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RESEARCH ARTICLE

U.S. International Oceans Law and Policy Interests in the South China Sea Arbitration: Implications for the U.S. Administration in the South China Sea and Elsewhere

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Abstract Even though the United States has not ratified UNCLOS, U.S. oceans policies and practices are inextricably linked to UNCLOS. For this reason, the United States needs to approach its future relations with China through the lens of UNCLOS and the recent Arbitration decision involving its claims in the South China Sea. The decision cannot be dismissed as something which is an insignificant technical legal disagreement. The Arbitration concretely addresses core resource, environmental and the entitlements to oceans territory in the South China Sea and the precedent impacts other disputes that could, if not resolved, become security flashpoints which will impact U.S. economic or military interests. The decision also confronts recent legal revisionism by China; a party to UNCLOS since 1996. China's continuing rejection of the decision will, in the long run, cause the decline of international law and cast doubt on whether the U.S., and other developed countries, can expect to have a rules- based order to govern their security and economic affairs if the decision is not respected by world's second most powerful country. For this reason, it is in the United States interest to make China's compliance with the Arbitration decision a central tenant of U.S. China Policy and, in doing so, persuade China that it has much to gain from a rules-based order at sea.

Keywords UNCLOS · Arbitration · South China Sea · SCS · Law of the sea · ITLOS · Nine dashed line · China · Taiwan · Philippines · EEZ · Continental shelf · Article 298 · Oceans law and policy

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The 1982 United Nations Convention on the Law of the Sea (UNCLOS) is supposed to be the constitution of the oceans because it establishes important principles on how ocean resources will be allocated and disputes settled. The negotiators of the UNCLOS never anticipated, however, that two of the five permanent members of the UN Security Council would, in the case of the United States, not ratify the treaty, or would, in the case of China, disregard many of the most important features of the Convention, including its dispute settlement procedures. What they also did not anticipate was that China would completely reject a far-reaching decision on July 12, 2016 by a UNCLOS dispute settlement panel overseen by the Permanent Court of Arbitration. To be detailed below, the July 12, 2016 decision has major implications for UNCLOS, U.S. Oceans Policy Interests, and bilateral relations with China. As much as the next Administration would like to have a free hand to negotiate with China, the Arbitration decision, and UNCLOS, will have a major impact on how U.S. China relations will evolve.

Defining U.S. Interests in the Law of the Sea and UNCLOS

In the current political environment it is difficult to get a clear reading on U.S. attitudes towards oceans governance. It is difficult because there is a small, but highly vocal element within the U.S. policy community, and perhaps the U.S. Senate, who are unconvinced that U.S. accession to UNCLOS is necessary or proper. Consequently, in order to chart a path for the new Administration on how to proceed forward after the landmark Arbitration case, we need to take account of the views of both sides and propose a course of action that is a consensus view and favors U.S. interests. We will assume going forward in this analysis that the United States has important resource and transit interests in the oceans; the only question is how best to characterize and advance those interests.

The Department of State Website contains quotes from Condelezza Rice and Hillary Clinton extolling the virtues of UNCLOS. Rice, in particular, argued that "….the United States benefits more than any other nation from the navigation provisions in the Convention." [30] The Department of State websites also list a great many environmental groups, business groups (Chamber of Commerce, National Association of Manufacturers), energy companies (like Conoco Philippines, Marathon Oil) and fortune 100 companies (like Lockheed Martin, and AT&T) who all advocate for U.S. accession to the convention because of UNCLOS. They assert that UNCLOS' provisions protect their underlying business interests in offshore oil and gas, transport, telecommunications, and undersea cables. The author, while serving at DOD, also was responsible for writing and coordinating an important DOD White Paper on the National Security Implications of UNCLOS. [29] That policy statement underscored many of the same points as U.S. industry, but also reinforced key DOD operational interests in UNCLOS regarding transits at sea, overflight, undersea operations, space operations, military maneuvering, and undersea cable laying.

The opponents to accession to UNCLOS are selected U.S. Senators and groups like the Heritage Foundation that believe that UNCLOS is superfluous and creates risky international entanglements with the United Nations in particular. Writing for Heritage, Steven Groves asserts that UNCLOS will undermine U.S. sovereignty because we are subject to mandatory dispute settlement procedures and because the U.S. lacks a veto in

the proceedings of the International Seabed Authority—a bloated bureaucracy in his estimation. Groves argues that the Treaty will become a lever that environmentalists will use to legislate climate change, and that the U.S. Navy has the right to make use of the navigational rights in UNCLOS whether or not the U.S. is party to the agreement. Regardless of which specific arguments carried the day, a group of 34 Republican Senators led by former Senator Jim DeMint (R, SC) (now at Heritage) voiced opposition to the Treaty in 2012 and effectively stalled its passage for the foreseeable future.

While uncertainty regarding Senate ratification remains because of political divisions, it seems that the beginning and end point for determining U.S. interests in UNCLOS is President Reagan's 1983 Ocean Policy Statement that was released in conjunction with the original decision of his Administration to not sign UNCLOS. [21] This particular Statement is cited by both sides on the UNCLOS Debate: proponents of UNCLOS argue that the all of President Reagan's objections were met. Opponents argue that the "fix" to UNCLOS was not sufficiently robust because some vestiges of the deep seabed mining apparatus remain to this day.[1] Regardless of this concern with the UN bureaucracy, Reagan still asserted that the bulk of UNCLOS "fairly balances the interests of all states." He went on to also say that the U.S. would respect and uphold the provisions dealing with maritime zones, the navigation and overflight provisions, provisions dealing with marine environmental protection, and the provisions dealing with rights in the Exclusive Economic Zone (EEZ). Put another way, it is fair to assert that there is consensus in the United States that the following principles codified in UNCLOS are beneficial:

- The rights of navigation and overflight for military and commercial purposes;
- The allocation of rights based on different zones (territorial sea, contiguous zone, exclusive economic zone, and continental shelf[2]) and the standards for establishing such zones;
- The commercial rights and entitlements to fish in the EEZ and to extract oil and gas in the continental shelf;
- The general obligations of states to act with "due regard" towards the rights of other states

Assuming that these points fairly represent national consensus, the question now becomes whether the recent South China Sea (SCS) Arbitration contributes or detracts from those important national goals and how the United States should proceed in its relations with China.

[1] The author is of the view that it is opponents of any sort of international scheme to deal with the registration and regulation of mining claims outside of national boundaries ignores the fact that there must be an international system of recognizing and registering those claims or else no one will lend money to develop the claims. Nor would the U.S. armed forces come to the aid of a U.S. investors in such claims unless they had some sort of "color of title." In short, deep seabed mining wildcating has no place in the twenty-first century given the high potential for conflict and environmental catastrophe (that would affect everyone's fisheries) if there was no regulation.

[2] It is indisputable that the U.S. liked the scheme because in Proclamation 5030 (issued the same day as the Ocean Policy Statement) the U.S. established its Exclusive Economic Zone (EEZ) and took note of the other zones as well.

The Arbitration

The Context

The SCS has been the subject of competing claims by six countries to rocks, islets, low tide elevations, and totally submerged features (most notably Reed Bank) since 1968, after the discovery of some oil. The disputes reached a low point in 1988 when Johnson Reef erupted in conflict in which Chinese frigates sank two Vietnamese vessels and killed 64 sailors [27, 28]. Because entitlements to waterspace (and fish/oil and gas) are derivative of the classification of features as either submerged (part of a continental shelf), a low tide elevation, a high tide elevation (rock), or an island, the Philippines petitioned the Arbitral panel in January of 2013 [5].

There was also the very important question of the legality of the so-called nine-dashed line (9DL) claim which, according to China's leading Law of the Sea Scholar, Judge Zhiguo Gao, had more or less existed on maps since roughly 1914; although a map produced between 1947 and 48 is the timeframe when this "claim" crystalized [6]. In some respects, U.S. ocean policy analysts —the author included—initially classified the nine-dashed line as something which was extra-UNCLOS and reflected something like a Chinese sphere of influence, much like the U.S. Monroe Doctrine or Chile's Mar Presencial, as opposed to a boundary claim. But, in 1958, and later in 1995, China enacted a territorial sea law and made specific claims to the *Xisha* (or Paracels), *Dongha* (or Pratas Islands), *Zhongsha* (or Macclesfield Bank) and *Nansha* (or Spratly Islands).

Initial perceptions that China's 9DL represented simply a sphere of influence were dashed by facts on the grounds; even though there are some revisionist theorists who make excuses for China's ambiguity and dissembling [8]. Chinese actions to block hydrocarbon prospecting by Vietnam in 1992 & 1996 [27] and the Philippines (Reed Bank) in 2011,[3] their annual institution of fishing bans since 1999 for most of the South China Sea [11], and China's deployment of an oil rig within 200 NM of Vietnam's Coast in 2014 [26] leaves little doubt that China regards the 9DL as something much more than an aspirational principle. China's formal proffer of its nine-dashed line chart in nota verbale to the United Nations[4] in 2009 is also strong evidence that the map reflects an underlying claim. Of greatest concern was China's written explanation to the United Nations of the chart:

> China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters and enjoys sovereign rights *and jurisdiction over the relevant waters as well as the seabed and subsoil thereof*. (see attached map) (emphasis supplied)

The italicized language, of course, suggests that china is claiming sovereignty over waters beyond those associated with a land feature. This is certainly borne out by their

[3] There was a joint survey mounted in 2005. However, the deal collapsed out of a Philippine claim that the Chinese partners never shared any of the seismic data with their partners [21, p. 36].

[4] The note and accompanying map was filed with the UN Commission on Limits of the Continental Shelf (CLCS) in response to a joint submission by Malaysia and Viet Nam in 2009

actions to ban fishing in waters that were beyond any sort of EEZ, or territorial sea claim, and its interference with offshore drilling by the Philippines in Reed Bank—also beyond the reach of any reasonable claim to water space based on ownership of a land feature.

Another issue before the Tribunal was whether China was subject to compulsory jurisdiction of the Arbitral Tribunal,[5] or properly under Article 298 of UNCLOS. In particular, China claimed that the matters before the Tribunal would, in effect, be determining a sea boundary and/or sovereignty over certain features. That latter argument was based on the notion that if a particular feature was below water at high - tide, then it could not be legally appropriated by a State, thereby calling into question a number of the Chinese man-made outposts on low-tide elevations. In other words, if found to be a low-tide elevation, then China has no rights or entitlements to occupy the feature, and this effectively constitutes a decision on sovereignty. China declined to participate in the establishment of the Tribunal, or to appear before it, but it issued a very detailed position paper [10] regarding the matters before the Tribunal which, in the end, the Tribunal heavily relied upon. China's decision to boycott the proceedings is not unprecedented: the United States withdrew from the mandatory jurisdiction of the International Court of Justice (ICJ) following the Nicaragua Mining Case, and the Russian Federation refused to participate in an action before the International Tribunal for the Law of the Sea (ITLOS) brought by the Netherlands arising from Russia's seizure of the Greenpeace Vessel *Arctic Sunrise* [7].[6]

The Specific Arbitration Questions Presented[7]

There were fifteen Philippine Submissions dealt with by the Tribunal, although for the purposes of this paper, the Philippine claims can be grouped into four basic issue clusters.

- Is the 9DL a legitimate claim? Or, put another way, are historic rights recognized in UNCLOS?
- What are the entitlements of certain low tide elevations (LTEs), rocks, and some claimed islands (mostly notably Itu Aba)?
- Is the PRC is interfering with the rights of the Republic of the Philippines (RP), as it relates to artificial island building (enviro damage) and overfishing?

[5] When a State becomes a party to UNCLOS, it consents in advance to the dispute settlement provisions in Part XV. If a dispute arises between two parties on the interpretation or application of a provision in UNCLOS, and it cannot be resolved by consultation and negotiation, either aggrieved party dispute may unilaterally bring the dispute before an international court or arbitral tribunal (depending on what dispute settlement mechanism the party selected). The legal effect of a unilateral action is legally binding on both parties to the dispute in the same way as if the matter went to a dispute tribunal voluntarily.

[6] Interestingly, China's Judge Gao did join in the decision to find jurisdiction over Russia in the Arctic Sunrise case in which Russia was bitterly resisting the right of the ITLOS to decide a case in which Russian authorities had seized a Dutch Flagged Greenpeace vessel for unsafe operations near Russian oil rigs in the Arctic. Russia characterized their seizure of the Greenpeace as a national defense matter and not within ITLOS' cognizance.

[7] Tribunal took note of various PRC interventions via position paper and statements by the PRC's ambassador to the Netherlands even though the PRC chose not to formally appear. The Tribunal provided daily transcripts of the proceedings and all exhibits to the PRC. The Tribunal noted a large number of other communications to the Tribunal by Chinese authorities including the Chinese Embassy in the Hague who presented extensive materials in various indirect forms. Taiwan late in the proceedings also filed a very detailed position paper that figured prominently in the Tribunal's decision to find that Itu Aba was a rock versus and island.

- Is the PRC illegally restricting access to the RP military detachment at Second Thomas Shoals, and to the submerged Reed Bank feature (an oil and gas site)?

China viewed the principal subject matters in dispute as political and beyond the jurisdiction and competence of the Tribunal. The Philippines characterized its dispute as involving the interpretation and application of UNCLOS, and thus within the jurisdiction of the Tribunal. They were careful to frame the questions before the Tribunal to seek their clarification of the nature of the feature (and the lawful entitlements), as opposed to seeking the Tribunal's ruling on who owned a particular feature. The Tribunal held in October 2013 that it had jurisdiction to consider the merits of almost all the Submissions made by the Philippines [16].

After nearly two years of proceedings, the Tribunal issued a 501 page decision that comprehensively addressed the issues raised by the Philippines (Hereinafter "The Award") [17]. The following portions of that ruling are germane to the question of U.S. interests in the ruling:

Nine Dashed Line Claim (9DL) The Tribunal reviewed all of China's domestic laws (including their territorial sea and EEZ laws) and drew heavily from China's position paper. The Tribunal tried to find justification in UNCLOS (and its negotiating history) for some sort of historic rights to support PRC's claim and analyzed the argument, set forth in the position paper, that the validity of the 9DL claim is "extra" UNCLOS. The Tribunal specifically cited the 2009 Map which China had proffered to the Commission on the Limits of the Continental Shelf, their oil and gas activities [17: para. 208–209], and their 2012 fishing ban [17: para. 210] as evidence that China was asserting some sort of claim to the entire area inside of the 9DL, as opposed to some vague assertion of a sphere of influence. After making an exhaustive examination of the principles in UNCLOS, and general international law as relates to the principles of historic title, the Tribunal held that the 9DL claim was invalid, as follows:

> Tribunal concludes that China's claim to historic rights to the living and non-living resources within the 'nine-dash line' is incompatible with the Convention to the extent that it exceeds the limits of China's maritime zones as provided for by the Convention. This is apparent in the text of the Convention which comprehensively addresses the rights of other States within the areas of the exclusive economic zone and continental shelf and leaves no space for an assertion of historic rights. It is also reinforced by the negotiating record of the Convention where the importance of adopting a comprehensive instrument was manifest and where the cause of securing the rights of developing States over their exclusive economic zone and continental shelf was championed, in particular, by China. Accordingly, upon China's accession to the Convention and its entry into force, any historic rights that China may have had to the living and non-living resources within the 'nine-dash line' were superseded, as a matter of law and as between the Philippines and China, by the limits of the maritime zones provided for by the Convention [17: para. 261-262].

General Status of Features & Criteria In the context of deciding the status of Scarborough Shoal, Mischief Reef, Second Thomas Shoal, Subi Reef, Johnson Reef,

Cuarteron Reef, Fiery Cross Reef, Gaven Reef, and McKennan Reef (including Hughes Reef), the Tribunal made a number of very important findings that confirmed generally accepted principles of international law as relates to the rights/entitlements associated with owning or squatting on a rock/high-tide elevation versus a low-tide elevation. The key analytic findings are:

- Scientific data, imagery and charting information is dispositive of the status of a particular feature as opposed to history;
- The status of features must be based on the "earlier, natural condition"[17: para. 306] as opposed to the improvements that have been made to a feature, i.e. manmade improvements to a feature cannot change its original status; and
- Low tide elevations (LTEs) are not land territory under UNCLOS (Art 13), and no measure of occupation or control can establish sovereignty over such features, unless they fall within the territorial sea or continental shelf (CS)[8] of the same state that "claims" them in connection with the drawing of baselines [17: para 308–309].[9] Such LTEs cannot be appropriated. Also, to the extent that a low-tide elevation is situated on the continental shelf of a state, that LTE is considered part of that continental shelf.
- High Tide elevations (HTE) are features entitled to a 12NM territorial sea and can be appropriated, i.e. sovereignty can be claimed. The Tribunal said that the question of whether something is above water at high tide can be determined based on existing U.S, Chinese, Japanese, and British Charts that specify tidal ranges and satellite data/time lapse imagery.
- Rocks vs. Islands. No features in the Spratly Island group are "islands" within the meaning of Article 121 of UNCLOS. The Tribunals spent extensive time looking at the history of Itu Aba (the largest feature) and ruled that Itu Aba was not an island within the meaning of Article 121 because there was no "sustained human habitation" and the water present on these features didn't match "modern standards" in terms of what is suitable for cultivation and agriculture. They also ruled that neither transitory presence nor occasional extractive activities constitute human habitation. The presence of diverse environment and soil suitable for cultivation were also factors that the Panel examined to determine if a feature met the test in Article 121 of UNCLOS.[10]
- Neither China nor the Philippines are entitled to claim archipelagic status for the Spratlys or any other features in the South China Sea [17: para 573–574].

[8] They are part of the submerged land mass of a state.

[9] See, Paragraphs 308 and 309 of the Award. The Tribunal drew support for its conclusions from the Territorial and Maritime Dispute (Nicaragua v. Columbia), Judgment, ICJ Reports 2012, p. 624 at p. 641, para 26.

[10] The Tribunal cited in support of their judgment China's past diplomatic protests versus Japan that had claimed island status for Okinotorishima (a very small uninhabited rock/atoll in the Philippine Sea which Japan claims is an Island and entitled to an EEZ). Oki-no-Tori Shima is uninhabited and consists of roughly 8500 m of dry land; most of that land is three concrete structures. Its highest elevation is 1.5 m above high tide and it is over a 1000 miles south of Tokyo; yet Japan claims an EEZ of over 400,000 sq. KMs based on this feature. This particular feature's status came up in connection with Japan's submission to the Commission on the Limits of the Continental Shelf (CLCS) to obtain an extended continental shelf. China and Korea both contest this EEZ assertion by Japan.

Determination Concerning Specific SCS Features Applying the principles discussed immediately above, the Tribunal made a number of findings regarding specific features in dispute:

- Rocks vs. Islands. Itu Aba, Pagasa/Tihutu, South-West Cay, and Spratly Island are rocks and only entitled to a 12NM territorial sea. Most analysts felt that both Itu Aba (Taiwan occupied) and Pagasa (Philippine occupied) could be classified as islands and were surprised by this portion of the ruling. Taiwan, of course, was also taken aback, since the Taiwan Authorities supplied argumentation and documentation in support of its argument that Itu Aba is an island. Given Taiwan's de facto appearance, it was not unexpected that the Tribunal would consider those materials in making their decision [17: para. 437–439].
- Low Tide Elevations. Mischief Reef and Second Thomas Shoals are LTEs that are part of the Philippine Continental Shelf because there are no overlapping continental shelf entitlements [17: para. 647]. As a consequence, China has no legal right to be occupying Mischief Reef and no legal basis for interfering with Philippine occupation of Second Thomas Shoals. The Tribunal did not opine whether China had to dismantle its settlement at Mischief Reef; however, they said that only the Philippines (not China) had the authority to build artificial structures on that LTE.
  - Gaven Reef, Hughes Reef, and Subi Reef—all currently occupied by the PRC—are low tide elevations that may not be appropriated by any country. Subi Reef, in particular, is part of the territorial sea of Pagasa /Tihutu (Philippines) and may not be occupied by the PRC.
- High Tide Elevations. Fiery Cross Reef, Johnson Reef, Cuarteron Reef, and McKennan Reef are all High Tide Elevations occupied by the PRC and are only entitled to a 12NM territorial sea.
  - Scarborough Shoals is a high tide elevation or rock [17: para. 554], and many states had fished in the waters surrounding that feature. Because it is only a rock, it is not entitled to an Exclusive Economic Zone. Even though the Tribunal recognized that features can be enclaved within the EEZ or Continental Shelf projection of another state, it declined to make such a ruling in the case of Scarborough Shoals which, more likely than not will ultimately be found to be enclaved within the EEZ of the Philippines since it is roughly 120 miles west of the Island of Luzon.

Chinese Fisheries Activities

The Tribunal found China's promulgation of a fishing ban, which is more or less predicated on their 9DL claim, legally improper. They similarly held that despite the fact that a question remains over sovereignty over Scarborough Shoals, recent Chinese actions to prevent Philippine fisherman from fishing inside of the atoll, or near the features, is "not compatible with the respect due under international law to the traditional fishing rights of Filipino fishermen." [17: para. 812] The Tribunal separately found that PRC authorities had not done anything to stop the illegal harvesting of endangered giant clams by propeller chopping of coral reefs [17: para. 965, 967].

Chinese Construction Activities and Environmental Protection Norms

The Tribunal noted that China has been involved in island building for quite some time (as have other claimants), but that "massive" island building projects had been undertaken since 2013 at Cuarteron Reef, Fiery Cross Reef, Gaven Reef (North), Johnson Reef, Hughes Reef, Subi Reef, and Mischief Reef. The Tribunal found that these activities did not improve the legal position of the PRC, that the activities were very harmful to the marine environment, and the PRC had extensive notice of the activities, including poaching of endangered species by Chinese fishermen and reef destruction. In doing so, the PRC had "breached its obligations under UNCLOS" (Article 192) to protect the marine environment [17: para. 966]. The Tribunal noted that "China was aware of the harvesting of giant clams. It did not merely turn a blind eye to this practice. Rather, it provided armed government vessels to protect the fishing boats."[17: para. 964] Finally, China also, based on the evidence produced in the proceedings, had an obligation to assess the impacts of its activities under Article 206 of UNCLOS, but there was no evidence that they had did this in good faith, or even followed its own legislation.

Chinese Interference with Philippine Rights

The Tribunal ruled that since the 9DL is illegal, and there are no islands in the South China Sea that would create overlapping entitlements, the PRC illegally interfered with Philippine fishing in the vicinity of Mischief Reef and Second Thomas Shoal. They also ruled that the 2012 Fishing Ban by China was a breach of Article 56 of UNCLOS. And, they ruled that there was no Chinese "legal entitlement" to either Reed Bank (SC 101) or another offshore petroleum block (SC 58). While the Tribunal could not find direct evidence of an assertion of claim by the PRC to these oil and gas areas, "it is apparent that China considers that it, and not the Philippines, has rights in the area" [17: para. 688] from their past actions to intimidate Philippine contracted vessels in the petroleum blocks. In the end, the Tribunal found that China has no legal entitlements.

Failure of China to Prevent Illegal Fishing

The Tribunal held that China took direct action in its licensing activities and failed to control/supervise the actions of its nationals. The Tribunal cited Article 61, 62 and 58(3) of UNCLOS to make clear that states have an obligation to act with "due regard to the rights of other states" and to control the activities of their nationals. The Tribunal was especially harsh on this point: "The actions of these ships constitute official acts of China and are all attributable to China as such."[17: para. 755]

The South China Sea Arbitration Ruling and U.S. Strategic Interests

The Ruling Advances U.S. General Strategic Interest?

There are good reasons why the United States should not be hesitant in forcing fair and balanced implementation Arbitration decision. First, the U.S. relies upon UNCLOS for its military and commercial navigation and overflight, its fisheries and offshore oil and

gas activities, its EEZs, and its undersea cables. The Arbitration decision, for the most part, reinforced U.S. traditional rights under UNCLOS and its understandings of those rights. Like international law or not, the United States has a strong national interest in having stable maritime boundaries, definitive rights to fish and extract oil and gas, and freedoms of passage, and those rights are contained in UNCLOS. Also, people often forget that the United States is a Pacific nation because of Hawaii and its vast EEZ claims in the Pacific as a result of its island territorial possessions including Guam, Midway Island, American Samoa, and a collection of other islands. Second, the United States has an interest in Vietnam and the Philippines' economic development. Both are dependent upon the SCS for fisheries and are net oil importers. Neither can afford to squander their limited dollar reserves to pay for oil imports, especially when there are significant potential oil and gas reserves off their coastline (particularly Reed Bank) which they need to be able to exploit [4]. If the economy of either country were to collapse because they were squeezed out of SCS resources, or squeezed by the PRC on the trade front, it would be costly to the United States politically and economically since both are U.S. trading partners and both have been top 10 "origin" states for illegal immigration into the U.S. [18] Third, denial of access to the SCS could trigger some sort of military reaction by the Philippines that implicates the 1951 Mutual Defense Treaty. A future Chinese provocation or denial of access to its fishing grounds in and around Second Thomas Shoal, Scarborough Shoal and elsewhere could be cause for a military confrontation. The same general considerations also pertain to China's current dispute with Japan in the East China Sea [19]. There are the military consequences for the U.S. if there is a clash between Japan and China, especially because the U.S. has sided with Japan's right to exercise Administrative Control over the Senkaku Islands [9].

Specific Aspects of the Ruling and their Effect on U.S. Interests

Invalidation of China's 9DL Helps the US in Other Regions This portion of the holding is central to U.S. foreign policy and oceans policy interests. The United States maintains a freedom of navigation program to publicly identify excessive maritime claims and then to contest them diplomatically and operationally. In addition to many decades of naval movements through that 9DL region which were in derogation of China's vague claim, the United States formally went on record in its Limits of the Sea Document, No. 143 [31] in 2014 and strongly refuted legality under both UNCLOS and general international law. The Arbitral Tribunal not only validated the findings in LIS No. 143, but also vindicated the analytic framework that the Department of State, and other respectable international legal scholars, have separately used to denounce the 9DL claim. Also, it is very important that the Arbitral Panel affirmatively ruled that there was no legal basis for the 9DL claim, or some derivation of that claim. There was some suspicion that the Tribunal might not rule on the 9DL because China had never formally published coordinates for the claim (as is required under UNCLOS). Thankfully, for the U.S. and regional states, the Tribunal preempted a later subterfuge by China to formally enact some later version of the 9DL.

The unequivocal Tribunal ruling that the 9DL claim is illegal also supports U.S. interests to oppose other sorts of excessive claims, regardless the flavor. There have been longstanding disputes between the United States and China over U.S. military

activities in their Exclusive Economic Zone (EEZ). The U.S. position on those activities is grounded on both the negotiating history of UNCLOS, state practice, and a close parsing of the text [14], as opposed to some sort of vague revisionist theory. Similarly, if China were to follow through on past threats to establish an Air Defense Identification Zone (ADIZ) [13] in the SCS that imposed restraints on air traffic, or established some sort of mandatory reporting system for air traffic (including military traffic), then the US would have no choice but to oppose those actions. China has yet to take those actions, but if they did, the U.S. could argue that China's ADIZ is illegal because it is being established for an improper reason (to punish other claimant states and restrict freedoms of navigation and overflight) and because it is not sanctioned in UNCLOS.

Fisheries Rulings Protects US EEZ. The United States has an interest in fighting excessive claims and in helping coastal states like Vietnam and the Philippines to be able to responsibly exploit their offshore fisheries. If China were to order another SCS fishing ban, the U.S. could cite the Tribunal decision as a basis for arguing that the ban is an excessive claim.[11]

Should China's very aggressive fishing fleet (many part of the so-called maritime militia) be emboldened to brazenly violate international law—as they have done in the SCS—and send its hordes of maritime militia vessels to the expansive U.S. EEZ territories around Guam, Midway, Hawaii, and its South Pacific Territories to plunder U.S. fisheries, the decision provides explicit legal support for opposing those actions. In the likely event that the Chinese government was not directly involved in the illegal fishing of the US EEZ, but casting a "blind eye" to the practice, the decision also stands for the proposition that states have an affirmative action to regulate and control the actions of their nationals in the marine environment. The Tribunal cited Article 61, 62 and 58(3) of UNCLOS to make clear that states have an obligation to act with "due regard to the rights of other states," and have an obligation to control the activities of their nationals.

This is not unprecedented: there is extensive evidence of a pattern of Chinese fishing vessels engaging in "out of area" fishing in Southern Hemispheric waters belongs to Argentina [2], New Zealand [1], and Antarctica [3]. As states step up enforcement (including sinking vessels on sight, in the case of Argentina), it stands to reason that the vast EEZs of U.S. and France would be next. Also, there is evidence that PRC fishing vessels that are part of the maritime militia vessels have been used in the past to lay mines, conduct surveillance, supply logistics to PLAN vessels, and could be used as a "foil" to lure U.S. and Japanese warships into a conflict with vessels that would otherwise be entitled to protections under international law. The important findings in the SCS Arbitration decision give the U.S. a strong basis for aggressively stopping these vessels.

Aggravation of the Dispute An often ignored component of the ruling by the Tribunal was the portion of the ruling that dealt with the duties of states in UNCLOS, Art. 279, to resolve "any dispute between them concerning the interpretation or application of

[11] China has imposed multiple fishing bans, but the Tribunal explicitly referenced the 2012 ban as an excessive action.

this Convention by peaceful means." The corollary of Art 279 is that states are supposed to solve their disputes peacefully and not take actions to exacerbate or inflame situations.[12]

The context of the decision was China's repeated efforts to prevent the resupply of the former USS *Sierra Madrea* in the vicinity of Second Thomas Shoal (beached Philippine Naval Vessel in 2014), and the continued PRC island building activities and reef destruction while the case was pending. While the Tribunal ultimately became preoccupied with whether the resupply missions were military activities, and declined to rule on that particular count, the Tribunal found that the PRC had acted "unequivocally" to aggravate and extend the dispute as relates to its dredging and construction activities. The Tribunal finally noted in paragraph 1179 that China had "undermined the integrity of the proceedings" by inflicting "irreparable" harm to Mischief Reef.

Even though the Tribunal declined to specifically rule on the blockade of the *Sierra Madre*, the import of the decision was clear: states have a duty under a variety of principles of International Law, including the UN Charter, such that:

> ….(Article 33) the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

As a permanent member of the UN Security Council, the United States should have a reasonable expectation that China would have behaved in a more responsible manner vis-à-vis its less powerful neighbors. The reality is that ALL of the claims in the South China Sea are based on slender reeds of evidence, and that, based on traditional principles of discovery and occupation, none of the claims are that strong because virtually all of the features are uninhabitable, and that their value only became manifest in the 1970s with the prospects of oil and gas and the post UNCLOS III entitlements to a 200NM EEZ that encompassed large amounts of valuable fisheries. So, in a sense, it was not unreasonable from a U.S. policy perspective for China to have an equal right to press its territorial claims. But, the area-wide fishing bans and the intentional destruction of the marine environment were actions that were clearly over the top and well beyond what is appropriate for a permanent representative of the UN Security Council. All the better, from a U.S. policy perspective, that an outside independent body comprised of eminent jurists from regions unconnected with the dispute censured the PRC's outrageous conduct.

Classification of Specific Features The 500-plus page ruling devotes considerable attention to delineating the criteria for classifying oceanic features and then ascribing the rights associated with those features. The Tribunal drew their support from a number of past decisions by the International Court of Justice, the International Tribunal for the Law of the Sea and general international law principles. The Tribunal was sensitive to

[12] Art 300 also pertains. The principle that states have a duty and an obligation to behave with restraint while a dispute is pending. *Electricity Company of Sofia and Bulgaria*. [1939 PCIJ] [15]. In *Sofia,* the Tribunal explained the principle thusly: "the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute…"

the fact that the SCS is a Gordian knot from the perspective of trying to decouple the individual territorial claims in the context of a systematic negotiation. Given this, one purpose behind their laying down an extensive number of legal benchmarks was to prevent "future chaos and insecurity that had resulted in the past year and a half from unilateral actions in the absence of a precisely defined legal order." [17: para. 1187].

From a U.S. oceans policy perspective, having legal certainty over the legal status of features and their associated water space claims has been a longstanding goal—"Our objectives have consistently been to provide a legal order that will, among other things, facilitate peaceful, international uses of the oceans and provide for equitable and effective management and conservation of marine resources." [25] Even though the United States may have to eventually accept some compromises in its own island claims; U.S. oceans law policy has generally followed its roots in the English Common Law when it comes to rights and entitlements. That policy, which also has some support in classical Roman law, is to have right in property full vested so that there can be certainty. Certainty enables individuals to pass on property to their heirs, borrow money, or to lease property to third persons. U.S. fisheries and oil and gas operators aren't interested in military conflicts of having their rigs or vessels seized. They prefer the certainty of clear boundaries and clear title.

U.S. oceans policy interests are also advanced with clear guidelines on the status of features because once there is a clear understanding of the status of features, it can set the stage for joint development arrangements; especially in the Spratlys [23]. The other benefit, if the parties were to heed the ruling, is that it creates no legal incentive for the parties to further enhance the features under the mistaken belief that it will improve their legal position.

Rocks Vs. Island The Tribunal's decision to delve into the status of Itu Aba was the most unpredicted feature of the decision; yet, the legal result was logical given the recent case law[13] and overall equities of the various South China Sea contestants who can ill afford for the situation to remain forever in limbo. As noted above, the finding that none of the features in the Spratlys were islands originally (or after they were improved) accomplishes a number of things that are positive to U.S. oceans policy interests:

- Provides less of a legal incentive for the states to agree to some sort of joint development scheme since none of the claimants are sitting on geographic features which are dominant;
- Pulls potentially overlapping maritime entitlements away from the Philippine Archipelago as well as the coastlines of Taiwan, Malaysia, and Vietnam so that each of those states have the orderly right to establish an EEZ and continental shelf and develop the associated resources;

[13] For an island to have full entitlements under Article 121, the Tribunal held that the any population on the island must rely upon "local and not imported" support and be capable of supporting general populations. This directly contrasts with small outposts that are designed to support a sovereignty claim. Fresh water, arable land, and continuous civilian inhabitation are all features that must be present before the Article 121 entitlement can be given. The Tribunal (para 420) relied upon on a line of three important precedents: The 2009 Serpent Island Case by the International Court of Justice (ICJ), the 2012 Bay of Bengal decision by the International Tribunal for the Law of the Sea (ITLOS), and the 2012 Nicaragua v. Columbia ICJ cases which together held that small remote features were "enclaved" in the EEZ projections of continental countries.

- Creates an incentive for the PRC to be restrained in its activities vis-à-vis the Paracels, since Woody Island (the largest feature in the Paracels) is only slightly larger than the 110 acre Itu Aba (Taiping Island) and, unlike Itu Aba, it does not have an indigenous source of fresh water. Woody Island's water comes from a desalinization plant and rainfall collection.
- Limits the sizes of the maritime entitlements that will project into the areas where U.S. forces will either transit or overfly and could be subject to a different type of dispute in the future.

In addition to these benefits, there are benefits to the United States in that the decision establishes clear standards of what constitutes an island under Article 121 of UNCLOS and can lead to resolution of some longstanding disputes involving U.S. allies. The Tribunal ruling has implications on the Diaoyu/Senkaku dispute in the East China Sea. Japan has yet to establish formal claims around the Senkakus to force the issue on the status of these uninhabited islets (that do not possess any fresh water or arable land sufficient to support agriculture). If both contestants (Japan and China) were to agree that sovereignty over the features was still unresolved and that, consistent with the Tribunal ruling, the feature was only a rock versus an island, then China and Japan could establish a median line to demarcate most of the East China Sea between the Chinese mainland and Japan's Ryuku Island Chain. This would create significant resource opportunities for both countries [20] and could lead to significant reduction in tensions. Were that to occur, it would be one less "stress factor" on the U.S. military given U.S. security guarantees to Japan.

The second dispute that complicates U.S. security relations in Asia involves the status of Liancourt Rocks (called Dokdo by Korea and Takeshima by Japan) midway between Japan and South Korea in the Sea of Japan. These rocks comprise less than 50 acres and have some very small fresh water sources, but there is no history of diverse vegetation or arable land sufficient to sustain a population or meet the standards of "an island" from the SCS Arbitration. The rocks are currently occupied by South Korea but Japan points to correspondence from the U.S. Department of State [24] that gave preference to the Japanese claim to these features. Japan has proposed to South Korea that the dispute be referred to the International Court of Justice, but these proposals have been rebuked by South Korea.

The Liancourt Rocks dispute has been a major irritant in U.S. relations with Korea, and in the relations between Korea and Japan [12]. Were the rocks determined to be Island under UNCLOS 121, it would significantly complicate the demarcation of ocean space in the Sea of Japan which is both rich in fisheries and also thought to possess natural gas deposits. For the U.S., the South China Tribunal provides the ammunition it needs to get the parties to agree that the features are only rocks and to force them to begin the process of demarcating their opposing continental shelf boundaries in the Sea of Japan.

Conclusion

China is in for a rude awakening now that business people have replaced political scientists at the helm of U.S. foreign policy. More so than any foreign policy arena,

U.S. business people are keenly aware that China used its economic muscle to strong arm U.S. businesses and harm U.S. economic interests through (a) predatory foreign direct investment in key U.S. industries; (b) patterns of violating trade agreements; (c) patterns of not respecting property rights—especially intellectual property; (d) patterns of dumping state subsidized products into the U.S.; (e) forcing U.S. businesses to compete with state-owned enterprises; and (f) lack of reciprocity when it comes to permitting U.S. businesses to invest in China or do business in China. Even though China has been able to get away with much of this because of passive U.S. trade policies, the memories of these business practices is seared into the consciousness of most of American industry and will have an effect on U.S. foreign policy going forward. As a counterbalance, China knows that they can ill afford to shut its export driven economy from the U.S. The question then becomes where is the "sweet spot" in terms of where U.S. and Chinese interests can coalesce, including with regard to how the SCS Arbitration findings are implemented.

In the last analysis, the U.S., as a Pacific power, has an overriding strategic interest in ensuring that China does not violate the international "rules of the road" relative to the rights of its neighbors. The U.S. needs to prevent backsliding in the international law of the sea to which the United States is globally dependent. UNCLOS was also intended to be a "package deal" which states could either accept in its entirety or reject. China accepted that deal in 1996 and needs to stay true to its international commitments and, more importantly, not be permitted to engage in both bullying behavior vis-à-vis its neighbors or be allowed to revise the international legal order. For this reason, U.S. policy should regard the Arbitration findings as central to its policies vis-à-vis China, even though the United States may be willing to allow China some strategic maneuvering room so it can explain the decision to its people.

As much as the Tribunal Decision stings the leaders in Beijing, the decision provides a *raison d'etre* for China to begin the process of negotiating with the Philippines regarding Scarborough Shoals, Reed Bank, Mischief Reef, and, possibly, the other Spratly Island claimants, and, in doing so, display constructive leadership. China has much to gain from the ruling [22], and the U.S. needs to press forward the positive aspects of the decision—especially, why China stands to gain much more by embracing its findings and putting its own spin on the decision. One can only hope that President Trump can push China in this direction because China has much more to gain from collaboration with the United States and its neighbors. Refuting the ruling and continued intimidation of its neighbors, will lead China into battles that it won't win.

References

1. Antarctic toothfish poaching ships shrug off New Zealand navy. 2015. The Guardian. https://www.theguardian.com/environment/2015/jan/21/antarctic-toothfish-poaching-ships-shrug-off-new-zealand-navy. Accessed 21 Jan.
2. Argentina sinks Chinese Fishing Boat. 2016. Wall street journal. https://www.bing.com/videos/search?q=chinese+illegal+fishing+antarctic&view=detail&mid=45FCAA8C476EDF6B25DD45FCAA8C476EDF6B25DD&FORM=VIRE. Accessed 16 March.
3. Antarctica, Cool. 2017. *Human impacts on Antarctica and threats to the environment - fishing.* http://www.coolantarctica.com/Antarctica%20fact%20file/science/threats_fishing.php.

4. Cunningham, Nick. 2014. Why oil and gas in the South China Sea won't be developed. Oil Price. http://oilprice.com/Energy/Energy-General/Why-Oil-and-Gas-in-the-South-China-Sea-Wont-Be-Developed.html. Accessed 17 July.
5. Department of Foreign Affairs, Republic of the Philippines. 2013. PHL PRC INT Notification and Statement of Claim on West Philippine Sea. No. 13–0211. Also available at Intern Account, Center for Strategic and International Studies. https://www.documentcloud.org/documents/2165477-phl-prc-notification-and-statement-of-claim-on.html.
6. Gao, Zhiguo, and Bing Bing Jia. 2013. The nine-dash line in the South China Sea: history, status and implications. *American Journal of International Law.* 107 (1): 98–124.
7. International Tribunal for the Law of the Sea. 2013. Case No. 22: The Arctic Sunrise Case (Kingdom of the Netherlands v. Russian Federation), provisional measures. https://www.itlos.org/index.php?id=264. Accessed 25 Oct 2013.
8. Kardon, Issac B. 2015. Maritime rights and interests. Asia Maritime Transparency Initiative. https://amti.csis.org/maritime-rights-and-interests/. Accessed 16 July.
9. McCurry, Justin, and Tania Branigan. 2014. Obama says US will defend Japan in island dispute with China. The Guardian. https://www.theguardian.com/world/2014/apr/24/obama-in-japan-backs-status-quo-in-island-dispute-with-china. Accessed 24 April.
10. Ministry of Foreign Affairs of the People's Republic of China. 2014. Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines. http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml. Accessed 7 Dec.
11. Nguyen, Mai, Sui-Lee Wee, and Megha Rajagopalan. 2015. Vietnam opposes Chinese fishing ban in disputed sea. Reuters. http://www.reuters.com/article/us-vietnam-china-fish-idUSKBN0O20PF20150518. Accessed 18 May.
12. Panda, Ankit. 2015. No. The US won't back South Korea against Japan on Dokdo. The Diplomat. http://thediplomat.com/2014/05/no-the-us-wont-back-south-korea-against-japan-on-dokdo/. Accessed 2 May.
13. Panda, Ankit. 2016. Is China really about to announce a South China Sea air defense identification zone? Maybe. The Diplomat. http://thediplomat.com/2016/06/is-china-really-about-to-announce-a-south-china-sea-air-defense-identification-zone-maybe/. Accessed 1 June.
14. Pedrozo, Raul (Pete). 2010. Coastal state jurisdiction over marine data collection in the Exclusive Economic zone; US views. In *Military Activities in the EEZ.* ed. Peter Dutton, 23–36. China Maritime Study, No. 7. Newport, RI: Center for Naval Warfare Studies, Naval War College Press, 2010. https://www.usnwc.edu/Research—Gaming/China-Maritime-Studies-Institute/Publications/documents/China-Maritime-Study-7_Military-Activities-in-the-.pdf.
15. Permanent Court of International Justice. 1939. The Electricity Company of Sofia and Bulgaria (Request for the Indication of Interim Measures of Protection.), Belgium v. Bulgaria. http://www.worldcourts.com/pcij/eng/decisions/1939.12.05_electricity.htm. Accessed 5 Dec.
16. Permanent Court of Arbitration. 2015. An Arbitral Tribunal Constituted under Annex VII to the 1982 UN Convention on the Law of the Sea between the Republic of the Philippines and the PRC. Award on Jurisdiction and Admissibility. PCA Case, No. 2013–19. https://pcacases.com/web/sendAttach/1506. Accessed 29 Oct.
17. Permanent Court of Arbitration. 2016. An Arbitral Tribunal Constituted under Annex VII to the 1982 UN Convention on the Law of the Sea between the Republic of the Philippines and the PRC. Award. PCA Case, No. 2013–19. https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Award.pdf. Accessed 12 July.
18. ProCon.org. 2014. Demographics of immigrants in the United States illegally. ProCon. http://immigration.procon.org/view.resource.php?resourceID=000845%20-%20countries. Accessed 19 Aug.
19. Rosen, Mark E. 2013. *China's ADIZ is a symptom*. Armed Forces Journal: Here's a cure No. 29. http://armedforcesjournal.com/chinas-adiz-is-a-symptom-heres-a-cure/.
20. Rosen, Mark E. 2014. Fixing the Senkaku/Diaoyu problem once and for all. The Diplomat. http://thediplomat.com/2014/12/fixing-the-senkakudiaoyu-problem-once-and-for-all/. Accessed 19 Dec.
21. Rosen, Mark E. 2014. Philippine claims in the South China Sea: A legal analysis. A CNA Occasional Paper. https://www.cna.org/cna_files/pdf/IOP-2014-U-008435.pdf. Accessed 24 Aug.
22. Rosen, Mark E. 2016. China has much to gain from the South China Sea ruling. The Diplomat. http://thediplomat.com/2016/07/china-has-much-to-gain-from-the-south-china-sea-ruling/. Accessed 18 July.
23. Rosen, Mark E. 2016. Elements of a South China Sea deal: saving face and making money. IPP Review. http://www.ippreview.com/index.php/Home/Blog/single/id/260.html. Accessed 21 Oct.

24. Rusk documents (also known as Rusk–Yang correspondence). 2016. Wikipedia. https://en.wikipedia.org/w/index.php?title=Rusk_documents&oldid=721260753. Accessed 20 May.
25. Statement on United States oceans policy. 1983. Reagan library archives. https://reaganlibrary.archives.gov/archives/speeches/1983/31083c.htm. Accessed 10 March.
26. Thayer, Carl. 2014. China's oil rig gambit: South China Sea game-changer? The Diplomat. http://thediplomat.com/2014/05/chinas-oil-rig-gambit-south-china-sea-game-changer/. Accessed 12 May.
27. The Economist. 2015. Oil on troubled waters: Two case studies in a disputed sea. http://www.economist.com/news/asia/21640403-two-case-studies-disputed-sea-oil-troubled-waters. Accessed 22 Jan.
28. Torode, Greg. 2013. Spratly Islands dispute defines China-Vietnam relations 25 years after naval clash. South China Morning Post. http://www.scmp.com/news/asia/article/1192472/spratly-islands-dispute-defines-china-vietnam-relations-25-years-after. Accessed 17 March.
29. US Department of Defense. 1996. *National Security and the Convention on the Law of the Sea*. Washington, DC: US Dept. of Defense, 2nd ed. http://www.dod.mil/pubs/foi/Reading_Room/International_Security_Affairs/876.pdf.
30. US State Department of State. n.d. *Law of the Sea Convention*. http://www.state.gov/e/oes/lawofthesea/.
31. US State Department of State. 2014. Maritime claims in the South China Sea. *Limits in the Seas*, No. 143. Office of Ocean and Polar Affairs, Bureau of Oceans and International Environmental and Scientific Affairs. Dec 5.

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