Deep Dive with New Haven: Comprehensive Analysis of the South China Sea Arbitration and its Progeny of Legal Literature

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I. DELIMITATION OF THE PROBLEM

A. What Started the South China Sea Arbitration

The South China Sea is a semi-enclosed sea that spans about 3.5 million kilometers and is shared with seven States.[1] Of the seven States that border the Sea's waters, five have competing claims: Brunei, China, Malaysia, the Philippines, and Vietnam.[2] These waters are coveted for having 11 billion barrels of oil, 190 trillion cubic feet of natural gas, and

[1] Phil. v. China, PCA Case Repository No. 2013-19, Award on Jurisdiction and Admissibility of Oct. 29, 2015, ¶ 3, https://pcacases.com/web/sendAttach/2579. [hereinafter Award on Jurisdiction and Admissibility]. The use of the word "States" instead of "countries" is to reflect the language of the treaty. This is a semantic choice rather than a clear distinction or departure from the ideas associated with the word "countries."

[2] *Id.* Taiwan also has competing claims, but some countries do not recognize the region as a sovereign state. This paper will later examine Taiwan's statehood and claims in relation to the dispute. *See infra* Section II.C.1.iii.

other resources such as fish, stocks, and coral[3]; these waters carry an estimated $3.4 trillion worth of commerce in sea transit per year.[4] With such value and importance on the world stage, it comes as no surprise that disputes between its bordering nations would arise. Although a grand naval and air conflict has yet to emerge, there looms an air of armed tension in the South China Sea.[5] Though such a future has yet to come to fruition, battles are instead being fought in the legal arena, with weighted legal arguments yielded like weapons.

Here lies the importance of revisiting the South China Sea Arbitration ("SCSA"), a decision molded by various proceedings spanning from 2013 to its conclusion in 2016. On January 22, 2013, the Philippines initiated arbitration under Part XV of the United Nations Convention on the Law of the Sea ("UNCLOS").[6] Both the Philippines and China are parties to the Convention.[7] Even though incidents between these States over the South China Sea have existed since as early as 1989,[8] they had never entered into arbitration until the Scarborough Shoal Standoff of 2012.[9] Even then, the specific facts of the incident and prior issues between the two nations would not be discussed until the Award of Jurisdiction and Admissibility

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[3] BEN DOLVEN, ET AL., CONG. RSCH. SERV., IF10607, CHINA PRIMER: SOUTH CHINA SEA DISPUTES 1 (2022).

[4] *Id.*; *see generally* Vox, *Why China is building islands in the South China Sea*, YOUTUBE, at 1:30 (Feb. 17, 2017), https://www.youtube.com/watch?v=luTPMHC7zHY (explaining that 30% of the world's shipping travels through this region).

[5] *See* Karem Lema, *U.S. to Spend $66 Mln on New Facilities at Philippines Military Bases*, REUTERS (Nov. 15, 2022), https://www.reuters.com/world/us-spend-66-mln-new-facilities-philippines-military-bases-2022-11-15/.

[6] Award on Jurisdiction and Admissibility, *supra* note 1, ¶ 2.

[7] *Id.* ¶ 1. To be a party to a treaty requires a State to sign and ratify it. This means that the State has assented to the obligations prescribed in the treaty. Moreover, if the treaty has a provision with a judicial element, States party to the treaty may bring a claim against another State for failing to meet their obligations. JENS DAVID OHLIN, INTERNATIONAL LAW; EVOLVING DOCTRINE AND PRACTICE 75 (Robert C. Clark et. al. eds., 2nd ed. 2021).

[8] Conor M. Kennedy & Andrew S. Erickson, *Model Maritime Militia: Tanmen's Leading Role in the April 2012 Scarborough Shoal Incident*, CIMSEC (Apr. 21, 2016), https://cimsec.org/model-maritime-militia-tanmens-leading-role-april-2012-scarborough-shoal-incident/.

[9] The Scarborough Shoal Standoff started in April and ended in July 2012. This started when the Philippines sent their largest naval frigate to the Scarborough Shoal, an atoll under de facto control of the Philippines, to arrest Chinese fishermen. The Chinese fishermen sent out a distress signal, and two Chinese surveillance vessels came in response. What transpired was a standoff between different Chinese and Filipino vessels over the course of four months. Michael Green et al., *Counter-Coercion Series: Scarborough Shoal Standoff*, ASIA MAR. TRANSPARENCY INITIATIVE (May 22, 2017), https://amti.csis.org/counter-co-scarborough-standoff/.

and Final Award in 2016.[10] This postponement was a result of the International Tribunal for the Law of the Sea's ("the Tribunal")[11] decision to bifurcate the proceedings because China held the position that it would not participate, and that the Tribunal did not have jurisdiction.[12] To respect all parties, the Tribunal first considered the case's jurisdiction and admissibility.[13] When the Tribunal published the Award on Jurisdiction and Admissibility in 2015, it was awarded jurisdiction on seven of the Philippines' Submissions[14]; a reservation to consider jurisdiction on six Submissions in the merits phase, and one Submission that needed narrowing to consider jurisdiction in the merits phase.[15] In 2016, the Tribunal published the Award on Merits and was found to have jurisdiction over fourteen of the fifteen Submissions.[16]

In the years proceeding publication of the Award on Jurisdiction and Admissibility and the Final Award, the scholarly legal community has criticized the legal arguments crafted by the arbitration, casting doubt on the Award's credibility.[17] While dialogue is necessary and important to facilitate academic discussion, it is peculiar to find many opposing voices to the arbitration when only six countries have officially opposed the SCSA.[18] Is there a reason for this disproportion? Do legal scholars know

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[10] Conor M. Kennedy & Andrew S. Erickson, *Model Maritime Militia: Tanmen's Leading Role in the April 2012 Scarborough Shoal Incident*, CIMSEC (Apr. 21, 2016), https://cimsec.org/model-maritime-militia-tanmens-leading-role-april-2012-scarborough-shoal-incident/.

[11] The UNCLOS established the Tribunal for the adjudication, interpretation, and application of the treaty. It is an independent judicial body made up of elected members who specialize in laws of the sea. *The Tribunal*, ITLOS, https://www.itlos.org/en/main/the-tribunal/the-tribunal (last visited Sept. 22, 2023).

[12] Award on Jurisdiction and Admissibility, *supra* note 1, ¶¶ 14, 68.

[13] *Id.* ¶ 68.

[14] While not necessarily defined in the Rules of the Tribunal, a Submission is equivalent to a complaint brought by a plaintiff in a civil case except in this context, it is a State bringing a complaint against another State before the Tribunal. It also stands to reason, that Submissions can be an answer from the opposing State. Int'l Trib. for the L. of the Sea, Rules of the Tribunal 24 (2021), https://itlos.org/fileadmin/itlos/documents/basic_texts/ITLOS_8_25.03.21.pdf.

[15] Award on Jurisdiction and Admissibility, *supra* note 1, ¶ 413.

[16] Phil. v. China, PCA Case Repository No. 2013-19, Award of July 12, 2016, 1203 [hereinafter Award on Merits], https://pcacases.com/web/sendAttach/2086.

[17] *See* Heng Liu, *Review of Literature on Jurisdiction and Admissibility of the South China Sea Arbitration,* 17 CHINA OCEANS L. REV. 20, (2021). This is not to say that all legal articles have critiqued the Awards, but more likely than not, a quick search reveals a negative tone on the *SCSA*.

[18] To avoid misrepresentation, there are 127 countries that remain neutral, only seven that respect the ruling, and thirty-three that positively acknowledge the *SCSA*. *Who*

something more about the ramifications of the SCSA that world leaders are unaware of? Or are world leaders aware of how Arbitration operates, but hesitant to comment?

To answer these questions, the New Haven Approach to dissecting the problem and considering alternate or new solutions may steer legal ideas in a better societal direction. The New Haven approach considers the law as "part of the entire social process . . . the process of decisions making."[19] This approach analyzes problems in society and finds solutions through a five step interdisciplinary analysis: (1) identifying the problem the law has to address; (2) reviewing conflicting claims; (3) analyzing past responses and factors that produced them; (4) predicting future consequences of such decisions; (5) and finally, assessing the problem.[20] As previously stated, the problem at issue is the criticism and uncertainty that SCSA has received since the final Award, and additionally, that China has not fully complied and followed through with the Tribunal's decision.[21]

The section to follow examines procedural aspects of the Arbitration and highlights the arguments the Tribunal uses to justify their decision. The second section then compares the claims the Philippines and China had to their positions, specifically looking at each side's point of view regarding the Awards.[22] This section also discusses third parties (Vietnam, Malaysia, and Taiwan), as these States continue to assert their claims and opinions. The third section highlights past decisions that reflect continued trends in the SCSA, including non-participation, arbitration, and the possibility of conciliation. Next, the paper discusses how the Tribunal's ruling might be applied to a dispute between Korea and Japan, and how the State of New Zealand's exclusive economic zone ("EEZ") might be redefined from the SCSA. This section also predicts possible future conduct of the Philippines and China in the South China Sea and the potential for U.S. involvement. Finally, the paper proposes solutions that could resolve the initial problem while respecting the Awards.

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is Taking Sides After the South China Sea Ruling?, ASIA MAR. TRANSPARENCY INITIATIVE, (Aug. 15, 2016), https://amti.csis.org/sides-in-south-china-sea/.

[19] Siegfried Wiessner, *The New Haven School of Jurisprudence: A Universal Toolkit for Understanding and Shaping the Law,* 18 ASIA PAC. L. REV. 45, 47 (2010).

[20] *Id.* at 48.

[21] *See* Liu, *supra* note 17. It is important to refrain from using the words "enforce" or "enforcement" as the language is about enforceability. *See* U.N. Convention on the Law of the Sea art. 39, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]. This is a key distinction because the Tribunal itself cannot enforce its decisions, and only the countries party to the arbitration can conduct such enforcement with each other. *Id.*

[22] "Awards" are referred to both the Awards on Jurisdiction and Admissibility and the Award on Merits.

B. The First Award: Jurisdiction and Admissibility

1. Framing Jurisdiction

Upon first glance at the Award on Jurisdiction and Admissibility, one may compare the three complaints found in China's 2014 Position Paper to that of the Philippines' fifteen Submissions.[23] As recognized by the Tribunal, China's position was non-participatory in the Arbitration, based upon China's belief that the Tribunal did not have jurisdiction.[24] However, this comparison would undermine the court's overall analysis of the complaints presented. To frame the Arbitration on China's points or the Philippines' Submission prevents the Tribunal from adjudicating in an unbiased manner. Here, the Tribunal lays out the argument from China that there is no jurisdiction because: (1) the dispute concerns territorial sovereignty on maritime features, and (2) the dispute itself is integral in discussing maritime delimitation.[25] In contrast, the Tribunal must find, based on the Submissions by the Philippines, that: (1) there are claims that contradict from opposing parties based on inference, and (2) the claims must be evaluated objectively.[26]

Starting with China's first argument, that the dispute concerns territorial sovereignty on maritime features, the Tribunal adopts the International Court of Justice's reasoning in the *United States Diplomatic and Consular Staff in Tehran*.[27] The Tribunal argues that even though a dispute on land sovereignty over maritime features in the South China Sea exists, it is not in itself grounds to decline adjudication.[28] Furthermore, the Tribunal stresses the fact that it can interpret the Philippines' Submissions

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[23] Award on Jurisdiction and Admissibility, *supra* note 1, ¶¶ 14, 99. The three complaints that China claimed were: 1) the lack of subject matter of the arbitration; 2) both China and the Philippines were obligated to negotiate the disputes brought before the Tribunal; and 3) assuming arguendo that subject matter of arbitration exist, China made a declaration that excludes China from arbitration for claims based on maritime delimitation. *Id.* ¶ 14.

[24] The Chinese ambassador to the Netherlands sent individual letters to the tribunal members reiterating their position of non-participation and reinforcing the 2014 Position Paper. *Id.* ¶ 64.

[25] *Id.* ¶ 151.

[26] *Id.* ¶ 163. Based on the plain reading the Arbitration, the Tribunal may appear to have the burden of proof to find that there is a genuine dispute between the parties. *Id.* However, the Tribunal simply infers from the facts presented. *See id.* Neither the Philippines nor the Tribunal can supplement and argue that China has contradicting claims as it would possibly become prejudicial against the non-participating party. *See id.* However, the Philippines can provide further arguments on jurisdiction and answer questions raised in the hearing. *See id.*

[27] *Id.* ¶ 152 (citing United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgement, 1980 I.C.J. 3, ¶ 36 (May 24)).

[28] *Id.*

as a dispute on sovereignty, and that such a dispute may explicitly and implicitly determine land sovereignty.[29] Yet the Tribunal limits the dispute only to the claims presented, and recognizes the Philippines' desire for the Tribunal not to determine sovereignty nor to advance or retract the State's claim to sovereignty.[30]

In response to China's second argument, that the dispute itself is integral in discussing maritime delimitation, the Tribunal characterizes the dispute as concerning maritime entitlement, not maritime boundary delimitation.[31] This distinction is important, because China issued a declaration in 2006 to be excluded from disputes listed in UNCLOS Article 298.[32] One of the excluded disputes listed in the declaration is maritime boundary delimitation, which, according to China's declaration, can only be determined between the two opposing States.[33] Here in the Award, the Tribunal first frames the question as to whether maritime entitlements exist, rather than where maritime boundaries are placed.[34] The Tribunal then limits the scope of inquiry further, finding maritime entitlements only on non-overlapping entitlement areas.[35] As such, the Tribunal considers both arguments offered by China, and finds said arguments to be unpersuasive.[36]

The next task requires the Tribunal to determine whether the Philippines has established "positive oppositions" and whether such oppositions can be objectively evaluated.[37] The Tribunal uses a two-prong test to answer this overarching question.[38] The first prong in determining a dispute "where a party has declined to contradict a claim expressly or to take a position on a matter [...] the Tribunal is entitled to examine the conduct of the Parties [...] and draw appropriate inferences."[39] The second

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[29] *Id.* ¶ 153.

[30] Award on Jurisdiction and Admissibility, *supra* note 1, ¶ 153. Article 298 of the UNCLOS provides a list of exceptions that allows the State to not participate in procedures outlined in Section 2 of the treaty. Hence, the right phrasing in writing is important to be excluded from the procedures. *Id.* ¶ 354.

[31] *Id.* ¶ 156.

[32] *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,* 15 CHINA J. INT'L L. 431, ¶¶ 1-3 (2014) [hereinafter *Position Paper 2014*].

[33] *Id.* ¶ 3.

[34] Award on Jurisdiction and Admissibility, *supra* note 1, ¶¶ 157.

[35] *Id.*

[36] *Id.*

[37] *Id.* ¶ 163. The term "positive opposition" is similar or treated the same as "disagreement on a point of law or fact' or "conflict of legal views or interest."

[38] *Id.*

[39] *Id.*

prong requires the dispute to be evaluated objectively. This means that the Tribunal cannot be overly technical or deliberate ambiguity to find a genuine dispute.[40] Due to China's non-participation, the obstacle that the Tribunal has to overcome is whether it can determine if an issue can exist absent the communication, or a silence of one party.[41] Based on two cases and one advisory opinion from the International Court of Justice ("ICJ"), the Tribunal can find a genuine dispute despite the obstacle.[42] In *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, the Tribunal may create an inference of a party's attitude if the State fails to respond.[43] Such failure to respond or advance an attitude does not prevent the Tribunal from finding a dispute raised by the opposing party's attitude.[44] The absence of finding a dispute at the current stage does not prevent the Tribunal from finding a dispute later.[45]

2. Procedural Necessities: Indispensable Third Parties, Preconditions, and Limitations

With an established two prong standard for the Tribunal to follow, we now proceed to analyze other obstacles the Tribunal must overcome and satisfy to consider the jurisdiction of the award.[46]

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[40] *Id.*

[41] *Id.* ¶ 160.

[42] *Id.* ¶¶ 161-62, nn. 123-25.

[43] Award on Jurisdiction and Admissibility, *supra* note 1, ¶¶ 161-62, nn. 123-25. (citing Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Preliminary Objections, Judgment, 2011 I.C.J. 70, ¶ 30 (Apr. 1)). This case between Georgia and Russia is similar to the SCSA because Russia argued that the I.C.J. did not have jurisdiction to adjudicate on the Submissions. Additionally, Russia made a similar argument made by China in the SCSA in claiming that Georgia failed to negotiate prior to adjudicating in the I.C.J. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Press Release No. 2011/9, I.C.J.,
Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation) (Apr. 1, 2011), https://icj-cij.org/sites/default/files/case-related/140/16396.pdf.

[44] *See id.* ¶ 162 (citing Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*,* Advisory Opinion, 1988 I.C.J. 12, ¶ 38 (Apr. 26)).

[45] See *id.* (citing Land and Maritime Boundary (Cameroon v. Nigeria), Preliminary Objections, Judgment, 1998 I.C.J. 275, ¶ 93 (June 11)).

[46] Note the absence of the discussion for "admissibility." Is there really a distinction between "jurisdiction" and "admissibility" that each requires a sharp demarcation? Nucup explores how the I.C.J. has determined the distinction: while some cases make the effort to define the differences, Nucup argues that such distinction is unnecessary and does not require two separate discussions. Neil B. Nucup, *The Janus*

The first obstacle that the Tribunal must resolve, is determining whether there are indispensable third parties to the proceeding. If an indispensable third party is found, then the Tribunal cannot render a decision on any party without the consent of the third party.[47] This is known as the *Monetary Gold Principle.*[48] The Tribunal argues that there are no indispensable third parties for two reasons: (1) the Tribunal is not deciding on issues of territorial sovereignty, and thus, not determining the legal rights and obligations of third parties, and (2) the Philippines' Submissions do not implicate the conduct of third parties.[49] Interested third parties held no obstacle and were able to receive copies of the pleadings and observe the hearings.[50]

The next obstacle that the Tribunal must resolve, is to satisfy the preconditions to jurisdiction. There are three Articles from the UNCLOS that, if applicable, may preclude the Tribunal from hearing a case: Article 281, Article 282, and Article 283.

The first precondition requires the Tribunal to determine whether Article 281 applies to the ASEAN Declaration on the Conduct of Parties in the South China Sea ("DOC").[51] The DOC is a document set "to enhance favorable conditions for a peaceful and durable solution of differences and disputes among countries concerned."[52] Considering Article 281 in regard to the DOC, the Tribunal examines three elements: (1) the agreement, (2) where no settlement has been reached, and (3) such agreement does not

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Face of Preliminary Objections: Are Jurisdiction and Admissibility Distinguishable, 2 U. ASIA & PAC. L.J. 64, 78 (2019). Rather, the discussion should focus on the preliminary objections before deciding on the merits of the case. *Id.*

[47] *Id.* at 71 (citing Monetary Gold Removed from Rome in 1943 (It. v. Fr., U.K., N. Ir., & U.S.), Preliminary Question, Judgment, 1954 I.C.J. 19, 19 (June 5)).

[48] *See infra* Section II.C.1.iii.

[49] Award on Jurisdiction and Admissibility, *supra* note 1, ¶¶ 180-81.

[50] *Id.* ¶ 188.

[51] Article 281 of the UNCLOS establishes:

> If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only *where no settlement has been reached by recourse to such means* and *the agreement between the parties does not exclude any further procedure*.

UNCLOS, *supra* note 21, at 129 (emphasis added).

[52] Award on Jurisdiction and Admissibility, *supra* note 1, ¶ 198 (citing Ass'n of Se. Asian Nations [ASEAN], *2002 Declaration on the Conduct of Parties in the South China Sea* (Nov. 4, 2002), https://asean.org/declaration-on-the-conduct-of-parties-in-the-south-china-sea-2.) (internal quotation marks omitted).

exclude further proceedings.[53] If the document satisfies all three elements, then Article 281 precludes the Tribunal from adjudicating on the Submissions.[54]

In order for the DOC to be considered a binding legal agreement, there must be clear intention to establish rights and obligations for each party of the treaty.[55] In reading the plain text of the DOC, there is language that demonstrates reaffirmation of obligations to the UNCLOS and language that indicates new obligations.[56] However, the Tribunal reasoned that the DOC was not an agreement, but rather, a political document.[57] This conclusion was reached by looking at the initial drafting of the DOC and the subsequent conduct between the parties.[58] Since the DOC is not considered a legally binding agreement, then the precondition of Article 281 does not apply to this document, and no further analysis is required.[59]

Two other documents posed potential barriers to jurisdiction. As with the previous document ("DOC"), both countries were parties to the following treaties.

The first is the Treaty of Amity and Co-operation in Southeast Asia ("Treaty of Amity").[60] This treaty is multilateral and predates the UNCLOS.[61] In Chapter IV of the Treaty of Amity, titled "Pacific Settlement of Disputes", Article 13 indicates an obligation for parties to settle disputes between themselves via negotiations.[62] Additionally, Articles 14 and 15 indicate an obligation to submit to the High Council if negotiation fails.[63] At first blush, the Treaty of Amity is a legally binding agreement and thus

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[53] *Id.* ¶¶ 212, 219.

[54] UNCLOS, *supra* note 21, at 129.

[55] Clear intention can be shown by the plain language of the written document, the drafting process, and the proceeding conduct of the states. Award on Jurisdiction and Admissibility, *supra* note 1, ¶ 213.

[56] *Id.* ¶¶ 215-16.

[57] *Id.*

[58] *Id.* ¶¶ 217-18.

[59] *Id.* ¶ 219. The Tribunal continues to analyze the two remaining elements for completeness in ¶¶ 220 to 228. This analysis is not pertinent to the discussion but only to the first part of the analysis. Similarly, the Tribunal further analyzes six Joint Statements made between 1995 to 2011. The Tribunal makes its decision in ¶¶ 241 to 251. Again, analysis of these Joint Statements is not necessary but important to note for completeness and transparency.

[60] Treaty of Amity and Cooperation in Southeast Asia, July 15, 1976, 1025 U.N.T.S. 319.

[61] *Id.* ¶ 252.

[62] Award on Jurisdiction and Admissibility*, supra* note 1, ¶ 266 (citing Treaty of Amity and Cooperation in Southeast Asia, July 15, 1976, 1025 U.N.T.S. 319).

[63] *Id.*

satisfies the first element of the Article 281 analysis.[64] However, this type of agreement does not fall within the definition of "agreement" in Article 281 because of Article 16 of the Treaty of Amity. Article 16 requires the consent of all disputed parties to agree in the application of Articles 13 through 15.[65] Thus the first element is not satisfied, and Article 281 does not pose as a barrier for this document.[66]

The last document that could have potentially precluded jurisdiction is the Convention on Biological Diversity ("CBD"). The CBD is a multilateral treaty that promotes the protection of ecosystems, and the maintenance of the viability of species.[67] The issue here is not whether CBD meets the analysis of Article 281, but whether Philippines' Submissions No. 11 and 12(b) comes within the CBD's scope, since both disputes are over maritime environment.[68] Additionally, the CBD does have a provision to settle disputes in Article 27.[69] The Tribunal argues that even though Article 192 and 194 of the UNCLOS and the CBD overlap in subject matter, this does not mean that CBD is within the scope of Article 281.[70] In other words, the CBD's scope is more narrow than the UNCLOS in terms of the maritime environment and thus, does not activate the precondition of Article 281.[71] Moreover, Article 22 of the CBD preserves the obligations and rights created under the UNCLOS.[72] Hence, Article 281 does not preclude Philippines' Submissions No. 11 and 12(b) in relation to the CBD.[73]

The next analysis relates to Article 282[74] and the three

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[64] *Id.* ¶ 265.

[65] *Id.* ¶ 266.

[66] *Id.* ¶ 266-67.

[67] *Id.* ¶ 271 (citing Convention on Biological Diversity, Dec. 29, 1993, 1760 U.N.T.S 79).

[68] Award on Jurisdiction and Admissibility*, supra* note 1, ¶ 281.

[69] *Id.* ¶ 272.

[70] *Id.* ¶ 285.

[71] *See id.*

[72] *Id*., ¶ 288.

[73] *Id.* ¶ 289.

[74] Article 282 of the UNCLOS establishes:

> If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have a*greed, 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.

UNCLOS, *supra* note 21, at 128 (emphasis added).

aforementioned documents (the DOC, the Treaty of Amity, and the CBD). Article 282 displaces the compulsory procedures entailing binding decisions as listed in UNCLOS, Part XV, Section 2, if certain conditions are met.[75] The Tribunal will not apply the procedures laid out in Section 2 of Part XV if: (1) the parties have agreed through "general, regional, or bilateral agreement", (2) that at the request of any party to the dispute (c) the disputes shall be submitted to the procedures from the agreement "that entails a binding decision", and (4) both parties agreed not to use procedures from Section 2 of Part XV.[76]

Starting with the DOC, the Tribunal finds the DOC is not a legally binding agreement, and the promotion of peaceful and friendly negotiation does not entirely mean that a binding decision is created.[77] Thus, the DOC fails to satisfy element one, nor element three of Article 282, if it was considered an agreement.[78]

The Treaty of Amity satisfies the first element, but the Tribunal finds that it fails to satisfy the other three.[79] Element two is not satisfied because Article 16 requires all parties to agree to the application, not to just one.[80] Element three is not satisfied because the language in the treaty's Articles 13, 14, and 15, calls for negotiation, mediation, conciliation, and recommendation, which does not indicate a binding decision.[81] Finally, element four is not satisfied because Article 17 prevents the preclusion of peaceful settlements in Article 33(1) of the UN Charter.[82] Thus, Section 2 of Part XV cannot be displaced by Articles 13, 14, and 15.[83]

Lastly, the Tribunal finds that the CBD fails to satisfy the first, second, and third elements of Article 282.[84] As mentioned in the Article 281 analysis, the scope of the agreement does not include the interpretation and application of the UNCLOS.[85] Even if the first element is satisfied, the second element is not because Article 27(3) of the CBD requires one written declaration from a State to accept arbitration or I.C.J. adjudication, which

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[75] Award on Jurisdiction and Admissibility, *supra* note 1, ¶ 291.

[76] *Id.*

[77] *Id.* ¶¶ 299-300.

[78] *Id.* ¶ 302.

[79] *Id.* ¶ 307.

[80] *Id.* ¶ 308.

[81] Award on Jurisdiction and Admissibility, *supra* note 1, ¶ 309.

[82] *Id.* ¶ 310.

[83] *Id.*

[84] *Id.* ¶¶ 319-20.

[85] *Id.* ¶ 319.

neither China nor the Philippines have done.[86] Additionally, Article 27(1), (2), and (4), use the language "negotiation", "mediation", and "conciliation" respectively, which does not indicate a binding decision.[87] Based on the foregoing analysis, none of the three documents preclude the Tribunal from jurisdiction based on Article 282.[88]

The last obstacle the Tribunal must overcome in order to have jurisdiction is Article 283.[89] The precedent that the Tribunal uses to analyze Article 283 requires that: (1) there is sufficient clarity that parties were aware of a disagreement[90] and (2) that the parties exchange their views on the means of settling the dispute.[91] The Tribunal finds five instances in which the States' views were exchanged on the current dispute: (1) the 1995 bilateral consultation, (2) the1998 bilateral consultation, (3) paragraph 4 of the DOC, (4) the 2012 bilateral consultation, and (5) the 2012 Note Verbale.[92] With none of the foregoing exchanges resulting in a resolution, the Tribunal considers Article 283 satisfied and finds that the Philippines

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[86] *Id.* ¶ 320.

[87] Award on Jurisdiction and Admissibility, *supra* note 1, ¶ 320.

[88] *Id.* ¶ 321.

[89] Article 283 of the UNCLOS establishes:

> 1. When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall *proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.*
>
> 2. The parties shall also proceed expeditiously to an *exchange of views where* a *procedure for the settlement of such a dispute has been terminated without a settlement* or where a settlement has been reached and the circumstances require consultation regarding the manner of implementing the settlement.

UNCLOS, *supra* note 21, at 128 (emphasis added).

[90] Award on Jurisdiction and Admissibility, supra note 1, ¶ 333 (citing Chagos Marine Protected Area Arbitration (Mauritius v. U.K.), Case No. 2011-03, Award, ¶¶ 382-83 (Perm. Ct. Arb. 2015), https://files.pca-cpa.org/pcadocs/MU-UK%2020150318%20Award.pdf).

[91] *Id.* (citing The Arctic Sunrise Arbitration (Neth. v. Russ.), Case No. 2014-12, Award on Jurisdiction, ¶ 151 (Perm. Ct. Arb. 2015), https://pcacases.com/web/sendAttach/1325).

[92] *Id.* ¶¶ 334-42. The Tribunal mentions in ¶ 332 that Article 283 does not distinguish where the exchanges must take place in discussing procedural or substantive matters or both. Moreover, the Tribunal finds that such a distinction cannot be separated when exchanges are given, and that one is brought by the other. In the current case, there are both substantive exchanges and procedural exchanges, satisfying the "either" or "both" requirements.

has exhausted the possibilities of reaching an agreement.[93]

The Tribunal further explores a broader question beyond Article 283 posed in China's 2014 Position Paper: whether the UNCLOS "imposes an obligation on State parties to engage in negotiations prior to resorting to compulsory settlement."[94] The obligation to negotiate can arise outside the scope of the UNCLOS, from: (1) customary international law, (2) interaction of respective rights claims by the parties, or (3) another treaty applicable to the parties.[95] The Tribunal finds that the Philippines satisfied the obligation to negotiate by holding regular bilateral discussions, formal annual meetings, work groups on confidence-building measures, and regular contacts regarding developments in the South China Sea.[96] Although the precise nomenclature of "negotiation" was not used, the Tribunal finds that both parties frequently approached discussions in good faith and with genuine interest to resolve their dispute.[97] In further clarification, the Tribunal finds that the negotiation need not reach an agreement[98] nor discuss all subject matter presented before the Tribunal.[99] Thus, neither Article 283, nor the customary law for the obligation to negotiate, precludes the Tribunal's jurisdiction.[100]

For the foregoing reasons, Articles 281, 282, and 283 do not preclude the Tribunal from having jurisdiction and thus, it can consider the

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[93] *Id.* ¶ 343 (citing Land Reclamation by Singapore in and around the Straits of Johor (Malay v. Sing.), Case No. 12, Order of Oct. 8, 2003, 2003 ITLOS Rep. 10, ¶¶ 45, 47, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_12/12_order_081003_en.pdf.)

[94] *Id.* ¶ 344.

[95] *Id.* ¶ 345 (footnote omitted). The Tribunal differentiates customary law from rights claimed by the parties because of the states' interactions. This is supported by two different citations, the *North Sea Continent Shelf* case and the *Fisheries Jurisdiction* case. Both cases examine an obligation to negotiate from two different analyses. However, should the two ideas be distinguished or should both ideas, taken together, lead to the conclusion that an obligation to negotiate is customary international law? *See* Martin A. Rogoff, *The Obligation to Negotiate in International Law: Rules and Realities*, 16 MICH. J. INT'L L. 141, 157-60 (1994) (discussing how the obligation to negotiate became customary international law).

[96] Award on Jurisdiction and Admissibility, *supra* note 1, ¶ 348.

[97] *Id.* ¶ 349.

[98] *Id.* ¶ 350 (citing Railway Traffic between Lithuania and Poland, Advisory Opinion, 1931 P.C.I.J. (ser. A/B) No. 42, at 108, 116 (Oct. 15)).

[99] *Id.* ¶ 351 (citing Application of the International convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Preliminary Objections, Judgment, 2011 I.C.J. 70, ¶ 161 (Apr. 1)).

[100] *Id.* ¶ 352.

Philippines' Submissions.[101]

The final step the Tribunal must take to determine jurisdiction is to consider remaining limitations and exceptions. These limitations and exceptions are laid out in Section 3 of Part XV and consist of three articles: Articles 297, 298, and 299.[102] The Tribunal best simplifies the articles when it establishes that Article 297 set limitations on jurisdiction that *apply automatically* to any dispute between State Parties to the UNCLOS.[103]

Article 298 then set out further, *optional exceptions that a State Party may activate* by declaration.[104] Finally, Article 299 confirms that, in the event that such a *limitation or exception is applicable*, "[a] dispute excluded under article 297 or excepted by a declaration made under article 298 from the *dispute settlement procedures provided for in section 2 may be submitted to such procedures only by agreement of the parties to the dispute*."[105]

These limitations are conditioned on the Tribunal's determination of whether some of the Submission's issues of jurisdiction can be determined at this phase of arbitration, or if such issues have to be deferred to a later stage on the merits.[106] This procedure is established in Article 20(3) of the Rules of Procedure which provides that if an objection to jurisdiction of a particular issue does not possess an exclusively preliminary character, then the Tribunal reserves the ability to analyze and decide it at a later stage of the proceeding.[107]

The "exclusive primary character test" poses two inquiries: first, whether the Tribunal had the opportunity to examine all the necessary facts to dispose of the preliminary objection; and second, whether the preliminary objection would entail prejudging the dispute or some elements of the dispute on the merits.[108]

Hence, the reason for the Tribunal bifurcating the arbitration for jurisdiction and admissibility is to respect the objections to jurisdiction as presented in China's 2014 Position Paper, and to resolve the objections that are exclusively preliminary in nature.[109] To the extent that the Tribunal found some of the Philippines' Submissions exclusively preliminary, the Tribunal also found that some Submissions are subject to Article 297 and

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[101] *Id.* ¶ 353.

[102] UNCLOS, *supra* note 21.

[103] Award on Jurisdiction and Admissibility, *supra* note 1, ¶ 354.

[104] *Id.*

[105] *Id.* (emphasis added).

[106] *Id.* ¶ 379.

[107] *Id.* ¶ 380.

[108] *Id.* ¶ 382.

[109] Award on Jurisdiction and Admissibility, *supra* note 1, ¶ 391.

298; thus, the issues on jurisdiction are significantly interwoven with the merits and cannot be decided at the current stage of the proceeding.[110]

First, Submission 2 looks to the nature and validity of China's claims based on historic rights.[111] The Tribunal cannot decide on jurisdiction without also considering the merits of China's claims.[112] Secondly, Submissions 5, 8, and 9 depend on the status of maritime features and the possibility of overlapping entitlements.[113] Not only does this require analysis of the Submissions based on Article 298, but the issue itself requires more facts to determine at a later stage.[114] Next, Submissions 8, 9, 10, and 13 depend on law enforcement activities within maritime zones.[115] As reasoned previously, the Tribunal recognizes another limitation set by Article 298 for law enforcement activities and the requirement to determine the characteristics of maritime features is reserved to be in the merit stage.[116] The fourth reason is that Submissions 12 and 14 depend on military activities.[117] Military activities can be excluded in Article 298, but to determine the characteristics of the activity requires more information for merit determination.[118]

After establishing their legal framework, the Tribunal made their considerations on whether the Tribunal has jurisdiction to hear the party's Submissions.[119]

3. What Can the Tribunal Hear?

The Tribunal lists, in numerical order, the 15 Philippines' Submissions on whether the Tribunal has jurisdiction at the current stage or

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[110] *Id.* ¶ 392. Note that the Tribunal uses Article 298 as a reason to reserve the decision for jurisdiction when entering the merit phase of the arbitration. This is because Article 298 is the optional exception, which requires more facts than the current stage. Juxtapose this to Article 297 being the automatic exception, which is arguably more decisive at the current stage because the article does not have to examine a separate declaration.

[111] *Id.* ¶ 393.

[112] *Id*.

[113] *Id.* ¶ 394.

[114] *Id.*

[115] Award on Jurisdiction and Admissibility*, supra* note 1, ¶ 395.

[116] *Id.*

[117] *Id.* ¶ 396.

[118] *Id.*

[119] *Id.* ¶ 397. The Tribunal's rationale for establishing procedural necessities is to recognize the legal framework for awarding jurisdiction and admissibility. Additionally, by providing the schematics of the Tribunal's mechanisms, one can properly compare the criticisms the court received as a result of the Awards. *See id.*

reserved the right to decide in the merits phase.[120]

In each analysis of the 15 Submissions, the Tribunal lists the elements of categorizing the Submission: (1) the dispute itself, (2) whether the dispute is barred by Section 1 of Part XV, (3) whether the dispute is on sovereignty, (4) whether the dispute concerns sea boundary delimitation, and (5) whether Article 297 or Article 298 applies.[121] The only exception is Submission 15, in which the Tribunal directs the Philippines to clarify and narrow the scope to determine jurisdiction and merits at a later stage.[122]

The Tribunal determines that it has jurisdiction over Submissions 3, 4, 6, 7, 10, 11, and 13 based on the foregoing analysis.[123] Moreover, the Tribunal also determines that Submissions 1, 2, 5, 8, 9, 12, and 14 do not pose exclusively preliminary characteristics, and thus the Tribunal reserves the right to consider jurisdiction and merits at a later stage for these Submissions.[124]

C. The Second Award: Merits

The delimitation of the problem continues into understanding the Award on Merits and the legal arguments presented for each of the Submissions presented by the Philippines. Before proceeding to the analysis of each Submission, the Tribunal explains the ramifications of China's non-participation.

1. Non-Participation and its Effects

The UNCLOS has a provision for non-participating parties in Article 9 of Annex VII.[125] Because China did not participate at any point of the proceedings, the Philippines requested the proceedings to continue, pursuant to Article 9.[126] Additionally, the Tribunal states that continuation

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[120] *Id.* ¶¶ 398-412. Note that the Tribunal did not provide the third possibility that the Submission does not have jurisdiction. *See id.*

[121] Award on Jurisdiction and Admissibility*, supra* note 1, ¶¶ 398-412.

[122] *Id.* ¶ 412.

[123] *Id.* ¶ 413.

[124] *Id.*

[125] Article 9 of Annex VII establishes:

> If one of the parties to the dispute does not appear before the arbitral 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.* Before making its award, the arbitral tribunal *must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law*.

UNCLOS, *supra* note 21, at 189 (emphasis added).

[126] Award on Merits, *supra* note 16, ¶¶ 116, 118.

of the proceedings legally binds China under international law to the Tribunal's decision.[127] Nonetheless, the Tribunal was still obligated to ensure that China's procedural rights were not diminished pursuant to Article 5 of Annex VII.[128] Some of the procedural safeguards of Article 5 include: ensured communication and materials to the Ambassador of China in the Netherlands; adequate and equal time to submit written responses; invitations to China to comment on procedural steps; invitations to China to comment on scheduling the hearings, on proposed candidates, and on materials in the public domain; and being provided copies of transcripts.[129] This does not mean that the Philippines' procedural rights were not safeguarded, because a participating party cannot be disadvantaged due to nonappearance of another party.[130]

Notwithstanding these safeguards protecting China's procedural rights, the Tribunal still must find jurisdiction and that the claims are founded in law and fact.[131] In terms of jurisdiction, the Tribunal has discussed the procedures and arguments at length in the Award on Jurisdiction.[132] In order for the Tribunal to find that the Philippines' claims were founded in law and fact, the Tribunal must take extra steps to determine if the claim or defense was established without changing the burden of proof or increasing/decreasing the standard of proof.[133] The Tribunal has crafted ten steps to find that claims are founded in law and fact.[134]

At step one, the Tribunal requests further written arguments from the Philippines pursuant to Article 25 of Rules of Procedure.[135] This request was "to provide additional historical and anthropological information, as well as detailed geographic and hydrographic information" on certain maritime features; the Philippines responded by providing an atlas and an

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[127] *Id.* ¶ 118, n.32. The Tribunal cites to Article 296 and Article 11 of Annex VII of the UNCLOS to show where this binding power exists.

[128] *Id.* ¶ 121.

[129] *Id.*

[130] *Id.* ¶ 122 (citing The Arctic Sunrise Arbitration (Neth. v. Russ.), Case No. 2014-12, Award on Jurisdiction, ¶ 151 (Perm. Ct. Arb. 2015), https://pcacases.com/web/sendAttach/1325.) The Tribunal continues to explain some of the disadvantages the Philippines might experience because of non-participation. *Id.*

[131] *Id.* ¶ 130.

[132] Award on Merits, *supra* note 16, ¶ 130.

[133] *Id.* ¶ 131.

[134] *Id.* ¶ 132-41.

[135] *Id.* ¶ 132. The Rules of Procedure were laid out in the Tribunal's "Request for Further Written Argument" to the Philippines. *Id.*

expert report at their request.[136] At step two, the Tribunal obtains an independent hydrographic expert to review, analyze, and critique the technical data submitted by the Philippines and other features.[137] At step three, the Tribunal asks a series of questions to the experts from step one about their understanding and reports.[138] At step four, the Tribunal asks a series of questions to an expert obtained by the Philippines about environmental consequences of China's conduct in the South China Sea.[139] At step five, the Tribunal obtains an independent opinion from coral reef ecology experts on the impact of Chinese construction activities at the Spratly Islands.[140]

At step six, the Tribunal attempts to ascertain China's stance on environmental issues by: (1) asking the Philippines to identify statements made by China about ecological preservation and protection in regard to the construction, (2) asking the parties to make comments on Chinese statements and reports about the ecological impact, and (3) directly asking China about an environmental impact study.[141] While China did not comment, the Tribunal was able to ascertain information from a comment by the Foreign Ministry Spokesperson for China.[142] At step seven, in relation to the Philippines' Submission 13, the Tribunal obtains a report by Captain Gurpreet Singhota on maritime safety obligations and ship maneuvering based on the materials.[143] At step eight, the Tribunal invites comments from both parties concerning features in the South China Sea, including materials from the Taiwanese Authority.[144] The Tribunal rationalizes this decision based on Article 22 and Article 25 of the Rules of Procedure, to "take all appropriate measures" and "whatever other steps [the Tribunal] may consider necessary" to find claims and defenses founded in law and fact.[145] The Philippines commented, despite remarking that it could

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[136] *Id.* (footnote omitted). The resulting report is entitled *An Appraisal of the Geographical Characteristics and Status of Certain Insular Feature in the South China Sea* by Professor Clive Schofield, Professor J.R.V. Prescott, and Mr. Robert van der Poll. *Id.*

[137] Award on Merits, *supra* note 16, ¶ 133.

[138] *Id.* ¶ 134.

[139] *Id.* ¶ 135, n.53. The report was written by Professor Kent Carpenter and is titled *Eastern South China Environmental Disturbances and Irresponsible Fishing Practices and their Effects on Coral Reefs and Fisheries*.

[140] *Id.* ¶ 136.

[141] *Id.* ¶ 137.

[142] *Id.*

[143] Award on Merits, *supra* note 16, ¶ 138.

[144] *Id.* ¶ 139.

[145] *Id.* ¶ 139, n.53.

be disregarded, and China did not.[146] At step nine, the Tribunal invites comments on the United Kingdom Hydrographic Office, a hydrographic survey work published prior to 1945 and conducted by the Royal Navy of the U.K.[147] Despite the Philippines' belief that such a record was unnecessary, the Tribunal argues that it provides a glimpse into the past before human modification.[148] At step ten, the Tribunal invites comments on excerpts from French documents from the 1930s.[149]

Based on the aforementioned steps for Article 5 and Article 9 of Annex VII, the Tribunal concludes that it had satisfied the obligation for procedural fairness, established jurisdiction, and found factual and legal foundations for claims and defenses.[150]

2. Analyzing the Award on the Merits

i. Understanding Submissions 1 and 2

Due to the nature of some of the disputes, the Tribunal has lumped the jurisdictional reasoning and/or the merits in some of the Philippines' Submissions in formatting their opinion. This is illustrated by the Tribunal's first discussion in Submissions 1 and 2 on jurisdiction and merits.

The first issue on jurisdiction is based on the optional exceptions in Article 298, particularly Article 298(1)(a)(i).[151] The Tribunal quickly resolves that boundary delimitation and historic bays do not apply, because the dispute does not deal with boundary delimitation, nor is the South China

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[146] *Id.*

[147] *Id.* ¶ 140.

[148] *Id.*

[149] These documents originated from the *Bibliothèque Nationale de France* and from the *Archives Nationales d'Outre-Mer.* Award on Merits, *supra* note 16, ¶ 141. These steps do not appear to be the inherent legal rationale for whether Article 9 of Annex VII has been satisfied or not. Rather, this may demonstrate as evidence that the Tribunal has complied with the UNCLOS by neither creating a *per se* rule that necessitates the ten steps, nor a rule that requires a certain number of independent experts or documents. The analysis for non-participation should be taken on a case-by-case basis.

[150] *Id.* ¶ 144.

[151] Article 298(1)(a)(i) establishes:

> When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes:
>
> (a) (i) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea *boundary delimitations*, or those involving *historic bays or titles* ...
>
> UNCLOS, *supra* note 21, at 136 (emphasis added).

Sea a historic bay.[152] Here the issue presented is whether China's claim amounts to 'historic title'—such a determination is dependent on "[1] the nature of China's claims in the South China Sea and [2] the scope of the exception."[153]

To the first part of the inquiry, the Tribunal examines the concept of the 'nine-dash line'[154] and its relationship with historic title.[155] First, the Tribunal examined the nature of the claim by defining terms.[156] Because the UNCLOS is a multi-lingual instrument, the Tribunal reasoned that a broader understanding of the non-English version of the UNCLOS "'best reconciles the texts'."[157] Additionally, the Tribunal took into consideration that "historic titles" evolved over time in international law of the sea.[158]

Thus, the tribunal established these terms in examining the nature of the claims:

> The 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. *Historic rights may include sovereignty, but may equally include more limited rights, such as fishing rights or rights of access, that fall well short of a claim of sovereignty*. *'Historic title', in contrast, is used specifically to refer to historic sovereignty to land or maritime areas.* 'Historic waters' is a term for historic title over maritime areas, typically exercised either as a claim to internal waters or as a claim to the territorial sea although "general international law . . . does not provide for a single 'régime' for 'historic waters' or 'historic bays', but only for a particular régime for each of the concrete, recognized cases of 'historic waters' or 'historic bays'." Finally, a 'historic bay' is a bay in which a State claims historic waters.[159]

The Tribunal reasoned that the nine-dash line is "China's repeated

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[152] Award on Merits, supra note 16, ¶ 205.

[153] *Id.* ¶ 206.

[154] *See id.* ¶¶ 207, 213; *Infra* Section I.C.2.i.

[155] *Id.* ¶ 207. The following paragraphs from 207 to 214 examine whether China's claims on the South China Sea were something other than a historic bay or title. The Tribunal concluded that the South China Sea is not categorized as territorial sea or internal waters. *Id.* ¶ 214.

[156] *Id*. ¶ 215.

[157] *Id.* ¶ 216 (citing Vienna Convention on the Law of Treaties art. 33, May 22, 1969, 1155 U.N.T.S. 331).

[158] Award on Merits, *supra* note 16, ¶ 217.

[159] *Id.* ¶ 225 (footnote omitted) (emphasis added).

invocation of rights formed in the long historical course" and that these rights apply to living and non-living resources.[160] Because the nine-dash-line is a collection of historic rights and not of historic title, Article 298(1)(a)(i) does not apply, and the Tribunal has jurisdiction to consider Submissions 1 and 2.[161]

In analyzing the merits of Submissions 1 and 2, the Tribunal raised three issues:

> (a) First, does the Convention, and in particular, its rules for the EEZ 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?[162]

According to the Tribunal, the first question is answered in the negative.[163] The Tribunal reasoned that the UNCLOS does not expressly permit the continuance of historic rights to living or non-living resources in EEZs, continental shelf, the high seas, or the Area.[164] The Tribunal did not find ambiguity in the plain language of Articles 56, 58, 62, and 77 of UNCLOS that implied that historic rights continued once a State became a party to the treaty.[165] The Tribunal therefore concluded that the claim to historic rights within the nine-dash-line "is incompatible with the

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[160] *Id.* ¶¶ 207, 213 (internal quotation marks omitted).

[161] *Id.* ¶ 229. Here is an example of how non-participation affected the analysis of the Tribunal for the jurisdiction in Submissions 1 and 2: the Tribunal considered the translation issue based on the available documents of China's claim, but had China participated, there would not be a translation issue and jurisdiction would have been harder to prove. *Id.* ¶ 227.

[162] *Id.* ¶ 234.

[163] Bernard H. Oxman, *The South China Sea Arbitration Award*, 24 U. MIAMI INT'L & COMP. L. REV. 235, 251 (2017).

[164] Award on Merits, *supra* note 16, ¶ 239.

[165] *Id.* ¶¶ 240-46.

Convention to the extent that it exceeds the limits of China's maritime zones."[166]

In answering the second question, the Tribunal argued again in the negative.[167] The Tribunal first defined historical rights as exceptional rights that the State would not have if "not for the operation of the historical process giving rise to the right and the acquiescence of other States in the process."[168] Exercising freedoms from international law, such as historical navigation and fishing, would therefore not create a historic right.[169] While China has historically conducted intensive navigation and fishing, China has not restricted other States from their conduct in the South China Sea.[170] As phrased by the Tribunal, China "did not extinguish historic rights ... [r]ather, China relinquished the freedoms of the high seas" in regard to living and non-living resources.[171] However, the Tribunal is careful of recognizing that China still has freedom to navigate, to have historic claims on islands in the South China Sea, and the ability to claim maritime zones.[172]

To the last question, the Tribunal also answered in the negative, since China did not establish rights at variance with the UNCLOS.[173] Although paragraphs three and four of Article 311 allow for modification, the Tribunal had not found that China had asserted a right at variance with the UNCLOS, that other State parties acquiesced to the right, and that there was sufficient time to establish the right and acquiescence.[174]

Thus are the reasonings, rationale, and conclusions for the Tribunal in relation to jurisdiction and merits to Submissions 1 and 2.

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[166] *Id.* ¶ 261.

[167] Oxman, *supra* note 163, at 251.

[168] Award on Merits, *supra* note 16, ¶ 268.

[169] *Id.* ¶¶ 268, 270.

[170] *Id.*

[171] *Id.* ¶ 271. It is important that the Tribunal used 'relinquished' instead of 'extinguished' because it would imply that the Tribunal stripped China of historic rights that it never had prior to the UNCLOS. *See* Raul Pedrozo, *The South China Sea Arbitration Award*, 97 INT'L L. STUD. 62, 64 (2021) (using the word 'extinguish' to describe any historic right China had after becoming party to the UNCLOS). *See also* Press Release, Permanent Ct. of Arb., The South China Sea Arbitration (Phil. v. China) (July 12, 2016), https://pcacases.com/web/sendAttach/1801 (using the word 'extinguish' in terms of historic rights being incompatible to the UNCLOS). It raises inquiries about how framing the rationale can leave to interpretation whether China has historic rights or if China voluntarily gave up freedoms of the high seas. Award on Merits, *supra* note 14, ¶ 278. Another way of framing the question is whether UNCLOS has agency in superseding any historic rights.

[172] Award on Merits, *supra* note 16, ¶ 272.

[173] Oxman, *supra* note 163, at 252.

[174] Award on Merits, *supra* note 16, ¶¶ 274-75. This process can also be referred to as establishing acquiescence and estoppel.

ii. Understanding Submissions 3 to 7

Following the order of the Tribunal's decision, the next legal analysis reviews Submissions 3 through 7. To recall, Submissions 3, 4, 6, and 7 resolved their jurisdictional issues in the Award on Jurisdiction and Admissibility, while 5 required an analysis on jurisdiction.[175] Central to Submissions 3 through 7 is the application and analysis of Article 121 of Part VIII of the UNCLOS.[176]

Starting with Submissions 4 and 6 in consideration of low-tide elevation, the Tribunal touched on and resolved the merits of these claims. The analysis, while important and necessary to resolving the dispute, focused primarily on the substance of the materials and documents with some legal arguments.[177] Of the legal arguments made, there are some worth mentioning. The first is that Article 13 of the UNCLOS, which defines low-tide elevations, uses the phrase "naturally formed" and indicates that the maritime feature will be evaluated by its natural condition.[178] Second, human modification does not change the low-tide elevation, regardless of how substantial the change is to the maritime feature.[179] Third, if such a maritime feature qualifies as low-tide under Article 13, then such a feature shall not entitle maritime zones including territorial sea, EEZ, and continental shelf.[180] Fourth, if such a maritime feature does not qualify as low-tide but high-tide, it may still not generate an EEZ or continental shelf if such a feature is defined as a 'rock' under Article 121(3).[181]

Based on the factual analysis on the maritime features in Submissions 4 and 6, the Tribunal made two conclusions. In conclusion one, the Tribunal characterized these maritime features as high-tide: (1) Scarborough Shoal, (2) Cuarteron Reef, (3) Fiery Cross Reef, (4) Johnson

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[175] *Id.* ¶¶ 164, 392.

[176] Article 121 of Part VIII of the UNCLOS establishes that:

> 1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.
>
> 2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the EEZ and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.
>
> 3. Rocks which cannot sustain human habitation or economic life of their own shall have no EEZ or continental shelf.

UNCLOS, *supra* note 21, at 66.

[177] Award on Merits, *supra* note 16, ¶¶ 303-81.

[178] *Id.* ¶ 305. *See* Oxman, *supra* note 163, at 255.

[179] Award on Merits, *supra* note 16, ¶ 305.

[180] *Id.* ¶ 307-08.

[181] *Id.* ¶ 309.

Reef, (5) McKennan Reef, and (6) Gaven Reef (North).[182] In conclusion two, The Tribunal characterized these maritime features as low-tide: (1) Hughes Reef, (2) Gaven Reef (South), (3) Subi Reef, (4) Mischief Reef, and (5) Second Thomas Shoal.[183]

The next legal rationale that the Tribunal crafts relates to Submissions, 3, 5, and 7, which also aids in the determination of jurisdiction of Submissions 8 and 9.[184] This rationale is applied to the Tribunal's interpretation of Article 121(3) with the aid of reviewing the text, "its context, the object and purpose of the Convention, and the *travaux préparatoires*, before setting out the conclusions that, in the Tribunal's view, follow with respect to the meaning of the provision."[185] From detailed analysis, the Tribunal has drawn ten conclusions on Article 121(3).

First, the word "rock" is not limited to the geological and geomorphological characteristics of the maritime feature to be a "rock" under Article 121(3).[186] Second, only the natural capacity of a feature shall determine its ability to "sustain human habitation or economic life."[187] Third, "human habitation" involves a stable community that lives on the feature and considers it home, where they remain.[188] A critical factor when considering "human habitation" is the non-transient characteristic, that is, the periodic or habitual residency of the feature's population.[189]

Fourth, "economic life of their own" is inextricably linked to "human habitation," meaning that the human population of the feature have livelihoods based on the feature itself and the surrounding waters.[190] "Economic life" cannot be solely dependent on external resources, nor solely extractive of the feature.[191] Fifth, the Tribunal considers, as a practical matter, that a maritime feature's sole sustained economic life is linked to having a stable human community inhabiting the feature.[192] This is despite the fact that Article 121(3) only requires either a sustained human

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[182] *Id.* ¶ 382. Even though these maritime features may be considered high-tide, they still may be considered as "rocks" under Article 121(3).

[183] *Id.* ¶ 383.

[184] *Id.* ¶ 473. Or to think in the inverse, this legal rationale aids in determining whether the maritime features are islands under Article 121(1). *See* Oxman, *supra* note 163, at 257.

[185] Award on Merits, *supra* note 16, ¶¶ 477-538.

[186] *Id.* ¶ 539.

[187] *Id.* ¶ 540.

[188] *Id.* ¶ 542.

[189] *Id.*

[190] *Id.* ¶ 543.

[191] Award on Merits, *supra* note 16, at ¶ 543.

[192] *Id.* ¶ 544.

habitation or an economic life of its own.[193] One exception the Tribunal considers is when a "constellation of maritime features" sustains a stable human population while only inhabiting a portion of the features and using the others solely for economic life.[194] Sixth, the Tribunal has an objective analysis of whether a maritime feature has the capacity to sustain human habitation or economic life of its own—this does not relate to the question of sovereignty.[195]

Seventh, the analysis for Article 121(3) is done on a case-by-case basis and is to be considered with different factors founded in an objective view, not through an abstract view.[196] Eighth, from a realistic perspective, the Tribunal considers that a network of islands sustaining human habitation, or the local use of a maritime feature for a livelihood, are both sufficient to satisfy as either sustained human habitation or economic life of its own, respectively.[197] Ninth, the Tribunal shall objectively consider both the physical characteristics and the historical evidence of the maritime feature in analyzing it under Article 121(3).[198] Tenth, following Article 31(3) of the Vienna Convention on the Law of Treaties, "'any subsequent application of the treaty which establishes the agreement of the parties regarding its interpretation' shall be taken into account together with the context."[199] To satisfy this article, subsequent acts of both parties must demonstrate a different interpretation of Article 121 and are analyzed under a strict standard.[200]

Based on the conclusions the Tribunal has drawn, and the analysis of the maritime features in Submissions 3 and 7, the Tribunal concluded that the Spratly Islands were rocks under Article 121(3) and therefore did not generate EEZs or a continental shelf.[201]

Next, the Tribunal analyzed Submissions 3, 4, 6, and 7. The Tribunal analyzed these Submissions before Submission 5, because they required the

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[193] *Id.*

[194] *Id.*

[195] *Id.* ¶ 545. To reiterate, both parties and the Tribunal refrain from deciding on sovereignty, *See infra*, p. 6-7.

[196] Award on Merits, *supra* note 16, ¶ 546.

[197] *Id.* ¶ 547. The wording of the eigth point is to negate the argument that the collection of islands means that the population requires external resources or that the economic life is extractive of the maritime feature.

[198] *Id.* ¶¶ 548-51. *See* Oxman, *supra* note 163, at 260-63 (breaking down the Tribunal's interpretation of conclusions one through nine).

[199] Award on Merits, *supra* note 16, ¶ 552 (citing Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331).

[200] *Id.*

[201] *Id.* ¶¶ 554-626. *See* Pedrozo, *supra* note 171, at 66 (breaking down the three main reasons the Spratly Islands are classified as rocks and not islands).

Tribunal to decide on a dispute in which overlapping entitlement may exist, bringing the dispute outside the scope of the UNCLOS.[202] However, because none of the Spratly islands generate EEZs nor continental shelves, there are no over lapping entitlements and they are not barred from Article 298(1)(a)(i).[203] In other words, China could not claim maritime entitlements to any of the features mentioned above.[204] Submission 5 is the Philippines requesting entitlement to Mischief Reef and Second Thomas Shoal. Since these maritime features are located 200 nautical miles from the Philippines' coast, the Tribunal finds that these features are part of Philippines' EEZ and continental shelf.[205]

iii. Understanding Submissions 8 to 13

Continuing the Tribunal's order, the Tribunal analyzes Submissions 8 to 13 as Chinese activities in the South China Sea.

Starting with Submission 8, which discusses China's interference with the Philippines' petroleum exploration, ability to conduct seismic surveys, and fishing, the Tribunal finds that it has jurisdiction to decide the dispute.[206] In the Award on Jurisdiction and Admissibility, Submission 8 was contingent on the same issue as Submission 5: boundary delimitation.[207] As mentioned previously, since the activities are not conducted in overlapping entitlements and are within Philippine's EEZ, the Tribunal has jurisdiction.[208] Similar to Submissions 4 and 6, the analysis of Submission 8 bears few legal arguments and looks to the facts to determine which articles have been breached by China.[209] In short, the Tribunal finds China breached the Philippines' sovereign rights over living resources in Article 56 of the UNCLOS and over non-living resources in Article 77.[210]

Next, as to Submission 9 regarding China's failure to prevent exploitation of living resources by its peoples in the Philippines' EEZ, the

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[202] Award on Merits, *supra* note 16, ¶¶ 629-30.

[203] *Id.* ¶¶ 632-33. The Tribunal continues the analysis of jurisdiction in relation to interested third parties, specifically Malaysia. As described in ¶¶ 634-39, Malaysia sent communication to the Tribunal on June 23, 2016, to express their rights under the *Monetary Gold* principle and their claims to sovereignty. The Tribunal explained that Malaysia's rights were unaffected by the Tribunal's decision and found that there were no jurisdictional issues in relation to the proceedings or to Submission 5 in particular. *Id.* ¶¶ 641-42.

[204] *Id.* ¶ 647.

[205] *Id.* ¶ 648.

[206] *Id.* ¶¶ 690, 695.

[207] Award on Merits, *supra* note 16, ¶¶ 690, 695.

[208] *Id.*

[209] *See id.* ¶¶ 696-715.

[210] *Id.* ¶ 716.

Tribunal finds that it has jurisdiction for the same reason provided in Submission 8.[211] For this Submission, the Tribunal analyzed two Articles from the UNCLOS and one decision by the Tribunal. The Tribunal frames the dispute on living resources to only encompass events that occurred within the Philippines' EEZ.[212] This is governed by Article 62(4) which imposes obligations to other Nationals fishing in the home State's EEZ.[213] Additionally, the Tribunal uses Article 58(3), which imposes obligations on the States for activities affecting the home State's EEZ.[214] To analyze the nature of the obligation, the Tribunal cites to *Chagos Marine Protected Arbitration*, reasoning that:

> [The] extent of the regard [to the obligations] required by the Convention will depend upon the nature of the rights held by [the second State], their importance, the extent of the anticipated impairment, the nature and importance of the activities contemplated by the [first State], and the availability of alternative approaches.[215]

More concisely, there must exist due diligence by a State to ensure their nations are lawfully fishing.[216] The Tribunal found through its analysis, that China failed to exercise due diligence in May 2013 to the Philippines' fisheries and thus breached Article 58(3).[217]

Next, Submission 10 deals with China's prevention of Filipino fishers from traditional fishing.[218] The Tribunal limits itself on jurisdiction by only considering traditional fishing and not raising the question of sovereignty.[219] The rationale of having traditional fishing rights "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."[220] However, the right to traditional

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[211] *Id.* ¶¶ 717, 733.

[212] *Id.* ¶ 736.

[213] Award on Merits, *supra* note 16, ¶ 739.

[214] *Id.* ¶ 741.

[215] *Id.* ¶ 742, (citing Chagos Marine Protected Area Arbitration (Mauritius v. U.K.), Case No. 2011-03, Award, ¶ 519 (Perm. Ct. Arb. 2015), https://files.pca-cpa.org/pcadocs/MU-UK%2020150318%20Award.pdf).

[216] *Id.* ¶ 744.

[217] *Id.* ¶ 757.

[218] *Id.* ¶ 758.

[219] Award on Merits, *supra* note 16, ¶ 793.

[220] *Id.* ¶ 798. The Tribunal uses the word 'artisanal' when defining the legal basis. Additionally, the Tribunal clarifies that these historic rights do not belong to the States, but are private rights. To its essential components, traditional, artisanal fishing

fishing is extinguished in EEZs under Article 62(3).[221] In contrast, traditional fishing rights continue to exist in territorial seas, but are subject to the regulations of the coastal State under Article 2(3) of the UN Charter.[222] Without veering into analyzing the limitations of customary international law with regard to traditional fishing, the Tribunal looked at the facts presented.[223] In this case, the Scarborough Shoal Standoff includes Chinese, Filipino, and Vietnamese fisherman who can claim traditional fishing rights.[224] In the Tribunal's view, China has unlawfully prevented Filipino fisherman from exercising their traditional fishing rights since May of 2012, when Chinese government vessels actively prevented Filipinos from fishing.[225]

Next, the Tribunal considers Submissions 11 and 12(b), as both deal with the protection and preservation of maritime features.[226] Since Submission 11 was amended, and Submission 12's jurisdiction has not been decide in the Award on Jurisdiction and Admissibility, the Tribunal had to decide on both of the Submissions' jurisdiction.[227] Jurisdiction was dependent on whether the activities described in the Submission amounted to military activity and were excepted via Article 298(1)(b).[228] The Tribunal determined the purpose of China's activities based on two statements by the Chinese Foreign Ministry Spokesperson, one statement by the Head of China's delegation to the Meeting of States Parties to the UNCLOS, and one statement by China's president.[229] All of the statements described that the activities described in the Submission were for civilian purposes, and with such continued affirmation, the Tribunal reasoned that Article

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protected the historic rights of fisheries against commercial or industrial fishing. *Id.* ¶ 796 (citing Sovereignty and Maritime Delimitation in the Red Sea (Eri.v. Yemen), Case No. 1996-04, Award of the Arbitral Tribunal in the Second Stage of the Proceedings, ¶ 106 (Perm. Ct. Arb. 1999), https://pcacases.com/web/sendAttach/518).

[221] *Id.* ¶ 804.

[222] *Id.* ¶¶ 808-09.

[223] *Id.* ¶ 812.

[224] *Id.* ¶ 805. The Tribunal put Taiwan in parenthesis, thus carefully acknowledging their interest in the Arbitration, but not risking the possibility that the Award is undermined for recognizing Taiwan.

[225] Award on Merits, *supra* note 16, ¶¶ 810-14. *See* Oxman, *supra* note 163, at 273.

[226] Award on Merits, *supra* note 16, ¶¶ 815-16. Submission 12(b) is discussed in this portion because the rest of the Submission directly analyzes artificial island creation and unlawful acts of attempted appropriation.

[227] *Id.* ¶ 932.

[228] *Id.* ¶ 934-935.

[229] *Id.* ¶¶ 936-37.

298(1)(b) did not bar, and jurisdiction existed.[230]

In the Tribunal's effort to analyze maritime duties under the UNCLOS, the Tribunal listed out all articles that pertain to the subject.[231] First, the Preamble of the UNCLOS calls for all State parties to promote "the conservation of their living resources, and the study, protection and preservation of the marine environment ...."[232] Secondly, Article 192 of the Convention "entails the positive obligation to take active measure to protect and preserve, the marine environment, and by logical implication, entails the negative obligation not to degrade the marine environment."[233] The third relates to Article 194 which entails the prevention of pollution in marine environments.[234] Fourth, Article 123 establishes that "[s]tates bordering an enclosed or semi-enclosed sea should cooperate with each other in the exercise of their rights and in the performance of their duties under the Convention."[235] Lastly, Article 206 keeps States informed of risks when another State conducts planned activities that can have potentially damaging effects.[236] This article on environmental impact assessment is an obligation under the Convention and customary international law.[237]

Based on this line of Articles, the Tribunal was able to conclude the following: first, the Tribunal determined that China breached its obligations under Article 192 and 194(5) for harvesting coral, giant clams, and

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[230] *Id.* ¶ 938.

[231] *Id.* ¶¶ 943, 946, 947

[232] UNCLOS, *supra* note 21, at 25.

[233] Award on Merits, *supra* note 16, ¶ 941.

[234] Article 194 establishes:

> 1. States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary *to prevent, reduce and control pollution of the marine environment from any source,* using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they *shall endeavor to harmonize their policies in this connection.*
>
> ...
>
> 5. 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*.

UNCLOS, *supra* note 21, at 100-01 (emphasis added).

[235] *Id.* at 63.

[236] Award on Merits, *supra* note 16, ¶ 948.

[237] *Id.* (citing Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Case No. 17, Advisory Opinion, 2011 ITLOS Rep. 10, ¶ 145).

endangered turtles.[238] Second, the Tribunal reasoned that China's artificial island-building "caused devastating and long-lasting damage to the marine environment" and constituted a breach under Article 192, Article 194(1), and Article 194(5).[239] Third, the Tribunal found that China breached Article 197 and Article 123 by not communicating and coordinating with neighboring States with regard to their activities on coral reefs.[240] Fourth, China had breached its duty under Article 206 to provide an environmental assessment report on their activities in the South China Sea.[241] Thus, the conclusions on Submission 11 and 12(b).

Turning to Submission 12 in its entirety, the Tribunal established jurisdiction based on the previous premises of Submissions 5 and 11. The Tribunal established jurisdiction over the dispute for Mischief Reef because the maritime feature is low-tide and is within the Philippines' EEZ.[242] Additionally, the activities at or near Mischief Reef do not constitute military activity, as mentioned in Submission 11, and therefore, are not barred by Article 298(1)(b)'s exclusion.[243] In a quick analysis by the Tribunal, the Tribunal found that China had breached Article 60 and 80 by constructing artificial islands on the Philippines' EEZ and continental shelf.[244] In continuation, Submission 13 dealt with China's breach of the operation of enforcement vessels in a dangerous manner to the Philippines' vessels at Scarborough Shoal.[245] The Tribunal established jurisdiction for the Submission in the Award on Jurisdiction and Admissibility because Article 298(1)(b) only applies to EEZs, not to the territorial sea of Scarborough Shoal.[246] The analysis for Submission 13 is set by the Convention on the International Regulations for Preventing Collisions at Sea (COLREGS). Although the Philippines was not party to the treaty until 2013 and the events occurred in 2012, Article 94(5) of the UNCLOS

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[238] *Id.* ¶ 960. *See* Oxman, *supra* note 163, at 267-68, (explaining how the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) informed the Tribunal of the obligation China and the Philippines has under the UNCLOS).

[239] Award on Merits, *supra* note 16, ¶ 983. *See* Oxman, *supra* note 163, at 269-70, (highlighting the devastating damages that the Tribunal used in learning China's breach).

[240] Award on Merits, *supra* note 16, ¶¶ 984, 986.

[241] *Id.* ¶ 989.

[242] *Id.* ¶ 1025.

[243] *Id.* ¶ 1028.

[244] *Id.* ¶ 1043. While the Tribunal addresses Submission 12(a), the Tribunal did not consider part (c).

[245] *Id.* ¶ 1044.

[246] Award on Merits, *supra* note 16, ¶ 1045.

incorporates COLREGS and binds China to COLREGS application.[247] Based on the Tribunal's independent expert's assessment and in consideration of precluding wrongfulness, the Tribunal finds that China has violated COLREGS for their vessels' occasional negligence and conscious disregard of their actions at Scarborough Shoal.[248] Thus, the Tribunal found China in breach of the Rules in COLREGS and in Article 94 of the UNCLOS.[249]

iv. Understanding Submission 14

The Tribunal continues its analysis in a separate subsection with Submission 14 in regard to China's actions having "aggravated and extended the dispute" by: (1) interfering with the Philippine's right to navigation, (2) preventing rotation and resupply and thus (3) endangering the health of personnel stationed on Second Thomas Shoal, and (4) continuing island building on maritime features.[250] In determining jurisdiction, the Tribunal must first consider the Second Thomas Shoal's classification under Article 121 and whether China's activities amount to military activities, and are thus excluded under Article 281(1)(b).[251]

In answering the first part of the question, Submissions 4 and 6 indicate that the Second Thomas Shoal is low tide, which cannot generate any entitlement from China, but is part of the Philippines' EEZ.[252] However, the Tribunal constitutes the first three parts of Submission 14 to be part of Article 298(1)(b) as military activity conducted by both parties.[253] Thus, the Tribunal lacks jurisdiction on these parts of the Submission.[254] As for the last part of Submission 14, the Tribunal recalls its analysis from Submission 11 and 12, finding that China's activities are not militaristic but for the purposes of civilians.[255] Thus, the Tribunal has jurisdiction on the last point of Submission 14.[256]

To start the analysis, the Tribunal acknowledges "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

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[247] *Id.* ¶¶ 1081-83. *See* Oxman, *supra* note 163, at 274-75 (explaining how COLREGS operates within the schema of the UNCLOS).

[248] Award on Merits, *supra* note 16, ¶¶ 1105, 1107.

[249] *Id.* ¶ 1109.

[250] *Id.* ¶ 1110.

[251] *Id.* ¶ 1151.

[252] *Id.* ¶ 1153.

[253] *Id.* ¶¶ 1158-61.

[254] Award on Merits, *supra* note 16, ¶ 1162.

[255] *Id.* ¶ 1164.

[256] *Id.* ¶ 1165

pendency of the settlement process."[257] This is mirrored in Article 300 of the UNCLOS, which establishes that parties "shall fulfill in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right."[258] This requires states to "abstain from [...] exercising a prejudicial effect and [...] not allow any step of any kind to be taken which might aggravate to extend the dispute."[259] The Tribunal may find that the party aggravated the dispute in three ways: (1) the party's action cause the violation to be more serious, (2) the party's action frustrates the effectiveness of the final decision or makes such decision more difficult to implement, or (3) renders the Tribunal's work more difficult to find a resolution.[260]

Through this analysis, the Tribunal finds three ways China has aggravated the dispute.[261] "First, China has effectively created a *fait accompli* [an irreversible act] at Mischief Reef by constructing a large artificial island [...] within the Philippines' EEZ and continental shelf [...]. In practical terms, the implementation of the Tribunals decision will be significantly more difficult for the Parties [...]."[262] Second, China continued to aggravate the dispute by causing irreparable harm to several coral reef habitats, leaving them permanently damaged, and thus, the Tribunal cannot give a resolution.[263] This also extends to the added maritime features in the amended portion of Submission 14.[264] Lastly, China's destruction on the natural status of the same maritime features has significantly made the Tribunal's work more difficult, aggravating the proceedings.[265]

v. Understanding Submission 15

Finally, the Tribunal analyzed Submission 15, regarding whether there was a genuine dispute among both parties. In the Philippines' amended Submission 15, the party requested from the Tribunal that China respect the Philippines' rights and freedoms of the Convention, that China complies with the Convention's duties, and that China exercises their rights and

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[257] *Id.* ¶ 1169.

[258] UNCLOS, *supra* note 21, at 137.

[259] Award on Merits, *supra* note 16, ¶ 1173 (citing Electricity Company of Sofia and Bulgaria (Belg. v. Bulg.), Interim Measures of Protection, 1939 P.C.I.J. (ser. A/B) No. 79, ¶ 199 (Dec. 4) (internal quotation marks omitted).

[260] *Id.* ¶ 1176.

[261] *Id.* ¶ 1177-79.

[262] *Id.* ¶ 1177.

[263] *Id.* ¶ 1178.

[264] *Id.* ¶ 1181.

[265] Award on Merits, *supra* note 16, ¶ 1179.

freedoms in the South China Sea in conjunction to that of the Philippines.[266] The Tribunal found that the amended Submission 15 was reciting the concept of *pacta sunt servanda*, which requires that each State party adheres to the treaty and all its obligations.[267] For the Tribunal to declare on Submission 15, would be redundant and out of scope of the dispute—thus, the Tribunal does not make any declaration.[268]

II. CONFLICTING CLAIMS AND CLAIMANTS, IDENTIFICATIONS, PERSPECTIVES, BASES OF POWER

Since the Award on Merits was published in 2016, a complicated exchange between the Philippines and China has emerged. With time and the ability to exchange ideas, new claims have developed alongside each Parties' original claim. In addition, other States, such as Vietnam, Malaysia, and Taiwan added to the conversation as interested third parties.

In framing the claims of each State party, it is important to note that scholarly literature aids in understanding how each State viewed the SCSA, without necessarily amounting to an official statement of the State.[269] Moreover, the subsections are organized by claims each State currently holds and has held prior to the release of the Award on Merits.

A. Philippines' Claims

1. Firm But Careful

For the Philippines to enter Arbitration against China, the task is monumental and requires careful plotting to be successful. Keeping this in mind, the Philippines crafted a "low risk strategy" to achieve their interests.[270] Rather than claiming that the maritime features in dispute generated maritime entitlement, the Philippines found it acceptable that the features would have the legal status of a rock.[271] By developing this careful framework, the Philippines maintained a firm hold on what they deemed to be their heritage, and asserted that international law helped sustain such

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[266] *Id.* ¶ 1191-94.

[267] *Id.* ¶ 1196.

[268] *Id.* ¶ 1201.

[269] *Compare* Francis H. Jardeleza, *How the Sea Was Won*, 61 ATENEO L. J. 1 (2017), *with* Bill Hayton, *Denounce But Comply: China's Response to South China Sea Arbitration Ruling,* 18 GEO. J. INT'L AFF. 104 (2017). Author Hardeleza was an Agent to the *SCSA* and has first-hand knowledge of the claims made during and after the Arbitration, but his ideas do not completely reflect the Filipino government. Author Bill Hayton analyzes China's official response and the Chinese perspective, but again, his ideas do not amount to China's official or authorized position then or now.

[270] *Id.* at 10. As an aside, the Philippines refers to South China Sea as the West Philippine Sea.

[271] *Id.* at 13.

heritage.[272]

The firm aspect of the Philippines' claims in asserting the Awards stems from the significance to the UNCLOS. First, the dispute settlement system of UNCLOS reflects the idea that international law places all States on a "level playing field."[273] Second, the frequency of unilateral submission of dispute via the UNCLOS has increased and thus creates the impression that the Awards should be respected.[274] Lastly, the Awards establish a basis for other States who hold claims in the South China Sea to strengthen their own claims along with the Philippines.[275]

2. Diplomatic Confusion

Despite the success of the Philippines in securing their interest from the SCSA, the Philippines still must take a diplomatic approach to have China comply.[276] However, then-President of the Philippines, Rodrigo Duterte, undermined the Award on Merits.[277] In fact, former President Duterte downplayed or suppressed information on Chinese violations to the Award on Merits and up-played the pledges of Chinese assistance to Filipino infrastructure and business.[278] In one instance, former President Duterte referred to the Award as a "piece of paper."[279] On the bureaucratic side, there was a lack of cooperation between China and the Philippines. On this end, the Philippines and China failed to come to any agreement during their meetings at the Philippines-China Bilateral Consultation Mechanism.[280] Additionally, the Defense Secretary denounced China's unauthorized activities on marine research in Philippine waters.[281]

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[272] *Id.* at 21.

[273] Hao Duy Phan & Lan Ngoc Nguyen, *The South China Sea Arbitration: Bindingness, Finality, and Compliance with UNCLOS Dispute Settlement Decisions,* 8 ASIAN J. INT'L L. 26, 59 (2018). *See* Alex Ansong*, The Concept of Sovereign Equality of States in International Law*, 2 GIMPA L. REV. 13 (2016) (explaining the principle of sovereign equality through history and concept).

[274] Phan & Nguyen, *supra* note 273, at 49.

[275] *Id.*

[276] Jardeleza, *supra* note 269, at 22.

[277] Jay L. Batongbacal, *The Philippines and the South China Sea Arbitration Award: External Appeasement and Internal Dissension*, ISEAS YUSOF ISHAK INST. 1, 3 (2021).

[278] *Id.*

[279] Benjamin Kang Lim, *Philippines Duterte Says South China Sea Arbitration Case to Take "Back Seat,*" REUTERS (Oct. 19, 2016), https://www.reuters.com/article/us-china-philippines/philippines-duterte-sayssouth-china-sea-arbitration-case-to-take-back-seat-idUSKCN12J10S.

[280] Batongbacal, *supra* note 277, at 4.

[281] *Id*. The article also mentions the Defense Secretary's denouncement of

The diplomatic messages become further complicated with the efforts of the Bureau of Fisheries and Aquatic Resources ("BFAR") and former President Duterte's messages. On one hand, BFAR incorporated the Award on merits to delineate the Philippines' EEZ and started projects to improve biodiversity and the marine ecosystem.[282] On the other hand, former President Duterte has publicly allowed Chinese fisheries to fish in the Philippines' EEZ.[283] Such announcement coincides with President Xi Jinping's endorsement for fisheries to fish more southwardly of mainland China.[284]

Despite the former President's statements, the Filipino government continued to express diplomatic messages for China to respect the Awards from the SCSA. This included the Department of Foreign Affairs expressing discontent with Chinese maritime militia vessels near the Philippines' EEZ in 2019 and the Philippine Mission sending a *Note Verbale* at the UN invoking the Awards against China in 2020.[285] Moreover, with Duterte out of office and current President Ferdinand Marcos Jr. asserting his presence in the South China Sea, the confusion on the Philippines' stance appears to dissipate.[286]

B. China's Claims

The outcome of the SCSA did not bode well for China and is clearly reflected in the outcome of the Award on Merits.[287] In order to understand the claims of China, one must orient themselves to the Chinese government's perspective towards the SCSA. This perspective comes from a sense of "historical memory" and an "emotional claim" to the South China

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Chinese militia and armed vessels in the area. Additionally, the Philippines also included allies in defense and security engagement. *Id.* at 5. These allies include the U.S., Japan, South Korea, and Australia. *Id.* A significant instance of military force used by the Philippines occurred in 2021 when the Armed Forces of the Philippines and the Philippines Coast Guard shooed 200 Chinese militia vessels. *Id.* at 6. However, since the *SCSA* refrained from adjudicating on military activity, this paper will also refrain from analyzing this claim against the Philippines.

[282] *Id.* at 5.

[283] *Id.*

[284] *Id.*

[285] *Id.* at 7.

[286] Agence France-Presse, *Marcos Jr. says South China Sea 'Keeps Him Up at Night'*, ABS-CBN NEWS (Jan. 19, 2023), https://news.abs-cbn.com/news/01/19/23/marcos-jr-says-south-china-sea-keeps-him-up-at-night. *See Del Rosario Lauds Marcos Jr for 'Defending Rights' in West Philippine Sea,* ABS-CBN NEWS (Feb. 28, 2023) https://news.abs-cbn.com/spotlight/02/28/23/del-rosario-lauds-marcos-for-defending-rights-in-west-ph-sea (reporting on Marco's support for the Award on Merits to be implemented).

[287] Award on Merits, *supra* note 16, ¶¶ 1202-03 (deciding on all but one of the Philippine's Submissions in their favor).

Sea and the sovereignty and entitlements that come with it.[288]

In a more coercive manner, the policies of the Chinese government take an active step in shaping the UNCLOS with "Chinese characteristics."[289] Such characteristics rely on negotiation, dialogue, and consultation while also avoiding mandatory arbitration.[290] In addition to China's approach to international law is China's principle of "inviolable Chinese sovereignty"—in other words, the prioritization of Chinese domestic law without regard to international consequences.[291] In essence, the Chinese claims still ring true at the start of arbitrational procedures: no acceptance, no participation, no recognition, and no implementation.[292]

1. Framing the SCSA the Chinese Way: Jurisdiction

The next subsection analyzes China's claims to jurisdiction, through a structure borrowed from a review of literature compiled by Heng Liu.[293] Using the structure in Liu's article, the subsection is divided into three sections: General Issues, Genuine Dispute, and Prerequisites to Jurisdiction.[294]

One of the first general issues to China's claims to jurisdiction, is the lack of state consent from China. The claim that China consented to the UNCLOS arbitration via being party to the UNCLOS is wrong.[295] The element of consent was either presumed or imputed to China by the Tribunals' rationale that the State agreed to the general dispute resolution of

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[288] Bill Hayton, *Denounce But Comply: China's Response to South China Sea Arbitration Ruling,* 18 GEO. J. INT'L AFF. 104, 108 (2017). Additionally, it is important to refrain from critiquing the claims favoring China because such claims directly oppose the *SCSA*. Rather, this section presents the logic behind the claims supporting China.

[289] Isaac B. Kardon, *China Can Say "No": Analyzing China's Rejection of the South China Sea Arbitration: Towards a New Era of International Law with Chinese Characteristics*, 12 U. PA. ASIAN L. REV. 1 (2018).

[290] *Id.* at 12.

[291] *Id.* at 13.

[292] *Id.* at 17 (citing Press Release, Hong Lei (洪磊), Ministry of Foreign Affairs Spokesperson, 2013 Nian 2 Yue 19 Ri Waijiao Bu Fayan Ren Hong Lei Zhuchi Li Xing Jizhe Hui (2013 年 2 月19日外交部发言人洪磊主持例行记者会) [Foreign Ministry Spokesperson Hong Lei Held a Press Conference on February 19, 2013] Ministry of Foreign Affairs of China (Feb. 19, 2013), http://ch.china-embassy.gov.cn/fyrth/201302/t20130219_3211654.htm.).

[293] *See* Liu, *supra* note 17, at 20.

[294] *Id.* at 22-36.

[295] *Id.* at 22 (citing Abraham D. Sofaer, *The Philippine Law of the Sea Action Against China: Relearning the Limits of International Adjudication,*15 CHINESE J. INT'L L. 393, ¶ 5 (2016)).

UNCLOS.[296] Moreover, when framing the disputes discussed in the Tribunal as dealing with sovereignty, consent to such jurisdiction is not granted by the UNCLOS.[297]

Another general issue is the expansive nature of the Tribunal. The problem is the possible trend that the Tribunal is "opening the doors" outside the scope of the UNCLOS with the use of compulsory jurisdiction.[298] In a way, this expansion was done by overcoming objections to jurisdiction through artful pleadings and the Tribunal's double standard when characterizing the disputes.[299] Non-parties to the UNCLOS would be hesitant to ratify the treaty because of the abuse that the Tribunal may use through jurisdictional expansion.[300]

Additional negative effects resulting from the Tribunal's decisions include the reduced effectiveness, credibility, and validity of the Awards. The Awards becomes less effective without the consent of China, since the tensions between the Philippines increased rather than being resolved.[301] Additionally, the way in which the Tribunal analyzed the exclusive preliminary characteristics of the Submissions lessens the credibility of the award due to its procedural irregularities.[302] The validity of the Tribunal is also called into question based on six observations by Sienho Yee: (1) the Tribunal did not take "proper cognizance of China's position", (2) China's arguments were not given proper effect in the awards, (3) there was a lack of full analysis, (4) the Tribunal refused to apply case law, (5) a double standard was applied against China for precedent and consistency, and (6)

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[296] *Id.* at 23 (citing M.C.W. Pinto, *Arbitration of the Philippine Claim Against China*, 8 ASIAN J. INT' L., 1, 8 (2018)).

[297] *Id.* at 23-24 (citing Sienho Yee, *The South China Sea Arbitration (The Philippines v. China): Potential Jurisdictional Obstacles or Objections*, 13 CHINESE J. INT'L L. ¶ 37 (2014)).

[298] *Id.* at 24 (citing Natalie Klein, *The Vicissitude of Dispute Settlement Under the Law of the Sea Convention,* 32 INT'L J. MARINE & COASTAL L. 332, 334 (2017)).

[299] Liu, *supra* note 17, at 24-25 (first citing Thomas J. Schoenbaum, *The South China Sea Arbitration Decision, and a Plan for Peaceful Resolution of the Disputes,* 47 J. MAR. L. & COMM. 451, 455 (2016); then citing Xiaoyi Zhang, *Problematic Expansion on Jurisdiction: Some Observation on the South China Sea Arbitration,* 9 J. E. ASIA AND INT'L L. 449, 451 (2016).

[300] *Id.* at 25 (citing Sienho Yee, *The South China Sea Arbitration Decisions on Jurisdiction and Rule of Law Concerns,* 15 CHINESE J. INT'L L., ¶ 47 (2016)).

[301] *Id.* at 22 (citing M.C.W. Pinto, *Arbitration of the Philippine Claim Against China*, 8 ASIAN J. INT' L. 1, 9 (2018)).

[302] *Id.* at 26 (first citing Stefan A. G. Talmon, *The South China Sea Arbitration: Observations on the Award on Jurisdiction and Admissibility*, 15 CHINESE J. INT'L L. 309, 309 (2016); then citing Stefan A.G. Talmon, *Objections Not Possessing an "Exclusively Preliminary Character" in the South China Sea Arbitration,* 3 J. TERRITORIAL & MAR. STUD. 88, 106 (2016)).

jurisdictional expansion undermining issues regarding sovereignty.[303]

Further questions of validity are raised when the Chinese Minister of Foreign Affairs claimed: (1) the Arbitral Tribunal was not an "international court"; (2) the establishment of the Arbitral Tribunal was political in nature due to the involvement of the then-International Tribunal for the Law of the Sea ("ITLOS")-President, Judge Yanai, a Japanese national; (3) the Tribunal did not have any arbitrators from Asia, which meant that the arbitrators might not have been aware of Asian culture, nor of the South China Sea issues; and (4) the arbitrators were paid for by the Philippines.[304]

To put concisely the sentiment of the general issues that some scholars have with the SCSA, the Tribunal has "complicate[d] the related issues; they have impaired the integrity and authority of the UNCLOS, threatened to undermine the international maritime legal order, run counter to the basic requirements of international rule of law, and also imperiled the interests of the whole international community."[305]

The next claim supporting China's position is the lack of an actual dispute. The Submissions lacked sufficient evidence to show opposite views existed nor that there was a "meaningful" exchange between the Philippines and China.[306] Instead, the Tribunal inferred the possible oppositions to the

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[303] *Id.* at 23-24 (citing Sienho Yee, *The South China Sea Arbitration (The Philippines v. China): Potential Jurisdictional Obstacles or Objections*, 13 CHINESE J. INT'L L., ¶ 16-31, 48 (2014)). With regards to number four and the role case precedent has in international courts *see* James Gerard Devaney, *The Role of Precedent in the Jurisprudence of the International Court of Justice: A Constructive Interpretation,* 35 LEIDEN J. INT'L L. 641 (2022) (exploring the role of *stare decisis* in the I.C.J.).

[304] Phan & Nguyen, *supra* note 273, at 42-43 (citing Press Release, Zhenmin Liu, Vice Foreign Minister, *Veil of the Arbitral Tribunal Must Be Tore Down-Vice Foreign Minister Liu Zhenmin Answers Journalists' Questions on the So-called Binding Force of the Award Rendered by the Arbitral Tribunal of the South China Sea Arbitration* Case (July 13, 2016) http://www.fmprc.gov.cn/mfa-eng/wjbxw/tI381879.shtml.)

The authors answered each of the question posed by the Foreign Minister. First, arbitration has been used for international disputes long before the installation of permanent international courts and is recognized under Article 33(1) of the UN Charter. *Id.* Second, the ITLOS President must appoint arbitrators under Article 3(e) of Annex VII and his nationality did not come into question for bias. *Id.* Third, having no Asian arbitrators does not inhibit the ability of the Tribunal to function. *Id.* Lasty, since China did not pay as required under Article 7 of Annex VII, the Philippines was the only party to pay. *Id.* at 4.

[305] Liu, *supra* note 17, at 29 (citing Chinese Society of International Law, *The South China Sea Arbitration Awards: A Critical Study,* 17 CHINESE J. INT'L L. 207, ¶ 5 (2018)).

[306] *Id.* (citing Jin-Hyun Paik, *South China Sea Arbitral Awards: Main Findings and Assessment,* 20 MAX PLANCK Y.B. U.N. L. 367-407 (2017)).

dispute by making assumptions and misrepresentations.[307] Even assuming that a dispute exists, some of the Submissions should be excluded under Article 298(1)(a)(i) due to the nature of the dispute affecting sovereignty and maritime delimitation.[308] To artificially divide the Submissions from maritime entitlements and historic titles is "flawed", and having the remaining Submissions be determined by the classification of maritime features makes the Submissions lack any real and actual dispute.[309] Rather, the Articles of the UNCLOS relating to jurisdiction have to be contextualized in a larger schema of maritime space and relevant land masses.[310]

Lastly, in dealing with the prerequisites required to trigger compulsory settlement procedures, claims supporting China state that they were not met. According to the Chinese Society of International Law, Article 281 was not satisfied because the Tribunal erred:

> (1) in finding no agreement between China and the Philippines to settle their dispute through negotiations; (2) in determining that China and the Philippines had resorted to negotiation but reached no settlement; (3) in finding that China and the Philippines had not excluded the compulsory dispute settlement procedures even if there existed an agreement.[311]

Additionally, the Chinese Society of International Law found that Article 283 was not satisfied because the Tribunal: (a) failed to ascertain whether the Philippines had fulfilled the obligation to exchange views on relevant "disputes"; (b) mismatched consultations between China and the Philippines concerning issues of territorial sovereignty and maritime delimitation, with exchange of views regarding "disputes" identified by the

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[307] *Id.* at 29-30 (citing Stefan A.G. Talmon, *Objections Not Possessing an "Exclusively Preliminary Character" in the South China Sea Arbitration,* 3 J. TERRITORIAL & MAR. STUD. 88, 174 (2016)).

[308] *Id.* at 30 (citing Sreenivasa Rao Pemmaraju, *The South China Sea Arbitration (The Philippines v. Chinese): Assessment of the Award on Jurisdiction and Admissibility,* 15 CHINESE J. INT'L L. 265, ¶ 77).

[309] *Id.* at 31 (citing Sreenivasa Rao Pemmaraju, *The South China Sea Arbitration (The Philippines v. Chinese): Assessment of the Award on Jurisdiction and Admissibility,* 15 CHINESE J. INT'L L., ¶¶ 78-79). *See* Chris Whomersley*, The Award on the Merits in the Case Brought by the Philippines Against China Relating to the South China Sea: A Critique*, 14 CHINESE J. INT'L L. 387 (2018) (explaining how the Submissions dealing with the operation of Chinese vessels and fishing rights cannot be artificially divided with the issues of sovereignty).

[310] Liu, *supra* note 17, at 32 (citing Natalie Klein, *The Vicissitude of Dispute Settlement Under the Law of the Sea Convention,* 32 INT'L J. MARINE & COASTAL L. 342, 348-49 (2017)).

[311] *Id.* at 35 (citing Chinese Society of International Law, *The South China Sea Arbitration Awards: A Critical Study,* 17 CHINESE J. INT'L L. 207, ¶¶ 274-330 (2018)).

Tribunal in the Philippines' submissions and means of their settlement; (c) erroneously narrowed the obligation to exchange views under UNCLOS to that concerning merely the means of dispute settlement.[312]

Through the quick list of the claims China has against the SCSA, much of the literature sides with China.[313]

2. Framing the SCSA the Chinese Way: Merits

From the Chinese perspective, the SCSA gave Awards that denied China maritime rights and interests, and was politically motivated by the Philippines to internationalize the arbitration.[314] China's post-Awards attitudes still remain in negotiating with the Philippines, but with the premise that international law and history governs the conversation, while undermining the authority of the UNCLOS.[315] China's thoughts about the 2016 Award reflects this disregard of the UNCLOS, as illustrated by the Vice Minister of Foreign Affairs Liu Zhenmin's referral to it as "just a piece of waste paper."[316]

In some ways, however, other portions of the response highlight the way China is steering the diplomatic conversation towards the conclusion that China's activities are legal within the ruling.[317] Rather than relying on the nine-dash line position that China held, the current approach looks into the distant historical past to claim historical rights and finding gaps and loopholes in the UNCLOS.[318] There is a need for ambiguity for this approach to work in order to keep an "internal nationalist narrative" and "external commitment" for peace and diplomacy.[319]

Another issue that China has regarding the Merits is the interpretation of historical rights and traditional fishing rights. The Tribunal reached the conclusion that traditional fishing rights in EEZs are

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[312] *Id.* at 36-37 (citing Chinese Society of International Law, *The South China Sea Arbitration Awards: A Critical Study,* 17 CHINESE J. INT'L LAW 207, ¶¶ 335-352 (2018)).

[313] *See* Kardon, *supra* note 289, at 27.

[314] *Id.* at 15.

[315] *Id.* at 31.

[316] *Id.* at 33 (citing Press Release, Zhenmin Liu, Vice Foreign Minister, *China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea* (July 13, 2016) https://www.fmprc.gov.cn/eng./wjdt_665385/zyjh_665391/201607/t20160715_678560.html). This furthers the idea that China has a sense of righteousness or chauvinism that denies other State claims to history, while failing to support their own historical arguments. Hayton, *supra* note 288, at 109.

[317] *Id.* at 39.

[318] *Id.*

[319] Hayton, *supra* note 288, at 106.

extinguished when States become party to the UNCLOS.[320] However, the Tribunal could have erred in this logic by diminishing the importance of Article 62(3) of the UNCLOS and customary international law.[321] The premise of the analysis is built on recognizing that the nine-dash line was analyzed in conjunction with China's "nonexclusive, historic/habitual fishing rights as specified in UNCLOS Article 62(3)."[322] Combined with good faith use of traditional fishing rights, and the Tribunal's affirmation that China has these rights in the Scarborough Shoal, one can come to the conclusion that the Tribunal misinterpreted the UNCLOS.[323]

This theme of finding the insufficiencies of the UNCLOS continues beyond just rights and extends to the interpretation of maritime features and the entitlements that they generate. Another analysis goes to the idea of "geographic unity" and equating maritime features to an "archipelagic baseline."[324] The Communist Party School's Center for Research on the Theoretical System of Socialism With Chinese Characteristic furthers this "geographic unity" in characterizing the Spratly Islands as an archipelago.[325] Steps away from the UNCLOS also include using DOC and "charming" the neighboring States to treat the disputed waters as a "common pool resource," mostly dominated by the Chinese.[326] Such efforts set by China's claims provides enough insight as to the possible future of a South China Sea dominated by the Chinese.

C. Third Party Claims

Although the SCSA was not open to the public, Australia, Indonesia, Japan, Malaysia, Singapore, Thailand, and Vietnam sent delegates to

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[320] Award on Merits, *supra* note 16, ¶ 804.

[321] Thomas J. Schoenbaum, *The South China Sea Arbitration Decision: The Need for Clarification*, 110 AM. J. INT'L L. UNBOUND 290, 293-94 (2016).

[322] *Id.* at 292.

[323] *Id.* (footnote omitted).

[324] Kardon, *supra* note 289, at 40 (citing Zhang Hua (障华), *Zhongguo Yang Zhong Qundao Shiyong Zhixian Jixian De Hefa Xing: Guoji Xiguan Fa De Shijiao (中国洋中群岛适用直线基线的合法性:国际习惯法的视角) [On the Legality of Applying Straight Baselines to China's Mid Ocean Archipelagos: A Perspective from International Customary Law]*, 2 WAIJIAO PINGLUN 129, 129-43 (2014)).

[325] Hayton, *supra* note 288, at 106 (citing Andrew Chubb, *Defining the Post-Arbitration Nine-Dash Line: More Clarity and More Complication,* SOUTHSEACONSERVATIONS 讨论南海 (July 20, 2016), https://southseaconversations.wordpress.com/2016/07/20/defining-the-post-arbitration-nine-dash-line-more-clarity-and-more-complication/).

[326] Kardon, *supra* note 289, at 41-42.

observe the hearings.[327] Of the seven States, Malaysia, and Vietnam both have claims in the South China Sea. How have their claims been affected by the SCSA and what is their stance on the Awards? This section examines the possible claims that Malaysia and Vietnam have in relation to the SCSA. Additionally, the section explores Taiwan, an entity that also has a substantial claim at stake.

1. Interested, Observing, Non-participating Nation States

i. Vietnam

After the Awards were published, Vietnam's foreign ministry spokesman, Le Hai Binh, firmly supported the Tribunal's decision while also reaffirming their claims in the South China Sea.[328] Similar to the Philippines, Vietnam has faced issues with China's interference in the South China Sea:[329] China has harassed Vietnam with a Chinese geological survey ship, sunk Vietnamese fishing vessels near the Paracel Islands, and created administrative areas in regions that Vietnam has laid claims.[330] Despite both nations sharing a Communist-type government system, their shared borders on land and sea has raised tensions between these nations.[331]

Although the State has yet to commence any arbitration using the UNCLOS, Vietnam has expressed their position in the South China Sea with a Note Verbale[332] on March 30, 2020.[333] In the Note Verbale, Vietnam made

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[327] Press Release, Permanent Ct. of Arb., Arbitration between The Republic of the Philippines and The People's Republic of China (Nov. 30, 2015), https://pcacases.com/web/sendAttach/1801.

[328] Mai Nguyen, et al., *Vietnam Welcomes South China Sea Ruling, Reasserts Its Own Claims,* REUTERS (July 12, 2016), https://www.reuters.com/article/us-southchinasea-ruling-vietnam-idUSKCN0ZS17A.

[329] David Hutt, Vietnam May Soon Sue China on South China Sea, ASIA TIMES (May 7, 2020), https://asiatimes.com/2020/05/vietnam-may-soon-sue-china-on-south-china-sea/.

[330] *Id.*

[331] Ralph Jennings, *Vietnam Weighs World Court Arbitration Against China If Maritime Diplomacy Fails*, VOA News (Aug. 26, 2020), https://www.voanews.com/a/east-asia-pacific_vietnam-weighs-world-court-arbitration-against-china-if-maritime-diplomacy-fails/6195002.html (providing an instance where Vietnamese protesters held an anti-Chinese riot in 2014).

[332] A note verbale is a formal communication written in the third person that responds to the United Nations or other governments. U.N. DEP'T OF GEN. ASSEMBLY AFF. & CONF. SERV., UNITED NATIONS CORRESPONDENCE MANUAL A GUIDE TO THE DRAFTING, PROCESSING AND DISPATCH OF OFFICIAL UNITED NATIONS COMMUNICATIONS, 19, U.N. Docs., ST/DCS/4/Rev.1 (2000), https://archive.unu.edu/hq/library/resource/UN-correspondence-manual.pdf.

[333] Vo Ngoc Diep, *VIETNAM'S NOTE VERBALE ON THE SOUTH CHINA SEA*, ASIAN MAR. TRANSPARENCY INITIATIVE (May 5, 2020),

their claims compatible with the Philippine's claims without explicitly referring to the Awards.[334] Distinctly, Vietnam's Note Verbale does not recognize China's "Four-shas" doctrine which treats four individual maritime features as a single unit that possibly generates an EEZ.[335]

ii. Malaysia

Like Vietnam, Malaysia sent a Note Verbale on December 12, 2019, expressing their extension of the continental shelf beyond 200 nautical miles pursuant to Article 76 of the UNCLOS.[336] Although China's response to Malaysia's claim was less than favorable, both States have maintained positive diplomatic relations.[337] This is due to Malaysia's three policies and three strategies in maintaining healthy ties with China.

Malaysia's first policy is to protect their territorial sovereignty and sovereign rights over their lucrative EEZs.[338] In implementing the first policy, Malaysia's first strategy is to assert control over their EEZ which includes monitoring and deterring China's vessels which could amount to stand-offs.[339] The second policy is being a supporter and advocate of

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https://amti.csis.org/103alaysia-note-verbale-on-the-south-china-sea/. It is worth mentioning that this Note Verbale has made a legal position on all high-tide features and clarifying their distinct opposition to China's position in the South China Sea.

[334] Vo Ngoc Diep, *Viet Nam's Note Verbale No.22/HC-2020: A Commentary*, MAR. ISS. (May 7, 2020), http://www.maritimeissues.com/uploaded/Viet%20Nam%E2%80%99s%20Note%20Verbale%20No_22_HC-2020-%20A%20Commentary.pdf. The islands listed in the Note Verbale were the Paracel Islands, which the Philippines holds no claims over. U.N. Secretary-General, No. 22/HC-2020 (Mar. 30, 2020), https://www.un.org/Depts/los/clcs_new/submissions_files/mys_12_12_2019/VN20200330_ENG.pdf.

[335] *Id.*

[336] U.N. Oceans & Law of the Sea, *Commission on the Limits of the Continental Shelf (CLCS) Outer Limits of the Continental Shelf Beyond 200 Nautical Miles from the Baselines: Submissions to the Commission: Partial Submission By Malaysia in the South China Sea* (July 25, 2022), https://www.un.org/Depts/los/clcs_new/submissions_files/submission_mys_12_12_2019.html. *See* UNCLOS, *supra* note 21, at 49.

[337] Diep, *supra* note 334. One of the few instances in which Malaysia has expressed dissatisfaction with China's activities in the South China Sea is when Chinese aircrafts entered Malaysia's maritime zone. According to Malaysia's foreign minister, the aircrafts' activities were a "serious threat to national sovereignty" and Malaysia was not willing to compromise on "[their] national security" over these acts. *South China Sea Dispute: Malaysia Accuses China of Breaching Airspace*, BBC News (June 2, 2021), https://www.bbc.com/news/world-asia-57328868 (internal quotation marks omitted).

[338] Ian Storey, *Malaysia and the South China Sea Dispute: Policy Continuity amid Domestic Political Change*, ISEAS YUSOF ISHAK INST., Mar. 20, 2020, at 1, 3 (2020).

[339] *Id* at 3.

international law, especially the UNCLOS.[340] To off-set possible tensions from developing, Malaysia's second strategy is becoming China's largest trade and investment partner and using this to de-emphasize and downplay maritime disputes.[341] Their third policy is to keep the South China Sea peaceful and stable since Malaysia's economy is dependent on maritime trade within the region.[342] Malaysia's third strategy focuses on diplomacy including the use of ASEAN to resolve conflicts, and avoiding the use of arbitration.[343] With the foregoing policies and strategies in place, Malaysia continues friendly relations with China, even going as far as resolving the States' dispute to facilitate the extraction of oil and gas within the South China Sea.[344]

iii. Taiwan

Before analyzing any claims or interests of Taiwan, it is imperative to understand the status of this region. Taiwan is *de jure* a part of China but can retain its own status in international law.[345] Taiwan satisfies the requirements of the Montevideo Convention of 1933, but Taiwan's manifestation of self-determination makes this region's status ambiguous.[346] The answer to Taiwan's international legal status remains unclear, and no answer has been reached. However, this does not negate the possibility of Taiwan to have a legitimate claim or to have the capacity to enter agreements with other States.

While Taiwan is capable of unilaterally adopting maritime legislation with neighboring States, and while some non-States may accede to the UNCLOS under Article 205, Taiwan itself mostly likely cannot meet the standard of accession.[347] One meaningful way in which Taiwan has

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[340] *Id.*. Malaysia noted that both the Philippines and China should respect the processes of the UNCLOS after the Awards were published. The foreign minister even went on to say that Malaysia does not recognize the nine-dash line. *Id.* (footnote omitted).

[341] *Id.*, at 4. Similar to the former President Duterte, Prime Minister Najib Razak has publicly undermined maritime issues dealing with Chinese vessels during his tenure.

[342] *Id* at 3.

[343] *Id* at 4.

[344] *Malaysia Open to Talks with Beijing over Dispute in South China Sea – PM*, REUTERS (Apr. 3, 2023), https://www.reuters.com/world/asia-pacific/105alaysia-open-talks-with-beijing-over-dispute-south-china-sea-pm-2023-04-03/.

[345] Brian McGarry, *Third Parties and Insular Features After the South China Sea Arbitration,* 25 CHINESE (TAIWAN) Y.B. INT'L L. & AFF. 99, 101.The term *de jure* translates to "of law", which means how the subject is treated on the legal sense. In comparison, the term *de facto*, which translates to "of fact", means how the subject is treated in reality.

[346] *Id.* at 102-03.

[347] *Id.* at 107 (citing Philippe Gautier, *Two Aspects of ITLOS Proceedings: Non-*

entered into international agreements has been under the U.N. Fish Stocks Agreement, in which Taiwan's status is designated as a "fishing entity."[348] This assignment of Taiwan's status is a result of Taiwan's *de facto* control of fishing activities, and the effort to avoid the political problems with Taiwan's legal status.[349] The status of "fishing entity" poses a problem for Taiwan because treaties with such classification replaces the dispute settlement provisions of the UNCLOS with the treaties' own provisions.[350] Additionally, the UNCLOS is silent to non-State entities in intervening in arbitral proceedings, and China has declared Taiwan as an incorporated territory under the UNCLOS.[351]

However, Taiwan could solicit the Tribunal through Article 59 of the UNCLOS, which establishes that disputes should "tak[e] into account the perspective importance of the interest involved to the parties as well as to the international community as a whole."[352] Despite the Article, solicitation is not mandatory for the Tribunal and third-party views are subject to the Rules of Procedure.[353]

Another avenue of participation is through "observer status." The rationale that the Tribunal possibly used in determining which States have Observer Status is *ratione personae.*[354] For Taiwan, it is evident that it should have observer status due to the location and interest over the South China Sea. The limitations imposed, however, are that Taiwan is not party

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state Parties and Costs of Bringing Claims, in REGIONS, INST. & L. OF THE SEA: STUD. IN OCEAN GOVERNANCE 73, 73-74 (Harry N. Scheiber & Jin-Hyun Paik ed., 2013)).

[348] *Id.* at 108 (citing Peter S.C. Ho, *The Impact of the U.N. Fish Stocks Agreement on Taiwan's Participation in International Fisheries For a*, 37 OCEAN DEV. & INT'L L. 133 (2006)).

[349] *Id.* at 109 (citing Martin Tsamenyi, *The Legal Substance and Status of Fishing Entities in International Law: A Note*, 27 OCEAN DEV. & INT'L L. 123 (2006)).

[350] McGarry, *supra* note 345, at 110-11 (citing Michael Shen-Ti Gau, *The Practice of the Concept of Fishing Entities: Dispute Settlement Mechanisms,* 37 OCEAN DEV. & INT'L L. 221, 225-26, 228 (2006)).

[351] *Id.* at 112-13 (footnote omitted).

[352] *Id.* at 114 (citation omitted).

[353] *Id.*

[354] *Id.* at 116. To be considered a *ratione personae*, the State must meet the required conditions of the treaty to bring or to be brought before the jurisdiction of a tribunal or court. SHABTAI ROSENNE, MAX PLANCK INST. FOR COMPAR. PUB. L. & INT'L L., INTERNATIONAL COURTS AND TRIBUNALS, JURISDICTION AND ADMISSIBILITY OF INTER-STATE APPLICATIONS, MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW, (2006), https://opil-ouplaw-com.stulaw.idm.oclc.org/display/10.1093/law:epil/9780199231690/law-9780199231690-e56?rskey=cm4hpV&result=2&prd=MPIL.

to the UNCLOS and its status is as a territory of China in the UNCLOS.[355]

The next possible claim for Taiwan is the application of the *Monetary Gold* principle. The principle states that a third-party entity without expressly delegated State powers can compel dismissal from an international court or tribunal, so long as the State exhibits traditional State functions.[356] The first reasoning is that the *Monetary Gold* principle is a much broader right than the limitation on accessing arbitrational proceedings.[357] The second reason is that the *Monetary Gold* principle is applicable beyond the inter-State dynamic and depends on:

> (i) the relation[ship] between that entity and one of the parties, (ii) the consistency of the tribunal's treatment thereof, and perhaps (iii) whether the agreement in question also functions as the basis of the tribunal's jurisdiction (as in UNCLOS and the special agreement among the parties which resulted in the Monetary Gold case).[358]

Lastly, the *Monetary Gold* principle comes from customary judicial practice that appeared before its codification.[359] One instance appears in the 1907 Convention for the Pacific Settlement of International Dispute ("CPSID"), where the word "powers" is used in place of "States."[360] The concept carried over to the UNCLOS with references of the CPSID in the 1974 draft, 1975 draft, and the commentary of UNCLOS.[361]

III. PAST TRENDS IN DECISIONS

In understanding the actions taken by both the Philippines and China, trends from other States in other international cases helps one understand how the SCSA developed. While the New Haven approach also considers conditioning factors, such fact specific interactions between the Philippines and China have already been discussed.[362] Case precedent and patterned conduct of States can clarify the views the Philippines and China had during and after the SCSA.

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[355] *Id.* The United States was also denied Observer Status because it was not a party to the UNCLOS. Additionally, the United Kingdom, despite no regional interest, received Observer Status. This could imply that the conferment of Observer Status is on a case-by-case basis.

[356] McGarry, *supra* note 345, at 120.

[357] *Id.* (citing CHRISTINE CHINKIN, THIRD PARTIES IN INTERNATIONAL LAW 250-51 (1993)).

[358] *Id.* at 121. The author did not apply the analysis to Taiwan, but further analysis would require a deeper dive than what the author has presented.

[359] *Id.*

[360] *See id.*

[361] *Id.* at 122.

[362] *See supra* Part I.

A. Past Decision: Non-participating States (Nicaragua v. United States, Arctic Sunrise)

As previously noted, China did not participate in the SCSA.[363] This raises the question: why did China not participate? The reason China stated in its 2014 Position Paper is that it did not accept the compulsory dispute settlement of the UNCLOS and that the Tribunal did not have jurisdiction.[364] The decision for non-participation extends beyond the reasons in China's 2014 Position Paper and is informed from past decisions by other States.

First, it is important to understand the role participation has in international law. On the one hand, there are three reasons that a State has a duty to participate. First, States that assent to the jurisdiction of a court have a duty to fulfill the obligations in good faith pursuant to the concept of *pacta sunt servanda*.[365] This is reflected in the UNCLOS in Section 1 of Part XV and in Article 296 which obligates the States to follow the Tribunal's decision.[366] The second reason is, since China contested jurisdiction of the court, China has a duty to participate on preliminary objections and proceedings related to jurisdiction.[367] Lastly, the duty exists because there are consequences for non-participation in Article 9 of Annex VII in the UNCLOS.[368]

On the other hand, there is no duty to participate because the consequence of non-participation is not a penalization; rather, only an expression of "regret" for the State's absence.[369] Moreover, rather than a duty, non-participation can be characterized as a right or a privilege.[370] Even if neither of the characterizations are correct, participation cannot be

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[363] *See supra* Section I.C.i.

[364] Position Paper 2014, *supra* note 32, ¶¶ 3, 76.

[365] Yen-Chiang Chang, *China's Non-Participation Approach Toward the South China Sea Arbitration,* 34 CHINESE (TAIWAN) Y.B. INT'L L. & AFF. 56, 62-63.

[366] *Id.* at 63.

[367] *Id.* (citing Gerald Fitzmaurice, *The Problem of the 'Non-Appearing' Defendant Government*, BRIT. Y.B. INT'L. 89, 90 (1980)). The author goes on to state that this logic goes against the rule of *la compétence de la compétence*, meaning that the court/ tribunal rules on its own jurisdiction, not the non-participating party. *See Competence/Competence in International Arbitration*, FERRER LAW. BLOG (Oct. 2009), https://ferrer.law/blog/litigation/competence-competence-in-international-arbitration (exploring how the concept of *la compétence de la compétence* is approached in different courts, both international and domestic).

[368] *Id.* at 64.

[369] *Id.* (citing Stanimir A. Alexandrov, *Non-Appearance Before the International Court of Justice*, 33 COLUM. J. TRANSNAT'L L. 41, 46 (1995)).

[370] Chang, *supra* note 365*,* at 65 (citing SHABTAI ROSENNE, THE WORLD COURT: WHAT IT IS AND HOW IT WORKS (Terry D. Gill ed., 6th rev. ed. 2003)).

a duty if the Tribunal can proceed without the absent State under Article 9 of Annex VII of the UNCLOS.[371] This act of non-participation is highlighted by two past cases: *Nicaragua v. United States* and the *Arctic Sunrise (the Netherlands v. Russia).*

1. Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)

In the realm of the International Court of Justice ("ICJ"), the Republic of Nicaragua brought against the United States the four following allegations: (1) the U.S. placed mines in Nicaragua's harbor, (2) the U.S. attacked oil installations, (3) the U.S. placed economic pressures in Nicaragua, and (4) supported Nicaraguan rebels.[372] The United States opposed participating and decided to optout of partaking in the proceedings that led to the Judgment of November 26, 1984 on the jurisdiction of Nicaragua's claims.[373]

For the U.S., the ICJ lacked jurisdiction based on three premises: (1) Nicaragua is not party to the ICJ because the State never ratified the Protocol of Signature of the State of the Permanent Court of International Justice; (2) pursuant to Article 36 of the ICJ Statute, the U.S. reserved participation to compulsory jurisdiction if the dispute arises from a multilateral treaty, without all of the affected parties participating in the same dispute, and the U.S. consented to jurisdiction; (3) more specifically, the U.S. clarified their reservation to preclude any Central American State in their April 6, 1984 note submitted to the Secretary General.[374]

To the U.S.'s first contention, the Court was not convinced that Nicaragua's lack of ratification of the PCIJ Statute meant that the ICJ lacked the transferred jurisdiction. Instead, since Nicaragua signed and ratified the United Nations Charter, the State impliedly accepted Article 36 of the ICJ Statute.[375] The Court approached the next two issues the U.S. had regarding jurisdiction in the merits phase. In their decision, the Court found that it lacked jurisdiction with any claims that are dependent on obligations with respect to parties under the U.N. Charter, and parties under the Charter of

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[371] *Id.* at 65-66 (citing The Arctic Sunrise Arbitration (Neth v. Russ.), Case No. 2014-02, Award on the Merits, ¶ 367 (Aug. 14, 2015) https://pcacases.com/web/sendAttach/1438.)

[372] Zia Modabber, *Collective Self-Defense: Nicaragua v. United States*, 10 LOY. L.A. INT'L & COMP. L.J. 449 (1988). (footnote omitted).

[373] *I.C.J. concerning Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), 12 PHIL. Y.B. INT'L L. 141, 146 (1986).

[374] Modabber, *supra* note 372, at 453; Victoria A. Grageda, *Nicaragua vs. United States in the World Court: Provisional Measures*, 1 WORLD BULL. 45, 46 (1985).

[375] Grageda, *supra* note 371, at 49.

the Organization of American States.[376] One of the key takeaways from the jurisdictional phase of the proceedings is the Court ruling that "[it] need not, before deciding whether or not to indicate [to the States], finally satisfy itself that it has jurisdiction [on] the merits" but only needed to satisfy itself that "the jurisdiction of the court might be founded" on the *prima facie* of the issues.[377] Additionally, the U.S.'s non-participation did not bar the ICJ from adjudicating the case, because Article 53 of the ICJ Statute allows the Court to give a decision guided by the principle of equality of the parties.[378]

In the end, the ICJ unanimously ruled in favor of Nicaragua and enjoined the U.S. from continuing their activities within Nicaragua.[379] Regardless of the Court's decision, the U.S. ignored the enjoinment and continued to assist the Nicaraguan Rebels for two more years, only lifting the embargo in 1990.[380] When comparing this case, the SCSA, and the case to follow (Artic Sunrise), there is a common pattern that develops. Firstly, a "Great Power" is involved in a dispute with a non-Great Power State.[381] Secondly, the State commences proceedings in an international court despite the protest of the Great Power. Thirdly, the Great Power decides not to participate in part or all of the proceedings because of jurisdictional reasons. Fourthly, the international court finds in favor of the non-Great Power with respect to jurisdiction and the merits. Lastly, the Great Power does not comply, continues to hold their position, and may slowly act within the court's decision.

2. Arctic Sunrise

Back to the realm of the UNCLOS, the Netherlands started proceedings on October 4, 2013, against Russia to release the Dutch vessel

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[376] Modabber, *supra* note 369, at 454. (footnote omitted). In particular, the Court examined El Salvador's right to collective self-defense as not being affected by the decision of the Court. Chang, *supra* note 370, at 141, 147-48.

[377] Grageda, *supra* note 371, at 49. The Court also addressed that in finding the possibility of jurisdiction that it was not prejudging jurisdiction of the case or even the merits.

[378] Chang, s*upra* note 370, at 141, 146

[379] Grageda, *supra* note 375, at 48.

[380] Lan Nguyen & Truong Minh Vu, *AFTER THE ARBITRATION: DOES NON-COMPLIANCE MATTER?*, ASIAN MAR. TRANSPARENCY INITIATIVE (July 22, 2016), https://amti.csis.org/arbitration-non-compliance-matter/.

[381] Oxford University Press defines great power as "[a] state seen as playing a major role in international politics. A great power possesses economic, diplomatic, and military strength and influence, and its interests extend beyond its own borders. *Great Power*, OXFORDREFERENCE.COM, https://www.oxfordreference.com/display/10.1093/oi/authority.20110803095905559 (last visited Apr. 23, 2023).

"Arctic Sunrise" and their crew from Russian authority.[382] Arctic Sunrise is a Dutch vessel that sailed near a Russian oil platform to protest its operations.[383] The crew left the ship via inflatable boats to reach the platform but were apprehended by the Russian Coast Guard along with the remaining members on the ship the next day.[384] The Netherlands sought from the Tribunal an order for provisional measures pursuant to Article 290(5) for the prompt release of the Arctic Sunrise and its crew.[385]

Similar to the U.S. in *Military and Paramilitary Activities in and against Nicaragua* and China in the SCSA, Russia rejected participation in the proceedings because of their reservation in Article 298 of the UNCLOS, meaning that the Tribunal did not have jurisdiction.[386] In a predicted pattern of procedure to the SCSA, the Tribunal was not barred from Russia's non-participation and maintained its right to present formal submissions.[387] Then, demonstrating more synergy with the SCSA, the Tribunal analyzed Russia's declaration on limiting the Tribunal's scope in compulsory dispute settlement. The Tribunal interpreted the limitations of Article 298(1)(b) very narrowly, to exclude disputes concerning law enforcement activities only within maritime research and fisheries.[388] On November 22, 2013, the Tribunal prescribed a provisional measure that required Russia to release the ship and the crew immediately along with a €3.6 million bond.[389] Although not instantaneous, Russia eventually released the crew in late December 2013 along with the Dutch ship in June 2014.[390]

Here marks the difference between Russia and the other Great Powers. Despite Russia's non-participation and non-immediate compliance with the Tribunal's decision, the State did not face much international

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[382] Joanna Mossop, *Protests Against Oil Exploration at Sea: Lessons from the Arctric Sunrise Arbitration*, 31 INT'L J. MARINE & COASTAL L. 60, 63 (2016).

[383] Eugena Kontorovich, *Arctic Sunrise (Netherlands v. Russia); In re Arctic Sunrise (Netherlands v. Russia),* 110 AM. J. INT'L 96 (2016).

[384] *Id.* at 96-97. The initial charge was piracy but became a lesser charge of hooliganism.

[385] *Id.* at 97. *See* UNCLOS, *supra* note 21, at 131. Article 292 specifically refers to the release of vessels and crew members.

[386] Kontorovich, *supra* note 386, at 97. *See* Mossop, *supra* note 387, at 63.

[387] Mossop, *supra* note 387, at 64, 74-75. *See The 'Arctic Sunrise' Case (Kingdom of the Netherlands v Russian Federation)*, CENTRE FOR MAR. L. FACULTY OF L. (Nov. 22, 2013), https://cmlcmidatabase.org/arctic-sunrise-case-kingdom-netherlands-v-russian-federation. Seven days before the Tribunal released their decision on August 14, 2015, Russia sent a position paper explaining their non-participation. Mossop, *supra* note 358, at 66.

[388] Kontorovich, *supra* note 386, at 98. (internal quotation marks omitted).

[389] Mossop, *supra* note 387, at 65.

[390] Kontorovich, *supra* note 386, at 98.

criticism nor has their diplomacy suffered.[391] This case, however, is not to demonstrate the different consequences of Great Powers not participating, but rather, to demonstrate the patterns in their behaviors. When comparing *Arctic Sunrise* to the *Nicaragua v. United States* case and the SCSA, there is more parallelism with the latter two in terms of consequences and solutions for the non-Great Power State.[392]

B. Past Decisions: Two Roads under the UNCLOS (New Zealand v. Japan, Australia v. Japan) (Timor-Leste v. Australia)

"Two roads diverged in a wood, and I, I took the one less travelled by, and that has made all the difference."[393]

There were two paths that the Philippines could have chosen to resolve disputes with China: arbitration under Annex VII, or Conciliation under Annex V of the UNCLOS. To understand why the Philippines chose the former from the latter, two cases illustrate the strengths and weaknesses of these different approaches: the *Southern Bluefin Tuna (Australia & New Zealand v. Japan)* and *Timor Sea Conciliation (Timor-Leste v. Australia)*.

1. Southern Bluefin Tuna

On July 15, 1999, Australia and New Zealand commenced arbitration proceedings against Japan for failing to commit its obligations under Articles 64 and 116 to 119 of the UNCLOS for Japan's experimental fishing program.[394] By August 27, 1999, the tribunal prescribed provisional measures for all three States to not take action that aggravated or extended the dispute, nor take actions that may have prejudiced the decision on the merits, and resume negotiations to reach an agreement.[395] At this stage of the proceedings, the Tribunal ruled that it had the jurisdiction to prescribe these measures despite the parties being part of the 1993 Convention for the Conservation of Southern Bluefin Tuna ("1993 Convention"). The rationale for the Tribunal's decision was not clearly explained other than ruling that the 1993 Convention does not preclude compulsory proceedings under

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[391] *Id.* at 101.

[392] Nguyen & Vu, *supra* note 380. With the U.S.'s continued defiance, Nicaragua sought to use Article 94(2) of the U.N. Charter and bring a resolution before the Security Council; the efforts were useless because of the U.S.'s veto power. Nicaragua then used the Generally Assembly and successfully adopted four resolutions to make the U.S. adopt the ICJ's decision. *Id.*

[393] Robert Frost, *A Group of Poems*, THE ATLANTIC (Aug. 1915), https://www.theatlantic.com/magazine/archive/1915/08/a-group-of-poems/306620/

[394] Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), U.N. ENV'T PROGRAMME L. ENV'T ASSISTANCE PLATFORM (Aug. 27, 1999) https://leap.unep.org/countries/au/national-case-law/southern-bluefin-tuna-cases-new-zealand-v-japan-australia-v-japan.

[395] *Id.*

Section 2 of Part XV of the UNCLOS.[396]

However, on August 4, 2000, the Tribunal ruled that it lacked jurisdiction on the merits and that the provisional measures prescribed were revoked.[397] The Tribunal's decision rested on the relationship between the disputes, the 1993 Convention, and the UNCLOS. The first question raised was whether the disputes could arise in both the 1993 Convention and the UNCLOS. According to the Tribunal, the parallelism in both treaties allows such disputes to be brought before the 1993 Convention and the UNCLOS, with the latter having a more expanded scope than the former.[398] The next question was whether the 1993 Convention precluded compulsory procedures in Section 2 of Part XV of the UNCLOS. The Tribunal answered the question in the positive based on three considerations. Firstly, the Tribunal interpreted Article 16 of the 1993 Convention to expressly prohibit disputes arising from the Convention to be referable or transferred to the ITLOS or to arbitration of the UNCLOS.[399] Secondly, based on Article 281(1) of the UNCLOS, the Tribunal could not prescribe a binding decision when the parties had other peaceful means to resolve their dispute.[400] Lastly, the Tribunal considered that due to the "significant number of international agreements" post-adoption to the UNCLOS that explicitly preclude arbitration based on Article 281(1) of the UNCLOS, the trend was to refer such disputes to those other agreements.[401] By November 2000, approximately four months after the Tribunals decision, all three parties came to an agreement under the Commission established by the 1993 Convention.[402] The caveat, as raised by Norio Tanaka, is the Tribunal's silence as to the implications of treaty parallelism and the extent to which the Tribunal could have made a decision based on the merits.[403] The given effect would mean that the Tribunal may rule on a decision outside the scope of the international agreement, that excludes arbitration.

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[396] Norio Tanaka, *Some Observations on the Southern Bluefin Tuna Arbitration Award,* 44 JAPANESE ANN. INT'L L. 9, 16 (2001). Japan also raised another objection on jurisdiction since the dispute primarily dealt with scientific facts rather than a particular legal issue. The Tribunal rejected the argument since the Tribunal was deciding on the conduct of the party in relations to its obligations under the UNCLOS. *Id. But see* Moritaka Hayashi, *The Southern Bluefin Tuna Arbitration*, 75 PHIL. L. J. 508, 511-12 (2001) (explaining how it is more reasonable to have these disputes with scientific experts and cautions other legal scholars on their view of the case).

[397] Tanaka, *supra* note 396, at 10.

[398] *Id.* at 20.

[399] *Id.* at 22. (footnote omitted).

[400] *Id.* at 22-23. (footnote omitted).

[401] *Id.* (footnote omitted).

[402] Tanaka, *supra* note 396, at 32. (footnote omitted).

[403] *Id.* at 33-34. (footnote omitted).

2. Timor Sea Conciliation

It is important to preface that the *Timor Sea Conciliation* began in April 2016, about three months before the Award on Merits was published and three years after the commencement of the SCSA.[404] Additionally, this is the first case in which Annex V was employed.[405] It begs the question: why is this case discussed in Past Decisions and not as a possible recommended solution? This case is more of a comparison to arbitration under Annex VII and illustrates the conditions that the Philippines would have faced had it commenced conciliation under Annex V.

Like China, Australia made a declaration to exclude maritime delimitation disputes under Section 2 of Part XV of the UNCLOS.[406] Unlike the proceedings in the SCSA, failure to reach an agreement through negotiation subjects the States to enter into compulsory conciliation under Section 2 of Annex V.[407]

The task of the Conciliation Commission is laid out in Article 6 of Annex V, explaining that "[t]he commission shall hear the parties, examine their claims and objections, and make proposals to the parties with a view to reaching an amicable settlement."[408] Australia objected to the Conciliation Commission based on three grounds: (1) the two States had to negotiate pursuant to Article 281 of the UNCLOS and another treaty; (2) the preconditions to compulsory conciliations were not satisfied; (3) Timor-Leste's initiation to conciliation was a breach of a previous treaty with Australia.[409] All of the objections raised by Australia were rejected, and the Conciliation Commission deemed it was competent for the proceedings.[410]

The goal of the Conciliation Commission is to issue a report, pursuant to Annex V of the UNCLOS, that "'provide[s] background and

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[404] Timor Sea Conciliation (Timor-Leste v. Austl.), Case No. 2016-10, Decision on Competence, ¶ 30 (Perm. Ct. Arb. 2016), https://pcacases.com/web/sendAttach/10052.

[405] See Gemmo Bautista Fernandez, *The Timor Sea Dispute: A Note on the Process, Resolution, and Application in the West Philippine Sea*, 93 PHIL. L. J. 29, 37 (2020) (citing Jianjun Gao, *The Timor Sea Conciliation (Timor-Leste v. Australia): A Note on the Commission's Decision on Competence,* 49 OCEAN DEV. & INT'L L. 208, 210 (2018)).

[406] *Id.* (citing Yoshifumi Tanaka, *Delimitation of the Exclusive Economic Zone between States with Opposite or Adjacent Coasts, in U.N. Convention on the Law of the Sea: A Commentary* 578 (Alexander Proelss ed., 2018)).

[407] *Id.*

[408] UNCLOS, *supra* note at 21, at 176.

[409] Fernandez, *supra* note 405, at 38 (citing Jianjun Gao, *The Timor Sea Conciliation (Timor-Leste v. Australia): A Note on the Commission's Decision on Competence,* 49 OCEAN DEV. & INT'L L. 208, 209, 214 (2018)).

[410] *Id.* (citing Timor Sea Conciliation (Timor-Leste v. Austl.), Case No. 2016-10, Decision on Competence, ¶ 30 (Perm. Ct. Arb. 2016), https://pcacases.com/web/sendAttach/10052.).

context to the process' through which the agreement between Australia and Timor-Leste [is] reached."[411] The benefits of the Conciliation include: a high level of flexibility and informality, a maintenance of confidentiality and limited disclosures, a simplification of the issues into two principal issues for maritime delimitation and resource governance, helping to "calibrate" the proceedings to address important elements, and helping to solidify that the agreement reached is in accordance with international law.[412]

With the benefits of conciliation in mind, it is not difficult to draw similarities to having diplomatic negotiations among the two States. The key distinction is that conciliation still requires a third party to participate just like arbitration under Annex VII of the UNCLOS. Had the Philippines undergone the conciliation under Annex V, China's non-participation would still have made the proceedings unfruitful. The option for conciliation, however, may be a viable option for a possible solution worth exploring.

IV. PROJECTION OF FUTURE TRENDS

A. Applying Awards to Future Issues

Before considering the possible applications of the SCSA to other possible disputes or to analyze maritime features, one must consider the role of precedent and bindingness. Although the SCSA is binding between the Philippines and China, the interpretations of the Tribunal are not binding to future disputes with other States with similar circumstances.[413] Two examples in which the international law has been interpreted differently is the *Namibia* advisory opinion and the judgment in the *Nicaragua* case.

In the *Namibia* case, the ICJ determined that decisions from the UN Security Council are binding under Article 25 of the U.N. Charter, but in practice, Chapter VII of the U.N. Charter is used to explicitly or implicitly give a binding decision.[414] In the *Nicaragua* case, the ICJ established the "effective control test", but other courts like the International Criminal Tribunal for the Former Yugoslavia ("ICTY") created an "overall control test" in *Tadić,* and the European Court of Human Rights ("ECtHR") created

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[411] *Id.*

[412] *Id.*

[413] Stefan Talmon*, The South China Sea Arbitration and the Finality of 'Final' Awards,* J. INT'L DISP. SETTLEMENT 388, ¶ 8 (2017) (first citing Statute of the I.C.J. art. 59; then citing Certain German Interest in Polish Upper Silesia (Ger. v. Pol.), Judgment, 1926 P.C.I.J. (ser. A) No. 7, at 19 (May 25)).

[414] *Id.* ¶ 10, (first citing Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶¶ 111-16 (Apr. 26); then citing LORAINE SIEVERS & SAM DAWS, THE PROCEDURE OF THE UN SECURITY COUNCIL (4th ed. 2014)).

the "effective overall control test" in *Loizidou v. Turkey*.[415]

Additionally, there are four other ways that the SCSA's interpretations may not be followed. First, international legislation via international treaty or creation of customary international law can change the analysis used in the SCSA.[416] Second, subsequent State practice that is contradictory to the Tribunal's decision can have the potential to change future Tribunal analysis.[417] Third, subsequent agreements between the Philippines and China on the interpretation of the Awards can impact the Tribunal's analysis of other States who have claims in the South China Sea.[418] Fourth, other international courts, tribunals, or domestic courts can question and lead to different analyses and conclusions than the SCSA.[419]

With the possible limitations to the application of the SCSA in mind, here are examples in which the Awards may be interpreted in future cases or future application.

1. Dokdo (South Korea v. Japan)

The island of Dokdo, or Takeshima in Japanese, is an island between Korea and Japan, in the Sea of Japan.[420] While Korea has had administrative control over the island since 1952, Japan has challenged Korea's control.[421] When applying the SCSA analysis to Dokdo, a Tribunal may identify the maritime feature as a rock under Article 121, which generates 12 nautical miles as territorial sea.[422] Dokdo's identification as a rock affects Korea's declaration under Article 298 of the UNCLOS, since the exclusion only applies to Korea's EEZ and not to its territorial sea.[423]

Following the possible precedent set by the SCSA, and with the

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[415] *Id.* ¶ 11 (first citing Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1984 I.C.J. 14, ¶ 115 (June 27); then citing *International Criminal Tribunal For the Former Yugoslavia—Appeals Chamber: Prosecutor v. Duško.Tadić*, 38 INT'L LEGAL MATERIALS 1518, ¶ 145; and then citing Loizidou v. Turkey, App No. 15318/89, 6 Eur. H.R. Rep. 2216, ¶ 56 (1996)).

[416] *Id.* ¶ 15.

[417] *Id.* ¶ 16.

[418] *Id.* ¶ 18.

[419] Talmon, *supra* note 410, ¶ 19.

[420] Seokwoo Lee & Leonardo Bernard, *South China Sea Arbitration and Its Application to Dokdo*, 8 ASIAN J. INT'L L. 24, 29 (2018) (citing Dae-song Hyun, *The Dokdo-Takeshima Issue: Its Origins and the Current Situation*, *in* THE HISTORICAL PERCEPTIONS OF KOREA AND JAPAN 37 (Dae-song Hyun ed., 2008)).

[421] *Id.* (citing JIN-MIEUNG LI, DOKDO: A KOREAN ISLAND REDISCOVERED 9 (2010)).

[422] The author speculates that state practice may weaken the Awards from the *SCSA* and a Tribunal may divert from this previous ruling. *Id.* at 30.

[423] *Id.* at 31.

assumption that Dokdo is a rock, Japan may bring a claim against Korea if Japanese fishermen are affected by Korean law enforcement within Dokdo's territorial sea.[424] Thus the Tribunal has jurisdiction for this specific dispute and is unaffected by Article 298. Additionally, Korea may also be subject to the UNCLOS under Article 192. In another hypothetical, if Korea failed to prepare an environmental impact assessment pursuant to its activities near Dokdo, and failed to share the report to Japan, then Japan may bring a claim against Korea for a breach of obligations under Article 192.[425] In weighing the interests of both countries, the Awards have a detrimental effect on Korea's maritime entitlement and choice of jurisdiction, while Japan gains an audience with the Tribunal under the UNCLOS, and the choice to bring a long awaited dispute to an end.

2. New Zealand

The prospects for New Zealand are also undesirable if the SCSA were to apply to the State's islands. In Joanna Mossop's article titled *The South China Sea Arbitration and New Zealand's Maritime Claims,* the author explores the ramifications of the Tribunal's rationale applied to New Zealand's offshore islands, specifically: the Chatham Islands, Kermadec Islands, Auckland Islands, Campbell Island, Antipodes Islands, Bounty Islands, and Snares Islands.[426] With regard to the first three islands, Mossop argues that there is a "very high bar" to satisfy the element of human habitation, since this element does not consider laws that prevent human habitation, and is dismissive of dependent outside support.[427] Following the technicalities of the SCSA's rationale, these features are considered "rocks." The next three islands do not fair better under a strict application of the SCSA rationale, because there lacks a history of human habitation.[428]

With all of these "islands" deemed "rocks" under Article 121, future cases dealing with similar disputes must be cautious in applying the SCSA rationale. In particular, the Tribunal should consider the absence of China's

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[424] *Id.* at 32.

[425] Assuming that the activity is not military in nature as per Korea's declaration. *Id.* at 34.

[426] Joanna Mossop, *The South China Sea Arbitration and New Zealand's Maritime Claims,* 15 N.Z. J. OF PUB. INT'L L. 265, 275-76 (2017) (footnote omitted). The author also mentions other maritime features that would be or are currently affected by the *SCSA* rationale. *Id.* This includes Savage Islands, Portugal; Aves Island, Venezuela; Okinotorishima, Japan; Johnson Atoll, Jarvis Islan, Palmyra Atoll, and Kingman Reef of the United States; Clipperton Island and Matthew Island of France; St Peter and Paul rocks of Brazil; and Antarctic Heard Island and McDonald Islands of Australia. *Id.* at 266-67 n. 6-12.

[427] *Id.* at 278-79. (footnote omitted).

[428] *Id.* at 279-80. The author further criticizes the Tribunal's interpretation of human habitation and its inconsistencies. *Id.* at 284-85.

participation in the proceedings, and the political nature of the dispute.[429] Additionally, the lack of state practice used in the Tribunal's decision in analyzing Article 121(3) weakens its precedent.[430] When taking into account the concept of state practice, it is more rational for Article 121(3)'s usage to focus on maximizing common areas and limiting excessive claims that relate to the distance of the maritime feature, rather than qualifying the feature's human habitability or unique economic qualities.[431]

Even if the SCSA would be used as precedent, States may use the argument of acquiescence and estoppel. Acquiescence can be defined as the "inaction of a state which is face[d] with a situation constituting a threat or infringement of its right" and if other States respond in silence, then the "state's unilateral assertion of its right is seen as [an] agreement with the actions and claims and their legal implications."[432] There are three steps to achieving acquiescence: (1) the state's claim is clear and communicated, and brings attention from other States to protest or comment; (2) the acquiescence is deemed universal; (3) sufficient time has passed that allows states to be aware of an opportunity to protest.[433] When applied to New Zealand's aforementioned maritime features, it is arguable that there is acquiescence for the features to generate EEZs because their legislation clearly stated their zones, and were not met with any objections since 1977.[434]

B. Dominant China, Diplomatic Philippines

Returning the focus of discussion back to the Philippines and China, the possible future between the two States seems to have China guiding the negotiations, or at the very least, preventing the Philippines from escaping the cycle of diplomatic conversation.

From the perspective of China, the Awards are "null and void" and therefore China does not have to implement any of rulings by the

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[429] Despite the political nature of the dispute, there are positive outcomes such as clarifying the exclusions listed under the UNCLOS and the "simplification" of the legal disputes in the South China Sea. *Id.* at 281.

[430] Lee & Bernard, *supra* note 420, at 31 (raising the same questions of how state practice may affect the *SCSA*'s precedent).

[431] Mossop, *supra* note 426, at 282-83. (footnotes omitted).

[432] *Id.* at 286 (first citing I.C. MacGibbon, *The Scope of Acquiescence in International Law*, 31 BRIT. Y.B. INT'L L. 143 (1954); then citing Georg M. Berrisch, *The Establishment of New Law Through Subsequent Practice in GATT,* 16 N.C. J. INT'L L. & COM. REG. 497, 504 (1991)).

[433] *Id.* at 288 (citing I. C. MacGibbon, *The scope of Acquiescence in International Law*, 31 BRIT. Y.B. INT'L L. 143 (1954).

[434] *Id.* at 290. The author lays out a four-part explanation on how each element was met in pages 288 to 290.

Tribunal.[435] This is only reinforced by the fact that in *Arctic Sunrise,* Russia did not immediately comply with the orders given by the ITLOS, nor did the U.S. implement the judgement from the ICJ in the *Nicaragua* case.[436] The vantage point from these cases allows China to come to the conclusion that non-participation gives rise to non-participation of the Awards.[437] Moreover, the lack of enforcement power from the UNCLOS would leave the Philippines to use the Security Council under Article 94(2).[438]

In keeping with this mentality, the possible future in the South China Sea is geared in China's favor. One way the Chinese government has manifested this goal of dominance, is by putting diplomatic efforts into championing the UNCLOS and international law by selectively adopting some parts of the Convention, while also rejecting the SCSA.[439] These diplomatic efforts would not change the global norm, but only cause regional custom with the Philippines and other neighboring states to acquiesce their rights and claims.[440] This so called "hyper-sovereigntist" approach pushes China's diplomatic narrative to have greater State autonomy within an international legal framework.[441] Next, the investment China has in increasing its presence in the South China Sea with an expansion of its coast guard helps to further its goal of dominance.[442] While not directly a militaristic approach, the given effect creates a sense of restriction for other States' rights and interests, but a greater control and scope of administration for the Chinese government.[443] Combined with China's non-participation, a precedent of rejecting the Awards may make other neighboring States reluctant to present their disputes in the mechanisms of the UNCLOS.[444]

On the Philippines' end, the diplomatic approach appears to be the

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[435] *Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award of July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines*, 15 CHINESE J. INT'L. L. 905 (2016).

[436] Chang, *supra* note 365, at 70 (footnote omitted).

[437] *Id.*

[438] *Id.* at 71. Article 94(2) allows the Security Counsel to give recommendations or decide actions necessary to ensure that judgement of an international court is enforced. *Id.* Unfortunately, a unanimous vote is required, and China is a member of the Security Counsel. *Id.*

[439] The author coins the term "creeping jurisdiction" to describe this approach by China. Kardon, *supra* note 289, at 43.

[440] *Id*.

[441] *Id.* at 44

[442] *Id.* at 44-45.

[443] *Id.*

[444] *Id.* at 46.

only peaceful, viable option. Current President Ferdinand Marcos Jr. matches the diplomatic approach with his renewed signature to China's Belt and Road Infrastructure initiative and ten other bilateral agreements.[445] Echoing former President Duterte, President Marcos Jr. continues to mitigate incidents with China, such as not activating a Mutual Defense Treaty with the U.S. when Chinese vessel pointed a laser at a Filipino Coast Guard.[446] Departing from his predecessor, President Marcos Jr. eases from the Philippines' diplomatic approach by modernizing the Philippine Air Force and adding four military bases with US militaristic and economic assistance.[447] In a sort of balancing act, diplomacy is still the preferred route with China, but diplomacy is supported with a firm hand on the military.

C. American Involvement

As shown in the previous subsection, the United States has demonstrated an interest in the South China Sea, its ally, the Philippines, and its rival, China. The U.S. is not party to the UNCLOS, but operates consistently within it since the Convention reflects customary international law.[448] Additionally, the U.S. has demonstrated their support of the SCSA since the Obama Administration, and have closely observed the proceedings.[449] Back in 2016, a few days before the Award on Merits was published, the Congressional Research Service provided possible responses for the U.S.: (1) call on member states of ASEAN and China to have a

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[445] Maricar Cinco & Kyodo News, *Marcos Jr. to Broach South China Sea Issue on China Trip*, ABS-CBN NEWS (Jan. 3, 2023), https://news.abs-cbn.com/spotlight/01/03/23/marcos-jr-to-broach-south-china-sea-issue-on-china-trip.

[446] Job Manahan*, 'It May Provoke Tensions': Marcos Not Keen on Invoking MDT After China Laser-Pointing Incident*, ABS-CBN NEWS (Feb. 18, 2023) https://news.abs-cbn.com/news/02/18/23/marcos-jr-not-keen-on-invoking-mdt-after-china-laser-pointing-incident. *But see* Deutsche Welle, *How is the Philippines Balancing Ties with China and the US?,* ABS-CBN NEWS (Feb. 22, 2023) https://news.abs-cbn.com/spotlight/02/22/23/how-is-the-philippines-balancing-ties-with-china-and-the-us (explaining how President Marcos Jr.'s reaction to China's laser is different from former President Duterte's reaction).

[447] Katrina Domingo, *Marcos: PH Air Force Modernization is 'Response toGrowing Complication' in WPS*, ABS-CBN NEWS (Apr. 1, 2023), https://news.abs-cbn.com/news/04/01/23/marcos-air-force-modernization-is-response-to-growing-complication-in-wps; Jauhn Etienne Villaruel, *Defense Officials Asked to Justify 4 New EDCA Sites, 'Non-Consultation' with Locals*, ABS-CBN NEWS (Mar. 1, 2023) https://news.abs-cbn.com/spotlight/03/01/23/defense-officials-asked-to-justify-4-new-edca-sites (rationalizing the construction of the four military bases with the U.S.).

[448] CONG. RSCH. SERV., R44555, ARBITRATION CASE BETWEEN THE PHILIPPINES AND CHINA UNDER THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (UNCLOS), 2 (2016).

[449] *Id.* at 3. (quoting former President Obama, former Assistant Secretary of the State for East Asia and Pacific Affairs, former Deputy Secretary, and the 113th and 114th Congress).

"meaningful Code of Conduct"; (2) conduct Freedom of Navigation Operations in the South China Sea; (3) argue to the International Seabed Authority that China should be disqualified from deep seabed mining in the Indian Ocean for rejecting the Awards; and (4) ratify the UNCLOS.[450]

The U.S.'s current interest remains the same in the South China Sea as of 2022. In 2020, the Commerce Department noted that China has barred U.S. companies involved in the South China Sea from exporting without a Chinese government license.[451] Furthermore, in August of 2022, the Secretary of State reminded President Marcos Jr. of their Mutual Defense Treaty.[452] Congress has also taken initiative by expanding on the Pacific Deterrence Initiative, which is authorized by the National Defense Authorization Act.[453]

To further expand on the U.S.'s position towards the South China Sea, the U.S. has subscribed to these concepts: (1) "Freedom of the Seas", which is defined as "the rights, freedoms, and uses of the sea and airspace guaranteed to all nations in international law"; (2) U.S. forces have the ability to conduct and assert Freedom of Navigation ("FON") in accordance with international law even in highly contested areas; (3) the UNCLOS only regulates economic activities in EEZs but not foreign military activities; (4) these foreign military activities also include surveillance flights in international airspace above EEZs.[454] Moreover, on July 13, 2020, former Secretary of State Michael Pompeo specified that the U.S. perceives China in the South China Sea as a bully that does not respect international law whose actions are deemed predatorial to its neighbors, and who imposes a policy of "might makes right" in an effort to make China a maritime empire.[455] In both February 19, 2021, and in July 11, 2021, the U.S. Department of State reaffirmed the July 13, 2020 position for the five year

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[450] *Id.* at 25 (citing Mark E. Rosen, *After the South China Sea Arbitration*, THE DIPLOMAT (June 21, 2016), https://thediplomat.com/2016/06/after-the-south-china-sea-arbitration/).

[451] BEN DOLVEN, ET AL., CONG. RSCH. SERV., IF10607, CHINA PRIMER: SOUTH CHINA SEA DISPUTES (2022).

[452] *Id*.

[453] *Id.*

[454] RONALD O'ROURKE, CONG. RSCH. SERV., R42784, U.S.-CHINA STRATEGIC COMPETITION IN SOUTH AND EAST CHINA SEAS 17-18 (2023).

[455] *Id.* at 20 (citing Press Release, Michael Pompeo, Former Sec'y of State, U.S. Dep't of State, U.S. Position on Maritime Claims in the South China Sea, U.S. Dept. of State (July 13, 2020), https://2017-2021.state.gov/u-s-position-on-maritime-claims-in-the-south-china-sea/index.html) (internal quotation marks omitted). This response was most likely prompted by China's activities towards Vietnam in April 2020. *Id.* at 21-22 (citing Press Release, U.S. Dep't of Def., China Coast Guard sinking of a Vietnam Fishing Vessel, (Apr. 9, 2020), https://www.defense.gov/News/Releases/Release/Article/2143925/china-coast-guard-sinking-of-a-vietnam-fishing-vessel/).

anniversary of the Merits Award of the SCSA.[456] In terms of U.S. activity in the South China Sea, former Secretary of Defense Mark Esper was quoted stating that the U.S. has conducted "more [FON] operations in the past year [2019] or so than we have in the past 20-plus years."[457] FON operations have also expanded in 2021 with the U.S.-Taiwan Coast Guard Agreement, which organizes U.S. vessels to transit through the Taiwan Strait in order to send a clear message to China.[458]

V. APPRAISAL AND RECOMMENDATIONS OF SOLUTIONS

To achieve a viable solution for the Philippines and China is a task that may take quite some time, and require a reduction to non-application of the SCSA. In the search to find such solutions, the possible avenues are limited, and the balance tends to be biased for one or the other. This section explores the possible solutions that have been presented since the publication of the Awards.

A. Joint Development

The concept of Joint Development within the South China Sea has long existed prior to the SCSA. At least three propositions posed prior to the arbitration are worth exploring.

The first possibility is a "Multilateral Spratly Development Authority*"* which encompasses a demilitarization and suspension of sovereignty claims, with the added benefits of exploration and exploitation of resources, "fisheries management, environmental preservation, and international cooperation in scientific research and environmental protection of the region."[459] The second possibility is a "Triple Level Plan"

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[456] *Id.* at 22-24 (first citing Press Release Ned Price, Senior Advisor to the Sec'y of State, Press Briefing – February 19, 2021 (Feb. 19, 2021), https://www.state.gov/briefings/department-press-briefing-february-19-2021/; then citing Press Release, Anthony J. Blinken, Sec'y of State, U.S. Dep't of State, Fifth Year Anniversary of the Arbitral Tribunal Ruling on the South China Sea, (July 11, 2021), https://www.state.gov/fifth-anniversary-of-the-arbitral-tribunal-ruling-on-the-south-china-sea/).

[457] *Id.* at 27 (quoting Andero Calonzo & Glen Carey, *U.S. Increased Sea Patrols to Send Message to China, Defense Secretary Says*, BNN BLOOMBERG (Nov. 19, 2019), https://www.bnnbloomberg.ca/u-s-increased-sea-patrols-to-send-message-to-china-defense-secretary-says-1.1349994) (internal quotations omitted).

[458] *Id.* at 40-41 (citing Ben Blanchard, *Taiwan, U.S. to Strengthen Maritime Coordination After China Law*, REUTERS (Mar. 25, 2021) https://www.reuters.com/world/china/taiwan-us-strengthen-maritime-coordination-china-looms-2021-03-26/) (footnote omitted). *See* Brad Lendon, *US Sends Two Warships Through Taiwan Strait, in First Transit Since Pelosi Trip*, CNN (Aug. 28, 2022), https://www.cnn.com/2022/08/27/asia/us-navy-destroyer-taiwan-strait-transit-intl-hnk-ml/index.html (explaining the ramifications of U.S. interactions with Taiwan).

[459] Zewei Yang, *Joint Development Issues after the South China Sea Arbitration:*

by Professor Kuen-chen Fu[460]. The three levels are: (1) to give China sovereignty over the maritime features and territorial sea; (2) to open the area encompassing the nine-dash line to joint development; (3) to share the entirety of the South China Sea not within the nine-dash line.[461] The third possibility is a "Multi-Party Negotiation" by Yingmin An which involves a multilateral, equal participation system among the States with an "economic cooperation development model" to resolve disputes.[462]

All three previously mentioned solutions, with possible exceptions to the first, are geared entirely in favor of China as a dominant power in the region.[463] Additionally, the model solutions do not take into account the SCSA*,* nor are they elaborate enough for implementation.[464] Besides the tendency to favor one State, there are other issues beyond just the models of joint development solutions. One of the issues in creating a Joint Development is the lack of political will from all States that have claims in the South China Sea.[465] Another reason is a lack of realistic consideration, clear functional characteristics to joint development, or a sense of urgency or obligation to exploit the resources.[466]

Dilemma, Opportunity and China's Choice, VESTNIK ST. PETERSBURG U.L. 254, 254-56 (2018) (citing Mark J. Valencia, *A Spratly Solution*, FAR E. ECON. REV. 30 (1994)).

[460] Professor Kuen-Chen Fu served in the Yuan Legislature from 1996 to 2005. He was a professor and visiting professor in several universities. Professor Fu has contributed and published many works related to the law of the sea, particularly the South China Sea. He currently is the dean of the South China Sea Institute at Xiamen University. FU KUEN-CHEN KOGUAN CHAIR PROFESSOR OF LAW, https://old.law.sjtu.edu.cn/uploads/fckeditors/file/LLM%E9%A1%B9%E7%9B%AE/FU%20Kuen-chen%20%20%20KoGuan%20Chair%20Professor%20of%20Law.pdf (last visited Sept. 25, 2023). Amber Wang, *France sends warships to South China Sea ahead of exercise with US and Japan*, S. CHINA MORNING POST, (Feb. 21, 2021, 10:00:00 PM), https://www.scmp.com/news/china/diplomacy/article/3122416/france-sends-warships-south-china-sea-ahead-exercise-us-and.

[461] Yang, supra note 459, at 256 (citing Zhonhai Zhou, *Legal Issues on Joint Development in the South China Sea*, 6 LEGAL REV. XIAMEN UNIV. 198-217 (2013)).

[462] *Id.* (citing An Yingmin & Liu Tingting, *The South China Sea Dispute of Regional Economic Cooperation Development Model Construction*, ASIA-PAC. ECON. REV., no. 5, 2011, at 115).

[463] *See id.* at 254-56.

[464] *See id.*

[465] *Id.* at 257 (first citing BECKMAN ROBERT ET. AL., BEYOND TERRITORIAL DISPUTES IN THE SOUTH CHINA SEA: LEGAL FRAMEWORK FOR THE JOINT DEVELOPMENT OF HYDROCARBON RESOURCES, 141 (Robert Beckman, et al. eds. 2013); then citing Yu Jai, *Issues and Prospective on Sino-Japan Joint Development,* 4 F. OF WORLD ECON. & POL. 51, 55 (2007)).

[466] *Id.* at 258 (first citing Jianguo Xiao*, Joint Development of Offshore Oil & Gas Across the International Maritime Boundaries,* OCEAN PRESS. 50 (2006); then citing Mark J. Valencia & Masahiro Miyoshi, *Southeast Asian Seas: Joint Development of*

The other option for joint development comes from the different "path" of conciliation proceedings.[467] One of the possible outcomes that may result in conciliation under Annex V of the UNCLOS is provisional agreements.[468] However, even if the provisional agreements produce joint development, three elements must be satisfied: first, the degree of domestic resistance must be low; second, the agreement must be the most promising course of action; and third, both sides must be regarded as willing to uphold the terms of the agreement.[469]

None of the elements are satisfied for the following reasons. Element one is not met because the Philippine Supreme Court ruled that joint development agreements require at least sixty percent of the capital owned by a Filipino citizen, and that the operations must be fully controlled by the state.[470] Second, joint development may not be the best course of action because China still maintains an ambiguous claim not in conformity with the UNCLOS, and entering into a joint development may legitimize China's claim and weaken the Awards.[471] Third, the stance that the Philippines and China have with each other can be described as rivals, due to their competition to control parts of the South China Sea and mutual distrust of each other.[472]

Additionally, going down the "path" of conciliation requires that both parties have a willingness to cooperate, with a faithfulness to comply, and a general disposition for a successful outcome.[473] On China's end, their willingness is absent, as demonstrated by the State's disposition towards the

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Hydrocarbons in Overlapping Claim Areas?, 16 OCEAN DEV. & INT'L L. 211, 223 (1986)). For full transparency, the author continues to add three more reasons for the obstacles in reaching joint development, but these reasonings are so blatantly pro-China and against the *SCSA* and Western powers. Adding these reasonings would, in the opinion of this author, make any possible resolution completely unfair to States other than China. *Id.* at 258-63.

[467] *See* discussion *supra* Section III.B.

[468] *See* Fernandez, *supra* note 405, at 50.

[469] *Id.* (citing Hendrik Schopmans*, Explaining (Non-)Cooperation on Disputed Maritime Resources: Joint Development Agreements, Disputed Territory, and Lessons from the Falkland Islands,* 10 AUSTL. J. MAR. OCEAN AFF. 98, 100 (2018)).

[470] *Id.* (citing La Bugal-B'laan Tribal Ass'n. Inc. v. Victor O. Ramos*,* G.R. No 127882, (Dec. 1, 2004) (Phil.)).

[471] *Id.* at 51 (citing Ralf Emmers*, China's Influence in the South China Sea and the Failure of Joint Development, in* RISING CHINA'S INFLUENCE IN DEVELOPING ASIA 158, 163, 168 (Evenlyn Goh ed., 2016)).

[472] *Id.* (citing Emily Meierding*, Joint Development in the South China Sea: Exploring the Prospects of Oil and Gas Cooperation Between Rivals,* 24 ENERGY RES. & SOC. SCI. 65, 67 (2017)).

[473] *Id.* at 52-53.

SCSA.[474] China also demonstrates a lack of positive disposition with their attempts "to apply force and coercion" towards the Philippines.[475] On the Philippines' end, the domestic resistance creates a jaded feeling toward China and an apprehension in entering a joint development agreement in the South China Sea.[476]

B. Fulfilling the Decision or Conceding to China

While the UNCLOS does not have an enforcement mechanism, States generally do not ignore their decisions—even States deemed as major powers eventually comply.[477] Moreover, instead of enforcement, the UNCLOS has mechanisms to promote compliance with the Tribunal's decisions.[478] The first is Article 33 of Annex VI which allows the Tribunal to construe the meaning or scope of the decision and create a concrete implementation plan of the judgment, at the request of any parties in the dispute.[479] The second mechanism is using Article 12 of Annex VII, which allows the Tribunal to verify that the parties have implemented the award when the request is submitted by either of the parties in dispute.[480] Lastly, the Philippines can raise issues of implementation problems with political or technical forums such as " [the] UNCLOS Meeting of States Parties, the United Nations General Assembly, ... [and] regional organizations such as the Association of Southeast Asian Nations."[481]

Another solution is to concede some aspects of the Awards that are more favorable to China. In Thomas J. Schoenbaum's[482] Three-Point Plan,

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[474] *Id.* at 52.

[475] Fernandez, *supra* note 405, at 53 (citing Renato Cruz De Castro*, Beware of China Giving Gifts: The Risk of Joint Development of the South China Sea Resources,* BUS. WORLD*,* (Sept. 17, 2019), https://www.bworldonline.com/beware-of-china-giving-gifts-the-risk-of-joint-development-of-the-south-china-sea-resources) (internal quotation marks omitted).

[476] *Id.* at 55.

[477] Phan & Nguyen, *supra* note 273, at 45. The author provides five other instances in which the UNCLOS was used, and States complied with the Tribunal's decision such as *M/V Saiga (St. Vincent v. Guinea)* and *Land Reclamation (Malay. v. Sing.)*.

[478] *See id.*

[479] *Id.* at 47-48. (internal quotation marks omitted).

[480] *Id.* at 48. (footnote omitted). *See* UNCLOS, *supra* note 21, at 190.

[481] Phan & Nguyen, *supra* note 273, at 49.

[482] Professor Thomas J. Schoenbuam is a professor of law at the University of Washington. His expertise covers "International Economic Law, Business Law, International Environmental law and Maritime Law" and has published several papers covering these topics. THOMAS SCHOENBAUN, SCH. L., UNIV. WASH.,https://www.law.uw.edu/directory/faculty/schoenbaum-thomas (last visited Sept. 25, 2023).

some of the ongoing disputes may be settled in three steps:

(1) Recognition of China's non-exclusive traditional fishing rights in the South China Sea based on the nine-dash line.

(2) Determinations of sovereignty over key features in the South China Sea.

(3) Conclusion of a multilateral agreement among all concerned states for the management of the living and non-living resources and protection of the environment of the South China Sea.[483]

The first step requires all the contesting States in the South China Sea to negotiate with China to "rehabilitate" the nine-dash line as a maritime right for non-exclusive traditional fishing.[484] The second step requires the contesting States to know the sovereignty over four maritime features: the Spratly Islands, the Paracels, Scarborough Shoal, and the Pratas Islands.[485] For the third step, Schoenbaum suggests that Article 123 of the UNCLOS makes it a duty for the regional States in the South China Sea to create a multinational organization.[486] The rationale for these three points is to off-set the Tribunal's one-sided favor of the Philippines, and to keep China from "losing face."[487]

C. Using the Regional Government Fora: ASEAN

The Association of Southeast Asian Nations ("ASEAN") is a multilateral organization consisting of ten members, with aims to cooperate "in the economic, social, cultural, technical, educational and other fields, and in the promotion of regional peace and stability through abiding respect for justice and the rule of law and adherence to the principles of the United Nations Charter."[488] Both China and the United States hold leverage power over the ASEAN members in both economic and militaristic aspect.[489]

Efforts for China and the Philippines to use ASEAN to help resolve their continuing disputes over the interpretation of the Awards may be effective. Evidence of China's willingness to cooperate with ASEAN has

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[483] The author makes note that China is not required to accept the Awards. Thomas J. Schoenbaum, *The South China Sea Arbitration Decision, and a Plan for Peaceful resolution of the Disputes,* 47 J. MAR. L. & COM., 455, 474 (2016).

[484] *Id.* at 474.

[485] *Id.* at 475.

[486] *Id.* at 476.

[487] *Id.* at 477.

[488] *The Founding of ASEAN,* ASS'N OF SE. ASIAN NATIONS [ASEAN], https://asean.org/the-founding-of-asean/ (last visited Apr. 22, 2023). *See* BEN DOLVEN, CONG. RSCH. SERV., IF10348, THE ASSOCIATION OF SOUTHEAST ASIAN NATIONS (ASEAN) (2023).

[489] BEN DOLVEN, CONG. RSCH. SERV., IF10348, THE ASSOCIATION OF SOUTHEAST ASIAN NATIONS (ASEAN) (2023).

been demonstrated by the plethora of communications China has with this forum.[490] Despite its nonbinding nature, the DOC is still a viable option for both China and the Philippines to further negotiations. Dubbed the "ASEAN Way", this forum allows States to reach resolutions that promote regional stability and continued conversations.[491] Since three other ASEAN members—Vietnam, Brunei, and Malaysia—also have disputes with China in the South China Sea, a push to confront the issues within the region can be brough in one of the two ASEAN Summits in a given year.[492]

D. Final Remarks

To circle back to the New Haven approach, the solutions share the human values of power, wealth, respect, and rectitude.[493] Of these four, respect and rectitude are the base values that the Philippines and China should prioritize, recognize, and implement when developing solutions in this semi-enclosed sea. As demonstrated by past trends, Great Powers must respect their neighboring States and rectify their conduct to benefit both themselves and others. Based on conflicting claims of parties not in the SCSA, respect towards these other States is required to ensure peace, development, and collaboration. Looking into the future, the U.S. has the power to either pressure peaceful negotiations with its presence or create the opposite effect of distrust. Through the New Haven approach, the SCSA and its progeny of legal literature can assist the Philippines, China, and other States who hold an interest in the South China Sea to finding a plausible solution.

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[490] Yang, *supra* note 459, at 263 (citing Xinhua Tongxunshe (新华通讯社) [Xinhua News Agency], *Zhongguo-dongmeng Jianli Duihua Guanxi 25 Zhounian Jinian Fenghui Fabiao Zhuxi Shengming (中国—东盟建立对话关系25 周年纪念峰会发表主席声明) [Chairman's Joint Statement of Commemorative Summit Marking the 25th Anniversary of China-ASEAN Dialogue* Relations], HUANQIU SHIBAO (环球时报) [GLOBAL TIMES] (Sept. 8, 2016), https://world.huanqiu.com/article/9CaKrnJXvg8).

[491] BEN DOLVEN, CONG. RSCH. SERV., IF10348, THE ASSOCIATION OF SOUTHEAST ASIAN NATIONS (ASEAN) (2023).

[492] *ASEAN Summit,* ASS'N OF SE. ASIAN NATIONS [ASEAN], https://asean.org/about-asean/asean-summit/ (last visited Apr. 4, 2023). *See* Samdech Akka Moha Sena Padei Techo Hun Sen, *Chairman's Statement of the 25th ASEAN-China Summit*, ¶¶ 25-26, (Nov. 22, 2022), https://asean.org/wp-content/uploads/2022/11/2.-Final-CS-25th-ASEAN-China-Summit-1.pdf (explaining positive commitments of ASEAN members and China towards DOC and COC but not raising disputes).

[493] Michael W. Reisman, et al., Commentary, *The New Haven School: A Brief Introduction*, 43 YALE J. INT'L L. 575, 580 (listing characterization of eight values related to human dignity) (footnote omitted).