Objections Not Possessing an "Exclusively Preliminary Character" in the South China Sea Arbitration

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Structured Abstract

Article Type: Research Paper

Purpose—The purpose of this article is to identify the criteria to be applied by UNCLOS Annex VII arbitral tribunals in deciding whether an objection possesses an "exclusively preliminary character" and to examine the treatment of preliminary objections by the Tribunal in the South China Sea Arbitration.

Design/Methodology/Approach—Analysis of the Award on Jurisdiction and Admissibility in the South China Sea Arbitration and the case law of international courts and tribunals on the question of preliminary objections.

Findings—The Tribunal in the South China Sea Arbitration largely followed in the footsteps of the International Court of Justice when dealing with preliminary objections but there are three notable exceptions which might undermine the credibility of the Tribunal and its Awards.

Practical Implications—The article may provide China with arguments for rejecting the Tribunal's Awards in the South China Sea Arbitration and will inform judges and international lawyers about the proper treatment of preliminary objections in law of the sea cases.

Originality, Value—This article presents the first comprehensive analysis of the treatment of preliminary objections in the decisions of UNCLOS Annex VII arbitral

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tribunals and, drawing on the jurisprudence of the International Court of Justice, provides guidance to these tribunals on how to treat such objections.

Key words: dispute settlement, jurisdiction and admissibility, law of the sea, preliminary objections

I. Introduction

On October 29, 2015, the Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea ("UNCLOS" or the "Convention") in the *Arbitration between the Republic of the Philippines and the People's Republic of China* (the "*South China Sea Arbitration*" or, in short, "*SCS Arbitration*") issued its Award on Jurisdiction and Admissibility.[1] The arbitration concerns disputes between the parties over maritime entitlements in the South China Sea, the status of certain maritime features in the South China Sea and the maritime entitlements they are capable of generating, and the lawfulness of certain actions by the People's Republic of China ("China" or "PRC") in the South China Sea that the Philippines alleges violate the Convention.[2]

The Philippines requested the Tribunal to rule on 15 specific final submissions set out in its Memorial of March 30, 2014, and confirmed at the close of the oral hearing on jurisdiction and admissibility on July 13, 2015.[3] The submission can be grouped into three inter-related issues. First, the Philippines seeks declarations that the parties' respective rights and obligations in regard to the waters, seabed, and maritime features of the South China Sea are governed by the Convention only and that any Chinese claims reflected by the so-called "nine-dash line" are inconsistent with the Convention and therefore invalid (Submissions No 1 and 2). Second, the Philippines seeks determinations that, under the Convention, Scarborough Shoal (Huangyan Dao) and eight maritime features in the Spratly Islands Group (Nansha Qundao), which are claimed by both China and the Philippines, are either "rocks" or "low-tide elevations" and, as such, are capable of generating only an entitlement to a 12 nautical mile ("nm") territorial sea or no maritime entitlement at all. In particular, the Philippines seeks declarations that none of these features can generate an entitlement to an exclusive economic zone ("EEZ") or continental shelf (Submissions No 3–8). Third, the Philippines requests the Tribunal to rule that China violated the Convention by interfering with the exercise of the Philippines' sovereign rights and jurisdiction, by interfering with the Philippines' freedom of navigation, and by conducting construction and fishing activities that harm the marine environment (Submissions No 9–15).[4]

China made it clear from the outset that it would neither accept nor participate in the arbitral proceedings because the disputes presented by the Philippines were outside the jurisdiction of the Tribunal. A Position Paper on the Matter of Jurisdiction in the South China Sea Arbitration, issued on December 7, 2014, put forward three main objections to the Tribunal's jurisdiction.[5] First, the subject-matter of the

arbitration, in essence, is "the extent of China's territorial sovereignty in the South China Sea" and, in particular, its "sovereignty over the Nansha Islands as a whole."[6] The jurisdiction of the Tribunal, however, is limited to "disputes concerning the interpretation or application of this Convention,"[7] and territorial sovereignty disputes are not governed by the Convention. Second, even assuming, arguendo, that the subject-matter of the arbitration concerns the interpretation or application of the Convention, the subject-matter in question forms an integral part of the maritime delimitation disputes between the two countries. Disputes concerning maritime delimitation (as well as disputes concerning historic titles, military activities and certain law enforcement activities) have been validly excluded from the Tribunal's jurisdiction by a declaration filed by China in August 2006 under Article 298 of the Convention.[8] Third, the recourse to arbitration is excluded because China and the Philippines have agreed to settle their disputes in the South China Sea exclusively by negotiations.[9]

The Tribunal treated the Chinese Position Paper and certain other communications from China as "a plea concerning jurisdiction" and decided to bifurcate the proceedings to address the questions of the Tribunal's jurisdiction and the admissibility of the Philippines' claims at a separate phase of the proceedings before dealing with the merits of the case.[10] Accordingly, from July 7 to July 13, 2015, the Tribunal conduced a hearing in The Hague focused on jurisdiction and admissibility. The Tribunal did not limit the hearing to the objections raised by China, but invited the Philippines to address other possible jurisdictional questions. In its Award, the Tribunal dealt with China's preliminary objections to its jurisdiction but also decided *proprio motu* "possible issues of jurisdiction and admissibility even if they [were] not addressed in China's Position Paper."[11]

The Tribunal's Award on Jurisdiction and Admissibility is remarkable in that the Tribunal found only with respect to five of the 15 submissions that it had outright jurisdiction (Submissions No 3, 4, 6, 7, and 11). With respect to Submissions No 10 and 13 it found that it had jurisdiction on condition that claimed rights and alleged interferences occurred within the territorial sea of Scarborough Shoal. The Tribunal reserved consideration of its jurisdiction over Submission No 15 to the merits phase because, on the basis of the information available, the Tribunal was unable to determine whether a dispute between the parties concerning the interpretation or application of the Convention existed. This left seven, i.e., a relative majority of all submissions where the Tribunal found that a determination of its jurisdiction "would involve consideration of issues that do not possess an exclusively preliminary character, and accordingly reserve[d] consideration of its jurisdiction to rule on Submissions No 1, 2, 5, 8, 9, 12 and 14 to the merits phase."[12] This raises the question of when objections to jurisdiction and admissibility do not possess an exclusively preliminary character.

The paper first identifies the criteria to be applied by UNCLOS Annex VII arbitral tribunals in deciding whether an objection possesses an "exclusively preliminary character," and then critically examines the Tribunal's decision that objections to seven of the Philippines' submissions do not possess an exclusively preliminary char-

acter so that, consequently, their consideration is to be joined to the merits phase of the case.

II. Preliminary Objections in the South China Sea Arbitration

In its fourth Procedural Order of April 21, 2015, the Tribunal decided to treat China's communications as constituting a plea concerning its jurisdiction for purposes of Article 20 of the Tribunal's Rules of Procedure.[13] Article 20, which deals with "Preliminary Objections," provides:

1. The Arbitral Tribunal shall have the power to rule on objections to its jurisdiction or to the admissibility of any claim made in the proceedings.

2. A plea that the Arbitral Tribunal does not have jurisdiction shall be raised no later than in the Counter-Memorial. A Party is not precluded from raising such a plea by the fact that it has appointed, or participated in the appointment of, an arbitrator. A plea that the Arbitral Tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The Arbitral Tribunal may, in either case, admit a later plea if it considers the delay justified.

3. The Arbitral Tribunal shall rule on any plea concerning its jurisdiction as a preliminary question, unless the Arbitral Tribunal determines, after seeking the views of the Parties, that the objection to its jurisdiction does not possess an exclusively preliminary character, in which case it shall rule on such a plea in conjunction with the merits.

4. Prior to a ruling on any matters relating to jurisdiction or admissibility, a hearing shall be held if the Arbitral Tribunal determines that such a hearing is necessary or useful, after seeking the views of the Parties.[14]

According to paragraph 3, the Tribunal may uphold or reject any preliminary objection in whole or in part. The third alternative provided in paragraph 3, that the Tribunal may declare that an objection does not possess, in the circumstances of the case, an exclusively preliminary character, is often overlooked. But, the Tribunal focused on this third alternative early on in the proceedings. In paragraph 2.2 of the fourth Procedural Order, the Tribunal stated that "[i]f the Arbitral Tribunal determines after the Hearing on Jurisdiction that there are jurisdictional objections that do not possess an exclusively preliminary character, then, in accordance with Article 20(3) of the Rules of Procedure, such matters will be reserved for consideration and decision at a later stage of the proceedings."[15] In other words, such matters will be joined to the merits of the case.

On June 23, 2015, the Tribunal sent a letter to the Philippines asking it to "address any objection that [the Philippines] considers could reasonably be advanced to the jurisdiction of the Arbitral Tribunal or to the admissibility of the Philippines' claims" irrespective of whether such objection had at any point been raised by China.

The Tribunal also provided the Philippines with an Annex of 38 issues set out in eight different categories, listed A to H, which the Philippines may wish to address at the July hearing. In section H of the Annex the Tribunal inquired whether there is "any potential issue of jurisdiction or admissibility [which] does not 'possess an exclusively preliminary character,' such that it should be deferred for consideration in conjunction with the merits of the Philippines' claims."[16] On July 6, 2015, the Tribunal put six questions to the Philippines to be addressed at the hearing. In question six the Tribunal invited the Philippines again to clarify whether there were any issues of jurisdiction or admissibility which should be deferred to the merits.[17]

The Philippines' position on the question of whether possible objections to the Tribunal's jurisdiction and the admissibility of the claims possessed an exclusively preliminary character was not consistent throughout the proceedings. It initially argued that "the jurisdictional issues in the case […] are plainly interwoven with the merits" and depend "in significant measure [on] the same facts and arguments on which the merits of the case depend" and "therefore do not possess an exclusively preliminary character."[18] At the hearing, however, the Philippines argued that there was no need to defer any question of jurisdiction or admissibility to the merits phase.[19] The Philippines emphasized that all issues of jurisdiction argued during the Hearing "could and should be resolved at this stage of the proceedings."[20] In the end, the Tribunal considered the view expressed in the course of the hearing as representing the position of the Philippines on this question.[21]

In his closing remarks at the end of the hearing the President of the Tribunal again highlighted the third alternative of dealing with preliminary objections. The President stated:

> [I]f the Arbitral Tribunal determines that there are jurisdictional objections or issues of admissibility that *do not possess an exclusively preliminary character*, then, in accordance with Article 20(3) of the Rules of Procedure, such matter will be reserved for consideration and decision at a later state of the proceedings.[22]

This leaves the question of what rules or criteria the Tribunal must apply in determining whether any of the jurisdictional objections or issues of admissibility addressed during the hearing did not possess an exclusively preliminary character and must therefore be reserved for decision in conjunction with the merits.

III. Whether Objections Do Not Possess an "Exclusively Preliminary Character"

1. The Question of Bifurcation Distinguished

Article 20(3) of the Rules of Procedure in the *SCS Arbitration* and the identical provision in the Rules of Procedure in the *Arctic Sunrise Arbitration* provides that the Tribunal "shall rule on any plea concerning its jurisdiction as a preliminary question, unless [it] determines […] that the objection to its jurisdiction does not

possess an exclusively preliminary character."[23] This provision thus takes a strict approach to bifurcation. Any preliminary objection automatically results in the bifurcation of the proceedings. Objections are generally to be decided at the preliminary objection stage of the proceedings. Only if an objection does not possess "an exclusively preliminary character" can it exceptionally be deferred for consideration at the merits stage.

The Rules of Procedure of UNCLOS Annex VII tribunals in other arbitrations have adopted a more flexible approach to bifurcation. For example, the Rules of Procedure in the *Guyana v. Suriname Arbitration* provided in Article 10(3) that the "Arbitral Tribunal, after ascertaining the views of the Parties, may rule on objections to jurisdiction or admissibility as a preliminary issue or in its final Award."[24] Similarly, the Rules of Procedure in the *Chagos Marine Protected Area Arbitration* provided in Article 11(3) that the "Arbitral Tribunal may, after ascertaining the views of the Parties, determine whether objections to jurisdiction or admissibility shall be addressed as a preliminary matter or deferred to the Tribunal's final award."[25] These provisions are neutral as to the phase of the proceedings at which objections should be resolved. They leave it to the Tribunal's discretion whether to address them as a preliminary matter or defer them for consideration with the merits. In particular, any decision of the Tribunal on bifurcation does not necessarily depend on whether objections do or do not possess an exclusively preliminary character.

The different wording of these two sets of Rules of Procedure means that the arbitral awards in *Guyana v. Suriname* and the *Chagos MPA Arbitration* cannot give much guidance on the question of the exclusively preliminary character of objections. In the *Chagos MPA Arbitration* the question of whether an objection does not possess "an exclusively preliminary character" was not addressed at all and all preliminary objections of the United Kingdom, irrespective of their character, were decided together with the merits.[26] The Tribunal in *Guyana v. Suriname* also deferred its decision on Suriname's preliminary objections to the final award simply stating that:

> [B]ecause the facts and arguments in support of Suriname's submissions in its Preliminary Objections are in significant measure the same as the facts and arguments on which the merits of the case depend, and the objections are not of an exclusively preliminary character, the Tribunal does not consider it appropriate to rule on the Preliminary Objections at this stage.[27]

Rules of procedure which expressly refer to objections not possessing an "exclusively preliminary character" do not establish any specific test to be applied in determining the character of a preliminary objection. Guidance on the question of whether an objection does not possess an exclusively preliminary character must therefore be sought in decisions or awards of international courts and tribunals operating under the same or largely similar rules of procedure as the Tribunal in the *SCS Arbitration*.[28]

2. *The Jurisprudence of the International Court of Justice as a Point of Reference*

The "exclusively preliminary character" test in Article 20(3) of the Rules of Procedure in the *SCS Arbitration* is modelled on Article 79(9) of the Rules of Court of the International Court of Justice ("ICJ"),[29] and Article 97(6) of the Rules of the International Tribunal for the Law of the Sea ("ITLOS"),[30] which provide in almost identical terms that the Court or Tribunal

> shall give its decision in the form of a judgment, by which it shall either uphold the objection, reject it, or declare that the objection does not possess, in the circumstance of the case, an exclusively preliminary character. If the Court [Tribunal] rejects the objection or declares that it does not possess an exclusively preliminary character, it shall fix time-limits for the further proceedings.

The jurisprudence of the ICJ and the ITLOS are apt points of reference for determining the character of preliminary objections considering that they are among the other possible means listed in Article 287(1) of the Convention for the settlement of disputes concerning the interpretation or application of the UNCLOS. The ITLOS so far has had no opportunity to pronounce on the "exclusively preliminary character" test; this leaves the jurisprudence of the ICJ as a point of reference. The ICJ has had a long history of deciding whether or not to reserve preliminary objections for consideration and decision at the merits stage of the proceedings because they lack an "exclusively preliminary character."[31] It is for that reason that the Tribunal in the *SCS Arbitration* made reference to "the accumulated jurisprudence of the International Court of Justice" when applying the test.[32]

Before examining the ICJ's jurisprudence on the "essentially preliminary character" of objections it is necessary to recall that the ICJ's practice on joining preliminary objections to the merits has changed over the years. Originally, under its 1946 Rules of Court, the ICJ could either "give its decision on the [preliminary] objection or … join [all or part of] the objection to the merits."[33] This wording gave the Court significant discretion.[34] Preliminary objections were joined to the merits whenever it was in the interest of good administration of justice or a decision on the preliminary objections raised questions of fact and law with regard to which the parties were in disagreement and which were too closely linked to the merits to adjudicate upon them.[35] The ICJ availed itself of this possibility on several occasions.[36] The legal situation under the 1946 Rules of Court is similar to the situation under the Rules of Procedure in *Guyana v. Suriname* and the *Chagos MPA Arbitration* and thus cannot provide any guidance on the content of the "exclusively preliminary character" test.

In 1972, the possibility to join an objection to the merits was deleted from the Rules of Court.[37] The revision of the Rules was prompted by the *Barcelona Traction* case, where the Court had joined the preliminary objection to the merits, but ultimately decided the case on the preliminary objection, after requiring the parties to plead the merits fully. This was regarded as an unnecessary prolongation of an expensive and time-consuming procedure.[38] As a consequence, the ICJ's Rules of Court

were amended.[39] A new provision was introduced that is identical with Article 79(9) of the present Rules of Court quoted above.

According to the ICJ, the clear advantage of the new rule is "that it qualifies certain objections as preliminary, making it quite clear that when they are exclusively of that character they will have to be decided upon immediately."[40] The aim of the new rule was "not to exclude the power to examine a preliminary objection in the merits phase, but to limit the exercise of that power, by laying down the conditions more strictly."[41]

While under Article 79(9) the Court can no longer formally join an objection to the merits, it can still reach *de facto* the same result by declaring that an "objection does not possess, in the circumstances of the case, an exclusively preliminary character."[42] The change of the Rules in 1972 was intended to be not just one of drafting but of substance.[43] Under the old Rules, the Court could order a joinder whenever it was in doubt of whether an objection was so related to the merits, or to questions of fact or law touching the merits, that it could not be considered separately without going into the merits.[44] This is no longer the case. Now the consideration of a preliminary objection can only be reserved for the merits stage if the objection *does not* have an exclusively preliminary character because it contains both preliminary aspects and aspects relating to the merits.[45] Under the ICJ's current Rules of Procedure and, consequently, under the Rules of Procedure in the SCS Arbitration, objections must be decided at the preliminary stage wherever reasonably possible: *in dubio preliminarium eligendum*.

According to Article 79(8) of the Rules of Court, the ICJ may, whenever necessary, request the parties to argue "*all* questions of fact and law" (including those touching upon certain aspects of the merits)[46] in order to enable it to determine its jurisdiction or the admissibility of the case at the preliminary state of the proceedings. Rather than carrying the preliminary objections over into the merits phase, as had been done prior to 1972, questions of fact and law "touching upon," but not "prejudging," the merits are now brought forward into the jurisdictional phase. This allows the Court to dispose of the objections at the earliest possible stage in the proceedings.

Article 20 of the Rules of Procedure in the *SCS Arbitration*, quoted above,[47] does not include a rule equivalent to Article 79(8) of the ICJ's Rules of Procedure. In both cases, however, an objection to jurisdiction is to be dealt with as a preliminary issue and may only be considered in the merits phase of the proceedings if it "does not possess an exclusively preliminary character." The underlying rationale for both provisions is based on the principles of sound administration of justice and procedural economy. It was therefore correct that the Tribunal in the *SCS Arbitration* drew upon the ICJ's jurisprudence with regard to the "exclusively preliminary character" test in Article 79(9) in order to determine whether to deal with China's pleas concerning jurisdiction and the admissibility of the Philippines' claims as a preliminary matter or to rule on such a plea in conjunction with the merits. Following the ICJ's restrictive approach of ruling on objections at the preliminary objections stage of the proceedings unless they do not possess "an exclusively preliminary character"

is also in line with the Tribunal's obligation to "conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the Parties' dispute."[48]

The absence in the Tribunal's Rules of Procedure of a rule equivalent to Article 79(8) did not constitute an obstacle in the *SCS Arbitration* as the Tribunal had requested the parties to "fully address all issues including matters relating to jurisdiction, admissibility, and the merits of the dispute."[49] In order to examine whether the Tribunal correctly declared the possible objections to its jurisdiction and to the admissibility of the Philippines' claims to be not of an "exclusively preliminary character," it is therefore useful to outline the ICJ's jurisprudence where the specific test of "exclusively preliminary character" has been applied.

3. Preliminary Objections and the "Exclusively Preliminary Character" Test in the ICJ's Jurisprudence

In the jurisprudence of the ICJ four different categories of preliminary objections may be distinguished.[50] First, there are objections that cannot be the proper subject of a preliminary objection. Such objections constitute a defense on the merits and must be rejected at the preliminary objections stage of the proceedings.[51]

Second, there are objections that are so independent of the merits that their exclusively preliminary character can never be in doubt. These objections can be decided at once. Thus, the Court said in the *Barcelona Traction* case:

> It is evident that certain kinds of objections […] are so unconnected with the merits that their wholly preliminary character can never be in doubt. They could arise in connection with almost any set of facts imaginable, and the Court could have neither reason nor justification for not deciding them at once, by way of either acceptance or rejections.[52]

This category of objections, for example, includes preliminary objections concerning the timeliness of an application for interpretation of a previous decision,[53] or—in the law of the sea context—the timeliness of an application for prompt release of a vessel and its crew.

Third, there are the objections that are so intertwined with the merits of the case that they can only be dealt with along with the merits as their preliminary treatment would otherwise risk prejudging or adjudicating upon (parts of) the merits.[54] One may think of an objection that a claim should be dismissed because of a violation of the clean hands or good faith principles.[55] Such objections clearly do not possess an exclusively preliminary character and are therefore to be joined to the merits. However, such clear cut situations are the exception, rather than the rule.

The majority of objections will fall into a fourth—intermediate—category where objections are *touching upon but not prejudging* the merits.[56] It has been pointed out that "[p]reliminary objections cannot be—and in practice never are—argued in a void, removed from all factual context. And that factual context may well touch on issues the full exposition of which will come later when—and if—the merits phase

is reached."[57] Considering that the change made in 1972 to the ICJ's Rules of Court was to be substantive and not just cosmetic, and was intended to limit the practice of joinder of objections to the merits,[58] these objections must—and in practice have been—treated as possessing an exclusively preliminary character.[59]

While these categories are helpful to provide general guidance, everything will depend on the circumstances of the case. For example, the failure to exhaust local remedies will usually be "a clear-cut issue of a preliminary objection that can be determined on its own." If, however, the merits of the case concern an allegation of denial of justice, and it was in the attempt to exhaust local remedies that the alleged denial of justice was suffered, the objection of non-exhaustion of local remedies will not possess an exclusively preliminary character and will have to be joined to the merits.[60]

In the *Nicaragua* case, the ICJ emphasized that, "[a]bove all, it is clear that a question of jurisdiction is one which requires decision at the preliminary stage of the proceedings."[61] The same is true for questions of admissibility. It is thus only in exceptional circumstances that the ICJ may find that an objection to jurisdiction or admissibility does not possess an exclusively preliminary character.[62] In fact, since the change to its Rules of Court in 1972, i.e., in almost 45 years, the ICJ has done so only on four occasions. In all other cases, the ICJ either accepted or rejected the objection at the preliminary objections phase of the proceedings. In order to better understand the ICJ's restrictive approach it is helpful to look at these four cases in some detail. This restrictive approach is also in line with the general principle that a State "should not have to give an account of itself on issues of merits before a tribunal which lacks jurisdiction in the matter, or whose jurisdiction has not yet been established."[63]

In *Nicaragua* and *Land and Maritime Boundary between Cameroon and Nigeria* the ICJ held that an objection that third States may be "affected" by the Court's decision did not possess, in the circumstances of these cases, an exclusively preliminary character. In the *Nicaragua* case the United States raised an objection to the jurisdiction of the Court based on a "multilateral treaty reservation" that limited the ICJ's compulsory jurisdiction with regard to disputes arising under a multilateral treaty to situations where "all parties to the treaty affected by the decision are also parties to the case before the Court."[64] The ICJ held that:

> [I]t is only when the general lines of the judgment to be given become clear that the States "affected" could be identified. By way of example we may take the hypothesis that if the Court were to decide to reject the Application of Nicaragua on the facts, there would be no third State's claim to be affected. […] At any rate, this is a question concerning matters of substance relating to the merits of the case: obviously the question of what States may be 'affected' by the decision on the merits is not in itself a jurisdictional problem. […] since the procedural technique formerly available of joinder of preliminary objections to the merits has been done away with since the 1972 revision of the Rules of Court, the Court has no choice but to avail itself of Article 79, paragraph 7 [now paragraph 9], of the present Rules of Court, and declare that the objection based on the multilateral treaty reservation of the United States Declaration of Acceptance does not possess, in the circumstances of the case, an exclusively preliminary character.[65]

In the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria* the question of "affected third States" was raised by Nigeria as an objection to the admissibility of Cameroon's application to delimit the maritime zones appertaining respectively to Cameroon and to Nigeria in the Gulf of Guinea. The ICJ stated with regard to Nigeria's preliminary objection:

> The Court notes that the geographical location of the territories of the other States bordering the Gulf of Guinea, and in particular Equatorial Guinea and Sao Tome and Principe, demonstrates that it is evident that the prolongation of the maritime boundary between the Parties […] will eventually run into maritime zones where the rights and interests of Cameroon and Nigeria will overlap those of third States. It thus appears that rights and interests of third States will become involved if the Court accedes to Cameroon's request. […] In order to determine where a prolonged maritime boundary beyond point G would run, where and to what extent it would meet possible claims of other States, and how its judgment would affect the rights and interests of these States, the Court would of necessity have to deal with the merits of Cameroon's request. At the same time, the Court cannot rule out the possibility that the impact of the judgment required by Cameroon on the rights and interests of the third States could be such that the Court would be prevented from rendering it in the absence of these States, and that consequently Nigeria's eighth preliminary objection would have to be upheld at least in part. … The Court concludes that therefore the […] preliminary objection of Nigeria does not possess, in the circumstances of the case, an exclusively preliminary character.[66]

In the *Lockerbie* cases, the United States and the United Kingdom raised, inter alia, the objection that Libya had no legal interest to assert the claims that the two States had breached their obligations under the Montreal Convention, and that the Libyan application therefore should be dismissed at the preliminary objections stage. The United States and the United Kingdom argued that the Libyan claims had been rendered moot as a result of binding decisions by the Security Council under Chapter VII of the United Nations Charter, which prevailed over any obligations under the Montreal Convention.[67] The ICJ examined whether the objection based on the Security Council decisions contained "both preliminary aspects and other aspects relating to the merits" or not. The Court found with regard to the United Kingdom:

> That objection relates to many aspects of the dispute. By maintaining that Security Council resolutions 748 (1992) and 883 (1993) have rendered the Libyan claims without object, the United Kingdom seeks to obtain from the Court a decision not to proceed to judgment on the merits, which would immediately terminate the proceedings. However, by requesting such a decision, the United Kingdom is requesting, in reality, at least two others which the decision not to proceed to judgment on the merits would necessarily postulate: on the one hand a decision establishing that the rights claimed by Libya under the Montreal Convention are incompatible with its obligations under the Security Council resolutions; and, on the other hand, a decision that those obligations prevail over those rights by virtue of Articles 25 and 103 of the Charter.
>
> The Court therefore has no doubt that Libya's rights on the merits would not only be affected by a decision, at this stage of the proceedings, not to proceed to

> judgment on the merits, but would constitute, in many respects, the very subject-matter of that decision. The objection raised by the United Kingdom on that point has the character of a defence on the merits. In the view of the Court, this objection does much more than "touching upon subjects belonging to the merits of the case" […]; it is "inextricably interwoven" with the merits […].
>
> If the Court were to rule on that objection, it would therefore inevitably be ruling on the merits; in relying on the provisions of Article 79 of the Rules of Court, the Respondent has set in motion a procedure the precise aim of which is to prevent the Court from so doing.
>
> The Court concludes from the foregoing that the objection of the United Kingdom according to which the Libyan claims have been rendered without object does not have "an exclusively preliminary character" within the meaning of that Article.[68]

The ICJ consequently joined the objection to the merits.[69] The Court, however, never had an opportunity to rule on this and the other objections of the United States and the United Kingdom because in 2003 the proceedings were discontinued as part of a political settlement between the parties.[70]

The last time the ICJ decided that an objection does not possess, in the circumstances of the case, an exclusively preliminary character was in 2008 in the *Genocide Convention* case between Croatia and Serbia.[71] In response to Croatia's claims that Serbia had breached its obligations toward the people and Republic of Croatia under the Genocide Convention, Serbia raised a preliminary objection *ratione temporis* both to the jurisdiction of the Court and to the admissibility of the claims. Serbia argued that Croatia's claims were based on acts and omissions which took place prior to April 27, 1992, that is to say prior to the formal establishment of the Federal Republic of Yugoslavia (Serbia and Montenegro), the name by which the present Serbia was formerly known. The Genocide Convention, including its jurisdictional clause, could not be applied to acts that occurred before Serbia came into existence as a State and before it became a party to the Genocide Convention. It also argued that acts or omissions which took place before Serbia came into existence could not possibly be attributed to it. The ICJ held:

> In the view of the Court, the questions of jurisdiction and admissibility raised by Serbia's preliminary objection *ratione temporis* constitute two inseparable issues in the present case. The first issue is that of the Court's jurisdiction to determine whether breaches of the Genocide Convention were committed in the light of the facts that occurred prior to the date on which the FRY came into existence as a separate State, capable of being a party in its own right to the Convention; this may be regarded as a question of the applicability of the obligations under the Genocide Convention to the FRY before 27 April 1992. The second issue, that of admissibility of the claim in relation to those facts, and involving questions of attribution, concerns the consequences to be drawn with regard to the responsibility of the FRY for those same facts under the general rules of State responsibility. *In order to be in a position to make any findings on each of these issues, the Court will need to have more elements before it.*
>
> In view of the above, the Court concludes that Serbia's preliminary objection *ratione temporis* does not possess, in the circumstances of the case, an exclusively preliminary character.[72]

The ICJ's decision in the *Genocide Convention* case is instructive for two reasons. First, it shows that whether or not an objection possesses an exclusively preliminary character will depend first and foremost on "the circumstances of the case."[73] It has been said that a "preliminary objection to jurisdiction *ratione materiae* is more likely to appear related to the merits of a case than an objection to jurisdiction *ratione personae* or *ratione temporis*."[74] While there may exist a presumption that an objection to jurisdiction *ratione temporis* has an exclusively preliminary character, there is no hard and fast rule to that effect.

Second, the exclusively preliminary character of an objection in many cases will not depend on the subject matter of the objection but on whether the Court considers that it has before it all the facts necessary to rule on the objection. This was also confirmed in the *Territorial and Maritime Dispute (Nicaragua v. Colombia)* case where the ICJ summarized its approach as follows:

> In principle, a party raising preliminary objections is entitled to have these objections answered at the preliminary stage of the proceedings unless the Court does not have before it all facts necessary to decide the questions raised or if answering the preliminary objection would determine the dispute, or some element thereof, on the merits.[75]

This approach was embraced by the Tribunal in the SCS Arbitration.[76]

IV. Treatment of Preliminary Objections in the South China Sea Arbitration

Once the Tribunal had decided to treat China's communications as constituting, in effect, "a plea concerning jurisdiction," the Tribunal was under an obligation to rule on this plea as a preliminary question unless it determined that the objection to its jurisdiction or to the admissibility of the Philippines' claims did not possess an exclusively preliminary character.

In the *SCS Arbitration* at least ten possible objections to the Tribunal's jurisdiction and the admissibility of the claims can be identified.[77] The Tribunal treated six of these objections either expressly or implicitly as possessing an exclusively preliminary character and dismissed them right away. This seems to be unproblematic with regard to the preliminary objections based on the obligation to exchange views in Article 283 of the Convention,[78] the agreement to seek settlement of the disputes exclusively by other peaceful means in Articles 281 and 282 of the Convention,[79] and the argument that the unilateral initiation of the arbitration constituted an abuse of legal process in terms of Articles 294 and 300 of the Convention.[80] These objections are so unconnected with the merits that their wholly preliminary character is not in doubt. As the ICJ ruled in the *Barcelona Traction* case, these objections "could arise in connection with almost any set of facts imaginable,"[81] and thus the Tribunal had no reasons for not deciding them at once.

The Tribunal ruled with regard to each of the Philippines' first 14 submissions

that this "is not a dispute concerning […] maritime boundary delimitation."[82] This suggests that the Tribunal regarded the objection based on Article 298(1)(a)(i) of the Convention, which excludes from the Tribunal's jurisdiction "disputes […] relating to sea boundary delimitation," as possessing an exclusively preliminary character. But, the Tribunal also expressly stated that "the limitations and exceptions to jurisdiction in Articles 297 and 298, are in significant respects interwoven with the merits" and, for that reasons to be considered with merits.[83] This seeming contradiction can be resolved by distinguishing two different questions. First, there is the question of whether a specific situation requires the delimitation of overlapping maritime entitlements. This question can be answered at the preliminary objections stage of the proceedings. Second, there is the question of whether a maritime delimitation dispute could potentially arise in the course of the proceedings depending on other decisions to be taken on the merits. This question can only be answered at the merits stage and thus does not possess an exclusively preliminary character. This situation arose with regard to the Philippines' claims in Submissions No. 5, 8 and 9 where the Philippines asked the Tribunal to adjudge and declare that certain maritime features were "part of the exclusive economic zone and continental shelf of the Philippines," and that China's alleged unlawful activities had occurred in "the exclusive economic zone and continental shelf" of the Philippines.[84] The Tribunal's jurisdiction over these submissions would be barred if a feature claimed by China in the South China Sea were found to be an "island" within the meaning of Article 121 of the Convention, entitled to an EEZ or continental shelf overlapping those generated by the Philippines archipelago. In that case, the resolution of the merits of these claims would not be possible without first delimiting the overlapping entitlements, a step which is excluded from the Tribunal's jurisdiction by China's August 2006 declaration. The question of delimiting overlapping entitlements would not arise, if, on the other hand, the Tribunal were to find at the merits stage that none of the features claimed by China in the South China Sea are islands generating an EEZ or continental shelf.[85] Whether there existed any overlapping entitlements depended on the merits determination on the status of the maritime features in the South China Sea. The Tribunal therefore concluded in identical terms for all three submissions:

> The possible jurisdictional objections with respect to the dispute underlying Submission No. 5 [8 and 9] therefore do not possess an exclusively preliminary character. *Accordingly, the Tribunal reserves a decision on its jurisdiction with respect to the Philippines' Submission No. 5 [8 and 9] for consideration in conjunction with the merits of the Philippines' claims.*[86]

The same considerations apply with regard to the exclusion from compulsory jurisdiction of "law enforcement activities" concerning marine scientific research and fisheries in the EEZ and on the continental shelf. The Philippines argued that the Chinese activities complained of in Submissions No 8, 9, 10 and 13 included fisheries-related law enforcement activities.[87] Article 298(1)(b) of the Convention would restrict the Tribunal's jurisdiction if these activities took place in areas that

formed part of China's EEZ or in an area in which the parties possessed overlapping entitlements to an EEZ.[88] The premise of the Philippines' submissions was that only the Philippines possessed an entitlement to an EEZ in the relevant areas. If, however, a feature claimed by China within 200 nm of these areas were an "island" in terms of Article 121 of the Convention, capable of generating an entitlement to an EEZ, the resulting overlap and the exclusion of maritime delimitation from the Tribunal's jurisdiction would prevent the Tribunal from addressing these submissions. This view was initially shared by the Philippines during the hearing.[89] The question of whether the activities could have taken place in China's EEZ depended upon a merits determination on the "island" status of the maritime features in the South China Sea. The possible jurisdictional objection with respect to China's fisheries-related law enforcement activities therefore did not possess an exclusively preliminary character and the decision on the Tribunal's jurisdiction with respect to Submissions No 8 and 9 was reserved for consideration in conjunction with the merits of the Philippines' claims.[90]

In contrast, objections concerning the scope of application of the "law enforcement activities" exception in Article 298(1)(b) of the Convention (i.e. whether the law enforcement activities relate to marine scientific research or a coastal State's sovereign rights with respect to living, rather than non-living resources, or whether they relate to other conduct) and its actual application to a specific situation (i.e. whether the fisheries or marine scientific research related law enforcement activities took place within the established EEZ or on the continental shelf of the coastal State, rather than in its territorial sea or on the high seas) can be decided at the preliminary objections stage of the proceedings.[91] This is confirmed by the Tribunal's decision on Submissions No 10 and 13 that, "to the extent that the [activities of China's law enforcement vessels] occurred within the territorial sea of Scarborough Shoal, the Tribunal […] has jurisdiction."[92]The Tribunal should, however, have gone one step further and should have ruled unconditionally on its jurisdiction. The Tribunal's Rules of Procedure do not know of "conditional findings of jurisdiction" or "continent findings of jurisdiction." Unless it had determined that the objection based on the law enforcement activities exception "does not possess an exclusively preliminary character," the Tribunal should have decided its jurisdiction on the basis of the Philippines' claim that "the conduct at issue was carried out in the territorial sea by law enforcement vessels."[93] At the preliminary objections stage of the proceedings, the Tribunal must not attempt to examine the claim itself in any detail, but must only be satisfied that the claim, as stated by the applicant when initiating the arbitration, is within its jurisdictional mandate.[94]

China objected to the Tribunal exercising jurisdiction on the ground that the subject-matter of the arbitration was, in essence, "the extent of China's territorial sovereignty in the South China Sea" and that territorial sovereignty disputes were not "disputes concerning the interpretation or application of this Convention."[95] The Tribunal ruled that "objections to jurisdiction […] concerning the characterization of the dispute," i.e., whether the dispute concerns the interpretation or application of the Convention or whether it concerns matters beyond the Convention,

was "exclusively preliminary in nature."[96] Consequently, it decided with regard to each of the Philippines' first 14 submissions that this "is not a dispute concerning sovereignty."[97] The existence and nature of a dispute are generally questions that can be approached as preliminary issues in proceedings. If this is correct, one wonders why the Tribunal did not decide the question of whether the Philippines' claim in Submission No 10 to "traditional fishing rights" of Filipino fishermen in the territorial sea of Scarborough Shoal constituted a "dispute concerning the interpretation or application of the Convention." In a letter sent to the Philippines after the end of the preliminary objection stage the Tribunal enquired about "the source, *within the Convention*, of any legal duty not to interfere with traditional fishing rights."[98] The Philippines referred the Tribunal to Article 2(3) of the UNCLOS which provides that the "sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law."[99] According to the Philippines, "other rules of international law" also encompass the obligation to respect fishing rights arising from commitments by the coastal State bilaterally or even unilaterally, as well as commitments based upon customary international law. In the *Chagos MPA Arbitration*, the Tribunal examined under the heading "Jurisdiction over Mauritius' Claim relating to Access to Fish Stocks in the Territorial Sea"[100] whether fishing rights claimed by Mauritius in the territorial sea of the Chagos Archipelago were "relevant to the application of Article 2" of the Convention.[101] The Tribunal held that the phrase "other rules of international law" in Article 2(3) refers only to "the general rules of international law" such as abuse of rights and the law of State responsibility. It does not refer to "particular rights in the territorial sea by virtue of bilateral agreements or local custom."[102] Consequently, the Tribunal in the *Chagos MPA Arbitration* ruled that it had no jurisdiction to rule on the violation of an obligation to respect fishing rights in the territorial sea. The Tribunal in the *SCS Arbitration*, on the other hand, ruled that "to the extent that the claimed [fishing] rights and alleged interference occurred within the territorial sea of Scarborough Shoal, the Tribunal […] has jurisdiction to address the matters raised in the Philippines' Submission No. 10."[103] Even if the Tribunal had wanted to deviate from the ruling of the Tribunal in the *Chagos MPA Arbitration* it should have decide at the preliminary objection stage the question of whether a dispute concerning respect for traditional fishing rights in the territorial sea of Scarborough Shoal constituted a "dispute concerning the interpretation or application of this Convention."

Contrary to the ICJ's consistent jurisprudence that an objection that third States may be "affected" by the Court's decision does not possess an exclusively preliminary character,[104] the Tribunal in the *SCS Arbitration* ruled at the preliminary objection stage of the proceedings that there was "no indispensable third party whose absence deprives the Tribunal of jurisdiction."[105] Vietnam, like China, claims sovereignty over the "Truong Sa (Spratlys) archipelago" as a whole, including all islands, parts of islands, interconnecting water and other natural features closely related.[106] Any decision that certain maritime features in the Spratly Islands "are part of the exclusive economic zone and continental shelf of the Philippines" logically excludes that they are part of the Truong Sa (Spratlys) archipelago which Vietnam claims as its

sovereign territory. A maritime feature can either be "part of" the EEZ and continental shelf of a State or it can be under the territorial sovereignty of another State—it cannot be both. Vietnam's alleged right of sovereignty over the Truong Sa (Spratlys) archipelago, in general, and the relevant individual maritime features, in particular, is not only affected by a decision in the present case, but forms the very subject-matter of the decision. Similarly, any determination that certain maritime features "are not features that are capable of appropriation by occupation or otherwise" prejudges and prejudices Vietnam's claim to sovereignty over these features. Vietnam's statement that it "has no doubt that the Tribunal has jurisdiction in these proceedings"[107] does not absolve the Tribunal from ruling on possible preliminary objections. The obligation set out in Article 9 of Annex VII to UNCLOS that the Tribunal must "satisfy itself […] that it has jurisdiction over the dispute" is an objective obligation, not dependent upon the views—legal or political—of either the applicant or any third State. In order to determine how its Award would affect the rights and interests of Vietnam, the Tribunal Court should of necessity have dealt with the merits of the Philippines' claims. Following the practice of the ICJ, the Tribunal should therefore have concluded that the possible jurisdictional objections with respect to the dispute underlying Submissions No. 4 and 5 do not possess an exclusively preliminary character.

Besides the preliminary objections concerning the exclusion from its jurisdiction of disputes concerning certain law enforcement activities and maritime delimitation, the Tribunal considered two more objections not to possess an exclusively preliminary character. First, the objection based on Article 298(1)(a)(i) of the Convention which excludes disputes "involving historic bays and titles" from the jurisdiction of the Tribunal. The Tribunal considered that the Philippines' claims in Submissions No 1 and 2 reflected a dispute concerning the source of maritime entitlements in the South China Sea and the interaction of China's claimed "historic rights" with the provisions of the Convention.[108] The Tribunal's jurisdiction was dependent on the nature of any such historic rights and whether they are covered by the exclusion from jurisdiction over "historic bays or titles" in Article 298. The Tribunal therefore concluded:

> The nature and validity of any historic rights claimed by China is a merits determination. The possible jurisdictional objections with respect to the dispute underlying Submission No. 1 [and 2] therefore do not possess an exclusively preliminary character. *Accordingly, the Tribunal reserves a decision on its jurisdiction with respect to the Philippines' Submission No. 1 [and 2] for consideration in conjunction with the merits of the Philippines' claims.*[109]

The exception to jurisdiction in Article 298(1)(a)(i) was thus—in the words of the ICJ—"inextricably interwoven" with the merits.

Second, the Tribunal considered the objection based on Article 298(1)(b) of the Convention, which excludes "disputes concerning military activities" from the jurisdiction of the Tribunal, not to possess an exclusively preliminary character. In its Submissions No. 12 and 14 the Philippines requested the Tribunal to rule on the legality of certain Chinese activities at Mischief Reef and Second Thomas Shoal, two maritime features in the Spratly Islands. If the Tribunal were to find that China's

construction activities at Mischief Reef and its activities with regard to the Philippine naval personnel stationed at Second Thomas Shoal were military in nature, the disputes would be excluded from its jurisdiction. Without providing any reasoning, the Tribunal asserted that the "nature of such activities, however, is a merits determination that the Tribunal cannot make at this point in the proceedings."[110] It further stated:

> The Tribunal considers that the specifics of China's activities on Mischief Reef [in and around Second Thomas Shoal] and whether such activities are military in nature to be a matter best assessed in conjunction with the merits. The possible jurisdictional objections with respect to the dispute underlying Submission No. 12 [No. 14] therefore do not possess an exclusively preliminary character. *Accordingly, the Tribunal reserves a decision on its jurisdiction with respect to the Philippines' Submission No. 12 [No. 14] for consideration in conjunction with the merits of the Philippines' claims.*[111]

The statement that the military nature is "a matter *best assessed* in conjunction with the merits" gives the impression that it is left to the Tribunal's discretion whether to address the question of the military nature of the activities as a preliminary matter or defer the question for consideration with the merits. This, however, is not in line with the strict approach laid down in Article 20(3) of the Rules of Procedure which allows the Tribunal to join a matter to the merits only if it does not possess an exclusively preliminary character. The military nature of activities can be determined as a preliminary matter in the same way as the question of whether an activity constitutes "law enforcement activity" related to marine scientific research or fisheries, and where that activity took place.[112] The question of the nature of an activity is independent of its legality—only the latter forms the dispute and is a question for the merits. This leaves the second alternative in the jurisprudence of the ICJ for joining a preliminary objection to the merits, namely that the Tribunal does not have before it all facts necessary to decide the question. There is no indication in the Award that the Tribunal was lacking information on the Chinese activities or that it could obtain further information at the merits stage. During the hearing on July 10, 2015, the Tribunal put six questions to the Philippines asking it, inter alia, to elaborate on the nature and purpose of the Chinese activities at Mischief Reef.[113] In its response the Philippines indicated that "it had presented in its Memorial all the information available to it concerning the construction and operation of the Chinese facilities at Mischief Reef."[114]As the Tribunal was unlikely to receive any further information on the nature of the Chinese activities it should have decided on the objection based on the military activities exception in Article 298(1)(b) of the Convention at the preliminary stage of the proceedings.

V. Conclusion

The Tribunal in the *SCS Arbitration* largely followed in the footsteps of the ICJ when dealing with preliminary objections to its jurisdiction and the admissibility of the Philippines' claims. There are, however, three notable exceptions. First, the ruling

on whether Vietnam was an indispensable third party as a question possessing an exclusively preliminary character; second the ruling that the objection based on Article 298(1)(b), which excludes military activities from the jurisdiction of the Tribunal, does not possess an exclusively preliminary character; and third, the omission to rule at all during the preliminary objection stage on the question of whether a dispute concerning respect for traditional fishing rights in the territorial sea of Scarborough Shoal constituted a "dispute concerning the interpretation or application of this Convention."

The institution of preliminary objections is an expression of the principle that in inter-State litigation jurisdiction flows from the consent of States. No State may be brought before an international court or tribunal unless it has consented thereto. A State raising preliminary objections to the jurisdiction of a court or tribunal is therefore entitled, as a rule, to have these objections answered at the preliminary stage. The institution also serves the good administration of justice by providing an efficient and economic process for addressing the disputes between the parties. In a case where the respondent State has chosen not to participate in the proceedings because it considers the Tribunal to be without jurisdiction and the claims inadmissible it is of the utmost importance for the credibility of the Tribunal and its Awards that it has scrupulously applied the "exclusively preliminary character" test and has decided all matters at the preliminary objection stage that can properly be decided at that stage. The Tribunal in the *SCS Arbitration* has not fully lived up to its responsibility in this respect.

Notes

1. The Tribunal was composed of Judge Thomas A. Mensah (Presiding Arbitrator), Judge Jean-Pierre Cot, Judge Stanislaw Pawlak, Professor Alfred H.A. Soons, and Judge Rüdiger Wolfrum. The Award and all other case documents referred to are available on two websites provided by the PCA: http://archive.pca-cpa.org/ showpage65f2.html?pag_id=1529 and http://www.pcacases.com/web/view/7, all websites last accessed on 8 June 2016.

2. On the disputes between the Philippines and China and the early procedural history of the arbitration, see Bing Bing Jia and Stefan Talmon, in the same (eds.), *The South China Sea Arbitration: A Chinese Perspective* (Oxford: Hart Publishing, 2014), pp. 1–13.

3. See Arbitral Tribunal constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea, *Arbitration between the Republic of the Philippines and the People's Republic of China*, Award on Jurisdiction and Admissibility, 29 October 2015 (hereinafter "*SCS Arbitration*, Award"), paras. 7, 101, 102.

4. Cf. *SCS Arbitration*, Award, paras. 4–6.

5. People's Republic of China ("PRC"), Ministry of Foreign Affairs ("MFA"), "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 Philippines," 7 December 2014 (hereinafter "China, Position Paper"), http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml.

6. See China, Position Paper, paras. 10, 19, 22, 86.

7. See United Nations Convention on the Law of the Sea, 10 December 1982 ("UNCLOS"), 1833 UNTS 397, Article 288(1).

8. See China, Position Paper, paras. 57–59, 64–69, 86.

9. See *ibid.*, paras. 30–56, 86.

10. See *SCS Arbitration*, Award, paras. 15, 68. See also *ibid.*, Procedural Order No. 4, 21 April 2015.

11. See *SCS Arbitration*, Hearing on Jurisdiction and Admissibility (hereinafter "*SCS Arbitration*, Hearing"), Day 1, 7 July 2015, pp. 19–21 (President Mensah).

12. See *SCS Arbitration*, Award, para. 413.

13. *SCS Arbitration*, Procedural Order No. 4, 21 April 2015. The Order is not publicly available but its content has been summarized in the Tribunal's Fourth Press Release, dated 22 April 2015.

14. *SCS Arbitration*, Rules of Procedure, 27 August 2013, Article 20.

15. See *SCS Arbitration*, Award, para. 68.

16. See *SCS Arbitration*, Award, para. 88. See also *ibid.*, Hearing, Day 2, 8 July 2015, p. 148: 2–5.

17. See *SCS Arbitration*, Hearing, Day 3, 13 July 2015, p. 26: 2–8.

18. See *SCS Arbitration*, Award, para. 387.

19. See *SCS Arbitration*, Hearing, Day 2, 8 July 2015, p. 148: 6. But see also *ibid.*, Day 1, 7 July 2015, p. 56: 1–3; Day 3, 13 July 2015, 27: 11.14.

20. *SCS Arbitration*, Hearing, Day 3, 13 July 2015, p. 28:3–4. See also *ibid.*, Award, para 388.

21. See *SCS Arbitration*, Award, para. 389.

22. SCS Arbitration, Hearing, Day 3, 13 July 2015, p. 83: 1–8 (italics added).

23. See above n. 14, and Arbitral Tribunal constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea, *Arctic Sunrise Arbitration (Kingdom of the Netherlands v. Russian Federation)* (hereinafter "*Arctic Sunrise Arbitration*"), Procedural Order No. 2 (Rules of Procedure; Initial Procedural Timetable), 17 March 2014, Article 20(3), http://www.pcacases.com/ web/sendAttach/1318.

24. Arbitral Tribunal constituted pursuant to Article 287 of the United Nations Convention on the Law of the Sea and in accordance with Annex VII thereto, *Arbitration between Guyana and Suriname* (hereinafter "*Guyana v. Suriname*"), Rules of Procedure, 30 July 2004, http://archive.pca-cpa.org/ROP%20Final%20300704%20(imported)1a7d.pdf?fil_id=683.

25. Arbitral Tribunal constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea, *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)* (hereinafter "*Chagos MPA Arbitration*"), Rules of Procedure, 29 March 2012, http://www.pca-cases.com/web/sendAttach/1567.

26. *Chagos MPA Arbitration*, Procedural Order No. 2, 15 January 2013, Application to Bifurcate Proceedings. See also *ibid.*, Award of 18 March 2015, paras. 31, 160–386, http://www.pca-cpa.org/showpagea579.html?pag_id=1429.

27. *Guyana v. Suriname*, Order No. 2, 18 July 2005, Preliminary Objections, para. 2. The Tribunal did not have to decide on Suriname's preliminary objections; see *ibid.*, Award of 17 September 2007, paras. 279–280, http://archive.pca-cpa.org/Guyana-Suriname%20Award70f6.pdf?fil_id=664.

28. Arbitral tribunals have occasionally dealt with the question of whether objections do not possess an exclusively preliminary character but little guidance can be derived from these decisions; see, e.g., Arbitration before a Tribunal constituted in accordance with Article 26 of the Energy Charter Treaty and the UNCITRAL Arbitration Rules 1976, *Yukos Universal Limited (Ilse of Man) v. Russian Federation*, Interim Award on Jurisdiction and Admissibility, 30 November 2009, paras. 583–586, 601(b), http://www.pca-cpa.org/showpage8d50.html?pag_id=1599; *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, Decision of 14 March 1978, Reports of International Arbitral Awards, vol. XVIII (2006), pp. 271, 290–291, para. 16.

29. ICJ, Rules of Court, adopted on 14 April 1978 and entered into force on 1 July 1978; reproduced in ICJ, *Acts and Documents Concerning the Organization of the Court*, No. 6 (2007), p. 141.

30. Rules of the ITLOS, adopted on 28 October 1997, and amended on 15 March and 21 September 2001, and on 17 March 2009, ITLOS/8, 17 March 2009.

31. See, e.g., *Right of Passage over Indian Territory (Portugal v. India)*, Preliminary Objections, Judgment, ICJ Reports 1957, pp. 125, 149–152; *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Preliminary Objections, Judgment, ICJ Reports 1964, pp. 6, 44–46. On the ICJ's treatment of the question, see the separate opinion of Judge Cançado Trindade in *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objections, Judgment, 24 September 2015, paras. 12–22, http://www.icj-cij.org/docket/files/153/18750.pdf.

32. *SCS Arbitration*, Award, para. 382.

33. ICJ, Rules of Court, adopted on 6 May 1946, Art. 67(5); reproduced in Shabtai Rosenne (ed.), *Documents on the International Court of Justice*, 2d ed. (Alphen aan den Rijn: Sijthoff & Noordhoff, 1979), p. 175.

34. See Christian Tomuschat, "Article 36," in Andreas Zimmermann et al. (eds.), *The Statute of the International Court of Justice: A Commentary*, 2d ed. (Oxford: Oxford University Press, 2012), p. 706, MN 136.

35. See *The Panevezys-Saldutiskis Railway case*, Preliminary Objections, PCIJ, Series A/B, No. 75, pp. 53, 56.

36. For references, see Stefan Talmon, "Article 43," in Andreas Zimmermann et al. (eds.), *The Statute of the International Court of Justice: A Commentary*, 2d ed. (Oxford: Oxford University Press, 2012), p. 1167, MN 195. The following passage draws in apart on the author's commentary on Article 43.

37. On the change to the Rules, see Ugo Villani, "Preliminary Objections in the New Rules of the International Court of Justice," *Italian Yearbook of International Law* 1 (1975), pp. 206, 214–219.

38. Cf. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports 1986, pp. 14, 30, para. 39.

39. See ICJ, Rules of Court, adopted on 6 May 1946, as amended on 10 May 1972, Art. 67(7); reproduced in Rosenne (n. 33), pp. 175, 177.

40. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports 1986, pp. 14, 31, para. 41.

41. See *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Preliminary Objections, Judgment, ICJ Reports 1998, pp. 115, 133, para. 48.

42. Cf. *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objections, Judgment, 24 September 2015, para. 53, http://www.icj-cij.org/docket/files/153/18746.pdf.

43. Cf. Eduardo Jiménez de Aréchaga, "The Amendments to the Rules of Procedure of the International Court of Justice," *American Journal of International Law* 67 (1973), pp. 1, 16; Hugh Thirlway, "The Law and Procedure of the International Court of Justice, 1960–1989, Part Twelve," *British Year Book of International Law* 72 (2001), pp. 36, 144. See also the declaration of Judge Bennouna in *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objections, Judgment, 24 September 2015, http://www.icj-cij.org/docket/files/153/18748.pdf. See further the separate opinion of Judge Owada in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Merits, Judgment, 3 February 2015, paras. 2–5, http://www.icj-cij.org/docket/files/118/18426.pdf.

44. Cf. *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Preliminary Objections, Judgment, ICJ Reports 1964, pp. 6, 43.

45. See Tomuschat (n. 43), pp. 706–707, MN 136; Talmon (n. 36), p. 1168, MN 197.

46. Cf. *Certain German Interests in Polish Upper Silesia (Preliminary Objections)*, PCIJ, Series A, No. 6, p. 15.

47. See text at n. 14.

48. *SCS Arbitration*, Rules of Procedure, 27 August 2013, Article 10(1).

49. See *SCS Arbitration*, Award, para. 39. See also *ibid.*, Procedural Orders No. 1, 27 August 2013, and No. 3, 16 December 2014, as summarized in the Tribunal's Third Press Release, 17 December 2014.

50. Cf. Thirlway (n. 43), p. 146 who distinguishes three classes of preliminary objections.

51. See, e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Preliminary Objections, Judgment, ICJ Reports 2008, pp. 412, 462, para. 136; p. 463, para. 139; and p. 465, para. 143.

52. *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Preliminary Objections, Judgment, ICJ Reports 1964, pp. 6, 45. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports 1986, pp. 14, 30, para. 41.

53. See, e.g., *Delimitation of the Continental Shelf between the United Kingdom of Great*

Britain and Northern Ireland and the French Republic, Award of 14 March 1978, RIAA Vol. XVIII, p. 271 at pp. 290–291, paras. 16–17.

54. See, e.g., *Right of Passage over Indian Territory (Portugal v. India)*, Preliminary Objections, Judgment, ICJ Reports 1957, pp. 125, 150, 152. See also *Panevezys-Saldutiskis Railway*, PCIJ, Series A/B, No. 76, p. 22.

55. See, e.g., *Guyana v Suriname*, Order No 2 of 18 July 2005, Preliminary Objections, para 2; and *ibid.*, Republic of Suriname, Preliminary Objections, Memorandum, 23 May 2005, para 1.10 and paras 7.1–7.9.

56. See *Certain German Interests in Polish Upper Silesia (Preliminary Objections)*, PCIJ, Series A, No. 6, p. 15; *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Judgment, ICJ Reports 1972, pp. 46, 56; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, ICJ Reports 2007, pp. 832, 852, para. 51.

57. *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, CR 2007/18, 6 June 2007, p. 20, para. 8 (Sir Arthur Watts for Colombia).

58. See text above at n. 43.

59. Contra Thirlway (n. 43), p. 146.

60. See *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Preliminary Objections, Judgment, ICJ Reports 1964, pp. 6, 46.

61. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports 1986, pp. 14, 30–31, para. 41.

62. Cf. the declaration of Judge Bennouna in *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objection, Judgment, 24 September 2015, http://www.icj-cij.org/docket/files/153/18748.pdf.

63. *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan*), Judgment, ICJ Reports 1972, p. 46 at p. 56.

64. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, ICJ Reports 1984, pp. 392, 421–422, para. 67.

65. *Ibid.*, p. 425, paras. 75 and 76. The ICJ examined the question of whether third States could be affected by the Court's decision at the merits stage of the proceedings and upheld the United States' objection; see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports 1986, pp. 14, 29–38.

66. *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Preliminary Objections, Judgment, ICJ Reports 1998, pp. 275, 324–325, paras. 116, 117. The ICJ dealt with Nigeria's objection in its decision on the merits and rejected it; see *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, ICJ Reports 2002, pp. 303, 417–421, 455.

67. Cf. ICJ Rules of Court, Article 79(1) which distinguishes between objections to the jurisdiction of the Court or to the admissibility of the application and "other objections." The objection of mootness of the claim may be regarded as such other objection.

68. *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Preliminary Objections, Judgment, ICJ Reports 1998, pp. 9, 28–29, para. 50. For similar reasoning in the case against the United States, see *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Preliminary Objections, Judgment, ICJ Reports 1998, pp. 115, 133–134, para. 49.

69. See *ibid.*, Order of 30 March 1998, ICJ Reports 1998, p. 237 and p. 240, respectively.

70. See *ibid.*, Order of 10 September 2003, ICJ Reports 2003, p. 149 and p. 152, respectively.

71. In *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, ICJ Reports 2011, pp. 70, 81, para. 22, the ICJ recorded but did not pronounce on the view of the Russian Federation that its objection to the Court's jurisdiction *ratione loci* did not possess an exclusively preliminary character.

72. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Preliminary Objections, Judgment, ICJ Reports 2008, pp. 412, 460, paras. 129, 130 (italics added). The ICJ dealt with the objection in the merits phase and in part rejected it; see

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment of 3 February 2015, paras. 79–119, 525(1), http://www.icj-cij.org/docket/files/118/18422.pdf.

73. Cf. ICJ Rules of Court, Article 79(9) ("in the circumstances of the case").

74. See the separate opinion of Judge Cançado Trindade in *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objections, Judgment, 24 September 2015, para. 6. See also Fouad Ammoun, "La jonction des exceptions préliminaires au fond en Droit international public," *Comunicazioni e Studi* 14 (1975), pp. 17, 38.

75. *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, ICJ Reports 2007, pp. 832, 852, para. 51. See also *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objections, Judgment, 24 September 2015, para. 53, http://www.icj-cij.org/docket/files/153/18748.pdf. Prior to the change of the Rules of Court in 1972, the ICJ joined objections to the merits if it was not in full possession of the facts; see *Right of Passage over Indian Territory (Portugal v. India)*, Preliminary Objections, Judgment, ICJ Reports 1957, pp. 125, 152; *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Preliminary Objections, Judgment, ICJ Reports 1964, pp. 6, 46.

76. See *SCS Arbitration*, Award, para. 382. See also *ibid.*, paras. 16, 24.

77. See, e.g., Stefan Talmon, "The South China Sea Arbitration: Is There a Case to Answer?," in Stefan Talmon and Bing Bing Jia (eds.), *The South China Sea Arbitration: A Chinese Perspective* (Oxford: Hart Publishing, 2014), pp. 15, 25–71, http://dx.doi.org/10.2139/ssrn.2393025.

78. See *SCS Arbitration*, Award, para. 391. See also *ibid.*, paras. 332–352.

79. See *SCS Arbitration*, Award, para. 391. See also *ibid.*, Part V of the Award.

80. See *SCS Arbitration*, Award, para. 126. The Tribunal did not rule on Article 294 of the Convention but the provision expressly provides that an objection based on abuse of legal process shall be dealt with in "preliminary proceedings."

81. *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Preliminary Objections, Judgment, ICJ Reports 1964, pp. 6, 45.

82. See *SCS Arbitration*, Award, paras. 398–411.

83. *SCS Arbitration*, Award, para. 392.

84. For the text of the Philippines' submissions, see *SCS Arbitration*, Award, para. 101.

85. See *SCS Arbitration*, Award, para. 369. This situation arose only because the Tribunal accepted the Philippines' "assumption" that, for the purposes of the proceedings, China was to be regarded as being sovereign over all insular features in the South China Sea.

86. *SCS Arbitration*, Award, para. 402, 405, 406 (emphasis in original).

87. See *SCS Arbitration*, Hearing, Day 2, 8 July 2015, p. 84: 16–24; p. 85: 1–4, 22–23; p. 86: 17–22; p. 89: 22–26 and p. 90: 1–3. See also *ibid.*, Award, paras. 173, 371, 405, 406.

88. See *SCS Arbitration*, Award, para 395.

89. See *SCS Arbitration*, Hearing, Day 2, 8 July 2015, p. 79: 7–17. This position, however, was modified only minutes later; see *ibid.*, Day 2, 8 July 2015, 85: 13–15.

90. See *SCS Arbitration*, Award, para. 406. See also *ibid.*, para 371.

91. See *Arctic Sunrise Arbitration*, Jurisdiction, Award of 26 November 2014, paras. 65–78; *Guyana v. Suriname*, Award of 17 September 2007, *International Legal Materials* 47 (2008), pp. 166, 225–226, paras. 411–416.

92. See *SCS Arbitration*, Award, para. 410.

93. *SCS Arbitration*, Hearing, Day 2, 8 July 2015, p. 89: 26, and p. 90: 1.

94. Cf. *Amco v. Indonesia*, Decision on Jurisdiction of 25 September 1983, ICSID case No. ARB 8111, ICSID Reports 1 (1993), pp. 389, 405; *Siemens AG v. Argentina*, Decision on Jurisdiction of 3 August 2004, ICSID case No. ARB/02/8, *International Legal Materials* 44 (2005), pp. 137, 167, para. 181

95. See text above at nn. 6, 7.

96. *SCS Arbitration*, Award, para. 391.

97. See *SCS Arbitration*, Award, paras. 398–411.

98. *SCS Arbitration*, Hearing on the Merits and Remaining Issues of Jurisdiction and Admissibility, Day 2, 25 November 2015, p. 164: 2–6 (italics added). Reference is made to the Letter from the Permanent Court of Arbitration to the Parties dated 10 November 2015, Annex of Issues the Philippines May Wish to Address at November Hearing.

99. *SCS Arbitration*, Hearing on the Merits and Remaining Issues of Jurisdiction and Admissibility, Day 2, 25 November 2015, p. 164: 7–11.

100. See *Chagos MPA Arbitration*, Award, heading preceding para. 261.

101. *Chagos MPA Arbitration*, Award, para. 296.

102. *Ibid.*, para. 516.

103. *SCS Arbitration*, Award, para. 407.

104. See above section III.3.

105. *SCS Arbitration*, Award, para. 413.D. See also *ibid.*, paras. 179–188.

106. See Articles 1 and 19 of The Law of the Sea of Vietnam, adopted on 21 June 2012 (entry into force on 1 January 2013), http://vietnamnews.vn/politics-laws/228456/the-law-of-the-sea-of-viet-nam.html.

107. See *SCS Arbitration*, Award, para. 183.

108. See *SCS Arbitration*, Award, para. 164.

109. *SCS Arbitration*, Award, paras. 398, 399. This view was initially shared by the Philippines; see *ibid.*, Day 1, 7 July 2015, p. 55: 20–26, and p. 56: 1–3. But see also *ibid.*, Day 3, 13 July 2015, p. 27: 11–14.

110. See *SCS Arbitration*, Award, para. 396.

111. *SCS Arbitration*, Award, paras. 409, 411.

112. See *Arctic Sunrise Arbitration*, Jurisdiction, Award of 26 November 2014, paras. 65–78.

113. See *SCS Arbitration*, Hearing, Day 3, 13 July 2015, p. 48: 5–10.

114. *SCS Arbitration*, Hearing, Day 3, 13 July 2015, p. 48: 16–21.

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