Fundamental Pitfalls of the *South China Sea Arbitration* Ruling

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Abstract

The award rendered by the Permanent Court of Arbitration (PCA) at The Hague in the dispute between the Philippines and China on 12 July 2016 is not as innovative or singular for most international lawyers as the international media reported. This is because, judging by precedents concerning international litigation by default of the respondent, such as those in the International Court of Justice (ICJ), the absence of China throughout the procedures almost guaranteed a favourable perspective from the beginning, thanks to the cunning litigation strategy set by the Philippines. However, what has so far been neglected by international lawyers is the fact that the litigation’s framework, allegedly prescribed by the 1982 United Nations Convention on the Law of the Sea (UNCLOS), is constrained by the current rules of international law, including UNCLOS. Behind the scenes, there is more going on; the current framework of the judicial settlement mechanism within international law will not appropriately consider the historical viewpoint of the regional politics in Southeast Asia. This article aims to solve that oversight and to offer a critical outlook of the procedures from a juridical and historical point of view. The article concludes that, unfortunately, this litigation and the award will not necessarily further the goal of the South China Sea dispute.

**Key words**: South China Sea dispute, nine-dash line, law of the sea, UNCLOS, arbitration, Eastphalia

I. Introduction

The *South China Sea Arbitration*¹ award, ruled upon by the tribunal established under the United Nations Convention on the Law of the Sea
(UNCLOS) on 12 July 2016, is in favour of the Republic of the Philippines (the Philippines), as expected by almost all Western international lawyers. As far as the content, scope, and history of the current body of international law are concerned, this result was not surprising. From the very beginning, it seems that the Philippines, who unilaterally initiated the litigation against the People’s Republic of China (China), assumed that China would certainly reject its jurisdiction, as well as any award, just as the other permanent members of the United Nations Security Council have repeatedly done (Allison).

There are various reasons for the initiation of this litigation under UNCLOS, as pointed out previously (Hu & McDorman; Talmon & Jia). It is possible that some foreign lawyers drove the Philippines to file the case at the International Tribunal for the Law of the Sea (ITLOS). These lawyers seemingly dared to challenge the peaceful settlement mechanism prescribed in UNCLOS through carefully drafted applications. In these applications, they raised legal issues that had been adjusted to fit the requirements under Part XV of UNCLOS. Accordingly, it was expected that an Arbitration Tribunal would be successfully established through the initiative of the incumbent President of ITLOS under Article 3(e) of Annex VII of UNCLOS (Chandrasekhara & Gautier). It was also hoped that UNCLOS would admit its jurisdiction of the application, despite the fact that China had already by declaration attempted to remove the possibility of any compulsory dispute settlement mechanism in the case of designated categories of disputes, including territorial sovereignty (Rao).

China, for its part, lacks experience in international litigation, or a field where skilful and experienced Western legal practitioners tend to carefully craft the structure of their arguments based on their judicial and arbitral expertise. They are aware that a litigant must be well prepared in terms of facts, law, strategy, and other details of litigation technique (Legum). In this sense, it can be said that China made a fatal mistake when it published its legal position on this litigation in ‘The Position Paper of the Government of the People’s Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines’, dated 7 December 2014 (‘Position Paper’). This response only succeeded in giving an advantageous push to the Philippines’ politically motivated plan, which
was supported mainly by Western countries. As a legal strategy, it may be said that China could have neglected the arbitration entirely, as the country had initially decided not to take part. This blunder, though perhaps deriving from a sense of honesty and justice, was taken as China’s intention to express itself outside of the Tribunal. The Position Paper was substantially succeeded by 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’ on the very next day of the Arbitral Award, 13 July 2016.

By itself, the award on merits is not necessarily intriguing, except for the fact that, literally interpreting and applying UNCLOS, the Arbitral Tribunal pronounced on the following two major points regarding the dispute: (1) it denied the legal ground of China’s so-called ‘nine-dash line’ in the South China Sea, and (2) it found none of the geographical features of the South China Sea to have the legal status of an island under Article 121 of UNCLOS. The reasoning in the award on merits could have been to a certain degree predictable and reasonably within the realm of arbitral function under international law. For those who would take this case from a different point of view, however, the award may seem to be irreparably harmful and misleading in the current world situation, where the status quo has been unexpectedly challenged by the unprecedented rise, or even ‘return’ (Kissinger) of China as the world’s second-largest power. In line with this argument, it is also maintained by some commentators that China’s major aim is to align the current world legal order with its own perspective, based on its own political, economic, and military power. This tendency and order may be referred to as an ‘Eastphalian’ world order in comparison with the modern basic international system called the Peace of Westphalia of 1648 (Fidler, 2–3; Ginsburg, 27–29). It was also noted that China may have already become not only a ‘rule changer’, but also a ‘game changer’ (Beckman) in world politics. However, China’s challenge may not yet have been successful under the current international legal order, although it may want to play the so-called new Great Game on ‘the appropriate spaces of sovereignty and internationalism’ (Desierto, 351) with the United States, which certainly takes no position on disputes over territorial sovereignty but retains its national interests in the region (US Department of State; Campbell & Salidjanova).

Under these circumstances, the South China Sea dispute is not a
regional one that affects only Southeast Asia but a global dispute with international impact. China has been a communist country since its establishment, but particularly during the period between its defeat in the Opium War of 1840–1842 and the end of the Second World War, the country has been forced to stay outside of the central forum where international law is created and adopted (Xue, 15). Its semi-colonised position and singular ideology as well as its long history of civilisation may lead China to feel uncomfortable and unsatisfied with the current situation in the South China Sea and the international rules applied in the current global affairs (Tzou, 7–22; Lo). China’s domestic maritime laws and regulations, which have been legislated and updated since China’s ratification of the UNCLOS, are largely based on UNCLOS (Greenfield).

Against the historical and cultural background mentioned above, this article aims to take a fresh look at the arbitration procedures in the South China Sea Arbitration, largely using juridical and historical arguments; it is hoped that doing so will bridge the gap between the perception of those who support the Arbitral Award of 12 July 2016 and those who criticise it. A juridical point of view normally addresses the jurisdictional phase, the merits phase, and other related phases of the arbitration procedures. However, owing to the space available to this article, the author first focuses on two aspects of the Award: (1) the significance of China’s nine-dash line, and (2) the legal status of the geographical features in the South China Sea. Second, a historical point of view considers hidden or overlooked historical incidents that are involved in the dispute. The author of the present article, whose intention is not to defend or support China’s position or argument, would like to stress those aspects not usually covered by an orthodox and traditional approach to international law, as the arguments concerned with (1) and (2) mentioned above not only fundamentally contradict China’s position but also cast a very dark shadow on an eventual settlement of the South China Sea dispute; China does not want to play the game of international law by the same rules, particularly in this dispute. This game also includes the jurisdiction of UNCLOS, which is, for China, a product of the rulers who created the current order through imperial colonisation. In conclusion, the present article wishes to propose a fresh look at the South China Sea dispute and to discuss several different viewpoints regarding the peaceful settlement of international
disputes in this region, as the role international law can play in this dispute is limited in effect.

II. China’s Position on the Compulsory Settlement Procedure of the South China Sea Dispute

China’s official position on the dispute and its background was not clarified for many years, even after conflicts among the states concerned started to arise frequently in the late twentieth century and despite severe criticism of China’s government. This low-key attitude may have been because of either a governmental policy or a strategy of ambiguity.

Strangely, however, China suddenly issued its ‘Position Paper’ after the start of litigation, as if the country wished to respond to the Philippines outside the Tribunal, in spite of its almost de facto forum prorogatum. Unable to keep quiet and indifferent to the case, perhaps China felt obliged to respond when faced with global pressure during the procedures. As explained below, this turned out be a critical failure by China in terms of international litigation. The ‘Position Paper’ of 2014 succinctly and comprehensively describes China’s legal and historical views of the dispute, ignoring the question of the procedures’ legal validity. Unfortunately, the Tribunal took this almost as an official reply to the case, which China had certainly never intended (Position Paper, paragraph 2). This is only because, on this point, the Tribunal ‘decided to treat the objections in China’s Position Paper and communications as effectively constituting a plea on jurisdiction’ (Award on Jurisdiction, paragraph 132, emphasis added).

This chapter discusses China’s intentions and objectives regarding the litigation and considers what was not addressed or clarified during the procedures and the award. The arguments made here are double-faceted: they apply both within the procedures of this litigation and in the outside realm.

A. Outside the Litigation

From the beginning, China firmly and assertively held the following position:

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. (Position Paper, paragraphs 3 & 4-29)

For China, this point is the most important in this litigation. It also maintains that, in accordance with the 2002 ‘China-ASEAN Declaration on the Conduct of Parties in the South China Sea’ (DOC) and some other relevant joint statements between China and the Philippines, the South China Sea dispute should be resolved among the states concerned through negotiation, without letting any third party interfere (Position Paper, paragraphs 30–56).

However, the Tribunal rejected this position on the following grounds: (1) the DOC is a political agreement and not legally binding, (2) it does not provide a mechanism for a binding settlement, (3) it does not exclude other means of settling disputes, and (4) the DOC does not, therefore, restrict the Tribunal’s jurisdiction under Articles 2817 or 2828 of UNCLOS. Even though both the Philippines and China had made other agreements and joint statements referring to the resolution of disputes through negotiation, the Tribunal found none of these to constitute a legally binding impediment to the Philippines’ unilateral application for arbitration. The prior diplomatic communications between these parties regarding the resolution of the dispute are all construed as meeting the requirement to exchange views under Article 2839 of UNCLOS (Award on Merits, paragraph 158).

One of the most controversial points of the litigation was the Arbitral Tribunal’s jurisdiction that was established under UNCLOS (Award on Merits, paragraphs 161–164). This is mainly because, in its declaration of 25 August 2006, (which was made after ratification on 7 June 1996 in accordance with Article 298 of UNCLOS),10 China had already designated some dispute categories as excluded from the compulsory dispute settlement mechanism under UNCLOS. China’s declaration reads:

The Government of the People’s Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a) (b) and (c) of Article 298 of the Convention.
Therefore, China was extraordinarily surprised when the Arbitral Tribunal accepted, in its award of 2015 on jurisdiction and admissibility, the Philippines’ application and established its jurisdiction.\(^{11}\)

In this context, it is worth noting UNCLOS’s relevant clauses regarding its compulsory procedures. Article 298, concerning ‘Optional Exceptions to Applicability of Section 2′,\(^{12}\) — a lengthy and complicated single clause in Part XV, ‘Settlement of Disputes’ — is one of the most relevant. The first paragraph of Article 298 allows a state to refuse to ‘[accept] any one or more of the procedures provided for in Section 2 with respect to one or more of the following categories of disputes’. These procedures include the following: (a) disputes regarding sea boundary delimitations, especially those involving historic bays or titles; (b) disputes concerning military or law enforcement activities; and (c) disputes in which the Security Council of the United Nations is exercising any function under its Charter.

China, therefore, considers these disputes to fall within the exceptions mentioned in Part XV of UNCLOS. For those disputes in category (a) mentioned above, there are two more (accumulative) conditions explicitly mentioned in Article 298(1)(a)(i). First, any dispute shall be excluded from arbitration if the declarant state shall ‘accept submission of the matter to conciliation under Annex V, Section 2 (‘Compulsory Submission to Conciliation Procedure Pursuant to Section 3 of Part XV’)’. Second, ‘any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission’ (emphases added). This latter condition more severely restricts any dispute submitted in this category, and could considerably reduce, or even bar, the possibility of submitting any dispute of this kind. Until the Philippines unilaterally submitted the South China Sea dispute, very few, if any, thought that a dispute concerning sovereignty or rights over continental or insular land territory would not be dealt with under the compulsory dispute settlement procedure of UNCLOS. China declared that this was so because it never doubted this interpretation of the clause under Article 298.

Regarding the dispute in category (a), however, two other relevant factors need to be considered. First, Article 298(4) implies that the declarant state is supposed to specify, in such a declaration, the procedure to which the
other state may submit. As can be seen above, China’s declaration is so simple that there is no reference to any available procedures in case of a dispute. It is not easy, however, to decide whether China’s failure in its declaration to designate any available procedure may have had a negative impact on China’s position in this case. China’s declaration could be regarded as the total exclusion of any dispute that may fall in the categories indicated by China from the compulsory dispute settlement mechanism under UNCLOS. This kind of practice would tend to lead this settlement mechanism to the will of states parties rather than to the rule of law.

Second, and more importantly, the Tribunal ascertained the applicability of Article 288(4) to this case (Award on Jurisdiction, paragraph 111). Article 288(4) prescribes an established tribunal’s ‘compétence de la compétence’ as follows:

In the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal.

This clause seemingly signifies that the established tribunal will, in the long run, have the power to decide whether it has jurisdiction over the case in question. In other words, UNCLOS’ compulsory dispute settlement procedure seems to presuppose that, regardless of the declaration made under Article 298, it is not the declarant state that will eventually decide the question of jurisdiction, but a court or established tribunal. One commentator is of the opinion that ‘[t]hese exceptions are not self-judging and cannot serve as a simple bar to proceedings under Section 2’ of Part XV (Klein, 123). In other words, once a tribunal is decided to be established under these provisions of UNCLOS, the composition of the tribunal may be more relevant to the future of the litigation.

Finding China’s declaration of 25 August 2006 ‘is an example of a declaration intended to activate certain exceptions to the compulsory settlement of disputes set out in Article 298’, the Tribunal found that, under Article 309 (on the prohibition of reservation and exceptions), the states that are parties to UNCLOS are ‘not free to pick and choose the portions of [UNCLOS] they wish to accept or reject’ (Award on Jurisdiction, paragraph 107 (emphases added)). Therefore, China’s declaration was identified as the
reservation or the exception that is prohibited under Article 309. Moreover, the Tribunal stressed the application of Article 287(1) and (3) (on ‘Choice of Procedure’), which read:

**Article 287**

**Choice of procedure**

1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention:

   (a) the International Tribunal for the Law of the Sea established in accordance with Annex VI;
   (b) the International Court of Justice;
   (c) an arbitral tribunal constituted in accordance with Annex VII;
   (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.

(...)

3. A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII.

The Tribunal judged that both the Philippines and China were, under Article 287(3), ‘deemed to have accepted arbitration in accordance with Annex VII to the Convention’, because neither of them had made ‘a written declaration choosing one of the particular means of dispute settlement set out’ in Article 287(1). This is why the Tribunal found that the present dispute was ‘correctly’ submitted to arbitration before a tribunal constituted under Annex VII’ of UNCLOS (Award on Jurisdiction, paragraph 109). What does this ruling mean? A declaration made under Article 298(1) is not treated as a reservation or exception prohibited under Article 309.

Finally, it may be said that the following statement of the Tribunal in its Award on Jurisdiction, the reasoning of which may for some ‘reflect a fair and evenhanded process’ (Noyes, 108), is the most succinctly summarised standpoint of this Arbitration:
In this award, the Tribunal only addresses matters of jurisdiction and admissibility; it does not address the merits of the Philippines’ claims. If the Tribunal finds it has no jurisdiction, the matter ends here. If the Tribunal finds it has jurisdiction over any of the Philippines’ claims, it will hold a subsequent hearing on the merits of those claims. If it finds that any of the jurisdictional issues are so closely intertwined with the merits that they cannot be decided as ‘preliminary questions’, the Tribunal will defer those jurisdictional issues for decision after hearing from the Parties on the merits. (Award on Jurisdiction, paragraph 16 (emphases added))

Thus, the Tribunal postponed its decision on jurisdiction to the merits phase with respect to the majority (eight out of fifteen) of the Philippines’ Submissions only because, in accordance with Article 20(3) of the Rules of Procedure, the Tribunal found that the following claims might ‘[have depended] upon certain aspects of the merits of the Philippines’ claims’ (Award on Jurisdiction, paragraphs 380–381; Award on Merits, paragraph 162) and that they ‘would be deferred for further consideration in conjunction with the merits’ (Award on Merits, paragraph 163): (1) China’s claim to historic rights in the South China Sea; (2) the status of certain maritime features therein; (3) the maritime zone in which alleged Chinese law enforcement activities in fact took place; and (4) the nature of certain Chinese activities. Moreover, the Tribunal concluded, as the rest of the Philippines’ claims were ‘not exclusively preliminary’ in character, its consideration of the claims was reserved for the merits phase.

However, this logic may imply that the declaration system under Article 298 will not actually exclude some dispute categories from the compulsory settlement procedure described in Part XV. It seems that this interpretation by the Tribunal, along with UNCLOS’ operation is incompatible with states’ previous understanding of UNCLOS: upon their ratification of, or accession to UNCLOS, states would be able to exclude the three categories of disputes mentioned above.

Therefore, the South China Sea Arbitration may have established the notorious precedent of a state party – the Philippines – attempting a unilateral application. Now, it may be said that, if this precedent becomes frequently used in the same manner, any court or established tribunal will be much more likely to accept many more future cases under UNCLOS.
B. Within the Litigation

Regarding the historic title mentioned in category (a) mentioned above, the Tribunal found that, as the meaning of ‘historic title’ in the law of the sea refers to claims of historic sovereignty over bays and other near-shore waters, China’s claim (expressed in the ‘Position Paper’) entails not a historic title to the waters of the South China Sea, but historic rights to resources within the ‘nine-dash line’. Thus, the Tribunal did not regard the exception of ‘historic title’ made by China’s declaration as a bar to its jurisdiction. Owing to its narrow interpretation of the concept of ‘historic title’, the Tribunal did not associate the term with the claim of a specific maritime area and the geographical features therein, thus setting a dashed line through the South China Sea. China’s ‘historic title’ was confined to its historic claims to resources, such as fish stocks, within the nine-dash line, and the historical significance of the nine-dash line was not considered to mean ‘historic title’ under the law of the sea (i.e. a law that includes UNCLOS).

Moreover, after reviewing available evidence, the Tribunal denied any reefs or islands claimed by China were entitled to an exclusive economic zone (EEZ). This denial of an EEZ, one that would possibly overlap with both the Philippines and China’s EEZ, also rejected China’s defence, using an exception to disputes concerning sea boundary delimitation. In the merits phase, the Tribunal found none of the geographical features within the South China Sea to have the legal status of islands, as defined by Article 121 of UNCLOS. Furthermore, since China has no EEZ in the maritime area concerned, the Tribunal also denied the dispute exception in category (b) (law enforcement activities). This exception due to military activities was partially accepted, but also partially rejected; in coming to a conclusion, the Tribunal relied on the statement made repeatedly by the Chinese government regarding the non-military nature of its land reclamation and the construction of artificial islands at the seven features in the Spratly Islands.

In sum, the Tribunal found no obstacle to establishing its own jurisdiction, despite the exceptions that China had declared under Article 298. In this connection, the precedence set by the International Court of Justice (ICJ) is noteworthy (Thirlway). The Tribunal’s compétence de la compétence easily accepted and admitted the unilateral application of the Philippines, which had been carefully and tactically crafted for some strategic purposes in
this litigation. It is almost impossible to know whether this decision is because of China’s non-appearance at the arbitration, but it may be that this may imply that China had been disadvantaged, if not punished, under the warning clause with respect to default of appearance under Article 9 of Annex VII of UNCLOS.\(^\text{15}\) The default of appearance, though not avoidable or unusual, may cast doubt on the authenticity and legitimacy of the Tribunal and its award, as any fact-finding, in particular, would have been partially one-sided and, unfortunately, it would become substantially impossible to uncover the whole picture of the dispute. For those who support the idea that the arbitral or judicial settlement of a dispute under the UNCLOS procedures should be conducted in accordance with a literal interpretation of the relevant clauses of UNCLOS, the award would have been acceptable.

### III. The Two Major Controversial Points on the Merits Phase

As mentioned above, this chapter focuses primarily on two major and controversial points of the 2016 arbitral award: (1) China’s nine-dash line and (2) the geographical features in the maritime area in question.

#### A. China’s Nine-Dash Line

The main theme of the litigation is the legality of the nine-dash line under UNCLOS. There are many interpretations for its meaning (Ikeshima 2013, Valencia/Van Dyke/Ludwig, Yabuki, Zou). The Arbitral Tribunal, however, denied, under UNCLOS, China’s claim to historic rights to resources within its nine-dash line on the following grounds. First, the Tribunal found that China’s claim to historic rights to resources is incompatible with the detailed allocation of rights and maritime zones in UNCLOS. Second, China’s rights, ‘to the extent it had in the waters of the South China Sea’, were ‘extinguished’ by UNCLOS’ entry into force, to the extent they were incompatible with the maritime zone system of UNCLOS. Third, even if there exists evidence that supports the use of ‘islands’ in the South China Sea by Chinese navigators and fishermen, the waters of the South China Sea beyond the territorial sea were, prior to UNCLOS, part of the high seas. Thus, the Tribunal found that China’s historical navigation and fishing represented the exercise of high seas freedoms, rather than a historic right, and that there
is no evidence that China had exclusively controlled the waters.

It may be only natural that the Tribunal’s rejection of the legal basis for China’s nine-dash line derives not only from China’s failure to produce effective evidence (attributable to its absence from the procedure) but also from the limits of the current international legal system, including UNCLOS, which has been largely created under the strong influence of Western countries, and which reflects their understanding of historical events that took place in the Eastern world, especially prior to the Second World War. Owing to its non-retrospective nature of application under the law of treaties, UNCLOS, among others, cannot mediate events that occurred before the Second World War, when colonial powers ruled international society largely by force and prioritised their own national interests through law-making processes. It may be construed that, for China, the Arbitral Tribunal, which was established under a Western worldview that has mainly held the same ideas about territorial sovereignty and maritime areas since the 1648 Peace of Westphalia, would never have taken pains to profoundly consider the historical background of the South China Sea dispute as a whole (Coleman & Maogoto). However, China’s perspective will not be easily accepted under the dispute settlement mechanism in the current legal system of the international society, including UNCLOS. With respect to the settlement of the South China Sea dispute, particularly, a question arises as to the question how to fill the gap between the West and the East in terms of the settlement of territorial and maritime dispute of this kind.

As the author has already considered the fundamental themes of China’s standpoint regarding the South China Sea dispute elsewhere (Ikeshima, 2013, 2014a, 2014b, 2015), its examination here is brief and intended only as an update. In essence, China would not endure the historically narrow-minded view of the other states concerned and of the Tribunal, both in regards to the dispute and to the maritime areas in the South China Sea. A Chinese official made a statement a few years ago, saying that as UNCLOS is not applicable to matters occurring before its validation, the nine-dash line ‘defines China’s territorial sovereignty and its related maritime interest’, which cannot be grasped by any rule of the current body of international law. It may be maintained that China is not a nation state, but a ‘civilization state’ with a history of over 3,000 years (Jacques). On the basis of this understanding, the
statehood of China may not easily fit the definition of a sovereign state under the Westphalian system (Jacques; Coleman & Maogoto). For more than a hundred years, China suffered from the aggression and semi-colonisation of the nineteenth century imperialism, but it rose up from this disgrace through victory in the Second World War and the Chinese Revolution of 1949, and became a communist country (Kissinger). Naturally, however, the current body of international law such as UNCLOS is a very limited reflection of the historical aspects that China and some other states of similar ideas tend to support, because the rules under that body are intended to become universally and objectively applicable in the world.

Therefore, because of its fundamental communist principles and its historical perspective, China maintains a very singular understanding of international law, which tends to result in conflicts with other states over the interpretation and application of some of its rules. Because it cherishes and firmly protects its land and maritime territory as the supreme composition of a sovereign state, it will not, in principle, entrust a third party, including an international court or tribunal, with the fate of any portion of its land territory. In other words, China will settle a territorial dispute through negotiation only with the state party concerned. No other country, let alone an international tribunal, will be able to force China under its jurisdiction in order to decide any part of China’s territory. It is not surprising that no Western state can easily understand this position, nor do any share it (Tzou).

China’s mistake, therefore, might have been to become party to UNCLOS in 1996. As mentioned above, the Tribunal concluded that China’s possible historic rights to resources in the South China Sea were ‘extinguished’ by the entry into force of UNCLOS. As a writer points out, China could still denounce UNCLOS (Talmon). This kind of reasoning concerning the Tribunal means that once China had ratified UNCLOS in 1996, it was necessarily bound by the rules of UNCLOS. China, in this case, lost all previous historical interests under UNCLOS. This would mean that there is no ‘Eastern’ element in the historic title under the current body of international law, which is, from the Chinese point of view, the product of the Western civilisation, although China does not expressly maintains this in its official statement. This viewpoint is among those aspects that China and some developing countries have been severely criticising with respect to some rules of the current body of
international law. In other words, the more powerful China grows, the more frustrated it becomes under the current situation of international law. However, what has actually happened with China with respect to the arbitral procedures and the dispute is that it cannot bear with the settlement in a narrow context of law but so far fruitlessly challenge the status quo.

B. The Legal Status of the Geographical Features in the Maritime Area in Question

The second most striking result of the arbitral award is that the Tribunal did not consider any of the geographical features in question in the South China Sea in this dispute to be ‘islands’, but instead determined that they were ‘rocks’, in the sense of UNCLOS’ regime of islands. It may be said that this was the ‘most difficult issue’ facing the Tribunal (Beckman, 3). At the same time, this interpretation and application of Article 121 of UNCLOS had probably never been so thoroughly considered by an international court or tribunal in a concrete case. Since none of the features is an island in the meaning of Article 121, they are not entitled to an EEZ or a continental shelf of their own. Accordingly, there is no overlapping maritime area between the Philippines and China, and there was therefore no need for the Tribunal to dwell on the legality of China’s activities, official or military, in the maritime area in question.

In China’s opinion, the issues raised by the Philippines in its application were, directly or indirectly, matters that, by nature, are concurrently the question of territorial and maritime sovereignty, which is beyond the scope of the Tribunal’s jurisdiction under UNCLOS. Instead, the Tribunal went so far as to find that even the largest ‘natural’ island in the South China Sea, Taiping Island (Itu Aba), which is occupied by Taiwan,\(^{16}\) does not have an island’s legal status, but is instead only a ‘rock’ on the ground that it is ‘not capable of sustaining an economic life of [its] own’ (Award on Merits, paragraphs 625 and 632).

Considering principally both archival materials and historical hydrographic surveys, along with the expertise of an appointed hydrographer, the Tribunal, under Articles 13 (on low-tide elevations) and 121 (on the regime of islands) of UNCLOS, examined and classified the features in question on the basis of their natural condition. Article 13 reads:
Article 13
Low-tide elevations
1. A low-tide elevation is a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide. Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea.
2. Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own.

The essential points of this provision in the Award are: (1) the ‘naturally formed’ nature of the low-tide elevation in question, and (2) its submergence during high tide. Considering the evidence available to it, the Tribunal admitted none of the features to have the status of an island, but did designate some as high-tide features and others as submerged during high tide.

Article 121, which is most relevant here, reads as follows:

Article 121
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.

This was essentially the first time an international tribunal interpreted and applied to a concrete case the criteria mentioned in Article 121(3) of UNCLOS (Award on Merits, paragraph 474). Even though this provision is ‘poorly drafted’ (Churchill & Lowe, 50) or is a provision of ‘deliberately negotiated vagueness’ (McDorman), the Tribunal noted that this provision
was related to the so-called creeping jurisdiction of coastal states. Judging from the object and purpose of Article 121(3), the Tribunal found that the provision was intended to prevent ‘encroachment’ on the deep seabed (or the common heritage of mankind) or to prevent features from generating large entitlements to maritime zones that would otherwise infringe on the entitlements of inhabited territory or on the high seas and the Area (the deep seabed) (Award on Merits, paragraph 535). The Tribunal concluded that entitlements depend on the following: (a) the objective capacity of a feature, (b) in its natural conditions, to sustain either (c) a stable community of people or (d) economic activity that is neither dependent on outside resources nor purely extractive in nature. As shown in the ICJ judgment of 2012 in *Territorial and Maritime Dispute* (*Nicaragua v. Colombia*), the award on merits pronounced that the ‘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’ (Award on Merits, paragraph 538).

As the current features in the maritime areas in question, owing to land reclamation and other related human activities, do not have the capacity to sustain a stable community of people, they are not deemed to be inhabitable islands. The Tribunal was of the opinion that temporary use of the features by fishermen did not amount to habitation of a stable community, and that all historical economic activity on these areas had been extractive in nature. Accordingly, it concluded that all of the high-tide features in the Spratly Islands, which were at issue in the arbitration, are legally ‘rocks’ that do not generate an EEZ or continental shelf. Thus, the Tribunal could not help but decide that *none* of the geographical features in the South China Sea are islands but rocks, as the hired expert reported that habitation and an independent economic life could not be established.

Therefore, it seems that, from the beginning, the Tribunal may have had the following order of the whole structure of the award: (1) there is no island but rocks and reefs in the maritime area in question; (2) these geographical features have no entitlement to an EEZ; (3) there is no overlap of EEZ of the states concerned in this maritime area; and, accordingly; and (4) there is no bar of territorial sovereignty or maritime delimitation in this arbitration. Because the largest geographical feature even in the South China Sea, such as Taiping Island, was denied its legal status as an island, no state in the region
would feel pleased to accept the reasoning of the Tribunal. Finally, it should be added that the arbitral award might have an unexpected backlash particularly on Japan’s position concerning the legal status of Okinotorishima as an island. Japan argues that Okinotorishima may be entitled to an EEZ of 200 nautical miles, while China and South Korea have been arguing against this position and identifying it as a rock (Ikeshima, 2010). Although Japanese Chief Cabinet Secretary Yoshihide Suga maintained the country’s official view a few days after the arbitral award (Mie), this position of the Japanese government may become considerably harder to defend in international society in the face of this award. The Japanese standpoint must be examined in light of the Tribunal’s pronouncement concerning the two major elements of an island’s legal status under Article 121 of UNCLOS: (1) it is a naturally formed feature that is not submerged at high tide, and (2) it is able to sustain an economic life of its own.

It is widely believed that, irrespective of its name, Okinotorishima in fact meets neither of these two conditions. Though there is no international dispute over the territorial sovereignty of Okinotorishima, China, in particular, has criticised Japan’s attempts to protect the landmass from wave erosion and to reclaim the features of Okinotori ‘rock’ with concrete and titanium as a way of disguising its real status and the fact that it does not meet the requirements of Article 121. As the award in the South China Sea dispute seems to emphasise the second factor – human habitation and economic life – China’s criticism of Japan’s position regarding Okinotorishima ironically turned out to end up hurting their own case.

IV. Conclusion

From the beginning of the litigation, unilaterally initiated by the Philippines, it was almost obvious that China’s position would not easily gain judicial or arbitral support; the fundamental idea of the nine-dash line and China’s territoriality of the South China Sea is far beyond the scope of existing international law, including UNCLOS. As is indicated in the last part of the Arbitral Award, the root of the dispute lies in ‘fundamentally different understandings of their respective rights under the Convention in the waters of the South China Sea’ (Award on Merits, paragraph 1198). On the basis of consensualism regarding a matter of sovereignty, China has never wanted any
third party, such as an international tribunal, to decide the legal meaning of
the nine-dash line or to mediate the territorial dispute over the South China
Sea, as the territory, its maritime area and its resources in the area consist of
China’s ‘core interests’. At the same time, China has long been aware that
the current world legal order does not work in favour of China’s legal and
historical position and that, therefore, no legal rule is neatly applicable to
the dispute over the nine-dash line and China’s territorial sovereignty in the
South China Sea. All China could do was to deny the Arbitral Tribunal’s
jurisdiction from the beginning. It is no wonder, however, that this position
was not accepted by the Tribunal, as discussed above.

In this sense, the Arbitral Award of 12 July 2016 has reinforced
the Western world’s persistent criticism towards China’s assertive and
sometimes aggressive policies and activities in the South China Sea and other
neighbouring maritime areas. From the Chinese point of view, it may be said
that the Award has been welcomed mainly by the Western world, whose
perspective in the region in question has been largely based on the Peace of
San Francisco and its legacies (Hara). Regardless of its intention, China, who
is not a party to the 1951 Peace Treaty of San Francisco, is not, in principle,
bound by the Treaty but has been inevitably under the strong influence of the
so-called San Francisco system in the regions of East and South Asia.

In this connection, it is understandable that the G7 countries are in one
voice to issue the following statement adopted by the G7 Foreign Ministers’
Meeting in New York on 20 September 2016:

[T]he foreign ministers remained concerned about the situation in the
East China Sea and South China Sea, and along with reconfirming the
G7’s position of emphasizing the rule of law, they shared the view that
the G7 will continue to present a united voice aimed at achieving the
rule of law. The foreign ministers shared recognition that the award in
the arbitration between the Republic of the Philippines and the People’s
Republic of China provides a useful basis for further efforts to peacefully
resolve disputes in the South China Sea.¹⁸

The G7 countries, who provided this critical statement, stress the rule of law,
towards the situation in the South China Sea as well as the East China Sea.
In terms of the territorial dispute settlement in the region, however, the present author is of the opinion that this kind of repetitive and obstinate check of the world’s political scenes and diplomatic forays will not necessarily be as effective in the long run as it might seem. In fact, the latest situation of the South China Sea as of the end of the year 2016 seems to be particularly unstable owing to a series of unpredicted relevant events regarding the region such as the recent tacit deal between China’s President Xi Jinping and the Philippines’ President Rodrigo Duterte and the new approach to China introduced by the President-elect Donald Trump. These events may have put the Award aside for the time being, reducing the real value of the arbitral settlement in the face of international political realities. What seems to be more important here for every state concerned in the disputed region is, as the author maintained elsewhere, to realise the following:

[T]he solution to the dispute over the South China Sea is not confined to the arguments regarding a judgment on the legal meaning of the dashed line that is issued within the framework of international law, but also entails a plan for maintaining peace and stability in the maritime area by eradicating the fundamental confrontational factors including the territorial dispute through peaceful means and cooperation among all the states concerned. (Ikeshima, 2013, 37)19

In the disputes over territorial sovereignty such as the South China Sea dispute, China does not necessarily play the game of Western international law (Jacques). It is certain that China’s unilateral and arbitrary attitude towards fundamental values such as the rule of law will be widely criticised and negated in international society. It goes without saying that, without ‘denouncing UNCLOS’ (Talmon), China also needs to responsibly try its best to think and act beyond its domestic principles and policies, so that the region will maintain peace and stability. However, like other major powers, who tend to ignore unfavourable rulings in a case at an international court or tribunal, China does not feel obliged to be bound by it, as China has already become powerful enough to overcome any difficulties in pursuing its own foreign policy in accordance with its communist principles. Therefore, a resolution under the compulsory dispute settlement mechanism under the
current rules of international law is inevitably partial and unreasonable as the final goal of regional peace and political independence in Southeast Asia, where China’s dominant influence on other neighbouring states in terms of history, geography, and economy, in particular, cannot and will not be easily erased.

In order for both the Philippines and China to ease the recent tensions in the region, the following suggestions are worth immediate consideration: (1) let both sides resume a peaceful dialogue on the normalisation of the current regional tension, in accordance with the DOC; (2) negotiate an agreement to leave aside, for the time being, the territorial sovereignty issue of the geographical features in the South China Sea; (3) as soon as possible, make a fisheries agreement in order to regulate fishermen’s activities in the relevant maritime areas (Valencia); and, finally, (4) establish a hotline or similar mechanism between the two countries so that they can safely avoid an inadvertent clash in case of a maritime emergency. It is also in the regional interest to let the countries concerned in the region settle the dispute by themselves within a regional framework, such as the Association of Southeast Asian Nations (ASEAN), and to let the parties concerned resume bilateral talks without any further interruption by a third party.

References


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1 For its official website, see the official website of the Permanent Court of Arbitration (PCA) at <https://www.pcacases.com/web/view/7> (accessed 13 July 2016).

Article 3 (e) of Annex VII of UNCLOS reads:

3 Article 3 (e) of Annex VII of UNCLOS reads:

Constitution of arbitral tribunal

For the purpose of proceedings under this Annex, the arbitral tribunal shall, unless the parties otherwise agree, be constituted as follows:

(...)

(e) Unless the parties agree that any appointment under subparagraphs (c) and (d) be made by a person or a third State chosen by the parties, the President of the International Tribunal for the Law of the Sea shall make the necessary appointments. If the President is unable to act under this subparagraph or is a national of one of the parties to the dispute, the appointment shall be made by the next senior member of the International Tribunal for the Law of the Sea who is available and is not a national of one of the parties. The appointments referred to in this subparagraph shall be made from the list referred to in article 2 of this Annex within a period of 30 days of the receipt of the request and in consultation with the parties. The members so appointed shall be of different nationalities and may not be in the service of, ordinarily resident in the territory of, or nationals of, any of the parties to the dispute.

4 For the arbitral award on jurisdiction of 29 October 2015, see the official website of the PCA at <https://www.pcarcases.com/web/sendAttach/1506> (accessed 31 October 2015).


7 Article 281 of UNCLOS reads:

Procedures where no settlement has been reached by the parties

1. If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.

2. If the parties have also agreed on a time-limit, paragraph 1 applies only upon the expiration of that time-limit.
8 Article 282 of UNCLOS reads:

Article 282

Obligations under general, regional or bilateral agreements
If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree.

9 Article 283 of UNCLOS reads:

Article 283

Obligation to exchange views

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

2. The parties shall also proceed expeditiously to an exchange of views where a procedure for the settlement of such a dispute has been terminated without a settlement or where a settlement has been reached and the circumstances require consultation regarding the manner of implementing the settlement.


11 See the Arbitral award on jurisdiction and admissibility, note 4.

12 Article 298 of UNCLOS reads:

Article 298

Optional exceptions to applicability of section 2

1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes:

(a) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles, provided that a State having made such a declaration shall, when such a dispute arises subsequent to the entry into force of this Convention and where no agreement within a reasonable period of time is reached in negotiations between the parties, at the request of any party to the dispute, accept submission of the matter to conciliation under Annex V, section 2; and provided further that any dispute that necessarily involves the
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concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission;

(ii) after the conciliation commission has presented its report, which shall state the reasons on which it is based, the parties shall negotiate an agreement on the basis of that report; if these negotiations do not result in an agreement, the parties shall, by mutual consent, submit the question to one of the procedures provided for in section 2, unless the parties otherwise agree;

(iii) this subparagraph does not apply to any sea boundary dispute finally settled by an arrangement between the parties, or to any such dispute which is to be settled in accordance with a bilateral or multilateral agreement binding upon those parties;

(b) disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3;

(c) disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations, unless the Security Council decides to remove the matter from its agenda or calls upon the parties to settle it by the means provided for in this Convention.

2. A State Party which has made a declaration under paragraph 1 may at any time withdraw it, or agree to submit a dispute excluded by such declaration to any procedure specified in this Convention.

3. A State Party which has made a declaration under paragraph 1 shall not be entitled to submit any dispute falling within the excepted category of disputes to any procedure in this Convention as against another State Party, without the consent of that party.

4. If one of the States Parties has made a declaration under paragraph 1(a), any other State Party may submit any dispute falling within an excepted category against the declarant party to the procedure specified in such declaration.

5. A new declaration, or the withdrawal of a declaration, does not in any way affect proceedings pending before a court or tribunal in accordance with this article, unless the parties otherwise agree.

6. Declarations and notices of withdrawal of declarations under this article shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the States Parties.

13 Article 309 reads:

Article 309

Reservations and exceptions

No reservations or exceptions may be made to this Convention unless expressly
permitted by other articles of this Convention.

Article 20(3) of the Rules of Procedure of the Arbitration calls for the Tribunal to rule on any plea concerning its jurisdiction as a preliminary question, ‘unless the Arbitral Tribunal determines, after seeking the views of the Parties, that the objection to its jurisdiction does not possess an exclusively preliminary character, in which case it shall rule on such a plea in conjunction with the merits.’ (emphases added)

Article 9 of Annex VII of UNCLOS reads:

Article 9

Default of appearance

If one of the parties to the dispute does not appear before the arbitral tribunal or fails to defend its case, the other party may request the tribunal to continue the proceedings and to make its award. Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings. Before making its award, the arbitral tribunal must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law.

See Taiwan’s Ministry of Foreign Affairs, ‘ROC [Taiwan’s] Position on the South China Sea Arbitration’, at its official website at <http://www.mofa.gov.tw/en/News_Content.aspx?n=1EADDCFD4C6EC567&s=5B5A9134709EB875> (accessed 20 July 2016). In this position paper, Taiwan states the following: (1) the Award has no legally binding force on Taiwan because the Award’s reference to Taiwan as ‘Taiwan Authority of China’ is demeaning to the status of Taiwan as a sovereign state and because the Award severely jeopardizes the legal status of the South China Sea Islands; (2) the Tribunal did not formally invite Taiwan to participate in its proceeding; and (3) Taiwan urges that disputes in the Sea be settled peacefully through ‘multilateral negotiations on the basis of equality.

One may find another occasion in the judgment of the International Court of Justice (ICJ) in the case of Territorial and Maritime Dispute (Nicaragua v. Colombia), Merits Judgment, ICJ Reports 2012.


This passage has been supported in the concluding part of the following: Shigeki Sakamoto, ‘Historic Waters and Rights Revisited: UNCLOS and Beyond?’, The Rule of Law in the Seas of Asia: Navigational Chart for Peace and Stability, the Ministry of Foreign Affairs for Japan, 2015, pp. 62-69, at 68-69. For the original slides of Professor Sakamoto’s paper presented at the symposium of 12 & 13 February 2015 on the law of the sea, see the website of the Ministry at <http://www.mofa.go.jp/files/000074505.pdf> (accessed 9 December 2015).