

DISPUTE SETTLEMENT MECHANISMS UNDER THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: THE WAY FORWARD FOR MALDIVES

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ABSTRACT

The maritime boundary delimitation judgment by the International Tribunal for the Law of the Sea between Mauritius and the Maldives was the first Maldivian dispute settled at an international court or tribunal. Regrettably, misinterpretation and misinformation regarding international laws and the Maldivian domestic laws related to the dispute became prevalent among the Maldivian community. One of the core concerns that need to be addressed is how Maldives got subjected to a legally binding dispute settlement mechanism concerning a dispute that was initially regarding the sovereignty over the Chagos Archipelago between two other States, namely: Mauritius and the United Kingdom. Additionally, it is important to determine whether Maldives has any other legal means to safeguard its maritime zones from future maritime disputes. The main objective of this paper is to explore the dispute settlement mechanisms under Part XV of the United Nations Convention on the Law of the Sea (LOSC) and determine how these provisions can be utilised to safeguard the Maldivian maritime zones. This research is primarily a doctrinal legal research. Firstly, the article outlines the provisions under Part XV of the LOSC whilst exploring its drafting history. Next, the article analyses the optional exception on maritime delimitation under LOSC Article 298(1)(a) and its significance to the Maldivian situation. It suggests that considering the undelimited outer continental shelves of Maldives, Maldives should consider declaring an optional exception under LOSC Article 298(1)(a). The article concludes

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[Received 17 September 2023, Accepted: 28 October 2023, Published: 11 December 2023]



that optional declarations serve as safeguards against premature and costly dispute resolution.

Keywords: LOSC 1982, Dispute Settlement Mechanism, Maldives, Mauritius, Maritime Delimitation.

MEKANISME PENYELESAIAN PERTIKAIAN DI BAWAH LOSC1982: HALUAN KE HADAPAN UNTUK MALDIVES

ABSTRAK

Keputusan penggarisan sempadan maritim antara Mauritius dan Maldives oleh ITLOS adalah pertikaian pertama yang berkaitan dengan Maldives yang dapat diselesaikan di mahkamah atau tribunal antarabangsa. Malangnya, penyalahafsiran dan maklumat yang salah mengenai undang-undang antarabangsa, undang-undang domestik Maldives yang berkaitan, dan undang-undang antarabangsa mengenai penggarisan Maritim adalah lazim dalam kalangan masyarakat Maldives. Perkara ini telah menimbulkan kekacauan dan kekeliruan dalaman. Oleh itu, penjelasan salah faham ini adalah penting. Salah satu kebimbangan utama yang perlu ditangani ialah bagaimana Maldives tertakluk kepada mekanisme penyelesaian pertikaian pihak ketiga yang mengikat secara sah mengenai pertikaian yang pada mulanya mengenai kedaulatan ke atas Kepulauan Chagos antara dua negara lain, iaitu: Mauritius dan United Kingdom. Di samping itu, adalah menjadi satu perkara penting untuk mengetahui samaada Maldives mempunyai cara undang-undang lain untuk melindungi negaranya dari potensi pertikaian Maritim pada masa hadapan yang boleh meletakkan zon maritimnya dalam bahaya. Objektif utama kajian ini adalah untuk meneroka mekanisme penyelesaian pertikaian di bawah bahagian XV LOSC dan menentukan bagaimana peruntukan ini boleh digunakan secara maksima untuk melindungi zon maritim Maldivian. Artikel ini di mulakan dengan menggariskan peruntukan bahagian XV sambil meneroka sejarah drafnya. Seterusnya, artikel ini menganalisis pengecualian pilihan mengenai penggarisan maritim di bawah Perkara 298(1)(a) dan kepentingannya kepada keadaan Maldives. Ia mencadangkan bahawa memandangkan LOSC yang tidak terhad di Maldives, Maldives harus mempertimbangkan untuk mengisytiharkan pengecualian pilihan di bawah Artikel 298(1)(a). Artikel ini menyimpulkan bahawa deklarasi pilihan berfungsi sebagai perlindungan terhadap penyelesaian pertikaian yang pramatang dan mahal.

Kata Kunci: LOSC 1982, Mekanisme Penyelesaian Pertikaian, Maldives, Mauritius, Persempadanan Maritim.

INTRODUCTION

In contrast to domestic laws, in international law, States are not obliged to submit international disputes to any binding third-party dispute settlement mechanism unless the disputing States have expressly or impliedly given their consent to the jurisdiction of the particular court or tribunal.¹ This rule stems from the fundamental principles of State sovereignty and independence.²

States typically hesitate to be subject to any compulsory third-party dispute settlement and prefer to settle their disputes using diplomatic efforts.³ Nonetheless, a mandatory dispute settlement system might be incorporated into the international treaty document. One such system is provided in the 1982 United Nations Convention on the Law of the Sea⁴ (hereinafter LOSC). This attitude towards international dispute settlement was truly extraordinary.⁵ LOSC is

¹ Malcolm N. Shaw, *International Law*, 6th ed. (United States of America: Cambridge University Press, 2008), 1012; United Nations, *Handbook on the Peaceful Settlement of Disputes between States* (New York: United Nations Publications, 1992), 74; Andrew T. Guzman, "The Cost of Credibility: Explaining Resistance to Interstate Dispute Resolution Mechanisms," *The Journal of Legal Studies* 31, no. 2 (June 2002): 304, <https://doi.org/10.1086/340811>.

² Tom Sparks, "Reassessing State Consent to Jurisdiction: The Indispensable Third Party Principle before the ICJ," *Nordic Journal of International Law* 91, no. 2 (May 9, 2022): 217, <https://doi.org/10.1163/15718107-91020005>.

³ Asraful Islam, Amira Paripurna, and Zahidul Islam, "Dispute Settlement under the UNCLOS with Special Reference to Compulsory Procedures: An Appraisal," *Journal of Asian and African Social Science and Humanities* 7, no. 2 (2021): 51, <https://www.aarcentre.com/ojs3/index.php/jaash/article/view/232/517>; Guzman, "Cost of Credibility," 304.

⁴ United Nations Convention of the Law of the Sea (adopted 10th December 1982, entered into force 16th November 1994) 1833 UNTS 397, (LOSC). To date, there are 168 parties to this Convention.

⁵ In 2002, Guzman surveyed 100 treaties registered under the United Nations (UN) and identified that 80 of them do not have a compulsory dispute

widely considered as one of the most successful treaties among international codifications. It contains complex provisions regulating and governing the uses of the ocean, including provisions under Part XV of the LOSC, subjecting parties to the mandatory jurisdiction for certain disputes relating to the interpretations and application of this Convention.

The primary objective of this paper is to analyse the dispute settlement mechanism under Part XV of the 1982 LOSC and determine how to utilise the dispute settlement system to benefit Maldives effectively. The research methodology used for this paper is primarily doctrinal legal research. This paper also analyses the State practice concerning the declarations made under Article 298 of the LOSC.

To begin with, the paper provides an overview of the dispute settlement mechanisms under Part XV of the LOSC and its relevant drafting history. The next part examines the significance of the optional exception on maritime delimitation under Article 298(1)(a) of the LOSC, as well as the relevance of Article 282 of the LOSC to the Maldivian situation. The paper also includes an analysis of the State practice with regard to the declarations made by States under Article 298 of the LOSC. The paper then concludes with recommendations and suggestions for Maldives.

resolution mechanism in place. In fact, 12 of the 20 treaties with a mandatory dispute resolution clause were bilateral investment treaties. The UN Charter with the International Court of Justice (ICJ) compulsory jurisdiction clause and the World Trade Organization (WTO) dispute resolution procedures are the most common multilateral treaties with compulsory dispute settlement incorporated directly into the documents other than the LOSC. See Guzman, "Cost of Credibility," 303; Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, Cambridge Studies in International and Comparative Law 39 (Cambridge: Cambridge University Press, 2005), 2; Emilia Justyna Powell and Sara McLaughlin Mitchell, "Forum Shopping for the Best Adjudicator: Dispute Settlement in the United Nations Convention on the Law of the Sea," *The Journal of Territorial and Maritime Studies* 9, no. 1 (2022): 8, 23, <https://www.jstor.org/stable/10.2307/48684177>.

CODIFICATION OF THE DISPUTE SETTLEMENT MECHANISMS UNDER THE LOSC 1982

During the Third United Nations Conference on the Law of the Sea (hereinafter UNCLOS III), which was conducted from 1973 to 1982, some States were opposed to legitimising a mandatory dispute settlement mechanism by third-party judges or arbitrators in the face of a dispute, insisting that direct negotiations between the parties would be the most effective method for the resolutions of conflicts.⁶ Meanwhile, other States noted that historically speaking, most negotiations failed, resulting in long-standing disputes or even leading to the use of force.⁷

Therefore, they persisted that the most reliable method for resolving conflicts peacefully was linked to the willingness of States to commit themselves in advance to accept the binding decisions of judicial bodies.⁸ The prospect of a binding mechanism was believed to deter and discourage States from violating the provisions of the Convention and ensure that the States adhere to the complex regimes of this Convention in practice.⁹ Their views were also influenced by the fact that the dispute settlement system under the 1958 Geneva Conventions was only offered as an optional protocol and thus had not received a single dispute reference.¹⁰

Consequently, the delegates at UNCLOS III decided to incorporate the dispute settlement mechanisms into the Convention as a package deal. The negotiations eventually concluded by combining the two approaches, considered by many as a landmark in international law.¹¹ This inclusion of a mandatory dispute settlement system was

⁶“The United Nations Convention on the Law of the Sea - A Historical Perspective,” Division for Ocean Affairs and the Law of the Sea, accessed July 5, 2023, https://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm.

⁷ Klein, *Dispute Settlement*, 52.

⁸ “A Historical Perspective,”

⁹ “A Historical Perspective,”

¹⁰ Asraful, Paripurna, and Zahidul, “Dispute Settlement under UNCLOS,” 52; Louis B. Sohn, “Peaceful Settlement of Disputes in Ocean Conflicts: Does UNCLOS III Point the Way?,” *Law and Contemporary Problems* 46, no. 2 (1983): 195, <https://www.jstor.org/stable/1191525>.

¹¹ Klein, *Dispute Settlement*, 350.

hailed by delegates at the UNCLOS III and by commentators as momentous progress for the international law.¹² States that become parties to this Convention are also inevitably agreeing to the mandatory jurisdiction for certain disputes relating to the interpretations and application of this instrument. Likewise, they also acquire the right to unilaterally bring a dispute to a court or tribunal without the specific agreement of the other disputant party to LOSC.

The main dispute settlement provisions are stipulated in Part XV of the Convention. The drafters divided Part XV of the LOSC into three sections: Section One: general obligations and provisions; Section Two: the procedure for compulsory dispute settlement; and Section Three: the limitations on the subject matter jurisdiction of the compulsory dispute settlement mechanism.

Section One outlines the preliminary steps to which all disputes are subject and gives due regard to the independent sovereignty of parties. It deals with the settlement of disputes through traditional public international law procedures based on the mutual agreement of the parties to the dispute. Whereas Section Two sets out more specific adjudicative and arbitrary procedures for the cases where agreement between the parties is not forthcoming. Finally, Section Three describes the limitations and exceptions to the mandatory system set out in Section Two.

SECTION ONE: GENERAL OBLIGATIONS RELATING TO THE PACIFIC SETTLEMENT OF DISPUTES

This Section essentially requires States to settle disputes through diplomatic channels prior to reference to the compulsory procedures of Section Two of Part XV of the LOSC. It declares that parties are required to settle any dispute between them concerning the interpretation or application of the Convention by peaceful means, in accordance with Article 2(3) of the UN Charter¹³ and a solution by the means indicated under Article 33(1) of the UN Charter,¹⁴ namely: through negotiation, inquiry, mediation, conciliation, arbitration,

¹²Klein, 349; Sohn, "Ocean Conflicts," 195.

¹³UN Charter, article 2(3): "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."

¹⁴LOSC, art. 279.

judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.¹⁵ Thus, recourse to non-peaceful means is impermissible for the settlement of any dispute under the LOSC. Yet the Convention does not prefer any one of these peaceful means of dispute settlement over another.

However, it is essential to note that nothing in this new mandatory mechanism prejudices the right of any parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice.¹⁶ It further goes on to stipulate that the procedures mentioned in this part apply only where no settlement has been reached by recourse to dispute settlement of the parties' own choice and if the agreement between the parties does not exclude any further procedure. Moreover, if the parties have agreed upon a time limit, the procedures in this part shall apply only upon the expiration of that time limit.¹⁷ Overall, the system allows the States to maintain control over the type of procedure used during the peaceful settlement of disputes.¹⁸

Additionally, the Convention requires the parties to a dispute to expeditiously exchange views regarding its settlement by negotiation or other peaceful means.¹⁹ This depicts the emphasis given to the goal of a peaceful resolution of disputes by stressing the importance of continued communication between the parties.²⁰

Finally, Section One outlines the option of non-binding conciliation. A State party may invite another party to submit the

¹⁵ UN Charter, article 33(1): "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."

¹⁶ LOSC, art. 280.

¹⁷ LOSC, art. 281.

¹⁸ Anne Sheehan, "Dispute Settlement under UNCLOS: The Exclusion of Maritime Delimitation Disputes," *The University of Queensland Law Journal*, 2005, 172; Sohn, "Ocean Conflicts," 196.

¹⁹ LOSC, art. 283.

²⁰ Marianne P. Gaertner, "The Dispute Settlement Provisions of the Convention on the Law of the Sea: Critique and Alternatives to the International Tribunal for the Law of the Sea," *San Diego Law Review* 19, no. 3 (April 1982): 581, <https://digital.sandiego.edu/sdlr/vol19/iss3/8>.

dispute to conciliation in accordance with the procedure under Annex V, Section One of Part XV of the LOSC or another conciliation procedure.²¹ The conciliation procedure is based on the consent of both parties. Thus, the parties have to agree on both conciliation as a means of resolving the dispute and the procedure to follow during its resolution.

SECTION TWO: COMPULSORY PROCEDURES ENTAILING BINDING DECISIONS

Section Two of Part XV of the LOSC, broadly defines the procedures to follow in the case of failure to resolve the problem using diplomatic means. If direct talks between the parties through diplomatic channels or otherwise through any other means mentioned in Section One do not prove successful,²² and if the dispute does not fall within the exceptions and limitations of Section Three of Part XV, the Convention gives them a choice among four procedures.²³

- a. The International Court of Justice (ICJ)²⁴
- b. The new International Tribunal for the Law of the Sea (ITLOS)²⁵
- c. An International Arbitral Tribunal,²⁶ or
- d. A Special Arbitral Tribunal.²⁷

These procedures involve binding third-party settlements, in which an agent other than the parties directly involved hands down a decision that the parties are committed in advance to respect. This is

²¹ LOSC, art. 284.

²² LOSC, art. 286.

²³ LOSC, art. 287.

²⁴ Established in 1945 by the UN Charter, commonly called the World Court or The Hague. It is the principal judicial organ of the UN. Seated in the Peace Palace in The Hague, Netherlands, the court settles legal disputes submitted by States. It provides advisory opinions on legal questions submitted by duly authorised international branches, agencies, and the UN General Assembly. See UN Charter, Chapter XIV.

²⁵ Established in accordance with Annex VI

²⁶ Constituted in accordance with Annex VII

²⁷ Constituted in accordance with Annex VIII, with expertise in specific types of disputes, such as fisheries, marine environment, marine scientific research and navigation

unique in the sense that compulsory judicial third-party dispute settlement is available at the request of only one of the disputant States.²⁸ No additional method of consent is required if the other disputant State is a party to the Convention. Consent to be bound by compulsory procedures entailing binding decisions is included in the consent given to the LOSC (subject to Sections One and Three of Part XV).²⁹ States may select their preferred forum when they sign, ratify, or accede to the Convention or any time thereafter employing a written declaration.³⁰

The ICJ and the International Arbitral Tribunal were judicial procedures that existed before, whereas the ITLOS and the Special Arbitral Tribunals were new procedures developed during UNCLOS III. During negotiations, some States preferred to submit disputes to the ICJ as per the traditional norm, while other States advocated for the establishment of an entirely new court or tribunal to address the contemporary principles deriving from the LOSC.³¹ On the other hand, some States favoured arbitration. Contrastingly, others maintained a functional approach, proposing that technical experts selected with the cooperation of competent specialised agencies are best qualified to decide disputes in areas they are familiar with.³² Eventually, this flexibility of procedural choice had to be made available in order to achieve consensus on compulsory dispute settlement at UNCLOS III.

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Suppose the States in dispute have accepted different settlement procedures or parties have not previously declared a specific procedure to settle their disputes, in such case, the parties are obliged to accept

²⁸ Abdul Ghafur Hamid, *Public International Law: A Practical Approach*, 4th ed. (Malaysia: Sweet & Maxwell Asia, 2019), 311.

²⁹ Gaertner, "Critique and Alternatives," 584; Klein, *Dispute Settlement*, 53.

³⁰ LOSC, art. 287(1).

³¹ Powell and Mitchell, "Forum Shopping," 10; Alan E. Boyle, "Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction," *International and Comparative Law Quarterly* 46, no. 1 (January 1997): 40, <https://doi.org/10.1017/S0020589300060103>.

³² Boyle, "Problems of Fragmentation and Jurisdiction," 40.

³³ Klein, *Dispute Settlement*, 54; Yoshifumi Tanaka, *The International Law of the Sea*, 1st ed (Cambridge: Cambridge University Press, 2012), 398.

arbitration in accordance with Annex VII.³⁴ Hence, arbitration is referred to as the ‘default’ dispute settlement procedure.³⁵ Ultimately, the Convention provides for obligatory third-party dispute settlement.³⁶ Yet under Article 280 of the LOSC, flexibility remains, as the parties may mutually agree at any time to settle the dispute by a different procedure, even after the dispute has been submitted to a procedure under Section Two.³⁷

Despite a large number of States ratifying the LOSC, the utilisation of declarations under Article 287 of the LOSC is not a common practice. Only 29% of parties have made declarations under this Article, opting to choose a specific forum to settle their disputes under the LOSC. In comparison, 71% of the parties to the LOSC have not attempted to choose any specific forum.³⁸ Ultimately, these States are accepting Annex VII Arbitration as the default dispute settlement procedure in the event the dispute fails to be resolved through the traditional non-binding procedures. To this date, Maldives has made no such declaration of a preferred forum and thus is subjected to Annex VII Arbitration by default.³⁹ Currently, it appears that ITLOS is the most preferred procedure of the available options, closely followed by the ICJ.⁴⁰

The Convention ensures the incorporation of the traditional governing rules of international courts and tribunals into this new compulsory mechanism. These rules include the rule of exhaustion of

³⁴ LOSC, art. 287(3)(5).

³⁵ Mohammad Naqib Ishan Jan, *Principles of Public International Law: A Modern Approach*, 1st ed (Kuala Lumpur: International Islamic University Malaysia, 2008), 284; Powell and Mitchell, “Forum Shopping,” 8.

³⁶ Louis Sohn et al., *The Law of the Sea in a Nutshell*, 2nd ed (St. Paul, Minnesota: West Academic Publishing, 2010), 499.

³⁷ Sohn, “Ocean Conflicts,” 196; Tanaka, *International Law of the Sea*, 393.

³⁸ Powell and Mitchell, “Forum Shopping,” 8.

³⁹ “Declarations and Reservations Made by States under the United Nations Convention on the Law of the Sea,” United Nations Treaty Collection, accessed October 24, 2023, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en.

⁴⁰ Powell and Mitchell, “Forum Shopping,” 26.

local remedies,⁴¹ the availability of provisional measures⁴² and the authority to settle jurisdictional challenges.⁴³ The decisions of courts and tribunals having jurisdiction under this section are final and binding on the parties to the dispute in respect of that specific dispute.⁴⁴

SECTION THREE: LIMITATIONS AND EXCEPTIONS TO THE APPLICABILITY OF SECTION TWO

Even though the availability of mandatory dispute resolution procedures was considered vital regarding specific areas, States were reluctant during the UNCLOS III to submit some issues to compulsory third-party settlements.⁴⁵ Additionally, due to Article 309 of the LOSC, which prevents States from making reservations to the provisions of the Convention, a system of exceptions and limitations had to be included.⁴⁶ Therefore, Section Three of Part XV of the LOSC frameworks the limitations and exceptions permitted to the applicability of the compulsory dispute settlement procedures contained in Section Two of Part XV of the Convention.

Firstly, the limitation to the provisions under Section Two is mainly made for sensitive cases involving the State's discretionary exercise of national sovereignty.⁴⁷ For instance, disputes arising from the coastal State's discretionary right to the regulation of the exploitation, conservation and management of the living resources of the exclusive economic zone (EEZ)⁴⁸ or disputes arising out of the coastal State's discretionary right to regulate marine scientific research conducted in its EEZ in accordance with Articles 246 and 253 of the LOSC.⁴⁹ In such circumstances, the parties are obliged to submit their dispute to a conciliation commission, but they will not be bound by any decision or finding of the commission.⁵⁰ The moral pressure resulting

⁴¹ LOSC, art. 295.

⁴² LOSC, art. 290.

⁴³ LOSC, art. 288.

⁴⁴ LOSC, art. 296.

⁴⁵ "A Historical Perspective,"

⁴⁶ Klein, *Dispute Settlement*, 121.

⁴⁷ Gaertner, "Critique and Alternatives," 584; Tanaka, *International Law of the Sea*, 401.

⁴⁸ LOSC, art. 297(3)(a).

⁴⁹ LOSC, art. 297(2)(a).

⁵⁰ LOSC, art. 297.

was reasoned as being adequate to ensure compliance with the findings.⁵¹

Besides these limitations, which automatically apply to all LOSC parties, Article 298 of the LOSC allows optional exceptions.⁵² Choosing these optional exceptions is up to the discretion of the States. They can be confirmed by a written declaration at the time a State signs, ratifies or accedes to the Convention or at any time thereafter. Essentially, a State may declare that it chooses not to be bound by one or more of the mandatory procedures if they involve: (1) maritime boundary disputes, (2) military activities, or (3) issues under discussion at the UN Security Council.⁵³

Disputes automatically excluded by Article 297 of the LOSC or optionally exempted by Article 298 of the LOSC from the application of the compulsory dispute settlement procedures provided for in Section Two of Part XV, may nonetheless be submitted to such procedures by mutual agreement of the parties to the dispute.⁵⁴ The parties are, however, free to agree at any time to some other procedure for the settlement of such disputes or to reach an amicable settlement.⁵⁵

The three Sections under Part XV of the LOSC mentioned above outline the basic provisions of the LOSC dispute settlement mechanisms. Additionally, Annexes V, VI, VII and VIII further elaborate the procedures for Conciliation, the ITLOS, Arbitration and the Special Arbitration Tribunal, respectively.

Analysis of Article 298(1)(a) of the LOSC: Optional Exception of Maritime Delimitation Disputes

Among the optional exceptions, the provision relevant to the current Maldivian maritime delimitation issue is Article 298(1)(a) of the LOSC. According to Article 298(1)(a) of the LOSC, maritime

⁵¹ Klein, *Dispute Settlement*, 122.

⁵² Anshuman Chakraborty, "Dispute Settlement Under the United Nations Convention on the Law of the Sea and Its Role in Oceans Governance" (LLM Thesis, Victoria University of Wellington, 2006), 79; Sohn, "Ocean Conflicts," 198.

⁵³ LOSC, art. 298.

⁵⁴ Chakraborty, "Role in Oceans Governance," 81; Tanaka, *International Law of the Sea*, 403.

⁵⁵ LOSC, art. 299.

delimitation disputes in relation to the territorial sea, exclusive economic zone, and the continental shelf and disputes involving historic bays or titles can be excluded from the compulsory dispute settlement mechanisms of Section Two if any State wishes to do so. This declaration can be submitted when signing, ratifying, or acceding to the LOSC or thereafter.

This option was included subject to an obligation to submit the maritime delimitation dispute to compulsory conciliation. However, the dispute can only be submitted to conciliation provided the conditions stipulated in Article 298(1)(a)(i) of the LOSC are fulfilled. If these conditions are not met, the dispute cannot be submitted to conciliation either. The conditions include, firstly, the dispute should arise after the entry into force of the LOSC between the parties to the dispute. Secondly, no agreement had been reached between the parties after a reasonable period of time. A further limitation to the scope of the dispute is that it cannot involve “the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory”.⁵⁶ For instance, if the maritime delimitation dispute includes an island of which the title is unresolved, the delimitation conducted by the conciliation commission cannot address the sovereignty dispute. Still, it can delimit to the point where the disputed island would influence the delimitation line.⁵⁷

Contrary to arbitration and adjudication, conciliation is more flexible and pursues a win-win resolution.⁵⁸ The findings of the conciliation commission would not be binding on the parties. However, it would clarify the principles and methods of delimitation the parties can use in bilateral negotiations for future agreements.

Only if these negotiations fail to reach an agreement can the parties ‘shall by mutual consent’ submit the dispute to one of the binding procedures under Section Two.⁵⁹ The phrase ‘shall by mutual

⁵⁶ LOSC, art. 298(1)(a)(i).

⁵⁷ Klein, *Dispute Settlement*, 260.

⁵⁸ Damos Agusman and Bernard H. Oxman, “Adjudicators, Negotiators and the Evolution of Maritime Delimitation Law: Indonesia’s Perspective,” in *Proceedings of the Annual Meeting (American Society of International Law)*, vol. 112 (Cambridge University Press, April 4–7, 2018), 288, <https://www.jstor.org/stable/10.2307/26628140>.

⁵⁹ LOSC, art. 298(a)(ii).

consent' was intentionally included to emphasise that once maritime delimitation disputes were excluded from Section Two, it could not be submitted to it unless both parties mutually agreed.⁶⁰ This was a compromise reached at UNCLOS III between States that proposed delimitation disputes to be included in the compulsory jurisdiction and States that were reluctant to submit such disputes of national interests to a third-party dispute settlement procedure entailing binding decisions.⁶¹ Thus, the normative framework of the LOSC was restricted to providing States ultimate control over their maritime boundary delimitation.⁶²

One instance of an optional declaration made by a State which is widely recognised, is Australia's declaration under Article 298 of the LOSC on 22nd March 2002. This declaration was made following the news of the imminent independence of its neighbouring State, Timor-Leste.⁶³ As predicted, Timor-Leste achieved its independence on 20th May 2002.⁶⁴ Consequently, Australia could not be subjected to any compulsory dispute settlement procedure against its consent in relation to the overlapping maritime zones.⁶⁵ Instead, Timor-Leste had to submit the maritime delimitation between the States to a conciliation commission on 11th April 2016.⁶⁶ This was the first invocation of the LOSC conciliation commission under Annex V. Its conclusion in 2018

⁶⁰ Klein, *Dispute Settlement*, 262; Sheehan, "Exclusion of Delimitation Disputes," 186.

⁶¹ Klein, *Dispute Settlement*, 256; Sheehan, "Exclusion of Delimitation Disputes," 186.

⁶² Klein, *Dispute Settlement*, 279.

⁶³ Natalie Klein, "Chagos: A Boundary Dispute Tips Over a Sovereignty Ruling," *The Interpreter*, February 8, 2021, accessed June 9, 2023, <https://www.lowyinstitute.org/the-interpreter/chagos-boundary-dispute-tips-over-sovereignty-ruling>.

⁶⁴ "East Timor Country Profile," *BBC News*, September 14, 2011, accessed June 9, 2023, <https://www.bbc.com/news/world-asia-pacific-14919009>.

⁶⁵ Australia ratified LOSC on 5th October 1994, and Timor-Leste ratified LOSC on 8th January 2013.

⁶⁶ Hao Duy Phan, "The Precedent-Setting Timor-Leste and Australia UNCLOS Case," *The Diplomat*, September 29, 2016, accessed June 19, 2023, <https://thediplomat.com/2016/09/the-precedent-setting-timor-leste-and-australia-unclos-case/>.

was regarded as a success and resulted in the Maritime Boundary Treaty between Indonesia and Timor-Leste.⁶⁷

Similarly, it was a declaration made pursuant to Article 298 of the LOSC, which enabled China to object to the jurisdiction of the Arbitral Tribunal initiated by the Philippines in 2013 regarding the renowned South China Sea Dispute. Previously, in 2006, China had made a declaration in line with Article 298 of the LOSC, which explicitly excluded all the categories of disputes referred to under the Article.⁶⁸ Citing this optional declaration, China refused to participate in the proceedings⁶⁹ and rejected the final award of 2016, although the Tribunal had accepted jurisdiction in respect of some of the submissions made by the Philippines.⁷⁰

To date, 40 States⁷¹ have declarations under Article 298(1)(a) of the LOSC, excluding maritime delimitation from mandatory third-

⁶⁷Agusman and Oxman, “Adjudicators, Negotiators,” 288.

⁶⁸“Declarations and Reservations Made by States under the United Nations Convention on the Law of the Sea,” United Nations Treaty Collection, accessed October 24, 2023, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=en.

⁶⁹“Position Paper of the Government of the People’s Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines,” *Chinese Journal of International Law* 15, no. 2 (August 12, 2016): 450, 454, <https://doi.org/10.1093/chinesejil/jmw024>.

⁷⁰National Institute for South China Sea Studies, “A Legal Critique of the Award of the Arbitral Tribunal in the Matter of the South China Sea Arbitration,” in *Asian Yearbook of International Law*, vol. 24 (Brill Nijhoff, 2018), 151–293, https://doi.org/10.1163/9789004437784_009.

⁷¹Some States have opted to declare that they exclude maritime delimitation disputes only regarding certain compulsory dispute settlement forums under Article 287. For example, Angola, Denmark, Norway, and Slovenia exclude Annex VII Arbitral Tribunals, Congo excludes Annex VII and VIII Arbitral Tribunals, and Cuba and Guinea-Bissau only exclude ICJ. Nicaragua and Iceland also made declarations in relation to Article 298. Nicaragua does not declare an exclusion but rather states that it only accepts ICJ jurisdiction for disputes covered under Article 298 exclusions. Iceland specifically declares that any interpretation of Article 83 should be submitted to conciliation under Annex V.

party dispute settlement procedures entailing binding decisions.⁷² As evident from the table below, seventeen States made use of this optional exception under Article 298(1)(a) of the LOSC during their signature, ratification of, or accession to the LOSC. Meanwhile, twenty-two States have made such declarations ‘anytime thereafter’, meaning any time after they had expressed their consent by signing, ratifying or acceding to the Convention.

Some States finally declared this optional exception after their neighbours filed cases at third-party dispute settlement forums. For instance, Trinidad and Tobago declared an exception under Article 298(1)(a) of the LOSC on 13th February 2009 after Barbados filed a delimitation case in the Permanent Court of Arbitration (PCA) on 16th February 2004.⁷³ Likewise, Kenya made a declaration on 24th January 2017 after Somalia filed a maritime boundary delimitation case at ICJ on 28th August 2014.⁷⁴

Even though making a declaration does not affect pending proceedings, it will protect the States from future submissions to courts and tribunals.⁷⁵ On the other hand, Ghana withdrew its declaration excluding maritime delimitation disputes on 22nd September 2014, followed closely by the institution of arbitral proceedings against Côte d’Ivoire under Annex VII to delimit its maritime borders.⁷⁶ Notably, several States have specifically mentioned in their declarations that

⁷²“Declarations and Reservations Made by States under the United Nations Convention on the Law of the Sea.” United Nations Treaty Collection, accessed October 24, 2023, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en.

⁷³See *Delimitation of the Exclusive Economic Zone and the Continental Shelf between Barbados and the Republic of Trinidad and Tobago* (2006). 45 ILM 800.

⁷⁴See *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Judgment, I.C.J. Reports 2021. The judgment was delivered on 12th October 2021. Kenya refused to participate in the oral proceedings and to abide by the ICJ judgement. See “ICJ Rejects Kenya Case in Somalia Maritime Border Row,” *BBC News*, October 12, 2021, accessed June 25, 2023, <https://www.bbc.com/news/world-africa-58885535>.

⁷⁵LOSC, art. 298(5).

⁷⁶ See *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana v. Côte d’Ivoire)*, Judgment, ITLOS Reports 2017, para. 1, 80 and 86.

they reserve the right to make declarations under Article 298 of the LOSC at the appropriate time.⁷⁷ One of the latest declarations in this area was by the United Kingdom on 31st December 2020.

Table 1: State Declarations under Article 298 of the LOSC⁷⁸

State	Date of Declaration	Time of Deposit	Art 298 (1) (a) Sea Boundary Delimitation	Art 298 (1) (b) Military Activities and Certain Law Enforcement	Art 298 (1) (c) Issues Being Discussed at SC
Algeria	22 nd May 2018	Anytime thereafter	✓	✓	✓
Angola	14 th October 2009	Anytime thereafter	✓ (Excludes Annex VII Arbitral Tribunals)		
Argentina	18 th October 1995	Upon Ratification	✓	✓ (Withdrawn on 26 th Oct 2012)	✓
Australia	22 nd March 2002	Anytime thereafter	✓ (Also excluding the choice of forums declared)		
Belarus	10 th December 1982	Upon Signature and reaffirmed upon Ratification	✓	✓	✓
Benin	29 th July 2021	Anytime thereafter	✓		
Canada	7 th November 2003	Upon Ratification	✓	✓	✓
Cabo Verde	10 th August 1987	Upon Ratification		✓	

⁷⁷ They are Bangladesh, Brazil, India, Iran, Morocco, Pakistan and South Africa.

⁷⁸ “Declarations and Reservations Made by States under the United Nations Convention on the Law of the Sea.” United Nations Treaty Collection, accessed October 24, 2023, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en.

Chile	25 th August 1997	Upon Ratification	✓	✓	✓
China	25 th August 2006	Anytime thereafter	✓	✓	✓
Congo	5 th November 2021	Anytime thereafter	✓ (Excluded Annexes VII and VIII arbitral tribunals only)		
Cuba	15 th August 1984	Upon Ratification	✓ (Only excludes ICJ)	✓ (Only excludes ICJ)	✓ (Only excludes ICJ)
Democratic Republic of the Congo	15 th April 2014	Anytime thereafter	✓ (Does not accept any of the procedures provided for in art. 287(1)(c))		
Denmark	16 th November 2004	Upon Ratification	✓ (Only excludes Annex VII Arbitral Tribunal)	✓ (Only excludes Annex VII Arbitral Tribunal)	✓ (Only excludes Annex VII Arbitral Tribunal)
Ecuador	24 th September 2012	Upon Accession	✓	✓	✓
Egypt	16 th February 2017	Anytime thereafter	✓	✓	✓
Equatorial Guinea	20 th February 2002	Anytime thereafter	✓		
France	11 th April 1996	Upon Ratification	✓	✓	✓
Gabon	23 rd January 2009	Anytime thereafter	✓		
Ghana	15 th December 2009	Anytime thereafter	✓ (Withdrawn on 22 nd September 2014)		
Greece	16 th January 2015	Anytime thereafter	✓	✓	✓
Guinea-Bissau	25 th August 1986	Upon Ratification	✓ (Only excludes ICJ)	✓ (Only excludes ICJ)	✓ (Only excludes ICJ)
Iceland	21 st June 1985	Upon Ratification	Any interpretation of Article 83 shall be submitted to conciliation under Annex V		
Italy	13 th January 1995	Upon Ratification	✓		
Kenya	24 th January 2017 and 24 th	Anytime thereafter	✓ (On 24 th Jan 2017)	✓ (On 24 th Sept 2021)	✓ (On 24 th Sept 2021)

	September 2021				
Malaysia	26 th August 2019	Anytime thereafter	✓ (Withdrawn on 16 th August 2023)		
Mexico	18 th March 1983	Upon Ratification	✓	✓	
Montenegro	20 th May 2011	Anytime thereafter	✓		
Nicaragua	3 rd May 2000	Upon Ratification	(Only accepts ICJ)	(Only accepts ICJ)	(Only accepts ICJ)
Norway	24 th June 1996	Upon Ratification	✓ (Only excludes Arbitration under Annex VII)	✓ (Only excludes Arbitration under Annex VII)	✓ (Only excludes Arbitration under Annex VII)
Palau	27 th April 2006	Anytime thereafter	✓		
Portugal	3 rd November 1997	Upon Ratification	✓	✓	✓
Republic of Korea	18 th April 2006	Anytime thereafter	✓	✓	✓
Russian Federation	10 th December 1982	Upon Signature and Reaffirmed Upon Ratification	✓	✓	✓
Saudi Arabia	10 th January 2014 and 2 nd January 2018	Anytime thereafter	✓ (On 10 th January 2014)	✓ (On 2 nd January 2018)	
Singapore	12 th December 2018	Anytime thereafter	✓		
Slovenia	11 th October 2001	Anytime thereafter	✓ (Excludes Arbitral Tribunal under Annex VII)	✓ (Excludes Arbitral Tribunal under Annex VII)	✓ (Excludes Arbitral Tribunal under Annex VII)
Spain	19 th July 2002	Anytime thereafter	✓		
Thailand	15 th May 2011	Upon Ratification	✓	✓	✓
Togo	12 th April 2019	Anytime thereafter		✓	✓
Trinidad and Tobago	13 th February 2009	Anytime thereafter	✓		

Tunisia	24 th April 1985	Upon Ratification	✓	✓	✓
Ukraine	10 th December 1982	Upon Signature and Reaffirmed Upon Ratification	✓	✓	✓
United Kingdom	7 th April 2003 and 31 st December 2020	Anytime thereafter	✓ (On 31 st December 2020)	✓ (On 7 th April 2003)	✓ (On 7 th April 2003)
Uruguay	10 th December 1992	Upon Ratification		✓ (Only excludes law enforcement activities)	

This indicates that diplomatic and other consent-based dispute settlement methods are preferable to these States when resolving maritime delimitation disputes due to their sensitive nature.⁷⁹ States generally opt to make this declaration due to the advantages of political or diplomatic dispute settlement procedures compared to third-party adjudication.⁸⁰ Furthermore, human and resource considerations are more likely to be considered during negotiations for boundary agreements rather than adjudication or arbitration.⁸¹ States also use this method to prolong the resolution of the dispute in cases where a prompt resolution may seem disadvantageous to them. The legal principles of maritime delimitation are relatively different from the practical resolution of the boundary dispute. States generally prefer to resolve disputes using bilateral negotiations due to their flexibility, cost efficiency,⁸² the need for compromises and the lack of confinement to the legal principles,⁸³ unlike settlement through courts and arbitral tribunals.

⁷⁹ Sheehan, “Exclusion of Delimitation Disputes,” 166.

⁸⁰ Klein, *Dispute Settlement*, 229.

⁸¹ Klein, 255.

⁸² Áslaug Ásgeirsdóttir and Martin Steinwand, “Dispute Settlement Mechanisms and Maritime Boundary Settlements,” *The Review of International Organizations* 10, no. 2 (June 2015): 4, <https://doi.org/10.1007/s11558-015-9217-9>.

⁸³ Andreas Østhagen, “Maritime Boundary Disputes: What Are They and Why Do They Matter?,” *Marine Policy* 120 (October 2020): 5, <https://doi.org/10.1016/j.marpol.2020.104118>.

Notably, one disadvantage of such declarations is that they work on the basis and condition of reciprocity. A State that has made such a declaration cannot bring disputes related to that declaration against any other State unless the former withdraws the original declaration.⁸⁴

Alternatively, a State that has made such a declaration always has the option to withdraw the declaration at any time or to submit the dispute to any agreed procedure by the parties.⁸⁵ For instance, on 26th October 2012, Argentina partially withdrew its declaration of "military activities by government vessels and aircraft engaged in non-commercial service" before initiating an Annex VII arbitration at the PCA against Ghana on 29th October 2012 for the unlawful detention of the Argentine frigate ARA Libertad.⁸⁶ With over 200 passengers onboard, the warship was detained in Ghana due to Argentina's failure to repay government bonds to a hedge fund. The hedge fund managed to convince a High Court in Ghana to detain the warship while it was at the Tema Port.⁸⁷ Argentina also filed a case with ITLOS against Ghana for the prescription of provisional measures pursuant to Article 290 of the LOSC on 14th November 2012 vis-à-vis the same dispute.⁸⁸ This case illustrates that States are permitted to withdraw their declarations when they wish to constitute proceedings against another State. Likewise, the State's rights are not restricted in any way during the new proceedings due to its previous declaration. On 16th August 2023, Malaysia submitted the withdrawal of its declaration related to

⁸⁴ Vinai Kumar Singh, "Analysis of Advantages and Disadvantages of Forums Prescribed under the UNCLOS and State Practice: The Way Ahead for India," *Revista de Direito Internacional, Brasília* 13, no. 3 (2016): 333, 10.5102/rdi/bjil.v13i3.4380.

⁸⁵ Sheehan, "Exclusion of Delimitation Disputes," 172.

⁸⁶ *ARA Libertad, (Argentina v. Ghana)*, ITLOS Case No. 20, Provisional Measures (Dec. 15, 2012), para. 34. (Hereinafter *Argentina v Ghana Provisional Measures*)

⁸⁷ Michael Hogan, "U.N. Court Orders Ghana to Release Argentine Naval Ship," *Reuters*, December 15, 2012, accessed June 28, 2023, <https://www.reuters.com/article/uk-ghana-argentina-ship-idUKBRE8BE07520121215>.

⁸⁸ *Argentina v Ghana Provisional Measures*, para. 27.

maritime delimitation under Article 298 of the LOSC, which was previously made on 26th August 2019.⁸⁹

Significance of Article 298(1)(a) of the LOSC: Optional Exception of Sea Boundary Delimitation to the Mauritius v Maldives Maritime Delimitation Dispute

For years, the delimitation of the southern maritime border of the Maldives was complicated by the sovereignty dispute over the Chagos Archipelago between Mauritius and the United Kingdom, which is the administering power over the archipelago. Not to mention the internal claims of the Maldivians regarding the Maldivian historical sovereignty over the Chagos Archipelago.⁹⁰ However, no government of Maldives had ever internationally made a claim.⁹¹ Sovereignty disputes over territory make delimitation more complex, often triggering nationalistic sentiments and passionate public opinion.⁹² According to the recognised principle, ‘*the land dominates the sea*’, it is essential to determine the sovereignty of the maritime feature before claiming the maritime area surrounding it.⁹³ Thus, due to the unresolved sovereignty dispute over the Chagos Archipelago, Maldives

⁸⁹“Declarations and Reservations Made by States under the United Nations Convention on the Law of the Sea.” United Nations Treaty Collection, accessed October 24, 2023, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=en.

⁹⁰Mohamed Rehan, “Speaker Claims Chagos Part of Maldives, Spoke Against UK Colonization,” *The Edition*, October 27, 2022, accessed September 11, 2023, http://edition.mv/fifa_world_cup_2022/26122.

⁹¹“Statement by the Government of Maldives Regarding the Statement by the Progressive Congress Coalition on the Chagos Archipelago Issue,” The President’s Office, April 27, 2023, accessed September 11, 2023, <https://presidency.gov.mv/Press/Article/28216>; Nafaahath Ibrahim, “Government: No Previous Government Claimed Chagos as Part of Maldives,” *Sun Online International*, October 26, 2022, accessed September 11, 2023, <https://en.sun.mv/78539>.

⁹²Sun Pyo Kim, *Maritime Delimitation and Interim Arrangements in North East Asia*, vol. 40, Publications on Ocean Development (Martinus Nijhoff Publishers, 2004), 14.

⁹³Abdul Ghafur Hamid, “The Principle That the Land Dominates the Sea in the Context of South China Sea Disputes: A Critical Appraisal,” *IIUM Law Journal* 30, no. 2 (2022): 52.

was reluctant to negotiate with Mauritius over the delimitation of the overlapping exclusive economic zones.

The ICJ Advisory Opinion on *the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* was delivered on 29th February 2019.⁹⁴ In this Opinion, ICJ ruled that Mauritius's decolonisation process was not lawfully completed in 1968.⁹⁵ According to the Advisory Opinion, the United Kingdom is obliged to hand over the sovereignty of the Chagos Archipelago to Mauritius, and the UN members are also obliged to cooperate with the UN in completing the decolonisation of Mauritius.⁹⁶ Nonetheless, it is essential to highlight that Advisory Opinions are consultative and not legally binding on any State.⁹⁷ Therefore, this Advisory Opinion itself did not create a legally binding obligation on Maldives at that point in time.

Following this Advisory Opinion, Mauritius hastily instituted arbitral proceedings against Maldives on 18th June 2019. According to Article 298(5) of the LOSC, if a new declaration is made or an existing declaration is withdrawn, it will not have any legal effect on ongoing legal proceedings unless the parties mutually agree otherwise.⁹⁸ This indicates that from 10th December 1982 (when Maldives signed the LOSC) until 18th June 2019, Maldives had the opportunity to deposit such a declaration to the Secretary General of the UN. In the absence of a declaration, Maldives was subjected to the compulsory dispute settlement mechanisms under Section Two of Part XV simply because Maldives is a party to the LOSC.⁹⁹ No additional consent to jurisdiction is needed, such as being a party to ITLOS or any other court or tribunal. By signing and ratifying the Convention, all States are, by default,

⁹⁴*Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion (2019) ICJ Rep. 95. (Hereinafter *Chagos Archipelago Advisory Opinion*)

⁹⁵*Chagos Archipelago Advisory Opinion*, para. 177.

⁹⁶*Chagos Archipelago Advisory Opinion*, para. 178, 180.

⁹⁷Jan, *Public International Law*, 394; Chenhong Liu, "How Should International Judicial Bodies Constituted Under UNCLOS Determine If They Have Jurisdiction Over Disputes Involving Territorial Sovereignty?," *Frontiers in Marine Science* 9 (2022): 4-5, <https://www.frontiersin.org/articles/10.3389/fmars.2022.1038843>.

⁹⁸LOSC, art. 298(5) See Sheehan, "Exclusion of Delimitation Disputes," 179.

⁹⁹LOSC, art 287.

subject to the compulsory dispute settlement procedures under the LOSC. States can select one of the binding procedures under Article 278 of the LOSC. But arbitration is deemed the final forum if a State has not accepted one procedure. The only exclusion to these binding procedures is declarations of exceptions and limitations outlined under Section Three of Part XV.

On 24th September 2019, following consultations with the President of ITLOS, Mauritius and Maldives concluded a Special Agreement to submit the dispute to the Special Chamber of ITLOS.¹⁰⁰ During the preliminary objections round, Maldives strongly opposed the ITLOS jurisdiction regarding the dispute. Maldives raised five objections in an effort to prevent ITLOS from exercising its jurisdiction over the delimitation dispute.¹⁰¹ Maldives submitted that, firstly, the UK was an indispensable third party to the proceedings and, secondly, that the Chamber lacked jurisdiction over the determination of the sovereignty dispute between Mauritius and the UK over the Chagos Archipelago. Thirdly, Maldives argued that the parties had not meaningfully engaged in negotiations as required under Section One of Part XV of the LOSC. Fourthly, Maldives maintained that there was no real dispute concerning the maritime boundary between Mauritius and Maldives. Last but not least, Maldives argued that Mauritius' claims were inadmissible due to abuse of process, reasoning that using the LOSC compulsory procedure to obtain a ruling on a territorial dispute with a third State constitutes an abuse of process.¹⁰²

On 28th January 2021, the Special Chamber of ITLOS rejected all five of the preliminary objections filed by Maldives and decided it had jurisdiction to hear the case. ITLOS determined that advisory opinions were authoritative statements of the international law, and therefore, the legal status of the Chagos Archipelago and the absence of a sovereignty dispute over it could be inferred from the *Chagos Marine Protected Area Arbitration*¹⁰³ and the *Chagos Archipelago*

¹⁰⁰*Dispute Concerning the Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean* (Mauritius v. Maldives) (Preliminary Objections) (ITLOS Case No 28, 28 January 2021), para. 2. (Hereinafter *Mauritius v Maldives Preliminary Objections*)

¹⁰¹*Mauritius v Maldives Preliminary Objections*, para. 79.

¹⁰²*Mauritius v Maldives Preliminary Objections*, para. 339.

¹⁰³*Chagos Marine Protected Area Arbitration* (Mauritius v. UK) (2015), Case No. 2011-03 (Hereinafter *Chagos Marine Protected Area Arbitration*)

*Advisory Opinion.*¹⁰⁴ Consequently, ITLOS combined several non-binding decisions to create a binding obligation on the parties to the dispute.¹⁰⁵ In contrast to the previous ICJ Advisory Opinion, the decision of ITLOS is final and binding on the parties to the dispute.¹⁰⁶ Thus, the dispute between Mauritius and Maldives concerning the maritime delimitation of the exclusive economic zones and the continental shelves had to be concluded under the ITLOS and Maldives was obliged to continue with the delimitation according to strict international delimitation laws at the Tribunal.

If Maldives had made a declaration under Article 298 of the LOSC, Maldives would not have been legally obliged under Part XV of the LOSC to make an agreement with Mauritius to take the dispute to ITLOS, nor would Maldives have had to try to deny that ITLOS had jurisdiction over the dispute at the Preliminary Objections hearing held at ITLOS. The issue would have been dealt with under Section One of Part XV, and its diplomatic means of dispute settlement, or the dispute would go to an unbinding conciliation commission if Mauritius ever instituted it. Or both States could have reached provisional agreements

¹⁰⁴*Chagos Archipelago Advisory Opinion.*

¹⁰⁵*Mauritius v Maldives Preliminary Objections* judgement has created speculations regarding its legal implications, especially concerning its impact on the effect of advisory opinions. See Craig D. Gaver, “Dispute Concerning the Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean,” *American Journal of International Law* 115, no. 3 (July 2021): 524, <https://doi.org/10.1017/ajil.2021.24>; Thomas Burri and Jamie Trinidad, “Dispute Concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean, Preliminary Objections (ITLOS),” *International Legal Materials* 60, no. 6 (December 2021): 969–1037, <https://doi.org/10.1017/ilm.2021.20>; Fabian Simon Eichberger, “Case Note: The Legal Effect of ICJ Advisory Opinions Redefined? The Mauritius / Maldives Delimitation Case Judgment of Preliminary Objections,” *Melbourne Journal of International Law* 22, no. 2 (2021): 1–20, <https://ssrn.com/abstract=3999063>; Sarah Thin, “The Curious Case of the ‘Legal Effect’ of ICJ Advisory Opinions in the Mauritius/Maldives Maritime Boundary Dispute,” *EJIL: Talk! Blog of the European Journal of International Law*, 2021, <https://www.ejiltalk.org/the-curious-case-of-the-legal-effect-of-icj-advisory-opinions-in-the-mauritius-maldives-maritime-boundary-dispute/>.

¹⁰⁶ ITLOS Statute, art. 33.

until the final resolution of the dispute. The rushed resolution of the dispute had to take place because Maldives failed to utilise the optional exceptions available under the LOSC from 10th December 1982 up until 18th June 2019. *Mauritius v Maldives* maritime delimitation dispute is a unique case in international law where a dispute over maritime boundaries was brought for resolution at a court or tribunal before the claiming State had obtained factual sovereignty over the territory in question. This case has revealed how States can potentially use international litigation to legalise their political agendas, including achieving legal sovereignty over a disputed territory.¹⁰⁷

Consequently, the overlapping exclusive economic zones and the continental shelves within 200 nm between Maldives and the Chagos Archipelago were delimited by ITLOS on 28th April 2023 according to the international maritime delimitation laws and the proposals submitted by both parties.¹⁰⁸ Judgments of international courts and tribunals on contentious cases are legally binding on the parties to the dispute and cannot be appealed. The same applies to the decisions of ITLOS.¹⁰⁹ The decisions of the Chamber must be enforced and upheld in the territories of the parties, similar to judgments or orders of the State's highest court.¹¹⁰

It is important to note that the Tribunal, however, declined to delimit the outer continental shelves beyond 200 nm (hereinafter OCS), citing that;

¹⁰⁷ Klein, "Chagos: A Boundary Dispute,"; Eichberger, "Case Note," 18-19.

¹⁰⁸ *Dispute Concerning the Delimitation of the Maritime Boundary Between Mauritius and Maldives in the Indian Ocean* (28th April 2023) ITLOS Case No. 28. (Hereinafter *Mauritius v Maldives Maritime Boundary Delimitation Case*)

¹⁰⁹ ITLOS Statute, art. 33. A party can, however, request the judgment to be revised, provided that a new fact of such a nature as to be a decisive factor was discovered by the requesting party. The time period for this is within ten years of the judgment being pronounced and, at the latest, within six months of the discovery of the new decisive fact. This new fact should have been unknown to the Tribunal and the requesting party on condition that such ignorance was not due to negligence. See art. 127(1) of the Rules of the Tribunal.

¹¹⁰ ITLOS Statute, art. 39. In the event of a dispute as to the meaning or scope of a judgment, any party may make a request for its interpretation. See ITLOS Statute, art. 33(3) and art. 126(1) of the Rules of the Tribunal.

“Given the significant uncertainty, the Special Chamber is not in a position to determine the entitlement of Mauritius to the continental shelf beyond 200 nm in the Northern Chagos Archipelago Region.”¹¹¹

The Chamber further endorsed the States to consent to the Commission on the Limits of the Continental Shelf (hereinafter CLCS) to allow the Commission to consider their submissions.¹¹² Hence, the delimitation of the OCS between Maldives and Mauritius is still pending.

LOSC, Article 76(8) provides that:

“Information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured shall be submitted by the coastal State to the Commission on the Limits of the Continental Shelf set up under Annex II on the basis of equitable geographical representation. The Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf. The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding.”¹¹³

Maldives submitted its applications for establishing the OCS on 26th July 2010 to the CLCS.¹¹⁴ Mauritius filed information regarding Mauritius OCS entitlement to the CLCS concerning the Southern Chagos Archipelago region on 26th March 2019, and subsequently, on 12th April 2022, Mauritius submitted information regarding a new claim of OCS in the Northern Chagos Archipelago region.¹¹⁵ It remains uncertain whether Mauritius will receive a favourable recommendation from the CLCS regarding its entitlements to the OCS. After a CLCS

¹¹¹ *Mauritius v Maldives Maritime Boundary Delimitation Case*, para. 450.

¹¹² *Mauritius v Maldives Maritime Boundary Delimitation Case*, para. 456

¹¹³ LOSC, art. 76 (8).

¹¹⁴ Republic of the Maldives, “Submission by the Republic of Maldives to the Commission on the Limits of the Continental Shelf - Executive Summary - MAL-ES-DOC,” July 26, 2010, accessed June 11, 2023, https://www.un.org/depts/los/clcs_new/submissions_files/submission_mdv_53_2010.htm.

¹¹⁵ “Submissions to the CLCS,” Division for Ocean Affairs and the Law of the Sea, accessed June 25, 2023, https://www.un.org/depts/los/clcs_new/commission_submissions.htm.

recommendation, States with overlapping maritime claims are to negotiate and come to a settled agreement using diplomatic means or compulsory binding procedures.¹¹⁶

On the off chance that the ‘significant uncertainty’ in the Mauritius entitlement to the OCS in the Northern Chagos Archipelago region - which the Tribunal previously used to decline delimitation - becomes invalid through the CLCS final recommendation, Mauritius will get the opportunity to institute the default arbitration procedures under the LOSC again. Maritime delimitation in courts or tribunals will strictly follow the current international maritime delimitation laws. Consequently, for Maldives, there is the possibility of losing leverage again by submitting to compulsory adjudication in contrast to diplomatic means of dispute settlement. Thus, at present, Maldives has the opportunity to make a declaration regarding an optional exception to the compulsory jurisdiction of the LOSC, excluding future maritime delimitation disputes. Therefore, Maldives should take this chance to protect its OCS from premature, unwarranted delimitations.

Significance of Article 282 of the LOSC and the Compulsory Jurisdiction of ICJ

Another essential aspect to be noted here is the effect of Article 282 of the LOSC on the optional exception clause of Article 298. According to Article 282 of the LOSC, if the parties to a dispute regarding the interpretation or application of the LOSC have mutually agreed, either through general, regional or bilateral agreement or by any other means, that the dispute will be submitted to a procedure that involves a binding decision, then that particular procedure will take precedence over the LOSC mechanisms unless the parties to the dispute otherwise agree.¹¹⁷

This article essentially takes into account other treaties, such as the Statute of the ICJ, which includes the acceptance of the compulsory jurisdiction of the ICJ stipulated under Article 36(2) of the ICJ Statute.¹¹⁸ This provision would mean that if all the parties to a dispute

¹¹⁶ Singh, “Analysis of Advantages,” 330.

¹¹⁷ LOSC, art 282.

¹¹⁸ ICJ Statute, art 36(2): “The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same

have accepted the compulsory jurisdiction of ICJ, declarations under Article 298 of the LOSC will be irrelevant.¹¹⁹ Ultimately, ICJ will have jurisdiction over the dispute irrespective of an optional exception under the LOSC by a disputant party. For instance, Australia had accepted ICJ's compulsory jurisdiction under Article 36(2) of the ICJ Statute. However, Australia specifically excluded sea boundary disputes from ICJ's jurisdiction the same day it submitted the declaration for the optional exception under Article 298 of the LOSC.¹²⁰ This action was taken in order to avoid being subjected to the ICJ's jurisdiction in relation to any potential maritime boundary delimitation dispute initiated by Timor-Leste.

Overall, seventy-three States have made declarations under Article 36(2) of the ICJ Statute accepting the compulsory jurisdiction of the ICJ for certain international disputes.¹²¹ Amongst the Maldivian neighbours, Mauritius and India have similar declarations filed at the ICJ.¹²² However, to date, Maldives has not accepted the compulsory jurisdiction of the ICJ under Article 36(2) of the ICJ Statute. Thus, the condition of reciprocity will not be fulfilled in order to bring a case against Maldives to the ICJ. In this regard, if Maldives ever decides to declare an optional exception under Article 298 of the LOSC, Maldives does not have to comprehend the legal effect of Article 282 of the LOSC on its optional exception as Maldives has not yet accepted the compulsory jurisdiction of the ICJ.

obligation, the jurisdiction of the Court in all legal disputes concerning: (a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obligation; and (d) the nature or extent of the reparation to be made for the breach of an international obligation.”

¹¹⁹ Sheehan, “Exclusion of Delimitation Disputes,” 176.

¹²⁰ Sheehan, 177.

¹²¹ “Declarations Recognizing the Jurisdiction of the Court as Compulsory,” International Court of Justice, accessed June 23, 2023, <https://icj-cij.org/declarations>.

¹²² “Declarations Recognizing the Jurisdiction of the Court as Compulsory.”

THE FINDINGS

The availability of various forums for dispute settlement and the limitations and exceptions offered to the States were seen as indispensable for the establishment of the Convention as a package deal. It is imperative for States to understand and utilise the unique dispute-settlement mechanism available to them. By doing so, they can reap the benefits for themselves and the international community.

In contrast to the Maldivian public and political opinion, once Mauritius initiated the compulsory dispute resolution system under Part XV of the LOSC, Maldives had no choice but to proceed with the delimitation of the overlapping maritime zones. Maldives has signed and ratified the LOSC and is obliged to abide by the conventional provisions. As a party to the Convention, Maldives is subjected to the dispute resolution system under Part XV of the LOSC, which provides compulsory dispute resolution once diplomatic efforts fail. Unfortunately, Maldives missed the strategic opportunity to make a declaration under Article 298(1)(a) of the LOSC prior to Mauritius initiating the adjudication proceedings against Maldives.

Despite this, it is unwise for the Maldivian opposition leaders to call for the rejection of the ITLOS verdict, as it could ultimately damage the country's reputation on the global stage.¹²³ Maldives is bound by the ITLOS judgment. Rejection of the decisions of international courts or tribunals is rare, particularly concerning maritime delimitation disputes. After the adoption of the LOSC, there have been only a few instances of States declining to enforce a maritime delimitation judgment.¹²⁴ States generally avoid non-compliance with international decisions because such actions may lead to political instability, loss of credibility and legitimacy in the international sphere,¹²⁵ political and economic embargoes,¹²⁶ strained

¹²³ Guzman, "Cost of Credibility," 304.

¹²⁴ See, Colombia in the *Territorial and Maritime Dispute (Nicaragua v Colombia)* ICJ (2012) and Kenya in the *Dispute relating to the Maritime Delimitation in the Indian Ocean (Somalia v Kenya)* (2021).

¹²⁵ Guzman, "Cost of Credibility," 311.

¹²⁶ Guzman, 323.

diplomatic relations and even further judicial action.¹²⁷ Besides the clear international legal obligations, Maldives, as a Muslim-majority State, is also committed under the Islamic international law rulings to respect and abide by the provisional obligations under treaties the Muslim State has signed and ratified.¹²⁸ Allah prescribes in the Holy Quran:

وَأَوْفُوا بِعَهْدِ اللَّهِ إِذَا عَاهَدْتُمْ ۖ إِنَّا نُنظُرُ الْإِيمَانَ ۖ بَعْدَ تَوْكِيدِنَا ۚ وَقَدْ جَعَلْنَاكُمْ
 اللَّهُ غَلِيظِينَ
 كَفِيلًا ۚ
 ﴿١٦٩﴾
 بَعْلَمُ
 تَاتَفْعَلُونَ¹²⁹

Therefore, Muslim States are obliged to follow their treaty obligations as long as they do not contradict the basic principles of the Shari'ah.¹³⁰ Moreover, the maritime delimitation between Mauritius and Maldives was concluded according to the well-established equidistance/relevant circumstances method based on equitable

¹²⁷ For example, Nicaragua filed a new case against Colombia following Colombia's decision to reject the 2012 maritime delimitation judgment by ICJ. See "ICJ: Colombia Must Stop Activity in Nicaraguan EEZ Waters," *Al Jazeera*, April 21, 2022, accessed June 28, 2023, <https://www.aljazeera.com/news/2022/4/21/icj-colombia-must-stop-activity-in-nicaraguan-eez-waters>; Robin Churchill, "Dispute Settlement in the Law of the Sea: Survey for 2022," *The International Journal of Marine and Coastal Law* 38 (September 28, 2023): 21, <https://doi.org/10.1163/15718085-bja10145>.

¹²⁸ Muhammad Hamidullah, *The Muslim Conduct of State* (Kuala Lumpur: Islamic Book Trust, 2012), 34; Jaber Seyvanizad, "Islamic International Law Concerning Law of Treaties" (International Conference on Law Political Science and Islamic Instructions, Tehran, 2017), 4, <https://ssrn.com/abstract=3020173>; Hasan Taisir Shammout, "The Nature of Treaties in Islamic Jurisprudence and International Law," *International Journal of Innovation, Creativity and Change* 15, no. 3 (2021): 281, https://ijicc.net/images/Vol_15/Iss_3/15325_Shammout_2021_E1_R.pdf

¹²⁹ Qur'ān, 16:91, "Honour Allah's covenant when you make a pledge and do not break your oaths after confirming them, having made Allah your guarantor. Surely Allah knows all you do."

¹³⁰ Shammout, "The Nature of Treaties," 281; Salma Binti Yusof, "The Law of

Maritime Delimitation and The Malaysian Practice” (PhD Thesis, International Islamic University Malaysia, 2014), 69.

principles.¹³¹ Likewise, equity or fairness are also integral norms of Islamic Law.¹³²

Overall, the Mauritius v Maldives maritime delimitation dispute has been unique. Judging by the previous international relations and jurisprudence related to Mauritius,¹³³ Mauritius heavily relies on international adjudication as a form of dispute settlement on the road to achieving sovereignty over the Chagos Archipelago.¹³⁴ It should be noted that Mauritius' endurance concerning the sovereignty claim over the Chagos Archipelago has, in due course, created new legal precedents highly beneficial to the international jurisprudence as a whole, albeit at the expense of Maldives. Nevertheless, Maldives should also be aware that the submission of a future dispute related to the unresolved OCS between Mauritius and Maldives to adjudication by Mauritius is highly probable. Thus, it is crucial for the Maldivian authorities to take action beforehand in order to prevent this probability from occurring.

Declaring an optional exception does not deprive the State of submission to a compulsory binding procedure if the State ever wishes to do so. But it does protect the State from hasty and untimely dispute resolution. If Maldives made the declaration to exclude maritime delimitation from the compulsory dispute settlement procedures entailing binding decisions, neighbouring States would only have the option of recourse to unbinding diplomatic dispute resolution mechanisms, including conciliation. Even the report of the conciliation commission is not binding on the parties unless by mutual consent. Therefore, it is in the Maldivian national interests to make a declaration

¹³¹Abdul Ghafur Hamid, "Refining Maritime Boundary Delimitation Methodology: The Search for Predictability and Certainty," *IIUM Law Journal* 27, no. 1 (June 29, 2019): 61, <https://doi.org/10.31436/iiumlj.v27i1.457>.

¹³²Equity in Islamic Law is termed *Istihsan*. See Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, 3rd ed. (United Kingdom: The Islamic Texts Society, 2013), 323, <http://archive.org/details/principles-of-islamic-jurisprudence>.

¹³³See *Chagos Marine Protected Area Arbitration* (2015), *Chagos Archipelago Advisory Opinion* (2019) and *Mauritius v Maldives Maritime Boundary Delimitation Case* (2023).

¹³⁴Thin, "The Curious Case,"

under Article 298(1)(a) of the LOSC, excluding maritime delimitation disputes from the compulsory dispute settlement mechanisms.

It is relevant to note here that this is also a good opportunity for Maldives to deliberate on the advantages and disadvantages of excluding military activities from the compulsory dispute settlement mechanisms under Article 298(1)(b) of the LOSC. Likewise, Maldives should contemplate making a declaration under Article 287(1) of the LOSC, choosing a specific forum for dispute settlement among the available procedures.

CONCLUSION

The LOSC is amongst the remarkably few international treaties that prescribe compulsory jurisdiction for disputes arising out of the interpretations and applications of its provisions. The LOSC mandatory dispute settlement regime can be triggered if States fail to resolve their maritime disputes according to the diplomatic means of their own choice. This Convention has earned some scepticism throughout the years, given the number of limitations and exceptions to the applicability of the compulsory procedures entailing binding decisions. Yet, it still stands to be the most progressive development of international law by the global legal community since the end of World War II.

Evidently, several States have made declarations under Article 298 of the LOSC and are continuously updating their declarations according to their political and strategic needs. Regardless of an optional declaration, States retain the right to submit to a compulsory procedure at any given time on the condition of mutual agreement. Nonetheless, such declarations serve as safeguards against premature, rushed and costly dispute resolution. The *Mauritius v Maldives* maritime delimitation case is a prime example of the consequences of delaying the decision to make such declarations.

The maritime delimitation dispute between Mauritius and Maldives at ITLOS is the Maldives' first appearance before an international court or tribunal concerning an international dispute. However, it might not necessarily be its last. It is critical for the Maldivians to understand that Maldives is a part of the international society and must adhere to and abide by international laws. Overall, owing to this conflict, much interest has been sparked among the Maldivians regarding the international laws of the sea. This is an excellent opportunity to cultivate this interest with the aim of creating more professionals, scholars and practitioners in the fields of international law and international law of the sea in Maldives. It is believed that this case will ultimately contribute to the development of international dispute resolution and the maritime policies of Maldives.