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Donald R Rothwell

The Arbitration between the People’s Republic of China and the Philippines over the Dispute in the South China Sea

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THE ARBITRATION BETWEEN THE PEOPLE’S REPUBLIC OF CHINA AND THE PHILIPPINES OVER THE DISPUTE IN THE SOUTH CHINA SEA *

Donald R. Rothwell
Professor of International Law and Deputy Dean,
ANU College of Law, Australian National University

Introduction

International law has a significant role to play in the multiple disputes that exist throughout the South China Sea. The first relevant area of international law is that dealing with territoriality and the basis under international law that States are able to assert, and have recognised, territorial claims. This area of international law is well developed, and notwithstanding the passing of an era when new lands were being discovered and territorial claims were asserted, international courts are still being called upon to settle a number of contemporary territorial disputes. ¹ Some of these disputes concern the direction of a territorial boundary, while others go directly to title over land territory such as islands. ² The second body of international law of relevance is that associated with the law of the sea. The law of the sea has steadily developed over 400 years, first through customary international law based upon the practice of states and then post World War II increasingly through the development of new treaties. ³ The Third United Nations Conference on the Law of the Sea ran from 1973-1982 and resulted in agreement being reached upon the 1982 United Nations Convention on the Law of the Sea (LOSC). ⁴ The LOSC, which entered into force in 1994, remains the dominant international law of the sea instrument that identifies the scope and extent of various maritime zones, provides mechanisms for the delimitation of maritime boundaries, and also for the resolution of international disputes as they relate to the law of the sea.

¹ Presented at Maritime Security in the South China Sea Tokyo Workshop, hosted by Centre for Military and Security Law (ANU College of Law, Australian National University), and Australian Network for Japanese Law (ANJeL), Tokyo, 3-4 November 2014.


⁴ 1833 United Nations Treaty Series 397


While international law recognises that ‘the land dominates the sea’ and accordingly coastal states need to be able to demonstrate their territorial sovereignty in order to be able to assert maritime claims, once territoriality is confirmed then a coastal state enjoys significant entitlements of sovereign rights and jurisdiction over its adjacent maritime domain. While overlapping maritime claims will be subject to an obligation on the part of the coastal states concerned to agree upon maritime boundaries, however the potential entitlements of a coastal state to be able to enjoy access to living and non-living resources such as fish stocks, and oil and gas, make the confirmation of territoriality and the assertion of appropriate maritime claims a significant sovereign right.

It is in this context that the dispute resolution mechanisms found in Part XV of the LOSC are of particular significance. The LOSC is distinctive amongst multilateral international treaties in that it contains within it compulsory mechanisms for dispute settlement. Every state party to the LOSC is therefore bound to abide by a range of general and specific mechanisms that are designed to bring about the peaceful resolution of international disputes as they relate to the law of the sea. There are some exceptions to the Part XV regime, especially as they relate to matters concerning territorial sovereignty and military operations. There is also a recognition that states parties may wish to avail themselves of some dispute resolution mechanisms and not others. The consequence of this is that notwithstanding states having made a declaration as to which dispute resolution procedures they have opted out of, there remain in place certain default mechanisms which will always apply.

This paper will review these issues as they particularly apply with respect to the mechanisms that are available to states under Part XV of the LOSC to resolve their disputes, in the context of the Philippines application commenced against China in January 2013. Particular attention is given to Article 298 of the LOSC and to the default mechanism of conciliation as a means of dispute resolution. It does so in the context of China’s Article 298 declaration and the implications that may have for the outcome of Annex VII Arbitration proceedings. This paper commences with a review of those proceedings, before turning to consider mechanisms generally under Part XV of the LOSC, Article 298 declarations, and Annex V Conciliation. In conclusion some consideration will be given to the implications of these mechanisms for the Philippines/China South China Sea dispute.

5 LOSC, Articles 15, 74, 83.
Philippines Annex VII Arbitration Application

The Philippines 2013 initiation of Annex VII arbitration against China over their South China Sea disputes is one of the most significant developments for the law of the sea more generally, and the South China Sea more specifically, since the LOSC entered into force in 1994. Given the weight the LOSC places upon dispute resolution and its general significance at the time of the Convention’s conclusion, it is clear that emphasis was placed upon not only the general principles of the peaceful settlement of disputes as a cornerstone of the new LOSC law of the sea regime, but also through the new institutional mechanisms established under Part XV to allow for a range of third party dispute settlement options. With this context, it should not be surprising that some States have sought to actively explore those options in the resolution of their law of the sea disputes, especially when the dispute involves States with significant differentials in their political power such as the Philippines and China. For the South China Sea, the Philippines action was also the first formal attempt to utilise third party dispute settlement in order to resolve South China Sea disputes since entry into force of the LOSC, clearly indicating that at least for the Philippines it had concluded that diplomatic options had been exhausted.

The Philippines notification to China, dated 22 January 2013, activated procedures under Article 287 and Annex VII of the LOSC. The Philippines notification and statement of claim provided:

The Republic of the Philippines brings this arbitration against the People’s Republic of China to challenge China’s claims to areas of the South China Sea and the underlying seabed as far as 870 nautical miles from the nearest Chinese coast, to which China has no entitlement under the [LOSC]…, and which, under the Convention, constitute the Philippine’s exclusive economic zone and continental shelf.  

The Philippines claim gives particular attention to the asserted invalidity under the LOSC of China’s “nine dash line”. The Philippines contests the validity of this line and any attempts by China to assert sovereignty or sovereign rights over islands and other maritime features found within this area. The Philippines application seeks an Award from the Arbitral Tribunal that:

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8 Republic of the Philippines, Notification and Statement of Claim (22 January 2013).
9 Ibid [1].
10 Ibid [2].
1. The respective rights and obligations of the parties are governed by the LOSC and that China’s claims based on the “nine dash line” are invalid;
2. Determines whether certain maritime features claimed by China and the Philippines are under Article 121 of the LOSC islands, low tide elevations or submerged banks and whether they are capable of generating maritime zones greater than 12 nm;
3. Enables the Philippines to exercise and enjoy rights within its EEZ and continental shelf.

The Philippines application raises a number of procedural issues that will need to be addressed prior to the Annex VII Arbitral Tribunal determining the claim on the merits. The first relates to China’s acceptance of the jurisdiction of the Tribunal to hear and determine the Philippines claim. In 2006 China made a Declaration subsequent to its ratification of the LOSC in which it declared that it did not accept certain compulsory dispute resolution procedures under Part XV, including disputes with respect to “historic bays or titles”.12 This raises issues as to whether elements of China’s disputes with the Philippines in the South China Sea would fall within this exception, including what precisely are the historic titles that China asserts in the South China Sea.13 The second is that on 19 February 2013 China indicated that it would not participate in the proceedings before the Annex VII Tribunal.14 This position would appear to be based upon China’s view that consistent with its Article 298 Declaration the Annex VII Tribunal lacks jurisdiction. On 1 August 2013 China submitted a note verbale to the Permanent Court of Arbitration, which is the registry for the proceedings, indicating that “it does not accept the arbitration initiated by the Philippines” and that it will not be participating in the proceedings.15 Nevertheless, Annex VII of the LOSC contains procedures whereby if one of the parties chooses to not participate in the proceedings, an Arbitral Tribunal can be constituted and proceed to a hearing of the application even in the case of a default appearance.16 The Tribunal in the case of default of appearance will need to make a determination that it does

11 Ibid [6].
15 Ibid.
16 LOSC, Annex VII, Articles 3, 9.
possess jurisdiction over the dispute but also that the claim is “well founded” in both fact and law. 17

**Arbitration between the Republic of the Philippines and the People’s Republic of China**

**Table of Critical Dates 2013-2014**

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<td>China presents Philippines with diplomatic note that rejected and returned the Philippines’ Notification</td>
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The Philippines filed its Memorial in this case on 30 March 2014. On 3 June 2014 the Arbitral Tribunal issued its Procedural Order No. 2 in which it fixed 15 December 2014 as the date by which China was to submit its counter-memorial responding to the Philippines Memorial. On 21 May 2014, China submitted a note to the Permanent Court of Arbitration in which it restated the position that it had taken previously that “it does not accept the arbitration initiated by the Philippines”. 18

As per the Table above, the proceedings in this Arbitration are reaching a critical stage as the 15 December 2014 date for China’s submission of its counter-memorial looms. To date, China has formally indicated to the Arbitral Tribunal that it will not participate in the proceedings. Accordingly all current indicators are that China will not submit its counter-memorial on 15

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17 LOSC, Annex VII, Article 9.

December. If this occurs, then Article 25 of the Rules of Procedure applicable to the Arbitration become relevant. Article 25 provides as follows:

**Failure to Appear or to Make Submissions**

*Article 25*

1. Pursuant to Article 9 of Annex VII to the Convention, if one of the Parties to the dispute does not appear before the Arbitral Tribunal or fails to defend its case, the other Party may request the Arbitral Tribunal to continue the proceedings and to make its award. Absence of a Party or failure of a Party to defend its case shall not constitute a bar to the proceedings. Before making its award, the Arbitral Tribunal must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law.

2. In the event that a Party does not appear before the Arbitral Tribunal or fails to defend its case, the Arbitral Tribunal shall invite written arguments from the appearing Party on, or pose questions regarding, specific issues which the Arbitral Tribunal considers have not been canvassed, or have been inadequately canvassed, in the pleadings submitted by the appearing Party. The appearing Party shall make a supplemental written submission in relation to the matters identified by the Arbitral Tribunal within three months of the Arbitral Tribunal’s invitation. The supplemental submission of the appearing Party shall be communicated to the non-appearing Party for its comments which shall be submitted within three months of the communication of the supplemental submission. The Arbitral Tribunal may take whatever other steps it may consider necessary, within the scope of its powers under the Convention, its Annex VII, and these Rules, to afford to each of the Parties a full opportunity to present its case.

Consistent with the provisions of the LOSC, and Annex VII, failure to appear by China will not constitute a bar to the proceedings. However, such an event does not automatically result in the Tribunal proceeding to hear the matter in the absence of China and rendering a judgment. Rather the Tribunal has the capacity to request further written submissions from the Philippines, including questions that it considers not to have been “canvassed, or have been inadequately canvassed” in the Philippines pleadings. If this were to occur, then the Philippines would be given three months within which those additional pleadings were to be submitted, which would then be communicated to China which would in turn be given a further three months in which to make its submissions on the Philippines supplemental submission. On this timeframe, it may not be until mid-2015 that these additional procedures have been completed and dates have been set for hearing of oral submissions. Consistent with these processes, and Article 25 of the Rules, the Tribunal would during this time need to afford every opportunity for China to present its case.

**Part VX LOSC Dispute Resolution Procedures**

As noted above, the LOSC is distinctive because it contains within Part XV compulsory procedures for the settlement of disputes. The law of the sea, alongside the procedures established by the WTO for the settlement of international trade dispute disputes, is therefore
one of only two multilateral international treaties that provide for compulsory settlement of disputes. While the framework and mechanisms that are established are in conformity with the general provisions of Article 33 of the Charter of the United Nations and the peaceful settlement of international disputes promoted by the Charter and more generally within the UN system, of which the law of the sea is a part, there is a clear distinction between the mechanisms provided for in Part XV as follows. Section 1 of Part XV outlines ‘General Provisions’ which generally reflect Article 33 of the Charter, how these mechanisms may interact with other treaties dealing with law of the sea matters that contain dispute resolution mechanisms, and some specific provisions of a general dispute resolution nature that have application to the LOSC. Section 2 of Part XV, on the other hand, contains ‘Compulsory Procedures Entailing Binding Decisions’ which as its title suggest establishes the LOSC’s distinctive compulsory dispute resolution procedures including new institutional mechanisms. Closely linked to these procedures are ‘Limitations and Exceptions to Applicability of Section 2’ found in Section 3.

Section 1 of Part XV places emphasis upon the peaceful settlement of international disputes consistent with the Charter of the United Nations, and reaffirms the capacity of States to choose any peaceful means of dispute settlement, thereby reaffirming the capacity of States to not only utilise mechanisms available to them under the LOSC but any other means of their choice to peacefully settle their disputes. Such means may include those that have been provided for under other bilateral, regional or general agreements, or ones that the States have specifically chosen in the context of a particular dispute. In the absence of those alternate mechanisms Part XV creates obligations upon States to exchange views regarding a dispute. There is also direct reference to conciliation procedures and the mechanisms available under Annex V. However, it can be observed under Article 284 conciliation is a purely voluntary process in which one of the parties will issue an invitation to the other disputing party/parties to agree upon a conciliation procedure and make use of either Annex V conciliation or any other conciliation procedure the parties may agree upon.

Section 2 outlines the default compulsory procedures for dispute settlement that are applicable in the absence of the dispute having been settled under the general mechanisms provided for

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19 LOSC, Article 279.
20 LOSC, Article 280.
21 LOSC, Articles 281, 282.
22 LOSC, Article 283.
23 LOSC, Article 284.
in Section 1. Of significance for this paper is the ‘Choice of Procedure’ mechanism provided
for under Article 287 whereby States parties to the LOSC are able to elect to choose between
referral of a dispute to the International Court of Justice, International Tribunal for the Law of
the Sea (ITLOS), Annex VII Arbitration, or Annex VIII Special Arbitration. Other than the
International Court of Justice, the latter three bodies are all distinctive to the LOSC. There is a
further inbuilt default mechanism provided for in the case of those States that have not made
an election as to which procedure they would prefer for the settlement of their disputes, or
where the parties to the dispute have not accepted the same procedure. In those instances,
arbitration before an Annex VII Tribunal will be adopted unless in the case of where there is
incompatibility in choice of the procedures the parties otherwise agree upon another procedure.

Notwithstanding the compulsory nature of these mechanisms, the LOSC does anticipate that
a dispute may arise as to whether a court of tribunal has jurisdiction to decide a matter and
Article 288 (4) anticipates that such matters will be determined by the relevant court or tribunal.
Since entry into force of the LOSC there have been occasions where the jurisdiction of ITLOS
has been challenged, such as in the 2013 Arctic Sunrise case, and also where the
jurisdiction of an Annex VII Tribunal has been challenged as occurred in the Southern Bluefin Tuna cases. Therefore, notwithstanding the compulsory procedures that have been
established under Section 2 it is not unknown for States to contest jurisdiction of a court or
tribunal, or to take the view that jurisdiction does not reside with the court or tribunal and to not
appear before that body. Ultimately the effect of the Section 2 procedures is that States are
given a choice as to which bodies they prefer for the settlement of their disputes, and that in
the absence of agreement between disputing States the matter will be determined by an Annex
VII Arbitral Tribunal.

24 The interaction of Section 1 dispute settlement mechanisms and Section 2 compulsory procedures
was briefly considered by the Annex VII Arbitral Tribunal in the Southern Bluefin Tuna case (Australia and New Zealand v. Japan) when the Tribunal formed the view that it did not have jurisdiction to consider the claim brought by Australia and New Zealand against Japan because there had been a failure to exhaust procedures under Section 1 as they related to an Article 282 regional agreement – in that instance the Convention on the Conservation of Southern Bluefin Tuna; see Southern Bluefin Tuna Case (Australia and New Zealand v. Japan), Award on Jurisdiction and Admissibility (2000) 39 ILM 1359.

25 LOSC, Article 287 (3), (5).

26 The Arctic Sunrise case (Kingdom of the Netherlands v. Russian Federation), Provisional Measures (22 November 2013), ITLOS Case No. 22.


28 The position of the Russian Federation in the Arctic Sunrise case was that they did not accept the jurisdiction of ITLOS to consider provisional measures and accordingly did not appear before the tribunal: The Arctic Sunrise case (Kingdom of the Netherlands v. Russian Federation), Provisional Measures (22 November 2013), ITLOS Case No. 22.
Section 3 of Part XV of the LOSC deals with limitations and exceptions to the applicability of Section 2, the effect of which is to place certain constraints upon the way in which the compulsory procedures provided for under Section 2 function. These limitations are divided into two types. The first are those disputes which are excluded from the Section 2 mechanisms and are provided for in Article 297. Generally, these limitations concern disputes that relate to marine scientific research, and decisions made by a State with respect to its sovereign rights with respect to the living resources of the exclusive economic zone (EEZ). Importantly for present purposes, Article 297 provides that in these instances settlement of the dispute shall be determined by way of conciliation. The second type of exception is optional and is entirely dependent upon a State lodging a declaration either at the time of signature, ratification, accession or any time thereafter declaring that it does not accept one or more of the procedures provided for under Section 2. The effect of these Article 298 Declarations will be considered below.

**Article 298 Declarations**

While the LOSC creates a distinctive dispute resolution regime under Part XV, States retain the option of being able to indicate which of the formal third party mechanisms they prefer which they do by way of a declaration. Article 298 Declarations can be made by States with respect to three types of disputes. They are as follows:

a) Disputes with respect to the delimitation of maritime boundaries and the application of Articles 15, 74 and 83 of the LOSC, or disputes involving historic bays or titles;

b) Disputes concerning military activities; and

c) Disputes in respect of which the United Nations Security Council is exercising its functions.

A total of 31 states have lodged declarations in reliance upon Article 298 (1) of the LOSC. The Declaration can relate to any one or more of the procedures provided for under Section 2, such that the State can exempt the dispute from only some of the Section 2 procedures or all of the Section 2 procedures. China’s Article 298 declaration was made on 25 August 2006 and reads as follows:

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29 LOSC, Article 297 (2), (3).

30 Those States are: Angola, Argentina, Australia, Belarus, Canada, Cape Verde, Chile, China, Denmark, Ecuador, Equatorial Guinea, France, Gabon, Ghana, Italy, Mexico, Montenegro, Norway, Palau, Portugal, Republic of Korea, Russian Federation, Saudi Arabia, Slovenia, Spain, Thailand, Trinidad and Tobago, Tunisia, Ukraine, United Kingdom, Uruguay; of which 27 include Article 298 (1)(a) procedures within the scope of their Declaration.
“The Government of the People’s Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a) (b) and (c) of Article 298 of the Convention.”

An Article 298 Declaration may raise issues as to its interpretation, and whether the State is able to only issue the Declaration activating the particular optional exception, or whether the terms of the Declaration can include some statement of understanding with respect to the effect of the Declaration. Given the potential ambiguity that may exist with respect to what constitute ‘historic bays or titles’, there may be some merit in a State lodging a more expansive Declaration so that it can precisely identify how it interprets those provisions.

Declarations may be withdrawn by the State party, or they may elect to submit a dispute covered by the Declaration to any of the procedures specified in the LOSC. As such there exists a level of flexibility with respect to how a State may seek to modify or withdraw its Article 298 Declaration, or to even elect ad hoc to not be bound by the terms of the Declaration in any particular instance. Likewise, the lodgement of a Declaration does not impact upon proceedings that are pending before a court or tribunal. However, it is important to note that this limitation does not apply with respect to a dispute, but rather only with respect to ‘proceedings’ that are pending. Article 298 Declarations can therefore have an impact upon an existing dispute which has yet to reach the stage of proceedings before a Section 2 court of tribunal.

Of particular significance to this paper, Article 298 (1)(a) disputes are not completely excluded from the application of Part XV dispute resolution mechanisms but rather will conditionally be subject to conciliation under Annex V. Three requirements must be met before Annex V conciliation may apply to the resolution of the dispute:

1. That a Declaration has been made relating to the categories of disputes identified in Article 298 (1)(a);
2. That the dispute is one that has arisen subsequent to the entry into force of the LOSC;

31 LOSC, Article 298 (2).
33 LOSC, Article 298 (5).
34 As to the date from which an Article 298 Declaration takes effect, see the discussion in Rosenne and Sohn eds, United Nations Convention on the Law of the Sea 1982: A Commentary Vol V, 140-141 [298.44].
3. That no agreement has been reached between the parties “within a reasonable period of time”.

Once these requirements are met, then a dispute subject to an Article 298 Declaration albeit exempted from the procedures of Section 2 and accordingly will not other than by way of an exceptional agreement between the parties be determined by a LOSC court or tribunal, becomes subject to conciliation under Annex V. However, when Annex V Conciliation is activated by way of Article 298, a further distinctive set of procedures apply to the conciliation.

Article 298 (1)(a) conciliation procedures can be activated by any of the parties to the dispute. However a further exemption to these procedures apply due to the particular features of a dispute arising with respect to maritime boundaries, historic bays or titles. Here the words of Article 298 (1)(a)(i) need to be quoted in full. They read as follows:

...any dispute that involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission.

In short, this proviso makes clear conciliation procedures can only apply to maritime and not land disputes. 35

Annex V Conciliation 36

Crawford has described conciliation as having a “semi-judicial aspect, since the commission of persons empowered has to elucidate the facts, may hear the parties and must make proposals for a settlement, which is normally non-binding.” 37 Conciliation as a method of dispute settlement has a history that formally extends throughout the twentieth century into the twenty-first century. Merrills has pinpointed conciliation as a form of recognised dispute settlement in a treaty extending back to 1920, 38 with the 1928 General Act of Arbitration for the Pacific Settlement of International Disputes being one of the first significant international instruments that directly referred to conciliation. 39 In modern treaty law, the practice of

35 Rosenne and Sohn eds, United Nations Convention on the Law of the Sea 1982: A Commentary Vol V, 133 [298.31] refer to this category as ‘mixed disputes’ being “disputes that necessarily involve the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory”.


conciliation is often reflected in multilateral instruments as being amongst a number of possible means available to parties to resolve their disputes. Such examples can be found in treaties dealing with general international law, such as the Vienna Convention on the Law of Treaties, or treaties dealing with environmental matters such as the 1992 Convention on Biological Diversity and the 1992 United Nations Convention on Climate Change. Nevertheless, while there is considerable evidence of conciliation as a means for dispute settlement, state practice associated with conciliation is not extensive. The most prominent example of conciliation having been utilised as a method of dispute settlement in the law of the sea occurred with the 1981 Report of the Conciliation Commission to the Governments of Iceland and Norway on the Continental Shelf between Iceland and Jan Mayen.

Procedures associated with conciliation under the LOSC are to be found in Annex V. Two types of conciliation are provided for. The first, referred to in Section 1 of Annex V is voluntary conciliation consistent with Article 284 of the LOSC which is located within the general dispute settlement procedures found in Section 1 of Part XV. The second is found in Section 2 of Annex V, and importantly is titled ‘Compulsory Submission to Conciliation Procedure Pursuant to Section 3 of Part XV’. The procedures outlined in Section 2 deal with the particular dynamics of compulsory conciliation, and address the institution of proceedings, failure to reply or to submit to conciliation, and competence of the conciliation commission. In sum, it is made clear that conciliation is a compulsory procedure that can arise under Article 298 (1)(a) and that once commenced the other party to the dispute “shall be obliged to submit to such proceedings”. Failure on the part of one of the parties to submit to the proceedings is not a bar to the proceedings, though it is clear in Article 13 that the competence of the conciliation commission may be challenged. Such a challenge could arise on the grounds that as noted

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45 LOSC, Annex V, Article 11.
46 LOSC, Annex V, Article 12.
48 LOSC, Annex V, Article 11 (2); Rosenne and Sohn eds, *United Nations Convention on the Law of the Sea 1982: A Commentary* Vol V, 326 [A.V.33] observe that “Through this unilateral institution of proceedings and this obligation to submit to the procedure, a much more thorough system of conciliation than is found in earlier conventions has been created, especially with regard to the obligatory submission of disputes to the conciliation process.”
49 LOSC, Annex V, Article 12.
above, the dispute arose prior to the entry into force of the LOSC, that a reasonable period of time had not been allowed to pass prior to the commencement of proceedings, or that the dispute was one that concurrently involved consideration of a land dispute.

Other than these distinctive features of Section 2, Annex V, conciliation commenced under Article 298 (1)(a) proceeds under the general conciliation procedures laid down in Articles 2-10 of Annex V. 50 A feature of these procedures is flexibility including the manner in which the procedure to be adopted by the conciliation commission is agreed upon, 51 which extends to whether oral or written submissions are received, and the capacity of the commission to “draw the attention of the parties to any measures which might facilitate an amicable settlement of the dispute.” 52 Reaching an amicable settlement is further reinforced in Article 6 of Annex V, which makes clear that the functions of the Commission are to:

“…hear the parties, examine their claims and objections, and make proposals to the parties with a view to reaching an amicable settlement.”

The final matter of procedural significance under the Annex V mechanisms is that the conciliation commission is to report within 12 months of its constitution. 53 The report is to be deposited with the Secretary-General of the United Nations who is transmit the report to the parties. 54

The general procedures with respect to conciliation are varied in an instance of compulsory conciliation arising under Article 298 (1)(a) once the commission’s report has been presented. While Article 7(2) of Annex V makes clear that the report of the commission is not binding upon the parties, Article 298(1)(a)(ii) on the other hand provides that upon presentation of the conciliation report “the parties shall negotiate an agreement on the basis of that report”, thereby suggesting some level of compulsion on the part of the disputing parties to in good faith engage with the commission report. 55 In the absence of such an agreement being reached,

50 LOSC, Annex V, Article 14.
51 LOSC, Annex V, Article 4.
52 LOSC, Annex V, Article 5.
53 LOSC, Annex V, Article 7 (1).
54 LOSC, Annex V, Article 7 (1).
55 Tullio Treves, “What have the United Nations Convention and the International Tribunal for the Law of the Sea to offer as regards Maritime Delimitation Disputes?” in Maritime Delimitation, eds. Rainer Lagoni and Daniel Vignes (Leiden: Martinus Nijhoff, 2006), 63, 76 refers to the “pressure” upon the states to settle their dispute arising from these procedures. It is observed that “the pressure on the State that is not ready to follow the recommendations is great.” See also Adede, The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea, 280-281.
the parties are to mutually submit the dispute\textsuperscript{56} to one of the procedures provided for under Part XV, Section 2, unless they agree otherwise. \textsuperscript{57}

The consequence of these procedures is that the parties are given every incentive to either endorse the report of the conciliation commission, or to negotiate a settlement of the dispute on the basis of the report. Failure to reach such an agreement will then see the fundamental dispute settlement provisions of Part XV, Section 2 activated with the consequence that the State that originally lodged an Article 298 Declaration so as to exempt a dispute with respect to maritime boundaries, historic bays or titles from Section 2 procedures will eventually be forced to engage in those procedures if it has been unwilling to settle the dispute through Annex V conciliation.

This raises for consideration where conciliation has at face value failed to settle the dispute and Section 2 procedures are now activated as to how the “mutual consent” of the parties could in these circumstances be determined. \textsuperscript{58} One view could be that such consent needs to be reached by separate agreement to refer the matter to a Section 2 court or tribunal. This view is taken by Rosenne and Sohn in the \textit{Virginia Commentary} on Article 298. They observed:

In case no substantive agreement is reached through such negotiations, there is also the further obligation to at least try to reach an agreement to select one of the procedures under Part XV, section 2, or some other procedure for settling the dispute. This agreement must also be negotiated in good faith, but can come into effect only by mutual consent. \textsuperscript{59} Churchill and Lowe commenting on these procedures observe that if the States are unable to reach agreement based on the commission report, “they must agree upon some other procedure for settling the dispute”. \textsuperscript{60}

A critical procedural issue that arises is how ‘mutual consent’ is attained, and whether this is consent which is specific to the dispute in question or consent that may previously have been given by the parties. The fact that ‘consent’ is referred to and not ‘agreement’ in Article 298

\begin{footnotes}
\item[56] LOSC, Article 298 (1)(a)(ii) uses the term ‘question’, which in context is taken to have the same meaning as ‘dispute’.
\item[57] A further exception to these procedures applies in the case of a “sea boundary dispute” where the parties had otherwise reached an arrangement, or via another bilateral or multilateral agreement that was binding upon the parties.
\item[58] See LOSC, Article 298 (1)(a)(ii).
\item[60] R.R. Churchill and A.V. Lowe, \textit{The law of the sea} 3\textsuperscript{rd} (Manchester: Manchester University Press, 1999) 456.
\end{footnotes}
(1)(a)(ii) is significant. As such, it should be possible to refer to where the parties have mutually given their consent to resolve the dispute in either a general or specific context. The better view would therefore be that in the absence of the parties mutually agreeing between themselves to utilise one of the Part XV, Section 2 courts and tribunals, the default would become arbitration in accordance with Annex VII consistent with the default procedures reflected in Article 287. Here ‘mutual consent’ could properly be identified through the consent of a State becoming a LOSC party by which that State agrees to become subject to the Part XV procedures with respect to dispute settlement, including the compulsory procedures found in Section 2. Under those procedures, while Article 287 provides for a choice of procedure, in the absence of a State having made a choice by way of a declaration then the default procedure is Annex VII Arbitration. Likewise, if the two disputing States have not accepted the same procedure, then the default once again becomes Annex VII Arbitration.

The Future of the Philippines/China Dispute

On the basis of the above analysis the following observations can be made with respect to the Philippines/China dispute and the application of Part XV LOSC procedures. The first is that China has given every indication to date that it will not participate in the Annex VII Arbitration proceedings commenced by the Philippines. While 15 December 2014 will be a critical date in the proceedings, they do not represent a ‘last chance’ for China to engage in the proceedings. Additional procedures will take place. In particular given the issues raised by the Philippines application, China’s Article 298 Declaration, and the real potential of China’s default of appearance, the Tribunal may seek to activate the mechanisms it has available to it under Article 25 of the Rules to elicit from the Philippines submissions on matters that go to jurisdiction, and in particular to respond to matters arising from the Philippines Memorial upon which it wishes to receive additional submissions. These additional procedures may take some time and oral proceedings cannot be anticipated until 2015.

Even in the case of default of appearance by China, consistent with Article 9 of Annex VII the Tribunal will need to rule on matters of its jurisdiction and that the claim is well founded in “fact and law”. If the Tribunal were to rule that the matter was not well founded in fact and law, the

61 cf. Rosenne and Sohn eds, United Nations Convention on the Law of the Sea 1982: A Commentary Vol V, 134 [298.31] who argue that: “If no such agreement can be reached, the only obligation that remains is the one under Part XV, section 1, to proceed expeditiously to an exchange of views regarding the settlement of the dispute by further negotiations or “other peaceful means (article 283, paragraph 1).”

62 LOSC, Article 287 (3).

63 LOSC, Article 287 (5).
Philippine’s claim could fall at that hurdle and the proceedings would be brought to an end. If the Tribunal declines to exercise jurisdiction in reliance upon China’s Article 298 Declaration, the Philippines has other dispute resolution options open to it under the LOSC, especially those provided for under Article 298 (1) with respect to compulsory conciliation. If the subject matter of the dispute between the Philippines and China is:

a) considered to have arisen following the entry into force of the LOSC,

b) does not raise issues with respect to territorial sovereignty over land or insular territory, and

c) one in which no negotiated agreement has been reached between the parties within a reasonable period of time,

then compulsory conciliation procedures can be activated as per Article 298 and Annex V.

Importantly, given the position that China has taken with respect to the Annex VII Arbitration, compulsory conciliation under Annex V, Section 2 can proceed in the absence of one of the parties to the dispute. Non-appearance by China before the Annex V conciliation commission would not bring about a cessation of those proceedings. If a disagreement were to arise over the competence of an Annex V conciliation commission, raised for example by China by way of formal written representations to the commission, those matters could be decided by the commission. The procedures to the applied by the Annex V conciliation commission are detailed in Annex V, with the commission to hear both parties, and to report within 12 months of its constitution. Following the report of the commission there is a clear obligation upon the parties to negotiate an agreement, and this obligation must be observed in good faith consistently with Article 300 of the LOSC.

Irrespective then of the position that China may take towards the competence of the commission under these procedures, if the commission has ruled in favour of its competence and concluded a report then China would be under a clear obligation consistent with Articles 298 and 300 of the LOSC to engage with that process in order to negotiate an agreement based on the report. If those negotiations were also to fail, then unless the parties otherwise agree, in the absence of an agreement being reached by mutual consent, the parties shall submit the dispute to one of the courts or tribunals provided for in Section 2, Part XV of the LOSC. Those bodies include the International Court of Justice, ITLOS, or an Annex VII Arbitral Tribunal. The default court or tribunal that would be available to determine this matter would be an Annex VII Arbitral Tribunal.

**Concluding Remarks**
One of the defining features of the LOSC is the manner in which it provides for dispute settlement. Other than the WTO there is no other equivalent compulsory multilateral dispute settlement framework that States commit to. Not only is Part XV of the LOSC distinctive because of the obligations it imposes upon States to settlement of their disputes in a peaceful manner, but also because of the choices States have available to them in settling their disputes. A range of voluntary and compulsory procedures are available. States are encouraged to make use of a range of flexible voluntary dispute settlement mechanisms, including Annex V conciliation. Compulsory means of dispute settlement also provides States with a number of courts and tribunals to which they can refer their disputes. The exceptions imbedded within Section 3, Part XV are designed to reflect a distinction between matters of fundamental state sovereignty, such as the determination of land boundaries, and matters which while of significance for state sovereignty are also vital to the efficient conduct and mutual recognition of rights and interests on the part of all States in the maritime domain. Article 298 (1)(a) of the LOSC seeks to reflect that balance by recognising that for some states matters regarding maritime boundary delimitation, historic bays and titles should not initially be subject to determination by a court of tribunal. In that case, States are given significant encouragement to settle their dispute by way of agreement, or in the absence of agreement by way of compulsory conciliation. Even following the issuing of the report of a conciliation commission the States are given a further opportunity to negotiate a settlement based on that report. Only, following the inability of these various mechanisms to reach a settlement of the dispute will the States be required to submit themselves to a Part XV court or tribunal, which in the absence of agreement having been reached as to the forum would be before an Annex VII Arbitration.

The Philippines/China Annex VII Arbitration is entering an important phase. China’s position with respect to the Annex VII Tribunal has parallels with the recent position adopted by the Russian Federation before ITLOS in the Arctic Sunrise case, and Russia’s indication of “its refusal to take part” in the subsequent Annex VII arbitration. Even if China persists with its current position regarding the Philippines application of 22 January 2013, there still remains the potential for the Arbitral Tribunal to determine that it does not possess jurisdiction to determine the dispute as a result of China’s Article 298 Declaration. If that were to occur, then consistent with Article 298 (1)(a) an issue will arise as to whether compulsory conciliation applies. This in turn will trigger a number of additional mechanisms under Article 298, and

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Annex V of the LOSC. There is some potential therefore that the Philippines/China South China Sea dispute could be the first instance of compulsory conciliation under the LOSC being activated, setting a precedent under the Convention and also becoming the focus of attention with respect to the capacity of conciliation to settle a law of the sea dispute in the modern era.