American Society of International Law

2017 ILA-ASIL ASIA-PACIFIC RESEARCH FORUM

The Geopolitics of International Law: Contemporary Challenges for the Asia-Pacific

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Welcome!

Dear Colleagues,

We warmly welcome you to the 2017 International Law Association (ILA) – American Society of International (ASIL) Asia-Pacific Research Forum in Taipei, Taiwan, Republic of China. The theme of the Research Forum is "The Geopolitics of International Law: Contemporary Challenges for the Asia-Pacific."

This Research Forum provides an opportunity for international law stakeholders to explore the full range of international and transnational legal issues concerning the Asia-Pacific region. We hope you will enjoy the intellectual discussions with the distinguished guests and scholars from all over the world. Research Forum papers are available at the official website: http://csil.org.tw/2017-Research-Forum/.

Best Regards,

2017 ILA-ASIL Asia-Pacific Research Forum Organizing Committee

Summary of the Program

Friday, May 19	
18:30-19:00	**Registration (by invitation only)** Conference Room, 14F
19:00-20:30	**Welcome Reception (by invitation only)** Conference Room, 14F
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09:50-10:10	**Coffee Break**
10:10-12:00	**Plenary Session:** *South China Sea Arbitration* Conference Room, 1F
12:00-13:20	**Lunch (by invitation only)** Garden Cafeteria, 1F
13:20-15:00	**Panel A1:** *International Economic Law* Conference Room, 14F
	Panel B1: *Transnational Law* Meeting Room 203, 2F
15:00-15:20	**Coffee Break**
15:20-16:50	**Panel A2:** *International Dispute Settlement* Conference Room, 14F
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18:30-21:00	**Dinner (by invitation only)** Shanghai Pavilion, Shangri-La's Far Eastern Plaza Hotel

Program

2017 ILA-ASIL ASIA-PACIFIC RESEARCH FORUM

The Geopolitics of International Law:
Contemporary Challenges for the Asia-Pacific

May 19-20, 2017

Howard Civil Service International House, Taipei, Taiwan, Republic of China
(公務人力發展中心福華國際文教會館)

Hosted by:
Chinese (Taiwan) Society of International Law -
Chinese (Taiwan) Branch of the International Law Association
(中華民國國際法學會) &
American Society of International Law -
Law in the Pacific Rim Region Interest Group &
Research Center for International Legal Studies, National Chengchi University
(國立政治大學國際事務學院國際法學研究中心) &
Co-sponsored by:
Center for International Law, National Taipei University
(國立臺北大學法律學院國際法學研究中心)

Friday, May 19

18:30-19:00: Registration

19:00-20:30: Welcome Reception (by invitation only)

Conference Room, 14F (貴賓廳)

Hosted by the Ministry of Foreign Affairs, Republic of China

- **His Excellency Mr. Paul Wen-liang Chang** (章文樑政務次長) – Deputy Minister of Foreign Affairs, Republic of China
- **Professor Torsten Stein** – Honorary Treasurer, ILA; President, ILA-German Branch
- **Professor Jae Ho Sung**–President, ILA-Korean Branch
- **Professor Yuka Fukunaga –** Professor, Waseda University; Member, Organizing Committee
- **Professor Nigel N.T. Li** (李念祖理事長) – President, Chinese (Taiwan) Society of International Law

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Saturday, May 20

08:00-12:00: Registration (與會者報到及領取資料)

Conference Room, 1F (前瞻廳)

09:00-09:50: Opening Ceremony

Conference Room, 1F (前瞻廳)

Opening Remarks

- **Professor James Nafziger** – Vice-Chair, ILA
- **Professor Torsten Stein** – Honorary Treasurer, ILA; President, ILA-German Branch
- **Professor Nigel N.T. Li** (李念祖理事長) – President, Chinese (Taiwan) Society of International Law

Welcome Address

- **Former President Ying-jeou Ma** (馬英九前總統) – Former President of the Republic of China; Editor-in-Chief, Chinese (Taiwan) Yearbook of International Law and Affairs

Keynote Address

- **Michael Huang S.C.** – Chief Justice, Dubai International Financial Centre Courts

09:50-10:10: Coffee Break

10:10-12:00: Plenary Session: South China Sea Arbitration

Conference Room, 1F (前瞻廳)

- **Kuan-Hsiung Wang** (王冠雄) – Professor, National Taiwan Normal University – *From Dangerous Ground to Safe Playground: A Revisit to Fishery Cooperation in the South China Sea*
- **Alina Miron** – Professor, Angers University, France – *State Responsibility for Unilateral Activities of Un-Delimited Maritime Areas*
- **Lan-Anh T. Nguyen** – Vice Dean, Diplomatic Academy of Vietnam – *The 12th July Award on Historic Title, Historic Rights and Impacts on State Practices in the South China Sea*
- **Yen-Chiang Chang** (張晏瑲) – Research Fellow, Research Center for International Legal Studies, National Chengchi University – *China's Non-Appearance Approach toward the South China Sea Arbitration*

- *Moderator*: **Fredrick F. Chien** (錢復) – Member of the Executive Committee, Chinese (Taiwan) Society of International Law

12:00-13:20: Lunch (by invitation only),

Garden Cafeteria, 1F (恬園餐廳)

(2 *Parallel Sessions: Panels A and B*)

13:20-15:00: Panel A1 – International Economic Law (Conference Room, 14F)

- **Giovanni Di Lieto** – Lecturer, Monash University – *The Normative Evolution of Multilateral Trade in Services from GATS to TiSA: Should Asia-Pacific Countries Follow the EU?*
- **Gu Weixia** – Associate Professor, University of Hong Kong – *The China-Asia "One Belt, One Road", Geolegal Considerations and International Commercial Arbitration*
- **Horia Ciurtin** – Research Fellow, European Federation for Investment Law and Arbitration – *The Floating Island: A Post-Westphalian Enquiry upon Taiwan's Sovereignty Dilemma (And Its Investment Treaty Bypass)*
- **Alexandr Svetlicinii** – Assistant Professor, Faculty of Law, University of Macau – *Emergency Arbitration in the Investor-State Dispute Settlement Cases: Challenges and Perspectives for the Asia-Pacific*
- **I-Ju Chen** (陳逸如) – Ph.D. Candidate, University of Birmingham – *The Necessity of Establishing Regional Environmental Governance through a Regional Trade Agreement in the Asia-Pacific – Why and How?*

- *Moderator*: **Blake C.Y. Wang** (王震宇) – Professor & Director, Center for International Law, National Taipei University

Concurrent with

13:20-15:00: Panel B1 – Transnational Law (Meeting Room 203, 2F)

- **Władysław Czapliński** – Professor, Polish Academy of Sciences – *State Responsibility for Unlawful Recognition*
- **Yasue Mochizuki** – Professor, Kwansei Gakuin University – *Transitional Justice in the Asia-Pacific*

Region: Development of International Law or Political Bargaining?

- **Phil C.W. Chan** – Senior Lecturer, Macquarie Law School – *Resolving Frozen Conflict across the Taiwan Strait through International Law*
- **Pei-Lun Tsai** (蔡沛倫) – Adjunct Assistant Professor, National Chengchi University – *Protection of Refugee Children in the Asia-Pacific: Challenges and Opportunities*
- **Agata Kleczkowska** – Ph.D. Candidate, Polish Academy of Sciences – *Recognition of Governments by International Organization?: The Example of the UN General Assembly and Asian States*

- *Moderator*: **Bernard Y. Kao** (高玉泉) – Professor, National Chung Hsing University

15:00-15:20: Coffee Break

(2 *Parallel Sessions: Panels A and B*)

15:20-16:50: Panel A2 – International Dispute Settlement
(Conference Room, 14F)

- **Kentaro Nishimoto** – Associate Professor, Tohoku University – *The Implications of the South China Sea Award for Third Parties*
- **Brian McGarry** – Researcher, Geneva Center for International Dispute Settlement – *Third Parties and Insular Features After the South China Sea Arbitration*
- **Lorenz Langer** – Lecturer, University of Zurich – *The South China Sea: A Challenge to International Law and to International Legal Scholarship*
- **Chien-Huei Wu** (吳建輝) – Associate Research Professor, Academia Sinica, Taiwan – *US-China Rivalry in the WTO and Trade-Related Activities*
- **Wim Chien-Liang Muller** – Lecturer, Maastricht University – *China's Challenge to International*

Dispute Settlement: Looking beyond the WTO and the South China Sea Arbitration

- *Moderator*: **Yuka Fukunaga** – Professor, Waseda University; Member, Organizing Committee

Concurrent with

15:20-16:50: Panel B2 – Law of the Sea (Meeting Room 203, 2F)

- **Hyun-Jin Park** –Senior Research Fellow, Yonsei University, Republic of Korea – *The Korean-Japanese Exchange of Notes Verbales (1952~1965) relating to the Dokdo Question*
- **Dai Tamada** – Professor, Kobe University – *Possibility to Exclude the Award of the South China Sea Case by an Agreement between Philippines and PRC*
- **Chen-Ju Chen** (陳貞如) – Associate Professor, National Chengchi University – *The Possible Means of Taiwan to Respond to the South China Sea Arbitral Award's Decision on the Legal Status of the Itu Aba (Taiping) Island*
- **Benoit Mayer** – Assistant Professor, Chinese University of Hong Kong – *Pollution of the Marine Environment in the South China Sea Arbitration: Just a Footnote?*

- *Moderator*: **Yann-huei Song** (宋燕輝) – Research Fellow, Academia Sinica, Taiwan

16:50-17:00: Closing Ceremony (Conference Room, 14F)

- **Professor Władysław Czapliński –** Member of the Advisory Board, Chinese (Taiwan) Yearbook of International Law and Affairs
- **Professor Pasha Hsieh** (謝笠天) – Associate Professor, Singapore Management University; Co-Chair, ASIL Law in the Pacific Rim Region Interest Group

- **Professor Blake C.Y. Wang** (王震宇) – Professor & Director, Center for International Law, National Taipei University
- **Professor Bernard Y. Kao** (高玉泉) – Secretary-General, Chinese (Taiwan) Society of International Law

18:30-21:00: Dinner (by invitation only)

Shanghai Pavilion, Shangri-La's Far Eastern Plaza Hotel

(臺北香格里拉遠東國際大飯店上海醉月樓)

Panel Abstracts

Plenary Session

10:00-12:00: South China Sea Arbitration

Moderator: *Fredrick F. Chien*

From Dangerous Ground to Safe Playground: A Revisit to Fishery Cooperation in the South China Sea – *Kuan-Hsiung Wang*

The South China Sea dispute is complicated in terms of its nature, which comprises sovereignty issues of the islands; maritime delimitation issues; resources utilization issues, including living and non-living resources; as well as non-traditional security issues, such as sea lane communication security. In order to solve the dispute, co-operation is one of the main considerations mentioned and proposed by the related Parties. However, the practice has not been realized.

This paper suggests that the establishment of co-operation mechanism on conserving and managing fishery resources could be treated as a starting point. From this, the related Parties might build up confidence for further co-operation or friendly interaction in other feasible fields. It also suggests that, for a well-organized mechanism to conserve and manage the living resources in the South China Sea, a regional co-operation among related parties and the contributions made by regional fisheries management organization is necessary. Furthermore, such model could be contributed towards the resolution of the disputes in the South China Sea and make this region from traditional "dangerous ground" to a "safe playground".

State Responsibility for Unilateral Activities of Un-Delimited Maritime Areas – *Alina Miron*

The *Why* of the Study?

This study rests upon 4 empiric observations:

- increasing competition for maritime resources, including fisheries, oil

and gas resources;
- a great number of maritime boundaries remaining unsettled;
- the increasing concerns to which unilateral activities in undelimited maritime areas have recently given birth;
- the recent judicial decisions (*Guyana v. Suriname arbitration*; *Nicaragua v. Colombia*, *Côte d'Ivoire v. Ghana*, *Philippines v. China*) which raise more questions than they provide for answers insofar the lawfulness of unilateral activities is concerned.

The *What* of the Study

States have engaged in unilateral activities in areas upon which another State had entitlements (the undelimited maritime areas) Are these activities unlawful under general international law (customary and UNCLOS)?

There is much ambiguity about the regime of economic activities in undelimited maritime areas. Customary law (if any…) gave rise to contradictory interpretations. There are also very few provisions of UNCLOS which relate to the rights and obligations of States with overlapping claims pending delimitation. Thus, one needs first to identify the primary obligations of States in relation to undelimited maritime areas before analysing whether unilateral activities may constitute breaches of international obligations.

Primary rules

Respect for territorial sovereignty and sovereign rights: does this principle as old as international law apply only after delimitation is definitely established or could it apply retroactively?

UNCLOS Rules: Articles 74 and 83 of UNCLOS provide for an obligation to negotiate a maritime boundary in good faith. Paragraph 3 insists that "Pending agreement […], the States concerned, in a spirit of understanding and cooperation, shall make every effort … not to jeopardize or hamper the reaching of the final agreement". To what extent could it be argued that this obligation requires States to abstain from any unilateral acts in the disputed area? Could unilateral activities by their nature hamper the reaching of a final agreement?

Paragraph 3 of Articles 74 and 83 of UNCLOS also requires from States to "make every effort to enter into provisional arrangements of a practical nature". Can this be interpreted as a ban on unilateral activities?

Secondary rules

To what extent the violations of the primary obligations referred to above could engage the responsibility of a State for unlawful activities? Responsibility for the violations of sovereign rights was not easily accepted by courts (see ICJ's reluctance in *Cameroun v. Nigeria* and *Nicaragua v. Colombia 2012*). However, in the recent case *Costa Rica v. Nicaragua*, the Court accepted Costa Rica's claim for compensation for unlawful dredging in disputed area. Could this decision constitute a lighthouse for cases relating to maritime disputed areas? What are the forms of reparations conceivable for the violations of the essentially soft law obligations in 3 of Articles 74 and 83?

Background interrogations

Is there necessary to make a distinction between sovereign rights relating to continental shelf and those relating to the EEZ? Because of their non-renewable character, activities on the continental shelf have an irreversible impact on the rights at stake. Moreover, CS rights are inherent, where EEZ must be proclaimed.

The 12th July Award on Historic Title, Historic Rights and Impacts on State Practices in the South China Sea – *Lan-Anh T. Nguyen*

The South China Sea Arbitration (Philippines v.China) established under Annex VII to the 1982 Unitited Nation Convention on the Law of the Sea (UNCLOS) unanimously delivered its two awards, Award on Jurisdiction and Admisibility on 29 October 2015 and Award on Merits on 12 July 2016. In more than 700 pages, the Arbitral Tribunal comprehensively and decisively addressed some legal aspects of the South China Sea disputes, including the legality of the nine-dash line claim of China, the legal regime of maritime features of the Spratlys and some activities conducted by China in the South China Sea. In its legal reasoning, the Tribunal also made an attemp to clarify some ambiguities of UNCLOS. The awards, therefore, not only have binding effects upon the parties to this case, but also help

guide and shape other state practices, particulary those in the region. This article will focus on examining the conclusions of the awards on the nine-dash line and the related legal concepts of histroric titles and historic rights. It will also explore the impacts of the Tribunal conclusion on historic titles and historic rights on state practices in the South China Sea. The main purpose of the article is to analyse the posivite contributions of the awards to regional dispute managment and where it might have fallen short in that respect. Accordingly, the analysis focuses on the consistent application of international law of the awards in comparison to other jurisprudences, relevant treaties and customary international law. In the analysis, desired adjustments in legal positions and regional state practices to show good-faith compliance with international law and to strengthen the regional rule-based order are also highlighted.

China's Non-Appearance Approach toward the South China Sea Arbitration – *Yen-Chiang Chang*

This paper aims to assess China's non-participation approach toward the *South China Sea Arbitration*. The paper commences by discussing non-participation and its manifestation. The issues regarding the legal nature, the reasons and the consequences for non-participation are also considered. This paper concludes that there are obvious connections between non-participation and non-compliance. There are ways to mitigate the negative effects of non-participation through informal communication and informal appearance from the non-participating State.

Parallel Sessions

13:20-15:00: Panel A1 – International Economic Law

Moderator: *Blake C.Y. Wang*

The Normative Evolution of Multilateral Trade in Services from GATS to TiSA: Should Asia-Pacific Countries Follow the EU? – *Giovanni Di Lieto*

The global development of digital technologies and the rise of liberalisation policies in the public services sector is increasingly blurring the boundaries between public/private and local/foreign services. This dynamic surely complicates the interpretation and application of international trading rules. As the WTO member states have not agreed on an exhaustive list of sectors to be covered under the General Agreement on Trade in Services (GATS), economic integration in the emerging services sectors lags behind the global needs of corporate supply chains. Unsurprisingly, Australia, Taiwan and other service-oriented economies in the Asia-Pacific region are moving away from the sluggish WTO system to seek further avenues of trade liberalisation at the mega-regional level, in particular through the Trade in Services Agreement (TiSA) proposed by the European Union (EU). However, adding yet another regulatory layer to the intricate framework of global trade in services may have the unintended consequence to encumber the economic integration process of the Asia-Pacific region. This paper investigates the normative implications of the TiSA for service-oriented Asia-Pacific economies in the wake of uncertain geopolitical dynamics attached to the proposed Regional Comprehensive Economic Partnership (RCEP), and Trans-Pacific Partnership (TPP) Agreement. Ultimately, this study seeks to assess whether the more developed countries of the Asia-pacific region such as Australia and Taiwan should either embrace the EU-inspired framework of trade in services, insist on the existing WTO-GATS system, or circumscribe their services trade regulation efforts within legal environments of regional economic integration, such the ASEAN Economic Community (AEC), and the proposed Free Trade Area of the Asia-Pacific (FTAAP)

The China-Asia "One Belt, One Road", Geolegal Considerations and International Commercial Arbitration – *Gu Weixia*

The past decade indicates a trend towards "delocalization" of arbitration laws in Asia where legislative reforms on basis of the UNCITRAL Model Law and New York Convention has been prevailing in most of the Asian jurisdictions. China's "One Belt, One Road" (OBOR) development initiative concerns her outbound investment strategy and aims to bolster regional economic connectivity along the historical Silk Road, particularly West, Central and Southeast Asia. In light of the large volumes of cross-border investment disputes involved, international commercial arbitration

is anticipated to be the popular dispute resolution means to tradeoff the uncertainties of different legal and judicial systems. Within the context, it is perceived that the OBOR initiative actually provides the incentive and cause to contemplate the possibility of a regional or "geo-legal" harmonization of cross-border arbitral enforcement in Asia, against the prevalence of harmonization of arbitration laws in Asia. While the presence of different legal systems and cultures in Asia offers formidable challenges, harmonization would yield greater benefits in trade and investment interests both with respect to China and extending to Asia alongside the OBOR jurisdictions.

This paper is structured as follows. Following the Introduction, Part II examines the indeterminacy created by the "public policy" exception under Article V2(b) of the New York Convention in cross-border arbitral enforcement, before turning to the theoretical underpinnings for the advancement of a "delocalization" approach to the development of international commercial arbitration. Macdonald's "Three Metaphors of Norm Migration" then forms the normative basis for advancing a need for "true harmonization" of norms within a delocalized international commercial arbitration system in Asia. Part III then explores the prospects of China's OBOR development initiative as forming a structural foundation for promoting a regional or "geo-legal" harmonization of the "public policy" exception and cross-border arbitral enforcement across Asia's "Belt and Road" nations, in light of these nations' common interests for economic integration and the importance that arbitration is expected to play in cross-border dispute resolution. The harmonization efforts on "public policy" exception of the European Union ("EU") and the Organization for the Harmonization of African Business Law ("OHADA") are considered as comparative case studies. In Part IV, the far-reaching implications of China's OBOR initiative within the international arbitration system and the wider global economic order will be considered. In particular, the changing power dynamics of the Asian region in China's economic "rise" and her OBOR strategy regarding soft power exportation in geolegal dimensions will be analyzed as forming the catalyst for a more integrated system of international commercial arbitration in Asia. Finally, Part V presents the Conclusion.

The Floating Island: A Post-Westphalian Enquiry upon Taiwan's Sovereignty Dilemma (And Its Investment Treaty Bypass) – *Horia Ciurtin*

Geo-Economic Prolegomena. (Para)military and religious conflicts, civilizational divides and post-sovereign deviations, economic breakdowns and financial crises. The entire attention of the great "global village" – confidently proclaimed by the late modernity – seems to be concentrated upon all these centrifugal dynamics, passing from one to another at a turbulent pace. None of the privileged subjects – be it the Syrian civil war, the secession of Donbas or the seemingly unavoidable breakdown in the South China Sea – manages, however, to persist in more than a few subsequent issues of relevant publications.

On the other hand, the apparent marginality of centripetal phenomena indicates their permanence, the possibility to discern – beyond the parade of endless crises – a re-structuring global interaction. Just when the world seems to collapse into sectarian dialectics and announces the death of any ordering narratives, opposite and simultaneous forces seem to lead to a new type of system. Beyond unipolarity and post-historical triumphalism in the vein of Fukuyama, but also beyond the image of a *bellum omnium contra omnes* a la Hobbes, new political and legal macro-spaces are created. A multipolar world constituted by sovereigns, non-sovereigns and supra-sovereigns appears to be generated, surpassing both the utopian universalism of the Enlightenment and the devouring dystopia of generalized civil war.

In this re-ordered dynamic of international law, various phenomena can be observed. Among them, a re-partition of international trade which also appears a re-localization and internal cohesion-building of distinct spaces, governed by specific rules and predictable interactions. By comprehensive trade and investment treaties, the sovereignty of members is not blurred, but rather valorised in a distinct manner, new normative "empires" arising through the cold letter of the law. The sovereignty of each retreats in order for a common goal of the signatories to be better projected in the race for global economic hegemony.

Taiwan in the (Economic) World Order. In such a different setting, even the Westphalian narrative appears to be displaced and eroded. A static

order of exclusive – but exhaustive – sovereignties upon strictly defined territories no longer paints an accurate picture. Rather, the dynamics of shape-shifting polities allows new interaction modes to emerge, creating a new space for (post)sovereign relations. Legal macro-spaces (such as the EU or the Eurasian Union), secessionist territories (such as Kosovo or Palestine), non-state actors make their presence felt in the international agora, not only as passive objects, but also as rule-making actors.

On this background, Taiwan and its shared claim to (legal) sovereignty upon a territory it no longer politically controls (mainland China) appear at the forefront of dismantling the rigid Westphalian arrangement. Moreover, the internal-constitutional dimension is reflected by an increasing assertiveness in the international realm, showing – once more – that "recognition" (and its artificial character) is not truly a *sine qua non* condition for emerging as an actor on the global arena.

Going beyond the traditional legal categories, Taiwan proved it can bypass such limitations and innovate this field as a major trend-setter. More precisely, a close look at Taiwan's nexus of investment treaty is revealing: 23 signed BITs (some of them with countries that do not offer it international recognition), 5 signed ample economic cooperation agreements with related investment provisions. Such an expanding treaty presence bears witness that the concept of international recognition (and subsequent diplomatic relations) does not directly determine the capacity and willingness of states to legally and economically interact.

In this sense, non-diplomatic (but formal) relations might be taken even a step forward as Taiwan grows nearer to concluding agreements with another post-sovereign entity, the European Union. This major global actor could open up the scene for a multi-tier dynamics where some of its constituent member-states are rigidly against any connection with Taiwan, but will be bound to it by virtue of their membership to the EU.

Such legal (and geopolitical) paradoxes cannot be solved by using the established instruments of international law, but need to develop a new theoretical framework for arriving at the right solutions. Of course, as in any case, the right answers can only be found when asking the right questions. And the row of necessary interrogations cannot commence with anything else than a discussion about (overcoming) sovereignty.

Emergency Arbitration in the Investor-State Dispute Settlement Cases: Challenges and Perspectives for the Asia-Pacific – *Alexandr Svetlicinii*

During the past decade Asian jurisdictions have been actively developing their network of bilateral investment treaties (BITs) and free trade agreements (FTAs). The most notable examples include the ASEAN Comprehensive Investment Agreement, China-Japan-Korea Trilateral Investment Agreement and the investment chapter of the Trans-Pacific Partnership (most recently being challenged by the revived negotiations of the Regional Comprehensive Economic Partnership). In terms of the investor-state dispute settlement (ISDS) the above mentioned BITs and FTAs, for the most part, refer to the institutional (ICSID or other arbitration institutions) or ad hoc (UNCITRAL Rules) arbitration.

As a result, the Asian arbitration institutions experience growing demand for adequate procedures and standards that meet the requirements of the ISDS. The emergency arbitration has become one of such requirements as the parties often experience the urgent need of interim relief that precedes the constitution of the arbitral tribunal and commencement of the regular arbitration proceedings. In order to meet this demand Asian arbitration institutions such as Singapore International Arbitration Centre, Hong Kong International Arbitration Centre, Kuala Lumpur Regional Centre for Arbitration, China International Economic and Trade Arbitration Commission, Japan Commercial Arbitration Association, Korea Commercial Arbitration Board have introduced emergency arbitration procedures that provide for urgent interim relief prior to or concurrent with the commencement of arbitration, including ISDS cases. While the specified institutions have already accumulated certain experience in applying emergency arbitration in commercial cases, the first ISDS cases under Asian BITs/FTAs are expected in the near future.

The proposed paper provides a critical assessment of the emergency arbitration rules adopted by the leading Asian arbitration institutions with particular focus on their suitability for ISDS cases, including the timing, applicability of the "cooling-off clauses" under the relevant BITs/FTAs, substantive criteria for granting interim relief, and the enforceability of the emergency arbitration orders/awards. The research builds on the original study of the first emergency arbitration awards rendered in ISDS cases in

2015-2016. It reveals a number of problematic issues related to the emergency arbitration in ISDS cases, which require further reform of the emergency arbitration rules by the respective Asian arbitration institutions, as well as poses substantial challenges for the legal representation of the states in ISDS cases.

The Necessity of Establishing Regional Environmental Governance through a Regional Trade Agreement in the Asia-Pacific – Why and How? – *I-Ju Chen*

It has been recognised that regional environmental governance is essential for dealing with transboundary environmental harm. In the Asia--Pacific, it is necessary to establish such a regional environmental governance. The reasons underlying this necessity are the diverse economic development of countries in the region and the countries' unequal standards of environmental law and regulations. Furthermore, there is an increased tension between the countries while dealing with transboundary environmental problems. These phenomena resulted in the complexity in establishing regional environmental governance in the Asia--Pacific.

The Asia Pacific Economic Cooperation (APEC) is the current regional institution in the Asia--Pacific rim. APEC operates based on an open regionalism – a voluntary scheme of the member economies -- which means that APEC's policy has no legally binding effect on the member economies. This caused obstacles of implementation in sensitive areas of environmental protection and public health owning to the complicated geopolitics and political economy. Nevertheless, the most recent development is the Trans--Pacific Partnership Agreement (TPP), which has been led by the US since 2008 and signed on 6 February 2016. Irrespective of the TPP's uncertain future arising from the new US Trump Government since January 2017 at the time of drafting this article, the TPP is still significant because of its unprecedented chapters as opposed to the existing preferential trade agreements in the region.

TPP's environmental chapter particularly becomes an advanced regional environmental governance in the Asia--Pacific. It covers and reflects the obligation derived from multilateral environmental agreements. Additionally, it provides original policies that aim to protect the oceans by a free trade agreement. There is an environmental dispute settlement

mechanism in the chapter. Despite these merits of the TPP's environmental chapter, its negotiation process has been criticised by environmental groups as a fast track without any transparency and sufficient environmental consideration. Another criticism concerns the effective enforcement or avoidance of curbing the rampant and widely--documented environmental violations. Finally, a lack of the climate change legal regime exists, which does not reflect the coherence with the trend of global warming amelioration.

This article aims to assess the necessity of regional environmental governance by way of creating a regional trade agreement in the Asia--Pacific. The first section in this article demonstrates the background of the interface between trade and environmental law and policies in the Asia--Pacific. The second section analyses the operation of the APEC in view of its degree of protecting the environment. The third section evaluates why the environmental chapter in the TPP appears to be an advanced regional environmental governance as opposed to the current APEC. However, several criticisms focus on the issues that did not consider effective implementation or enforcement of environmental protection. Finally, the author addresses the concluding remarks concerning the contemporary challenges and opportunities in trade and environmental law, policies and the governance in the Asia--Pacific.

13:20-15:00: Panel B1 – Transnational Law

Moderator: *Bernard Y. Kao*

State Responsibility for Unlawful Recognition – *Władysław Czapliński*

Articles on state responsibility, as confirmed by the UNGA resolution 56/83 of 12 December 2001, are universally accepted by the international community as a codification of customary law. According to the articles, there are two preconditions of international responsibility: a violation of an international obligation incumbent upon the state and an attribution of a specific action/omission to the state. The former condition is preliminary – one has to start with establishing whether the state did not meet its international obligation. This applies also to a recognition. The latter

condition will automatically be fulfilled in case of unlawful recognition, as the recognition is always granted by a state agency empowered to act on behalf of the state.

A possible unlawfulness of the recognition requires a detailed analysis. It seems that from a point of view of the recognizing state the recognition would always be lawful, as the states do not recognize entities that do not meet criteria of statehood. There is no agency nor international organ that could declare in a binding way that the recognition by the specific state would be unlawful. The situation changes if the ban on recognition is proclaimed by an international organization, in particular the UNSC or a regional organization. However, in such cases the responsibility will be connected with a violation of the obligation towards the organization concerned than with the recognition.

Transitional Justice in the Asia-Pacific Region: Development of International Law or Political Bargaining? – *Yasue Mochizuki*

This presentation aims at identifying the roles of transitional justice mechanisms in the Asia-Pacific and their functions in the development of international law. Seeking for justice in a transitional period becomes a universal criterion whereas it should be analyzed whether and to what extent such efforts serve to the evolution of universal norms which would be applied and incorporated into domestic laws in countries in a transitional period. As the Asia-Pacific enjoys diverse experiences in justice seeking efforts, it is worth exploring the purposes and functions of each justice mechanism in countries in the region and to examine the achievements as well as challenges these mechanisms encounter to seek for justice.

First, the paper overviews the current trend of transitional justice, i.e. complex set of mechanisms at international, domestic and local levels, with varieties of elements such as impunity, truth-seeking and reparations. It then looks into justice mechanisms established in countries in the Asia-Pacific, such as Sri Lanka, South Korea, East Timor and Cambodia. It studies features of these mechanisms and to explore to what extent these mechanisms seeks for justice and serve to the development of international law. The paper further looks into some reflections of experiences of the Asia-Pacific into international community; whether they are unique in the

region or whether they strengthen the universal trend and value of justice seeking. Whereas transitional justice is a global phenomenon, its mechanisms and functions would reflect unique situations in a country, which may either contribute to the development of international legal norms or undermine it. This paper argues whereas justice seeking mechanisms are useful tools in evolving international norms on the one hand, they may undermine the norms on the other hand if they are employed as a political bargaining.

Resolving Frozen Conflict across the Taiwan Strait through International Law – *Phil C.W. Chan*

China's rise continues to fuel apprehension as to how it might seek to bypass the legal and political rules of international order to pursue military, economic and cultural power and reflect its superpower status. The extent of assertiveness that China has displayed in pushing its claims and control over certain areas of the East China Sea and the South China Sea, together with its insistence that it would not entertain international adjudication over its territorial and maritime claims, has reinvigorated the notion of a "China threat" to regional and international peace and security. Submerged in the currents of these troubled waters, the Taiwan question continues to be unresolved.

Although commonly associated with Hong Kong and Macau, the system of "one country, two systems" special administrative regions was in fact intended for Taiwan's reunification with China. For the People's Republic of China government, reunification with Taiwan, "[t]he most concrete marker of sovereignty for China today", is central to China's state identity and is non-negotiable. Lowell Dittmer argues that "China's unfulfilled quest for identity is of paramount importance in stimulating Chinese nationalism, which has become the regime's main legitimating ideology since the collapse of communism as a plausible candidate for international leadership in 1989–1991. And national division, of which Taiwan is the sole remaining exemplar, is of course the missing piece in the nationalist parade."

When Ma Ying-jeou, who was in favour of maintaining dialogues with the People's Republic of China government, was elected President of the Republic of China (Taiwan) in May 2008, relations across the Taiwan

Strait improved and prospered. Dialogues between the two governments, through the Association for Relations across the Taiwan Straits (representing the People's Republic of China government) and the Straits Exchange Foundation (representing the authorities on Taiwan), aborted in 1999 when Lee Teng-hui, then President of Taiwan, advocated a theory of two states in cross-Strait relations, resumed in June 2008. However, since Ma was succeeded by Tsai Ing-wen in May 2016, cross-Strait relations have markedly deteriorated. The election of Donald Trump to the United States presidency and his subsequent actions and rhetoric in relation to China and Taiwan have heightened concerns that the "frozen conflict" between China and Taiwan since the end of the Chinese civil war in 1949 might rapidly metamorphose into a full-blown conflict that has ramifications not only across the Taiwan Strait but also for the maintenance of international peace and security.

In this paper, I first explore the concept of "frozen conflict" and its nature and implications in international law, through various instances of its manifestations notably in Eastern Europe and the Caucasus following the disintegration of the Soviet Union. I then explain how the continuing impasse surrounding the legal status of Taiwan could be understood as a "frozen conflict", and how it could be resolved with the aid of international law.

Protection of Refugee Children in the Asia-Pacific: Challenges and Opportunities – *Pei-Lun Tsai*

Refugees are by definition individuals in need of protection, and refugee children are at times the most vulnerable group among them. Various reports by international actors, including the United Nations High Commissioner for Refugees, document the suffering of refugee children, including separation from families, isolation from communities of the receiving States, physical injuries, emotional distress, detention, exploitation, want of education and leisure, and the lack of identity documents and birth registration, etc. While the focus of the international community has been the European migrant crisis over the past couple of years, the situation in the Asia Pacific receive relatively little attention.

This paper seeks to explore the law and practice concerning refugee children in the Asia-Pacific region. Following an introduction, the paper

would first address the relationship between States in this region and the international legal regime concerning refugee protection. Issues concerning the participation in international legal instruments concerning refugees and cooperation with international organisations/mechanisms would be discussed. Many States in the region have not become parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol. Reasons behind non-participation merit further consideration, and it is also important to observe the practice of these non-member States and the role of international human rights instruments in this regard.

The paper would then turn to the challenges faced by refugee children, with emphasis on those especially affecting refugee children in the region. It is envisaged that those challenges would need to be tackled by multi-level efforts. In addition to the work carried out by international organisations, the paper would explore the contributions of regional organisations/mechanisms, including the Association of South East Asian Nations, Asian African Legal Consultative Organisation, and the Comprehensive Plan of Action for Indo-Chinese Refugees, etc. Based on the analyses of relevant law and practice in the region, the paper aims to conclude by identifying the common characteristics of the attitudes and policies of Asia-Pacific States towards refugee children, and proposing opportunities for future contributions by States in cooperation with international and regional actors for the purpose of advancing the protection of refugee children.

Recognition of Governments by International Organization?: The Example of the UN General Assembly and Asian States – *Agata Kleczkowska*

The procedure connected with the acceptance of credentials of representatives of the UN Member States by the UN General Assembly (UN GA) was drafted as the purely technical proceeding. Thus, this procedure should not affect the membership in the UN, since if a State is the UN Member, and no procedure leading to suspension of the membership was initiated under the Charter rules, a State has the full right to participate in the works of the Organization. Nevertheless, the credentials procedure was used by the UN GA a few times in its history in order to express its acceptance to one government and deny it to another. The aim of the paper will be to analyze this issue, as well as to answer the

question whether the credentials could potentially serve as a tool to recognize governments by the UN. These examinations will be carried out using two examples of the Asian States: the Republic of China (Taiwan) and Cambodia.

When it comes to Taiwan, in November 1949, the communist government from Pekin demanded the United Nations to deprive the Chinese national government of a right to represent Chinese people in the Organization. Even though the problem was debated in the UN GA as the credentials issue, the question of the representation was voted under Article 18 of the UN Charter, so using the procedure drafted for decisions on important questions. Ultimately, in a Resolution 2758 (XXVI), the UN GA decided to grant all rights connected with the Chinese membership to the People's Republic of China.

In case of Democratic Kampuchea (name of Cambodia under the Pol Pot regime), after the initial border clashes, Vietnam started the full scale invasion on December 25, 1978, and after the Vietnamese army reached Phnom Penh, on January 9, 1979, the Kampuchea People's Republic was proclaimed. The new government, created by the United Front for the National Salvation of Kampuchea, claimed to be the only rightful representation of Cambodia. However, the UN GA Credentials Committee decided to accept the credentials submitted by the representatives of the Democratic Kampuchea, and this decision was subsequently approved by the UN GA.

These two examples lead to the following conclusions: first of all, the credentials procedure may serve as a tool of recognition of governments by the United Nations; however, only the UN GA uses this tool. Secondly, recognition is a political act, no matter if made by States or international organizations. Thirdly, it can be questioned if the UN GA, in its decisions on credentials, acted in compliance with the purposes and principles of the UN Charter, if it decided to 'recognize' the regimes which acted in breach of human rights and right to self-determination of peoples. Finally, they show that the UN GA is willing to take on much more active role that the one which was attributed to this organ under the UN Charter, sometimes even abusing its competences.

15:20-16:50: Panel A2 – International Dispute Settlement

Moderator: *Yuka Fukunaga*

The Implications of the South China Sea Award for Third Parties – *Kentaro Nishimoto*

The South China Sea (SCS) case has attracted attention as a landmark decision towards the resolution of the SCS dispute. The Tribunal's Award is only binding on the parties to the proceedings in the particular case, and the direct consequences of the Award will be on the Philippines and the People's Republic of China (PRC). However, considering the complex and multi-party nature of the SCS dispute, it is also important to discuss the implications of the Award for third parties, especially, but not limited to, the coastal States of the SCS. The paper will therefore discuss the implications of the Award for third parties.

The obvious implication for third parties is that its findings may eventually come to be seen as authoritative interpretation of the law. From this viewpoint, the implications of the Award will be explored with respect to three aspects of the Award: the validity of PRC's claims to historic rights within the nine-dash lines, the legal status of maritime features, and the legality of PRC's actions in the SCS.

The first two aspects of the Award relate to title to maritime areas, which is capable of objective determination. However, the determination by the Tribunal is not binding on third parties. This creates difficulties where a third party does not agree with the Award, and especially when that State has a claim in the SCS. It will be pointed out that the Award has complex implications in this regard, since the Award may be regarded as an ambitious attempt to interpret the much-contested Article 121. Although State practice in reaction to the Award may eventually point to an alternative interpretation, the persuasiveness of third parties adopting such interpretation will be undermined vis-à-vis the parties to the proceedings.

The Award also decided on the legality of PRC's actions in the SCS. Although the conclusion of the Award was clear, it will be argued that the Tribunal missed an opportunity to clarify rules and standards concerning the legality of the activities. A salient feature of the Award on the legality

of PRC's actions is the fact-intensive manner in which it made its decisions. A well-reasoned discussion of, for example, the circumstances in which land reclamation activities would constitute a violation of UNCLOS, and how COLREG rules apply to law enforcement vessels would have provided valuable guidance for future conduct of parties in the SCS. However, the Tribunal narrowly confined its decision on the facts of the case, reducing its value as guidance for third-parties.

In conclusion, it is argued that the Award offers an important basis towards the resolution of the overall SCS dispute. However, the implications on third parties vary depending on the reasoning of the Award on a particular issue, and on how such reasoning is received in the international society.

Third Parties and Insular Features after the South China Sea Arbitration – *Brian McGarry*

The aspect of the Final Award in the South China Sea arbitration that has garnered the greatest surprise may be the conclusion that Taiping Island, the largest feature in the Nansha archipelago, does not generate "island" entitlements under UNCLOS Article 121(3). However, insufficient attention has been paid to certain broader questions raised by the ROC's effective control over Taiping Island and disputed status vis-à-vis the PRC. This year's ILA-ASIL Asia-Pacific Research Forum is an ideal venue for exploring these questions, which require comparative legal analysis and pose implications for future case law in UNCLOS dispute settlement.

The present paper first explores the relevance of statehood and effective control to the preservation of third-party legal interests. This analysis begins by reference to the principle of indispensable parties advanced by, inter alia, the ICJ in Monetary Gold (and discussed in the South China Sea Jurisdictional and Final Awards in regard to neighboring states). Specific attention is paid to how this customary principle might be construed and applied more narrowly in disputes that arise under UNCLOS.

Second, the paper addresses the concept of the de facto binding third-party effect of the South China Sea tribunal's interpretations of Article 121(3). Background information is briefly presented regarding the role of cross-fertilization and institutional precedent in the development of the law of the sea (e.g., filling lacunae in UNCLOS provisions on maritime

delimitation), and this concept is presented vis-àvis the distinct sources of international law systematized in Article 38 of the ICJ Statute. The probability of other bodies adopting the tribunal's interpretation of "island" is then explored by reference to the customary status of Article 121(3) and the judicial treatment of insular feature entitlements in delimitation case law (such as Black Sea, Greenland and Jan Mayen, Qatar v. Bahrain, and Eritrea/Yemen).

Third, the paper considers the permanence of judicial applications of Article 121(3) to disputed features. This analysis begins by reframing the South China Sea tribunal's interpretation of this provision in the context of sea level rise in order to gauge the general durability of such pronouncements. The variables of disputed sovereignty and third-party interests are then introduced by envisaging the broad recognition of the ROC's statehood. The most important question raised by this hypothesis is whether the jurisdictional basis on which the tribunal decided this case—its ability to construe entitlements under UNCLOS without considering sovereignty over the features which generate these entitlements—would prevent its interpretations of Article 121(3) from "attaching" to insular features in the event of apparent territorial transfer, such as the recognition of the ROC's statehood and sovereignty over Taiping Island.

The potential application of the South China Sea tribunal's findings to other susceptible islands (including in cases initiated by states exercising *erga omnes* interests in the high seas or international seabed) suggests that the foregoing legal questions are fertile ground for debate among academics and practitioners in Taipei.

The South China Sea: A Challenge to International Law and to International Legal Scholarship – *Lorenz Langer*

The 2016 Arbitration Award of the PCA has set out the maritime legal questions in the South China Sea in great detail, and the technicalities of these questions have also been extensively analysed by legal scholars. The proposed paper will take the Award as a starting point, but rather than focussing on maritime zones or low-tide elevations, the paper will use the South China Sea as a paradigm for the challenges that face not only international law as a normative order, but also international legal scholarship.

First, the conflict in the South China Sea has important implications for the law of the sea. Historically, the Western sea-faring nations have, since Grotius' *mare liberum*, pushed for a liberal regime of the sea – but just as that seminal text was meant to further Dutch trade interests, so did the concept of the freedom of the sea serve primarily its Western proponents. By contrast, the second half of the 20th century has seen a proliferation of sovereign rights over certain zones of the sea, and extensive State claims to these zones. The 2016 Award shows that there are limits to such rights and claims, but also that these limits may not be universally accepted. As a result, political and military tensions in the Asian-Pacific region are rising.

More importantly, and beyond the law of the sea, the conflict in the South China Sea therefore threatens the safeguarding of peace as one of the main tasks of international law. Historical parallels between the early 20th century and the rise of China and its challenge to the hegemonic position of the United States have been drawn out before. But these parallels are not limited to political or military aspects. The period before World War I saw significant progress in the codification of international law and in the institutionalisation of dispute settlement. And yet, war nevertheless broke out. When it did, the Allied Powers named the defence of international law as one of the main purposes of their fight. Today, the arbitral proceedings provided for by UNCLOS have not led to a peaceful settlement, and the United States similarly insists that its presence in the South China Sea aims to protect the freedom of the sea, and international law more generally.

These worrisome developments, however, are not sufficiently addressed by current legal scholarship. The developments in the South China Sea should serve as a cautionary contrast to the prevailing narrative of international law as a progressively successful normative order. According to that narrative, international law is increasingly overcoming its traditional limitations and the primacy of State sovereignty. The paper will analyse two such claims of progress in some detail: the gradual deterritorialisation and the advancing constitutionalisation of international law. It will be argued that while such concepts have their merits, the South China Sea exposes the (considerable) limitations that they are still subject to.

US-China Rivalry in the WTO and Trade-Related Activities – *Chien-Huei Wu*

WTO Dispute Settlement Mechanism has been praised as the "pearl of the crown" because of its compulsory jurisdiction and efficient and effective resolution of the disputes in question. With China's entry into the WTO, the Dispute Settlement Mechanism has witnessed another wave of litigation, by virtue of China's lion share in international trade volume and a different set of detailed obligations in China's Accession Protocol. Due to the large trade volume between the US and China and the competition of international (trade) relations, US-China trade disputes constitute the main component of WTO disputes to which China is either the complaining party or defendant party.

While the res judicata of the pertinent ruling of the panel/Appellate Body is limited to the disputing parties, the benefits arising from elimination of WTO-inconsistent measures upon the recommendation of the WTO Dispute Settlement Body may spill over to other WTO Members. Therefore, other WTO Members may wish to influence the course of the panel/Appellate Body proceedings even though they are not disputing parties. The third-party intervention mechanism as provided in Article 10 of the DSU thus offers a channel for Members other than the disputing parties to achieve this goal by making oral statement or submitting written submission to the panel/Appellate Body.

In view of growing number of US-China disputes and other WTO Members' incentive to intervene in the proceedings, this sub-research paper, firstly, aims to examine US-China rivalry in the WTO Dispute Settlement Mechanism by looking at US-China disputes and to analyse other WTO Members' positions in these disputes through the lens of third party intervention. By looking at the oral arguments or third party submissions, this paper will be able to examine whether intervening third countries are in favour of the US or China, namely, how their allies take position in relation to a trade dispute between two powers. Specifically, this paper asks whether and how China and the US influence their alliance in the WTO dispute settlement mechanism and other WTO related activities.

The criteria for case-selection would be political and economic implications as well as their legal significance. In applying such criteria to the current research paper, this paper tentatively selects China – Raw Materials, China – Rare Earths, China – Export Duties on Certain Raw Materials, and a series of concurrent anti-dumping and countervailing measures between the US and China. The former three cases are a series of disputes relating to China's export restrictive measures on key strategic materials. They also touch upon the legal status of WTO-plus obligations in China's accession protocol. The latter relates to China's market economy status, which China strives to seek with some degree of success. Through the lens of third party intervention, these two types of cases constitute a good testing stone to explore the competition of China and the US in the WTO dispute settlement mechanism.

Besides, a trade dispute in the WTO Dispute Settlement Mechanism may be foreshadowed in other related forum, the prime example being the FAO/WHO Codex Alimentarius Commission (the Codex) by virtue of its embedded linkage with SPS Agreement. To be specific, Article 3.2 of the SPS Agreement provides that "[s]anitary or phytosanitary measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994," and Codex is the recognised standard-setting international organisation for food safety. As a consequence, a health-related dispute may firstly surfaces in the Codex and then comes to the WTO Dispute Settlement Mechanism. Since the Codex is an UN related institution and adopts voting system in key issues. This paper will move onto Codex and examine the voting behaviour of trade nations in controversial issues. Focus will be placed on those areas where the US and China disagree with each other, such as the use of ractopamine. Beyond the litigation front, the WTO, in conjunction with the World Bank (the WB), has also engaged a number of capacity building activities, such as Aid for Trade (AfT) and Integration Framework (IF). In view of China's growing influence in the WB and its role as a donor country, this paper will then investigate the competition of leadership, if any, in trade capacity building activities.

China's Challenge to International Dispute Settlement: Looking beyond the WTO and the South China Sea Arbitration – *Wim Chien-Liang Muller*

As a direct result of the importance it attaches to its sovereignty, the People's Republic of China has a consistent policy of not accepting or excluding the jurisdiction of international dispute settlement mechanisms. The only notable exceptions to this policy have been in the field of international commercial law and in the law of the sea: the WTO Dispute Settlement Mechanism, which it had to accept in 2001 as a condition for membership of the World Trade Organisation, certain forms of international commercial arbitration, and the compulsory dispute settlement arrangements in the UN Convention on the Law of the Sea. Even with these mechanisms, when possible China has made as many jurisdictional reservations as they allowed.

China's participation in the WTO Dispute Settlement Mechanism has been a relative success and served to promote international adjudication to the Chinese government. It has accepted the outcome of these cases and initiated cases of its own. However, there are several challenges on the horizon: a legal battle is looming about the end of the PRC's non-market status, while initiatives it is taking elsewhere, such as the Regional Economic Comprehensive Partnership, the AIIB and agreements concluded in the context of One Belt One Road, are diminishing the importance of the WTO.

The relative success of the WTO dispute settlement mechanism in engaging China has not been seen in other areas of international law. On the contrary: when the Philippines brought the South China Sea arbitration case against it under UNCLOS, the PRC responded by refusing to participate in the proceedings and even denying the *compétence de la compétence* of the arbitration panel appointed under UNCLOS. The outcome of the arbitration was disastrous for China, and its official and semi-official responses so far have included not only legal arguments, but also personal attacks against members of the tribunal and allegations of bias against the tribunal as well as the wider system of international adjudication. If the Chinese government persists in this rhetoric and translates it into its foreign policy, it may undermine the wider credibility

of the institutions which currently maintain the international legal order, which are already under pressure from elsewhere.

In explaining its approach to international dispute settlement, the Chinese government has taken care to distinguish its "core interests", including territorial sovereignty, and other interests. In its view, the South China Sea case was about core interests, while WTO cases are not. The present contribution demonstrates that this is at best a partial explanation, that China's engagement with international dispute settlement in one field does affect how it conducts itself in the other, and that it is increasingly trying to shape international dispute settlement mechanisms in accordance with its preferences. Elaborating on the developments summarised above, the paper identifies the challenges which China presents to international dispute settlement mechanisms, as well as opportunities to increase its engagement despite the recent setbacks.

15:20-16:50: Panel B2 – Law of the Sea

Moderator: *Yann-huei Song*

The Korean-Japanese Exchange of Notes Verbales (1952~1965) relating to the Dokdo Question – *Hyun-Jin Park*

The Republic of Korea (hereinafter referred to as "Korea") and Japan exchanged *notes verbale* from 1952 to 1965 as regards Dokdo ownership. The exchanges constituted the longest-running, in-depth debates yet between the two countries over Dokdo sovereignty. Japan initiated the exchanges in a note of Jan. 28, 1952, 10 days after the proclamation of the Peace Line, challenging Korean title to Dokdo and provoking a heated and long drawn-out historical and legal battle of wits and wills over the fate of the island in the East Sea/Sea of Japan. The Japanese note was immediately followed and refuted by the Korean note of Feb. 12, 1952. As in the first round of battle waged for six years in the late 17th century, the primary rule of this second round of the game was the rule of law, or to be precise, the rule of international law.

The otherwise escalating political and diplomatic tension over Dokdo ownership somewhat subsided around 1965 when the two countries entered into the Agreement on Basic Relations to normalize diplomatic relations after a lapse of 20 years. The exchanges of notes identified, set out and summed up the basic contentious points to represent their respective official position on Dokdo. As such, the exchanges are regarded as the starting point for any meaningful discussions of the question. It is proposed here to focus our discussions and analyses on two main arguments advanced by Japan in the lengthy diplomatic correspondence, i.e. Dokdo having formed its inherent territory and its alleged 1905 incorporation of Dokdo.

Possibility to Exclude the Award of the South China Sea Case by an Agreement between Philippines and PRC – *Dai Tamada*

1. Post-Award legal issues

Two legal issues have occurred with regard to the legal effect of the Award in the South China Sea case. First, the PRC alleged that the Award was null and void. However, this allegation must be excluded by the principle of *compétence-compétence* (Article 288(4) of UNCLOS). Second issue, more sensitive one, is whether the disputing parties (Philippines and PRC) can exclude, or at least modify, the legal effect of the Award by concluding a bilateral agreement.

2. Binding Force of Arbitral Award

On the second issue, Article 296 (1) stipulates that "[a]ny decision rendered by a court or tribunal having jurisdiction under this section shall be final and shall be complied with by all the parties to the dispute" (emphasis added). Article 296 (2) provides: "[a]ny such decision shall have no binding force except between the parties and in respect of that particular dispute". It is clear from these articles that both parties are legally obliged to abide by the Award of 12 July 2016 without any modification.

3. Possibility of exclusion

On the other hand, Article 280 provides: "[n]othing in this Part [XV] impairs the right of any States Parties to agree at any time to settle a dispute

between them concerning the interpretation and application of this Convention by any peaceful means of their own choice" (emphasis added). The expression "at any time" includes the post-award phase and "any peaceful means" clearly contains the direct negotiation and consultation (Article 279 and Article 33(1) of the UN Charter). This article, thus, should be interpreted as allowing the disputing parties to conclude an agreement whose content can be different from that of the Award.

4. Analysis and tentative conclusions

It is necessary to analyse the following two issues. First issue is whether the Annex VII Arbitration is ad hoc arbitration or not. In theory, the disputing parties should be allowed to exclude the legal effect of ad hoc arbitral award by an agreement. On this point, it should be emphasised that the Annex VII arbitration is a key factor of compulsory dispute settlement mechanism under Part XV (see Article 287 (3), (5)). In other words, the Annex VII arbitration is designed to solve all the fundamental issues of the UNCLOS, as far as they are not exempted by declarations (Article 298). Second, the Award touches upon the legal status of maritime features, which is of objective character. In other words, once a maritime feature X is regarded as 'rock' by the Tribunal, this finding cannot be changed by subsequent agreement between the disputing parties (because the legal status of maritime feature is not dependent upon the intent or consent of States). The above two analysis will make clear that the compulsory arbitration under Annex VII of the UNCLOS works as a mechanism for the objective determination of the legal status of maritime features. As a result, the possibility of subsequent agreement to set aside the legal effect of the Award is legally excluded.

The Possible Means of Taiwan to Respond to the South China Sea Arbitral Award's Decision on the Legal Status of the Itu Aba (Taiping) Island – *Chen-Ju Chen*

Rendered on 12th July 2016, the Republic of Philippines v. the People's Republic of China South China Sea Arbitral Award claimed the Itu Aba (Taiping) Island as a rock. Concerns were raised over Taiwan's possible reactions to this result. Therefore, this paper examines how Taiwan should respond from both substantial and procedural means.

About substantial means, this paper analyzes the arbitral award's contents for discussions about the Itu Aba (Taiping) Island's legal status. The arbitral award referred to broad proofs to prove that fishermen worked, along with potable fresh waters, vegetation, soil, agricultural potentials, and commercial activities existed on the Itu Aba (Taiping) Island. Despite these matching criteria, a conclusion was quickly made that the maintenance of individuals' livelihoods was constrained and that human activities were namely governmental in nature and thus not qualified under Article 121(3) of the LOS Convention. This decision should be questioned. For it seemed to result from inadequate and illogical analysis, along with insufficient knowledge of East Asia's political and historical developments. Also, as Article 121(3) can hardly be considered as customary law, different State practice can be developed to deter the tribunal's interpretation leading to further effects.

About procedural means, proposed was whether Taiwan (as a fishing entity) can use procedures established under the LOS Convention to solve disputes. Based on Article 288 of the LOS Convention and Articles 20-22 of the Annex VI to the LOS Convention (Statute of the International Tribunal for the Law of the Sea), the International Tribunal for the Law of the Sea (ITLOS) is given both the competence and jurisdiction to solve disputes raised by entities other than State Parties based on the LOS Convention, along with any other agreement that specifically provided subject-matters. Especially as both Mensah and Wolfrum, who were former Presidents of the ITLOS, have long proposed the ITLOS' function. With these developments, to strengthen the ITLOS' role, the disputes involving fishing entities should also seek to be solved within the ITLOS when the required criteria are reached. Also, Article 138 of the Rules of the ITLOS provides the ITLOS both the competence and jurisdiction to give an advisory opinion on a legal question. This occurs if a relevant international agreement specifically provides for the submission to request for such an opinion. If provided, whether the submission is provided by State Parties should be out of the question. With these provisions, if the consensus or agreements are reached, Taiwan should also be granted opportunities to secure Taiwan's interests via ITLOS procedures, by either case submission or advisory opinion requests.

Based on these analyses, this paper proposes that to respond to the arbitral award's decision, different State practice should be developed that

includes drawing the baselines and ensuring further effective control over the Itu Aba (Taiping) Island. Moreover, the arbitral award's substantial inadequate and illogical discussions about this Island should be clarified and considered should also be the procedural remedy via such as the ITLOS to ensure the status of the Itu Aba (Taiping) Island.

Pollution of the Marine Environment in the South China Sea Arbitration: Just a Footnote? – *Benoit Mayer*

Most commentaries – and critiques – of the South China Sea arbitration have focused on issues such as the qualification of marine features or the existence of historical rights, extending sometimes to a discussion about the existence of fishing rights. By contrast, the aspects of the award regarding pollution of the environment have received very little attention. This article seeks not only to remedy this absence of commentary on the environmental aspects of the South China Sea arbitration, but also to explain why it has not received more attention. On a long historical perspective, it makes no doubt that the reckless destruction of the unique ecosystem of the South China Sea will be attached much greater importance than dispositions of relevance to the territorial projection of power by respective parties.

As an introduction, this article offers a retrospective on the concept of pollution to the marine environment in the UN Convention on the Law of the Sea and its development through previous awards. Then, it reviews the claims which have been made by the Philippines: firstly, regarding the environmental impact of reclamation works carried out by the Chinese government; secondly, regarding the wanton fishing in endangered species conducted by Chinese fishers with, allegedly, a failure of the Chinese government to prevent or punish them. The article then assesses the responses that have or could have been made by the Chinese government and the reasoning developed by the Tribunal in its awards on jurisdiction and (mostly) on merits. Finally, the article explores the impact of the award on the conduct of China, in the South China sea and beyond, with regard to the protection and preservation of the marine environment. While questions that somehow relate to territory attract great political sensitivities, compliance with obligation to protect and preserve the environment would come at a relatively low political price. It is therefore argued that, even if China was to adopt a pure "Realpolitik" perspective disregarding any

ethical argument, non-compliance is likely to become much more expensive than compliance because a responsible policy of environmental protection and preservation could contribute to affirming the legitimacy of territorial claims. One does not spoil one's own garden.

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Guidelines for Submissions to the Chinese (Taiwan) Yearbook of International Law and Affairs

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