

## Part II

# Rule of Law and Maintenance of Maritime Order



## ***Chapter 5***

# **The *South China Sea Arbitration* and the Dispute in the South China Sea**

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### **Introduction**

In the *South China Sea Arbitration*, the Philippines referred the dispute against China to the Arbitral Tribunal constituted in accordance with Annex VII of the United Nations Convention on the Law of the Sea, hereafter referred to as UNCLOS. It was the decision of the Philippines to refer a case against China as a bilateral dispute to the compulsory arbitration although several States are involved in the dispute in the South China Sea. It seems that the Arbitral Awards in this case and the subsequent events reflect the significance and the limits of international compulsory adjudication for purposes of the final settlement of international disputes. The present article will be divided into three parts. In the first part, the historical development of compulsory adjudication in the international community is explained very briefly. In the second, the salient issues of the findings of the Arbitral Tribunal in its Awards of 29 October 2015<sup>1</sup> and 12 July 2016<sup>2</sup> are summed up. The last part discusses the significance and limits of those Arbitral Awards in the post-award process by referring to such processes in the precedents.

## **1. Significance of the Compulsory Procedures in the International Community and the *South China Sea Arbitration***

### **(1) Development of international courts and tribunals as peaceful means to settle international disputes**

International adjudication may be one of the most important third-party dispute settlement means because of the legally binding nature of the decisions. Since the end of the 19th century, the international community has consistently endeavored to facilitate the use of international courts and tribunals to settle international disputes. Initially

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<sup>1</sup> *The South China Sea Arbitration (The Republic of the Philippines v. the People's Republic of China)*, PCA Case 2013-19, Award on Jurisdiction and Admissibility, 29 October 2015.

<sup>2</sup> *The South China Sea Arbitration (The Republic of the Philippines v. the People's Republic of China)*, PCA Case 2013-19, Award on Jurisdiction and Admissibility, 12 July 2016.

those efforts were closely related to the regulation of the right of sovereign States to resort to war and, in light of the prohibition of the threat or use of force under Article 2, paragraph 4, of the Charter of the United Nations, international adjudication has become important for regulating and preventing unilateral forcible activities by sovereign States and the unilateral change of the *status quo* by forcible measures, thus ensuring the rule of law in the international community. The enhancement of compulsory jurisdiction of international courts and tribunals has constituted the principal and essential issue for facilitating and encouraging States to resort to international adjudication.

### **(2) Development of the law of the sea under the auspices of the United Nations**

UNCLOS provides for the comprehensive rules for the law of the sea and contributes both to the clarification of customary international rules and to the establishment of new conventional rules and regimes. It should be noted that the principal feature of the rules and regimes in UNCLOS is the emphasis on international cooperation and due regard for the rights and interests of other States.

### **(3) Mechanism for the peaceful settlement of international disputes under Part XV of UNCLOS**

It is necessary to note that UNCLOS covers a wide variety of rules and regimes. Some of them are the results of sensible compromise or are based on the scientific and technical knowledge and circumstances at the time of the negotiations in the 1970s. Therefore, there are provisions with regard to which of several modes of interpretation exist or remain ambiguities when they are applied to concrete matters in the current circumstances of the international community and that situations may lead to international disputes concerning the interpretation or application of UNCLOS. The drafters expected the disputes in the future and, thus, fully recognized the need to establish an effective dispute settlement mechanism.

The compulsory mechanism provided in Section 2 of Part XV of UNCLOS reflects that idea. In this section, all State Parties are, at least, deemed to accept the compulsory jurisdiction of an arbitral tribunal constituted in accordance with Annex VII while they are also entitled to choose or to express a preference of international courts and tribunals, as provided in Article 287 and to make declaration to exclude the dispute provided in Article 298.

## 2. Salient Issues of the Findings of the Arbitral Tribunal on Its Jurisdiction and Admissibility in the *South China Sea Arbitration*

### (1) Conditions for referring a dispute to the compulsory adjudication under Part XV

In accordance with Articles 286 and 288, there are three conditions for a State Party to refer an international dispute to the compulsory jurisdiction of an international court or tribunal provided by Article 287 (1): first, the existence of a “dispute concerning the interpretation or application of UNCLOS,” second, “no settlement has been reached by recourse to Section 1,” and, third, the limitations and exceptions provided by Section 3 are not applicable to the subject of the dispute.

In the *South China Sea Arbitration*, China raised its objections to the jurisdiction of the Arbitral Tribunal regarding each of these conditions. Moreover, the Arbitral Tribunal *proprio motu* examined the possible objections even though they had not been raised by China. I think that the issues relating to the objections concerning the jurisdiction of the Arbitral Tribunal might contain one of the most important but difficult issues for justifying the unilateral reference of this dispute to the compulsory jurisdiction in accordance with Part XV in the *South China Sea Arbitration*, and I would like to take up the salient issues.

### (2) Dispute concerning the interpretation or application of UNCLOS and a “mixed dispute”

In this case, one of the principal claims submitted by the Philippines was the legality or effect of the “nine-dash line” or the historic rights. As the Arbitral Tribunal noted, China has not clarified the nature of its claims on the basis of the “nine-dash line” or the historic rights.<sup>3</sup> That ambiguity was closely related to the first condition. The dispute may contain both the aspect of the claims to the sovereignty over the maritime features and that of jurisdiction in maritime areas and resources therein, a circumstance that is called a “mixed dispute.”

There have been arguments on whether a “mixed dispute” can be regarded as a dispute concerning the interpretation or application of UNCLOS.<sup>4</sup> The Arbitral Tribunal examined the issue of the jurisdiction on the mixed dispute, for the first time,

<sup>3</sup> *Award of 2015*, *supra* note 1, para. 160.

<sup>4</sup> For Example, I. Buga, “Territorial Sovereignty Issues in Maritime Disputes: A Jurisdictional Dilemma for Law of the Sea Tribunals,” *The International Journal of Marine and Coastal Law*, Vol. 27 (2012), pp. 59-95.

in the *Chagos Marine Protected Area Arbitration*. It found that, because the dispute regarding sovereignty was predominant in two of the submissions by Mauritius, it lacked jurisdiction over them.<sup>5</sup> Fully noting the controversial arguments on the jurisdiction over a “mixed dispute,” the Philippines was very sensible in the formulation of the subject of the dispute to be referred to the Arbitral Tribunal. The Tribunal considered that none of the Philippines’ submissions required an implicit determination of sovereignty and that the Philippines had successfully narrowed the issues in dispute.<sup>6</sup> It further found that the dispute referred by the Philippines was concerned with the existence and extent of the maritime entitlements claimed by China in the South China Sea and should be distinguished from the dispute over maritime boundaries.<sup>7</sup> Thus, the Arbitral Tribunal held that the first condition was satisfied.<sup>8</sup>

### **(3) Freedom of choice of peaceful means to settle an international dispute and the compulsory jurisdiction provided in Part XV, Section 2**

As far as the second condition was concerned, China’s principal argument was that the Parties had “agreed” to settle the dispute by negotiation. Regarding this objection, the applicability of Articles 281 and 282 providing for the prevalence of the peaceful means chosen by the Parties had to be discussed. The Arbitral Tribunal did not examine only the China-ASEAN Declaration on the Conduct of Parties in the South China Sea, hereafter referred to as DOC, and the joint statements prior to and post-date the DOC, which China referred as the bases of its objection. But the Tribunal also took up the dispute settlement clauses in the Treaty of Amity and Cooperation in Southeast Asia and the Convention on Biological Diversity as possible objections. The Tribunal’s finding that the DOC and related statements did not constitute the “agreement” with a legally binding effect between the Parties regarding the settlement of the dispute by negotiation played the principal role in its determination.<sup>9</sup> It also concluded that the Treaty of Amity and CBD did not bar it from exercise its jurisdiction under Articles 281 and 282.<sup>10</sup>

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<sup>5</sup> *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, PCA Case 2011-3, Award of 18 March 2015, paras. 209-212, 229-230, and 323.

<sup>6</sup> *Award of 2015*, *supra* note 1, paras. 153-154.

<sup>7</sup> *Ibid.*, para. 157.

<sup>8</sup> *Ibid.*, para. 178.

<sup>9</sup> *Ibid.*, paras. 212-239, 241-251, and 299-302.

<sup>10</sup> *Ibid.*, paras. 265-269, 281-289, 307-310, and 317-321.

#### (4) Optional exceptions in accordance with Article 298

In 2006, China made a declaration in accordance with Article 298 excluding all categories of disputes provided thereby. Therefore, the Arbitral Tribunal had to examine the effects of this declaration in relation to the case concerned. In its Award of 2015, the Tribunal determined to reserve consideration of its jurisdiction to rule on the Philippines' Submissions Nos. 1, 2, 5, 8, 9, 14, and 15, to the merits phase. Except for Submission No. 15, the Tribunal found that those submissions might be related to the "historic bays or titles" and the overlapping entitlements to the maritime zones provided by Article 298 (1)(a)(i), and that military activities and law-enforcement activities provided by Article 298 (1)(b) and that decisions on these submissions were not exclusively preliminary.<sup>11</sup>

The Arbitral Tribunal finally decided the issues of its jurisdiction in accordance with Article 298 in the Award of 2016. In its consideration of Submissions Nos. 1 and 2, the Tribunal examined China's claim on the basis of the "historic rights" in light of the applicability of the exception of the "historic bays and titles" under Article 298 (1)(a)(i). It found that "China claims rights to the living and non-living resources within the so-called 'nine-dash line', but (apart from the territorial sea generated by any islands) does not consider that those waters form part of its territorial sea or internal waters." The Tribunal then examined the drafting process of the terms "historic titles" in this provision and stated that they were a "reference to claims of sovereignty over maritime areas derived from historical circumstances." Accordingly, it concluded that the "historic rights" claimed by China were broader and less specific than the "historic titles" and that it had jurisdiction to consider Submissions 1 and 2 by the Philippines regarding the compatibility of the "historic rights" and the "nine-dash line" claimed by China with UNCLOS.<sup>12</sup>

With regard to the exclusion of the dispute "concerning sea boundary delimitations" under Article 298 (1)(a)(i), the findings of the Arbitral Tribunal that some of the maritime features concerned were low-tide elevations and that there was no island that was capable of generating an entitlement to exclusive economic zone or continental shelf in the Spratly Islands played a decisive role. As a result of these findings, the Tribunal found that there was no possibility of overlap of maritime entitlements. Accordingly, it concluded that it had jurisdiction to consider Submissions Nos. 5, 8, and 9.<sup>13</sup>

Regarding the exception of the dispute concerning "military activities" in

<sup>11</sup> *Ibid.*, paras. 398, 399, 402, 405, 406, 411, and 412.

<sup>12</sup> *Award of 2016, supra* note 2, paras. 214, and 225-228.

<sup>13</sup> *Ibid.*, paras. 633, 695, and 734.

accordance with Article 298 (1)(b), the Tribunal first examined the nature of China's activities taken up by the Philippines in Submission 11 as amended, Submission 12, and Submission No. 14 (d), which the Philippines was allowed to add after the closure of the oral proceedings. These submissions related to the obligation to protect and preserve the marine environment. The Tribunal noted that China had consistently repeated land reclamation and other activities in order to fulfil civilian purposes and for this reason concluded that it had jurisdiction to consider these submissions.<sup>14</sup>

By contrast, Submissions No. 14 (a) to (c) concerned the aggravation or extension of the dispute through China's activities after the initiation of the proceedings related to China's interaction with the Armed Forces of the Philippines at Second Thomas Shoal. Accordingly, the applicability of Article 298 (i)(b), was decisive in establishing the jurisdiction of the Arbitral Tribunal. The Tribunal stated that the Tribunal noted that there was a "quintessentially military situation" in China's actions in and around Second Thomas Shoal and its interaction with the Philippine military forces stationed there constitute and that those facts fell within the exclusion of "military activities." Accordingly, the Tribunal concluded that it lacked "jurisdiction to consider the Philippines' Submissions No. 14 (a) to (c)."<sup>15</sup>

### **3. Salient Issues of the Findings of the Arbitral Tribunal on the Merits**

The Arbitral Tribunal divided the 15 submissions of the Philippines into the following five groups: First, the "nine-dash line" and China's claims to historic rights in the maritime areas of the South China Sea; second, the legal status of maritime features in the South China Sea; third, Chinese activities in the South China Sea; fourth, aggravation or extension of the dispute between the Parties; and fifth, the future conduct of the Parties. While the Arbitral Tribunal did not find it necessary to respond to the fifth one, it admitted almost all of the submissions of the Philippines. Here, I will take up salient findings that may be closely related to the dispute in the South China Sea as a whole.

#### **(1) Effect of China's claims on the basis of "nine-dash line" or historic rights**

The first issue is the decision of the Arbitral Tribunal on the effect of China's claims on the basis of the "nine-dash line" or historic rights. It found that "China's claims to historic rights or other sovereign rights or jurisdiction, with respect to the maritime areas of the

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<sup>14</sup> *Ibid.*, paras. 935-938 and 1027-1028.

<sup>15</sup> *Ibid.*, paras. 1159-1162.



South China Sea encompassed by the relevant part of the ‘nine-dash line’ are contrary to the Convention and without lawful effect to the extent that they exceed the geographic and substantive limits of China’s maritime entitlements under the Convention.” The Tribunal further declared, “the Convention superseded any historic rights, or other sovereign rights or jurisdiction, in excess of the limits imposed therein.”<sup>16</sup>

## (2) Legal status of the maritime features in the Spratly Islands

Regarding the legal status of the maritime features in the South China Sea, the Tribunal found that Scarborough Shoal, Gaven Reef (North), McKennan Reef, Johnson Reef, Cuarteron Reef, and Fiery Cross Reef were high-tide features under Article 121, and Subi Reef, Gaven Reef (South), Hughes Reef, Mischief Reef, and Second Thomas Shoal are low-tide elevations within the meaning of Article 13 of the Convention. It should be noted that the Arbitral Tribunal determined the legal status of those maritime features by examining their natural and original conditions. It pointed out that “[m]any of features in the South China Sea have been subjected to substantial human modifications,” and that “[i]n some cases, it would likely no longer be possible to directly observe the original status of the feature.” Thus, it stated that it would “reach its decision on the basis of the best available evidence of the *previous* status of what are now heavily modified coral reefs.”<sup>17</sup>

The Tribunal found that all of the high-tide features taken up by the Philippines were rocks within the meaning of Article 121 (3) of the Convention. The Tribunal further declared that there was no other high-tide feature in the Spratly Islands that generated the entitlements to the exclusive economic zone and continental shelf.<sup>18</sup> It should be noted that the Tribunal examined the legal status of the maritime features in the Spratly Islands, which the Philippines did not mention in its submissions.

## (3) Obligation to respect the sovereign rights of the Philippines in its exclusive economic zone

With regard to certain conduct undertaken by China in the South China Sea, the Arbitral Tribunal found that China had breached, through its conduct, the obligations to respect the sovereign rights of the Philippines in the exclusive economic zone of the Philippines.<sup>19</sup>

<sup>16</sup> *Ibid.*, para. 277-278.

<sup>17</sup> *Ibid.*, para. 306.

<sup>18</sup> *Ibid.*, paras. B-(3), (4), (5), (6), and (7) of the *dispositif*.

<sup>19</sup> *Ibid.*, paras. B-(8), (9), (10), and (11) of the *dispositif*.

#### **(4) Obligation to protect and preserve the marine environment**

The Arbitral Tribunal found that China had breached its obligations to protect and preserve the marine environment based on the following two reasons: First, China was aware of, tolerated, protected and did not prevent fishermen from Chinese flagged vessels from the fishing activities, harvesting of endangered species on a significant scale, and harvesting giant clams in a manner that was severely destructive of the coral reef ecosystem;<sup>20</sup> and, second, China's land reclamation and construction of artificial islands, installations, and structures at the maritime features were contrary to several provisions providing for the obligation to protect and preserve the marine environment.<sup>21</sup>

#### **(5) Obligation not to aggravate and extend the dispute during the pendency of the proceedings**

The Arbitral Tribunal noted that China's intensified construction of artificial islands and other activities on seven features in the Spratly Islands during the course of the proceedings had unequivocally aggravated the dispute between the Parties and particularly noted that China undertook those activities while the arbitral proceedings were ongoing.<sup>22</sup>

#### **(6) Salient issues of the findings of the Arbitral Tribunal**

The Philippines did not request the Arbitral Tribunal to decide the form of the reparation as consequences of the findings of the wrongfulness of the conduct of China. However, the issues determined and declared by the Tribunal may have significant consequences in the dispute in the South China Sea.

First, China's claims based on the "nine-dash line" and the historic rights have been clarified through the Awards of 2015 and 2016. Moreover, the decision that those claims were not compatible with UNCLOS will be significant.

Second, in the examination of the legal status of the maritime features, the Tribunal considered their original conditions by considering the best available evidence. This confirms that the actual human modification cannot change the legal status of a maritime feature or enhance the claims for sovereignty or entitlements over maritime areas.

Third, the Arbitral Tribunal found that various activities undertaken by China in the exclusive economic zone of the Philippines constituted a breach of the relevant provisions

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<sup>20</sup> *Ibid.*, para. B-(12) of the *dispositif*.

<sup>21</sup> *Ibid.*, para. B-(13) of the *dispositif*.

<sup>22</sup> *Ibid.*, para. 1177-1178 and 1181.

of UNCLOS and of relating international convention.<sup>23</sup> That declaration is significant because China is obliged to refrain from pursuing or continuing the conduct that was considered to be a breach.

Fourth, China violated the obligation under UNCLOS to preserve and protect the marine environment by its conduct. It is particularly important that the Tribunal found that the works of construction, which have been intensified since the institution of arbitral proceedings, violated that obligation.

Fifth, the decision of the Tribunal regarding the breach by China of the obligation not to aggravate and extend the dispute after the initiation of the arbitral proceedings, in accordance not only with UNCLOS but also with general international law, reflects the importance of cooperation to the arbitral proceedings on the side of the Respondent in the compulsory dispute settlement mechanism. It should be noted that the Tribunal criticized China's attitude to these arbitral proceedings and found that Article 300 concerning the good faith and prohibition of the abuse of rights was also breached.<sup>24</sup>

Finally, it is necessary to add two particular points regarding the basic approach of the Tribunal to the proceedings.

First, the findings regarding the legal status of the maritime features seem to reflect the serious concerns of the Arbitral Tribunal with the grave situation of the dispute in the South China Sea as well as its willingness and sense of responsibility to contribute to the settlement of the dispute through its Award. If the Tribunal had found that in the Spratly Islands there was any high-tide feature that could satisfy the conditions of an island generating the entitlements to an exclusive economic zone and continental shelf in accordance with Article 121 (1), its jurisdiction would have been limited.

Second, in examining the breach of the obligation not to aggravate or extend the dispute, the Arbitral Tribunal permitted the Philippines to modify its Submissions after the closure of the oral proceedings on the merits and examined the activities undertaken by China after the initiation of the arbitral proceedings. It is the general rule for international

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<sup>23</sup> Among Submissions 8 through 13, regarding Submission No. 13 concerning the operation of law enforcement vessels in a dangerous manner, the Arbitral Tribunal took the view that as Article 94 of UNCLOS incorporated the COLREGS into it, "the violation of the COLREGS, as 'generally accepted international regulations' concerning measures necessary to ensure maritime safety, constitutes a violation of UNCLOS itself," *ibid.*, para. 1083. It found that "China has, by virtue of the conduct of Chinese law enforcement vessels in the vicinity of Scarborough Shoal, created serious risk of collision and danger to Philippines vessels and personnel" and that China had violated the rules of the COLREGS and, as consequence, to Article 94 of UNCLOS, *ibid.*, para. 1109. The Tribunal examined the other submission by applying relevant provisions of UNCLOS.

<sup>24</sup> *Ibid.*, para. 1179 and B-(16) of the *dispositif*.

courts and tribunals to examine the matters by the initiation of the proceedings. Therefore, the approach of the Arbitral Tribunal, in this case, is rather special. It can be considered that that may reflect the serious concerns of the Tribunal about the acceleration of China's activities after the commencement of the arbitral proceedings.

#### **4. Responses of the Parties to the *South China Sea Arbitration* and Other States and the Significance of the Post-Award Process**

##### **(1) Responses of the Parties and other States to the Award of 2016**

Immediately after the Award of 2016, China made a statement that it refused it. The Philippines basically welcomed the Award, but it has not so strongly insisted on the immediate compliance with the Award by China. As far as other States are concerned, the responses of the member States of ASEAN varied significantly.<sup>25</sup> Thus, ASEAN did not adopt a unified statement in the meetings of the Ministers of Foreign Affairs right after the Award.<sup>26</sup> It should be noted that Japan, Australia, and the United States explicitly supported the Award with a legally binding nature and expressed their wishes for its contribution to the peaceful settlement of the dispute in the South China Sea.<sup>27</sup> In this section, I would like to discuss how to explore the direction to go and seek for the ways to ensure the safety and security in the South China Sea by referring to the precedents of the post-judgment/award process.

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<sup>25</sup> As far as the States that have the claims in the South China Sea, Vietnam: "Vietnam welcomes Hague ruling," *Viet Nam News*, 12 July 2016 (<http://vietnamnews.vn/politics-laws/299460/vn-welcomes-hague-ruling.html>), Indonesia: L. Yosephine, "Indonesia urges parties to respect laws following South China Sea ruling" (<http://www.thejakartapost.com/seasia/2016/07/12/indonesia-urges-parties-to-respect-laws-following-south-china-sea-ruling.html>), Malaysia: "Malaysia, Singapore, Indonesia react to S. China Sea ruling," *ABS-CBN News*, 13 July 2016 (<http://news.abs-cbn.com/overseas/07/13/16/malaysia-singapore-indonesia-react-to-s-china-sea-ruling>). Singapore does not have the claims but made a statement: "Singapore urges respect for court ruling on South China Sea," 12 July 2016 (<http://www.todayonline.com/singapore/singapore-south-china-sea-ruling-reaction>).

<sup>26</sup> <http://asean.org/sstorage/2016/07/Joint-Statement-on-the-full-and-effective-implementation-of-the-DOC-FINAL.pdf>, lastly visited on 25 June 2017.

<sup>27</sup> Japan: ([http://www.mofa.go.jp/mofa/press/release/press4e\\_001204.html](http://www.mofa.go.jp/mofa/press/release/press4e_001204.html)), Australia: "Australia supports peaceful dispute resolution in the South China Sea," Media release, 12 July 2016 ([http://foreignminister.gov.au/release/Pages/2016/jb\\_mr\\_160712a.aspx](http://foreignminister.gov.au/release/Pages/2016/jb_mr_160712a.aspx)), and USA: S. Hunt, "South China Sea Court rules in favor of Philippines over China," (<http://edition.cnn.com/2016/07/12/asia/china-philippines-south-china-sea/index.html>).

## (2) Effects and Implications of the Awards

Article 296 of UNCLOS provides for the finality and binding effect of the decisions of international courts and tribunals under Part XV, and Article 11 of Annex VII also provides for the finality of the award. In accordance with those provisions, the Award of 2016, as such, is binding between the Philippines and China regarding the present case regardless of China's reaction and final. In a legal sense, China's refusal of the Award never affects the legally binding nature of the Award.

In the *Arctic Sunrise* case, Russian Federation did not participate in the proceedings of the International Tribunal for the Law of the Sea, hereafter referred to as the ITLOS, for provisional measures, and the arbitration constituted in accordance with Annex VII. In the Award of 2015, the Arbitral Tribunal found that "by failing to comply with Paragraphs (1) and (2) of the *dispositif* of the ITLOS Order, Russia breached its obligations to the Netherlands under Articles 290 (6) and 296 (1) of the Convention."<sup>28</sup> According to the Award, it can be stated that non-compliance with decisions of an international court or tribunal constitutes an international wrongful act.

## (3) Lack of the mechanism to ensure the compliance with decisions of international courts and tribunals

Despite the finality and binding nature of the decisions of an international court or tribunal, their compliance depends on the willingness of the Parties, in particular, the Party whose conduct is found to be wrongful in the award because of the lack of an international mechanism to ensure the compliance with decisions of international courts and tribunals in the international community.

## (4) Effectiveness of the decisions of international courts and tribunals

### (i) Willingness of the Parties to cooperate to reach the final settlement of their dispute

It is necessary to note that the decisions of international courts and tribunals have been complied with in good faith in most precedents despite the lack of the mechanism to ensure the compliance with those decisions. The principal reason may be found in the special feature of the international community, in which the honour and reputation play an important role. The non-compliance with the decisions of an international court or tribunal affects the international reputation of the State rejecting that compliance. As the non-compliance with a decision constitutes the breach of an international obligation, it is

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<sup>28</sup> *Arctic Sunrise*, PCA Case No 2014-02, Award of 14 August 2015, para. 360.

not a good idea for a sovereign State to continue such a breach. Although it does not bring an immediate result, it will affect the international relations of that State for a long time.

I hereby take up some precedents in which the dispute was successfully settled through the post-decision negotiations.

It is important to note that the Parties do not have to comply strictly with the *dispositif* of the judgment or award when they pursue the negotiation to comply with it. In the *Jan Mayen* case,<sup>29</sup> after the Judgment of 14 June 1993, Denmark and Norway concluded an agreement to settle the dispute regarding the delimitation between Greenland and Jan Mayen in 1995 and in this Agreement the Parties implemented the terms of the Judgment of the ICJ with some minor adjustments to the boundary.<sup>30</sup> On 11 November 1997, Denmark and Iceland, Denmark and Norway, and Iceland and Norway respectively concluded bilateral agreements on the delimitation of the continental shelf and fishery zones.<sup>31</sup> These are the precedents in which the Parties, in appropriate cases, with third States, pursued negotiations on the basis of the basic elements of the Judgment and successfully and comprehensively settled the dispute.

It is also noted that there are various precedents in which initiation of adjudicative proceedings led to the final settlement of the dispute. Here, I would like to cite three cases which were referred to the arbitral tribunal constituted in accordance with Annex VII of UNCLOS. In the *Southern Bluefin Tuna Arbitration*, the Arbitral Tribunal concluded that it lacked the jurisdiction to rule on the merits of the dispute in its Award of 4 August 2000.<sup>32</sup> In that Award, the Tribunal also recommend the Parties to resume the negotiations to reach the settlement of the dispute.<sup>33</sup> After the Award, the Parties pursued negotiation and the dispute was finally settled.<sup>34</sup> It is also worthwhile noting that the arbitral proceedings in this case have contributed to the expansion and enhancement of

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<sup>29</sup> *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, p. 38.

<sup>30</sup> C. Shulte, *op. cit.*, p. 223 and G.O. Elferink, "Bilateral agreements on the Delimitation of the Continental Shelf and Fishery Zones," 13 *The Journal of Marine and Coastal Law* 607, p. 610.

<sup>31</sup> *Ibid.*, p. 607.

<sup>32</sup> *Southern Bluefin Tuna Cases (Australia v. Japan and New Zealand v. Japan), Award, 4 August 2000, RIAA*, Vol. 23 (2006), p. 48, para. 72.

<sup>33</sup> *Ibid.*, pp. 47-48, paras. 67-71.

<sup>34</sup> M. Kawano, "L'affaire du thon à nageoire bleue et les chevauchements de juridictions internationales," 49 *Annuaire Français du droit international*, Vol. 49 (2003), p. 530.

the Commission for the Conservation of Southern Bluefin Tuna.<sup>35</sup>

There are other cases in which the Order prescribing the provisional measures of the ITLOS in accordance with Article 290, paragraph 5, led to the final settlement of the dispute. For example, in the *Land Reclamation Arbitration*, the Parties reached the agreement for the settlement of their dispute as a result of their negotiation in accordance with the Order prescribing the provisional measures of 8 October 2003. The Arbitral Tribunal rendered the Award on Agreed Terms on 1 September 2005 and the proceedings were terminated.<sup>36</sup>

In the *“ARA Libertad” Arbitration*, Ghana complied with the Order prescribing the provisional measures of 15 December 2012. The Supreme Court of Ghana delivered a Judgment on 20 June 2013 where it set out the Ghanaian law with regard to the arrest of warships and which upholds the customary international law position on the immunity of warships. The Parties agreed that this, and other measures taken by Ghana, “constitute sufficient satisfaction to discharge any injury occasioned by the injunction measure over the ARA Libertad.” In response to those developments, the Arbitral Tribunal issued a Termination Order on 11 November 2013, which records that the proceedings in this arbitration were terminated.<sup>37</sup>

(ii) Assistance in the post-judgment/award process by international organization(s) and/or third State(s)

There are several cases in which international organization(s) and/or third State(s) have contributed to facilitating and assisting the negotiations between the Parties in the post-judgment process. Particularly successful examples can be seen in three cases of territorial or maritime disputes in the West African region.

In the *Frontier Dispute* case,<sup>38</sup> the Parties referred the dispute by their Special Agreement, in which they did not only raised the question of what their frontier was but

<sup>35</sup> The Republic of Korea, Indonesia, and South Africa joined the Commission for the Conservation of Southern Bluefin Tuna. The Fishing Entity of Taiwan and EU respectively became a Member of the Extended Commission. The Philippines was accepted as a Cooperating Non-Member. (<https://www.ccsbt.org/en/content.orgins-convention> (finally accessed on 5 July 2017)).

<sup>36</sup> *Case concerning Land Reclamation by Singapore in and around the Straits of Johor, Award on Agreed Terms, 1 September 2005, RIAA*, Vol. 27, pp. 136-145.

<sup>37</sup> Brief summary of the proceedings can be found in *the ARA Libertad (Argentina v. Ghana)*, PCA Press Release, 13 November 2013. All the materials relating to this case are available at <https://www.pccases.com/web/view/65> (Lastly accessed on 30 June 2017).

<sup>38</sup> *Frontier Dispute (Burkina Faso/Mali)*, Judgment of 1986, I.C.J. Reports 1986, p. 554.

also requested that the Chamber of the ICJ to nominate in its Judgment three experts.<sup>39</sup> The Organization of African Unity (OAU) helped the Parties to refer the dispute to the ICJ because their frontier dispute had caused an armed conflict which broke out on 25 December 1985.<sup>40</sup> Following the Judgment of 10 January 1986, the Chamber nominated the experts in its Order of 9 April 1987.<sup>41</sup> The Parties took advantage of the advice of the experts nominated and received the assistance from the United Nations and OAU and reached the final settlement of their dispute.

In the *Territorial Dispute* case,<sup>42</sup> the UN and OAU had paid close attention to the developments related to the settlement of the dispute between these Parties even before the dispute was referred to the ICJ.<sup>43</sup> After the Judgment of 3 February 1994, the Parties, on 4 April 1994, concluded the agreement relating to the implementation of the 3 February 1994 Judgment of the ICJ. Following the conclusion of this agreement, the Security Council of the United Nations adopted the resolution to establish the United Nations Aozou Strip Observer Group and to authorize a deployment for a single period of up to 40 days, starting from the date of the resolution, of nine United Nations observers and six support staff to observe the implementation of the agreement of 4 April 1994.<sup>44</sup> On 6 June 1994, Libya and Chad issued a joint declaration with regard to the Libyan withdrawal from the region concerned, and the dispute was finally settled.<sup>45</sup>

In the *Land and Maritime Boundary between Cameroon and Nigeria* case,<sup>46</sup> the efforts of the Secretary-General of the UN to support the Parties in reaching a final settlement of their dispute were made even before the Judgment of 10 October 2002. After that Judgment, the Parties published a joint communiqué that asked the Secretary-General to

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<sup>39</sup> Special Agreement notified to the ICJ on 20 October 1983.

<sup>40</sup> C. Shulte, *Compliance with Decisions of the International Court of Justice* (2007), pp. 183-184.

<sup>41</sup> *Frontier Dispute (Burkina Faso/Mali), Nomination of Experts, Order of 9 April 1987, I.C.J. Reports 1987*, p. 7.

<sup>42</sup> *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 6.

<sup>43</sup> *Ibid.*, pp. 36-37, paras. 69-70.

<sup>44</sup> In response to the agreement between the Parties, the Secretary-General and the Security Council took the measures to ensure the implementation of that agreement, in particular, the withdrawal by Libya from the area in question, S/RES 907 (1994), S/RES/910 (1994), and S/RES/915 (1994).

<sup>45</sup> Joint Declaration by the Great Socialist People's Libyan Arab Jamahiriya and the Republic of Chad on the withdrawal of the Libya administration and forces from the Anzou Strip, Annex I to the Report of the UN Secretary-General on the United Nations Anzou Strip Observer Group, 6 June 1994, UN doc. S/1994/672, p. 4.

<sup>46</sup> *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment of 2002, I.C.J. Reports 2002*, p. 303.



establish the Mixed Commission of Cameroon, Nigeria, and the United Nations.<sup>47</sup> As the fruits of the works of that Commission, two agreements were signed to settle the dispute. The Commission also supported and encouraged the efforts to implement confidence measures and strengthen cross-border co-operation.<sup>48</sup> In that process, financial support from other States played a significant role as well.

The important role of international cooperation and assistance can be seen in the cases in which the wrongfulness of the conduct of Parties was argued. For example, in the *Obligation to Prosecute or Extradite* case,<sup>49</sup> after the Judgment of 20 July 2012, the extraordinary African Chambers were established in Senegal's internal legal system via international assistance.<sup>50</sup> The Chamber found that Mr. Habré, the former President of Chad, was guilty for the war crimes, crimes against humanity, and torture on 30 May 2016, and his appeal was dismissed except for a conviction of rape, on 27 April 2017.<sup>51</sup>

### (5) Disputes in Asia and international adjudication

When we see the precedents in which decisions of international courts and tribunals effectively and successfully contributed to the final settlement of the international dispute, the special circumstances in the region and willingness of the Parties to seek for the final settlement played a pivotal role.

As far as disputes in Asia are concerned, it should be noted that the respect for sovereignty is emphasized in this region. There are comparatively fewer disputes which were referred to international adjudication and the Parties to a dispute tend to prefer settling it by negotiations. Therefore, while there are cases in which the Parties voluntarily

<sup>47</sup> With regard to the Mixed Commission, please see M.M.M. Salah, "La commission mixte Cameroun/Nigeria, un mécanisme original de règlement des différends interétatiques," 51 *Annuaire français de droit international* 162 (2005).

<sup>48</sup> United Nations Office for West Africa, Cameroon-Nigeria Mixed Commission (<http://www.un.org/unowa/cnmc>, last visited on 8 August 2008).

<sup>49</sup> *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, *I.C.J. Reports 2012*, p. 422.

<sup>50</sup> Basic features of the Extraordinary African Chambers are explained in S. Williams, "The Extraordinary African Chambers in the Senegalese Courts," 11 *Journal of International Criminal Justice* 1139 (2013), pp. 1139-1160.

<sup>51</sup> "Hisséne Habré, Ex-President of Chad, Is Convicted of War Crimes," 30 May 2016, *New York Times*, <https://www.nytimes.com/2016/05/31/world/africa/hissene-habre-leader-chad-war-crimes.html>, lastly visited on 25 June 2017, "Hisséne Habré, Ex-President of Chad, Loses War Crimes Appeal," 27 April 2017, *New York Times*, <https://www.nytimes.com/2017/04/27/world/africa/court-habre-chad.html>, lastly visited on 25 June 2017, and "Court Rejects Former Chad President's Appeal," 27 April 2017, *Voice of Africa News*, <https://www.voanews.com/a/senegal-habre/3827780.html>, lastly visited on 25 June 2017.

accepted a Judgment or Award,<sup>52</sup> in other cases, the dispute has not been settled even after a Judgment or Award.<sup>53</sup> In this region, it is necessary to consider the effective ways to take advantage of international adjudication in the process for the final settlement of international disputes.

## Concluding Remarks

As I have stated at the beginning of my presentation, it is the particular feature of the dispute in the South China Sea that States have concerned with it on account of different interests. While there are some States that have claims of the sovereignty over maritime features and for the entitlements and jurisdiction to maritime areas, there are other States that have an interest based on the safety and security of the region. However, irrespective of those different interests, it may be the common interests of all of the States to ensure the rule of law in the region. It is important for them to consider how to establish a mechanism to protect those common interests. I hope that the Awards in the *South China Sea Arbitration* have provided the basis for negotiations to this end. In that sense, I welcome the news that the fishermen of the Philippines have been allowed to undertake fishing activities around the Scarborough Shoal<sup>54</sup> and that the ASEAN Member States and China have basically reached the agreement of the basic draft of the Code of Conduct

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<sup>52</sup> The Parties voluntarily accepted the Judgment or the Award in the *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, ITLOS Reports 2012, p. 4, and the *Bay of Bengal Maritime Boundary Arbitration*, Award of 7 July 2014.

<sup>53</sup> In the *Temple of Preah Vihear* case, Cambodia requested the interpretation of the Judgment of 1962 almost fifty years later, *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand)*, Judgment, I.C.J. Reports 2013, p. 281. In the *Pulau Ligitan and Pulau Sipadan* case, the Parties accepted the Judgment as such, but the dispute concerning the delimitation of the maritime area around those two islands has not been settled yet, *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, I.C.J. Reports 2002, p. 625. In the *Pedra Branca/Pulau Batu Puteh* case, the Parties accepted the Judgment and established the mechanism for cooperation between the Parties. However, Malaysia decided to request the revision of the Judgment in 2017, *Application for revision of the Judgment of 23 May 2008 in the Case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore) (Malaysia v. Singapore)*, 2 February 2017.

<sup>54</sup> C. Woody, "A most welcome development' in the South China Sea may not be all that it seems," *Business Insider*, 1 November 2016, <http://www.businessinsider.com/china-philippines-relations-scarborough-shoal-fishing-access-2016-11>, and R. Paddock, "Chinese Vessels Leave Disputed Fishing Grounds in South China Sea," *The New York Times*, 28 October 2016, <http://www.nytimes.com/2016/10/29/world/asia/south-china-sea-scarborough-shoal.html>, lastly visited on 25 June 2017.

in the South China Sea.<sup>55</sup> At the same time, it is necessary to note that the contents of the draft have not been published and its contents have not been clarified yet. The international community should sensibly follow the process of further negotiation. The post-award process of the *South China Sea Arbitration* has only just begun.

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<sup>55</sup> L. Zhou, "China and Asean agree to draft code of conduct in South China Sea," *CNBC*, 18 May 2017, <http://www.cnbc.com/2017/05/18/china-and-asean-agree-to-draft-code-of-conduct-in-south-china-sea.html>, and Panda, "China, ASEAN Come to Agreement on a Framework South China Sea Code of Conduct," *The Diplomat*, 19 May 2017, <http://thediplomat.com/2017/05/china-asean-come-to-agreement-on-a-framework-south-china-sea-code-of-conduct>, and t-framework-for-code-of-conduct.

