

## The South China Sea Arbitration Award and Its Widespread Implications

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### INTRODUCTION

The Chinese call it *Nan Hai*, the Malaysians call it *Laut Cina Selatan*, the Filipinos call it *Dagat Kanlurang Pilipinas*, and the

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Vietnamese call it *Biển Đông*. Despite the many names it has been given, the South China Sea has come to be known primarily for the raging maritime disputes that have marred the surrounding nation states that each lay claim to part, if not all, of its waters.

The South China Sea is a critical commercial gateway for a significant portion of the world's merchant shipping and is an important economic and strategic region of the Indo-Pacific. This "semi-enclosed sea in the western Pacific Ocean, spanning an area of almost 3.5 million square kilometers," is home to many islands and reefs, most notably The Paracels and Spratlys.<sup>1</sup> These chains of small islands and coral reefs are important because control of the islands and reefs means control of the sea's fisheries and oil and natural gas deposits.

The fundamental dispute in the South China Sea concerns sovereignty over these off-shore islands and reefs. China, Brunei Darussalam, Malaysia, the Philippines, and Vietnam claim to control some or all of the Spratly Islands.<sup>2</sup> China and the Philippines claim the islands in Scarborough Shoal, and China and Vietnam claim the Parcel Islands.<sup>3</sup> In addition, Taiwan claims the same islands as China. China's nine-dash line, a vague historical depiction by China of its claim (encompassing about ninety percent of the South China Sea<sup>4</sup>), is the origin of numerous conflicting territorial claims in the region. Since around 2009, China "steadily increased its efforts to consolidate its position in the South China Sea under this claim with varied tactics, including using its military, coast guard, and maritime militia to harass foreign ships; exploring and extracting resources in disputed areas; and, starting in 2013, constructing artificial islands and basing military and civilian assets there."<sup>5</sup>

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<sup>1</sup> *In re* Republic of the Phil. v. China, PCA Case No. 2013-19, Certified Award, ¶ 3 (July 12, 2016), <https://pcacases.com/web/view/7> [hereinafter Award].

<sup>2</sup> *Why is the South China Sea Contentious?*, BBC NEWS (July 12, 2016), <http://www.bbc.com/news/world-asia-pacific-13748349>.

<sup>3</sup> *Id.*

<sup>4</sup> David Lague, *Analysis: China's Nine-Dash Line in the South China Sea*, REUTERS (May 25, 2012, 9:13 PM), <http://www.reuters.com/article/us-china-sea-boundary-idUSBRE84O07520120525>.

<sup>5</sup> Caitlin Campbell & Nargiza Salidjanova, *South China Sea Arbitration Ruling: What Happened and What's Next?*, U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION 1 (July 12, 2016), <http://www.uscc.gov/Research/south-china-sea-arbitration-ruling-what-happened-and-what%E2%80%99s-next>.



Source: *Joining the Dashes*, *ECONOMIST* (Oct. 4, 2014), <http://www.economist.com/news/asia/21621844-south-china-seas-littoral-states-will-fight-museums-archives-and>.

The 1982 United Nations Convention on the Law of the Sea (UNCLOS)<sup>6</sup> established an international legal framework to govern all uses of the oceans. All of the states bordering the South China Sea—Brunei Darussalam, China, Indonesia, Malaysia, the Philippines, and Vietnam—are parties to UNCLOS.<sup>7</sup> Taiwan, which also borders the South China Sea, took steps to bring its legislation into conformity with UNCLOS.<sup>8</sup> Therefore, UNCLOS is critically important when analyzing the legal disputes in the South China Sea.

This summary begins by discussing how, under UNCLOS, territorial sovereignty is established and what water rights attach to islands and coastal states in order to provide the reader with the background necessary to understand the competing claims advanced by the Philippines and China. After introducing the Philippines' and China's claims that led to the initiation of arbitral proceedings, this summary examines the Permanent Court of Arbitration's July 2016 Award (the

<sup>6</sup> United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, [http://www.un.org/depts/los/.convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/depts/los/.convention_agreements/texts/unclos/unclos_e.pdf) [hereinafter UNCLOS].

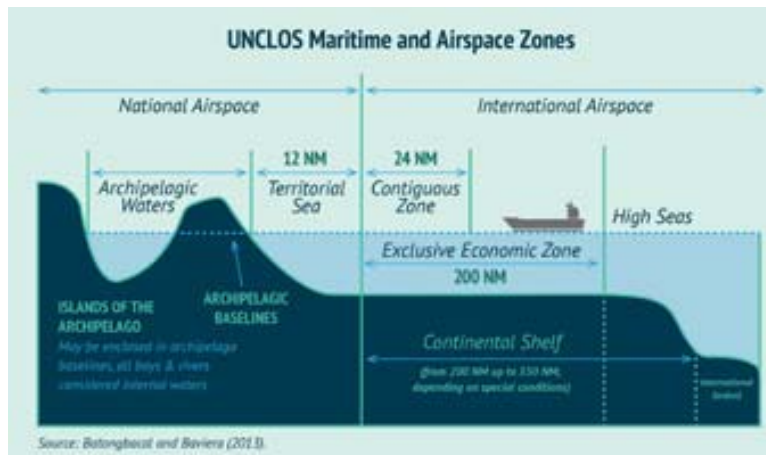
<sup>7</sup> The dates of ratification of the five claimant states are as follows: Brunei Darussalam, November 5, 1996; China, June 7, 1996; Malaysia, October 14, 1996; the Philippines, May 8, 1984; and Vietnam, July 25, 1994. See United Nations Treaties Collection, *Status of Treaties*, UNITED NATIONS (Nov. 24, 2017), [https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtsg\\_no=XXI-6&chapter=21&Temp=mtsg3&clang=\\_en](https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtsg_no=XXI-6&chapter=21&Temp=mtsg3&clang=_en).

<sup>8</sup> See Yann-Huei Song & Zou Keyuan, *Maritime Legislation of Mainland China and Taiwan: Developments, Comparison, Implications, and Potential Challenges for the United States*, 31 *OCEAN DEV. & INT'L L.* 303, 310–12 (2000).

Award). This summary outlines all fifteen of the Philippines' final submissions, the Tribunal's findings on jurisdiction, and the Tribunal's analysis and conclusions on the Philippines' submissions. In light of the Award, this summary also discusses China's recent efforts, and lack thereof, to become compliant with the Award. Additionally, this summary presents the regional and international implications of the Award.

## I

### UNCLOS: TERRITORIAL SOVEREIGNTY AND THE RIGHTS TO SURROUNDING WATERS



Source: *United Nations Convention on the Law of the Sea (UNCLOS): The Interpretations*, THE PAPER (Mar. 24, 2016), <http://asiamaritime.net/the-paper-united-nations-convention-on-the-law-of-the-sea-unclos-the-interpretations>.

The principal dispute over sovereign control of the island chains, and the purpose of China's nine-dash line, in the South China Sea is concentrated on the fact that UNCLOS grants certain rights and obligations attaching to ocean areas surrounding a state's sovereign territory. Territorial sovereignty extends over land territory, the territorial sea surrounding that land, and the seabed of the territorial sea.<sup>9</sup> Territorial sovereignty is the "right to exercise [within the territory], to the exclusion of any other [s]tate, the functions of a [s]tate."<sup>10</sup> Accompanying this right is the obligation to protect within

<sup>9</sup> IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 105 (7th ed. 2008).

<sup>10</sup> *Island of Palmas (U.S. v. Neth.)*, 11 R.I.A.A. 829, 838 (Perm. Ct. Arb. 1928).

this territory the rights of other states.<sup>11</sup> Islands and rocks are both territory that become subject to state jurisdiction.<sup>12</sup> In order for a state to establish sovereignty over waters, it is imperative that the state demonstrate that it has sovereignty over the land mass.<sup>13</sup> If a state does not have territorial sovereignty over an island, then that state does not have rights to the surrounding waters. UNCLOS's rights protecting the surrounding waters are often the reason states want to claim sovereignty over islands and land masses in the open waters.

Unfortunately, UNCLOS does not outline how competing states determine which have a better sovereignty claim over a disputed territory, including off-shore islands; UNCLOS is limited in settling territory disputes to only defining the maritime zones that can be claimed once sovereignty over the land has been established.<sup>14</sup>

The water surrounding a coastal state is divided into three zones: the territorial sea, the contiguous zone, and the Exclusive Economic Zone (EEZ).<sup>15</sup> In addition to specific rights in these three zones, the state has rights to the continental shelf.<sup>16</sup>

#### **A. Territorial Sea**

According to UNCLOS, “[t]he sovereignty of a coastal [s]tate extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.”<sup>17</sup> The territorial sea extends up to twelve nautical miles from the baseline.<sup>18</sup> A state has the same rights in its territorial sea as it does in its land territory.<sup>19</sup> Delineating the territorial sea was one of the main objectives of the third conference on

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<sup>11</sup> BROWNIE, *supra* note 9, at 105.

<sup>12</sup> *Id.* at 183.

<sup>13</sup> UNCLOS, *supra* note 6, at art. 2.

<sup>14</sup> ROBERT BECKMAN, ASIA SOC'Y / LKY SPP CONFERENCE, THE PHILIPPINES V. CHINA CASE AND THE SOUTH CHINA SEA DISPUTES 2 (2013), <https://cil.nus.edu.sg/wp-content/uploads/2013/03/Beckman-Asia-Society-LKY-SPP-March-2013-draft-of-6-March.pdf>.

<sup>15</sup> Section 1.3: *United Nations Convention on the Law of the Sea (UNCLOS)*, GLOBAL CCS INSTITUTE, <https://hub.globalccsinstitute.com/publications/offshore-co2-storage-legal-resources/united-nations-convention-law-sea-unclos> (last visited Feb. 3, 2018).

<sup>16</sup> UNCLOS, *supra* note 6, at art. 77.

<sup>17</sup> *Id.* at art. 2.

<sup>18</sup> *Id.* at art. 3.

<sup>19</sup> *Id.* at art. 2.

the Law of the Sea.<sup>20</sup> The sovereign state has the obligation to allow for the “innocent passage” of foreign ships within its territorial sea.<sup>21</sup>

### ***B. Contiguous Zone***

The contiguous zone is the water extending from the outer perimeter of the state’s territorial sea, and may extend up to twenty-four nautical miles from the baseline.<sup>22</sup> A coastal state may take enforcement measures in a contiguous zone to prevent or punish “infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea.”<sup>23</sup>

### ***C. Exclusive Economic Zone***

The EEZ is an area beyond and adjacent to the territorial sea extending up to 200 nautical miles from the baseline.<sup>24</sup>

In the exclusive economic zone, the coastal state has:

- (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
- (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:
  - (i) the establishment and use of artificial islands, installations and structures;
  - (ii) marine scientific research;
  - (iii) the protection and preservation of the marine environment;
- (c) other rights and duties provided for in this Convention.<sup>25</sup>

### ***D. Continental Shelf***

The continental shelf “comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea . . . to a distance of 200 nautical miles from the baseline.”<sup>26</sup> The coastal state has the

<sup>20</sup> Div. for Ocean Affairs & the Law of the Sea, *The United Nations Convention on the Law of the Sea (A Historical Perspective)*, U.N. (1998), [http://www.un.org/depts/los/convention\\_agreements/convention\\_historical\\_perspective.htm#ThirdConference](http://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm#ThirdConference).

<sup>21</sup> UNCLOS, *supra* note 6, at art. 17.

<sup>22</sup> *Id.* at art. 33.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at arts. 55, 57.

<sup>25</sup> *Id.* at art. 56.

<sup>26</sup> *Id.* at art. 76(1). Note: the continental shelf extends, at minimum, 200 nautical miles.

exclusive sovereign rights to explore and exploit the natural resources of the continental shelf.<sup>27</sup>

When a state becomes a party to UNCLOS, it consents in advance to the dispute settlement provisions in Part XV of UNCLOS. The general principle in Part XV is that if a dispute arises between two parties on the interpretation or application of a provision in UNCLOS, and the dispute cannot be resolved by consultation and negotiation, either party to the dispute may unilaterally bring the dispute before an international court or arbitral tribunal.<sup>28</sup> Part XV also provides that any resulting decision of the court or tribunal is legally binding on both parties to the dispute.<sup>29</sup>

## II

### INITIATION OF ARBITRATION PROCEEDINGS

On January 22, 2013, the Philippines initiated arbitration proceedings with the Permanent Court of Arbitration (the Tribunal) in The Hague, Netherlands, to clarify its conflicting claims with China in the South China Sea.<sup>30</sup> The Philippines submitted an application for rulings in respect to four overarching matters concerning the relationship between the Philippines and China in the South China Sea.<sup>31</sup>

First, the Philippines sought a ruling on the source of the parties' rights and obligations in the South China Sea and the effect of UNCLOS on China's claims to historic rights within its so-called nine-dash line.<sup>32</sup>

Second, the Philippines sought a ruling on whether certain maritime features claimed by both China and the Philippines are properly characterized as islands, rocks, low-tide elevations, or submerged banks under UNCLOS.<sup>33</sup> The status of these maritime features under UNCLOS determines the maritime zones that the features are capable of generating.<sup>34</sup>

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<sup>27</sup> *Id.* at arts. 77(1)–(2).

<sup>28</sup> *Id.* at art. 286.

<sup>29</sup> *Id.* at art. 296(1).

<sup>30</sup> Award, *supra* note 1, ¶ 28.

<sup>31</sup> *Id.* ¶ 4.

<sup>32</sup> *Id.* ¶ 7.

<sup>33</sup> *Id.* ¶ 8.

<sup>34</sup> *Id.*

Third, the Philippines sought rulings on whether certain Chinese actions in the South China Sea have violated UNCLOS by interfering with the exercise of the Philippines' sovereign rights and freedoms under UNCLOS, or through construction and fishing activities that have harmed the marine environment.<sup>35</sup>

Finally, the Philippines sought a ruling that certain actions taken by China—in particular its large-scale land reclamation and construction of artificial islands in the Spratly Islands since the arbitration was commenced—unlawfully aggravated and extended the parties' dispute.<sup>36</sup>

The Philippines' claim recognized that the Tribunal does not have jurisdiction to decide two categories of legal issues. The Philippines admitted that the Tribunal has no jurisdiction to decide which state has the better claim to sovereignty over the disputed islands.<sup>37</sup> The Philippines also conceded that the Tribunal has no jurisdiction over certain categories of disputes—these being disputes that are excluded from the compulsory dispute settlement procedures in UNCLOS because of China's Declaration under Article 298 of UNCLOS.<sup>38</sup> In its Statement of Claim, the Philippines expressly stated that it is conscious of China's Declaration under Article 298 of UNCLOS excluding certain categories of disputes—including disputes on sea boundary delimitation and historic titles—from binding dispute settlement, and has avoided raising any subjects or making any claims of such.<sup>39</sup>

Throughout the arbitration process, the Chinese government adhered to the position of neither accepting nor participating in the proceedings. The government reiterated that position in diplomatic notes; in the "Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines" dated December 7, 2014 ("China's Position Paper"); in letters to members of the Tribunal from the Chinese Ambassador to the Kingdom of the Netherlands; and in many public statements.<sup>40</sup> The Chinese Government also made clear

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<sup>35</sup> *Id.* ¶ 9.

<sup>36</sup> *Id.* ¶ 10.

<sup>37</sup> *Id.* ¶ 6.

<sup>38</sup> Gov't of China, *Declarations and Statements: China*, U.N.: DIV. OF OCEAN AFFAIRS & THE LAW OF THE SEA (Aug. 25, 2006), [http://www.un.org/Depts/los/convention\\_agreements/convention\\_declarations.htm#](http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#).

<sup>39</sup> Award, *supra* note 1, ¶ 28.

<sup>40</sup> *Id.* ¶ 51.



that these statements and documents “shall by no means be interpreted as China’s participation in the arbitral proceeding [in any form].”<sup>41</sup>

### III

#### THE PERMANENT COURT OF ARBITRATION’S AWARD

Despite China’s steadfast decision to not participate, the Tribunal emphasized that China’s non-participation did not deprive the Tribunal of jurisdiction; its resulting award was overwhelmingly favorable to the Philippines’ position, ruling several elements of China’s claims in the South China Sea unlawful.<sup>42</sup> The following sections address the specifics of the Philippines’ submissions, the Tribunal’s conclusion to these submissions, and some implications of the Tribunal’s decision in regards to the Philippines and China.

##### *A. Relief Requested by the Philippines*

During the proceedings, the Philippines made fifteen Final Submissions that provided more detail to supplement its four overarching claims (summarized in Section III). The Philippines requested the Tribunal to find that:

- (1) China’s maritime entitlements in the South China Sea, like those of the Philippines, may not extend beyond those expressly permitted by the United Nations Convention on the Law of the Sea . . . ;
- (2) China’s claims to sovereign rights jurisdiction, and to “historic rights,” with respect to the maritime areas of the South China Sea encompassed by the so-called “nine-dash line” are contrary to the Convention and without lawful effect to the extent that they exceed the geographic and substantive limits of China’s maritime entitlements expressly permitted by UNCLOS;
- (3) Scarborough Shoal generates no entitlement to an exclusive economic zone or continental shelf;
- (4) Mischief Reef, Second Thomas Shoal, and Subi Reef are low-tide elevations that do not generate entitlement to a territorial sea, exclusive economic zone or continental shelf, and are not features that are capable of appropriation by occupation or otherwise;

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<sup>41</sup> *Id.*

<sup>42</sup> Press Release, Permanent Court of Arbitration, *The South China Sea Arbitration: The Republic of the Philippines v. The People’s Republic of China*, 6 (July 12, 2016), <https://pcacases.com/web/sendAttach/1801> [hereinafter Press Release].

- (5) Mischief Reef and Second Thomas Shoal are part of the exclusive economic zone and continental shelf of the Philippines;
- (6) Gaven Reef and McKennan Reef (including Hughes Reef) are low-tide elevations that do not generate entitlement to a territorial sea, exclusive economic zone or continental shelf, but their low-water line may be used to determine the baseline from which the breadth of the territorial sea of Namyit and Sin Cowe, respectively, is measured;
- (7) Johnson Reef, Cuarteron Reef and Fiery Cross Reef generate no entitlement to an exclusive economic zone or continental shelf;
- (8) China has unlawfully interfered with the enjoyment and exercise of the sovereign rights of the Philippines with respect to the living and non-living resources of its exclusive economic zone and continental shelf;
- (9) China has unlawfully failed to prevent its nationals and vessels from exploiting the living resources in the exclusive economic zone of the Philippines;
- (10) China has unlawfully prevented Philippine fishermen from pursuing their livelihoods by interfering with traditional fishing activities at Scarborough Shoal;
- (11) China has violated its obligations under the Convention to protect and preserve the marine environment at Scarborough Shoal, Second Thomas Shoal, Cuarteron Reef, Fiery Cross Reef, Gaven Reef, Johnson Reef, Hughes Reef and Subi Reef;
- (12) China's occupation of and construction activities on Mischief Reef:
  - (a) Violate the provisions of the Convention concerning artificial islands, installations and structures;
  - (b) Violate China's duties to protect and preserve the marine environment under the Convention; and
  - (c) Constitute unlawful acts of attempted appropriation in violation of the Convention;
- (13) China has breached its obligations under the Convention by operating its law enforcement vessels in a dangerous manner causing serious risk of collision with Philippine vessels navigating in the vicinity of Scarborough Shoal;
- (14) Since the commencement of this arbitration in January 2013, China has unlawfully aggravated and extended the dispute by, and among other things:
  - (a) Interfering with the Philippines' rights of navigation in the waters at, and adjacent to, Second Thomas Shoal;

- (b) Preventing the rotation and resupply of Philippine personnel stationed at Second Thomas Shoal;
  - (c) Endangering the health and well-being of Philippine personnel stationed at Second Thomas Shoal; and
  - (d) Conducting dredging, artificial island-building, and construction activities at Mischief Reef, Cuarteron Reef, Fiery Cross Reef, Gaven Reef, Johnson Reef, Hughes Reef and Subi Reef; and
- (15) China shall respect the rights and freedoms of the Philippines under the Convention, shall comply with its duties under the Convention including those relevant to the protection and preservation of the marine environment in the South China Sea, and shall exercise its rights and freedoms in the South China Sea with due regard to those of the Philippines under the Convention.<sup>43</sup>

### ***B. Preliminary Matters of Jurisdiction Before the Tribunal***

Throughout the proceedings, the Tribunal took a number of steps to satisfy whether it had jurisdiction and whether the Philippines' claims were "well founded in fact and law."<sup>44</sup> The Tribunal was led to infer, through informal statements, that China objected to defer to the Tribunal's jurisdiction.<sup>45</sup> The Tribunal noted in its Award on Jurisdiction, that UNCLOS does not allow parties to the treaty to excuse themselves from the provisions that detail dispute resolution. Therefore, because both the Philippines and China are parties to UNCLOS, they must submit to Tribunal dispute resolution processes.<sup>46</sup> The Tribunal held that China's non-participation does not deprive the Tribunal of jurisdiction and that the Tribunal had been properly established pursuant to the provisions of Annex VII to UNCLOS, which includes a procedure to form a tribunal even in the absence of one party.<sup>47</sup> The Tribunal rejected the arguments set out in "China's Position Paper," in which China claimed that the parties' dispute is actually about territorial sovereignty and maritime boundary delimitation, and that these issues cannot be addressed by the Tribunal.<sup>48</sup> The Tribunal ultimately resolved that each of the

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<sup>43</sup> Award, *supra* note 1, ¶ 112.

<sup>44</sup> Press Release, *supra* note 42, at 4.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 6.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 6.

Philippines' submissions concerned a matter that could be addressed by UNCLOS.<sup>49</sup>

The Tribunal's Award on Jurisdiction held that it had jurisdiction over seven of the matters raised in the Philippines' submissions and reserved the issue of its jurisdiction with respect to seven other submissions for decision together with the merits.<sup>50</sup> Subsequently, the Tribunal held that it had jurisdiction over all submissions when deciding on the merits.<sup>51</sup> Because the submissions did not involve issues of sovereignty over land territory, the Tribunal had jurisdiction to rule on all of the submissions put forth by the Philippines and the Award revolved around whether China's claim to sovereignty over much of the South China Sea was compatible with UNCLOS.<sup>52</sup>

### *C. China's Nine-Dash Line and Historic Claims*

China's claim to historic rights within the nine-dash line, which overlaps with the EEZ of the Philippines, was the major reason the Philippines instituted proceedings and was the focus of the Philippines' submissions 1 and 2. Therefore, it was a major victory for the Philippines when the Tribunal ruled that, to the extent China claimed historic rights to resources in the waters inside its nine-dash line, such rights were forfeited when it ratified UNCLOS, if those waters are now within the EEZs of other coastal states.<sup>53</sup> The Tribunal emphasized that the underlying rationale of UNCLOS was to give resources in EEZs to coastal states. Correspondingly, states with only a limited governmental presence on a small maritime feature would not have the same entitlements as coastal states.<sup>54</sup> The Tribunal noted that the drafters of UNCLOS had explicitly rejected proposals for recognizing the historic rights of one state in another's EEZ.<sup>55</sup>

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<sup>49</sup> *Id.* at 7.

<sup>50</sup> Matthew Koh, *Permanent Court of Arbitration Tribunal Issues Landmark Interpretation of UNCLOS in Philippines v China Arbitration*, KLUWER ARBITRATION BLOG (Aug. 14, 2016), <http://kluwarbitrationblog.com/2016/08/14/permanent-court-of-arbitration-tribunal-issues-landmark-interpretation-of-unclos-in-philippines-v-china-arbitration/>.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> See Award, *supra* note 1, ¶ 217.

<sup>54</sup> *Id.* ¶¶ 517–19.

<sup>55</sup> *Id.* ¶ 243.

Although the Tribunal found that China's claim to historic rights in the nine-dash line was not compatible with UNCLOS, it did not rule that the nine-dash line per se is illegal or invalid.

The nine-dash line's legitimacy remains in relation to China's sovereignty over specific islands in the South China Sea.<sup>56</sup> Simply, China may attempt to claim sovereignty over maritime features within its nine-dash line that are islands as defined in Article 121 of UNCLOS—that is, “naturally formed areas of land surrounded by and above water at high tide.”<sup>57</sup> This distinction bars any and all claims of sovereignty by China over maritime features other than islands, such as reefs or low-tide elevations (LTEs).<sup>58</sup>

#### *D. Status of Features in the South China Sea*

In submissions 3–7, the Philippines asserted disputes that arose between China and the Philippines on the status of, and entitlement to, maritime zones for the islands and reefs occupied by China.

The first step taken by the Tribunal was a technical evaluation to determine which, if any, of the maritime features claimed by China were above high tide. Under Articles 13 and 121 of UNCLOS, maritime features that sustain land mass above the water while at high tide are entitled to a twelve nautical mile territorial sea, while features below high tide have no claim to rights under maritime zones.<sup>59</sup> Because UNCLOS classifies features on their natural condition, it required the Tribunal to investigate many of the reefs' recent modifications by land reclamation and construction.<sup>60</sup> An expert hydrographer evaluated the technical evidence and referenced historical surveys to determine the features' natural condition.<sup>61</sup> “The Tribunal ultimately agreed with the Philippines that Scarborough Shoal, Johnson Reef, Cuarteron Reef, and Fiery Cross Reef are high-tide features, while Subi Reef, Hughes Reef, Mischief Reef, and Second Thomas Shoal were submerged at high tide in their natural

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<sup>56</sup> Robert Beckman, *Tribunal Ruling a Game Changer*, THE STRAITS TIMES (July 14, 2016), <http://www.straitstimes.com/opinion/tribunal-ruling-a-game-changer-south-china-sea> [hereinafter Beckman, *Tribunal Ruling*].

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> Press Release, *supra* note 42, at 9.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

condition.”<sup>62</sup> These LTEs are not entitled to maritime zones of their own and cannot be the subject of a sovereignty claim unless they are within twelve nautical miles of an island.<sup>63</sup>

The Tribunal then considered whether any of the maritime features China claimed could generate an entitlement to maritime zones beyond twelve nautical miles. In other words, the Tribunal considered if any of the features claimed by China are islands that China could then use to claim sovereignty over the surrounding LTEs. The Philippines admitted that several of the reefs occupied by China were islands (as defined in Article 121 of UNCLOS) because they were naturally formed areas of land surrounded by and above water at high tide.<sup>64</sup> Under Article 121 of UNCLOS, islands generate an entitlement to an EEZ of 200 nautical miles and to a continental shelf. However, “[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.”<sup>65</sup> The Tribunal held that a feature is not a rock if, objectively, in its natural condition, it can sustain either a stable community of people or an economic activity that is not dependent on outside resources or is not purely extractive in nature.<sup>66</sup> On this basis, the Tribunal concluded that all the high-tide features in the Spratlys are rocks; these include Scarborough Shoal, Johnson Reef, Fiery Cross Reef and Itu Aba Island.<sup>67</sup> Therefore, each feature only has a twelve mile territorial sea and not an EEZ. In so concluding, the Tribunal noted that modern habitations on many of these features, being dependent on outside resources, do not constitute evidence of whether they can sustain human habitation or economic activity in their natural condition.<sup>68</sup> Temporary occupation of the features in the past also did not amount to habitation by stable communities; all historical economic activity had been purely extractive.<sup>69</sup> In fact, the Tribunal presumed that if a feature has never hosted a stable community, “the most reasonable conclusion would be that the natural conditions are simply too difficult

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<sup>62</sup> *Id.*

<sup>63</sup> UNCLOS, *supra* note 6, at art. 13(2).

<sup>64</sup> Award, *supra* note 1, ¶ 426.

<sup>65</sup> UNCLOS, *supra* note 6, at art. 121.

<sup>66</sup> Award, *supra* note 1, ¶¶ 504–05.

<sup>67</sup> *Id.* ¶¶ 643–44.

<sup>68</sup> *Id.* ¶ 578.

<sup>69</sup> *Id.* ¶ 624.

for such a community to form and that the feature is not capable of sustaining such habitation.”<sup>70</sup>

The Tribunal ruled that Mischief Reef is a LTE, not an island, located within the EEZ of the Philippines. This ruling means that the Philippines has jurisdiction and control over Mischief Reef and may exercise its exclusive right to authorize and regulate the construction, operation, and use of installations and structures on the reef.<sup>71</sup> Consequently, the Tribunal ruled that the installations and structures that China built on Mischief Reef are legally under the jurisdiction and control of the Philippines.<sup>72</sup> In addition, nations such as the United States and Australia may extend their freedom of navigation and overflight operations to within twelve nautical miles of Mischief Reef since the Mischief Reef does not generate a territorial sea. These operations by foreign countries could lead to tense engagements with Chinese military vessels and aircrafts.

The Tribunal’s decision that all of the Spratly Islands are rocks, and are entitled to no more than a twelve nautical mile territorial sea, establishes no areas of overlapping EEZ claims between the Philippines and China. “Consequently, the Philippines has the exclusive right to develop the oil and gas resources in Reed Bank, the area off its coast with the greatest potential for hydrocarbon resources.”<sup>73</sup> China hindered the exploitation of this area because it claimed a right to the resources, as the area was within its nine-dash line. Under this decision, the EEZs of Vietnam, Malaysia, Brunei, and Indonesia are protected because China (with no historic rights to resources in their EEZs and none of the disputed islands entitled to an EEZ of its own) “has no legal basis under UNCLOS to claim that it has a right to share the fishing or hydrocarbon resources in [these] EEZs.”<sup>74</sup>

### *E. Chinese Activities in the South China Sea*

Once the features in dispute were clearly defined, and the appropriate maritime zones established, the Tribunal could address submissions 8–13. These submissions concerned the lawfulness under UNCLOS of various Chinese actions in the South China Sea. Having

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<sup>70</sup> *Id.* ¶ 549.

<sup>71</sup> See UNCLOS, *supra* note 6, at art. 56.

<sup>72</sup> Award, *supra* note 1, ¶ 647.

<sup>73</sup> Beckman, *supra* note 56.

<sup>74</sup> *Id.*

found that Mischief Reef, Second Thomas Shoal, and Reed Bank are LTEs, form part of the Philippines's EEZ and continental shelf, and are not overlapped by any possible entitlement of China, the Tribunal concluded that UNCLOS clearly allocates sovereign rights to the Philippines with respect to sea areas in its EEZ.<sup>75</sup>

The Tribunal found as a matter of fact that China (a) had interfered with Philippine petroleum exploration at Reed Bank; (b) [had been] purported to prohibit fishing by Philippine vessels within the Philippines' [EEZ]; (c) protected and failed to prevent Chinese fishermen from fishing within the Philippines' [EEZ] at Mischief Reef and Second Thomas Shoal; and (d) constructed installations and artificial islands at Mischief Reef without the authorization of the Philippines. The Tribunal therefore concluded that China violated the Philippines' sovereign rights with respect to its [EEZ] and continental shelf.<sup>76</sup>

Interestingly, the Tribunal held that both China and the Philippines had historic rights in the territorial sea around Scarborough Shoal.<sup>77</sup> Therefore, China violated its duty to respect the historic rights of the Philippines when it prevented Philippine fishermen from accessing the Shoal.<sup>78</sup> Furthermore, China also breached its obligations under UNCLOS on the International Regulations for Preventing Collisions at Sea 1972 when its vessels created a serious risk of collision with Philippine vessels by preventing Philippine vessels from entering the Shoal.<sup>79</sup> The Tribunal also held that China's land reclamation and construction of artificial islands in the Spratlys, and failure to prevent Chinese fishermen from harvesting endangered sea life, breached its obligations under Articles 192 and 194 of UNCLOS to preserve and protect the marine environment.<sup>80</sup>

#### ***F. China's Aggravation or Extension of the Dispute***

The Philippines added submission 14 after the initial arbitration process commenced. The Philippines claimed that China had unlawfully aggravated and extended the dispute. The Tribunal recalled that a duty exists for parties engaged in a dispute settlement procedure to refrain from aggravating or extending the disputes at issue during the

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<sup>75</sup> Press Release, *supra* note 42, at 10.

<sup>76</sup> *Id.*

<sup>77</sup> Award, *supra* note 1, ¶ 805.

<sup>78</sup> *Id.* ¶ 812.

<sup>79</sup> *Id.* ¶ 1109.

<sup>80</sup> *Id.* ¶¶ 991–92.



pending status of the settlement process.<sup>81</sup> The Tribunal held China's activities, such as constructing a large artificial island on Mischief Reef and destroying evidence of the natural condition of the features, aggravated and extended the dispute.<sup>82</sup>

### *G. The Parties' Future Conduct*

In respect to submission 15, "the Tribunal noted that both the Philippines and China have repeatedly accepted that [UNCLOS] and general obligations of good faith define and regulate their conduct."<sup>83</sup> The Tribunal surmised that neither China nor the Philippines intended to infringe on each other's legal rights, but that this dispute arose over a fundamental difference in interpreting and understanding their respective rights under UNCLOS in the South China Sea.<sup>84</sup>

The Tribunal then ended by reiterating, "Article 11 of Annex VII provides that the 'award . . . shall be complied with by the parties to the dispute,'" implying that the Tribunal expects both parties to abide by the Award.<sup>85</sup>

## IV

### CHINA'S COMPLIANCE WITH THE AWARD

In reaction to the Tribunal's ruling, China immediately released two statements: (1) a notably subdued government statement that reaffirmed China's "territorial sovereignty and maritime rights" in the South China Sea and expressed its desire to "resolve the relevant disputes peacefully" without making explicit reference to either the Philippines or the arbitration proceedings,<sup>86</sup> and (2) a much more hardline statement from the Ministry of Foreign Affairs declaring that the ruling is "null and void and has no binding force."<sup>87</sup> China's state-

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<sup>81</sup> Press Release, *supra* note 42, at 11.

<sup>82</sup> Award, *supra* note 1, ¶ 1181.

<sup>83</sup> Press Release, *supra* note 42, at 11.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> Government of China, *Statement on China's Territorial Sovereignty and Maritime Rights and Interests in the South China Sea* (July 12, 2016), [http://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1379493.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1379493.shtml).

<sup>87</sup> China's Ministry of Foreign Affairs, *Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines* (July 12, 2016), [http://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1379492.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1379492.shtml).

affiliated press simultaneously released a slew of articles condemning the ruling.<sup>88</sup>

Although China has seemed to assert its intention to ignore the Award, there are factors that may permit China to become partially, if not completely, compliant in the future.<sup>89</sup> China's interactions with neighboring states in the South China Sea are a more appropriate determination of whether China intends to comply with the Award.<sup>90</sup> China is currently clearly violating four of the Tribunal's rulings and is fully compliant with one;<sup>91</sup> "it is uncertain whether China is in compliance with the rest of the Tribunal's rulings."<sup>92</sup> "Two of China's violations of the [A]ward stem from activity related to its [continued] presence on an artificial island at Mischief Reef, which the . . . [T]ribunal found was an unlawful occupation and constitutes interference with Philippines' rights to an . . . [EEZ] and continental shelf."<sup>93</sup> Two more examples of non-compliance include "China's continuing refusal to allow Filipino fishermen to return to their traditional fishing grounds around Scarborough Shoal and its broader interference with Filipino fishermen within the Philippines' EEZ."<sup>94</sup> The only example of full compliance is China's agreement that "disputes in the South China Sea should be resolved on the basis of international law, including UNCLOS."<sup>95</sup> Overall, China is neither clearly in compliance nor clearly in violation with most of the Tribunal's award.<sup>96</sup> Since the Award's issuance in July of 2016, China has not explicitly violated even the Tribunal's most well-known ruling—against China's nine-dash line claim.<sup>97</sup>

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<sup>88</sup> See generally, *President Xi Says China Rejects Any Proposition, Action Based on S. China Sea Arbitration Award*, XINHUA (July 12, 2016, 8:03 PM), <http://en.people.cn/n3/2016/0712/c90883-9085068.html>; *Inherently Biased and Unjust 'Piece of Paper'*, CHINA DAILY (July 12, 2016), [http://www.chinadaily.com.cn/opinion/2016-07/12/content\\_26063420.htm](http://www.chinadaily.com.cn/opinion/2016-07/12/content_26063420.htm); and Wang Xiaohui, *S. China Sea Arbitration: A US-led Conspiracy behind the farce*, PEOPLE'S DAILY (July 12, 2016), <http://en.people.cn/n3/2016/0712/c90000-9085051.html>.

<sup>89</sup> Julian Ku & Chris Mirasola, *Tracking China's Compliance with the South China Sea Arbitral Award*, LAWFARE (Oct. 3, 2016, 2:39 PM), <https://www.lawfareblog.com/tracking-chinas-compliance-south-china-sea-arbitral-award>.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

On October 18, 2016, Philippine President Rodrigo Duterte traveled to Beijing to meet with Chinese President Xi Jinping.<sup>98</sup> The respective parties discussed many matters of state including concessions to bring China further into compliance with the Tribunal's award. First, the parties "consider[ed] allowing Filipino fishermen conditional access to waters in and around Scarborough Shoal."<sup>99</sup> Second, officials began the process of finalizing a deal on joint oil and natural gas exploration near Reed Bank in the South China Sea that would be controlled by the Philippines.<sup>100</sup> Third, a Memorandum of Understanding was released outlining Chinese and Philippine trade deals ranging from infrastructure to trade and tourism worth \$13.5 billion.<sup>101</sup> An additional memo established procedures for bilateral defense cooperation and joint communication between the countries' respective Coast Guards.<sup>102</sup> Finally, "Presidents Xi and Duterte agreed to begin bilateral negotiations to resolve their maritime disputes, [where they] 'will meet regularly on current and other issues of concern to either side of the South China Sea.'"<sup>103</sup>

Although China is currently working toward compliance with the Award and is engaged in bilateral negotiations with the Philippines, it could decide to resume its pursuit of sovereign domain over the nine-dash line. Months after the Award, it is still unclear whether or how the Award will prompt a change in China's behavior in the short or long term. It can reasonably be expected that China will not depart from the position it has held since 2013; it will not acknowledge the authority of the arbitral tribunal or abide by the ruling.<sup>104</sup> In this event, several responses are possible. Some likely responses are discussed below.

China could pursue a strategy of "show the flag," where the People's Liberation Army (PLA), the Chinese Coast Guard, or its maritime militia conduct patrols or staged exercises in its claimed waters.<sup>105</sup> This strategy would symbolically reinforce China's perceived claim through

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<sup>98</sup> Chris Mirasola, *Water Wars: Mr. Duterte Goes to Beijing*, LAWFARE (Oct. 21, 2016, 9:05 AM), <https://www.lawfareblog.com/water-wars-mr-duterte-goes-beijing>.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> Greg Poling, *The South China Sea Arbitration: Anticipating Next Moves and Countermoves*, YOUTUBE (June 20, 2016), <https://www.youtube.com/watch?v=6pNnIMkTimU>.

<sup>105</sup> Campbell & Salidjanova, *supra* note 5, at 4.

continued presence and deterrence of foreign vessels in the region. Increased harassment or intimidation of Philippine or other vessels by either the Chinese Coast Guard or the maritime militia, a frequent occurrence in recent years, is also possible.<sup>106</sup>

The PLA could also respond by deploying fighter jets or other advanced military assets to the Spratly Islands (which would violate China's pledge not to "militarize" the area).<sup>107</sup>

There is the potential for China to renew or expand its push in the commercial exploration and exploitation of hydrocarbons and other minerals in the disputed waters.<sup>108</sup> China demonstrated its willingness to escalate tensions by twice moving an oil rig into waters near the Paracel Islands—an area also claimed by Vietnam—despite Vietnam's protests.<sup>109</sup> China also reportedly approved plans for a mobile deep-sea platform to explore for minerals in the South China Sea.<sup>110</sup>

China might employ overt or indirect economic sanctions against the Philippines, as it did when it restricted Philippine banana imports and restricted Chinese travel to the Philippines during the Scarborough Shoal crisis in 2012.<sup>111</sup>

China has thus far refrained from conducting land reclamation at Scarborough Shoal, likely due to intense U.S. pressure.<sup>112</sup> However,

<sup>106</sup> See generally Todd Crowell, *A Coast Guard Arms Race*, REAL CLEAR DEFENSE (May 23, 2016), [http://www.realcleardefense.com/articles/2016/05/23/a\\_coast\\_guard\\_arms\\_race\\_109386.html](http://www.realcleardefense.com/articles/2016/05/23/a_coast_guard_arms_race_109386.html); Andrew S. Erickson & Conor M. Kennedy, *China's Maritime Militia*, CNA 3 (Mar. 7, 2016), <http://www.andrewerickson.com/2016/03/chinas-maritime-militia-our-most-extensive-detailed-analysis-yet/>.

<sup>107</sup> Poling, *supra* note 104.

<sup>108</sup> Campbell & Salidjanova, *supra* note 5, at 4.

<sup>109</sup> Ben Blanchard, *China Rebuffs Vietnam Criticism of Oil Rig Move*, REUTERS (Apr. 8, 2016), <http://www.reuters.com/article/us-southchinasea-china-vietnam-idUSKCN0X5WU>.

<sup>110</sup> David Tweed & Keith Zhai, *China Is Planning a Massive Sea Lab 10,000 Feet Underwater*, BLOOMBERG (June 7, 2016), <http://www.bloomberg.com/news/articles/2016-06-07/china-pushes-plan-for-oceanic-space-station-in-south-china-sea>.

<sup>111</sup> See Andrew Higgins, *In Philippines, Banana Growers Feel Effect of South China Sea Dispute*, WASH. POST (June 10, 2012), [https://www.washingtonpost.com/world/asia\\_pacific/in-philippines-banana-growers-feel-effect-of-south-china-sea-dispute/2012/06/10/gJQA47WTV\\_story.html](https://www.washingtonpost.com/world/asia_pacific/in-philippines-banana-growers-feel-effect-of-south-china-sea-dispute/2012/06/10/gJQA47WTV_story.html); *Island Spat: China Suspends Philippine Travel*, CNN (May 10, 2012), <http://travel.cnn.com/shanghai/life/china-travel-suspension-437031/>.

<sup>112</sup> See Demetri Sevastopulo, Geoff Dyer, & Tom Mitchell, *Obama Forced Xi to Back Down Over South China Sea Dispute*, FINANCIAL TIMES (July 12, 2016), <http://www.ft.com/cms/s/0/c63264a4-47f1-11e6-8d68-72e9211e86ab.html#axzz4ECRJKMu>; Zack Cooper & Jake Douglas, *Successful Signaling at Scarborough Shoal?*, WAR ON THE ROCKS (May 2, 2016), <http://warontherocks.com/2016/05/successful-signaling-at-scarborough-shoal/>.

China may perceive it to be a way to expand its physical presence in its claimed waters after being dealt a blow to its legal position. Though the Tribunal ruled that Scarborough Shoal was a rock (rather than an island or LTE), it did not determine whether China or the Philippines has sovereignty over the feature. Further, the Tribunal did not deem Chinese fishing activities near Scarborough Shoal unlawful.<sup>113</sup> China could feasibly use this part of the Award as a justification for reclamation for the purposes of facilitating fishing activities in the area. Should China develop Scarborough Shoal in the way it developed the other reclaimed features in the Spratly Island chain, it could significantly enhance China's military presence in the South China Sea and establish a military outpost unprecedentedly close to the Philippines. This would effectively create a "strategic triangle" of occupied islands (the Paracel Islands, Scarborough Shoal, and the Spratly Islands) with the ability to host civilian and military infrastructure.<sup>114</sup>

Since China established an Air Defense Identification Zone (ADIZ) in the East China Sea in 2013, several Chinese officials have suggested that China might create a second zone in the South China Sea.<sup>115</sup> Though it is unclear whether the PLA has the capabilities in place to enforce an ADIZ in the South China Sea, it is possible China would establish one anyway for geopolitical, rather than operational, reasons.<sup>116</sup> In such a case, the ADIZ's utility could largely be symbolic, signaling China's resolve and rejection of the ruling.<sup>117</sup>

In recent years, Chinese officials and state-affiliated media advanced an argument that China's position on the South China Sea disputes are

<sup>113</sup> See generally Award, *supra* note 1, ¶¶ 805–13.

<sup>114</sup> Yoji Koda, *Japan's Perceptions of and Interests in the South China Sea*, ASIA POLICY 21 (Jan. 2016), <http://nbr.org/publications/element.aspx?id=862>. See also Cooper & Douglas, *supra* note 112.

<sup>115</sup> CHINA'S MINISTRY OF FOREIGN AFFAIRS, *Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference* (Jan. 4, 2016). See also Edward Wong, *China Says It Could Set up Air Defense Zone in South China Sea*, N.Y. TIMES (May 31, 2015), <http://www.nytimes.com/2015/06/01/world/asia/china-says-it-could-set-up-air-defense-zone-in-south-china-sea.html>; *China Has Right to Set Another Air Zone, Envoy Says*, ASSOCIATED PRESS (Dec. 2, 2013), <http://www.todayonline.com/chinaindia/china/china-has-right-set-another-air-zone-envoy-says>.

<sup>116</sup> Michael Pilger, *ADIZ Update: Enforcement in the East China Sea, Prospects for the South China Sea, and Implications for the United States*, U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION 7 (Mar. 2, 2016), [http://origin.www.uscc.gov/sites/default/files/Research/ADIZ%20Update\\_0.pdf](http://origin.www.uscc.gov/sites/default/files/Research/ADIZ%20Update_0.pdf).

<sup>117</sup> Campbell & Salidjanova, *supra* note 5, at 5.

fully in line with international law, and that the Tribunal's proceedings constitute a violation, or are outside the jurisdiction, of UNCLOS.<sup>118</sup> As the ruling drew near, Chinese diplomats reportedly suggested to their counterparts in Southeast Asia that China was considering withdrawing from UNCLOS if the ruling was unfavorable to China.<sup>119</sup> However, taking this step does little to advance China's actual interests and, more likely, undermines those interests.<sup>120</sup>

## V

### IMPLICATIONS OF THE AWARD

The Award is final and binding on both China and the Philippines.<sup>121</sup> Hopefully China, despite its initial reactions, will comply voluntarily. Voluntary adherence to the Award's guidelines would be an opportunity for China to repair any reputational damage resulting from its non-participation in the arbitration. The Award could be a starting point for improved diplomatic relations between the states surrounding the South China Sea. "One of the most significant implications of the Award is that it may encourage States to compromise on their sovereignty claims in the South China Sea" and further joint development in the region.<sup>122</sup> Joint development may be the most practical and peaceful way for states to exploit resources in this contentious region. China and the Philippines are already exploring the benefits of joint development through their continued negotiations for a deal on joint oil and natural gas exploration near Reed Bank.<sup>123</sup> However, it should be noted that rulings regarding UNCLOS must be enforced by individual member states; the lack of a formal enforcement

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<sup>118</sup> *Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines*, CHINA'S MINISTRY OF FOREIGN AFFAIRS (Dec. 7, 2014), [http://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1217147.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml).

<sup>119</sup> Kyodo, *Beijing Indicates it May Exit U.N. Sea Convention if South China Sea Ruling Disappoints*, JAPAN TIMES (June 21, 2016), <http://www.japantimes.co.jp/news/2016/06/21/national/politics-diplomacy/beijing-indicates-may-exit-u-n-sea-convention-south-china-sea-ruling-disappoints/#.V2qFYbsrLRZ>.

<sup>120</sup> Tara Davenport, *Why China Shouldn't Denounce UNCLOS*, THE DIPLOMAT (Mar. 24, 2016), <http://thediplomat.com/2016/03/why-china-shouldnt-denounce-unclos/>.

<sup>121</sup> UNCLOS, *supra* note 6, art. 296.

<sup>122</sup> Koh, *supra* note 50.

<sup>123</sup> Mirasola, *supra* note 98.

regime means that there is no legal process of enforcing China's compliance with the Award.<sup>124</sup>

If the Award fails to alter China's behavior in the long term, it would signal to the rest of the world that adherence to international law is optional. Optional adherence would undermine the viability of international maritime law as a tool to ensure the peaceful, stable, and lawful use of the seas.<sup>125</sup> China's current response to the Award, while creating significant long-term consequences in international maritime law, also directly contradicts the United States' oft-stated goal of preserving peace in the Asia Pacific through the promotion of a "rules-based order."<sup>126</sup> Despite China's response, the states bordering the South China Sea can be expected to strongly support the Award as its reasoning applies equally to their EEZ claims. They will strongly oppose any attempt by China to assert a right to the natural resources within their EEZs on the basis that it has historic rights within the nine-dash line. China's compliance with the Tribunal's Award notwithstanding, other countries, particularly Vietnam, that have competing maritime claims with China may be encouraged by the Tribunal ruling to initiate their own cases against China.<sup>127</sup> Future actions would be a positive development as they would provide some authoritative clarity on the other competing natural resource claims in the region, and could be a useful way to apply additional pressure on China to voluntarily comply with the Award's guidelines.<sup>128</sup>

No matter China's actions, the Award confirms the compulsory nature of the UNCLOS dispute resolution mechanism and reinforces the rule of law in the oceans. The value of the Philippines/China arbitral

<sup>124</sup> International Institutions and Global Governance, *The Global Oceans Regime*, COUNCIL ON FOREIGN RELATIONS (June 19, 2013), <http://www.cfr.org/oceans/global-oceans-regime/p21035>.

<sup>125</sup> Justin Nankivell, *Navigating Unsettled Waters: Introducing the Maritime Awareness Project*, NATIONAL BUREAU OF ASIAN RESEARCH (Apr. 14, 2016), <https://www.youtube.com/watch?v=BgoECozdMYI>.

<sup>126</sup> U.S. Department of Defense, *Annual Report to Congress: Military and Security Developments Involving the People's Republic of China 2016* 95 (Apr. 26, 2016), <http://www.defense.gov/Portals/1/Documents/pubs/2016%20China%20Military%20Power%20Report.pdf>; U.S. Department of Defense, *Asia Pacific Maritime Security Strategy 2* (Aug. 21, 2015), [http://www.defense.gov/Portals/1/Documents/pubs/NDAA%20A-P\\_Maritime\\_Security\\_Strategy-08142015-1300-FINALFORMAT.PDF](http://www.defense.gov/Portals/1/Documents/pubs/NDAA%20A-P_Maritime_Security_Strategy-08142015-1300-FINALFORMAT.PDF).

<sup>127</sup> Manuel Mogato, *Vietnam PM says Considering Legal Action against China over Disputed Waters*, REUTERS (May 22, 2014), <http://www.reuters.com/article/us-vietnam-china-idUSBREA4K1AK20140522>.

<sup>128</sup> Poling, *supra* note 104.

proceedings goes beyond China's compliance and is important for articulating the significance of the international dispute settlement system to global peace and security. Another value of the Tribunal's ruling is the clarification of certain principles in UNCLOS that have been buried in uncertainty, or have been subject to conflicting interpretations.<sup>129</sup> For example, one of the catalysts for heightened tensions in the South China Sea is the lack of a clear definition of an island capable of sustaining human habitation or economic life of its own under Article 121 (3).<sup>130</sup> Previous international courts and tribunals managed to avoid pronouncing definitively on this issue, but now that the Award has been issued, there are clear standards that states can use to determine whether a maritime feature is an "island" or a "rock" as defined by UNCLOS. And while most law of the sea experts definitively agree that historic rights cannot be recognized in the EEZ, China instigated friction in the South China Sea by relying on UNCLOS's lack of an express condemnation of historic rights to validate its claims.<sup>131</sup> The definitive ruling on these and other issues from the Tribunal provide authoritative, independent guidance on critical aspects of law of the sea that have for years gone unanswered by UNCLOS.<sup>132</sup> The Tribunal's interpretation of UNCLOS in its Award enhances the legitimacy of both the Convention and its dispute resolution system in the realm of international law by defining how the functional application of the law of the sea relates to member states.<sup>133</sup> By articulating standards and clarifying uncertainties found in UNCLOS, the Tribunal is repositioning UNCLOS to once again be the definitive law of the sea.<sup>134</sup>

### CONCLUSION

The issuance of the Award represented a resounding win for the Philippines, but by no means does it put to rest the disputes or the tensions in the South China Sea. The arbitration was never going to resolve issues of sovereignty over the islands in the South China Sea, and combined with the Tribunal's lack of enforcement capability in the

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<sup>129</sup> Tara Davenport, *Why the South China Sea Arbitration Case Matters (Even if China Ignores It)*, THE DIPLOMAT (July 08, 2016), <http://thediplomat.com/2016/07/why-the-south-china-sea-arbitration-case-matters-even-if-china-ignores-it/>.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*



face of an openly hostile China, there remains many unanswered questions as to how the disputes in the South China Sea move forward. However, the Tribunal's main objective was to issue a final and binding decision on a legal dispute on the interpretation and application of UNCLOS. By compelling China to arbitrate, the Philippines took an essential step that clarified many of the issues that have been obstacles for any long-lasting agreement in the South China Sea. The award not only clarified in several ways how UNCLOS applies to the complex disputes in the South China Sea, but the reasoning in this case will likely impact the development of a rules-based order for the oceans, whether or not it is strictly complied with by the parties in the case. As an authoritative interpretation of UNLCOS by eminent law of the sea experts, the Award will be studied by law students and government legal advisers for years to come.

