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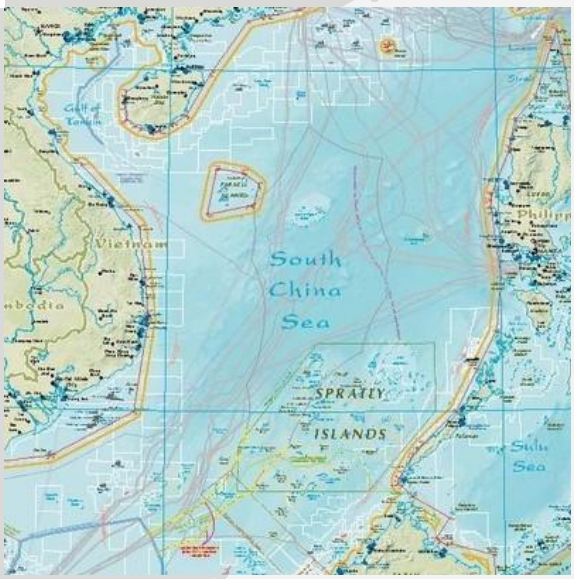
The International Law of the Sea and the South China Sea Disputes



Dr. L.N. Nguyen

Prof. Dr. A.G. Oude Elferink

13-05-2025

About the authors

L.N. Nguyen

Dr Lan Nguyen is an Assistant Professor at Utrecht University School of Law, and a Senior Research Associate of the Netherlands Institute for the Law of the Sea (Utrecht University Centre for Water, Oceans and Sustainability Law). Dr Nguyen holds a B.A in International Relations and International Law from the Diplomatic Academy of Vietnam, an LL.M (First Class Honours) in International Law and a PhD both from the University of Cambridge. She is the author of, among others, the monograph entitled 'The Development of the Law of the Sea by UNCLOS Dispute Settlement Bodies' (CUP 2023) and laureate of the 4th edition of the Daniel Vignes Prize awarded by the International Association of the Law of the Sea (AssIDMer). Her research interests lie in public international law, law of the sea, settlement of international disputes and the management and resolution of maritime disputes in Asia Pacific.

A.G. Oude Elferink

Dr. Alex Oude Elferink is a professor in international law of the sea and the Director of the Netherlands Institute for the law of the sea (NILOS), and an associate of the Utrecht Centre for Oceans, Water and Sustainability Law (UCWOSL), School of Law, Utrecht University, the Netherlands. He is the author of The Delimitation of the Continental Shelf between Denmark, Germany and the Netherlands; Arguing Law, Practicing Politics? (Cambridge University Press, 2013) and the co-editor of The Oxford Handbook of the Law of the Sea (Oxford University Press, 2015) and International Law and Marine Areas beyond National Jurisdiction; Reflections on Justice, Space, Knowledge and Power (Brill, 2022). His current research among others focusses on dispute settlement under the United Nations Convention on the law of the sea.

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Abbreviations

Area	seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction (international seabed area)
ASEAN	Association of Southeast Asian Nations
BBNJ Agreement	Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction
BCM	Bilateral Consultation Mechanism on the South China Sea
Brunei	Brunei Darussalam
CBD	Convention on Biological Diversity
CCSBT	Convention for the Conservation of Southern Bluefin Tuna
China	People's Republic of China
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CLCS	Commission on the Limits of the Continental Shelf
COC	Code of Conduct in the South China Sea
CSIL Critical Study	Chinese Society of International Law 'Critical Study of the South China Sea Arbitral Award'
DOC	Declaration on the Conduct of Parties in the South China Sea
ICJ	International Court of Justice
ICJ Reports	Reports of Judgments, Advisory Opinions and Orders
Indonesia	Republic of Indonesia
ITLOS	International Tribunal for the Law of the Sea
IUU fishing	illegal, unreported and unregulated fishing
Malaysia	Federation of Malaysia
NATO	North Atlantic Treaty Organization
PCA	Permanent Court of Arbitration
Philippines	Republic of the Philippines
Position Paper	Position Paper on the Matter of Jurisdiction in the South China Arbitration Initiated by the Republic of the Philippines
RIAA	Reports on International Arbitral Awards
RORE	Rotation and Resupplying
Taiwan	Republic of China
UNCLOS	United Nations Convention on the Law of the Sea
UNTS	United Nations Treaty Series
VCLT	Vienna Convention on the Law of Treaties
Viet Nam	Socialist Republic of Viet Nam

1. Introduction

The development of the law of the sea in the second half of the 20th century – and in particular the extension of coastal State jurisdiction beyond the territorial sea through the regimes of the exclusive economic zone and the continental shelf – has radically transformed the geopolitics of the ocean. Until the middle of the 20th century, the law of the sea was mainly characterized by the dichotomy between the territorial sea and the high seas. While the sovereignty of the coastal State extended over the territorial sea, the high seas beyond the outer limit of the territorial sea were open to all States on an equal basis under the principle of the freedom of the high seas. Due to the limited extent of the territorial sea – major maritime powers insisted on a maximum breadth of 3 nautical miles, while other states claimed a territorial sea of 4 or 6 nautical miles and in some instances 12 nautical miles – the large majority of the ocean was subject to the regime of the high seas. Currently, about half of the ocean is subject to coastal State jurisdiction.

The South China Sea is a key example of the way in which the development of the law of the sea has impacted on the geopolitics of the ocean.[1] This development has been accompanied by competing interpretations of the law of the sea that have radically diverging implications for the legal and political division of the South China Sea. In addition, the South China Sea is characterized by a number of territorial disputes that add to the complexity of its geopolitical seascape.

The main characteristics of the interaction between the law of the sea and the geopolitics of the South China Sea may be summarized as follows. The basic law of the sea framework is provided by the United Nations Convention on the Law of the Sea (UNCLOS).[2] All coastal States of the South China Sea,[3] Brunei Darussalam (Brunei), the People's Republic of China (China), the Republic of Indonesia (Indonesia), the Federation of Malaysia (Malaysia), the Republic of the Philippines (the Philippines) and the Socialist Republic of Viet Nam (Viet Nam) are parties to the UNCLOS.[4] Four of these coastal States, China, Malaysia, the Philippines and Viet Nam have sovereignty claims over all or some of the islands that are located in central part of the South

[1] The current report uses the term 'South China Sea', which is the term used in most relevant sources. Other terms that are used to refer to the South China Sea include the 'East Sea', mostly used in Viet Nam, and West Philippines Sea, mostly used in the Philippines to refer to the part of the South China Sea comprising the maritime zones of the Philippines. In referring to geographical features in the South China Sea, the report will generally refer to the names that are generally used in the English language, while referring to the names that are used by States in the South China Sea as appropriate.

[2] Opened for signature 10 December 1982, entered into force 16 November 1994 (1833 UNTS 3). It may be noted that the South China Sea qualifies as a semi-enclosed sea for which Part IX of the UNCLOS creates specific obligations of cooperation (UNCLOS, articles 122-123). However, these obligations add little to the obligations of cooperation that exist generally under the UNCLOS (see, *e.g.*, articles 64-65, 118, 197, 242 and 243).

[3] The report does not consider the positions of the Republic of China (Taiwan). Including the positions of Taiwan in the analysis would add a further level of complexity. Even more importantly, it is not considered necessary to include an analysis of the positions of Taiwan in the analysis to answer the research questions in relation to China and other relevant States.

[4] As a general definition of the South China Sea, the report considers the sea area surrounded by the coasts of China, Taiwan, the Philippines, Malaysia, Brunei, Indonesia, and Viet Nam, excluding the Gulf of Thailand. For the purposes of this report, it is not considered pertinent to provide a more precise definition.

China Sea: the Paracel Islands, the Spratly Islands and the islands on Scarborough Shoal.[5, 6] China claims sovereignty over all of these islands, Viet Nam over the Paracel Islands and the Spratly Islands, while the Philippines and Malaysia have claims over specific islands in the Spratly Islands and the Philippines also claims sovereignty over the islands on Scarborough Shoal.[7] These competing sovereignty claims also complicate the picture as regards the determination of coastal State rights in the South China Sea. In order to determine which State has coastal State rights based on these islands, it is first necessary to establish which State has sovereignty over the islands. In the absence of that determination, the claimant States also have competing claims to the maritime zones of these islands.[8]

Due to their location, the Paracel Islands, the Spratly Islands and the islands on Scarborough Shoal potentially have a huge impact on the political geography of the South China Sea.[9] The UNCLOS provides that islands in principle have the same maritime zones as continental territory.[10] Beyond the territorial sea, coastal States have an exclusive economic zone and continental shelf. The latter, which gives the coastal State rights over the seabed and subsoil, may extend beyond the 200-nautical-mile limit of the exclusive economic zone where the relevant criteria of Article 76 of the UNCLOS are met.[11] This also is the case in the South China Sea.

If we were to exclude the Paracel Islands, the Spratly Islands and the islands on Scarborough Shoal from the picture, the central part of the South China Sea would be beyond the combined outer limits of the exclusive economic zones of the surrounding coastal States. This is a considerable part of the South China Sea. From its northern to southern extremity this high seas

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[5] Brunei possibly might also be listed as a claimant State. Louisa Reef is located within the maritime boundaries that have been claimed by Brunei. However, there is some question as to whether there are any features on Louisa Reef that meet the definition of an island contained in article 121 of the UNCLOS, and as such qualify as land territory (see, *e.g.* J.A. Roach *Malaysia and Brunei: An Analysis of their Claims in the South China Sea* (A CNA Occasional Paper, August 2014), pp. 39-41 and 43). Louisa Reef is classified as an island in two volumes of the *Limits in the Seas* series, which however do not provide any further information in this connection (*Limits in the Seas No. 143; China: Maritime Claims in the South China Sea* (US State Department, 5 December 2014), p. 5; *Limits in the Seas No. 150; People's Republic of China: Maritime Claims in the South China Sea* (US State Department, January 2022), p. 3). The preliminary information that Brunei has submitted to the Commission on the Limits of the Continental Shelf seems to indicate that Louisa Reef was not taken into account as part of Brunei's land territory in determining Brunei's baselines (*Brunei Darussalam's Preliminary Submission concerning the Outer Limits of its Continental Shelf* (available at https://www.un.org/depts/los/clcs_new/submissions_files/preliminary/brn2009preliminaryinformation.pdf), para. 9)

[6] For a further description of the various islands in the South China Sea see, *e.g.*, Limits in the Seas No. 150 n 5, *passim*.

[7] This report will refer to these States as 'claimant States' where relevant. It may be noted that there is a sovereignty dispute between Malaysia and the Philippines over North Borneo (Sabah). This matter is not further considered in the present report as it is not relevant to the discussion of the issues that are the subject of this report.

[8] This report is not concerned with providing a legal assessment of the sovereignty claims over the Paracel Islands, the Spratly Islands and Scarborough Shoal, which is a complex matter requiring the assessment of a historical record, which in part is not in the public domain. Although the settlement of the sovereignty disputes is required for determining which State is the coastal State over a specific island, assessing these claims is not necessary in assessing the positions of the States concerned on the law of the sea issues that are the subject of this report.

[9] Various terms are used to refer to geographical features in the South China Sea, including 'island' 'low-tide elevation' and 'rock', as well as the general term 'feature' which may be qualified, *e.g.*, by referring to a 'permanently submerged feature' or a 'high-tide feature' (*i.e.*, an island). These terms are both used in a geographical and legal sense. Whether the former or latter sense is intended will generally be clear from the context in which a term is being used. Use of a term in its geographical sense is not determinative of the legal classification of the feature concerned. For instance, reference to the presence of islands on Scarborough Shoal in the geographical sense does not imply that these islands are not rocks in a legal sense under article 121(3) of the UNCLOS.

[10] UNCLOS, article 121(2).

[11] Article 76(1) provides that the continental shelf extends to the outer edge of the continental margin, where that margin is beyond 200 nautical miles from the baselines of the State concerned. Article 76(4) to (6) provide a number of criteria for more precisely determining the outer limits of that continental shelf. The outer edge of the continental margin may be determined by fixed points connected by straight lines. These fixed point are measured from the foot of the continental slope (one of the elements of the legal continental shelf (see UNCLOS, article 76(3)), either with reference to sediment thickness or distance from the foot of the slope. The outer limits of the continental shelf in addition shall not exceed 350 nautical miles from the baselines or 100 nautical miles beyond the isobath of 2,500 meters (see *ibid*., article 76 (5) and (6)).

area measures more than 750 nautical miles, while from east to west its widest extent is around 220 nautical miles.[12] Most of the seabed and subsoil of this high seas area likely is part of the continental shelf of the surrounding coasts. As a glance at a map indicates, when only considering the surrounding coasts, the Philippines and Viet Nam have by far the most extensive exclusive economic zone and continental shelf. China's maritime zones under this scenario are limited to the northern part of the South China Sea, while Brunei, Indonesia and Malaysia are limited to its southern part.

If the Paracel Islands, the Spratly Islands and the islands on Scarborough Shoal were found to be islands that are entitled to an exclusive economic zone and continental shelf, the potential extent of coastal State maritime zones would change radically. An exclusive economic zone of these islands would imply that most of the high seas area as described above would instead be part of that exclusive economic zone.[13] In addition, the exclusive economic zone and continental shelf of these islands would overlap with the same zones of the coasts surrounding the South China Sea.[14] This situation would give the State(s) that has/have sovereignty the Paracel Islands, the Spratly Islands and the islands on Scarborough Shoal potentially coastal States rights over the larger part of the South China Sea.

But are any of the islands in the Paracel Islands, the Spratly Islands and Scarborough Shoal entitled to an exclusive economic zone and continental shelf to start with? This is where China and the other claimant States part ways. While China takes the position that all the islands in the Paracel Islands, the Spratly Islands and on Scarborough Shoal indeed are entitled to an exclusive economic zone and continental shelf, this is rejected by the other claimant States. The latter position is based on Article 121(3) of the UNCLOS, which provides that '[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf'. In addition, China and the other claimant States differ over the basis for determining coastal State rights. While the other claimant States, as well as other coastal States of the South China Sea, hold that coastal State rights are exhaustively defined by the UNCLOS, China has contended that its claims find support in international law beyond the Convention.[15] China has also defined the extent of its maritime claims with reference to a line that has among others has been referred to as the nine-dash line.[16] The area included within that line covers most of the South China Sea.[17] The exact basis and justification of this line remain uncertain. The nine-dash line in any case could not be the outcome of a delimitation of the continental shelf and

[12] Measurements in this report have been made by one of its authors using Google Earth with layers representing EEZ and continental shelf limits and maritime boundaries available from the Flanders Marine Institute (see https://www.marineregions.org/).
[13] Under this scenario, the question of the extent of the continental shelf beyond 200 nautical miles would be less relevant as most or all of the area concerned is within 200 nautical miles of either the Paracel Islands, the Spratly Islands and the islands on Scarborough Shoal.
[14] The latter areas would be subject to delimitation between neighboring States, in case the sovereign over the islands would a different State than the opposite coastal State. As explained in the box 'The UNCLOS and the delimitation of the exclusive economic zone and the continental shelf between neighboring States' in section 6.5.1 of this report, under such a scenario, the islands most likely would be enclaved in a 12-nautical-mile territorial sea within the exclusive economic zone and continental shelf of the other State concerned.
[15] See further sections 4 and 6.5 of this report.
[16] The number of dashes that have been used have varied over time. This report will be referring to the nine-dash or ten-dash line depending on the context of the reference concerned. For a further discussion of the nine-dash line see section 5 of this report
[17] For a depiction of the nine-dash line see, *e.g.*, Note Verbale CML/17/2009 of 7 May 2009 (available at https://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf), Attached Map.

exclusive economic zone between the Paracel Islands, the Spratly Islands and the islands on Scarborough Shoal, if they were to be found to be entitled to these zones and all would be under the sovereignty of China, and the surrounding coasts.[18]

The positions of China and the other claimant States have in particular been clarified by two events. In 2009, Malaysia and Viet Nam submitted information on the outer limits of their continental shelf beyond 200 nautical miles in the South China Sea to the Commission on the Limits of the Continental Shelf (CLCS) in accordance with Article 76 of the UNCLOS. The information in relation to these submissions in the public domain indicates that Malaysia and Viet Nam consider that the Paracel Islands, the Spratly Islands and the islands on Scarborough Shoal do not have a continental shelf.[19] That position implies that these islands are considered to be rocks in the sense of Article 121(3) of the UNCLOS.[20] In reaction to the submissions of Malaysia and Viet Nam, China issued diplomatic notes in which it submitted that the islands claimed by it are fully entitled islands. China in this connection also relied on the nine-dash line to illustrate the extent of its maritime claims in the South Chain Sea.[21]

In January of 2013 the Philippines initiated an arbitration over maritime claims in the South China Sea against China under the UNCLOS.[22] The momentous nature of this step and its potential for clarifying the law of the sea as relevant to the South China Sea were immediately apparent. China from the outset vehemently opposed the initiation of the arbitral proceedings[23] – and by that stance arguably signaled the potential importance of the outcome of the arbitration.

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[18] See further note 14 above.

[19] Malaysia and the Socialist Republic of Viet Nam, Joint submission to the Commission on the Limits of the Continental Shelf, in accordance with Article 76, paragraph 8, of the United Nations Convention on the Law of the Sea in respect of the southern part of the South China Sea; Executive Summary (available at www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/mys_vnm2009excutivesummary.pdf), p. 5, figure 1; Socialist Republic of Viet Nam, Submission to the Commission on the Limits of the Continental Shelf pursuant to Article 76, paragraph 8, of the United Nations Convention on the Law of the Sea; Partial submission in respect of Viet Nam's Extended Continental Shelf; North Area (NMV-N); Executive Summary (available at www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/vnm2009n_executivesummary.pdf), p. 5, Figure 1. Malaysia and Viet Nam have subsequently each made a further submission to the CLCS based on the same position on the entitlements of the islands in respectively 2019 and 2024 (Malaysia Partial submission to the Commission on the Limits of the Continental Shelf, pursuant to Article 76, paragraph 8, of the United Nations Convention on the Law of the Sea 1982; Part I (available at www.un.org/Depts/los/clcs_new/submissions_files/mys85_2019/20171128_MYS_ES_DOC_001_secured.pdf), p. 4, figure 1.1; Socialist Republic of Viet Nam, Submission to the Commission on the Limits of the Continental Shelf pursuant to Article 76, paragraph 8, of the United Nations Convention on the Law of the Sea; Partial submission in respect of Viet Nam's Extended Continental Shelf; Central Area (VNM-C); Part I – Executive Summary (available at https://www.un.org/Depts/los/clcs_new/submissions_files/vnm95_24/Vnm952024-EXECUTIVE_SUMMARY.pdf). pp. 1-2 and 4, Figure 1). The Philippines has taken a similar approach in its partial submission in relation to the West Palawan region (see Republic of the Philippines, A partial submission of data and information on the outer limits of the continental shelf of the Republic of the Philippines in the West Palawan region pursuant to article 76 of the United Nations Convention on the Law of the Sea; Part I Executive Summary (available at https://www.un.org/depts/los/clcs_new/submissions_files/phl1/2023PhlEsDoc001Secured.pdf), p. 8, figure 3).

[20] As was remarked by the anonymous reviewer of this final report, the claims of Viet Nam, Malaysia and the Philippines as regards the legal classification of the islands in the South China Sea prior to 2009 may have been unclear. This question is not further considered in this report as it is not essential for answering the main research questions of this report.

[21] See, *e.g.*, Note Verbale CML/17/2009, n 17.

[22] Notification and Statement of Claim of the Republic of the Philippines (No 13-0211), 22 January 2013 (available at https://dfa.gov.ph/images/UNCLOS/Notification%20and%20Statement%20of%20Claim%20on%20West%20Philippine%20Sea.pdf). It is to be noted that the Notification and Statement of Claim refer to the 'West Philippine Sea'. On this use of terms see above note 1.

[23] See further section 7 of this report.

Notwithstanding the opposition of China to the arbitration, including its refusal to participate in the proceedings, the arbitration went ahead and in 2015 and 2016 the arbitral tribunal rendered two awards.[24] The first award considered the tribunal's jurisdiction and the admissibility of the claims of the Philippines[25] and the second award, while dealing with further points of jurisdiction, decided on the merits of the case.[26]

The 2016 award on merits made a number of critical findings in relation to the interpretation and application of the UNCLOS. It assessed China's claims in relation to the nine-dash line, declaring that:

> China's claims to historic rights, or other sovereign rights or jurisdiction, with respect to the maritime areas of the South China Sea encompassed by the relevant part of the 'nine-dash line' are contrary to the Convention and without lawful effect to the extent that they exceed the geographic and substantive limits of China's maritime entitlements under the Convention; and further declares that the Convention superseded any historic rights, or other sovereign rights or jurisdiction, in excess of the limits imposed therein.[27]

The tribunal also found that all of the features in the Spratly Islands and on Scarborough Shoal were either low-tide elevations or rocks in the sense of Article 121(3) of the Convention.[28] Combined, these findings imply that China does not have coastal State rights over most of the southern part of the South China Sea. At most, in case the sovereignty disputes over the Spratly Islands and the islands on Scarborough Shoal were to be resolved in China's favor, China would have sovereignty over the territorial sea of the features concerned.[29]

The arbitration has consequently radically clarified the legal seascape of the South China Sea. Notwithstanding China's non-participation and rejection of the awards of the tribunal, the Convention leaves no doubt that the awards are 'final and binding and shall be complied with by all the parties to the dispute'.[30] At the same time, the legal situation is complicated by fact that China takes the position that the awards are null and void and as such do not have any legal effect for China.[31]

This report is intended to critically analyze the current positions of China in particular in relation to the law of the sea, including the *South China Sea* arbitration, as they relate to the South China Sea. The positions of in particular other claimant States will be discussed to the extent this is

[24] See further section 7 of this report.
[25] The South China Sea Arbitration between the Republic of the Philippines and the People's Republic of China (Philippines v China), Award on Jurisdiction and Admissibility (2015) RIAA XXXIII, p. 1 (hereafter South China Sea, Award on Jurisdiction and Admissibility).
[26] The South China Sea Arbitration between the Republic of the Philippines and the People's Republic of China (Philippines v China) (2016) RIAA XXXIII, p. 153 (hereafter South China Sea, Award on Merits).
[27] *Ibid*., para. 1203(B)(2).
[28] *Ibid*., para. 1203(B)(3)-(7).
[29] Under article 121(3) of the UNCLOS, rocks are only entitled to a territorial sea, which extends from the baselines of the features determined in accordance with the UNCLOS, and a contiguous zone. As per the ICJ, the contiguous zone of one State may overlap with the exclusive economic zone another State. See *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia),* Judgment of 21 April 2022, ICJ Reports 2022, p. 266, paras 160-164. This latter point is not further considered in the report.
[30] UNCLOS, article 296(1). See also *ibid*, Annex VII, article 9.
[31] The implications of this Chinese position are further considered in various sections of this report.

considered to be relevant to provide a (comparative) context.[32] The guiding question in this respect will be to what extent these positions are in line with the law as interpreted in accordance with the relevant rules of treaty interpretation and the relevant rules for the determination of the content of customary international law. These relevant rules are further explained in section 2 of the report.

Next, the report contains a number of sections on specific issues concerning the international law of the sea that are pertinent to the South China Sea. Although this analysis is not exhaustive of all relevant issues, we consider that our coverage is sufficiently comprehensive for drawing general conclusions on the relevance of the international law of the sea for the South China Sea disputes. Section 3 discusses how States rely on the concepts of 'public international law' and 'rules-based order' in arguing rights and obligations. Section 3 also considers how the concepts of 'lawfare' and 'strategic litigation' have been used to characterize how States employ international law (of the sea) as a foreign-policy tool. Section 4 discusses how China has increasingly shifted its focus away from the UNCLOS and given more weight to rules other than those contained in the Convention to justify its claims in the South China Sea. Section 5 considers China's historic rights claim, discussing how the *South China Sea* tribunal dealt with that claim, while assessing whether and how China's claim has changed after the arbitration.

China and other States holds diametrically opposed views on the entitlements of various maritime features, including different legal categories of islands and low-tide elevations. This issue is discussed in section 6 of the report. This section also considers the rules applicable to the drawing of straight baselines around islands, including the question whether the UNCLOS provides a comprehensive regime in this respect or whether there are additional rules of customary international law. Section 7 first provides an overview of the compulsory dispute settlement system of the UNCLOS, and then examines the procedural issues that were raised in the *South China Sea* arbitration. It also assesses how States have responded to the arbitration, focusing on China's arguments relating to the establishment and exercise of compulsory jurisdiction by the Annex VII arbitral tribunal, and the reaction of the Philippines and other Southeast Asian States with regards to recourse to third-party dispute settlement.

Incidents between China and other claimant States in the South China Sea regularly feature in news media worldwide. As this media coverage and public statements of the States concerned indicate, international law figures quite prominently in this connection. On the one hand, States refer to the law to justify their own actions, while, on the other hand, the actions of other States are condemned as being in breach of international law. This state of affairs raises two questions concerning the relationship between activities on the ground and international law. First, what impact does the discrepancy between activities on the ground and the rights and obligations of States have on the development of the law? Second, what do arguments in relation to activities

[32] Therefore, a detailed analysis of Southeast Asian States' (evolving) claims and practice as a response to the arbitration, such as Viet Nam's 'belly-shaped' claim, the Philippines' KIG-box or developments amongst ASEAN States concerning the delimitation of maritime zones, falls beyond the scope of this report.

on the ground tell us about the relevance of international law as a regulatory framework for the South China Sea? These questions are examined in section 8 of the report.

The diverging views on maritime entitlements of States in the South China Sea imply that they have overlapping claims to coastal State maritime zones. Section 9 considers how a disputed maritime area may be defined in light of the applicable law and what rules are applicable pending the resolution of the underlying dispute. As regards the latter point, the focus will largely be on the rules that are applicable to the States that are involved as (potential) coastal States and not those that are applicable to third States. Section 9 first considers the question of the determination of the spatial scope of disputed maritime areas and the substantive rights and obligations of the States concerned in general terms. Next, it turns to a consideration of specific obligations under general international law and the UNCLOS in relation to disputed maritime zones. Finally, it reflects upon the situation in the South China Sea. The section is not concerned with assessing the legality of specific activities of States in the light of the rules that are applicable to disputed maritime areas.

Section 10 of the report provides an assessment of what the content of a future Code of Conduct in the South China Sea (COC), which is being negotiated between China and Member States of the Association of Southeast Asian Nations (ASEAN) might look like. In this connection, the report focuses on the following issues: a COC as a legally-binding or non-legally binding instrument; the area of application of a COC; the substantive content of a COC; the way in which a COC might refer to the settlement of the territorial and jurisdictional disputes; and review mechanisms for the implementation of a COC.

The protection and preservation of the marine environment figured prominently in the *South China Sea* arbitration. Section 11 of the report first examines the key findings of the *South China Sea* tribunal on marine environmental protection, with a focus on fishing activities, before moving on to discuss China's fishing activities in the South China Sea after the arbitration. Concluding section 12 provides general reflections on the significance of the law of the sea for the South China Sea and how in particular China has been using the law of the sea and how the claimant States may use it in the future in dealing with the maritime dimension of their disputes.[33]

The current report has been made possible with funding provided through the China Knowledge Network.[34] Drafts of this report have been discussed with representatives of the China Knowledge Network and the Netherlands Ministries of Foreign Affairs and of Defense. The views expressed in this report are solely attributable to its authors and do not necessarily reflect the views of the China Knowledge Network or the Netherlands Ministries of Foreign Affairs and Defense. We take this opportunity to thank Ms Matilda Kelly, who was involved in this project during her LLM studies

[33] It may be noted that the scoping report that was prepared as an initial stage of the project had proposed a more structured approach to the question concerning the relevance of the law of the sea in international relations. The scoping report had proposed to use a number of international relations perspectives in assessing the way in which States use the international law of the sea in their South China Sea policies. In light of the available resources and the extent of the legal analysis that approach was not adopted in preparing the report. The current report may provide a starting point for a future analysis along these lines.
[34] For further information on the China Knowledge Network see 'China Knowledge Network' (available at https://www.chinakennisnetwerk.nl/).

at the School of Law at Utrecht University, for the assistance she provided in collecting the materials that have been used in connection with the preparation of this report. We also take this opportunity to thank an external reviewer for their comments on a previous version of this final report.

2. Methodological approach to the analysis of international law

The analysis of international law in this report is based on a positivist approach. Although it is recognized that there are limits to this approach, we consider that it is possible to determine the content of the law using the rules of treaty interpretation as contained in the Vienna Convention on the Law of Treaties (VCLT).[35] A similar observation applies to the determination of the rules of customary international law.

The pertinent rules for treaty interpretation are contained in Articles 31 and 32 of the VCLT.[36] Article 31 of the VCLT provides the general rule for the interpretation of treaties, namely that interpretation shall be in good faith in accordance with the ordinary meaning in light of the context,[37] and the treaty's object and purpose. Article 32 allows for the use of supplementary means of interpretation (such as a treaty's preparatory materials), where the meaning remains ambiguous, or the general rule of interpretation leads to a manifestly absurd or unreasonable result. These articles indicate that the main focus of treaty interpretation is on determining the ordinary meaning of terms, taking into account relevant practice of the States concerned. Articles 31 and 32 generally are considered to represent customary international law.[38] This implies that these rules are also relevant for interpreting the treaty obligations of States that are not parties to the VCLT. In the South China Sea this concerns Brunei, Indonesia and Singapore.

Although all coastal States in the South China Sea are parties to the UNCLOS, at times it will be relevant to assess the content of customary international law. Apart from the issue of historic rights claimed by China and extensively discussed in the *South China Sea* arbitration, this for instance concerns the question whether there is a rule of customary international law concerning straight baselines of archipelagos like the Spratly Islands or the Paracel Islands that is different from the rules contained in the UNCLOS.[39]

Customary international law or 'international custom', which is defined as 'evidence of a general practice accepted as law', is recognized as source of international law.[40] Unlike treaty law, which is written law, customary international law is unwritten law. As per Article 38(1)(b) of the Statute

[35] Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980 (1155 UNTS 331)).
[36] It should be noted that article 33 of the VCLT is concerned with the interpretation of treaties authenticated in two or more languages. This is the case for the UNCLOS (see UNCLOS, article 320). For the present report it is not considered necessary to have recourse to other language versions of the UNCLOS, apart from the English text.
[37] Article 31(2) clarifies the meaning of 'context' for the purpose of treaty interpretation and article 31(3) sets out certain matters which may be taken into account, such as (amongst other things) subsequent practice in the application of the treaty or relevant rules of international law applicable in the relations between parties.
[38] Responsibility and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Advisory Opinion) (ITLOS, Case No 17, 1 February 2011), para. 57; Maritime Dispute (Peru v Chile), Judgment of 27 January 2014, para. 57.
[39] The UNCLOS only allows archipelagic States to draw straight archipelagic baselines around their archipelagos, but not mainland States in relation to their dependent archipelagos (hereafter dependent archipelagos (of continental States)) (see UNCLOS, articles 46 and following). Other terms are also employed to refer to these archipelagos, such as mid-ocean archipelagos or outlying archipelagos. The issue of the establishment of baselines around the various archipelagos in the South China Sea is further considered below in section 6.5.
[40] Statute of the International Court of Justice (available at www.icj-cij.org/statute), Article 38(1)(b).

of the International Court of Justice (ICJ), it is formed by State practice and recognition on the part of States as law.[41] This means that in order for a rule of customary international law to exist two requirements need to be met simultaneously: (i) there is general uniform and consistent State practice; and (ii) that general practice needs to accepted as law. As regards the first requirement, the case law indicates that complete uniformity is not necessary but substantial uniformity is; similarly, complete consistency is not required. The second requirement means that:

> Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. [...] The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.[42]

As has been observed, '[i]nternational courts tend to infer the existence of *opinio juris* from a general practice, from scholarly consensus, or from its own or other tribunals' previous determinations.'[43] As the ICJ recently recalled 'the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States'.[44] In instances where it is relevant to consider the content of customary international law, we will assess that content or the existence of specific rules by adopting the approach international courts and tribunals have taken in this respect.

The determination of the content of specific rules based on the rules of interpretation outlined above may result in different outcomes. In some cases it will be possible to identify their content and implications with more certainty than in other cases. This may be explained by two examples. There would seem to be little room for argument that the breadth of the territorial sea under the UNCLOS and customary international law may not exceed 12 nautical miles, 'measured from baselines determined in accordance with [international law]'.[45] The determination as to whether a State complies with this rule only requires measuring whether the outer limits of its territorial sea are within 12 nautical miles of its baselines.[46]

An example of a much more flexible rule is provided by Articles 74 and 83 of the UNCLOS on the delimitation of the exclusive economic zone and the continental shelf, respectively. Common paragraph 1 provides:

> The delimitation of the [exclusive economic zone/continental shelf] between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

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[41] *Ibid*.
[42] North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) (Judgment of 20 February 1969) [1969] ICJ Rep 3, para. 77.
[43] James Crawford Brownlie's Principles of Public International Law, 9th edition, p. 24.
[44] Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia), Judgment of 13 July 2023, para. 46.
[45] UNCLOS, article 3.
[46] It may be noted that in this case there may also be scope for argument concerning the legality of specific outer limits. For instance, article 12 of the UNCLOS allows for the inclusion in the territorial sea of roadsteads beyond 12 nautical miles from the baselines. However, that exception does not detract from the determinacy of the general rule for determining the outer limits of the territorial sea. The same consideration applies where there is a question about the legality of the baselines employed by the coastal State for determining the breadth of the territorial sea – a situation that is not uncommon.

Although courts and tribunals have endowed this nebulous provision with more specific content by adopting a standard approach to the process of delimiting maritime boundaries, it may be more difficult to assess whether specific claims of States are in accordance with an outcome based on the law than in the case of the rule on the breadth of the territorial sea.

In our analysis we are cognizant of the challenges in determining the specific content of individual rules with certainty and will identify the scope for different interpretations where this is considered to be pertinent in assessing the position of individual States.

3. The use of international law in States' rhetoric

3.1 Introduction

Various States in the context of the South China Sea have advanced the concept of 'rules-based order' when discussing the international legal order.[47] This concept has, however, been rejected by other States, including China.[48] For this reason, it is important to analyze the concept of 'rules-based order', including how it has been developed, why it is being used by some States and opposed by others, and the justifications that have been offered in that respect (section 3.2). In carrying out this analysis, we also examine the concepts of 'lawfare' and 'strategic litigation' that have been used to characterize how States employ international law (of the sea) as a foreign-policy tool (section 3.3).

3.2 Rules-based order

While the use of the term 'rules-based order' has gained prominence in press releases, policy documents and scholarly writings, the content of this concept remains elusive. The term is most frequently invoked by Western States, while others, most noticeably China and Russia, remain skeptical and dismissive of it.[49] As for scholars, the term 'rules-based order' appears most frequently in the works of political scientists as well as international lawyers, but each seems to have a different conception of what the term entails. For the purposes of this report, the most pertinent questions in relation to the usage of rules-based order include: (i) whether it carries the same meaning as 'international law', and if not, what else it encompasses; and (ii) the implication of the invocation of rules-based order in the particular context of the South China Sea. Each of these questions will be addressed in turn below.

3.2.1 The relationship between rules-based order and international law

For both the opponents and proponents of the rules-based order concept, international law remains relevant and forms part of the concept of 'rules-based order'. Where they differ is the centrality of international law within the order. The rules-based order has been described by scholars as 'concentric circles of increasingly more authoritative and determinate rules'.[50] The outside of these concentric circles comprises of political statements of intent, and at the core are treaties and customary rules of international law to which states have legally consented. The position of the German Federal Foreign Office provides a pertinent illustration of how they perceive rules-based order and international law to be different:

> International law refers to the legally binding rules on the relations between subjects of international law such as states. The political term rules-based order encompasses the

[47] See below sections 3.2.2 and 3.2.3.
[48] *Ibid*.
[49] As Jorgensen has commented, 'the division between proponents and critics of the rules-based order discourse is largely identical to the divisions between Western and non-Western interpretations of basic rules of international law.' See: Malcolm Jorgensen 'The Jurisprudence of the Rules Based Order: The Power of Rules Consistent with but Not Binding under International Law' (2021) 22(2) *Melbourne Journal of International Law*, p. 233.
[50] Malcolm Jorgensen 'China is overturning the rules-based order from within' (available at https://www.lowyinstitute.org/the-interpreter/china-overturning-rules-based-order-within).

> legally binding rules of international law, but extends also to non-binding norms, standards and procedures in various international fora and negotiating processes.[51]

The opponents of the concept emphasize the difference between legally and non-legally binding rules. This means that for the opponents the conduct of States should only be regulated by the inner concentric circle of binding international rules, as they are based on the fundamental principles of sovereignty and consent. The main criticism that the opponents have against rules-based order seems to be that while international law is based on the principle of sovereign equality of States, a 'rules-based order' detached from the requirement of consent may become an order of the strong, or an order by dictate of the majority.[52]

In contrast, proponents of rules-based order, while not discarding law, appeal to the dynamic relationship between legal and non-legal rules. Based on this dynamism between binding and non-binding rules, however, as remarked by commentators:

> [A]ctors may strategically create and deploy formal and informal lawmaking procedures in an attempt to undermine, change, and reorient substantive legal provisions with which they disagree, and advocate for legal norms that most closely fit their substantive preferences.[53]

The result is that the outside of the concentric circles may differ depending on who the actors are and what they advocate for. These outside layers may then impact on how the legal rules at the core are deployed and interpreted. This consequence has important implications for the South China Sea disputes.

How is the concept of rules-based order employed in the practice of States? While Western States are generally considered to be in favor of the concept, their official statements show different understandings, particularly in terms of its relationship with international law. Although the variants of the rules-based order can be traced back to the end of the Cold War, the increased preference for the term 'rules-based order' is closely associated with the United States.[54] In the 2000 National Security Strategy of the United States the term 'rules-based international order' was mentioned only once,[55] while in the 2015 version the number increased to five times.[56] Variants of the rules-based order appeared eight times in the 2022 version.[57] However, alongside 'rules-based order', these documents interestingly continue to refer to 'international law', while the 2017 US National Security Strategy makes no mention of rules-based order, only international law.[58] Thus, it would seem that while there increasingly is a preference for the employment of the term 'rules-based order', it cannot be concluded with certainty that the US is seeking to replace international law by it. For the US, the avoidance of references to international law may be

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[51] Quote cited in Jorgensen, n 49 at p. 232.
[52] Stefan Talmon 'Rules-based order v. international law?' (available at https://gpil.jura.uni-bonn.de/2019/01/rules-based-order-v-international-law/).
[53] Mark A Pollack and Gregory C Shaffer 'The Interaction of Formal and Informal International Lawmaking' in Joost Pauwelyn, Ramses A Wessel and Jan Wouters (eds), *Informal International Lawmaking* (Oxford University Press, 2012) p. 252.
[54] Shirley Scott 'The Decline of International Law as a Normative Ideal' (2018) 49 *Victoria University of Wellington Law Review*, p. 637.
[55] https://history.defense.gov/Portals/70/Documents/nss/nss2000.pdf?ver=vuu1vGIkFVV1HusDPL21Aw%3d%3d.
[56] https://history.defense.gov/Portals/70/Documents/nss/NSS2015.pdf?ver=TJJ2QfM0McCqL-pNtKHtVQ%3d%3d.
[57] https://www.dote.osd.mil/Portals/97/pub/articles/2022%20National%20Security%20Strategy%2020221012.pdf.
[58] National Security Strategy of the United States of America (December 2017) (available at https://trumpwhitehouse.archives.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf).

intentional in light of its own failure to comply with international law on various occasions and thus would raise questions of hypocrisy.[59]

With regards to other Western States, while they also frequently and increasingly invoke the term 'rules-based order', these States continue to refer to the term 'international law' and acknowledge its relevance.[60] It may be argued that the employment of both terms indicates that either in their views, rules-based order and international law are not synonymous but complementary,[61] or that it is not clear which one they prefer.[62] What is common in the use of the term by Western States is that they purposely employ rules-based order 'to convey a sense of disruption' and to specifically denote the existence of an outcast who is acting and relying on power to undermine an accepted global order.[63] In other words, Western States employ the term most frequently in their attempt to criticize the conduct of other States. In this way, the term rules-based order creates a sense of us v. them. It then becomes both a sword to attack 'them', *i.e.*, those deemed to be acting in contravention of the interests of the global order, and a shield to paint the image of 'us' as staying within and protecting this order. This underlying connotation is arguably absent with the more neutral term 'international law'.

It is no surprise that States most critical to the use of rules-based order are those usually at the receiving end of the criticism, namely Russia and China. Russia noted:

> the trend of our Western partners to make fewer references to international law or even remove it from the international lexicon altogether. Instead of the well-established term 'international law' they are attempting to use a new expression, 'a rules-based order'. [64]

Lavrov sees this as an approach that 'goes beyond universal, multilateral institutions' in which 'they want to uphold their exclusive position on these issues and do not want to negotiate.'[65]

China, for its part, has stated that:

> First, we often hear the talk about a rules-based international order by some countries. But what kind of rules are they talking about? And who are the rule makers? No one has given us a clear and precise answer. In fact, the so-called rules-based international order

[59] Scott, n 54 at p. 635.

[60] See, for example, the statements of G7, NATO, the Netherlands, Australia, Germany. The Declaration issued by the Heads of State at the conclusion of the 2022 Madrid Summit of NATO which stated that '[w]e adhere to international law and to the purposes and principles of the Charter of the United Nations. We are committed to upholding the rules-based international order' (available at https://www.international.gc.ca/news-nouvelles/2021/2021-05-05-g7-communique.aspx?lang=eng). It may be noted that some of these organizations, such as G7 or NATO, include the US in their membership. This strengthens the point made above that the US's preference for rules-based order over international law is not clear.

[61] G7 using the term 'international rules-based order' when discussing South China Sea, while also mentioning the UNCLOS and the 2016 Award. It is not clear whether G7 views the latter two as part of the international rules-based order. Specifically with regard to China, G7 'encourage[s] China, as a major power and economy with advanced technological capability, to participate constructively in the *rules-based international system*' (G7 Foreign and Development Ministers Communiqué (6 April 2019) (available at https://www.international.gc.ca/news-nouvelles/2021/2021-05-05-g7-communique.aspx?lang=eng), para. 13 (emphasis provided).

[62] It may be noted that certain States, such as the Netherlands, also employ the term 'international legal order'. It would seem, however, that this term is closely linked to 'international law' and is used to describe the setup of international law. See, *e.g.*, International legal order (available at https://www.government.nl/topics/international-peace-and-security/international-legal-order).

[63] Jorgensen, n 49 at p. 226.

[64] Foreign Minister Sergey Lavrov's remarks and answers to questions at a roundtable discussion with the participants of the Gorchakov Public Diplomacy Fund in the videoconference format, Moscow, April 21, 2020 (available at https://mid.ru/en/foreign_policy/news/1430804/).

[65] *Ibid*.

> advocated by some is really intended to create another system outside the existing system of international law and to seek legitimacy for double standards and exceptionalism. I would like to emphasize that there is only one order in the world, that is the international order based on international law. There is only one set of rules, and they are the basic norms governing international relations based on the purposes and principles of the UN Charter. There is no room for ambiguity on matters of principle, and the positions must be clearly staked out. It is time that those concepts that aim to confuse the public be put to rest.[66]

In response to the G7 statement 'encourag[ing] China, as a major power and economy with advanced technological capability, to participate constructively in the rules-based international system',[67] China responded as follows:

> For some time, the topic of the international system and international rules has been raised frequently worldwide. We believe it is good news that everyone wants to follow the rules, but we hope the relevant parties can specify what international system and rules they are talking about when they discuss them. What the vast majority of the international community uphold are the basic norms governing international relations based on the purposes and principles of the UN Charter, the multilateral system with the UN at its center, and the multilateral trading system with the WTO rules at its core. I can assure you they are what China upholds.[68]

Neither Russia nor China is denying or refuting the existence of a global order. What they question is: what is included in that order? What these two States share in their denouncement of the concept of 'rules-based order' is the understanding that rules-based order is the new construct of the US and its allies aimed at imposing their rules on the rest of the world, and as such, that rules-based order is something that exists separately from international law. In their Joint Statement in 2022, Russia and China seemed to implicitly reject the rules-based order concept as being exclusive and revisionist by stating that:

> [Russia and China] intend to resist attempts to substitute universally recognized formats and mechanisms that are consistent with international law for rules elaborated in private by certain nations or blocs of nations, and are against addressing international problems indirectly and without consensus, oppose power politics, bullying, unilateral sanctions, and extraterritorial application of jurisdiction.[69]

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[66] Remarks by China's Permanent Representative to the UN Ambassador Fu Cong at the UN Security Council Open Debate on Multilateral Cooperation in the Interest of a More Just, Democratic and Sustainable World Order (16 July 2024) (available at https://www.mfa.gov.cn/eng/xw/zwbd/202407/t20240718_11456200.html).
[67] G7 Foreign Ministers Communiqué, n 61 at para. 13.
[68] Foreign Ministry Spokesperson Lu Kang's Regular Press Conference on April 8, 2019 (available at http://sv.china-embassy.gov.cn/exp/declare/201904/t20190408_4865659.htm).
[69] Joint Statement of the Russian Federation and the People's Republic of China on the International Relations Entering a New Era and the Global Sustainable Development (04 February 2022) (available at http://www.en.kremlin.ru/supplement/5770).

3.2.2 Rules-based order in the South China Sea

In the context of the South China Sea, the rules-based order language has also started to appear in official political statements made by some of the claimant States. For example, President Ferdinand Marcos Jr. of the Philippines remarked that his participation in the 43rd ASEAN Summit 'will highlight our advocacies in promoting a rules-based international order, including in the South China Sea, strengthening food security, calling for climate justice.' [70] It has also been observed that rules-based order is also increasingly being used 'by Vietnamese foreign policy-makers in official policy statements and during meetings with foreign leaders (particularly with the Quad member countries,[71] the EU, and ASEAN member States)'.[72] However, it is not clear what these States have in mind when using this term. Most Southeast Asian countries find themselves in the middle of the flow of different cultural influences and having had a long history – even to this day – of being caught in between superpower rivalry. Thus when it comes to defining rules-based order, the question is whether Southeast Asian countries will adopt their own conception of what constitutes rules-based order or whether they will look to and adopt one that is pushed for by outside powers. As one commentator has remarked:

> A big question for ASEAN now is to explore the possible existence of consensus on rules-based order, what rules are to be followed, what visions actors have about the institutions that must be used to establish the rules, what their mechanisms would be, and how decisions are reached within them?[73]

The Australia-ASEAN Declaration issued on 6 March 2024 reiterates the importance of an open, inclusive, transparent, resilient 'rules-based order' and an ASEAN-centered 'rules-based regional architecture' that upholds international law and built upon ASEAN-led mechanisms.[74] Such a statement suggests a vision of a more unique regional order. However, it remains unclear whether and how this regional order differs from the global order, or whether it is leaning towards a regional implementation of the global order.

Because the line between binding and non-binding rules may be blurred in the construction of rules-based order, rules-based order may allow users to '[fashion] a framework of rules that are consistent with and therefore reinforce particularistic understandings of global legal order'.[75] Perhaps due to this flexibility, China has shown more receptiveness to the concept than one might think in light of the strong statements against rules-based order discussed above. China can take advantage of the muddling of the line between binding and non-binding legal commitments in order to evade compliance with the rules of the UNCLOS, including those interpreted by the *South China Sea* arbitration, while still maintaining the image of complying with the rules. We have seen such an attempt when China invoked a 'solemn commitment' made

[70] Chihiro Shikata 'South China Sea issue: Enhancing the rule of law under the US-China competition' (available at https://www.griffith.edu.au/__data/assets/pdf_file/0030/1519590/Shikata-rule-of-law-SCS-web.pdf).
[71] The Quad countries include Australia, India, Japan and the United States.
[72] Thuy T. Do 'Vietnam's prudent pivot to the rules-based international order', (2023) 99(4) *International Affairs* p. 1557.
[73] Kwa Chong Guan 'Competing Rules-Based Orders in Southeast Asia' RSIS Commentary 2023 (available at https://www.rsis.edu.sg/rsis-publication/rsis/competing-rules-based-orders-in-southeast-asia/).
[74] The Melbourne Declaration – A Partnership for the Future (6 March 2024), paras 6-9, 11 (available at https://asean.org/wp-content/uploads/2024/03/ASEAN-AU-agreed-Melbourne-Declaration_FINAL.pdf).
[75] Jorgensen, n 49 at p. 241.

under the Declaration on the Conduct of Parties in the South China Sea (DOC)[76] – a non-legally binding instrument – in order to reject the *South China Sea* arbitral tribunal's jurisdiction to resolve the dispute under the UNCLOS.[77] Thus, the use of rules-based order may allow China to redraw the boundaries between law and politics while not overtly overthrowing the order and the rules of international law.[78] The blurred boundaries certainly serve its interest as the only major power in the South China Sea region.

In short, it seems that when it comes to the concept of 'rules-based order', China has been vocally critical of its usage, condemning it as a term coined and advocated for the benefit of Western States, particularly the US. At the same time, in light of China's tendency to emphasize the importance of rules beyond the UNCLOS to justify its actions in the South China Sea, it is not surprising to see China is exploiting the potentials of the rules-based order concept, particularly with regards to the blurred line between binding and non-binding rules, in serving its rhetoric in the South China Sea. Such a fluid distinction may in particular be appropriate for China to use in insisting on a non-binding COC. [79]

3.3 Lawfare

Similar to rules-based order, lawfare is not a term with a generally accepted definition. Unlike rules-based order, it is not a term that is widely used by States in their official statements, but rather by analysts and scholars when studying State behavior. In the early days of its introduction, the term carried a neutral meaning as 'a strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective.'[80] As such, the term is placed in juxtaposition with warfare, as an alternative approach to using warfare to achieve certain purposes, and as such is a 'value-neutral' concept that is 'intrinsically neither good nor bad'.[81] The neutral value has at times been questioned, for the term has come to be associated with a negative connotation denoting 'for better or worse, only the misuse or distortion of legal forms'.[82] However, over the years, 'lawfare' has again found some distance with both warfare and the negative connotation. The term is currently commonly understood as the 'purposeful use of law to achieve a particular strategic, operational, or tactical objective against a particular adversary of bolster the legitimacy of one's own, or weaken the legitimacy of one's adversaries strategic, operational or tactical objectives'.[83] As such, 'lawfare' now serves the purposes of not only showing the legality of one's action, but also persuading others of that legality. Given the nature of international law as being horizontal and amenable to politics, the function of legitimacy of lawfare is as significant—if not more significant—than the function of legality.[84]

[76] Adopted on 4 November 2002 (available at https://asean.org/declaration-on-the-conduct-of-parties-in-the-south-china-sea-2/).
[77] See section 10 of this report.
[78] Jorgensen, n 50.
[79] On the negotiation of a COC and the question of it being legally binding or not see further section 10 of this report.
[80] CJ Dunlap Jr 'Lawfare Today: A Perspective' (2008) 3 *Yale Journal of Int'l Affairs* p. 146.
[81] Orde F. Kittrie *Lawfare: Law as a Weapon of War* (OUP 2016) p. 6.
[82] 'A brief history of the term and the site' (available at https://www.lawfaremedia.org/about/our-story).
[83] Carola Frey 'Lawfare and Power Politics in the South China Sea: Perspectives on Resilience' (available at https://resiliencejournal.e-arc.ro/wp-content/uploads/2023/04/2023_I_1_C_Frey_Lawfare.pdf).
[84] Congyan Cai *The Rise of China and International Law* (OUP 2019) p. 273.

What does lawfare then entail, particularly in the context of the South China Sea? Amongst the claimant States of the South China Sea, China is the only State which has adopted an official policy relating to lawfare. In 2003, the People's Republic of China's Central Military Commission (CMC) officially introduced 'the Three Warfares' (*san zhong zhanfa)* in its *Political Work Guidelines of the People's Liberation Army,* which includes public opinion, psychological, and legal warfare. As law is one of the key pillars, it is clear that, as one commentator has observed:

> China's leaders clearly see a path forward in using legal norms to frame China's ambitions to influence global governance and counter the actions of the United States. This will likely bring renewed attention to defining and shaping China's claims in the South China Sea.[85]

China's strategy has been to use law to consolidate its expansive claims in the South China Sea, both through the adoption of domestic legislation as well as advancing its own interpretation of international law in order to support its claims. In other words, for China law plays a central role in supporting its positions. Specifically with regards to the law of the sea, China's strategy has been to downplay the significance of the UNCLOS, while elevating the importance of customary international law in combination with employing broad and general terms such as 'state sovereignty' to claim rights beyond the UNCLOS. As will be shown in sections 5 and 6 of this report, this strategy is particularly evident with regards to China's two key claims in the South China Sea, namely historic rights and claims relating to the straight baselines of dependent archipelagos, which have increasingly gained prominence since the *South China Sea* arbitration.[86] By placing particular emphasis on customary international law, it has been argued that China is attempting to open up 'spaces in which it can act as a norm entrepreneur and in so doing consolidate its 'rightful' regional position', while at the same time, still remaining a 'legitimate actor within the international legal–political system'. [87] It should, however, be noted that such spaces are not without limitations, as unconvincing interpretations of the law that undermine the UNCLOS have not been accepted by States supporting the UNCLOS.[88] Finally, it has also been observed that China is engaged in 'a quest for enforcing particularistic claims rather than promoting a comprehensive re-writing of the law of the sea.'[89] This strategy aligns with what the term 'rules-based order' enables and lends credence to the argument made above that China is also benefiting from the use of the rules-based order, even if criticizing its use by others at the same time.

The instrumentalization of law to serve and support a State's political and strategic interests is thus the key characteristic of lawfare. However, understanding lawfare as merely the practice of using law blurs the distinction between, on the one hand, using the law in a legally consistent way with the relevant legal framework and, on the other hand, using the law in a way that undermines the law. One can, for example, see the difference between lawfare activities by China and those

[85] Ryan Lucas 'Realising the Great Change: Beijing's South China Sea Lawfare Strategy' (available at https://www.9dashline.com/article/realising-the-great-change-beijings-south-china-sea-lawfare-strategy).
[86] On the definition of the term 'dependent archipelagos' see note 39.
[87] Douglas Guilfoyle 'The rule of law and maritime security: understanding lawfare in the South China Sea' (2019) 95(5) *International Affairs* p. 999.
[88] See, for example, sections 6.4 and 6.5 of this report.
[89] Christian Schultheiss 'What Has China's Lawfare Achieved in the South China Sea?' (available at https://www.iseas.edu.sg/wp-content/uploads/2023/06/ISEAS_Perspective_2023_51.pdf).

of other States in the region, *e.g.*, the Philippines in instituting arbitral proceedings, and Malaysia's and Viet Nam's submissions to the CLCS concerning the outer limits of their continental shelf beyond 200 nautical miles. The former is a type of lawfare that obscures claims and insists on invalidated claims whereas the latter tries to clarify claims in accordance with Article 76 of the UNCLOS and incentivize dispute settlement based on the UNCLOS provisions.[90]

One prominent aspect of lawfare is recourse to international courts and tribunals. As theorized by Guilfoyle, 'litigation can affect the politics or the polices of respondent governments' and thus 'litigation may be part of a wider campaign seeking long-term change beyond the immediate object of the case.'[91] The long-term change that is sought by the litigant is built upon the power of international courts and tribunals to name violations in order to gain legitimacy from the favorable decision, and from thereon to 'knit together broader constituencies of support'. In other words, 'the two most direct impacts of international litigation are inflicting a legitimacy penalty on a respondent and mobilizing a wider constituency to support an applicant'.[92]

It follows, therefore, that the initiation of the dispute and the outcome to be achieved from a judicial body are not the end goal, they are merely a means to an end. This theory would suggest it is up to the Philippines to mobilize the support needed in order to inflict legitimacy interests on China and its position in the South China Sea. Here again, the importance of legitimacy as part of lawfare comes to the forefront. It is precisely this need to ensure legitimacy that also plays a key role in how China engages with the *South China Sea* arbitral awards. As predicted by one scholar, China would be engaging in counter-lawfare against the arbitral awards by, first, countering the attack on its legitimacy with the argument that the dispute is either inherently 'political' and thus non-justiciable, and by, second, maintaining that the dispute is solely bilateral, thus attempting to persuade others not to join the applicant's cause.[93] The use of lawfare in the context of the *South China Sea* arbitration will be examined in more detail in section 7.4 of this report.

3.4 Conclusions

The practice of States indicates that law still plays an important role as a foreign-policy tool. What is clear is that States frequently resort to the language of law to explain or justify their behavior, whether in the form of 'international law', 'rules-based order' or 'lawfare'. As such, law has a legitimizing effect, and States continue to assign such an effect to the law.

What is unclear is what States understand as the law or what the content of that law is. This has allowed room for concepts such as 'rules-based order' or 'lawfare' to develop over the past decades, even though it is still difficult to pinpoint the exact content of these concepts. For rules-based order, it would seem that it has an all-encompassing nature, comprising of both binding and non-binding rules, with the line between the two not being clearly demarcated. On the one hand, one could argue that such a blurred lined between binding and non-binding rules

[90] *Ibid*.
[91] Douglas Guilfoyle 'Litigation as Statecraft: Small States and the Law of the Sea' (2023) *British Yearbook of International Law,* p. 16.
[92] *Ibid*., p. 19.
[93] Cai, n 84 at pp. 302-305.

also exists with respect to the international legal order in the sense that non-binding rules may inform the content of obligations[94] and impact on the future development of the law. As a result, it may be further argued that the concept of 'rules-based order' adds little to what is already in existence. On the other hand, while concepts such as 'rules-based order' and 'international legal order' all contain binding and non-binding rules, there are still fundamental differences in how these rules are applied. Under international law or the classic understanding of the international legal order, non-binding rules are widely acknowledged to be such, and can only become binding through a particular mechanism of consent.[95] Such a clear distinction is not found in the invocation of the concept of 'rules-based order', where non-binding rules may have effect in their own right. Thus the line between binding and non-binding rules remains more elusive, seemingly creating space for States to justify their behavior based on non-binding rules or a broad and general understanding of 'consent'. With regards to lawfare, States' strategies to turn to international courts and the subsequent reaction to the proceedings and their outcome by other States provide clear examples of how lawfare may both be used to reinforce one's own position or to delegitimize and invalidate an opponent's claim. We will reflect upon these issues in the remainder of this report.

[94] For example, non-binding rules may become binding through a *renvoi* (reference) to them by a treaty. The *renvois* contained in various articles of the UNCLOS allow for the incorporation of non-binding rules into the UNCLOS, thus making them binding on UNCLOS States parties (see, for example, UNCLOS, articles 207-212). In this case, States have consented that non-binding rules may become binding through the inclusion of a *renvoi* and that the non-binding rules do not have the power to become binding on their own. See, *e.g.*, Lan Ngoc Nguyen 'Expanding the Environmental Regulatory Scope of UNCLOS Through the Rule of Reference: Potentials and Limits' (2022) 52(4) *Ocean Development & International Law* p. 419.
[95] *Ibid*.

4. China and customary international law of the sea

4.1 Introduction

China is a party to the UNCLOS and has always maintained that 'as a State Party, China attaches great importance to UNCLOS, implements it to the letter and spirit, and safeguards its authority and integrity with concrete actions.'[96] Yet, in the past decade or so, and particularly since the 2016 award of the *South China Sea* arbitration was rendered, China has increasingly shifted its focus away from the Convention and given more weight to rules other than those contained in the UNCLOS to justify its claims in the South China Sea. As will be analyzed below, China's current position in this regard is that 'UNCLOS is not the whole of the maritime order' and that general international law continues to govern issues which are not regulated under the UNCLOS. General international law – or customary international law – is particularly pertinent to China's two key claims in the South China Sea, namely claims to historic rights and claims relating to dependent archipelagos of continental States. Due to the centrality of these two concepts in China's South China Sea policy, this section will discuss China's turn towards customary international law.

4.2 The turn towards customary international law

Between these two claims, China's claim based on historic rights in the South China Sea has been around for a longer time than that relating to dependent archipelagos. China has long insisted it has historic rights claims in the South China Sea. However, it has also deliberately maintained an ambiguous policy with regards to the scope, content and legal basis of this claim. As analyzed in section 5, China first made references to historic rights in its domestic law in 1998, but seemingly without the intention of claiming historic rights over the whole of the South China Sea. The nine-dash line was not introduced to the international community until 2009. Until 2016, the UNCLOS was still perceived to be the primary legal basis for China's maritime claims. However, arguably in response to the *South China Sea* tribunal's conclusion that China's historic rights claim is in violation of the UNCLOS, China has started basing its claim on customary international law by advancing the argument that historic rights are mainly regulated by customary international law and are a matter not regulated by the Convention.[97] The weight given to customary international law is clear not only in the Chinese government's official statements, but also in writings by Chinese legal scholars.[98] As noted by one commentator, 'the lawfare aspect in this example is rather obvious: China's legal experts and scholars are very much aware that their claim does not stand ground under the UNCLOS. Hence, an alternative narrative, based on customary international law, specifically focusing on state practice is presented.'[99]

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[96] China Stays Committed to Peace, Stability and Order in the South China Sea (18 April 2022) (available at http://nz.china-embassy.gov.cn/eng/ztbd/NANHAI2015/202204/t20220418_10669054.html).
[97] Xinmin Ma 'Analyzing the illegality and invalidity of the South China Sea Arbitration Awards via six 'whys'; MA Xinmin's Keynote Speech at the Symposium on "South China Sea Arbitration Awards and International Law"' (8 May 2024) (available at http://in.china-embassy.gov.cn/eng/zgxw/202405/t20240508_11301270.htm).
[98] See, *e.g.*, Chinese Society of International Law 'Critical Study of the South China Sea Arbitral Award' (2018) 17 *Chinese Journal of International Law* pp. 207-748 (hereafter CSIL Critical Study).
[99] Marta Hermez 'Global Commons and the Law of the Sea: China's Lawfare Strategy in the South China Sea' (2020) 22 *International Community Law Review* p. 559.

In the same vein, China now maintains that 'the regime of continental States' outlying archipelagos is not regulated by the UNCLOS, and the rules of general international law should continue to be applied in this field.'[100] China's claim that it is allowed to establish straight baselines around its dependent archipelagos is not entirely new, but has clearly been revived in the aftermath of the *South China Sea* arbitration. While China claims that it 'has consistently claimed and exercised territorial sovereignty and maritime rights over the Nanhai Zhudao, including Dongsha Qundao, Xisha Qundao [Paracel Islands], Zhongsha Qundao and Nansha Qundao [Spratly Islands], as a unified whole',[101] such a claim to Nanhai Zhudao 'as a unified whole' conflicts with the historical record. The concept of 'Nanhai Zhudao' seems to have first appeared in China's official statements only in 2016, earlier legislation or declarations referred to the islands as distinct entities.[102] Indeed, the use of the term 'Nanhai Zhudao' and China's classification of the Spratly Islands as a 'geographical, economic, and political entity' that meets the criteria for the definition of an 'archipelago' under international law[103] could be seen as a response of the *South China Sea* tribunal's findings concerning the maritime entitlements of the individual Spratly Islands under Article 121(3) of the UNCLOS. This became more evident in the 2019 Note Verbale protesting Malaysia's CLCS submission in which China stated that it 'has internal waters, territorial sea and contiguous zone, based on Nanhai Zhudao [Dongsha Qundao, Xisha Qundao, Zhongsha Qundao and Nansha Qundao] and that 'China has exclusive economic zone and continental shelf, based on Nanhai Zhudao.' As is further discussed in section 6.5 of this report it remains unclear what legal implications China attaches to its reliance on the term 'Nanhai Zhudao'.

With regards to the legal basis of its claims to historic rights and claims in relation to the islands in the South China, in the 2019 Note Verbale China referred to 'international law and practice' without mentioning the UNCLOS.[104] Various Notes Verbales submitted by China in 2020 again referred to international law as the legal basis of its claims, but included a reference to the 'UN Charter and UNCLOS', alongside with 'historical practice' to support its position.[105] It was not until 2020 onwards that a clear turn towards general international law and away from the UNCLOS in China's policy can be discerned. China's Note Verbale CML/63/2020 provided the first clear and express statement presenting China's claims as falling outside the scope of the UNCLOS. In paragraph 1 of this Note Verbale, China puts forward the argument that:

[100] Permanent Mission of the PRC to the United Nations, communication CML/32/2021, August 16, 2021 (available at https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/20210816ChnNvUNen.pdf).
[101] Xinmin Ma, note 97.
[102] See, *e.g.*, China's Law on the Territorial Sea and Contiguous Zone of 25 February 1992 (available at https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1992_Law.pdf).
[103] Xinmin Ma, note 97.
[104] Permanent Mission of the PRC to the United Nations, communication CML/14/2019, December 12, 2019 (available at https://www.un.org/depts/los/clcs_new/submissions_files/mys85_2019/CML_14_2019_E.pdf).
[105] Permanent Mission of the PRC to the United Nations, communication CML/42/2020, April 17, 2020 (available at https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_04_17_CHN_NV_UN_003_EN.pdf).

> UNCLOS does not cover everything about the maritime order. Paragraph 8 of the preamble of UNCLOS emphasizes that 'matters not regulated by this Convention continue to be governed by the rules and principles of general international law'.[106]

After stating this general proposition on the relationship between the Convention and customary international law, in paragraph 3 of the Note observed that:

> China attaches great importance to the provisions and applicable conditions set forth in the UNCLOS for the drawing of territorial sea baselines. At the same time, China believes that the long-established practice in international law related to continental States' outlying archipelagos shall be respected.[107]

China's Note Verbale CML/32/2021 issued in 2021 continued with the rhetoric of presenting China's claims as falling outside the scope of the UNCLOS – this time for both historic rights claims and the regime of continental States' dependent archipelagos.[108] Notably, paragraph II of the note observes that:

> Being a State party to UNCLOS, China complies with and applies UNCLOS with a rigorous and responsible attitude. It must be pointed out that UNCLOS is not the whole of the maritime order. The State Parties to UNCLOS affirm that 'matters not regulated by this Convention continue to be governed by the rules and principles of general international law.[109]

China's clearest and most extensive explanation of the role of general international law to date can be found in the recent keynote speech given by the Chinese Director-General of the Department of Treaty and Law of China's Ministry of Foreign Affairs at the 'South China Sea Arbitration Awards and International Law' symposium. In his speech, he alleged that the Tribunal disregarded the fact that 'general international law can serve as the legal basis for maritime claims'. The statement also expands upon China's justifications of the 'well-established' regimes of continental states' dependent archipelagos and historic rights in general international law.[110]

4.3 Conclusions

It is submitted that the emergence of China's claims based on general international law, next to its continued reliance on the UNCLOS, or at least the adoption of an official policy regarding general international law as part of the basis for these claims, is a recent development. It is considered highly likely that this development is in effect partly a response to the outcomes of the *South China Sea* arbitration.

China is in fact claiming that customary international law continues to govern activities at sea next to the UNCLOS. However, customary international law requires substantially uniform,

[106] Permanent Mission of the PRC to the United Nations, communication CML/63/2020 of 18 September 2020 (available at https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_09_18_CHN_NV_UN_009_e.pdf). For a further discussion of these positions see section 6.5 of this report.
[107] *Ibid*.
[108] Communication CML/32/2021, n 100.
[109] *Ibid*.
[110] Xinmin Ma, note 97, section II. Also see the discussion of these issues in sections 5 and 6.5 of this report.

consistent State practice and the belief that the practice is required as a matter of law.[111] As is set out in section 5 of this report, China's claimed historic rights do not meet these requirements. Similarly, as analyzed in section 6.5 of this report, China's claim of a rule of customary law allowing continental states to enclose their dependent archipelagos in straight archipelagic baselines does not meet these requirements.

[111] See further section 2 of this report.

5. China's claimed historic rights

5.1 Introduction

China's claim of historic rights constituted and continues to constitute a key element of China's South China Sea policy. This claim was also one of the key points that the *South China Sea* arbitration considered. This section first provides an overview of China's claim to historic rights (section 5.2), then it discusses how the *South China Sea* tribunal dealt with China's historic rights claim (section 5.3) and concludes with an assessment of whether and how China's claim has changed after the arbitration (section 5.4).

5.2 Overview of China's claim to historic rights

China's historic rights claim is closely connected with the nine-dash line. This line was originally created and used by the Republic of China in 1947 containing 11 dashes and was later adopted by the People's Republic of China in 1949. A number of historians have argued that the line was an 'islands attribution' boundary until at least 1974, delimiting a claim to the disputed islands, features, and adjacent waters created solely to delineate China's sovereignty over territory, including that over the features in the South China Sea.[112]

China cites various domestic legal instruments as proof to reaffirm China's longstanding historic rights in the South China Sea. However, China made no official claim to waters resembling the area encompassed by the nine-dash line for several decades after 1947. In the 1958 Declaration on the Territorial Sea, China made reference to 'high seas' separating China's mainland and coastal islands from 'all other islands belonging to China'.[113] As has been noted, such reference to 'high seas' indicates that at this point in time China did not claim the entirety of the ocean space within the nine-dash line, which contradicts an interpretation of the nine-dash line as a claim of historic waters.[114] It may also be noted that the high seas are open to all states under the regime of freedom of the high seas. Activities under this regime in principle do not lead to the creation of historic rights.[115] From 1974 onwards, China started employing vague terms such as 'adjacent' and 'relevant' to characterize the waters next to the islands it claimed. The first time China indicated that it held historic rights in its domestic legislation was in Article 14 of China's 1998 Exclusive Economic Zone and Continental Shelf Act.[116]

On the international plane, China first introduced the nine-dash line map as the basis for its claim in the South China Sea in a 2009 Note Verbale,[117] which was submitted in response to the Joint

[112] Chris P. C. Chung, 'Drawing the U-Shaped Line: China's Claim in the South China Sea, 1946-1974' (2016) 42 *Modern China*, p. 38.
[113] Declaration of the Government of the People's Republic of China on China's Territorial Sea (4 September 1958), para. 1.
[114] Limits in the Sea No. 143, n 5 at p. 18.
[115] See *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States)*, Judgment, ICJ Reports 1984, p. 246, para. 235. The *South China Sea* arbitral tribunal cited the findings in *Gulf of Maine* to support its conclusion that China had relinquished the rights it may have held in the waters allocated to the exclusive economic zones of other States by the UNCLOS. See South China Sea, Award on Merits, n 26 at paras 256-257.
[116] Available at https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/chn_1998_eez_act.pdf.
[117] Communication CML/17/2009, n 17.

Submission by Malaysia and Viet Nam to the CLCS concerning the outer limits of the continental shelf beyond 200 nautical miles in the southern part of the South China Sea.[118] However, this Note Verbale did not contain any reference to 'historic rights'. Rather it only includes claims to sovereignty over the islands in the South China Sea and the ambiguous language of 'sovereign rights and jurisdiction over relevant waters as well as the seabed and subsoil thereof' accompanied by a map of the nine-dash line. The use of 'relevant waters' was later changed to 'relevant rights' in the 2011 Note Verbale CML/8/2011, which could be interpreted to be moving closer to claiming 'historic rights'.[119] China only expressly referred to 'historic rights' in its Statement on China's South China Sea Sovereignty, Rights and Interests issued on 12 July 2016, *i.e.*, the exact same day as the rendering of the *South China Sea* arbitral award on the merits.[120] Two key points are worth highlighting in relation to this Statement: (i) it neither specified what these historic rights comprise nor their geographical scope; and (ii) the basis for this claim was also provided in a general manner as 'national law and international law, including the [UNCLOS]', indicating that the UNCLOS was still perceived to be one of the primary legal bases for China's maritime claims.

5.3 Historic rights in the South China Sea arbitration

Although the claim to historic rights occupies a central role in China's South China Sea policy, its legal basis has always been shrouded in ambiguity. The reference to 'historic rights' has been interpreted by scholars as either a claim to the entire maritime area within the nine-dash line as China's historic waters, a claim to sovereignty over land, or as simply indicating that the Chinese claim is based on historical evidence (without clarifying whether this applies to waters, land or both).[121] In the *South China Sea* arbitration, the Philippines' argument was twofold: (i) international law did not historically permit the type of expansive claim advanced by China's 'nine-dash line' and even if China did possess historic rights in the South China Sea, any such rights were extinguished by the adoption of the Convention; (ii) on the basis of the historical record of China's activities in the South China Sea, China cannot meet the criteria for having established historic rights within the 'nine-dash line'.[122] Each of these arguments will be discussed in turn.

5.3.1 Historic rights under the UNCLOS

The relationship between historic rights and the UNCLOS, particularly the question as to whether the former continue to exist in the maritime zones specified in the UNCLOS was of particular

[118] China submitted a similar note in reaction to Viet Nam's submission concerning the North Area, which was made a day after the joint submission of Malaysia and Viet Nam (Permanent Mission of the PRC to the United Nations, Communication CML/18/2009 of 7 May 2009 (available at https://www.un.org/depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm.pdf).
[119] Permanent Mission of the PRC to the United Nations, Communication CML/8/2011, April 14, 2011 (available at https://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2011_re_phl_e.pdf).
[120] Full text of Chinese govt statement on China's territorial sovereignty and maritime rights and interests in South China Sea (available at http://english.www.gov.cn/archive/publications/2016/07/12/content_281475391807773.htm).
[121] See Florian Dupuy and Pierre-Marie Dupuy, 'A Legal Analysis of China's Historic Rights Claims in the South China Sea' (2017) 104 *American Journal of International Law*, p. 124.
[122] *South China Sea*, Award on Merits, n 26 at para. 192.

importance in the Philippines' submissions. In relation to the territorial sea, the tribunal stated that:

> [t]raditional fishing rights constitute a vested right, and the Tribunal considers the rules of international law on the treatment of the vested rights of foreign nationals to fall squarely within the "other rules of international law" applicable in the territorial sea [as provided for in Article 2(3) of the UNCLOS].[123]

The tribunal therefore concluded that the UNCLOS did not alter acquired rights in the territorial sea. The tribunal thus established that traditional fishing rights remain protected in the territorial sea.[124]

Beyond the territorial sea, the tribunal was faced with the question of whether 'the Convention, and in particular its rules for the exclusive economic zone and continental shelf, allow for the preservation of rights to living and non-living resources that are at variance with the provisions of the Convention?'[125] The short answer was no. The answer to this question, in the tribunal's view, rests upon the relationship between the UNCLOS and other possible sources of rights under international law',[126] which is set out in Articles 311 and 293(3) of the Convention. Applying these provisions to the relationship between the UNCLOS and historic rights, the tribunal found that historic claims that are expressly permitted or reserved by the Convention, such as historic bays and historic titles under Articles 10 and 15 'shall remain unaffected'.[127] By contrast, historic rights that are not expressly permitted or preserved by the Convention can only continue to exist 'where their operation does not conflict with any provision of the Convention or to the extent that interpretation indicates that the Convention intended the prior agreements, rules, or rights to continue in operation'.[128] Having found that the UNCLOS does not expressly permit or provide for the continued existence of historic rights to living and non-living resources in the exclusive economic zone, the continental shelf, the high seas or the Area, the tribunal embarked on an inquiry as to whether the UNCLOS intended the continued operation of such historic rights.[129] In conducting this inquiry, the tribunal resorted to the text and context of Articles 56 and 77 relating to the coastal State's sovereign rights in the exclusive economic zone and continental shelf respectively, [130] to the negotiating history of the Convention and the creation of the exclusive economic zone, as well as existing decisions in which claims involving rights in the exclusive economic zone of another State were considered. Based on the text and context of Articles 56 and 77, the tribunal found that the Convention was 'clear in superseding any historic rights that a State may once have had in the areas that now form part of the exclusive economic zone and continental shelf of another State.'[131] As for the negotiating history of the Convention, based on the fact that the UNCLOS was negotiated by consensus and that the final text represented a package deal, the tribunal observed that:

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[123] *Ibid*., paras 259, 808.
[124] *Ibid*., para. 804.
[125] *Ibid*., para. 234.
[126] *Ibid*., para. 235.
[127] *Ibid*., para. 238(a).
[128] *Ibid*., para. 238(b).
[129] *Ibid*., para. 239.
[130] *Ibid*., paras 243-246.
[131] *Ibid*., para. 247.

> [i]t is simply inconceivable that the drafters of the Convention could have gone to such lengths to forge a consensus text and to prohibit any but a few express reservations while, at the same time, anticipating that the resulting Convention would be subordinate to broad claims of historic rights.[132]

In its survey of relevant case law, the tribunal paid particular attention to distinguishing its findings from those in previous cases that were deemed contradictory, such as the *Fisheries Jurisdiction* cases before the ICJ,[133] or *Eritrea/Yemen* before an arbitral tribunal.[134] All these considerations then led the tribunal to conclude that 'any historic rights that China may have had to the living and non-living resources within the 'nine-dash line' were superseded, as a matter of law and as between the Philippines and China, by the limits of the maritime zones provided for by the Convention.'[135]

It follows that, according to the *South China Sea* tribunal, historic rights continue to exist in the territorial sea, but not in the exclusive economic zone and continental shelf as they have been superseded by the coastal State's sovereign rights in these maritime zones. The tribunal was conscious that this could be seen as a contradiction, but stated that 'the law reflects the particular circumstances of the creation of the exclusive economic zone.'[136] The tribunal saw 'nothing that would suggest that the adoption of the Convention was intended to alter acquired rights in the territorial sea',[137] but it concluded that 'the degree of control over fisheries that was ultimately given to the coastal State'[138] and more specifically the inclusion of Article 62(3) 'which would be entirely unnecessary if traditional fishing rights were preserved in the exclusive economic zone—confirms that the drafters of the Convention did not intend to preserve such rights [in the exclusive economic zone].'[139]

Even though the tribunal did not directly discuss historic rights in the high seas, its exposition of China's purported exclusive historic rights to living and non-living resources sheds some light on this matter. As will be explained below, the tribunal's approach suggests that claims to historic rights based on fishing activities in the high seas would unlikely succeed as such activities are exercised as a high freedom and as such cannot create exclusive user rights.[140] In other words, historic fishing rights simply cannot develop in the high seas to start with.

While the authors of the present report share the tribunal's conclusions regarding the existence of historic rights in the territorial sea, the exclusive economic zone and the high seas, we observe that the tribunal's reasoning leaves room for debate. First, the tribunal's understanding of the relationship between the UNCLOS and historic rights through Articles 311 and 293 may be

[132] *Ibid*., para. 254.
[133] *Ibid*., para. 258.
[134] *Ibid*., para. 803.
[135] *Ibid*., para. 262.
[136] *Ibid*., para. 801.
[137] *Ibid*., para. 804(c).
[138] *Ibid*., para. 803.
[139] *Ibid*., para. 804(b).
[140] See also Yoshifumi Tanaka, 'Reflections on Historic Rights in the South China Sea Arbitration (Merits)' (2017) 32 *International Journal of Marine and Coastal Law* p. 475; Clive R Symmons, 'Historic rights in the light of the Award in the South China Sea Arbitration: what remains of the doctrine now?' in S. Jayakumar et al. (eds), *The South China Sea Arbitration: The Legal Dimension* (Edward Elgar, Northampton 2018), p. 31.

questioned. In particular, the refence to Article 293 raises questions as this article does not regulate the relationship between different sources of law, but merely serves to specify what sources of law an UNCLOS tribunal may apply in the course of dispute settlement. As for Article 311, the tribunal did not provide any explanation as to how this article, which governs the relationship between the Convention and *other international agreements*, might 'appl[y] equally to the interaction of the Convention with other norms of international law, such as historic rights, that do not take the form of an agreement'.[141] Article 311 deals specifically with the relationship between treaties,[142] as does Article 30 of the VCLT that the tribunal invoked as an example of the general rules concerning the interaction of different bodies of law.[143] As historic rights have been accepted by international courts and tribunals to exist under customary international law, [144] the relationship between the UNCLOS and historic rights then becomes one between treaty law and rights existing under customary law. As the tribunal held, historic rights are those asserted at variance with the Convention,[145] the treaty rule and the customary rule are in conflict. The tribunal should have explained how such a conflict could be resolved in the context of the South China Sea. The rules of international law applicable to resolve conflict between treaty law and customary law are not straightforward. One suggestion for dealing with this conflict has been to apply 'the traditional legal presumptions that later law trumps prior law (*lex posterior derogat legi priori*) and that specialized law trumps general law (*lex specialis derogat legi generali*).'[146]

Second, treaties may prevail over custom as between the parties to the treaty if states agree in the treaty concerned to derogate from existing customary rules.[147] However, there is nothing in the UNCLOS that points to such an agreement. The Preamble of the Convention clearly acknowledges that 'matters not regulated by this Convention continue to be governed by the rules and principles of general international law'. The invocation of Article 309 which prohibits reservations to the UNCLOS to demonstrate the 'objective of limiting exceptions to the Convention to the greatest extent possible'[148] was also misplaced. The argument made by Chinese scholars that 'Article 309 of the Convention deals with the issue of the integrity of the Convention rather than the comprehensiveness of the Convention'[149] seems correct.

Third, the tribunal's reliance on Article 62(3) of the UNCLOS seemed misplaced. Article 62(3) provides an illustrative list of factors that a coastal States may take into account when giving

[141] South China Sea, Award on Merits, n 26 at para. 235.
[142] Nele Matz-Lück, 'Final Provisions' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck, Hart, Nomos, 2017) p. 2010.
[143] South China Sea, Award on Merits, n 26 at para. 237.
[144] For example, in *Tunisia/Libya*, the ICJ stated that while there are references to historic bays, historic titles or historic reasons in the then draft UNCLOS, 'it seems clear that the matter continues to be governed by general international law' *Continental Shelf (Tunisia/Libyan Arab Jamahiriya),* Judgment, ICJ Reports 1982, p. 18, para. 100. Note, however, that customary international law provides for conditions that need to be met for a State to claim historic rights. As analyzed below, the *South China Sea* tribunal concluded that China did not meet these conditions in the South China Sea.
[145] South China Sea, Award on Merits, n 26 at para. 275.
[146] Brian D Lepard, *Customary International Law: A New Theory with Practical Applications* (Cambridge University Press, 2010) 272; *contra* Sophia Kopela, 'Historic Titles and Historic Rights in the Law of the Sea in the Light of the South China Sea Arbitration' (2017) 48 *Ocean Development and International Law*, p. 184 (arguing that the principle of *lex specialis* should apply as historic rights are 'established on the basis of a particularized regime').
[147] *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* (Judgment) [1969] ICJ Reports, p. 3, para. 72; Christopher Greenwood, 'Sources of International Law: An Introduction' (2008) (available at https://legal.un.org/avl/pdf/ls/greenwood_outline.pdf).
[148] South China Sea, Award on Merits, n 26 at para. 245.
[149] CSIL Critical Study, n 98 at p. 429.

access to its exclusive economic zone to other States.[150] In other words, habitual fishing constitutes one of the considerations that coastal States may take into account, but it does not imply a right held by other States on the same footing as the exclusive sovereign rights of the coastal State. Thus, this article does not support the existence of historic rights in the exclusive economic zone, because a State does not need to get access permission from the coastal State if it already held historic rights.

That being said, the argument made by Chinese scholars that the *South China Sea* tribunal's findings were inconsistent with precedents, most notably that *Eritrea/Yemen* arbitration[151] is not correct. It is submitted that there are fundamental differences between the two cases. The crux of the matter in *Eritrea/Yemen* is that the findings on the traditional regime were part of the issue of sovereignty, over which the parties agreed in their arbitration agreement to confer jurisdiction to the tribunal.[152] While the South China Sea tribunal stated that it 'disagrees with the conclusions of the tribunal in *Eritrea/Yemen*',[153] it went on to acknowledge that the different conclusions could be explained by the fact that 'that tribunal was able to reach the conclusions it did only because it was permitted to apply factors other than the Convention itself under the applicable law provisions of the parties' arbitration agreement'.[154] This allowed the *Eritrea/Yemen* tribunal to make findings on traditional fishing that went beyond the confines of the UNCLOS:

> In finding that the Parties each have sovereignty over various of the Islands the Tribunal stresses to them that such sovereignty is not inimical to, but rather entails, the perpetuation of the traditional fishing regime in the region. [...] In the exercise of its sovereignty over these islands, Yemen shall ensure that the traditional fishing regime of free access and enjoyment for the fishermen of both Eritrea and Yemen shall be preserved for the benefit of the lives and livelihoods of this poor and industrious order of men.[155]

It is worth noting that in *Eritrea/Yemen*, the Eritrean fishermen's traditional fishing rights had been recognized and approved by Yemen.[156] As has been pointed out by some scholars, '[i]n practice [...] some States still recognize historic rights that existed prior to the Convention'.[157] This means that historic fishing rights may continue to exist subject to the recognition of the coastal State. The *South China Sea* tribunal itself acknowledged this possibility when discussing Article 62(3), stating that:

> [t]he Convention does not, of course, preclude that States may continue to recognise traditional fishing rights in the exclusive economic zone in their legislation, in bilateral fisheries access agreements, or through regional fisheries management organisations.[158]

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[150] James Harrison and Elisa Morgera, 'Article 62' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck, Hart, Nomos, 2017) p. 500.
[151] CSIL Critical Study, n 98 at p. 447.
[152] Territorial Sovereignty and Scope of the Dispute (Eritrea and Yemen) (1998) RIAA XXII, p. 209, para. 2.
[153] *South China Sea,* Award on Merits, n 26 at para. 803.
[154] *Ibid*.
[155] *Eritrea/Yemen*, n 153 at para. 259.
[156] *Ibid*, paras 107 and 109.
[157] Leonardo Bernard, 'The Effect of Historic Fishing Rights in Maritime Boundaries Delimitation' in Harry N. Scheiber and Moon Sang Kwon (eds*), Securing the Ocean for the Next Generation* (Berkeley Law School 2013) p. 9 (listing the examples of India and Sri Lanka, Japan as accepting fishing rights of fishermen from Korea and China, Australia and Papua New Guinea).
[158] *South China Sea,* Award on Merits, n 26 at para. 804(b).

Thus, it would seem that the South China Sea tribunal's approach did not differ from precedents. The position would be that under the UNCLOS, traditional fishing rights indeed do not exist in principle unless a coastal State recognizes their continued existence. In light of the situation under the Convention, such recognition is a matter of comity rather than an obligation in law. In any case, whether such rights can be claimed by a certain State has to be examined on a case-by-case basis based on whether they have met the requirements set out under customary international law. In other words, historic rights cannot be claimed unilaterally, they need to meet the requirements set out under international law as discussed below.

5.3.2 China's claim to historic rights in the South China Sea

As China did not participate in the *South China Sea* arbitration, when examining the Philippines' submissions the tribunal could only rely on the position of China contained in its prior Notes Verbales and official statements. The tribunal proceeded to examine China's claim based on three assumptions, namely that China's historic rights claim was: (i) a claim to exclusive rights to living and non-living resources, (ii) a claim to non-exclusive rights to living and non-living resources, and (iii) a historic claim to the islands in the South China Sea.

The need to examine the nature of China's claim to historic rights arose in *South China Sea* because, as analyzed in section 7 of this report, China had made a declaration under Article 298 excluding, *inter alia*, disputes over historic titles from the compulsory jurisdiction of UNCLOS tribunals. The tribunal therefore had to consider whether China's claim in the South China Sea was one relating to historic title.[159] This necessarily required the tribunal to examine the different categories of historical claims.

The UNCLOS uses the term 'historic' when referring to historic bays or historic title under Articles 10, 15 and 298(1). Historic fishing rights and historic waters are not mentioned as such in the UNCLOS. In some of the cases before the ICJ and ad hoc tribunals, the terms 'historic rights' and 'historic title' or historic rights' and 'historic waters' have been used interchangeably, creating confusion regarding whether they carry the same meaning under international law.[160]

The *South China Sea* tribunal acknowledged that 'there exists, within the context of the law of the sea, a cognizable usage among the various terms for rights deriving from historical processes'.[161] On the basis of that observation, the tribunal made a distinction between these different terms:

> The term 'historic rights' is general in nature and can describe any rights that a State may possess that would not normally arise under the general rules of international law, absent particular historical circumstances. Historic rights may include sovereignty, but may equally include more limited rights, such as fishing rights or rights of access, that fall well short of a claim of sovereignty. 'Historic title', in contrast, is used specifically to refer to

[159] *Ibid,* para. 205.
[160] See, e.*g.*, *Tunisia/Libya*, n 144 at p. 18, para. 100; *Eritrea/Yemen* n 153 at p. 209, paras 23-26.
[161] *South China Sea*, Award on Merits, n 26 at para. 225.

> historic sovereignty to land or maritime areas. 'Historic waters' is simply a term for historic title over maritime areas, typically exercised either as a claim to internal waters or as a claim to the territorial sea [...]. Finally, a 'historic bay' is simply a bay in which a State claims historic waters.[162]

Essentially, the tribunal confirmed that historic rights are categorized into two groups: (i) historic rights based on sovereignty (historic title) and (ii) historic rights short of sovereignty.

With regards to the first, the tribunal found that China's claim within the nine-dash line could not be one to historic title because China had unequivocally accepted the freedom of navigation and overflight, signifying that it did not consider the areas within the nine-dash line to be equivalent to its territorial sea or internal waters.[163] Put differently, because China did not claim rights on the basis of sovereignty, its claim did not qualify as a 'historic title' claim.

In terms of historic rights short of sovereignty, including non-exclusive historic fishing rights, the requirements for the establishment of these rights include: the continuous exercise of the claimed rights and acquiescence on the part of other affected States.[164] The tribunal stated that historic rights are 'exceptional rights' which 'accord a right that a State would not otherwise hold, were it not for the operation of the historical process giving rise to the right and the acquiescence of other States in the process.'[165] Thus, 'in order to establish historic rights in the waters of the South China Sea, it would be necessary to show that China had engaged in activities that deviated from what was permitted under the freedom of the high seas and that other States acquiesced in such a right.'[166] This means that to establish the exclusive historic right to living and non-living resources within the 'nine-dash line', 'it would be necessary to show that China had historically sought to prohibit or restrict the exploitation of such resources by the nationals of other States and that those States had acquiesced in such restrictions.'[167] The tribunal, however, could not find any evidence suggesting that China had 'historically regulated or controlled fishing in the South China Sea, beyond the limits of the territorial sea'.[168]

Finally, with regards to historical claims to islands in the South China Sea, the tribunal emphasized that 'nothing in this Award should be understood to comment in any way on China's historic claim to the islands of the South China Sea'.[169] At the same time, the tribunal also made clear that its findings on historic rights to living and non-living resources did not limit China's claims to maritime zones.[170] In essence, due to its jurisdictional scope, the tribunal was careful not to make – or not be seen to make – any conclusion on issues relating to territorial sovereignty.

In short, in order for historic rights to be established, two requirements must be met, namely the continuous exercise of the claimed rights and acquiescence on the part of affected States. In

[162] *Ibid*.
[163] *Ibid*., para. 213.
[164] *Ibid*.
[165] *Ibid*., para. 268.
[166] *Ibid*., para. 270.
[167] *Ibid*.
[168] *Ibid*.
[169] *Ibid*., para. 272.
[170] *Ibid*.

most of its statements – official or unofficial – China has focused on the first element.[171] However, while evidence of long usage is necessary, it is not sufficient. As the tribunal emphasized, acquiescence is of equal importance. The tribunal also explained why the requirement of acquiescence was not met in the case of China's historic rights claim in the South China Sea.[172] On the point of acquiescence, the Chinese statements in response to the arbitration tend to either ignore it or be conspicuously brief.[173]

5.4 China's claim to historic rights after the arbitration

The *South China Sea* arbitration's findings on China's claim to historic rights and the nine-dash line were perhaps the most awaited part of the arbitration, precisely because of the centrality of China's historic rights claim in the South China Sea disputes. It is unsurprising that in China's response to the arbitral award, the objection to historical rights findings occupies a prominent position. However, it is noteworthy that in the two official statements issued on the day of the award and the day after,[174] China did not appear to base its historic rights on the nine-dash line. This has been interpreted to mean that 'China wants to reduce the significance of the map in its claim'.[175] China's shift away from the 'nine-dash line' in its South China Sea policy was also noted by some other States.[176] On the ground and over time, however, the map has not been completely abandoned. In August 2024, the Ministry of Natural Resources of China issued the 2023 edition of its 'Standard Map' in which the nine-dash line included a new dash to encompass Taiwan, thus creating a 'ten-dash line.'[177] While some commentators have observed that the added dash 'does not exactly do anything more than mere symbolism, since it does not alter the basis of Beijing's longstanding claims in the South China Sea',[178] the fact that the tenth dash encompasses Taiwan might point to the original use of the dash-line as a claim to sovereignty over the islands. Whether or not China is still relying on the nine/ten-dash line for its claim does not change the fact that China has not given up its historic rights claims in the South China Sea until today.

As observed in sections 4 and 7 of the report, China continues to reject the tribunal's finding that its historic rights claim violates the UNCLOS, by adopting the position that its claim is based on customary international law. In terms of the normative content, China maintains the position that:

> The arbitral tribunal concluded that China's claims of historic rights in the South China Sea exceeded the provisions of the Convention, leading to legal mischaracterization and

[171] See *e.g.*, Xinmin Ma, n 97.
[172] *South China Sea*, Award on Merits, n 26 at para. 275.
[173] See *e.g.*, Xinmin Ma, n 97.
[174] China's Statement of 12 July 2016, n 120; China's White Paper 'China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea' (13 July 2016) (available at http://www.xinhuanet.com/english/nhbps2016/en/index.html).
[175] Feng Zhang, 'Assessing China's response to the South China Sea arbitration ruling' (2017) 71 *Australian Journal of International Affairs*, p. 445. See also, Andrew Chubb, 'Did China just clarify the nine-dash line?' (available at https://eastasiaforum.org/2016/07/14/did-china-just-clarify-the-nine-dash-line/).
[176] Malaysian FM sees shift in China's justification of sweeping South China Sea claims (available at https://www.rfa.org/english/news/china/malaysia-southchinasea-01182022151031.html).
[177] A copy of the map is available at https://www.channelnewsasia.com/asia/china-new-map-territory-g20-asean-summit-india-malaysia-russia-indonesia-protest-3737366.
[178] Koh Swee Lean Collin, 'Commentary: What one more dash in the South China Sea tells us about China's game' (available at https://www.channelnewsasia.com/commentary/china-south-china-sea-map-ten-dash-line-3777486).

> erroneous finding that China had no historic rights in the South China Sea. In terms of time, the tribunal incorrectly held that China's claims of historic rights began in 2009. In terms of characterization, the tribunal erred in limiting China's historic rights in the South China Sea to rights over natural resources, thereby disregarding its sovereign historic rights. In terms of scope, the tribunal erroneously limited China's historic rights to functional rights concerning resources and activities, overlooking China's historic rights over Nanhai Zhudao and relevant waters. Furthermore, the tribunal erroneously characterized China's navigation, fishing, resource exploitation and other activities in the South China Sea as exercising freedom of the high seas rather than exercising historic rights.[179]

Each of these arguments, however, seems to be a repetition of the existing Chinese position without any meaningful engagement with the tribunal's relevant findings. For example, in terms of time, the tribunal already acknowledged that the nine-dash line was introduced in 1948 and looked at Chinese domestic legislation going back to the 1950s which, according to Chinese officials, consistently maintain that 'China's sovereignty and relevant rights in the South China Sea were formed throughout the long course of history'.[180] In terms of characterization and function, China in this statement is making claims that are just as ambiguous as before. It is not at all clear what 'China's historic rights over Nanhai Zhudao and relevant waters' or 'China's sovereign historic rights' encompass or, more importantly, how they differ from those examined by the tribunal. For example, 'China's historic rights over Nanhai Zhudao' seems to be a historic claim over the islands which – as analyzed above – the tribunal found to be an issue falling beyond the scope of its jurisdiction. Similarly, 'China's historic rights over relevant waters' or 'China's sovereign historic rights' are equally shrouded in vagueness. These are neither legal terms nor are they rights provided for under international law. The former seems to allude to historic rights to maritime zones based on sovereignty. The latter, with the term 'sovereign rights' which is used under the UNCLOS in connection with living and non-living resources, seems to imply non-exclusive historic rights over resources. As analyzed above, the tribunal canvassed all the possible explanations for China's claim to historic rights, considered both types of historic rights that China seemingly invoked here, examined their validity and rejected them. Lastly, the claim that China's navigation, fishing, and other activities in the South China Sea amounted to something more than the exercise of high seas freedoms also has to be rejected in the absence of evidence of acquiescence from other States as mentioned above.

In short, while there appears to be a slight shift in the legal basis that China invokes to justify its historic rights claim in the South China Sea, namely using customary international law instead of the UNCLOS, the content of the claim has not changed much from that considered and rejected by the *South China Sea* tribunal.

[179] Xinmin Ma, n 97.
[180] *South China Sea*, Award on Merits, n 26 at para. 200.

5.5 Conclusions

Given the centrality of historic rights in China's claims in the South China Sea and perhaps also the vast scope of this claim, the Philippines' submission regarding the nine-dash line and China's historic rights therein was undoubtedly one of the most prominent aspects of the *South China Sea* arbitration. The tribunal engaged in a detailed analysis of different types of historic rights under international law and conducted a thorough review of the extent to which historic rights are preserved under the UNCLOS. Based on this, the tribunal was able to assess and eventually reject the legality of China's claimed historic rights in the South China Sea.

While certain questions may be raised with regards to the reasoning provided by the tribunal, it is now confirmed that under the UNCLOS, historic rights continue to exist in the territorial sea, but they no longer exist in the exclusive economic zone and continental shelf as they have been superseded by the coastal State's sovereign rights in these maritime zones. The tribunal also found that China's historic rights claim in the South China Sea does not meet the requirements for the establishment of historic rights under customary international law. As a result, this claim is invalid under international law.

After the arbitration, there have been suggestions that China is quietly stepping away from basing its historic rights on the nine-dash line. However, this does not mean that China is giving up its historic rights claims in the South China Sea. The only aspect of China's historic rights claim that has been clarified in the aftermath of the arbitration seems to be the basis of its historic rights claim, namely customary international law, which, according to China, has to be prioritized over the rights of States under the UNCLOS. Apart from this, China continues to criticize the findings of the tribunal in a superficial manner and continues to maintain its historic rights claim in defiance of the tribunal's conclusion. Despite China's rhetoric, it is important for the international community to uphold the tribunal's findings and categorically reject any attempts by China to enforce its historic rights claim on the grounds. The *South China Sea* arbitration provides an important and authoritative reference point and basis to reject China's historic rights claim and makes it problematic for China to credibly rely on legal positions that are in not in accordance with the UNCLOS and customary international law.

6. Maritime entitlements and baselines of islands and related matters

6.1 Introduction

As was observed in the introduction to this report, the development of the law of the sea in the second half of the 20th century – and in particular the extension of coastal State jurisdiction beyond the territorial sea – has been one of the key factors in shaping the disputes concerning the South China Sea.

As was also observed, most of the South China Sea is located within 200 nautical miles of the coasts surrounding it and as such part of the exclusive economic zone, while leaving a significant area of high seas at its center, which from its northern to southern extremity measures more than 750 nautical miles, while from east to west its widest extent is around 220 nautical miles. As the practice of the coastal States indicates, most of the seabed and subsoil of this high seas enclave likely is part of the continental shelf beyond 200 nautical miles as defined by Article 76 of the UNCLOS. This picture changes dramatically once the islands in the Paracel Islands and the Spratly Islands and on Scarborough Shoal are taken into consideration. Apart from the fact that their potential maritime zones overlap with most of the maritime zones of the coasts surrounding the South China Sea, most of the high seas enclave as described above is within 200 nautical miles of these islands. This situation has made the question regarding the maritime entitlements of these islands an essential legal aspect of the South China Sea disputes.

As Article 121(2) of the UNCLOS indicates, islands in principle are entitled to the same maritime zones as mainland coasts. However, Article 121(3) introduces an important exception to this general rule, providing that '[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.' Viet Nam, Malaysia and the Philippines have taken the position that this provision is applicable to the islands in the Paracel Islands, the Spratly Islands and on Scarborough Shoal.[181] For the latter two groups this position was confirmed by the tribunal in the *South China Sea* arbitration. For China, classifying all islands concerned as article 121(3) rocks would have a dramatic impact on the potential extent of its rights as a coastal State in the South China Sea. The southward extent of China's exclusive economic zone and continental shelf under this scenario would be determined from the baselines of the island of Hainan, even if China were to have sovereignty over all of the disputed islands in the South China Sea.

China seemingly has not explicitly claimed that individual islands in the South China Sea do not fall under the scope of application of Article 121(3) of the UNCLOS. However, China has taken the

[181] This is among others evident from the submissions of these States to the CCLS (see further note 19, which lists these submissions, while pinpointing the information that indicates this position on article 121(3)).

position that the islands are entitled to an exclusive economic zone and continental shelf.[182] As will be discussed in the present section, China has also developed a number of additional arguments seeking to enhance its claims to coastal State maritime zones, including seemingly claiming: that certain submerged features as such are part of China's maritime zones; rights based on low-tide elevations; and arguing that China is entitled to enclose the island groups within straight baselines. These issues will be considered in the following subsections of the report dealing respectively with the legal regime applicable to: permanently submerged features; low-tide elevations; islands including rocks; and straight baselines.

6.2 Permanently submerged features

The UNCLOS makes a fundamental distinction between mainland coasts, islands and low-tide elevations on the one hand, and the permanently submerged seabed beyond on the other hand, in relation to the determination of the baselines for determining the entitlement to and breadth of maritime zones. Mainland coasts, islands and low-tide elevations provide the starting point for determining the maritime entitlements of coastal States. Article 5 of the Convention provides that the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast. This provision is applicable to mainlands and islands.[183] The low-water line along a low-tide elevation may only be used as part of the baseline where it 'is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island'.[184] Points on the low-water line along mainland coasts and islands may also be used to draw various types of straight baselines in accordance with the relevant provisions of the UNCLOS.[185] Straight baselines may also be drawn to and from low-tide elevations, but additional restrictions on their use apply.[186] The baseline provisions of the UNCLOS imply that the part of the ocean's seabed that is permanently submerged cannot contribute to the normal baseline, while straight baselines cannot be drawn to and from permanently submerged features.[187]

The question of the legal status of permanently submerged features is pertinent to the current analysis due to China's ambiguous position in this respect. Before further addressing this point, it may be observed that other claimant States and third States have rejected that submerged features are able to generate coastal State maritime entitlements. For instance, a diplomatic note of Viet Nam of 30 March 2020 in response to a Chinese Note Verbale of 12 December 2019 among others observed:

> the baselines of the groups of islands in the East Sea [South China Sea], including the Hoang Sa Islands [Paracel Islands] and the Truong Sa Islands [Spratly Islands], cannot be

[182] China's 1998 Exclusive Economic Zone and Continental Shelf Act provides that the exclusive economic zone and continental shelf are adjacent to its territorial sea as measured from the baselines of the territorial sea (1998 Exclusive Economic Zone and Continental Shelf Act, n 116 at article 2. The Act does not exclude any islands from its scope of application. For a further discussion of the Chinese position, see also below text after note 218.
[183] See, *e.g.,* UNCLOS, articles 13(1) and 121(2).
[184] *Ibid*., article 13(1).
[185] *Ibid*., articles 7, 9-10 and 47.
[186] See *ibid*., articles 7(4) and 47(4).
[187] A limited exception in this respect is included in article 7(2) of the Convention. However, as this provision indicates, when the basepoints concerned are selected they have to be located on the low-water line along the coast. Article 7(2) is not relevant to the current discussion related to submerged features in the South China Sea.

drawn by joining the outermost points of their respective outermost features; low-tide elevations or submerged features are not capable of appropriation and do not, in and of themselves, generate entitlements to any maritime zones.[188]

China, as far as can be ascertained, has not publicized baselines located on permanently submerged features in the South China Sea.[189] However, certain positions of the Chinese authorities or other Chinese sources might be taken to imply that China does consider that it is entitled to either claim submerged features as part of its territory or use points on submerged features in connection with the definition of the baselines for determining the extent of its maritime zones. For instance, China reportedly considers James Shoal its most southern territory in the Spratly Islands.[190] James Shoal, which is permanently submerged, is over 150 nautical miles south of Louisa Reef, the closest high-tide feature in the Spratly Islands,[191] and over 50 nautical miles to the north of the island of Borneo. Another example is provided by the definition and use of the term 'Zhongsha Qundao', which translates as Zhongsha Islands or Zhongsha Archipelago. According to *Limits in the Seas* No. 150 the China Geographical Names Committee defines Zhongsha Qundao as including 'Scarborough [Shoal], Macclesfield Bank, and other submerged features such as Saint Esprit Shoal and Helen Shoal (north), Constitution shoal (central), and Dreyer Banks (south)'.[192] All of these features, except for a number of islands on Scarborough Shoal, are permanently submerged. Scarborough Shoal is separated from these other features by waters that reach water depths of over 4,000 meters. Scarborough Shoal in Chinese is named Huangyan Dao. In that light, referring to Chinese sovereignty over Zhongsha Qundao without any qualification, as is for instance done in a Chinese Note Verbale of 12 December 2019,[193] seems to imply a claim to sovereignty over a large part of the South China Sea that is beyond 12 nautical miles from any land territory.[194] The CSIL Critical Study in two instances intimates that China's land territory and sovereignty in Zhongsha Qundao are not limited to Scarborough Shoal.[195]

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[188] Permanent Mission of the Socialist Republic of Viet Nam to the United Nations, Communication No. 22/HC-2020 (available at https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/VN20200330_ENG.pdf). See also, *e.g.*, the documents referenced in Limits in the Seas No. 150, n 5 at p.14, notes 51 and 52.

[189] China established straight baselines around the Paracel Islands in 1996 (Declaration of the Government of the People's Republic of China of 15 May 1996 on the Baselines of the Territorial Sea of the People's Republic of China of 15 May 1996 (available at https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/chn_mzn7_1996.pdf) and around Scarborough Shoal in 2024 (Statement of the Government of the People's Republic of China on the Baseline of the Territorial Sea Adjacent to Huangyan Dao of 10 November 2024 (available at https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/ChnMzn165StatementEN.pdf). All of the basepoints concerned are located on the low-water line of islands or low-tide elevations (for a figure illustrating this point for the Paracel Islands see, *e.g.*, Limits in the Seas No. 150, n 5 at p. 15, figure 3; and for a figure for Scarborough Shoal see https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/MAPS/ChnMzn165Chart.jpg). The legality of these straight baselines is further discussed in section 6.5.

[190] For further details see Limits in the Sea No. 143, n 5 at p. 17.

[191] For a discussion of the status of Louisa Reef see note 5 above.

[192] Limits in the Seas No. 150, n 5 at p. 11. Other Chinese sources refer to Zhongsha Qundao as including Scarborough Shoal and Macclesfield Bank, without referring to the other features (see, *e.g.*, CSIL Critical Study, n 98 at pp. 217 and 351).

[193] Note Verbale CML/14/2019 of 12 December 2019 (available at https://www.un.org/depts/los/clcs_new/submissions_files/mys85_2019/CML_14_2019_E.pdf).

[194] The possible extent of what might be a Chinese sovereignty claim over Zhongsha Qundao is illustrated in Limits in the Seas No. 150, n 5 at p. 12, Map 2. The assumption for this depiction of a possible Chinese claim is explained at *ibid.*, p. 15.

[195] Reference is made to respectively the land territory of China including 'Zhongsha Qundao (including Macclesfield Bank and Scarborough Shoal)' (CSIL Critical Study, n 98 at p. 217) and China having 'always enjoyed territorial sovereignty over and maritime entitlements based on Zhongsha Qundao (including Huangyan Dao [Scarborough Shoal])' (*ibid.*, p. 351).

The applicable law indicates that sovereignty over permanently submerged parts of the seabed is only possible in two specific instances. First, this concerns those parts of the seabed that are enclosed by the baselines for measuring the breadth of the territorial sea.[196] Such areas either are part of the internal waters of the coastal State or the archipelagic waters of an archipelagic State. Second, this concerns the seabed of the territorial sea. In these instances, the sovereignty over submerged features is the result of the general rules concerning the establishment of baselines along the coast and the limits of the territorial sea.[197] Beyond the territorial sea, claims to sovereignty are excluded by Article 89 of the UNCLOS, which provides '[n]o State may validly purport to subject any part of the high seas to its sovereignty.'[198] As Article 58(2) of the UNCLOS indicates, Article 89 is also applicable to the exclusive economic zone.

6.3 Low-tide elevations

Low-tide elevations are not land territory. Land territory, be it a mainland or an island, remains permanently above water, while low-tide elevations only are above water at low tide. This difference has led to the question whether the rules on the acquisition of territory are also applicable to low-tide elevations or whether different rules apply in that case. This question was also at issue in the *South China Sea* arbitration. The Philippines in its final submissions maintained that low-tide elevations beyond the territorial sea 'are not features that are capable of appropriation by occupation or otherwise'.[199] As a consequence, low-tide elevations that are located in the exclusive economic zone and/or continental shelf are part of those zones.[200] China, in its Position Paper on the jurisdiction of the *South China Sea* tribunal, also addressed the issue as to whether low-tide elevations may be appropriated. The Position Paper did not answer this question, but argued that it was not a 'question concerning the interpretation or application of the Convention'.[201] As a consequence, China rejected that the tribunal had the competence to deal with this issue.[202] Among the claimant States other than the Philippines, at least Viet Nam also has taken the position that low-tide elevations are not capable of appropriation.[203]

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[196] UNCLOS, article 2(1).
[197] *Ibid*., article 2(2).
[198] A similar obligation is contained in article 2 of the Convention on the High Seas (adopted on 29 April 1958; entered into force 30 September 1962 (450 UNTS 11)), which provides: 'The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty'. As the preamble to the Convention on the High Seas indicates its provisions are 'generally declaratory of established principles of international law'.
[199] See *South China Sea*, Award on Merits, n 26 at para. 112. In its submissions, the Philippines referred to a number of specific low-tide elevations and its exclusive economic zone and continental shelf (see, *e.g.*, *ibid*., paras 291 and following). However, that position is based on the general proposition as reflected in the main text of this report.
[200] See *South China Sea*, Award on Merits, n 26 at para. 112.
[201] Position Paper on the Matter of Jurisdiction in the South China Arbitration Initiated by the Republic of the Philippines, 7 December 2014 (available at http://nl.china-embassy.gov.cn/eng/hldt/201412/t20141216_2655633.htm), para. 25 (hereafter Position Paper). China has issued statements that refer to sovereignty over low-tide elevations that are beyond the territorial sea of a mainland or island. This for instance concerns the position that China has sovereignty over Second Thomas Shoal (Ren'ai Jiao). However, these statements do not indicate whether that sovereignty is the result of an alleged rule that allows claiming sovereignty over low-tide elevations, or the fact that Second Thomas Shoal could be included in straight baselines around the Spratly Islands. Both these positions are problematic under public international law (see further sections 6.3 and 6.5) and were rejected by the Tribunal in the *South China Sea* arbitration, which found that Second Thomas Shoal is within the continental shelf and exclusive economic zone of the Philippines (*South China Sea*, Award on Merits, n 26 at para. 1203(B)).
[202] Position Paper, n 201 at para. 25. Whether this actually is a question that is not concerned with the interpretation or application of the Convention is questionable. As is also indicated below, article 89 of the UNCLOS is pertinent to this question. The question of the jurisdiction of the tribunal is not further considered in this section as it is not necessary for dealing with the issue of substance.
[203] Note Verbale No. 22/HC-2020, n 188.

Both the Philippines and China have relied on the jurisprudence of the ICJ to support their position on the question of the status of low-tide elevations.[204] The tribunal in its 2016 award subscribed to the view of the ICJ expressed in *Territorial and Maritime Dispute (Nicaragua v. Colombia)* that 'low-tide elevations cannot be appropriated, although 'a coastal State has sovereignty over low-tide elevations which are situated within its territorial sea, since it has sovereignty over the territorial sea itself'.'[205]

In arriving at this view, the tribunal held that:

> low-tide elevations do not form part of the land territory of a State in the legal sense. Rather they form part of the submerged landmass of the State and fall within the legal regimes for the territorial sea or continental shelf, as the case may be.[206]

The tribunal further held that in light of this view, low-tide elevations in the exclusive economic zone and continental shelf of the Philippines were part of those maritime zones.[207]

In arriving at its view that low-tide elevations cannot be appropriated, the tribunal did not comment on any of the other jurisprudence on this point that was invoked by either the Philippines or China. China in its Position Paper had also referred to the ICJ's judgment in *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, but rejected its relevance by arguing that the Court:

> did not point to any legal basis for this conclusory statement. Nor did it touch upon the legal status of low-tide elevations as components of an archipelago, or sovereignty or claims of sovereignty that may have long existed over such features in a particular maritime area.[208]

The Position Paper also refers to the fact that in its 2001 judgment in *Qatar v. Bahrain* the Court had observed that '[i]nternational treaty law is silent on the question whether low-tide elevations can be considered to be "territory" and that the Court was not 'aware of a uniform and widespread State practice which might have given rise to a customary rule which unequivocally permits or excludes appropriation of low-tide elevations'.[209]

In assessing the Chinese argument, it may be observed that the argument of the Court on low-tide elevations in its 2001 judgment in *Qatar v. Bahrain* is only rendered in part by the Position Paper. After the text that is quoted above, the judgment observes that 'a number of permissive rules have been established with regard to low-tide elevations which are situated at a relatively short distance from a coast' in the context of the law of the sea.[210] From these rules, the Court then draws the following conclusions:

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[204] Position Paper, n 201 at para. 25; South China Sea arbitration, Memorial of the Philippines, Vol. I (available at https://files.pca-cpa.org/pcadocs/Memorial%20of%20the%20Philippines%20Volume%20I.pdf), paras 5.86 and 6.105-6.106.
[205] *South China Sea*, Award on Merits, n 26 at para. 309. The quotation is from *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, ICJ Reports 2012, p. 624, para. 26.
[206] *South China Sea*, Award on Merits, n 26 at para. 309.
[207] See, *e.g.*, *ibid*., para. 1203(B).
[208] Position Paper, n 201 at para. 25.
[209] *Ibid*., quoting from *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Judgment of 16 March 2001, ICJ Reports 2001, p. 40, para. 205.
[210] Qatar v. Bahrain, n 209 at para. 205.

> The few existing rules do not justify a general assumption that low-tide elevations are territory in the same sense as islands. It has never been disputed that islands constitute terra firma, and are subject to the rules and principles of territorial acquisition; the difference in effects which the law of the sea attributes to islands and low-tide elevations is considerable. It is thus not established that in the absence of other rules and legal principles, low-tide elevations can, from the viewpoint of the acquisition of sovereignty, be fully assimilated with islands or other land territory.[211]

The above reasoning of the Court indicates that the rules on the acquisition of territory are not as such applicable to low-tide elevations. The other rules that might make this application possible in the view of the Court do not exist, as is apparent from the part of the judgment that is quoted by the Position Paper itself. The Position Paper's claim that the Court in *Territorial and Maritime Dispute (Nicaragua v. Colombia)* did not point to any basis for its conclusion that low-tide elevations cannot be appropriated is only correct to the extent that the Court does not explicitly refer to the above reasoning in *Qatar v. Bahrain*, which in turn is ignored by the Position Paper.

The Position Paper also fails to refer to the discussion in relation to the question of sovereignty over the low-tide elevation of South Ledge in another case before the ICJ, namely *Pedra Branca*. In both *Qatar v. Bahrain* and *Pedra Branca* the Court was faced with the situation where a low-tide elevation was located in the overlapping territorial sea entitlements of the Parties.[212] In neither of these cases, although they were both concerned with issues of territorial sovereignty, did the Court make any suggestion that the status of the low-tide elevation concerned had to be determined with reference to the rules on the acquisition of territory before proceeding to a maritime delimitation. In *Qatar v. Bahrain*, the Court established a territorial sea boundary ignoring the low-tide elevation of Fasht ad Dibal, which was attributed to Qatar because it was located on its side of the maritime boundary.[213] In *Pedra Branca*, the Court recalled, after quoting extensively from paragraphs 205 and 206 from its 2001 judgment in *Qatar v. Bahrain*, that:

> in the Special Agreement and in the final submissions it *has been specifically asked to decide the matter of sovereignty separately for each of the three maritime features* [one of those being the low-tide elevation of South Ledge]. At the same time the Court has not been mandated by the Parties to draw the line of delimitation with respect to the territorial waters of Malaysia and Singapore in the area in question. [...] In these circumstances, the Court concludes that for the reasons explained above sovereignty over South Ledge, as a low-tide elevation, belongs to the State in the territorial waters of which it is located.[214]

The Philippines in its pleadings in the *South China Sea* arbitration relied on the position of the Court in *Qatar v. Bahrain* and *Pedra Branca* that a coastal State has sovereignty over a low-tide

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[211] *Ibid*.; see also *ibid*., paras 207-208. As regards the 2014 Position Paper's argument that the ICJ's judgment in *Territorial and Maritime Dispute (Nicaragua v. Colombia)* did not 'touch upon the legal status of low-tide elevations as components of an archipelago', it may be observed that this status is addressed in articles 7 and 47 of the UNCLOS. These provisions indicate that low-tide elevations that are beyond straight baselines are part of the maritime zone in which they are located.
[212] *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment, ICJ Reports 2008, p. 12, paras 293, 294; *Qatar v. Bahrain*, n 209 at para. 209.
[213] *Qatar v. Bahrain*, n 209 at paras 220-222.
[214] *Pedra Branca*, n 212 at paras 295-299 (emphasis provided).

elevation in the territorial sea due to its sovereignty over the territorial sea for arguing that a similar rule applies to the continental shelf. A low-tide elevation in that maritime zone is part of that maritime zone.[215] As was set out above, this position was also adopted by the arbitral tribunal in its 2016 award. As a consequence, the regime of the continental shelf is applicable unabridged to such a low-tide elevation. Depending on the location of the low-tide elevation concerned (*i.e.*, within or beyond 200 nautical miles from the baselines), the regimes of the exclusive economic zone or the high seas are also relevant in this connection.

This conclusion is further supported by the absence of a rule that allows for the application of the rules on the acquisition of land territory to low-tide elevations. In addition, reference may again be had to Article 89 and 58(2) of the UNCLOS, which prohibit States to claim sovereignty over any part of the high seas or the exclusive economic zone. The above analysis makes the claim of China's Position Paper at paragraph 25 that sovereignty or claims of sovereignty may have long existed over low-tide elevations problematic.

6.4 Islands and rocks

The legal regime of islands is defined in Article 121 of the UNCLOS. Article 121 reads:

Regime of islands

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.

Paragraph 1 provides a definition of the term 'island', while paragraph 2 indicates that islands are entitled to the same maritime zones as other land territory. Paragraph 3 carves out an exception to paragraph 2 for one specific category of islands, namely rocks which do not meet the requirements set out in that paragraph in relation to human habitation and economic life of their own.

The differences between the claimant States in the South China Sea as regards the regime of islands center on paragraph 3 of Article 121.[216] As far as can be ascertained, China and other claimant States do not have different views on the interpretation of paragraph 1 of Article 121. In relation to the requirement of 'naturally formed', both China and other claimant States have indicated that this requires that a feature has to be assessed on the basis of its natural conditions,

[215] See *South China Sea*, Award on Merits, n 26 at para. 1018.
[216] The claimant States also differ as regards the rules applicable to the determination of straight baselines around island groups. That issue is further considered in section 6.5.

that is, prior to any human modification.[217] There also is no indication that these States have different views on the requirement that an island has to be above water at high tide.[218]

Where China and the other claimant States sharply diverge is the interpretation and application of Article 121(3) of the UNCLOS. China maintains that the islands in the South China Sea have a continental shelf and exclusive economic zone. That is, they do not fall under the scope of application of Article 121(3). Although China more recently has emphasized that fact that the islands are part of an archipelago and their capacity to generate maritime entitlements should be assessed on that basis,[219] China has also taken the position that the individual islands are entitled to a continental shelf and exclusive economic zone.[220] In this connection, it may be noted that China's practice seemingly points to a possible ambiguity as regards its position on the entitlements of the islands in the South China Sea. On 7 December 2012 China made a submission to the CLCS on the outer limits of its continental shelf beyond 200 nautical miles in the East China Sea. The Executive Summary observes that this submission 'is without prejudice to any future submission by China on the outer limits of the continental shelf in the [East China Sea] and other seas.'[221] The only other sea that actually is relevant in this respect is the South China Sea. However, that only would be the case if some or all of the islands in the South China Sea would not be entitled to a continental shelf, that is they would be article 121(3) rocks. This suggests that China does not exclude the possibility of accepting that position in the future.

There is only limited information on China's interpretation of Article 121(3). China has indicated that it holds that Japan's Okinotorishima is a rock that falls under the scope of application of Article 121(3) in two diplomatic notes.[222] China observed in this connection that:

> Available scientific data fully reveal that the rock of Oki-no-Tori, on its natural conditions, obviously cannot sustain human habitation or economic life of its own, and therefore shall have no exclusive economic zone of continental shelf.[223]

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[217] See, *e.g.*, Law of the Sea of Vietnam (No. 18/20/2QH13) of 21 June 2012, article 19(1) (available at https://luatminhkhue.vn/en/law-no-18-2012-qh13-dated-june-21--2012-of-the-national-assembly-on-vietnamese-sea.aspx); Permanent Mission of the PRC to the United Nations, communication CML/2/2009, February 6, 2009 (available at https://www.un.org/depts/los/clcs_new/submissions_files/jpn08/chn_6feb09_e.pdf); Permanent Mission of the PRC to the United Nations, communication CML/59/2011, August 3, 2011 (available at https://www.un.org/depts/los/clcs_new/submissions_files/jpn08/chn_3aug11_e.pdf); South China Sea arbitration, Memorial of the Philippines, n. 204 at para. 5.79 (available at https://files.pca-cpa.org/pcadocs/Memorial%20of%20the%20Philippines%20Volume%20I.pdf). See also CSIL Critical Study, n 98, pp. 526-527. Admittedly, the two Chinese notes make a slightly different point, as they submit that the assessment as to whether a feature is a rock in the sense of article 121(3) has to be done on the basis of 'its natural conditions'.

[218] This point warrants two observations. First, it is concerned with the interpretation of article 121, not its application to individual features in the practice of States. Second, as the practice of China in relation to submerged features indicates, China seemingly has taken the position that these features could contribute to generating maritime entitlements on the same or a similar basis as islands. However, that position rather seems aimed at expanding the rules on the categories of features that generate maritime entitlements than on putting in issue the requirement contained in article 121 of the Convention that islands have to be permanently above high tide.

[219] For a further discussion of this point see below at section 6.5.

[220] See above, text at n 182.

[221] Submission of the People's Republic of China concerning the limits of the continental shelf beyond 200 nautical miles in part of the East China Sea; Executive Summary (available at https://www.un.org/depts/los/clcs_new/submissions_files/chn63_12/executive%20summary_EN.pdf), p. 2. A similar without prejudice clause was already included in China's preliminary information submitted in 2009 (Preliminary Information Indicative of the Outer Limits of the Continental Shelf Beyond 200 Nautical Miles of the People's Republic of China (available at https://www.un.org/depts/los/clcs_new/submissions_files/preliminary/chn2009preliminaryinformation_english.pdf), para. 10).

[222] Note Verbale CML/2/2009, n 217 and Note Verbale CML/59/2011, n 95.

[223] Note Verbale CML/2/2009, n 217 at p. 2; similar language is included in Note Verbale CML/59/2011, n 95 at p. 1.

The reference to 'natural conditions' implies that in assessing the scope of application of Article 121(3) human modifications to make a rock suitable for sustaining human habitation or economic life of its own may not be taken into account.[224] Otherwise, this statement provides limited guidance in interpreting and applying Article 121(3). Comparing the natural conditions of Okinotorishima to islands in the South China, it is submitted that, under the interpretation that China has advanced, the islands on Scarborough Shoal (and any comparable features in the South China Sea) have to be classified as rocks that cannot sustain human habitation or economic life of their own and would thus have no continental shelf and exclusive economic zone. Making that comparison for other features in the South China Sea which differ significantly from the islands on Scarborough Shoal on their natural conditions, is not possible due to the limited guidance China has provided on the interpretation of Article 121(3).

Other States, including the other claimant States, have indicated that the islands in the South China Sea fall under the scope of Article 121(3) of the UNCLOS. As far as the Spratly Islands and the islands on Scarborough Shoal are concerned, this is among others indicated by the Executive Summary of the submissions of Malaysia, Viet Nam and the Philippines to the CLCS.[225] These submissions on the outer limits of the continental shelf beyond 200 nautical miles would not be required under the Convention in case the Spratly Islands and Scarborough Shoal would have a continental shelf. All of the outer limit lines included in the submissions are within 200 nautical miles of the baselines of the Spratly Islands and Scarborough Shoal, including Itu Aba, the largest of the Spratly Islands. Put differently, if these islands were to have a continental shelf entitlement, there would be no basis to submit information on an outer limit lime beyond 200 nautical miles within the 200-nautical-mile limit of the islands.[226] Apart from the Philippines, which extensively argued the interpretation of Article 121(3) in the *South China Sea* arbitration,[227] there is no further information on how Viet Nam and Malaysia interpret Article 121(3). In addition to the claimant States, Indonesia has also stated that none of the Spratly Islands has a continental shelf of its

[224] It may be noted that the CSIL Critical Study subsequently has taken a different position on this point, criticizing the tribunal in the *South China Sea* arbitration for committing:

> a fundamental error in distilling a "natural capacity" criterion from the term "naturally formed" used to describe the natural characteristics of low-tide elevations and islands in Articles 121(1) and 13(1) and from some other speculations that find no support in the Convention, and in adding this requirement to Article 121(3) [...] In the text of Article 121(3), there is no reference to "natural", nor is there any term expressly or implicitly indicating "in natural conditions" or "natural capacity" (CSIL Critical Study, note 98 at pp. 526-527).

[225] See further the text at note 19 and note 19, which lists these submissions, while pinpointing the information that indicates this position on article 121(3)).

[226] It may moreover be noted that in depicting their 200-nautical-mile limit in the Executive Summary of their submissions, the States concerned do not use any features in the Paracel Islands, the Spratly Islands, or Scarborough Shoal, although they claim sovereignty over them (see Viet Nam, North Area, n 19 at p. 5, figure 1; Joint submission of Malaysia and Viet Nam, n 19 at p. 5, figure 1; Malaysia, n 19 at p. 4, figure 1.1; Philippines n 19 at p. 8, figure 3; Viet Nam, Central Area n 19 at p. 4, figure 1).

[227] For a summary of the Philippines arguments see *South China Sea*, Award on Merits, n 26 at paras 409 and following. For the purposes of the present analysis it is not considered necessary to further discuss the arguments of the Philippines in this respect.

own.[228] In a diplomatic note of 26 May 2020, Indonesia explicitly endorsed the conclusions on this point of the 2016 Award of the tribunal in the *South China Sea* arbitration.[229]

As regards the Paracel Islands, Viet Nam's submission to the CLCS for the North Area indicates that all of the outer limit of its continental shelf beyond 200 nautical miles is within 200 nautical miles of the Spratly Islands, Scarborough Shoal and/or the Paracel Islands. [230] As was observed above, a submission on the outer limits of the continental shelf would not have been required in case these features would have a continental shelf. In a diplomatic note of 30 March 2020, Viet Nam observed that maritime entitlements of all of the islands in the Spratly Islands and the Paracel Islands 'shall be determined in accordance with Article 121(3) of [the] UNCLOS'.[231]

Article 121(3) is a paragon of ambiguous drafting to accommodate widely diverging views that existed during the negotiations of the UNCLOS, leaving the task of providing specific meaning to it to the subsequent practice of States and the judiciary. Article 121(3) has figured in a number of cases before the ICJ, but in none of these cases did the ICJ provide any specific guidance on the interpretation of Article 121(3). [232] For instance, in *Territorial and Maritime Dispute* the Court limited itself to observing that the parties were in agreement that the rock QS32 on the Bank of Quitasueño was a rock under the customary law equivalent of Article 121(3) of the UNCLOS.[233]

To this day, the 2016 Award of the tribunal in the *South China Sea* arbitration remains the only judicial decision that has provided a detailed interpretation of Article 121(3) and assessed its application to individual islands, *i.e.*, all the islands in the Spratly Islands and on Scarborough Shoal.[234] Not surprisingly, due to the multiple ambiguities in Article 121(3) and the resulting range of different interpretational options, the tribunal's findings have been critically appraised.[235] This among others concerns the questions whether Article 121(3) is only applicable to islands below a certain size or potentially to all islands, and the tribunal's findings in relation to requirements of 'human habitation' and 'economic life of their own'.[236]

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[228] See, *e.g.*, Permanent Mission of the Republic of Indonesia to the United Nations, communication No. 480/POL-703/VII/10, July 8 2010 (available at https://www.un.org/Depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_05_26_IDN_NV_UN_001_English.pdf) and Permanent Mission of the Republic of Indonesia to the United Nations, communication No. 126/POL-703/V/20, May 26, 2020 (available at https://www.un.org/Depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_05_26_IDN_NV_UN_001_English.pdf).

[229] Note Verbale No. 126/POL-703/V/20, n 228 at p. 1. The note observes:

> Indonesia notes that its view concerning the maritime entitlements of the maritime features as reflected in the 2010 circular note has been confirmed by the Award of 12 July 2016 by the Tribunal instituted under Annex VII to the United Nations Convention on the Law of the Sea 1982 (UNCLOS 1982) between the Republic of the Philippines against the People's Republic of China (The South China Sea Arbitration) in which no maritime features in the Spratly Islands is entitled to an Exclusive Economic Zone or a Continental Shelf of its own.

[230] Viet Nam North Area, n 19 at p. 5, figure 1.

[231] Note Verbale No. 22/HC-2020, n 188.

[232] This concerns Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway; Maritime Delimitation in the Black Sea (Romania v Ukraine); Territorial and Maritime Dispute, n 205; and Question of the Delimitation, n 44.

[233] *Territorial and Maritime Dispute*, n 205 at paras 139, 177 and 183.

[234] It may be observed that QS32 is similar in characteristics to the islands on Scarborough Shoal. Also see the text at n 582.

[235] The CSIL Critical Study provides an extensive criticism of the tribunals findings, while referring to publications from various jurisdictions (CSIL Critical Study n 98 at pp. 520 and following).

[236] For the findings of the tribunal on these points see *South China Sea*, Award on Merits, n 26 at paras 475 and following. One of the authors of this report has also critically engaged with certain of the findings of the tribunal on article 121(3), in particular as regards the implications of the use of the term 'rock' in article 121(3) as compared to the term 'island' in paragraphs 1 and 2 and the tribunal's approach to the criterion of size (see A.G. Oude Elferink, 'The South China Sea Arbitration's Interpretation of Article 121(3)

Critical engagement with judicial decisions is part and parcel of State practice and academic debate. What eventually matters in this connection is whether the interpretation that has been offered by a court will be accepted in subsequent case law and by the community of States. Whether any opportunity will present itself to a court or tribunal to rule on this matter in the not too distant future remains to be seen. As regards State practice, as was pointed out above, a number of the States in the South China Sea support the conclusions of the tribunal as regards the applicability of 121(3) to the Spratly Islands and the islands on Scarborough Shoal. Arguably, China's emphasis on assessing the islands in the South China Sea as one or more groups as regards their maritime entitlements, could be said to demonstrate a certain amount of hesitance to go down the road of arguing the interpretation of Article 121(3) in detail and its inapplicability to the individual islands in the South China Sea. As was submitted above, China's classification of Japan's Okinotorishima as an article 121(3) rock at least captures the islands on Scarborough Shoal under the scope of Article 121(3).

However, State practice on Article 121(3) indicates that many States have not applied the standards that the tribunal has set in determining the maritime entitlements of their own islands. As a matter of fact, the only State, apart from States in the South China Sea in relation to the Spratly Islands, the Paracel Islands and the islands on Scarborough Shoal, that has applied Article 121(3) to its own islands is the United Kingdom in relation to among others Rockall, which with its barren nature, limited size of some 600 m^2 and isolated nature, has been considered to be the quintessential Article 121(3) rock.

The tribunal in the *South China Sea* arbitration briefly considered the relevance of State practice for the interpretation of Article 121(3), observing:

> the Tribunal recalls that Article 31(3) of the Vienna Convention [on the Law of Treaties] provides that "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" shall be taken into account together with the context. This means that the Parties must have acquiesced in such practice so that one can speak of an agreement reached concerning the interpretation of the provision in question. Scrutinising the jurisprudence of the International Court of Justice on this issue [...], indicates that the threshold the Court establishes for accepting an agreement on the interpretation by State practice is quite high. The threshold is similarly high in the jurisprudence of the World Trade Organisation, which requires "a 'concordant, common and consistent' sequence of acts or pronouncements" to establish a pattern implying agreement of the parties regarding a treaty's interpretation.

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of the LOSC: a Disquieting First' (available at https://site.uit.no/nclos/2016/09/07/the-south-china-sea-arbitrations-interpretation-of-article-1213-of-the-losc-a-disquieting-first/)). However, it is submitted that the interpretation of the law on this point certainly would not be a reason for nullity of the award. As is observed by Oellers-Frahm:

> An error of law, on the other hand, is difficult to establish because of the broad scope for interpretation inherent in a tribunal's jurisdiction and the discretion of the judge or arbitrator to seek an adequate solution to the dispute. Although, in theory, cases can be imagined where an essential error of law could be found, there is no practice where nullity was invoked on the ground of an essential error of law (Karin Oellers-Frahm 'Judicial and Arbitral Decisions, Validity and Nullity' (*Max Planck Encyclopedia of Public International Law*; Article last updated 2019) para. 14).

This conclusion has particular force in relation to article 121(3) of the UNCLOS due to its multiple ambiguities and the resulting range of different interpretational options.

> [...] On the basis of the foregoing, the Tribunal comes to the conclusion that as far as the case before it is concerned, there is no evidence for an agreement based upon State practice on the interpretation of Article 121(3) which differs from the interpretation of the Tribunal as outlined in the previous Sections.[237]

The tribunal did not provide any further clarification as to why it reached this conclusion on subsequent practice. However, a number of considerations indeed can be seen as supporting this conclusion. Although there is a widespread practice of States claiming all maritime entitlements for all of their islands, certain of those claims have also been protested. Two examples are provided by Romania's position that Serpents' Island is an Article 121(3) rock and Nicaragua's position that a number of Colombian cays in the Western Caribbean are such. States in claiming an exclusive economic zone and continental shelf for their coasts including those of islands generally do not provide any information on their interpretation of Article 121(3).

Notwithstanding the fact that State practice does not provide a guide for the interpretation of Article 121(3), it is undeniable that the predominant practice of States in relation to their own islands does point to a tension between that practice and the findings of the tribunal. One example that is directly relevant to the South China Sea, is Viet Nam's treatment of the island of Hon Hai. Hon Hai is included in Viet Nam's system of straight baselines and that straight baseline is used to determine the 200-nautical-mile limit of Viet Nam.[238] As will be further discussed below, it is difficult to maintain that Viet Nam's straight baselines are in accordance with Article 7 of the UNCLOS.[239] This makes it of interest to also assess Hon Hai in accordance with the findings on Article 121(3) of the UNCLOS of the 2016 Award in the *South China Sea* arbitration. Such an assessment indicates that Hon Hai more than likely falls under the scope of that provision. Although the tribunal indicated that 'size cannot be dispositive of a feature's status as a fully entitled island or rock and is not, on its own, a relevant factor [...] [it] may correlate to the availability of water, food, living space, and resources for an economic life'.[240] Hon Hai is estimated to measure around 0,05 km^2, which is comparable to Itu Aba, the largest of the Spratly Islands.[241] Hon Hai is an isolated barren rock,[242] with hardly any vegetation, no fresh water and no population.[243]

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[237] *South China Sea*, Award on Merits, n 26 at paras 552-553.
[238] This concerns points A6 and A7 of Viet Nam's straight baselines (Statement of 12 November 1982 by the Government of the Socialist Republic of Viet Nam on the Territorial Sea Baseline of Viet Nam (available at https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/VNM_1982_Statement.pdf), Annex.
[239] It should be observed that straight baselines that are in accordance with article 7 (or 47) of the UNCLOS do allow for the inclusion of islands that otherwise would fall under the scope of application of article 121(3). In support of this position, reference may be had to the fact that these articles also allow to include low-tide elevations in straight baselines where certain conditions are met.
[240] *South China Sea*, Award on Merits, n 26 at para. 538.
[241] The estimated size of Hon Hai is based on a measurement of the island in Google Earth by one of the authors of this report.
[242] Hon Hai is respectively some 4 and 20 kilometers distant from two smaller islands and some 140 kilometers distant from the mainland of Viet Nam.
[243] This description is based on information that is contained on the web page 'Hon Hai - a landmark of sovereignty in the East Sea' hosted by the Authority Of External Information of the Ministry Of Information And Communications of Viet Nam (https://www.vietnam.vn/en/hon-hai-cot-moc-chu-quyen-bien-dong/; last accessed 28 August 2024; accessed version on file with the authors).

The tension between State practice and the outcome of the *South China Sea* arbitration on Article 121(3) of the UNCLOS, and its implications, is cogently put by Jonathan Odom, who, after concluding that a US claim to an exclusive economic zone for number of islands in the Hawaiian Archipelago is questionable, observes:

> Return now to the context of the United States potentially advocating for the viability of this element of the tribunal's ruling. If the United States were to highlight the lengthy portion of the arbitral tribunal's ruling that interprets, analyzes, and applies Article 121(3) and concludes that none of the South China Sea features are entitled to an EEZ, then the United States could be accused of following a double-standard in not applying this rule to its remote islands in the Pacific Ocean.[244]

It may be noted that there indeed are States claiming an exclusive economic zone and continental shelf for islands that would fall under article 121(3) applying the interpretation of the *South China Sea* arbitration that at the same time call upon China to accept the outcomes of the *South China Sea* arbitration. For instance, Rebecca Strating, after pointing out that certain Australian subantarctic islands most likely would have to be classified as Article 121(3) rocks when applying the findings of the tribunal in the *South China Sea* arbitration, observes:

> Indeed, in its 2020 *note verbale* defence of the 2016 Arbitral Tribunal ruling, Australia refrained from commenting on the legal reasoning behind natural land features being classified as islands, rocks, low-lying or submerged elevations under article 121 of UNCLOS. It appears that not all 'rules' in the 'rules-based order' are to be defended equally.[245]

Similarly, Japan maintains its claim that Okinotorishima is entitled to the continental shelf and exclusive economic zone, while at the same time calling upon China to comply with the rulings of the *South China Sea* arbitration.[246]

6.5 Straight baselines

6.5.1 General

A number of provisions of the UNCLOS allow States to draw straight baselines that may be used instead of the normal baseline determined in accordance with its Article 5.[247] These provisions identify the conditions that have to be met for a State to be able to draw those straight baselines.

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[244] Jonathan G. Odom 'The Value and Viability of the South China Sea Arbitration Ruling: The U.S. Perspective 2016–2020'(2021) 97 *International Law Studies*, pp. 122-187, p. 177. The argument on the islands in the Hawaiian Archipelago is set out in *ibid*., pp. 169-177. It may be noted that the US State Department in its analysis of China's claims in the South China Sea in discussing the findings of the *South China Sea* arbitration on article 121(3) has observed that "[t]he tribunal's award is final and binding on [China] and the Philippines pursuant to Article 296 of the Convention" (Limits in the Seas No. 150, n 5, p. 27). A footnote to this sentence observes "The United States has not taken a position on whether specific islands in the South China Sea are "rocks" under Article 121(3) of the Convention" (*ibid*., n 97), illustrating the tension between calling upon China to adhere to the arbitration and the potential implications of the tribunal's interpretation of article 121(3) for the maritime claims of the United States.

[245] Rebecca Strating 'Assessing the maritime 'rules-based order' in Antarctica'(2022) 76:3 *Australian Journal of International Affairs* pp. 286-304, pp. 298-299.

[246] Six years since the issuance of the Arbitral Tribunal's award as to the disputes between the Republic of the Philippines and the People's Republic of China regarding the South China Sea (Statement by Foreign Minister HAYASHI Yoshimasa) (Press release of 12 July 2022 (available at https://www.mofa.go.jp/press/release/press1e_000307.html).

[247] This concerns UNCLOS articles 7, 9-10 and 47.

Straight baselines connect points on the low-water line (the normal baseline) and the lines themselves will be located seaward from the low-water line. Where straight baselines have been established, the outer limit of the territorial sea and other coastal State zones will be measured from these baselines. In particular for the territorial sea, this may lead to a significant shift of that outer limit.[248] Waters inside straight baselines are either internal waters or archipelagic waters.[249]

For the current analysis, Articles 7 and 47 of the UNCLOS are in particular relevant. Article 7 allows all States to establish straight baselines when a number of conditions are met. The main requirement in this respect is that the coastline in the area concerned (Article 7 refers to 'localities') 'is deeply indented and cut into, [or has] a fringe of islands [...] in its immediate vicinity'.[250] Paragraph 3 of Article 7 further provides that:

> straight baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.

Paragraph 4 allows the drawing of straight baselines to and from low-tide elevations where:

> lighthouses or similar installations which are permanently above sea level have been built on them or [...] where the drawing of baselines to and from such elevations has received general international recognition.

Article 47 is included in Part IV of the UNCLOS, which creates a regime applicable to archipelagic States. Article 46 of Part IV defines an archipelagic State as 'a State constituted wholly by one or more archipelagos [which] may include other islands'[251] The implication of this definition is that States with continental territory cannot rely on Article 47 of the Convention to establish archipelagic baselines around their dependent archipelagos.

Article 47 contains different criteria for the establishment of straight baselines as compared to Article 7 of the UNCLOS. Straight archipelagic baselines may be drawn 'joining the outermost points of the outermost islands and drying reefs of the archipelago'.[252] Article 47(3) provides that 'The drawing of such baselines shall not depart to any appreciable extent from the general configuration of the archipelago'. Article 47 also includes two numerical criteria: the length of individual straight baselines shall not exceed 100 nautical miles, but 3 % of the baselines may measure up to 125 nautical miles and the ratio between land and water included in the straight baselines has to be between 1 to 1 and 1 to 9.[253]

All coastal States of the South China Sea, except for Brunei, have drawn straight baselines along (part of) their coasts. In this connection a question has arisen regarding the applicable legal

[248] Straight baselines may have less impact on the outer limit of other maritime zone due to the fact that these outer limits are further seaward and in general will be determined only by the most seaward basepoints, which in the case of straight baselines are the points connecting them, which are located on the low-water line.
[249] See UNCLOS, articles 8 and 49.
[250] *Ibid*., article 7(1).
[251] *Ibid*., article 46(a). The term 'archipelago' is defined in *ibid.*, article 46(a).
[252] *Ibid*., article 47(1).
[253] *Ibid*., articles 47(1) and (2).

framework. While other coastal States in the South China Sea consider that the UNCLOS provides an exhaustive regime for establishing baselines, including straight baselines, China has submitted that there are additional rules of customary international law that may be applied, next to the rules of the Convention. For that reason, the present analysis will first consider these positions before assessing the conformity of specific straight baselines with the applicable rules.

A diplomatic note of 30 March 2020 of Viet Nam provides an example of the position that the UNCLOS provides an exhaustive regime for establishing baselines.[254] The note observes that:

> Viet Nam affirms that as between Viet Nam and China, the 1982 United Nations Convention on the Law of the Sea (UNCLOS) provides the *sole legal basis for and defines in a comprehensive and exhaustive manner* the scope of their respective maritime entitlements in the East Sea [South China Sea]. Accordingly, the maritime entitlement of each high-tide feature in the Hoang Sa Islands and the Truong Sa Islands shall be determined in accordance with Article 121(3) of UNCLOS; the *baselines* of the groups of islands in the East Sea, including the Hoang Sa Islands and the Truong Sa Islands, *cannot be drawn by joining the outermost points of their respective outermost features* [...] Viet Nam opposes any maritime claims in the East Sea that exceed the limits provided in UNCLOS [...].[255]

China's position is among others set out in two diplomatic notes from respectively 18 September 2020 and 16 August 2021. The note of 18 September 2020 observes:

> UNCLOS does not cover everything about the maritime order. Paragraph 8 of the preamble of UNCLOS emphasizes that "matters not regulated by this Convention continue to be governed by the rules and principles of general international law".
>
> [...]
>
> China attaches great importance to the provisions and applicable conditions set force [sic!] in UNCLOS for the drawing of territorial sea baselines. At the same time, China believes that the long established practice in international law related to continental States' outlying archipelagos shall be respected. The drawing of territorial sea baselines by China on relevant islands and reefs in the South China Sea conforms to UNCLOS and general international law.[256]

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[254] For other statements to that effect see, *e.g.*, Foreign, Commonwealth & Development Office *UK government's position on legal issues arising in the South China Sea* (September 2020) (available at https://data.parliament.uk/DepositedPapers/Files/DEP2020-0516/UK_govt_analysis_of_legal_issues_in_the_South_China_Sea.pdf), p. 7; Note Verbale SC/21/002 of the Permanent Mission of Japan to the United Nations of 19 January 2021 (available at https://www.un.org/Depts/los/clcs_new/submissions_files/mys_12_12_2019/20210119JpnNvUn001OLA202000373.pdf), p. 1; Note Verbale 08/21/02 of the Permanent Mission of New Zealand the United Nations of 3 August 2021 (available at https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/20210803NzNote.pdf), p. 1; Limits in the Seas No. 150, n 5 at pp. 23 and 29.

[255] Note Verbale No. 22/HC-2020 of the Permanent Mission of the Socialist Republic of Viet Nam to the United Nations of 30 March 2020 (emphasis provided) (available at https://www.un.org/Depts/los/clcs_new/submissions_files/mys_12_12_2019/VN20200330_ENG.pdf).

[256] Communication CML/63/2020, n 106 at pp. 1-2, paras 1 and 3.

The diplomatic note of 8 August 2021 largely repeats the earlier note, but in doing so also refers to the fact that 'China has internal waters, territorial sea, contiguous zone, exclusive economic zone and continental shelf, based on Nanhai Zhudao'.[257] The term 'Nanhai Zhudao' comprehensively refers to maritime features in the South China Sea, including *inter alia* the Spratly Islands, Paracel Islands, Scarborough Shoal and Macclesfield Bank. The Director-General of the Department of Treaty and Law of China's Ministry of Foreign Affairs in a 2024 speech also referred to 'maritime rights over the Nanhai Zhudao [...] as a unified whole'.[258] The speech further developed the argument on baselines of the diplomatic notes, referring among others to the drafting history of the baseline provisions of the UNCLOS.[259] As regards State practice, the speech observed that:

> Presently, approximately 20 continental countries worldwide possess outlying archipelagos, with 17 of them having established straight baselines for their outlying archipelagos as a whole. This widespread practice constitutes a common and consistent State practice, accompanied by corresponding opinio juris, sufficient to prove the existence of relevant customary international law.[260]

In relation to the UNCLOS, the Director-General argued that it:

> supports the notion that continental countries can claim rights over entire outlying archipelagos. Firstly, Article 46 of the Convention defines "archipelago" without restricting it to archipelagic States, indicating its broader application in general international law. Secondly, Article 7 of the Convention allows for drawing straight baselines when "there is a fringe of islands along the coast in its immediate vicinity". The term "coast" in this provision lacks additional qualifications, suggesting the potential applicability of this provision to drawing straight baselines for the outlying archipelagos of continental countries.[261]

Interestingly, the latter argument undercuts the argument that there is a separate rule of customary international law allowing States to draw straight baselines around their dependent archipelagos.

Before assessing China's arguments in relation to straight baselines as set out above, it is relevant to briefly consider the implications of straight baselines for determining the extent of maritime entitlements in the delimitation of overlapping maritime zones between neighboring States. For this purpose, the law applicable to the delimitation of the exclusive economic zone and the continental shelf and its implications for the South China Sea is further explained below in the box 'The UNCLOS and the delimitation of the exclusive economic zone and the continental shelf between neighboring States'.

The UNCLOS and the delimitation of the exclusive economic zone and the continental shelf between neighboring States

[257] Communication CML/32/2021, n 100 at pp. 1-2, paras II and V.
[258] *Ibid*., section IV.
[259] Xinmin Ma, n 97, at section IV. On the relevance of the drafting history of these provisions see further below note 272.
[260] Xinmin Ma, n 97 at section IV.
[261] *Ibid*.

The delimitation of the exclusive economic zone and the continental shelf between neighboring States has not figured prominently in the discussions on the law of the sea and the South China Sea. Nonetheless, that delimitation would eventually determine how the South China Sea would be divided between its coastal States.[262] For that reason, this box briefly explains the relevant rules of international law and the approach courts and tribunals have applied to the delimitation of the exclusive economic zone and the continental shelf. This allows assessing the positions of the claimant States in the South China Sea on the entitlements and baselines of islands in light of the outcome of an eventual delimitation of the South China Sea between its neighboring States.

The UNCLOS addresses the delimitation of the exclusive economic zone and continental shelf in common paragraph 1 of Articles 74 and 83, which provides:

> The delimitation of the [exclusive economic zone/continental shelf] between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.[263]

This general rule has been given specific content in an extensive case law, which spans more than 30 cases, decided by the ICJ, the International Tribunal for the Law of the Sea (ITLOS) and arbitral tribunals. Before further considering these rules, it is pertinent to briefly reflect upon the relationship of the territorial sea with the exclusive economic zone and the continental shelf. The latter two zones are seaward of the territorial sea, while the rights of coastal States in these two zones (sovereign rights and jurisdiction) are more limited than the sovereignty a coastal State has in its territorial sea.[264] This situation is reflected in the approach to the delimitation of the continental shelf and the exclusive economic zone in relation to the territorial sea. As observed by the ICJ in *Territorial and Maritime Dispute*:

> The Court has never restricted the right of a State to establish a territorial sea of 12 nautical miles around an island on the basis of an overlap with the continental shelf and exclusive economic zone entitlements of another State.[265]

The fact that the territorial sea cannot be abridged in a delimitation of the exclusive economic zone and continental shelf between neighboring States points to the critical importance of determining the baselines from which the outer limit of the territorial is measured. Straight baselines may result in an outer limit of the territorial sea that is significantly seaward from the

[262] States may defer seeking agreement on this delimitation by concluding a provisional arrangement for the joint development of resources in the area concerned. However, in that case States may be expected to take into account what the outcome of a delimitation on the basis of international law would be. It would seem unlikely that a State would accept a joint development regime for an area that would be located wholly or mostly on its side of a prospective boundary.

[263] As noted above, all coastal States of the South China Sea are parties to the UNCLOS. In light of China's position that customary international law may contain rules additional to the Convention, it may be noted that the case law currently indicates that the Convention and case law are aligned as regards the rules applicable to the delimitation of the exclusive economic zone and the continental shelf (see *e.g.*, *Maritime Dispute (Peru v. Chile)*, n 38 at para. 179, where reference is also made to earlier judgments).

[264] The latter point is also discussed in *Territorial and Maritime Dispute*, n 205 at para. 178.

[265] *Ibid*., para. 178. The ICJ in *Alleged Violations* concluded that a contiguous zone of one State may overlap with the exclusive economic zone of another State (*Alleged Violations*, n 29 at para. 161). That finding would also be relevant for the islands in the South China Sea that would be enclaved in a territorial sea within the exclusive economic zone of another State.

outer limit that is measured from the low-water line, while straight baseline may comprise extensive areas that otherwise would be part of the continental shelf and exclusive economic zone subject to delimitation with neighboring States.

On the basis of Articles 74 and 83 of the UNCLOS, the case law has developed the so-called three-stage approach to the delimitation of the exclusive economic zone and the continental shelf. The three-stage approach is intended to ensure that the boundary that is established represents an equitable solution as is required by Articles 74 and 83. The main steps of this process are the determination of a provisional boundary line and assessing whether there are any circumstances requiring the adjustment of that provisional line to arrive at the final boundary. The provisional line in principle will be an equidistance line, that is, a line that is at equal distance from the baselines of the parties. However, in this connection courts and tribunals may disregard specific basepoints. This quite frequently concerns small islands.

At the second stage of the delimitation process courts and tribunals will consider whether there are any relevant circumstances requiring an adjustment of the provisional line. This mostly concerns geographical circumstances. Islands have figured prominently at this second stage. A pertinent example in this respect is *Territorial and Maritime Dispute*, where the ICJ determined a continental shelf and exclusive economic zone boundary between Nicaragua's mainland and Colombia's archipelago of San Andres and Providencia. The Court established a boundary giving limited weight to the islands of San Andres and Providencia, while establishing separate boundaries following the 12-nautical-mile territorial sea limit around the islands on the banks of Quitasueño and Serrana. San Andres and Providencia are significantly larger than any of the islands of the Spratly Islands or the Paracel Islands. San Andres measures some 26 square kilometers and Providencia some 17.5 square kilometers. Serrana is similar in size to the larger islands in the Spratly Islands. The single island on the Bank of Quitasueño, a rock made up of coral, is similar in size to the islands on Scarborough Shoal. The Court explained the delimitation in relation to Serrana in the following terms:

> Its small size, remoteness and other characteristics mean that, in any event, the achievement of an equitable result requires that the boundary line follow the outer limit of the territorial sea around the island. The boundary will therefore follow a 12-nautical-mile envelope of arcs measured from Serrana Cay and other cays in its vicinity.[266]

In assessing the situation in the South China Sea a number of points may be noted. Under a scenario where all disputed islands would be part of China and accepting the Chinese position that all these islands have a continental shelf and economic zone, in a maritime boundary delimitation on the basis of international law they most likely would be enclaved in a territorial sea of 12 nautical miles to the extent they are located in the exclusive economic zone and continental shelf of another State.[267] This would be the case for all of the Spratly Islands and

[266] *Territorial and Maritime Dispute*, n 205 at para. 238.
[267] It should be noted that Brunei, Indonesia, Malaysia, the Philippines and Viet Nam will also have to finalize the process of delimiting their bilateral maritime boundaries between themselves. This is an issue that is beyond the scope of the present report.

the islands on Scarborough Shoal and the Paracel Islands to the south of the equidistance line between the mainland of Viet Nam and China's Hainan. This assessment may at least in part explain China's insistence that it is entitled to establish straight baselines around these islands. If the establishment of these baselines would be in accordance with international law,[268] the sea area within these baselines would be part of China's internal waters and its territorial sea would be measured from these baselines. This is a significantly larger area than the 12-nautical-mile territorial sea enclaves of the individual islands. A final implication of China's position under the scenario of Chinese sovereignty over the islands would be that all of the area beyond 200 nautical miles from the surrounding coasts would be part of its exclusive economic zone and continental shelf of the islands.[269] On the other hand, under the UNCLOS, including the outcome of the *South China Sea* arbitration, the southern part of the central part of the South China sea would be part of the high seas and the continental shelf beyond 200 nautical miles of the coastal States surrounding that area, which does not include China. Which of these scenarios would be applicable in the northern part of the South China Sea would depend on the question whether or not all of the Paracel Islands fall under the scope of application of Article 121(3) of the UNCLOS.

China's position that the UNCLOS does not establish a comprehensive regime in relation to baselines is based on the premise that its preamble affirms that 'matters not regulated by this Convention continue to be governed by the rules and principles of general international law'.[270] This premise first of all requires determining what matters are regulated by the Convention. In the case of baselines, the starting point is Article 5 of the Convention, which provides a rule that is generally applicable to all coasts, be they of mainlands or islands. As Article 5 itself indicates this rule is applicable '[e]xcept where otherwise provided in this Convention'.[271] These are the rules on straight baselines contained in other provisions of the Convention. The Convention thus establishes a comprehensive regime, with a general rule and a limitative number of exceptions to that general rule, indicating that this conventional regime is not covered by the preamble's reference to the rules and principles of general international law.[272]

[268] As is explained in section 6.5, international law does not allow the drawing of straight baselines around the Paracel Islands, the Spratly Islands and Scarborough Shoal.
[269] This is explained by the Court's reasoning in *Question of the Delimitation* to the effect that the continental shelf beyond 200 nautical miles of one State 'may not extend within 200 nautical miles from the baselines of another State' (*Question of the Delimitation*, n 44 at para. 79).
[270] UNCLOS, 8th preambular paragraph.
[271] It may be noted that the ICJ in *Qatar v. Bahrain* observed that 'the method of straight baselines [...] is an exception to the normal rules for the determination of baselines' (*Qatar v. Bahrain*, n 209 at para. 212; see also *Alleged Violations*, n 29 at para. 241).
[272] The CSIL Critical Study relies on the drafting history of Part IV of the UNCLOS to argue that it 'only applies to archipelagic States, and the issue of continental States' outlying archipelagos falls within the matters not regulated by the Convention' (CSIL Critical Study, n 98 at pp. 482-484 (quoted text at p. 484); see also Xinmin Ma, n 97, at section IV). This argument first of all raises the question whether reliance on the drafting history is justified in this specific case. Article 32 of the VCLT provides that recourse to that history 'may be had' in order to confirm an interpretation on the basis of the general rules of treaty interpretation contained in its article 31 or where those rules 'leave [...] the meaning ambiguous or obscure; or [...] lead [...] to a result which is manifestly absurd or unreasonable'. The analysis in this report indicates that the general rules of treaty interpretation lead to a different conclusion than that of the CSIL Critical Study that is, the result of their application is neither ambiguous or obscure nor absurd or unreasonable. A major point in the analysis of the CSIL Critical Study on this point is that a draft text of the Convention contained an article reading 'The provisions of [Archipelagic States] are without prejudice to the status of oceanic archipelagos forming an integral part of the territory of a continental state' (CSIL Critical Study, note 98 at p. 484). This article was subsequently deleted from Part IV of the Convention. It may be noted that this article does not contain a substantive rule on dependent archipelagos of continental States, but only provides that their status is not affected by the rules dealing with archipelagic States. This means that the general rule contained in article 5 of the UNCLOS and the exceptions contained in other provisions of the Convention, which reflect customary international law, were and remain applicable to dependent archipelagos.

Although the above conclusions settle the matter as between States Parties to the Convention, to comprehensively assess the Chinese position a further discussion of the State practice on which China relies is also considered appropriate. In assessing that practice, the following points have to be kept in mind. This practice developed in the context of the rule of customary law concerning the drawing of straight baselines as formulated by the ICJ in the *Anglo/Norwegian fisheries case*,[273] which was subsequently included in Article 4 of the Convention on the Territorial Sea and the Contiguous Zone of 1958[274] and repeated almost *verbatim* in Article 7 of the UNCLOS.[275] This implies that the practice of continental States in relation to their dependent archipelagos has to be assessed against those rules of identical conventional and customary international law.[276] Only in case this practice indicates a different rule that meets the criteria for the formation of a new rule of customary international law, such a rule would come into existence.

A comprehensive analysis of State practice in relation to the dependent archipelagos of States with continental territory is provided by the *State practice supplement* of issue 150 of *Limits in the Seas*.[277] Without repeating this detailed analysis, a number of points may be gleaned from it. Much of this practice arguably is in accordance with Article 7 of the UNCLOS and its customary law pendant and the practice of a number of States indicates the application of that rule.[278] Other States have protested specific instances of this State practice where they consider it to be contrary to Article 7 of the UNCLOS and/or its customary law pendant. In numerous cases, States have drawn straight baselines around individual islands of their archipelagos instead of around the entire archipelago concerned. The latter practice has to be viewed as an implementation of Article 7 of the UNCLOS and its customary law pendant, which at the same time implies the absence of an alleged rule of customary law allowing the drawing of straight archipelagic baselines around these dependent archipelagos as a unit.

On the basis of the above analysis, it has to be concluded that for parties to the UNCLOS, their baselines have to be determined in accordance with the rules contained in the Convention. The rules of customary law are identical to those contained in the Convention and there is no rule of customary law the allows the drawing of straight baselines around dependent archipelagos of continental States that is at variance with the customary law pendant of Article 7 of the UNCLOS.

[273] *Fisheries case (United Kingdom v. Norway)*, Judgment of 18 December 1951, ICJ Reports 1951, p. 116, pp. 128-129 and 133.
[274] Adopted on 29 April 1958; entered into force 10 September 1964 (516 UNTS 206).
[275] The ICJ in its 2022 judgment in *Alleged Violations* observed that the parties agreed that both article 5 and 7 of the UNCLOS reflected customary international law (*Alleged Violations*, n 29 at para. 241). The Court assessed Colombia claims in relation to Nicaragua's straight baselines in accordance with these rules of customary international law.
[276] As may be noted, the argument that the practice of these States may also be based in article 7 of the UNCLOS is also made by Director-General of the Department of Treaty and Law of China's Ministry of Foreign Affairs (see further above text at note 261).
[277] Limits in the Seas No. 150, n 5.
[278] For the latter point see, *e.g.*, *ibid*., ; *State practice supplement* pp. 14, 19, 26, 28, 33, 40, 51-52, 55-56, 62-63 65, 67, 70-71, 78, 84 and 87.

6.5.2 Analysis of State practice in the South China Sea

As was noted above, China has relied on the concept of 'Nanhai Zhudao' as a unified whole in referring to its internal waters, territorial sea, contiguous zone, exclusive economic zone and continental shelf in the South China Sea. The import of this reliance on Nanhai Zhudao as a unified whole remains somewhat unclear. As far as can be ascertained, the concept has not been used to argue that all composite elements of Nanhai Zhudao may be included in a single system of straight baselines.[279] Indeed, there would be no basis international law for making such an expansive claim. The reference to the maritime rights of Nanhai Zhudao as a unified whole possibly may be intended to express the idea that this unity cannot be disrupted as a consequence of maritime boundary delimitations with neighboring States.[280]

China established straight baselines around the Paracel Islands and along its mainland coast, including the island of Hainan, bordering the north of the South China Sea in 1996.[281] The straight baselines along the Paracel Islands enclose all of the islands in the Paracel Islands. Apart from connecting the outermost islands of the group, the straight baselines also include two low-tide elevations, North Reef and Bombay Reef. Both these low-tide elevations are beyond 12 nautical miles from any high-tide feature. Low-tide elevations under certain conditions may be included in straight baselines.[282] These specific low-tide elevations do not contribute to the baseline in case they would not be included in a system of straight baselines because they are beyond 12 nautical miles of any of the islands in the Paracel group.[283]

As was explained above, the conformity of the baselines around the Paracel Islands with international law has to be assessed on the basis of Articles 7 and Articles 46 and 47 of the UNCLOS. Customary international law does not contain any additional rules for the drawing of straight baselines around dependent archipelagos of States that also have continental territory. China cannot use Article 47 as a basis for establishing straight baselines as it is not an archipelagic State. As regards Article 7 of the Convention, the starting point for assessing whether straight baselines may be established is whether there are localities where the coast is deeply indented and cut into or fringed with islands. In the case of the Paracel Islands there are no islands that in localities have a coast that is deeply indented or cut into or that are fringed by smaller islands. To the contrary, the Paracel Islands consist of a group of small islands that either assessed on an individual basis or as a unity do not meet the requirements of Article 7(1) of the UNCLOS. Their coast is not deeply indented and cut into and they are not fringing islands. Consequently, the straight baselines around the Paracel Islands cannot be justified on the basis of Article 7 of the Convention. In that light, the baseline along the individual features in the Paracel

[279] For instance, in his 2024 speech, the Director-General of the Department of Treaty and Law of China's Ministry of Foreign Affairs while referring to the maritime rights of Nanhai Zhudao as a unified whole also referred to the Spratly Islands as an individual archipelago (Xinmin Ma, n 97 at section IV).

[280] If this were the intended purpose of using the concept, it is also untenable. For instance, under the hypothetical scenario that the islands on Scarborough Shoal would be part of China's territory and would have maritime entitlement beyond the territorial sea, the law applicable to maritime boundaries clearly indicates that the islands on Scarborough Shoal would be enclaved in a 12-nautical-mile territorial sea within the exclusive economic zone and continental shelf of the Philippines. For a further discussion of the latter point see the box 'The UNCLOS and the delimitation of the exclusive economic zone and the continental shelf between neighboring States' in section 6.5.1 of this report.

[281] Declaration of the Government of the People's Republic of China of 15 May 1996, n 189.

[282] See UNCLOS, articles 7(4) and 47(4).

[283] See *ibid*., article 13.

Islands has to be determined in accordance with Article 5 of the UNCLOS and other rules that are relevant to determining the location of the normal baseline.

China established straight baselines around Scarborough Shoal on 10 November 2024.[284] As far as can be ascertained, the points connecting the straight baselines are all located on the low-water line. The straight baselines generally are closely aligned with the low-water and as such do not lead to a notable seaward shift of the outer limit the territorial sea. The straight baselines are not in accordance with international law, which is contained in Article 7 of the UNCLOS, as the above reasoning on the non-applicability of Article 7 to the Paracel Islands is equally valid in the case of Scarborough Shoal. It may be noted that the same conclusion would apply to any straight baselines in the Spratly Islands.

In view of the minimal impact the straight baselines along Scarborough Shoal have in practice, the question remains what may have inspired this move by China. A spokesperson of China's Ministry of Foreign Affairs indicated that this concerned 'a natural step by the Chinese government to lawfully strengthen marine management and is consistent with international law [including the UNLCOS] and common practices'.[285] The spokesperson also indicated that this was a reaction to legislation the Philippines had enacted earlier in 2024 that was aimed:

> to further solidify the illegal arbitral award on the South China Sea in the form of domestic legislation and illegally include China's Huangyan Dao and most of the islands and reefs of China's Nansha Qundao, and their relevant waters into the Philippines' maritime zones.[286]

It remains unclear how these specific baselines strengthen China's marine management, due to the fact that they largely coincide with the low-water line of Scarborough Shoal. Interestingly, the establishment of these straight baselines suggests that for purposes of establishing straight baselines, Scarborough Shoal is treated a separate entity and not part of the broader geographical concept of Nanhai Zhudao.[287, 288]

China has also established straight baselines along the coast of Hainan and the Chinese mainland in the northern part of the South China Sea. Although part of that coast arguably meets the criteria of being deeply indented and cut into and/or being fringed with islands – this for instance concerns the coast in the vicinity of Macau – a number of these straight baselines nonetheless do not meet the requirements of Article 7 of the Convention. For instance, the coast that is behind the straight baseline connecting basepoints 33 and 34 is neither deeply indented and cut into nor fringed with islands. Arguably, the coast lying behind the straight baseline

[284] Statement of the Government of the People's Republic of China on the Baseline of the Territorial Sea Adjacent to Huangyan Dao of 10 November 2024. The text of the statement and a chart depicting the straight baselines are available at https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/CHN.htm.
[285] Foreign Ministry Spokesperson's Remarks on China's release of the Baselines and Base Points of the Territorial Sea Adjacent to Huangyan Dao (updated 10 November 2024; available at https://www.fmprc.gov.cn/eng/xw/fyrbt/202411/t20241110_11524122.html).
[286] *Ibid*.
[287] See also Yucong Wang, Clive Schofield and Warwick Gullett 'Did China just blink in the South China Sea?; China declares modest new baselines around contested Scarborough Shoal, enclosing a much smaller strategic area than previously feared' (*Asia Times*, 29 November 2024) (available at https://asiatimes.com/2024/11/did-china-just-blink-in-the-south-china-sea/).
[288] For a further discussion of this concept see section 6.5.1 of this report.

segment connecting basepoints 31 and 32 could be said to meet the requirements of Article 7(1). However, the straight baseline segment concerned does not meet other requirements that are included in Article 7. For one thing, the segment does not meet the requirement of 'not depart[ing] to any appreciable extent from the general direction of the coast' contained in Article 7(3).[289] The expanse of ocean space that is included in the straight baseline segment makes it difficult to justify that it meets the requirement of 'being sufficiently closely linked to the land domain to be subject to the regime of internal waters'.[290]

Looking at the other claimant States in the South China Sea, it is submitted that (part of) the straight baselines of Viet Nam and Malaysia are not in accordance with Article 7 of the UNCLOS.[291, 292] Viet Nam's straight baselines between points A2 and A7 are located on a number of islands that do not constitute a fringe of islands, while it may also be questioned whether these islands are in the immediate vicinity of the coast. For instance, basepoint A6 is at a distance of over 70 nautical miles from the mainland of Viet Nam. In the case of Malaysia a number of straight baseline segments are drawn between points along parts of the coast that neither are deeply indented and cut into nor have a fringe of islands in their immediate vicinity. This for instance concerns the straight baseline segment between points SM 70/1 and SM 71 along the Malaysian mainland and between points SWK 04 and SWK 05 and between SWK 05 and SWK 06/1 on Sarawak.

6.6 Conclusions

The present section considered the maritime entitlements of various features in light of in particular the expansive views Chinese sources have presented in this respect. As is apparent from this analysis, there is a certain ambiguity in this respect. Certain positions have not translated into specific legislative acts. For instance, while Chinese sources suggest that all the island groups in the South China Sea form a unity, straight baselines have been established around separate islands, respectively the Paracel Islands and Scarborough Shoal.

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[289] Although there may be a certain scope for arguing what constitutes the general direction of the coast, the coast under consideration could be said to have two general directions. A southern part facing northeast and a northern part facing west southwest. The former segment makes an angle of around 90° with the straight baselines.

[290] At its center the straight baseline segment between points 31 and 32 is around 50 nautical miles from the nearest point on the low-water line, while the distance of that center to the coast that is directly behind it is between 60 and 70 nautical miles.

[291] These straight baselines have been defined respectively in Statement of the Government of Viet Nam, n 238; and Annex; List of Geographical Coordinates of Points (available at https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/ListofCoords.pdf).

[292] The Philippines has established archipelagic baselines. These baselines have been analyzed in *Limits in the Seas No. 142*, which concludes that ' the Philippines' archipelagic baseline system set forth in [its legislation] appears to be consistent with Article 47 of the [UNCLOS]' (*Limits in the Seas No. 142; Philippines: Archipelagic and other Maritime Claims and Boundaries* ((US State Department, September 2014) p, 4). Before reaching this conclusion, different aspects of conformity are assessed (*ibid*., pp. 2-3). *Limits in the Seas No. 141* reaches a similar conclusion in relation to Indonesia's archipelagic baselines, observing:

> In conclusion, Indonesia's archipelagic baseline system set forth in Regulation No. 37 of 2008 appears to be generally consistent with Article 47 of the LOS Convention. However, it appears as though Indonesia needs to address with Timor-Leste the effect that its archipelagic baselines have on Timor-Leste's maritime claims (*Limits in the Seas No. 141; Indonesia: Archipelagic and other Maritime Claims and Boundaries* (US State Department, September 2014), p.3).

It may be noted that Timor-Leste's maritime claims are beyond the South China Sea. The authors of this report are in agreement with these assessments of the straight baselines of the Philippines and Indonesia.

The section first of all considered the status of permanently submerged features under the law of the sea. The report concludes that sovereignty over permanently submerged parts of the seabed is only possible in two specific limited instances. First, this concerns those parts of the seabed that are enclosed by the baselines for measuring the breadth of the territorial sea. Such areas either are part of the internal waters of the coastal State or of the archipelagic waters of an archipelagic State. Second, this concerns the seabed of the territorial sea. In these instances, the sovereignty over submerged features is the result of the general rules concerning the establishment of baselines and the limits of the territorial sea. Beyond the territorial sea, claims to sovereignty over permanently submerged features are not in accordance with international law.

In relation to the rules applicable to low-tide elevations, the report in particular assessed China's position that such features possibly may be subject to the rules on the acquisition of territory in light of the relevant case law. It is concluded that this case law indicates that the rules on the acquisition of territory are not applicable to low-tide elevations. Beyond the territorial sea, low-tide elevations as a consequence are part of the maritime zone in which they are located.

As regards the legal regime of islands, it is noted that China and other States in the South China Sea in particular differ about the applicability of 121(3) of the UNCLOS to islands in the South China. Islands that fall under this provision do not have a continental shelf and exclusive economic zone. While China maintains that all islands in the South China Sea are entitled to these maritime zones, other States take the position that this is not the case. The latter conclusion was also reached by the tribunal in the *South China Sea* arbitration for the Spratly Islands and the islands on Scarborough Shoal. As the report points out, due to the multiple ambiguities in Article 121(3) and the resulting range of different interpretational options, it should not come as a surprise that the tribunal's findings have been critically appraised. As is also observed, critical engagement with judicial decisions is part and parcel of State practice and academic debate. What eventually matters in this connection is whether the interpretation that has been offered by a court will be accepted in subsequent case law and by the community of States. It is further noted that State practice on Article 121(3) has not been uniform and has not led to an agreed interpretation. Other States having claims that are not aligned with the interpretation of Article 121(3) by the tribunal, and who at the same time call upon China to accept the outcomes of the *South China Sea* arbitration, could be accused of applying double standards. This may have repercussions for their credibility when calling upon other States to adhere to the law.

The limited information that is in the public domain on China's interpretation of Article 121(3) – specifically its argument on Japan's Okinotorishima – indicates that the islands on Scarborough Shoal are captured by that interpretation of Article 121(3). That limited information does not allow making a meaningful assessment of the implications of the interpretation China has offered for other islands in the South China that are not similar in size to these features.

China and other States also differ about the regime of straight baselines. While other States argue that the UNCLOS creates a comprehensive regime, China submits that there are separate rules for dependent archipelagos of continental states in customary international law that supplement the rules of the Convention. The report concludes that the UNCLOS contains a comprehensive regime and that the rules of customary law and the Convention are equivalent. State practice in relation to dependent archipelagos of continental states does not point to the genesis of an additional rule of customary law. The report also considers the straight baseline claims of China and other States in the South China Sea. It is among others concluded that the straight baselines that China has established along the Paracel Islands and Scarborough Shoal are not in accordance with international law. A similar conclusion applies to certain baselines of Malaysia and Viet Nam.

The present section also highlights the importance of the Chinese positions on entitlements of islands and straight baselines for the extent of China's maritime zones in the South China Sea under a scenario where the disputes over sovereignty over all of these islands were to be settled in its favor. Under a scenario where the islands are included in straight baselines, the waters inside these straight baselines would be part of China's internal waters and its territorial sea would be measured from these straight baselines. Under this scenario, the area beyond the 200-nautical-mile limit of the coasts surrounding the South China Sea would be part of the continental shelf and exclusive economic zone of the islands. The extent of this area is significantly larger as compared to a scenario assuming Chinese sovereignty applying the law of the sea as contained in the UNCLOS. Individual features on Scarborough Shoal and the Spratly Islands would be enclaved in a territorial sea inside the exclusive economic zone and continental shelf of other coastal States. An assessment is more complex in relation to the Paracel Islands as there is no authoritative ruling on their entitlements under Article 121 of the UNCLOS. If they were found to be fully entitled islands, their continental shelf and exclusive economic zone would in any case include the area that is beyond the 200-nautical-mile limit of the coasts surrounding the South China Sea. Under the hypothetical scenario of Chinese sovereignty they would probably receive limited to no weight in a delimitation in relation to Viet Nam within 200 nautical miles if the substantive rules of maritime delimitation law were to be applied.

7. States' engagement with compulsory dispute settlement and the *South China Sea* Arbitration

7.1 Introduction

The *South China Sea* arbitration dealt with a number of specific legal issues, but also resulted in an intense debate about issues of a more general nature, including the propriety of having recourse to compulsory dispute settlement in this particular instance, the tribunal's jurisdiction over the dispute, the admissibility of the claims and China's rejection of the arbitration process and its outcomes. This section first provides an overview of the compulsory dispute settlement system of the UNCLOS (section 7.2), then examines the procedural issues that were raised in the *South China Sea* arbitration (section 7.3). It then assesses how States have responded to the arbitration, focusing on China's arguments relating to the establishment and exercise of compulsory jurisdiction by the Annex VII arbitral tribunal (sections 7.4 and 7.5), and the reaction of the Philippines and other Southeast Asian States with regards to recourse to third-party dispute settlement (sections 7.6 and 7.7).

7.2 Overview of compulsory dispute settlement system under the UNCLOS

Dispute settlement constitutes an integral part of the UNCLOS. Part XV of the UNCLOS on Settlement of Disputes sets out compulsory dispute settlement procedures which are binding on States once they become a party to the Convention. It is worth pointing out at the outset that international courts—unlike their domestic counterparts—do not have automatic competence to settle disputes. They can only hear disputes if, and only if, all parties concerned have consented to their competence. Accordingly, before any State wishes to bring another State before an international court or tribunal, the former must first secure the consent of the latter. For disputes under the UNCLOS, however, this first step of securing the consent of the respondent State in the individual case is no longer necessary. This is because consent has been given to the courts and tribunals included under the UNCLOS by virtue of a State being a party to the Convention. Put differently, when a State becomes a party to the UNCLOS, it automatically accepts the jurisdiction of the courts and tribunals provided therein. These courts and tribunals thus have compulsory jurisdiction as defined in Part XV of the Convention.

Part XV is unique in that it combines compulsory dispute settlement with considerable room for flexibility.[293] Several features contribute to this dual nature of the system. The first is the freedom accorded to States to settle their disputes by a means of their own choice as stipulated in Article 279. This freedom is further demonstrated by Articles 281, 282 and 283 of Section 1 of Part XV which allows States, subject to certain conditions, to settle their disputes using other mechanisms than those found under the UNCLOS. Second, Article 287 in Section 2 allows States

[293] Yoshifumi Tanaka, The International Law of the Sea (3rd ed, CUP 2019) p. 496.

to choose one or more of the four means for the settlement of disputes, namely the ITLOS, the ICJ, an arbitral tribunal constituted in accordance with Annex VII and a special arbitral tribunal constituted in accordance with Annex VIII of the Convention. The UNCLOS remains until today one of the very few multilateral international conventions which provides States with such flexibility in choosing the forum for dispute settlement.

Finally, Articles 297 and 298 of Section 3 of Part XV exclude certain types of disputes from the compulsory jurisdiction of a court or tribunal. Article 297 contains two express limitations in its paragraphs (2) and (3) pertaining to disputes concerning marine scientific research and disputes concerning fisheries respectively. The exceptions to compulsory jurisdiction under Article 298 are found under sub-paragraphs (a) to (c) of Article 298(1). These exceptions are optional and can only be invoked if a State has made a declaration to that effect. Once a State has made a declaration under Article 298, a court or tribunal under Part XV will not have the competence to settle one or more of the following disputes: (i) maritime boundary delimitations, (ii) historic bays and titles, (iii) law enforcement activities, and (iv) military activities. In 2006, China made such a declaration to exclude all these categories of disputes contained under Article 298 from compulsory dispute settlement.[294]

7.3 Procedural issues in the *South China Sea* arbitration

The *South China Sea* arbitration was initiated following the rules of procedure under Part XV. The Philippines exercised its right as a State party to the UNCLOS to bring a case against China - another State party to the Convention. As stated above, the compulsory nature of the dispute settlement procedures meant that the Philippines did not need to take an additional step of securing China's consent prior to bringing the dispute before an international tribunal. The Philippines could unilaterally bring the case before a tribunal under the UNCLOS and the unilateral nature of the decision to initiate the dispute is not a violation of the UNCLOS, but a right guaranteed under the Convention. The dispute was heard by an Annex VII arbitral tribunal because neither the Philippines nor China had specified their preferred procedure(s) amongst the four options contained in Article 287 prior to the initiation of the dispute, and thus an Annex VII arbitral tribunal became the default forum.[295] The Philippines' turn to the compulsory dispute settlement under the UNCLOS stemmed from its wish to have a peaceful means to deal with the dispute. Bilateral negotiations were to no avail, a brief mediation attempt also saw no progress and there was little trust on the part of the Philippines in mediation.[296] As will be shown below, the Philippines legal team carefully crafted the submissions and legal arguments to avoid running into the jurisdictional obstacles laid out above.

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[294] China's Declaration under Article 298 (available at https://treaties.un.org/doc/Publication/CN/2006/CN.666.2006-Eng.pdf).
[295] Article 287(3) UNCLOS provides that if a State Party has not made a declaration specifying its choice of procedure, it shall be deemed to have accepted Annex VII arbitration. As the arbitral tribunal was of an ad hoc nature, the Permanent Court of Arbitration (PCA) acted as the Registry for the case. This perhaps explains why mass media usually refers to the case as being heard or the awards being rendered by the PCA. Note however that such a description is not legally correct. The PCA is not a judicial body and as such does not have the competence to render judicial decisions. It merely 'provides services for the resolution of disputes involving various combinations of states, state entities, intergovernmental organizations, and private parties'. See: Introduction to the PCA (available at https://pca-cpa.org/en/about/introduction/).
[296] Krista E. Wiegand and Erik Beuck, 'Strategic Selection: Philippine Arbitration in the South China Sea Dispute', (2020) 16(2) *Asian Security* p.141.

As mentioned above, an Annex VII arbitral tribunal's exercise of compulsory jurisdiction is subject to three groups of conditions. China's objection to the *South China Sea* arbitral process and eventually the arbitral awards continue to revolve around the position that the arbitral tribunal's exercise of jurisdiction did not satisfy these three groups of conditions. Although China did not participate in the arbitral process, its Position Paper[297] made it official that China's objection to the *South China Sea* arbitral tribunal's exercise of jurisdiction was based on three main grounds:

(i) The essence of the subject-matter of the arbitration is the territorial sovereignty over several maritime features in the South China Sea, which is beyond the scope of the Convention and does not concern the interpretation or application of the Convention;
(ii) China and the Philippines have agreed, through bilateral instruments and the Declaration on the Conduct of Parties in the South China Sea, to settle their relevant disputes through negotiations.
(iii) The subject-matter of the arbitration would constitute an integral part of maritime delimitation between the two countries, thus falling within the scope of the declaration filed by China in 2006 in accordance with the Convention.

Each of these points pertains to each of the three conditions for the exercise of compulsory jurisdiction under Part XV of the UNCLOS and will be examined in turn.

7.3.1 The subject-matter of the submissions

Under Article 288(1), questions relating to territorial sovereignty are not regulated by the UNCLOS, thus disputes concerning territorial sovereignty would not per se fall within the jurisdiction of the Annex VII arbitral tribunal. The Philippines argued that even though a sovereignty dispute exists between China and the Philippines over maritime features in the South China Sea, the tribunal would neither need to 'express any view at all as to the extent of China's sovereignty over land territory, or that of any other state'[298] nor would it require the tribunal to make any prior determination on sovereignty in order to hear the Philippines' submissions over historic rights or maritime entitlements in the South China Sea.[299] For China, the tribunal could not decide upon any of the Philippines' claims without determining, directly or indirectly, sovereignty over maritime features in the South China Sea.[300] The Tribunal acknowledged the existence of a sovereignty dispute between the Parties, but stated that the resolution of the Philippines' claims did not require the Tribunal to first render a decision on sovereignty, either expressly or implicitly; and the actual objective of the Philippines' claims was not to advance its position in the Parties' dispute over sovereignty.[301] The Tribunal further did not consider that 'any of the Philippines' Submissions require an implicit determination of sovereignty'.[302] It should be noted that the *South China Sea* arbitration was not the first time questions relating to the jurisdiction of a law of the sea tribunal over issues of territorial sovereignty was raised. In two other cases, the respective tribunals found that they could not entertain the law of the sea dispute

[297] Position Paper, n 201 at para. 3.
[298] *South China Sea*, Award on Jurisdiction and Admissibility, n 25 at para. 141.
[299] *Ibid*.
[300] *Ibid*., para. 134.
[301] *Ibid*., para. 153.
[302] *Ibid*.

brought before them because 'the real dispute' between the parties was not a maritime dispute but a territorial sovereignty one,[303] and because a finding on territorial sovereignty was 'prerequisite' for the tribunal to decide on the law of the sea claims.[304]

7.3.2 Recourse to alternative dispute settlement mechanisms

The two most pertinent articles in Section 1 in determining whether States have decided to have recourse to alternative dispute mechanisms are Articles 281 and 283. Article 281 essentially provides that when the parties to a case have agreed to an alternative means of dispute settlement, UNCLOS tribunals can only exercise jurisdiction if the parties have not been able to settle the dispute between them using the means agreed and the parties have not agreed to exclude further procedures, including recourse to the UNCLOS dispute settlement procedures. The Philippines argued that the bilateral or regional agreements between itself and China were either non-binding or, if considered binding, did not exclude recourse to compulsory dispute settlement under Part XV.[305] China, for its part, adopted the position that in respect of the DOC, the word 'undertake' in paragraph 4 established an intention of the parties to accept the obligation to settle disputes through friendly consultations and negotiations.[306] This binding commitment, according to China, was further reinforced by the multitude of other bilateral instruments which record the two States' commitment to settle disputes through negotiations.[307] Furthermore, China was also of the opinion that even though the DOC contained no express exclusion of recourse to compulsory dispute settlement under the UNCLOS, previous case law, namely the *Southern Bluefin Tuna* arbitration's award of 2000, indicated that such an express exclusion was not necessary.[308]

It is submitted that the language of paragraph 4 of the DOC *prima facie* could both be constructed as excluding or allowing recourse to compulsory dispute settlement in accordance with the UNCLOS.[309] An argument that paragraph 4 excludes recourse to compulsory dispute settlement under section 2 of Part XV of the UNCLOS could rely on the fact that paragraph 4 refers to the settlement of territorial and jurisdictional disputes through consultations and negotiations. The reference to 'jurisdictional disputes' is arguably broad enough to cover any dispute concerning the interpretation or application of the UNCLOS. Paragraph 4 does not expressly exclude recourse to further procedures, but it could be argued that it does so impliedly by the reference to the undertaking to settle the disputes concerned through negotiations and consultations without providing any limitations or conditionalities on the use of these means. On the other hand, an argument that paragraph 4 allows recourse to compulsory dispute settlement under section 2 of Part XV of the UNCLOS could be based on the argument that paragraph 4 does not exclude the recourse to other means of dispute settlement that are available to the parties under

[303] *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)* (2015) RIAA XXI, p. 359, para. 212.
[304] Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v the Russian Federation), Award on Preliminary Objections, PCA Case No 2017-06, para. 197.
[305] South China Sea, Award on Jurisdiction and Admissibility, n 25 at paras 208-212.
[306] *Ibid*., para. 203.
[307] *Ibid*.
[308] *Ibid*., para. 204.
[309] After these *prima facie* interpretations of paragraph 4 are set out, they will be further assessed in the light of the relevant case law, that is the *Southern Bluefin Tuna* arbitration and the *South China Sea* arbitration.

other instruments including the UNCLOS. In that connection, it could also be pointed out that paragraph 1 of the DOC refers to the 'commitment [of the parties] to the purposes and principles of the Charter of the United Nations [and] the 1982 UN Convention on the Law of the Sea'. Those purposes and principles include the recognition that a comprehensive system of dispute settlement was an essential part of the UNCLOS, and Part XV is a specific implementation of the principle of the peaceful settlement of disputes enshrined in both the United Nations Charter and the Convention.[310]

To further assess the choice of wording of paragraph 4 of the DOC the relevant case law may be assessed. In 2000 an arbitral tribunal in the *Southern Bluefin Tuna* arbitration ruled on the implications of Article 281(1) for its jurisdiction in relation to a dispute that had been submitted by Australia and New Zealand in accordance with the UNCLOS. The defendant, Japan, argued that the dispute only arose under the Convention for the Conservation of Southern Bluefin Tuna (CCSBT)[311] excluding recourse to Part XV of the UNCLOS.[312] The tribunal did not subscribe to Japan's argument, holding that the dispute 'while centered in the [CCSBT], also arises under the United Nations Convention on the Law of the Sea.'[313] This made it imperative to consider the implications of Article 281 of the UNCLOS.[314] The tribunal first of all concluded that Article 16 of the CCSBT, which provided for various options for dispute settlement, fell within the scope of Article 281, and allowed it to deal with the whole dispute, including aspects relating to the interpretation and application of the UNCLOS.[315] The tribunal found that although not all means listed in Article 16 had been exhausted, Article 281 did not require parties to continue negotiating indefinitely until a settlement would have been reached. For the purposes of Article 281, a party to a dispute could conclude that no settlement had been reached.[316] Finally, the tribunal considered whether recourse to any further procedure was excluded by Article 16 of the CCSBT. The tribunal observed that Article 16 did not expressly exclude recourse to further procedures, but found that this was not determinative of the issue.[317] Looking at Article 16 as a whole and considering its genesis, the tribunal concluded that it was the intent of the parties to exclude unilateral recourse to compulsory dispute settlement.[318]

The tribunal's finding that the absence of an express reference to further procedures in Article 16 of the CCSBT was not decisive for ruling out recourse to compulsory dispute settlement under the UNCLOS was criticized in the dissenting opinion of Kenneth Keith. For a number of reasons,

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[310] United Nations Charter, article 2(3); UNCLOS, article 279.
[311] Convention for the Conservation of Southern Bluefin Tuna (adopted on 10 May 1993; entered into force 20 May 1994) (819 UNTS 360).
[312] Southern Bluefin Tuna Case (Australia and New Zealand v Japan), Award on Jurisdiction and Admissibility (4 August 2000) 39 International Legal Materials p. 1359, para. 34. (hereafter Southern Bluefin Tuna).
[313] *Ibid*., para. 52.
[314] *Ibid*., para. 53.
[315] *Ibid*., paras 54-55.
[316] *Ibid*., para. 55.
[317] *Ibid*., paras 56-57.
[318] *Ibid*., paras 57-59. The tribunal further supported this finding by observing that the UNCLOS 'falls significantly short of establishing a truly comprehensive regime of compulsory jurisdiction entailing binding decision' and that a large number of agreements concluded after the adoption of the UNCLOS 'exclude with varying degrees of explicitness unilateral reference of a dispute to compulsory adjudicative or arbitral procedure'. The tribunal argued that its approach to article 281 avoided that dispute settlement procedures such as those contained in the CCSBT 'would be effectively [deprived] of substantial effect' (*ibid*., paras 60-63).

he held that there was a 'need for clear wording to exclude the obligations to submit to the UNCLOS binding procedure, beyond the wording found in article 16' of the CCSBT.[319]

It is not known to what extent the award in the *Southern Bluefin Tuna* cases impacted the negotiations on paragraph 4 of the DOC. It may be noted that although the final text of the DOC was adopted after the issuance of the award, the negotiations on the DOC, including its paragraph 4, may have been well advanced prior to that issuance. Parties may have been unwilling to reopen the debate on paragraph 4 following the award. With that *caveat* in mind, the following may be noted. The wording that is employed by paragraph 4 of the DOC, like Article 16 of the CCSBT, does not include clear wording to exclude recourse to compulsory dispute settlement under the UNCLOS. At the same time, the context of the relevant text in paragraph 4 of the DOC is quite different from that of Article 16 of the CCSBT, indicating that one should be careful in drawing analogies.

As a matter of fact, comparing Article 16 of the CCSBT to paragraph 4 of the DOC, the tribunal's reasoning in the *Southern Bluefin Tuna* arbitration indicates that a different outcome would be achieved if that reasoning were to be applied to paragraph 4. Article 16(2) of the CCSBT provides that recourse to the ICJ is possible, but only 'with the consent in each case of all parties to the dispute'. Moreover, Article 16(2) provides that

> failure to reach agreement on reference to the International Court of Justice or to arbitration shall not absolve the parties to the dispute from the responsibility of continuing to seek to resolve it by any of the various peaceful means referred to in paragraph 1 above.

The arbitral tribunal specifically commented on the latter obligation, observing:

> That express obligation equally imports, in the Tribunal's view, that the intent of Article 16 is to remove proceedings under that Article from the reach of the compulsory procedures of section 2 of Part XV of [the] UNCLOS, that is, to exclude the application to a specific dispute of any procedure of dispute resolution that is not accepted by all parties to the dispute. Article 16(3) reinforces that intent by specifying that, in cases where the dispute is referred to arbitration, the arbitral tribunal shall be constituted as provided for in an annex to the 1993 Convention, which is to say that arbitration contemplated by Article 16 is not compulsory arbitration under section 2 of Part XV of UNCLOS but rather autonomous and consensual arbitration provided for in that CCSBT annex.[320]

Similar language conditioning the recourse to compulsory dispute settlement is totally absent from paragraph 4 of the DOC.

The tribunal in the *South China Sea* arbitration had the opportunity to consider the implications of paragraph 4 of the DOC in light of Article 281 of the UNCLOS in its Award of jurisdiction and admissibility. Contrary to the tribunal in *Southern Bluefin Tuna*, the tribunal concluded that the exclusion of a further procedure has to be explicit and that no such explicit exclusion was

[319] *Southern Bluefin Tuna Award*, Separate Opinion of Judge Kenneth Keith, para. 19. The argument to reach this conclusion is set out in *ibid*., paras 17-31.
[320] *Southern Bluefin Tuna Award*, n 312 at para. 57.

included in the DOC.[321] The tribunal then went on to argue that it was neither possible to conclude that the exclusion of recourse to compulsory dispute settlement was implied by paragraph 4 of the DOC. After quoting paragraph 4, it observed:

> The DOC did not carve out any part of the Convention, let alone a fundamental part that has been described by the Convention's founders as the "pivot upon which delicate equilibrium of the compromise must be balanced." Instead, the DOC (in paragraphs 1 and 3) repeatedly invokes the Convention and the UN Charter generally, without differentiating amongst the component parts of those instruments.[322]

In conclusion, although the interpretation of Article 281 remains to date one of the few instances in which two UNCLOS tribunals explicitly adopted a contrasting interpretation of the same article, the analysis of the award in the *Southern Bluefin Tuna* cases indicates that Article 16 of the CCSBT has to be distinguished from paragraph 4 of the DOC. As a matter of fact, as is argued above, the reasoning of the tribunal in these cases indicates that applying it to the DOC would lead to the conclusion that paragraph 4 of the DOC does not exclude recourse to compulsory dispute settlement under the UNCLOS.

Article 283 requires parties to 'proceed expeditiously to an exchange of views regarding [a dispute's] settlement by negotiation or other peaceful means'. China argued that contrary to the requirements to exchange views under Article 283, China and the Philippines' exchanges of views did not constitute negotiations and did not concern the subject-matter of the Philippines' claims for arbitration.[323] The tribunal found, relying on precedents, that Article 283 did not require the parties to engage in negotiations regarding the subject-matter of the dispute. It only requires:

> that a dispute has arisen with sufficient clarity that the Parties were aware of the issues in respect of which they disagreed [...] Once a dispute has arisen, Article 283 then requires that the Parties engage in some exchange of views regarding the means to settle the dispute.'[324]

Based on the evidence of exchanges between the two States from 1995 until shortly before the initiation of the arbitral proceedings, many of which indicated that the parties had exchanged views on the means to settle the disputes between them, the tribunal found that the conditions set out in Article 283 had been satisfied.[325]

The *South China Sea* arbitration followed and continued to adopt the relatively low threshold set by previous tribunals relating to the fulfilment of Article 283.[326] This was achieved by requiring the parties only to exchange views on the method of dispute settlement, not the substance of the dispute, by giving the parties large discretion in determining how and for how long the exchange

[321] *South China Sea*, Award on Jurisdiction and Admissibility, n 25 at paras 219-224.It may be noted that the tribunal could also have reached the conclusion that the DOC did not exclude recourse to compulsory dispute settlement by distinguishing paragraph 4 of the DOC from article 16 of the CCSBT, drawing on the tribunal's reasoning in the *Southern Bluefin Tuna* arbitration in that connection (see further above).
[322] *Ibid*, para. 228 (footnote omitted).
[323] *Ibid*, para. 325.
[324] *Ibid*, para. 333.
[325] *Ibid*., para. 352.
[326] See, *e.g.*, *Chagos Marine Protected Area Arbitration*, n 303 at para. 378; *Southern Bluefin Tuna,* n 312 at para. 55.

of views should proceed and by examining in a cursory manner the evidence of communications of the parties. As a result, Article 283 in the *South China Sea* arbitration did not —similar to the previous cases—constitute a bar for the establishment of jurisdiction of an UNCLOS tribunal.

7.3.3 The exceptions under Article 298

Due to 2006 China's declaration under Article 298, in order to exercise jurisdiction the tribunal would need to satisfy that the submissions brought by the Philippines did not relate to (i) maritime boundary delimitations, (ii) historic bays and titles, (iii) law enforcement activities, and (iv) military activities.[327] As mentioned above, China's Position Paper indicated that China's focus was on the exception relating to maritime boundary delimitations.

The Philippines argued that what it requested the tribunal to determine was entitlements to maritime zones of various features in the South China Sea, and that the determination of maritime entitlements, *i.e.*, determining which maritime zones a feature could generate, is a distinct step that precedes maritime delimitation, which 'does not arise unless and until it is determined that there are overlapping maritime entitlements.'[328] In contrast, China contended that the Philippines' submissions concerning the existence and extent of China's maritime entitlements in the South China Sea were 'actually a request for maritime delimitation by the Arbitral Tribunal in disguise. The Philippines' claims have in effect covered the main aspects and steps in maritime delimitation.'[329] As noted by the tribunal, China thus viewed maritime delimitation as 'an integral and systemic process' encompassing any issues which might arise in the process of delimitation.[330]

The tribunal disagreed with China and found that 'a dispute concerning the existence of an entitlement to maritime zones is distinct from a dispute concerning the delimitation of those zones in an area where the entitlements of parties overlap'.[331] It agreed that 'fixing the extent of parties' entitlements and the area in which they overlap will commonly be one of the first matters to be addressed in the delimitation of a maritime boundary',[332] but that '[w]hile all sea boundary delimitations will concern entitlements, the converse is not the case: not all disputes over entitlements concern delimitation.'[333] On this basis, the tribunal concluded that Article 298(1)(a) excluding disputes concerning maritime delimitation 'does not reach so far as to capture a dispute over the existence of entitlements that may—or may not—ultimately require delimitation'.[334] As will be discussed below, the tribunal thus adopted a narrower understanding of the term 'disputes concerning maritime delimitation' for the purposes of Article 298(1) than that argued by China.

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[327] The South China Sea dispute was (and is) not included in the agenda of the UN Security Council, thus Article 298(1)(c) was not relevant before the arbitral tribunal.
[328] *South China Sea*, Award on Jurisdiction and Admissibility, n 25 at para. 146.
[329] Position Paper, n 201 at para. 69.
[330] *South China Sea*, Award on Jurisdiction and Admissibility, n 25 at para. 155.
[331] *Ibid*., para. 156.
[332] *Ibid*.
[333] *Ibid*., para. 204.
[334] *Ibid*.

In order to determine whether the exclusion involving historic titles was applicable to the Philippines' claims concerning China's historic rights in the South China Sea, the tribunal conducted a detailed examination of the scope and meaning of the term 'historic title' under Article 298(1)(a). As analyzed in section 5, the tribunal found that 'the reference to 'historic titles' in Article 298(1)(a)(i) of the Convention is [...] a reference to claims of sovereignty over maritime areas derived from historical circumstances.'[335] It was not intended to exclude jurisdiction over 'a broad and unspecified category of possible claims to historic rights falling short of sovereignty'.[336] As the tribunal found that China's claims to historic rights in the South China Sea did not amount to 'historic title to the waters of South China Sea, but rather a constellation of historic rights short of title', the exception in Article 298(1)(a) did not apply. The tribunal's categorization of different types of historic claims and consequently the finding that China's claims to historic rights in the South China Sea did not fall under Article 298(1)(a)(i) seems correct. The tribunal's conclusion on this point not only shed a much-needed light on China's hitherto ambiguous claim relating to the nine-dash line, but also for the first time clarified the scope of the exception under Article 298(1)(a)(i).

Finally, the exception concerning disputes over military activities was discussed in relation to two separate submissions brought by the Philippines concerning Chinese land reclamation activities at seven reefs in the South China Sea, and China's activities in and around Second Thomas Shoal and China's interaction with the Philippine military forces stationed on the vessel *Sierra Madre* at the Shoal.[337] With regards to the first of these submissions, the tribunal found that Article 298(1)(b) was not applicable, based on the fact that 'the Tribunal accepts China's repeatedly affirmed position that civilian use comprises the primary (if not the only) motivation underlying the extensive construction activities on the seven reefs in the Spratly Islands.'[338] In examining the second claim relating to activities around Second Thomas Shoal, the tribunal held that 'Article 298(1)(b) applies to 'disputes concerning military activities' and not to 'military activities' as such.'[339] The tribunal noted 'the deployment of a detachment of the Philippines' armed forces that is engaged in a stand-off with a combination of ships from China's Navy and from China's Coast Guard and other government agencies' and that 'China's military vessels have been reported to have been in the vicinity'.[340] In the view of the tribunal, 'this represents a quintessentially military situation, involving the military forces of one side and a combination of military and paramilitary forces on the other, arrayed in opposition to one another', which meant that the facts fell within the exception.[341] It would seem that the tribunal, contrary to the test that it set out, attached more weight to the presence of military forces in the situation before it rather than whether there was any dispute concerning military activities. As a result, the threshold set by the *South China Sea* tribunal for the application of Article 298(1)(b) was quite low.

[335] *Ibid*., para. 226.

[336] *Ibid*.

[337] On this latter issue see also section 8.3.

[338] South China Sea, Award on Merits, n 26 at para. 938.

[339] *Ibid*., para. 1158.

[340] *Ibid*., para. 1161.

[341] *Ibid*.

7.4 China's responses to the arbitral award

After the Arbitral Award on Jurisdiction and Admissibility was rendered on 29 October 2015, China issued a Statement in which it stated that the Award was 'null and void, and has no binding effect on China'.[342] After the Arbitral Award on the Merits was rendered on 12 July 2016, China issued a White Paper the day after declaring 'four nos': no-participation, no-recognition, no-acceptance and no-compliance.[343] Vice Foreign Minister Liu Zhenmin pronounced the award was 'just a piece of waste paper. You may just chuck it in the bin, leave it on the shelf, or put it in archives. In the end, the parties concerned will be back to the track of negotiation.'[344] To date, this remains the position of the Chinese government. In a keynote speech made at the Symposium on 'South China Sea Arbitration and International Law' in May 2024, the Director-General of the Department of Treaty and Law of the Foreign Ministry Ma Xinmin still classified the arbitration as 'a political charade masquerading as a legal process' and that 'the arbitral tribunal acted ultra vires and contravened the law, rendering the so-called awards null and void, devoid of any binding effect.'[345]

Official statements of the Chinese government suggest three main strands of arguments to show that the awards were null and void, namely that: (1) the arbitration was illegally constituted without China's consent and participation; (2) the Arbitral Tribunal acted *ultra vires* in exercising its jurisdiction; and (3) the Arbitral Tribunal was not a legitimate 'international court'. As will be explained below, these arguments upon closer scrutiny are not legally sound.

7.4.1 China's non-consent and non-participation

Non-participation before international courts does happen from time to time.[346] There is no obligation for a State to appear before an international court, including those under the UNCLOS. However, the practice of international courts makes clear that whether a State remains a party to a case does not depend upon whether or not that State appears before the dispute settlement body. Rather, it depends on whether the State in question has given consent to the jurisdiction of

[342] Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award on Jurisdiction and Admissibility of the South China Sea Arbitration by the Arbitral Tribunal Established at the Request of the Republic of the Philippines (30 October 2015) (available at https://www.mfa.gov.cn/eng/zy/gb/202405/t20240531_11367307.html).
[343] China's White Paper, n 174.
[344] Vice Foreign Minister Liu Zhenmin at the Press Conference on the White Paper Titled China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea (available at http://bi.china-embassy.gov.cn/fra/sgxw/201607/t20160719_7156983.htm).
[345] Xinmin Ma, n 97.
[346] For example, before the ICJ, the United States did not appear in the second phase of the oral hearings in the case brought by Nicaragua in 1985 (see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. Merits, Judgment. ICJ Rep 1986, p. 14); France did not appear in the case brought by Australia in 1974 (see *Nuclear Tests (Australia v. France)*, Judgment, ICJ Rep 1974, p. 253); Russia did not appear in the provisional measures phase in the case brought by Ukraine in 2022 (see *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation),* Provisional Measures, Order of 16 March 2022, ICJ Rep 2022, p. 211), Russia also did not appear in the case brought by the Netherlands before the ITLOS and an Annex VII arbitral tribunal in 2013 (see *Arbitration regarding the Arctic Sunrise (Kingdom of the Netherlands v Russian Federation)* (2014-2015) RIAA XXXII 183).

the dispute settlement body.[347] As explained above, the jurisdiction of the dispute settlement bodies established under the UNCLOS is compulsory and automatic once a State becomes a party to the Convention. China's consent to the jurisdiction of the arbitral tribunal was given by virtue of it becoming a party to the UNCLOS through ratification in 1996. China's non-participation does not amount to withdrawing consent to the Tribunal's jurisdiction, nor does it make the arbitration process 'illegal'. Despite its refusal to participate in the proceedings, China thus remains a party to the case. In fact, Article 9 of Annex VII of the UNCLOS envisions non-participation of a party to a case and provides that 'absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings'. In order to fulfil the requirements set out in Article 9 of Annex VII, the tribunal implemented a series of measures to safeguard China's procedural rights as a party to the case as specified in the Award on Jurisdiction and Admissibility.[348]

7.4.2 China's allegation that the tribunal was acting *ultra vires*

In its most recent statements,[349] China maintains the argument that the arbitral award is null and void because the tribunal went beyond the scope of its power by:

(i) dealing with a territorial sovereignty dispute,
(ii) exercising jurisdiction over maritime delimitation which has been excluded by China on account of its declaration under Article 298,
(iii) infringing upon the parties' right to settle disputes through peaceful means of their own choice, and
(iv) violating the principle of *non ultra petita* which requires international courts to 'to abstain from deciding points not included in those submissions'. This argument pertains to the arbitral tribunal's finding that all high-tide features of the Spratly Islands are rocks and that the Spratly Islands cannot claim maritime rights as a whole.

The first three arguments are essentially those presented in China's 2014 Position Paper, while argument (iv) seems to be a new addition in the aftermath of the award. In its statements post-award mentioned above, China mostly repeats the objections included in its Position Paper in 2014. It has not engaged with the analysis of the tribunal in any level of depth in order to show why and how it disagrees with the tribunal's specific findings.

With respect to (i), China still maintains that the Philippines' submissions 'revolve around disputes over territorial sovereignty concerning certain maritime features in the South China Sea' which matter is not regulated by the Convention. China makes reference to the *Chagos Marine Protected Area* arbitration decided in 2015, in which the tribunal found that it could not hear some of the submissions brought by Mauritius against the United Kingdom due to the fact that the question of sovereignty over the Chagos Archipelago constituted the real dispute between the

[347] See, *e.g.*, Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), Merits, (1986) ICJ Reports, p. 14, para. 28; 'Arctic Sunrise' (Kingdom of the Netherlands v. Russian Federation), Provisional Measures, Order of 22 November 2013, (2013) ITLOS Reports, p. 230, Joint Separate Opinion of Judge Wolfrum and Judge Kelly, para. 6.
[348] South China Sea Award on Merits, n 26 at paras 116, 117, 122.
[349] Xinmin Ma, n 97.

parties.[350] As mentioned above, another tribunal, namely the arbitral tribunal in the *Coastal State Rights* case between Ukraine and Russia also reached the same decision in declining to hear a dispute relating to Crimea 'to the extent that a ruling of the Arbitral Tribunal on the merits of Ukraine's claims necessarily requires it to decide, expressly or implicitly, on the sovereignty of either Party over Crimea'.[351] However the *South China Sea* arbitration differed from the two abovementioned cases in that both of those cases required the respective tribunals to either make a determination on territorial sovereignty prior to dealing with the law of the sea issue or make an implicit decision on territorial sovereignty by dealing with the submissions concerned. Neither of these scenarios was present in the *South China Sea* arbitration, as the tribunal also explained. The bulk of the Philippines' submissions revolved around the maritime entitlement of the features in the Spratly Islands, the determination of which was based on Article 121 of the UNCLOS and as such did not require a pre-determination nor an implicit decision on territorial sovereignty.

Turning to (ii), in addition to the central argument raised in its 2014 Position Paper that maritime entitlement is part and parcel of maritime delimitation, the 2024 Statement criticized the tribunal's finding that none of maritime features in the Spratly Islands could generate an exclusive economic zone and continental shelf, and thus there was no overlapping maritime claims. In China's view, by stating that there was no overlapping maritime entitlement, the tribunal was already engaged in maritime delimitation. As mentioned above, the tribunal adopted a narrower understanding of the term 'disputes concerning maritime delimitation' for the purposes of Article 298(1) than what China argued. This interpretation has not been without controversy. Some scholars have critiqued the tribunal for essentially 'salami-slicing'[352] one big dispute into isolated issues for the purposes of exercising jurisdiction[353] and for failing to have regard to the term 'concerning' which arguably requires a non-restrictive interpretation of the exception.[354] It is submitted, however, that *the South China Sea* tribunal's approach to interpreting the scope of exception under Article 298(1) was warranted. Applying the rules of treaty interpretation found in Article 31 of the VCLT to Article 298(1)(a), the wording of this provision plainly only includes 'disputes concerning the interpretation or application of Articles 15, 74 and 83 relating to sea boundary delimitations'. These articles concern the drawing of an equidistant median line following the requirements of Article 15 or the application of the three-stage approach to delimiting the exclusive economic zone and continental shelf as developed by case law to

[350] Xinmin Ma, n 97.

[351] *Coastal State Rights,* n 304 at para. 197.

[352] This term was already used by a scholar in 1997 to 'categorise and separate different kinds of dispute, some of which will lead to binding compulsory settlement, others of which will not'. See Alan Boyle, 'Dispute Settlement and the Law of the Sea Convention; Problems of Fragmentation and Jurisdiction' (1997) 46 *International and Comparative Law Quarterly*, pp. 41-42.

[353] See, *e.g.*, Stefan Talmon, 'The South China Sea Arbitration: Is There a Case to Answer?' in Stefan Talmon and Bing Bing Jia (eds), *The South China Sea Arbitration: A Chinese Perspective* (Hart Publishing 2014) p. 56; Sienhoo Yee, 'The South China Sea Arbitration (The Philippines v. China): Potential Jurisdictional Obstacles or Objections' (2014) 13 *Chinese Journal of International Law*, p. 708; Natalie Klein, 'The Vicissitudes of Dispute Settlement under the Law of the Sea Convention' (2017) 32 *International Journal of Marine and Coastal Law*, p. 355.

[354] Keyuan Zou and Qing Ye, 'Interpretation and Application of Article 298 of the Law of the Sea Convention in Recent Annex VII Arbitrations: An Appraisal' (2017) 48(3-4) *Ocean Development and International Law*, p. 335.

achieve an equitable solution as required under Article 73 and 84.[355] The establishment of maritime boundaries in accordance with articles 15, 74 and 83 is premised upon the existence of overlapping entitlements, but these articles are not concerned with the rules for the determination of the extent of the entitlements to these zones. These latter rules are among others included in articles 3, 57 and 76 of the UNCLOS, while for islands this also concerns article 121 of the Convention. China's argument that the tribunal by considering these latter rules was engaged in maritime delimitation was therefore not correct.[356] Furthermore, it should be recalled that an examination of the drafting history of Convention shows that States agreed to exclude disputes considered to be highly sensitive from the purview of UNCLOS tribunals.[357] However, as a compromise, they also agreed to limit the available exceptions to the maximum extent possible.[358] As a result, the exclusions in Article 298 should be construed to include only the three categories of disputes specified therein.[359] Therefore a broad interpretation of Article 298 to cover issues that are not explicitly stipulated, but only potentially related to the exceptions, would not seem to be consistent with the intention of the drafters.

As regards (iii) concerning the Parties' right to settle a dispute through peaceful means of their own choice, China again criticized the tribunal's interpretation of 'agreed' to mean 'legally binding agreement', and 'exclude' to mean 'expressly exclude'. It is interesting to note in this respect that China had successfully advocated for the DOC to not be a binding legal instrument. Yet in the *South China Sea* arbitration, China invoked the DOC as though it constituted a binding agreement. One scholar has pointed out that:

> In Chinese domestic law, this is indeed a distinction without a difference. PRC's 1990 Law on the Procedure of the Conclusion of Treaties (Treaty Law) does not distinguish between 'treaties' and 'important agreements' nor provide a standard for 'important.' The determination of which agreements will count as 'important' (and thus entail legal obligations on par with formal treaties) is left entirely to the PRC State Council, the executive cabinet of the Chinese state. This statute authorizes the state to undertake ad hoc decisions about which agreements will count as legally binding. Where convenient, non-legal, non-binding joint press statements (like those cited in the Position Paper) may outweigh ratified treaties.[360]

[355] See the box 'The UNCLOS and the delimitation of the exclusive economic zone and the continental shelf between neighboring States' in section 6.5.1 of this report.

[356] It may be noted that in the *Coastal State Rights* arbitration (Ukraine v Russia), the arbitral tribunal found that the exception relating to maritime boundary delimitation under Article 298(1)(a)(i) was not applicable because the tribunal could not determine whether there 'there are entitlements of either Party to the maritime areas around Crimea, let alone whether such entitlements overlap'. This suggests that the tribunal considered the determination of entitlements and whether they overlap to be a step that takes place prior to and is thus separate from a delimitation exercise within the meaning of Articles 15, 74 and 83. See *Coastal State Rights*, n 304 at paras 377-383.

[357] Myron H. Nordquist (eds), United Nations Convention on the Law of the Sea, 1982: A Commentary (Martinus Nijhoff 1985), p. 110.

[358] *Ibid*.

[359] P Chandrasekhara Rao, 'Delimitation disputes under the United Nations Convention on the Law of the Sea: Settlement Procedures' in Tafsir Malick Ndiaye and Rüdiger Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (Martinus Nijhoff 2007), p. 877.

[360] Isaac B. Kardon, 'China Can Say 'No': Analyzing China's Rejection of The South China Sea Arbitration - Toward A New Era of International Law with Chinese Characteristics' (2018) 13 *University of Pennsylvania Asian Law Review*, p. 24 (footnotes omitted).

It should be noted that the determination of whether an international agreement is binding or not must be guided by the criteria laid out under international treaty law as developed in case law.[361] The discretion granted under Chinese domestic law to political organs to make this determination, allows China to blur the distinction between binding and non-binding law at the international level, thus providing opportunities for China to make use of the concept of rules-based order to justify its actions as discussed in section 3. In any case, as explained above in section 7.3.2, while the interpretation of Article 281 adopted by the *Southern Bluefin Tuna* and *South China Sea* tribunals may be different, the application of the two tribunals' reasoning to paragraph 4 DOC would likely lead to the same outcome, *i.e.*, that paragraph 4 of the DOC does not exclude recourse to compulsory dispute settlement under the UNCLOS.

Further, with regards to point (iii) listed above, China continues to argue that the exchange of views between the Philippines and China, which related to sovereignty over maritime features and not the disputes concerning the law of the sea, did not meet the requirements of Article 283. However, again China is not engaging with the findings of the arbitration in a meaningful manner. Article 283 does not impose an obligation to negotiate the substance of a dispute as a precondition that needs to be satisfied before an UNCLOS tribunal could exercise jurisdiction pursuant to Part XV. It only requires awareness of the issues in respect of which the parties disagreed and that the parties have exchanged views on *the means* to settle disputes. As mentioned above, the *South China Sea* tribunal's interpretation of Article 283 is consistent with the approach adopted by prior tribunals. The threshold for meeting the requirements of Article 283 is low.

Finally, with respect to point (iv) listed above relating to the principle of *non ultra petita*, this principle indeed requires an international court or tribunal to abstain from deciding points not included in the parties' submissions.[362] However, the ICJ has observed that this principle 'cannot preclude the Court from addressing certain legal points in its reasoning' should it deem this necessary.[363] As the ICJ stated in the *Libya/Malta Continental Shelf* case: '[t]he Court must not exceed the jurisdiction conferred upon it by the Parties, but it must also exercise that jurisdiction to its full extent.'[364] In the *South China Sea* arbitration, the tribunal's finding that all high-tide features of the Spratly Islands were rocks was part of its reasoning to determine whether it had jurisdiction over the Philippines' Submission 5 that Mischief Reef and Second Thomas Shoal are part of the exclusive economic zone and continental shelf of the Philippines.[365] In its Award on Jurisdiction and Admissibility, the tribunal found that it had to defer taking a decision on whether it had jurisdiction over Submission 5 because such a decision depended upon the status of maritime features in the Spratly Islands.[366] Thus, in the *South China Sea* arbitration, such a finding was necessary in the tribunal's reasoning to establish jurisdiction over a submission that was put

[361] See, *e.g.*, *Maritime delimitation and territorial questions between Qatar and Bahrain, Jurisdiction and Admissibility*, (1994) ICJ Reports, p. 112.
[362] *Asylum (Colombia/Peru),* Judgment, (1950) ICJ Reports p. 395 at p. 402.
[363] Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), Judgment, (2002) ICJ Reports p., 3, para. 43.
[364] *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, (1985) ICJ Reports, p. 13, para. 19.
[365] *South China Sea*, Award on Merits, n 26 at paras 646-647.
[366] *South China Sea*, Award on Jurisdiction and Admissibility, n 25 at para. 394.

before it. Consequently, it cannot be said that the *non ultra petita* principle was violated as China has claimed.

7.4.3 China's allegation of an illegitimate court

Chinese government officials and scholars have frequently conducted *ad hominem* attacks at the arbitrators of the tribunal[367] as well as the appointing authority[368] – all as part of a concerted campaign to discredit the tribunal as an 'illegitimate court' and to portray China as 'upholding the rules against foreign subversion.'[369] Amongst the main grievances that China has put forward, two were particularly prominent, namely that the arbitrators of the tribunal were appointed by the then President of ITLOS who was a Japanese national and that the expenses of the arbitral proceedings were paid for by the Philippines. Ironically, these two issues both came about as a result of China's decision to not participate in the proceedings. Arbitral tribunals are ad hoc dispute settlement bodies whose composition needs to be determined by the parties to the dispute.[370] Because China did not select its party-appointed arbitrator or attempt to engage in a discussion with the Philippines regarding the selection of the other members of the tribunal, this task necessarily fell upon the then ITLOS President, Judge Yanai, in accordance with Article 3(e) of Annex VII. In relation to the finances of the Tribunal, according to Article 7 of Annex VII of the UNCLOS, 'the expenses of the tribunal, including the remuneration of its members, shall be borne by the parties to the dispute in equal shares'. This is not peculiar to Annex VII arbitral tribunals, rather it is a common feature of all ad hoc arbitration. Since China refused to participate in the arbitration, the Philippines was the only party to fulfil its obligation under Article 7.[371] The fact that the expenses of ad hoc arbitral tribunals are borne by the parties to the case does not provide any indication for or impact the way in which the tribunal decides the case.

Finally, despite China's rhetoric, arbitral awards are binding upon the parties as a matter of law. Article 296, paragraph (1), of the UNCLOS states that any decision rendered by a court or tribunal having jurisdiction under Part XV, Section 2 of the UNCLOS 'shall be final and shall be complied with by all the parties to the dispute'. As this article applies to the decisions of all the dispute settlement bodies 'having jurisdiction under Section 2', an award rendered by an arbitral tribunal under Annex VII is final and binding on the parties to the arbitration. The binding and final nature of the decisions of international courts and tribunals is grounded in the independent role of an international court or tribunal to settle disputes brought before it and the consent to jurisdiction that states have given to the court or tribunal in question. As explained above, China has consented to the jurisdiction of the arbitral tribunal by virtue of being a party to the UNCLOS, despite its objections to the tribunal's exercise of jurisdiction and non-participation.

[367] Ministry of Foreign Affairs of the People's Republic of China, 'Veil of the Arbitral Tribunal Must Be Tore Down—Vice Foreign Minister Liu Zhenmin Answers Journalists' Questions on the So-called Binding Force of the Award Rendered by the Arbitral Tribunal of the South China Sea Arbitration Case' (13 July 2016). Note, however, that this particular Press Conference has now been taken off the website of the Chinese Ministry of Foreign Affairs.
[368] People's Daily unmasks manipulator behind South China Sea arbitration (available at https://www.globaltimes.cn/content/995003.shtml).
[369] Isaac B. Kardon, *China's Law of the Sea* (Yale University Press 2023), p. 221.
[370] UNCLOS, Annex VII, article 3.
[371] See also *South China Sea*, Award on Merits, n 26 at paras 110-111.

7.5 China's systematic opposition to third-party dispute settlement

At the core of China's objection to the South China Sea arbitration is a fundamental opposition to compulsory third-party dispute settlement for territorial sovereignty and maritime disputes.[372] In fact, one commentator observed that 'China's approach to maritime dispute resolution is the only body of rules in which its practice is virtually uniform and consistent across the board.'[373] This strong stance was already apparent during the negotiation of the UNCLOS, during which China observed that:

> *any* compulsory and binding third-party settlement of a dispute concerning sea boundary delimitations must have the consent of all parties to the dispute. Otherwise, such a form of settlement would not be acceptable to the Chinese delegation.'[374]

China's antagonism against the involvement of a third party for disputes relating to maritime boundaries is further evident from its declaration upon ratifying the UNCLOS in 1996 that 'the PRC will effect, *through consultations,* the delimitation of boundaries of maritime jurisdiction with the states with coasts opposite or adjacent of China respectively on the basis of international law and in accordance with the equitable principle.'[375] At first glance, this declaration would seem to constitute a declaration within the meaning of Article 298(1)(a)(i) as it purported to exclude maritime delimitation from compulsory dispute settlement. However, this would not be the case as Article 298(1)(a)(i) requires that delimitation disputes excluded from compulsory dispute settlement be submitted to compulsory conciliation pursuant to Annex V of the UNCLOS. Article 298 does not allow a State to choose its own means of settlement for maritime boundary delimitation disputes. In other words, China's 1996 declaration is not in line with Article 298(1)(a) and therefore cannot be deemed as a declaration falling thereunder. This declaration should rather be interpreted as a reservation excluding the UNCLOS compulsory dispute settlement procedures, which would be in violation of Article 309 prohibiting any reservations to be made to the UNCLOS, 'unless expressly permitted by other articles of this Convention'.

China has framed its objection to third-party dispute settlement as one that is driven by the broader desire to uphold the legal order of the UNCLOS and to portray itself as championing the rule of law, for example by stating that:

> The Arbitration brings our attention to the question that the international community should be concerned of, i.e., how to interpret and apply the compulsory arbitration procedures under the UNCLOS comprehensively, accurately and in good faith. If other States follow the Philippines to abuse the compulsory arbitration procedures . . . the consequence would be the opening of the 'Pandora's Box' of lawsuit abuse, and that the

[372] See: Xinmin Ma, 'China and the UNCLOS: Practices and Policies' (2019) 5(1) *The Chinese Journal of Global Governance*, p. 1.
[373] Kardon, n 369 at p. 215.
[374] Third United Nations Conference on the Law of the Sea, Eighth Session, 112th Plenary Meeting, UN Doc. A/CONF.62/SR.112 (25 April 1979), para. 49.
[375] China's Declaration upon ratifying UNCLOS (available at https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#EndDec) (emphasis provided).

> declarations excluding compulsory arbitration made by over 30 States will be rendered completely meaningless.[376]

China's rejection of compulsory dispute settlement for territorial and maritime disputes, and the emphasis on consent could again be felt during the negotiations of the Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction (BBNJ Agreement).[377] When negotiating the dispute settlement provisions of the Agreement, China proposed an option which only allowed for third-party dispute settlement if all parties to the dispute agreed. One commentator has observed that '[a]lthough the case was never expressly mentioned, undoubtedly China's support for consent-based dispute settlement was influenced by its views about the South China Sea arbitration'.[378] When it was clear that the majority of States present were still in favor of compulsory dispute settlement, China then wanted to add an exclusion for issues concerning 'sovereignty, sovereign rights or jurisdiction' of a State Party from disputes. While such a broad exclusion was eventually not accepted by other States, part of China's concerns was accommodated in Article 60(9) of the BBNJ Agreement, which specifically excludes the jurisdiction of UNCLOS tribunals over a:

> dispute that concerns or necessarily involves the concurrent consideration of the legal status of an area as within national jurisdiction, nor over any dispute concerning sovereignty or other rights over continental or insular land territory or a claim thereto of a Party to this Agreement.[379]

At a more general level, China's position taps into a broader debate surrounding the UNCLOS dispute settlement system regarding the allegedly expansionist approach that UNCLOS tribunals have taken in interpreting their jurisdictional scope, and thus, according to some authors and States, going beyond the drafters' intentions and circumventing State consent. It should be noted that what constitutes an 'expansionist approach' depends on how the scope of jurisdiction of the UNCLOS is determined. As the preceding discussion illustrates, China has adopted a self-judging approach to determining whether consent has been given, which is what would contravene the drafter's intention of putting in place a compulsory dispute settlement system. It should further be noted that the UNCLOS is not a self-contained regime. The Convention has a broad regulatory scope in which its interlinkages with other rules of international law are recognized. Thus, there may be cases in which an UNCLOS tribunal may exercise its jurisdiction over issues not per se regulated under the UNCLOS but incorporated into the Convention from other sources of law. [380] In such cases, they cannot be deemed to have adopted an 'expansionist' approach.

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[376] Briefing on the South China Sea Arbitration Initiated by the Philippines XU Hong, Director-General of Department of Treaty and Law, 12 May 2016 (available at http://eu.china-mission.gov.cn/eng/fyrjh/201605/t20160512_8267585.htm).
[377] Text available at https://www.un.org/bbnjagreement/sites/default/files/2024-08/Text%20of%20the%20Agreement%20in%20English.pdf (adopted on 19 June 2023; not yet entered into force).
[378] Douglas Guilfoyle and Joanna Mossop, 'The Extent and Legitimacy of the Judicial Function in UNCLOS Dispute Settlement' (2024) 73(3) *International and Comparative Law Quarterly*, p. 641.
[379] However, this provision arguably does not exclude the consideration of the extent of coastal States zones (*i.e.*, determinations in relation to, for example, Articles 7 or 121 of the UNCLOS). See: Alex G. Oude Elferink, Danae F. Georgoula, Lan N Nguyen, Seline Trevisanut, 'Compulsory Jurisdiction as the DNA of LOSC Dispute Settlement: An Evolutionary Path' (2023) 38(2) *The International Journal of Marine and Coastal Law*, p. 185.
[380] See Danae Georgoula, Supplemental Jurisdiction under the UN Convention on the Law of the Sea: Prongs, Scope, Potentials (PhD thesis, Utrecht University 2025).

7.6 The Philippines' responses to the arbitration

While China's position towards the arbitration has been one of consistency – albeit questionable from a legal perspective – the Philippines' response has been one that vacillates. According to one commentator, 'compulsory dispute settlement can [...] become a means for successful litigants to acquire 'symbolic, legal and political resources and leverage. This can occur even without any respondent state compliance.'[381] However, in the case of the Philippines, changes in government administrations since the *South China Sea* awards were rendered have resulted in inconsistent policies and approaches towards the arbitral awards, which resulted in making the leverage not immediately apparent.

The *South China Sea* arbitration was initiated under President Benigno Aquino III and was hailed as a 'historic' accumulation of his hallmark strategy of 'naming and shaming' foreign policy.[382] In his Statement before the arbitral tribunal, the then Secretary of Foreign Affairs Albert del Rosario paid particular attention to the equalizing power of international law and added that 'no provisions of the Convention are as vital to achieving this critical objective than Part XV. It is these dispute resolution provisions that allow the weak to challenge the powerful on an equal footing'.[383] The Philippines' view that compulsory dispute settlement under the UNCLOS could provide a level playing field for smaller States aligned with those expressed by smaller and less developed States during the negotiations of the UNCLOS, ultimately becoming one of the reasons for the inclusion of compulsory dispute settlement in the Convention.[384]

When President Duterte took office mere weeks before the arbitral award on the merits was handed down, he immediately downplayed the importance of the award as part of a shift in his foreign policy in favor of China and Russia. Months thereafter, Duterte stated that the *South China Sea* arbitration would 'take the back seat' during talks with China,[385] and that the two sides were 'to seek settlement on the South China Sea issue through bilateral dialogue'.[386] Even when the Philippines assumed the rotating chairmanship of ASEAN in 2017, it was reported that Duterte said he would not raise the arbitral award and his nation's win did not concern other ASEAN members.[387] The timing of the change in administration thus resulted in a loss of momentum to build on the successful outcome of the arbitration in order to put pressure on China to comply

[381] Guilfoyle, n 91 at p. 17.
[382] Edcel John A. Ibarra, Aries A. Arugay, 'Something Old, Something New: The Philippines' Transparency Initiative in the South China Sea' *ISEAS Perspective*, 6 May 2024 (available at https://www.iseas.edu.sg/articles-commentaries/iseas-perspective/2024-27-something-old-something-new-the-philippines-transparency-initiative-in-the-south-china-sea-by-edcel-john-a-ibarra-aries-a-arugay/).
[383] Statement before the Permanent Court of Arbitration 'Why the Philippines brought this case to arbitration and its importance to the region and the world' (available at https://www.un.int/philippines/statements_speeches/statement-permanent-court-arbitration-why-philippines-brought-case-arbitration).
[384] This view is exemplified in a statement made by the representative of Singapore, in which it is argued that dispute settlement is a powerful means to help small countries 'to prevent interference by large countries' and 'necessary in order to avoid political and economic pressures'. See: *Official Records of the Third United Nations Conference on the Law of the Sea,* vol. V (United Nations publication, Sales No. E. 76. V. 8), p. 10, para. 24.
[385] Philippines' Duterte says S.China Sea arbitration case to take 'back seat' (available at https://www.reuters.com/article/world/philippines-duterte-says-schina-sea-arbitration-case-to-take-back-seat-idUSKCN12J1QJ/).
[386] Duterte in China: Xi lauds 'milestone' Duterte visit (available at https://www.bbc.com/news/world-asia-37700409).
[387] Duterte Won't Bring Up South China Sea Arbitration Victory at Southeast Asia Summit (available at https://www.wsj.com/articles/duterte-wont-raise-south-china-sea-arbitration-win-at-southeast-asia-summit-1493298290).

with the award. However, scholars have pointed out that while the President adopted an appeasement policy towards China, not all his cabinet members toed this line. For example, it has been observed that the 'Arbitration Award remained at the core of Philippine diplomatic positions in closed-door meetings of the Philippines-China Bilateral Consultation Mechanism', or that the Philippines' position when signing a memorandum of understanding for joint oil and gas development with China was 'premised on The Philippines' exclusive sovereign rights to the resources as vindicated by the Award'.[388]

Duterte himself had a change of position in the latter half of his term when he moved away from his China-friendly policy, resulting in a warm embrace of the arbitral award. In July 2020, he stated that the ruling was 'beyond compromise' and that any attempts to undermine it would be rejected.[389] His Foreign Affairs Secretary Teodoro Locsin Jr. also called upon China to comply with the award, pointing out that compliance is an obligation under international law, including the UNCLOS, and further noted that the award is 'a milestone in the corpus of international law, the cornerstone of a rules-based regional and international order.'[390] It follows that even within one administration, the Philippines was struggling to adopt a consistent policy towards the arbitration. There is, however, support from the current administration of President Marcos Jr. On the eighth anniversary of the 2016 Award, the Philippines' statement saw the Award as 'a testament to our unwavering commitment to the rule of law and the peaceful settlement of disputes' and as a 'a positive and legitimate source of international law'.[391] However, China's hard stance against the award, the Philippines' inconsistent position towards the arbitration, the asymmetry in power between the two States and the lack of enforcement mechanisms under international law may indicate that the arbitration has inserted little compliance pull towards China and has resulted in little change in China's behavior on the ground. The costs associated with resorting to third-party dispute settlement may present a discouraging precedent for other smaller claimant States, most of whom lack both expertise and experience in international litigation. However, this does not mean that the arbitration was futile. The Award has assessed China's legal arguments and makes it problematic for China to credibly keep relying on legal positions that are in not in accordance with the UNCLOS. In that sense, the arbitration exerts a legitimacy pull regardless of issues of non-compliance.

7.7 Responses from other States

Several States, including claimant and non-claimant States, attended the hearings of the *South China Sea* arbitral proceedings. Claimant States included Viet Nam and Malaysia, non-claimant States included Indonesia, Thailand and Japan.

[388] Jay L. Batongbacal 'The Philippines and the South China Sea Arbitration Award: External Appeasement and Internal Dissension' (24 September 2021) (available at https://www.iseas.edu.sg/wp-content/uploads/2021/09/ISEAS_Perspective_2021_126.pdf).
[389] Derek Grossman 'Duterte's Dalliance with China Is Over' (2 November 2021) (available at https://www.rand.org/pubs/commentary/2021/11/dutertes-dalliance-with-china-is-over.html).
[390] China claims on most of SCS 'completely unlawful': US (available at https://www.pna.gov.ph/articles/1108873).
[391] Statement on the 8th Anniversary of the 2016 Arbitral Award on the South China Sea (available at https://philippineembassy-dc.org/statement-on-the-8th-anniversary-of-the-2016-arbitral-award-on-the-south-china-sea/).

Amongst these States, Viet Nam was the most active in its communications with the tribunal and in expressing its view regarding the arbitral process. As the tribunal noted, Viet Nam requested copies of the pleadings to determine whether its 'legal interest and rights may be affected'. [392] Specifically with respect to the jurisdiction of the tribunal, Viet Nam stated that it:

> has no doubt that the Tribunal has jurisdiction in these proceedings [and more broadly that it supported] UNCLOS States Parties which seek to settle their disputes concerning the interpretation or application of the Convention . . . through the procedures provided for in Part XV of the Convention.[393]

Viet Nam also left open the possibility of using 'any peaceful means as appropriate and necessary in accordance with the Convention' to protect its legal rights and interests in the South China Sea.[394] Viet Nam was also the first ASEAN member State to welcome the arbitral ruling. On the day the Award on the Merits was issued, the Vietnamese Foreign Ministry Spokesperson stated that 'Vietnam welcomes the arbitration court issuing its final ruling' and that 'Vietnam strongly supports the resolution of the disputes in the South China Sea by peaceful means, including diplomatic and legal processes and refraining from the use or threats to use force, in accordance with international law.'[395] However, since then, Viet Nam has been much less vocal in expressing support for the arbitration, at least explicitly. In its official statements, and particularly in its Notes Verbales issued since 2016,[396] Viet Nam has adopted positions that align with the findings of the arbitral tribunal, for example on the invalidity of the nine-dash line, and the maritime entitlements of features in the South China Sea, but it has refrained from citing the award or even mentioning it.[397] With regards to third-party dispute settlement, Vietnamese high-ranking officials have at times hinted at the possibility of invoking third-party dispute settlement,[398] but official statements are usually couched in more general terms such as commitments to 'resolving disputes by peaceful means in accordance with international law'. [399]

Malaysia's position has been even more ambivalent. It did not issue any requests to the arbitral tribunal similar to those of Viet Nam. On the day the award came out, Malaysia simply 'notes' the award and issued a generally-worded statements of support for 'diplomatic and legal

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[392] *South China Sea*, Award on Jurisdiction and Admissibility, n 25 at para. 183.
[393] *Ibid*.
[394] *Ibid*., para. 184.
[395] Vietnam welcomes South China Sea ruling, reasserts its own claims (available at https://www.reuters.com/article/world/vietnam-welcomes-south-china-sea-ruling-reasserts-its-own-claims-idUSKCN0ZS17A/).
[396] See, for example, Permanent Mission of the Socialist Republic of Viet Nam to the United Nations, Communications No. 22/HC-220, 30 March 2020 (available at https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/VN20200330_ENG.pdf).
[397] Vo Ngoc Diep, 'Vietnam Is Revitalising the SCS Arbitration Award' (2020) 2 ASEAN Focus (available at https://www.iseas.edu.sg/wp-content/uploads/2020/05/ASEANFocus-June-2020.pdf)
[398] Richard Javad Heydarian, 'Vietnam's Legal Warfare Against China: Prospects and Challenges' Asia Maritime Transparency Initiative, 21 November 2019 (available at https://amti.csis.org/vietnams-legal-warfare-against-china-prospects-and-challenges/).
[399] See, *e.g.*, 'East Sea disputes need to be resolved through peaceful means: Spokeswoman' (available at https://en.vietnamplus.vn/east-sea-disputes-need-to-be-resolved-through-peaceful-means-spokeswoman-post256419.vnp).

processes'.[400] Similar to Viet Nam, its Notes Verbales since 2016 contain claims that are clearly based on the arbitral award, but again with no reference to the arbitration itself.[401]

Brunei has been by far the most silent and passive in its response. Brunei did not attend the arbitral proceedings as an observer. It also did not issue any statement after the award was rendered. It was not until four years later, in 2020, that Brunei broke its silence to make known its position on the South China Sea disputes. In its statement, no mention is made to the *South China Sea* arbitration. Instead, Brunei's foreign ministry urged countries to discuss issues bilaterally and underscored that negotiations should be based on the UNCLOS and international law.[402] In essence, this statement could be read as a rejection of not only the *South China Sea* arbitration itself but also of third-party settlement in general. When meeting his counterpart from Brunei, considered a 'friendly' claimant state by China, Foreign Minister Wang Yi (2016) emphasized the importance of the so-called 'dual-track thinking' initially proposed by Brunei and keenly promoted by China—namely, specific disputes need to be resolved by the relevant parties through peaceful consultation, while the stability of the South China Sea needs to be maintained by both China and ASEAN.[403]

Indonesia in 2016 took a neutral stance and neither positively acknowledged the ruling nor opposed its findings. However, in recent years this neutral stance has changed and Indonesia has become much more vocally supportive of the arbitral award. Besides the Philippines, Indonesia is the only other ASEAN State which in recent years has explicitly referred to the *South China Sea* arbitration in its Notes Verbales,[404] or in other official statements[405] to refute Chinese claims in the South China Sea.

7.8 Conclusions

It would seem safe to conclude that China's rejection of compulsory jurisdiction will not likely change in the foreseeable future. If anything, the *South China Sea* arbitration has stimulated China to further strengthen its position that 'on issues concerning territorial sovereignty and maritime delimitation, China does not accept any recourse to third party dispute settlement; nor does China accept any solution imposed on it.'[406] What the BBNJ Agreement negotiations further demonstrate is that China has no reservation in expressing its rejection of the UNCLOS

[400] Ministry of Foreign Affairs of Malaysia, Press Release Following the Decision of the Arbitral Tribunal on the South China Sea Issue (available at https://www.kln.gov.my/web/guest/home?p_p_id=101&p_p_lifecycle=0&p_p_state=maximized&p_p_mode=view&_101_struts_action=%2Fasset_publisher%2Fview_content&_101_returnToFullPageURL=%2F&_101_assetEntryId=8393068&_101_type=content&_101_urlTitle=press-release-following-the-decision-of-the-arbitral-tribunal-on-the-south-china-sea-issue&inheritRedirect=true).
[401] Permanent Mission of Malaysia to the United Nations, Communication HA 26/20, 29 July 2020 (available at https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_07_29_MYS_NV_UN_002_OLA-2020-00373.pdf).
[402] Ministry of Foreign Affairs of Brunei Darussalam, Statement on the South China Sea (available at http://www.mfa.gov.bn/Lists/Press%20Room/news.aspx?id=841&source=http://www.mfa.gov.bn/site/home.aspx).
[403] Wang Yi: Stick to 'Dual-track Approach' When Dealing with the South China Sea Issue (available at http://pg.china-embassy.gov.cn/eng/zgyw/201607/t20160726_436778.htm).
[404] See, *e.g.*, Communication No. 126/POL-703/V/20, n 228.
[405] Indonesia rejects China's claims over South China Sea (available at https://www.reuters.com/article/world/indonesia-rejects-chinas-claims-over-south-china-sea-idUSKBN1Z01QY/).
[406] Kardon, n 369 at p. 239.

compulsory dispute settlement in different fora and in endeavoring to limit the scope of this jurisdiction in the aftermath of the *South China Sea* arbitration. [407] China's approach to compulsory jurisdiction 'was not universally shared'[408] and thus the extent of China's influence was limited during the BBNJ Agreement negotiations. However, the nature of the BBNJ Agreement negotiations –the largest global multilateral negotiations in the past decades – certainly differs from those between China and other States in Southeast Asia. The power asymmetry between China and ASEAN and the division amongst ASEAN States in their stance towards the South China Sea disputes, China's strong stance against compulsory dispute settlement may have a greater impact on how territorial and maritime disputes are to be resolved. This may raise questions among ASEAN States regarding the importance and value of resorting to judicial measures particularly in cases involving small States against more powerful States.

Despite the hesitation to explicitly acknowledge the *South China Sea* awards, the brief overview of the responses from other States in the region indicates that 'there is a slow but sure convergence among [ASEAN] states to finally start making use of the award as a means of pushing back against Chinese assertions.'[409] In terms of substance, 'the award has now become a common denominator of the positions of the Philippines, Malaysia, Indonesia and Viet Nam.'[410] However, this common denominator seems to be much less clear when it comes to recourse to compulsory dispute settlement. The attitude of Viet Nam and Malaysia is similar to that of 'free-riders' who benefit from the arbitral findings without having to contribute their own resources. Their hesitance to explicitly acknowledge the arbitral award even in light of China's aggressiveness on the ground in the aftermath of the award may be indicative of a more general reluctance to resort to third-party settlement due to political pressure. On the other hand, although Indonesia is a non-claimant State in the South China Sea disputes, it is one of the most influential members in ASEAN. Thus its support for the arbitration, coupled with its own problems with Chinese incursions in the North Natuna Sea, may result in stronger support for the inclusion of third-party dispute settlement in the COC.

[407] See also China's oral submissions in the ITLOS Advisory Proceedings on Climate Change, during which, in response to many delegations' references to the South China Sea arbitral award, China stated that:

> China notices that some States mentioned the so-called South China Sea arbitration awards in their written and oral statements. The position of China on this issue is clear and consistent. The arbitral tribunal in the South China Sea arbitration acted ultra vires, erred in fact finding, misinterpreted and perverted the law in adjudication. The so-called 'awards' are null and void and should not be invoked as a legal basis (see: International Tribunal for the Law of the Sea, Minutes of Public sittings Held from 11 to 25 September 2023, p. 327 (available at https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/C31_Minutes.pdf) p. 327).

[408] Douglas Guilfoyle and Joanna Mossop, n 378 at p. 664.

[409] Jay L. Batongbacal, 'Waters That Run Deep: The SCS Arbitration in 2020' (available at https://www.iseas.edu.sg/wp-content/uploads/2020/05/ASEANFocus-June-2020.pdf).

[410] Vo, n 397 at p. 27.

8. The relationship between activities on the ground and international law

8.1 Introduction

Incidents between China and other claimant States in the South China Sea regularly feature in news media worldwide. As this media coverage and public statements of the States concerned indicate, international law figures quite prominently in this connection. On the one hand, States refer to the law as justifying their own actions, while on the other hand the actions of other States are condemned as being in breach of international law. This state of affairs raises two questions concerning the relationship between activities on the ground and international law. First, what impact does the discrepancy between activities on the ground and the rights and obligations of States have on the development of the law? Second, what do arguments in relation to activities on the ground tell us about the relevance of international law as a regulatory framework for the South China Sea?

The consideration of these two questions first of all requires having a closer look at the kind of legal argumentation States have used in relation to specific incidents/activities. To this end, the current section of the report has selected two specific issues.[411] A first issue concerns the deployment of the Chinese rig *Haiyang Shiyou 981* in disputed waters to the south of the Paracel Islands in 2014 and 2015. In this connection, the report relies on an earlier analysis of that case by one of its authors.[412] Although these events took place a decade ago, it is considered that the way in which international law was argued still provides a good illustration of the relation between activities on the ground and international law arguments. A second issue concerns recent developments in relation to the rotation of personnel and resupply of the vessel *Sierra Madre*, which is grounded at Second Thomas Shoal. After discussing these two issues, this section further reflects on the two questions that are raised above.

[411] It is recognized that in light of the numerous incidents taking place in the South China Sea, this is a limited selection. However, it is considered that these two incidents provide a sufficient illustration for assessing the relation between activities on the ground and international law (arguments). There is an extensive academic debate focusing in particular on China's activities in the South China Sea and beyond, which analyzes these activities through the lens of the concept of 'gray zone operations' (see, *e.g.*, R. Pedrozo 'Narrowing "The Gap": Counter Gray Zone Operations' (2024) 103 *International Law Studies* pp. 364-384; A.S. Erickson and R.D. Martinson (eds) *China's Maritime Gray Zone Operations* (Naval Institute Press, 2019); Bonny Lin *et al. Competition in the Gray Zone; Countering China's Coercion Against U.S. Allies and Partners in the Indo-Pacific* (Rand Corporation, 2022); Rob McLaughlin, 'The Law of the Sea And PRC Gray-Zone Operations in the South China Sea' (2022) 116 *American Journal of International Law* pp. 821-835. Various definitions of the term 'gray zone operations' have been offered. Pedrozo defines gray zone operations as involving coercive actions that fall below the level of an armed attack (Pedrozo, n 411 at p. 366). Lin *et al*. define gray zone tactics as including:

> coercive [Chinese] activities that U.S. allies and partners view as *intentional* (accompanied by Chinese government coercive messages or threats against U.S. allies or partners) or *ambiguous* (that U.S. allies or partners interpret as having coercive potential but that Beijing has not explicitly and officially messaged as such) (Lin *et al.*, n 411 at p. 3).

For a further discussion of the term see also McLaughlin, n 411 at pp. 824-828.

[412] A.G. Oude Elferink 'Arguing International Law in the South China Sea Disputes: The *Haiyang Shiyou 981* and *USS Lassen* Incidents and the *Philippines* v. *China* Arbitration' (2016) 31 *International Journal of Marine and Coastal Law* pp. 205-241.

8.2 The *Haiyang Shiyou 981* incident

In May 2014, the rig *Haiyang Shiyou 981* (HYSY 981) was deployed in an area south of the Paracel Islands by the China National Offshore Oil Corporation to drill for hydrocarbons under a Chinese license. The rig drilled at two specific locations.[413] These two locations are respectively 17 and 25 nautical miles distant from Triton Island, the nearest island in the Paracel Islands. Both locations are beyond the 12-nautical-mile territorial sea of the Paracel Islands. The locations are respectively some 120 and 140 nautical miles from the Cu Lao Re Islands, the nearest undisputed Vietnamese territory and respectively some 180 and 190 nautical miles from China's Hainan Island. The drilling operations led to confrontations at sea between Chinese and Vietnamese vessels and to riots in Viet Nam against Chinese business interests and Chinese workers. On 15 July 2015 it was reported that the HYSY 981 had finished its operations to the south of the Paracel Islands and was moved back to Hainan.

Prior to reviewing the legal arguments advanced by China and Viet Nam in relation to the HYSY 981 incident, brief reference to the relevant rules of the UNCLOS is appropriate. The HYSY 981 operated at two locations. These two locations are not only within the maritime zones of the Paracel Islands, but also within 200 nautical miles of undisputed territory of China and Viet Nam. This implies that, independently of how the sovereignty dispute will be resolved, this area is subject to overlapping maritime entitlements. This arguably makes Articles 74(3) and 83(3) relevant for assessing the HYSY 981 incident. As is argued in in section 9 of this report common paragraph 3 and similar obligations under general international law provide the main yardstick for determining the legality of actions of claimant States in areas of overlapping entitlements. Interestingly, any direct reference to Articles 74(3) and 83(3) is conspicuously absent from the public statements of both States on the legal aspects of the HYSY 981 incident.[414]

China initially did not refer to the exclusive economic zone and continental shelf in indicating the location of the incident. For instance, a statement of a spokesperson of the Ministry of Foreign Affairs refers to 'waters off China's Xisha Islands'.[415] Similarly, the 2014 Position Paper refers to 'waters close to China's Xisha Islands'.[416] In addition, the paper makes reference to the fact that the HYSY 981 was operating 17 nautical miles from Triton Island of the Paracel Group and 150

[413] The first location was at 15° 29.58 N; 111° 12.06 E, while the rig subsequently was moved to the location 15° 33.38 N; 111° 34.62 E (see *Letter dated 3 July 2014 from the Permanent Representative of Viet Nam to the United Nations addressed to the Secretary-General* (UN Doc. A/68/943 of 9 July 2014), Annex, section 1 and a number of Notices to Mariners published by the Chinese Maritime Safety Administration (see *e.g.* Navigation Warning 14033 of 3 May 2014 (available at http://www.msa.gov.cn/page/article.do?articleId=7291b46d-ab69-4949-8a88-6c55dad815e8); Navigation Warning 14041 of 27 May 2014 (available at http://www.msa.gov.cn/page/article.do?articleId=390bd50d-b5a9-44b0-a132-c16350e6f358)).

[414] Arguably, some statements by Viet Nam could be said to rely implicitly on this provision (see *e.g.* Letter dated 7 May 2014 from the Permanent Representative of Viet Nam to the United Nations addressed to the Secretary-General (UN Doc. A/68/870 of 9 May 2014), Annex, para. 6; Letter dated 28 May 2014 from the Chargé d'affaires a.i. of the Permanent Mission of Viet Nam to the United Nations addressed to the Secretary-General (UN Doc. A/68/897 of 30 May 2014) Annex, para. 1.

[415] *Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on May 6, 2014* (available at http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/t1153131.shtml); see also the statement by Yi Xianliang the Deputy Director-General of the Department of Boundary and Ocean Affairs of the Foreign Ministry of China reported in ("Company's drilling activities are within Chinese waters: official" (*Xinhuanet* 11 May 2014; available at http://news.xinhuanet.com/english/china/2014-05/11/c_133325741.htm).

[416] Letter dated 22 May 2014 from the Chargé d'affaires a.i. of the Permanent Mission of China to the United Nations addressed to the Secretary-General (UN Doc. A/68/887 of 27 May 2014) Annex, para. 1. A Vietnamese source mentions that during meetings China twice mentioned that the area concerned was located in the contiguous zone and territorial waters of the Paracel Islands (UN Doc. A/68/870, n 414 at Annex, para. 2).

nautical miles from the coast of Viet Nam.[417] This assertion obviously ignores the fact that there exists a sovereignty dispute over the Paracel Islands. It moreover suggests that the closer distance to the Paracel Islands determines which State would have control over the activities concerned. The latter position is problematic in the light of the law applicable to areas of overlapping claims as expressed in Articles 74(3) and 83(3) of the UNCLOS. Furthermore, it is debatable whether the area would be attributed to China if the sovereignty dispute were to be resolved in favor of China and maritime boundaries would be established in accordance with the applicable law.[418]

In a subsequent position paper, China explicitly referred to the continental shelf and exclusive economic zone, although the paper first mentions that the operations are taking place in the contiguous zone of the Paracel Islands,[419] which, however, does not give the coastal State jurisdiction over oil and gas activities. The reference may have been intended to press home the point that closeness to the Paracel Islands should settle the legal case.[420] However, the paper subsequently refers to the fact that China and Viet Nam have not agreed on the delimitation of their continental shelf and exclusive economic zone, while recognizing that both States are entitled to these zones. This notwithstanding, the paper concludes on this point that the waters concerned 'will never become the exclusive economic zone and continental shelf of Viet Nam, no matter which principle is applied in the delimitation process'.[421] As was mentioned above, the latter point is debatable. In any case, the fact that an area eventually will be attributed to one of the parties in a delimitation does not make Articles 74(3) and 83(3) of the UNCLOS or general international law, which are applicable to areas of overlapping claims, inoperative.

Viet Nam in referring to the location of the rig from the outset took the position that it was located 'entirely within the exclusive economic zone and continental shelf of Viet Nam'.[422] Viet Nam, like China, took the position that 'whatever the principle applied for the purpose of boundary demarcation, the area where the Chinese oil rig operated could never be within the exclusive economic zone or on the continental shelf of China'.[423] This statement merits the same caveats as set out above in relation to China's position on this point.

The exchanges between China and Viet Nam on the HYSY 981 incident also involved another argument relating to maritime zones. In reaction to a Chinese reference to its baselines around the Paracel Islands,[424] Viet Nam observed that those baselines were not in accordance with the

[417] UN Doc. A/68/887, n 416 at Annex, para. 2.
[418] See further the box 'The UNCLOS and the delimitation of the exclusive economic zone and the continental shelf between neighboring States' in section 6.5.1 of this report.
[419] Letter dated 9 June 2014 from the Chargé d'affaires a.i. of the Permanent Mission of China to the United Nations addressed to the Secretary-General (UN Doc. A/68/907 of 9 June 2014) Annex, section I.
[420] The reference to the contiguous zone is followed by a reference to the distance to the Paracel Islands and Viet Nam's mainland coast (*ibid*.).
[421] *Ibid*., section III. This argument was repeated in Letter dated 8 December 2014 from the Permanent Representative of China to the United Nations addressed to the Secretary-General (UN Doc. A/69/645 of 10 December 2014). Annex, section 1.
[422] UN Doc. A/68/870, n 414 at Annex, para. 2. See also *e.g.* Letter dated 22 August 2014 from the Permanent Representative of Viet Nam to the United Nations addressed to the Secretary-General (UN Doc. A/68/980 of 27 August 2014) Annex, para. 1.
[423] UN Doc. A/68/980, n 422 at Annex, para.1.
[424] See *e.g.* Letter dated 24 July 2014 from the Permanent Representative of China to the United Nations addressed to the Secretary-General (UN Doc. A/68/956 of 28 July 2014), Annex, para. 7.

UNCLOS and had been protested by Viet Nam and other states.[425] In response, China argued for the legality of its baselines.[426] Interestingly, the focus is entirely on the procedural aspects of the determination of these baselines (*i.e.* the due publicity and deposit requirements contained in the UNCLOS), while the protests against these baselines concerned their concordance with the substantive provisions (*i.e.* the rules for determining along which coasts specific types of straight baselines may be drawn) of the UNCLOS. As is explained in section 6.5 of this report, the Chinese position on the latter point is problematic and it would be difficult to offer a credible defense.

Apart from the location of the drilling operations, China also justified the activities of the HYSY 981 by pointing out that this concerned 'a continuation of the routine process of explorations', which had included 'seismic surveys and well site surveys, for the past 10 years'.[427] Interestingly, this argument arguably reveals a certain tension with China's argument that the operations were taking place in undisputed Chinese waters. There would be no need to justify these kind of activities if they were taking place in undisputed waters.

The reference to ongoing operations, with the implicit suggestion that there had never been a Vietnamese protest, gives the impression of reliance on Articles 74(3) and 83(3) of the UNCLOS, which allow certain unilateral activities to take place in a maritime disputed area as long as they are not perceived as jeopardizing or hampering the conclusion of a final delimitation agreement.[428] In response to China's reference to the ongoing nature of the activities, Viet Nam pointed out that it had sent law enforcement vessels to give warning of the illegal nature of earlier Chinese activities and that it had also repeatedly protested them through diplomatic channels and public statements.[429] From the perspective of Articles 74(3) and 83(3) and general international law, two observations are called for. First, the fact that a unilateral activity is a continuation of earlier unilateral activities does not make it in accordance with these provisions *per se*. Both the nature of the activity and the position of the other State concerned would have to be taken into account in this connection. As *Guyana v. Suriname* indicates, even non-intrusive activities, like seismic surveys, may, in the circumstances of the specific case, fail to meet the requirement of making every effort of not jeopardizing or hampering the conclusion of a final agreement.[430]

China and Viet Nam also fundamentally disagreed about the actions both states took to respectively allow and prevent the activities of the HYSY 981. According to China:

> Shortly after the Chinese operation started, Viet Nam sent a large number of vessels, including armed vessels, to the site, illegally and forcefully disrupting the Chinese operation and ramming the Chinese Government vessels on escort and security missions there. In the meantime, Viet Nam also sent frogmen and other underwater agents to the area, and dropped large numbers of obstacles, including fishing nets and floating objects,

[425] UN Doc. A/68/980, n 422 at para. 2.
[426] UN Doc. A/69/645, n 421 at Annex, section 2.
[427] See UN Doc. A/68/907, n 419 at Annex, section I; see also *e.g.* UN Doc. A/68/887, n 416 at Annex, para. 2.
[428] The leading case that has further clarified this provision is *In the Matter of an Arbitration between Guyana and Suriname (Guyana v. Suriname)*, award of 17 September 2007, paras 465-470 and 479-484.
[429] See UN Doc. A/68/943, n 413 at Annex, section 1.
[430] Award of 17 September 2007, n 428 at para. 481.

into the waters. As of 5 p.m. on 7 June, the number of Vietnamese vessels in the area had peaked at 63, attempting to break through China's cordon and ramming the Chinese Government ships a total of 1,416 times.[431]

China characterized Viet Nam's conduct as 'harassment',[432] 'violent disruption of the normal operation of the Chinese company',[433] and 'illegal and forcible disruption of the drilling activities of China'.[434] China argued that the Vietnamese actions 'seriously infringed upon the legitimate and lawful rights of the Chinese side' and 'China's sovereignty, sovereign rights and jurisdiction'.[435] The actions moreover posed a risk to the safety and freedom of navigation and the safety of the HYSY 981 and its personnel.[436] China furthermore emphasized that the Vietnamese actions left it no choice other than to take necessary actions in response, but that in doing so had exercised great restraint.[437] China also repeatedly requested Viet Nam to withdraw its personnel and vessels from the area.[438] Apart from referring to the infraction of China's sovereignty, sovereign rights and jurisdiction, China also considered that the Vietnamese actions constituted a violation of the UN Charter, the UNCLOS and the 1988 SUA Convention and 1988 SUA Protocol.[439] Apart from invoking these legal instruments against Viet Nam, China also underscored its own adherence to the relevant principles of international law and its commitment to 'peace and stability in the South China Sea' indicating that '[t]he least China wants is any turbulence in its neighborhood'.[440] Viet Nam's actions on the other hand were considered as having damaged peace and stability in the region.[441]

The Vietnamese arguments to a large extent are a mirror image of those of China. Viet Nam repeatedly submitted that the illegal deployment of the HYSY 981 in Viet Nam's exclusive economic zone and continental shelf seriously infringed upon Viet Nam's rights as defined in the UNCLOS.[442] Viet Nam moreover indicated its willingness to commence a dialogue with China on pending maritime issues, but made this conditional on the withdrawal of the rig.[443] Viet Nam did not respond to China's allegations that Viet Nam's actions had endangered the safety of navigation and that of the rig and its personnel, but instead focused on Chinese actions directed against Vietnamese vessels.[444] In addition, Viet Nam referred to specific incidents involving the ramming and sinking of a Vietnamese fishing vessel and the ramming and breaking of a Vietnamese coastguard vessel.[445] Viet Nam characterized one of these actions as violation of the

[431] UN Doc. A/68/907, n 419 at Annex, section II.
[432] Company's drilling activities, note 415.
[433] UN Doc. A/68/887, n 416 at Annex, paras 2 and 3.
[434] UN Doc. A/68/956, note 424 at Annex, para. 7; see also UN Doc. A/69/645, n 421 at Annex, section 1.
[435] UN Doc. A/69/645, n 421 at Annex, section 1; UN Doc. A/68/887, n 416 at Annex, para. 3; see also UN Doc. A/68/907, n 419 at Annex, section II.
[436] See *e.g.* UN Doc. A/68/887, n 416 at, Annex, para. 3; See UN Doc. A/68/907, n 419 at Annex, section II.
[437] UN Doc. A/68/887, n 416 at Annex, para. 3; See UN Doc. A/68/907, n 419 at Annex, section III.
[438] See *e.g.* Company's drilling activities, n 415; UN Doc. A/68/887, n 416 at Annex, para. 3.
[439] See UN Doc. A/68/907, n 419 at Annex, section II. In a subsequent position paper China referred more generally to Viet Nam violating 'international law and basic norms governing international relations' (UN Doc. A/69/645, n 421 at Annex, para. 1).
[440] See UN Doc. A/68/907, n 419 at Annex, section V.
[441] *Ibid*., section II.
[442] See UN Doc. A/68/870, n 414 at Annex, para. 2; Letter dated 6 June 2014 from the Permanent Representative of Viet Nam to the United Nations addressed to the Secretary-General (UN Doc. A/68/906 of 9 June 2014), Annex, para. 1.
[443] See *e.g.* UN Doc. A/68/870, n 414 at Annex, para. 6; UN Doc. A/68/897, n 414 at Annex, para. 1.
[444] See *e.g.* UN Doc. A/68/906 note 442 at Annex, para. 2; Annex, para. 2; UN Doc. A/68/943, note 413 at Annex, section 1.
[445] UN Doc. A/68/906 note 442 at Annex, para. 2; Annex, para. 2; UN Doc. A/68/943, note 413 at Annex, section 1.

prohibition to threat or use force as enshrined in the UN Charter and 'inhumane conduct against fellow seafarers'.[446] Similar to China, Viet Nam maintained that the 'actions by China have aggravated tensions in the [South China] Sea and seriously threatened peace, stability, freedom of navigation and maritime security and safety in the region'.[447] Finally, Viet Nam submitted that the Chinese actions went against the spirit and letter of the DOC, and relevant rules of international law, including bilateral agreements and the UNCLOS and had affected the political trust between the two countries.[448]

Providing an assessment of the legality of the actions of China and Viet Nam to respectively protect and prevent the operation of HYSY 981 is beyond the scope of the present report. However, it would seem that the actions of both States *prima facie* may not have been in full compliance with Articles 74(3) and 83(3) of the UNCLOS and general international law.[449] The underlying assumption of this law is the exercise of restraint by States having overlapping claims to the continental shelf or exclusive economic zone.[450] A similar requirement of restraint is contained in paragraph 5 of the DOC.

8.3 The continued stand-off at Second Thomas Shoal

In 1999 the Philippines Navy ran the vessel *Sierra Madre* aground on Second Thomas Shoal in the Spratly Islands to maintain a presence in the area. Ever since, the Philippines has maintained a small detachment of marines on board the *Sierra Madre*.[451] According to the account provided by the 2016 award on merits in the *South China Sea* arbitration, China started objecting to the presence of *Sierra Madre* on Second Thomas Shoal shortly after the Philippines initiated the arbitration in 2013.[452] In 2014, Chinese Coast Guard vessels for the first time interfered with the rotation of Philippines personnel to the *Sierra Madre* and the vessel's resupply.[453]

Second Thomas Shoal is a reef area in the Spratly Islands located to the west of and at a distance of some 100 nautical miles from the Philippine island of Palawan. The status of Second Thomas Shoal, *i.e.*, whether it was a low-tide elevation or an island, was considered in the *South China Sea* arbitration. On the basis of the available factual information, the tribunal concluded that part of the reef of Second Thomas Shoal was above water at low tide, but that no part of it was above water at high tide, that is, these features classify as low-tide elevations under the UNCLOS.[454] In

[446] UN Doc. A/68/943, note 413 at Annex, section 1.
[447] UN Doc. A/68/906 note 442 at Annex, para. 2.
[448] UN Doc. A/68/870, n 414 at Annex, para. 5; UN Doc. A/68/906 note 442 at Annex, para. 1.
[449] See also the discussion in section 9 of this report concerning the implications of States not agreeing on the definition of a disputed maritime area.
[450] See the discussion in section 9 of this report and in D Anderson and Y van Logchem, 'Rights and obligations in areas of overlapping maritime claims' in S Jayakumar, T Koh and R Beckman (eds.), *The South China Sea Disputes and Law of the Sea* (Elgar, London, 2014) at pp. 207-208.
[451] *South China Sea*, Award on Merits, n 26 at para. 1113.
[452] *Ibid*., para. 1116. The Award also provides an overview of diplomatic exchanges between the Philippines and China in relation to the *Sierra Madre's* presence on Second Thomas Shoal from 2013 and 2014 (*ibid*., paras 1116-1125).
[453] *Ibid*., para. 1123.
[454] *Ibid*., para. 379-381. The tribunal in this connection among others referred to Chinese Sailing Directions. The text quoted from the Sailing Directions among others observes '[t]here are several solitary exposed reefs on the atoll' (*ibid*., para. 380). This language seemingly is not completely unequivocal, because it does not refer to tidal information. It may be noted that CSIL Critical Study in its

view of Second Thomas Shoal's location, more than 12 nautical miles from any territorial sea baseline, the low-water line around Second Thomas Shoal cannot be used as part of the baseline by a coastal State and Second Thomas Shoal is thus not located in the territorial sea.[455] In light of the tribunal's finding that all of the high-tide features in the Spratly Islands are rocks in the sense of Article 121(3) of the UNCLOS, the tribunal concluded that Second Thomas Shoal, as a low-tide elevation that does not generate maritime entitlements and is not subject to appropriation, is 'within the exclusive economic zone and continental shelf of the Philippines'.[456] The present report's analysis of the pertinent provisions of the UNCLOS likewise leads to that conclusion.[457]

Following the award on the merits in the *South China Sea* arbitration, incidents concerning the presence of the *Sierra Madre* on Second Thomas Shoal have continued. The current analysis is based on a review of a number of document available from the websites of the Chinese Ministry of Foreign Affairs and the Philippines Department of Foreign Affairs from the period between August of 2023 and July of 2024.[458] During this period, various incidents took place between Philippine vessels that sought to rotate personnel and resupply the *Sierra Madre* and Chinese vessels. The situation at Second Thomas Shoal was discussed in various meetings of the Bilateral Consultation Mechanism on the South China Sea (BCM) that is in place between the two countries. Following the 9th meeting of the BCM in July of 2024, China and the Philippines reached

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criticism of the tribunal's handling of the issues related to Second Thomas Shoal at no point takes issue with its classification as a low-tide elevation. Instead, the CSIL Critical Study criticized the tribunal for ignoring that Second Thomas Shoal was an integral part of China's Nansha Qundao (Spratly Islands) (see *e.g.*, CSIL Critical Study, note 98 at pp. 296 and 511. The issue of low-tide elevations is further considered in section 6.3 of this report.

[455] See UNCLOS, article 13.

[456] *South China Sea*, Award on Merits, n 26 at para. 1203(B)(7).

[457] It may be noted that Second Thomas Shoal is within 200 nautical miles of the baselines of Malaysia, indicating that this concerns an area to which both the Philippines and Malaysia have an entitlement to an exclusive economic zone and continental shelf. As far as can be ascertained, Malaysia has not objected to the tribunal's findings on Second Thomas Shoal and has not advanced a position on its maritime boundary with the Philippines that affects Second Thomas Shoal. An equidistance line between Malaysia and the Philippines, which is located well to the south of Second Thomas Shoal, *prima facie* would seem to constitute an equitable boundary.

[458] Statement of the DFA Spokesperson on the 10 November 2023 Ayungin Shoal Incident (16 November 2023) (available at https://dfa.gov.ph/dfa-news/statements-and-advisoriesupdate/33666-sta); Statement of the DFA Spokesperson on the 09 December 2023 Bajo de Masinloc Incident and 10 December 2023 Ayungin Shoal Incident (11 December 2023) (available at https://dfa.gov.ph/dfa-news/statements-and-advisoriesupdate/33797-sta); DFA Summons Chinese Ambassador to protest back-to-back harassments in the West Philippine Sea (12 December 2023) (available at https://dfa.gov.ph/dfa-news/statements-and-advisoriesupdate/33810-df); DFA Statement on the RORE Incident on 17 June 2024 (19 June 2024) (available at https://dfa.gov.ph/dfa-news/statements-and-advisoriesupdate/34933-dfa-...1); Philippines and China Agree on Arrangement for Rotation and Resupplying (RORE) to BRP Sierra Madre on Ayungin Shoal (21 July 2024) (available at https://dfa.gov.ph/dfa-news/statements-and-advisoriesupdate/35166-phil); Statement on the Conduct of the RORE Mission in Ayungin Shoal on 27 July 2024 (27 July 2024) (available at https://dfa.gov.ph/dfa-news/statements-and-advisoriesupdate/35201-sta); DFA Spokesperson's Response to MFA Spokesperson's Statement Regarding the 27 July 2024 RORE Mission in Ayungin Shoal (28 July 2024) (available at https://dfa.gov.ph/dfa-news/statements-and-advisoriesupdate/35202-dfa); Wang Yi Talks about the Current Situation in the South China Sea Region (12 August 2023) (available at https://www.fmprc.gov.cn/eng/xw/zyxw/202405/t20240530_11332149.html); Foreign Ministry Spokesperson's Remarks on CCG Lawfully Blocking Philippine Attempt to Send Construction Materials to Its Illegally "Grounded" Warship at Ren'ai Jiao (22 October 2023) ((available at https://www.globalsecurity.org/military/library/news/2023/10/mil-231022-prc-mofa01.htm); Wang Yi Has a Phone Call with Philippine Secretary of the Department of Foreign Affairs Enrique A. Manalo (20 December 2023) (available at https://www.fmprc.gov.cn/eng/xw/zyxw/202405/t20240530_11332601.html); China and the Philippines Hold the Eighth Meeting of the Bilateral Consultation Mechanism on the South China Sea (available at https://www.fmprc.gov.cn/nanhai/eng/wjbxw_1/202401/t20240119_11229115.htm); Vice Foreign Minister Chen Xiaodong Lodges Serious Representations on the Philippines' Illegal Resupply to Ren'ai Jiao (25 March 2024) (available at https://www.einnews.com/pr_news/698824634/vice-foreign-minister-chen-xiaodong-lodges-serious-representations-on-the-philippines-illegal-resupply-to-ren-ai-jiao); China and the Philippines Hold the Ninth Meeting of the Bilateral Consultation Mechanism on the South China Sea (2 July 2024) (on file with the authors); Wang Yi Elaborates on China's Solemn Stance on South China Sea Issue (27 July 2024) (available at https://www.fmprc.gov.cn/eng/wjbzhd/202407/t20240729_11462525.html); Foreign Ministry Spokesperson's Remarks on China's Handling of Philippine Resupply to Ren'ai Jiao (27 July 2024) (available at http://us.china-embassy.gov.cn/eng/lcbt/wjbfyrbt/202407/t20240727_11461683.htm).

an arrangement on the Rotation and Resupplying (RORE) to the *Sierra Madre*, which will be subject to review by the BCM.[459] A newspaper report from November of 2024 indicates that since the conclusion of the arrangement three Philippine missions took place without incidents.[460] Reportedly, during the 10th meeting of the BCM in January of 2025, it was agreed to continue implementing the arrangement.[461]

In assessing the situation in relation to the *Sierra Madre* both sides have offered diverging views of the legal situation. The core issue in this respect is the legal status of Second Thomas Shoal. China has repeatedly asserted that it has sovereignty over Second Thomas Shoal. Generally, this claim to sovereignty is linked to the Chinese claim to sovereignty over the Spratly Islands in their totality.[462] Any further explanation as to how Chinese sovereignty over the Spratly Islands would result in sovereignty over a low-tide elevation that is beyond the territorial sea of any land territory is not provided.[463] Other arguments of China in relation to the *Sierra Madre* are grounded in this claim to sovereignty over Second Thomas Shoal. Chinese statements repeatedly refer to the illegal grounding of the *Sierra Madre* in Second Thomas Shoal.[464] The rotation and resupply of the *Sierra Madre* has also been characterized as being illegal because it has been carried out without the permission of the Chinese government.[465]

The Philippines position is grounded on the basis that Second Thomas Shoal is a low-tide elevation that is part of its exclusive economic zone and continental shelf. On that basis, the Philippines has argued that:

> the resupply mission to and the upkeep of the BRP Sierra Madre are legitimate Philippine Government activities in our EEZ, and in accordance with international law, particularly

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[459] See Philippines and China Agree on RORE, n 458 at p. 1. A text of the arrangement is not available in the public domain. Statements of the Philippines and China shortly after its conclusion indicate different perspectives on what has been agreed. On 27 June 2024 a spokesperson of the Chinese Ministry of Foreign Affairs observed:

> This morning, based on the provisional arrangement China reached with the Philippines on managing the situation at [Second Thomas Shoal], the Philippine side conducted a resupply mission of living necessities. The entire process was monitored by China Coast Guard. China had been informed of the resupply before it was carried out. After confirming on-the-scene that the Philippine vessel carried only humanitarian living necessities, the Chinese side let the vessel through.
>
> Let me stress that the arrangement was reached by China with the Philippines based on the three-point principled position of China on managing the situation at [Second Thomas Shoal]. China's position on the [Second Thomas Shoal]issue has not changed. China has sovereignty over [Second Thomas Shoal], the rest of Nansha Qundao and their adjacent waters. China will continue to properly deal with relevant territorial issues and disputes over maritime rights with the Philippines through dialogue and consultation (Foreign Ministry Spokesperson's Remarks on China's Handling, n 458 at p. 1).

A spokesperson of the Philippines Department of Foreign Affairs in a reaction the next day indicated that:

> Instead of acknowledging how two countries were able to manage differences in order to avoid miscalculation and misunderstanding, the Spokesperson chose to misrepresent what has been agreed between the Philippines and China regarding RORE missions in [Second Thomas] Shoal. Let us make it absolutely clear: the understanding between the Philippines and China was concluded in good faith, with the explicit agreement that it will not prejudice national positions. It is not helpful to keep giving false notions about what has been agreed on and how they were implemented (DFA Spokesperson's Response to MFA Spokesperson's Statement Regarding the 27 July 2024 RORE, no 458 at p. 1).

[460] Jim Gomez 'Chinese and Philippine forces again avoid a clash in a fiercely disputed shoal under a rare deal' (available at https://apnews.com/article/china-philippines-second-thomas-shoal-a8c895de0c90bd6f5045320034f562aa).

[461] Joyce Ann L. Rocamora 'PH, China agree to uphold 'provisional arrangement' for Ayungin RORE' (16 January 2025) (available at https://www.pna.gov.ph/articles/1241995).

[462] See *e.g.*, Foreign Ministry Spokesperson's Remarks on CCG Lawfully Blocking, n 458 at p. 1. See also CSIL Critical Study, n 98 at pp. 262, 269, 283, 291, 295-296.

[463] For a further discussion of this point see section 6.3 of this report.

[464] Foreign Ministry Spokesperson's Remarks on CCG Lawfully Blocking, n 458 at p.1; Vice Foreign Minister Chen Xiaodong Lodges Serious Representations, n 458 at p. 1.

[465] Vice Foreign Minister Chen Xiaodong Lodges Serious Representations, n 458 at p. 1.

> UNCLOS. It is difficult to imagine how these activities could be deemed threatening to China.
>
> The *Sierra Madre* is a commissioned Philippine naval vessel permanently stationed in Ayungin Shoal in 1999 to serve as a constant Philippine government presence in response to China's illegal occupation in 1995 of Panganiban Reef, also known as Mischief Reef.[466]

It was moreover submitted that:

> the Philippines has not entered into any agreement abandoning its sovereign rights and jurisdiction over its [exclusive economic zone] and continental shelf, including in the vicinity of Ayungin Shoal.
>
> We are being asked to give prior notification each time we conduct a resupply mission to Ayungin Shoal. We will not do so. The resupply missions are legitimate activities within our [exclusive economic zone], in accordance with international law. [467]

In a subsequent press release, the Philippines Department of Foreign Affairs also focused on issues of navigation, including the safety of navigation, observing among others:

> The actions of the Chinese vessels within the Philippine [exclusive economic zone] are illegal and violate the freedom of navigation.
>
> The Philippine Government firmly asked China to immediately undertake the following actions:
>
> > (1) direct its vessels to cease and desist from its illegal actions against Philippines vessels, and to stop interfering in legitimate Philippine Government activities, or lingering in waters around Ayungin Shoal, and doing any action that violates the Philippines' sovereign rights and jurisdiction in its exclusive economic zone;
> >
> > (2) comply with its obligations under international law, including the 1982 UNCLOS, the 2016 Award in the South China Sea Arbitration, and the 1972 COLREGS[.][468]

In a statement of an incident on 17 June 2024, the Department of Foreign Affairs of the Philippines made the link between activities on the ground and the law explicit:

> In line with the Philippines' commitment to pursue peace, the Department has been exerting efforts to rebuild a conducive environment for dialogue and consultation with China on the South China Sea.
>
> This cannot be achieved if China's words do not match their actions on the waters. We expect China to act sincerely and responsibly, and refrain from behavior that puts to risk the safety of personnel and vessels.

[466] Statement of the DFA Spokesperson on the 10 November 2023 Ayungin Shoal Incident, n 458 at p. 2.
[467] *Ibid*.
[468] DFA Summons Chinese Ambassador to protest back-to-back harassments, n 458 at p. 2.

> We reiterate our call for China to adhere to international law, especially UNCLOS and the 2016 Arbitral Award, and respect the Philippines' sovereignty, sovereign rights and jurisdiction in our own waters.[469]

China has similarly called upon the Philippines to bring its actions in line with its commitments. For instance, a statement on the 9th meeting of the BCM on 2 July 2024 observed:

> China reiterated its sovereignty over Nansha Qundao including Ren'ai Jiao and the adjacent waters, and its sovereign rights and jurisdiction over the relevant waters. The Chinese side urges the Philippine side to stop maritime infringement and provocation at once, earnestly abide by the provisions of the Declaration on the Conduct of Parties in the South China Sea (DOC), return to the right track of properly handling disputes through dialogue and consultation, jointly manage the situation at Ren'ai Jiao with the Chinese side, promote the easing and cooling down of the maritime situation, and stabilize China-Philippines relations from further deterioration.[470]

8.4 Conclusions

8.4.1 The impact of the discrepancy between activities on the ground and the rights and obligations of States on the development of the law

From a legal perspective a discrepancy between activities on the ground and the rights and obligations of States in principle does not change the law. States remain bound by their obligations under international law when they are acting in breach of these obligations. Acting in a way that impinges on the rights of other States similarly does not affect these rights of other States, and they continue to exist unaltered.

The risks of a continued discrepancy between activities on the ground and the legal framework are political, rather than legal. Where activities of one State are not effectively opposed by another State, they may create facts on the ground, although illegal, will have long-term effects. Those effects in turn may feed into changing the legal situation. The situation at Second Thomas Shoal may be taken as an example. If the Philippines would not continue expending resources to maintain a presence by rotating personnel and resupplying the *Sierra Madre* China might consider establishing a presence at Second Thomas Shoal. Once that presence would be established, it is difficult to envisage that it would be removed unless it were to be part of a larger settlement in which the Philippines might feel compelled to compromise in a way that would affect its rights as a coastal State in the South China Sea under international law. A continued discrepancy between activities on the ground and the law may also lead to a weakening of the belief in international law as a regulatory framework and make policy makers less inclined to rely on international law in managing international relations.

[469] DFA Statement on the RORE Incident on 17 June 2024, n 458.
[470] China and the Philippines Hold the Ninth Meeting n 458 at p. 1; see also Vice Foreign Minister Chen Xiaodong Lodges Serious Representation, n 458 at p. 1.

8.4.2 The relevance of international law as a regulatory framework for the South China Sea

As the above analysis indicates, activities on the ground take place in and are justified by a specific position on coastal State maritime entitlements in the South China Sea. For China, the main components of that position are its claimed sovereignty over the Spratly Islands, the Paracel Islands and Scarborough Shoal and rights as a coastal State over their adjacent territorial sea, continental shelf and exclusive economic zone. As far as the Spratly Islands and Scarborough Shoal are concerned, the latter position is accompanied by a rejection of the outcome of the *South China Sea* arbitration. On the other hand, other claimant States similarly base themselves on their claimed sovereignty over specific islands, but reject that these islands have a continental shelf and exclusive economic zone. These positions indicate that the impact of the law of the sea in the South China Sea has been profound. This in particular concerns the exception included in paragraph 3 of Article 121 of the UNCLOS that rocks which cannot sustain human habitation or economic life of their own do not have a continental shelf and exclusive economic zone. That provision, in combination with the physical characteristics of the islands, has allowed the other claimant States to argue that the disputed islands in the South China Sea are largely irrelevant for determining the extent of maritime zones in the South China Sea. Although that argument was vindicated by the *South China Sea* arbitration for the Spratly Islands and Scarborough Shoal, China's rejection of the outcome of the award implies that in practice most of the South China Sea remains disputed between the China and the other claimant States.

As recent developments in relation to the *Sierra Madre* point out, the continued disagreement about the legal status of most of the waters of the South China Sea leads to opposing framings of what is happening on the ground. For the Philippines, the *Sierra Madre* is located in its exclusive economic zone and continental shelf and as the coastal State it is fully entitled to maintain the *Sierra Madre* at its location. China's interference with the rotation of personnel and the resupply of the *Sierra Madre* is not in accordance with the navigational rights China has in the maritime zones of the Philippines. The arguments of the Philippines in general are in line with the applicable law, although the call on China to have it vessels refraining from lingering in the waters of Second Thomas Shoal may not be in line with existence of the freedom of navigation in the exclusive economic zone. As long as vessels act in compliance with Article 58 of the UNCLOS, their presence in the exclusive economic zone is in accordance with the navigational regime applicable in that zone. China's arguments on the *Sierra Madre* are based on its position on its claimed sovereignty over the Spratly Islands, including Second Thomas Shoal. As the analysis in this report points out, even if the Chinese position on sovereignty over the Spratly Islands is accepted, the claim that this sovereignty also includes Second Thomas Shoal is problematic. [471]

The HYSY 981 incident similarly points out that critically assessing the positions of the parties may result in exposing discrepancies between legal justifications that are being offered and the details of the legal framework to which reference is had in this connection. That exercise most likely will not have a direct impact on the situation on the ground, but it nonetheless is submitted

[471] See the discussion on low-tide elevations in section 6.3 of this report.

to be relevant. It is acknowledged that it could be argued that international law has no significant impact on China's position. However, a detailed analysis of international law, which allows teasing out discrepancies between China's position and the applicable legal framework, arguably is relevant for a number of reasons. It provides argument for other States to explain and justify their rejection of China's actions in terms of international law. Second, where China is seeking agreed approaches on the basis of its interpretation of international law, it may be more difficult to convincingly advance specific positions. While States may ignore the law to the extent it is not in line with their claims and interests, not engaging with the law may make diplomatic interactions with others more difficult and increase the costs of those interactions.[472]

[472] While acknowledging that assessing the impact of international law on State behavior is a complex matter, which is largely beyond the scope of this report, it is submitted that the tensions between China's legal argumentation and international law for instance is an important factor for other States to not agree on provisional arrangements in relation to resource exploitation (see also section 9.4 of this report).

9. The legal regime of disputed maritime areas

9.1 Introduction

States may differ over the legal status of maritime areas. In most cases, this is the result of the absence of an agreed maritime boundary between neighboring States. In this case, the maritime zones of two or more coastal States overlap because the area concerned is within the outer limits of the maritime zones of all of the States concerned. A dispute over the legal status of a maritime area may also be the result of competing sovereignty claims over territory. In this case the maritime claims of the States concerned overlap because they both claim sovereignty over the territory that generates the maritime entitlements. Maritime zones generated by disputed territory may moreover also overlap with the maritime zones of undisputed territory. A further case concerns the situation where one State considers that a feature is entitled to coastal State zones, while this is disputed by other States. An example is a dispute about whether an island has to be classified as a rock under Article 121(3) of the UNCLOS. For the State rejecting this position, the island has a continental shelf and exclusive economic zone that may overlap in part or in total with the same maritime zones of another State. For a State that takes the position that the island has to be classified as a rock, the same area may be part of that States undisputed maritime zones or those of another coastal State or it may be part of the high seas and the Area. All these scenarios are pertinent for the South China Sea.

For all of the above scenarios the question exists as to how to determine the extent of the disputed maritime area. Is that area necessarily constituted by the overlapping claims of the States concerned, or are there circumstances where a State may take the position that it is not required to accept the claim of the other State in connection with the definition of the disputed maritime area? Another question is what rules are applicable pending the resolution of the underlying dispute. As regards this latter question, the focus will largely be on the rules that are applicable to the States that are involved as (potential) coastal States and not those that are applicable to third States. The current section of the report will first consider the question of the determination of the spatial scope of disputed maritime areas. Subsequently, the substantive rights and obligations of the States concerned in relation to disputed maritime areas will be discussed in general terms. Next, the discussion will turn to a consideration of specific obligations under general international law and the UNCLOS in relation to disputed maritime areas. Finally, this section will briefly reflect on the situation in the South China Sea.

9.2 Spatial scope of disputed maritime areas and the substantive rights and obligations concerned

One aspect of considering the obligations of States in disputed maritime areas in the specific case is the determination of the area to which those obligations are applicable. A *prima facie* identification of that area can be made with reference to the claims of the parties to a dispute. However, States may differ about the question as to whether there actually is a disputed maritime

area. This is illustrated by the situation involving the Philippines and China in the South China Sea. The Philippines defines its rights to a continental shelf and exclusive economic zone in accordance with the UNCLOS including the outcome of the *South China Sea* arbitration. On that basis, there is no disputed area of continental shelf and exclusive economic zone between the Philippines and China in the southern part of the South China Sea. On the other hand, China's rejection of the awards as null and void, and China's interpretation of the UNCLOS and other rules of international law imply that its maritime claims in the southern part of the South China Sea overlap with the continental shelf and exclusive economic zone of the Philippines.

The question as to how to define a disputed maritime area has received some attention in the academic literature. In relation to delimitation disputes concerning the continental shelf, Murphy has submitted that where there is:

> a dispute as to whether one of the two States is even capable of advancing a claim to a continental shelf [...], [g]enerally speaking, each State must be advancing a claim that is plausible, a standard that was applied by the *Ghana/Côte d'Ivoire* ITLOS Special Chamber in the context of its 2015 order on provisional measures of protection.[473]

Murphy provides two examples in which a plausibility test could be applied, namely where a continental shelf claim is based on territory that is subject to a sovereignty dispute and where there is a dispute as to whether a feature is capable of generating a continental shelf.[474]

The definition of a disputed maritime area has been considered in some more detail in the *Report on the Obligations of States under Articles 74(3) and 83(3) of UNCLOS in respect of Undelimited Maritime Areas*. Although the report at the outset questions the relevance of the plausibility test as defined in *Ghana/Côte d'Ivoire*, it eventually adopts an approach that is a variation of that test.[475]

The Special Chamber of the ITLOS in *Ghana/Côte d'Ivoire* did not provide a specific threshold for meeting the plausibility test, but limited itself to finding that 'Côte d'Ivoire has presented enough material to show that the rights it seeks to protect in the disputed area are plausible'.[476] Prior to making this finding the Special Chamber did indicate that it considered that 'for the purpose of the present proceedings and *pending the final decision on the merits*, the disputed area' was situated between the claim lines of the parties and that the rights claimed by Côte d'Ivoire comprised those existing in the territorial sea and the continental shelf.[477]

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[473] Sean D. Murphy 'Obligations of States in Disputed Areas of the Continental Shelf' in Tomas Heidar (ed.) *New Knowledge and Changing Circumstances in the Law of the Sea* (Brill 2020), pp. 185-186. Murphy's suggestion that the plausibility test provides a standard for determining the extent of the disputed area would be equally applicable to disputes concerning the delimitation of the exclusive economic zone. It may be noted that the plausibility test is generally applied by courts and tribunals in the context of the indication of provisional measures (for a further discussion see, *e.g.*, Massimo Lando 'Plausibility in the Provisional Measures Jurisprudence of the International Court of Justice' (2018) 31 *Leiden Journal of International Law* pp. 641-668).

[474] Murphy, n 473 at p. 186.

[475] Report on the Obligations of States under Articles 74(3) and 83(3) of UNCLOS in respect of Undelimited Maritime Areas (British Institute of International and Comparative Law 2016) p. 31.

[476] Dispute concerning delimitation of the maritime boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire), Order of 25 April 2015, para. 62.

[477] *Ibid*., paras 60-61 (emphasis provided).

Some further light on the content of the plausibility test has been provided by the tribunal in *Coastal State rights*, where plausibility was distinguished from a 'mere assertion':

> 189. The Arbitral Tribunal does not consider that the Russian Federation's claim of sovereignty is a mere assertion or one which was fabricated solely to defeat its jurisdiction. The Arbitral Tribunal notes that since March 2014, both Parties have held opposite views on the status of Crimea, and this situation persists today. The Parties have engaged in the controversy regarding sovereignty before and outside these proceedings, including in various international fora such as in debates at the UNGA. Even if the Arbitral Tribunal applied an additional element—as the ICJ did in Nuclear Arms and Disarmament by stating that "evidence must show that [...] the respondent was aware, or could not have been unaware," of a position—the Arbitral Tribunal's finding on the existence of a sovereignty dispute over Crimea would not change.
>
> 190. For this reason, the Arbitral Tribunal does not accept Ukraine's argument that the Russian Federation's claim of sovereignty is implausible.[478]

Mauritius v. Maldives provides an example where the plausibility test was not found to be relevant in the context of a maritime dispute because of the existence of a prior authoritative decision relating to an aspect of the case. This case concerned the delimitation between the Maldives and the Chagos Archipelago, over which there had been a long-standing sovereignty dispute between Mauritius and the United Kingdom. Maldives considered that the existence of this dispute precluded a Special Chamber of the ITLOS from adjudging the maritime boundary between Maldives and Mauritius. Maldives among others had argued that:

> in any event Mauritius has not established that the United Kingdom's sovereignty claim is implausible. According to the Maldives, "if the Special Chamber were to find ... that it *should* consider the plausibility of the United Kingdom's claim, it should reach the conclusion that that claim is (at the very least) plausible."[479]

The Special Chamber recognized that it was 'beyond doubt that there had been a long-standing sovereignty dispute'.[480] However, the Special Chamber, while distinguishing the issue before it from *Coastal State Rights* that had been invoked by Maldives, observed that the tribunal in that case 'did not have the benefit of prior authoritative determination of the main issues relating to sovereignty claims to Crimea by any judicial body. However, that does not seem to be the case in the present proceedings',[481] in which there was an advisory opinion of the ICJ. The Special Chamber observed that:

> In light of the advisory opinion, which determined, *inter alia*, the United Kingdom's continued administration of the Chagos Archipelago to be an unlawful act of a continuing character, the Special Chamber does not find convincing the Maldives' argument as to the matter-of-fact existence of a sovereignty dispute over the Chagos Archipelago.[482]

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[478] *Coastal State Rights*, n 304 at paras 189-190.
[479] Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives) Preliminary Objections, Judgment of 28 January 2021, para. 235.
[480] *Ibid*., para. 242.
[481] *Ibid*., para. 244.
[482] *Ibid*., para. 245.

It may be noted that the plausibility test has been developed in the context of provisional measures proceedings before international courts and tribunals. In this context, the plausibility test is intended to establish whether the rights asserted by applicant are plausible and in that light might require that a court or tribunal indicates interim measures pending a decision on the merits of the case. The authors of the current report consider that the plausibility test as developed in the case law in the context of the indication of provisional measures is not an appropriate test for determining the extent of a disputed maritime area beyond that context. The threshold for passing the plausibility test is low.[483] This may be an acceptable standard for the indication of provisional measures, which in principle are only applicable pending the decision on the merits by a court or tribunal.[484] Beyond that context, where parties do not resort to third party settlement, a dispute may continue to exist for an indeterminate period of time. Secondly, in the case of the indication of provisional measures, a court or tribunal will review whether or not a claim of a party is at least plausible. Beyond the context of the indication of provisional measures there will not be *any* authoritative review of the claims of the States concerned.

That leaves the question what rules do apply in a case in which the States concerned do not agree on the spatial definition of the maritime area that is in dispute between them. There is no indication of the existence of a rule of conventional or customary law providing that a State has to accept the claim line of the other State concerned for defining the disputed maritime area. A State in considering the position of the other State is required to act in good faith.[485] However, that does not entail an obligation for States to accept the claim line of another State as relevant for defining a disputed maritime area.[486] This could eventually lead of a stalemate and the absence of an agreed definition of the disputed maritime area.

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[483] Judge Mensah in his separate opinion to the Order of the Special Chamber in *Ghana/ Côte d'Ivoire* observed:

> I have some doubts about the claim of Côte d'Ivoire to the maritime areas in dispute. In particular, *I do not think that this claim has serious prospects of success on the merits*. However, I agree with the finding of the Chamber that the claim is plausible (*Ghana/ Côte d'Ivoire*, Order of 25 April 2015, Separate Opinion of Judge ad hoc Mensah, para. 1 (emphasis provided)).

[484] Alternatively, provisional measures will be revoked where a case is discontinued because a court or tribunal finds that it does not have jurisdiction on the merits or a claim is inadmissible.

[485] That fundamental rule is also contained in article 300 of the UNCLOS.

[486] In connection, it may be noted that the tribunal in *Guyana v. Suriname* observed that the parties had discharged their obligation to make every effort to enter into an provisional arrangement as required by articles 74(3) and 83(3) of the UNCLOS as they, '[a]lthough [...] ultimately unsuccessful in reaching a provisional arrangement, demonstrated a willingness to negotiate in good faith in relatively extensive meetings and communications (*Guyana v. Suriname*, n 428 at para. 478). The judgment in the *North Sea continental shelf* cases seemingly points in a different direction, as the Court observed that:

> [the parties] are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it' (*North Sea continental shelf* cases, judgment of 20 February 1969, para. 85(a).)

This pronouncement would seem to imply that a party might be required to modify a position based in the law if the other party were to insist on a position that is at odds with the substantive rules of delimitation law. However, this observation of the Court has to be read in the context of the circumstances of these specific cases (see further A.G. Oude Elferink *The Delimitation of the Continental Shelf between Denmark Germany and the Netherlands; Arguing Law, Practicing Politics?* (Cambridge University Press, 2013), pp. 327-328). In other delimitation cases, the Court has limited itself to the more general observation that the parties to delimitation negotiations are required to negotiate in good faith (See *e.g. Gulf of Maine* case, judgment of 12 October 1984, para. 87; *Cameroon* v. *Nigeria*, judgment of 10 October 2002, para. 244).

9.3 Specific obligations in relation to a disputed maritime area under general international law and the UNCLOS

As was set above in the introduction to this section, disputed maritime areas may be the result of overlapping maritime entitlements of undisputed territory and/or disputed territory. Where only undisputed territory is concerned, the UNCLOS provides basic rules of the road for disputed maritime areas. Articles 74(3) and 83(3) of the UNCLOS provide that States, pending agreement on the delimitation of the boundaries of their exclusive economic zone and continental shelf 'in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement'. The provision on the delimitation of the territorial sea contained in the Convention does not contain a similar provision, but it is generally considered that under general international law similar obligations of, on the one hand, restraint in carrying out unilateral activities and, on the other hand, a duty to seek to engage in cooperation apply. Arguably, these obligations are also applicable in the case of disputed maritime areas that result from the overlapping entitlements between disputed and undisputed maritime zones. This position has been advanced in academic literature, although this discussion is not going into much detail.[487] The academic literature does not shed much light on the question whether these general rules also exist for States in relation to disputed maritime areas that are only generated by disputed territory.[488] It could be argued that the general obligations of States in relation to disputes, such as those relating to their non-aggravation are also applicable in this case.

Without entering into a detailed analysis of the implications of the rules concerning provisional arrangements and the scope for unilateral actions, the following broad contours may be sketched. First, it has been recognized that an assessment of what results in jeopardizing or hampering the reaching of the final agreement on the boundary is case specific. Whether the activities (authorized) by one party will have that effect first and foremost depends on the assessment of the other party concerned.[489] This may for instance imply that all activities on the ground fall under the scope of this provision. As a consequence, a State has to make every effort to not engage in these kinds of activities. One implication of this obligation is that the State concerned shall make every effort to enter into a provisional arrangement of a practical nature.

International law does not contain any rules specifically addressing the spatial extent of a provisional arrangement and it is not required that it is limited to (part of) the overlapping claims of the parties. In principle the parties concerned may agree on any area of application as long as it does not include the maritime zones of third States or areas beyond coastal state jurisdiction (*i.e.*, the high seas and the Area).

[487] See further Youri van Logchem 'Exploration and Exploitation of Oil and Gas Resources in Maritime Areas of Overlap under International Law: The Falklands (Malvinas)' (2015) 28 *Hague Yearbook of International Law* pp. 29-64 at pp. 58-62; Irini Papanicolopulu 'Enforcement Action in Contested Waters: the Legal Regime' (paper presented at the 6th IHO-IAG ABLOS Conference 'Contentious Issues in UNCLOS - Surely Not?', Monaco, 25-27 October) 2010) pp. 3-5.
[488] *Ibid*.
[489] See *Guyana v. Suriname*, n 428 at para. 481, where the tribunal refers to the case-specific nature of assessing unilateral actions.

As is the case for defining the spatial extent of provisional arrangements, international law does not contain any rules specifically addressing the substantive regime applicable to the area of application of a provisional arrangement. States may agree upon any provisional arrangement that is in accordance with their rights and obligations under international law.

State practice indicates a wide range of provisional arrangements, ranging from an agreement to not engage in specific activities to detailed regimes for joint development of hydrocarbon resources.[490]

9.4 The question of defining the disputed maritime area(s) in the South China Sea

The positions of the claimant States in the South China Sea in regards of territorial sovereignty and maritime entitlements result in a complex overlay of maritime claims. First, the disputes concerning sovereignty over the Spratly Islands and the Paracel Islands, and the islands on Scarborough Shoal entail that the maritime zones of these territories are also disputed between the States concerned.

Second, the positions of Malaysia, the Philippines and Viet Nam that all islands in the Spratly Islands, the Paracel Islands, and on Scarborough Shoal are Article 121(3) rocks implies that the outer limits of the exclusive economic zone and continental shelf in the South China Sea have to be measured from the mainland coasts and islands bordering the South China Sea. Under this position the central part of the South China is beyond the outer limit of the exclusive economic zones of its coastal States. As such this central area falls under the regime of the high seas.[491] The outer limits of the continental shelf beyond 200 nautical as included in the submissions of Malaysia, the Philippines and Viet Nam to the CLCS imply that most of the seabed and subsoil of that high seas area would be part of the continental shelf of these States. A limited area in the north east of the high seas area is located beyond the combined outer limits of the continental shelf and as such would be part of the Area.

Third, China maintains the position that the Spratly Islands, the Paracel Islands, and the islands on Scarborough Shoal, are fully entitled islands, either individually or as part of archipelagos that may be enclosed by straight baselines. Under this position, the entire South China Sea is part of the exclusive economic zones of its coastal States and there would be no high seas. Moreover, China maintains the position that it has historic rights with the nine/ten-dash line, which overlaps with most of the continental shelf and exclusive economic zones of the other coastal States of the South China Sea.[492]

[490] See, *e.g.*, Sun Pyo Kim Maritime delimitation and interim arrangements in North East Asia (Martinus Nijhoff, 2004).
[491] UNCLOS, article 86.
[492] Historic rights, to the extent they would exist, would also imply duties to cooperate and not aggravate dispute. For an assessment of the Chinese claim to historic rights claim in light of the outcome of the *South China Sea* arbitration see section 5 of this report.

The positions of China and the other claimant States on the maritime entitlements of the Spratly Islands, the Paracel Islands, and the islands on Scarborough Shoal also have significant implications for the delimitation of maritime zones. The position of China implies that the continental shelf of the Spratly Islands, the Paracel Islands, and the islands on Scarborough Shoal overlaps with the continental shelf and exclusive economic zone of other islands and mainlands bordering the South China Sea. In that light, any prospective maritime boundaries for these zones in principle would require the prior resolution of the sovereignty disputes over the islands. On the other hand, the position of Malaysia, the Philippines and Viet Nam implies that the Spratly Islands, the Paracel Islands, and the islands on Scarborough Shoal only have a territorial sea and do not have any impact of the delimitation of the exclusive economic zone and continental shelf in the South China Sea. Depending on the eventual resolution of the sovereignty disputes, the islands would either be located within the maritime zones of the State that has sovereignty over them or be enclaves consisting of the island(s) concerned with a 12-nautical-mile territorial sea, within the exclusive economic zone and continental shelf of another State.[493] The position of Malaysia, the Philippines and Viet Nam on the entitlements of the islands would imply that there are overlapping exclusive economic zones and continental shelf entitlements between Viet Nam and China and the Philippines and China in the northern part of the South China Sea and between the other coastal States, save for China, in the southern part of the South China Sea.

A combination of these conflicting positions and claims results in a matrix of overlapping maritime areas. For instance, in the northern part of the South China Sea the continental shelf and exclusive economic zone of Viet Nam overlaps with the same zones of the Chinese island of Hainan, while these zones generated by the mainland territory of Viet Nam also overlap with the same zones claimed by China for the Paracel Islands. Beyond 200 nautical miles from the mainland of Viet Nam, the 200-nautical-mile zone of the Paracel Islands claimed by China overlaps with the continental shelf of Viet Nam, while under the position of Viet Nam the high seas regime is also applicable to this area and part of it is part of the Area. In the southern part of the South China Sea, the situation arguably is even more complex, in light of the multilateral sovereignty dispute over the Spratly Islands, the different views on the maritime entitlements and the concomitant different views of the extent of overlapping maritime entitlements and their eventual delimitation.

As the above an analysis indicates, international law at best offers very general guidance on determining the extent of a disputed maritime area. As was explained, the authors of the present report consider that the plausibility test as developed by the case law in the context of provisional measures proceedings does not provide an appropriate test for defining a disputed maritime area. Indeed that test, due to its low threshold, instead of assisting States in this respect, rather may be a recipe for fostering conflict and espousing claims that do not stand any serious chance in legal proceedings. The above analysis also submitted that the question of defining a disputed maritime area beyond the situation of the indication of provisional measures in a court setting is

[493] For a further discussion of this point see the box 'The UNCLOS and the delimitation of the exclusive economic zone and the continental shelf between neighboring States' in section 6.5.1 of this report.

covered by the general rule that States are required to act in good faith, but that this does not entail an obligation for States to accept the position of another State.[494] This could eventually lead of a stalemate and the absence of an agreed definition of the disputed maritime area. That currently seems to be the situation in the South China Sea.

One issue that sets the South China Sea apart from almost all other cases of disputed maritime zones is that the position of China on a number of points has been rejected by the arbitral tribunal in the *South China Sea* arbitration. This in particular concern the tribunal's finding that none of the Spratly Islands or the islands on Scarborough Shoal has an exclusive economic zone and continental shelf.[495] In light of the existence of the award, which is final and without appeal for China and has to be complied with by China,[496] the situation in the South China Sea is analogous to that in *Mauritius v. Maldives* where the Special Chamber of the ITLOS found the existence of an advisory opinion of the ICJ implied that 'the continued claim of the United Kingdom to sovereignty over the Chagos Archipelago cannot be considered anything more than "a mere assertion". However, *such assertion does not prove the existence of a dispute*.'[497]

However, what distinguishes the situation in the South China Sea from *Mauritius v. Maldives* is that China has submitted that the final award of the tribunal in the *South China Sea* arbitration is null and void. Although the arguments that China has offered in this respect are considered to be unconvincing,[498] they arguably are more than 'a mere assertion', that is, China's claims arguably are not implausible.[499] At the same time, this finding has limited implications beyond a court setting. Under the relevant rules of international law as set out in the current report, other States are not obliged to accept China's claim as pertinent for defining the disputed maritime area(s) in the South China Sea. This most likely implies that there will be a continued stalemate over that issue. This would imply that there is no agreement as to where the rules pending the settlement of the dispute apply. One option that eventually could be entertained to address this matter would be recourse to compulsory conciliation under Annex V of the UNCLOS. The implications of that step are not further considered in the present report.

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[494] See further n 486.

[495] The same reasoning applies to China's continued claim that it has historic rights in the South China Sea. For an assessment of that claim in light of the outcome of the *South China Sea* arbitration see section 5 of this report.

[496] UNCLOS, Annex VII, article 11. These obligations apply to all parties to the dispute that has been decided by an Annex VII tribunal, *i.e.*, in this case the Philippines and China.

[497] *Mauritius v. Maldives*, n 479 at para. 243 (emphasis provided).

[498] See also sections 7.4 and 7.8 of this report.

[499] See also *Coastal State Rights*, n 304 at paras 189-190. The law in relation to the nullity of awards indicates that China's claims at least as they relate to errors in fact and law arguably should be classified as 'mere assertions'. As has been observed by Oellers-Frahm:

> an essential or manifest error of *fact* can hardly justify nullity of a decision but may give rise to revision or rectification unless the error was induced by fraud. An error of *law*, on the other hand, is difficult to establish because of the broad scope for interpretation inherent in a tribunal's jurisdiction and the discretion of the judge or arbitrator to seek an adequate solution to the dispute. Although, in theory, cases can be imagined where an essential error of law could be found, there is no practice where nullity was invoked on the ground of an essential error of law. This ground for nullity, therefore, is not even listed in the ILC Model Rules on Arbitral Procedure or the ICSID Convention, which instead refer to a serious departure from a fundamental rule of procedure or a failure to state the reasons for the decision (Oellers-Frahm, n 236 at para. 14).

9.5 Conclusions

The claimant States in the South China Sea are bound by their obligations in relation to disputed maritime areas under the UNCLOS and international law generally. However, as the above analysis indicates, these rules indicate that these States are not required to and are unlikely to agree on the determination of the disputed maritime area(s) in the South China Sea. This raises the question as to what obligations of conduct are applicable in the absence of such an agreement. It is seemingly unsatisfactory that States would be bound by the duties of restraint in areas that in light of an arbitral award are undisputed, by the mere fact that another State has a claim that is perhaps more than 'a mere assertion', but at the same time likely has no serious prospects of success if it were to be adjudged on the merits, to paraphrase judge Mensah's opinion in *Mauritius v. Maldives*.[500]

A similar observation applies to the conclusion of provisional arrangements. As was submitted above, the absence of agreement about the definition of a disputed maritime area would imply that there is no agreement as to where the rules pending the settlement of the dispute apply, if at all. While it is recognized that some of the issues that lend themselves to bilateral or multilateral cooperation may also include areas that in the view of one or more of the parties is not part of a disputed maritime area, any provisional arrangement that would entail the joint exploitation of the natural resources of the exclusive economic zone or continental shelf in the area beyond the territorial sea of the Spratly Islands and Scarborough Shoal could be seen as entailing an implicit rejection of the findings of the *South China Sea* tribunal, which concluded that these areas are part of the maritime zones of the Philippines.[501]

[500] As quoted above in note 483.
[501] See also text at note 523 and the text of that note.

10. Code of Conduct in the South China Sea

10.1 Introduction

A call to establish 'a code of international conduct over the South China Sea' was already included in the 1992 ASEAN Declaration on the South China Sea.[502] As is detailed by Beckman and Vu, an ASEAN Draft Code of Conduct was presented to China in 1999 and a first consultation between ASEAN and China on a COC was held in 2000.[503] Due to differences about certain elements to be included in the proposed COC, China and ASEAN Member States eventually agreed on the conclusion of the DOC in November of 2002.[504]

The DOC reaffirmed that the parties would continue working towards the adoption of a COC.[505] Negotiations on a COC have been continuing until the present. Reportedly, ASEAN Member States and China have completed two readings of the single draft negotiating text of a COC.[506] The single draft negotiating text is not in the public domain, making an assessment of its possible form – *e.g.*, a legally or non-legally-binding instrument – and content a seemingly somewhat daunting task.[507] However, it is submitted that it is possible to provide a meaningful reflection on a number of key aspects of a future COC nonetheless. In that connection, this section focuses on the following topics:

- A COC as a legally-binding or non-legally binding instrument;
- The area of application of a COC;
- The substantive content of a COC;
- The settlement of the territorial and jurisdictional disputes; and
- Review mechanisms for the implementation of a COC.

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[502] 1992 ASEAN Declaration on the South China Sea (adopted in Manila, Philippines on 22 July 1992) (available at https://cil.nus.edu.sg/wp-content/uploads/2019/02/1992-ASEAN-Declaration-on-the-South-China-Sea-1.pdf), para. 4. According to Beckman and Vu this was the first time such a code 'for all relevant parties in the South China Sea' was suggested (Robert Beckman and Vu Hai Dang, 'ASEAN and Peaceful Management of Maritime Disputes in the South China Sea' in James Kraska, Ronan Long and Myron H. Nordquist (eds) *Peaceful Maritime Engagement in East Asia and the Pacific Region* (Brill, 2023), pp. 341-358 at p. 348).

[503] Beckman and Vu, n 502 at p. 349.

[504] According to Beckman and Vu 'China rejected the mention of Paracels in the disputed areas and in the commitment to refrain from occupying new islands, reefs, or shoals. ASEAN objected to China's proposal to ban multilateral military exercises and military patrols in the Spratly Islands' (*ibid*.).

[505] DOC, n 76 at para. 10.

[506] The Chairman's Statement of the 27th ASEAN-China Summit of 10 October 2024 indicates that the parties concerned had progressed to a third reading of the single draft negotiating text of the COC (Chairman's Statement of the 27th ASEAN-China Summit of 10 October 2024, para. 43 (available at https://asean.org/wp-content/uploads/2024/10/1.-Final-Chairmans-Statement-of-the-27th-ASEAN-China-Summit.pdf).

[507] In preparing this section of the report, its authors identified two commentaries on respectively a document that is referred to as the Framework Agreement on the Code of Conduct, which reportedly was endorsed by the ministers of foreign affairs of ASEAN Member States and China in August of 2017 (Ian Storey 'Anatomy of the Code of Conduct Framework for the South China Sea' (24 August 2017) (available at https://www.nbr.org/publication/anatomy-of-the-code-of-conduct-framework-for-the-south-china-sea/) and a 2018 draft of the Single Draft South China Sea Code of Conduct Negotiating Text (SDNT) (*ibid*.; Carl Thayer 'A Closer Look at the ASEAN-China Single Draft South China Sea Code of Conduct; A sneak peak at the ASEAN-China Single Draft Code of Conduct in the South China Sea Negotiating Text' (*The Diplomat*, 3 August 2018) (available at https://thediplomat.com/2018/08/a-closer-look-at-the-asean-china-single-draft-south-china-sea-code-of-conduct/). Although it is acknowledged that these commentaries do not assess the current version of the SDNT of the COC, it is considered that they reflect some of the dilemmas that have to be addressed in arriving at a final text of a COC. The commentaries suggest that at least at the time, it seemed unlikely that a COC would provide a major elaboration of the undertakings that are already included in the DOC, or for that matter, general international law, including the UNCLOS. Thayer's discussion of the SDNT indicates that the negotiating parties at least at the time of writing had diverging views on critical aspects of the text, such as a COC's geographical scope of application and the availability of different types of dispute settlement mechanisms.

10.2 A Code of Conduct as a of a legally-binding or non-legally binding instrument

A COC could either be in the form of a legally-binding or non-legally binding instrument.[508] The distinction is relevant because a legally-binding instrument could impact on the existing rights and obligations of the States that would be parties to a COC. It is submitted that this in particular concerns the UNCLOS, due to its centrality to the ocean regime, including in the South China Sea.

As the practice of China and the other claimant States as well as other ASEAN member States indicates, crucial differences of views exist on a number of legal issues, such as the conditions under which States may have recourse to third-party dispute settlement under the UNCLOS; the relation between the Convention and general international law and the interpretation of specific provisions of the Convention. This points to the fact that assessing the implications of a COC that is or is not legally binding first of all depends on the language it will contain on the above subject areas. It is considered likely that the negotiators will seek to settle on compromise language that will allow all States concerned to read their specific preferences into the text of a COC.[509] As is also indicated by the DOC, various techniques may be used in this connection. For instance, paragraph 4 of the DOC contains an undertaking 'to resolve their territorial and jurisdictional disputes [...] in accordance with universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea'. This commitment recognizes the relevance of both general international law and the UNCLOS, without (explicitly) taking a position on their relationship. Paragraph 3 of the DOC reaffirms the freedom of navigation in and overflight over the South China Sea, while referring to international law, including the UNCLOS, without providing any clarification of the content of these two freedoms of communication. It is on the latter point that States have diverging views that may lead to incidents on the ground, not on these freedoms as defined in general terms.

The above might suggest that the choice between a legally-binding or non-legally binding instrument is of limited significance. It is considered likely that there will little to no further elaboration of already existing legally-binding commitments. Both as a legally-binding instrument and a political commitment, States would be able to refer to a COC supporting their own positions and to argue that others are not acting in accordance with that COC. Moreover, there already exists a quite detailed framework for managing activities and incidents in the South China Sea.[510]

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[508] Thayer's discussion of the SDNT indicates that at the time, the negotiating parties had not yet reached agreement on this point (Thayer, n 507). Storey indicates that the Framework Agreement on the Code of Conduct contains ambiguous language in this respect, referring to establishing a 'rules-based framework'. He also notes that the final clauses of the framework refer to 'entry into force', suggesting that the framework left the door open for negotiating a legally-binding COC (Storey, n 507). Thayer further observes that the 2018 SDNT 'does not include reference to the COC as a treaty under international law' (Thayer, n 507).

[509] Thayer's discussion of the SDNT for instance indicates the negotiating parties have different views as regards the availability of compulsory dispute settlement. Text proposed by Viet Nam providing that nothing in the COC 'shall prevent' the peaceful settlement of disputes under article 33(1) of the United Nations Charter (see Thayer, n 507), implicitly includes the option of having recourse to compulsory dispute settlement under Part XV of the UNCLOS.

[510] As mentioned above, this first of all concerns the UNCLOS. Although it should be acknowledged that the UNCLOS does not explicitly address the regime of disputed maritime areas resulting from the existence of disputes over sovereignty over territory,

This raises the question whether adding another layer to that framework would substantially change the situation on the ground, lacking the political will of all parties to do so.

However, it is submitted that adopting a legally-binding COC would be crucial in one respect. A legally-binding COC would become part of the assessment framework for determining whether a State party to the UNCLOS is entitled to unilaterally invoke the compulsory binding dispute settlement provisions under Part XV of the UNCLOS.[511] As is explained in section 7.3.2, this in particular concerns Article 281 of the UNCLOS, which allows States parties to vary the availability of compulsory binding dispute settlement. As Article 281 indicates, States may even agree to completely exclude recourse to that mode of settlement under the UNCLOS. Due to the opposing views of the negotiating parties on this issue, it is likely that a COC will contain ambiguous language that allows reading both views into a compromise text.[512] However, the crux of the matter would be that in case a dispute is unilaterally submitted to binding dispute settlement under the UNCLOS, it would be the dispute settlement body involved that would have the power to interpret the relevant provision of a COC, and not an individual party to a COC. And in that case, that body would have to choose one specific interpretation, lifting the veil of ambiguity that States can maintain in the absence of compulsory binding dispute settlement.

10.3 The area of application of a COC

As the proposed title of the COC indicates it is intended to be applicable in the South China Sea. However, the South China Sea is characterized by an extremely complex legal seascape that is characterized by sovereignty disputes over territory, different views over the entitlements of islands to maritime zones, the use of straight baselines, the implications of the ruling of *South China Sea* arbitration, and an absence of bilateral maritime boundaries. All these issues imply that the claimant States in the South China Sea hold conflicting views about the legal status of most of the South China Sea.[513]

Although these kind of opposing claims involving extensive maritime areas are not uncommon, what distinguishes the South China Sea from most other cases is the existence of a legally-binding award that has rejected most of the maritime claims of one of these States, China, and by implication has recognized that only the other State concerned, the Philippines, has rights as

many provisions of the UNCLOS are applicable to the marine environment as a whole, such as for instance the rules on the protection and preservation of the marine environment (also see the discussion in section 11.2.1 of this report). A similar consideration also applies to many other global and regional instruments, such as the Charter of the United Nations; the Convention of Biological Diversity (opened for signature 5 June 1992, entered in force 29 December 1993) (1760 UNTS 79) (CBD); the Convention on the International Regulations for Preventing Collisions at Sea, 1972 (COLREGs) (adoption 20 October 1972; entered into force: 15 July 1977) (1050 UNTS 16); and the Treaty of Amity and Cooperation in Southeast Asia (adopted on 24 February 1976; entered into force 16 July 1976) (1025 UNTS 316). Apart from legally binding instruments this also concerns legally non-binding instruments such as, for example the Code for Unplanned Encounters at Sea (CUES) (adopted 22 April 2014); and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (United Nations General Assembly Resolution 2625 (XXV), Annex (adopted 24 October 1970) (available at https://digitallibrary.un.org/record/202170?v=pdf).

[511] The UNCLOS also carves out certain issues from compulsory dispute settlement under its article 297, while article 298 allows States parties to opt of compulsory dispute settlement.

[512] For a further discussion of article 281 on this point see section 7.3.2 of this report.

[513] For a further elaboration of this point see section 9.4 of this report.

a coastal State in the area concerned.[514, 515] This poses a particular challenge to defining the area of application of a COC. Any definition that implies that specific areas are or are not subject to the obligations of States pending the final settlement of their sovereignty or maritime disputes would either imply support for or a rejection of the outcome of the *South China Sea* arbitration.[516]

In considering further how a COC might deal with this issue, it is instructive to consider the approach that is taken by the DOC. The DOC as such is applicable to the South China Sea, as is apparent from its title. In defining specific commitments of the parties to the DOC, there generally is no reference to specific maritime areas.[517] Paragraph 6 of the DOC refers to cooperative activities, which could require a definition of their area of application. Paragraph 6 leaves it to the parties that are entering into cooperation to agree upon the area of application.

A COC could copy the approach of the DOC as regards determining the area of application. Leaving the scope of application of a COC undefined is likely the highest common denominator that is attainable. That approach would leave it to the parties to a COC to flesh out its implications in practice in the individual case. However, that approach is problematic for States other than China in light of the outcomes of the *South China Sea* arbitration. The arbitration determined that China does not have historic rights in the South China Sea and that the Spratly Islands and the features on Scarborough Shoal do not have a continental shelf and exclusive economic zone. As a consequence, only the Philippines was found to have rights over the continental shelf and exclusive economic zone in the area concerned.[518] In other words, this is an undisputed maritime area. The same argument is relevant for other coastal States that have expressed support for the findings of the *South China Sea* arbitration on historic rights and the entitlements of islands.[519] Both as regards cooperative arrangements and duties of restraint, it could be argued that leaving the issue of their area of application undefined would put into question the undisputed nature of the large parts of the continental shelf and exclusive economic zone of the Philippines and other coastal States that have accepted the findings of the *South China Sea* arbitration on historic rights and the entitlement of islands. This may be illustrated by the language that is contained in paragraph 5 of the DOC, which provides that '[t]he Parties undertake to exercise self-restraint in

[514] This concerns an area to the west of the Philippines up to the 200-nautical-mile limit of its exclusive economic zone, which to the south is bounded by the pending bilateral maritime boundary with Malaysia. The continental shelf beyond 200 nautical miles of the Philippines in the central part of the South China Sea overlaps with the same zone of other coastal States. Any island in the Spratly Islands and on Scarborough Shoal is entitled to a 12-nautical-mile territorial sea, measured from the relevant low-water line.
[515] Although the outcome of the *South China Sea* arbitration is only binding on the parties involved (UNCLOS, Annex VII, article 11) a number of findings of the tribunal have broader implications. In particular, the tribunal's finding that none of the islands in the Spratly Islands and on Scarborough Shoal has an exclusive economic zone or continental shelf is relevant for Brunei, Indonesia, Malaysia and Viet Nam. Large areas of the continental shelf and exclusive economic zone off their coasts surrounding the South China Sea are within 200 nautical miles of the Spratly Islands. Absent an exclusive economic zone and continental shelf of the latter, there are no overlapping continental shelf and exclusive economic zone entitlements in these areas between these islands and other coasts. Similarly, the tribunal's findings on historic rights are also applicable to China's claim as such. Finally, the findings on straight baselines of the tribunal imply that China's straight baselines around the Paracel Islands are not in accordance with the law (see further section 6.5 of this report).
[516] It may be noted that some of the proposals included in the SDNT that are discussed by Thayer would have that result. For instance, Viet Nam reportedly proposed language to the effect that 'the Contracting States respect "the maritime zones as provided for and established in accordance with the 1982 UNCLOS."' According to Thayer, similar language was suggested by Indonesia (Thayer, n 507). The reference to 'in accordance with the UNCLOS' includes the outcome the Annex VII *South China Sea* arbitration.
[517] The only specifically localized commitment in the DOC concerns the reference to ' the presently uninhabited islands, reefs, shoals, cays, and other features', with an undertaking to refrain from inhabiting them (DOC, n 76 at para. 5).
[518] For a more precise definition of this area see above note 514.
[519] See also above note 514.

the conduct of activities that would complicate or escalate disputes and affect peace and stability'. Assuming that a COC would not address the status and implications of the *South China Sea* arbitration – and it would seem to be beyond imagination that a COC actually might do so – a commitment similar to paragraph 5 would imply that China could argue that the Philippines, in exercising its rights in accordance with the UNCLOS as confirmed by the tribunal, would be acting in breach of that commitment. This is explained by the fact that under such a scenario, the Philippines would be carrying out activities in an area that according to China is disputed and the Philippines consequently would complicate or escalate its maritime disputes with China. That this is already an issue is illustrated by recent incidents in relation to the *Sierra Madre*, in which case China is accusing the Philippines, which is carrying out operations that are in accordance with the UNCLOS and the arbitration, of acting in breach of undertakings contained in the DOC.[520]

10.4 The substantive content of a COC

As was argued above, a COC can be expected to consist of compromise formulations between the diverging views of different States. In addition, the conduct of ASEAN member States and China is already governed by the UNCLOS and other pertinent rules of international law. This raises the question as to what a COC could add in terms of substantive obligations as compared to those that are already in place. The DOC provides a starting point in this connection in two different ways. In light of the avowed importance the ASEAN Member States and China attach to the development of a 'substantive and effective COC'[521] it would seem to stand to reason that a COC would further develop upon the commitments contained in the DOC. Secondly, the type of commitments that are contained in the DOC provide a starting for point for considering the kind of obligations ASEAN Member States and China might be willing to commit to under a COC.

The core obligations of the DOC in relation to exercising restraint and seeking to conclude cooperative arrangements are included in its paragraphs 5 and 6. Paragraph 5 contains a general undertaking in relation to:

> the conduct of activities that would complicate or escalate disputes and affect peace and stability including, among others, refraining from action of inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features

It would probably be possible to further specify the activities that would be covered by this obligation of restraint. However, a couple of challenges would seem to exist in this connection. One was already noted above and concerns the relationship of a duty of restraint as contained in a COC to the rights of the parties under the UNLOCS in light of the outcomes of the *South China Sea* arbitration. The other challenge in developing a 'substantive and effective' COC would be ensuring that parties to a COC would effectively implement their obligations and that there is an effective review mechanism. The experience with the DOC demonstrates that its paragraph dealing with restraint in carrying our unilateral activities has been largely ineffective.

[520] See, *e.g.*, the text quoted at note 470.
[521] Joint Statement on the 20th Anniversary of the Declaration on the Conduct of the Parties in the South China Sea (Phnom Penh, Cambodia, 11 November 2022) (available at https://www.asean.org/wp-content/uploads/2022/11/FINAL-ASEAN-China-Joint-Statement-on-the-20th-Anniversary-of-DOC.pdf), para. 9.

Paragraph 6 of the DOC is concerned with cooperative activities that its parties may undertake. In this connection it specifically lists the following activities: marine environmental protection; marine scientific research; safety of navigation and communication at sea; search and rescue operation; and combating transnational crime. Although this is not a limitative list – it is preceded by the words '[t]hese [cooperative activities] may include the following' –, what is not included nonetheless is telling. The list does not include a reference to either living resources or non-living resources, although the control over their exploitation and management is one of the issues that is at the heart of the South China Sea disputes.[522] And the *raison d'être* of both the exclusive economic zone and the continental shelf, which cover most of the South China Sea, mostly is giving the coastal State sovereign rights over these resources. That situation at the same time points to the difficulty in developing cooperative activities in respect of natural resources. Seeing the wide gap between the positions of China and the other claimant States as regards their rights as coastal States or otherwise (China's alleged historic rights), it is difficult to envision a collaborative scheme that bridges this gap without compromising the position of one or both of the sides in practice.[523] While it is recognized that cooperative activities may be classified as being without prejudice to the legal positions of the parties on the underlying dispute, a cooperative arrangements that locks in the parties in specific mode of cooperation may have long-term effects on their interests. The above suggest that even if a COC would include an explicit reference to cooperation on the use of resources, developing actual collaboration between China and other claimant States may not be feasible. And even such an explicit reference in a COC may be difficult to accept, as it implies that this is an issue that is in principle subject to a commitment to seek cooperation.

10.5 The settlement of the territorial and jurisdictional disputes

The DOC refers to the settlement of the territorial and jurisdictional disputes in the South China Sea in the following terms in its paragraph 4:

> The Parties concerned undertake to resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea.

[522] According to Thayer, among the issues for cooperation proposed by China is the conservation of fishing resources and oil and gas cooperation (Thayer, n 507).

[523] To illustrate this point, a provisional arrangement may divide the revenues from oil and gas exploitation in specific percentages between the States concerned. It would be difficult to explain why a State would give up a part of this revenue for an area that is part of its undisputed maritime zones, without receiving any comparable advantages in return. As has been observed by Malcolm Davis, commenting on a reported willingness of the Philippines to revive failed negotiations for joint oil exploration: 'states are concerned that if they do go down this path of cooperation [with China], [...] it might end up eroding the rights that they have under international law of the sea' (quoted in Toby Mann 'What has been happening in the South China Sea and what do experts predict for 2023?' (ABC News 2 February 2023; available at https://www.abc.net.au/news/2023-02-03/south-china-sea-beijing-china-taiwan-gas-fishing-military/101843870).

According to Storey and Thayer the Framework Agreement on the Code of Conduct and the 2018 SDNT likewise included a recognition that they are not intended to provide a framework for settling the territorial and jurisdictional disputes.[524]

Paragraph 4 of the DOC only explicitly refers to consultations and negotiations to settle the territorial and jurisdictional disputes between the parties concerned. On the other hand, the UNCLOS, within the parameters set by its Part XV, allows the settlement of jurisdictional disputes that are concerned with the interpretation and application of the UNCLOS.[525] In that light, it is relevant to consider the implications of the language contained in paragraph 4 of the DOC for the availability of compulsory binding dispute settlement under the UNCLOS in a discussion of a future COC that may be legally binding and may also refer to the settlement of the underlying disputes in a similar manner as the DOC. This issue has been considered in detail in section 7.3.2 above. The main points of that analysis may be summarized as follows.

Article 281(1) implies that States may agree that they will not resort to compulsory dispute settlement in accordance with section 2 of Part XV of the UNCLOS in a case where they are a party to a dispute concerning the interpretation or application of the UNCLOS. However, such recourse remains possible: a) where the alternative means they have agreed upon do not result in settlement of the dispute concerning the interpretation or application of the Convention; and b) the other means do not exclude a further procedure. As is discussed in section 7.3.2, the implications of Article 281 have been considered in detail in two arbitrations under the UNCLOS, the *Southern Bluefin Tuna* arbitration and the *South China Sea* arbitration. The latter actually had the opportunity to consider the implications of paragraph 4 of the DOC in light of Article 281 of the UNCLOS.

The analysis in section 7.3.2 concluded that the key takeaway of the analysis of the award in the *Southern Bluefin Tuna* cases is that Article 16 of the CCSBT has to be distinguished from paragraph 4 of the DOC. The reasoning of the tribunal in the *Southern Bluefin Tuna* cases indicates that applying it to paragraph 4 of the DOC would lead to the conclusion that it does not exclude recourse to compulsory dispute settlement under the UNCLOS.

The above findings on the implications of paragraph 4 of the DOC in light of the jurisprudence on Article 281 of the UNCLOS and China's position seemingly lead to a somewhat peculiar situation. Two arbitral awards, while providing two different reasonings, indicate that paragraph 4 does not exclude recourse to compulsory dispute settlement under the UNCLOS. That would seem to imply that China, which opposes such unilateral recourse, would not be served by maintaining the language of paragraph 4 in a future COC. At the same time, China's interpretation of paragraph 4 of the DOC to the effect that it does exclude such recourse would seem to make it difficult for China to suggest departing from that language in a future COC. On the other hand, other States may be expected to resist additional language that varies the implications of

[524] Storey, n 507; Thayer, n 507.
[525] Such disputes could among others include the question as to whether a coastal State has established its baselines in accordance with the Convention or as to how a feature has to be classified under article 121 of the Convention.

paragraph 4. As mentioned above, according to Storey and Thayer the Framework Agreement on the Code of Conduct and the 2018 SDNT contained language that is similar to paragraph 4 of the DOC.[526]

10.6 Review mechanisms for the implementation of a COC

Most observers of developments in the South China Sea would likely agree that the implementation of the DOC has been a limited success. This raises the question whether the inclusion of specific review mechanisms in a COC could contribute to improving the situation. The DOC already addresses this point in its paragraph 7, which among others envisages 'regular consultations on the observance of this Declaration'. The review of the observance of the DOC has been undertaken by the Joint Working Group on the Implementation of the DOC and the Senior Officials' Meeting on the Implementation of the DOC. In general, information on the work of the working group and the senior officials' meetings indicates that the outcomes that are produced do not focus in any detail on specific instances of (in)observance of the DOC. It is considered unlikely that this type of review mechanism may significantly contribute to the effective implementation of specific commitments under the DOC.

Whether a more robust review mechanism under a COC might be attainable may be open to doubt. Storey, in commenting on the Framework Agreement on the Code of Conduct observes:

> the monitoring of the CoC is likely to be undertaken by the Joint Working Group on the Implementation of the DoC and the Senior Officials' Meeting on the Implementation of the DoC, which will report to the foreign ministers. The foreign ministers will have the right to review the CoC if and when necessary.[527]

Thayer observes that the 2018 SDNT contains two proposals for reviewing implementation:

> The first option, supported by Brunei, Cambodia, China, Malaysia, and Singapore, places responsibility with the ASEAN-China Senior Officials' Meeting. The second option, proposed by Vietnam, calls for setting up a Commission led by foreign ministers or their representatives.[528]

10.7 Conclusions

Although little information is available on the actual SDNT of the COC, the current analysis suggests that a future COC will unlikely go much beyond commitments that the parties to the negotiations have already accepted. This is not because such an elaboration would not be possible – there are many examples of detailed joint development regimes for disputed (maritime) areas that could serve as a blueprint – but because China and other States have diametrically opposed positions and interests on key issues. Probably the one most important

[526] Storey, n 507; Thayer, n 507.
[527] Storey, n 507.
[528] Thayer, n 507.

issue is the area of application of a future COC. While the Philippines and other States, based on the UNCLOS including the *South China Sea* arbitration, hold that most of the South China Sea is undisputed between themselves and China, China continues to hold that it has historic rights and rights as a coastal State in this same area. As it seems unlikely that China and these other States can agree on a geographical scope of application of a future COC, safe a reference to the South China Sea generally, the scope for agreeing on substantive areas of future cooperation is also severely curtailed. States are highly unlikely to agree on cooperative schemes in areas which they consider to be part of their undisputed maritime zones under the UNCLOS on terms that would not reflect that undisputed nature. In that light, a COC is likely, just as the DOC, to focus on cooperation in areas that are unrelated to the use of natural resources, while that use is one of the main contentious issues.

It is submitted that the choice between a legally-binding or non-legally binding COC in most respects is of limited significance. It is likely that there will be little to no further elaboration of already existing legally-binding commitments. Moreover, there already exists a quite detailed framework for managing activities and incidents in the South China Sea.[529] This raises the question whether adding another layer to that framework would substantially change the situation on the ground, lacking the political will of all parties to do so. The one issue for which the choice between a legally-binding or non-legally binding COC would be critical is the availability of compulsory dispute settlement under the UNCLOS. A legally-binding COC would become part of the assessment framework for determining whether a State party to the UNCLOS is entitled to unilaterally invoke compulsory binding dispute settlement under Part XV of the UNCLOS. In this connection, it was observed that the negotiation of a COC may face another challenge. As is concluded, the existing case law indicates that the language contained in paragraph 4 of the DOC does not exclude recourse to compulsory dispute settlement under the UNCLOS for settling disputes concerning the interpretation or application of the Convention. In any case, while China is unlikely to accept leaving the recourse to compulsory dispute settlement an option, other States will hardly accept an opt out from compulsory dispute settlement under the UNCLOS. Ambiguous language in a COC would address that matter for the time being, but it would be upon a court or tribunal under the UNLCOS to clarify such language, where that would be required to establish its jurisdiction over a dispute that has been submitted unilaterally.

Another point on which it seems unlikely that a COC would go beyond the DOC is the review mechanism for its implementation that would actually allow drawing conclusions on the steps that States should take or refrain from taking to act in accordance with their obligations under a COC, let alone the fact, as was pointed out above, that a COC unlikely will contain obligations that will lead to provisional arrangements on such issues as the use of resources.

In the final analysis, even though a COC does not look likely to reinforce dispute management in the South China Sea, it is a political project to which ASEAN and China have committed themselves time and again after their initial agreement to work towards a COC. It would seem to be impossible for either side to extract itself from that commitment without paying a high

[529] For a listing of such instruments see note 510.

political prize. The choices that remain are letting the negotiations drag on or conclude a COC that most likely will look much like the current DOC.

11. Protection and preservation of marine environment and fishing activities

11.1 Introduction

Fishing plays a major role in ensuring food security for all States surrounding the South China Sea. However, it has been estimated that around 50% of the fish stocks in the South China Sea have either collapsed or have been over-exploited.[530] This dire reality is the result of decades-long illegal, unreported and unregulated fishing,[531] accelerated by destructive fishing practices such as cyanide fishing. These harmful fishing practices have also caused detrimental impact to the marine biodiversity of the South China Sea – considered one of the most biodiverse marine areas in the world with an estimated 3,000 species of fish and about 600 species of coral and some 80% of the world's giant clam species. [532] However, rampant harvesting of these clams for their shells by fishermen from China, the Philippines and Viet Nam has decimated their populations.[533] China is certainly not the only State in the region engaged in unsustainable fishing activities. However, the dominant presence of Chinese fishing vessels in the South China Sea and the destructive methods that Chinese fishermen use, with full awareness and at times endorsement of Chinese authorities, mean that China's fishing fleets are the ones contributing the most to the depletion of the fish stocks and the destruction of the marine environment in the South China Sea.

In light of these circumstances, it did not have to come as a surprise that China's harmful fishing practices were one of the issues that the *South China Sea* tribunal was asked to examine. The Philippines requested the tribunal to find that 'China's toleration, encouragement of, and failure to prevent environmentally destructive fishing practices by its nationals' violated the duty to protect and preserve the marine environment found under Articles 192 and 194 of the UNCLOS.[534] In particular, the Philippines complained that China had allowed 'its fishermen to harvest coral, giant clams, turtles, sharks and other threatened or endangered species which inhabit the reefs' and 'to use dynamite to kill fish and destroy coral, and to use cyanide to harvest live fish.'[535] The Philippines drew attention to the extraction of giant clams not only because 'they are important

[530] Clive Schofield, Rashid Sumaila, William W.L. Cheung, 'Fishing, not oil, is at the heart of the South China Sea dispute' (available at https://theconversation.com/fishing-not-oil-is-at-the-heart-of-the-south-china-sea-dispute-63580).
[531] The concept of 'Illegal, unreported and unregulated fishing' is defined in the FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (available at https://openknowledge.fao.org/server/api/core/bitstreams/a80c3bfb-1d5b-4ee6-9c85-54b7e83986a2/content), paras 3.1-3.3.
[532] Pratnashree Basu, 'Troubled waters: Marine ecology threats in the South China Sea' (available at https://www.orfonline.org/research/troubled-waters-marine-ecology-threats-in-the-south-china-sea).
[533] Carolyn Cowa, 'Island-building and overfishing wreak destruction of South China Sea reefs' (available at https://news.mongabay.com/2024/04/island-building-and-overfishing-wreak-destruction-of-south-china-sea-reefs/).
[534] In relation to the protection of the marine environment, the Philippines also requested the tribunal to find that China's land reclamation activities have caused harm to the marine environment. As indicated in the scoping report of this project, this section only focuses on fishing activities that have adverse impact on the marine environment. It is acknowledged that land reclamation projects by China – and other States, in particular Viet Nam – raise relevant legal questions and in particular have significant geopolitical implications. As regards the former, these activities raise questions concerning among others the obligations of States in relation to the protection and preservation of the environment and the commitment of the parties to the DOC to "undertake to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability including, among others, refraining from action of inhabiting on the presently uninhabited islands, reefs, shoals, cays" (DOC, n 76 at para. 5). For a discussion of the legal issues in relation to artificial islands and land reclamation, including a discussion of practice in the South China Sea see, *e.g.*, D.R. Rothwell *Islands and International Law* (Bloomsbury, 2022), pp. 46-63.
[535] *South China Sea*, Award on Merits, n 26 at para. 894.

elements of the coral reef structure and also because the method of harvesting them entails crushing surrounding corals.'[536] This section first examines the key findings of the *South China Sea* tribunal on marine environmental protection, with a focus on fishing activities (section 11.2) before moving on to discuss China's fishing activities in the South China Sea after the arbitration (section 11.3).

11.2 Protection of the marine environment in the *South China Sea* arbitration

In the *South China Sea* arbitration, the tribunal first provided a detailed analysis of the obligations contained in the UNCLOS concerning the protection of the marine environment, before moving on to consider whether the fishing activities carried out by Chinese-flagged vessels caused harm to the marine environment and whether China could be held responsible for the activities carried out by Chinese fishermen.

11.2.1 UNCLOS provisions on protection of the marine environment

The protection of the marine environment assumes a special place under the UNCLOS. As the 'first comprehensive codification of international law on the protection and preservation of the marine environment',[537] the UNCLOS not only prescribes States' rights and obligations regarding the conservation of marine resources in the maritime zones falling under their jurisdiction, but also devotes its entire Part XII to the 'Protection and Preservation of the Marine Environment'. The *South China Sea* tribunal found that Article 192, which reads 'States have the obligation to protect and preserve the marine environment', 'may be broadly worded enough to include the obligation to protect and preserve marine biodiversity' and that 'obligations under Article 194 of the Convention may include the protection and preservation of the biological diversity represented by coral reefs'.[538] The tribunal also found that the environmental obligations in Part XII 'apply to all States with respect to the marine environment in all maritime areas, both inside the national jurisdiction of States and beyond it.'[539] The term 'beyond' national jurisdiction might give the impression that the tribunal was referring to the high seas and the Area. However, placed in the context of this case, it seemed to refer to areas which may or may not fall under the jurisdiction of another State, in other words, maritime areas whose status is disputed. It follows that, even in disputed maritime zones, the obligation to protect and preserve the marine environment still applies.

The tribunal read a two-fold obligation into the general formulation of Article 192, comprising of both a positive obligation to take active measures to protect and preserve the marine

[536] *Ibid*., para. 897
[537] Detlef Czybulka, 'Article 192' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck, Hart, Nomos, 2017) p. 1281.
[538] *South China Sea*, Award on Jurisdiction and Admissibility, n 25 at para. 284. As is further detailed below in the text at note 563, the tribunal's interpretation of article 192 has subsequently been endorsed by the ITLOS.
[539] *South China Sea*, Award on Merits, n 26 at para. 940.

environment and a negative obligation to not degrade the marine environment.[540] More importantly, the *South China Sea* tribunal specified that the content of Article 192 is 'detailed in the subsequent provisions of Part XII, including Article 194, as well as by reference to specific obligations set out in other international agreements, as envisaged in Article 237 of the Convention.'[541] Within the UNCLOS, Article 192, read together with Article 194(5) concerning the protection of fragile ecosystems, includes a due diligence obligation both 'to prevent the harvesting of species that are recognised internationally as being at risk of extinction and requiring international protection'[542] and to '[prevent] harms that would affect depleted, threatened, or endangered species indirectly through the destruction of their habitat.'[543] Based on these findings, the tribunal concluded that 'the harvesting of sea turtles, species threatened with extinction, to constitute a harm to the marine environment as such' and that the harvesting of corals and giant clams on the scale that China was engaged in, had a harmful impact on the marine environment.[544]

11.2.2 Application to the South China Sea

With regards to the Philippines' allegations concerning the harvesting of endangered species by Chinese-flagged vessels, the tribunal was satisfied, based on a variety of sources of evidence, that 'Chinese fishing vessels have been engaged in widespread harvesting of giant clams through the use of boat propellers to break through the coral substrate in search of buried clam shells'.[545] This method of harvesting, according to the expert used by the tribunal, was 'more thoroughly damaging to marine life than anything he had seen in four decades of investigating coral reef degradation'.[546] Relying on the definition of 'ecosystem' found in the Convention on Biodiversity (CBD),[547] the tribunal found that 'the marine environments where the allegedly harmful activities took place in the present dispute constitute 'rare or fragile ecosystems''.[548] The tribunal also referred to the Appendices of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)[549] to find the sea turtles and giant clams harvested by Chinese-flagged vessels to be endangered species. The tribunal emphasized the universal nature of the CITES, and the fact that both the Philippines and China are parties to these conventions,[550] and

[540] *Ibid*., para. 941.
[541] *Ibid*., para. 942.
[542] *Ibid*., para. 956.
[543] *Ibid*., para. 959.
[544] *Ibid*., para. 960.
[545] *Ibid*., para. 953.
[546] *Ibid*., para. 958.
[547] Article 2 of the CBD (n 510) defines 'ecosystem' as 'a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit.'
[548] *South China Sea*, Award on Merits, n 26 at para. 945.
[549] Convention on International Trade in Endangered Species of Wild Fauna and Flora (opened for signature 3 March 1973, entered into force 1 July 1975) (993 UNTS 243). Appendices I, II and III to the CITES are lists of species afforded different levels or types of protection from over-exploitation. Appendix I lists species that are the most endangered among CITES-listed animals and plants. Appendix II lists species that are not necessarily now threatened with extinction, but that may become so unless trade is closely controlled. Appendix III is a list of species included at the request of a Party that already regulates trade in the species and that needs the cooperation of other countries to prevent unsustainable or illegal exploitation. See: 'The CITES Appendices' (available at https://cites.org/eng/app/index.php).
[550] *South China Sea*, Award on Merits, n 26 at para. 956. The CBD has an even larger number of State parties than CITES, including China and the Philippines.

observed that CITES 'forms part of the general corpus of international law that informs the content of Article 192 and 194(5) of the Convention'.[551] The tribunal in this instance relied on CITES to deal with the dispute under the UNCLOS, it did not exercise jurisdiction over a dispute under CITES.[552]

The tribunal recalled from previous case law that while fishing activities may be carried out by individuals, the State whose flag a vessel flies bears a due diligence obligation, which is an obligation to 'to take all necessary measures to ensure compliance and to prevent IUU fishing by fishing vessels flying its flag'.[553] The tribunal clarified that this due diligence obligation requires the flag State to not only adopt legislative measures, but also to take enforcement measures to ensure that its vessels do not engage in IUU fishing.[554] In this case, the tribunal placed particular emphasis on the latter component. The tribunal acknowledged that while China had put in place legislation which prohibited the catching and killing of state-protected wild-life,[555] 'adopting appropriate rules and measures to prohibit a harmful practice is only one component of the due diligence required by States'.[556] There was no evidence indicating that China had 'taken any steps to enforce those rules and measures against fishermen engaged in poaching of endangered species', and further even 'provided armed government vessels to protect the fishing boats', which indicated that 'China must have known of, and deliberately tolerated, and protected the harmful acts'.[557] Similarly, the use of propeller chopping for harvesting giant clams took place in areas under control of Chinese authorities with full awareness from the Chinese authorities. Consequently, the tribunal found that China had violated its obligation under Articles 192 and 194(5) of the UNCLOS to protect and preserve the marine environment for the poaching of endangered species. [558]

As for the use of cyanide and explosives at Scarborough Shoal and Second Thomas Shoal, the tribunal accepted that cyanide and blast fishing were ''highly destructive methods' that have been used in the Spratly Islands in the past decades'.[559] However, the tribunal took note of the legislation that China had put in place which prohibited the use of explosives and poisons[560] and further found that, contrary to the poaching of endangered species, there was scant evidence about the use of explosives and cyanide over the previous decade. Therefore, the tribunal gave China the benefit of the doubt and suggested that 'China may have taken measures to prevent such practices in the Spratly Islands'.[561] Consequently, the tribunal did not make any finding on the available evidence on this point.

[551] *Ibid*.
[552] In light of the tribunal's reasoning, this same observation is applicable to its reliance on the CBD.
[553] Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission (Advisory Opinion, 2 April 2015) ITLOS Reports 2015, p. 4, para. 129.
[554] *South China Sea*, Award on Merits, n 26 at para. 964.
[555] *Ibid*., para. 963.
[556] *Ibid*., para. 964.
[557] *Ibid*.
[558] *Ibid*.
[559] *Ibid*., para. 970.
[560] *Ibid*., paras 973-974.
[561] *Ibid*., para. 975.

The *South China Sea* arbitration's interpretation of the scope and content of the obligations to protect the marine environment remains the most comprehensive examination of the relevant provisions under the UNCLOS. As such, it is an authoritative source for understanding these obligations. As an illustration, in the written memorials and oral pleadings of States for the advisory proceedings on climate change before the ITLOS, the majority of States referred to the *South China Sea* arbitration's interpretation of Articles 192 and 194 as the authority for understanding these Articles.[562] The ITLOS itself also referred to the *South China Sea* arbitration's interpretation in its Advisory Opinion.[563] As observed by scholars, 'the frequent reference to the *South China Sea* arbitral award can enhance the precedential value of the award with regard to the interpretation of environmental norms'.[564] The tribunal's findings relating to the obligations to protect the marine environment are perhaps the most broadly invoked part of the final award, both from scholars and States alike. As outlined elsewhere in this report, China's objections to the arbitral award have focused on various issues, however none of which related to the tribunal's conclusions pertaining to marine environmental protection.

The findings in the *South China Sea* arbitration seem to have been based on two main grounds. The first is clear evidence showing harm caused to the environment. The tribunal has in fact been commended for its vigilance and diligence:

> in using scientific experts not only to gather evidence in what is to a certain extent a complex environmental dispute, but also to understand the complexity, interdependence, and interconnectedness that characterize the South China Sea and its ecosystems.[565]

When the tribunal did not have sufficient evidence of harm, as in the case of the use of cyanide and explosives, the tribunal was not prepared to draw a conclusion. Second, the tribunal placed great emphasis on the enforcement aspect in the obligation of States to protect of the environment. Such an emphasis would prevent States from evading their international obligation by simply passing the law on paper but without making the efforts to enforce those rules on the ground.

11.3 After the arbitration

The arbitration seems to have had an impact on the Chinese fishermen's activities in the South China – albeit only temporarily. In 2017 the Hainan Province People's Congress banned the trade of giant clam shells in its most important commercial hub. According to one study, China was the only country other than the Philippines to have reported giant clam shell seizures in the period

[562] ITLOS, Minutes of the Public Sittings, n 407 at pp. 67, 74, 104, 110, 157, 192 and 240.
[563] *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion (21 May 2024) paras 387 and 404 (available at https://www.itlos.org/fileadmin/itlos/documents/cases/31/Advisory_Opinion/C31_Adv_Op_21.05.2024_corr.pdf).
[564] Yoshifumi Tanaka 'The South China Sea Arbitration After Eight Years: Its Implications for Jurisprudence and Third Parties' (2024) 103 *International Law Studies*, p. 607.
[565] Makane Moïse Mbengue 'The South China Sea Arbitration: Innovations in Marine Environmental Fact-Finding and Due Diligence Obligations' (2016) 110 *AJIL Unbound*, p. 285.

since 2016, of which at least 46 seizures were made in relation to the smuggling or illegal trade of giant clam shells.[566] However, after a sharp drop in activity from 2016 to late 2018, Chinese clam harvesting fleets returned to the South China Sea from the beginning of 2019 to extract endangered clams.[567] Chinese clam harvesting boats were spotted with regularity at the Paracel Islands – which are in dispute between China and Viet Nam – extracting clams with the alleged knowledge of Chinese authorities. Chinese clam boats also returned to Scarborough Shoal, which is disputed with the Philippines, in even larger numbers. The coral reefs and the marine environment near Scarborough Shoal had already been extensively damaged by the earlier clam harvesting also with the acknowledgement and even condonement of Chinese authorities.[568] As mentioned above, the harvesting of clams in Scarborough Shoal was found by the *South China Sea* tribunal to be in violation of the UNCLOS, both in terms of the harvesting of an endangered species but also in terms of the damage that the harvesting method caused to the marine ecosystem. What was different since then is the method that Chinese fishermen used to harvest clams, namely by using tubes hooked up to engines on the boats in order to apply high-pressure to create enough suction to quickly remove sediment from the seabed. This method is even more destructive, and more difficult to detect via satellite imagery.[569] This method appears to be used only by Chinese fishermen although fishermen from other countries such as Viet Nam and the Philippines have also had a history of harvesting giant clams. In the same pattern as that found by the *South China Sea* tribunal, the harvesting and trade of giant clams has continued under the supervision of the China Coast Guard and the protection of local Chinese government officials.[570] The Philippines in 2019 reportedly considered legal actions against China for the continued mass harvest of giant clams.[571]

Thus, the reality is that since the arbitration, China has continued to simultaneously put in place domestic legislation to conserve marine living resources while at the same systematically and institutionally supporting the harvesting of endangered species such as giant clams in areas under dispute with other countries to serve its political interests. On the one hand, efforts to tackle illegal fishing stem from China's desire to assume 'the role of leader in global fisheries governance and taking enough anti-IUU fishing action to be credible in that role.'[572] On the other hand, for China, fishing activities and sovereignty of the South China Sea go hand in hand.[573] Chinese scholars have argued that 'food security and economic factors are the primary drivers

[566] Wildlife Justice Commission 'Giant Clam Shells, Ivory and Organised Crime: Analysis of a Potential New Nexus', October 2021 (available at https://wildlifejustice.org/wp-content/uploads/2021/10/Giant-Clam-Shells-Ivory-And-Organised-Crime_A-Potential-New-Nexus_WJC_spreads.pdf).
[567] Asia Maritime Transparency Initiative 'China's most destructive boats return to the South China Sea', 20 May 2019 (available at https://amti.csis.org/chinas-most-destructive-boats-return-to-the-south-china-sea/).
[568] *Ibid*.
[569] Monica Sato, Harrison Prétat, Tabitha Mallory, Hao Chen, and Gregory Poling 'Deep Blue Scars: Environmental Threats to the South China Sea', December 18th, 2023 (available at https://features.csis.org/environmental-threats-to-the-south-china-sea/#group-section-II-Reef-Destruction-RRIkF3AdSA).
[570] Ariana L. 'Giant Clam Harvesting: The South China Sea's Environmental Catastrophe', 3 September 2024 (available at https://www.sealight.live/posts/giant-clam-harvesting-the-south-china-sea-s-environmental-catastrophe).
[571] 'Philippines to take legal action against China for clams harvest', 16 April 2019 (available at https://www.aljazeera.com/news/2019/4/16/philippines-to-take-legal-action-against-china-for-clams-harvest).
[572] Annie Young Song, Michael Fabinyi, Kate Barclay 'China's approach to global fisheries: power in the governance of anti-illegal, unreported and unregulated fishing' (2022) 32(3) *Environmental Politics*, p. 408.
[573] Chengyong Yu and Yen-Chiang Chang, 'China's Incentives and Efforts against IUU Fishing in the South China Sea' (2023) 15(9) *Sustainability*, p. 3.

for the outward expansion of China's marine fishery sector'. [574] Chinese fishing in these disputed areas is in line with China's claims to sovereignty and jurisdiction in these areas, which explains why the Chinese government continues to 'support—and in some cases, direct—the activities of Chinese fishers operating in contested space.'[575] At the same time, it may be noted that these activities do not reinforce these claims in legal terms, instead they are arguably in breach of various obligations of China under international law.[576]

It is also noteworthy that China imposes an annual fishing ban north of the 12 degrees latitude in the South China Sea, which is portrayed to be 'part of the country's efforts to promote sustainable marine fishery development and improve marine ecology.'[577] The *South China Sea* tribunal found that the imposition of the fishing ban without exception for areas of the South China Sea falling within the exclusive economic zone of the Philippines and without limiting the moratorium to Chinese flagged vessels constituted a violation of the Philippines' sovereign rights over the living resources of its exclusive economic zone.[578] This notwithstanding, as observed by a commentator:

> [The Chinese government's] fisheries policy in the southern Spratlys is largely focused on the political importance of Chinese fishing in these waters. It proceeds from two key beliefs. First, that Chinese fishers have the right to operate in the northern part of the Sunda Shelf because it falls within the nine-dash line. Second, Chinese fishers should operate in the southern Spratlys because their activities serve the political function of upholding China's claims to maritime rights in these waters. Just by being present there, they demonstrate Chinese sovereignty.[579]

11.4 Conclusions

The jurisprudential value of *South China Sea* arbitration's findings on marine environmental protection is hardly questionable due to the tribunal's detailed interpretation of the law. As was noted above, some of the key findings of the tribunal have subsequently been endorsed by the ITLOS in its *Advisory Opinion on Climate Change and International Law*. The arbitral tribunal's progressive approaches to using evidence and experts in dealing with complex environmental issues are also noteworthy.

On the other hand, its impact on China seems to have been limited. Although harmful fishing practices seemed to have stopped temporarily after the award was rendered, this did not last long. It seems unlikely that Chinese fishing activities, including harmful fishing practices, will come to a stop in the coming time, given that these arguably are an important means for China to underline that it maintains its sovereignty and maritime claims in the South China Sea and continues challenging the rights of other claimant States under the UNCLOS.

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[574] Hongzhou Zhang, 'Chinese fishermen in disputed waters: Not quite a 'people's war'' (2016) 68 *Marine Policy*, p. 65.
[575] Ryan Martinso, 'Catching sovereignty fish: Chinese fishers in the southern Spratlys' (2021) 125 *Marine Policy*, p. 1.
[576] See, *e.g.*, the analysis in this section above and section 9.3 of this report.
[577] China's State Council, 'China begins annual summer fishing ban', 2 May 2022 (available at https://english.www.gov.cn/news/topnews/202205/02/content_WS626f2b06c6d02e533532a2a1.html).
[578] *South China Sea*, Award on Merits, n 26 at para. 712.
[579] Martinso, n 575 at p. 9.

12. General conclusions – Assessing the impact of the law of the sea on the South China Sea disputes

Arguably, China's posturing in the South China Sea poses a fundamental challenge to the UNCLOS. It is submitted that this challenge is due to the fact that the rules on maritime zones contained in the Convention, which provide the cornerstone of the legal and political order of the ocean, do not support China's interest in gaining access – as a coastal State – to the southern part of the South China Sea. To briefly recapitulate, our analysis indicates that the UNCLOS, prior to the *South China Sea* arbitration, was not completely clear as regards its implications for the political geography of the South China Sea. The main question in this respect would be the role the Paracel Islands, the Spratly Islands and the islands on Scarborough Shoal in determining the extent of maritime zones in the South China Sea. If the impact of these islands on the extent of coastal State maritime zones is not taken into account, most of the South China Sea would still be part of the exclusive economic zone and continental shelf of the coastal States, with a significant area of high seas at its central part. Most of the seabed of that high seas area would likely be part of the continental shelf of the coastal States. Under this scenario, China would only have an exclusive economic zone and continental shelf in the northern part of the South China Sea.

If the Paracel Islands, the Spratly Islands and the islands on Scarborough Shoal were to be entitled to an exclusive economic zone and continental shelf, they potentially could have dramatically affected the political geography of the South China Sea as described above. An exclusive economic zone of these islands would imply that most of the high seas area at its center would instead be part of that exclusive economic zone.[580] In addition, the exclusive zone and continental shelf of these islands would overlap with the same zones of the coasts surrounding the South China Sea. This scenario potentially would give the State that has sovereignty over the Paracel Islands, the Spratly Islands and the islands on Scarborough Shoal coastal States rights over the larger part of the South China Sea. However, apart from the disputed sovereignty over these islands, the UNCLOS poses two challenges to realizing this potential by China.

Even before the *South China Sea* arbitration, serious doubts could be entertained about whether some or all of these islands would be entitled to a continental shelf and exclusive economic zone, due to Article 121(3) of the UNCLOS. A clear example in this respect is provided by the islands on Scarborough Shoal, which are comparable to Okinotorishima, a Japanese island that China considers to be an Article 121(3) rock[581], and smaller than Rockall. Rockall has been considered to constitute the quintessential Article 121(3) rock. Upon becoming a party to the UNCLOS, the United Kingdom actually rolled back its claim to a 200-nautical-mile zone around Rockall, recognizing that it is an Article 121(3) rock.[582]

[580] For further background to the issues discussed in this paragraph see the box 'The UNCLOS and the delimitation of the exclusive economic zone and the continental shelf between neighboring States' in section 6.5.1 of this report.
[581] For a more detailed discussion of this point see section 6.4 of this report.
[582] See D.H. Anderson *Modern Law of the Sea; Selected Essays* (Brill/Nijhoff 2008), p. 80.

The second challenge the UNCLOS posed to realizing the potential maritime entitlements of the Paracel Islands, the Spratly Islands and the islands on Scarborough Shoal, leaving aside for a moment the question of their entitlements under Article 121 of the Convention, are its rules on the delimitation of the exclusive economic zone and continental shelf. There would seem to be next to no doubt that under these rules as interpreted and applied by a voluminous case law, most or all of the individual islands in the Paracel Islands, the Spratly Islands and the islands on Scarborough Shoal would at best receive limited weight in relation to the opposite coasts and most likely would be enclaved in a 12-nautical-mile territorial sea.[583]

China has developed two lines of arguments to justify its claims in the South China Sea, which also have the effect of addressing the two above-mentioned challenges. First, China developed the argument that it had historic rights in the waters enclosed by the nine-dash line, which comprises most of the South China Sea. Second, China has argued that it can draw straight baselines around the Paracel Islands, the Spratly Islands and the islands on Scarborough Shoal and possibly other features in the South China Sea. As is argued in sections 5 and 6.5 of this report, both these claims are difficult if not impossible to square with the UNCLOS. The UNCLOS does not recognize the continued existence of historic rights in the exclusive economic zone and the continental shelf. Moreover, prior to the genesis of these zones, the areas concerned were part of the high seas, with an equal access regime for all States. Access and use of the high seas does not lead to the existence of exclusive rights, which would be contrary to the fundamental tenet of non-appropriation of the high seas. Apart from these legal points, in the particular case of the South China Sea significant evidence of a practice that could have led to the creation of historic rights is lacking.

Drawing straight baselines around the Paracel Islands, the Spratly Islands and the islands on Scarborough Shoal – as has done by China for the Paracel Islands and Scarborough Shoal – has two advantages. First, it arguably circumvents the need to determine the status of individual features under Article 121(3) and can be used to argue the inapplicability of that article. Second, it ensures that a larger part of the South China Sea would be attributed to the islands in delimiting the exclusive economic zone and the continental shelf. Validly established baselines, and the territorial sea measured from those baselines, will not be affected in a delimitation of the exclusive economic zone and the continental shelf. This approach to maritime delimitation would imply that all of that area would be part of the maritime zones of the sovereign over the islands concerned. To the contrary, the individual islands, absent straight baselines enclosing them. would most likely be enclaved in separate 12-nautical-mile territorial sea enclaves.[584] Area-wise this constitutes a significant difference. The problem with drawing straight baselines around the Paracel Islands, the Spratly Islands and the islands on Scarborough Shoal is that it would not be in accordance with the relevant rules of the UNCLOS. Interestingly, this is impliedly recognized by China, which instead has argued that there are rules beyond the Convention that do allow the

[583] For further background information on this point see the box 'The UNCLOS and the delimitation of the exclusive economic zone and the continental shelf between neighboring States' in section 6.5.1 of this report.
[584] *Ibid*.

drawing of such straight baselines. As is argued in section 6.5 of this report, that Chinese position is problematic on two counts. First, the UNCLOS provides for a comprehensive regime for straight baselines and customary international law contains the same set of rules. Second, the practice on which China relies does not meet the standard for arguing the existence of a rule of customary international law that varies the application of the pertinent UNCLOS rules.

The *South China Sea* arbitration has resulted in China further challenging the UNCLOS, by arguing that there should be limitations to resorting unilaterally to UNCLOS courts and tribunals that are additional to the limitations contained in Part XV of the Convention. As explained in section 7.2, Part XV of the Convention is a carefully crafted compromise that contains important limitations to the availability of compulsory binding dispute settlement under its section 2. However, that compulsory dispute settlement system of section 2 is an integral part of the UNCLOS, whereby States parties consent to third-party dispute settlement by virtue of being a party to the UNCLOS, Furthermore, an essential tenet of section 2, which applies to judicial dispute settlement in general, is that it is the prerogative of the dispute settlement body concerned to determine the extent of its jurisdiction in accordance with its constitutive instrument, which in this case is the UNCLOS. China has challenged its consent to compulsory dispute settlement as an UNCLOS party by arguing that:

> [a]s a sovereign State and State party to the UNCLOS, China is entitled to choose the means and procedures of dispute settlement of its own will. China has all along been committed to resolving disputes with its neighbors over territory and maritime jurisdiction through negotiations and consultations.[585]

China, by becoming a Party to the UNCLOS, indeed has made a choice, namely accepting the whole of the compromise set out in Part XV of the Convention, including the possibility that another State will unilaterally have resort to section 2 of Part XV in a dispute with China, and the *compétence de la compétence* of courts and tribunals.

In the statement in which the above quotation is included, China already hinted at a legal basis for rejecting the outcome of the arbitration by accusing the tribunal of abusing relevant procedures.[586] Subsequently, China has also argued that for various reasons the awards of the tribunal are null and void. As is set out in section 7.4 China has not offered any convincing evidence that any of the requirements of nullity is present. This notwithstanding, its rejection of the arbitration has had a profound impact on the South China Sea dispute. As has been observed:

> although there are recognized grounds for nullity, there is no authority in international law to test them, so that the party alleging nullity may act as a judge in its own case [...]. as long as it is not willing to submit the question to a new arbitration or to the ICJ, a situation that is not at all satisfactory and which underlines again the damaging effect of the lack, or near lack, of courts with compulsory jurisdiction in international law.[587]

[585] Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award on Jurisdiction and Admissibility, n 342 at para. III.
[586] *Ibid*., para. IV.
[587] Oellers-Frahm (2019), n 236 at para. 24.

In the specific case of the South China Sea, this state of affairs among others implies that China and the other claimant States continue to hold radically diverging views on in particular the maritime entitlements of the Paracel Islands, the Spratly Islands and the islands on Scarborough Shoal and the issue of historic rights. The presence of an authoritative interpretation of the law on these points, certainly from the perspective of the Philippines, Malaysia and Viet Nam, makes the room for compromise solutions most likely even smaller than it was before the *South China Sea* arbitration. This shows that although the outcome of the arbitration was a resounding legal victory for the Philippines, its aftermath also is testimony to the weakness of international law as an ordering principle and conflict resolution mechanism in a sensitive geopolitical setting.

As the analysis of the legal regime of disputed maritime areas in section 9.2 indicates, the law offers limited guidance on how to go about defining a disputed maritime area where states have different views in this respect. It is concluded that the States in the South China Sea are not obliged and unlikely to agree on the determination of the disputed maritime area(s) in the South China Sea. This raises the question what obligations of conduct are applicable in the absence of an agreed definition of the disputed area(s). It is seemingly unsatisfactory that States would be bound by the duties of restraint in areas that in light of an arbitral award are undisputed, by the mere fact that another State has a claim that, while more than 'a mere assertion', likely has no serious prospects of success if it were to be adjudged on the merits. Similarly, the absence of agreement about the definition of a disputed maritime area would imply that there is no agreement as to where the rules concerning provisional arrangements apply pending the settlement of the dispute.

The analysis of the possible content of a future COC indicates a number of challenges in reaching agreement on a text that provides effective normative guidance for the practice of all States concerned. As was set out in section 10, this among others concerns defining the area of application of a COC and identifying substantive areas of cooperation. In that light it may be seriously questioned what a COC would add to the existing regulatory framework for the South China Sea. At the same time, it is acknowledged that under most circumstances, it would not be politically expedient for any party that is involved in the negotiations to discontinue them.

As the analysis in section 8 indicates, activities on the ground take place in and are justified by a specific position on the legal ordering of the South China Sea by individual claimant States. For China, the main traits of that framework are its claimed sovereignty over the Spratly Islands, the Paracel Islands and the islands on Scarborough Shoal and rights as a coastal State over their adjacent, territorial sea, continental shelf and exclusive economic zone. As far as the Spratly Islands and Scarborough Shoal are concerned, the latter position is accompanied by a rejection of the outcome of the *South China Sea* arbitration. On the other hand, other claimant States similarly base themselves on their claimed sovereignty over specific islands, but reject that these islands have a continental shelf and exclusive economic zone.

As recent developments in relation to the *Sierra Madre* point out, the continued disagreement about the legal status of most of the waters of the South China Sea leads to opposing framings of

what is happening on the ground. For the Philippines, the *Sierra Madre* is located in its exclusive economic zone and continental shelf and as the coastal State it is fully entitled to maintain the *Sierra Madre* at its location. China's interference with the rotation of personnel and the resupply of the *Sierra Madre* is not in accordance with the navigational rights China has in the maritime zones of the Philippines. The arguments of the Philippines in general are in line with the applicable law,. China's arguments on the *Sierra Madre* are based on its position on its claimed sovereignty over the Spratly Islands, including Second Thomas Shoal. As the analysis in this report points out, even if the Chinese position on sovereignty over the Spratly Islands were to be accepted, the claim that this sovereignty also includes Second Thomas Shoal is problematic.

This state of affairs points to two arguments about the relevance of international law. On the one hand, it could be argued that international law has no significant impact on China's positions, suggesting that engaging in legal arguments with China is a futile exercise. On the other hand, it could be argued that a detailed analysis of international law allows teasing out the discrepancies between China's position and the applicable legal framework.[588] The latter point is relevant for a number of reasons. It provides argument for other States to explain and justify their positions and actions in relation to China in terms of international law. Second, where China is seeking agreed approaches on the basis of its interpretation of international law it may be more difficult to convincingly advance specific positions. This suggests that it remains meaningful to engage in a dialogue on the law. In that connection, other States will also have to consider how their reliance on international law compares to their positions. This is poignantly illustrated the analysis in section 6.4, which observes that much State practice on islands is not in accordance with the findings of the tribunal in the *South China Sea* arbitration on Article 121(3) of the UNCLOS. Calling upon China to accept the outcome of the arbitration while not applying that standard to oneself creates the impression of applying double standards. A similar observation applies to the practice of straight baselines of some of the claimant States.

The HYSY 981 incident discussed in section 8.2 similarly points out that critically assessing the positions of the parties may result in exposing discrepancies between legal justifications and the details of the legal framework to which reference is had in this connection. Although pointing out such discrepancies most likely will not have a direct impact on the situation on the ground, this exercise nonetheless is considered to be relevant. While States may ignore the law to the extent it is not in line with their own positions and interests, not engaging with the law may make diplomatic interactions with others more difficult and increase the costs of those interactions.

As is also argued in section 8.4, from a legal perspective a discrepancy between activities on the ground and the rights and obligations of States in principle does not change the law. States remain bound by their obligations under international law when they are acting in breach of these obligations. Acting in a way that impinges on the rights of other States similarly does not affect these rights of other States, but these rights continue to exist unaltered. As the analysis of two

[588] In addition, it may be noted that such an analysis indicates there seemingly is a certain ambiguity in the (legal) argumentation and positions of China, as is for instance witnessed by its historic rights claim that overlaps with the maritime zones it claims from the islands in the South China Sea. For other examples of such ambiguity see the text at notes 221 and 284 and following.

specific issues in sections 8.2 and 8.3 indicates, incidents on the ground are accompanied by quite detailed legal argument, which indicates that States aim to justify their actions in legal terms.

The risks of a continued discrepancy between activities on the ground and the legal framework are political, rather than legal. Where activities of one State are not effectively opposed by another State, they may create facts on the ground that, although illegal, will have long-term effects that eventually may feed into changing the legal situation. A continued discrepancy between activities on the ground and the law may also lead to a weakening of the belief in international law as a relevant regulatory framework and make policy makers less inclined to rely on international law in managing international relations.

China's rejection of the *South China Sea* arbitration and its continued claims in the South China Sea in defiance of both the UNCLOS and the arbitration, however, raise questions regarding whether China is seeking to challenge or change the law. Our analysis indicates that China does not seem to be challenging the relevance of the law as such. Its policy instead has been to rely on the law to justify its position, but through a distorted interpretation of the law and through blurring the line between legally-binding and non-legally-binding rules, such as political commitments, to create space for the advancement of its claims. As a result, it seeks to build a framework that is loosely based on the language of international law, but subject to its own understanding and interpretation.[589] In essence, this means that international law is not discarded by China and that all claimant States in the South China Sea are engaged in lawfare – both within the positive and negative meaning of the term as analyzed in section 3.3. As also discussed in that section, despite its opposition to the concept of rules-based order, the strategy that China is using seems to try making use of this concept to its advantage.

In the final analysis, the bottom line for the South China Sea disputes is that there is a fundamental disagreement between China and other claimant States about how the international law of the sea defines the political geography of the South China Sea. As among others the analysis in sections 9 and 10 indicates, as long as that disagreement persists it is unlikely that meaningful cooperation going beyond the level of crisis management will be possible. Framing this fundamental issue slightly differently, the law of the sea, and international law generally, offer the coastal States of the South China Sea a framework for assessing each other's claims about the political geography of the South China Sea and taking that assessment into account in deciding on their policy options. The *South China Sea* arbitration, for its part, has played an important role in clarifying some of the key legal issues which are central to the South China Sea dispute, but which are not elaborated in detail in the UNCLOS. As such, even though China continues to reject the arbitration, the findings of the arbitral tribunal provide an important authoritative reference point for other claimant States to continue relying on the UNCLOS to object to China's legal claims and China's actions on the

[589] In that sense, we do not agree with the view that China is engaged in 'a quest for enforcing particularistic claims rather than promoting a comprehensive re-writing of the law of the sea' (Schultheiss, note 89). Although it is true that China is framing its claims in terms of the UNCLOS and international law beyond the UNCLOS, the implications of China's claims are radically different from an outcome in accordance with the law of the sea.

grounds. The legitimacy pull of the awards can only be effective, however, if they continue to be upheld by the international community. States supporting the legal order created by the UNCLOS should continue using the arbitral awards as a reference point in their foreign policy relating to the South China Sea.