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# *Judicial Fact-Finding Initiatives in the* South China Sea Arbitration

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**Abstract**
The historic Award in the *South China Sea Arbitration* gave much-needed clarity to many of the complex legal issues lying at the heart of the Philippines-China maritime dispute. Often overlooked, however, is the procedural significance of the case. This Comment submits that the *South China Sea Arbitration* represents a shift towards the use of judicial fact-finding initiatives as a means to overcome the adjudicatory challenges inherent to highly technical and scientific cases where one Party fails or refuses to participate. Even more striking, the Tribunal's independently acquired facts appear to be the basis for the majority of its conclusions in the Award. This Comment highlights the appropriateness and practicality of the Tribunal's actions in view of its extraordinary obligation under Article 9 of Annex VII of the UNCLOS to "satisfy itself" that the Philippines' claims are "well-founded in fact and law".

## I. JUDICIAL FACT-FINDING IN THE SOUTH CHINA SEA ARBITRATION: AN ISOLATED CASE?

On 22 June 2013, the Philippines initiated a case[1] against China under Annex VII to the 1982 United Nations Convention on the Law of the Sea [UNCLOS].[2] The Philippines sought a ruling that would bring clarity to the many complex issues relating to the South China Sea, and which would specifically address China's sweeping claims to disputed waters within a unilaterally declared "nine-dashed-line", the legal character of various maritime features in that area, and China's various breaches of the UNCLOS. Despite China's categorical refusal to participate in the proceedings, the arbitration continued in accordance with Article 9 of Annex VII,[3] with only the

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1. *South China Sea Arbitration (Philippines v. China)*, Award of 12 July 2016, [2016] PCA Case No 2013-19.
2. *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 3 (entered into force on 16 November 1994) Annex VII [*UNCLOS*]. "UNCLOS" and "the Convention" are used interchangeably in this Comment.
3. *UNCLOS*, *supra* note 2 at art. 9, annex VII. It provides: "If one of the parties to the dispute does not appear before the arbitral tribunal or fails to defend its case, the other party may request the tribunal to

Philippines appearing as a Party. Importantly, the Philippines was still made to observe the principle of *actori incumbit probation*,[4] and thus had to present vast amounts of evidence in order to substantiate its claims, many of which involved highly technical or scientific questions. Roughly three years later, on 12 July 2016, the Tribunal issued a final award which was overwhelmingly in favour of the Philippines.

The *South China Sea Arbitration* is certainly not the first time that a country has refused to participate in an international dispute settlement proceeding.[5] However, what sets this arbitration apart from earlier cases was the Tribunal's use of proactive fact-finding and the great extent to which such initiatives influenced the final outcome of the case. It is apposite to note that the *South China Sea Arbitration* is a particularly unique case to study from an evidentiary standpoint given that: (1) it is a case that involved the non-appearance of one Party; (2) it involved highly technical and scientific questions; and (3) it is the first time in the rather limited history of UNCLOS dispute settlement proceedings that both characteristics coincided in the same case.

Judicial fact-finding initiative was exhibited in the *South China Sea Arbitration* in two ways. First, the Tribunal exercised its discretionary authority under Article 289 of the UNCLOS and commissioned a number of independent experts to conduct fact-finding and analysis on several issues involving scientific or technical questions. Second, the Tribunal independently sought out documentary evidence beyond what was submitted by the Philippines as the appearing Party. Although both forms of judicial fact-finding initiative are not unheard of, they are certainly not common practice among international adjudicative bodies. The International Court of Justice [ICJ], despite having extremely flexible rules on evidentiary matters,[6] has been notoriously reluctant to engage in proactive fact-finding in cases involving scientific or technical questions despite the obvious benefits of doing so.[7] They have in fact taken a

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continue the proceedings and make its award. Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings. Before making its award, the arbitral tribunal must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well-founded in fact and law."

4. Tafsir Malick NDIAYE and Rüdiger WOLFRUM, eds., *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Americorum Judge Thomas A. Mensah* (Leiden: Martinus Nijhoff, 2007) 353.

5. See for example, the *Corfu Channel Case (United Kingdom v. Albania)*, Merits, [1949] ICJ Rep. 4; *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, Judgment, [1980] ICJ Rep. 3; *Anglo-Iranian Oil Case (United Kingdom v. Iran)*, Judgment, [1952] ICJ Rep. 93; *Aegean Sea Continental Shelf Case (Greece v. Turkey)*, Jurisdiction, Judgment, [1978] ICJ Rep. 3; *Nottebohm Case (Liechtenstein v. Guatemala)*, Judgment, [1955] ICJ Rep. 1; *Nuclear Test Case (Australia and New Zealand v. France)*, Judgment, [1974] ICJ Rep. 253; *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v. United States*), Merits, [1986] ICJ Rep. 14; *Arctic Sunrise Case (Netherlands v. Russia)*, Provisional Measures, Order of 22 November 2013, ITLOS Case No. 22; *Arctic Sunrise Case (Netherlands v. Russia)*, Award of 14 August 2015, [2015] PCA Case No. 2014-02.

6. Peter TOMKA and Vincent-Joël PROULX, "The Evidentiary Practice of the World Court", NUS Law Working Paper 2015/010, December 2015.

7. Tullio TREVES, "Law and Science in the Jurisprudence of the International Tribunal for the Law of the Sea" in Harry N. SCHEIBER, James KRASKA, and MOON Sang-Kwon, eds., *Science, Technology and New Challenges to Ocean Law* (Leiden: Martinus Nijhoff, 2015), 18; Tullio SCOVAZZI, "Between Law and Science: Some Considerations Inspired by the Whaling in the Antarctic Judgment" (2015) 14 Questions of International Law 13, online: <www.https://boa.unimib.it/handle/10281/89459>; James

largely "reactive approach".[8] This was the precise criticism that Judge Simma and Judge Al-Khasawneh levelled on their colleagues in *Joint Dissenting Opinion in the Case Concerning Pulp Mills on the River Uruguay*.[9] The two Judges said that:

> The Court on its own is not in a position adequately to assess and weigh complex scientific evidence of the type presented by the Parties … Yet, it is certainly compatible with the Court's judicial function to have recourse, when necessary, to experts: as the Court previously has stated, "the purpose of the expert opinion must be *to assist* the Court in giving judgment upon the issues submitted to it for decision".
>
> This reliance on experts is all the more unavoidable in cases concerned with highly complex scientific and technological facts … In short, in a scientific case such as the present dispute, the insights to make sound legal decisions necessarily emanate from experts consulted by the Court, even though it certainly remains for the Court to discharge the exclusively judicial functions, such as the interpretation of legal terms, the legal categorization of factual issues, and the assessment of the burden of proof.

The International Tribunal for the Law of the Sea [ITLOS] and various arbitral tribunals constituted under Annex VII of the UNCLOS have likewise used their broad fact-finding powers quite sparingly. The *South China Sea* Arbitral Tribunal is thus notable not only because it engaged in such judicial fact-finding initiatives, but also because it relied on the results of its proactive fact-finding to such a significant extent that the evidence derived from the Tribunal's own initiatives became the main determinant of the case outcome, as will be argued in Part III below.

## II. LEGALITY AND PROPRIETY OF JUDICIAL INITIATIVE IN THE *SOUTH CHINA SEA ARBITRATION*

A Party's non-appearance in a case being heard before an international adjudicative body is naturally bound to result in an evidentiary shortfall. "Non-appearance" is defined as "the situation in which one party to a case fails to appear before the Court [or tribunal], to submit a counter-memorial or withdraws from the proceedings at any stage before the final judgment is rendered".[10] When such a situation arises, the appearing Party is obviously the only one submitting evidence for the Tribunal's consideration. In a civil or commercial case under municipal law, a court faced with a similar situation would ordinarily treat one Party's non-appearance as a waiver to present evidence, likely resulting in the issuance of a default judgment in favour of the appearing Party.[11] However, the rule in international dispute settlement proceedings is very different. The case continues and the non-appearing Party is bound by the

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Gerard DEVANEY, *Fact-finding before the International Court of Justice* (Cambridge: Cambridge University Press, 2016) at 27.

8. Devaney, *supra* note 7.
9. See *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Joint Dissenting Opinion of Judges Al-Khasawneh and Simma, [2010] ICJ Rep. 425.
10. Devaney, *supra* note 7 at 115.
11. See for example, Rules of Court, Rule 9 (Phil.)

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outcome of the decision. In UNCLOS dispute settlement proceedings, this is reinforced by Article 28 of Annex VI (in cases heard before the ITLOS), Article 9 of Annex VII (in cases decided by means of arbitration), and Article 53 of the Statute of the ICJ (in cases decided by the ICJ). One common thread underlying all three provisions is that the tribunal/court is given an extraordinary yet rather ambiguous obligation: in the event of the non-appearance of one Party, it must "satisfy itself" that the appearing Party's claim is "well founded in fact and law" before making its decision. The bottom line is that the tribunal/court cannot default to a wholesale acceptance of the claims made, and must instead base its judgment on a comprehensive understanding of all aspects of the dispute. One important preliminary issue that needs to be considered, however, is what the phrases "satisfy itself" and "well founded in fact and law" actually mean. In the *Nicaragua* case, the ICJ explained these concepts in this manner:

> The use of the term "satisfy itself" in the English text of the Statute … implies that the Court must attain the same degree of certainty as in any other case that the claim of the party appearing is sound in law, and, so far as the nature of the case permits, that the facts on which it is based are supported by convincing evidence …
>
> As to the facts of the case, in principle the Court is not bound to confine its consideration to the material formally submitted to it by the parties.

The ICJ's pronouncement suggests that international adjudicative bodies enjoy a degree of flexibility in satisfying itself that the appearing Party's claim is well-founded in fact and law. Quite unlike domestic courts, international courts and tribunals do not subscribe to rigid rules governing the submission, administration, and appreciation of evidence—much is left to the discretion of the judges.[12] Such flexibility means that judges could, for example, resort to a range of measures[13] during the course of the proceedings that could ultimately affect the question of proof,[14] including taking a more proactive role in fact-finding. It is thus a matter of general acceptance that international courts and tribunals have the authority to investigate *motu proprio* any facts relevant to a case being heard before it despite one Party's non-appearance, and regardless of whether such facts go beyond the submitted evidence.[15]

A closer look at the procedures in the *South China Sea Arbitration* sheds some additional insight on this matter. The Tribunal first explained the rationale behind Article 9 of Annex VII by saying that:

> Article 9 of Annex VII seeks to balance the risks of prejudice that could be suffered by either party in a situation of non-participation. First, it protects the participating party by

12. Andreas ZIMMERMAN, Karin OELLERS-FRAHM, Christian TOMUSCHAT, and Christian J. TAMS, eds., *The Statute of the International Court of Justice: A Commentary* (Oxford/New York: Oxford University Press, 2012); Juliane KOKOTT, *The Burden of Proof in Comparative and International Human Rights Law: Civil and Common Law Approaches with Specific Reference to the American and German Legal Systems* (The Hague/London/Boston: Kluwer Law International, 1998) at 190.

13. Devaney, *supra* note 7 at 15–27.

14. Chittharanjan F. AMERASINGHE, *Evidence in International Litigation* (Leiden: Martinus Nijhoff Publishers, 2005) at 148.

15. Zimmerman et al., *supra* note 12 at 1274.

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> ensuring that proceedings will not be frustrated by the decision of the other party not to participate. Second, it protects the rights of the non-participating party by ensuring that a tribunal will not simply accept the evidence and claims of the participating party by default.[16]

The Tribunal then proceeded to satisfy the "well founded in fact and law" standard in Article 9 of Annex VII by testing the evidence provided by the Philippines and augmenting the record with additional evidence and expert input relevant to questions arising in the merits phase.[17] This is proper considering that Article 5 of Annex VII of the UNCLOS grants the Tribunal full authority to "determine its own procedure, assuring to each party a full opportunity to be heard and to present its case". In relation to this, the Tribunal's own Rules of Procedure gives itself the mandate to "take all appropriate measures in order to establish the facts, including when necessary, the conduct of a visit to the localities to which the case relates".[18]

The steps taken by the Tribunal are briefly described below:

(1) In accordance with Article 24 of the Rules of Procedure[19] of the Tribunal, and after seeking the views of the Parties, the Tribunal retained four independent technical experts to assist it in understanding the technical aspects of the case.

(2) The Tribunal independently obtained documents from the archives of the United Kingdom Hydrographic Office [UKHO], the online database of the Bibliothèque Nationale de France, and from the Archives Nationales d'Outre-Mer. These documents are publicly available and include hydrographic surveys conducted by the Royal Navy of the United Kingdom prior to 1945 as well as similar surveys conducted by the Imperial Japanese Navy a few years later.

One might wonder whether such acts of judicial initiative are common among UNCLOS dispute settlement proceedings involving a non-appearing Party, given the Article 9 obligation to satisfy itself that the appearing Party's claim is "well founded in fact and law". A review of the cases initiated under Part XV show that there has only been one other case of non-appearance—the *Arctic Sunrise Case*. The proceedings before the ITLOS and the Annex VII Arbitral Tribunal were both straightforward evaluations of the submitted evidence, and the tribunals involved did not undertake any proactive fact-finding other than posing clarificatory questions to the Appearing Party.

## III. MANIFESTATIONS OF JUDICIAL INITIATIVE IN THE *SOUTH CHINA SEA ARBITRATION*

The Philippines submitted extensive documentary evidence to support its claims against China. These included historic maps, photographs, remote imaging and

16. *South China Sea Arbitration*, *supra* note 1 at 119.
17. *Ibid*., at 131.
18. "Rules of Procedure of the South China Sea Arbitration" *Permanent Court of Arbitration* (27 August 2013), online: Permanent Court of Arbitration, at art. 22 <https://www.pcacases.com/web/sendAttach/233>.
19. *Ibid*., at art. 24.

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satellite data, and expert reports and analysis. In the light of China's refusal to participate in the proceedings, the Tribunal decided to augment these submissions in order to assure itself that the Philippine claims were "well founded in fact and law". The Tribunal did so in two ways: (1) the appointment of independent experts; and (2) the identification and review of additional historical documents.

## A. *Appointment of Independent Experts*

Article 289 of the UNCLOS specifically provides for the appointment of experts in any dispute involving scientific or technical matters. The Tribunal may make such an appointment *motu proprio*, emphasizing the idea that said expert is independent of either Party and only serves to complement the decision-making ability of the Tribunal. Furthermore, the expert does not exercise judicial powers (i.e. he/she does not have the right to vote on any matter relating to the dispute) under the UNCLOS. His/her role is confined to assisting the sitting judges who have full discretion to use or not use the expert's opinion.

### 1. *Status of features*

The Philippines had asked the Tribunal to determine that the following maritime features were low-tide elevations [LTEs]: Mischief Reef, Second Thomas Shoal, Subi Reef, Gaven Reef, and McKennan Reef (including Hughes Reef). It had also asked the Tribunal to determine that Scarborough Shoal, Johnson Reef, Cuarteron Reef, and Fiery Cross Reef were high-tide features with rocks that remained above water at high tide. The Tribunal decided to examine the status of all ten features in relation to Article 13 and Article 121(1) of the UNCLOS "for the sake of completion and in keeping with its duty under Article 9 of Annex VII and to satisfy itself that the Philippines' Submissions were well-founded in fact".[20]

The Tribunal recognized that many of the features in question had been subjected to such substantial human modification that it was no longer possible to directly observe their original status. It decided to ascertain the status of the features by using the best available evidence of their natural condition prior to modification, and by analyzing, in addition to the Philippines' satellite photographs and chart evidence, all available height datum as well as tidal patterns and ranges in the South China Sea.[21] As such scrutiny necessarily involved the appreciation of highly technical data, the Tribunal retained Mr Grant Boyes, an expert hydrographer, to assist in the difficult task. It should be noted, however, that the final award never mentioned any specific opinion or advice given by Mr Boyes, only noting that the Tribunal sought his assistance in finding that the substantial information on historical and modern observations of tidal ranges in the Spratly Islands all appear to be consistent with each other.[22] Nevertheless, it can be assumed that some degree of consultation happened between the Tribunal and its expert, given the subject matter, the latter's expertise, and his presence at all the

20. *South China Sea Arbitration*, *supra* note 1 at 282.
21. *Ibid.*, at 310–19.
22. *Ibid.*, at 317.

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hearings relating to the merits of the case. To a certain extent, Mr Boyes functioned like the "experts fantômes" of the ICJ in that there was little or no transparency in his contribution and impact on the final outcome.

2. *Damage to the marine environment*

The Philippines alleged that two categories of activities within China's jurisdiction or control had caused significant damage to the fragile marine ecosystem in the South China Sea.[23] The first category pertained to China's toleration, encouragement of, and failure to prevent environmentally destructive fishing and harvesting practices by its nationals in Scarborough Shoal, Second Thomas Shoal, Cuarteron Reef, Fiery Cross Reef, Gaven Reef, Johnson Reef, Hughes Reef, and Subi Reef. It alleged that China's actions under this category violated the "duty to protect and preserve the marine environment" set forth in Articles 192 and 194 of the Convention. The Philippines further complained that China had allowed "its fishermen to harvest coral, giant clams, turtles, sharks and other threatened or endangered species which inhabit the reefs" and "to use dynamite to kill fish and destroy coral, and to use cyanide to harvest live fish". The second category pertained to China's occupation of and construction activities on Mischief Reef, Cuarteron Reef, Fiery Cross Reef, Gaven Reef (North), Johnson Reef, Hughes Reef, and Subi Reef. In support of its claims, the Philippines submitted documentary, videographic, and photographic evidence, as well as three expert reports prepared by Professor Kent E. Carpenter.

The Tribunal decided to seek an independent opinion on the environmental impact of China's activities. It thus appointed three experts in coral reef ecology: Dr Sebastian Ferse, Dr Peter S. Mumby, and Dr Selina Ward. The experts provided the Tribunal with a report entitled "Assessment of the Potential Environmental Consequences of Construction Activities on Seven Reefs in the Spratly Islands in the South China Sea" (the "Ferse Report"). Their report is based on "an independent review of the factual record, scientific literature, and other publicly available documents, including from China".[24] In sharp contrast to its rather ambiguous utilization of Mr Boyes in analyzing the status of disputed maritime features, the Tribunal appears to have relied more heavily on the Ferse Report. This is easily surmised from the Tribunal's repeated references[25] to the Ferse Report in the Award, and in the fact that it even conveyed—via a formal Letter from the Tribunal to the Parties—a clarificatory request[26] from Dr Ferse to one of the experts cited by the Philippines during the hearing on the merits regarding the extent of damage caused by the extraction of giant clams. More importantly, the Tribunal accepted the analyses and conclusions in the Ferse Report with regard to the destructive impact of China's recent construction activities in and around Cuarteron Reef, Fiery Cross Reef, Gaven Reef, Johnson Reef, Hughes Reef, Mischief

23. "Memorial of the Philippines", *Permanent Court of Arbitration* (30 March 2014), online: Permanent Court of Arbitration, at Submission No. 11 and No. 12 <https://files.pca-cpa.org/pcadocs/Memorial%20of%20the%20Philippines%20Volume%20I.pdf>.

24. *South China Sea Arbitration, supra* note 1 at 821.

25. See for example, *ibid.*, at 851, 857, 945, 957, 970, 977, 978–83.

26. *Ibid.*, at 849

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Reef, and Subi Reef. It even adopted a portion of the Ferse Report which unequivocally stated that:

> The effects of these impacts on the reefs, together with altered hydrodynamics and released nutrients, are likely to have wide-ranging and long-lasting ecological consequences for the affected reefs and the wider ecosystem of the Spratly Islands, and possibly beyond. Reefs subjected to direct land reclamation have disappeared entirely. Reefs subjected to dredging in order to create landfill will have lost their complex structure that was built over centuries to millennia. This structure will take decades to centuries to recover. Reefs that did not experience dredging directly but were impacted by the associated sedimentation and nutrient release will likely have experienced severe coral mortality and recovery will take place more slowly than in natural settings, likely taking decades …
>
> China's construction activities have led to reduced productivity and complexity of the affected reefs, with significant reductions of nursery habitat for a number of fish species. Therefore, not only will the reefs affected by construction have a greatly reduced capacity to sustain local fisheries but their ability to help replenish the fisheries of neighboring jurisdictions will also be vastly diminished – at least threefold. The construction activities thus will have a broader impact on the marine ecosystem in and around the South China Sea and on fisheries resources.[27]

Furthermore, a close reading of the Award shows that the Tribunal also gave wholesale credence to the independent experts' point-by-point refutation of China's claims that its construction activities "do not damage the environment on the reefs".[28]

It is thus absolutely clear that the Ferse Report became an indispensable tool for the Tribunal to verify the evidence submitted by the Philippines and its experts, as well as for assessing China's claim that its construction activities "followed a high standard of environmental protection". Despite China's non-appearance in the proceedings, the Tribunal was nonetheless able to conclude with certainty that China's actions breached its obligations under Article 192, Article 194(1), and Article 194(5) of the UNCLOS.

### 3. *Navigational safety*

The Philippines alleged that "China operated its law enforcement vessels in a dangerous manner, causing serious risk of collision to Philippine vessels navigating in the vicinity of Scarborough Shoal".[29] It further alleged that China's actions constituted breaches of its obligations relating to safe navigation under Articles 21 and 94 of the UNCLOS, as well as Rules 2, 6, 7, 8, 15, and 16 of the Convention on the International Regulations for Preventing Collisions at Sea [COLREGS].[30] In support of its allegations, the Philippines provided the Tribunal with a report prepared by its designated expert, Professor Craig H. Allen (the "Allen Report").

27. *Ibid.*, at 978–9.
28. *Ibid.*, at 982.
29. *Ibid.*, at 1059.
30. *Ibid.* Also *Convention on the International Regulations for Preventing Collisions at Sea,* 20 October 1972, 1050 UNTS 16 (entered into force on 15 July 1977) [*COLREGS*].

Given that the issues turned on technical questions of seamanship, the Tribunal engaged Captain Gurpreet S. Singhota to prepare a report to further aid its understanding. After a review of the factual record, Captain Singhota submitted to the Tribunal his report entitled "Report of the International Navigational Safety Expert appointed by the Permanent Court of Arbitration, The Hague, The Netherlands" (the "Singhota Report"), where he agreed with the Philippines that China breached its obligations under the COLREGS. What is interesting is that in deciding the Philippines' claim, the Tribunal appears to have considered both the Allen Report and the Singhota Report in equal measure. In fact, the Award took pains to show that each report corroborated and validated the other's findings. This was the case in at least two points of analysis related to the near-collisions which occurred on 28 April 2012 and 26 May 2012. First, the Tribunal noted that both Professor Allen and Captain Singhota considered the incident to have been China's fault given that its vessel, FLEC 310, passed by the Philippines' BRP Pampanga and BRP Edsa II at close range and at unsafe speeds of 20.3 knots and 20.6 knots, respectively. The Tribunal thus concurred with both experts that the Chinese vessel's actions breached Rule 6 of the COLREGS, the relevant part of which provides that: "Every vessel shall at all times proceed at a safe speed so that she can take proper and effective action to avoid collision and be stopped within a distance appropriate to the prevailing circumstances and conditions."[31] Second, the Tribunal also noted that both experts concluded that the prevailing circumstances and conditions meant that the Chinese vessels should have determined that there was a clear risk of collision under Rule 7 of the COLREGS.[32] They then went on to conclude that, despite the existence of risk, the Chinese vessels did not take any action under Rule 8 of the COLREGS to avoid collision, including passing at a "safe distance".[33] Professor Allen believes that "safe distance" means that the passing distance must "be large enough to leave a margin for error and allow for the unexpected". This was echoed by Captain Singhota, who believes that a "safe distance" must allow for "human error on the bridge and engine or [for] steering gear failure at a critical phase of the maneuver, as well as for any incidental effects of the interaction between passing vessels".[34] Both experts' opinions enabled the Tribunal to conclude that the conduct of the Chinese vessels not only fell far short of the standard of passing at a "safe distance", but also that they made the possibility of collision even more likely.[35]

This approach is a striking departure from the Tribunal's ambiguous use of the independent expert in deciding the status of maritime features, as well as from its heavy reliance on the independent experts' report in deciding that China breached its obligations under the UNCLOS to protect the marine environment. Unlike the Ferse Report, the Tribunal seemed to have considered the Singhota Report persuasive but not necessarily conclusive.

31. *COLREGS, ibid.*, at Rule 6(a).
32. *South China Sea Arbitration, supra* note 1 at 1098.
33. *Ibid.*
34. *Ibid.*, at 1100.
35. *Ibid.*, at 1100–1.

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### B. *Identification and Review of Additional Historical Documents*

In addition to the engagement of Mr Boyes, the Tribunal thought it necessary to locate and review original records based on direct observation of the maritime features before they were subject to significant human modification.[36] It thus decided to consider the archives of the UKHO, which holds the Royal Navy of the United Kingdom's hydrographic survey work of the South China Sea prior to 1945, as well as similar records created by the Imperial Japanese Navy during World War II.[37] The Tribunal also thought it appropriate to consult French documents from the 1930s that it was able to obtain from the Bibliothèque Nationale de France (the National Library of France) and from the Archives Nationales d'Outre-Mer (the National Overseas Archives).[38] It should be emphasized that the Tribunal took pains to ensure that China's procedural due process rights were not violated by the procurement of these additional documents. Not only did it provide the absent Party with sufficient notice via daily hearing transcripts and copies of all evidentiary documents, it also gave China every opportunity to comment, clarify, or refute their contents.[39]

A close reading of the final award reveals just how much the Tribunal relied on the historical documents that it independently sought. In fact, they were either the sole basis or one of the critical proofs for nearly all of the Tribunal's determinations of the status of the disputed maritime features.[40] The Tribunal's rationale for its conclusions was simple: direct, in-person observation (covering an extended period of time across a range of weather and tidal conditions of the disputed features[41]) would be the best way to determine their status. However, such observation is no longer possible given that extensive human modifications have already obscured the original status of the features. Of the available evidence, historical UK and Japanese surveys and sailing directions appeared to be the best substitute for direct, in-person observation. The Tribunal disagreed with the Philippines when the latter said that recourse to such documents was unnecessary since the "consistent depiction of features" in the published charts that it submitted to the Tribunal was already sufficient proof of the status of said features.[42] The Tribunal specifically noted that "in any sensitive determination, it will very often be beneficial to have recourse to original survey data, prepared by individuals with direct experience and knowledge of the area in question".[43] It seemed to be unwilling to simply accept the probative value of the Philippines' chart evidence given that: (1) they were mostly copies of one another, and thus did not add much value as a source of independent confirmation; and (2) they sometimes contained additions or omissions that reflected political considerations rather than a desire to maintain factual accuracy. The Tribunal also refused to give too much credence to satellite

36. *Ibid.*, at 89.
37. *Ibid.*
38. *Ibid.*, at 99
39. *Ibid.*, at 15, 84, 89, 99.
40. *Ibid.*, at 331–81.
41. *Ibid.*, at 321.
42. *Ibid.*, at 331.
43. *Ibid.*

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imagery given the accuracy flaws of the technology. This scepticism, coupled with a commendable effort to go beyond the evidence presented, demonstrates the fundamental fairness of the Tribunal's approach.

## IV. IMPLICATIONS FOR FUTURE UNCLOS DISPUTE SETTLEMENT PROCEEDINGS

Prior to the *South China Sea Arbitration*, international adjudicative bodies have been largely reluctant to exercise their broad fact-finding powers. This case was therefore a stark deviation from this trend. Given the relative novelty of the Tribunal's initiatives, it was interesting to observe the extra care that the judges gave to ensuring the fundamental fairness of the initiatives taken at every turn of the fact-finding process: their every action was documented, rationalized, and open for comment by the Parties. Such procedural meticulousness forestalled any criticism of procedural impropriety. It must be further emphasized that this case is a convergence of two scenarios which, individually or together, will likely happen again in the future: a scenario where one Party refuses to participate in the dispute settlement process, and a scenario where the case requires the consideration of complex scientific or technical questions. Such convergence in the present case meant that the Tribunal had the added burden of ensuring that their final award was sufficiently warranted by the law as well as all available facts, even if it meant going beyond the evidence submitted by the appearing Party. All of these observations taken together mean that the singular importance of the *South China Sea Arbitration* lies in its ability to remind judges of the procedural choices that they can make and the opportunities that are given to them by law when faced with similar circumstances.

Despite the aforementioned conclusions, this Comment is not prepared to advocate on behalf of judicial fact-finding in every dispute settlement proceeding. Such initiatives must be used with prudence, caution, and a keen awareness of the procedural rights of all concerned. An overzealous court or tribunal could potentially assume the *onus probandi* of either of the Parties, giving the appearance of partiality. This Comment argues that judicial fact-finding is appropriate, even necessary, when a Tribunal is faced with circumstances similar to those found in the *South China Sea Arbitration*. In this case, the basic responsibility previously articulated by the ICJ in a number of cases remained the same: that the Party asserting certain facts has the burden of proving it.[44] The Tribunal simply did not confine itself to a consideration of those submitted facts, something that was well within its authority to do.[45] It could even be argued that the Tribunal had the duty under Article 9 of Annex VII to find and consider all relevant facts. In fulfilling its duty, the Tribunal ably demonstrated that it could overcome the adjudicatory challenges inherent to the circumstances of the case.

44. *Military and Paramilitary Cases in and Against Nicargua, supra* note 4 at 101; *Pulp Mills Case, supra* note 9 at 162.

45. See Stefan TALMON and Bing Bing JIA, eds., *The South China Sea Arbitration: A Chinese Perspective* (Portland, OR: Hart Publishing, 2014).