

## BOOK REVIEW

*JUDGING THE LAW OF THE SEA: JUDICIAL CONTRIBUTIONS TO THE UN CONVENTION ON THE LAW OF THE SEA* BY NATALIE KLEIN AND KATE PARLETT (OXFORD UNIVERSITY PRESS, 2022) XL + 424 PAGES. PRICE GBP 95 (HARDBACK) ISBN 9780198853350

The *United Nations Convention on the Law of the Sea* ('*Convention*')<sup>1</sup> has been hailed as 'a constitution for the oceans'.<sup>2</sup> Although for law of the sea experts this may be a worn epithet, to a wider audience it brings home the fundamental importance of the *Convention* for ocean governance. Ambassador Tommy Koh actually introduced this qualification of the *Convention* in a question, namely whether with its conclusion in 1982, the international community had achieved the 'fundamental objective of producing a comprehensive constitution for the oceans which will stand the test of time'.<sup>3</sup> Perhaps not altogether unsurprisingly, Ambassador Koh answered his question in the affirmative.<sup>4</sup> In doing so, he listed eight reasons, one of those being that

[t]he world community's interest in the peaceful settlement of disputes and the prevention of use of force in the settlement of disputes between States have been advanced by the mandatory system of dispute settlement in the *Convention*.<sup>5</sup>

In the meantime, more than 40 years have passed since the adoption of the *Convention*, and its provisions started to figure in the judicial settlement of disputes even prior to its entry into force.<sup>6</sup> Although the case law under the *Convention* is limited as compared to some other international treaties, as Natalie Klein and Kate Parlett also note in *Judging the Law of the Sea: Judicial Contributions to the UN Convention on the Law of the Sea* ('*Judging the Law of the Sea*'),<sup>7</sup> their analysis attests to the fact that there is ample material to test

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<sup>1</sup> *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) ('*Convention*').

<sup>2</sup> The phrase was first coined by Ambassador Tommy Koh, President of the third United Nations Conference on the Law of the Sea, which adopted the *Convention*: Tommy TB Koh, "A Constitution for the Oceans": Remarks by Tommy TB Koh, of Singapore, President of the Third United Nations Conference on the Law of the Sea' in *The Law of the Sea: Official Text of the United Nations Convention on the Law of the Sea* (St Martin's Press, 1983) xxxiii, xxxiii <[https://www.un.org/Depts/los/convention\\_agreements/texts/koh\\_english.pdf](https://www.un.org/Depts/los/convention_agreements/texts/koh_english.pdf)>, archived at <<https://perma.cc/4APK-64TP>>.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> In *Continental Shelf (Tunisia v Libyan Arab Jamahiriya)*, the parties had requested the International Court of Justice to take its decision according to, among others, 'new accepted trends in the Third Conference on the Law of the Sea': *Continental Shelf (Tunisia v Libyan Arab Jamahiriya) (Judgment)* [1982] ICJ Rep 18, 29. In doing so, the Court took into account arts 76 and 83 of the draft *Convention*, which also are included in the *Convention* as adopted: at 48 [47].

<sup>7</sup> Natalie Klein and Kate Parlett, *Judging the Law of the Sea: Judicial Contributions to the UN Convention on the Law of the Sea* (Oxford University Press, 2022) 380.

Ambassador Koh's assertion about the *Convention's* system of compulsory dispute settlement.

Achieving the acceptance of compulsory dispute settlement as a feature of the *Convention* was the result of a hard-fought compromise, which is included in pt XV of the *Convention*. Section 1 of pt XV, containing general provisions on dispute settlement, comprises procedural limitations and exclusions to the recourse to compulsory disputes settlement.<sup>8</sup> For instance, art 283(1) contains an obligation to exchange views '[w]hen a dispute arises between States Parties concerning the interpretation or application of [the] *Convention*'.<sup>9</sup> Articles 281 and 282 both, in different ways, limit the recourse to compulsory dispute settlement under the *Convention* where the parties have agreed on other means of dispute settlement.<sup>10</sup> Section 2 of pt XV allows states parties to unilaterally submit any dispute concerning the interpretation or application of the *Convention* to judicial settlement, provided that no settlement has been reached under s 1 and subject to pt XV s 3.<sup>11</sup> The latter section through art 297 contains a number of limitations to s 2 that have to do with the exercise of sovereign rights and jurisdiction by coastal states. Article 298 of s 3 allows states parties to except a number of specific issues from compulsory dispute settlement.<sup>12</sup> This set-up of pt XV has implied that the case law under the *Convention*, apart from dealing with substantive issues, in significant part has been concerned with the implications of ss 1 and 3 for the jurisdiction of courts and tribunals under s 2 of pt XV.

As Klein and Parlett indicate in their final concluding remarks, *Judging the Law of the Sea* '[i]n some respects ... provides simply a snapshot of the current state of [the *Convention's*] jurisprudence'.<sup>13</sup> In some respects, this may be somewhat of an understatement. *Judging the Law of the Sea* provides a quite detailed overview of all aspects of that jurisprudence. Obviously, in providing a comprehensive overview it is not possible to do justice to all intricacies of the individual case and all viewpoints that have been advanced in the literature. However, if one wants to put a label on *Judging the Law of the Sea*, referring to it as providing a 'tour d'horizon' does more justice than a 'snapshot'. The latter term refers to 'a casual photograph' or 'an impression or view of something brief or transitory'.<sup>14</sup> On the other hand, a tour d'horizon has been described as a 'circuit of the horizon: general survey'.<sup>15</sup> *Judging the Law of the Sea* does exactly that; it does not simply record the current status of the jurisprudence, but assesses how that jurisprudence on different issues has developed over time, identifying commonalities and divergencies.

*Judging the Law of the Sea* starts its tour d'horizon of the case law under the *Convention* in Chapter 1, with a general introduction to the *Convention*, its dispute settlement procedures and reflections on the role of dispute settlement under the *Convention*. This introductory chapter is exemplary of the approach of its authors.

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<sup>8</sup> *Convention* (n 1) pt XV s 1.

<sup>9</sup> *Ibid* art 283(1).

<sup>10</sup> *Ibid* arts 281, 282.

<sup>11</sup> See *ibid* pt XV ss 2, 3.

<sup>12</sup> *Ibid* art 298.

<sup>13</sup> Klein and Parlett (n 7) 380.

<sup>14</sup> *Merriam-Webster Dictionary* (online at 27 September 2023) 'snapshot'.

<sup>15</sup> *Merriam-Webster Dictionary* (online at 27 September 2023) 'tour d'horizon'.

Although *Judging the Law of the Sea* deals with complex and specialised issues, its methodical approach makes the book accessible to a broad audience interested in the wider issue of the role of dispute settlement mechanisms in international law and international relations.<sup>16</sup> Admittedly, having been involved in dealing with the law of the sea for some time, this reviewer may not be the best person to make a final call in that respect.

The remainder of *Judging the Law of the Sea* is set up as follows. Chapter 2 reviews the roles of judges in international law generally and under the *Convention*. Chapters 3 and 4 explore the issues of jurisdiction that have arisen in cases that have been brought under the *Convention*. Apart from questions concerning the impact of ss 1 and 3 of pt XV on the availability of compulsory dispute settlement under its section 2, this also concerns subject matter jurisdiction. As was noted above, courts and tribunals under s 2 are competent to deal with disputes concerning the interpretation and application of the *Convention*. At the same time, art 293(1) contains an applicable law provision that requires courts and tribunals to also apply ‘other rules of international law not incompatible with [the] *Convention*’.<sup>17</sup> As is detailed in Chapter 4 of *Judging the Law of the Sea*, the case law has advanced different approaches to the implications of this provision and the related issue as to whether courts and tribunals under the *Convention* have jurisdiction to decide on matters that are not concerned with the interpretation or application of the *Convention*, without which a dispute under the *Convention* cannot be (fully) resolved.

Chapters 5 to 9 of *Judging the Law of the Sea* deal with a number of substantive issue areas that have been addressed by the judiciary under the *Convention*. This concerns respectively different aspects concerning the limits of maritime zones (Chapter 5), bilateral boundary delimitation (Chapter 6), navigation (Chapter 7), fisheries (Chapter 8) and the marine environment (Chapter 9). Chapter 10 presents key findings about dispute settlement under the *Convention* and revisits the role of the judge as discussed in Chapter 2 and further developed in relation to the *Convention* by analysing the case law in Chapters 3 to 9. Going into detail into the content of each of these individual chapters would not fit the length of the current review, but a number of general remarks are in place. In line with the earlier observation concerning the accessibility of *Judging the Law of the Sea*, it may be noted that each chapter succinctly explains the provisions of the *Convention* that are being discussed in the chapter at hand. The chapters not only discuss the majority decisions, but also consider the impact of individual opinions to those decisions. In this analysis, the authors also engage with the assessments of the case law that have been made in the academic literature. Although Chapters 3 to 9 have a common format, the elaboration is not completely even across the board. For instance, Chapter 6 on maritime boundary delimitation, much more than other chapters, provides a somewhat long-winding discussion of the individual cases. The conclusion of Chapter 6, that ‘[t]he consistency of the case law is notable’,<sup>18</sup>

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<sup>16</sup> Perhaps one minor point of criticism in this respect is the extensive and integral quotations of specific articles of the *Convention*. This concerns among others page-long or longer quotations of arts 61, 62, 111 and 194: *ibid* 292–3, 309–10 and 344–5. It remains somewhat unclear what function the full quotation of these articles has in light of the discussion in which they are placed.

<sup>17</sup> *Convention* (n 1) art 293(1).

<sup>18</sup> Klein and Parlett (n 7) 258.

perhaps also is somewhat questionable. In that respect, the authors mostly seem to rely on the analysis of Massimo Lando in his book *Maritime Delimitation as Judicial Process*.<sup>19</sup> However, other literature argues that although the case law has adopted a common approach to maritime delimitation, in its application that approach is riddled with inconsistencies.<sup>20</sup>

Another example where, in this reviewer's opinion, a more nuanced approach would have been welcome, particularly so in light of the highly sensitive nature of the case involved, the *South China Sea* arbitration between the Philippines and China, is the discussion of art 298(1)(a) of the *Convention* in Chapter 4 on subject matter jurisdiction. As was also mentioned above, art 298 allows states to opt out from compulsory dispute settlement for specific issues. Paragraph 1(a) allows a state to do so in relation to 'disputes concerning the interpretation or application of articles 15, 74 and 83'.<sup>21</sup> Klein and Parlett take the arbitral tribunal in *South China Sea* to task for separating the issue of entitlements to maritime zones of land features from the issue of maritime boundary delimitation,<sup>22</sup> which implied that China's art 298 declaration did not prevent the Tribunal from interpreting and applying art 121 of the *Convention*, which deals with the regime of islands. Klein and Parlett hold that '[a] better view is that something that will "commonly be one of the first matters to be addressed in the delimitation of a maritime boundary" should be excluded from jurisdiction under Article 298'.<sup>23</sup> But that completely misconstrues the issue. Indeed, for a delimitation to be possible, there have to be overlapping entitlements. However, the determination of the existence of an entitlement to maritime zones is a matter of applying other provisions of the *Convention* that are in no way intrinsically linked to arts 15, 74 and 83.<sup>24</sup> A dispute over the entitlement of a feature to maritime zones may also be submitted to a court or tribunal without subsequently asking that court or tribunal to delimit a maritime boundary.<sup>25</sup> Klein and Parlett further argue that the Tribunal recognised

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<sup>19</sup> Ibid 242–3.

<sup>20</sup> See, eg, Alex G Oude Elferink, Tore Henriksen and Signe Veierud Busch (eds), *Maritime Delimitation: The Case Law* (Cambridge University Press, 2018).

<sup>21</sup> *Convention* (n 1) art 298(1)(a).

<sup>22</sup> Klein and Parlett (n 7) 124–5.

<sup>23</sup> Ibid 124.

<sup>24</sup> See *Convention* (n 1) arts 3, 4, 57, 76, which deal with the breadth and determination of the territorial sea, exclusive economic zone and continental shelf. See also at art 121, which deals with the regime of islands. The interpretation and application of these provisions do not require recourse to art 15, 74 and 83. Only after the application of arts 3, 4, 57, 76 and 121 will it become apparent whether or not there is an overlap between the maritime zones of two or more coastal states which requires their delimitation.

<sup>25</sup> 'A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this *Convention* which is submitted to it in accordance with [Part XV]': ibid art 288(1). Article 298 creates an optional exception to this jurisdiction for, among others, 'disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations': at art 298(1)(a)(i). It may be noted that this exception does not include a reference to arts 3, 4, 57, 76 or 121 of the *Convention*.

the interconnectedness between entitlement and delimitation in its decision on jurisdiction.<sup>26</sup> However, as they also recognise, the Tribunal was only indicating that to deal with certain claims of the Philippines, it had to determine whether or not China might have an entitlement to specific maritime areas or not.<sup>27</sup> This required an interpretation of art 121 of the *Convention*. In the case of a negative answer to this question of entitlements, the issue of maritime boundary delimitation and the application of arts 74 and 83 would not arise, as there would not be any overlapping entitlements of continental shelf and exclusive economic zone in the area concerned. Klein and Parlett conclude their argument on this point by observing that the decision of the Tribunal

begs the question as to what other parts of the maritime delimitation process will be segregated in the same manner. Could we arrive at the point that the ‘delimitation’ is considered to be the actual drawing of the line and a court or tribunal may otherwise undertake all steps leading up to that point, including the articulation of the principles to be utilised in the delimitation as occurred in the *North Sea Continental Shelf Cases*?<sup>28</sup>

Perhaps this question most of all begs the question: Why pose it? Why the hyperbole? There is nothing in the reasoning of the Tribunal in the *South China Sea* arbitration that even hints at the idea that a court or tribunal could take the approach that is suggested by Klein and Parlett where one of the parties has excepted arts 15, 74 and 83 from compulsory dispute settlement in accordance with art 298(1)(a) of the *Convention*.<sup>29</sup>

Apart from systematically analysing the case law under the *Convention*, *Judging the Law of the Sea* also has a broader ambition, namely assessing how judges ‘have contributed to the good order of the oceans in resolving the immediate dispute and have potentially contributed to the future conduct of a larger set of stakeholders’.<sup>30</sup> The parameters for making this assessment are set out in Chapter 2 of *Judging the Law of the Sea*, which identifies the different roles of judges in performing their functions<sup>31</sup> and then asks the question what the roles of judges should be in the broader framework of dispute settlement under the *Convention* in general.<sup>32</sup> Klein and Parlett identify two possible ways of looking at the role of dispute settlement: the Westphalian model, which ‘stresses State sovereignty and emphasises restrictions on compulsory dispute settlement under

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Perhaps the most telling illustration of the relationship between the two sets of provisions is provided by art 121(3) of the *Convention*. Where a dispute over the interpretation and application of that provision in relation to a specific feature is submitted to a court or tribunal and it is found that a feature falls under the scope of application of that paragraph, the question of the delimitation of the exclusive economic zone and continental shelf with other states does not even arise. In other cases where a court or tribunal has interpreted arts 3, 4, 57, 76 and 121 of the *Convention* and there is a resulting overlap of maritime zones, delimitation would be required. A court or tribunal would only not have jurisdiction to deal with that matter if one of the states concerned has made a pertinent declaration under art 298 of the *Convention*.

<sup>26</sup> Klein and Parlett (n 7) 124–5.

<sup>27</sup> See *ibid.*

<sup>28</sup> *Ibid.* 125.

<sup>29</sup> See *South China Sea Arbitration (Philippines v China) (Award on Jurisdiction and Admissibility)* (Permanent Court of Arbitration, Case No 2013-19, 29 October 2015).

<sup>30</sup> Klein and Parlett (n 7) 380.

<sup>31</sup> *Ibid.* 22–36.

<sup>32</sup> *Ibid.* 36.

[the *Convention*]; and an objectivist approach, which accords ‘greater emphasis ... to dispute settlement under [the *Convention*] as integral to the international legal order established in the *Convention*’.<sup>33</sup> Although *Judging the Law of the Sea* recognises the significance of the latter approach, it is also cognisant of the lasting importance of the Westphalian model for states. Next, the authors offer two specific frameworks for assessing the performance of judges under the *Convention*. First, they indicate they will apply stakeholder identification theory.<sup>34</sup> In applying this theory, which ‘seeks to answer the question of who and what counts for managers in their decisions’, they equate judges to managers.<sup>35</sup> At the same time, it is argued that in order to assess the contribution of the judiciary to the development of the law of the sea ‘we need to consider to what extent the decisions are contributing to the overall good order of the oceans’.<sup>36</sup> These are interesting perspectives for assessing the case law, although the question of how the interest of stakeholders and the overall good order of the ocean correlate is not clearly answered. The law of the sea offers clear examples where the interests of stakeholders and the overall good order of the ocean are not aligned. Similarly, what is implied in the concept of ‘good order of the ocean’ remains somewhat nebulous.

Perhaps not altogether surprisingly, in light of the complexity of the matter, *Judging the Law of the Sea* does not really deliver on the promise implied in its reliance on stakeholder identification theory. Assessments are broad in nature and it is unclear how the reliance on stakeholder identification theory actually contributes to greater analytical depth. A typical example in this respect is contained in the conclusion of Chapter 8 dealing with fisheries, which observes:

Such elaboration [of the *Convention*] should, though, still pay close attention to the other legal regimes that have bearing on this activity and how best to meet the interests of key stakeholders. A close assessment of the interests of coastal States and the rights and responsibilities of flag States, as was undertaken in the *SRFC Advisory Opinion* and the *South China Sea* arbitration, will remain critical in contributing to the future conduct of all stakeholders in the public order of the oceans.<sup>37</sup>

On balance Klein and Parlett assess the contribution of the case law to the good order of the oceans positively. While they stress the likelihood that this will continue to be the case on the basis of their analysis, at the same time they caution on putting too much emphasis on the significance of compulsory dispute settlement and instead argue that it is complementary to other modes of dispute settlement.<sup>38</sup> In that sense, *Judging the Law of the Sea* confirms Ambassador Koh’s assessment on the significance of compulsory dispute settlement under the *Convention* as advancing ‘[t]he world community’s interest in the peaceful

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<sup>33</sup> Ibid 36–7.

<sup>34</sup> Ibid 37, citing Natalie Klein, ‘Stakeholders in Dispute Settlement under the UN Convention on the Law of the Sea’ in Marta Chantal Ribeiro, Fernando Loureiro Bastos and Tore Henrikson (eds), *Global Challenges and the Law of the Sea* (Springer, 2020) 239, 245–8.

<sup>35</sup> Klein and Parlett (n 7) 37.

<sup>36</sup> Ibid 39.

<sup>37</sup> Ibid 338.

<sup>38</sup> Ibid 380–1.

settlement of disputes and the prevention of use of force in the settlement of disputes between States',<sup>39</sup> which was quoted at the outset of this review.

*Judging the Law of the Sea* offers a well-informed overview of the case law under the *Convention* to date. It is somewhat less convincing in its application of stakeholder identification theory to assess that case law. That exercise may require a much more detailed analysis of individual cases, which is beyond the scope of a book such as the present one.

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<sup>39</sup> Koh (n 2) xxxiii.

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