

The South China Sea Award and the Vienna Convention on the Law of Treaties

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Case Commented On: [Award on the Merits](#) of the Annex VII Tribunal, In the Matter of the South China Sea Arbitration, *The Republic of the Philippines v The People's Republic of China*, 12 July 2016

The Annex VII Tribunal in the South China Sea Arbitration handed down its decision on the merits in the dispute between the Philippines and China on 12 July 2016. The dispute between the parties involves China's extensive maritime claims in the South China Sea (many within the context of China's so-called nine dash line); claims in relation to fishing activities by Chinese flagged vessels; and claims in relation to China's dredging and construction activities associated with reclamation activities on a series of maritime features in the South China Sea. The Tribunal ruled in favour of the Philippines on almost all issues in its 479 page unanimous and comprehensive decision. There are already a number of posts on the Award; see, for example the useful [first thoughts](#) offered by Doug Guilfoyle on the blog of the European Journal of International Law.

Introduction

This post examines the Tribunal's approach to some of the interpretive issues raised in the course of its decision on the merits. For the last nine months or so I have been examining the interpretive approaches of the three main types of tribunal that may have jurisdiction to consider disputes under section 2 of Part XV of the *Law of the Sea Convention* ([LOSC](#)) (Compulsory Procedures Entailing Binding Decisions). The three types of tribunals are: (1) ad hoc arbitral tribunals under Annex VII of LOSC, (2) the International Tribunal of the Law of the Sea (ITLOS), and (3) the International Court of Justice (the ICJ). As part of that research, one line of inquiry was to examine how closely the different tribunals adhere to the interpretive approach demanded by Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* ([VCLT](#)). I am also interested in the question of whether it is possible to identify distinctive interpretive approaches as between the different types of tribunals (see Joost Pauwelyn and Manfred Elsig, "The Politics of Treaty Interpretation: Variation and Explanations Across International Tribunals" in J Dunoff and M Pollack, eds, *International Law and International Relations: Taking Stock* (Cambridge: Cambridge University Press, 2013) 445). One of my hypotheses is that one might expect "new" tribunals (e.g. ITLOS) and tribunals where jurisdiction is contested (and especially to the point of non-appearance as in *Arctic Sunrise* ([Jurisdiction](#) and [Merits](#)) and *South China Sea*) to be particularly concerned to establish and maintain their legitimacy. This might lead them not only to extend all possible procedural protections to the non-appearing party (which was certainly the case here), but also to hew closely to the interpretive rules of the VCLT insofar as they demand, whether by treaty or by custom, a particular methodological approach to the exercise of treaty interpretation.

Until this Award my general assessment was that it was very difficult to discern any difference in the manner in which any of these three types of tribunals applied articles 31 and 32 of the VCLT. Of course, all three types of tribunals refer from time to time to these articles of the VCLT (both in majority and separate opinions) and in some very few cases (e.g. ITLOS, Sea Bed Disputes Chamber, [Advisory Opinion on the Area](#), esp at paras 57 et seq.) somewhat systematically, but there was certainly no consistent self-conscious practice of applying the provisions and no consistency of practice within any of the three categories of tribunal. To take but one example, this same Annex VII Tribunal in its Award on [Jurisdiction and Admissibility](#) only refers to the VCLT at paras 176 and 182 in the context of emphasising that while the Tribunal could have no jurisdiction with respect to an alleged breach of the [Convention on Biological Diversity](#) (CBD) it could resort to the CBD (applying article 31(3)(c) of the VCLT) for assistance in interpreting articles 192 and 194 of LOSC. The arbitral award in the modern era dealing with law of the sea issues which (until this Award) perhaps most systematically applied the VCLT interpretative rules was the non-Annex VII ad hoc arbitral award in *Filleting in the Gulf of St. Lawrence (La Bretagne (Canada\France) Arbitration)* (the official French version is available [here](#), an English translation is reproduced in (1986) 82 ILR 590).

In this post I will comment on the manner in which this Annex VII Tribunal approached the interpretive issues with which it had to grapple, and in particular its interpretation of article 121, dealing with the Regime of Islands. It is, I think, the most sophisticated example of the application of the VCLT rules to the Law of the Sea Convention that we have seen to date. That this should be so is hardly surprising since the interpretation and application of this article was the lynchpin on which the tribunal's jurisdiction and thus its substantive rulings on the merits turned. For the sake of completeness I will also comment on the manner in which the Tribunal applied other articles of the VCLT in the course of its award.

Treaty Interpretation and the Preservation of Historic Rights

The Tribunal first refers to articles 31 and 32 of the VCLT in the context of the Philippines' Submissions 1 and 2. In these submissions the Philippines sought to have the Tribunal declare that China could claim no maritime entitlements beyond those accorded by LOSC and that any claims of historic rights, including those related to the nine dash line that extended beyond rights accorded by LOSC were without lawful effect. The principal interpretive issue therefore (at para 234(a)) (all subsequent paragraph references in square brackets as follows [234(a)]) was whether there was any room to contend that the provisions of the LOSC, and in particular those dealing the exclusive economic zone (EEZ) and continental shelf, allowed for the *preservation* of historic rights (as opposed to title) to extended maritime zones that were at variance with those provisions.

The Tribunal began by acknowledging that the text of the Convention did not expressly address the issue with the result that the question for the Tribunal was “whether the Convention nevertheless intended the continued operation of such historic rights, such that China's claims should be considered not incompatible with the Convention.” [239] The Tribunal concluded that such claims of historic rights (as distinct from historic bays and title) did not survive the adoption of the Convention. In reaching that conclusion the Tribunal referred to both “the text and context of the Convention” (implicitly but not explicitly recalling the language of article 31 of the VCLT) and then the supplementary means of interpretation (and here explicitly referring to article 32 of the VCLT).

As for the text and context, the Tribunal referred to the main EEZ provisions of LOSC (articles 56, 58 & 62) pointing both to the language of exclusivity and noting that these provisions expressly address the circumstances in which other states might have access to the living resources of the EEZ as well as the degree of respect to be accorded to habitual fishing practices. Based on this the Tribunal concluded “as a matter of the text alone” that [243]

... the Convention is clear in according sovereign rights to the living and non-living resources of the exclusive economic zone to the coastal State alone. The notion of *sovereign* rights over living and non-living resources is generally incompatible with another State having historic rights to the same resources, in particular if such historic rights are considered exclusive, as China’s claim to historic rights appears to be. Furthermore, the Tribunal considers that, as a matter of ordinary interpretation, the (a) express inclusion of an article setting out the rights of other States and (b) attention given to the rights of other States in the allocation of any excess catch preclude the possibility that the Convention intended for other States to have rights in the exclusive economic zone in excess of those specified.

The text of the LOSC continental shelf provisions (article 77) equally, and even more so, confirmed the exclusive nature of the rights of the coastal state.

Moving from text to context (and thus still within the framework of article 31, VCLT) the Tribunal concluded that various provisions of the LOSC confirmed that the “system of maritime zones created by the Convention was intended to be comprehensive and cover any area of the sea or seabed.” This was:

... apparent in the Preamble, which notes the intention to settle “all issues relating to the law of the sea” and emphasises the desirability of establishing “a legal order for the seas.” The same objective of limiting exceptions to the Convention to the greatest extent possible is also evident in Article 309, which provides that “[n]o reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention.” [245]

All of this led to the conclusion that any claims by China to historic rights (as opposed to rights based upon China’s own EEZ and shelf) to living or non-living resources within the exclusive zones of the Philippines were inconsistent with the Convention:

The Convention does not include any express provisions preserving or protecting historic rights that are at variance with the Convention. On the contrary, the Convention supersedes earlier rights and agreements to the extent of any incompatibility. The Convention is comprehensive in setting out the nature of the exclusive economic zone and continental shelf and the rights of other States within those zones. China’s claim to historic rights is not compatible with these provisions. [246]

For the Tribunal that was all clear enough; there was no ambiguity here that required it to have recourse to the supplementary means of interpretation but, given “the sensitivity of the matters at issue in these proceedings, the Tribunal considers it warranted to recall the origin of and purpose behind the Convention’s provisions on the exclusive economic zone and continental shelf.” [247] Under the rubric of article 32 the Tribunal then referred to the general background to the Third

UN Conference on the Law of the Sea to emphasise that the EEZ emerged as a compromise between the claims to greater control by coastal states and the interests of long distance fishing states. The rights accorded were deliberately framed as exclusive rights and not just as preferential rights [250 – 251]. Furthermore, the Convention was a consensus package and while some reservations to the dispute settlement scheme were permissible, a state:

... is not entitled to except itself from the system of compulsory settlement generally. In the Tribunal's view, the prohibition on reservations is informative of the Convention's approach to historic rights. It is simply inconceivable that the drafters of the Convention could have gone to such lengths to forge a consensus text and to prohibit any but a few express reservations while, at the same time, anticipating that the resulting Convention would be subordinate to broad claims of historic rights. [254]

While this was evidently a reasonably systematic application of the methodology prescribed by the VCLT for discerning the intentions of the parties, the Tribunal's discussion of the interpretation of article 121 is even more so, and certainly much more searching and detailed, taking up close to 30 pages of text.

Treaty Interpretation and Article 121

The critical interpretive issue within article 121 related to paragraph (3) which provides that “[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.” Having quoted that paragraph the Tribunal immediately referenced articles 31 and 32 of the VCLT as follows [476 & 477]:

476. In order to interpret this provision, the Tribunal must apply the provisions of the Vienna Convention on the Law of Treaties. The general rule of interpretation is set out in Article 31 of the Vienna Convention and provides that a treaty “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Further, “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” shall be taken into account. Pursuant to Article 32 of the Vienna Convention, as supplementary means of interpretation, recourse may be had to the preparatory work of the treaty to confirm its meaning, or determine the meaning when it is otherwise ambiguous, obscure, or leads to a manifestly absurd or unreasonable result.

477. In approaching the interpretation of Article 121, the Tribunal will separately review the text, its context, the object and purpose of the Convention, and the *travaux préparatoires*, before setting out the conclusions that, in the Tribunal's view, follow with respect to the meaning of the provision. (References omitted.)

Under the heading of text the Tribunal examined the component words and phrases of article 121(3). Using this approach, and with frequent reference to the *Oxford English Dictionary*, or the *Shorter Oxford*, the Tribunal concluded that the word rock did not import any geological or geomorphological criteria and thus a rock for the purposes of article 121(3) need not necessarily be composed of “rock” but might for example, consistent with dictionary definitions, be composed of coral or clays [479 – 482]. As for “cannot” (as in “cannot sustain”), this word refers to the capacity to sustain rather than whether or not the subject feature does in fact sustain

habitation or economic life; however the historical fact (or not) of human habitation would clearly be relevant evidence in any such inquiry [483 – 484]. “Sustain” in its ordinary meaning has a number of components: support of essentials, a temporal (continuing element) and a sense of a minimal standard [485 – 487]; similarly, the term “habitation” implies a “non-transient presence of persons ... in a settled manner” and “persons” rather than an individual because “humans need company and community over sustained periods of time” [488 – 492]. The Tribunal preferred a disjunctive reading of the word “or” thus recognizing that a feature that could sustain *either* human habitation *or* an economic life of its own would be entitled to both an EEZ and a continental shelf [493 – 497]. Finally, the combination of “economic” and “life” suggested a community activity, a level of viability and ongoing activity, while “of their own” indicated that the feature (or an associated group of features) must “have the ability to support an independent economic life, without relying predominantly on the infusion of outside resources or serving purely as an object for extractive activities, without the involvement of a local population.” [500] And in making that assessment the Tribunal was firmly of the view that it could not consider economic activity associated with a possible EEZ or shelf since that would be circular. [502]

The Tribunal summed up its textual assessment in a number of propositions [504] but also acknowledged that there remained uncertainties [505], especially with respect to the degree of economic activity which might suffice. With that acknowledgement the Tribunal turned to context and the objects and purposes of the Convention (all part of article 31, VCLT).

“Context” for the Tribunal required it to recognize that rocks and fully entitled islands are part of a classifications system of different maritime features in the Convention. Thus, it was important to consider how the rock/island categories fit within this scheme as well as the provisions of the Convention which refer to other objects within this classification scheme including low-tide elevations (article 13) and submerged features. Furthermore, since classification as a rock serves to deny that feature EEZ and shelf entitlements, it was also important to assess this categorization system in light of the purpose of these entitlements, and especially the introduction of the EEZ [509].

Consideration of the classification system for marine features as a whole led the Tribunal [508 – 511] to emphasise that the classification of all features within the system must be based on natural conditions drawing upon the best available evidence; and, just as a low tide elevation or a submerged maritime feature could not be turned into an island via human intervention, neither could a rock be turned into an island via human intervention. As for the link between article 121(3) as a provision of limitation or disentitlement and the purpose of the EEZ zone, the Tribunal delved [512 – 520] into the *travaux* to emphasise that the EEZ was created to benefit the peoples and communities of coastal states and that article 121(3), which precluded barren rocks from any entitlement to an EEZ, was part of the balancing of interests (coastal states vs distant water fishing fleets referred to earlier). This in turn led the Tribunal to opine that the quality of habitation demanded before a feature might avoid classification as a rock should be “habitation of a feature by a settled group or community for whom the feature is a home.” [520]

While the Tribunal necessarily reached beyond the text of article 121(3) to identify the purpose of the EEZ (as part of ascertaining and assessing *context*), the Tribunal also went on to consider the *travaux* more systematically for the “light it sheds on the purpose of the provision itself” (i.e. article 121(3)) [521]. The Tribunal’s review of the background to article 121(3) extended as far back as a British Imperial Conference of 1923 while recognizing that the entitlements associated with maritime features assumed far heightened significance with the expansion of the maritime

claims of coastal states and the recognition of a common heritage area [522 – 529]. The Tribunal noted that paragraph (3) emerged as part of the compromise that was part of the Informal Single Negotiating Text (1975). While there is no detailed record of the elements of the compromise the Tribunal considered that the record would support the following conclusions [535 – 537, references to the detailed *travaux* omitted]:

535. First, Article 121(3) is a provision of limitation. It imposes two conditions that can disqualify high-tide features from generating vast maritime spaces. These conditions were introduced with the object and purpose of preventing encroachment on the international seabed reserved for the common heritage of mankind and of avoiding the inequitable distribution of maritime spaces under national jurisdiction. ...

536. Second, the definitions in Article 121(3) were not discussed in isolation, but were frequently discussed in the context of other aspects of the Convention. These included: (a) the introduction of an exclusive economic zone, (b) the purpose of the exclusive economic zone in securing the benefit of maritime resources for the population of the coastal State, (c) the question of islands under foreign domination or colonial dependence, (d) the introduction of the international seabed area (the common heritage of mankind), (e) the protection of the interests of archipelagic States, (f) the role of islands in maritime delimitation, and (g) concerns about the potential for artificial installations to generate maritime zones.

537. Third, the drafters accepted that there are diverse high-tide features: vast and tiny; barren and lush; rocky and sandy; isolated and proximate; densely and sparsely populated, or not populated at all. Many States considered that criteria such as surface area, population size, and proximity to other land might be useful in deciding whether a high-tide feature should be a fully entitled island. But the negotiating history clearly demonstrates the difficulty in setting, in the abstract, bright-line rules for all cases. Proposals to introduce specific criteria were considered, but consistently rejected. Against such attempts at precision, the drafters clearly favoured the language of the compromise reflected in Article 121(3).

Ultimately, acknowledged the Tribunal, size could not be dispositive of a feature's status "although size may correlate to the availability of water, food, living space, and resources for an economic life".

In the end, the Tribunal's analysis of text, content, object and purpose, and the drafting history of article 121(3) led it to some nine conclusions which I reproduce here in slightly abbreviated form [540-548]:

540. First, ... the word "rock" does not limit the provision to features composed of solid rock. The geological and geomorphological characteristics of a high-tide feature are not relevant to its classification pursuant to Article 121(3).

541. Second, the status of a feature is to be determined on the basis of its natural capacity, without external additions or modifications intended to increase its capacity to sustain human habitation or an economic life of its own.

542. Third, with respect to “human habitation”, the critical factor is the non-transient character of the inhabitation, such that the inhabitants can fairly be said to constitute the natural population of the feature, for whose benefit the resources of the exclusive economic zone were seen to merit protection. The term “human habitation” should be understood to involve the inhabitation of the feature by a stable community of people for whom the feature constitutes a home and on which they can remain. Such a community need not necessarily be large, and in remote atolls a few individuals or family groups could well suffice. Periodic or habitual residence on a feature by a nomadic people could also constitute habitation An indigenous population would obviously suffice, but also non-indigenous inhabitation could meet this criterion if the intent of the population was truly to reside in and make their lives on the islands in question.

543. Fourth, the term “economic life of their own” is linked to the requirement of human habitation, and the two will in most instances go hand in hand. Article 121(3) does not refer to a feature having economic value, but to sustaining “economic life”. The Tribunal considers that the “economic life” in question will ordinarily be the life and livelihoods of the human population inhabiting and making its home on a maritime feature or group of features. Additionally, Article 121(3) makes clear that the economic life in question must pertain to the feature as “of its own”. Economic life, therefore, must be oriented around the feature itself and not focused solely on the waters or seabed of the surrounding territorial sea. Economic activity that is entirely dependent on external resources or devoted to using a feature as an object for extractive activities without the involvement of a local population would also fall inherently short with respect to this necessary link to the feature itself. Extractive economic activity to harvest the natural resources of a feature for the benefit of a population elsewhere certainly constitutes the exploitation of resources for economic gain, but it cannot reasonably be considered to constitute the economic life of an island as its own.

544. Fifth, the text of Article 121(3) is disjunctive, such that the ability to sustain either human habitation or an economic life of its own would suffice to entitle a high-tide feature to an exclusive economic zone and continental shelf. However, as a practical matter, the Tribunal considers that a maritime feature will ordinarily only possess an economic life of its own if it is also inhabited by a stable human community. One exception to that view should be noted for the case of populations sustaining themselves through a network of related maritime features. The Tribunal does not believe that maritime features can or should be considered in an atomized fashion. A population that is able to inhabit an area only by making use of multiple maritime features does not fail to inhabit the feature on the grounds that its habitation is not sustained by a single feature individually. Likewise, a population whose livelihood and economic life extends across a constellation of maritime features is not disabled from recognising that such features possess an economic life of their own merely because not all of the features are directly inhabited.

545. Sixth, Article 121(3) is concerned with the *capacity* of a maritime feature to sustain human habitation or an economic life of its own, not with whether the feature is presently, or has been, inhabited or home to economic life. The capacity of a feature is necessarily an objective criterion. ...

546. Seventh, the capacity of a feature to sustain human habitation or an economic life of its own must be assessed on a case-by-case basis. ... The Tribunal considers that the principal factors that contribute to the natural capacity of a feature can be identified. These would include the presence of water, food, and shelter in sufficient quantities to enable a group of persons to live on the feature for an indeterminate period of time. ...

547. Eighth, the Tribunal considers that the capacity of a feature should be assessed with due regard to the potential for a group of small island features to collectively sustain human habitation and economic life. On the one hand, the requirement in Article 121(3) that the feature itself sustain human habitation or economic life clearly excludes a dependence on external supply. A feature that is only capable of sustaining habitation through the continued delivery of supplies from outside does not meet the requirements of Article 121(3). ... At the same time, the Tribunal is conscious that remote island populations often make use of a number of islands, sometimes spread over significant distances, for sustenance and livelihoods. ... [P]rovided that such islands collectively form part of a network that sustains human habitation in keeping with the traditional lifestyle of the peoples in question, the Tribunal would not equate the role of multiple islands in this manner with external supply. Nor would the local use of nearby resources as part of the livelihood of the community equate to the arrival of distant economic interests aimed at extracting natural resources.

548. Ninth, in light of the Tribunal's conclusions on the interpretation of Article 121(3), evidence of the objective, physical conditions on a particular feature can only take the Tribunal so far in its task. In the Tribunal's view, evidence of physical conditions will ordinarily suffice only to classify features that clearly fall within one category or the other. If a feature is entirely barren of vegetation and lacks drinkable water and the foodstuffs necessary even for basic survival, it will be apparent that it also lacks the capacity to sustain human habitation. The opposite conclusion could likewise be reached where the physical characteristics of a large feature make it definitively habitable. The Tribunal considers, however, that evidence of physical conditions is insufficient for features that fall close to the line. It will be difficult, if not impossible, to determine from the physical characteristics of a feature alone where the capacity merely to keep people alive ends and the capacity to sustain settled habitation by a human community begins. This will particularly be the case as the relevant threshold may differ from one feature to another.

The Tribunal continued with some evidentiary observations, noting that historical use will likely provide the most reliable evidence as to the capacity of features and that "a purely official or military population, serviced from the outside, does not constitute evidence that a feature is capable of sustaining human habitation." [550]

That was not quite the end of the Tribunal's efforts to apply articles 31 and 32 of the VCLT since article 31(3) also refers to subsequent practice amounting to an agreement. But here the Tribunal observed (following the jurisprudence of the ICJ and that of the WTO's Appellate Body), that the threshold for establishing an agreement on interpretation derived from state practice is high, and in this case there was no evidence of such an agreement that would lead the Tribunal to

diverge from the interpretation that it had already settled on and recorded in the above nine propositions or conclusions. [552]

The Tribunal then went on to apply these propositions to the various maritime features with respect to which the Philippines sought declarations (including the Spratly Islands “as a whole”) concluding that none of the high tide features in the Spratly Islands were capable of sustaining human habitation or a life of their own [626]; the same conclusion prevailed with respect to other contested high tide features including the Scarborough Shoal and other reef features [643 – 646]. As a result, none of these features could generate an EEZ or a continental shelf thereby justifying the further conclusion that there could be no overlapping maritime entitlements as between China and the Philippines that would have precluded the Tribunal from exercising its jurisdiction pursuant to China’s declaration under article 298(1)(a).

In sum, this Award represents a sophisticated application of the interpretive rules of the VCLT to the construction of article 121(3). One gap in the Tribunal’s reasoning is that while it identifies both the EEZ and the shelf provisions of LOSC as part of the interpretive context for article 121(3), in the end it only analyzes the EEZ provisions. It is not clear that including the shelf provisions in the analysis would have changed the conclusions. The principal difference between the two sets of provisions is that while LOSC undoubtedly created or crystallized the concept of an EEZ, the doctrine of the continental shelf was already part of customary international law long before the Third Law of the Sea Conference began.

Article 33: Multiple Language Versions of LOSC

In addition to articles 31 and 32, the Tribunal also referred to article 33, the third and final provision in section 3, of Part III of the VCLT. Article 33 deals with treaties like LOSC which are concluded in multiple language versions and provides that where a comparison of the different authentic texts discloses a difference of meaning, the interpreter should adopt the meaning “which best reconciles the texts, having regard to the object and purpose of the treaty ...”. There has been little consideration of article 33 in the context of LOSC although there is some discussion of the multiple language versions of LOSC in the ITLOS, Sea Bed Disputes Chamber, [Advisory Opinion on the Area](#), esp at paras 57 et seq and in several separate opinions of ITLOS judges in prompt release proceedings where the issue has been the proper interpretation of the term “reasonable bond” in Article 73(2) (“garantie suffisante” in French).

The Tribunal considered the applicability of this provision as part of interpreting the scope of China’s declaration under article 298(1)(a). The Philippines took the view that article 298(1)(a) could only serve to allow a state to opt out of compulsory dispute resolution with respect to disputes concerning “historic bays or titles” to the extent that such disputes were delimitation disputes. The Tribunal acknowledged that the English text might be somewhat ambiguous but concluded [215 – 216] that the non-English texts supported the broader interpretation to the effect that a state could exclude compulsory jurisdiction to all disputes involve historic bays or titles; regardless of whether the dispute involved an issue of delimitation.

Other VCLT Issues: Article 26

In addition to the interpretation provisions of the VCLT the Tribunal also had cause to refer to article 26 (good faith performance) and article 30 (successive treaties relating to the same subject matter). The Tribunal relied on article 26 as part of its discussion of the Philippines’ request that the Tribunal rule that China was in breach of its obligations not to aggravate or extend the

dispute between the parties once the Philippines had commenced its action. While LOSC does not specifically address this duty (other than in the context of a provisional measures order and the Philippines had made no such application) the Tribunal concluded that such a duty could be derived from consistent judicial practice [1168] but was also supported by article 26 of the VCLT. The Tribunal put the point this way [1171]:

... such a duty [i.e. the duty not to aggravate or extend a dispute] is inherent in the central role of good faith in the international legal relations between States. Article 26 of the Vienna Convention on the Law of Treaties recognises this when it provides that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.” This obligation is no less applicable to the provisions of a treaty relating to dispute settlement. Where a treaty provides for the compulsory settlement of disputes, the good faith performance of the treaty requires the cooperation of the parties with the applicable procedure. Compulsory settlement is also premised on the notion that the final result will be binding on the parties and implemented by them as a resolution of their dispute. The very purpose of dispute settlement procedures would be frustrated by actions by any party that had the effect of aggravating or extending the dispute, thereby rendering it less amenable to settlement.

Other VCLT Issues: Article 30

No less interesting was the Tribunal’s discussion of article 30. The Tribunal referred to article 30 as part of its assessment of whether or not historic rights could survive the adoption of LOSC. Article 30 of the VCLT deals with the relationship between successive treaties dealing with the same subject matter. Paragraph 2 of that article sets up a presumption to the effect that a later treaty will ordinarily prevail over an earlier treaty unless the later treaty stipulates that it is subject to that earlier treaty.

The Tribunal took the view that article 311 of LOSC and article 30 of the VCLT were parallel provisions each of which contemplated that a later treaty would prevail over an earlier treaty. That however was not precisely the issue before the Tribunal since the Tribunal was not faced with a scenario of competing treaty texts but rather a potential conflict between a claim based on state practice and a treaty text (LOSC) that implicitly (as already noted above, there was no explicit provision) extinguished claims of historic rights. Nevertheless the Tribunal was clearly of the view that both article 311 of LOSC and article 30 of the VCLT should be read as addressing both conflicts between agreements and conflicts between older customary claims and more recent treaties. As already noted above, the Tribunal was firmly of the view that claims of historic rights could not have survived the adoption of LOSC.

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