STAKEHOLDERS IN DISPUTE SETTLEMENT UNDER THE UN CONVENTION ON THE LAW OF THE SEA

NATALIE KLEIN

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UNSW Law
UNSW Sydney NSW 2052 Australia

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Natalie Klein*

Abstract*: The role of various actors in dispute settlement processes under the UN Convention on the Law of the Sea (UNCLOS) may be assessed from different perspectives to assess the relevance or salience of those actors in decision-making processes. This paper utilises a stakeholder identification theory, more commonly utilised in management contexts, to identify and prioritise the interests of different actors from the perspective of the judge in reaching decisions to advance the goals of UNCLOS dispute settlement. The theory is tested against the decisions made on the interpretation of Article 121(3) of UNCLOS in the* South China Sea *arbitration. The use of stakeholder identification theory enables us to examine the position of superpowers, as well as other states and non-state actors, in relation to a particular legal question and consider how well their interests and claims are met in judicial decision-making under UNCLOS. The paper concludes that the theory is a useful explanatory tool and could bring greater transparency in decision-making but acknowledges limitations in its applicability to the UNCLOS context.*

Key words**:** international dispute settlement, law of the sea, South China Sea, international courts

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1. Introduction

The study of international dispute settlement necessarily spans international law and international politics as we undertake an assessment of the legal rules in place and how they

operate as well as the responses of different actors to those rules in resolving international disputes. International law provides the bases for claims as to what rights an actor holds in any international dispute and what duties are considered to be owing to that actor. International politics provides us with a further means to examine how and why the rights and duties are asserted and/or responded to the way they are. The actors involved in an international dispute will be varied, but commonly the assertions concerning international law are made by states. Despite the recognised sovereignty equality of states under international law, international politics allows consideration of diverse differences between states, including their political, economic, military power. This paradigm prompts the following questions: Is there a way to explain the positioning of superpowers in any particular dispute settlement mechanism? How different is their position to other actors in the dispute? Explaining the legal and political factors becomes more challenging the more legalised the dispute settlement process becomes. In this process, the legal aspects of a dispute may overshadow the political dimensions. One highly legalised dispute settlement mechanism is the compulsory procedures under UNCLOS.[1] The purpose of this chapter is to consider how we might understand the role of superpowers and other actors in the operation of compulsory arbitration or adjudication under UNCLOS.

The compulsory dispute settlement procedures under UNCLOS entail both flexibility and complexity. Both elements were necessary to devise an acceptable dispute settlement regime to address disputes arising from what is often described as 'the constitution of the oceans'. In Section 1 of Part XV of UNCLOS, there is acknowledgement that disputes may be resolved through a variety of peaceful means,[2] and in some limited instances, the dispute settlement procedures available under other agreements will prevail over those set out in UNCLOS.[3] If a

* Professor, UNSW Sydney, Australia. The author thanks Matthew Kingsland for editorial assistance in the preparation of this chapter. Any remaining errors are of course my own.

[1] These procedures are contained in Part XV of UNCLOS.

[2] UNCLOS, art 279 and art 280.

[3] As set forth in Articles 281 and 282 of UNCLOS.

state party to UNCLOS wishes to refer a dispute to compulsory procedures entailing binding procedures under Section 2 of Part XV, it may choose between the dispute being heard at the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS), ad hoc arbitration under Annex VII of UNCLOS, or special arbitration under Annex VIII of UNCLOS.[4] If a state has not selected a preferred means of dispute settlement as between these options, or states differ in their preferred forum, ad hoc arbitration under Annex VII is the default procedure available unless the parties agree otherwise.[5] The dispute must be one that concerns the interpretation or application of UNCLOS,[6] but a court or tribunal may refer to other rules of international law as part of the applicable law in any such dispute.[7] Section 3 of Part XV excludes a limited number of disputes from the subject matter jurisdiction of a court or tribunal constituted under UNCLOS.[8]

Resorting to international arbitration or adjudication under UNCLOS thus engages the states parties to UNCLOS in a decidedly legalised mode of dispute settlement. Arbitration and adjudication sit at one end of the dispute resolution spectrum, which traverses from highly political modes of dispute settlement, such as negotiation, to the legal processes entailed in a third party crafting a binding decision based on legal arguments presented.[9] Once a third party is involved in resolving an inter-state dispute by adjudication or arbitration, the potential participation and role of different actors also crystallises as the precise parameters of the dispute are delineated for resolution. To account for the legal and political dynamics at play in a formal legal process such as adjudication or arbitration, we can consider what role each actor

[4] UNCLOS, art 287(1).
[5] UNCLOS, art 287(5).
[6] UNCLOS, art 286.
[7] UNCLOS, art 293(1).
[8] UNCLOS, art 297 and art 298. These exceptions include certain fisheries and marine scientific research disputes in the EEZ; maritime boundary delimitation; military activities and historic bay disputes.
[9] This spectrum is exemplified in Article 33 of the UN Charter, which provides: 'The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.'

plays, and how their interests are identified and weighted in resolving the dispute. In this respect, we can explain how the legal principle of sovereign equality operates in a setting where the states concerned hold different levels of power. In doing so, we can highlight to what extent superpowers influence decision-making as stakeholders in the compulsory resolution of disputes under UNCLOS, as well as account for the roles of other important actors in this process.

To reflect on and potentially explain the role of superpowers as stakeholders in cases resolved under UNCLOS, this paper proceeds as follows. Part 2 will identify the different actors that are typically engaged in any arbitration or adjudication under UNCLOS. Part 3 will introduce stakeholder identification theory and explain its possible application in assessing cases resolved under the UNCLOS dispute settlement regime. Part 4 will scrutinise how this theory might explain aspects of decisions from the *South China Sea* arbitration. Finally, Part 5 will draw some lessons from the use of stakeholder identification theory—its limits and its potential—in explaining decision-making processes under UNCLOS dispute settlement, and the role of superpowers therein.

2. Dynamics of Different Actors

We should acknowledge the broad range of actors that may have an interest in the resolution of a dispute under the UNCLOS dispute settlement procedure. In any dispute arising under UNCLOS, there will necessarily be at least one state making a claim against at least one other state due to differing interpretations or applications of the legal principles enshrined in UNCLOS. The states in dispute are thus central in any adjudication or arbitration under UNCLOS. The court or tribunal will engage in an assessment of the factual and legal claims of each state to resolve the dispute, even in the absence of one of the states in dispute before it. In

the latter situation, the court or tribunal must still satisfy itself 'not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law'.[10]

Under Article 296(2) of UNCLOS, the decision of the court or tribunal 'shall have no binding force except between the parties and in respect of that particular dispute'. Yet a statement of law from a court or tribunal constituted under Part XV of UNCLOS will be of interest to other states party to UNCLOS even if that state party is not formally bound by the decision. This situation emerges because once a court or tribunal constituted under UNCLOS has set forth what a provision of UNCLOS means, if a state party subsequently acts contrarily to that meaning, that state is arguably in violation of international law.[11] The factual setting may enable a state to argue a point of distinction from a previous case, so there is a possibility of the court or tribunal departing from or qualifying an earlier holding.[12] Yet this outcome is less likely where there is a *jurisprudence constante*.[13]

In addition to those states that are already parties to UNCLOS, as almost 170 states are, there are also states that are not yet party to UNCLOS but would be interested in understanding how the treaty is likely to operate in any given setting. This non-state-party would assess any decision explaining the meaning of treaty terms and consider that holding in relation to its own maritime interests. The United States is an obvious actor in this regard, but other states with notable maritime interests in this category include Venezuela, North Korea, Turkey, Israel, Iran, and Peru.[14]

We can note that any of these three categories of states (states in dispute, state parties to UNCLOS and non-state-parties to UNCLOS) encapsulate states with different power positions.

[10] UNCLOS, annex VII, art 9.
[11] See, eg, Triggs (2006), p. 672 (referring to states following statements of law issued in the context of a non-binding advisory opinion).
[12] Crawford (2012), p. 39.
[13] Ibid.
[14] See UNCLOS Status. Iran and North Korea are at least signatories to UNCLOS, but have not ratified.

Powerful states, such as Russia and China, have been engaged in arbitrations under UNCLOS.[15] Important regional actors, including Brazil, Indonesia, Kenya, Saudi Arabia and Germany, are parties to UNCLOS although they have not yet been directly involved in any case under Part XV. The United States remains the most powerful state outside the UNCLOS regime.

While not usually directly involved as a party in an arbitration or adjudication under Part XV of UNCLOS, intergovernmental organisations, both global and regional, may have an interest in this decision-making process. An organisation like the International Maritime Organization may find that the treaties adopted under its auspices are interpreted and applied in cases addressing, for example, marine pollution. Notably, the COLREGs were interpreted and applied in the *South China Sea* arbitration.[16]

A number of non-state actors will have an interest in cases being resolved under Part XV of UNCLOS. Conservation groups will have an interest in how certain rules under UNCLOS are upheld, as evident in the interest of Greenpeace in the *Arctic Sunrise* arbitration.[17] Multinational corporations, especially those involved in the exploration and exploitation of the continental shelf, will have an interest in the resolution of boundary disputes under UNCLOS. An example may be seen with Woodside Petroleum and the Greater Sunrise Joint Venture in learning how the boundary would be delineated between Australia and Timor-Leste near the Greater Sunrise gas field in the Timor Sea following their compulsory conciliation.[18] These companies would have also followed the *Guyana v Suriname* decision that addressed the lawful

[15] See South China Sea Arbitration (Jurisdiction and Admissibility); South China Sea Arbitration (Award); Arctic Sunrise Arbitration (Award); Black Sea Arbitration.
[16] South China Sea Arbitration (Award), paras 1081-1109.
[17] See generally Mossop (2016).
[18] See 'Permanent Court of Arbitration (2017).

amount of force that could be used in the face of alleged illegal exploration activities by a company during a maritime boundary dispute.[19]

Shipping companies will also be engaged in interpretations of UNCLOS that address law enforcement against vessels involved in bunkering in a state's EEZ, as at issue in the *Virginia G*,[20] and *Norstar* cases.[21] Fishing companies are similarly concerned about the rules and parameters of UNCLOS affecting their operations, notably the standards for prompt release and the factors to be used in determining a reasonable financial bond in the event of a fishing vessel being arrested in the EEZ of a coastal state. The latter issues have been addressed in a number of cases instituted under Article 292 of UNCLOS.[22]

Other non-state actors that have stakes in the Part XV arbitration or adjudication are those directly involved in the case: the lawyers arguing the case, the registrar overseeing its administration, the experts and witnesses that may be used to present evidence or opinions. The lawyers arguing the case will likely include lawyers that work for the government of the state in dispute, but also extend to private lawyers who may be involved in many cases instituted under UNCLOS. In prompt release proceedings, the ship owners' lawyer may act in the name of the state party to UNCLOS.[23] The registry services for Annex VII arbitrations have predominantly been performed by the Permanent Court of Arbitration.[24] Expert opinions may be sought by the court or tribunal itself or by the states in dispute, and may be of particular use when one of the states in dispute does not appear before the UNCLOS court or tribunal. Witnesses have performed a critical role in assessing the application of UNCLOS provisions,

[19] Guyana v Suriname Arbitration (Award), paras 425-452.
[20] The M/V 'Virginia G' Case.
[21] The M/V 'Norstar' Case (Preliminary Objections).
[22] See, eg, Camouco Case; Volga Case (Judgment). For general discussion, see Trevisanut (2017).
[23] Article 292(2) permits the application for prompt release to be made 'by or on behalf of the flag State of the vessel.'
[24] All but one Annex VII arbitration has been administered through the Permanent Court of Arbitration; the one exception being Southern Bluefin Tuna Cases, which used the International Centre for the Settlement of Investment Disputes (ICSID) as its registrar.

especially in law enforcement settings.[25] Each of these actors will have varying degrees of influence in framing the key issues for resolution and how those issues are ultimately resolved.

Yet critical among all these actors are the judges; the individual judges comprise the 'court' or 'tribunal' making the decisions in an UNCLOS arbitration or adjudication. These actors may be assessed as individual actors, each bringing their own experience and knowledge, as well as their own conscious or unconscious predilections to the dispute resolution process.[26] Often there is an assessment of the 'court' or 'tribunal' as the critical decision-making actor with its own position within the international legal and political system. This legal institution carries with it certain responsibilities and characteristics in the role it performs in resolving disputes under UNCLOS.[27] These are assessed further in discussing the stakeholder identification theory in the following Part.

Another 'institution' or 'regime' that may be recognised in UNCLOS dispute settlement is UNCLOS itself. In this context, we can draw on regime theory, which Stephen D. Krasner defined in 1982 as a set of explicit or implicit 'principles, norms, rules, and decision making procedures around which actor expectations converge in a given issue-area'.[28] While international governance theories have moved beyond regime theory, what is important to recognise is how the 'regime' is endowed with its own qualities or characteristics. It is thus worth noting 'UNCLOS' as an actor in dispute settlement because other actors involved in the dispute settlement process do so themselves. This phenomenon is readily seen when there are decisions to be made on the parameters of jurisdiction; the parties will reference the purposes

[25] See, eg, M/V 'Virginia G' Case, paras 35-38 (listing 11 witnesses that appeared before ITLOS and the questions posed to them).
[26] These issues have been canvassed in literature dealing with gender balance in international courts. See, eg, Grossman (2012).
[27] See, eg, Alter (2012).
[28] Krasner (1982), p. 2.

of UNCLOS as an international regime. For example, in the *South China Sea* arbitration, China claimed that:

> the Philippines and the Arbitral Tribunal have abused relevant procedures and obstinately forced [sic] ahead with the arbitration, and as a result, have severely violated the legitimate rights that China enjoys as a State Party to the UNCLOS, completely deviated from the purposes and objectives of the UNCLOS, and *eroded the integrity and authority of the UNCLOS*.[29]

In cataloguing this diverse universe of actors and how they might be engaged in any case that arises for resolution under Part XV of UNCLOS, we can see that any number of them may either directly engage or wish to engage in the process so as to influence the outcome. The next Part contemplates how we can categorise and rank these actors, either as a way to explain what is currently happening in UNCLOS dispute settlement or as a means to develop a normative tool to explain how disputes should be resolved under UNCLOS.

3. Stakeholder Identification Theory

One possible explanatory paradigm is stakeholder identification theory, which has been used in the management context for managers to determine who are the salient stakeholders in making decisions in the interests of the organisation.[30] Stakeholder theory seeks to answer the question of who and what counts for managers in their decisions.[31] In utilising this theory,[32] we equate managers with judges, as they are the ultimate decision-makers for disputes resolved by arbitration or adjudication under UNCLOS. The decisions they make are for 'the

[29] South China Sea Arbitration (Award), para. 61 (citing a statement from the Chinese Ministry of Foreign Affairs) (emphasis added).
[30] Thanks to Gerry Natzgaam, Monash University, for bringing this theory to my attention in the context of whaling.
[31] A seminal work in this area is Freeman (1984). Stakeholder identification theory and how to determine the salience of stakeholders was expounded in an influential piece in 1997 by Mitchell, Agle and Wood. The 1997 piece remains the key starting point. Mitchell, Lee and Agle (2017), p. 127.
[32] Building on work in a new monograph: Klein and Parlett (forthcoming).

organisation', which we can understand to be the UNCLOS regime. Judges as the managers must make decisions that are in the best interests of the organisation, that is, the UNCLOS regime. The stakeholders are then the various other actors identified in the previous Part with interests in dispute settlement. In creating this analogy, we have the opportunity to articulate what factors, including different actors, could or should influence judges. How should judges prioritise these different interests? We can therefore assess the possible applicability of stakeholder theory in the context of UNCLOS dispute settlement.

A stakeholder may be broadly defined as 'any group or individual who can affect or is affected by the achievement of the organization's objectives'.[33] To achieve the organisation's objectives, managers (or in our case judges) must pay varying attention to different types of stakeholders.[34] Mitchell, Agle and Wood propose that we look to the power, legitimacy and urgency associated with stakeholders.[35] The *power* held may be coercive ('based on physical resources of force, violence, or restraint'); utilitarian ('based on material or financial resources') or normative ('based on symbolic resources').[36] Whatever the source of power, the upshot is that it enables the stakeholder to impose its will.[37]

Legitimacy may have different meanings depending on its context, and was given a broad-based definition by Suchman, as follows: 'a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs and definitions'.[38] Legitimacy has a strong place in

[33] Freeman (1984), p. 46.
[34] Mitchell, Agle and Wood (1997), p. 855 This assessment involves determining stakeholder salience, which is 'the degree to which managers give priority to competing stakeholder claims'. Mitchell, Agle and Wood (1997), p. 854.
[35] See Mitchell, Agle and Wood (1997), pp. 859-863 and 865-868.
[36] Mitchell, Agle and Wood. (1997), p. 865, citing Etzioni (1964), p. 59.
[37] Mitchell, Agle and Wood. (1997), p. 865.
[38] Suchman (1995), p. 574, cited by Mitchell, Agle and Wood. (1997), p. 866.

international law,[39] and is important in consent-based treaty regimes where state actors can make rational decisions on their level of involvement in the regime.

In applying stakeholder identification theory to UNCLOS dispute settlement, a question does emerge as to how we might differentiate normative power from legitimacy? Symbolic power could be ascribed to an actor adhering to the rules of international law and taking steps to uphold or enforce those rules. The key difference would seem to be the ability to impose one's will based on the assertion of legal rules. Some actors are more able to enforce international law than others. Yet the very availability of the UNCLOS dispute settlement regime for all parties to that treaty does open up the possibility to states parties having normative power if they choose to avail themselves of compulsory dispute settlement procedures entailing binding decisions and there are no barriers to doing so.

Urgency assesses the time sensitivity of claims or relationships as well as the importance of the claim or the relationship to the stakeholder.[40] It is the urgency of the claim of the stakeholder rather than the urgency of the stakeholder itself that matters.[41]

While these three categories provide a way to classify the interests of stakeholders, it must also be acknowledged that the attributes of stakeholders may vary over time, might entail subjective determinations and may or may not be asserted in any given context.[42] Yet even with this possible nuance, the categories allow us to identify the stakeholders and their interests in a decision-making process.

[39] Epitomized by Thomas Franck's writing in the area. See, eg, Franck (1995).
[40] Mitchell, Agle and Wood (1997), p. 867. An additional dimension proposed to the urgency of a claim is the probability of the claim's occurrence. See Driscoll and Starik (2004), discussed in Mitchell, Lee & Agle (2017), p. 139. Although arguably this dimension could be captured in an assessment of the importance of the claim or relationship.
[41] See Mitchell, Lee and Agle (2017), p. 140, discussing the work of Eesley and Lennox (2006). Stakeholder urgency would instead be part of the power attribute.
[42] Mitchell, Agle and Wood (1997), p. 868.

These are the factors that must be weighed by the manager in making strategic decisions for the organisation; they determine which stakeholders are salient.[43] In assessing stakeholders, a process may be undertaken in determining which stakeholders possess power, legitimacy and urgency, or perhaps just two of those attributes or only one. A sliding scale applies. As such, a stakeholder exhibiting all three of power, legitimacy and urgency means that a manager (judge) has 'a clear and immediate mandate to attend to and give priority to that stakeholder's claim'.[44]

Stakeholder identification theory provides a tool for articulating what could or should be influencing decision-making and why decision-makers should take heed. There is no consistent set of variables, but we instead have an opportunity to look broadly at the variety of actors in the international system and different forms of communications between those actors and have a means to weigh those interactions and assess their salience in the judicial decision-making process. There is therefore an opportunity to account for the complexity of UNCLOS dispute settlement and to engage more transparently in what has influenced diverse outcomes. Inherent difficulties remain of course, as it will not always be evident on the face of any judgement how or why a judge has either emphasised, downplayed or overlooked any dimension of a case.[45]

What also potentially remains elusive is whether the judges all share the same objectives for the organisation. The identification of stakeholders' attributes only makes sense when we have a clear sense of what ends a judge is trying to achieve in making decisions on claims presented. Judges deciding cases under UNCLOS appear to be motivated by the broad aims associated with the peaceful settlement of disputes, the rule of law, and the public order (or good

[43] Mitchell, Agle and Wood (1997), pp. 870-871.
[44] Mitchell, Agle and Wood (1997), p. 878. As there are three types of power, arguably the more of these types of power attributes exhibited then this would also positively influence the salience of the stakeholder. See Parent and Deephouse (2007).
[45] Context will remain important, including the characteristics of the judges making the decisions. See Mitchell, Lee and Agle (2017), p. 141.

governance) of the oceans.[46] Ultimately, there needs to be a connection between who and what counts in decision-making with the outcome sought to be achieved.

Stakeholder identification theory thus potentially provides us with a tool to explain what is happening in UNCLOS arbitrations and adjudication and the extent that the interests of superpowers are accommodated in this setting. In relation to any decision emanating from adjudication or arbitration, we can identify the actors, their interests and the extent those interests were satisfied in the decisions of the judges. Using this technique, we can show to what extent superpowers have prevailed, if at all, in the compulsory arbitration and adjudication procedures under UNCLOS.

4. Applied to the *South China Sea* Arbitration

Considering the many important dimensions to the final award of the *South China Sea* arbitration, this paper will only examine one aspect of the case to test the use of stakeholder identification theory. One controversial issue was the status of various land features in the South China Sea as either 'fully-entitled' islands or rocks under Article 121 of UNCLOS.[47] Article 121 provides:

> 1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.
>
> 2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are

[46] See, eg, Duzgit Integrity Arbitration, para. 132.
[47] A fully entitled island may be used by the sovereign state to claim a territorial sea, contiguous zone, EEZ and continental shelf. See UNCLOS, art. 121(1). The South China Sea Arbitration Tribunal utilised the terminology of a 'fully entitled' island to distinguish features under Article 121(1) from those classified as a rock under Article 121(3). A rock, while still an island, is not entitled to either an EEZ or a continental shelf.

determined in accordance with the provisions of this Convention applicable to other land territory.

3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.

Critical for assessing the entitlement of a land feature to maritime zones is thus whether an island 'cannot sustain human habitation or economic life of their own', because if not, the islands are deemed 'rocks' that do not have an EEZ or continental shelf.[48] The *South China Sea* Tribunal undertook a review of the text of Article 121(3), as well as considering the context, object, and purpose of UNCLOS and the negotiating history (the *travaux préparatoires*) to ascertain the meaning of Article 121(3). Notable in the reasoning was the Tribunal's dismissal of the relevance of state practice,[49] as well as its reliance on a policy position of not allocating extensive maritime zones to the exclusive control of one coastal state based on the presence of a very small island.[50]

The detailed study of the text of Article 121(3)[51] brought to light some critical characteristics. Notably, the Tribunal considered that a range of basic requirements would have to be met to establish 'human habitation'; these requirements being those 'necessary to provide for the daily subsistence and survival of a number of people for an indefinite time'.[52] The Tribunal further noted that '[a] feature that is only capable of sustaining habitation through the continued delivery of supplies from outside does not meet the requirements of Article 121(3).'[53] In relation to an 'economic life of their own', the Tribunal considered *inter alia* that human engagement would be needed so that the economic life was not simply derived from extractive

[48] UNCLOS, art. 121(3).
[49] South China Sea Arbitration (Award), paras. 552-553. See further Klein (2016), pp. 28-30; Elferink (2016).
[50] See South China Sea Arbitration (Award), paras. 512-520.
[51] See South China Sea Arbitration (Award), paras. 482-553.
[52] South China Sea Arbitration (Award).
[53] South China Sea Arbitration (Award), para. 547.

activities, particularly where those activities would have no benefit for any local population on the feature itself.[54] Moreover, the extractive activity had to occur on the land, or be connected with the land, of the feature itself and not merely occur in the waters around the feature.[55] In this regard, the Tribunal appeared to be motivated by the view that the EEZ and the continental shelf had to be for the benefit of an actual population rather than for the pure economic benefit of a sovereign state that otherwise has no connection with the land in question in the absence of that human habitation.

The *South China Sea* Tribunal ultimately determined that Subi Reef, Gaven Reef (South), Hughes Reef, Mischief Reef and Second Thomas Shoal were low-tide elevations. Other features contested by the Philippines, Scarborough Shoal, Gaven Reef (North), McKennan Reef, Johnson Reef, Cuarteron Reef, and Fiery Cross Reef, were ruled to be, in their natural condition, 'rocks' within the meaning of Article 121(3). To ensure that there was no possibility of an overlapping Chinese maritime claim that would put the Philippines' claims outside jurisdiction, the Tribunal further considered the status of other high-tide features in the Spratly Island group. It concluded that none of Itu Aba, Thitu, West York, Spratly Island, South-West Cay, and North-East Cay were capable of sustaining human habitation within the meaning of Article 121(3).[56] Hence, they were also rocks only entitled to a territorial sea and contiguous zone.

In reaching this decision, the two immediate stakeholders were the Philippines and China as the parties to the case. In classifying its interests, China clearly had power, both coercive as a strong military actor with a history of demonstrating that military strength,[57] and utilitarian because it had the financial and material resources to develop the features and potentially

[54] South China Sea Arbitration (Award), paras. 499-500.
[55] South China Sea Arbitration (Award), para. 503. As such, economic life derived from the EEZ or the continental shelf of the feature could not be considered as meeting this criterion. Ibid, para. 502.
[56] South China Sea Arbitration (Award), para. 621.
[57] See, eg, The Guardian (2015).

underline their characterisation as fully-entitled islands rather than rocks. China also could be viewed as having normative power for two reasons. First, its engagement with international law in justifying its claims through its assertion of sovereignty over the disputed land features and its consistent view as to its authority over the features at issue and the adjacent waters as a matter of international law. Second, China's assertion of extended maritime zones over these small land features is arguably consistent with the practice of other coastal states that have sovereignty over small island features and relied upon these claims as consistent with their interpretation of UNCLOS in asserting maritime rights and delimiting maritime boundaries.

The Philippines' power was normative only, as the actor seeking to uphold the rules-based order established under UNCLOS through the UNCLOS dispute settlement processes. This symbolic power arguably emerges in the dynamic of an actor asserting legal rights in defiance of another actor that has coercive and utilitarian power.[58]

Both the Philippines and China could also make claims as to the urgency of their interests in this aspect of the dispute. China's urgency was reflected in its accelerated land reclamation activities following the institution of proceedings by the Philippines.[59] The urgency for the Philippines was also China's accelerated activities, which could be perceived as an intrusion on the Philippines' claimed sovereignty over the features and to the maritime zones in question. Further, there was urgency because of the ongoing denial of fishing rights for its nationals in some of the contested waters. Finally, the Philippines had particular urgency in the resolution of this issue in its favour as holdings to the contrary would have prevented the exercise of jurisdiction over other of its claims in the arbitration due to the unresolved maritime boundary delimitation.

[58] See discussion of the Philippines' strategy in Talmon (2014), p. 72 ('More important than winning the case seems the opportunity for the Philippine Government to publicise its case against China to the world.')
[59] An argument that the Philippines made in the context of China's aggravation of the dispute as a discrete violation of international law. See *South China Sea* Arbitration (Award), paras. 1163-1180.

Determining the legitimacy of the claims asserted by the states in the dispute may become quite circular. There was legitimacy to the claim of the Philippines because its legal argument that the features in question were not fully-entitled islands was upheld by the Tribunal. China's claim was not upheld and so therefore was not legitimate. In this situation, making a claim that aligns with that of the decision-maker as to the correct interpretation of the law creates the legitimacy rather than the legitimacy of the interpretation being the interest to be considered.

This issue around legitimacy may be seen more clearly when we consider the position of other states parties to UNCLOS that would also have an interest in the interpretation of a provision of UNCLOS that has long been subject to varied perspectives. Three states that would be relevant in this regard are Australia, France and Japan. Each of these states has small islands that they view as fully-entitled islands but their claims to EEZs and continental shelves have been challenged in different settings. For Australia, the Heard and McDonald Islands and for France, Kerguelen Island, were all questioned as to whether the criteria of Article 121(3) were met by Judge Vukas in his separate opinion in judgments for ITLOS.[60] The observation by Judge Vukas, which was questioned by other judges in the case for different reasons,[61] was not relevant to the determination of the cases before ITLOS at the time yet still served to shine a spotlight on the issue. Japan's claim for an EEZ and continental shelf entitlement for Okinotoroshima has been protested by China and South Korea in relation to its submissions to the Commission on the Limits of the Continental Shelf.[62]

Do their claims to extended maritime zones for these islands reflect a legitimate interest to be taken into account by a decision-maker? Australia, for example, may well argue that its position is legitimate because the marine environment around the Heard and McDonald Islands is much

[60] Volga Case (Declaration of Vice-President Vukas), paras 2-6; Monte Confurco Case (Declaration of Judge Vukas), p. 122.
[61] See, eg, Monte Confurco Case (Dissenting Opinion of Judge Anderson), p.128.
[62] For discussion, see Qui and Liu (2009).

better served by the 2002 establishment of the HIMI Marine Reserve,[63] and its assertion of exclusive jurisdiction has facilitated better conservation and management of the living resources in the area. As with the Philippines and China, a decision that favours its claims becomes its own self-fulfilling legitimacy of the interest.

Yet Australia may also assert its legitimacy, as would France, on the basis that the claims to the extended maritime zones have been in place without protest for an extended length of time, reflecting other states' acquiescence in the legitimacy of those claims. Japan, by contrast, has faced greater resistance to its claims to fully-entitled island status for Okinotorishima and in this situation, the legitimacy of its position is undermined. In this factual setting, it is easier to identify the legitimacy of a particular claim.

For completeness, we can consider the power and urgency interests of Australia, France and Japan. At the time of the judgment, all three would have held normative power comparable to the Philippines to the extent they all support a rules-based order and wish to engage in the UNCLOS regime and assert and protect the interests enshrined in that treaty. All three states have been involved in UNCLOS dispute settlement processes (although Japan and France only as respondents),[64] so have some credibility as players in the compulsory UNCLOS procedures.

The urgency for these three states would not have been as high as would have been the situation with the Philippines and China. Nonetheless, all three states have interests in the regulation of maritime activities in the South China Sea as it relates to their navigation and defence concerns within and across this semi-enclosed sea. Greater certainty as to the maritime entitlements of

[63] See Australian Government Department of the Environment and Energy, Australian Antarctic Division (undated).
[64] See, eg, Monte Confurco Case, p. 86; Camouco Case, p.10; Volga Case (Judgment); Southern Bluefin Tuna Cases; Southern Bluefin Tuna Cases (Jurisdiction and Admissibility).

each neighbouring state would enhance national decision-making on navigation and defence issues in both short- and long-term.

Other stakeholders that are also parties to UNCLOS are the other states that border the South China Sea. Beyond China and the Philippines, Viet Nam, Malaysia, and Brunei hold competing claims over different island groups, such as the Paracels and the Spratly islands, as well as over other islands and land features located throughout this semi-enclosed sea.[65] On the issue of the status of the features as fully-entitled islands, rocks or low-tide elevations, there were likely two primary considerations for these states. First would be the impact of any determination in the arbitration on their claims to maritime zones in the area based on the maritime entitlements of the features at issue in the case. In this regard, a question for the states bordering the South China Sea would be where their maritime boundary would fall if the small features in the case were fully-entitled islands and hence produced overlapping EEZs and continental shelves requiring delimitation between them. As McDorman noted, a finding that none of the features at issue were fully-entitled islands meant that any maritime boundaries within the South China Sea would only be based on maritime zones emanating from the mainland coasts of the states in question.[66] Moreover, it is worth noting that if the Tribunal had concluded in the arbitration that there were fully-entitled islands at issue, the jurisdiction of the Tribunal would have likely been reduced. This lack of jurisdiction would have arisen because a question of maritime boundary delimitation would emerge and could not be resolved due to China's exclusion of maritime boundary disputes from compulsory procedures entailing binding decisions under Article 298(1)(a)(i) of UNCLOS.

[65] For a map of the claims, see Damrosch and Oxman (2013), p. 96. Taiwan is also a claimant, but it is not universally recognised as a state and is not a party to UNCLOS.
[66] McDorman (2016).

A second key consideration in the case for the other states bordering the South China Sea would be the status of their own claimed features, for example Viet Nam's claims in the Paracel Island group, in light of the elucidation of the interpretation and application of Article 121 by the *South China Sea* Tribunal. Ultimately, to ensure that its subject matter jurisdiction was not limited because of China's declaration under Article 298(1)(a)(i), the *South China Sea* Tribunal considered the status of all the features in the Spratly Island group even though not all of them were explicitly raised for consideration by the Philippines in its claims. Such a determination was especially relevant for Taiwan given its claim that Itu Aba/Taiping Island is a fully-entitled island, but the *South China Sea* Tribunal determined that it did not meet the criteria of Article 121(3). Moreover, Malaysia and Viet Nam also make claims to features in the Spratly Islands so potentially have rights implicated by the decision.[67] Finally, to the extent that there are other comparable land features in the South China Sea, as may be the case for Viet Nam and China in relation to their contested rights over the Paracel Islands,[68] the interpretation and application of Article 121(3) will affect other maritime claims in the South China Sea.

To assess the interests of the states bordering the South China Sea in terms of stakeholder identification theory, it would be argued that these states hold only normative power, similarly to the Philippines, to the extent that they are seeking to uphold the rules-based order of UNCLOS. Each of the state parties could contemplate resort to UNCLOS dispute settlement with claims similar to the Philippines. Their legitimacy is derived from the chicken-and-egg scenario also like the Philippines whereby any claims they made supported by the Tribunal gave them legitimacy. Where legitimacy may additionally be asserted in relation to this group of states is in relation to the need to establish a cooperative regime and create a scenario that is

[67] See Beckman (2013), p. 144.
[68] See Beckman (2013), p. 144.

conducive to facilitating coordination in this semi-enclosed sea.[69] By denying extended maritime zones to the small islands, the maritime boundary disputes are arguably simplified and resolution of the competing claims may be more conducive. However, the counter-view is that the outright denial of China's position and its concomitant rejection of the decision has diminished the likelihood of resolution of the competing maritime claims in a cooperative manner. Reaching a conclusion that lacked any compromise or face-saving for China may undercut the legitimacy of the claims of the other border states that seek cooperation.

These states would all share urgency in wanting this issue resolved sooner rather than later in the face of China's increasing presence throughout the semi-enclosed sea. Moreover, there would also be urgency in that each state has an interest in ensuring their own access to the resources of the area for their own economic development.

As a military and economic superpower, the United States, even as a non-party to UNCLOS is still a stakeholder in a dispute concerning the South China Sea because of the interests it holds in supporting allies in the region, its own security interests, and in ensuring the freedom of navigation for both military and commercial ships. For a determination of the meaning of Article 121, the United States also had an interest in gaining an understanding of how the language of this provision would operate and thereby affect the United States' islands. In particular, the United States claims extended maritime zones around the small and isolated Johnston Atoll, located between the Marshall Islands and Hawai'i.[70] Further, the United States was highly engaged in the negotiations of UNCLOS, and continues to engage in debates within the United States polity on the possible ratification of the treaty.[71]

[69] As required under Article 123 of UNCLOS, which reads in part: 'States bordering an enclosed or semi-enclosed sea should cooperate with each other in the exercise of their rights and in the performance of their duties under this Convention.'
[70] See Klein (2016), p. 28.
[71] For recent discussion on the US position, see Smith LH (2017).

In terms of identifying the United States' interests as a stakeholder in the resolution of this issue, it can be observed that its military and economic status indicates the coercive and utilitarian power it holds, similar to China. However, the United States lacks normative power or legitimacy to the extent that these factors are aligned with participation in UNCLOS as a party that has accepted both the rights and obligations enshrined throughout that treaty. Arguably, the United States has similar normative power to any other state asserting adherence to international law but its position in this regard is undermined by its failure to ratify UNCLOS. For the United States, there may be urgency in the resolution of the claims to the extent that the United States wishes to resolve the competing claims within the South China Sea and bring certainty to the exercise of legal rights within this maritime area. As any interpretation of Article 121 relates to its own maritime claims, there is no urgency because of the United States' non-party status and because it would not be in its interest to have a decision that would cut against its own expansive maritime claims.

Fishing and shipping companies could also be identified as stakeholders in relation to this aspect of the dispute to the extent that the claimed maritime zones emanating from these land features implicate their rights to fish and /or move freely throughout the South China Sea. Their claims would be urgent to the extent that their economic rights were potentially being infringed with the uncertainty for their operations as to which state had rights in any specific area within this sea. Their rights are derived from the different states concerned, though, and could be viewed as marginal compared to the interests of states in this setting.

Another actor in the *South China Sea* arbitration on this issue was that of the expert hydrographer appointed by the Tribunal.[72] The Tribunal described the assistance provided by this hydrographer as assisting it:

[72] South China Sea Arbitration (Award), para. 58.

> in "reviewing and analysing geographic and hydrographic information, photographs, satellite imagery and other technical data in order to enable the Arbitral Tribunal to assess the status (as a submerged feature, low-tide elevation, or island)" of the features named in the Philippines' Submissions or any other such feature determined to be relevant during the course of the reference. While the appointment of hydrographic experts is common practice in Annex VII arbitrations, in light of China's non-participation, Mr. Boyes was also tasked with assisting with a "critical assessment of relevant expert advice and opinions submitted by the Philippines."[73]

The nature of the role of the expert would typically be one that does not allow the expert to impose their will (at least not overtly) on the decision-maker. As such, no power could be attributed to the interests of the actor. There would be legitimacy because of the type of role being performed. The urgency, if any, would be limited to contributing to the definition of the immediate relationships before the tribunal and any time sensitivity derived from the position of other stakeholders, notably the Philippines, rather than any urgency in the expert's own right or interest in seeing their views upheld or vindicated in the Tribunal's decision.

In sum, while acknowledging the counter-arguments set forth above, the following table summarises the identification of interests across the different stakeholders in the interpretation and application of Article 121 in the *South China Sea* arbitration:[74]

Stakeholder	Power			Legitimacy	Urgency
	Coercive	Utilitarian	Normative		
The Philippines			X	X	X

[73] South China Sea Arbitration (Award), para. 133 (citations omitted).
[74] Ultimately, this assessment is an impressionistic analysis. Preferably, interviews would be conducted with each of the stakeholders (if possible) as a more rigorous method for testing the relative strength of each of the interests involved.

China	X	X	X		X
Australia /France			X	X	
Japan			X		
States bordering the South China Sea: (Taiwan), Viet Nam, Malaysia, and Brunei			X	X	X
United States	X	X			
Companies					X
Expert				X	

Through this analysis, we can see that the *South China Sea* Tribunal prioritised the claims of the Philippines, which had power, legitimacy and urgency attributes identified, as did the other states bordering the South China Sea except for China (and by extension, Taiwan). Arguably, the urgency claims of the Philippines were as strong as or stronger than the power claims of China. In a judicial setting, it is imaginable that judges would weight coercive and utilitarian power less as compared to normative power or legitimacy, both of which would likely align better with the overall regime goals of the peaceful settlement of disputes, the rule of law and the good governance of the oceans. Yet these power factors cannot be dismissed in their entirety and must still form part of the decision-making process. The *South China Sea* Tribunal's failure to engage with state practice in any detail may indicate that the power elements mentioned

were not accounted for sufficiently, which has prompted some of the dissatisfaction surrounding this aspect of the decision.[75]

5. Lessons Learned

The above examination has provided a possible explanation for the decision of the *South China Sea* Tribunal in ascertaining that there were no fully-entitled islands at issue in the case, as opposed to rocks and low-tide elevations. The advantage to using this approach is that it provides transparency in highlighting what actors' interests were at play and what importance could or should have been attributed to each stakeholder and their interests in decisions that were to be for the good of the 'organisation'. To this end, stakeholder identification theory enables us to see how superpowers can influence a decision, but also shows us the possible limits of superpower interest. In the case of the United States, its interests were not, and could not be, pressing in the minds of the decision-makers when it was not a party to the dispute and it is not even a party to UNCLOS.

Yet the analysis has also shown an important limitation in using stakeholder identification theory in the context of international adjudication or arbitration under UNCLOS. How do we identify legitimacy as an interest separate to the decision that is being made? To be legitimate, we are potentially already making a call on whether an actor's assertion aligns with our understanding and interpretation of the law or not. This difficulty is compounded by the use of international law in different ways to justify state action rather than a state necessarily acknowledging a breach of international law. Widespread condemnation of a state's actions might enable more easily decisions about legitimacy. Hence, it was argued above that additional factors could be relied upon to show legitimacy beyond the actual decision on the question of law at issue. As argued by international relations scholars, legitimacy extends

[75] See, eg, Oude Elferink (2016); Talmon (2017).

beyond questions of what is lawful and what is not.[76] Although a court or tribunal must be limited by their assessments of the legality of actions consistent with their jurisdictional mandate, there is scope to consider the object and purpose of rules, as well as the context for those rules.[77] The broader setting for the rules at issue can then inform the assessment of the stakeholder's interests.

We can also learn from the stakeholder identification theory that it may need to be looked at through quite a wide and dense lens.[78] In this chapter, I have focused on the possible application of stakeholder identification theory to one discrete issue in the *South China Sea* arbitration. Yet we know that in international dispute settlement that there are frequently linkages between different questions that make up any dispute. It has been noted that there was an important link between the decision on the status of the land features and the jurisdiction of the tribunal. So one decision connects to another, which connects to another. Hence the possible width of scrutiny that might be needed in trying to apply the stakeholder identification theory across an entire judgment. We also have to appreciate that there might be trade-offs by the decision-maker. So even if a stakeholder is denied an outcome in relation to one issue, perhaps the decision-maker compensates by rewarding the stakeholder for another issue. This dimension creates the density of analysis: the identification and weighting of interests in the context of one decision may involve some trade-offs at another level of decision-making. This sort of compromise can be seen, for example, in maritime boundary disputes where the court or tribunal attributes different weight to varied geographic and other factors along the course of a boundary.

[76] See, eg, discussions in Falk, Juergensmeyer and Popovski (eds) (2012).
[77] This power is derived from the rules of treaty interpretation. Article 31(1) of the Vienna Convention on the Law of Treaties provides: A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. VCLT, art. 31(1).
[78] Such a lens may be captured by the idea of 'interactive salience', which acknowledges that 'prioritization of stakeholders appears to be influenced by multiple activities within and outside of the organization'. Mitchell, Lee and Agle (2017), p. 143.

Ultimately, although the task is complex and still entails subjective assessments, our understanding of judgments can be enhanced through stakeholder identification theory as a means to explain why decisions were reached the way they were. The fit may not always be perfect and, as acknowledged at the outset, we may be limited by what information is publicly available in any judgment or relevant documents or pleadings in a case.[79] We are left, though, with the question as to whether stakeholder identification theory is just an explanatory tool,[80] or whether we can go further and suggest that it is a normative tool in its own right that should be used by decision-makers in UNCLOS dispute settlement to inform their processes and better elucidate the reasoning by which decisions are reached. The latter seems unlikely to be adopted in any formulaic fashion as has been followed here, but it seems the very process of thinking broadly and deeply about the different actors and their interests should be rally cry to ensure greater transparency in the reasoning of courts and tribunals. Moreover, the process allows for a broader appreciation of the complexity of international law with its multitude of actors, as well as the increasingly sophisticated and varied modes of communication that are all put into play in the regulation of international conduct and in the settlement of international disputes.

Abbreviations

COLREGs – International Regulations for Preventing Collisions at Sea

EEZ – Exclusive Economic Zone

HIMI - Heard Island and McDonald Islands

ICJ – International Court of Justice

ITLOS - International Tribunal for the Law of the Sea

UNCLOS - United Nations Convention on the Law of the Sea

[79] As noted above, interviews with the stakeholders may fill important knowledge gaps in this regard. However, this method involves its own challenges (including access to all stakeholders and questions of privileged information in a lawyer-client relationship).

[80] As is the case in the management context. See Mitchell, Lee and Agle (2017), p. 148 (referring to the 'explanatory potential' of the stakeholder salience model).

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