

# Legal and Geographical Implications of the South China Sea Arbitration

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## Introduction

On 12 July 2016 the Arbitral Tribunal in the case between the Philippines and China delivered its *Award*, following its earlier 29 October 2015 *Award on Jurisdiction and Admissibility*.<sup>1</sup> The Tribunal was constituted under Annex VII of the United Nations Convention on the Law of the Sea (LOS),<sup>2</sup> having been initiated by the Philippines.<sup>3</sup> The Permanent Court of Arbitration in The Hague acted as the registry for the case and venue for hearings.<sup>4</sup> China, for its part, returned the Philippines' notification of its claims, argued that the Tribunal lacked jurisdiction to hear the case, and has rejected the Tribunal's Award.<sup>5</sup>

The objective of this *Issue Brief* is to evaluate concisely the status of the Award before highlighting the main findings of the Tribunal, notably in relation to the regime of islands, historic rights and environmental obligations. The paper then explores the potential implications of the arbitration legally and geographically, both for the South China Sea and beyond.

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<sup>1</sup> Both the Tribunal's Award and its Award on Jurisdiction and Admissibility are available on the website of the Permanent Court of Arbitration, available from, <https://pca-cpa.org>, at <https://pcacases.com/web/view/7>.

<sup>2</sup> United Nations Convention on the Law of the Sea 1982 (Montego Bay, 10 December 1982, in force 16 November 1994) 1833 *UNTS* 396, Article 6 [hereinafter "LOS" or "the Convention"].

<sup>3</sup> Philippines, "Notification and Statement of Claim on the West Philippine Sea", 22 January 2013, available from; <http://www.pcacases.com/pcadocs/The%20Philippines%27%20Memorial%20-%20Volume%20III%20%28Annexes%201-60%29.pdf>. See also, Philippines Memorial, Vol. III, Annex 1, available from, <https://pca-cpa.org>

<sup>4</sup> Designated PCA Case No.2013.-19: The Republic of the Philippines vs. The People's Republic of China on the PCA's website, <https://pca-cpa.org/en/cases/>. While the case was hosted by the PCA, it is important to note that the case arises from LOSC.

<sup>5</sup> China has stated that both of the Tribunal's awards are "null and void" and lack "no binding force." See, China, "Statement of the Ministry of Foreign Affairs 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, on the Ministry of Foreign Affairs of China website available from [www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1310474.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1310474.shtml) and "Statement of the Ministry of Foreign Affairs on the Award of 12 July 2016 of the Arbitral Tribunal Established at the Request of the Republic of the Philippines," 12 July 2016, on the Ministry of Foreign Affairs of China website available from [www.fmprc.gov.cn/nanhai/eng/snhwtlcwj\\_1/t1379492.htm](http://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1379492.htm).

## Status of the Award

Both the Philippines and China are parties to LOSC. Consequently, both States are subject to the Convention's dispute resolution provisions.<sup>6</sup> Part XV of the Convention, which deals with the settlement of disputes, provides for "compulsory procedures entailing binding decisions" and it is these that the Philippines invoked in order to bring the case.<sup>7</sup> However, immediately subsequent articles of the Convention outline limitations and exceptions to the applicability of such binding dispute settlement provisions. In particular, States have the option to declare that the aforementioned dispute resolution mechanisms do not apply where concurrent consideration of "any unsettled dispute concerning sovereignty or other rights over continental or insular land territory" is required, where disputes related to "sea boundary delimitations" are involved, or should "historic bays or titles" be involved.<sup>8</sup> China activated these exceptions through a Declaration made on its ratification on 7 June 2006.<sup>9</sup>

The Philippines in its *Statement of Claim* was careful to frame its questions so as to avoid issues of sovereignty and maritime delimitation, instead raising issues which it contended arise from the interpretation and application of LOSC. China, in contrast, argued in a "Position Paper" that, fundamentally, the disputes in question related to sovereignty and, if not that, then issues of maritime delimitation were implicated and that therefore the Tribunal lacked the jurisdiction to hear the case.<sup>10</sup>

The Tribunal addressed this fundamental difference of view as to whether it had jurisdiction to hear the case at considerable length in both its initial *Award on Jurisdiction and Admissibility* and the first part of its final *Award*. The detailed reasoning devoted to the jurisdictional aspects of the case arguably indicates an acknowledgement by the Tribunal of the delicacy of addressing the issues raised by the Philippines without the express consent of China. Ultimately the Tribunal found that it did have the necessary jurisdiction to rule on almost all of the issues raised by the Philippines.

Concerning the existence of sovereignty disputes over islands in the South China Sea and the submissions on the part of the Philippines, the Tribunal observed that it did "not see that any of the Philippines' Submissions require an implicit determination of sovereignty"<sup>11</sup>, underscored that the Philippines had "expressly and repeatedly" requested the Tribunal to refrain from ruling on sovereignty<sup>12</sup>, and undertook "to ensure that its decision neither advances nor detracts from either Party's claims to land sovereignty in the South China Sea."<sup>13</sup>

With regard to issues of maritime boundary delimitation, the Tribunal drew a distinction between determining whether maritime entitlements exist versus the

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<sup>6</sup> LOSC, Part XV.

<sup>7</sup> LOSC, Articles 286-296.

<sup>8</sup> LOSC, Article 298(1)(a)(i).

<sup>9</sup> See UN Division of Ocean Affairs and the Law of the Sea (DOALOS) website, available from [http://www.un.org/Depts/los/convention\\_agreements/convention\\_declarations.htm](http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm).

<sup>10</sup> China, "Position Paper on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines," 7 December 2014, available on the website of the Ministry of Foreign Affairs of China at [www.fmprc.gov.cn/nanhai/eng/snhwtlcwj\\_1/t1368899.htm](http://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1368899.htm).

<sup>11</sup> Award on Jurisdiction, para.153; Award, para.154.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

delimitation of such entitlements where they overlap.<sup>14</sup> The Tribunal also emphasised that the Philippines had not asked it to delimit a maritime boundary.<sup>15</sup>

Concerning whether historic bays or titles were involved in the questions before it the Tribunal sought, at some length, to distinguish between historic rights, historic waters, and historic title in the context of the application of LOSC, Article 298.<sup>16</sup> The Tribunal concluded that this exception related to “disputes involving historic title” and that as China in the South China Sea amounted to “a constellation of historic rights short of title”, this exception under Article 298 also did not apply.<sup>17</sup> The Tribunal further considered whether the Declaration on a Code of Conduct on the South China Sea represented a bar to the Philippines invoking arbitration through the Convention or whether an adequate exchange of views between the parties had occurred prior to the Philippines seeking dispute settlement through arbitration, and concluded that neither of these objections to the Philippines’ conduct had merit.<sup>18</sup>

China, as noted above, refused to acknowledge the legitimacy of the Tribunal, did not participate directly in its proceedings,<sup>19</sup> and has also robustly rejected its final Award.<sup>20</sup> However, there appears little basis for the latter assertions under the Law of the Sea Convention. The Arbitral Tribunal arose from LOSC and was satisfied that, in keeping with its powers under the Convention, it had the necessary jurisdiction to address the vast majority of the issues and questions posed to it by the Philippines.<sup>21</sup> Moreover, under the Convention the Tribunal’s Award is explicitly “final and binding and without appeal.”<sup>22</sup>

### Main Findings in the Award

The Tribunal’s award spans almost 500 pages and covers a multitude of complex issues. A brief and necessarily selective summary of the main findings of the Tribunal is provided below.

#### *Historic Rights and China’s Nine-Dash Line*

The precise nature of China’s claims within the Nine-Dash line depicted on its maps has long been a source of uncertainty in the South China Sea disputes. It is unclear whether the dashed line represents a claim to sovereignty over the territory – that is, the disputed islands – within it, is indicative of a unilateral claim to a maritime boundary, or represents a claim to the maritime spaces within the dashes, whether as historic waters or another type of maritime zone. The Tribunal acknowledged this ambiguity,<sup>23</sup> and in the absence of clear articulation on the part of China as to the meaning of the Nine-Dash line and given China’s non-participation in the case, the Tribunal was instead forced to

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<sup>14</sup> Award on Jurisdiction, paras 155-157; Award, para. 155.

<sup>15</sup> Award on Jurisdiction, para. 157; Award, para. 155.

<sup>16</sup> See especially, Award, paras 215-229.

<sup>17</sup> Award, para. 229.

<sup>18</sup> Award on Jurisdiction, paras. 212-229, 299-30 and paras. 332-352. See also, Award, para. 167.

<sup>19</sup> China did, however participate in the proceedings of the Tribunal without participating formally by issuing official statements and documents such as its Position Paper, which the Tribunal took into account in its deliberations.

<sup>20</sup> See note 5 above.

<sup>21</sup> LOSC, Article 288. See also, Award, para. 167.

<sup>22</sup> LOSC, Annex VII, Article 11.

<sup>23</sup> Award, para. 180.

undertake an assessment of China's conduct with respect to areas within the Nine-Dash line.

On the basis of this appraisal the Tribunal determined that any historic rights to resources in the waters within China's apparent claim to areas within the so-called Nine-Dash line were extinguished where they are incompatible with the maritime zones set out under LOSC. The prime reasoning for this was that the Convention was designed to be comprehensive in nature regarding rights within maritime zones such that the "Convention supersedes earlier rights and agreements to the extent of any incompatibility".<sup>24</sup> In particular the Tribunal reasoned that:

China's claim to historic rights to the living and non-living resources within the 'nine-dash line' is incompatible with the Convention to the extent that it exceeds the limits of China's maritime zones as provided for by the Convention. This is apparent in the text of the Convention which comprehensively addresses the rights of other States within the areas of the exclusive economic zone and continental shelf and leaves no space for an assertion of historic rights. It is also reinforced by the negotiating record of the Convention where the importance of adopting a comprehensive instrument was manifest and where the cause of securing the rights of developing States over their exclusive economic zone and continental shelf was championed, in particular, by China.<sup>25</sup>

The Tribunal did also consider historic fishing rights with particular reference to Scarborough Shoal (see below).

### *Status of Insular Features*

In evaluating the Regime of Islands, that is, Article 121 of LOSC, and providing an authoritative interpretation of its provisions the Tribunal directly addressed one of the crucial ambiguities in the Convention. That is, the challenge of distinguishing between above high-water insular features which are able to generate extended maritime claims, and those that should be classified as "rocks", which in accordance with Article 121(3) "cannot sustain human habitation or an economic life of their own" and which therefore "shall have no exclusive economic zone or continental shelf."<sup>26</sup>

The Tribunal concluded that the assessment of a particular feature was not to be based on geological or geomorphological criteria.<sup>27</sup> That is, that the term "rocks" is meant to apply only to features "composed of solid rock."<sup>28</sup> Further, it ruled that assessment should be on the basis of the feature's "natural capacity" to sustain human habitation or an economic life of its own, "without external additions or modifications intended to increase its capacity" to do so.<sup>29</sup> The Tribunal went on to determine that only features with a capacity to sustain either "a stable community of people"<sup>30</sup> or economic activity that is "oriented around the feature itself and not focused solely on the waters or seabed of the surrounding territorial sea" and not dependent on outside resources or purely extractive in nature are capable of generating extended maritime claims.<sup>31</sup> It was also

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<sup>24</sup> *Ibid.*, para. 246.

<sup>25</sup> *Ibid.*, para.261.

<sup>26</sup> LOSC, Article 121(3).

<sup>27</sup> Award, para.540.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*, para.541.

<sup>30</sup> *Ibid.*, para.542.

<sup>31</sup> *Ibid.*, para.543.

made clear that the text of Article 121(3) is disjunctive, meaning that either capacity to sustain human habitation or economic life is required in order for a feature to escape being classified as a “rock”,<sup>32</sup> and that the assessment of insular features concerns their capacity to sustain human habitation or economic life rather than whether a feature is presently or has historically done so.<sup>33</sup>

The Tribunal emphasised that assessment of insular features should be on a “case-by-case basis”,<sup>34</sup> and with “due regard” to the possibility that a group of islands may collectively provide for human habitation or economic life as the Tribunal was “conscious that remote island populations often make use of a number of islands, sometimes spread over significant distances, for sustenance and livelihoods.”<sup>35</sup> The Tribunal considered that evidence relating to the historical use of features was “the most reliable” for the assessment of a feature’s capacity to sustain human habitation or an economic life of its own.<sup>36</sup>

On the basis of the above interpretation of Article 121 of the Convention, the Tribunal concluded that none of the above high-tide features in the Spratly Islands, “are capable of sustaining human habitation or an economic life of their own within the meaning of those terms in Article 121(3)” meaning that all of the above high-tide Spratly Islands “are therefore legally rocks for purposes of Article 121(3) and do not generate entitlements to an exclusive economic zone or continental shelf.”<sup>37</sup> Consequently, individually or collectively, they are not capable of generating extended maritime claims (beyond a 12-nautical mile territorial sea). Similarly, Scarborough Shoal was determined by the Tribunal to comprise “rocks that cannot sustain human habitation or economic life of their own and accordingly shall have no exclusive economic zone or continental shelf.”<sup>38</sup>

With regard to low-tide elevations (LTEs), that is, features that are submerged at high-tide but uncovered at low-tide, the Tribunal noted that, in keeping with Article 13(2) of LOSC, an LTE generates no territorial sea of its own save where it falls wholly or partially within the breadth of a territorial sea generated by an above high-tide feature or the mainland. The Tribunal then made the point that, even though Article 13(2) of LOSC does not expressly state it, it follows that LTEs are also “not entitled to an exclusive economic zone or continental shelf”.<sup>39</sup> The Tribunal also concurred with the ruling of the International Court of Justice (ICJ) in the Nicaragua/Columbia case that “low-tide elevations cannot be appropriated”, although a coastal State will have sovereignty over LTEs situated within its territorial sea by virtue of its sovereignty over the territorial sea itself.<sup>40</sup> The Tribunal classified certain features, for example, Mischief Reef and Second Thomas Shoal, as LTEs. Moreover, as a consequence of its ruling on the Nine-Dash line, coupled with its conclusion that none of the above high-tide features of

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<sup>32</sup> *Ibid.*, para.544.

<sup>33</sup> *Ibid.*, para.545.

<sup>34</sup> *Ibid.*, para.546.

<sup>35</sup> *Ibid.*, para. 547.

<sup>36</sup> *Ibid.*, para.549.

<sup>37</sup> Award, para.646.

<sup>38</sup> *Ibid.*, para.643.

<sup>39</sup> *Ibid.*, para.308.

<sup>40</sup> *Ibid.*, para.309 and 1043. See also, *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Judgment (2012) ICJ Report p.624, at p.641, para.26.

the Spratly Islands can generate exclusive economic zone (EEZ) or continental shelf rights, the Tribunal observed that Mischief Reef and Second Thomas Shoal are located in an area “not overlapped by the entitlements generated by any maritime feature claimed by China” and that therefore these LTEs “form part of the exclusive economic zone and continental shelf of the Philippines.”<sup>41</sup> The Tribunal further ruled that China, through its island-building activities on these features without permission being granted by the Philippines, had infringed the sovereign rights of the Philippines, breaching Articles 60 and 80 of the Convention in the process.<sup>42</sup>

### *Conduct of Parties*

Having found that the above-mentioned LTEs are part of the EEZ and continental shelf of the Philippines, the Tribunal found that China has violated the sovereign rights of the Philippines in its EEZ and continental shelf by interfering with Philippine fishing and petroleum exploration activities, constructing artificial islands, and failing to prevent Chinese fishermen from fishing in the Philippines’ EEZ. In particular, the Tribunal found that China had acted contrary to Article 77 of LOSC in preventing the Philippines from undertaking activities related to non-living resources on the Reed Bank.<sup>43</sup> The Tribunal also found that China contravened Article 56 of the Convention concerning the Philippines’ sovereign rights over the living resources of its EEZ through China enacting a moratorium on fishing in the South China Sea without excepting areas of the South China Sea within the Philippines EEZ and limiting the moratorium to vessels flagged to China.<sup>44</sup>

Concerning activities at Scarborough Shoal specifically, the Tribunal also determined that China had “unlawfully prevented Filipino fishermen from engaging in traditional fishing at Scarborough Shoal” though it was at pains to note that “this decision is entirely without prejudice to the question of sovereignty over Scarborough Shoal”.<sup>45</sup> Of note here is that the Tribunal did not necessarily find that such traditional fishing rights belong to Filipino fishermen exclusively. Instead the Tribunal was of the view that “Scarborough Shoal has been a traditional fishing ground for fishermen of many nationalities, including the Philippines, China (including from Taiwan), and Viet Nam.”<sup>46</sup> It follows from this that these States may also have traditional fishing rights at Scarborough Shoal although the Award does not make this explicit. The Tribunal also found that the actions of Chinese law enforcement vessels in the vicinity of Scarborough Shoal had “created serious risk of collision and danger to Philippine vessels and personnel”,<sup>47</sup> thereby violating multiple rules of COLREGS,<sup>48</sup> and in consequence China was found to have breached Article 94 of the Convention.

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<sup>41</sup> *Ibid.*, para.647.

<sup>42</sup> *Ibid.*, para.1043.

<sup>43</sup> *Ibid.*, para.716.

<sup>44</sup> *Ibid.* See also, para.757.

<sup>45</sup> *Ibid.*, para.814.

<sup>46</sup> *Ibid.*, para.805.

<sup>47</sup> *Ibid.*, para.1109.

<sup>48</sup> See, Convention on the International Regulations for Preventing Collisions at Sea, 20 October 1972, 1050 UNTS 1976. Specifically, China was found to have breached Rules 2, 6, 7, 8, 15, and 16. See, Award, para.1109.



### *Failure to protect and preserve the marine environment*

The Tribunal also ruled on the harmful fishing practices and the harvesting of endangered species on the part of Chinese fishers as well as China's construction activities on seven reefs in the South China Sea against the context of the obligation under LOSC to protect and preserve the marine environment.<sup>49</sup> The Tribunal found that China has caused severe harm to the coral reef environment and violated its obligation to preserve and protect fragile ecosystems and the habitat of depleted, threatened, or endangered species through its recent large-scale land reclamation and construction of artificial islands. In particular, The Tribunal ruled that China, "through its toleration and protection of, and failure to prevent" Chinese fishing vessels from engaging in such harmful practices, had breached Articles 192 and 194(5) of the Convention.<sup>50</sup> Further, the Tribunal found that China, through its island-building activities, had "breached Articles 192, 194(1), 194(5), 197, 123, and 206 of the Convention".<sup>51</sup>

### *Dispute Settlement*

Finally, the Tribunal found that during the course of the case China had "aggravated and extended" the disputes between the parties through its dredging, artificial island-building and construction activities, and in doing so inflicted "permanent, irreparable harm to the coral reef habitat" of Mischief Reef whilst "permanently destroying evidence of the natural condition" of multiple insular features through such activities.<sup>52</sup>

### *Implications of the Arbitration Award for the South China Sea Disputes*

As determined by LOSC, the Arbitration Tribunal in the Philippines v. China case could only address issues arising from the interpretation and application of the Convention. This factor, coupled with the fact that the case directly involved only the Philippines and China among the South China Sea claimants, meant that the Tribunal could not resolve the core sovereignty issues at stake – that is, determining which State has sovereignty over which disputed islands in the South China Sea. Nonetheless, the Award of the Tribunal has potentially major implications for the South China Sea disputes, both legally and geographically.

The legal basis for any claims on the part of China to historic rights to the waters within the Nine-Dash line was essentially dismissed by the Tribunal.<sup>53</sup> This ruling, coupled with the Tribunal's finding that none of the Spratly Islands or Scarborough Shoal is capable of generating extended maritime claims has the potential to radically reshape the South China Sea disputes. Indeed, the spatial implications of the Tribunal's ruling are striking: China's EEZ and continental shelf claims would be restricted to the northern part of the South China Sea. The extent of disputed waters in the southern part of the South China Sea would be restricted to pockets of contested territorial sea surrounding islands sovereignty over which is disputed, as well as any disputes between adjacent neighbouring States. Additionally, the ruling also creates a pocket of high seas outside any national claim in the central part of the South China Sea (see Figure 1).

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<sup>49</sup> LOSC, Article 192.

<sup>50</sup> Award, para.992.

<sup>51</sup> *Ibid.*, para.993.

<sup>52</sup> *Ibid.*, para.1181.

<sup>53</sup> That said, China may retain traditional fishing rights in parts of the South China Sea, notably the lagoon lying within Scarborough Shoal.

This scenario would facilitate other South China Sea littoral States, particularly the Philippines as a party to the case, but by extension Brunei, Indonesia and Malaysia, to claim rights over the sea to 200 nautical miles from their coasts as part of their EEZs. Indeed, there is evidence to suggest that some of the South China Sea coastal States, excepting China (and Taiwan), are adopting a more robust stance with regard to asserting jurisdiction over what they regard as national waters, proximate to their mainland and main island coasts.<sup>54</sup>

Given China's vociferous rejection of the Tribunal's ruling, any such efforts on the part of the other South China Sea coastal States to enhance efforts to use and patrol waters off their coasts but which lie within the confines of the Nine-Dash line – discredited in international law of the sea though it may be – will be resisted by China. In short, more incidents at sea appear to be highly likely. Such incidents are also likely to involve fishing vessels in light of the large number of such vessels operating in the South China Sea, a symptom of China's enormous demand for fish, as well as China's penchant for directing what has been termed a "maritime militia" in conjunction with its well-developed para-military maritime forces such as the Coast Guard.<sup>55</sup> There is every indication that the Chinese will continue to operate within the Nine-Dash line and that Chinese maritime forces will seek to protect China's claims there. This view is supported by China's recent moves to open new fishing port facilities on the islands of Hainan,<sup>56</sup> and a 2 August ruling of the Chinese Supreme People's Court indicating that China had the right to prosecute those illegally entering what China claims to be its waters.<sup>57</sup> This sets the scene for increased maritime conflicts in the South China Sea.

### Implications beyond the South China Sea

The Tribunal's Award will resound well beyond the South China Sea. This is particularly so because it addresses notable ambiguities in the Convention. In seeking to clarify such uncertainties in the law of the sea, the Tribunal's Award has the potential to greatly assist in the development of the law of the sea. The ruling also represents a strong assertion of the governing role of the framework of maritime zones the rights and obligations established through the Convention. Agreement on the spatial limits of these zones and the rights and duties within them was a major achievement of the LOSC as it served to constrain urges towards what is commonly termed "creeping coastal State jurisdiction". This structure is threatened by exceptions to the rule – arguably a hypocritical attitude on the part of some States – to sign up to the Convention's terms but still try to maintain more expansive unilateral claims, often justified on hazy

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<sup>54</sup> See, for example, Clive Schofield, Rashid Sumalia and William Cheung, "Fishing, not oil, is at the heart of the South China Sea dispute", *The Conversation*, 16 August 2016, available from <https://theconversation.com/fishing-not-oil-is-at-the-heart-of-the-south-china-sea-dispute-63580>.

<sup>55</sup> *Ibid.* See also, Rashid Sumalia and William Cheung, Boom or Bust: The Future of Fishing in the South China Sea, ADM Capital Foundation, available from [http://www.admcf.org/wordpress/wp-content/uploads/2015/11/FishSCSea03\\_11-FINAL-FINAL.pdf](http://www.admcf.org/wordpress/wp-content/uploads/2015/11/FishSCSea03_11-FINAL-FINAL.pdf); and, James Kraska, "China's Maritime Militia Upends Rules on Naval Warfare", *The Diplomat*, 10 August 2015, available from, <http://thediplomat.com/2015/08/chinas-maritime-militia-upends-rules-on-naval-warfare/>.

<sup>56</sup> *Ibid.* See also, "New Hainan Fishing Port to Extend China's Maritime Reach in the South China Sea", *South China Morning Post*, 6 August 2016, available from <http://www.scmp.com/news/china/diplomacy-defence/article/1999794/new-hainan-fishing-port-extend-chinas-maritime-reach>.

<sup>57</sup> *Ibid.* See also, James Griffiths, "South China Sea: Beijing vows to prosecute 'trespassers'", CNN, 2 August 2016, available from <http://edition.cnn.com/2016/08/02/asia/south-china-sea-supreme-court/index.html>.



historical grounds. The Tribunal's ruling arguably closes loopholes and counters temptations towards exceptionalism on the part of some States.

The Tribunal's finding that any historical claims to waters within the Nine-Dash line were extinguished on China becoming a party to the Convention makes it clear that coastal States cannot take a selective approach to the Convention, taking advantage of some provisions – often rights – whilst discarding or ignoring others – frequently obligations. It also serves to counter apparently historically inspired unilateral claims to maritime spaces.

The Tribunal's ruling also represents the first time that an international Court or Tribunal has squarely addressed the Regime of Islands under the Convention. The Tribunal's effort to clarify the status of insular features and their capacity to generate broad maritime claims means that its award is hugely significant for the development of the law of the sea and international law generally. In particular, the Tribunal's finding that only features that have a capacity to sustain either a stable community of people or economic activity that is not dependent on outside resources or purely extractive in nature in their natural state represents a major development with significant implications. Although the Tribunal's Award was specifically focussed on insular features in the South China Sea, and its findings are only binding on China and the Philippines in its specifics, the Tribunal's Award nonetheless has potential relevance to insular features elsewhere. This is especially the case as the ruling is an authoritative and unanimous ruling by an international judicial body, and the Award therefore carries considerable legal weight.

As a result of uncertainties over which insular features can generate what maritime zones many States have advanced expansive maritime claims from small islands and these claims are placed in jeopardy. For example, the US claims 200-nautical mile EEZs from several remote Pacific island territories that appear remarkably similar to some of the South China Sea features which the Tribunal found could not generate extended maritime claims. It will be intriguing to see whether the US and other States modify their practice in light of the Tribunal's award. Considerable resistance is likely.

Figure 1: Maritime Claims in the South China Sea



Source: This map was prepared by Clive Schofield and Andi Arsana of the Australian National Centre for Ocean Resources and Security (ANCORS), University of Wollongong, Australia. The map appeared in the January 2013 issue of the *American Journal of International Law*, Vol.107 (January 2013): 95, © 2013 American Society of International Law.