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The South China Sea Arbitration Award

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THE SOUTH CHINA SEA ARBITRATION AWARD

*Bernard H. Oxman**

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I. INTRODUCTION

On January 22, 2013, the Philippines submitted to arbitration under the compromissory clauses of the United Nations Convention on the Law of the Sea its dispute with China regarding the interpretation and application of the Convention in the South China Sea. On July 12, 2016, the arbitral Tribunal constituted under Annex VII of the Convention rendered a unanimous award of almost 500 pages in which it found China's expansive maritime claims and related actions in the South China Sea to be inconsistent with the Convention.¹ "It goes without saying that both Parties are obliged . . . to comply with the Convention and this Award in good faith."² (Award, Merits, para. 1200).

¹ "[T]he Tribunal accepts that China has asserted its claim to rights in the waters within 200 nautical miles of the Philippines baselines in good faith. That the Tribunal disagrees with China's understanding of its rights and considers that there is no possible legal basis for China's claimed rights does not mean that China's understanding has not been genuinely held." (Award, Merits, para. 704).

² China ratified the Convention on June 7, 1996 and the Philippines on May 8, 1984.

The first article of Section 2 of Part XV of the Convention on compulsory procedures entailing binding decisions, Article 286 provides, "Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or Tribunal having jurisdiction under this section."

The award of July 12, 2016 (cited herein as “Award, Merits”), the earlier award on jurisdiction and admissibility of October 29, 2015 (cited herein as “Award, Jurisdiction”), and other documents can be found at <https://pcacases.com/web/view/7>. Two maps of the South China Sea included in the award are appended below. (Award, Merits, Map 1, p. 9, Map 3, p. 125). Also appended is a copy of the map showing the “nine-dash line” that

If they wish, States may make a declaration on choice of forum under paragraph 1 of Article 287. But if, like China and the Philippines, they opt not to do so, then under paragraph 3 of that article they “shall be deemed to have accepted arbitration in accordance with Annex VII.”

Article 9 of Annex VII provides *inter alia*, “If one of the parties to the dispute does not appear before the Tribunal or fails to defend its case, the other party may request the Tribunal to continue the proceedings and to make its award. Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings.”

Article 288, paragraph 4, of the Convention provides, “In the event of a dispute as to whether a court or Tribunal has jurisdiction, the matter shall be settled by decision of that court or Tribunal.”

Article 296, paragraph 1, of the Convention provides, “Any decision rendered by a court or Tribunal having jurisdiction under this section shall be final and shall be complied with by all the parties to the dispute.” Article 11 of Annex VII adds, “The award shall be final and without appeal, unless the parties to the dispute have agreed in advance to an appellate procedure. It shall be complied with by the parties to the dispute.”

Article 300 of the Convention provides *inter alia*, “States Parties shall fulfil in good faith the obligations assumed under this Convention.”

accompanied China's notes verbales of May 7, 2009 to the U.N. Secretary-General.³ (Award, Merits, Figure 2, p. 77).

"China presented a note verbale to the Department of Foreign Affairs of the Philippines on 19 February 2013, rejecting the arbitration and returning the Notification and Statement of Claim to the Philippines." (Award, Jurisdiction, para. 27). China did not exercise its right under Annex VII to appoint one of the five arbitrators and to join with the Philippines in selecting three. In that situation, Article 3(e) of Annex VII provides that the President of the International Tribunal for the Law of the Sea (ITLOS)⁴ shall make the

³ The "nine-dash line" is depicted on the map accompanying two notes verbales of May 7, 2009 from China's Permanent Mission to the United Nations to the Secretary-General of the United Nations regarding the submission of Viet Nam and the joint submission of Malaysia and Viet Nam to the Commission on the Limits of the Continental Shelf (CLCS). (Award, Merits, para. 169, n.131, para. 182). The notes stated *inter alia*:

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). The above position is consistently held by the Chinese Government, and is widely known by the international community.

"What has become known as the 'nine-dash line' first appeared on an official Chinese map in 1948." (Award, Merits, para. 181).

⁴ At the time Judge Shunji Yanai, a national of Japan, was President of the International Tribunal for the Law of the Sea (ITLOS).

necessary appointments.⁵ The result was an expert, experienced, and exacting panel of extraordinary distinction.⁶

China also declined to participate in the proceedings. That said, its Foreign Ministry and other officials commented publicly on certain issues; some of those statements were transmitted by China's ambassador in The Hague to the members of the Tribunal either directly or through the PCA registry with the caveat that this did not mean that China was participating. This included a lengthy Position Paper of December 7, 2014 setting forth jurisdictional objections that was released and transmitted shortly before the deadline for submission of a counter-memorial. The Tribunal treated it and related letters as a

⁵ Annex VII provides for the appointments by the ITLOS President to be made from a list of arbitrators to which each State Party to the Convention is entitled to nominate up to four individuals.

⁶ The Philippines appointed Judge Rüdiger Wolfrum, a national of Germany. In the absence of an appointment by China, the President of ITLOS appointed Judge Stanislaw Pawlak, a national of Poland. In the absence of agreement of the parties on the remaining appointments, the ITLOS President then appointed Judge Jean-Pierre Cot, a national of France, Professor Alfred H.A. Soons, a national of the Netherlands, and as president Judge Thomas A. Mensah, a national of Ghana (following the withdrawal of Ambassador M.C.W. Pinto, a national of Sri Lanka, shortly after his appointment). (Award, Jurisdiction, paras. 28-31; Award, Merits, para. 30).

plea on jurisdiction.⁷ (Award, Jurisdiction, paras. 15, 104; Award, Merits, para. 13).

Although its ambassador's letter delivering China's jurisdictional objections described them as comprehensive, the Tribunal made clear during the proceedings that it would not deem China to have waived other jurisdictional limitations.⁸ This is but one indication of the seriousness with which the Tribunal viewed its duty, in the absence of the respondent, to "satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law." In this regard the Tribunal noted "that Article 9 of Annex VII [which sets forth that obligation] does not operate to change the burden of proof or to raise or lower the standard of proof normally expected of a party to make out its claims or defences. However, as a practical matter, Article 9 has led the Tribunal to take steps to test the evidence provided by the Philippines and to augment the record by seeking additional evidence, expert input, and Party submissions relevant to questions arising in this merits phase, including as to the status of features in the South China Sea, the allegations concerning violations of maritime

⁷ Russia's statement regarding jurisdiction conveyed by note verbale had been similarly characterized in paragraph 5 and in the glossary of defined terms of the 2014 Award on Jurisdiction in the *Artic Sunrise* arbitration in which Russia declined to participate.

⁸ Readers may recall that in paragraphs 76 to 95 of its 2001 judgment, ITLOS dismissed the *Grand Prince* case on jurisdictional grounds that were not invoked by a respondent that participated fully in the proceedings.

safety obligations, and claims about damage to the marine environment.” (Award, Merits, para. 131 (footnote omitted)).⁹

The Tribunal bifurcated the oral proceedings in light of China’s jurisdictional objections. It held a hearing on jurisdiction and admissibility from July 7 to 13, 2015, and a subsequent hearing on the merits from November 24 to 30, 2015 that also included those jurisdictional issues deferred to the merits stage.¹⁰ Both hearings were attended by observer delegations from Indonesia, Japan, Malaysia, Thailand, and Viet Nam. Observers from Australia and Singapore attended the hearing on the merits.¹¹ The states granted observer

⁹ These steps are outlined in detail in the ensuing paragraphs of the award. (Award, Merits, paras. 132-142).

¹⁰ In order to accommodate the large number of individuals in attendance from the Philippines and the observer delegations, the hearings were held in the Great Hall of Justice at the Peace Palace in The Hague rather than in one of its smaller arbitration hearing rooms.

¹¹ The United Kingdom decided not to send an observer to the hearing on the merits after its request for “neutral observer status” was granted. The United States request to send an observer to that hearing “[a]s a major coastal and maritime State, and as a State that is continuing to pursue its domestic Constitutional processes to accede to the United Nations Convention on the Law of the Sea” was not granted; the Tribunal decided that “only interested States parties to the United Nations Convention on the Law of the Sea will be admitted as observers.” (Award, Merits, paras. 65-68).

Readers may recall that ITLOS, in paragraph 24 of its 2015 advisory opinion on fisheries, concluded that a written statement from the United States should be considered as part of the case file because the United

status were also afforded access to certain documents. While the Tribunal did not open the hearings to the public, verbatim records were made available to China promptly and were later published on the PCA website.

Prior to the hearings, at approximately the same time that China issued its Position Paper on jurisdiction, Viet Nam delivered to the Tribunal a statement of its Foreign Ministry. That statement described the nature of Viet Nam's interest, affirmed the Tribunal's jurisdiction, rejected China's claims and actions based on the nine-dash line, stated that none of the maritime features mentioned by the Philippines in the proceedings can generate maritime entitlements in excess of 12 nautical miles because they are either low-tide elevations or rocks which cannot sustain human habitation or economic life of their own, and reserved the right to intervene. (Award, Merits, para. 36; Award, Jurisdiction, para. 54).

II. JURISDICTION

The Tribunal's award on the merits incorporates the conclusions of its earlier award of October 29, 2015 on jurisdiction and admissibility. That award addressed China's assertions in its December 7, 2014 Position Paper that the Tribunal lacks jurisdiction because, in China's words:

States was a party to the Law of the Sea Convention's 1995 Implementation Agreement on straddling fish stocks.

- The essence of the subject-matter of the arbitration is the territorial sovereignty over several maritime features in the South China Sea, which is beyond the scope of the Convention and does not concern the interpretation or application of the Convention;
- China and the Philippines have agreed, through bilateral instruments and the Declaration on the Conduct of Parties in the South China Sea, to settle their relevant disputes through negotiations. By unilaterally initiating the present arbitration, the Philippines has breached its obligation under international law;¹²
- Even assuming, *arguendo*, that the subject-matter of the arbitration were concerned with the interpretation or application of the Convention, that subject-matter would constitute an integral part of maritime delimitation between the two countries, thus falling within the scope of the declaration filed by China in 2006 in accordance with the Convention, which excludes, *inter alia*, disputes concerning maritime delimitation from compulsory arbitration and other compulsory

¹² The Tribunal also considered *proprio motu* whether the dispute settlement provisions of certain treaties had similar effect.

dispute settlements. (Award, Jurisdiction, para. 14, quoting para. 3 of China's Position Paper (footnote added)).

These challenges to jurisdiction were not accepted. In its Statement of Claim and subsequent pleadings, the Philippines expressly excluded disputes regarding territorial sovereignty. The Tribunal concluded that it could determine whether a feature was amenable to appropriation and capable of generating entitlement to maritime zones, and if so which zones, without resolving questions of disputed territorial sovereignty over that feature. The Tribunal observed "that it is entirely possible to approach the Philippines' Submissions from the premise . . . that China is correct in its assertion of sovereignty over Scarborough Shoal and the Spratlys." (Award, Jurisdiction, para. 153; Award, Merits, para. 447).

In addition the Tribunal found that the Declaration of Conduct was not a legally binding instrument, and that none of the instruments examined precluded resort to the Convention's compulsory dispute settlement procedures under Articles 281 and 282 of the Convention. (Award, Jurisdiction, paras. 212-218, 300, 301, 413(E)).¹³

¹³ The Tribunal agreed with the previously expressed view of the Law of the Sea Tribunal that although other agreements may contain rights or obligations similar to or identical with the rights and obligations set out in the Convention, the rights and obligations under those agreements have a separate existence from those under the Convention. (Award, Jurisdiction, para. 178). Citing the dissenting opinion of Sir Kenneth Keith with approval, the Tribunal indicated its

In its Statement of Claim and subsequent pleadings, the Philippines also expressly excluded disputes regarding maritime delimitation covered by Article 298 and China's declaration thereunder. The Tribunal concluded that the question of whether a feature generated maritime jurisdiction, and if so where and what kind, was separate from the question of delimitation of overlapping maritime jurisdictional zones and could be addressed without reaching delimitation issues. (Award, Jurisdiction, paras. 400-401, 403-404; see also Award, Merits, paras. 391-396).

Although China had not raised a question regarding absent parties, the Tribunal considered the issue and held that third-state claimants were not indispensable parties. It distinguished "the few cases in which an international court or tribunal has declined to proceed due to the absence of an indispensable third party" and noted *inter alia* Viet Nam's express communication to the Tribunal that it had no doubt that the Tribunal had jurisdiction. The Tribunal added, "Like Viet Nam, Malaysia and Indonesia have received copies of the pleadings and attended the hearings as observers and Brunei Darussalam has been provided with copies of documents. No argument has been made by China, the

disagreement with the majority decision in the *Southern Bluefin Tuna* arbitration, on which China relied, that notwithstanding the absence of any express language to this effect, the dispute settlement provisions of another agreement, if they do not provide for compulsory jurisdiction, may imply that they preclude resort to the compulsory jurisdiction provisions of the Convention under Article 281. (Award, Jurisdiction, paras. 221-225, 285-286).

Philippines, or the neighbouring States that their participation is indispensable to the Tribunal proceeding with this case.” (Award, Jurisdiction, paras. 181, 183, 187-188). The Tribunal reaffirmed its prior conclusion in response to a communication from Malaysia delivered on June 23, 2016. (Award, Merits, paras. 634-641).

Although China also did not invoke the optional exception for disputes concerning military activities under its August 2006 declaration pursuant to Article 298, that exception was held to apply to the Philippine submission concerning the standoff between Philippine armed forces personnel and Chinese government vessels at Second Thomas Shoal.¹⁴ (Award, Merits, para. 1161). On the other hand, “[t]he Tribunal will not deem activities to be military in nature when China itself has consistently resisted such classifications and affirmed the opposite at the highest level.” Accordingly, the Tribunal did not apply the military activities exception to the submissions concerning China’s construction activities, noting that China had repeatedly stated that the facilities it was building in the Spratlys were intended exclusively or primarily for civilian use. Shortly

¹⁴ This jurisdictional limitation applied to the Philippine allegation that China aggravated and extended the dispute by interfering with Philippine access to Second Thomas Shoal and to its personnel posted on a grounded ship there. In the context of other submissions, the Tribunal concluded that Second Thomas Shoal is a low-tide elevation that is not subject to appropriation and, as between the parties to the case, forms part of the EEZ and continental shelf of the Philippines. It reached the same conclusion regarding Mischief Reef. (Award, Merits, paras. 381, 647, 1040).

before the hearing on the merits President Xi Jinping stated at a White House press conference, with reference to China's construction activities in the Nansha [Spratly] Islands, that "China does not intend to pursue militarization." (Award, Merits, paras. 937, 1027, 1028, 1164).

The same clause of Article 298 that permits declarations excluding disputes relating to sea boundary delimitations also refers to those involving historic bays or titles. China's Position Paper invoked the former but not the latter exclusion. The Tribunal nevertheless considered whether the latter exclusion applied. It distinguished the reference to historic title from a broader notion of historic rights, and interpreted the former to refer to claims to sovereignty, noting its association with claims to internal waters or a territorial sea. Both are close to shore and are subject to the sovereignty of the coastal state. After detailed examination of the text of Chinese laws and assertions, including China's affirmation of freedom of navigation in the South China Sea, the Tribunal found that while China asserted historic rights within the so-called nine dash line encircling much of the South China Sea, it did not claim historic title over those waters. (Award, Merits, paras. 225-228).¹⁵

¹⁵ The Tribunal's conclusion that the jurisdictional exception is inapplicable because China does not claim historic title to the maritime areas in question would not appear to have required the Tribunal to determine that the reference to historic bays or titles is independent of the immediately preceding reference to delimitation in the same clause of Article 298(1)(a)(i). (See Award, Merits, para. 215). The Tribunal's linguistic analysis on the latter point should be approached carefully lest

III. HISTORIC RIGHTS AND THE NINE-DASH LINE

This finding opened the door to consideration of perhaps the most fundamental legal issue in the case, namely the lawfulness of China's claim of historic rights in the vast maritime area within the nine-dash line.

As far as the Tribunal is aware, China has never expressly clarified the nature or scope of its claimed historic rights. Nor has it ever clarified its understanding of the meaning of the 'nine dash line'. Certain facts can, however, be established. (Award, Merits, para. 180 (footnote omitted)).

The Tribunal observed that "China's repeated invocation of rights 'formed in the long historical course'

it be read (one trusts misread) to permit a state to avoid compulsory jurisdiction over a challenge to the legality of a maritime claim that the state characterizes as a claim to full sovereignty rooted in historic title. To be sure, the permissibility and effect of a reservation to jurisdiction is independent of the legality of the action thereby excluded from judicial review, as the ICJ pointed out in its 1998 judgment dismissing the Fisheries Jurisdiction case brought by Spain against Canada (paras. 54-55). But under the Law of the Sea Convention the scope of a permissible exception to jurisdiction itself depends on the interpretation and application of Article 298 in the context of other relevant provisions, and the Tribunal did not have the occasion to address whether this optional jurisdictional exception applies to unlawful claims to historic bays or titles. In this regard, it is unclear that a requirement that the claim be made in good faith would provide an effective solution to the problem. See note 1 *supra*.

and its linkage of this concept with the 'nine-dash line' indicates that China understands its rights to extend, in some form, beyond the maritime zones expressly described in the Convention." It analyzed China's acts and statements relating to areas that are beyond the maximum entitlements that could be claimed under the Convention "even if a full exclusive economic zone were ascribed to the single small rock above water at high tide." The Tribunal concluded "that China does claim rights to petroleum resources and fisheries within the 'nine-dash line' on the basis of historic rights existing independently of the Convention." (Award, Merits, paras. 207-211).

The Tribunal's analysis of this claim concentrated on three issues it identified as follows:

- (a) First, does the Convention, and in particular its rules for the exclusive economic zone and continental shelf, allow for the preservation of rights to living and non-living resources that are at variance with the provisions of the Convention and which may have been established prior to the Convention's entry into force by agreement or unilateral act?
- (b) Second, prior to the entry into force of the Convention, did China have historic rights and jurisdiction over living and non-living resources in the waters of the South China Sea beyond the limits of the territorial sea?
- (c) Third, and independently of the first two considerations, has China in the years since the conclusion of the Convention established rights and jurisdiction over living and non-living resources in the waters of the South

China Sea that are at variance with the provisions of the Convention? If so, would such establishment of rights and jurisdiction be compatible with the Convention? (Award, Merits, para. 234).

The Tribunal answered the first question in the negative. It observed that the Convention sets forth a comprehensive system of rights and freedoms that covers the oceans as a whole and was intended to supersede prior inconsistent claims. It noted that the issue of prior fishing was carefully considered in the particular context of the EEZ: proposals for protection of traditional fishing rights in the zone were strongly opposed by China and other coastal states and were not accepted; the coastal state is merely obliged to take into account economic dislocation in states that have habitually fished in the area as one of the relevant factors in deciding how to allocate access to that portion of the allowable catch, if any, that is surplus to the coastal state's harvesting capacity. As for the continental shelf, the provisions of the Convention affirm the exclusivity of the coastal State's rights, and make no provision for foreign rights to the natural resources of the continental shelf. (Award, Merits, paras. 235-254).

The Tribunal also answered the second question in the negative. It observed that prior to the Convention, and certainly prior to World War II, most of the South China Sea was high seas, and "the exercise of freedoms [of the high seas, including navigation and fishing] permitted under international law cannot give rise to a historic right; it

involves nothing that would call for the acquiescence of other States and can only represent the use of what international law already freely permits." (Award, Merits, paras. 268-269).¹⁶

[T]o establish the exclusive historic right to living and non-living resources within the 'nine-dash line', which China now appears to claim, it would be necessary to show that China had historically sought to prohibit or restrict the exploitation of such resources by the nationals of other States and that those States had acquiesced in such restrictions. In the Tribunal's view, such a claim cannot be supported. The Tribunal is unable to identify any evidence that would suggest that China historically regulated or controlled fishing in the South China Sea, beyond the limits of the territorial sea. . . . With respect to the seabed, the Tribunal does not see any historical activity that could have been restricted or controlled, and correspondingly no basis for a historic right. (Award, Merits, para. 270).

With respect to the third question, the Tribunal concluded that China has not established rights at variance with the Convention in the years since the conclusion of the

¹⁶ The Tribunal noted that the ICJ Chamber in the Gulf of Maine case made the same point regarding historic U.S. fishing on Georges Bank. (Award, Merits, para. 270).

Convention.¹⁷ “The extent of the rights asserted within the ‘nine-dash line’ only became clear with China’s Notes Verbales of May 2009. Since that date, China’s claims have been clearly objected to by other States. In the Tribunal’s view, there is no acquiescence.” (Award, Merits, para. 275).

The Tribunal concluded that “China’s claims to historic rights, or other sovereign rights or jurisdiction, with respect to the maritime areas of the South China Sea encompassed by the relevant part of the ‘nine-dash line’ are contrary to the Convention and without lawful effect to the extent that they exceed the geographic and substantive limits of China’s maritime entitlements under the Convention.” (Award, Merits, para. 278).

IV. ISLANDS, ROCKS, AND LOW-TIDE ELEVATIONS

No question was raised in the proceedings regarding maritime entitlements generated by the Chinese mainland or nearby islands in accordance with the Convention. The questions concerned maritime entitlements, if any, generated by small features at great distances from the Chinese mainland, namely Scarborough Shoal and the Spratly Islands,¹⁸ where there are extensive overlapping sovereignty

¹⁷ Some hesitation in raising this issue at all may be discerned in the Tribunal’s remarks that it is doing so “for the sake of completeness” and that it “does not consider it necessary here to address in general whether and under which conditions the Convention may be modified by State practice.” (Award, Merits, paras. 273, 275; *see also* paras. 575, 576).

¹⁸ Located in the southern portion of the South China Sea, the Spratly Islands are a constellation of small islands and coral reefs, existing just above or below water, that comprise the peaks of undersea mountains

claims by China and the Philippines, as well as Viet Nam in the Spratlys. Each of the three occupies some of the Spratly features. Taiwanese personnel occupy the largest, Itu Aba. In recent years Chinese ships have denied Philippine vessels access to the waters of Scarborough Shoal.

The first question posed was whether particular features occupied by China in the Spratlys were islands, or rather formed part of the seabed and subsoil. Consistently with the jurisprudence of the International Court of Justice, the Tribunal made clear that islands are amenable to appropriation and generate maritime jurisdiction, while features of the seabed and subsoil (including low-tide elevations) are not amenable to appropriation and do not themselves generate maritime jurisdiction. (Award, Merits, paras. 308-309).

Paragraph 1 of Article 121 of the Convention provides, "An island is a naturally formed area of land, surrounded by water, which is above water at high tide." Under paragraph 2 of Article 121 an island generates the same maritime entitlements as other land territory, including a territorial sea with a maximum breadth of 12 nm from the coastal baselines, an EEZ and continental shelf beyond the territorial sea with a maximum breadth of 200 nm from those baselines, and perhaps a broader continental shelf in areas where the continental margin extends beyond 200 nm.

rising from the deep ocean floor. They were long known principally as a hazard to navigation and identified on nautical charts as the "dangerous ground." (Award, Merits, para. 3).

Paragraph 3 of Article 121 adds, however: “Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.”

Following extensive analysis of the data, the Tribunal upheld in some but not all cases the Philippine contention that the features it named were not islands. (Award, Merits, paras. 382-383).¹⁹ The words “naturally formed” in Article 121 were central to the legal inquiry. The Tribunal made clear that artificial alterations and installations and structures are not relevant to the determination that a feature is an island and, if so, to the determination of whether it can sustain human habitation or economic life of its own. This in turn required evidence regarding the features in their natural state.²⁰ The Tribunal observed:

There is no question that all of the significant high-tide features in the Spratly Islands are presently controlled by one or

¹⁹ If a feature is within 12 nm of an island claimed by the same state, in terms of the generation of maritime jurisdiction it may make little difference whether the feature is a low-tide elevation or an island. Under Article 2(2) of the Convention, the sovereignty of the coastal state over the territorial sea extends to its bed and subsoil. Under Article 13(1), “Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea” from the mainland or the island.

²⁰ Cf. note 23 *infra*.

another of the littoral States, which have constructed installations and installed personnel. This presence, however, is predominantly military or governmental in nature and involves significant outside supply. Moreover, many of the high-tide features have been significantly modified from their natural condition. Additionally, accounts of current conditions and human habitation on the features may reflect deliberate attempts to colour the description in such a way as to enhance or reduce the likelihood of the feature being considered to generate an exclusive economic zone, depending on the interests of the State in question. Accordingly, the Tribunal considers historical evidence of conditions on the features--prior to the advent of the exclusive economic zone as a concept or the beginning of significant human modification--to represent a more reliable guide to the capacity of the features to sustain human habitation or economic life. (Award, Merits, para. 578).

The present award is the first decision by an international tribunal in which the issues posed by paragraph 3 of Article 121 are analyzed in depth.²¹ The

²¹ After years of avoiding the issue, in paragraph 183 of its 2012 judgment in the *Nicaragua v. Colombia* case, the ICJ characterized a coral outcropping at Quitasueño as a "rock" under paragraph 3 of Article 121, having noted that there was no dispute in this regard.

question of whether particular high-tide features are, in the terminology used by the Tribunal, “fully entitled islands” under paragraph 2 or “rocks” under paragraph 3, was posed in two different contexts. The first was the claim by the Philippines that certain named features occupied by China were rocks that generated no entitlement to an EEZ or continental shelf. The second was the claim by the Philippines that China was unlawfully interfering with the rights of the Philippines in its EEZ and continental shelf.

Because the Tribunal lacked jurisdiction to delimit overlapping entitlements, it reasoned that the latter claim could be addressed and upheld only if China were found to have no coastal state entitlements in the maritime areas in question. China claims all of the Spratly Islands. A 200-mile arc around any significant high-tide feature there would overlap large areas within 200 miles of the Philippines, including specific areas with respect to which the Philippines sought an express determination that they were part of the Philippine EEZ and continental shelf. The Tribunal accordingly concluded that it needed to determine whether any of the high-tide features in the Spratlys were “fully entitled islands” that generate an EEZ and continental shelf. (Award, Merits, paras. 391-396).

The Tribunal summarized the positions in this regard as follows:

China considers that it “has, based on the Nansha Islands as a whole, territorial sea, exclusive economic zone, and continental shelf,” but has not explicitly set out its position on the application of Article 121(3) to each of the maritime features identified in the Philippines’ Submissions. China’s general

silence in this regard can be contrasted with (a) the positions of States such as Viet Nam, Indonesia, and the Philippines that high-tide features in the Spratly Islands are “rocks” for purposes of Article 121(3) and should only be entitled to a 12-nautical mile territorial sea; (b) the position implied in Malaysia and Viet Nam’s Joint Submission to the CLCS [Commission on the Limits of the Continental Shelf] that sets out official coordinates for the 200-nautical-mile limit of the continental shelves of the two States, drawn only from basepoints adjacent to Borneo and the mainland of Viet Nam and not from any feature in the Spratlys; and (c) recent assertions by the Taiwan Authority that Itu Aba “indisputably qualifies as an ‘island’ according to the specifications of Article 121 . . . and can sustain human habitation and economic life of its own” and “is thus categorically not a ‘rock’.”²² (Award, Merits, para. 449 (footnotes omitted)).

In light of China’s assertion that its entitlement to an EEZ and continental shelf is based on the Nansha [Spratly] Islands “as a whole,” the Tribunal broached and rejected the idea that baselines could be drawn around the Spratly

²² Following Taiwan’s assertions, China indicated that it too regards Itu Aba as a fully entitled island and not a rock. (Award, Merits, para. 466).

Islands. It noted that Article 47 of the Convention permits only archipelagic states comprised exclusively of islands to draw archipelagic baselines around an offshore archipelago, adding that archipelagic baselines around the Spratly Islands also would not satisfy the requirement that the ratio of water to land within the baselines not exceed nine to one. The Tribunal went on to observe that Article 7 of the Convention permits states to draw straight baselines “where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity.” In its view, “[n]otwithstanding the practice of some states to the contrary,” Article 7 does not permit states to draw straight baselines around offshore archipelagos to approximate the effect of archipelagic baselines. “Any other interpretation would effectively render the conditions in Articles 7 and 47 meaningless.” (Award, Merits, paras. 573-576).

The Tribunal also noted China’s emphasis on the importance of Article 121(3) in its diplomatic communications and statements, including those contesting Japan’s entitlement to a continental shelf in respect of Okinotorishima, which China regards as a rock.

Through the statements recounted above, China has demonstrated a robust stance on the importance of Article 121(3). It has repeatedly alluded to the risks to “the common heritage of mankind” and “overall interests of the international community” if Article 121(3) is not properly applied to small features that on their “natural conditions” obviously cannot sustain human habitation or economic life of their own. China has not, however, assessed those factors in any specific analysis of most of

the individual features in the South China Sea .
... (Award, Merits, para. 458).

The Tribunal undertook a lengthy analysis of Article 121(3) before applying it to specific features. The following are extracts from the Tribunal's enumeration of its conclusions regarding the interpretation of the provision. (Award, Merits, paras. 539-550 (footnotes added)):

First, the use of the word "rock" does not limit the provision to features composed of solid rock. The geological and geomorphological characteristics of a high-tide feature are not relevant to its classification pursuant to Article 121(3).²³

²³ In this regard, the Tribunal observed (Award, Merits, para. 481):

Within Article 121, rocks are a category of island. An island is defined as a "naturally formed area of land," without any geological or geomorphological qualification. Introducing a geological qualification in paragraph (3) would mean that any high-tide features formed by sand, mud, gravel, or coral--irrespective of their other characteristics--would always generate extended maritime entitlements, even if they were incapable of sustaining human habitation or an economic life of their own. Such features are more ephemeral than a geological rock and may shift location or appear and disappear above high water as a result of conditions over time. A geological criterion would thus accord greater entitlements to less stable and less permanent features. This cannot have been the intent of the Article.

Second, the status of a feature is to be determined on the basis of its natural capacity, without external additions or modifications intended to increase its capacity to sustain human habitation or an economic life of its own.²⁴

Third, with respect to “human habitation”, the critical factor is [its] non-transient character, such that the inhabitants can fairly be said to constitute the natural population of the feature, for whose benefit the resources of the exclusive economic zone were seen to merit protection.²⁵

Fourth, the “economic life” must be oriented around the feature itself. Economic activity that is entirely dependent on external resources or devoted to using a feature as an object for extractive activities without the involvement of a local population would fall inherently short with respect to this necessary link to the feature itself.

²⁴ “Just as a low-tide elevation or area of seabed cannot be legally transformed into an island through human efforts, the Tribunal considers that a rock cannot be transformed into a fully entitled island through land reclamation. The status of a feature must be assessed on the basis of its natural condition.” (Award, Merits, para. 508).

²⁵ While the Tribunal did not import concepts such as domicile or habitual residence from private international law, some resonance may be discerned.

Fifth, the ability to sustain either human habitation or an economic life of its own would suffice to entitle a high-tide feature to an exclusive economic zone and continental shelf. However, as a practical matter, a maritime feature will ordinarily only possess an economic life of its own if it is also inhabited by a stable human community.

Sixth, Article 121(3) is concerned with the *capacity* of a maritime feature to sustain human habitation or an economic life of its own, not with whether the feature is presently, or has been, inhabited or home to economic life.

Seventh, the principal factors that contribute to the natural capacity of a feature would include the presence of water, food, and shelter in sufficient quantities to enable a group of persons to live on the feature for an indeterminate period of time.

Eighth, the capacity of a feature should be assessed with due regard to the potential for a group of small island features to collectively sustain human habitation and economic life.

Ninth, evidence of physical conditions will ordinarily suffice only to classify features that clearly fall within one category or the other. [It] is insufficient for features that fall close to the line. In such circumstances, the Tribunal considers that the most reliable evidence of the capacity of a feature will usually be the historical use to which it has been put. Humans have shown no shortage of ingenuity

in establishing communities in the far reaches of the world, often in extremely difficult conditions.

The physical characteristics of Scarborough Shoal and many of the high-tide features of the Spratlys leave little room for doubt that they are rocks under paragraph 3 of Article 121. Most attention was focused on the principal features in the Spratlys,²⁶ including the largest, Itu Aba.²⁷ Based on its detailed analysis of physical characteristics, the Tribunal concluded:

The principal features of the Spratly Islands are not barren rocks or sand cays, devoid of fresh water, that can be dismissed as uninhabitable on the basis of their physical characteristics alone. At the same time, the features are not obviously habitable, and their

²⁶ The award specifically addresses Itu Aba, Thitu, West York, Spratly Island, South-West Cay, and North-East Cay. “The Tribunal has also considered, and reaches the same conclusion with respect to, the other, less significant high-tide features in the Spratly Islands, which are even less capable of sustaining [human habitation or economic life], but does not consider it necessary to list them individually.” (Award, Merits, paras. 622, 625).

²⁷ The surface area of Itu Aba is approximately 0.43 km². It is barely over 200 nm from the Philippine Island of Palawan and well over 500 nm from Hainan Island off the Chinese mainland. Noting that China, in a letter previously delivered to the individual members of the Tribunal, “objected strongly to the possibility of any site visit to the South China Sea,” the Tribunal did not pursue “the Taiwan Authority of China’s public offer to arrange a site visit to Itu Aba.” (Award, Merits, para. 142).

capacity even to enable human survival appears to be distinctly limited. In these circumstances, . . . the Tribunal considers that the physical characteristics of the features do not definitively indicate the capacity of the features. Accordingly, the Tribunal is called upon to consider the historical evidence of human habitation and economic life on the Spratly Islands and the implications of such evidence for the natural capacity of the features. (Award, Merits, para. 616).

After reviewing that evidence, it concluded as follows:

The Tribunal sees no indication that anything fairly resembling a stable human community has ever formed on the Spratly Islands. Rather, the islands have been a temporary refuge and base of operations for fishermen and a transient residence for labourers engaged in mining and fishing. The introduction of the exclusive economic zone was not intended to grant extensive maritime entitlements to small features whose historical contribution to human settlement is as slight as that. Nor was the exclusive economic zone intended to encourage States to establish artificial populations in the hope of making expansive claims, precisely what has now occurred in the South China Sea. On the contrary, Article 121(3) was intended to prevent such developments and to forestall a provocative and counterproductive effort to

manufacture entitlements. (Award, Merits, para. 621).

The Tribunal also determined that the history of economic activity in the Spratly Islands (*i.e.*, mining for guano, collecting shells, and fishing) does not satisfy the standard that such activity “be oriented around the feature itself and not be focused solely on the surrounding territorial sea or entirely dependent on external resources.” It added that “extractive economic activity, without the presence of a stable local community, necessarily falls short of constituting the economic life of the feature.” (Award, Merits, para. 623).

Accordingly, the Tribunal concluded that “none of the high-tide features in the Spratly Islands is capable of sustaining human habitation or an economic life of their own” and therefore “such features shall have no exclusive economic zone or continental shelf.” (Award, Merits, paras. 554-570, 626).

V. ACTIONS REGARDING THE PHILIPPINE EEZ AND CONTINENTAL SHELF

Having determined that China has no entitlement to an EEZ and continental shelf that overlaps the EEZ and continental shelf of the Philippines in the areas in question, the Tribunal proceeded to address the conformity with the Convention of China’s actions and activities. The Tribunal did not regard China’s communication to the Philippines or its nationals or licensees of China’s claims to maritime areas within 200 nm of the Philippines as constituting a violation of the Convention. It did however regard the physical interception by Chinese marine surveillance vessels in 2011 of a ship carrying out seismic activities under Philippine authorization at Reed Bank, and the order to stop those activities and leave the area, as a violation of the Philippines’

exclusive rights with respect to its continental shelf. And it found that China's construction activities at Mischief Reef violate the Philippines' rights with respect to its EEZ and continental shelf, including those concerning the construction of artificial islands, installations and structures under Articles 60 and 80. The Tribunal also determined that a 2012 fishing moratorium declared by China in the northern part of the South China Sea "established a realistic prospect that Filipino fisherman, seeking to exploit the resources of the Philippines' exclusive economic zone, could be exposed to the punitive measures spelled out in the moratorium" and constituted a violation of the Philippines' rights in its EEZ. In addition, citing the 2015 ITLOS fisheries advisory opinion, the Tribunal found "that China has, through the operation of its marine surveillance vessels in tolerating and failing to exercise due diligence to prevent fishing by Chinese flagged vessels at Mischief Reef and Second Thomas Shoal in May 2013, failed to exhibit due regard for the Philippines' sovereign rights with respect to fisheries in its exclusive economic zone." (Award, Merits, paras. 708, 712, 757, 1043).

VI. ENVIRONMENTAL DUTIES

The Tribunal held that China's failure to take steps to prevent environmental harm by its fishing vessels violated its environmental duties under the Convention. While no claims were made under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) as such, the Tribunal noted that "CITES is the subject of nearly universal adherence, including by the Philippines and China, and in the Tribunal's view forms part

of the general corpus of international law that informs the content of Article 192 and 194(5) of the Convention.”²⁸ Accordingly “Article 192 includes a due diligence obligation to prevent the harvesting of species that are recognised internationally as being at risk of extinction and requiring international protection.” (Award, Merits, para. 956).

²⁸ Part XII of the Convention addresses protection and preservation of the marine environment. It opens with one of rare unqualified statements of a basic environmental duty in a widely ratified treaty: Article 192 provides, in its entirety, “States have the obligation to protect and preserve the marine environment.” The article’s general language “is informed by the other provisions of Part XII and other applicable rules of international law.” (Award, Merits, para. 941). Paragraph 5 of Article 194 adds, “The measures taken in accordance with this Part shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.” The Tribunal cited the statement by ITLOS in paragraph 70 of its 1999 provisional measures order in the *Southern Bluefin Tuna* case that “the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment.” (Award, Merits, para. 956).

In this regard it may be recalled that the executive branch commentary that accompanied submission of the Convention to the U.S. Senate some years earlier states, “The term ‘marine environment,’ as used in the Convention, includes ‘marine life,’” and accordingly a tribunal’s authority under Article 290 to prescribe provisional measures to prevent serious harm to the marine environment includes “provisional conservation measures for living marine resources . . . whether or not such measures are necessary to protect the respective rights of the parties.” (Treaty Doc. 103-39, p. 85 (1994)).

The Tribunal . . . considers the harvesting of sea turtles, species threatened with extinction, to constitute a harm to the marine environment as such. The Tribunal further has no doubt that the harvesting of corals and giant clams from the waters surrounding Scarborough Shoal and features in the Spratly Islands, on the scale that appears in the record before it, has a harmful impact on the fragile marine environment. The Tribunal therefore considers that a failure to take measures to prevent these practices would constitute a breach of Articles 192 and 194(5) of the Convention (Award, Merits, para. 960).

[A]dopting appropriate rules and measures to prohibit a harmful practice is only one component of the due diligence required by States There is no evidence in the record that would indicate that China has taken any steps to enforce those rules and measures against fishermen engaged in poaching of endangered species. Indeed, at least with respect to the April 2012 incidents, the evidence points directly to the contrary. China was aware of the harvesting of giant clams. It did not merely turn a blind eye to this practice. Rather, it provided armed government vessels to protect the fishing boats. (Award, Merits, para. 964).

The most serious environmental harm in the Spratlys was the direct result of construction activities undertaken by China on seven reefs²⁹ while the dispute was before the Tribunal.

The massive island-building project that China has embarked on since the end of 2013 . . . far exceeds the scale of . . . earlier construction projects” in the Spratlys by China or other states, including the Philippines and Viet Nam. (Award, Merits, para. 854).

Whatever other States have done within the South China Sea, it pales in comparison to China’s recent construction. (Award, Merits, para. 1178).

[T]he record shows that since the end of 2013, China has created on top of the coral reefs approximately 12.8 million square metres of land, from millions of tons of dredged coral, rocks and sand. There is no question that the artificial island-building program is part of an official Chinese policy and program implemented by organs of the Chinese State. (Award, Merits, para. 976).

²⁹ Cuarteron Reef, Fiery Cross Reef, Gaven Reef (North), Johnson Reef, Hughes Reef, Subi Reef, and Mischief Reef. (Award, Merits, para. 852).

The conclusions of the Tribunal-appointed independent experts are unequivocal with respect to the more recent construction activities, which they say have “impacted reefs on a scale unprecedented in the region.” They cite a 2016 study analysing satellite imagery that found up to 60 percent of the shallow reef habitat at the seven reefs has been directly destroyed. Construction-related sedimentation and turbidity have affected large portions of the reefs beyond the immediate area of construction. (Award, Merits, para. 978 (footnotes omitted)).

“Based on the compelling evidence, expert reports, and critical assessment of Chinese claims” regarding environmental effects, the Tribunal concluded that “China’s artificial island-building activities on the seven reefs in the Spratly Islands have caused devastating and long-lasting damage to the marine environment.”³⁰ The Tribunal found

³⁰ The Tribunal quoted various passages from reports by the experts it appointed. Each of the points below regarding the nature and duration of the harm is separately excerpted from the passages quoted in paragraph 979 of the award:

--The harm caused by direct burial of reef habitat during the construction of artificial islands is near-permanent.

--The . . . harm to areas affected by dredging for navigable channels and basins will likely be near-permanent and . . . the prospects for rejuvenation are

that “through its construction activities, China has breached its obligation under Article 192 to protect and preserve the marine environment, has conducted dredging in such a way as to pollute the marine environment with sediment in breach of Article 194(1), and has violated its duty under Article 194(5) to take measures necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.” There was also “no convincing evidence of

low, particularly as long as maintenance dredging for the use of the artificial islands continues.

--[W]here major geomorphological structures [of the reefs] have been removed through dredging . . . there is little prospect for recovery on ecological time scales. These structures constitute accumulated reef growth on geological time scales of centuries to millennia.

--Harm to areas affected by smothering of sediments and increased turbidity . . . is likely to endure for years to decades within the lagoons (due to limited water exchange), and for weeks to months on the outer reef slopes. Rejuvenation of these areas is possible . . . but will take several decades, and it will likely take centuries for large massive colonies to regrow.

--China’s construction activities have led to . . . significant reductions of nursery habitat for a number of fish species. . . . The construction activities thus will have a broader impact on the marine ecosystem in and around the South China Sea and on fisheries resources. However, the magnitude of this impact . . . is difficult to quantify due to a lack of empirical studies.

China attempting to cooperate or coordinate with the other States bordering the South China Sea” in this regard. Moreover, notwithstanding China’s repeated assurances that it has undertaken environmental studies, “neither the Tribunal, the Tribunal-appointed experts, the Philippines, nor the Philippines’ experts have been able to identify any report that would resemble an environmental impact assessment that meets the requirements of Article 206 of the Convention.”³¹ (Award, Merits, paras. 976, 983, 986, 989).

VII. SCARBOROUGH SHOAL

The Tribunal found that Scarborough Shoal is a rock under Article 121(3) and accordingly generates a territorial sea but not an EEZ. (Award, Merits, para. 554). The parties’ dispute regarding sovereignty over Scarborough Shoal and the territorial sea it generates was not before the Tribunal.

China’s efforts to block Philippine access to the waters of Scarborough Shoal prompted two different claims that were upheld: (1) that China has unlawfully prevented Philippine fishermen from pursuing their livelihoods by interfering with traditional fishing activities at Scarborough Shoal, and (2) that China breached its obligations under the Convention by operating its law enforcement vessels in a dangerous manner causing serious risk to Philippine

³¹ “[T]he Tribunal directly invited the Chinese Government ‘to indicate whether it has conducted an environmental impact study per Article 206 of the Convention and, if so, to provide the Tribunal with a copy.’ China did not respond to the Tribunal’s request” either directly or by other means. (Award, Merits, paras. 924, 991).

government vessels navigating in the vicinity of Scarborough Shoal.

VIII. TRADITIONAL ARTISANAL FISHING

Drawing on the analysis in the 1999 award in the *Eritrea v. Yemen* arbitration and other decisions, the Tribunal observed that the “legal basis for protecting artisanal fishing stems from the notion of vested rights and the understanding that, having pursued a livelihood through artisanal fishing over an extended period, generations of fishermen have acquired a right, akin to property, in the ability to continue to fish in the manner of their forebears.” The Tribunal distinguished the legal situation in the territorial sea from that in the EEZ. As previously noted, the Convention addresses, and rejects, traditional fishing rights in the EEZ. On the other hand, as noted by the 2015 award in the *Chagos Marine Protected Area Arbitration*, the provisions on the territorial sea include a general reference to “international law” in Article 2(3) that the Tribunal held to include prior traditional fishing rights protected by international law. In this regard the Tribunal noted that “the vast majority of traditional fishing takes place in close proximity to the coast.” The Tribunal accepted the claims of both the Philippines and China to have traditionally fished at the shoal. On the grounds that the protected rights are “customary rights, acquired through long usage,” it limited them generally to “artisanal fishing in keeping with the traditions and customs of the region.” It also acknowledged that such rights are subject to reasonable regulation by the coastal state. (Award, paras. 798, 802-809).

Having noted that China excluded all Philippine fishing vessels while allowing Chinese vessels to continue to fish, and that “it would have reached exactly the same

conclusion had the Philippines established control over Scarborough Shoal and acted in a discriminatory manner to exclude Chinese fishermen engaged in traditional fishing," the Tribunal found "that China has, through the operation of its official vessels at Scarborough Shoal from May 2012 onwards, unlawfully prevented Filipino fishermen from engaging in traditional fishing at Scarborough Shoal," adding "that this decision is entirely without prejudice to the question of sovereignty over Scarborough Shoal." (Award, Merits, paras. 812, 814).

IX. OPERATION OF LAW ENFORCEMENT VESSELS

The Philippine claim regarding the operation of Chinese law enforcement vessels referred to two near collisions with Philippine government vessels. One occurred on April 28, 2012 when two Philippine Coast Guard vessels were approached at significant speed by a Chinese law enforcement vessel. Another occurred on May 26, 2012 when a Philippine Bureau of Fisheries and Aquatic Resources vessel attempting to resupply a Philippines Coast Guard vessel was repeatedly approached by several Chinese law enforcement vessels.

The Tribunal found that the rules set forth in the widely ratified Convention on the International Regulations for Preventing of Collisions at Sea, 1972 (COLREGS) are incorporated by reference into the Law of the Sea Convention by virtue of the duty of the flag State under Article 94(5) to conform to generally accepted international regulations, procedures and practices with respect to matters

such as the use of signals, the maintenance of communications and the prevention of collisions. Accordingly, a violation of COLREGS constitutes a violation of the Convention. (Award, Merits, para. 1082-1083).³²

The Tribunal noted that the dispute with respect to the operation of the Chinese law enforcement vessels relates principally to events that occurred in the territorial sea of Scarborough Shoal. Accordingly, while Articles 58 and 86 of the Convention provide that Article 94 applies to the EEZ and the high seas beyond, the obligation to observe the COLREGS under Article 94 presumably applies to the territorial sea as well. ³³ (Award, Merits, paras. 1045, 1060; Award, Jurisdiction, para. 410).

³² Insofar as Article 94 requires observance of the COLREGS, that obligation may be limited by the COLREGS themselves. Under Rule 1(a) the COLREGS apply to the high seas and all waters connected with the high seas and navigable by seagoing vessels, subject under Rule 1(b) to special coastal state rules for "roadsteads, harbours, rivers, lakes or inland waterways."

³³ This ensures a coherent application of the Convention. Article 21(4) expressly requires ships in innocent passage through the territorial sea to comply with generally accepted international regulations relating to the prevention of collisions at sea. Similarly, Article 39(2)(a) contains an express requirement of compliance with the COLREGS while a ship is in transit passage through the territorial sea in straits. What of ships in the territorial sea that are not exercising the right of innocent passage or transit passage, such as those registered in the coastal state? Regulations to avoid collisions cannot achieve their purpose unless the same rules are observed by all ships navigating in the same area. The duty of the coastal state under Articles 24, 42 and 44 not to hamper innocent passage or transit passage may be relevant in this regard.

The expert appointed by the Tribunal, after an analysis of the incidents, concluded that the Chinese maneuvers on both occasions “demonstrated a complete disregard for the observance and practice of good seamanship including the ordinary practice of seamen but most importantly, a total disregard for the observance of the collision regulations.” (Award, Merits, para. 1089). The Tribunal agreed, noting:

Where Chinese vessels were under an obligation to yield, they persisted; where the regulations called for a safe distance, they infringed it. The actions are not suggestive of occasional negligence in failing to adhere to the COLREGS, but rather point to a conscious disregard of what the regulations require. The various violations are underscored by factors such as the large disparity in size of the Chinese and Philippine vessels, the shallow waters in which the incidents took place, and the creation of a two metre-high wake causing additional risk to the Philippines’ crews. (Award, Merits, para. 1105).

Noting that operational requirements of law enforcement vessels “occasionally stand in tension with the obligations imposed by the COLREGS,” the Tribunal “having considered possible circumstances precluding wrongfulness has found no convincing evidence that the aforementioned violations are excusable by any mitigating circumstances.” It added, “The same conclusions about violations of the navigational safety provisions of the Convention would be reached irrespective of which State has sovereignty over Scarborough Shoal. The Tribunal does

not purport to make a finding on that question.” (Award, Merits, paras. 1107-1108).

X. AGGRAVATION AND EXTENSION OF THE DISPUTE

The Philippines twice amended its claims to address actions that, in the Philippine view, aggravated and extended the dispute after it was submitted to arbitration. The first amendment concerned Chinese actions to prevent rotation of Philippine personnel at Second Thomas Shoal that commenced shortly after the dispute was submitted to arbitration. The second amendment concerned China’s dredging, artificial island-building, and construction activities at the seven reefs discussed above. As previously noted, the Tribunal found that it lacked jurisdiction to address the first amendment by virtue of the exception for military activities in Article 298, but that the military activities exception did not apply to China’s construction activities at the seven reefs in light of China’s affirmations of their civilian character.

While there is an extensive jurisprudence on the duty to refrain from aggravating or extending a dispute before an international tribunal, the issue typically arises in the context of a request for provisional measures. There was no such request in this case. In this regard the Tribunal observed:

[T]he proper understanding of this extensive jurisprudence on provisional measures is that there exists a duty on parties engaged in a dispute settlement procedure to refrain from aggravating or extending the dispute or disputes at issue during the pendency of the settlement process. This duty exists independently of any order from a court or tribunal to refrain from aggravating or

extending the dispute and stems from the purpose of dispute settlement and the status of the States in question as parties in such a proceeding. Indeed, when a court or tribunal issues provisional measures directing a party to refrain from actions that would aggravate or extend the dispute, it is not imposing a new obligation on the parties, but rather recalling to the parties an obligation that already exists by virtue of their involvement in the proceedings. (Award, Merits, para. 1169).

In the present case, the Tribunal concluded that this duty arises from the provisions of the Convention regarding the settlement of disputes as well as Article 300 regarding good faith and abuse of rights, and that this duty also arises from rules of international law not incompatible with the Convention to the which Tribunal may have recourse under Article 293. (Award, Merits, para. 1173). It concluded that China's dredging, artificial island-building, and construction activities have aggravated and extended the dispute in several ways:

First, China has effectively created a *fait accompli* at Mischief Reef by constructing a large artificial island on a low-tide elevation located within the Philippines' exclusive economic zone and continental shelf In practical terms, the implementation of the Tribunal's decision will be significantly more difficult for the Parties, and Mischief Reef cannot be returned to its original state, before China's construction work was begun.

Second, China has aggravated the Parties' dispute with respect to the protection and preservation of the marine environment by causing irreparable harm to the coral reef habitat [at the seven reefs previously discussed] In practical terms, neither this decision nor any action that either Party may take in response can undo the permanent damage that has been done to the coral reef habitats of the South China Sea.

Finally, China has undermined the integrity of these proceedings and rendered the task before the Tribunal more difficult. At the same time that the Tribunal was called upon to determine the status of features in the Spratly Islands and the entitlements that such features were capable of generating, China has permanently destroyed evidence of the natural status of those same features. . . . Despite this, the Tribunal has reached a decision on the status of features in the South China Sea using the best evidence available to it and drawing heavily on historical sources. The Tribunal is satisfied that its decisions regarding the status of features are well founded in fact, but records that they were rendered significantly more difficult by China's works at the features in question.

China has been free to represent itself in these proceedings in the manner it considered most appropriate, including by refraining from any formal appearance, as it has in fact done. . . . China is not free, however, to act to undermine the integrity of these proceedings or to

frustrate the effectiveness of the Tribunal's decisions. (Award, Merits, paras. 1177-80).

XI. POST SCRIPT

China continued to rehearse its jurisdictional objections notwithstanding their rejection in the award on jurisdiction. It has now adopted a similar posture regarding the award on the merits.³⁴ That may continue to be its official response to any invocation of the award, at least for now.

But both in the near term and in the longer term, the award's actual impact on perceptions and behavior is a different matter. One would not, for example, argue that the award as such is legally binding as between states other than China and the Philippines. Yet the perceptions of those that border and use the South China Sea, and indeed the seas and oceans beyond, will unquestionably be affected by this authoritative contribution to the law of the sea and its application to one of the world's most important seas.

³⁴ There have been fleeting intimations for some time that China might consider denouncing the Convention following the award. Quite apart from the fact that denunciation would not relieve China of its obligations under the award or enhance the legitimacy of its claims in the South China Sea or elsewhere, it would prejudice China's standing and economic, environmental, political, and security interests as a coastal state and maritime state in a globally accepted Convention whose comprehensive substantive and institutional provisions govern two-thirds of the planet. An apt metaphor might be China's reported burning of its fleet after Admiral Zheng He's last voyage.

Among the effects over the long term may be a reduction in the temptation to invoke historic use of the high seas as a legal basis for claims of control, a tempering of disputes over small features at sea and the entitlements they generate, a decline in gratuitous environmental disruption occasioned by attempts to artificially enhance such features to reinforce claims to maritime jurisdiction, heightened scrutiny of the destruction of coral reefs and endangered species, avoidance of dangerous law enforcement tactics at sea, and increased appreciation of the contributions of the Law of the Sea Convention and its compulsory dispute settlement system to the rule of law in international affairs.

Map 1

The South China Sea Arbitration
Award of 12 July 2016



Map 3

The South China Sea Arbitration
Award of 12 July 2016

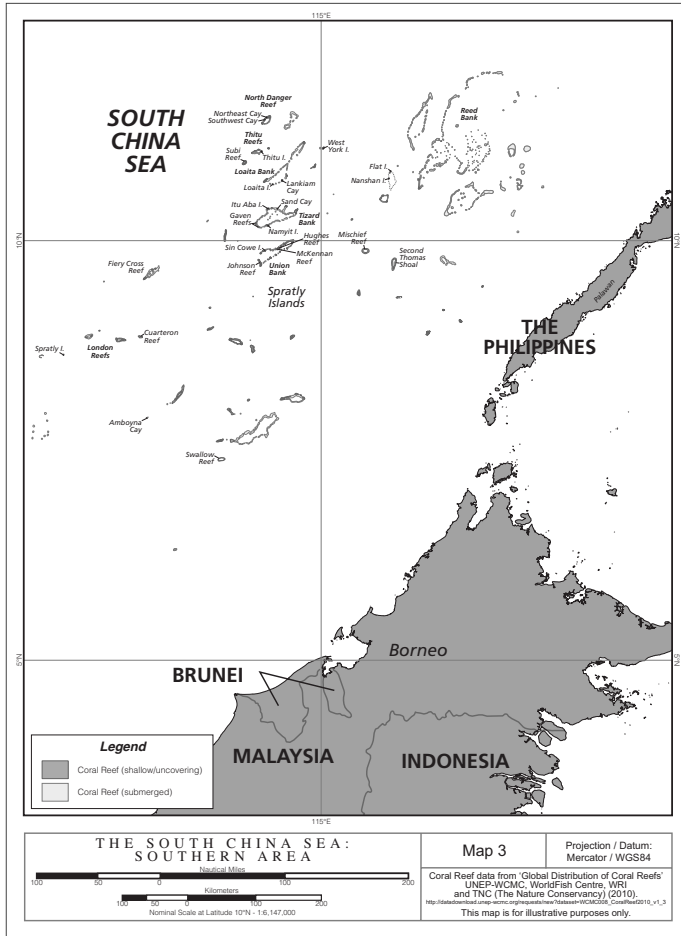


Figure 2

The South China Sea Arbitration
Award of 12 July 2016

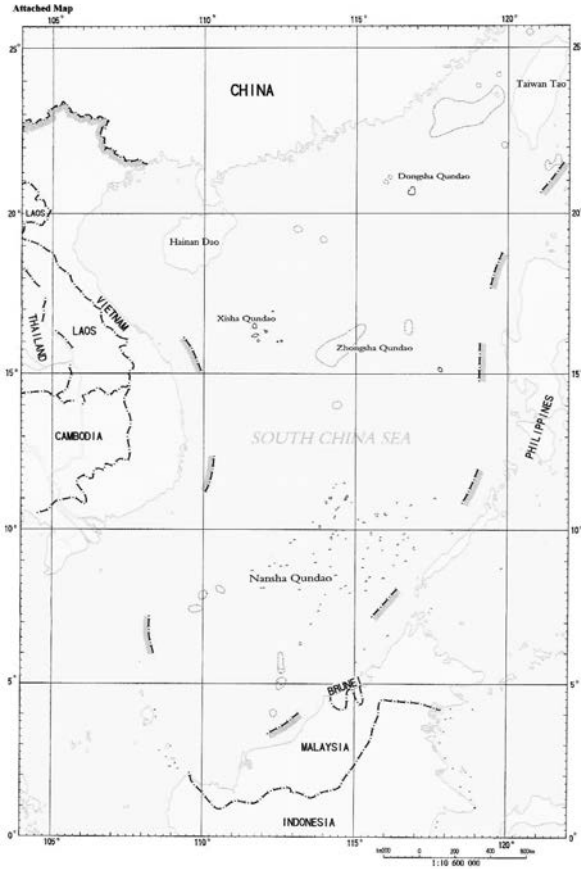


Figure 2: Map attached to China's 7 May 2009 Notes Verbales
Attachment to Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/17/2009 (7 May 2009) (Annex 191); Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/18/2009 (7 May 2009) (Annex 192).