THE LEGACY OF THE SOUTH CHINA SEA ARBITRATION:
AN INTRODUCTION OF PCA RULING IN A HISTORICAL AND POLITICAL CONTEXT

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Introduction

What is the Legacy of the PCA Ruling on the South China Sea Arbitration?

On January 22\textsuperscript{nd}, 2013, the Philippines drafted a Notification and Statement of Claim under the United Nations Convention on the Law of the Sea (UNCLOS) and filed an arbitration against China at the Permanent Court of Arbitration (PCA) in The Hague. The arbitration was established to decide on the legality of China’s so-called “Nine-dash Line” and historic claims on the South China Sea. China refused to participate in this arbitral tribunal and has then been criticized for contempt of the international law. The international community actively participated in the discussion of this arbitration, and the decision of this Tribunal was significant for the development of international law in terms of the international tribunal’s jurisdiction, finality and enforcement of its ruling. The purpose of this thesis is to investigate the legacy of this PCA ruling by studying the historical background of the South China Sea region and analyzing the current and possible future developments of this dispute in a political context.

Chapter I provides the historical background of the South China Sea from a Chinese perspective and the development of international law in general. According to the Chinese perspective, the Chinese historical kingdoms exerted their dominance through an institutional design of the tributary system over the course of history. The prosperity of numerous Southeast Asian societies relied on establishing tributary relationships with China. It was an irreplaceable system in East Asian history that was maintained for two millennia until the Europeans’ imperial penetration started in the seventeenth century. The colonial penetration destroyed a well-established social and ideological system in Southeast Asia and created an ideological gap during the forced transition from a traditional Asian model to a modern Western one. The clear assignment of rights, especially historic rights of Southeast Asian countries, were lost, and
ambiguity was created as a result of this transition. This chapter also introduces the modern international law framework based on the Westphalian ideologies traced back to the seventeenth century. The author compares the traditional tributary system and modern international law system to build the foundation for legal discussion in the later chapters.

Chapter II provides the Philippines’s submission and the Tribunal’s ruling on three main topics: the jurisdiction of the Tribunal, the legality of China’s Nine-dash Line and the determination of rocks versus islands. The Tribunal decided that it had jurisdiction on October 29th, 2015. In its final decision on July 12th, 2016, The Tribunal ruled that China’s Nine-dash Line was illegal. The Tribunal decided in favor of the Philippines that all the features in the Spratly Islands cannot generate 200 nm Exclusive Economic Zone (EEZ), and thus, protect the Philippines’ maritime claim out of its shore.

Chapter III responds to the Philippines’ three main arguments correspondingly from the Chinese point of view. China argued against the Tribunal’s jurisdiction since the Tribunal ruled on interstate disputes concerning territorial sovereignty, which does not fall under the jurisdiction of the tribunal. This chapter also provides Chinese arguments on how the Nine-dash Line had a legal basis under the general international law. This chapter finally challenged this Tribunal’s decision on ruling all the maritime features in the Spratly Islands to be rocks. It was again created conflicts of maritime delimitation between states. Thus, it should not covered under the jurisdiction of this Tribunal. Chapter II and III together provide a legal debate between the Philippines’ submission and China’s counter-arguments.

Chapter IV assesses the merit of this arbitration from legal and political perspectives. Legally speaking, the final Award, indeed, has contributed to the clarification of the South China Sea disputes in its fact-finding process, and also emphasized the necessity for China to take its
definition of the Nine-dash Line more seriously. However, due to the issue of jurisdiction and the problematic interpretations of rocks and islands under UNCLOS, the Award lacked finality and credibility. Thus, the pursuit of international arbitration by the Philippines did not solve the disputes between the Philippines and China but rather further complicated the issue. From a political aspect, the media reports from different countries selling the general public different narratives of this arbitration represented an enormous involvement of political interests. The heavy involvement of the outside powers impeded the continuing peaceful development of the region. For the disputes to be properly addressed between the Philippines and China, the two need to be aware that a bilateral negotiation and direct conversation would be the best option to solve the issue in a way that benefiting all.

Methodology and Sources

This thesis conducts qualitative analysis on the South China Sea Arbitration by utilizing primary and secondary resources from relevant fields of study.

Chapter I will lay foundation on the history of Southeast Asia and development of International Law. Bill Hayton’s book on *The South China Sea: The Struggle for Power in Asia* (2014) was a comprehensive study of historical, legal and political aspects of the South China Sea conflicts before the Tribunal’s final Award. This chapter will rely on Hayton’s narrative on Southeast Asian history and include Timothy Brook’s *Mr. Selden’s Map of China: Decoding the Secrets of a Vanished Cartographer* (2013) and Robert Batchelor’s *London: The Selden Map and the Making of a Global City, 1549-1689* (2014) to construct the story of the Selden Map. David Kang’s *East Asia before the West: Five Centuries of Trade and Tribute* (2010) and Ji-Yong Lee’s *China’s Hegemony: Four Hundred Years of East Asian Domination* (2016) will
provide background for China’s tributary system. The interpretation of modern international law will be joined by the books from David Bederman, *International Law Framework (2010)*, and Sophia Kopela, *Dependent Archipelagos in the Law of the Sea (2013)*.

Chapter II will provide textual analysis on primary resources, such as the PCA’s final Award on this arbitral tribunal between the Republic of the Philippines and the People’s Republic of China on July 12th 2016, China’s Position Paper in 2014 and United Nations Convention on the Law of the Sea (UNCLOS), to address the Philippines’ arguments and the decisions of this Tribunal.

Chapter III will rely on academic books published on the South China Sea and international law journals worldwide to construct Chinese legal standings against the main arguments provided in Chapter II. Stefan Talmon and Binbing Jia’s book on *South China Sea Arbitration: A Chinese Perspective (2014)* will be included. This chapter will also incorporate journal articles in the *Chinese Journal of International law, China Ocean Law Review* and *American Journal of International Law*.

Chapter IV will be based on news reports on the South China Sea Arbitration through a three-year period among sixteen media outlets chosen across seven countries. Public newspaper articles will be used in this sections from sources such as *CNN, BBC*, and the *New York Times*. Sources for political implications will come from online international magazines including *The Guardian, The Diplomat, NPR*, and *Time* to provide the developments of South China Sea disputes within the present political context.

This work includes historical, legal and political aspects of the South China Sea disputes and arbitration. The tributary system and its relationship with the China’s historic rights claim will be studied. This thesis attempts to address why, from a Chinese perspective, the tributary
system was an institution comparable with the modern international law, and why the ambiguity created by the transition between the two laid the foundations for the current disputes. Therefore, this dispute could not be resolved solely under the framework of modern international law. It also attempts to provide a balanced perspective on legal debate between the two states by constructing China’s narrative correspondingly to the three most important legal arguments from the Philippines. This thesis discovers the problems resulted from the unenforceability and lack of finality of the Tribunal’s decision which impeded its credibility to solve the disputes between the countries. After the investigation of this arbitration process, the thesis argues that the internationalization of the South China Sea conflicts imposed pressure on the parties, more on the Philippines than the Chinese side. The optimal solution is to conduct bilateral negotiations between the two parties involved, free of the outside involvement.
Chapter I. Background: Historical Context and International Law Framework

The South China Sea Arbitration has brought this region of water to the attention of the public worldwide since 2013. This attention has been escalated to one of its climaxes when the final Award of the Permanent Court of Arbitration (PCA) came out on July 12th, 2016. Aside from political implications of the complexity of this issue, the South China Sea conflict should be analyzed with its historical context under the modern international law framework. China asserted its rights over “long course of history,”¹ and the Philippines argued against these rights in front of the Tribunal that based on the modern international law. That is, the Philippines claimed that its rights under the United Nations Convention on the Law of the Sea (UNCLOS) are seriously violated by Chinese actions within this region.

Due to the complexity of the issue under discussion, the author will provide her readers with the background of this confrontation between China and the Philippines. This chapter will first provide geographic facts and a brief history of the South China Sea before exploring the relatively recent development of tension between China and the Philippines. The author will then address some important international law issues related to this case, especially the UNCLOS and the system of customary international law. This chapter will end with a brief summary of the timeline of this arbitration case unilaterally initiated by the Philippines against China.

I.1 Geographic and Historical Background of the South China Sea

I.1.1 Geographical Facts

The South China Sea is a semi-enclosed maritime area of almost 3.5 million square kilometers in the western Pacific Ocean. It lies to the south of China, to the west of the Philippines, to the east of Vietnam, and to the north of Malaysia, Brunei, Singapore, and Indonesia. The Spratly Islands, a “constellation of small islands and coral reefs,” are located in the southern portion of the South China Sea.\(^2\) Its southern boundary is a rise in the seabed between Sumatra and Borneo, and the northern boundary is from the northernmost point of Taiwan to the coast of the Fujian province, China. It is the largest marginal sea of the western Pacific. The South China Sea and the East China Sea together constitute the China Sea. The China Sea Basin is believed to have dropped 2.5 miles (4 km) as a result of the seafloor spreading some 1 million to 60 million years ago. This situation has created the plateaus with numerous coral reefs, islets, banks and drowned atolls.\(^3\)

\(^2\) South China Sea Arbitration (Philippines v China), PCA Case No.2013-19 Award at 1:3 (Jul 12, 2016), thereafter, Final Award.
I.1.2 Prehistory to the Twentieth Century from a Chinese Perspective

I.1.2.1 Prehistory to 1500s

Neighboring one of the earliest human civilizations, the history of the South China Sea can be traced back to around 1.5 million years ago, when the earliest evidence of humans in Southeast Asia, the remains of “Java Man,” were found both in Java and in China. Undoubtedly, Chinese empires have played crucial roles in Southeast Asia throughout the millennia. The rise

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and fall of the Chinese empires profoundly influenced the prosperity of the surrounding communities.

Numerous examples of interaction between the Chinese dynasties with other Southeast Asian communities can be found throughout the centuries. The dominant power in the Southeast Asia in the first centuries CE seems to be a place that the Chinese records as “Funan,” a place that was based in the Mekong Delta, what is now southern Vietnam and Cambodia. In times of crises, Funan would send “embassies” to China to make “tribute” offerings to Chinese rulers seeking to preserve its position as a preferred trading partner. The Chinese historians regard this action as proof that the Southeast Asian societies were vassals to the Chinese emperor, although the contemporary Southeast Asian historians suggested that the “tribute” should not be viewed as a subordinate position in a feudal relationship, but rather a simple relation as a trading partner.

The argument saying that the tributary system is merely a trading system is problematic. The tribute trade regime, where many surrounding communities relied on China for their technological and economic development, was not the only source of power. In fact, the lengthy history of the tributary system revealed that it is associated with the notion of hegemony. The identity of the Chinese emperor as the Son of Heaven was constructed through the practice of actors’ compliance with the tributary system. The vassal states came and paid tribute before receiving the Chinese title showing that under Chinese hegemony, states followed the rules of tributary system created by the Chinese. The Chinese Confucius thinking became the cultural

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7 Ibid., 14.
9 Ibid., 64.
foundation of many surrounding polities and the Chinese believed themselves to be more civilized than the peripheral societies.

Besides the establishment of a tributary system since very early centuries, there were occasions where Chinese empires brought military actions against other Southeast Asian communities. For example, after the fall of the Jin dynasty (265-420 AD), overland routes from China to the west were closed to the Southern new rulers, the Liu Song. They became dependent on maritime trade, which was being damaged by Champa’s piracy.\(^{10}\) Champa was an Indianized maritime kingdom based in what is now central Vietnam since early centuries AD.\(^{11}\) Liu Song forces invaded Champa in 446 and destroyed its capital as a resolution to its piracy problem. The Pearl River Delta, what is now Guangzhou, became the main port of southern China and the trade over the South China Sea became highly profitable.\(^{12}\)

The power transition of the East Asian societies never stopped. In 618, the Tang Dynasty had taken power in China and unified the lowlands for the first time in two centuries, the South China Sea trade became prosperous again with this strong Tang center. The Tang Dynasty’s significant development could be proved when in 683, the Tang court sent its first embassy to Nanyang, the islands in Southeast Asia, to build a relationship between China and Srivijaya.\(^{13}\) Srivijaya was a thalassocrat society based on the island of Sumatra that had influenced many Southeast Asian countries as an important center of Buddhism.\(^{14}\) From Hayton’s perspective, Srivijaya then became a gatekeeper of the Tang Dynasty in the region.\(^{15}\) In exchange for

\(^{10}\) Hayton, *The South China Sea: The Struggle for Power in Asia*, 15.
\(^{13}\) Ibid., 16.
\(^{15}\) Hayton, *The South China Sea: The Struggle for Power in Asia*, 16.
Srivijaya’s successful protection of the Southeast Asian zone, China granted it the preferred trade status. Historians believed that the Chinese connection is crucial for the survival of Srivijaya since when trade with China’s ports prospers, Srivijaya thrived. But when China’s ports periodically closed, the declined trade revenue endangered the stability of its political authority.\(^\text{16}\)

The trade pattern did not diminish with the fall of Tang in 906. In 987, the Song Dynasty sent four missions abroad to encourage foreign states to trade, and after 1069, a Song court official, Wang Anshi, pioneered reforms intended to increase government revenue by stimulating trade. Around 1090, not only Chinese ships were allowed to sail abroad from any ports, but it also allowed Fujianese traders to break into a business previous monopolized by foreigners. The commerce around the South China Sea during Song Dynasty became a very important period of economic development for this region.\(^\text{17}\)

The private maritime trade was so lucrative that the Ming Dynasty later tried to bring it under state control. Trading relationship shifted mainly to “tribute” arrangements rather than the open market, and Guangzhou again became important as the legitimate port of the ships from Southeast Asia. During this period, Malacca also became a center of trade in the South China Sea and Yongle Emperor of Ming Dynasty sent his envoy to Malacca in 1403, when the Malay King Parameswara had just established his control in 1401.\(^\text{18}\) According to Bill Hayton, Wade’s study of the Ming Shi-Lu revealed that there were 25 voyages led by different eunuch commanders in the years between 1403 to early 1430s. The most famous eunuch commander, Zheng He made his first voyage to Malacca to establish a tributary relationship between Malacca and Ming. Malacca then became a dominant port city in the region. During his voyages, Zheng He did not

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physically occupy any piece of land or seize any wealth from other countries. Among his commercial and trading activities, he gave more than he received, and thus was lauded and welcomed by the people of the countries along his routes. Thus, these voyages of the Ming Dynasty aimed not only at controlling the trade routes, but also to give the usurping emperors in these Southeast Asian countries legitimacy at home through the gesture of subordination to the Ming.¹⁹ These actions by the Ming and other emerging states surrounding the South China Sea proved that even until the fifteenth century, the tributary system still dominated. Legitimacy was established mostly by the recognition of other states, specifically speaking in this region, the Chinese Ming Dynasty. Through the tributary system, Ming Dynasty granted political legitimacy to its tributary states in the Southeast Asia.

It is crucial to realize that at this point, the East Asian polities did not identify their sphere of influence regarding borders and sovereignty. The idea of a sovereign nation and state was far beyond the understanding and interpretation of the East Asian people. Bill Hayton emphasized in his book that the East Asian rulers during this time recognized themselves as the center of networks, rather than states with defined borders. Their legitimacy came more from recognition by other rulers, than from physical control over actual territory.²⁰ Thus, China’s tributary system had an important function of granting legitimacy to the rulers in the neighboring countries. Trade was a critical motivating factor for countries to participate in the tributary system, nevertheless, the political power generated by establishing a tributary relationship with China should not be overlooked.

¹⁹ Wade, Southeast Asia in the Ming Shi-lu: an open access resource, 366; Hayton, The South China Sea: The Struggle for Power in Asia, 23-35.
²⁰ Ibid.
To further the discussion, David Kang has described in his book *East Asia Before the West* that the difference between a border and a frontier is the difference between a line and a space. Borders are fixed, and it is a clear line that separates two different political entities with clear rights and responsibilities. A frontier is a zone, an ambiguous area where political control and organizations gradually diminish and intermingle with other ideas, institutions, rulers, and peoples.21 Without the recognition of definite borders between the societies, the interactions among the frontiers of the East Asian societies became ambiguous, where only the tributary system provides a relative definite answer to the political relationship between the authorities in the region. The concept of a tributary system was described by historian John King Fairbank as “a set of ideas and practices developed and perpetuated by the rulers of China over many centuries.”22 In the social relationship, the meaning of country A sending tribute to country B represented that A acknowledged B’s superior position. Chinese Confucian theory of hierarchical social relationship dominated the system and sustained itself through the practices of the tributary system. The institutional design of the tributary system underlay China’s influence throughout the millennia.

1.1.2.2 1500s to Early 1990s

The history of the South China Sea and societies around it, prior the 1500s seems complicated and the historical ownership of the islands in this area appears to be ambiguous because the idea of clear borders among sovereign states has yet to be developed in the East

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22 Lee, *China's Hegemony: Four Hundred Years of East Asian Domination*, 29.
Asian countries. The level of complication within the region escalated after the 1500s, as the European powers entered the stage as key players with a different ideological background.

The Ming Dynasty suffered from economic imbalance and ultimately was replaced by the invading Qing in 1644. The Qing consolidated its control over the coast and in 1684, the new authority felt confident enough to end their ban on the private overseas trade. China’s long history had nurtured a culture that was able to create artistic products which are greatly favored by the Westerners. The trade started flourishing since the seventeenth century, even the English “empire” in the region was consisted of a trading factory in Canton. It was the beginning of a “Chinese Century” in the South China Sea region.\(^\text{23}\)

During the same century, a map created by the Chinese has been brought to England and lay in the Bodleian Library in Oxford for the next five centuries. The map entered the library in 1659 as part of a large donation from the estate of a lawyer named John Selden.\(^\text{24}\) Robert Batchelor discovered this Map and it portrays a network of pale lines radiating from the southern Chinese port of Quanzhou. The lines linked Quanzhou with almost every port in the region: from Nagasaki to Manila, Malacca and beyond. The East route was marked with navigational instructions, a Chinese compass bearing and an indication of the distance.\(^\text{25}\) Robert Batchelor discovered that on the back of the map was a draft of the routes, which means that these routes had been drawn first. He believed that this map was drafted around 1619, out of the Late Ming shifts in trade, the rise of Tokugawa Japan, and corresponding shifts in the global trade in silver and “silver cycle.”\(^\text{26}\) The most unique element of this map is that the heart of the map was not

\(^{23}\) Ibid., 42.
\(^{24}\) Timothy Brook, Mr. Selden's Map of China: Decoding the Secrets of a Vanished Cartographer (New York: Bloomsbury Press, 2013), 11.
\(^{25}\) Hayton, The South China Sea: The Struggle for Power in Asia, 29.
China. Instead, the center of the map was occupied by the South China Sea. Timothy Brook emphasized in his book that rather than letting the landforms dominate the graph he had drawn, the map maker of the Selden Map had pushed the landforms to the periphery and invited what is now the South China Sea into the center.\textsuperscript{27}

This map destructed the traditional image of seventeenth century China as an inward facing and isolationist power. It shows, instead, a China that had engaged with the sea to the wider world.\textsuperscript{28} It also reaffirmed the importance of European participation of trade in Southeast Asia since the seventeenth century. The appearance of this map proved that Chinese had immensely participated in navigation and trading in the South China Sea. The professionality unfolded in this map demonstrated the importance of Chinese engagement in the area. It refuted the argument that China was an isolated power in the heart of Asia.

\textsuperscript{27} Brook, \textit{Mr. Selden's Map of China: Decoding the Secrets of a Vanished Cartographer}, 12.
\textsuperscript{28} Hayton, \textit{The South China Sea: The Struggle for Power in Asia}, 30.
Figure 2. The Selden’s Map of China29

The foreigners’, especially the Europeans’, involvement in the South China Sea region had increased exponentially. The Europeans’ imperial penetration endangered the integrity of the tributary system in Southeast Asia. The Europeans’ purpose was to take over the lucrative trading opportunities, especially the spice trade. They did so by colonizing tributary states of China throughout the sixteenth to the twentieth century. The Portuguese retained the Spice Islands which would become Indonesia, and the Spanish controlled the area that became the Philippines under the 1529 Treaty of Zaragoza. It was the Portuguese who first gave the water east of Malacca the name by which we knew them today: Mara De China or the South Sea of China. This is where the name in Chinese Nanhai, South China Sea, came from.

At the beginning of the seventeenth century, the Dutch established the Dutch East India Company (VOC) and built a trading and military bridgehead on the Malay Peninsula. Hugo Grotius was asked by the Dutch authority to advocate for the rule of free sea in order to challenge the Portuguese tightening control of the trade routes in Southeast Asia. When the English East India Company (EIC) allied with Dutch VOC, the Dutch Republic dominated global trade in the early decades of the seventeenth century. However, the VOC still had to depended on local allies, the merchants of Fujian, if they wanted to trade with China.

The trade with China was so lucrative that all colonial powers tried to step in. The rising power of EIC participated in tea and opium trade with China during the eighteenth century, and it strived to build a base in Malacca Straits. Thus, The EIC acquired Singapore in 1819 and by controlling trade through Malacca, the British became the new hegemon in Southeast Asia. At the beginning of the nineteenth century, the European powers and Southeast Asian societies still

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31 Ibid., 37.
32 Ibid., 41.
33 Ibid., 45.
held different ideas about what constituted a “country.” Unlike Southeast Asians who believed the rulers were the centers, the Westerners adopted the Westphalia and defined a country in terms of laws and rights within a strict boundary. After the destruction of Chinese tributary states throughout Southeast Asia, the European powers could not wait to take over the center of the wealth. Thus, the two Opium Wars in the nineteenth century forced China to opened up its markets for the colonial powers.

Entering the twentieth century with the fall of the last Chinese Dynasty, Qing, the first constitution of the Republic of China (ROC) asserted that “the sovereign territory of the Republic of China continues to be the same as the domain of the former Empire.” As pointed out by Bill Hayton, this equation of “domain” with the new “sovereign territory” is fundamental in determining the borders of the South China Sea region. A private cartographer, Hu Jinjie, drafted a new guide to China’s historic territory, which was eventually published in December 1914 the New Geographical Atlas of the Republic of China. This map included a line drawn across the South China Sea, and both the Pratas and the Paracels were within the line. On April 13th, 1930, the French warship Malicieuse dropped anchor off Spratly Island and fired a 21-gun salute. The French government publicized its occupation but did not formally annex it until 1933. On June 7th, 1933, the Chinese government established the Review Committee for Land and Water Maps. China published a newly-made Chinese Atlas in which the Chinese sea border stretched down to the Spratly Island that France just claimed. It was published in 1935 for the 132 islands and islets in the South China Sea that the committee believed rightfully belong to China.

World War II has made this region more complicated, but to some extent, into a simpler situation. Japan had taken Taiwan in 1895, and when American forces in the Philippines

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34 Ibid., 46.
35 Ibid., 52-55.
surrendered in May 1942, the entire coast of the Sea fell under the control of Japan from Taiwan to Singapore. The South China Sea became a “Japanese lake,” as Bill Hayton described, and remained so until January 1945. It was the Japanese effort to take coastal China and Southeast Asian countries as providers of resources for its country.

The history of the South China Sea became far more complicated with the involvement of the Westerners and their idea of colonialization. The history of the seventeen to the twentieth century shows an increasing distribution of western ideology in the East and Southeast Asian countries. During the rise of colonialization, wars, and establishment of the nation-state, this great map, the Selden Map, was secretly transported by hand of the person, John Selden, who preserved its value. He was one of the authors of the international law of the sea, and the person who first argued that states could claim jurisdiction over the ocean- a very similar to the claim China now makes over the South China Sea. Batchelor believed that Selden did not merely place a Chinese map at the center of his collection as a symbol. He rather highlighted a unique kind of map that demonstrated the use of technology by Chinese merchants to define sea routes and achieve *dominium* outside of the strict sphere of *imperium*. On the one hand, this map might be one of the first inspirations of the modern international law, which allows some area of the sea subject to the sovereign control of the states. On the other hand, it is a combination of the East and the West’s understanding of the South China Sea in the seventeenth century. The cartographer of the Selden Map might believe in China’s control over the land and sea areas on the map in the tributary system, and he may also be influenced by the Westerners to put the landmass of Chinese Kingdoms in the periphery of the map. Due to the analysis provided above,

36 Ibid., 56-57.
the future study of this map is needed for a better understanding of the South China Sea area and its relationship with the origin of modern international law.

I.1.3 Recent Aggravated Tension and Regional Conflicts- Post WWII

After the end of WWII, none of the Parcels or Spratly islands were occupied or controlled by any states. On July 4th, 1946, the Philippines became independent of the United States, and within weeks, the Vice President Elpidio Quirino, declared the Spratly Islands as part of its sphere of influence. On December 9th, 1946, the Chinese Navy dispatched two vessels to the Parcels and two to the Spratlys. In 1947, Chinese and French forces landed on different islands in the Parcels, making rival claims as a result. The new “Location Map of the South China Sea Islands” was created by the Chinese government and formally published in February 1948, and the eleven-dashes was drawn out to the eastern side of the South China Sea from Taiwan to the Coast of Borneo and then northward to the Gulf of Tonkin in a U-shape.

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40 Ibid., 58.
Figure 3. Map showing the “Location of the Various Islands in the South Sea,” 1948 Boundary Department of the Ministry of Interior, Republic of China\textsuperscript{41}

\textsuperscript{41} PCA, Final Award, 75.
Specifically, in the discussion of this arbitration case between the Philippines and China, the Spratly Islands are a subject of concern. The historical ownership and power transition of this islands group are controversial as six states and authorities might try to make a claim. France would claim based on its discovery and occupation in 1933 and reoccupation in 1946; the Philippines could claim based upon its proclamation of Vice President Quirino in July 1946; the ROC could claim based on its occupation in December 1946 and actions since then; the People’s Republic of China (PRC) would claim based on its role as the legitimate successor states of ROC and thus, based on the actions of the ROC; and Vietnam could claim based upon its role as the successor states to French Indochina and its actions since then.\footnote{Hayton, \textit{The South China Sea: The Struggle for Power in Asia}, 108.}

Itu Aba is an island among the Spratly Archipelago, and it is currently under the control of Taiwan. Two ROC Navy ships, the Taiping and Zhongye, arrived at Itu Aba on December 12\textsuperscript{th}, 1946. The ships’ crews removed a Japanese mark from the island and replaced it with a Chinese symbol. Two islands in the Spratlys Islands were named after these two navy ships, Taiping (Itu Aba) and Zhongye (Thitu Island). It is an act of sovereignty made by the Chinese government in the Spratlys which would be recognized by an international tribunal.\footnote{Ibid., 95.} Although the island is just 370 meters wide, it has its local supply of fresh water and natural vegetation. Although the garrison sent by the Taiwan authority relied upon some supplies shipped from Taiwan, the island itself is clearly able to support minimal human habitation. Based on Bill Hayton’s investigation, he concluded that Taiwan’s position on Itu Aba is secure, or even better in a legal sense.\footnote{Ibid., 111.}
After a review of the brief history of the South China Sea, the author found that the Chinese had participated in the development of the South China Sea region for almost two millennia. Its Confucian thinking had laid the ideological foundation for the construction of the tributary system in the early Southeast Asian civilizations. The tributary system itself had been the unique diplomatic institutions in Asia that had benefited the kingdoms and societies involved. Before the Westerners’ arrival, the tributary system established many ports, such as Guangzhou and Malacca, that are still influential today. As a form of early Asian international relation management, the tributary system had played a crucial role throughout its existence. Therefore, the critical involvement of the Chinese throughout the entire history of Southeast Asian development laid the foundation for China to assert its historical claim.

Nevertheless, the author also found that it is hard to find the answer to the current disputes from the past, and explored why that is. First of all, the book by David C. Kang provided some insight when he pointed out that the maritime frontiers were not clearly delineated until the twentieth century. The maritime borders are different from the land borders, where in the past, a body of water, for example, “a gulf, a gap, where people can pass on ships but not live permanently” could be regarded as a frontier that delineates different societies. Furthermore, the early modern East Asian maritime borders- Taiwan and Spratlys- did not issue between states, since even the precise definition of a sovereign state did not exist back then. Thus, there was no need to demarcate national ownership over space, and there was no way to find a fixed border.\(^{45}\) Secondly, many Chinese involvements in the course of history in the South China Sea were carried out by individual mariners, for example, the Fujianese, instead of the central courts. The current study of the Selden Map proved this speculation since scholars

\(^{45}\) Kang, *East Asia before the West: Five Centuries of Trade and Tribute*, 53-54.
believed that it was drafted by an individual. Thus, to what extent Chinese involvements could exert its influence of dominance that is parallel to today’s sovereign claim is left to be determined.

Therefore, since the tributary system is overlooked in China’s early dominance of Southeast Asia and the transition between the tributary system to the western international law was ambiguous in nature, it would be hard to use the modern international law concepts to solve these problems of historical ideologies and events, when the tools we use to analyze them did not exist at that time.\textsuperscript{46} It is also unfair to desert everything that had happened in the past. The struggling of the historical and the modern systems derived from the fact that when the Westernized ideas came to the East Asia, Asia was not ready. When the history was told by the powerful ones, the existing East Asian system collapsed, regardless of how well it had guided the region before the West had come.

\section*{I.2 International Law Framework}

The confrontation between the West and the East originated in the seventeenth century and continues today, as the disputes between China and the Philippines exhibit a clash between two sets of law: an older form of law governs “historical claims” to territory and a newer form of law governs the maritime claims that can be measured from territorial claims, which is defined by the United Nations Convention on the Law of the Sea (UNCLOS). Before the twentieth century, states generally recognized five ways for one to establish territory\textsuperscript{47}:

1. Conquest, a forcible acquisition of rights over territory;
2. Cession, the previous rulers gave up their rights through a treaty;

\textsuperscript{46} Ibid., 156.
\textsuperscript{47} Hayton, \textit{The South China Sea: The Struggle for Power in Asia}, 53.
3. Occupation, establishment of an administration over territory that not belongs to any other ruler (terra nullius or the “empty land”);

4. Prescription, the gradual recognition of one ruler’s rights by others;

5. Accretion, where the land is added to the existing territory by method, such as, reclaiming the sea.

Beyond a territorial control over the lands, the modern international law, including the law of the sea, was emerging during this time.

It is interesting to point out that the foundation of the modern law of the sea was largely contributed by Hugo Grotius, a Dutch jurist who is also regarded as the founder of international law. Hugo Grotius brought his idea of “innocent passage” in his work, *The Free Sea (Mare Liberum)*, in 1609. In his work, he described the principle that the sea was an international territory and that all nations were free to use it.⁴⁸ Within the same century, John Selden, an English jurist and the donor of the Selden Map, conveyed his development on Hugo Grotius’ *Free Sea* and insisted that states should have rights to restrict access to those waters under certain circumstances. He believed that the open sea could be “occupied” and thus not necessarily open to all. John Selden was also in favor of drawing imaginary lines, and ultimately, even Hugo Grotius conceded that bays, gulfs, and straits could be possessed.⁴⁹ A confrontation between these two great minds in the seventeenth century indeed laid the foundation of the modern international law, and especially the law of the sea. We can still find the delicate balance that modern international law has tried to maintain in the current version of UNCLOS that came out in the late twentieth century.

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During the seventeenth century, Grotius’ position where the seas are open to all allowed states to have only a narrow band of jurisdiction offshore. This position has not been changed dramatically until the end of WWII where all the naval powers were looking at securing their regulatory control over the sea. With the trend of establishing the international institutions, in 1958, the first U.N. Conference on the Law of the Sea (UNCLOS I) appeared as the first diplomatic negotiations in a row. It produced the 1958 Geneva Conventions on the Territorial Sea and the Contiguous Zone, the High Sea, the Continental Shelf, and Fishing and Conservation of the Living Resources of the High Seas. As the UNCLOS II failed to bring consensus among states, UNCLOS III entered into its nine-year negotiations among thousands of delegates in 1973.50

Members of the United Nations started to draft a new Convention on the Law of the Sea on December 3rd, 1973. At this time, ROC just lost its U.N. seat, and PRC was still a relatively new member to the U.N. This negotiation process was in the middle of the Cold War and the war in Vietnam was in its final phase. It was not only a confrontation between states who favored the Free Sea and the ones went against it. It was also a center of the conflict between the capitalist and the communist believers.51 Nevertheless, the negotiation finally resulted in the 1982 United Nations Convention on the Law of the Sea (UNCLOS III, and UNCLOS hereinafter).52

The UNCLOS was regarded as a “constitution for the oceans,” and Sophia Kopela has concluded that its constitutional characteristics came from its establishment of a comprehensive framework of governance of the oceans and international waters. The broad and universal

51 Hayton, The South China Sea: The Struggle for Power in Asia, 112.
52 Ibid.
application of this Convention created a limit for itself- meaning that it could not be able to regulate all issues concerning the law of the sea. In the relationship between the UNCLOS and other sources of international law, the Convention itself did not establish its absolute supremacy with other treaties. This is a decentralized system, customary law coexists with other treaty laws. Under such circumstances, states would be able to justify their practice either by the interpretation of UNCLOS or on the basis of their understanding of what the UNCLOS allows, in which may be considered as an element of the customary international law.

Custom can be a unique strength of international law. However, taking a set of customs into the law, issues appear since in mature legal systems, only binding rules that are made by the legislative body can be considered the law. Article 38 of the Statute of the International Court of Justice, the international custom is defined as “evidence of a general practice accepted as law.” To show an establishment of customary international law, one must prove that the rule has firstly been followed as a “general practice” and secondly, has been “accepted as law.” In many occasions, this simple equation could not resolve the complicated conflicts in international disputes. A delicate balance between the interaction of the UNCLOS and other sources of international law remains to be an ambiguous area that requires further research and development.

54 Ibid., 154.
55 Ibid., 156.
56 Bederman, International Law Frameworks, 18.
58 Bederman, International Law Frameworks, 18.
I.2.2 Permanent Court of Arbitration (PCA)

The Permanent Court of Arbitration (PCA) is the place where the South China Sea case has been brought to. The author believes that it is useful to provide some background information regarding the history of international institutions and PCA in this section specifically.

The very first international organization was created after WWI in 1920, the League of Nations, with the hope of providing a disputes settlement mechanism to avoid later military conflicts. The outbreak of the WWII showed it as a failed attempt, and after the WWII, an advanced version of the League of Nations, the United Nations, has created in 1945 and appeared to become a more developed mechanism to maintain international order. However, the creation of the international adjudicatory body came long before the League of Nations. The initial attempts were made at The Hague Peace Conferences of 1899 and 1907 since many states believed that the international law could be hardly enforced without a permanent institution for settling inter-states disputes. While some countries held skeptical attitude towards building up a strong court, PCA was established in 1907 as merely a facilitation center for arbitration instead of a permanent judicial body.

It was not until 1920, the Permanent Court of International Justice (PCIJ) was built up and later replaced by the International Court of Justice (ICJ) in 1945, as an organ of the United Nations. While both ICJ, an actual court under the U.N. branch and PCA are located in the Peace Palace in The Hague, Netherlands, they are different organizations in their characterization. Although PCA was the first intergovernmental organization to provide a stage

\[59\] Ibid., 114.
\[60\] Ibid., 65.
\[61\] Ibid.
for international dispute resolution, it only provides services for the resolution procedures, such as arbitral tribunal and other peaceful means.\textsuperscript{62} This is why the final Award of the South China Sea Arbitration stated that PCA served as the Registry in this arbitration.\textsuperscript{63} It is important to distinguish the difference between the ICJ and PCA, when one of them is not under the regulatory control of the U.N. Thus, in the later chapters of this thesis, the author will use “this Tribunal” to refer this arbitral process facilitated and administered by PCA.

\textbf{I.3 Timeline of the South China Sea Arbitration}

Many believed that the Scarborough Shoal standoff between China and the Philippines began on April 8\textsuperscript{th}, 2012 was the determinant factor for the Philippines to bring China to PCA. China achieved a victory in a ten-week standoff with the Philippines surrounding the Scarborough Reef when the Philippines conceded on June 15\textsuperscript{th}, 2012.\textsuperscript{64}

On January 22\textsuperscript{nd}, 2013, the Philippines initiated arbitration proceedings against China by Notification and Statement of Claim under Article 286 and Article 287 of the Convention and in following Article 1 of Annex VII of the Convention.\textsuperscript{65} China presented a Note Verbale to the Department of Foreign Affairs of the Philippines on February 19\textsuperscript{th}, 2013 to reject the arbitration and return the Notification and Statement of Claim.\textsuperscript{66} The tribunal later agreed on receiving consecutive memorials and documents from the Philippines throughout 2013 and 2014. On December 7\textsuperscript{th}, 2014, the Ministry of Foreign Affairs of the PRC published a “Position Paper of


\textsuperscript{63} PCA, Final Award, 3:11.


\textsuperscript{65} PCA, Final Award, 11:28.

\textsuperscript{66} Ibid., 12:29.
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” (Position Paper, thereafter).67 During the process, China reiterated its rejection to the arbitration and decision on not participating in any of the processes regarding this case. In June 2nd, 2015, the Tribunal confirmed the date of the Hearing on Jurisdiction, and it took place from July 7th to 13th, 2015 at the Peace Palace in The Hague.68

On October 29th, 2015, the Tribunal issued its Award on Jurisdiction and found it has jurisdiction over most of Philippine submissions and requests.69 The Hearing on the Merits took place from November 24th to 26th, and November 30th, 2015.70 During this time, China insisted its position that it would neither accept nor participate in the unilateral arbitration initiated by the Philippines. The tribunal finally issued its final Award on July 12th, 2016.71

The general timeline of this arbitration process is relevant as it presents when the important decisions are made and will be able to facilitate an analysis of political implications in Chapter IV of this thesis.

67 Ibid., 14:37.
68 Ibid., 17:47-52.
69 Ibid., 22:68.
70 Ibid., 23:69.
71 Ibid., 38:106.
Chapter II. Philippines’ Claims and Submissions to Arbitral Tribunal

Building on the background information provided in the first chapter, author will provide discussion on major legal issues for this arbitration case between the Philippines and China. One situation of the case worth noting was that the case is still proceeding under a compulsory procedure despite the fact that China refused to participate in the arbitral process. The consequences of Chinese default of appearance on the Tribunal is still left to be determined and will be discussed in Chapter IV of this thesis. This chapter will expand on the Philippines’ claims and submissions to this Tribunal on its three major issues: jurisdiction of the PCA, unlawfulness of the Nine-dash Line and Chinese historic rights claim, and the status of features in the South China Sea.

II.1 Jurisdiction of the Permanent Court of Arbitration (PCA)

The Philippines believed that the Tribunal had jurisdiction over its disputes with China in the South China Sea. It is necessary to discuss the jurisdiction of PCA under the 1982 UNCLLOS since it is the prerequisite for the case proceeding. Both the Philippines and China have participated into this Convention as the Philippines ratified it on May 8th, 1984 and China ratified it on June 7th, 1996. Thus, setting the expectation that they are both bound by the dispute settlement procedures provided for in Part XV, Settlement of Disputes, of the Convention. PCA should have general jurisdiction on disputes between the parties concerning the interpretation and application of the Convention. Efforts should be made to identify whether the disputes were relevant to the interpretation and application of the Convention. It is essential to examine

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72 PCA, Final Award, 37:106.
the Philippines’ arguments about the characterization of its disputes with China to determine whether this Tribunal would have jurisdiction over this case.

The Philippines delivered its submission to the Tribunal during 2015 and asserted its arguments concerning the characterization of the disputes. These submissions of the Philippines went against Chinese Position Paper in 2014, which is an official document responding to Philippines’ action of taking China to this Tribunal. The Philippines rejected China’s attempts to characterize the parties’ disputes as relating either to sovereignty or maritime boundary delimitation. While the Philippines admitted that there are potential disputes related to territorial sovereignty or boundary delimitation, it is within the Tribunal’s jurisdiction to hear specific disputes that are covered under the UNCLOS. The Philippines relied on the decisions in the United States Diplomatic and Consular Staff in Tehran, Military and Paramilitary Activities in and against Nicaragua, and Application of the Interim Accord of 13 September 1995 and concluded that, “a dispute may have different elements,” and these different elements do not “preclude some elements from falling within jurisdiction.” The Philippines believed that China’s maritime entitlements within the Nine-dash Line are beyond the maximum extent that is allowed under the Convention.

Like China, the Philippines agreed that the land dominates the sea. However, they argued that there can be no maritime entitlement from historic rights or otherwise. In another word, the Philippines believed that UNCLOS should be the sole and exhausted standard for coastal states to claim its maritime entitlements, especially in this case. According to the Philippines, unlike

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73 Ministry of Foreign Affairs (PRC), Position Paper.
74 South China Sea Arbitration (Philippines v China), PCA Case No.2013-19 Award on Jurisdiction and Admissibility at 48:140 (Oct 29, 2015).
75 Ibid., 49:142.
76 Ibid., 49:143.
how China argued in its Position Paper in 2014, the Philippines did not believe that sovereignty must be determined before proceeding to the disputes in this case. They portrayed China’s claims to the maritime features in the South China Sea as “unlawful conduct” because they believed that some features that China claimed are in fact within the EEZ or Continental Shelf of their own.\textsuperscript{77} It is unlawful for China to claim their sovereignty on these features and it is not acceptable for China to impede the legal fishing and exploitation of the Philippines in their own EEZ and Continental Shelf.

The following sections will explore two specific issues related to the question of jurisdiction: whether there is a prerequisite of negotiation prior before initiating the compulsory settlement procedure and why the Philippines’ submissions should not be impeded by Article 298 Optional exceptions to applicability of section 2. The Philippines and the Tribunal’s jurisdiction decision on October 29\textsuperscript{th}, 2015 provided that the prerequisite of negotiation and Article 298, Optional exceptions, would not bar the Tribunal to find its jurisdiction.

II.1.1 Prerequisite of Negotiation

The issue of whether there is a prerequisite of negotiation before initiating the compulsory settlement is pivotal since if there is a requirement of a completion of a bilateral negotiation before the arbitral process, it is the Philippines’ burden to prove that negotiations have taken place between the Philippines and China. Article 282 of the Convention provides that:

\begin{quote}
If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute,
\end{quote}

\textsuperscript{77} Ibid., 53:145.
be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree.\textsuperscript{78}

There were two relevant agreements that may fulfill the qualification of a “regional or bilateral agreement” mentioned in Article 282. One is the Declaration on the Conduct of Parties in the South China Sea (DOC) jointly signed between China and the member states of Southeast Asian Nations (“ASEAN”) in 2002, and another is Treaty of Amity and Cooperation in Southeast Asia (TAC).\textsuperscript{79} From the Philippines’ perspective, the TAC should not be considered under Article 282 of the Convention because none of the Treaty’s dispute settlement provisions established “a procedure entailing a binding decision.”\textsuperscript{80} Similarly, regarding the application of the DOC, the Philippines insisted that Article 282 is not applicable because it is not an “agreement” and does not provide a procedure that “entails a binding decision.”\textsuperscript{81} Article 283 of the Convention also includes the obligation for parties to exchange views before the arbitral proceedings by “negotiation and other peaceful means,” as Article 283(1) provides:

1. When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.\textsuperscript{82}

The Philippines rejected the applicability of Article 283 into this case, and it stated during the hearing that “[a]rticle 283 is not a requirement to negotiate as such. Rather, it is only an


\textsuperscript{79} Ministry of Foreign Affairs (PRC), \textit{Position Paper}, para 35, 54.

\textsuperscript{80} PCA, \textit{Award on Jurisdiction and Admissibility}, 108:305.

\textsuperscript{81} Ibid., 106:294.

\textsuperscript{82} UNCLOS, Article 283.
obligation to exchange views.” The Philippines maintained that it had conducted extensive exchanges of view with China and it laid out its discussions with China regarding China’s Notes Verbales of May 2009, consultations on the status of Scarborough Shoal in 1997 and 1998, and communications concerning the entitlements of maritime features in the Spratlys in 2011. Thus the Philippines concluded that whether there is a requirement or an obligation of exchange of view prior the arbitral proceedings, they had fulfilled those requirements in this case.

II.1.2 Application of Article 298

Another section of the Convention that is essential to determine the jurisdiction of the Tribunal is Part XV Section 3, Limitations and exceptions to the application of section 2. This Tribunal had initiated the compulsory settlement procedure under section 2 to of Part XV, which entails binding decisions. To summarize the three relevant articles in section 3, Article 297, 298, and 299 of the Convention, this Tribunal has concluded in its Award on Jurisdiction and Admissibility on October 29th, 2015 that Article 297 sets out limitations on jurisdiction that apply automatically to any dispute between State Parties to the Convention and Article 298 then sets out optional exceptions that a State Party may activate by declaration. As Article 299 confirms that when the exceptions under Article 298 are met, a compulsory dispute settlement procedure should be submitted only by the agreement of the parties to the dispute.

Article 297 sets out Limitations on applicability of section 2, the compulsory procedures, as it provides in part (3) (a) that “[d]isputes concerning the interpretation or application of the provisions of this Convention with regards to fisheries shall be settled in accordance with section

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83 PCA, Award on Jurisdiction and Admissibility, 113:329.
84 Ibid., 113:327.
85 Ibid., 113:329.
86 Ibid., 125:354.
2, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise.\textsuperscript{87} As Article 297(3) could potentially become a bar to the jurisdiction of this Tribunal, the Philippines considers that the Tribunal should not be barred from Article 297 because one of the dispute concerns preservation of the marine environment in and around Second Thomas Shoal. Article 297 only applies to the exercise of sovereign rights and jurisdiction by the coastal States.\textsuperscript{88} From Philippines’ perspective, it is the only relevant coastal State with an entitlement to an exclusive economic zone (EEZ) in the area of Second Thomas Shoal. Thus, its request does not involve the exercise of China’s sovereign rights.

Article 298 further provides \textit{Optional exceptions to applicability of section 2}, as its part (1) provides that, “[w]hen signing […] to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2.”\textsuperscript{89} This means that the declaration China issued on August 25\textsuperscript{th}, 2006 that pursued to Article 298 to activate all the optional exceptions to jurisdiction is legally based under the UNCLOS. The Award has noticed that China asserted “the Government of the People’s Republic of China does not accept any of the procedures provided for in section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1(a), (b) and (c) of Article 298 of the Convention.”\textsuperscript{90} Its part (1)(a)(i) provides that,

\begin{quote}
[D]isputes concerning the interpretation or application… relating to sea boundary delimitations, or those involving historic bays or titles, provide that a State having made such a declaration shall, when such a dispute arises subsequent to the entry into force of
\end{quote}

\textsuperscript{87}\textsuperscript{88}\textsuperscript{89}\textsuperscript{90} UNCLOS, Article 297.\footnote{PCA, \textit{Award on Jurisdiction and Admissibility}, 128:362.}\footnote{UNCLOS, Article 298.}\footnote{PCA, \textit{Award on Jurisdiction and Admissibility}, 130:365.}
this Convention and where no agreement within a reasonable period of time is reached in
negotiations between the parties […] accept submission of the matter to conciliation
under Annex V, section 2; […] any dispute that necessarily involves the concurrent
consideration of any unsettled dispute concerning sovereignty or other rights over
continental or insular land territory shall be excluded from such submission[.].\footnote{91}

Under the consideration of Article 298, China’s Position Paper again challenged the
characteristics of the disputes and asserted this Article would exclude the jurisdiction of the
Tribunal when the disputes are relating to sea boundary delimitations.\footnote{92} Furthermore, this
Tribunal’s jurisdiction should be barred in some of Philippines’ submissions if a feature claimed
by China in the South China Sea were found to be an island within the meaning of Article 121 of
the Convention, which entitles its own EEZ or continental shelf overlapping with Philippines’
claims. However, if the Tribunal finds that none of the features claimed by China are islands that
generate their own EEZ or continental shelf, the question of delimitation overlapping
entitlements would not arise, and the jurisdiction should not be barred.\footnote{93} Meanwhile, Article 298
excludes disputes “involving historic bays or titles,” “military activities,” and “law enforcement
activities”\footnote{94} related to marine scientific research or fisheries, if the activities in the disputes were
to be characterized as such, then the jurisdiction of this Tribunal should be barred.\footnote{95}

To repudiate these possible objections, the Philippines insisted that Article 298 does not
exclude the jurisdiction because the question of maritime delimitation “arise only in the context
of overlapping entitlements of coastal states.”\footnote{96} It provided in its supplemental written
submission contesting that it believed “none of the insular features claimed by China in the
Southern Sector of the South China Sea generates [an] entitlement to an EEZ or continental

\footnote{91} UNCLOS, Article 298.
\footnote{92} PCA, Award on Jurisdiction and Admissibility, 130:368.
\footnote{93} Ibid., 131:369.
\footnote{94} UNCLOS, Article 298.
\footnote{95} Ibid., 131:370-1.
\footnote{96} Ibid., 132:375.
Therefore, the insular features within the 200 nm of Philippine shore should constitute the Philippines’ EEZ and continental shelf, instead that of China’s. Regarding the “historic bays or titles,” the Philippines argued that China did not claim such titles in the South China Sea. Thus Article 298 does not apply. The Philippines further argued that the concept of “historic title” in Article 298 has a specific and limited meaning, as the Philippines interpreted, that “it pertains only to near-shore areas of sea that are susceptible to a claim of sovereignty as such.”\textsuperscript{98} The other two characterizations in this context were objected as well since the Philippines contained that “the nature and purpose of the activity itself that determines whether it is to be categorized as ‘military’ or ‘law enforcement,’ not the identity of the actor.”\textsuperscript{99} China has repeatedly asserted that these activities were for “civilian purposes,” and the main purpose of [its construction] activities is to meet various civilian demands.”\textsuperscript{100} Thus, the purpose and nature of China’s activities exclude the possibility to apply exceptions under Article 298 against the compulsory procedure.

II.2.2 Unlawfulness of the Nine-dash Line and Chinese Historic Rights Claim

The Philippines believed that the Nine-dash Line is unlawful under the UNCLOS, and China did not have a valid historic rights claim within the Nine-dash Line. The Philippines asked the Tribunal to determine that “any rights that China may have” in the South China Sea that beyond those granted in the Convention were “extinguished by China’s accession to the Convention.” It also wanted the Tribunal to rule that “China never had historic rights in the

\begin{footnotes}
\item[97] Ibid., 132:375.
\item[98] Ibid., 133:376.
\item[99] Ibid., 133:377.
\item[100] Ibid., 134:377.
\end{footnotes}
waters of the South China Sea.”101 If the requests were to be granted, the area between the end of Chinese EEZ and continental shelves at the 200 nm mark from Chinese baseline and the Nine-dash Line would not be considered under Chinese sovereign control. If Chinese historic rights cannot be established in the Tribunal’s opinion, the legality of China’s actions within the encompassing area of the Nine-dash Line would be substantially diminished.

The Philippines has noticed that there was a 1948 Chinese map with 11 dashes, and the two dashes in the Gulf of Tonkin were removed in 1953. The Philippines insisted that the first official appearance of the Nine-dash Line in the international community was on May 7th, 2009, when China sent Notes Verbales to the UN Secretary-General in response to Malaysia and Vietnamese joint submission.102 Thus, China’s statement of its position in 2011 violated the rule of the Convention, ratified by both states in the 1990s, addressing that, China’s Nansha Islands is fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf” under the provision of 1982 UNCLOS, Law of the People’s Republic of China on the Territorial Sea and the Contiguous Zone (1992) and the Law on the Exclusive Economic Zone and the Continental Shelf of the People’s Republic of China (1998).103

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101 PCA, Final Award, 74:188.
102 Ibid., 71-72:181-183.
103 Ibid., 73:185.
Figure 4. Map attached to China’s May 7th, 2009 Notes Verbales Attachment to the Secretary-General of the United Nation.\textsuperscript{104}

\textsuperscript{104} Ibid., 77.
Under the international law frameworks, the definition of the territorial sea is that within this band of water, “coastal States have asserted a form of sovereignty.”105 Based on 1982 UNCLLOS, the limit of the territorial sea includes the area of waters from the shore of the state to the twelve nautical miles’ mark.106 The limit for a coastal State’s continental shelf and EEZ can extend from the 12 nm mark up to 200 nm mark.107 Therefore, from the Philippines perspective, China cannot claim the Nansha Islands as “fully entitled to Territorial Sea, EEZ and Continental Shelf” under the Convention since the Nansha Islands are far beyond the 200 nm mark from the Chinese mainland coastal baseline. Furthermore, some islands in the discussion are within the 200 nm of the Philippine shore, and thus, it should be the Philippines who enjoy the benefit of EEZ and continental shelf granted by the UNCLLOS.

The Philippines insisted that the Tribunal’s exception to jurisdiction in Article 298 of the Convention should not impact the jurisdiction of this Tribunal since Article 298 only concerns disputes involving “historic bays or titles.” Only if China can prove that the disputes in the South China Sea are the issues of “historic bays or titles,”108 then the exceptions of compulsory procedures in Article 298 should be considered. The Philippines argued that the area encompassed by the Nine-dash Line is too broad for China to say it enjoys “historic title” in this area. Although “historic title,” from the Tribunal’s opinion, is used specifically to refer to a historic sovereignty to land or maritime areas,109 and the Convention did not accept the “assertions of historic rights over such a vast area” as China now claims.110 The Philippines

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106 Ibid.
107 Ibid., 189.
108 UNCLLOS, Article 297.
109 PCA, Final Award, 96:225.
110 Ibid., 80:193.
argued that the specific use of “historic bays or titles” in the Convention intended to show a restricted definition which would not apply to the South China Sea.

The Philippines argued that China’s use of “historical rights” in China’s Exclusive Economic Zone and Continental Shelf Act and the term ‘historic title’ in Article 298 are inherently different. Thus, China’s claim of “historic rights” within the area encompassed by the Nine-dash Line is not covered by Article 298(1)(a)(i), and therefore the disputes are under the scope of the Convention. The Philippines challenged the existence of Chinese historic rights because China firstly claimed the existence of such rights on May 7th, 2009, and the Philippines submitted that China’s historic maps dating back to 1136 consistently show China’s territory extending no further south than Hainan.

While if one state were to claim its historic rights over a maritime area, it is essential for the state to present consistent effort and ability to protect and guard that territorial control. The Philippines argued that China has failed to react to both the colonial activities of European States in the South China Sea and the European navigation in the South China Sea since the sixteenth century. After World War II, the effort of the Chinese government to name the features in the South China Sea in both their Chinese and English names were then identified only by Chinese transliterations of their English names. It is believed that it was the English names that came first. Thus it is hard for Chinese to establish their historic rights over all features on the South China Sea area with “so little involvement or connection.”

111 Ibid., 79-80:191.
112 Ibid., 81:195.
113 Ibid., 82:196.
114 Ibid., 82:197.
115 Ibid.
II.3 Status of Features

After discussing Philippines’ relative position on China’s historic rights claim and the Nine-dash Line (represented by Philippines submission No.1 and No.2), the author wants to give some emphasize to Philippine submissions from No.3 to No.7, which relates to the status of features in the South China Sea. All nine maritime features mentioned in these five submissions of the Philippines, Scarborough Shoal, Mischief Reef, Second Thomas Shoal, Subi Reef, Gaven Reef, McKennan Reef, Johnson Reef, Cuateron Reef and Fiery Cross Reef, are currently under China’s effective control, except the condition where the Philippine warship BRP Sierra Madre had been sitting on the shoal of the Second Thomas Shoal since 1999.116 Given the relatively close visual distance between these features and Philippines’ border, Philippines requested the Tribunal to rule in favor of their interest by identifying all the above features are “rocks,” instead of “islands” that are entitled EEZ and continental shelf. The Philippines wanted the Tribunal to decide all the features China controlled are rocks, instead of islands. Under such circumstances, the Philippines would build a strong legal foundation for its maritime claims that are overlapping with the Chinese claims.

II.3.1 Definition of Rocks and Islands

Before discussing the characteristics of these specific features, this Tribunal has made clear definitions of “rocks” and “islands” along with the relevant articles in the UNCLOS. The Tribunal has summarized the definition of this concept in its final Award that the features which

are exposed at low tide but covered with water at high tide are referred to as a “low-tide elevation” (LTE).\(^{117}\) Article 13 Low-tide elevations provides that,

1. A low-tide elevation is a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide. Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on the elevation may be used as the baseline for measuring the breadth of the territorial sea.
2. Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own.\(^{118}\)

Features that are above water at high tide are referred to generically as “islands.”\(^{119}\) And Article 121 Regime of islands provides the statutory definition that,

1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.
2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.
3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.\(^{120}\)

This Tribunal believed that it is not enough to interpret the plain text of these two articles of the Convention and it wanted to establish strict and clear definitions that can be used to identify the characteristics of the features in Philippines’ submission. The definition should be clear enough that the Tribunal can rule on whether a particular feature is entitled an “island” that is capable of generating EEZ and continental shelf. As this Tribunal mentioned in the Award, the entitlements that an island can generate to maritime zones will depend on Article 121(3) of the Convention and whether the island can “sustain human habitation or economic life of [its] own.” While it wants to make distinctions of different high-tide features, the Tribunal uses the term

\(^{117}\) PCA, Final Award, 119:280.
\(^{118}\) UNCLOS, Article 13.
\(^{119}\) PCA, Final Award, 119:280.
\(^{120}\) UNCLOS, Article 121.
“rocks” for high-tide features that “cannot sustain human habitation or economic life of their own” and which, therefore, pursuant to Article 121(3), are disqualified from generating an EEZ or continental shelf. The counterpart of the “rocks” under the category of high-tide features is “fully entitled islands,” which under Article 121(2) enjoy the same entitlement as other land territory under the Convention.\(^{121}\)

Together with referring features that are fully emerged at low tide as “submerged features,” the definition of these characterizations of the features can be shown in the graph below:

\[\text{Figure 5. Structure of Final Award’s Definition on Features}\]

Based on this precise definition and other supportive materials that the Philippines submitted to the Tribunal, the Tribunal finally found that Scarborough Shoal, Cuarteron Reef, Fiery Cross Reef, Johnson Reef, McKennan Reef and Gaven Reef can be characterized as high-

\(^{121}\) PCA, Final Award, 119:280.
tide features in their natural condition. And Hughes Reef, Gaven Reef (South), Subi Reef, Mischief Reef, and Second Thomas Shoal are LTE since these features are exposed at low tide and submerged at high tide.\textsuperscript{122} No. 3, 5 and 7 of the Philippines’ Submission to the Tribunal related to the disputes of characterization of the features under Article 121 \textit{Regime of Islands}. As these three submissions provides that,

\begin{itemize}
  \item[(3)] Scarborough Shoal generates no entitlement to an exclusive economic zone or continental shelf.
  \item[(5)] Mischief Reef and Second Thomas Shoal are part of the economic zone and continental shelf of the Philippines;
  \item[(7)] Johnson Reef, Cuarteron Reef and Fiery Cross Reef generate no entitlement to an exclusive economic zone or continental shelf;\textsuperscript{123}
\end{itemize}

All the six features mentioned above are under China’s effective control, except the Second Thomas Reef, where Philippines had a warship sitting on. Philippines’ submissions asked the Tribunal to identify all the six as “rocks,” pursuant the Article 121. Paragraph (2) of Article 121 contains the general rule that islands generate the same entitlements under the Convention as other land territory.\textsuperscript{124} If these features are to be categorized as islands, then there will be overlapping EEZ claims which would result in a sovereign territorial dispute. Paragraph (3) provides limitation on this definition where that “rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.”\textsuperscript{125} Article 121 thus contains a distinction between two categories of naturally formed high-tide features, that this Tribunal refers as “fully entitled islands” and “rocks” respectively.\textsuperscript{126}

\begin{itemize}
  \item[\textsuperscript{122}] Ibid., 174:382-3.
  \item[\textsuperscript{123}] Ibid., 41:112.
  \item[\textsuperscript{124}] Ibid., 175:389.
  \item[\textsuperscript{125}] UNCLOS, Article 121.
  \item[\textsuperscript{126}] PCA, Final Award, 176:390.
\end{itemize}
As a result of Philippines’ requests, none of the features among this area would be able to generate effective EEZ or continental shelf. Under this condition, Philippines will be able to assert its stronger EEZ and continental shelf claim over Mischief Reef and Second Thomas Reef.

**Relative Positions of the Features in the Submissions**

*Figure 6. Relative Positions of the Features in the Submissions*
II.3.2 Application to Features

The Philippines argued that all the six features in the Submission No.3 to 7 are rocks instead of islands. The Philippines concludes that “it would be unjustifiable and inequitable to allow tiny and insignificant features, which just happen to protrude above water at high tide, to generate vast maritime entitlement to the prejudice of other proximate coastal states with lengthy coastlines and significant populations, or to the prejudice of the global commons beyond national jurisdiction.” The words “sustain human habitation” must mean that, in naturally occurring conditions, a feature can “support a stable group of human being across a significant period of years,” by providing fresh water, food and living materials for human shelter. The Philippines emphasized that in order to prove that one feature can sustain life and provide economic activities on their own, it has to show its ability to support an independent economic life without an infusion from the outside. It would need to produce local products, though “100 percent self-sufficiency is not required.” It finally concluded that a feature must be capable of both sustaining human habitation and sustaining an economic life of its own to become a fully entitled island. The Philippines also expressed its concern that if any of the Spratly Islands were found to be fully entitled islands and China remained to avoid any of the legally binding decisions from the Tribunal, and as a result, the tension over the area would be brought up again. Therefore, if these features were only rocks, then there would be less “flex muscles and [demonstration of] sovereignty over minuscule features” in which can only generate 12 nm entitlement claims around each of them.

\[127\] Ibid., 182:409.
\[128\] Ibid., 183.
\[129\] Ibid., 185:421.
The Philippines submitted that all four of the high-tide features in No.3 to No.7 submissions—Scarborough Shoal, Johnson Reef, Cuarteron Reef, and Fiery Cross Reef—are indisputable Article 121(3) rocks. According to the Philippines, there is no evidence of drinkable water, food, or shelter materials on any of the four features. Scarborough Shoal is a 55 km chain of reefs and rocks with an area of 150 square km with a lagoon (an area of 130 square km and a depth of 15 m). All except six rocks are submerged at high tide. From the Philippines perspective, due to the tiny sizes of these islands and the lack of evidence to prove their own ability to sustain human habitation and economic activities, none of these high-tide features should be fully entitled islands.

Since the area of a feature can be one of the determining factors of this characterization, the Philippines continued to discuss the three largest features, Itu Aba Island, Thitu Island, and West York Island. They insisted that none of these larger features would be able to sustain both human habitation and economic life of their own based on its own natural elements. Itu Aba Island has been under control of Taiwan authority, and the Philippines has controlled Thitu and West York Islands. The Philippines recalled that the Taiwan authority never claimed maritime entitlement beyond 12 nm from Itu Aba until the Philippines initiated this arbitration. They also recognized Taiwanese officials’ earlier reference to the need for regular external supplies to sustain the garrison and therefore, undermined Taiwan’s claim that Itu Aba has natural resources that can be self-sufficient. It also rejected Taiwan authority’s claim about the “rich supply of

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130 Ibid., 186:423.
131 Ibid., 185-6.
133 PCA, Final Award, 187:426.
134 Song, "The South China Sea Arbitration Case Filed by the Philippines Against China: Arguments Concerning Low Tide Elevations, Rocks, and Islands," 342.
135 PCA, Final Award, 190:433.
ground water” from five wells on the islands.\textsuperscript{136} The Philippines used its example since there is a well on Thitu that contains “brackish but drinkable water.” Philippines claimed that since the water must be filtered before consumption and the local population on Thitu was transplanted by the Philippine Government since 2001.\textsuperscript{137} Therefore, the Philippines concluded that even the largest three features in the Spratly Islands cannot identify themselves as fully entitled islands, as it would not apply to other features in the Spratly to claim itself as an island entitled EEZ and continental shelf under Article 121.

\textsuperscript{136} Ibid., 191:435-6.
\textsuperscript{137} Ibid., 193:441.
Chapter III. China’s Possible Objections to the Arbitration

This thesis is designed to provide a legal debate between Chinese perspectives and the Philippines’ submission to this Tribunal. The purpose of this chapter is to correspondingly respond to the three arguments included in Chapter II from a Chinese perspective. The author believes that asserting China’s legal standing on the South China Sea is crucial for China to be judged fairly in its legal action of default of appearance in PCA. Here the author hopes to provide some of her interpretation and insight about the legality of Chinese perspectives, countering the Philippines’ arguments and the Tribunal’s Award, by establishing her understanding of this case through a careful reading of various works by respected scholars.

III.1 Objections to PCA’s Jurisdiction of the Case

It is a preliminary procedure to determine whether the Tribunal has jurisdiction over the disputes between the Philippines and China. Therefore, in this first section of Chapter III, the author wants to expand on some preliminary objections and arguments against the Philippines’ claim on this tribunal’s jurisdiction. This section will be the counterpart of the first section of Chapter II, where it expands on the decision of this Tribunal’s jurisdiction.

Chinese scholars were aware that both the Philippines and China gave general consent to the compulsory dispute settlement system under section 2 of Part XV of UNCLOS as the parties ratified the Convention in 1984 and 1996 respectively. While they both deemed to have accepted arbitration following Annex VII to UNCLOS, there is a limited subject matter on jurisdiction since the compulsory jurisdiction of arbitral tribunal is limited to “any dispute

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concerning the interpretation or application of the Convention.”\textsuperscript{139} From the Chinese perspective, since the Convention does not deal with questions of sovereignty and other disputes over rights related to land territory, these issues are not subject to the jurisdiction \textit{ratione materiae} of UNCLOS arbitral tribunals.\textsuperscript{140} In Philippines’ opinion mentioned in Chapter II, the Philippines insisted that certain islands in dispute are within its own EEZ and continental shelf. Thus, there is no question of sovereignty of overlapping claims.

However, whether or not the Philippines is entitled to a 200 nm EEZ or a continental shelf over certain maritime features would depend on the existence or absence of overlapping claims by other States in the South China Sea.\textsuperscript{141} Since only if there are no overlapping claims, then the court could have jurisdiction over the disputes. The Chinese scholar Jia Bingbing stated that, “[t]he main obstacle to the Tribunal ruling on the Philippines’ claims that China’s occupation of and construction activities on Mischief Reef […] are unlawful is that these claims cannot be addressed without dealing with the question of sovereignty or other rights over these reefs” first.\textsuperscript{142} China has characterized its disputes with the Philippines as ones that related to territorial sovereignty and maritime boundary delimitation. Thus, China maintained that the Tribunal does not have jurisdiction over these issues that are neither concerning the application and interpretation of the Convention, nor excluded for the topic of sovereignty.

III.1.1 Prerequisite of Negotiation

The Philippines had expressed explicitly that it has fulfilled Article 283 \textit{Obligation to exchange views} as it presented the court with its communication with the Chinese government in

\begin{flushright}
\textsuperscript{139} Ibid.
\textsuperscript{140} Ibid., 31.
\textsuperscript{141} Ibid., 29.
\textsuperscript{142} Ibid., 34.
\end{flushright}
several occasions. It is also noted that it refuted the possible objections of China under Article 282 of the Convention, where it addresses obligations under general, regional or bilateral agreements when it asserted that both 2002 ASEAN-China DOC and Treaty of Amity and Cooperation in Southeast Asia (TAC) are not binding decisions. Thus, the author will expand on Chinese perspectives specifically in these two treaties and show how these two might be relevant under the consideration of Article 282 and Article 283. It is Chinese perspective that there is a prerequisite of negotiation before the pursuit of the compulsory settlement, and the Philippines failed to show there were qualified negotiations before they brought this case to the PCA. Therefore, there is no exhaustion of all the other peaceful settlement before triggering the compulsory procedure.

The importance of the application of Article 283 was addressed again by Chinese scholars. Since the compulsory jurisdiction of the arbitral tribunal under section 2 of Part XV of the Convention can be invoked only when “no settlement has been reached by recourse to section 1,” the precondition for the admissibility of any claims that parties have fulfilled their obligation to exchange views regarding the settlement of the dispute.\textsuperscript{143} UNCLOS Article 283(1) obliges parties to a dispute concerning the interpretation or application of the Convention to “proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.”\textsuperscript{144} This previous “exchange of views” is a necessary precondition for submitting a dispute to an arbitral tribunal under Annex VII of UNCULS. As Judge Chandrasekhara Rao pointed out, the obligation to exchange views “is not an empty formality, to be dispensed with at the whims of a disputant. The obligation in this regard must be discharged

\textsuperscript{143} UNCLOS, Article 283.  
\textsuperscript{144} Talmon and Jia, \textit{South China Sea Arbitration: A Chinese Perspective}, 60.
in good faith, and it is the duty of the Tribunal to examine whether this is being done.”

The ICJ also summarized the requirement of negotiations as, “[n]egotiations entail more than the plain opposition of legal views or interests between two parties, or the existence of a series of accusations and rebuttals, or even the exchange of claims and directly opposed counter-claims.”

In international law, the failure of the negotiation process must be considered when there are exhaustions of the venue of negotiations. In the history of contact between China and the Philippines regarding the current disputes, there has never been any indication that “one of the parties definitely declares himself unable or refuses, to give way, and there can, therefore, be no doubt that the dispute cannot be settled by diplomatic negotiations,” or that “there appears to be no prospect of its [negotiation] being continued or resumed.” Thus, one can conclude that the negotiations under Article 281(1) UNCLOS have never properly taken place between the parties, although negotiations were a chosen method of dispute settlement in the South China Sea since 2002 under the DOC, TAC and other documents.

III.1.1.1 2002 ASEAN-China DOC

The Tribunal rejected DOC as a possible bar to the jurisdiction on the ground that the joint statements are political in nature and not legally binding agreements. This 2002 ASEAN-

\[\text{\textsuperscript{145}}\] Ibid.
\[\text{\textsuperscript{146}}\] Ibid., 61.
\[\text{\textsuperscript{147}}\] Ibid., 117.
\[\text{\textsuperscript{148}}\] Ibid., 119.
\[\text{\textsuperscript{149}}\] Ibid. 121.
China Declaration on the Conduct of Parties in the South China Sea was issued jointly by China and the Philippines.\textsuperscript{151} The nature of this declaration constitutes an agreement among the Parties, as the paragraph 4 of DOC includes an undertaking of the Parties to the Declaration to settle their disputes through consultation and negotiation. The word “undertaking” is further emphasized in paragraph 8 of the DOC as it states that the “parties undertake to respect the provisions of this Declaration and take actions consistent therewith.”\textsuperscript{152}

From Jia Bingbing’s perspective, this word “undertake” is significant in the interpretation of DOC. As ICJ has put in an interpretation of this word in the \textit{Genocide} case, “the ordinary meaning of the word ’undertake’ is to give a formal promise, to bind or engage oneself, to give a pledge or promise, to agree, to accept an obligation. It is a word regularly used in treaties setting out the obligations of the Contracting Parties […] It is not merely hortatory or purposive.”\textsuperscript{153} This interpretation is essential here under the provision of Article 281(1) since it shows its purpose of encouraging the states to settle dispute by peaceful means, instead of requiring them to enter into binding agreements in order to realize that purpose.\textsuperscript{154} Thus, this interpretation of how the word “undertake” has made the DOC a solid promise between the joint parties and thus, DOC should not be overlooked.

Besides the interpretation of the DOC itself, after the DOC’s signature, joint press statements between China and the Philippines were issued on both September 3\textsuperscript{rd}, 2004 and on September 1\textsuperscript{st}, 2011 between China and the President of the Philippines. The 2011 joint statement issued when the President of Philippines, Aquino III, visited China was crucial as he stated that, “[b]oth leaders reaffirmed their commitments to respect and abide by the Declaration

\textsuperscript{151} Talmon and Jia, \textit{South China Sea Arbitration: A Chinese Perspective}, 111.
\textsuperscript{152} Ibid., 112.
\textsuperscript{153} Ibid.
\textsuperscript{154} Ibid.
on the conduct of Parties in the South China Sea signed by China and the ASEAN member
countries in 2002” and he reaffirmed that “[b]oth leaders exchanged views on the maritime
disputes and agreed not to let the maritime disputes affect the broader picture of friendship and
cooperation between the two countries.” This Joint Statement was particularly relevant since
the President of Philippines that spoke for this Statement is also the President who later initiated
this arbitration against China in January 2013. It is believed by the scholars arguing for the
Chinese perspective that the two joint statements reaffirmed previous commitment between the
Philippines and China undertaken under the DOC. 

In this present case, under the consideration of DOC, negotiation has been the means
chosen. The parties to the DOC only agreed to this specific means of dispute settlement as
stated in the DOC, and no other agreement exists between them for other procedures.

III.1.1.2 Treaty of Amity and Cooperation in Southeast Asia (TAC)

The Tribunal held that the TAC, which China and the Philippines are both parties to, does
not bar for the exercise of its jurisdiction because it, firstly, did not provide for a “binding
mechanism.” Secondly, it did not “exclude further procedures” within the meaning of Article
281(1) of the Convention. China acceded to the Treaty in 1976, as amended by two
subsequent protocols of 1987, 1998 and October 8th, 2003. As Article 13 of TAC provides
that,

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155 Ibid., 113.
156 Ibid.
157 Ibid., 115.
158 Ibid., 112.
159 Pemmaraju, "The South China Sea Arbitration (the Philippines V. China): Assessment of the
   Award on Jurisdiction and Admissibility," para 28.
The High Contracting Parties shall have the determination and good faith to prevent disputes from arising. In cases disputes on matters directly affecting them should arise, especially disputes likely to disturb regional peace and harmony, they shall refrain from the threat or use of force and shall at all times settle such disputes among themselves through friendly negotiations.\textsuperscript{161}

Even if the word “agreement” in Article 281(1) only means “treaty,” the TAC is suitable for this characterization and thus, should be considered in further details. There is a primary obligation for the contracting states to negotiate, over and above all other means of settlement. And the alternative means of settlement as enumerated in Article 33 UN Charter should only be considered when the negotiations failed to resolve the dispute in given cases.\textsuperscript{162}

\textit{III.1.1.3 Choice of procedure and Compulsory settlement of dispute}

Under what conditions the obligations of compulsory mechanism would prevail over other means agreed by the parties to settle disputes? The author believes that in this case, the obligations of compulsory mechanism should not prevail over other means of dispute settlement. The interpretation and application of the UNCLOS appeared in the \textit{Southern Bluefin Tuna (SBT)} case between Australia and New Zealand v. Japan in 2000.\textsuperscript{163} The \textit{SBT} case related to an unilateral experimental fishing program undertaken by Japan, and both Australia and New Zealand contended that this program was contrary to fisheries conservation provisions of the 1993 Convention for the Conservation of Southern Bluefin Tuna (CCSBT) and the UNCLOS, to which the three states were parties.\textsuperscript{164} Invoking Article 281(1), Japan opposed the jurisdiction of

\begin{itemize}
  \item \textsuperscript{161} Ibid., 116.
  \item \textsuperscript{162} Ibid., 123.
  \item \textsuperscript{163} Pemmaraju, "The South China Sea Arbitration (the Philippines V. China): Assessment of the Award on Jurisdiction and Admissibility," para 24.
\end{itemize}
the Tribunal on the ground that it was superseded by the procedure of dispute settlement agreed to by the three parties in a 1993 Convention.  

Article 281(1) provides that the compulsory dispute settlement mechanism contained in Section 2 of Part XV will only operate where the parties to a dispute have not reached a settlement by their agreed means and that agreement does not exclude any further procedure. Article 282 states that those procedures will apply instead of Part XV. Therefore, Japan believed that Annex VII, the arbitration, should not be initiated. The International Tribunal for the Law of the Sea (ITLOS) rejected its argument due to the absence of an express exclusion under 1993 Convention, *prima facie*, the Tribunal constituted under Annex VII and thus had jurisdiction.

The *SBT* arbitral tribunal observed that lack of express exclusion of the UNCLOS procedure for the application of Article 288(1) within the 1993 Convention was not decisive. Article 16(2) of the 1993 Convention maintained a decisive assertion that it first to “stress the consensual nature of any [reference to arbitration],” and second to “remove proceedings under that Article from the reach of the compulsory procedure of peaceful settlement of UNCLOS.” Thus, the ITLOS declined its jurisdiction. Sir Kenneth Keith observed in his Separate Opinion that clear wording is required to exclude the obligations of states to submit to binding procedures under the UNCLOS. It is concluded by the tribunal that the consensual dispute settlement system of CCSBT prevailed over the compulsory system of Part XV by operation of Article 281. The view of the Tribunal may have some justification in considering that DOC might not

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168 Ibid., para 25.
170 Ibid.
be sufficient enough to deny its jurisdiction in this case, due to a lack of consensus on the matter of exclusion of further procedures. This Tribunal is incorrect to assume that the compulsory settlement procedure under UNCLOS would continue to apply unless it can show that the express exclusion is in place.\textsuperscript{171} The lack of an express exclusion, in this case, is not “decisive,” thus the Tribunal cannot hold a firm stand to exclude other agreements or treaties between the parties before proceeding to the Annex VII, a compulsory procedure of the Convention.

\textbf{III.1.2 Application of Article 298}

China had invoked Article 298, the optional exceptions to the application of compulsory mechanism in 2006. Therefore, the exceptions are applicable to China in this case. Section 2 of Part XV provides for compulsory settlement of disputes concerning the UNCLOS, but this compulsory settlement is subject to limitation under Article 297 and exceptions under Article 298.\textsuperscript{172} Article 298 of section 3, Part XV states that Parties to the Convention are eligible to exclude by express declarations for the following category of dispute concerning,\textsuperscript{173}

\begin{itemize}
  \item [(i)] The interpretation and application of article 15, 74, 83 relating to sea boundary delimitations or those involving historic bays or titles; or
  \item [(ii)] Military activities including military activities by government vessels and aircraft engaged in non-commercial service and law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, para 2 or 3.\textsuperscript{174}
\end{itemize}

As the author has discussed in the previous Chapter, China has made a declaration on August 25\textsuperscript{th}, 2006 to assert that it does not accept any of the procedures provided for in section 2

\textsuperscript{171} Pemmaraju, "The South China Sea Arbitration (the Philippines V. China): Assessment of the Award on Jurisdiction and Admissibility," para 27.
\textsuperscript{172} Ibid., para 13.
\textsuperscript{173} Ibid., para 16.
\textsuperscript{174} UNCLOS, Article 298.
of Part XV of the Convention with respect to Article 298 (1)(a) to (c) of the Convention. The Philippines had submitted an “understanding,” as showing its awareness of that declaration, before initiated arbitration under Annex VII of the Convention on January 22\textsuperscript{nd}, 2013. These means that China had already excluded the application of compulsory mechanism under the legality of UNCLOS. When the arbitral tribunal heard this dispute, it could not avoid addressing the issue of sovereignty and maritime delimitation on certain features in the South China Sea.

States could exclude from compulsory settlement under Article 297 and Article 298 concerning issues of historic bays or titles, and it also could exclude issues concerning maritime delimitation from this choice of settlement procedure. Also, if the maritime delimitation issues require further consideration of any unsettled dispute concerning sovereignty or other rights over the features, these issues should be excluded from the compulsory mechanism procedure. It is worth considering another dispute between Norway and Iceland concerning the continental shelf around Jan Mayan Islands. This case was recommended to be settled through a Conciliation Commission. If one of the parties is not favorable in the compulsory procedure and refused to participate in the proceeding, the unilateral submissions to the Tribunal might even harm the impartiality of the Tribunal and create more problems than before.

From the Chinese perspective, Philippines’ arguments on the inapplicability of Article 297 and Article 298 limitations and exceptions lay on the misleading assumptions that there are

\[\text{\underline{Footnotes:}}\]

176 Ibid.
178 Pemmaraju, "The South China Sea Arbitration (the Philippines V. China): Assessment of the Award on Jurisdiction and Admissibility," para 18.
179 Ibid.
180 Ibid.
no islands regarding Article 121(2) UNCLOS in the South China Sea that could generate their own EEZ and continental shelf. Article 121 *Regime of islands* provides that,

1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.
2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provision of this Convention applicable to other land territory.
3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.\(^{181}\)

From the Philippines’ perspective, there are no islands in the South China Sea that allow China to lay its territorial sovereignty on, and thus China cannot be a coastal state with EEZ or continental shelf in the South China Sea. This means that China cannot have overlapping claims with the Philippines, and thus, there is no sovereign disputes and issue of maritime boundary delimitation in this present case. However, the Tribunal has to accept this strong assumption that there is no island in the South China Sea before considering its jurisdiction because the question of whether China is a coastal state and whether China had its maritime zones could not be answered before a determination of territorial sovereignty over islands or features.\(^{182}\) Any ruling on the extent of China’s EEZ or continental shelf necessarily requires the Tribunal to engage in boundary delimitations, and this issue is a subject-matter removed from the Tribunal’s jurisdiction by China’s declaration of August 2006.\(^{183}\)

Paragraph 2(a) and 3(a) of Article 297 and Article 298 are exclusive requirements, meaning that the jurisdiction of an arbitral tribunal may be challenged if any such requirements are satisfied.\(^{184}\) Paragraph 3(a) of Article 297 applies to “any dispute relating to its sovereign

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\(^{181}\) UNCLOS, Article 121.
\(^{182}\) Talmon and Jia, *South China Sea Arbitration: A Chinese Perspective*, 55.
\(^{183}\) Ibid., 56.
\(^{184}\) Heng Liu, "Legal Requirements for the Establishment of Jurisdiction Over Compulsory Arbitration of Maritime Disputes: From the Perspective of Arbitration Under Annex VII of the
rights with respect to the living resources in the EEZ or their exercise.” With Article 299(1), a
dispute excluded under Article 297 and Article 298 from the compulsory procedures “may be
submitted to such procedures only by agreement of the parties to the disputes.” Clearly, in this
case, China has fulfilled the requirement of accepting an exclusion from the compulsory
procedure under several articles in UNCLOS. Pursuing Article 299, China chose not to agree on
proceeding the compulsory settlement procedure. Thus, it is not valid under the provisions of the
UNCLOS to force China into this compulsory mechanism.

As Jia Bingbing addressed on his assessment of jurisdiction, the reference to jurisdiction
must not only mean 'jurisdiction' stricto sensu, but also the conditions under which the
jurisdiction is to be exercised. While the Tribunal recognized the possibility of the issue of
overlapping maritime delimitation and dispute over sovereignty, it should increase its discretion
in finding its solid jurisdiction of this case, instead of relying on a strong assumption before
further proceeding the case.

III.2 Nine-dash Line and Historical Rights

In this section, the author wants to include two distinctions between Chinese arguments
and that of the Philippines in its interpretation of the nine-dash line and historic rights in the
South China Sea. Firstly, historic rights, which China has addressed consistently throughout its
statements regarding this disputes, are not exclusive. Secondly, it is not the sole basis of Chinese

\[^{186}\text{Ibid.}\]
\[^{186}\text{Talmon and Jia, South China Sea Arbitration: A Chinese Perspective, 109.}\]
claims of its rights within the U-shaped line. The lawfulness of the U-shaped line is determined by the laws passed and corresponding actions that Chinese government has taken since 1948.

III.2.1 The Unexclusiveness of Historic Rights

The author intends to show why China’s historic rights is not exclusive and is a different definition of a sovereignty claim. To demonstrate the unexclusiveness of the definition of historic rights, it is useful to understand the origin of historic rights in the context of international law. The word “historic” is explained by Marriam-Webster Dictionary as “famous or important in history,” “having great and lasting important,” “known or established in the past” or “dating from or preserved form a past tie or culture.” 187 While there is no specific written definition of historic rights in international law, it is useful to first explain “historic title,” the historic sovereignty to land or maritime areas. A narrower definition than historic title is “historic waters,” which is a form of historic title over maritime areas, typically exercised either as a claim to internal waters or as a claim to the territorial sea. 188 The historic rights concerning maritime areas are different from both historic titles and historic waters. 189 According to Bouchez, "[h]istoric waters are waters over which the coastal State, contrary to the applicable rules of international law, clearly, effectively, continuously, and over a substantial period of

188 PCA, Final Award, 96:225.
time, exercises sovereign rights within the acquiescence of the community of States.”

Regarding the South China Sea, China has never claimed that the waters are historic waters.

It is not hard to find the connection between the definition of historic waters and historic rights. In fact, the concept of historic rights evolved from historic waters, which is usually defined as historic bays and historic straits. By this Tribunal’s definition, “historic rights” are general in nature and can describe any rights that a state may possess that would not normally arise under the general rules of international law, absent particular historical circumstances.

For example, in the case of the United Kingdom v. Norway on fisheries, the ICJ formally accepted the assertion of Norway relating to historic rights and determined it to be valid, even when Norway's declaration of its territorial waters is not consistent with general international law. It is also crucial to note that in the Gulf of Fonseca in 1992, ICJ not only recognized the existence of historic rights in international law, but also determined that the historic rights of specific waters can be shared by more than one country. The above cases showed how the topic of historic rights had been brought into the discussion in the international context and the international courts and tribunals have admitted the possibilities of the unexclusiveness of historic rights in this context.

It is also the belief of this Tribunal that the idea of historic rights may include sovereignty, but may equally include more limited rights, such as fishing rights, or rights of access, that fall well short of a claim of sovereignty. Given the broad range of definition of

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191 Ibid., 66.
192 PCA, Final Award, 96: 225.
194 Ibid.
195 PCA, Final Award, 96:225.
this terminology, it is worth mentioning a well-summarized description of this term by Ted McDorman in *Tunisia v. Libyan Arab Jamahiriya* under the ICJ. He stated that “[h]istoric claims to waters exists in international law; there is a difference between historic waters, which involves exclusivity of rights, and historic rights, which are not exclusive.” While the term historic water is a subset of historic title, which required the idea of sovereignty to be explicitly and exclusively addressed, the definition of historic rights can be better understood with this comparison and characteristics of unexclusiveness.

![Figure 7. Relationship between Historic Rights and Sovereignty](image)

Besides the explanation of the unexclusiveness of historic rights, it is important to discuss the relationship between the idea of historic titles, included in in Article 15 and Article 298 of the UNCLOS, and the idea of historic rights, one of the core concerns of this section but not mentioned in the UNCLOS. Article 15 states that, “[t]he above provision does not apply… where it is necessary by reason of historic title or other special circumstances to delimit the territorial

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seas of the two States.”\textsuperscript{197} Article 298(a)(i), concerning optional exceptions to application of the compulsory procedures entailing binding decisions, includes the provision that,

[D]isputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles, provided that a State having made such a declaration shall, […] accept submission of the matter to conciliation’ and ‘any dispute that necessarily involves the concurrent consideration of any unsettled disputes concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission.\textsuperscript{198}

Since only the phrase “historic titles,” instead of “historic rights,” has appeared in the UNCLOS concerning this arbitration, it is important to reveal the relationship between the two to further understand the scope and jurisdiction of the Tribunal in this case. The claim of historic rights by Tunisia is worth noting since its claim is beyond its territorial sea, particularly historic fishing rights, arguing that such historic rights may influence the delimitation of EEZ in the future.\textsuperscript{199} The ICJ’s perspective in this case is that historic rights, historic titles, and the continental shelf belong to two different legal regimes under customary international law, where “the former is based on acquisition and occupation, while the latter is based on the existence of rights ‘\textit{ipso facto} and \textit{ab initio}’” granted under the UNCLOS.\textsuperscript{200} The court clearly recognized the existence of historic rights and has implied that it may affect the formation of the EEZ, which is closely relevant to boundary delimitation.

The ICJ judgment has made a distinction between the idea of historic titles and territorial sea by arguing that they belong to different legal systems. The establishment of historic rights and historic titles is “based on acquisition and occupation.”\textsuperscript{201}  

\textsuperscript{197} UNCLOS, Article 15.  
\textsuperscript{198} Ibid., Article 298.  
\textsuperscript{199} Zou and Liu, "The Legal Status of the U-Shaped Line in the South China Sea and its Legal Implications for Sovereignty, Sovereign Rights and Maritime Jurisdiction," 67.  
\textsuperscript{200} Ibid.  
\textsuperscript{201} Ibid.
law, discovery and occupation establish sovereignty in the initial stage. By the early twentieth century, as in the 1928 arbitration in the Island of Palmas, international law came to see discovery as “creating an inchoate title that needs to be maintained through peaceful and continuous acts of the claimant state.” An inchoate title is necessary for the later actions to be taken as an effective way of maintaining a title. The prerequisite to establish occupation by a sovereign state is that the piece of land territory in discussion must be preceded by a finding of \textit{terra nullius}. While the action of occupation takes different forms, one of the forms of occupation known as symbolic annexation may play a role in the South China Sea case, where “very little in the way of the actual exercise of sovereign rights” may equally suffice to established the Chinese historic title by discovery and occupation.

To draw a specific example in the \textit{Island of Clipperton (Mex. V Fr)} arbitration, if a territory was completely uninhabited and “from the first moment when the occupying State made its appearance there, was at the absolute disposition of that state, the possession of the territory must, from that moment, be considered as accomplished and the occupation by that State of the territory is complete.” In the case of Chinese historic rights and historic titles relating to this case, it is China’s burden to prove that they had discovered the islands and occupied them under \textit{terra nullius}. Once the arguments for discovery and occupation stand for China, the later attempt to claim sovereignty and historic rights over the islands that are not susceptible for occupation would not be legal, as the failure of annexation of Mexico in the preceding case.

\begin{flushright}
\textsuperscript{203} Ibid., 111.
\textsuperscript{204} Ibid.
\end{flushright}
Numerous similarities shared by the two definitions. This Tribunal has defined historic title as historic sovereignty to land or maritime areas, and historic rights as general in nature and can describe any rights a state may possess that would not arise under the general rules of international law, absent particular historic circumstances. It is not hard to conclude here that based on a general understanding of concepts, historic rights have a broader range of interpretation of historic titles specifically related to the idea of sovereignty. The confusion and ambiguity of a Chinese interpretation of its historic rights firstly came from its default of appearance to present its interpretation of such terminology in this Tribunal; and secondly, the mixed language used in Chinese official statements and press conference, under a cross-language reporting for these disputes, may cause misunderstanding.

China claimed its “indisputable sovereignty over the islands in the South China Sea and the adjacent waters” within the “Nine-dash Line” or “U-shaped Line.” Chinese officials claim Chinese historic rights within the “U-shaped Line.” The Tribunal believed that China has expressed the establishment of the Nine-dash Line to its rights as “formed over a long course of history.” It is easy to misinterpret that the establishment of historic rights is the singular basis for China to claim its “U-shaped line,” and to overlook the fact that historic rights might only be a one possible basis for China’s claim to its “indisputable sovereignty over the islands.” The purpose of this section is to make a distinction between the author’s understanding of Chinese perspective and the Tribunal’s interpretation. The author will try to bring the issue of the Nine-dash Line to the next section in order to further clarify the distinctions and relationship between the two concepts.

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205 PCA, Final Award, 96:225.
206 Talmon and Jia, South China Sea Arbitration: A Chinese Perspective, 49.
207 PCA, Final Award, 186.
208 Talmon and Jia, South China Sea Arbitration: A Chinese Perspective, 49.
III.2.2 UNCLOS and the U-shaped Line

From Chinese perspectives, the development of the U-shaped Line is collaterally consistent with its accession of UNCLOS. It is the Philippines’ initial submission to ask the Tribunal to determine the Nine-dash Line to be invalid when China’s claim has gone beyond the limits of its entitlements under the UNCLOS. 209 In fact, China signed the UNCLOS right after it was opened for signature in Jamaica on December 10th, 1982, and China ratified it in 1996, two years after the UNCLOS came into force in November 1994. 210 China enacted two ocean laws to implement the UNCLOS at the domestic level, and the law were under consideration of this Tribunal when it points out on February 25th, 1992, China enacted a Law on the Territorial Sea and the Contiguous Zone and on June 26th, 1998, China enacted a Law on the Exclusive Economic Zone and the Continental Shelf. 211 The 1992 Law of the People’s Republic of China on the Territorial Sea and the Contiguous Zone provides in its Article 2 that,

The territorial sea of the People’s Republic of China is the sea belt adjacent to the land territory and the internal waters of the People’s Republic of China.

The land territory of the People’s Republic of China includes the mainland of the People’s Republic of China and its coastal islands; Taiwan and all islands appertaining thereto including the Diaoyu Islands; the Penghu Islands; the Dongsha Islands; the Xisha Islands; the Zhongsha Islands and the Nansha Islands; as well as all the other islands belonging to the People’s Republic of China.

The waters on the landward side of the baselines of the territorial sea of the People’s Republic of China constitute the internal waters of the People’s Republic of China. 212

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210 Ibid.
211 PCA, Final Award, 69-70:175-178.
According to Article 2 of the 1992 Territorial Sea Law, China’s Territorial sea is a belt of the maritime area adjacent to the land territory and internal waters of China. The provision of this law specifically includes offshore islands, Taiwan and all islands appertaining thereto including the Diaoyu, the Penghu, the Dongsha, the Xisha, the Zhongsha and the Nansha Islands, along with its mainland into its land territory.\textsuperscript{213} Its 1998 Law of the People’s Republic of China on the Exclusive Economic Zone and the Continental Shelf further provides in its Article 14 that, “[n]o provisions of this Law can prejudice historical rights of the People’s Republic of China.”\textsuperscript{214}

The laws mentioned above are believed to be a reiterative of the relevant provision in China’s 1958 Declaration on the Territorial Sea. It is also in the Tribunal’s knowledge that On June 7\textsuperscript{th}, 1996, China clarified its EEZ in conjunction with its ratification of the Convention as, “the People’s Republic of China reaffirms its sovereignty over all its archipelagoes and islands as listed in Article 2 of the Law of the People’s Republic of China on the Territorial Sea and Contiguous Zone which was promulgated on February 25\textsuperscript{th}, 1992.”\textsuperscript{215} With the evident connections between the domestic legislative actions and the ratification of the Convention in the 1990s, China’s national interests has been bonded by the Convention, and China has taken affirmative actions to support an effective implementation of the UNCLOS.\textsuperscript{216}

The Article 38 of the Statute of the International Court of Justice has stipulated the sources of international law as not only the “international conventions […] establishing rules expressly recognized by the contesting states,” but also the “international customs, as evidence

\textsuperscript{213} Zou and Liu, ”The Legal Status of the U-Shaped Line in the South China Sea and its Legal Implications for Sovereignty, Sovereign Rights and Maritime Jurisdiction,” 59.


\textsuperscript{215} Permanent Court of Arbitration, 70:177.

\textsuperscript{216} Zou and Liu, ”The Legal Status of the U-Shaped Line in the South China Sea and its Legal Implications for Sovereignty, Sovereign Rights and Maritime Jurisdiction,” 59.
of general practice accepted as law." Therefore, it is essential to bring customary international law into discussion as it carries equal legally binding forces with no hierarchy with international conventions, here the UNCLOS, and the customary international law should not be treated as subsidiary in the judicial decisions of the court. While the specific implication of customary international law is further to be determined in this case, it is noteworthy to bring the importance of custom into discussion since the South China Sea disputes are not only concerning to international law, but also maritime boundary delimitation and international navigations. Whether the UNCLOS itself is sufficient to resolve such complicated situation also requires further elaboration.

Where does this “Nine-dash Line” come from? The Philippines has insisted that it had not appeared in the international community until the Note Verbales to the UN Secretary-General in 2009. In reality, the Chinese government internally circulated an atlas in 1947, drawing an Eleven-dash Line to indicate the geographical scope of its authority over the South China Sea, right down to the Zengmu Ansha, or James Shoal. In February 1948, the Atlas of Administrative Areas of the Republic of China was officially published, in which a significant amount of information regarding the 1947 map was included. Since then, the maps officially published in both mainland China and Taiwan are almost the same regarding the line. In May 1949, the four islands groups in the South China Sea and other attached islands were placed under the authority of the Hainan District of Guang Dong Province. Two dashes were removed.

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221 Ibid.
from the Eleven-dash Line in 1953, leaving nine segments, and in that same year the new line made its first appearance in atlases produced on the Mainland of China.\textsuperscript{222}

This Tribunal is aware of the existence of China’s 1958 Declaration on the Territorial Sea, in which has since became one of the inchoate institutions of China’s maritime order.\textsuperscript{223} Article 1 of the 1958 Declaration not only provided for a 12 nm territorial sea for China, but applied that breadth both to the mainland and coastal islands including “the off-lying islands of Dongsha, Nansha, Penghu, Taiwan, Xisha, and Zhongsha, among others.”\textsuperscript{224} This 1958 Declaration has profound influence on China’s decision to ratify the UNCLOS as the Law on the Territorial Sea and the Contiguous Zone in 1992 and Law on the Exclusive Economic Zone and Continental Shelf in 1998 further elaborated Chinese maritime legislative actions in the anticipation of the ratification of UNCLOS.

Since the current Nine-dash Line came from the previous Eleven-dash Line, Chinese scholars both from Mainland China and Taiwan believed that it is appropriate to use the term “U-shaped Line” to represent this subject. Zou Keyuan, a prominent Chinese international law scholar, concluded the definition of the line to be “(a) a line indicating that the geographic features within are Chinese territory; or (b) a line of historic waters; or (c) a line of historic rights; and (d) a line indicating that the marine resources within belong to China.”\textsuperscript{225} According to Wu Shicun, President of the National Institute for South China Sea Studies, the U-shaped Line based on sovereignty China enjoyed over all the features within the line. These sovereignty

\textsuperscript{222} Gao and Jia, ”The Nine-Dash Line in the South China Sea: History, Status, and Implications,” 103.
\textsuperscript{223} PCA, Final Award, 68-9:174.
\textsuperscript{224} Gao and Jia, ”The Nine-Dash Line in the South China Sea: History, Status, and Implications,” 104.
\textsuperscript{225} Zou and Liu, ”The Legal Status of the U-Shaped Line in the South China Sea and its Legal Implications for Sovereignty, Sovereign Rights and Maritime Jurisdiction,” 63.
rights and jurisdiction are also defined by the UNCLOS and historic rights relating to fishing, navigation, and resource development. Therefore, if only the UNCLOS standards were used to assess the legality of the U-shaped line, it is reasonable to say that the legal standing of the U-shaped line is not compatible with the Convention.

It should be noticed that in Chinese Note I of 2009, Chinese official explained how the lines may have a residual function as potential maritime delimitation boundaries, and the design of the lines is “not intended to assert a historic title of sovereignty over the sea areas, as enclosed by the lines, beyond what is allowed under international law.” The U-shaped Line is on nature a potential maritime boundary between China and neighboring states and within the line, China claims sovereignty over the island groups, in the form of archipelagos, under international law. China only claimed the rights conferred by general international law and UNCLOS, under Article 14 of its 1998 Law on the EEZ and the Continental Shelf, with respect to fishing, navigation, exploration and exploitation of resources. Not all the rights China claimed are exclusive, as discussed in the previous sections, when some sets of historic rights within the U-shaped line can be shared with other countries in particular circumstances.

The next question is the position of the U-shaped Line after China’s accession to the UNCLOS in 1996 and the role this line should play in the international community. The Award on July 12th, 2016 has cited the Director-General of the Department of Treaty and Law at the Chinese Ministry of Foreign Affairs responded on May 12th, 2016 on the topic of the Nine-dash Line in the context of the Tribunal, and the official stated, “[t]he ‘nine-dash line’ […] is called

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226 Ibid.
228 Ibid., 109.
229 Ibid., 110.
by China the dotted line. I want to stress that China’s sovereignty and relevant rights in the South China Sea were formed throughout the long course of history and have been maintained by the Chinese Government consistently. Chinese officials also asserted that it is crucial to first determine the territorial sovereignty over the maritime features in the South China Sea because, in accordance with international law, territorial sovereignty is the basis of maritime rights. These speeches imply that the delimitation of the 200 nm mark from the shore of the Chinese Mainland may not be an accurate depiction of the maritime rights China enjoyed under the UNCLOS.

III.2.3 Historic Rights and the U-shaped Line

Using the background to understand how the concepts of historic rights and the U-shaped line each fit into the general international law framework from a Chinese perspective, the author wants to further elaborate on the relationship between the two concepts in this section. It is perceived by the general public that there is a causality between the historic rights and the establishment of the U-shaped Line. While this Tribunal refused the Chinese historic rights claim to rule against the U-shaped Line, here the author wants to argue that, since historic rights claim is never a sufficient condition to prove the legality of the U-shaped line, it is redundant to conclude that it is illegal when one refutes the historic rights claim. This conclusion is also supported by Wu Shicun’s definition of the U-shaped line, that is universally acknowledged by Chinese international law scholars.

The concept of historic rights has become a topic of discussion among international dispute settlements and has been asserted by many countries. Therefore, the concept itself is

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230 PCA, Final Award, 84:200.
231 Ibid.
completely valid and is admitted following international law. When the Chinese government asserts this concept, such assertion should be within the scope of international law.\textsuperscript{232} From the Chinese perspective, since historic rights do not conflict with the provision of the UNCLOS, the Philippine allegation that all historic rights have been superseded by China’s accession to the UNCLOS is incorrect. As a general rule, any law such as the UNCLOS has no retroactive force to revoke a state’s acquired rights prior to its adoptions.\textsuperscript{233} Therefore, China’s historic rights were not superseded by the accession to UNCLOS.

On May 12\textsuperscript{th}, 2016, Chinese official asserted that “the dotted line came into existence much earlier than the UNCLOS” and the Convention itself does not cover all aspects of maritime law. Thus, the issue of the line itself is not under the jurisdiction of the Tribunal.\textsuperscript{234} Since the Philippines tended to rely exclusively on the UNCLOS to define its position related to China, a further assessment of the structure of the international legal order is necessary. The issue concerns an interaction between two legal systems because both the historic title and law of discovery and occupation are a matter of customary international law. Custom relies primarily on the evidence of state practice and no treaty, including the UNCLOS, should supersede the rules of international law. It is also important to acknowledge that the two sets of legal systems may as well exist in parallel and do not necessarily have a hierarchical relationship.\textsuperscript{235}

Another important question is whether the concepts of historic rights and the U-shaped Line fall under the jurisdiction of the UNCLOS. UNCLOS is not the sole determiner of rights

\textsuperscript{232} Zou and Liu, "The Legal Status of the U-Shaped Line in the South China Sea and its Legal Implications for Sovereignty, Sovereign Rights and Maritime Jurisdiction," 69.
\textsuperscript{233} Ibid., 70.
\textsuperscript{234} PCA, Final Award, 84:200.
and jurisdiction, so there is flexibility in the rights exercisable by a state.\textsuperscript{236} Article 298 shows that issues of historic bays and historic titles fall within the scope of optional exceptions to compulsory dispute settlement mechanism. The court believes that the concept of a historic bay is well founded in international law and since the South China Sea is not a bay, the question is whether China’s potential claims on historic title in the South China Sea has an implication for the Tribunal’s jurisdiction.\textsuperscript{237} It can be inferred, however, that concepts of historic rights and historic waters are very much left to be continuously governed by general international law including customary law. It is rightly pointed out that “whether historic rights exist is not a matter regulated by UNCLOS” though some part of the UNCLOS is relevant when it talks about the use of marine resources.\textsuperscript{238}

It is the Philippines’ argument that China failed to show its constant control over the region in a historical context. China also has to admit that it is their burden to prove to its strong and solid historic rights as well as its form of sovereignty over the maritime area. To some extent, China showed its consistent protests against foreign challenges over the affected islands and other relevant islands and features in the South China Sea. This position has been stated during the sessions of the Third United Nations Conference on the Law of the Sea.\textsuperscript{239}

At the early stage of modern international law, discovery and occupation might have been sufficient to establish title to sovereignty.\textsuperscript{240} Chinese historic entitlement is consistent and has been recognized, from a Chinese perspective, for more than 60 years. China started to perform its

\textsuperscript{236} Zou and Liu, "The Legal Status of the U-Shaped Line in the South China Sea and its Legal Implications for Sovereignty, Sovereign Rights and Maritime Jurisdiction," 65.
\textsuperscript{237} PCA, Final Award, 86:205.
\textsuperscript{238} Zou and Liu, "The Legal Status of the U-Shaped Line in the South China Sea and its Legal Implications for Sovereignty, Sovereign Rights and Maritime Jurisdiction," 66.
\textsuperscript{239} Gao and Jia, "The Nine-Dash Line in the South China Sea: History, Status, and Implications," 105.
\textsuperscript{240} Ibid., 110.
law enforcement function when “Qing Shi Lu” recorded lots of information about China
arresting pirates and sea robbers in the South China Sea, including arrests happened in October 1791 and December 1844. Only China had established artificial facilities within the U-shaped line when the Chinese government began the construction of observatories, radios, and lighthouses in 1925. Regarding navigational rights, as deliberated in Chapter I, the Chinese were the first groups of people in history who participated in maritime trade and had complied complicated navigational routes in the early maps. One significant map is the Selden’s Map graphed in the seventeenth century.

It is worth noting that China does not claim everything within the U-shaped Line, but sovereignty and maritime entitlement allowed by the general international law.\textsuperscript{241} The general international law includes both the UNCLOS and customary international law. China’s claims to the South China Sea are primarily based on the provision in the UNCLOS concerning the territorial sea, EEZ and continental shelf, rather than historic rights deriving from the U-shaped line.\textsuperscript{242} It is also important to recall that the U-shaped Line is in the nature of a potential maritime boundary between China and neighboring states.\textsuperscript{243} When the Chinese government claims its “indisputable sovereignty over the islands in the South China Sea and the adjacent waters,”\textsuperscript{244} it actually claims its territorial sovereignty over the features and islands instead of every inch of water encompassed by the U-shaped Line.

\textsuperscript{241} Zou and Liu, ”The Legal Status of the U-Shaped Line in the South China Sea and its Legal Implications for Sovereignty, Sovereign Rights and Maritime Jurisdiction," 73.
\textsuperscript{242} Ibid., 74.
\textsuperscript{244} Zou and Liu, ”The Legal Status of the U-Shaped Line in the South China Sea and its Legal Implications for Sovereignty, Sovereign Rights and Maritime Jurisdiction," 75.
III.3 The Determination of Rocks/Islands

It was not until the publication of the final Award of this Tribunal that a specific definition of “rocks” and “islands” was given in such a detailed manner. Despite the fact that China refused to participate in the Tribunal and thus chose not to provide a supporting argument against Philippines’ claim on this topic, China did not provide specific arguments in terms of the identification of features in its position paper in 2014. At the same time, China insisted that this action of determining the relevant features in Philippines’ submission is not well founded in fact and law since the Tribunal failed to prove its jurisdiction over this action. China believed that it is very difficult for the Arbitral Tribunal not to touch upon the issues involving sovereignty over the disputed island and maritime boundary delimitation. As China again emphasized, it opted out of the Tribunal’s jurisdiction by making a declaration in August 2006 following Article 298 and Article 310.245

The Philippines argued that Huangyan Dao (Scarborough Shoal) should be identified as a “rock” which could not generate the EEZ and the continental shelf, and thus there could be no possible overlapping maritime claims between China and the Philippines. China insisted that Huangyan Dao should be an island entitled EEZ and continental shelf. The Philippines tried to characterize all the features in Nansha Qundao (Spratly Islands/Archipelago) as not entitled the 200 nm maritime claims by arguing the three largest features, Itu Aba, Thitu and West York, as rock instead of fully entitled islands. China believed that based on geographical facts, these three features should each be treated as an “island” in accordance with Article 121.246 These different characterizations of the features came from a different logical interpretation of Article 121(3),

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246 Ibid.
where it sets out the limitation of this identification. Article 121(3) provides that, “[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.”247 From Philippines’ perspective, for a feature to fully entitle EEZ and continental shelf, the feature has to be able to sustain both human habitation and economic life of its own.

The Tribunal determined that there is a problem with Philippine’s interpretation of Article 121(3) regarding formal logic. The logic should result in that if a feature is capable of sustaining either human habitation or an economic life of its own, it will qualify as a fully entitled island.248 It laid its reasoning on the double negation in formal logic. It further concludes that a rock would be disentitled from an EEZ and continental shelf only if it were to lack both the capacity to sustain human habitation and the capacity to sustain an economic life of its own. This means that an island that is able to sustain either human habitation or an economic life of its own is entitled both an EEZ and a continental shelf.249 This interpretation of the Tribunal is consistent with the interpretation of a Chinese perspective, where the qualification of an island under Article 121 should not be a standard that can be hardly achieved.

247 UNCLOS, Article 121.
248 PCA, Final Award, 209:494.
249 Ibid., 210:496.
Figure 8. Potential Overlapping Claims

The area enclosed by the dashed line (- - -) is all the "high seas" that remain in the South China Sea after hypothetical 200nm EEZs are drawn from coastal states' baseline claims (giving full effect here to claims extending from the Paracels).

The potential to eliminate all high seas in the South China Sea can be seen by the circles drawn to show the effect of extending 200 nm EEZs from Thitu Island, Itu Aba Island, Spratly Island, and Scarborough Reef.

* Islands in the South China Sea

 Ji Seoong, EastWest Center Analysis #59, August 2001.

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III.3.1 Maritime Delimitation and Overlapping Territorial Claims

Based on the logical interpretation of the Tribunal, a high-tide feature can be categorized as an island if it can either sustain human habitation or economic life of its own. China claims sovereignty over Scarborough Shoal, which is known as “Huangyan Dao” in China and it has been treated as part of the Zhongsha Islands.\textsuperscript{251} It is suggested by China that Huangyan Dao “has attracted fishermen for many years and it is reasonable to assume that the rocks and the drying reefs can sustain economic life of their own in the context of Article 121(3)” of the Convention. Although it is difficult to establish that this feature can sustain human habitation, it does have the ability to sustain economic life of its own, and thus, it should be categorized as an “island” instead of a “rock.”\textsuperscript{252}

Chinese Foreign Ministry officials indicated that China considers Scarborough Shoal to be at least a high-tide feature within the definition of “island” under Article 121(1) of the Convention. As a press briefing on May 22\textsuperscript{nd}, 1997 entitled “Chinese Foreign Ministry Statement regarding Huangyandao” stated:

Huangyan Dao has always been Chinese territory and its legal position has been long determined. According to Article 121 of the UNCLOS, Huangyan Dao is surrounded by water on all sides and is a natural dry land area that is higher than the water level during high tide; it is not a shoal or submerged reef that does not rise above the water all year round. […] The Philippines has never challenged the position that Huangyan Dao is China’s territory. Recently, the Philippines side suddenly claims that it has maritime jurisdiction over Huangyan Dao because the island is in the 200 nm EEZ of the Philippines. This position violates the principle of international law and the UNCLOS […] the issue of Huangyan dao is an issue of territorial sovereignty […] and EEZ is a question of maritime jurisdiction.\textsuperscript{253}

\textsuperscript{251} Ibid., 199:459.
\textsuperscript{252} Song, "The South China Sea Arbitration Case Filed by the Philippines Against China: Arguments Concerning Low Tide Elevations, Rocks, and Islands," 354-5.
\textsuperscript{253} PCA, Final Award, 200-1:462.
After the Philippines’ problematic claims on Huangyan Dao, it also requested the Tribunal to decide in its Submission No.4 that “Mischief Reef, Second Thomas Shoal and Subi Reef are low-tide elevations that do not generate an entitlement to a territorial sea, exclusive economic zone or continental shelf.”  

China claimed all three features as a part of its Nansha Qundao (Spratly Islands/ Archipelago), and the Nansha Qundao is considered a group of islands in the South China Sea that is fully entitled to the territorial sea, EEZ and continental shelf. No baselines have been announced by China in Nansha Qundao in accordance with its 1992 Territorial Sea Law and UNCLOS. Besides this, according to Article 121, these three features should be under Chinese jurisdiction since China also identified Taiping Dao (Itu Aba Islands) as a fully entitled island that can generate 200 nm EEZ and continental shelf. According to China on June 3rd, 2016, China’s Foreign Ministry Spokesperson stated that,

Over the history, Chinese fishermen have resided on Taiping Dao for years, working and living there, carrying out fishing activities, digging wells for fresh water, cultivating land and farming, building huts and temples, and raising livestock. 

[…] The working and living practice of Chinese people on Taiping Dao fully proves that Taiping Dao is an “island” which is completely capable of sustaining human habitation or economic life of its own.

From the Chinese perspective, Taiping Dao is an island with the meaning of Article 121(2) and (3) of the Convention, and the distance between Meiji Jiao (Mischief Reef) and Zhubi Jiao (Subi Reef) to Taiping Dao is 74.7 nm and 36.7 nm, respectively. Both distances are shorter than 200 nm EEZ and continental shelf range and thus, China would have a legal basis to

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254 Ibid., 41:112.
256 PCA, Final Award, 202:466.
claim these two features. Furthermore, the Philippines’ claims in submission No.5 that Mischief Reef and Second Thomas Shoal are part of its EEZ and continental shelf are inadmissible because they gave rise to the question of maritime boundary delimitation over Meiji Jiao.\(^{258}\)

Based on writings on Nansha Qundao, Gregory B. Poling suggests that there are 30 features in the Spratly archipelago that are classified as “islands” which include Cuarteron Reef, Fiery Cross Reef, Gaven Reef, Itu Aba Islands, Johnson South Reef, Thitu Island, and West York Islands.\(^{259}\) These features mentioned above were all in the submissions of Philippines, and the Tribunal decided that all of them are “rocks.” China believed that “it is plain that, in order to determine China’s maritime entitlements based on the Nansha Islands under the Convention, all maritime features comprising the Nansha Islands must be taken into account.”\(^{260}\) The distinction between these controversial claims might arise due to the different way of establishing their claims. While the Philippines had made a successful attempt to convince the Tribunal to identify the characteristics of selected individual features over the dispute, China insisted its claim of the Nansha Islands as an archipelago, and its claim should be out of the jurisdiction of this Tribunal.

### III.3.2 The Whole: One Island? Or Group of Islands?

China considered that it “has, based on the Nansha Islands (Spratly Islands) as a whole, territorial sea, exclusive economic zone, and continental shelf.” However, it did not explicitly set out its position on the application of Article 121(3) to each of the maritime features identified in the Philippines’ submissions.\(^{261}\) It is premature to assume that only if China’s claim seems to differ from the definition given by the UNCLOS, then China’s claims have to be unlawful.

\(^{258}\) Ibid., 356.
\(^{259}\) Ibid., 358.
\(^{260}\) PCA, Final Award, 195:448.
\(^{261}\) Ibid., 196:449.
The Philippines argued that the three largest features in Nansha Qundao, Taiping Dao (Itu Aba Islands), Zhongye Dao (Thitu Islands), and Xiyue Dao (West York Islands), are “rocks” within the context of Article 121. This argument, however, can be undermined by the fact that a number of features located in Nansha Qundao are in fact islands according to the Convention. Mark J. Valencia, Jon M. Van Dyke, and Noel A. Ludwig suggest that between 25 and 35 out of the 80 to 90 distinct features in the Nansha area are above water at high tide, and therefore qualified as “islands” under Article 121 of the Convention. Also, it is important to distinguish the different types of claims made by the Philippines and the Chinese. The Philippines wanted to challenge Chinese claims by characterizing individual features as not fully entitled islands. However, China did not assert its claim regarding particular islands, and instead, it claimed Qundao, the archipelagos. According to Article 46(b) UNCLOS, "archipelago means a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely inter-related that such islands, waters and other natural features form an intrinsic geographical, economic and political entity or which historically have been regarded as such.”

Therefore, this type of claim is well founded in the Convention, and this difference in claims should be identified.

In conjunction with its ratification of the Convention on June 7th, 1996, China declared an EEZ of 200 nm and a continental shelf in accordance with the provisions of the Convention and reaffirmed its sovereignty over the islands listed in Article 2 of its 1992 Law on the Territorial Sea and the Contiguous Zone. Besides, China, as analyzed in Sophia Kopela’s book,

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264 PCA, Final Award, 200:461.
Dependent Archipelagos in the Law of the Sea, Denmark, Ecuador, Norway, Spain, Portugal, Australia, UK, France, and India have all enacted legislations in the form of declarations, orders, decrees and acts proclaiming their outlying archipelagos.\textsuperscript{265} China had claimed the islands as archipelagos, instead of different individual maritime feature. For the purpose of this arbitration, the Philippines only selected a few features occupied by China in order to deconstruct the whole dispute and mislead the Tribunal.\textsuperscript{266} In its position paper, China argued that the Philippines’ selection of particular features was “an attempt at denying China’s sovereignty over the Nansha Islands as a whole.”\textsuperscript{267}

On the other hand, the UNCLOS does not deal with the acquisition of sovereignty over the land territory, including islands and rocks. It also does not allocate territorial sovereignty to the land that will generate sovereignty over those waters, and the disputes between China and the Philippines were chiefly concerned with territorial sovereignty over certain island groups.\textsuperscript{268} This specific category of disputes, from a Chinese perspective, is excluded from the jurisdiction of this Tribunal and this exclusion is well founded in fact and law. As suggested by Boyle, “consensus negotiation remains the most effective means of securing generally accepted changes and additions to the corpus of UNCLOS law.”\textsuperscript{269} It is also important to realize that many states’ practices relating to archipelagos do have law-creating value in international law, either as an indication of interpretation of treaty provision or as an element leading to the creation of

\begin{thebibliography}{99}
\bibitem{266} Song, "The South China Sea Arbitration Case Filed by the Philippines Against China: Arguments Concerning Low Tide Elevations, Rocks, and Islands," 356.
\bibitem{267} Ministry of Foreign Affairs (PRC), \textit{Position Paper}, para 19.
\bibitem{269} Kopela, \textit{Dependent Archipelagos in the Law of the Sea: Publications on Ocean Development}, 158.
\end{thebibliography}
It is believed by the author that the evidence and research provided by this thesis showed that China’s action can be characterized as one of this state practice, and its action should be considered carefully under the customary international law. It is true that China’s default appearance and reluctance to target every legal detail of its claim developed a negative reputation in the international community. It is unfair, however, to determine that China does not have any legal basis to do what it had done merely on the basis that it chose not to present itself in this arbitration procedure.

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270 Ibid.
Chapter IV. Analysis of the Merit of the Arbitration

IV.1 Assessment of the Tribunal’s Awards

IV.1.1 Assessment of the PCA Ruling

The final Award on this South China Sea arbitration between the Philippines and China is a one-sided victory for the Philippines. The Award adjudicated fourteen out of the total fifteen claims made by the Philippines against China in the South China Sea, and ruled in favor of the Philippines on all of them.\(^{271}\) Assessing the legacy of the arbitration, one needs to realize that the purpose of this arbitration process should be resolving the conflicts and providing a peaceful dispute settlement process. This section assesses the final Award of the Tribunal, and the author believes that the Award itself, especially the standard created within it, can hardly be universally adopted. The Award was problematic within itself and thus, it could not provide an optimal solution for the South China Sea disputes.

IV.1.1.1 Lack of Finality

Although the Award is final in a procedural sense, the ruling itself lacks finality in a legal sense since the definition of rocks and islands given in this Award can hardly form a precedent that the other party states would follow. As discussed in Chapter II, this Tribunal provides its interpretation of the UNCLOS Article 121. Followed by the standard created by itself, the tribunal made a conclusion that none of the maritime features in the Spratly Islands qualify as “islands” under UNCLOS, and thus none of the features are capable of generating full EEZ and continental shelf. This may seem to create a positive effect for the exercise of *mare liberum* (freedom of navigation), commerce, and fisheries. However, this reduction of the maritime

spaces which states can claim would not only intensify disputes in the South China Sea, but also disputes over insular features elsewhere.\textsuperscript{272} If a decision from an international arbitral tribunal is final, then the ruling would serve as the precedent for future cases. In this South China Sea arbitration, the ruling of the tribunal itself stimulated rejections from many States besides China. Due to their rejections, as Stefan Talmon believed, that it is highly unlikely that a consensus on the interpretation of Article 121 could be achieved.\textsuperscript{273}

Why do many states other than China tend not to recognize this Award? This is mainly because its specific definition of rocks would deprive many of states’ rights to make maritime claims of islands. Since this Tribunal provides strict standards for evaluating the features in the South China Sea, if the criteria were used to test the characteristics of many other islands claimed by other countries, these features cannot be called an “island” and thus, would not be able to generate 200 nm EEZ and continental shelf. For example, Japanese Foreign Minister Fumio Kishida denied that the Award applied to Oki-no-Tori Shima when he stated that he “do[es] not believe that there is a specific definition of what constitutes rocks.” He further stated that “there are various provisions, including UNCLOS Article 121, paragraph 3, but even in those provisions there is no definition of rocks.”\textsuperscript{274} The United States also claimed full EEZ entitlement around Kingman Reef in Micronesia, and by this standard created by the PCA judgment, such claim would become invalid under UNCLOS.\textsuperscript{275}

\begin{footnotesize}
\begin{enumerate}
\item[274] Ibid., 12-3.
\end{enumerate}
\end{footnotesize}
The interpretation given by the tribunal lacks precedent in the international law. Article 121 provides that “rocks which cannot sustain human habitation or economic life of their own” shall not have 200 nm EEZ and continental shelf entitlement. Stefan Talmon mentioned that the Norwegian Supreme Court ruled that the 13.2 square kilometers Abel Island “alone is sufficient to rule out that it is a ‘rock,’” and the US District Court for the District of Guam in 2008 found that the uninhabited Howland and Baker Islands were islands in terms of Article 121(1) and (2). ICJ also treated Jan Mayen as an island generating EEZ despite noting that there were only 25 persons temporarily inhabiting the islands for a defense-related station. If the standards of this Tribunal were applying to any of the above situations, none would qualify as a proper island. Therefore, the inconsistent interpretation of Article 121(1) generated questions on the credibility of PCA ruling in this case.

One may argue that the new definition and interpretation of the specific article in UNCLOS is a necessary part of the Tribunal’s law creating function. However, it is also true that the reliability and finality of this ruling may be challenged by states’ reactions against such Award. Thus, the author believes that the Tribunal’s award in the South China Sea Arbitration is final in a procedure sense, but to some extent, it does not mean it is final when the substantive issues are involved. In other words, this final Award did not resolve the disputes in the region, but rather further exacerbated its intensity.

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276 UNCLOS, Article 121.
278 Ibid., 11.
279 Ibid., 3.
IV.1.1.2 Jurisdiction Issue

After the discussion in Chapter II and III, the author considers the jurisdiction issue to be the major debate over the validity of this arbitral procedure. The key here is whether the Philippines’ submissions involved sea boundary delimitation, a topic relating to the disputed territorial sovereignty issue. While this Tribunal ruled that the requests did not involve disputes over territorial sovereignty and it had jurisdiction over the case, the other perspective provided the opposite.

The prerequisite of this discussion is that the UNCLOS Article 298(1)(a)(i) provides that a state-party may declare an optional exception to compulsory dispute settlement over disputes related to “sea boundary delimitations or […] historic bays or titles.” China activated this exception in 2006, and thus this exception applies to this arbitration. The Tribunal believed that the question over maritime entitlement does not implicate maritime delimitation. This meant that the tribunal’s ruling on the status of features was irrelevant to sovereignty issue. However, the author believes that this argument required strong assumptions. Some maritime features claimed by China are geographically within 200 nm or closer to the Philippines’ shore. Thus, the islands claimed by China, supposedly generating 12 nm territorial zone or 200 nm EEZ, would create overlapping claims with that of the Philippines. By not fully explained this overlapping, the Tribunal made an assumption that there is no overlapping meaning that China’s sovereign claim is not valid. Under these circumstances, the Tribunal’s further arguments would be biased since it already denied China’s claim before entering into its discussion of the status of features.

Chris Whomersley, a former deputy legal advisor in the United Kingdom’s Foreign and Commonwealth Office states, that the “real issue was disputed sovereignty over land territory.”

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281 Ibid.
He then pointed out that there is no precedent for deciding merely on the status of features unless the sovereignty issue is solved.\textsuperscript{282} It is also the Tribunal’s responsibility to “satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law.”\textsuperscript{283} This Tribunal had transferred some of this responsibility to the Philippines when it directed them to address the matters of jurisdiction fully. This is sometimes criticized as a negative approach and should not thus diminish the Tribunal’s obligation.\textsuperscript{284} The determination of the characteristics of the disputes themselves is the key, and due to the arguments provided above, the author believes that the jurisdiction of this tribunal is debatable and it should remain as a topic of discussion in the further legal analysis.

\textit{IV.1.1.3 Contribution of this Arbitration}

The legacy of this Arbitration is multifaceted. Its contribution to the fact finding of the South China Sea disputes and the further development of international law system should not be neglected. In the five-hundred-page final Award of this Tribunal, lots of updated geographic information and resource allocation were included. The Tribunal also tried to provide Chinese arguments in its fact-finding process. The publicity and popularity of this arbitration case produced numerous media reports addressing this issue. The overlapping claims made by the political entities surrounding the South China Sea area became a heated topic of discussion worldwide. The discussions mainly laid on the legality of the Nine-dash Line and the role of international law in this dispute settlement process.

\begin{flushright}
\textsuperscript{283} UNCLOS, Annex VII Article 9.
\textsuperscript{284} Liu, "Legal Requirements for the Establishment of Jurisdiction Over Compulsory Arbitration of Maritime Disputes: From the Perspective of Arbitration Under Annex VII of the UNCLOS," 58.
\end{flushright}
This Arbitration indeed discovered serious ambiguity of China’s claim on historic rights and Nine-dash Line. For example, the Tribunal has defined China’s claim should not be regarded as a historic “title,” but rather a historic “rights” to the living and nonliving resources in maritime areas.285 Thus, China’s strong claim to sovereignty within the Nine-dash Line became illegal if its claim was not an absolute representation of “title.” It also provides an inconsistency in China’s mapping exercise since it had an Eleven-dash Line in a 1947 Map created by ROC, and it became a Nine-dash Line in PRC’s later mapping attempts. Some also argued that the dash lines of 2013 appeared closer to the coastlines of neighboring states as compared to the Eleven-dash Lines of 1947.286

The problems of the Nine-dash Line highlighted by this Arbitration imposed the burden of proof on the Chinese side. The arbitration stimulated various publications from both sides, and especially Chinese scholarly works on the legal status of the Nine-dash Line. The debate also revealed a China’s potential strategy to maintain a vagueness in the definition of this line. This deliberate ambiguity provided a long-term strategy for ensuring the regional disputes settlement and flexibility in search of sustainable solutions to the South China Sea problem.287 Moreover, this ambiguity would not impinge sovereign rights that China has claimed in the region. Besides the strategic purpose, this ambiguity was also an unsolved historical conflict left over during the transition from seventeenth to the twentieth century. As discussed in Chapter I, the shared East Asian ideologies constructed under the tributary system were destroyed by the occupation of the western theory of sovereignty and international law came after.

287 Ibid., 283.
This Arbitration also provided a chance for people to reevaluate the function and effectiveness of the international law system: the relationship between the historic rights and UNCLOS, the negotiation and compulsory procedure, and the tribunal’s legal decision and states’ political actions. While the Chinese believed that their historic rights were consistent with its adoption of the UNCLOS, the Tribunal decided that China’s historic rights possessed under the Nine-dash Line were “superseded […] by the limits of the maritime zones provided” by the UNCLOS.\(^{288}\) China also favored the regionally-negotiated settlement with ASEAN as the relevant forum compared to a compulsory mechanism under the international tribunal; however, the Tribunal stated that the regional agreements lacked binding forces and thus should not be regarded as a prerequisite of initiating compulsory procedure. The confrontation between the legal decisions and states’ political actions is crucial and the major determinant of a final solution in the regional disputes like this. Specifically speaking, China’s non-participation of the whole arbitral process and default of appearance should be taken into consideration. The fact is that during the time of the arbitral process, China actually accelerated its island building and strengthened its sovereign claims over the South China Sea region. These actions demonstrated that whether the arbitral Tribunal has produced an optimal environment for dispute settlement is left to be determined.

\textit{IV.1.1.4 Better Solutions}

The previous sections in this chapter intend to show that China’s steadfast rejection of this ruling was not the only reason that made the result of this Tribunal is debatable. Duncan French argued in his article that this Award would also likely generate a potentially negative

\(^{288}\) Schoenbaum, "The South China Sea Arbitration Decision: The Need for Clarification," 292.
effect on many environmental subjects, such as climate change and the rise of sea levels. Some commentaries believed that this Award is unwise since it failed to create an environment for further cooperation. A better ruling may leave room for China to claim the Nine-dash Line to assert nonexclusive, historic and habitual fishing rights as specified in UNCLOS Article 62(3). The possibility of cooperation would create the framework for further regional dialogues and negotiations. Thus, the situation in the South China Sea may become less aggravated.

Some may argue that if the Award was not harsh enough, China may become more audacious and aggressive as a regional hegemon. In fact, the extensive debate created by this arbitration revealed the imperfections of this international arbitral system. If the Award itself is problematic, the system needs to minimize the potential effect of the ruling to be utilized in any political purpose. From the author’s perspective, China’s default of appearance should be discussed as a loophole in the international law. Chinese non-participation has created strong implications for the further development of this system.

IV.1.2 Default of Appearance

Default of appearance means a state’s non-participation in a tribunal or arbitral process. Many believed that China’s refusal to participate in the arbitration process demonstrated its rejection of international law and justice. This misunderstanding should be explained since default of appearance is nothing unusual in international adjudication. Default of appearance occurred many times in the past. For example, Iceland did not participate in the proceedings

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concerning the unilateral extension of its exclusive fisheries jurisdiction in *United Kingdom v Iceland* 1951. Turkey was also absent in *Aegean Sea Continental Shelf (Greece v Turkey)* 1978 concerning the elimination of the continental shelf related to Greece and Turkey.\(^{291}\) Default of appearance also occurred in the case *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)* 1986 litigated before the ICJ. Examples also included *Arctic Sunrise Arbitration (The Kingdom of Netherlands v The Russian Federation)*, and the 2004 ICJ advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* case.\(^{292}\)

A state may choose not to appear before an arbitral tribunal in order to avoid anything that may give credibility to a claim that it considers inadmissible or manifestly without jurisdiction.\(^{293}\) Hugh Thirlway has commented in his *Non-appearance before the International Court of Justice (1985)* that “it has to be recognized that to refrain from appearing in proceeding before the International Court of Justice must be regarded as, if not a legal privilege, at least a line of conduct which may not be stigmatized as illicit or improper.”\(^{294}\) No punishment should be given and it is not a general duty under the Convention for a party to appear in proceedings brought against it.\(^{295}\) Thus, it is legal for China to not participate in this arbitral process and it should not be punished for this action.

This arbitration was described as a “single-party adjudication” by David Ong, a professor of international and environmental law at Nottingham Law School.\(^{296}\) Default of appearance

\(^{292}\) Feria-Tinta, "Business as Usual?" 2.
\(^{293}\) Talmon and Jia, *South China Sea Arbitration: A Chinese Perspective*, 16.
\(^{296}\) Feria-Tinta, "Business as Usual?" 1.
before the tribunal does not automatically result in a judgement against it.\textsuperscript{297} However, the fact that the international agreements and tribunals failed to enforce, or in fact allowed, state party not to participate in its procedures, weakened its own legitimacy. Even UNCLOS provides that the Tribunal should show effort to satisfy its jurisdiction and provides arguments for the non-appearing party, the effort would not be comparable with the appearing party, in this case the Philippines. It is logical that the lack of participation led to different results regarding the compliance with the tribunal’s awards.\textsuperscript{298} Thus, the author argues that this is an institutional flaw that may diminish the credibility of the international court.

**IV.2 The Merit of Arbitration under International Politics**

The timing and existence of the South China Sea arbitration process is crucial for the future development of the conflicts in the region. Not only were the numerous countries in Southeast Asia involved, but the popularity of this arbitration also attracted other countries’ attention around the world. A number of media reports on the South China Sea disputes soared up after the initiation of this arbitration process. The strong political implication in these media reports, as the main sources of information perceived by the general public, created different perspectives. Media outlets from different countries commented on the same arbitral process in different ways. Thus, the legal positions of states were not merely motivated by noble ideas of the rule of international law, but rather by hardened self-interests.\textsuperscript{299}

In order to present how the general public were fed plotted information, the author will present selected news report of seven different countries: the United States, the United Kingdom,

\textsuperscript{297} Ibid., 19.
\textsuperscript{298} Feria-Tinta, "Business as Usual?" 2.
Australia, Russia, India, South Korea, and Japan, throughout the beginning of the arbitration in January 2013 until the decision on the Tribunal’s jurisdiction in October 2015. In the later section, further development of disputes in the South China Sea will be discussed, and the author will show how the South China Sea disputes started reaching to a peaceful settlement and diplomatic cooperation.

IV.2.1 Media Reports and Press Analysis

There are 16 media sources chosen for this section across 7 different countries. Some countries, like the United States and Australia were active participants of the military mobilization in the South China Sea region. Others like Russia, India, South Korea and Japan showed their perspective with strong political preferences. The United Kingdom was chosen as a representative of the European countries, which did not have direct political interests within this region.

Sources chosen for each county are based on their popularity within their countries and also their influence worldwide. These sources are CNN, USA Today, New York Times, and Los Angeles Times from the United States; The Sydney Morning Herald from Australia; TASS and RT from Russia; Dainik Jargran, The Times of India, and Hindustan from India; Chosun Media, The Korean Herald, and Times of Korea from South Korea; Kyoto News, The Japan News, and The Asahi Shimbun from Japan; and BBC from the United Kingdom. Around 100 to 150 news reports were searched through the website of each source under the key word “South China Sea,” and several samples were picked through these 100 to 150 observations as the representative of the perspective of the given country in certain period of time.
The media analysis will be conducted in country chosen through three time periods: before the Philippines’ submission to the PCA on January 22\textsuperscript{nd}, 2013, from submission to the decision on jurisdiction on October 29\textsuperscript{th}, 2015, and after the Award on jurisdiction in October 2015.

<table>
<thead>
<tr>
<th>Country</th>
<th>Media Sources</th>
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<tbody>
<tr>
<td>The United States</td>
<td>CNN, USA Today, New York Times, Los Angeles Times</td>
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<tr>
<td>The United Kingdom</td>
<td>BBC</td>
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<tr>
<td>Australia</td>
<td>The Sydney Morning Herald</td>
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<tr>
<td>Russia</td>
<td>TASS, RT</td>
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<tr>
<td>India</td>
<td>The Times of India, The Indian Express</td>
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<tr>
<td>South Korea</td>
<td>Chosun Media, The Korean Herald, Times of Korea</td>
</tr>
<tr>
<td>Japan</td>
<td>Kyoto News, The Japan News (by Yomiuri Shimbun), The Asahi Shimbun</td>
</tr>
</tbody>
</table>

**Figure 9. List of Countries and Media Sources**

*The United States*

Major media outlets in the United States started to pay attention to the South China Sea disputes prior to the initiation of this arbitration. On the July 12\textsuperscript{th}, 2012 report “China, ASEAN at odds over sea territory,” CNN pointed out that China’s claim of the Nine-dash Line does not comply with the UNCLOS.\textsuperscript{300} Another CNN report from September 24\textsuperscript{th}, 2012 suggested that the major issue of overlapping sovereign claims in the South China Sea was due to economic interest. Sources provided that there might be as much as 213 billion barrels of oil lied untapped in the South China Sea region.\textsuperscript{301} Most reports prior to the arbitration relied on the regional conflicts, in particular on the economic interests over resources in the area. The United States has


yet to directly participate in the disputes to solve these problems. After January 22nd, 2013, USA Today published a news report titled “China rejects Philippine U.N. mediation effort” on February 19th, 2013. The article suggested China’s move into the oil-rich region of the South China Sea was unlawful, and further implicated China’s rejection of the PCA’s peaceful and friendly dispute settlement process prove its disrespect to the international law. After the court hearing on July 13th, 2015, CNN reported on “Google alters [the] name of disputed South China Sea reef” two days after the hearing took place. Google stated that it removed its Chinese name and replaced it with a Philippines’ name, Scarborough Shoal. During this period, news reports began to target China’s choice of non-participation and characterized it as a rejection of international rule and peaceful settlement. The report ignored the fact that the PCA is not a branch of U.N. and started to show a tendency of supporting the Philippines.

On October 30th, 2015, The New York Times described the tribunal’s ruling on jurisdiction as a “Victory for Philippines.” Los Angeles Times reported on November 17th, 2015 that “Obama highlights support for the Philippines amid tension with China.” The news reported that President Obama planned to give two more ships and other aid to Manila to help with its confrontation with China. One week later, USA Today stated that “US and Japanese

navies come together in South China Sea” to perform joint exercises.³⁰⁶ In the news after the Tribunal decided its jurisdiction over the case, US showed stronger military and diplomatic support for the Philippines.

**Australia**

Australia’s *The Sydney Morning Herald* started to comment on the South China Sea disputes after the initiation of the arbitration and its strategy seemed to follow the United States. On May 28th, 2015, *The Sydney Morning Herald* publicized “China moves weapons on artificial island[s] in South China Sea.” The article stated that China risks confrontation with the United States and also threatens regional security that might affect Australia.³⁰⁷ Australia also “increase[d] cooperation with US navy in the South China Sea” before the Tribunal made decision on jurisdiction.³⁰⁸ After the decision, this newspaper reported that “Indonesia says could also take China to the court” on November 12th, 2015, trying to add more pressure on Chinese side.³⁰⁹ In general, Australia had demonstrated strong political preference towards adding pressure on China. Along with the United States, Australia participated in the joint exercises in order to maintain the national security in the region, and thus satisfied its country’s interest.

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Russia

Prior to the hearing of the jurisdiction, TASS publicized that “China comments on media reports of US considering to contest Beijing in South China Sea” on May 13th, 2015. This news report included Chinese Foreign Ministry spokeswomen Hua Chunying’s argument that China urged corresponding countries to take practical and less provocative measures to maintain the stability of the region. It also stated that China respected the freedom of navigation of other countries, but it does not mean that foreign combat ships or aircraft can enter the territorial waters or the air space of another state. In the same month, on May 30th, RT described Russia’s attitude towards the disputes when “Russia will take part in multinational navy drills in the South China Sea” with China. The article targeted the US action in the region as aiming against Russia and China. Even before the confirmation of the Tribunal’s jurisdiction, Russia showed its strong support to China as it feared that the US and Australia’s navy drills in the region would become a destabilization factor. TASS publicized article again providing Chinese perspective that “Beijing says work on expanding landmass on disputed islands continues on legal grounds.” Russia was the only major international player that demonstrated its support to China, and this tendency continued after the tribunal found its jurisdiction over the disputes.

On October 30th, 2015, TASS acknowledged that “China does not recognize Hague’s arbitration court jurisdiction in South China sea.” Untill April 13th 2016, “Chinese Foreign Ministry commends Lavrov’s stance on South China Sea” when this Russian Foreign Minister

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said that it is necessary “to stop any interference in the talks between the parties directly involved and attempts to internationalized these disputes.” China was appreciated to the political stance that Russian took in the mist of this arbitration process, and it is reasonable to find that Russia’s support to China was an exhibition of balance of power in the international politics.

India

Around the time of October 2015, India allied with the United States and the Philippines when it was even “aggressively seeking freedom of navigation.” As the Times of India publicized on November 4th, 2015 that “Delhi purposefully relies Beijing as tension mounts in South China Sea.” In this article, the reporter also referred South China Sea as West Philippine Sea, which was a Philippine name for the sea area. On February 18th, 2016, The Times of India borrowed perspective from its allies, “US and EU warn China on need to respect South China Sea ruling.” However, this unconditional support started becoming moderated when “at UN, China blocks India bid to ban JeM chief Masood Azhar.” This article showed how India’s support to the Philippines and the United States on this arbitration may danger its own diplomatic relation with China. It is not surprising to see later on India moved back and forth when its “stands on South China Sea lead to confusion,” as reported by the Times of India on

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May 4th, 2016. The India case was an example of how its political interests may largely influence its stands on the South China Sea disputes. Thus, the reports in the news during time were targeted for its own diplomatic strategy.

South Korea

South Korea did not have direct interests in the South China Sea, but as a key player in Asia, South Korea had a close political connection with China. The news reports from South Korean sources showed their strong concern of the aggravated confrontation between China and the United States in the region. The Korea Times was “[w]orrying about war” in its article published on February 23rd, 2016. In the article, the South Korea was in a dilemma where the THAAD threatened their relationship with China and it also needed to rely on China to solve the problem with North Korea. It showed increasing concern when “China Redeploys Fighter Jets on Disputed Island,” reported by Chosun Media on February 25, 2016. It also objectively comments on key event like “Taiwan gives tour of disputed island in bid to boost claim.” The purpose of Korea’s news reports tended to be balanced in terms of recognizing different perspectives. The unique aspect of its reports was that it presented its dangerous and hard diplomatic circumstance in the midst of this arbitration process.

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Japan

Japanese sources published article on “Japan, Australia, India share concern over South China Sea Tensions” which showed that it allied with Australia and India at this point.\(^{322}\) The Asahi Shimbun also reported that “Philippines gets U.S. military aid boost amid South China Sea dispute.”\(^{323}\) Given that Japan and China had disputes over Senkaku (Diaoyu) Islands, Japan allied with the United States and the Philippines was not surprising. However, after the final Award of the South China Sea, Japan did not recognize this Award since the standard provided in the ruling would make many features claimed by Japan as invalid as islands.

The United Kingdom

Before the arbitration, BBC reported news like “South China Sea tensions rattle China’s neighbors” on November 4\(^{\text{th}}\), 2011 to comment on the general tension in the region.\(^{324}\) After January 2013, BBC presented “China refused to prove its historic rights on the South China Sea” on June 4\(^{\text{th}}\), 2014. It shows how China chose not to participate in this arbitral process initiated by the Philippines under PCA.\(^{325}\) On September 9\(^{\text{th}}\), 2014, BBC published a report, “China’s Island Factory”, on many aspects of the South China Sea. This report not only mentioned the interactions between the Philippines and Chinese on the islands, it also included comments from

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the legal professionals from both sides as reference to the arbitration.\textsuperscript{326} Compared to the report from the United States, \textit{BBC} presented more diverse perspectives in the discussion of the South China Sea. It even publicized Chinese position paper against the Philippines’ claim on December 7\textsuperscript{th}, 2014.\textsuperscript{327} After the Tribunal confirmed its jurisdiction, news reports on \textit{BBC} did not show strong preference in either side. For example, it reported on December 15\textsuperscript{th}, 2015 that “Australia conducting ‘freedom of navigation’ flights in South China Sea.”\textsuperscript{328} The reports discussed the concept of freedom of navigation, but it did not comment on whether the perform of freedom of navigation was an infringement of China’s sovereign rights. In general, the reaction of news outlet in the United Kingdom did not show a strong political preference and predilection towards either party in the disputes.

\textit{Political Implication}

From the samples chosen from 16 media outlets across 7 countries, the author observes a differentiation of media’s reaction towards this arbitration. In the sample, only the worldwide media sources, such as \textit{CNN} and \textit{BBC}, had touched upon the South China Sea issue before the initiation of this arbitration in January 2013. Some countries started to talk about the South China Sea disputes after 2013, but the discussion soared up in the late 2015 and early 2016 after the Tribunal recognized its jurisdiction. The United States and Australia held consistent perspectives

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against China in the context. Russia, at the same time, provided unconditional support to China by citing many Chinese sources and arguments in its news articles.

The voices of India, South Korea, and Japan showed some inconsistency. India moderated its criticism to China when its U.N. vote for the ban of JeM chief Masood Azhar was threatened. The media outlets from South Korea was hesitated to choose a side since it allied with the United States to deter the possible attack from North Korea, and it also did not want to irritate China as a key player in the region. Japan initially criticized China’s actions of not complying with the international law. After the final Award had come out, however, it shifted its support for the rule of international law to a refusal to recognize the ruling. Japan did so only because the definition of islands provided by this Tribunal would deny the extent of its maritime claim.

While the United Kingdom neither directly involved in the disputes, like the United States and Australia, nor it had critical political concerns, like India, South Korea, and Japan, it was able to create a more balanced and diverse perspective to the audience by addressing opinions of various sources. Since the general public learns about the South China Sea arbitration mainly from the accessible news reports, it is important to recognize the different perspectives provided by various sources around the world. The reports of various influential international media outlets had exerted their power to establish an aggressive and disrespectful image of China in the midst of this disputes and arbitral process. To what extent did these report serving a political purpose should be investigated before making an unbiased judgment of the South China Sea arbitration.
IV.2.2 Continuing Development of the Conflicts

When the final Award came out on July 12th, 2016, the Philippines’ supporters applauded for this victory and the Chinese strongly repudiated this final ruling. Xi Jinping, the Chinese president said China’s “territorial sovereignty and marine rights” would not be affected by the ruling. Chinese media outlets reacted angrily and described the verdict as “ill-founded” and naturally “null and void.” The Philippines’ legal team commented that the ruling was not only benefiting the Philippines, but also the international community. If China’s Nine-dash Line is invalid to the Philippines, it would be equally invalid to other states such as Vietnam and Indonesia.²²⁹ However, the adversary between the Philippines and China did not remain consistent for long time. The Philippines’ foreign secretary Perfecto Yasay Jr. was included in “Philippines to Deepen China Talks despite South China Sea Differences” on September 16th, 2016. He said that Manila emphasized the South China Sea dispute was a “small portion” of its relationship with Beijing, and Duterte administration would continue seeking opportunities to improve Sino-Philippine ties.³³⁰

President Rodrigo Duterte has taken steps to mend relationship with China since he took office in June 2016, and he stated that “in the play of politics, […] I will set aside the arbitral ruling. I will not impose anything on China.”³³¹ Even if the United States and Philippines have


been close allies since WWII, Duterte showed the international community a dramatic shift in this political relationship. He played down the tribunal’s July ruling in favor of the Philippines, and he agreed to create a bilateral talk with Beijing on the South China Sea disputes. Duterte strategy at the end of 2016 was to please Beijing by separating himself from the United States. He made several statements in public against the United States and showed attempted to remove all foreign troops from Philippine soil. China also changed its strategy after Duterte’s visit to Beijing in October 2016 and his posture shift. According to reporter Aurora Almendral, China has agreed to finance infrastructure in the Philippines and lift its embargo on the import of tropical fruits. It also promised to encourage tourism to the country.

The author believes that there might be three reasons for Duterte’s decision to divorce the United States at the end of 2016. Firstly, given the final months of the Obama administration, the tension risen during the electoral period made the Duterte doubt about the United States’ willingness to support the Philippines, and if yes, how much. Secondly, the United States’ military presence in the Southeast Asia meant to acquire some degree of balance in the region, and the hope it that its presence will deter China. However, a fundamental component of deterrence is credibility. As William G. Frasure commented in The Diplomat that the deterrence requires your friend to believe that your adversary is intimidated by your posture, and that is

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334 Associated Press, "Philippines to 'Set Aside' South China Sea Tribunal Ruling to Avoid Imposing on Beijing."

335 Chappell, "Philippines' Duterte Says He's 'Separated' from U.S., as He Cozies Up to China."

unlikely the case in the South China Sea. Given that it was almost impossible for the United States to actually start a war with China in the South China Sea, its presence would only exacerbate the already heated region. Thirdly, the Philippines may not be able to bear the consequence of losing China as an important trading partner. Even the United States could provide necessary support on its national defense, the United States’ supports on its economy might be limited and distant compared to what the economic tie between the Philippines and China could create.

Duterte was criticized by the Philippines’ public, who trusted the United States as a reliable ally than China, when he made peace with Beijing. He was also urged by the Philippines’ Defense Secretary Delfin Lorenzana, who believed that the Philippines should make strong sovereign claims. Thus, Duterte shifted his posture again in April 2017 when he ordered troops to fortify islands that the Philippines claimed in the South China Sea. International community accused him for having inconsistent political strategies in such a short and sensible period of time. His moves indeed made a future diplomatic relationship unpredictable and corresponding states hesitant to take subsequent actions. However, the author believes that this might be a smart diplomatic move for the Philippines in the midst of this dilemma. Duterte said that the Americans were “treating us like dogs on a leash” when he decided to divorce the United States. He also boosted confidence of his soldiers who would go

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340 Beech, "How Philippine President Rodrigo Duterte is Shaking Up the South China Sea."
defending their islands on the South China Sea by saying that “[y]ou will be treated like a pig only to be executed.”

His expression in the public revealed his hard political position between the United States and China in the South China Sea disputes. His people wanted him to behave with strength and assertion, but at the same time, he had to make sure his country can survive.

What will happen next is left to be determined. Throughout the study of this arbitral process, the author concludes that this arbitration stimulated more conflicts and exacerbated confrontation in the South China Sea region. Some may argue that China would continue to build on artificial islands even without this arbitration and nothing would stop China from doing so if not bringing in the power of the United States. This argument is valid to some extent since not a single country in which has territorial disputes with China in the South China Sea would be able to withstand China’s military power. Nevertheless, the participation of the outside powers would complicate issues more when the negotiation between the parties involved become a difficult option. Even when China and the Philippines tried to make peace with each other, the international community would add pressure on their choices. Cooperation should be the future of the development of Southeast Asia, and peaceful negotiation should be the first option in front of key players in this region. The author hopes that the final solution of the South China Sea disputes will result in good-faith negotiations among the parties involved, and tightened collaboration in the region will provide opportunities for a future of collective economic prosperity.

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341 Chappell, “Duterte Orders Philippine Army to Occupy Disputed Islands in South China Sea.”
V. Conclusion

The essence of this thesis is to provide a balanced perspective of legal arguments from the Philippines and China. To thoroughly investigate the issues, however, we need to uncover where the disputes came from and where will they move forward in the future. Thus, this thesis offers a historical background of the South China Sea in Chapter I to prove how the clash between the eastern and western hemisphere from the seventeenth to the twentieth century created an ideological gap in Southeast Asia, specifically speaking, in the South China Sea. Moreover, the future solution of the disputes relied on the bilateral negotiation and direct conversation between states involved. Thus, a media report analysis and its political implication are provided in Chapter IV to show why diplomatic negotiation between the parties directly involved, in this case, the Philippines and China, is an optimal option for the current peaceful settlement and future collective economic development of the region.

V.1 Historic claims in History

In the investigation of the historical background of the South China Sea area in Chapter I, the author finds that from a Chinese perspective, the tributary system provided a sustainable institution for international relation and economic development of Southeast Asia in history. Since one of the most crucial functions of the tributary system was to maintain a trade relationship between kingdoms, numerous port cities were established. The early kingdom like Funan, what is now southern Vietnam and Cambodia, was a tributary state of the Chinese courts. Guangzhou has been one of the important trading ports in Asia since the fourth century. Malacca also established a tributary relation with Ming when Zhenghe visited there in the fifteenth century. Beyond the economic benefits, becoming vassal states of Chinese courts would help the
rulers in the neighboring kingdoms to gain their political legitimacy domestically. From a Chinese perspective, this is the way-of-doing-things in Southeast Asia under tributary system before the colonial penetration in later centuries.

Historical Asian polities regarded the rulers as their centers, and power of the ruling was the strongest geographically at the center, as the more peripheral the area, the weaker the power of the ruler. The characterization of the sphere of a polity in the Southeast Asian societies was based on what David Kang described as a frontier. The frontiers between the kingdoms in Southeast Asia were ambiguous, and the most efficient way to define the relationship between the kingdoms was tributary system. The tributary states of China were granted preferred commercial opportunities and legitimacy over other kingdoms. The non-tributary states be difficult to position themselves in this hierarchic system with China.

Imperial penetration of the Europeans started from the seventeenth century, and they firstly diminished the effectiveness of tributary system by taking over Southeast Asian kingdoms. The Portuguese, Spanish, Dutch and British had all participated in this process. The Dutch designed the basic idea of international law, the free sea, to stop Portuguese from monopolizing trade in the Southeast Asia. The Dutch then became the new hegemon in the eighteenth century followed by the British. The East Indian Company (EIC) represented British participation in the Southeast Asian trade, trading in commodities like tea or opium. EIC was even a huge determinant of the start of the Opium Wars between China and Britain. Qing court gradually lost control of the tributary system encountering the danger of becoming a colony itself.

Kang, *East Asia before the West: Five Centuries of Trade and Tribute*, 139.
During the five-hundred years of European’s participation in the Southeast Asia, they imposed the idea of clear border delimitation in the region. The Philippines and Indonesia were split by an agreement between Portugal and Spain in 1529; the line between Malaysia and Indonesia was determined by the British and the Dutch. The border between China and Vietnam were dictated by the French in 1887, and the frontier of the Philippines was decided by the United States and Spain in 1898. The border between the Philippines and Malaysia was ruled by the United States and Britain in 1930. The colonial states were subject to the influence of the colonial powers from the West. With the collapse of tributary system and fall of Qing, China lost its sphere of influence over an area it had maintained in the course of history.

How are the history of the South China Sea and power transition from the old hegemon China, from Chinese perspective, to the colonial powers from the West relevant to the current disputes of the South China Sea? It is useful to assess where Chinese historic rights came from and how well they are established in the course of history. The author discovers that the tributary system was an effective and sustainable set of rules that had penetrated into Southeast Asian societies for a long time. Vassal states were benefited from participating in this set of rules. China did exert its sphere of influence through this system over more than a thousand years. It was a system parallel to modern international law, in which all the party states were bound by the rules and meanwhile, benefiting from the system.

The question is whether this sphere of influence should be considered as an equivalent of the modern idea of sovereignty? It seems that this sphere of influence was granted weaker claims than what sovereignty today would grant. It is important to distinguish, however, that these two concepts were from different sets of rules, different cultures and different periods. It was the

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colonial powers came to Southeast Asia to exploit wealth when it brought the set of rules that were applicable to their own country and culture. The process of this forced application of rules in the Southeast Asian colonies created a period of ambiguity where states in the same region perceived themselves in different ways. The inconsistency represented an ideological gap, and China, a state that was never fully colonized, chose not to comply with the western set of rules as it was not forced to.

Thus, the historic claim of China came from its hegemonic position, as a Chinese perspective perceives, and its sphere of influence maintained in the eastern hemisphere for almost two millennia. The ideological gap created by the colonial powers’ intervention of the rule of Southeast Asia prevented this historic claim to be clearly addressed. Thus, the transition from a Chinese traditional ideology to a Western modern one was the source of ambiguity, according to the historic claims of China. This ambiguity came from the past and could not be solved in a modern system of international law.

V.2 Legal arguments in Legality

The legality of the U-shaped Line in the South China Sea was the most controversial topic in this dispute, and the topic was in the submission of the Philippines to the Tribunal. Before addressing the U-shaped Line, the author finds two questions need to be answered. Was China’s 2006 Declaration to activate Article 298 Optional exceptions to applicability of section 2 applicable to the South China Sea Arbitration? Did China’s accession to the UNCLOS in 1996 automatically supersede its historic rights?

In order to address the first question, whether China’s 2006 Declaration was applicable, the author wants to clarify that making a declaration after the rectification of UNCLOS is
reconcile with the Convention. When China activated Article 298, China was allowed to reject compulsory procedures entailing binding decisions under UNCLOS Part XV Section 2. This is the source of China’s objection to the tribunal’s ruling as it came from a compulsory procedure. Within Article 298, disputes related to “sea boundary delimitations,” “historic bays or titles,” “sovereign […] rights over continental or insular land territory,” “military activities,” and “law enforcement activities in regard to the exercise of sovereign rights” are subject to exceptions.\footnote{UNCLOS, Article 298.} The final Award ruled that none of these elements were activated during this Tribunal, and from the author’s perspective, it is not legitimate. The Tribunal precluded the discussion of sovereignty before its determination on the status of features in the Philippines’ submission. The result of the Tribunal’s decision on whether certain features are islands would have a potential to cause a problem with “sea boundary delimitations” and “sovereign […] rights over continental or insular land territory” between the two states. If the disputes are related to the elements in this article, this Tribunal should not continue its compulsory procedure and thus, China’s 2006 Declaration should be applicable. Therefore, the Tribunal should not proceed its ruling with an impingement of China’s legal rights granted by Article 298.

The second question, whether China’s accession to the UNCLOS automatically superseded its historic rights claims in the past, can be answered by the findings in the previous section. On the one hand, if the ambiguity created by the power transition of the colonial period in Southeast Asia remains unsolved, the sets of historic rights China claimed based on the previous Southeast Asian system could not be explicitly addressed. Thus, while the characteristics of one subject of discussion are unclear, the subject should not be adjudicated by a modern institution that was yet to be developed when the subject emerged. On the other hand, if
the topic of historic rights can be analyzed under the customary international law as a part of the
general international law, the customary international law is not subordinated to the treaty law, in
this case, the UNCLOS. Therefore, the transition between sets of rules within the same
parameter should not have retrospective power. Moreover, whether historic rights claims can be
all concluded in the branch of customary international law is left to be determined.

Then the question is how U-shaped Line can be legitimate in the modern world. As the
author discussed in the previous chapters, it is China’s responsibility to treat this design more
seriously whether continue to leave it ambiguous or clarify the limit of its claim within the line.
The Chinese government attempted to build its historic rights into the modern international law
framework by passing 1992 territorial law in anticipation of the accession of UNCLOS in 1996.
It also passed another 1998 law to make a clarification of its EEZ and continental shelf.
Regardless of how much these attempts would boost the legality of the U-shaped Line, these
laws should not be overlooked or brought against China after two decades. The author believes
that although the U-shaped Line is problematic from the perspective of UNCLOS, the
jurisdiction of this South China Sea Tribunal was more problematic and should not be neglected
as a topic of discussion. If the 2006 Declaration is applicable and China was not forced to give
up its rights in the accession to the UNCLOS, the author would conclude that the decision of the
final Award is null and void under the general international law.

V.3 Political confrontation in Politics

The legacy of the South China Sea arbitration could not be clearly addressed without the
context of political confrontation since, as shown in Chapter IV, the prevalent implication of
political gestures was revealed in the media reports throughout the arbitration process. The
author wants to bring the debate between China and the United States through an RT interview on August 23rd, 2016 after the final Award came out from PCA into her reader’s attention. The cross-examination between Wang Guan, a Chief political correspondent at CCTV America, and his American counterparts, John Feffer, Director of Foreign Policy in Focus at the Institute for Policy Studies, and Daniel Wagner, the CEO of Country Risk Solutions, directly addressed the questions that were long been overlooked. Wang Guan challenged the impartiality of the media reports from major western media outlets which had clearly expressed their positions against China. Almost none of these reports mentioned non-western sources on the jurisdiction of the arbitration and rather, emphasized on China’s action of non-participation and interpreted this action as contemptuous of the international law and order.

The United States challenged China’s claims under the framework of UNCLOS, and its arguments were facing two serious validity issues. The first problem was that the United States was never a party state to the UNCLOS since it never ratified it. It brought its military powers along with its ally, Australia, to the South China Sea to execute its freedom of navigation, a right that is well-defined in UNCLOS. Isn’t it an ironic move for the United States to, on the one hand, criticize China for not complying with international law, but on the other hand, itself had never doing so? The next question is to what extent did the United States involvement in the South China Sea disputes aim to contain China as opposed to striving to keep the South China Sea in peace. Moreover, whether its action should be considered as a stabilizing or a destabilizing factor in the region is also to be determined. Throughout the investigation of this thesis, the author believes that the United States’ involvement along with this arbitration exacerbated the conflicts and it is more of a political containment strategy against China.

President Obama clearly admitted with *the Atlantic* in April 2016 that, “we have been able to mobilize most of Asia to isolate China in ways that have surprised China, frankly, and have very much served our interest in strengthening our alliances.”\(^{346}\)

The selective media reports were also a demonstration of the containment strategy. As Wang Guan addressed in the debate, Washington did not challenge Vietnam when it established the first airstrip in the Spratly Islands in 1976, and it also did not do so when its ally, the Philippines, claimed islands in the area two years after. The United States’ Presidents Franklin Roosevelt and Dwight Eisenhower once sent vessels and helped China to reclaim islands in the South China Sea after WWII. All these facts were not discussed in the selective reports. Thus, the author concludes that the Western media is free, but also biased.\(^{347}\)

The final question is how China could make a claim to those islands that are geographically so close to the Philippines than to the Chinese territory. If the proximity is the standard of solving this problem, then why the United States came from another continent to participate in this issue as the disputes are within the South China Sea. This reasoning conformed with the United States containment strategy and confirmed its actions in the region as a result of its own political interest. To answer the question about the Spratly Islands’ proximity to the Philippines as opposed to China, the author wants to refer to the United States Northern Mariana Islands and Guam, which are located much closer to the Western Pacific countries than the United States. Will the United States deny their sovereign claim to these islands due to the proximity issue? The answer is no.

\(^{346}\) Jeffrey Goldberg, “The Obama Doctrine,” in The Atlantic, April 2016 issue
https://www.theatlantic.com/international/archive/2016/03/obama-doctrine-quotes-foreign-policy/424281/

\(^{347}\) “China vs Lawfare.”
The political confrontation expressed through media reports in the process of this arbitration failed to address the important legal issue in discussion, namely the jurisdiction of the tribunal. Countries utilized the existence of the arbitration as an excuse to mobilize their political power to preserve their own interests. Thus, the author concludes that the third parties’ participation in this disputes should be minimized and bilateral negotiations should be taken between the states involved, the Philippines and China. The United States’ involvement especially became a destabilizing factor in the resolution of this dispute. It is not valuable for one country to risk stimulating conflicts in a crucial region of international commerce in order to disparage the image of another country. This South China Sea Arbitration revealed the flaw in the international legal system and its unenforceability is strongly correlated with its inseparable relationship with international politics.

There are also some benefits of this arbitration since the bilateral communication targeting on these issues initiated between the parties after. Collaboration between China and the Philippines were put in good shape in October 2016, but this tie was unstable due to conflicting political interests. The future of a better Asia can only be established by a collaboration with Asian societies, who shared cultural and historical similarities. The dark colonial exploitation period may not happen in the future in the exact model, but all countries need to be cautious about being colonized in another way, either in forms of institutional design or ideologies. Asian countries want peace like people from the rest of the world. Therefore, a cooperation and negotiation between the states directly involved is the optimal way to solve disputes like this in the future, instead of politicizing and internationalizing it to make it out of the hand of people who are truly affected.
Appendix

I  Abbreviations

- Article # - particular Article in the UNCLOS
- ASEAN - Association of Southeast Asian Nations
- CCSBT - Convention for the Conservation of Southern Bluefin Tuna
- DOC - 2002 ASEAN-China Declaration on the Conduct of Parties in the South China Sea
- EEZ - Exclusive Economic Zone (Baseline to the 200 nm mark)
- EIC - British East India Company
- Final Award - Award in the matter of the South China Sea Arbitration before an arbitration constituted under Annex VII to the 1982 UNCLOS between the Republic of the Philippines and the People’s Republic of China on July 12th, 2016
- ICJ - International Court of Justice
- ITLOS - International Tribunal for the Law of the Sea
- Jurisdiction Award - Award on Jurisdiction and Admissibility in the matter of an arbitration before an arbitral tribunal constituted under Annex VII to the 1982 UNCLOS between the Republic of the Philippines and the People’s Republic of China on October 29th, 2015
- LTE - Low-Tide Elevation
- Nm - Nautical Mile (Around 1.15 miles or 1.85 km)
- PCA - The Permanent Court of Arbitration
- PCIJ - Permanent Court of International Justice
- Position Paper - China’s Position Paper in 2014
- PRC - People’s Republic of China
- ROC - Republic of China
- SBT - Southern Bluefin Tuna (SBT) case between Australia and New Zealand v. Japan in 2000
- TAC - Treaty of Amity and Cooperation in Southeast Asia
- THAAD - Terminal High Altitude Area Defense
• This Tribunal- Arbitral Tribunal Constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea between the Republic of the Philippines and the People’s Republic of China
• VOC- Vereenigde Oost-Indische Compagnie, Dutch East India Company

II List Selected Place Names (English- Chinese- Filipino)

• Cuarteron Reef- Huayang Jiao 华阳礁- Calderon Reef
• Fiery Cross Reef- Yongshu Jiao 永暑礁- Kagitingan Reef
• Gaven Reef- Nanxun Jiao 南薰礁- Burgos Reefs
• Islands/ Archipelago- Qundao 群岛
• Itu Aba Island- Taiping Dao 太平岛- Ligaw Island
• Johnson Reef- Chigua Jiao 赤瓜礁- Mabini Reef
• Macclesfield Bank and Scarborough Shoal- Zhongsha Islands 中沙群岛
• McKennan Reef- Ximen Jiao 西门礁- Chigua Reef
• Mischief Reef- Meiji Jiao 美济礁- Panganiban Reef
• Paracel Islands- Xisha Islands 西沙群岛
• Penghu Islands- Penghu Islands 澎湖岛
• Pratas Islands- Dongsha Islands 东沙群岛
• Scarborough Shoal- Huangyan Dao 黄岩岛- Panatag Shoal or Bajo de Masinloc
• Second Thomas Shoal- Ren’ai Jiao 仁爱礁- Ayungin Shoal
• Senkaku Islands- Diaoyu Islands 钓鱼岛
• Spratly Island Group (Spratly Islands or Spratlys)- Nansha Qundao 南沙群岛-
  Kalayaan Island Group (Kalayaan Islands)
• Subi Reef- Zhubi Jiao 浊碧礁- Zamora Reef
• Thitu Island- Zhongye Dao 中业岛- Pagasa Island
• West York Island- Xiyue Dao 西月岛- Likas Island
III Terminologies

- *ab initio*: From the beginning
- *dominium*: Any of various property rights, especially ownership; political power (as through lordship, sovereignty, suzerainty)
- *imperium*: Empire- imperial sovereignty, rule or dominion
- *ipso facto*: By that very fact or act
- *mare liberum*: The Free Sea, or Freedom of the Sea
- *opinio juris*: Denotes a subjective obligation, a sense on behalf of a state that it is bound to the law in question
- *prima facia*: "At first look," or "on its face"
- *ratione materiae*: Jurisdiction Ratione Materiae- by reason of the matter- otherwise known as subject-matter jurisdiction refers to the court's authority to decide a particular case
- *stricto sensu*: In a narrow or restrict sense
- *terra nullius*: Nobody's land

IV Figures

- Figure 1. Competing Claims in the South China Sea
• Figure 2. The Selden’s Map of China
Figure 3. Map showing the “Location of the Various Islands in the South Sea,” 1948
Boundary Department of the Ministry of Interior, Republic of China
Figure 4. Map attached to China’s May 7th, 2009 Notes Verbales Attachment to the Secretary-General of the United Nation.
Figure 5. Structure of the Final Award’s Definition on Features

- Rocks
  - High-Tide Features (HTF)/Islands
    - Cannot Sustain Human Habitation; No EEZ or Continental Shelf
    - Can Sustain Human Habitation; Generate EEZ and Continental Shelf
  - Fully Entitled Islands
  - Low-Tide Elevations (LTE)
    - Can generate TS at its Low-Tide baseline within TS of a shore
  - Submerged Features
Relative Positions of the Features in the Submissions

Submission (3)(5)(7)
1. Scarborough Shoal
2. Mischief Reef
3. Second Thomas Reef
4. Johnson Reef
5. Cuarteron Reef
6. Fiery Cross Reef

3 Largest Features in Spratly
1. Itu Aba Island
2. Thitu Island
3. West York Island
• Figure 7. Relationship between Historic Rights and Sovereignty

- **Historic Rights**: Historic Claim to Waters [Non-Exclusive]
- **Historic Title**: Territorial Sea
- **Historic Waters**: Historic Bays/ Straits
- **Sovereignty**: Supreme Authority [Exclusive]
• Figure 8. Potential Overlapping Claims

The area enclosed by the dashed line (---) is all the "high seas" that remain in the South China Sea after hypothetical 200nm EEZs are drawn from coastal states' baseline claims (giving full effect here to claims extending from the Paracels).

The potential to eliminate all high seas in the South China Sea can be seen by the circles drawn to show the effect of extending 200 nm EEZs from Thitu Island, Itu Aba Island, Spratly Island, and Scarborough Reef.

* Islands in the South China Sea

Figure 9. List of Countries and Media Sources

<table>
<thead>
<tr>
<th>Country</th>
<th>Media Sources</th>
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<td>Kyoto News, The Japan News (by Yomiuri Shimbun), The Asahi Shimbun</td>
</tr>
</tbody>
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Bibliography


*China's Declaration After Ratification Under Article 298 2006.*


