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The *South China Sea Arbitration* After Eight Years: Its Implications for Jurisprudence and Third Parties

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I. INTRODUCTION

Eight years have passed since the issuance of the *South China Sea* arbitral award between the Republic of the Philippines and the People's Republic of China.[1] Needless to say, the *South China Sea* arbitral award is binding upon the parties in accordance with Article 296 of the UN Convention on the Law of the Sea (UNCLOS) and Article 11 of Annex VII to the Convention.[2] However, China has repeatedly claimed that the *South China Sea* arbitral award is null and void.[3] It seems unlikely that China will change its position in the near future. Assuming it doesn't, what are the legal consequences of the *South China Sea* arbitral award in international law and international relations?[4]

The aim of this article is to consider this question by analyzing the impacts of the *South China Sea* arbitral award from three viewpoints: The impacts on the jurisdiction of an adjudicative body with regard to mixed disputes (adjudicative implications), the protection of the marine environment (environmental implications), and the perception of third States in a spatial order in the South China Sea (spatial implications). This article does not review the content of the *South China Sea* arbitral award per se.[5] Nor does it aim to critically assess the policy of any particular State. Rather, it seeks to examine the *South China Sea* arbitral award as a case study regarding the legal

1. South China Sea Arbitration (Phil. v. China), Case No. 2013-19, PCA Case Repository, Award (Perm. Ct. Arb. 2016), https://pcacases.com/web/sendAttach/2086 [hereinafter SCS Arbitration Award].

2. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

3. *See, e.g.*, Chinese Embassy in the Philippines, Remarks on the Seventh Anniversary of the So-called Award on the South China Sea Arbitration (July 7, 2023), https://ph.china-embassy.gov.cn/eng/sgdt/202307/t20230712_11112236.htm.

4. It is not infrequent that one of the disputing parties refuses to accept or implement a decision of an international court or tribunal. For recent examples, *see* Territorial and Maritime Dispute (Nicar. v. Colom.), Judgment, 2012 I.C.J. 624 (Nov. 19); Jurisdictional Immunities of the State (Ger. v. It.), Judgment, 2012 I.C.J. 99 (Feb. 3); Artic Sunrise Arbitration (Neth. v. Russ.), Case No. 2014-02, Award on the Merits (Perm. Ct. Arb. 2015); Arbitration between the Republic of Croatia and the Republic of Slovenia, Case No 2012-04, Award (Perm. Ct. Arb. 2017); Maritime Delimitation in the Indian Ocean (Som. v. Kenya), Judgment, 2021 I.C.J. 206 (Oct. 12).

5. There is much literature on the *South China Sea* arbitral award. For the author's view, *see* YOSHIFUMI TANAKA, THE SOUTH CHINA SEA ARBITRATION: TOWARD AN INTERNATIONAL LEGAL ORDER IN THE OCEANS (2019).

consequences of an international decision in which one of the disputing parties refuses to accept its validity.

This article is structured as follows. Part II examines the implications of the *South China Sea* arbitral award regarding jurisdiction for the mixed disputes in the *Ukraine v. Russia Arbitration* (preliminary objections).[6] Part III addresses the impacts of the *South China Sea* arbitral award on the interpretation of environmental norms under UNCLOS. Part IV considers the reaction of third States regarding China's claim to historic rights in the South China Sea. Part V offers a conclusion.

II. ADJUDICATIVE IMPLICATIONS

This Part examines the implications of the *South China Sea* arbitral award for the *Ukraine v. Russia Arbitration* (preliminary objections) focusing on the jurisdiction of an adjudicative body acting under Part XV of UNCLOS (i.e., UNCLOS tribunals) with regard to mixed disputes involving territorial and maritime issues.

A. The Approach in the South China Sea Award

1. Background

The establishment of jurisdiction of an adjudicative body is the first hurdle that must be overcome in international adjudication. Under UNCLOS Article 288(1), it is clear that UNCLOS tribunals have jurisdiction over any dispute concerning the interpretation or application of UNCLOS. However, the question is whether UNCLOS tribunals can exercise jurisdiction with regard to mixed disputes involving territorial and maritime issues together. The *South China Sea Arbitration* is a leading case on this matter.

Multiple States, including China and the Philippines, claim territorial sovereignty over maritime features in the South China Sea, often resulting in territorial disputes. The territorial disputes are also linked to various maritime disputes, such as entitlement to marine spaces, fisheries, and marine environmental protection. Thus, the South China Sea disputes are a complex

6. Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukr. v. Russ.), Case No. 2017-06, Award Concerning the Preliminary Objections of the Russian Federation (Perm. Ct. Arb. 2020), https://pcacases.com/web/sendAttach/9272 [hereinafter Ukr. v. Russ.].

mix, involving both territorial and maritime disputes.[7] Both the Philippines and China are involved in the South China Sea disputes. Against that background, on January 22, 2013, the Philippines initiated arbitration proceedings against China pursuant to UNCLOS Articles 286 and 287 and in accordance with Article 1 of Annex VII of the Convention.[8] The Philippines, in its Notification and Statement of Claim, stressed that it

> does not seek in this arbitration a determination of which Party enjoys sovereignty over the islands claimed by both of them. Nor does it request a delimitation of any maritime boundaries. The Philippines is conscious of China's Declaration of 25 August 2006 under Article 298 of UNCLOS, and has avoided raising subjects or making claims that China has, by virtue of that Declaration, excluded from arbitral jurisdiction.[9]

However, China countered that the essence of the subject matter of the arbitration was territorial sovereignty over several maritime features in the South China Sea, which fall outside the scope of UNCLOS.[10] According to China, even if the parties' dispute were to be concerned with UNCLOS, the dispute would constitute an integral part of the maritime delimitation between the two countries, and maritime delimitation disputes are precluded from the compulsory procedures by virtue of the declaration filed by China in 2006.[11] Accordingly, China rejected the arbitration.[12]

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7. TANAKA, *supra* note 5, at 1.

8. South China Sea Arbitration (Phil. v. China), Case No. 2013–19, PCA Case Repository, Award on Jurisdiction and Admissibility, ¶ 26 (Perm. Ct. Arb. 2015), https://pcacases.com/web/sendAttach/2579. [hereinafter SCS Arbitration Award on Jurisdiction and Admissibility].

9. *Id.* ¶ 26 (quoting Notification and Statement of Claim of the Republic of the Philippines); *see also id.* ¶ 8.

10. *Id.* ¶ 133; *see also id.* ¶¶ 134–37.

11. *Id.* at 52, ¶ 133; *see also id.* ¶¶ 138–39. On August 25, 2006, China declared that "The Government of the People's Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a) (b) and (c) of Article 298 of the Convention." Declaration by People's Republic of China on the 1982 United Nations Convention on the Law of the Sea (Aug. 25, 2006), U.N. TREATY COLLECTION, https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en (scroll down the list to China).

12. Thus, China did not appear before the arbitral tribunal in the *South China Sea Arbitration*. *See also* Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines, pts. II, IV (Dec. 7, 2014), https://www.fmprc.gov.cn/nanhai/eng/snhwtl

2. The Three Elements Approach

When establishing the jurisdiction of an adjudicative body, the characterization of the international dispute is key. In this regard, the arbitral tribunal stated in the *South China Sea* arbitral award on jurisdiction and admissibility: "The nature of the dispute may have significant jurisdictional implications, including whether the dispute can fairly be said to concern the interpretation or application of the Convention or whether subject-matter based exclusions from jurisdiction are applicable."[13]

Referring to *Nuclear Tests (New Zealand* v. *France)*, the arbitral tribunal further stressed that an objective approach was called for. Thus "the Tribunal is required to 'isolate the real issue in the case and to identify the object of the claim.'"[14] Of particular note is the approach of the Annex VII arbitral tribunal to jurisdiction. The tribunal's approach can be characterized by three elements that are closely interlinked.

The first element concerns the distinction between maritime issues and territorial disputes. In the view of the tribunal, "[t]here is no question that there exists a dispute between the Parties concerning land sovereignty over certain maritime features in the South China Sea."[15] However, sovereignty was not the appropriate characterization of the claims the Philippines submitted in the proceedings.[16] In the view of the arbitral tribunal:

> [T]he Philippines' Submissions could be understood to relate to sovereignty if it were convinced that either (a) the resolution of the Philippines' claims would require the Tribunal to first render a decision on sovereignty, either expressly or implicitly; or (b) the actual objective of the Philippines' claims was to advance its position in the Parties' dispute over sovereignty. Neither of these situations, however, is the case. The Philippines has not asked the Tribunal to rule on sovereignty and, indeed, has expressly and repeatedly requested that the Tribunal refrain from so doing. The Tribunal likewise does not see that any of the Philippines' Submissions require an implicit determination of sovereignty. The Tribunal is of the view

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cwj_1/201606/t20160602_8527277.htm; STEFAN TALMON, THE SOUTH CHINA SEA ARBITRATION: JURISDICTION, ADMISSIBILITY PROCEDURE 12–24 (2022).

13. SCS Arbitration Award on Jurisdiction and Admissibility, *supra* note 8, ¶ 150.

14. *Id.* (quoting Nuclear Tests (N.Z. v. Fr.), Judgment, 1974 I.C.J. 253, ¶ 30 (Dec. 20) (citation omitted).

15. SCS Arbitration Award on Jurisdiction and Admissibility, *supra* note 8, ¶ 152.

16. *Id.*

> that it is entirely possible to approach the Philippines' Submissions from the premise—as the Philippines suggests—that China is correct in its assertion of sovereignty over Scarborough Shoal and the Spratlys.[17]

The arbitral tribunal's approach can be called the maritime-territorial separability test.

> The Convention [UNCLOS], however, does not address the sovereignty of States over land territory. Accordingly, this Tribunal has not been asked to, and does not purport to, make any ruling as to which State enjoys sovereignty over any land territory in the South China Sea, in particular with respect to the disputes concerning sovereignty over the Spratly Islands or Scarborough Shoal. None of the Tribunal's decisions in this Award are dependent on a finding of sovereignty, nor should anything in this Award be understood to imply a view with respect to questions of land sovereignty.[18]

Relatedly, in its award on the merits the arbitral tribunal distinguished the *South China Sea Arbitration* from the *Chagos Arbitration*. In the words of the arbitral tribunal: "The Tribunal understands the majority's decision in [the *Chagos Arbitration*] to have been based on the view both that a decision on Mauritius' first and second submissions would have required an implicit decision on sovereignty and that sovereignty was the true object of Mauritius' claims."[19] In contrast to the *Chagos Arbitration*, the arbitral tribunal in the *South China Sea Arbitration* did not consider that "any of the Philippines' Submissions require an implicit determination of sovereignty."[20] The tone of the statement seemed to suggest that if the Philippines' submissions required an implicit decision on sovereignty, the arbitral tribunal could not determine the merits of the submissions.[21] Thus, one can say that the separability between maritime and territorial issues is at the heart of the arbitral tribunal's approach.

The second element relates to the distinction between maritime entitlement and maritime delimitation disputes. The arbitral tribunal did not accept that the parties' dispute was properly characterized as a maritime delimitation dispute.[22] In the view of the tribunal:

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17. *Id.* ¶ 153.
18. SCS Arbitration Award, *supra* note 1, ¶ 5.
19. SCS Arbitration Award on Jurisdiction and Admissibility, *supra* note 8, ¶ 153.
20. *Id.*
21. TANAKA, *supra* note 5, at 31.
22. SCS Arbitration Award on Jurisdiction and Admissibility, *supra* note 8, ¶ 155.

> [A] dispute concerning the existence of an entitlement to maritime zones is distinct from a dispute concerning the delimitation of those zones in an area where the entitlements of parties overlap. While fixing the extent of parties' entitlements and the area in which they overlap will commonly be one of the first matters to be addressed in the delimitation of a maritime boundary, it is nevertheless a distinct issue. A maritime boundary may be delimited only between States with opposite or adjacent coasts and overlapping entitlements. In contrast, a dispute over claimed entitlements may exist even without overlap, where—for instance—a State claims maritime zones in an area understood by other States to form part of the high seas or the Area for the purposes of the Convention.[23]

Thus, the arbitral tribunal separated maritime entitlement issues from maritime delimitation disputes.

Third, the arbitral tribunal made a distinction between marine environmental issues and territorial disputes. It held:

> The substantive provisions relevant to the marine environment comprise their own Part XII of the Convention [UNCLOS]. At the outset, the Tribunal notes that the obligations in Part XII apply to all States with respect to the marine environment in all maritime areas, both inside the national jurisdiction of States and beyond it. Accordingly, questions of sovereignty are irrelevant to the application of Part XII of the Convention. The Tribunal's findings in this Chapter have no bearing upon, and are not in any way dependent upon, which State is sovereign over features in the South China Sea.[24]

In conclusion, the arbitral tribunal declared that it had jurisdiction to consider the matters raised in the Philippines' Submissions Numbers 1 through 13 and 14(d) and that such claims are admissible.[25] In summary, it separated maritime issues from territorial and maritime delimitation disputes.[26]

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23. *Id.* ¶ 156.

24. SCS Arbitration Award, *supra* note 1, ¶ 940; *see also id.* ¶ 927.

25. *Id.* ¶ 1203(A)(8).

26. The detailed examination of the validity of the approach of the arbitral tribunal falls outside the scope of this article. For the author's view on this matter, *see* TANAKA, *supra* note 5, at 30–38.

B. The Approach in the Ukraine v. Russia Arbitration

What are the implications of the arbitral tribunal's approach in the *South China Sea Arbitration* for subsequent cases? To consider this question, we will examine the *Ukraine v. Russia* arbitral award on preliminary objections.

1. Background

On September 16, 2016, Ukraine instituted arbitral proceedings against the Russian Federation in accordance with Article 287 and Annex VII, Article 1 of UNCLOS in respect of a "Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait."[27] However, Russia claimed that the arbitral tribunal had no jurisdiction over Ukraine's claims because "the dispute in this case concerns Ukraine's claim to sovereignty over Crimea."[28] Thus, like the *South China Sea Arbitration*, characterization of the disputes was key in the *Ukraine v. Russia Arbitration*.

2. The Dual Test Approach

When considering its jurisdiction, the *Ukraine v. Russia* arbitral tribunal, in its award of 2020, stressed the importance of the characterization of the dispute. It referred to the *South China Sea* arbitral award, which stated that "[t]he nature of the dispute may have significant jurisdictional implications, including whether the dispute can fairly be said to concern the interpretation or application of the Convention or whether subject-matter based exclusions from jurisdiction are applicable."[29] In the view of the *Ukraine v. Russia* arbitral tribunal, "the real issue of contention between the Parties in the present case is whether there exists a sovereignty dispute over Crimea, and if so, whether such dispute is ancillary to the determination of the maritime dispute brought before the Arbitral Tribunal by Ukraine."[30] To address this question, the arbitral tribunal applied a dual test.[31]

First, by applying the maritime-territorial separability test, the tribunal held:

27. Ukr. v. Russ., *supra* note 6, ¶ 43.
28. *Id.*
29. SCS Arbitration Award on Jurisdiction and Admissibility, *supra* note 8, ¶ 150.
30. Ukr. v. Russ., *supra* note 6, ¶ 161.
31. *Id.* ¶¶ 157–60.

> [I]f the legal status of Crimea, contrary to Ukraine's assumption, is not settled in the sense that it forms part of Ukraine's territory, but is disputed as the Russian Federation contends, the Arbitral Tribunal would not be able to decide the claims of Ukraine insofar as they are premised on the settled status of Crimea as part of Ukraine without first addressing the question of sovereignty over Crimea. The Arbitral Tribunal therefore considers that the question as to which State is sovereign over Crimea, and thus the "coastal State" within the meaning of several provisions of the Convention invoked by Ukraine, is a prerequisite to the decision of the Arbitral Tribunal on a significant part of the claims of Ukraine.[32]

Here, the existence of a territorial dispute over Crimea was of critical importance. According to the tribunal, "[t]his claim of the Russian Federation [sovereignty over Crimea] has been positively and repeatedly opposed by Ukraine, and the Parties therefore hold clearly opposite views on the question of sovereignty over Crimea."[33] The tribunal thus concluded that "[t]his finding would seem to be sufficient for a conclusion that a sovereignty dispute exists between the Parties."[34] Relatedly, the tribunal dismissed Ukraine's argument that Russia's claim to sovereignty over Crimea was inadmissible and implausible.[35]

Next, the arbitral tribunal applied the ancillary test. That test was formulated by the *Chagos* arbitral award, which stated: "The Tribunal does not categorically exclude that in some instances a minor issue of territorial sovereignty could indeed be ancillary to a dispute concerning the interpretation or application of the Convention."[36] Following the ancillary test, the key question was "whether a sovereignty dispute over Crimea in the present case is an issue ancillary to a dispute concerning the interpretation or application of the Convention, to which its jurisdiction could be extended."[37] In this regard, the arbitral tribunal held:

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32. *Id.* ¶ 154.

33. *Id.* ¶ 165.

34. *Id.* ¶ 166.

35. *Id.* ¶¶ 167–90.

36. Chagos Marine Protected Area Arbitration (Mauritius v. U.K.), Award of Mar. 18, 2015, 31 R.I.A.A. 359, ¶ 221 (Perm. Ct. Arb. 2015). For the ancillary test, *see also* TANAKA, *supra* note 5, at 35–38. For an analysis of this arbitration, *see* Stefan Talmon, *The Chagos Marine Protected Area Arbitration: Expansion of the Jurisdiction of UNCLOS Part XV Courts and Tribunals*, 65 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 927 (2016).

37. Ukr. v. Russ., *supra* note 6, ¶ 194.

> The Parties' dispute regarding sovereignty over Crimea is not a minor issue ancillary to the dispute concerning the interpretation or application of the Convention. On the contrary, the question of sovereignty is a prerequisite to the Arbitral Tribunal's decision on a number of claims submitted by Ukraine under the Convention. Those claims simply cannot be addressed without deciding which State is sovereign over Crimea and thus the "coastal State" within the meaning of provisions of the Convention invoked by Ukraine.[38]

The arbitral tribunal accordingly concluded that it "has no jurisdiction over Ukraine's claims, to the extent that a ruling of the Arbitral Tribunal on the merits of Ukraine's claims necessarily requires it to decide, directly or implicitly, on the sovereignty of either Party over Crimea."[39]

C. Analysis

The above considerations require three observations. First, the separability between maritime and territorial issues constituted a key issue in both the *South China Sea Arbitration* and *Ukraine v. Russia*. As explained earlier, the tribunal in the *South China Sea Arbitration* could separate maritime issues from territorial and maritime delimitation disputes. By contrast, the tribunal in the *Ukraine v. Russia Arbitration* considered that a significant part of Ukraine's claims were inseparable from territorial disputes over Crimea. Thus, one can say that the watershed separating the two arbitral awards consisted in the separability between maritime and territorial issues. The *Ukraine v. Russia* arbitral award on preliminary objections suggests that separability between maritime and territorial issues relies on the formulation of a dispute and that maritime issues are not always separable from territorial issues.

Second, in *Ukraine v. Russia*, neither Ukraine nor Russia disputed the validity of the *South China Sea* arbitral award. Rather, both Ukraine and Russia relied on the *South China Sea Arbitration* to support their claims. Furthermore, the arbitral tribunal in the *Ukraine v. Russia* arbitral award on preliminary objections confirmed the approach of the *South China Sea* arbitral award regarding the importance of the characterization of an international dispute. It then applied the maritime-territorial separability test, which derived from the *South China Sea* arbitral award. To this extent, it can be observed that the

38. *Id.* ¶ 195.
39. *Id.* ¶ 492(a).

tribunal's approach in the *South China Sea* arbitral award did affect the *Ukraine v. Russia* arbitral award.

Third, the question that arises concerns the relationship between the maritime-territorial separability test and the ancillary test. If a ruling on a maritime claim does not require an adjudicative body to decide, directly or implicitly, on the sovereignty over a territory, there is no room to apply the ancillary test. Conversely, if, as in the *Ukraine v. Russia* dispute, sovereignty over a land territory is a prerequisite to the decision on maritime claims, the sovereignty dispute cannot be regarded as a minor issue ancillary to the interpretation or application of UNCLOS.[40] Accordingly, it seems logical to consider that the maritime-territorial separability test precedes the ancillary test when the relationship between maritime claims and territorial disputes is at issue.

III. ENVIRONMENTAL IMPLICATIONS

This Part addresses the impacts of the *South China Sea* arbitral award on advisory proceedings of the International Tribunal for the Law of the Sea (ITLOS) as a full court addressing climate change.

A. Background

On October 31, 2021, Antigua and Barbuda and Tuvalu concluded the Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law.[41] Article 2(2) of the Agreement authorized the Commission to request an advisory opinion from ITLOS on any legal question within the scope of UNCLOS, consistent with Article 21 of the ITLOS Statute and Article 138 of ITLOS's Rules.[42] On December 12, 2022, the Commission requested that ITLOS, as a full court, give an advisory opinion regarding the following question:

40. *Id.* ¶ 195.

41. Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law, Oct. 31, 2021, 3444 U.N.T.S, https://cpij-pcji.ca/wp-content/uploads/2021/11/Agreement-for-the-establishment-of-COSIS.pdf.

42. UNCLOS, *supra* note 2, annex VI; International Tribunal for the Law of the Sea, Rules of the Tribunal, ITLOS/8, Mar. 17, 2009 (as amended), https://www.itlos.org/fileadmin/itlos/documents/basic_texts/ITLOS_8_25.03.21.pdf.

> What are the specific obligations of State Parties to the United Nations Convention on the Law of the Sea (the "UNCLOS"), including under Part XII:
>
> (a) to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea level rise, and ocean acidification, which are caused by anthropogenic greenhouse gas emissions into the atmosphere?
>
> (b) to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification?[43]

In the advisory proceedings before ITLOS, either in written statements or oral proceedings, many States and international organizations referred to the *South China Sea* arbitral award in various contexts. Even though no comprehensive examination of each and every reference to the *South China Sea* arbitral award by those States can be made here, the following five issues merit discussion: (1) the interpretation of UNCLOS Articles 192 and 194, (2) the systemic interpretation of UNCLOS Articles 192 and 194(5), (3) the due diligence obligation, (4) the obligation to conduct an environmental impact assessment (EIA), and (5) the distinction between territorial sovereignty and marine environmental protection.

B. Analysis of Statements of States and International Organizations Before ITLOS

1. Interpretation of UNCLOS Articles 192 and 194

The first noteworthy point concerns the arbitral tribunal's interpretation of Articles 192 and 194 of UNCLOS in the *South China Sea* arbitral award. Article 192 provides a general obligation to protect and preserve the marine environment. As this provision remains general and abstract, further clarification of its content is needed. In this regard, the arbitral tribunal made an important statement:

43. Letter from the Commission of Small Island States to the Registrar of the International Tribunal for the Law of the Sea, Subject: Request for an Advisory Opinion (Dec., 12, 2022), https://www.itlos.org/fileadmin/itlos/documents/cases/31/Request_for_Advisory_Opinion_COSIS_12.12.22.pdf.

> Article 192 of the Convention provides that "States have the obligation to protect and preserve the marine environment." Although phrased in general terms, the Tribunal considers it well established that Article 192 does impose a duty on States Parties, the content of which is informed by the other provisions of Part XII and other applicable rules of international law. This "general obligation" 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 the positive obligation to take active measures to protect and preserve the marine environment, and by logical implication, entails the negative obligation not to degrade the marine environment.[44]

The tribunal's interpretation is inter-temporal in the sense that the obligation set out as UNCLOS Article 192 includes both the obligation to maintain or improve the *present* condition and the obligation to prevent *future* damage to the marine environment. Given that ecological conditions in the oceans may change over time and environmental knowledge and technology are developing rapidly, it is important to take account of time elements in the interpretation of environmental norms in order to adapt them to new situations. Thus, it is significant that the arbitral tribunal incorporated an inter-temporal element into Article 192.[45]

In the written statements submitted to ITLOS during the advisory proceedings, many States and international organizations referred to the above statement of the arbitral tribunal. For example, the Netherlands argued that "the content of the general obligation of article 192 is informed by the relevant, more specific, applicable corpus of international environmental law, including, but not limited to, the precautionary principle and the obligation to conduct environmental impact assessment."[46] Other States and international organizations also supportively referred to the tribunal's approach.

44. SCS Arbitration Award, *supra* note 1, ¶ 941 (emphasis added).

45. TANAKA, *supra* note 5, 135.

46. Written Statement of the Kingdom of the Netherlands ¶ 4.3, Climate Change Advisory Opinion, Case No. 31, 2024 ITLOS Rep. (June 16, 2023), https://itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-28-NL.pdf.

They included the African Union,[47] Australia,[48] Belize,[49] Canada,[50] Chile,[51] the Commission of Small Island States,[52] the Democratic Republic of the Congo,[53] Djibouti,[54] Egypt,[55] the European Union,[56] the Food and Agriculture Organization,[57] the International Union for Conservation of Nature and

47. Written Statement of African Union ¶¶ 252, 258, Climate Change Advisory Opinion, 2024 ITLOS Rep. (June 16, 2023), https://itlos.org/fileadmin/itlos/documents/cases/31/written_statements/2/C31-WS-2-7-African_Union.pdf.

48. Written Statement of Australia ¶ 43, Climate Change Advisory Opinion, 2024 ITLOS Rep. (June 16, 2023), https://itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-11-Australia.PDF.

49. Written Statement of Belize ¶ 56, Climate Change Advisory Opinion, 2024 ITLOS Rep. (June 16, 2023), https://itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-23-Belize.pdf.

50. Written Statement of Canada ¶ 10, Advisory Opinion Climate Change, 2024 ITLOS Rep. (June 16, 2023), https://itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-25-Canada-rev_01.pdf.

51. Written Statement of the Republic of Chile ¶ 43, Climate Change Advisory Opinion, 2024 ITLOS Rep. (June 16, 2023), https://itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-20-Chile_01.pdf.

52. Written Statement of the Commission of Small Island States on Climate Change and International Law (COSIS), vol. I, ¶ 388, Climate Change Advisory Opinion, 2024 ITLOS Rep. (June 16, 2023), https://itlos.org/fileadmin/itlos/documents/cases/31/written_statements/2/C31-WS-2-4-COSIS.pdf.

53. Observations Submitted by the Democratic Republic of the Congo ¶¶ 271, 300, Climate Change Advisory Opinion, 2024 ITLOS Rep. (June 13, 2023), https://itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-1-RD_Congo_translation_ITLOS.pdf.

54. Written Statement of the Republic of Djibouti ¶ 42, Climate Change Advisory Opinion, 2024 ITLOS Rep. (June 16, 2023), https://itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-31-Djibouti_translation_ITLOS.pdf.

55. Written Statement of the Arab Republic of Egypt ¶ 79, Climate Change Advisory Opinion, 2024 ITLOS Rep. (June 16, 2023), https://itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-17-Egypt.pdf.

56. Written Statement by the European Union ¶ 18, Climate Change Advisory Opinion, 2024 ITLOS Rep. (June 15, 2023), https://itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-9-EU.pdf; *see also* Verbatim Record of Sept. 20, 2023, ITLOS/PV.23/C31/14/Rev.1, at 37, Climate Change Advisory Opinion, 2024 ITLOS Rep. (Sept. 20, 2023), https://itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/verbatim_records_rev/ITLOS_PV23_C31_14_Rev.1_E.pdf (statement of Bruti Liberati, European Union delegation).

57. Written Statement of the Food and Agriculture Organization of the United Nations ¶ 26 n.43, Climate Change Advisory Opinion, 2024 ITLOS Rep. (June 16, 2023), https://itlos.org/fileadmin/itlos/documents/cases/31/written_statements/3/C31-WS-3-2-FAO.pdf.

Natural Resources,[58] Mauritius,[59] Micronesia,[60] Nauru,[61] New Zealand,[62] the Philippines,[63] Portugal,[64] Rwanda,[65] Sierra Leone,[66] Singapore,[67] Timor-Leste,[68] and the United Kingdom.[69]

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58. Written Statement of the International Union for Conservation of Nature and Natural Resources ¶ 127, Climate Change Advisory Opinion, 2024 ITLOS Rep. (June 13, 2023), https://itlos.org/fileadmin/itlos/documents/cases/31/written_statements/2/C31-WS-2-2-IUCN.pdf.

59. Written Statement of the Republic of Mauritius ¶ 64, Climate Change Advisory Opinion, 2024 ITLOS Rep. (June 16, 2023), https://itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-12-Mauritius.pdf.

60. Written Statement of the Federated States of Micronesia ¶ 59, Climate Change Advisory Opinion, 2024 ITLOS Rep. (June 16, 2023), https://itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-30-FS_Micronesia_01.pdf.

61. Written Statement of the Republic of Nauru ¶ 54, Climate Change Advisory Opinion, 2024 ITLOS Rep. (June 15, 2023), https://itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-22-Nauru.pdf.

62. Written Statement of New Zealand ¶ 77, Climate Change Advisory Opinion, 2024 ITLOS Rep. (June 15, 2023), https://itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-3-New_Zealand.pdf; *see also* Verbatim Record of Sept. 15, 2023, ITLOS/PV.23/C31/10/Rev.1, at 9–10, Climate Change Advisory Opinion, 2024 ITLOS Rep. (Sept. 15, 2023), https://itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/verbatim_records_rev/ITLOS_PV23_C31_10_Rev.1_E.pdf (statement of Charlotte Skerten, New Zealand delegation).

63. Verbatim Record of Sept. 19, 2023, ITLOS/PV.23/C31/12/Rev.1, at 13, Climate Change Advisory Opinion, 2024 ITLOS Rep. (Sept. 19, 2023), https://itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/verbatim_records_rev/ITLOS_PV23_C31_12_Rev.1_E.pdf (statement of Carlos D. Sorreta, Philippines delegation).

64. Written Statement of the Portuguese Republic ¶ 61, Climate Change Advisory Opinion, 2024 ITLOS Rep. (June 16, 2023), https://itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-24-Portugal_01.pdf.

65. Written Statement of the Republic of Rwanda ¶ 175, Climate Change Advisory Opinion, 2024 ITLOS Rep. (June 17, 2023), https://itlos.org/fileadmin/itlos/documents/cases/31/written_statements/3/C31-WS-3-1-Rwanda.pdf.

66. Written Statement of the Republic of Sierra Leone ¶ 76, Climate Change Advisory Opinion, 2024 ITLOS Rep. (June 16, 2023), https://itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-29-Sierra_Leone.pdf.

67. Written Statement of the Republic of Singapore ¶ 64, Climate Change Advisory Opinion, 2024 ITLOS Rep. (June 16, 2023), https://itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-15-Singapore.pdf.

68. Verbatim Record of Sept. 20, 2023, ITLOS/PV.23/C31/14/Rev.1, at 9, Climate Change Advisory Opinion, 2024 ITLOS Rep. (Sept. 20, 2023), https://itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/verbatim_records_rev/ITLOS_PV23_C31_14_Rev.1_E.pdf (statement by John Middleton, Timor-Leste delegation).

2. The Systemic Interpretation of UNCLOS Articles 192 and 194(5)

The second noteworthy point relates to the systemic interpretation of UNCLOS Articles 192 and 194(5). Notably, the *South China Sea Arbitration* tribunal read Article 192 in light of "the corpus of international law relating to the environment" and "other applicable international law."[70] In this connection, the arbitral tribunal made an explicit reference to the 1973 Convention on the International Trade in Endangered Species of Wild Fauna and Flora,[71] stating that the Convention

> is the subject of nearly universal adherence, including by the Philippines and China, and in the Tribunal's view forms part of the general corpus of international law that informs the content of Article 192 and 194(5) of the Convention. . . . [T]he Tribunal considers that the general obligation to "protect and preserve the marine environment" in Article 192 includes a due diligence obligation to prevent the harvesting of species that are recognised internationally as being at risk of extinction and requiring international protection.[72]

As regards Article 194(5), UNCLOS contains no definition of "ecosystems." However, the arbitral tribunal stated that Article 2 of the Convention on Biological Diversity defines ecosystem to mean "a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit," and that that definition was internationally accepted.[73] It would seem to follow that Article 2 of the Convention on Biological Diversity informs UNCLOS Article 194(5).

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69. Written Statement of the United Kingdom ¶ 50, Climate Change Advisory Opinion, 2024 ITLOS Rep. (June 16, 2023), https://itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-27-UK.pdf.

70. SCS Arbitration Award, *supra* note 1, ¶¶ 941, 959.

71. Convention on the International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, T.I.A.S. 8249, 993 U.N.T.S. 243.

72. SCS Arbitration Award, *supra* note 1, ¶ 956 (citation omitted).

73. *Id.* ¶ 945.

Currently, complex webs of treaties are developing in multiple branches of international law. The coexistence of treaties necessitates a systemic outlook.[74] The arbitral tribunal's statement mentioned above provides an interesting example of the systemic interpretation of environmental treaties.[75] Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT) provides a legal basis for the tribunal's systemic interpretation regarding Articles 192 and 194(5) of UNCLOS, even though the tribunal, in its Award on the Merits, did not refer to this provision when considering the Philippines' Submissions Numbers 11 and 12(b).[76]

The systemic treaty interpretation is of critical importance when considering the ocean-climate nexus. Thus, some States, in their written statements, highlighted the importance of systemic interpretation. For example, Italy stated:

> In Italy's view, for the purpose of the concrete application of Part XII UNCLOS "without prejudice" of specific obligations assumed under such conventions and agreements, the additional interpretative method of systemic integration may be relevant. This method, enshrined in article 31, paragraph 3 (c), of VCLT, makes it possible to coordinate each provision of Part XII with the specific obligations of other agreements referred to in article 237 UNCLOS.[77]

Relatedly, Italy explicitly referred to the *South China Sea* arbitral award, stating:

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74. *See* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 53 (June 21).

75. *See also* Nilüfer Oral, *The South China Sea Arbitral Award, Part XII of UNCLOS, and the Protection and Preservation of the Marine Environment*, *in* THE SOUTH CHINA SEA ARBITRATION: THE LEGAL DIMENSION 223, 237 (S. Jayakumar et al. eds., 2018).

76. In its Award on Jurisdiction, however, the tribunal made a clear reference to Article 31(3). SCS Arbitration Award on Jurisdiction and Admissibility, *supra* note 8, ¶ 176 ("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 [Convention on Biological Diversity] for the purposes of interpreting the content and standard of Articles 192 and 194 of the Convention.").

77. Written Statement of Italy ¶ 14, Climate Change Advisory Opinion, 2024 ITLOS Rep. (June 15, 2023), https://itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-7-Italy-rev_s.pdf.

> [T]he Annex VII Arbitral Tribunal in the South China Sea Arbitration stated in its award on jurisdiction and admissibility that article 293, paragraph 1, of UNCLOS and article 31, paragraph 3, of VCLT enabled it to take into account the Convention on Biological Diversity of 5 June 1992 ("CBD") for the purpose of interpreting the UNCLOS provisions at stake in the case. In its subsequent award of 2016 on the merits, the Tribunal relied on the CDB [sic] to determine the meaning of the term "ecosystem" in Article 194, paragraph 5, of UNCLOS.[78]

Canada also noted the interpretation of the *South China Sea* arbitral award, which incorporated the Convention on Biological Diversity and Convention on the International Trade in Endangered Species of Wild Fauna and Flora into Article 192 of UNCLOS.[79]

Referring to Articles 31 to 33 of the VCLT, Germany argued that "'other rules of international law' should be referred to by the Tribunal, where necessary, in order to substantiate, or inform respectively, the meaning of the terms of the Convention [UNCLOS]."[80] According to Germany, "[a]s far as the protection and preservation of the marine environment is concerned, the award rendered by the Annex VII Tribunal in the *South China Sea Arbitration* can be referred to as an illustrative example of such an integrated reading of the Convention."[81] Egypt noted that "[t]he arbitral tribunal in *the South China Sea Arbitration* emphasized the direct link between Article 192 of UNCLOS and other international rules and agreements."[82] Mozambique also argued:

> [A]s the Annex VII tribunal in the *South China Sea Arbitration* observed, Article 192 is "informed by the other provisions of Part XII" of UNCLOS as a whole, as well as by "other applicable rules of international law." This

78. *Id.* ¶ 18 (footnote omitted); *see also* Written Statement of Chile, *supra* note 51, ¶ 90.

79. Written Statement of Canada, *supra* note 50, ¶ 24.

80. Written Statement of the Federal Republic of Germany ¶ 39, Climate Change Advisory Opinion, 2024 ITLOS Rep. (June 14, 2023), https://itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-6-Germany.pdf.

81. *Id.* (footnote omitted); *see also* Verbatim Record of Sept. 13, 2023, ITLOS/PV.23/C31/5/Rev.1, at 20–21, Climate Change Advisory Opinion, 2024 ITLOS Rep. (Sept. 13, 2023), https://itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/verbatim_records_rev/ITLOS_PV23_C31_5_Rev.1_E.pdf (statement by Tania Freiin von Uslar-Gleichen, German delegation).

82. Written Statement of Egypt, *supra* note 55, ¶ 30 (footnote omitted).

> approach is consistent with customary and conventional rules of treaty interpretation.[83]

Other States and international organizations, such as Bangladesh,[84] Belize,[85] the Commission of Small Island States,[86] the European Union,[87] the International Union for Conservation of Nature and Natural Resources,[88] Nauru,[89] Sierra Leone,[90] and the Philippines,[91] also refer to the systemic interpretation of the arbitral tribunal in the *South China Sea* arbitral award.

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83. Written Statement of the Republic of Mozambique ¶ 4.8, Climate Change Advisory Opinion, 2024 ITLOS Rep. (June 16, 2023), https://itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-10-Mozambique_01.pdf (footnote omitted).

84. Written Statement of the People's Republic of Bangladesh ¶ 41, Climate Change Advisory Opinion, 2024 ITLOS Rep. (June 16, 2023), https://itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-21-Bangladesh.pdf.

85. Written Statement of Belize, *supra* note 49, ¶ 59.

86. Written Statement of the Commission of Small Island States, *supra* note 52, ¶¶ 351, 404, 408; *see also* Verbatim Record of Sept. 11, 2023, ITLOS/PV.23/C31/2/Rev.1, at 38, Climate Change Advisory Opinion, 2024 ITLOS Rep. (Sept. 11, 2023), https://itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/verbatim_records_rev/ITLOS_PV23_C31_2_Rev.1_E.pdf (statement by Makane Moïe Mbengue, Commission of Small Island States delegation).

87. Written Statement by the European Union, *supra* note 56, ¶ 23; *see also* Verbatim Record of Sept. 20, 2023, *supra* note 56, at 37 (statement of Liberati).

88. Verbatim Record of Sept. 21, 2023, ITLOS/PV.23/C31/16/Rev.1, at 39, Climate Change Advisory Opinion, 2024 ITLOS Rep. (Sept. 21, 2023), https://itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/verbatim_records_rev/ITLOS_PV23_C31_16_Rev.1_E.pdf (statement of Tara Davenport, representative of International Union for Conservation).

89. Written Statement of Nauru, *supra* note 61, ¶ 53; *see also* Verbatim Record of Sept. 14, 2023, ITLOS/PV.23/C31/8/Rev.1, at 28–29, Climate Change Advisory Opinion, 2024 ITLOS Rep. (Sept. 14, 2023), https://itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/verbatim_records_rev/ITLOS_PV23_C31_8_Rev.1_E.pdf (statement of Eirik Bjorge, Nauru delegation).

90. Written Statement of Sierra Leone, *supra* note 66, ¶ 80.

91. Verbatim Record of Sept. 19, 2023, ITLOS/PV.23/C31/12/Rev.1, at 5–6, Climate Change Advisory Opinion, 2024 ITLOS Rep. (Sept. 19, 2023), https://itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/verbatim_records_rev/ITLOS_PV23_C31_12_Rev.1_E.pdf (statement of Gilbert U. Medrano, Philippines delegation); *id.* at 12 (statement of Maria Angela A. Ponce, Philippines delegation).

3. Due Diligence Obligation

Third, the due diligence obligation merits mention. As noted earlier, the arbitral tribunal held that "Article 192 includes a due diligence obligation."[92] 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. The second related to an obligation to *maintain* a level of vigilance in enforcing those rules and measures.[93] Focusing on the approach of the arbitral tribunal, the Philippines argued:

> From the *South China Sea Arbitration*, we can deduce that the obligation of due diligence is twofold: first is "adopting appropriate rules and measures to prohibit a harmful practice," and second is ensuring enforcement or compliance with said rules and measures, with the qualification that "the obligation to 'ensure' is an obligation of conduct" and not of result.[94]

Referring to the approach of the tribunal, some States and international organizations, such as the African Union,[95] Belize,[96] the Commission of Small Island States,[97] the European Union,[98] Latvia,[99] Mozambique,[100] Sierra

92. SCS Arbitration Award, *supra* note 1, ¶ 956.

93. *Id.* ¶ 961.

94. Verbatim Record of Sept. 19, 2023, *supra* note 91, at 11–12 (statement of Ponce) (footnote omitted).

95. Written Statement of African Union, *supra* note 47, ¶ 333.

96. Written Statement of Belize, *supra* note 49, ¶ 59.

97. Written Statement of the Commission of Small Island States, *supra* note 52, ¶¶ 278, 415; Verbatim Record of Sept. 12, 2023, ITLOS/PV.23/C31/3/Rev.1, at 39, Climate Change Advisory Opinion, 2024 ITLOS Rep. (Sept. 12, 2023), https://itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/verbatim_records_rev/ITLOS_PV23_C31_3_Rev.1_E.pdf (statement of Philippa Webb, Commission of Small Island States delegation).

98. Written Statement by the European Union, *supra* note 56, ¶ 17; *see also* Verbatim Record of Sept. 20, 2023, *supra* note 56, at 37 (statement of Liberati).

99. Written Statement of Latvia ¶ 14, Climate Change Advisory Opinion, 2024 ITLOS Rep. (June 16, 2023), https://itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-14-Latvia_01.pdf; *see also* Verbatim Record of Sept. 15, 2023, ITLOS/PV.23/C31/9/Rev.1, at 12, Climate Change Advisory Opinion, 2024 ITLOS Rep. (Sept. 15, 2023), https://itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/verbatim_records_rev/ITLOS_PV23_C31_9_Rev.1_E.pdf (statement of Mārtinš Paparinskis, Latvia delegation).

100. Verbatim Record of Sept. 18, 2023, ITLOS/PV.23/C31/11/Rev.1, at 13, Climate Change Advisory Opinion, 2024 ITLOS Rep. (Sept. 18, 2023) (statement of Phoebe Okowa, Mozambique delegation).

Leone,[101] and Viet Nam,[102] also discussed the obligation of due diligence in the context of the protection of the marine environment.

4. Obligation to Conduct an Environmental Impact Assessment

Next, the obligation to conduct an EIA must be examined. An EIA is a procedure to predict environmental risks and likely impacts of a proposed project and to integrate environmental concerns into the decision-making process before authorizing or funding the project.[103] Given that damage to the environment may be irreversible,[104] it is a prerequisite to conduct an EIA *before* authorizing planned activities with a view to preventing environmental harm.[105]

In UNCLOS, the obligation to conduct an EIA is set out in Article 206. The arbitral tribunal highlighted the inter-link between Articles 206 and 194(2) of UNCLOS:

> Article 206 ensures that planned activities with potentially damaging effects may be effectively controlled and that other States are kept informed of their potential risks. In respect of Article 206, the International Tribunal for the Law of the Sea emphasised that "the obligation to conduct an environmental impact assessment is a direct obligation under the Convention

101. Written Statement of Sierra Leone, *supra* note 66, ¶ 50.

102. Written Statement by the Socialist Republic of Viet Nam ¶ 4.4, Climate Change Advisory Opinion, 2024 ITLOS Rep. (June 16, 2023), https://itlos.org/fileadmin/itlos/documents/cases/31/written_statements/3/C31-WS-3-3-Viet_Nam.pdf.

103. *See* ALAN BOYLE & CATHERINE REDGWELL, BIRNIE, BOYLE, AND REDGWELL'S INTERNATIONAL LAW AND THE ENVIRONMENT 184 (4th ed. 2021).

104. Gabcíkovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. Rep. 7, ¶ 140 (Sept. 25).

105. U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26 (Vol. I), annex I, princ. 17 (Aug. 12, 1992), https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf (emphasizing the importance of environmental impact assessment (EIA)). For more recent detailed procedures for an EIA, *see* Agreement under the United Nations Convention on the Law of the Sea on Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction, U.N. Doc. A/Conf.232/2023/4 (June 19, 2023), https://treaties.un.org/doc/Publication/CTC/Ch_XXI_10.pdf. *See also* Yoshifumi Tanaka, *Reflections on the Environmental Impact Assessment in the BBNJ Agreement: Its Implications for the Conservation of Biological Diversity in the Marine Arctic Beyond National Jurisdiction*, 55 OCEAN DEVELOPMENT AND INTERNATIONAL LAW 85 (2024).

> and a general obligation under customary international law." As such, Article 206 has been described as an "essential part of a comprehensive environmental management system" and as a "particular application of the obligation on states, enunciated in Article 194(2)."[106]

Belize,[107] the Philippines,[108] and Sierra Leone[109] referred to the approach of the *South China Sea* arbitral award with regard to Article 206.

However, it is problematic that UNCLOS Article 206 provides no further precision with regard to the content of an EIA.[110] In light of this, it may be difficult to judge whether a State properly fulfilled the obligation set out in Article 206. In the *South China Sea Arbitration*, the question arose whether China had fulfilled obligations to conduct an environmental impact assessment under the Convention. The arbitral tribunal 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.[111] What is of particular importance in this regard is the obligation to communicate enshrined in Article 206. In the view of the arbitral tribunal, "While the terms 'reasonable' and 'as far as practicable' contain an element of discretion for the State concerned, the obligation to communicate reports of the results of the assessments is absolute."[112]

Under Article 205 of 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 arbitral tribunal accordingly concluded that China had not fulfilled its duties under Article 206 of the Convention.[113] Given that it

106. SCS Arbitration Award, *supra* note 1, ¶ 948 (footnote omitted).

107. Verbatim Record of Sept. 18, 2023, ITLOS/PV.23/C31/11/Rev.1, at 37, Climate Change Advisory Opinion, 2024 ITLOS Rep. (Sept. 18, 2023), https://itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/verbatim_records_rev/ITLOS_PV23_C31_11_Rev.1_E.pdf (statement of Sam Wordsworth, Belize delegation).

108. Verbatim Record of Sept. 19, 2023, *supra* note 63, at 16 (statement of Sorreta).

109. Written Statement of Sierra Leone, *supra* note 66, ¶ 60.

110. Responsibilities and Obligations of States with Respect to Activities in the Area, Case No. 17, Advisory Opinion, 2011 ITLOS Rep. 51, ¶ 149 (Feb. 1).

111. SCS Arbitration Award, *supra* note 1, ¶ 991.

112. *Id.* ¶ 948 (footnote omitted).

113. *Id.* ¶ 991.

may be less easy to determine whether a State properly carried out an environmental impact assessment, the tribunal's approach focusing on the nonfulfillment of a procedural requirement, that is, communication, is noteworthy.[114] In fact, the absolute nature of the obligation to communicate was highlighted by the United Kingdom.[115]

5. Distinction Between Territorial Sovereignty and Marine Environmental Protection

The last point concerns the distinction between territorial sovereignty and the obligation to protect and preserve the marine environment. As explained earlier, the arbitral tribunal held that "questions of sovereignty are irrelevant to the application of Part XII" of UNCLOS.[116] The written statements of Mozambique[117] and the Democratic Republic of Congo[118] refer to the above statement of the *South China Sea* arbitral award.

According to the arbitral tribunal, "Article 297(1)(c) expressly reaffirms the availability of compulsory dispute settlement for disputes concerning 'alleged violations of international rules and standards for the protection and preservation of the marine environment.'"[119] Thus the arbitral tribunal concluded that it had jurisdiction to consider the Philippines' Submission Number 11, even though the territorial sovereignty over maritime features referred to in Submission Number 11 remains undetermined.[120] The separation of marine environmental disputes from territorial disputes over maritime features may expand the *locus standi* of States in response to the alleged obligations concerning the protection of the marine environment under UNCLOS.

6. Summary

On the basis of the above survey, two observations can be made. The first observation concerns the frequent reference to the *South China Sea* arbitral

114. Construction of a Road in Costa Rica along the San Juan River (Nicar. v. Costa Rica), Judgment, 2015 IC.J. 665, ¶ 104 (Dec. 16); *see also* TANAKA, *supra* note 5, at 93–94.

115. Written Statement of the United Kingdom, *supra* note 69, ¶ 72.

116. SCS Arbitration Award, *supra* note 1, ¶ 940; *see also id.* ¶ 927.

117. Witten Statement of Mozambique, *supra* note 83, ¶ 4.5.

118. Observations Submitted by the Congo, *supra* note 53, ¶ 121.

119. SCS Arbitration Award, *supra* note 1, ¶ 930.

120. *Id.* ¶ 931.

award in the advisory proceedings of ITLOS. In oral proceedings, China claimed that "[t]the so-called 'awards' [the *South China Sea* arbitral awards] are null and void and should not be invoked as a legal basis."[121] Despite the opposition of China, however, there is a clear trend that many States and international organizations relied on the *South China Sea* arbitral award. It could well be said that the validity of the *South China Sea* arbitral award is well-recognized by States and international organizations in the advisory proceedings of ITLOS.

The second observation concerns the contribution of the *South China Sea* arbitral award to the interpretation of environmental norms set out in UNCLOS. As explained earlier, the arbitral tribunal in the *South China Sea Arbitration* elaborated on the interpretation of relevant provisions of UNCLOS, including Articles 192, 194, and 206. The above survey seems to reveal that many States relied on the interpretation of the arbitral tribunal. The frequent reference to the *South China Sea* arbitral award can contribute to enhancing the value of the arbitral award as precedent in jurisprudence.

C. Analysis of the Advisory Opinion of ITLOS as a Full Court

ITLOS, as a full court, delivered its advisory opinion on May 21, 2024. Although a comprehensive analysis of the advisory opinion falls outside the scope of this article, references to the *South China Sea Arbitration* in the advisory opinion merit mention. ITLOS made an explicit reference to the *South China Sea Arbitration* in three points.

The first point relates to an obligation to conduct an EIA. Referring to the *South China Sea* arbitral award, ITLOS stated that "the obligation to conduct environmental impact assessments is crucial to ensure that activities do not harm the marine environment and is an essential part of a comprehensive environmental management system."[122] Furthermore, relying on the approach of the *South China Sea* arbitral award, ITLOS held that "Article 206

121. Verbatim Record of Sept. 15, 2023, ITLOS/PV.23/C31/10/Rev.1, at 30, Climate Change Advisory Opinion, 2024 ITLOS Rep. (Sept. 15, 2023), https://itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/verbatim_records_rev/ITLOS_PV23_C31_10_Rev.1_E.pdf (statement of Ma Xinmin, China delegation).

122. Climate Change Advisory Opinion, Advisory Opinion, 2024 ITLOS Rep. ¶ 354 (May 21), https://www.itlos.org/fileadmin/itlos/documents/cases/31/Advisory_Opinion/C31_Adv_Op_21.05.2024_orig.pdf.

therefore constitutes a "particular application" of the obligation enunciated in article 194, paragraph 2."[123]

The second point is the interpretation of Article 192 of UNCLOS. In this regard, ITLOS directly quoted Paragraph 941 of the *South China Sea* arbitral award.[124]

The third point concerns the systemic interpretation of Article 194(5) of UNCLOS. Referring to the *South China Sea* arbitral award, ITLOS held that the Convention on the International Trade in Endangered Species of Wild Fauna and Flora "is an agreement to which there is near-universal adherence" and that "the classification of species in the appendices to [the Convention] provides guidance in interpreting the term 'depleted, threatened or endangered species' in article 194, paragraph 5."[125] Here, it would appear that ITLOS followed the systemic interpretation of Article 194(5) adopted by the arbitral tribunal in the *South China Sea* award. Overall, it would appear that the *South China Sea* arbitral award has been recognized as part of the law of the sea jurisprudence.

IV. SPATIAL IMPLICATIONS

China's claim to historic rights in the South China Sea constitutes a key component in a spatial order in the South China Sea. Thus, this Part examines the impact of the *South China Sea* arbitral award on the reaction of third States to China's claim to historic rights.

A. Malaysia's Partial Submission of Information to the Commission on the Limits of the Continental Shelf

On December 12, 2019, Malaysia made a "partial submission for the remaining portion of the continental shelf of Malaysia beyond 200 nautical miles in the northern part of the South China Sea" to the Commission on the Limits of the Continental Shelf (CLCS).[126]

123. *Id.* ¶ 356; *see also id.* ¶ 361.

124. *Id.* ¶ 387. Paragraph 941 was quoted in Section III(B)(1) of this article.

125. *Id.* ¶ 404.

126. Note Verbale, Permanent Mission of Malaysia to the United Nations, HA 59/19 (Dec. 12, 2019), https://www.un.org/depts/los/clcs_new/submissions_files/mys85_2019/2019_12_12_MYS_NV_UN_001.pdf (advising that "on 6 May 2009, Malaysia and Vietnam made a joint submission for a portion of the two States' continental shelf, in the southern part of the South China Sea").

> The Government of Malaysia wishes to inform the Commission [CLCS] that the area of continental shelf beyond 200 M that is the subject of this Partial Submission as described in paragraph 5 below is not located in an area which has any land or maritime dispute between Malaysia and any other coastal State.[127]

China strongly objected to Malysia's submission to the CLCS. In its Note Verbale of December 12, 2019, China claimed:

> China has sovereignty over Nanhai Zhudao, consisting of Dongsha Quindao, Xisha Qundao, Zhongsha Qundao and Nansha Qundao; China has internal waters, territorial sea and contiguous zone, based on Nanhai Zhudao; China has exclusive economic zone and continental shelf, based on Nanhai Zhudao; China has historic rights in the South China Sea.[128]

According to China, Nanhai Zudao means the South China Sea Islands consist of Dongsha Qundao (the Dongsha Islands), Xisha Qundao (the Xisha Islands), Zhongsha Qundao (the Zhongsha Islands) and Nansha Qundao (the Nansha Islands).[129] The statement of China implicitly denies the validity of the *South China Sea* arbitral award, even though there is no clear reference to the award. In fact, China, in its communication of March 23, 2020, declared that "China neither accepts nor participates in the South China Sea arbitration, neither accepts nor recognizes the awards, and will never accept any claim or action based on the awards."[130]

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127. Malysia Partial Submission to the Commission on the Limits of the Continental Shelf Pursuant to Article 76, paragraph 8 of the United Nations Convention on the Law of the Sea 1982 in the South China Sea, ¶ 4.1. (Nov. 2017), https://www.un.org/depts/los/clcs_new/submissions_files/mys85_2019/20171128_MYS_ES_DOC_001_secured.pdf.

128. Note Verbale, Permanent Mission of People's Republic of China to the United Nations, Ref. No. CML/14/2019 (Dec. 12, 2019), https://www.un.org/depts/los/clcs_new/submissions_files/mys85_2019/CML_14_2019_E.pdf.

129. Statement of the Government of the People's Republic of China on China's Territorial Sovereignty and Maritime Rights and Interests in the South China Sea (July 12, 2016), http://english.www.gov.cn/archive/publications/2016/07/12/content_281475391807773.htm.

130. Note Verbale, Permanent Mission of the People's Republic of China to the United Nations, Ref. No. CML/11/2020 (Mar. 23, 2020), https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/China_Philippines_ENG.pdf. For China repeating the same claim, *see* Note Verbale, Permanent Mission of the People's Republic of China to the United Nations, Ref. No. CML/46/2020 (June 2, 2020), https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_06_02_CHN_NV_UN_eng.pdf; Note Verbale, Permanent Mission of the People's Republic of China to the

In response, the Philippines maintained that in the *South China Sea Arbitration*, "[t]he Tribunal conclusively settled the issue of historic rights and maritime entitlements in the South China Sea."[131] Relatedly, the Philippines confirmed that the arbitral tribunal ruled that "none of the high-tide features in the Spratly Islands, in their natural condition, are capable of sustaining human habitation or economic life of their own within the meaning of Article 121 (3) of the Convention;" and "that none of the high tide features in the Spratly Islands generate entitlements to an exclusive economic zone or continental shelf."[132]

Malaysia's partial submission requires two comments. First, should maritime features in the South China Sea be regarded as fully entitled islands, there will be very little left of the high seas in the South China Sea. In light of its partial submission, however, Malaysia seemingly considers that the central part of the South China Sea remains the high seas. It would appear that Malaysia considers maritime features as rocks in accordance with the *South China Sea* arbitral award.[133]

Second, Malaysia's partial submission on the continental shelf beyond two hundred nautical miles falls within the scope of the marine space surrounded by China's nine-dash line. In its partial submission Malaysia seemingly considered that the superjacent waters above the continental shelf concerned remain the high seas. It would seem to follow that through the submission of the information of the continental shelf to the CLCS, Malaysia indirectly rejects the validity of the nine-dash line.[134] In light of this, it can be said that Malaysia's partial submission relies on the *South China Sea* arbitral award.

United Nations, Ref. No. CML/54/2020 (July 29, 2020), https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/20200729_CHN_NV_UN_e.pdf; Note Verbale, Permanent Mission of the People's Republic of China to the United Nations, Ref. No. CML/1/2021 (Jan. 28, 2021), https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/20210128ChnNvUn009OLA202000373e.pdf.

131. Note Verbale, Permanent Mission of the Republic of the Philippines to the United Nations, No. 00191-2020 (Mar. 6, 2020), https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_03_06_PHL_NV_UN_001.pdf.

132. *Id.*

133. Nguyen Hong Thao, *Malaysia's New Game in the South China Sea: What to Make of Kuala Lumpur's New Claim to an Extended Continental Shelf in the South China Sea*, THE DIPLOMAT (Dec. 21, 2019), https://thediplomat.com/2019/12/malaysias-new-game-in-the-south-china-sea/.

134. *Id.*

B. Reactions of Third States to Malaysia's Partial Submission

In response to the communications of China, several States expressed their views on China's claim to historic rights in the South China Sea.[135] For example, on March 20, 2020, Viet Nam stated that it "opposes any maritime claims in the East Sea that exceed the limits provided in UNCLOS, including claims to historic rights; these claims are without lawful effect."[136] Indonesia, in its communication of May 26, 2020, noted:

> Indonesia reiterates that the Nine-Dash Line map implying historic rights claim clearly lacks international legal basis and is tantamount to upset UNCLOS 1982. This view has also been confirmed by the Award of 12 July 2016 by the [*South China Sea*] Tribunal that any historic rights that the People's Republic of China may have had to the living and non-living resources were superseded by the limits of the maritime zones provided for by UNCLOS 1982.[137]

Indonesia reiterated its position in its communication dated June 12, 2020.[138]

The United States, in its letter dated June 1, 2020, reiterated its prior objections to China's maritime claims. Among other things, the United States stated:

> [T]he United States objects to China's claim to "historic rights" in the South China Sea to the extent that the claim exceeds the maritime entitlements that China could assert consistent with international law as reflected

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135. *See also* Nguyen Hong Thao, *South China Sea: Battle of the Diplomatic Notes Among China and Non-Claimant States*, 8 ASIA-PACIFIC JOURNAL OF OCEAN LAW AND POLICY 128 (2023).

136. Note Verbale, Permanent Mission of the Socialist Republic of Viet Nam to the United Nations, No. 22/HC-2020 (Mar. 30, 2020), https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/VN20200330_ENG.pdf.

137. Note Verbale, Permanent Mission of the Republic of Indonesia to the United Nations, No. 126/POL-703/V/20, ¶ 3 (May 26, 2020), https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_05_26_IDN_NV_UN_001_English.pdf.

138. Note Verbale, Permanent Mission of the Republic of Indonesia to the United Nations, No. 148/POL-703/VI/20 (June 12, 2020), https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_06_12_IDN_NV_UN_002_ENG.pdf. According to Nguyen Hong Thao, "Indonesia, a non-claimant State in the SCS [South China Sea] sovereignty disputes, became the second State in Southeast Asia (after the Philippines) to make an official statement in support of the SCS Arbitral Award." Nguyen Hong Thao, *supra* note 135, at 133.

> in the Convention. The United States notes in this regard that the Tribunal unanimously concluded in its ruling—which is final and binding on China and the Philippines under article 296 of the Convention—that China's claim to historic rights is incompatible with the Convention to the extent it exceeds the limits of China's possible maritime zones as specifically provided for in the Convention.[139]

Relatedly, the United States stressed that "[t]hese positions are consistent with the decision of the Tribunal in The South China Sea Arbitration."[140] The United States also confirmed that the *South China S*ea arbitral award is "final and binding on China and the Philippines under article 296 of the Convention."[141] Thus, the United States urged China to "comply with the Tribunal's 12 July 2016 decision."[142]

Australia also reacted to China's objections to the submission of Malaysia to the CLCS. In its communication dated July 23, 2020, Australia rejected "China's claim to 'historic rights' or 'maritime rights and interests' as established in the 'long course of historical practice' in the South China Sea."[143] Australia maintained that in the *South China Sea* award, the arbitral tribunal found these claims to be inconsistent with UNCLOS and, to the extent of that inconsistency, invalid.[144] Furthermore, Australia stressed that it had rejected any claims to internal waters, territorial sea, EEZ, and continental shelf based on straight baselines connecting the outermost points of maritime features or "island groups" in the South China Sea, including around the "Four Sha" or "continental" or "outlying" archipelagos.[145] Moreover, Australia stated that it "does not accept that artificially transformed features can ever acquire the status of an island under Article 121(1) of UNCLOS."[146] Finally, Australia opined that "[t]he rationale put forward by China as an

139. Permanent Rep. of the U.S. to the U.N., Letter dated June 1, 2020 from the Permanent Rep. of the United States of America to the United Nations addressed to the Secretary-General, U.N. Doc. A/74/874–S/2020/483, at 2 (June 2, 2020) (footnote omitted).

140. *Id.*

141. *Id.*

142. *Id.* at 3.

143. Note Verbale, Permanent Mission of the Commonwealth of Australia to the United Nations, No. 20/026 (July 23, 2020), https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_07_23_AUS_NV_UN_001_OLA-2020-00373.pdf.

144. *Id.* at 1.

145. *Id.*

146. *Id.* at 1–2.

explanation of why the Arbitral Award is not binding on China is not supported by international law."[147] Thus, it stressed that "[p]ursuant to Article 296 and Article 11 of Annex VII of UNCLOS the Tribunal's decision is final and binding on both parties to the dispute."[148]

The United Kingdom, France, and Germany also highlighted that "claims with regard to the exercise of 'historic rights' over the South China Sea waters do not comply with international law and UNCLOS provisions and recall that the arbitral award in the Philippines v. China case dating to 12 July 2016 clearly confirms this point."[149]

Subsequently, Japan, in its communication dated January 19, 2021, stressed:

> The freedom of navigation and overflight must be guaranteed in sea and airspace surrounding and above maritime features found to be low-tide elevations that do not have territorial sea and territorial airspace of their own, as stated in the award of the South China Sea Arbitration dated 12 July 2016, which is final and binding on the parties to the dispute.[150]

In its communication dated August 3, 2021, New Zealand also stated that "[t]here is no legal basis for states to claim 'historic rights' with respect to maritime areas in the South China Sea, as confirmed in the 2016 South China

147. *Id.* at 2.

148. *Id.* at 2. In addition, Marise Payne, Australia's Minister for Foreign Affairs, confirmed in a July 12, 2021 statement that the *South China Sea* arbitral award found that "China's claim to 'historic rights' or 'maritime rights and interests' established in the 'long course of historical practice' in the South China Sea were inconsistent with UNCLOS and, to the extent of that inconsistency, invalid." Press Statement, Australian Minister for Foreign Affairs, Marking the 5th Anniversary of the South China Sea Arbitral Award (July 12, 2021), https://www.foreignminister.gov.au/minister/marise-payne/media-release/marking-5th-anniversary-south-china-sea-arbitral-award.

149. Note Verbale, Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations, UK NV No. 162/20, ¶ 1 (Sept. 16, 2020), https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_09_16_GBR_NV_UN_001.pdf; *see also* Note Verbale, Permanent Mission of France to the United Nations (Sept. 16, 2020), https://www.un.org/depts/los/clcs_new/submissions_files/mys_2_ 12_2019/2020_09_16_FRA_NV_UN_001_EN.pdf; Note Verbale, Permanent Mission of the Federal Republic of Germany to the United Nations, No. 324/2020 (Sept. 16, 2020), https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_09_16_DEU_NV_UN_001.pdf.

150. Note Verbale, Permanent Mission of Japan to the United Nations, SC/21/002 (Jan. 19, 2021), https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/20210119JpnNvUn001OLA202000373.pdf.

Sea Arbitral Award (the Arbitral Award)"[151] and that "[t]he Arbitral Award is final and binding on both parties."[152]

C. Analysis

The above considerations lead to three observations. First, the CLCS is a technical body for reviewing information on the continental shelf beyond two hundred nautical miles submitted by coastal States and issuing recommendations on the limits of the continental shelf. Nonetheless, Malysia's partial submission to the CLCS triggered a "battle of diplomatic notes."[153] It appears that the CLCS became a forum for States to exchange their positions with regard to South China Sea disputes.

Second, the arbitral tribunal in the *South China Sea Arbitration* found:

> [A]s between the Philippines and China, China's claims to historic rights, or other sovereign rights or jurisdiction, with respect to the maritime areas of the South China Sea encompassed by the relevant part of the "nine-dash line" are contrary to [UNCLOS] and without lawful effect to the extent that they exceed the geographic and substantive limits of China's maritime entitlements under the Convention. [154]

Relying on the finding of the *South China Sea* arbitral award, several third States, in their statements in relation to Malaysia's partial submission, rejected China's claim to historic rights in the South China Sea. Thus, it can be observed that the *South China Sea* arbitral award provides a legal basis for third States when denying the validity of China's claim on its historic rights and the nine-dash line.

Third, in their statements mentioned above, several States confirmed the binding nature of the *South China Sea* arbitral award. Additionally, third States have stressed the binding nature of the arbitral award on various other occasions. On July 11, 2021, for example, Antony Blinken, U.S. Secretary of State, issued a press statement on the "Fifth Anniversary of the Arbitral Tribunal

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151. Note Verbale, Permanent Mission of New Zealand to the United Nations, Note No. 08/21/02 (Aug. 3, 2021), https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/20210803NzNote.pdf.

152. *Id.*

153. *See* Nguyen Hong Thao, *supra* note 135; Note Verbale, Permanent Mission of the Socialist Republic of Viet Nam to the United Nations, *supra* note 136.

154. SCS Arbitration Award, *supra* note 1, ¶ 1203(B)(2).

Ruling on the South China Sea."[155] In his statement, Blinken stated: "The PRC and the Philippines, pursuant to their treaty obligations under the Law of the Sea Convention, are legally bound to comply with this decision."[156] Likewise, in her statement of July 12, 2021, Marise Payne, Australia's Minister for Foreign Affairs, stated: "The Australian Government has consistently called on the parties to the arbitration to abide by the Tribunal's decision, which is final and binding on both China and the Philippines."[157] Subsequently, on July 11, 2023, the U.S. Department of State issued a press statement on the seventh anniversary of the *South China Sea* arbitral award and confirmed that "[u]nder the terms of the Convention, this ruling is final and legally binding on the Philippines and the PRC."[158] "We continue to urge Beijing to comport its maritime claims with international law as reflected in the 1982 Law of the Sea Convention."[159]

On the same day, the delegation of the European Union to the Philippines, together with the embassies of the EU member States to the Philippines—Belgium, Czechia, Denmark, Germany, Ireland, Greece, Spain, France, Italy, Netherlands, Poland, Austria, Romania, Slovakia (non-resident), Finland, and Sweden—issued the following statement: "The Award of the Arbitral Tribunal is a significant milestone, which is legally binding upon the parties to those proceedings, and a useful basis for peacefully resolving disputes between the parties."[160] Furthermore, on July 12, 2023, Mr Yoshitaka Hayashi, Foreign Minister of Japan, stated that "[a]s the Tribunal's award is final and legally binding on the parties to the dispute under the pro-

155. Press Statement, Antony J. Blinken, U.S. Sec'y of State, Fifth Anniversary of the Arbitral Tribunal Ruling on the South China Sea (July 11, 2021), https://www.state.gov/fifth-anniversary-of-the-arbitral-tribunal-ruling-on-the-south-china-sea/.

156. *Id.*

157. Australian Minister for Foreign Affairs, *supra* note 148.

158. Press Statement, U.S. Dept. of State, Seventh Anniversary of the Philippines-China South China Sea Arbitral Tribunal Ruling (July 11, 2023), https://www.state.gov/seventh-anniversary-of-the-philippines-china-south-china-sea-arbitral-tribunal-ruling/.

159. *Id.*

160. Press Statement, Delegation of the European Union to the Philippines, Local EU Statement on the Anniversary of the Award Rendered in the Arbitration Between the Republic of the Philippines and the People's Republic of China on the South China Sea (July 11, 2023), https://www.eeas.europa.eu/delegations/philippines/local-eu-statement-anniversary-award-rendered-arbitration-between-republic-philippines-and-peoples_en?s=176.

visions of the United Nations Convention on the Law of the Sea (UNCLOS), the parties to this case, the Philippines and China, are required to comply with the award."[161]

Apart from China, it appears that there is no State that denies the binding nature of the *South China Sea* arbitral award. Thus, it would be fair to say that the binding nature of the arbitral award upon China and the Philippines is widely recognized by third States.

V. CONCLUSION

This article examined the implications of the *South China Sea* arbitral award from three viewpoints: adjudicative implications, environmental implications, and spatial implications. By way of conclusion, the following observations can be made.

First, as the arbitral tribunal stated in the *South China Sea* arbitral award on jurisdiction and admissibility, the characterization of an international dispute is of critical importance when considering the jurisdiction of UNCLOS tribunals over mixed disputes involving territorial and maritime issues. This point was echoed by the arbitral tribunal in the *Ukraine v. Russia* arbitral award (preliminary objections). Furthermore, in that award, the tribunal applied the maritime-territorial separability test relying on the *South China Sea* arbitral award on jurisdiction and admissibility. To this extent, it can be observed that the arbitral tribunal's approach in the *South China Sea* arbitral award influenced the *Ukraine v. Russia* arbitral award (preliminary objections).

Second, in the advisory proceedings of ITLOS as a full court addressing climate change, many States and international organizations refer to the interpretation of the tribunal in the *South China Sea* arbitral award (Merits) with regard to environmental obligations under UNCLOS. Such references include: (1) the interpretation of UNCLOS Articles 192 and 194, (2) the systemic interpretation of UNCLOS Articles 192 and 194, (3) the due diligence obligation, (4) the obligation to conduct an environmental impact assessment, and (5) the distinction between territorial sovereignty and marine environmental protection. Furthermore, ITLOS in its advisory opinion of 2024

161. Press Statement, Ministry of Foreign Affairs of Japan, Seven Years Since the Issuance of the Arbitral Tribunal's Award as to the Disputes Between the Republic of the Philippines and the People's Republic of China Regarding the South China Sea (Statement by Foreign Minister Hayashi Yoshimasa) (July 12, 2023), https://www.mofa.go.jp/press/release/press1e_000448.html.

explicitly relied on the *South China Sea* arbitral award in relation to the interpretation of Articles 192, 194(5), and 206. The frequent reference to the *South China Sea* arbitral award can enhance the precedential value of the award with regard to the interpretation of environmental norms.

Third, it can be observed that the *South China Sea* arbitral award provides a legal basis for third States to deny the validity of China's claim of historic rights in the South China Sea. Furthermore, contrary to the denial of the *South China Sea* arbitral award by China, not a few third States stressed the final and binding nature of the *South China Sea* arbitral award. The attitude of these third States can contribute to endorsing the validity of the arbitral award in practice.

Fourth, the above survey suggests that the legal consequences of a judicial decision cannot be completely erased by a denial of its validity by one of the disputing parties. Even if the effectiveness of a judicial decision relies on the attitude of the parties, its legal consequences cannot be assessed by the reaction of the parties only. A judicial decision may affect subsequent jurisprudence and third States' practice and interpretation of relevant rules of international law. Conversely, jurisprudence and third States' views can affect the precedential value of the judicial decision. Thus, the assessment of a judicial decision can be regarded as a dynamic process that requires constant verification in light of the interaction between the judicial decision, subsequent jurisprudence, and State practice.