

# MEDDLING IN THE DRAGON’S POOL: EXPLORING THE VALIDITY OF CHINA’S ACTIONS IN THE SOUTH CHINA SEA

## ARTICLE

IVÁN M. COLÓN-ESTARELLAS\*

Introduction.....	247
I. Background.....	248
A. The Area .....	248
B. China’s Claims .....	250
C. The Case before the Permanent Court of Arbitration - The Philippines’ Claims .....	254
II. Legal Framework .....	256
A. United Nations Convention on the Law of the Sea.....	256
B. Legal Regime of Islands, Artificial Islands, Rocks, Reefs, Low Tide Elevations and other Formations in the Water .....	260
III. Discussion .....	262
Conclusion .....	269

## INTRODUCTION

**I**N ONE OF THE BUSIEST SHIPPING LANES IN THE WORLD, A MAJOR MARITIME dispute is taking place. Over the last half-century, China has been asserting its claims all around the South China Sea in an effort to further cement its presence and control across the region. This has provoked a response by all other countries in the South China Sea basin including Vietnam, the Philippines, Brunei, Malaysia, Indonesia, and Taiwan. Other neighboring countries, such as Japan and Thailand, and even the United States, have been keeping an eye on the developments in this region. The Philippines, frustrated with the bullying tactics of the Chinese government and the lack of progress in any bilateral negotiation, submitted their case before the Permanent Court of Arbitration (hereinafter, “PCA”) in an attempt to find a resolution for this conflict. Even though China refused to participate in the proceedings, the rest of the interested states in the region paid close attention to the Court’s decision that came out on July 12, 2016. The Philippines had petitioned the PCA to interpret provisions of the United Nations Conference on the Law of Sea (U.N.C.L.O.S.) that would

---

\* Third-year student at the University of Puerto Rico School of Law. This note was written for a seminar course on International Law under the supervision of professor Luis A. Avilés.

render China's actions, several maritime claims and the construction of islands in the region, as contrary to international law<sup>1</sup> and the provisions of the so-called *Constitution of the Sea*. The PCA ruled that China's actions in the South China Sea are indeed illegal under international law and ordered the Chinese government not to extend the dispute further. This case may constitute an important precedent in dealing with a complex legal and political question that could possibly expand judicial interpretations of key UNCLOS provisions for the continuing development of international law in the context of the sea.<sup>2</sup> This article will explore the applicable law to this maritime, international law inquiry and assess if the PCA's decision on this case was appropriate. Also, by using the UNCLOS and other case-law decided by international courts, this article will provide recommendations and alternate legal analysis as to other viewpoints the PCA may have taken into account when deciding this case and how future tribunals could deal with a similar conflict.

## I. BACKGROUND

### A. The Area

The South China Sea is located in the Western Pacific Ocean and it is surrounded by China, the Philippines, Taiwan, Vietnam, Malaysia and Brunei. The width of the South China Sea is approximately 550-650 nautical miles and its length is more than 1,200 nautical miles.<sup>3</sup> Almost thirty per cent of the world's maritime trade transits through this region.<sup>4</sup> It is estimated that around a third of all seaborne crude oil passes through the South China Sea.<sup>5</sup> Also, it is widely speculated that vast deposits of hydrocarbons lie beneath these waters.<sup>6</sup> There are a couple of island groups or formations that are at the center of the disputes in the South China Sea. These are the Paracel Islands, the Spratly Islands, the Pratas Islands and the Scarborough Reef.

The Paracel Islands are located in the northeast corner of the South China Sea off the coast of Vietnam, and claims in the region by the Chinese started

---

<sup>1</sup> Even though this a matter of public international law, the term *international law* will be loosely used in this article to encompass all aspects of public international law.

<sup>2</sup> It would be too ambitious to call this case a *full-fledged* precedent. Primarily since this case is only binding to the parties involved in the dispute and it is up to China to comply with this decision to have the desired effect. However, this case serves a guide to solve similar situations in the future.

<sup>3</sup> Robert Beckman, *The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea*, 107 AM. J. INT'L L. 142, 143 (2013).

<sup>4</sup> U.S. DEPARTMENT OF DEFENSE, ASIA-PACIFIC MARITIME SECURITY STRATEGY 1 (2015), [http://www.defense.gov/Portals/1/Documents/pubs/NDAA%20A-P\\_Maritime\\_Security\\_Strategy-08142015-1300-FINALFORMAT.PDF](http://www.defense.gov/Portals/1/Documents/pubs/NDAA%20A-P_Maritime_Security_Strategy-08142015-1300-FINALFORMAT.PDF).

<sup>5</sup> The Economist, *Videographic: What does China want?* YOUTUBE (Aug. 27, 2014), <https://www.youtube.com/watch?v=SscQBrJbiNo> (last visited May 30, 2017).

<sup>6</sup> *Id.*

when World War II ended. The Chinese government took the islands from the Japanese, but later retreated them to the Taiwanese.<sup>7</sup> Later, the South Vietnamese moved to these islands, but in 1974 the Chinese occupied the islands and established a military base in Woody Island, which drove the Vietnamese forces to move south, to the Spratly islands.<sup>8</sup> It is estimated that around 4,000 Chinese citizens live in Woody Island.<sup>9</sup> Chinese authorities even established Sansha City in Woody Island as the administrative center of the South China Sea.<sup>10</sup> Although the Chinese drove the Vietnamese forces out of the Paracel Islands, there have been ongoing hostilities between the two countries. Currently, Vietnam and Taiwan contest China's claims in this group of islands.<sup>11</sup>

Another major dispute of claims in the region involves the Spratly Islands. This group of islands is located in the eastern part of the South China Sea to the west of the Philippines and to the northwest coast of the island of Borneo.<sup>12</sup> All six countries in the South China Sea basin have claims over these islands.<sup>13</sup> It is estimated that this group of islands consists of thirty-three islands, cays and rocks that are permanently above sea level.<sup>14</sup> Other formations are totally or occasionally submerged in the South China Sea.<sup>15</sup> The Chinese government has argued that "historical evidence" prove that they were the first to discover, exploit and develop the Spratly Islands.<sup>16</sup> Nowadays, China has been constructing military bases and airstrips in many reefs in the region, including the Subi Reef and the Fiery Cross Reef, among others.<sup>17</sup>

Finally, yet another formation in dispute is the Scarborough Shoal, located in the west coast of the island of Luzon in the northern part of the Philippines archipelago. According to historical records, this shoal has been part of the Phil-

---

<sup>7</sup> See Jon M. Van Dyke & Dale L. Bennett, *Islands and the Delimitation of Ocean Space in the South China Sea*, 10 OCEAN Y.B. 54, 56 (1993).

<sup>8</sup> COUNCIL ON FOREIGN RELATIONS, *China's Maritime Disputes*, <http://www.cfr.org/asia-and-pacific/chinas-maritime-disputes/p31345> (last visited May 30, 2017).

<sup>9</sup> Van Dyke & Bennett, *supra* note 7.

<sup>10</sup> See *China establishes Sansha City*, XINHUA NEWS (July 24, 2012), [http://news.xinhuanet.com/english/china/2012-07/24/c\\_131734893.htm](http://news.xinhuanet.com/english/china/2012-07/24/c_131734893.htm) (last visited May 30, 2017).

<sup>11</sup> CENTRAL INTELLIGENCE AGENCY, *The World Factbook: Paracel Islands*, (Sep. 13, 2016), <https://www.cia.gov/library/publications/the-world-factbook/geos/pf.html> (last visited May 30, 2017).

<sup>12</sup> THE ECONOMIST, *POCKET WORLD IN FIGURES 15* (25th ed. 2016) (illustrating Borneo as the third largest island in the world, consisting of Brunei, Malaysia and Indonesia).

<sup>13</sup> U.S. DEPARTMENT OF DEFENSE, *supra* note 7, at 6.

<sup>14</sup> Van Dyke & Bennett, *supra* note 7, at 58.

<sup>15</sup> Beckman, *supra* note 3.

<sup>16</sup> Van Dyke & Bennett, *supra* note 7, at 61-62.

<sup>17</sup> COUNCIL ON FOREIGN RELATIONS, *supra* note 8.

ippines since the time of the Spanish Colonial rule.<sup>18</sup> The Treaty of Paris of 1898 ceded the Philippines, among other territories including Cuba and Puerto Rico, to the United States signaling the end of the Spanish-American War.<sup>19</sup> In the 1900's, the Treaty of Washington specified that all territory comprising the Philippine archipelago were to be ceded to the United States.<sup>20</sup> Subsequently, when the United States conceded independence to the Philippines, they transferred the Scarborough Shoal to their control.<sup>21</sup> The United States used this region for military practices until 1991. At this time, the Chinese started moving to this region and in 2012 they excluded all Philippines fishing and enforcement activities.<sup>22</sup> Chinese and Philippine vessels have had some incidents in the Scarborough Shoal during the last couple of years.<sup>23</sup> Currently, the Chinese have been transforming the Scarborough Shoal into an artificial island fortress, just as they have done to other formations in the South China Sea.<sup>24</sup>

### B. China's Claims

China is the economic and political powerhouse in the region. Currently it has the second biggest economy in the world and with a great appetite for natural resources, they have been claiming areas in the South China Sea. As mentioned before, it is believed that the South China Sea has large deposits of hydrocarbons under its seabed waiting to be extracted. In order to secure the most area as possible in the sea, the Chinese government has been claiming territories all over the area. China has made many claims in the South China Sea under what they call *historic rights*, yet "UNCLOS does not recognize historic rights as a basis for claiming sovereignty over waters."<sup>25</sup> According to Chinese officials, over two thousand years ago, they were "the first country to discover, name, explore and exploit the resources of the South China Sea Islands and the first to

---

<sup>18</sup> Jay Batongbacal, *Scarborough Shoal: A Red line?* CENTER FOR STRATEGIC & INTERNATIONAL STUDIES: ASIA MARITIME TRANSPARENCY INITIATIVE (Apr. 25, 2016), <http://amti.csis.org/scarborough-shoal-red-line> (last visited May 30, 2017).

<sup>19</sup> Treaty of Peace Between the United States and Spain, Dec. 10, 1998, 30 Stat. 1754.

<sup>20</sup> Treaty for the Cession to the United States of Any and All Islands of the Philippine Archipelago Lying Outside of the Line Described in the Article III of the Treaty of Peace of December 10, 1898, Jan 1, 2009, (under this premise, it can be understood that the Scarborough Shoal falls under the definition of the territory of the Philippine archipelago).

<sup>21</sup> Batongbacal, *supra* note 18.

<sup>22</sup> *Id.*

<sup>23</sup> Jane Perlez, *Philippines and China Ease Tensions in Rift at Sea*, N.Y. Times, June 18, 2012, [http://www.nytimes.com/2012/06/19/world/asia/beijing-and-manila-ease-tensions-in-south-china-sea.html?\\_r=0](http://www.nytimes.com/2012/06/19/world/asia/beijing-and-manila-ease-tensions-in-south-china-sea.html?_r=0) (last visited May 28, 2017).

<sup>24</sup> Batongbacal, *supra* note 18.

<sup>25</sup> Florian Dupuy & Pierre-Marie Dupuy, *A Legal Analysis of China's Historic Rights Claim in the South China Sea*, 107 AM. J. INT'L L. 124, 138 (2013).

continuously exercise sovereign powers over them.”<sup>26</sup> On September 9, 1958, the Chinese made their first official claim to most of the islands including the Pratas, the Paracels, Macclesfield Bank and Spratlys in what it called, the Declaration on China’s Territorial Sea.<sup>27</sup> Following this initial, claim multiple historical incidents have occurred, for example: (1) in 1974, the Chinese fought with the Vietnamese to later occupy the Paracel Islands;<sup>28</sup> (2) in 1988, the Chinese had the first conflict in the Spratly archipelago by sinking three Vietnamese ships in the region;<sup>29</sup> (3) in 1996, the Philippine and the Chinese government had their first military confrontation in the Mischief Reef in the Spratly Islands;<sup>30</sup> (4) in November 2002, as an effort to curb confrontations in the South China Sea, all ten member states of the Association of Southeast Asian Nations (ASEAN), including the Philippines and China, agreed to a code of conduct that had the purpose to create guidelines for conflict resolutions,<sup>31</sup> (5) and most recently, in 2009 China submitted a *note verbale* to the United Nations in order to express its claims after recent altercations and aggressions with Vietnam.<sup>32</sup> In this *note verbale*, the Chinese submitted a map with a U-shape, nine-dashed line with the limits of its sovereignty in the South China Sea, which poses a couple of interpretation problems. It is too ambiguous to tell the exact delimitations of China’s claims in the South China Sea and it lacks geographical coordinates and enough precision.<sup>33</sup> This map’s actual legal value remains to be seen. Additionally, it has been widely accepted that maps do not constitute titles in international law.<sup>34</sup> The International Court of Justice in the case of *Burkina Faso v. Republic of Mali*<sup>35</sup> stated that:

Whether in frontier delimitations or in international territorial conflicts, maps merely constitute information which varies from case to case; of themselves, and by virtue solely of their existence, they cannot constitute a territorial title, that

---

<sup>26</sup> Ministry of Foreign Affairs of the People’s Republic of China, *Position Paper of the Government of the People’s Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines*, 2015 CHINA OCEANS L. REV. 538, 539 (2015).

<sup>27</sup> Dupuy & Dupuy, *supra* note 25, at 126.

<sup>28</sup> COUNCIL ON FOREIGN RELATIONS, *supra* note 8.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Letter from Permanent Mission of the People’s Republic China to Secretary-General of the United Nations, U.N. Doc. CML/18/2009 (May 7, 2009).

<sup>33</sup> Dupuy & Dupuy, *supra* note 25, at 132.

<sup>34</sup> *Id.* at 133 (using the example of *Burkina Faso v. Mali* and the *Island of Palma Case*, both submitted to the I.C.J.).

<sup>35</sup> Mali and Burkina Faso, both former French colonies, went to the ICJ to settle a dispute regarding the drawing of their borders after independence.

is, a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights.<sup>36</sup>

One important aspect also mentioned in the decision is that maps may acquire legal force if States are willing to give it such legal force.<sup>37</sup> Professors Florian Dupuy and Pierre-Marie Dupuy explain that in order for the map to have probative value, international jurisprudence has developed two important factors: “(1) their geographical accuracy and reliability and (2) their neutrality in relation to the dispute and the parties involved.”<sup>38</sup>

In 2013, the Philippines submitted this case at the PCA in order to contest the claims of China in the South China Sea. China did not submit to the jurisdiction of the Court, but released a Position Paper regarding the situation.<sup>39</sup> Even though China did not give its consent, Annex VII of UNCLOS in article 9 explains that the “[a]bsence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings.”<sup>40</sup> Article 9 goes on by saying that “[b]efore making its award, the arbitral tribunal must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law.”<sup>41</sup> Also, according to article 11 of Annex VII and article 296 (1) any decision reached by the Tribunal will be binding to both parties in the dispute.<sup>42</sup> On October 29, 2015, the Tribunal awarded jurisdiction in this matter and the PCA used China’s Position Paper as their plea concerning jurisdiction in this case.<sup>43</sup> This Position Paper discusses four main reasons as to why the Tribunal should have not taken the case. The first position is that since “the subject-matter of the arbitration is the territorial sovereignty over several maritime features”,<sup>44</sup> it is beyond the scope of UNCLOS to hear the case. China believes that “without determining the sovereignty over a maritime feature, it is impossible to decide whether maritime claims based on that feature are consistent with the Convention.”<sup>45</sup> It is important to point out that UNCLOS does not have any specific provisions to help States in claims concerning a land-territory’s sovereignty; only for

---

<sup>36</sup> Concerning the Frontier Dispute (Burk. Faso v. Mali), Judgment, 1986 I.C.J. Rep. 554, 582 (Dec. 1986).

<sup>37</sup> *Id.*

<sup>38</sup> Dupuy & Dupuy, *supra* note 25, at 134.

<sup>39</sup> See Ministry of Foreign Affairs of the People’s Republic of China, *Position Paper of the Government of the People’s Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines*, 2015 CHINA OCEANS L. REV. 538 (2015).

<sup>40</sup> United Nations Convention on the Law of the Sea, Annex VII, art. 9, Dec. 10, 1982, 1833 U.N.T.S. 573 [hereinafter UNCLOS].

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* art. 296(1); Annex VII, art. 11.

<sup>43</sup> South China Sea Arbitration, at ¶ 99 (Perm. Ct. Arb. 2015) (award on jurisdiction and admissibility) [hereinafter Award on Jurisdiction and Admissibility].

<sup>44</sup> Ministry of Foreign Affairs of the People’s Republic of China, *supra* note 26, at 538-39.

<sup>45</sup> *Id.* at 543.

maritime delimitations.<sup>46</sup> The second position is that the Philippines and China have agreed to settle their disputes through negotiations and that the Philippines has failed the agreement by going unilaterally to the Permanent Court of Arbitration. The Chinese Government stated that they have agreed with the Philippines to settle their differences using peaceful means without any timeframe.<sup>47</sup> It is important to remember that ten Southeast Asian countries —plus China— signed the *Declaration on the Conduct of Parties in the South China Sea* in 2002 to use peaceful and cooperative means to settle disputes in the region.<sup>48</sup> Also, “China has on a number of occasions proposed to the Philippines the establishment of a China-Philippines regular consultation mechanism on maritime issues.”<sup>49</sup> The third position is that the subject-matter of this case will look to determine the maritime delimitation between the two countries. China believes that this is not consistent with the declaration filed in 2006, which excludes any type of dispute involving maritime delimitations from compulsory dispute settlement procedures.<sup>50</sup> In this 2006 declaration sent to the Secretary General of the United Nations, China rejected “disputes settlement procedures concerning maritime delimitation, historic bays or titles, military and law enforcement activities, and disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations.”<sup>51</sup> The fourth, and final, position is that China’s right to freely choose the means of dispute settlement must be fully respected, and its rejection of non-participation in the present arbitration is solidly grounded in international law.<sup>52</sup>

When assessing these positions, it can be said that the Chinese government correctly argues that the Permanent Court of Arbitration cannot decide territorial limits in territorial disputes, however, this is not the case at hand. China argues that, under the international law principle of *la terre domine la mer* or *the land dominates the sea*, this dispute is essentially one of determining sovereignty.<sup>53</sup> This implies that “the terrestrial situation must be taken as the starting point for the determination of the maritime rights of the coastal State.”<sup>54</sup> In the case of islands, regardless of their size, they enjoy the same legal status, and

---

<sup>46</sup> Beckman, *supra* note 3, at 142-43.

<sup>47</sup> Ministry of Foreign Affairs of the People’s Republic of China, *supra* note 26, at 551.

<sup>48</sup> *Declaration on the Conduct of Parties in the South China Sea*, ASSOCIATION OF SOUTHEAST ASIAN NATIONS (Oct. 17, 2012), [http://www.asean.org/?static\\_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea-2](http://www.asean.org/?static_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea-2) (last visited May 30, 2017).

<sup>49</sup> Ministry of Foreign Affairs of the People’s Republic of China, *supra* note 26, at 552.

<sup>50</sup> *Id.* at 539.

<sup>51</sup> *Id.* at 556-57.

<sup>52</sup> *Id.* at 539.

<sup>53</sup> *Id.* at 541-42.

<sup>54</sup> Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.), Judgment, 2001 I.C.J. Rep. 40, 97 (Mar. 2001) (discussing the principle that “the land dominates the sea”).

therefore generate the same rights, as any other land territory. The Chinese use this principle as an argument to determine the claims of the formations in the South China Sea, the Court must rule on the maritime delimitations first.<sup>55</sup> The Philippines rebuts this argument by saying that the PCA has to interpret UNCLOS and give proper definitions on the formations in the South China Sea and for it to declare that China's arguments of historic rights and the nine-dashed line are contrary to international law.

*C. The Case before the Permanent Court of Arbitration - The Philippines' Claims*

The Philippines is one of the main players in the South China Sea. The country has a population of around ninety-eight million people and currently has the 41st biggest economy with a GDP of \$272 million.<sup>56</sup> Aside from Vietnam, the Philippines has been the main opponent against China's claims in the South China Sea, and is claiming an area on the western side of its archipelago. In order to further assert its claim, the Philippines renamed that area as the *Western Philippine Sea* and the President instructed the country's official mapping agency to reflect their claims accordingly.<sup>57</sup> In a *note verbale* sent to the United Nations on April 5, 2011 they stated their claim of the western section of the Spratly Islands.<sup>58</sup> As mentioned before, the Chinese based their claims invoking historical rights and the *nine-dash line map* arguing, in general, that these claims overlap those of the Philippines. The Philippines submitted a map rebutting the stance of China regarding the *nine-dash line* by showing what they believe to be a 200 nautical mile zone, which illustrates the maximum that each country could claim in the South China Sea.<sup>59</sup> The Philippines wants to delineate how the South China Sea should be divided, according to its interpretation of UNCLOS; notably Part XV of the Convention that establishes the provisions for settlement of disputes. Article 287 states that when signing to this Convention a State shall be free to choose any means for the settlement of disputes concerning the interpretation or application, including "an arbitral tribunal constituted in accordance with Annex VII."<sup>60</sup> Arbitration may be seen as the default method of dispute resolu-

---

<sup>55</sup> Ministry of Foreign Affairs of the People's Republic of China, *supra* note 26, at 542.

<sup>56</sup> THE ECONOMIST, *supra* note 12, at 196 (illustrating that the size of the economy is based on economic numbers from 2013).

<sup>57</sup> Patthara Limsira, *Thailand as an ASEAN-China Coordinator Country on the South China Sea Disputes*, 7 J. E. ASIA & INT'L L. 554, 556-57 (2014).

<sup>58</sup> Letter from Permanent Mission of the Republic of the Philippines to Secretary-General of the United Nations, 11-00494/No. 000228 (Apr. 5, 2011).

<sup>59</sup> See Award on Jurisdiction and Admissibility (illustrating in Figure 5 the map submitted by the Philippines).

<sup>60</sup> UNCLOS, *supra* note 40, at art. 287 (pointing out in Annex VII the thirteen articles concerning the institution of proceedings, list of arbitrators, constitution of arbitral tribunal, functions of arbitral tribunal, procedure, duties of parties to a dispute, expenses, required majority for decisions, default



tions.<sup>61</sup> In 2013, the Philippines went to the PCA in the Netherlands in an attempt to solve its disputes with China over the South China Sea. The Philippines tried to present the case before the PCA and persuade them to interpret the Convention in its favor by not determining sovereignty over the islands since it's prohibited in this kind of procedure.<sup>62</sup> The Tribunal awarded jurisdiction on the matter even though China did not participate in any of the proceedings. The Philippines wanted to seek relief in many subjects. Among those, it wanted the Court to:

[1.] Declare that China's rights in regard to maritime areas in the South China Sea, like the rights of the Philippines, are those that are established by UNCLOS, and consist of its rights to a Territorial Sea and Contiguous Zone under Part II of the Convention, to an Exclusive Economic Zone under Part V, and to a Continental Shelf under Part VI;

[2.] Declare that China's maritime claims in the South China Sea based on its . . . "nine dash line" are contrary to UNCLOS and invalid;

. . . .

[3.] Declare that . . . [some] submerged features . . . are "rocks" under Article 121(3) of the Convention and . . . therefore [they only] generate entitlements [of no more] than 12 nautical miles; and that China has . . . claimed . . . beyond 12 M from these features;

. . . .

[4.] Declare that the Philippines is entitled under UNCLOS to a 12 [mile] Territorial Sea, a 200 [miles] Exclusive Economic Zone, and a Continental Shelf under Parts II, V and VI of UNCLOS, measured from its archipelagic baselines;

[5.] Declare that China . . . has unlawfully exploited . . . resources in the Philippines' Exclusive Economic Zone and Continental Shelf. . . .<sup>63</sup>

After filing the case, the Philippines had high hopes for it. The Philippines Ambassador to the United States catalogued it as crucial since "what is at stake is the integrity and spirit of UNCLOS itself."<sup>64</sup> Given the importance of the Philippines in this case, the Ambassador wanted Vietnam to participate in the case as well, yet it ultimately refused to become a party.<sup>65</sup> This insertion in the proceedings would have made sense provided that the Vietnamese also have maritime disputes in the South China Sea with China, specifically in the Spratly Islands. Even though Vietnam did not formally joined the cause of action, it sent a *note*

---

of appearance, award, finality of award, interpretation or implementation of award and application to entities other than State Parties).

<sup>61</sup> Kristen E. Boon, *International Arbitration in Highly Political Situations: The South China Sea Dispute and International Law*, 13 WASH. U. GLOBAL STUD. L. REV. 487, 489 (2014).

<sup>62</sup> *Id.*

<sup>63</sup> Award on Jurisdiction and Admissibility, at ¶ 33.

<sup>64</sup> Center for Strategic and International Studies, *An AMTI Interview featuring Jose L. Cuisia, Jr.*, YOUTUBE (Dec. 17, 2015), <https://www.youtube.com/watch?v=PSlugLSBC44> (last visited May 30, 2017).

<sup>65</sup> Matthew Waxman, *Legal Posturing and Power Relations in the South China Sea*, CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES: ASIA MARITIME TRANSPARENCY INITIATIVE (Jan. 21, 2015), <http://amti.csis.org/legal-posturing-and-power-relations-in-the-south-china-sea> (last visited May 30, 2017).

*verbale* to the PCA with its position on the case and stated that: (1) the Tribunal had full jurisdiction over the proceedings; (2) Vietnam's rights and legal interests are preserved; (3) it did not want the Tribunal to consider issues of maritime and territorial delimitation; (4) the PCA should reject any claim by China based on the *nine-dash line*, and (5) it supported the Tribunal's competence to interpret and apply articles 60, 80, 194(5), 206, 293(1) and 300 of UNCLOS, and other relevant instruments.<sup>66</sup> Besides Vietnam, other countries such as Indonesia, Japan, Thailand and Malaysia requested, and were eventually granted, to send small delegations to the proceedings.<sup>67</sup> Brunei, another of the countries in the South China Sea basin, requested "the transcripts of the arbitration and any other relevant information as soon as it be[came] available."<sup>68</sup> Meanwhile, the United States has maintained a neutral position in the proceedings. Even though it manifested its neutrality in this matter, the United States filed a position paper with its interpretation for what they believe is the applicable law in this case.<sup>69</sup>

## II. LEGAL FRAMEWORK

### A. *United Nations Convention on the Law of the Sea*

The UNCLOS governs the law of the sea, and was ratified in 1982 in a Convention attended by 165 states with full voting rights.<sup>70</sup> Before UNCLOS, the law of the sea was mostly a collection of customary international law, unilateral claims and multilateral agreements between countries.<sup>71</sup> UNCLOS's main purpose was to codify all of these customs and agreements to have it as a single treaty source of law. Some examples of customary international law codified at the Convention were: (1) the rule of innocent passage; (2) the freedom of the high seas, and (3) the coastal state sovereignty over territorial waters.<sup>72</sup> This Convention is arguably one of the greatest "success stories" of international legal activity enabled by the United Nations.<sup>73</sup> The basic approach of the Convention was to divide the oceans and seas into zones and further determine for each zone its

---

<sup>66</sup> Award on Jurisdiction and Admissibility, at ¶ 20.

<sup>67</sup> *Id.* at 27.

<sup>68</sup> *Id.* at 28.

<sup>69</sup> *Limits in the Seas: China Maritime Claims in the South China Sea*, U.S. DEPARTMENT OF STATE (Dec. 5, 2014), <http://www.state.gov/documents/organization/234936.pdf> (the United States in this position paper, even though it adopted a neutral position in this case, was mostly skeptical of China's claims using its maps, especially the "nine dash line.").

<sup>70</sup> See Julia Gebhard & Shabtai Rosenne, *Conferences on the Law of the Sea* ¶ 27, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2008).

<sup>71</sup> Tullio Treves, *Law of the Sea* ¶ 11, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2011).

<sup>72</sup> Martin Lishexian Lee, *The Interrelation Between the Law of the Sea Convention and Customary International Law*, 7 SAN DIEGO INT'L L.J. 405, 411-12 (2006).

<sup>73</sup> Tullio Treves, *supra* note 71, at ¶ 20.

spatial limits and the regime applicable, such as rights and obligations of different categories of states.<sup>74</sup> Among the zones defined in the Convention were: all related legal aspects of the territorial sea and the contiguous zone, straits used for international navigation, archipelagic states, the exclusive economic zone, the continental shelf, the high seas, the regime of islands, right of access of land-locked states to and from the sea and freedom of transit, the protection and preservation of the marine environment, and the settlement of disputes, among other subjects.<sup>75</sup> One of the main impacts of the Convention was that the parties agreed that the territorial sea could extend up to twelve nautical miles from the baseline and resource jurisdiction for a minimum of 200 nautical miles from the baseline.<sup>76</sup> The Convention also created the International Tribunal for the Law of the Sea (ITLOS), which entered into force in 1996, and was created as a specialized tribunal that could interpret and apply the Convention. Based in Hamburg, it has twenty-one judges from all regions of the world and it has ruled on cases concerning the protection of marine species, territorial limits, and cases about vessels, among others.<sup>77</sup>

Some of the most crucial concepts that to the understanding of any maritime claim are: (1) the territorial sea; (2) the contiguous zone; (3) the continental shelf, and (4) the exclusive economic zone. These zones define the breath of activities that each State may assert depending on the distance from the baselines. UNCLOS defines in Article two the legal status of the territorial sea:

1. The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.
2. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil.
3. The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.<sup>78</sup>

The breadth of the territorial sea extends up to twelve nautical miles measured from the baselines as determined by the Convention.<sup>79</sup> The two main methods of determining the baselines are the normal baseline and the straight baseline method. The normal baseline takes into account the low-water line along the coast of each state as determined by them in official charts.<sup>80</sup> Also, reefs and

---

<sup>74</sup> *Id.* at ¶ 23.

<sup>75</sup> *Id.*

<sup>76</sup> Gebhard & Rosenne, *supra* note 70, at ¶ 38.

<sup>77</sup> INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA, <https://www.itlos.org/jurisdiction/competence/> (last visited May 30, 2017).

<sup>78</sup> UNCLOS, *supra* note 40, at art. 2 (discussing the legal status of the territorial sea, of the air space over the territorial sea, and of its bed and subsoil).

<sup>79</sup> *Id.* art. 3 (breathe of the territorial sea).

<sup>80</sup> *Id.* art. 5 (Normal baseline), 7 (Straight baselines; also provides multiple methods in order to determine the baseline from each State).

ports may be taken into account when determining a straight baseline.<sup>81</sup> Meanwhile, straight baselines can be used by the coastal State when having deeply indented coastlines and fringes of islands, bays, mouths of rivers, deltas and archipelagic states.<sup>82</sup> In this matter, the International Court of Justice in *Qatar v. Bahrain* interpreted that the straight baseline method of delimitation is more of an exception than the prevailing rule and it must be applied restrictively.<sup>83</sup> Basically, the normal baseline follows the natural configuration of the coast, while straight baselines are drawn on the basis of an artificial construction.<sup>84</sup>

Article 33 provides the legal implications of the contiguous zone.<sup>85</sup> In this zone the State has the power to prevent any violations of their customs, fiscal, immigration or sanitary law or any other regulation. Moreover, this article provides that the contiguous zone extends up to twenty-four nautical miles from where the breadth of the territorial sea is measured. Another important concept that needs to be understood to determine maritime claims is the continental shelf. Before World War II, the main reason of control for the continental shelf was for sedentary fisheries that were located beyond the limits of the territorial sea.<sup>86</sup> In 1958, several countries drafted the Convention on the Continental Shelf to regulate its use. After many technological developments and the world's hunger for resources, such as oil and gas, UNCLOS codified the concept of the continental shelf into the treaty. Article 76 defines the continental shelf as:

[T]he seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.<sup>87</sup>

The treaty also puts forward that “[t]he rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.”<sup>88</sup> UNCLOS replaced the earlier practice of determining the breadth of the continental shelf by measuring the geophysical characteristics instead of a determined area.<sup>89</sup> This means that the distance principle follows the

---

<sup>81</sup> *Id.* art. 6 (Reefs), 11 (Ports).

<sup>82</sup> See Tullio Scovazzi, *Baselines* ¶ 8, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2007); see also UNCLOS, *supra* note 40, at art. 7, 9, 10, & 47 (regarding straight baselines, mouths of rivers, bays, and archipelagic baselines, respectively).

<sup>83</sup> Maritime Delimitation and Territorial Questions between Qatar and Bahrain (*Qatar v. Bahr.*), Judgment, 2001 I.C.J. Rep. 40, 103 (March 2001).

<sup>84</sup> Scovazzi, *supra* note 82, at ¶ 8.

<sup>85</sup> UNCLOS, *supra* note 40, at art. 33.

<sup>86</sup> LOUIS B. SOHN & JOHN E. NOYES, *CASES AND MATERIALS ON THE LAW OF THE SEA* 495 (2004).

<sup>87</sup> UNCLOS, *supra* note 40, at art. 76 (1).

<sup>88</sup> *Id.* art. 77 (3).

<sup>89</sup> DAVID JOSEPH ATTARD, *THE EXCLUSIVE ECONOMIC ZONE IN INTERNATIONAL LAW* 133 (1987).

principles of distance established by the definition of the exclusive economic zone.<sup>90</sup> Now, in cases that the continental margin extends beyond the 200 nautical miles distance from the baselines, the State can claim an extended continental shelf up to 350 nautical miles from the baselines.<sup>91</sup> In these circumstances, UNCLOS is clear by stating that: “[t]he coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.”<sup>92</sup> Additionally, the delimitation of the continental shelf between states with opposite and adjacent coasts shall be agreed to on the basis of international law, specifically referring to Article 38<sup>93</sup> of the International Court of Justice’s statute, in order to achieve an equitable solution.<sup>94</sup> Annex II of UNCLOS establishes a commission to determine the limits of the continental shelf, which consists of twenty-one members who are experts in the fields of geology, geophysics or hydrography, and are elected by member states of the Convention.<sup>95</sup>

The Exclusive Economic Zone (EEZ) is defined in UNCLOS as “an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, [of the treaty] under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention.”<sup>96</sup> Contrary to the continental shelf regime, which may take into account geophysical characteristics, the EEZ regime is more concerned with the *water-column*.<sup>97</sup> The EEZ extends up to 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.<sup>98</sup> Since the EEZ’s measurements depend on the baselines of the territorial sea, it would vary subject to the width of the territorial sea.<sup>99</sup> All states have the sovereign right to explore, exploit, conserve and manage all natural resources within the EEZ.<sup>100</sup> The Convention gives the right within the EEZ to establish artificial islands, installations and structures, to do marine scientific research and to protect the environment.<sup>101</sup> In essence, the coastal State possesses “sover-

---

<sup>90</sup> *Id.*

<sup>91</sup> Peter Tobias Stoll, *Continental Shelf* ¶ 15, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2008); see also UNCLOS, *supra* note 40, at art. 76 (5).

<sup>92</sup> UNCLOS, *supra* note 40, at art. 77 (1).

<sup>93</sup> Statute of the International Court of Justice art. 38, June 26, 1945, 33 U.N.T.S. 933.

<sup>94</sup> UNCLOS, *supra* note 40, at art. 83.

<sup>95</sup> *Id.* at Annex II, art. 2.

<sup>96</sup> *Id.* at Annex II, art. 55.

<sup>97</sup> ATTARD, *supra* note 89, at 214.

<sup>98</sup> UNCLOS, *supra* note 40, at art. 57.

<sup>99</sup> ATTARD, *supra* note 89, at 44.

<sup>100</sup> UNCLOS, *supra* note 40, at art. 56 (1).

<sup>101</sup> *Id.* at art. 56 (1) (b).

eign rights” and not sovereignty in the EEZ.<sup>102</sup> At the heart of the concept of the EEZ is the fact that a coastal State exercises “sovereign rights” in the EEZ for economic purposes.<sup>103</sup> It could arguably be stated that this interpretation creates a greater disturbance of the high seas freedom.<sup>104</sup>

*B. Legal Regime of Islands, Artificial Islands, Rocks, Reefs, Low Tide Elevations and other Formations in the Water*

The regime of islands is defined in UNCLOS’s article 121. Foremost, the article states that “[a]n island is a naturally formed area of land, surrounded by water, which is above water at high tide.”<sup>105</sup> It also says that “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.”<sup>106</sup> The *natural characteristics* of an island are central to any analysis being made when determining if a formation is or not an “island.”<sup>107</sup> Notwithstanding, “man-made structures, such as those that help to keep an island above sea level when it is gradually sinking due to erosion or disappearing due to tidal phenomena caused by climatic changes, should not be excluded from this definition.”<sup>108</sup>

It could be argued that by using the definition of *island*, “an artificial island is an area of land that is above water at high tide that is not naturally formed.”<sup>109</sup> Article 60 (8) of UNCLOS makes an important distinction between an island and an artificial island; “[a]rtificial islands, installations and structures do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf.”<sup>110</sup> In the EEZ, States can authorize and regulate the construction, operation and use of artificial islands, installations and structures.<sup>111</sup> The “legal regime” of artificial islands depends precisely on the maritime zone on which they are located.<sup>112</sup> The only maritime zone that an artificial island

<sup>102</sup> Dolliver Nelson, *Exclusive Economic Zone* ¶ 10, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2008)

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 62.

<sup>105</sup> UNCLOS, *supra* note 40, at art. 121 (1).

<sup>106</sup> *Id.*

<sup>107</sup> HARITINI DIPLA, LE RÉGIME JURIDIQUE DES ÎLES DANS LE DROIT INTERNATIONAL DE LA MER 25 (1984).

<sup>108</sup> Haritini Dipla, *Islands* ¶ 4, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2008).

<sup>109</sup> Alex G. Oude, *Artificial Islands, Installations and Structures* ¶ 3, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2013).

<sup>110</sup> UNCLOS, *supra* note 40, at art. 60 (8).

<sup>111</sup> *Id.*

<sup>112</sup> Oude, *supra* note 109, at ¶ 11.

is supposed to generate is a 500 meters *safety zone*.<sup>113</sup> Any artificial island, installation or structure may not be established if it will create a disruption of navigation in recognized sea-lanes.<sup>114</sup> Also, in the continental shelf regime, all provisions of artificial islands described in article 60 of UNCLOS shall apply.<sup>115</sup>

An interesting debate may arise when discussing the subject of rocks and low tide elevations in international law. According to article 121 of UNCLOS, “[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.”<sup>116</sup> Rocks, if they can sustain human or economic life of their own, are indeed entitled to the territorial sea and contiguous zone.<sup>117</sup> This poses a clear problem, as it is ambiguous as to what would it mean to sustain human habitation or economic life. It can be argued that a permanent population is needed to fulfill the definition in this article or that a *rock* is used as a base for fisherman to visit regularly to harvest living resources in the area.<sup>118</sup> The PCA ruled in the present controversy that *human habitation* in the context of 121 (3) consisted in “the habitation of a feature by a settled group or community for whom the feature is a home.”<sup>119</sup> In contrast, article 13 of UNCLOS provides that “[a] low-tide elevation is naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide.”<sup>120</sup> Additionally, if the low tide elevation is situated in the territorial sea from a mainland or an island, it can be used to draw the baseline to measure the breadth of the territorial sea.<sup>121</sup> If the low tide elevation is beyond the territorial sea of the mainland or an island, it has no territorial sea of its own.<sup>122</sup> The International Court of Justice in two different rulings has interpreted the legal status of low tide elevations in international law. In *Qatar v. Bahrain*, Qatar filed the case in order to determine the sovereignty over a group of islands and shoals between the two countries in the Persian Gulf. The Court reasoned and decided that low tide elevations cannot, “from the viewpoint of the acquisition of sovereignty, be fully assimilated with islands or other land territory.”<sup>123</sup> Also, the Court concluded that any low tide elevation located beyond the territorial sea of any State does not have a territorial sea of its own because they do not generate the

---

113 UNCLOS, *supra* note 40, at art. 60 (5).

114 *Id.* art. 60 (7).

115 *Id.* art. 80.

116 *Id.* art. 121 (3).

117 Beckman, *supra* note 3, at 150.

118 Van Dyke & Bennett, *supra* note 7, at 78-79.

119 South China Sea Arbitration (Phil. v. China), Case No. 2013-19, ¶ 520 (Perm. Ct. Arb. 2016) (award) [hereinafter Arbitration Award].

120 UNCLOS, *supra* note 40, at art. 13.

121 *Id.*

122 UNCLOS, *supra* note 40, at art. 13 (2).

123 Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.), Judgment, 2001 I.C.J. Rep. 40, ¶ 206 (Mar. 2001).

same rights as islands and other territories<sup>124</sup> In *Nicaragua v. Colombia*, Nicaragua filed a claim concerning a dispute between the two countries regarding a maritime boundary in the Caribbean Sea. Among the disputed features were low tide elevations. The Court reiterated in the matter of low tide elevations that these formations could not be appropriated.<sup>125</sup>

### III. DISCUSSION

During the last couple of years, China has been asserting claims within the surrounding seas of its territory. Mostly, it has been claiming small formations on the sea and enraging its neighbors in the process. This has not deterred the Chinese government of continuing making claims and trying to manipulate the legal status of features. As it has been previously discussed, depending on the type of formation, a country may be entitled to a continental shelf and an exclusive economic zone that can be exploited to extract all possible resources. Therefore, China has been building islands over reefs in the Spratly and Parcel Islands under this premise. Some of these reefs are the Cuarteron Reef, Fiery Cross Reef, Gaven Reef, Hughes Reef, Johnson Reef, Mischief Reef, Sand Cay,<sup>126</sup> Subi Reef and West Reef.<sup>127</sup> In these formations, the Chinese government has been building military facilities with airstrips and ports. Specifically, in Fiery Cross Reef, it is rumored that China will expand existing projects in order to build an airstrip and ameliorate the harbor, to create “a military base twice the size of Diego García, a key U.S. military base in the Indian Ocean.”<sup>128</sup> Moreover, China has even considered building nuclear plants in the region.<sup>129</sup>

The Chinese government has claimed the above-mentioned formations in the South China Sea by using a *nine-dash line* map and by claiming historical rights over the contested formations. On this matter, the PCA ruled that the nine-dash line’ [was] contrary to the Convention [and does not have the] lawful

---

<sup>124</sup> *Id.* ¶ 207.

<sup>125</sup> Territorial and Maritime Dispute (Nicar. v. Colom.), Judgment, 2012 I.C.J. Rep. 624, ¶ 26 (Nov. 2012).

<sup>126</sup> See *Country: Vietnam*, CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES: ASIAN MARITIME TRANSPARENCY INITIATIVE, <https://amti.csis.org/island-tracker/vietnamese-occupied-features> (last visited May 28, 2017). In Sandy Cay, the island building was made by Vietnam.

<sup>127</sup> See *Land Reclamation by Country*, CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES: ASIAN MARITIME TRANSPARENCY INITIATIVE, <http://amti.csis.org/island-tracker> (last visited May 28, 2017).

<sup>128</sup> Andrew Erickson & Austin Strange, *China’s Island-Building Strategy in the South China Sea*, FOREIGN AFFAIRS (Jul. 13, 2014), <https://www.foreignaffairs.com/articles/china/2014-07-13/pandoras-sandbox> (last visited May 28, 2017). For more information about the Diego García Military Base in the Indian Ocean, see *Welcome to Naval Support Facility Diego Garcia*, NAVAL SUPPORT FACILITY DIEGO GARCIA, [http://www.cnic.navy.mil/regions/cnrj/installations/nsf\\_diego\\_garcia.html](http://www.cnic.navy.mil/regions/cnrj/installations/nsf_diego_garcia.html) (last visited May 28, 2017).

<sup>129</sup> Michael Forsythe, *China to Develop Floating Nuclear Power Plants*, N.Y. TIMES, Apr. 22, 2016, <http://www.nytimes.com/2016/04/23/world/asia/china-nuclear-power-south-china-sea.html> (last visited May 28, 2017).



effect to determine the maritime delimitations that the Chinese wanted.<sup>130</sup> The Tribunal explains that “historical rights are, in most instances, exceptional rights.”<sup>131</sup> Now the attention turns for the PCA to define each formation and to determine if each of them are entitled to any maritime claims.

The Philippines asked the PCA to declare that the Mischief Reef, McKennan Reef and Second Thomas Shoal are submerged features, which consequently are part of the Continental Shelf of the Philippines, and that the occupation and island building made by China constitutes a violation of the sovereign rights of the Philippines.<sup>132</sup> Similarly, it asked the court to “determine that the Scarborough Shoal, Johnson Reef, Cuarteron Reef and Fiery Cross Reef are submerged features in the South China Sea, except that each has small rocks that remain above sea level at high tide and should be treated according to the regime of Article 121(3) of UNCLOS”.<sup>133</sup> The Tribunal decided that formations such as the Scarborough Shoal, Gaven Reef (North), McKennan Reef, Johnson Reef, Cuarteron Reef and Fiery Cross Reef are all high tide elevations that are encumbered by a number of rocks.<sup>134</sup> Other formations such as the Subi Reef, Gaven Reef (South), Hughes Reef, Mischief Reef, and Second Thomas Shoal are all low tide elevations according to the Court.<sup>135</sup> As it has been shown, artificial islands, uninhabitable rocks and low tide elevations do not generate an EEZ or a Continental Shelf regime. Therefore, and correctly so, the Tribunal concluded that the Chinese should not be able to reclaim any maritime zones near those formations.

Now, part of the dispute lies on the question: is the construction on reefs, rocks and low tide elevations being done in an area that is actually theirs? If the island building were inside their own EEZ or continental shelf, under the current international law regime these actions would be permissible. Even though the Tribunal has repeatedly said that it would not attend matters regarding sovereignty over a specific formation, they did so with the specific case of the Mischief Reef. As mentioned before, the Tribunal decided that the Mischief Reef is a low-tide elevation. Since the Chinese government cannot reclaim any entitlements to maritime zone to this formation, the Tribunal ruled that the Mischief Reef is located within the exclusive economic zone of the Philippines.<sup>136</sup> Moreover, provided that the Mischief Reef is located within the exclusive economic zone of the Philippines, the only country that could authorize the construction of any artificial structure is the Philippines itself.<sup>137</sup>

---

<sup>130</sup> Arbitration Award, at ¶ 278.

<sup>131</sup> *Id.* ¶ 268.

<sup>132</sup> Award on Jurisdiction and Admissibility, at ¶ 99.

<sup>133</sup> *Id.*

<sup>134</sup> Arbitration Award, at ¶¶ 334, 339, 343, 351, 354, 358.

<sup>135</sup> *Id.* ¶¶ 366, 373, 378, 381.

<sup>136</sup> *Id.* ¶ 1025.

<sup>137</sup> *Id.* ¶ 1043.

Even though the Tribunal did not directly attend the matter of sovereignty over the contested features, it did so implicitly by defining them and determining that it did not generate any maritime claims due to its classifications of rocks or low tide elevations; there were no overlapping Chinese and Philippines' claims regarding its EEZ. In essence, this means that the Tribunal did not have to define maritime boundaries between the two countries since there was no overlapping EEZ or Continental Shelf regimes between the contested features, and the maritime delimitations generated from the Philippines' archipelago. This is the reason why the Tribunal was able to make a determination regarding the Mischief Reef.<sup>138</sup> A similar logic could be followed for any other formation that does not fall into any overlapping claim between the two countries in the South China Sea yet lies within the EEZ or Continental Shelf of either the Philippines or China.

One of the general questions about this case was whether the Chinese government, under international law, could change the status of these features. Can the Chinese *transform* a high tide feature into an island and later claim all of the rights and privileges that an island is entitled to? On this matter, the Tribunal reached several conclusions. The Tribunal applied article 121(3) to the various contested features of the South China Sea. Foremost, it concluded that under article 121(3), the status of any feature is determined according to its natural capacity without external modifications intended to increase its capacity to sustain human habitation or an economic life of its own.<sup>139</sup> In features such as the Scarborough Shoal, Johnson Reef, Cuarteron Reef, Fiery Cross Reef, and Gaven Reef (north) the Tribunal decided that, even though the Chinese government constructed an installation and maintained an official presence there, it cannot be elevate its status from a rock to a fully entitled island.<sup>140</sup> It reached this conclusion mostly due to the fact that all of these features are fully dependent on outside supplies in order to sustain human life.<sup>141</sup> Finally, the Tribunal ruled that all of these before mentioned features are not entitled to any exclusive economic zone or continental shelf.<sup>142</sup>

As mentioned before, under international law, island building is permitted if done in a State's EEZ or continental shelf as long as there is no disruption in maritime navigation.<sup>143</sup> Given the reality of climate change and the rising sea levels, States with low tide elevations may need to build on islands that are being sucked into the ocean in order to preserve their population and homes. For example, in 2014, the President of Kiribati had to buy 6,000 acres of land in Fiji in case the sea levels keep rising and their islands eventually become fully sub-

---

138 *Id.* ¶¶ 693, 694, 695, 1025.

139 *Id.* ¶ 541.

140 *Id.* ¶¶ 556, 559, 562, 565, 568.

141 *Id.*

142 *Id.* ¶¶ 643, 644, 645.

143 UNCLOS, *supra* note 40, at art. 60 (7) (addressing Artificial islands, installations and structures in the exclusive economic zone).

merged in the Pacific Ocean.<sup>144</sup> Similarly, the Maldives have dealt with the rising sea levels by building an island that would serve as their own the Noah's Ark in case that most of the country submerges in the Indian Ocean.<sup>145</sup>

However, by adding sand to areas where the sea has risen and a low elevation island existed, does this imply a legal status change as to the formation?<sup>146</sup> All of this, supposing that this was a formation that had a permanent presence in high tide but due to rising sea level its characteristics have changed. In *Qatar v. Bahrain*, one of the formations in water in controversy was Qit'at Jaradah which Qatar contested that it was not supposed to be designated as an island since they considered it to be a low-tide elevation. Meanwhile, Bahrain argued that this formation had a permanent presence, even if it was small, in high tide. It also contested that due to natural alluvial accretion and some man-made structures such as beacon, an artesian well and some structures for oil drilling they had to build up the cay and it should have the status of an island. The Court decided that due to the combination of these factors, both natural and man-made, this formation had the status of island.<sup>147</sup> Using this case as an example, it can be put forward that in the event that a man-made structure or alteration is made, it would maintain its status as an island under the international law regime.

Haritini Dipla suggests that it is necessary to examine the intention of the State that builds in order to determine if the island is being built to be used later or to simply preserve the maritime areas of the affected state.<sup>148</sup> The problem with the situation in the South China Sea is that the Chinese government is building in a contested area without any particular purpose of preserving a local population from having to abandon their home. Also, they are building on formations that did not have an *island status*; therefore, they cannot later claim to treat that formation as having the same rights and entitlements, under international law, as any other island. China is building for the sole purpose of claiming more land and maritime zones to further assert their presence and military power in the region. Following Madame Dipla's questions and arguments, this decision will continue to further expand the definition and legal regime of island building given the circumstances of the 21st century.<sup>149</sup> States that have to deal with the threat of rising sea levels should have the legal protection to build islands to maintain their maritime and territorial claims where they were original-

---

<sup>144</sup> *Making Waves*, THE ECONOMIST, (Mar. 12, 2016), <http://www.economist.com/news/asia/21694548-south-pacific-climate-change-animates-presidential-election-making-waves> (last visited May 30, 2017).

<sup>145</sup> Michael Gagain, *Climate Change, Sea Level Rise, and Artificial Islands: Saving the Maldives' Statehood and Maritime Claims through the "Constitution of the Oceans,"* 23 COLO. J. INT'L ENVTL. L. & POL'Y 77, 82 (2012).

<sup>146</sup> DIPLA, *supra* note 107, at 29.

<sup>147</sup> Maritime Delimitation and Territorial Questions between Qatar and Bahrain (*Qatar v. Bahr.*), Judgment, 1994 I.C.J. Rep. 112 ¶¶ 191-97 (Jul. 1, 1994).

<sup>148</sup> DIPLA, *supra* note 107, at 29.

<sup>149</sup> See Gagain, *supra* note 145.

ly and not lose international legal protection.<sup>150</sup> It is important to point out that this provision should not be extended to countries that have the sole purpose of expanding territory and further militarizing regions, it should only apply to situations in which the main purpose is to preserve territorial integrity.

Most of China's island building takes place on top of reefs and in fishing grounds,<sup>151</sup> which could be in violation of articles 123 and 192 of UNCLOS. Article 123 imposes obligations on States to enclose or semi-enclosed seas to cooperate with each other in, among many things, the coordination of implementing rights and duties with respect to the protection and preservation of the marine environment.<sup>152</sup> Even more so, article 192 imposes that: "States have the obligation to protect and preserve the marine environment."<sup>153</sup> On this matter, the PCA evaluated the different methods and techniques that the Chinese are using to build on top of the contested formations in the South China Sea. The Philippines believe that these activities have inflicted damage to marine biodiversity and economic productivity.<sup>154</sup> The Chinese government defended their actions stating that its techniques "had gone through science-based evaluation and assessment with equal importance given to construction and protection' and . . . had taken 'full account of issues of ecological preservation and fishery protection' . . . [while] 'follow[ing] strict environmental protection standards.'"<sup>155</sup> According to the Tribunal, construction activities in the Cuarteron Reef, Fiery Cross Reef, Gaven Reef (north), Johnson Reef, Hugues Reef, Subi Reef and Mischief Reef have breached articles 192 and 194(5) of UNCLOS.<sup>156</sup> In order to make this determination, the Tribunal appointed independent experts to assess the construction activities. These experts produced the Ferse Report, which concluded that these activities "impacted reefs on a scale unprecedented in the region."<sup>157</sup> The report concluded that: (1) the replenishment of species will be affected; (2) the timing of works had been made in periods of spawning time of reef corals; (3) the quality of water had also been affected; (5) the restoration of the damage ecosystems could take more than fifty years in some cases, and (6) the reef's health and structure had also

---

150 *Id.*

151 Huy Duong, *Massive Island-Building and International Law*, CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES: ASIA MARITIME TRANSPARENCY INITIATIVE (June 15, 2015), <http://amti.csis.org/massive-island-building-and-international-law> (last visited May 30, 2017); see UNCLOS, *supra* note 40, at art. 123 (explaining the co-operation of States bordering enclosed or semi-enclosed seas and notification of imminent or actual damage).

152 UNCLOS, *supra* note 40, at art. 123.

153 *Id.* art. 192.

154 Arbitration Award, at ¶ 861.

155 *Id.* at ¶ 862.

156 *Id.* at ¶ 992; see also, UNCLOS, *supra* note 40, at art. 194(5) (providing that necessary measures must be taken in order to protect and preserve rare or fragile ecosystems and places that provide habitats for endangered species).

157 Arbitration Award, at ¶ 978.

been compromised by the activities, among several other conclusions.<sup>158</sup> Due to this devastating and long-lasting damage, the Tribunal concluded that the Chinese violated articles 192 and 194(5) of UNCLOS.<sup>159</sup>

In the fringes of this decision, not only have the countries in the South China Sea basin taken notice, but also the United States has been concerned by the expansion of the reclamation efforts. The United States has been worried that such expansion efforts could disrupt the navigation in the South China Sea.<sup>160</sup> It has also kept a close eye on the decision that the Permanent Court of Arbitration rendered. Regarding the case, the U.S. Department of State released a Position Paper in which they explained why they believe that China is not entitled to any claims under UNCLOS.<sup>161</sup> The United States has also promised to respect and support the decision by the PCA and has reiterated that they will ultimately maintain a neutral role in the process.<sup>162</sup> Even though the United States has stated their neutrality in the process, the U.S. Navy has sailed within twelve nautical miles of Subi Reef to make a point since they believe this is a formation that is not entitled to any territorial sea.<sup>163</sup> After the decision was rendered by the PCA, the United States Department of State commented that it expected for the Chinese government to comply with the decision and that it had the opportunity to show itself as the responsible global superpower it professed to be.<sup>164</sup> Notwithstanding, the United States has been participating in military exercises with the Philippines in the region.<sup>165</sup> Even the new Secretary of State, Rex Tillerson suggests that the Chinese government should be denied access to their artificial

---

<sup>158</sup> *Id.* at ¶ 982.

<sup>159</sup> *Id.* at ¶ 983.

<sup>160</sup> Idress Ali, *U.S. to boost South China Sea freedom of navigation moves, admiral says*, REUTERS (Feb. 27, 2016), <http://www.reuters.com/article/us-southchinasea-usa-idUSKCN0VX22B> (last visited May 30, 2017).

<sup>161</sup> See UNITED STATES DEPARTMENT OF STATE, BUREAU OF OCEANS AND INTERNATIONAL ENVIRONMENTAL AND SCIENTIFIC AFFAIRS, LIMITS IN THE SEAS, CHINA: MARITIME CLAIMS IN THE SOUTH CHINA SEA No. 143 (2014), <https://www.state.gov/documents/organization/234936.pdf>.

<sup>162</sup> The Editorial Board, *Tensions Rise in the South China Sea*, N.Y. TIMES (Apr. 6, 2016), <http://www.nytimes.com/2016/04/07/opinion/tensions-rise-in-the-south-china-sea.html> (last visited May 30, 2017).

<sup>163</sup> Mira Rapp-Hooper, *Confronting China in the South China Sea*, FOREIGN AFFAIRS (Feb. 8, 2016), <https://www.foreignaffairs.com/articles/china/2016-02-08/confronting-china-south-china-sea> (last visited May 30, 2017).

<sup>164</sup> Jane Perlez, *Tribunal Rejects Beijing's Claims in South China Sea*, N.Y. TIMES (Jul. 12, 2016), <https://www.nytimes.com/2016/07/13/world/asia/south-china-sea-hague-ruling-philippines.html> (last visited May 30, 2017).

<sup>165</sup> Floyd Whaley, *U.S. and Philippines Bolster Air and Sea Patrols in South China Sea*, N.Y. TIMES (Apr. 14, 2016), <http://www.nytimes.com/2016/04/15/world/asia/south-china-sea-philippines-us-naval-patrols.html> (last visited May 30, 2017).

islands in the South China Sea.<sup>166</sup> Although the United States is doing all of these military exercises, it will be in its best interest for the disputes to be resolved in a peaceful and legal manner. It is not in its best interest that a confrontation with China takes place in its backyard.

Due to the widespread interests of avoiding any type of military confrontation, there has been an ongoing debate of whether the arbitration process is the most effective way to move forward with a possible dispute resolution to this conflict. In order to have a successful arbitration, author Kristen Boon has signaled out three key elements: “(i) Consent of the parties, (ii) The ability of politicians to sell the process of arbitration to their people, (iii) [and the] Arbitral tribunal’s ability to tactically manage consent.”<sup>167</sup> It could be argued that the most important of these elements is the consent of the parties. If the award were to be implemented or followed, it would be crucial that the affected party fully agrees with the process in order to comply. Some authors and commentators believe that it would have been more effective to push for negotiations and bilateral agreements –and even multilateral agreements– to resolve this crisis.<sup>168</sup> Robert Beckman recognizes the difficulty of negotiating provisional joint-development arrangements.<sup>169</sup> However, he suggests that “this approach could be more easily implemented if all the claimant states bring their claims into conformity with UNCLOS.”<sup>170</sup> He believes that by doing that, the locations of the areas of overlapping entitlements under UNCLOS would be clarified and negotiations could take place between the claimant states to reach multilateral agreements between them.<sup>171</sup> The problem with this proposal is that even after China signed the ASEAN code of conduct in 2002, it has claimed more area in the South China Sea and tensions have been continuing to build. It would be hard to make a country with such military and economic strength sit down at the negotiation table and start waiving claims that it believes it has a historic right to. This is why, with the growing complication of the situation and the deadlock between neighboring states, it was necessary for a neutral, well-respected institution such as the Permanent Court of Arbitration to interpret UNCLOS in order to define each claim to push the countries for a peaceful solution. Now that the decision has been rendered, it could be possible that China and all other interested states will sit at the negotiation table to find and equitable solution to the conflict by using the ruling as their guide.

---

<sup>166</sup> Michael Forsythe, *Rex Tillerson’s South China Sea Remarks Foreshadow Possible Foreign Policy Crisis*, N.Y. TIMES (Jan. 12, 2017), <https://www.nytimes.com/2017/01/12/world/asia/rex-tillerson-south-china-sea-us.html?mcubz=2> (last visited May 30, 2017).

<sup>167</sup> Boon, *supra* note 61, at 490.

<sup>168</sup> Beckman, *supra* note 3, at 159.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

Finally, the process of going to the Permanent Court of Arbitration will legitimize even more the international dispute settlement regime. International tribunals were mostly created to diffuse tension, so that countries would have a forum to resolve their disputes without going to war. Additionally, these tribunals give economic and militarily disadvantaged countries another opportunity to settle the dispute without having to engage in direct confrontation. Before the creation of the international tribunals, most likely, nations would have gone to war over a dispute such as this one. How can international law scholars support the idea of not going to an international tribunal to solve a crisis? It makes no sense. The UNCLOS has indeed a comprehensive legal framework that, for the most part, been effective due to the compliance of nations to the provisions of the treaty. Even China, the main aggressor in this dispute, ratified the Convention in 1996 and in its position paper on this matter, supported its arguments using provisions from the Convention.<sup>172</sup> This decision should be fully binding, like all decisions regarding UNCLOS have been in the past. Even if China did not participate in the proceedings, as an important member of a civilized group of nations, it should abide by any decision that the PCA may render and not hide behind the bamboo curtain to defy any international law obligation imposed by the very same Convention that it ratified. With the American government planning further military exercises with the Philippines, and Vietnam increasing military presence in the region, the South China Sea would be a like a pressure-cooker waiting to explode if it is not dealt with in time.

## CONCLUSION

This case presented a key opportunity for further legitimizing the provisions and legal validity of UNCLOS. The *Constitution of the Sea* regulates almost all aspects of sea-based activities. Now, in a situation such as the one taking place in the South China Sea, it is essential to have the legal means and institutions to ease the tensions and resolve the matters in a peaceful and civilized manner. The Permanent Court of Arbitration issued a comprehensive decision holding that the Philippines and other countries in the South China Sea basin can force China into the negotiating table if it decides not to abide by it. Since both China and the Philippines ratified UNCLOS, it is their legal obligation to follow the interpretation that the Court gave in this decision. The expressions made by ambassador Cuisia of the Philippines invoking that the spirit of UNCLOS is at stake, seems very appropriate to this situation.<sup>173</sup> Most importantly, the provisions of dispute settlements are mostly under attack in this junction of UNCLOS' life.

As mentioned before and under the entire legal framework provided by UNCLOS, the PCA correctly ruled against permitting island building and later

---

<sup>172</sup> U.N. Oceans & Law of the Sea, Division for Ocean Affairs and the Law of the Sea, *Declarations and Statements*, (Oct. 29, 2013) [http://www.un.org/depts/los/convention\\_agreements/convention\\_declarations.htm](http://www.un.org/depts/los/convention_agreements/convention_declarations.htm) (last visited May 30, 2017).

<sup>173</sup> Center for Strategic and International Studies, *supra* note 64.

claiming maritime zones in the South China Sea. It is clear that the Chinese government is building for the sole purpose of military and economic expansion in an area that it has claimed unilaterally by using historic rights that are not permitted under international law. Additionally, China has made these claims by using a *nine-dash line* that the court correctly ruled as illegal and unable to give titles under international law. In addition, serious environmental harm is being done by building on top of reefs and thus violating provisions of environmental protection in UNCLOS. Additionally, increasing military presence in the region would pose a hazard and an *obstruction* of free navigation in these waters. This would cause the opposite of easing any tensions in the region. Moreover, the Chinese government cannot change the status of natural formations at their own will in order to satisfy its economic and military appetite. It clearly goes against the preamble, and overall purpose of establishing such an international agreement, of the Convention which states that: “[T]his Convention will contribute to the strengthening of peace, security, cooperation and friendly relations among all nations in conformity with the principles of justice and equal rights.”<sup>174</sup>

It is clear that China’s actions have been building over the years and it has gotten into the point of needing a prompt resolution before it is too late. Having existed the possibility of the passage of the Trans Pacific Partnership, the United States would have undoubtedly *established the rules* of economic and commercial relations among countries in the Pacific Rim, including some in the South China Sea.<sup>175</sup> It would have been in the best interests of China to establish friendly relationship with other countries in the area to try to buffer any economic and political influence that the United States might have brought on its own turf. However, with Donald Trump as the new president of the United States, the prospects of approving the TPP faded almost immediately after his coming to power.<sup>176</sup> This could represent a major hurdle for the United States to promote its political and strategic interests in the region. The TPP and this decision could have proven to be the perfect guide to establish a long-term solution to the conflicts of the region. Nevertheless, this decision may prove to be a very important precedent in the field of international law. It needs effective political and diplomatic maneuvering in order to turn it into a proper solution instead of an idealistic guide for the future. If an agreement is not reached soon, and China continues to assert their claims along the region, the Dragon’s pool will be even harder to use and thus harder for other states to even claim a spot at the pool’s edge.

---

<sup>174</sup> UNCLOS, *supra* note 40, at Preamble.

<sup>175</sup> See Executive Office of the President, Office of the U.S. Trade Representative: The Trans-Pacific Partnership, <https://ustr.gov/tpp> (last visited May 30, 2017) (explaining the United States’ position on the issue). The countries located in the South China Sea basin that are part of the deal are Vietnam, Brunei and Malaysia.

<sup>176</sup> Peter Baker, *Trump Abandons Trans-Pacific Partnership, Obama’s Signature*, N.Y. TIMES (Jan. 23, 2017) <https://www.nytimes.com/2017/01/23/us/politics/tpp-trump-trade-nafta.html> (last visited May 28, 2017).