the High Seas: The Case of the Territorial Sea Delimitation between Croatia and Slovenia*, 8 OCEAN & COASTAL L.J. 21 (2002) (discussing Slovenia's rejection of Croatia's proposal to submit their mixed dispute to the ITLOS).

[100] *In re* the Chagos Marine Protected Area (Mauritius v. U.K.), PCA Case No. 2011-03, ¶ 212 (2015).

[101] *Id.* ¶ 213.

[102] *Id.* ¶ 215.

[103] *Id.* ¶ 213.

opt-out facility within this article.[104] Consequently, the majority adopted a conservative view, claiming that an "incidental connection" between the dispute and some matter regulated by the Convention was, of itself, insufficient to bring the dispute within the ambit of Article 288(1).[105] The test, rather, was whether the "real issue in the case" or the "object of the claim" related to the interpretation of the Convention.[106] The tribunal did not rule out, however, the possibility for a court or tribunal to make findings of fact or ancillary determinations of law necessary to resolve the dispute where it concerns the interpretation or application of the Convention.[107]

Accordingly, the majority declined to assert jurisdiction over the second claim—that the MPA infringed upon Mauritius's rights as the coastal state—because they considered that determination of whether Mauritius was the coastal state would have effectively led to the finding that the United Kingdom was less than fully sovereign over the archipelago.[108] This finding is somewhat inconsistent with the discussion pertaining to the fourth submission, wherein the arbitrators nonetheless examined issues in a manner that seemed to presuppose that the UK was indeed the coastal state.

In the *Chagos* case, the majority elected not to use comparative examples to illustrate the limits of the "real issue" test, thus leaving its contents ambiguous.[109] It is unsurprising, therefore, that Judges Kateka and Wolfrum, dissenting, were not convinced by the test, exposing a more liberal understanding of sovereignty and jurisdiction.[110] They argued that the reach of the proceedings before the tribunal ought to be expanded, so as to include Mauritius's first and second submissions.

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[104] *Id.* ¶ 214. *But cf.* Chagos Marine Protected Area, PCA Case No. 2011-03, Dissenting and Concurring Opinion of Judge James Kateka and Judge Rüdiger Wolfrum, ¶ 27; Southern Bluefin Tuna (Austl v. Japan, N.Z. v. Japan), 23 R.I.A.A. 1, 49 (2000) (separate opinion of Justice Sir Kenneth Keith).

[105] Chagos Marine Protected Area, PCA Case No. 2011-03, ¶ 220.

[106] *Id.* The International Court of Justice adopted a similar view in the *Nuclear Tests* case: "In the circumstances of the present case, as already mentioned, the Court must ascertain the true subject of the dispute, the object and purpose of the claim." Nuclear Tests (N.Z. v. Fr.), Judgment, 1974 I.C.J. Rep. 457, ¶ 31 (Dec. 20).

[107] Chagos Marine Protected Area, PCA Case No. 2011-03, ¶ 220; *see also* Peter Tzeng, *Supplemental Jurisdiction under UNCLOS*, 38 HOUS. J. INT'L L. 499, 569–70 (2016).

[108] Chagos Marine Protected Area, PCA Case No. 2011-03, ¶ 229–30.

[109] *See id.* ¶ 220.

[110] Judge Wolfrum expressed this view in his earlier statements. Chagos Marine Protected Area, PCA Case No. 2011-03, Dissenting and Concurring Opinion of Judge James Kateka and Judge Rüdiger Wolfrum, ¶ 27.

They insisted that Article 288(1) of the Convention, granting the tribunal jurisdiction with regard to "any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part," is not restricted merely to matters intimately related to the interpretation or application of the Convention, but rather simply requires a nexus between the case and the Convention.[111] The argument was that Article 56, pertaining to the rights and duties of the coastal state in the exclusive economic zone was, of itself, sufficient to establish this link in the present case.[112]

Moreover, the judges disagreed with the majority's decision to dismiss the first and second submissions as questions relating to the sovereignty of the Chagos Archipelago and thus falling outside of the scope of the Convention.[113] The dissenters argued that, factually and legally, Mauritius never framed the dispute in terms of sovereignty, as it only questioned the United Kingdom's competence to establish the MPA.[114] At the same time, they conceded that the resolution of this issue would lead to an inevitable discussion of sovereignty—an exercise that they felt the tribunal ought to have undertaken.[115]

B. TREATMENT OF OPT-OUTS AND EXCEPTIONS

Both the majority and dissenters stood united in respect to the fourth Mauritian submission, agreeing that it should give rise to the jurisdiction of the tribunal pursuant to Articles 288(1) and 297(1)(c) of UNCLOS.[116] A heated debate between the parties unfolded with respect to the interpretation of Articles 297(1)(c) of the Convention. The name of the Article is somewhat misleading, as it refers to the *limitations* on compulsory dispute settlement procedures. At the same time, its first section provides for the *grounds* of jurisdiction in the specific case when a coastal state exercises its sovereign rights in contravention of other rules in the Convention and other international rules. In particular, subsection (c) refers to the violation by the coastal state of the rules for the protection and preservation of the marine environment.[117] In contrast,

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[111] *Id.* ¶ 44.
[112] *Id.* ¶ 45.
[113] *Id.* ¶ 9.
[114] *Id.* ¶ 10.
[115] *Id.* ¶ 42.
[116] *Id.* ¶ 40; Chagos Marine Protected Area, PCA Case No. 2011-03, ¶ 323.
[117] UNCLOS, *supra* note 3, art. 297(1)(c)

section (3) of the same article establishes the limitations of the jurisdiction of the tribunal, just as the name of the article promises. In addition, subsection (a) provides that the coastal state shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone.[118]

The United Kingdom argued that Article 297(1)(c) should not apply to the dispute because the establishment of the MPA ultimately amounted to a ban on commercial fishing, while fishing measures fall squarely outside of the scope of Article 297(1).[119] The argument ran that section 1 concerns the protection of the freedom of navigation against abuse by a coastal state.[120] The United Kingdom further posited that the MPA, as a measure concerning fisheries, fell squarely within the exception to jurisdiction provided by Article 297(3)(a).[121] Mauritius disagreed. It argued that Articles 297(1) and 297(3) provide separate bases of jurisdiction; hence, even if the tribunal found that the MPA did not constitute an environmental measure pursuant to section 1, it should still declare itself competent to hear the dispute, because the exception of section 3 does not apply in this case.[122] Moreover, Mauritius pointed out that the salient point in the dispute was not the rights of the United Kingdom as a coastal state with respect to the living resources, but rather the rights of Mauritius.[123] Consequently, the tribunal must assess whether the Lancaster House Undertakings limit the exercise of sovereignty of the United Kingdom within the exclusive economic zone and give rise to

> (Disputes concerning the interpretation or application of this Convention with regard to the exercise by a coastal State of its sovereign rights or jurisdiction provided for in this Convention shall be subject to the procedures provided for in section 2 in the following cases:
>
> [. . .] when it is alleged that a coastal State has acted in contravention of specified international rules and standards for the protection and preservation of the marine environment which are applicable to the coastal State and which have been established by this Convention or through a competent international organization or diplomatic conference in accordance with this Convention.).

[118] Chagos Marine Protected Area, PCA Case No. 2011-03, ¶ 232.

[119] *Id.* ¶¶ 234–35.

[120] *Id.* ¶¶ 234–38.

[121] *Id.* ¶ 245.

[122] *Id.* ¶ 249.

[123] *Id.* ¶ 260(b).

certain obligations towards Mauritius, such as consultation and cooperation.[124]

The tribunal agreed with Mauritius that both Articles 288 and 297(1)(c) should apply to the dispute.[125] A detailed recital of the history of Article 297(1) did not dispel the doubts as to the intent of the provision, but the judges suggested two propositions that might explain the discrepancy between the word "limitations" and the content of the article itself. First, the drafters might have envisaged limitations on the exercise of sovereignty by coastal states in cases other than those mentioned in the article, or, secondly, the affirmation of jurisdiction in Article 297(1) might be explained by the fact that it initially also contained procedural safeguards, which were later moved to a different article of the Convention.[126] Such an interpretation involved allotting considerable weight to the *travaux préparatoires* in the course of interpretation, effectively amounting to reading implied terms into the article.

The judges reaffirmed that Lancaster House Undertakings entailed significantly broader commitments than the mere granting of fishing rights. In particular, the United Kingdom had committed itself to return the islands to Mauritius.[127] Thus, the MPA could not be interpreted as a mere fishing measure. Indeed, it was heralded as a way of preserving a pristine marine environment.[128] Consequently, the arbitrators declared themselves competent to hear Mauritius's fourth submission insofar as it concerned the compatibility of the MPA with a number of the provisions of UNCLOS.[129]

III. EXPANDING UNCLOS VIA TREATY INTERPRETATION: COHERENCE, CONFLICT, AND COMPLEMENTARITY

During the *Chagos* arbitration, the tribunal was obliged to reconcile conflicting provisions of the UNCLOS and decide on the

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[124] *Id.* ¶ 260(c); Southern Bluefin Tuna (Austl v. Japan, N.Z. v. Japan), 23 R.I.A.A. 1, 23 (2000) (separate opinion of Justice Sir Kenneth Keith).

[125] Chagos Marine Protected Area, PCA Case No. 2011-03, ¶¶ 317, 323.

[126] *Id.* ¶¶ 314–315.

[127] *Id.* ¶ 298.

[128] *Id.* ¶¶ 286, 304.

[129] *Id.* ¶ 323.

matters outside its immediate competence.[130] As such, the case offered an opportunity to test the coherence and cogency of various methods of treaty interpretation. In deciding the award, the tribunal followed the lead of ITLOS, which has developed a reputation for rarely resorting to customary international law.[131] Instead, the arbitrators filled gaps in the Convention *praeter legem* and resolved issues where provisions conflicted *infra legem* by employing a number of sophisticated techniques to achieve harmonious understanding of the norms at stake. This is consistent with Article 293 UNCLOS. It is also consistent with the Annex VII tribunal decision in *Guyana v. Suriname*, where the term "other rules of international law" was interpreted as encompassing both general international law and international treaties.[132]

A. OPENING THE DOOR A LITTLE WIDER: MIXED DISPUTES

The approach of the majority in *Chagos* begs the question as to what exact circumstances might bring "mixed disputes" within the purview of the UNCLOS. While there are few contentious cases to choose from, a number of disputes that have yet to come before a judicial instance might provide guidance. For example, the authors of the present article would point to the UK's purported annexation of Rockall—an attempt to frustrate Irish,[133] Icelandic,[134] and Danish[135] claims to the Rockall Trench and the associated rights to fish and to extract mineral

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[130] Linarelli argues that "greater integration" of international law might be required to deal with particular circumstances such as natural overlaps between policy and measures or for balancing out the distributive effects of different agreements. John Linarelli, *Concept and Contract in the Future of International Law*, 67 RUTGERS U. L. REV. 61, 75 (2015).

[131] Int'l Law Comm'n, First Rep. on Formation and Evidence of Customary Int'l Law, U.N. Doc. A/CN.4/663, at ¶ 67 (2013).

[132] Guy. v. Surin., Award, PCA Case Repository, Case No. 2004-04, ¶ 406 (2007).

[133] In 1995, it was clear from parliamentary proceedings that Ireland did not recognize the UK claim to sovereignty. *Written Answers – Ownership of Rockall*, 453 DÁIL ÉIREANN DEBATE 3 (May 23, 1995), http://debates.oireachtas.ie/dail/1995/05/23/00032.asp.

[134] The Icelandic government, while not claiming the islet itself, considers its presence irrelevant for continental shelf delimitation (since Iceland classifies it as a mere rock, which does not possess its own Continental Shelf), and claims significant portions of the Rockall Trench, which it has incorporated into its EEZ and Continental Shelf. *See* Reglugerð varðandi afmörkun landgrunnsins til vesturs, í suður og til austurs, Reg. No. 196/1985 (Ice.), http://www.reglugerd.is/interpro/dkm/WebGuard.nsf/key2/196-1985; *see also* Lög um landhelgi, efnahagslögsögu og landgrunn, Law No. 41 (June 1, 1979) (Ice.), http://www.althingi.is/lagas/nuna/1979041.html.

[135] The Danish government still claims continental shelf rights on behalf of the Faroe Islands in the Hatton-Rockall area. *See* Clive R. Symmons, *The Rockall Dispute Deepens: An Analysis of Recent Danish and Icelandic Actions*, 35 INT'L & COMP. L.Q. 344, 349 (1986).

resources in and under the surrounding waters—as a clearer example of a mixed dispute where the object of the claim clearly relates to maritime delimitation.[136]

In this instance, a 1972 Act of Parliament attempted to claim the islet of Rockall as UK territory by employing a claim of incorporation—as well as failed (though humorous) attempts at effective occupation[137]—to settle the dispute as to the ownership of the islet in favor of the United Kingdom. As such, the Act claimed territorial sea and continental shelf rights, whilst playing down the import of 121(3) UNCLOS, which stipulates, "rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf."[138] It was only after having settled the boundary dispute with Ireland concerning the respective EEZ in the area that the United Kingdom conceded that Rockall was in fact a rock, and not a habitable island, thus possessing a territorial sea, but no EEZ or Continental Shelf.[139] Here, contrarily to the *Chagos* case, the land area was incidental

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[136] *See* Island of Rockall Act 1972, c. 2 (Eng.), http://www.legislation.gov.uk/ukpga/1972/2/pdfs/ukpga_19720002_en.pdf (attempting to claim the islet of Rockall as UK territory, incorporating it into the lieutenancy of Inverness-shire, thereby using a claim of incorporation—as well as failed attempts at effective occupation—to settle the dispute as to the ownership of the rock in its favour, thereby claiming territorial sea and continental shelf rights in its favour, seemingly ignoring the provisions of 121(3*)* UNCLOS, which stipulates that "rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf."). An agreement with Ireland was later reached to divide the continental shelf in the Rockall Trench, avoiding the islet itself. *See* Agreement Between the United Kingdom and Northern Ireland and Ireland Establishing a Single Boundary Between the Exclusive Economic Zones of the Two Countries and Parts of Their Continental Shelves, Mar. 28, 2013, Gr. Brit.-N. Ir.-Ir. T.S. No. 1 (2013) (Cm. 8666).

[137] Former SAS member and survival expert Tom McClean lived on the island from May 26, 1985 to July 4, 1985 to affirm the UK's claim to the islet, discontinuing his intended occupation due to near-impossible conditions. *See* Severin Carrel, *King of Rockall Tom McClean Gets Ready to Hand Over His Crown*, GUARDIAN (May 28, 2013), https://www.theguardian.com/uk/2013/may/28/rockall-nick-hancock-tom-mcclean.

[138] Per the provisions of UNCLOS and customary international law, a territorial sea (implying something approaching full sovereignty) of 12 miles, an exclusive economic zone (according exclusive economic rights to marine resources) of 200 nautical miles, and a Continental Shelf (according exclusive rights to the deep sea bed) of up to 350 nautical miles (depending on the bathysphere) may generally be claimed by the coastal State. Article 121(3) UNCLOS represents an exception to this position. UNCLOS, *supra* note 3, arts. 3, 57, 76.

[139] Foreign & Commonwealth Office, *Freedom of Information Act 2000 Request Ref* (Mar. 8, 2012), https://www.whatdotheyknow.com/request/97923/response/262438/attach/3/0109%2012.pdf (claiming Rockall as UK territory, conceding that, as a "rock," it cannot have its own EEZ according to Article 121(3) UNCLOS, claiming a 12 nm territorial sea around it, and claiming a circle of sovereign airspace over the islet); *see also* Marine Management: The Exclusive Economic Zone Order, SI 2013 No. 3161,

to the maritime rights, which constituted the core of the dispute, and not vice-versa.

The issue of a "mixed dispute" also arose in the *South China Sea* arbitration. One of the core questions in this case was similar to those posed in *Rockall*, whether certain formations in the South China Sea are islands, or, rather rocks or low-tide elevations not capable of generating entitlements to EEZ and continental zone pursuant to the Convention.[140] The follow-up question was whether these entitlements (if any) belong to China. It is well known that China elected not to participate in the proceedings formally,[141] yet it made its stance clear via a Position Paper, in which it objected to the jurisdiction of the tribunal, arguing that the matter before it was essentially a dispute about sovereignty over relevant land territory.[142] On the basis of this argument, the dispute should fall outside the scope of the Convention, because it is impossible for an arbitral tribunal to determine the extent of China's maritime rights in the South China Sea, without first having ascertained sovereignty over the relevant maritime features.[143]

The Philippines responded that it was not asking the tribunal to decide on matters of sovereignty, but rather whether the features in the South China Sea generate entitlements.[144] The tribunal agreed with the Philippines, opining, possibly somewhat disingenuously, that none of the Philippines' claims required implicit determination of sovereignty.[145] The tribunal expressly distinguished this case from the *Chagos* case, which required such an implicit determination. Such reasoning may raise objections, however. It seems that by declaring certain features in the South China Sea as low-tide elevations and refuting Chinese claims to

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http://www.legislation.gov.uk/uksi/2013/3161/pdfs/uksi_20133161_en.pdf (claiming Rockall as within the UK's EEZ).

[140] *In re* the South China Sea (Phil. v. China), PCA Case No. 2013-19, Award, ¶ 112 (2016).

[141] For political implications of China's non-participation, see Yu, *supra* note 8.

[142] Ministry of Foreign Affairs for the People's Republic of China, Position Paper of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines, ¶ 17 (2014).

[143] *Id.* ¶ 29.

[144] *See* South China Sea, PCA Case No. 2013-19, ¶¶ 141–45. On characterization of disputes under UNCLOS, see Boyle, *supra* note 4, at 44.

[145] South China Sea, PCA Case No. 2013-19, ¶ 153. *See* Sreenivasa Rao Pemmaraju, *The South China Sea Arbitration (The Philippines v. China): Assessment of the Award on Jurisdiction and Admissibility*, 15 CHINESE J. INT'L L. 265, 288 (2016).

historical rights in this region, the tribunal did indeed decide on matters of sovereignty.[146]

Both the *South China Sea* and the *Chagos* cases generated tensions with regard to the nature of a dispute that can be properly characterized as one about territorial sovereignty, therefore falling outside of the respective tribunals' jurisdiction. The tensions are evident in the inherent contradiction in the approach of the *Chagos* majority to the fourth claim—that the MPA was incompatible with the substantive and procedural obligations incumbent upon the UK by virtue of UNCLOS—when compared with its treatment of the first and second claims. While, in relation to Article 297, the tribunal did not endeavor to identify the coastal state, it is nonetheless clear that in order to apply the article in question, a particular state must be identified as such.

The refusal of the tribunal to identify the coastal state in relation to the first and second claims thus gave way to the (tacit) recognition that the United Kingdom should be treated as constituting the coastal state for the purposes of Article 297. While this approach does not resolve the disagreement over sovereignty between the two parties, it would certainly seem to be at odds with the previous reasoning of the majority. On the basis of this point alone, the approach of the dissenting judges to the case viewed as a whole would certainly seem rather more consistent.

B. AGREEMENTS PREDATING THE UNCLOS

The source of Mauritius's claims, as recognized by the tribunal, represents a peculiar twist on the scope of the rights and obligations falling within the ambit of UNCLOS. The *Chagos* award recognized Mauritius's rights in the EEZ declared by the United Kingdom in the BIOT.[147] These rights, predating the Convention, stemmed from 1968 Undertakings rather than from the Convention itself. This is in stark contrast to the *South China Sea* award.

This latter ruling expressly discussed the hierarchy of the sources of law to be applied by the tribunal constituted according to the Convention, focusing, in particular, on Article 293 UNCLOS (which reaffirms that the tribunal should apply the UNCLOS and rules not

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[146] André de Hoogh, *Jurisdictional Qualms about the Philippines v. China Arbitration Awards*, EJIL: TALK! (Aug. 11, 2016), http://www.ejiltalk.org/jurisdictional-qualms-about-the-philippines-v-china-arbitration-awards.

[147] South China Sea, PCA Case No. 2013-19, ¶ 260.

incompatible with it).[148] When confronted with the historic rights claims by China, the judges did not rule out the possibility of existence of rights and obligations predating the entry into force of the UNCLOS. The key question was: however, their compatibility with the UNCLOS.[149] Accordingly, the tribunal ruled that "China's claim to historic rights to the living and non-living resources within the 'nine-dash line' is incompatible with the Convention to the extent that it exceeds the limits of China's maritime zones as provided for by the Convention."[150] Clarifications of this kind are most welcome as they assist in interpreting the Convention in the light of competing claims and provide instructions on avoiding normative conflicts.

C. TREATY INTERPRETATION TECHNIQUES AND SYSTEMIC INTEGRATION

The *Chagos* case exposed the limitations of the UNCLOS regime. At the heart of the jurisdictional dispute was the claim that it was beyond the tribunal's power to rule on matters relating to sovereignty. The arbitrators adopted a conservative position in this regard, admitting that questions pertaining to territorial sovereignty fall outside of the jurisdictional scope under the UNCLOS (thus refusing to adjudicate on the first and second submission of Mauritius). The matters that the bench agreed to consider were those stemming from UNCLOS itself. When it came to the merits and the applicable law, however, the arbitrators linked the UNCLOS regime to the acts flowing from the exercise of sovereignty by the United Kingdom. The arbitrators also invoked general principles of international law beyond those mentioned in the Convention. In so doing, they used a number of interpretative methods contained in the VCLT as well as certain doctrines that went beyond mere interpretation. This amounted to the application of self-standing general principles with independent normative force.

The *Chagos* award therefore represents a remarkable example of treaty interpretation across different regimes. Both the ILC[151] and the

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[148] *Id*. ¶ 236.

[149] *Id*. ¶ 238.

[150] *Id*. ¶ 261.

[151] Int'l Law Comm'n, Rep. of the Study Group, Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law, UN Doc A/CN.4/L.682, at 14 (2006).

ICJ[152] have highlighted the existence of a number of specialized regimes in international law, whereby each claims relative autonomy through the existence of specialized secondary rules. As Brownlie has noted, "[t]he assumption is made that there are discrete subjects such as 'international human rights law,' or 'international law and development.' As a consequence, the quality and coherence of international law as a whole are threatened."[153] This phenomenon is commonly branded as fragmentation.[154] Problems arise when rules contained in different regimes come into conflict with one another.

The VCLT invariably represents a starting point for resolving conflicts between self-contained regimes.[155] It allows for the conceptualization of international law as a unitary system rather than a pluralist or fragmented one, constituting an appealing option for scholars of international law.[156] The usual suspects of treaty interpretation are widely known. Primary means of interpretation include the terms of the treaty in the light of its object and purpose, its context, any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions, any subsequent practice in the application of the treaty that establishes the agreement of the parties regarding its interpretation, and any relevant rules of international law applicable in the relations between the parties.[157] The *travaux préparatoires* of the treaty and the circumstances of its conclusion represent supplementary means of interpretation.[158]

The arbitrators implicitly referred to all of these elements on several occasions, for example, in their assessment as to whether Articles 288(1) and 297(1)(c) of the UNCLOS both establish the jurisdiction of the tribunal.[159] The only explicit reference to the VCLT in the *Chagos* case is to Article 33. This provision regulates the resolution of

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[152] United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. Reports 3, ¶ 86 (May 24).

[153] Ian Brownlie, *The Rights of Peoples in Modern International Law*, *in* THE RIGHTS OF PEOPLES 1, 15 (James Crawford ed., 1988).

[154] Int'l Law Comm'n, Rep. of the Group Established by the ILC on the Fragmentation of Law of the Fifty-Sixth Session, ¶ 303, U.N. Doc. A/59/10 (2004) [hereinafter Fragmentation Report].

[155] *Id.* ¶ 324.

[156] Ralf Michales & Joost Paulwelyn, *Conflict of Norms or Conflict of Laws: Different Techniques in the Fragmentation of Public International Law*, 22 DUKE J. COMP. & INT'L L. 349, 351 (2011).

[157] Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 18232.

[158] *Id.* arts. 31–32.

[159] *See supra* Section II.B.

differences between texts that are equally authoritative in a number of languages. This provision was used to address the United Kingdom's argument that the term "other rules of international law" in Article 2(3) of the UNCLOS was ambiguous, and should not provide for an obligation of compliance with the entirety of international law.[160] The tribunal conceded that the English formulation of this provision was indeed ambiguous, thus having recourse to the Chinese, Russian, Spanish, and French texts. The bench concluded that the obligation was more evident in the formulation provided in other languages.[161]

The *Chagos* award is demonstrative of one of the techniques suggested by the ILC to bolster the toolkit of international lawyers when faced with normative conflicts that undermine the coherence of international law.[162] This is the idea of "systemic integration."[163] This doctrine emphasizes the relationship between law (*qua lex specialis*) and its more general normative environment, thus underlining the holistic nature of international law, and serving as a partial palliative to the difficulties caused by fragmentation. The doctrine takes its inspiration from Article 31(3)(c) VCLT, which prescribes that, together with the context, the interpreter must take into account "any relevant rules of international law applicable in the relations between the parties."[164] Villiger notes that such rules need have no particular relationship with the treaty in question other than assisting in the interpretation of its terms.[165] Although international tribunals do not frequently refer to this provision,[166] the ILC has emphasized that this should not dissuade interpreters from making use thereof.[167]

Notions such as *sovereignty*, *non-intervention*, and *self-determination*, as well as general principles of law, thus serve as a normative umbrella, reinforcing legal reasoning in times of doubt or

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[160] *In re* the Chagos Marine Protected Area (Mauritius v. U.K.), PCA Case No. 2011-03, ¶¶ 467–68 (2015).

[161] *Id.* ¶¶ 500–02. Article 33(4) of the Vienna Convention on the Law of Treaties advocates for adopting the meaning that best reconciles the texts, having regard to the object and purpose of the treaty. Vienna Convention on the Law of Treaties, *supra* note 157, art. 31.

[162] Christopher J. Borgen, *Treaty Conflicts and Normative Fragmentation*, *in* THE OXFORD GUIDE TO TREATIES 469 (Duncan B. Hollis ed., 2012).

[163] *See* Fragmentation Report, *supra* note 154, at ¶ 304.

[164] Vienna Convention on the Law of Treaties, *supra* note 157, art. 31(3)(c).

[165] MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 432 (2009).

[166] Duncan French, *Treaty Interpretation and the Incorporation of Extraneous Legal Rules*, 55 INT'L & COMP. L.Q. 281, 300 (2006).

[167] Fragmentation Report, *supra* note 154, at ¶ 349.

ambiguity. Such an approach upholds the presumption in international law against normative conflict.[168] The idea is to diminish the extent of the normative conflict by reading the relevant provisions in the light of the broader systemic objective.[169]

To go a little further, one might well argue that the tribunal's decision to eschew extraneous customary norms led it to instead employ general principles—such as broad notions of good faith—as a supplementary source to read the UNCLOS provisions in a manner consistent with the obligations of the parties, particularly those arising from the Lancaster House Undertakings. It should perhaps be noted that this would not be the first instance of a decision related to maritime issues referring to general principles of law in a broader sense. The *North Sea Continental Shelf*[170]and *Tunisia v. Libya Continental Shelf*[171] cases before the ICJ involved significant recourse to general principles and equity beyond either treaty or customary law. The Court in the former instance stated that such rules rest "on a foundation of very general precepts of justice."[172] Francioni has written of the latter case as representing a high water mark for equity in international law, demonstrating it to be a self-standing source of legal principles, which does not require specific consent by the parties to be operable.[173]

The recent *South China Sea* award also referred to the principle of good faith in interpreting various provisions of UNCLOS.[174] In particular, it treated the obligation to settle a dispute by peaceful means under Article 279 UNCLOS as linked with the general obligation to fulfill in good faith the obligations assumed under the Convention.[175] The tribunal found that China had violated, *inter alia*, the principle of good faith by aggravating the dispute with Philippines. What is peculiar is that the tribunal, nonetheless, avoided directly enunciating China's violation of the principle, rather preferring to reiterate both parties' commitment to facilitate their future relations in accordance with the general obligations

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[168] *See id.* ¶ 311.

[169] *See id.* ¶¶ 120, 412.

[170] North Sea Continental Shelf (Ger. v. Den./Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶ 85 (Feb. 20).

[171] Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, 1982 I.C.J. Rep. 18, ¶ 71 (Feb. 24).

[172] North Sea Continental Shelf, 1969 I.C.J. Rep. 3, ¶ 85.

[173] Francesco Francioni, *Equity in International Law*, THE MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L LAW, ¶ 15 (2015), http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1399?prd=EPIL.

[174] *E.g.*, South China Sea (Phil. v. China), PCA Case No. 2013-19, Award, ¶ 476 (2016).

[175] *Id.* ¶ 1172.

of good faith,[176] while discreetly mentioning the violation on China's part in the dispositive part of the award.[177] This approach is consistent with the trend to interpret UNCLOS provisions in a manner that links different provisions together in a harmonious way.

The aim of the judges in *Chagos* to arrive at an interpretation that was harmonious *inter se* is apparent throughout the award, but is particularly evident in the discussion of Article 2(3) of UNCLOS. In supporting the finding that this provision creates obligations, the judges examined the general structure of the Convention and provisions regulating other maritime zones, such as the EEZ. The conclusion of the bench was that, although the language of different norms throughout the Convention is not harmonized, the UNCLOS ensures that in *any* given zone, states exercise their rights subject to, or having "due regard to," the rights and interests of the other states.[178] It might be objected at this point, however, that if the drafters of the convention had intended that such obligations should be uniform, then uniform language would surely have been employed. While the *travaux préparatoires* were exhaustively consulted to justify other elements of the tribunal's conclusions, a thorough discussion of the factual circumstances underlying the diverse nomenclatures employed is conspicuously absent.

The tribunal seems to have held that, despite the difference in language in Articles 2(3) and 56(2)—with the latter providing for a specific obligation of "due regard," while the former is silent (dealing with the obligation to respect international law more generally)—they essentially deal with the same obligation to consider the rights of other states. The arbitrators concluded that the declaration of the MPA affected Mauritius's rights. The measure in question necessarily had an impact on the condition of the archipelago upon its return to Mauritius because its fishing rights had been effectively extinguished.[179] In this respect, the judges made reference to the record of the communications between the parties preceding the declaration of the MPA. It was noted that Mauritius's position had been disregarded, while the urgency with which the decision was taken was deemed unjustified. It is noteworthy that the judges ignored the legislative intent in choosing divergent terminology in

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[176] *Id.* ¶ 1198.

[177] *Id.* ¶ 1159.

[178] *In re* the Chagos Marine Protected Area (Mauritius v. U.K.), PCA Case No. 2011-03, ¶ 293 (2015).

[179] *Id.* ¶¶ 520–21.

the respective articles, instead opting for a parallel interpretation. Given that the negotiation and drafting of UNCLOS took more than a decade, it would seem implausible that the drafters would have wished distinct terminology to be interpreted in a uniform manner. Here again, the lack of reference to the *travaux préparatoires*—particularly in light of the fact that they are used rather prominently elsewhere in the award—is striking.

IV. THE CHAGOS AWARD AND POST-COLONIAL JUSTICE

The historical context underpinning the *Chagos* award raises issues related to post-colonial justice and the right to self-determination. The dispute arose during a period of struggle between emerging new states and their former sovereigns. The United Nations General Assembly played a major role in pushing forward the agenda of self-determination of the new subjects of international law. More specifically, in 1970, the General Assembly passed the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States, which guaranteed the territory of a colony or other non-self-governing territory, a status separate and distinct from the territory of the state administering it until the people of the colony or non-self-governing territory had exercised their right of self-determination.[180]

The notion of self-determination is highly contested in international law, and there are many views on the content of the specific rights that comprise it. The International Covenant on Civil and Political Rights (ICCPR) defines it in Article 1(1) as the right of "all peoples" to "freely determine their political status and freely pursue their economic, social and cultural development."[181] Article 1(2) adds the right of "all peoples" to resources and means of subsistence.[182] Klabbers argues that, since the 1970s, the right to self-determination transformed itself from a substantive right to independence to a procedural right to be heard in the process of decision-making when such decisions pertain to the future of

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[180] G.A. Res. 2625 (XXV), annex (Oct. 24, 1970).

[181] International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966, 999 U.N.T.S. 14668.

[182] *Id.* art. 1(2)

> (All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.).

certain groups.[183] The ambiguity regarding the exact content of the right stems from the injustices and subjectivities plaguing "boundary drawing" in the colonial and post-colonial era.[184]

At the time of the events leading to Mauritius's independence, the UN General Assembly directly engaged with the detachment of certain islands from the territory of Mauritius. Shortly after the 1965 Lancaster House Meeting, the General Assembly adopted Resolution 2066(XX)[185] expressing its concern over this issue. The resolution criticized the United Kingdom's failure to comply with another UN Resolution passed just five years earlier pertaining to the independence of colonial countries and peoples.[186] This resolution had guaranteed the right to self-determination of all peoples and the territorial integrity of the newly independent states.[187] The General Assembly implored the United Kingdom to refrain from taking any steps that would lead to the dismemberment of the Mauritian colonial unity.[188]

The United Kingdom vehemently defended its position before the General Assembly's Fourth Committee, arguing that the archipelago was only attached to the colony of Mauritius for the sake of administrative convenience and that there was no pre-colonial nexus between the Chagos Islands and Mauritius. Consequently, the United Kingdom argued that Mauritius had no claim to the archipelago on the basis of a right of colonial self-determination.[189] Despite these assurances, it seems that the United Kingdom was in the wrong at the time. The facts are such that between 1968 and 1973, the United Kingdom forcibly removed the Chagossian population from the islands. In 1971, the UK government passed an Immigration Ordinance, prohibiting anyone without a permit to be present on the territory of the islands.[190] Since the Chagossians were displaced over a period of a few

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[183] *See* Jan Klabbers, *The Right to be Taken Seriously: Self-Determination in International Law*, 28 HUM. RTS. Q. 186 (2006).

[184] Joshua Castellino, *International Law and Self Determination: Peoples, Indigenous Peoples, and Minorities*, *in* SELF-DETERMINATION AND SECESSION IN INTERNATIONAL LAW 28 (Christian Walter et al. eds., 2014); *see also* David S. Case, *Subsistence and Self-Determination: Can Alaska Natives Have a More Effective Voice*, 60 U. COLO. L. REV. 1009, 1012–15 (1989).

[185] G.A. Res. 2066 (XX), Question of Mauritius (Dec. 16, 1965).

[186] G.A. Res. 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples (Dec. 14, 1960).

[187] *Id.*

[188] ALLEN, *supra* note 22, at 246.

[189] *See id.* at 214.

[190] *In re* the Chagos Marine Protected Area (Mauritius v. U.K.), PCA Case No. 2011-03, ¶ 90 (2015).

years, it would seem clear that a certain number of inhabitants remained present when the right to colonial self-determination concerning non-self-governing territories became binding on the United Kingdom by virtue of the 1970 Friendly Relations Declaration.[191]

UNCLOS arbitration became an avenue for Mauritius to advance its claim to the Chagos Islands a few decades later. The *Chagos* award did not engage with the issue of self-determination directly, as the bench decided that it fell outside the jurisdictional scope afforded by UNCLOS. Nonetheless, the award has far-reaching implications not only for Mauritius but also for other states seeking amends for past injustices with the help of the law of the sea. The arbitrators made it explicit that Mauritius forwent a chance to claim the islands at the most apt juncture—in the years directly pursuant to its independence—out of respect for its commitments towards the United Kingdom. As a result, they held, the United Kingdom is bound by the obligations towards Mauritius to return the islands in such a state so as to enable resettlement.[192] The judges further confirmed that nothing in the United Kingdom's behavior suggested that it viewed its commitment as anything but irrevocable.[193]

As a matter of post-colonial justice, Mauritius received an opportunity, in the context of the *Chagos* arbitration, to reassert its position regarding the conduct of what it perceived as sharply asymmetrical negotiations between a powerful colonizing state and a weak, remote colonial entity. Mauritius argued that, in effect, it acted under duress and never gave its genuine consent for the severance of its territory. While this assertion was ultimately not of direct significance to the outcome of the award, the result of the action conferred Mauritius a modicum of redress by restricting the United Kingdom's sovereignty with respect to the archipelago, and more particularly, its appurtenant maritime zones.

The tribunal rejected the United Kingdom's attempt to invoke its domestic constitutional law to render any commitments potentially encroaching upon its sovereignty without legal effect.[194] Such a position

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[191] G.A. Res. 2625, *supra* note 180.

[192] "The obligation to return the Archipelago is conditioned upon the disappearance of defence needs. In turn, the obligation to return the benefit of any minerals or oil to the Mauritius Government is conditioned upon the eventual return of the Archipelago itself." Chagos Marine Protected Area, PCA Case No. 2011-03, n.563.

[193] *Id.* ¶ 445.

[194] *Id.* ¶ 425.

denotes a shift to a more cosmopolitan understanding of sovereignty. The tribunal therefore reclaimed the notion of sovereignty from UK domestic law, elevated it to an international plane, and limited it accordingly. As such, the tribunal upheld the principle that sovereignty does not imply freedom from law, but rather freedom within the law.[195] Thus, the *Chagos* award reinforces the idea that there is much less room for any one state to assert a monopoly of unfettered authority.

It is well established in international law that states are accountable for the acts and omissions of all three branches of government, including regional and devolved administrations. Indeed, the ICJ has twice held that the state will be held responsible even for the acts of regional devolved administration and even when the central government does not exercise power over the acts of such devolved branches.[196] In the *Chagos* award, the United Kingdom was required to take responsibility for the acts of the BIOT Commissioner and the government representatives who negotiated the Lancaster House Undertakings. International law therefore fulfilled its broader objective that goes beyond guiding the resolution of a particular dispute.[197]

V. CONCLUSION

The outcome of the *Chagos* case and its procedural history support the idea that the law of the sea may occasionally act as a redistributive and corrective force rather than as a tool for maintaining the status quo in terms of global power relations. The same holds for the *South China Sea* award.

The *Chagos* award represents an important milestone for a number of reasons. Its potential impact upon bilateral relations between the United Kingdom and Mauritius is undeniable. In fettering the United Kingdom's heretofore rather expansive discretion with regard to the usage of the islands and their appurtenant waters, the award diminishes

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[195] James Crawford, *Sovereignty as a Legal Value*, *in* THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 122 (James Crawford & Martti Koskenniemi eds., 2012).

[196] *Id.* at 121; LaGrand (Ger. v. U.S.), Judgement, 2001 I.C.J. Rep. 466, ¶¶ 111–15 (June 27); Avena and Other Mexican Nationals (Mex. v. U.S.), Judgment, 2004 I.C.J. Rep. 12, ¶¶ 71–72 (Mar. 31).

[197] "Moreover, especially at the frontiers of the discipline of international law, it needs to be multi-disciplinary, drawing from other disciplines such as history, sociology, anthropology, and psychology such wisdom as may be relevant for its purpose. On the need for the international law of the future to be interdisciplinary." Gabcikovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. Rep. 7, 96–97 (Sept. 25) (separate opinion by Vice President Weeramantry).

the potential usefulness of the base at Diego Garcia in the long term. This may affect the capacity of the United Kingdom and the United States to pursue their plans to continue to use the base on Diego Garcia for military purposes, unmolested by Chagossian fishermen. As such, the award may also have the potential effect of expediting the return of the islands to Mauritius, given that the United Kingdom's control over the archipelago has been so visibly impeded. However, this remains to be seen.

Aside from notions of post-colonial justice—or lack thereof—the award also raises a number of broader concerns relating to the extent and understanding of sovereignty over territory. The waters abutting a body of land are typically held to belong to that body of land, and with regard to territorial waters at least, an analogous legal regime—albeit nuanced by the right of innocent passage in the case of territorial waters and the absence of a similar right over land[198]—was commonly assumed to exist. The *Chagos* case alters this position by inferring from Article 2(3) of the UNCLOS the requirement to have "due regard" to the rights of states *other* than the coastal state.[199] The arbitrators thus extended the body of duties on the part of the coastal state concerning other states. They did so by drawing analogies with Article 56 of the UNCLOS governing the rights and duties of the coastal state in the EEZ and containing express reference to the "due regard" requirement. This conclusion is little short of astonishing given the diverse histories of the maritime zones, the divergent drafting histories of the UNCLOS provisions relating thereto, and the nature of the state jurisdiction exercised in the two zones.

There can be at least two explanations for such a liberal interpretation of UNCLOS. From a strictly legal perspective, one may suggest that the tribunal was merely following the lead of ITLOS, which has developed a reputation for rarely resorting to customary international law. Therefore, the arbitrators chose to overlook certain past judgments concerning maritime zones and containing an impressively expansive understanding of equitable principles. Instead, they preferred the method of systemic integration, invoking general principles to interpret specific provisions of the UNCLOS in context. What is surprising is that the

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[198] *See* Right of Passage over Indian Territory (Port. v. India), Judgment, 1960 I.C.J. Rep. 6, 45 (Apr. 12).

[199] Chagos Marine Protected Area, PCA Case No. 2011-03, ¶ 293.

arbitrators used this method even in instances when the provisions in question were clear and non-ambiguous.

The second explanation for the tribunal's approach does not reside in the nature of the provisions themselves or their similarity. Rather, one could posit that the tribunal's interpretative approach was informed by a certain sensitivity towards the plight of the Mauritian government, as informed by its own jurisdiction (or lack thereof). Having been told in no uncertain terms that the temporary excision of the Chagos Archipelago represented a *conditio sine qua non* for the achievement of independence, Mauritius had reluctantly assented on the basis of what it assumed was an agreement upon which it could rely. Indeed, the Lancaster House Undertakings were held to have evolved into an agreement between sovereign states subsequent to Mauritius attaining independence. An Arbitral Tribunal constituted under Annex VII of UNCLOS, however, is not the ICJ. Its jurisdiction pertains to UNCLOS alone. As such, estoppel or breaches of the Lancaster House Undertakings would not, on their own, be sufficient to hold the United Kingdom accountable on the basis of Mauritius's fourth claim. Therefore, the arbitrators chose to stretch the UNCLOS provisions in order to avoid having to deny justice in the case before them. This reflects a holistic perception of international law, wherein the subject of the dispute cannot be detached from its broader context.[200]

Such an approach is not without grave risks, however. International law is worth little if not interpreted consistently. Effectively appending the "due regard" requirement to the rules governing the territorial sea will, for example, weaken Russian claims concerning the Northern Sea Route.[201] Such an extended view of the UNCLOS jars sharply with the conservatism that other international tribunals have generally displayed with regard to narrow textual application of the provisions of relevant treaties. One could even argue that reading differently worded articles of the same treaty in a substantially identical manner amounts to a willful disregard for the sovereign intention of states. International courts that engage in such prevarication are lucky to emerge unscathed.[202]

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[200] *See* KAREL WELLENS, NEGOTIATIONS IN THE CASE LAW OF THE INTERNATIONAL COURT OF JUSTICE: A FUNCTIONAL ANALYSIS 99 (2014).

[201] *See* CHRISTOPHER R. ROSSI, SHARED SOVEREIGNTY AND TERRITORIAL TEMPTATION: THE GROTIAN TENDENCY 98–101 (2017).

[202] The *locus classicus* in this instance is undoubtedly the *Nicaragua (jurisdiction)* case before the ICJ. In this instance, the perception of bias created by this piece of reasoning from the Court

While the interpretative approach of the tribunal in the *Chagos* award is curious at best, and piecemeal at worst, it nonetheless ensured that a cynical piece of chicanery on the part of the United Kingdom did not achieve its goal. There can be little doubt that the purported MPA was enacted in order to protect the base on Diego Garcia from prying eyes, and not to protect the pristine maritime environment. Given the United Kingdom's record in this area, and particularly its exclusion of the Chagos Archipelago from the remit of the European Convention on Human Rights, it is certainly refreshing to see a result that may help to ensure that some of the injustices vested upon the islanders are undone. Concerns remain, however, that the tribunal may have delivered justice by virtue of selective—and even partial—interpretation of law.

undoubtedly played a key role in the subsequent decision of the US to take no further part in proceedings and to block the enforcement of the Court's judgment via the Security Council. *See* Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment, 1984 I.C.J. Rep. 14, ¶¶ 277–80 (June 27).