Asian Journal of International Law, 11 (2021), pp. 24–35
doi:10.1017/S2044251320000235

First published online 05 November 2020

"One of the First Matters to be Addressed but Distinct" or "Distinct but Inseparable"? The Distinction Between Maritime Entitlement and Sea Boundary Delimitation in the Philippines v. China Arbitration

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Abstract
The distinction between disputes of sea boundary delimitation and disputes over the existence of maritime entitlements was one key element of the legal argument that the Philippines brought forward against China in the *Philippines v. China* Arbitration. On the one hand, the distinction between delimitation and entitlement allowed the Tribunal to establish its jurisdiction on several Philippine submissions despite the jurisdictional exclusions of China's declaration under Article 298(1)(a)(i) of the Law of the Sea Convention. On the other hand, the Tribunal's finding about the lack of China's entitlements has important consequences. China and a number of lawyers objected to the jurisdictional separability of entitlement and delimitation. The aim of this paper is to discuss the question of whether a tribunal can establish jurisdiction on the existence of maritime entitlements in a context where jurisdiction on boundary delimitation is excluded and where a determination of entitlements has consequences for boundary delimitation.

The distinction between disputes of sea boundary delimitation and disputes over the existence of maritime entitlements was one key element of the legal argument that the Philippines brought forward against China in the *Philippines v. China* Arbitration.[1] The Arbitral Tribunal followed the Philippines' argument in that it defined parts of the dispute presented by the Philippines as "a dispute over the source and existence of maritime entitlements" and it found that such a dispute "does not 'concern' sea boundary delimitation merely because the existence of overlapping entitlements is a necessary condition for delimitation".[2] This distinction between delimitation and

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1. *South China Sea Arbitration (Philippines v. China)*, Award, 12 July 2016, [2016] P.C.A. Case No. 2013-19 [*South China Sea Arbitration (Merits)*].

2. *Ibid*., at 85, para. 204; *South China Sea Arbitration (Philippines v. China)*, Memorial of the Philippines–Vol. I, 30 March 2014, P.C.A. Case No. 2013-9 at 14, para. 1.53; see also Bernard

entitlement was a central aspect in the Arbitration, because it allowed the Tribunal to overcome the jurisdictional obstacle that China's declaration under Article 298(1)(a)(i) of the Law of the Sea Convention [LOSC] presented.[3] China invoked optional exceptions to compulsory dispute settlement procedures subsequent to this Article, and these exceptions exclude disputes concerning sea boundary delimitation. Thus, on the one hand, the distinction between delimitation and entitlement allowed the Tribunal to establish its jurisdiction on several Philippine submissions. On the other hand, the Tribunal's finding about the lack of China's entitlements has far-reaching consequences.

China rejected the award and has not complied with it.[4] Statements of China's government and a group of lawyers under the aegis of the Chinese Society of International Law [CSIL] have rejected, among other objections to the Tribunal's jurisdiction, the distinction between entitlement and boundary delimitation.[5] The Tribunal's approach to the separability of entitlement and delimitation received question marks from lawyers who were not related to the parties of the dispute. Schoenbaum, for instance, referred to the Tribunal's circumvention of jurisdictional obstacles as "an ingenious, if suspect, interpretive flurry to eradicate this jurisdictional obstacle".[6]

The aim of this paper is to discuss the distinction between disputes of entitlement and of delimitation with a focus on the implication of this distinction for the jurisdictional obstacle posed by the exclusion of boundary delimitation disputes from the Tribunal's jurisdiction. The paper argues that the substantive distinction between entitlement and delimitation is established in the law of the sea and related jurisprudence. The real bone of contention between the Tribunal's award and its critics is about the jurisdictional implication of the distinction: Are disputes of entitlement and disputes of delimitation, albeit being related, distinct for the purpose of jurisdiction as the Tribunal and Philippine lawyers have argued? Alternatively, are both issues too closely related to be distinct for jurisdictional purposes, as China's statements and a number of lawyers have argued? To answer this question, this paper begins by

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Oxman's presentation during the hearing, B. OXMAN, *South China Sea Arbitration (Philippines v. China)*, Final Transcript Day 2–Jurisdiction Hearing, 8 July 2015, P.C.A. Case No. 2013-19 at 39–45 [*South China Sea Arbitration Day 2 Transcript*].

3. The Government of the People's Republic of China, *Declaration Under Article 298*, 25 August 2006, online: <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en> [*China's Declaration Under Article 298*]; *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 U.N.T.S. 397, 21 I.L.M. 1261 (entered into force 16 November 1994).

4. "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" *Ministry of Foreign Affairs of the People's Republic of China* (7 December 2014), online: MFA <https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml> [*Position Paper of the Government of China*]; "Statement of the Government of the People's Republic of China on China's Territorial Sovereignty and Maritime Rights and Interests in the South China Sea" *Ministry of Foreign Affairs of the People's Republic of China* (12 July 2016), online: MFA <https://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1379493.htm>.

5. Chinese Society of International Law, "The South China Sea Arbitration Awards: A Critical Study" (2018) 17 Chinese Journal of International Law 207.

6. Thomas J. SCHOENBAUM, "The South China Sea Arbitration Decision and a Plan for Peaceful Resolution of the Disputes" (2016) 47 Journal of Maritime Law and Commerce 451 at 459.

outlining the central role the Tribunal's distinction between disputes of entitlements and delimitation played in the Arbitration. The paper then discusses the substantive distinction between entitlement and delimitation in the law of the sea and jurisprudence. This is followed by an analysis of the criteria that can be derived from the respective arguments about the Tribunal's jurisdiction. The paper neither discusses the procedural issues of the Tribunal's jurisdiction[7] nor the approach to adjudicating the status of features independently of the question of sovereignty over the feature(s).[8]

I. THE ROLE OF THE DISTINCTION BETWEEN ENTITLEMENT AND DELIMITAITON IN THE SOUTH CHINA SEA ARBITRATION

The Arbitral Tribunal's award in the *Philippines v. China*[9] case distinguished between disputes over the source of entitlements and disputes over sea boundary delimitation. This distinction played a central role in the Tribunal's award for the following reasons. First, based on the distinction between disputes of delimitation and of entitlement, the Tribunal found that China and the Philippines do not have overlapping exclusive economic zones [EEZs] or continental shelves in eastern parts of the South China Sea, as there is no legal basis for China to claim an EEZ or continental shelf in this area.[10] This decision is far-reaching and has a clear effect on maritime boundary delimitation between China and the Philippines—namely, that no EEZ or continental shelf boundary delimitation is required in eastern parts of the South China Sea as there are no overlapping entitlements in this area. Second, the distinction allowed the Tribunal to overcome the jurisdictional obstacle posed by China's optional declaration of 25 August 2006 under Article 298(1)(a)(i).[11] China's declaration excludes "disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles" as well as disputes concerning sovereignty, and military and certain law enforcement activities from the jurisdiction of an Arbitral Tribunal. The Tribunal

7. For a discussion of various questions regarding the Tribunal's jurisdiction, see Moragodage C.W. PINTO, "Arbitration of the Philippine Claim Against China" (2018) 8 Asian Journal of International Law 1.

8. *South China Sea Arbitration (Merits)*, *supra* note 1 at 92–7, paras. 215–29; *South China Sea Arbitration* (*Philippines* v. *China*), Award on Jurisdiction and Admissibility, 29 October 2015, [2015] P.C.A. Case No. 2013-9 at 59–60, paras. 152–4 [*South China Sea Arbitration (Jurisdiction)*].

9. For a general discussion of the Arbitration, see Lucy REED and Kenneth WONG, "Marine Entitlements in the South China Sea: The Arbitration Between the Philippines and China" (2016) 110 American Journal of International Law 746; Thomas J. SCHOENBAUM, "The South China Sea Arbitration Decision: The Need for Clarification" (2016) 110 American Journal of International Law 290; Kate PARLETT, "Jurisdiction of the Arbitral Tribunal in *Philippines v. China* under UNCLOS and in the Absence of China" (2016) 110 American Journal of International Law 266. For a critique of the Arbitration from a Chinese perspective, see Stefan TALMON and JIA Bing Bing, eds., *The South China Sea Arbitration: A Chinese Perspective* (Oxford: Hart Publishing, 2014).

10. *South China Sea Arbitration (Merits)*, *supra* note 1 at 85, para. 204. A determination of the extent of overlapping claims in the north-eastern South China Sea would also have to take into consideration the claims and status of Taiwan.

11. *China's Declaration Under Article 298*, *supra* note 3.

https://doi.org/10.1017/S2044251320000235 Published online by Cambridge University Press

acknowledged that the disputes in the South China Sea involve various issues including disputes over sea boundary delimitation and sovereignty. But it established that it has jurisdiction to rule on the existence of maritime entitlements independently of boundary and sovereignty disputes that exist in addition to a dispute over entitlements.[12]

Third, the Tribunal reasoned that its jurisdiction on several submissions did not depend only on the jurisdictional distinction between entitlement and delimitation, but was also conditional on finding the lack of China's entitlements. The Tribunal reasoned that its jurisdiction on Philippine submissions 5 (whether Mischief Reef and Second Thomas Shoal can generate an EEZ and continental shelf), 8 (certain law enforcement activities of China), and 9 (China's failure to prevent certain fishing activities of Chinese nationals) was conditional on the finding that China and the Philippines do not possess overlapping entitlements in the relevant areas, and that no sea boundary delimitation was required.[13] The Tribunal's jurisdiction on Philippine submissions 2 (China's claims to "historic rights"), 10 (China's interference in Philippine fishing activities), and 13 (dangerous law enforcement operations of Chinese law enforcement vessels) was also conditional on the Tribunal establishing the absence of overlapping entitlements.[14] In other words, the Tribunal's jurisdiction on these submissions depended on a merits determination that, in turn, is based on the jurisdictional separability between entitlement and delimitation.

The Tribunal's finding on the lack of China's entitlements derives from three substantive findings which can be briefly summarized. First, China is not entitled to claim historic rights as historic rights "were superseded … by the limits of the maritime zones provided for by the Convention".[15] The Tribunal acknowledged that individually held traditional fishing rights are preserved in territorial seas but not in EEZs.[16] Second, all features in the Spratly Islands and Scarborough Shoal are "rocks" or "low-tide elevations" in the meaning of Article 121(3) of the LOSC. These cannot give rise to entitlements to an EEZ or continental shelf even if China were assumed to have sovereignty over these features.[17] Third, the Tribunal maintained that the Spratly Islands cannot be grouped together to form a collective unit which would then result in an EEZ or continental shelf entitlement.[18] In consequence, China is

12. *South China Sea Arbitration (Jurisdiction)*, *supra* note 8 at 58–61, 139–40, 142–3, paras. 151–7, 392–4, 401–3.

13. *Ibid*., at 61, 139–40, paras. 157, 394.

14. *Ibid*., at 139–40, paras. 393, 395.

15. *South China Sea Arbitration (Merits)*, *supra* note 1 at 111, para. 262. For a discussion, see Sophia KOPELA, "Historic Titles and Historic Rights in the Law of the Sea in the Light of the South China Sea Arbitration" (2017) 48 Ocean Development and International Law 181. For a critique of the Tribunal's reasoning on historic rights, see MA Xinmin, "Merits Award Relating to Historic Rights in the South China Sea Arbitration: An Appraisal" (2018) 8 Asian Journal of International Law 12.

16. *South China Sea Arbitration (Merits)*, *supra* note 1 at 109–15, paras. 257–72. On traditional fishing rights in this case, see Schoenbaum, *supra* note 6.

17. *South China Sea Arbitration (Merits)*, *supra* note 1 at 259–60, paras. 643–8. For a discussion, see Yoshifumi TANAKA, "Reflections on the Interpretation and Application of Article 121(3) in the *South China Sea Arbitration* (Merits)" (2017) 48 Ocean Development and International Law 365.

18. *South China Sea Arbitration (Merits)*, *supra* note 1 at 236–7, paras. 573–6. Regarding the use of straight baselines and offshore archipelagos, see J. Ashley ROACH, "Offshore Archipelagos

entitled only to territorial seas that surround the disputed high-tide features of Scarborough Shoal and of some of the Spratly Islands, namely Cuarteron Reef, Johnson Reef, Fiery Cross Reef, Gaven Reef (North), and McKennan Reef.[19]

II. "ONE OF THE FIRST MATTERS TO BE ADRESSED BUT DISTINCT" OR "DISTINCT BUT INSEPARABLE"? THE DISTINCTION BETWEEN ENTITLEMENT AND DELIMITATION

As the preceding section illustrates, the distinction between disputes of entitlement and disputes of delimitation was one central element of the Philippines' argument in the *South China Sea* Arbitration. China objected to the Tribunal's jurisdiction and does not accept the award,[20] but the award is nevertheless final and binding.[21] China's government and the CSIL rejected the separability of entitlement and delimitation, and the Tribunal's approach to the separability was also questioned by lawyers who were unrelated to a party to the dispute. Parlett noted that "[w]hether or not a dispute is caught by Part XV therefore depends not on its underlying substance or real object, but on how the issues are formulated. That arguably would come as a surprise to negotiating parties to the Convention."[22] Schoenbaum even called the Tribunal's circumvention of China's declaration under Article 298(1)(a)(i) "an ingenious, if suspect, interpretive flurry to eradicate this jurisdictional obstacle" and attributed a "vague perception of unfairness" to the Judgment.[23] In order to discuss the separability of entitlement and delimitation, the following will at first present the argumentations of the Tribunal and of China. It will then split a discussion of the two argumentations into two parts: first, the substantive distinction between entitlement and delimitation, and second, a discussion of the jurisdictional implication.

The Tribunal argued in its award on jurisdiction and admissibility that:

> [A] dispute concerning the existence of an entitlement to maritime zones is distinct from a dispute concerning the delimitation of those zones in an area where the entitlements of parties overlap. While fixing the extent of parties' entitlements and the area in which they overlap will commonly be one of the first matters to be addressed in the delimitation of a maritime boundary, it is nevertheless a distinct issue. A maritime boundary may be delimited only between States with opposite or adjacent coasts and overlapping entitlements. In contrast, a dispute over claimed entitlements may exist even without overlap,

Enclosed by Straight Baselines: An Excessive Claim?" (2018) 49 Ocean Development and International Law 176.

19. *South China Sea Arbitration (Merits)*, *supra* note 1 at 259–60, paras. 643–8.

20. "Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines", *Ministry of Foreign Affairs of the People's Republic of China* (12 July 2016), online: MFA <https://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1379492.htm>.

21. PHAN Hao Duy and NGUYEN Lan Ngoc, "The South China Sea Arbitration: Bindingness, Finality, and Compliance with UNCLOS Dispute Settlement Decisions" (2018) 8 Asian Journal of International Law 36.

22. Parlett, *supra* note 9 at 269–70.

23. Schoenbaum, *supra* note 6 at 459, 452.

https://doi.org/10.1017/S2044251320000235 Published online by Cambridge University Press

> where—for instance—a State claims maritime zones in an area understood by other States to form part of the high seas or the Area for the purposes of the Convention.[24]

In its award on the merits, the Tribunal further clarified that:

> [A] dispute over the source and existence of maritime entitlements does not "concern" sea boundary delimitation merely because the existence of overlapping entitlements is a necessary condition for delimitation. While all sea boundary delimitations will concern entitlements, the converse is not the case: all disputes over entitlements do not concern delimitation. Where, as here, a party denies the existence of an entitlement, a possible outcome may well be the absence of any overlap and any possibility of delimitation.[25]

In the Tribunal's view, fixing the extent of entitlements precedes delimitation. Only if entitlements overlap does the question of delimitation arise. Determining the existence of entitlements is a different subject matter in law than delimiting overlapping entitlements. Consequentially, the Tribunal has jurisdiction to determine entitlements, as the jurisdictional limitation under Article 298(1)(a)(i) does not exclude a determination of the existence of entitlements. Moreover, the Tribunal also held that it would address the question of entitlements

> [O]nly insofar as the two Parties' respective rights and obligations are not dependent on any maritime boundary or where no delimitation of a boundary would be necessary because the application of the Convention would not lead to any overlap of the two Parties' respective entitlements.[26]

The position paper of China on the Tribunal's jurisdiction, however, considered that a determination of maritime entitlements "would constitute an integral part of maritime delimitation" and that issues that "constitute an integral part of maritime delimitation" are excluded from compulsory arbitration by China's declaration under Article 298(1)(a)(i) of LOSC.[27] The same position paper stated that the objective of the Philippines in distinguishing between entitlement and delimitation is "to seek a recognition by the Arbitral Tribunal that the relevant areas are part of the Philippines' EEZ".[28] It concluded that the Philippine submission

> [I]s actually a request for maritime delimitation by the Arbitral Tribunal in disguise. The Philippines' claims have in effect covered the main aspects and steps in maritime delimitation. Should the Arbitral Tribunal address substantively the Philippines' claims, it would amount to a de facto maritime delimitation.[29]

A number of lawyers under the aegis of the CSIL rejected the jurisdictional distinction, and argued in a similar way that "the resolution of such claims, i.e. the determination of the status and maritime entitlements of a feature, constitutes the main component

24. *South China Sea Arbitration (Jurisdiction)*, *supra* note 8 at 61, para. 156.
25. *South China Sea Arbitration (Merits)*, *supra* note 1 at 85, para. 204.
26. *Ibid*. para. 6
27. Position Paper of the Government of China, *supra* note 4 at paras. 3, 67.
28. *Ibid*., at para. 69.
29. *Ibid*.

https://doi.org/10.1017/S2044251320000235 Published online by Cambridge University Press

of the delimitation, and even the delimitation itself".[30] Three further studies made similar arguments. Talmon reasoned that "[t]he establishment of maritime entitlements in areas of conflicting and overlapping claims … necessarily entails delimitation of maritime areas. The question of sea boundary delimitations runs like a red thread through the Philippines' Notification and Statement of Claim."[31] Whomersly contended that questions of entitlement and delimitation are "inextricably intertwined; from this, it must follow that to extract one of these elements is inappropriate".[32] Pemmaraju opined that a determination of maritime entitlements is "integrally linked to the issues of sovereignty and maritime delimitation, even if they are two separate parts of the same exercise", and should therefore be outside the jurisdiction of the Tribunal.[33]

A. *The Substantive Distinction Between Entitlement and Delimitation*

The report of the CSIL did not reject the substantive distinction between entitlement and delimitation per se. The CSIL referred to several cases that distinguished between entitlement and delimitation.[34] Further, the CSIL stated "[g]ranted, maritime entitlement and maritime delimitation are distinct concepts. However, they are inseparable where two States have overlapping claims for maritime entitlements, i.e. where there exists a delimitation situation between them."[35] Indeed, the International Court of Justice [ICJ] has distinguished repeatedly between issues of entitlement and delimitation.[36] The ICJ had already argued in the *North Sea Continental Shelf* case that

> [T]he notion of apportioning an as yet undelimited area, considered as a whole … is quite foreign to, and inconsistent with, the *basic concept of continental shelf entitlement, according to which the process of delimitation is essentially one of drawing a boundary line between areas which already appertain to one or other of the States* affected.[37]

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30. Chinese Society of International Law, *supra* note 5, at 266.
31. Stefan TALMON, "The South China Sea Arbitration: Is There a Case to Answer?" in Stefan TALMON and JIA Bing Bing, eds., *The South China Sea Arbitration: A Chinese Perspective* (Oxford: Hart Publishing, 2014), 15 at 57.
32. Chris WHOMERSLEY, "The South China Sea: The Award of the Tribunal in the Case Brought by Philippines against China—A Critique" (2016) 15 Chinese Journal of International Law 239 at 251.
33. Sreenivasa R. PEMMARAJU, "The South China Sea Arbitration (The Philippines v. China): Assessment of the Award on Jurisdiction and Admissibility" (2016) 15 Chinese Journal of International Law 265 at 306.
34. Chinese Society of International Law, *supra* note 5 at 265 (referring to the following cases and paragraphs: *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, 12 March 2012, [2012] ITLOS Case No. 16 at 117, para. 398; *Aegean Sea Continental Shelf Case (Greece v. Turkey)*, Judgment, 19 December 1978, [1978] I.C.J. Rep. 3 at 35, para. 83; *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, 3 June 1985, [1985] I.C.J. Rep. 13 at 29–30, para. 27).
35. Chinese Society of International Law, *supra* note 5 at 265.
36. *Maritime Delimitation in the Black Sea* (*Romania* v. *Ukraine*), Judgement, 3 February 2009, [2009] I.C.J. Rep. 61 at 89, 96–7, paras. 77, 99; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgement, 19 November 2012, [2012] I.C.J. Rep. 624 at 669–70, 683, 685–8, 695, paras. 129–32, 159, 163, 168–9, 190 [*Nicaragua v. Colombia*]; *Maritime Delimitation in the Area between Greenland and Jan Mayen* (*Denmark* v. *Norway*), Judgement, 14 June 1993, [1993] I.C.J. Rep. 38 at 64, para. 59.
37. *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, 20 February 1969, [1969] I.C.J. Rep. 3 at 22, para. 20 (emphasis added).

https://doi.org/10.1017/S2044251320000235 Published online by Cambridge University Press

The Tribunal's argumentation in the *South China Sea Arbitration* regarding China's entitlements could also be re-formulated using the language of the *North Sea Continental Shelf* case, namely that the Tribunal established that claimed maritime zones that exceed the rights under the LOSC cannot "already appertain" to China. And if some maritime zones do not already appertain to China, then the process of delimitation is not required for these maritime zones. And if the process of delimitation is not required, the jurisdictional exclusion of boundary disputes does not bar the Tribunal's jurisdiction on questions of the existence of entitlements. Furthermore, it is noteworthy that both the CSIL and lawyers representing the Philippines referred to two subsequent paragraphs of the *Bay of Bengal* case in order to defend their respective arguments. The CSIL referred to paragraph 398 of the *Bay of Bengal* case ("While entitlement and delimitation are two distinct concepts … they are interrelated").[38] Oxman referred to paragraph 397 of the same case during the hearing on jurisdiction ("Delimitation presupposes an area of overlapping entitlements").[39]

This section demonstrates that the substantive distinction between questions of entitlement and of delimitation is well established in the Law of the Sea and related jurisprudence. The concept of a state's entitlements to maritime zones predates the LOSC and has been applied after the LOSC entered into force. The relevant rules of the LOSC, especially Articles 57, 74, 76, and 83, can then be read as determining the maximum extent of the parties' EEZ and continental shelf entitlements. Moreover, the ICJ has considered that Articles 74, 83, and 121 of the LOSC form part of customary international law.[40] Against this background it is not surprising that the CSIL has accepted the substantive distinction between delimitation and entitlement because not doing so would deviate from fifty years of jurisprudence. The idea that the Tribunal's argumentation somehow "invented" the concept of entitlement to assess the compatibility of China's claims with the LOSC and to move around the jurisdictional exclusion of boundary delimitation is hence unfounded. The real bone of contention between the CSIL and other critics of the Tribunal is the jurisdictional implication of the distinction.

B. *The Jurisdictional Distinction Between Entitlement and Delimitation*

It might very well be the case that China made a declaration under Article 298(1)(a)(i) in the expectation that all questions that could have an impact on sea boundary delimitation would be excluded from compulsory jurisdiction. The question about the jurisdictional distinction, however, cannot be addressed with regard to states' political expectations, but requires addressing the following question. Could a tribunal establish jurisdiction on the existence of maritime entitlements when jurisdiction on delimitation is excluded and when a determination of entitlements has clear

38. Chinese Society of International Law, *supra* note 5 at 266–7.

39. *South China Sea Arbitration Day 2 Transcript*, *supra* note 2 at 44.

40. *Nicaragua v. Colombia*, *supra* note 36 at 673–4, paras. 137–9, and *Maritime Delimitation and Territorial Questions (Qatar v. Bahrain)*, Judgment, 16 March 2001, [2001] I.C.J. Rep. 40 at 91, paras. 167 *et seq*.

consequences for delimitation? One way to approach this question is to derive and crystalize the criteria that both the Tribunal and China relied on to defend their respective positions and to assess these criteria in the light of their concrete applicability and normative implications.[41]

The Tribunal acknowledged that the question of the existence of entitlements "will commonly be one of the first matters to be addressed in the delimitation of a maritime boundary", but insisted that this question "is nevertheless a distinct issue".[42] The Tribunal relied on the distinctiveness of the subject matters as a criterion to establish jurisdiction: determining the existence of a maritime entitlement is a different subject matter than delimiting a maritime boundary. The exception of Article 298(1)(a)(i) therefore does not apply to a determination of entitlements. The Tribunal accepted that there is a link between determining entitlements and delimiting a boundary, and specified the nature of the link: the "existence of overlapping entitlements is a necessary condition for delimitation."[43] The criterion of the distinctiveness of subject matters can be applied in a concrete way even as a general criterion. In cases where a basis for a tribunal's jurisdiction exists, a tribunal can establish its jurisdiction on issues unless these are specifically and explicitly excluded from its jurisdiction.

Although the report of the CSIL accepted the conceptual distinction between entitlements and boundary delimitation, the report rejected the Tribunal's conclusion about jurisdiction. The CSIL insisted that determinations of entitlements "have an important effect on delimitation and constitute part of their maritime delimitation dispute".[44] In this view, disputes of entitlement should be covered by the jurisdictional exceptions of Article 298(1)(a)(i) by virtue of the fact that a determination of entitlements has effects on a dispute that is covered by this exception. As the CSIL accepted the substantive distinction between entitlement and delimitation, the argument of "hav[ing] an important effect" and "constitut[ing] part of" could be understood as relying on the criterion of consequentiality to reject the Tribunal's jurisdiction: the jurisdictional exception of one subject matter that necessarily has inextricable consequences for a second subject matter should be implied by a jurisdictional exception of that second subject matter. The criterion of consequentiality of one subject matter for another subject matter would result in what may be called "implied jurisdictional exclusion", and hence in a much more restrictive scope of jurisdiction for third-party dispute settlement mechanisms. With regard to its concrete applicability, China's criterion of consequentiality has the difficulty that it does not specify when consequences are sufficiently consequential. It would need to specify under which conditions the consequences of a determination of one aspect are sufficiently inextricable, necessary,

41. This approach could be justified with reference to Koskenniemi's methodological remark: "The methodology of international law is best seen as being about criteria that legal arguments ought typically to fulfil in different contexts—including the academic context—in order to seem plausible. These criteria may be grouped into two: normativity and concreteness"; see Martti KOSKENNIEMI, "Methodology of International Law" *Max Planck Encyclopedias of International Law* (November 2007), online: MPIL <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1440> at 1.

42. *South China Sea Arbitration (Jurisdiction)*, *supra* note 8 at 61, para. 156.

43. *South China Sea Arbitration (Merits)*, *supra* note 1 at 85, para. 204.

44. Chinese Society of International Law, *supra* note 5 at 266.

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or integral for another aspect (that is excluded from jurisdiction) so as to result in a jurisdictional exclusion of that first aspect that is not specifically excluded from jurisdiction. Short of such a specification, a criterion of consequentiality could not be applied in a uniform way.

In defence of the position that the Tribunal should not have established jurisdiction, Talmon referred to the principle that tribunals can exercise jurisdiction only with a state's consent, and concludes that "[i]n case of doubt, such consent must be interpreted restrictively".[45] He noted that the jurisdiction of a tribunal "can be wider in cases of optional jurisdiction, ie jurisdiction established by agreement of the parties".[46] The opposing view is that reservations to jurisdiction of compulsory dispute settlement procedures must be read restrictively, because otherwise dispute settlement procedures would lose their purpose and meaning. If the jurisdictional exclusion of one aspect of a dispute were implied by the exclusion of a second aspect of a dispute, limitations to a dispute settlement procedure would expand greatly. A normative implication of China's criterion of consequentiality would be to result in a much more restrictive role of international tribunals or courts in the peaceful settlement of disputes. In this vein, the Tribunal referred to *United States Diplomatic and Consular Staff in Tehran* to support its jurisdiction based on the distinctiveness of subject matters. The Tribunal quoted the ICJ, which argued that there are no grounds to "decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important".[47] While the substantive link between different aspects of a dispute in *United States v. Iran* (violations of diplomatic law and "general grievances against the United States") is weak in comparison with the link between questions of entitlement and delimitation, the ICJ pronounced its view on this jurisdictional question in unequivocal language:

> Nor can any basis for such a view [to decline to resolve a legal question because it is only part of a dispute] of the Court's functions or jurisdiction be found in the Charter or the Statute of the Court; if the Court were, contrary to its settled jurisprudence, to adopt such a view, it would impose a far-reaching and unwarranted restriction upon the role of the Court in the peaceful solution of international disputes.[48]

This discussion suggests that the fact that a decision on one legal issue may have implications for another issue that is excluded from jurisdiction cannot be enough for a tribunal not to exercise jurisdiction when there is a basis for jurisdiction. Otherwise, the dispute settlement system of the LOSC would need to accept far-reaching restrictions, because various aspects of law of the sea disputes are related in one way or another. In the *South China Sea* Arbitration this argument is reinforced by the fact that, if an exclusion of determining entitlements were implied by the jurisdictional exclusion of delimitation, then that which precedes the process of delimitation as a matter of

45. Talmon, *supra* note 31 at 26.

46. *Ibid*., at 27.

47. *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, Judgment, 24 May 1980, [1980] I.C.J. Rep. 3 at 19–20, para. 36 [*United States v. Iran*], quoted by the Tribunal in *South China Sea Arbitration (Jurisdiction)*, *supra* note 8 at 59, para. 152.

48. *United States v. Iran*, *supra* note 47 at 20, para. 37.

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substantive law—the existence of entitlements—would be excluded from jurisdiction by virtue of the posterior issue being excluded.

Guilfoyle raised the question of the broader significance of the Tribunal's decision on jurisdictional limitations. He argued that what appears radical about the award of *South China Sea* Arbitration is a change in the historical assumptions about the scope of the dispute settlement system of the LOSC.[49] In contrast to the *Southern Bluefin Tuna* case that emphasized the exceptions of the dispute settlement system in Section 3 of Part XV, the *South China Sea* case exemplifies a comprehensive reading of the dispute settlement procedures with an emphasis on the protection of the integrity of the LOSC.[50] The discussion above illustrates that the ICJ applied the basic concept of entitlement to a maritime zone as opposed to the delimitation of overlapping entitlements already in the *North Sea Continental Shelf* case. Therefore, this substantive distinction does not reflect a re-prioritization of the dispute settlement system with regard to the integrity of the LOSC. It appears plausible, however, that the Tribunal's approach to the jurisdictional separability of issues of maritime entitlements from boundary delimitation in the *South China Sea* Arbitration reflects an attempt to protect the integrity of the LOSC. The Tribunal's justification for the jurisdictional separability, though, rests on the distinctiveness of subject matters and on the rejection of the idea that the jurisdictional exception of one aspect applies to another by virtue of two aspects being connected, even if this connection is close.

III. CONCLUSIONS

This discussion demonstrated that the substantive distinction between maritime entitlement and delimitation is well established in jurisprudence in the law of the sea. Even lawyers who opposed the Tribunal's jurisdiction accepted the substantive distinction. Criticism in the context of the *South China Sea* Arbitration is not directed against this distinction per se, but against its jurisdictional implication. The Tribunal acknowledged that there is a link between entitlement and delimitation, and it specified the nature of the link—the existence of entitlements is a necessary condition for the process of delimitation. The Tribunal can be said to have used the distinctiveness of subject matters as a criterion for the argument that disputes of entitlement are not covered by the jurisdictional exception of Article 298(1)(a)(i). China and a number of lawyers rejected this and brought forward a much more restrictive view on the dispute settlement procedures of the LOSC: the jurisdictional exception of one aspect of a dispute, namely the existence of entitlements, that has inextricable consequences for a second aspect of a dispute, namely sea boundary delimitation, should be implied by a jurisdictional exception of that second subject matter. Various aspects of maritime disputes and various elements of law of the sea issues are related as a matter of fact. Adopting the criterion of consequentiality would hence result in far-reaching

49. Douglas GUILFOYLE, "The South China Sea Award: How Should We Read the UN Convention on the Law of the Sea?" (2018) 8 Asian Journal of International Law 51.

50. *Ibid.*, at 56–9.

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restrictions on the scope of dispute settlement procedures—a result that both the *South China Sea* Arbitration and the ICJ have rejected. Finally, it remains to be seen whether other states will follow the Tribunal's reasoning and submit cases under Part XV. The Tribunal's reasoning about the separability of questions of entitlement and delimitation could potentially be applied to issues between Japan and Korea regarding Dokdo (Takeshima),[51] or to further disputes in the South China Sea.[52]

51. Seokwoo LEE and Leonardo BERNARD, "South China Sea Arbitration and its Application to Dokdo" (2018) 8 Asian Journal of International Law 24.

52. David HUTT, "Vietnam May Soon Sue China on South China Sea" *Asia Times* (7 May 2020), online: Asia Times <https://asiatimes.com/2020/05/vietnam-may-soon-sue-china-on-south-china-sea/>.

https://doi.org/10.1017/S2044251320000235 Published online by Cambridge University Press