



## THE SOUTH CHINA SEA DISPUTES CURRENT DEVELOPMENTS, THE RULE OF LAW & PEACE INITIATIVES



*International Association of Democratic Lawyers  
International Fund "The Way for Peace"  
Confederation of Lawyers of Asia and the Pacific  
Japan Lawyers International Solidarity Association*

## TABLE OF CONTENTS

### Introduction

|                               |   |
|-------------------------------|---|
| <i>Le Thi Kim Thanh</i> ..... | 4 |
|-------------------------------|---|

### Part I: UPDATE SITUATION IN THE SOUTH CHINA SEA

Situation of maritime territorial disputes in Asia-Pacific

|                           |   |
|---------------------------|---|
| <i>Nguyen Giang</i> ..... | 6 |
|---------------------------|---|

Philippine kowtowing foreign policy on the South China Sea dispute: A threat to regional peace

|                              |    |
|------------------------------|----|
| <i>Neri Colmenares</i> ..... | 11 |
|------------------------------|----|

Updating situation in the South China Sea

|                           |    |
|---------------------------|----|
| <i>Le Dinh Tinh</i> ..... | 20 |
|---------------------------|----|

### Part II: LAW ENFORCEMENT IN THE SOUTH CHINA SEA

Philippines v. China: Rulings and legal implications

|                                 |    |
|---------------------------------|----|
| <i>Jay L. Batongbacal</i> ..... | 23 |
|---------------------------------|----|

Role of international law for the settlement of territorial disputes - Focusing mainly on the means of settlement

|                             |    |
|-----------------------------|----|
| <i>Yoshiro Matsui</i> ..... | 26 |
|-----------------------------|----|

Different peaceful resolution mechanisms under Article VI of the UN Charter and other dispute resolution mechanisms under international law

|                           |    |
|---------------------------|----|
| <i>Erik Franckx</i> ..... | 44 |
|---------------------------|----|

### Part III: PEACE INITIATIVES FOR THE SOUTH CHINA SEA

Proposals on possible forms, mechanisms, or methods of the peaceful resolution

|                           |    |
|---------------------------|----|
| <i>Erik Franckx</i> ..... | 54 |
|---------------------------|----|

Enforcement of the Philippines v. China Arbitral Award through De-polarization and State Socialization into a Rules-Based Regime in the South China Sea

|                                      |    |
|--------------------------------------|----|
| <i>Frank Lloyd B. Tiongson</i> ..... | 64 |
|--------------------------------------|----|

Conciliation under Annex V, UNCLOS: A potential dispute settlement measure for complex disputes relating to law of the sea

|                           |    |
|---------------------------|----|
| <i>Vo Ngoc Diep</i> ..... | 73 |
|---------------------------|----|

Multilateral Management of the South China Sea Dispute

|                             |    |
|-----------------------------|----|
| <i>Yamagata Hideo</i> ..... | 78 |
|-----------------------------|----|

### Conclusion

|                               |    |
|-------------------------------|----|
| <i>Le Thi Kim Thanh</i> ..... | 91 |
|-------------------------------|----|

## Part IV: USEFUL LINKS

1. UN Charter: <http://www.un.org/en/sections/un-charter/un-charter-full-text/>
2. UN Convention on the Law of the Sea 1982:  
[http://www.un.org/depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf)
3. Award on Jurisdiction and Admissibility of the Arbitral Tribunal, 29 October 2015:  
<https://pcacases.com/web/sendAttach/1506>
4. The South China Sea Arbitration Award of 12 July 2016:  
<https://pcacases.com/web/sendAttach/2086>



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IADL, International Association of Democratic Lawyers, is a Non- Governmental Organization (NGO) with consultative status to ECOSOC and represented at UNESCO and UNICEF. The IADL was founded in 1946 by a gathering of lawyers who had survived the war against fascism and participated in the Nuremberg Trials.

The International Review of Contemporary Law is a digital legal journal published by IADL. It does not follow the mainstream, but instead analyzes legal questions in their cultural, economical, political and social context.

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The South China Sea, as shown in the Tribunal's Award on Jurisdiction and Admissibility, (October 29<sup>th</sup>, 2015)

## INTRODUCTION

***Le Thi Kim Thanh\****

*“...the Tribunal concludes that, as between the Philippines and China, China’s claims to historic rights, or other sovereign rights or jurisdiction, with respect to the maritime areas of the South China Sea encompassed by the relevant part of the ‘nine-dash line’ are contrary to the Convention and without lawful effect to the extent that they exceed the geographic and substantive limits of China’s maritime entitlements under the Convention. The Tribunal concludes that the Convention superseded any historic rights or other sovereign rights or jurisdiction in excess of the limits imposed therein”*

### ***The South China Sea Arbitration Award of 12 July 2016 - Section V(F)(d)(278)***

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Hosting one-third of global shipping traffic that accounts for \$5.3 trillion in total trade<sup>1</sup>, the South China Sea is one of the world’s busiest sea routes. As home to 11 billion barrels of oil and 190 trillion<sup>2</sup> cubic feet of natural gas, this resource-rich region is vital not only to the livelihoods of coastal states but is also critical for the import and export economies of many countries, including Japan, South Korea, Taiwan, Singapore and China. This is an essential oil and commercial resources transport route from the Middle East and

Southeast Asia to East Asia. More than 90% of the world's commercial shipping travels by sea and 45% of it goes through the South China Sea. It is projected that 90% of Middle Eastern fossil fuel exports will go to Asia by 2035.<sup>3</sup> The importance of these waters and their geopolitical significance cannot be underestimated.

The South China Sea disputes date back centuries. More recently, simmering disagreements over South China Sea waters unleashed a chain of armed conflicts between China and neighboring countries by the end of the 20<sup>th</sup> century. Tensions reached a new height after the 2012 incident known as the Scarborough Shoal standoff, where China had effectively occupied the disputed island. Political unrest and a series of incidents together with China’s reclamation activities in the Spratlys and militarization all over the South China Sea later brought the region to a political boiling point.

In 2013, after having “exhausted all political and diplomatic avenues for a peaceful settlement of its maritime disputes with China,” the Philippines filed an arbitration case against the Peoples Republic of China under Annex VII to the 1982 United Nations Convention on the Law of the Sea (UNCLOS). On July 12, 2016, the Permanent Court of Arbitration, constituted under Annex VII, ruled in favor of the Philippines, concluding that

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\* Vice President of Vietnam Lawyers Association

<sup>1</sup> Source: The White House

<sup>2</sup> Source: U.S. Energy Information Administration

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<sup>3</sup> Source: International Energy Agency

China had “no historical rights” based on the “Nine-Dash Line” map.

The International Association of Democratic Lawyers (IADL), since its founding in 1946, has advocated for the goals of the UN Charter. IADL has actively endeavored to promote peace in the South China Sea for a long time. IADL considered the 2016 ruling an opening to achieve a peaceful resolution of the dispute, particularly in light of the court’s conclusion regarding the entitlements of various maritime features in the Sea and China’s claim with respect to the Nine-Dash Line.

In January 2017 in Japan, and September 2018 in Russia, IADL, with the support of the Japanese Lawyers for International Solidarity (JALISA) and Russia’s International Fund “The Way for Peace”,

held two international conferences to discuss the impact of the 2016 ruling and how it could provide a basis for peaceful resolution of the South China Sea disputes, despite China’s objection to the ruling.

In this issue of the Review, the editorial board presents selected articles, speeches and reports from both conferences, divided into three categories:

1. Developments in the South China Sea since the court’s ruling in 2016;
2. The rule of law in the region and infringement of the court’s ruling in the South China Sea; and
3. Peaceful resolutions of and initiatives to resolve the disputes in the South China Sea.

# **PART I**

## **UPDATE SITUATION IN THE SOUTH CHINA SEA**

### **SITUATION OF MARITIME TERRITORIAL DISPUTES IN ASIA- PACIFIC**

*Nguyen Giang\**

Ladies and gentlemen, it is an honor to speak in front of IADL members because you are experts of international law. I would also like to thank the organizations here who gave me a chance to speak.

My presentation focuses on the overview on maritime territorial disputes in South China Sea. I also intend to discuss maritime disputes after the arbitration award in July that was mentioned by the distinguished professor from the Philippines in his presentation. I would also discuss other relevant issues in the South China Sea such as the incidents on fishing, oil and gas, land reclamation activities, and the possible militarization of the islands. I would also present the position of my country and other interested parties in the South China Sea. I look forward to your comments and contributions to the presentation.

First, on the territorial disputes in the South China Sea is on the Paracel islands, which is a subject of a bilateral dispute between Vietnam and China. China currently occupies the whole Paracel islands. Even though we do not occupy the

Paracel islands, Vietnam still maintains its claim over the islands.

The Spratly islands on the other hand have multiple claimants Vietnam and China claim the whole Spratly and the Philippines claims some part of the island. The same with Malaysia, Brunei and Taiwan. For the status of the occupation, Vietnam is now occupying 21 features while China occupies seven; the Philippines, nine; Malaysia, five; and, Taiwan, one.

For the overlapping maritime dispute, I would like to emphasize that after the arbitration, the picture of the maritime disputes has changed. But, the territorial disputes have not been changed because the arbitration cannot touch on the issue of sovereignty. No court can solve the territorial dispute if there is no consensus among the parties involved.

Before the arbitration in July, there are multiple 200-nautical mile circles of the Exclusive Economic Zone (EEZ) from the islands overlapping with each other, and with EEZ of coastal States. There is also an overlapping of the Nine-dash line claim by China with the 200-nautical mile exclusive zone of coastal States. This is the picture of the South China Sea before the arbitration. As you can see, it is complicated given the several maritime

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disputes that are potential sources of conflict.

After the arbitration award on July 12, 2016, the dispute here has been reduced and the potential for conflict is greatly eased.

Because a no “high tide” feature in the Spratlys was agreed upon similar to the islands with 200-nautical mile of EEZ, and because, they are rocks with only 12-nautical miles of territorial sea, therefore, there are less overlapping maritime areas in the South China Sea.

As we go into the details of the Award we see some key issues. The first one concerns the nine-dash line claim. The award stated that China’s claim to historic rights to the resources with this nine-dash line is incompatible with the UNCLOS because it is compatible with the rights of coastal State to have 200 nautical mile exclusive economic zone provided under the UNCLOS.

It is important for all the States to comply with the UNCLOS in claiming their rights in the sea. When a State agreed to sign the UNCLOS, it is bound to accept all the regulations provided therein.

The second point is on the status of the islands. The court decided that no feature on the Spratly has EEZ of 200 nautical miles; they are rocks not islands. The feature applies individually and collectively. The Spratlys cannot have an EEZ because the Spratlys cannot be considered as an archipelago.

From the pictures you can see the potential circles of 200-nautical mile of the EEZ in the disputed islands in the South China Sea. It is now narrowed down to 12 nautical miles of territorial sea. The maritime overlapping areas are now limited to dispute rocks in the sea only. There are no maritime overlapping areas among islands and the 200-nautical mile EEZ of the coastal States. The areas of maritime disputes in the South China Sea are now smaller, thus, the potential for conflicts has been reduced.

The arbitration award also ruled that China violated the sovereign rights of the Philippines and its traditional fishing rights in the Scarborough Shoal. Also, China’s land reclamation has damaged the marine environment in the South China Sea. China violated the Safety of Sea and risks collision when it did not follow the UNCLOS and International Regulations for Preventing Collisions at Sea (Colregs).

These are the key elements of the arbitral award. The award is a significant international law since it becomes a source of law and precedent for other similar cases. For this arbitration, it becomes important for the regime of islands. For the first time, the tribunal clearly defined and explained in detail of the difference between rock and islands that is also a precedent for other cases and in the settlement of disputes in the future.

In the case of Vietnam, even before the arbitration award, Vietnam already sent a note to the Tribunal. Viet Nam stated it



upholds the Tribunal's jurisdiction, rejected the claim of the nine-dash line by China and maintains its sovereign rights and interest over the South China Sea.

After the tribunal announced the award on July 12, 2016, Vietnam government issued a statement supporting the settlement of the dispute in the South China Sea by peaceful means, including the legal and diplomatic processes. Vietnam also emphasized the principle that the parties must refrain from the use of force in the South China Sea in accordance with the UNCLOS. Vietnam likewise reaffirmed its sovereign right over the Paracel and the Spratly islands, including other rights in accordance with the UNCLOS. That is Vietnam's position.

The views of other countries on the Arbitral Award are on the website of **Asian Maritime Initiative** where their position before and after the ruling is presented. There are countries that called for the award to be respected and considered it binding. Other countries acknowledged the ruling while some were neutral in their statements.

The pictures (insert picture) here indicate the many activities and incidents which arose in the South China Sea and in the areas within the EEZ of Vietnam.

**First**, the biggest incident is the oil rig HYSY981 of China that was dispatched to Vietnam's EEZ in May 2014. The location of the oil rig was 119 nautical miles from Vietnam's EEZ and 17 nautical miles from the Triton rock of the Paracel Islands. This

had been the biggest and longest conflict between Vietnam and China. The incident took two and a half months, from May 1 to July 15, 2014. There was a high level of mobilization of protective forces from both countries. Although, China mobilized more than hundred civilian law enforcement and military vessels and aircrafts into the disputed area. a low level of force was used in the oil rig incident. China used water cannons to attack Vietnam's Coast Guard vessels. Vietnam's law enforcement and fishing vessels were hit and damaged because China used bigger and stronger vessels. One Vietnamese fishing vessel sunk and a number of law enforcement vessels broke down.

Vietnam only dispatched civilian vessels to protect the maritime area without the intention of escalating the conflict. But, China had military vessels and aircraft to show force and threatened to use that force.

Vietnam stands by its position that the oil rig HYSY 981 and other Chinese vessels are within Vietnam's EEZ and continental shelf. Chinese activities violated the UNCLOS of 1982, violated the Declaration of Conduct (DOC) agreement not to escalate the tension and violated the Vietnam-China basic agreement on the settlement of maritime disputes. Vietnam requested China to withdraw the vessel.

**Second**, are the incidents related to fishing activities? There are a number of incidents in the area where Vietnamese

fishing boats, and some Filipino fishing vessels, were accosted by China, and confiscated fishing equipment. But the area is a traditional fishing area of Vietnam fishermen. Until now, China's annual fishing ban, which started in 1999, is still an issue.

The map (insert map) here indicates the areas covered by the fishing ban: Hainan, the Paracel islands up to 12th Parallel North that also includes the EEZ of Vietnam. During the ban, fishing equipments of fishermen are confiscated by China's law enforcement agency. Vietnam strongly protests the ban because it is a serious violation of Vietnam's territorial right over the Paracel islands and Vietnam's Exclusive Economic Zone. China's action violates international law, especially the UNCLOS 1982 and the spirit of DOC.

Aside from the issue of fishing activities, there is also the issue of land reclamation and the potential for the militarization of the islands in the South China Sea. At present, China has reclaimed seven features in the Spratlys. They are Subi, Cuateron Reef, South Johnson Reef, Mischief Reef, Hughes Reef, Gaven Reef and the Fiery Cross Reef, with a total area of about 13 kilometers. China's land reclamation activities are the biggest and fastest in the region. Some of these reclaimed areas have facilities to accommodate modern military equipment such as the 3000-meter airstrip for jet fighters. The deep water harbor can

accommodate the modern navy vessels and even modern submarine. Radar and other kinds of telecommunication can serve the information warfare. These facilities may be used in modern combat.

The Mischief Reef, Subi Reef and Fierycross Reef were constructed with helipads, hangars, 3000-meter airstrips, radars and other facilities for telecommunication. The airstrips are long enough for the use of tactical combat jet fighters and modern bombers. The construction and reclamation of islands in the Spratlys can serve as bases for modern military equipment that help China to cover the whole area. The new artificial islands and facility build-up by China have changed the balance of power in the area overwhelmingly in China's favor.

There are also signs of militarization in the South China Sea. On February 2016, China deployed 32 HQ-9 missiles on the Woody Island in the Paracels. On March 2016, China again deployed YJ-62 missiles on the Woody Island. In December 2016, there was a report that China there are anti-aircraft guns and anti-missiles defense point on some of the artificial islands of the Spratlys. These are some of the recent developments in the South China Sea. There could be more incidents in the Sea when facilities installed on the islands become sufficient. I say this because it concerns the aviation. Will China declare the Air Defense Identification Zone (ADIZ) in the South China Sea? In East China Sea, China

already declared the ADIZ in 2013 and the possibility of enforcing ADIZ in the South China Sea is always open. China's military foreign affairs spokesperson said, "China has the right to establish ADIZ in South China Sea." Also, the spokesperson of China's Ministry of Defense stated, "China will establish other ADIZ at an appropriate time after completing preparations." After the arbitration award, China's Vice Foreign Minister Liu Zhenmin said Beijing could declare an air defense identification zone over the waters if it felt threatened.

China, as the biggest power in the region, would like to use asymmetric power to settle the disputes and ignore the jurisdictional means. China proposed the approach of bilateral negotiations and consultation with each claimant in the South China Sea-no multilateralization, no internationalization and no third party settlement of the disputes.

On the other hand, the smaller claimants in among the Association of Southeast Asian Countries (ASEAN), would like to avoid asymmetric power by going through multilateral approach in the settlement of disputes. The multilateral negotiations and the use of third party is viewed as a

peaceful means of settling the disputes that involve multiple parties.

For Vietnam and the Philippines, third party settlement is an option. The Philippines has already chosen that option and Vietnam is also open to that possibility.

Vietnam has a claim on the Spratly and the Paracel islands on legal and historical bases. Vietnam supports peaceful settlement of disputes based on international law, particularly that of UNLCOS. Vietnam favors to settle the dispute bilaterally with China, in the case of the Paracel islands; and for the Spratlys, which involve multiple parties, though multilateral negotiations with parties involved.

In the interim, while seeking a permanent resolution to the disputes, Vietnam supports the management of disputes through increased confidence-building and cooperation measures. Vietnam supports the implementation of the Declaration Of Conduct (DOC) in the South China Sea and in the crafting of the Code of Conduct (COC).

I have come to the end of my presentation. Thank you very much for your attention.

# PHILIPPINE KOWTOWING FOREIGN POLICY ON THE SOUTH CHINA SEA DISPUTE: A THREAT TO REGIONAL PEACE

*Colmenares Neri Javier\**

*“International Conference on the Current  
Dispute on the South China Sea:  
Proposals for Dispute Resolution”*

September 21, 2018

Moscow, Federation of the Russian  
Republic

*“I’ll go down, riding a jet ski, carrying a  
Filipino flag ... and then I would say, “This  
is ours, and do what you want with me.  
“I would stake that claim, and if they  
(China) want to [kill me], you know, I  
have the ambition of being a hero too”*  
**(Pres. Duterte during his presidential  
campaign, April 27, 2016 on how he  
will stake Philippine claim in the  
South China Sea Dispute)**

**“That was a Joke” (Pres. Duterte,  
March 1, 2018)**

Not only was the above foreign policy statement of Pres. Rodrigo Duterte a bad joke, but it was the wrong and dangerous way of resolving the South China Sea dispute had it not been a joke.

This paper posits that the Pres. Duterte’s foreign policy on the South China Sea (SCS) dispute is, on deeper contemplation, a threat to regional peace as it only escalates the tension instead of diffusing it. It essentially entrenches a disputant in

the contested area and further emboldens it to aggressively resist any efforts at amicable resolution as its powers grow in disparate proportion to the other disputants.

The current SCS foreign policy of the Philippine Government is composed of three main postures:

(1) **Kneel or War posture** - It is incorrect to stand by the South China Sea Arbitral Award favorable to the Philippines because it is tantamount to going to war with China

(2) **No Protest Posture** - Protesting against or opposing China’s continued expansion through island reclamation and deployment of military weapons and *materiel* will only escalate the tension, and

(3) **Trade and Aid in exchange of sovereign rights posture** - Bilateral negotiations between China and the Philippines, with emphasis on “joint” exploration, is the most effective means of resolving the dispute.

This paper contends that this foreign policy increases the power disparity among disputants, it is not sustainable and in fact only escalates the tension between China and the other disputants, as well as, encourages or justifies the intervention of non-disputant countries such as the United States who are

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\* Former Congressman, Chairman, National Union of Peoples Lawyers (NUPL), Philippines

concerned with the growing power of China in the disputed area thereby complicating matters.

The peaceful resolution of the dispute requires an approach that strongly demands a cessation of expansion of any disputant and the demilitarization of the area, while actively pursuing a multilateral approach involving the disputants within the framework of the search for a peaceful resolution of the dispute.

### **The Shift to “Kowtowing” Foreign Policy: Sacrificing Regional Peace and Philippine Sovereign Rights for Loans and Grants**

The Philippine foreign policy signifies a major shift towards which is best described in the this paper as a “kowtowing” foreign policy as it practically and needlessly bends backward, if not kneel before China, despite its supposedly moral and legal superiority arising from its arbitration victory.

The first signal of this major shift came on the very day the Arbitral Award favoring the Philippines came out when Pres. Duterte, through his Foreign Affairs Secretary Perfecto Yasay, declared on July 12, 2016 that *“our experts are studying the Award with the care and thoroughness that this significant arbitral outcome deserves. We call on all those concerned to exercise restraint”*. Said statement may expectedly come from a losing disputant but that was a very weak and tentative statement from a winning litigant.

On September 10, 2016 the shift was further firmed up when Pres. Duterte laid the justification of his “kneel or war” foreign policy when he explained that *“there are only two options there: You go to war and pick a fight, which we cannot afford at all, or talk and appeal to the humanity of the fellow in front of you”*.

In December 2016 Pres. Duterte, through Sec. Yasay, practically signaled China that its continued militarization in the disputed areas can continue without Philippine opposition:

**Yasay on China's deployment of military equipment in Spratlys: 'There is nothing that we can do about that now' [CNN December 17, 2016]**

Following China's confirmation that it has deployed military equipment on the Spratly Islands, Philippine Secretary of Foreign Affairs Perfecto Yasay said on Friday that the Philippines "cannot stop China at this point in time." However, he added that the country "will continue to pursue peaceful means at which all of these can be prevented."

"[T]here is nothing that we can do about that now, whether or not it is being done for purposes of further militarizing these facilities that they have put up".<sup>1</sup>

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<sup>1</sup> CNN Report-CNN Philippines, “Yasay on Chinas Deployment of military equipment in Spratlys”, Dec. 17, 2016 CNN Philippines, <http://cnnphilippines.com/news/2016/12/17/Yasay-on-Chinas-deployment-of-military-equipment-in-Spratlys.html>.



This “no protest” posture of the Philippines has a major impact on the increasing militarization of the disputed area considering that it comes from a country who was the winning party in the South China arbitration case. While other disputants could have actively protested the increasing militarization, the fact that the Philippines itself refused to protest Chinese expansion took the wind out of any active opposition from other disputants.

The Philippines “no protest” posture was taken to the hilt when it justified its refusal to oppose China’s deployment of missiles in the disputed area with a weak and absurd justification—the missiles were not directed at the Philippines:

**Philippines 'confident' Chinese missiles 'not directed at us'**

The Philippines is “confident” that the missiles China recently deployed in the South China Sea, including in one reef declared by a tribunal in The Hague as part of Filipino territory, are not directed at Manila, a spokesman of President Rodrigo Duterte has said.

“With our recently developed close relationship and friendship with China, we are confident that those missiles are not directed at us,” Harry Roque said on Friday, in a statement described by critics as the “weakest possible response”. [Philippines 'confident' Chinese missiles

'not directed at us', Al Jazeera, May 4, 2018]<sup>2</sup>

The real basis for this major foreign policy shift, however, is actually hinged on the promised loans and other bilateral aid from China. The March 9, 2017 statement of Pres. Duterte announcing China’s commitment to give Philippines US\$ 10 Billion gave a not so cryptic message that this foreign policy shift was based on economic trade offs:

“I thank China profusely, and they have really lightened up the economic life of our country. So let me publicly again thank President Xi Jinping and the Chinese people for loving us and giving us enough leeway to survive the rigors of economic life in this planet,” [Pres. Rodrigo Duterte March 9, 2017]<sup>3</sup>

China’s Foreign Minister Wang Yi responded positively to this statement declaring that the Philippine-China relations have returned to the right path and that “*cooperation on infrastructure projects, including roads, bridges and*

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<sup>2</sup> Al Jazeera News, “Philippines confident Chinese missiles not directed”, May, 2018  
<https://www.aljazeera.com/news/2018/05/philippines-confident-chinese-missiles-directed-180504101427158.html>

<sup>3</sup> Manila Bulletin, “Duterte: China helped boost Ph economy”, March 9, 2017,  
<https://news.mb.com.ph/2017/03/09/duterte-china-helped-boost-ph-economy-cites-trade-hike-project-financing/>.

*dams, is being actively discussed, with some becoming operational this year”.*<sup>4</sup>

More than being merely based on loans and grants, however, Pres. Duterte later added a surprisingly candid admission that one trade off was China protecting Pres. Duterte from domestic opposition:

MANILA (UPDATE) - President Rodrigo Duterte on Tuesday said Chinese President Xi Jinping gave him assurances that he would not let him get ousted, as the Filipino leader again touted Manila and Beijing’s blooming ties under his leadership.

“The assurances of [President] Xi Jinping were very encouraging... ‘We will not allow you to be taken out from your office, and we will not allow the Philippines to go to the dogs,’” Duterte quoted Xi as saying [ABS CBN May 15, 2018] <sup>5</sup>

No self-respecting leader of a sovereign country will admit to encouraging foreign intervention to protect his political fortunes—except Pres. Duterte. More importantly, the inclusion of personal motivation as a factor in the Kowtowing Foreign Policy, only shows the difficulty that will be encountered by efforts at

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<sup>4</sup> Xinhua.net, “**China, Philippine relations return to right path: FM**”, March 8, 2017, [http://www.xinhuanet.com/english/2017-03/08/c\\_136112358.html](http://www.xinhuanet.com/english/2017-03/08/c_136112358.html)

<sup>5</sup> Placido, Dharel. ABS-CBN News “Duterte: China won’t let me get ousted”, May 15, 2018, <https://news.abs-cbn.com/news/05/15/18/duterte-china-wont-let-me-get-ousted>

reshaping Philippine posture on the South China Sea dispute.

### **Bilateral Negotiations: Joint Exploration**

While joint exploration with China has been previously mentioned, this line of action was officially announced by Pres. Duterte in the middle of 2018:

**PH, China may sign agreement on joint exploration in West PH Sea ‘anytime’- Palace** By: Nestor Corrales - INQUIRER.net / **03:34 PM August 09, 2018**

The joint exploration between the Philippines and China in the West Philippine Sea (WPS) could be signed “anytime” before, or even during the visit of Chinese President Xi Jinping to the Philippines, Malacañang said on Thursday.

The visit of Xi to Manila is scheduled before the end of 2018 or after Xi attends the Asia-Pacific Economic Cooperation (APEC) in November this year.

Presidential Spokesperson Harry Roque said Foreign Affairs Secretary Alan Peter Cayetano discussed the joint exploration of natural resources between Manila and Beijing in the West Philippine Sea during the Cabinet meeting on Monday.

Asked about the time frame for the signing of the agreement on joint exploration, Roque said it was not “expressly stated” during the Cabinet meeting. “No time frame po. But of course, because of the impending visit of President Xi, I would

say that it is anytime between now and visit of President Xi, but it was not expressly stated as such,” he said in a palace briefing.

Roque explained that the Philippines will enter into “a bilateral agreement that would enable the joint exploration to happen.”<sup>6</sup>

The idea of joint exploration with China came as a shock to many in the Philippines especially since many feared that such action could endanger the Philippine victory in the arbitral award, and more importantly, could escalate the tension in the disputed area. Additionally, there is a pending case filed before the Philippine Supreme Court asserting that the joint explorations with China should be declared unconstitutional.

### **The Petition against the Joint Marine Seismic Undertaking (JMSU)**

On May 21, 2008 a petition was filed by Bayan Muna against what it claimed as China’s violation of the Philippine Constitution and sovereignty through an unequal and corruption ridden joint exploration deal during the term of then President Gloria Arroyo.<sup>7</sup> The joint

exploration ended a few months after this petition was filed when the Philippines did not renew the Agreement as a result of the Petition and the growing opposition among Filipinos against such an undertaking.

Due to the increasing possibility of the revival of another joint exploration and Pres. Duterte’s shift to the Kowtowing Foreign Policy, the author<sup>8</sup>, filed a Motion asking the Supreme Court to resolve the petition, to wit:

“It has been eight (8) years since petitioners filed the instant case, six (6) years after the case has been submitted for decision, and two (2) years after the filing of the first Motion for Resolution, hence this second Motion for Immediate Resolution; x x x

5. Petitioners believe that the Honorable Court has to render its decision and resolve the issues now, most specially in light of the most recent transgressions of China against our sovereignty and territory; x x x

6. There has been reported aggressive reclamation activities and building of artificial islands by China at the Spratly groups of islands, in the process scarring our reefs and generally damaging the ecosystem around and between the islands;

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<sup>6</sup> Corrales, Nestor. Philippine Daily Inquirer, “PH-China may sign agreement on joint exploration”, Aug. 9, 2018, <https://newsinfo.inquirer.net/1019514/ph-china-may-sign-agreement-on-joint-exploration-in-west-ph-sea-anytime-palace#ixzz5QxA6yI6Z>

<sup>7</sup> Bayan Muna vs. Pres. Gloria Arroyo, G.R. No. 182734, Philippine Supreme Court. It was filed by

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Atty. Neri Colmenares who was then the General Counsel of Bayan Muna.

<sup>8</sup> The author is the current Chairman of Bayan Muna, who filed the petition.

7. Also reported were landing of military planes on airstrips built by them, as part of China's military build-up in the area, seen as a form of provocation and aggression on their part;

8. There are reports as well of escalating poaching activities and driving away of our local fishermen at the Scarborough Shoal by use of force, on top of plans for reclamation on the region;

9. But the most alarming would be the test-firing of nuclear capable missile into the West Philippine Sea, aggravating further the already heightened tension in the area and spreads a sense of terror in our populace;

10. Serious constitutional issues are raised in the petition, as respondents' unconstitutional acts have grave repercussions on our national sovereignty, natural resources, national economy and patrimony, territorial integrity and national interest." The main problem with the planned joint exploration, however, is that other disputants will vigorously oppose such a bilateral deal which does not even seek a genuine resolution of the dispute. Vietnam in fact, vigorously protested against the first Joint Exploration under Pres. Gloria Arroyo. Any move by the Philippines to have joint patrols and exploration or drilling activities with China in the South China Sea could lead to a clash with the other disputants. Worse, it will practically defang the arbitral award used by other disputants to contest the escalation of

China's artificial island building in the disputed area. Unless the Supreme Court will resolve this Petition in favor of Bayan Muna, the threat of another joint exploration may become a reality soon.

### **Kowtowing Foreign Policy: Escalating tension, a threat to peace**

The current path undertaken by Pres. Rodrigo Duterte is a self-serving foreign policy that does not consider the complexity of the issue and the possible escalation of conflict. Allowing one disputant to gain so much power in the South China Sea will petrify its position and create obstacles to the search for a peaceful but just solution to the dispute.

The Philippines should have stood by its claim to the area and the arbitral award without necessarily resorting to war. Other countries have stood firm on their claims but such position did not necessarily result to war. It is therefore possible for the Philippines to stand firm on its claim and the arbitral award without necessarily going to war. Where Pres. Duterte got his 'kneel or war' analysis if the Philippines insists on its position, China will invade country has not been explained until now.

The Philippines should have used a multilateral approach to the issue by cooperating with other disputants to actively search for a peaceful resolution of the dispute with China, without abandoning their opposition to China's militarization and expansion in the area.

The disputants could also rally other countries and the international community who are also concerned with freedom of navigation issues in the South China Sea, to support efforts at peace.<sup>9</sup>

If the Philippines pursue its current path, it will not only make the search for a peaceful resolution more difficult but could even escalate the conflict in the region. It is imperative that the Philippines be convinced to abandon this road and consider the interest of the Filipino people as well as peace and stability of the region.

### **People's participation in the efforts at peaceful resolution**

Pres. Duterte has not been swayed so far by criticism from academics and politicians. However, he recently showed a degree of variation from his Kowtowing Foreign Policy when he surprisingly criticized China's warning of Philippine planes flying over the disputed area saying that "You cannot create an island and you say that the air above the artificial island is your own. That is wrong. The right to

innocent passage is guaranteed," [Pres. Duterte August 16, 2018]<sup>10</sup>

This statement was a follow up of Pres. Duterte statement in August 15, 2018 declaring that China should temper its behavior to ensure peace in the region:

### **Beijing should 'temper' its behavior in the South China Sea, Duterte says [CNN- Ben Wescott, August 15, 2018]<sup>11</sup>**

Philippines President Rodrigo Duterte has called for the Chinese government to tone down its behavior in the South China Sea, warning ongoing tensions could spark an accidental conflict. Speaking Tuesday at the Malacanang Palace in Manila, Duterte said the heavily-contested region could become a "flashpoint". "I hope that China would temper at least its behavior x x x" he added.

While Pres. Duterte's assertion for China to temper its behavior may not be that strong, it is something to build on. Pres. Duterte's acquiescence to China's military build up is detrimental to the search for peace. Any effort to deter the increasing militarization of the region will

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<sup>9</sup> It must be stressed that this kind of independent foreign policy strategy should not mean encouraging the United States to enter the fray, considering that the US has not been known for respecting the rights of smaller countries as well. Ousting a bully in order to replace it with another bully cannot be the cornerstone of the search for peace.

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<sup>10</sup> "After Duterte Tirade, China asserts right to warn plane", August 16, 2018, Rappler <https://www.rappler.com/nation/209726-china-rejects-duterte-criticisms-plane-warnings-west-philippine-sea>

<sup>11</sup> Wescott, Ben. "Beijing should temper its behavior on South China Sea, Duterte says", CNN, Aug. 15, 2018 <https://edition.cnn.com/2018/08/15/asia/duterte-china-south-china-sea-intl/index.html>



substantially contribute to the dispute's peaceful resolution.

The question is, why this sudden, albeit minor, foreign policy variation? Pres. Duterte was never deterred by criticisms from academics or the opposition. His slight change of tone was actually sourced from the groundswell of opposition to his Kowtowing Foreign Policy from the Filipino people themselves. A survey conducted in June 2018 found that more than 70% of the Filipinos want Pres. Duterte to assert the arbitral award:

**Majority of Filipinos want Duterte to assert sovereignty in West PH Sea: poll [ABS-CBN News, Posted at Jul 12 2018]<sup>12</sup>**

MANILA - Seven out of 10 Filipinos want the Duterte administration to assert Manila's 2016 victory in an international arbitral court and the country's sovereignty over its exclusive economic zone (EEZ) in the disputed South China Sea, results of a survey released Thursday showed.

A Pulse Asia poll conducted from June 15 to 21 this year revealed that 73 percent of Filipinos believe that President Rodrigo Duterte should assert Manila's rights to the West Philippine Sea, the country's EEZ within the contested waters.

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<sup>12</sup>ABS-CBN, "Majority of Filipinos want Duterte to assert sovereignty", July 12, 2018, ABS CBN TV, <https://news.abs-cbn.com/news/07/12/18/majority-of-filipinos-want-duterte-to-assert-sovereignty-in-west-ph-sea-poll>

The poll results were released as the Philippines marked the second anniversary of its landmark 2016 victory in the Permanent Court of Arbitration, which invalidated China's sweeping nine-dash line claim to the waters.

China recently stepped up its militarization efforts in the disputed waters, installing military-grade runways, hangars, hardened storage for ammunition, and retractable roofs for anti-cruise missiles, prompting the Philippines to beef up its force in the area.

The survey found that 46 percent of Filipinos strongly agreed that the Duterte administration must assert the court ruling while 27 percent somewhat agreed.

Only 3 percent strongly disagreed with asserting the court ruling, while 4 percent somewhat disagreed. Seventeen percent, meanwhile, were in the middle. Some 2 percent of Filipinos said they do not have enough knowledge of the issue to give an opinion, while less than one percent (0.4) had zero knowledge of the matter.

Pres. Duterte who rode on a populist wave may have been concerned with this overwhelming support for the arbitral award and the people's disagreement with his Kowtowing Foreign Policy. This was what may have triggered the fine tuning of his posture. After all, the opinion of more than seventy percent of the population cannot be belittled.

This new development, therefore, shows that any search for peace cannot be

undertaken without including the people in the discourse. Since the people have become a major factor in Pres. Duterte's foreign policy consideration, it is imperative that raising their awareness on the issue, ensuring their participation in the discourse and harnessing them in the search for peace must immediately be undertaken. In the Philippines, the debates must no longer be confined in the

courts or the legal or academic conferences, but must be brought to the streets and the communities. Peace advocates must, therefore, support any effort towards this end and grab the new arena that could succeed where others failed-forcing Pres. Rodrigo Duterte to abandon his Kowtowing Foreign Policy in order to contribute to the region's search for peace.

## UPDATING SITUATION IN THE SOUTH CHINA SEA: CUI BONO?

*Le Dinh Tinh\**

### Overview

On surface, the South China Sea currently looks calmer as compared to the time that preludes the PCA ruling in 2016. The undercurrent is, however, still strong and complicated. On the ground, the most distressing reality of is the land reclamation of islands and features, the process of militarization and attempts to legalize the new status quo. The latest AMM meeting in Singapore took note of some of these concerns.

### The SCS in the regional architecture

- Security wise, at least, in the Asia Pacific region, ASEAN and its related mechanisms are pushing for cooperative transborder peace and security with ASEAN being at the center of the evolving architecture. Up to date, the ASEAN-led institutions, though labeled by some as a talking shop, offers the only venue that discusses regional security from critical issues like the South China Sea to the Korean peninsular to emerging threats, and that are able to bring to the table all the important stakeholders.

- The East Asia Summit for one, including ASEAN and 8 partners (Russia is one such important partner) provides another significant avenue toward a security

architecture that can provide policy consultations and discussion for the resolution of regional issues, including the SCS. Other ASEAN-led institutions that can be helpful include the ARF, ADMM, ADMM-Plus, AMMTC, AMF and the Expanded ASEAN Maritime Forum, and joint studies on conservation and sustainable use of sea and maritime resources.

- Of course, it takes two to tango, so role by ASEAN partners is critical in this regard. A divided ASEAN would weaken the Association's ability to contribute not only to the resolution of the SCS issue but also the building of a regional security architecture that benefits all.

### Traditional and emerging threats

- Along with the long-standing sovereignty and maritime disputes are challenges posed by non-traditional security problems such as the degradation of marine life and resources or other increasingly alarming environmental issues.

- As an example, the recent Joint Communiqué of the 51<sup>st</sup> ASEAN Foreign Ministers' Meeting highlighted deep concerns towards marine debris, specifically plastic marine debris due to the threat it poses to marine biodiversity, human health, as well as the adverse effects it has on tourism and fishing activities.

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- Cooperation on dealing with such emerging threats however is constrained by the difference in capacity, intention and modalities proposed by stakeholders.

- Because of the changing nature of many of the challenges, the maritime domain no longer looks the same. For example, there is no code of conduct for law enforcements operating at seas while the need for maritime domain awareness (MDA) becomes ubiquitous. The maritime domain, very much like other operational and strategic fields, now also has an added dimension: cyber with the introduction and proliferation of artificial intelligence, IOT, machine learning, unmanned aerial and submarine vehicle for intelligence gathering etc. in the background. It is noteworthy that unmanned aerial and submarine vehicle are still grey area of international law, each party may have their own understanding and interpretation of law regarding this issue. As a result, the proliferation and deployment of those vehicles may place the South China Sea in situations prone to miscalculation and crisis.

### **Legal issues and a possible effective and legally binding COC**

- On the legal front, two years after the ruling of the Philippines v. China Arbitral Tribunal, China has, on the one hand, confuted and rejected the tribunal's ruling, and on the other hand taken several measures to challenge the validity of the case and justify its own case.

- Meanwhile, the Rodrigo Duterte Administration of the Philippines shows

signs of speaking less about Tribunal rulings.

- Enforcement remains a recurring theme in international law.

- There has been some progress in negotiations on the Code of Conduct (COC), including ASEAN and China agreeing unanimously on a single draft negotiating text to lay the foundation, at the same time emphasizing the importance of maintaining a conducive environment for future discussions. However, due to the complexities, a potential delay and protracted path for the COC negotiation process cannot be ruled out.

- Pending a COC, a full and effective implementation of DOC in its entirety has not been as expected. For example Para.5 has not been duly observed to enforce self-restraint. The DOC itself has ambiguous language that need to be fixed by another milestone document such as an effective and legally binding COC. One of the ambiguities is it does not include a clear definition of the geographical scope that's necessary for managing behaviors.

- Along the line of promoting a rules-based order, IMO conventions and other related conventions such as SOLAS, CORLEGS, CUEs have been increasingly discussed and embraced.

- Numerous provisional arrangements are also suggested by track II and track I, pending the ultimate solution.

### **Responses and strategies by key stakeholders**

- National policies with regard to the SCS have changed profoundly on a number of issues. China is promoting its “Belt and Road Initiative”, with the “Maritime Silk Road” as a part of it; while the United States is proposing its “Free and Open Indo-Pacific Strategy”. This put regional countries amid policy choices that might produce long-term consequential implications.

- ASEAN has been doubling its efforts to assure its centrality and solidarity, maintaining the discussions on the issue and aim to conduct substantial and effective COC negotiations with China.

- Claimants have been proposing ideas and taking actions they think are optimal to their respective national interests while working on inter-state/regional/global cooperative mechanisms, for example, on fishery or early harvest measures such as hotlines to reduce the risks of accidents, misunderstandings and miscalculations.

- Due to new recent developments and varying degrees of interest, middle powers like Japan, Australia, India, South Korea, Britain and France have shown greater interests vis-à-vis the South China Sea issue, through both words and deeds.

- Against that background, many have called for the “rules-based order” and “respect for international law” and peace, stability, and freedom of navigation at sea and over flight, maritime safety and security. In terms of actions, countries within and without the region have stepped up presence in the South China Sea.

## **Projection of trajectory**

- Issues discerning the South China Sea in the coming time will continue to take on a complicated path because the root of the problem has yet to be solved.

- If there continues to be an growing trend towards militarization, power politics and great power competition, the situation could be pushed to a new level of tension, not excluding the potential of conflicts or collisions, be them accidental or deliberate.

- Without effective conflict prevention and management mechanisms, littoral states will face greater risks than before, not to mention the threat for miscalculation arising from the deployment of UAV and USV. So COC is expected to include conflict management measures?

## **Conclusion**

Maintaining a strategic balance and self-restraint that is beneficial to the common peace and stability in the region become an imperative for all countries. Now more than ever, there emerges the necessity to construct a law-based order, including mechanisms and ways forward for the South China Sea issue. Such an order would call for respect for international law, including the 1982 United Nations Convention on the Law of the Sea. ASEAN, China and others could all this well together for the larger interests of the regional and world community. To the contrary, a diversion, exclusionary approach will benefit no one.



## **PART II**

### **LAW ENFORCEMENT IN THE SOUTH CHINA SEA**

#### **PHILIPPINES V. CHINA RULINGS AND LEGAL IMPLICATIONS**

*Jay L. Batongbacal\**

##### **Introduction**

Against most expectations, the Philippines made a clean sweep of nearly all of its Submissions in its UNCLOS Annex VII arbitration case against China on 12 July 2016, and in doing so laid down significant rulings that will undoubtedly reshape the discourse over the SCS disputes in the years to come. The five broad categories of claims that the Tribunal decided in the Philippines' favor establish the foundations for how interested States, whether principal claimants or affected users, should interact with each other pending the final resolution of the SCS disputes. These have had particularly restrictive legal implications for China and the recent manifestations of its maritime expansion into the South China Sea, to the detriment of the surrounding Southeast Asian coastal States. This paper carries out an

overview of the key rulings of the Annex VII tribunal and consider their legal Effects on China's maritime expansion activities.

##### **Highlights of the Award**

###### ***China's Excessive Claims***

The Tribunal definitively interpreted and then struck down the most expansive of all the various claims to the SCS: China's historic rights claims, as represented by the "nine dashed lines" map. These historic rights claims allegedly existed prior to and independently of the UN Convention on the Law of the Sea and purported to apply to the living and non-living resources beyond the territorial sea of any islands or rocks but within the sea areas encompassed within the nine dashed lines. In the eyes of the Tribunal, based on the record of official statements in the past "China does not claim historic title to the waters of South China Sea, but rather a constellation of historic rights short of title."<sup>1</sup> Furthermore, the Tribunal

"...understands, on the basis of China's actions, that China claims historic rights to the living and non-living resources in the waters of the South China Sea within the 'nine-dash line', but that China does not consider that those waters form part

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<sup>1</sup> Award, para. 229

of its territorial sea or internal waters (other than the territorial sea generated by islands). Such a claim would not be incompatible with the Convention in any areas where China already possesses such rights through the operation of the Convention. This would, in particular, be the case within China's exclusive economic zone and continental shelf. However, to the extent that China's claim to historic rights extends to areas that would be considered to form part of the entitlement of the Philippines to an exclusive economic zone or continental shelf, it would be at least at variance with the Convention."<sup>2</sup>

The above interpretation directly addresses China's historical ambiguity and refusal to clarify the nature of its claims as represented by the nine-dash lines map. Rather than await China's own explanation, the Tribunal used as basis China's own varied and sometimes contradictory statements and allegations in numerous diplomatic communications in order to classify and interpret the claim. This permitted the Tribunal to measure China's claimed historic rights against UNCLOS, dividing such claims into distinct geographic areas:

- a. historic rights to land territory within islands and rocks in the SCS;
- b. historic rights to the territorial sea adjacent to such islands and rocks, but not

exceeding the 12nm limit as specified in UNCLOS;

- c. historic rights to the living and non-living resources of the EEZ and continental shelf within 200nm of China's land territory but not within the corresponding 200nm limits of other coastal States in the SCS;

- d. historic claims to the living and non-living resources beyond 200nm from its land territory but within 200nm of other coastal States' baselines in the SCS;

- e. historic claims to the living and non-living resources beyond 200nm from its land territory and not within 200nm of other coastal States' baselines in the SCS.

The Tribunal held that any and all historic rights claims to waters beyond the territorial sea or to living and non-living resources beyond 200 nm of China's coast, and within 200 nm of other coastal States, i.e., categories "d" and "e" above, were relinquished and abandoned by China when it signed and ratified UNCLOS and thereby agreed with the establishment of the EEZ and continental shelf regimes in favor of all coastal States. According to the Tribunal,

"... the Convention is clear in according sovereign rights to the living and non-living resources of the exclusive economic zone to the coastal State alone. The notion of sovereign rights over living and non-living resources is generally incompatible with another State having historic rights to the same resources, in particular if such

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<sup>2</sup> Id., para. 232

historic rights are considered exclusive, as China's claim to historic rights appear to be. Furthermore, the Tribunal considers that, as a matter of ordinary interpretation, the (a) express inclusion of an article setting out the rights of other States and (b) attention given to the rights of other States in the allocation of any excess catch preclude the possibility that the Convention intended for other States to have rights in the exclusive economic zone in excess of those specified."<sup>3</sup>

The Tribunal therefore emphasized that

"Insofar as China's relevant rights comprise a claim to historic rights to living and non-living resources within the 'nine-dash line', partially in areas that would otherwise comprise the exclusive economic zone or continental shelf of the Philippines, the Tribunal cannot agree with this position. The Convention does not include an express provisions preserving or protecting historic rights that are at variance with the Convention. On the contrary, the Convention supersedes earlier rights and agreements to the extent of any incompatibility. The Convention is comprehensive in setting

out the nature of the exclusive economic zone and continental shelf and the rights of other States within those zones. China's claim to historic rights is not compatible with these provisions.

"The Tribunal considers the text and context of the Convention to be clear in superseding any historic rights that a State may once have had in the areas that now form part of the exclusive economic zone and continental shelf of another State."<sup>4</sup>

The Tribunal noted that even China itself, in the negotiations for UNCLOS, "was resolutely opposed to any suggestion that coastal States could be obliged to share the resources of the exclusive economic zone with other powers that had historically fished in those areas."<sup>5</sup> In addition,

"... China's position, as asserted during the negotiation of the Convention, is incompatible with a claim that China would be entitled to historic rights to living and non-living resources in the South China.

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<sup>3</sup> Id., para. 243

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<sup>4</sup> Id., para. 246-247

<sup>5</sup> Id., para. 251

# **ROLE OF INTERNATIONAL LAW FOR THE SETTLEMENT OF TERRITORIAL DISPUTES – FOCUSING MAINLY ON THE MEANS OF SETTLEMENT**

***Yoshiro MATSUI\****

## **Introduction**

This Paper argues, mainly based on jurisprudence of international courts and tribunals, about role of international law for the settlement of territorial disputes, including maritime disputes, and takes up its role of offering basis of settlement (I), its role of providing means for settlement (II), and its role for management of disputes until their final settlement (III). Lastly, this Paper will argue about some points to be taken into account for the equitable settlement of territorial disputes (IV).

Main interest of participants here will be the South China Sea Arbitration between the Philippines and the Peoples Republic of China, and also this Paper will touch on the Awards, if need be, but they are not the heart of this Paper.

## **I. Role of International Law of Offering Basis of Settlement for Territorial Disputes**

### **1. Multi-dimensional Character of Disputes and Need for Common Basis**

Almost all of international disputes are multi-dimensional in their character. They

have not only legal, but also political, economic, cultural, national, historical and the other aspects. China, for instance, stresses the historical development of the South China Sea Problems (A White Paper published by the State Council Information Office of the People's Republic of China, "China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea", July 13, 2016, paras.1-22, (hereafter, China's White Paper)). However, each contending parties has its own version of history, which is necessarily subjective in character. And when the parties contend each other based on these subjective aspects, settlement of the dispute seems to be difficult to attain. There must be some objective and common basis for this purpose. Among numerous historical facts, relevant facts for the settlement of dispute concerned and irrelevant ones must be distinguished.

International law can serve as an objective basis for the contending parties. It can provide them with common ground and language for discussion and mutual understanding. International legal arguments of both parties also enable international public opinion to compare them and to judge their respective adequacy and reasonableness. Today, "repute" may be an important factor in

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solving territorial disputes (See, *Award of the Arbitral Tribunal in the first stage of the proceedings between Eritrea and Yemen (Territorial Sovereignty and Scope of the Dispute)*, Decision of 9 October 1998, 22 *UNRIAA*, p.328, paras.513-516, hereafter, *Eritrea/Yemen Arbitration*).As the reverse side of the coin, multi-dimensional character of international disputes signifies that international law alone cannot bring their successful settlement. Other diverse aspects have to be dealt with. The International Court of Justice (hereafter, ICJ) once stated that, “[i]t is for the Court, [...], to resolve any legal questions that may be in issue between parties to a dispute; and the resolution of such legal questions by the Court may be an important, and sometimes decisive, factor in promoting the peaceful settlement of the dispute” (*United States Diplomatic and Consular Staff in Tehran*, Judgment of 24 May 1980, *ICJ Reports 1980*, p.22, para.40.) .It must be noted that the Court distinguished here between “the resolution of [...] legal questions” and “the peaceful settlement of the dispute” as a whole, and confined its role to the former. For the purpose of “the peaceful settlement of the dispute” as a whole, other aspects of the disputes must be taken into account. This point will be dealt with in Part IV below.

## **2. Basis of Settlement for Territorial Disputes**

It goes without saying that basis of settlement for each dispute, territorial or

otherwise, may be different according to their own character. However, following points can safely be said in general.

### **(1) Territorial Disputes: The Principle of Effectivité**

The hart of the title to territory is “effective control” or the principle of “effectivité”. In *the Island of Palmas Case*, the sole Arbitrator Max Huber stated that “the continuous and peaceful display of territorial sovereignty [...] is as good as a title” (Award of April 4<sup>th</sup>, 1928, 2 *UNRIAA*, p.839), and the Permanent Court of International Justice (hereafter, PCIJ) ruled in *the Legal Status of Eastern Greenland Case* that “a claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority” (Judgement of 5 April 1933, PCIJ, *Ser. A./B.*, No.53, pp.45-46.) .This is the established jurisprudence of international courts and tribunals, and we can cite many precedents to the same effect.

The principle of effectivité is of Western origin, and has some elements of rule of force, to be sure. However, considering the exclusive nature of territorial sovereignty, it is indispensable for the protection of the rights of foreign countries and peoples in the territory concerned. Thus, to quote Arbitrator Huber again, “the principle that



occupation, to constitute a claim to territorial sovereignty, must be effective, that is, offer certain guarantees to other States and their nationals” (*Supra*, p. 846).

It seems to be opportune to make some comments on the principle of *effectivité*. Firstly, it is clear that effective control or *effectivité* cannot be confirmed by an instant fact at the moment of incorporation of the territory concerned. For instance, the *Island of Palmas* Award stated that “[i]t is quite natural that the establishment of sovereignty may be the outcome of a slow evolution, of a progressive intensification of State control” (*Supra*, p.867.). Also, the Award of *Eritrea/Yemen Arbitration* stated that the gradual consolidation of title is a process “well illustrated in the *Eastern Greenland* case, the *Palmas* case, and very many other well-known cases (*Supra*, pp. 311-312, para. 450).

Secondly, acts constituting effective control or *effectivité* must be those conducted before a “critical date”, which denotes the date when the dispute was crystallized or when the parties to it resorted to a means of peaceful settlement. According to the ICJ, “the significance of a critical date lies in distinguishing between those acts [...] which are in principle relevant for the purpose of assessing and validating *effectivité*, and those acts occurring after such critical date, which are in general meaningless for that purpose” (*Case concerning Territorial*

*and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*, Judgment of 8 October 2007, *ICJ Reports 2007*, p. 697, para. 117.). Therefore, acts performed by a contending party after the critical date, in order to “strengthen” its effective control, would be irrelevant for the settlement of that dispute.

Thirdly, acts, in order to establish *effectivité*, must be acts of State performed *à titre de souverain*. Thus, Judge Hsu Mo stated in his Separate Opinion in the *Fisheries Case* that, “[a]s far as the fishing activities of the coastal inhabitants are concerned, I need only point out that individuals, by undertaking enterprises on their own initiative, for their own benefit and without any delegation of authority by their Government, cannot confer sovereignty on the State” (Judgement of December 18<sup>th</sup>, 1951, *ICJ Reports 1951*, p.157.). Also, the Award of *Eritrea/Yemen Arbitration* ruled that evidence of fishing activities by private persons “is not indicative as such of state activity supporting a claim for administration and control of the Islands. [...] [I]t does not constitute evidence of *effectivités* for the simple reason that none of these functions are acts *à titre de souverain*.” (*Supra*, pp. 283-284, para. 315).

Last but not least, as stated by the Chamber of the ICJ, where the disputed territory is effectively administered by a party other than the one possessing the legal title, derived from a treaty, for

instance, “preference should be given to the holder of the title” (*Burkina Faso/Mali Frontier Dispute*, Judgement of the Chamber of 22 December 1986, *ICJ Reports 1986*, pp.586-587, para.63.). This ruling was followed also by *the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria*. In this case, the ICJ, rejecting Nigeria’s plea of effectivité, conferred the territories concerned on Cameroon, which possessed legal title (Judgement of 10 October 2002, *ICJ Reports 2002*, pp. 344, 353-355, paras.55, 68-70; pp.412-416, paras.218-224.).

## (2) Emergence of the Principle of Legitimacy

It must be noted, however, that the principle of effectivité, though retaining its central importance, has become to be limited by the principle of legitimacy under contemporary international law. First, the right of self-determination of peoples lays restraint on the functioning of the principle of effectivité, at least in principle. As put it by Judge Dillard in his Separate Opinion in *the Western Sahara Advisory Opinion*, “[i]t is for the people to determine the destiny of the territory and not the territory the destiny of the people” (Advisory Opinion of 16 October 1975, *ICJ Reports 1975*, p.122.). But, the Chamber of ICJ, in its Judgement of *Burkina Faso/Mali Frontier Dispute Case*, recognized the application of the principle of *uti possidetis juris* to the African continent. This principle originated from

19<sup>th</sup> century Spanish America and made the former colonial boundaries to be international boundaries upon accession to independence. Though the Chamber recognized the apparent contradiction between the right of peoples to self-determination and the principle of *uti possidetis juris*, it opted for the latter as “[t]he essential requirement of stability in order to survive”. Thus, the principle of *uti possidetis juris* must be taken into account in the interpretation of the principle of self-determination of peoples (*Supra*, pp.565-567, paras.20-26.).

Second, the prohibition of the threat or use of force is applied also to territorial and frontier disputes. No territorial acquisition resulting from the threat or use of force shall be recognized as legal. This is confirmed by the General Assembly Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (GA Res. 2625 (XXV), Annex, 24 October 1970: hereafter, Friendly Relations Declaration) and also by the General Assembly Definition of Aggression (GA Res.3314 (XXIX), Annex, 14 December 1974). The ICJ, in its Advisory Opinion on *the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, stated that the illegality of territorial acquisition resulting from the threat or use of force is the corollary of the principle of non-use of force, and therefore reflect customary international law (Advisory Opinion of 9

July 2004, *ICJ Reports 2004*, p.171, para.87.).

### (3) Concept of “Domain” under the Islamic and the East Asian World Orders

Above discussion on the principle of effectivité is based on the contemporary international law, which, notwithstanding its Western origin, is universally applicable today. However, until about the end of 19<sup>th</sup> century, there had been several World Orders with different ordering principles from those of the Western or traditional international law. The Islamic World Order, for instance, was based on the relationship of religious allegiance between the ruler, called Caliph or Sultan, and his subjects, and, the East Asian or Chinese World Order was based on a kind of feudal relationship between the Emperor of China and peoples who submitted to Emperor’s rule for his virtue. Under traditional international law, “territory” was defined by definite boundaries within which effective control by the State concerned was equally extended. In contrast, Islamic or Chinese “domain” was thought to be comprised of the area where the inhabitants submitted to the Caliph or the Chinese Emperor. Neither definite boundaries nor effective control evenly over its domain were required. “Territory” denoted domination over land, while “domain” implied domination over peoples.

By the end of 19<sup>th</sup> century, those countries belonging to these different World Orders had been forced, often by the threat or use

of force, to enter into the Western World Order. And at that time, their “domain” had to be reconstructed into “territory” under international law. For this purpose, they had to establish effective control there. In this respect, the Judgment of the ICJ in the *Minquiers and Ecrehos Case* should be recalled. The Court stated that “[s]uch an alleged original feudal title of the Kings of France in respect of the Channel Islands could today produce no legal effect, unless it had been replaced by another title valid according to the law of the time of replacement”. The Court indicated that “effective possession of the islets in dispute” was regarded as “another title valid according to the law of the time of replacement” (Judgment of November 17<sup>th</sup>, 1953, *ICJ Reports 1953*, p. 56.). Almost fifty years later, a similar perception appeared again in the Award of *Eritrea-Yemen Arbitration* (*Supra*, p.245, para. 131).

Recently, international courts and tribunals have become more positive toward the traditional concepts derived from different World Order, but, they continue to rely on the principle of effectivité as the last resort in order to resolve territorial disputes (Eg., Award of *Eritrea/Yemen Arbitration*, *supra*, pp.245-246, paras. 126-130;.). In any case, it seems to be quite natural for international law to require effectivité, considering its role of common basis for the settlement of territorial disputes.

(4) Maritime Disputes: The Principle of the “Land Dominates the Sea”

Turning to maritime disputes, the starting point must be the principle of “the land dominates the sea”. This principle has been repeatedly relied on in the maritime delimitation cases. To quote only one example, the ICJ, in the *Case concerning Maritime Delimitation in the Black Sea*, referred to, as one of the principles “underpinning its jurisprudence on this issue”, the principle “that the ‘land dominates the sea’ in such a way that coastal projections in the seaward direction generate maritime claims” (Judgement of 3 February 2009, *ICJ Reports 2009*, pp.96-97, para.99.).

China emphasizes the importance of the principle of the “land dominates the sea” for the purpose of the South China Sea dispute. By virtue of this principle, China contends, for instance, that the problems of marine entitlement cannot be determined without prior determination on the sovereignty over land territory, which are not a problem “concerning the interpretation or application” of the United Nations Convention on the Law of the Sea (hereafter, UNCLOS), and thus are outside the jurisdiction of an Arbitral Tribunal constituted under Part XV of the Convention (E.g., China’s White Paper, *supra*, para.67; Position Paper of the Government of the Peoples’ Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration initiated by the Republic of the Philippines, 2

December 2014, para.11 (hereafter, China’s Position Paper). See also, Chinese Society of International Law, “The Tribunal’s Award in the ‘South China Sea Arbitration’ Instituted by the Philippines Is Null and Void”, 10 June 2016, Section II. 1. (hereafter, CSIL’s Paper).

There must be a clear distinction between the principle of the “land dominates the sea”, which explains the creation of title of coastal States to the maritime area, and the delimitation of overlapping area of coastal States’ entitlement thus created. The notion of continental shelf as the “natural prolongation” of the land territory, pronounced by the ICJ in the *North Sea Continental Shelf Cases* (Judgement of 20 February 1969, *ICJ Reports 1969*, p.47, para.85 (c)) had sometimes been misunderstood as a principle for delimitation. However, as stated by the Court in the *Tunisia/Libya Continental Shelf Case*, “the idea to which [the term “natural prolongation”] gave expression was already a part of existing customary law as the basis of the title of the coastal State”, but “it would not necessarily be sufficient, or even appropriate, in determining the precise extent of the rights of one State in relation to those of a neighbouring State” (Judgement of 24 February 1982, *ICJ Reports 1982*, p.46, para. 43).

As for the delimitation of maritime area, the ICJ declared that, in its judgement of *Case concerning Maritime Delimitation in the Black Sea*, when it called upon to

delimit the continental shelf or exclusive economic zone, it will use the following “delimitation methodology”. First, it will establish a provisional delimitation line, usually this line being median or equidistance line. Second, it will consider whether there are relevant circumstances calling for the adjustment or shifting of the provisional line in order to achieve an equitable result. And third, it will verify that the line thus established does not lead to an inequitable result from any disproportion between the ratio of the respective coastal length and the ratio between the relevant marine areas of each State by reference to the delimitation line (*Supra*, pp.101-103, paras.115-122.).

This judgement seems to be corpus of the jurisprudence of ICJ concerning the delimitation of marine areas, and adopted unanimously without any separate opinion or declaration. Thus, this “delimitation methodology” will exert decisive influence on the following cases of maritime delimitation. For instance, the International Tribunal for the Law of the Sea (hereafter, ITLOS), *Case concerning Delimitation of the Marine Boundary between Bangladesh and Myanmar* (Judgement of 14 March 2012, ITLOS Case No.16) and *Award of Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India* (Award of 7 July 2014: PCA Case No.2010-16) seems to follow basically the three steps delimitation methodology.

Returning to the South China Sea Dispute, it seems to be necessary to touch upon, though summarily, China’s claim to “nine-dash line”. Since its appearance in a Note Verbale of Chinese Mission to the United Nations addressed to the Secretary-General (7 May 2009: CML/17/2009), it has been much debated among international law scholars, including those from China. The Note Verbale claims that, “China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof”. However, there has been no official explanation by the Chinese Government on the nature, content and legal basis of “nine-dash line” at that time or since then.

In the proceedings of the Arbitral Tribunal, the Philippines sought an Award, *inter alia*, that China’s claim based on its “nine-dash line” was inconsistent with the UNCLOS and therefore invalid. Through the analysis of China’s fragmentary statements as well as its conduct, the Tribunal understood Chinese claims based on “nine-dash line” as claims to right to the living and non-living resources within the line, but not to be a claim of territorial sea or internal waters. According to the Tribunal, the UNCLOS created the comprehensive system of marine zones, and superseded earlier rights and arrangements to the extent of any incompatibility. Thus, the Tribunal concluded that “China’s claims to historic

rights, or other sovereign rights or jurisdiction, with respect to the marine areas of the South China Sea encompassed by [...] the ‘nine-dash line’ are contrary to the Convention and without lawful effect to the extent that they exceed the [...] limits of China’s maritime entitlement under the Convention” (Section V of the Award of 12 July 2016, esp., para.278).

## **II. Role of International Law of Providing Means of Settlement for Territorial Disputes**

### **1. Place of Means for Peaceful Settlement of Disputes**

Under traditional international law, which did not regulate a States’ act to resort to war, peaceful or amicable means for settlement of disputes was only one of the legitimate means along with forcible or compulsive means. 1907 Hague Convention for the Pacific Settlement of International Disputes (hereafter, 1907 Hague Convention), provided that “[w]ith a view to obviating *as far as possible* recourse to force in the relations between States, the Contracting Powers agree to use their *best efforts* to ensure the pacific settlement of international differences” (Article 1: emphases added.).

In contrast to this, under the UN Charter, peaceful settlement of disputes has become a legal obligation of every State (Article 2 (3)). This is a logical corollary of the prohibition of the threat or use of force (Article 2 (4)). There is beyond all doubt that these provisions are norms of customary or general international law

(See, e.g., Friendly Relations Declaration; Manila Declaration on the Peaceful Settlement of International Disputes (GA Res.37/10, Annex, 15 November 1982: hereafter, Manila Declaration)).

Article 33 (1) of the Charter enumerates, though not exhaustive, means for pacific settlement of disputes. Apart from resort to regional organization, and reference to the UN Organs which is not stipulated here, and will be discussed in **Section 2** (3), these means are sometimes arranged as follows: starting from negotiation, through mediation, enquiry and conciliation, they lead to arbitration and judicial settlement. This sequence is explained as a process from a subjective verification of relevant facts and law to an objective verification, with third party participation, competence of the third party being strengthened one after another. This understanding reflects a domestic law analogy on the model of domestic law of Western developed countries, and regards arbitration and judicial settlement, applying international law and bringing about binding decisions, as the best means for settlement.

During the drafting process of the Friendly Relations Declaration, this evaluation of judicial settlement, mainly those by the ICJ, was advocated by Western developed countries, and highly contested by Asian and African developing countries as well as Socialist countries at that time. They criticized judicial settlement mainly on the following two grounds. First, they argued

that international law applied by the ICJ was unfavorable for them. Customary international law was formed by Western developed countries when they were under colonial domination and had not their say about it. As for treaty law, unequal treaties concluded under duress will be deemed to be valid and will be applied against their interests, they contended. Second, they criticized the composition of the ICJ not to be equitable for them. The ICJ was composed, at its inauguration in 1945, of 6 judges from West-European and other countries, 3 from East-European countries, 4 from Latin-American countries, and each one from Asian and African countries. Thus, these countries contended that judicial settlement would be unfavorable for them, and argued, instead, for settlement by negotiation which they deemed more responsive to the sovereign equality. In addition to these two points criticism, cultural difference between Asian and African countries on the one hand and Western countries on the other were sometimes referred to. Though this argument seems to have lost its influence before long, it reemerged in the CSIL's Paper. The Paper stated that "non-litigation" was inherent in "the centuries-long Chinese cultural tradition" (*Supra*, Section IV).

In fact, Asian and African countries' apprehension for the ICJ was justified at that time, at least partly. For instance, ICJ's Second Phase Judgement of the *South-West Africa Case* denied the Applicants' standing, and thus overlooked

in effect South Africa's incorporation of South West Africa into its territory and practice of apartheid there (Judgment of 18 July 1966, *ICJ Reports* 1966, p.6). This judgement was highly criticized not only by Asian and African countries but also by the international community as a whole, and the IJC had no new case before it for about five years except for the *North Sea Continental Shelf Cases* applied in 1967.

A compromise formula of these opposing standpoints of Western developed countries and Asian and African countries were the "principle of free choice of means". This principle was implicit in Article 33 (1) of the UN Charter, in so far as it referred to "other peaceful means of their own choice", and recognized explicitly as a "principle" by the Friendly Relations Declaration and the Manila Declaration as follows: "International disputes shall be settled on the basis of the sovereign equality of States and in accordance with the principle of free choice of means". This principle is also reflected, for instance, in Articles 280 and 287 of the UNCLOS.

It seems natural that China emphasizes the importance of the principle of free choice of means. China contends that the Philippines has violated China's right to choose means of dispute settlement by unilaterally initiating arbitration. According to China, China and the Philippines have agreed through bilateral and multilateral agreements, including 2002 Declaration on the Conduct of

Parties in the South China Sea (hereafter, DOC) between ASEAN countries and China, to settle the South China Sea Dispute by negotiation, and therefore the compulsory procedures entailing binding effect, including of course arbitration, does not apply by virtue of Article 281 (1) of the UNCLOS (China's Position Paper, paras.76-85; China's White Paper, paras.115-118). This position of China is debatable, to say the least, but, its right or wrong would depend on the interpretation of the relevant provisions of the UNCLOS as well as of agreements relied on by China. Therefore, Article 288 (4) of the UNCLOS seems to be applicable, namely, in the event of a dispute as to whether an Arbitral Tribunal has jurisdiction, the matter shall be settled by the Tribunal concerned.

## **2. Characteristics of Main Means for Settlement**

Among the various means of peaceful settlement mentioned in **Part II, Section 1.** above, two means situated both ends of the arrangement, namely negotiation (1) and, arbitration and judicial settlement (2), are discussed here. This selection seems to be justified, because all of the other means may produce conclusions without binding force, even with intervention by third party. Therefore, parties to the dispute must negotiate based on these conclusions in order to attain settlement. Thus, these means can be understood as means to facilitate negotiated settlement between

the contending parties. Means involving international organizations will be discussed separately (3).

### **(1) Reevaluation of Negotiation**

Basic nature of negotiation as a means of pacific settlement has long since been recognized. The PCIJ, in its order in the *Free Zones Case*, stated that "the judicial settlement of international disputes [...] is simply an alternative to the direct and friendly settlement of such disputes between the Parties" (Order of August 19<sup>th</sup>, 1929, PCIJ *Ser.A* No.22, p.13.), and also the ICJ, stressed that "[t]here is no need to insist upon the fundamental character of this method of settlement", citing PCIJ's Order mentioned above (*North Sea Continental Shelf Cases, supra*, p.47, para.86.).

Notwithstanding these precedents, Western developed countries and their international law specialists have generally been negative to negotiation. Though admitting an elementary nature of negotiation as simple and flexible without impairing sovereignty, they contend that there will be no settlement without an agreement of contending parties, and the settlement may not be equitable because it often reflects power relationship and skill of negotiation of the parties concerned. Instead, they recommended arbitration or judicial settlement which, by applying international law, can decide the case with binding effect.

They fiercely disputed with Asian and African countries as well as from Socialist



countries at that time and their lawyers, and agreed to a compromise principle of free choice of means in the Friendly Relations Declaration, as stated above. And the Manila Declaration is a little more positive to negotiations in recommending States to “bear in mind that direct negotiations are a flexible and effective means of peaceful settlement of their disputes”.

It must be noted that international law is not irrelevant for negotiations. General Assembly Resolution on Principle and guidelines for international negotiations (GA Res. 53/101, 8 December 1998), though reaffirming the right of free choice of means, recognized that “in their negotiations States should be guided by the relevant principles and rules of international law”, and presented as “a general, non-exhaustive frame of reference for negotiations”, seven principles of international law, almost parallel with those provided for in the Friendly Relations Declaration.

The principle of free choice of means does not accord priority to any of the means of peaceful settlement. However, parties in dispute, by logical necessity, “shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means” (Article 283 (1) of the UNCLOS). The CSIL’s Paper emphasizes the importance of “exchange of views” as a means for parties to agree with peaceful means to be chosen (*Supra*, Section V). At least on

this point, position of the CSIL’s Paper seems to be justified. Reference to third party settlement procedures cannot dispense with direct negotiation between the parties in some respects. Many conventions for the peaceful settlement of disputes oblige the parties to do direct negotiation before recourse to conciliation, arbitration or judicial settlement, in order to clarify each other’s claims and points at issue. And conclusions of third party settlement without binding force have to be followed by negotiation by the parties for the settlement based on these conclusions.

## (2) Reevaluation of Arbitration and Judicial Settlement

International law has responded somehow with the criticism to arbitration and judicial settlement mentioned before. As for the composition of the courts and tribunals, the ICJ became to be composed, from 1969 on, of 5 judges from West-European and other countries, each 2 from East-European and Latin-American countries, and each 3 from Asian and African countries. This may be still somewhat unsatisfactory for Asian and African countries, considering their proportion to the whole of the UN membership. This is, however, the same ratio to the regional distribution of the Members of the Security Council. And, 1978 Rules of the ICJ conferred on the parties some say for the composition of the Chamber to be constituted under Article 26 (2) of the Statute (Article 17 (2)

of the Rules). In case of arbitration, views of contending parties may be reflected more directly to the composition of the tribunal. Annex VII Arbitral Tribunals under the UNCLOS, for instance, will be composed of each one arbitrators appointed by the parties and other three arbitrators appointed by agreement of the parties, the President being appointed by agreement from the latter three members (Article 3 of Annex VII).

As for the applicable law, the progressive development and codification of international law, mainly under the auspices of the United Nations, has made remarkable success. The Vienna Convention on the Law of Treaties, based on the “principle of free consent”, declared to be void treaties procured by the threat or use of force, or treaties conflicting with a peremptory norm of general international law (*jus cogens*) (Articles 52 and 53). Developing countries have also increased their influence to the formation and development of customary international law. General Assembly Resolutions have become to be taken into account in identifying customary international law. General Assembly Resolution on the Review of the role of the ICJ (GA Res. 3232 (XXIX), 12 November 1974) recognized that “the development of international law may be reflected, *inter alia*, by declarations and resolutions of the General Assembly which may to that extent be taken into consideration by the International Court of Justice”. And the ICJ itself has relied on General Assembly

Resolutions, including the Friendly Relations Declaration, as expressive of the *opinion juris* of States. In case of the law of the sea, 1982 UNCLOS adopted in many points the demands of developing countries, which participated positively in its drafting. This seems to make possible for its Part XV on the settlement of dispute to incorporate “Compulsory Procedure Entailing Binding Decisions”.

Judicial settlement is said to be rigid in applying international law. The ICJ decides “in accordance with international law (Article 38 (1) of the Statute) . In contrast to this, arbitration was traditionally said to be more flexible in this respect. 1907 Hague Convention provided that “[i]nternational arbitration has for its object the settlement of disputes between States by Judges of their own choice and *on the basis of respect for law*” (Article 37: emphasis added). The parties also entitled to designate, in a *compromis*, rules to be applied by the arbitral tribunal. However in recent times, arbitral tribunals have become to be more rigid in applying international law. For example, Annex VII Arbitral Tribunals under the UNCLOS, along with the ICJ and the ITLOS, “shall apply this Convention and other rules of international law not incompatible with this Convention (Article 293 (1) of the UNCLOS).

These developments seem to promote international courts and tribunals to make more equitable decisions in favour of developing countries, and these trends in

turn have prompted more positive attitude on the part of developing countries toward arbitration and judicial settlement. One of the great breakthroughs was said to be the *Nicaragua Case* before the ICJ, in which a tiny developing country situated in Central America, sometimes called the “backyard of the United States”, won the suit against its great neighbor. Thus, since about the last decade of 20<sup>th</sup> century, developing countries have become more positive in referring their disputes to international courts and tribunals. Even “political disputes”, traditionally said to be “unjustifiable”, such as territorial disputes or disputes involving the use of force, have become often litigated. China’s Position Paper stated, at least in principle, that, “China highly values the positive role played by the compulsory dispute settlement procedure of the Convention in upholding the international legal order for the ocean” (para.79).

These positive developments notwithstanding, it must be conceded that two defects of arbitration and judicial settlement remain to be solved. First, jurisdiction of courts and tribunals depend on agreements of the contending parties, except for few regional institutions. And second, though their decisions are binding in theory, there is no international machinery to enforce these decisions against losing parties. In order to make up these defects, many ideas *de lege ferenda* have been proposed. However, these ideas can never be actualized without agreements among States. Here is the imperative role of

domestic and international public opinion to force the Governments to accept, as means for peaceful settlement of disputes, arbitration or judicial settlement, and to implement their decisions.

### (3) Disputes Settlement Involving International Organizations

Article 33 (1) of the UN Charter, in addition to the above mentioned series of means, refers to “resort to regional agencies or arrangements”. The Charter itself provides for dispute settlement by UN Organs: the General Assembly; the Security Council; and the Secretary-General. Decisions of the General Assembly, as the most representative among UN Organs, though only recommendatory in effect, are highly persuasive as backed by international public opinion. But, considering its size and working methods, it seems to be more suitable to formulate general principles to be followed in dispute settlement, than to settle individual dispute. The Security Council, on the other hand, is conferred with competence to deal with concrete dispute or situation likely to endanger the maintenance of international peace and security. And the parties to a dispute, in certain circumstances, have to refer it to the Council, and the Council may recommend procedures of adjustment or terms of settlement. However, dispute settlement by the Council is often influenced significantly by the interests of Permanent Members, and its “double standard” has often been criticized.

The Charter also recognizes the existence of regional mechanisms to deal with regional matters appropriate for regional action, provided that they are consistent with the Purposes and Principles of the United Nations, and the Members shall make every effort to achieve pacific settlement of local disputes through such regional mechanisms. Regional mechanisms are well informed about circumstances of the region concerned, and can realize more appropriate resolution of dispute based on the regional solidarity. Each of regional organizations, such as the African Union, the European Union, and the Organization of American States, have distinctive system of peaceful settlement of disputes. There are also some regional conventions specifically aimed at peaceful settlement of dispute, such as 1948 America Treaty on Pacific Settlement (Pact of Bogota) and 1957 European Convention for the Pacific Settlement of Disputes.

The ASEAN has 1976 Treaty of Amity and Cooperation in Southeast Asia, Chapter IV of which is devoted to Pacific Settlement of Disputes. If disputes should arise between the Contracting Parties, they shall refrain from the threat or use of force and shall settle such disputes through friendly negotiations (Article 13). As a continuing body to settle disputes, a High Council is constituted (Article 14), and in the event no solution is reached by direct negotiation, the High Council shall recommend appropriate means of settlement, or, upon agreement of the

parties, constitute itself into a committee of mediation, inquiry or conciliation (Article 15). However, above provisions of the Treaty do not preclude recourse to the modes of settlement contained in Article 33 (1) of the UN Charter. This ASEAN mechanism centering on negotiation seems to be distinctive to this region compared with European or African counterparts which rather favour judicial settlement.

## **Management of Disputes until Their Final Settlement**

### **1. Obligation Not to Aggravate the Dispute**

Obligation of States to settle their international disputes by peaceful means, enshrined in Article 2 (3) of the UN Charter, signifies not only obligation to settle standing disputes by peaceful means, but also obligation to refrain from any action which may aggravate the situation and make more difficult or impede the peaceful settlement of the dispute. This obligation has been reiterated in such General Assembly Resolutions as the Friendly Relations Declaration and the Manila Declaration, and there are quite a few treaty provisions to the same effect.

An institution of provisional measures provided for in Article 41 of the ICJ Statute seems to reflect this obligation. The PCIJ stated in its Order in the *Electricity Company of Sofia and Bulgaria Case* that Article 41 of the Statute applied the principle “universally

accepted by international tribunals and likewise laid down in many conventions [...] to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute” (Order of December 5<sup>th</sup>, 1939: PCIJ *Ser. A/B*, No.79, p. 199).

According to Article 41 of the Statute, the objective of provisional measures is “to preserve the respective rights of either party”. Notwithstanding this, the ICJ has become to indicate provisional measures the sole aim of which is to prevent the aggravation or extension of the dispute. The Chamber of the ICJ, in the *Burkina Faso/Mali Frontier Dispute Case*, though admitting that under Article 41 of the Statute “the Court may only indicate provisional measures [...] for the preservation of the rights of either Party”, stated that after recourse of the dispute to the Chamber, incidents occur which not merely are likely to aggravate the dispute but comprise a resort of force in contravention of the Charter, “there can be no doubt of the Chamber’s power and duty to indicate, if need be, such provisional measures as may conduce to the due administration of justice” (Order of 10 January 1986, *ICJ Reports 1986*, pp.8-9, paras.11, 18-19.).

The Award of South China Sea Arbitration, reaffirmed the above findings on provisional measures since the time of

PCIJ, and applied them to the case before it, stating that “such a duty is inherent in the central role of good faith in the international legal relations between States”, and that the duty “constitutes a principle of international law that is applicable to States engaged in dispute settlement as such” (Award of 12 July 2016, *supra*, pp.457-461, paras.1166-1173). The Arbitral Tribunal declared that China’s dredging, artificial island-building and construction activities in the disputed area during the proceedings have been breach of the obligations under Articles 279, 296 and 300 of the UNCLOS, as well as obligations under general international law “to abstain from any measure capable of exercising prejudicial effect in regard to the execution of the decisions to be given and in general, not to allow any step of any kind to be taken which might aggravate or extend the dispute during such time as dispute resolution proceedings were ongoing” (*Ibid.*, pp.461-464, paras.1174-1181, pp.476-477, Dispositif B (16)).

## **2. Measures for Management of Disputes**

Thus the parties to a dispute, until the agreed means for settlement put in motion and lead to its resolution, bear the obligation to manage the dispute in order to ensure that any action not to be undertaken which may aggravate the situation and make more difficult the peaceful settlement of the dispute.

One of the most useful means to manage territorial disputes would be to “shelve” or “freeze” them without prejudice to the

positions of the contending parties. 1959 Antarctic Treaty set up one of the most successful system for international cooperation by “shelving” territorial claims. Until that time, several countries had claimed sovereignty over some portion of the Antarctic, sometimes overlapping, and another contested these claims. Article 4 of the Treaty does not recognize, dispute, nor establish territorial claims, and no new claims shall be asserted while the Treaty is in force. Under this system, wide range of international cooperation in relation to Antarctic activities have developed, such as 1982 Convention for the Conservation of Antarctic Marine Living Resources, and 1991 Protocol on Environmental Protection.

2002 DOC between the ASEAN countries and China presented an interesting formula to manage outstanding territorial disputes. Under the DOC, the Parties concerned undertake to resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations in accordance with universally recognized principles of international law, including the UNCLOS (para.4). The Parties also undertake to exercise self-restraint in their activities that would escalate the dispute, including refraining from action inhabiting on the presently uninhabited islands and other features, and they undertake, pending the settlement of disputes, to take the following confidence-building measures, *inter alia*: holding dialogues between military officials;

ensuring humane treatment of persons in distress; notifying any impending joint/combined military exercise (para.5). Pending a comprehensive settlement of disputes, the Parties concerned are also recommended to take cooperative activities including the following: marine environmental protection; marine scientific research; safety of navigation; and, combating transnational crime (para.6).

The DOC is political, not legal, in its nature, and the Parties undertake to pursue the adoption of a legally binding code of conduct in the South China Sea (para.10). Therefore, the above cited provisions of the DOC as such do not produce legal obligations for its parties. The South China Sea Arbitral Tribunal, in its Award on Jurisdiction and Admissibility, made a detailed examination of the DOC’s terms, intention of its parties, and the parties’ subsequent conduct, and concluded that the DOC was not intended to be a legally binding agreement referred to in Article 281 of the UNCLOS (Award of 29 October 2015, pp.82-85, paras.212-218.). However, the DOC is remarkable because it materializes somewhat the above mentioned obligation to manage the dispute. For this reason, the DOC seems to have general validity beyond the situation in the South China Sea.

### **For the Equitable Settlement of Territorial Disputes: In Lieu of Conclusion**

The followings are some suggestions, not exhaustive, for the equitable settlement of

territorial disputes, including maritime disputes.

As stated in **Part I, Section 1** above, most of the territorial disputes are multi-dimensional in character. They have not only legal, but also political, economic cultural and other aspects as well. Therefore, settlement of their legal aspect, through judicial settlement for example, might not lead to the equitable resolution of the dispute as a whole. For this purpose, diverse interests of the parties concerned have to be taken into account.

The Report of the Conciliation Commission on the Continental Shelf area between Iceland and Jan Mayen, delivered in June 1981 (27 *UNRIAA* p. 1), is one of the good examples of settlement taking into account various interests of the Parties. The Commission, composed of three law of the sea specialists, was mandated to recommend the dividing line for the shelf area between Iceland and Jan Mayen (under Norwegian sovereignty) taking into account "Iceland's strong economic interests in these sea area, the existing geographical and geological factors and other special circumstances". The Commission's Recommendation did not propose a demarcation line for the continental shelf different from the economic zone line, Iceland's 200-mile economic zone having already been agreed upon, but recommended adoption of a joint development agreement covering the area offering any significant prospect of hydrocarbon production.

This Report of the Conciliation Commission, in its consideration of

"Iceland's strong economic interests" as well as its recommendation of joint development, represents a typical characteristic of conciliation not seen in case of judicial settlement. The dispute was resolved through negotiation of the Parties based on this Recommendation. Joint development of resources may be useful device for settlement of territorial disputes, not only for their final settlement but also for their management until their final settlement. Because, though territorial dispute are normally a zero-sum game, joint development or equitable distribution of resources, especially marine resources, may be possible options.

In settling territorial disputes, not only interests of contending States as such, but interests of the local population concerned must also be taken into account. As early as 1951, in its judgment of the *Fisheries Case*, the ICJ referred to, as one of the "basic considerations inherent in the nature of the territorial sea", consideration of "certain economic interest peculiar to a region, the reality and importance of which are clearly evidenced by a long usage" (Judgment of December 18<sup>th</sup> 1951, *ICJ Reports 1951*, p.133.). It is noteworthy that recent jurisprudence of international courts and tribunals has become increasingly to pay attention to the interests of local population affected by the delimitation. For instance, Award of *Eritrea/Yemen Arbitration* ordered Yemen in the exercise of its sovereignty over the islands accorded to it by the Award, "Yemen shall ensure that the traditional fishing regime of free access

and enjoyment for the fishermen of both Eritrea and Yemen shall be preserved” (*Supra*, pp.329-330, paras.525-526.).

The ICJ, for its part, in its Judgment of the *Case concerning the Dispute regarding Navigational and Related Rights* between Costa Rica and Nicaragua, admitted a right of non-commercial navigation for the inhabitants of the Costa Rican bank, the boundary being on the Costa Rican bank of the San Juan river, and also a customary right of Costa Rica for its riparian of subsistence fishing, long practiced by them but not documented in any formal way (Judgment of 13 July 2009, *ICJ Reports 2009*, p.246, paras.77-79; pp.265-266, paras.140-141.).

And also, Judgment of the ICJ, in the *Burkina Faso/Niger Frontier Dispute Case*, asked by the Special Agreement to apply “the principle of the intangibility of boundaries inherited from colonization”, namely the principle of *uti possidetis juris* referred to in **Part I, Section 2** (2) above, decided the boundary in the area not specifically delimited by the French colonial document concerned, on the median line of the River Sirba, noting that “the requirement concerning access to water resources of all the people living in the riparian villages is better met by a frontier situated in the river than on one bank or the other”. And having determined the course of the frontier, the Court expressed its “wish” that “each Party, in exercising its authority over the

portion of the territory under its sovereignty, should have due regard to the needs of the population concerned” (Judgement of 16 April 2013, *ICJ Reports 2013*, p.85, para.101; pp.90-91, para.112).

These decisions are noteworthy not only in their substantive rulings but also in their methods of interpretation in reaching the decisions. Eritrea/Yemen Arbitral Tribunal took note of the fact that “Western ideas of territorial sovereignty are strange to peoples brought up in the Islamic tradition”. The ICJ, in the *Dispute regarding Navigational and Related Rights Case*, in interpreting the 1858 Treaty, used methods not necessarily accord with those of Articles 31 and 32 of the Vienna Convention of the Law of Treaties, which the Court had recognized as reflecting customary international law. Also, the Court, in this judgement, recognized establishment of customary right of a Party, based not on the practice of the Parties concerned but on the practice of the local population not contested by the other Party. Judgment of the *Burkina Faso/Niger Frontier Dispute Case* based its decision on a frontier not on legal interpretation of the applicable document but on the, so-to-speak, policy consideration in favour of the population concerned. These sensibilities to the interests of local population concerned, if any, on the part of courts and tribunals seem to be indispensable for the equitable settlement of territorial disputes.



## DIFFERENT PEACEFULL RESOLUTION MECHANISMS UNDER ARTICLE VI OF THE UN CHARTER AND OTHER DISPUTE RESOLUTION MECHANISMS UNDER INTERNATIONAL LAW

*Erik Franckx\**

Thank you very much for the kind introduction. I would like to start out by thanking the International Association for Democratic Lawyers for having had the kindness of inviting me here. I feel very privileged indeed. I would like to talk this morning about dispute settlement under International Law in general, and especially as it applies to the Law of the Sea. These two systems are quite different. The purpose of my paper is to present and clarify these differences to you.

Since the previous speaker talked about the general International Law situation, I think I can go over my first part quite quickly. I will rather focus on the Law of the Sea and try to highlight the specific and quite distinctive features to be found there when compared with the International Law system in general. Quintessential to understand this difference is that we have at present a Constitution of the Oceans, namely a document that legally binds many countries. Within this document, we have a specific system of dispute settlement that has been established. It is a quite innovative system for the settlement of disputes, but at the same time a very

complex one as well. Finally, before drawing conclusions, I will try to highlight elements which are of importance for the South China Sea without going into the specifics of the Arbitration award.

### *1. General International Law*

With respect to the United Nations system, the general principles have already been stated, namely that the use of force is prohibited and that all disputes have to be settled in a peaceful manner. These principles have been further developed by means of a number of resolutions adopted by the General Assembly. Even though such resolutions normally have no binding force, in this case, because the General Assembly is interpreting its own founding document, we see that these specific resolutions carry more weight within the framework of the United Nations system.

If you try to analyse the content of Article 33 Paragraph 1 of the United Nations Charter you have, on the one hand, what are called diplomatic means, such as negotiations, mediation and good offices. On the other hand, you have the so-called judicial means, where courts or arbitral tribunals become involved. Since this basic scheme was well explained by the previous speaker, I can limit myself to pay attention to the main difference that exist

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between these two groups of dispute settlement mechanisms.

Very often people think that one is binding and the other one is non-binding. I would dare to contest that. When negotiations are successful, they normally result in the conclusion of a treaty. And when you conclude a treaty, of course, that treaty is as binding between the parties as would be the decision rendered by a court or arbitration in a case between them.

The difference, I believe, lies in the power that the States retain. From the start until the very end, the politicians involved in diplomatic negotiations can always state that such negotiations, even if they have been going on for many, many years, are not acceptable to them from a political point of view. And then they simply don't accept the result arrived at. This feature characterizes all of the diplomatic means. With respect to the second part, when the parties decide to turn the judicial means, they give the ultimate decision out of hand and it will be somebody else who will ultimately decide in their place. And I think that is the main difference between these two means of dispute settlement. I don't have to tell you that States prefer the diplomatic means because they want to maintain as much as possible the end solution into their own hands. Thus judicial means are normally only the second kind of means that countries will rely upon after having exhausted diplomatic means.

Now, if we then compare this basic scheme just mentioned with Article 33 Paragraph 1 of the United Nations Charter, we see that the latter document also mentions good offices, which is a method not to be found in the enumeration of diplomatic means given above. Contrary to mediation, States sometimes do not want to be seen as being involved in the negotiations between two parties. With good offices, the third party remains in the background, doesn't take any initiative, and only attempts to bring the parties together without the third party trying to influence the content.

There are also elements in Article 33 Paragraph 1 of the United Nations Charter that are not mentioned in the basic scheme mentioned above. These are inquiry or fact finding, conciliation, settlement of disputes through regional organization, but all these methods were already mentioned by the previous speaker.

When one compares Article 33 Paragraph 1 of the United Nations Charter with the above-mentioned basic scheme, one has to admit that the former is clearly more specific than the latter. But, at the same time, Article 33 Paragraph 1 is also more limited in its field of application than the basic scheme mentioned above because the former only applies to disputes the continuation of which might endanger international peace and security.

## *2. International Law of the Sea*

We then turn to the International Law of the Sea. First, the International Law of the Sea forms part of International Law, of which it forms a sub-branch. But the good thing for us about this particular sub-branch is that it has been codified and consequently has a written document that guides us when we have to apply it.

The codification of the Law of the Sea was, however, not an easy task. The League of Nations tried to accomplish that with respect to the legal regime of the territorial waters in 1930, but this organization was utterly unsuccessful mainly because countries could not agree on the breadth of this particular maritime zone. The United Nations, on the other hand, was successful in the sense that this organization not only codified this law once, but twice. This is highly exceptional. The United Nations has a specific body, the International Law Commission, which is responsible for the codification of International Law as well as its progressive development. The Commission has been instrumental in the first attempt made by United Nations in 1958.

When the diplomats gathered in Geneva that year, they had four draft conventions in front of them on which they could rely during the negotiations. And in a rather short period of time, namely only three weeks, they were able to adopt four conventions which are shown on slide number 8, namely 1) the Convention on the Territorial Sea and the Contiguous

Zone, 2) the Convention on the Continental Shelf, 3) the Convention on the High Seas and 4) the Convention on Fishing and Conservation of the Living Resources of the High Seas. That four separate conventions were adopted at that time rested on the idea that States, even if they objected for instance to the content of one of them, would nevertheless be in a position to adhere to the others if they so wished. If we had only one document, a good number of States would probably be unable to adhere to this one document covering the four different fields now treated in separate conventions.

But these four conventions adopted in 1958 did not settle all issues concerning the Law of the Sea. Indeed, some problems remained, such as the extent of the territorial sea and possible fishing rights of coastal States beyond that zone. That is why we had a second attempt in 1960 to try to solve these few remaining problems. But this second attempt proved unsuccessful as no new agreement could be adopted.

### *3. The Constitution for the Oceans*

This brings us to the Third United Nations Conference on the Law of the Sea (1973-1982). When compared to the two previous conferences convened on this issue by the United Nations, this one is markedly different because the International Law Commission was not involved in this exercise at all, probably explaining why it took almost a decade for these negotiations to conclude.

Here, diplomats simply sat down together around the negotiating table and wanted to create a new system of law. Why was such a re-codification needed only years after the Law of the Sea had been codified a first time? I believe one of the compelling reasons to be the fact that the developing countries only started to gain their independence during the 1960s, i.e. after the conclusion of this first codification exercise. These States considered the four 1958 conventions not to reflect their positions and interests as they had been absent at the time of their creation. Consequently, they were not interested in adhering to these documents. On the other hand, these countries were very much attracted by the proposal launched in 1967 by Mr. Arvid Pardo, the ambassador of Malta at that time, who proposed to the General Assembly of the United Nations that the manganese nodules to be found on the deep ocean floor should be declared to constitute the common heritage of mankind.

That was the way the Third World was drawn into the negotiations for the creation of a new set of rules codifying the Law of the Sea. Their participation also influenced the procedural rules governing the new conference, because from the start it was agreed that, as a rule, there would be no voting. The numerical majority of the Third World States would otherwise have granted them an almost automatic two-thirds majority, which was the basic rule applied during the First and Second United Nations Conferences on the Law of

the Sea. A gentleman's agreement adopted at the very outset of the Third United Nations Conference on the Law of the Sea rather provided that this conference would move forward by means of consensus, meaning the absence of any formal objections. Only if consensus remained elusive would States be allowed to ask for a vote. A second major novelty of this Third United Nations Conference on the Law of the Sea was that negotiators would draft one single document, not four separate ones like in 1958, which would constitute a single package, to take or to leave as a whole. At the end of almost 10 years of negotiations, the United Nations Convention on the Law of the Sea was adopted in 1982 (1982 Convention). This entails that one cannot pick and choose within the package, as will become clear to you in a minute.

The systems of resolving disputes in 1958 and 1982 are also diametrically opposed. Under the 1958 conventional system, no provisions on dispute settlement are to be found within the conventions themselves. And here I have to correct myself if I want to be exhaustive, because in one of the four conventions, there are some dispute settlement provisions. But that concerns the Convention on Fishing and Conservation of the Living Resources of the High Seas, a legal document that proved to be very unsuccessful in the end because when you look at it today, only 36 Parties are members to it. If one realizes that the United Nations today counts 193 Member States, it means that this

particular Convention applies only to a very small minority of States.

The only other provisions on dispute settlement that you have are to be found in an Optional Protocol, meaning that these rules are not obligatory. States have to opt in for these provisions to become operational, and once they opted in, they can as easily opt out at a later stage. As of today, only 38 States are parties to this Optional Protocol. It means that very often when a dispute arises between two States bound by the 1958 Conventional framework, these disputes simply linger on.

#### *4. Settlement of Disputes under Part XV of the 1982 Convention*

Today, this has completely changed. In the 1982 Convention we now have an integral part of the Convention, namely Part XV, which deals with dispute settlement. The 1982 Convention is a consensus document. It means that all States needed to be able to find something to their favour, and thus consequently also to accept some provisions that are not so favourable to them. The total package, however, should be acceptable to the community as a whole. Once arrived at, however, the package needs to be strictly preserved for otherwise the whole construction would quickly start to unravel. The unity of the 1982 Convention has been secured by means of its Article 309, which provides that reservations are simply not possible. It means that you either accept that document as a whole or

stay out altogether. So cherry picking, as I said, is prohibited. One cannot do that, because the only “picking” that is allowed consist of adhering to the document as a whole.

The importance of conserving the package deal is reflected in the fact that more than 100 articles of a document consisting of over 300 articles concern dispute settlement. It clearly indicates that dispute settlement not only forms a central piece of the whole edifice, but also a very elaborate part of the 1982 Convention. Why so elaborate? Because the States wanted the necessary flexibility and this flexibility was incorporated into the system, resulting into a rather complex system of dispute settlement.

Louis B. Sohn, a member of the United States delegation during the Third United Nations Conference on the Law of the Sea, has been very instrumental in drafting this part of the 1982 Convention. This document and its different parts becomes very important because at present it is labelled the Constitution for the Oceans as so many countries are a party to it, namely<sup>167</sup> plus the European Union, which is of course not a State but an international organization, to be precise. This means that most of the world community is involved, with a balanced representation of developed and less developed States coming from all regions of the world. If one moreover takes into consideration that a good number of countries do not even have coastlines at all

– and consequently may not have a major interest in becoming a Party to it – the number of 167 is quite elevated.

What then is so special about Part XV on the Settlement of Disputes? It is totally different from any kind of system that had existed before in multilateral treaties of a universal character and even International Law in general. Under the United Nations system, you have the International Court of Justice (ICJ) which according to Article 92 of the United Nations Charter is the “principal judicial organ of the United Nations”. But the ICJ, as a starting point, has no jurisdiction. Everyone accepts the rules of the game, as worked out in the Statute of the ICJ, which by the way forms an integral part of the United Nations Charter binding 193 States today, but the ICJ as such has no jurisdiction. So every time two States want to bring a certain case before the ICJ, they both first have to consent to its jurisdiction for that particular case. With respect to the Law of the Sea, this consent is given beforehand by becoming a member of the 1982 Convention and once you have assumed that commitment, one party can unilaterally take the other one before a court or tribunal whenever a dispute arises between them relating to the Law of the Sea.

Part XV is composed of three sections. First States have to try to solve the issue through diplomatic means (Section 1. General Provisions). If that proves unsuccessful, States can unilaterally turn

to juridical means of dispute settlement (Section 2. Compulsory Procedures Entailing Binding Decision). Such a far-reaching system of dispute settlement could only become acceptable to the participating States if certain exceptions were to be included. For that reason there is a third section under Part XV, entitled “Limitations and Exceptions”. Let us now look at these three sections in turn.

First, there are the general provisions, which are very important. They partly echo points of general International Law, such as the requirement that all disputes need to be solved by peaceful means. At the same time this section introduced the basic freedom of choice of the Parties, which is specific to this 1982 Convention. Normally, if you have a compromissory clause in a treaty, you either go before the ICJ or arbitration, depending on what was agreed upon between the parties. Here, in order to make the unilateral institution of compulsory procedures palatable to the Parties of the 1982 Convention, four different institutions had to be mentioned as will be seen. Despite this flexibility, and no matter what the more than 100 other provisions on dispute settlement in the 1982 Convention provide for, States always retain the freedom to jointly opt for a different procedure of their own choice if they so wish. This is what Articles 280 and 299 (2) clearly provide for. Finally, these general provisions of Section 1 also contain certain obligations, it means things that States cannot normally exempt themselves from. These obligations

comprise the requirement 1) to exchange views, 2) to follow first procedures established under general, regional or bilateral agreements (unless the parties otherwise agree), and 3) to apply Part XV if under another procedure freely chosen by the Parties no settlement was reached. To make a general synthesis of Section 1, one could conclude that the rules of Part XV, notwithstanding the fact that they are very elaborate, have only a residual nature and can be easily put aside if the parties so agree.

Turning to the Section 2, the question can be raised as to the specificity of the compulsory procedures entailing binding decisions? Article 286 lays down its basic premise. If any dispute arises concerning the interpretation or application of the 1982 Convention between two States Parties to that document, a legal obligation exists for one of them to accept a unilateral application submitted by the other. For the first time in a multilateral agreement of a universal nature we thus have a unilateral right for all States Parties to an international agreement to take another State Party before a judicial body for adjudication and the compulsory settlement of their dispute under that document. This is totally different than the prevailing situation under general International Law. I would like to stress, once again, that such a right does not exist before the ICJ, despite the fact that all United Nations Member States accept the Statute of the ICJ, because the jurisdiction of this institution requires the consent of

both States involved in any bilateral legal dispute. With respect to the Law of the Sea, as I said, the consent is given by becoming a Party to the 1982 Convention.

Another novelty of Part XV of the 1982 Convention, as already alluded to before, is that there is a choice of forum. According to Article 287, a State can choose between 1) the International Tribunal on the Law of the Sea, established in Hamburg, Germany, 2) the ICJ, located in The Hague, the Netherlands, 3) normal arbitration, or 4) special arbitration. Everybody can make this choice freely, and if these choices correspond, then Parties know where to introduce their case. Of course, countries may also make different choices, or no choice at all, and then the question arises as to how the system operates when there is a lack of choice by at least one Party or the choices made do not match?

Professor Louis B. Sohn, was able to untangle this difficult knot by specifically asking States for their preferred second choice. The answers he received showed an overwhelming preponderance in favour of arbitration, meaning that almost all States agreed that if they could not have their first choice, they would be willing to settle for arbitration. That is also what is reflected in the 1982 Convention today: If there is no match between the will of the States in this respect, arbitration becomes the default procedure.

Furthermore, special new rules needed to be included for the proper application of

Part XV to the European Union, an international organization. As the European Union can for instance not appear before the ICJ, which is only open to States, a Special Annex to the 1982 Convention was drafted for this purpose (Annex IX). The European Union now has the same choice as the other States Parties, with the exception of the ICJ.

As of present, few States have made an explicit choice under Article 287. As a consequence, arbitration will often be the way to go forward if two States have a dispute.

What then finally are the exceptions dealt with in Section 3? A distinction needs to be made between automatic and optional exceptions. Automatic exceptions *grosso modo* either relate to fisheries issues or marine scientific research, both as they relate to the exclusive economic zone. Optional exceptions, on the other hand, are only applicable if States have opted in. They can relate to dispute settlement procedures concerning sea boundary delimitations or historic titles and bays. These kind of exceptions were, of course, important in the South China Sea arbitration. But also disputes concerning military activities or law enforcement activities can be excluded. Again this exception was at stake in the case brought by the Philippines against China. If a State makes use of those exceptions by means of a declaration when signing, ratifying or acceding to the 1982 Convention, or any time thereafter, Section 2 will no longer be

applicable. It is noteworthy that China did not include such exceptions when it made a declaration at the time of ratification in 1996, but only did so later on by means of a separate declaration issued in 2006.

For the rest, Part XV was conceived as a fault-proof system, meaning that even if one of the parties does not want to appear, the other Party may request that procedure to continue. If so, the court or tribunal has the obligation to continue the dispute settlement procedure, whether the other party participates or not. The court or tribunal will continue the case and the decision will be binding on both parties. With respect to the default procedure, i.e. arbitration, this has explicitly been provided in Article 9 of Annex 7. One will find a similar provision with respect to the ICJ (Article 53 of the Statute of the ICJ), the International Tribunal for the Law of the Sea (Article 28 of Annex VI) and special arbitration (Article 4 of Annex VIII, which refers back to Article 9 of Annex VII).

As far as arbitration is concerned, this has happened twice so far: The first time in the Arctic Sunrise Case between the Netherlands and the Russian Federation; the second time in the case brought by the Philippines against China relating to the South China Sea. In both cases the arbitral tribunal delivered an award on the merits. Non-participation is a new development that might be worrisome to some extent.

## 5. South China Sea



If we apply the above-mentioned legal framework to the South China Sea, it is worth noting that, with only few exceptions, all States in the South China Sea have ratified the 1982 Convention. The exceptions relate to Cambodia, which is not a claimant State, and Taiwan, which for reasons which are totally outside of the 1982 Convention, can simply not become a Party to this document because of its present status under International Law. The latter gave rise to lot of intricate legal and practical problems, which also burdened the arbitration initiated by the Philippines against China. One of the concrete problems that arose during these proceedings was how to make sure that point of view of Taiwan was duly taken into consideration once the Tribunal decided that it would make a ruling on the exact legal status (Article 121 (2) island or Article 121 (3) rock) of Itu Aba/Taiping? Taiwan became very annoyed with this direction taken by the Tribunal. In order to be heard, Taiwan expressed its own legal position on the issue by means of a Position Paper on ROC South China Sea Policy and an *amicus-curiae* submission by the Chinese (Taiwan) Society of International Law, to which the Philippines made no objections. That way, the Tribunal was at least able to look at the Taiwanese arguments within the framework of arbitration.

But in so doing, the Tribunal used in its award the denomination ‘Taiwan Authority of China’, which Taiwan finds very denigrating. So after the rendering of

the award, Taiwan raised two points in a first reaction: Firstly, it did not accept that it was referred to by the Tribunal as ‘Taiwan Authority of China’; secondly, it did not accept that Itu Aba/Taiping was not an island with an exclusive economic zone and a continental shelf but a rock deprived of those same maritime zones. But the order of the points raised speaks for itself on how difficult it is for Taiwan to function on the international level at present.

None of the South China Sea States that are bound by the 1982 Convention made a choice of forum declaration as provided by Article 287 so far. This is also important to note, because it implies that arbitration becomes the default procedure in this region.

Finally, it is to be noted that this default system to arrive at a binding decision under the 1982 Convention proved to function in a fault-proof manner in practice. The case between China and the Philippines makes that very clear. China did always refuse to participate, but now the decision on the merits has been rendered and China, as a Party to the 1982 Convention, is obliged to respect it. Again, it is only in the Law of the Sea that you can have these unilateral actions. You cannot have them outside of that system. Moreover, only China and Thailand have so far made use of the optional exceptions under Article 298. Both countries exclude delimitation, historic title and bays as well as military and enforcement activities from the application of Part XV.

## *6. Conclusions*

In conclusion, it can be stated that the 1982 Convention provides for an exceptional framework as far as the settlement of Law of the Sea related disputes is concerned. As you see it on slide number 18, a counsel of the Philippines defends his client in a room of the Peace Palace in The Hague, the Netherlands, which is of course the home not only of the ICJ but also of the Permanent Court of Arbitration.

I mention these two institutions on purpose, because neither of them forms the basis of the award rendered between China and the Philippines on 12 July 2016. It is not a case before the ICJ, but because of multiple instances of misreporting in the press this Court felt obliged to place a notice on its website early July, when the award in this case had been rendered public, to inform the public that this particular award was totally unrelated to the ICJ. At the same time, I would like to emphasize that this is not an arbitration of the Permanent Court of Arbitration either, even though you will find the award posted on their official webpages. The only link between this arbitration and the Permanent Court of Arbitration is that the arbiters in the case between China and the Philippines decided to make use of the Registry of the Permanent Court of Arbitration. The only link is consequently the Registry services. The basis of jurisdiction empowering the arbiters to render their award in 2016 is consequently not to be found in the system of the Permanent Court of Arbitration, namely

the agreements of 1899 or 1907. It is rather to be found in the 1982 Convention.

Part XV of the 1982 Convention certainly provides a new window of opportunity. At the same time it cannot be denied that it also holds certain dangers. The fact that two important States, both permanent members of the Security Council of the United Nations, have refused to participate in arbitration procedures initiated against them in accordance with Part XV of the 1982 Convention, might be considered a bad omen. And even though some voices have been heard advising the Chinese government to withdraw from the 1982 Convention, I can assure you that this is not a steadfast political position of these countries. I can inform you that the Russian Federation, for instance, has recently been involved in yet another arbitration instituted against it, this time by Ukraine, with respect to maritime activities in the area around the Crimea. You will see that the Russian Federation decided to participate in this arbitration.

It means that apparently there is some counterweight to those sceptical voices indicating that the South China Sea decision might well induce States to withdraw from the 1982 Convention, because they don't like the way these arbitrations have been ran. The Russian Federation at least has taken new approach and appears at present willing again to defend its legal position in front of such arbitral bodies.

With that, I would like to conclude my presentation. Thank you.

## PART III

### PEACE INITIATIVES FOR THE SOUTH CHINA SEA

#### PROPOSALS ON POSSIBLE FORMS, MECHANISMS, OR METHODS OF THE PEACEFUL RESOLUTION OF DISPUTES

*Erik Franckx\**

The topic that I will address this afternoon, namely the South China Sea Arbitration and the Entitlement of Islands, might seem somewhat controversial. This is a session on the way forward and I am rather going back to the Arbitral Award in the case initiated by the Philippines against China. And specifically to that part of the Award which addresses the treatment of small maritime features under present-day International Law.

I find it nevertheless a useful and even necessary exercise to go back to this arbitration. And on this point I disagree somewhat with the previous speaker. I disagree with the proposition that the arbitration will be unable to solve the lingering South China Sea disputes and that it will only be of secondary importance at best. If you look at the way forward, law can also be a useful tool in order to restrict the framework inside of which the claims of the parties will have to be fitted.

As States are sovereign under contemporary International Law, they can

pretend whatever they want. But law is there, I think, to indicate the outer limits of this discretionary power beyond which even claims of sovereign States become highly unconvincing. And with respect to the kind of maritime zones small maritime features can generate, I consider this Award to constitute a major step forward. So, as to the future, it might well be that China will continue to say *urbi et orbi* that they do not respect the decision. But I am convinced that when China will continue the process and start going back to a bilateral mode, the different countries involved will of course no longer be very much impressed when China puts forward its nine-dash-line argument as part of the discussions. The Tribunal in other words has determined the outer limits within which the States will from now on have to frame their aspirations. And that is why I am of the opinion that it is important to try to go back to that part of the Award which deals with the entitlements of maritime features. The latter constitutes moreover a non-negligible part of the Award because about 20 per cent of the whole Award is devoted to this issue. My talk today will be very focused: It concentrates on *one* specific convention, namely the United Nations Convention on the Law of the Sea (1982 Convention), *one*

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specific provision of that document, namely Article 121, and *one* specific paragraph of that provision, namely Paragraph 3.

First of all I will provide some background as to my own interest in this particular topic. Then I will try to illustrate the importance of the issue. Article 121 of the 1982 Convention itself will be analyzed next in some detail. Before drawing some conclusions, the application in practice of this particular article by courts and tribunals prior to the 2016 Award in the case between China and the Philippines will be scrutinized.

### *1. Personal Interest in the Topic*

Let me start by explaining to you why I have a particular interest in this issue. I have attended a good number of conferences on the South China Sea lately and often speakers would show you pictures, like the ones on slide number 4, and ask the question: Is this an island or this is a rock? But besides the person raising the question, everybody else in the room would also have their own personal opinion. As lawyers we know that it is not really through the expression of personal opinions that the law is developed these days, no matter how well-respected the speaker who asked the question might have been. A much more trustworthy source these days to move the law forward are judicial decisions, as a subsidiary means for the determination of rules of law as provided in Article 38 (1)(d) of the Statute of the International Court of

Justice (ICJ). As I will try to demonstrate, this is particularly so if the judicial decision in question for the first time interprets a particular conventional provision, which hitherto had been shrouded in mystery.

When the International Maritime Law Institute, located in Valletta, Malta, celebrated its 25<sup>th</sup> anniversary, the decision was taken to publish a Manual on International Maritime Law, covering public as well as private law issues. When I was asked to contribute to Volume 1 on the Law of the Sea, the editors suggested as title “The Regime of Islands and Rocks”. This contribution was written in *tempore non suspecto*, meaning before the Award on jurisdiction and admissibility and the Award on the merits had been rendered in the arbitration initiated by the Philippines against China, namely on 29 October 2015 and 12 July 2016 respectively.

### *2. Importance of the Issue*

What is the importance of the issue? The basic premise in International Law is quite simple, namely that islands should be treated exactly the same as land territory. According to the maxim “*la terre domine la mer*” (the land dominates the sea) it was generally agreed upon that islands should not be treated any differently than land territory. Some 19<sup>th</sup> century case law firmly established this principle of International Law. Also treaty law of that period governing fisheries can be relied upon in support of this maxim. As fish

resources are not spread out evenly over the oceans, shallow waters are generally known for their rich fishing grounds. When overfishing became an issue in the North Sea, for instance, a treaty was concluded in 1882 according to which even low-tide elevations could serve as starting point for projecting the fishery competence of coastal States seaward. The rule that the land dominates the sea also found its reflection in the 1958 conventional framework. A continental shelf, for instance, could not only be claimed from continents proper, but also from islands, as explicitly stated in Article 1 *in fine* of the Convention on the Continental Shelf. The ICJ has reaffirmed this basic rule of thumb in the Law of the Sea many times over in its judgments.

But this policy of treating islands in exactly the same manner as *terra firma* started to be questioned during the Third United Nations Conference on the Law of the Sea (1973-1982). If before the assimilation of land and islands had applied at a time when the seaward projection of coastal State competence concerned maritime zones of rather limited extent, this drastically changed after the creation of exclusive economic zones of 200 nautical miles, as well as the introduction of notion of continental margin, resulting in legal continental shelves extending at least to the same distance, but sometimes also far beyond. Today, indeed, an isolated tiny maritime feature could easily generate a maritime zone of 431 014 km<sup>2</sup>, with the possibility

of its continental shelf substantially extending beyond this figure. This is of course an enormous maritime zone for not really possessing very much land to start with. It also easily explains why States are at present so eager to have possession of these very small maritime features. As will be seen next, the international community found it necessary during the Third United Nations Conference on the Law of the Sea, after first having extended maritime jurisdiction to at least 200 nautical miles from shore, to subsequently take away some of the sharp edges the continued assimilation of land and islands would otherwise have under such new conditions.

### *3. Article 121 of the 1982 Convention*

To achieve this goal, a new addition to existing conventional law is to be found in the 1982 Convention, namely Article 121 (3). This paragraph reads: "Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf." If the ultimate purpose of this paragraph is clear, namely that certain small maritime features would no longer be treated on an equal footing as land because they would be deprived of any exclusive economic zone or continental shelf, its formulation is enigmatic, to say the least.

Paragraph 3 is so complicated to interpret because it has been the invention of one single person, namely the Chairman of the Second Committee, who at the request of

the President of the Conference in 1975 needed to combine all the proposals which had been made so far in order to arrive at an informal single negotiating text. He certainly did the best he could by gathered a little bit here, a little bit there, putting it all together in one single paragraph while making sure he would generate the widest possible support as many delegations would find some part of their proposals reflected in it. Only the combination of all these bits and pieces, sometimes generated in different contexts, proved to be sibylline at best, with the hidden meaning probably not even known to its creator. The fact that the Chairman of the Second Committee was hospitalized during that time period and that this task fell in reality fell to the Rapporteur and a person from the Secretariat, does not really change these findings.

And even though it was clearly stated that this new text was only the basis for further negotiations, the substance of this paragraph did not change anymore after its introduction in 1975. Not that all States agreed to its wording, because a good number of proposal were made afterwards on both sides of the spectrum, and this until the last session of the Conference. The fact remains that none of them was able to muster sufficient support to be adopted by consensus. This made that the paragraph introduced in 1975, despite or maybe thanks to its vagueness, survived the different draft versions and finally also found its way into the 1982 Convention, as nobody apparently dared to upset the

consensus which had in the meantime been reached on the other provisions. But the underlying problem present from day one of course remains, and that is that this paragraph does not make much sense when one tries to understand it.

Let us now briefly dwell in turn on each of the three separate paragraphs that Article 121 contains. With respect to Paragraph 1, which provides the definition of an island, not much needs to be said because this paragraph contains nothing new when compared with what had already been codified in the 1958 Conventional system. Moreover, as confirmed by the ICJ, this provision also forms part of customary law.

Paragraph 2 gives you the legal consequences once a feature fulfills the requirements of Paragraph 1. Also this Paragraph 2 is uncontested as it already formed part of the 1958 conventional system where land and islands were place on an equal footing. This time, however, the sentence is introduced by a new introductory part stating “[e]xcept as provided for in Paragraph 3”, to which we will turn next. But before doing so, it should be noted that, just like Paragraph 1, this provision forms part of customary International Law, as confirmed by the ICJ.

Paragraph 3 is of much more recent nature as it only saw the light of day in 1975. I tried to explain to you the way it was created during the Third United Nations Conference on the Law of the Sea.

This also helps to explain the difficulties encountered at present when States want to apply this paragraph, the terms of which are utterly unclear. It will suffice to give you a few examples. The term “rocks”, does it mean something concrete, something hard or can it also mean islands made of sand or mud? The legal history of this paragraph will not be very helpful in trying to clarify the exact meaning of this term. Also the notions “cannot sustain human habitation” and “cannot sustain economic life” are open to a broad spectrum of possible interpretations. Because of its highly unclear content, I suppose, publicists were almost unanimous in concluding that this particular paragraph of Article 121 did not form part of customary International Law.

But then, in 2012, the ICJ suddenly declared that Paragraph 3 formed part and parcel of the “island” provision and needed to be read together with Paragraphs 1 and 2 as a single whole. It meant that no one can simply do away with it any longer, for it even applies to non-Parties to the 1982 Convention. Unless States persistently object, they simply have to apply Paragraph 3 because, according to the ICJ, it forms part of customary International Law. One consequently cannot apply Article 121, without also taking into consideration its Paragraph 3.

#### *4. Application in Practice*

When one tries to understand how this provision has been applied in practice, we

see that international courts and tribunals have had many opportunities to interpret this particular provision. Even though the Parties before them were more than once disputing the very fact as to whether a particular maritime feature was an Article 121 Paragraph 2 island or rather a Paragraph 3 rock, these bodies always sidestepped this problematic issue probably because they did not want to interpret such a difficult provision. They found relief in the law of maritime delimitation, which is very flexible. Ever since the de-codification of this law as far as the continental shelf is concerned by the Third United Nations Conference on the Law of the Sea, instead of providing the method to be applied (as in Article 6 of the 1958 Convention on the Continental Shelf) the law only mentions the result to be achieved, namely an equitable solution (Article 83 (1) of the 1982 Convention; a similar rule also applies to the exclusive economic zone by means of Article 74 (1)). Within this flexible framework courts and tribunals prefer to decide that they do not give such contested maritime features more than 12 nautical miles from a delimitation point of view, and if that is the case, the determination as to whether the feature in question is to be considered a Paragraph 2 island or a Paragraph 3 rock becomes simply redundant because the maritime zone it receives corresponds with the lowest common denominator of the outcome of such determination, namely that a Paragraph 3 rock generates a 12 nautical mile territorial sea. In

maritime delimitation law this is the absolute minimum a maritime feature, which is above water at high tide, will generate, unless it touches another territorial sea. If one were to grant a maritime zone exceeding 12 nautical miles, the determination of whether that feature falls under Paragraph 2 or 3 would have to be made in order to ascertain whether such maritime zone beyond 12 nautical mile was in accordance with International Law.

Until the Arbitration initiated by the Philippines against China, this had been the tread of Ariadne throughout the cases, listed on slide 12, in which the issue of Article 121 (2-3) was touched upon. It is important to understand that it certainly was not a manifestation of arbitral activism that this steady policy adopted by the ICJ was reversed in the Award of 2016. This arbitration simply did not have the luxury of being able to rely on the law of maritime delimitation because, as I already mentioned this morning, China in 2006 had explicitly excluded maritime delimitation from the application of Section 2 of Part XV, i.e. compulsory procedures entailing binding decisions. When I finished my contribution to the festivities surrounding the 25<sup>th</sup> anniversary of the International Maritime Law Institute, the last sentence I wrote was the following: “It will be interesting to see whether the recently established arbitral tribunal in the dispute between China and the Philippines will be the first to provide further guidance in this

respect” (*Erik Franckx*, *The Regime of Islands and Rocks*, in: *David Joseph Attard, Malgosia Fitzmaurice and Norman A. Martinez Gutiérrez* (eds.), *The IMLI Manual on International Maritime Law, Volume I, The Law of the Sea*, Oxford, Oxford University Press, 2014, p. 99, 124). Once the Arbitral Tribunal decided in 2015 that it did have jurisdiction to proceed with this case, it became highly probable that this question would have to be answered in the affirmative.

Let us now turn to the 2016 Award on the merits to see how the Tribunal has tackled this issue. But before doing so, there are a few preliminary considerations that I would like to mention. The first one concerns the opposition oftentimes found in the literature between islands on the one hand and rocks on the other hand. No matter how useful this distinction may be from a pedagogical point of view, I believe this basic distinction to be incorrect. One does not have to distinguish so much between islands and rocks, but rather between islands and rocks which cannot sustain human habitation or economic life of their own. Both of these categories remain moreover islands, as indicated by the chapeau of Article 121. If this proposition finds support in the literature, it is more difficult to find similar support for the submission that two kinds of rocks exist: Those that cannot sustain human habitation or economic life of their own and those that can. In the latter case, such rocks can generate exclusive economic



zones and continental shelves. Last, but not least, it implies that there can also exist islands which cannot sustain human habitation or economic life of their own, but will nevertheless be able to generate exclusive economic zones and continental shelves as they fit under Paragraph 2. As the Tribunal downplayed the importance of the element size, a lot of criticism has been directed toward the Tribunal's Award because it would mean that certain sizeable maritime features could still fall under Paragraph 3 as interpreted by the Tribunal. Based on the submissions just made, I would tend to argue they are not rocks and thus escape the application of that third paragraph.

The Award of 2016 starts out by looking at the arguments of the Parties. Because China refused to participate in the arbitration, the Philippines found themselves in a position where they not only had to argue their own position but also had to guess as to what arguments China might well want to develop in order to provide relevant counter arguments to the Tribunal. China indirectly informed the Tribunal of its main arguments concerning the jurisdiction by means of a Position Paper published on 7 December 2014, which the Tribunal subsequently considered to be a plea according to its own rules of procedure so that it could rely on this document anyway.

The Tribunal subsequently decided to apply the general rules of treaty interpretation under International Law as

codified in the 1969 Vienna Convention on the Law of Treaties (Articles 31-33), to which both China (3 September 1997) and the Philippines (15 November 1972) are a Party. As this treaty does not apply retroactively (Article 4 of the 1969 Vienna Convention on the Law of Treaties), it is important to note that these rules also form part of customary International Law in order to apply them *in casu* to the interpretation of the 1982 Convention.

First of all, as far as the term "rocks" is concerned, the Tribunal for the first time clearly states that this notion does not require any solid or concrete substance. To reach the opposite conclusion would have been totally illogical, as it would give to such a rock 12 nautical miles, whereas if you had a sand bank of the same size, this would generate a 200 nautical mile zone and possibly a continental shelf extending even further at sea.

The Tribunal also emphasizes that the notion "cannot" relates to a capacity, meaning that it aims at a theoretical possibility, not a practical reality. It is thus important to go back in history in order to ascertain whether a specific maritime feature was able to sustain human habitation and economic life of its own: If humans have never lived there before this is an indication that the feature should probably be qualified as a Paragraph 3 rock, but if there has been life there in the past the presumption would rather be that it is a Paragraph 2 island. A similar logic applies to the economic life requirement.

The next notion concerns the word “sustain”. According to the Tribunal, this implies something has to continue over a longer period of time. What is needed is consequently a sustained kind of human habitation and economic life. If applied to habitation, one type is indeed the settlement of people living there for a longer period of time. According to the Tribunal it cannot be anything that is imported from the outside or ephemeral. As far as the economic life is concerned, it implies that people living on the maritime feature should be able sustain themselves by means of local economic activities. A purely extractive economic activity organized from abroad would therefore not be sufficient. In a similar vein, an economic activity that solely depends on the exclusive economic zone or the continental shelf surrounding the maritime feature cannot be sufficient, as these zones can only be attributed if that maritime feature already fulfills the requirements mentioned in Paragraph 3. Otherwise, as the Tribunal rightly remarks, this would become a circular provision.

Finally, there are the conjunctions used in this Paragraph 3, namely twice the word “or”. Even though the Philippines had argued that the conjunctions in this Paragraph 3 should be read as “and”, the Tribunal disagrees, implying that it is sufficient that one of the two elements, namely human habitation or economic life of its own, is present in order for that maritime feature to be able to claim

maritime zones in excess of 12 nautical miles.

After having interpreted Article 121, the Tribunal then applies these findings in practice and comes to the conclusion that all of the features in the Spratly Islands are to be considered as rocks falling under Paragraph 3. The Tribunal reaches that conclusion after having studied in detail to most prominent features constituting this island group and having decided that none of them was able to sustain human habitation or economic life of its own, as these terms had just been interpreted.

When I go back to the article that I wrote in 2014, some of the conclusions reached at that time are totally in line with the findings of the Arbitral Tribunal. A good example is the interpretation of the term “rocks”. Others, however diverge. I for instance disagree with the Tribunal on the meaning of the term “or” used in Paragraph 3. The Tribunal does seem to reach its alternative reading of both conditions in order to make sure that certain small island States, which need more than one maritime feature to be able to have an economic life of its own, need to be able to comply with only one of these conditions. I personally believe this unnecessarily complicates the issue because the Tribunal immediately adds that it acknowledges that both conditions are normally interlinked. An argument from logic and argumentation can be made to argue that both conditions need to be fulfilled simultaneously. If you would

like to know more about it, I refer you back to my 2014 article, mentioned above. But I believe that argument to make sense. As I tried to argue there, everybody agrees, as far as the second part of Paragraph 3 is concerned (“shall have no exclusive economic zone or continental shelf”), that the “or” should be interpreted as having a cumulative and not an alternatively meaning. A State will not be able to claim just one of the two zones if the maritime feature in question cannot sustain human habitation or economic life of its own even though the two zones are connected with the word “or”. So why not apply the same logic with respect with the first part of that Paragraph 3?

Size by itself is not sufficient according to the Tribunal. I believe this approach to be rather problematical as well. There are many countries that feel very unsecure at present because their larger maritime features could now be qualified as rocks falling under Paragraph 3, even though they already established exclusive economic zones and continental shelves around them. Countries, like Untied States, possess a good number of such features and they are certainly not willing to retract the maritime claims that they have made in the past. If one however considers that some maritime features can be qualified as islands without human habitation and economic life of their own, and, because they are islands, still fall under Paragraph 2, as I argued before, such kind of objections could be overcome as to the future.

## *5. Conclusions*

In conclusion, I cannot deny that I have some critical comments with respect to this 2016 Award. Nevertheless, I believe that this first interpretation by a judicial body of Paragraph 3 of Article 121 of the 1982 Convention should be very much welcomed by the international community of States.

With almost no instance of State practice available and bilateral agreements having limited value, because their treatment of maritime features as Paragraph 2 islands or Paragraph 3 rocks does not have to be based on law, not much guidance was available to States prior to the 2016 Award.

In such circumstances States very much rely on the guidance provided by courts and tribunals. The ICJ has had many occasions to do just that, but preferred to hide behind the screen of maritime boundary law. This Arbitral Tribunal, however, did not have that possibility and needed to tackle the issue up front. As a result, its 2016 Award contains a long-awaited clarification and interpretation of that enigmatic provision. It does not seem to be fair, however, to blame the Tribunal for having done so, a critique often heard in certain quarters.

On the contrary, it is to be considered a welcome development of the law. Personally I consider it to be a courageous and well-reasoned first step. But at the same time it is only a first step. Now that the ICJ declared in 2012 that Paragraph 3

of Article 121 forms part of customary International Law, it is to be hoped that other courts and tribunals will now be more inclined to also address this issue head on. If this were to be the case, the interpretation of this important conventional provision, forming part of customary International Law, could be further refined in a manner like the law of maritime delimitation, which has been described as a kind of judge-made common law. As we know, the law on maritime delimitation needed many cases before a certain tendency could be discerned. It is believed that in the case of

the interpretation of Article 121 more than one decision will be needed as well, for whether one deals with maritime delimitation or the qualification of maritime features, not two cases are believed to be identical. That way, not only the interpretation of the 1982 Convention, but also the content of customary International Law more generally would be able to profit from such further fine-tuning.

And this is where I would like to end my presentation. Thank you very much for your kind attention.

## ENFORCEMENT OF THE PHILIPPINES V. CHINA ARBITRAL AWARD THROUGH DE-POLARIZATION AND STATE SOCIALIZATION INTO A RULES-BASED REGIME IN THE SOUTH CHINA SEA

**Frank Lloyd B. Tiongson\***

“By power... I do not understand a general system of domination exercised by one element or one group over another, whose effects... traverse the entire body social... It seems to me that first what needs to be understood is the multiplicity of relations of force that are immanent to the domain wherein they are exercised, and that are constitutive of its organization; the game that through incessant struggle and confrontation transforms them, reinforces them, inverts them; the supports these relations of force find in each other, so as to form a chain or system, or, on the other hand, the gaps, the contradictions that isolate them from each other; in the end, the strategies in which they take effect, and whose general pattern or institutional crystallization is embodied in the mechanisms of the state, in the formulation of the law, in social hegemonies. The condition of possibility of power... should not be sought in the primary existence of a central point, in a unique space of sovereignty whence would radiate derivative and descendent forms; it is the moving base of relations of force that incessantly induce, by their

inequality, states of power, but always local and unstable. Omnipresence of

power: not at all because it regroups everything under its invincible unity, but because it is produced at every instant, at every point, or moreover in every relation between one point and another. Power is everywhere: not that it engulfs everything, but that it comes from everywhere.”- Michel Foucault, *History of Sexuality*

It could be said that China’s disavowal of the 2016 Arbitral Award of the Permanent Court of Arbitration in *Philippines v. China* rests upon its dogged efforts to structure the discursive field of the South China Sea dispute along the lines of asymmetry and polarization. This is evident in China’s persistent position that the regional conundrum is best resolved through “friendly negotiations” with individual claimant states and its characterization of the Arbitral Award as essentially an adjudication of sovereign title and maritime boundary delimitation. The discursive practices engendered by this structuring includes sustained radio warnings against freedom of navigation exercises in certain areas of the South China Sea as well as ramped up military presences in the region, among others.

As seen, the resort to “friendly negotiations” saw the current Philippine

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administration virtually compromising the gains from the Arbitral Award in exchange for lucrative trade and financing agreements under the ambit of the Duterte regime's so-called "Build Build Build" program – a massive infrastructure drive estimated to cost USD 36 billion – underscoring the asymmetrical nature of China's relationship with the Philippines. The Duterte administration has also shown itself prone to subscribe to the aforementioned structuring by China as seen in President Rodrigo Duterte's usual zero-sum rhetoric on how a Philippine assertion of its claims would necessarily place the country in a war footing – a testament to how his administration has succumbed to China's polarization of the South China Sea dispute.

The structuring by China is, in fact, consistent with its objections at the outset of the arbitral proceedings in *Philippines v. China* as registered in its publicized 07 December 2014 Position Paper where it characterized the subject matter of the Philippines' submission as, essentially, territorial sovereignty – beyond the jurisdiction of the Arbitral Tribunal constituted under the auspices of the United Nations Convention on the Law of the Sea (UNCLOS) – and the resort to arbitration by the Philippines as an "abuse compulsory arbitral procedures" as well as a supposed derogation of its duty to

address the subject dispute through friendly negotiations.<sup>1</sup>

This paper submits that resolving the regional conundrum could also be framed as a resistance to China's discursive structuring by de-polarizing the dispute's narrative towards the organic establishment of a symmetrical, rules-based regime in the South China Sea. It is suggested that the 2016 Arbitral Award in *Philippines v. China* could be strategically enforced, in the near-term, through multilateral efforts in establishing binding rules of conduct with particular attention to the Arbitral Tribunal's ruling on Submissions No. 10, 11, 13, and 14 of the Philippines and, in the long-term, through China's gradual "socialization" into the rules-based framework of the Arbitral Award through the organization of Commissions of Inquiry for the South China Sea.

As mentioned, the resolution of the Arbitral Tribunal on Submission Nos. 10, 11, 13, and 14 of the Philippines already serves as sufficient basis for multilateral efforts to enforce the Arbitral Award inasmuch as the said submissions pertain to conduct and/or do not tend to be contingent on findings on maritime entitlement or territorial sovereignty

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<sup>1</sup> *Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines* (7 December 2014), available at

<[www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1217147.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml)> (hereinafter "China's Position Paper").

which is at the heart of the polarized narrative advanced by China.

***Respect for and recognition of traditional fishing rights***

Submission No. 10 of the Philippines, for one, charged that China unlawfully failed to prevent Filipino fishermen from pursuing their livelihoods by interfering with traditional fishing activities at Scarborough Shoal. The Arbitral Tribunal began its own disquisition on this matter as follows:

... the following discussion of fishing rights at Scarborough Shoal is not predicated on any assumption that one Party or the other is sovereign over the feature. Nor is there any need for such assumptions. The international law relevant to traditional fishing would apply equally to fishing by Chinese fishermen in the event that the Philippines were sovereign over Scarborough Shoal as to fishing by Filipino fishermen in the event that China were sovereign.<sup>2</sup>

The Arbitral Tribunal explained that the legal basis for protecting artisanal fishing:

... stems from the notion of vested rights and the understanding that, having pursued a livelihood through artisanal fishing over an extended period, generations of fishermen have acquired a right, akin to property, in the ability to

continue to fish in the manner of their forebears.<sup>3</sup>

It then concluded:

In the Tribunal's view, it is not necessary to explore the limits on the protection due in customary international law to the acquired rights of individuals and communities engaged in traditional fishing. The Tribunal is satisfied that the complete prevention by China of fishing by Filipinos at Scarborough Shoal over significant periods of time after May 2012 is not compatible with the respect due under international law to the traditional fishing rights of Filipino fishermen. This is particularly the case given that China appears to have acted to prevent fishing by Filipinos, specifically, while permitting its own nationals to continue. The Tribunal is cognisant that April and May 2012 represented a period of heightened tensions between the Philippines and China at Scarborough Shoal. China's dispute with the Philippines over sovereignty and law enforcement at Scarborough Shoal, however, was with the Philippine Government. The Tribunal does not see corresponding circumstances that would have justified taking action against Filipino fishermen engaged in their traditional livelihood or that would have warranted continuing to exclude Filipino fishermen from Scarborough Shoal for months after the Philippines had withdrawn its official vessels. The Tribunal notes, however, that it would

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<sup>2</sup> Par. 793, Arbitral Award.

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<sup>3</sup> Par. 798, *ibid.*

have reached exactly the same conclusion had the Philippines established control over Scarborough Shoal and acted in a discriminatory manner to exclude Chinese fishermen engaged in traditional fishing.<sup>4</sup>

It is submitted that a coordinated undertaking by claimant states to further formalize recognition of traditional fishing rights is possible as such project concerns the protection of the private rights of their respective citizens. This brings to fore an impetus to establish a regional fisheries management regime in waters where around 55 percent of global marine fishing vessels and an industry employing at least 3.7 million people operate.<sup>5</sup>

### ***Preservation of marine environments***

The cited regime could also very well include a marine environment management regime through the establishment, for instance, of a Fishery and Environmental Management Area in the South China Sea, as suggested by the Center for Strategic and Environmental Studies' Expert Working Group on the South China Sea.<sup>6</sup>

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<sup>4</sup> Par. 812, *ibid.*

<sup>5</sup> Fridtjof Nansens Institute, "Fish, not oil, at the heart of the South China Sea conflict", (October 24, 2017), *available at* <<https://www.fni.no/news/fish-not-oil-at-the-heart-of-the-south-china-sea-conflict-article1556-330.html>>.

<sup>6</sup> South China Sea Expert Working Group, "A Blueprint for Fisheries Management and Environmental Cooperation in the South China

The above is in light of the resolution of the Arbitral Tribunal on Submission No. 11 of the Philippines which charged China of violating its obligations under the Convention to protect and preserve the marine environment at Scarborough Shoal, Second Thomas Shoal, Cuarteron Reef, Fiery Cross Reef, Gaven Reef, Johnson Reef, Hughes Reef and Subi Reef.

The Arbitral Tribunal considered:

The substantive provisions relevant to the marine environment comprise their own Part XII of the Convention. At the outset, the Tribunal notes that the obligations in Part XII apply to all States with respect to the marine environment in all maritime areas, both inside the national jurisdiction of States and beyond it. Accordingly, questions of sovereignty are irrelevant to the application of Part XII of the Convention. The Tribunal's findings in this Chapter have no bearing upon, and are not in any way dependent upon, which State is sovereign over features in the South China Sea.<sup>7</sup>

Verily, the establishment of a regional formation dedicated to the protection of the marine environment in the South China Sea has firm basis in UNCLOS, as the Arbitral Tribunal affirmed that states have the "duty to cooperate" in the

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Sea", Asia Maritime Transparency Initiative (September 13, 2017), *available at* <<https://amti.csis.org/coc-blueprint-fisheries-environment/>>

<sup>7</sup> Par. 940, Arbitral Award.



preservation of the marine environment. It cited:

Part XII of the Convention also includes Article 197 on cooperation, which requires States to cooperate on a global or regional basis, “directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features.” In its provisional measures order in *MOX Plant*, the International Tribunal for the Law of the Sea emphasised that “the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law.”<sup>8</sup> (citations omitted)

### ***Unplanned encounters at sea***

Submission No. 13 of the Philippines, meanwhile, charged China of breaching its obligations under the UNCLOS by operating its law enforcement vessels in a dangerous manner causing serious risk of collision to Philippine vessels navigating the vicinity of Scarborough Shoal.

As held by the Arbitral Tribunal, its jurisdiction to rule on the said submission did not depend on a prior determination of sovereignty over Scarborough Shoal.<sup>9</sup>In

its ruling, the Arbitral Tribunal referred to relevant provisions of the 1972 Convention on the International Regulations for Preventing Collisions at Sea (COLREGS), to which China and the Philippines are signatories.

It bears noting that even during the pendency of the arbitral proceedings, the Philippines and China, along with Brunei, Cambodia, Indonesia, Malaysia, Singapore, and Thailand, being members of the Western Pacific Naval Symposium, adopted the Code for Unplanned Encounters at Sea (CUES) in 2014. The adoption was followed by a Joint Statement on the Application of the Code for Unplanned Encounters at Sea in the South China Sea on September 7, 2016 signed by the heads of state/government of Association of Southeast Asian Nations (ASEAN) Member States and China.

In the said Joint Statement, the aforementioned parties reaffirmed their commitment to the 2002 Declaration on the Conduct of Parties in the South China Sea (DOC), “including the importance of the freedom of navigation and overflight, as provided for by universally recognised principles of international law including the [UNCLOS]”.<sup>10</sup>The parties also recognized that “maintaining peace and stability in the South China Sea region serves the fundamental interests of

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<sup>8</sup> Par. 946, *ibid.*

<sup>9</sup> Par. 1045, *ibid.*

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<sup>10</sup> Joint Statement on the Application of the Code for Unplanned Encounters at Sea in the South China Sea, September 7, 2016.

ASEAN Member States and China... as well as the international community”.<sup>11</sup>

The foregoing developments highlight the capacity of relevant parties to build a consensus around the matter at the heart of Submission No. 13 of the Philippines. They likewise point to the capacity of claimant states to rally around related common concerns enumerated in the 2002 DOC as follows: safety of navigation and communication at sea; search and rescue operation; and combating transnational crime.

### ***Prohibition against aggravating and extending disputes***

The Arbitral Tribunal’s ruling on Submission No. 14 of the Philippines, which charged China of unlawfully aggravating and extending the dispute since the commencement of the arbitration in January 2013, points to the existence of a duty on the part of parties to a dispute to refrain from aggravating or extending the said dispute. As held by the Arbitral Tribunal:

In the Tribunal’s view, the proper understanding of this extensive jurisprudence on provisional measures is that there exists a duty on parties engaged in a dispute settlement procedure to refrain from aggravating or extending the dispute or disputes at issue during the pendency of the settlement process. This duty exists independently of any order from a court or tribunal to refrain from

aggravating or extending the dispute and stems from the purpose of dispute settlement and the status of the States in question as parties in such a proceeding. Indeed, when a court or tribunal issues provisional measures directing a party to refrain from actions that would aggravate or extend the dispute, **it is not imposing a new obligation on the parties, but rather recalling to the parties an obligation that already exists by virtue of their involvement in the proceedings.**<sup>12</sup> (emphasis supplied)

The ruling of the Arbitral Tribunal serves merely as an affirmation of the 2002 DOC, signed by China, where relevant parties undertook, among others, to “exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability”. As cited by the Arbitral Tribunal, the duty to refrain from aggravating or extending disputes is an obligation existing by virtue of parties’ mere involvement in a dispute, notwithstanding their respective positions therein. As shown, it is viable to formulate comprehensive and binding rules intended to de-escalate tensions in the South China Sea independent of determinations concerning territorial sovereignty or maritime entitlements.

Indeed, efforts towards the end envisioned above are slowly, but gradually gaining ground as seen in the recent agreement between the foreign ministers of the 10 ASEAN Member States, on the one hand,

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<sup>11</sup> Ibid.

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<sup>12</sup> Par. 1169, Arbitral Award.

and China, on the other hand, on a Single Draft South China Sea Code of Conduct Negotiating Text (SDNT) that will serve the basis for the adoption of a Code of Conduct in the South China Sea, announced on August 3, 2018.<sup>13</sup>

### ***Regime of open-ended inquiry***

The foregoing discussions highlight the potent possibilities for a regime of open-ended inquiry inasmuch as focus could be drawn on delimited issues of conduct rather than on zero-sum discourses on sovereign entitlements. Such regime could aid in an epistemic shift towards a transparent and rules-based discourse structuring the South China Sea dispute towards the gradual enforcement of the whole Arbitral Award itself.

A regime of open-ended inquiry is not a new concept in international law as such framework has been adopted in United Nations-mandated commissions of inquiry, particularly in the areas of international humanitarian law and international human rights law.

The mechanism of instituting commissions of inquiry is one found in Title III of the 1899 Convention for the Pacific Settlement of International Disputes. Article 9 of Title III sets the scope of commissions of inquiry to

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<sup>13</sup> Carl Thayer, “A Closer Look at the ASEAN-China Single Draft South China Sea Code of Conduct”, *The Diplomat* (August 3, 2018), available at <<https://thediplomat.com/2018/08/a-closer-look-at-the-asean-china-single-draft-south-china-sea-code-of-conduct/>>

“facilitating a solution of... differences by elucidating facts by means of an impartial and conscientious investigation” if the said differences, said to be of an “international nature”, neither involves “honor” nor “vital interests”.<sup>14</sup>

Since 1899, the PCA has administered five fact-finding commissions of inquiry, starting with the commission created on November 15, 1904 by agreement between Russia and Great Britain to address the so-called North Sea or Dogger Bank Case. The incident occurred during the Russo-Japanese War and concerned the sinking of British vessels by the Russian Baltic fleet, mistaking the former for Japanese war ships. The fact-finding investigation by the commission eventually led to the indemnification of the British in a report rendered on February 26, 1905.<sup>15</sup> Notably, the most recent commission of inquiry administered by the PCA dates back to 1961, involving the “Red Crusader” Incident (Great Britain/Denmark), which involved the arrest of a British vessel in the waters of the Faroe Islands.<sup>16</sup> At present, the PCA has instituted the PCA Optional Rules for Fact-Finding Commissions of Inquiry.<sup>17</sup>

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<sup>14</sup> Article 9, Title III, 1899 Convention for the Pacific Settlement of International Disputes.

<sup>15</sup> Permanent Court of Arbitration, <“Fact-finding/Commissions of Inquiry”, available at <https://pca-cpa.org/en/services/fact-finding-commissions-of-inquiry/>>

<sup>16</sup> *ibid.*

<sup>17</sup> *ibid.*

Significantly, resort to the mechanism is tacitly recognized in the 1976 Treaty of Amity and Cooperation in Southeast Asia, referenced in the 2002 DOC, particularly Article 15, Chapter IV thereof, which provides:

In the event no solution is reached through direct negotiations, the High Council shall take cognizance of the dispute or the situation and shall recommend to the parties in dispute appropriate means of settlement such as good offices, mediation, inquiry or conciliation. The High Council may however offer its good offices, or upon agreement of the parties in dispute, constitute itself into a committee of mediation, inquiry or conciliation. When deemed necessary, the High Council shall recommend appropriate measures for the prevention of a deterioration of the dispute or the situation.<sup>18</sup> (underscoring supplied)

Mitchell, who recently brought up the possibility of setting up International Commission of Inquiry for the South China Sea, has submitted:

Ultimately, the formation of a transnational community of inquirers to begin addressing the *aporiae* of South China Sea territorial claims is a first step in redirecting conversations over territory from the politically volatile, totalizing realm of “metaphysical universalism” (e.g.,

ideas of ancient, sacred heritage or of discovery and territorial “emptiness”) to that of “a discursive, communicative concept of rationality.”<sup>19</sup> (citations omitted)

He furthered:

... the mechanism would serve the functions noted in Part IV of this Article, helping to transition the South China Sea dispute from a dangerously confrontational and emotional political discourse into a technical process of communal inquiry and transnational, professional legal work. While this would not necessarily take the form of a definite resolution to the issue of ultimate ownership, **the deterrence of ethno-nationalist historical narratives and promotion of a technical idiom of judicially-determined ownership would constrain subsequent debate within the formal conceptual categories of a positivist juridical *Weltanschauung*. The progressive incorporation of regional powers into judicial transnational legal processes would, in turn, greatly aid in their process of state socialization into the existing international system.** Constituting both a prerequisite sociological foundation for and potential beneficiary of this process, the

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<sup>18</sup> Article 15, Chapter IV, 1976 Treaty of Amity and Cooperation in Southeast Asia.

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<sup>19</sup> Ryan Mitchell, *An International Commission of Inquiry for the South China Sea?: Defining the Law of Sovereignty to Determine the Chance for Peace*, 49 *Vanderbilt Journal of Transnational Law* 60 (2016).

development of the legal profession has been an important element of both state-led modernization plans and the phenomena of burgeoning civil society throughout East Asia.<sup>20</sup> (emphasis supplied)

As seen, while a commission of inquiry is mainly a fact-finding body whose findings does not bind the parties to a dispute, except when so agreed upon by the submitting parties, the process of inquiry itself serves to gradually usher an epistemic shift in the discourses pervading the South China Sea dispute. This paper submits that the current impasse faced by the enforcement of the polarizing terms of the Arbitral Award in *Philippines v. China* could be overcome by the gradual and organic establishment of a rules-based regime in the South China Sea built upon continuing open-ended inquiries.

The foregoing is in keeping with the idea that the enforcement of the landmark 2016 Arbitral Award could very well be an inter-generational struggle, as stated by Philippine Supreme Court Associate Justice Antonio Carpio, a leading advocate of the Philippine's assertions of its maritime entitlements. Before the release of the landmark 2016 Arbitral Award, he noted:

Initially they will always say 'we will not honor, we will not comply' but the cost of non-compliance is much more than compliance so eventually they will comply. It will take time. So we should look at this as a long-term struggle, even an inter-generation struggle. This generation will win that ruling, the next generation will convince the world, and the generation after that will convince China but we should not expect instant gratification here if we win this.<sup>21</sup>

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<sup>20</sup>*Ibid.*, 63-64.

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<sup>21</sup> Tetch Torres-Tupas, "Carpio: Even if PH wins case vs China, struggle will continue", Phil. Daily Inquirer (July 3, 2015), *available at* <<https://globalnation.inquirer.net/125548/carpio-even-if-ph-wins-case-vs-china-struggle-will-continue>>

## CONCILIATION UNDER ANNEX V, UNCLOS: A POTENTIAL DISPUTE SETTLEMENT MEASURE FOR COMPLEX DISPUTES RELATING TO LAW OF THE SEA

*Vo Ngoc Diep\**

### UNCLOS dispute settlement mechanism

- The UNCLOS compulsory dispute settlement mechanism is widely praised for its comprehensiveness. Part XV of UNCLOS adopts the ‘cafeteria’ approach in settling disputes concerning the interpretation and application of the Convention between its member states. The UNCLOS judicial measures have jurisdiction over any dispute concerning the interpretation or application of this Convention, however, their jurisdictions are subject to automatically applicable limitations set out in Article 297 and optional exceptions under Article 298.
- Article 287 UNCLOS enumerates a list of four judicial bodies (the ICJ, the ITLOS, the Annex VII Arbitral Tribunal and the Annex VIII Arbitral Tribunal) that member states, when signing, ratifying, accessing to the Convention or at any time thereafter, can declare to choose at least one of them to resolve their disputes concerning the interpretation and application of the Convention.
- If two parties choose a same procedure, such procedure will have jurisdiction. When parties to a dispute

have not made a declaration as such or do not choose the same procedure, the Annex VII Arbitral Tribunal will be the compulsory procedure.

- The absence or objection of one party does not affect the Tribunal’s jurisdiction over the case. (*South China Sea Arbitration, Arctic Sunrise cases*).

### Conciliation under the Convention on the Law of the Sea

- *Overview of conciliation as a peaceful dispute settlement means*
  - As a quasi-judicial method, conciliation is praised for its flexibility in procedure, a hybrid form of disputes settlement with the ability to result in compromise solution: an *ad-hoc* conciliation commission, of which most members are appointed by parties to the dispute and one chairperson chosen by those members of the commission.
  - In principle, the commission works together with parties to the dispute to issue a list of non-binding recommendations which are basis or suggestions for parties in later stages of negotiation.
  - Conciliation commissions may employ a variety of techniques, including but not limited to inquiry, fact-finding, expert

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advisory opinion, shuffle diplomacy and mediation.

- *Comparison to other peaceful mean:*

- Comparing with mediation, conciliation proposes a more well-framed platform for settling a dispute. Conciliation commissions usually operate under certain rules of procedure agreed by parties to the dispute while success of mediation depend on diplomatic skills and ingenuity of mediators.

- Comparing with arbitration, conciliation, to a certain extent, share similarity with arbitration in terms of procedure: a third party suggests resolutions for a dispute.

- + The fact that conciliation's commission recommendations are not legally binding does not necessarily indicate conciliation is a less powerful measure. International law has been long criticized for its lack of law enforcement mechanism; thus, it is reasonable to question the actual binding force of an arbitration award or a court decision, especially when practice has shown in several previous cases (the *South China Sea Arbitration*, the *Nicaragua Military and Paramilitary Activities* case).

- + Conciliation, meanwhile, could result in an agreed resolution between parties to the dispute.

Example: *Jan Mayen case, Belize v. Guatemala, Western Africa Community.*

- *Conciliation as a peaceful dispute settlement mean under UNCLOS*

- Relevant provisions: Article 284, Article 297 and Article 298. Two forms of conciliation: voluntary conciliation and compulsory conciliation.

- Voluntary conciliation: A party to a dispute may invite the other party or parties to submit the dispute to conciliation in accordance with the procedure under Annex V, section 1, or another conciliation procedure (Article 284). Conversely, 'if the invitation is not accepted or the parties do not agree upon the procedure, the conciliation proceedings shall be deemed to be terminated'.

- Compulsory conciliation: Though the UNCLOS judicial measures have jurisdiction over any dispute concerning the interpretation or application of this Convention, their jurisdictions are subject to automatically applicable limitations set out in Article 297 and optional exceptions under Article 298. Disputes concerning those limitations and exceptions are subject to a compulsory conciliation procedure in accordance with section 2, Annex V of UNCLOS provided that certain conditions are met. By reading Article 297 and Article 298, a list of disputes subject to compulsory conciliation procedure is drawn up as below:

- + Disputes concerning the interpretation or application of Articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles. The compulsory conciliation procedure is applied in such cases when the three

following conditions are met. (i) The dispute must arise subsequent to the entry into force of this Convention and (ii) where no agreement within a reasonable period of time is reached in negotiations between the parties. Furthermore, (iii) the dispute must not necessarily involve the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory.

+ Disputes concerning a decision not to grant consent to undertake marine scientific research in the EEZ or on the continental shelf of a coastal state; provided that the conciliation commission shall not call in question the exercise by the coastal State of its discretion to designate specific areas where exploitation or exploratory operations are occurring or will occur within a reasonable period of time.

+ Disputes where a coastal state has 'manifestly failed' or 'arbitrarily refused' to fulfill its responsibilities of a coastal states with respect to the living resources in the EE, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations.

- Mandatory conciliation procedure requires parties to negotiate an agreement on the basis of the report of the conciliation commission. In case these

negotiations fail to reach an agreement and the dispute remains unsettled, judicial measures provided in Section 2 of Part XV are still applicable for the dispute if the parties agree. These provisions certify the mandatory character of the procedure and underscore the differences between the voluntary and compulsory conciliation.

⇒ **UNCLOS provides a flexible framework for voluntary and compulsory conciliation as a means of settling disputes relating to the interpretation or application of the Convention. Conciliation could, at least in theory, be used twice in the relation to certain disputes: one as a voluntary measure under Section 1, Part XV; one as a compulsory measure under Section 3, Part XV of UNCLOS. In addition, while resorting to conciliation, parties reserve the right to invoke judicial measures set out in Section 2 given their mutual consent are reached.**

Lessons learnt from the Timor Sea Gap Conciliation: Prospects of conciliation as a method to settle international disputes in concerning Law of the Sea

- Still, so far, only one dispute has been settled by the UNCLOS compulsory conciliation and the voluntary conciliation proceeding has never been resorted to settle disputes concerning UNCLOS provisions: the Timor Sea Conciliation in April 2018.

- The success of the *Timor Sea Conciliation* would remind international



law practitioners and legal advisors of a prominent measure for complex disputes:

- tested and tried the conciliation procedure under Annex V of UNCLOS;
- proved to be a convenient and effective measure;
- more face-saving solution than judicial measures.

- Moreover, the fact that Law of the Sea disputes are usually complicated and prone to multiple procedures adds another layer of reasoning for the above argument.

- Since disputes concerning law of the sea are normally complicated and contain inter-related multiple aspects, some aspects might be subject to the UNCLOS compulsory judicial measures while the others are not subject to any other institutive judicial mean. (*Chagos Archipelago* case. For instance, the United Kingdom and Mauritius have multiple disagreements over the Chagos Archipelago encompass varied from sovereignty to the legality of the United Kingdom's marine park project in the archipelago ⇒ The Annex VII Tribunal + the ICJ for an advisory opinion)

- 'Salami – slicing disputes': Alan Boyle uses this term to describe a situation where a law of sea dispute has multiple aspects with certain aspects fall into the compulsory dispute settlement mechanism of UNCLOS, while other aspects of the dispute belong to the mandatory exceptions under Article 297 and the optional exceptions under Article

298 of UNCLOS. All matters that belong to the second group are only addressed by consensual measures depending on political wills of parties to the dispute, such as negotiations or conciliation. As the result, a 'Salami-slicing dispute' is broken down into judicial measures and consensual measures, though in many cases they are too closely related to discern as separate matters.<sup>1</sup> Thus, the phenomenon suggests that a dispute might be torn apart to various stages or proceedings to serve the purpose of one party, which may impede comprehensive settlement of dispute.

**Conciliation is a quasi-judicial measure that could cover a wide range of issues; thus, it should be considered a promising measure to resolve complex disputes comprehensively.**

### **Conciliation and the South China Sea issues**

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<sup>1</sup> For example, a dispute on overfishing in the Exclusive Economic Zone (EEZ) of a coastal state might include matters of fishing, marine environmental protection, scientific research and navigation within the EEZ. The issues of navigation and environmental protection are subject to compulsory judicial measures under UNCLOS. Meanwhile, due to the practical effect of Article 297, the judicial measures do not have jurisdiction over the issues of fishing and marine scientific research; these disputes are subject to consensual measures. As the result, to invoke the compulsory procedures, legal advisors of states must have 'a certain amount of ingenuity' in shaping submissions to fit within the scope of the compulsory procedure and avoid the Salami-slicing effect.

- South China Sea issues = multi-faceted disagreements on sovereignty, maritime claims, fishery management, navigation, use of force, fishing, marine environmental protection, scientific research, etc.  $\Rightarrow$  Multi-faceted issue requires comprehensive resolutions and good faith of claimants.

- Conciliation: a potential measure for the South China Sea issues

- Pros: covers various subject matters, well-framed under a rule of procedure, recommend compromise solution, face-saving measure

- Cons: non-legally binding, require political will.

- This research is an attempt to explore one out of many possible solutions for the South China Sea issues. Conciliation, like all other dispute settlement mechanism, has its own advantages and disadvantages. Nothing in this research should be interpreted as a deterioration of the South China Sea Arbitration ruling. Indeed, according to the res judicata principle, once an issue between two parties is decided by an arbitral tribunal, it is disposed of for goods. For that reason, the SCS arbitration award must be respected and complied with to uphold the rule of law and the legal order at sea.

## MULTILATERAL MANAGEMENT OF THE SOUTH CHINA SEA DISPUTE

*YAMAGATA Hideo\**

### Introduction

The South China Sea<sup>1</sup> is a flashing point among States claiming the territorial titles over small islands, islets, reefs and rocks. Claimants are Brunei, China, Malaysia, the Philippines, Taiwan, and Vietnam.<sup>2</sup> A legal dispute between the Philippines and China culminated in the arbitral procedures before the Arbitral Tribunal in the Hague established under the 1982 UN Convention on the Law of the Sea (UNCLOS), although China remained absent from the whole procedures, failing to appoint agents and advocates, to submit its arguments officially and to send its delegates to the arbitration.

The arbitral award was delivered in favor of the Philippines on its almost all claims

against China on July 12, 2016. It held that maritime features in the South China Sea claimed by China have “no capacity to generate an entitlement to an exclusive economic zone (EEZ) or continental shelf” and that there are no overlapping entitlements between China and the Philippines for the purpose of maritime delimitation.<sup>3</sup> Disputed shoals and reefs were determined to be “within the exclusive economic zone and continental shelf of the Philippines.”<sup>4</sup> Therefore, certain activities conducted by China beyond 12 nautical mile territorial sea including the construction of artificial islands without permission of the Philippines are unlawful under UNCLOS.

The award brought the dispute into the post-adjudicative phase and the most salient issue has turned into how to implement the award. However, China maintained that “the award is filled with errors in procedures, legal basis, evidences and facts, and thus has no impartiality, credibility, and binding force at all.”<sup>5</sup> It is clear that China has no intention to comply with the award, declaring that it

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<sup>1</sup> The South China Sea is called “the South Sea” by China, “the East Sea” by Vietnam, and “the Western Philippine Sea” by the Philippines. Here in this paper, the word “the South China Sea” is employed for reference because it appears most widely used in the international society and the arbitral award itself employs this terminology.

<sup>2</sup> Indonesia and Singapore are coastal States of the South China Sea, but do not have any competing claims over the features. The Arbitral Tribunal recognized this fact in 2015 without reference to the two States as non-claimants. The South China Sea Arbitration (the Philippines and China), Jurisdiction and Admissibility, Arbitral Tribunal, AWARD 1, para.3 (29 Oct. 2015) [hereinafter cited as 2015 AWARD].

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<sup>3</sup> The South China Sea Arbitration (the Philippines and China), Arbitral Tribunal, AWARD 472 (12 July 2016) [hereinafter cited as 2016 AWARD].

<sup>4</sup> *Id.*, at 474.

<sup>5</sup> China, “China’s Sovereignty and Maritime Rights and Interests in the South China Sea Shall not Be Affected by Arbitration Award,” available at [http://www.fmprc.gov.cn/nanhai/eng/wjbxw\\_1/t1382766.htm](http://www.fmprc.gov.cn/nanhai/eng/wjbxw_1/t1382766.htm)

has “no binding force at all.” The Philippine position is rather ambivalent on the matter. It is reported on December 17 that “the Philippine president said that he would ‘set aside’ a ruling by an international arbitration tribunal.”<sup>6</sup> However, on December 19, the Philippine Foreign Minister said that the Philippines “will not ‘deviate from’ an international tribunal ruling.” The post-adjudicative phase is a political rather than legal process dependent on the political will of the parties to the dispute. The winning party is in position to request the other party for full implementation of the ruling. At the same time, it is free to refrain from doing so on condition that it can draw some economic, financial or other gains from the other party through negotiations. The award can be utilized as stuff for barter to get some benefits. That may be what the Philippines is considering at this moment.

Legal issues concerning application and interpretation of UNCLOS such as the legal status of rocks are settled by the award. However, the territorial issues are not resolved yet, because they are questions of general international law which do not fall within the ambit of UNCLOS and the arbitral tribunal has no

jurisdiction over them. On the top of that, as a matter of law, the award is binding only on the parties to the litigation, namely the Philippines and China. The other claimants are not bound by it, although it may be understood that the award has established interpretation of relevant provisions of UNCLOS and may be invoked as a strong justification for some arguments in future negotiation or adjudication with China. Qualified by some legal limitations on it, it is natural that the award should be a legal foundation and a starting point, from which a quest for pacific resolution of the overall dispute must be pursued in order to create the zone of friendship among the bordering States, because rule of law is reiterated even by China.<sup>7</sup>

To establish rule of law in the region, this paper aims (a) to analyze the significance of the award, (b) to develop an idea of multilateral cooperation in the South China Sea on the basis of the semi-enclosed sea regime, and (c) to discuss some challenges to multilateral cooperation in that region in the following chapters.

## **I. Isolation of Territorial Issues from Maritime Issues**

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<sup>6</sup> The Washington Post, “Duterte Says He’ll Set Aside Sea Feud Ruling against China,” available at: [https://www.washingtonpost.com/world/asia\\_pacific/duterte-says-hell-set-aside-sea-feud-ruling-against-china/2016/12/16/4e4a606e-c40f-11e6-92e8-co7f4f671da4\\_story.html?utmterm=.28fea2ddbdf5](https://www.washingtonpost.com/world/asia_pacific/duterte-says-hell-set-aside-sea-feud-ruling-against-china/2016/12/16/4e4a606e-c40f-11e6-92e8-co7f4f671da4_story.html?utmterm=.28fea2ddbdf5)

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<sup>7</sup> China says that it “is committed to upholding and promoting international rule of law” in its White Paper “China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines,” available at [http://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj\\_1/t1380615.htm](http://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1380615.htm)

The Arbitral Tribunal was successful in separation of the maritime legal issues from the territorial issues. It is conferred with jurisdiction over any dispute “concerning the interpretation or application of this Convention” under Article 279 of UNCLOS. The Tribunal with limited capacity to deal with issues emanating from UNCLOS cannot handle territorial claims. China argued that the Tribunal lacked its jurisdiction over the case submitted by the Philippines on the basis of “the land dominates the sea” principle, which means that “sovereignty over land territory is the basis for the determination of maritime rights.”<sup>8</sup> This is a good justification to refuse the validity of the nine-dash line which allowed China to assert the historic rights over the vast area of the South China Sea. The principle “will not recognize any claim to maritime space that is not measured from land territory, including islands.”<sup>9</sup> It also functions as an obstacle to the jurisdiction of the Tribunal. Without and before a decision made on the territorial claims over islands in the South China Sea, the Tribunal might not have been able to rule on the maritime entitlements to the EEZ and continental shelf.

Another objection raised by China was that the Chinese exclusion of a dispute concerning the maritime delimitation

from the compulsory dispute settlement mechanism under Article 298 (a) (i) deprived the Tribunal of its jurisdiction over the case. China availed the provision to opt out the mechanism over a case on the delimitation of the EEZ and continental shelf by declaring the exceptions. Before proceeding to the merits of the case, the Tribunal had two tasks: first to overcome the Chinese plea sustained by “the land dominates the sea” principle by way of detachment of the justiciable issues from the territorial issues; secondly to establish that the case had nothing to do with the maritime delimitation.

The Tribunal found that all the maritime features in the Spratly islands are “rocks” which are not entitled to the EEZ and continental shelf under Article 121. Therefore “there is ... no jurisdictional obstacle to the Tribunal’s consideration of the Philippines’ Submission.”<sup>10</sup> Even though some rocks may be owned by China as a legitimate title holder, they do not produce any entitlement to the EEZ and continental shelf. They have only 12 nautical mile territorial water measured from their baseline. Whether China or the Philippines may possess territorial titles over them, activities conducted by China beyond the outer limit of territorial sea may be legally assessed by application of UNCLOS. Moreover, they are “located in an area that is not overlapped by the entitlements generated by any maritime

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<sup>8</sup> 2015 AWARD 46, para.135.

<sup>9</sup> Beckman, *the UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea*, 107 AJIL 142, 158 (2013) citing the Philippine argument.

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<sup>10</sup> 2016 AWARD, 260, para.646.

feature claimed by China.”<sup>11</sup> The Tribunal’s finding that there are no overlapping claims for the EEZ and continental shelf rejects the Chinese objection to the jurisdiction grounded on its exceptions. That is how the Tribunal escaped from the difficult situations in which it had procedural impediments. The jurisdiction was satisfied by the Tribunal on the premise that all the features are rocks disqualified for the entitlements to the EEZ and continental shelf.

This ruling is significant in its effects to reduce the legal values of the land. The territorial disputes in the South China Sea became volatile after the oil crisis in 1970s. It is said that “claims to the Spratlys sprang up after the prospect of oil discovery arose.”<sup>12</sup> Exploitation and development of natural resources including fishery stocks motivated littoral States to occupy small islands, reefs, shoals, sands and even tiny rocks in the South China Sea to exercise sovereign rights over them. They carried out reclamation work on several features and began to station a small number of garrisons.<sup>13</sup> China is not exceptional.<sup>14</sup> All

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<sup>11</sup> *Id.*, at 260, para.647.

<sup>12</sup> Christopher C. Joyner, *The Spratly Islands Disputes: What role for Normalizing Relations between China and Taiwan*, 32 NEW ENG. L. REV. 819, 825 (1998).

<sup>13</sup> See the table for information on the Spratly Islands occupied by claimant States up to 1998. Christopher C. Joyner, *The Spratly Islands Dispute: Rethinking the Interplay of Law, Diplomacy, and Geo-politics in the South China Sea*, 13 INT’L J. MAR. & COASTAL L. 193, 204 (1998).

these efforts were made to ensure that they could assert the rights to the EEZ and continental shelf measured from those occupied features. The sea dominates the land in claimants’ consideration of exploitation and development of natural resources, even though the land is an uninhibited tiny one without any flesh water and food to sustain human life. That is exactly in the reverse way of “the land dominates the sea” principle.

If it is right to say that claimant States are motivated to assert the territorial rights for the purpose of natural resources, the award must have certain practical effects to calm them down by saying that all the features cannot generate the EEZ or continental shelf.<sup>15</sup> The award is certainly a warning to all the claimant States that the occupation and reclamation work conducted by them in order to consolidate the legal titles over maritime features are of no use to attain their maritime interests. The enthusiasm of the bordering States for the maritime claim may be chilled down, if they take the opinion of

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<sup>14</sup> However, “China has now reclaimed 17 times more land in 20 months than the other claimants combined over the past 40 years, accounting for approximately 95 percent of all reclaimed land the Spratly Islands.” Ronald O’Rourke, *Maritime Territorial and Exclusive Economic Zone (EEZ) Disputes Involving China: Issues for Congress*, CONGRESSIONAL RESEARCH SERVICE REPORT, R42784 (May 31, 2016).

<sup>15</sup> Strikingly Itu Abu, the biggest island in the South China Sea, is denied entitlements to the EEZ and continental shelf in the Award. 2016 AWARD 254, para.625.

the Arbitration properly. In this vein, there are no doubts that the Arbitration would contribute to creation of rule of law atmosphere in this region in the long run.<sup>16</sup>

## II. The South China Sea as a “Semi-Enclosed” Sea

### A. Description of the South China Sea as a Semi-Enclosed Sea in the Award

The South China Sea is a “semi-enclosed sea” in a geographical sense. This fact was affirmed by the Arbitral Award on jurisdiction and admissibility of the case in 2015<sup>17</sup> and reaffirmed by the Award on the merits in 2016.<sup>18</sup> UNCLOS has specific provisions on the regime of enclosed or semi-enclosed seas under Articles 122 and 123. Article 122 gives the definition of the enclosed or semi-enclosed seas, and Article 123 sets out some “obligations” to cooperate among States bordering them. It provides that they “should co-operate with each other in exercise of their rights and

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<sup>16</sup> Keyuan Zou prospected that “if the Arbitral Tribunal were to grant all the contested reefs to the Philippines, such an award would in reality only exacerbate the tensions in the South China Sea.” Keyuan Zou, *The South China Sea*, in DONALD R. ROTHWELL, ALEX G OUDE ELFERINK, KAREN N. SCOTT AND TIM STEPHENS ED., *THE OXFORD HANDBOOK OF THE LAW OF THE SEA* 626, 642 (2015). In fact, the Tribunal did not grant any contested reefs to the Philippines. For China, however, it denied any sovereign rights in the EEZ and continental shelf in the South China Sea save those area measured from its main land. The award might have made China furious about its ruling.

<sup>17</sup> 2015 AWARD 1, para.3.

<sup>18</sup> 2016 AWARD 1, para.3.

the performance of their duties under [UNCLOS].” The regime may be applied to the South China Sea for settlement of the dispute.<sup>19</sup> The Tribunal, nevertheless, did not examine the applicability of the clause.

The Tribunal’s silence on the enclosed or semi-enclosed sea regime under UNCLOS may be explained in three folds. First, the characterization of the Sea as semi-enclosed sea by the Tribunal might have been just aimed to describe the topography of the Sea in the introductory part of the Awards, and not intended to be fact finding from which it could draw a conclusion to apply the special rules for the regime in legal terms. The perfunctory statement on the semi-enclosed sea nature of the South China Sea might not permit the readers to argue for the cooperation obligation on the basis of these articles. Secondly, the arbitration procedures, basically bilateral in its nature, did not involve all the littoral States of the Sea besides the Philippines and China. No third States made a request for permission of intervention in the procedures in defiance of the Chinese strong objection to it.<sup>20</sup> The Tribunal was not able to grasp the

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<sup>19</sup> It is suggested, for instance, by Keyuan Zou, *supra* note 16 at 638.

<sup>20</sup> China sent a letter to the individual members of the Tribunal (6 February 2015), maintaining “the Chinese Government underlines that China opposes the initiation of the arbitration and any measures to push forward the arbitral proceeding, holds an omnibus objection to all procedural applications or steps that would require some kind of response from China, such as ‘intervention by other States’, ‘amicus curiae submissions’ and ‘site

question on the legal status of the Sea as semi-enclosed sea without participation of the other three claimant States. Finally, Article 123 provides for fairly milder form of obligations to cooperate among bordering States of a semi-enclosed sea and it is controversial whether or not it imposes certain obligations on them.

First, it will be examined whether the South China Sea meets criteria for the semi-enclosed sea regime under Article 122 for application of Article 123. Secondly, whether the obligations provided for in Article 123 are legal duties on the coastal States or not will be considered in this chapter. Finally, it will be discussed how effectively the regime might be implemented in the South China Sea.

#### B. Definition of a Semi-Enclosed Sea

Article 122 provides a definition of enclosed or semi-enclosed seas. It reads that:

“‘enclosed or semi-enclosed sea’ means a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States.”

First of all, enclosed or semi-enclosed seas must be “surrounded by two or more States.” Secondly, they must be

“connected to another sea or the ocean *by a narrow outlet.*” Finally, they must be consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States.” The first requirement is a precondition for the regime with the effect of excluding the sea possessed by a single State. It is connected to the second and the third condition with the term “and.” Meanwhile, the second and the third requirements are linked to each other with the term “or.”

Considering that Articles 122 and 123 compose Part IX under the title of “Enclosed or Semi-Enclosed Seas,” it is arguable that the second requirement is for enclosed sea and the third is for semi-enclosed sea, while the first is a condition set out for both categories of the seas: the enclosed and semi-enclosed sea. The Virginia Commentary states that “the first part relates to an ‘enclosed sea,’ which consists of a body of water that is almost completely surrounded by land, having only a ‘narrow outlet’ to other waters,” while “the second characteristic relates to ‘semi-enclosed seas’.”<sup>21</sup>

This interpretation is grounded on the Iranian proposal on the definition of the enclosed or semi-enclosed seas during the Third UN Conference on the Law of the Sea (UNCLOS III). It stated that:

For the purpose of these articles:

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visit’.” 2016 AWARD 55, n.67. See also 2016 AWARD 16, para.42; 2015 AWARD 23, para.64, and at 73, para.185.

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<sup>21</sup> MYRON H. NORDQUIST ed., UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 348 (1995).



(a) The term “enclosed sea” shall refer to a small body of inland waters surrounded by two or more States which is connected to the open sea *by a narrow outlet*.

(b) The term “semi-enclosed sea” shall refer to a sea basin located along the margins of the main ocean basins and enclosed by the land territories of two or more States.<sup>22</sup>

On the one hand, the enclosed sea is required to be connected to another sea *by a narrow outlet*. On the other hand, the semi-enclosed sea must be enclosed by two or more States. The sea which has only one narrow outlet may be considered to be enclosed sea, while the sea which has multiple narrow outlets may be semi-enclosed sea.

Some argue that “even if a sea is connected to another body of water by several narrow outlets, it can still be said that it is connected to another body of water by ‘a narrow outlet’.”<sup>23</sup> A textual method for interpretation of a treaty would not result in such an interpretation. Clearly the connecting outlet in the clause is singular, not plural, which does not permit any interpretation to read in it the argument that enclosed sea may have multiple outlets. A distinction between enclosed

seas with single outlet and semi-enclosed seas with multiple outlets may be tenable from the consideration of the drafting history of UNCLOS III.

Nonetheless, there are no clear differences on legal effects between enclosed and semi-enclosed seas. Article 123 does not differentiate enclosed seas from semi-enclosed seas regarding obligations imposed on States bordering them. It would not make any sense to suppose that enclosed seas and semi-enclosed seas should be different from each other. It is possible to take a view that “meeting either of the two definitions is sufficient to qualify as an enclosed or semi-enclosed sea.”<sup>24</sup> In fact, during UNCLOS III, the Iranian proposal was not supported by other States and the text as a part of the Informal Single Negotiation Text (ISNT), Part II, “indicated that, for the purposes of that part of the Convention, they were being treated together.”<sup>25</sup> No need to make a distinction between enclosed and semi-enclosed seas is found in the negotiation of UNCLOS III.

The South China Sea is surrounded by seven States and satisfies the first condition for an enclosed or semi-enclosed sea, “surrounded by two or more States.” It has several exits to other oceans, such as the Taiwan Strait to the East China Sea, the Luzon Strait to the Pacific Ocean, and the Strait of Malacca to the Indian Ocean. It does not meet the single outlet

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<sup>22</sup> *Id.*, citing A/CONF.62/C.2/L.72, article 1, III Off. Rec. 237.

<sup>23</sup> Christopher Linebaugh, Joint Development in a Semi-Enclosed Sea: *China’s Duty to Cooperate in Developing the Natural Resources of the South China Sea*, 52 COLUM. J. TRANSNAT’L L. 542, 549 (2014).

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<sup>24</sup> *Id.*, at 552.

<sup>25</sup> MYRON H. NORDQUIST, *supra* note 21 at 349.

definition. Nor may the straits be “narrow” enough to qualify the South China Sea as an enclosed or semi-enclosed sea. However, the third requirement seems to be satisfied, as it is “a sea consisting ... primarily of the territorial seas and exclusive economic zones of two or more coastal States.” In the center of the South China Sea, there remain high seas beyond the 200 nautical mile EEZs from the mainland of each claimant State. Certainly it is not “entirely” but “primarily” composed of the territorial sea and EEZs of the littoral States. So long as the first and the third requirements are met, the South China Sea can claim itself to be an enclosed or semi-enclosed sea.

Finally, it is noteworthy that China itself admitted the South China Sea was a semi-enclosed sea. The Chinese statement issued immediately after the award described it as a semi-enclosed sea.<sup>26</sup> China may not have intended to introduce the regime of the enclosed or semi-enclosed sea, but this statement is a firm evidence to show the Chinese belief that the South China Sea is a semi-enclosed sea.

### C. Legal Effects of a Semi-Enclosed Sea

Article 123 reads that:

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. To this end they shall

endeavor, directly or through an appropriate regional organization:

- (a) to coordinate the management, conservation, exploration and exploitation of the living resources of the sea;
- (b) to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment;
- (c) to coordinate their scientific research policies and undertake where appropriate joint programs of scientific research in the area;
- (d) to invite, as appropriate, other interested States or international organizations to cooperate with them in furtherance of the provisions of this article.

It is true that the term “should” sounds rather exhortatory than obligatory in legal arts in comparison with the term “shall.” Although the second sentence adopts the word “shall,” it has weakened its legal force by adding the word “endeavor.” Article 123 may not have binding effects on the bordering States of the South China Sea.

However, Linebaugh argues that “it is clear that the broad legal duty interpretation is the most plausible.”<sup>27</sup> After he classifies three interpretations, the no legal duty interpretation, the broad legal duty interpretation and the limited duty interpretation, he upholds the second

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<sup>26</sup> China, *supra* note 7, para. 1.

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<sup>27</sup> Linebaugh, *supra* note 23 at 556.

one. The first reason is that obligations listed from (a) to (d) are enshrined in other provisions of UNCLOS. Obligations in (a) are also embodied in Article 61, para.2, those in (b) are in Article 197, those in (c) are in Article 242 and those in (d) are in Article 61, para.2 and 197. The Virginia Commentary takes the same view that “those States (bordering enclosed or semi-enclosed seas) have the same rights, jurisdiction and duties as other coastal States.”<sup>28</sup> There are no additional duties on the coastal States of enclosed or semi-enclosed seas. Therefore, Linebaugh maintains that those States are obliged to implement the duties from (a) to (d) like other States.

The second reason is based on the drafting history of the provision. First, when the Chairman of the Second Committee explained the reason that he replaced the term “shall” with “should” and added the term “endeavor,” he said that “I have ... [made] less mandatory the co-ordination of activities in such seas [as enclosed or semi-enclosed sea].”<sup>29</sup> Admitting that “the phrase ‘less mandatory’ adds some confusion,” he argues that “this odd phrase does seem to show that the Article was intended to create some legal duty.”<sup>30</sup> It means that indeed it is less mandatory, but it is still mandatory. Secondly, a proposed Article 135 saying that “the provisions of this part shall not affect the

rights and duties of coastal or other States under other provisions of present Convention, and shall be applied in a manner consistent with those provisions” was dropped off in the Revised Single Negotiating Texts (RSNT). Linebaugh contends that “the removal of Article 135 implies that Article 123 was intended to alter the duties of coastal States.”<sup>31</sup>

His argument needs to be subject to careful and systematic analysis on UNCLOS as a whole and on the drafting history of UNCLSO III. Even though Article 123 is an obligatory provision, it is “less” obligatory than other provisions obliging the contracting parties. Cooperation and coordination are dependent on the consent of coastal States. Establishment of a regional organization for that purpose is all the more dependent on their strong will. It is natural that Article 123 was drafted as exhortatory in the sense that it suggests such regional cooperation can be done necessarily through a regional organization.

Identification of a less obligatory duty is a challenge regarding Article 123. A key to this may be found out in the phrase “shall endeavor.” It is certainly a duty of conduct, although it may not be a duty of result. All the coastal States of enclosed or semi-enclosed State has a duty to make efforts to establish cooperation and coordination in the region. Of course, such efforts must be made in good faith.

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<sup>28</sup> MYRON H. NORDQUIST, *supra* note 21 at 365.

<sup>29</sup> *Id.*, at 362.

<sup>30</sup> Linebaugh, *supra* note 23, at 559.

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<sup>31</sup> *Id.*

Speaking of this duty in negative way, each State bordering enclosed or semi-enclosed sea has an obligation not to behave in bad faith. What can be said at the best is that under Article 123 there are obligations to refrain from preventing other States from exercising their rights and obligations.

Fishing in the EEZ of another State without its permission is contrary to paragraph (a). Even fishing activities on the high seas in the region without due consideration on conservation of fish stocks or overfishing in its own EEZ may be in violation of paragraph (a). Water pollution caused by reclamation or construction of artificial islands is a breach of paragraph (b). Exacerbation of a dispute with other States is not in conformity with the spirit of Article 123, which is to reiterate and ensure the rights and obligations provided for in other provisions. A legal framework or a regional arrangement should be established for better cooperation and coordination among the States facing the South China Sea.

### **III. Multilateral Management over the South China Sea**

To establish regional framework within which cooperation and coordination can be facilitated in the South China Sea as a semi-enclosed sea, a multilateral negotiation among seven littoral States would be the best choice in theory, because every related issue to the South China Sea would be resolved by States concerned at once. Actually many authors

argue for joint development in the Sea.<sup>32</sup> However, China prefers bilateral direct talks with another State one by one to the multilateral approach. For China, it may be possible to exert its influential powers on the other State sitting at the negotiating table, since China is the most powerful country in the region.<sup>33</sup> China can hold certain bargaining powers for beneficial settlement. Moreover, it is suggested that China is trying to buy time to pursue “a strategy of creeping annexation or creeping invasion, or as a ‘talk and take’ strategy, meaning a strategy in which China engages in (or draws out) negotiations while taking actions to gain control of contested areas.”<sup>34</sup>

One of the obstacles to the multilateral talks is the fact that Taiwan is also a claimant in the South China Sea. Taiwan is exercising its effective control over Itu Aba (or Taiping Island), the largest island in the Spratly Islands. Under the One China policy, China will never accept Taiwan as a party to the territorial and maritime dispute. The Arbitral Tribunal studied Itu Aba to hold that it is a rock not qualified as a full-fledged island entitled to the EEZ

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<sup>32</sup> For instance, Zou Keyuan maintains that “joint development is a most feasible mechanism by which to shelve the dispute so as to pave the way for cooperation pending the settlement of the territorial and/or maritime disputes.” Zou Keyuan, *Joint Development in the South China Sea: A New Approach*, 21 INT’L J. MAR. & COAST. L. 83, 90 (2006).

<sup>33</sup> See Ronald O’Rourke, *supra* note 14, at 25.

<sup>34</sup> *Id.*, at 24.

and continental shelf. It only says that it is “currently under the control of the Taiwan Authority of China.”<sup>35</sup> Should Taiwan be involved in multilateral negotiations on the territorial issues, the other parties in that process could be regarded as having recognized Taiwan as an independent State de facto contrary to the One China policy. That scenario is not tolerable for China at all.

It is advisable to design a regional mechanism without the participation of Taiwan, but taking care of its interests. For that purpose, the Antarctic Treaty regime might be a good model for the South China Sea.<sup>36</sup> First, claimants can retain their land claim and freedom to deny such claims put forward by other claimants under Article 4. That mechanism is able to shelve every claim over land territory during the period when the regional treaty founding the regime is valid. But a new claim based on the activities initiated after the regional arrangement comes into force is not allowed to become a basis for a new claim. Then the rights and claims of Taiwan would be intact as they are, though it is a third party to the arrangement. The Declaration on the Conduct of Parties in the South China Sea (DOC) in 2002 stipulates that “the Parties undertake to [refrain] from action of inhabiting on the presently uninhabited islands, reefs,

shoals, cays, and other features.”<sup>37</sup> This is reaffirmed by the Joint Statement of the Foreign Ministers of ASEAN Member States and China on the Full and Effective Implementation of the Declaration on the Conduct of Parties in the South China Sea issued on July 25, 2016 after the award was made public. Making a binding document to the effect will be the first step toward shelving the claims by coastal States in the South China Sea and is a good idea to avoid aggravation of the dispute. Furthermore, it is worth considering addition of the prohibition of “the erection of new structures in the disputed areas.” The phrase was proposed during the negotiation on DOC in 2002, but was dropped from the text under the strong opposition of China.<sup>38</sup> The status quo must be preserved in the proposed mechanism until the time comes for constructive scheme to be established among the coastal States including Taiwan.

Secondly, the Antarctic Treaty has established nuclear free zone for the first time in the globe. Under Article 5, any nuclear explosions in Antarctica are prohibited. Article 1 provides that

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<sup>35</sup> 2016 AWARD 179, para.401.

<sup>36</sup> This was suggested in 1998 by Joyner, *supra* note 13, at 222-24.

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<sup>37</sup> The Declaration on the Conduct of Parties in the South China Sea, available at:

[http://asean.org/?static\\_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea-2](http://asean.org/?static_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea-2)

<sup>38</sup> James Kraska & Paul Pedrozo, INTERNATIONAL MARITIME SECURITY LAW 330 (2013) citing Hardev Kaur, Saiful Azhar Abdullah & Roziana Hamsawi, *Consensus reached on South China Sea*, NEW STRAITS TIMES (Malaysia), Nov.3, 2002, at 20.

“Antarctica shall be used for peaceful purposes only.” In the South China Sea, remaining issues are over territorial titles which were left untouched by the Tribunal. Reefs, islets, sands, cays and rocks occupied by States are not useful for economic purpose, since they cannot sustain human habitation and economic life. The reclaimed reefs may serve for military purposes. It is reported on December 15, 2016, that “China appears to have installed weapons, including anti-aircraft and anti-missile systems, on all seven of the artificial islands it has built in the South China Sea.”<sup>39</sup> The 2016 Joint Statement declared that “the Parties concerned undertake to resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force.” This is the restatement of the 2002 DOC. It should be enhanced to the establishment of the zone of peace and a ban on the use of nuclear weapons by incorporating the Southeast Asia Nuclear-Weapon-Free Zone (SEANWFZ) Treaty (Treaty of Bangkok), although the treaty has failed to get nuclear weapon States joining the protocol attached to it.

Thirdly, the Antarctic Treaty has the Antarctic Treaty Consultative Meeting (ATCM). ASEAN might be a good forum to discuss issues concerning the South China

Sea. However, it contains non-claimant States like Cambodia, Laos, Myanmar and Thailand. Decision making can be made on the basis of consensus among 10 member States of ASEAN. On July 25, 2015, Cambodia blocked a joint statement referring to the Arbitral Award of July 12, 2016. It is believed that “China last week promised more than half a billion dollars in aid” for Cambodia.<sup>40</sup> Under the framework of ASEAN, even a non-claimant State can exercise a veto on the South China Sea dispute. Therefore it is necessary to found a meeting only by the claimant States in the Sea to consult various issues and make declarations, protocols and other documents. Such a mechanism would be helpful for confidence building among member States.

ASEAN is continuing its efforts for dispute management in the South China Sea. Some elements in the Antarctic Treaty regime are being introduced in a non-binding form by ASEAN. However, it may not be the best organization for the South China Sea dispute for aforementioned reasons. Final resolution of the dispute cannot be expected through ASEAN. It is worth studying how to shelve the claims among the claimants. From the Antarctic Treaty, the claimant States may be able to

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<sup>39</sup> Reuters, “China Installs Weapons Systems on Artificial Islands: U.S. Think Tank,” available at: <http://www.reuters.com/article/us-southchinasea-china-arms-idUSKBN1431OK>

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<sup>40</sup> The Cambodia Daily, “Cambodia Blocks Asean Statement on South China Sea” available at: <https://www.cambodiadaily.com/news/cambodia-blocks-asean-statement-on-south-china-sea-115834/>

draw some lessons useful for their dispute management.

## **Conclusion**

This short article, first, examined how significant the Arbitral Award is. It is certain that the award played a valuable role to isolate the territorial issues from the maritime issues and to degrade the importance of the former issues. Uninhabited islands, rocks, reefs and other features have lost the entitlements to the EEZ and continental shelf except for the territorial sea. They are denied certain economic values under UNCLOS. In this respect, the Arbitral Tribunal was successful for containment of the dispute in a legal perspective.

Next the application of Article 124 regarding enclosed or semi-enclosed seas was studied to draw a conclusion that the South China Sea might be considered to be a semi-enclosed sea. All the coastal States have specific obligations to coordinate development of living natural resources, prevention of pollution, scientific research and others. The obligations are provided for in a milder fashion, but they are obligatory. Coastal States have a negative

duty not to do harm the semi-enclosed sea regime.

Finally, it is suggested that the Antarctic Treaty regime may be a good model to regulate conducts of States in the Sea. Shelving claims, territorial titles and other rights over the land must be the first step for the dispute management. Moreover, the establishment of a zone of peace free from nuclear weapons should be made by incorporation of SEANWFZ. As a forum, the Antarctic Treaty Consultative Meeting may be an advisable mechanism for the purpose to contain the disputes in the South China Sea.

The Award has ruled on almost every point of the Law of the Sea concerning the definition of rocks, the legal effects of them, and way of navigation, reclamation work causing water pollution and so on. It definitely contributed to the future establishment of a rule based society in the region. However, such a society cannot be formed only by a single legal document or the award. The international society must garner the voices of people searching for rule of law on the basis of the award.

## CONCLUSION

***Le Thi Kim Thanh\****

*“States Parties shall fulfill in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.”*

### ***United Nations Convention on the Law of the Sea – Article 300***

Both the Tokyo and Moscow conferences were of high quality in terms of information imparted and opinions exchanged. They featured updates on the current situation in the South China Sea and forecast forthcoming challenges the region will face in the future. Conference participants also acknowledged violations of the court’s ruling two years after its issuance. International law is still not respected and adhered to in the South China Sea.

Nevertheless, scholars and lawyers expressed the hope for peace in the region. In the light of the landmark court’s 2016 ruling, there is space for co-operation.

The relevant parties can exercise self-restraint, and step by step, implement international laws to resolve the disputes and halt activities that threaten the region’s security.

As the court stated: *“The Tribunal*

*considers it beyond dispute that both Parties are obliged to comply with the Convention, including its provisions regarding the resolution of disputes, and to respect the rights and freedoms of other States under the Convention” (PCA’s South China Sea Award July 2016).*

Several scholars believed that the forthcoming Code of Conduct in the South China Sea, between China and ASEAN, would provide a legal framework to resolve the conflicts in the Sea if it is based on the court’s ruling and UNCLOS.

At the conclusion of the second conference, IADL President Jeanne Mirer called on members of IADL to closely monitor the situation in the South China Sea so the good offices of IADL can act accordingly and discuss further necessary steps and actions.

Due to space limitations in the Review, the editorial board could not present all reports and presentations from both conferences. The selected articles we present here illustrate the abiding desire that one day, the South China Sea will be a region of peace and unity. It is also the desire of IADL to promote peace in the South China Sea in particular, and in the world as a whole.

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