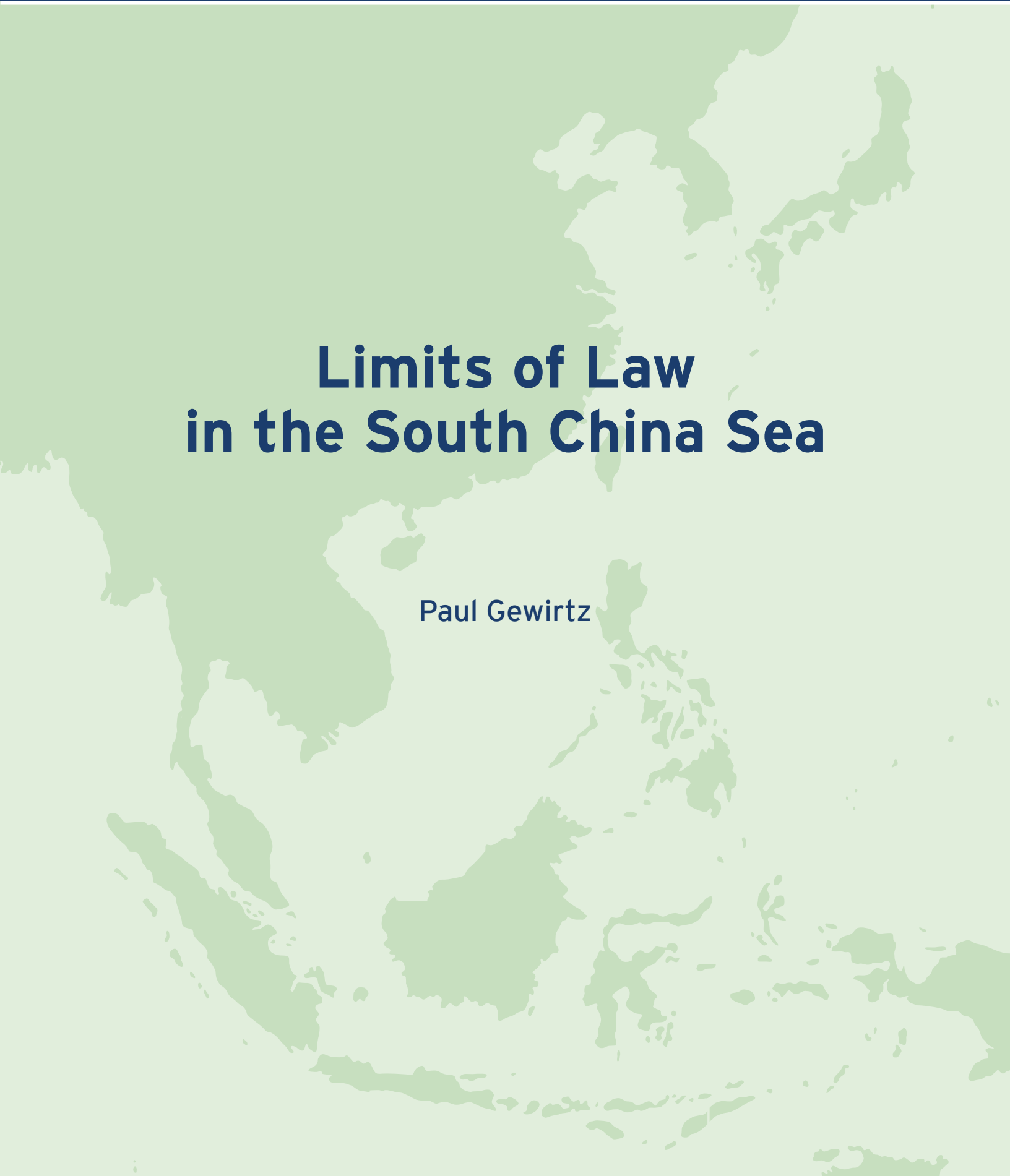



Limits of Law in the South China Sea

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Limits of Law in the South China Sea

The vast South China Sea has become one of the world's most dangerous hotspots. Through words and deeds, six claimants including China contend for control over numerous small land features and resource-rich waters, with the United States also heavily involved because of alliances and our own security and economic interests. The great geo-political question of our age, whether the United States as the established dominant superpower can co-exist with a re-emerging powerful China, sits on the sea's horizon like a huge and taunting Cheshire Cat.

Most of the contending countries have been aggressive in recent years, but China has been especially bold in staking out very broad claims to sovereignty and related rights to land features and waters in the South China Sea. It has also been bold in undertaking "land reclamations" that build on land features, turning claims into physical structures and threatening further militarization. Its rapidly developing naval presence and capability have raised added concerns among China's weaker neighbors as well as the United States, whose military presence has greatly contributed to peace and stability in the Asia-Pacific for decades. The risk of accidents or small conflicts leading to dangerous escalations is constant.

There is not yet a path ahead for resolving the many disputes and controlling the serious risks they pose, but the United States has articulated an approach. We have stated that we do not take a position on the competing sovereignty claims but we have called for a law-based and rules-based resolution of the competing claims. As President Obama has recently said, the United States is committed to "a regional order where international rules and norms—and the rights of all nations, large and small—are upheld. [Disputes] between claimants in the region must be resolved peacefully, through legal means, such as the upcoming arbitration ruling under the U.N. Convention on the Law of the Seas, which the parties are obligated to respect and abide by."¹

This statement invokes one of the hallmark ideas of President Obama's foreign policy: international issues should be resolved in a rules-based way through the rule of law. The point of this essay is both simple and regretful: in theory, a rules-based and law-based approach in the international arena is an admirable aspiration, but law will not solve the dangerous problems in the South China Sea. More specifically, the upcoming ruling in the case brought by the Philippines against China before an arbitration tribunal under the U.N. Convention on

the Law of the Seas (UNCLOS) will not solve the problems or even make major headway in resolving them.

I. Background

The South China Sea is a huge sea of 1.4 million square miles, bordered by nations that contain approximately 2 billion people. About a third of the world's shipping goes through its waters, which also provide vast amounts of food and whose seabed is rich in oil and gas. Scattered through the sea are small land features—often tiny, often underwater during high tide. These fall into two main groupings, the Paracel Islands in the northern part of the sea, and the Spratly Islands in the southern part. China, Taiwan, the Philippines, Vietnam, Brunei, and Malaysia all claim sovereignty over some of these land features and waters, and the claims conflict. China, through its “nine-dash line” map and many statements, has claimed at the very least sovereignty over all the islands and rocks in the South China Sea and rights over the adjacent waters. The other five stakeholders have conflicting claims over land features that in turn produce numerous additional overlapping and conflicting claims over adjacent waters and how they are used. Neither the vastness of the sea nor the smallness of the disputed land specks has prevented an escalation in intensity in recent years. Concerns about security and resources have driven much of the tension, and rival nationalisms in stakeholder countries breathe fire on the waters.

UNCLOS is one of the world's great international treaties, and its preamble begins with the heroic statement expressing “the desire to settle...all issues relating to the law of the sea...as an important contribution to the maintenance of peace, justice and progress for all peoples of the world.” Unlike many other heroic efforts, this one is not a grand gesture, but rather a tedious verbalization of human thoughts about endless minutia that, unaddressed, can cumulatively cause much human misery.

UNCLOS provides not only rules but also remedial mechanisms for countries that believe that other parties to UNCLOS have violated its provisions. Both the Philippines and China, along with 164 other countries, are parties to UNCLOS—although the United States is one of the few that is not. In 2013 the Philippines invoked remedial provisions specified in UNCLOS and brought 15 claims against China before an UNCLOS arbitration tribunal at the Permanent Court of Arbitration in The Hague. This is the case referred to by President Obama above. China immediately announced its “resolute opposition” to the Philippines action, called upon the Philippines to “return to the right track of resolving the disputes through bilateral negotiations,” and said that “China does not and will never change its position of non-acceptance of and non-participation in the arbitration.”² China has kept this pledge, although it issued a detailed “Position Paper” on December 7, 2014,³ that, along with other statements, have functioned as *de facto* filings in the case.

A threshold question the case presented was whether the UNCLOS arbitration tribunal had “jurisdiction” to decide these 15 claims—jurisdiction being the legal term to indicate that a tribunal has the power to decide the substantive issues in a litigation, a question separate from how the tribunal might decide the “merits” of the substantive issues if indeed it has “jurisdiction” to decide those merits.

On October 29, 2015, the UNCLOS tribunal issued its much misunderstood 151 page ruling on “jurisdiction.” The tribunal concluded that it indeed had jurisdiction over the Philippines’ case—but concluded that it had jurisdiction over only seven of these claims. It did not accept jurisdiction over the other eight claims, including the critical claims that China’s famous “nine-dash line” is inconsistent with UNCLOS. Regarding this and the other eight claims, the tribunal deferred decision on whether it had jurisdiction, concluding that the question of “jurisdiction” was tied up with the “merits” and therefore should be postponed until its decision on the merits.

China immediately denounced the jurisdiction ruling as “null and void” with “no binding effect on China,” and accused the Arbitral Tribunal of having “abused relevant procedures and severely violated the legitimate rights that China enjoys as a State Party to the UNCLOS” and “eroded the integrity and authority of the UNCLOS.”⁴ It labelled the Philippines’ initiation of the arbitration “a political provocation under the cloak of law” and again called on the Philippines to resolve its disputes with China “through negotiations and consultations.”⁵

Over four days in November 2015, the arbitration tribunal heard oral arguments on the merits. No one from China appeared or participated in the oral arguments. The tribunal’s much-awaited decision in the case is expected sometime in May or June. Nations need to be thinking through now how they will react, even though all must make conjectures about what the tribunal will do—although only a small number of people know the relevant law well enough to be ready to understand the tribunal’s decision, much less understand the significance of the decision or how it may affect the path forward in addressing the dangerous problems in the South China Sea.

II. The Limits of the Tribunal’s Decision

President Obama and many others have understandably raised hopes that the tribunal’s decision will be a major step forward in providing a law-based solution to the most contentious issues in the South China Sea. Law-based approaches are peaceful, offer the promise of fair and impartial application of rules, and can protect the weak as well as the strong. In addition, through application of law, legal tribunals can also provide solutions to issues that are otherwise unavailable because of political stalemate elsewhere.

However, an examination of the issues before the tribunal and its most likely decisions demonstrate

that the arbitration tribunal and law can make only a very limited contribution to resolving the South China Sea crisis. Law will not save us from continuing to focus predominantly on negotiations and, yes, power politics. Messaging after the tribunal’s decision should not make the tribunal’s decision the main pivot point of the path forward, which will need to focus most intensively on the major matters the tribunal will surely not touch on and that must be urgently addressed by other means.

There are four basic reasons that the arbitration tribunal can make only a very limited contribution:

1. Despite much confusion in the media, all concede that the tribunal has no jurisdiction to decide any issues of “sovereignty” over the islands and rocks in the South China Sea, even though these “sovereignty” issues are the heart of the many controversies.
2. All concede that China was within its legal rights under Article 298 of UNCLOS after ratifying the treaty in explicitly exempting itself from compulsory dispute resolution of a wide swath of issues concerning “sea boundary delimitations” (basically, sorting out overlapping maritime rights between nations), “historic bays or titles,” or “military activities,” so the tribunal will not decide any of these contentious issues.
3. Assuming, as of course we should, that the tribunal will continue to play it straight in deciding the legal issues presented, the Philippines is unlikely to win all of its 15 claims against China. The tribunal is likely to conclude that it lacks jurisdiction over a number of the Philippines claims and to rule against the Philippines in some of the other claims.
4. Even if the Philippines wins some or all of its 15 claims against China, and even though an adverse decision would be “binding” against China, there is no enforcement mechanism. China’s non-participation in the proceedings on jurisdictional grounds

foreshadows the consequences of any adverse ruling against China.

To establish these conclusions will require some immersion in underwater weeds of legal detail—to parse the Philippines’ legal claims one by one. Such weeds are the terrain of law and exactly the ground on which law-based solutions are frequently found. No foreign policy expert can call for law-based

solutions to international disputes without facing up to what that effort entails and what solutions are produced or not produced.

III. The Law and the Sea

The Philippines brought 15 claims against China,⁶ summarized below:

Summary of Philippine Claims

Submission	Claim
1	China’s maritime entitlements may not extend beyond those permitted by UNCLOS.
2	China’s “nine-dash line” claim is contrary to UNCLOS.
3	Scarborough Shoal generates no exclusive economic zone or continental shelf.
4	Mischief Reef, Second Thomas Shoal, and Subi Reef are all low tide elevations. As such, they are not subject to appropriation.
5	Mischief Reef and Second Thomas Shoal are within the exclusive economic zone and continental shelf of the Philippines.
6	Gaven Reef and McKennan Reefs are low tide elevations. They generate no maritime entitlements, but may be used to measure baselines.
7	Johnson Reef, Cuarteron Reef, and Fiery Cross Reef generate no maritime entitlements to an exclusive economic zone or continental shelf.
8	China has interfered with the Philippines exercise of sovereign rights over resources located in the Philippines’ maritime entitlement zones.
9	China has failed to prevent Chinese nationals and Chinese flagged vessels from exploiting living resources in the Philippines’ exclusive economic zone.
10	China prevents Philippine fishermen from pursuing their livelihoods around Scarborough Shoal.
11	China has violated environmental obligations under UNCLOS to protect Scarborough Shoal and Second Thomas Shoal.
12	Chinese occupation of and construction on Mischief Reef violates UNCLOS provisions on artificial islands and environmental protections, and are unlawful acts of attempted appropriation.
13	China has breached UNCLOS obligations by dangerous operation of law enforcement vessels around Scarborough Shoal.
14	China has unlawfully aggravated and extended the dispute by interfering with the Philippines’ right to navigation around Second Thomas Shoal, preventing the resupply of Philippine personnel at Second Thomas Shoal and endangering the health of those personnel.
15	China shall desist from further unlawful claims and activities.

These Philippine claims were carefully crafted to try to avoid two obstacles that frame the entire arbitration proceeding and that underscore how limited the tribunal's decision will be. First, it is undisputed that the arbitration tribunal may not decide any issues of "sovereignty" over the islands and rocks in the South China Sea, even though these clashing "sovereignty" claims are the main engine of the conflicts. As the Philippines' lawyers well know, UNCLOS does not address sovereignty issues and the UNCLOS tribunal may not address them. The International Court of Justice may adjudicate "sovereignty" disputes, but only if the parties consent—consent being the foundation of most international law. There will be no consent by the parties and therefore no adjudication any time soon of the numerous "sovereignty" disputes that form the heart of the matter in the South China Sea.

Second, UNCLOS itself allows signatories to exclude themselves from remedial procedures addressing a significant range of issues that do come up under UNCLOS. Part XV of UNCLOS explicitly and importantly provides "compulsory procedures" for settling many disputes in a "binding" way, but several exceptions are also explicitly provided, and China has invoked them. First, Article 281 of UNCLOS bars compulsory procedures where the parties have "agreed to seek settlement of the dispute" by other means. The agreements with the Philippines that China has invoked are vague political statements, and cannot reasonably be seen as binding agreements excluding UNCLOS's compulsory legal procedures. The arbitration tribunal has already rejected China's arguments based on this exception, and properly so.

However, Article 298 of UNCLOS allows countries to carve out other exceptions to the compulsory remedial procedures, and China and a number of other countries have taken the requisite steps to activate those exceptions and limit the issues an arbitration tribunal may consider. Specifically, Article 298 provides that a state may "declare in writing that it does not accept any one or more of the procedures,"

including for "disputes concerning the interpretation or application of Articles 15, 74, and 83 relating to sea boundary delimitations, or those involving historic bays or titles," "disputes concerning military activities," and "disputes concerning [certain] law enforcement activities." China has declared in writing that it does not accept the UNCLOS procedures in the categories of disputes just described.

This carve out is very large indeed. Perhaps the most important provision is the exclusion of disputes relating to "sea boundary delimitations." These disputes arise primarily when countries have overlapping claims regarding 12 nautical mile "territorial seas" or 200 nautical mile "exclusive economic zones" deriving from "islands" or "rocks" as provided by UNCLOS. A "sea boundary delimitation" is a way of setting the boundary between these overlapping claims. With so many disputes regarding sovereignty over islands and rocks in the South China Sea, and so many of these land features closer together than 200 miles (and sometimes closer than 12 miles), overlapping claims are everywhere. As will be clear from the examination of the Philippines specific claims below, excluding "sea boundary delimitations" from the tribunal's allowable decisionmaking is likely to greatly narrow the tribunal's rulings. As will also be clear below, the exclusion of disputes "involving historic bays or titles," "military activities," and "law enforcement activities" at a minimum raise difficult issues the tribunal will need to overcome before it can address other important issues.

In short, the fact that the arbitration tribunal in the Philippines' case against China may not decide any issues of sovereignty and may not decide any issues of "maritime delimitation," "historic bays or titles," or "military" or "law enforcement" activities leaves the tribunal with only very limited jurisdiction. It is foreclosed from deciding most of the main disputes in the South China Sea between the Philippines and China. This means that "law-based" answers to those disputes will not be available from the tribunal. The significance of these conclusions can only

be demonstrated by looking specifically at the Philippines' claims actually before the tribunal—wading through the weedy terrain of law.

Let's begin with the 7 claims over which the arbitration tribunal has already asserted jurisdiction in a way favorable to the Philippines and against China. These are Claims 3, 4, 6, 7, 10, 11, and 13, listed above. Four of the claims (3, 4, 6, and 7) ask the tribunal to categorize particular land features, deciding which of the legally relevant UNCLOS categories they fall into—a “low-tide elevation,” a “rock,” or an “island.” The tribunal's decisions on categorization are important because they will become the foundation for far more contentious issues of sovereignty and maritime delimitation that the tribunal cannot decide. Categorization decisions are also relevant to other issues before the tribunal about China's behavior in the vicinity of these land features.

If the tribunal says a particular land feature is a low tide elevation, no country may claim sovereignty over it unless that land feature is itself within that country's territorial sea. If the tribunal says that the land mass is an “island” or “rock,” that has several consequences:

- (a) Countries may claim islands and rocks as sovereign territory (although the tribunal itself will not decide which country has sovereignty);
- (b) If the land feature is deemed an island, the country having sovereignty over that island also has rights to a 12 mile territorial sea and a 200 mile Exclusive Economic Zone (EEZ), and a continental shelf.
- (c) If the land feature is deemed a rock rather than an island, the country with sovereignty gets only a 12 mile territorial sea, not an EEZ or a continental shelf.
- (d) These conclusions are limited, however, if there are other nearby “rocks” or “islands” over which a different country claims sovereignty. The reason is that there may be overlapping territorial seas and EEZs, and

a maritime delimitation must be made—delimitation decisions that the arbitration tribunal may not make in this case because all agree that China invoked Article 298 of UNCLOS to exclude such decisions from UNCLOS compulsory remedial procedures. Indeed in its earlier order granting jurisdiction over Claims 4 and 6, the tribunal itself included an important “caveat with respect to the possible effects of any overlapping entitlements.”⁷

The arbitration tribunal is likely to agree with the Philippines about the appropriate categorization of the various features mentioned in Claims 3, 4, 6, and 7. In fact, it is not clear that China disputes any of the categories that the Philippines is proposing for these land features. The tribunal is likely to conclude that Scarborough Shoal is a “rock” (Claim 3); Mischief Reef, Second Thomas Shoal, and Subi are “low-tide elevations” (Claim 4); Gaven and McKennan Reefs are “low-tide elevations” (Claim 6); and Johnson, Cuarteron, and Fiery Cross Reefs are “rocks” (Claim 7).

Rulings on these four claims will not by themselves say that China is doing anything unlawful. The categorization will affect the rights of whichever country has sovereignty over the “rocks” and waters, but the tribunal will not decide which country that is. Even saying that a land feature outside a territorial sea is a ‘low-tide elevation,’ over which no country may have sovereignty, does not necessarily bar China or any other country from building an artificial island around the low-tide elevation. That artificial structure cannot change the status of the LTE to an “island” or “rock” over which sovereignty may be claimed, but that does not mean that China is barred from building land reclamations around or atop a low-tide elevation— that is a separate question raised in a separate Philippines claim (12) over which the tribunal has not yet accepted jurisdiction.

The other three claims over which the tribunal has already asserted jurisdiction (Claims 10, 11, and

13) challenge specific Chinese practices around two particular locations in the South China Sea: Scarborough Shoal and Second Thomas Shoal. These are significant claims that directly challenge particular activities that China is undertaking, particularly at the now-famous Scarborough Shoal. These decisions are likely to provoke intense reactions in both the Philippines and China, but in fact these claims do not go to the heart of the dangerous conflicts in the South China Sea, which involve core questions of sovereignty and maritime delimitation.

Claim 10 asserts that China is preventing fishermen from fishing around Scarborough Shoal, which the tribunal will likely deem a “rock” in deciding Claim 3. Both China and the Philippines claim sovereignty over Scarborough Shoal (and the Philippines also considers it within its EEZ extending from its coast), but the tribunal must assume China’s sovereignty for purposes of deciding on Philippine fishing rights inside China’s territorial sea since the tribunal cannot decide any sovereignty issues. This greatly complicates the Philippines’ claims that China has violated its nationals’ fishing rights. Ordinarily, non-nationals may not fish in another country’s territorial sea—a territorial sea gives the sovereign exclusive fishing rights. So the Philippines is making a special argument in the context of Scarborough: that its fishermen have “traditional” fishing rights around Scarborough that China is interfering with. The question is a very close one, and there is not very clear “law” to settle it. If the tribunal decides for the Philippines it will be at the outer limits of an appropriate legal interpretation, and it is still likely to leave unresolved significant practical questions about China’s duties as the assumed sovereign operating in its territorial sea.

Claim 11 is that China violated its environmental obligations around both Scarborough Shoal and Second Thomas Shoal. UNCLOS contains several quite general provisions providing that “[s]tates have the obligation to protect and preserve the marine environment” (Articles 192 and following; Article 56(1)(b)(iii)). The tribunal might enforce these

provisions, but it may consider them too vague to deem China a violator or may conclude that the proceedings in The Hague did not provide a sufficiently firm factual basis for finding a violation. However, one standard is quite specific, requiring states to “assess the potential effects of [their] activities on the marine environment” and to “publish reports of the results” and provide them “to the competent international organizations” (Articles 205-206). If China failed to publish such reports, it will have clearly violated the standard, but at least going forward, China could easily comply with this reporting provision without making major changes in its activities.

Claim 13 is that China has dangerously operated Chinese law enforcement vessels around Scarborough. This claim has elements closely related to Claim 10, concerning a claimed right of Philippine fishermen to fish in the territorial waters of Scarborough. And at least part of the Philippines claim may implicate the exclusion of compulsory remedial measures for “law enforcement activities” that China has activated under Article 298, although the tribunal accepted jurisdiction over this claim with no caveats.

So there you have the seven claims that the UNCLOS arbitration tribunal has already agreed it will decide. These alone will certainly not chart a law-based path through the main issues in dispute in the South China Sea, but there are eight other Philippine claims, and the arbitration tribunal may yet decide to assume jurisdiction over these and decide them. How are those claims likely to affect the South China Sea disputes?

Let us put aside for a moment Claims 1 and 2, which raise truly fundamental issues about China’s nine-dash line and China’s broadest claims to maritime entitlements that seem to go beyond the entitlements contained in UNCLOS itself. Let us also put aside Claim 15, which seeks general assertions that “China must desist from further unlawful activities” and will have little or no practical impact.

IV. “The Very Heart of This Case”: Itu Aba

Claims 5, 8, 9, and to some extent 12 and 14 share a common element: the Philippine claim that China is interfering with the Philippines’ rights within its EEZs. However, these claims are all greatly complicated by the fact that at the outer edge of the Philippines’ EEZ is a land feature called Itu Aba by the Philippines and Taiping Island by China and Taiwan (hereafter referred to as “Itu Aba” because that is what the tribunal has been calling it). Taiwan has claimed sovereignty over this feature, and also claims that it is an “island” that brings with it a 12 mile territorial sea, a 200 mile EEZ, and a continental shelf.⁸ If Taiwan is right, then Itu Aba’s EEZ would greatly overlap with the EEZ generated by the major Philippine island of Palawan, and there would be overlapping maritime claims related to the Philippines’ Claims 5, 8, 9, and perhaps also Claims 12 and 14. These overlapping claims could not be resolved without making a “sea boundary delimitation” establishing the boundary of these overlapping claims. However, the tribunal would lack jurisdiction to decide the proper “sea boundary delimitation” since China has removed such matters from UNCLOS’s remedial provisions under UNCLOS Article 298 discussed above. In previously deferring a decision on whether it had jurisdiction over these claims, the tribunal itself suggested this very reason that it might not have jurisdiction.⁹

Recognizing that the arbitration tribunal has no power to decide what the delimitation should be, the Philippines has put an enormous amount of litigation effort into trying to prove that Itu Aba is not an “island” but is only a “rock” under UNCLOS Article 121(3). In the oral argument before the arbitration tribunal, the Philippines lawyer went so far as to say that Article 121(3) and the status of Itu Aba “lies at the very heart of this case.”¹⁰

If Itu Aba is only a “rock,” then China/Taiwan’s sovereignty over it would generate only a territorial sea and no EEZ or continental shelf. There would

be no overlapping claims requiring a “sea boundary delimitation,” and the arbitration tribunal would be able to decide the Philippines’ Claims 5, 8, and 9 and probably Claims 12 and 14 as well. The difficulty for the Philippines is that in fact Itu Aba looks very much like an “island”¹¹ and also seems to fit the UNCLOS definition of an “island” not a “rock” under UNCLOS Article 121(3).

Article 121 is entitled “Regime of islands,” and those who advocate a regime of law to govern international relations and the disputes in the South China Sea must read Article 121 in its entirety, because interpreting such legal texts is what “law-based” solutions are all about. Article 121 reads in full:

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.”

The structure of this Article is to define an “island” (section 1), then set forth what maritime rights come with sovereignty over an “island” (section 2), and then state an exception to those maritime rights for mere “rocks” (section 3).

Itu Aba clearly meets the definition of an “island” in section 1: it is “a naturally formed area of land, surrounded by water, which is above water at high tide.” The Philippines nevertheless argues that it fits within the exception of section 3 because although it meets the definition of an “island,” it is a mere “rock.” Section 3 defines “rocks” as places that “cannot sustain human habitation or economic

life of their own”—permitting inquiry into what is hypothetically possible, not only what is currently occurring. However, with Itu Aba we do not need to hypothesize—in fact, Itu Aba currently *is* sustaining “human habitation or economic life of its own.” It has in fact been inhabited by humans for at least 60 years—now totaling about 200 people, mostly coast guard personnel but also environmental researchers, fishermen, and people staffing a hospital, a post office, and a temple.¹² Supplies are mostly flown in, but there are chickens and natural vegetation on the island, and many reports say it has fresh water (the Philippines contests this). It’s big enough for all that activity—not Australia, but not a “rock” like so many other tiny land features in the South China Sea whose tips just poke above water at high tide.

There are numerous textual interpretation details that lawyers can argue about, and that the Philippines’ lawyers developed in making their legal argument that Itu Aba is a “rock.” Do islands become mere rocks if they “cannot sustain” *either* “human habitation” *or* “economic life of their own”? Or do islands become mere rocks if they “cannot sustain” *both* “human habitation” *and* also “economic life of their own”? What does “economic life of their own” mean? Surely it cannot mean that an island must be a place of business activity. Surely it cannot mean that an island must be a completely self-sustaining economic community. If chickens can survive, reproduce, and be eaten there, is that sufficient? Is fresh water required, or is bottled water or de-salination sufficient? What if certain supplies need to be shipped in or flown in, as with Martha’s Vineyard? Can it be that a tribunal’s decision based on such factors is what is meant by “rules-based” and “law-based” international relations?

Reaching the counterintuitive legal conclusion that Itu Aba is a rock would only be plausible if supported by much established legal precedent that firmly embraced a legal interpretation that defied what ordinary human beings would conclude and common sense would suggest about Itu Aba. However, such established legal precedent does not exist: “there is

an unhelpful lack of judicial authority,” the Philippines’ lawyer admitted.¹³ The better conclusion is that Itu Aba is not a “rock” but is an “island,” and is entitled to a territorial sea and EEZ.

In addition to their legal arguments building on each phrase in Article 121(3)’s definition of a “rock,” the skillful Philippines lawyers put forth an additional reason they thought Itu Aba should not be called an “island.” To do so, they said, would make the adjudication of legal rights and claims in the waters between the Philippines and Itu Aba very complicated. Multiple land features involved in the Philippines’ claims would all be within Itu Aba’s EEZ as well as the Philippines’ EEZ. Furthermore, since Itu Aba’s sovereignty is claimed by Taiwan and China as well as the Philippines, and since the arbitration tribunal may not resolve this sovereignty dispute, the only way to decide the main issues the Philippines has raised in the relevant claims would be to make a “sea boundary delimitation” deciding which part of the overlapping EEZs belongs to the Philippines and which part belongs to whoever is sovereign over Itu Aba. However, the tribunal lacks the power to make any “sea boundary delimitation.” The contending issues in the South China Sea would be so much simpler if Itu Aba were just a “rock” and not an “island.”

In one of the most remarkable parts of the four-day oral argument before the arbitration tribunal in November 2015, the Philippines’ distinguished lawyer Paul Reichler admitted as much. If Itu Aba is determined to be an “island” and “China and potentially other claimants [allowed] to continue to assert [rights] that overlap,” Mr. Reichler said, “this would open the door to much mischief”:

“Mr President, this can’t be right...[T]he dispute in this part of the South China Sea would remain frozen in place, perhaps permanently. China, as the superior power, would continue to run roughshod over the Philippines, Vietnam, Malaysia and the other coastal states, claiming and exercising all

rights and jurisdiction for itself. . . . In these circumstances, Mr President, the Philippines respectfully submits that the avoidance of such a frozen conflict is consistent with the Tribunal's mandate to promote the maintenance of legal order in respect of the relevant maritime areas. . . . Indeed, a determination that [Itu Aba is a "rock"] could very well be the most important contribution this Tribunal could make to the establishment of legal order and the maintenance of peace in the South China Sea. . . . [T]he incentives to acquire and build more would no longer exist, and therefore the prospects would be greatly enhanced for a peaceful negotiated solution to the most contentious issue fueling the dispute between China and its neighbours." ¹⁴

However, that persuasiveness is not a legal argument. It is a policy argument and a political argument. The "law-based" argument is on the side of Itu Aba being an "island." The law-based argument is therefore on the side of the arbitration tribunal answering "No" to various questions it had deferred in its earlier opinion on jurisdiction. The tribunal is likely to lack jurisdiction over these claims because it lacks the power to make the 'sea boundary delimitations' central to resolving them.

Most significantly, this conclusion would probably put a major obstacle in the way of the tribunal's ruling on one of the most explosive and important issues in the South China Sea, the land reclamations that China is undertaking—specifically Claim 12, which argues that "China's occupation and construction on Mischief Reef is unlawful." Under UNCLOS, a country is explicitly allowed to build "artificial islands" within its territorial sea, its EEZ, and on the high seas (Articles 60 and 87), but it may not build artificial islands inside another country's territorial sea or EEZ. The Philippines argues

that Mischief Reef is within its EEZ, but if Itu Aba is an "island," Mischief Reef would also be within the 200 mile EEZ of the country with sovereignty over Itu Aba. Deciding where the boundary of the overlapping EEZs should be drawn is exactly the "sea boundary delimitation" that the tribunal is barred from making. So it is doubtful the tribunal could declare China's construction of an artificial island unlawful as within the Philippines' Exclusive Economic Zone.¹⁵

V. The Nine-Dash Line

We come at last to the Philippines' Claims 1 and 2, particularly its claim that China's "so-called 'nine-dash line' claim" is "contrary to" UNCLOS and "without lawful effect to the extent that [it exceeds] the geographic and substantive limits of China's maritime entitlements under UNCLOS."¹⁶ This is the most important claim. It is abstract but sweeping. Most U.S. courts would probably say it is too abstract to be adjudicated, and dismiss it; there isn't a concrete dispute involved, no particular land feature or body of water that the Philippines and China are fighting over in this claim. However, the U.S. court practice of dismissing abstract claims is certainly not universal, and the UNCLOS tribunal will probably decide the nine-dash line claim if it is not excluded either by the bar against deciding sovereignty issues or the Article 298 exclusions discussed above.

The nine-dash line originated in a 1947 map (where it was actually an eleven dash line with a slightly different shape) prepared by the KMT Chinese government before the success of the Communist revolution in 1949, but it has remained part of China's claims since then. The map does not appear to have become part of any "official" Chinese government document until it was attached to a *note verbale* that China submitted to the United Nations in 2009.¹⁷



The text of the *note verbale* included this passage:

“China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof (see attached map).”

The conventional wisdom is that China’s nine-dash line claim is an example of “strategic ambiguity”—China deliberately not being clear about what the line represents. As summarized in a valuable paper prepared by the U.S. Department of State, China has three possible claims: (1) the dashed line is a “claim to islands” and related UNCLOS waters; (2) the dashed line is “a national boundary,” with China claiming national sovereignty over all the enclosed waters as well as land features; and (3) the

dashed line is “a historic claim,” which may include sovereignty over the maritime space or some lesser set of “historic rights.”¹⁸ Thus a core element of the United States’ South China Sea policy has been to demand that China “clarify” what it means by the nine-dash line. This approach would either expose the extravagant excess of China’s claim or might allow China an off-ramp for its most expansive claims—for example, allowing China to say clearly that the nine-dash line reflects a claim to all the islands and rocks inside the line and the associated waters now codified in UNCLOS. Indeed there have been suggestions in some Chinese statements that China, or at least some officials in China, are moving in that direction.¹⁹

However, the Philippines sees things differently. What China means by the nine-dash line, the Philippines has told the arbitration tribunal, is clear—and, as such, inconsistent with UNCLOS, with which China must comply. The Philippines reads the *note verbale* as containing two distinct clauses. The first clause—“China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters”—means that China claims sovereignty over all the islands and rocks within the nine-dash line plus whatever “adjacent waters” UNCLOS attaches to those islands and rocks (territorial sea and EEZs as appropriate). The second clause claims additional “sovereign rights and jurisdiction” over waters and seabeds and subsoil that are *not* included within UNCLOS. China is claiming these as “historic rights” that precede UNCLOS and that survive UNCLOS’ adoption. The Philippines argues, here China is flatly wrong: UNCLOS does not permit any “historic rights” to waters, seabeds and subsoil that are not authorized by UNCLOS itself.

The Philippines is persuasive on this crucial and major point. UNCLOS is the sole source for rights over waters. In agreeing with the Philippines, the tribunal would not be making a decision on “sovereignty” or challenging China’s claim that it has sovereignty over all islands and rocks within the nine-

dash line and also the adjacent territorial seas, EEZs and continental shelves provided by UNCLOS. The tribunal cannot challenge that claim of “sovereignty” by China, which would allow China to continue to claim substantial control over very large portions of the South China Sea. Rather, the tribunal would be rejecting any separate historic claim to “sovereign rights and jurisdiction” over certain waters and their seabeds and subsoil—a phrase that appears to be carefully drafted by China to be different from the claims to “sovereignty” in the first clause.

Is it legally appropriate for the tribunal to conclude that UNCLOS does not provide or permit any claims to “historic rights” in certain waters that go beyond what UNCLOS itself authorizes if UNCLOS itself gives legitimacy to certain “historic bays” and “historic titles” (Articles 10, 15, 298)? Yes, although both phrases as used in UNCLOS are unclear and the question is not free of doubt. The word “bay” used in UNCLOS has a specific meaning regarding the “indentations” we associate with that word, and UNCLOS simply suggests that “so-called ‘historic bays’” may trigger different measurements than other bays (Article 10). The phrase “historic title” is also unclear but appears in UNCLOS only in the context of demarcations of territorial seas (Articles 15 and 298)—there is no indication that anything so open-ended as “historic rights” to waters was preserved by UNCLOS, whose central purpose was precisely to create international law that would codify, modify, and regularize a wide variety of historic practices of nations in the seas. Similarly, China’s exclusion of disputes regarding “historic bays and titles” under Article 298 does not bar the tribunal from ruling on China’s claims to “historic rights” within the nine-dash line because those claimed “historic rights” are not “historic bays or titles” but something different.

The arbitration tribunal would be wise to say that the meaning of the nine-dash line is unclear from China’s statements, but that China’s claims can and must be interpreted in a way consistent with UNCLOS—i.e., that Chinese claims to all the islands

and rocks and related UNCLOS waters within the nine-dash line would be consistent with UNCLOS, but that claims to “historic waters” beyond that would not be consistent with UNCLOS. This would allow China to save face if it wanted—and at the same time would allow the Philippines and the international community to say that the tribunal has disallowed China’s more extreme claims. Of course it is altogether possible that China will adhere to a more extreme version of its claims and denounce the tribunal for trying to strip China of those “rights.”

Whatever the tribunal and China do on these fronts, however, a core fact remains: since the tribunal has no power to decide issues of sovereignty or sea boundary delimitations, its ruling on the nine-dash line will not in any way affect China’s vast claims within the South China Sea deriving from sovereignty claims to all of the “islands” and “rocks” within the nine-dash line and derivative rights over territorial seas and EEZs. The tribunal’s likely decision that the land features in Claims 3, 4, 6, and 7 are “low-tide elevations” without EEZs would limit the scope of China’s claims that fit within UNCLOS, but only somewhat. The huge and dangerous disagreements between China and its neighbors remaining from even this more limited version of China’s claims will remain unaffected by what the tribunal does in resolving Claims 1 and 2.

VI. Assessment and Path Forward

The UNCLOS arbitration tribunal’s decision will be a foundational moment in the still-young history of UNCLOS, in international law, in the contemporary effort to find law-based solutions to international crises, and even in the new world order with a rising China.

What we are likely to see from the UNCLOS tribunal is an admirable call for the supremacy of international law, and the declarations of some law-based answers to the claims presented. Yet the analysis

above demonstrates that these declarations may be more limited than is widely expected, and also may have a more fragile basis. UNCLOS is a major treaty, but it covers only a very limited number of issues being contested in the South China Sea—excluding the most fundamental issues of sovereignty and sea boundary delimitations. Thus it will provide only very few “law-based” and “rules-based” answers to these contested matters.

The tribunal’s decision will provide some structure to the ongoing contests by determining whether certain land features are “islands,” “rocks,” or “low-tide elevations.” In the negotiations that the parties always claim they want, these legal conclusions could reduce some of the issues that need to be worked through. If the tribunal determines that Itu Aba is an “island,” even though the tribunal will not be able to decide a number of the Philippines’ claims because a maritime delimitation is involved, there will be more clarity going forward—and, there are indeed international law standards for maritime delimitations that will remain an important background for negotiations that might take place. Most importantly, if the tribunal rejects the lawfulness of the most expansive interpretation of China’s nine-dash line, that will put new pressure on China to clarify its claims and would at least create a firmer international law context for addressing the claims within the nine-dash line. The tribunal’s ruling would still leave China with very expansive, as well as still dangerously contested, claims in the South China Sea, but it will have made a difference.

There will be other consequences from the tribunal’s ruling. The “law-based” nature of some of the tribunal’s conclusions will themselves be revealed to rest on contestable multi-factored judgments that demonstrate that the hardest questions of law are often inescapably intertwined with policy choices and subjective assessments. Experienced lawyers and citizens understand that law is not mathematics and that these sorts of “judgments” are part of what judicial decisionmaking in hard cases is, but their willingness to be bound by decisions resulting from

such a process is mostly explained by their acceptance of the legitimacy of the particular tribunal.

In the *Philippines v. China* case, however, the UNCLOS arbitration tribunal making these law-based judgments is itself of fragile legitimacy. One of the parties to the case—the most populous country in the world and a global power—has directly challenged its legitimacy (This is hardly unprecedented in landmark cases reflecting powerful political forces. Students of U.S. history may recall that in *Marbury v. Madison*, the defendant Secretary of State James Madison refused to appear before the U.S. Supreme Court, Madison’s way of demonstrating that the Jefferson Administration did not recognize the Supreme Court’s jurisdiction in that case). China has refused to participate by its own choice, but its non-participation has inescapably skewed the facts and arguments before the tribunal in the Philippines’ direction. No UNCLOS arbitration tribunal has ever considered a case of this visibility. The tribunal is composed of five part-time arbitrators who were themselves selected through an ad hoc process of subjective judgment. The UNCLOS arbitration system is still young.

Yet the tribunal will act, and there is no doubt that under UNCLOS the tribunal’s decisions are “binding.” Under law, it is not for China to have the final word on the arbitration tribunal’s jurisdiction. In Article 288(4), UNCLOS itself provides that the tribunal has the last word on its own jurisdiction.²⁰ Similarly, under law, it is not for China to have the final word on the correctness of the tribunal’s decisions on the merits. The tribunal has the final word, but that final word does not necessarily mean the end of the plot. China may decide to ignore the tribunal, and the tribunal has no mechanism for enforcing its own judgments—no police force or army, no sanctions system. Some have predicted that, if the tribunal decides against China, it will lash out with even bolder actions in the South China Sea. All of this creates problems for the Philippines, as well as risks for the system of international law itself. And it may create problems for China, as

other nations decide what messages to send as well as what actions to take.

The United States has already been sending messages. President Obama, as noted above, has stated that “the parties are obligated to respect and abide by” the “upcoming arbitration ruling.”²¹ Other U.S. officials, as well as the statement issued at the conclusion of the recent G7 meeting, declare that the tribunal’s decision is “binding.”²² This is all true. China is indeed bound by the tribunal’s decision, and it is right to insist that China follow the decision when announced. Moreover, it is appropriate to undertake “shaming” of countries who ignore international law to try to create at the very least political pressure to comply and loss of international stature for not complying.

The problem is that the United States is deeply handicapped as a credible messenger of demands and “shaming” of China regarding UNCLOS. We have not ratified the treaty, one of only 27 countries who have not done so. President Clinton signed the treaty, but under the U.S. Constitution, the U.S. Senate must provide “advice and consent” by a 2/3 vote before the treaty is ratified. The Senate has failed to do so. Presidents have followed most of the treaty’s terms by treating those provisions as “customary international law,” and therefore not requiring Senate ratification. Although we have a system of checks and balances and separation of powers, we are one United States of America, and, whatever presidents have done to support UNCLOS, the United States of America has refused to ratify UNCLOS because the U.S. Senate has refused to give its constitutionally required ratification. None of this is to minimize the fact that China *has* ratified UNCLOS and therefore must comply with its terms, but it is awkward, to say the least, for the United States to be leading the charge in insisting that China comply with a treaty it has refused to ratify itself.

There is an even more awkward detail regarding U.S. statements demanding China’s compliance

with the arbitration tribunal’s decision. Although U.S. presidents treat most of the substantive provisions of UNCLOS as “customary international law” and therefore binding law, one thing U.S. presidents cannot do is to make the U.S. subject to the compulsory remedial mechanisms of UNCLOS. No nation may sue us and bring us before an arbitration tribunal at The Hague as a party-defendant because we are not a party to the treaty. We are insisting that China behave as we ourselves could not be ordered to behave. If anything could lead the U.S. Senate to ratify UNCLOS at last, perhaps this grave threat to U.S. moral authority regarding China’s unlawful conduct will be the stimulus. Ratifying UNCLOS is now a central need of our national security and our stature in the global order.

For now, we will be at our strongest in speaking out in defense of UNCLOS and its legal requirements, including the arbitration tribunal’s decision, if we continue what we did recently at the G7 meeting and speak in concert with other countries that have ratified UNCLOS and are subject to its compulsory remedies, rather than speaking alone.

The point of this essay has been to indicate the limits of law in addressing the South China Sea disputes—not to deny that law can play some role. Furthermore, the point of this essay is certainly not to suggest that the United States and other countries of the world should be passive or acquiescent in the face of China’s bold moves in the South China Sea. These are genuine territorial disputes of major importance, and China is using its power and wealth to change the situation on the ground and at sea by occupying contested land features and building on them (including new evidence of radar and surface-to-air missiles), deploying more of its rapidly growing naval forces through the Sea, and explicitly and implicitly threatening its neighbors. China is clearly seeking to increase its capacity to project military force throughout the area. It is doing these things in an incremental way so that no single step seems to be an overwhelming provocation or threat, but the overall advance and likely future advances are

of genuine concern. All the while China is talking about the need for “negotiations” to address the problems, rather than legal mechanisms such as the UNCLOS arbitration tribunal, but it has taken no significant steps to advance the path of negotiations.

The UNCLOS tribunal’s decision will leave the United States with policy choices similar to those it has already been wrestling with in the South China Sea, but without an UNCLOS tribunal as a potential law-based *deus ex machina*. U.S. policy on the South China Sea is necessarily embedded in the larger challenging questions about our China policy and our Asia policy more broadly. Our relationship with China today is a complex and uneasy mix of interdependence, cooperation, competition and rivalry related to security issues, economic issues, and wide-ranging global challenges, pervaded by the fact that we are hugely powerful countries with very different political systems. As China’s capacities grow, its intentions remain unclear. The most likely evolution is that China will continue to grow as a major regional military and economic power, and the U.S. will rightfully insist on maintaining its powerful regional presence and major alliances in Asia, which have advanced U.S. interests and also contributed powerfully to the peace and prosperity of the Asia-Pacific region. The challenge is to find a path for our two countries to coexist as major powers in the Asia-Pacific consistent with protecting their legitimate interests. The hope is that we will find wider converging interests that benefit both countries and the world at large. It is not foreordained that we will either fail or succeed.

Regarding the South China Sea disputes, the most realistic path forward for the United States is to

more strongly encourage negotiations and at the same time project resolve through the use of power in its multiple forms. It is appropriate and essential that we conduct robust and regular Freedom of Navigation transits and regional military exercises, but these can be only part of our demonstration of resolve. Less clear is what should be the goals of our “resolve,” what tools to use and what risks to take in pursuing those goals, and how to manage our obligations to allies like the Philippines. On the negotiating front, the 2002 Declaration on the Conduct of Parties, to which all still give lip service, provides a starting point framework that must be reinforced to achieve a binding Code of Conduct—to develop paths for negotiations on the underlying disputes, to strengthen tools to prevent unwanted and escalating military conflict, and to address serious environmental issues. Both bilateral and multilateral negotiations need to be explored vigorously. New approaches are needed to give China greater incentives to negotiate with its neighbors to find workable solutions. Older ideas about sharing resources, as well as deferring ultimate questions of sovereignty, still have value. China has on occasion signaled a possible distinction between the Paracel Islands towards the north of the South China Sea and the Spratly Islands to the south—with perhaps greater negotiating flexibility on the latter. That too needs to be explored further.

Along with limits to law in the South China Sea, we must also recognize limits to optimism—but the only way forward is to have enough optimism to create the possibility of peaceful resolutions and to avoid the resolute pessimism that will surely become a self-fulfilling prophecy.

Endnotes

1. <http://www.c-span.org/video/?404677-1/president-obama-news-conference-usasean-leaders-summit>
2. http://www.fmprc.gov.cn/mfa_eng/wjb_663304/zygy_663314/gyhd_663338/t1145623.shtml
3. http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml
4. http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1310474.shtml
5. Id. See also http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1348632.shtml
6. Award on Jurisdiction and Admissibility, October 29, 2015, pp. 34-35. <http://www.pcacases.com/web/sendAttach/1506>
7. Award on Jurisdiction and Admissibility, October 29, 2015, pp. 142, 143. <http://www.pcacases.com/web/sendAttach/1506>
8. http://www.mofa.gov.tw/en/News_Content.aspx?n=0E7B91A8FBEC4A94&s=EDEB-CA08C7F51C98.
9. Award on Jurisdiction and Admissibility, <http://www.pcacases.com/web/sendAttach/1506> (e.g., paragraphs 402, 405).
10. Day 2 Transcript, p. 58, <http://www.philstar.com/headlines/2015/12/22/1535338/full-text-transcript-merits-hearing-philippines-vs-china-case>.
11. <http://www.cnn.com/2016/03/26/asia/taiwan-south-china-sea/>; <http://www.cnn.com/2016/03/25/asia/gallery/taiwan-taijing-itu-aba-2/>.
12. <http://www.reuters.com/article/us-southchina-sea-taiwan-idUSKCN0WP0IH>; <http://www.reuters.com/article/us-taiwan-southchinasea-idUSKCN0V502V>; <http://amti.csis.org/taiping-island-an-island-or-a-rock-under-unclos/>.
13. Day 2 Transcript, p. 58, <http://www.philstar.com/headlines/2015/12/22/1535338/full-text-transcript-merits-hearing-philippines-vs-china-case>.
14. Day 2 Transcript, 127-29., <http://www.philstar.com/headlines/2015/12/22/1535338/full-text-transcript-merits-hearing-philippines-vs-china-case>.
15. The tribunal's inability to decide this question will have the effect of permitting China to continue such construction, and thus to change the situation on the ground even as legal disputes continue outside of the arbitration chamber. Might the arbitration tribunal have the power to order a "moratorium" on such construction? In litigation, courts do sometimes order parties to stop allegedly unlawful conduct temporarily pending resolution of the legal dispute, but such judicial orders are issued by the tribunal that will be deciding the legal dispute, to protect its own jurisdiction. Since the UNCLOS arbitration tribunal has no power to decide the "sea boundary delimitation," it is difficult to see how it can nevertheless have the power to order a "moratorium." Alternatively, the tribunal might challenge China's construction on Mischief Reef as violating China's environmental obligations under UNCLOS. But UNCLOS' environmental standards are quite vague and the tribunal's access to relevant and critically tested facts is limited—and most land reclamations worldwide cause some environmental harm, so an innovative tribunal ruling on this basis could have major international implications that the tribunal is reluctant to take on.
16. Award on Jurisdiction and Admissibility, <http://www.pcacases.com/web/sendAttach/1506>, p. 34.
17. Permanent Mission of the People's Republic of China to the United Nations, CML/18/2009, May 7, 2009, http://www.un.org/depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm.pdf
18. United States Department of State Bureau of Oceans and International Environmental and Scientific Affairs, "Limits in the Seas, No. 143 China: Maritime Claims in the South China Sea," December 5, 2014, <http://www.state.gov/documents/organization/234936.pdf>.
19. Id., p.12; see also China's 2011 *note verbale*. http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2011_re_phl_e.pdf
20. This is not inevitable. Although courts in the United States always have "jurisdiction to decide their jurisdiction," arbitrators often do not. Their jurisdiction determination is often reviewable by a court, although UNCLOS provides no such review system.
21. <http://www.c-span.org/video/?404677-1/president-obama-news-conference-usasean-leaders-summit>
22. See, e.g., "G7 Foreign Ministers' Statement on Maritime Security," April 11, 2016, http://eeas.europa.eu/statements-eeas/2016/160411_05_en.htm; Deputy Secretary of State Antony Blinken's statements during a recent House Foreign Affairs Committee hearing, April 28, 2016, <http://uk.reuters.com/article/uk-southchinasea-usa-china-asean-idUKKCN0XP2T9>.

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The Paul Tsai China Center, which Professor Gewirtz founded in 1999 as The China Law Center, carries out research and teaching, and also undertakes a wide range of cooperative projects with Chinese counterparts to help advance China's legal reforms and to improve U.S.-China relations. Through the Center, Gewirtz is currently co-leading a Track II Dialogue on U.S.-China Relations involving prominent former government officials from both countries. From 1997–1998, Professor Gewirtz was on leave from Yale University and was part of President Bill Clinton's administration, where he served as Special Representative for the Presidential Rule of Law Initiative at the U.S. Department of State. In that post, he developed and led the U.S.-China initiative to cooperate in the legal field that President Clinton and China's President Jiang Zemin agreed to at their 1997 and 1998 Summit meetings. In 2015 Gewirtz was named to *Foreign Policy* magazine's Pacific Power Index, a list of "50 people shaping the future of the U.S.-China relationship."

Gewirtz was also the founder of Yale Law School's Global Constitutionalism Seminar, which brings leading Supreme Court judges from around the world to Yale each year, and was the Seminar's Director for ten years. Before joining the Yale faculty, Gewirtz served as a Law Clerk to Justice Thurgood Marshall of the United States Supreme Court and practiced law in Washington, D.C. at Wilmer, Cutler & Pickering and the Center for Law and Social Policy. He was recently named the inaugural Jones Day Chair Professor in Globalization and the Rule of Law at Peking University Law School, and is also a member of the American Law Institute and the Council on Foreign Relations. He received his B.A. degree summa cum laude from Columbia University and his law degree from Yale.

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