WHOSE SEA IS IT ANYWAY?: AN ANALYSIS OF THE PERMANENT COURT OF ARBITRATION'S SOUTH CHINA SEA ARBITRATION DECISION

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Beginning in 2014 the People's Republic of China ("China") began to convert several features in the South China Sea into artificial islands. Two years later the Philippines and China engaged in a standoff near the Second Scarborough Shoal resulting in the Philippines withdrawing from the shoal. However, the Philippines did not take this withdrawal lying down. Instead they invoked the arbitration proceedings under the United Nations Convention on the Law of the Sea ("UNCLOS") and took China to arbitration. This arbitration would lead to the creation of persuasive case law which elaborated the distinction between and island and a rock under Article 121 of the UNCLOS and find that China was in violation of the UNCLOS. However, China remains undeterred in its mission to expand its influence in the South China Sea. This article will propose one novel solution to this problem, the resurrection of the Southeast Asia Treaty Organization.

I. INTRODUCTION

On April 8th, 2012 a group of Chinese fishermen anchored off the Second Scarborough Shoal were spotted by the Philippines' aircraft.[164] The Philippines' government responded by sending its own vessel, the BRP *Gregorio del Pilar*, to detain the Chinese fishermen.[165] China, in turn, dispatched two unarmed China Marine Surveillance ships to assist the Chinese fishermen, resulting in a standoff at the Second Scarborough Shoal's mouth.[166] Neither party was willing to be the first to withdraw from the shoal after initial negotiations in April 2012 to deescalate the situation failed.[167]

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[164] Michael Green, et al., *Counter-Coercion Series: Scarborough Shoal Standoff*, ASIA MARITIME TRANSPARENCY INSTITUTE (May 22, 2017), https://amti.csis.org/counter-co-scarborough-standoff/.

[165] *Id*.

[166] *Id.*

[167] *Id*.

With this lack of movement, the Philippines called on both the Association of Southeast Asian Nations ("ASEAN") and the United States. ASEAN was for the first time unable to issue a joint statement on confrontation.[168] The United States made vague reassurances of its mutual defense treaty with the Philippines.[169] In response, China threatened escalation, harassed the Philippines fishing vessels, and placed an import ban on the Philippines' fruit.[170] After nearly two months of tense confrontation, backchannel negotiations, and pressure from the United States, the Philippines withdrew its remaining two vessels from the shoal.[171] China, on the other hand, maintained its presence on the shoal and denied that any negotiations took place.[172] The nearly three-month long confrontation resulted in the Philippines initiating arbitration proceedings under the UNCLOS.[173]

Section II of this paper will discuss the background of the dispute in the South China Sea.[174] Section III will discuss the arguments raised and the conclusion of the Permanent Court of Arbitration ("PCA") on its Award of Jurisdiction and Admissibility.[175] Section IV will discuss the arguments raised and the PCA's Award, concluding with the argument that the PCA ruled correctly and in doing so added significant persuasive case law to the law of the sea.[176] Section V. will discuss how Southeast Asian States can protect themselves from further encroachment from China by resurrecting the Southeast Asia Treaty Organization.[177]

[168] *Asean Nations fail to reach agreement on South China Sea*, British Broadcasting Corporation, BBC, (July 13, 2012) https://www.bbc.com/news/world-asia-18825148.
[169] Green, *supra* note 1.
[170] *Id*.
[171] *Id*.
[172] *Id*.
[173] *Id*.
[174] See *Infra* Section II
[175] See *Infra* Section III
[176] See *Infra* Section IV.
[177] See *Infra* Section V.

II. THE BACKGROUND OF THE DISPUTE IN THE SOUTH CHINA SEA

China bases its claims to nearly 90 percent of the South China Sea on the nine-dash line.[178] At the turn of the 20th century, nationalist groups began to form in southeastern China, one of which was the Guangdong Self-Government Society.[179] The Self-Government Society collected travelers' testimony and oral history in an effort to prove that Pratas Shoal was "historically Chinese."[180] Under the Self-Government Society's pressure, the Qing Dynasty bought out a Japanese guano mining operation on Pratas Shoal, marking as one author put it "a key turning point in China's awaking interests over the South China Sea."[181] In this vein of rising nationalism, the nine-dash line first appeared on Hu Jinje's private map; Hu Jinje was a private cartographer.[182] The next time the nine-dash line appeared was in 1935 on the Republic of China's Land and Water Maps Inspection Committee of 1935, although this version of the nine-dash line only included the Pratas and Paracel Islands.[183] Based on Hu's map, Bai Meichu, the founder of the China Geographical Society, created the U-shaped line which formed the basis for the nine-dash line.[184] This version of the U-shaped line was the one that was published by the Republic of China in 1948, although this version contained eleven dashes.[185] Two dashes were removed from the Gulf of Tonkin based on an agreement between China and Vietnam, which was reached in 2000.[186] Thus, when viewing the nine-dash line, the specter of the "Century of

[178] Hannah Beech, Just Where Exactly Did China Get the South China Sea Nine-Dash Line From?, TIME (July 19, 2016), https://time.com/4412191/nine-dash-line-9-south-china-sea/.
[179] Christopher Rossi, *Treaty of Tordesillas Syndrome: Sovereignty ad Absurdum and the South China Sea*, 50 CORNELL INT'L L.J. 231, 256 (2017).
[180] *Id*.
[181] *Id*.
[182] Rossi at 256.
[183] *Id*.
[184] *Id*. at 257.
[185] *Id*.
[186] *Id*.

Humiliation" cannot be overlooked.[187] It is through this lens that China has sought to assert itself after over a century of colonialization by seeking to establish its claim to historic rights in the South China Sea.

To justify its use of the nine-dash line, China has used a historical narrative. China cites various explorations carried out during a myriad of dynasties, including the Zhou (770-256 BCE), Qin (221-206 BCE), Han (206 BCE-220 CE), Tang (618-907 CE), and Song (960-1279 CE) dynasties.[188] China further uses the legendary seven voyages of Admiral Zheng He, which all took place in the South China Sea.[189] During these voyages, Zheng He charted the South China Sea, including the Spratly Islands, and indeed passed through them.[190] China claims the nine-dash line was not an attempt to generate new claims to nearly the entire South China Sea and rather the nine-dash line codified pre-existing rights.[191] In an effort to bolster their claim, China also insists that much of the Spratly Islands constitute a traditional fishing grounds for Chinese fishermen.[192] By looking to its past own historic exploration and exploitation, China cloaked its use of the nine-dash line under a historical narrative.

Over recent years, China aggressively converted many features in the South China Sea into artificial islands. In the Paracel Islands, China has established 20 outposts while in the Spratly Islands; China established seven.[193] The Asia Maritime Transparency Initiative noted

[187] *Id*. at 239.
[188] *Id.* at 259-60.
[189] *Id*. at 260.
[190] *Id*. at 260-61.
[191] Xu Hong, Director General, Department of Treaty and Law, Briefing by Xu Hong at the International Press Center of the Ministry of Foreign Affairs (May 12, 2016), https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/zyjh_665391/201605/t20160519_678521.html.
[192] Government 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* Pt. 11 (4) (Dec. 7, 2014). [hereinafter Position Paper].
[193] China Island Tracker, https://amti.csis.org/island-tracker/china/ (last visited May 6, 2021).

"[s]ince 2013, China has engaged in unprecedented dredging and artificial island-building in the Spratlys, creating 3,200 acres of new land, along with a substantial expansion of its presence in the Paracels."[194]

One of the reasons for China's intense building campaign is its increased blue water naval capabilities. Their campaign is in line with China's new focus on the South China Sea.[195] China's is emerging as a growing maritime power, sporting today the largest navy with 360 battle force ships.[196] Many of these 360 battle force ships are designed to excel in the South China Sea's shallow waters.[197] One magazine, owned by the China State Shipbuilding Corporation, a supplier of the People's Liberation Army Navy, stated that "[i]slands and reefs in South China Sea have unique advantages in safeguarding national sovereignty and maintaining a military presence in the open sea[.]"[198] This shows that China's actions in the South China Sea, particularly its artificial island buildup, are part of China's strategic plan to increase its ability to project its power on the high seas, specifically in the South China Sea. China has sought to legitimize its claim to the South China Sea by using the nine-dash line in an effort to increase its control over the South China Sea, a control that China seeks because of China's increased naval capacity.

III. THE PERMANENT COURT OF ARBITRATION'S DECISION ON JURISDICTION

[194] *Id.*
[195] H.I. Sutton, Chinese Navy Expanding Bases Near South China Sea, UNITED STATES NAVAL INSTITUTE NEWS, (Dec. 29, 2020), https://news.usni.org/2020/12/29/chinese-navy-expanding-bases-near-south-china-sea.
[196] Brad Lendon, *China has built the world's largest navy. Now what's Beijing going to do with it?*, CNN (last updated Mar. 5, 2021). https://www.cnn.com/2021/03/05/china/china-world-biggest-navy-intl-hnk-ml-dst/index.html.
[197] *Id.*
[198] Brad Lendon, *China has built the world's largest navy. Now what's Beijing going to do with it?*, CNN (last updated Mar. 5, 2021). https://www.cnn.com/2021/03/05/china/china-world-biggest-navy-intl-hnk-ml-dst/index.html.

One of the cardinal rules of customary international law when determining maritime rights is *la terre domine la mer*, meaning the land dominates the sea.[199] And what happens when there is a disagreement over the nature of the dispute? This matter was the exact situation facing the Permanent Court of Arbitration Tribunal ("Tribunal") when it rendered its decision on jurisdiction. On the one hand, China disputed over the sovereignty of maritime features in the South China Sea.[200] On the other hand, the Philippines argued that disputes over sovereignty of maritime features had no bearing on the Tribunal's jurisdiction because "[o]ne of [the Philippines'] submissions require the tribunal to express any view at all as to the extent of China's sovereignty over land territory, or that of any other state."[201] Weighing these two conflicting narratives, the Tribunal correctly determined that it had jurisdiction over seven of the Philippines' submissions to the Tribunal.[202]

A. CHINA'S ATTEMPT TO AVOID JURISDICTION

China's refusal to participate in the arbitration proceedings stems from its assertion that the dispute concerns sovereignty over the features of the South China Sea, and, in the alternative, the dispute falls within the scope of China's Article 298 reservation. Article 298 of the UNCLOS permits States to declare reservations from section two of the UNCLOS, which governs dispute resolutions.[203] Article 298(1)(a)(i) limits the reservations to disputes relating to sea boundary's

[199] Bing Bing Jiaa, *The Principle of the Domination of the Land over the Sea: A Historical Perspective on the Adaptability of the Law of the Sea to New Challenges*, 6-7 (2016), https://iilj.org/wp-content/uploads/2016/09/JiaIILJColloq2015.pdf.
[200] Position Paper, *supra* note 22, at ¶ 3.
[201] *The Republic of Philippines v. The People's Republic of China*, PCA Case No. 2013-19, Award on Jurisdiction and Admissibility, ¶. 141 (Oct. 29, 2015). https://pcacases.com/web/sendAttach/2579 [hereinafter Award on Jurisdiction].
[202] *The Republic of Philippines v. The People's Republic of China* at ¶ 413.
[203] United Nations Convention on the Law of the Sea art. 298, Dec. 10, 1982, 1833 U.N.T.S. pg. 3 [hereinafter UNCLOS].

delimitations, historic bays, or titles.[204] China deposited one such reservation, opting out of the UNCLOS dispute resolution.[205] Based on both its reservation and internal laws, China asserted three reasons why the dispute fell outside the jurisdiction of the Tribunal.

China's first argument was that it is impossible to determine maritime claims without first determining sovereignty over the maritime feature.[206] China further argued that:

> [O]nly after a State's sovereignty over a maritime feature has been determined and the State has made maritime claims in respect thereof, could there arise a dispute concerning the interpretation or application of the Convention, if another State questions the compatibility of those claims with the Convention or makes overlapping claims.[207]

China then went further, stating if the maritime sovereignty of the feature was undecided, then there could not be a "concrete and real dispute for arbitration."[208] China went so far as to state that ". . . the Philippines is putting the cart before the horse," regarding the Philippines' arguments that maritime entitlements may be dictated without first determining the issue of sovereignty.[209] In short, China argued that there must first be a determination of sovereignty over the features in the South China Sea before determining maritime rights.

China next argued that determining whether low tide elevations can be appropriated is a question of sovereignty, not one of treaty interpretation.[210] China based this argument on two International Court of Justice (ICJ) cases, *Qatar v Bahrain* and *Nicaragua v. Columbia.*[211] China claimed that *Qatar v. Bahrain* supported its position based on the following statement:

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[204] *Id.*
[205] UNCLOS, China's Declaration under article 298. https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#EndDec.
[206] Position Paper, *supra* note 22, at ¶ 16.
[207] *Id.* at ¶ 17.
[208] Position Paper, *supra* note 22, at ¶ 17.
[209] *Id.* at ¶ 18.
[210] *Id.* at ¶ 25.
[211] *Id.*

"[i]nternational treaty law is silent on the question whether low-tide elevations can be considered to be 'territory'. Nor is the Court aware of a uniform and widespread State practice which might have given rise to a customary rule which unequivocally permits or excludes appropriation of low-tide elevations."[212] At the same time, China criticized the *Nicaragua v. Columbia* decision because it stated that "low-tide elevations cannot be appropriated."[213] China criticized the latter as having no basis in international law while asserting that the former supported its position that low tide's elevations may be appropriated on the basis that "International treaty law" included the UNCLOS.[214] In short, China argued that, in addition to requiring a determination of sovereignty over features, determining whether appropriation of low tide features was valid is also a question of sovereignty.

And finally, responding to actions by Chinese vessels in the disputed waters, China claimed that the legality of such actions "rests both on the sovereignty over relevant maritime features and the maritime rights derived therefrom."[215] China insisted that the Philippines' claims "must be that the spatial extent of the Philippines' maritime jurisdiction is defined and undisputed, and that China's actions have encroached upon such defined areas."[216] China further argued that the delimitation of maritime rights had not been settled. As such, until China and the Philippines had settled the issue of sovereignty over the disputed area, the Philippines' claim concerning the actions of Chinese vessels could not be entertained.[217]

[212] *Id.*
[213] *Id.* at ¶ 25.
[214] *Id.*
[215] Position Paper, *supra* note 22, at ¶ 26.
[216] *Id.* at ¶ 27.
[217] *Id.*

In the alternative, China also argued that even if the subject matter fell within the UNCLOS dispute resolution mechanisms, the Philippines' claims were an integral part of maritime delimitation between two States.[218] As such, the Philippines' claims are subject to China's Article 298 reservation made in 2006.[219] China argued that the legal issues presented by the Philippines were "part and parcel of maritime delimitation."[220] China further claimed that if the Philippines were allowed to split maritime delimitation from the dispute it would lead to the eventual destruction of the integrity, indivisibility of maritime delimitation, and "all relevant factors must be taken into account."[221] Accordingly, China argued the dispute was over maritime delimitation, thus, falling within its Article 298 reservation.

B. THE PHILIPPINE'S ARGUMENT IN SUPPORT OF JURISDICTION

On the other hand, the Philippines made a plethora of arguments in favor of establishing the jurisdiction of the Tribunal. The Philippines argued that the arbitration fell under the jurisdiction of the Tribunal because the Philippines was not asking the Tribunal to make any determination about China's, or for that matter any States', sovereignty over land.[222] More importantly, the Philippines argued "a dispute may have different elements," which does not "preclude some elements from falling within jurisdiction."[223] In support of that argument, the Philippines cited multiple cases that led to the conclusion an international tribunal may consider disputes even when other parts of the dispute may lay outside the tribunal's jurisdiction.[224] As such, the Philippines sought to detangle the issue of sovereignty from maritime rights.

[218] *Id.* at ¶ 75.
[219] *Id.* at ¶ 74-75.
[220] *Id.* at ¶ 66.
[221] *Id.* at ¶ 68. (Quoting art. 38 of the Statute of the International Court of Justice).
[222] Award on Jurisdiction, *supra* note 38, at ¶ 141.
[223] *Id.* at ¶ 142. (Quoting Jurisdictional Hearing Tr. (Day 1), pg. 69).
[224] *Id.*

The Philippines put forth the argument that there is no need to determine sovereignty over a feature before determining whether that feature generates any maritime rights.[225] The Philippines, in effect, argued that under the UNCLOS, a rock under Article 121 is a rock not just for one state, but for every state.[226] That is, one State's rock cannot be another state's island under Article 121. Thus, the Tribunal need only address the issue of sovereignty if the feature is, in fact, an island under Article 121; and thereby, capable of generating maritime rights under the UNCLOS. The Philippines further asserted that it was not attempting to cherry-pick features that would be more likely be classified as rocks rather than islands under Article 121.[227] To demonstrate, if the largest feature in the South China Sea was a rock, and thus, incapable of generating any claims under UNCLOS, then the rest of the nearly 750 features would likewise be incapable of generating any claims.[228] The final argument, in support of this, targeted China's assertion that low tide elevations is wholly within the Tribunal's jurisdiction as low tide elevations, are governed by Article 13 of the UNCLOS.[229] The Philippines sought to detangle the issue of sovereignty from the issue of whether features generated any maritime rights. However, the Philippines went further, arguing that the Philippines' claims were premised on China's maximum entitlements under the UNCLOS.

Additionally, the Philippines rejected China's characterization of the dispute as a maritime delimitation.[230] Consistent with its claim that maritime rights can be determined without determining the sovereignty of the features, the Philippines claimed that maritime delimitation "does not arise unless and until it is determined that there are overlapping maritime

[225] *Id.* at ¶ 144.
[226] *See Id.*
[227] *Id*. ¶144.
[228] Award on Jurisdiction, *supra* note 38, at ¶ 144. (Quoting Jurisdictional Hearing Tr. (Day 1) pg. 89).
[229] *Id.* (Quoting Jurisdictional Hearing Tr. (Day 1) pg. 95).
[230] *Id.* ¶ 146.

entitlements."[231] In making this argument, the Philippines relied on *Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* and *Territorial and Maritime Dispute (Nicaragua v. Colombia),* where the courts first determined the existence of overlapping claims before turning towards the issue of delimitation.[232] In conclusion, the Philippines stated "[t]he fact that resolution of delimitation issues may require the prior resolution of entitlement issues does not mean that entitlement issues are an integral part of the delimitation process itself."[233] The Philippines' numerous arguments sought to detangle the issue of maritime entitlements from the issue of maritime delimitation, thereby, passing China's Article 298 reservation—arguments the Tribunal found favorable.

The Philippines cited *U.S. v Iran,* in which Iran attempted to claim that the ICJ could not consider the issue concerning Iran's taking of internationally protected personnel.[234] Yet, the ICJ rejected their proposition stating "[t]he Court, at the same time, pointed out that no provision of the Statute or Rules contemplates that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important."[235] The ICJ came to a similar conclusion in *Military and Paramilitary Activities in and against Nicaragua*. There the ICJ in part citing *United States Diplomatic and Consular Staff in Tehran,* rejected the United States' argument that Nicaragua must first seek settlement of its dispute with the United States through the Contrado Process.[236] The ICJ found "the existence of active negotiations in which both parties might be involved should not prevent . . . the Court from exercising their separate

[231] *Id.* (Quoting Jurisdictional Hearing Tr. (Day 2) pg. 44).
[232] *Id.*
[233] *Id.* (Quoting Jurisdictional Hearing Tr. (Day 2) pg. 46).
[234] United States Diplomatic and Consular Staff in Iran, (U.S. v. Iran), Judgment, 1980 I.C.J. 64 ¶¶ 35-36 (May 24).
[235] *Id.* at ¶ 36.
[236] Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment, 1984 I.C.J. 70, ¶¶ 105-106 (Nov. 26).

functions under . . . the Statute of the Court."[237] Given these two decisions by the ICJ, the Tribunal properly determined that international tribunals are capable of addressing disputes, that are part of other disputes or that have other aspects, which cannot be addressed by the court.

In the second prong of their argument, the Philippines correctly asserted that maritime delimitation "does not arise unless and until it is determined that there are overlapping maritime entitlements."[238] In *Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal*, the court stated, "the Commission is assigned the function of making recommendations to coastal States on matters relating to the establishment of the outer limits of the continental shelf, but it does so without prejudice to delimitation of maritime boundaries."[239] It further stated "[t]here is nothing in the Convention or in the Rules of Procedure of the Commission or in its practice to indicate that delimitation of the continental shelf constitutes an impediment to the performance by the Commission of its functions."[240] In other words, the Tribunal may first establish whether there are previous overlapping claims addressing the issue of maritime delimitation. The ICJ came to a similar conclusion in *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, where the ICJ initially declined to follow Nicaragua's proposal concerning an island grouping before determining whether those islands were first subject to overlapping claims.[241]

Therefore, when there is a dispute over maritime claims, the first issue to decide is the extent of the claims by the relevant parties. Only after the extent of the claims are established can

[237] *Id*.
[238] Award on Jurisdiction, *supra* note 38, at ¶ 146. (Quoting Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment, 1984 I.C.J. 70, ¶¶ 105-106 (Nov. 26).)
[239] Delimitation of the Maritime Boundary Bangladesh and Myanmar in the Bay of Bengal (Bangl. v. Myan.), Judgment, 2012 I.T.L.O.S 16, ¶ 376 (Mar. 14).
[240] *Id.* at ¶ 377.
[241] Territorial and Maritime Dispute (Nicar. v. Colum.) Judgment, 2012 I.C.J. 124, ¶ 169 (Nov. 19).

there be a determination of whether or not those claims overlap. Thus, under the UNCLOS, the Tribunal was correct determining that it held jurisdiction over the Philippines' submissions because the Philippines was not asking the Tribunal to make a maritime delimitation decision. Rather, it requested the Tribunal to first determine whether there were in fact any overlapping claims. As such, the Tribunal correctly limited its jurisdiction to a decision based on the premise that parts of the South China Sea are part of the Philippines' exclusive economic zone ("EEZ") or continental shelf only if first, the Tribunal finds that China does not have any overlapping claims.[242]

C. THE TRIBUNAL'S DECISION

Fortunately for the Philippines, the Tribunal determined that the dispute was not over sovereignty. The Tribunal based its conclusion on the limited claims the Philippines submitted to the Tribunal.[243] The Tribunal concluded that its exercise of jurisdiction would have no bearing on China's claim to sovereignty over the Spratly Islands.[244]Although sovereignty over the features may be an issue between China and the Philippines, it does not follow that the present arbitration was a dispute over the sovereignty of the features.[245]

The Tribunal stated only two arguments could persuade it that the Philippine's claims related to sovereignty. The first argument is "the resolution of the Philippines' claims would require the Tribunal to first render a decision on sovereignty, either expressly or implicitly."[246] The Tribunal found this was not the case because the Philippines' claims were based on the

[242] Award on Jurisdiction, *supra* note 38, at ¶ 157.
[243] Award on Jurisdiction, *supra* note 38, at ¶ 153.
[244] *Id.*
[245] *Id.* at ¶ 152.
[246] *Id*. at ¶ 153.

assumption that China's claims to sovereignty over the features was entirely correct.[247] The second argument was that the Philippines was attempting to use the arbitration as a means to extend its own claims to sovereignty over the features.[248] The Tribunal correctly determined that this was not the case, since any decision would not assist in the Philippines claims to sovereignty, and the Philippines had repeatedly requested a narrow scope when reviewing its submissions.[249] The Tribunal correctly determined that the Philippines submissions did not implicate sovereignty over the features in the South China Sea, but this is not the only hurdle the Philippines was required to overcome.

The next issue the Philippines faced in establishing jurisdiction was distinguishing two disputes from one another regarding maritime delimitation and of the other about maritime entitlements. The Tribunal also agreed with the Philippines that disputes over the existence of maritime entitlements were distinct from disputes over delimitation of zones that were subject to overlapping entitlements.[250] The Tribunal distinguished the conflict between these two types of disputes by stating:

> A maritime boundary may be delimited only between States with opposite or adjacent coasts and overlapping entitlements. In contrast, a dispute over claimed entitlements may exist even without overlap, where—for instance—a State claims maritime zones in an area understood by other States to form part of the high seas or the Area for the purposes of the Convention.[251]

This was the correct characterization of the dispute. China's claims stem from the nine–dash line, which make claims far outside the 200-mile EEZ or continental shelf claims permitted

[247] *Id.*
[248] *Id.*
[249] *Id.*
[250] Award on Jurisdiction, *supra* note 38, at ¶ 156.
[251] *Id.*

by the UNCLOS. Thus, it was a dispute over maritime entitlements rather than maritime boundaries.

The final two obstacles to exercise jurisdiction were Articles 281 and 282 of the UNCLOS. Beginning with Article 281, under the UNCLOS, if there is a dispute as to whether the UNCLOS should be applied or when the parties have agreed to seek settlement of the dispute by other peaceful means, then the Tribunal must look to Article 281.[252] There were a number of statements that could be seen as agreements to seek settlement for the disputes. These include the Declaration of Conduct ("DOC") in the South China Sea,[253] a series of joint statements between China and the Philippines,[254] the Treaty of Amity and Co-operation in Southeast Asia ("Treaty of Amity"),[255] and the Convention on Biological Diversity("CBD").[256] The Tribunal determined, correctly, that none of those statements or agreements precluded the Tribunal's exercise of jurisdiction.[257]

The second final obstacle to jurisdiction is Article 282, which states:

> If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree.[258]

[252] UNCLOS, *supra* note 36, at Art. 281.
[253] Award on Jurisdiction, *supra* note 38, at ¶ 198.
[254]Award on Jurisdiction, *supra* note 38, at ¶¶ 231-32.
[255] *Id* at ¶ 252.
[256] *Id* at ¶ 270.
[257] Id. at ¶¶ 229, 251, 269, and 289.
[258] UNCLOS, *supra* note 36, at Art. 282.

The Tribunal found that Article 282, like Article 281, did not apply to the DOC,[259] the Treaty of Amity,[260] nor the CBD.[261] Because the Philippines had limited its claims to maritime entitlements and did not call for an implicit or explicit determination of sovereignty, the Tribunal, correctly, found that it held jurisdiction over the dispute because it did not concern sovereignty and did not fall within China's Article 298 reservation.

IV. THE PERMANENT COURT OF ARBITRATION FINAL AWARD

On July 12, 2016, the Tribunal issued its final award.[262] The award decision contributed significantly to the UNCLOS's interpretation. The most important among these contributions was the distinction that the Tribunal made between historic rights and title.[263] In making this distinction, the Tribunal detangled China's repeated claims to historic title of the South China Sea.[264] In turn, it prevented China from raising its Article 298 reservation that permits reservations concerning historic bays and titles. Another major contribution was the in-depth analysis concerning the Regime of Islands under Article 121.[265] In its award, the Tribunal correctly determined that China's claims to historic rights do not amount to a claim to historic title and that the features in the South China Sea do not constitute islands under Article 121.[266] Therefore, China was unable to generate any claims to territorial waters or an EEZ under the UNCLOS.

[259] Award on Jurisdiction, *supra* note 38, at ¶ 299.
[260] *Id*. at ¶ 307.
[261] *Id*. at ¶¶ 320-21.
[262] The Philippines v. Peoples Republic of China, PCA Case No. 2013-19, Award, at ¶ 1 (July, 12, 2016). [hereinafter Award]
[263] *See*, *infra* Section IV B.
[264] *Id*.
[265] *See infra* Section IV C.
[266] *See infra* Section IV D.

A. CHINA'S POSITION REGARDING THE SOUTH CHINA SEA

One of the major side-effects of China refusing to participate in the arbitration proceedings was that the Tribunal was forced to make determinations on China's stance, which was often ambiguous. In 2009, China sent a verbal note to the UN Secretary General, accompanied by the following map and message:

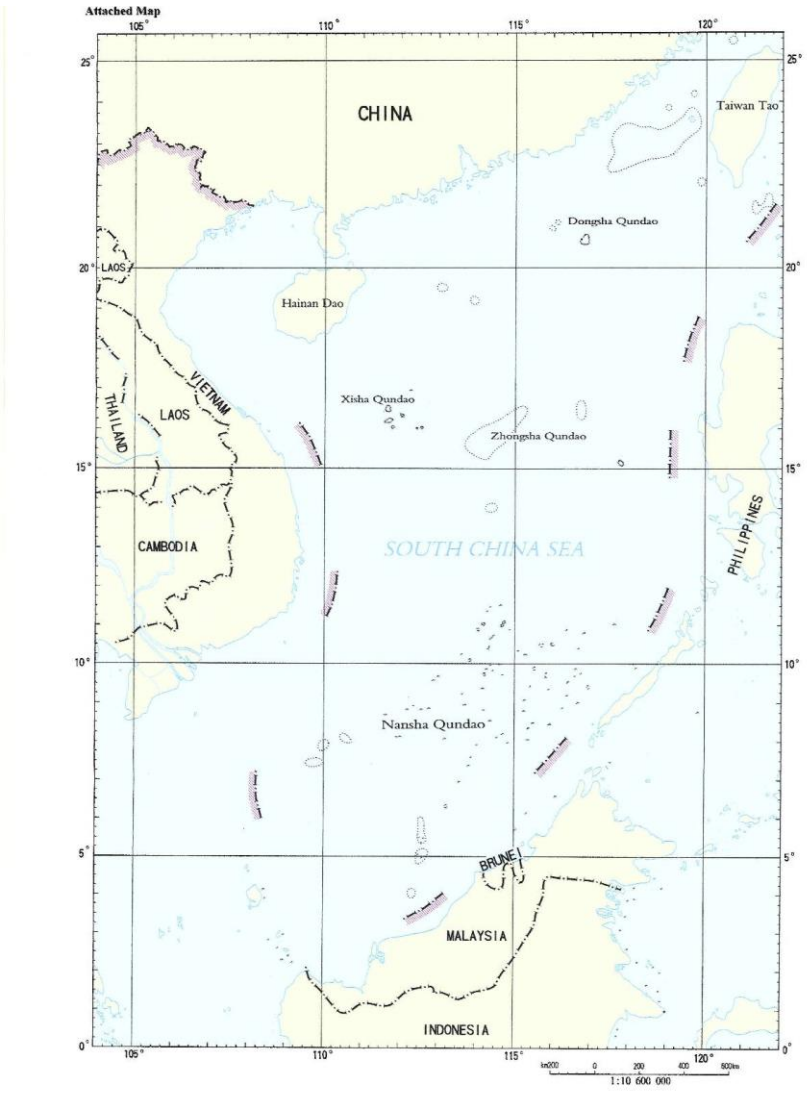
> China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof (see attached map below). The above position is consistently held by the Chinese Government and is widely known by the international community.[267]

China based that claim on historic rights extensively on a historic narrative.[268]

[267] Permanent Mission of the People's Republic of China, Note Verbale dated May 7, 2009. https://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf

[268] *See supra* Section II

Map attached to China's May 7, 2009, Note Verbale



[269]

The natural consequence of claiming rights, which have been formed over the course of history, is that people might ask what those rights are. The basis for China's expansive claims to the South China Sea, which on their face expand past those claims permitted by the UNCLOS,

[269] *See supra* note 100.

led the Tribunal to determine that those claims arose independently of the UNCLOS.[270] The Tribunal was forced to determine the nature of these rights.

The Tribunal listed three instances in which it had determined that China claimed rights that fell outside of the UNCLOS with regards to the South China Sea, and more importantly, were based on the nine-dash line. The first instance was an award of petroleum blocks that were actioned off by the Chinese National Offshore Oil Corporation, parts of which fell outside of the EEZ and continental shelf claims permitted by the UNCLOS.[271] The second instance was China's objection to the Philippines auctioning off petroleum blocks, and it made the following statement "[s]ince ancient times, China has indisputable sovereignty over the Nansha islands and its adjacent waters. The [petroleum block] area is situated in the adjacent waters of the Nansha Islands (Spratlys)."[272] The third instance was China additionally protesting in a Note Verbale regarding the auctioning off of a separate lot of petroleum blocks stating:

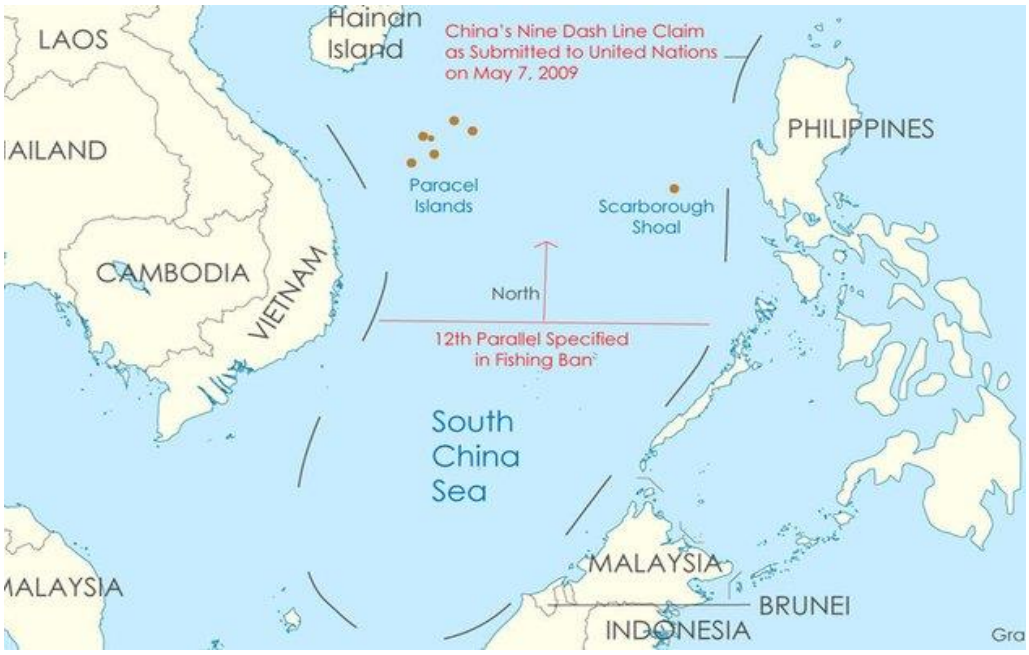
> On 30 June 20l1 at the launching of Fourth Philippine Energy Contracting Round (PECR4), the Department of Energy of the Philippines offered 15 petroleum blocks to local and international companies for exploration and development. Among the aforesaid blocks, AREA 3 and AREA 4 are situated in the waters of which China has historic titles including sovereign rights and jurisdiction.[273]

China's claims were not limited to energy exploration. However, they also included claims to fisheries within the nine-dash line and outside the claims permitted by the UNCLOS. In May 2012, China placed a moratorium on fishing with the following announcement: "All

[270] Award, *supra* note 99, at ¶ 207.
[271] *Id.* at ¶ 208.
[272] *Id.* at ¶ 209. (Quoting Memorandum from the Undersecretary for Special and Ocean Concerns, Department of Foreign Affairs, Republic of the Philippines, to the Secretary of Foreign Affairs of the Republic of the Philippines (30 July 2010)).
[273] *Id.* (Quoting Note Verbale from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs, Republic of the Philippines, No. (11) PG-202 (6 July 2011)).

productive activity types, …, shall be prohibited from .... in the South China Sea areas from 12º north latitude up to the 'Common Boundary Line of Fujian-Guangdong Sea Areas' (including the Gulf of Tonkin) under the jurisdiction of the People's Republic of China."[274] China further clarified this by stating that the fishing ban applied "in most parts of the South China Sea . . . including Huangyan Island [Scarborough Shoal]."[275] Further, upon an examination of the 12-degree north latitude, the Tribunal correctly determined that it covered nearly the entire South China Sea.[276]

12th Parallel Fishing Ban in the South China Sea[277]



[274] Fishery Bureau of Nanhai District, Ministry of Agriculture, People's Republic of China, Announcement on the 2012 Summer Ban on Marine Fishing in the South China Sea Maritime Space (10 May 2012).
[275] Award, *supra* note 99, at ¶ 211.
[276] *Id.*
[277] *Vietnamese, Philippine Fishermen Protest China's Fishing Ban in the SCS*, VIETNAM NEWS. NET (May 5, 2020). https://www.vietnamnews.net/news/264943059/vietnamese-philippine-fishermen-protest-chinas-fishing-ban-in-scs.

Based on those claims the Tribunal came to the correct determination. That is, the rights China claimed in the South China Sea were those over petroleum resources and fisheries that existed within the nine-dash line and therefore outside the scope of the UNCLOS.[278]

Those claims aside, there was another larger nail-in-the-coffin that defeated China's claim to the South China Sea as a territorial sea. That nail was the freedoms of overflight and navigation. China stated that "[t]he Chinese side respects and safeguards the freedom of navigation and over-flight in the South China Sea to which all countries are entitled under international law . . . . There has been and will be no obstruction to navigation and over-flight freedom in the South China Sea."[279] One of the central tenants surrounding territorial waters is the freedom of navigation and overflight is only allowed under the right of innocent passage, which is codified in the UNCLOS under Article 17.[280] As such, the Tribunal correctly determined that China did not recognize the area within the nine-dash line as a territorial sea by permitting the freedom of navigation and overflight.[281] China cannot, on the one hand, say that the South China Sea is a territorial sea, while, on the other hand, treat it as the high seas.[282] Thus, given China's repeated claims to natural resources within the South China Sea and China's treatment of the South China Sea as an area of the high seas rather than territorial or internal waters, the Tribunal correctly determined that China's claims amounted to claims of historic rights to resources.[283] Because China's claims amounted to historic rights, the Tribunal had to

[278] Award, *supra* note 99, at ¶ 211.
[279] Award, *supra* note 99, at ¶ 212. (Quoting Ministry of Foreign Affairs, People's Republic of China, Vice Foreign Minister Zhang Yesui Makes Stern Representations to US over US Naval Vessel's Entry into Waters near Relevant Islands and Reefs of China's Nansha Islands (27 October 2015)).
[280] UNCLOS, *supra* note 36, at Art. 17.
[281] Award, *supra* note 99, at ¶ 213.
[282] *Id*.
[283] *Id*. at ¶ 214.

decide whether those rights had been signed away by China upon its accession to the UNCLOS.[284]

B. HISTORIC RIGHTS VS. HISTORIC TITLES

To make that determination, the Tribunal had to first determine the significance of the difference between historic rights and titles. The Tribunal correctly determined that "'historic titles' in Article 298(1)(a)(i) of the Convention is accordingly a reference to claims of sovereignty over maritime areas derived from historical circumstances."[285] In reaching that conclusion, the Tribunal relied on the three-factor test first introduced in a memorandum.[286] The three factors are:

> (i) The authority exercised over the area by the State claiming it as "historic waters";
> (ii) The continuity of such exercise of authority; and
> (iii) The attitude of foreign States.[287]

Regarding the first factor, China has only recently attempted to exercise control over the Spratly and Paracel Islands.[288] And while China has only recently begun to exercise control over the Spratly and Paracel Islands, China has consistently done so since it began to exercise its control.[289] However, foreign States surrounding the South China Sea have continued to challenge China's exercise of control, most notably the Philippines, Vietnam, Indonesia, and the United States.[290] Therefore, under this three-factor test it is apparent that China failed to exercise its authority over the contested waters in a consistent manner. Neighboring States, as well as those

[284] Award, *supra* note 99, at ¶ 214.
[285] *Id.* at ¶ 226.
[286] *Juridical Regime of Historic Waters including Historic Bays*, 1962, 2 Y.B. Int'l L. Comm'n 185, U.N. Doc A/CN..4/143 [hereinafter Juridical Regime of Historic Waters].
[287] Award, *supra* note 99 at¶ 222. *See also* Juridical Regime of Historic Waters.
[288] *See supra* Section I.
[289] Award, *supra* note 99 at ¶ 208-13.
[290] Nguen Hing Thao, *South China Sea: US Joins the Battle of Diplomatic Notes*, THE DIPLOMAT (June 10, 2020). https://thediplomat.com/2020/06/south-china-sea-us-joins-the-battle-of-diplomatic-notes/.

far removed from the area, have consistently objected to China's claimed historic title.[291] The fact that China has been consistent with its exercise of authority over the disputed waters does not weigh enough in finding China created a historic title. China has only recently attempted to exercise control, and objections by both near and far States are dispositive to China's claim to historic title.

The detangling of historic rights from historic title has also found support in international case law, most notably the ICJ's opinions in *Qatar v. Bahrain* and *Continental Shelf*.[292] In *Qatar v. Bahrain*, the ICJ noted that historic pearl fishing "seems in any event never to have led to the recognition of an exclusive quasi-territorial right to the fishing grounds themselves or to the superjacent waters."[293] While the Court in *Continental Shelf* never addressed the merits of Tunisia and Libya's claims to historic fishing rights, it did treat those rights as separate from the continental shelf regime.[294] As the Tribunal put it "[t]he term 'historic rights' is general in nature and can describe any rights that a State may possess that would not normally arise under the general rules of international law, absent particular historical circumstances."[295] Further, historic rights can include sovereignty; however, historic title explicitly refers to "historic sovereignty to land or maritime areas."[296] Thus, under international case law, while not binding, there is ample persuasive evidence that historic rights are not synonymous with historic title.

Reading that distinction between historic rights and title is also consistent with the UNCLOS because historic rights are mentioned nowhere in the UNCLOS; whereas historic title

[291] Nguen Hing Thao, *South China Sea: US Joins the Battle of Diplomatic Notes*, THE DIPLOMAT (June 10, 2020). https://thediplomat.com/2020/06/south-china-sea-us-joins-the-battle-of-diplomatic-notes/.
[292] *See* Award, *supra* note 99, at ¶ 224.
[293] *Id.* (Quoting Qatar v. Bahrain, p. 40 at pp. 112-13, ¶ 236).
[294] *Id.*
[295] *Id.* at ¶ 225.
[296] *Id.*

is mentioned only in Articles 15 and 298.[297] A reading of Article 298 under the Vienna Convention on the Law of Treaties ("VCLT") Article 31[298] calls for a limited reading of historic title. This is because Article 31 of the VCLT states that treaties are to be interpreted according to their context and in light of their object and purpose.[299] The preamble of the UNCLOS states that the object and purpose of the UNCLOS was to create a legal regime to "[. . .] promote peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, [. . .] Bearing in mind that the achievement of these goals will contribute to the realization of a just and equitable international economic order[. . . .]"[300]

To put historic rights into Article 298 would blow open a hole in the limited reservations allowed under the UNCLOS and permit States to escape their obligations by claiming historic rights. The drafters of the UNCLOS intended for the UNCLOS to have limited reservations with regards to the dispute resolution section.[301] The drafters evidenced the limited number of reservations permitted under Articles 298 and 309, which prohibits any reservations or exceptions unless expressly permitted under the UNCLOS.[302] Further, China specifically protested that exact situation during the drafting of the UNCLOS.[303] During the drafting of the UNCLOS, both the Soviet Union and Japan wished to keep the historic rights to fishing in other States' EEZs, while China "resolutely opposed to any suggestion that coastal States could be obliged to share the resources of the exclusive economic zone with other powers that had

[297] *See* Award, *supra* note 99, at ¶ 226.
[298] Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331 (1969).
[299] *Id*.
[300] UNCLOS, *supra* note 36, at Preamble.
[301] See *Id*. at Arts. 298, 309.
[302] *Id*.
[303] Award, *supra* note 99, at ¶ 251.

historically fished in those waters."[304] As such, the Tribunal correctly decided that historic rights are distinct from historic title under Article 298.

Turning to the application of China's claims, the Tribunal correctly ruled their claims amounted to claims to historic rights rather than historic title. China repeatedly stated it had historic rights within the nine-dash line.[305] While some communications by China have referred to its claims to historic title, the majority of China's communications refer to historic rights.[306] Had China excluded the disputes concerning its actions in the South China Sea, it should have consistently referred to its claims as historic title rather than historic rights. And in referring to its claims as historic rights, the majority of the time, China thwarted its claim to Article 298's reservations. Further, under the three-factor analysis concerning the establishment of historic title discussed previously, China has not met the burden of establishing its claims to historic title rather than historic rights. As such, China's actions and words show that China's claims amount to, "[. . .] a constellation of historic rights short of title[.]"[307] China's actions and repeated statements show that it too had treated its claims as historic rights as opposed to historic title; therefore, the Tribunal correctly determined that China had merely claimed "[. . .] a constellation of historic rights short of title[.]"[308]

Because China only claimed historic rights to the South China Sea, the next issue is whether those historic rights China claims, which include rights in other State's EEZs, survived China's accession to the UNCLOS. In short, they did not, in accord with customary international law and case law on the matter. The most on point decision concerning one State's claimed

[304] Award, *supra* note 99, at ¶ 251
[305] *See Id*. at ¶ 227.
[306] *Id.*
[307] *Id.* at ¶ 229.
[308] *Id.*

maritime rights in another State's EEZ was the *Gulf of Maine* decision.[309] While that case dealt with maritime delimitation, that court rejected the United States' argument that the court should take into account the longstanding use of Georges Bank by American fishermen, when making the delimitation decision.[310] The *Gulf of Maine* decision showed that one State's historic rights do not survive if those historic rights fall within another State's EEZ, as was customary international law at the time.[311] Because China claims an amalgamation of rights to the natural resources within the nine-dash line, those claims were surely abandoned when China acceded to the UNCLOS.

The contradictory caselaw in international law can be properly distinguished from the facts of the arbitration. In *Fisheries Jurisdiction Cases*, Iceland declared a 50-mile exclusive fishing zone.[312] However, the *Fisheries Jurisdiction Cases* were decided in 1974, prior to the ratification of the UNCLOS and reflected the customary international law at that time.[313] Unlike China's current dispute, in the *Fisheries Jurisdiction Cases*, the parties claimed right of access within the 50-mile exclusive fishing zone.[314] However, in this arbitration, China claimed rights to the living and non-living resources in another State's EEZ to the effect of negating the Philippines' rights within their EEZ.[315] A contradictory case is *Eritrea v. Yemen*, which permitted the "t]he traditional fishing regime is not limited to the territorial waters of specified islands' but extended also through the exclusive economic zone of Eritrea and Yemen."[316]

[309] Award, *supra* note 99, at ¶ 256, *see also* Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), Judgement, 1984 I.C.J. 246, ¶ 235.
[310] *Id.* at ¶ 256.
[311] *Id.*
[312] *See* Fisheries Jurisdiction (U.K. v. Ice.), Merits, Judgment, ICJ Reports 1974, p. 3 at pp 27-28, ¶ 62.
[313] Award, *supra* note 99, at ¶ 258.
[314] *Id*.
[315] *Id*.
[316] Award, *supra* note 99, at ¶ 259. (Quoting Eritrea v. Yemen, Award of 17 December 1999, 335 RIAA Vol. XXII 361, ¶ 109).

However, that case is easily distinguished as it was not an arbitration conducted under the regime of the UNCLOS. Thus, the applicable law included law contradictory to the UNCLOS.[317] China's claimed rights were signed away by China upon its accession to the UNCLOS because they amounted to claims to historic rights to living and nonliving resources within the nine-dash line.

C. BETWEEN A ROCK AND AN ISLAND

The other important takeaways from the Tribunal's award were the distinction between islands and rocks under Article 121.[318] Article 121 states:

> i. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.
> ii. Except as provided in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone, and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other and territory.
> iii. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.[319]

It is important to clarify what constitutes an island and what constitutes a rock. because islands are capable of generating territorial seas, contiguous zones, EEZs, and continental shelfs, and there is a plethora of features in the South China Sea. In coming to a definition of a "rock," the Tribunal split Article 121(3) into five subsections.[320] Those subsections are "rocks," "cannot," "sustain," "human habitation," "or," and "economic life of their own."[321] In starting this interpretation, the Tribunal contributed to the distinction between claim generating islands and mere rocks.

[317] *Id.*
[318] See UNCLOS, *supra* note 36, at Art. 121,.
[319] *Id*.
[320] *Id*.
[321] Award*, supra* note 99, at ¶ 478.

The first term the Tribunal attempted to define was "rock." Here, the Tribunal relied on both the dictionary definition of "rock" and the application of that definition in international case law. The Tribunal stated "[t]he dictionary meaning of 'rock' does not confine the term so strictly, and rocks may 'consist of aggregates of minerals . . . and occasionally also organic matter . . . . They vary in hardness, and include soft materials such as clays.'"[322] International case law supports that definition, as the ICJ stated in *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, "[i]nternational law defines an island by reference to whether it is 'naturally formed' and whether it is above water at high tide, not by reference to its geological composition . . . The fact that the feature is composed of coral is irrelevant."[323] Further, under the VCLT, Article 32 permits the use of supplementary means of interpretation when that interpretation "leads to a result which is manifestly absurd or unreasonable."[324] If a limited definition of a "rock" were applied to the UNCLOS, it would lead to absurd results because it would eliminate all non-mineral elevations throughout the world's oceans from classification of "rock(s)" under the UNCLOS.[325] In relation to this matter's arbitration, it would eliminate the vast number of reefs in the South China Sea, many are used to build the artificial islands, which are, in part, the cause of this dispute. By using international case law, as well as supplementary definitions, the Tribunal was correct to determine that a "rock" under Article 121(3) refers to any natural, forming formation that lies above water at high or low tide.[326]

The second subsection the Tribunal defined was "cannot." The Tribunal determined that "cannot" was an objective test as to whether the feature "apt, able to, or lends itself to human

[322] Award*, supra* note 99, at ¶ 480.
[323] *Id.* (Quoting Territorial and Maritime Dispute, (Nic. v. Colom.) Merits Judgment 2012 I.C.J. 624 at 645 at ¶ 37).
[324] See VCLT *supra* note 128, at art. 32(b).
[325] Award, *supra* note 99, at ¶ 481.
[326] Id. at ¶ 482.

habitation or economic life."[327] Because "cannot" refers to whether or not the feature is capable of sustaining human habitation or economic life of its own, historical evidence of human habitation or economic life may be used to show that the feature is capable of sustaining human habitation or economic life, or conversely incapable of sustaining human habitation or an economic life.[328]

The third subsection defined by the Tribunal was "sustain." Applying the dictionary definition to "sustain" in connection with a piece of land, the Court found that "to support or maintain (life) by providing food, drink, and other necessities."[329] Based on that definition, the Tribunal concluded that "sustain" contained three components.[330] The first component required providing essentials to support life.[331] The second component required the first component to continue over a period of time because it cannot intermittently provide support.[332] The third component contained a qualitative factor.[333] As such, when applying that definition of "sustain," to human habitation or economic life of their own, the feature must provide essentials over a period of time that satisfy the minimum standards required for human habitation or economic life.[334]

Once again, the Tribunal was correct to use supplementary means of interpretation under the definition of "sustain." "Sustain," in relation to human habitation and economic life of its own, is ambiguous as it does not provide a definition; thus, by using supplementary means of

[327] Award, *supra* note 99, at ¶ 483.
[328] *Id.* at ¶ 484.
[329] *Id.* at ¶ 486. (Quoting "Sustain," Oxford English Dictionary 3rd ed. 2013).
[330] *Id*. at ¶ 487.
[331] *Id*.
[332] *Id*.
[333] *Id.*
[334] *Id*.

interpretation, the Tribunal clarified "sustain" in regard to the regime of islands.[335] By requiring the rocks be capable of providing essentials to support life over a period of time and adding a qualitative factor, the Tribunal defined "sustain" with regard to the object and purpose of the UNCLOS.[336] One benefit of the definition is that it provides order to UNCLOS regime. By listing the three factors the Tribunal has made it far more difficult to show that a rock may actually sustain human habitation or economic life. This definition will prevent States from attempting to claim rocks, which on their own are incapable of sustaining human habitation or economic life. It also ensures that a rock, which may only sustain itself for a short period of time, will not be considered an island.[337] If a rock is only capable of sustaining itself for a short period, then it cannot be considered to sustain itself long enough to sustain a stable human population or economic life. In short, by formulating the three-factor test, the Tribunal raised the bar in order to prove a rock is capable of sustaining human habitation or economic life. And in doing so, the Tribunal made it much more difficult for States to attempt to claim rocks as islands.

The fourth subsection the Tribunal defined was "human habitation." The Tribunal added a qualitative factor to "human habitation," stating "the term habitation implies a non-transient presence of persons who have chosen to stay and reside on the feature in a settled manner."[338] Because human habitation requires settlement, this combined with the definition of "sustain" requires features to provide for persons' food, drink, shelter, and other necessities required by a permanent human settlement.[339] As such, the settlement would need to be permanent or semi-permanent in cases of nomadic peoples.[340] That reading is consistent with the object and purpose

[335] Award, *supra* note 99, at ¶¶ 481-87.
[336] *Id*.
[337] Id. at ¶¶ 486-87.
[338] *Id.* at ¶ 489.
[339] Award, *supra* note 99, at ¶ 489.
[340] *Id.* at ¶ 542.

of the treaty under Article 31 of the VCLT because by merely sending one person, a state could claim that a feature was capable of sustaining "human habitation." A contradictory reading, which incentivizes States to lay claim to features that have long been recognized as incapable of sustaining human habitation, would lead to a scramble to expand their maritime claims., In turn, a scramble would frustrate the object and purpose of the UNCLOS in connection to the regime of islands.[341] Moreover, the language of Article 121(3) states "human habitation or economic life."[342] So, a state need only show that the feature supports human habitation or an economic life of its own, not both.

One of the novel arguments made in this arbitration was that "or" within the context of Article 121(3) should be read negatively, in the "absence of either [human habitation or economic life of its own] is sufficient to deprive [the feature] of such maritime zones.[343] The Tribunal explained that negatively Article 121(3) reads "[r]ocks which cannot sustain (human habitation or economic life of their own)' is equal to '[r]ocks which cannot sustain human habitation [and which cannot sustain] economic life of their own.'"[344] The Tribunal concludes that a feature that is capable of sustaining either human habitation or an economic life of its own, qualifies as an island under Article 121(3).[345]

Some might fear that this decision will make it easier for States to claim features as islands. This fear is not unwarranted. As argued above, the requirement under human habitation already requires that the feature be capable of sustaining the population for a period of time and

[341] *Id.* at ¶ 509.
[342] *See* UNCLOS *supra* note 36, at Art. 121,
[343] UMBERTO LEANZA AND MARIA CRISTINA CARACCIOLO, THE EXCLUSIVE ECONOMIC ZONE, IN THE IMLI MANUEL ON MARITIME LAW: THE LAW OF THE SEA, pg. 117.
[344] Award, *supra* note 99, at ¶ 494.
[345] Award, *supra* note 99, at ¶ 494.

requiring that the feature on its own provide the basic necessities for prolonged habitation. And as will be discussed below, economic life of its own similarly prevents States from participating in territory grabs by placing stringent requirements on what constitutes economic life. In short, "or" in the context of Article 121(3) means "or," and cannot be negatively read to require both "human habitation" and an "economic life of their own" because Article 121(3) concludes that "or" means "or," not "and."

Finally, the fifth subsection the Tribunal defined was "economic life of their own." In doing so, the Tribunal split "economic life of their own" into "economic life" and "of their own."[346] First the Tribunal defined "economic" as "relating to the development and regulation of the material resources of a community[.]"[347] Second, "life" refers to the human activity required to exploit the resources, the mere presence of resources is not enough to bring about economic life because there can be no life if the resources are not exploited.[348] On the one hand, "economic life" together with "sustain" requires a showing that the "economic life" is ongoing; neither a transaction nor exploitation of the feature can constitute an economic life of their own.[349] On the other hand, the Tribunal determined that "of their own" referred to the ability of the feature to sustain its economic life without "relying predominantly on the infusion of outside resources or serving purely as an object for extractive activities, without the involvement of a local population."[350]

The previous interpretation is correct for two reasons. First, an "economic life" that was predominately dependent on outside resources is dispositive of sustaining the "economic life" of

[346] Id. at ¶ 498
[347] *Id.* at ¶ 499. (Quoting "Economic" Shorter Oxford English Dictionary 5th ed. 2002).
[348] *Id.*
[349] *Id.*
[350] Award, *supra* note 99, at ¶ 500.

a feature on its own.[351] If the feature relies on the influx of external resources, it fails to have independent economic life. Second, purely extractive activities, which do not benefit the feature nor the people living on it, cannot support an economic life of its own.[352] If the features' entire economic life is centered on the extraction of resources, and the resources are not used to assist it, the feature would be incapable of sustaining its own economic life because the extraction of those resources do not support the feature.

The final issue is the ability of the feature to support a "life of its own" from the surrounding waters. On one hand, With regards to EEZs and continental shelfs, the Tribunal found that "[i]t would be circular and absurd if the mere presence of economic activity in the area of the possible exclusive economic zone or continental shelf were sufficient to endow a feature with those very zones."[353] On the other hand, "economic life" can be related to territorial seas, so long as the economic activity in the territorial seas was related to the feature.[354] That being said, the Tribunal was of the opinion that a cluster of features may satisfy both the "human habitation" requirement or the "economic life of their own" requirement so long as there was evidence that the human habitation or economic life was connected to the group of features.[355]

The Tribunal added much clarity to the confusion surrounding Article 121. The fear of States participating in territorial gains is assuaged by the high burdens of establishing an economic life on the feature. Thus, a high burden has been placed on States that wish to claim features as islands. First, the State must prove the feature is not dependent on the import of external resources. Secondly, the State must prove the feature's economic life is not solely

[351] *Id.*
[352] *Id.*
[353] *Id.* at ¶ 502.
[354] *Id.* at ¶ 503.
[355] Award, *supra* note 99, at ¶ 544.

dependent on the extraction of its resources that do not benefit the feature. In this way, the Tribunal has placed a significant hurdle on States who wish to set up temporary shop on a feature in order to bolster its claims. In order for a State to establish an economic life on a feature that qualifies as an economic life of its own will require significant investment by the State. Additionally, by attempting to establish such economic life, the State may turn the feature into an artificial island; thus, disqualifying the State from claiming any maritime rights outside of the 500 meter protection zone permitted in Article 60.[356] The Tribunal recognized the chaos that would ensue if a state were able convert a rock into an island "[. . .]by the introduction of technology and extraneous materials[. . . .]"[357] By placing significant hurdles in establishing either human habitation or economic life, the Tribunal added persuasive case law that will, in part, act as a deterrence to States looking to expand their maritime claims by establishing temporary outposts.

D. ARTIFICIAL ISLANDS AND THE SOUTH CHINA SEA

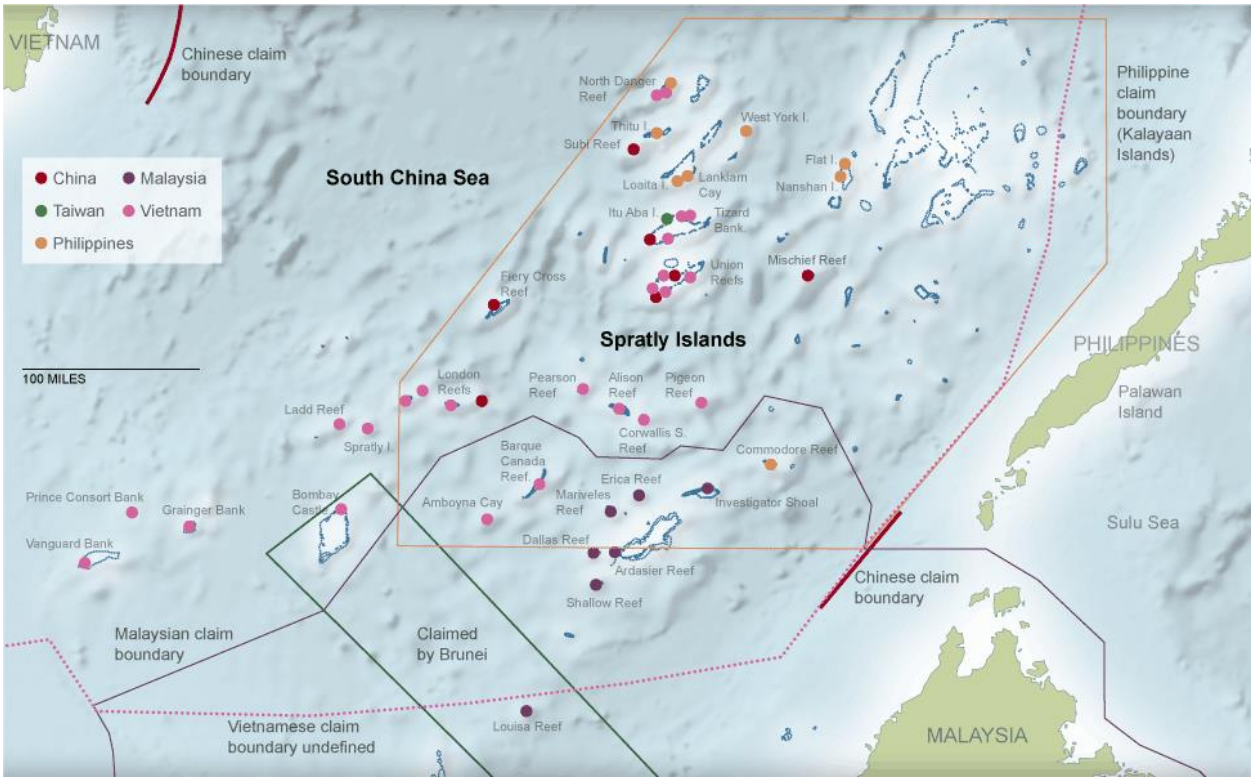
Considering that the dispute in the South China Sea stems from the building of artificial islands, it is important to note their status under the UNCLOS.[358] Artificial islands are governed by Articles 60 and 80 of the UNCLOS. Article 60(1) provides for the building of artificial islands within a States' EEZ.[359] Most notably, however, Article 60(8) states emphatically "artificial islands [. . .] do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone, or the continental shelf."[360] Article 80 applies Article 60 to artificial islands built

[356] *See* UNCLOS, *supra* note 36, at Art. 60,.
[357] Award, *supra* note 99, at ¶ 509.
[358] *See* UNCLOS, *supra* note 36, at Arts. 60 and 81.
[359] UNCLOS, *supra* note 36, at Art. 60(1).
[360] *Id.* at 60(8).

on the continental shelf.[361] In any event, application of these articles is straightforward in the present arbitration. That is because the Tribunal has correctly determined that China had signed over any claims it might have had under the nine-dash line upon its ratification of the UNCLOS.[362] As such, the artificial islands and installations that China had been building in some of the Spratly Islands, in particular at Mischief Reef, fall inside the Philippine's EEZ rather than China's EEZ as permitted by the UNCLOS and are therefore in violation of Article 60.[363] In fact, the only State permitted to build an artificial island at Mischief Reef is the Philippines as it lies within the Philippines' EEZ.[364]

[361] UNCLOS, *supra* note 36, at Art. 80.
[362] Award on Jurisdiction, supra note 38 at ¶ 229.
[363] Award, *supra* note 99, at ¶ 1036-38.
[364] *Id.*

Spratly Islands Occupied Status Map



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The regime of islands in Article 121, places a high burden on States to show that a feature is island rather than a rock. At the same time, Articles 60 and 80 prevent States from establishing artificial islands to expand their claims. Therefore, Articles 121, 60, and 80 are legally sufficient to prevent States from engaging in territory grabs by building artificial islands. However, compliance in international law is often more difficult. One way to ensure China's compliance is to establish a new regional power bloc compromised of Southeast Asian States.

[365] *Territorial Claims in the South China Sea*, N.Y. TIMES (May 2012), http://archive.nytimes.com/www.nytimes.com/interactive/2012/05/31/world/asia/Territorial-Claims-in-South-China-Sea.html?_r=0.

V. SOUTHEAST ASIAN STATES SHOULD RESURRECT THE SOUTHEAST ASIA TREATY ORGANIZATION

One such route to ensure China's compliance in the South China Sea is to bolster the capacity of Southeast Asian States to defend themselves against China's continuous salami slicing. Salami-slicing is "the slow accumulation of small actions, none of which is a casus belli, but which add up over time to a major strategic change."[366] This can be accomplished by reviving the Southeast Asian Treaty Organization ("SEATO").[367] As one author aptly put it "because China is fundamental to Asia, its …. power must be hedged against to preserve the independence of smaller States in Asia that are U.S. allies."[368] By implementing both economic and collective security measures, Southeast Asian States could band together and act as an important check on China in their own neighborhood, and in doing so, will ensure China's compliance with international tribunals as well as stability in one of the world's most important seas.

On the other hand, China's use of salami-slicing tactics often makes it easier for it to expand, particularly, when it encounters smaller, less-powerful States. China wishes to use salami-slicing to bolster its claims to the natural resources there, a claim that as discussed above has been thoroughly and rightly rejected by the Tribunal. However, China may yet use salami-slicing to enter into negotiations with less powerful States in Southeast Asia. To prevent China's salami-slicing, Southeast Asian States must come together to form a collective security pact.

[366] Robert Haddock, Salami Slicing in the South China Sea, FOREIGN POL., (Aug. 3, 2012) https://foreignpolicy.com/2012/08/03/salami-slicing-in-the-south-china-sea/.
[367] *See* Southeast Asia Collective Defense Treaty, Sept. 8, 1954, 6 UST 81-86, TIAS 3170.
[368] ROBERT D. KAPLAN, ASIA'S CAULDRON: THE SOUTH CHINA SEA AND THE END OF A STABLE PACIFIC 166-67 (2014).

Therefore, SEATO ought to be given new life to address the new security problems that face Southeast Asia today.

When making a collective security agreement for Southeast Asia, it is hard to forget the failure of the Manilla Pact and SEATO.[369] As one author noted, one of the most significant failures of SEATO was the fact that it only included three Asian States.[370] Further, SEATO, unlike NATO, did not call for a unified command structure or military force.[371] The ultimate undoing of SEATO was the Vietnam War, just five months after the fall of Saigon, the member States of SEATO agreed to dissolve it in 1977.[372] However, the situation facing Southeast Asia today is a far different conflict that faced Southeast Asia during SEATO's lifetime. Today, the threat is not the spread of communism, rather is it against an increasingly expansive China. As such, the antipathy that a few Asian member States of the original SEATO expressed will not be repeated because the State parties will have more skin-in-the-game than they had in the fight against communism.

The South China Sea is one of the world's most important sea lanes. It also contains vast untapped mineral reserves. Because of this Southeast Asian States have a vested interest in ensuring that the South China Sea remains stable. The importance of the South China Sea regarding shipping cannot be understated because nearly one-third of the world's trade passes through the South China Sea.[373] To further ensure the success of any collective defense treaty in

[369] See, David Brennan, *Could Pompeo's Anti-China alliance Work? SEATO-Asian NATO- Failed Before*, Newsweek (July 31, 2020), https://www.newsweek.com/mike-pompeo-anti-china-alliance-work-seato-asian-nato-failed-before-1521977

[370] Michael Kelly & Sean Watts, *Rethinking the Security Architecture of North East Asia*, 41 VICTORIA UNIV. WELLINGTON L. REV. 273, 279 (2010).

[371] *Id.* at 278.

[372] *Id.* at 279.

[373] Drake Long, *Data Shows Commercial Shipping Avoids Hotspots in South China Sea*, RADIO FREE ASIA (Sept. 28, 2020) https://www.rfa.org/english/news/china/southchinasea-shipping-09282020155242.html.

Southeast Asia, it is important that the overwhelming majority of the State parties to it are actually Southeast Asian States. However, a resurrected SEATO should include a limited number of non-Southeast Asian States like the United States, due to its maritime power. By resurrecting SEATO while amending it to address the shortfalls of the original version and address the modern issues facing Southeast Asia, Southeast Asian states will be able to create a power bloc to counter the expansionist policies of China and ensure stability in the region as well as protect their own independence.

China's claim to the nine-dash line has raised significant issues in the South China Sea and with the overall problem of non-enforceability of international law. The Tribunal correctly found that it had jurisdiction over the dispute and that China's actions in the South China Sea were in violation of the UNCLOS. Further, the Tribunal significantly added to international case law by distinguishing historic rights from historic titles, as well as its in-depth analysis of the regime of islands within Article 121 of the UNCLOS. However, China's refusal to recognize or cooperate with the Tribunal created an opportunity for Southeast Asian States to contribute to the enforceability of international law. The creation of a new collective defense organization, created by and ran by Southeast Asian States, will help to enforce recognition of the Tribunal's findings as well as ensure stability in the South China Sea.