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This Article reviews some of the most significant developments in the work of international courts and tribunals in 2016.

I. The International Court of Justice (ICJ)

In 2016, which marked the ICJ's 70th anniversary, the Court issued five judgments on preliminary objections relating to two important controversies: the maritime boundary and sovereign rights dispute between Nicaragua and Colombia (*NICOL II*[1] and *NICOL III*[2]), and the Marshall Islands' complaints against India, Pakistan and the United Kingdom concerning their obligations to negotiate the cessation of the nuclear arms race and nuclear disarmament (*Marshall Islands*[3]).

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1. Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicar. v. Colom.), Judgment, Preliminary Objections (Mar. 17, 2016), *available at* http://www.icj-cij.org/docket/files/154/18956.pdf [hereinafter *NICOL II*].

2. Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicar. v. Colom.), Judgment, Preliminary Objections (Mar. 17, 2016), *available at* http://www.icj-cij.org/docket/files/155/18948.pdf [hereinafter *NICOL III*].

3. Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. India), Judgment, Jurisdiction of the Court and Admissibility of the Application (Oct. 5, 2016), *available at* http://www.icj-cij.org/docket/files/158/19134.pdf [hereinafter Marshall Islands v. India]; Obligations Concerning Negotiations Relating to the Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. Pak.), Judgment of the Court and Admissibility of the Application (Oct 5, 2016), *available at* http://www.icj-cij.org/docket/files/159/19166.pdf [hereinafter Marshall Islands v. Pakistan]; Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. U.K.), Judgment, Preliminary Objections (Oct. 5, 2016), *available at* http://www.icj-cij.org/docket/files/160/19198.pdf [hereinafter Marshall Islands v. UK].

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In these judgments, the ICJ shed additional light on the notion of a legal "dispute" in international law, addressing the following questions: when does a "dispute" arise; when is a dispute considered finally and definitively settled by a judgment; and where does the line lie between the enforcement of a judgment settling an "old" dispute and the bringing of a "new" dispute to judicial settlement?

A. Existence of a "Dispute"

In each of its 2016 judgments, the Court reaffirmed that its jurisdiction is conditional upon the existence, on the date of filing of the application, of an "actual dispute between the Parties."[4]

The established case law of the Court defines a dispute as "a disagreement on a point of law or fact, a conflict of legal views or of interests" and emphasizes that the existence of a dispute "is a matter for objective determination" turning on "an examination of the facts. The matter is one of substance, not of form."[5] "It must be shown that the claim of one party is positively opposed by the other."[6] The ICJ reaffirmed these broad principles in each of its 2016 judgments.

However, in *Marshall Islands*, the Court (by a narrow majority) introduced a new "awareness" test for the existence of a "dispute," drawing upon its holding in *NICOL III* that "Colombia was aware that its [conduct was] positively opposed by Nicaragua,"[7] and thus that a dispute did exist concerning Nicaragua's first claim.[8] In *Marshall Islands*, the Court fully articulated the new test as follows: "a dispute exists when it is demonstrated, on the basis of the evidence, that the respondent was aware, or could not have been unaware, that its views were 'positively opposed' by the applicant."[9]

The Court's departure from its previous case law and the subjective character of its new "awareness" criterion were severely criticized in several dissenting and separate opinions in *Marshall Islands*, which also opposed the Court's strict and formalistic application of the general requirement that a dispute exist on the date of the application, arguing that post-application events crystallizing the dispute should have been taken into account.

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4. *NICOL II*, *supra* note 1, ¶ 124.

5. *See NICOL III*, *supra* note 2, ¶ 50.

6. *Id.*

7. *Id.* ¶ 73.

8. *NICOL III*, *supra* note 2, ¶ 58 (Caron, J., dissenting) (criticizing the holding and arguing that there was no basis in the case law of the ICJ to infer the assertion of a claim where that claim was never communicated to the respondent), *available at* www.icj-cij.org/docket/files/155/18964.pdf.

9. Marshall Islands v. UK, *supra* note 3, ¶ 41; Marshall Islands v. India, *supra* note 3, ¶ 38; Marshall Islands v. Pakistan, *supra* note 3, ¶ 38.

B. Res Judicata

In *NICOL II*, Nicaragua's First Request was that the Court adjudge and declare "[t]he precise course of the maritime boundary between Nicaragua and Colombia in the areas of the continental shelf which appertain to each of them beyond the boundaries determined by the Court"[10] in its 2012 judgment in *NICOL I (the "2012 Judgment")*.[11]

Colombia objected to the Court's jurisdiction on the ground that the principle of res judicata barred it from examining Nicaragua's request.[12] Colombia argued that the Court had already disposed of Nicaragua's First Request in subparagraph 3 of the operative clause of its 2012 Judgment,[13] in which the Court expressly found that it "could not uphold" Nicaragua's request that the Court adjudge and declare that "[t]he appropriate form of delimitation, within the geographical and legal framework constituted by the mainland coasts of Nicaragua and Colombia, is a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both Parties."[14] According to Colombia, the Court, in its 2012 Judgment, found Nicaragua's request admissible but rejected it on the merits due to lack of evidence.[15] Thus, Colombia reasoned, the 2012 Judgment contained a decision on the merits of that request, which carried res judicata effect.

For its part, Nicaragua argued that the Court in *NICOL I* refused to rule on the merits of the relevant request because Nicaragua had failed to fulfill a procedural and institutional requirement: the completion of its submission to the Commission on the Limits of the Continental Shelf (CLCS) as required by Article 76(8) of the United Nations Convention on the Law of the Sea (UNCLOS),[16] a Convention to which Nicaragua—unlike Colombia—was a party.[17] According to Nicaragua, the Court in its 2012 Judgment only decided whether it was then "in a position to determine 'a continental shelf boundary . . .'"[18] and concluded that it was not, because Nicaragua had only provided the CLCS with "Preliminary Information."[19]

Re-characterizing Colombia's preliminary objection as one of admissibility rather than jurisdiction,[20] the Court "examined subparagraph 3 of the operative clause of the 2012 Judgment in its context, namely by reference to the reasoning which underpins its adoption and accordingly

10. *NICOL II*, *supra* note 1, ¶ 10.

11. Territorial and Maritime Dispute (Nicar. v. Colom.), Judgment, 2012 I.C.J. 624 (Nov. 19) [hereinafter *NICOL I* or the "2012 Judgment"].

12. *NICOL II*, *supra* note 1, ¶ 47.

13. *Id.* ¶ 49.

14. *Id.* (citing *NICOL I*, *supra* note 11, ¶ 17).

15. *NICOL II*, *supra* note 1, ¶¶ 51, 56, 63–67.

16. United Nations Convention on the Law of the Sea annex VII art. 9, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter *UNCLOS*].

17. *NICOL II*, *supra* note 1, ¶¶ 68–71.

18. *NICOL II*, *supra* note 1, ¶ 69 (citing *NICOL I*, supra note 11, ¶ 129).

19. *NICOL II*, *supra* note 1, ¶¶ 69–70 (citing *NICOL I*, supra note 11, ¶¶ 113, 227–29).

20. *NICOL II*, *supra* note 1, ¶ 48.

serves to clarify its meaning."[21] The Court, ascribing particular weight to Paragraph 129 of its 2012 Judgment, ultimately agreed with Nicaragua's interpretation and concluded that "[t]he Court . . . did not settle the question of delimitation in 2012 because it was not, at that time, in a position to do so."[22] Thus, the Court held, res judicata did not attach to the 2012 Judgment with respect to that issue.[23]

The Court adopted this decision by the thinnest possible margin, in an eight to eight vote decided by the President's casting vote. The Court's majority opinion was accompanied by a joint dissenting opinion signed by seven judges, and three additional separate and dissenting opinions on the issue—all arguing that the 2012 Judgment was a decision on the merits having res judicata effect, either in respect of all, or only some, of the overlapping entitlements between Nicaragua and Colombia.[24]

C. Enforcement of a Judgment vs. New Dispute Concerning Related Rights

In *NICOL III*, the Court addressed Colombia's preliminary objection to a separate application brought by Nicaragua, which Colombia argued was an attempt to enforce the Court's 2012 Judgment rather than a "new" claim, as Nicaragua maintained. According to Colombia, the Court lacked post-adjudicative enforcement jurisdiction, which is reserved for the Security Council in accordance with Article 94(2) of the UN Charter, and therefore could not entertain Nicaragua's application.

By fifteen votes to one, the Court rejected Colombia's preliminary objection.[25] The Court held that, even though the 2012 Judgment was "undoubtedly relevant to [the] dispute,"[26] "Nicaragua [did] not seek to enforce the 2012 Judgment as such," but rather

> ask[ed] the Court to adjudge and declare that Colombia ha[d] breached 'its obligation not to violate Nicaragua's maritime zones as delimited in [NICOL I] as well as Nicaragua's sovereign rights and jurisdiction in these zones' and 'that, consequently, Colombia has the obligation to wipe out the legal and material consequences of its internationally wrongful acts, and make full reparation for the harm caused by those acts.'[27]

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21. *Id.* ¶ 75.

22. *Id.* ¶ 85.

23. *Id.* ¶ 88.

24. *See NICOL II*, *supra* note 1 (joint dissenting opinion) (Owada, J., separate opinion) (Greenwood, J., separate opinion) (Donoghue, J., dissenting opinion), *available at* http://www.icj-cij.org/docket/index.php?p1=3&p2=1&k=02&case=154&code=nicolb&p3=4.

25. *NICOL III*, *supra* note 2, ¶¶ 110, 111(1).

26. *Id.* ¶ 109.

27. *Id.*

Judge Bandhari voted against this holding, and in a separate Declaration explained his disagreement with the majority's factual conclusion that Nicaragua did not seek to enforce the 2012 Judgment.[28]

For his part, Judge Cançado Trindade wrote a Separate Opinion criticizing the Court's unwillingness to engage with Nicaragua's alternative argument that the Court has "inherent power to pronounce on the actions required by its Judgment[ ],"[29] which in his view the Court possesses, and argued that nothing in the text of Article 94(2) of the UN Charter confers on the Security Council exclusive authority to secure compliance with ICJ judgments.[30]

II. Developments in International Criminal Law

2016 has marked yet another transformational year for international criminal courts and tribunals. In the past twelve months, several of the individuals responsible for the world's most horrific contemporary human rights violations and war crimes have been brought to justice. Judgments have been issued and specific developments have been made by the International Criminal Court (ICC), the Mechanism for International Criminal Tribunals (MICT) and the International Criminal Tribunal for the Former Yugoslavia (ICTY), the Extraordinary African Chambers (EAC), the Extraordinary Chambers in the Courts of Cambodia (ECCC), and the Special Tribunal for Lebanon (STL).

A. The ICC

This year, the ICC took a notable step by imposing its first conviction for crimes of sexual violence since the Court's inception in 2002. The Court convicted Jean-Pierre Bemba Gombo, the military commander of the Movement of Liberation of Congo (MLC), a highly violent rebel faction in the Central African Republic, for the atrocities committed by MLC troops under his leadership between 2002 and 2003.[31] On June 21, 2016, Bemba was convicted on two counts of crimes against humanity for rape and murder, and three counts of war crimes for murder, rape, and pillaging, for which he was sentenced to eighteen years imprisonment.[32] Bemba's appeal of this judgment remains pending at the time of publication.

28. *Id.* ¶ 109 (Bandhari, J., declaration), *available at* www.icj-cij.org/docket/files/155/18962.pdf.

29. *NICOL III*, *supra* note 2, ¶ 102.

30. *NICOL III*, *supra* note 2, ¶¶ 67–82 (Cançado Trindade, J., separate opinion), *available at* www.icj-cij.org/docket/files/155/18960.pdf.

31. Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Judgment pursuant to Article 74 of the Statute (Mar. 21, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_02238.pdf.

32. Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision on Sentence pursuant to Article 76 of the Statute, ¶¶ 95–96 (Jun. 21, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_04476.pdf.

Several months after his conviction, Bemba, along with his case manager, lawyer, and two witnesses in his trial, were convicted of corruptly influencing witnesses and falsifying evidence.[33] The Court has yet to impose a sentence for these convictions.

B. The International Criminal Tribunals

Since July 2012, the ICTY has been operating under the jurisdiction and administration of the MICT. The MICT was established by the United Nations Security Council to carry out the essential functions of the ICTY and the International Criminal Tribunal for Rwanda, which closed in 2015 following the completion of all trials and appeals.[34]

On March 24, 2016, the ICTY convicted Radovan Karad_iæ of various crimes against humanity and violations of customs of war associated with the Bosnian War, including genocide, murder, terror, unlawful attacks on civilians, and hostage-taking, for which he was sentenced to forty years imprisonment.[35] Karad_iæ, a founding member and president of the Serbian Democratic Party and the President and Supreme Commander of the armed forces of Republika Sprska, directed the extermination and forced removal of Bosnian Muslims and Croat inhabitants from Bosnia and Herzegovina, and served a vital role in the massacre at Srebrenica.[36] His conviction represents the successful prosecution of the most senior Bosnian Serb leader.

In addition, on June 30, 2016, the Appeals Chamber of the ICTY affirmed the convictions and sentences of twenty-two years imprisonment for both Miæo Stanišiæ and Stojan _upljanin.[37] Stanišiæ served as the Minister of the Ministry of Interior of the Republika Sprska, and _upljanin held the title of Chief of the Regional Security Services Centre.[38] Both men participated in the forced removal and extermination of Bosnian Muslims and Croats from Serbia, and were ultimately convicted by the Trial Chamber on March 27, 2013, of forcible transfer, deportation and persecution as crimes against

33. Prosecutor v. Jean-Pierre Bemba Gombo, et al., Case No. ICC 01/05-01/13, Public Redacted Version of Judgment pursuant to Article 76 of the Statute (Oct. 19, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_18527.pdf.

34. *See About the MICT*, United Nations Mechanism for International Criminal Tribunals, http://www.unmict.org/en/about (last visited June 7, 2012).

35. Prosecutor v. Karad_ic, Case No. IT-95-5/18-T, Public Redacted Version of Judgment (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2016), http://wwwicty.org/x/cases/Karad_ic/tjug/en160324_judgment.pdf.

36. Prosecutor v. Karad_ic, Case No. IT-95-5/18, Case Information Sheet (Int'l Crim. Trib. for the Former Yugoslavia), www.icty.org/x/cases/karadzic/cis/en/cis_karadzic_en.pdf (last visited Apr. 5, 2017).

37. Prosecutor v. Stanišic & _upljanin, Case No. IT-08-91-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Jun. 30, 2016), http://www.icty.org/x/cases/zupljanin_stanisicm/acjug/en/160630.pdf.

38. Prosecutor v. Stanišic & _upljanin, Case No. IT-08-91, Case Information Sheet (Int'l Crim. Trib. for the Former Yugoslavia), www.icty.org/x/cases/zupljanin_stanisicm/cis/en/cis_stanisic_zupljanin_en.pdf (last visited Apr. 12, 2017).

humanity, and murder and torture as violations of the laws and customs of war.[39]

The ICTY also proceeded with the trial of Ratko Mladiæ, the prior colonel general and commander of the army of Republika Srpska, who faces a number of charges, including two counts of genocide.[40] Closing arguments were held in December 2016.[41]

C. THE EAC

The EAC was established in 2012 with the mission of prosecuting former Chadian Prime Minister Hissène Habré and members of his government for war crimes and crimes against humanity committed during his rule between 1982 and 1990. Four years after its establishment, the EAC reached a conviction, ultimately sentencing Habré to life imprisonment for a number of crimes, including torture, murder, abduction, and unlawful detention.[42]

The EAC's conviction and sentencing of Habré represents an extremely significant milestone for the Chambers. Habré's counsel appealed the judgment on June 13, 2016, marking the first appeal to be made in the EAC and necessitating the creation of the Extraordinary African Chamber of Assizes of Appeal.[43]

D. THE ECCC

In 2016, the ECCC proceeded with the prosecution of Nuon Chea, the prior Deputy Secretary of the Communist Party of Kampuchea (the official name of the Khmer Rouge regime) and Khieu Samphan, the prior Chairman of the People's Representative Assembly and the Acting Prime Minister of Democratic Kampuchea.[44] The litigation against Chea and Samphan had previously been severed into two separate trials, the first of which was focused solely on charges related to the forced movement of persons from

39. Prosecutor v. Stanišic & _upljanin, Case No. IT-08-91-T, Judgment, vol. 2 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 27, 2013), http://www.icty.org/x/cases/zupljanin_stanisicm/tjug/en/130327-2.pdf.

40. Prosecutor v. Mladic, IT-09-92, Case Information Sheet (Int'l Crim. Trib. for the Former Yugoslavia), http://www.icty.org/x/cases/mladic/cis/en/cis_mladic_en.pdf (last visited Apr. 12, 2017).

41. *Id.*

42. Prosecutor v. Hissen Habré, Delivery and Summary of Judgment (Assize Ct. of the Extraordinary African Chambers May 30, 2016), http://www.chambresafricaines.org/pdf/Prononc%C3%A9-r%C3%A9sum%C3%A9%20du%20Jugement%20HH%2020160528%20[620786].pdf.

43. Press Release, Extraordinary African Chambers, Defense Lawyers Appeal (June 13, 2016), *available at* http://www.chambresafricaines.org/index.php/le-coin-des-medias/communiqu%C3%A9-de-presse/640-les-avocats-de-la-d%C3%A9fense-interjettent-appel.html.

44. Prosecutor v. Chea & Samphan, Case No. 002/01, Summary of Judgment in Case 002/01 (Extraordinary Chambers in the Cts. of Cambodia Aug. 7, 2014), https://www.eccc.gov.kh/sites/default/files/articles/20140807%20FINAL%20Summary%20of%20Judgement%20ENG.pdf.

Phnom Penh and other regions of the country, as well as the execution of Khmer Republic soldiers at the Tuol Po Chrey execution site in 1975.[45] In the first trial, both Chea and Samphan were convicted of these charges and were sentenced to life imprisonment.[46] Following the defendants' appeal, on November 23, 2016, the Supreme Court Chamber of the ECCC issued a judgment quashing the defendant's convictions pertaining to crimes against humanity of extermination and persecution on political grounds.[47] However, in the same judgment, the Chamber upheld the defendants' convictions for crimes against humanity of murder and other inhumane acts, thereby affirming the sentences of life imprisonment.[48]

This year, the ECCC also proceeded with the prosecution of Chea and Samphan in the second of the two severed trials. This trial focuses on the remaining charges against the two defendants, including crimes against humanity relating to their involvement in the genocide of Cham and Vietnamese peoples, forced marriages, rape, and the operation of the S-21 Security Centre, in which thousands of persons were tortured and executed at the hands of the Khmer Rouge.[49] For the past several months, dozens of witnesses have testified against Chea and Samphan regarding these charges, but a date for the issuance of a judgment has yet to be scheduled.

Investigation also remains ongoing with regard to Case 003 against Meas Muth, Case 004 against Ao An and Yim Tith, and Case 004-01 against Im Chaem.

E. THE STL

The STL, which was created to prosecute the persons involved in carrying out the February 14, 2005, Beirut bombings, which killed 22 people, including then Lebanese Prime Minister Rafiq Hariri, issued several contempt judgments in 2016 related to the publication of information on confidential witnesses. The STL imposed contempt fines of _20,000 and _6,000 on Ibrahim Al Amin and the media company Akhbar Beirut S.A.L.,

45. Prosecutor v. Chea & Samphan, Case No. 002/02, Decision on Additional Severance of Case 002 and Scope of Case 002/02, ¶¶ 41–44 (Extraordinary Chambers in the Cts. of Cambodia Apr. 4, 2014), https://www.eccc.gov/kh/sites/default/files/documents/courtdoc/2014-04-07%2016:12/E301_9_1_EN-optimized.pdf.

46. Prosecutor v. Chea & Samphan, Case No. 002/01, Case 002/01 Judgment (Extraordinary Chambers in the Cts. of Cambodia Aug. 7, 2014), https://www.eccc.gov.kh/sites/default/files/articles/20140807%20FINAL%20Summary%20of%20Judgement%20ENG.pdf.

47. Prosecutor v. Chea & Samphan, Case No. 002/01, Appeal Judgment (Extraordinary Chambers in the Cts. of Cambodia Nov. 23, 2016), https://www.eccc.gov/kh/sites/default/files/documents/courtdoc/2016-11-23%2011:55/Case%20002_01%20Appeal%20Judgment.pdf.

48. *Id.*

49. Prosecutor v. Chea & Samphan, Case No. 002/02, Case Information Sheet (Extraordinary Chambers in the Cts. of Cambodia), https://www.eccc.gov/kh/en/case/topic/1299 (last visited Apr. 12, 2017).

respectively,[50] but affirmed the acquittal of media company Al Jadeed and reversed the conviction of Al Jadeed TV's Deputy Head of News and Political Programs, Ms. Karma Al Khayat, for similar charges.[51]

III. The South China Sea Arbitration Award

On July 12, 2016, a Tribunal constituted under Annex VII of UNCLOS (or the "Convention") issued its long-awaited Award in the *South China Sea Arbitration* between the Philippines and China.[52] This article describes five of the decision's most notable contributions to international law.

A. China's Non-Participation

China declined to participate in the arbitration and publicly rejected its legitimacy and legality.[53] The Tribunal's procedural actions sought to safeguard China's rights and bolster the legitimacy of its decisions notwithstanding China's non-appearance. In conformity with the Convention and the Tribunal's Rules of Procedure,[54] the Tribunal recognized that China's non-participation was not a bar to the proceedings or to China's status as a "Party to the arbitration," and determined that China "shall be bound by any award the Tribunal issues."[55] Additionally, the Tribunal recognized that China's non-participation engendered a "special responsibility . . . to satisfy itself 'not only that it ha[d] jurisdiction over the dispute but also that the claim [was] well founded in fact and law,'"[56] and took a number of steps to do so.[57]

First, the Tribunal decided that certain statements made by China outside of the arbitration, including a legal memorandum submitted by China individually to each of the five arbitrators but not formally to them as a Tribunal, constituted pleas on jurisdiction.[58] The Tribunal bifurcated the

50. Prosecutor v. Akhbar Beirut S.A.L. & Al Amin, Case No. STL-14-06, Public Redacted Version of the Judgment (Special Trib. for Leb. July 5, 2016), https://www.stl-tsl.org/en/the-cases/contempt-cases/stl-14-06/judgments-stl-14-06/5092-f0262prv.

51. Prosecutor v. Al Jadeed S.A.L. & Al Khayat, Case No. STL-14-05, Public Redacted Version of Judgment on Appeal (Special Trib. for Leb. Mar. 8, 2016), https://www.stl-tsl/org.en/the-cases/contempt-cases/stl-14-05/filings-stil-14-05/appeal-1/judgments-stl-14-05/4823-f0028.

52. South China Sea Arbitration (Phil. v. China), Case No. 2013-2019, Award (Perm. Ct. Arb. July 12, 2016), https://pca-cpa.org/wp-content/uploads/sites/175/2016/. . ./PH-CN-20160712-Award.pdf [hereinafter *Award*].

53. *Id.* ¶ 11.

54. *See e.g.*, *UNCLOS*, *supra* note 16.

55. *Award*, *supra* note 52, ¶ 12.

56. *Id.*

57. *See* South China Sea Arbitration (Phil. v. China), Case No. 2013-2019, Award on Jurisdiction and Admissibility, ¶¶ 39, 58 (Perm. Ct. Arb. Oct. 29, 2015), http://www.pcacases.com/web/sendAttach/1506 [hereinafter *Award on Jurisdiction*].

58. *Id.* ¶¶ 55–56, 132.

proceedings[59] and put numerous questions to the Philippines regarding potential additional jurisdictional objections not raised by China.[60] Second, the Tribunal sought neutral sources of information to assist it in "establishing whether the Philippines' claims [were] well founded in fact and law,"[61] including by appointing various independent experts.[62] Third, the Tribunal "invit[ed] comments from both Parties on materials that were not originally part of the record submitted to the Tribunal by the Philippines"[63] – these materials included both information that the Tribunal had sought out itself and that had been published by the Taiwan Authority of China and related entities[64]. Finally, the Tribunal provided China with ample opportunity to comment on various aspects of the proceedings, "consistently remind[ing] China that it remained open to it to participate in [the] proceedings at any stage."[65]

B. Entitlement and Delimitation

China objected to the Tribunal's jurisdiction on the basis of its UNCLOS Article 298(1)(a)(i) declaration, which excludes disputes regarding maritime boundary delimitation from compulsory dispute resolution. According to China, the issues presented by the Philippines, in particular "maritime claims, the legal nature of maritime features, [and] the extent of relevant maritime rights," were "part and parcel of maritime delimitation," and were therefore covered by the declaration.[66] The Tribunal disagreed, deciding that a "dispute concerning the existence of an entitlement to maritime zones is distinct from a dispute concerning the delimitation of those zones in an area where the entitlements of parties overlap."[67] Entitlement is a separate determination that precedes delimitation, and thus, the Tribunal could determine those entitlements without engaging in delimitation.[68]

C. Historic and Other Rights

The Philippines sought to challenge China's claims to sovereign and historic rights within the maritime area of the South China Sea encompassed by the "nine-dash line." The Tribunal found that China's "claim of historic rights to living and non-living resources is not compatible with the Convention . . . ."[69]

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59. South China Sea Arbitration (Phil. v. China), Case No. 2013-2019, Procedural Order No. 4, ¶¶ 1.1–1.4 (Perm. Ct. Arb. Apr. 21, 2015), https://www.pcacases.com/web/sendAttach/1807.
60. *Award on Jurisdiction*, *supra* note 57, ¶¶ 92, 120, 197.
61. *Award*, *supra* note 52, ¶ 15.
62. *Id.* ¶¶ 58, 136, 138.
63. *Id.* ¶¶ 15, 89.
64. *Id.* ¶ 89
65. *Id.* ¶ 27.
66. *Award on Jurisdiction*, *supra* note 57, ¶ 138.
67. *Id.* ¶ 156.
68. *Id.* ¶ 156–157.
69. *Award*, *supra* note 52, ¶ 272.

In reaching this conclusion, the Tribunal determined that UNCLOS Article 62 was clear in affording "sovereign rights to the living and non-living resources of the exclusive economic zone to the coastal State *alone*," and not to any other State.[70] The same principle applied to the continental shelf under Article 77.[71] Importantly, the Tribunal observed that "the Convention is comprehensive in setting out the nature of the exclusive economic zone and continental shelf and the rights of other States within those zones."[72] In the absence of any provisions in the Convention preserving historic (or other) rights within those zones, China's claims to such rights within the nine-dash line beyond 200 meters from China's coast were incompatible with, and had been superseded by, the Convention, and were "without lawful effect."[73] In any event, the Tribunal rejected China's claim to historic rights under pre-Convention law, finding that "[h]istorical navigation and fishing, beyond the territorial sea, cannot . . . form the basis for the emergence of a historic right."[74]

The Tribunal also distinguished between historic rights to maritime space, which attach to the State, and traditional fishing rights, which attach to individuals. Traditional fishing rights within the territorial sea remain protected under international law, and were unaltered by the Convention;[75] thus, the Tribunal recognized and protected those rights within the territorial sea of Scarborough Shoal.[76] By contrast, traditional fishing rights in the exclusive economic zone (EEZ) were expressly extinguished by the Convention, "except insofar as Article 62(3) specifies that 'the need to minimize economic dislocation in States whose nationals have habitually fished in the zone' shall constitute one of the factors to be taken into account by the coastal State in giving access to any surplus in the allowable catch."[77]

D. The Regime of Islands

UNCLOS Article 121(3) provides that "[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf."[78] Only once before had Article 121 been applied to determine whether a particular feature was a "rock," and in that case, the issue was not whether the feature in question was a "rock" or a fully-entitled "island" (as in the *South China Sea* Arbitration), but rather whether it was a "rock" or a "low-tide elevation."[79]

70. *Id.* ¶ 243 (emphasis added).
71. *Id.* ¶ 244.
72. *Id.* ¶ 246.
73. *Id.* ¶¶ 246–247, 278.
74. *Id.* ¶¶ 263–71.
75. *Id.* ¶ 804(c).
76. *Id.* ¶¶ 806–07, 811–12.
77. *Id.* ¶ 804(b) (citing United Nations Convention on the Law of the Sea art. 62(3)).
78. United Nations Convention on the Law of the Sea art. 121(3), Dec. 10. 1982, U.N.T.S. 397.
79. *See NICOL I*, *supra* note 11, ¶¶ 27–38, 181–83.

In determining whether various features in the South China Sea fell under Article 121(3), the Tribunal established a number of guidelines, including: (1) "size cannot be dispositive . . . and is not, on its own, a relevant factor";[80] (2) "human habitation entails more than the mere survival of humans on a feature and that economic life entails more than the presence of resources";[81] (3) "a purely official or military population, serviced from the outside, does not constitute evidence that a feature is capable of sustaining human habitation";[82] and (4) "purely extractive economic activities, which accrue no benefit for the feature or its population, would not amount to an economic life of the feature as 'of its own.'"[83] Moreover, a feature is to be assessed in its *natural* condition, or the feature's condition before there were any man-made enhancements by a State claiming sovereignty over it.[84] Finally, a tribunal's inability to rule on *sovereignty* over a feature should not prevent it from assessing that feature's *status* under Article 121(3), which can be done without considering or prejudicing disputed sovereignty claims.[85]

The Tribunal concluded that none of the features at issue were "capable of sustaining human habitation or economic life of their own," and therefore they could not generate entitlements to an EEZ or a continental shelf.[86]

E. The Marine Environment

The Tribunal was also the first to reach the merits stage to determine the content and scope of UNCLOS's environmental provisions.

As a starting point, the Tribunal observed that the Convention's substantive environmental provisions apply to all States, within and beyond their national jurisdictions. The Tribunal ruled that Article 192 "entails the positive obligation to take an active measure to protect and preserve the marine environment," or, in other words, a "duty to prevent," but also "the negative obligation not to degrade the marine environment."[87] Additionally, Article 194 encompasses a duty of due diligence.[88]

With respect to the protection of endangered species, the due diligence obligation includes the duty to prevent "the direct harvesting" of endangered species, as well as the destruction of their habitat.[89] The duty of due diligence is fulfilled by the adoption of "rules and measures to prevent" certain acts under States' jurisdiction or control, and through enforcement.[90]

80. *Award*, *supra* note 52, ¶ 538.
81. *Id.* ¶ 546.
82. *Id.* ¶ 550.
83. *Id.* ¶ 500.
84. *Id.* ¶ 508.
85. *Id.* ¶ 545.
86. *Id.* ¶ 626.
87. *Id.* ¶ 941.
88. *Id.* ¶ 944.
89. *Id.* ¶ 959.
90. *Id.* ¶ 961.

Further, the Tribunal reaffirmed that State Parties have a "direct obligation" to conduct environmental impact assessments.[91] They must, "as far as practicable," conduct such an assessment when there are "reasonable grounds for believing that planned activities under their jurisdiction or control may cause significant and harmful changes to the marine environment,"[92] and they must also communicate the results to "competent international organizations."[93]

China's activities in the South China Sea, including its unprecedented island-building activities and its tolerance of the harvesting of endangered species, led the Tribunal to conclude that China violated its environmental obligations under the Convention.[94]

IV. The International Centre for Settlement of Investment Disputes

The ICSID Convention celebrated its fiftieth anniversary on October 14, 2016.[95] The year 2016 also marked a number of noteworthy developments in ICSID arbitration.

A. Treaty Definition of Investor's Seat

In *Tenaris S.A. v. Venezuela*, the applicable Bilateral Investment Treaties (BITs) required the investor to be incorporated and have its seat in the home state.[96] Venezuela argued that the investors did not qualify under the treaties because they did not have any genuine links to either of the two countries, and the bulk of the employees were in a third country.[97] The Tribunal rejected this argument, noting that the seat requirement could not be equated with the "real economic activities" criteria.[98] Applying a "flexible" test, the Tribunal concluded that even though both companies were holding companies, they were effectively seated in those countries, because it was in those countries that their holding activities were carried out.[99]

But in *CEAC v. Montenegro*, the Tribunal found (in a two-to-one decision) that the claimant's registered office being located in Cyprus was insufficient grounds to meet the "seat" requirement under the Cyprus-Montenegro

91. *Id.* ¶¶ 947–48.
92. *Id.* ¶ 987 (quoting United Nations Convention on the Law of the Sea art. 206).
93. *Award*, *supra* note 52, ¶¶ 948, 991.
94. *Id.* ¶ 993.
95. *See* Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159.
96. Tenaris S.A. & Talta-Trading E Mktg. Sociedade Unipessoal LDA v. Bolivarian Republic of Venez., ICSID Case No. ARB/11/26, Award, ¶ 115 (Jan. 29, 2016), icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C1820/DC7492_En.pdf.
97. *Id.* ¶¶ 119-120.
98. *Id.* ¶¶ 142-143.
99. *Id.* ¶¶ 200, 206–16.

BIT.[100] In this case, the respondent presented unrebutted evidence that the Cypriot registered office was unoccupied and was not used for commercial activity.[101] Further, the majority noted that there were very few documents that dealt with the company's actual activities in Cyprus, despite representations to the contrary.[102]

B. MERITS

In *Rusoro Mining v. Venezuela*, the Tribunal found that Venezuela unlawfully expropriated Rusoro's investment by implementing a series of measures that regulated the country's gold production market, and then passed a decree that transferred its mining rights to the State, deprived the investment of its economic value, and failed to provide adequate compensation.[103] The Tribunal also found that a 2010 resolution, which limited the amount of gold that foreign investors could export, breached the Annex to the BIT, which prohibits restrictions on the export of products by volume.[104] But the Tribunal dismissed a creeping expropriation claim, finding that there was no evidence that the measures were interconnected, because measures taken in 2010 that partially re-liberated the gold market seemed to undo the more stringent restrictions implemented in 2009.[105] The Tribunal also found that several measures did not breach Venezuela's commitment to provide fair and equitable treatment (FET),[106] and ordered Venezuela to pay $971,079,502 in damages, interest, and costs.[107]

In *Crystallex Int'l Corp. v. Venezuela*, the Tribunal found that Venezuela breached the Canada-Venezuela BIT by denying a key environmental permit, and then rescinding a concession contract owned by Crystallex.[108] The Tribunal found that a letter from Venezuela requesting that Crystallex post a construction compliance bond created a legitimate expectation that the permit was forthcoming, and that Venezuela breached its FET obligations by denying the permit and rescinding the contract.[109] The Tribunal also found a breach based on a creeping expropriation arising from the denial of the permit, the issuance of political statements indicating a political intention to oust the investor, and the subsequent recession of the

100. CEAC Holdings Ltd. v. Montenegro, ICSID Case No. ARB/14/8, Award, ¶ 148 (July 26, 2016), icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C3424/DC8694_en.pdf.
101. *Id.* ¶ 191.
102. *Id.* ¶¶ 205–07.
103. Rusoro Mining Ltd. v. Bolivarian Republic Venez., ICSID Case No. ARB(AF)/12/5, Award, ¶¶ 373–410 (Aug. 22, 2016), www.italaw.com/sites/default/files/case-documents/italaw7507.pdf.
104. *Id.* ¶¶ 584–97.
105. *Id.* ¶¶ 430–38.
106. *Id.* ¶¶ 527–41.
107. *Id.* ¶ 904.
108. Crystallex Int'l Corp. v. Bolivarian Republic Venez., ICSID Case No. ARB(AF)/11/2, Award, ¶¶ 18–63 (Apr. 4, 2016), www.italaw.com/sites/default/files/case-documents/italaw7194.pdf.
109. *Id.* ¶¶ 575, 623.

contract.[110] Like in *Rusoro*, the course of events was also found to be an unlawful direct expropriation.[111] The tribunal awarded the investor $1.202 million plus interest.[112]

In *Philip Morris v. Uruguay*, the Tribunal dismissed Philip Morris's claims brought under the Switzerland-Uruguay BIT.[113] The case arose from Uruguay's imposition of tobacco control measures; the prohibition on marketing more than one variant of cigarette per brand family; and the 80/80 Regulation, which increased the size of health warnings on cigarette packaging to 80 percent.[114] The Tribunal embraced the police powers exception to the expropriation claim, noting Uruguay's interest in the health of its citizens[115] and the fact that there can be no "indirect expropriation" where the business retains "sufficient value."[116] Further, the Tribunal found that the implemented measures did not constitute an FET breach and were not arbitrary or discriminatory because they were reasonable attempts to protect public health.[117] Gary Born, in a dissent, stated that the single presentation requirement was an FET breach; that the World Health Organization Framework Convention on Tobacco Control did not explicitly recommend a similar measure; and that the measure was implemented in a mere few days.[118]

C. Abuse of Process

In *Transglobal Green Energy, LLC v. Panama*, the Tribunal declined jurisdiction, finding that the investor's attempt to invoke international jurisdiction over a domestic dispute was an abuse of the investment treaty process.[119] La Mina, a Panamanian company, had entered into a concession contract with The National Authority of Public Services (ASEP), Panama's agency regulating public utilities, to "build and operate a hydroelectric power plant."[120] ASEP issued a resolution terminating the concession contract when La Mina failed to commence construction by the agreed upon

110. *Id.* ¶¶ 668–708.
111. *Id.* ¶¶ 711–18.
112. *Id.* ¶ 961.
113. Philip Morris Brands Sàrl, Philip Morris Prod. S.A. & Abal Hermanos S.A. v. Oriental Republic of Urug., ICSID Case No. ARB/10/7, Award, ¶ 590 (July 8, 2016), icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C1000/DC9012_En.pdf.
114. *Id.* ¶¶ 108–32.
115. *Id.* ¶¶ 291–307.
116. *Id.* ¶ 286.
117. *Id.* ¶¶ 388–420.
118. Philip Morris Brands Sàrl, Philip Morris Prod. S.A. & Abal Hermanos S.A. v. Oriental Republic of Urug., ICSID Case No. ARB/10/7, Concurring and Dissenting Opinion (Born, Arbitrator), ¶¶ 192–97 (July 8, 2016), www.italaw.com/sites/default/files/case-documents/italaw7428.pdf.
119. Transglobal Green Energy, LLC & Transglobal Green Pan., S.A. v. Republic of Pan., ICSID Case No. ARB/13/28, Award, ¶¶ 118, 130 (June 2, 2016), icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C3144/DC8333_En.pdf.
120. *Id.* ¶ 50.

deadline.[121] The Supreme Court held that La Mina's concession contract remained in force and ordered restitution of the concession.[122] While awaiting implementation of the court order, the owner of La Mina signed a memorandum of understanding (MOU) and a partnership and transfer agreement with Transglobal Green Energy, LLC, a company incorporated in the United States, in order to create a special-purpose entity to undertake the project—Transglobal Green Energy (TGGE Panama), a company to be incorporated in Panama.[123] But, ASEP denied several requests to enforce the Supreme Court decision or transfer the concession to TGGE Panama.[124]

Panama argued that the claimants wrongfully invoked "international jurisdiction over a domestic dispute," which essentially pertained to Panama's efforts to implement the Supreme Court decision by creating international ownership.[125] In evaluating the abuse of process objection, the Tribunal considered the circumstances of the BIT claim, including "the timing of the purported investment, the timing of the [international] claim, the substance of the transaction, the true nature of the operation, and the degree of foreseeability of the governmental action at the time of restructuring."[126] The Tribunal recognized that while Transglobal created the new company to effectuate the Supreme Court's ruling, Transglobal retained de facto control over the investment through voting rights, and it twice sought arbitration suspensions based on developments in the Panama proceedings.[127]

V. The EU-Led Permanent Investment Court

In October 2015, the European Union (EU) set out a fundamentally new investor-state dispute settlement (ISDS) policy in response to widespread criticism of the ad hoc ISDS system, which became evident during the 2014 public consultation on the US-EU Transatlantic Trade and Investment Partnership (TTIP). In its "Trade for All" policy, the European Commission stated that the "status quo [of ad hoc investment arbitration] is not an option"[128] for future investment treaty models. Nearly in tandem, the European Commission published a concept paper setting out the proposed

121. *Id.* ¶ 52.
122. *Id.* ¶¶ 54–58.
123. *Id.* ¶¶ 59–64.
124. *Id.* ¶¶ 65–74.
125. *Id.* ¶ 85.
126. *Id.* ¶ 103.
127. *Id.* ¶¶ 104–18.
128. *Trade for All: Towards a more responsible trade and investment policy*, EUR. COMM'N, at 21 (2015), *available at* http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf.

investment court,[129] which was shortly followed by a full proposal deployed in the course of TTIP negotiations.[130]

The EU has since acted on its new investment policy and proposal, incorporating the investment court model in its recent trade and investment agreements including, among others, the Canada-EU Comprehensive Economic and Trade Agreement (CETA), signed on October 30, 2016, and the EU-Vietnam Free Trade Agreement (FTA). It is clear that, at least for the EU, the investment court model is the way forward.

At present, each treaty envisages its own bilateral permanent Investment Court. Although their features are broadly similar, some differences do exist. The TTIP and CETA Investment Courts would have a court of first instance (the Tribunal), comprised of fifteen judges,[131] while the EU-Vietnam FTA provides for nine judges.[132] The TTIP and the EU-Vietnam FTA provide for an appeal tribunal with six members.[133] The CETA provides for an appellate tribunal with an unspecified number of members, to be determined by a committee.[134] All judges are to be appointed by State parties to these treaties. The Court of First Instance is to sit in benches of three members each, chosen at random.

The courts would be administered by a multilateral institution: CETA proceedings are to be administered by ICSID,[135] while the TTIP and the EU-Vietnam FTA give parties the option between ICSID and the Permanent Court of Arbitration.[136] The function of the Court is largely left to the discretion of the appointed members and treaty parties. At present, it is not clear where such an institution would be physically located. The treaty texts do not provide for an arbitral seat, thus allowing for the possibility of a virtual seat, with arbitrations being held in one location.

In response to critiques from civil society and the international bar, ethical obligations have become mandatory under each treaty's text. The ethics provisions prohibit members of the Investment Court from acting as legal counsel in investment dispute cases and improves transparency for arbitrator challenges. Appointed members may act as arbitrators outside of the

129. *Concept Paper: Investment in TTIP and beyond – the path for reform*, EUR. COMM'N, at 4 (May 5, 2015), *available at* http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.pdf.

130. Transatlantic Trade and Investment Partnership (EU, Proposed Official Draft Nov. 12, 2015), *available at* trade.ec.europa.eu/doclib/html/153955.htm.

131. TTIP art. 9(2); Canada – European Union Comprehensive Economic Trade Agreement [hereinafter CETA] art. 8.27(2) (signed on Oct. 30, 2016), http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/10.aspx?lang=eng.

132. European Union – Vietnam Free Trade Agreement [hereinafter EU-Vietnam FTA] art. 12(2) (published on Feb. 1, 2016), http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437.

133. TTIP art. 10(2); EU-Vietnam FTA art. 13(2).

134. CETA art. 8.28(7)(f).

135. CETA art. 8.27(16). The CETA does not identify who will administer the Appellate Tribunal. Pursuant to Article 8.28(7), this is a decision that will have to be made by the Committee.

136. TTIP art. 9(16) and art. 10(15). The administering institution remains in bracketed text in the November draft. *See also* EU-Vietnam FTA art. 12(18) and art. 13(18).

Investment Court. The CETA provides for an ethical code and requires that the judges follow the International Bar Association's *Guidelines on Conflict of Interest for Arbitrators*. It remains to be seen how effective these mandatory provisions will be in practice.

To date, there have been several commentaries on the Investment Court proposal.[137] The ABA's Investment Treaty Working Group's *Task Force Report on the Investment Court* analyzed in detail the Investment Court proposal, and concluded that the Investment Court System, as currently articulated, is a work in progress. Concerns were raised about the appointment system, the functioning of the Court, and the enforceability of its awards. Some of these concerns may be addressed if the Investment Court is multi-lateralized though a further instrument.

Each treaty text provides that the Investment Court will be multi-lateralized, with only one institution deciding disputes brought under all EU treaties (and potentially others as well).[138] The EU has started the process towards a multilateral investment court by creating a parallel path alongside the bilateral texts with the publication of a multilateralization road. But the EU is currently conducting an impact assessment,[139] and it may affect how the Investment Court will be multi-lateralized.

At the time of writing this article, it is doubtful that the TTIP will advance under a Trump administration. But it is clear that the EU will move forward with the Investment Court through other agreements, such as the CETA and the EU-Vietnam FTA, and that the Investment Court is likely to be established in either a bilateral or multilateral form in the coming years.

137. *See, e.g.*, *Investment Treaty Working Group: Task Force Report on the Investment Court System Proposal*, AMERICAN BAR ASSOCIATION, (Oct. 14, 2016), http://apps.americanbar.org/dch/committee.cfm?com=IC730000; Koorosh Ameli *et al.*, *EFILA Task Force Paper Regarding the Proposed International Court System (ICS)*, at 15, (Feb. 1, 2016), http://efila.org/wp-content/uploads/2016/02/EFILA_TASK_FORCE_on_ICS_proposal_1-2-2016.pdf

138. TTIP art. 12; CETA art. 8.29; EU-Vietnam FTA art. 15.

139. *Establishment of a Multilateral Investment Court for investment dispute resolution*, EUROPEAN COMMISSION, http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_trade_024_court_on_investment_en.pdf.