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Lawfulness of Chinese Activities in the South China Sea

I. INTRODUCTION

AFTER THE EXAMINATION of the legal status of maritime features, the Tribunal moved on to consider the lawfulness of Chinese activities in the South China Sea. In this connection, the Tribunal wrestled with a wide array of issues in international law. Among other things, the following issues deserve serious consideration:

- (a) Can diplomatic statements and communications themselves be regarded as a breach of the UNCLOS?
- (b) What is the obligation to have ‘due regard to the rights and duties’ under Article 58(3) of the Convention?
- (c) What are the rules applicable to the traditional fishing rights under the UNCLOS?
- (d) What is the ‘general obligation’ under Article 192 of the Convention, and what are the requirements for fulfilling the obligation of due diligence in the context of environmental protection?
- (e) How is it possible to determine the breach of the obligation to conduct an environmental impact assessment?
- (f) Is it legally possible to conduct construction activities on low-tide elevations in a third state’s EEZ or continental shelf?
- (g) What is the relationship between Article 94 of the UNCLOS and the Convention on the International Regulations for Preventing Collisions at Sea (COLREGS)?
- (h) What are the criteria for deciding the breach of the obligation of non-aggravation in international law?

Beyond the scope of the settlement of the dispute between the Philippines and China, the Tribunal’s view on these matters sheds some light on the interpretation or application of rules and obligations of international law. Thus this chapter addresses the above issues in light of the *South China Sea* Arbitration

Award (Merits).¹ Following this Introduction, section II examines: alleged interference with the Philippines' sovereign rights in its EEZ and continental shelf, alleged failure to prevent Chinese nationals from exploiting the Philippines' living resources, China's actions in respect of traditional fishing at Scarborough Shoal, the protection and preservation of the marine environment, occupation and construction activities on Mischief Reef, and the operation of law enforcement vessels in a dangerous manner. Section III addresses the obligation of non-aggravation and future conduct of the parties, and the chapter ends by offering conclusions in section IV.

II. LAWFULNESS OF CHINA'S ACTIONS IN THE SOUTH CHINA SEA

A. Alleged Interference with the Philippines' Sovereign Rights in its EEZ and Continental Shelf

i. Jurisdiction of the Tribunal

The first issue relates to China's interference with the Philippines' sovereign rights in its EEZ and continental shelf. In its Submission No 8, the Philippines requested the Tribunal to declare:

(8) China has unlawfully interfered with the enjoyment and exercise of the sovereign rights of the Philippines with respect to the living and non-living resources of its exclusive economic zone and continental shelf.²

In this connection, the Philippines claimed that China interfered with the Philippines' sovereign rights and jurisdiction over the living resources by the following conduct:

- (a) China's prevention of fishing by Philippine vessels at Mischief Reef since 1995,
- (b) The 2012 moratorium on fishing in the South China Sea north of 12° N latitude,
- (c) China's revision of the Hainan Regulation,³ and
- (d) China's prevention of fishing by Philippine vessels at Second Thomas Shoal since 1995.⁴

China did not directly respond to the Philippines' allegations. Referring to various statements made by China, however, the Tribunal held that apparently China considered that it had sovereignty and sovereign rights in the areas where

¹PCA Case No 2013–19. The *South China Sea Arbitration Award* (Merits) ('the *South China Sea Arbitration Award* (Merits)'), 12 July 2016.

²*ibid*, [649]. See also *ibid*, [685]; the Philippines' Memorial, vol I, 165, [6.17]–[6.19]; presentation by Sands, Merits Hearing Tr (Day 2), 140–42.

³People's Republic of China, Hainan Province, *Hainan Provincial Regulation on the Control of Coastal Border Security*, 31 December 2012. This document was reproduced in Annex 123 to the Philippines' Memorial, vol V.

⁴The *South China Sea Arbitration Award* (Merits), n 1, [686].

the Philippines launched a petrol exploration, and that it had sovereign rights with respect to fisheries in the areas in question.⁵

In the Award on Jurisdiction, the Tribunal reserved a decision on its jurisdiction with respect to the Philippines' Submission No 8 for consideration in conjunction with the merits of the Philippines' claims.⁶ At the same time, it held that this was not a dispute concerning sovereignty or maritime boundary delimitation, nor was it barred from the Tribunal's consideration by any requirement of Section 1 of Part XV of the Convention.⁷ This point was confirmed by the Tribunal in its Award on the Merits.⁸

In the Award on the Merits, the Tribunal found that there was no legal basis for any Chinese historic rights in the South China Sea encompassed by the 'nine-dash line';⁹ and that none of the high-tide feature in the Spratly Islands was a fully entitled island for the purposes of Article 121 of the UNCLOS.¹⁰ Accordingly, there was no maritime feature in the Spratly Islands capable of generating an entitlement to an EEZ or continental shelf in the areas of Mischief Reef or Second Thomas Shoal, or in the areas of the GSEC101 bloc, Area 3, Area 4, or the SC58 block. It followed that there was no situation of overlapping entitlement that would call for maritime delimitations in accordance with Articles 15, 74 and 83 of the UNCLOS.¹¹ Since the areas of the South China Sea at issue in Submission No 8 could only constitute the EEZ of the Philippines, the Philippines possessed sovereign rights with respect to resources in these areas by virtue of Articles 77 and 56 of the Convention.¹²

Article 297(3)(a) and the law enforcement exception in Article 298(1)(b) of the Convention serve to limit compulsory dispute settlement where a claim is brought against a state's exercise of its sovereign rights in respect of living resources in its *own* EEZ. In the view of the Tribunal, however, these provisions do not apply where a state is alleged to have violated the Convention in respect of the EEZ of another state. As the areas of the South China Sea at issue in the Philippines' Submission No 8 constituted the EEZ of the Philippines,

⁵ *ibid*, [68]–[689]. In this regard, the Tribunal referred to the following instruments: Note Verbale from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs, Republic of the Philippines, No (10) PG-047 (22 February 2010); Memorandum from Rafael E Seguis, the Undersecretary for Special and Ocean Concerns, Department of Foreign Affairs, Republic of the Philippines, to the Secretary of Foreign Affairs of the Republic of the Philippines (30 July 2010); Note Verbale from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs, Republic of the Philippines, No (11) PG-202 (6 July 2011); and 'Fishing ban starts in South China Sea', *Xinhua* (17 May 2012).

⁶ PCA Case No 2013–19. The *South China Sea* Arbitration (Jurisdiction and Admissibility) (hereinafter 'the *South China Sea* Arbitration Award (Jurisdiction and Admissibility)'), 29 October 2015, [405].

⁷ *ibid*.

⁸ The *South China Sea* Arbitration Award (Merits), n 1, [690].

⁹ *ibid*, [1203]B(2). See also [277]–[278].

¹⁰ *ibid*, [626].

¹¹ *ibid*, [692]–[694].

¹² *ibid*, [697]–[700].

these provisions posed no obstacle to the jurisdiction of the Tribunal. The Tribunal thus concluded that it had jurisdiction with regard to the Philippines' Submission No 8.¹³

ii. Lawfulness of China's Actions

The Tribunal then turned to examine the legal consequences of China's interference with the Philippines' sovereign rights in its EEZ and continental shelf. In this regard, three types of conduct can be identified:

- (a) diplomatic communications;¹⁴
- (b) physical actions;¹⁵ and
- (c) a statement that may have a deterring effect.¹⁶

It is beyond serious argument that provisions of the UNCLOS can be breached by physical actions of a state. In fact, the Tribunal held that China's actions that induced the MV *Veritas Voyager* to cease operations and to depart from an area that constituted part of the continental shelf of the Philippines amounted to a breach of Article 77 of the UNCLOS, which accords sovereign rights to the Philippines with regard to its continental shelf in the area of Reed Bank.¹⁷ In contrast, the Tribunal held that there was no distinct evidence concerning China's prevention of fishing by Philippines vessels at Mischief Reef and Second Thomas Shoal; and that the provisions of the Convention concerning fisheries were not implicated.¹⁸ However, the legal effect of diplomatic communications and a statement needs further consideration. In this regard, two issues arise.

The first issue is whether diplomatic statements and communications themselves can be regarded as a breach of the UNCLOS. In this regard, the Tribunal took the view that '[i]t is an altogether normal occurrence that States will have different understandings of their respective rights'.¹⁹ For the Tribunal, 'If the expression of such differences were itself sufficient to place the State whose understanding of the law ultimately proved incorrect in breach of the underlying

¹³ *ibid*, [695].

¹⁴ In this regard, the Philippines referred to two types of Chinese statements: (i) diplomatic statements, ie China's objections to the Philippines Government regarding the conversion of the GSEC101 contract, the SC58 contract, and the tender for Area 3 and Area 4; and (ii) a statement by a Chinese official to a representative of Nido Petroleum Ltd: *ibid*, [702].

¹⁵ Specifically the Philippines objected to actions by Chinese Marine Surveillance (CMS) vessels to order the MV *Veritas Voyager* to halt operations and leave the area of Reed Bank, and to China's prevention of fishing by Philippines vessels at Mischief Reef and Second Thomas Shoal: *ibid*, [702] and [709].

¹⁶ In this connection, the Philippines objected to China's extension of its jurisdiction over fisheries in the South China Sea through the 2012 moratorium on fishing in the area north of 12° N latitude and through the Hainan Regulation: *ibid*, [709].

¹⁷ *ibid*, [708], [716].

¹⁸ *ibid*, [714]–[715].

¹⁹ *ibid*, [705].

obligation, it would cast an unacceptable chill on the ordinary conduct of diplomacy.²⁰

The Tribunal did not exclude the possibility that ‘it could reach a different conclusion in the case of diplomatic statements claiming rights in bad faith, or in the case of attempts by one State to induce another to relinquish its rights through repeated statements, veiled threats, or diplomatic coercion’.²¹ However, this was not the case on the record before the Tribunal. It thus concluded that China’s diplomatic statements to the Philippines regarding their respective rights did not constitute breaches of the UNCLOS, even though incorrect with respect to the law.²² Likewise it found that China’s action in merely informing a private party of its claims in the South China Sea did not constitute breaches of the Convention.²³ Yet the reasoning of the Tribunal seems to lack consistency. As discussed in chapter 3, the Tribunal held that China’s *claims* to historic rights, or other sovereign rights or jurisdiction, with respect to the maritime areas of the South China Sea encompassed by the relevant part of the ‘nine-dash line’ were contrary to the Convention. In so doing, the Tribunal judged the illegality of China’s *claims*, not China’s physical conduct to implement its alleged historic rights in marine spaces encompassed by the ‘nine-dash line’. If China claimed its rights in good faith,²⁴ this did not automatically preclude the wrongfulness of those claims that were at variance with the Convention. Indeed, the Tribunal, in its Award on the Merits, clearly stated that China’s understanding of its rights concerning non-living resources in the South China Sea was ‘incorrect with respect to the law’.²⁵

The second issue pertains to the legal effect of a statement that may have a deterring effect. The question of interest here was whether China’s 2012 promulgation of the fishing moratorium²⁶ and the Hainan Regulation²⁷ infringed on the right of the Philippines and constituted a breach of the Convention, irrespective of whether the moratorium was directly enforced.²⁸ As regards China’s moratorium, the Tribunal considered that it was intended to apply to areas of the Philippines’ EEZ north of 12° N latitude and was not limited to Chinese flagged vessels. In contrast to mere statements, the fishing moratorium established a ‘realistic prospect’ that Filipino fishermen could be exposed to the punitive measures spelled out in the moratorium, including the possible confiscation of

²⁰ *ibid.*

²¹ *ibid.*

²² *ibid.*

²³ *ibid.*, [706].

²⁴ *ibid.*, [704].

²⁵ *ibid.*, [705].

²⁶ People’s Republic of China, Ministry of Agriculture, South China Sea Fishery Bureau, *Announcement on the 2012 Summer Ban on Marine Fishing in the South China Sea Maritime Space* (10 May 2012). This document was reproduced in Annex 118 to the Philippines’ Memorial, vol V.

²⁷ Hainan Provincial Regulation, n 3.

²⁸ The *South China Sea* Arbitration Award (Merits), n 1, [711].

the fishing vessels in question. The Tribunal considered that such developments might have a deterring effect on Filipino fishermen and their activities.²⁹ It thus ruled that such an assertion of jurisdiction amounted to a breach of Article 56 of the Convention, which accords sovereign rights to the Philippines with respect to the living resources of its EEZ.³⁰ In contrast, the Tribunal found no provision in the Hainan Regulation that would restrict the rights of the Philippines over the resources of its EEZ. Furthermore, the Regulation applies only within 12 nautical miles of Hainan. Accordingly, the Tribunal ruled that the Hainan Regulation did not infringe on the rights of the Philippines or amount to a breach of the provisions of the UNCLOS concerning the EEZ.³¹

According to the Tribunal's approach, where a statement may have a deterring effect, that statement violates relevant provisions of the UNCLOS. Hence the existence of a deterring effect becomes the key element. An issue that arises in this regard is how it is possible to determine the existence of a deterring effect. Here the Tribunal applied a 'realistic prospect' test. According to this test, the existence of a deterring effect is to be decided on the basis of the existence of a 'realistic prospect' that punitive measures arising from a statement could be brought to bear in the *future*. Thus if a statement presents a realistic prospect that the exercise of the sovereign rights of a coastal state would be deterred in its EEZ in the *future*, that statement has a deterring effect.

While the deterring effect is a matter for the future, the existence or non-existence of a 'realistic prospect' is a matter for the present. In this sense, the 'realistic prospect' test can be thought to be a temporal concept. Yet the concept of a 'realistic prospect' is not wholly unambiguous. An question that arises in this regard is how it is possible to assess the existence of a 'realistic prospect'. Since the 'prospect' relies on the subjective perception of states, it may be less easy for an international court or tribunal to objectively determine the content of such 'prospect'. Furthermore, the adjective 'realistic' seems to be a matter of degree. Yet the Tribunal offered scant explanation to answer the question to what extent the prospect of the future events must exist. Moreover, unlike the China's 2012 promulgation of the fishing moratorium, the Tribunal did not apply the 'realistic prospect' test to China's diplomatic statements regarding the conversion of the GSEC101 contract, the SC58 contract, and the tender for Area 3 and Area 4. This is a double standard. With regard to SC58 contract, however, the Chinese Government stated, in its Memorandum of 30 July 2010, that it considered this as a 'very serious matter', and that it reserved the 'right to unilaterally act on this matter to protect [its] interests'.³² Accordingly, there appears to

²⁹ *ibid*, [712].

³⁰ *ibid*; see also *ibid*, [716].

³¹ *ibid*, [713].

³² Memorandum from the Undersecretary for Special and Ocean Concerns, Department of Foreign Affairs, Republic of the Philippines, to the Secretary of Foreign Affairs of the Republic of the Philippines, 30 July 2010, quoted *ibid*, [663].

be some scope to reconsider the question regarding whether the Memorandum would create a deterring effect.

B. Alleged Failure to Prevent Chinese Nationals from Exploiting the Philippines' Living Resources

i. Jurisdiction of the Tribunal

The next issue concerns the alleged failure of China to prevent Chinese nationals from exploiting the Philippines' living resources. In this regard, the Philippines, in its Submission No 9, requested the Tribunal to declare:

(9) China has unlawfully failed to prevent its nationals and vessels from exploiting the living resources in the exclusive economic zone of the Philippines.³³

The above submission related to developments at Mischief Reef and Second Thomas Shoal, both of which are low-tide elevations lying within 200 nautical miles of the Philippines' baselines.³⁴ In this connection, the Philippines argued that China had violated its obligations under Article 56 of the UNCLOS concerning the sovereign rights and jurisdiction of the Philippines.³⁵ According to the Philippines, China prevented fishing by Philippine vessels in the South China Sea, while tolerating fishing by Chinese nationals and vessels, including in areas that comprise the Philippines' EEZ.³⁶ The Philippines thus claimed that whereas China was not responsible per se for the actions of its fishermen, it was responsible for its own failure to control their illegal and damaging activities.³⁷ China has never directly addressed the above-mentioned allegation. In light of China's contemporaneous statements, however, the Tribunal observed that China did not consider the Philippines to have rights in the area of Second Thomas Shoal and Mischief Reef. In fact, China repeatedly demanded that the Philippines withdraw its personnel from Second Thomas Shoal.³⁸

³³ *ibid*, [717].

³⁴ *ibid*, [718].

³⁵ *ibid*, [723].

³⁶ *ibid*, [724]. See also Memorial, [6.36].

³⁷ The *South China Sea* Arbitration Award (Merits), n 1, [728]; presentation by Professor Sands, Merits Hearing Tr Day 4, 88.

³⁸ The *South China Sea* Arbitration Award (Merits), n 1, [730]–[731]. In this regard, the Tribunal relied on numerous statements of China, such as: Note Verbale from the Ministry of Foreign Affairs, People's Republic of China to the Embassy of the Republic of the Philippines in Beijing, No (2015) Bu Bian Zi No 5 (20 January 2015); Note Verbale from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs, Republic of the Philippines, No 14 (PG)-195 (30 June 2014) (Annex 675); Note Verbale from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs, Republic of the Philippines, No 14 (PG)-197 (4 July 2014); Note Verbale from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs, Republic of the Philippines, No 14 (PG)-264 (2 September 2014).

In its Award on Jurisdiction, the Tribunal reserved a decision on its jurisdiction with respect to the Philippines' Submission No 9 for consideration in conjunction with the merits of the Philippines claims.³⁹ As had been seen, the Tribunal, in its Award on the Merits, determined that Mischief Reef and Second Thomas Shoal are both low-tide elevations and that no high-tide feature in the Spratly Islands is capable of generating an entitlement to an EEZ. It follows that there existed no legal basis for any entitlement by China to maritime zones in the area of Mischief Reef and Second Thomas Shoal. Nor was there any situation of overlapping entitlement that would call for maritime delimitations in accordance with Articles 15, 74 and 83 of the Convention. Furthermore, since the areas of the South China Sea at issue in Submission No 9 were able to constitute the EEZ of the Philippines only, Article 297(3)(a) and the law enforcement exception in Article 298(1)(b) of the UNCLOS posed no obstacle to the Tribunal's jurisdiction. The Tribunal thus held that it had jurisdiction with regard to the Philippines' Submission No 9.⁴⁰

ii. Lawfulness of China's Actions

As the relevant areas could only constitute the EEZ of the Philippines, the Philippines had sovereign rights with regard to resources in those areas.⁴¹ Under Articles 61 and 62 of the UNCLOS, it is clear that the Philippines could control the process of granting and regulating access to the fisheries of its EEZ under the Convention.

When considering the lawfulness of China's actions, the Tribunal highlighted the difference between Article 62(4) and Article 58(3) of the UNCLOS. According to the Tribunal, Article 62(4) imposes an obligation directly on *private* parties engaged in fishing. Under this provision, Chinese nationals are required to comply with the licensing and other access procedures of the Philippines within the EEZ of the Philippines.⁴² In contrast, Article 58(3) provides for obligations of *states*. Under this provision, states must have 'due regard to the rights and duties of the coastal State' in exercising their rights and performing their duties under the Convention in the EEZ. In its Advisory Opinion of 2015, ITLOS interpreted the obligation of due regard as requiring the obliged states to 'take the necessary measures to ensure that their nationals and vessels flying their flag are not engaged in illegal, unreported and unregulated (IUU) fishing activities', by reading it in conjunction with the obligation directly imposed upon nationals by Article 62(4).⁴³ According to ITLOS, '[t]he flag State is under the

³⁹The *South China Sea* Arbitration Award (Jurisdiction and Admissibility), n 6, [406].

⁴⁰The *South China Sea* Arbitration Award (Merits), n 1, [734].

⁴¹*ibid*, [735].

⁴²*ibid*, [740].

⁴³*Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion, ITLOS Case No 21, [2015] ITLOS Rep 4, 38, [124].

“due diligence obligation” to take all necessary measures to ensure compliance and to prevent IUU fishing by fishing vessels flying its flag’.⁴⁴ This is an obligation of conduct.⁴⁵

The interpretation of Article 58(3) was further amplified by Judge Paik, stating that:

Although ‘States’ are direct [addressees] of the obligation to comply with the laws and regulations of the coastal State, private actors, be they natural or juridical persons, are the ultimate regulatory targets under this provision, as they are the main actors engaging in various activities in the foreign EEZ. Thus in order to perform its duties under article 58, paragraph 3, of the Convention, the State must ensure that those subject to its jurisdiction comply with the laws and regulations adopted by the coastal State in accordance with the provisions of the Convention. Through article 94, paragraph 1, of the Convention, those subject to jurisdiction of the State should include a ship flying its flag.⁴⁶

According to the learned judge, ‘[t]aking article 94 and article 58, paragraph 3, of the Convention together, it can be stated that the flag State has an obligation to ensure that fishing vessels flying its flag comply with the laws and regulations adopted by the coastal State when fishing in its EEZ’.⁴⁷

In this connection, ITLOS specified certain measures to be taken. In the words of ITLOS:

While the nature of the laws, regulations and measures that are to be adopted by the flag State is left to be determined by each flag State in accordance with its legal system, the flag State nevertheless has the obligation to include in them enforcement mechanisms to monitor and secure compliance with these laws and regulations. Sanctions applicable to involvement in IUU fishing activities must be sufficient to deter violations and to deprive offenders of the benefits accruing from their IUU fishing activities.⁴⁸

The dictum of ITLOS was echoed by the Tribunal in the Award on the Merits. For the Tribunal:

[A]nything less than due diligence by a State in preventing its nationals from unlawfully fishing in the exclusive economic zone of another would fall short of the regard due pursuant to Article 58(3) of the Convention.⁴⁹

As the Tribunal admitted, evidence with regard to China’s activities at Mischief Reef and Second Thomas Shoal was rather limited. Despite this, the Tribunal accepted that Chinese fishing vessels, accompanied by the ships of the CMS,

⁴⁴ *ibid*, [129].

⁴⁵ *ibid*.

⁴⁶ Separate Opinion of Judge Paik [2015] ITLOS Rep 102, 107–08, [14].

⁴⁷ *ibid*, 108, [16].

⁴⁸ [2015] ITLOS Rep 42, [138]. Further, see A Prölss, ‘Article 58’ in A Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (Beck/Hart Publishing/Nomos, 2017) 456.

⁴⁹ The *South China Sea* Arbitration Award (Merits), n 1, [744].

were engaged in fishing at both Mischief Reef and Second Thomas Shoal in May 2013 for two reasons. First, China asserted sovereign rights and jurisdiction in the South China Sea and issued a ‘Nansha Certification of Fishing Permit’, which extended to the area of Mischief Reef and Second Thomas Shoal. Second, the pattern of Chinese fishing activity at Mischief Reef and Second Shoal was consistent with that exhibited at other reef formations for which the Tribunal had information.⁵⁰

In conclusion, the Tribunal, in its Award on the Merits, established that Chinese vessels had been engaged in fishing at Mischief Reef and Second Thomas Shoal in May 2013. It further observed that in all reported instances, Chinese fishing vessels had been closely escorted by government CMS vessels, and that the officers aboard the Chinese Government vessels in question were fully aware of the actions being taken by Chinese fishermen. Nonetheless, the Chinese Government vessels did not put a stop to them. Obviously the actions of the Chinese Government ships constituted official acts of China and were all attributable to China as such.⁵¹ The Tribunal thus ruled that China failed to exhibit due regard for the Philippines’ sovereign rights with respect to fisheries in its EEZ, by tolerating and failing to exercise due diligence to prevent fishing by Chinese -flagged vessels at Mischief Reef and Second Thomas Shoal in May 2013, and that China breached its obligations under Article 58(3) of the Convention.⁵²

As noted, the obligation to have ‘due regard to the rights and duties’ constitutes the key element in Article 58(3) of the UNCLOS. It appears that the Tribunal, in its Award on the Merits, virtually equated the obligation of due regard with the obligation of due diligence. Due diligence is an elusive concept, and the degree of due diligence may vary depending on the nature of the specific activities, the technical and economic capabilities of states, and the effectiveness of territorial control, etc.⁵³ The standard of due diligence may also change over time. In this connection, the view of the ITLOS Seabed Disputes Chamber deserves to be quoted:

Among the factors that make such a description difficult is the fact that ‘due diligence’ is a variable concept. It may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge.⁵⁴

In light of the variable nature of due diligence, it may not be easy for an international court or a tribunal to determine the breach of the obligation.⁵⁵

⁵⁰ *ibid*, [745]–[748].

⁵¹ *ibid*, [755].

⁵² *ibid*, [757]; see also *ibid*, [753].

⁵³ Y Tanaka, ‘Principles of International Marine Environmental Law’ in R Rayfuse (ed), *Research Handbook on International Marine Environmental Law* (Edward Elgar, 2015) 31, 38.

⁵⁴ *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion, ITLOS Case No 17, [2011] ITLOS Rep 10, 36, [117].

⁵⁵ Tanaka, n 53, 38.

The difficulty associated with the obligation of due diligence was also recognised by the Tribunal in its Award on the Merits. In the words of the Tribunal:

In many cases, the precise scope and application of the obligation on a flag State to exercise due diligence in respect of fishing by vessels flying its flag in the exclusive economic zone of another State may be difficult to determine.⁵⁶

According to the Tribunal, however, that is not the case in the *South China Sea* arbitration. In the present case, there was evidence before the Tribunal to prove the existence of the fishing activity of Chinese vessels at Mischief Reef and Second Thomas Shoal in May 2013, and the escorting of the fishing vessels by Chinese Government vessels. The Tribunal thus considered:

The obligation to have due regard to the rights of the Philippines is unequivocally breached when vessels under Chinese Government control act to escort and protect Chinese fishing vessels engaged in fishing unlawfully in the Philippines' exclusive economic zone.⁵⁷

On the basis of the dictum of the Tribunal, with caution and prudence, it can be argued that a state breaches the obligation of due regard when that state was aware of illegal fishing activities conducted by its nationals in an EEZ of another state and, nonetheless, failed to prevent them.

C. China's Actions in Respect of Traditional Fishing at Scarborough Shoal

i. Jurisdiction of the Tribunal

Another fishery-related issue in the Award on the Merits concerns China's actions with respect to the traditional fishing activities of Philippine nationals at Scarborough Shoal. This issue relates to the Philippines' Submission No 10:

(10) China has unlawfully prevented Philippine fishermen from pursuing their livelihoods by interfering with traditional fishing activities at Scarborough Shoal.⁵⁸

In this connection, the Philippines referred to a series of incidents that occurred between Philippine and Chinese vessels at Scarborough Shoal that heightened tensions between the Parties on 10 and 28 April 2012 and 26 May 2012. According to the Philippines, efforts to negotiate a mutual withdrawal of government vessels were not successful and, as tensions intensified, fishermen active in the vicinity of Scarborough Shoal were affected by the

⁵⁶ The *South China Sea* Arbitration Award (Merits), n 1, [754].

⁵⁷ *ibid*, [756].

⁵⁸ *ibid*, [758].

Parties' dispute.⁵⁹ The Philippines thus argued that China violated its obligations under Articles 2(3), 51(1) and 62(3) of the UNCLOS;⁶⁰ and that China breached its obligations under Article 2(3) of the UN Charter and Article 279 of the UNCLOS to resolve disputes through peaceful means.⁶¹ On the other hand, China asserted that waters surrounding Scarborough Shoal constitute a traditional fishing ground for Chinese fishermen and set out its own account of the events that took place on 10 April 2012.⁶² China also responded to the Philippines' allegations that China's conduct fell short of its obligation to resolve the Parties' dispute peacefully.⁶³

In the view of the Tribunal, the Philippines' Submission No 10 did not relate to a dispute concerning sovereignty or maritime boundary delimitation. In its Award on the Jurisdiction, the Tribunal noted that traditional fishing rights may exist even within the territorial waters of another state. According to the Tribunal, its jurisdiction to address this dispute was not dependent on a prior determination of sovereignty over Scarborough Shoal. As Articles 297 and 298 of the Convention have no application in the territorial sea, these provisions imposed no limitation on the Tribunal's jurisdiction. Accordingly, to the extent that the claimed rights and alleged interference occurred within the territorial sea of Scarborough Shoal, the Tribunal concluded that it had jurisdiction to address the matters raised in the Philippines' Submission No 10.⁶⁴ This view was confirmed by the Tribunal in the Award on the Merits.⁶⁵

ii. Lawfulness of China's Actions

Traditional fishing rights constituted the key concept in the Philippines' Submission No 10.⁶⁶ Indeed, both the Philippines and China consider Scarborough Shoal to be a traditional fishing ground for their nationals.⁶⁷ In this connection, two issues arise: the nature of traditional fishing rights; and the law applicable to such rights.

⁵⁹ *ibid*, [767]–[770]; the Philippines' Memorial, vol I, 171–74, [6.40]–[6.46].

⁶⁰ The *South China Sea* Arbitration Award (Merits), n 1, [771].

⁶¹ *ibid*, [780].

⁶² *ibid*, [787]–[788]. See also Embassy of the People's Republic of China in the Republic of the Philippines, *Ten Questions Regarding Huangyan Island* (15 June 2012), reproduced in the Philippines' Memorial, vol V, Annex 120.

⁶³ The *South China Sea* Arbitration Award (Merits), n 1, [790]. See also Memorandum from the Embassy of the Republic of the Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No ZPE-080-2012-S (24 May 2012), reproduced in the Philippines' Memorial, vol IV, Annex 81.

⁶⁴ The *South China Sea* Arbitration Award (Jurisdiction and Admissibility), n 6, [407].

⁶⁵ The *South China Sea* Arbitration Award (Merits), n 1, [759].

⁶⁶ On this issue, see also J Mossop, 'Can the South China Sea Tribunal's Conclusions on Traditional Fishing Rights Lead to Cooperative Fishing Arrangements in the Region?' (2018) 3 *Asia-Pacific Journal of Ocean Law and Policy* 210.

⁶⁷ The *South China Sea* Arbitration Award (Merits), n 1, [792].

First, with regard to the nature of the traditional fishing rights, the Tribunal stated that:

[T]raditional fishing rights in international law [stem] from the recognition that traditional livelihoods and cultural patterns are fragile in the face of development and modern ideas of interstate relations and warrant particular protection.⁶⁸

According to the Tribunal, traditional fishing rights are not the historic rights of states but private rights.⁶⁹ In approaching this issue, the Tribunal seemed to assimilate traditional fishing to artisanal fishing, referencing the *Eritreal/Yemen* arbitration:

'Artisanal fishing' is used in contrast to 'industrial fishing'. It does not exclude improvements in powering the small boats, in the techniques of navigation, communication or in the techniques of fishing; but the traditional regime of fishing does not extend to large-scale commercial or industrial fishing nor to fishing by nationals of third States ..., whether small-scale or industrial.⁷⁰

The specific practice of artisanal fishing will vary from region to region. In contrast with industrial fishing, however, artisanal fishing will be carried out on 'a small scale, using fishing methods that largely approximate those that have historically been used in the region'.⁷¹ According to the Tribunal, 'Scarborough Shoal has been a traditional fishing ground for fishermen of many nationalities, including the Philippines, China (including from Taiwan), and Viet Nam'.⁷² In this connection, the Tribunal observed that at least some of the fishing carried out at Scarborough Shoal was of a traditional and artisanal nature.⁷³ Nonetheless, the Tribunal offered little evidence in this matter. Nor did the Tribunal specify precise threshold for those fishing methods that would qualify as artisanal fishing.⁷⁴ Related to this, attention must be paid to the evolutionary nature of traditional fishing. As the Tribunal admitted,⁷⁵ traditional fishing may gradually change over time owing to the development of technology. In this sense, the concept of traditional fishing contains a temporal element. This view was echoed by the arbitral tribunal in the *Eritreal/Yemen* arbitration, which stated

⁶⁸ *ibid*, [794].

⁶⁹ *ibid*, [798]. In this regard, the Philippines stressed that it did not 'make a claim to "historic rights" that were ... superseded by UNCLOS'. The Philippines' Memorial, vol I, 171, [640].

⁷⁰ The *Eritreal/Yemen* Arbitration (Second Phase: Maritime Delimitation), Award of 17 December 1999, (2001) 22 *RIAA* 335, 360, [106]. See also The *South China Sea* Arbitration Award (Merits), n 1, [796]. According to the Food and Agriculture Organization of the UN (FAO), 'artisanal fishing' refers to '[t]raditional fisheries involving fishing households (as opposed to commercial companies), using [a] relatively small amount of capital and energy, relatively small fishing vessels (if any), making short fishing trips, close to shore, mainly for local consumption'. FAO Term Portal, available at <http://www.fao.org/faoterm/en/?defaultCollId=21>. See also Mossop, n 66, 224.

⁷¹ The *South China Sea* Arbitration Award (Merits), n 1, [797].

⁷² *ibid*, [805].

⁷³ *ibid*.

⁷⁴ *ibid*, [806].

⁷⁵ *ibid*, [806]–[807].

that '[t]he term "artisanal" is not to be understood as applying in the future only to a certain type of fishing exactly as it is practised today.'⁷⁶ Given that the level of artisanal skills may change over time, there is a need to explore a standard to determine whether certain fishing activities would fall within the scope of artisanal fishing.

Second, the law applicable to traditional fishing must be considered. This differs according to jurisdictional zones. The Tribunal identified the law applicable to traditional fishing in the three distinct jurisdictional zones: archipelagic waters, EEZ and the territorial sea. In archipelagic waters,⁷⁷ traditional fishing rights are expressly protected by Article 51(1) of the UNCLOS, which provides:

Without prejudice to article 49, an archipelagic State shall respect existing agreements with other States and shall recognize traditional fishing rights and other legitimate activities of the immediately adjacent neighbouring States in certain areas falling within archipelagic waters ...

In contrast, traditional fishing rights are extinguished in the EEZ. Article 62(3) of the UNCLOS requires the coastal state to take into account 'the need to minimize economic dislocation in States whose nationals have habitually fished in the zone' in giving access to any surplus in the allowable catch. In the view of the Tribunal, the inclusion of this provision confirms that the drafters of the Convention did not intend to preserve such rights.⁷⁸ The Tribunal's view was echoed by McDorman, stating that '[t]he promise of the EEZ for coastal state fishing interests effectively precluded any significant arguments that might have been made to respect or even take into account any traditional or historic fishing that arguably existed in the merging 200 n. mile national exclusive zone.'⁷⁹

As for the law applicable to the traditional fishing rights in the territorial sea, the Tribunal held:

The Tribunal sees nothing that would suggest that the adoption of the Convention was intended to alter acquired rights in the territorial sea and concludes that within that zone – in contrast to the exclusive economic zone – established traditional fishing rights remain protected by international law. The Tribunal also notes that the vast majority of traditional fishing takes place in close proximity to the coast.⁸⁰

According to the Tribunal, the rule of international law on the treatment of the vested rights of foreign nationals falls squarely within the 'other rules of

⁷⁶The *Eritrea/Yemen* Arbitration (Second Phase: Maritime Delimitation), n 70, 360, [106].

⁷⁷The *South China Sea* Arbitration Award (Merits), n 1, [804](a).

⁷⁸*ibid*, [804](b). As the Tribunal noted, 'States may continue to recognise traditional fishing rights in the exclusive economic zone in their legislation, in bilateral fisheries access agreements, or through regional fisheries management organisations.'

⁷⁹TL McDorman, 'The Law of the Sea Convention and the U-Shaped Line: Some Comments' in Shicun Wu and Keyuan Zou (eds), *Arbitration Concerning the South China Sea: Philippines versus China* (Routledge, 2017) 147, 153.

⁸⁰The *South China Sea* Arbitration Award (Merits), n 1, [804](c).

international law' applicable to the territorial sea.⁸¹ At the same time, the Tribunal went to add that 'traditional fishing rights are not absolute or imperious to regulation', and 'the careful regulation of traditional fishing may be necessary for conservation and to restrict environmentally harmful practices.'⁸²

Since May 2012, Chinese Government vessels have acted to prevent entirely fishing by Filipino fishermen at Scarborough Shoal for significant, but not continuous, periods of time, while permitting China's own nationals to continue fishing there.⁸³ As the actions of Chinese Government vessels constitute official acts of China, these actions are attributable to China.⁸⁴ In the view of the Tribunal, 'the complete prevention by China of fishing by Filipinos at Scarborough Shoal over significant periods of time after May 2012 is not compatible with the respect due under international law to the traditional fishing rights of Filipino fishermen.'⁸⁵ It thus concluded that China unlawfully prevented Filipino fishermen from engaging in traditional fishing at Scarborough Shoal.⁸⁶ On the other hand, it did not find it sufficient to support the Philippines' claim with regard to the breach of Article 2(3) of the UN Charter and Article 279 of the UNCLOS by China.⁸⁷

However, the legal basis for protecting the traditional fishing rights in the territorial sea needs further consideration. On this issue, the Tribunal took the view:

The legal basis for protecting artisanal fishing stems from the notion of vested rights and the understanding that, having pursued a livelihood through artisanal fishing over an extended period, generations of fishermen have acquired a right, akin to property, in the ability to continue to fish in the manner of their forebears.⁸⁸

Accordingly, 'traditional fishing rights extend to artisanal fishing that is carried out largely in keeping with the longstanding practice of the community'.⁸⁹ As shown in the terms 'an extended period' and 'longstanding practice of community', the temporal element can be thought to be the key element of traditional fishing. This view was echoed by Sir Gerald Fitzmaurice, who stated:

[I]f the fishing vessels of a given country have been accustomed from *time immemorial*, or *over a long period*, to fish in a certain area, on the basis of the area being high seas and common to all, it may be said that their country has through them ... acquired a vested interest that the fisheries of that area should remain available to its fishing

⁸¹ *ibid*, [808].

⁸² *ibid*, [809].

⁸³ *ibid*, [810] and [812].

⁸⁴ *ibid*, [810].

⁸⁵ *ibid*, [812].

⁸⁶ *ibid*, [814].

⁸⁷ *ibid*, [813].

⁸⁸ *ibid*, [798].

⁸⁹ *ibid*.

vessels (of course on a non-exclusive basis) – so that if another country asserts a claim to that area as territorial waters, which is found to be valid or comes to be recognized, this can only be subject to the acquired rights of the fishery in question, which must continue to be respected.⁹⁰

However, there is no objective standard to determine the length of time necessary to establish traditional fishing. Accordingly, it is difficult to determine the existence of traditional fishing rights in certain marine spaces. The Tribunal, in its Award on the Merits, offered scant explanation of its understanding of the question as to how long traditional fishing by Filipino has continued.

In reality, it may be less easy to establish traditional fishing rights in the territorial sea. In this connection, O’Connell’s view deserves to be quoted:

There is no precedent for a successful claim to continued fishing rights in waters newly converted into territorial waters, so that the claim made in the case of adjacent fishery zones had the appearance of a novel legal institution – in the absence of treaty rights – which could be rationalised only on the basis of practice. However, the practice has favoured phasing-out rather than maintenance of rights, and phasing out presupposes a concession rather than a recognition of a right ... most traditional fishing rights are opposable to State extending their fishery limits ... only when derived from treaty.⁹¹

D. Alleged Failure to Protect and Preserve the Marine Environment

i. Jurisdiction of the Tribunal

As pointed out earlier, the South China Sea is rich in biological diversity.⁹² Thus environmental protection of the South China Sea is of critical importance. In this connection, the Philippines, in its Submission No 11 as amended⁹³ and Submission No 12, claimed that:

- (11) China has violated its obligations under the Convention to protect and preserve the marine environment at Scarborough Shoal, Second Thomas Shoal, Cuarteron Reef, Fiery Cross Reef, Gaven Reef, Johnson Reef, Hughes Reef and Subi Reef;

⁹⁰G Fitzmaurice, ‘The Law and Procedure of the International Court of Justice, 1951–54: General Principles’ (1953) 30 *British Yearbook of International Law* 1, 51.

⁹¹DP O’Connell, *The International Law of the Sea*, vol I, ed IA Shearer (Clarendon Press, 1982) 538.

⁹²See ch 1, section I of this book.

⁹³The Philippines’ Submission No 11 in its original form was limited to China’s failure to protect and preserve the marine environment at Scarborough Shoal and Second Thomas Shoal. Subsequently the Tribunal allowed the Philippines to amend Submission No 11 to encompass the marine environment at Cuarteron Reef, Fiery Cross Reef, Johnson Reef, Hughes Reef, Gaven Reef (North) and Subi Reef. In this regard, the Tribunal considered that the amendments were incidental to the original Submissions and did not involve the introduction of a new dispute between the Parties. The *South China Sea* Arbitration Award (Merits), n 1, [933].

- (12) China's occupation of and construction activities on Mischief Reef
- (a) ...
 - (b) violate China's duties to protect and preserve the marine environment under the Convention.⁹⁴

The Philippines Submission No 11 as amended relates to the protection and preservation of the marine environment under Articles 192 and 194 of the UNCLOS. In this regard, the Philippines argued that China had allowed its fishermen to harvest coral, giant clams, turtles, sharks and other threatened or endangered species that inhabit the reefs, and that it had allowed them to use dynamite to kill fish and destroy coral, and to use cyanide to harvest live fish.⁹⁵ According to the Philippines, extracting giant clams is especially problematic, because they are important elements of the coral reef structure and also because the method of harvesting them entails crushing surrounding corals.⁹⁶ Furthermore, the Philippines' Submission No 12(b) reflects a dispute concerning China's activities on Mischief Reef and their effects on the marine environment. In summary, the Philippines alleged that China had breached Articles 123, 192, 194, 197, 205 and 206 of the UNCLOS.⁹⁷ China did not directly clarify its position concerning the above issues. Even so, the Tribunal considered that China's position could be discerned from contemporaneous official statements.⁹⁸

In its Award on Jurisdiction, the Tribunal was satisfied that the incidents alleged by the Philippines could involve violations of obligations under Articles 192 and 194 of the UNCLOS to take measures to prevent, reduce and control pollution of the marine environment. It also acknowledged that the factual allegations made by the Philippines could potentially give rise to a dispute under both the UNCLOS and the Convention on Biological Diversity (CBD).⁹⁹ According to the Tribunal, this did not necessarily exclude its jurisdiction to consider Submissions No 11 and 12(b). The Tribunal thus concluded that it had jurisdiction over Submission No 11, as involving a dispute over the interpretation and application of Articles 192 and 194 of the Convention.¹⁰⁰

On the other hand, the Tribunal's jurisdiction to address the Philippines' Submission No 12 was dependent on the status of Mischief Reef as an 'island', 'rock' or 'low-tide elevation'. If the Tribunal were to find that Mischief Reef was an 'island' or 'rock' and thus constituted land territory, the Tribunal would lack

⁹⁴ *ibid*, [112].

⁹⁵ Presentation by Professor Boyle, Merits Hearing Tr (Day 3), 12.

⁹⁶ Memorial of the Philippines, vol I, 30 March 2014, [6.57]; the *South China Sea* Arbitration Award (Merits), n 1, [897].

⁹⁷ *ibid*, [906].

⁹⁸ *ibid*, [912] et seq.

⁹⁹ Convention on Biological Diversity (adopted 22 May 1992, entered into force 29 December 1993) 1760 UNTS 79.

¹⁰⁰ The *South China Sea* Arbitration Award (Jurisdiction and Admissibility), n 6, [175]–[178] and [408].

jurisdiction to consider the lawfulness of China's construction activities or the appropriation of the feature. Since the status of Mischief Reef was a matter for the merits, the Tribunal reserved a decision on its jurisdiction with respect to the Philippines' Submission No 12 for consideration in conjunction with the merits of the Philippines' claims.¹⁰¹

As discussed earlier,¹⁰² the Tribunal, in its Award on the Merits, ruled that Mischief Reef was a low-tide elevation and that it formed part of the EEZ and continental shelf of the Philippines.¹⁰³ It followed that China had no entitlement over Mischief Reef. Furthermore, the Tribunal, in its Award on the Merits, ascertained whether its jurisdiction over the Philippine's Submissions No 11 and 12(b) was constrained by the military activities exception in Article 298(1)(b) of the UNCLOS. In this regard, the Tribunal took note of China's repeated statements that its installations and island-building activities were intended to fulfil civilian purposes.¹⁰⁴ It followed that China's conduct fell outside the scope of Article 298(1)(b). The Tribunal thus concluded that it had jurisdiction to consider the Philippine's Submission Nos 11 and 12(b).¹⁰⁵

ii. *Lawfulness of China's Actions*

In considering the Philippines' Submissions Nos 11 and 12(b), the Tribunal examined three obligations: the obligation of due diligence; the obligation to conduct an environmental impact assessment; and the obligation to cooperate.¹⁰⁶

a. *Obligation of Due Diligence*

The first issue that needs discussion concerns the obligation of due diligence. Article 192 of the UNCLOS provides a general obligation to protect the marine environment as follows:

States have the obligation to protect and preserve the marine environment.

When interpreting this provision, two points must be noted. The first noteworthy point concerns a time element incorporated in Article 192. According to the

¹⁰¹ *ibid*, [409].

¹⁰² See ch 4, section III.D of this book.

¹⁰³ The *South China Sea* Arbitration Award (Merits), n 1, [647].

¹⁰⁴ *ibid*, [934]–[935].

¹⁰⁵ *ibid*, [938].

¹⁰⁶ The present writer briefly examined the three obligations in Y Tanaka, 'The *South China Sea* Arbitration: Environmental Obligations under the Law of the Sea Convention' (2018) 27 *RECIEL* 90, 91–94. See also C Kojima, 'South China Sea Arbitration and the Protection of the Marine Environment: Evolution of UNCLOS Part XII Through Interpretation and the Duty to Cooperate' (2017) 27 *Asian Yearbook of International Law* 166; Z Scanlon and R Beckman, 'Assessing Environmental Impact and the Duty to Cooperate: Environmental Aspects of the *Philippines v China* Award' (2018) 3 *Asia-Pacific Journal of Ocean Law and Policy* 5.

Tribunal, the 'general obligation' under Article 192 extends both to 'protection' of the marine environment from *future* damage and 'preservation' in the sense of maintaining or improving its *present* condition. Article 192 thus entails a positive obligation to take active measures to protect and preserve the marine environment, and a negative obligation not to degrade the marine environment at the same time.¹⁰⁷ The marine environment, including marine ecosystems, is dynamic by nature, and ecological conditions in the oceans may change over time. Environmental knowledge and technology are also developing rapidly. Hence it is important to take account of time elements in the interpretation of environmental norms in order to adopt them flexibly to new situations. It is significant that the Tribunal incorporated an inter-temporal element, namely the obligation to protect the marine environment from *future* damage, into Article 192.

The second noteworthy point pertains to the systemic interpretation. At present, complex webs of treaties are developing in multiple branches of international law. The coexistence of treaties necessitates a systemic outlook.¹⁰⁸ Notably, the Tribunal read Article 192 in light of 'the corpus of international law relating to the environment' and 'other applicable international law'.¹⁰⁹ In this connection, the Tribunal made an explicit *renvoi* to the 1973 Convention on the International Trade in Endangered Species of Wild Fauna and Flora (CITES).¹¹⁰ As CITES is the subject of nearly universal adherence, including by the Philippines and China, it forms part of the general corpus of international law that informs the content of Articles 192 and 194(5) of the UNCLOS. Accordingly, the Tribunal considered that the general obligation to 'protect and preserve the marine environment' in Article 192 included a 'due diligence obligation to prevent the harvesting of species that are recognised internationally as being at risk of extinction and requiring international protection'.¹¹¹ The Tribunal's interpretation provides an interesting example of the systemic interpretation of environmental treaties.¹¹²

¹⁰⁷ The *South China Sea* Arbitration Award (Merits), n 1, [941]; Tanaka, n 106, 91.

¹⁰⁸ Related to this, the ICJ stated that 'an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation': *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, [1971] ICJ Rep 16, 31, [53]. See Separate Opinion of Judge Cançado Trindade in *Whaling in the Antarctic (Australia v Japan, New Zealand intervening)*, [2014] ICJ Rep 348, 357–58, [25]–[26].

¹⁰⁹ The *South China Sea* Arbitration Award (Merits), n 1, [941] and [959]. See also MM Mbengue, 'The South China Sea Arbitration: Innovations in Marine Environmental Fact-Finding and Due Diligence Obligations' (2016) 110 *AJIL Unbound* 285, 286.

¹¹⁰ Convention on the International Trade in Endangered Species of Wild Fauna and Flora (adopted 3 March 1973, entered into force 1 July 1975) 993 *UNTS* 243.

¹¹¹ The *South China Sea* Arbitration Award (Merits), n 1, [956]. See also *ibid*, [959].

¹¹² See also N Oral, 'The South China Sea Arbitral Award, Part XII of UNCLOS, and the Protection and Preservation of the Marine Environment' in S Jayakumar et al (eds), *The South China Sea Arbitration: The Legal Dimension* (Edward Elgar, 2018) 223, 237.

An issue that needs further consideration is the legal basis for systemic interpretation. In this regard, Article 31(3)(c) of the Vienna Convention on the Law of Treaties merits particular attention.¹¹³ This provision stipulates that:

There shall be taken into account, together with the context:

...

- (c) any relevant rules of international law applicable in the relations between the parties.

The Tribunal, in its Award on the Merits, did not refer to this provision when considering the Philippines' Submissions Nos 11 and 12(b). In its Award on Jurisdiction, however, the Tribunal made a clear reference to Article 31(3), stating:

The Tribunal is satisfied that Article 293(1) of the Convention, together with Article 31(3) of the Vienna Convention on the Law of Treaties, enables it in principle to consider the relevant provisions of the CBD for the purposes of interpreting the content and standard of Articles 192 and 194 of the Convention.¹¹⁴

It would seem to follow that Article 31(3) of the Vienna Convention provides a basis for the Tribunal's systemic interpretation regarding Articles 192 and 194(5) of the UNCLOS. In this regard, it might have been useful if the Tribunal had been able to further explore the role of Article 31(3)(c) of the Vienna Convention in systemic interpretation of environmental norms.

According to the Tribunal, there was no doubt that the harvesting of corals and giant clams from the waters surrounding Scarborough Shoal and features in the Spratly Islands had a harmful impact on the fragile marine environment. It follows that a failure to take measures to prevent these practices would constitute a breach of Articles 192 and 194(5) of the UNCLOS.¹¹⁵ In this connection, the Tribunal specified two components of the obligation of due diligence. The first concerned an obligation to *adopt* rules and measures to prevent harmful acts; and the second element related to an obligation to *maintain* a level of vigilance in enforcing those rules and measures.¹¹⁶ Given that the obligation to maintain is a continuous one, it can be considered that that obligation contains a temporal

¹¹³ Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331. For a monograph on this subject, see H van Asselt, *The Fragmentation of Global Climate Governance: Consequences and Management of Regime Interactions* (Edward Elgar Publishing 2014); R Wolfrum and N Matz, *Conflicts in International Environmental Law* (Springer 2003); P Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato's Cave* (Brill/Nijhoff, 2015). See also G Distefano and PC Mavroidis, 'L'interprétation systémique: le liant de l'ordre international' in O Guillod and C Müller (eds), *Pour un droit équitable, engagé et chaleureux, Mélanges en l'honneur de Pierre Wessner* (Helbing Lichtenhan, 2011) 743.

¹¹⁴ The *South China Sea* Arbitration Award (Jurisdiction and Admissibility), n 6, [176].

¹¹⁵ The *South China Sea* Arbitration Award (Merits), n 1, [960].

¹¹⁶ *ibid*, [961].

element. An issue thus arises with regard to the impact of the passage of time on the level of vigilance. In this regard, the Seabed Disputes Chamber of ITLOS, in its Advisory Opinion of 2011, took the view that 'The standard of due diligence may vary over time and depends on the level of risk and on the activities involved.'¹¹⁷ However, the Tribunal, in the *South China Sea* Arbitration Award (Merits), did not refer to the variability of the standard of due diligence over time.¹¹⁸ In any event, an inquiry was made whether China had breached the obligation of due diligence. When considering this issue, the Tribunal noted two points.

First, according to the Tribunal, the harvesting of sea turtles and species threatened with extinction constitutes a harm to the marine environment as such. There is no doubt that the harvesting of corals and giant clams from the waters surrounding Scarborough Shoal and features in the Spratly Islands would have a harmful impact on the fragile marine environment. Accordingly, a failure to take measures to prevent these practices would constitute a breach of Articles 192 and 194(5) of the Convention.¹¹⁹

Second, even though China enacted a Law of the Protection of Wildlife in 1989, '[t]here is no evidence in the record that would indicate that China has taken any steps to enforce those rules and measures against fishermen engaged in poaching of endangered species'.¹²⁰ Instead, China provided armed government vessels to protect the fishing boats. Therefore the Tribunal held that:

China has, through its toleration and protection of, and failure to prevent Chinese fishing vessels engaging in harmful harvesting activities of endangered species at Scarborough Shoal, Second Thomas Shoal and other features in the Spratly Islands, breached Articles 192 and 194(5) of the Convention.¹²¹

A particular issue that needs further consideration concerns China's responsibility for environmental degradation caused by propeller chopping for giant clams across the Spratly Islands. According to the Tribunal, '[g]iant clams (*Tridacnidae*) and many of the corals found in the Spratly Islands are listed in Appendix II to CITES and are unequivocally threatened'.¹²² In this regard, the Ferse Report noted that:

More recently, fishermen in the South China Sea are reported to utilise the propellers of their boats to excavate shells from reef flats in the Spratly Islands on an industrial scale, leading to near complete destruction of the affected reef areas.¹²³

¹¹⁷ [2011] ITLOS Rep 74, [242](3).

¹¹⁸ Furthermore, Mbengue argued that the Tribunal defined 'a very high standard of due diligence in Part XII of the UNCLOS'. See Mbengue, n 109, 286.

¹¹⁹ The *South China Sea* Arbitration Award (Merits), n 1, [960].

¹²⁰ *ibid*, [964].

¹²¹ *ibid*, [992].

¹²² *ibid*, [957].

¹²³ *Ferse Report: Assessment of the Potential Environmental Consequences of Construction Activities on Seven Reefs in the Spratly Islands in the South China Sea*, 26 April 2016, 11 (footnote omitted).

In addition to the Ferse Report, the Tribunal referred to other reports that testified to significant damage to coral reefs and the marine environment.¹²⁴

The Tribunal considered that the small propeller vessels involved in harvesting the giant clams were within China's jurisdiction and control, and that China was fully aware of the practice and had actively tolerated it as a means to exploit the living resources of the reefs. It thus found that China breached its obligation to protect and preserve the marine environment in respect of its toleration and protection of the harvesting of giant clams by the propeller-chopping method.¹²⁵

On the other hand, the Tribunal noted that in 2000, China updated its Fisheries Law and prohibited in Article 30 the 'use of explosives, poisons, electricity and any other means in fishing that impairs the fishery resources'.¹²⁶ Furthermore, according to the Tribunal:

In contrast to the situations of harvesting of endangered species and harmful construction activities, there is scant evidence in the case record about the use of explosives and cyanide over the last decade or Philippine complaints about its use. This suggests China may have taken measures to prevent such practices in the Spratly Islands. In any event, the Tribunal is not prepared to make a finding on the evidence available, under Submission No 11 with respect to cyanide and explosives.¹²⁷

Therefore the Tribunal did not accept the Philippines' Submission No 11 with respect to cyanide and explosives.¹²⁸ According to the logic of the Tribunal's argument, the lack of evidence would lead to the presumption that a state – in this case, China – took preventive measures. It would seem to follow that hard evidence is needed to prove the breach of environmental obligations by a state. It may be said that the Tribunal treated evidence carefully.¹²⁹

The further issue relates to the lawfulness of China's construction activities on seven reefs in the Spratly Islands: (i) Cuarteron Reef, (ii) Fiery Cross Reef, (iii) Gaven Reef (North), (iv) Johnson Reef, (v) Hughes Reef, (vi) Subi Reef, and (vii) Mischief Reef. While Chinese construction activities reportedly commenced at Cuarteron Reef in 1992, more substantial land reclamation began in the spring of 2014. Chinese land reclamation intensified throughout 2015, and it is estimated that as at November 2015, China's construction work had resulted in the creation of at least 231,000 square metres of new land on Cuarteron Reef.¹³⁰ Likewise, land reclamation at Fiery Cross Reef was intensified throughout 2015, and by November 2015 approximately 2,740,000 square metres of land had

¹²⁴ These reports include: report by VR Lee, McManus Report, First, Second, and Third Carpenter Reports; The *South China Sea* Arbitration Award (Merits), n 1, [848]–[851]. See also Memorial of the Philippines, vol I, 177–79, [6.52]–[6.54]; 187–88, [6.73]–[6.74].

¹²⁵ The *South China Sea* Arbitration Award (Merits), n 1, [965]–[966].

¹²⁶ *ibid*, [974].

¹²⁷ *ibid*, [972], [975]. See also question by Judge Wolfrum, Merits Hearing Tr (Day 3), 46.

¹²⁸ The *South China Sea* Arbitration Award (Merits), n 1, [975].

¹²⁹ Mbengue, n 109, 289.

¹³⁰ The *South China Sea* Arbitration Award (Merits), n 1, [864]–[866].

been created at Fiery Cross Reef.¹³¹ At Gaven Reef (North), intense reclamation work began in the spring of 2014, and within the span of a year, China transformed Gaven Reef (North) from a coral reef to an artificial island measuring approximately 300 by 250 metres, created from 136,000 square metres of materials dredged from the seabed.¹³² Furthermore, in the spring of 2014, China began extensive reclamation activities at Johnson Reef, which is classified as a rock for the purpose of Article 121(3) of the UNCLOS. By November 2015, China transformed Johnson Reef to an artificial island measuring approximately 109,000 square metres, nearly 1,000 times larger than the previous structure.¹³³ Likewise, by November 2015, China had created an artificial island on Hughes Reef measuring around 75,000 square metres.¹³⁴ Lastly, Subi Reef is classified as a low-tide elevation.¹³⁵ Nonetheless, the massive scale of China's work on Subi Reef transformed nearly the entire atoll into an artificial island.¹³⁶

The artificial island-building programme is clearly part of an official Chinese policy and programme implemented by organs of the Chinese state.¹³⁷ A pivotal issue in this regard concerns the impact of the construction activities on the marine environment. In considering this issue, scientific evidence becomes a key element. Hence, the Tribunal referred to various expert reports, such as the Ferse Report. The Ferse Report clearly stated that '[t]he construction activities have impacted reefs on a scale unprecedented in the region'.¹³⁸ According to the Report:

China's recent construction activities have [caused] and will cause environmental harm to coral reefs at Cuarteron Reef, Fiery Cross Reef, Gaven Reef, Johnson Reef, Hughes Reef, Mischief Reef, and Subi Reef; beyond the pre-existing damage to reefs that resulted from destructive fishing and the collection of corals and clams, storm damage, Crown-of-Thorns starfish, and the human presence on small garrisons on the reefs. The scale of these previous impacts generally cannot be compared with the environmental harm caused by the construction activities, both in terms of spatial extent and duration.¹³⁹

On the basis of the observation, the Tribunal found that through its construction activities, China had breached its obligations under Articles 192 and 194(1) and (5) of the UNCLOS.¹⁴⁰ It is notable that the expert reports significantly affected the decision of the Tribunal in the *South China Sea* arbitration.

¹³¹ *ibid*, [869].

¹³² *ibid*, [873].

¹³³ *ibid*, [877].

¹³⁴ *ibid*, [881].

¹³⁵ *ibid*, [368].

¹³⁶ *ibid*, [886].

¹³⁷ *ibid*, [976].

¹³⁸ *Ferse Report*, n 123, 3.

¹³⁹ *ibid*, 59; *The South China Sea Arbitration Award (Merits)*, n 1, [979].

¹⁴⁰ *The South China Sea Arbitration Award (Merits)*, n 1, [983].

This highlights the role of experts in the settlement of international environmental disputes.¹⁴¹

b. Environmental Impact Assessment and Monitoring

The next issue pertains to the obligation to conduct an environmental impact assessment and monitoring.¹⁴² Development of a project, such as land reclamation, may entail the risk of damaging the environment. Environmental impact assessment is a device to detect potential environmental risks arising from a proposed project before authorising or funding it.¹⁴³ Environmental harms themselves belong to the future, but the risks of environmental harms belong to the present since the risks must be detected in the present. From them, the future can to some extent be predicted. In this sense, an environmental impact assessment can be considered a legal device to address inter-temporality in environmental protection. By identifying potential risks, an effective environmental impact assessment can assist decision makers in determining whether precautionary action must be taken, and indeed whether the project should go ahead or not.¹⁴⁴

The obligation to carry out an environmental impact assessment under general international law was affirmed by the International Court of Justice (ICJ) in the *Pulp Mills* case, stating:

[I]t may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource.¹⁴⁵

The dictum of the ICJ was echoed by the ITLOS Seabed Disputes Chamber in its Advisory Opinion of 2011. According to the Chamber, ‘It should be stressed that the obligation to conduct an environmental impact assessment is a direct obligation under the Convention and a general obligation under customary international law.’¹⁴⁶

In the UNCLOS, obligations to conduct an environmental impact assessment and monitoring are provided in Articles 204, 205 and 206. Under Article 204(1),

¹⁴¹ This issue will be discussed in ch 6, section III.D.ii of this book. See also Oral, n 112, 233–34.

¹⁴² On this issue, see Oral, n 112, 237–41; Tanaka, n 106, 92–94.

¹⁴³ The 1991 Convention on Environmental Impact Assessment in a Transboundary Context (the Espoo Convention) defines ‘environmental impact assessment’ as ‘a national procedure for evaluating the likely impact of a proposed activity on the environment’ (Art 1(vi)). Text in (1991) 30 *ILM* 802. Entered into force 10 September 1997.

¹⁴⁴ Environmental impact assessment and the precautionary approach are arguably integrally inter-linked, in the sense that it is difficult to detect potential risks that may trigger the application of the precautionary approach unless an effective environmental impact assessment is carried out before a proposed project has begun.

¹⁴⁵ *Pulp Mills on the River Uruguay (Argentina v Uruguay)* [2010] ICJ Rep 14, 83, [204].

¹⁴⁶ *Responsibilities and Obligations of States*, n 54, [2011] ITLOS Rep 50, [145].

states are under the obligation to endeavour, as far as practicable, to observe, measure, evaluate and analyse the risks or effects of pollution of the marine environment. Article 205 requires states to publish reports of the results obtained pursuant to Article 204 to the competent international organisations, which should make them available to all states. Furthermore, Article 206 seeks to ensure that planned activities with potentially damaging effects may be effectively controlled and that other states are kept informed of their potential risks.¹⁴⁷ This provision deserves to be quoted in full:

When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments in the manner provided in article 205.

Arguably, a state whose activities cause serious environmental damage would not be able to deny breach of the obligation of due diligence on grounds of non-foreseeability if it had not conducted an environmental impact assessment.¹⁴⁸ This view seems to be echoed by the 2010 *Pulp Mills* judgment, which stated:

[D]ue diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the régime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works.¹⁴⁹

An issue in point in the *South China Sea* arbitration was whether China had fulfilled obligations to conduct an environmental impact assessment under the Convention. China repeatedly asserted that it had undertaken thorough environmental studies. According to the Tribunal, however,

neither the Tribunal, the Tribunal-appointed experts, the Philippines, nor the Philippines' experts have been able to identify any report that would resemble an environmental impact assessment that meets the requirements of Article 206 of the Convention, or indeed under China's own Environmental Impact Assessment Law of 2002.¹⁵⁰

Therefore the Tribunal had to admit that it could not make a definitive finding that China had prepared an environmental impact assessment, but neither could it definitely find that China had failed to do so.¹⁵¹

Nonetheless, such a finding is not necessary in order to establish a breach of Article 206. In the view of the Tribunal, what is more important is the obligation

¹⁴⁷ The *South China Sea* Arbitration Award (Merits), n 1, [948].

¹⁴⁸ AE Boyle, 'Land-based Sources of Marine Pollution: Current Legal Regime' (1992) 16 *Marine Policy* 20, 23; P-M Dupuy, 'Soft Law and the International Law of the Environment' (1991) 12 *Michigan Journal of International Law* 420, 434.

¹⁴⁹ *Pulp Mills on the River Uruguay*, n 145, [2010] ICJ Rep 83, [204].

¹⁵⁰ The *South China Sea* Arbitration Award (Merits), n 1, [989].

¹⁵¹ *ibid*, [991].

to communicate. As noted, Article 206 obliges states to communicate reports of the results of assessments on the potential effects of planned activities on the marine environment, when states have ‘reasonable grounds for believing that planned activities under their jurisdiction or control may cause ... significant and harmful changes to the marine environment’. According to the Tribunal, ‘the obligation to communicate reports of the results of the assessment is absolute.’¹⁵² Furthermore, the Tribunal considered that ‘China could not reasonably have held any belief other than that the construction “may cause significant and harmful changes to the marine environment.”’¹⁵³ Thus China was under an obligation to communicate the result of the assessment.¹⁵⁴ Under Article 205 of the UNCLOS, states are obliged to publish reports of the results of monitoring of the risk or effects of pollution or provide such reports to the ‘competent international organizations’. Although the Tribunal directly asked China for a copy of any environmental impact assessment it had prepared, China did not provide one. Nor did it deliver an assessment in writing to that forum or to any other international body as far as the Tribunal was aware. The Tribunal accordingly concluded that China had not fulfilled its duties under Article 206 of the Convention.¹⁵⁵

Three points can be made with regard to the interpretation and application of this provision.¹⁵⁶ The first point relates to the interlinkage between an environmental impact assessment and the obligation to communicate. As explained earlier, the Tribunal found that China had not fulfilled its duties under Article 206 of the Convention with regard to environmental impact assessment because of the absence of communication.¹⁵⁷ Given that it may be less easy to determine whether a state properly carried out an environmental impact assessment, the Tribunal’s approach focusing on the non-fulfilment of a procedural requirement, that is communication, is noteworthy.¹⁵⁸ Concerning the manner of communication, however, the Tribunal generally stated that China ‘has delivered no assessment in writing to that forum or any other international body as far as the Tribunal is aware’.¹⁵⁹ In so stating, the Tribunal did not examine the question to which organisation the environmental impact assessment report should have been provided, nor the question as to whether

¹⁵² *ibid*, [948].

¹⁵³ *ibid*, [988].

¹⁵⁴ *ibid*.

¹⁵⁵ *ibid*, [991].

¹⁵⁶ Tanaka, n 106, 93–94.

¹⁵⁷ The *South China Sea* Arbitration Award (Merits), n 1, [991].

¹⁵⁸ The ICJ, in *Costa Rica v Nicaragua/Nicaragua v Costa Rica*, also linked the obligation to notify with the obligation to conduct an environmental impact assessment. *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)* (*‘Costa Rica v Nicaragua/Nicaragua v Costa Rica’*), Judgment, [2015] ICJ Rep 665, 707, [104]. See also Tanaka, n 106, 93–94.

¹⁵⁹ The *South China Sea* Arbitration Award (Merits), n 1, [991].

a relevant organisation exists in the South China Sea region.¹⁶⁰ It might have been useful if the Tribunal could have provided its view regarding the manner of communication.

Second, the quality of environmental impact assessments is at issue. The Tribunal, in its Award on the Merits, reviewed the China's own legislative standards and ruled that the alleged Chinese environmental impact assessments were 'far less comprehensive' than environmental impact assessments reviewed by other international courts and tribunals.¹⁶¹ In so stating, the Tribunal stressed 'comprehensiveness' as an important characteristic of an environmental impact assessment.¹⁶² Yet it offered scant explanation about the meaning of 'comprehensiveness' of an environmental impact assessment.¹⁶³ It might have been helpful if the Tribunal had been able to clarify the specific contents of an environmental impact assessment in more detail, since Article 206 of the UNCLOS contains no guidance on this matter.¹⁶⁴

The third point pertains to a condition for triggering an environmental impact assessment. Under Article 206, the obligation to conduct an environmental impact assessment is limited to the situation where 'States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment'. However, this provision provides no further precision with regard to the standard of 'reasonable grounds'. Related to this, it is relevant to note that the ICJ, in the *Costa Rica v Nicaragua* case, specified a dual assessment: first, the state is obliged to ascertain whether there is a risk of significant transboundary harm that would trigger the duty to conduct an environmental impact assessment (preliminary assessment); second, only if such a risk exists is the state further required to carry out an environmental impact assessment.¹⁶⁵ In this regard, the ICJ ruled that a preliminary assessment must be carried out 'on the basis of an objective evaluation of all the relevant circumstances'.¹⁶⁶ Yet the evidential standard for determining 'significant' transboundary harm remains less clear and is a matter of subjective appreciation. As a consequence, there is

¹⁶⁰ Scanlon and Beckman, n 106, 15. In this regard, Scanlon and Beckman argued that 'where there is no such organisation, there is an obligation to "publish" the report instead': *ibid*, 16.

¹⁶¹ The *South China Sea* Arbitration Award (Merits), n 1, [990].

¹⁶² Mbengue, n 109, 287.

¹⁶³ *ibid*.

¹⁶⁴ In practice, a dispute may arise with regard to the quality of an environmental impact assessment and monitoring. In this regard, see Tanaka, n 106, 94; P Birnie, A Boyle and C Redgwell, *International Law and the Environment* (Oxford University Press, 2009) 170. For a thorough analysis of interstate disputes concerning environmental impact assessment, see N Craik, *The International Law of Environmental Impact Assessment: Process, Substance and Integration* (Cambridge University Press, 2008) 111–20.

¹⁶⁵ *Costa Rica v Nicaragua/Nicaragua v Costa Rica* case, n 158, [2015] ICJ Rep 720, [153].

¹⁶⁶ *ibid*.

the risk that the obligation to conduct an environmental impact assessment may not be appropriately triggered by the state causing the risk.¹⁶⁷

c. International Cooperation

The obligation of international cooperation is key in environmental protection.¹⁶⁸ Its importance in marine environmental protection was stressed by ITLOS in the *MOX Plant* case: ‘[T]he duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law.’¹⁶⁹ More generally, the ICJ, in the *Pulp Mills on the River Uruguay* case, has emphasised that ‘it is by cooperating that the States concerned can jointly manage the risks of damage to the environment that might be created by the plans initiated by one or other of them, so as to prevent the damage in question’.¹⁷⁰

Under the UNCLOS, Article 197 places a general obligation upon states to cooperate on a global or regional basis,

directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features.

Furthermore, Article 123 provides an obligation to cooperate between states bordering enclosed or semi-enclosed seas, including the obligation to ‘coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment’. As the South China Sea is regarded as a semi-enclosed sea, the application of this provision is important in the environmental protection of the South China Sea. According to the Tribunal, however, there was no convincing evidence of China’s attempting to cooperate or coordinate with the other states bordering the South China Sea with regard to China’s island-building programme. This lack of coordination is not unrelated to China’s lack of communication.¹⁷¹ Indeed, China had delivered no report of the results of environmental impact assessments. For these reasons, the Tribunal ruled that China had breached Articles 123 and 197 of the Convention.¹⁷² Yet the Tribunal’s reasoning on this matter needs further consideration.

¹⁶⁷ Tanaka, n 106, 94.

¹⁶⁸ For an analysis of the obligation of international cooperation, see Tanaka, n 53, 52–55; Tanaka, n 106, 95.

¹⁶⁹ *MOX Plant* case (*Ireland v United Kingdom*), ITLOS Case No 10, [2011] ITLOS Rep 110, [82]. See also *Case concerning Land Reclamation by Singapore in and around the Straits of Johor* (*Malaysia v Singapore*), Provisional Measures, ITLOS Case No 12, [2003] ITLOS Rep 10, 25, [92].

¹⁷⁰ *Pulp Mills on the River Uruguay* [2010] ICJ Rep 49, [77].

¹⁷¹ The *South China Sea* Arbitration Award (Merits), n 1, [986].

¹⁷² *ibid*, [993].

First, Article 197 provides an obligation to cooperate 'in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features'. Environmental damage from China's land-building activities and the formulation and elaboration of relevant rules are two different matters. In this regard, the Tribunal seemingly failed to specify how China's land-building activities breached the obligation set out in Article 197.¹⁷³

Second, Article 123 sets out an obligation of states to endeavour to 'coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment'. Even though China's land-building activities might certainly cause environmental damage, this does not directly lead to the breach of the obligation to coordinate under Article 123.¹⁷⁴

Overall the Tribunal seemed to assimilate the obligations under Articles 123 with a duty to notify or communicate.¹⁷⁵ This point can be deduced from the statement of the Tribunal: 'This lack of coordination is not unrelated to China's lack of communication ...'¹⁷⁶ Yet there appears to be scope to consider the question whether this is a correct interpretation of Articles 123 and 197 of the Convention.¹⁷⁷ In any event, the Tribunal concluded that China had breached Articles 192, 194(1), 194(5), 197, 123 and 206 of the UNCLOS.¹⁷⁸

E. Occupation and Construction Activities on Mischief Reef

i. Jurisdiction of the Tribunal

The next issue pertains to the lawfulness of occupation and construction activities on Mischief Reef by China. In this regard, the Philippines, in its Submission No 12(a) and (c), requested the Tribunal to declare that:

- (12) China's occupation of and construction activities on Mischief Reef
 - (a) violate the provisions of the Convention concerning artificial islands, installations and structures;
 - ...
 - (c) constitute unlawful acts of attempted appropriation in violation of the Convention.¹⁷⁹

¹⁷³ Scanlon and Beckman, n 106, 21.

¹⁷⁴ *ibid*, 23.

¹⁷⁵ *ibid*, 24.

¹⁷⁶ The *South China Sea* Arbitration Award (Merits), n 1, [986].

¹⁷⁷ As an alternative approach, Scanlon and Beckman argued that the Tribunal could have applied a legal duty to notify and consult relying directly on a general principle of international law or on Part XII of the UNCLOS read in light of customary international law. Scanlon and Beckman, n 106, 28.

¹⁷⁸ The *South China Sea* Arbitration Award (Merits), n 1, [1203]B(12) and (13).

¹⁷⁹ *ibid*, [994].

At least, Chinese construction activities on Mischief Reef reportedly date back to January 1995.¹⁸⁰ According to data presented by the Philippines, China's construction work had resulted in the creation of 5,580,000 square metres of new land on Mischief Reef as of November 2015.¹⁸¹

In its Award on Jurisdiction, the Tribunal held that its jurisdiction to address these questions would rely on the status of Mischief Reef as an 'island', 'rock' or 'low-tide elevation'. If the Tribunal were to find that Mischief Reef was an 'island' or 'rock', and thus constituted land territory, the Tribunal would lack jurisdiction to consider the lawfulness of China's construction activities or the appropriation of the feature. Furthermore, Article 298(1)(b) of the UNCLOS excludes disputes concerning military activities from the Tribunal's jurisdiction. In the view of the Tribunal, the specifics of China's activities on Mischief Reef and whether such activities were military in nature, were matters best assessed in conjunction with the merits. Given that the possible jurisdictional objections with respect to the dispute underlying Submission No 12 therefore did not possess an exclusively preliminary character, the Tribunal reserved a decision on its jurisdiction with respect to the Philippines' Submission No 12 for consideration in conjunction with the merits of the Philippines' claims.¹⁸²

In its Award on the Merits, the Tribunal found that Mischief Reef was a low-tide elevation and, as such, generated no entitlement to maritime zones of its own.¹⁸³ As noted, none of the high-tide features in the Spratly Islands is a fully entitled island for the purposes of Article 121 of the UNCLOS. Consequently, there was no situation of overlapping entitlements that would require maritime delimitation by applying Articles 15, 74 and 83 of the Convention.¹⁸⁴ Moreover, China repeatedly stated that its installations and island construction were intended to fulfil civilian purposes.¹⁸⁵ In this regard, the Tribunal took note of the public statement of China's President Xi Jinping, that 'Relevant construction activities that China are undertaking in the island of South – [sic] Nansha Islands do not target or impact any country, and China does not intend to pursue militarization.'¹⁸⁶ As civilian activity, the Tribunal considered that China's

¹⁸⁰ *ibid*, [996]; Memorial of the Philippines, 193–94, [6.92].

¹⁸¹ The *South China Sea* Arbitration Award (Merits), n 1, [1008]; Supplemental Documents of the Philippines, vol IV, Annex 782, 19 November 2015.

¹⁸² The *South China Sea* Arbitration Award (Jurisdiction and Admissibility), n 6, [409].

¹⁸³ The *South China Sea* Arbitration Award (Merits), n 1, [1025].

¹⁸⁴ *ibid*, [1025].

¹⁸⁵ *ibid*, [1027].

¹⁸⁶ US, The White House, Office of the Press Secretary, 'Press Release: Remarks by President Obama and President Xi of the People's Republic of China in Joint Press Conference' (25 September 2015), Annex 664, Supplemental Documents of the Philippines, vol I, Annexes, 19 November 2015; the *South China Sea* Arbitration Award (Merits), n 1, [1027].

conduct fell outside the scope of Article 298(1)(b). It thus concluded that it had jurisdiction to consider the Philippines' Submission.¹⁸⁷

ii. Lawfulness of China's Actions

Two issues arise with regard to China's occupation and construction activities on Mischief Reef. The first issue pertains to their lawfulness. In approaching this issue, it must be noted that Mischief Reef is a low-tide elevation, and that it can only constitute part of the EEZ and continental shelf of the Philippines; and that it does not lie within any entitlement that could be generated by any feature claimed by China.¹⁸⁸ In accordance with Article 60 of the UNCLOS, it is clear that only the Philippines could construct or authorise artificial islands, installations and structures.¹⁸⁹ Nonetheless, China's activities at Mischief Reef had evolved into the creation of an artificial island. Given that China's conduct took place in the face of the Philippines' protests, it is equally clear that China proceeded without receiving the permission of the Philippines.¹⁹⁰ Accordingly, China's violation of its obligations was manifest.¹⁹¹ In conclusion, the Tribunal ruled that China breached Articles 60 and 80 of the UNCLOS with respect to the Philippines' sovereign rights in its EEZ and continental shelf.¹⁹²

The second issue concerns the lawfulness of China's appropriation of Mischief Reef. Since low-tide elevations form part of the submerged land-mass of a state, low-tide elevations, as distinct from land territory, cannot be appropriated.¹⁹³ Since Mischief Reef as a low-tide elevation falls within the legal regime for the continental shelf, it is incapable of appropriation by occupation or otherwise.¹⁹⁴ Related to this, the Tribunal already held that China's actions at Mischief Reef unlawfully interfered with the Philippines' enjoyment of its sovereign rights. Hence the Tribunal ruled that there was no need to address Submission No 12(c).¹⁹⁵

The findings of the Tribunal require two comments. First, it must be stressed that the legal status of maritime features cannot be changed by land reclamation. In fact, the Tribunal made it clear that if what was originally a reef platform that submerged at high tide was elevated into an island that was permanently

¹⁸⁷ The *South China Sea* Arbitration Award (Merits), n 1, [1028].

¹⁸⁸ *ibid*, [1025], [1030]. See also Memorial of the Philippines, vol I, 198, [6.103].

¹⁸⁹ The *South China Sea* Arbitration Award (Merits), n 1, [1036].

¹⁹⁰ *ibid*, [1037].

¹⁹¹ *ibid*, [1038].

¹⁹² *ibid*, [1043]. In this regard, it is relevant to recall that the Tribunal found that through its construction activities, China also breached its obligations under Arts 192, 194(1) and (5) of the UNCLOS with regard to environmental protection: *ibid*, [983].

¹⁹³ See ch 4, section II of this book.

¹⁹⁴ The *South China Sea* Arbitration Award (Merits), n 1, [1040].

¹⁹⁵ *ibid*, [1042].

exposed by land reclamation, ‘such an island is undoubtedly “artificial” for the purpose of Article 60.’¹⁹⁶ This view echoed what the Tribunal had stated earlier, that ‘a low-tide elevation or area of seabed cannot be legally transformed into an island through human efforts’.¹⁹⁷

Second, attention must be paid to the interrelationship between destruction of evidence and the obligation of non-aggravation of disputes. China, through its construction activities on Mischief Reef, permanently destroyed evidence of the natural status of the maritime feature. As will be discussed in section III of this chapter, it can be argued that the China’s action might also lead to the breach of the obligation of non-aggravation of disputes.

F. Operation of Law Enforcement Vessels in a Dangerous Manner

i. Jurisdiction of the Tribunal

Lastly, the lawfulness of operation of Chinese law enforcement vessels must be examined. In its Submission No 13, the Philippines requested a declaration:

(13) China has breached its obligations under the Convention by operating its law enforcement vessels in a dangerous manner causing serious risk of collision to Philippine vessels navigating in the vicinity of Scarborough Shoal.¹⁹⁸

This Submission concerned interactions between Chinese law enforcement vessels and Philippine coast guard and surveillance ships on 28 April 2012 and on 26 May 2012.¹⁹⁹ In this connection, the Philippines alleged that China breached its obligations relating to safe navigation under Articles 94 and 21 of the UNCLOS and related provisions in the 1972 Convention on the International Regulations for Preventing of Collisions at Sea (COLREGS), by operating its law enforcement vessels in a dangerous manner.²⁰⁰

In the Award on Jurisdiction, the Tribunal found that this was not a dispute concerning sovereignty or maritime boundary delimitation, nor was it barred from the Tribunal’s consideration by any requirement of Section 1 of Part XV of the UNCLOS. It also found that Article 298(1)(b) had no application in the territorial sea and that the Tribunal’s jurisdiction was not dependent on a prior determination of sovereignty over Scarborough Shoal. Accordingly, to the extent that the claimed rights and alleged interference occurred within the territorial sea of Scarborough Shoal, the Tribunal concluded that it had jurisdiction to

¹⁹⁶ *ibid*, [1037].

¹⁹⁷ *ibid*, [508].

¹⁹⁸ *ibid*, [1044].

¹⁹⁹ *ibid*, [1046].

²⁰⁰ *ibid*, [1059].

address the matters raised in the Philippines' Submission No 13.²⁰¹ The conclusion was confirmed by the Tribunal in the Award on the Merits.²⁰²

ii. Lawfulness of China's Actions

Both China and the Philippines ratified the COLREGS.²⁰³ Even though the Philippines did not become a party to the 1972 Convention until 2013, the Tribunal considered that the COLREGS was binding upon the two states relating to the conduct of their respective vessels by virtue of Article 94 of the UNCLOS.

Article 94(1) of the Convention places a general obligation upon every state to 'effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag'. This obligation is further amplified by Article 94(5):

In taking the measures called for in paragraphs 3 and 4 each State is required to conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance.

The Tribunal took the view that Article 94 incorporates the COLREGS into the UNCLOS, since the COLREGS constitutes a 'generally accepted international regulation'.²⁰⁴ It follows that a violation of the COLREGS constitutes a violation of the Convention itself.²⁰⁵

The Tribunal's view rests on 'rules of reference'. The UNCLOS often incorporates a 'no less effective' standard or an 'at least have the same effect obligation' into its relevant provisions.²⁰⁶ For instance, Article 208(3) requires coastal states to adopt seabed operations laws that 'shall be no less effective than international rules, standards and recommended practices and procedures'. Such international rules include the 1990 International Convention on Oil Pollution Preparedness, Response and Cooperation²⁰⁷ and the 2000 Protocol to the Convention. Article 210(6) obliges states to adopt dumping regulations that 'shall be no less effective in preventing, reducing and controlling such pollution than the

²⁰¹ The *South China Sea* Arbitration Award (Jurisdiction and Admissibility), n 6, [410].

²⁰² The *South China Sea* Arbitration Award (Merits), n 1, [1045].

²⁰³ Convention on the International Regulations for Preventing Collisions at Sea (adopted 20 October 1972, entered into force on 15 July 1977) 1050 UNTS 1976. China and the Philippines ratified the Convention in 1980 and in 2013, respectively.

²⁰⁴ The *South China Sea* Arbitration Award (Merits), n 1, [1083]. This view was supported by the IMO: IMO, *Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization*, LEG/MISC.8, 30 January 2014, 15 and 113. See also Memorial of the Philippines, vol I, 208, [6.130].

²⁰⁵ The *South China Sea* Arbitration Award (Merits), n 1, [1083].

²⁰⁶ The list of legal instruments corresponding to 'generally accepted international rules and standards' is available in IMO, *Circular Letter No 2456, Implication of UNCLOS for the Organization*, 17 February 2003, Annex II.

²⁰⁷ (1991) 30 *ILM* 735. Entered into force 13 May 1995.

global rules and standards'. It is generally considered that such global rules and standards are set out by the 1972 London Dumping Convention and its 1996 Protocol.²⁰⁸ Similarly, Article 211(2) stipulates that flag-state regulation of vessel pollution must 'at least have the same effect as that of generally accepted international rules and standards established through the competent international organization or general diplomatic conference'. Such international rules are embodied in MARPOL.²⁰⁹ The reference to internationally agreed rules and standards was also made in relation to atmospheric and land-based pollution under Articles 207(1) and 212(1), though only in a weaker manner.

The legal technique of 'rules of reference' seeks to maintain uniformity of national and international regulation with regard to marine environmental protection. By updating 'generally accepted international rules and standards', it also becomes possible to adapt relevant rules of the UNCLOS to a new situation. Accordingly, 'rules of reference' can be considered a useful tool to take the new demands of the international community into account in the interpretation and application of existing rules and standards.²¹⁰

In considering the Philippines Submission, the facts are of central importance. What is of particular interest in this regard is the role of experts. To assess the Philippines' claims, the Tribunal appointed an independent expert, Captain Gurpreet S Singhota, in accordance with Article 24 of the Rules of Procedure.²¹¹ Captain Singhota submitted his report on 15 April 2016.²¹² In the report, Captain Singhota concluded that China had breached its obligations under Rules 2, 6, 8, 15 and 16 of the COLREGS.²¹³

As the Tribunal observed, all Chinese-flagged vessels involved in the above-mentioned incidents belonged to one of two Chinese agencies: the CMS or the Fisheries Law Enforcement Command of China (FLEC). It followed that the alleged incidents were caused by vessels falling directly under the command and control of the Chinese Government. Hence the conduct of the Chinese vessels was automatically attributable to China.²¹⁴ The Tribunal then applied

²⁰⁸ LA De La Fayette, 'The London Convention 1972: Preparing for the Future' (1998) 13 *IJMCL* 515, 516.

²⁰⁹ International Convention for the Prevention of Pollution from Ships and Its Protocol (adopted 2 November 1973 (Convention), 1978 (Protocol), the combined instrument entered into force on 2 October 1983) 1340 *UNTS* 61.

²¹⁰ Y Tanaka, *The International Law of the Sea*, 3rd edn (Cambridge University Press, 2019) 333–35.

²¹¹ The *South China Sea* Arbitration Award (Merits), n 1, [1084]. According to the Tribunal, Captain Singhota's experience includes 26 years of service with the IMO's Maritime Safety Division, Sub-committee on Safety of Navigation, and other departments, as well as 14 years of seagoing experience: *ibid.*

²¹² Captain Gurpreet S Singhota, *Report of the International Navigational Safety Expert appointed by the Permanent Court of Arbitration, The Hague, The Netherlands* (15 April 2016) ('Singhota Report').

²¹³ The *South China Sea* Arbitration Award (Merits), n 1, [1085].

²¹⁴ *ibid.*, [1091].

the relevant Rules of the COLREGS presented by the Singhota Report to the alleged incidents. Basically the Tribunal confirmed the conclusions of the Singhota Report.²¹⁵ It thus concluded that China had violated Rules 2, 6, 7, 8, 15 and 16 of the COLREGS and, as a consequence, was in breach of Article 94 of the Convention.²¹⁶ At the same time, the Tribunal added that its determination in Submission No 13 did not involve any finding of sovereignty over Scarborough Shoal and its waters.²¹⁷ In assessing the manner of law enforcement operation by Chinese vessels, the Tribunal relied heavily on the Singhota Report. In light of the technicality of the rules of COLREGS, it would be less easy for judges to determine breaches of that Convention. Thus, as the *South China Sea* arbitration demonstrated, the appointment of independent experts by the judicial body is an option well worth considering. Given that an international court or tribunal rarely addresses breaches of COLREGS in the jurisprudence, the *South China Sea* Arbitration Award on the Merits provides an important precedent that undertook a detailed review of this matter.

III. AGGRAVATION OR EXTENSION OF THE DISPUTE BETWEEN THE PARTIES

A. Aggravation of the Dispute between the Parties

i. Jurisdiction of the Tribunal

Given that international disputes may escalate over time, it is necessary to prevent their aggravation. Hence the obligation not to aggravate a dispute is of critical importance.²¹⁸ This obligation can be regarded as a corollary of the obligation of peaceful settlement of international disputes. It is no coincidence that the 1970 Friendly Relations Declaration refers to the two obligations at the same time. In fact, the Declaration first states that ‘Every State shall settle its international disputes with other States by peaceful means in such a manner that international peace and security and justice are not endangered.’²¹⁹ It then continues:

States parties to an international dispute, as well as other States shall refrain from any action which may aggravate the situation so as to endanger the maintenance of

²¹⁵ *ibid*, [1090]–[1105].

²¹⁶ *ibid*, [1109].

²¹⁷ *ibid*, [1108].

²¹⁸ The obligation not to aggravate a dispute is also called the ‘obligation of restraint’. The Tribunal, in its Award of 2016, used the term ‘obligation not to engage in acts that might aggravate a dispute’: *ibid*, [1135].

²¹⁹ UN 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*, UN Doc A/RES/25/2625 (24 October 1970), Principle 2, [1].

international peace and security, and shall act in accordance with the purposes and principles of the United Nations.²²⁰

The 1982 Manila Declaration also confirmed the two obligations at the same time.²²¹

In the particular context of the *South China Sea* dispute, the 1992 ASEAN Declaration on the South China Sea emphasised ‘the necessity to resolve all sovereignty and jurisdictional issues pertaining to the South China Sea by peaceful means, without resort to force’; and it urged ‘all parties concerned to exercise restraint with the view to creating a positive climate for the eventual resolution of all disputes’.²²² The 2002 Declaration on the Conduct of Parties in the South China Sea, adopted by ASEAN and China, also stressed that:

The Parties undertake to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability including, among others, refraining from action of inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features and to handle their differences in a constructive manner.²²³

An issue that needs to be considered in this context was whether the conduct of the Chinese Government in the South China Sea was at variance with the obligation of restraint. In this regard, the Philippines, in its Submission No 14 as amended, requested the Tribunal to declare:

- (14) Since the commencement of this arbitration in January 2013, China has unlawfully aggravated and extended the dispute by, among other things:
- (a) interfering with the Philippines’ rights of navigation in the waters at, and adjacent to, Second Thomas Shoal;
 - (b) preventing the rotation and resupply of Philippine personnel stationed at Second Thomas Shoal;
 - (c) endangering the health and well-being of Philippine personnel stationed at Second Thomas Shoal; and
 - (d) conducting dredging, artificial island-building and construction activities at Mischief Reef, Cuarteron Reef, Fiery Cross Reef, Gaven Reef, Johnson Reef, Hughes Reef and Subi Reef.²²⁴

²²⁰ *ibid*, [4].

²²¹ UN General Assembly Resolution 37/10, Manila Declaration on Peaceful Settlement of Disputes between States, para 1(8). See also *Electricity Company of Sofia and Bulgaria (Belgium v Bulgaria)*, Order of 5 December 1939 Request for the Indication of Interim Measures of Protection, Series A/B 79, [1939] PCIJ Rep 194,199.

²²² ASEAN Declaration on the South China Sea adopted 22 July 1992, available at <https://cil.nus.edu.sg/wp-content/uploads/2017/07/1992-ASEAN-Declaration-on-the-South-China-Sea.pdf>.

²²³ Para 5. The text of the Declaration is available at http://asean.org/?static_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea-2.

²²⁴ The *South China Sea* Arbitration Award (Merits), n 1, [1110].

Paragraph (d) was newly added to the amended Submission No 14, while paragraphs (a) to (c) were included in the initial formulation of this Submission.²²⁵ In addition, the Philippines' Submission No 14 related to China's activities after the commencement of the *South China Sea* arbitration.

In considering Submission No 14, the Tribunal first needed to ascertain whether it had jurisdiction to deal with the submission. In the Award of Jurisdiction, the Tribunal ruled that 'this is not a dispute concerning sovereignty or maritime boundary delimitation, nor is it barred from the Tribunal's consideration by any requirement of Section 1 of Part XV [of the Convention]'.²²⁶ At the same time, the Tribunal held that its jurisdiction to address these questions might depend on the status of Second Thomas Shoal as an 'island', 'rock' or 'low-tide elevation'. Furthermore, the question of whether China's activities in and around Second Thomas Shoal were military in nature under Article 298 of the Convention must be assessed in conjunction with the merits. Since the possible jurisdictional objections with respect to the dispute underlying Submission No 14 did not possess an exclusively preliminary character, the Tribunal reserved a decision on its jurisdiction with respect to the Philippines' Submission No 14 for consideration in conjunction with the merits of the Philippines' claims.²²⁷

As had been seen, the Tribunal found that Second Thomas Shoal was a low-tide elevation. Nor were there any high-tide features within 12 nautical miles of Second Thomas Shoal. Since there was no legal basis for any entitlement by China to marine zones in the area of Second Thomas Shoal, no maritime delimitation issues arose. Furthermore, as Second Thomas Shoal was located within the EEZ of the Philippines, there was no need for the Tribunal to address sovereignty over Second Thomas Shoal.²²⁸ However, the application of the military activities exception set out in Article 298(1)(b) needs further consideration. In this regard, two issues arise.

The first issue concerns the question of whether the optional exception under Article 298(1) must be specifically invoked by the respondent state. While China activated this exception through its Declaration of August 2006,²²⁹ the Philippines took the position that '[t]he decision to rely on those options is a matter of choice',²³⁰ and that if China did not specifically invoke Article 298(1)(b) in the course of these proceedings, there was no need for the Tribunal to examine the application of this provision.²³¹ However, the Tribunal was not

²²⁵ *ibid.*, [1111].

²²⁶ The *South China Sea* Arbitration Award (Jurisdiction and Admissibility), n 6, [411].

²²⁷ *ibid.*

²²⁸ The *South China Sea* Arbitration Award (Merits), n 1, [1153].

²²⁹ *ibid.*, [1154].

²³⁰ Presentation by Professor Oxman, Jurisdiction Hearing Tr (Day 2), 74.

²³¹ The *South China Sea* Arbitration Award (Merits), n 1, [1156].

persuaded by the Philippines' argument. In the view of the Tribunal, there was nothing to suggest that a provision of Article 298(1) must be specifically invoked. The Tribunal thus held that '[o]nce made, a declaration under Article 298(1) excludes the consent of the declaring State to compulsory settlement with respect to the specified categories of disputes' and '[s]uch a declaration stands until modified or withdrawn'.²³² In so stating, the Tribunal can be said to have clarified the automatic application of Article 298(1)(b).

The second issue pertains to the application of optional exceptions to aggravation of disputes subsequent to the commencement of proceedings. This issue concerns the time frame of the application of Article 298(1)(b). In this regard, the Philippines argued that 'Articles 297 and 298 do not apply to aggravation and extension of the dispute'.²³³ The Philippines' argument seemed to suggest that insofar as any obligation not to aggravate the dispute concerns events subsequent to the commencement of proceedings, it is not separately subject to the limitations on dispute resolution set out in the Convention.²³⁴ In this regard, the Tribunal took the view:

Where a State Party has initiated compulsory dispute settlement under the Convention in respect of a dispute that does not concern military activities, Article 298(1)(b) would not come into play if the other Party were later to begin employing its military in relation to the dispute in the course of proceedings. Nor does the Tribunal see that Article 298(1)(b) would limit its ancillary jurisdiction to prescribe provisional measures in respect of military activities taking place in relation to a dispute that does not, itself, concern military activities.²³⁵

For the Tribunal, it was 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'.²³⁶ In this connection, the Tribunal considered that 'China's actions in and around Second Thomas Shoal and its interaction with the Philippine military forces stationed there constitute a distinct matter, irrespective of their effect in potentially aggravating other disputes before the Tribunal'.²³⁷ Accordingly, there was a need for the Tribunal to consider the question whether this dispute concerned military activities for the purposes of Article 298(1)(b).²³⁸ The essential facts at Second Thomas Shoal concerned the opposition between the Philippines' armed forces and China's Navy and Coast Guard and other government agencies. According to the Tribunal, these facts represented a

²³² *ibid.*

²³³ Presentation by Professor Oxman, Merits Hearing Tr (Day 3), 84.

²³⁴ The *South China Sea* Arbitration Award (Merits), n 1, [1157].

²³⁵ *ibid.*, [1158].

²³⁶ *ibid.*, [1159].

²³⁷ *ibid.*, [1160].

²³⁸ *ibid.*

quintessentially military situation and fell within the exception for the purposes of Article 298(1)(b).²³⁹ The Tribunal thus concluded that it lacked jurisdiction to consider the Philippines' Submission No 14(a), (b) and (c).²⁴⁰

In this regard, the Tribunal applied another ancillary test.²⁴¹ Where the military action aggravating the dispute is ancillary to non-military action that triggered compulsory dispute settlement under the Convention by a state party, Article 298(1)(b) would not limit the jurisdiction of an international court or tribunal. Thus continuity between the original action creating an international dispute and the action ancillary to the original action constitutes the key element in deciding the applicability of Article 298(1)(b). If such a continuity exists, the applicability of Article 298(1)(b) rests on the nature of the original action creating the dispute in question. If no continuity exists, the applicability of the provision relies on the nature of the action aggravating the dispute that is distinct from the original action.

On the other hand, China's dredging and construction activities were not military in nature since China itself consistently resisted such classification. As civilian activity, China's conduct fell outside the scope of Article 298(1)(b).²⁴² The Tribunal thus concluded that it had jurisdiction with regard to the matter raised in the Philippines' Submission No 14(d).²⁴³ The Tribunal thus turned to the examination of the Philippines' Submission No 14(d).

ii. Lawfulness of China's Actions

a. The Obligation of Non-aggravation

The pivotal issue before the Tribunal was whether, as the Philippines alleged, China aggravated and extended the disputes between the Parties through its dredging, artificial island-building and construction activities.²⁴⁴ After the examination of four materials, namely, (i) the jurisprudence of the PCIJ and ICJ concerning provisional measures, (ii) multilateral treaties and UN instruments, (iii) provisions of the UNCLOS, and (iv) general international law, the Tribunal ruled that the obligation not to aggravate a dispute constituted a 'principle of international law that is applicable to States engaged in dispute settlement as such'.²⁴⁵ Accordingly, the principle was applicable to the *South China Sea*

²³⁹ *ibid*, [1161].

²⁴⁰ *ibid*, [1162].

²⁴¹ The ancillary test was at issue when deciding the jurisdiction of an international court or tribunal with regard to the mixed disputes involving land and maritime issues at the same time. See ch 2, section IV.C of this book.

²⁴² The *South China Sea* Arbitration Award (Merits), n 1, [1164].

²⁴³ *ibid*, [1165].

²⁴⁴ *ibid*, [1166].

²⁴⁵ *ibid*, [1173].

case as one of the ‘other rules of international law not incompatible with this Convention’ pursuant to Article 293 of the UNCLOS.²⁴⁶

It is significant that the Tribunal regarded the obligation not to aggravate a dispute as a ‘principle of international law’.²⁴⁷ In this connection, by referring to the jurisprudence of the PCIJ²⁴⁸ and the ICJ,²⁴⁹ the Tribunal accepted the existence of a ‘duty on parties engaged in a dispute settlement procedure to refrain from aggravating or extending the dispute or disputes at issue during the pendency of the settlement process’.²⁵⁰ For the Tribunal:

This duty exists *independently* of any order from a court or tribunal to refrain from aggravating or extending the dispute and stems from the purpose of dispute settlement and the status of the States in question as parties in such a proceeding. Indeed, when a court or tribunal issues provisional measures directing a party to refrain from actions that would aggravate or extend the dispute, it is not imposing a new obligation on the parties, but rather recalling to the parties an obligation that already exists by virtue of their involvement in the proceedings.²⁵¹

Beyond the scope of the *South China Sea* arbitration, the dictum may affect the ICJ’s power to indicate provisional measures. It is common practice that the Court indicates provisional measures to ensure that the parties in dispute take no action that might aggravate or extend the dispute before the Court. These can be called ‘non-aggravation measures’. However, opinions of commentators are divided whether the Court has the power *proprio motu* to indicate non-aggravation measures.

According to a narrow view, the Court does not have the power *proprio motu* to indicate non-aggravation measures unless such measures are linked with the protection of the rights of the parties. For instance, Merrills argued that ‘the powers of the Court under Article 41 have the specific purpose of preserving the rights in issue in litigation and so it is only in that context that the Court is entitled to act to prevent extension or aggravation of the dispute’.²⁵² This view was echoed by Palchetti, stating that ‘the Court’s practice reveals that the element of aggravation must in any case be linked with the protection of the rights of the parties which are at issue in a case’.²⁵³

²⁴⁶ *ibid.*

²⁴⁷ *ibid.*, [1173].

²⁴⁸ *Electricity Company of Sofia and Bulgaria (Belgium v Bulgaria)* [1939] PCIJ Rep 199. By referring to this case, the Philippines asserted that ‘[a]lthough the PCIJ’s views were stated in connection with its decision on provisional measures, there is no reason to presume that the principle is not of universal application’. Memorial of the Philippines, vol I, 174, [646].

²⁴⁹ *LaGrand (Germany v United States of America)*, Judgment, [2001] ICJ Rep 466, 503, [102]–[103].

²⁵⁰ The *South China Sea* Arbitration Award (Merits), n 1, [1169].

²⁵¹ *ibid.*, [1169] (emphasis added).

²⁵² J Merrills, ‘Interim Measures of Protection in the Recent Jurisprudence of the International Court of Justice’ (1995) 44 *ICLQ* 90, 123.

²⁵³ P Palchetti, ‘The Power of the International Court of Justice to Indicate Provisional Measures to Prevent the Aggravation of a Dispute’ (2008) 21 *LJIL* 623, 634.

According to a less restrictive view, however, the Court may indicate non-aggravation measures in the absence of linkage between the measures and the alleged rights in the principal request. For instance, Thirlway took the view that ‘the existence of a bar to the indication of preservative measures does not necessarily signify that the Court cannot indicate non-aggravation measure’.²⁵⁴ To some extent, this position seems to be supported by the practice of the Court. By way of illustration, the ICJ, in the *Cameroon v Nigeria* case, held:

Considering that, independently of the requests for the indication of provisional measures submitted by the Parties to *preserve specific rights*, the Court possesses by virtue of Article 41 of the Statute the power to indicate provisional measures with a view to preventing the aggravation or extension of the dispute whenever it considers that circumstances so require.²⁵⁵

This passage seems to suggest that the Court has the power to indicate non-aggravation measures independently of any preservative measures.²⁵⁶ This interpretation was supported by Judge Greenwood in the *Costa Rica v Nicaragua* case. According to the learned judge:

It is, however, open to the Court to indicate measures different from those requested, or even to act *proprio motu* without a request having been made (see Article 75 of the Rules of Court) but, if it does so, it is still bound to satisfy itself that the measures which it proposes to order meet the requirements set out above, since those requirements follow from the provisions of Article 41 of the Statute. The only exception – and that only a partial one – is the indication of measures requiring the parties to refrain from action which might aggravate or extend the dispute. Such measures are not limited to the protection of rights which might be adjudged to belong to either party but serve a wider purpose.²⁵⁷

If, as the Tribunal ruled in its Award of 2016, the non-aggravation measures are not ‘imposing a new obligation on the parties, but rather recalling to the parties an obligation that already exists by virtue of their involvement in the proceedings’, this interpretation will contribute to strengthening the ICJ’s power *proprio motu* to indicate non-aggravation measures.²⁵⁸

²⁵⁴H Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence*, vol I (Oxford University Press, 2013) 951.

²⁵⁵*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)*, Provisional Measures, [1996] ICJ Rep 13, 22–23, [41] (emphasis added).

²⁵⁶Thirlway, n 254, 949. According to Thirlway, the Chamber of the Court, in para 18 of the Order of 1986 in *Frontier Dispute (Burkina Faso v Mali)*, also implied that it could indicate non-aggravation measures independently of any finding that preservative measures were appropriate: *ibid*, 949; [1986] ICJ Rep 9, [18]. See also Separate Opinion of Judge Ajibola in *Cameroon v Nigeria* [1996] ICJ Rep 53.

²⁵⁷Declaration of Judge Greenwood in *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*, Provisional Measures, [2011] ICJ Rep 46, 48, [8]. See also *ibid*, 46–47, [2]. However, it appears that the subsequent case law of the Court does not support this dictum. See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Order, [2019] ICJ Rep (not yet reported), [28].

²⁵⁸However, it must be noted that in the jurisprudence of the ICJ, non-aggravation measures were ordered only as an adjunct to preservative provisional measures. *Case Concerning Pulp Mills on the*

However, the independent existence of the obligation not to aggravate a dispute does not mean that the obligation is separated from other obligations in international law. In this regard, particular attention must be paid to the interlinkage between the obligation not to aggravate a dispute, the obligation of peaceful settlement of international disputes and the principle of good faith. In the view of the Tribunal, '[t]he very purpose of dispute settlement procedures would be frustrated by actions by any party that had the effect of aggravating or extending the dispute, thereby rendering it less amenable to settlement'.²⁵⁹ It follows that the obligation not to aggravate a dispute and the obligation of peaceful settlement of international disputes are closely intertwined. Furthermore, the Tribunal linked the obligation of peaceful settlement of international disputes to the principle of good faith. Indeed, by referring to Article 279 of the UNCLOS concerning the obligation of peaceful settlement of international disputes, the Tribunal held that:

In carrying out the dispute settlement procedures of the Convention, the Parties are also under an obligation, pursuant to Article 300, to 'fulfil in good faith the obligations assumed under this Convention and ... exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.'²⁶⁰

The Tribunal further considered that the obligation not to aggravate a dispute is 'inherent in the central role of good faith in the international legal relations between States' and that 'actions by either Party to aggravate or extend the dispute would be incompatible with the recognition and performance in good faith of these obligations'.²⁶¹ Accordingly, the obligation of peaceful settlement of international disputes, the obligation not to aggravate a dispute and the principle of good faith are integrally interlinked. It is important that the Tribunal clarified the interlinking of the three elements. It would seem to follow that the breach of the obligation not to aggravate a dispute also leads to the breach of the obligation of peaceful settlement of international disputes and the principle of good faith at the same time.

b. Criteria for Deciding Breaches of the Obligation Not to Aggravate a Dispute

There is little doubt that parties are under the obligation not to aggravate a dispute in international law. However, the question is what the criteria are for

River Uruguay (Argentina v Uruguay), Provisional Measures, [2007] ICJ Rep 3, 16, [49]. See also Palchetti, n 253, 635; Y Tanaka, 'A New Phase of the Temple of Preah Vihear Dispute before the International Court of Justice: Reflections on the Indication of Provisional Measures of 18 July 2011' (2012) 11 *CJIL* 191, 212–16.

²⁵⁹ *The South China Sea Arbitration Award (Merits)*, n 1, [1171].

²⁶⁰ *ibid*, [1172].

²⁶¹ *ibid*, [1171]–[1172].

deciding breaches of the obligation. In this regard, the Tribunal specified three actions that are contrary to the obligation:

- (a) actions that are alleged to violate the rights of the other party during the pendency of the proceedings, in such a way as to render the alleged violation more serious;
- (b) actions that would frustrate the effectiveness of a potential decision, or render its implementation by the parties significantly more difficult; and
- (c) actions that would undermine the integrity of the dispute resolution proceedings themselves.²⁶²

The three categories of actions provide the criteria for determining breaches of the obligation not to aggravate a dispute. By applying the criteria, the Tribunal determined breaches of the obligation by the Chinese Government. The Court's findings may be summarised in three points.

First, the Tribunal held that China effectively created a *fait accompli* at Mischief Reef by constructing a large artificial island on a low-tide elevation located within the Philippines' EEZ. As Mischief Reef cannot be returned to its original state, the China's construction work made the implementation of the Tribunal's decision difficult.²⁶³

Second, according to the Tribunal, China's action aggravated the dispute between the Parties concerning the marine environment at Mischief Reef and extended that dispute to encompass additional features that became the sites of large-scale construction work while this arbitration was ongoing. In this connection, the Tribunal noted that '[i]n 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'.²⁶⁴ It is notable that the breach of the obligation not to aggravate a dispute led to breaches of the substantive obligation not to cause harm to the environment at the same time.

Third, China permanently destroyed evidence of the natural status of maritime features in the Spratly Islands. The assessment of the legal status of maritime features as above/below water at high tide was rendered significantly more difficult by the China's action. Accordingly, the Tribunal ruled that China undermined the integrity of the arbitral proceedings and rendered the task before the Tribunal more difficult.²⁶⁵ In this connection, Tribunal referred to non-appearance of China and stressed that:

The decision of how best to represent China's position is a matter for China, not the Tribunal. China is not free, however, to act to undermine the integrity of these proceedings or to frustrate the effectiveness of the Tribunal's decisions.²⁶⁶

²⁶² *ibid*, [1176].

²⁶³ *ibid*, [1177].

²⁶⁴ *ibid*, [1178].

²⁶⁵ *ibid*, [1179]. See also *ibid*, [1203]B(16).

²⁶⁶ *ibid*, [1180].

All in all, the Tribunal found that during the time at which these dispute resolution proceedings were ongoing, China:

- (a) had aggravated the Parties' dispute concerning their respective rights and entitlements in the area of Mischief Reef;
- (b) had aggravated the Parties' dispute concerning the protection and preservation of the marine environment at Mischief Reef;
- (c) had extended the scope of the Parties' dispute concerning the protection and preservation of the marine environment to Cuarteron Reef, Fiery Cross Reef, Gaven Reef (North), Johnson Reef, Hughes Reef and Subi Reef;
- (d) had aggravated the Parties' dispute concerning the status of maritime features in the Spratly Islands and their capacity to generate entitlements to maritime zones.²⁶⁷

In conclusion, the Tribunal declared:

China has breached its obligations pursuant to Articles 279, 296, and 300 of the Convention, as well as pursuant to general international law, to abstain from any measure capable of exercising a 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.²⁶⁸

It is noteworthy that the Tribunal, in its Award of 2016, specified three criteria for deciding breaches of the obligation not to aggravate a dispute in the judicial proceedings. In general, it could well be said that destruction of evidence and a *fait accompli* constitute the breach of the second criterion and/or third criterion. Even so, it may have to be admitted that the application of the three criteria is context-specific and that breaches of the obligations of non-aggravation must be decided on a case-by-case basis, taking account of particularities of each case.

B. The Future Conduct of the Parties

The final claim made by the Philippines pertained to the future conduct of the Parties. In its Submission No 15, the Philippines requested the Tribunal to declare:

(15) China shall respect the rights and freedoms of the Philippines under the Convention, shall comply with its duties under the Convention, including those relevant to the protection and preservation of the marine environment in the South China Sea, and shall exercise its rights and freedoms in the South China Sea with due regard to those of the Philippines under the Convention.²⁶⁹

²⁶⁷ *ibid*, [1181].

²⁶⁸ *ibid*, [1203]B(16).

²⁶⁹ *ibid*, [1182].

In its Award on Jurisdiction, the Tribunal considered that it was unable to determine whether there existed a dispute between the Parties concerning the interpretation or application of the Convention, or to assess the scope of the Tribunal's jurisdiction in this respect. It thus directed the Philippines to clarify the content and narrow the scope of its Submission No 15, and reserved the question of its jurisdiction in relation to Submission No 15 for consideration in conjunction with the merits of the Philippines' claims.²⁷⁰

Subsequently the Philippines reframed its Submission. In the view of the Tribunal, the Philippines' Submission No 15 as amended contained three components:

- (a) asking the Tribunal to declare that China 'shall respect the rights and freedoms of the Philippines under the Convention';
- (b) asking the Tribunal to declare that China 'shall comply with its duties under the Convention, including those relevant to the marine environmental protection in the South China Sea'; and
- (c) asking the Tribunal to declare that China 'shall exercise its rights and freedoms in the South China Sea with due regard to those of the Philippines under the Convention'.²⁷¹

According to the Philippines, the focus of Submission No 15 was prospective.²⁷² In the view of the Tribunal, however, it was beyond dispute that both Parties were obliged to comply with the Convention and to respect the rights and freedoms of other states under the UNCLOS. Indeed, neither Party contended this point.²⁷³ In this connection, the Tribunal stressed that it is a fundamental principle of international law that 'bad faith is not presumed'.²⁷⁴ The Tribunal thus ruled that it was not necessary nor appropriate for it to make any further declaration.²⁷⁵

IV. CONCLUSIONS

The Tribunal, in its Award on the Merits, examined a wide array of issues with regard to the lawfulness of Chinese activities in the South China Sea. The Tribunal's views on these issues shed some light on the interpretation and application of relevant rules and obligations of international law. The principal points discussed in this chapter may be summarised as follows.

²⁷⁰ The *South China Sea* Arbitration Award (Jurisdiction and Admissibility), n 6, [412].

²⁷¹ The *South China Sea* Arbitration Award (Merits), n 1, [1192]–[1194].

²⁷² Presentation by Professor Oxman, Merits Hearing Tr (Day 3), 90.

²⁷³ The *South China Sea* Arbitration Award (Merits), n 1, [1201].

²⁷⁴ *ibid*, [200].

²⁷⁵ *ibid*, [1201].

First, according to the Tribunal, a statement itself violates relevant provisions of the UNCLOS where there is a 'realistic prospect' that the statement may create a deterring effect. The Tribunal's approach may be called the 'realistic prospect' test. It is argued that the 'realistic prospect' test is regarded as an inter-temporal concept, in the sense that it seeks to envisage future events. In this regard, further consideration must be given to the questions of how it is possible to assess the existence of a 'realistic prospect' and to what extent the prospect of the future events must exist.

Second, the key element in Article 58(3) of the UNCLOS is the obligation to have 'due regard to the rights and duties'. Referring to the ITLOS Advisory Opinion of 2015, the Tribunal equated 'the obligation of due regard' with 'the obligation of due diligence'. The *South China Sea Arbitration Award* (Merits) suggests that a state breaches the obligation of due diligence when that state was aware of illegal fishing activities conducted by its nationals in an EEZ of another state and it failed to prevent them.

Third, traditional fishing rights are not the historic rights of states but private rights. By referring to the *Eritrea/Yemen Arbitration Award* (Second Phase), the Tribunal regarded traditional fishing as artisanal fishing. Yet it did not go into further detail with regard to the criteria for deciding whether certain fishing activities would fall within the scope of artisanal fishing. The law applicable to traditional fishing rights differs according to jurisdictional zones. According to the Tribunal, established traditional fishing rights in the territorial sea remain protected by international law.

Fourth, the 'general obligation' under Article 192 with regard to marine environmental protection extends both to 'protection' of the marine environment from *future* damage and 'preservation' in the sense of maintaining or improving its *present* condition. In this sense, this provision contains a temporal element. Furthermore, Article 192 must be read against the background of other applicable international law, such as CITES. The Tribunal's systemic approach to treaty interpretation merits particular notice. In this connection, it is noteworthy that the Tribunal recognised application of the obligation of due diligence to the protection of rare or fragile ecosystems and the habitat of endangered species. In this regard, the Tribunal specified two requirements of the obligation of due diligence:

- (a) a duty to adopt rules and measures to prevent harmful acts; and
- (b) a duty to maintain a level of vigilance in enforcing those rules and measures.

According to the Tribunal, to fulfil the obligation of due diligence, legislation of municipal law alone is inadequate; there is also a need to take steps to enforce it.

Fifth, Article 206 of the UNCLOS includes the obligation to communicate. In the view of the Tribunal, this obligation is absolute. Given that it may be

less easy to determine whether a state properly carried out an environmental impact assessment, the Tribunal's approach focusing on the non-fulfilment of a procedural requirement, that is communication, is noteworthy. While there are some issues remaining regarding the obligation under Article 206, the Tribunal's finding may contribute to cementing the normative position of environmental impact assessment in international law.²⁷⁶

Sixth, according to the Tribunal, only the Philippines could construct or authorise artificial islands, installations and structures in accordance with Article 60 of the UNCLOS, since Mischief Reef was a low-tide elevation and it could only constitute part of the EEZ and continental shelf of the Philippines. It would seem to follow that construction activities on low-tide elevations in a third state's EEZ or continental shelf are contrary to the UNCLOS, unless there is a valid circumstance precluding wrongfulness.²⁷⁷ As a low-tide elevation, as distinct from land territory, cannot be appropriated, Mischief Reef was incapable of appropriation by occupation.

Seventh, the COLREGS, as a 'generally accepted international regulation', is thought to be incorporated into Article 94 of the UNCLOS. It follows that a violation of the COLREGS constitutes a violation of Article 94 of the UNCLOS. When examining the manner of law enforcement operations by Chinese vessels, the Tribunal relied on the report of an independent expert, namely, the Singhota Report. In light of the highly technical nature of the rules under the COLREGS, the assessment of an independent expert was particularly useful.

Eighth, the Tribunal considered that the obligation not to aggravate a dispute may be regarded as a 'principle of international law that is applicable to States engaged in dispute settlement as such'. In this connection, the Tribunal specified three actions that are contrary to the obligation. On the basis of the three actions, it may be possible to formulate three criteria for determining breach of the obligation:

- (a) Whether an action violates the rights of the other party during the pendency of the proceedings, in such a way as to render the alleged violation more serious.
- (b) Whether an action would frustrate the effectiveness of a potential decision, or render its implementation by the parties significantly more difficult.
- (c) Whether an action would undermine the integrity of the dispute resolution proceedings themselves.

The criteria may offer an insight into the obligation on non-aggravation of a dispute.

²⁷⁶ Scanlon and Beckman, n 106, 29–30.

²⁷⁷ See also T Davenport, 'Island-building in the South China Sea: Legality and Limits' (2018) 8 *Asian Journal of International Law* 76, 89.

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