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THE BELT AND ROAD INITIATIVE AND THE POTENTIAL FOR DISPUTE SETTLEMENT UNDER THE UN CONVENTION ON THE LAW OF THE SEA

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The Belt and Road Initiative and the Potential for Dispute Settlement under the UN Convention on the Law of the Sea

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Abstract: This chapter explores the potential use of the dispute settlement regime in the UN Convention on the Law of the Sea (UNCLOS) in relation to certain aspects of the Belt and Road Initiative. The maritime aspects of the BRI predominantly entail developing ports and ensuring unimpeded access along key trade routes identified through maritime regions of Southeast Asia, South Asia, the Middle East, East Africa and the Mediterranean. The Chapter first provides an overview of the UNCLOS dispute settlement procedures and then considers their application in relation to possible disputes relating to three subjects that may arise pursuant to the BRI: ports, navigation and military activities. The Chapter concludes in observing that there is undoubtedly an important role for judges or arbitrators to play in ensuring that the implementation of the BRI remains consistent with the rights and obligations agreed under UNCLOS.

Key Words: Belt and Road Initiative, UN Convention on the Law of the Sea, international dispute settlement, ports, navigation, military activities

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1. Introduction

The strategy of the Belt and Road Initiative (BRI) entails a vast re-imagining of trade routes and trade linkages between China and countries across Asia to the borders of the European Union. It has been described as 'creat[ing] the world's largest platform for economic cooperation, including policy coordination, trade and financing collaboration, and social and cultural cooperation'.[1] As the foreign policy and economic strategy of one of the world's great powers, the significance of this initiative cannot be easily dismissed.[2] As one commentator has noted:

* Professor, UNSW Faculty of Law, UNSW Sydney. [Parts of this chapter draw on Natalie Klein, *Maritime Security and the Law of the Sea* (OUP, 2011)].

[1] Tian Jinchen, '"One Belt and One Road": Connecting China and the world', *McKinsey Report*, July 2016, available at: http://www.mckinsey.com/industries/capital-projects-and-infrastructure/our-insights/one-belt-and-one-road-connecting-china-and-the-world.

[2] 'The Belt and Road project is undoubtedly the most important international project that China has embarked on in the last few decades.' European Parliament Directorate-General for External Policies, Policy Department, 'Challenges to freedom of the seas and maritime rivalry in Asia', 14 March 2017, available at http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/578014/EXPO_IDA(2017)578014_EN.pdf [hereinafter European Parliament]. As the economic belt could encompass three billion people, it would constitute the biggest trade market globally. Ibid, 10.

> The result will be to channel Eurasian economic transactions toward China to deepen interdependence between individual countries of Eurasia on the one hand, and the massive Chinese economy on the other. This economic interdependence will give China superior leverage over any other Eurasian country in a one-on-one negotiation, and will give China a leadership position in any Eurasian multilateral economic policy setting.[3]

The BRI comprises of land and maritime dimensions, with the 21st Century Maritime Silk Road reflecting the maritime initiative. A 2015 policy document, 'Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road, reflects the implementation of the BRI and describes the purpose of the maritime component as achieving 'interconnection and intercommunication' between countries that are along this Maritime Silk Road.[4]

The maritime aspects of the BRI predominantly entail developing ports and ensuring unimpeded access along key trade routes identified through maritime regions of Southeast Asia, South Asia, the Middle East, East Africa and the Mediterranean. While the initial focus is on Southeast Asia, trade routes are also to be developed across the Indian Ocean to the Persian Gulf and East Africa, as well as through the Red Sea into the Mediterranean.[5] A sea route is also envisaged into the South Pacific.[6] Concerns may arise about how navigational and port access rights will be enforced in the future.[7] Further questions may also arise as to the extent that commercial interests and economic development also further military and strategic goals in the maritime arena (and beyond).

To the extent that conflict between states may arise in light of the BRI strategy, it is worth considering what options may exist to resolve those disputes peacefully. Some disputes will be focused on trade and may be referred to the World Trade Organisation regime,[8] others may relate to investors who have protection under bilateral investment treaties or regional trade agreements, or other treaty relationships may be implicated. Some disputes may be commercial in nature and engage the terms of particular contracts, which will be resolved through commercial arbitration or in national courts. For disputes relating to the maritime dimensions of the BRI, the UN Convention on the Law of the Sea (UNCLOS) may further provide a mechanism for states to resolve disputes.[9]

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[3] David Arase, 'China's Two Silk Road Initiatives: What it Means for Southeast Asia' (2015) *South East Asian Affairs* 25, 33.

[4] Cited in Guobin Zhang and Yu Long, 'Connectivity and International Law in the 21st Century Maritime Silk Road' in Maximilian Meyer (ed) *Rethinking the Silk Road and Emerging Eurasian Relations* (Springer Singapore, 2018) 57, 57-58.

[5] Arase, above n 3, 35.

[6] Chen Jia, '"Belt and Road" Takes New Route', 15 April 2015, *China Daily*, available at http://www.chinadaily.com.cn/bizchina/2015-04/15/content_20435585.htm

[7] Arase has noted, 'The difference in economic scale between China and its neighbours means that deepening economic interdependence gives China more bilateral leverage, and military superiority gives China additional leverage'. Arase, above n 3, 32-33.

[8] Under the 1994 Dispute Settlement Understanding. Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2, World Trade Organisation Agreement, 1869 UNTS 401; 33 ILM 1226 (1994).

[9] United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) [hereinafter UNCLOS]

Every state that becomes a party to UNCLOS, as nearly 170 states have done,[10] agrees to be bound by the rights and obligations enshrined in that treaty and to the possibility of disputes relating to those rights and obligations being referred to arbitration or adjudication. UNCLOS is similar in this regard to the World Trade Organisation dispute settlement regime, but has been used much less frequently. Nonetheless, there is clear potential for states to invoke this dispute settlement regime, especially in situations where a poorer or less powerful state is seeking ways to recalibrate the dynamics of the dispute to enhance their position.

This chapter therefore explores the potential use of the UNCLOS dispute settlement regime in relation to certain aspects of the BRI. The importance of this dimension has been recognised in the following terms:

> According to most Chinese scholars' view, in the process of converting ideas into action, [the Maritime Silk Road] needs to be guided, promoted, and safeguarded by international law. IN trun, some argue that to eventually build the [Maritime Silk Road] greatly depends on the ability of China to shape, formulate, and implement cooperation based on international law. Therefore, China should carefully study the international law relevant to [the Maritime Silk Road] in order to resove the actual challenges of "maritime connectivity".[11]

In light of the relevance of international law to China and the opportunities and obstacles presented by its dispute settlement mechanism, this Chapter proceeds as follows. It first provides an overview of the UNCLOS dispute settlement procedures and then considers their application in relation to possible disputes relating to three subjects that may arise pursuant to the BRI: ports, navigation and military activities.

The Chapter concludes in observing that there is undoubtedly an important role for judges or arbitrators to play in ensuring that the implementation of the BRI remains consistent with the rights and obligations agreed under UNCLOS. How successfully this role will be played will ultimately depend on the precise details of any dispute and the final decisions of a particular court or tribunal, including the enforcement of those decisions. Courts or tribunals will likely see themselves as having a critical position in ensuring that the balance of interests agreed in UNCLOS is not jeopardised by the national strategies or priorities of any one state party.

2. Overview of UNCLOS Dispute Settlement

Part XV of UNCLOS is divided into three Sections that operationalise dispute settlement processes for controversies that may arise in relation to the rights and obligations owed under that treaty. At the outset, it is important to note that the UNCLOS dispute settlement regime is not available for each and every maritime dispute. Instead, the regime is designed for legal disputes relating to the interpretation or application of provisions of UNCLOS.[12] Although the jurisdictional scope has been challenged in different decisions,[13] the UNCLOS dispute

[10] See 'Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements', last updated 6 November 2017, available at http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm

[11] Zhang and Long, above n 4, 58.

[12] UNCLOS, Art 288. A point emphasised in *M/V Louisa*. The M/V 'Louisa' Case (Saint Vincent and the Grenadines v. Kingdom of Spain), ITLOS Case No. 18, Judgment of 28 May 2013, para. 99 and para. 151.

[13] See, eg, The South China Sea Arbitration (Philippines v China), Award on Jurisdiction and Admissibility, Oct. 25, 2015, PCA Case No. 2013-19, https://www.pcacases.com/web/view/7; Chagos Marine Protected Area

settlement regime will not necessarily be available for all differences of opinions that may arise in the implementation of the BRI. This section of the paper provides an overview of the dispute settlement procedure, indicating its limitations, before turning to a more detailed discussion on the potential resolution of disputes relating to specific aspects of BRI in the following sections.

Section 1 of Part XV sets out initial requirements to resolve any disputes that may arise in relation to the interpretation or application of UNCLOS. Consistent with the UN Charter,[14] states are to seek peaceful means for the resolution of their disputes and may engage in a diversity of dispute settlement methods, ranging from negotiation, mediation, and conciliation through to arbitration or adjudication.[15] States are allowed to choose their own means to resolve disputes,[16] and in some instances, another dispute settlement process may prevail over those available under UNCLOS.[17] States are required to proceed to an exchange of views as to the means of dispute settlement in accordance with Article 283 of UNCLOS.[18]

In relation to a dispute settlement procedure prevailing over that in UNCLOS, Article 281 of UNCLOS anticipates that if states have agreed in another treaty to a method of dispute settlement, that process must be used unless no settlement is reached and the agreement does not exclude any further dispute settlement procedure. The other agreement must be a legally binding agreement,[19] but tribunals have differed as to whether UNCLOS dispute settlement procedures must be explicitly excluded or whether such an exclusion may be implied.[20] States rarely exclude UNCLOS dispute settlement in express terms in their treaties that also address other ocean affairs and if such a benchmark is maintained, it is unlikely that Article 281 will prevent recourse to UNCLOS compulsory procedures even where other dispute settlement methods may have been available under an alternative ocean-related treaty.[21] Article 282 similarly prioritises dispute settlement procedures that produce binding results under a general, regional or bilateral agreement or otherwise over the UNCLOS dispute settlement mechanism.[22]

Arbitration (Mauritius v United Kingdom), Award of 18 March 2015, PCA Case No. 2011-03, https://www.pcacases.com/web/view/11 (hereinafter Chagos Archipelago). For discussion, see Natalie Klein, 'The Vicissitudes of Dispute Settlement under the Law of the Sea Convention' (2017) 32 *International Journal of Marine and Coastal Law* 332; Kate Parlett, 'Beyond the Four Corners of the Convention: Expanding the Scope of Jurisdiction of Law of the Sea Tribunals' (2017) *Ocean Development and International Law* 1, available at http://dx.doi.org/10.1080/00908320.2017.1327289.

[14] UN Charter, Art 2(3).

[15] UN Charter, Art 33 and UNCLOS, Art 279.

[16] UNCLOS, Art 280.

[17] UNCLOS, Art 281 and Art 282.

[18] The parameters of Article 283 were discussed in *Chagos Archipelago*. See Chagos Archipelago, paras 378-385.

[19] *A Conciliation Commission Constituted under Annex V to the 1982 United Nations Convention on the Law of the Sea between the Democratic Republic of Timor-Leste and the Commonwealth of Australia (Timor-Leste v. Australia), Decision on Australia's Objections to Competence*, 19 September 2016, available at http://www.pcacases.com/web/sendAttach/1921, para. 56.

[20] Contrasting views on this position may be seen in *Southern Bluefin Tuna* and the *South China Sea* arbitrations. See discussion in Klein, 'Vicissitudes', above n 13, 336-338.

[21] See ibid, 339-340.

[22] In *Somalia v Kenya*, both states were parties to UNCLOS but proceedings were instituted before the ICJ based on their mutual acceptance of compulsory jurisdiction under Article 36(2) of the Court's Statute. This situation prompted consideration of the role of Article 282 of UNCLOS and which dispute settlement procedure would prevail. The ICJ emphasized that Article 282 applied to the alternative dispute settlement procedures applying *in lieu* of the UNCLOS procedures. Moreover, acceptances of the Court's jurisdiction under Article 36(2) of its Statute still apply in lieu of compulsory procedures under UNCLOS where those acceptances include

Once states in dispute have exchanged views in accordance with Article 283 and there is no alternative dispute settlement option available under Articles 281 or 282, state parties may refer the dispute to any court or tribunal having jurisdiction under UNCLOS.[23] As to which court or tribunal may have jurisdiction, state parties to UNCLOS have an option of choosing between the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS), an ad hoc arbitral tribunal constituted under Annex VII or a special arbitral tribunal constituted under Annex VIII to focus on fisheries, marine environment, marine scientific research or navigation.[24] States are able to declare their preferred forum when becoming parties to UNCLOS or at any time thereafter. If a state party fails to make a declaration, or states select different fora, arbitration under Annex VII is deemed the preferred option.[25] To date, no state has resorted to a special arbitral tribunal under Annex VIII for resolution of a dispute under UNCLOS nor referred a dispute to the ICJ on the basis of the UNCLOS compromissory clause. Any law of the sea dispute is thus most liked to be resolved by ITLOS or ad hoc arbitration if referred to compulsory procedures entailing binding decisions.

When a state institutes compulsory proceedings under UNCLOS, it has the option of seeking an order of provisional measures. Such measures may be needed for urgent matters where the state's rights may be irreparably prejudiced or serious harm to the marine environment may be caused prior to the rendering of a final award.[26] If a state is concerned that the institution of proceedings are an abuse of legal process or that *prima facie* the case is not well-founded, a preliminary proceeding may occur to determine such a claim.[27] Such an option is only available in relation to disputes that concern those listed under Article 297 of UNCLOS.

Article 297 of UNCLOS identifies the disputes that may be submitted to arbitration or adjudication in relation to the coastal state's exercise of sovereign rights or jurisdiction recognised under UNCLOS. Most particularly, Article 297 identifies when compulsory procedures entailing binding decisions are not available, and thereby reflects a limitation on what disputes may be referred to arbitration or adjudication.[28] Similarly, Article 298 sets out disputes that states may optionally exclude from arbitration or adjudication by declaration either at the time of becoming a party to UNCLOS or anytime thereafter.[29] The possible exclusions under Article 298 concern disputes relating to the delimitation of maritime boundaries under Articles 15, 74 or 83 of UNCLOS, or involving historic bays or titles;[30] disputes concerning military activities as well as certain law enforcement activities over fishing

reservations comparable to those of Kenya's in the case before it. See *Maritime Delimitation in the Indian Ocean* (Somalia v. Kenya), Preliminary Objections (2017) ICJ Reports, Judgment of 2 February 2017, paras 125-130.

[23] UNCLOS, Art 286.

[24] UNCLOS, Art 287.

[25] UNCLOS, Art 287(3) and (5).

[26] UNCLOS, Art 290(1). Under Article 290(5), ITLOS may make an order on provisional measures pending the constitution of an ad hoc arbitral tribunal depending on the urgency of the matter.

[27] UNCLOS, Art 294.

[28] *Chagos Archipelago* discusses that it limits disputes and leaves all others in as a 'jurisdiction-affirming' provision. Chagos Archipelago, paras 308-317. See also Stefan Talmon, 'The Chagos Marine Protected Area Arbitration: Expansion of the Jurisdiction of UNCLOS Part XV Courts and Tribunals' (2016) 65 *International and Comparative Law Quarterly* 927, 942-943; Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* 141-142.

[29] UNCLOS, Art 298.

[30] UNCLOS, Art 298(1)(a).

and marine scientific research in the EEZ;[31] and, disputes over which the Security Council is exercising its functions.[32]

The UNCLOS dispute settlement regime thus provides a certain amount of deference to the preferences of the parties in selecting means for resolving differences concerning the interpretation or application of UNCLOS. The parties have choices as to what form of dispute settlement to use, as to which court or tribunal is preferred and as to whether to exclude certain categories of disputes. Where there is a lack of choice is in the event that a state institutes compulsory procedures over a matter that falls within the subject matter jurisdiction of a court or tribunal constituted under UNCLOS. A state is fully entitled to challenge the jurisdiction of any court or tribunal resolving a dispute under UNCLOS, but it is that court or tribunal that has the authority to resolve those questions relating to its jurisdiction and any such decision will be final and binding on the parties.[33]

It is in this context, where a state party may institute compulsory arbitration or adjudication under UNCLOS, that it is important to examine dispute settlement in relation to aspects of the BRI. If a state party considers that the implementation of BRI impinges on rights granted under UNCLOS, that state party may ultimately seek to resolve the dispute through arbitration or adjudication. Such a case will proceed to a decision on the merits if it falls within the jurisdiction of the court or tribunal constituted under UNCLOS. The following sections examine what particular disputes might arise under the BRI that will also constitute disputes relating to the interpretation or application of UNCLOS. The analysis considers possible outcomes of resolving jurisdictional disputes through the UNCLOS dispute settlement procedures.

3. Potential Disputes over Ports

An important element of the BRI has been investment in a series of ports along the principal sea lanes of communication that are instrumental for China's trade with other participants in the BRI.[34] One of the priorities articulated in the Vision and Actions document is to 'push forward port infrastructure construction, build smooth land-water transportation channels, and advance port cooperation; increase sea routes and the number of voyages, and enhance information technology cooperation in maritime logistics'.[35] With the BRI emphasis on trade development, the smooth transition of ships (and goods) in and out of ports will be critical to the overall success of the strategy.[36]

China has already entered into agreements with states in relation to particular ports, or Chinese entities have assumed ownership rights over those ports. A striking example in the latter regard is the purchase of the Piraeus Container Terminal, which was already half-owned and managed

[31] UNCLOS, Art 298(1)(b).
[32] UNCLOS, Art 298(1)(c).
[33] UNCLOS, Art 288(2); UNCLOS, Art 296(1).
[34] The chain of ports in the Indian Ocean is referred to as the 'string of pearls'. European Parliament, above n 2, 8.
[35] Cited in Hu Zhang, 'The 21st Century Maritime Silk Road and the Leading Function of the Shipping Industry' in Maximilian Mayer, *Rethinking the Silk Road: China's Belt and Road Initiative and Emerging Eurasian Relations* (Springer Singapore, 2017), 43, 46.
[36] Zhang and Long, above n 4, observe that the Visions and Actions policy document notes that maritime connectivity refers to 'jointly building a free, safe and efficient channel with key ports as the node'. 58.

by the Chinese state-owned shipping company COSCO.[37] Port investments have extended across at least another dozen countries.[38] Ports are critical for the Maritime Silk Road both for the economies of the countries in which ports are developed and for enhancing interconnectivity along the route.[39]

Establishing authority over or creating ownership interests in a series of ports is essential for China to guarantee access of its ships into those ports. Ports are largely unregulated under UNCLOS, with the exception of indicating the relevance of ports for the purposes of delimiting the territorial sea,[40] and providing for the exercise of port state jurisdiction for the purposes of enforcing requirements relating to the protection and preservation of the marine environment.[41] Article 11 of UNCLOS does not specifically define ports, but to the extent they are to be utilized for maritime delimitation, ports are considered as 'permanent harbour works' and are regarded as forming part of the coast. As part of the coast, states have sovereignty over ports located within their territory,[42] and may control what vessels enter their ports and under what conditions.

Access to ports is largely a matter of customary international law, or is otherwise regulated by separate agreement. Article V of the General Agreement on Tariffs and Trade (GATT) guarantees freedom of transit.[43] McDorman has noted that Article V is 'silent on the issue of vessel access to ports, although the denial of a right of access may amount to a trade barrier inconsistent with GATT'.[44] While a dispute may thus emerge within the international trade law system, it is not possible to point to a comparable provision within UNCLOS that guarantees any such access,[45] and thus could be the subject of dispute settlement proceedings under Part XV of UNCLOS.

In prescribing conditions for entry, states are entitled to regulate their ports consistent with their national interests. For example, the International Ship and Port Facility Security (ISPS) Code allows states to put in place notice requirements regarding the entry of a vessel into port as part of a suite of measures to reduce the likelihood of a terrorist attack against a port.[46] The Port State Measures Agreement allows states to set requirements and restrictions on fishing

[37] Arase, above n 3, 26.
[38] As of January 2015, investments had been made in Bangladesh, Djibouti, Egypt, Greece, Indonesia, Kenya, Malaysia, Myanmar, Pakistan, Sri Lanka, Sudan and Tanzania. Arase, 36. Australia and Oman could also be added to this list. See Geoff Wade, 'China's "One Belt, One Road" initiative', *Parliamentary Library Briefing Book* available at: http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook45p/ChinasRoad.
[39] See Zhang, above n 35, 49.
[40] UNCLOS, Art 11.
[41] UNCLOS, Art 218 and 211(3). Article 98(1)(c) refers to ports in the context of the duty to render assistance and provision of information as to the journey of a ship involved in a collision.
[42] Robin R Churchill & A Vaughn Lowe, *The Law of the Sea* (3rd ed, 1999) 61.
[43] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, Art V.
[44] Ted L. McDorman, 'Port State Enforcement: A Comment on Article 218 of the 1982 Law of the Sea Convention' (1997) 28 *Journal of Maritime Law and Commerce* 305, 310-311.
[45] Except for access and transit rights that may be granted to land-locked states under the requirements of Article 125 of UNCLOS.
[46] See Natalie Klein, *Maritime Security and the Law of the Sea* (OUP, 2011), 158-162 (discussing the ISPS Code).

vessels seeking entry into port so as to prevent, deter and eliminate illegal, unregulated or unreported fishing.[47]

If access of a vessel is restricted because of environmental risks associated with that vessel, different treaties adopted under the auspices of the International Maritime Organisation (IMO), such as MARPOL,[48] may be at issue but Article 211(3) of UNCLOS may also be invoked. This provision anticipates that states will 'establish particular requirements for the prevention, reduction and control of pollution of the marine environment as a condition for the entry of foreign vessels into their ports or internal waters or for a call at their off-shore terminals'. In doing so, a state is required to give due publicity to any such requirements and communicate them to the IMO, as the relevant competent intergovernmental organisation.[49] A state that considers itself prejudiced through denial of access on environmental grounds may challenge the port state's adherence to these procedural requirements under Article 211(3). A failure to provide appropriate notice would not, however, equate with requiring a state to grant access to its ports and on its own would seem to lack sufficient importance for the core issue of maintaining the flow of trade between various ports.

Ultimately, states engaging in the BRI have an incentive to ensure that conditions of access are consistent with international standards so that their ports are commercially viable and business is not re-directed to another, less demanding, port.[50] The economic incentives associated with the BRI port investments may prompt bilateral agreements between China and the port state that guarantee access rights. These bilateral agreements may have their own dispute settlement procedures that would potentially prevail over the UNCLOS procedures if express provision is included to that effect.

In relation to the rights and obligations that a state may exercise over any vessels in its ports, this legal authority is also governed by customary international law and treaties other than UNCLOS. To this end, McDougal and Burke have noted:

> It is universally acknowledged that once a ship voluntarily enters port it becomes fully subject to the laws and regulations prescribed by the officials of that territory for events relating to such use and that all types of vessels, military and other, are in common expectation obliged to comply with the coastal regulations about proper procedures to be employed and permissible activities within internal waters.[51]

[47] Agreement on Port State Measures to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing, signed 22 November 2009, entered into force 5 June 2016, UNTS Registration No. I-54133. See discussion in Klein, *Maritime Security*, above n 46, 72.

[48] See Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (Concluded 29 December 1972, entered into force 30 August 1975) 1046 UNTS 120, Art 5(3). See also Convention for the Prevention of Pollution of the Sea by Oil, May 12, 1954, 327 UNTS 3, Art VI. A series of regional memoranda of understanding on port state control have been adopted to prevent the operation of substandard ships. See Ted L. McDorman, 'Regional Port State Control Agreements: Some Issues of International Law' (2000) 5 *Ocean and Coastal Law Journal* 207.

[49] UNCLOS, Art 211(3).

[50] See McDorman, 'Regional Port State', above n 48, 207-208, 218.

[51] Myres S McDougal & William T Burke, *The Public Order of the Oceans* (1962) 156.

Exceptions to this authority apply in relation to vessels that have entered the port in distress,[52] vessels subject to sovereign immunity,[53] and in relation to the inapplicability of local labour laws.[54]

Inspections and other related law enforcement activities may be possible in port under the terms of particular multilateral treaties, including the Port State Measures Agreement[55] and the Fish Stocks Agreement.[56] Security restrictions in relation to ports are identified in the ISPS Code, which is included as part of the Safety of Life at Sea Convention.[57] An UNCLOS dispute may arise in relation to Article 218 of UNCLOS, which permits the exercise of port state jurisdiction over polluting vessels. However, if the dispute concerns commercial terms and conditions, or is otherwise unrelated to environmental concerns, it is much less likely that a dispute relating to the interpretation or application of UNCLOS will arise in relation to a state's assertion of authority over foreign-flagged vessels in its ports.

A central reason for ensuring that a series of ports are available for the BRI is to counteract the right of a coastal state to close a port to foreign shipping. This right is a corollary of the principle of state sovereignty,[58] and ports may be closed to safeguard good order on shore, to signal political displeasure, or to defend 'vital interests'.[59] In practice, de La Fayette has observed that ports have been closed:

> …for various reasons related to the protection of public health and safety; to ships carrying explosives; to ships carrying passengers with contagious diseases; to ships carrying dangerous cargoes, such as hazardous wastes; for general coastal pollution protection; to substandard ships; and to ships presenting hazards to maritime navigation.[60]

Unless the closure of the port is linked to other violations, particularly in relation to the freedom of navigation, it may be difficult to base a dispute concerning access or regulation of ports under the terms of UNCLOS.

Jurisprudence under UNCLOS has thus far addressed the situation of vessels detained in port and arguments that such detention violates the vessel's freedom of the high seas or its immunities if a warship. For example, in the *M/V Louisa* case, it was argued that a vessel in detention was permitted to leave a port because of the freedom of the high seas enshrined in Article 87 of UNCLOS. However, ITLOS determined that Article 87 could not be interpreted so as to encapsulate 'a right to leave the port and gain access to the high seas notwithstanding

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[52] Stuart Kaye, 'The Proliferation Security Initiative in the Maritime Domain; (2005) 35 *Israel Yearbook of Human Rights* 205, 210-211.
[53] See UNCLOS, Art 32 and Art 95.
[54] Kaye, above n 52, 210-211.
[55] Port State Measures Agreement, Arts 12-19.
[56] Fish Stocks Agreement, Arts 21-22.
[57] International Convention for the Safety of Life At Sea, 1 November 1974 (entered into force 25 May 1980), 1184 UNTS 3, Chapter XI-2. For discussion, see Klein, *Maritime Security*, above n 46, 160-162.
[58] Justin S.C. Mellor, 'Missing the Boat: The Legal and Practical Problems of the Prevention of Maritime Terrorism' (2002) 18 *American University International Law Review* 341, 393. See also A.V. Lowe, 'The Right of Entry into Maritime Ports in International Law' (1977) 14 *San Diego Law Review* 597, 607.
[59] See Klein, *Maritime Security*, above n 46, 67.
[60] Louise de La Fayette, 'Access to Ports in International Law' (1996) 11 *International Journal of Marine and Coastal Law* 1, 6.

its detention in the context of legal proceedings against it'[61] where the vessel was arrested for activities conducted in the territorial sea. Yet a vessel arrested in port for activities on the high seas does render consideration of Article 87 relevant, as determined in the *M/V Norstar* decision on jurisdiction.[62] Argentina had also argued that the detention of one of its warships in port in Ghana was a violation of the freedom of navigation under Article 87 in the *ARA Libertad* provisional measures case.[63] Yet the Tribunal rejected the view that the freedom of navigation related to the immunity of warships in port for the purposes of establishing *prima facie* jurisdiction.[64]

It may be argued that whether or not a dispute relates to particular UNCLOS provisions is sufficient to bring it within the jurisdiction of a court or tribunal constituted under UNCLOS. The Philippines pursued this view in asserting that China could not justify the use of its nine-dash line within the South China Sea based on historic rights.[65] In characterising China's claim as based on historic rights, the Philippines had to face the argument that historic rights are not explicitly addressed within UNCLOS. If UNCLOS does not have provisions dealing with historic rights at sea, is the claim one relating to the interpretation or application of UNCLOS for the purposes of exercising jurisdiction?

In resolving this issue, the *South China Sea* Tribunal determined:

> A dispute concerning the interaction of the Convention with another instrument or body of law, including the question of whether rights arising under another body of law were or were not preserved by the Convention, is unequivocally a dispute concerning the interpretation and application of the Convention.[66]

On this view, there is scope to incorporate other legal regimes that touch on matters also covered by UNCLOS but not strictly part of UNCLOS. Issues relating to access to ports and closure of ports may fall within this query of whether port rights were or were not preserved by the Convention. In this scenario, a state may argue that port access or the regulation of ports 'interacts' with UNCLOS and hence should fall within jurisdiction. It may ultimately depend on how widely any court or tribunal is willing to interpret its jurisdictional remit. It is difficult fully to predict such a claim and how it might be resolved in the absence of specific facts. Elucidation of the connections between the freedom of navigation and actions taken in port may be forthcoming in the merits stage of the *Norstar* case before ITLOS.

4. Potential Disputes over Navigation

[61] M/V Louisa, para. 109.
[62] *The M/V 'Norstar' Case*, Panama v Italy, Preliminary Objections, ITLOS Case No 25, 4 November 2016, para. 122. But see ibid, Joint Separate Opinion of Judges Wolfrum and Attard, para. 5 and paras 35-41, criticising the standard of appreciation used by the Tribunal to establish jurisdiction and the application of Article 87 in this context. See also ibid, Dissenting Opinion of Judge ad hoc Treves, paras. 12-16. It remains to be seen if the interpretation of Article 87 indicated at the Preliminary Objections stage is upheld at the merits stage of the case.
[63] *'ARA Libertad' Case*, Argentina v Ghana, Order, Provisional Measures, ITLOS Case No 20, [2012] ITLOS Rep 21, para. 43.
[64] ARA Libertad, para. 61. The Tribunal instead considered that Article 32, addressing the immunities of a warship, may instead form a basis of jurisdiction as the parties differed on the scope of application of that provision and whether it applied to more than the territorial sea. See ibid, para. 65.
[65] See *The South China Sea Arbitration* (Philippines v. China), Award of 12 July 2016, PCA Case No. 2013-19, https://www.pcacases.com/web/view/7, paras 169-278.
[66] South China Sea (Jurisdiction), para. 168.

Facilitating the free movement of cargo vessels is an important dimension of the BRI and is thus dependent on the full recognition of navigational rights accorded under UNCLOS. China's interests in this regard should align with other states, like the United States, that share strong interests in maintaining the freedom of navigation. However, what should be rights accorded equally to all states appear to have been sought as exclusive rights in China's maritime engagements and have entailed Chinese efforts to control maritime areas to the exclusion of other commercial, fishing and military vessels.[67] The US Pentagon has referred to this Chinese strategy as 'Anti-Access/Area Denial'.[68] Yet China's policy in this regard appears to focus on asserting rights associated with China's territorial sovereignty claims over small islands in the South China and East China Seas.[69] As mentioned, China has also asserted historic rights over most of the South China Sea using a nine-dash line, but the *South China Sea* arbitral tribunal denied the legality of this claim.[70] If China seeks to assert sovereignty and exclusive authority over maritime areas with the effect of denying other states' navigational rights recognised in UNCLOS, it is very likely that disputes will arise.

Disputes concerning navigation may generally arise in relation to the passage of commercial vessels depending on the control or authority that a coastal state is exerting over its maritime areas.[71] A coastal state exercises sovereignty over the territorial sea, a band of water extending up to 12 miles from that state's baselines.[72] A coastal state's sovereignty over the territorial sea is subject to the right of innocent passage enjoyed by foreign flagged vessels for traversing the waters of the coastal state. The right of innocent passage involves continuous and expeditious passage where the vessel does not enter the internal waters or ports of the coastal state.[73] To be innocent, the passage must not prejudice the peace, good order or security of the coastal state,[74] and UNCLOS identifies a list of inclusive activities that may be considered prejudicial, including the loading or offloading of any commodity, fishing activities, or any research or survey activities.[75] The coastal state is authorized to take steps to prevent any passage that is not innocent.[76]

In this context, if a coastal state sought to hinder the passage of a vessel through its territorial sea that was engaged in international trade as part of the BRI, the flag state of the vessel concerned could potentially challenge those actions under the UNCLOS dispute settlement regime. The coastal state is allowed to introduce some regulations over the passage of vessels, including traffic separation schemes,[77] and must usually ensure that regulations relating to navigation align with international agreements or standards.[78] Any interference with passage would have to be consistent with the requirements of UNCLOS, and the international

[67] European Parliament, above n 2, 8.
[68] Arase, above n 3, 29.
[69] See Yen-Chiang Chang, 'The "21st Century Maritime Silk Road Initiative" and Naval Diplomacy in China' (2018) 153 *Ocean and Coastal Management* 148, 152 and 153.
[70] South China Sea (Award), para. 278.
[71] The passage of military vessels is addressed in the next section.
[72] UNCLOS, Art 2.
[73] UNCLOS, Art 18.
[74] UNCLOS, Art 19(1).
[75] UNCLOS, Art 19(2).
[76] UNCLOS, Art 25(1).
[77] See UNCLOS, Art 22.
[78] UNCLOS, Art 21.

agreements alluded to in its provisions, to prevent a claim against the coastal state being upheld in arbitration or adjudication.

Outside the territorial sea, foreign-flagged vessels may exercise the freedom of navigation throughout the EEZ of a coastal state,[79] subject only to showing due regard for the rights and duties of the coastal state in that maritime area.[80] Compulsory dispute settlement is available 'when it is alleged that a coastal State has acted in contravention of [UNCLOS] in regard to the freedoms and rights of navigation, overflight or the laying of submarine cables and pipelines, or in regard to other internationally lawful uses of the sea specified in article 58'.[81] Consequently, if the BRI was thwarted by interference with the freedom of navigation in the EEZ of a coastal state, a flag state could utilise the UNCLOS dispute settlement regime to resolve this dispute if necessary. If a coastal state considered that the passage of vessels further to the BRI strategy was inconsistent with its rights under UNCLOS in the EEZ, it equally could resort to compulsory procedures in line with Part XV of UNCLOS.[82]

Freedom of navigation is also exercised on the high seas,[83] and it is most typically only the flag states of vessels on the high seas that have the right to regulate and enforce laws against those vessels.[84] The navy or policing vessels of one state may not visit or enforce laws against a foreign-flagged vessel on the high seas unless the flag state consents, either on an ad hoc basis or by treaty.[85] Flag states are required to 'effectively exercise … jurisdiction and control in administrative, technical and social matters' over their ships.[86] If a flag state fails to take reasonable steps to exercise control over its vessels, a court or tribunal may find it responsible for its lack of due diligence in dispute settlement proceedings.[87]

To the extent that the BRI does not impinge on existing navigational rights that are enshrined and protected under UNCLOS, it should not be expected that the UNCLOS dispute settlement regime would be needed to uphold navigational rights. If, however, the BRI anticipates greater exclusivity in the exercise of navigational rights, rather than allowing the free, unhindered passage of commercial vessels across the varied maritime zones, flag states could challenge such restrictions through compulsory arbitration or adjudication. A central dynamic in the negotiation of UNCLOS was ensuring protection for the rights of navigation even in the face of increasing coastal state claims over greater expanses of ocean space. A court or tribunal faced with a dispute in relation to the implementation of the BRI would likely strive to ensure that the balance achieved at the time UNCLOS was adopted was maintained in future ocean use.

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[79] UNCLOS, Art 58(1).
[80] UNCLOS, Art 58(3).
[81] UNCLOS, Art 297(1)(a).
[82] UNCLOS, Art 297(1)(b).
[83] UNCLOS, Art 90.
[84] UNCLOS, Art 94.
[85] For example, the right of visit is granted under UNCLOS for a limited range of activities. See UNCLOS, Art 110.
[86] UNCLOS, Art 94(1).
[87] This possibility was discussed in relation to flag state responsibilities over fishing vessels that conduct unlawful fishing. See *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission* (SRFC) [2015] ITLOS Case No. 21, 2 April 2015, paras 110-140 available at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/advisory_opinion_published/2015_21-advop-E.pdf.

A further threat to navigation may eventuate if the safety of navigation routes is (or is perceived to be) threatened by maritime crime (notably, terrorism and piracy). In that situation, coastal states and other participants in the BRI, including China, may consider that joint law enforcement efforts may be required. China has recognised the importance of ensuring maritime safety for international shipping against terrorism and piracy threats.[88] Such law enforcement efforts may be considered as hampering the freedom of navigation depending on where (that is, in what maritime zones) and how (that is, authorised by the relevant coastal state or an international organisation including the UN Security Council?) it is undertaken. A flag state may wish to challenge these law enforcement actions and may potentially turn to the dispute settlement procedures under Part XV of UNCLOS.[89]

Where the exercise of the freedom of navigation may further prove controversial is where there are different viewpoints as to which maritime zone a vessel may be traversing. In some instances, states will object to how a coastal state has drawn its baselines, or closing lines across bays, and those states will then hold a different view as to where the outer limits of the territorial sea may lie for a particular coastal state.[90] In the South China Sea, the United States has recently challenged China's declaration of territorial seas off artificial islands that have been constructed on fully-submerged reefs.[91] If the reefs were never above water, they would not be entitled to a territorial sea. Similarly, states may dispute whether a particular feature is a rock or an island under Article 121 of UNCLOS, and hence what maritime zones may be claimed by the coastal state depending on the status of the feature as a rock or island.[92] This issue was of particular controversy in the *South China Sea* arbitration, which addressed the status of a variety of features in the South China Sea.[93] The validity of baselines, rights associated with artificial islands and the status of islands, rocks, low-tide elevations and reefs could all be assessed in the context of UNCLOS dispute settlement proceedings if necessary. However, where the sovereignty (or ownership) of a particular island or rock is also contested, it is unlikely that a territorial sovereignty question could be resolved by a court or tribunal with jurisdiction under UNCLOS.[94]

5. Potential Disputes over Military Activities

The military and strategic dimensions of the BRI have been the cause of speculation among commentators.[95] One assertion has contemplated that the string of ports and efforts to ensure

[88] See Zhang, above n 35, 50-51.
[89] It must be noted that a coastal state's law enforcement activities with respect to fisheries and some aspects of marine scientific research within its EEZ may be optionally excluded from compulsory arbitration or adjudication under Art 298(1)(b) of UNCLOS.
[90] See further Chang, above n 69, 153.
[91] See Preeti Nalwa, 'Beijing Remains "Undeterred" in the South China Sea', *The National Interest*, 10 January 2016, available at http://nationalinterest.org/blog/the-buzz/beijing-remains-%E2%80%98undeterred%E2%80%99-the-south-china-sea-14863; Franz-Stefan Gady, 'South China Sea: US Navy Conducts Freedom of Navigation Operation', *The Diplomat*, 10 August 2017, available at https://thediplomat.com/2017/08/south-china-sea-us-navy-conducts-freedom-of-navigation-operation/.
[92] UNCLOS, Art 121(3).
[93] It found that none of the features in dispute were 'islands' under Article 121 of UNCLOS but at most were rocks, entitled only to a territorial sea.
[94] See Chagos Archipelago, para. 217-219. The scope of jurisdiction to consider territorial disputes has been controversial. See Irina Buga, 'Territorial Sovereignty Issues in Maritime Disputes: A Jurisdictional Dilemma for Law of the Sea Tribunals' (2012) 27 *International Journal of Marine and Coastal Law* 65, 90.
[95] See Arase, above n 3, 40. See also Anoush Ehteshami, 'China's new Silk Road is all part of its grand strategy for global influence', 6 January 2017, *The Conversation*, available at: https://theconversation.com/chinas-new-

open sea lanes of communication equally benefit the passage of military vessels.[96] For China's ever-growing navy, it shares an interest with the United States, as noted above, in ensuring that its naval vessels are able to move into different areas to assert a military presence in times of controversy or even in times of armed conflict.[97] To a large extent, military vessels share the freedoms of navigation enjoyed by commercial vessels as discussed in the preceding section. However, there are some important differences that may trigger disputes concerning the interpretation or application of UNCLOS.

In relation to passage through the territorial sea, one unresolved issue has been whether prior notice or authorization is required for warships or other naval vessels. UNCLOS does not address this question specifically and state practice has varied on this point.[98] If a warship violates its right of innocent passage, the coastal state is limited in its responses because of the warship's immunity.[99] At most, it may request that the warship leave its territorial sea.[100] In this situation, it may also be open to the coastal state to challenge the actions of the warship through the dispute settlement procedures in UNCLOS.

Beyond navigating from one port to the next, naval vessels will also typically engage in military exercises and surveillance activities as part of their training and missions. Such activities are considered prejudicial to the peace, good order and security of a coastal state if conducted in the territorial sea of that coastal state.[101] However, outside the territorial sea, states like the United States have argued that such military activities fall within the freedom of navigation and other internationally lawful uses of the sea related to this freedom and have protested state actions contrary to this view.[102] China has disagreed with this view of third state rights within the EEZ,[103] and has actively opposed US surveillance missions within China's EEZ.[104] One basis for this view is an interpretation of Article 58 of UNCLOS that focuses on the listing of the specific freedoms and that not all military activities are related to the specified freedoms.[105]

Article 58 of UNCLOS provides that all states (including land-locked states) enjoy within the EEZ 'the freedoms referred to in Article 87 of navigation …, and other internationally lawful uses of the sea related to these freedoms'.[106] In this respect, it must be borne in mind that the rights of navigation are qualified in various ways by Article 58. These qualifications include reference to 'relevant provisions' of UNCLOS, demanding 'due regard to the rights and duties of the coastal State' and require compliance with 'the laws and regulations adopted by the

silk-road-is-all-part-of-its-grand-strategy-for-global-influence-70862; Wade, above n 38; European Parliament, above n 2, 14.

[96] While China has built up 'commercial access points along its sea lanes… only a few ports can be used as military bases'. European Parliament, above n 2, 10. See also ibid, 24.

[97] For discussion of China's naval diplomacy, see generally Chang, above n 69.

[98] See discussion in Klein, *Maritime Security*, above n 46, 38-39.

[99] UNCLOS, Art 32.

[100] UNCLOS, Art 30.

[101] UNCLOS, Art 19(2).

[102] See Donald R Rothwell and Tim Stephens, *The International Law of the Sea* (2nd ed, 2016) 296.

[103] As do other developing states, such as Bangladesh, Brazil, Cape Verde, India, Malaysia, Pakistan and Uruguay. See Chang, above n 69, 150.

[104] See Rothwell and Stephens, above n 102, 297.

[105] Klein, *Maritime Security*, above n 46, 48.

[106] Other high seas freedoms are incorporated into the EEZ provided that they are not incompatible with the EEZ regime in Part V of the Convention. UNCLOS, Art 58(2).

coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.'[107]

Yet the right of a coastal state to prevent or control military activities within its EEZ remains controversial.[108] Coastal states have objected to third states' military activities based on possible interference with its economic activities in the EEZ.[109] Thus to the extent that coastal states have the right to prevent interference with its economic interests[110] then this right arguably extends to limiting what military activities are undertaken by third states.[111]

A further aspect of this debate relates to the meaning of Article 88 of UNCLOS, which provides that 'the high seas shall be reserved for peaceful purposes'. Some scholars argue that the navigation activities of warships must therefore be limited to align with this requirement.[112] However, an alternative view would allow the operation of military vessels in the EEZ of coastal states provided those activities do not breach the requirements of Article 2(4) of the UN Charter as a threat or use of force against the territorial integrity or political independence of any state, as indicated in Article 301 of UNCLOS. This debate may need to be resolved within the context of dispute settlement procedures considering the interpretation or application of these particular provisions.

As UNCLOS does not definitely settle what military activities may be permissible within the EEZ of a coastal state, any dispute might ultimately come down to a question of due regard. Have the military exercises or activities failed to show sufficient due regard to the rights of other vessels seeking to deliver goods pursuant to the BRI? There is no order of priorities between coastal states' rights and third states' rights in the EEZ established in UNCLOS.[113] A balance must instead be struck.[114] Much will ultimately depend on the particular activity in question and what influence it has on the rights and duties of the other user.

As UNCLOS does not have specific rules on military exercises outside the territorial sea, questions that relate to whether military operations fall within the freedom of navigation under Article 58 of UNCLOS or are for peaceful purposes under Article 88 could potentially be referred to compulsory arbitration or adjudication. However, an outstanding issue with any referral of a dispute under the UNCLOS dispute settlement procedures is the possibility that a state has issued a declaration under Article 298, as China has done, excluding from jurisdiction 'disputes concerning military activities'. The precise parameters of this exception are unclear but were considered in the *South China Sea* arbitration.

In that case, the Tribunal indicated that where a state disavows that its activities are military in nature then this characterization is of distinct relevance. Hence China's consistent claims that its land reclamation activities and creation of artificial islands were for civilian purposes meant

[107] See, eg, Ren Ziafeng & Cheng Xizhong, 'A Chinese Perspective' (2005) 29 *Marine Policy* 139, 140.
[108] Klein, *Maritime Security*, above n 46, 47.
[109] See Jon M. Van Dyke, 'Military Ships and Planes Operating in the Exclusive Economic Zone of Another Country' (2004) 28 *Marine Policy* 29, 31.
[110] Francisco Orrego Vicuna, *The Exclusive Economic Zone* (Cambridge University Press, 1989) 114.
[111] Klein, *Maritime Security*, above n 46, 47.
[112] See, eg, Zhang and Long, above n 4, 63.
[113] DJ Attard, *The Exclusive Economic Zone in International Law* (Clarendon Press, 1987) 64, 66.
[114] Bernard H. Oxman, 'The Third United Nations Conference on the Law of the Sea: The 1976 New York Session' (1977) 71 *AJIL* 247, 260-61 ('It can be anticipated that these balanced duties will provide the juridical basis for resolving many practical problems of competing uses.').

that the military activities exception could not preclude examination of potential environmental violations in the course of that reclamation work.[115]

The military activities exception was also assessed in response to the Philippines' claims that China unlawfully aggravated the dispute in its actions subsequent to the commencement of the arbitration. Contrary to the view of the Philippines that the military activities exception did not apply because it had never been invoked by China, the Tribunal considered that such an explicit claim was not necessary.[116] Rather, the Tribunal emphasized 'the relevant question to be whether the dispute itself concerns military activities, rather than whether a party has employed its military in some manner in relation to the dispute'.[117] The facts before the Tribunal relating to certain incidents at Second Thomas Shoal were deemed to be a 'quintessentially military situation' and hence covered by the exception to jurisdiction enshrined in Article 298(1)(b).[118]

Questions relating to the passage of military vessels could potentially be viewed as questions of navigation, particularly if the status of the vessel as a military vessel is not decisive in the coastal state actions taken against the foreign vessel. A court or tribunal may view an interpretation of Articles 56 and 58 as defining state's rights in a particular maritime area and determining what falls within the 'freedom of navigation' and 'other internationally lawful uses of the sea related to these freedoms'. A dispute focused on the interpretation or application of those provisions of UNCLOS would likely fall within the subject matter jurisdiction of a court or tribunal constituted under UNCLOS. As such, the military activities exception would not necessarily apply.

While a court or tribunal has not yet had opportunity to assess whether military exercises or surveillance activities by military vessels fall within the jurisdictional exception under Article 298, it could be anticipated that a strong argument as to the quintessential military nature of such activities could be successfully mounted. If a warship is not engaged in actual hostilities, its other key responsibilities are preparing for such hostilities through training activities or surveillance. If an interpretation of Article 58 has to be applied to these types of military activities then arguably the dispute 'concerns' military activities. The counterpoint to this argument is that the current trend in tribunals constituted under UNCLOS is to read grants of jurisdiction broadly and exceptions narrowly, so it cannot be too readily assumed that a more inclusive perspective on 'military activities' would necessarily be adopted in the context of an UNCLOS arbitration or adjudication.

6. Concluding Remarks

Given the overall scale of the BRI, the legal rights and duties associated with the maritime dimensions of the strategy are a relatively small component. Any dispute that may arise in relation to the BRI may well be multifaceted and implicate a variety of obligations under international law, as well as posing economic, social or diplomatic problems. A dispute arising under UNCLOS may thus be a small factor or potentially just one part of a much bigger dispute. Arguably, the *South China Sea* arbitration instituted by the Philippines against China under UNCLOS concerned some limited dimensions of a much bigger controversy concerning

[115] South China Sea (Award), para. 893 and paras 934ff. See further ibid, para. 1012 and para 1028 in relation to Mischief Reef.
[116] Ibid, para. 1156.
[117] Ibid, para. 1158.
[118] Ibid, para. 1161.

competing claims and entitlements in the South China Sea. The relevance of UNCLOS dispute settlement to the BRI may therefore be relatively contained.

A further lesson learned from the *South China Sea* arbitration is that China will not necessarily engage with international dispute settlement processes involving compulsory arbitration or adjudication. China advised at the outset of the arbitration that it would not participate.[119] The failure of China to appear did not prevent the arbitral tribunal from determining its jurisdiction and resolving the claims before it.[120] China instead issued various statements and policy papers to indicate its views without engaging fully and properly in analysis or defence of key legal positions.[121] When the decision was rendered largely in favour of the Philippines, China denounced it as null and void.[122]

China's response to the ruling of the *South China Sea* arbitral tribunal reflects disregard for the rule of law and international legal processes. The European Union considers China's reaction as 'open[ing] the way to other contests and put[ting] the law at risk'.[123] Instead, the European Union's Global Strategy anticipates engagement with and support for the international law of the sea and the use of mechanisms available for the peaceful resolution of disputes, including arbitration.[124] Such engagement will not be forthcoming from the United States, as it has not yet become a party to UNCLOS and may therefore not assert rights guaranteed only under that treaty or rely on its processes to resolve law of the sea disputes falling within its terms. Other states may be dissuaded from pursuing dispute settlement options under UNCLOS in light of China's reaction to the *South China Sea* arbitration.

Yet it may be possible that China itself will wish to rely on the guaranteed rights within UNCLOS and potentially utilise the dispute settlement procedures to its own advantage. In this regard, one commentator has observed:

> What one sees is China deploying its growing military and civilian power in intimidating ways to get neighbours to cede their maritime territorial rights granted under [UNCLOS], which China has signed. It is possible that China may decide to embrace the international rule of law and rely on UNCLOS dispute resolution provisions at some point in future, but if it does not, neighbours both large and small will face difficult choices. It is already apparent that few, if any, of China's neighbours are willing to see China govern the region single-handedly.[125]

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[119] South China Sea (Jurisdiction), para. 111.
[120] UNCLOS, Annex VII, Art 9.
[121] See, eg, South China Sea (Jurisdiction), paras 121-122.
[122] 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, 12 July 2016, available at http://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1379492.htm; Chinese Society of International Law, The Tribunal's Award in the "South China Sea Arbitration" Initiated by the Philippines Is Null and Void', 10 June 2016, available at: http://www.csil.cn/News/Detail.aspx?AId=201
[123] European Parliament, above n 2, 22.
[124] 'In East and Southeast Asia, we (the EU) will uphold freedom of navigation, stand firm on the respect for international law, including the Law of the Sea and its arbitration procedures, and encourage the peaceful settlement of maritime disputes.' European Union Global Strategy, June 2016, p.38 cited in European Parliament, above n 2, 19.
[125] Arase, above n 3, 41.

As arbitration and adjudication hand responsibility to a small and select group of individuals to decide legal questions and make determinations that are legally binding on the states concerned, China may well perceive this form of dispute settlement as too removed from its control and influence. Yet China's neighbours that are also party to UNCLOS do not need to rely on China's consent if they wish to institute proceedings under UNCLOS. The *South China Sea* arbitration instead reflects that a less powerful state may have a useful means available to influence discussions and world perceptions in seeking to uphold maritime rights and obligations protected under UNCLOS.

The full implementation of the BRI is by no means guaranteed and there is no shortage of events that might be imagined that could re-shape the strategy in the years ahead. If China's BRI vision is ultimately fulfilled, the potential global impact may be tremendous:

> If any single state were to establish hegemony over the whole of the Eurasian land mass, the scale of resources and the geo-strategic advantages available to that state would allow it to dominate the entire world.[126]

The UNCLOS dispute settlement procedures are not able to prevent world domination, but they count as one of many tools to be used to moderate state behaviour as the BRI progresses. Most importantly, the UNCLOS dispute settlement regime may prove vital if the freedom of navigation for the benefit of all states is to be preserved.

[126] Ibid, 40.