

CHINA CAN SAY “NO”:
ANALYZING CHINA’S REJECTION OF THE SOUTH CHINA
SEA ARBITRATION

*Toward A New Era of International Law with Chinese
Characteristics*

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At least since the 2008 global financial crisis, the People’s Republic of China (“PRC”) has been feeling its oats on the world stage. After decades of “reform and opening” to ever-deeper integration into global affairs, China is now shaping the international system as much as that system is shaping China. The “engagement” thesis—variations on the idea that China’s sustained participation in interlocking Western-dominated institutions will produce a more liberal, compliant, and cooperative China (Economy and Oksenberg 1999, Kent 2007, Johnston 2008)—is all but historical artifact.

Now equipped with ample experience and outsized capacity, China can give as well as they get on the global stage. Operating at impressive scale in economic, security, and diplomatic arenas, Chinese actors and organizations are now major players who drive the agenda. Deng Xiaoping’s dictum to never seek leadership (绝不当头) is no longer operative as the Chinese Communist Party (CCP) publicly touts China’s role as a global leader with major ambitions.¹ PRC diplomats are no longer so reticent and have announced

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¹ See Xi Jinping, *Full text of Xi Jinping’s report at the 19th CCP National Congress*, XINHUA (Nov. 4, 2017, 06:07 PM), http://www.chinadaily.com.cn/china/19thcpnationalcongress/2017-11/04/content_34115212.htm [<https://perma.cc/H233-DKF3>] (stating that all traditional Chinese communist thought must be altered to the new era of China).

China's intent to serve as an active agent of change within the international order.²

China's influence is increasingly evident in the international legal arena. The Fourth Plenum of the 18th National Party Congress of the Chinese Communist Party exhorted Chinese diplomats and scholars to "vigorously participate in the formulation of international norms[,] . . . strengthen [China's] discourse power and influence in international legal affairs[,] . . . [and] use legal methods to safeguard [China's] sovereignty, security and development interests."³ Indeed, many international legal regimes now embody not only Western, liberal norms and values (that the Chinese were supposed to internalize), but Chinese norms and values as well. The lack of normativity in the Chinese pronouncements about international law and the overwhelming focus on its practical *use as an instrument* in service of policy and in defense of sovereignty are the most notable characteristics of China's evolving approach to international law.

The United Nations Convention on the Law of the Sea ("UNCLOS") is one such regime where this new Chinese intent and capability are on vivid display. PRC's full-throated rejection of the arbitration brought by the Philippines under UNCLOS⁴ compulsory

² See Yang Jiechi (杨洁篪), *Promote the Building of a Community of Common Destiny (Seriously Study, Propagate, and Implement the Spirit of the 19th CCP National Congress)* (推动构建人类命运共同体(认真学习宣传贯彻党的十九大精神)), RENMIN WANG (Nov. 19, 2017, 08:55 AM), <http://hb.people.com.cn/n2/2017/1119/c192237-30938426.html> [<https://perma.cc/2CRF-HTTJ>] (proclaiming that the western structure of international law is flawed and China is confident and capable of contributing to changes in the world).

³ Chinese Communist Party Central Committee, *Decision concerning Some Major Questions in Comprehensively Moving Governing the Country According to the law Forward* (中共中央关于全面推进依法治国若干重大问题的决定), RENMIN RIBAO (Oct. 29, 2014, 07:17 AM), <http://cpc.people.com.cn/n/2014/1029/c64387-25927606.html> [<https://perma.cc/YP4B-DFM7>].

⁴ See United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994), http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf [http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf] (describing PRC's reaction to the Philippines' arbitration).

dispute resolution procedures in 2013 (“The South China Sea Arbitration”)⁵ marks a new high tide in China’s confidence that it can shape the global institutions it once only grudgingly endured. What influence will China wield on the development of the law of the sea regime? PRC’s conduct and rhetoric surrounding this case provide some important insights.

In refusing outright to participate in the arbitration, China showed itself willing and able to reject a vital component of a cornerstone treaty of the international legal order. Beijing went further than simply ignoring the procedure by denying the standing and jurisdiction of the arbitral body to render binding judgments, vowing to never implement the final award rendered on July 12, 2016, and attacking the motives and professional competence of the arbitral body itself. With some irony, this is the same UNCLOS treaty China had ratified some twenty years prior in full exercise of its sovereignty; meanwhile, the supposed custodian of that international legal order, the United States, remains unlikely to ratify (despite enthusiastically backing the arbitration). Enforcement of judgments under international law is a tall order under any circumstance, and especially so when one of the parties has actively sought to delegitimize the procedure. The field appears open for China.

While some Chinese influence on legal processes will occur as a matter of course, this case demonstrates an active and disciplined PRC policy geared toward shaping the law of the sea, not destroying or ignoring it. China has not rejected UNCLOS. Instead, it is seeking to champion an UNCLOS with Chinese characteristics. PRC officials and a large cohort of domestic and international well-wishers chastised the arbitral tribunal for what they held to be

⁵ See *The Republic of Philippines v. The People's Republic of China*, PCA CASE Repository Permanent Court of Arbitration, Case No. 2013-19 (Perm. Ct. Arb. 2016), <https://www.pcacases.com/web/view/7> [<https://perma.cc/M5A5-YCBE>] ([describing the previous dispute resolution procedures and how they affected the arbitration between the Philippines and PRC](https://perma.cc/M5A5-YCBE)). NB—this arbitration is often incorrectly described as a Permanent Court of Arbitration or “PCA” arbitration. The PCA in the Hague was only the registry for the proceedings, providing a venue, clerks, and administrative support. The claim was brought under Annex VII of UNCLOS III, and relies on jurisdiction specific to that treaty.

inappropriate reach into a thicket of issues revolving around China's maritime disputes in the South China Sea. Their core arguments? UNCLOS does not regulate the issues under dispute; international law itself does not bear on matters of Chinese sovereignty. If international law is deemed insufficient to solve these problems, what exactly is the alternative China is proposing? How and why did China go about rejecting the arbitration? What are the legal and political consequences of this action for China, for UNCLOS, for international dispute resolution, and for international law?

This essay addresses those questions in four stages, analyzing (I) China's pre-arbitration positions on UNCLOS, focusing on its compulsory dispute resolution mechanisms, (II) China's campaign against the arbitration while it was underway from 2013 to 2016, and (III) China's reactions to the final arbitral award. Finally, I conclude with a provisional assessment of (IV) how China's rejection of the arbitration has influenced regional politics and the law of the sea regime. The South China Sea arbitration is destined to be a seminal case in our reckoning with a risen China's relationship to international law. Taking careful stock at present, the implications are troubling for the coherence, uniformity, and legitimacy of the international legal system.

I. China's Pre-Arbitral Stance on UNCLOS & Third-Party Dispute Resolution

UNCLOS III was the PRC's first major multilateral treaty as a member of the United Nations. Prior to that, China's official and practical stance toward such treaties (including the first UNCLOS treaty in 1958)⁶ was outright contempt, based in post-colonial

⁶ See Shen Weiliang, *PRC Representative to the UN Seabed Committee*, XINHUA WEEKLY, 18 (Apr. 1, 1973) (stating this first multilateral effort to codify the customary law of the sea concluded with the four 1958 Geneva Conventions on the Law of the Sea (*i.e.*, UNCLOS I). The People's Republic of China did not participate and denounced UNCLOS I as "fundamentally in the interests of the superpowers in pursuing maritime hegemony and not to the advantage of the large numbers of developing countries in their just struggle to defend their sovereignty and national economic interests.") (Shen Weiliang, PRC Representative to the UN Seabed Committee, *Xinhua Weekly* (March 18, 1973)). For convenience, this essay will refer to UNCLOS III as "UNCLOS" unless specification is required.

nationalism and a distinctive strain of Marxism-Leninism.⁷ Until China's reform and opening, international law was regarded as an unwelcome foreign import, forced upon China in the form of an "Unequal Treaty System" through a series of humiliating defeats in the long nineteenth century. The history of extraterritoriality and other insults imposed upon China through the Western practice of treaty-making occupies a prominent role in the national psyche.⁸

Whatever the impact of these bitter, early experiences on the Chinese rhetoric on the subject, PRC practice shows an evolutionary change toward accepting and contributing to international law. PRC's volte face on the acceptability of such treaties is a remarkable shift, and nowhere more evident than in the law of the sea. After participating energetically throughout the long UNCLOS negotiations (1973-1982), ratifying it in 1996, and steadily promulgating domestic legislation based largely on the treaty's text,⁹ China's relationship with UNCLOS appeared, on its face, like a success story for the engagement doctrine. China was a member in good standing of a major international legal regime, and it seemed to be gradually internalizing its norms into its domestic law and practice.

⁷ See JEROME A. COHEN & HUNGDAH CHIU, *PEOPLE'S CHINA AND INTERNATIONAL LAW: A DOCUMENTARY STUDY* (1974) (explaining PRC's attitudes toward international law); see also Jacques DeLisle, *China's Approach to International Law: A Historical Perspective*, *Proceedings of the Annual Meeting*, 94 AM. SOC. INT'L L. 267, 267-75 (2000) (exploring PRC's attitude toward international law across history).

⁸ Wang Jianlang (王建朗), *The Record of Abolishing All Unequal Treaties in China* (中国废除不平等条约的历程)(*Zhongguo Feichu bu Pingdeng Tiaoyue de Licheng*) (2000); Nanchang: Jianxi People's Press (江西人民出版社), 2000); Lin Quan, ed., *Sources on the Relinquishment of the Unequal Treaties during the War Resistance Period* (抗战期间废除不平等条约史料)(*Kangzhan Qijian Feichu bu Pingdeng Tiaoyue Shiliao*) (*Period* (抗战时期废除不平等条约史料) (Taipei: Zhengzhong shuju, 1984).

⁹ See Isaac Kardon, *China's Maritime Interests and the Law of the Sea: Domesticating Public International Law*, in 12 *CHINA'S SOCIALIST RULE OF LAW REFORMS UNDER XI JINPING* 179 (John Garrick & Yan Chang Bennett eds., New York: Routledge, 2016) (explaining China's law reforms relating to international law).

Closer inquiry, however, demonstrates that PRC never internalized core norms essential to the treaty's functionality. Among them, two stand out as most relevant to this arbitration. First, China does not accept that the rights and jurisdiction codified in UNCLOS III should extinguish or supersede rights and jurisdiction based on other sources. In this case, China bases its claims to some 80% of the water space of the South China Sea upon "historical rights" that it refuses to define. Second, China purports to exclude from compulsory dispute resolution some of the central issues for which that mechanism was designed. Here, the Chinese demand bilateral diplomatic "negotiation and consultation" instead of third-party dispute-resolution prescribed in the Convention.

In both instances, addressed in detail below, China reconciles inconvenient parts of UNCLOS with PRC policy through tortured interpretations of the treaty. This mode of interpretation treats UNCLOS as fundamentally indeterminate and far from comprehensive. In so doing, China's advocates grant a wide berth to extravagant PRC claims to rights and jurisdiction not contemplated by the other parties to the Convention. Correspondingly, China's stance on compulsory dispute resolution effectively denies the authority of the international community to adjudicate or otherwise restrict those unique claims. This section analyzes each of these issues to establish a "baseline" description of China's position from which to assess PRC's subsequent actions surrounding the arbitration.

China's "Historical Rights" and Other Excessive Claims in the South China Sea

PRC was willing to ratify UNCLOS III despite several clear disadvantages posed by the new treaty. The final text had to be accepted as a "package deal,"¹⁰ meaning any state seeking the rights and jurisdiction conferred by the treaty took on all of the corresponding obligations. Chinese policymakers understood

¹⁰ See United Nations Convention on the Law of the Sea, art. 309 (Dec.10, 1982), 1833 U.N.T.S. 397. (whereas some treaties allow parties to issue "reservations" that exempt them from one or more elements of the treaty, Article 309 of UNCLOS categorically denies this right).

clearly and in advance that certain “contradictions” between the clear black letters of the treaty and the broad, undefined nature of China’s maritime claims would inevitably cause some friction.¹¹ Yet PRC has never relinquished its extra-UNCLOS claims, and has, in fact, augmented them since ratifying.¹² This process is possible because China’s domestic legal institutions do not necessarily bind the state to its international legal obligations. Lax and under-institutionalized legal rules permit *ad hoc* and opportunistic interpretations to prevail where international law comes into conflict with policy.¹³

The PRC’s “excessive claims”¹⁴ are most evident in the South China Sea. Among them are (1) straight baselines around all PRC-claimed territory, regardless of whether they satisfy the requirements of Article 7;¹⁵ (2) archipelagic baselines drawn around the Paracel Islands (and by inference, the Spratly Islands), which are entitled at most to individual sets of baselines around each feature; (3) a host of restrictions on navigation (notably, on innocent passage through territorial seas and military activities in EEZs); and finally, (4) the notorious “nine-dashed line” map that represents some form

¹¹ See Song Yann-Huei & Zou Keyuan, *Maritime Legislation of Mainland China and Taiwan: Developments, Comparison, Implications, and Potential Challenges for the United States*, 31 OCEAN DEV. & INT’L L. 303, 308-09 (2000) (discussing why the Vice-Foreign Minister Li Zhaoxing thought PRC should ratify UNCLOS. Addressing the Standing Committee of the Eighth PRC National People’s Congress shortly before the ratification, he listed four pros and four cons to joining the convention, arguing that the former outweighed the latter).

¹² See Kardon, *supra* note 9 (discussing PRC’s ambitious domestic legal efforts to augment its maritime rights, which would be seen as unlawful by any reasonable interpretation of UNCLOS).

¹³ See Xue Hanqin & Jin Qian, *International Treaties in the Chinese Domestic Legal System*, 8.2. CHINESE J. INT’L L. 299, 300 (2009) (discussing the loophole in Chinese Constitution and basic laws that “do not contain any provision on the legal status of international treaties and their hierarchy in the domestic legal system”).

¹⁴ See J. ASHLEY ROACH, ROBERT W. SMITH, *EXCESSIVE MARITIME CLAIMS* (3rd ed. 2012) (offering the comprehensive, if U.S.-determined, accounting of which maritime claims do not comport with the law of the sea and why).

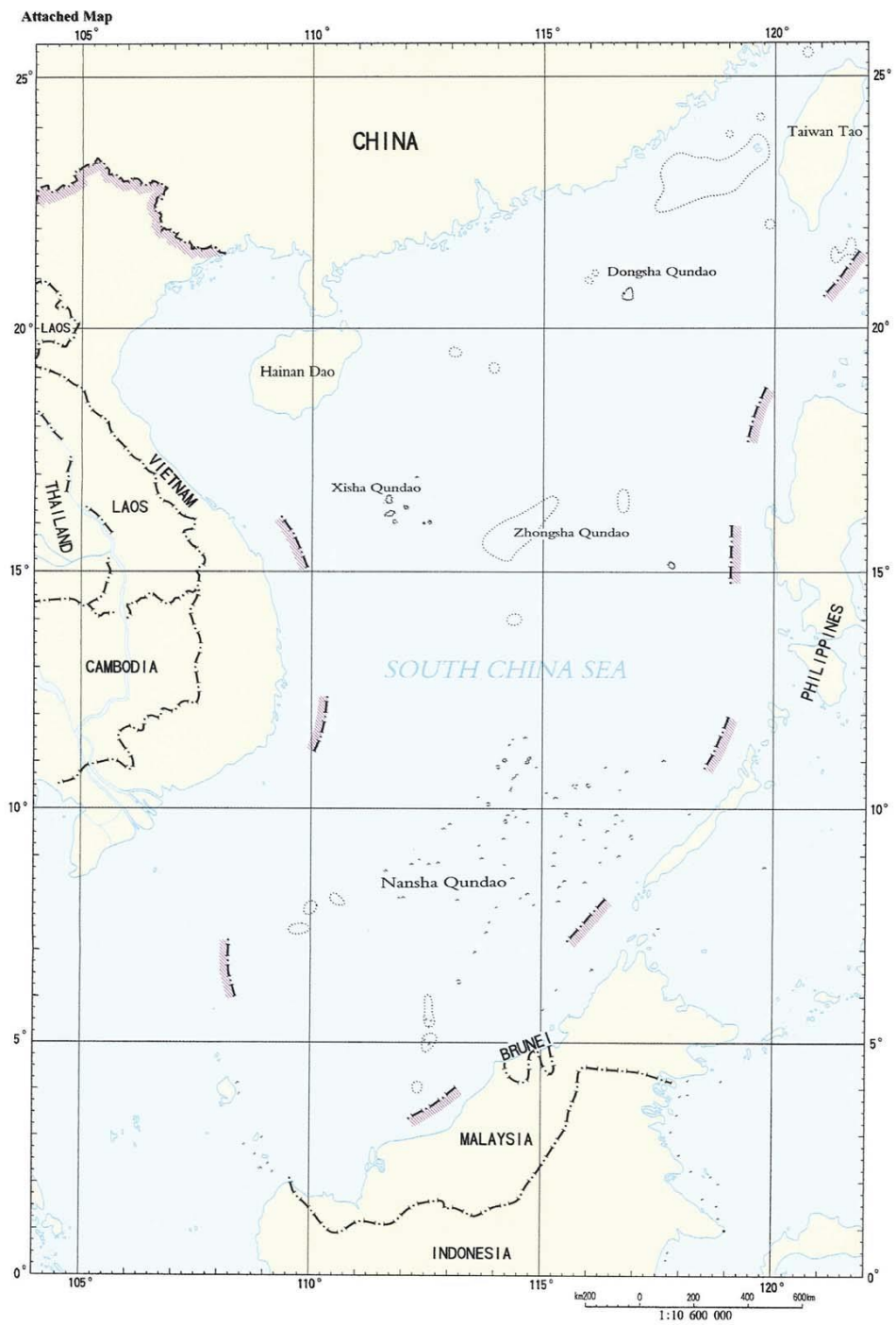
¹⁵ See United Nations Convention on the Law of the Sea, art. 7.1 (Dec.10, 1982), 1833 U.N.T.S. 397. (specifying limited conditions under which straight baselines may be drawn, namely “where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity.”).

of sovereignty and “historic rights” claim to most of the South China Sea.¹⁶ While there are other ways to characterize PRC’s claims, this minimal accounting establishes that there are multiple elements of Chinese interpretation and application of the law of the sea that are likely to come into conflict with that of other states.

Image 1: China’s “Nine-Dashed Line”¹⁷ as submitted to the UN

¹⁶ See Zhiguo Gao & Bing Bing Jia, *The Nine-Dash Line in the South China Sea: History, Status and Implications*, 107 Am. J. Int’l L. 98, 108 (Beijing: Haiyang, 2014) (offering the most careful and comprehensive Chinese accounting for how this claim, however defined, might entitle the PRC to some maritime rights not included in UNCLOS).

¹⁷ See “Note Verbale,” from People’s Republic of China, “Note Verbale,” submitted to the United Nations Commission on the Limits of the Continental Shelf (May 7, 2009), http://www.un.org/depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm.pdf [<https://perma.cc/96UH-6B39>] (stating China’s position of indisputable sovereignty over the islands in the South China Sea).



That nine-dashed line claim is the most easily recognizable (*see* Image 1 above) and consequential of the PRC's various claims, and one that is plainly at odds with some basic norms of the Convention. For one, the treaty expressly establishes a geographic basis for maritime entitlements. All maritime rights and jurisdiction conferred under the Convention (which is framed as a comprehensive "constitution for the world's oceans") are a function of proximity to sovereign land territory (*la terre domine la mer*). Any historical claim not based on geography is in theory superseded by an agreed geographic system for distributing rights to coastal states. Thus, certain of China's claims to maritime space on the basis of some historical usage contradict the basic intent and purposes of UNCLOS III—and especially the EEZ regime.

In effect, the nine-dashed line deprives all of the other coastal states in the South China Sea of EEZ resource rights and jurisdiction. Although there is no domestic legislation establishing the basis of this claim, PRC's 1998 Law on the Exclusive Economic Zone and Continental Shelf creates the statutory possibility for a "historical rights" claim in stating that "the provisions in this Law shall not affect the rights that PRC has been enjoying ever since the past."¹⁸ This indeterminate, historical argument for, in effect, exempting itself from the EEZ regime looms large in China's efforts to deny the authority of the UNCLOS tribunal to render judgment on China's claims. The Philippines launched its suit against China in large part to put the question of the legality of that line to the judgment of the international community.

Downplaying the Role of Third-Party Dispute Resolution

China maintains a principled opposition to mandatory dispute resolution procedures. PRC legal scholars have been asserting as much since at least the early 1960s: where sovereignty is implicated, "it is never possible to seek a settlement from any

¹⁸ Zhuanshu Jingjiqu he Dalujia Fa (专属经济区和大陆架法专属经济区与大陆架法) [Law of the Exclusive Economic Zone and the Continental Shelf of the People's Republic of China] (promulgated by Standing Comm. Nat'l People's Cong., (effective June 26, 1998), http://www.npc.gov.cn/englishnpc/Law/2007-12/11/content_1383573.htm [<https://perma.cc/RG3K-AGQJ>].

form of international arbitration.”¹⁹ This rejection emerges from some combination of opportunism, weak domestic legal institutions, and the bitter legacy of extraterritoriality and other infringements on Chinese sovereignty. While blanket opposition to international arbitration is no longer in effect (*e.g.*, China’s growing and effective use of the WTO arbitration system),²⁰ the vestiges of that hostile attitude remain in the PRC’s current practice. Given the tacit invitation to arbitrate manifested in China’s excessive maritime claims, and their plausible bearing on sovereignty, it is not at all surprising that PRC would seek to exclude itself from the Philippines’ suit.

In respect of the law of the sea, China made its views on this issue known during the negotiations of the Conference. The leading international legal scholar on the Chinese delegation, Wang Tieya, made his only official comment to the plenary group on the subject of dispute resolution, stating that a compulsory and binding dispute resolution procedure is a non-starter.²¹ This opposition meant that the PRC did not entirely embrace the “package deal” of UNCLOS when it ratified in 1996. Instead, by including several reservations in its signing statement, China signaled that it would not fully accept the dispute resolution procedures of Part XV. Among those reservations, China announced that it “will effect, through consultations” resolution on maritime boundary issues.²² In so doing, it acted in breach of the clear prohibition on excluding any part of the Convention

¹⁹ Gao Yuanping, *International Dispute Settlement*, in GUOJI FA (国际法) [International Law] 611-12, (Wang Tieya ed., Beijing: Law Press, 1995).

²⁰ Gregory Shaffer & Henry Gao, *China’s Rise: How it Took on the U.S. at the WTO*, 1 U. OF ILLINOIS L. REV. 115, 132 (Jan. 2018).

²¹ See UNCLOS III Official Documents, A/CONF.62/SR.112 (listing Wang Tieya’s comment).

²² See United Nations Division for Ocean Affairs and the Law of the Sea, *Declarations and Statements* (1996), http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#China Upon ratification [https://perma.cc/P6VH-739N] (NB—in 2006, China opted to exempt itself from certain forms of compulsory dispute resolution—including boundary delimitation—by evoking Article 298. Had PRC exercised this possibility in 1996 upon ratification, there would have been no obvious breach of Article 309).

(Article 309), signaling an *a la carte* approach to interpreting and applying the treaty's rules.

This emphasis on dialogue and consultation in lieu of formal dispute resolution is a central component of PRC's modern practice of international law. In 2013, PRC's UN Ambassador to the UNGA Sixth Committee (on legal affairs) offered the official statement, "[t]he Chinese government actively upholds peaceful settlement of disputes, and proposes to settle international disputes properly through negotiation, dialogue and consultation."²³ This statement is significant for its omission of "arbitration and judicial settlement," listed in Article 33(1) of the UN Charter²⁴ as available options for international dispute resolution. Those procedures are by no means mandatory, but it is notable that China has *a priori* excluded them from consideration in dealing with international disputes.²⁵ A jealous regard for sovereign prerogatives is a key principle in PRC practice of international law.

These two positions—maintaining excessive, undefined claims and excluding mandatory arbitration that might limit them—prefigure the PRC's reaction to the Philippines' arbitration. They reflect certain national interests that Beijing is unwilling to subordinate to international law, a posture not uncommon among great powers.²⁶ Further, and more specific to the Chinese case, they represent a principled rejection of authoritative decisions

²³ H.E. Ambassador Wang Min, *From Chinese Mission to the United Nations*, Address Before the 68th Session of the UN General Assembly (Oct. 10, 2013), http://www.fmprc.gov.cn/mfa_eng/wjb_663304/zwjg_665342/zwbd_665378/t1087085.shtml [https://perma.cc/MK9Y-NPWW].

²⁴ U.N. Charter art. 33, ¶1, <http://www.un.org/en/charter-united-nations/> [https://perma.cc/JQ2C-Y764].

²⁵ Julian Ku, *China's Definition of the "Peaceful Settlement of International Disputes" Leaves Out International Adjudication*, OPINIO JURIS (Oct. 15, 2013, 12:53 PM), <http://opiniojuris.org/2013/10/15/obligation-seek-peaceful-settlement-international-disputes-include-international-adjudication/> [https://perma.cc/7DMD-2CXZ].

²⁶ See Anu Bradford & Eric A. Posner, *Universal Exceptionalism in International Law*, 52. HARV. INT'L L.J. 1 (2011) (refuting the American exceptionalism underlying the American stance toward international law by comparing the case of China, the European Nation, and the United States).

rendered outside of Beijing's sovereign control. Whatever the many causes of this acute preoccupation with sovereignty, it has distinct consequences for the effectiveness of international legal regimes largely predicated on making certain binding demands of sovereign states.

The overwhelming imperative for the Chinese party-state to exercise control manifests in the sequence of official and semi-official reactions to the South China Sea Arbitration. At an early stage, PRC statements sought to diminish the importance of the law of the sea as the sole authoritative source of law, subordinating it to historical factors as well as other bodies of law. Following a principled commitment to "inviolable Chinese sovereignty" that brooks no meaningful penetration by international law, China reserved the right to interpret the rules according to its domestic priorities, with only minimal regard for international consequences.

II. Struggling Against an "Illegitimate" Arbitration

In January of 2013, the Republic of the Philippines Ministry of Foreign Affairs filed a Statement and Notification of Claim under Article 287 and Annex VII of UNCLOS III.²⁷ The Philippines opted to pursue UNCLOS arbitration as a final option after the PRC had seized the Scarborough Shoal in the spring of 2012. In evicting Philippine fishermen and law enforcement from a disputed feature in the South China Sea that both states had tenuously shared for decades, China catalyzed another round of a vain international frenzy over its "assertiveness."²⁸ U.S. efforts to

²⁷ REPUBLIC OF PHILIPPINES DEPARTMENT OF FOREIGN AFFAIRS, NOTIFICATION OF STATEMENT AND CLAIM. NO. 13-0211 (2013), <http://www.philippineembassy-usa.org/uploads/pdfs/embassy/2013/2013-0122-Notification%20and%20Statement%20of%20Claim%20on%20West%20Philippine%20Sea.pdf> [<https://perma.cc/A6C3-M2T8>].

²⁸ This "assertiveness" trope began in 2009 and has continued through the present. Several analysts weighed in on the degree to which it was properly labeled, though all agree that the Scarborough Shoal incident could not be considered otherwise. See Michael Swaine & Taylor Fravel, *China's Assertive Behavior—Part Two: The Maritime Periphery*, *Periphery*, 35 CHINA LEADERSHIP MONITOR (2011), <http://www.hoover.org/research/chinas-assertive-behavior-part-two>

mediate and stand down the Chinese at Scarborough in the spring of 2012 were ineffectual, as were bilateral Sino-Philippines efforts to deescalate and return to the status quo ante.²⁹ Chinese law enforcement vessels remained at the shoal and excluded the once-routine operation of Philippine fishing vessels in around the shoal. This failure, compounded by decades of incremental Chinese gains at their expense, led the Philippine leadership to launch proceedings under the compulsory arbitration provisions of UNCLOS—this despite no reasonable expectation China would willingly comply.

Still, as a party to the Convention, China was and remains legally bound to honor the arbitral award. Because consent for compulsory arbitration was granted in ratification, the mechanism established in UNCLOS Part XV does not require both parties to appear before the tribunal for its decision to be final and binding.³⁰ Despite some of the PRC's objections to the Philippines' standing and the tribunal's jurisdiction, the power to determine legal obligation plainly lies with the UNCLOS body

maritime-periphery [<https://perma.cc/5YJK-LEX91>] (assessing China's maritime policy in terms of how assertive PRC has become in resolving both disputed and undisputed maritime territories); Michael Yahuda, *China's New Assertiveness in the South China Sea*, 22 J. CONTEMP. CHINA (ISSUE) 81, 446 (2013) (explaining China's heightened nationalism and assertiveness in promoting its claims in South China Sea); Alastair Iain Johnston, *How New and Assertive Is China's New Assertiveness*, 37 INTERNATIONAL SECURITY 7 (2013) (critiquing the concept of Chinese diplomacy's "new assertiveness" by evaluating seven recent cases where Chinese diplomacy shows consistent, or even moderate, reaction to international, diplomatic claims, except where maritime disputes are involved).

²⁹ MICHAEL GREEN ET AL., CTR. FOR STRATEGIC AND INT'L STUDIES, COUNTERING COERCION IN MARITIME ASIA: THE THEORY AND PRACTICE OF GRAY ZONE DETERRENCE 95-123 (2017), https://csis-prod.s3.amazonaws.com/s3fs-public/publication/170505_GreenM_CounteringCoercionAsia_Web.pdf?OnoJXfWb4A5gw_n6G.8azgEd8zRIM4wq [<https://perma.cc/8DJH-PEG6>].

³⁰ Article 296 establishes the binding and final nature of an award rendered under the compulsory dispute resolution procedures of UNCLOS III. Part XV, Annex VII, Article 9 explicitly states that a default of appearance "shall not constitute a bar to the proceedings" while Article 11 in that section affirms an award's finality.

that arbitrated the case.³¹ China immediately and forcefully rejected this obligation nonetheless, and presented its arguments to the court of public opinion rather than to the arbitrators.

Two Arguments and One Prescription

The thrust of Chinese statements throughout the three and a half years of the arbitral process was constant. It can be distilled to two arguments and one prescription that flows from them. The first argument is that the Philippines took China to arbitration solely as a *political* exercise to deny China's rightful "maritime rights and interests" and "internationalize" the disputes. China's opposition, therefore, was undertaken to uphold the *legal* regime of the law of the sea against this alleged abuse. Second, Chinese spokespeople argued that the Philippines' complaints fell beyond the scope of the Convention or were ruled out as subjects of arbitration by the Convention itself. They reasoned that a broader set of considerations—including general and customary international law as well as vague consideration of *history*—rightly govern the disputes. Of course, such factors cannot be adjudicated in an UNCLOS forum and therefore demand alternative modes of dispute resolution.

These two arguments yield a policy prescription from Beijing about how to manage disputes: bilateral "dialogue and consultation" (对话协商). Whereas any state can have recourse to international legal means at any time as an exercise of its sovereignty, China counseled the Philippines to forego this right and instead to pursue a diplomatic approach (despite disadvantages intrinsic to dealing directly with a far larger power). This prescription broadcasts a signal to any other small state that might seek to punch above its weight in seeking legal remedy against China, negating any leverage international law may offer.³² China's insistence on this approach tracks its general

³¹ See United Nations Convention on the Law of the Sea, art. 288 (Dec. 10, 1982), 1833 U.N.T.S. 397 ("In the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal.").

³² As will be discussed in the concluding section, Vietnam is the proximate target of this signal. The Vietnamese government submitted a *Note Verbale* and a

attitude on the highly limited nature of international law. Any authoritative third-party judgment on its maritime claims is anathema to the PRC approach to these disputes. Specifically, the *determinate* nature of an award would radically narrow the possibilities for China's excessive claims. Informed Chinese recognized that Beijing's legal strategy is to precisely avoid any determination of the nature and scope of its claims, and thus to retain the maximum flexibility to conduct diplomacy.³³

The proceeding section examines PRC's official statements over the course of the arbitration, as well as notable commentaries from Chinese and sympathetic foreign scholars. The legal (or logical) validity of the claims from either side of the case is not under scrutiny. Rather, the aim is to analyze China's response, showing its attitude toward (and possible influence on) the international law of the sea.

China Can Say "No No No No!"

Within days of the Philippines' Statement and Notification of Claim, PRC officially rejected the entire procedure with extreme prejudice. The Philippines sought relief for fifteen alleged Chinese violations of its obligations under UNCLOS, ranging from the validity of China's "historic rights" to lapsed seamanship and poor environmental stewardship.³⁴ The Philippines' claims had been crafted by skilled UNCLOS lawyers in the Philippines and Foley Hoag LLP, an experienced private law firm in Washington, D.C. Their submissions scrupulously avoided treading on questions of territorial sovereignty and

statement of interest in the case to the tribunal, requested official materials, and sent an official delegation to observe the proceedings. *See* PCA, *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, Judgment, P.C.A. No. 2013-9 (Oct. 29) (explaining Vietnam's movements against China).

³³ Interviews by Author in Hainan, Beijing, and Shanghai (2014).

³⁴ After submission of the Notification and Statement of Claim, the arbitral body was formed, and formal procedures adopted. The Philippines submitted a Memorial setting out fifteen submissions on which they sought relief. *See* *The South China Sea Arbitration*, *supra* note **Error! Bookmark not defined.** (providing a thorough recounting of all the stages of the process).

boundary delimitation, which would fall outside of the tribunal's competence. Instead, the submissions hinged on the question of maritime *entitlements*—that is, the type and extent of jurisdiction and rights that UNCLOS permits states to claim from the sovereign territory, not the status of the sovereign territory per se. Nonetheless, the Chinese riposte protested the underlying sovereignty issues: “[t]he key and root of the dispute over the South China Sea between China and the Philippines is territorial disputes”³⁵ announced the PRC Ministry of Foreign Affairs (MFA) on the day of the claim. China did not abandon this premise that the arbitration implicated sovereignty claims throughout the nearly four years of hearings and deliberation held at the Permanent Court of Arbitration in Hague.³⁶

On February 19, the PRC's Ministry of Foreign Affairs (MFA) publicized a fixed legal and policy position on the matter in a *Note Verbale* to the Philippines. That position summarized as “Four Nos:” (1) no acceptance, (2) no participation, (3) no recognition, and (4) no implementation (不接受, 不参, 不承认, 不执行).³⁷ By several accounts from Chinese legal scholars, this outright refusal to honor any aspect of the procedure now underway was a knee-jerk reaction from central leadership. Confronted with the prospect of legitimizing an arbitration likely to go poorly for China, the consensus view among the leadership in Beijing was to attack the legal process itself and punish the Philippines for its “insubordination.”³⁸ China did not formally participate in any part

³⁵ *China Reiterates Islands Claim After Philippine UN Move* (Jan. 23, 2013) <http://www.bbc.com/news/world-asia-21163507> [<https://perma.cc/FVS9-X3T2>].

³⁶ NB—The arbitration was not a “PCA arbitration,” despite the frequent citation as such in the press. The PCA served as the registry for the arbitration, providing the venue, clerks, and administrative work necessary to conduct a complex international arbitration. The legal force of the ruling, the process by which the arbitrators were selected, as well as the source of their jurisdiction are solely a product of UNCLOS (specifically Part XV, Section 2, which provides “Compulsory Procedures Entailing Binding Decisions,” and Annex VII which details the default arbitration procedures).

³⁷ Press Release, Foreign Ministry Spokesperson Hong Lei, Ministry of Foreign Affairs of the People's Republic of China (Feb. 19, 2013), http://www.mfa.gov.cn/web/fyrbt_673021/jzhsl_673025/t1014798.shtml [<https://perma.cc/K56K-D9PL>].

³⁸ Interviews by Author in Hainan and Beijing (April–December 2014).

of the procedure. It neglected to appoint an arbitrator, declined to argue on its own behalf, and failed to submit documents and evidence that might have disposed the arbitrators more favorably to its counterclaims. However, China did mount a large-scale public relations campaign surrounding the arbitration, seeking support within the international community for its interpretation of UNCLOS and the role of international law in international disputes.

China's categorical rejection of the arbitration process is best captured in a "Position Paper" published by the MFA in December of 2014.³⁹ The arguments put forward in the Position Paper were a composite of an all-hands-on-deck effort from lawyers and analysts throughout China's highly integrated government and think-tank community.⁴⁰ While it was not submitted directly to the arbitrators, the PRC published its statement not long before the deadline to officially submit materials in response to the Philippines claim. It was ultimately considered officially by the tribunal as a plea and informed the decision to bifurcate the proceedings into separate jurisdiction and merits phases.⁴¹ In it, China's diplomats offered three principal reasons that the arbitral tribunal should not find jurisdiction. Each endeavors to confound the arbitral process by introducing novel elements of China's claims and diplomatic history that do not admit of interpretation under the Convention.

³⁹ Ministry of Foreign Affairs of the People's Republic of China, *Position Paper on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines* (Dec. 7, 2014), http://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1368895.htm [<https://perma.cc/GRG9-NYGL>] [hereinafter *Position Paper*].

⁴⁰ LOUIS B. SOHN & JOHN E. NOYES, *CASES AND MATERIALS ON THE LAW OF THE SEA* (2004). The author attended fifteen separate workshops, conferences, and meetings concerning the arbitration during the period April–December 2014, in which experts (and non-experts) discussed the various components of the Chinese objection and "perfected" them in reports that were sent directly to MFA.

⁴¹ *The Republic of the Philippines v. the People's Republic of China*, PCA Case 2013-9, Procedural Order No. 4 (Apr. 21, 2015), In the Matter of an Arbitration before an Arbitral Tribunal Constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea ("Convention") (Permanent Court of Arbitration Apr. 21, 2015), <https://www.pcacases.com/web/sendAttach/1807> [<https://perma.cc/E334-WZDZ>].

Sovereignty is a non-starter. The Position Paper’s first argument is that “[t]he essence of the subject-matter of the arbitration is the territorial sovereignty over several maritime features in the South China Sea, which is beyond the scope of the Convention and does not concern the interpretation or application of the Convention.”⁴² The Convention authorizes an arbitral body (there are several choices in Part XV and Annexes for how it is to be constituted) to rule on “interpretation and application” of the Convention as regards the case under consideration. Because the Convention treats only matters maritime, the more fundamental questions of territorial sovereignty is obviously excluded from the jurisdiction of any arbitral body formed pursuant to the treaty.

The Position Paper claims that the Philippines acted in bad faith, smuggling in a sovereignty dispute under the guise of questions of maritime entitlement. “The Philippines,” the paper alleges,

is well aware that a tribunal . . . of the Convention has no jurisdiction over territorial sovereignty disputes. In an attempt to circumvent this jurisdictional hurdle and fabricate a basis for institution of arbitral proceedings, the Philippines has cunningly packaged its case in the present form . . . This contrived packaging, however, fails to conceal the very essence of the subject-matter of the arbitration, namely, the territorial sovereignty over certain maritime features in the South China Sea.⁴³

Recognizing that there is no explicit request for a decision on sovereignty, the PRC paper parses the Philippines’ claims against it, citing the impossibility of ruling on entitlements if the underlying sovereignty questions are undetermined.⁴⁴

China is arguably justified in recognizing that ultimately, virtually all questions of “interpretation and application” of the treaty rely on some determination of sovereignty. Without sovereignty

⁴² Ministry of Foreign Affairs of the People’s Republic of China, *supra* note 39.

⁴³ *Id.* at ¶14.

⁴⁴ *Id.* at ¶15.

prefiguring a claim, there is no possibility of maritime jurisdiction of any sort. However, following this logic, the tribunal would lack the authority to make virtually any decision whatsoever—an obvious absurdity. From the Chinese legal standpoint, however, there is nothing absurd about this. “Whatever logic is to be followed, only after the extent of China’s territorial sovereignty in the South China Sea is determined can a decision be made on whether China’s maritime claims in the South China Sea have exceeded the extent allowed in the Convention.”⁴⁵ This high bar for admissibility would preclude most use of compulsory dispute resolution, consistent with China’s stated preferences.

By a way of reinforcing the claim that sovereignty is necessarily implicated, the Position Paper issued the PRC’s clearest statement to date about the *nature* of its sovereignty claims to the Spratly Islands.⁴⁶ Among other clarifying effects, this statement confirms that China’s 2011 *Note Verbale*, which was addressed to Secretary General of the United Nations, intentionally referred to the Spratly Islands in the singular form.⁴⁷ China evidently considers them a geographic unity for the purposes of sovereign title and maritime entitlements.⁴⁸ The Position Paper denounces the Philippines specification of individual features occupied by China as “an attempt at denying China’s sovereignty over the Nansha [Spratly] Islands as a whole.” This claim to the “islands as a whole,” or as a “dependent archipelago” in the words of one U.S. law of the sea specialist,⁴⁹ is among the several creative efforts employed by Chinese lawyers and diplomats to confound the application of the

⁴⁵ *Id.* at ¶10.

⁴⁷ Permanent Mission of the People’s Republic of China to the United Nations, *Note Verbale*, No. CML/8/2011 (Apr. 14, 2011).

⁴⁸ Among other clarifying effects, this statement confirms that China’s 2011 *Note Verbale* addressed to Secretary General of the United Nations intentionally referred to the Spratly Islands in the singular form; China evidently considers them a geographic unity for the purposes of sovereign title and maritime entitlements. Permanent Mission of China to the United Nations, *Note Verbale*, No. CML/8/2011 (Apr. 14, 2011).

⁴⁹ J. Ashley Roach, *Dependent Archipelagos Enclosed by Straight Baselines: an Excessive Claim?*, 49.3 OCEAN DEV. & INT’L L. (forthcoming 2018) (draft on file with author).

Convention to its claims. In describing the features as an archipelago (群岛), or collection of intrinsically linked islands, PRC attempted to reconfigure the demands facing the arbitrators. Instead of ruling on the status of individual features, the tribunal would have to consider the whole cluster of hundreds of rocks, reefs, atolls, and sandbars controlled in part by China, Taiwan, Vietnam, Malaysia, and the Philippines before reaching any judgments. Naturally, if this argument were to be admitted, judgment on anything concerning the Spratly Islands would be impossible in an UNCLOS court trying a bilateral claim.

The Position Paper adduces an additional reason that sovereignty is implicated in the Philippines' claim. Namely, two of the Philippines submissions (numbers four and six) ask the tribunal to determine whether or not a given feature is in fact a naturally formed island under Article 121, or a "low-tide elevation," which cannot be the subject of a sovereign title. "Whether low-tide elevations can be appropriated as territory is in itself a question of territorial sovereignty, not a matter concerning the interpretation or application of the Convention. The Convention is silent on this issue of appropriation."⁵⁰ Alongside the "archipelago" argument, this stands as another effort to confound the application of the treaty to the case at hand. In this case, the Chinese appeal to gaps in general international law for making determinations about appropriation of low-tide elevations.⁵¹

This line of reasoning regarding sovereignty rests on the two core arguments introduced above, namely that the Philippines abused international law to pursue a political agenda, and that they are asking an UNCLOS body to arbitrate a matter that falls beyond its competence. The Position Paper enjoins the reader to consider that China has been unjustly maligned for breaches of its obligations. Instead, it is "the Philippines [that] contravenes the general principles of international law and international jurisprudence on the settlement of international maritime

⁵⁰ *Position Paper*, *supra* note 39 at ¶25.

⁵¹ *Position Paper*, *supra* note 39 at ¶25 (citing *Qatar v. Bahrain*, ICJ 2001 and *Nicaragua v. Columbia*, ICJ 2012).

disputes.”⁵² This argumentation goes well beyond what would be necessary to establish a jurisdictional exception, and instead moves to reposition China as the champion of international law. This interpretation is developed at length throughout the Position Paper.

The Philippines does not enjoy the right to bring a suit against China. The second line of attack in the Position Paper is again directed at the Philippines’ supposed bad faith in launching the arbitration. In this instance, the fault lies in the Philippines failure to satisfy China’s standards for diplomatic negotiation prior to pursuing arbitration. “There exists an agreement between China and the Philippines to settle their disputes in the SCS through negotiations, and the Philippines is debarred from unilaterally initiating compulsory arbitration.”⁵³ The notion of “unilateral” use of a compulsory mechanism betrays a basic disregard for the Philippines’ rights as a party to the multilateral treaty that established this mandatory procedure. Nonetheless, China’s explicit position is that the Philippines is obliged to consult with China before undertaking a sovereign decision to launch an arbitration on the basis of agreements concluded *outside* of the treaty framework. The crux of this claim is that UNCLOS is not the appropriate instrument for handling this dispute, and is, in fact, superseded by the record of Sino-Philippines diplomacy.

In the Chinese interpretation, the Philippines had previously renounced its rights under the Convention over the course of several diplomatic agreements with China. This process of renouncing its right to “unilaterally” seek a legal remedy began, according to PRC, with agreements following the first (unilateral) Chinese seizure of the Philippine-held territory in the Spratlys, at Mischief Reef in 1995. Following this flare-up, the parties issued a joint statement in which they “agreed to abide by” certain norms “with a view to eventually negotiate a settlement of the bilateral disputes.”⁵⁴ Citing chapter and verse of the nations’ subsequent and extensive bilateral and multilateral diplomatic intercourse

⁵² *Position Paper*, *supra* note 39 at ¶29.

⁵³ *Position Paper*, *supra* note 39 at Heading III.

⁵⁴ *Position Paper*, *supra* note 39 at ¶31.

over the past two decades, the Position Paper identifies a range of hortatory statements that “establish an obligation between the two countries”⁵⁵ to resolve their disputes through “dialogue and consultation.” PRC holds that these agreements, collectively, should constitute a bar on compulsory dispute resolution.

One of the principal sources that China cites as evidence of the Philippines’s lack of grounds for launching the suit is the 2002 Declaration on the Conduct of Parties in the South China Sea (DOC), which states in paragraph four that “[t]he Parties concerned undertake to resolve their territorial and jurisdictional disputes by peaceful means . . . through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea.”⁵⁶ As the signatories well knew at the time, such hortatory statements were hardly binding—nor even specific enough to rule out all manner of adversarial action. Ironically, China was a staunch opponent of the DOC being considered a binding legal instrument,⁵⁷ yet cites it here as part of a diplomatic pattern that, in aggregate, constitutes a binding agreement.

That such diplomatic statements should override treaty obligations can be explained by China’s position on the narrow effective scope of UNCLOS. It shows a disregard for the difference between political statements of intent and legal contracts—at least where such a distinction puts China at a disadvantage. In Chinese domestic law, this is indeed a distinction without a difference. PRC’s 1990 Law on the Procedure of the Conclusion of Treaties (Treaty Law) does not distinguish between “treaties” and

⁵⁵ *Position Paper*, *supra* note 39 at ¶38.

⁵⁶ ASEAN, *Declaration on the Conduct of Parties in the South China Sea*, http://asean.org/?static_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea-2 [<https://perma.cc/4Y7G-NYWU>].

⁵⁷ “The existence of the U-shaped line may be one of the reasons why China has been reluctant to sign a legally binding code of conduct with the ASEAN countries,” notes an UNCLOS scholar typically supportive of Chinese claims. Zou Keyuan, *China’s U-Shaped Line in the South China Sea Revisited*, 43 OCEAN DEV. & INT’L L. 18, 24 (2012).

“important agreements” nor provide a standard for “important.”⁵⁸ The determination of which agreements will count as “important” (and thus entail legal obligations on par with formal treaties) is left entirely to the PRC State Council, the executive cabinet of the Chinese state. This statute authorizes the state to undertake *ad hoc* decisions about which agreements will count as legally binding.⁵⁹ Where convenient, non-legal, non-binding joint press statements (like those cited in the Position Paper) may outweigh ratified treaties.

A Chinese exemption under the Convention. The Position Paper advances a final set of claims to further diminish the effective scope of UNCLOS. “Even assuming, *arguendo*, that the subject-matter of the arbitration were concerned with interpretation or application of the Convention, that subject-matter would still be an integral part of maritime delimitation and, having been excluded by the 2006 Declaration filed by China, could not be submitted for arbitration.”⁶⁰ The “2006 Declaration” refers to China’s additional submission to its signing statement, taken pursuant to Article 298, that excludes certain categories of dispute from compulsory arbitration.⁶¹ Among those excluded categories is maritime boundary delimitation, which the Position Paper alleges is also necessarily implicated by the Philippines’ claim.

⁵⁸ Zhonghua Renmin Gongheguo Dijie Tiaoyue Chengxu Fa (中华人民共和国缔结条约程序法) [Law of the People's Republic of China on the Procedure of the Conclusion of Treaties] (art. 2, promulgated by the Standing Comm. Nat'l People's Cong., effective Dec. 28, 1990), http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383893.htm [<http://perma.cc/A7SY-2WES>].

⁵⁹ For example, PRC has determined that the series of bilateral communiques between the U.S. and China have achieved equal status to treaties, even though these agreements oblige China to accept a continued U.S.-Taiwan relationship, otherwise anathema to the Chinese Communist Party. ZHONGGUO DA BAIKE QUANSHU: LAW (中国大百科全书: 法学) [ENCYCLOPEDIA OF CHINA: LAW] 195 (Encyclopedia of China Editorial Bd. ed., 1984).

⁶⁰ *Position Paper*, *supra* note 39 at Heading IV.

⁶¹ U.N. Div. for Ocean Affairs and the Law of the Sea, Declarations and Statements, China Upon ratification (Jun. 7, 1996), http://www.un.org/depts/los/convention_agreements/convention_declarations.htm [<https://perma.cc/7U8W-S9CZ>].

Again, however, the absurdity of making all possible linkages among the clearly interlinked elements of the law of the sea regime shines through. Questions about one substantive issue in the law of the sea can be made to bear upon virtually any other substantive area, provided sufficient leeway to make logical connections. If this logic were applied universally, no compulsory dispute resolution could exist because all questions would have vestigial elements of sovereignty or maritime boundary delimitation. In arguing against jurisdiction on this count, PRC strikes another blow at the efficacy of the dispute resolution procedures in the Convention. Further, it again alleges that the Philippines acted with bad-faith political motives “[t]o cover up the maritime delimitation nature of the China-Philippines dispute and to sidestep China’s 2006 declaration.”⁶² The “cover up,” as it were, is the act of smuggling certain discrete questions that have bearing on maritime delimitation such that “a so-called ‘legal interpretation’ on each of them”⁶³ “would amount to a de facto maritime delimitation.”⁶⁴ The Philippines’ submissions include issues that have been considered in previous, successful maritime boundary delimitations; ergo, the Paper reasons, the Philippines are simply seeking a backdoor to achieve maritime delimitation.

The Position Paper further alleges political motives in the Philippines failure to consult with China in advance to discover whether the issues in dispute were, in China’s view, covered under its Article 298 declaration. Without such diplomatic overtures,

it could be well imagined that any of the disputes listed in article 298 may be submitted to the compulsory procedures under section 2 of Part XV simply by connecting them . . . with the question of interpretation or application of certain provisions of the Convention. Should the above approach be deemed acceptable, the question would then arise as to whether the provisions of Article 298 could still retain any value, and whether there is any practical meaning left of the

⁶² *Position Paper*, *supra* note 39 at ¶65.

⁶³ *Position Paper*, *supra* note 39 at ¶65.

⁶⁴ *Position Paper*, *supra* note 39 at ¶69.

declarations so far filed by 35 States Parties under Article 298.⁶⁵

PRC thus positions itself as the defender of the Convention against abuses that, if taken to their logical extreme, would undermine the functioning of the treaty.

China's mode of championing the treaty, however, is largely to spare it from functioning at all in issues of any political import. In concluding the Position Paper, the Chinese argued that the South China Sea issue "is compounded by complex historical background and sensitive political factors . . . China always maintains that the parties concerned shall seek proper ways and means of settlement through consultations and negotiations on the basis of respect for historical facts and international law."⁶⁶ This valedictory statement recaps the basic thrust of the Position Paper: sovereignty is too politically sensitive to legally adjudicate; UNCLOS has a narrow scope; and the only appropriate means of resolution runs through bilateral diplomacy with Beijing.

Although it was not formally submitted, the arbitral tribunal elected to "treat the Position Paper and certain communications from China as constituting, in effect, a plea concerning jurisdiction."⁶⁷ Taken in sum, PRC objections in the Position Paper reflect long-standing positions and modes of interpretation on the law of the sea—even if they also appear cynically convenient in this case. Especially where issues of sovereignty are implicated, we should expect China to reject all modes of third-party dispute resolution. More significant and surprising, perhaps, are the various arguments intended to narrow the scope of substantive issues which may be arbitrated under the Convention. If claims to jurisdiction and sovereign rights that rely on vague historical claims and appeals to "general international law" were to fall beyond the writ of the Convention, as argued in

⁶⁵ *Position Paper*, *supra* note 39 at ¶74.

⁶⁶ *Position Paper*, *supra* note 39 at ¶92.

⁶⁷ *The Republic of the Philippines v. the People's Republic of China*, Case No. 2013-19, Arbitration Award on Jurisdiction and Admissibility, (Perm. Ct. Arb. 2015), <https://www.pcacases.com/web/sendAttach/1506> [https://perma.cc/362B-CYCS].

the Chinese paper, the capacity of the treaty to regulate maritime claims and activities would be radically curtailed.

Recruiting Support Among Chinese and Foreign Legal Experts

Despite China's principled rejection of the process, the arbitral tribunal explicitly considered the Chinese arguments about jurisdiction in its deliberations, electing to bifurcate its procedure into jurisdictional and merits awards. In the October 2015 award on jurisdiction and admissibility, the arbitrators found jurisdiction over seven of the fifteen Philippine submissions, and withheld determination on jurisdiction for the remaining eight depending on consideration of the facts during the merits phase (and clarification of one submission deemed too general). This decision guaranteed that an award on the merits was forthcoming and inspired a PRC-directed campaign to delegitimize the arbitration, the arbitrators, and the various parties purportedly conspiring against China.

Given the high probability of an adverse award, the ensuing public relations campaign was swift and pointed. A cottage industry of South China Sea arbitration law books and articles, a sudden flurry of masters and doctoral theses, and a lively conference circuit all emerged during this period.⁶⁸ Each of the arguments in the December 2014 Position Paper found enthusiastic advocates throughout China's commentariat and academy. These took the form of *ad hominem* media attacks on the arbitrators,⁶⁹ attempted *ex parte* contact with arbitrators to discourage them from

⁶⁸ The author observed this directly, as he was conducting research in Hainan, Beijing, and Taipei in 2014-2015 and had the opportunity to conduct hundreds of interviews with many of the scholars and think-tankers engaged in study and advocacy surrounding the arbitration, attend some fifteen conferences on the subject, and both teach and audit several law classes on UNCLOS at Tsinghua University and Hainan University.

⁶⁹ For a summary of this campaign, see Liu Zhen, *Questions of Neutrality: China Takes Aim at Judges in the South China Sea Case*, SOUTH CHINA MORNING POST (Jul. 11, 2016), <http://www.scmp.com/news/china/diplomacy-defence/article/1988119/questions-neutrality-china-takes-aim-judges-south-china> [<https://perma.cc/KP9A-LMM8>].

unfavorable rulings,⁷⁰ impugning the motives of personnel involved in the selection of arbitrators (articulated by a senior MFA official),⁷¹ and a spate of impassioned presentations at international law events denouncing the “wanton abuse of the law of the sea.”⁷²

This campaign achieved more than internal solidarity. A detailed rebuttal to the SCS arbitration under the auspices of a Cambridge University legal scholar marketed these arguments to a sophisticated foreign audience.⁷³ The essays in that volume set out several markers that reappear throughout the various commentaries supporting PRC during this period and provide some evidence of the tactics China employs to win converts to its mode of interpreting international law. Other volumes assembled foreign law of the sea experts, some of whom made arguments not entirely along the lines of those endorsed by PRC officialdom, but whose imprimatur gave the appearance of a credible legal debate on whether or not the arbitration was indeed a lawful exercise.⁷⁴ The upshot of these commentaries was the establishment of a body of literature available to all interested that prescribes a far narrower scope for UNCLOS-related jurisdiction than the field

⁷⁰ *The Republic of the Philippines v. the People's Republic of China*, Award on Jurisdiction and Admissibility.

⁷¹ Liu Zhenmin (刘振民), *Zhongguo Bujieshou Feilibin Suoti Nanhai Zhongcaian Wanquan Fuhe Guojifa* (中国不接受菲律宾所提南海仲裁案完全符合国际法) [*China Does Not Accept that the Philippines' Arbitration Completely Conforms to International Law*], QIUSHI [QSTHEORY] (Jul. 3, 2016), http://www.qstheory.cn/dukan/qs/2016-07/03/c_1119153268.htm [<https://perma.cc/Z7EG-5XXF>]; *News Analysis: Shunji Yanai, Manipulator Behind Illegal South China Sea Arbitration*, XINHUA (Jul. 17, 2016), http://www.xinhuanet.com/english/2016-07/17/c_135519215.htm [<https://perma.cc/T5X9-F3QC>].

⁷² Yee Sienho, Remarks at the American Society of International Law Annual Conference (Apr. 14, 2017) (meeting audio available at <https://www.asil.org/resources/audio/2017-annual-meeting> [<https://perma.cc/R3D3-H8BW>]).

⁷³ *THE SOUTH CHINA SEA ARBITRATION: A CHINESE PERSPECTIVE* (Stefan Talmon & Bing Bing Jia eds., 2014).

⁷⁴ See e.g., *ARBITRATION CONCERNING THE SOUTH CHINA SEA: PHILIPPINES VERSUS CHINA* (Wu Shicun & Zou Keyuan eds., 2016) (featuring articles by Donald Rothwell, Ted McDorman, Robert Beckman, Sam Bateman, and other well-recognized scholars of law of the sea issues).

has typically recognized. The intent was to place the Convention lower in the hierarchy of norms that bear on maritime order. If “History” or general international law or customary international law could be positioned as superior to the UNCLOS treaty, then the impact of the inevitably unfavorable award might be diminished.

The intensely political tenor of this campaign also lent credence to the proposition that the arbitration was entirely political, and that any decision that emerged from it was illegitimate. In conversation, the author has been told that the Japanese are behind the case, that the U.S. State Department wrote the Philippines’ memorial to the tribunal, and that there is some vast conspiracy of Western states to use international law to discredit China’s sovereignty in the South China Sea.⁷⁵ These non-scholarly views were widely circulated on several WeChat forums of Chinese academics and enthusiasts.⁷⁶ While these venues hosted plenty of debate on just how illegal the arbitration was, only one set of arguments overtly critical of PRC laws garnered any publicity, delivered by a Chinese-born law professor working in Australia.⁷⁷

⁷⁵ Ji Mingkui (纪明葵), *Nanhai Zhongcai Shi Xifang Daoyande Naoju* (南海仲裁是西方导演的闹剧) [*The ‘SCS Arbitration’ is a Western-sponsored Farce*], QIUZU WANG [QSTHEORY] (Dec. 11, 2014), http://www.qstheory.cn/international/2014-12/11/c_1113607463.htm [<https://perma.cc/XMY7-NEAZ>].

⁷⁶ Wang Jiangyu (王江雨), *Nanhai Zhongcaian: Guoji Zhengzhi, Guojifa Yu Guojia Liyi* (南海仲裁案: 国际政治, 国际法与国家利益) [*The SCS Arbitration: International Politics, International Laws, and National Benefits*], LIANHE ZAobao [UNION MORNING POST] (Dec. 22, 2015), https://mp.weixin.qq.com/s?__biz=MjM5MTc0NzI2Nw==&mid=401332148&idx=1&sn=04600a80141f54a9e246dc147a93b6c5&scene=5&srcid=12227FgKIvOv3JvWT0kqai6g#rd [<https://perma.cc/EV98-7QY2>].

⁷⁷ Ling Bing (凌兵) *Weishenme Zhongguo Jujue Nanhai Zhongcai Yousun Zhongguode Quanyi?* (为什么中国拒绝南海仲裁有损中国的权益?) [*Why Has China’s Rejection of the South China Sea Arbitration Damaged China’s Rights and Interests?*], ZHONGMEI YINXIANG [US-CHINA PERCEPTION MONITOR] (Dec. 18, 2015), http://www.uscnpm.com/model_item.html?action=view&table=article&id=7961 [<https://perma.cc/H9HJ-3WZD>]. These remarks were publicized by Julian Ku after the award in Julian Ku, *The Leaf Nation: China’s Legal Scholars Are Less*

With these arguments intact and circulating throughout the expert community, PRC diplomats began to recruit states to announce that they, too, did not accept the arbitration. Presumably linking opposition to some consequence, China was able to solicit clear statements from five states that they opposed the ruling: Montenegro, Pakistan, Russia, Sudan, Taiwan⁷⁸, and Vanuatu.⁷⁹ This is not an overwhelming group, though in number it is comparable to those willing to directly and explicitly support the SCS arbitration: Australia, Canada, Japan, New Zealand, the Philippines, the U.S., and Vietnam. China's MFA claimed that over sixty states had joined PRC's cause in opposing the ruling, employing an unusual counting method that included states who merely expressed support for China's principle of resolving disputes through consultation and dialogue.⁸⁰ Commenting to reporters on this outpouring of purported support, an MFA spokesman maintained that international support for the Chinese position was itself a resounding affirmation of the rule of law. PRC was defending the integrity of the system against those states (*i.e.*, the Philippines) that "break rules and undermine international rule of law under the excuse of ostensibly 'upholding the rule.'"⁸¹

He added that this support also reflects "affirm[ation] that the sovereign disputes over relevant islands and reefs in the South

Credible After the South China Sea Ruling, FOREIGN POLICY, (July 14, 2016), <http://foreignpolicy.com/2016/07/14/south-china-sea-lawyers-unclos-beijing-legal-tribunal/> [<https://perma.cc/4MVV-ZX9J>].

⁷⁸ Taiwan is not formally a state. It also bears noting that Taiwan's opposition came not because of Chinese efforts to discredit the award, but because Taiwan bristled at being excluded from observing the proceedings because it is not a member UNCLOS III because of PRC opposition. Republic of China Ministry of Foreign Affairs, *ROC Position on the South China Sea Arbitration* (Jul. 12, 2016),

https://www.mofa.gov.tw/en/News_Content.aspx?n=1EADDCFD4C6EC567&s=5B5A9134709EB875 [<https://perma.cc/ZYJ9-6UE3>].

⁷⁹ Greg Poling, Arbitration Support Tracker, Asia Mar. Transparency Initiative (June 16, 2016), <https://amti.csis.org/arbitration-support-tracker/> [<https://perma.cc/GZ9V-SSK5>].

⁸⁰ Lu Kang(陆慷), *Foreign Ministry Spokesperson Regular Press Conference*, P.R.C. MINISTRY OF FOREIGN AFFAIRS (June 14, 2016), http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1372136.shtml [<https://perma.cc/K4NJ-DYQP>].

⁸¹ *Id.*

China Sea shall be properly resolved through friendly negotiation by parties directly concerned on the basis of respecting historical facts and international law.”⁸² This construction—the juxtaposition of international law *and* history—is of paramount importance to a full understanding of the Chinese view on the appropriate scope and reach of international legal norms.

UNCLOS, from this perspective, is not the exclusive source of law on maritime issues. Chinese interlocutors frequently point to the customary international law of territorial acquisition as a basis for their claims to sovereignty over South China Sea features. China’s acquisitive actions predate the Convention itself, and therefore should not be regulated by it under a doctrine of “intertemporal law” (时际法).⁸³ Corollary to this argument is the claim that there are different bodies of law that are equally if not more valid, and that must be balanced against UNCLOS rules.⁸⁴ Following this reasoning, the questions of China’s “historical” rights to resources or jurisdiction in the SCS flow from an entirely different legal regime.⁸⁵ The reams of tendentious historical “research” commissioned by PRC institutions during this period all point unwaveringly in this direction. In official communications, PRC

⁸² *Id.*

⁸³ Mu Caijia (母彩佳), *Woguo Dui Zhongfei Nanhai Zhongcaiande Lichang Ji Yiju* (我国对中海南海仲裁案的立场及依据) [Our Country’s Position and Basis on the Sino-Philippines South China Sea Arbitration], 10 FAZHI YU SHEHUI [LEGAL SYS. & SOC’Y], 132-33 (2017).

⁸⁴ Luo Guoqiang (罗国强), *Nanhai Zhongcaian Chubu Caijue Pingxi*, (南海仲裁案初步裁决评析) [Analysis of the Initial Award in the South China Sea Arbitration], HEXUN WANG (Mar. 24, 2016), <http://opinion.hexun.com/2016-03-24/182934912.html> [<https://perma.cc/2PUV-7J78>]; Bing Bing Jia, *The Principle of the Domination of the Land over the Sea: A Historical Perspective on the Adaptability of the Law of the Sea to New Challenges*, 57 GER. Y.B. INT’L L. 1, 1–32 (2014).

⁸⁵ Hong Nong, *Post-Arbitration South China Sea: China’s Legal Policy Options and Future Prospects*, (Apr. 2017), <https://storage.googleapis.com/scstt/publications/South-China-Sea-Lawfare-2017.pdf> [<https://perma.cc/48BG-KCJL>].

cites its “abundant historical and legal evidence”⁸⁶ and publishes it frequently in official media and academic presses.⁸⁷

The commentary from PRC officials, academics, and like-minded voices collectively advanced the two broader arguments detailed above: (1) that the arbitration is a political exercise designed to subvert China’s sovereignty, and therefore China’s actions actually uphold the legal order of the oceans; and (2) that the Convention is too narrow to rule on questions of sovereignty and history. Taken together, these yield the preferred Chinese solution: sideline UNCLOS and engage in bilateral consultation and dialogue. Following the publication of the award, this prescription has come to dominate Chinese diplomacy and scholarship on the subject of the South China Sea.

III: “A Piece of Waste Paper”

The July 12, 2016 publication of the tribunal’s final “Award”⁸⁸ was breathtaking in scope and ambition, far surpassing the expectations of the law of the sea community. Not only did the tribunal find its way to jurisdiction on all of the outstanding Philippines’s claims, but it also went much further than expected in pronouncing China’s “nine-dashed line” invalid as a claim to resource rights. Additionally, the tribunal established a demanding new test for determining the status of islands; applying it to the Spratlys, they determined that none of the features—not those occupied by China nor those of any other claimant—were sufficient to warrant status as a full island entitled to an EEZ and continental shelf. Two of the seven PRC-occupied features in the Spratlys were even determined to be low-tide elevations (Subi and

⁸⁶ *Permanent Mission of the People’s Republic of China, Note Verbale*, CML/8/2011 (Apr. 14, 2011), available from DOALOS at http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2011_re_phl_e.pdf [].

⁸⁷ Pounding the table at academic and think-tank conferences on this count is *de rigueur*.

⁸⁸ See generally *Republic of the Phil. v. China*, No. 2013-19, Award (Perm. Ct. Arb. 2016), <http://www.pcacases.com/pcadocs/PH-CN%20-%2020160712%20-%20Award.pdf> [<https://perma.cc/KT4K-FWXR>] (detailing the contents of the “Award”).

Mischief Reefs), and thus not lawfully subject to a claim of sovereignty—despite impressive Chinese facilities constructed atop those submerged features.

Immediately after the award was released, the MFA published a statement on the award, recapping their prior objections and pronouncing the PRC policy on the matter. It stated that “PRC solemnly declares that the award is null and void and has no binding force,” and consequently, “China neither accepts nor recognizes it.”⁸⁹ In comments to the press, MFA Vice-Minister Liu Zhenmin pronounced the Award as “just a piece of waste paper.”⁹⁰ PRC officials largely omitted comment on the matter as the Philippines’s new administration vowed not to seek enforcement and parroted Liu’s “piece of [waste] paper” comment as justification for their disinterest in discussing the award.⁹¹ PRC’s subsequent practice and diplomacy offer some indications of the ways in which China aims to shape the law of the sea regime moving forward. After a brief summary of the Award, this section turns to China’s reactions and what they reveal about the characteristics of Chinese influence on UNCLOS.

The Tribunal’s Ambitious Award

⁸⁹ *Statement of the Ministry of Foreign Affairs of the People’s Republic of China on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines*, XINHUA (Jul. 12, 2016), http://www.xinhuanet.com/english/2016-07/12/c_135507744.htm [<https://perma.cc/N3RV-P4QY>].

⁹⁰ Speech, Ministry of Foreign Affairs of the People’s Republic of China, Vice Foreign Minister Liu Zhenmin at the Press Conference on the White Paper Titled *China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea* (Jul. 13, 2013), http://www.fmprc.gov.cn/mfa_eng/wjdt_665385/zyjh_665391/t1381980.shtml [<https://perma.cc/HP4C-KFNT>].

⁹¹ 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-says-south-china-sea-arbitration-case-to-take-back-seat-idUSKCN12J10S> [<https://perma.cc/9S4W-BNMR>].

A key finding about the status of islands in the South China Sea enabled the tribunal to decide on all of the other issues. Namely, in finding that none of the features in the South China Sea can be considered “islands” under the definition offered in the Convention, the arbitrators cleared the central obstruction to ruling on the Philippines’s other submissions. *En route* to this decision, the arbitrators wrestled with the indeterminacy of the rule, laid out in the black letters of Article 121(3), which state, “[r]ocks[,] which cannot sustain human habitation or economic life of their own[,] shall have no exclusive economic zone or continental shelf.”⁹² Because these terms are not defined elsewhere in the treaty, nor dealt with in any depth in jurisprudence, the arbitrators go to comical lengths to define each of the scarce words in this definition, and settle on a highly rigorous test for determining whether a feature can be considered a full-fledged island.⁹³ None of the features under consideration meet these stringent requirements, which hinge on a demonstrated, empirical record of human habitation and economic use.⁹⁴

Because China had been exercising its jurisdiction in the form of maritime law enforcement in areas surrounding these features that are not entitled to EEZ rights, this decision on the status of islands clears the way for a determination that those PRC practices are unlawful. The lack of additional entitlements allowed the tribunal to remain agnostic about sovereignty claims while finding that China’s claims to exclusive or non-exclusive rights to resources (primarily fish and hydrocarbons) were illegal in areas beyond the territorial seas of the disputed features. Perhaps more damaging, several of the features were determined to be incapable of sovereign possession because they lay under water at high tide and thus are properly classified as “low-tide elevations” (LTEs). This determination is especially problematic in the case of the

⁹² Law of the Sea Convention art. 121(3), Dec. 10, 1982, UNCLOS III.

⁹³ Republic of the Phil. v. China., No. 2013-19, Award (Perm. Ct. Arb. 2016), <http://www.pcacases.com/pcadocs/PH-CN%20-%2020160712%20-%20Award.pdf> [<https://perma.cc/KT4K-FWXR>].

⁹⁴ There is much discussion of the test, but it is aptly summarized in paragraph 549: “the Tribunal considers that the most reliable evidence of the capacity of a feature will usually be the historical use to which it has been put.” *Id.*

poetically-justly-named “Mischief Reef,” which the award determined to be a low-tide elevation that lies on the continental shelf—and thus within the jurisdiction—of the Philippines. The presence of a large artificial island on this feature, constructed by PRC, further complicates this mischievous reef’s status.

Several other elements of the award make somewhat more diffuse demands on China, preemptively disqualifying several policies or practices that PRC might see fit to undertake in the South China Sea. Most significant among them is the decision that the “nine-dashed line” is not a valid claim to maritime rights. The arbitrators concluded that “China’s claims to historic rights, or other sovereign rights or jurisdiction, with respect to the maritime areas of the South China Sea encompassed by the relevant part of the ‘nine-dashed line’ are *contrary to the Convention and without lawful effect* to the extent that they exceed the geographic and substantive limits of China’s maritime entitlements under the Convention.”⁹⁵ Read alongside the ruling on entitlements, this decision means that China’s lawful rights and jurisdiction in the South China Sea can be no more than twelve nautical miles from any of the features, pending settlement on their underlying sovereignty.

The Award goes even further in preemptively ruling out any possible Chinese efforts to claim broader entitlements, expressly denying the possibility of establishing “archipelagic baselines” around groups of islands in the SCS, which might collectively rate a status as a full-fledged island. Reading the black letters of the Convention in Article 47, the Award makes a special point of denying the legality of any kind of archipelagic claim from PRC because it is not an archipelagic state as defined in Article 46.⁹⁶ While no question was posed by the Philippines to this effect, the tribunal here is struggling to head off efforts by China to subvert the ruling by pursuing claims that are not expressly outlawed.

⁹⁵ Award, “Dispositif,” Part B, Section (2), 473.

⁹⁶ Republic of the Phil. v. China., No. 2013-19, Award (Perm. Ct. Arb. 2016), <http://www.pcacases.com/pcadocs/PH-CN%20-%2020160712%20-%20Award.pdf> [<https://perma.cc/KT4K-FWXR>].

Another preemptive move in the Award concerns China's much-publicized artificial islands, replete with fighter and bomber aircraft-capable runways, hardened defensive facilities, weapons emplacements, and radar.⁹⁷ The Philippines sought relief on the basis of extensive environmental damage wrought by construction of these islands. The tribunal heard substantial expert testimony about the environmental damage caused by PRC dredging and reclamation efforts in building up these non-islands, and found PRC in breach of its obligations to protect and conserve the natural environment, as established in UNCLOS. Further construction has been in direct contravention of the award.⁹⁸

A further set of decisions concerns unsafe navigational practices by Chinese maritime law enforcement and fishing vessels, violations of UNCLOS and another set of international standards referenced in UNCLOS, the 1972 Convention on the International Regulations for Preventing Collisions at Sea (COLREGs). The China Coast Guard has periodically engaged in risky seamanship, including ramming, near-misses, use of water cannons, and so on. Further action in this vein will be in breach of the award.

China's Response: So What?

The award's unequivocal demands on PRC of course beg the question "so what?" After all, PRC had spent the better part of four years announcing its total rejection for the arbitration, asserting that they would not implement the award even if it were to turn out favorably. No enforcement mechanisms exist in UNCLOS, and the Philippines would be hard-pressed to insist on full implementation even if their government were so inclined. However, the tremendous volume of PRC diplomatic energy expended throughout the procedure is a clear indication that

⁹⁷ The Asia Maritime Transparency Initiative has effectively publicized this island-building campaign using open-sourced satellite data, which it frequently updates to monitor China's construction. Note their "Island Tracker" at <https://amti.csis.org/island-tracker/>.

⁹⁸ Center for Strategic & International Studies, A Constructive Year For Chinese Base Building, *Asia Maritime Transparency Initiative* (Dec. 14, 2017), <https://amti.csis.org/constructive-year-chinese-building/> [<https://perma.cc/WCP9-VVBN>].

China's leadership perceived some significant costs associated with the arbitration. Their response to the award demonstrates more than just defiance of the award; it is a bid to shape the future "interpretation and application" of the law of the sea in ways that permit far greater leeway for sovereign states to define their own rights and jurisdiction.

The immediate response from the MFA, released on the day of the award, reprises many of the specific objections to the Philippines case, and then closes with a single paragraph that encapsulates each of the arguments analyzed above:

The Chinese government reiterates that, regarding territorial [sovereignty] issues and maritime delimitation disputes, China does not accept any means of third party dispute settlement or any solution imposed on China. The Chinese government will continue to abide by international law and basic norms governing international relations as enshrined in the *Charter of the United Nations*, including the principles of respecting state sovereignty and territorial integrity and peaceful settlement of disputes, and continue to work with states directly concerned to resolve the relevant disputes in the South China Sea through negotiations and consultations on the basis of respecting historical facts and in accordance with international law, so as to maintain peace and stability in the South China Sea.⁹⁹

This statement epitomizes China's dogmatic emphasis on the inviolability of its sovereignty and consequent inadmissibility of third-party decisions without its consent. It highlights the political instrumentality of the Philippines's use of international law. It mounts vague appeals to indeterminate principles rather than

⁹⁹ Ministry of Foreign Affairs of the People's Republic of China, *Statement on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines* (Jul. 12, 2016), http://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1379492.htm [<https://perma.cc/NB24-S47B>].

concrete rules. Finally, it asserts that solutions can be reached only by “respecting historical facts *and* in accordance with international law,”¹⁰⁰ tacitly subjugating norms of international law to a Chinese interpretation of history. China’s consistency on these principles warrants close attention, and foreshadows their subsequent practice.

The following day, July 13, 2016, the PRC State Council released a White Paper entitled “China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea.”¹⁰¹ Liu Zhenmin spoke on the release of the White Paper, further denigrating the award: “[i]ts composition is obviously problematic, and it has no representativeness, authority nor credibility and cannot represent international law at all. Therefore, its award is surely illegal and invalid.”¹⁰² This senior official’s statement rehashes known objections to the award and introduces a document that began a process of posing a Chinese alternative to the UNCLOS dispute resolution process. This authoritative White Paper on the subject of the South China Sea is the first of its kind and represents the state of the art in Beijing’s thinking about its claims in these disputed waters. Importantly for our efforts to understand China’s relationship with international law, it indicates some of the key lines of effort in China’s efforts to shape the law of the sea regime.

Recognizing the inconvenience of a determinate ruling against China’s central claim, the White Paper goes a considerable way towards decoupling the nine-dashed line from the substance of

¹⁰⁰ *Id.*

¹⁰¹ White Paper, The State Council of the People’s Republic of China, *China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea* (Jul. 13, 2016), http://english.gov.cn/state_council/ministries/2016/07/13/content_281475392503075.htm [<https://perma.cc/62AU-9Z58>].

¹⁰² MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE’S REPUBLIC OF CHINA, VICE FOREIGN MINISTER LIU ZHENMIN ATTENDS PRESS CONFERENCE ON WHITE PAPER TITLED “CHINA ADHERES TO THE POSITION OF SETTling THROUGH NEGOTIATION THE RELEVANT DISPUTES BETWEEN CHINA AND THE PHILIPPINES IN THE SOUTH CHINA SEA” (Jul. 13, 2016), http://www.fmprc.gov.cn/mfa_eng/wjbxw/t1381878.shtml [<https://perma.cc/X84X-PR9K>].

Chinese claims to extraordinary rights and jurisdiction throughout the South China Sea. Despite its continued prominence on PRC maps (and, inferentially, its geographic relevance to ongoing PRC law enforcement and economic activities throughout the disputed region), the nine-dashed line was not presented as the central element of Chinese claims to rights and jurisdiction. By separately listing these entitlement claims, the “historic rights” claim, and the “nine-dashed line” claim, China is implicitly acknowledging the legal weaknesses of the nine-dashed line—predictably confirmed by the Award—and charting a new course to redefine the criteria under which maritime zones may be established under UNCLOS. By contrast to the purely negative statements produced throughout the protracted arbitration process, this is a positive statement of intent—not an intent to honor the award, but rather to avoid making claims that are plainly contradicted by it. The White Paper marks a step toward a new agenda by spelling out the lawful bases of Chinese activities in these disputed waters in mostly recognizable legal terms.

Indeed, the White Paper goes to great lengths to spell out the basis *under a distinctive interpretation of UNCLOS* for China’s rights and jurisdiction. This argument is complemented by one of the more abundant official recitations of evidence documenting the accretion of Chinese authority over the islands and maritime spaces “in the long course of history . . . as early as the 2nd century BCE in the Western Han Dynasty.”¹⁰³ This history-trumps-law tack is not new, but represents a decisive break from prior statements, which do not articulate the specific evidence China believes to be dispositive in the case. It also marks the beginning of an ongoing groundswell in academic research on various arcane subjects in the law of the sea, especially historic rights and archipelagic waters, in which Chinese experts endeavor to identify the indeterminacies and gaps in UNCLOS that might be exploited by clever Chinese legal claims to expand the aperture for the exercise of rights and jurisdiction.

A prominent example came in an article, published the following week in the military’s flagship newspaper, which begins with a

¹⁰³ White Paper, *supra* note 101 at ¶3-8

categorical statement of the insufficiency of UNCLOS: “UNCLOS did not provide rules for the issue of territorial sea baselines for continental countries’ archipelagos; nor did it provide rules for historic rights, although it affirmed their status in international law.”¹⁰⁴ The authors, led by the Deputy Director of the Chinese Communist Party’s influential Central Party School, Wang Jumin, go on to suggest that China’s historic rights claims have been horribly misconstrued by the Award and can be easily reconciled with international law because they do not amount to an *exclusive* claim to economic rights within the waters of the South China Sea. They begin to parse the various types of rights that are possible, including navigational rights, fishing rights, and law enforcement rights, then go some way towards articulating how China can use archipelagic baselines to claim some of these. Subsequent Chinese scholarship has picked up some of these themes and run with them. Some of these efforts undertake in an exhaustive analysis of the practices of other states to suggest that there is indeed a precedent for claims, such as those to a “geographic unity” composed of tiny islets, reefs and rocks, that could justify some kind of “archipelagic baseline” claim.¹⁰⁵ These are all efforts that bear close scrutiny, representing clear examples of China’s commitment to generating *new* customary international norms through consistent practice.

In forwarding such creative interpretations at the seams in UNCLOS III, Chinese authors are trying to socialize their foreign counterparts to some plausible new norms. The mere fact that these ideas are originating in China, with Chinese scholars

¹⁰⁴ Chinese Communist Party Central Party School Postgraduate Studies Institute, *Zhongguo Bujieshou Nanhazhongcaian Caijue Juyou Fali Zhengdangxing* (中国不接受南海仲裁案裁决具有法理正当性) [*China Does Not Accept the Jurisprudential Legitimacy of the SCS Arbitral Tribunal’s Award*],” JIEFANGJUN BAO (解放军报) [LIBERATION ARMY DAILY] (Jul. 18, 2016), http://www.81.cn/jfjbmap/content/2016-07/18/content_150851.htm [https://perma.cc/U37C-BB5D].

¹⁰⁵ Zhang Hua (张华), *Zhongguo Yangzhong Qundao Shiyong Zhixian Jixian De Hefaxing: Guojixiguanfa 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 (外交评论) [FOREIGN AFFAIRS REVIEW] 129, 129-43 (2014).

attempting to socialize the rest of the world to them, is an epochal change to the past pattern. At least one of these efforts has even been applauded for representing partial “compliance” with the award.¹⁰⁶ PRC’s concession to Filipino fishermen’s “traditional fishing activities” around the Scarborough Shoal. Given that China is increasingly seeking to characterize its own fishing activities as “traditional fishing rights” (as in the “southwest fishing grounds” in the area near Indonesia’s Natuna Islands),¹⁰⁷ there are reasons to view this limited concession as an attempt to establish a precedent for fishing in the territorial seas and other jurisdictional waters of neighboring states. That the Chinese Coast Guard has maintained a close cordon on the shoal and can unilaterally reverse this limited concession to the Philippines should also be borne in mind. Already the tenuous nature of this “compliance” is evident: Philippine vessels have been prohibited from operating near the shoal during PRC’s unilateral summer fishing moratorium.¹⁰⁸

Since the award, the thrust of PRC diplomatic efforts in Southeast Asia has been to re-introduce the “charm” into the once-vaunted “charm offensive” it mounted in the region in the mid-2000s.¹⁰⁹ One of the central themes of this newly gracious approach has been the swift conclusion of a “Code of Conduct” for the South China Sea disputes, the long-awaited and perhaps legally-binding culmination of the effort commenced with the 2002 DOC. One of the proposals being socialized by Chinese diplomats is for parties to forego any discussion of areas within the twelve nautical miles territorial seas of the features, and treat all the areas beyond those zones as some sort of common pool resource with a joint

¹⁰⁶ Julian Ku & Christopher Mirasola, *Tracking China’s Compliance with the South China Sea Arbitral Award*, LAWFARE (Oct. 3, 2016), <https://www.lawfareblog.com/tracking-chinas-compliance-south-china-sea-arbitral-award> [https://perma.cc/S2FJ-RGLZ].

¹⁰⁷ **Ryan D. Martinson**, *Shepherds of the South Seas*, 58 SURVIVAL 187 (2016).

¹⁰⁸ Center for Strategic & International Studies, *Fishing in Troubled Waters*, ASIA MARITIME TRANSPARENCY INITIATIVE (Jul. 7, 2017), <https://amti.csis.org/fishing-troubled-waters/> [https://perma.cc/9M5E-3L64].

¹⁰⁹ JOSH KURLANTZICK, CHARM OFFENSIVE: HOW CHINA’S SOFT POWER IS TRANSFORMING THE WORLD 37-43 (2007).

development scheme for fisheries and hydrocarbons.¹¹⁰ Such innovative proposals illustrate the creative energy PRC is now devoting to shaping the law of the sea regime to suit its interests and is doing so with some clear, substantive goals in mind. That these discussions have proceeded without the other claimants being able to insist on rigorous adherence to the award is a distinct signal that alternative norms and values are viable in this region. China's exponentially greater capacity to use and administer resources under any such agreement guarantees that any joint management of these areas will be dominated by Chinese vessels and aircraft, and likely managed by Chinese firms.

IV: International Law Is Dead! Long Live International Law!

What are the legal and political consequences of this action for China, for UNCLOS, for international dispute resolution, and for international law? Beijing's implicit goal was to undermine this specific arbitration and deter future unwelcome legal infringement on what China considers to be its sovereign prerogatives. The central lines of PRC efforts have been to reframe the case as an instance of deliberate abuse of UNCLOS in service of political aims, to minimize the scope of issues on which UNCLOS is treated as the authoritative set of rules and norms, and to promote bilateral diplomatic alternatives to third-party dispute resolution. If these positions were to gain broad international acceptance, the upshot would be a radical diminution of the effectiveness of ocean governance under the law of the sea regime. Is there a different, Chinese-preferred mode of ocean governance apparent in this strategy? Or is there simply a reversion to the diverse domestic laws and practices of coastal states, untethered from onerous international legal obligations?

At present, only preliminary judgments are possible about the effects of the arbitration and China's extraordinary actions to undermine it. The overarching question concerns the influence China will have over the law of the sea regime, and maritime order generally, as it seeks to press forward with its maritime

¹¹⁰ Versions of this proposal have been discussed with the author by MFA contacts in January and July 2017.

claims in the wake of a ruling that profoundly discredits some of the key pillars on which they stand. Three concluding observations stand out as appropriate for our consideration at present.

First, the sheer volume of diplomatic efforts devoted to pronouncing China to be the state properly upholding UNCLOS and international law should be sufficient to indicate that Beijing has no intention of entirely discarding the law of the sea regime. Rather, we observe a far more subtle process of selectively adopting elements of UNCLOS III and forging them with elements of China's domestic law and policy. This process amounts to "creeping jurisdiction," wherein the steady accumulation of domestic laws and practices in zones with hazily defined rights and jurisdiction can lead to a net increase in coastal state authority over those maritime zones. By rejecting the arbitral proceeding but, paradoxically, wrapping itself in the mantle of international law, China is charting a course in which its participation—at scale and with defined goals based on its interests—can shape the way other states practice UNCLOS. How this has transpired is a question left open to future research, though it bears noting that many of the states along the Asian littoral share some Chinese views about coastal state authority (albeit not the nine-dashed line) that the United States deems to be "excessive maritime claims."¹¹¹

China's views on coastal state authority need not become recognized as a global norm for them to bring about systemic effects. It would be sufficient for other states to simply acquiesce to a regional custom (perhaps one authorized in a code of conduct, though not necessarily). Such an outcome would not immediately undermine UNCLOS, but would radically degrade its uniformity across the world's oceans. However grudging, international acceptance of a special set of Chinese excessive claims would create a precedent for other states and regional groupings to develop non-uniform practices. It would become more difficult for courts or arbitral panels to deny the validity of plural

¹¹¹ J. ASHLEY ROACH & ROBERT W. SMITH, *EXCESSIVE MARITIME CLAIMS* (3d ed., Martinus Nijhoff Publishers 2012).

interpretations of important norms. Such fragmentation of the global law of the sea regime may already be underway, a countervailing tendency to the ambitious dreams of UNCLOS drafters to realize a “constitution for the oceans.”

At present, the Chinese alternative is not fully recognizable because it is limited to the region and inextricably bound up with maritime disputes that do not exist elsewhere. Still, China is actively marketing its version of sea law to many states outside of the North Atlantic. Many would not quickly sacrifice other economic and political interests—over which China has growing interest—for the sake of upholding a liberal and relatively open maritime domain. China has shown considerable deftness (if not subtlety) in its coercive economic statecraft,¹¹² and it is hardly speculative to expect that such disincentives could be presented to states that resist. Beijing’s ready invocation of “sovereignty” as a means to diminish the penetration of international norms into the domestic sphere has considerable appeal in states throughout the developing world, especially those with non-democratic governments.

This hyper-sovereigntist cause was initially weak during the post-cold war era, a period in which a relatively liberal mode of interpreting major international conventions like UNCLOS was in ascendance. However, the PRC is increasingly sophisticated and motivated in its attempts to establish norms that will permit states to carve out greater autonomy within an international system that has evolved to provide legal justification for universal jurisdiction in a variety of domains, from humanitarian interventions, to human rights, to environmental protection and conservation.

Second, much has been made of China’s vested interest in free navigation throughout the South China Sea. Because of its heavy trade dependence and concentration of major commercial centers on its far eastern periphery, China is uniquely vulnerable to trade disruptions and unlikely to support any systemic restrictions on

¹¹² Evan A. Feigenbaum, “Is Coercion the New Normal in China’s Economic Statecraft?,” *MacroPolo* (Jul. 25 2017), <https://macropolo.org/coercion-new-normal-chinas-economic-statecraft/> [<https://perma.cc/C3BL-ZCMZ>].

maritime traffic. The fact that some 90% of global trade transits via maritime routes, however, is no bar on China's efforts to promote a less liberal interpretation of the law of the sea regime. The norms that underpin this system—namely, a deference to user state rights over those of coastal states and a presumption that navigation is free in the absence of recognized jurisdiction—are neither inevitable nor immutable. Even if China is disproportionately dependent on its maritime trade and certainly has no interest in a global constriction of container and tanker traffic, there is also no *a priori* reason to think China will not continue to press its local advantages to control and administer all navigation in its “near seas.” The impressive expansion of China's coast guard capacity and the global reach of the People's Liberation Army Navy are among the sources of power that China can employ to limit its vulnerability. Arguably, China's primary vulnerability is to American sea power, so carving out some legal restrictions on U.S. navy access appears to be a cheap and dirty way to achieve some of this security without engaging in full-on confrontation.

It is a past due observation that China has not been socialized into thinking that the existing order is the best order. If Chinese maritime capabilities continue to advance, as seems highly likely, commercial navigation can remain unfettered while other areas of user state rights and interests are restricted (*e.g.*, resource exploitation, military navigation, scientific research). This would be a non-uniform and perhaps dysfunctional evolution in the law of the sea regime, as there is neither Chinese capacity nor intent to defend other states' interests in similarly asserting coastal state rights. Based on the current trajectory, Chinese influence appears to be diminishing the relative importance of global norms embodied in treaties and elevating the priorities of individual sovereigns to interpret UNCLOS according to their rights and to seek to control and administer maritime space in line with their domestic law.

Finally, this arbitration is not the final Chinese statement on legal dispute resolution. While there are few reasons to think PRC will abandon a long-standing principle of preferring bilateral

“negotiation and consultation” to third party adjudication, there are many reasons to think it is adaptive. The case of China’s practice in WTO dispute resolution is one example, though perhaps inapposite because the large volume of relatively trivial cases in that arena do not resemble the large, and (arguably) sovereignty-related stakes of maritime arbitration. Nonetheless, there are a host of UNCLOS issues on which China has relatively minor disputes with neighbors on which China may consent to arbitration, if only to shore up its status as a good faith party to UNCLOS. Challenging Japan’s claim to an EEZ and continental shelf surrounding Okino-tori is one possibility proposed by some Chinese law of the sea specialists.

Alternatively, China has already dealt a major blow to the institution’s functionality. If awards can be easily sloughed off, and further, denigrated as unlawful themselves, there may be a chilling effect on other attempts to launch arbitral processes. This single case will not be fatal for the efficacy of that mechanism, but it establishes a precedent that may become corrosive in the event of other suits against China. It also goes towards explaining some of the “dogs that don’t bark”—namely, Vietnam’s reluctance to seek arbitration on similar issues in its disputes with China in the South China Sea. If fewer states believe that legal dispute resolution mechanisms can be used effectively, they will wither. Less dramatically, if China has established a higher bar for jurisdiction and admissibility of cases that plausibly touch on maritime delimitation, the compulsory dispute system may simply fall into relative disuse.

The Chinese response to the South China Sea arbitration has set an important, if still uncertain, precedent for future practice. Backed up by impressive capacity and enabled by a less robust international legal environment that lacks energetic American enforcement of key norms, China is primed to externalize its distinctive approach to international law into the wider international legal arena. We should remain highly attuned to China’s subsequent practice as it bears on the South China Sea arbitral award, and perhaps even more so to the ways in which its practices influence those of other states in the region and beyond.