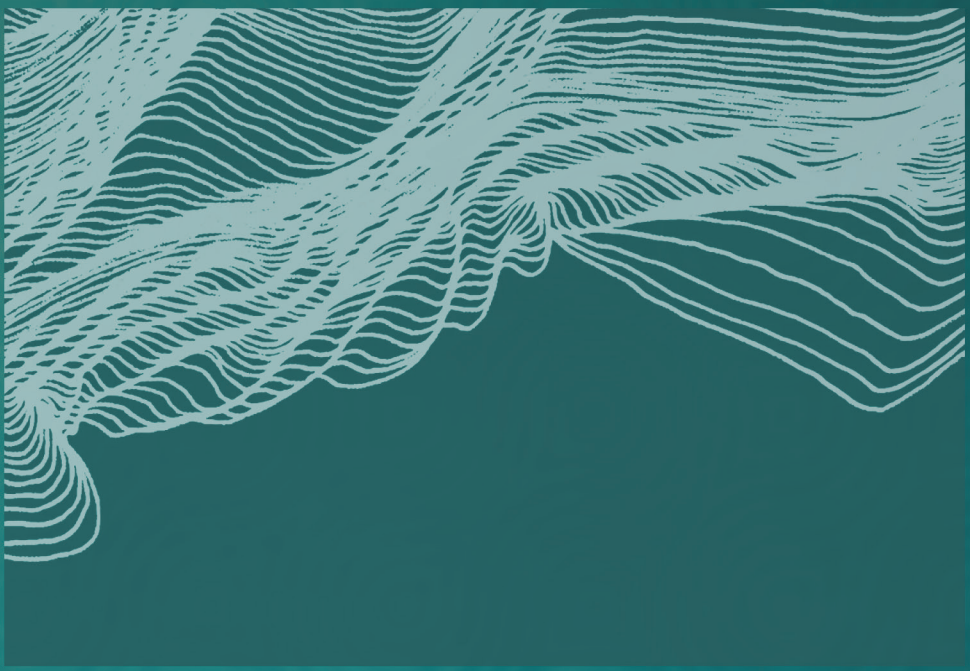
Conference on the South China Sea Dispute and the Search for Peaceful Resolution



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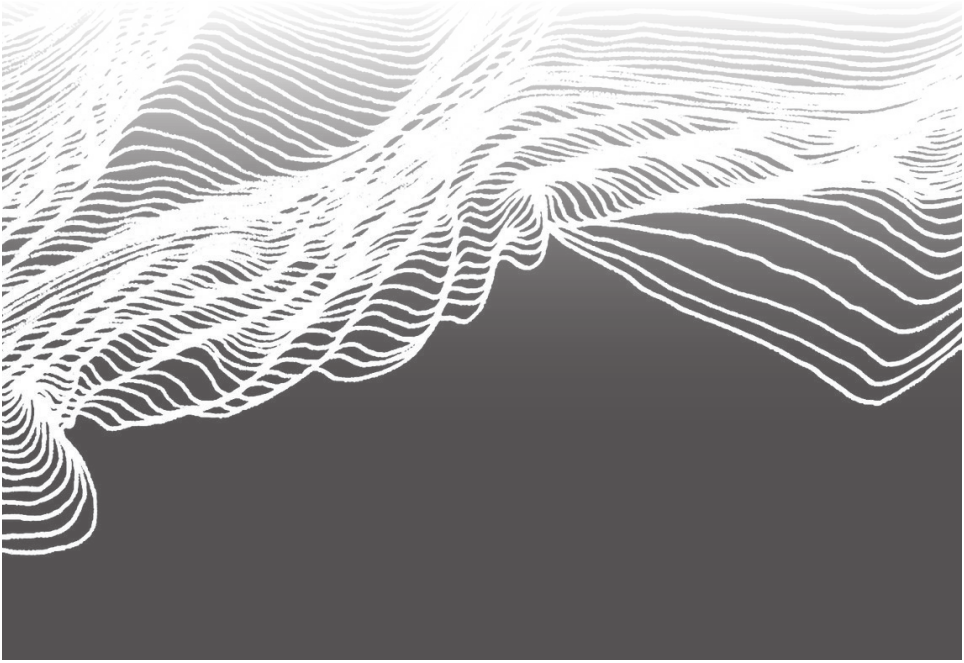

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CONTENTS

Conference on the South China Sea Dispute and the Search for Peaceful Resolution

Aoyama-gakuin University Tokyo, Japan
09 January 2017

THEME: ***Peace and security in the Asia-Pacific are in peril due to tensions in the South China Sea (SCS). Since the final Award by the Permanent Court of Arbitration (PCA) for the case by the Philippines against China, situation in the SCS has been a cause for international concern. IADL, which has called on all parties to respect international law, has also called for the peaceful resolution of the dispute and committed to help facilitate in finding a means towards this end.***

OBJECTIVES OF THE CONFERENCE

The Conference is convened and sponsored by the IADL and hosted by the JALISA without whose support the Conference would have been difficult to organize. The conference seeks to discuss the current situation in the SCS and find means for the peaceful resolution of the issue which international law requires from all states involved in international disputes. IADL also aims to provide the parties to the disputes attending the conference all the opportunity to discuss among themselves, whether in the conference proper or in the sidelines, possible ways of achieving an understanding towards this end. IADL hopes that the concluding session of the Conference will discuss future conferences or actions among the parties to dispute to continue the search for a peaceful resolution to the dispute.

As such, the conference will be divided into three main topics:

1. Updates on the current situation in the SCS including an assessment of concerned parties' relations and their policies, interests in the region.
2. Discussion on the PCA ruling in the Philippines-China case, identify the legal positions of parties related to the case and discuss the parameters set by the decision of the Arbitral Tribunal.
3. Identify different dispute settlement mechanisms and explore prospects for concerned parties to defuse tension in the area by finding the most acceptable means of dispute resolution under international law.

FORMAT AND EXPECTED OUTCOME

There will be at least three different sessions of the aforementioned topics where lawyers, delegations and scientific communities from concerned countries deliver their presentations regarding issues of the SCS. The expected outcomes of the conference are:

- To give IADL members a better understanding of the matter in order to build its position in the future

- To initially find some possible mechanism to cope with the threat of maritime security in the concerned region and create possibilities for some follow up conferences.

INTRODUCTION

Peace and security in the Asia-Pacific are in peril due to tensions in the South China Sea (SCS). Since the final Award by the Permanent Court of Arbitration (PCA) for the case of the Philippines against China, the situation in the SCS has been a cause for international concern.

The International Association of Democratic Lawyers (IADL) in cooperation with the Confederation of Lawyers in Asia and the Pacific (COLAP) initiated the "Conference on the South China Sea Dispute and the Search for Peaceful Resolution" after it earlier called on all parties involved in the SCS dispute to respect international law and to work on its peaceful resolution.

To achieve the aims of the conference, as stated in the theme, experts from Vietnam, the Philippines and China were invited to discuss their respective positions on the SCS dispute and share their insights and opinions on the peaceful ways of settling the dispute. The conference provided a venue and an opportunity for the conference participants, who are in the countries involved in the dispute, to discuss among themselves and arrive at a common understanding of the issue. An action plan was defined at the end of the conference to ensure continuity of dialogue among the participants.

The conference was divided into three main topics:

1. Updates on the current situation in the SCS. The topic included an assessment of concerned parties' relations and their policies and interests in the region.
2. Discussion of the ruling of the Permanent Court on Arbitration on the Philippines-China case.

   Also discussed under this topic was the identification of the legal positions of the parties to the case and a

discussion on the parameters set by the decision of the Arbitral Tribunal.

3. Identification of the various dispute settlement mechanisms and the most acceptable means of dispute resolution under international law.

There were 33 conference participants, representing 12 countries, namely: Bangladesh, Belgium, Costa Rica, France, India, Italy, Japan, Nepal, Pakistan, Philippines, Vietnam, and the USA.

Distinguished lawyers from the countries involved in the South China Sea conflict and international law experts served as resource persons who, with the other participants, enriched the discussion towards a common understanding of the nuances of the conflict and arriving at resolutions on the issues surrounding the South China Sea.

The Conference on the South China Sea Dispute and the Search for Peaceful Resolution was convened and sponsored by the IADL. The IADL has a Consultative II status in the United Nations Economic and Social Economic and Social Council (ECOSOC) and is represented in the United Nations Educational, Scientific and Cultural Organization (UNESCO) and United Nations International Children's Emergency Fund (UNICEF).The Japan Lawyers Association hosted the event.

PROGRAMME

8:00 A.M.- 8:30 A.M.	Registration of Delegates
8:30 A.M.- 9:00 A.M.	Inauguration of the Conference Welcome remarks by Mr. Jun Sasamo (JALISA representative) Opening remark by Ms. Jeanne Mirer, IADL President
9:00 A.M.- 10:15 A.M.	**Session I:** Situation of the maritime territorial disputes in Asia–Pacific; International navigation and aviation security and maritime environment; and the PCA's Ruling **Chair:** Ms. Jeanne Mirer **Co Chair:** Prof. Tatsuo Mutou (JALISA) **Speakers:** 1. Mr. Nguyen Truong Giang *Director, Institute for South China Sea* VIETNAM 2. Prof. Jay Batongbacal *Director, IMLOSM, College of Law University of the Philippines* PHILIPPINES 3. Neri Javier Colmenares *Vice President, Confederation of Lawyers in Asia and the Pacific (COLAP)*

10:15 A.M-10:45 A.M	Q & A/ Open Forum
10:45 A.M.-11:00 A.M.	Tea/Coffee Break
11:00 AM – 12:00 PM	**Session II:** Various mechanisms for peaceful resolution under Article VI of the UN Charter and other dispute resolution mechanisms under International Law **Chair:** Ms. Jeanne Mirer **Co Chair:** Prof. Tatsuo Mutou **Speakers:** 1. Prof. Yoshiro Matsui *Emeritus Professor of Nagoya University* JAPAN 2. Prof. Eric Franckx *President of the Department of International and European Law, Faculty of Law and Criminology* *Vrije Universiteit Brussel* BRUSSELS, BELGIUM
12:00 P.M.-13:30 P.M.	Lunch
13:30P.M.-14:00 P.M.	Q & A/ Open Forum **Chair:** Ms. Jeanne Mirer **Co Chair:** Prof. Tatsuo Mutou

14:00 P.M.-16:05 P.M.	**Session III:** Proposals on possible forms, mechanisms, or methods for peaceful resolution of disputes **Chair:** Ms. Jeanne Mirer **Co Chair:** Prof. Tatsuo Mutou **Reactor:** IADL **Speakers:** 1. Mr. Nguyen Truong Giang 2. Prof. Jay Batongbacal, 3. Prof. Eric Franckx 4. Prof. Hideo Yamagata *Professor of Nagoya University* JAPAN
16:05 P.M – 16:50 PM	**Discussion:** **Chair:** Ms. Jeanne Mirer **Co Chair:** Prof. Tatsuo Mutou
16:50 P.M. - 17:10 P.M.	Closing remarks Ms. Jeanne Mirer

Conference on the South China Sea Dispute and the Search for Peaceful Resolution

Aoyama-gakuin University Tokyo
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Peace and security in the Asia-Pacific are in peril due to tensions in the South China Sea (SCS). Since the final award by the Permanent Court of Arbitration (PCA) for the case of the Philippines against China, the situation in the SCS has been a cause for international concern.

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The Japan Lawyers Association or JALISA and the Conference of Lawyers of Asia-Pacific (COLAP) hosted the event.

WELCOME REMARKS

Jun Sasamoto
Secretary General, Confederation of Lawyers in Asia and Pacific; Representative, Japan Lawyers International Solidarity Association (JALISA)

Good morning everyone. Welcome to Tokyo! I am Jun Sasamo, a Japanese lawyer and a member of JALISA or the Japan Lawyers International Solidarity Association. Our chapter is also part of the organizers.

In July 2012, a Court decision by the Arbitration Tribunal made a grand impact on the region. The Court accepted most of the Philippines's claim and rejected most of China's. China announced that it was not accepting the Court decision. Meanwhile, Chinese military expansion has not stopped. The Court decision is binding, but it has no enforcement measure. The only way to go is through their bilateral negotiation. Given the situation, what can lawyers do? This is the main focus of our conference.

The UN Charter Article 33 said the Parties to any dispute should, first of all, seek a solution by negotiation, inquiry, mediation, reconciliation, arbitration, and judicial settlements to regional agencies, or other peaceful means of their choice. But, Article 33 of the Charter does not say which of the measures should be given priority.

In a meeting of the IADL last year, the members decided to meet with Chinese experts in a neutral country and discuss these dispute issues and consider the International Law and the means for a peaceful resolution of the conflict. JALISA also has a territorial issue with China, but remains in a neutral stance regarding the South China Sea conflict.

In this Conference, there are no Chinese experts, although we extended all efforts to contact six Chinese experts. Unfortunately, no one made it because of their work schedule. In lieu of the Chinese experts, we have Atty. Neri Colmenares, the Vice President of the Confederation of Lawyers in Asia-Pacific (COLAP) who will introduce some of the responses of the Chinese government.

Also, I am informing you of the absence of Prof. Yoshiro Matsui, one of our resource persons for Session 2 because he is sick. Fortunately, Prof. Yamagata is here to read his paper? Despite this, I wish the Conference comes out with a fruitful result through the reports of the experts and the discussions among participants. I believe the Conference will succeed because of our common aim to promote International Law and the peaceful resolution of conflict in the South China Sea. Thank you for hearing me.

OPENING REMARKS

Jeanne Mirer
President, International Association Of Democratic Lawyers (IADL)

On behalf of the International Association of Democratic Lawyers (IADL), I would like to welcome all of you to this conference. We are very grateful that JALISA is hosting us and that we are able to combine this conference with the meeting of the Executive Committee of the Confederation of Lawyers in Asia Pacific or COLAP.

The IADL since its founding in 1946 has advocated the goals of the United Nations Charter which outlaws the use of force or the threat of use force in international disputes. In other words, we seek peaceful resolution of disputes. In this regard, the IADL has long been, on record, supporting a peaceful resolution of disputes in South China Sea.

We have noticed the various disputes among the various coastal States—which in fact, caused the arbitration of the case involving the Philippines and China in 2013, pursuant to Annex 7 of the United Nations Convention on the Law of the Sea (UNCLOS).

In 2014, when China placed an oil rig in the waters claimed to be within Vietnam's exclusive economic zone, IADL was very concerned with the rising tension in the region and we in fact asked China for its reasons to justify why it placed the rig in this area. And we got no response.

When the rig was removed, there was a relative calm for a while. But, with the US pivot to Asia and the apparent attempt to confront China in the South China Sea, the geopolitical tensions have escalated between the US and China. At the same time, the decision of the Permanent Court of Arbitration may provide an opening to find peaceful solutions to the disputes in South China despite the objection on the part of China to the arbitration ruling.

In response to the Court's ruling, IADL determined to hold this conference to discuss the issues in search of peaceful resolution.

Today's conference has three sessions. First, we will explore the background facts to the disputes. In the second session, we will talk about the various mechanisms that exist for the peaceful resolution of the conflict, and in the third session, we will speak about specific and concrete suggestions for peaceful resolution. And, at all times, members of this conference will have the chance to ask questions to the experts and make interventions.

Today, we hope to take the next steps toward to find a peaceful resolution to the dispute in the South China Sea. We are certain that the experts have done a good job in trying to crystallize the issues and we look forward to having a very good discussion. Thank you very much.

Session 1: Situation of Maritime Territorial Disputes in Asia-Pacific

Mr. Nguyen Giang
Subject Matter Expert and Researcher
Institute for East Sea Study
Diplomatic Academy of Vietnam in Hanoi

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. 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 were multiple 200-nautical mile circles of the Exclusive Economic Zone (EEZ) from the islands overlapping with each other, and with the 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 was the picture of the South China Sea before the arbitration. As you can see, it is complicated given the several maritime 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 of 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 it 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 disputed rocks in the sea only. There is 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.

Even before the arbitration award, Vietnam already sent a note to the Tribunal. Vietnam 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. It 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 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 was 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 with China mobillizing 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 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.

Map from presentation 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 equipment of fishermen were confiscated by China's law enforcement agency. Vietnam strongly protested the ban because it was 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 there were anti-aircraft guns and anti-missiles defense point on some of the artificial islands in 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 becomes 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, it already declared the ADIZ in 2013 and the possibility of enforcing ADIZ in the South China Sea is always there. 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 and supports peaceful settlement of disputes based on international law, particularly that of UNCLOS. It 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. It 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.

Philippines v. China: Rulings and Legal Implications

Jay L. Batongbacal[1]
Associate Professor, University of the Philippines College of Law;
Director, U.P. Institute for Maritime Affairs & Law of the Sea.

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.

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1 B.A. Political Science, U.P. 1987; L.L.B., U.P. 1991; Ph.D., Dalhousie U. (Canada), 2010. Originally presented at a small academic group meeting at Hosei University, August 2016. An edited version of this paper was submitted to the Center for Strategic and International Studies, Washington DC, USA in October 2016.

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."[2] 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 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."*[3]

The above interpretation directly address 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

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2 Award, para. 229

3 Id., para. 232

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 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 our 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."*[4]

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."*[5]

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."[6] 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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[4] Id., para. 243

[5] Id., para. 246-247

[6] Id., para. 251

Outline Of The Position of the People'S Republic of China on the South China Sea Dispute

Compiled by Atty. Neri J. Colmenares[1]
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Introduction

The People's Republic of China's claim of territorial and maritime rights in the South China Sea is based on (i) its historical rights over the South China Sea and (ii) the relevant provisions of international law.

I. **Historical claims** — The South China Sea has been subject to China's exploration and administration since ancient times

   1) China was the first country to discover and name the South China Sea and its islands since the Eastern Han dynasty.

   2) China was the first to exploit its natural resources since the Western Jin Dynasty.

   3) China has governed the South China Sea since the Song Dynasty.

1 Since not one of the six speakers invited could attend the Conference from China, COLAP Vice President Neri Colmenares was tasked to compile the main points of China's position. This compilation was based on the "*Position Paper of the Government of the Peoples Republic of China on the Matter of Jurisdiction in the SCS Arbitration initiated by the Republic of the Philippines*" dated December 7, 2014 and "*Chinas Positions and Interests in the SCS: A Rational Choices in its Cooperative Policies*" a draft paper of Prof. Su Hao (Director of the Center for Strategic and Conflict Management, China Foreign Affairs University).

4) South China Sea was recorded in Chinese maps since the Song Dynasty.

II. **China's claim to sovereignty** has existed long before the modern international law and therefore modern international law cannot explain or decide China's rights and interest over South China Sea.

Nevertheless, since the modern historical law was based on historical facts, China's claim is supported by the widely accepted territorial sovereignty principles of international law, namely:

1) The claim to sovereignty is based on the doctrine of discovery of a *terra nullus*.

2) The Doctrine of *uti possidetis*. China has a factual occupation of the islands through exploration and administration.

3) Administration of a territory is an important basis for gaining the recognition of international law.

4) The effective administration is shown by exploration and exploitation of the claimed area.

5) State succession is a basic principle under international law and the People's Republic of China has legally inherited all the national sovereignty rights of the Republic of China, including its sovereignty in the South China Sea.

6) The illegal acts, by other parties, do not generate rights.

7) The recognition of international sovereignty is a manifestation of sovereignty.

8) Estoppel because the behavior of other claimant States recognizing China's sovereignty binds them.

On the Tribunal Decision on the Philippine Submission against China

A. The Tribunal is without jurisdiction over the issue on the following grounds:

a) The essence of the subject matter of the arbitration is China's territorial sovereignty over maritime features in the South China Sea, and therefore, it is not within the Tribunal's jurisdiction.

b) The issue does not concern the interpretation or application of the UN Convention on the Law of the Sea. However, presuming it concerns the interpretation or application of the Convention, the subject matter constitutes maritime delimitation thus excluded from compulsory arbitration under China's Declaration of 2006.

B. Other Supplemental Arguments

a) China was the first country to discover, exploit, and exercise sovereignty over South China Sea.

b) The Philippines, prior to 1970s, clearly defined its territories under its 1935 Constitution and its 1961 Baseline Law and these exclude South China Sea from Philippine territory.

c) The Philippines illegal occupation violated the UN Charter and its claim, therefore, is null and void.

C. Counter arguments to the Philippine Submission

a) **Philippines:** China's assertion of historic rights, including its 9-dash line is beyond the limits of its entitlement under UNCLOS.

China: without first having determined China's territorial sovereignty over the maritime features of the South China Sea, the tribunal is not in a position to determine the extent to which China may claim maritime rights.

b) **Philippines:** China's claim to exclusive economic zone rights based on rocks, low-tide elevation (LTE), and submerged features is inconsistent with the Convention.

China: the nature and entitlements of certain maritime features cannot be considered in isolation from the issue of sovereignty. A State's sovereignty over a maritime feature is entitled to rights based on that feature:

- The Philippines only questioned those features occupied by China, but not features occupied by the Philippines.
- Whether or not low tide elevation (LTE) can be appropriated is a question of territorial sovereignty.

c) **Philippines:** China's assertion and exercise of rights in the South China Sea unlawfully interfered with sovereign rights, jurisdiction, and freedom of navigation that the Philippines enjoy under UNCLOS.

China: Both countries have not delimited their respective claims; and, until and unless sovereignty over its maritime features is ascertained and maritime delimitation is completed, this claim cannot be decided.

D. **The Philippines violated the agreement with China**—that both will resolve the dispute peacefully and in a friendly manner—when it filed its submission.

There are Three Levels of China's national interest in the South China Sea:

a) **Vital interest**— it involves national unity and territorial integrity.

b) **Important interest**—it involves national security and development.

c) **General interest**—it involves overseas interest.

Principle: One of China's important national interests is its stability and development. China's interests in South China Sea consists of:

1) Safeguarding China's territory from being invaded, and no government could ever make an absolute compromise on the issue of territorial sovereignty. China's proposal: shelving disputes and solving dissensions through peaceful negotiation.

2) Peace and stability in South China Sea are of great importance to China's peaceful development. Any action trying to destroy peace and stability in the region becomes a major threat to China's national security.

3) Maintaining friendly relations with other countries around the South China Sea are important to China's national interest.

4) Natural resources are of great significance to China's economic development.

5) Protection of freedom of navigation in South China Sea determines whether China could develop external cooperation and strengthen ties with the outside world. China needs to protect and maintain its freedom to navigate in the South China Sea.

6) The South China Sea is an important platform for China to promote cooperation and non-traditional security actions with neighbors (cross border crimes, typhoons etc.).

7) The "spill over" of national interest determines that security status of South China Sea is decreasing. Technical level problems should not affect the overall framework of peace, cooperation and coordination. The friction between China and other countries will not affect its cooperation on the strategic framework level.

Comment[2] of Prof. Su Hao, one of those invited to the COLAP Conference:

"China's interests in the South China Sea are a polymer mixing national interests and regional interests. In dealing with the South China Sea issue, China needs to focus on long-term and overall interests, and not rigidly adhere to the micro-level disputes and frictions. Only by adopting a responsible attitude and behavior could China maintain and develop friendly relations of cooperation with neighboring countries, and ultimately maintain peace and stability and promote the process of East Asian regional integration."

2 Sourced from China's Positions and Interests in the South China Sea: A Rational Choices in its Cooperative Policies, by Prof. Su Hao, Center for Strategic and International Studies

Role of International Law for the Settlement of Territorial Disputes: The Means of Settlement

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Introduction

This Paper argues, mainly based on the jurisprudence of international courts and tribunals, about the role of international law on the settlement of territorial disputes: This includes:

- Maritime disputes and the basis of settlement
- Management of disputes until the final settlement

This Paper also argues about points to be taken into account for the equitable settlement of territorial disputes.

The main interest of the participants here is the South China Sea Arbitration between the Philippines and the People's Republic of China. This Paper will also touch on the Awards, if need be, but they are not the heart of this paper.

I. Role of International Law as Basis of Settlement of Territorial Disputes

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

Almost all international disputes are multi-dimensional in their character. They are not only legal, but also political, economic, cultural, national, historical. China, for instance, stresses the historical development of the problems in the South China Sea.[1] However, each contending party has its own version of history, which is necessarily subjective in character. When parties contend with each other based on 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, the relevant facts of the settlement of the dispute must be distinguished from the irrelevant facts.

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 solving territorial disputes[2].

The multi-dimensional character of international disputes signifies that international law alone cannot bring a successful settlement. Other diverse aspects have to be dealt with. The International Court

1 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, referred to as China's White Paper).

2 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 (2006), p.328, paras.513-516, hereafter, referred to as Eritrea/Yemen Arbitration.

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"[3]. 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 the basis of settlement for each dispute, territorial or otherwise, may be different according to its own character. However, the following points can safely be said in general.

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

The heart of the title to a 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"[4], 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"[5]. 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 the rule of force, to be sure. However, considering the exclusive

3 United States Diplomatic and Consular Staff in Tehran, Judgment of 24 May 1980, ICJ Reports 1980, p.22, para.40.
4 Award of April 4th, 1928, 2 UNRIAA (2006), p.839.
5 Judgement of 5 April 1933, PCIJ, Ser.A./B., No.53, pp.45-46.

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"[6].

It seems to be an opportune time 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"[7]. 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"[8].

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"[9]. 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.

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6 Supra note 4, p.846.
7 Ibid, p.867.
8 Supra, note 2, pp. 311-312, para. 450.
9 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.

Thirdly, acts, in order to establish *effectivité*, must be acts of the 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 from their Government, cannot confer sovereignty on the State"[10]. 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*."[11].

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"[12]. 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[13].

(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.

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10 Judgement of December 18th, 1951, ICJ Reports 1951, p.157.
11 Supra, note 2, pp.283-284, para.315.
12 Burkina Faso/Mali Frontier Dispute, Judgement of the Chamber of 22 December 1986, ICJ Reports 1986, pp.586-587, para.63.
13 Judgement of 10 October 2002, ICJ Reports 2002, pp. 344, 353-355, paras.55, 68-70; pp.412-416, paras.218-224.

First, the right of self-determination of peoples lays a 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"[14]. 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 19th 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[15].

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[16] and also by the General Assembly Definition of Aggression[17]. 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[18].

14 Advisory Opinion of 16 October 1975, ICJ Reports 1975, p.122.
15 Supra note 12, pp.565-567, paras.20-26.
16 General Assembly Resolution 2625 (XXV), Annex, 24 October 1970: hereafter, referred to as Friendly Relations Declaration.
17 General Assembly Resolution 3314 (XXIX), Annex, 14 December 1974.
18 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

The 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 the 19th 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 the peoples who submitted to the Emperor's rule for his virtue. Under traditional international law, "territory" was defined by definite boundaries within which effective control of 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 over its domain were required. "Territory" denoted domination over the land, while "domain" implied domination over peoples.

By the end of the 19th 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.. 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"[19]. Almost 50 years later, a similar perception appeared again in the Award of *Eritrea-Yemen Arbitration*[20].

Recently, international courts and tribunals have become more positive toward the traditional concepts derived from a different World Order, but, they continue to rely on the principle of *effectivité* as the last resort in order to resolve territorial disputes[21]. 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"[22].

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[23].

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19 Judgment of November 17th, 1953, ICJ Reports 1953, p. 56.

20 Supra note 2, p.245, para. 131.

21 Eg., Award of Eritrea/Yemen Arbitration, supra note 2, pp.245-246, paras. 126-130.

22 Judgement of 3 February 2009, ICJ Reports 2009, pp.96-97, para.99.

23 E.g., China's White Paper, supra note 1, 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*[24] 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"[25].

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[26].

This judgement seems to be corpus of the ICJ's jurisprudence 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), in the *Case concerning Delimitation*

24 Judgement of 20 February 1969, ICJ Reports 1969, p.47, para.85 (c).
25 Judgement of 24 February 1982, ICJ Reports 1982, p.46, para.43.
26 Supra note 22, pp.101-103, paras.115-122.

of the Marine Boundary between Bangladesh and Myanmar[27] and the *Award of Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India*[28] seem to have followed basically the three-step delimitation methodology.

Returning to the South China Sea Dispute, it seems necessary to touch on this, though in summary, 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[29], it has been much debated among international law scholars, including those from China. The Note Verbale claimed 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" were 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"[30].

27 Judgement of 14 March 2012, ITLOS Case No.16.
28 Award of 7 July 2014: PCA Case No.2010-16.
29 7 May 2009 : UN Doc., CML/17/2009.
30 Section V of the Award of 12 Jury 2016, esp., para.278.

II. The Role of International Law in Providing Means of Settlement for Territorial Disputes

1. The Means for Peaceful Settlement of Disputes

Under traditional international law—which does not regulate a State's act to resort to war—peaceful or amicable means of settlement of disputes was only one of the legitimate means along with forcible or compulsive means. The 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 to the prohibition of the threat or use of force (Article 2 (4)). Beyond doubt, these provisions are norms of customary or general international law[31].

Article 33 (1) of the Charter enumerates, though not exhaustively, the means for the pacific settlement of disputes. Apart from resorting 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

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

reflects a domestic law analogy modeled after the domestic law of Western developed countries. It regards arbitration and judicial settlement, applying international law and bringing about binding decisions as the best means of settlement.

During the drafting process of the Friendly Relations Declaration, the 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 they had no say about it. As for the treaty law, unequal treaties concluded under duress are deemed valid and are applied against their interests.

Second, they criticized the composition of the ICJ to be prejudiced against them. The ICJ was composed, at its inauguration in 1945, of six judges from West-European and other countries, three from East-European countries, four from Latin-American countries, and one each from Asian and African countries. Thus, these countries contended that judicial settlement would be unfavorable to them, and argued, instead, for a settlement by negotiation which they deemed more responsive to sovereign equality. In addition to these two criticisms, cultural differences between Asian and African countries, on the one hand, and Western countries, on the other, was 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"[32].

In fact, Asian and African countries' apprehension with the ICJ was justified at that time, at least partly. For instance, ICJ's Second Phase

32 Supra note 23, Section Ⅱ.

Judgement on 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 the practice of apartheid[33]. This judgement was highly criticized not only by Asian and African countries but also by the international community as a whole. 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 was 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 the means of dispute settlement by unilaterally initiating arbitration. According to China, China and the Philippines have agreed through bilateral and multilateral agreements, including the 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. Therefore, the compulsory procedures entailing binding effect, including of course arbitration, does not apply by virtue of Article 281 (1) of the UNCLOS[34]. This position of China is debatable, to say the least, but, whether it's 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. But, whether an Arbitral Tribunal has jurisdiction over the matter shall be settled by the Tribunal concerned.

33 Judgment of 18 July 1966, ICJ Reports 1966, p.6.
34 China's Position Paper, paras.76-85; China's White Paper, paras.115-118.

2. Characteristics of Main Means for Settlement

Among the various means of peaceful settlement mentioned in Part II, Section 1., there are two means situated at both ends of the arrangement, namely (1) negotiation; and, (2) arbitration and judicial settlement. This selection seems to be justified, because all of the other means may produce conclusions without binding force, even with intervention by a 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 a means to facilitate negotiated settlement between the contending parties. Means involving international organizations will be discussed separately.

(1) Reevaluation of Negotiation

The 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"[35], 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[36].

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 the 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 and their lawyers, and agreed ultimately, in the Friendly Relations Declaration,

35 Order of August 19th, 1929, PCIJ Ser.A No.22, p.13.
36 North Sea Continental Shelf Cases, supra note 24, p.47, para.86.

to a compromise principle of free choice of means, as stated above. And the Manila Declaration is a little more positive to negotiations by recommending to the 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[37], 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 seven principles of international law—almost parallel with those provided for in the Friendly Relations Declaration—as "a general, non-exhaustive frame of reference for negotiations."

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"[38]. The *CSIL's Paper* emphasizes the importance of "exchange of views" as a means for parties to agree with peaceful means to be chosen[39]. At least on this point, the 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. The conclusions of the 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 to the criticism to arbitration and judicial settlement mentioned before. As for the composition of the courts and tribunals, the ICJ was composed, from 1969 onwards,

37 General Assembly Resolution 53/101, 8 December 1998.
38 Article 283 (1) of the UNCLOS.
39 Supra note 23, Section .

of five judges from West-European and other countries, two each from East-European and Latin-American countries, and three each 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, of the same ratio with the regional distribution of the Members of the Security Council.

The 1978 Rules of the ICJ conferred on the parties some say in the composition of the Chamber to be constituted under Article 26 (2) of the Statute[40]. In case of arbitration, views of contending parties may be reflected more directly to the composition of the tribunal. Annex VII of Arbitral Tribunals under the UNCLOS, for instance, will be composed of two arbitrators appointed by each party and the three arbitrators chosen by both parties. The President will be chosen from among the three members who were appointed by both parties.

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" (Preamble, para.3), declared to be void treaties procured by threat or use of force, or treaties conflicting with a peremptory norm of general international law (*jus cogens*) (Articles 52 and 53). In case of the Law of the Sea, the 1982 UNCLOS reflected in many points the demands of developing countries, which participated positively in its drafting. This made possible the incorporation of "Compulsory Procedure Entailing Binding Decisions" on Part XV, which deals with the settlement of dispute.

Developing countries have also increased their influence on the formation and development of customary international law. General Assembly Resolutions have been taken into account in identifying customary international law. General Assembly Resolution on the Review of the role of the ICJ recognized that "the development of international law may be reflected, *inter alia*, by declarations

40 Article 17 (2) of the 1978 Rules of the ICJ.

and resolutions of the General Assembly which may be taken into consideration by the International Court of Justice"[41]. The ICJ has relied on General Assembly Resolutions, including the Friendly Relations Declaration, as expressive of the *opinion juris* of States.

Judicial settlement is said to be rigid in applying international law. According to Article 38 (1) of the Statute, the ICJ decides "in accordance with international law. In contrast to this, arbitration was traditionally said to be more flexible in this respect. Article 37 of the 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*" (emphasis added). The parties are also entitled to designate, in a *compromis*, rules to be applied by the arbitral tribunal. However, in recent times, arbitral tribunals have become more rigid in applying international law. For example, Annex VII Arbitral Tribunals under the UNCLOS, no less than the ICJ and the ITLOS, "shall apply this Convention and other rules of international law not incompatible with this Convention"[42].

These developments seem to promote international courts and tribunals to make more equitable decisions in favour of developing countries. 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 the 20th century, developing countries have become more positive in referring their disputes to international courts and tribunals. Even "political disputes", traditionally said to be "unjusticiable", such as territorial disputes or disputes involving the use of force, have become litigated often. *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).

41 General Assembly Resolution 3232 (XXIX), 12 November 1974, Preamble, para.8.
42 Article 293 (1) of the UNCLOS.

Notwithstanding these positive developments, it must be conceded that the two defects of arbitration and judicial settlement remain to be solved. First, jurisdiction of courts and tribunals depend on the agreements of the contending parties, except for few regional institutions. 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 for these defects, many ideas *de lege ferenda* have been proposed. However, these ideas can never be materialized without agreements among States. Here is the imperative role of domestic and international public opinion to force the governments to accept, as a means of 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 (Articles 10~12 and 14); the Security Council (Articles 34~38); and the Secretary-General (Articles 98 and 99). Decisions of the General Assembly, as the most democratic among UN Organs. Although only recommendatory in effect, these 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 applied in dispute settlement than to settle individual disputes. 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. 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 the 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 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 (Article 52). Regional mechanisms are well informed about circumstances of the region concerned and can realize more appropriate resolution of the dispute based on the regional solidarity. Each of these regional organizations such as the African Union, the European Union, and the Organization of American States has a distinctive system of peaceful settlement of disputes. There are also some regional conventions specifically aimed at a peaceful settlement of dispute such as the 1948 America Treaty on Pacific Settlement (Pact of Bogota) and the 1957 European Convention for the Pacific Settlement of Disputes.

The ASEAN has 1976 Treaty of Amity and Cooperation in Southeast Asia. The chapter IV of the Treaty is devoted to Pacific Settlement of Disputes. If disputes should arise between the Contracting Parties, they shall refrain from using threat or 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 that 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, the 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 its European or African counterparts, which rather favor judicial settlement.

III. Management of Disputes until Their Final Settlement

1. Obligation Not to Aggravate the Dispute

The Obligation of States to settle 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"[43].

According to Article 41 of the Statute, the objective of provisional measures is "to preserve the respective rights of either party". Notwithstanding, the ICJ indicated that provisional measures have the sole aim of preventing 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 may likely aggravate the dispute or may comprise a resort of force in contravention of the

43 Order of December 5th, 1939: PCIJ Ser.A/B, No.79, p.199.

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"[44].

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"[45]. The Arbitral Tribunal declared that China's dredging, artificial island-building, and construction activities in the disputed area during the proceedings are breaches 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"[46].

2. Measures for Management of Disputes

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

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. The 1959 Antarctic Treaty set up one of the most successful systems 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

44 Order of 10 January 1986, ICJ Reports 1986, pp.8-9, paras.11, 18-19.
45 Award of 12 July 2016, supra, pp.457-461, paras.1166-1173.
46 Ibid.,pp.461-464, paras.1174-1181, pp.476-477, Dispositif B (16).

this system, a wide range of international cooperations in relation to Antarctic activities has developed, such as the 1982 Convention for the Conservation of Antarctic Marine Living Resources and the 1991 Protocol on Environmental Protection.

The 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 exercise self-restraint in their activities that would escalate the dispute, including refraining from inhabiting the presently uninhabited islands and other features. 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. The Parties 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 of the 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 the parties, and the parties' subsequent conduct. It concluded that the DOC was not intended to be a legally binding agreement referred to in Article 281 of the UNCLOS[47]. However, the DOC is remarkable because it somehow materializes 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.

47 Award of 29 October 2015, pp.82-85, paras.212-218.

IV. For the Equitable Settlement of Territorial Disputes

The following are some suggestions, though 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 are not only legal, but also political, economic, cultural, and other aspects as well. Therefore,the 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, the 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[48] is one of the good examples of settlement taking into account the 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 the adoption of a joint development agreement covering the area offering any significant prospect of hydrocarbon production.

The 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 cases of judicial settlement. The dispute was resolved through negotiation of the Parties based on this Recommendation.

48 27 UNRIAA (2008), p.1,

Joint development of resources may be a useful device for the settlement of territorial disputes, not only for their final settlement, but also for their management until their final settlement. Though territorial disputes are normally a zero-sum game, joint development or equitable distribution of resources, especially marine resources, may be possible options.

In settling territorial disputes, the interests of contending States and the 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 the "basic considerations inherent in the nature of the territorial sea", as one of the considerations of "certain economic interest peculiar to a region, the reality and importance of which are clearly evidenced by a long usage"[49]. It is noteworthy that the recent jurisprudence of international courts and tribunals has increasingly paid attention to the interests of the local population affected by the delimitation. For instance, the Award of *Eritrea/Yemen Arbitration* ordered Yemen, in the exercise of its sovereignty over the islands accorded to it by the Award, to"ensure that the traditional fishing regime of free access and enjoyment for the fishermen of both Eritrea and Yemen shall be preserved"[50].

In its judgment of the *Case concerning the Dispute regarding Navigational and Related Rights* between Costa Rica and Nicaragua, the ICJ 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 riparians of subsistence fishing, long practiced by them but not documented in any formal way[51].

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)

49 Judgment of December 18th 1951, ICJ Reports 1951, p.133.
50 Supra note 2, pp.329-330, paras.525-526.
51 Judgment of 13 July 2009, ICJ Reports 2009, p.246, paras.77-79; pp.265-266, paras.140-141.

above, the ICJ judgement in the Burkina Faso/Niger *Frontier Dispute case* that the boundary in the area is not specifically delimited by the French colonial document concerned, on the median line of the River Sirba. It noted 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"[52].

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 interpreting the 1858 Treaty in the *Dispute regarding Navigational and Related Rights Case* used methods not necessarily in accordance 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. The Court, in this judgement, recognized the establishment of a 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 the legal interpretation of the applicable document, but on the policy consideration in favor 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.

52 Judgement of 16 April 2013, ICJ Reports 2013, p.85, para.101; pp.90-91, para.112.

Session 2: Various Mechanisms for Peaceful Resolution

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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.

I will 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. I can limit myself to pay attention to the main difference that exist between these two goups 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. These features 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 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.

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 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 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 167 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.

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 compromisory 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.

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.

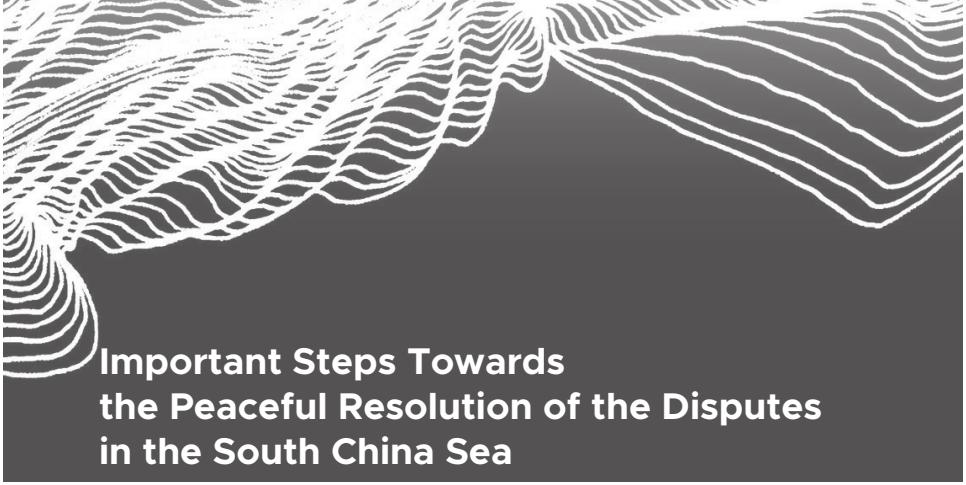
I mention these two institutions on purpose, because neither of them forms the basis of the award rendered between China and the Philippines on 12 July 2016. It is not a case before the ICJ, but because of multiple instances of misreporting in the press this Court felt obliged to place a notice on its 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.

Party 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.



Important Steps Towards the Peaceful Resolution of the Disputes in the South China Sea

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For the time being, due to the complexity of the long-standing disputes in the South China Sea (named by Vietnam as the East Sea), a solution for these disputes seems to be a remote future. The deadlock in the settlement of the disputes in the South China Sea not only seriously threatens peace and security in the region; the freedom of navigation and overflight in the South China Sea; but also challenges the sovereignty and sovereign rights of the claimant states, the rights and the interests of all countries both inside and outside the region. Therefore, finding the way towards a final and sustainable solution for the disputes in the South China Sea is an urgent task of not only the countries which are the parties to the disputes but also the urgent task of all countries which have the rights and interests in the region. The search for such a solution is a difficult and long process in which a lot of obstacles need to be overcome and a lot of efforts need to be made to make the peaceful resolution of the disputes in the South China Sea possible, namely:

1. Promoting the compliance with the obligation to settle peacefully international dispute

To settle peacefully international disputes is an important principle of international law which has been stipulated in many international

legal instruments. The Charter of the United Nations, in Article 33, para 1, provides that the "parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice". This principle is also confirmed in the General Assembly Declaration on Principles of International law concerning friendly relations and cooperation among states in accordance with the Charter of the United Nations (GA Res. 2625 XXV). The United Nations Convention on the Law of the Sea, in Article 279, also requires that "States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations and, to this end, shall seek a solution by the means indicated in Article 33, paragraph 1, of the Charter".

Because, the maritime disputes in the South China Sea endangers peace and security in the region, it is the obligation of all countries concerned to resolve their disputes peacefully. Those countries have the obligation :

- To settle the disputes with other disputing countries by peaceful means in such a manner that peace and security and justice in the region are not endangered.

- In the event of failure to reach a solution by any one of the above peaceful means, to continue to seek a settlement of the dispute by other peaceful means agreed upon them.

- To refrain from any action which may aggravate the situation so as to endanger the maintenance of peace and security in the region and shall act in accordance with the purposes and principles of the Charter of the United Nations. That is to respect the principle that states shall refrain from the threat or use of force against other states; the principle of sovereign equality of states; the principle that states shall fulfill in good faith their international obligations ...

The fact that the obligation to settle peacefully disputes has not been respected, and sometimes even seriously violated, is the main cause leading to tension in the region and is the main ostacle for the peaceful resolution of maritime disputes in the South China Sea. In that context, international and regional efforts are needed to promote the principle of peaceful settlement of disputes. In some circumstances, the international community need to put pressure on those who do not respect that principle and force them to respect the principle.

In short, promoting the obligation to settle peacefully international disputes is the first important step towards the peaceful resolution of the disputes in the South China Sea.

2. Promoting the agreement on determining the basis for the settlement of international disputes and for the making of the lawful claims

To be able to reach a solution for the disputes in the South China Sea, the relevant countries need to determine clearly the basis for the settlement of these disputes. Due to the fact that the disputes in the South China Sea is of legal nature, the settlement of these disputes needs to be based on the rules and principles of international law and of the traditional international law.

With regard to the territorial disputes in the South China Sea, principles and practices of traditional international law on acquisition of sovereignty, at its heart is effective occupation, which have been universally recognized should be applied. The acquisition of the sovereignty over the features in the South China Sea needs to be proven by certified evidence of: an intentional display of power and authority over the features, the exercise of jurisdiction and state functions on a continuous and peaceful basis.

A lawful claim to sovereignty over features in the South China Sea made by claimant countries needs to be based on the above-

mentioned principles and practices, especially with the intention and will to act as sovereign, and some actual exercise of display of such authority. Mere discovery could not establish the title of sovereignty over the claiming features. Discovery could have a certain meaning only when followed by acts of qualified effectiveness. Acts by private individuals are disregarded.

With regard to the disputes arising out of the interpretation and application of the United Nations Convention on the Law of the Sea, the principles and provisions in the Convention are the most important basis for their settlement. The most important principles are the principle of the land dominates the sea; freedom of navigation and overflight; and freedom of the high seas. The most important provisions are articles on the territorial sea, archipelagic states, exclusive economic zone, continental shelf, regime of islands and settlement of disputes. The United Nations Convention embodies traditional rules of the law of the sea and introduces new legal concepts and regimes, creating the global regime dealing with all matters relating to the law of the sea, including the settlement of disputes. Therefore, the rules of customary international law of the sea such as historic rights are no longer applied to solve the maritime problems and to settle maritime disputes nowadays.

A lawful maritime claim needs to be made on the basis of the relevant norms of international law and the above-mentioned principles and provisions in the United Nations Convention on the Law of the Sea. Maritime claims made inconsistent with the aforementioned legal basis cannot be considered lawful. Such claims complicates the situation and hinder the process of the resolution of maritime disputes in the South China Sea.

Therefore, promoting the agreement on determining the legal basis to resolve disputes and to form the lawful territorial claims and the lawful maritime claims is another important step towards the peaceful resolution of disputes in the South China Sea.

3. Means and mechanisms for the peaceful resolution of disputes

Contemporary international law, up to now, has not only provided for the obligation to settle international disputes peacefully, but also provided a long list of means and mechanisms that can be used for the peaceful resolution of international disputes.

The Charter of the United Nations, in Article 33 para 1, requires the disputing states to seek resolution for their disputes by "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."

In addition to the peaceful means in Article 33 of the Charter of the United Nations, the United Nations Convention on the Law of the Sea provides for a number of compulsory procedures entailing binding decisions for any dispute over the interpretation or application of any provision of the Convention, and provides State Parties with a wide array of dispute settlement options. The options range from the International Court of Justice to the International Tribunal for the Law of the Sea established in accordance with Annex VI of the Convention, arbitral tribunal constituted in accordance with Annex VII of the Convention and special arbitral tribunal constituted in accordance with Annex VIII.

All the above peaceful means for the resolution of disputes are available for all countries which are parties to the disputes in the South China Sea. As the parties to the Charter of the United Nations and to the United Nations Convention on the Law of the Sea, these countries have the right and also have the obligation to use the above-mentioned means to settle their disputes.

Over the past decades, means and mechanisms mentioned above have contributed significantly in solving a number of regional maritime disputes. Nevertheless, some other maritime disputes, including

disputes over the Spratlys, remain unresolved. Why? Certainly, it is not because of not having enough effective means and mechanisms for peaceful resolution of disputes. It is because certain countries concerned lack the goodwill to peacefully resolve the maritime disputes in the South China Sea.

Therefore, strengthening the goodwill of claimant countries in resolving disputes peacefully is urgently needed. It is one of the most important steps towards the peaceful resolution of marinetime disputes in the South China Sea.

4. Provisional arrangements

Article 73 para 3 and Article 83 para 3 of the United Nations Convention on the Law of the Sea provides clearly: Pending agreements on the delimitation of the exclusive economic zone and the continental shelf between States with opposite or adjacent coasts, the States concerned, in a spirit of understanding and co-operation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.

Thus, while the claimants in the South China Sea have not yet reached agreements on the delimitation of maritime boundaries and have not been able to settle the disputes, they can consider the possibility of provisional arrangements for the maritime overlapping areas in accordance with the United Nations Convention on the Law of the Sea. Such provisional arrangements can contribute to the management of disputes, promote cooperation, reduce tension and prevent the disputes to turn into violent conflicts.

In case of the South China Sea, as a semi-enclosed sea, the provisional arrangements referred to in the Convention cover a wide range of areas of cooperation, namely:

- ❖ to coordinate the management, conservation, exploration and exploitation of the resources of the sea, including living resources.

- ❖ to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment;

- ❖ to coordinate their scientific research policies and undertake, where appropriate, joint programmes of scientific research in the area;

- ❖ to invite, as appropriate, other interested States or international organizations to cooperate with them in furtherance of the provisions of this article.

Among the areas of cooperation mentioned above, reaching provisional arrangements on the exploration and exploitation of marine resources is a specially difficult and sensitive mission. Such arrangements can only be achieved if the following principles are complied with, namely :

- ❖ First, the relevant States need to respect the voluntary principle, not to use force or threat to use of force, or to use any economic or political pressure to force other States to accept the provisional arrangements.

- ❖ Second, while signing and implementing the provisional arrangements, the concerning States need to adhere to the fundamental principles of International Law, of the Modern International Law of the Sea, particularly the United Nations Convention on the Law of the Sea.

- ❖ Third, in the process of setting up the provisional arrangement areas and implementing the joint exploration and exploitation in these areas, the States concerned need to respect the sovereignty, sovereign rights and jurisdiction of states who are parties to the arrangements and of other States as well.

- ❖ Fourth, the joint exploration and exploitation of marine resources can only proceed in the overlapping area created by the lawful claims of the States concerned.

- ❖ Fifth, the joint exploration and exploitation of marine resources needs to be conducted on the basis of respect for the principles of equality, fairness and mutual interests in the process of distribution of benefits and responsibilities, in the management of joint development activities consistent with the rights and obligations of coastal states as set forth in the United Nations Convention on the Law of the Sea.

- ❖ Sixth, provional arrangements are of a practical nature and only a temporary solution in the process of finding long-term solution for the marine disputes. Such arrangements shall be without prejudice to the final delimitation of the disputing areas.

Based on the above principles, a number of provisional arrangements on joint exploration and exploitation of marine resources in the overlapping areas have been agreed upon. The other similar provisional arrangements can be reached in the future if those principles are complied with.

In short, to be able to achieve a peaceful solution to the disputes in the South China Sea, a lot of efforts need to be made with a view to promote the compliance with the obligation to settle peacefully international disputes; to promote the agreement on the legal basis for the peaceful settlement of disputes and for the making of lawful claims; resorting to all means for the peaceful settlement of international disputes available; and to strengthen the goodwill of the disputing countries in resolving maritime disputes. While a long-term solution has not yet been reached, the countries which are parties to the maritime disputes can agree on provisional arrangements in line with International Law, Modern International Law of the Sea, particularly the United Nations Convention on the Law of the Sea and on the basis of the six principles mentioned above.

SESSION 3

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In the second session, we looked at proposals for possible forms, mechanisms, and methods for peaceful solution of SCS disputes. The SCS disputes are extremely complicated, and any discussion to solve these disputes literally can take years.

There have been ongoing workshops on dispute settlement in the SCS, the longest being called the Informal Workshops that have been going on for more than 25 years. Yet, these still have not produced any solution. Let me just say that probably, we do not want to take years in this room. But, let me describe one way of trying to think the problem through.

Sometimes it is called a wicked problem, which is a new word for an overly complicated problem. First of all, the steps that we need to take in order to appreciate the disputes is to try to divide them into smaller pieces. The same way you would want to try to solve a complex problem personally—you would approach it one aspect, or one part, at a time.

So, here we first need to divide clearly the aspects of the disputed areas that are related to territorial sovereignty, and those that are related to maritime jurisdictions. Possibly soon, we might have to also consider a new aspect of it—that's the airspace above. This will be needed if China actually pushes through with its stated option of declaring an air defense identification zone. For now, it's not yet there, but this is a possible new aspect in the near future.

By dividing the problem into territorial sovereignty and maritime jurisdiction disputes, we will be able to identify which body of International Law we can refer to. If it is a territorial sovereignty problem then you have the whole of the Customary International Law to consider. It is a little bit more difficult because it's much less exact. This is unlike the maritime aspect, where we now have UNCLOS—a whole range of other maritime conventions, and international jurisprudence. These included the IMO (International Maritime Organization) Conventions, conventions creating regional fishermen organizations, the UN Fish Stocks Agreement, and so on. These allow us to have a clearer idea of appropriate sources of possible rules to invoke or use to adapt or modify when addressing a particular problem that arises in these disputes. The problems can be further distinguished into general maritime issues and territorial issues; and we can classify the specific types of disputes that arise.

The first to consider is the military strategic dimension of the SCS, which has been dominating the discussions of these problems in recent years. In this dimension, the competition is not between China and the Southeast Asian nations, but between China and the United States. The US has always stated that it has a certain interest in the SCS over freedom of navigation and overflight which are often more military issues rather than commercial transportation issues.

Perhaps in the future we might see Japan also increasing its presence in these areas because of all the countries outside the Southeast Asian (SEA) region, Japan is the most directly affected. The SCS disputes could not only end up destabilizing the region; Japan's economic lifeline through energy and trade routes could also be potentially threatened.

In the military aspect, we know there is very little International Law that can be brought to bear. We have the Laws of War, which in a way is an oxymoron because the war rarely follows rules, but at least in peacetime we do have some applicable. The Laws of War provide us with possible guidance in anticipation of a conflict, but, admittedly, it does not really have much relevance in the absence of actual conflict. So ultimately, we can only try to prevent a conflict.

The next aspect, which is more directly relevant to the SEA region, are the economic and resource related aspects of these disputes: competition over fisheries, competition over petroleum resources, and probably other activities later on. These resource issues can be divided into extractive issues (*i.e.,* who can take what? how much of it? why, or on what basis) and the non-extractive issues, which concerns who may otherwise use these resources and how (*e.g.,* who have the ability to travel through the sea). The resource issues can also be considered in terms of either common concerns/interests or exclusive interests.

One example of an extractive issue/exclusive interest problem is the conduct of fishing in an area which is actually within the EEZ (Exclusive Economic Zone) of one country. An example of a non-extractive issue/common concern is the exercise of freedom of the seas in the high seas beyond the jurisdiction of any State. Depending on the kind of issues, there will be particular bodies of law that might be applicable.

Note that there are issues that are a common concern, regardless whether the States have exclusive jurisdiction or not. These are things like search and rescue, environmental protection, and a new common problems such as maritime terrorism. These issues are the kinds of problems that even the disputants must address cooperatively in order to make any improvement.

The political aspect is a third one. Here, we talk about the political relationships between the disputing States. It may be that political relations, deteriorating government-to-government relations, and

tensions arise not really because of any particular problem at sea or on land in the disputed area, but because of the way by which States regard and perceive each other.

These kinds of disputes could be a seen as either bilateral (or really limited to two parties), or it could be regional (*e.g.,* China and the ASEAN and how the ASEAN treats China or how China treats ASEAN). Or, it could be global: it might be a political issue that has a global aspect, such as issues of human rights, treatment of people who happen to be found within SCS, and refugees who use the SCS.

Then lastly, disputes could also be cultural, they might involve matters outside SCS itself but are more in the minds of the people. Here, we are talking not of State-to-State, but rather of people-to-people relations. This may involve, for example, how the fishermen of the respective countries treat each other when they meet at the sea. This could arise because of problems or opposing views about history; For instance, who actually was there first and may therefore have some superior rights? These could arise in the course of exchanges between peoples like when they send delegations to the other. Or, it could be any kind of interaction directly occurring with peoples (e.g., businessmen) and influenced by how they treat each other on issues or matters that are taking place in the SCS.

These are the different aspects that may arise from the SCS disputes and it is important for us not to consider everything as simply one big SCS dispute and then involve everything. It could be resolved incrementally, beginning at the lower, smaller levels. For all we know, it might have originated from a simple argument between two fishermen. If we can solve it at that level and prevent the escalation into a full-blown conflict, then it may be a way to resolve these disputes.

Given the different aspects, what are the possible outcomes? Outcomes are determined by the parties and the kind of mechanisms they use. But generally, you could say there is only a limited range of possible outcomes.

One, which nobody wants, is simply for one party to allow the other party to do what they want, while the former just sleeps in its shell and accept that the other party dominates or has power over it. A middle-road would be accommodation and adjustment, where each tries to recognize the other's interests, and give each other a chance to benefit from the resources which are shared. The last outcome is complete compliance with and enforcement of agreed rules, such as International Law. The assumption is that International Law is clear—and specifies who is entitled to what—and that the parties will no longer attempt any kind of adjustments and accommodations.

Now, while the parties involved are trying to arrive at any one of these outcomes, non-parties may also play a role in the dispute. This means external powers like the US, Japan, and Australia. They also have similarly-limited options. The first is to simply not do anything at all. The State may consider itself completely detached from the problem and not be affected by it. (Of course, in a globalized world with interacted relationships, this is going to be difficult.) The second option would be to actively support one side. This ranges from moral to material support and can involve the positions of each one of the countries either exclusively or as a group. It is also possible to support all, in efforts such as peacemaking, where one tries to support the parties' own efforts to achieve a solution.

Another option which a State might consider is intervention in the disputes. Some States want others to intervene on their behalf; other States intervene for their own interests. But this one is always controversial and has the potential of escalating or even complicating the disputes even more.

The last option is about open participation. Who will try to address these disputes, whether alone or as a group or as a whole? And try to do it so that everyone's interest are respected and accommodated somehow. Of course, if you consider the politics between the region and the world, that is also a little bit unlikely given how the various countries have positioned themselves against each other. But the

usefulness of that range is for us to be able to consider the possibilities, and from the possibilities, identify which one may actually be feasible.

Now, in the immediate period, there are priorities that could be addressed, although they are a bit complicated. There are different aspects to the disputes and some of them require urgent solutions more than the others. In my experience, there's this kind of priority.

First, the fisheries because it is an activity of common concern, and if fisheries collapse it can affect the most number of States. Also, fisheries often become the trigger for confrontation that can escalate into a crisis. That's why fisheries have to be addressed first and foremost; solutions have to be thought of immediately. Fisheries could also include the environmental aspect of these disputes.

Second, the militarization and the use of SCS as a military staging ground which has become a military arena between the two great powers. How they interact politically is another area that requires further thought. Unfortunately, the real competitors in the region are China and the US which is outside the region, making it harder for the Southeast Asian States. But they can try to promote a dialogue among these parties involved and help try to resolve this.

The third priority is the petroleum resources. This is more of a practical matter. All nations around the SCS need energy. The smaller SEA nations, in a way, are betting on the SCS, betting on their own EEZ/continental shelf to secure their requirements. While China has other options around the world for its energy needs, the Philippines has it all in the SCS—so far its only promising source of indigenous petroleum. This needs to be addressed and could include not only State-to-State mechanisms but also the private sector, especially for some of the smaller Southeast Asian States. The private sector in the petroleum industry may have a bigger role to play because it's no longer just the States directing oil exploration and development. One must consider the business itself.

Last in this list, although no less important, is shipping. Shipping is a global concern; it is a very complicated industry. There are more nations that are involved in shipping even if they are not maritime States. This is in a sense related to all previous three because ships are used in all of those three previous activities in the SCS. A huge amount of trade passes through the SCS. I don't think anyone, not even among the parties in dispute, , would want shipping trade in the SCS restricted.

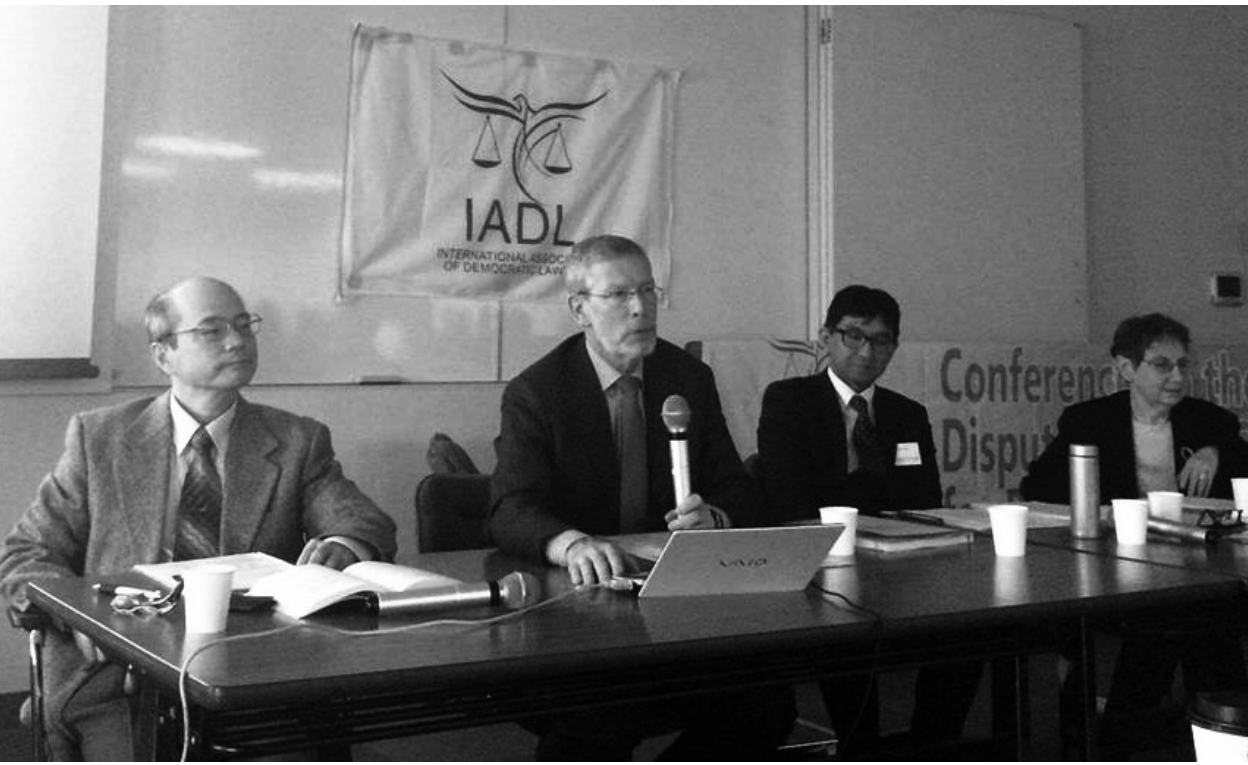
When we consider all these, then the question that must be asked is, "what would be the role of law? And of the "Rule of Law"? Unfortunately, unlike the Lord of the Rings, there is no "one Rule to bind them all" International Law is so complicated. There are many different subjects, topics, specializations and each particular area could be different from the other. Air law would be different from Sea law, Land law, etc. In the absence of a single systematic way of addressing all of these complicated issues, we have to go back to the basics and divide them, cut them into smaller bits and pieces and address them one by one.

Now, the law could play various roles; it doesn't have to be just one. It can possibly prescribe in certain cases, maybe there are clear rules that can be invoked. However, right now because of what's happening in SCS, we can see that China does not abide by this idea for most of the SCS disputes. For now, if the law were to be considered to be represented by the arbitration award, for example, clearly China does not acknowledge it. That means it cannot be prescriptive. The other way of looking at it, is that the law is a way of moderating or guiding behavior; more like a soft source of international law. And this depends on how countries relate to each other first. It is their foreign relations which determine their susceptibility to accepting the application of rules, especially if the rules initially appear to be contrary to their national interest. So here, the law could again play a role, but not the way which it does in a domestic setting. In the domestic setting, "the law is hard, but that is the law," but in the international community, the law is soft.

We could also look at the law as a way to be able to determine likely outcomes. It's not a straight progression from stage one to stage two to stage three, but it might give us an idea what should be the appropriate outcome. Here we are looking at what is an equitable solution. And the law might help describe that equitable solution for us, for all the countries in the SCS. It does not need to tell us exactly how to get to that equitable solution; all the countries try to use everything, all the things that I have mentioned, and try to arrive at that ultimate goal.

This is not easy, this will never be easy. The disputes are so complex and therefore, the solutions will also be similarly complex.

Thank you very much!



SESSION 3:
South China Sea Arbitration and the Entitlement of Islands

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The topic that I will address, 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. 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. 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 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,

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 25th 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 19th 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, 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 gathering 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 and that this task fell, in reality, 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 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 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 been reached on the other provisions. But the underlying problem present from day one of course remains, 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 placed 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"—is not clearly defined—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 rocks 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, 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 25th 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 merits of the 2016 Award to see how the Tribunal 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” that 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 itself in a position where it did not only had to argue its 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 (*t*), 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 fulfils 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 seems to reach its alternative reading of both conditions in order to make sure that certain small island States, which needs 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 cummulative and not an alternative 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 to 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 United 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.

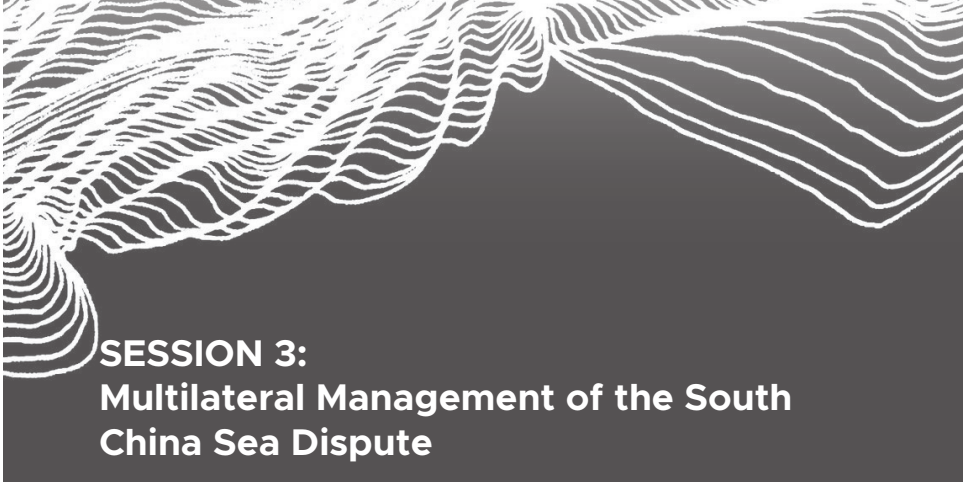
With almost no instance of State practice available and bilateral agreements having limited value—because their treatment of maritime features as Paragraph 2 islands or Paragraph 3 rocks does not have to be based on law—not much guidance was available to States prior to the 2016 Award.

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.



SESSION 3: Multilateral Management of the South China Sea Dispute

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Introduction

The South China Sea[1] 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.[2] 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). 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.

1 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.

2 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].

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.[3] Disputed shoals and reefs were determined to be "within the exclusive economic zone and continental shelf of the Philippines."[4] 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."[5] It is clear that China has no intention to comply with the award, declaring that it 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."[6] 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

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

4 *Id.*, at 474.

5 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

6 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-c07f4f671da4_story.html?utm_term=.28fea2ddbdf5

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.[7]

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.

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7 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

I. Isolation of Territorial Issues from Maritime Issues

The Arbitral Tribunal was successful in the 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."[8] 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."[9] 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; second, to establish that the case had nothing to do with the maritime delimitation.

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8 2015 Award 46, para.135.

9 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.

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."[10] 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 feature claimed by China."[11] 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."[12] 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.[13] China is not

10 2016 Award, 260, para.646.
11 *Id*., at 260, para.647.
12 Christopher C. Joyner, *The Spratly Islands Disputes: What role for Normalizing Relations between China and Taiwan,* 32 New Eng. L. Rev. 819, 825 (1998).
13 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 o Law, Diplomacy, and Geo-politics in the South China Sea*, 13 Int'l J. Mar. & Coastal L. 193, 204 (1998).

exceptional.[14] All 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.[15] 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 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.[16]

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14 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'Rouke, *Maritime Territorial and Exclusive Economic Zone (EEZ) Disputes Involving China: Issues for Congress*, Congressional Research Service Report, R42784 (May 31, 2016).

15 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.

16 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.

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[17] and reaffirmed by the Award on the merits in 2016.[18] 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 the performance of their duties under [UNCLOS]." The regime may be applied to the South China Sea for settlement of the dispute.[19] 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.

Second, 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

17 2015 Award 1, para.3.
18 2016 Award 1, para.3.
19 It is suggested, for instance, by Keyuan Zou, *supra* note 16 at 638.

in the procedures in defiance of the Chinese strong objection to it.[20] The Tribunal was not able to grasp the 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. Second, 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." Second, they must be "connected to another

20 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 visit'." 2016 Award 55, n.67. See also 2016 Award 16, para.42; 2015 Award 23, para.64, and at 73, para.185.

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'."[21]

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:

(a) The term "enclosed sea" shall refer to a small body of inland warters 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.[22]

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

21 Myron H. Nordquist ed., United Nations Convention on the Law of the Sea 1982: A Commentary 348 (1995).

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

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'."[23] 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."[24] 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."[25] 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

23 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).

24 *Id.*, at 552.

25 MYRON H. NORDQUIST, *supra* note 21 at 349.

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 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.[26] 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;

26 China, *supra* note 7, para. 1.

(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."[27] After he classifies three interpretations, the no legal duty interpretation, the broad legal duty interpretation and the limited duty interpretation, he upholds the second 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."[28] 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

27 Linebaugh, *supra* note 23 at 556.
28 Myron H. Nordquist, *supra* note 21 at 365.

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]."[29] 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."[30] 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."[31]

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. 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

29 *Id.*, at 362.
30 Linebaugh, *supra* note 23, at 559.
31 *Id.*

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.[32] 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

32 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).

the region.[33] 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."[34]

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 and continental shelf. It only says that it is "currently under the control of the Taiwan Authority of China."[35] 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.[36]

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

33 See Ronald O'Rourke, *supra* note 14, at 25.
34 *Id.*, at 24.
35 2016 Award 179, para.401.
36 This was suggested in 1998 by Joyner, *supra* note 13, at 222-24.

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."[37] 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 the 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.[38] 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.

Second, 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 "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 military purposes. It is reported on December 15, 2016, that "China appears

37 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

38 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.

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."[39] 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 towards 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.

Third, 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 includes 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.[40] 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

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

40 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/

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 draw some lessons useful for their dispute management.

Conclusion

This short article, 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.

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 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.

CLOSING REMARKS

Jeanne Mirer
President, International Association Of Democratic Lawyers (IADL)

This conference has covered a lot of ground in our search for a peaceful resolution in dispute in South China Sea (SCS). Despite differences in opinion and views on the jurisdiction of the Arbitration Panel which ruled on the Philippine case against China we have had good discussions and shared many ideas.

I tend to agree with Professor Eric Francxs that the ruling may be an opening that makes settlement more possible, instead of less possible. The first slide of our Vietnamese friends, which showed the impact of the ruling is to remove the issue of competing EEZ's around the islands.

The other issue may be solved, that's my personal opinion. But I think what was stated here by all the participants who have talked about the possible bases of the settlement using principles of international law.

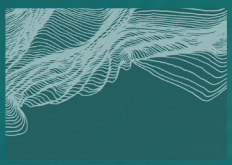
Professor Jay Batongbacal talked about trying to make the South China Sea a zone of peace. He also presented the possibility of developing regional bodies to help coordinate and promote environmental protection and all of the aspects of common use and economic development and growth of all countries in the region.

There are some of the proposals we have talked about and I think we will certainly continue discussions. IADL needs to use its good offices to promote more dialogue and

Therefore, I do think that it is important for us to go through what transpired at the conference and put together a list of the suggestions to share these with all the participants, as well as with our respective governments. From there, let us try to see if there is a basis for uniting the people on the best suggestions for peace.

I will work with the secretariat on this to make sure that it happens. I think these will help focus our attention in the future.

Conference on the South China Sea Dispute
and the Search for Peaceful Resolution



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