

JANUARY 2016

# South China Sea Lawfare:

## Legal Perspectives and International Responses to the Philippines v. China Arbitration Case

Edited by **Fu-Kuo Liu** and **Jonathan Spangler**





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This report is the result of a collaborative effort by an international team of authors. The content of the report does not necessarily reflect the views of the individual authors, the editors, their respective institutions, or the governments involved in the South China Sea maritime territorial disputes.

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Permanent Court of Arbitration / Merits hearing in session

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# Executive Summary

In January 2013, the Department of Foreign Affairs of the Republic of the Philippines initiated international arbitral proceedings against the People's Republic of China. Initiated under Article 287 and Annex VII of the 1982 United Nations Convention on the Law of the Sea (UNCLOS), the arbitration case challenges the legality of the PRC's claims, resource exploitation, and law enforcement actions in the South China Sea and requests that the Arbitral Tribunal constituted to hear the arbitration case issue an award with regards to these matters. In July and August 2013, the Tribunal released its Rules of Procedure and timetable for the arbitration case and announced that the Permanent Court of Arbitration in The Hague would serve as the registry in the arbitral proceedings. In March 2014, the Philippines submitted a ten-volume, 4,000-page memorial to the Tribunal detailing its case on the jurisdiction of the Tribunal and the merits of its claims. While China has opted not to formally participate in the arbitral proceedings, the Tribunal has taken into account official statements made by the PRC, including a note verbale released by its embassy in February 2013 and a position paper released by its Ministry of Foreign Affairs in December 2014.

In July 2015, the Tribunal concluded its hearing on jurisdiction and admissibility and announced that it would release its relevant award by the end of the year. In October 2015, in its Award on Jurisdiction and Admissibility, the Tribunal concluded "that it does have jurisdiction with respect to the matters raised in seven of the Philippines' Submissions[, ...] that its jurisdiction with respect to seven other Submissions by the Philippines will need to be considered in conjunction with the merits[, and that it] has

Initiated under Article 287 and Annex VII of the 1982 UNCLOS, the Philippines' arbitration case challenges the legality of the PRC's claims, resource exploitation, and law enforcement actions in the South China Sea.

requested the Philippines ... clarify and narrow one of its Submissions.” In November 2015, the Tribunal concluded its hearing on the merits and remaining issues of jurisdiction and admissibility. Following the final deadline of January 1, 2016, for the China to submit official comments on the arbitral proceedings, the Tribunal entered into deliberations and has stated that it intends to issue its second award in 2016.

As tensions in the South China Sea have risen, the arbitral proceedings in *The Republic of the Philippines v. The People’s Republic of China* case and the Philippines’ decision, after many years of unsuccessful bilateral negotiations, to engage in lawfare—that is, the use of international legal mechanisms as a tactic for advancing one’s interests in bilateral or multilateral disputes or conflicts—have become a focal point of the maritime territorial disputes,

As tensions in the South China Sea have risen, the arbitral proceedings in the Philippines v. China case have become a focal point of the maritime territorial disputes, leading many state and non-state actors to become increasingly involved in and vocal about South China Sea issues.

leading many state and non-state actors to become increasingly involved in and vocal about South China Sea issues. The controversial nature of the issue has resulted in a proliferation of heated diplomatic and military interactions and, in many instances, hindered meaningful cooperation between relevant stakeholders. This report, as the result of a collaborative effort between authors from ten countries, aims to serve as an example of constructive international cooperation on South China Sea issues in the midst of heightened regional tensions.

The report is organized into four parts and incorporates the perspectives of claimants and non-claimant stakeholders in the



South China Sea maritime territorial disputes. Part I provides an introduction to the report, a background and timeline of the arbitral proceedings initiated by the Philippines against China, and an overview of the findings of the report. In Part II, four chapters offer

## This report aims to serve as an example of constructive international cooperation on South China Sea issues in the midst of heightened regional tensions.

detailed overviews of the legal perspectives of the parties willingly or unwillingly implicated in the arbitration case, including China, the Philippines, Taiwan, and UNCLOS. Part III focuses on ten different actors and their responses to the Tribunal's Award, the arbitral proceedings, and the South China Sea disputes more broadly. Specifically, the chapters cover the diplomatic and security responses of ASEAN, Australia, China, India, Indonesia, Malaysia, the Philippines, Taiwan, the United States, and Vietnam. Part IV concludes the report by summarizing its key findings and discussing the implications of the incompatible legal perspectives and diplomatic and security responses covered in the report.





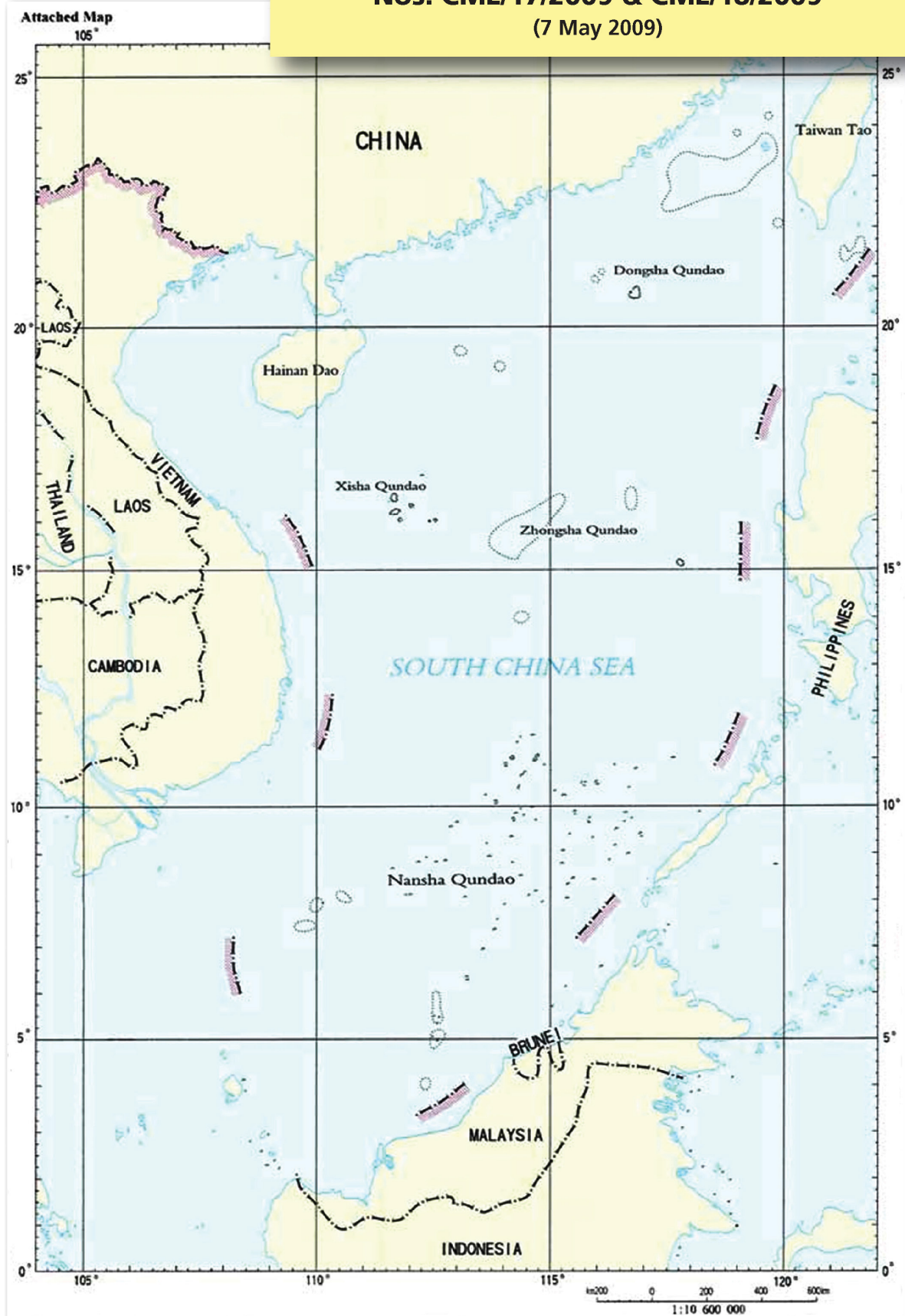
# Maps of the South China Sea



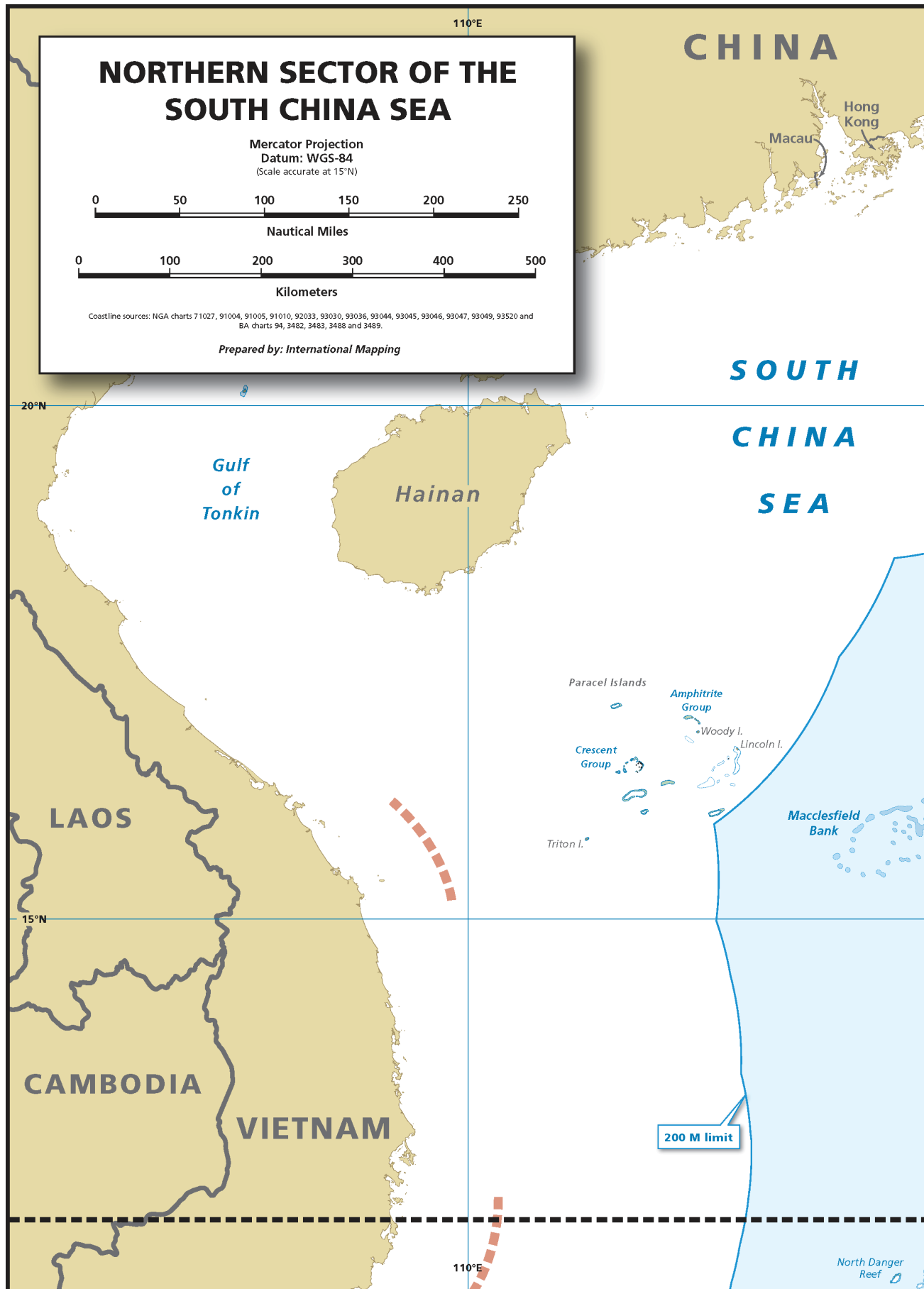
Source: Permanent Court of Arbitration, "Award on Jurisdiction and Admissibility," PCA Case No. 2013-19, October 29, 2015, p. 20. <http://www.pcacases.com/web/sendAttach/1506>

**MAP ATTACHED TO CHINA'S NOTES VERBALES  
Nos. CML/17/2009 & CML/18/2009**

(7 May 2009)

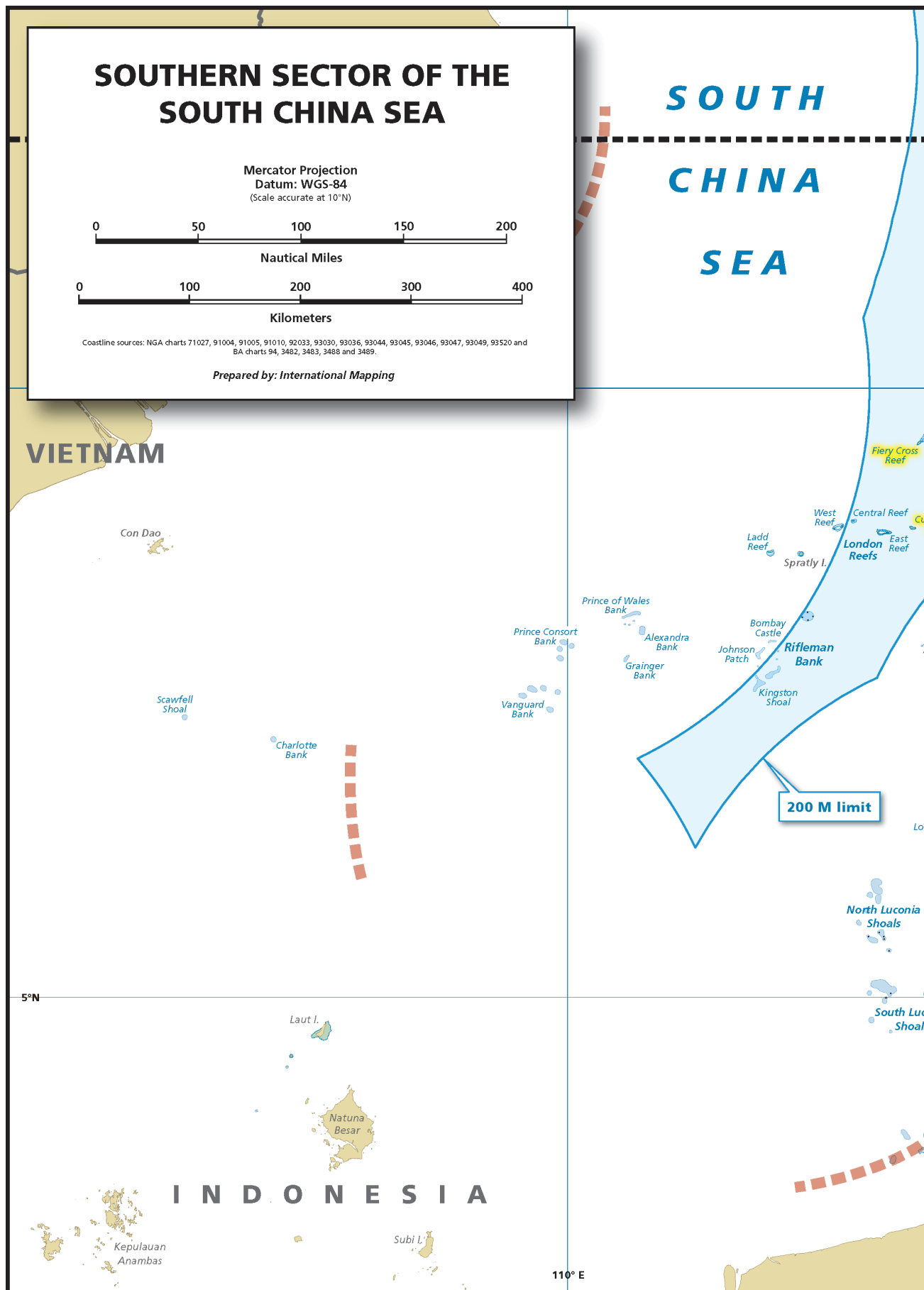


Source: Permanent Court of Arbitration, "Award on Jurisdiction and Admissibility," PCA Case No. 2013-19, October 29, 2015, p. 20. <http://www.pcacases.com/web/sendAttach/1506>





Source: Permanent Court of Arbitration, "Award on Jurisdiction and Admissibility," PCA Case No. 2013-19, October 29, 2015, p. 20. <http://www.pcacases.com/web/sendAttach/1506>



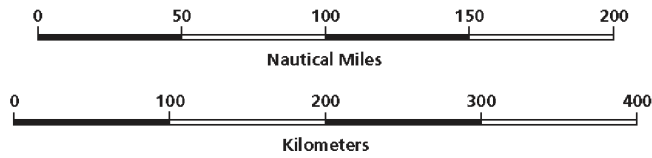




Source: Permanent Court of Arbitration, "Award on Jurisdiction and Admissibility," PCA Case No. 2013-19, October 29, 2015, p. 20. <http://www.pcacases.com/web/sendAttach/1506>

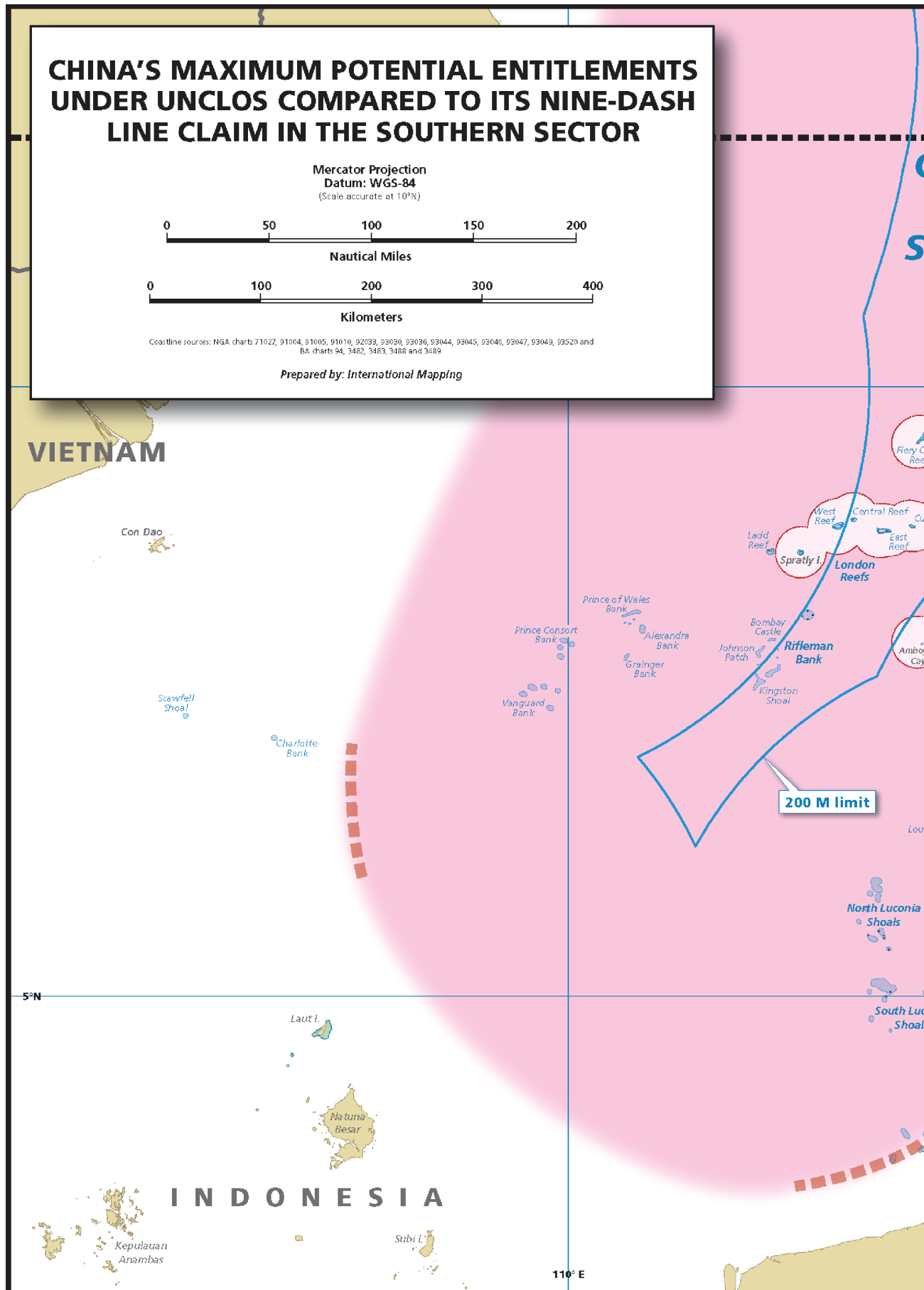
# CHINA'S MAXIMUM POTENTIAL ENTITLEMENTS UNDER UNCLOS COMPARED TO ITS NINE-DASH LINE CLAIM IN THE SOUTHERN SECTOR

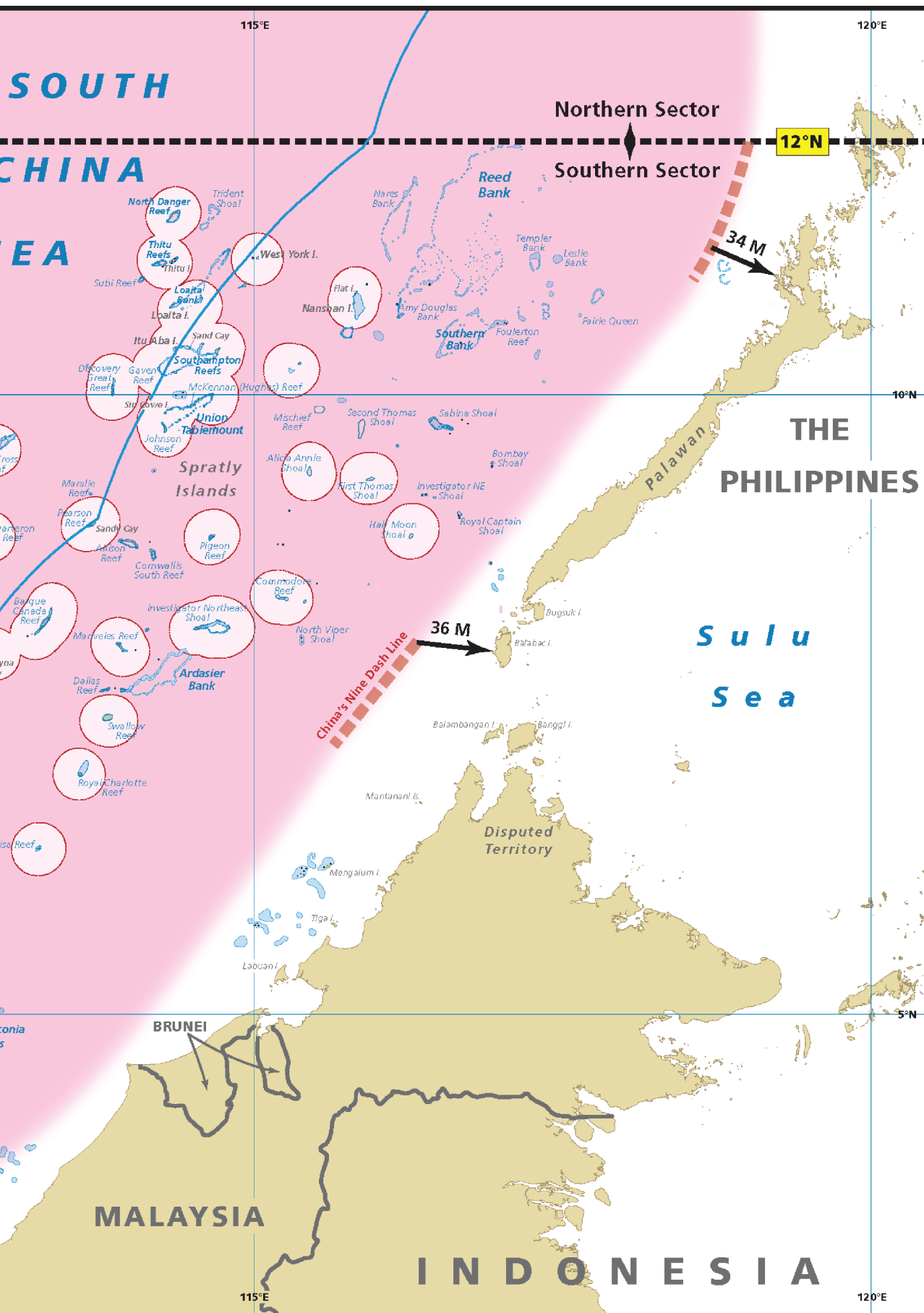
Mercator Projection  
Datum: WGS-84  
(Scale accurate at 10°N)



Coastline sources: NGA charts 71027, 91004, 91005, 91010, 92033, 93030, 93036, 93044, 93045, 93046, 93047, 93049, 93520 and BA charts 94, 3462, 3463, 3488 and 3489.

Prepared by: International Mapping





Source: Permanent Court of Arbitration, "Award on Jurisdiction and Admissibility," PCA Case No. 2013-19, October 29, 2015, p. 20. <http://www.pcacases.com/web/sendAttach/1506>



# Part I: **Introduction**



Philippines v. China Arbitration Case:

# Background, Legal Perspectives, and International Responses

Jonathan Spangler and Olga Daksueva

The announcement of the Award on Jurisdiction and Admissibility on October 29, 2015, and the forthcoming Award on Merits and Remaining Issues of Jurisdiction and Admissibility to be issued in 2016 are pivotal events not only in the arbitral proceedings brought forth by the Philippines against China but also, more broadly, in the history of the South China Sea maritime territo-

international maritime law. Nevertheless, international law has become a cornerstone of the relations among states in today's world. Although abidance by international law is far from universal, interpretations of international law differ because it remains fraught with ambiguity, and enforcement mechanisms are lacking, the number of agreements signed and ratified is evidence

## Interactions in the South China Sea are characterized by multiple different but interrelated disputes.

rial disputes. The complex and controversial nature of these disputes has drawn attention from policymakers, scholars, and media outlets around the world, and their far-reaching implications have pulled state and non-state actors far and wide into the disputes.

Interactions in the South China Sea are characterized by multiple different but interrelated disputes. The most evident of these are the overlapping and thus incompatible claims to sovereignty over maritime features and the relevant rights that such sovereignty confers. This aspect of the disputes has been long ongoing and, indeed, predates the enactment of relevant agreements in

that there is a general consensus regarding the importance of operating within the established international legal framework.

This chapter first provides an overview of the United Nations Convention on the Law of the Sea (hereafter, "UNCLOS" or "the Convention"), the role of the Permanent Court of Arbitration (PCA) in The Hague, and a background and timeline of *The Republic of the Philippines v. The People's Republic of China* (hereafter, "Philippines v. China") arbitration case. It then gives a condensed overview of the legal perspectives discussed in Part II and the international diplomatic and security

responses discussed in Part III of the report.

## Background and Timeline of the Arbitration Case

As maritime activity increased over the past centuries, key concepts governing the behavior and rights of vessels in the maritime domain emerged, eventually coalescing into today's international maritime legal framework upon which the Philippines v. China arbitration case in the South China Sea is based. This section offers a brief primer on these issues, including a back-

ground of the relevant institutions and a timeline of the arbitration case from interactions between the two countries prior to the arbitration to its initiation in January 2013 to the present day (i.e., January 2016).

Although abundance by international law is far from universal, interpretations of international law differ because it remains fraught with ambiguity, and enforcement mechanisms are lacking, the number of agreements signed and ratified is evidence that there is a general consensus regarding the importance of operating within the established international legal framework.

### United Nations Convention on the Law of the Sea (UNCLOS)

The growing ambitions of nations to gain control over resources and expand territorial waters beyond the traditional maritime boundaries, which were limited to three nautical miles, challenged the existing doctrines of freedom of the seas and *mare liberum*, which had been practiced since the seventeenth century. The United States first extended its jurisdiction over natural resources on its continental shelf, and other nations soon followed it. In 1947, the International Law Commission was established, and at its sessions from 1949 to 1956, prepared final reports on continental shelves, fisheries, contiguous zones, and territorial seas, which turned into four conventions adopted at the first

UN Conference on the Law of the Sea in 1958.

In 1973, the third UN Conference on the Law of the Sea, involving 160 state participants, was held and culminated nine years later with the approval of the 1982 United Nations Convention on the Law of the Sea (UNCLOS). UNCLOS entered into force on November 16, 1994, a year after ratification by the sixtieth nation, Guyana. As of January 2, 2015, 167 nations have ratified or acceded to UNCLOS. The Convention became a first-time attempt to control all aspects of usage of and rules of behavior at seas and oceans, maintain stability at sea, and preserve marine life.



The Convention consists of 320 articles regulating “navigational rights, territorial sea limits, economic jurisdiction, legal status of resources on the seabed beyond the limits of national jurisdiction, passage of ships through narrow straits, conservation and management of living marine resources, protection of the marine environment, a marine research regime, and ... a binding procedure for settlement of disputes between States.”<sup>1</sup> It has also established the International Seabed Authority, “which organize[s] and control[s] activities in the deep seabed beyond national jurisdiction with a view to administering its resources” and the International Tribunal for the Law of the Sea (ITLOS), “which has competence to settle ocean related disputes arising for the application and interpretation of the Convention.”<sup>2</sup> Besides ITLOS, the Convention set forth ad hoc arbitration pursuant to Annex VII of UNCLOS and “special arbitral tribunal” formation procedures for certain fields (in accordance with Annex VIII of UNCLOS) as means for settling disputes.

### Role of the Permanent Court of Arbitration

The Permanent Court of Arbitration (PCA) was established by the Convention for the Pacific Settlement of International Disputes, adopted at the first International Peace Conference in The Hague in July 1899. The convention was revised at the second Hague Conference in 1907. Today, 117 states have acceded to one or both of the PCA’s founding conventions. Since the 1990s the PCA has further developed its dispute settlement system, covering “territorial, treaty and human rights disputes between States; private claims against an inter-governmental organization; and commercial disputes, including disputes arising under bilateral investment treaties.”<sup>3</sup>

Today, the PCA acts as registry in five interstate ar-

In 1995, both sides agreed to find a solution through a “gradual and progressive process of cooperation” and “in a peaceful and friendly manner through consultations on the basis of equality and mutual respect.”

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1 “The United Nations Convention on the Law of the Sea (A historical perspective),” United Nations Oceans and Law of the Sea. [http://www.un.org/depts/los/convention\\_agreements/convention\\_historical\\_perspective.htm](http://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm)

2 “The United Nations Convention on the Law of the Sea (A historical perspective),” United Nations Oceans and Law of the Sea. [http://www.un.org/depts/los/convention\\_agreements/convention\\_historical\\_perspective.htm](http://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm)

3 “Dispute settlement,” United Nations Conference on Trade and Development, New York and Geneva, 2003. [http://unctad.org/en/docs/edmisc232add26\\_en.pdf](http://unctad.org/en/docs/edmisc232add26_en.pdf)

bitrations, 55 investor-state arbitrations, and 34 arbitrations under contracts or other agreements involving a state, state-controlled entity, or intergovernmental organization. It offers arbitration as a tool for compliance with international public law. The procedures for arbitration are described and Tribunals are constituted under Annex VII of UNCLOS. Pending cases include (1) *Malta v. Sao Tome and Principe*, (2) *Netherlands v. Russia*, (3) *Timor-Leste v. Australia*, (4) the *Philippines v. China*, and (5) *Croatia v. Slovenia*.

## Pre-2013 China–Philippines Diplomatic Interactions in the South China Sea

Over the past decades, South China Sea tensions have been punctuated by incidents and intense diplomatic interactions. All the while, many of the concerned parties have been negotiating to resolve or at least ease tensions through bilateral and multilateral frameworks. Since the 1970s, China and the Philippines have frequently exchanged views on relevant disputes and reached a first agreement on these issues in the signing of the Joint Statement between the People’s Republic of China and the Republic of the Philippines concerning Consultations on the South China Sea and on Other Areas of Cooperation on August 10, 1995. Both sides agreed to find a solution through a “gradual and progressive process of cooperation” and “in a peaceful and friendly manner through consultations on the basis of equality and mutual respect.”<sup>4</sup>

In 1999, the two countries organized the Experts’ Group Meeting on Confidence-Building Measures, the main purpose of which was to serve as a platform for dialogue and consultation to facilitate further development of relations between the two nations. The meeting issued the Joint Statement of the China-Philippines Experts Group Meeting on Confidence-Building Measures, which reiterated the countries’ commitment to “continu[ing] to work for a settlement of their difference through friendly consultations.”<sup>5</sup>

The following year, China and the Philippines signed the Joint Statement between the Government of the People’s Republic of China and the Government of the Republic of the Philippines on the Framework of Bilateral Cooperation in the Twenty-First Century to reaffirm their pledge “to promote a peaceful settlement of disputes through bilateral friendly consultations and negotiations in accordance with universally-recognized principles of international law, including the 1982 United Nations Convention on the Law of the Sea.”<sup>6</sup> Furthermore, they agreed to contribute to the finalization of a Code of Conduct in the South China Sea.

The third China-Philippines Experts’ Group Meeting on Confidence-Building Measures issued a joint press statement on April 4, 2001, which positively evaluated the “constructive role” of the bilateral consultation mechanism in maintaining peace and stability in the region.<sup>7</sup> They also held a tabletop exercise on search-and-rescue operations during this meeting.

By 2002, after a long process of negotiations, ASEAN members and China finalized the Declaration on the Conduct of Parties in the South China Sea (DOC). Although it is not legally binding on concerned parties and contains no mechanisms for enforcement, the DOC has nevertheless become one of the most important documents for regulating parties’ activities in the region. Significantly, the signatories signaled their intentions “to resolve their territorial and jurisdictional disputes by peaceful means ... through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea.”<sup>8</sup> The declaration also identified four trust- and confidence-building measures and five voluntary cooperative activities.

4 Xinhua, “China reaffirms non-acceptance of arbitration on S.China Sea: FM,” *China Daily*, August 25, 2015. [http://www.chinadaily.com.cn/china/2015-08/25/content\\_21691994.htm](http://www.chinadaily.com.cn/china/2015-08/25/content_21691994.htm)

5 Xinhua, “Chinese government’s Position Paper on Matter of Jurisdiction in South China Sea Arbitration Initiated by Philippines (4),” *Global Times*, December 7, 2014. <http://www.globaltimes.cn/content/895321.shtml>

6 “Joint Statement Between China and the Philippines on the Framework of Bilateral Cooperation in the Twenty-First Century (Done in Beijing, China, on this 16th day of May 2000),” Embassy of the People’s Republic of China in the Republic of the Philippines. <http://ph.chinese-embassy.org/eng/zfgx/zzgx/t183269.htm>

7 Xinhua, “Chinese government’s Position Paper on Matter of Jurisdiction in South China Sea Arbitration Initiated by Philippines (4),” *Global Times*, December 7, 2014. <http://www.globaltimes.cn/content/895321.shtml>

8 “2002 Declaration on the Conduct of Parties in the South China Sea,” NUS Centre for International Law. <http://cil.nus.edu.sg/rp/pdf/2002%20Declaration%20on%20the%20Conduct%20of%20Parties%20in%20the%20South%20China%20Sea-pdf.pdf>

In order to prevent the escalation of tensions or eruption of conflict in the South China Sea, ASEAN countries started discussing the possibility of adopting a binding code of conduct in the region. In July 2012, a draft was accepted by a meeting of ASEAN senior officials in Phnom Penh and later at the forty-fifth Annual Ministerial Meeting (AMM) as well. ASEAN senior officials were also directed to start negotiations with their Chinese counterparts.<sup>9</sup> Thus far, negotiations have been ongoing but have produced no significant results.

### Initiation of and Response to the Arbitral Proceedings

On January 22, 2013, the Philippines initiated arbitral proceedings under Article 287 and Annex VII of UNCLOS via the submission of its Notification and Statement

the Notification and Statement of Claim. It also stated its position that it would neither accept nor participate in the arbitration. This stance was reiterated in the Note Verbale to the PCA on August 1, 2013, which stated that “[China] does not accept the arbitration initiated by the Philippines.”<sup>11</sup>

The Arbitral Tribunal is composed of five judges: Judge Thomas Mensah (President), Judge Jean-Pierre Cot, Judge Stanislaw Pawlak, Professor Alfred Soons, and Judge Rüdiger Wolfrum. One of the judges, Judge Rüdiger Wolfrum, was appointed by the Philippines of its own accord before it requested that the President of the International Tribunal on the Law of the Sea (ITLOS) appoint the others. The PCA serves as the administering institution and registry in the arbitration case. On August 27, 2013, the Tribunal issued the Rules of Procedure regulating the arbitration process. At the same time, the

## Manila has argued that “international law including UNCLOS will be the great equalizer in resolving the dispute over the West Philippine Sea.”

of Claim to the United Nations and the Embassy of the People’s Republic of China in Manila. In paragraph 31 of the document, the Philippines asserted ten claims relating to the China’s ‘nine-dash line,’ the nature of submerged features in the South China Sea, exclusive economic zones (EEZs), and China’s unlawful activities in the region. A week later, the Philippine government issued a press release publicly announcing the beginning of the arbitral process against the PRC and pledging that “international law including UNCLOS will be the great equalizer in resolving the dispute over the West Philippine Sea.”<sup>10</sup> In response, China, on February 19, 2013, rejected and returned the plaintiff’s Note Verbale with

PCA published its First Press Release in the proceedings, announcing a deadline of March 30, 2014, for the Philippines to submit its Memorial and noting China’s aforementioned position on the arbitration.

### Memorial Submission and Response

On March 30, 2014, the date set by the Arbitral Tribunal, the Philippine government presented its Memorial composed of ten volumes of nearly 4,000 pages in total. Volume I consisted of its “analysis of the applicable law and the relevant evidence,” and facts that may make evident “that the Arbitral Tribunal has jurisdiction over all

9 Carlyle A. Thayer, “ASEAN, China and the Code of Conduct in the South China Sea,” SAIS Review, vol. 33 no. 2 (Summer–Fall 2013), 75–84.

10 Philippine Consulate General of the Philippines in Chicago, “Submission of Notification and Statement of Claim on the West Philippine Sea Dispute,” Press Release, No. 02-13, January 30, 2013. <http://www.chicagopcg.com/pr02-13.pdf>

11 Permanent Court of Arbitration, “Arbitral Tribunal Establishes Rules of Procedure and Initial Timetable,” Press Release, August 27, 2013. <http://www.pcacases.com/web/sendAttach/227>

of the claims ... and that every claim is meritorious.”<sup>12</sup> Other volumes contained documents, maps, and other evidence to back up its claims. After receiving the Philippines’ Memorial, the Tribunal set December 15, 2014, as the date for China to respond and submit its Counter-Memorial.<sup>13</sup>

On December 7, 2014, China released 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, in which it argued that this case falls outside the Tribunal’s jurisdiction and reiterated its position of non-acceptance and non-participation in the arbitra-

## The Tribunal has decided to “treat China’s communications (including the Position Paper) as constituting a plea concerning the Arbitral Tribunal’s jurisdiction.”

tion. Its stance is grounded in the following statements: (1) the arbitration is based on “territorial sovereignty over several maritime features in the South China Sea, which is beyond the scope of the Convention;” (2) even if it were not, the “subject-matter would constitute an integral part of maritime delimitation between the two countries” and then it would fall within the Declaration of the People’s Republic of China under Article 298 of the 1982 United Nations Convention on the Law of the Sea of 2006, in China opted, “in accordance with the Convention, to exclude maritime boundary delimitations from its acceptance of compulsory dispute settlement

procedures under the Convention;”<sup>14</sup> and (3) the Philippines violated international law by initiating unilaterally the arbitration as both sides had agreed to settle the disputes through negotiations.<sup>15</sup>

The Arbitral Tribunal on December 17, 2014, issued a press release acknowledging that China’s Position Paper would not be considered as “China’s acceptance of or its participation in the arbitration.”<sup>16</sup> It noted that, based on Article 25(2) of the Rules of Procedure, the arbitral proceedings would continue despite China’s non-participation. The Tribunal also requested that the Philippines file a supplemental written submission by March 15, 2015, and set a deadline of June 16, 2015, for China to provide any comments on this submission.

### Hearing on Jurisdiction and Admissibility and Award on Jurisdiction and Admissibility

On April 22, 2015, the Arbitral Tribunal acknowledged receipt of the supplemental written submission by the Philippines and decided to “treat China’s communications (including the Position Paper) as constituting a plea concerning the Arbitral Tribunal’s jurisdiction.”<sup>17</sup> Furthermore, it determined that it would hold a hearing in July 2015 in order to address the objections to jurisdiction featured in China’s Position Paper. The hearing was conducted from July 7–13, 2015.

At the first day of the Hearing on Jurisdiction and Admissibility, Philippine Secretary of Foreign Affairs Albert F. del Rosario stated the Philippines’ point of view on the PCA’s jurisdiction over the case, reiterated the principal claims made by his country, described the efforts to resolve the maritime dispute bilaterally, and emphasized China’s recent “assertive and disconcerting” behavior

12 Albert F. del Rosario, “Statement of the Foreign Affairs Secretary: PH files memorial under UNCLOS against China,” March 30, 2013. <http://www.gov.ph/2014/03/30/statement-of-the-secretary-of-foreign-affairs-ph-files-memorial-under-unclos-against-china/>

13 Permanent Court of Arbitration, “The Arbitral Tribunal Sets Further Proceedings,” Press Release, June 3, 2014. <http://www.pcacases.com/web/sendAttach/230>

14 Permanent Court of Arbitration, “Award on Jurisdiction and Admissibility,” PCA Case No. 2013-19, October 29, 2015. <http://www.pcacases.com/web/sendAttach/1506>

15 Ministry of Foreign Affairs of the People’s Republic of China, “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,” December 7, 2014. [http://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1217147.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml)

16 Permanent Court of Arbitration, “The Arbitral Tribunal Requests Further Written Argument from the Philippines,” Press Release, December 17, 2014. <http://www.pcacases.com/web/sendAttach/1295>

17 Permanent Court of Arbitration, “The Arbitral Tribunal Sets Dates for Hearing on Jurisdiction and Admissibility,” Press Release, April 22, 2015. <http://www.pcacases.com/web/sendAttach/1298>

in the region.<sup>18</sup> Other members of the Philippine delegation, comprised of over sixty individuals, provided a series of arguments during the three days of the hearing that the Tribunal had jurisdiction over all claims since it is a dispute regarding maritime entitlements in the South China Sea but does not address sovereignty issues.<sup>19</sup> At the end of the hearing, the PCA issued a press release stating that it had concluded the preliminary hearing and noted that, if “the Arbitral Tribunal determines that it has jurisdiction over some or all of the Phil-

enforcement activities near Scarborough Shoal). The Tribunal reserved consideration of its jurisdiction with respect to seven other claims, including the Philippines’ Submission No. 1 (concerning the source of maritime entitlements in the South China Sea and the role of the Convention), Submission No. 2 (concerning the legal legitimacy of China’s historical claims in the South China Sea), Submission No. 5 (concerning overlapping entitlements in the area of Mischief Reef and Second Thomas Shoal), Submission No. 8 (concerning China’s actions

## In its Award, the Tribunal concluded that it had jurisdiction over seven of the fifteen submissions made by the Philippines.

ippines’ claims, it will then proceed to a hearing on the merits.”<sup>20</sup>

On October 29, 2015, the Tribunal issued its Award on Jurisdiction and Admissibility. In the Award, the Tribunal concluded that it had jurisdiction over seven of the fifteen claims submitted by the Philippines, including the Philippines’ Submission No. 3 (concerning the status of Scarborough Shoal as an ‘island’ or ‘rock’), Submission No. 4 (concerning the status of Mischief Reef, Second Thomas Shoal, and Subi Reef as ‘low-tide elevations’), Submission No. 6 (concerning the status of Gaven Reef and McKennan Reef, including Hughes Reef, as ‘low-tide elevations’), Submission No. 7 (concerning the status of Johnson Reef, Cuarteron Reef, and Fiery Cross Reef as ‘islands’ or ‘rocks’), Submission No. 10 (concerning China’s actions with regard to fishing activities of Filipino fishermen at Scarborough Shoal), Submission No. 11 (concerning the protection and preservation of the marine environment at Scarborough Shoal and Second Thomas Shoal), and Submission No. 13 (concerning China’s law

with regard to petroleum exploration, seismic surveys, and fishing within the Philippine-claimed EEZ), Submission No. 9 (concerning China’s fishing activities within the Philippine-claimed EEZ), Submission No. 12 (concerning China’s activities on Mischief Reef and their effects on the marine environment), and Submission No. 14 (concerning China’s activities in and around Second Thomas Shoal and China’s interactions with the Philippines military forces stationed there). The Tribunal also requested that the Philippines clarify the content and narrow the scope of Submission No. 15 (requesting a declaration that “China shall desist from further unlawful claims and activities”).<sup>21</sup>

### Responses to the Award on Jurisdiction and Admissibility

Philippine President Benigno Aquino III, in an interview with reporters, expressed that it “is the proof that the rule of law is the equalizer between small and big countries such as the Philippines and China.” Other high-ranked officials from the Philippines also responded positively to the Award. Communications Secretary Hermindo Coloma Jr. said that it gave a chance to present the merits of the case and that the country would await

18 Albert F. del Rosario, “Statement before the Permanent Court of Arbitration, Peace Palace, The Hague, Netherlands: Why the Philippines brought this case to arbitration and its importance to the region and the world,” July 7, 2015. <http://www.gov.ph/2015/07/07/statement-of-secretary-albert-del-rosario-before-the-permanent-court-of-arbitration-peace-palace-the-hague-netherlands/>

19 Permanent Court of Arbitration, “Day 1: Hearing on Jurisdiction and Admissibility,” Transcript, PCA Case No. 2013-19, July 7, 2015. <http://www.pcacases.com/web/sendAttach/1399>

20 Permanent Court of Arbitration, “The Arbitral Tribunal Concludes Hearing on Jurisdiction and Admissibility,” Press Release, July 13, 2015. <http://www.pcacases.com/web/sendAttach/1304>

21 Permanent Court of Arbitration, “Award on Jurisdiction and Admissibility,” PCA Case No. 2013-19, October 29, 2015. <http://www.pcacases.com/web/sendAttach/1506>



further advice from the Arbitral Tribunal.<sup>22</sup> The Philippines' newspapers went even further and depicted the Tribunal's decision as a victory versus China in the initial round.<sup>23</sup>

In response to the Award, China's foreign ministry declared that it "is null and void, and has no binding effect on China," criticized the Philippine government for its "political provocation under the cloak of law," and reiterated its previous position of non-acceptance and non-participation.

China responded to the Award by issuing a PRC foreign ministry statement that declared that the Award "is null and void, and has no binding effect on China," criticized the Philippine government for its "political provocation under the cloak of law," and reiterated its previous position of non-acceptance and non-participation.<sup>24</sup> Vietnam, one of the observers at the Tribunal, also expressed its views by stating that it supported UNCLOS procedures for dispute settlement but, at the same time, reaffirmed its "indisputable sovereignty" over the Paracel and Spratly Islands. In order to protect its rights and interests, the Vietnamese government submitted a Statement of the Ministry Foreign Affairs to the Arbitral Tribunal on December 5, 2014, requesting that the Tribunal pay due respect to its interests and rights.<sup>25</sup>

### Hearing on the Merits and Remaining Issues of Jurisdiction and Admissibility

From November 24–30, 2015, the Tribunal held the Hearing on the Merits and Remaining Issues of Jurisdiction and Admissibility in the arbitration case. During the hearing, the Judges heard the Philippines' presentations regarding "China's unlawful assertion of histor[ical] rights within the nine-dash line,"

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22 "Aquino hails initial victory vs China, says rule of law prevails," *Philstar*, October 30, 2015. <http://www.philstar.com/headlines/2015/10/30/1516593/aquino-hails-initial-victory-vs-china-says-rule-law-prevails>

23 Matikas Santos, "Key points of the Arbitral Tribunal's decision in PH vs China case," *Inquirer.net*, October 30, 2015. <http://globalnation.inquirer.net/130215/south-china-sea-arbitration-philippines-china-spratly-islands-west-philippine-sea>; Patricia Lourdes Viray, "Tribunal sides with Philippines in initial round vs China," *Philstar*, October 30, 2015. <http://www.philstar.com/headlines/2015/10/30/1516559/tribunal-sides-philippines-initial-round-vs-china>; Paterno Esmaguél II, "Philippines wins round 1 in historic case vs China," *Rappler*, October 30, 2015. <http://www.rappler.com/nation/111142-philippines-china-case-tribunal-jurisdiction-award>

24 "Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award on Jurisdiction and Admissibility of the South China Sea Arbitration by the Arbitral Tribunal Established at the Request of the Republic of the Philippines," Ministry of Foreign Affairs of the People's Republic of China, October 30, 2015. [http://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1310474.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1310474.shtml)

25 "Remarks by MOFA Spokesperson Le Hai Binh on Award of the Tribunal in the Arbitration instituted by the Philippines against China," The National Boundary Commission - Ministry of Foreign Affairs, November 20, 2015. <http://123.30.50.199/sites/en/remarksbymofaspokespersonlehai-gid--nd-40175410.aspx>

maritime entitlements claimed by China, China's violation of the Philippines' rights in regard to resources within its EEZ and continental shelf, fishing activities at Scarborough Shoal, and PRC construction of an artificial island and installations and structure at Mischief Reef, as well as China's violation of its environmental obligations.<sup>26</sup> The Tribunal appointed a technical expert, Grant W. Boyes, to assist in the arbitration. The Philippines also invited two independent expert witnesses, Professor Clive Schofield (a geographer) and Professor Kent Carpenter (a marine biologist), to present their views. The Press Release issued on the last day of the hearing summarized the Philippines' final claims, which include a request for a Tribunal declaration that China's 'nine-dash line' is contrary to the Convention, some maritime entitlements do not generate EEZs, Mischief Reef and Second Thomas Shoal fall within the Philippines' EEZ, China violated the Philippines' rights, and China has not fulfilled its obligations to protect the marine environment.<sup>27</sup> The award on merits and remaining jurisdictional issues is expected to be issued in 2016.

The PRC contends that, because any award issued by the Tribunal will involve deciding on sovereignty issues, the arbitration case itself threatens to undermine the authority of similar tribunals and the rule of international law.

### Responses to the Merits Hearing

Philippine President Benigno Aquino III, on November 22, 2015, at the tenth East Asia Summit in Kuala Lumpur, Malaysia, appealed to Beijing to respect the rule of law. "As the arbitration process we have entered into continues to its logical conclusion, we are hopeful that China would honor its word and respect the rule of law. The world is watching and expects no less from a responsible global leader."<sup>28</sup>

China, in response to the Hearing on the Merits and Remaining Issues of Jurisdiction and Admissibility, criticized the Philippines and Secretary of Foreign Affairs Albert del Rosario specifically for "unreasonable and groundless accusations against China," accused the Philippines of not making "an effort attempt to resolve disputes but an attempt cover up its illegal occupation of some islands and reefs of

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26 Permanent Court of Arbitration, "Day 1: Hearing on the Merits and Remaining Issues of Jurisdiction and Admissibility," Transcript, PCA Case No. 2013-19, November 24, 2015. <http://www.pcacases.com/web/sendAttach/1547>

27 Permanent Court of Arbitration, "The Tribunal Concludes Hearing on the Merits," Press Release, November 30, 2015. <http://www.pcacases.com/web/sendAttach/1524>

28 Patricia Lourdes Viray, "Aquino to China: Respect rule of law," *Philstar*, November 23, 2015. <http://www.philstar.com/headlines/2015/11/23/1525068/aquino-china-respect-rule-law>

China's Nansha Islands.”<sup>29</sup> In this note verbale, China explained its historical claims in the South China Sea and elaborated on mechanisms for settling disputes with relevant states. It also accused the Philippines and the Tribunal that they “have abused relevant procedures and obstinately forced ahead with the arbitration, and as a result, have severely violated the legitimate rights that China enjoys as a State Party to the UNCLOS.”<sup>30</sup>

## Legal Perspectives

The chapters in this report reveal that, despite some similarities, the parties involved in the disputes have developed a variety of distinct legal perspectives on South China Sea issues. This calls into question the view

rejected and returned the Philippines' Notification and Statement of Claim that initiated the arbitral proceedings, has declined to participate in the arbitration case, and maintains that the Tribunal has no jurisdiction over the issues raised in the arbitration case. Furthermore, it views the Philippines' internationalization of the disputes as breaching several bilateral agreements signed between the two countries and a violation of the spirit of the Declaration on the Conduct of Parties in the South China Sea. Beijing asserts that bilateral negotiations are the only appropriate means of dispute settlement in the South China Sea and remains committed to returning to bilateral negotiations with the Philippines. It argues that the Philippines' arbitration case is an attempt to

Despite some similarities, the parties involved in the disputes have developed a variety of distinct legal perspectives on South China Sea issues. This calls into question the view that two camps had formed in terms of their diplomatic perspectives on and approaches to the disputes.

that two camps had formed in terms of their diplomatic perspectives on and approaches to the disputes—one in support of using UNCLOS for dispute settlement and one opposed to it.

In its official statements on the arbitration case, China holds that it remains supportive of the principles of international law and recognizes the importance of international arbitration tribunals for dispute settlement within the appropriate contexts. However, it argues that the essence of this specific arbitration case relates to issues of territorial sovereignty. On these grounds, Beijing

use international law to disguise what China views as illegal occupations of Chinese territory and contends that, because any award issued by the Tribunal will involve deciding on sovereignty issues, the arbitration case itself threatens to undermine the authority of similar tribunals and the rule of international law. Moreover, it warns that such an award will harm the interests of other countries, including the Philippines, and claims that the arbitration case has increased regional tensions and may damage bilateral relations between the

29 Permanent Mission of the People's Republic of China to the United Nations, “Note Verbale CML/79/2015,” December 11, 2015. <http://www.documentcloud.org/documents/2648486-PRC-PHL-China-Note-Verbale-2015.html>

30 Permanent Mission of the People's Republic of China to the United Nations, “Note Verbale CML/79/2015,” December 11, 2015. <http://www.documentcloud.org/documents/2648486-PRC-PHL-China-Note-Verbale-2015.html>



two countries<sup>31 32</sup>

In contrast, the Philippines notes that seventeen years of bilateral negotiations have not led to a resolution to the disputes and cites the lack of progress as a major impetus for its decision to initiate the arbitral proceedings. In the arbitral proceedings, the Philippines asserts that all countries' entitlements to maritime territory, including those of both China and the Philippines, are clearly laid out in

international legal instruments, including UNCLOS, and that all of its Submissions in the arbitration case concern the interpretation and application of the Convention. It argues that the extent of Chinese claims to the South China Sea, particularly those based on "historic rights" and its "nine-dash line" submission to the UN Commission on the Limits of the Continental Shelf in 2009, are inconsistent with international law. Manila also claims that none of the territories occupied by the PRC—and, implicitly, those occupied by the ROC—qualify as "islands" under the definitions laid out in UNCLOS and, instead, can only be regarded as "rocks" or "low-tide elevations" incapable of generating EEZs. Consequently, the Philippines asserts that Chinese activities in the relevant areas, including occupation, construction, resource exploitation, and law enforcement actions, are a breach of UNCLOS. It has thus requested that the Tribunal confirm

its jurisdiction over relevant matters and issue awards declaring that the PRC's claims and activities, as noted above, are unlawful, that it must cease such activities, and that its rights are only those

China holds that it remains supportive of the principles of international law and recognizes the importance of international arbitration tribunals for dispute settlement within the appropriate contexts, but the essence of this specific arbitration case relates to issues of territorial sovereignty.

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31 Keyuan Zou and Xinchang Liu, "Philippines v. China Arbitration Case: China's Legal Perspectives on the Arbitral Proceedings," in Fu-Kuo Liu and Jonathan Spangler (eds.), *South China Sea Lawfare: Legal Perspectives and International Responses to the Philippines v. China Arbitration Case*, Taipei: South China Sea Think Tank / Taiwan Center for Security Studies, January 29, 2016.

32 Nong Hong, "Philippines v. China Arbitration Case: China's Diplomatic and Security Responses," in Fu-Kuo Liu and Jonathan Spangler (eds.), *South China Sea Lawfare: Legal Perspectives and International Responses to the Philippines v. China Arbitration Case*, Taipei: South China Sea Think Tank / Taiwan Center for Security Studies, January 29, 2016.

accorded to it by UNCLOS.<sup>33 34</sup>

Although the documents issued in the arbitration case do not explicitly refer to the Republic of China or Taiwan, the ROC is implicitly and directly involved due to its sovereignty claims, territorial occupations, maritime activities, the source of documents implicated in the proceedings, and its unresolved and ambiguous diplomatic relationship with the PRC, the Philippines, the UN, and other countries and actors. The involved parties are cognizant of this issue and have thus attempted to tread carefully in relevant communications, most often by omitting explicit reference to Taiwan. Nevertheless, the ROC government has made clear its legal perspectives and positions regarding the arbitral proceedings and maritime territorial disputes more broadly in a series of official statements. In particular, it has asserted that the sea features in question and surrounding waters are an inherent part of its territory as view from historical, geographical, and international legal perspectives and that Itu Aba (Taiping) Island is capable of sustaining human habitation and economic life and is therefore an “island” as defined by UNCLOS. The ROC has also reaffirmed its support for the rule of international law, opposition to unilateral actions that may result in increased regional tensions, and status as a founding member of the UN having later lost representation. Taipei has also declared that any Award issued by the Tribunal or decisions made in other fora without ROC participation will not be recognized and will have no effect legally.<sup>35 36 37</sup>

Yet in the context of the arbitral proceedings, it is

In the context of the arbitral proceedings, it is less the perspectives of the Philippines, PRC, or ROC and more the five members of the Tribunal’s interpretations of UNCLOS and understandings of international maritime law that guide the decision-making process.

33 Award on Jurisdiction and Admissibility, para. 99.

34 Jay L. Batongbacal, “Philippines v. China Arbitration Case: The Philippines’ Legal Perspectives on the Arbitral Proceedings,” in Fu-Kuo Liu and Jonathan Spangler (eds.), *South China Sea Lawfare: Legal Perspectives and International Responses to the Philippines v. China Arbitration Case*, Taipei: South China Sea Think Tank / Taiwan Center for Security Studies, January 29, 2016.

35 Ministry of Foreign Affairs of the Republic of China, “Statement on the South China Sea,” July 7, 2015. [http://www.mofa.gov.tw/en/News\\_Content.aspx?n=0E7B91A8FBEC4A94&sms=220E98D761D34A9A&s=EDEB-CA08C7F51C98](http://www.mofa.gov.tw/en/News_Content.aspx?n=0E7B91A8FBEC4A94&sms=220E98D761D34A9A&s=EDEB-CA08C7F51C98)

36 Ministry of Foreign Affairs of the Republic of China, “ROC government reiterates its position on South China Sea issues,” October 31, 2015. [http://www.mofa.gov.tw/en/News\\_Content.aspx?n=1EADDCFD4C6E-C567&s=F5170FE043DADE98](http://www.mofa.gov.tw/en/News_Content.aspx?n=1EADDCFD4C6E-C567&s=F5170FE043DADE98)

37 Chen-Ju Chen, “Philippines v. China Arbitration Case: Taiwan’s Legal Perspectives on the Arbitral Proceedings,” in Fu-Kuo Liu and Jonathan Spangler (eds.), *South China Sea Lawfare: Legal Perspectives and International Responses to the Philippines v. China Arbitration Case*, Taipei: South China Sea Think Tank / Taiwan Center for Security Studies, January 29, 2016.

less the perspectives of the Philippines, PRC, or ROC and more the five members of the Tribunal's interpretations of UNCLOS and understandings of international maritime law that guide the decision-making process. In order for an arbitration case to be appropriately constituted under the provisions of UNCLOS, it must meet

plication.<sup>38 39</sup> UNCLOS also allows for Parties to declare, at the time of signing, ratification, or accession, relevant exceptions to the Convention.<sup>40</sup> Regarding China's exception of "maritime delimitation" from compulsory dispute settlement, the Tribunal has also managed to tread carefully, suggesting that its ability to decide

Key issues for the Tribunal to decide upon before proceeding included whether or not a dispute existed, whether or not that dispute related to the interpretation or application of UNCLOS, whether or not China's maritime delimitation exclusion was grounds for dismissal, whether or not non-participation of one Party prevented it from proceeding with the case, whether or not previous bilateral or multilateral agreements hindered the admissibility of the case, and whether or not views had been exchanged between the two Parties.

two conditions. First, there must be a "dispute" between the two parties based on the legal definition of the term set forth in UNCLOS. The Tribunal in the *Philippines v. China* case has concluded as such. Second, the dispute must relate to the "interpretation or application" of the Convention. Despite China's assertions that the Philippines' case concerns sovereignty issues and not merely interpretation or application, the Tribunal has decided in favor of the Philippines' position that its case fulfills this second condition as well. It has done so cautiously by assuming that, hypothetically, if China's sovereignty claims to sea features were correct, it would still be able to proceed with the case while limiting itself to only issuing an award on matters of interpretation and ap-

may be limited by the extent of China's potential entitlements—entitlements that, at this point, remain un-

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38 Chris Whomersley, "Philippines v. China Arbitration Case: The Arbitral Proceedings from the Point of View of UNCLOS and the Tribunal," in Fu-Kuo Liu and Jonathan Spangler (eds.), *South China Sea Lawfare: Legal Perspectives and International Responses to the Philippines v. China Arbitration Case*, Taipei: South China Sea Think Tank / Taiwan Center for Security Studies, January 29, 2016.

39 Award on Jurisdiction and Admissibility, paras. 153–154.

40 "Declarations and Statements upon UNCLOS ratification," United Nations Division for Ocean Affairs and Law of the Sea, October 29, 2013. [http://www.un.org/depts/los/convention\\_agreements/convention\\_declarations.htm](http://www.un.org/depts/los/convention_agreements/convention_declarations.htm)

decided from the perspective of the Tribunal.<sup>41 42</sup> As for the issue of non-participation, it has not been considered by arbitral tribunals to be an obstacle in the past, and the Tribunal in this case has also determined that it can proceed unhindered. However, decisions not to participate may put the defendants at a disadvantage in an arbitration case.<sup>43</sup> In the UNCLOS provisions, it is also stipulated that Parties who have agreed to use alternative mechanisms for dispute settlement or otherwise entered into relevant “general, regional or bilateral” agreements may be excluded from the Convention’s dispute settlement provisions.<sup>44</sup> However, despite China’s objections, the Tribunal in the Philippines’ case has determined that the DOC and the various bilateral agreements between the two countries do not constitute legally binding agreements under UNCLOS.<sup>45</sup> Regarding the Convention’s obligation for Parties to exchange views,<sup>46</sup> the Tribunal has concluded that sufficient discussions between China and the Philippines have taken place, and the Tribunal is likely aware of the potential that one country could drag out discussions indefinitely if it were to decide otherwise.<sup>47</sup> Thus, from the perspective of the Tribunal tasked with interpreting UNCLOS as applies to the dispute presented in the Philippines’ case against China, no less than six key issues were considered and decided upon before moving on to consider the Philippines’ fifteen specific Submissions. In brief, these key issues included whether or not a dispute

While the bulk of the decisions have been in the Philippines’ favor, Manila is far from having received all that it initially sought, and even so, there is already some question as to whether or not the Tribunal has exceeded the powers accorded to it under international law.

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41 Chris Whomersley, “Philippines v. China Arbitration Case: The Arbitral Proceedings from the Point of View of UNCLOS and the Tribunal,” in Fu-Kuo Liu and Jonathan Spangler (eds.), *South China Sea Lawfare: Legal Perspectives and International Responses to the Philippines v. China Arbitration Case*, January 29, 2016.

42 Award on Jurisdiction and Admissibility, paras. 155–156.

43 Chris Whomersley, “Philippines v. China Arbitration Case: The Arbitral Proceedings from the Point of View of UNCLOS and the Tribunal,” in Fu-Kuo Liu and Jonathan Spangler (eds.), *South China Sea Lawfare: Legal Perspectives and International Responses to the Philippines v. China Arbitration Case*, January 29, 2016.

44 Articles 281–282.

45 Chris Whomersley, “Philippines v. China Arbitration Case: The Arbitral Proceedings from the Point of View of UNCLOS and the Tribunal,” in Fu-Kuo Liu and Jonathan Spangler (eds.), *South China Sea Lawfare: Legal Perspectives and International Responses to the Philippines v. China Arbitration Case*, January 29, 2016.

46 Article 283.

47 Chris Whomersley, “Philippines v. China Arbitration Case: The Arbitral Proceedings from the Point of View of UNCLOS and the Tribunal,” in Fu-Kuo Liu and Jonathan Spangler (eds.), *South China Sea Lawfare: Legal Perspectives and International Responses to the Philippines v. China Arbitration Case*, January 29, 2016.

existed, whether or not that dispute related to the interpretation or application of UNCLOS, whether or not China's maritime delimitation exclusion was grounds for dismissal, whether or not non-participation of one Party prevented it from proceeding with the case, whether or not previous bilateral or multilateral agreements hindered the admissibility of the case, and whether or not views had been exchanged between the two Parties. On all six of these issues, the Tribunal has decided more or less in favor of the Philippines' positions though it has done so cautiously on several of them, remaining ambiguous enough to avoid the possibility of collateral damage resulting from its decisions. As for the Philippines' fifteen Submissions, the Tribunal concluded in its Award "that it does have jurisdiction with respect to the matters raised in seven of the Philippines' Submissions[, ...] that its jurisdiction with respect to seven other Submissions by the Philippines will need to be considered in conjunction with the merits[, and that it] has requested the Philippines ... clarify and narrow one of its Submissions."<sup>48</sup> Considering the above six key issues decided upon by the Tribunal and its response to the Philippines' Submissions specifically, it is clear that, while the bulk of the decisions have been in the Philippines' favor, Manila is far from having received all that it initially sought, and even so, there is already some question as to whether or not the Tribunal has exceeded the powers accorded to it under international law.

48 Permanent Court of Arbitration, "The Tribunal Renders Award on Jurisdiction and Admissibility; Will Hold Further Hearings," Press Release, October 29, 2015. <http://www.pcacases.com/web/sendAttach/1503>.

## Diplomatic and Security Responses

In addition to expressing their legal perspectives on the Philippines v. China arbitration case, many stakeholders have also had a wide range of differing diplomatic and security responses to the arbitral proceedings and the South China Sea disputes more broadly. As the following chapters in this report reveal, there are some similarities and overlap among the various actors in terms of their responses, as are there important differences

and outliers. Each of these may be attributable in large part to the actors' pursuit of their own diverse interests within the complex and ever-shifting context of the disputes.

For its part, the Association of Southeast Asian Nations (ASEAN) has responded diplomatically by promoting restraint, non-militarization, and peaceful dispute settlement and calling for increased dialogue and confidence-building measures. It has acted as the platform for several key agreements relevant to the South China Sea, including the 1976 Treaty of Amity and Co-

operation in Southeast Asia (TAC) and the 2002 Declaration on the Conduct of Parties in the South China Sea, and has pushed for further negotiations on the signing of a Code of Conduct in the South China Sea (COC) with China. It has also continued to promote the rule of international law through its support for UNCLOS, the International Maritime Organization (IMO), and the International Civil Aviation Organization (ICAO). Given the importance of its relationship with China and the overlapping claims of some of its member states, the

Australia has thus far taken a cautious approach to the South China Sea disputes, emphasizing its general support for the clarity of territorial claims, a rules-based order grounded in international law, military restraint and conflict avoidance, and peaceful dispute settlement.

association itself has remained cautious regarding the South China Sea disputes. Although ASEAN does not have any defense forces of its own, the grouping hosts the ASEAN Defence Ministers' Meeting Plus (ADMM+) and has decided to form an ASEAN Political and Security Community.

Australia has thus far taken a cautious approach to the South China Sea disputes, emphasizing its general support for the clarity of territorial claims, a rules-based order grounded in international law, military restraint and conflict avoidance, and peaceful dispute settlement. Within the country, two camps have formed regarding its role in regional security—one that favors increased military involvement and another that favors decreased involvement. Australia is also indirectly involved in the disputes by means of two treaty arrangements. These include the Australia–U.S. alliance and the Five Power Defence Arrangements (FPDA), which include Malaysia, New Zealand, Singapore, and the United Kingdom.<sup>49</sup>

China, as the explicit target of the arbitration case initiated by the Philippines, has been compelled to respond diplomatically not only to the Philippine government and the Tribunal but also to the host of countries and other actors whom Manila has managed to rally with the turbulence caused by the arbitration case. China also understands that, given the Award issued by the Tribunal, there is now a procedural roadmap for other countries that may seek to submit similar disputes to international arbitration. Given the situation it has been forced to face, Beijing has taken advantage of the arbitral proceedings to reassert its stance on key issues and has become increasingly vocal in doing so. These issues include its claims to sovereignty, its legal positions noted above on matters of international maritime law and dispute resolution, non-acceptance of what is seen as a self-interested abuse of international law and organizations by other claimants, preference for bilateral negotiations for peaceful dispute settlement, and rejection of interference by extra-regional actors. As for its security responses, China has continued the development of military and civilian infrastructure on its occupied sea features, conducted military operations in the disputed ar-

India may be aiming to hedge, balance against, or isolate China in what New Delhi sees as Beijing's quest to achieve a position as the dominant power in the region.

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49 Sam Bateman, "Philippines v. China Arbitration Case: Australia's Diplomatic and Security Responses," in Fu-Kuo Liu and Jonathan Spangler (eds.), *South China Sea Lawfare: Legal Perspectives and International Responses to the Philippines v. China Arbitration Case*, Taipei: South China Sea Think Tank / Taiwan Center for Security Studies, January 29, 2016.



eas, and responded accordingly to perceived intrusions into its claimed maritime territory by other countries' militaries and civilians.<sup>50</sup>

Under the administration of Prime Minister Narendra Modi, India has entered an era of “high-octane diplomacy” and shifting diplomatic relations with other countries, many of which are claimants or non-claimant stakeholders in the South China Sea disputes. By building its partnerships with other countries, India may be aiming to hedge, balance against, or isolate China in what New Delhi sees as Beijing's quest to achieve a position as the dominant power in the region. India has also expressed its diplomatic support for the rule of law in guaranteeing freedom of navigation and continued to engage in economic activities in the South China Sea, including natural resource exploration and exploitation. India's security responses to the disputes while the arbitral proceedings are ongoing have included a shifting of its “Look East” policy into one of “Act East,” which has included flag visits, arms sales, and military training and capacity building.<sup>51</sup>

For the most part, Indonesia has refrained from becoming overly involved in the disputes while, at the same time, keeping a close eye on related developments in the region. In particular, Jakarta is concerned with the possibility that the Natuna Islands in the southwest corner of the South China Sea will become the object of controversy because of the ambiguity of the U-shaped line claims of the ROC and PRC. Over the course of the arbitral proceedings, Indonesia has responded diplomatically by advocating the expeditious passage of a legally-binding COC, promoting the ASEAN Institute for Peace and Reconciliation as a dispute settlement mechanism, voicing its willingness to serve as a “neutral” facilitator in the disputes, thereby expressing its support for multilateral dispute settlement, sending an observer delegation to The Hague, and proposing joint naval patrols involving all claimants to the South China Sea. Its

For Malaysia, the arbitration case has the potential to both positively and negatively affect its interests in the South China Sea.

50 Nong Hong, “Philippines v. China Arbitration Case: China's Diplomatic and Security Responses,” in Fu-Kuo Liu and Jonathan Spangler (eds.), *South China Sea Lawfare: Legal Perspectives and International Responses to the Philippines v. China Arbitration Case*, January 29, 2016.

51 Raviprasad Narayanan, “Philippines v. China Arbitration Case: India's Diplomatic and Security Responses,” in Fu-Kuo Liu and Jonathan Spangler (eds.), *South China Sea Lawfare: Legal Perspectives and International Responses to the Philippines v. China Arbitration Case*, Taipei: South China Sea Think Tank / Taiwan Center for Security Studies, January 29, 2016.

security responses have included an increased emphasis on its role as a maritime power under the administration of President Joko Widodo, and it has sought to expand the presence of its armed forces in the Natuna Islands and along its borders with the South China Sea.<sup>52</sup>

Despite not being a Party to the case, Malaysia has also been following the arbitral proceedings closely as the government understands that the content of awards issued by the Tribunal may have a direct impact on the delimitation of its maritime boundaries in accordance with international law. In July 2015, Malaysia notified the Tribunal of its concern by means of a note verbale and has also attended the hearings as an observer. It is also worth noting that the China's nine-dash line map and claim challenged in the case was submitted in response to Malaysia's joint submission with Vietnam to the UN Commission on the Limits of the Continental Shelf (CLCS). For Malaysia, the arbitration case has the potential to both positively and negatively affect its interests in the South China Sea. While it could clarify certain issues that have caused tensions, it could also force Malaysia to further consider its maritime boundary delimitation policies. Like other claimants, it has taken advantage of the proceedings to reassert its claims. However, largely due to its perceived special relationship with Beijing, Malaysia has taken a softer approach in its criticism of China's claims and has refrained from being overly vocal regarding its position on the Philippines' arbitration case. Instead, Kuala Lumpur has reiterated its commitment to using ASEAN and relevant mechanisms, including the DOC and a potential COC, to manage the disputes.<sup>53</sup> This is different from Manila, who has sought to frame it as an international issue to be managed by UN organizations, and Beijing, who has sought to frame it as a domestic or regional issue to be managed through bilateral negotiations. Malaysia's support

The ROC government has been vocal in its opposition to the Philippines' arbitration case, taking advantage of the opportunities presented by the proceedings to reiterate its sovereignty claims, refute the Philippines' claims regarding the definition and entitlement of sea features, reassert its view on the status of Itu Aba (Taiping) Island, the largest feature in the Spratly Islands, and clarify its legal obligations as relate to any awards issued by the Tribunal given its non-involvement in the arbitration case.

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52 Senia Febrica, "Philippines v. China Arbitration Case: Indonesia's Diplomatic and Security Responses," in Fu-Kuo Liu and Jonathan Spangler (eds.), *South China Sea Lawfare: Legal Perspectives and International Responses to the Philippines v. China Arbitration Case*, Taipei: South China Sea Think Tank / Taiwan Center for Security Studies, January 29, 2016.

53 Sumathy Permal, "Philippines v. China Arbitration Case: Malaysia's Diplomatic and Security Responses," in Fu-Kuo Liu and Jonathan Spangler (eds.), *South China Sea Lawfare: Legal Perspectives and International Responses to the Philippines v. China Arbitration Case*, Taipei: South China Sea Think Tank / Taiwan Center for Security Studies, January 29, 2016.



for ASEAN may be attributable in part to its role as the Chair of ASEAN in 2015 as turbulence over the arbitral proceedings reached a crescendo. Thus far, Malaysia has exercised restraint in its security responses. Based on recent developments, however, and the possible security responses of other countries in the near future, there is some concern as to whether it will have to reconsider its maritime security strategy and modernize its relevant defense forces, and discussions have taken place within the government in this regard.<sup>54</sup>

For the Philippines, its diplomatic responses during the arbitral proceedings have been primarily procedural because of its role as the initiator of and key player in the arbitration case. In essence, the case itself is the cul-

least, threaten to do so.<sup>56</sup> Furthermore, likely in order to strengthen its case, the Philippines has supposedly halted its land reclamation efforts while the case is ongoing and been increasingly vocal in international fora about the disputes. The Philippines has also responded militarily to the South China Sea tensions more broadly by accelerating the pace of arms purchases, upgrading its military capabilities, and attempting to further strengthen its security ties with other countries, including Japan and the U.S.<sup>57</sup>

Because of the extent and significance of its claims as well as its delicate political relationship with mainland China, Taiwan has a role both in the arbitration case and in the territorial disputes more broadly. In its

Vietnam is the only country besides the Philippines to have made a formal submission to the Tribunal, in which it expressed its concern that its legal interests and rights could be affected.

mination of Manila's diplomatic response to many years of bilateral and multilateral negotiations that have been less fruitful than it had hoped, the 2012 Scarborough Shoal standoff and aftermath, and more recent Chinese activities in the South China Sea.<sup>55</sup> Because the Philippines is unable to confront China on its own in the disputes, a key aspect of its arbitration case is the potential for it to serve as precedent for other claimants who may initiate their own arbitral proceedings or, at the

diplomatic responses, the ROC government has been vocal in its opposition to the Philippines' arbitration case, taking advantage of the opportunities presented by the proceedings to reiterate its sovereignty claims, refute the Philippines' claims regarding the definition and entitlement of sea features, reassert its view on the status of Itu Aba (Taiping) Island, the largest feature in the Spratly Islands, and clarify its legal obligations as relate to any awards issued by the Tribunal given its non-involvement in the arbitration case. In terms of its security responses, Taiwan has continued to move forward with its primarily civilian infrastructural develop-

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54 Sumathy Permal, "Philippines v. China Arbitration Case: Malaysia's Diplomatic and Security Responses," in Fu-Kuo Liu and Jonathan Spangler (eds.), *South China Sea Lawfare: Legal Perspectives and International Responses to the Philippines v. China Arbitration Case*, January 29, 2016.

55 Richard Javad Heydarian, "Philippines v. China Arbitration Case: The Philippines' Diplomatic and Security Responses," in Fu-Kuo Liu and Jonathan Spangler (eds.), *South China Sea Lawfare: Legal Perspectives and International Responses to the Philippines v. China Arbitration Case*, Taipei: South China Sea Think Tank / Taiwan Center for Security Studies, January 29, 2016.

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56 Richard Javad Heydarian, "Philippines v. China Arbitration Case: The Philippines' Diplomatic and Security Responses," in Fu-Kuo Liu and Jonathan Spangler (eds.), *South China Sea Lawfare: Legal Perspectives and International Responses to the Philippines v. China Arbitration Case*, January 29, 2016.

57 Richard Javad Heydarian, "Philippines v. China Arbitration Case: The Philippines' Diplomatic and Security Responses," in Fu-Kuo Liu and Jonathan Spangler (eds.), *South China Sea Lawfare: Legal Perspectives and International Responses to the Philippines v. China Arbitration Case*, January 29, 2016.

ment while considering a possible transition of forces stationed on Itu Aba Island from Coast Guard to military.<sup>58</sup>

Despite not being a signatory to UNCLOS, the United States has long been a vocal proponent of the rule of international law in ensuring the rights of all countries in the world's oceans, particularly in regards to freedom of navigation. It has also consistently expressed its support for international arbitration and multilateral negotiations as mechanisms for dispute settlement. In the wake of the Award, however, the leadership has been relatively reserved in expressing its support for the arbitral proceedings, most likely in order to avoid further antagonizing Beijing. No official statements have emerged from Washington, and government and military officials have, for the most part, simply reiterated the U.S. stance regarding international law and peaceful dispute settlement. In terms

Vietnam has, for the most part, refrained from using force as the proceedings are ongoing, even in the face of serious challenges to its claimed sovereignty.

of its security responses, during the proceedings, the U.S. has strengthened its alliance with the Philippines and reassured its allies that it intends to honor its security commitments to the region. Although U.S. freedom of navigation operations have been ongoing for decades and do not necessarily represent a direct response to the arbitral proceedings, the timing of such operations has led many to see them as such. The U.S. has long claimed that it maintains a position of neutrality on the South China Sea disputes. This position remains controversial, however, as both military operations and active support for international arbitration could easily be considered as not maintaining a neutral position.<sup>59</sup>

Due to the the extent of its claims, involvement in high-profile maritime incidents with China, and communication with the Tribunal, Vietnam has played an important, albeit indirect, role in the arbitral proceedings as well as a central role in the South China Sea disputes more broadly. Diplomatically, Vietnam

has followed the proceedings closely, has sent observer delegations to the PCA, and is the only country besides the Philippines to have made a formal submission to the Tribunal, in which it expressed its concern that its legal interests and rights could be affected and reserved the right to intervene should the need arise. Nevertheless, Hanoi has expressed its support for the Tribunal's jurisdiction and the use of international arbitration for dispute settlement, even suggesting that the possibility of initiating its own arbitral proceedings in the future was depen-

58 Jonathan Spangler, "Philippines v. China Arbitration Case: Taiwan's Diplomatic and Security Responses," in Fu-Kuo Liu and Jonathan Spangler (eds.), *South China Sea Lawfare: Legal Perspectives and International Responses to the Philippines v. China Arbitration Case*, Taipei: South China Sea Think Tank / Taiwan Center for Security Studies, January 29, 2016.

59 Raul (Pete) Pedrozo, "Philippines v. China Arbitration Case: United States' Diplomatic and Security Responses," in Fu-Kuo Liu and Jonathan Spangler (eds.), *South China Sea Lawfare: Legal Perspectives and International Responses to the Philippines v. China Arbitration Case*, Taipei: South China Sea Think Tank / Taiwan Center for Security Studies, January 29, 2016.

dent on China's actions in the region.<sup>60</sup> It was also Vietnam's joint submission with Malaysia to the CLCS that provided the impetus for China's nine-dash line map submission, which Vietnam has vehemently opposed despite the ambiguity of its own claims. As with other claimants, it has also taken advantage of key events in the arbitral proceedings to reiterate its South China Sea claims and express its support for the rule of international law, including UNCLOS, as a means for peaceful dispute resolution. In terms of its security responses, Vietnam has, for the most part, refrained from using force as the proceedings are ongoing, even in the face of serious challenges to its claimed sovereignty. Although Hanoi was slow to domestic protests that damaged the businesses of Chinese, Taiwanese, and other countries' companies, it has attempted to maintain a diplomatic approach to maritime incidents in which it has been involved. However, Vietnam has continued to bolster its armed forces and made efforts to increase its defense

In Part II and Part III that follow, each of the chapters attempts to provide a deeper understanding of the legal perspectives or diplomatic and security responses of individual stakeholders in the South China Sea disputes.

ties with other countries.

In Part II and Part III that follow, each of the chapters attempts to provide a much deeper understanding of the legal perspectives or diplomatic and security responses of individual stakeholders in the South China Sea disputes. It is our sincere hope that this report will serve as an example of constructive international collaboration in the midst of heightened tensions in the region and that the content of the report will provide a useful foundation for researchers and others interested in the impacts of the Philippines v. China arbitration case on the South China Sea disputes.

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60 Do Viet Cuong, "Philippines v. China Arbitration Case: Vietnam's Diplomatic and Security Responses," in Fu-Kuo Liu and Jonathan Spangler (eds.), *South China Sea Lawfare: Legal Perspectives and International Responses to the Philippines v. China Arbitration Case*, Taipei: South China Sea Think Tank / Taiwan Center for Security Studies, January 29, 2016.



Part II:

# **Legal Perspectives on the Philippines v. China Arbitral Proceedings**



Philippines v. China Arbitration Case:

# China's Legal Perspectives on the Arbitral Proceedings

Keyuan Zou and Xinchang Liu

On 22 January 2013, the Republic of the Philippines, by means of a note verbale with its Notification and Statement of Claim, initiated the compulsory arbitration procedures stipulated in the 1982 United Nations Convention on the Law of the Sea (UNCLOS) against the People's Republic of China. Regarding the arbitration case initiated by the Philippines, China stated that it would not participate in the arbitration and accused the

negotiation and consultation to settle the disputes so as to avoid further damage to bilateral relations between the two countries.<sup>2</sup>

## China's Position Paper

On 7 December 2014, the Chinese Foreign Ministry was authorized to release a position paper of the govern-

China has asked the Philippines to return to negotiation and consultation to settle the disputes so as to avoid further damage to bilateral relations between the two countries.

Philippines of complicating the issue by distorting "the basic facts underlying the disputes between China and the Philippines. In so doing, the Philippines attempts to deny China's territorial sovereignty and clothes its illegal occupation of China's islands and reefs with a cloak of 'legality'".<sup>1</sup> China asked the Philippines to return to

ment on the matter of jurisdiction in the South China Sea arbitration initiated by the Republic of the Philippines. China holds the view that the Tribunal manifestly has no jurisdiction over this arbitration, unilaterally initiated by the Philippines, with regard to disputes between China and the Philippines in the South China Sea for four reasons.

1 Chunying Hua, "Foreign Ministry Spokesperson Hua Chunying's Remarks on the Philippines' Efforts in Pushing for the Establishment of the Arbitral Tribunal in Relation to the Disputes between China and the Philippines in the South China Sea," April 26, 2013. <http://www.mfa.gov.cn/ce/cemm/eng/fyrth/t1035577.htm>

2 Keyuan Zou and Xinchang Liu, "The Legal Status of the U-shaped Line in the South China Sea and Its Legal Implications for Sovereignty, Sovereign Rights and Maritime Jurisdiction," *Chinese Journal of International Law* 14(1), 2015, pp. 57–77. doi:10.1093/chinesejil/jmv008

Firstly, China has defended its non-participation based on its position that “the essence of the subject matter of the arbitration is the territorial sovereignty over the relevant maritime features in the South China Sea, which is beyond the scope of the Convention and is

that dispute has other aspects, however important.”<sup>6</sup>

Secondly, China has argued that “there is an agreement between China and the Philippines to settle their disputes in the South China Sea by negotiations, as embodied in bilateral instruments and the [Declaration on

“China and the Philippines have agreed to settle their relevant disputes by negotiations, without setting any time limit for the negotiations, and have excluded any other means of settlement.”

### – PRC Ministry of Foreign Affairs

consequently not concerned with the interpretation or application of the Convention.”<sup>3</sup> China maintains that it “has indisputable sovereignty over the South China Sea Islands”,<sup>4</sup> including the Dongsha (Pratas) Islands, Xisha (Paracel) Islands, Zhongsha Islands (Macclesfield Bank and Scarborough Shoal) and Nansha (Spratly) Islands, and the adjacent waters. All related acts, such as carrying out laws and regulations regarding the South China Sea since 1949, erecting commemorative stone markers, stationing garrisons, and conducting geographical surveys, “affirm China’s territorial sovereignty and relevant maritime rights and interests in the South China Sea.”<sup>5</sup> Unfortunately, “the issue in this case concerning state’s sovereignty” itself does not provide sufficient reasons to exclude the Tribunal’s jurisdiction, as the Tribunal held that “[t]here is no question that there exists a dispute between the Parties concerning land sovereignty over certain maritime features in the South China Sea”. It further held that there are no grounds to “decline to take cognizance of one aspect of a dispute merely because

the Conduct of Parties in the South China Sea].”<sup>7</sup> Thus, China holds that “the unilateral initiation of the present arbitration by the Philippines has clearly violated international law.”<sup>8</sup>

With regard to disputes concerning territorial sovereignty and maritime rights, China has always maintained that they should be peacefully resolved through negotiations between the countries directly concerned. In the present case, there has been a long-standing agreement between China and the Philippines on resolving their disputes in the South China Sea through friendly consultations and negotiations.<sup>9</sup>

Through bilateral and multilateral instruments, such as “the Joint Statement between the People’s Republic of China and the Republic of the Philippines concerning Consultations on the South China Sea and on Other Ar-

3 Ministry of Foreign Affairs of the People’s Republic of China, “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,” December 7, 2014, para. 86. [http://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1217147.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml)

4 “Position Paper,” para. 4.

5 “Position Paper,” para. 4.

6 Permanent Court of Arbitration, 2015, Award on Jurisdiction and Admissibility, PCA Case No. 2013-19, October 29, para. 152. <http://www.pcacases.com/web/sendAttach/1506>

7 “Position Paper,” para. 86.

8 “Position Paper,” para. 86.

9 “Position Paper,” para. 30.



eas of Cooperation” issued on 10 August 1995,<sup>10</sup> “The Joint Statement of the China-Philippines Experts Group Meeting on Confidence-Building Measures” issued on 23 March 1999,<sup>11</sup> “The Joint Statement between the Government of the People’s Republic of China and the Government of the Republic of the Philippines on the Framework of Bilateral Cooperation in the Twenty-First Century” issued on 16 May 2000,<sup>12</sup> “The Joint Press Statement of the Third China-Philippines Experts’ Group Meeting on Confidence-Building Measures” dated 4 April 2001<sup>13</sup>, and the Declaration on the Conduct of Parties in the South China Sea,

China and the Philippines have agreed to settle their relevant disputes by negotiations, without setting any time limit for the negotiations, and have excluded any other means of settlement. In these circumstances, it is evident that, under the above-quoted provisions of the Convention, the relevant disputes between the two States shall be resolved through negotiations and there shall be no recourse to arbitration or other compulsory procedures.<sup>14</sup>

Here, it seems that China treats negotiation as an independent and exclusive means of dispute settlement. However, the Charter of the United Nations and even UNCLOS provide a series of mechanisms of peaceful dispute settlement, and negotiation is only one of them.

Thirdly, China has explained that, “even assuming that the subject-matter of the arbitration did concern the interpretation or application of the Convention, it has been excluded by its 2006 Declaration filed under Article 298 of the Convention, as the case constitutes an integral part of maritime boundary delimitation between the two States.”<sup>15</sup> “Part XV of the Convention establishes the right for the States Parties to file a written declaration to exclude specified

China has emphasized its respect for arbitration as an international dispute settlement mechanism.

10 Under the Joint Statement between the People’s Republic of China and the Republic of the Philippines concerning Consultations on the South China Sea and on Other Areas of Cooperation, both sides “agreed to abide by” the principles that “[d]isputes shall be settled in a peaceful and friendly manner through consultations on the basis of equality and mutual respect” (Point 1); that “a gradual and progressive process of cooperation shall be adopted with a view to eventually negotiating a settlement of the bilateral disputes” (Point 3); and that “[d]isputes shall be settled by the countries directly concerned without prejudice to the freedom of navigation in the South China Sea” (Point 8).

11 The Joint Statement of the China-Philippines Experts Group Meeting on Confidence-Building Measures states that the two sides reiterated their commitment to “[t]he understanding to continue to work for a settlement of their difference through friendly consultations” (para. 5), and that “the two sides believe that the channels of consultations between China and the Philippines are unobstructed. They have agreed that the dispute should be peacefully settled through consultation” (para. 12).

12 The Joint Statement between the Government of the People’s Republic of China and the Government of the Republic of the Philippines on the Framework of Bilateral Cooperation in the Twenty-First Century states in Point 9 that “[t]he two sides commit themselves to the maintenance of peace and stability in the South China Sea. They agree to promote a peaceful settlement of disputes through bilateral friendly consultations and negotiations in accordance with universally-recognized principles of international law, including the 1982 United Nations Convention on the Law of the Sea. They reaffirm their adherence to the 1995 joint statement between the two countries on the South China Sea”.

13 The Joint Press Statement of the Third China-Philippines Experts’ Group Meeting on Confidence-Building Measures states in Point 4 that “The two sides noted that the bilateral consultation mechanism to explore ways of cooperation in the South China Sea has been effective. The series of understanding and consensus reached by the two sides have played a constructive role in the maintenance of the sound development of China-Philippines relations and peace and stability of the South China Sea area.”

14 “Position Paper,” paras. 31–41.

15 “Position Paper,” para. 86.

categories of disputes from the compulsory dispute settlement procedures as laid down in section 2 of that Part.”<sup>16</sup>

On 25 August 2006, China deposited, pursuant to Article 298 of the Convention, with the Secretary-General of the United Nations a written declaration, stating that, “The Government of the People’s Republic of China does not accept any of the procedures provided for in section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a), (b) and (c) of Article 298 of the Convention”. In other words, as regards disputes concerning maritime delimitation, historic bays or titles, military and law enforcement activities, and disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations, the Chinese Government does not accept any of the compulsory dispute settlement procedures laid down in section 2 of Part XV of the Convention, including compulsory arbitration. China firmly believes that the most effective means for settlement of maritime disputes between China and its neighboring States is that of friendly consultation and negotiation between the sovereign States directly concerned.<sup>17</sup>

Fourthly, “China has never accepted any compulsory procedures of the Convention with regard to the Philippines’ claims for arbitration. The Arbitral Tribunal shall fully respect the right of the States Parties to the Convention to choose the means of dispute settlement of their own accord, and exercise its competence to decide on its jurisdiction within the confines of the Convention.”<sup>18</sup> China has accused the Philippines that the initiation of the present arbitration by the Philippines is an abuse of the compulsory dispute settlement procedures under the Convention. According to China, “there is a solid basis in international law for its rejection of and non-participation in the present arbitration.”<sup>19</sup>

China further emphasizes that it

consistently adheres to the policy of friendly relations with its neighboring States, and strives for fair and equitable solution in respect of disputes of territorial sovereignty and maritime delimitation by way of negotiations on the

China never stands outside  
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itself but to this case  
specifically.

<sup>16</sup> “Position Paper,” para. 57.

<sup>17</sup> “Position Paper,” para. 58.

<sup>18</sup> “Position Paper,” para. 86.

<sup>19</sup> “Position Paper,” para. 86.

basis of equality and the Five Principles of Peaceful Co-existence. China holds that negotiation is always the most direct, effective, and universally used means for peaceful settlement of international disputes.”<sup>20</sup>

“After years of diplomatic efforts and negotiations, China has successfully resolved land boundary disputes with twelve out of its fourteen neighbors, delimiting and demarcating some 20,000 kilometers in length of land boundary in the process, which accounts for over 90% of the total length of China’s land boundary.”<sup>21</sup>

China highly values the positive role played by the compulsory dispute settlement procedures of the Convention in upholding the international legal order for the oceans. As a State Party to the Convention, China has accepted the provisions of section 2 of Part XV on compulsory dispute settlement procedures. But that acceptance does not mean that those procedures apply to disputes of territorial

unilateral resort to compulsory arbitration against another State, however, cannot be taken as a friendly act, when the initiating State is fully aware of the opposition of the other State to the action and the existing agreement between them on dispute settlement through negotiations. Furthermore, such action cannot be regarded as in conformity with the rule of law, as it runs counter to the basic rules and principles of international law. It will not in any way facilitate a proper settlement of the dispute between the two countries. Instead it will undermine mutual trust and further complicate the bilateral relations.”<sup>23</sup>

By expressing the above view, China has emphasized its respect for arbitration as an international dispute settlement mechanism. China may wish to make clear that it never stands outside the international dispute settlement system, nor does it ignore or disregard international dispute settlement organs. Instead, its

“China has successfully resolved land boundary disputes with twelve out of its fourteen neighbors, delimiting and demarcating some 20,000 kilometers in length of land boundary in the process, which accounts for over 90% of the total length of China’s land boundary.”  
— PRC Ministry of Foreign Affairs

sovereignty, or disputes which China has agreed with other States Parties to settle by means of their own choice, or disputes already excluded by Article 297 and China’s 2006 Declaration filed under Article 298. With regard to the Philippines’ claims for arbitration, China has never accepted any of the compulsory procedures of section 2 of Part XV.<sup>22</sup>

In its Position Paper, China points out that

China does not consider submission by agreement of a dispute to arbitration as an unfriendly act. In respect of disputes of territorial sovereignty and maritime rights,

non-participation is not in opposition to the arbitration mechanism itself but to this case specifically. By accession to the UNCLOS, China has already accepted at least one of the four compulsory dispute settlement mechanisms as required by the Convention and nominated judges for the International Tribunal for the Law of the Sea. Therefore, the explanations from China’s Position Paper aim to avoid the risk of China being criticized as an irresponsible State disregarding the international rule of law.

Throughout the Position Paper, China does not mention nor make clear the legal status of the U-shaped line

20 “Position Paper,” para. 87.

21 “Position Paper,” para. 88.

22 “Position Paper,” para. 79.

23 “Position Paper,” para. 90.

and related historic rights in the South China Sea. This omission may be due to the fact that China has not yet found a solid foundation in international law for historic rights. Although “historic rights” have been used in the reasoning of judgments in various cases through the International Court of Justice, International Tribunal for the Law of the Sea, and arbitral tribunals,<sup>24</sup> the legal concept and scope of it remains unclear. There are still debates on whether the rulings from international judicial bodies on historic rights have constituted customary international law. Since China bases some of its legal rights in the South China Sea on historical reasons, such as continuously exercising its legitimate rights and authority in the South China Sea and, in particular, the use of marine resources, construction of artificial structures and installations, marine scientific research, maritime law enforcement, navigation, and military uses,<sup>25</sup> it has been urged by the international community to clarify the meaning of its U-shaped line and its related sovereign and maritime rights. The omission of the important issue concerning the U-shaped line and historic rights may trigger more criticism from the international community and give the Tribunal’s arbitrators more leverage and discretion to arbitrarily explain the U-shaped line in a way that does not reflect China’s interests. The United States issued a government report on 5 December 2014 stating that “unless China clarifies that the dashed-line claim reflects only a claim to islands within that line and any maritime zones that are generated from those land features in accordance with the international law of the sea, as reflected in the LOS Convention, its dashed-line claim does not accord with the international law of the sea.”<sup>26</sup> It is very likely that the arbitrators would endorse the views from the United States.

The omission of the important issue concerning the U-shaped line and historic rights may trigger more criticism from the international community and give the Tribunal’s arbitrators more leverage and discretion to arbitrarily explain the U-shaped line in a way that does not reflect China’s interests.

## Latest Developments

China’s legal and political stance on the South China Sea is not changing. As noted in its Position Paper,

24 See, for example, the *Tunisia v. Libyan Arab Jamahiriya* case in 1982, the *United Kingdom v. Norway* case on fisheries in 1951, the *Gulf of Fonseca* case in 1992, and the *Eritrea and Yemen* case in 1998.

25 Keyuan Zou and Xinchang Liu, “The Legal Status of the U-shaped Line in the South China Sea and Its Legal Implications for Sovereignty, Sovereign Rights and Maritime Jurisdiction,” *Chinese Journal of International Law* 14(1), 2015, pp. 70–75. doi:10.1093/chinesejil/jmv008

26 Office of Ocean and Polar Affairs Bureau of Oceans and International Environmental and Scientific Affairs U.S. Department of State, Limits in the Seas, No. 143, *China Maritime Claims in the South China Sea*, December 5, 2014.

The unilateral initiation of the present arbitration by the Philippines will not change the history and fact of China's sovereignty over the South China Sea Islands and the adjacent waters; nor will it shake China's resolve and determination to safeguard its sovereignty and maritime rights and interests; nor will it affect the policy and position of China to resolve the relevant disputes by direct negotiations and work together with other States in the region to maintain peace and stability in the South China Sea.<sup>27</sup>

We can reasonably suggest that, this stance will stand at present and in the near future unless the two parties will find a constructive method to settle the complicated South China Sea issue and finally reach an agreement.

On 29 October 2015, the Arbitral Tribunal ruled that it had jurisdiction over the case. On the following day, China stated, in its "Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award on Jurisdiction and Admissibility of the South China Sea Arbitration by the Arbitral Tribunal Established at the Request of the Republic of the Philippines", that the Tribunal award was null and void and therefore had no binding effect on China.<sup>28</sup> China also reiterated its stance in the Position Paper that it "has indisputable sovereignty over the South China Sea Islands and the adjacent waters."<sup>29</sup> Also, China has argued,

The Philippines' unilateral initiation and obstinate pushing forward of the South China Sea arbitration by abusing the compulsory procedures for dispute settlement under the UNCLOS is a political provocation under the cloak of law. It is in essence not an effort to settle disputes but an attempt to negate China's territorial sovereignty and maritime rights and interests in the South China Sea.<sup>30</sup>

China once again emphasized,

As a sovereign State and a State Party to the UNCLOS, China is entitled to choose the means and procedures of dispute settlement of its own will. China has all along been committed to resolving disputes with its neighbors over

China has consistently  
stated that the Arbitral  
Tribunal has no jurisdiction  
over this arbitration  
case and that China has  
indisputable sovereignty  
over the South China Sea  
Islands and the adjacent  
waters.

27 "Position Paper," para. 93.

28 Ministry of Foreign Affairs of the People's Republic of China, "Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award on Jurisdiction and Admissibility of the South China Sea Arbitration by the Arbitral Tribunal Established at the Request of the Republic of the Philippines," November 30, 2015. [http://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1310474.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1310474.shtml)

29 "Statement," para. I.

30 "Statement," para. II.

territory and maritime jurisdiction through negotiation and consultation.<sup>31</sup>

China contends,

the Philippines and the Arbitral Tribunal have abused relevant procedures and obstinately forced ahead with the arbitration, and as a result, have severely violated the legitimate rights that China enjoys as a State Party to the UNCLOS, completely deviated from the purposes and objectives of the UNCLOS, and eroded the integrity and authority of the UNCLOS.<sup>32</sup>

Finally, “China urges the Philippines to honor its own commitments, respect China’s rights under international law, change its course and return to the right track of resolving relevant disputes in the South China Sea through negotiations and consultations.”<sup>33</sup>

While it is not certain how China will react to the upcoming award on merits, it is for sure that the award will fatally affect China’s claimed sovereign and maritime rights in the South China Sea.

## Conclusion

On many occasions and in relevant documents, China has consistently stated that the Arbitral Tribunal has no jurisdiction over this arbitration case and that China has indisputable sovereignty over the South China Sea Islands and the adjacent waters. However, China does not mention anything about the issue of the U-shaped line in its official documents, and this legal ambiguity could result in more criticism from the international community. Despite China’s repeated statement that the essence of the case concerns issues state sovereignty, in its Award on Jurisdiction and Admissibility, the Tribunal has concluded that it has jurisdiction in the case and will soon render another award on the merits of the case. Despite China’s denial of the Tribunal’s jurisdiction and the binding effect of its award on China, in accordance with relevant provisions of the UNCLOS, China is still legally a party to the case and is obliged to abide by the award once it is rendered. While it is not certain how China will react to the upcoming award on merits, it is for sure that the award will fatally affect China’s claimed sovereign and maritime rights in the South China Sea.

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31 “Statement,” para. III.

32 “Statement,” para. IV.

33 “Statement,” para. V.

Philippines v. China Arbitration Case:

# The Philippines' Legal Perspectives on the Arbitral Proceedings

Jay L. Batongbacal

The Philippines' legal perspectives on the arbitral proceedings are contained in the Award on Jurisdiction and Admissibility issued by the Arbitral Tribunal on 29 October 2015.<sup>1</sup> Apart from this and the original Notification and Statement of Claim dated 22 January 2013, no

cluded hearings in two phases: the preliminary phase on jurisdiction and admissibility held from 7–13 July 2015, and the merits phase held from 24–30 November 2015. This report primarily concerns arguments heard at the preliminary phase, as the decision on the merits is still

The Philippines emphasizes that it does not ask the Tribunal to rule on the territorial sovereignty aspects of its disputes with China and only seeks “to clarify [the Philippines’] maritime entitlements in the SCS.”

other documents may be considered to express the Philippines' legal perspectives since the latter has refrained from making any elaborate official commentary on its case against China while the proceedings are pending. Accurate information on the Philippines' legal perspectives, particularly its legal arguments presented in the case, can only be based on the Award, and where relevant, on extracts from the transcripts of the oral arguments.

As of the time of this writing, the Tribunal has con-

cluded hearings in two phases: the preliminary phase on jurisdiction and admissibility held from 7–13 July 2015, and the merits phase held from 24–30 November 2015. This report primarily concerns arguments heard at the preliminary phase, as the decision on the merits is still pending to date. Nonetheless, in order to appreciate the jurisdictional arguments it is necessary to take account of the numerous submissions made by the Philippines against China, officially encapsulated in a statement by Secretary of Foreign Affairs Albert F. del Rosario as follows:

1. China is not entitled to exercise what it refers to as “historic rights” over the waters, seabed and subsoil beyond the limits of its entitlements under UNCLOS;
2. The so-called “nine-dash line” has no basis

<sup>1</sup> Permanent Court of Arbitration, Award on Jurisdiction and Admissibility, PCA Case No. 2013-19, October 29, 2015. <http://www.pcacases.com/web/sendAttach/1506>



whatsoever under international law insofar as it purports to define the limits of China's claim to "historic rights;"

3. The various maritime features relied upon by China as a basis upon which to assert its claims in the South China Sea are not islands that generate entitlement to an exclusive economic zone (EEZ) or continental shelf (CS), but are either

maritime entitlements in the SCS."<sup>4</sup> It also emphasizes that it is not asking the Tribunal to delimit any maritime boundaries.<sup>5</sup>

China publicly presented its views on the claims of the Philippines in a Position Paper dated 7 December 2014, which together with other official statements on the proceedings were considered by the Tribunal as a plea concerning its jurisdiction.<sup>6</sup> China presented a

## China presented a number of preliminary objections to jurisdiction which were duly addressed by the Philippines during the preliminary phase of the proceedings.

"rocks" within the meaning of UNCLOS Article 121(3), or low-tide elevations or permanently submerged features, none of which are capable of generating entitlements beyond 12 nautical miles, if at all;

4. China has breached UNCLOS by interfering with the Philippines' exercise of its sovereign rights and jurisdictions; and
5. China has irreversibly damaged the regional marine environment in breach of UNCLOS, by its destruction of coral reefs in the SCS including areas within the Philippine EEZ, by destructive and hazardous fishing practices, and harvesting of endangered species.<sup>2</sup>

The above five points cover not less than 15 specific submissions that may be broken down into 19 principal claims and associated sub-claims,<sup>3</sup> all of which are argued to be within the Tribunal's jurisdiction. The Philippines emphasizes that it does not ask the Tribunal to rule on the territorial sovereignty aspects of its disputes with China and only seeks "to clarify [the Philippines']

number of preliminary objections to jurisdiction which were duly addressed by the Philippines during the preliminary phase of the proceedings, summarized below. In addition, the Tribunal *motu proprio* also asked the Philippines to address other possible objections to its jurisdiction.<sup>7</sup>

### Arguments on Jurisdiction and Admissibility

In summary, the Philippines argued that the Tribunal has jurisdiction over all of its claims for the following reasons:

6. All aspects of the disputes raised by the Philippines concern the interpretation and application of UNCLOS;
7. China's decision not to appear in the proceedings has no effect on the Tribunal's jurisdiction;
8. The 2002 Declaration on the Conduct of the Parties in the SCS and other instruments signed by the parties do not bar the exercise of jurisdiction by the Tribunal;

2 Albert F. del Rosario, "Statement before the Permanent Court of Arbitration, Peace Palace, The Hague, Netherlands: Why the Philippines brought this case to arbitration and its importance to the region and the world," July 7, 2015. <http://www.gov.ph/2015/07/07/statement-of-secretary-albert-del-rosario-before-the-permanent-court-of-arbitration-peace-palace-the-hague-netherlands/>

3 Award on Jurisdiction and Admissibility, para. 101.

4 "Statement," para. 10; Award on Jurisdiction and Admissibility, para. 7.

5 Award on Jurisdiction and Admissibility, para. 8.

6 Ministry of Foreign Affairs of the People's Republic of China, "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," December 7, 2014. [http://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1217147.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml)

7 Award on Jurisdiction and Admissibility, para. 16.



9. The Philippines fulfilled the requirement to engage in an exchange of views with China;
10. The limitations to jurisdiction provided in Article 297 are inapplicable to the claims of the Philippines; and
11. The optional exceptions to jurisdiction provided in Article 298 do not apply to the claims of the Philippines.<sup>8</sup>

## Preliminary Matters

At the outset, the Philippines argued that China's non-participation in the proceedings did not bar the Tribunal's jurisdiction, as set forth in Article 9 of UNCLOS Annex VII. Despite non-participation, China remained a party to the proceedings, with ensuing rights and obligations under international law, including the obligation to be bound by and comply with the Tribunal's decision, as stated in UNCLOS Article 296(1).<sup>9</sup> The

Philippines at first suggested that the Tribunal could reasonably discern China's possible arguments and positions from "communications from its officials, statements of those asso-

ciated with the Government of China, and academic literature by individuals closely associated with Chinese authorities."<sup>10</sup> However, this was eased by the release of China's Position Paper, as well as all subsequent public statements it issued regarding the proceedings.<sup>11</sup> The Tribunal has clearly not considered China's non-participation to be an obstacle.

On China's implicit objection that the Philippines was abusing the legal process through its unilateral resort to arbitration without China's consent or participation, no specific arguments have been made by the Philippines since this was integrally linked to the Philippines' arguments concerning its compliance with the procedural requisites for resort to arbitration (Items 3 and 4). In any event, the Tribunal declined to rule on the matter, noting that "a mere act of unilaterally initiating arbitration under Part XV in itself cannot constitute an abuse of rights."<sup>12</sup>

The Tribunal has clearly not considered  
China's non-participation to be an obstacle.

## Nature and Character of the Disputes

With the preliminary matters disposed of, the Tribunal proceeded to consider the nature and character of the disputes brought by the Philippines, includ-

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8 Award on Jurisdiction and Admissibility, para. 100.

9 Award on Jurisdiction and Admissibility, para. 114.

10 Award on Jurisdiction and Admissibility, para. 119.

11 Award on Jurisdiction and Admissibility, para. 121.

12 Award on Jurisdiction and Admissibility, para. 126.

ing whether or not they are matters concerning only the interpretation and application of UNCLOS, contrary to China's view that the essence of the subject-matter of arbitration is the territorial sovereignty over several maritime features in the SCS, and whether or not they constitute an integral part of maritime delimitation between the two countries, either of which would bring the disputes beyond the Tribunal's jurisdiction. The Philippines, however, argues that, even though there are admittedly territorial aspects in its disputes with China, none of the submissions to the Tribunal require the expression of any view at all as to the extent of sovereignty over land territory, whether in favor of China or any other State. Specifically, its submissions contesting China's claim to "historic rights" within the South China Sea and the validity of the nine-dash line do not require any prior determination of sovereignty.<sup>13</sup> Furthermore, its claims may be decided upon even hypothetically assuming that China is sovereign over all the land territory it claims since its claim to "historic rights" within the area of the nine-dashed lines exceeds the limits of its potential entitlements under UNCLOS.<sup>14</sup> The Philippines holds that, regardless of which State has sovereignty, the entitlements of any feature to any one, some, or all of the maritime zones under UNCLOS is "a matter for objective determination."<sup>15</sup>

The Philippines also rejects China's contention that sovereignty over the various land features must be determined first before its submissions concerning the Philippine sovereign rights and jurisdictions may be decided upon by the Tribunal. It argues that its claims against China's unlawful conduct are premised on China's maximum permissible entitlement under UNCLOS even hypothetically assuming that China had sovereignty over the land features.<sup>16</sup>

Further, the Philippines rejects China's characterization of the dispute as relating to maritime boundary delimitation. From the former's perspective, such a characterization confuses two different issues: (a) entitlement to maritime zones, and (b) delimitation of areas when they overlap. As far as the Philippines is concerned, the

The Philippines holds that, regardless of which State has sovereignty, the entitlements of any feature to any one, some, or all of the maritime zones under UNCLOS is "a matter for objective determination."

13 Award on Jurisdiction and Admissibility, para. 143.

14 Award on Jurisdiction and Admissibility, para. 143.

15 Award on Jurisdiction and Admissibility, para. 144(a).

16 Award on Jurisdiction and Admissibility, para. 145.

resolution of entitlement issues (i.e., deciding what maritime zones can be generated by any specific feature) do not necessarily form an integral part of a maritime delimitation process<sup>17</sup> and can be decided independently of the latter.

Separately from the issues above, the Philippines argues that every one of its numerous claims require the interpretation and application of specific provisions of UNCLOS.<sup>18</sup> The Tribunal agrees with this characterization in its Award.

### Procedural Requisites for Resort to Arbitration

China's position is that the Philippines is barred from resorting to arbitration by the 2002 Declaration of Con-

procedures, the Philippines argues that China could not invoke it against the arbitration in light of its "flagrant disregard" of the DOC, particularly the obligation to exercise self-restraint in the conduct of activities that would complicate or escalate dispute and affect peace and stability."<sup>23</sup> In respect of this last argument, the Philippines made particular note of China's interference with the activities of Philippine vessels and its artificial island-building activities since 2014.

The Philippines also considers other bilateral documents, specifically statements jointly made by the leaders of China and the Philippines in 2004 and 2011 after the DOC was signed, as not constituting legally-binding agreements and therefore not precluding resort to arbitration.<sup>24</sup> It admitted only one significant agreement,

## In its Award, the Tribunal agreed with the Philippines' contentions that the procedural requisites were sufficiently complied with.

duct of the Parties in the SCS (DOC), which expresses an agreement to resolve the disputes through consultations and negotiations. In contrast, the Philippines argues that the DOC does not impair resort to arbitration because it is not a legally binding agreement but a non-binding political document that did not create legal rights and obligations.<sup>19</sup> Even if it were, no settlement could be reached through the means described (i.e., consultations and negotiations) as shown by over seventeen years of fruitless diplomatic exchanges,<sup>20 21</sup> and even so, the DOC does not preclude resort to arbitration in the absence of an express exclusion of recourse to further procedures outside of the DOC.<sup>22</sup> Finally, even if it were a binding document that precluded further

the ASEAN Treaty of Amity and Cooperation (TAC), to which China referred to in relation to the DOC, as a legally binding instrument. However, the Philippines argues that the TAC itself does not contain a specific compulsory mode of dispute settlement, and at best contains only a recommendatory mechanism for its adherents. Moreover, the TAC also expressly retains the parties' right to resort to all other peaceful modes of dispute settlement under the UN Charter, which include arbitration.<sup>25</sup>

Turning to the matter of whether the parties had engaged in prior exchange of views or negotiations on the dispute, as required by UNCLOS Article 283, the Philippines argues that it has indeed engaged with China for many years since the 1990s and that, in any event, the obligation to have an "exchange of views" does not require a detailed negotiation but imposes only a modest burden on disputing states.<sup>26</sup> In particular, it is not necessary to exchange views on the substance of each and

17 Award on Jurisdiction and Admissibility, para. 146.

18 Award on Jurisdiction and Admissibility, para. 147.

19 Award on Jurisdiction and Admissibility, para. 208; paras. 294–298.

20 Award on Jurisdiction and Admissibility, para. 209.

21 Department of Foreign Affairs of the Republic of the Philippines, "Notification of Statement and Claim," Notification, No. 13-0211, January 22, 2013. <http://www.philippineembassy-usa.org/uploads/pdfs/embassy/2013/2013-0122-Notification%20and%20Statement%20of%20Claim%20on%20West%20Philippine%20Sea.pdf>

22 Award on Jurisdiction and Admissibility, para. 210.

23 Award on Jurisdiction and Admissibility, para. 211.

24 Award on Jurisdiction and Admissibility, paras. 238–240.

25 Award on Jurisdiction and Admissibility, paras. 259–264; 305–306.

26 Award on Jurisdiction and Admissibility, para. 329.

every submission *per se* for as long as there is an exchange of views on the general subject matter, and there is no need to touch upon specific articles of the Convention in these exchanges.<sup>27</sup> In its Award, the Tribunal agreed with the Philippines' contentions that the procedural requisites were sufficiently complied with.

## Application of UNCLOS Limitations and Exclusions

Although China does not specifically raise arguments concerning the application of the automatic limitations from jurisdiction under UNCLOS Article 297, the Philippines was asked to address the possible objections on that basis. The Philippines argues that the relevant limitations to jurisdiction under UNCLOS Article 297 pertaining to sovereign rights and jurisdictions in the EEZ and to fisheries are not applicable to its claims concerning Scarborough Shoal and Second Thomas Shoal. With respect to its claims against Chinese activities in Scarborough Shoal, the activities complained of occurred within the territorial sea around the shoal, while claims against Chinese activities around Second Thomas Shoal occurred in an area where only the Philippines may properly claim an EEZ. Thus, the limitations under UNCLOS Article 297 may not be invoked by China.<sup>28</sup>

The Philippines, like most States, generally acknowledged that the Award was merely preliminary to further proceedings and perceived it as incidental to a longer and broader process of peaceful resolution of international disputes in the South China Sea.

As for the optional exclusions under UNCLOS Article 298, which China activated in a declaration on 26 August 2006, the Philippines presented arguments on each specific exclusion. First, the exclusion of disputes involving maritime boundary delimitations is not applicable since in its view, there are no overlapping entitlements that require delimitation in the areas in which activities took place that the Philippines complains of.<sup>29</sup> As to the exclusion concerning historic bays or titles, the Philippines argues that China is not claiming such title in the SCS, as it is apparent from China's statements that it is only claiming "historic rights" which extend only to near-shore areas or bays, and furthermore the exclusion also applies in cases of delimitation of such historic bays and titles.<sup>30</sup>

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27 Award on Jurisdiction and Admissibility, para. 331.

28 Award on Jurisdiction and Admissibility, paras. 361–363.

29 Award on Jurisdiction and Admissibility, para. 375.

30 Award on Jurisdiction and Admissibility, para. 376.

With respect to the third exclusion for military activities, the Philippines argues that the activities of the Chinese government vessels about which the Philippines complains in its case are not “military” in nature and carried out by China’s civilian maritime forces.<sup>31</sup> Finally, as to the exclusion for law enforcement activities, the Philippines argues that this is not applicable because they can be invoked only in relation to marine scientific research and fisheries, while the Philippine claims pertain to other activities taking place in areas where China cannot claim either an EEZ or continental shelf.<sup>32</sup>

## Perspectives on the Award

The Philippines, like most States, generally acknowledged that the Award was merely preliminary to further proceedings and perceived it as incidental to a longer and broader process of peaceful resolution of international disputes in the South China Sea. Manila, through Presidential Communications Secretary Herminion B. Coloma, Jr. and Foreign Affairs Spokesman Charles C. Jose, in separate statements to the press welcomed the decision allowing the Philippines to present its claims on the merits.<sup>33</sup> Solicitor General Florin Hilbay described the ruling as “a significant step forward in the Philippines’ quest for a peaceful, impartial resolution of the disputes between the parties and the clarification of their rights under UNCLOS.”<sup>34</sup> He added that the Philippines expected the tribunal to decide the case within six months.<sup>35</sup> The absence of any other extended official commentary indicates that the Philippines is fully aware that the more important challenge remains in the merits phase.

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31 Award on Jurisdiction and Admissibility, para. 377.

32 Award on Jurisdiction and Admissibility, para. 378.

33 “PH ready for next round,” *Manila Times*, October 31, 2015. <http://www.manilatimes.net/ph-ready-for-next-round/226497/>; A. Monzon, “International tribunal says it has jurisdiction over Philippines-China dispute,” *Businessworld*, October 30, 2015. <http://www.bworldonline.com/content.php?section=Nation&title=international-tribunal-says-it-has-jurisdiction-over-philippines-china-dispute&id=117850>

34 A. Deutsch, “In defeat for Beijing, Hague court to hear South China Sea dispute,” Thomson Reuters, October 30, 2015. <http://www.reuters.com/article/2015/10/30/us-philippines-china-arbitration-idUSKCN0SN26320151030>

35 A. Monzon, “International tribunal says it has jurisdiction over Philippines-China dispute,” *Businessworld*, October 30, 2015. <http://www.bworldonline.com/content.php?section=Nation&title=international-tribunal-says-it-has-jurisdiction-over-philippines-china-dispute&id=117850>

From the Philippines' perspective, at present, the majority of international opinion appears to be aligned with the Philippines' position that international arbitration is a legitimate and acceptable means of attempting to resolve at least some aspects of the South China Sea disputes. The Philippines sees that there are no serious legal objections posed to the process by any States other than China and Taiwan, which continue to actively state their opposition to the proceedings despite the tribunal's ruling on jurisdiction. The fact

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that more international observers from Japan, Australia, Indonesia, Malaysia, Vietnam, Thailand, and Singapore were present at the second round of oral arguments at The Hague indicates to the Philippines that such States do not question the proceedings.<sup>36</sup>

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36 Agence France Presse, "Hague court begins hearing on PH case vs China," *Rappler*, November 24, 2015. <http://www.rappler.com/world/regions/asia-pacific/philippines/113928-hague-court-hearing-sea-row>

Philippines v. China Arbitration Case:

# Taiwan's Legal Perspectives on the Arbitral Proceedings

Chen-Ju Chen

For years, the Ministry of Foreign Affairs (MOFA) of the Republic of China (ROC) (Taiwan) has released statements reiterating its position on the South China Sea disputes. On October 29, 2015, the government also took note of the Award on Jurisdiction and Admissibility issued by the Arbitral Tribunal in the Philippines v. China arbitration case. On October 31, the ROC government promptly reacted to the Award by formally issuing a seven-point statement of its position.<sup>1</sup> In fact, before

consistent in their format and content and are analyzed in the sections that follow.

## Perspectives on the Arbitral Proceedings and the Award

Since the Tribunal in the Philippines v. China arbitration case was established in 2013 under Annex VII of the UN Convention on the Law of the Sea (UNCLOS), the ROC

The ROC government is of the view that, if the Award were to be legally binding on the ROC, it should have had the opportunity to express its views in the arbitration case.

the Award was published, the ROC government had already clearly stated its position on the South China Sea on July 7 of the same year.<sup>2</sup> These two statements were

has followed developments of the arbitral proceedings. Unlike the governments of Indonesia, Japan, Malaysia, Thailand, and Vietnam, which are permitted to send small delegations of observers to attend the hearings, the ROC has no means of participating in the proceedings. Based on similar rationales, both mainland China and the ROC governments have respectively claimed sovereignty over the islands and maritime territory of the South China Sea. The ROC government is of the view

1 Ministry of Foreign Affairs, Republic of China (Taiwan) [ROC MOFA], "ROC government reiterates its position on South China Sea Issues," October 31, 2015. [http://www.mofa.gov.tw/en/News\\_Content.aspx?n=1EADD4C6EC567&s=F5170FE043DADE98](http://www.mofa.gov.tw/en/News_Content.aspx?n=1EADD4C6EC567&s=F5170FE043DADE98)

2 Ministry of Foreign Affairs, Republic of China (Taiwan) [ROC MOFA], "Statement on the South China Sea," July 7, 2015. [http://www.mofa.gov.tw/en/News\\_Content.aspx?n=0E7B91A8FBEC4A94&sms=220E98D-761D34A9A&s=EDEBCA08C7F51C98](http://www.mofa.gov.tw/en/News_Content.aspx?n=0E7B91A8FBEC4A94&sms=220E98D-761D34A9A&s=EDEBCA08C7F51C98)



that, if the Award were to be legally binding on the ROC, it should have had the opportunity to express its views in the arbitration case. However, neither the Philippines nor the Tribunal in their respective communications released during the proceedings have considered the aforesaid. Also, according to Article 26(2) of the Rules of Procedure, the Award is merely binding on the Parties, namely the Philippines and mainland China. Thus, the ROC has no obligation to act as the Parties and to be bound by the Award. Although the claims of the Philippines in its Notification and Statement of Claim cover

As the ROC enjoys all rights to these islands and their surrounding waters in accordance with international law, the ROC government does not recognize any claim to sovereignty over, or occupation of, these areas by other countries, irrespective of the reasons put forward or methods used for such claim or occupation.<sup>3</sup>

Historically, the ROC maintains that the South China Sea Islands were recorded long ago in ancient Chinese historical records and local chronicles, even since the Han dynasty. During World War II, the South China Sea Islands were occupied by Japanese forces. Called “Shin-

“Whether from the perspective of history, geography, or international law, the Nansha (Spratly) Islands, Shisha (Paracel) Islands, Chungsha Islands (Macclesfield Bank), and Tungsha (Pratas) Islands ... as well as their surrounding waters, are an inherent part of ROC territory and waters.”  
— Republic of China MOFA

various issues that seem to impact the ROC’s claims in the South China Sea, as long as the ROC does not participate in the procedures in any form, the ROC government holds that the arbitration and its awards do not impact the its rights. For the abovementioned reasons, as the ROC has not taken part in the proceedings in any way, the ROC will neither recognize nor accept any related awards.

## Reiteration of Territorial Claims

In its statements, the ROC government has also reiterated its sovereignty claims to the South China Sea Islands and rights in the surrounding waters by stating,

[w]hether from the perspective of history, geography, or international law, the Nansha (Spratly) Islands, Shisha (Paracel) Islands, Chungsha Islands (Macclesfield Bank), and Tungsha (Pratas) Islands (together known as the South China Sea Islands), as well as their surrounding waters, are an inherent part of ROC territory and waters.

nan Gunto” and placed under the jurisdiction of Kaohsiung Prefecture in 1939, these islands were administered by Taiwan’s ‘Governor-General’ office. By the end of World War II, Japan withdrew from the South China Sea Islands. In 1946, the ROC reclaimed these islands and set up outposts on the Tungsha (Pratas Islands), Shisha (Paracel Islands), and Nansha Islands (Spratly Islands). Since then, the ROC has conducted various administrative measures that support its sovereignty. Such measures include the publication of a cross-reference table for the South China Sea Islands’ new and old names and the publication of the Location Map of the South China Sea Islands in 1947 that delineates the scope of ROC territory and waters in the region.<sup>4</sup>

Formally, according to Article 2 of the 1952 Treaty of Peace between the Republic of China and Japan, which is pursuant to Article 2 of the 1951 San Francisco Peace

3 ROC MOFA, “ROC government reiterates its position on South China Sea Issues,” point 1.

4 ROC MOFA, “Statement on the South China Sea,” point 2.



Treaty, Japan renounced all rights, titles, and claims to the Nansha Islands (Spratly Islands) and Shisha Islands (Paracel Islands). By then, the ROC had formally restored the territories that Japan had stolen from the Chinese. Thus, the ROC does not recognize any other countries' claims to occupation or sovereignty over these areas.

Therefore, as further emphasized in the statement released by MOFA,

[t]he South China Sea islands were first discovered, named, and used, as well as incorporated into national territory, by the Chinese. Furthermore, the San Francisco Peace Treaty, which entered into effect on April 28, 1952, as well as the Treaty of Peace between the ROC and Japan, which was signed that same day, together with other international legal instruments, reconfirmed that the islands and reefs in the South China Sea occupied by Japan should be returned to the ROC.<sup>5</sup>

## Legal Status of Itu Aba (Taiping) Island

Regarding Itu Aba (Taiping) Island, the largest naturally formed island in the Spratly Islands—where the ROC maintains a permanent presence—the ROC has highlighted the legal status of the island in accordance with UNCLOS. Specifically, as it has emphasized,

Taiping Island (Itu Aba), the largest (0.5 square km) of the naturally formed Nansha (Spratly) Islands, has been garrisoned by ROC troops since 1956. The ROC argues that, from legal, economic, and geographic perspectives, Taiping Island (Itu Aba) indisputably qualifies as an “island” according to the specifications of Article 121 of the United Nations Convention on the Law of the Sea (UNCLOS), and can sustain human habitation and economic life of its own; it is thus categorically not a “rock” under the same article. Any claims by other countries which aim to deny this fact will not impair the legal status of Taiping Island (Itu Aba) and its maritime rights based on UNCLOS.<sup>6</sup>

Unequivocally, the government has maintained that Taiping Island constitutes an “island” as defined under Article 121(1) of the UNCLOS as “a naturally formed area of land, surrounded by water, which is above water at high tide.” Furthermore, Taiping Island’s fresh water supplies and other conditions enable the island to sustain human habitation and economic life of its own. These

Taiping Island constitutes an “island” as defined under Article 121(1) of the UNCLOS as “a naturally formed area of land, surrounded by water, which is above water at high tide.” Furthermore, Taiping Island’s fresh water supplies and other conditions enable the island to sustain human habitation and economic life of its own.

5 ROC MOFA, “ROC government reiterates its position on South China Sea Issues,” point 2.

6 ROC MOFA, “ROC government reiterates its position on South China Sea Issues,” point 3.

circumstances adhere to the criteria set under Article 121(3) of the UNCLOS for an island to enjoy full rights over the maritime zones. Thus, Taiping Island's legal status is by no means subject to discussion or re-interpretation by other claimants.

As for the administration of Taiping Island, since the 1950s, ROC armed forces have been able to defend against foreign invasions, including that of the Filipino Brothers Cloma in 1956, and maintain the presence of Taiping Island's Nansha garrison, which was established in the same year. In 1990, a military defense zone was also established. Since then, naval vessels have been sent to regularly patrol these southern territories. Taiping Island also houses transportation facilities, temples, and hospitals. Thus, the ROC holds that all of these have demonstrated that the ROC has exercised effective control over this region that has been recognized by various international organizations and foreign governments. For instance, according to the Compilation of Historical Archives on the Southern Territories of the Republic of China, in 1955, the International Civil Aviation Organization requested that the ROC provide weather information for the Nansha Islands. In 1961, the U.S. military also requested permission from the ROC to conduct surveys in the Nansha Islands.<sup>7</sup> In its view, these interactions further confirm the ROC's sovereignty over and status of Taiping Island.

## Freedom of Navigation and Overflight

In terms of its legal perspectives on freedom of navigation and overflight, the ROC has stressed that it "has consistently adhered to ... freedom of navigation and overflight as stipulated in the UN Charter and other relevant international law and regulations. ... Nor has the ROC interfered with other nations' freedom of navigation or overflight in the South China Sea."<sup>8</sup> Through these statements and a history of actions to support them, the ROC has assured the international community of its support for freedom of navigation and overflight in the relevant areas of its South China Sea territory. These assurances

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7 Dustin K. H. Wang (eds.), *Compilation of Historical Archives on the Southern Territories of the Republic of China*, Taipei: Ministry of the Interior, 2015, pp. 128 and 161.

8 ROC MOFA, "ROC government reiterates its position on South China Sea Issues," point 4.

comply with the UN Charter and other relevant international norms. Moreover, in terms of implementation, the ROC's has ensured these freedoms in practice by not interfering with the legal activities of other states.

## Peaceful Management of Disputes

As peaceful dispute settlement forms a core aspect of modern international law, the ROC has emphasized that it “has consistently adhered to the principles of peaceful settlement of international disputes ... as stipulated in the UN Charter and other relevant international law and regulations. In fact, the ROC has defended Taiping

cue operations.

To maintain regional peace, “the ROC government calls on the coastal states of the South China Sea to respect the provisions and spirit of the UN Charter and UNCLOS, and to exercise restraint, safeguard peace and stability in the South China Sea, uphold the freedom of navigation and overflight through the South China Sea, refrain from taking any action that might escalate tensions, and resolve disputes peacefully.”<sup>10</sup> To avoid regional tensions, as other claimants are seen as having been aggressive in expanding their influence over the South China Sea, the ROC has called upon them to respect international law and assure of freedom of navi-

To build Taiping Island into a location of peace, as well as one with abundant ecology and low carbon emissions, the ROC has set up solar photovoltaic systems and improved navigation facilities and developed its regional maritime rescue capabilities.

Island and other islands without ever getting into military conflict with other nations.”<sup>9</sup> Moreover, not only has the ROC emphasized the importance of peaceful dispute settlement, but it has also backed up its words with actions, as it has developed Taiping Island for the purposes of defense, instead of expanding its offensive military power. The ROC has also highlighted that its management of Taiping Island is focused on humane and peaceful goals. To build Taiping Island into a location of peace, as well as one with abundant ecology and low carbon emissions, the ROC has set up solar photovoltaic systems and improved navigation facilities and developed its regional maritime rescue capabilities. In December 2013, a communications network on Taiping Island was completed to facilitate normal and emergency communications for international humanitarian res-

gation and overflight.

Finally, as proposed by the ROC government on May 26, 2015, the South China Sea Peace Initiative re-emphasized the abovementioned position statements with a roadmap for moving forward on regional cooperation between South China Sea claimants. It has been stressed that the initiative is “based on the principles of safeguarding sovereignty, shelving disputes, pursuing peace and reciprocity, and promoting joint development. Based on consultations conducted on the basis of equality and reciprocity, the ROC is willing to work with other parties concerned to jointly ensure peace and stability in the South China Sea, as well as conserve and develop resources in the region.”<sup>11</sup> Above all, the South

9 ROC MOFA, “ROC government reiterates its position on South China Sea Issues,” point 4.

10 ROC MOFA, “ROC government reiterates its position on South China Sea Issues,” point 5.

11 ROC MOFA, “ROC government reiterates its position on South China Sea Issues,” point 6.

China Sea Peace Initiative calls on all parties concerned to:

1. exercise restraint, safeguard peace and stability in the South China Sea, and refrain from taking any unilateral action that might escalate tensions;
2. respect the principles and spirit of relevant international law, including the Charter of the United Nations and the United Nations Convention on the Law of the Sea, peacefully deal with and settle disputes through dialogue and consultations, and jointly uphold the freedom and safety of navigation and overflight through the South China Sea;
3. ensure that all parties concerned are included in mechanisms or measures that enhance peace and prosperity in the South China Sea, e.g. a maritime cooperation mechanism or code of conduct;
4. shelve sovereignty disputes and establish a regional cooperation mechanism for the zonal development of resources in the South China Sea under integrated planning; and
5. set up coordination and cooperation mechanisms for such non-traditional security issues as environmental protection, scientific research, maritime crime fighting, and humanitarian assistance and disaster relief.

With the South China Sea Peace Initiative, an effort to resolve disputes and jointly develop resources, the ROC has formally expressed its willingness to cooperate with other parties concerned to implement the concept and spirit of the South China Sea Peace Initiative and finally build the South China Sea into a “Sea of Peace and Cooperation.”

With the South China Sea Peace Initiative, the ROC has formally expressed its willingness to cooperate with other parties concerned to build the South China Sea into a “Sea of Peace and Cooperation.”

## Conclusion

As for the ROC’s legal perspectives on the arbitral proceedings and the award, given its territorial claims in the South China Sea and views on Taiping Island’s legal status, the ROC government has concluded that “the Philippines has not invited the ROC to participate in its arbitration with mainland China, and the arbitral tribunal has not solicited the ROC’s views. Therefore, the arbitration does not affect the ROC in any way, and the ROC neither recognizes nor accepts related awards.”<sup>12</sup> The government has been consistent in its assertions that neither claimants’ statements nor the Tribunal’s decisions will impact the ROC’s legitimate territorial claims or the legal status of Taiping Island. It has also been clear in its rationale for these assertions. In addition, as a member of the international community, the ROC has reassured other countries of its commitment to ensuring freedom of navigation and overflight and has reiterated the importance of peaceful dispute settlement in compliance with international law.

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12 ROC MOFA, “ROC government reiterates its position on South China Sea Issues,” point 7.

Philippines v. China Arbitration Case:

# The Arbitral Proceedings from the Point of View of UNCLOS and the Tribunal

Chris Whomersley, CMG

UNCLOS is one of the most widely accepted multilateral treaties of modern times; there are 165 States parties<sup>1</sup>, plus the European Union, and it is generally known as the “a constitution for the oceans”<sup>2</sup>. Its Part XV contains an elaborate set of provisions concerning the settlement of disputes. Some disputes can be referred to the International Court of Justice, or to the International Tribunal for the Law of the Sea created by UNCLOS, if the State party so declares; but if a State party makes no declaration then the dispute will be submitted to an arbitral tribunal constituted under Annex VII to UNCLOS. Certain disputes between States are subject to compulsory dispute settlement; in other words a dispute may be put to a third-party dispute settlement procedure at the request of one State without the concurrence of the other State party to the dispute; there are however certain disputes which are excepted from this regime and certain other disputes which may be excepted at the discretion of a State party. The resultant scheme is complex and has been the subject of considerable litigation.

## Non-participation

In two of the latest cases to be submitted to arbitration under Annex VII to UNCLOS, the defendant State has failed to appear—the proceedings brought by the Philippines against China and those brought by the Netherlands against Russia in respect of the detention of the Dutch-registered vessel, the *Arctic Sunrise*. Both arbitral tribunals have nevertheless attempted to take account of the arguments which might have been made by the defendant State if it had appeared. Although in the *Netherlands v. Russia* case, the Tribunal declined to consider a paper produced by Russia because it was submitted so late, in the *Philippines v. China* case, the Tribunal made many references to the Position Paper issued by the Chinese Ministry of Foreign Affairs. However, there seems little doubt that by failing to appear the defendant States put themselves at a disadvantage; for example, they were unable to respond to or develop at the hearing points which seemed to attract the members of the Tribunal.

## “Dispute” between the Parties

Article 288 of UNCLOS sets out two conditions for a tribunal to have jurisdiction under Part XV, the first being

1 There are some notable absentees, particularly the United States, but also Venezuela, Israel, Turkey and Iran.

2 See the statement of Ambassador Tommy T. B. Koh of Singapore, the President of the Third United Nations Conference on the Law of the Sea. [www.un.org/Depts/Los/convention\\_overview\\_convention.htm](http://www.un.org/Depts/Los/convention_overview_convention.htm)

that there must be a “dispute” between the parties. There is an accepted definition of dispute in international law, namely that there should be “a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons”. The Tribunal had little difficulty in deciding that there was a “dispute” in the legal sense between the Philippines and China<sup>3</sup>.

## “Interpretation or Application” of UNCLOS

The second condition is that the dispute must concern the “interpretation or application” of UNCLOS. This is standard terminology in multilateral treaties, and in a case in the International Court of Justice Judge Abdul Koroma cautioned that there must be a link between the dispute and the subject-matter of the treaty, as otherwise “States could use [such a] clause as a vehicle for forcing an unrelated dispute with another State before the Court”<sup>4</sup>. In deciding whether the dispute does indeed concern the interpretation or application of UNCLOS, the Tribunal had to consider what is the “real issue” between the parties. In doing so, the Tribunal adopted an objective view, based upon the position of the two States. China had argued that the “real issue” concerned the sovereignty over various features in the South China Sea. However, Philippines explicitly stated several times during the oral proceedings that it was not seeking a ruling on sovereignty over any feature in the South China Sea<sup>5</sup>.

In a key passage in the Award, which it is worth quoting in full, the Tribunal concluded on this point that it:

might consider that the Philippines’ Submissions could be

There is an accepted definition of dispute in international law, namely that there should be “a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons”.

understood to relate to sovereignty if it were convinced that either (a) the resolution of the Philippines’ claims would require the Tribunal to first render a decision on sovereignty, either expressly or implicitly; or (b) the actual objective of the Philippines’ claims was to advance its position in the Parties’ dispute over sovereignty. Neither of these situations, however, is the case. The Philippines has not asked the Tribunal to rule on sovereignty and, indeed, has expressly and repeatedly requested that the Tribunal refrain from so doing. The Tribunal likewise does not see that any of the Philippines’ Submissions require an implicit determination of sovereignty. The Tribunal is of the view that it is entirely possible to approach the Philippines’

Submissions from the premise—as the Philippines suggests—that China is correct in its assertion of sovereignty over Scarborough Shoal and the Spratlys. The Tribunal is fully conscious of the limits on the claims submitted to it and, to the extent that it reaches the merits of any of the Philippines’ Submissions, intends to ensure that its decision neither advances nor detracts from either Party’s claims to land sovereignty in the South China Sea. Nor does the Tribunal understand the Philippines to seek anything further. The Tribunal does not see that success on these Submissions would have an effect on the Philippines’ sovereignty claims and accepts that

the Philippines has initiated these proceedings with the entirely proper objective of narrowing the issues in dispute between the two States.<sup>6</sup>

This statement is obviously an attempt by the Tribunal to steer a difficult course: on the one hand, the Tribunal understood that it could not decide the sovereignty dispute, that being manifestly not a dispute about the interpretation or application of UNCLOS; the Tribunal distinguished the recent decision in a case brought by Mauritius against the United Kingdom about the Chagos Marine Protected Area, because “the majority’s decision in that case [was] based on the view both that a

3 Permanent Court of Arbitration, Award on Jurisdiction and Admissibility, PCA Case No. 2013-19, October 29, 2015, para. 149. <http://www.pcacases.com/web/sendAttach/1506>

4 Separate Opinion of Judge Abdul Koroma in *Georgia v. Russian Federation*, *I.C.J. Reports 2011*, p. 183 at p. 185, para. 7.

5 Award on Jurisdiction and Admissibility, para. 151.

6 Award on Jurisdiction and Admissibility, para. 153.



decision on Mauritius' first and second submissions would have required an implicit decision on sovereignty and that sovereignty was the true object of Mauritius' claims"<sup>7</sup>. Equally, however, like most international tribunals, it was clearly reluctant to rule the claims inadmissible at a preliminary stage. Nevertheless, the question is whether the Tribunal was being realistic in considering that none of the Philippines' submissions "require an implicit determination of sovereignty" and that "its decision [will] neither advance.. nor detract.. from either Party's claims to land sovereignty in the South China Sea". This sounds casuistical even to lawyers, but one can imagine that to politicians and the general public it will sound, at the least, confusing.

It is noteworthy that during the hearing Judge Pawlak asked the Philippines' legal team whether they could quote any precedent "when entitlements to maritime features were decided separately from sovereignty over them"<sup>8</sup>. The Philippines' team promised to revert on this point, but there is no sign in the Award that they were able to discover a precedent. Equally, however, there seems to be no precedent the other way, i.e., where a tribunal declined to give its decision on the status of a feature when there was a dispute over sovereignty. In such circumstances, one might expect an international tribunal to proceed with circumspection, knowing that it is moving into uncharted territory.

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7 Award on Jurisdiction and Admissibility, para. 153.

8 Permanent Court of Arbitration, "Day 3: Hearing on Jurisdiction and Admissibility," Transcript, PCA Case No. 2013-19, July 13, 2015, p. 62, lines 10–13. <http://www.pcacases.com/web/sendAttach/1401>

## “Maritime Delimitation”

An alternative argument advanced by China was that the Philippines’ claim related to the maritime delimitation between the territories of the two States in the South China Sea, this being a matter which in its discretion China had excepted from compulsory dispute settlement. The Tribunal however noted that the Philippines had not asked the Tribunal to delimit any overlapping entitlements between Philippines and China; as a result it concluded that, in order to avoid any issue of delimitation, it could not decide whether a particular area falls within a maritime zone of the Philippines unless China “could not possess any potentially overlapping entitlement in that area”<sup>9</sup>. Again, the Tribunal is obviously trying to ride two horses at the same time and it will be interesting to see how successful the Tribunal is in the attempt.

### The Philippines’ Submissions, Generally

Having considered and rejected these “two objections raised generally by China concerning the nature of the Parties’ dispute”<sup>10</sup> (i.e., sovereignty and maritime delimitation), the Tribunal then considered each of the Philippines’ submissions in turn, with a view to deciding whether each could be characterised as involving a dispute between China and the Philippines concerning the interpretation or application of UNCLOS. The Tribunal concluded that each of them does<sup>11</sup>(although of course it did not follow from this that the Tribunal has jurisdiction over all of these disputes); however, the Tribunal accepted that it may subsequently emerge “that the Parties are not, in fact, in dispute on the status of, or entitlements generated by, a particular maritime feature”<sup>12</sup>, although this is presumably unlikely if China continues not to appear at the hearings.

Two points of particular interest might be highlighted. The first is that, as to China’s argument that it has historic rights in the South China Sea, the Tribunal decided that the dispute whether these rights are nullified

One might expect an international tribunal to proceed with circumspection, knowing that it is moving into uncharted territory.

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9 Award on Jurisdiction and Admissibility, para. 157.

10 Award on Jurisdiction and Admissibility, para. 158.

11 Award on Jurisdiction and Admissibility, para. 178.

12 Award on Jurisdiction and Admissibility, para. 171.



by UNCLOS is itself a dispute about the interpretation or application of UNCLOS<sup>13</sup>. Second, even though many of the exchanges between China and the Philippines have covered the South China Sea issue in a general manner, whereas the Philippines' submissions deal separately with certain features, the Tribunal nevertheless concluded that: "viewed objectively, a dispute exists between the Parties concerning the maritime entitlements generated in the South China Sea. Such a dispute is not negated by the absence of granular exchanges with respect to each and every individual feature"<sup>14</sup>.

## Alternative Procedures

One of the other main planks in the Chinese argument, as set out in its Position Paper, is that China and the members of ASEAN, including of course the Philippines, have committed themselves to settling any differences

title of a document which is determinative of its status<sup>16</sup>; the Tribunal then seems to place a lot of weight upon the fact that many of the provisions of the Declaration reaffirm the parties' existing obligations<sup>17</sup>, although it is submitted that this cannot be a decisive factor, as legally binding treaties often do this as well. The Chinese position that the DOC is an agreement for the purposes of Article 281 was however significantly, and probably fatally, undermined by certain statements made contemporaneously with the adoption of the DOC. These were a description by the Chinese drafters of the 1999 draft that it was intended to be "a political document of principle" and a statement to like effect by the Chinese Ministry of Foreign Affairs in 2000, as well as the official report of the working group drafting what became the DOC making the same point<sup>18</sup>. The subsequent practice of the participants, and statements by Chinese officials,

It is not the title of a document which is determinative of its status.

between them through negotiation and the application of a Code of Conduct. The difficulty with this argument in terms of UNCLOS is that the relevant Article, namely Article 281, talks about the alternative procedures being "agreed". That word naturally suggests to a lawyer a legally binding treaty between the parties, and it is difficult at first blush to see that the Declaration on a Code of Conduct can be regarded as a treaty in the usual sense. However, the Chinese Position Paper argues that the Declaration was indeed an agreement for the purposes of Article 281, and not surprisingly therefore the Tribunal plunges straight into the question whether the Declaration "constitutes a binding "agreement" within the meaning of Article 281"<sup>15</sup>. The Tribunal reviews the legal precedents and concludes rightly that it is not the

also indicated to the Tribunal that the DOC was intended as a political document<sup>19</sup>. The Tribunal thus comes to the conclusion that the Declaration was not intended to be legally binding and therefore that Article 281 does not apply<sup>20</sup>.

Additionally, Article 281 requires that the agreement should exclude recourse to Part XV of UNCLOS. In considering whether there is any agreement binding China and the Philippines fulfilling this requirement, the Tribunal refers to bilateral statements made by the two States, the Treaty of Amity of 1976 and the multilateral Convention of Biodiversity. However, the Tribunal concludes that none of them sufficiently clearly constitutes an agreement to exclude the use of Part XV. Nor for sim-

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13 Award on Jurisdiction and Admissibility, para. 168.

14 Award on Jurisdiction and Admissibility, para. 170.

15 Award on Jurisdiction and Admissibility, para. 212.

16 Award on Jurisdiction and Admissibility, para. 214.

17 Award on Jurisdiction and Admissibility, para. 215.

18 Award on Jurisdiction and Admissibility, para. 217.

19 Award on Jurisdiction and Admissibility, para. 218.

20 Award on Jurisdiction and Admissibility, para. 219.

ilar reasons does the Tribunal find applicable Article 282, which excludes Part XV where the parties have agreed to submit their disputes to another procedure for dispute settlement. Of course, by failing to appear at the hearing China was unable to put forward further factual evidence which might possibly have countered the evidence submitted by the Philippines on the applicability of Articles 281 and 282.

## “Exchange of Views”

Under Article 283, the parties to a dispute about UNCLOS “shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means”. This is a precondition to the submission of a dispute to the procedures in Part XV, and is designed to exclude the ordinary rule under customary international

law, which is that a State is not obliged to initiate negotiations with another State before beginning legal proceedings. Article 283 is however specific about what has to be discussed, namely the “settlement” of the dispute. China’s view in the Position Paper was that the parties had never exchanged views as required by Article 283<sup>21</sup>. However, the Tribunal, having considered the extensive bilateral discussions which

took place, concluded that the terms of Article 283 had been fulfilled, making the point that the Philippines was not obliged to continue the discussions once it was clear that the possibility of reaching agreement had been exhausted<sup>22</sup>. One suspects that the Tribunal was concerned that, if the position were otherwise, a party to a dispute might be tempted to protract the discussions indefinitely so that Article 283 could never be regarded as having been fulfilled, and thereby prevent the other party from ever initiating proceedings in accordance with Part XV. The Tribunal also considered whether there might be some separate obligation to settle the dispute by negotiation, arising from the general provisions in Section 1 of Part XV. Without taking a final view on the scope of any such obligation, the Tribunal nevertheless concluded that the Philippines had fulfilled any obligation that might exist by seeking to negotiate with China

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21 Award on Jurisdiction and Admissibility, para. 325.

22 Award on Jurisdiction and Admissibility, para. 343.

concerning the dispute<sup>23</sup>. Again, one wonders whether, if China had been present at the hearing, contrary evidence on these points could have been put.

## The Philippines' Submissions, Specifically

Finally, the Tribunal considered under its Rules of Procedure whether all of the pleas raising “objection to its jurisdiction ... possess an exclusively preliminary character”; if any do not, the Tribunal is obliged to rule on that plea “in conjunction with the merits”<sup>24</sup>. In deciding whether an objection has “an exclusively preliminary character”, the Tribunal must first consider “whether [it] has had the opportunity to examine all the necessary facts to dispose of the preliminary objection; and second, whether the preliminary objection would entail prejudging the dispute or some elements of the dispute on the merits”<sup>25</sup>.

The Philippines made 15 separate submissions and the Tribunal went through them in turn<sup>26</sup>. In two cases, the Tribunal indicated that it had jurisdiction “subject to a caveat with respect to the possible effects of any overlapping entitlements” between the Philippines and China (numbers 4 and 6), and in two other cases the Tribunal limited its jurisdiction to events occurring within the territorial waters of Scarborough Shoal (numbers 10 and 13). In seven cases, the Tribunal joined its consideration of the jurisdictional objection to the merits; this was either because the submission involves a consideration of China’s claim to historic rights, which is a question of substance (numbers 1 and 2), or because a decision on the submission would depend upon a ruling about the status of a particular feature (numbers 5, 8 and 9), or because a decision would depend upon a ruling on the status of a feature, as well as on whether China’s activities were of a military character and therefore excluded from the Tribunal’s jurisdiction (numbers 12 and 14). Finally, the Tribunal asked the Philippines to clarify its submission that the Tribunal should order that “China shall desist from further unlawful claims and activities” (number 15), it being unclear to the Tribunal to

Under Article 11 of Annex VII to UNCLOS, an award is final and “shall be complied with by the parties”.

23 Award on Jurisdiction and Admissibility, para. 347.

24 Award on Jurisdiction and Admissibility, para. 380.

25 Award on Jurisdiction and Admissibility, para. 382.

26 Award on Jurisdiction and Admissibility, para. 397–412.

what precise activities this could potentially relate. Perhaps surprisingly, the result is that the Tribunal found unequivocally that it has jurisdiction over only three of the Philippines' submissions (numbers 3, 7 and 11).

## The Award

One technical point of interest is that the decision was rendered in the form of an award. Under Article 11 of Annex VII to UNCLOS, an award is final and "shall be complied with by the parties". The implication appears

to be that even if China now decided to participate in the proceedings, it could not dispute the terms of this Award. One wonders however whether in this respect the Tribunal might have exceeded its powers. Although Article 26(3) of the Tribunal's Rules of Procedure allows it to make "interim, interlocutory or partial awards", Article 20 of the Rules of Procedure, which deals with preliminary questions such as objections to jurisdiction, uses the terms "rule" and "ruling" and does not suggest that a decision on such a question is to be rendered in the form

of an award. Furthermore, one might argue that Article 10 of Annex VII, which ought in the event of an inconsistency to prevail over the Rules of Procedure adopted by the Tribunal, should be interpreted as meaning that it is only the final decision of the Tribunal which should be rendered as an award, but that preliminary decisions, such as one like this on jurisdiction, should not be.

## Critique of the Award

What are the implications of this Award for the dispute settlement procedures set out in Part XV? Most obviously it is unsatisfactory that in this case, as in the *Netherlands v. Russia* case, the defendant State has not appeared at the hearing. This can be seen as a challenge to

the whole system of dispute settlement under UNCLOS, which is accepted as being a delicate compromise which could be upset if States unilaterally decide whether or not to participate in proceedings brought under it.

Specifically in relation to this case, whilst the Tribunal strove conscientiously to consider the legal arguments which might have been put by China – although one will never know whether, if China had been present, some of these arguments might have been more convincingly developed – the Tribunal obviously cannot know what factual evidence China might have put. This

latter problem might become more acute at the merits stage of the case, when some difficult factual issues might need to be addressed, for example whether or not a feature is a low-tide elevation, a question which is not always straightforward to answer.

In considering the Award, one must ask whether the Tribunal was wise to proceed to consider the status of certain land features when there is admittedly an underlying dispute about sovereignty over those features—a dispute which the Tribunal accepted that it cannot look into, and which like

many sovereignty disputes is a very sensitive political issue for both sides. Might the Tribunal have been wiser to have adopted a self-denying ordinance, and taken the view that as a judicial body it should not embark upon an enquiry about the status of features whose underlying sovereignty is so hotly disputed? In paragraph 153 of the Award, which has been quoted *in extenso* above, the Tribunal weaves a tightrope for itself; how easy will it be for the Tribunal to walk that tightrope?

Finally, it is worth emphasising that the Tribunal was far from giving the Philippines everything that it sought. Indeed, as indicated above, it was only in relation to three out of the fifteen Philippines' submissions that the Tribunal unequivocally held that it had jurisdiction. So, there is still a lot to be decided.

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One must ask whether the Tribunal was wise to proceed to consider the status of certain land features when there is admittedly an underlying dispute about sovereignty over those features—a dispute which the Tribunal accepted that it cannot look into, and which like many sovereignty disputes is a very sensitive political issue for both sides.



Part III:

**International Diplomatic and  
Security Responses to the  
Philippines v. China Arbitration  
Case**





## Philippines v. China Arbitration Case:

# Australia's Diplomatic and Security Responses

Sam Bateman

Australia's position on the South China Sea is complex with a range of occasionally conflicting economic, political and strategic interests.<sup>1</sup> Economically, China is Australia's major trading partner and about 20% of Australia's seaborne trade crosses the South China Sea, three-quarters of which is trade to and from China. Politically, Australia has two treaty arrangements that could involve it in the area. The first is the Alliance with the United States. This could lead to Australia bolstering American efforts to counter China in the area. However, Canberra has not so far agreed to support U.S. freedom of navigation operations (FONOPs) around Chinese claimed features in the South China Sea despite some active lobbying for it to do so.<sup>2</sup>

The Five Power Defence Arrangement (FPDA) is the second treaty that links Australia to the region. Malaysia and Singapore, Australia's regional partners in FPDA, are both littoral to the South China Sea, but while Malaysia

is a claimant to several island features, both countries have been relatively mild in their anti-China rhetoric. Strategically, by virtue of geography, its regional relations and economic interests, Australia has a clear strategic interest in the situation in the South China Sea not deteriorating further.

Australia has come under pressure both directly from the U.S., and indirectly from Japan through the Trilateral Dialogue between Australia, Japan and the U.S., to extend its current military activities in the South China Sea and more directly confront China. Australia's involvement would help bolster the legitimacy of the involvement of these other extra-regional parties in the South China Sea.

There are differing views in Australia regarding whether and how the country might become more directly involved in the South China Sea, including by joining the U.S. FONOPs. There are those who support greater involvement arguing that Australia's vital interests are threatened by China's destabilizing actions, and it is necessary for like-minded countries to act together to ensure that a rules-based order is maintained in the region.<sup>3</sup> However, there are others who argue that the situation in the South China Sea is complex and greater

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1 Sam Bateman, "China and America's South China Sea Clash: What Do U.S. Allies Think?," *The National Interest*, May 31, 2015. <http://nationalinterest.org/blog/the-buzz/china-americas-south-china-sea-clash-what-do-us-allies-think-13007>

2 For example, Bonnie Glaser, "High stakes for Australia in limiting China's South China Sea incursions," *The Age*, May 22, 2015. <http://www.theage.com.au/comment/high-stakes-for-australia-in-limiting-chinas-south-china-sea-incursions-20150521-gh6nww.html>; Euan Graham, "As RAN prepares to exercise with China's navy, Australia risks a PR disaster," *The Interpreter*, October 30, 2015. <http://www.lowyinterpreter.org/post/2015/10/30/As-RAN-prepares-to-exercise-with-Chinas-navy-Australia-risks-a-PR-disaster.aspx>

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3 John Garnaut, "A bet each way: our China policy is rational," *The Age*, May 22, 2015. <http://www.theage.com.au/comment/a-bet-each-way-our-china-policy-is-rational-20150521-gh6dsv.html>

military involvement would not necessarily help Australia's own interests as an independent player in the region.<sup>4</sup> As well as provoking China, such a gesture could be widely seen in the region as Australia slavishly following the U.S. and trying to act as the region's 'deputy sheriff'.<sup>5</sup>

## Diplomatic Responses

The Australian Government, as far as I can ascertain, has not made any official statement on the South China Sea Arbitration Case Award. There seems no record either of Australia welcoming the Philippines launching the arbitration. Australia's formal position is one of encouraging all parties to clarify and pursue territorial claims and maritime entitlements peacefully and in accordance with international law.<sup>6</sup> As the Australian Foreign Minister, Julie Bishop, said in a speech in Canberra on 19 October 2015, "While we do not take sides on the competing claims, we have consistently urged restraint and peaceful negotiations as a means to resolve these claims and disputes."<sup>7</sup> At the APEC meetings in Manila 16–18 November 2015, she is reported to have

It is hard for Australia to criticize China in deciding not to participate in the arbitration when Australia itself has opted out of mandatory dispute settlement under Article 298 of UNCLOS.

made the following comments about the arbitration: "It will set some legal principles against which China's actions and the actions of other countries will be judged." She went on to say, "We don't take sides, we don't back one player against another - that is a matter for arbitration and negotiation," and that Australia urged all parties to settle claims peacefully and in accordance with international law.<sup>8</sup>

Australia and the Philippines enjoy a close bilateral relationship. There is a strong interpersonal aspect to the relationship with more than 250,000 Filipinos living in Australia.<sup>9</sup> Regular bilateral meetings include the Foreign and Trade Ministers' meeting (the Philippines-Australia Ministerial Meeting, or "PAMM") and associated PAMM business dialogue and senior officials' meeting; counter-terrorism consultations; annual joint defence cooperation consultations; a strategic dialogue; and High Level Consultations on Development Cooperation.

The Last PAMM was held in Manila in February 2014 with the Ministers agreeing in reference to the South China Sea to "Continue to encourage all parties to clarify and pursue territorial claims and maritime entitlements in the South Chi-

na Sea peacefully and in accordance with international law, including the United Nations Convention on the Law of the Sea (UNCLOS), and reiterate support for closer ASEAN-China negotiations for the early conclusion of a substantive Code of Conduct in the South China Sea".<sup>10</sup>

There are two aspects of the arbitration case that could be factors in any Australian diplomatic response

4 Geoff Miller, "Australia should not follow the US into an ill-considered adventure in the South China Sea", *The Interpreter*, June 2, 2015. <http://www.lowyinterpreter.org/post/2015/06/02/South-China-Sea-Australia-should-not-follow-US-into-ill-considered-adventure.aspx>; Sam Bateman, "Australia and the Freedoms of Navigation," *The Strategist*, June 5, 2015. <http://www.aspistrategist.org.au/australia-and-the-freedoms-of-navigation/>

5 Sam Bateman, "Australia and the US: great allies but different agendas in the South China Sea," *The Interpreter*, November 12, 2015. <http://www.lowyinterpreter.org/post/2015/11/12/Australia-and-the-US-great-allies-but-different-agendas-in-the-South-China-Sea.aspx>

6 Bill Tweddell, "Australia and the Philippines: A long history of cooperation," *The Philippine Star*, March 13, 2014. <http://www.philstar.com/opinion/2014/03/13/1300266/australia-and-philippines-long-history-cooperation>

7 The Hon Julie Bishop MP, Australian Minister for Foreign Affairs, Speech to Australian Institute of International Affairs National Conference, Canberra, October 19, 2015. [http://foreignminister.gov.au/speeches/Pages/2015/jb\\_sp\\_151019a.aspx](http://foreignminister.gov.au/speeches/Pages/2015/jb_sp_151019a.aspx)

8 "Aust open to US moves in disputed waters," AAP, November 18, 2015. <http://www.sbs.com.au/news/article/2015/11/18/aust-open-us-moves-disputed-waters>

9 Tweddell, "Australia and the Philippines."

10 Australian Embassy – the Philippines, *Philippines-Australia Ministerial Meeting: Joint Ministerial Statement*, February 20, 2014. <http://philippines.embassy.gov.au/mnla/medrel140221.html>

to the Award. The first and most important is that it is hard for Australia to criticize China in deciding not to participate in the arbitration when Australia itself has opted out of mandatory dispute settlement under Article 298 of UNCLOS. The second could be some concern that Australia's best interests may not be served should the Permanent Court of Arbitration introduce tighter criteria for defining "rocks" and "islands".

## Arbitration between Australia and Timor-Leste

Australia, like China, is one of the relatively few countries that have made declarations regarding optional exceptions to compulsory dispute settlement under Article 298.<sup>11</sup> On 22 March 2002, Australia lodged a declaration under Article 298(1)(a) stating that it does not accept any of the procedures provided for in section 2 of Part XV of UNCLOS with respect to disputes relating to sea boundary delimitations. On the same day Australia also lodged a declaration under Article 36(2) of the International Court of Justice (ICJ) Statute excluding sea boundary delimitation disputes from the ICJ's jurisdiction.<sup>12</sup>

Australia has chosen in accordance with UNCLOS Article 298 (1) not to accept any of the dispute

resolution mechanisms with respect to disputes concerning the interpretation or application of Articles 15, 74 and 83 relating to sea boundary delimitations as well as those involving historic bays or titles.<sup>13</sup> The National Interest Analysis conducted for the Australian Parliament suggested that the government has taken this action because it is of the view that maritime boundary disputes are best resolved through negotiation and not litigation.<sup>14</sup>

After Timor-Leste became independent on 20 May 2002, following 24 years occupation by Indonesia and three years of UN administration, Australia and Timor-Leste entered into several agreements covering joint development of an area of the Timor Sea between the two countries allowing for joint development for a period of 30 years or until such time as a permanent seabed boundary is

Australia's best interests may not be served should the Permanent Court of Arbitration introduce tighter criteria for defining 'rocks' and 'islands'.

11 29 countries have made such declarations relating to maritime boundaries and historic title. Md. Saiful Karim, "Litigating law of the sea disputes using the UNCLOS dispute settlement system" in Natalie Klein, ed., *Litigating International Law Disputes: Weighing the Options*, Cambridge: Cambridge University Press, 2014, p. 272, Table 12.1.

12 Anne Sheehan, "Dispute Settlement under UNCLOS: The Exclusion of Maritime Delimitation Disputes," *University of Queensland Law Journal*, 7, 24(1), p. 165.

13 UN Division for Ocean Affairs and Law of the Sea, *Declaration by Australia of 21 March 2002 under articles 287 and 298 of the United Nations Convention on the Law of the Sea*. [http://www.un.org/Depts/los/convention\\_agreements/convention\\_declarations.htm#Australia after ratification](http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#Australia%20after%20ratification)

14 National Interest Analysis tabled on 18 June 2002, Australian declarations under Articles 287(1) and 298(1)(a) of the United Nations Convention on the Law of the Sea 1982, lodged at New York on 22 March 2002. <http://www.austlii.edu.au/au/other/dfat/nia/2002/21.html>

delimited.<sup>15</sup> The main agreements are the 2002 Timor Sea Treaty between the Government of East Timor and the Government of Australia (*Timor Sea Treaty*)<sup>16</sup>; and the 2006 Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea (*CMATS Treaty*)<sup>17</sup>.

Timor-Leste would like to take Australia to arbitration over maritime boundaries, but has been frustrated in this by Australia opting out of compulsory dispute resolution in respect of maritime boundaries. Nevertheless, Timor-Leste has initiated arbitration against Australia over the two major treaties between the two countries. An initial case relating to the validity of the CMATS Treaty and questions relating to the seizure and detention of certain documents and data was discontinued when Australia returned the documents in question. However, Timor-Leste subsequently decided to resume arbitration challenging the validity of the CMATS Treaty.<sup>18</sup> Timor-Leste has also initiated arbitration against Australia disputing Australia's exclusive right to tax the pipeline from the Bayu Undan gas field in the Joint Petroleum Development Area set up under the Timor Sea Treaty.<sup>19</sup> In a striking similarity to the South China Sea arbitration case, Australia believes the differences between the two countries would be best resolved through consultation and dialogue rather than by arbitration. This supports a general principle that the larger players in a dispute—for example, China and Australia—want consultation and negotiation while the smaller players—the Philippines and Timor-Leste, respectively—seek arbitration.

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15 Sam Bateman and Anthony Bergin, "The maritime interests of Timor-Leste" in "A reliable partner: Strengthening Australia – Timor-Leste relations," *Special Report Issue 39*, Canberra: Australian Strategic Policy Institute, April 2011, Box 4, p. 58.

16 *Timor Sea Treaty*, Australian Treaty Series [2003] ATS 13. <http://www.austlii.edu.au/au/other/dfat/treaties/2003/13.html>

17 *CMATS Treaty*, Australian Treaty Series [2007] ATS 12. <http://www.austlii.edu.au/au/other/dfat/treaties/2007/12.html>

18 The Hon Julie Bishop MP, Australian Minister for Foreign Affairs, "Timor-Leste: ICJ case discontinued," *Media Release*, June 5, 2015. [http://foreignminister.gov.au/releases/Pages/2015/jb\\_mr\\_150605.aspx?w=tb1CaGpkPX%2FIS0K%2Bg9ZKEg%3D%3D](http://foreignminister.gov.au/releases/Pages/2015/jb_mr_150605.aspx?w=tb1CaGpkPX%2FIS0K%2Bg9ZKEg%3D%3D)

19 The Hon Julie Bishop MP, Australian Minister for Foreign Affairs, "Timor-Leste arbitration," *Media Release*, September 25, 2015. [http://foreignminister.gov.au/releases/Pages/2015/jb\\_mr\\_150925.aspx](http://foreignminister.gov.au/releases/Pages/2015/jb_mr_150925.aspx)

## Small Rocks and Islands

Under the arbitration case Award, the Tribunal has decided to determine the legal entitlements of some disputed features in the South China Sea. It is likely to find that some of these features are only ‘rocks’ that cannot sustain human habitation or an economic life of their own and thus are not entitled to an exclusive economic zone (EEZ), while it may determine that other features are low-tide elevations with no entitlement to a territorial sea.<sup>20</sup> The significance of this possible determination for Australia is that Australia has used small and uninhabited features to extend its maritime jurisdiction in the Timor and Coral seas—Ashmore and Cartier Islets in the Timor Sea and Mellish, Elizabeth and Middleton

the boundary to be drawn are valid, then there are serious questions as to whether there can be a valid boundary at all,” but the boundary’s validity would have to be challenged by a third state and the prospect of that occurring is “very low”.<sup>22</sup> Similar difficulties arise with Elizabeth and Middleton Reefs, which are said to be periodically submerged, but have been used as base points in the maritime boundary between Australia and France (New Caledonia).<sup>23</sup>

While this concern for Australia is mainly of an academic nature, other countries around the world with maritime claims based on small outlying features will also be watching what the Tribunal might determine. Japan could be particularly affected with its extensive EEZ and outer continental shelf claimed from Okinoto-

Paradoxically, a tight determination from the Tribunal as to what a ‘rock’ is and what an ‘island’ is could strengthen the grounds that China has for challenging Japan over its maritime claims based on Okinotori-Shima.

Reefs in the Coral Sea. All are smaller than four major features in the Spratlys—Itu Aba, Spratly, West York and Thitu islands. Ashmore and Cartier islets were given weight in determining maritime boundaries between Australia and Indonesia although neither country has yet ratified their 1997 boundary agreement.<sup>21</sup>

Mellish Reef has been used as a base-point for the maritime boundary between Australia and the Solomon Islands, which in turn has used Indispensable Reef as its base-point. Mellish Reef has a small grassed sand cay about 1.5 meters high, but Indispensable Reef is reported to have only two rocks awash at high tide. Kaye has concluded that “If neither of the basepoints that allow

ri-Shima in the Pacific Ocean; the only naturally-formed parts of this feature above high tide are several small rocks. Paradoxically, a tight determination from the Tribunal as to what a ‘rock’ is and what an ‘island’ is could strengthen the grounds that China has for challenging Japan over its maritime claims based on Okinotori-Shima.”<sup>24</sup>

## Security Responses

Relations between Australia and the U.S., the Philippines and China are central to determining any Australian security response to the Award. Australia’s alliance with the U.S. has long been Australia’s most important

20 James Kraska, “A Legal Analysis of the Philippine-China Arbitration Ruling,” *The Diplomat*, November 2, 2015. <http://thediplomat.com/2015/11/a-legal-analysis-of-the-philippine-china-arbitration-ruling/>

21 Stuart Kaye, “Australia’s Maritime Boundaries,” 2<sup>nd</sup> ed., *Wollongong Papers on Maritime Policy*, No. 12, Wollongong: Centre for Maritime Policy, 2001, p. 56.

22 Stuart Kaye, “Australia’s Maritime Boundaries,” p. 145

23 Stuart Kaye, “Australia’s Maritime Boundaries,” pp. 149–151.

24 Peter Lee, “Okinotorishima-ization: South China Sea arbitration case enters middle game,” *Asia Times*, July 18, 2015. <http://atimes.com/2015/07/okinotorishima-ization-south-china-sea-arbitration-case-enters-middle-game/>

defence relationship and “a pillar of Australia’s strategic and security arrangements”.<sup>25</sup> The U.S. has become a key player in the South China Sea, and has been increasing its military presence in the region. It has declared a “national interest” in preserving freedoms of navigation through the South China Sea and has sought to internationalise the dispute by suggesting that China’s actions threaten the security of sea lines of communication. It has supported the Philippine case while, as a non-party to UNCLOS itself, it is limited in its own ability to take action against China’s claims.

The U.S. has consistently supported the Philippines in recent years in building its maritime security presence and capabilities. This is in line with a professed common objective in a “rule-based approach in resolving competing claims in maritime areas through peaceful, collaborative, multilateral and diplomatic processes within the framework of international law”.<sup>26</sup> The U.S. Senate has said the Philippines properly exercised its right in pushing for peaceful means in resolving the maritime disputes.<sup>27</sup>

Australia and the Philippines share many interests in the region, including promoting maritime security in accordance with international law, building a regional disaster preparedness and response capacity, and strengthening economic integration.

Australia has been a major destination for Philippine military trainees, particularly during the period when military relations between the U.S. and the Philippines were

on hold. Defence and security issues are key parts of the bilateral relationship.<sup>28</sup> The 2012 Status of Visiting Forces Agreement between Australia and the Philippines opened up the possibility of deeper personal relationships, more training opportunities and more advanced military exercises.

Australia faces a difficult foreign and defence policy balancing act between China as its main trading partner and the U.S. as its major security partner. Any sign of wavering by Canberra towards China is viewed with concern by Washington. Nevertheless, Australia has forged a defence relationship with China through senior-level dialogue, educational exchanges, reciprocal naval ship visits, and humanitarian assistance and disaster relief exercises, involving the

## Australia faces a difficult foreign and defence policy balancing act between China as its main trading partner and the U.S. as its major security partner.

25 Australian Government, Defence White Paper 2013 – Defending Australia and its National Interests, Canberra: Department of Defence, 2013, p. 56, para. 6.8.

26 US State Department, Office of the Spokesperson, Joint Statement of the United States-Philippines Ministerial Dialogue, *Media Note*, April 30, 2014. <http://www.state.gov/r/pa/prs/ps/2012/04/188977.htm>

27 “US Senate passes resolution supporting PH move vs China,” *ABS-CBNnews.com*, July 13, 2014. <http://www.abs-cbnnews.com/nation/07/13/14/us-senate-passes-resolution-supporting-ph-move-vs-china>

28 Sam Bateman, Anthony Bergin and Hayley Channer, *Terms of engagement – Australia’s regional defence diplomacy*, Canberra: Australian Strategic Policy Institute, July 2013, p. 29.



military forces of the two countries. In an example of this balancing, at the APEC Summit meeting on 17 November 2015, Australia's Prime Minister Turnbull pledged Australia's absolute support for the U.S. in its campaign against China's incursions in the South China Sea,<sup>29</sup> just two weeks before the 18th high-level Defence Strategic Dialogue between Australia and China was held in Australia that led to an agreement on stepped-up cooperation on counter-terrorism, peacekeeping and senior personnel exchanges.<sup>30</sup> This agreement was viewed, however, by one commentator as an opportunity for China to drive a wedge between Washington and Canberra just after Australia had pledged its full support for the U.S. in the South China Sea.<sup>31</sup>

## Conclusion

As a committed liberal democracy, Australia supports a rules-based international order. However, with regard to maritime boundary disputes, Australia's dealings with Timor-Leste suggest that it has a preference for resolving maritime boundary disputes through negotiation rather than by litigation. While Australia may not have formally responded to the arbitration case Award, this is not to say that Australia is not interested in the Award or the eventual outcome of the arbitration case. In view of its diverse economic, political and strategic interests in the region, Australia wishes to see a peaceful settlement of the disputes in the South China Sea, as well as the introduction of effective regimes for managing the sea, its resources and activities within it. As a country with a large area of maritime jurisdiction of its own, Australia has a great interest in the effective management of the world's oceans and seas. It also has developed great expertise in managing maritime space that could help countries bordering the South China Sea fulfil their obligations to cooperate under Part IX of UNCLOS.

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29 Phillip Coorey, "Malcolm Turnbull absolutely behind US in South China Sea," *AFR Weekend*, November 17, 2015. <http://www.afr.com/news/politics/election/malcolm-turnbull-absolutely-behind-us-in-south-china-sea-20151117-gl1ae2>

30 Brendan Nicholson, "Top brass strengthens military ties with China," *The Weekend Australian*, December 2, 2015. <http://www.theaustralian.com.au/national-affairs/defence/top-brass-strengthens-military-ties-with-china/news-story/ac651ba339d8b218a7a317b48d6bd7d8>

31 Euan Graham, "China's puzzling defence agreement with Australia," *The Interpreter*, December 7, 2015. <http://www.lowyinterpreter.org/post/2015/12/07/Chinas-puzzling-defence-agreement-with-Australia.aspx>





Philippines v. China Arbitration Case:

# China's Diplomatic, Security, and Legal Responses

Nong Hong

In *The Republic of Philippines v. The People's Republic of China* arbitration case, the Tribunal ruled on October 29, 2015, that the case was “properly constituted” under the United Nations Convention on the Law of the Sea (UNCLOS) and China’s “non-appearance” did not prevent the Court’s jurisdiction. On November 30, 2015, the Tribunal concluded its hearing on the merits and remaining issues of jurisdiction and admissibility. This piece summarizes China’s diplomatic, security and legal responses following the latest development of this case.

## Diplomatic Responses

Ultimately, the Award means that all of the Philippines’ claims will have their day in court and does not suggest that China stands to lose the case completely. Beijing’s secondary line of defense—that each measure for relief requested by Manila ultimately requires maritime delimitation to be carried out before it can be granted—remains to be considered with

the merits of the case.

Other states with their own maritime disputes with China now have a proven legal approach that could be used for specific incidents before other Annex VII tribunals, in particular, incidents involving maritime rights. Although obviously each case would be different, there

is now a procedural roadmap that exists to bring a dispute to arbitration.

However, Beijing, not surprisingly, refused to honor the Arbitral Tribunal’s Award on Jurisdiction and Admissibility with Vice Foreign Minister Liu Zhenmin stating, “We will not participate and we will not accept the arbitration...The ruling or the rest of arbitration will not affect China’s position.” China has insisted that it has indisputable sovereignty over the Spratly (Nansha) Is-

lands and adjacent waters in the disputed sea. Liu continued, “It won’t affect China’s sovereignty rights and jurisdiction in the South China Sea, our rights will not be

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undermined.”<sup>1</sup> Liu further noted, “From this ruling you can see the Philippines’ aim in presenting the case is not to resolve the dispute. Its aim is to deny China’s rights in the South China Sea and confirm its own rights in the South China Sea.”<sup>2</sup>

Meanwhile, Zhu Haiquan, spokesman for the Chinese Embassy in Washington, also reiterated China’s position

be regarded as China’s acceptance of or participation in the proceedings.”<sup>5</sup> In December 2014, China published a “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” in which is explained China’s view that the Arbitral Tribunal lacks jurisdiction to consider the

The way the Philippines presented its claim in that it has cleverly attempted to de-link its claims from the terms of ‘territory’, ‘maritime delimitation’, and ‘historic title’, with the support of the experienced legal team from the United States, might have a heavy impact on the Arbitration Tribunal.

of not accepting or participating in the arbitration. “The attempts to attain more illegal interests by initiating arbitration unilaterally is impractical and will lead nowhere. ... China is committed to resolving relevant disputes through negotiation and consultation with parties directly involved. This is the only right choice.”<sup>3</sup>

China’s official reaction was not unexpected and is consistent with its previous statements. On February 19, 2013, China presented a Note Verbale to the Philippines in which it described “the Position of China on the South China Sea issues” and rejected the Philippines’ Notification.<sup>4</sup> On May 21, 2014, the Permanent Court of Arbitration received a Note Verbale from China that stated “it does not accept the arbitration initiated by the Philippines” and the Note Verbale submitted “shall not

Philippine’s submission.”<sup>6</sup>

China holds that the dispute presented by the Philippines constitutes, at its core, a land territorial sovereignty dispute and the relevant maritime delimitation, which is excluded from the third party compulsory dispute settlement mechanism under UNCLOS, through China’s 2006 declaration. On August 25, 2006, China deposited, pursuant to Article 298 of the Convention, with Secretary-General of the United Nations a written declaration, stating that, “The Government of the People’s Republic of China does not accept any of the procedures provided for in section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a), (b) and (c) of Article 298 of the Convention.” In other words, as regards disputes concerning maritime delimitation, historic bays or titles, military and law enforcement activities, and disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of

1 “Beijing slams tribunal decision on South China Sea row,” Associated Press/Channel NewsAsia, October 30, 2015. <http://www.channelnewsasia.com/news/asiapacific/beijing-slams-tribunal/2227900.html>

2 Anthony Deutsch, “In defeat for Beijing, Hague court to hear South China Sea dispute,” Reuters, October 30, 2015. <http://www.reuters.com/article/us-philippines-china-arbitration-idUSKCN0SN26320151030>

3 Mike Corder and Jim Gomez, “Arbitration panel OKs jurisdiction in South China Sea case,” Associated Press, October 29, 2015. <http://bigstory.ap.org/article/e0fa82cbe80b49bc8f5ae156f005d384/arbitration-panel-oks-jurisdiction-south-china-sea-case>

4 Embassy of the People’s Republic of China in the Republic of the Philippines, “Note Verbale No. (13) PG-039 from the Embassy of the People’s Republic of China in the Republic of the Philippines,” Note Verbale, No. (13) PG-039, February 19, 2013. <https://perma.cc/WMB2-DDPF>

5 Permanent Court of Arbitration, “The Arbitral Tribunal Sets Further Proceedings,” Press Release, June 3, 2014. <http://www.pcacases.com/web/sendAttach/230>

6 Ministry of Foreign Affairs of the People’s Republic of China, “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,” December 7, 2014. [http://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1217147.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml)

the United Nations, the Chinese Government does not accept any of the compulsory dispute settlement procedures laid down in section 2 of Part XV of the Convention, including compulsory arbitration.<sup>7</sup> However, the way the Philippines presented its claim in that it has cleverly attempted to de-link its claims from the terms of ‘territory’, ‘maritime delimitation’, and ‘historic title’, with the support of the experienced legal team from the United States, might have a heavy impact on the Arbitration Tribunal, without China’s participation and the missed chance to express its position in a professional legal way. It is also questionable whether the messages that China intends to convey through “amicus curiae” (“friends of the court”) reach the five arbitrators, how much weight they may carry, and the extent to which they may be considered as effective “reply” to the Memorial of the Philippines.

On December 11, 2015, the Permanent Mission of China to the UN sent a *Note Verbale* on the South China Sea arbitration to the other permanent missions, with reference to the Note Verbale No. 000840-2015 of the Permanent Mission of the Republic of the Philippines to the United Nations dated on December 2, 2015. China’s Note Verbale criticized Secretary of Foreign Affairs of the Philippines Albert F. del Rosario, for his “unreasonable and groundless accusations against China

which ignored basic facts and confused right and wrong.” The note claims that “it is precisely the Philippines’ adoption of an expansionist policy in the South China Sea and its blatant violation of China’s sovereignty and rights and interests in breach of the Charter of the United Nations that have given rise to the relevant disputes between China and Philippines in the South China Sea.” The note points to the Philippines’ accusations against China’s U-shaped line in the South China Sea as an attempt to negate China’s sovereignty and relevant rights in the South China Sea and cover up what China views as illegal occupation of some islands and reefs of China’s Nansha Islands. China reiterates that, as a sovereign state and a State Party to the UNCLOS, China has the freedom

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– Permanent Mission of the PRC to the UN

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7 Ministry of Foreign Affairs of the People’s Republic of China, “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,” December 7, 2014. [http://english.gov.cn/archive/press\\_briefing/2014/12/07/content\\_281475020441708.htm](http://english.gov.cn/archive/press_briefing/2014/12/07/content_281475020441708.htm)

and right to choose the means and procedures of dispute settlement independently, which are protected by international law and should be respected.

## Security Responses

Chen Xiangyang, an expert with the China Institutes of Contemporary International Relations (CICIR), noted that the Tribunal's decision came just two days after a U.S. Navy's freedom of navigation operations near Subi and Mischief Reefs. "In my view, it is related, and that explains why the Philippines was vocal in its support for Washington's sailing. ... The US ship and the legal battle made by the Philippines made the problem in the South China Sea even more complicated."<sup>8</sup> Chen Qinghong, another researcher with CICIR, commented on the complexity of the issue. "For instance, you have to take sovereignty, national emotions, public activities in history and traditional fishing grounds into consideration. So I think the best way to solve it is bilateral negotiations, in which the international law could be used."<sup>9</sup>

Tensions in the South China Sea have escalated since the U.S. destroyer USS *Lassen* sailed within 12 nautical miles of the two China-occupied artificial islands on October 27, 2015. Admiral Wu Shengli, the Commander of the People's Liberation Army Navy (PLAN), warned his U.S. counterpart Admiral John Richardson during a video call on October 29, 2015. As paraphrased by Xinhua, he stated, "If the US continues to carry out these kinds of dangerous, provocative acts, there could be a serious situation between frontline forces from both sides on the sea and in the air, or even a minor incident that could spark conflict."<sup>10</sup>

In response to U.S. freedom of navigation operations in the South China Sea, the Chinese government has repeatedly stated that it is fully committed to respecting freedom of navigation in the region. It is clear that Chi-

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8 Xiaokun Li, and Xu Wang, "South China Sea ruling 'null and void', says ministry," China Daily, October 31, 2015. [http://www.chinadaily.com.cn/china/2015-10/31/content\\_22331955.htm](http://www.chinadaily.com.cn/china/2015-10/31/content_22331955.htm)

9 Xiaokun Li, and Xu Wang, "South China Sea ruling 'null and void', says ministry," China Daily, October 31, 2015. [http://www.chinadaily.com.cn/china/2015-10/31/content\\_22331955.htm](http://www.chinadaily.com.cn/china/2015-10/31/content_22331955.htm)

10 "China naval chief warns US of conflict risk in South China Sea," Agence France-Presse, October 30, 2015. <http://www.globalpost.com/article/6678316/2015/10/30/china-naval-chief-warns-us-conflict-risk-south-china-sea>

na's interpretation of freedom of navigation applies to both commercial vessels and military vessels, but it is cautious about U.S. military vessels and aircraft traversing its claimed territorial waters. China has criticized enhanced U.S. defense ties with Singapore that include the deployment of U.S. Navy P-8 Poseidon surveillance aircraft to the Southeast Asian city state. China views a stronger U.S. military presence as running counter to the interests of countries in the region.

On December 10, a U.S. warplane flew within two nautical miles of an artificial island claimed by China in the South China Sea, which the U.S. explained as “un-

plan.”<sup>12</sup>

Wu Shicun, a well-known maritime security analyst in China and President of the National Institute for South China Sea Studies (NISCSS), holds that, “in light of the muscle-flexing acts conducted by the U.S. in the South China Sea in recent years, it is important for China to consider certain precautionary measures like promulgating the territorial sea baseline of the Nansha Islands, bolstering defensive military deployment on the artificial islands and declaring an air defense identification zone.”<sup>13</sup>

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intentional”. This incident prompted an angry response from China. Beijing filed a formal diplomatic complaint with the US embassy in Beijing on 18 December, prompting the Pentagon to investigate the incident. The Chinese Defence Ministry accused the US of deliberately stoking tensions in the region and warned that it was prepared to take any measure necessary to protect its sovereign territory.<sup>11</sup>

On December 13, China's Ministry of National Defense announced that PLAN had recently conducted a routine military training exercise in the South China Sea. The statement released noted that the Navy had “in recent days organized a fleet to go to relevant waters in the South China Sea, by way of the Western Pacific, to carry out exercises. ... This action is a routine arrangement made in accordance with this year's naval training

## Legal Responses

China's failure to appear in court demonstrates its continued position of “non-acceptance and non-participation” in the arbitration unilaterally initiated by the Philippines. It does not mean disrespect for the Arbitration Tribunal, the Permanent Court of Arbitration (PCA), or international law, nor does it reflect China's inability to fulfill its obligations regarding the peaceful settlement of international disputes. China was one of the first countries to participate in international dispute settlement mechanisms, including the PCA.

Since the 1980s, the UN and other international organizations have called on the international community to set up mechanisms like the PCA to resolve international

11 Ministry of National Defense of the People's Republic of China, “国防部新闻事务局就美B-52轰炸机进入中国南沙群岛有关岛礁邻近空域答记者问,” December 19, 2015. [http://www.mod.gov.cn/affair/2015-12/19/content\\_4633354.htm](http://www.mod.gov.cn/affair/2015-12/19/content_4633354.htm)

12 “Beijing holds new round of war drills in South China Sea,” RT, December 13, 2015. <https://www.rt.com/news/325791-china-war-military-drills/>

13 Shicun Wu, “应对南海问题的三点建议,” Global Times, October 31, 2015. [http://www.nanhai.org.cn/index.php/Index/Research/review\\_c/id/138.html](http://www.nanhai.org.cn/index.php/Index/Research/review_c/id/138.html)

disputes. To give full play to their functional roles, many international conventions, including UNCLOS, have introduced litigation and arbitral procedures into their dispute settlement mechanisms. This was a good experiment and good starting point, but the result was opposite to what one might want. Since its entry into force in 1994, about twenty cases on maritime disputes have been sitting in the International Court of Justice, while only ten cases have been forwarded to arbitral procedures, mainly because the dispute settlement provisions from the Convention are very complicated and contain disputed aspects and loopholes. In the lead up to the entry into force of UNCLOS, its compulsory dispute settlement provisions were the subject of heavy criticism. It was pointed out that the limitations and exclusions in Part XV would ensure that a broad range of ocean disputes would not be subject to the compulsory procedures at all. Criticism was also directed at the provisions for the establishment, and selection, of a wide range of tribunals on the basis that each tribunal listed would clearly have different functions and there was no way to ensure that their procedures and *modus operandi* would be appropriate to the dispute before them. A country that does not accept arbitral procedures will be unfairly portrayed as “not endorsing international law” by a party unilaterally initiating arbitration.

China holds that the arbitral tribunals should limit their jurisdiction to the scope of disputes rather than expanding their jurisdiction. The provisional nature of arbitration

demonstrates that the purpose of arbitration is to solve specific disputes, not to address broader issues. In the case of the South China Sea arbitration, the Tribunal grants itself jurisdiction even though it is aware of China’s consistent position on resolving the territorial sovereignty and maritime disputes through bilateral negotiations. Likewise, it grants itself jurisdiction knowing that China does not wish to participate in the arbitral proceedings or accept its rulings and is aware that rulings responding to Philippines’ appeals do not resolve the disputes. China’s desire to resort to negotiations in order to solve the disputes has been unfairly neglected.

China maintains that the South China Sea arbitration also raises questions about breaking the balance of the two famous doctrines in the maritime system: *mare clausum* (“closed sea”) and *mare liberum* (“free sea”). These two doctrines generated two major principles of the law of the sea: the principle of domination (‘land dominates the sea’) and the principle of freedom of the high seas. UNCLOS is the combination and compromise of the two principles. The convention not only absorbed the coastal states’ diversified claims to maritime

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rights, such as the continental shelf and the exclusive economic zones, but also maintained the principle of freedom on the high seas, limiting the rights of coastal states in the exclusive economic zone to the rights to economic activities.

China holds that the Arbitration Tribunal's insistence on adjudicating the legal status of disputed islands in the Spratlys might potentially upset the balance between these two principles. There is only one clause in the Convention, Article 121, defining the island regime. However, the Spratlys are composed of different types of "insular features" (islands, reefs and low tide elevations, reefs, etc.) with various legal statuses, producing different maritime rights and having differing implications for delimitating maritime boundaries. These issues are far from being able to be regulated by just one clause. It is hard to distinguish an island from a rock, and a reef from a low tide elevation. In the *Romania v. Ukraine* case, the International Court of Justice has chosen to simply draw a delimitation line between the two countries, thus avoiding giving a clear answer on whether the "Serpents' Island" is an island as requested by Ukraine, or a rock, as claimed by Romania.<sup>14</sup> This demonstrates well how hard it is to differentiate an "island" from a "rock." Another issue relates to the maritime zones granted to the islands and other features in the SCS. Applying Article 121 (3) in the context of the SCS is extremely difficult. Since the status of features may vary over time, so will the result of an application. Since a low-tide elevation is not entitled to territorial claims, the judgment of their legal status directly impacts the nation's sovereignty, leading to territorial expansion or reduction. This makes a judicial determination of their status all the more consequential.

Judging from recent cases, including *Mauritius v. United Kingdom* and *Philippines v. China*, the Arbitral Tribunal is eroding and undermining the sovereignty of coastal states and the connotation and extension of their jurisdiction over the sea. It will ultimately damage the interests of all coastal states including the Philip-

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14 Mrunal Dattatraya Buva and Tania Sebastian, "Analytical Look Of The International Court Of Justice On The Strife Regarding Continental Shelf And The Exclusive Economical Zones' Delimitation Between Romania And Ukraine: A Case Comment," Manupatra, n.d. <http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=94d8b3bb-bd55-4da0-a469-819a1da2d655&txtsearch=Subject:%20International%20Law>

pines.

As far as the South China Sea dispute is concerned, the involvement of the international arbitration has weakened a nation's rights in establishing a regional maritime order. The power of arbitration mechanisms has gradually strengthened and continues to expand. The Arbitral Tribunal will give final rulings in 2016 on the arbitration initiated by the Philippines and may negate the legal basis of the China's U-shaped line in the South China Sea and its rights within the line. As the Arbitration Tribunal expands its jurisdiction and ignores the

of utilizing a third-party compulsory settlement mechanism for resolving the multiple overlapping claims in the South China Sea. The value of the compulsory dispute settlement mechanism UNCLOS provides should not be underestimated. However, the impact of the arbitration case on regional security should not be overlooked either, given the complex nature of the disputes involving both sovereignty and maritime delimitation. In the short term, the arbitration case has increased tensions in the South China Sea and delayed both cooperation and progress towards an agreed COC. In the

**In the short term, the arbitration case has increased tensions in the South China Sea and delayed both cooperation and progress towards an agreed COC. In the longer term, it might clarify some legal issues, but this is at the risk of undermining the international dispute settlement process.**

claims that the coastal states view as legitimate and reasonable, tensions between the contracting states of UNCLOS will increase. The arbitration will thus be not prudent in implementation.

## Conclusion

China's diplomatic response on the Award issued on October 29 echoes its long-standing position on the arbitration case, which could be summarized as "no acceptance, no participation". On the security side, there have not been many official responses that are explicitly related to the arbitral proceedings while some security analysts have linked the operations of the USS *Lassen* on October 27 with the Award issued two days later. They have been read as closely related, and a strong signal of the U.S. taking sides in the dispute. China's Ministry of National Defense has protested the U.S. Navy's increasingly frequent military operations in the name of exercising its right to freedom of navigation in the South China Sea.

The Philippines was praised for setting the precedent

longer term, it might clarify some legal issues, but this is at the risk of undermining the international dispute settlement process. Article 298 of UNCLOS allows states to opt out of the compulsory settlement mechanism in disputes related to sovereignty, maritime delimitation, military activities, among others. Article 298 was achieved through lengthy negotiations as a compromise to meet the demands of some states that did not wish to address certain disputes through a third party. China is of the view that the utilization of Article 287 in such a case as the South China Sea arbitration, which obviously involves sovereignty and maritime delimitation, could set an example undermining the true spirit of the dispute settlement mechanism of UNCLOS. Given the obvious and predictable result that any award provided by the Arbitration Tribunal will not be able to solve the real dispute between China and the Philippines, this arbitration case is an example of a political game of international law, whose main purpose is to attempt to humiliate China and tarnish its image internationally.



Philippines v. China Arbitration Case:

# India's Diplomatic and Security Responses

Raviprasad Narayanan

Maritime disputes in the South China Sea are increasingly reaching a zone of stasis. Actors involved in the wrangle focus on reiterating their respective positions while shying away from an acceptable resolution involving all the claimants. The salience of the South China Sea

India arriving at its position on the South China disputes and will detail the variables making this a position to be adopted by India irrespective of the change in political dispensation in New Delhi. A primary determinant for India is to subscribe to established norms and the avowed

Since Modi's election in 2014, a noticeable trend has been India's high-octane diplomacy with the great powers, including India's *bête noire* China.

disputes lies in its appeal to countries located far away from the geographical theatre like the United States and India. This 'appeal' is evolving in the direction of possessing capabilities that would make the re-ordering of strategic space an expensive proposition for any challenger to the current status quo. While the United States has anchored its position on "freedom of navigation," countries like India also have an opinion on the South China disputes. India seeks to enhance its geopolitical outreach by deepening relations with some of the states in the region involved in the disputes and also to build its credentials as a norm adherent.

This paper will tease out the complexities involved in

reliance on mechanisms that foster dialogue and cooperation—not 'go it alone' behavior which encourages a coalescing of actors over unresolved issues.

## Diplomatic Responses

Since the election of Narendra Modi as Prime Minister of India in May 2014, a noticeable trend is India's high-octane diplomacy with the great powers, including India's *bête noire* China. It could be argued that if India's foreign policy in the past had anchored itself to non-alignment, what we are witnessing today is 'multi-alignment,' the antithesis to India's first premier Jawaharlal Nehru's

non-alignment. The Modi administration is calibrating with greater intensity a closer relationship and hence an ostensible strategic tilt towards the United States. This is a process of common interest to the two main political parties in India—the Indian National Congress and the Bharatiya Janata Party (BJP). The current BJP government is by far more strident in calling for closer relations with the United States, an aspect to be noted as it has the legislative majority in the lower house of India’s parliament, the Lok Sabha.

This strategic tilt is not to be interpreted as an overwhelming endorsement of whatever the United States chooses to do or even contemplates but a position based on principles that advance India’s consistent abiding of international law and its provisions. If the Manmohan Singh-led government made headlines with the Indo-US nuclear deal in 2005, the decade that followed has witnessed the emergence of the US as one of India’s largest arms suppliers. Washington in equal measure reciprocates the importance India holds, and this is a perception shared by both parties, Republican and Democrat.

Regarding closer India-US relations, three statements made by Washington over the past decade and a half regarding the centrality it visualizes for India in the coming years are to be noted.

Former U.S. Secretary of State Condoleezza Rice, in a *Foreign Affairs* article written during the 2000 presidential campaign, observed rather bluntly that:

China is a great power with unresolved vital interests, particularly concerning Taiwan and the South China Sea. China resents the role of the United States in the Asia-Pacific region. This means that China is not a “status quo” power but one that would like to alter Asia’s balance of power in its own favor. That alone makes it a strategic competitor, not the “strategic partner” the Clinton administration

once called it. Add to this China’s record of cooperation with Iran and Pakistan in the proliferation of ballistic-missile technology, and the security problem is obvious. ... [The US] should pay closer attention to India’s role in the regional balance. ... *India is an element in China’s calculation, and it should be in America’s, too. India is not a great power yet, but it has the potential to emerge as one.*<sup>1</sup> (emphasis added)

After the second Bush administration, the Democrats picked up where Rice had left off. During a visit to the southern city of Chennai in India for the 2nd Strategic Dialogue between the two countries, former U.S. Secretary of State Hillary Clinton made a strong pitch for India in the Asia-Pacific by stating, “India’s leadership will help to shape positively the future of the Asia Pacific. That’s why the United States supports India’s Look East policy, and we encourage India not just to look east, but to engage east and act east as well.”<sup>2</sup>

Washington’s wooing seemed to have made a mark and New Delhi’s posture towards the South China Sea was made most explicit during President Obama’s visit to New

Delhi in January 2015 as chief guest for India’s Republic Day. Parsing through the US-India Joint Strategic Vision for the Asia-Pacific and Indian Ocean Region, one comes across a paragraph that states:

Regional prosperity depends on security. We affirm the importance of safeguarding maritime security and ensuring freedom of navigation and over flight throughout the region, especially in the South China Sea.

China is increasingly wary of the growing strategic relationship between the United States and India, and Beijing has expressed concern over potential alignments in Asia that could result in the “encirclement” of China.

1 Condoleezza Rice, “Campaign 2000: Promoting the National Interest,” *Foreign Affairs* 79(1), January/February 2000, pp. 45–62.

2 Sarah Parnass, “Hillary Clinton Urges India to Lead in China’s Neighborhood” ABC News, July 20, 2011. <http://abcnews.go.com/blogs/politics/2011/07/hillary-clinton-urges-india-to-lead-in-chinas-neighborhood/>

We call on all parties to avoid the threat or use of force and pursue resolution of territorial and maritime disputes through all peaceful means, in accordance with universally recognized principles of international law, including the United Nations Convention on the Law of the Sea.<sup>3</sup>

This joint statement perhaps for the first time denoted a shift in Indian foreign policy mirroring that of the US as regards maritime disputes in the region. Perhaps a fundamental shibboleth of India's foreign policy based on the Five Principles of Peaceful Co-existence has changed with every administration in New Delhi subscribing to a larger global role and in turn appealing to Washington to take note of India's growing aspiration and influence.

China is increasingly wary of the growing strategic relationship between the United States and India, and Beijing has expressed concern over potential alignments in Asia that could result in the "encirclement" of China. Chinese concern in this regard was made evident when Beijing protested discussions under the Bush Administration to develop a quadrilateral group of like-minded democracies in Asia that would include the United States, Japan, Australia, and India.<sup>4</sup> After a few hiccups, the quadrilateral seems more cohesive with Shinzo Abe in Tokyo and Australia paying more attention to this grouping. The Australian defence minister Kevin Andrews has been quoted by the *Sydney Morning Herald* as saying: "If we were to be invited by India to observe or to participate in such an exercise in the future, it would be the clear disposition of both myself and the government to accept that invitation."<sup>5</sup>

While Washington and New Delhi are calibrating their strategic commonalities the South China Sea dispute is one of the several issues bringing together a joint effort at creating the basis for a long term shared vision. At the First US-India Strategic and Commercial Dialogue held in Washington in September 2015, paragraph 17 of the Joint Statement issued stated, "[t]he Sides reflected on their shared commitment to peaceful use of the oceans, freedom of navigation, and protection of the ocean ecosystem. They agreed to explore a new Oceans Dialogue to

While Washington and New Delhi are calibrating their strategic commonalities the South China Sea dispute is one of the several issues bringing together a joint effort at creating the basis for a long-term shared vision.

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3 Ministry of External Affairs of India, "US-India Joint Strategic Vision for the Asia-Pacific and Indian Ocean Region," January 25, 2015.

4 K. Alan Kronstadt et al, *India: Domestic Issues, Strategic Dynamics, and U.S. Relations*, Congressional Research Service, 7-5700, RL33529, p. 21.

5 David Wroe and John Garnaut, "Australia flags naval drills with US, Japan and India in signal to China," *Sydney Morning Herald*, September 3, 2015. <http://www.smh.com.au/federal-politics/political-news/australia-flags-naval-drills-with-us-india-and-japan-in-signal-to-china-20150903-gjenvf.html>

As part of the Modi government's embracing an 'Act East' policy, relations with the ASEAN have deepened.

promote sustainable development of the blue economy.”<sup>6</sup>

India has also been alert to the concerns expressed by the Philippines. To illustrate this point, it is important to quote paragraph 11 of the Joint Statement issued after the Third India-Philippines Joint Commission on Bilateral Cooperation in October 2015, which reads,

Secretary Del Rosario briefed Minister Swaraj on the developments in the West Philippine Sea, and the status of the Philippine arbitration case at the Permanent Court of Arbitration, in The Hague, the Netherlands. ... In this regard, they reiterated the importance of an expeditious conclusion on a Code of Conduct and full and effective implementation of the 2002 Declaration of the Code of Conduct of Parties in the South China Sea.<sup>7</sup>

It could be advanced that, as part of the Modi government's embracing an 'Act East' policy, relations with the ASEAN have deepened. At the ASEAN-India Summit in November 2015, Modi stated, “India shares with ASEAN a commitment to freedom of navigation, over flight and unimpeded commerce, in accordance with accepted principles of international law, including the 1982 UN Convention on the Law of the Sea. Territorial disputes must be settled through peaceful means.”<sup>8</sup>

The Philippines and India share a relationship that needs to be enhanced, and the few institutional linkages Manila and New Delhi share are dictated by commercial and security themes. New Delhi's tilting towards Manila should not be seen as an endorsement of a particular slant but of the need for parties to not take international law for granted and rather to subscribe to a norm-adhering construct that will defuse tensions and create opportunities for cooperation. India stands for a peaceful resolution of the “West Philippine Sea” (South China Sea) dispute and calls on all the parties to refrain from the threat of use of force and abiding by the 1982 UNCLOS.<sup>9</sup>

Interestingly the Joint Statement refers to the West Philippine Sea in a first for the foreign ministry in India. This is rather an effort to make Beijing realize that it stands alone in its irredentist claims and that aggression in

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6 “Joint Statement on the First U.S.-India Strategic and Commercial Dialogue Washington D.C. (September 22, 2015)”, Indian Ministry of External Affairs, September 23, 2015. [http://www.mea.gov.in/bilateral-documents.htm?dtl/25834/Joint\\_Statement\\_on\\_the\\_First\\_USIndia\\_Strategic\\_and\\_Commercial\\_Dialogue\\_Washington\\_DC\\_September\\_22\\_2015](http://www.mea.gov.in/bilateral-documents.htm?dtl/25834/Joint_Statement_on_the_First_USIndia_Strategic_and_Commercial_Dialogue_Washington_DC_September_22_2015)

7 “Joint Statement: Third India-Philippines Joint Commission on Bilateral Cooperation,” Indian Ministry of External Affairs, October 14, 2015. [http://www.mea.gov.in/bilateral-documents.htm?dtl/25930/Joint\\_Statement\\_\\_Third\\_IndiaPhilippines\\_Joint\\_Commission\\_on\\_Bilateral\\_Cooperation](http://www.mea.gov.in/bilateral-documents.htm?dtl/25930/Joint_Statement__Third_IndiaPhilippines_Joint_Commission_on_Bilateral_Cooperation)

8 Narendra Modi, “Text of PM's opening statement at the ASEAN-India Summit,” November 21, 2015. [http://pmindia.gov.in/en/news\\_updates/text-of-pms-opening-statement-at-the-asean-india-summit/](http://pmindia.gov.in/en/news_updates/text-of-pms-opening-statement-at-the-asean-india-summit/)

9 “India backs Philippines on South China Sea row,” *Times of India*, October 15, 2015. <http://timesofindia.indiatimes.com/india/India-backs-Philippines-on-South-China-Sea-row/article-show/49363556.cms>

establishing its claims will be met with a disparate yet evolving common approach from nations within and beyond the region in cautioning Beijing to not ‘push the envelope’ too far. We have to look at New Delhi and its evolving position on the South China Sea not just being anchored to the maritime disputes that garner most attention. For New Delhi, the South China Sea is a zone where commerce and strategic outreach coalesce. Slightly more than half of India’s overall trade is with countries of East Asia (China, Singapore, Hong Kong, Japan, Korea, ASEAN), and a majority of its comprehensive economic partnership agreements (CEPAs) are with countries of the region, making it take a position on the South China Sea, albeit one that is closer to that of the

mouth of the Hariabhanga River where it flows into the Bay of Bengal, led to eight rounds of bilateral talks between 1974 and 2009 that eventually failed. The delimitation dispute revolved around the island’s exclusive economic zone (EEZ) and continental shelf. After the failure of bilateral talks, Bangladesh initiated arbitral proceedings against India in 2009 under the United Nations Convention on the Law of the Sea (UNCLOS).<sup>11</sup>

Both of the countries made claims based on their respective interpretations of international maritime law. India based its claims on the UNCLOS principle of ‘equidistance’—applied in the absence of an agreement, historical titles or special circumstances (Article 15)—while Bangladesh based its claim on the principle of ‘equi-

India accepted the verdict made by the tribunal stating that both sides benefit by “cooperation and mutual understanding” with Bangladesh lauding India’s adherence to international law and respect for the process of arbitration.

United States.

## Abiding by International Maritime Law

Two noteworthy aspects mark New Delhi’s approach to maritime disputes and maritime cooperation. First is the adherence to and acceptance of international law in the adjudication of disputes, and second, the emphasis on creating new forums for multilateral cooperation. The first feature was demonstrated in the Bangladesh–India dispute over New Moore/South Talpatti. The Arbitration Tribunal in *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India* delivered its final award in July 2014 in a delimitation dispute between the two countries that had stretched on for four decades.<sup>10</sup> The dispute over New Moore/South Talpatti, located at the

ty’—as it was left with a disproportionately small EEZ hemmed in by the EEZs of India and Myanmar.

Bangladesh and India agreed that article 15 of the Convention governs the delimitation of the territorial sea in this case. That provision provides for the boundary between two States with opposite or adjacent coasts to be the median, or equidistance, line unless either “historic title” or “special circumstances” apply. Neither Party claimed the existence of any agreement between them with respect to the boundary or a “historic title” within the meaning of article 15. They disagreed, however, on the interpretation of “special circumstances,” whether such circumstances exist in this case, and the implications of any special circumstances for the meth-

10 Permanent Court of Arbitration, “Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India: The Arbitral Tribunal Renders its Award,” Press release, July 8, 2014. [http://www.pca-cpa.org/PCA%20Press%20Release%20--%20Tribunal%20Issues%20Award%20in%20Bangladesh-India%20Maritime%20Boundary%20Arbitration7e49.pdf?fil\\_id=2708](http://www.pca-cpa.org/PCA%20Press%20Release%20--%20Tribunal%20Issues%20Award%20in%20Bangladesh-India%20Maritime%20Boundary%20Arbitration7e49.pdf?fil_id=2708)

11 Mercedes Page, “Does India have lessons for China and the South China Sea,” *The Diplomat*, November 29, 2015. <http://thediplomat.com/2015/11/does-india-have-lessons-for-china-and-the-south-china-sea/>

od of delimiting the boundary.<sup>12</sup>

The Tribunal emphasized that article 15 of the Convention refers specifically to the median/equidistance line method for the delimitation of the territorial sea, in which the boundary takes the form of a line, every point of which is equidistant from the nearest points on the coasts of the Parties. In constructing a provisional median/equidistance line, the Tribunal decided not to rely on base points located on low-tide elevations.

The judgment, to the benefit of Bangladesh, established a precedent that “equidistance wouldn’t lead to an equitable solution given the geographical circumstances, and awarded

19,467 km of the 25,602 km EEZ to Bangladesh.”<sup>13</sup> Significantly, India accepted the verdict made by the tribunal stating that both sides benefit by “cooperation and mutual understanding” with Bangladesh lauding India’s adherence to international law and respect for the process of arbitration. For India, abiding by the decision of the Tribunal and not contesting the ruling enhances its norm-abiding image and gives hope to littoral states in awe of larger states that usually sanctimoniously pay tribute to established international law while actively subverting the same.

It has to be mentioned though that the island in dispute between India and Bangladesh disappeared under rising sea levels in 2011. How this case inspires powerful stakeholders in the South China Sea dispute to condition responses based on international maritime law is a moot point but salient enough to offer the argument that norms are a powerful motivator conditioning state behavior.

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## Multilateral Cooperation Mechanisms

The second aspect of New Delhi’s approach to maritime disputes and maritime cooperation is its active initiation and creation of institutions involving littoral

12 Permanent Court of Arbitration, “Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India: The Arbitral Tribunal Renders its Award,” Press release, July 8, 2014. [http://www.pca-cpa.org/PCA%20Press%20Release%20--%20Tribunal%20Issues%20Award%20in%20Bangladesh-India%20Maritime%20Boundary%20Arbitration7e49.pdf?fil\\_id=2708](http://www.pca-cpa.org/PCA%20Press%20Release%20--%20Tribunal%20Issues%20Award%20in%20Bangladesh-India%20Maritime%20Boundary%20Arbitration7e49.pdf?fil_id=2708)

13 Mercedes Page, “Does India have lessons for China and the South China Sea,” *The Diplomat*, November 29, 2015. <http://thediplomat.com/2015/11/does-india-have-lessons-for-china-and-the-south-china-sea/>



ral states in furthering ocean security. The Indian Ocean Rim Association (IORA), based in Mauritius is a case in point. The charter of IORA declares:

IORA seeks to build and expand understanding and mutually beneficial cooperation through a consensus-based, evolutionary and non-intrusive approach. In keeping with this spirit, there are no laws, binding contracts or rigid institutional structures.

Cooperation is based on the principles of sovereign equality, territorial integrity, political independence, non-interference in internal affairs, peaceful coexistence and mutual benefit.<sup>14</sup>

The Indian Ocean Dialogue is an important aspect of the IORA and this nascent grouping perhaps indicates a way in which the disputes in the South China Sea ought to be handled.

The Indian Ocean Naval Symposium (IONS) comprising twenty-two states including Indonesia, Myanmar, Singapore and Thailand from ASEAN and China as an observer, is the naval equivalent of getting together on a common platform to foster maritime cooperation. Given time and emerging cooperation, the IONS might well evolve into an important multilateral defense grouping. Adding to the IONS as an expression of emerging naval commonalities is 'Exercise Milan' a biannual event involving sixteen navies and coast guards in the Indo-Pacific region. Developing relationships between the littoral navies and coast guards of the region is the aim of the exercise.<sup>15</sup> The increasing participation by navies of Southeast Asia in 'Exercise Milan' coincides with increasing tensions in the South China Sea and the increasing rhetoric the falls short of putting forward solutions based on consensus and cooperation.

Yet another endeavor from New Delhi is 'Project Mausam.' Project 'Mausam' pitches itself at two levels: "at the macro level it aims to re-connect and re-establish communications between countries of the Indian Ocean world, which would lead to an enhanced understanding of cultural values and concerns; while at the micro level the focus is on understanding national cultures in their

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Indian Ocean littoral and  
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centers with the hinterland.

14 "Charter," Indian Ocean Rim Association, March 1997. <http://iora.net/charter.aspx>

15 David Brewster and Sameer Patil, "Shaping Regional Diplomacy," Gateway House (Mumbai), February 21, 2014. <http://www.gatewayhouse.in/indian-navy-shaping-regional-diplomacy/>

regional maritime milieu.”<sup>16</sup> Unlike security dominated discourse, Project Mausam emphasizes the connection of ‘cultural routes and maritime landscapes’ that have historically bound the Indian Ocean littoral and connected coastal economic centers with the hinterland. The project, launched by India as a cultural extension of diplomacy provides an alternative forum to interact, disseminate and further regional cooperation through a framework where consensus prevails.

New Delhi is very assiduously promoting an alternative where forums exist to discuss common problems such as piracy, disaster and humanitarian relief and encourage dialogue within the neighborhood. These initiatives are government-neutral in New Delhi and owe their implementation to a worldview that promotes peace, dialog and respect for international law as cardinal principles uniting members of the international community.

## From ‘Look East’ to ‘Act East’

As part of his policy, Indian Prime Minister Narendra Modi highlights “Act East” as an improvement over the “Look East” policy of his predecessors. However, institutional actors have their own interpretation of what the South China Sea is to New Delhi. For instance, amongst the armed forces in India, the Indian Navy has made its mark in defense diplomacy by regularly conducting flag visits with ASEAN littoral and providing its facilities for training especially Vietnam and Singapore. Modi’s recent visit to Singapore only firmed up the signing of a revised defence cooperation agreement and expanded cooperation in maritime security.

The relationship to watch is that between New Delhi and Hanoi. The November 2007 ‘Strategic Partnership’ signed between the two countries during the visit by

Vietnam’s Prime Minister Nguyen Tan Dung to India is the template to be followed. As the fourth point of ‘Political, Defense and Security Cooperation’ section of the Joint Declaration signed stated,

in light of shared maritime interests, India and Vietnam agreed to enhance cooperation in capacity building, technical assistance and information sharing between relevant agencies with a particular attention to security of sea-lanes, anti-piracy, prevention of pollution and search and rescue.<sup>17</sup>

Both the countries have enhanced their military training and “capacity building” as also joint exploration of oil in the South China Sea – something which Beijing protests loudly. In 2013 New Delhi offered a US \$100 million credit line to Hanoi for defence purchases and intends to transfer four naval offshore patrol vessels. Vietnamese sailors are also undergoing training in “comprehensive underwater combat operations” at *INS Satavahana* in Vishakapatnam, the headquarters of India’s Eastern Naval Command. Viet-

nam’s purchase of Kilo-class submarines necessitates training and battle simulation, which can be done with the Indian Navy as it has operated these Russian vessels for decades. India and Vietnam have also inked a five-year defence cooperation agreement (2015–2020). This agreement was signed by Manohar Parrikar, India’s defence minister, and General Phùng Quang Thanh, Minister for National Defence, Vietnam. Cooperation between the two countries’ navies and maritime agencies has also increased with four Indian naval vessels including the indigenously built stealth frigate *INS Satpura* and its complement of officers and sailors visiting Da Nang from June 6–10, 2013. Another multi-role stealth frigate, the *INS Shivalik*, visited the Haiphong port from August 5–8 2014, and *Samudra Pehredar*, an Indian Coast Guard

## Indian Prime Minister Narendra Modi highlights “Act East” as an improvement over the “Look East” policy of his predecessors.

16 “Project ‘Mausam’- Mausam/ Mawsim: Maritime Routes and Cultural Landscapes,” Indira Gandhi National Centre for Arts. <http://ignca.nic.in/mausam.htm>

17 “Joint Declaration on the Strategic Partnership between India and Vietnam,” Indian Ministry of External Affairs.



vessel, visited Da Nang port from October 14–16, 2014.<sup>18</sup>

An intensifying equation with Hanoi is New Delhi's way of reciprocating the interest Beijing has shown in expanding its presence in the Indian Ocean and funding the expansion of the port in Gwadar, Pakistan. A zero sum game it isn't but a joust where long term calculations are being drawn ostensibly taking into account worst case scenarios.

The Indian Navy also in a "once only" published *India's Maritime Military Strategy* in 2007 that defined the South China Sea as an area of "strategic interest" to India.<sup>19</sup> To David Scott, India's appearance in the South China Sea is akin to subscribing to "lateral pressure theory."<sup>20</sup> In brief, lateral pressure refers to any tendency (or propensity) of individuals and societies to expand their activities and exert influence and control beyond their established boundaries, whether for economic, political, military, scientific, religious, or other purposes. India faces the predicament of not being in a position of absolute strength to prevent or checkmate the emergence of the Chinese navy in the Indian Ocean, but it does possess the wherewithal to reach out to the South China Sea littoral. In the Indian Ocean, India's geographical centrality creates opportunities for New Delhi to take the initiative in fostering co-operation and dialog mechanisms.

## Conclusion

India's approach to maritime disputes is anchored in abiding by established norms and building up its credentials as a rational normative actor. India's evolving posture on the South China disputes is also reflective of domestic politics. If earlier postures of not taking a clear position

on the dispute were reflective of 'Non-alignment 2.0,'<sup>21</sup> a predicated approach reflecting the *weltanschauung* of the Congress-led government in power from 2004 to 2014, the new approach is of a political dispensation that wishes to demonstrate its departure from established pillars in Indian foreign policy and moves away from the inertia of the past. The Modi government reflects the temperament of a center-right party in power that makes a point of simultaneously

If earlier postures of not taking a clear position on the dispute were reflective of 'Non-alignment 2.0,' the new approach is of a political dispensation that moves away from the inertia of the past.

18 "Eye on China – India and Vietnam advance their strategic relationship" *Economic Times*, 17 September 2015. <http://economictimes.indiatimes.com/articleshow/49002738.cms>

19 This document is no longer available on the internet and the author cites this from his personal notes.

20 Nazli Choucri and Robert C. North, "Lateral pressure in international relations: Concept and theory," in Manus I. Midlarsky, *Handbook of War Studies*, pp. 289–326, Ann Arbor: University of Michigan Press, 1989; David Scott, "India's Incremental Balancing in the South China Sea," *E-International Relations*, July 26, 2015. <http://www.e-ir.info/2015/07/26/indias-incremental-balancing-in-the-south-china-sea/>

21 Sunil Khilnani et al., "Non-Alignment 2.0 – A Foreign and Strategic Policy for India in the Twenty First Century," Centre for Policy Research, New Delhi, 2012.

highlighting India's centrality to global security and seeking to intensify India's economic leverage with the world and East Asia in particular—the multi-alignment mentioned earlier. The current strategy is akin to riding two horses: a strategic/diplomatic one that announces an abiding faith in international law and global conventions and an economic one that advertises India as an alternative 'market' inviting investments and willing to expand its trade potential.

Before concluding, it is worth pondering a quote by MIT international relations Professor M. Taylor Fravel:

As for hypothetical solutions, it is far from clear whether Beijing has any that would satisfy other claimants. The lack of mechanisms to address varying opinions and arrive at an agreement on this vital issue is creating space for actors beyond the region to increase their relevance to the region.

Behavior in territorial disputes is a fundamental indicator of whether a state is pursuing status quo or revisionist foreign policies.<sup>22</sup>

Perhaps Beijing needs to reflect deeply on the costs it is incurring in upping the ante in the South China Sea disputes. Most worrying for actors involved in the disputes is the manner in which China, from their perspectives, disregards established international norms and prefers not to participate in arbitration mechanisms. As for hypothetical solutions, it is far from clear whether Beijing has any that would satisfy other claimants. The lack of mechanisms to address varying opinions and arrive at an agreement on this vital issue is creating space for actors beyond the region to increase their relevance to the region. Beijing's behavior is indicative of its apprehension that it might have to re-visit its claims to the ocean space it has so assiduously protected and its anxiety regarding the potential domestic consequences of a setback determined by international law.

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22 M. Taylor Fravel, "Regime Insecurity and International Cooperation – Explaining China's Compromises in territorial disputes," *International Security* 30(2), 2005, p. 47.

## Philippines v. China Arbitration Case:

# Indonesia's Diplomatic and Security Responses

Senia Febrica

One day before the Tribunal issued their Award on Jurisdiction and Admissibility in the arbitration case initiated by the Philippines against China, Indonesian President Joko “Jokowi” Widodo, during his visit to the United States, called upon all claimants to the South China Sea to exercise restraint and urged China and ASEAN to begin discussions regarding the substance of a Code of Conduct (COC) to address the growing tensions there.<sup>1</sup> His statement was made to the backdrop of the USS *Lasen* “transit” operation within 12 nautical miles of Subi Reef in the Spratly Islands, placing the U.S. warship in an area China considers its sovereign territory.<sup>2</sup> The following day, on October 29, 2015, the Arbitral Tribunal announced that “it is presently able to decide that it does have jurisdiction with respect to the matters raised in ... the Philippines’ submissions against China.”<sup>3</sup> The Indonesian government’s response to the arbitration award reiterated Jokowi’s statement made a day earlier. As the

Indonesian Ministry of Foreign Affairs Director of ASEAN Cooperation I Gusti Agung Wesaka Puja put it:

As the President said, we continue to call upon all parties involved to maintain their commitment to sustain peace, stability and security in the region. Stability in South China Sea is so influential on regional peace in Southeast and East Asia. ... We do not expect this region to transform into a conflict zone.<sup>4</sup>

In response to the Tribunal’s Award and as part of efforts to prevent the region from transforming into a conflict zone, Indonesia has taken both diplomatic and security actions. This chapter will explain Indonesia’s diplomatic and security responses and the implications that follow. First, it will account for the diplomatic course of actions that the Indonesian Ministry of Foreign Affairs and the Ministry of Defence have taken in reaction to the Award. These diplomatic efforts include pushing for an agreed timeline for the Code of Conduct, advocating for the involvement of the ASEAN Institute for Peace and Reconciliation in dispute settlement, promoting the idea of joint patrols among all claimants to the South China Sea, and sending a team of observers to the Permanent Court of Arbitration in The Hague. This chapter

1 Matthew Pennington, “Indonesia leader calls for restraint in South China Sea,” *Jakarta Post*, October 28, 2015. <http://www.thejakartapost.com/news/2015/10/28/indonesia-leader-calls-restraint-south-china-sea.html#sthash.MksCEuhe.dpuf>

2 Jim Sciutto and Barbara Starr, “U.S. warship sails close to Chinese artificial island in South China Sea,” CNN, October 27, 2015. <http://edition.cnn.com/2015/10/26/politics/south-china-sea-islands-u-s-destroyer/>

3 Permanent Court of Arbitration, “Arbitration between the Republic of the Philippines and the People’s Republic of China: The Tribunal Renders Award on Jurisdiction and Admissibility; Will Hold Further Hearings,” October 20, 2015.

4 Andreas Gerry Tuwo, “Respons RI Terkait Konflik AS-Tiongkok di Laut China Selatan,” *Liputan 6*, October 29, 2015. <http://news.liputan6.com/read/2352456/respons-ri-terkait-konflik-as-tiongkok-di-laut-china-selatan>

then proceeds by explaining the security and military development in Indonesia's South China Sea frontline. It will look at the Indonesian Air Force's Baruna Nusantara patrol, the training of rapid reaction forces by the army, and the navy's deployment of warships in areas close to the South China Sea. The final part of this chapter will elaborate on the implications of Indonesia's diplomatic and security measures.

parties directly involved. This is the only right choice.”<sup>7</sup>

Following the Tribunal's ruling, Indonesian officials have indicated that pushing for the speedy formulation of a COC in the South China Sea is a key policy to address the growing tension in the region. Director of the Indonesian ASEAN Political and Security Directorate of the Ministry of Foreign Affairs Muhammad Chandra W. Yudha suggested that his ministry has continued to keep

## Indonesia has continued to emphasise its willingness to play an active role as a facilitator in the dispute settlement negotiations with all concerned parties.

### Diplomatic Responses

In order to diffuse tensions, Indonesia has engaged parties to the dispute primarily through the ASEAN-China Joint Working Group on the Implementation of the Declaration on the Conduct of Parties in the South China Sea and track two approaches, namely, the Workshop on Managing Potential Conflict in the South China Sea that Jakarta has organised since 1990.<sup>5</sup>

After the Tribunal issued its Award in October 2015, Indonesia has continued to emphasise its willingness to play an active role as a facilitator in the dispute settlement negotiations with all concerned parties. This contrasts China's position of resolving the dispute through negotiations only with parties directly involved. Thus, Beijing has implicitly stated its reluctance to accept Indonesia's role as facilitator in the process.<sup>6</sup> As the spokesman for the Chinese Embassy in Washington Zhu Haiquan claimed, “China is committed to resolving relevant disputes through negotiation and consultation with

the momentum going to complete the COC faster.”<sup>8</sup> Puja explained that “the process continues to roll and has made significant progress for ASEAN and China towards establishing a Code of Conduct. ... Without the COC, we cannot regulate everything related to the conflict in the South China Sea.”<sup>9</sup> According to him, currently, the Indonesian Ministry of Foreign Affairs and relevant parties have continued “to negotiate the elements and structure of the COC” that deal with various instances such as “collision between vessels, search and rescue of vessels under distress, and the development of hotline communication if an incident occurs in the South China Sea.”<sup>10</sup>

Since the signing of the Declaration on the Conduct of Parties in the South China Sea in November 2002 by ASEAN member states and China, Indonesia has pushed

5 Arif Havas Oegroseno, “Indonesia, South China Sea and the 11/10/9-dashed lines,” *Jakarta Post*, April 9, 2014. <http://www.thejakartapost.com/news/2014/04/09/indonesia-south-china-sea-and-11109-dashed-lines.html>

6 Veeramalla Anjaiah, “SCS Dispute: A Big Litmus Test for Jokowi, Minister Retno,” *Jakarta Post*, November 4, 2014. <http://www.thejakartapost.com/news/2014/11/04/scs-dispute-a-big-litmus-test-jokowi-minister-retno.html>

7 Mike Corder and Jim Gomez, “Arbitration panel OKs Jurisdiction in South China Sea case,” *Jakarta Post*, October 30, 2015. <http://www.thejakartapost.com/news/2015/10/30/arbitration-panel-oks-jurisdiction-south-china-sea-case.html-0>

8 “AIPR Cegah Campur Tangan Internasional di ASEAN,” *Republika*, October 30, 2015. <http://www.republika.co.id/berita/koran/internasional-koran/15/10/30/nx0zxy1-aipr-cegah-campur-tangan-internasional-di-asean>

9 “AIPR Cegah Campur Tangan Internasional di ASEAN,” *Republika*, October 30, 2015. <http://www.republika.co.id/berita/koran/internasional-koran/15/10/30/nx0zxy1-aipr-cegah-campur-tangan-internasional-di-asean>

10 “AIPR Cegah Campur Tangan Internasional di ASEAN,” *Republika*, October 30, 2015. <http://www.republika.co.id/berita/koran/internasional-koran/15/10/30/nx0zxy1-aipr-cegah-campur-tangan-internasional-di-asean>

for the formulation of a legally binding COC.<sup>11</sup> In 2012, when Indonesia took up the chairmanship of ASEAN, the Indonesian Ministry of Foreign Affairs initiated and circulated a draft of the COC that included elements related to conflict prevention and management if a crisis arises to ASEAN foreign ministers.<sup>12</sup> The ASEAN member states were expected to discuss the draft before the ASEAN Summit in November 2012, prior to negotiation with China.<sup>13</sup> The deliberation on the draft has not led to a legally binding code as China was not enthusiastic about the prospect of negotiating the terms and conditions of the COC in the ASEAN+1 format.<sup>14</sup> On October 9, 2013, at the 16<sup>th</sup> China–ASEAN meeting in Brunei Darussalam, China agreed to take part in formal consultations on the COC and proposed the establishment of an Eminent Persons and Experts Group (EPEG), also known as track 1.5, to consult on the COC draft. Currently, according to the Indonesian Ministry of Foreign Affairs, the most immediate aim is for ASEAN and China to reach an agreement on the timeframe for finalising the COC.<sup>15</sup> Indonesia is pushing for an agreed timeline on the COC because of the perceived slowness in reaching an agreement between ASEAN and China.

Outside of the regular channels of the ASEAN-China Joint Working Group and the track two approach, there are a few other diplomatic avenues that the Indonesian Ministry of Foreign Affairs and the Ministry of Defence have embarked upon. First, Indonesia has advocated the involvement of the ASEAN Institute for Peace and Reconciliation (AIPR) in dispute resolution. The Director of the Indonesian Ministry of Foreign Affairs ASEAN Political and Security Directorate proposed the involvement of the AIPR because this institute was established by ASEAN states. Therefore, it is an acceptable forum for ASEAN countries to resolve conflict, and minimise the possibility of international involvement in regional disputes.<sup>16</sup> The establishment of the AIPR itself was guided by the ASE-

The most immediate aim is for ASEAN and China to reach an agreement on the timeframe for finalising the Code of Conduct.

11 Rodolfo Severino, "A Code of Conduct for the South China Sea", *PacNet* 45A, August 17, 2012. <http://csis.org/publication/pacnet-45a-code-conduct-south-china-sea>

12 Yohanna Ririhena, "RI circulates draft code of conduct on South China Sea," *Jakarta Post*, September 29, 2012. <http://www.thejakartapost.com/news/2012/09/29/ri-circulates-draft-code-conduct-south-china-sea.html>

13 Yohanna Ririhena, "RI circulates draft code of conduct on South China Sea," *Jakarta Post*, September 29, 2012. <http://www.thejakartapost.com/news/2012/09/29/ri-circulates-draft-code-conduct-south-china-sea.html>

14 C. P. F. Luhulima, "Can SBY end China's dominance in the South China Sea," *Jakarta Post*, May 5, 2014. <http://www.thejakartapost.com/news/2014/05/05/can-sby-end-china-s-dominance-south-china-sea.html>

15 Andreas Gerry Tuwo, "Menlu Retno: RI Dorong Situasi Kondusif di Laut China Selatan," *Liputan 6*, June 13, 2015. <http://news.liputan6.com/read/2251337/menlu-retno-ri-dorong-situasi-kondusif-di-laut-china-selatan>; Sekretariat Kabinet Indonesia, "Menlu: Tekanannya, Indonesia ingin perdamaian di kawasan Laut China Selatan terwujud," March 24, 2015. <http://setkab.go.id/menlu-tekanannya-indonesia-ingin-perdamaian-di-kawasan-laut-china-selatan-terwujud/>

16 "AIPR Cegah Campur Tangan Internasional di ASEAN," *Republika*, October 30, 2015. <http://www.republika.co.id/berita/koran/internasional-koran/15/10/30/nx0zxy1-aipr-cegah-campur-tangan-internasional-di-asean>

AN Political-Security Community blueprint.<sup>17</sup> This institute held its first Governing Council meeting in December 2013 to discuss its work plan, recruitment, funding and reporting mechanism.<sup>18</sup>

Second, Indonesia is promoting its naval diplomacy as a measure to reduce tension in the South China Sea. This policy measure falls within a grey area between diplomatic and security responses. Indonesia has proposed joint patrols in the South China Sea involving all claimants. The reasons underpinning Indonesia's proposal include the urgency of preventing open conflict and the need to for functional cooperation measures for dealing with common concerns such as armed robbery against ships and pollution prevention, including special operations to deal with oil spills in the waterway.<sup>19</sup> This idea was first proposed by Ryamizard Ryacudu of the Indonesian Ministry of Defence at the Shangri-La dialogue in Singapore in May 2015.<sup>20</sup> On the sidelines of this regional meeting of defence ministers and military chiefs, Ryacudu met his Chinese counterpart to convey the joint peace patrol idea that would involve all of the South China Sea claimants. Ryacudu also shared his idea with the ASEAN countries' defence ministers at the meeting.<sup>21</sup> In response to the idea, Malaysian Defence Minister Hishammuddin Hussein stated that the joint patrol plan with China was "not impossible," since "China has more to lose if the region is unstable."<sup>22</sup> Ryacudu highlighted that "Indonesia is committed to supporting all parties that prioritize peace and stability in the South China Sea. If the sea lanes are secure, then the

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diplomatic and security  
responses.

17 "ASEAN Institute for Peace and Reconciliation kicks off in Jakarta," ASEAN, December 10, 2013. <http://www.asean.org/news/asean-secretariat-news/item/asean-institute-for-peace-and-reconciliation-kicks-off-in-jakarta>

18 "ASEAN Institute for Peace and Reconciliation kicks off in Jakarta," ASEAN, December 10, 2013. <http://www.asean.org/news/asean-secretariat-news/item/asean-institute-for-peace-and-reconciliation-kicks-off-in-jakarta>

19 Liputan 6, "Redam Konflik Laut China Selatan, Menhan Cetuskan Patroli Damai," *Liputan 6*, June 4, 2015. <http://news.liputan6.com/read/2244948/redam-konflik-laut-china-selatan-menhan-cetuskan-patroli-damai>

20 "Indonesia Urges Joint Patrols with China in South China Sea," Bloomberg, May 30, 2015. <http://www.bloomberg.com/news/articles/2015-05-30/indonesia-urges-peace-patrols-with-china-in-south-china-sea-iaao1wmc>

21 Detik, "Cerita Menhan yang Berhasil 'Merayu' Tiongkok Soal Laut China Selatan," June 4, 2015. <http://news.detik.com/berita/2933752/cerita-menhan-yang-berhasil-merayu-tiongkok-soal-laut-china-selatan>

22 "Indonesia Urges Joint Patrols with China in South China Sea," Bloomberg, May 30, 2015.



trade route will also be safe, which could improve economic development and regional prosperity.”<sup>23</sup> During Ryacudu’s visit to Beijing from October 13–18, 2015, the proposal was further discussed with China’s Minister of Defence Chang Wanquan. The idea has been welcomed by the Chinese Defence Minister, and he stated his support for “Indonesia to hold a dialogue between China and the ASEAN countries as well as to conduct joint patrols to promote peace in the South China Sea.”<sup>24</sup> The two agreed that details of the peace patrols, including locations, when they would be carried out, the time-span, and the implementation mechanism, would be discussed by task forces developed by the two countries.<sup>25</sup> Both the negotiations on the details of the patrol operations and the establishment of the task forces are to be carried out through the two countries bilateral navy-to-navy dialogue.<sup>26</sup> Following the Award in the arbitration case, Ryacudu has continued his “shuttle diplo-

Hague.<sup>28</sup> The decision to send observers could be seen as an effort to observe the arbitral proceedings and anticipate the implications of the Tribunal’s decisions regarding the Philippines’ claims against China with regards to the South China Sea dispute.<sup>29</sup> Despite sending observers, Indonesia has refrained from becoming one of the claimants in the South China Sea dispute, let alone taking China to court. This is despite the recent statement articulated by the Indonesian Coordinating Minister of Political, Legal and Security Affairs Luhut Pandjaitan on November 11, 2015, about taking China to court. Pandjaitan pointed out that if the problem posed by China’s claim over the South China Sea, including areas that overlap with parts of Indonesian territory, could not be resolved through dialogue, Jakarta would bring the problem to international court.<sup>30</sup> As confirmed by an Indonesian security expert and adviser to the government, Pandjaitan’s statement must be understood pri-

## Indonesia has not changed its official position that it is a neutral party in the dispute.

macy.” Ryacudu, who took part as a member of Jokowi’s delegation to the U.S. at the end of October 2015, also used the visit to explain to Washington Indonesia’s proposal for joint patrols with China and ASEAN countries.<sup>27</sup>

Third, as part of the Indonesian diplomatic responses, the government has also sent a team of observers lead by Secretary of the Directorate General of Law and International Treaty Damos Dumoli Agusman, to The

marily as political rhetoric intended to put pressure on Beijing.<sup>31</sup> Indonesia has not changed its official position that it is a neutral party in the dispute and has pushed for the finalisation of the COC. Following Pandjaitan’s statement, the Indonesian Ministry of Foreign Affairs made clear to the press that the Indonesian government has asked China for a clarification of its claims in the South China Sea but refrained from making any remarks

23 “Indonesia reiterates urgency to conduct South China Sea patrols,” *Antara News*, October 16, 2015. <http://www.antaranews.com/en/news/101012/indonesia-reiterates-urgency-to-conduct-south-china-sea-patrols>

24 “Indonesia reiterates urgency to conduct South China Sea patrols,” *Antara News*, October 16, 2015. <http://www.antaranews.com/en/news/101012/indonesia-reiterates-urgency-to-conduct-south-china-sea-patrols>

25 “Soal ‘Joint Patrol’ di Laut China Selatan, RI Harus Hati-hati,” *Berita Satu*, October 21, 2015. <http://sp.beritasatu.com/home/soal-joint-patrol-di-laut-china-selatan-ri-harus-hati-hati/99372>

26 “Soal ‘Joint Patrol’ di Laut China Selatan, RI Harus Hati-hati,” *Berita Satu*, October 21, 2015. <http://sp.beritasatu.com/home/soal-joint-patrol-di-laut-china-selatan-ri-harus-hati-hati/99372>

27 “Indonesia Calls for South China Sea Restraint Amid U.S.-China Tensions,” *The Diplomat*, October 28, 2015. <http://thediplomat.com/2015/10/indonesia-calls-for-south-china-sea-restraint-amid-us-china-tensions/>

28 “RI Kirim Delegasi ke Tribunal Arbitrase Laut Cina Selatan,” *Tempo*, November 25, 2015. <http://dunia.tempo.co/read/news/2015/11/25/118722260/ri-kirim-delegasi-ke-tribunal-arbitrase-laut-cina-selatan>

29 “RI Kirim Delegasi ke Tribunal Arbitrase Laut Cina Selatan,” *Tempo*, November 25, 2015. <http://dunia.tempo.co/read/news/2015/11/25/118722260/ri-kirim-delegasi-ke-tribunal-arbitrase-laut-cina-selatan>

30 “Indonesia says could also take China to court over South China Sea,” *Reuters*, November 11, 2015. <http://www.reuters.com/article/us-south-chinasea-china-indonesia-idUSKCN0T00VC20151111>

31 Discussion with an Indonesian security expert and an adviser to the Indonesian government, Jakarta, December 16, 2015.



regarding taking China to court.<sup>32</sup>

## Security Responses

After the Tribunal issued the Award on Jurisdiction and Admissibility, Indonesia has taken a number of security measures in its territory adjacent to the South China Sea. The Indonesian waters around the Natuna Islands are not part of the disputed territory. However, as Indonesian government documents and officials have frequently cited, due to the proximity of Natuna to the disputed area and the absence of clarification from China on whether or not its claims overlap Indonesia's exclusive economic zone, the growing tension in South China Sea is perceived as a threat to Indonesia.<sup>33</sup> The implementation of new security measures in Indonesia following the Award has been carried out systematically by all components of the Indonesian Armed Forces, including the Navy, the Air Force and the Army. In order to bolster its naval presence in the area, the Indonesian Navy sent seven of its warships to Natuna at the beginning of November 2015.<sup>34</sup>

The Indonesian Air Force has carried out Operation Baruna Nusantara to patrol Indonesian borders close to the South China Sea. The patrols involve jet fighters from three air bases including Kalimantan, Halim and Pekanbaru. The Commandant of Roesdin Nurjadi Air Base in Pekanbaru Marsma TNI Henri Alfiandi explained that this operation aimed to generate a "deterrent effect to conflicting parties in the South China Sea."<sup>35</sup> He pointed out the need for Indonesia to increase its "presence" given the growing tensions in the South China Sea to secure the country's

Due to the proximity of Natuna to the disputed area and the absence of clarification from China on whether or not its claims overlap Indonesia's exclusive economic zone, the growing tension in South China Sea is perceived as a threat to Indonesia.

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32 Discussion with an Indonesian security expert and an adviser to the Indonesian government, Jakarta, December 16, 2015; "Natuna Diklaim Tiongkok, Seriuskah Indonesia Bawa ke Arbitrase Internasional?," *Solo Pos*, November 13, 2015. <http://www.solopos.com/2015/11/13/sengketa-laut-china-selatan-natuna-diklaim-tiongkok-seriuskah-indonesia-bawa-ke-arbitrase-internasional-661058>

33 "South China Sea Conflict A Real Threat," *Jakarta Post*, September 20, 2014. <http://www.thejakartapost.com/news/2014/09/20/south-china-sea-conflict-a-real-threat-indonesia.html>; Pokok-Pokok Kebijakan dan Strategi Badan Keamanan Laut Tahun, Badan Keamanan Laut (Bakamla), Republik Indonesia, 2015, p. 22; "Masukan ARMABAR Kepada Pemerintah dalam Menyikapi Perkembangan Situasi di Laut Cina Selatan," *TNI Angkatan Laut*, Kementerian Politik Hukum dan Keamanan Republik Indonesia, May 5, 2015; Interviews with two officials from the Indonesian Bakamla, August 26, 2015, an official from the Indonesian Coordinating Ministry for Political, Legal and Security Affairs, August 21, 2015, an official from the Indonesian Ministry of Defence, August 24, 2015, Jakarta.

34 Banjarmasin Post, "Kirim 7 Kapal Perang ke Natuna, Ini Alasan TNI," November 9, 2015. <http://banjarmasin.tribunnews.com/2015/11/09/kirim-7-kapal-perang-ke-natuna-ini-alasan-tni>

35 "Konflik Laut China Selatan TNI Rajin Patroli Perbatasan," *Liputan 6*, November 9, 2015. <http://news.liputan6.com/read/2361406/konflik-laut-china-selatan-tni-rajin-patroli-perbatasan>

territory without getting involved further or taking sides in the dispute.<sup>36</sup> Alfiandi announced that, in 2016, the Pekanbaru Air Base would intensify its patrols and that all the necessary resources to carry out the task, including Hawk and F-16 fighter jets, have been put in place.<sup>37</sup>

Military Resort Command 031 Wirabima Riau are preparing and training Indonesian army personnel as part of the country's rapid reaction forces in anticipation of conflict escalation in the South China Sea, although no actual numbers have been released.<sup>38</sup> According to Wirabima Riau Commandant Brigjen TNI Nurendi, "the rapid reaction forces have been established. They are still training as of now, and all of them are ready to be deployed to face any worst case scenario ... if physical contact or war takes place."<sup>39</sup> Nurendi confirmed that Indonesia is not taking part or taking a side in the South China Sea. The rapid reaction forces will be deployed from Riau only to defend the archipelago.<sup>40</sup>

Despite the increasing military activities in Indonesian territory bordering the South China Sea, Head of the Navy Information Department Laksma M. Zainudin denied that the reason underpinning the deployment of warships and the increased frequency of air patrols in the area is because of the growing tensions in the region. Rather, as Zainudin put it, these activities "are only part of routine operations...to secure Natuna waters. Especially, [since] illegal fishing often happens in [waters surrounding] Natuna."<sup>41</sup> Air Force Commandant Alfiandi and Army Commandant Nurendi, however, have stated that the security measures are being taken to increase Indonesia's military presence along its borders with the South China Sea, guard the country's territorial integrity and defend Natuna, the country's outermost island in

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36 "Konflik Laut China Selatan TNI Rajin Patroli Perbatasan," *Liputan* 6, November 9, 2015. <http://news.liputan6.com/read/2361406/konflik-laut-china-selatan-tni-rajin-patroli-perbatasan>

37 "Konflik Laut China Selatan TNI Rajin Patroli Perbatasan," November 9, 2015. <http://news.liputan6.com/read/2361406/konflik-laut-china-selatan-tni-rajin-patroli-perbatasan>

38 "Prajurit TNI AD Dilatih Antisipasi Konflik Laut China Selatan," *Liputan* 6, November 10, 2015. <http://news.liputan6.com/read/2362396/prajurit-tni-ad-dilatih-antisipasi-konflik-laut-china-selatan>

39 "Prajurit TNI AD Dilatih Antisipasi Konflik Laut China Selatan," *Liputan* 6, November 10, 2015. <http://news.liputan6.com/read/2362396/prajurit-tni-ad-dilatih-antisipasi-konflik-laut-china-selatan>

40 "Prajurit TNI AD Dilatih Antisipasi Konflik Laut China Selatan," *Liputan* 6, November 10, 2015. <http://news.liputan6.com/read/2362396/prajurit-tni-ad-dilatih-antisipasi-konflik-laut-china-selatan>

41 "Kirim 7 Kapal," *Banjarmasin Post*.

the region, if war occurs.<sup>42</sup>

The implementation of various security measures by Indonesian authorities in areas bordering the South China Sea could potentially add to tensions in the region. In the waters surrounding the Natuna Islands, illegal fishing is rampant and is often carried out by Chinese fishermen. Indonesia detained 31 China-flagged vessels from 2007 to 2015.<sup>43</sup> China's increasing coordination and physical support between its maritime agencies and fishermen in the South China Sea may lead to friction with Indonesian authorities.<sup>44</sup> In 2010, a Chinese naval vessel confronted an Indonesian patrol boat and demanded the release of a Chinese trawler that was fishing illegally in Natuna waters. This incident was widely reported by the media. An Indonesian official claimed that at least three such incidents between Indonesia's maritime authorities and its Chinese counterparts took place in 2010 alone, with one of them involving the shooting of an Indonesian citizen.<sup>45</sup> In 2013, armed Chinese vessels compelled an Indonesian maritime and fisheries ministry patrol boat to release Chinese fishermen apprehended in Natuna waters.<sup>46</sup> Given the Indonesian military is on high alert along its border with the South China Sea, if a similar incident takes place, a military standoff between the two countries could be unavoidable.

## China's increasing coordination and physical support between its maritime agencies and fishermen in the South China Sea may lead to friction with Indonesian authorities.

On the diplomatic front, the Indonesian Ministry of Foreign Affairs has sought to push for the finalisation of the COC and agreement on a timeline. The success of this effort could significantly reduce tension in the region. The Indonesian Ministry of Defence has also pushed forward the idea of joint patrols to China and its ASEAN counterparts. Indonesia has proposed that the joint patrols involve all claimants to the South China Sea. If successful, the joint patrol plan would be the first implementation of maritime cooperation in the South China Sea involving not only ASEAN countries and China but also Taiwan. China has reacted positively to the Indonesian joint patrol proposal. Given China might be reluctant to join an arrangement that could be perceived as increasing Taiwan's diplomatic status, the challenge for Indonesia as the initiator of the plan would be to find terms of cooperation that are acceptable to China and inclusive of all claimants.

## Conclusion

Indonesia's response to the Tribunal's Award on Jurisdiction and Admissibility could be categorised as diplomatic and security policy measures. Indonesia has carried out its diplomatic efforts primarily through two main forums including the ASEAN-China Joint Working Group on the Implementation of the Declaration on the Conduct of Parties in the South China Sea and the Workshop on Managing Potential Conflict in the South China Sea to push for an agreed COC. Outside of these two forums Indonesia has pursued three diplomatic measures. These include promoting the involvement of the ASEAN Institute for Peace and Reconciliation (AIPR) in dispute resolution, advocating for the establishment of naval joint patrols that involve all claimants to the South China Sea—a measure that falls in the grey area

42 "Prajurit TNI AD Dilatih Antisipasi Konflik Laut China Selatan," *Liputan 6*, November 10, 2015. <http://news.liputan6.com/read/2362396/prajurit-tni-ad-dilatih-antisipasi-konflik-laut-china-selatan>; "Danlanud: Indonesia digiring masuk konflik Laut China Selatan," *Liputan 6*, November 9, 2015. <http://news.liputan6.com/read/2361431/danlanud-indonesia-digiring-masuk-konflik-laut-china-selatan>

43 "Data Kapal Tangkapan," Indonesian Ministry of Maritime and Fisheries, March 19, 2015.

44 Lucio Blanco Pitlo, "Fishing Wars: Competition for South China Sea's Fishery Resources," July 10, 2013. <http://isnblog.ethz.ch/security/fishing-wars-competition-for-south-china-seas-fishery-resources>

45 Interview with an Indonesian official, Jakarta, April 7, 2015.

46 "Remote, gas-rich islands on Indonesia's South China Sea frontline," Reuters, August 26, 2014. <http://www.reuters.com/article/2014/08/26/us-southchinasea-indonesia-natuna-insigh-idUSKBN0GP1WA20140826>

between diplomatic and security policy—and sending a team of observers to The Hague to oversee the arbitral proceedings and anticipate the implications of the Tribunal’s awards regarding developments in the South China Sea. Despite the political rhetoric of taking China to court, the Indonesian government has carefully maintained its official stance of remaining neutral in the disputes. The success of Indonesian diplomatic efforts, especially the finalisation of the COC and the establishment of joint patrols, could reduce tension in the region. In terms of security responses, Indonesia has embarked upon three policy

Despite the political rhetoric of taking China to court, the Indonesian government has carefully maintained its official stance of remaining neutral in the disputes. The success of Indonesian diplomatic efforts, especially the finalisation of the COC and the establishment of joint patrols, could reduce tension in the region.

measures. First, the Indonesian Air Force has intensified its operations patrolling Indonesian areas adjacent to the South China Sea. Second, the Army has trained some of their personnel as rapid reaction forces in anticipation of conflict escalation in the South China Sea. Third, the Indonesian Navy has deployed warships in the waters around Natuna. The growing military activities by Indonesian authorities in areas bordering the South China Sea could generate tension in the region. Given the militarisation and the rampant growth of transnational crimes such as illegal fishing in this area, a small-scale incident between Indonesian and Chinese authorities has the potential to escalate and even involve the two countries’ militaries.



Philippines v. China Arbitration Case:

# Malaysia's Diplomatic and Security Responses

Sumathy Permal

Since the official publication of the nine-dash line map that was attached to China's note verbale dated 7 May 2009 on the Malaysia-Vietnam Joint Submission to the Commission on the Limits of the Continental Shelf (CLCS), Malaysia, other claimants, and the international community have been concerned at the extent of China's maritime claims that encompass almost all of the SCS and overlap with the Exclusive Economic Zones (EEZ) and continental shelf claims of other states.<sup>1</sup> The publication of the map was followed by administrative, legislative and military acts aimed at asserting China's claims. On 22 January 2013 the Philippines initiated an arbitral proceeding challenging the validity of China's claims and activities in the South China Sea (SCS) in particular the status of the nine-dash

line map that encapsulates China's historic, sovereignty and sovereign rights claims.<sup>2</sup>

Despite China's non-participation in the arbitral proceeding, the tribunal "in the matter of an arbitration

The Tribunal's decisions may have a legal effect on zones of national maritime jurisdiction and the delimitation of Malaysia's maritime boundaries.

concluded that China is still a party to the arbitration, and pursuant to the terms of Article 296(1) of the Convention and Article 11 of Annex VII, it shall be bound by any award the Tribunal issues". In principle, the awards of the Tribunal apply only to the parties concerned. China has maintained that it is not party to the arbitration, and it has not participated in the proceedings. In the case of Malaysia, it has thus far not submitted documents to the PCA and has therefore not tak-

en any formal position regarding the award.

Although the Philippines' arbitration case is intend-

1 "Joint submission by Malaysia and the Socialist Republic of Viet Nam," Commission on the Limits of the Continental Shelf, Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, May 6, 2009. [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/submission\\_mysvnm\\_33\\_2009.htm](http://www.un.org/Depts/los/clcs_new/submissions_files/submission_mysvnm_33_2009.htm)

2 "Notification of Statement and Claim," Notification, No. 13-0211, Department of Foreign Affairs of the Republic of the Philippines, January 22, 2013. <http://www.philippineembassy-usa.org/uploads/pdfs/embassy/2013/2013-0122-Notification%20and%20Statement%20of%20Claim%20on%20West%20Philippine%20Sea.pdf>

ed to protect its national interests from China's claims in the SCS and does not involve other claimants, the arbitral proceedings as a whole have legal, territorial and geopolitical implications for Malaysia as one of the claimants in the SCS. The Tribunal will need to issue a judgement and clearer interpretation of Article 121 as well as determine the entitlements of maritime fea-

ing is of critical importance to Malaysia, as are the outcomes of the proceedings.

In principle, any arbitral award issued pursuant to the proceedings will only be legally binding on the Parties to the arbitral proceedings (i.e., China and the Philippines).<sup>4</sup> Notwithstanding, China's rejection of the Philippines' Notification of Statement and Claim and

Malaysia has taken a warmer and friendlier approach that highlights trade and investment priorities in its relationship with China and favors using the ASEAN mechanism to protect its interests and promote a multilateral solution to South China Sea issues.

tures. Its legal arguments and jurisprudence will provide a definitive interpretation of Article 121 and application in relation to maritime entitlement in the South China Sea which may have a legal effect on zones of national maritime jurisdiction and the delimitation of Malaysia's maritime boundaries.<sup>3</sup>

## Diplomatic Responses

On 11 June 2015, the Embassy of Malaysia in the Kingdom of the Netherlands sent a Note Verbale to the Tribunal noting that "as one of the littoral states of the South China Sea, Malaysia has been following the proceedings and considers ... that Malaysia's interests might be affected." The Malaysian Embassy therefore requested copies of pleadings and other relevant documents and requested that representatives of Malaysia be permitted to attend the Hearing on Jurisdiction and Admissibility as observers. Malaysia was admitted to the hearing as an observer, and the Tribunal agreed to provide Malaysia with a copy of relevant documents. Indonesia, Thailand, Vietnam and Japan were also permitted to attend the hearing as observers. This showcases that the hear-

subsequent position of non-participation in the arbitration case also indicates that it will also reject any award given out by the Tribunal. However, the Tribunal's issuing of an award, regardless of whether or not it is in favor of the Philippines or not, has consequences for other claimants, including Malaysia, for several reasons. Firstly, Malaysia is a party to the United Nations Convention on the Law of the Sea (UNCLOS). Secondly, Malaysia has claims to the South China Sea that overlap with those of other claimants. Thirdly, Malaysia is a signatory of the Treaty of Amity and Cooperation in Southeast Asia (TAC) and as well a signatory of the Declaration on the Conduct of Parties in the South China Sea (DOC).

Malaysia, although it has not released an official position, agrees in practice that the nine-dash line is not valid and is not supported by international law. It also does not support China's occupation of submerged features and low-tide elevations and disagrees with China's note verbale regarding Malaysia's joint submission with Vietnam.<sup>5</sup> Unlike the Philippines' provocative and confrontational manner in dealing with China, Malaysia's approach has been more pragmatic. It has taken a

3 Internal discussion among government departments, Kuala Lumpur, Malaysia, December 3, 2015.

4 Article 34 (2) of PCA Arbitration Rules 2012; Article 59 of the ICJ Statute.

5 Internal discussion among government departments, Kuala Lumpur, Malaysia, December 3, 2015.



warmer and friendlier approach that highlights trade and investment priorities in the relationship and favors using the ASEAN mechanism to protect its interests and promote a multilateral solution to SCS issues.

For Malaysia, the Philippines' case against China is a double-edged sword. On one hand, it may provide the much needed clarity as to the legal status of the nine-dash line and the interpretation of Article 121 of UNCLOS as well as provide a check on China's expansion in the SCS. To this extent, Malaysia and other claimants may benefit from this new development. However, some of the decisions by the Tribunal may not be to Malaysia's advantage. For example, if the Tribunal's later awards address any of these issues, it may complicate the Malaysia-Vietnam Joint Submission to the Extended Continental Shelf Submission taking into consideration that both China and the Philippines have submitted notes verbales objecting to the joint partial submission by Malaysia and Vietnam to the CLCS in the area of the southern part of the SCS based on the ongoing disputes in the SCS.<sup>6</sup>

Malaysia maintains that it is entitled to an extended continental shelf covering an area up to latitude 12°30'N or an area up to 350 nautical miles from its baselines.<sup>7</sup> It has made a partial submission to date, and the government has decided to make a full submission later. Therefore, the Philippines' Notification relating to features such as Cuarteron Reef, Fiery Cross Reef, and other features in the claimed area will affect Malaysia's claim to an extended continental shelf. On the other hand, China has occupied Cuarteron Reef and Fiery Cross Reef. In October 2015, China completed construction of lighthouses on Cuarteron Reef and Johnson South Reef and has "already begun to provide navigation services to all nations."<sup>8</sup>

For Malaysia, the Philippines' case against China is a double-edged sword.

## Malaysia's ASEAN Chairmanship

Malaysia assumed Chairmanship of ASEAN in November 2014 and led the member countries towards achieving the vision of becoming a security community by the end of 2015. In this regard, Malaysia held an exciting and challenging task. The primary challenge that Malaysia shouldered was to ensure that members remained united to maintain a central role in the regional architecture, contribute to regional stability, and promote closer economic integration. Economic integration will be more easily achieved than regional stability because

6 See "Communications received with regard to the joint submission made by Malaysia and Viet Nam to the Commission on the Limits of the Continental Shelf," at "Joint submission by Malaysia and the Socialist Republic of Viet Nam," Commission on the Limits of the Continental Shelf, Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, May 6, 2009. [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/submission\\_mysvnm\\_33\\_2009.htm](http://www.un.org/Depts/los/clcs_new/submissions_files/submission_mysvnm_33_2009.htm)

7 "Joint submission by Malaysia and the Socialist Republic of Viet Nam," Commission on the Limits of the Continental Shelf, Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, May 6, 2009. [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/submission\\_mysvnm\\_33\\_2009.htm](http://www.un.org/Depts/los/clcs_new/submissions_files/submission_mysvnm_33_2009.htm)

8 "Chinese general says will never recklessly resort to force in South China Sea," Reuters, October 17, 2015. <http://uk.reuters.com/article/2015/10/17/uk-china-southchinasea-idUKKCN0SB01220151017>

economic development generally benefits member states and external parties. The issue of maintaining a coherent political security community is far more difficult due to the fragile strategic environment, especially because it involves multiple stakeholders with differing interests.

In order to achieve the ASEAN Vision 2020, ASEAN adopted the Declaration of ASEAN Concord II, in 2003 to establish an ASEAN Community by 2020. The ASEAN Community consists of three pillars, namely the ASEAN Political-Security Community (APSC), the ASEAN Economic Community (AEC) and the ASEAN Socio-Cultural Community (ASCC). The primary objective to achieving APSC is to have higher levels of cooperation on security issues among member states, focus on priority areas including political developments in line with democratic processes, promote rules-based governance and the promotion and protection of human rights and freedom.<sup>9</sup> It also seeks to have mutually beneficial relations between ASEAN and its Dialogue Partners and friends. Despite the obstacles towards realizing a mature APSC, Malaysia successfully bridged the gap and diverging approaches to form a common intra-ASEAN perspective in dealing with issues in the South China Sea. Malaysia, as the Chair of ASEAN, stated,

We share the serious concerns expressed by some Leaders on the land reclamation being undertaken in the South China Sea, which has eroded trust and confidence and may undermine peace, security and stability in the South China Sea. In this regard, we instructed our Foreign Ministers to urgently address this matter constructively including under the various ASEAN frameworks such as ASEAN China relations, as well as the principle of peaceful co-existence.<sup>10</sup>

The 26<sup>th</sup> ASEAN Summit statement clearly shows that ASEAN is serious about achieving a peaceful dispute settlement in the South China Sea. It goes beyond rhetoric and showcases the unified position of its members. ASEAN's rules-based community of shared values and norms stipulates that it aims to promote good conduct

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9 ASEAN Political-Security Community Blueprint, ASEAN Secretariat, June 2009. <http://www.asean.org/wp-content/uploads/archive/5187-18.pdf>

10 "Chairman's Statement of The 26th ASEAN Summit," ASEAN, Kuala Lumpur and Langkawi, April 27, 2015. <http://www.miti.gov.my/miti/resources/fileupload/Chairman%20Statement%2026th%20ASEAN%20Summit.pdf>

among its member states, consolidate and strengthen ASEAN solidarity, cohesiveness and harmony, and contribute to the building of a peaceful, democratic, tolerant, participatory, and transparent community in Southeast Asia. In this regard, Action Plan A.2.3 in the *ASEAN Political-Security Community Blueprint* calls for ensuring full implementation of the DOC for peace and stability in the South China Sea based on agreed principles among the concerned parties. The agreement encourages member countries and interested parties to continue the existing practice of close consultation to implement the agreed activities under the DOC, undertaking cooperative activities in the DOC, and ensuring that those activities do not infringe upon the sovereignty and integrity of member countries. The action plan also aims towards adoption of a regional Code

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of Conduct in the South China Sea (COC).<sup>11</sup>

In line with the Blueprint, Malaysia, together with the member states, managed to provide some statements that underline its commitment to uphold the principles on peaceful settlement in the South China Sea. Statements emerged from ASEAN regarding the progress of COC at the 22nd ASEAN Regional Forum (ARF) and the 5th East Asia Summit Foreign Ministers' meeting in Kuala Lumpur on 6 August 2015. ASEAN and China have also agreed to proceed to the next stage of consultations towards the establishment of the COC and looked forward to the expeditious establishment of the COC.<sup>12</sup> In this respect, ASEAN and China have been working on negotiation on the DOC and COC. The main task is done at the Track 1 level by the Joint-Working Group (JWG) and the Senior Officials Meeting (SOM). The objectives of the meetings are not to solve the sovereignty issues between the claimants but creating a regional order between China and ASEAN claimants.

Since 2013, ASEAN and China have held consultations on the COC,

11 *ASEAN Political-Security Community Blueprint*, ASEAN Secretariat, June 2009, p. 7. <http://www.asean.org/wp-content/uploads/archive/5187-18.pdf>

12 "Joint Communiqué 48th ASEAN Foreign Ministers Meeting," ASEAN, Kuala Lumpur, August 4, 2015. [http://www.asean.org/storage/images/2015/August/48th\\_amm/JOINT%20COMMUNIQUE%20OF%20THE%2048TH%20AMM-FINAL.pdf](http://www.asean.org/storage/images/2015/August/48th_amm/JOINT%20COMMUNIQUE%20OF%20THE%2048TH%20AMM-FINAL.pdf)

and senior officials have agreed on the process and modality of moving forward. The significant part of the document is the suggestion that the parties will work toward one that is legally binding. The documents promote a reinvigoration of efforts to reach a solution to the disputes and note that progress will be reported on an annual basis to an ASEAN–China ministerial meeting.

A Joint Working Group (JWG) was established to hold in-depth discussions on all aspects of the COC, including consideration of expert services that would support the work of official consultations. The general understanding is that the COC should be rules-based framework to regulate the conduct of parties on the ground, set norms, promote maritime cooperation on search and rescue, safety of navigation and marine scientific research, serve as guidelines for the activities in the area that are permissible, and be acceptable to China and ASEAN member states. ASEAN and China have agreed upon the Terms of Reference for the establishment of an Eminent Persons and Experts Group (EPEG) as a body to support the work by the JWG. The approach of the COC and DOC is referred as a 3+1 formula. They are promoting confidence, preventing accidents,

managing accidents, and an early harvest.

To this end, ASEAN countries are negotiating a COC that can serve as an effective tool for preventive diplomacy that can be accepted without the show of force by any claimant, without raising

## As the ASEAN Chair, the culmination of Malaysia's diplomatic approach to the South China Sea disputes was reaffirmed at the 27th ASEAN Summit in November 2015.

tensions or using tactics such as applying pressure on smaller countries. The territorial dispute and the features reclamations activity by China in the last two years have brought some serious challenges to the Track 1 meetings and progress. Aiming for regional unity, stability, and prosperity, Malaysia is concerned about the action-reaction incidents in the South China Sea as they reflect a region fraught with uncertainties and plagued by the assertiveness and rhetoric of various parties willing to go to great lengths stake their respective claims.

Malaysia has promoted ASEAN as the mechanism for discussions leading to greater understanding through confidence-building measures. The South China Sea issues featured in the discussions at the 5<sup>th</sup> ASEAN Maritime Forum (AMF) and Expanded ASEAN Maritime Forum (EAMF) in 2015 with the objective of facilitating discussion among the claimants and non-claimants in the South China Sea. Malaysia has shown to the regional and the international community that it takes the path of ensuring that ASEAN plays a central role on issues concerning its members as well as those involving its dialogue partners. The culmination of Malaysia's diplomatic approach to the South China Sea disputes was reaffirmed at the 27<sup>th</sup> ASEAN Summit in November 2015. Among others, Malaysia reaffirmed ASEAN's position on the importance of maintaining peace,

stability, security and upholding freedom of navigation in and overflight over the South China Sea; shared the concerns on the increased presence of military assets and the possibility of further militarization of outposts in the South China Sea; urged all parties to ensure the maintenance of peace, security and stability; urged all parties to maintain and enhance mutual trust and confidence, to exercise self-restraint in the conduct of activities and avoid actions that would escalate tensions, and to not resort to threat or the use of force.

## Security Responses

An examination of developments in the Philippines' arbitration case and possible responses from China indicates that Malaysia may have to revisit her approaches in the South China Sea and develop a comprehensive maritime strategy that is defensive in order to safeguard Malaysia's long-term interests. The focus of the strategy should be developed with the objective of enhancing the military and enforcement aspects, addressing security matters concerning the SCS, and strengthening the legal framework to defend Malaysia's areas. In order to maintain a pragmatic approach, Malaysia responses are in the following areas:<sup>13</sup>

1. Develop a comprehensive long-term policy and strategy encompassing legal, diplomatic, geo-political, security, and economic dimensions in the South China Sea;
2. Closely monitor positions and actions of the other claimants through regular updates to relevant agencies;
3. Review Malaysia's defense policy vis-à-vis new developments in the South China Sea; and
4. Focus on force modernization that will enhance interoperability and enforcement activity in the areas claimed by Malaysia.

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13 Internal discussion among government departments, Kuala Lumpur, Malaysia, December 3, 2015.

affect bilateral relations between the two countries, especially if the Philippines were to press its claims in areas also claimed by Malaysia. The Philippines has in fact acquired new assets to strengthen its military and enforcement capabilities. Given the possible increase in Chinese and Philippine presence in the area concerned, it is significant that the Malaysian Armed Forces (MAF) may increase patrols around the features occupied and claimed by Malaysia and begin to place greater emphasis on a show of presence and deterrence.

## Conclusion

It is highly unlikely that questions of sovereignty over the features can be resolved by way of negotiation because no country can afford to compromise on sovereignty issues. There is the possibility of attempting to resolve the SCS disputes through an international court,

**It is highly unlikely that questions of sovereignty over the features can be resolved by way of negotiation because no country can afford to compromise on sovereignty issues.**

but China will impose obstacles to such actions made by any parties to the dispute. The Philippines has challenged the validity of China's nine-dash line claims and the Award as of now provides that the PCA has the jurisdiction to proceed with the Philippines' case. However, it has yet to deliver the final ruling on the case, which is a more complicated process than the questions of jurisdiction and admissibility. Nevertheless, the Award has shed some light on the legal issues surrounding what has been termed the world's most complicated maritime dispute. Malaysia, as a Chairman of ASEAN, has played a significant role in the development of SCS negotiations. It has not provided any official position regarding the Award but has nevertheless maintained that it pledges to contribute to the various efforts in promoting cooperation and diplomacy regarding the peaceful use, resource management, and sustainable development of the SCS.

Philippines v. China Arbitration Case:

# The Philippines' Diplomatic and Security Responses

Richard Javad Heydarian

Conventional thinking in international relations scholarship tends to underplay the significance of international legal regimes in shaping the behavior of states, particularly great powers, which have historically been more interested in influencing the regional/international order in their own image than succumbing to common rules of conduct. Under conditions of global anarchy—that is to say, the absence of a global state that wields a monopoly on the legitimate use of violence—there are limited to no mechanisms to enforce compliance and ensure the proper implementation of even universally-accepted principles of inter-state relations. In this sense, international “law” can be, at best, viewed as normative standards of behavior, which powerful and/or rogue states may choose to ignore with often limited repercussions.

Based on this thread of thinking, common among

International “law” can be, at best, viewed as normative standards of behavior, which powerful and/or rogue states may choose to ignore with often limited repercussions.

realist thinkers, it is easy to downplay the significance of the Republic of the Philippines' (RP) decision to take the People's Republic of China (PRC) to court over mar-

itime disputes in the South China Sea. Nonetheless, it is important to (1) understand the context and dynamics of the Philippines' legal warfare (“lawfare”) against China and (2) evaluate its potentially significant repercussions, particularly in terms of altering China's strategic calculus (if not behavior).

For years, the RP mulled a legal remedy to the South China Sea disputes. But Beijing's vehement opposition to “internationalization”—involving extra-regional powers and international arbitration bodies—of the disputes forced Filipino policy-makers to constantly reconsider that option lest they risk a total diplomatic breakdown and potential conflict with the PRC. As a result, the RP, especially under the Gloria Macapagal-Arroyo (2001–2010) admin-



istration, mostly focused on bilateral engagement that maintained, albeit controversially, robust diplomatic and economic relations with Beijing.

The Philippines also invested in multilateral conciliation under the aegis of the Association of Southeast Asian Nations (ASEAN), best embodied by the 2002 Declaration on the Conduct of Parties in the South China Sea (DOC), which encourages disputing parties to, among other things, peacefully resolve their maritime disputes and refrain from any coercive or unilateral alteration of the status quo. In 2009, the Philippines refrained from joining Vietnam and Malaysia in submitting their extend-

## Leap of Faith

In fairness, the Aquino administration's decision to employ lawfare against China came on the heels of the Southeast Asian country's humiliating loss of the Scarborough Shoal in mid-2012, after weeks of a precarious standoff over the disputed feature between a Filipino naval frigate (*Gregorio Del Pilar*) on one side and an armada of well-armed Chinese coast guard forces on the other. The Scarborough Shoal is located well within the Philippines' 200-nautical-mile exclusive economic zone (EEZ), so there was immediately a massive public outcry

Bereft of the requisite military capability to defend and consolidate its territorial claims in the contested area and amid Washington's continued ambivalence vis-à-vis the precise extent of its defense treaty obligations to Manila, the Aquino administration saw lawfare as the only viable option to force China's hand.

ed continental shelf claims in the South China Sea to the United Nations Commission on the Limits of Continental Shelf (UNCLCS). The Arroyo administration was committed to maintaining cordial relations with Beijing, which vehemently opposed the joint Vietnamese-Malaysian submission of their claims to the UN. In response, the PRC formally announced its controversial "nine-dash line" claim, which covers much of the South China Sea. It was not until 2012, a year after Benigno Aquino's (Arroyo's successor) historic visit to Beijing, when bilateral relations suddenly plunged to a historic low.<sup>1 2</sup>

1 International Crisis Group, *Stirring up the South China Sea (I)*, Asia Report No. 223, April 23, 2012. <http://www.crisisgroup.org/~media/Files/asia/north-east-asia/223-stirring-up-the-south-china-sea-i.pdf>

2 International Crisis Group, *Stirring up the South China Sea (II)*, Asia Report No. 229, July 24, 2012. <http://www.crisisgroup.org/~media/Files/asia/north-east-asia/229-stirring-up-the-south-china-sea-ii-regional-responses.pdf>

for a decisive government response to what many saw (and continue to see) as blatant Chinese usurpation of Filipino "territory".<sup>3</sup> The populist Aquino administration had no option but to exhibit its commitment to retaking what the Philippines considers as an extension of its national territory.

Bereft of the requisite military capability to defend and consolidate its territorial claims in the contested area and amid Washington's continued ambivalence vis-à-vis the precise extent of its defense treaty obligations to Manila, the Aquino administration saw lawfare as the only viable option to force China's hand. What has followed is a high-stakes legal showdown between the

3 Jay L. Batongbacal, *Bajo de Masinloc (Scarborough Shoal): Maps and Documents*, Joint publication of the University of the Philippines, Law Center, Institute for Maritime Affairs and Law of the Sea, and National Mapping and Resource Information Authority, Philippines, 2014.

RP and PRC, which may carry significant ramifications for the South China Sea disputes.

## The Fog of Law

Both the RP and PRC are signatories to the United Nations Convention on the Law of the Sea (UNCLOS). The Aquino administration contends that UNCLOS should be the basis to generate maritime claims and manage as well as resolve overlapping claims in the South China Sea. In contrast, China contends that its sweeping nine-dash line claims are based on “historical rights”, which precede the establishment of modern international law and, therefore, cannot be retroactively nullified by the relevant provisions of UNCLOS.

The PRC claims “indisputable” sovereignty over much of the South China Sea. By citing such inter-temporal doctrine to justify its claims, China has shown—especially in the view of the Aquino administration—limited, if any, willingness to adjust its maritime claims in accordance with modern, accepted rules of the game, as enshrined in UNCLOS. Accordingly, the RP has resorted to compulsory arbitration under Article 287 and Annex VII of UNCLOS to settle its maritime disputes with China. In this sense, the RP’s arbitration case can also be seen as a clash between two doctrines: modern international law (crystallized under the aegis of European colonialism in Asia) vs. China’s pre-modern doctrine of territoriality (crystallized under the ancient Sino-centric order in Asia).

The PRC, however, has cited procedural arguments, based on the provisions of UNCLOS, to sabotage the RP’s lawfare. Beijing contends that arbitration bodies under UNCLOS do not have the mandate to adjudicate upon the South China Sea disputes, since they fundamentally concern the questions of sovereignty and title to claims over disputed land features in the area. The PRC has also reiterated its 2006 declaration to the UN, whereby it cited exemption clauses (under Article 298) from compulsory arbitration, specifically regarding

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issues that concern sovereignty and territory. In addition, the PRC has also argued that the RP is prematurely seeking compulsory arbitration, since both parties haven't consummated bilateral negotiations and alternative mechanisms of conciliation under agreed-upon regional principles such as the 2002 DOC. In short, China has sought outright dismissal of the Philippines' case based on both the question of jurisdiction and admissibility.<sup>4</sup>

However, the arbitration proceedings, in accordance with Article 9, Annex VII of UNCLOS, have not been jeopardized by China's continued non-participation and refusal to formally submit counter-memorials to the court. Nevertheless, in accordance with Article 5, Annex VII, the arbitration body has taken the PRC's arguments into consideration, even if they have been expressed through position papers, diplomatic statements and similar channels outside the formal proceedings at the court.<sup>5</sup>

## China has increasingly described its sweeping territorial claims as its national “blue soil”, effectively a domestic lake.

It is doubtful whether the PRC can ever justify its sweeping territorial claims across the South China Sea, which it has increasingly described as its national “blue soil”, effectively a domestic lake.<sup>6</sup> China's territorial claims fall well beyond its coastal waters, EEZ and continental shelf. They also do not seem to fulfill requirements such as effective demonstration of Chinese sovereignty or occupation and explicit acquiescence of neighboring states.

For much of the modern period and particularly in the 19<sup>th</sup> century, the European maritime powers, particularly Britain and France, were in *de facto* control of the Paracel and Spratly Islands. In fact, Chinese names for many of the features in the area are simply transliterations of earlier names given by English sailors, who regularly navigated across the South China Sea.<sup>7</sup>

Many of China's neighbors gained independence only in the mid-20<sup>th</sup> century and almost all of them—from the post-Commonwealth Philippines to (south and north) Vietnam and Malaysia—tried to exert control over contested features in the area as soon as they consolidated power at home. While South

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4 See “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”, December 7, 2014. [http://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1217147.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml)

5 Jay L. Batongbacal, “Arbitration 101: Philippines v. China,” Asia Maritime Transparency Initiative, Center for Strategic and International Studies, January 21, 2015. <http://amti.csis.org/arbitration-101-philippines-v-china/>

6 George F. Will, “The ‘blue national soil’ of China's navy,” *The Washington Post*, March 18, 2011. [https://www.washingtonpost.com/opinions/the-blue-national-soil-of-chinas-navy/2011/03/18/AB-5AxAs\\_story.html](https://www.washingtonpost.com/opinions/the-blue-national-soil-of-chinas-navy/2011/03/18/AB-5AxAs_story.html)

7 Bill Hayton, *The South China Sea: The Struggle for Power in Asia*, London: Yale University Press, 2014.

Vietnam tried to control much of the Paracels during the early Cold War period, the unified Vietnam sought to control much of the Spratly chain of islands towards the end of the Cold War.<sup>8</sup> Countries like the Philippines were among the first to establish modern military facilities on key features (i.e., Thitu Island) to demonstrate effective occupation and control. It is therefore not surprising that the PRC has no interest in subjecting its claims to third-party arbitration.

## Moment of Truth

The decision of the Arbitral Tribunal, which was formed under Article 287, Annex VII of UNCLOS, to exercise jurisdiction over a compulsory arbitration case filed by the Philippines against China is a major breakthrough for at least two reasons. First, it shows that UNCLOS can

the Philippines' case by citing exemption clauses under UNCLOS (i.e., Art. 9, Annex VII), arguing that compulsory arbitration is premature since not all avenues of conciliation have been exhausted and asserting that UNCLOS has no mandate to oversee the case because the issue is fundamentally sovereignty-related.

However, the Tribunal has unanimously voted in favor of exercising jurisdiction in the case,<sup>10</sup> effectively rejecting China's procedural challenges and setting the stage for a substantive discussion of the merits of the Philippines' claim. The Tribunal judges argued that the Philippines' case "was properly constituted" and that the Southeast Asian country's "act of initiating this arbitration did not constitute an abuse of process [as asserted by China]." Reassuringly for the Philippines, the Tribunal argued that "China's non-appearance in these proceedings does not deprive the Tribunal of jurisdic-

## Arbitration bodies under UNCLOS do not have the mandate to address title to claims or sovereignty-related issues, so the Philippines' legal team repackaged its complaint as a maritime entitlements issue.

indeed be useful for managing or even resolving the disputes in the South China Sea. Second, it shows that UNCLOS can be leveraged by smaller claimant countries to challenge China's territorial claims across the area. After all, international law, in the view of the Philippines, is supposed to be the ultimate equalizer in inter-state affairs.<sup>9</sup>

Arbitration bodies under UNCLOS do not have the mandate to address title to claims or sovereignty-related issues, so the Philippines' legal team repackaged its complaint as a maritime entitlements issue. In the Philippines' view, China tried to procedurally sabotage

tion," and that "international law does not require a State to continue negotiations when it concludes that the possibility of a negotiated solution has been exhausted." In short, the Philippine won both the jurisdiction (on whether UNCLOS has jurisdiction vis-à-vis disputes) and admissibility (on whether compulsory arbitration is justified) arguments.

The Tribunal, however, did not conclude that it had jurisdiction on all of the Philippines' Submissions, concluding that it did on seven of the fifteen items. The remaining items were left for either further clarification or further consideration since they "do not possess an exclusively preliminary character." The items the Tribunal has exercised jurisdiction over fall within three catego-

8 John W. Garver, "China's push through the South China Sea: the interaction of bureaucratic and national interests," *China Quarterly* 132, 1992, pp. 999–1028.

9 Louis Bacani, "Aquino hails initial victory vs China, says rule of law prevails," *Philippine Star*, October 30, 2015. <http://www.philstar.com/headlines/2015/10/30/1516593/aquino-hails-initial-victory-vs-china-says-rule-law-prevails>

10 Permanent Court of Arbitration, "The Tribunal Renders Award on Jurisdiction and Admissibility; Will Hold Further Hearings," Press Release, October 29, 2015. <http://www.pcacases.com/web/sendAttach/1503>

ries: the Chinese Coast Guard forces' aggressive actions against Filipino vessels, particularly fishermen, near the Scarborough Shoal; the environmental impact of China's activities in contested areas, particularly in the Scarborough and Second Thomas Shoals; and finally, the most important one, the determination of the nature of disputed features (see Article 121), including Scarborough Shoal and Cuarteron, Fiery Cross, Mischief, Gaven, McKennan, Hughes, and Johnson Reefs.

This means that the Philippines feels that it now has a golden opportunity to, at the very least, invalidate China's sovereignty claims over land features, such as Subi (located close to Philippine-held Thitu Island) and Mischief (located close to the Philippine-controlled Second Thomas Shoal and Reed Bank) reefs. The Philippines argues that since these land features were originally low-tide elevations, they are not entitled to their own territorial sea and EEZ.

By successfully overcoming the jurisdiction hurdle, the Philippines has set an important precedent, which other claimant states such as Vietnam and Malaysia can exploit. Other claimant states can now realistically contemplate using UNCLOS to initiate arbitral proceedings against China and question the validity of its claims within their EEZs. At the very least, they can credibly threaten China with doing so, even if they do not choose to actually file a case.

This is what one call a "legal multiplier", whereby China is confronted with the prospect of multiple law suits over its sweeping claims and assertive posturing across the whole South China Sea basin. So far, both Vietnam and Indonesia, which have also sent observers to the arbitration case at the Permanent Court of Arbitration at The Hague, have threatened China with lawfare.<sup>11</sup>

As of this writing, the Philippines has moved to the next stage of the arbitration proceedings, presenting the merit of its arguments before the Arbitral Tribunal. The Philippines' jurisdiction success is actually partial. It will also have to convince the Tribunal's judges that they should ex-

The legal battle is far from over. The Philippines recognizes that China has the option of ignoring the ultimate outcome, further punishing the Philippines by withholding economic investments, and digging in further by bolstering its construction activities on the ground.

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11 Richard Javad Heydarian, "The Forces Awakening Against an Antagonistic China," *The National Interest*, December 22, 2015. <http://nationalinterest.org/feature/the-forces-awakening-against-antagonistic-china-14702>

ercise jurisdiction over its other and more crucial arguments, particularly with respect to the validity of China's concept of "historical rights", its aggressive posturing within the Philippines' EEZ, and massive construction activities across the Spratly chain of islands. There is no assurance that the Philippines can win those arguments.

If the Philippines manages to convince the court that it should exercise jurisdiction on the nine-dash line claim and historical rights issue and subsequently win those arguments against China, then the case will have major legal repercussions not only for the disputes between Manila and Beijing, particularly in the Spratlys, but also across the South China Sea, which the nine-dash line covers. At the very least, the Philippines expects that the Tribunal can pressure China to clarify its vaguely expressed claims in the area. After all, China is yet to clarify the precise coordinates and meaning of its claims.<sup>12</sup>

For instance, it is far from clear whether China is claiming the entire South China Sea basin, land features, fisheries, and hydrocarbon resources in the area, or, alternatively, if it is claiming land features and their surrounding territorial waters. Some analysts have forwarded the argument that China is more minimalistic in its claims, primarily seeking non-exclusionary/joint exploitation of fisheries and hydrocarbon resources in the area but not claiming the entire waters and not intent on occupying all land features in the area.<sup>13</sup>

The legal battle is far from over. The Philippines recognizes that China has the option of ignoring the

ultimate outcome, further punishing the Philippines by withholding economic investments, and digging in further by bolstering its construction activities on the ground. Anticipating any unfavorable outcome in the first half of 2016, China may be tempted to further intensify its construction activities in order to exercise *de facto* sovereignty over features and waters it claims.

In fact, one could argue that China's accelerated reclamation activities in the past two years across the Spratly chain of islands, which has given birth to a sprawling network of airbases and military facilities across the area, is a pre-emptive strategy to secure a territorial *fait accompli* on the ground. For the Philippines, this means that it is important for the US and its allies to challenge these counter-measures while the arbitration is ongoing.

One thing is now clear: China will continue to pay more reputational costs and undermine its soft power as it continues to reject international law, which is now increasingly favoring the arguments of smaller claimant states like the Philippines. It cannot simultaneously have the cake of regional leadership and international respect on one hand and gobble up the contested features in the area on the other. The Philippines' arbitration case has progressively increased the strategic costs of China's maritime assertiveness in the area.

## Security Responses

In addition to the Philippines' lawfare against China, the Aquino administration has also doubled down on improving the country's heavily underdeveloped 'minimum deterrence' capability. Half-way into his six-year term in office, President Aquino allocated US\$648.44 million for the modernization of the Armed Forces of the Philippines, with the years 2013 and 2015 witnessing a whopping 17% and 29% increase, respectively, in the Southeast Asian country's defense spending. For the 2014–2017 period, the government allocated US\$1.73

## The Philippines' arbitration case has progressively increased the strategic costs of China's maritime assertiveness in the area.

12 See, for example, "China's Maritime Claims in the South China Sea," *Limits in the Seas* 143, Office of Ocean and Polar Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, U.S. Department of State, December 5, 2014. <http://www.state.gov/documents/organization/234936.pdf>

13 See, for example, Sourabh Gupta, "Why US analysis of China's nine-dash line is flawed," *East Asia Forum*, January 11, 2014. <http://www.eastasiaforum.org/2015/01/11/why-us-analysis-of-chinas-nine-dash-line-is-flawed/>



The Aquino administration has staked much of its legacy in the ongoing legal showdown with China, hoping that a potentially favorable verdict will alter Beijing's behavior and enhance the Philippines' position in the South China Sea.

billion for defense procurement. In 2015, for the first time in a decade, the Philippines was able to once again field its own jet fighters, thanks to the arrival of the first batch of FA-50s, worth \$415.7 million, purchased from South Korea. The Philippines' allies have also been pitching in. In 2014, the United States increased its annual Foreign Military Financing to the Philippines to \$40 million, \$14.5 million of which was specifically earmarked for the en-

hancement of the Philippines' maritime security capabilities. Japan, another key strategic partner of the Philippines, has also doubled down on assisting the modernization and capacity-building of the Philippine Coast Guard, which is expected to receive 10 multi-role patrol boats from Tokyo over the coming years.<sup>14</sup> Crucially, however, the Philippine government, in order to presumably aid its legal case and maintain the 'moral high ground', has postponed any major maintenance and refurbishment activity on the Thitu Island, where it has, over the past four decades, established an airstrip and a small community of permanent residents.<sup>15</sup>

## Conclusion

Overall, the Philippines has placed a lot of its strategic eggs in the legal arbitration basket, while gradually building up its defense capabilities and upgrading its defense cooperation with longstand-

ing allies like the Philippines and Japan. In many ways, the Aquino administration has staked much of its legacy in the ongoing legal showdown with China, hoping that a potentially favorable verdict will alter Beijing's behavior and enhance the Philippines' position in the South China Sea.<sup>16</sup>

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14 Richard Javad Heydarian, "Catch-up in Manila for Minimum Deterrence," Asia Maritime Transparency Initiative, Center for Strategic and International Studies, March 18, 2015.

15 Jerry E. Esplanda, "PH heeds moratorium on activities on Spratlys," *Philippine Daily Inquirer*, June 1, 2015. <http://globalnation.inquirer.net/123781/ph-heeds-moratorium-on-activities-in-spratlys>

16 Richard Javad Heydarian, "Philippines' Lopsided South China Sea Policy," Asia Maritime Transparency Initiative, Center for Strategic and International Studies, July 29, 2015. <http://amti.csis.org/philippines-lopsided-south-china-sea-policy/>



Philippines v. China Arbitration Case:

# Taiwan's Diplomatic and Security Responses

Jonathan Spangler

The extent and significance of Taiwan's territorial claims, its unique political relationship with mainland China, and its position as a key aspect of the U.S. government's strategy in the Asia-Pacific region make Taiwan an important player both in the arbitration case and in the South China Sea maritime territorial disputes more broadly. Throughout the Philippines v. China arbitral proceedings, the government of the Republic of China (ROC) has responded diplomatically by reiterating its sovereignty claims, raising awareness about its legal and historical perspectives, reaffirming its commitment

the upcoming change in political administration on the island has raised some questions as to whether or not there will be a resulting shift in approach towards the South China Sea.

## Diplomatic Responses

Taiwan's diplomatic responses are complicated and otherwise influenced by several factors. First, the ROC's loss of status as United Nations member state in 1971 has had a crippling effect on its capacity to engage in normal

**Taiwan's diplomatic responses are complicated and otherwise influenced by several factors.**

to abiding by international law and guaranteeing freedom of navigation and overflight, and positioning itself as a peacemaker in the South China Sea disputes. The ROC's security responses have included a continuation of its defensive security posture and an emphasis on island development for civilian and humanitarian purposes while continuing to consider a possible transition of forces on one of its occupied features. Meanwhile,

diplomatic relations with other countries. Second, Taipei's delicate and politically sensitive relationship with the People's Republic of China (PRC), who views Taiwan as a renegade province that will eventually reunify with the mainland, can hinder meaningful cooperation between the two sides on any issues that can be construed as even remotely political. Third, as a democracy, Taiwan's domestic politics must be responsive to the de-

mands of the local population, which could result in an increased or decreased government emphasis on South China Sea issues as well as tilt its policy towards being more or less assertive regarding its territorial claims. Fourth, Taiwan is a key component in the United States' role as guarantor of regional security in East Asia, and in the context of the U.S. rebalancing strategy under the administration of President Barack Obama, it has become all the more crucial.

Admissibility in its fourth press release,<sup>1</sup> the Ministry of Foreign Affairs (MOFA) released a brief three-point statement of the ROC's position on the South China Sea.<sup>2</sup> On July 7, 2015, the first day of the hearing, MOFA released a more comprehensive "Statement on the South China Sea."<sup>3</sup> In the statement, the ROC advances that it "enjoys all rights to [the South China Sea] island groups and their surrounding waters in accordance with international law [and] does not recognize any claim to sover-

## The ROC government has been vocal in its opposition to the Philippines' arbitration case because it views the Tribunal's decisions as having the potential to directly affect the ROC's sovereignty claims and rights in the region accorded to it under international law.

As it continues to manage the impacts of these factors, the ROC has made its voice heard regarding the disputes. In its diplomatic responses, Taipei has reiterated its sovereignty claims, sought to increase awareness about its legal and historical perspectives, reaffirmed its commitment to the rule of international law, and promoted itself as a peacemaker in the South China Sea disputes. The following subsections discuss each of these diplomatic responses in greater detail.

### Reiteration of Claims

The ROC government has been vocal in its opposition to the Philippines' arbitration case because it views the Tribunal's decisions as having the potential to directly affect the ROC's sovereignty claims and rights in the region accorded to it under international law. Accordingly, the government has taken advantage of the opportunities presented by the proceedings to reiterate its sovereignty claims. On April 29, one week after the Tribunal announced the date for its Hearing on Jurisdiction and

eignty over, or occupation of, these areas by other countries, irrespective of the reasons put forward or methods used for such claim or occupation."<sup>4</sup> The "island groups" referred to in the official document include the Pratas (Dongsha) Islands, the Paracel (Xisha) Islands, the Spratly (Nansha) Islands, and the Macclesfield Bank and Scarborough Shoal (collectively referred to as Zhongsha). The statement also notes that the 1947 Location Map of the South China Sea Islands and corresponding list of revised names "delineate the scope of ROC territory and waters in the region."<sup>5</sup> On October 31, 2015, two days af-

1 Permanent Court of Arbitration, "The Arbitral Tribunal Sets Dates for Hearing on Jurisdiction and Admissibility," Press Release, April 22, 2015. <http://www.pcacases.com/web/sendAttach/1298>

2 "Republic of China's Position on the South China Sea," Ministry of Foreign Affairs of the Republic of China [ROC MOFA], April 29, 2015. [http://www.mofa.gov.tw/News\\_Content.aspx?n=604CBAA3DB3DDA11&sms=69594088D2AB9C50&s=F89D158709C5C752](http://www.mofa.gov.tw/News_Content.aspx?n=604CBAA3DB3DDA11&sms=69594088D2AB9C50&s=F89D158709C5C752)

3 "Statement on the South China Sea," Ministry of Foreign Affairs of the Republic of China [ROC MOFA], July 7, 2015. [http://www.mofa.gov.tw/en/News\\_Content.aspx?n=0E7B91A8FBEC4A94&sms=220E98D761D34A9A&s=EDEBCA08C7F51C98](http://www.mofa.gov.tw/en/News_Content.aspx?n=0E7B91A8FBEC4A94&sms=220E98D761D34A9A&s=EDEBCA08C7F51C98)

4 "Statement on the South China Sea," ROC MOFA, July 7, 2015, point 1.

5 "Statement on the South China Sea," ROC MOFA, July 7, 2015, point 2.

ter the Tribunal issued its Award on Jurisdiction and Admissibility, MOFA released another statement that reiterated most of the points from its earlier statement.<sup>6</sup> After canceling a trip to Itu Aba (Taiping) Island in December 2015, President Ma Ying-jeou joined a thirty-member delegation that flew to the island on January 28, 2016, where he again reiterated Taiwan's sovereignty claims and hopes for a peaceful resolution to the disputes.<sup>7</sup>

Reference to the 1947 map is significant in that it reiterates the ROC's eleven-dash/U-shaped line claim in the South China Sea, upon which the PRC's nine-dash line claim, as submitted to the United Nations Commission on the Limits of the Continental Shelf (CLCS) on May 7, 2009, is based.<sup>8</sup> In recent years, a few voices in the international community have called upon the ROC to "give up" its U-shaped line claim based on the 1947 map. The basic argument is that, since the map forms the basis for the PRC's claims and these claims are framed by other claimants as a ma-

major source of tensions, the ROC could effectively undermine the PRC's claims without incurring significant losses to its island claims (i.e., Itu Aba Island and Pratas Islands) while simultaneously gaining international backing for its actions. However, such calls overlook several key consequences that would result from such a hypothetical diplomatic move by the ROC government. Most importantly, such a move would undoubtedly

provoke a negative response from Beijing. If it were not perceived as akin to a shift towards *de jure* independence, thereby triggering a military response, it would at least lead to an unwelcome fissure in the already delicate cross-strait relationship. Moreover, if not carefully executed, it could create the impression that the ROC administration is weak in its stance, caving to pressure from the international community to abandon what the government has long consid-

In recent years, a few voices in the international community have called upon the ROC to "give up" its U-shaped line claim based on the 1947 map. Such calls are a longshot, at best, and overlook several key consequences that would result from such a hypothetical diplomatic move by the ROC government.

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6 "ROC government reiterates its position on South China Sea issues," Ministry of Foreign Affairs of the Republic of China [ROC MOFA], October 31, 2015. [http://www.mofa.gov.tw/en/News\\_Content.aspx?n=1EADDCFD4C6EC567&s=F5170FE043DADE98](http://www.mofa.gov.tw/en/News_Content.aspx?n=1EADDCFD4C6EC567&s=F5170FE043DADE98)

7 "Taiwan president sets off for disputed Taiping island in South China Sea," *The Guardian*, January 28, 2016. <http://www.theguardian.com/world/2016/jan/28/taiwan-president-ma-ying-jeou-visit-south-china-sea->

8 "Submission to the Commission on the Limits of the Continental Shelf, CML/17/2009," Permanent Mission of the People's Republic of China to the United Nations, May 7, 2009. [http://www.un.org/depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/chn\\_2009re\\_mys\\_vnm\\_e.pdf](http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf)

ered “an inherent part of ROC territory and waters.”<sup>9</sup> In other words, at present, the potential costs of formally renouncing its U-shaped line claim far outweigh the potential benefits for the ROC.

That said, in contrast to incumbent President Ma Ying-jeou, who has explicitly referenced the U-shaped line claim when reiterating Taiwanese sovereignty claims in the South China Sea, President-Elect Tsai Ing-wen has opted for a more ambiguous approach that reaffirms the same Taiwanese sovereignty claims without specifically referencing the U-shaped line. If Tsai continues to take this approach, it may allow her administration more flexibility in its South China Sea strategy after her inauguration in May 2016.

## Raising Awareness about its Legal and Historical Perspectives

In addition to reiterating its sovereignty claims, Taiwan has redoubled its efforts to raise awareness about its legal and historical perspectives on South China Sea issues. In its official statements, the ROC has elaborated on the historical evidence supporting its territorial claims,<sup>10</sup> refuted the Philippines’ submissions regarding the definitions and entitlements of sea features, reasserted its view on the status of Itu Aba (Taiping) Island, the largest feature in the Spratly Islands,<sup>11</sup> and clarified its legal obligations as relate to any awards issued by the Tribunal given its non-involvement in the arbitration case.<sup>12</sup>

In addition to issuing formal position statements, the ROC has also sought to raise international awareness by

Taiwan has redoubled its efforts to raise awareness about its legal and historical perspectives on South China Sea issues.

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9 “Statement on the South China Sea,” ROC MOFA, July 7, 2015, point 1; “ROC government reiterates its position on South China Sea issues,” ROC MOFA, October 31, 2015, point 1.

10 “Statement on the South China Sea,” ROC MOFA, July 7, 2015, point 2; “ROC government reiterates its position on South China Sea issues,” ROC MOFA, October 31, 2015, point 2.

11 “Statement on the South China Sea,” ROC MOFA, July 7, 2015, point 3; “ROC government reiterates its position on South China Sea issues,” ROC MOFA, October 31, 2015, point 3.

12 “Statement on the South China Sea,” ROC MOFA, July 7, 2015, point 8; “ROC government reiterates its position on South China Sea issues,” ROC MOFA, October 31, 2015, point 7. For more detailed analyses of Taiwan’s legal perspectives, see Chen-Ju Chen, “Philippines v. China Arbitration Case: Taiwan’s Legal Perspectives on the Arbitral Proceedings,” in Fu-Kuo Liu and Jonathan Spangler (eds.), *South China Sea Lawfare: Legal Perspectives and International Responses to the Philippines v. China Arbitration Case*, Taipei: South China Sea Think Tank / Taiwan Center for Security Studies, January 29, 2016.

other means. Accompanying its July 2015 statement in response to the first hearing, MOFA also released an “atlas” featuring a collection of photos and information about the environment and facilities on Itu Aba (Taiping) Island. The forty-some photos featured in the document depict local flora and fauna, the available fresh water sources, cultural activities, agricultural development, and various types of infrastructure.<sup>13</sup> MOFA has also produced several videos that have explored various different aspects of life and scientific research conducted on Itu Aba (Taiping) Island as well as reiterating Taiwan’s territorial sovereignty claims and elaborating on its efforts to promote peace in the region.<sup>14</sup> Chinese-

## Reaffirmation of Commitment to International Law

Taiwan has also consistently reiterated its commitment to international law, including the United Nations Convention on the Law of the Sea (UNCLOS). It maintains that it has continuously supported and abided by international law despite having lost its UN seat in 1971 and also notes that it “was a founding member of the United Nations” and “its full name remains in Articles 23 and 110 of the Charter of the United Nations.”<sup>16</sup> The government has also called upon South China Sea littoral states “to respect the provisions and spirit of the UN Charter and UNCLOS.”<sup>17</sup> In addition, the ROC govern-

MOFA has produced several videos that explore various different aspects of life and scientific research conducted on Itu Aba (Taiping) Island as well as reiterating Taiwan’s territorial sovereignty claims and elaborating on its efforts to promote peace in the region.

and English-language versions of the atlas and videos have been released, with one of the videos released in six different languages.<sup>15</sup> The multilingual nature of the informational materials indicates that the intended audiences are both domestic and international. Besides raising public awareness about the island, they serve a dual purpose in that they also strengthen the ROC’s body of evidence that Itu Aba (Taiping) Island qualifies as an “island”—not a “rock,” as the Philippines has argued—under international law.

ment has reassured other countries that it has always and will continue to guarantee freedom of navigation and overflight in the South China Sea, calling on other claimants to uphold these principles as well.<sup>18</sup>

It is in this regard that, although Taiwan shares almost the same territorial claims as China, the emphasis placed on its explicit and consistent support for UNCLOS and freedom of navigation and overflight, may be an attempt to distance itself from the policies of the PRC. Although China has expressed its support for both UNCLOS and freedom of navigation and overflight as well, many in the international community have seen these as hollow political commitments not backed up by the

13 “Our Island: The Atlas of Taiping Island of the Republic of China (Taiwan), Vol. 1,” Ministry of Foreign Affairs of the Republic of China [ROC MOFA], 2015. <http://www.mofa.gov.tw/Upload/RelFile/661/150648/a1fe8e7f-aeeb-4953-8921-ef2607294072.pdf>

14 “Taiping Island in The South China Sea,” Video, Ministry of Foreign Affairs of the Republic of China [ROC MOFA], July 7, 2015. [https://www.youtube.com/watch?v=4\\_fDk\\_Y8zQI](https://www.youtube.com/watch?v=4_fDk_Y8zQI)

15 “Nanhai Heping Changyi,” Video playlist, Ministry of Foreign Affairs of the Republic of China [ROC MOFA]. <https://www.youtube.com/playlist?list=PLnCzJTTEtULCN37L1emGzsWLCNRxhnCLB>

16 “Statement on the South China Sea,” ROC MOFA, July 7, 2015, points 5–6; “ROC government reiterates its position on South China Sea issues,” ROC MOFA, October 31, 2015, points 4–5.

17 “ROC government reiterates its position on South China Sea issues,” ROC MOFA, October 31, 2015, point 5.

18 “Statement on the South China Sea,” ROC MOFA, July 7, 2015, points 5; “ROC government reiterates its position on South China Sea issues,” ROC MOFA, October 31, 2015, points 4–5.

reality of its actions. It appears that the government in Taiwan is hoping that it can earn the favor of other claimants and stakeholders by acting in accordance with its own self-professed political commitments. Time will tell whether or not this approach is effective in further strengthening Taiwan's image as a responsible stakeholder in the international system.

## Role as Peacemaker

Building upon this momentum and recognition that it should redouble its efforts to define itself as a responsible stakeholder in the international system, Taipei has attempted to go beyond such basic commitments by positioning itself as a peacemaker in the region. From Taiwan's perspective, its potential role as a peacemaker in the South China Sea disputes goes further than self-aggrandizing political rhetoric in two ways. First, Taipei is well-versed in managing sensitive political issues and has a history of successful actions upon which to base its peacemaking efforts. Second, its efforts have already caught the attention of political analysts and policymakers in the international community.<sup>19</sup> For any foreign policy, receiving initial recognition and follow-up support from relevant international stakeholders is a fundamental determinant of its long-term feasibility.

Taipei is well-versed in managing sensitive political issues and has a history of successful actions upon which to base its peacemaking efforts.

Bearing these issues in mind, on May 26, 2015, President Ma announced the South China Sea Peace Initiative at an international legal conference in Taipei<sup>20</sup> and further pushed the initiative in a commentary published in *The Wall Street Journal* the following month.<sup>21</sup> The plan follows in the footsteps of the East China Sea Peace Initiative launched on August 15, 2012,<sup>22</sup> and Ma has emphasized that “[w]hether in the Taiwan Strait, East China Sea, or South China Sea, our approach is the same—to resolve disputes through peaceful means.”<sup>23</sup> Based on the principle that “while sovereignty cannot be divided, resources can be

19 Lynn Kuok, “Tides of change: Taiwan’s evolving position in the South China Sea—and why other actors should take notice,” East Asia Policy Paper Series 5, Center for East Asia Policy Studies, Brookings Institution, May 2015. <http://www.brookings.edu/~media/research/files/papers/2015/05/taiwan-south-china-sea-kuok/taiwan-south-china-sea-kuok-paper.pdf>

20 “President Ma proposes South China Sea Peace Initiative,” Foreign Press Liaison Office, Ministry of Foreign Affairs, Republic of China, May 26, 2015. [http://www.mofa.gov.tw/en/News\\_Content.aspx?n=8157691CA2AA32F8&sms=4F8ED5441E33EA7B&s=F71CA7963F189938](http://www.mofa.gov.tw/en/News_Content.aspx?n=8157691CA2AA32F8&sms=4F8ED5441E33EA7B&s=F71CA7963F189938)

21 Ma Ying-jeou, “A Plan for Peace in the South China Sea,” *The Wall Street Journal*, June 11, 2015. <http://www.wsj.com/articles/a-plan-for-peace-in-the-south-china-sea-1434040267>

22 “East China Sea Peace Initiative,” Ministry of Foreign Affairs of the Republic of China [ROC MOFA], August 15, 2012. <http://www.mofa.gov.tw/en/theme.aspx?s=780E70E6D142B833&sms=BC-DE19B435833080>

23 Ma Ying-jeou, “President Ma’s remarks at opening ceremony of “2015 ILA-ASIL Asia-Pacific Research Forum,” News release, Office of the President, Republic of China, May 26, 2015. <http://english.president.gov.tw/Default.aspx?tabid=491&itemid=34796&rmid=2355>



shared,”<sup>24</sup> the South China Sea Peace Initiative’s five-point plan is summarized in the relevant MOFA press release as follows:

The initiative urges all parties concerned to exercise restraint in the South China Sea; observe relevant international law, including the UN Charter and UN Convention on the Law of the Sea, and settle disputes peacefully, while jointly guaranteeing freedom of navigation and overflight; ensure that all important actors are included in measures such as a maritime cooperation mechanism or code of conduct; shelve sovereignty disputes and cooperate on the development of resources; and establish coordination mechanisms for nontraditional security issues such as scientific research, environmental protection, humanitarian assistance and disaster relief.<sup>25</sup>

The aims of the initiative have been designed in a way that can be supported by most if not all claimants and non-claimant stakeholders. Indeed, Taipei has more experience drafting these kinds of cautious yet effective agreements than most other governments in the world, as its continued relevance is to a certain extent based on navigating such political ambiguities and diplomatic grey areas. Reception has been mostly positive but necessarily cautious: the U.S. government has expressed its appreciation for Taiwan’s efforts; the PRC has noted them but refrained as usual from encouraging any activities that would appear to raise the political status of Taiwan to anything resembling that of a state; and members of international academic circles have expressed their support.<sup>26</sup>

That said, it may be to the detriment of the South China Sea Peace Initiative that much of its content focuses on reiterating ROC sovereignty claims before launching into the more meaningful aspects of the proposal. Although prefacing each document with such a disclaimer about sovereignty may seem necessary to the ROC government, it may also be looked upon coolly by other

The South China Sea  
Peace Initiative is based  
on the principle that  
“while sovereignty cannot  
be divided, resources can  
be shared.”

24 Ma Ying-jeou, “President Ma’s remarks at opening ceremony of “2015 ILA-ASIL Asia-Pacific Research Forum,” News release, Office of the President, Republic of China, May 26, 2015. <http://english.president.gov.tw/Default.aspx?tabid=491&itemid=34796&rmid=2355>

25 “President Ma proposes South China Sea Peace Initiative,” Foreign Press Liaison Office, Ministry of Foreign Affairs, Republic of China, May 26, 2015. [http://www.mofa.gov.tw/en/News\\_Content.aspx?n=8157691CA2AA32F8&sms=4F8ED5441E33EA7B&s=F71CA7963F189938](http://www.mofa.gov.tw/en/News_Content.aspx?n=8157691CA2AA32F8&sms=4F8ED5441E33EA7B&s=F71CA7963F189938)

26 Lynn Kuok, “Taiwan and the South China Sea: More steps in the right direction,” Brookings Institution, August 24, 2015. <http://www.brookings.edu/research/opinions/2015/08/24-taiwan-south-china-sea-kuok>



claimants—those same claimants that Taipei is hoping to woo into supporting the initiative.

Taiwan seems to have made significant progress down the path towards being recognized as a regional peacemaker, but the obstacles that remain—its crippling diplomatic situation, the variables imposed by the upcoming transitions of power in Taiwan and the U.S., and the intransigence of all claimants on issues of national sovereignty—are significant. It will require a

it is in no position to engage in military confrontations with any country in the region—if for no other reason than it could result in it becoming the object of a power struggle between great powers that would effectively negate the decades of arduous diplomatic efforts by several countries to maintain stability and security in the region. As a result, Taiwan has taken a primarily defensive approach in the acquisition of military assets and development of its armed forces. The basic goal has

**It will require a significant investment of time, financial resources, domestic political commitment, and diplomatic capital for Taiwan to turn its nascent South China Sea peacemaking efforts into something that other claimants will view as worth investing in themselves.**

significant investment of time, financial resources, domestic political commitment, and diplomatic capital for Taiwan to turn its nascent South China Sea peacemaking efforts into something that other claimants will view as worth investing in themselves.

## **Security Responses**

In terms of its security responses to the arbitral proceedings and South China Sea disputes more broadly, Taiwan has maintained its signature defensive approach to security and continued to move forward with its primarily civilian infrastructural development. In the meantime, it has considered a possible transition of forces stationed on Itu Aba (Taiping) Island from Coast Guard to military, but no such moves have been made to date.

### **Defensive Posture**

Taiwan's security approach in the South China Sea mirrors that of its approach to cross-strait relations. While the ROC's military capabilities are relatively advanced,

been to minimize the risk of attack by making the costs for any potential adversary so high that they would outweigh any potential benefits.

In the South China Sea, its approach is much the same. While Taiwan has some defensive capabilities on its occupied features, it has also sought to increase the diplomatic costs for any claimant that might decide to advance on its positions. Taipei understands that its reputation for developing Itu Aba (Taiping) Island and the Pratas (Dongsha) Islands for civilian, scientific, environmental, and humanitarian purposes does as much for the defense of the islands as would funneling equivalent resources into military infrastructural development. Given the context and its unique position in the South China Sea disputes, it is likely to maintain this defensive posture and emphasize its non-military developments and peaceful, law-abiding approach in the future.

### **Potential Transition of Forces**

Although Taiwan has refrained from developing military infrastructure that could raise objections from other

claimants, there has been discussion among government and defense officials about transitioning the Coast Guard forces stationed on Itu Aba (Taiping) Island to military personnel, namely, those of the Marines or Army.<sup>27</sup> Previously, military forces had been garrisoned on the island but were replaced by the Coast Guard in 2000. The advantage of a stronger defense posture would be that it could dissuade other claimants from invading the island, whereas the disadvantage would be that it could trigger a negative reaction from other countries that might seek to frame the shift as a “provocation” or an alteration of the status quo in the area. Although discussions on the issue had been long on-going, the government decided in May 2015 to maintain the status quo of having Coast Guard forces on the island.

## Post-Election Era

The administration of incumbent President Ma Ying-jeou has taken a relatively conciliatory approach towards maritime territorial disputes, similar to its approach to cross-strait relations.<sup>28</sup> Nevertheless, tensions in the South China Sea have increased since his inauguration in 2008, particularly during his second term beginning in 2012. On January 16, 2016, Democratic Progressive Party (DPP) candidate Tsai Ing-wen was elected in a landslide victory as the next president of the ROC and will be inaugurated on May 20, 2016. In the election, the Chinese Nationalist Party (KMT) suffered major losses in the Legislative Yuan, which will give the DPP a majority of seats for the first time in ROC history. Decisions regarding domestic policy priorities under the new administration will have implications for Taiwan’s maritime territorial claims, for its relationships with Beijing and Washington, and for its continued commitment to serving the role of peacemaker in the region.

Because President-Elect Tsai and the new DPP legislators have yet to assume office, questions remain as to how Taiwan’s South China Sea strategy will

Decisions regarding domestic policy priorities under the new administration will have implications for Taiwan’s maritime territorial claims, for its relationships with Beijing and Washington, and for its continued commitment to serving the role of peacemaker in the region.

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27 Jonathan Spangler and Richard Hu, “Interview with Richard Hu: Transitioning Taiwan’s Armed Forces in the South China Sea,” *Perspectives* 4, Taipei: South China Sea Think Tank, November 2015. <http://scstt.org/perspectives/2015/455/>

28 In May 2014, the Ma administration did, however, effectively reject Beijing’s proposal that the two sides cooperate on South China Sea issues. See “Mainland proposes cross-Strait cooperation on South China Sea issue,” *Xinhua*, May 14, 2014. [http://news.xinhuanet.com/english/china/2014-05/14/c\\_133333018.htm](http://news.xinhuanet.com/english/china/2014-05/14/c_133333018.htm); “MAC sees no room for cross-strait cooperation on territorial issues,” *Focus Taiwan*, Central News Agency, May 15, 2014. <http://focustaiwan.tw/news/acs/201405150040.aspx>

evolve in the coming years. No comprehensive policy plan for the disputes has been forwarded thus far, so the incoming administration's potential approach can only be inferred from statements from the campaign trail and assessments of what would prove most beneficial for the DPP administration and ROC.

On March 26, 2015, while speaking at Chia Nan University of Pharmacy and Science in Tainan, Tsai refuted the idea that the DPP would abandon its sovereignty claims in the South China Sea and expressed that “mar-

the legal principles of the United Nations Convention on the Law of the Sea.”<sup>31</sup> At an international press conference on the evening of her election victory on January 16, 2016, Tsai was asked about her policy plans for the South China Sea. In her response, she emphasized that the administration would (1) reaffirm its sovereignty, (2) call upon all parties involved to abide by international law, including UNCLOS, (3) support freedom of navigation and overflight, (4) oppose provocative actions that increase regional tensions, and (5) continue to express

## If the DPP can demonstrate that it has the resolve to carry on the South China Sea peacemaker torch and forge ahead, it will be to the benefit of both parties, the Taiwanese political system, and the other claimants and stakeholders in the South China Sea.

itime territorial disputes and sovereignty issues among all concerned parties in the South China Sea be peacefully solved according to international law, particularly the United Nations Convention on the Law of the Sea.”<sup>29</sup> In an interview in Washington, D.C., on June 6, 2015, Tsai stressed that Taiwan should be “prepared to work with all the parties involved” and that it is “ready to talk to anybody [to] explore the possibilities.” She also expressed that “the most important thing is that we will follow international law and the relevant UN Convention ... [and] make sure that [freedom of] navigation would not be affected as a result of ... differences among countries. ... The best way to resolve conflicts of this kind is diplomacy and peaceful means.”<sup>30</sup> On October 28, 2015, she reiterated her stance that “all countries have an obligation to maintain the right to freely fly over or navigate through the disputed region” and “all parties should put forth their proposals and state their stances based on

its hope for a peaceful resolution to the South China Sea disputes.”<sup>32</sup>

Based on the evidence from the campaign trail, which is the best available at present, there is little reason to believe that the DPP administration will make any significant revisions to ROC territorial claims or the delimitation of its maritime boundaries in the South China Sea. The potential costs of such a move far outweigh the potential benefits, and the people and policymakers of Taiwan today seem to have little interest in causing any major disruptions to the domestic or regional status quo.

The extent to which the Tsai administration will continue to push for a peace initiative to ease tensions and advance Taiwan's international image as a peacemaker in the South China Sea is yet to be seen. If it decides to do so, it will first have to get over the difficult psycholog-

29 “DPP has no plan to give up Taiping sovereignty: Tsai,” Central News Agency, May 27, 2015. <http://www.chinapost.com.tw/taiwan/national/national-news/2015/05/27/437001/DPP-has.htm>

30 Tsai Ing-wen, “Tsai Ing-wen 2016: Taiwan Faces the Future,” Video of speech at the Center for Strategic and International Studies, June 3, 2015. <https://youtu.be/OWH-o6oczJE?t=35m5s>

31 “KMT, DPP presidential candidates comment on South China Sea strategy,” Central News Agency, October 28, 2015. <http://focustaiwan.tw/news/aip/201510280032.aspx>

32 Olga Daksueva and Jonathan Spangler, “Commentary: President-Elect Tsai Ing-wen and the Future of Taiwan's South China Sea Policy,” *Perspectives* 7, Taipei: South China Sea Think Tank, January 2016. <http://scstt.org/perspectives/2016/517/>

ical hurdle that the South China Sea Peace Initiative has been seen as a strategy put forth by the Ma administration and KMT. It may not be easy for the new DPP administration to find the courage to pick up where its rivals left off. This is a weakness on the part of the DPP as well as partisan democratic politics more generally. If the DPP can demonstrate that it has the resolve to carry on the South China Sea peacemaker torch and forge ahead, it will be to the benefit of both parties, the Taiwanese political system, and the other claimants and stakeholders in the South China Sea.

## Conclusion

Because of its unusual diplomatic status, Taiwan's policy options in the South China Sea are less straightforward than those of other claimants. Taipei has responded diplomatically to the arbitral proceedings in several ways, including by reiterating its sovereignty claims; raising awareness about its legal and historical perspectives, especially regarding the legal status of Itu Aba (Taiping) Island; reaffirming its commitment to abiding by international law and guaranteeing freedom of navigation and overflight; and positioning itself as a peacemaker in the South China Sea disputes, especially through the South China Sea Peace Initiative launched by the President Ma in May 2015. These diplomatic responses have come in the form of official government documents, leaders' statements, publications and videos intended for domestic and international audiences, and the implementation of policy. In terms of its security responses, the ROC has maintained a primarily defensive posture, discussed but not acted upon a potential transition of forces stationed on Itu Aba (Taiping) Island, and emphasized in rhetoric and policy that infrastructural developments on its occupied features are mostly for civilian, scientific, environmental, and humanitarian purposes. Although questions remain as to the potential for policy shifts under the new administration, which is set to assume office in May 2016, existing evidence indicates that it is unlikely that there will be any major changes in the short term, but the Tsai administration will have to figure out how to proceed with the incumbent government's peace initiative. Given the momentum that it has already gained, it will serve both parties and the ROC well if it can find the resolve to keep the initiative alive.

The ROC has emphasized in rhetoric and policy that infrastructural developments on its occupied features are mostly for civilian, scientific, environmental, and humanitarian purposes.



# Philippines v. China Arbitration Case: United States' Diplomatic and Security Responses

Raul (Pete) Pedrozo

On October 29, 2015, an Arbitral Tribunal constituted under Annex VII to the United Nations Convention on the Law of the Sea (UNCLOS) issued its Award on Jurisdiction and Admissibility in the arbitration case between the Republic of the Philippines and the People's Republic of China. After three months of deliberation, the Tribunal unanimously determined that (1) it had jurisdiction over seven of the fifteen submissions brought by the Philippines, (2) it would defer judgment on the jurisdictional question over seven of the submissions until the merits phase, and (3) the Philippines should clarify the content and narrow the scope of one of its submissions.<sup>1</sup>

The landmark decision reflects what the United States should view as a clear victory for the rule of law and the principle of peaceful settlement of disputes. It also underscores the prominence of UNCLOS as "A Constitution for the Oceans," as well as the import the Convention places on freedom of navigation. As a seafaring nation and the world's preeminent naval power, the United States should have enthusiastically supported the Tribunal's decision. Yet, U.S. reaction to the Tribunal's Award has been relatively restrained.

## Diplomatic Responses

To date, the United States has not posted an official statement regarding the Arbitral Tribunal's announcement on any government website. A State Department spokesperson made a casual reference to the decision in response to a question during the Daily Press Briefing. He simply took "note of today's unanimous decision" after reiterating the long-standing U.S. position that the South China Sea dispute "be resolved peacefully, diplomatically, and through international legal mechanisms such as arbitration."<sup>2</sup> The spokesperson additionally emphasized that, "in accordance with the terms of the Law of the Sea Convention, the decision of the tribunal will be legally binding on both the Philippines and China."<sup>3</sup> In an apparent rejoinder to China's position that the Tribunal's decision is "null and void, and has no binding effect on China,"<sup>4</sup> Assistant Secretary of State

1 The views expressed do not necessarily represent the position of the US Government or the US Department of Defense.

2 John Kirby, "Daily Press Briefing," Office of Press Relations, Bureau of Public Affairs, U.S. Department of State, October 29, 2015. <http://www.state.gov/r/pa/prs/dpb/2015/10/248963.htm>

3 John Kirby, "Daily Press Briefing," Office of Press Relations, Bureau of Public Affairs, U.S. Department of State, October 29, 2015. <http://www.state.gov/r/pa/prs/dpb/2015/10/248963.htm>

4 Ministry of Foreign Affairs of the People's Republic of China, "Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award on Jurisdiction and Admissibility of the South China Sea Arbitration by the Arbitral Tribunal Established at the Request of the Republic of the Philippines," November 30, 2015. [http://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1310474.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1310474.shtml)

Daniel Russel reiterated the following day that both parties were legally obligated to respect the final ruling of the Tribunal, regardless of the outcome.<sup>5</sup> He further added that, although the Tribunal will not address the underlying sovereignty dispute, the case “has the potential to resolve some important differences over the right and entitlements of the claimants to the South China Sea maritime space and its resources.”<sup>6</sup> Finally, although not an “official” statement, an unnamed U.S.

international arbitration could both easily be considered by some as not maintaining a neutral position. It is also possible that the U.S. downplayed the importance of the decision, given that the Tribunal’s pronouncement came on the heels of the USS *Lassen* (DDG-82) freedom of navigation (FON) assertion in the vicinity of Subi Reef on October 27, 2015. China reacted stridently to the operation, calling the *Lassen* transit a “deliberate provocation” and a threat to “China’s sovereignty and security

## As a seafaring nation and the world’s preeminent naval power, the United States should have enthusiastically supported the Tribunal’s decision. Yet, U.S. reaction to the Tribunal’s Award has been relatively restrained.

defense official was quoted as saying that the U.S. welcomed the Tribunal’s decision because “it demonstrates that sovereign claims are not necessarily indisputable and it shows that judging issues like this on the basis of international law and international practice are a viable way of ... managing territorial conflicts if not resolving them.”<sup>7</sup>

Washington’s subdued response to the Tribunal’s decision is understandable given long-standing U.S. policy on the Spratlys and the South China Sea. Since 1995, the United States has claims that it maintains a position of neutrality on the underlying territorial dispute amongst the various claimants, but this position remains controversial.<sup>8</sup> U.S. military operations and active support for

interests,”<sup>9</sup> and the Obama Administration has refused to publicly discuss the FON in order to avoid antagonizing Beijing further.<sup>10</sup> Given China’s similar reaction to the Tribunal’s decision, the Administration may believe that drawing excessive attention to the announcement at this time could be counterproductive.

Nonetheless, the United States unquestionably supports the Philippines’ decision to submit the case to arbitration. Since the proceedings were instituted in 2013, the United States has maintained its strong opposition to the “use of intimidation, coercion or force to assert a territorial claim.”<sup>11</sup> U.S. officials have also repeatedly called on the parties to settle the dispute “peacefully, diplomatically and in accordance with international

5 Mike Corder and Jim Gomez, “Arbitration panel OKs jurisdiction in South China Sea case,” Associated Press, October 29, 2015. <http://bigstory.ap.org/article/e0fa82cbe80b49bc8f5ae156f005d384/arbitration-panel-oks-jurisdiction-south-china-sea-case>

6 Daniel R. Russel, “U.S.-Asia Policy Update,” Remarks by the Assistant Secretary, Bureau of East Asian and Pacific Affairs at The Asia Society, New York City, U.S. Department of State, November 4, 2015. <http://www.state.gov/p/eap/rls/rm/2015/11/249201.htm>

7 “U.S. welcomes arbitration decision against China’s claims in South China Sea: official,” Reuters, October 29, 2015. <http://www.reuters.com/article/2015/10/30/us-philippines-china-arbitration-usa-idUSKCN-0SN2XV20151030>

8 Christine Shelly, “Daily Press Briefing,” Office of the Spokesman, U.S. Department of State, May 10, 1995. [http://dosfan.lib.uic.edu/ERC/briefing/daily\\_briefings/1995/9505/950510db.html](http://dosfan.lib.uic.edu/ERC/briefing/daily_briefings/1995/9505/950510db.html)

9 Lu Kang, “Foreign Ministry Spokesperson Lu Kang’s Regular Press Conference,” October 27, 2015. [http://www.fmprc.gov.cn/mfa\\_eng/xwfw\\_665399/s2510\\_665401/t1309625.shtml](http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1309625.shtml)

10 Helene Cooper and Jane Perlez, “White House Moves to Reassure Allies With South China Sea Patrol, but Quietly,” *The New York Times*, October 27, 2015. <http://www.nytimes.com/2015/10/28/world/asia/south-china-sea-uss-lassen-spratly-islands.html>

11 Daniel Russel, “Maritime Disputes in East Asia,” Testimony Before the House Committee on Foreign Affairs Subcommittee on Asia and the Pacific [HCFA Testimony], Washington, D.C., February 5, 2014. <http://www.state.gov/p/eap/rls/rm/2014/02/221293.htm>; Daniel Russel, “Maritime Issues in East Asia,” Testimony Before the Senate Foreign Relations Committee [SFRS Testimony], Washington, D.C., May 13, 2015. [http://www.foreign.senate.gov/imo/media/doc/051315\\_RE- VISED\\_Russel\\_Testimony.pdf](http://www.foreign.senate.gov/imo/media/doc/051315_RE- VISED_Russel_Testimony.pdf); *Asia-Pacific Maritime Security Strategy*, U.S. Department of Defense, August 2015, p. 6.



law,” such as negotiations or arbitration.<sup>12</sup>

## Security Responses

The United States has an “abiding interest in freedom of navigation and overflight and other internationally lawful uses of the sea related to those freedoms in ... the South China Sea.”<sup>13</sup> Consequently, U.S. officials have emphasized that the country would “view with serious concern any maritime claim or restriction on maritime activity in the South China Sea that was not consistent with international law, including ... [UNCLOS].”<sup>14</sup>

Rising tensions in the South China Sea have prompted the United States to openly criticize China’s “nine-dash line” as inconsistent with international law. In December 2014, a State Department study concluded that, absent further clarification from China, the nine-dash line does not accord with the international law of the sea.<sup>15</sup> Assistant Secretary Russel elaborated on these findings during his testimony before the House Committee on Foreign Affairs in August 2015, stating that “maritime claims must be derived from land features and otherwise comport with the international law of the sea” and that “claims in the South China Sea that are not derived from land features area fundamentally flawed.”<sup>16</sup> Thus, Assistant Secretary Russel concluded that “any use of the ‘nine dash line’ by China to claim maritime rights not based on claimed land features would be inconsistent with international law.”<sup>17</sup>

Since 1979, the United States has carried out a robust Freedom of Navigation (FON) Program on a global scale to demonstrate non-acquiescence to excessive maritime claims asserted by coastal States. The Program is comprehensive

Since 1979, the United States has carried out a robust Freedom of Navigation (FON) Program on a global scale to demonstrate non-acquiescence to excessive maritime claims asserted by coastal States.

12 Daniel Russel, “Maritime Disputes in East Asia,” HCFA Testimony; Daniel Russel, “Maritime Issues in East Asia,” SFRC Testimony; *Asia-Pacific Maritime Security Strategy*, U.S. Department of Defense, August 2015, p. 6.

13 Daniel Russel, “Maritime Issues in East Asia,” SFRC Testimony.

14 Christine Shelly, “Daily Press Briefing,” Office of the Spokesman, U.S. Department of State, May 10, 1995. [http://dosfan.lib.uic.edu/ERC/briefing/daily\\_briefings/1995/9505/950510db.html](http://dosfan.lib.uic.edu/ERC/briefing/daily_briefings/1995/9505/950510db.html)

15 The available evidence suggests at least three different interpretations that China might intend by the dashed-line claim. Unless China clarifies that the “9-dash line” “reflects only a claim to islands within that line and any maritime zones that are generated from those land features in accordance with the international law of the sea...,” its dashed-line claim does not accord with the international law of the sea.” See “China’s Maritime Claims in the South China Sea,” *Limits in the Seas* 143, Office of Ocean and Polar Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, U.S. Department of State, December 5, 2014. <http://www.state.gov/documents/organization/234936.pdf>

16 Daniel Russel, “Maritime Disputes in East Asia,” HCFA Testimony; *Asia-Pacific Maritime Security Strategy*, U.S. Department of Defense, August 2015, p. 6.

17 Daniel Russel, “Maritime Disputes in East Asia,” HCFA Testimony; *Asia-Pacific Maritime Security Strategy*, U.S. Department of Defense, August 2015, p. 6.

in scope in that it “encompasses all of the rights, freedoms, and lawful uses of the sea and airspace available to all nations under international law.”<sup>18</sup> The United States maintains that the Program is administered on a non-discriminatory basis, challenging excessive claims of potential adversaries and competitors, as well as allies, partners and other nations. In furtherance of the Program, Secretary of Defense Ashton Carter stated that “the United States will fly, sail, and operate wherever international law allows, as we do around the world, and the South China Sea is not and will not be an exception.”<sup>19</sup>

Two weeks later, on October 27, 2015, the USS *Lassen* (DDG 82) conducted an FON operation, sailing within 12 nautical miles (nm) of China’s reclaimed artificial formation on Subi Reef, as well as within 12 nm of reefs also claimed by the Philippines and Vietnam.<sup>20</sup> A People’s Liberation Army Navy destroyer and frigate shadowed the *Lassen* at a safe distance but did not ostensibly interfere with the transit. Several Chinese merchant ships and fishing vessels did, however, harass the *Lassen* by crossing its bow and maneuvering around the U.S. warship when it transited near the reef.<sup>21</sup>

China protested the incursion and warned the United States that it would take “all necessary measures” against further U.S. intrusions to safeguard its national sovereignty and security interests.<sup>22</sup> Despite the rhetoric, U.S. officials indicated that the Navy would conduct at least two FON operations per quarter in the South China Sea for the foreseeable future to reassure regional allies and partners, as well as exercise navigational rights and freedoms guaranteed to all states by international law.<sup>23</sup> Defense Secretary Carter and Admiral Harry Harris, Commander,

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18 Freedom of Navigation Program Fact Sheet, U.S. Department of Defense, March 2015. <http://policy.defense.gov/OUSDPoffices/FON.aspx>

19 John Kerry, “Remarks With Secretary of Defense Ash Carter, Australian Foreign Minister Julie Bishop, and Australian Defense Minister Marise Payne,” Press Availability, Revere Hotel, Boston, Massachusetts, October 13, 2015. <http://www.state.gov/secretary/remarks/2015/10/248180.htm>

20 “U.S. sees more frequent patrols in South China Sea: defense official,” Reuters, October 27, 2015. <http://news.yahoo.com/u-sees-more-frequent-patrols-south-china-sea-135406144.html>; Sam LaGrone, “U.S. South China Sea Freedom of Navigation Missions Included Passage Near Vietnamese, Philippine Claims,” USNI News, October 27, 2015. <http://news.usni.org/2015/10/27/u-s-south-china-sea-freedom-of-navigation-missions-included-passage-near-vietnamese-philippine-claims>

21 Christopher P. Cavas, “China’s ‘Little Blue Men’ Take Navy’s Place in Disputes,” *Defense News*, November 2, 2015. <http://www.defensenews.com/story/defense/naval/2015/11/02/china-lassen-destroyer-spratly-islands-south-china-sea-andrew-erickson-naval-war-college-militia-coast-guard-navy-confrontation-territorial-dispute/75070058/>

22 Keith Johnson and Dan De Luce, “China Lambasts ‘Illegal’ U.S. Operation in South China Sea,” *Foreign Policy*, October 27, 2015. <http://news.yahoo.com/china-lambasts-illegal-u-operation-143929373.html>; Lolita Baldoro, “US, China officials discuss ship’s passage by China islets,” Associated Press, Oct. 29, 2015. <http://news.yahoo.com/us-china-officials-discuss-ships-passage-china-islets-202816978.html>

23 A U.S. defense official was quoted as saying that “We’re going to come down to about twice a quarter or a little more than that. That’s the right amount to make it regular but not a constant poke in the eye. It meets the intent to regularly exercise our rights under international law and remind the Chinese and others about our views.” See Andrea Shalal and Idrees Ali, “U.S. Navy plans two or more patrols in South China Sea per quarter,” Reuters, November 3, 2015. <http://www.reuters.com/article/2015/11/03/us-southchinasea-usa-navy-idUSKCN0SR28W20151103>

U.S. Pacific Command, also informed their counterparts that the United States would continue to operate in the South China Sea consistent with international law.<sup>24</sup>

Although the U.S. FON operations were not a direct response to the Tribunal's decision, their justification lies along the same lines of reasoning as those presented by the Philippines in the arbitral proceedings. Conducting the Subi Reef FON operation around the time of the Award suggests an implicit support for the

in accordance with its constitutional processes.”<sup>26</sup> An armed attack includes “an armed attack on the metropolitan territory of either of the Parties, or on the island territories under its jurisdiction in the Pacific Ocean, its armed forces, public vessels or aircraft in the Pacific.”<sup>27</sup> Although the United States does not recognize the Philippines' claims to the Kalayaan Island Group (KIG) in the Spratly archipelago, an attack by Chinese forces against the BRP *Sierra Madre* (LT-57), a commissioned warship

## Although the U.S. FON operations were not a direct response to the Tribunal's decision, their justification lies along the same lines of reasoning as those presented by the Philippines in the arbitral proceedings.

Philippines' strategy of framing the dispute as an international legal issue. Perhaps the same could be said of recent U.S. efforts to re-strengthen its military ties with the Philippines.

U.S. concerns over China's actions in the South China Sea are particularly acute with regards to the Philippines, a treaty ally of the United States. U.S. officials have stated on more than one occasion that the United States will honor its security commitments to allies and partners in the region, including the Philippines.<sup>25</sup> Article IV of the U.S.-Philippines Mutual Defense Treaty (MDT) provides that “[e]ach Party recognizes that an armed attack in the Pacific area on either of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common dangers

of the Philippine Navy, and the Marine detachment on board the vessel at Second Thomas Shoal, could trigger U.S. defense commitments under the MDT.

### Conclusion

U.S. national and economic security is dependent on unfettered access to the world's oceans. Accordingly, the U.S. *National Strategy for Maritime Security* underscores America's “commitment to ... advancing economic well-being around the globe by facilitating commerce and abiding by the principles of freedom of the seas.”<sup>28</sup> The strategic importance of the Asia-Pacific sea lines of communication, in particular, cannot be overstated—“almost 30 percent of the world's maritime trade transits the South China Sea annually, including approximately \$1.2 trillion in ship-borne trade bound for the United States.”<sup>29</sup>

Thus, the United States clearly has an enduring na-

24 Thomas Watkins, “US to keep operating in South China Sea,” Agence France-Presse, November 3, 2015. <http://news.yahoo.com/us-keep-operating-south-china-sea-defence-chief-145134744.html>; “US to operate ‘wherever’ law allows in South China Sea,” Agence France-Presse, November 3, 2015. <http://news.yahoo.com/us-operate-wherever-international-law-allows-china-sea-050639233.html>

25 Daniel Russel, “Maritime Issues in East Asia,” SFRC Testimony; Daniel Russel, “Remarks at the Fifth Annual South China Sea Conference,” Center for Strategic and International Studies, Washington, D.C., July 21, 2015. <http://www.state.gov/p/eap/rls/rm/2015/07/245142.htm>; Tarra Quismundo, “US: We stand by our allies,” *Philippine Daily Inquirer*, April 5, 2014. <http://globalnation.inquirer.net/101672/us-we-stand-by-our-allies>

26 The Mutual Defense Treaty between the Philippines and the United States of America, 1951, 3 UST 3947, TIAS 2529, 177 UNTS 77, Art. IV.

27 The Mutual Defense Treaty between the Philippines and the United States of America, 1951, 3 UST 3947, TIAS 2529, 177 UNTS 77, Art. V.

28 *The National Strategy for Maritime Security*, The White House, September 2004, p. 25.

29 *Asia-Pacific Maritime Security Strategy*, U.S. Department of Defense, August 2015, p. 1.

tional interest in the “maintenance of peace and stability; respect for international law; unimpeded lawful commerce; and freedom of navigation and overflight in the ... South China Sea.”<sup>30</sup> The U.S. FON Program is one part of “a global policy to promote compliance with the international law of the sea.”<sup>31</sup> Given Secretary Carter’s affirmation that “the United States will fly, sail, and operate wherever international law allows,”<sup>32</sup> China should anticipate that U.S. ships and aircraft will operate in

requested relief,<sup>33</sup> based on Assistant Secretary Russel’s stated expectation that both parties will respect the final ruling of the Tribunal, China can expect the United States to take a more active role, both regionally and internationally, in encouraging Beijing to comply with the final decision.

The United States does not have a sovereignty claim in the South China Sea, nor does it explicitly endorse one claimant over another. The U.S. argues that, ulti-

## China should anticipate that U.S. ships and aircraft will operate in close proximity of its occupied features in the South China Sea for the foreseeable future and the Award on Jurisdiction and Admissibility and future outcomes of the arbitral proceedings may well embolden the United States in its efforts.

close proximity of its occupied features in the South China Sea for the foreseeable future and the Award on Jurisdiction and Admissibility and future outcomes of the arbitral proceedings may well embolden the United States in its efforts.

It is unlikely, however, that the Obama Administration will embark on an active public affairs campaign to express support for the Tribunal’s pronouncement. To do so would only harden China’s stance with regard to the arbitration. However, should the Tribunal decide in favor of the Philippines on the merits and grant the

mately, it is the responsibility of the individual claimants to resolve their disputes legally and peacefully, either through bilateral negotiations, third-party arbitration, or with the assistance of the Association of Southeast Asian Nations. All nations should understand, however, that the United States will continue to play an active role in the Asia-Pacific region to defend its national interests, reassure its friends and allies, and ensure that territorial and maritime claims are based on international law and are not advanced through aggression, coercion, or threats.

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30 Daniel Russel, “Maritime Disputes in East Asia,” HCFA Testimony.

31 Daniel Russel, “Remarks at the Fifth Annual South China Sea Conference,” Center for Strategic and International Studies, Washington, D.C., July 21, 2015. <http://www.state.gov/p/eap/rls/rm/2015/07/245142.htm>

32 John Kerry, “Remarks With Secretary of Defense Ash Carter, Australian Foreign Minister Julie Bishop, and Australian Defense Minister Marise Payne,” Press Availability, Revere Hotel, Boston, Massachusetts, October 13, 2015. <http://www.state.gov/secretary/remarks/2015/10/248180.htm>

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33 The Philippines seeks an Award that, *inter alia*, China’s claims based on its “9-dash line” are inconsistent with UNCLOS and therefore invalid, and enables the Philippines to exercise and enjoy the rights within and beyond its EEZ and continental shelf that are established in UNCLOS. See “Notification of Statement and Claim,” Notification, No. 13-0211, Department of Foreign Affairs of the Republic of the Philippines, January 22, 2013, para. 6. <http://www.philippineembassy-usa.org/uploads/pdfs/embassy/2013/2013-0122-Notification%20and%20Statement%20of%20Claim%20on%20West%20Philippine%20Sea.pdf>

## Philippines v. China Arbitration Case:

# Vietnam's Diplomatic and Security Responses

Do Viet Cuong

The South China Sea (SCS) is frequently considered a primary regional security flashpoint with the potential for escalating regional tensions. This maritime space is characterized by multiple sovereignty disputes over small and isolated islands, rocks, and reefs, together with broad, though not always well-defined, overlapping jurisdictional claims.<sup>1 2</sup> On 22 January 2013, the Philippines initiated arbitral proceedings against China under Annex VII to the 1982 United Nations Convention on the Law of the Sea (UNCLOS), with respect to its dispute with China over maritime jurisdiction in the SCS. The arbitration case stands as the most significant and most closely watched development for specialists and observers of the maritime disputes in the SCS.<sup>3</sup>

Following the Hearing on Jurisdiction and Admissibility that took place in The Hague on 7, 8 and 13 July

2015, in the “Seventh Press Release”<sup>4</sup> and the Award on Jurisdiction and Admissibility<sup>5</sup> issued on 29 October 2015, the Tribunal at the Permanent Court of Arbitration ruled that it had jurisdiction in regard to seven of the Philippines’ fifteen submissions filed by the Philippines against China. With the jurisdictional issue partially resolved, the case could move forward to evaluating the merits of the Philippines’ legal assertions in the SCS. As scheduled, the hearing on the merits of the Philippines v. China arbitration case was held from 24 November to 30 November 2015 in The Hague.<sup>6</sup>

On 31 October 2015, in response to reporters’ questions regarding Vietnam’s reaction to the Award on Jurisdiction and Admissibility and the Statement of the Chinese Ministry of Foreign Affairs on 30 October 2015, in which Beijing rejected the Award while reasserting claims to sovereignty and historical rights in the disputed area, the Vietnamese Ministry of Foreign Affairs Spokesperson Le Hai Binh stated that:

1 The author would like to thank Dr. Truong-Minh Vu, Director of the Center for International Studies (SCIS) at the University of Social Sciences and Humanities in Ho Chi Minh City, for his insightful comments on an earlier version of the chapter.

2 Clive Schofield et al., *From Disputed Waters to Seas of Opportunity: Overcoming Barriers to Maritime Cooperation in East and Southeast Asia*, (NBR Special Report No 30, 2011), p. 3; see also Nguyen Hong Thao and Ramses Amer, “A New Legal Arrangement for the South China Sea?,” *Ocean Development and International Law* 40, 2009, p. 333.

3 Jay Batongbacal, “Arbitration 101: Philippines v. China,” Asia Maritime Transparency Initiative. <http://amti.csis.org/arbitration-101-philippines-v-china/>

4 Permanent Court of Arbitration, “The Tribunal Renders Award on Jurisdiction and Admissibility; Will Hold Further Hearings,” Press Release, October 29, 2015. <http://www.pcacases.com/web/sendAttach/1503>

5 Permanent Court of Arbitration, Award on Jurisdiction and Admissibility, PCA Case No. 2013-19, October 29, 2015. <http://www.pcacases.com/web/sendAttach/1506>

6 Department of Foreign Affairs, Republic of the Philippines, “Statement on the Philippine arbitration case,” November 10, 2015. <http://www.dfa.gov.ph/newsroom/dfa-releases/7836-statement-on-the-philippine-arbitration-case>

First and foremost, I would like to reaffirm Viet Nam's indisputable sovereignty over the Hoang Sa [Paracel] and Truong Sa [Spratly] Archipelagos. As a coastal state in the East Sea [South China Sea] and a party to the 1982 UN Convention on the Law of the Sea, Viet Nam enjoys sovereign rights and jurisdiction in its exclusive economic zone and on the continental shelf established in accordance with the Convention.

Regarding the Arbitration instituted by the Philippines,

Vietnam's position on the Hoang Sa and Truong Sa Archipelagos has been reiterated on several occasions. Vietnam also claims that it possesses adequate historical evidence and legal foundation to affirm its indisputable sovereignty over these two archipelagos.

It is worth highlighting that, in the late seventies and eighties, the Ministry of Foreign Affairs of Vietnam issued several white books including historical documents to demonstrate that its sovereignty over these two archi-

**“Viet Nam continues to keep a close watch on the progress of this case and reserves its right to use all necessary and appropriate peaceful means to protect its rights and legal interests in the East Sea.”**  
— Vietnam MOFA

Viet Nam has on multiple occasions expressed its view, especially in the Statement of the Ministry of Foreign Affairs submitted to the Tribunal on 5 December 2014. Viet Nam continues to keep a close watch on the progress of this case and reserves its right to use all necessary and appropriate peaceful means to protect its rights and legal interests in the East Sea.<sup>7</sup>

From the official statement mentioned above, Vietnam's position regarding the Philippines v. China arbitration case can be understood as follows.

## **Sovereignty and Maritime Rights**

Throughout the duration of the arbitral proceedings, Vietnam has reasserted its indisputable sovereignty over the Hoang Sa (Paracel) and Truong Sa (Spratly) Archipelagos and claimed its legal rights and interests in the maritime zones established in line with UNCLOS.

pelagos had lasted for a long and uninterrupted period of time and was in accordance with international law. The white books published included “Vietnam's Sovereignty over the Hoang Sa and Truong Sa Archipelagos” in August 1979, “Hoang Sa and Truong Sa Islands, Vietnamese Territories” in December 1981, and “Hoang Sa (Paracel) and Truong Sa (Spratly) Archipelagos and International Law” in April 1988.<sup>8</sup> Importantly, the Vietnamese Constitutions of 1980 and 1992, the Resolution by Vietnam's National Assembly in 1994, and the Law on National Boundaries in 2003 also reaffirmed that the Paracel and Spratly Archipelagos were part of Vietnamese territory.<sup>9</sup>

With respect to the Submission from Vietnam to the Commission on the Limits of the Continental Shelf (CLCS), in a communication to the United Nations Division for Ocean Affairs and the Law of the Sea on 3 May

7 Ministry of Foreign Affairs of Vietnam, “Remarks by MOFA Spokesperson Le Hai Binh on Award of the Tribunal in the Arbitration instituted by the Philippines against China,” October 31, 2015. [http://www.mofa.gov.vn/en/tt\\_baochi/pbnfn/ns151104142526](http://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns151104142526)

8 Shicun Wu, *Solving Disputes for Regional Cooperation and Development in the South China Sea: A Chinese Perspective*, UK: Chandos Publishing, 2013, p. 87.

9 Nguyen Hong Thao, “Vietnam's Position on the Sovereignty over the Paracels & the Spratlys: Its Maritime Claim,” *Journal of East Asia International Law* 1, 2012, p. 192.



2011, Vietnam's Permanent Mission to the United Nations claimed that "Hoang Sa (Paracel) and Truong Sa (Spratly) archipelagos are integral parts of Vietnamese territory. Vietnam has sufficient historical evidence and legal foundation to assert her sovereignty over these two archipelagos."<sup>10</sup>

On 21 June 2012, Vietnam's National Assembly promulgated the Law of the Sea of Vietnam which came into effect from 1 January 2013. Through the enactment of this legislation, Vietnam has included the Hoang Sa and Truong Sa Archipelagos in its territory by means of a domestic law. Accordingly, Article 1 defines its scope as follows: "This Law provides for the baseline, the internal waters, the territorial sea, the contiguous zone, the exclusive economic zone, the continental shelf, islands, the Paracel and Spratly archipelagos and other archipelagos under the sovereignty, sovereign rights and jurisdiction of Vietnam."

As a consequence, when it came to the announcement released by China's National Administration of Surveying, Mapping and Geo-information (NASMG) that this organization has finished and planned to publish in late January 2013 the official "National Map of China" and the "Topographic Map of China" in a vertical format which ink the "nine-dash line", and islands, rocks and shoals

in Vietnam's Hoang Sa (Paracel) and Truong Sa (Spratly) archipelagoes, Nguyen Duy Chien, Deputy Chairman of the National Border Committee, Ministry of Foreign Affairs of Vietnam, stated that "Maps featuring wrongful information on Vietnam's sovereignty over Hoang Sa and Truong Sa archipelagoes, as well as its sovereign right and jurisdiction in the East Sea are illegal and void."<sup>11</sup>

In the late seventies and eighties, the Ministry of Foreign Affairs of Vietnam issued several white books including historical documents to demonstrate that its sovereignty over these two archipelagos had lasted for a long and uninterrupted period of time and was in accordance with international law.

## Support for UNCLOS and Peaceful Dispute Settlement

It has been Vietnam's consistent policy to support full compliance with and implementation of all provisions and procedures of UNCLOS, including the settlement of disputes concerning the interpretation and application of UNCLOS

10 "Communications dated 3 May 2011 with regard to the submission made by Viet Nam to the Commission on the Limits of the Continental Shelf," Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, May 3, 2011. [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/vnm37\\_09/vnm\\_2011\\_re\\_phlchn.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/vnm_2011_re_phlchn.pdf)

11 Ministry of Foreign Affairs of Vietnam, "Remarks by Deputy Chairman of the Viet Nam National Border Committee," January 24, 2013. [http://www.mofa.gov.vn/en/tt\\_baochi/pbnfn/ns130125230245](http://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns130125230245)



by peaceful means. On 24 January 2014, in response to questions from the media regarding Vietnam's reaction to the Philippines' decision to bring China before an Arbitral Tribunal under Article 287 and Annex VII of UNCLOS, Nguyen Duy Chien, Deputy Chairman of the National Border Committee, said that "Vietnam's consistent position is that all issues relating to the East Sea should be resolved by peaceful means on the basis of international law, especially the 1982 United Nations Convention on the Law of the Sea (UNCLOS). Vietnam believes that every country may take any peaceful mean to resolve disputes in line with the UN Charter and international law, including the UNCLOS."<sup>12</sup> This position was reiterated by Vietnamese Ministry of Foreign Affairs Spokesperson Le Hai Binh regarding Vietnam's reaction to the Award on Jurisdiction and Admissibility issued on 31 October 2015. Accordingly, he emphasized that "Vietnam wishes the Tribunal will interpret and apply relevant provisions of the Convention in this case with a view to making an impartial and objective decision."<sup>13</sup>

With purpose of assessing Vietnam's consistent policy of settling maritime disputes and disagreements through peaceful means, it is worth recalling a controversial incident that took place in early May 2014. In the incident, China placed its deep sea drilling rig, Haiyang Shiyou 981 (HD-981), at 15°29'58" north latitude and 111°12'06" east longitude, escorted by approximately 140 Chinese ships, including military ships of various types (missile frigates, fast attack missile crafts, anti-submarine crafts, landing crafts and jet fighters). In response, Vietnamese officials declared that China had illegally installed the HD-981 oil rig within Vietnam's exclusive economic zone and continental shelf, where, according to the UNCLOS, Vietnam has exclusive rights to all mineral and hydrocarbon resources.<sup>14</sup> China's Ministry of Foreign Affairs responded to Vietnam's complaints by insisting that the rig was placed completely within the

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12 Ministry of Foreign Affairs of Vietnam, "Remarks by Deputy Chairman of the Viet Nam National Border Committee," January 24, 2013. [http://www.mofa.gov.vn/en/tt\\_baochi/pbnfn/ns130125230245](http://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns130125230245)

13 Ministry of Foreign Affairs of Vietnam, "Remarks by MOFA Spokesperson Le Hai Binh on Award of the Tribunal in the Arbitration instituted by the Philippines against China," October 31, 2015. [http://www.mofa.gov.vn/en/tt\\_baochi/pbnfn/ns151104142526](http://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns151104142526)

14 Ministry of Foreign Affairs of Vietnam, "Contents of the International Press Conference on developments in the East Sea," June 5, 2014. [http://www.mofa.gov.vn/en/tt\\_baochi/tcbc/ns140609024213](http://www.mofa.gov.vn/en/tt_baochi/tcbc/ns140609024213)

waters of China's Xisha (Parcel) Islands.<sup>15</sup> This presumably refers to the 200 nautical mile exclusive economic zone and continental shelf that those islands, which are occupied by China but claimed by Vietnam, would generate under the UNCLOS if they met certain requirements.<sup>16</sup> The situation escalated dramatically when Vietnam accused Chinese vessels of turning high-powered water cannons on the Vietnamese ships, and eventually ramming several vessels. The incident reportedly

rum in Singapore, Deputy Defense Minister of Vietnam Nguyen Chi Vinh reiterated the Prime Minister's statement that "They [China] have asked us several times not to bring the case to international court. Our response was that it's up to China's activities and behavior; if they continue to push us, we have no choice. This [legal] option is also in accordance with international law."<sup>19</sup>

From another perspective, on 23 June 2014, a Host Country Agreement and Letters of Cooperation between

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left six Vietnamese injured and several Vietnamese ships damaged.<sup>17</sup> This event plunged diplomatic relations between the two countries to an all-time low.

Shortly thereafter, Vietnam's Prime Minister Nguyen Tan Dung made world headlines when he stated that "Like all countries, Vietnam was considering various defense options, including legal action in accordance with international law."<sup>18</sup> In early June 2014, speaking on the sidelines of the annual Shangri-La Dialogue security fo-

rum in Singapore, Deputy Defense Minister of Vietnam Nguyen Chi Vinh reiterated the Prime Minister's statement that "They [China] have asked us several times not to bring the case to international court. Our response was that it's up to China's activities and behavior; if they continue to push us, we have no choice. This [legal] option is also in accordance with international law."<sup>19</sup>

From another perspective, on 23 June 2014, a Host Country Agreement and Letters of Cooperation between the Socialist Republic of Viet Nam and the Permanent Court of Arbitration (PCA) was signed and exchanged. The Agreement, which took effect immediately upon signing, would facilitate the PCA's work in conducting arbitral proceedings within the country.<sup>20</sup> In turn, the signing of these two documents will help Vietnam get access to arbitration procedures, enhance the respect of international law and contribute to dealing with regional conflicts. It should be also noted that Vietnam acceded to the 1899 Convention for the Pacific Settlement of International Disputes on 29 December 2011 and the 1907 Convention for the Pacific Settlement of International Disputes on 27 February 2012.

In short, it can be seen that Vietnam expressed support for the UNCLOS States Parties which seek to settle their disputes concerning the interpretation and appli-

15 Ministry of Foreign Affairs of the People's Republic of China, "The Operation of the HYSY 981 Drilling Rig: Vietnam's Provocation and China's Position," June 8, 2014. [http://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1163264.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1163264.shtml)

16 Ernest Z. Bower and Gregory B. Poling, "China – Vietnam Tensions High over Drilling Rig in Disputed Waters," Center for Strategic & International Studies (CSIS), May 7, 2014. <http://csis.org/publication/critical-questions-china-vietnam-tensions-high-over-drilling-rig-disputed-waters>

17 Ernest Z. Bower and Gregory B. Poling, "China – Vietnam Tensions High over Drilling Rig in Disputed Waters," Center for Strategic & International Studies (CSIS), May 7, 2014; see also Nguyen Tan Dung, "PM Dung's Full Remarks at 24th ASEAN Summit," May 12, 2014. <http://thutuong.chinhphu.vn:2012/Home/PM-Dungs-Full-Remarks-at-24th-ASEAN-Summit/20145/2431.vgp>

18 Embassy of the Socialist Republic of Vietnam in the United States of America, "PM Nguyen Tan Dung in Manila: Viet Nam to defend sovereignty," May 22, 2014. <http://vietnamembassy-usa.org/news/2014/05/pm-nguyen-tan-dung-manila-vietnam-defend-sovereignty>

19 Kristine Kwok, "China wants to avoid court over maritime disputes, says Vietnam official," *South China Morning Post*, June 2, 2014. <http://www.scmp.com/news/china/article/1523491/china-wants-avoid-court-over-maritime-disputes-says-vietnam-official?page=all>

20 Permanent Court of Arbitration, "Permanent Court of Arbitration enters into Host Country Agreement with Vietnam," June 23, 2014. [http://www.pca-cpa.org/shownews38c8.html?ac=view&pag\\_id=1261&news\\_id=437](http://www.pca-cpa.org/shownews38c8.html?ac=view&pag_id=1261&news_id=437)

cation of the Convention through the procedures provided for in Part XV of the Convention.

## Preparations for Intervention

Taking note of Article 3 and Article 13 of Annex VII to the UNCLOS, the government of Vietnam has considered the possibility of intervention in the Philippines v. China arbitration case as a third party. Therefore, Vietnam has requested the Tribunal pay due regard to Vietnam's rights and legal interests in the SCS. As early as April 2014, Vietnam informed the Tribunal that it had been "following the proceedings closely" and requested copies of the pleadings to help it determine whether "Vietnam's legal interests and rights may be affected." After seeking the views of the Parties, the Tribunal granted Vietnam access to the Memorial.<sup>21</sup>

On 7 December 2014, Vietnam delivered to Tribunal a "Statement of the Ministry of Foreign Affairs of Vietnam." The Statement requested the Tribunal have due regard to the position of Vietnam "in order to protect its rights and interests of a legal nature in the SCS ... which may be affected in this arbitration." With respect to jurisdiction, it stated that "Vietnam has no doubt that the Tribunal has jurisdiction in these proceedings" and expected that the Tribunal's decision could contribute to "clarifying the legal positions of the parties in this case and interested third parties." Another important point concerning the merits of the claims should be emphasized that "Vietnam resolutely protests and rejects any claim ... based on the nine-dash line ... [which] has no legal, historical or factual basis and is therefore null and

void."<sup>22</sup> This is to say, Vietnam supports the Philippines' arguments against the legality of China's nine-dash line claim.

It should be taken into consideration that the aforementioned "Statement of the Ministry of Foreign Affairs of Vietnam" is not a "statement of claim" as released by the Philippines on 22 January 2013, but a "statement of interest" submitted to the Tribunal in the Philippines v. China arbitration case. By lodging a submission with the Tribunal at the Permanent Court of Arbitration, as opposed to directly joining the Philippines as co-plaintiff in taking legal action against China in its case, Vietnam has found a way to make its views heard but not alienate China.

However, it is also essential to reiterate the remarks on 31 October 2015 by Vietnamese Ministry of Foreign Affairs Spokesperson Le Hai Binh on Award of the Tribunal in the Arbitration instituted by the Philippines against China, that "Vietnam continues to keep a close watch on the progress of this case and reserves its right to use all necessary and appropriate peaceful means to protect its rights and legal interests in the East Sea."

## Conclusion

As a country with 3,260 km of coastline, Vietnam's interests in the sea are significant. Therefore, with respect to the Philippines v. China arbitration case, Vietnam has used legal instruments and leaders' statements to express cautious support for the Award on Jurisdiction and Admissibility and the arbitral proceedings more broadly. Vietnam has also used the opportunity to reaffirm its claims to sovereignty over the internal waters, territorial sea, and sovereign rights and jurisdiction over the contiguous zone, exclusive economic zone and con-

21 Permanent Court of Arbitration, Award on Jurisdiction and Admissibility, PCA Case No. 2013-19, October 29, 2015, para. 183. <http://www.pcacases.com/web/sendAttach/1506>

22 Permanent Court of Arbitration, Award on Jurisdiction and Admissibility, PCA Case No. 2013-19, October 29, 2015, paras. 183-184. <http://www.pcacases.com/web/sendAttach/1506>

tinental shelf; and calls on other countries to respect the aforementioned rights of Vietnam. Furthermore, Vietnam maintains that it has full historical evidence and the legal foundation to proclaim its sovereignty over the Hoang Sa (Paracel) and Truong Sa (Spratly) Archipelagos. That said, it has consistently been Vietnam's position to fully reject China's claim over the Hoang Sa and Truong Sa Archipelagos and the adjacent waters, as well as China's claim of historic rights to the waters, seabed and subsoil within the nine-dash line unilaterally claimed by China.

In addition, Vietnam has responded to the award and proceedings by reiterating its firm support for the principle of respect for international law, including the UNCLOS, which is viewed as a primary means for settling and dealing with insular and maritime disputes through peaceful means. With regard to the arbitration case,

## Vietnam has stated its support for the Tribunal's jurisdiction over the case and its expectation of an impartial and objective decision.

Vietnam has stated its support for the Tribunal's jurisdiction over the case and its expectation of an impartial and objective decision. Equally important, in order to protect its legal rights and interests in the SCS which may be affected in the arbitration case, Vietnam has expressed its position to the Tribunal regarding this case, requested the Tribunal pay due attention to the legal rights and interests of Vietnam, and effectively reserved the right to intervene in the case should the need arise. Concerning this point, the Philippine Foreign Ministry has stated that "the Vietnamese position is helpful in terms of promoting the rule of law and in finding peaceful and nonviolent solutions to the South China Sea claims based on international law. ... This promotes peace and stability in our region."<sup>23</sup>

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23 "Vietnam's sea dispute arbitration case vs China promotes peace: Manila," Reuters, December 13, 2014. <http://www.reuters.com/article/2014/12/14/us-philippines-south-chinasea-idUSKBN0JS03O20141214>



## Part IV:

# Conclusion





Philippines v. China Arbitration Case:

# Lawfare and its Implications for Regional Security

Fu-Kuo Liu

Ever since the Philippines submitted its arbitration case in January 2013, the region has been fraught with the anxiety that the United States has joined forces with the Philippines in fighting this legal battle against China. Tension in the region has since risen. On December 5, 2014, the US government issued a document in its Limits in the Seas entitled “China’s Maritime Claims in the South China Sea”. The report questioned legality of

ed by the Republic of the Philippines” to illustrate critical evidence of historical claims for the nine-dash line. Although China emphasized that the position paper did not represent its involvement in the arbitral proceedings, the Tribunal took the paper seriously and rules that it constituted a plea from the defendant’s perspective.

On December 12, 2014, Vietnam filed a statement with the Arbitral Tribunal. The Vietnamese statement

The region has been fraught with the anxiety that the United States has joined forces with the Philippines in fighting this legal battle against China.

China’s position in the nine dashed line claim and has been seen as the the Department of State taking an official stance on key issues related to the arbitration case. Politically, it was considered to pre-empt China’s formal response to the request by the Tribunal to make a submission by the end of December. Two days later, China’s Foreign Ministry issued its “Position Paper on the Matter of Jurisdiction in the South China Sea Arbitration Initiat-

highlighted three critical points: (1) supporting the Philippines on the tribunal’s jurisdiction over the case; (2) requesting the tribunal to give due regard to Vietnam’s legal rights and interests; and (3) rejecting the legality of the Chinese nine-dash line. Submitted in the aftermath of the clash over the HD-981 oil rig in the Paracel Islands in May 2014, the statement summarizes Vietnam’s negative perceptions towards China’s actions in the South

China Sea. Vietnam has since been even more vocal in supporting the Philippines's position in the arbitration case and strongly opposing China's claim.

What is more important to learn from this arbitration case, beyond its legal aspects, is that it has profound impacts on regional politics and security. The purpose of arbitration stipulated by UNCLOS is to seek a possible settlement beyond any legal disputes with the parties involved. However, when arbitration is utilized by parties concerned as a means of practicing lawfare against one another, it stirs up further tensions rather than easing them. The arbitral proceedings parallel with the US

the South China Sea, in late 2013, China began large-scale land reclamation efforts in seven reefs that it occupies in the Spratly Islands. China feels its rights and interests are threatened by the case and the shifting alliances in the region. China has further improved its law enforcement and energy exploration activities in the disputed areas of the South China Sea. As the arbitral proceedings develop, China is increasingly blamed for culpability. In particular, when critics in the region take only the views of UNCLOS and deny the rest of the legal bases that China has for its claims, no traditional legal explanations are seriously considered. It gives the im-

## The process of lawfare initiated by the Philippines has so far created greater divisions in the region—far from facilitating a path towards peaceful settlement.

mantra of its rebalance to Asia. In this context, it may seem like a US client state's legal battle against China in the South China Sea instead of a well-intended effort to lead to a dispute settlement and improve relations, as the Philippines has suggested. As the Tribunal proceeds, the arbitration has been completely overshadowed by the US-China strategic competition in the South China Sea. Furthermore, through the arbitral proceedings, the Philippines has stirred up nationalist sentiment against China, influenced ASEAN members, and triggered a strong desire for a bilateral alliance with Vietnam. As a result, Vietnam and the Philippines signed the Joint Statement on the Establishment of a Strategic Partnership at the sidelines of the Asia-Pacific Economic Cooperation meeting in Manila.<sup>1</sup> The joint strategic partnership focuses on defense and maritime security.

In order to strengthen its claims for sovereignty in

pression that the Arbitral Tribunal has been used as a tool of lawfare to reshape the disputes to the detriment of China and perhaps Taiwan.

The impacts of the arbitration and the first award should be noted. First, the process of lawfare initiated by the Philippines and, arguably, the United States has so far created greater divisions in the region—far from facilitating a path towards peaceful settlement. Whatever reasons the Philippines has given for filing the arbitration case, the effect is that it has kept the region apart and created a grouping that challenges China's legal claims in the South China Sea. As the first award issued by the Tribunal on October 29, 2015, highlighted its jurisdiction over seven issues submitted by the Philippines, the outcome implies that the key points of China's Position Paper have been completely rebuffed and the legal bases for China's claims are at risk. Backed by historical evidence, China and Taiwan strongly assert that the legality of the nine-dash line is based on historic facts and traditional international law that predate UNCLOS, and their rights should not be neglected or denied. As such,

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1 "President Aquino's Statement during the Joint Press Conference with the President of Vietnam," Delivered at Malacanan Palace, December 17, 2015. <http://www.gov.ph/2015/11/17/president-aquino-press-con-vietnam-president/>

both of them have announced their non-participation in the proceedings, and non-recognition and non-acceptance of the final award.<sup>2</sup> Diplomatically, China stands almost alone in its defense as the Philippines has attempted to rally support for its South China Sea arbitration strategy.

Second, as China and Taiwan are in the early process of cross-strait rapprochement, the award by the Tribunal may have alerted them to their common responsibility for protecting sovereignty in the South China Sea. Although Taipei and Beijing could not formally cooperate in responding to the arbitral proceedings, their responses happen to be very similar. The nine-dash line was drawn by the Nationalist Government (ROC) in 1947 and inherited by the PRC. The Tribunal's award surprisingly accelerates this common urgency and has drawn attention to what is perceived as an attack on their common interests in the South China Sea. Even though Taiwan and China have not coordinated directly on South China Sea issues through the existing cross-strait mechanisms, they have managed to strengthen their respective bases. Under the KMT ruling in Taiwan, Beijing and Taiwan's South China Sea policies have gradually developed a parallel course.

Third, the first award has also unexpectedly alerted Taiwan of the need for it to be more proactive in the South China Sea. As Taiwan suffers from diplomatic isolation, its hands-off policy in the South China Sea has taken its toll. Taiwan, as on most international issues, has been marginalized. Although Taiwan has historical evidence that it is the earliest and longest-standing claimant in the South China Sea, its policy mistakes have caused its significance to shrink over the last two decades. In its legal campaign, the Philippines has tried to challenge the legal status of Itu Aba (Taiping) Island as an entitled "island", suggesting that it be regarded as a "rock" in the arbitration proceedings. As a result, the Taiwanese government has been pushed by public opinion to react strongly. In late 2013, a legal proposal of 3.3 billion New Taiwan Dollars was approved by the Legislative Yuan (Parliament) for construction of a wharf on the island. On October 31, 2015, Taiwan's Ministry of Foreign Affairs protest-

The first award has unexpectedly alerted Taiwan of the need for it to be more proactive in the South China Sea.

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2 "ROC government reiterates its position on South China Sea issues," Public Diplomacy Coordination Council, Ministry of Foreign Affairs, October 31, 2015. [http://www.mofa.gov.tw/en/News\\_Content.aspx?n=1EADDCFD4C6EC567&sms=5B9044CF1188EE23&s=F5170FE043DADE98](http://www.mofa.gov.tw/en/News_Content.aspx?n=1EADDCFD4C6EC567&sms=5B9044CF1188EE23&s=F5170FE043DADE98)

ed against the Arbitral Tribunal for not giving Taiwan a proper chance to respond to legal queries in the arbitration case. Accordingly, Taiwan has indicated that it will not recognize and not accept any ruling by the Tribunal.

Taiwan's unprecedented response to the first award by accelerating its civilian and defensive infrastructural development efforts and improving its public diplomacy reflects the profound impact of the arbitration on the region. From Taipei's perspective, the arbitral proceedings represent a push for a change of the existing power structure in the South China

If the Philippines gains the upper hand in the case, it will not guarantee a constructive outcome for all parties concerned on the path towards dispute settlement. Rather, it could increasingly complicate the situation and make resolution seem less feasible than ever.

Sea. It understands that claimants are taking advantage of international legal mechanisms to directly challenge China's claims and, implicitly, also Taiwan's. It worries that the arbitration, in effect, could exacerbate tensions in the relations between China and the Philippines, the United States and Japan. Through the arbitration, the US and the Philippines are hoping to deny the legality of China's nine-dash line and rewrite the rules of diplomatic interaction in the region in one fell swoop. However, the real challenge will start after the final award is issued by the Tribunal in 2016. Even if the Philippines gains the upper hand in the case, it will not guarantee a constructive outcome for all parties concerned on the path towards dispute settlement. Rather, it could increasingly complicate the situation and make resolution seem less feasible than ever.

Philippines v. China Arbitration Case:

## Lessons for the South China Sea: Areas of Compatibility, Incompatibility, and Ambiguity

Jonathan Spangler

Since 2013, the Philippines v. China arbitration case has been a key focal point of the South China Sea maritime territorial disputes, and the turbulence created by the arbitral proceedings has sent ripples far beyond the waters of the region. The case itself has significant implications for countries' sovereignty claims, the delimitation of maritime boundaries, and the activities that take place in maritime spaces. Perhaps even more significant, however, are the responses that the case has generated as state and non-state actors around the world

proceedings of the parties directly involved. The proceedings have provided an impetus for many actors to further elaborate their legal perspectives on the case itself, international maritime law, and the South China Sea disputes more broadly. As a result, areas of agreement, disagreement, and ambiguity among their views have become increasingly apparent. In Part III, the chapters have discussed the international diplomatic and security responses to the arbitral proceedings. Broadly speaking, these responses have come in one of

**The turbulence created by the arbitral proceedings has sent ripples far beyond the waters of the region.**

have become increasingly involved in and vocal about the issue. These responses, including the new dialogues they open, the diplomatic relations they strengthen and weaken, and the positive and negative feelings attached to them, have significant implications for the political relations between claimants and non-claimant stakeholders involved in the disputes and the future of regional stability.

The chapters in Part II of this report have offered an in-depth look at the legal perspectives on the arbitral

three forms: political rhetoric, official documents, and policy implementation. In political rhetoric and official documents, many actors have taken advantage of the arbitral proceedings to reassert or elaborate upon their claims to sovereignty, rights to the use of maritime territory, interpretations of international law, perspectives on the definitions of sea features, and preferences regarding negotiation procedures for dispute settlement. In the policies implemented, many have strengthened or otherwise adjusted their diplomatic relations with

other countries, implemented defense reforms, and increased the development of civilian and military infrastructure.

Taken together, the chapters in this report offer insights into (1) the *compatibilities* between different countries' perspectives, which may provide foundations for cooperation and dialogue; (2) the inherent *incompatibilities* in their differing views, which have led to a variety of diplomatic and security responses and increased friction in bilateral relations; and (3) *areas of ambiguity*, which have the potential to serve as either a space for cooperation or a source of conflict, depending on the

## Far-reaching Implications

The Philippines' decision, after many years of unsuccessful bilateral negotiations, to initiate international arbitral proceedings against China represents a major event in the South China Sea disputes. There is broad agreement among all claimants and many non-claimant stakeholders that its engagement in lawfare—that is, the use of international legal mechanisms as a tactic for advancing one's interests in bilateral or multilateral disputes or conflicts—has potentially far-reaching implications. Many countries have been following the arbitral

The findings of the report give credence to the notion that there is space for constructive engagement between parties to the dispute. In the coming months and years, the more they are able to clearly recognize the areas of compatibility, incompatibility, and ambiguity between them, the more likely they will be to find a way forward in the disputes.

context. The findings of the report give credence to the notion that there is space for constructive engagement between parties to the dispute. In the coming months and years, the more they are able to clearly recognize the areas of compatibility, incompatibility, and ambiguity between them, the more likely they will be to find a way forward in the disputes. This concluding chapter touches upon some of the key issues raised by the arbitration case and in the South China Sea disputes more broadly, noting the extent of agreement, disagreement, or ambiguity between countries regarding each of the issues. Based on the findings, it then offers support for the idea that the principles of “easy issues first, hard issues later” and “economics first, politics later,” as embodied, albeit implicitly, in some existing dispute settlement efforts, may provide the best way forward in the disputes.

proceedings closely, as evident in the observer delegations present at the hearings, discussions between and statements by high-ranking political officials, continued relevance of the disputes as a major theme at international fora, and continuous media coverage of the issue. It has been widely acknowledged that the Tribunal's decisions in the Philippines v. China arbitration case have the potential to affect not only the basic issues contained in the Philippines' submissions but also the delimitation of maritime boundaries and the application of UNCLOS provisions around the world. Apart from China and the Philippines, whose interests are both directly affected by the case, Australia, Indonesia, Malaysia, Vietnam, Taiwan, the United States, the Tribunal itself, and many other actors, have recognized that the arbitral proceedings and relevant decisions may have far-reaching implications. Whether or not the effects will be positive or negative for each of the stakeholders has

yet to be determined.

## Existence of the Dispute

All relevant stakeholders have acknowledged that a dispute exists in the South China Sea. Agreement on that basic fact is a crucial first step on the road towards constructive negotiations and dispute settlement. Although claimants disagree on the means of resolving the dispute, assert that their sovereignty is indisputable, and do not necessarily recognize others' claims, it is significant that none have chosen to deny the existence of the dispute itself. Beijing, perhaps to the benefit of all involved parties, is clear in its acknowledgement that disputes exist in the region. It also acknowledges that these disputes relate to sovereignty over sea features and maritime territory, legal rights that states are entitled to given sov-

erignty over such features, and the interpretation of international maritime law. This is in contrast to territorial disputes elsewhere in the world, in which one party has refused to recognize the existence of any dispute. Far from resolving the dispute, such an approach prevents meaningful co-operation on the issue and

increases mutual distrust, which may even spill over and negatively impact relations on other issues. In contrast, all of the claimants and major stakeholders have acknowledged the existence of the South China Sea maritime territorial disputes in many different fora over the years. As such, negotiations, however tense, can be held on relevant issues.

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## Rule of International Law

Claimants and stakeholders have also achieved an implicit consensus regarding the importance of the rule of international law. This includes both China and Taiwan, who have opposed the Philippines' arbitration case; Malaysia, who has pushed for dispute settlement through ASEAN mechanisms; and Vietnam, who has expressed its anxiety that its interests might be affected by the Tribunal's decisions but has nevertheless reserved the right to intervene; and Indonesia, who has raised the possibility of it initiating its own arbitral proceedings should its claims be affected.

Despite agreement on the importance of international law and arbitration, there remains wariness about committing to legally binding agreements and



mechanisms for enforcement. The reluctance to make such international legal commitments has been common throughout history and is particularly evident in the relations between countries in East and Southeast Asia. International law and bilateral and multilateral agreements are all ripe with ambiguities, which, on the one hand, has the effect of making them feasible and, on the other hand, weakens them, often to the extent that their intended effects are trivial and can be effectively disregarded by allowing for differing interpretations. Furthermore, while there is consensus regarding the value of international law, there is disagreement about where international law applies because the sovereignty issues in the region have yet to be resolved.

### **Freedom of Navigation and Overflight**

There is also agreement, at least in theory and political rhetoric, that the principles of freedom of navigation and overflight in accordance with international law are universally shared. In official statements, claimants have sought to remind the international community that they have not interfered with freedom of navigation or overflight in the past and expressed their commitment to abiding by the principles in the future.

However, compatibility in perspectives on freedom of navigation and overflight ends there. Disagreement remains regarding two key issues: the types of vessels and aircraft and the activities that are appropriate under the two principles and, because of unresolved sovereignty issues, the geographical locations in which such activities can freely take place. Because differences in interpretations and implementation of freedom of navigation and overflight have been the source of incidents and clashes at sea, there is an urgent need for all stakeholders to harmonize their perspectives in order to avoid future incidents that may further damage bilateral relations and negatively impact regional stability.

### **Resource Exploration and Exploitation**

One of the primary reasons that the South China Sea has attracted such a high level of attention in recent years is the increasing recognition of the vast amounts of available resources in the area. These include living

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resources, such as fish and other seafood, and non-living resources, including oil and liquified natural gas. In essence, there are only three possibilities for the exploration and exploitation of these resources: (1) refraining from such activities, (2) engaging in them unilaterally, with or without the consent of other actors, or (3) participating in joint exploration and exploitation efforts with other claimants. All of these possibilities have been suggested at one time or another, and each has its advantages and disadvantages. Because the unilateral development of resources in disputed areas has the inevitable effect of heightening tensions and triggering maritime clashes, the possibility of joint development has been

pass. In fact, all claimants have been consistent in their support for peaceful dispute settlement. Though often overlooked, these explicit affirmations, as contrived as they may seem, demonstrate that there is a consensus among all involved parties about the existence and significance of shared norms that govern state behavior in the region. This area of compatibility in the perspectives of claimants has served them well in the past and will continue to serve as a fundamental building block for future agreements.

That said, evidence from the region shows that claimants can profess their support for peaceful dispute settlement while simultaneously strengthening their

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explored by various claimants. However, because of the unresolved sovereignty disputes, involved parties will have to find ways to proceed without explicitly affecting issues of sovereignty. When such agreements have proved successful in the past, they have allowed for a certain level of diplomatic ambiguity in their texts in order to skirt the sensitive issues and focus on those that are conducive to cooperation.

### **Peaceful Dispute Settlement and Non-militarization**

The East Asian region has been widely recognized for its virtual lack of conflict over the past three and a half decades. This “East Asian peace” has been the subject of intense scholarly inquiry, and a multitude of explanations have been forwarded in the academic literature. Increasing tensions in the South China Sea have served as the inspiration for some doom-and-gloom forecasts for regional stability, but none of them have yet come to

own military capabilities. This is justified by asserting that such capabilities are defensive in nature, essential for ensuring national security, and merely responses to the military buildup of other claimants. These developments are also often downplayed as being secondary in importance to the ongoing development of civilian infrastructure.

### **Unilateral Actions, Provocations, and the Status Quo**

Claimants and stakeholders have also expressed their opposition to so-called “provocations” and unilateral actions that alter the status quo or increase tensions in the region. However, given the ambiguity in usage of the term “status quo” and the lack of consensus about what constitutes a provocation, a unilateral action, or aggressive behavior, there is a long way to go before the basic agreement on the issue in theory can be transformed into something meaningful in practice. Militarization, as

noted above, as well as land reclamation, which has been a major source of tensions, can both be easily argued to be for peaceful or defensive purposes or not a unilateral alteration of the status quo because they constitute responses to the actions of other claimants. For the shared opposition to aggressive provocations and unilateral alterations of the status quo to have any practical meaning, involved parties will need to begin what will likely be a tedious process of negotiations on the definitions of such terms.

## Management of Maritime Incidents

Another issue that countries have suggested that there is an urgent need to address is the standard procedure for communicating with one another in the event of unexpected military confrontations or other incidents at sea. However, despite the mutual understanding that this is a key issue to be tackled collectively, limited progress has been made. Given that the management of maritime incidents is less politically sensitive than other issues, such as those involving sovereignty or the delimitation of maritime boundaries, there are substantial opportunities here for further bilateral and multilateral negotiations.

Claimants and stakeholders have voiced their preferences for a diversity of negotiation procedures.

## Negotiation Procedures

Lack of consensus on the appropriate negotiation procedures for managing disputes has been one of the key obstacles hindering progress towards dispute settlement. As the chapters in this report reveal, claimants and stakeholders have voiced their preferences for a diversity of negotiation procedures. Needless to say, the Philippines has gone all in with its lawfare approach, concluding that international arbitration was the only way to make progress towards a resolution to the disputes. China has been of the view that territorial disputes should be resolved through bilateral negotiations between the parties directly involved, and China is by no means alone in this regard. Australia has also voiced support for bilateral negotiations regarding sovereignty disputes over sea features and has been hesitant to push for dispute settlement through international arbitration. Malaysia, as the ASEAN Chair in 2015, pushed for multilateral negotiations through established ASEAN mechanisms. Citing its neutrality in the disputes, Indonesia has volunteered to act as a facilitator in multilateral dialogues among claimants. Taiwan has also positioned itself as a peacemaker in the disputes and expressed its support for shelving the disputes in order to establish multilateral mechanisms for cooperation. These findings call into question the notion that two camps had formed on the issues—one

that favors international dialogue and arbitration for dispute settlement and another that has a preference for bilateral negotiations. In terms of preferred negotiation procedures, the reality is that many possibilities exist and claimants are unlikely to reach a consensus on the issue. Thus, it may be the case that the only option that could gain traction in the region is one that allows for multiple approaches to coexist.

## **Basis for Sovereignty Claims**

The basis for sovereignty claims is another area of contention between countries. While some claimants have asserted that historical rights are grounds for sovereignty claims, others have argued that physical geography or continuous occupation and administration in accordance with international law are the only means of demonstrating sovereignty over a given territorial claim. These perspectives are inherently incompatible with one another. Although the Tribunal's decisions may address the issue, it seems unlikely that claimants would willingly accept any loss of territory that they claim to have indisputable sovereignty over.

## **Interpretations of International Law**

One of the key functions of international arbitral tribunals is to interpret and clarify the ambiguities present in international law. Indeed, this is one of the main requests that the Philippines has made in its arbitration case. In the deliberations leading up to its Award on Jurisdiction and Admissibility, the Tribunal considered, one by one, a series of at least six issues that were relevant to its jurisdiction in and the admissibility of the case before deciding that it could proceed with the case. In considering the Philippines' fifteen submissions, it came to several different conclusions. Thus, there was and still is inherent disagreement between the views of the Tribunal, the Philippines, and China, and other claimants and stakeholders have also offered different perspectives on these issues.

Among these, claimants have yet to engage in consultations or reach agreement on the definitions of sea features—that is, what constitutes an “island,” “rock,” or otherwise under the provisions of UNCLOS. Perspectives are diverse and, like the issue of the basis for sovereignty claims, incompatible. As with the previous issue, it would not be difficult for the Tribunal to issue in its next award some clarification regarding the classification of sea features in the South China Sea. Although claimants

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can simply disregard such decisions and provide several possible justifications for doing so, the more objective nature of the issue means that they may have a harder time doing so. On the flipside, the relative objectivity of the dispute over definitions may make it easier for claimants to accept a decision not in their favor if they understood that the diplomatic benefits outweighed the loss of sovereign rights. There are precedents for this in past international arbitration cases.

## Territorial Claims

The thorniest issue of all, however, is that of territorial sovereignty claims. It is for this reason that China excluded arbitration on issues of territorial sovereignty upon its accession to UNCLOS. It is also for this reason that the Philippines and its legal team have painstakingly avoided touching upon such issues in the evidence presented in the arbitral proceedings. Territorial claims are the area of greatest incompatibility between countries, and they are also the issue that claimants are least likely to make concessions on. Moreover, the incompatibility in territorial claims has broader implications as it directly contributes to disagreement about where international and domestic laws apply, the permissible locations for freedom of navigation and overflight, and the rights to the use of maritime territory for resource exploration and exploitation.

## Looking Forward

Media coverage of the South China Sea often gives the impression that the region is hopelessly embroiled in interstate conflict. Without a doubt, there are areas of serious disagreement between involved parties. For most readers, the confirmation that there is no consensus on South China Sea issues will come as no surprise. However, this report also reveals that there are major

issues upon which claimants agree, as are there important areas of ambiguity. Based on evidence presented in the chapters of this report, this conclusion has argued that there are (1) compatibilities in the perspectives of involved parties that may provide foundations for cooperation and dialogue; (2) incompatibilities that have prompted a variety of diplomatic and security responses and increased regional tensions; and (3) areas of ambiguity that have the potential to serve as either a space for cooperation or a source of conflict, depending on the context.

To the benefit of all involved, there are many potential areas of compatibility in perspectives on the South China Sea. These include a consensus that the

**Territorial claims are the area of greatest incompatibility between countries, and they are also the issue that claimants are least likely to make concessions on.**

arbitral proceedings may have far-reaching implications, acknowledgement that there is a dispute in the region, agreement on the importance of international law and arbitration in appropriate contexts, common support for freedom of navigation and overflight in theory if not in practice, mutual understanding that there are vast amounts of living and non-living resources available in the area, agreement on the importance of peaceful dispute settlement, a consensus

that provocations and unilateral actions altering the status quo must be minimized in order to ensure continued regional stability, and a recognition of the urgent need for agreement on standard procedures for the management of maritime incidents.

On the other hand, there are also issues where claimants' views are inherently incompatible. These include preferences about negotiation procedures for dispute settlement, the basis for sovereignty claims, interpretations of international law, and the territorial sovereignty claims themselves. On these matters, claimants are unlikely to willingly make concessions, at least in the short term. Areas of ambiguity include understandings of what constitutes a provocative or unilateral action, definitions of the regional status quo, and lack of clarity

in international law and the territorial claims of individual claimants.

Although the arbitral proceedings have increased tensions over the past few years, been detrimental to regional stability, and are unlikely to lead to a resolution to the disputes, a major benefit is that they have forced claimants to reiterate and elaborate on their legal perspectives, territorial claims, and diplomatic approaches to the South China Sea disputes. Indeed, this is what has made this report possible. In particular, the proliferation of official statements and diplomatic and security responses have made clear the compatibilities, incompatibilities, and ambiguities in the perspectives of different claimants and stakeholders. In the months and years ahead, it will be important for the parties involved to recognize

all of these. The compatibilities and areas of agreement have the potential to serve as a foundation for cooperation. The areas of ambiguity, depending on the context, can also create diplomatic grey areas that are conducive to bilateral and multilateral cooperation if managed

carefully. As for the areas of incompatibility and disagreement, these too are important for countries to be clear about because they can then be set aside, at least temporarily, in order to make progress on the other issues.

This general understanding of the disputes lends some credence to the principles of “easy issues first, hard issues later” and “economics first, politics later” that have been used successfully in other longstanding and seemingly intractable disputes, such as cross-strait relations. This model is entirely dependent on clear understandings of what the easy and hard issues are and what diplomatic grey areas and ambiguities can be taken advantage of during negotiations and in signing agreements. Ongoing efforts, such as the Code of Conduct and the South China Sea Peace Initiative, are preliminary attempts to build upon such a model. This is reflected in the Declaration on the Conduct of Parties in the South China Sea’s allowance for cooperative activities “[p]ending a comprehensive and durable settlement” and the South China Sea Peace Initiative’s call to “shelve sovereignty disputes.” The arbitration case and, more importantly, the legal, diplomatic, and security responses to the proceedings have increased the amount of information available for those seeking to promote peaceful dispute settlement in the South China Sea. It is quite possible that the greater availability of relevant information, as encapsulated in this report, and a clearer understanding of the compatibilities, incompatibilities, and ambiguities in countries’ views will provide a foundation for meaningful cooperation on South China Sea issues in the months and years to come.

The principles of “easy issues first, hard issues later” and “economics first, politics later” that have been used successfully in other longstanding and seemingly intractable disputes, such as cross-strait relations.





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**Keyuan Zou** is Harris Professor of International Law, University of Central Lancashire, UK and his publications have been cited widely within and outside academia.



# **South China Sea Lawfare:**

**Legal Perspectives and International Responses  
to the Philippines v. China Arbitration Case**

Edited by **Fu-Kuo Liu** and **Jonathan Spangler**