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Arbitration of the Philippine Claim Against China

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Abstract
This paper discusses the Tribunal's decision to assume jurisdiction over the Philippine claim notwithstanding China's publicly declared and law-based withholding of consent to the proceedings instituted by the Philippines. The Tribunal relied on its interpretation of China's general commitment under Section 2 of Part XV (Settlement of Disputes) of the UN Convention on the Law of the Sea,[1] which was subjected to a Convention-authorized "exception" under Article 298 (China's Declaration of 25 August 2006) that had selectively deprived any such proceeding of the essential element of China's consent. The paper calls for inventive consideration of the methods available for resolving disputes, which might be seen currently as excessively influenced by procedures designed for resolving international trade disputes where only one party is a state.

I. THE CONSENT OF DISPUTING STATES AS ESSENTIAL TO A TRIBUNAL'S ASSUMPTION OF JURISDICTION

Sir Hersch Lauterpacht, without question among "the most highly qualified publicists" to whom the UN Charter[2] directs the reader as "subsidiary means for the determination of rules of law", begins a chapter sub-titled "Sovereignty and the Jurisdiction of the Court" thus:

> There are few rules of modern international law which are more widely acknowledged than the rule that the jurisdiction of international tribunals is derived from the will of the parties and that to that extent the principle—which is generally recognized in civilized States—that no one is entitled to be judge in his own case does not obtain in international law. Upon that rule the Court has acted consistently …[3]

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1 *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 U.N.T.S. 396, 21 I.L.M. 1261 (entered into force 16 November 1994) [*The Convention*].

2. *1945 Charter of the United Nations*, 26 June 1945, I U.N.T.S. 993 (entered into force 24 October 1945).

3. Sir Hersch LAUTERPACHT, *The Development of International Law by the International Court* (London: Stevens & Sons Ltd., 1958) at 338.

The Court's jurisprudence is replete with decisions that reflect consistent adherence to that rule. Thus, the Permanent Court of International Justice declared in the *Eastern Carelia* case: "It is well established in international law that no State can, without its consent be compelled to submit its dispute with other States either to mediation or to arbitration or any other kind of pacific settlement."[4] The International Court of Justice confirmed that rule in the *Interpretation of the Peace Treaties* case: "The consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases."[5] In the *Mavrommatis Palestine Concessions* case the Permanent Court emphasized that "its jurisdiction is limited, that it is invariably based on the consent of the respondent and only exists in so far as this consent has been given …",[6] and in the *Chorzow Factory* case observed that "[w]hen considering whether it has jurisdiction or not, the Court's aim is always to ascertain whether an intention on the part of the Parties exists to confer jurisdiction upon it".[7]

As one authority has observed:

> All these decisions combine with firm attachment to principles a prudent suppleness of application. Conscious of the political resistance of governments, the Court, like its predecessor the Permanent Court, looks with scrupulous care to the parties' consent to the exercise of its jurisdiction as the source of its powers. Less concerned to enlarge its jurisdiction than to establish it within unchallengeable limits, it finds in this consent the just measure between sovereignties that it recognizes and the law which it is its function to apply.[8]

Recalling a comment by Umpire Plumley in the *Rio Grande Irrigation and Land Company* case,[9] "The Permanent Court and the International Court have, in fact, seldom been content to approach the question of jurisdiction simply as a matter of construction without regard to the whole background of the proceeding …"[10]

II. THE TEXTUAL BASIS OF THE TRIBUNAL'S JURISDICTION OVER THE PHILIPPINE CLAIM: DEFAULT OF APPEARANCE

The basis of the Tribunal's jurisdiction over the claim by the Philippines against China is that China, as a party to the Convention had, in fact, given its consent to, and was therefore bound by, the provisions of Part XV Section 2 (Compulsory Procedures entailing Binding Decisions). Upon becoming a party, China undertook to be bound by those provisions, and in particular by its choice of dispute settlement through a

4. *Status of Eastern Carelia*, Advisory Opinion, [1923] P.C.I.J., Series B, No. 5 at 27.
5. [1950] I.C.J. Rep. at 71. See also the *Nottebohm* case [1953] I.C.J. Rep. at 122; and the *Monetary Gold* case [1954] I.C.J. Rep. at 32.
6. [1924] P.C.I.J., Series A, No. 2 at 16.
7. [1927] P.C.I.J., Series A, No. 9 at 32.
8. Charles DE VISSCHER, *Theory and Reality in Public International Law*, trans. P.E. CORBETT (Princeton, NJ: Princeton University Press, 1968) at 381.
9. J.H. RALSTON, *The Law and Procedure of International Tribunals* (Stanford, CA: Stanford University Press, 1926) at 43.
10. J.L. SIMPSON and Hazel FOX, *International Arbitration* (London: Stevens & Sons, 1959) at 72–3.

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procedure of arbitration (Article 287(1)(c) or 287(3)). That undertaking, commencing with China's ratification of the Convention on 7 June 1996, was modified by a Declaration under Article 298 of the Convention on 25 August 2006 (permitted subject to continued observance of the General Provisions on dispute settlement in Articles 279–285):

> 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.

By its Declaration, China sought to except (remove) from the ambit of the Convention's "Compulsory Procedures entailing Binding Decisions" a number of categories of disputes the outcome of which could have the potential to be politically sensitive. Declarations authorized by the Convention to be made under Article 298 could be seen as the equivalent of provisions of the Convention of 1907 soliciting submission to its settlement procedures of only "disputes of an international nature involving neither honour nor vital interests" (Article 9), or alternatively requiring states to submit their disputes to arbitration only "so far as circumstances permit" (Article 38). Such provisions present perhaps insuperable difficulties in interpreting particular disputes as excluded from or included within the categories listed. Article 298 would offer difficulties in ascertaining, for example, limits to a category of dispute as "necessarily involving the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory" (Article 298(a)(i)). To establish limits to a category of disputes involving "concurrent consideration … of sovereignty" would be difficult enough even without its link to another category: disputes over unspecified "other rights over continental or insular land territory".

The Tribunal did make the effort to include within its jurisdiction only disputes which it interpreted as not precluded by the limitations imposed by China's Declaration under Article 298(a)(i) that reflected China's lack of consent with respect to the disputes covered by it. Readers will determine the extent to which the Tribunal's effort achieved its purpose. China's refusal to participate in the proceeding initiated by the Philippines indicates its lack of confidence that those limitations would be interpreted as intended by the declarant.

The Tribunal thus chose to approach the issue of jurisdiction as a matter of textual construction and without regard to "the whole background of the proceedings", and the whole fabric of international law.

Informed of China's rejection of the Philippines' unilateral initiative to open arbitral proceedings, the Tribunal, constituted and functioning in accordance with Rules of Procedure dated 27 August 2013 adopted by it for application to those proceedings, notified China thereof designating it "Respondent" in the case, and treating it as such by reference to the provisions of Articles 3 and 4 of Annex VII to the Convention. Deriving its authority from Article 9 of Annex VII entitled "Default of Appearance", the Tribunal addressed the situation of China's non-participation which had been the subject of intensive correspondence with China as well as published statements by its academic community encouraged and often referred to by the Tribunal in its effort to

ascertain China's point of view, as an instance of "absence of a party or failure of a party to defend its case", concluding:

> Thus the non-participation of China does not bar this Tribunal from proceeding with the arbitration. China is still a party to the arbitration and pursuant to the terms of Article 296 (1) of the Convention and Article 11 of Annex VII, it shall be bound by any award the Tribunal issues.[11]

Although the Tribunal did not find it necessary to deal in greater detail with the circumstance that China had not merely "failed to appear before it" and defend its position, but had in addition, repeatedly, publicly, and emphatically declared that the proceeding did not have its consent, it did record that a Tribunal assuming jurisdiction notwithstanding non-appearance of a party, whatever the cause, had what it characterized as a "special responsibility" not merely to adopt the claimant's averments but would be required under Annex VII to "satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and in law before making any award".[12]

These words, which recall a procedure similar to that provided for in different terms in paragraph 2 of Article 53 of the Statute of the International Court of Justice [ICJ], gives the appearance of requiring of an arbitral tribunal an extra-ordinary degree of responsibility. It does so first by somewhat arbitrarily implying that a state which "does not appear" before an Annex VII tribunal is *ipso facto* in "default", then going further to declare that that failure "*shall not* constitute a bar to the proceeding" (emphasis added). In what may be seen as a gloss intended to moderate the stringency of the provision, Article 9 would require a tribunal having to discipline a "defaulting" respondent to "satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well-founded in fact and law".[13]

A tribunal is surely required in *any and all circumstances*, when fulfilling its regular and most basic arbitral responsibility, "to satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law", and the recitation of that function in the context of Article 9 seems no more than a tautology and does not indicate the nature of the "special", i.e. particular or peculiar quality of its responsibility when dealing with the fraught and more complex circumstance where a state named as respondent is not merely absent or does not present its case but publicly declares its non-participation on legal grounds. Given the basic nature of the requirement of the consent of a respondent State Party, it would seem reasonable and appropriate to have questioned the legal foundation of a proceeding where a putative respondent state is not merely "absent", or does "not present its case" when invited to do so, but in addition publicly and consistently declares that it has not given its consent to the proceeding before a tribunal

11. *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, Award on Jurisdiction and Admissibility, [2015] P.C.A. Case No. 2013-19, at [11].

12. The Rules of Procedure adopted by the Tribunal referred to in the Award are the *Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two States*, published by the PCA (effective 20 October 1992), available in a compendium entitled "Basic Documents, Conventions, Rules, Model Clauses and Guidelines" published by the PCA in 1998 with a Foreword by Kofi Annan, then Secretary-General of the United Nations; as well as *The Convention*, *supra* note 1 at Annex VII.

13. *The Convention*, *supra* note 1 at Annex VII.

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unilaterally constituted and functioning upon the demand of the claimant alone, and that it had no intention of according its consent to that proceeding. It would seem that a tribunal, taking into account the "whole background of the proceedings", could conclude that its assumption of jurisdiction over the proceeding could be open to question. However, the Tribunal felt bound to approach the issue of jurisdiction as a matter of interpreting textual constructions agreed by both disputants.

The main textual "constructions" considered by the Tribunal included:

(1) Article 9 of Annex VII to the Convention, the caption of which would predispose the reader to conclude that the absence of a State Party, or its failure to present its case when invited to do so, would *ipso facto* be in "default";

(2) Articles 287 and 288 of the Convention, which together provide in part that "A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part [;] …"[14]

(3) Article 25 of the Rules of Procedure adopted by the Tribunal at the request of the Claimant (the appearing party) and providing for continuance of the proceeding notwithstanding the appearance of only one State Party to the dispute, and for supplemental submissions and other action by the appearing party;

(4) a *dictum* of the International Court of Justice in *Military and Paramilitary Activities in and Against Nicaragua*, declaring

> [a] State which decides not to appear must accept the consequences of its decision, the first of which is that the case will continue without its participation; the State which has chosen not to appear remains a party to the case, and is bound by the eventual judgement in accordance with Article 59 of the Statute[15]

and similar pronouncements by the International Tribunal for the Law of the Sea [ITLOS], emphasizing that non-participation by a State Party in any of the compulsory procedures entailing binding decisions provided for in Section 2 of Part XV of the Convention, including arbitration, does not affect the jurisdiction of the court or tribunal seized of the case.[16]

The Tribunal arbitrating the Philippine claim was required "to satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and in law". China had from the outset declared that it did not consent to the proceeding, citing its Declaration under Article 298 of the Convention "excepting" certain categories of dispute from the application of Section 2 on compulsory procedures entailing binding decisions, and affirming that the disputes sought to be resolved through arbitration of the Philippine claim, concerned directly, or by

14. *Ibid*.

15. *Nicaragua v. U.S.* (Merits), [1986] I.C.J. Rep. 14.

16. *The "Arctic Sunrise" case (Netherlands v. Russia)*, Provisional Measures, [2013] ITLOS Case No. 22. See also *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, Merits, [2016] P.C.A. Case No. 2013-19 at 45, ftn 32.

necessary implication, issues arising in connection with disputes in categories authorized by the Convention as subject to exception from the application of Section 2 of Part XV.

The Tribunal, holding that not all the issues submitted for decision were among those associated with "excepted" categories covered by China's Declaration under Article 298 of the Convention, decided unanimously to deal with the Philippine claim, dividing some fifteen of its submissions into those that would be determined as preliminary questions following a hearing on jurisdiction and admissibility in an award (eventually rendered 29 October 2015), and others determined after a hearing on their merits, which was rendered on 12 July 2016. Both awards distinguish those issues which the Tribunal considered subject to China's Declaration of "excepted issues" under Article 298, while dealing with others which it considered not so "excepted" under China's Declaration.

As one authoritative treatise on international arbitration declares: "It is an established principle of international law that the reference of a dispute between States to judicial settlement must be based on the consent of the parties."[17] Where that consent has been signified through the parties' Declaration of adherence to a general agreement to arbitrate disputes, as in the present case under the Convention,

> Such a provision amounts only to acceptance in principle of arbitration as a means of settling disputes. It cannot be given effect without further agreement or *compromis* to define the question to be referred to arbitration and the method by which the tribunal is to be constituted.[18]

The Permanent Court of Arbitration's [PCA] basic rules on arbitration are contained in Articles 51–53 of the Convention of 1907, and deal exclusively with disputes between states, and not with disputes where only one party is a state, for which the PCA has since offered optional rules to prospective disputants. The Convention of 1907 required "Powers" which have agreed to arbitration under that Convention, to "sign a 'Compromis', in which the subject of the dispute is clearly defined …" and providing that if the parties agree, the tribunal could be given the competence: "to settle the 'Compromis'", and to determine whether a particular dispute belongs in the category of disputes which can be submitted to compulsory arbitration. The intermediate step of "signing a 'Compromis'" would seem to be a way to facilitate arbitration of interstate disputes, and where this is not feasible, permitting an indication that parties should consider alternative procedures.

The Convention of 1907, which dealt exclusively with disputes between states, contains no rules authorizing an award against a state upon "default of appearance". However, the PCA's "Optional Rules" offered to arbitrating parties since 20 October 1992 does contain a provision entitled "Failure to Appear or to Make Submissions", which provides that, where the failure is that of the respondent without showing sufficient cause for such failure, "the arbitral tribunal shall order that the proceedings continue" (Article 28, paragraph 1). Those provisions are declared to be based on the United Nations Commission on International Trade Law [UNCITRAL] Arbitration

17. Simpson and Fox, *supra* note 10 at 42.
18. *Ibid*., at 44.

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Rules,[19] designed for arbitration of trade disputes which frequently, if not generally, occur between non-state entities, or where only one party is a state. Although the PCA in its introduction declares that "[t]hese Rules have been elaborated for use in arbitrating disputes under treaties or other agreements between two States", they do not seem adequately to take the parties' character as states fully into account, particularly in relation to the "downstream" consequences of an award against a state, where, for example, national legislative provisions on the "sovereign immunity" of a respondent state may severely limit enforcement mechanisms, and the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards could only be of limited assistance.

III. OPTIONAL APPROACHES TO ACCEPTANCE OF COMPULSORY DISPUTE SETTLEMENT: THE ICJ AND THE CONVENTION

Article 36 of the Statute of the ICJ offers optional approaches to dispute resolution that would enable a state to accept, subject to conditions, including reciprocity, the compulsory jurisdiction of the Court. The Convention offers through Article 298 provisions which could be seen as a mirror image of that approach: whereas Article 36 of the Statute of the ICJ invites states, prior to any dispute arising, to recognize the compulsory jurisdiction of the Court "*ipso facto* and without special agreement" in all "legal disputes" as therein defined, the Convention's Section 2 (Compulsory Procedures entailing Binding Decisions) of Part XV of the Convention sets forth the general rule that

> any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to *Section 1* [a list of dispute settlement procedures], be submitted, at the request of any party to the dispute, to the court or tribunal having jurisdiction under this section.

Whereas Article 36 of the ICJ Statute invites states *at their option,* to declare that "*they recognize as compulsory ipso facto* and without special agreement … the jurisdiction of the Court" (emphasis added), Section 3 of Part XV of the Convention invites states to declare, at their option, that they EXCEPT, i.e. DO NOT ACCEPT any one or more of a list of categories of disputes, as subject to "compulsory procedures entailing binding decisions". While a dispute not covered by a state's acceptance of compulsory jurisdiction may only be brought before the ICJ by "*special agreement*" (emphasis added) between the states concerned, under the Convention a dispute "excepted" from the operation of Section 2 of Part XV (Compulsory procedures entailing binding decisions) may be subjected to those compulsory procedures only if the "excepting" state were to *either* withdraw its declaration made under Section 3, or enter into an *agreement to submit* the dispute to one or other of the listed settlement mechanisms.

19. Permanent Court of Arbitration, *Optional Rules for Arbitrating Disputes Between Two States*, in *Basic Documents*, at p. 45.

The Tribunal seized of the claim by the Philippines against China on the basis of its interpretation of the textual provisions on dispute settlement among States Parties to the UN Convention on the Law of the Sea, and the Rules of Procedure adopted by it upon the request of the Philippines as claimant, concluded that for the reasons set forth in its Award on Jurisdiction, "China is a Party to the arbitration before it, and is bound under international law by any awards rendered by the Tribunal".[20] Accordingly, the Tribunal did not find it necessary to consider the rules of general international law on the jurisdiction of tribunals charged with resolving disputes between states other than those provided for in the Convention.

That the legitimacy of an arbitral procedure for the settlement of disputes between states depends on the essential element of the consent of the disputants has been affirmed and reaffirmed by the highest international judicial authority. The Tribunal arbitrating the Philippine claim under Annex VII to the Convention seems to concede as much when it declares "There is no system of default judgement under the Convention",[21] implying, perhaps, that adherence to the Convention records the consent of both parties, and after a full and carefully conducted inquiry over some two years with the participation of the Claimant alone, during which China repeatedly declared to the Tribunal, and to the world at large, that it had not consented to the process and would not participate therein, issued (1) an award declaring its jurisdiction over the claim, and (2) decisions on various complex and politically charged aspects of the merits of the claim. Both awards were issued notwithstanding the manifest and law-based withholding of consent to the process by China.

It appears that, although both the award on jurisdiction and the award on the merits were issued following "default of appearance" by China, they did not come within the Tribunal's conception of a "default judgement", presumably because both awards had been "cleansed" of that character by the Tribunal's having "satisf[ied] itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and in law", a provision that tracks paragraph 2 of Article 53 of the Statute of the ICJ. It also follows *dicta* in cases before the ICJ (*Nicaragua*) and ITLOS (*Arctic Sunrise*) which might nevertheless be shown to be *obiter*. Thus, the Tribunal appears to have substituted a presumed or imputed consent by China based upon the latter's adherence to the Convention's general dispute resolution provisions, despite repeated and widely publicized selective disavowal of such consent based on China's Declaration of 2006.

A claimant in an interstate dispute that requests a tribunal to "continue" an arbitral proceeding notwithstanding that a "respondent" party is not merely "absent" or has "failed to present its case" but has publicly demonstrated that it does not consent to the proceedings begun by a claimant, does so in the knowledge that when the case concerns issues that are politically charged, the award or judgement will be perceived as implying that one party has "won" and the other has "lost", and is thus likely, with the intervention of the media, to enhance tensions rather than foster amicable resolution of the issues and a foundation for future friendly relations.

The Tribunal did not deal in detail with the consequence of China's non-participation in, and resolute opposition to, the arbitral proceeding initiated by

20. Award on Jurisdiction and Admissibility, *supra* note 11 at [11].

21. Merits, *supra* note 16 at [129].

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the Claimant and implemented through the administrative mechanism provided at its request by the Permanent Court of Arbitration. The purpose of the rule enunciated and repeatedly endorsed at the highest international judicial level in respect of arbitral or judicial resolution of interstate disputes requiring the consent of the respondent state for its effectiveness needs emphasis and review in the light of the object and purpose of such a proceeding, which is the fair resolution of the dispute, and avoidance of aggravating circumstances. An arbitral tribunal would always be entitled and empowered as master and controller of a proceeding to make a choice as to whether or not to "continue" a proceeding at the request of a claimant. A provision that absence of a party would be no "bar to continuance of the proceedings" would not appear to deprive a tribunal of a choice as to whether or not to continue, interrupt, or terminate a proceeding, since the fair or equal treatment of both parties could be virtually impossible to ensure under those circumstances.

Certain aspects of the "continuance" of a proceeding in the absence of a party designated as "respondent" in an interstate dispute need to be appreciated: (1) the task of reaching a determination perceived as fair on any issue is likely to be increased substantially——if not made impossible—due to lack of adequate evidence and argument from a respondent, and insufficient verification of averments by either side; (2) upon completion of the arbitration and issue of the award, the tribunal would be *functus officio* and without the competence to accomplish more in the process of resolving the dispute, unless some provision for appeal or clarification had been put in place by prior agreement of the parties; and (3) enforcement of the award against an unsuccessful State Party would not be practicable unless (a) a means of enforcement through the agency of an independent third party has been put in place by prior agreement;[22] (b) circumstances exist in which the Security Council could decide to take enforcement measures under Chapter VII of the UN Charter, a process which could also be frustrated by the negative vote of a permanent member of the Council.

Given that these likely consequences of the "continuance" of an arbitration between states when one of them has withheld its consent to the process are likely to increase tensions between the parties and lead to unpredictable and possibly destructive consequences, the availability of other means of resolving interstate disputes, many of which are already provided for in the Hague Convention of 1907, should be the subject of renewed consideration. A tribunal's finding of *non liquet* in such circumstances ought not to be characterized as a "failure" but rather as resulting from the counsels of economy, of fairness, and ultimately of reason.

22. For an example of complex multilateral arrangements designed with a view to ensuring that specified monetary awards by an international tribunal rendered against a State Party would be paid out of a "Security Account", see "Declaration of the Government of the Democratic and Popular Republic of Algeria" *Iran-United States Claims Tribunal* (19 January 1981), online: Iran-United States Claims Tribunal <http://www.iusct.net/General%20Documents/1-General%20Declaration%E2%80%8E.pdf>, at art. VII, when that government, at the request of Iran and the US, agreed "to serve as an intermediary in seeking a mutually acceptable resolution of the crisis in their relations …". For a description of those arrangements, see Charles N. BROWER and Jason D. BRUESSCHKE, *The Iran-United States Claims Tribunal* (The Hague: Nijhoff, 1998) at 8 and ftn 23.

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IV. A WORLD DISPUTE RESOLUTION ORGANIZATION?

It may be useful for those states which do not always favour adversarial approaches to dispute resolution, to establish dispute settlement procedures more nuanced and able to attract the consent of states more generally. Article 298 of the Convention in paragraph 1 itself offers the option of submitting agreed types of disputes concerning the interpretation or application of specific articles of the Convention to *conciliation under Annex V*. If negotiations between states aimed at resolving a maritime dispute encounter situations that seriously impede progress and undermine confidence in the steps being followed, a procedure of what might be termed "guided negotiation" might be considered whereby the parties agree that experts of their choice assist the disputing states in their search for equitable and viable solutions. Under such a procedure, no "decision" would be contemplated, only advice that could guide the disputants in reaching agreed resolutions. Dispute resolution which commences with the aim of bringing parties together, and only when that is not practical may become an agreed "arbitral process", has been practised in East Asia for centuries, and might be studied with a view to more general adoption. The PCA, which has been most active in developing procedural rules for adoption in different types of dispute settlement, could undertake, or be given a mandate to develop, other types of dispute resolution for states that could offer alternatives to recourse to adversarial proceedings. Perhaps the Administrative Council could consider converting the Permanent Court of Arbitration into a World Dispute Resolution Organization equipped to advise states, and states only, on ways to resolve their disputes, not merely "peacefully", but also "amicably". The method of a new World Dispute Resolution Organization would consist of discreet and confidential guidance through the applicable law, conferring, where necessary, with the official legal advisers of both disputing states, and keeping the national media from moving into football competition mode. It would not be the aim of the World Dispute Resolution Organization to produce a "winner", but instead two states ready to agree on a solution they both consider equitable as the foundation for friendly relations in the future.

V. HISTORIC RIGHTS

A conclusion of the Tribunal that could generate further study of the *travaux preparatoires* of the Convention, and of the statements by representatives, occurs at the end of Part V of the Award dated 12 July 2016.[23] Having considered "China's claims to historic rights and other sovereign rights or jurisdiction with respect to maritime areas of the South China Sea", the Tribunal concludes that

> they are contrary to the Convention and without lawful effect to the extent that they exceed the geographic and substantive limits of China's maritime entitlements under the Convention. The Tribunal concludes that *the Convention superseded any historic rights or other sovereign rights or jurisdiction in excess of the limits imposed therein.* (italics added)

Not during the decade-long study at the United Nations that began in the "Sea-bed Committee" of the United Nations in 1973, nor during "deliberations" in Preparatory Committee to select a range of subjects and issues that would be considered by the

23. Merits, *supra* note 16 at [278].

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Conference, nor during the Third UN Conference on the Law of the Sea itself was it recorded that the object and purpose of the study was the "codification" of the Law: to produce the whole thing and the sole thing. There was praise for the achievements of the Conference. Javier Pérez de Cuéllar, then Secretary-General of the United Nations, believed that the Convention would "establish a new legal order for ocean space", and Ambassador T.T.B. Koh, the President of the Conference described the Convention as "A Constitution for the Oceans";[24] but it was never suggested that the Convention would contain the whole of the law governing the oceans, or that there could be no recognition of developments because the Convention had, for the States Parties to it, somehow brought to an end the allocation of rights in the oceans and their resources.

President Koh, in an introductory statement at the signing of the Convention at Montego Bay, commented on what he thought were the "major themes" in statements by delegations in the closing stages of the Conference at Montego Bay in December 1982. In his words:

> The third theme I heard was that this Convention is not a codification Convention. The argument that, except for Part XI [exploiting the sea bed beyond national jurisdiction] the Convention codifies customary international law or reflects existing international practice is factually incorrect and legally insupportable …[25]

We may also note here the final paragraph of the Preamble to the Convention itself:

> *Affirming* that matters not regulated by this Convention continue to be governed by the rules and principles of general international law …

Such declarations correctly approach the Law of the Sea with appropriate circumspection, taking into account the long, complex, and changing history of the uses of the seas and their resources, and anticipating future development. Acknowledged to have grown out of practices developed over the centuries by Arab and Chinese navigators in the Indian Ocean, and by European and American navigators in other areas, the rules and principles that comprised the "Law of the Sea" deliberated at the Third UN Conference on the Law of the Sea were of relatively recent origin: the maritime activity of European sovereigns eager to enhance their wealth and prestige by conquest and exploitation of distant lands, and the works of their scholars in the languages familiar to them, and now entrenched in discourse across the world.

In such a setting, "historic rights" have tended to fade into insignificance, confronted by the military and economic power of modern naval and merchant fleets. Their survival through mention in the Convention[26] means that they have not been, and should not be thought of as having been, swept aside. As with other aspirations among states, claims to historic rights in the sea should be the object of study and negotiation to determine their proper scope and significance and, where appropriate, suitability for formal incorporation in the current Law of the Sea.

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24. Tommy T.B. KOH, "A Constitution for the Oceans" *UN* (1982), online: UN <http://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf>.

25. *Ibid.*

26. *The Convention*, *supra* note 1 at arts. 10(6), 15, 298(1)(a)(i).