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**SIGNIFICANCE OF THE PERMANENT COURT OF ARBITRATION
JUDGMENT OF 12 JULY 2016 IN THE SOUTH CHINA SEA
CASE NO 2013–19 TO SELECTED ISSUES OF INTERNATIONAL
LAW OF THE SEA**

Summary

South China Sea Arbitration case No 2013–19 was an arbitration case brought by the Philippines against China at the Permanent Court of Arbitration. As China did not accept the arbitration initiated by the Philippines, what significance can bear this PCA's judgment? The 501-pages-long award on such an important matter as adjudicated thereof contains a lot of new insights on international law of the Sea and related fields. In this case note, we highlight some of the most interesting legal issues addressed by the Court. First, we outline international legal norms applicable to each question. Then, we present how the Court interpreted them and applied to given circumstances of the case. After presenting final holdings on each of selected issues, we refer to opinions of legal scholars and jurists to indicate, how reasoning adopted by the Court may affect application of international law in similar cases.

Keywords: the international law of the Sea, the Permanent Court of Arbitration, 'military activities'

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Introduction

In its judgment of 12 July 2016 in the South China Sea case No 2013–19,¹ the Permanent Court of Arbitration ('PCA' or 'Court') not only assessed claims and activities of China and the Philippines in the South China Sea, but also explained, how international law of the Sea addresses certain conflict-producing aspects of relations between coastal States. While the Court unanimously upheld vast majority of the Philippines' claims,² a case involving 501-pages-long judgment cannot be that simple.³ Thus, it might be interesting to take a closer look at certain legal issues addressed in the judgment and find out whether international law really gained clarity.

The legal issues analysed in this case note are as follows: what is encompassed by 'military activities', 'law enforcement activities' and 'historic titles' exceptions to compulsory jurisdiction, set in Art. 286–296 of United Nations Convention on the Law of the Sea (1982) (UNCLOS)? What are the legal implications of constructing artificial islands, installations and structures on maritime entitlements of States? What characteristics must be met by an area in order to generate entitlements to maritime zones? What are the State's obligations under Art. 192 and 194(5) of UNCLOS with respect to protection and preservation of marine environment? What is the scope of duty to 'abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given' and not to 'aggravate or extend the dispute'?⁴

The abovementioned issues are analysed separately. We start each section from illustrating applicable norms of international law. Then, we present reasoning adopted by the Permanent Court of Arbitration and the Court's holding. Finally, we assess significance of the judgment at hand to resolution of disputes concerning similar issues.

¹ The Republic of The Philippines v. The People's Republic of China, PCA's Judgment of 12 July 2016 Case No 2013–19, <http://www.pcacases.com/pcadocs/PH-CN%20-%2020160712%20-%20Award.pdf> (*Philippines v China*). For history of the proceedings and much more, see the Debate Map: Disputes in the South and East China Seas http://opil.ouplaw.com/page/222/debate-map-disputes-in-the-south-and-east-china-seas#III._Philippines-China_UNCLOS_Arbitration.

² *Philippines v China* (n 2), para 1203.

³ And it cannot be simple not only from legal perspective. See D. Cheng, *South China Sea After the Tribunal Ruling: Where Do We Go From Here?* (Heritage Foundation, 20 July 2016), <http://www.heritage.org/research/commentary/2016/7/south-china-sea-after-the-tribunal-ruling>.

⁴ *Philippines v China* (n 2), para 1173.

What is encompassed by ‘military activities’, ‘law enforcement activities’ and ‘historic titles’ exceptions to compulsory jurisdiction

The legal basis for ‘military activities’, ‘law enforcement activities’ and ‘historic titles’ exceptions to compulsory jurisdiction under UNCLOS, are provided in its Art. 298(1)(a) and (b). In order to trigger any of them, a State must file a declaration in writing.⁵ Neither of the above terms used to describe exceptions is exhaustively defined in UNCLOS. The ‘historic titles’ exception is subject only to procedural requirements. The ‘military activities’ exception is only described as ‘including military activities by government vessels and aircraft engaged in non-commercial service’⁶. The ‘law enforcement activities’ exception is confined to ‘the exercise of sovereign rights or jurisdiction excluded from jurisdiction of a court or tribunal under article 297, paragraph 2 or 3’⁷, which refer to law enforcement activities over marine scientific research and fisheries within own exclusive economic zone.

With respect to the applicability of ‘military activities’ exception, the Court noted that in light of Art. 298(1)(b), a relevant question is ‘whether the dispute itself concerns military activities, rather than whether a party has employed its military in some manner in relation to the dispute’.⁸ While this statement was relevant for assessing whether standoff between Chinese and Philippine vessels at Second Thomas Shoal fell within this exception,⁹ the Court did not formulate a test relevant for assessing whether works on dredging, artificial island-building, and construction activities were military activities. The Court only posed a question whether such activities were military ‘in nature’.¹⁰

Regarding the ‘military activities’ exception to compulsory jurisdiction, the Court held that ‘the stand-off between Philippine marines on Second Thomas Shoal and Chinese naval and law enforcement vessels constituted military activities’¹¹ and concluded that it ‘lacked jurisdiction to consider the Philippines’

⁵ On 25 August 2006, China made such declaration, rendering all exceptions applicable. See https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#15 (accessed 30 August 2016).

⁶ UNCLOS, art. 298(1)(b).

⁷ *Ibidem*.

⁸ *Philippines v China* (n 2), para 1158.

⁹ *Ibidem*, paras 1158–1162.

¹⁰ *Ibidem*, paras 935 and 1027.

¹¹ *Philippines v China* (n 2), paras 1161–1162.

Submission No. 14(a) to (c)'. At the same time, the Court held that would not find Chinese works on 'dredging, artificial island-building, and construction activities' at 7 reefs to be 'military in nature', when China 'repeatedly affirmed position that civilian use was its primary (if not the only) motivation'.¹²

As to 'law enforcement activities' exception, the Court stated that it is applicable to disputes concerning certain law enforcement activities in own exclusive economic zone and 'does not apply to incidents in a territorial sea'.¹³ Nevertheless, if the status of an area in which the activities took place was unclear, first it was necessary to determine disputed entitlements to exclusive economic zone.¹⁴

Regarding the 'law enforcement activities' exception to compulsory jurisdiction, the Court held that as the exception 'does not apply to incidents in a territorial sea', it 'could not be relevant to incidents at Scarborough Shoal'.¹⁵

With respect to the 'historic titles' exception, the Court thoroughly analysed historic understanding of this term,¹⁶ and found that there is a distinction between 'historic rights' and 'historic title'. 'Historic rights may include sovereignty, but may equally include more limited rights, such as fishing rights or rights of access, that fall well short of a claim of sovereignty'.¹⁷ "'Historic title', in contrast, is used specifically to refer to historic sovereignty to land or maritime areas".¹⁸ 'This accords with the only other direct usage of the term, in Article 15 of the Convention, where historical sovereignty would understandably bear on the delimitation of the territorial sea'.¹⁹ Other 'historic rights', are not mentioned in UNCLOS, and the Court found 'nothing to suggest' that Art. 298(1)(a)(i) 'was intended to also exclude jurisdiction over a broad and unspecified category of possible claims to historic rights falling short of sovereignty'.²⁰ UNCLOS does not include provisions 'preserving or protecting historic rights

¹² *Ibidem*, paras 938, 1028 and 1164.

¹³ *Ibidem*, 929.

¹⁴ *Ibidem*, 930.

¹⁵ *Ibidem*, 929.

¹⁶ *Philippines v China* (n 2), 217–229.

¹⁷ *Ibidem*, 225.

¹⁸ *Ibidem*.

¹⁹ *Ibidem*, 226.

²⁰ *Ibidem*. See also S. Talmon, *The South China Sea Arbitration: Observations on the Award on Jurisdiction and Admissibility*, "Chinese Journal of International Law" 2016, Vol. 15(2), 309.

that are at variance' with it, thus superseding 'earlier rights and agreements to the extent of any incompatibility'.²¹

As to the 'historic titles' exception to compulsory jurisdiction, the Court held that as it applies only to historic sovereignty to land or maritime areas, China's claims in the South China Sea do not include claim to such title, 'but rather a constellation of historic rights short of title'.²² Furthermore, "the extent of the rights asserted within the 'nine-dash line' only became clear with China's Notes Verbales of May 2009". 'Since that date, China's claims have been clearly objected to by other States'. In the Court's view, 'there was no acquiescence'.²³

As to what was encompassed by 'military activities' exception, one might argue that the Court left uncertainty as to whether dredging, artificial island-building, and construction activities might ever fall within the scope of 'military activities' exception e.g. if performed as military in nature. By basing solely on China's position that these works primarily (if not only) had civilian purposes,²⁴ it possibly contradicted its own statement that exception is applicable when the dispute concerns military activities.²⁵ Also, the Court posed questions whether activities were military in nature,²⁶ which could not be answered by mere reference to Chinese statements. Rather, the Court should have addressed the real purpose and character of Chinese installations.

On the other hand, decision over the South China Sea case is regarded as clarifying the issue of 'whether historic rights can be recognized in the Exclusive Economic Zone'.²⁷ In doing that, the Court stayed coherent with previous case-law, and for instance followed an observation of the International Court of Justice in *Anglo-Norwegian Fisheries* that "[b]y 'historic waters' are usually meant waters which are treated as internal waters but which would not have that

²¹ *Philippines v China* (n 2), 246.

²² *Ibidem*, paras 229 and 1203(A)(1).

²³ *Ibidem*, 275. See N. Antunes, 'Acquiescence', *Max Planck Encyclopedia of Public International Law* (2006), para 13. See also D. Guilfoyle, *Philippines v China: first thoughts on the Award in the South China Seas Case* (EJIL: Talk! 12 July 2016), <http://www.ejiltalk.org/philippines-v-china-first-thoughts-on-the-award-in-the-south-china-seas-case/>.

²⁴ *Ibidem*, paras 938, 1028 and 1164.

²⁵ *Philippines v China* (n 2), para 1158.

²⁶ *Ibidem*, paras 935 and 1027.

²⁷ T. Davenport, *Why the South China Sea Arbitration Case Matters (Even if China Ignores It)* (The Diplomat, 8 July 2016), <http://thediplomat.com/2016/07/why-the-south-china-sea-arbitration-case-matters-even-if-china-ignores-it/>.

character were it not for the existence of an historic title”.²⁸ However, some there still are questions concerning the ‘historic titles’ exception. For instance, whether or not, it is possible to talk about a ‘historic title of sovereignty over low-tide elevations’ or ‘rules of regional customary international law providing for sovereignty over low-tide elevations’.²⁹

What are the legal implications of constructing artificial islands, installations and structures on maritime entitlements of States?

When it comes to law applicable for assessing the legal implications of constructing artificial islands, installations and structures on maritime entitlements of States, the relevant provisions are as follows: Within its exclusive economic zone, Art. 60(1) of UNCLOS grants State ‘the exclusive right to construct and to authorize and regulate construction, operation and use of: (a) artificial islands, (b) installations and structures for economic purposes and (c) installations and structures which may interfere with the exercise of the rights of the coastal State in the zone’. Up to 500 meters around the above constructions, ‘the coastal State may, where necessary, establish reasonable safety zones’ (Art. 60(4) and (5)). Under Art. 80 of UNCLOS, the above applies *mutatis mutandis* within the continental shelf. Under Art. 87, on the high seas there is ‘freedom to construct artificial islands and other installations permitted under international law’.

The Court’s reasoning was that both Art. 13 and Art. 121 of UNCLOS, apply to ‘naturally formed areas of land’. Thus, through human efforts, neither area of seabed, nor a low-tide elevation, nor even a rock can ‘be legally transformed into an island’. Rather, ‘the status of a feature must be assessed on the basis of its natural condition’.³⁰ Given the fact that ‘many of the features in the South China Sea have been subjected to substantial human modification’ and ‘in some cases, it would likely no longer be possible to directly observe’ their ‘original status’, the Court found itself required to assess the status of each feature on the basis

²⁸ *Anglo-Norwegian Fisheries (United Kingdom v. Norway)*, Judgment, ICJ Reports 1951, p. 130.

²⁹ S. Talmon, *The South China Sea Arbitration: Observations on the Award on Jurisdiction and Admissibility*, “Chinese Journal of International Law” 2016, Vol. 15(2), 347. On other controversies concerning jurisdiction, see C. Whomersley, *The South China Sea: The Award of the Tribunal in the Case Brought by Philippines against China – A Critique*, “Chinese Journal of International Law” 2016, Vol. 15(2), 239.

³⁰ *Ibidem*, paras 305 and 508.

of ‘best available evidence’ of its earlier, natural condition, prior to ‘significant human modification’.³¹

As to the legal implications of constructing artificial islands, installations and structures by China on maritime entitlements of States, the Court held that, by engaging in ‘the construction of artificial islands, installations, and structures at Mischief Reef without the authorisation of the Philippines’, China has breached Art. 60 and Art. 80 of UNCLOS ‘with respect to the Philippines’ sovereign rights in its exclusive economic zone and continental shelf’.³²

The discussed judgment is certainly an added value in terms of assessing legal implications of constructing artificial islands, installations and structures on maritime entitlements of States.³³ Tara Davenport from Yale Law School stated that ‘the primary value of the tribunal’s ruling is the clarification of certain principles in UNCLOS that have hitherto been shrouded in uncertainty’. As an example, she pointed out ending the stalemate caused by ‘lack of a clear definition of an island capable of sustaining human habitation or economic life of its own under Article 121 (3)’. The Court’s reasoning was also regarded as explanatory in terms of the legal status of waters surrounding a disputed feature, crucial also for issues like protection of marine environment, control over fisheries as well as enforcement activities.³⁴

What characteristics must be met by an area in order to generate entitlements to maritime zones?

In order to generate entitlements to maritime zones, an area which is not a part of mainland, must either meet characteristics of island, rocks, or a low-tide elevation. Island is a ‘naturally formed area of land, surrounded by water, which

³¹ *Ibidem*, 306.

³² *Philippines v China* (n 2), para 1203(B)(14).

³³ But Stefan Talmon points that ‘State parties to a treaty can effectively overrule the interpretation of a treaty provision by an international court or tribunal by concluding a subsequent agreement regarding the interpretation of the treaty or the application of its provisions’. Interestingly, ‘China tried previously to bring the interpretation of Article 121(3) before the Meeting of States Parties – without much success’. See S. Talmon, *The South China Sea Arbitration and the Finality of ‘Final’ Awards*, “Journal of International Dispute Settlement” 2017, Vol. 8(2), 388.

³⁴ T. Davenport, *Why the South China Sea Arbitration Case Matters (Even if China Ignores It)* (The Diplomat, 8 July 2016), <http://thediplomat.com/2016/07/why-the-south-china-sea-arbitration-case-matters-even-if-china-ignores-it/>.

is above water at high tide' (Art. 121(1)). Islands give rise to maritime entitlements similarly to mainland (Art. 121(2)). The exception pertains to 'rocks which cannot sustain human habitation or economic life of their own'. Such areas 'have no exclusive economic zone or continental shelf' (Art. 121(3)). Under Art. 13(1), 'a low-tide elevation is a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide'. Where it is at least partly situated at a distance not exceeding breadth of territorial sea from the mainland or an island, it may be used for measuring breadth of territorial sea. Where, however, 'a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own' (Art. 13(2)).

When it comes to other characteristics that must be met by an area in order to generate entitlements to maritime zones, there were two main legal uncertainties.

First referred to definition of rocks, as opposed to 'fully entitled islands'.³⁵ The Court distinguished the following elements of definition set in Art. 121(3): (a) 'rocks', (b) 'cannot', (c) 'sustain', (d) 'human habitation', (e) 'or', and (f) 'economic life of their own'.³⁶ The Court's interpretation was as follows: (a) 'Rocks' for the purposes of Art. 121(3) do not necessarily need to be composed of rock. If that was the case, any high-tide feature 'formed by sand, mud, gravel, or coral' would always be treated as an island. Thus, other elements of definition are more important.³⁷ (b) 'Cannot' indicates incapability 'to sustain human habitation or economic life', rather than actual fact of being not inhabited.³⁸ (c) 'Sustain' means: in connection with human habitation – 'to provide that which is necessary to keep humans alive and healthy over a continuous period of time, according to a proper standard; in connection with economic life – 'to provide that which is necessary not just to commence, but also to continue, an activity over a period of time in a way that remains viable on an ongoing basis'. (d) 'Human habitation' implies 'daily subsistence and survival of a number of people for an indefinite time'.³⁹ (e) 'Or' means that 'the text remains open to possibility that a feature may be able to sustain human habitation but offer no resources to support an economic life, or that a feature may sustain economic life while lacking the conditions necessary to

³⁵ *Ibidem*, 390.

³⁶ *Ibidem*, 478.

³⁷ *Ibidem*, 481–482.

³⁸ *Ibidem*, 483.

³⁹ *Ibidem*, 492.

sustain habitation directly on the feature itself'.⁴⁰ (f) 'economic life of their own' means that the economic activity, interpreted as activity 'relating to the development and regulation of the material resources of a community',⁴¹ must be 'linked to the feature itself'. It is not sufficient to refer to 'economic activity derived from a possible exclusive economic zone, continental shelf',⁴² or even territorial sea.⁴³

The second legal question regarded the scope of maritime entitlements created by a low-tide elevation. The Court stated that even though Art. 13(2) of UNCLOS expressly precludes only 'territorial sea of its own', a low-tide elevation neither creates entitlements to exclusive economic zone nor to continental shelf. 'It follows automatically from the operation' of Art. 57 and Art. 76, 'which measure the breadth of the exclusive economic zone and continental shelf from the baseline for the territorial sea'. 'The same restriction follows implicitly' from Art. 121(3), 'which provides that even certain high-tide features are deemed to be rocks that are ineligible to generate an exclusive economic zone or continental shelf'.⁴⁴ Finally, the Court adopted the view that, as distinct from State's land territory in the legal sense, 'low-tide elevations cannot be appropriated'. However, 'a coastal State has sovereignty over low-tide elevations situated within its territorial sea, since it has sovereignty over the territorial sea itself'.⁴⁵

With respect to their status under international law of the Sea, the Court held that Cuarteron Reef, Fiery Cross Reef, Johnson Reef, McKennan Reef, Gaven Reef (North) and Scarborough Shoal 'in their natural condition, were rocks that cannot sustain human habitation or economic life of their own, within the meaning of Article 121(3)' of UNCLOS and accordingly 'generate no entitlement to an exclusive economic zone or continental shelf'.⁴⁶ 'Gaven Reef (South), Hughes

⁴⁰ *Ibidem*, 497.

⁴¹ *Ibidem*, 499.

⁴² What would be circular and absurd, given the fact that entitlements to these maritime zones depend on whether a feature is an island.

⁴³ *Philippines v China* (n 2), 502–503.

⁴⁴ *Ibidem*, 308.

⁴⁵ *Ibidem*, 309.

⁴⁶ *Ibidem*, para 1203(B)(6). 'This means that even the largest islands within the group lack an exclusive economic zone and a continental shelf. It also means that the separate question of sovereignty over the islands themselves is suddenly much less consequential than it might have been: whoever has title over the land now enjoys a diminished package of maritime rights that spatially extend no farther than a 12-nautical-mile territorial sea and an additional 12-nautical-mile contiguous zone.' See R. Scoville, *The South China Sea Arbitration: Implications for the Senkaku Islands* (Lawfare, 18 July 2016), <https://www.lawfareblog.com/south-china-sea-arbitration-implications-senkaku-islands> (accessed 7 October 2016).

Reef, Mischief Reef, Second Thomas Shoal, Subi Reef are low-tide elevations' within the meaning of Art. 13 of UNCLOS. As such, these neither are features capable of appropriation, nor generate entitlements to 'maritime zones of their own'.⁴⁷ At the same time, Subi Reef, Gaven Reef (South), and Hughes Reef 'may be used as the baseline for measuring the breadth of the territorial sea of high-tide features situated at a distance not exceeding the breadth of the territorial sea'.⁴⁸ Last of the disputed features, Reed Bank, was found to be 'an entirely submerged reef formation that cannot give rise to maritime entitlements'.⁴⁹

This is 'the first decision by an international tribunal in which the issues posed by paragraph 3 of Article 121 are analyzed in depth'.⁵⁰ The Court's answers as to what characteristics must be met by an area to generate entitlements to maritime zone are certainly beneficial for the freedom of seas.⁵¹ Significance of this judgment can also be illustrated by its finding that 'even the largest islands within the group' of the Spratly Islands are mere rocks and as such, lack an EEZ or and continental shelf. As Ryan Scoville notes, this has bearing on other disputed features, such as the Senkaku Islands in the East China Sea, as 'the UNCLOS tribunal's exposition and application of 121(3) strongly suggest that the Senkaku Islands are rocks'.⁵²

There is another legal question that reveals itself after reading the judgment. The rocks are differentiated from fully entitled islands in that in their natural state they are incapable of sustaining human habitation and economy. But is there any difference between legal status of plain rocks and rocks which were artificially made capable of, and actually sustain human habitation any economy? The judgment only answers that establishing such installations within a foreign maritime zone may con-

⁴⁷ *Ibidem*, para 1203(B)(3)(c).

⁴⁸ *Ibidem*, para 1203(B)(4) and (5). See also J. Ku, *Short, Quick Take on the Philippines' Sweeping Victory in the South China Sea Arbitration* (Lawfare 12 July 2016), <https://www.lawfareblog.com/short-quick-take-philippines-sweeping-victory-south-china-sea-arbitration>.

⁴⁹ *Philippines v China* (n 2), para 1203(A)(3)(c). On possible US reactions to such findings, see: J. Ku, *Possible U.S. Responses to the South China Sea Arbitration Award: The Aggressive FONOPs Option* (Lawfare, 13 July 2016), <https://www.lawfareblog.com/possible-us-responses-south-china-sea-arbitration-award-aggressive-fonops-option>.

⁵⁰ B. Oxman, *The South China Sea Arbitration Award*, University of Miami Legal Studies Research Paper 2016, No. 16–41, p. 9.

⁵¹ See also Exclusive: *U.S. sees new Chinese activity around South China Sea shoal* (Reuters, 19 Mar 2016), <http://www.reuters.com/article/us-southchinasca-china-scarborough-exclu-id-USKCN0WK01B> (accessed 30 November 2016).

⁵² R. Scoville, *The South China Sea Arbitration: Implications for the Senkaku Islands* (Lawfare, 18 July 2016), <https://www.lawfareblog.com/south-china-sea-arbitration-implications-senkaku-islands> (accessed 7 October 2016).

stitute infringement of sovereign rights of another State. This, in turn, suggests that in case such installation can, at least partly, be denoted as ‘military activities’, it may constitute use of force, prohibited under Art. 2(4) of the UN Charter.

A similar space for further clarification is left as to the legal status of an artificial island on low-tide elevation on the high seas. A low-tide elevation is ‘incapable of appropriation’ as the land territory of a state in the legal sense.⁵³ But being distinguished as a separate feature, such island does not constitute common heritage of mankind as a part of the ‘Area’ covering ‘seabed and the ocean floor beyond the limits of national jurisdiction’ (Art. 1(1) and Art. 136 of UNCLOS). Although unlikely, legal uncertainties could also arise if one State tried to turn an area of seabed or a low-tide elevation into rocks, which do not have to be naturally formed.

Under Art. 121(1) of UNCLOS, ‘island is a naturally formed area of land’, but there is no reference to natural rocks. The Court further reasoned: “In addition to maintaining the structure apparent across Articles 13 and 121, this reading is consistent with the object and purpose of Article 121(3). If States were allowed to convert any rock incapable of sustaining human habitation or an economic life into a fully entitled island simply by the introduction of technology and extraneous materials, then the purpose of Article 121(3) as a provision of limitation would be frustrated. It could no longer be used as a practical restraint to prevent States from claiming for themselves potentially immense maritime space.⁵⁴ In this regard, the Tribunal agreed with the Philippines that ‘[a] contrary rule would create perverse incentives for States to undertake such actions to extend their maritime zones to the detriment of other coastal States and/or the common heritage of mankind’”.⁵⁵

What are the State’s obligations under Art. 192 and 194(5) of UNCLOS with respect to protection and preservation of marine environment?

With respect to protection and preservation of marine environment under Art. 192 and 194(5) of UNCLOS, first of these provisions sets a general obligation

⁵³ *Philippines v China* (n 2), para 1040.

⁵⁴ However, as Kirsten Sellars writes, ‘This adds a lot of baggage to two plain words, ‘human habitation’ – and goes beyond the UNCLOS drafters’ intent. The drafters, after all, were simply discussing the absence of human habitation from a rock, which is easy to establish (did people live there or not?).’ See K. Sellars, *Rocking the Boat: The Paracels, the Spratlys, and the South China Sea Arbitration*, “Columbia Journal of Asian Law, Forthcoming”, 2017, p. 41.

⁵⁵ *Anglo-Norwegian Fisheries (United Kingdom v. Norway)*, Judgment, ICJ Reports 1951, para 509.

of States ‘to protect and preserve the marine environment’. Art. 194(5) provides that ‘the measures taken in accordance’ with Part XII of UNCLOS (Protection and Preservation of the Marine Environment) ‘shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life’.

In its assessment, the Court noted that the first provision ‘entails the positive obligation to take active measures to protect and preserve the marine environment’, and by logical implication, ‘negative obligation not to degrade the marine environment’. As a test, the Court pointed out the positive duty of States to ‘prevent, or at least mitigate, significant harm to the environment when pursuing large-scale construction activities’. Regarding Art. 194(5), the Court reiterated its own observation from *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, that this provision confirms that Part XII of UNCLOS ‘is not limited to measures aimed strictly at controlling marine pollution’.⁵⁶

Regarding protection and preservation of marine environment, the Court held that tolerating, protecting, and failing to prevent harmful activities of Chinese flagged vessels, including harvesting ‘endangered species on a significant scale’ and harvesting ‘giant clams in a manner that was severely destructive of the coral reef ecosystem in the South China Sea’, ‘China has breached its obligations under Articles 192 and 194(5) of UNCLOS’.⁵⁷ Next, in its ‘land reclamation and construction of artificial islands, installations, and structures’ at Cuarteron Reef, Fiery Cross Reef, Gaven Reef (North), Johnson Reef, Hughes Reef, Subi Reef, and Mischief Reef China ‘has caused severe, irreparable harm to the coral reef ecosystem’,⁵⁸ and breached its obligations under Art. 123, 192, 194(1), 194(5), 197 and 206 of UNCLOS.⁵⁹

Regarding State’s obligations under Art. 192 and 194(5) of UNCLOS as to protection and preservation of marine environment, Joshua Paine emphasises the judgment’s contribution to international jurisprudence on Environmental Impact Assessments (EIAs, Art. 206 of UNCLOS). After finding that the construction activities ‘may cause significant and harmful changes to the marine environment’,

⁵⁶ *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, PCA Judgment of 18 March 2015, paras 320 and 538.

⁵⁷ *Philippines v China* (n 2), para 1203(B)(12).

⁵⁸ *Ibidem*, para 1203(B)(16).

⁵⁹ *Ibidem*, para 1203(B)(13). See also D. Desierto, *The Philippines v. China Arbitral Award on the Merits as a Subsidiary Source of International Law* (EJIL: Talk! 12 July 2016), <http://www.ejiltalk.org/the-philippines-v-china-arbitral-award-on-the-merits-as-a-subsi-dary-source-of-international-law/>.

the Court found that China was obliged “as far as practicable to ‘observe, measure, evaluate and analyse [...] the risks or effects of pollution on the marine environment’” (Art. 204).⁶⁰ The China was also obliged to ‘publish reports of the results from such monitoring to the competent international organisations, which should make them available to all States’ (Art. 205). As Joshua Paine notes, the Court cited *Construction of a Road* case (Nicaragua v. Costa Rica)⁶¹ to indicate that ‘a simple assertion by a State that it performed a preliminary assessment of environmental risk does not prove that such an assessment was actually undertaken’.⁶²

What is the scope of duty to not to aggravate the dispute?

Regarding ‘the duty to 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’, its legal basis is indicated to lay in customary international law⁶³. Its existence may be evidenced by indicating treaty law and judgments of international court. For example Art. 41(1) of the Statute of International Court of Justice (1945) give the International Court of Justice the power to indicate any provisional measures to be taken to preserve the respective rights of either party. Art. 279 of UNCLOS reaffirms Art. 2(3) of the Charter of the United Nations (1945) (UN Charter) and provides an obligation to settle international disputes concerning its interpretation or application, ‘by peaceful means in such a manner that international peace and security, and justice, are not endangered’. Art. 300 of UNCLOS, in line with Art. 26 of Vienna Convention on the Law of Treaties (1969), require the States to fulfill their obligations in good faith and exercise the rights, jurisdiction and freedoms in a manner which would not constitute an abuse of right.⁶⁴

⁶⁰ *Philippines v China* (n 2), para 947.

⁶¹ *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua: Construction of a Road in Costa Rica Along the San Juan River (Nicaragua v. Costa Rica)*, Merits Judgment, ICJ Reports 2015, para. 154.

⁶² J. Paine, *Environmental Aspects of the South China Sea Award* (EJIL: Talk!, July 21, 2016), <http://www.ejiltalk.org/environmental-aspects-of-the-south-china-sea-award/#more-14453>.

⁶³ *Philippines v China* (n 2), para 1166–1173.

⁶⁴ Further examples include Convention on Conciliation and Arbitration within the Conference on Security and Co-operation in Europe (1992), Art. 16; European Convention for the Peaceful Settlement of Disputes (1957), Art. 31; Revised General Act for the Pacific Settlement of International Disputes (1949), Art. 33(3).

When it comes to judgments, examples of recognizing the discussed obligation include the case of *Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria)*, Interim Measures of Protection, Order of 5 December 1939, PCIJ Series A/B, No. 79, p. 194 at p. 199 as well as *LaGrand (Germany v. United States of America)*, Judgment, ICJ Reports 2001, p. 466 at p. 503, paras. 102–103.

With respect to the scope of duty to ‘abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and not to aggravate or extend the dispute’, the Court adopted the following reasoning. First, it is necessary to ‘consider whether the claim of aggravation remains dependent on an underlying dispute, or whether it constitutes itself a distinct dispute to which the military activities exception would be applicable’.⁶⁵ ‘In order to fall foul of the limits applicable to parties engaged in the conduct of dispute resolution proceedings, actions must have a specific nexus with the rights and claims making up the parties’ dispute’.⁶⁶ Either party may aggravate a dispute in at least three ways: (a) by continuing, ‘during the pendency of the proceedings, with actions that are alleged to violate the rights of the other, in such a way as to render the alleged violation more serious’; (b) by taking actions which ‘would frustrate the effectiveness of a potential decision, or render its implementation by the parties significantly more difficult’; or (c) ‘by undermining the integrity of the dispute resolution proceedings themselves, including by rendering the work of a court or tribunal significantly more onerous or taking other actions that decrease the likelihood of the proceedings in fact leading to the resolution of the parties’ dispute’.⁶⁷

The Court held that China has aggravated its respective disputes with the Philippines by: (a) ‘building a large artificial island on Mischief Reef, a low-tide elevation located in the exclusive economic zone of the Philippines’; (b) ‘inflicting permanent, irreparable harm to the coral reef habitat’ of Mischief Reef; (c) ‘commencing large-scale island-building and construction works at Cuarteron Reef, Fiery Cross Reef, Gaven Reef (North), Johnson Reef, Hughes Reef, and Subi Reef’; and (d) ‘permanently destroying evidence of the natural condition of Mischief Reef, Cuarteron Reef, Fiery Cross Reef, Gaven Reef (North), Johnson Reef, Hughes Reef, and Subi Reef’.⁶⁸

⁶⁵ *Philippines v China* (n 2), para 1159.

⁶⁶ *Ibidem*, 1174.

⁶⁷ *Ibidem*, 1176.

⁶⁸ *Philippines v China* (n 2), para 1181.

Although the Court found that China breached its duty not to aggravate the dispute, the concerns cannot be expressed better than by citing Joshua Paine, who said: ‘in practical terms, neither this decision nor any action that either Party may take in response can undo the permanent damage that has been done to the coral reef habitats of the South China Sea’.⁶⁹

Final remarks

Significance of the judgment is undoubtedly diminished by Chinese boycott.⁷⁰ But as a substantial part of applicable UNCLOS provisions was clear enough to assume that Chinese authorities knew they acted contrary to international law, the decision to disregard a part of international maritime law was taken long before the proceedings.⁷¹ On the other hand, ‘China’s post-arbitration behaviour demonstrated that it has taken the awards to heart. Otherwise, it would not have mounted a sustained, and somewhat hysteric, legal, political and diplomatic campaign to discredit the Tribunal and its findings’.⁷² Reputation of a State abiding by international law is especially important for big powers who need to be perceived as reliable partner in multiple alliances and agreements. But international law is not the supreme value, especially in cases when a State does not benefit from it and it collides with a strategy it perceives as vital to its interests. If that is the case, arguments become more similar to those anonymous words: ‘America is arbitrating what belongs to China? Are you crazy? What kind of logic is this? Regulate gun control in your country before talking to

⁶⁹ J. Paine, *Environmental Aspects of the South China Sea Award* (EJIL: Talk!, July 21, 2016), <http://www.ejiltalk.org/environmental-aspects-of-the-south-china-sea-award/#more-14453>.

⁷⁰ For Statement of the Ministry of Foreign Affairs of the People’s Republic of China on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines, see http://news.xinhuanet.com/english/2016-07/12/c_135507744.htm. See also *Beijing rejects tribunal’s ruling in South China Sea case* (12 July 2016), <https://www.theguardian.com/world/2016/jul/12/philippines-wins-south-china-sea-case-against-china>.

⁷¹ However, there are also different opinions. See *China should accept PCA ruling on South China Sea: Expert, interview with Baladas Ghoshal* (The Economic Times, 7 Aug 2016), <http://economictimes.indiatimes.com/opinion/interviews/china-should-accept-pca-ruling-on-south-china-sea-expert/articleshow/53584165.cms>.

⁷² J. Wang, *Legitimacy, Jurisdiction and Merits in the South China Sea Arbitration: Chinese Perspectives and International Law*, “Journal of Chinese Political Science” 2017, Vol. 22(2), 211.

me. My wish is world peace'.⁷³ That being said, the discussed judgment is still important. As Roncevert Ganan Almond said, 'it will provide a framework for viewing the behavior of claimants in the South China Sea starting with China'.⁷⁴

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⁷³ International court strikes down China's territorial claim (Reuters with CNBC.com, 12 July 2016), <http://www.cnbc.com/2016/07/12/tensions-in-south-china-sea-to-persist-even-after-court-ruling.html>.

⁷⁴ *The South China Sea Ruling with Roncevert Ganan Almond* (The Diplomat, 16 July 2016), <http://thediplomat.com/2016/07/interview-the-south-china-sea-ruling/>.

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